The Law and Ethics of Restitution

Hanoch Dagan

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THE LAW AND ETHICS OF RESTITUTION

Dagan's book provides a dynamic and much needed account of the American law of restitution. The book reviews the existing doctrine, including the forthcoming (third) Restatement, using an ethical perspective to expose and examine critically the normative underpinnings of the core categories of restitution. Dagan also discusses some of the most controversial issues in the area, such as cohabitation, improper tax payments, and the role of constructive trusts as trumps in bankruptcy. He further tackles the recent restitution claims of slave laborers (or their descendants) against corporations that benefited from their enslavements, and of governmental bodies against injurious industries.

Dagan argues that the concept of unjust enrichment is not an independent reason for restitution but, rather, serves as a loose framework, structuring the contextual application of commitments to autonomy, utility, and community in situations where either the cause of action or the measure of recovery is benefit-based. By integrating doctrinal and ethical analyses of restitution, the author offers significant and provocative insights into existing law as well as possible reforms.

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To my mother,
Ruth Dagan

CONTENTS

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Several chapters of this book update, rework, expand, and frequently revise themes and materials which have appeared elsewhere: *Mistakes*, 79 Texas L. Rev. 1795 (2001); *In Defense of the Good Samaritan*, 97 Michigan L. Rev. 1152 (1999); *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. Rev. 354 (2000) (with James J. White); *The Distributive Foundation of Corrective Justice*, 98 Michigan L. Rev. 138 (1999); *Encroachments: Between Private and Public, in* Unjustified Enrichment: Key Issues in Comparative Perspective (David Johnston & Reinhard Zimmermann eds., 2002); and *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 Theoretical Inq. L. 115 (2000). I thank the editors and publishers of these volumes as well as Jim White, my co-author in one of these articles, for their permission to include these materials.

TABLE OF CASES

TABLE OF STATUTES AND TREATIES

Statutes

US State

US

International

Model

Treaties

1

Introduction

Two of the most publicly salient litigation patterns of recent years – the claims of victims of slavery against corporations that benefitted from their slave labor, and the suits of governments against injurious industries for the prevention and amelioration costs they incurred in dealing with harms which were arguably caused to their citizens by the defendant industries – share one common denominator. Both invoke restitution, loosely defined in this book as the body of law dealing with benefit-based liability or benefit-based recovery.

This book discusses the American law of restitution in an attempt to expose and examine critically some of its underlying normative commitments. Writing a book on restitution in a US environment is a risky (but hopeful) enterprise. To be sure, "Americans led the way in the development of the modern law" of restitution and the "sense that they were at the frontier of the law of restitution endured into the 1950s and 1960s."[1] In those days restitution was a hot topic in the American law school environment: a standard part of the upper-year curriculum, and a matter of considerable academic interest.[2] But this is no longer the case. Only a bare handful of American law schools offer a restitution course these days, and few academics write in this area. Restitution was subsumed under the general category of remedies or dissipated into the interstices of property, torts, and contract. As a consequence, many American lawyers and judges are unfamiliar with the law of restitution.[3]

The unhappy predicament of restitution in the American academic environment cannot be explained by a lack of practical implications.

[1] John H. Langbein, *The Later History of Restitution, in* Restitution – Past, Present and Future: Essays in Honour of Gareth Jones 57, 60 (W. R. Cornish et al. eds., 1998).

[2] *See, e.g.*, Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. Cal. L. Rev. 1369, 1370–71 (1994).

[3] *See id.* at 1371; Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1195 & n.14, 1241 (1995); Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1277 (1989).

Lawyers in America (like in most other places) encounter restitution on a daily basis, and the law reports are full of cases – many of which will be discussed in these pages – of mistaken payments (such as mistaken wire transfers or the payment of taxes improperly imposed), performance of joint obligations or the protection of jointly held property interests, cohabitation, and profitable infringements of intellectual property, to mention only a few typical restitution issues. Moreover, the fall of restitution in the landscape of American legal academia is an extreme anomaly from a comparative perspective – as can be seen, for example, from the remarkable flourishing of restitution scholarship in the United Kingdom during the past few decades.[4] As one American commentator noted, "from afar, the subject sometimes seems to dominate legal intellectual life."[5]

Recently there have been a few indications that the long period of decline in American restitution scholarship may soon come to an end. Two conferences were organized by two major law reviews,[6] and the American Law Institute has undertaken an important initiative of producing a new

[4] *See, e.g.*, The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution (Jack Beatson ed., 1991); Peter Birks, An Introduction to the Law of Restitution (paperback ed. with revisions 1989); Peter Birks, Unjust Enrichment (2003); Andrew Burrows, The Law of Restitution (2d ed. 2002); James Edelman, Gain-Based Damages: Contract, Tort, Equity and Intellectual Property (2002); Lord Goff of Chieveley & Gareth Jones, The Law of Restitution (Gareth Jones ed., 6th ed. 2002); Steve Hedley, Restitution: Its Division and Ordering (2001); Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement (2000); Thomas Krebs, Restitution at the Crossroads: A Comparative Study (2001); Charles Mitchell, The Law of Contribution and Reimbursement (2003); Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights (2002); Graham Virgo, The Principles of the Law of Restitution (1999); Essays on the Law of Restitution (Andrew Burrows ed., 1991); The Law of Restitution (Steve Hedley & Margaret Halliwell eds., 2002); Restitution – Past, Present and Future, *supra* note 1; Restitution and Banking Law (Francis Rose ed., 1998); Restitution and Insolvency (Francis Rose ed., 2000); The Search for Principle: Essays in Honour of Lord Goff of Chieveley (William Swadling & Gareth Jones eds., 1999); Lionel Smith, The Law of Tracing (1997); Andrew Tettenborn, The Law of Restitution in England and Ireland (3d ed. 2002); Unjustified Enrichment: Key Issues in Comparative Perspective (David Johnston & Reinhard Zimmermann eds., 2002); the Restitution Law Review; Peter Birks & Robert Chambers, Restitution Research Resource (2d ed. 1997).

[5] Langbein, *supra* note 1, at 61.

[6] 67 S .Cal. L. Rev. 1369 (1994); 79 Tex. L. Rev. 1763 (2001). *See also* 36 Loy. L.A. L. Rev. 777 (2002).

(third[7]) Restatement of the Law of Restitution and Unjust Enrichment.[8] While these are preliminary signs, they may point to the possibility of a revival of restitution in American law schools, a renewed acknowledgment that "the common law coach runs not on three substantive wheels" – property, contracts, and torts – "but on four."[9] In this book I wish to celebrate this renewed academic interest in restitution and contribute to the emerging debates it provokes.

I am not a legal historian. I do not purport to explain here why restitution fell out of favor with American academic lawyers.[10] And yet my starting point in this book is one suggested explanation of the decline. John Langbein analyzes this unfortunate development as part of "the terrible toll that the realist movement has inflicted on doctrinal study." For Langbein, when doctrine is understood as "a smokescreen for the policies, politics, values, social forces, or whatever, that really motivate the decisions, the hard work of refining and articulating legal rules will not be regarded as an attractive enterprise." The task of "producing, criticizing, reconciling, and improving" the law of restitution, he insists, "requires an environment that treats the study of legal doctrine with respect." By supplying "alternative accounts of why cases get decided," legal realism is inhospitable to such doctrinal work, thus undermining restitution scholarship.[11]

Langbein's thesis as to the detrimental effects of legal realism on restitution is worth mentioning here not because I find it to be correct. On the contrary, one of my challenges here is to disprove the jurisprudential component of his claim. I intend to study the law of restitution in this book with respect, and to help refine, and at times improve, some of its rules. And yet, as the remainder of this introduction explains, the book largely follows the footsteps of mainstream legal realism, represented by

[7] After producing two tentative drafts, the Restatement (Second) of Restitution project did not proceed to completion. *See* Restatement (Second) of Restitution (Tentative Drafts, 1983–84).

[8] *See* Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 1, 2001).

[9] Epstein, *supra* note 2, at 1371.

[10] The suggestion that it is the result of the expansion of public law at the expense of private law is probably part of the explanation. *See* Epstein, *supra* note 2, at 1371; Langbein, *supra* note 1, at 61.

[11] Langbein, *supra* note 1, at 62. *See also* David F. Partlett & Russell L. Weaver, *Restitution: Ancient Wisdom*, 36 Loy. L.A. L. Rev. 975, 976–79, 981–82 (2003). *Cf.* Stephen A. Smith, *Taking Law Seriously*, 50 U. Toronto L.J. 241, 249–50, 254–65 (2000).

the work of Karl Llewellyn and Felix Cohen. Against Langbein, I wish to show that paying attention to policies and values is a necessary component of the serious tasks of understanding, criticizing, and improving the law of restitution.

More specifically, this book offers an interpretation of American restitution law as a contextual application of our commitments to autonomy, utility, and community in various situations of benefit-based liability or benefit-based recovery. As any interpretation, my account is neither an invention of something that was not there before, nor a mere report of the current existing rules.[12] Law is a dynamic enterprise whose content is constantly made and remade as it unfolds. The point of an interpretive theory of law – like the one offered in these pages – is to help direct the future evolution of our present rules and precedents. My task is therefore to present existing restitutionary doctrine in its best normative light.[13] This constructive perspective shapes the outlook of this book. It also defines its limitations. This book does not purport to offer any explanatory wisdom. My account is silent about the intent of the myriad judges and legislators who molded the existing rules and precedents. It is also indifferent to the possibility that some part of the existing rules may be (or may have been) also placed in other social environments, which do not necessarily share one or more of the normative commitments to autonomy, utility, and community. My focus is only on the present and the future of the American law of restitution, leaving its past and its counterparts abroad to a later day (or another author).

I begin my journey with a typical realist move of doubting some of the prevailing language of the field. "Unjust enrichment at the expense of another" has long been the accepted currency of the law of restitution. Chapter 2 examines the use and abuse of this terminology. Its core claim is that, while the theme of unjust enrichment can be useful as a loose framework for restitutionary claims, the frequent reference to the principle against unjust (or unjustified) enrichment as the normative foundation of rules of restitution tends to be question-begging and to confuse, rather than clarify, both the doctrine and its normative underpinnings. (Readers who are less familiar with the field may prefer reading chapter 2 just before they reach the conclusion of this book, rather than after this introduction.)

[12] *Cf.* Michael Walzer, Interpretation and Social Criticism 1–32 (1987).
[13] *See* Ronald Dworkin, Law's Empire 52–53 (1986).

Chapters 3–9 delve into the main (or at least the most distinctive) categories of restitution cases – mistakes, other-regarding (good samaritan) interventions, self-interested conferrals of benefits, conferral of benefits in contexts of informal intimacy, wrongful enrichments, breaches of contract, and restitution in bankruptcy. (The order of this presentation by and large follows the convention of the restitution literature; it also facilitates an orderly introduction of the major normative themes of the book.) Each chapter takes the existing doctrinal landscape of restitution as the starting point of its analysis. The existing doctrine matters not only because I doubt the option of wholesale abandonment of existing law, but also because it represents an accumulated judicial experience that is normatively valuable.[14] Judges may not have the time and resources to articulate fully the reasons for the rules they prescribe, and their normative judgment tends to be implicit and thus often imperfect. But, because adjudication – especially in an adversarial system – is a unique institutional environment, its yield, namely our case-law, is worthy of respect.

"The ancient wisdom of our common law" explained Felix Cohen, "recognizes that [people] are bound to differ in their views of fact and law, not because some are honest and others dishonest, but because each of us operates in a value-charged field which gives shape and color to whatever we see." Only "a many-perspectived view of the world can relieve us of the endless anarchy of one-eyed vision." The institutional structure of (common law) adjudication is meant to force judges to have a "synoptic vision" which is "a distinguishing mark of liberal civilization."[15] Indeed, the authority of case-law does not derive from the judges' unique characteristics as individuals, but rather, in the language of Karl Llewellyn, from "the office." Judges are embedded in an institutional environment that inspires an attitude "toward understanding sympathetically [and] toward quest for wisdom in the result." The two most important features of that environment are the adversarial process, in which "officers of the court" marshal the authorities "on each side in support of one persuasive view of sense in life, as well as one view technically tenable in law," and the role of judicial opinions, which are aimed at persuading the parties, the bar, and the interested public. These features help make judges "experts in that

[14] *See* Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 Cardozo L. Rev. 21, 26 (1996).
[15] Felix S. Cohen, *Field Theory and Judicial Logic*, 59 Yale L.J. 238, 241–42 (1950).

necessary but difficult task of forming judgment without single-phased expertness, but in terms of the Whole, *seen whole*."[16]

And yet, as (I hope) a good legal realist, I am also disinclined to give each and every existing rule overwhelming normative authority. Rather, I approach the rules of restitution critically and contextually.

Legal realists call for an ongoing (albeit properly cautious) process of identifying the human values underlying existing legal doctrines and trying to promote them in the best way possible. (I deliberately use the vague term "promote" in order to capture both the material as well as the expressive and constitutive or interpretive ways in which law can facilitate human values; a critical analysis must resort to all these ways, and properly recognize their mutual interdependence.[17])

Because law is a coercive mechanism backed by state-mandated power, its prescriptions need to be justified in terms of their promotion of human values.[18] Therefore, restitutionary doctrines must be reevaluated in terms of their effectiveness in promoting their accepted values, and the continued validity and desirability of these values.[19] Thus, each chapter examines the normative choices that explain why the law of restitution finds a specific subset of enrichments unjust, and others just. In each chapter, I show how certain values – notably autonomy, utility, and community – importantly, although frequently implicitly, shape the specific doctrinal details.

[16] Karl N. Llewellyn, The Common Law Tradition 45–47, 132 (1960) [hereinafter Common Law Tradition]; Karl N. Llewellyn, *American Common Law Tradition and American Democracy, in* Jurisprudence: Realism in Theory and in Practice 282, 308–10 (1962) [hereinafter Jurisprudence]. For a modern articulation of these institutional virtues, see Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982).

[17] *See* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 Mich. L. Rev. 134 (2000).

[18] On the power dimension of adjudication, see Robert Cover, *Violence and the Word, in* Narrative, Violence, and the Law 203 (Martha Minow et al. eds., 1992). On the dialectical relation between law's coercion and its nature as a justificatory practice, see Dworkin, *supra* note 13, at 261–62; Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1381–86 (1940). For other views as to the relationship between law's coercion and its normativity – reductive, additive, and disjunctive – see generally Meir Dan-Cohen, *In Defense of Defiance*, 23 Phil. & Pub. Aff. 24 (1994).

[19] *See* Thomas W. Bechtler, *American Legal Realism Revaluated, in* Law in Social Context: Liber Amicorum Honouring Professor Lon L. Fuller 3, 20–21 (Thomas W. Bechtler ed., 1978). *See also, e.g.*, Grey, *supra* note 14, at 26, 41–42.

If this normative inquiry is to be properly critical and properly constructive, the values underlying restitution law – as well as its existing categorization – should be approached in a legal realist (anti-foundationalist) spirit. Therefore, I treat the normative underpinnings of the law of restitution as "pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative."[20] And yet, with Don Herzog I believe that "[u]nlike preferences, our moral principles can be defended with reasons," and that "the reasons are not irreducibly arbitrary," but rather must relate to "such concepts as human interests . . . and not just anything can count as human interest."[21] For this reason, the book sets aside skeptical doubts and explicitly engages in, as Justice Holmes recommended, a normative inquiry that makes judgments relating to "social ends" and "considerations of social advantage" inevitable.[22]

This normative analysis does not undermine law's predictability; in fact it reinforces it. The positivist fear that value discourse undermines law's certainty is premised on the view that rules discourse yields, in most cases, one legal answer. But as the legal realists have shown, this view is far from being true. To be sure, the narrower problem of rule indeterminacy has been effectively addressed by H. L. A. Hart's distinction between the core and the penumbra of rules, and his insistence that "the core of any given rule is determinate enough to supply standards of correct judicial decisions."[23] But as the legal realists showed, legal doctrine, strictly speaking, is hopelessly indeterminate, not – at least not mainly – because of the indeterminacy of discrete legal rules, but rather, because of the

[20] Hessel E. Yntema, *Jurisprudence on Parade*, 39 Mich. L. Rev. 1154, 1169 (1941).

[21] Don Herzog, Without Foundations: Justification in Political Theory 232, 237–38 (1985). *See also, e.g.*, Ronald Dworkin, *Pragmatism, Right Answers, and True Banality, in* Pragmatism in Law and Society 359, 360 (Michael Brint & William Weaver eds., 1991).

[22] *See* Oliver W. Holmes, *The Path of the Law, in* Collected Legal Papers 167, 184 (1920); Oliver W. Holmes, *Law in Science and Science in Law, in* Collected Legal Papers, *id.*, at 210, 238–39. For some powerful statements of the inevitability of applying moral judgments as part of legal discourse (even in its most descriptive aspects), see, e.g., Roscoe Pound, *A Comparison of Ideals in Law*, 47 Harv. L. Rev. 1, 2–3 (1933); Felix S. Cohen, *Modern Ethics and the Law*, 4 Brook. L. Rev. 33, 44–45 (1934); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 848–49 (1935). Referring to Justice Holmes and his *Path of the Law*, the text implicitly adopts an interpretation of Holmes' (and the legal realists') endorsement of the separation of law and morality as a strategic device, aimed at preserving our capacity for morally responsible and morally informed legal criticism, rather than as a manifestation of moral skepticism or of a libertarian persuasion. *See* Robin West, *Three Positivisms*, 78 B.U. L. Rev. 791 (1998).

[23] H. L. A. Hart, The Concept of Law 123, 141–42, 144 (1961).

multiplicity of doctrinal sources.[24] Nevertheless, as the realists insisted, this radical doctrinal indeterminacy does not imply unpredictability because it does not mean that the law as a whole is indeterminate.[25] Rather, the (dynamic) content of any doctrine is prescribed according to a contextual normative equilibrium.[26] Thus, a realist perspective facilitates, rather than undermines, law's predictability.[27]

This analysis is not an abstract inquiry into the universal principles of abstract justice. Rather, the normative inquiry in this book is – again following the legal realists' lead – contextual, looking at the specific categories of restitution, which are rooted in practice and custom, and reflective of existing patterns of human conduct and interaction. As opposed to some modern friends of unjust enrichment who embrace it as a sweeping underlying theme of the law of restitution, this book analyzes legal problems in relatively narrow categories, hoping to capture the factual subtleties of each type of case (each paradigm of restitution). As we will see, these subtleties are significant for the possible, as well as for the ideal, legal outcome. This contextual outlook is (again) inspired by legal realism. As Herman Oliphant and Karl Llewellyn claimed, narrow legal categories are to be preferred because our lives are divided into economically and socially differentiated segments. Each "transaction of life" has some features that are of sufficient normative importance to justify a distinct legal treatment.[28]

[24] *See* Felix S. Cohen, *The Problems of Functional Jurisprudence, in* The Legal Conscience: Selected Papers of Felix S. Cohen 77, 83 (Lucy Kramer Cohen ed., 1960); Jerome Frank, Law and the Modern Mind 138 (1930); Karl N. Llewellyn, *Some Realism about Realism, in* Jurisprudence, *supra* note 16, at 42, 58; Karl N. Llewellyn, The Case Law System in America 45, 51 (Paul Gewirtz ed., Michael Ansaldi trans., 1933, 1989); Fred Rodell, Woe Unto You, Lawyers! 154, 160 (1939). *See also* Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 90 (1973); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 Phil. & Pub. Aff. 205 (1986).

[25] *See* Karl N. Llewellyn, The Bramble Bush 48 (1930); Michael Martin, Legal Realism: American and Scandinavian 39–40, 76 (1997).

[26] *See* Llewellyn, Common Law Tradition, *supra* note 16, at 19–61, 178–255.

[27] *Cf.* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex. L. Rev. 267 (1997).

[28] *See* Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928); Llewellyn, *A Realistic Jurisprudence: The Next Step, in* Jurisprudence, *supra* note 16, at 3, 27–28, 32, 34–36; Llewellyn, *Some Realism, in* Jurisprudence, *id.*, at 42, 56–57, 62, 73. For similar contemporary claims for contextuality, see Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983); Elizabeth Anderson, Value in Ethics and Economics 157 (1993); Grey, *supra* note 14, at 41.

In many cases, my contextual normative analysis largely reaffirms the existing rules, as in the chapter on wrongful enrichments. At times – the notable example here is my discussion of restitutionary recovery for breach of contract – it even gives reasons to resist some academic demands for the adoption of new, revolutionary rules which I find unsupportable. In other cases, as in my analyses of the self-interested conferral of unsolicited benefits and of restitutionary claims in contexts of informal intimacy, clarifying the normative underpinnings of the law helps focus the issues at stake and direct its future development by pointing to new rules that can further bolster and vindicate its underlying principles and policies. But there are also cases in which this inquiry points to "blemishes" in the existing doctrine: rules that undermine its most illuminating and defensible account, and should thus be reformed if we want the law of restitution to live up to its own (implicit) ideals.[29] This reformist potential may yield – as it does throughout many chapters of this book – different types of legal reform. In some cases, the relatively radical option of reversing the baseline norm of existing doctrine (as in my analysis of restitutionary claims of good samaritans) is in order. In other cases (as I suggest in the context of mistaken payments), the more moderate alternative of restating the doctrine in a way that brings its rules closer to its underlying commitment, removing in the process indefensible rules, seems appropriate. Finally, my discussion of restitution in bankruptcy shows the limits of this constructive methodology. Although it succeeds in deciphering a defensible normative premise for this troubled area of law, it openly admits that aligning the doctrine with this premise requires an overall reconstruction of bankruptcy law which is beyond the legitimate agenda of common law adjudication.

I present this book as an exercise in legal optimism; an attempt to explicate and develop the existing doctrines in a way that accentuates their normative desirability and is attuned to their social context.[30] This book reflects a conception of law – which was introduced by Karl Llewellyn and was later popularized (with some important modifications that are not adopted here[31]) by Ronald Dworkin – as a dynamic justificatory practice

[29] *See* Ronald Dworkin, Taking Rights Seriously 118–23 (1977).

[30] On legal optimism, see Benjamin N. Cardozo, The Nature of the Judicial Process 178–79 (1921); Dworkin, *supra* note 13, at 400–13.

[31] Two important characteristics of Llewellyn's jurisprudence, which are mentioned in the text, are unlikely to be shared by Dworkin. First, Llewellyn's understanding of justice is dynamic, experimental, and contextual; in short: pragmatic. Dworkin, by contrast, casts

that evolves along the lines of fit and justification.[32] By this I hope to be loyal to the common law method of "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice."[33] The title of this book – *The Law and Ethics of Restitution* – should not be read as suggesting two distinct inquiries of restitution: one legal; the other normative. Rather, in what follows, the normative discourse is integrated into the legal discourse. Normative values are the spokes of restitution, as they are of the other three wheels of private law. Without recognizing their central role, our legal inquiry could not move forward.

himself as a critic of pragmatism: RONALD DWORKIN, *What Justice Isn't, in* A MATTER OF PRINCIPLE 214 (1985). (This difference may account for another difference – which is irrelevant for our purposes – regarding the issue of judicial review.) Second, unlike Dworkin, Llewellyn did not treat the dimension of fit ("fitness" as he called it) as a global imperative, and thus advocated the use of smaller categories to analyze legal questions. In contemporary terms, Llewellyn was talking about "local coherence," namely: pockets of coherence that reflect clusters of cases which are sufficiently similar in terms of the pertinent principles governing them and the appropriate weights of those principles and thus should be governed by a unified normative framework. *See* JOSEPH RAZ, *The Relevance of Coherence, in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 261, 281–82, 294–304 (1994).

[32] *See* LLEWELLYN, COMMON LAW TRADITION, *supra* note 16, at 36–38, 44, 49, 60, 194–95, 222–23; DWORKIN, *supra* note 13, at 164–258.

[33] LLEWELLYN, COMMON LAW TRADITION, *supra* note 16, at 37–38.

2

Preventing unjust enrichment

"A person who is unjustly enriched at the expense of another is liable in restitution to the other." These are the words of the first section of a partial draft of a new (and exciting) *Restatement (Third) of Restitution and Unjust Enrichment*.[1] These words repeat almost verbatim the language of the first section of the first Restatement, published in 1937,[2] so that the "central achievement"of the old Restatement – the "identification of unjust enrichment as an independent basis of substantive liability" – will be carried forward.[3] Along these lines, the new Restatement further prescribes that "[t]he source of a liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff."[4]

Since the very inception of restitution as a field with the publication (in the United States!) of William Keener's treatise on quasi-contracts in 1893,[5] the role of the principle of preventing unjust enrichment in the law of restitution has been and still is a matter of some intense debate.[6] But Keener's position – placing the principle against unjust enrichment as the normative foundation of the law of restitution – is by now the orthodoxy. The new Restatement reflects modern-day American restitution law, which is dominated by the language of preventing unjust enrichment. Issues as diverse as mistaken payments, contribution claims between joint tortfeasors, cohabitation, and the availability of restitution in cases of losing contracts or the infringement of trademarks are regularly analyzed

[1] Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft, 2000) [hereinafter ALI Draft].

[2] Restatement of Restitution § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

[3] ALI Draft, *supra* note 1, § 1 cmt. h.

[4] *Id.* § 1 cmt. a.

[5] William A. Keener, A Treatise on the Law of Quasi-Contracts (1st ed. 1893).

[6] *See* Everett V. Abbot, *Keener on Quasi-Contracts – I*, 10 Harv. L. Rev. 209 (1896); Learned Hand, *Restitution or Unjust Enrichment*, 11 Harv. L. Rev. 249 (1897).

in terms of this one unified reason. Concerns about existing doctrine are, at times, summarily dismissed by reference to their role in preventing unjust enrichment. (A prominent example is the status of constructive trusts in bankruptcy, which I discuss in chapter 9.) Innovative rules are advocated and vigorously defended on the grounds that they properly vindicate the principle against unjust enrichment. (A salient example here is the suggestion to apply restitutionary recovery for profitable breaches of contract discussed in section 8.A.)

This chapter describes and criticizes this approach that understands unjust enrichment as an argument for restitution. It further critiques the attempts of some modern scholars, notably Andrew Kull, the reporter for the new Restatement, to preserve the role of unjust enrichment as the "core idea" of the law of restitution[7] by understanding it as referring to "unjustified enrichments," that is: enrichments that lack an adequate legal basis. (Chapter 7 explores the deficiencies of a related move, which presents corrective justice as the foundation of the law of restitution.) I consider a few conspicuous dialects of the language of unjust (or unjustified) enrichment. I criticize some as normatively suspicious, and others as meaningless at best and as a disguise for unaccounted-for doctrinal choices at worst. I thus conclude that unjust (or unjustified) enrichment should not be used as a legal argument. The following chapters contextually demonstrate the faults of unjust enrichment reasoning and the possible paths of a more significant normative analysis.

And yet notwithstanding this critique, I do not endorse – in fact, I explicitly criticize – some recurrent claims that unjust enrichment has no role to play in the law of restitution. Instead, I maintain that unjust enrichment can play a modest role as both a loose common theme of the law of restitution[8] and as a reminder of the potential viability of the normative underpinnings of this body of law, thus functioning as an ongoing invitation to engage these underlying contextual commitments in developing restitution's divergent doctrines.

A Between moral principles and open-ended discretion

When Warren Seavey and Austin Scott, the reporters of the first Restatement, explained the project to their readers in England, who were at that time "unfamiliar" with the field, they referred to unjust enrichment as

[7] Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1196 (1995).

[8] *Cf.* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 Tex. L. Rev. 2083, 2084 (2001).

the "unitary principle" which "underlies the rules" of restitution. Seavey and Scott were careful enough to note that restitution law responds only imperfectly to its "basic premise." Institutional limitations, historical accidents, and conflicting principles that make it "impossible to be just to one without being unjust to the other" inhibit the perfect translation of "the fundamental conception of restitution" into rules. But this is always the case in law and, as with other branches of the law, such blemishes should not blind us from seeing the unitary principle of unjust enrichment. As in other fields, "the subject of restitution is not properly or adequately described merely by a description of the purpose or interest that gives life to the rules. It is an organism, growing in accordance with the principle which causes it to exist; a statement of the principle is not a description of what it produces."[9]

This account suggests that the principle of preventing unjust enrichment is the regulative principle of the law of restitution. This moral principle is implicit in the existing legal landscape, giving life to the existing restitutionary rules. The prevention of unjust enrichment is also, in this view, a normative argument, and thus a potential source to new rules; a guide to the growth of the law.

Seavey and Scott's approach seems innocuous. It should be distinguished from the position – recently articulated by Peter Linzer – that the prevention of unjust enrichment should serve as a source for applying "rough justice" in individual cases when normally sound rules produce unsatisfactory results.[10] This use of unjust enrichment for judicial equity is indefensible because, as Emily Sherwin claims, "[t]here is nothing both unique to restitution and common to all subjects of restitution that justifies a greater disregard of rules than judges would countenance in other areas of law."[11] But Seavey and Scott do not fall into this trap. Instead, they look to the prevention of unjust enrichment – as many courts and

[9] Warren A. Seavey & Austin W. Scott, *Restitution*, 213 L.Q. Rev. 29, 29, 31–32, 36–37 (1938). For similar views see, e.g., Andrew Burrows, The Law of Restitution 5 (2d ed. 2002) ("The law of restitution is the law concerned with reversing a defendant's unjust enrichment at the plaintiff's expense"); 1 Dan B. Dobbs, Law of Remedies § 4.1(2), at 557–58 (2d ed. 1993) (unjust enrichment is "the fundamental substantive basis for restitution" with "potential for resolving new problems in striking ways"); Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 14 (Gareth Jones ed., 6th ed. 2002) (unjust enrichment is a "principle of justice which the law recognizes and gives effect to in a wide variety of claims").

[10] *See* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. Rev. 695.

[11] Sherwin, *supra* note 8, at 2084, 2112–13. As an aside, nothing in this chapter (or this book) should be read as taking a position regarding the more technical implications of characterizing restitution as legal or equitable. On this matter, see Great-West

commentators do – as an uncontroversial moral principle which, as such, can serve as a solid moral ground for the law of restitution. (The conventional view that the prevention of unjust enrichment is an uncontroversial moral principle can be illustrated by the fact that it is included in John Finnis' minimalist conception of natural law.[12])

But what is the content of this normative principle of preventing unjust enrichment that can arguably be identified "*a priori*, by the exercise of a moral judgement anterior to legal rules"?[13] Two prominent suggestions constantly reappear (and are sometimes conflated) in the literature: the first is usually associated with Lord Mansfield; the second with the Roman jurist Pomponius. In what follows I claim that the former collapses principle into unbridled discretion while the latter presents a principle unworthy of moral support.

Consider first Lord Mansfield's famous dictum that "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."[14] A comment to the new Restatement captures the problem with this account: "saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not."[15] This concern is particularly acute because, as Sherwin recently claimed, "what makes unjust enrichment both powerful and dangerous when interpreted as a legal principle is its open-endedness. Unjust enrichment is a highly abstract and morally charged idea, capable of accommodating many contestable views . . . [thus investing] judges with a tremendous amount of power."[16]

One interpretation of this concern – which probably reflects Sherwin's view of the matter – is that allowing the moral principle of unjust enrichment to have a bearing on the judicial development of the law of restitution is undesirable because, as a broad idea of justice, it may leave rules too insecure. This interpretation, which is entailed by Sherwin's legal

Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Tracey A. Thomas, *Justice Scalia Reinvents Restitution*, 36 Loy. L.A. L. Rev.1063 (2003).

[12] *See* John Finnis, Natural Law and Natural Rights 288 (1980). As Lloyd Weinreb claims, in line with the analysis that follows, Finnis' premises are uncontroversial only insofar as they are indeterminate and thus not helpful to the solution of moral issues. *See* Lloyd L. Weinreb, Natural Law and Justice 111–15 (1987).

[13] ALI Draft, *supra* note 1, § 1 cmt. b.

[14] Moses v. Macferlan, 97 Eng. Rep. 676, 681 (K.B. 1760).

[15] ALI Draft, *supra* note 1, § 1 cmt. b.

[16] Sherwin, *supra* note 8, at 2106–07.

positivism,[17] casts the problem as an illustration of the difficulties inherent in any introduction of normative issues into legal discourse. As chapter 1 indicates, this book is not informed by the positivist credo and celebrates, rather than agonizes over, the role of normative analysis in legal discourse. Therefore, if the prevention of unjust enrichment had been a normative ideal, I would have had no difficulty joining scholars who present it as "a legal principle with normative weight."[18] My concern with Lord Mansfield's dictum is not that it injects a normative ideal into legal discourse, but rather that it provides judges with the authority to engage in unprincipled adjudication.

To see why, recall Ronald Dworkin's famous distinction between discretion in the weak sense and discretion in the strong sense. Discretion in the weak sense covers cases in which the decisionmaking power of an official (a judge) is constrained by standards which "for some reason . . . cannot be applied mechanically but demand a use of judgment," as in Dworkin's example of a sergeant who is ordered to select his "five most experienced men."[19] By contrast, strong discretion means that the official is not bound by standards "that purport to impose any particular decision." As Dworkin emphasizes, strong discretion properly applies "not to comment on the vagueness or difficulty of the standards . . . but on their range." For this reason, strong discretion "does not exclude criticism [based on] standards of rationality, fairness, and effectiveness." In cases of strong discretion – such as "sentencing under criminal statutes that provide a maximum and minimum penalty" or "framing equitable relief under general equity jurisdiction" – the judge still needs to select "the decision that is best on the whole, all things considered."[20]

The binarism of weak and strong discretion and Dworkin's use of this distinction to vindicate his "one right answer" thesis have been subject to some criticism. The line between weak and strong, argues Kent Greenawalt, is far from being sharp because in most cases (certainly in

[17] *See* Larry Alexander & Emily Sherwin, The Rule of Rules: Rules, Principles, and Dilemmas of Law (2001).

[18] *See* Kit Barker, *Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons, in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004). *See also, e.g.*, John D. McCamus, *Unjust Enrichment: Its Role and Its Limits, in* Equity, Fiduciaries and Trusts 129, 147–53 (Donovan W. M. Waters ed., 1993).

[19] Another type of weak discretion – where an official "has final authority to make a decision and cannot be reviewed and reversed by any other official" – is irrelevant for my purposes.

[20] Ronald Dworkin, Taking Rights Seriously 31–33, 69–71 (1977).

the context of adjudication) even strong discretion implies, as Dworkin admits, a duty to decide fairly and rationally. Instead of a dichotomy, it is more accurate to think of a spectrum which ranges from simple factual judgment to wide freedom of choice. Inasmuch as a case approaches the pole of "freedom to choose," the decisionmaker is increasingly free to set her own standards although she must choose these standards conscientiously. In (most) other cases, in between the poles of factual judgment and open normative choice, there are authoritative standards, but judges may still have discretion because more than one result is widely regarded as complying with these standards. Thus, while the distinction between weak and strong discretion is neither binaric nor supportive of the "one right answer" thesis, it is still instructive. This "softer" taxonomy is helpful for distinguishing most cases of legitimate judicial rulemaking – in which discretion is constrained by authoritative standards – from legislation, in which it is not.[21] I will refer to this distinction as a distinction between principled adjudication and unbridled discretion.

The values of autonomy, utility, and community, which are used extensively in the following chapters, can serve as standards for principled adjudication. To be sure, each of these values is vague. Reasonable lawyers may dispute my interpretation of any one of these values – or the way I balance them – for any given setting. Therefore, notwithstanding my own persuasions, I will (try to) avoid presenting my conclusions as the one right answer. But the principle against unjust enrichment is qualitatively different. Preventing unjust enrichments cannot be the basis of principled adjudication any more than the instruction to decide fairly and rationally. The range of standards covered under the umbrella of justice renders this interpretation of the principle against unjust enrichment a source of unbridled discretion, bounded only by the most abstract criteria of "rationality, fairness, and effectiveness," or by the prescription of selecting "the decision that is best on the whole, all things considered." For this reason, it is not surprising that in the context of many new – or debated – legal questions, the rhetoric of unjust enrichment is invoked as a rationale for diametrically conflicting rules.[22] As the new

[21] Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 365–66, 368–69, 377–78, 382 (1975).

[22] Two examples stand out. One comes from the inter-jurisdictional debate as to whether a trademark owner should collect the profits from infringements where they are not the fruit of willful deception and where there was no competitive relationship between the parties. See Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 123–24 (9th Cir. 1968); George Basch Co., Inc. v. Blue Coral Inc., 968 F.2d 1532, 1538 (2d Cir.

Restatement concludes, this interpretation of Lord Mansfield's approach ends up as "an open-ended and potentially unprincipled charter of liability."[23]

But maybe Lord Mansfield's dictum misinterprets the principle against unjust enrichment when it portrays it as a *carte blanche* authority to prescribe just rules (or, worse, just results). Maybe unjust enrichment can be understood in a way that both constrains the judicial rulemaking power and channels it in morally desirable ways. The recurrent invocation in restitution scholarship of Pomponius' dictum (in the second century AD) that "it is by nature fair that nobody should enrich himself at the expense of another"[24] seems to explore this possibility. Mark Gergen revives John Dawson's account of this ancient Roman maxim as "the idea of justice that is at the heart of much of the law of Restitution." Gergen claims that modern moral philosophy "is the wrong place to look" for a justification for this idea "that it is wrong to profit from the misfortune of another." Instead, this idea is "a product of our need to give a reasoned account of judgments that themselves are the products of more basic instincts and values." In this view, the principle against unjust enrichment – and arguably a legal doctrine that, guided by this principle, reverses enrichments by impoverishment – stands for "human unhappiness over the role of chance in our lives, discomfort with change, the instinct for possession, dislike of human cunning, and, perhaps, just a touch of envy."[25]

By suggesting that the claimant's impoverishment (meaning any material worsening in her position) is what makes the defendant's enrichment unjust, Gergen recasts the principle of unjust enrichment as a principle, rather than as an open-ended charter of liability. The price of this proposal, however, is high; it is, in fact, too high. If the problem with enrichments by impoverishment is the claimant's harm, then it is better to focus directly on the defendant's responsibility for the claimant's predicament, which is not obvious. After all, there are many contexts in

1992). Another involves the use of unjust enrichment in the debate over standards of compensation for the nationalization of foreign-owned property. *See* Hanoch Dagan, Unjust Enrichment: A Study of Private Law and Public Values 155–56 (1997).

[23] ALI Draft, *supra* note 1, § 1 cmt. b. *See also, e.g.*, Joachim Dietrich, Restitution: A New Perspective 44 (1998); W. S. Holdsworth, *Unjustifiable Enrichment*, 217 L.Q. Rev. 37, 51, 53 (1939).

[24] Dig. 12.6.14 (Pomponius, Sabinus 21) (Alan Watson ed., Peter Birks trans., 1998).

[25] Mark Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927, 1927, 1929, 1945, 1953–54 (2001) (discussing John P. Dawson, Unjust Enrichment: A Comparative Analysis (1951)).

which such responsibility would be inappropriate; in many cases, a profit which we deem to be legitimate is, by definition, at the expense of others: that is what competitive markets are all about. Alternatively, if the crux of the matter lies not in the claimant's harm, but rather in the correspondence between that harm and the defendant's gain,[26] then the prevention of unjust enrichment ends up as a fancy disguise for envy. Some argue that in the grand scheme of affairs, envy – in the sense of preferences regarding relative wealth or other primary goods – has normative significance.[27] But even if we take this view as a given, it does not follow that sentiments of envy or spite should inform private law and guide the resolution of disputes between a particular claimant and a particular defendant.[28]

Gergen's account ends up celebrating a principle that constrains the judicial rulemaking discretion in a morally indefensible way, thus winning, at best, a Pyrrhic victory. Unjust enrichment fails as a moral principle. Can *unjustified* enrichment do better as the foundation of liability in restitution?

B The positivist trap of unjustified enrichment

The draft of the new Restatement attempts to address the difficulties with the concept of unjust enrichment by claiming that the concern of restitution is only with cases "giving rise to what is more appropriately called *unjustified enrichment*."[29] The shift from "unjust" to "unjustified" – a term principally used in jurisdictions following the civil law tradition[30] – is

[26] *See* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 56 (1936).

[27] For the competing views on this question, see Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 232 n.28 (1998).

[28] *Cf.* Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 181 (1996).

[29] ALI Draft, *supra* note 1, § 1 cmt. b.

[30] *See id.* at the Reporter's Note to cmt. b. *Cf.* Francesco Giglio, *A Systematic Approach to "Unjust" and "Unjustified" Enrichment*, 23 OX. J. LEGAL STUD. 455, 456 (2003). To be sure, the question whether the new Restatement's use of "unjustified enrichment" indeed reflects the civilian tradition is debated. *Cf., e.g.*, Dennis Klimchuk, Mack v. Canada (Attorney-General) *and the Structure of the Action in Unjust Enrichment, in* CALLING POWER TO ACCOUNT: LAW'S RESPONSE TO PAST INJUSTICE (David Dyzenhaus & Mayo Moran eds., forthcoming 2004) (arguing that the core distinction of the common law vs. civilian law is that the former "is oriented around reasons for restitution," whereas the latter is oriented "around reasons for retention.").

more than merely verbal. "Unjustified enrichment is an enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alternation in ownership rights." Therefore, substituting unjust enrichment with unjustified enrichment shifts the focus of the analysis from moral justification to legal justification, thus making instances of unjustified enrichment "both predictable and objectively determined."[31]

This notion of unjustified enrichment is fraught with difficulties. To equate unjustified enrichment with illegal enrichment is to invite tautologies.[32] If the meaning of a claimant's assertion that the defendant has been unjustifiably enriched at her expense is that the defendant's enrichment lacks an adequate legal basis, then, if the plaintiff prevails, to say that it was because the defendant was unjustifiably enriched is a clear begging of the question. By the same token, if the claimant is defeated, to tell her that it is because the defendant was not unjustifiably enriched is again not a reason at all. In order for the principle of preventing unjustified enrichment to serve as a reason it needs an anterior standard that explains why an enrichment has (or rather lacks) an adequate legal basis. But in that event the anterior standard, rather than the principle of preventing unjustified enrichments, becomes the real reason for the rule.

Consider, for example, the classic restitutionary case of mistaken payments, the focus of my inquiry in the next chapter. As we will see, the questions the law of restitution needs to settle here are whether the recipient of a mistaken payment should make restitution, whether her good faith reliance (or receipt) makes a difference, and what, if any, is the significance of the identity of the parties and of their relative fault in the misunderstanding. If we justify the plaintiff's entitlement to the payment she mistakenly made – in whole, or in part; irrespective of the defendant's good faith detrimental reliance, or subject to such reliance – then the retention thereof by the recipient surely amounts to unjustified enrichment. This is, however, a rather self-evident, almost trivial conclusion. After all, had there been more convincing reasons to prescribe a rule that assigns the entitlement with the recipient, the opposite conclusion would have been arrived at, namely, that the enrichment had not been unjustified. Basing liability on the recipient's unjustified enrichment is either hopelessly circular or a conclusory statement based on another reason that does the real work but is not explicitly mentioned.

[31] ALI Draft, *supra* note 1, § 1 cmt. b.

[32] *Cf.* Abbot, *supra* note 6, at 223–26.

But maybe the new Restatement's concept of unjustified enrichment can be rescued by reference to the (legal) concept of property as a baseline from which unjustified (in the sense of nonconsensual) enrichments can be measured. In this view, the risk of circularity is limited to contractual settings, in which the presence or absence of unjust enrichment is arguably determined by reference to the parties' bargain. In non-contractual arenas the principle of preventing unjustified enrichment can serve as a guideline by triggering restitutionary liability whenever there is enrichment as a result of employing another's property without her consent.[33]

This maneuver, however, will not do. First, a property-based approach to unjustified enrichment is inadequate in that it fails to include in its scope – with no apparent justification – many of the resources that are dealt with by the law of restitution.[34] Although many of the interests protected by the law of restitution fall within the scope of interests in (tangible or intangible) "property" as defined in other branches of law, many other protected interests are conventionally treated as non-proprietary interests, such as trade secrets, and a variety of interests in the self or in certain attributes thereof such as one's reputation or one's name, picture, personal characteristics, voice, etc., as well as contractual relations (or even expectations and opportunities).[35] Hence, a property-based approach to restitution leads to one of two undesirable results.[36] One option is to employ a narrow approach to restitution as a vindication of rights to property *stricto sensu*.[37] But this theory would account for only a fragment of the existing doctrine. Another option is to invoke a more expansive notion of property (at times utilizing terms such as quasi-property).[38] But this approach detaches the concept of property from its conventional usage, and thus detracts from whatever appeal this concept is supposed to provide to the notion of preventing unjustified enrichment. Furthermore,

[33] *See e.g.*, Ross B. Grantham & Charles E. F. Rickett, Enrichment and Restitution in New Zealand 18–20, 45–46, 53, 58–60 (2000); Nicholas J. McBride and Paul McGrath, *The Nature of Restitution*, 15 Ox. J. Legal Stud. 33, 37–39, 43 (1995). *Cf.* Kull, *supra* note 7, at 1196–97, 1200, 1209 & n.54; John Carter, *Restitution and Contract Risk*, *in* Restitution: Developments in Unjust Enrichment 137 (Mitchell McInnes ed., 1996).

[34] *See* Jack Beatson, *The Nature of Waiver of Tort*, *in* The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution 206, 208 (Jack Beatson ed., 1991).

[35] *See* Dagan, *supra* note 22, at 71–108.

[36] *Cf.* Lusina Ho, *The Nature of Restitution – A Reply*, 16 Ox. J. Legal Stud. 519, 524 (1996).

[37] This seems to be Stoljar's approach. Samuel J. Stoljar, The Law of Quasi-Contract 5–7, 93, 100 (2d ed. 1989). The critique of this approach is summarized in G. H. L. Fridman & James G. McLeod, Restitution 32–34 (1982).

[38] *See* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504, 506, 509 (1980).

as Daniel Friedmann notes, it is circular to base a right of restitution on the ground that the invaded resource is a property interest, where the basis for regarding the resource as property is that otherwise unjustified enrichment would be permitted.[39]

Moreover, property cannot serve as a baseline for unjustified enrichments because – as an artifact, a human creation that can be, and has been, modified in accordance with human needs and values[40] – property is an essentially contested concept[41] that is open to competing interpretations and permutations.[42] The indeterminacy of property is particularly detrimental to its ability to serve as the touchstone of the law of restitution because there is no *a priori* list of entitlements that the owner of a given resource inevitably enjoys.[43] Thus, there is no reason to presuppose that *any* gains derived from property are *necessarily* within the entitlement of the property's owner.[44] Likewise, it is difficult to see why the entitlement to profit cannot be an element of rights that we do not usually classify as proprietary. Hence, the concept of property cannot possibly provide answers to the specific type of questions the law of restitution needs to resolve;[45] it only further postpones (or obscures) the inevitable normative inquiry.[46]

To be sure, a specific theory of property may be robust enough to answer such particular questions. Consider, for example, James Gordley's

[39] *See id.* at 511 n.36.

[40] *See* Jeremy Bentham, The Theory of Legislation 111–113 (C. K. Ogden ed., R. Hildreth trans., 1931); Fredrick G. Whelan, *Property as Artifice: Hume and Blackstone*, 22 NOMOS 101 (1980).

[41] *See* W. B. Gallie, *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society (New Series) 167 (1956).

[42] *See, e.g.*, Joseph William Singer, Entitlement: The Paradoxes of Property 7 (2000).

[43] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 746–47 (1917). *See also, e.g.*, Bruce A. Ackerman, Private Property and the Constitution 9–15, 26–29, 97–100 (1977); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 Ariz. St. L.J. 1075, 1076 (1997).

[44] *See* Barbara Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement ch. 4 (1998); John Christman, The Myth of Property: Toward an Egalitarian Theory of Ownership (1994).

[45] *Cf.* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 Buff. L. Rev. 325 (1980); Joseph W. Singer, *Legal Realism Now*, 67 Cal. L. Rev. 467, 491 (1988). *See also* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601, 631 (1998).

[46] *Cf.* Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights (2002); Hanoch Dagan, *The Craft of Property*, 92 Cal. L. Rev. 1517, 1527–32 (2003).

account of the way in which the principle against unjustified enrichment was used by natural lawyers. Gordley demonstrates that this principle can yield some very specific prescriptions once private property is understood as aimed at avoiding quarrels and encouraging the productive use of resources. Specifically, he shows that these utilitarian injunctions answer the crucial question of whether a plaintiff has an exclusive right to certain potential benefits that can be captured by using a resource she possesses.[47] Even if this is correct, however, nothing follows insofar as the purported regulative role of the unjustified enrichment principle or even of the concept of property is concerned. After all, the real work in this account is done by a commitment to certain utilitarian concerns of avoiding quarrels and incentivizing production, and not by either unjustified enrichment or property. Furthermore, once we pierce these legal concepts and address some utilitarian purposes they may serve, it is unclear why we should not expand our normative outlook (as this book does) and look also at other utilitarian effects of potential restitutionary rules, as well as at the implication of doctrinal choices on other values, notably autonomy and community.

Thus, either if interpreted as referring to the entire corpus of legal rules as the sole premise of "adequate legal basis," or if it is to rely on the concept of property, unjustified enrichment leads to an impasse. In either form, unjustified enrichment quickly collapses into either a statement that if the defendant is not legally entitled to the enrichment, its retention is unjustified, or to an unsupported assertion of the baseline of the parties' entitlements. Both alternatives – the two sides of the positivist trap – are rather unhappy.[48]

The former – if it is not to be understood as a sheer triviality – may imply that the law of restitution does not include any substantive rules allocating entitlements. This, however, is clearly wrong, as the case of mistaken payments demonstrates. Another, seemingly more promising way to make sense of unjustified enrichment is as an attempt to encapsulate Peter Birks' claim – echoed by the new Restatement – that whatever adjective is chosen to qualify enrichment, its role is only to identify "disapproved" or "reversible" enrichments: "No enrichment can be regarded as unjust,

[47] James Gordley, *The Principle Against Unjustified Enrichment, in* Gedächtnisschrift Für Alexander Lüderitz 213 (K. Luig et al. eds., 2000).

[48] I borrow the term "positivist trap" from a different, although not completely unrelated, context. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 922–26 (2000).

disapproved or reversible unless it happens in circumstances in which the law provides for restitution." Unjustified enrichment in this sense merely reminds us to "look downward to the cases" and "adds nothing to the existing law."[49]

I find no reason to enshrine in such a way the rules that happen to exist at the moment in which we proudly announce the principle of unjustified enrichment. Elevating unjustified enrichment, as a shorthand for any infringement of the existing rules, to the status of a legal principle implies that somehow the law of restitution can no longer upset its current doctrine; that somewhere along the way it lost its viability and has now no potential of setting new substantive rules allocating entitlements.[50] It is hard to find a reason supporting such a celebration of the legal *status quo*.[51]

I do not think that this result reflects Birks' intention or the direction of the new Restatement. Rather than entrenching the *status quo*, maybe their idea of looking downward to the cases is to stay reasonably close to existing rules. But, whatever this prescription means regarding the pace of legal evolution, it is hard to see how it can inform the direction of such evolution. In fact, if any evolution is allowed, then unjustified enrichment may end up being a camouflage for unbridled discretionary power, exacerbating, rather than ameliorating, the problems we identified with unjust enrichment.

The new Restatement is vulnerable on this front. It presents unjust enrichment and unjustified enrichment as "mutually reinforcing explanations of liability," suggesting that "[e]nrichment is unjust, in legal contemplation, to the extent it is without adequate legal basis; and the law supplies a remedy for unjustified enrichment because such enrichment cannot

[49] Peter Birks, An Introduction to the Law of Restitution 19, 23 (paperback ed. with revisions 1989) [hereinafter Birks, Introduction]. *See also* ALI Draft, *supra* note 1, § 1 cmt. b. Birks has recently modified his approach, and he now refers to the word "unjust" as "weakly normative." See Peter Birks, Unjust Enrichment 235–36 (2003) [hereinafter Birks, Unjust Enrichment]. As the text below explains, this modified approach is also deeply problematic.

[50] *Cf.* Graham Virgo, The Principles of the Law of Restitution 52–55 (1999); Doug Rendleman, *When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom*, 36 Loy. L.A. L. Rev. 991, 1001, 1005 (2003).

[51] As Justice Holmes famously remarked: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver W. Holmes, *The Path of the Law, in* Collected Legal Papers 167, 187 (1920). Even the strongest defenders of precedent, who insist that its status is premised on more than instrumental reasons, do not advocate complete stagnation. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029 (1990).

conscientiously be retained."[52] If this statement is not to be read as a tautology (or a mistake), it must imply that the law of restitution has the viability to revise and add substantive (and remedial) rules in the common law tradition of an endless quest for better law.[53] But by cloaking this quest in a positivist garb, unjustified enrichment ends up, like unjust enrichment, as "a name for a legal conclusion that remained to be explained."[54] Worse still, its positivist flavor might unduly shield it from criticism.

Certain uses of accepted legal formulas, explained Justice Holmes many years ago, are objectionable because "they do not represent a final analysis, but dodge difficulty and responsibility with a rhetorical phrase."[55] The concept of unjustified enrichment suffers from the problem Holmes identified. The law of restitution requires a resolution of difficult allocative questions. Referring to unjustified enrichment as the reason (or even *a* reason) for new rules – or, for that matter, for the reinstatement of any existing rule – is bothersome because it might disguise decisions as to when enrichments should be deemed unjust and precisely how the injustice is to be reversed as matters of legal technicality, indeed legal inevitability, and thus improperly immunize them from any normative criticism.[56]

The choices restitution law needs to make in prescribing the precise contours of just entitlements, and thus, by implication, delineating the scope of unjust enrichments, cannot be resolved by a question-begging reference to the slogan of preventing unjustified (or unjust) enrichment. Instead, they require a deliberate normative discussion to identify the values that shape, or can be used to shape, the pertinent rules and to guide value-choices where there is a clash.[57] Using the prevention of unjustified

[52] ALI Draft, *supra* note 1, § 1 cmt. b.

[53] *See also, e.g.*, Grantham & Rickett, *supra* note 33, at 50; Lionel Smith, *Restitution, in* The Oxford Handbook of Legal Studies 48, 53 (Peter Cane & Mark Tushnet eds., 2003).

[54] ALI Draft, *supra* note 1, § 1 cmt. b (referring to the objection to unjust enrichment as "the embodiment of natural justice").

[55] Oliver W. Holmes, *Law in Science and Science in Law, in* Collected Legal Papers, *supra* note 51, at 210, 230. *See also, e.g.*, Mark Kelman, A Guide to Critical Legal Studies 4, 290–95 (1987); Robert W. Gordon, *New Developments in Legal Theory, in* The Politics of Law: A Progressive Critique 413, 418–21, 424 (David Kairys ed., 2d ed. 1990).

[56] *See* Steve Hedley, *Unjust Enrichment*, 54 Cambridge L.J. 578, 580–81, 592–93, 595 (1995); Stewart Macaulay, *Restitution in Context*, 107 U. Pa. L. Rev. 1133, 1139–40 (1959); Wonnell, *supra* note 28, at 159–60. *See generally*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 812, 820 (1935).

[57] *See* Kit Barker, *Unjust Enrichment: Containing the Beast*, 15 Ox. J. Legal Stud. 457, 463 (1995).

(or unjust) enrichment as an argument ends up as an outright cloak for a decision by fiat, rather than by reason, obscuring the choices the law of restitution must make and inhibiting the normative discourse that is required for rationalizing and improving the doctrine.

Furthermore, presenting the formula of unjustified enrichment as the unifying justification for the law of restitution constitutes an unwarranted simplification of this complex and diversified body of law. The law of restitution encompasses a plethora of remedies that emanate from many sources,[58] and – more importantly here – cover a wide diversity of social settings that are governed by a multitude of specific rules. Such heterogeneity raises the suspicion – which this book attempts to vindicate – that the rules of different categories are guided by somewhat different normative concerns.[59] Where unjustified (or unjust) enrichment is presented as the rationale at the foundation of every restitutionary rule, this diversity unfortunately disappears.[60]

C Unjust enrichment as a framework and an invitation

Does the critique of the last two sections of unjust enrichment and of unjustified enrichment as legal arguments require that we dispense with this concept and maybe dissolve the law of restitution? In his critique of Keener's invention of unjust enrichment, Everett Abbot claimed, along these lines, that cases of restitution are all instances of a breach of consensual obligation or a tort.[61] In a similar vein, Steve Hedley, a harsh unjust enrichment skeptic, recently suggested that "restitution has nothing to say about any particular social situation," and that "rather than searching for a new principle *outside* 'property,' 'contract' and 'tort,' we need to expand our understandings of *those* concepts to accommodate the neglected areas" which are currently lumped together under the unsuccessful heading of unjust enrichment.[62]

As the previous sections clarify, I share some of the concerns undergirding the unjust enrichment skeptics' criticism of the over-employment of

[58] *See* Dawson, *supra* note 25, at 38–39.

[59] *See* Dietrich, *supra* note 23, at 20–21; Hedley, *supra* note 56, at 589, 594, 599; Macaulay, *supra* note 56, at 1138, 1145–46.

[60] *See* Dietrich, *supra* note 23, at 20; Steve Hedley, Restitution: Its Division and Ordering 200 (2001).

[61] *See* Everett V. Abbot, *Keener on Quasi-Contracts – II*, 10 Harv. L. Rev. 479 (1897).

[62] Hedley, *supra* note 60, at 218, 224, 231–32. *See also* Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement (2000).

the notion of unjust (or unjustified) enrichment by restitution enthusiasts. And yet the vulnerability to criticism of overdosing on unjust enrichment does not imply that unjust enrichment has no role to play in the law of restitution, let alone that the field should be dissolved.[63] In this section I resist these conclusions by offering an understanding of the role of unjust enrichment that will be modest enough so that the insurmountable difficulties outlined above are not reintroduced.

I suggest viewing unjust enrichment as a loose framework as well as an invitation for a normative inquiry. By a loose framework I mean a mere placeholder for arranging and classifying legal rules that involve benefit-based liability or benefit-based recovery and that – for whatever reason – do not find a comfortable home in another legal field. As Learned Hand showed in his response to Abbot, many restitution categories, notably but by no means only the category of mistaken payments, do not fit without distortion into the other branches of private law.[64] Even respecting categories which may seem easily amenable to being swallowed by other branches – think of restitution for wrongful enrichments – this reshuffling of the law would be unfortunate. As chapter 7 shows, the focus of restitution for wrongful enrichments is dramatically different from the focus of tort law. Eliminating the category of restitution for wrongful enrichments because of an aesthetic desire to preserve the classic tripartite division of private law would (detrimentally) change the existing legal landscape.

Yet, the framework of unjust enrichment is, I believe, a loose one. Thus, for example, even though it may be desirable to discuss certain cases of restitution following breaches of contract under restitution law – for the rather mundane reason that these important cases tend somehow to be marginalized in contract law – their analysis is by and large informed, as chapter 8 demonstrates, by the underlying normative concerns of contract law (although, interestingly enough, *not* by the principle of promise-keeping).

More generally, as a loose framework, the theme of unjust enrichment is unable to do some of the work that even unjust enrichment minimalists, such as Birks, want it to do. Birks refers to unjust enrichment

[63] *See* Peter Schlechtriem et al., *Restitution and Unjust Enrichment in Europe*, 2&3 European Rev. Private Law 377, 379 (2001).

[64] *See* Hand, *supra* note 6, at 250–57.

as a "generic conception" that has three important tasks to perform.[65] First, unjust enrichment can provide "starting points" for legal analysis: a "shared analytical scheme" and "a stable pattern of reasoning" composed of four steps: (1) pointing out the defendant's enrichment; (2) identifying such enrichment as being "at the plaintiff's expense"; (3) classifying the enrichment as unjust (in the Birksian sense mentioned earlier); and (4) examining the existence of other considerations barring the claim.[66] Second, unjust enrichment prevents, says Birks, "the fragmentation of the subject" which obscures "structural similarities" between cases in different categories. A unified account based on the four elements noted above brings to the fore these similarities. It encourages analogies between "factually dissimilar cases,"[67] such as mistaken payments and interventions by good samaritans. Thus it helps reconstitute "the whole picture, relating together fragments which seem to have nothing to do with each other" and preventing the law of restitution from seeming to be "more heterogeneous than is necessary." Finally, in Birks' view the language of unjust enrichment helps reveal the deep reason for the affinity between restitution cases, exposing the "quality" which is common to them; a quality which – if I understand Birks correctly – justifies using his four elements as the basis for analysis and analogy.

I do not deny that the various restitutionary doctrines, which all deal with benefit-based liability or benefit-based recovery, are likely to share some qualities. Therefore, I would be hesitant to dismiss out of hand Birks' four elements and the advantages he emphasizes of using lessons from one restitutionary doctrine for facilitating the analysis of another.[68] But Birks' framework should be handled with great caution. Recall that the principle of preventing unjust (or unjustified) enrichment is inadequate for resolving the doctrine's focal questions of identifying cases of unjust enrichment and delineating the appropriate legal response. Therefore, the common qualities of restitutionary cases are not always as neat and pristine as the Birksian methodology may suggest. While the quadripartite test may help discipline the legal inquiry, this structure should not obscure the need for a contextual normative analysis of the allocative

[65] *See* Birks, Introduction, *supra* note 49, at 17, 19–22, 25. *See also, e.g.*, Kull, *supra* note 7, at 1226. For a recent articulation of Birks' scheme (which includes five, rather than four, steps), see Birks, Unjust Enrichment, *supra* note 49.

[66] *See also, e.g.*, Burrows, *supra* note 9, at 15.

[67] *See also, e.g.*, Sherwin, *supra* note 8, at 2109–11.

[68] *Contra* Hedley, *supra* note 60, at 219.

question each restitutionary category raises. At times, such an analysis will reveal important differences between restitutionary categories. The significant diversity apparent among the various restitutionary paradigms requires acknowledging, rather than suppressing, the important normative – and thus doctrinal – heterogeneity of the field. Thus, analogies between paradigms should be examined with great care, and at times rejected. (Good samaritan cases, for example, differ greatly from mistakes cases – their different settings raise concerns that are very different from one another – so that I will find little reason to use the mistakes analysis, or any mistakes cases, in chapter 3 for analyzing the good samaritan context in chapter 4.) The methodical examination of Birks' elements should not underplay the law of restitution's important heterogeneity.[69]

The vindication of these comments depends upon the merits of the alternative frameworks I offer in the chapters that follow. But some preliminary remarks regarding each of the four elements can at least give a sense of my claim that the unjust enrichment framework can be helpful only if it remains loose and is dealt with cautiously – only if unjust enrichment remains a common theme in the modest sense of the word.

Consider first the element of *enrichment*. While in most cases a cash benefit easily complies with this element, noncash benefits are more problematic. A major concern in the context of unilateral conferral of unsolicited benefits, studied in chapter 5, is with such cases, where considerations of personal autonomy (and aggregate utility) may tilt against restitution where the defendant's claim of subjective devaluation cannot be easily rejected.[70] The lessons of this inquiry are relevant to, and will thus be integrated in, chapter 3 in the context of mistaken conferrals of noncash benefits which is a relatively small subfield of the doctrine of mistakes.[71] But subjective devaluation should not necessarily upset restitutionary liability in other contexts. Thus, if the good samaritan's restitutionary recovery is partly premised, as chapter 4 insists, on offsetting countervailing incentives faced by potential good samaritans in order to facilitate the potential beneficiary's preferences, then the subjective devaluation exception should not apply in this category of cases because it may frustrate this very goal.[72] Similarly, as we will see in chapter 6, given the

[69] *Contra, e.g.*, BURROWS, *supra* note 9, at 77.

[70] *See infra* section 5.C.

[71] *See infra* section 3.E.

[72] *See infra* pp. 96–101. *Contra, e.g.*, BURROWS, *supra* note 9, at 19. Another confusion in this area – whether failed attempts of good samaritans should prompt restitution even though it is hard to identify the beneficiary's enrichment – is also avoided if the element of

emphasis on community and the collective achievement of collective goods in contexts of informal intimacy, subjective devaluation is wholly misplaced in considering restitutionary claims arising in contexts of informal intimacy.[73]

The next question is whether the defendant was enriched *at the expense of the plaintiff*. A recent debate in the literature with respect to this (second) element of Birks' scheme reveals the difficulties that quickly arise once unjust enrichment deviates from its modest role as a loose framework for restitutionary claims. Birks identifies a schism between those who think that restitution and unjust enrichment are different names for the same area of law (the "quadrationists"), and those who think that a right to restitution "may be triggered by one of a number of distinct causative events" (the "multicausalists").[74] Andrew Burrows, and probably also Kull, the reporter for the new Restatement, defend the former approach, according to which "the law of restitution and the law of unjust enrichment form a single square that can be named indifferently from either response or causative event."[75] The rival view insists that restitution law should be subdivided because restitution "does not always respond to unjust enrichment but may be triggered by one of a number of distinct causative events."[76] Birks' own suggestion is of particular interest. Birks claims that restitutionary rights "arise from consent, from wrongs, from unjust enrichments, or from various other events." He is particularly eager to maintain "the bright line that runs between unjust enrichment and wrongful enrichment" – which are, in his view, two different types of events – insisting that "wrongful enrichment be kept separate from unjust enrichment." Two important practical conclusions follow: a tort victim who claims that a profitable wrong is tantamount to an enrichment at her expense would still be subject to the limitation period of torts law; by the same token, the tort victim need not be vulnerable to the restitutionary defense of change of position.[77]

enrichment is analyzed normatively and contextually, rather than conceptually. *See infra* p. 111.

[73] *See infra* p. 176.

[74] Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 Tex. L. Rev. 1767, 1769–70 (2001).

[75] *Id.* at 1767. *See* Andrew Burrows, *Quadrating Restitution and Unjust Enrichment: A Matter of Principle*, 8 Restitution L. Rev. 257 (2000); Kull, *supra* note 7, at 1192–93, 1196. *See also, e.g.*, Goff & Jones, *supra* note 9, at 3 (same).

[76] Birks, *supra* note 74, at 1767. *See also* Virgo, *supra* note 50, at 7–8; Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1280, 1293 (1989).

[77] *See* Birks, *supra* note 74, at 1767, 1771–72, 1783–88.

I happen to agree with these two conclusions.[78] Nevertheless, I think that Birks' bright-line dichotomy between unjust enrichment and wrongful enrichment should be rejected. To see why, consider the way the debate is framed: by questioning whether unjust enrichment is the one and only reason, or rather one of a few reasons, for restitution.[79] Thus, setting aside wrongful enrichments as "something different" conveys the misleading impression that other restitutionary cases – which do fall within the "square" of restitution for unjust enrichment – are uniquely similar to one another. This impression is further entrenched by Birks' vindication of the validity of the bright line between unjust enrichment and wrongful enrichment by reference to the inapplicability of unjust enrichment defenses in cases of wrongful enrichment, implying that other cases – which are properly classified in the unjust enrichment square – are all automatically subject to the same defenses. Because Birks' taxonomy underplays the heterogeneity of the law of restitution and might facilitate an unreflective borrowing of rules (e.g., regarding defenses) from one category to another, it must be rejected. Paradoxically, the view that seems more monolithic – referring interchangeably to restitution and unjust enrichment – may be less vulnerable to this difficulty if, but only if, the term unjust enrichment remains, as I claim in this section, a loose framework and an invitation to a normative inquiry.[80]

(As an aside, Birks' strict separation of wrongful enrichment from unjust enrichment is also potentially harmful in obscuring similarities between wrongful enrichments and some other categories of unjust enrichment, thus creating the very over-fragmentation his scheme is supposed to prevent. Separating wrongful enrichment from unjust enrichment may obscure commonalities regarding the identification and the valuation of the defendant's enrichment.[81] Likewise, Birks' suggested bifurcation of the field may also blur the way in which many branches of the law of restitution – of both the unjust enrichment and the wrongful

[78] See respectively Dagan, *supra* note 22, at 90; *infra* p. 258 n.168. Even Burrows, a strong supporter of the quadration thesis, agrees with the first, although not with the second, conclusion. *See* Burrows, *supra* note 75, at 260–61, 264.

[79] Some multicausalist views do not include unjust enrichment as one of the events triggering restitution, and are thus exempt from the critique of the text. *See* I. M. Jackman, The Varieties of Restitution 1 (1998); Jaffey, *supra* note 62, at 19–21.

[80] *Contra* Burrows, *supra* note 75, at 267 (advocating the quadration thesis as the one which categorizes the law of restitution "on the basis of principle, namely: the principle against unjust enrichment").

[81] *See* Burrows, *supra* note 75, at 263.

enrichment kind – are careful to fine-tune the remedial response to the nature of the resource at stake.[82])

Next in the Birksian scheme comes the element of "*unjust factors*." As Birks and other scholars of this tradition admit, the question "whether the facts reveal a ground for characterizing the enrichment as 'unjust' and therefore reversible" is the "main question" (or the "crucial question") of the legal analysis.[83] The unjust factors element triggers liability in restitution whenever a plaintiff can point to a concrete reason – embedded in the doctrinal rules – for conceptualizing the defendant's enrichment as "unjust." This analysis is premised on the common law methods of distilling rules from cases and of experimental expansion of the existing categories: a "gradual incremental development" properly informed by "careful analysis of principle and policy."[84] The "unjust factors" methodology has been challenged as inferior to the arguably more elegant civilian model in which, as may be recalled, liability in restitution is triggered whenever the defendant's enrichment is without adequate legal basis.[85] Here it seems that Birks' model is clearly superior, as it both highlights, rather than suppresses, the need for normative justification, and preserves the important virtue of the common law's contextual approach and the attendant variety of restitutionary entitlements.[86] If the unjust factors model is "inelegant" it is only because it requires the legal reasoner – as law always should – to provide a contextual normative explanation for her position. Furthermore, if one is to raise any complaint against the unjust factors element, it may be that it is *too* elegant, by conveying (at least to some scholars) the incorrect and undesirable sense that all

[82] The nature of the resource at stake is, as we will see in chapter 7, a major key to the understanding of the diversity of measures of recovery in the context of wrongful enrichments. But as the text indicates, this concern also informs other restitutionary doctrines. *See infra* pp. 83–84 (where a mistaken benefit is attached to the defendant's land, restitution is particularly difficult because it might force a landowner to liquidate a constitutive resource); *infra* p. 90 (good samaritans whose intervention is aimed at rescuing life are treated more liberally than benefactors who preserve only a proprietary interest of another).

[83] Birks, Introduction, *supra* note 49, at 139; Burrows, *supra* note 9, at 41–42.

[84] Burrows, *supra* note 9, at 41–42; Thomas Krebs, Restitution at the Crossroads: A Comparative Study 307 (2001).

[85] Krebs, *supra* note 84, at 2–3, 307.

[86] *See* Peter Birks, The Foundations of Unjust Enrichment: Six Centennial Lectures 73 (2002); Mindy Chen-Wishart, *In Defense of Unjust Factors: A Study of Rescission for Duress, Fraud and Exploitation, in* Unjustified Enrichment: Key Issues in Comparative Perspective 160, 161 (David Johnston & Reinhard Zimmermann eds., 2002). Unfortunately, Birks recently changed his position and is now endorsing the civilian absence of basis methodology. *See* Birks, Unjust Enrichment, *supra* note 49, at 38–40, 87–143.

unjust factors trigger, as a matter of course, the same remedial response.[87] One theme in the following chapters is that within the law of restitution one can – and should – find significant remedial diversity corresponding to the contextual heterogeneity of the field.

The final stage of Birks' quadripartite scheme – followed, in one variation or another, by the new Restatement, as well as by many books on the subject – comprises a list of *defenses*, including, among others, the limitations and the change-of-position defenses noted earlier.[88] As I have already implied, I am uncomfortable with an overall detachment of defenses to restitution from the various restitutionary categories, and thus prefer the approach of American law (prior to the new Restatement), in which defenses are not considered as a separate heading in organizing the law of restitution.[89] A unified analysis of defenses implies that each defense is uniformly applicable throughout the field, thus inhibiting a contextual normative inquiry as to the propriety of a given defense to a particular restitutionary category. I do not deny that where a defense operates similarly in the different restitutionary contexts, it may be advisable to apply it throughout the field, thus simplifying administration and reducing litigation costs. Some defenses – limitations come to mind as an example – can indeed comfortably apply throughout the field with only minimal need for contextual adjustment.[90] Similarly, other defenses – think here, for example, of illegality – may only require some contextual tinkering that can be accomplished under a unified umbrella of a defense to restitution.[91] But there are defenses with respect to which a unified discussion of the *prima facie* case for restitution and the defense is advisable.

[87] Dietrich, *supra* note 23, at 46, 77.

[88] *See* Birks, Introduction, *supra* note 49, ch. 12; Restatement (Third) of Restitution and Unjust Enrichment xx (Tentative Draft No. 1, 2001). *See also, e.g.*, Burrows, *supra* note 9, at ch. 15; Virgo, *supra* note 50, at pt. VI.

[89] *See* Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. Rev. 919, 926 n.16 (2001).

[90] *See, e.g.*, Virgo, *supra* note 50, at 767–75.

[91] *See* Birks, Introduction, *supra* note 49, at 424–32 (showing how the differences between the vulnerability of various restitutionary claimants to the defense of illegality can be explained by reference to the intrinsic limitation of this defense that does not apply where the *delictum* is not *par*, as, for example, in cases of mistakes or wrongful enrichments). For a more up-to-date discussion of this defense, which is beyond the scope of this book, see, e.g., Peter Birks, *Recovering Value Transferred Under an Illegal Contract*, 1 Theoretical Inq. L. 155 (2000) (arguing that in the context of illegal contracts the only remaining objection of contemporary law to restitution is stultification). For a general discussion of punishment in restitution – which indeed comes about by way of a denial of a restitutionary claim or counter-claim – see Andrew Kull, *Restitution's Outlaws*, 78 Chi.-Kent L. Rev. 17 (2003).

The defense of change of position is a case in point. As I show in the next chapter, the change-of-position defense is integral to understanding liability in restitution in the context of mistakes. Only an integrated discussion of the *prima facie* case for restitution (that the plaintiff's conferral of the benefit was mistaken) and the defense (which in essence points to a harm the defendant will incur if forced to make restitution) can capture the conflicting autonomy concerns raised by the mistakes category and facilitate an analysis of the fair and efficient distribution of the harm mistakes potentially cause. It is not enough to recognize the availability of a change-of-position defense and postpone the consideration of its specific contours to a general analysis of change of position as a restitutionary defense.[92] An abstract consideration of the change-of-position defense, outside the context of mistakes and together with the other restitutionary categories, cannot be expected to yield a regime that adequately accommodates the two most pertinent concerns in the context of mistakes: reconciling mistaken parties' liberty with recipients' security and minimizing social costs; therefore such consideration cannot generate doctrinal subtleties that sufficiently respond to these concerns. Given the centrality of the change-of-position defense to mistakes law and the fact that in practice this defense "has been almost exclusively confined to restitution of transfers made under mistake,"[93] an integrated discussion of both sides of the doctrine – mistake and change of position – is appropriate (even if it is somewhat less elegant).[94]

If my cautionary notes to Birks' model are convincing, we indeed end up with a loose framework that – while potentially useful – should always be applied with a grain of salt. Furthermore, as a loose framework, unjust enrichment cannot set precise boundaries between the law of restitution and the other branches of private law; in fact, this book does not attempt to offer any taxonomy of private law into mutually exclusive branches.[95]

[92] This is, unfortunately, the way the new Restatement is structured. ALI Draft, *supra* note 1, § 6 cmt. j.

[93] John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. Rev. 563, 568 (1981).

[94] *Cf.* Abraham Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 U. Toronto L.J. 459, 481–88 (1998).

[95] *See also, e.g.*, Dietrich, *supra* note 23, at 89 (referring to "the wonderful diversity within restitution and . . . the many similarities of ideas and principles found in restitution and other areas of law"). *Compare, e.g.*, Birks, Introduction, *supra* note 49, at 74 (unjust enrichment claims "an independent place in the series of causative events that include consent and wrong. The four headings 'consent, wrongs, unjust enrichment and other events' . . . constitute an analytically distinct and comprehensive series.").

For me this "failure" is an expected, rather than embarrassing, feature of the law. The need to divide and subdivide the law emanates both from a mundane concern of setting manageable fields of study and teaching and from the more substantive concern of contextualizing our normative inquiries. But life is messy, and different contexts, while distinct in some senses, also raise overlapping concerns.[96]

Thus, for example, there are important continuities between the underlying concerns and methodologies of contract law and those of torts: the canonical tort law search for the cheapest cost avoider is frequently translated into an analysis that prescribes contractual defaults by attaching liability to the party who is the least cost bearer;[97] and, at times, torts scholars helpfully use a contractarian approach (looking, to be sure, to a hypothetical contract behind some veil of ignorance) to justify an existing or suggested tort doctrine.[98] Correspondingly, there are some doctrines – for example, product liability law – that resist an easy pigeonholing into either contracts or torts.[99] Just like these overlaps imply neither the death of contract[100] nor the death of torts, the overlaps between the law of restitution and its sister private law branches of contracts, torts, and property do not undermine the significance of this body of law. The lack of clear doctrinal boundaries among these fields reflects the approach of much of contemporary law and legal theory that discounts the appeal of a system which defines one normative "core" per field and jealously safeguards the boundaries between fields. Instead, in the spirit of legal realism, American lawyers tend to demarcate legal fields pragmatically and tentatively, and welcome cross-boundary concerns whenever they can facilitate the contextual normative analysis of law.[101]

[96] As Philip Mechem remarked in reviewing the first casebook on restitution, "[i]t once was thought (so the reviewer has heard) that each field of law was a beautiful, logical whole," but this view is no longer in vogue, and thus – especially regarding the heterogeneous field of restitution – unity "is the last thing to expect." Philip Mechem, *A Realistic Treatment of Restitution*, 25 Iowa L. Rev. 187, 189–90 (1939). *See also* Schlechtriem, *supra* note 63, at 415.

[97] *See, e.g.*, Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 19 (2d ed. 1993).

[98] For two very different examples, see Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L.J. 353 (1988); Gregory C. Keating, *Fairness and Two Fundamental Questions in the Tort Law of Accidents* (USC Olin Working Paper No. 99–21).

[99] *See, e.g.*, 1 Marshall S. Shapo, The Law of Products Liability lxxvii (3d ed. 1994).

[100] *See* Grant Gilmore, The Death of Contract (1974).

[101] *See, e.g.*, Menachem Mautner, The Decline of Formalism and the Rise of Values in Israeli Law 49–50 (1993) (Heb.); Stephen Waddams, Dimensions of

For this reason I reject the claim of some unjust enrichment skeptics that the failure of unjust (or unjustified) enrichment to serve as the guiding principle of the law of restitution implies that there is no good reason to retain (or revive) restitution as an important legal category.[102] This claim frequently presents property, contract, and tort law as legal fields that provide the strong coherence of principle that restitution lacks, concluding that it is better to think of restitution as an element of one or more of these fields.[103] Because the premise of this approach – that there is a single normative principle per area of law – is misguided, its conclusion does not follow. Retaining (or reviving) the law of restitution as a home for legal rules dealing with benefit-based liability or benefit-based recovery is justified enough if, as we will see in this book, it helps demarginalize important doctrines that (1) do not comfortably fit in other legal fields, and (2) share some common denominators – bear family resemblances – which derive from the thin descriptive similarities they share.[104] Likewise, analyzing restitution contextually and with reference to multiple normative commitments is not a sign of the disintegration of the field. After all, many other "mature" fields – including property, contract, and tort law – are (or should be) also analyzed in exactly the same way.[105]

In line with my modest sense of unjust enrichment as a framework and the loose ends of my demarcation of the law of restitution, this book has no pretense of giving a comprehensive coverage of the field. Instead, the next seven chapters employ a contextual normative perspective in discussing the seven most important categories (in my view) of restitutionary cases. Each chapter should be read as an attempt to illustrate the way in which the theme of unjust enrichment can be understood as an invitation for normative inquiry. This book may not provide precise answers to each and every doctrinal question. But it proposes answers to many of the most germane questions and – even more importantly – it exposes the rich normative underpinnings of the law of restitution. In so doing, I hope that this book can facilitate further extrapolations of the (few) restitutionary categories that are not covered herein or at least help make the debate on these matters more intelligible.

PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 2,15 (2003).

[102] *See, e.g.*, Peter Jaffey, *Two Theories of Unjust Enrichment, in* UNDERSTANDING UNJUST ENRICHMENT (Jason Neyers et al. eds., forthcoming 2004).

[103] *See, e.g.*, Steve Hedley, *Unjust Enrichment: A Middle Course?*, 2 OX. U. COMM. L.J. 181, 194–95 (2002).

[104] *Cf.* Barker, *supra* note 18.

[105] *See, e.g.*, Dagan, *supra* note 46.

In his 1978 encyclopedic treatise on American restitution law, George Palmer admits, in line with the analysis of this chapter, that "unjust enrichment is an indefinable idea in the same way that justice is an indefinable idea." And yet Palmer rightly observes that "this wide and imprecise idea has played a creative role in the development of an important branch of substantive law."[106] In what follows I suggest that this role can be disciplined if, instead of resorting to unjust enrichment as a (question-begging and thus obfuscating) argument, courts and commentators use it as an invitation to launch a contextual normative inquiry, along the lines of the realist legacy celebrated in this book. Rather than an open-ended license to unprincipled discretion, the theme of unjust enrichment – if properly guarded against excesses of the types discussed in this chapter – can serve as a doctrinal invitation to unpack and examine critically the multiple and dynamic concerns of autonomy, utility, and community which contextually inform (or should inform) the various restitutionary categories. In this way, unjust enrichment can facilitate the introduction into the law of restitution of the common law tradition of raising doubts and offering justifications, seeking to advance law so that it can better enhance human interests, notably those involving autonomy, utility, and community.

[106] 1 George E. Palmer, The Law of Restitution § 1.1, at 5 (1978).

3

Mistakes

Mistakes are ubiquitous. On numerous everyday occasions, we are mistaken about facts or law. Many of these mistakes are inconsequential or self-regarding, with no detrimental effect on anyone but the mistaken party. Such mistakes require no legal intervention. Law is invoked, however, when more than one person is involved in the drama.

One such case, outside the scope of this chapter (and of the law of restitution), is mistake in the formation of a contract.[1] A similar type of mistake, also somewhat beside my inquiry here, involves mistakes in dispute settlements. The pertinent rule for such mistakes has been laid down by the first Restatement of Restitution, and is still – as it should be – good law: "A person is not entitled to rescind a transaction with another if, by way of compromise or otherwise, he agreed with the other to assume, or intended to assume, the risk of a mistake for which otherwise he would be entitled to rescission and consequent restitution."[2] As the draft of the new Restatement explains, if money is paid "in the face of a recognized uncertainty as to the existence or extent of the payor's obligation to the recipient," it "may not be recovered on the ground of 'mistake,' merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation."[3] A strict rule of no restitution, where the mistake in question relates to the uncertainty (or one of the uncertainties) the parties' transaction was supposed to settle – to a risk that was "within the contemplation of the parties"[4] – is indeed in place.

[1] *See, e.g.*, E. Allan Farnsworth, Contracts § 9.4 (3d ed. 1999); Charles Fried, Contract as Promise: A Theory of Contractual Obligation 61–63 (1981); Mark P. Gergen, *Liability for Mistake in Contract Formation*, 64 S. Cal. L. Rev. 1 (1990); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, *in* Foundations of Contract Law 160, 161–62 (Richard Craswell & Alan Schwartz eds., 1994).

[2] Restatement of Restitution § 11 (1937) [hereinafter Restatement]. *See also* Restatement (Third) of Restitution and Unjust Enrichment §§ 5 cmt. a, 6 cmt. d (Tentative Draft No. 1, 2001) [hereinafter ALI Draft].

[3] ALI Draft, *supra* note 2, § 6 cmt. e. *See also id.*, § 6 cmt. d.

[4] ALI Draft, *supra* note 2, § 6 cmt. e.

Allowing parties to repudiate settlements when they are based on such erroneous beliefs is tantamount to a rule that denies the enforceability of settlements. Such a rule would have been misguided given the virtue of compromises in reducing the risks and the costs of litigation and supplying a relatively cooperative strategy of dispute resolution.[5]

In this chapter I focus on mistakes in the unilateral conferral of benefits. The paradigmatic example is a mistaken payment either from one private individual to another or from an individual to a financial institution or a taxing authority (or vice versa). Other typical cases of mistake in the unilateral conferral of benefits include mistaken provisions of services and mistaken improvements of property. The rules of the common law of restitution with respect to these (and other) contexts have been carefully and lucidly articulated by the draft of the new Restatement.[6] The Restatement resorts to the prevention of unjust enrichment as the underlying principle of the law of mistakes.[7] As I hope to have established in chapter 2, the use of unjust enrichment as a justification is unhelpful and potentially confusing. Therefore, in considering the normative underpinnings of this important category of restitution, this chapter avoids the term unjust enrichment. In fact, it can be read as an attempt to replace the prevailing language of unjust enrichment with a more specific normative framework for analyzing mistakes.

I present two ways to approach the challenge of mistakes. First, mistakes are most conspicuously cases of involuntary transfers. As such – at least within the liberal tradition – they call for an autonomy-based analysis. This analysis, elaborated in section A, suggests that mistakes invite the law's corrective measures to reinstate the commands of a mistaken party's

[5] *See generally* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663 (1995). *Cf.* Peter McDermott, *Mistaken Payments, in* The Law of Restitution 371, 396 (Steve Hedley & Margaret Halliwell eds., 2002). *But cf.* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

[6] The new Restatement also discusses a few other cases of mistakes that will not be addressed here. *See* ALI Draft, *supra* note 2, §§ 7–8, 11–12 (performance or discharge of another's obligation; payment in discharge of lien; mistake in gifts *inter vivos*; and mistake in expression). Also, like the new Restatement, this chapter does not cover many cases of mistaken payments in banking contexts, where the "traditional common-law formulation has been largely displaced by the applicable provisions of the Uniform Commercial Code." ALI Draft, *supra* note 2, § 6 cmt. h; *see also* Steven B. Dow & Nan S. Ellis, *The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4*, 65 Ind. L.J. 779, 798–843 (1990).

[7] See in particular ALI Draft, *supra* note 2, §§ 9–10.

will, thus expanding her freedom of action and securing her integrity of self. From the perspective of mistakes as involuntariness, the law should respond favorably and accord restitution if such an award is not likely to harm the recipient or if the recipient should fairly bear such harm.

But, as section B explains, because mistakes might potentially invoke detrimental reliance, they should also be analyzed as accidents, and the mistakes with which the law deals frequently have casualties. So another way to think about mistakes is in terms of minimizing social costs by inducing the appropriate avoidance behavior on the part of both parties, properly allocating between them the costs of mistakes and minimizing the system's administrative costs. When analyzed from this perspective, the law regarding mistakes should grant restitution if it is supported by such a cost-benefit analysis.

Sections A and B discuss these normative premises of mistakes doctrine in the abstract using the standard case of mistaken payment as the paradigm. Armed with some appreciation of the prescriptions required by commitments to autonomy and efficiency (which can safely serve here as a stand-in for utility),[8] the remainder of this chapter turns to an evaluation of the prevailing rules as restated by the draft of the new Restatement. I focus on four types of cases: mistaken payments, improper tax payments (which is considered a particular area of mistaken payments subject to its own set of rules), mistakes in the conferral of noncash benefits, and mistaken improvements of property.

Sections C–F demonstrate the doctrinal teeth of the theoretical analysis. They show how the imperatives of autonomy and utility generate surprisingly similar conclusions, and thus consolidate the normative framework that emerges from sections A–B. This encounter of normative prescriptions with doctrinal rules dealing with concrete, real-life situations both enriches the theory and helps articulate some important doctrinal guidelines. Thus, on the one hand, this more contextual analysis helps refine the theory by adding to the simple scenario of mistaken payments some nuanced types of mistakes that raise specific difficulties and therefore require some adaptations and modifications to the basic normative framework. On the other hand, this contextual inquiry shows how the theoretical groundwork can inform the doctrine of mistakes. As usual, the impact of theory on doctrine takes various forms: in many cases the theory provides a defensible normative infrastructure for the prevailing

[8] There are, to be sure, contexts in which efficiency and utility are not interchangeable. *See infra* p. 98.

rules. But with respect to mistaken payments, the theory yields some directions for legal reform. Thus, section C suggests a new reading of the existing defenses of change of position and good faith creditor. Section D is more radical, claiming that if the law of restitution for mistakes is to live up to our normative commitments to autonomy and utility, the exceptional rule regarding improper tax payments must be reversed.

A Correcting involuntariness

An autonomy-based analysis of mistakes can begin with Peter Birks' proposition that "restitution for mistake rests on the fact that the plaintiff's judgment was vitiated in the matter of the transfer of wealth to the defendant."[9] This proposition helpfully focuses attention on both the types of mistakes that may trigger restitutionary liability and the reason for invoking that liability. While I need to say a few words about the former issue, the bulk of my discussion is devoted to the latter.

The mistakes I am considering are not merely propositional mistakes; they are also action mistakes. That is, they are cases in which an error unintentionally occurred while the actor (the plaintiff) performed an action.[10] The action in question is a transfer of wealth by way of a payment, a provision of a service, or an improvement of property. Mistakes that interest the law are consequential. The law of restitution deals with cases in which the plaintiff's mistaken transfer of wealth to the defendant has frustrated the intended goal of the plaintiff's action.

The fact that restitution rules deal with wealth transfers and that plaintiffs are likely to care more about this wealth than about the affront to their will or their integrity, might suggest that an autonomy-based account is beside the point. This would be a mistake. People lose wealth all the time without any legal redress. As the following discussion shows, cases of mistakes are treated differently because law (justifiably) accords particular significance to losses whose reversal can be justified in terms of autonomy. Mistaken payments in this view prompt restitution because, and to the extent that, the retention of the wealth by the recipient would undermine the claimant's autonomy *and* restitution would not unduly infringe on the autonomy of the recipient.

[9] Peter Birks, An Introduction to the Law of Restitution 147 (paperback ed. with revisions 1989).

[10] *See* Natika Newton, *Error in Action and Belief*, 19 Philosophia 363, 366 (1989).

Pure unilateral cases

I begin the analysis of the autonomy-based reasons for restitutionary liability for mistakes in the noncontractual transfer of wealth with the simplistic assumption that the case is of a pure unilateral nature. That is, I assume that, but for the mistaken party, there is no other person whose interests may be substantially affected by the rule governing such transfers. This subsection presents three complementary lines of inquiry that support a plaintiff's claim to reverse a mistaken transfer in this pure unilateral case, thus establishing what I call "the liberal presumption of restitution." Restitution, I argue, helps reinstate the commands of the transferor's will; it expands her freedom of action; and it secures the integrity of her self.

Grounding restitution in these autonomy-based justifications helps delineate the types of mistakes that can trigger a restitutionary cause of action. First, these justifications explain why mispredictions (mistakes as to the future) do not give rise to restitutionary claims. As Birks claims, the sheer fact that things disappointingly turned out differently than the plaintiff expected does not show that her judgment was vitiated.[11] Likewise, protecting people from mispredictions neither would expand their freedom of action nor would it secure the integrity of their selves. Second, as Thomas Krebs argues, building on an earlier version of my account in this chapter, founding restitution on these liberal premises requires that the category of mistakes include not only cases where the belief upon which the plaintiff acted can be proven to be incorrect, but also cases of complete absence of knowledge.[12]

Helpful as it may be, my current assumption of pure unilateralism is surely unrealistic. Unilateralism not only over-simplifies mistakes. By ignoring the impact of the mistaken party's acts and omissions on other parties, this initial analysis misses important normative considerations. Potential recipients have an autonomy interest that may be affected by other people's mistakes. By the same token, one entailment of the

[11] Birks, *supra* note 9, at 147; *see also* I. M. Jackman, The Varieties of Restitution 13 (1998). The text should not be interpreted as referring (under the rubric of mispredictions) also to cases where the mistake relates to the desirability of the state of affairs which would come about following the transfer. In this type of case, at least in contractual and semi-contractual contexts, conflicting values – similar to the ones discussed above regarding mistakes in settlements – should (and do) curtail the restitutionary claim notwithstanding the sense in which the transfer is non-voluntary.

[12] *See* Thomas Krebs, Restitution at the Crossroads: A Comparative Study 37 (2001). *Contra* Duncan Sheehan, *What Is a Mistake?*, 20 Legal Stud. 538, 539 (2000).

autonomy of the mistaken party herself is taking responsibility for the consequences of her own acts and omissions insofar as they affect other people.[13] For these reasons, my account of mistakes as cases of involuntariness will not be complete without the next subsection which brings the analysis to the real world by considering the potential impact of mistakes on other people. This shift to multiparty mistakes will refine the liberal case for restitution in ways that must – and indeed do – affect mistakes doctrine. None of these refinements, however, undermines the significance of the liberal presumption of restitution.[14]

Reinstating the commands of the will

The first reason for restitution in the unilateral case is pretty straightforward. Mistakes are frequently said to "destroy action" by preventing the action from being of its intended character.[15] In our context, the transferor's mistake undermines the recipient's entitlement and should thus trigger restitutionary liability. The reason for this result is that the mistake vitiates the actor's judgment as to the transfer in question. A mistaken transfer is not the result of an autonomous decision of the actor, but rather subverts her control over her resources.[16] Validating a wealth transfer based on such vitiated judgment would offend the liberal commitment to individual free choice; it would violate the maxim that the exercise of (subjective) free will should be the prerequisite to any legitimate transfer of, or interference with, resources.[17] Therefore, absent conflicting considerations, a liberal law must prescribe restitution, reversing the mistake by nullifying the unintended consequences of the mistaken transfer and reinstating the *status quo ante*.

Stephen Smith worries about the tension between this commitment to promote people's autonomy and the liberal suspicion of legal intervention

[13] *Cf.* Melvin A. Eisenberg, *Mistake in Contract Law*, 91 Calif. L. Rev. 1573, 1589 (2003).

[14] *But cf.* Steve Hedley, Restitution: Its Division and Ordering 32 (2001) (insisting that allowing a claimant to set aside her own acts "merely on the ground of subjective mistake" unless a defense is proven is a "truly startling proposition").

[15] G. E. M. Anscombe, *The Two Kinds of Error in Action*, *in* Ethics 279, 280, 285 (Judith J. Thomson & Gerald Dworkin eds., 1968).

[16] *See* Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement 159 (2000); *see also, e.g.*, Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 Tex. L. Rev. 2115, 2140 (2001).

[17] *See, e.g.*, Steven Lukes, Individualism 66 (1973); Robert Nozick, Anarchy, State, and Utopia 57, 71–73 (1974); F. A. Hayek, *Freedom and Coercion*, *in* Liberty 80, 81–82, 89, 95–98 (David Miller ed., 1991); Ross B. Grantham & Charles E. F. Rickett, *On the Subsidiarity of Unjust Enrichment*, 117 L.Q. Rev. 273, 278 (2001).

absent wrongdoing.[18] Smith is right that even pure unilateral cases – in which restitution merely reinstates the normative boundaries between the parties – involve a positive duty. But a restitutionary obligation is the most effective way to promote the mistaken party's autonomy, and it imposes – as Smith himself admits – a rather trivial burden. For this reason, I believe that even if restitution constitutes an exception to the harm principle it should be an acceptable one: even avowed libertarians should have no difficulty with this type of state action.[19] Yet, given this caveat, I have no difficulty endorsing Smith's view – which corresponds to the approach taken by the Restatement of Restitution – that restitutionary liability in mistakes cases arises only when the recipient "has notice of the facts upon which the [mistaken party's] right depends and has had a reasonable opportunity for making restitution."

Expanding the actor's freedom of action

In a world without restitution, people may be too hesitant in conferring benefits. To some extent, one may count on other people's decency. But, in an imperfect world like ours, this may not be a sufficient guarantee.[20] Thus, facing the risk of an irrevocable mistake, they may either avoid transfers they would otherwise want to make, or engage excessively in precaution taking. Both alternatives are not only wasteful from an economic standpoint,[21] they are also harmful to autonomy. Systematic avoidance of conferrals of benefits or obsessive confirmations and verifications to minimize the risk of mistakes may lead people to interact with one another in an intolerably thoroughgoing, rigid fashion.[22] Restitution can help relieve people's interactions from this burden.[23] By softening the possible tangible losses of mistakes, restitution can give people breathing

[18] *See* Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 Tex. L. Rev. 2177 (2001). *Cf.* Dennis Klimchuk, *Unjust Enrichment and Corrective Justice, in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004).

[19] One may think of a duty to make restitution as a very modest – and thus arguably unobjectionable – form of a duty to aid.

[20] *Cf.* H. L. A. Hart, The Concept of Law 193 (1961); Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights, in* Liberal Rights 370, 374 (1993).

[21] *See* Christopher T. Wonnell, *Unjust Enrichment and Quasi-Contracts, in* 2 Encyclopedia of Law and Economics 795, 801 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[22] *Cf.* Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice 179–81 (1970).

[23] *Cf.* H. J. Perkinson, *Education and Learning from Our Mistakes, in* In Pursuit of Truth 126, 147–49 (Paul Levinson ed., 1982).

space for spontaneity and ease that are important aspects of freedom and individuality.[24]

Securing the integrity of the self

Hagi Kenaan's analysis of "the 'hermeneutical function' of the phenomenon of error" also helps substantiate the liberal presumption of restitution. Kenaan explains that our experience of error takes the form of a critical repositioning of ourselves; replacing one (erroneous) perception with another (more accurate) one. Although replaced, the old perception does not disappear; rather, it is incorporated into our account of our perceptual transition. But this account changes the status of the old perception: an experience which was *real* "is now redetermined as an 'as if experience,' as only 'seeming to be,' as not-real." In this way, "the (narration of) error apprehension carves into the relation between past and present a peculiar reality-difference, a difference which lends the present the form of 'a return to the real.'" This narration of error is important in enabling us "to eliminate conflicting voices of the self": "to bridge a point of discontinuity the presence of which would have threatened to disintegrate the unity of [our] own experience."[25]

As Kenaan's discussion suggests, the narration of error helps us avoid two undesirable predicaments. First, once we realize we have erred, we do *not* need to strike out the experienced error from the story of our lives, thus disintegrating the experiences of our self. Second, we do *not* need to adhere to our earlier perceptual experience in an environment that no longer supports it. The narration of error both escapes the isolation of our self from its surroundings and preserves our self as a unified subject of experience. (The phenomenology of error does not spare us, of course, from blaming ourselves for making a mistake.)

At times, law can play an important role in this story. It can help reaffirm the narration of error by preserving the record of the actor's mistake while nullifying the unintended consequences of her action.[26] (It can also somewhat soften the blow of our self-blame by minimizing

[24] Notice that here, the law has no aspiration to change people's preexisting attitudes toward risk. Rather, it merely seeks to extend their autonomy by allowing them to do things they may not have done otherwise, given the risks involved. *Cf.* Fried, *supra* note 1, at 7–17; Stephen A. Smith, *Towards a Theory of Contract*, *in* Oxford Essays in Jurisprudence 107, 127–28 (Jeremy Horder ed., 4th ser. 2001).

[25] *See* Hagi Kenaan, *Subject to Error: Rethinking Husserl's Phenomenology of Misperception*, 7 Int'l J. Phil. Stud. 55, 57–60, 62–65 (1999).

[26] *Cf.* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 780–86 (1983).

the material consequences we suffer due to our mistakes.) Like the way our own narration of error functions, such a legal response does not erase the past. A positive legal act – such as an order of restitution – is required because the actor's action is not *ab initio* invalid. The law also does not ignore the fact that an error slipped into the way the actor carried out her intended plan; it does not leave the unintended consequences of the action intact, but rather reverses those unintended consequences. Thus such a legal response rewrites the past in a way that facilitates its integration into a unified account. A liberal regime, committed to the preservation of the integrity of the self, finds itself again summoned to endorse the presumption of restitution.

Multiparty mistakes

Liberty vs. security

If we lived in a world in which every mistaken conferral of benefits were quickly discovered and costlessly reversed, there would be no justification for reversing the liberal presumption of restitution.[27] In the real world, however, mistakes are not immediately and costlessly discovered. Thus, multiparty mistakes – namely, real-world mistakes – are more complex. Recipients of benefits sometimes fail to notice the mistakes and, in consequence, dispose of their income, believing that the conferred benefit is rightfully theirs. If recipients were required to hold themselves always ready to give back any benefits they received, the security and stability of their affairs would be severely threatened.[28]

This objection to restitution should not be taken too lightly.[29] Our ability to rely on the security and stability of our holdings is intimately

[27] *See* Jack Beatson, *Mistaken Payments in the Law of Restitution*, *in* The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution 137, 138 (Jack Beatson ed., 1991). As Beatson explains, in a world where mistakes are socially costless events, we want both parties to use as few resources as possible avoiding mistakes or minimizing their consequences. An unlimited-restitution rule facilitates this result because it guarantees the mistaken party that she will not be harmed if she makes a socially costless mistake. *Id.*

[28] Birks, *supra* note 9, at 148; Peter Birks, *The Role of Fault in the Law of Unjust Enrichment*, *in* The Search for Principle: Essays in Honour of Lord Goff of Chieveley 235, 243 (William Swadling & Gareth Jones eds., 1999). Another, albeit somewhat secondary concern, is a loss of the enrichment that the recipient would not have suffered but for the mistaken payment. *See* Paul Key, *Change of Position*, 58 Mod. L. Rev. 505, 507–08, 511–13, 519–22 (1995).

[29] *See* Graham Virgo, The Principles of the Law of Restitution 134 (1999); Keith Mason & J. W. Carter, Restitution Law in Australia 114 (1995). *Contra* Andrew Kull, *The Simplification of Private Law*, 51 J. Legal Edu. 284, 292 & n.13 (2001).

connected to our ability to lead our own lives – to be in control of our affairs and to plan ahead.[30] A general rule of restitution for every mistaken conferral of benefits may upset our ability to take *any* holding we have for granted and thus may significantly undermine our autonomy.[31] Therefore, instead of imposing a generalized duty of restitution in mistake cases, restitutionary obligations must be carefully delineated, cautiously balancing the autonomy interests of *both* parties.

Indeed, every mistaken party's autonomy claim for freedom of action is countered by the recipient's autonomy claim for security and stability.[32] This symmetry need not imply indeterminacy.[33] It does, however, pose the core challenge of the law of mistakes: in order to adjudicate these two autonomy-based competing claims in a principled fashion, the law must reconcile our liberty to make mistakes with our aspiration for security and stability that is no less essential to our ability to lead our own lives. Mitigating the mistaken party's liberty by the recipient's stability does not require us to compromise our commitment to autonomy. On the contrary, holding people responsible for the potentially adverse consequences of their choices to others is part and parcel of this very commitment.[34]

Reconciling liberty and stability through the allocation of potentially avoidable harms is, of course, the core task of tort law.[35] Indeed, analogously to tort cases, cases of multiparty mistakes require an inquiry into two controlling variables: (1) the harm that may be caused by a legal reversal of the mistake, and (2) the parties' avoidance abilities.

[30] *See* Jeremy Bentham, The Theory of Legislation 111–13 (C. K. Ogden ed., R. Hildreth trans., 1931) (1802); 1 David Hume, A Treatise of Human Nature 477–516 (L. A. Selby-Bigge 2d ed. 1978) (1739).

[31] *See* Peter Birks, The Foundations of Unjust Enrichment: Six Centennial Lectures 130 (2002); Peter Birks & Charles Mitchell, *Unjust Enrichment, in* 2 English Private Law 525, 611, 614 (Peter Birks ed., 2000).

[32] *Cf.* Hoffman F. Fuller, *Mistake and Error in the Law of Contracts*, 33 Emory L.J. 41, 41 (1984).

[33] *Cf.* Henry Cohen, *Change of Position in Quasi-Contracts*, 45 Harv. L. Rev. 1333, 1351–54 (1932); Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927, 1953 & n.130 (2001).

[34] *See, e.g.,* Charles Fried, *Is Liberty Possible?*, *in* Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy 89, 94–95 (Sterling M. McMurrin ed., 1987).

[35] *See, e.g.*, Dan B. Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury 8–9 (2d ed. 1993); B. S. Markesinis & S. F. Deakin, Tort Law 42 (4th ed. 1999); Gregory C. Keating, *Fairness and Two Fundamental Questions in the Tort Law of Accidents* 4, 58–59 (University of Southern California Law School, Olin Working Paper No. 99-21).

The harm

Theoretically, the recipient's interest in security and stability that challenges the liberal presumption of restitution comes to life immediately upon receipt of the benefit mistakenly conferred.[36] Nevertheless, the accepted analysis of mistakes distinguishes between restitution that frustrates the recipient's expectations and restitution that may generate *actual* harm.[37] Mistakes are harmful where forcing the recipient to return the full amount paid to her by the mistaken party would leave the recipient materially worse off than she was at the outset.[38] Only a detrimental change of position of the recipient in reliance on the benefit mistakenly conferred constitutes actual harm that may in some cases reduce the mistaken party's restitutionary award.[39]

The expectations–reliance divide is a convenient starting point for the analysis of harm due to its almost canonical role in private law.[40] But it is not free from difficulties, both theoretical and practical. Frustrated expectations are not really harmless. Even when the recipient cannot point to any specific reliance expenditure, imposing on her the uncertainty of title is not a trivial cost, at least in cases in which a considerable amount of time elapses between the mistaken conferral and the claim for restitution.[41] Recipients should not be led to suppose that their resources are greater than they really are because even prudent people accommodate their modes of living – their decisions about consumption, as well as their responses to income-earning opportunities – to what they suppose to

[36] *Cf.* P. S. Atiyah, Promises, Morals, and Law 42–44 (1981).

[37] *See, e.g.*, Glover v. Metropolitan Life Ins. Co., 664 F.2d 1101, 1105 (8th Cir. 1982).

[38] *See* Jonathan Wade, *The Change of Position Defence in Restitution*, 52 U. Toronto L. Rev. 275, 279 (1994).

[39] *See, e.g.*, Birks, *supra* note 9, at 156. The law never protects reliance *per se*; it protects reliance if and only if there is a good reason to encourage (or at least not discourage) the type and magnitude of the reliance at issue. *See* Gerald J. Postema, *On the Moral Presence of Our Past*, 36 McGill L.J. 1153, 1168 (1991); Lucian Arye Bebchuk & I. P. L. Png, *Damage Measures for Inadvertent Breach of Contract*, 19 Int'l Rev. L. & Econ. 319, 322–23 (1999). However, recall that I have already considered the value of allowing recipients to rely on mistaken transfers. This value – people's interest in security and stability – is what makes recipients' reliance an important countervailing consideration to the liberal presumption of restitution.

[40] For the classical distinction between reliance and expectation, see L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 Yale L.J. 52, 54–55 (1936). For criticism, see, e.g., Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99, 155–56 (2000).

[41] *See* Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1240 (1995); Gergen, *supra* note 33, at 1965.

be their resources.[42] The problem with ignoring frustrated expectation goes, however, even deeper than these significant and systematic evidentiary difficulties suggest. People's legitimate expectations regarding the availability of wealth in the future inform their life-plans. Therefore, even with no material reliance in place, frustrated expectations are disruptive to individual autonomy.

Furthermore, isolating cases of detrimental change of position and measuring the recipient's reliance in such cases is not an easy task.[43] To start with, while usually a detrimental change of position takes the form of a post-receipt expenditure, there may be other types of detrimental reliance: post-receipt forgone benefits on the one hand and pre-receipt expenditures made as a result of an expectation of such receipt on the other hand.[44] These refinements, however, are only the tip of the iceberg. Two elements implied in the concept of detrimental reliance – its irrevocability and its causal link to the mistaken payment – prove to be particularly complicated.

A change of position is detrimental only if it is irrevocable – if the *status quo* cannot be restored easily and without significant expense. In cases in which the mistaken benefit has been lost, transferred, stolen, or destroyed without benefit to the recipient, an irrevocability determination is relatively easy.[45] By contrast, expenses (such as increased tax liabilities) which can be refunded, as well as use of the received payment for an investment, do not, without further information, substantiate irrevocability.[46] In other cases – in between these extremes – a more complex determination of the detriment suffered by the recipient is required, looking at the difference between the value that she has expended and the value of any incontrovertible benefit she gained by virtue of her reliance (e.g., the fair market value of a readily realizable asset she purchased).[47] Finally, there

[42] Skyring v. Greenwood, 107 Eng. Rep. 1064, 1067 (K.B. 1825); Wade, *supra* note 38, at 279–81; *see also* Hedley, *supra* note 14, at 27–28; Peter D. Maddaugh & John D. McCamus, The Law of Restitution 232 (1990).

[43] *Cf.* Fuller & Perdue, *supra* note 40, at 61–62.

[44] *See respectively, e.g.*, Elise Bant & Peter Creighton, *The Australian Change of Position Defence*, 30 W. Austrl. L. Rev. 208, 230 (2002); Richard Nolan, *Change of Position*, *in* Laundering and Tracing 135, 163–70 (Peter Birks ed., 1995). For a recent example in which both extensions were recognized, see Commerzbank AG v. Price-Jones, [2003] EWCA Civ. 1663.

[45] *See* Nolan, *supra* note 44, at 137–39.

[46] *See* First Nat'l City Bank v. McManus, 223 S.E.2d 554, 558–59 (N.C. Ct. App. 1976). *See also, e.g.,* Scottish Equitable v. Derby, [2000] 3 All E.R. 793 (QBD).

[47] Key, *supra* note 28, at 518–19.

are also borderline cases in which the *status quo ante* can be restored but only with significant inconvenience to the recipient.[48]

Moreover, not every irrevocable expenditure constitutes detrimental reliance. Only expenditures that were *caused* by the mistake fall into this category.[49] This causation inquiry measures an amount to be deducted from the value of the benefit conferred so that the recipient is left in as good a position as she would have been in *but for* the mistaken transfer. But such an inquiry is almost never straightforward. It requires interpreting changes in the recipient's pattern of spending before and after the mistake. At times – especially when the type of the recipient's expenditure has not been changed by the mistake, but its magnitude arguably has been – it also requires access to the recipient's subjective utility function.[50]

I do not deny that in most cases reliance represents a greater, as well as a more easily computed, harm to the recipient than "mere" frustrated expectations.[51] Therefore, I am not willing to dismiss out of hand the conventional practice of using the recipient's reliance as the measure for the harm the recipient may potentially incur from an award of restitution to the mistaken party notwithstanding these imperfections.[52] But the significant difficulties of this practice outlined above should also not be forgotten or suppressed, because, as we will see, in some contexts they may – or should – affect the law.

Loss avoidance

Acknowledging the symmetry of autonomy claims and the inevitability of balancing them necessitates some refinement of our description of the parties' conflicting interests. As we have seen, the autonomy interest of a potentially mistaken party is the ability to act without fear that a mistake will irrevocably frustrate her intentions and threaten the integrity of her self. This interest is strongest when the mistake is unavoidable. But when reasonable steps well within her power – such as employing a moderate level of care prior to the conferral of a benefit – could have avoided the mistake, asking her to take responsibility for the consequences of her

[48] *See* Daniel Friedmann, The Law of Unjust Enrichment 1186 (2d ed. 1998) (Heb.).

[49] *See, e.g.*, Wachovia Bank of S.C., N.A. v. Thomasko, 529 S.E.2d 554, 556 (S.C. App. 2000); Virgo, *supra* note 29, at 712–20; Key, *supra* note 28, at 507.

[50] *See, e.g.*, Beatson, *supra* note 27, at 139–41; Nolan, *supra* note 44, at 161–62.

[51] *See* Peter Birks, *Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences, in* Restitution: Developments in Unjust Enrichment 49, 52 (Mitchell McInnes ed., 1996).

[52] *Contra* Hedley, *supra* note 14, at 27–32.

action may be quite different.[53] By the same token, cases in which the recipient cannot reasonably assume that she is not the intended recipient of the benefit are significantly different from cases in which she could have reasonably realized this fact but failed to do so.[54]

More generally, the challenge of mistakes doctrine from an autonomy perspective is to allocate the burden of avoiding (or incurring) the harm of mistaken conferrals of benefits between the mistaken party and the recipient in a way that fairly reconciles their interests in liberty and stability. (The burden should be allocated between these two parties because their discrete interaction generated a loss and there is no good reason to externalize its cost to the public at large or to any specific third party.) The following discussion takes up this challenge using some lessons of Gregory Keating's parallel account in the context of torts.

Keating endorses the Kantian maxim that the separate lives of different people should not "be collapsed into a single life that reaps both the burdens and the benefits of rational risk impositions." This maxim requires law to reconcile liberty and security on terms that not only are favorable – enabling people "to pursue their aims and aspirations over the course of complete lives" – but also are fair. Such fair terms "reconcile the competing claims of liberty and security in ways that benefit even those they disadvantage."[55] This prescription entails different rules for two different types of mistakes.

Consider first mistakes of moderate magnitude that are relatively frequent and in which people are randomly distributed on both the conferring and the receiving sides. In these cases, potential mistaken parties are also potential recipients and equally so. Therefore, it is fair to impose the risk of harm from mistaken conferrals of benefits on potential recipients if doing so advances the long-term advantage of a representative member of this "community of risk" – namely, where the *ex ante* liberty to make mistakes is more valuable to the representative member than the security and stability lost from having to bear exposure to equivalent risk impositions at the hands of others.

Because both risk *and* harm are fairly distributed in these cases, a liability regime of negligence seems best. This regime follows the basic calculation of the representative member of the community of risk just mentioned. Thus it examines whether the precautions taken by the

[53] *See* James E. Broyles, *Knowledge and Mistake*, 78 MIND 198, 203–04, 207 (1969). In a similar vein, mistake is not always a good defense in criminal law. *See* LLOYD L. WEINREB, CRIMINAL LAW 710–15 (5th ed. 1993); Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2124 (1998).

[54] *See* KREBS, *supra* note 12, at 274.

[55] Keating, *supra* note 35, at 4–6.

mistaken party benefit the security of the recipient at least as much as they burden the mistaken party's own liberty to make mistakes. By the same token, this negligence regime should examine whether the precautions taken by the recipient benefit the mistaken party's liberty to make mistakes at least as much as they burden the recipient's own security of holdings. In short, to allocate fairly the harm of a mistaken conferral of a benefit in these cases, the law should compare the parties' preventive failures. The harm caused by the mistake – approximated by the recipient's detrimental reliance – should be allocated to the parties according to their respective fault.[56]

Matters are different when harms are not reciprocal in the sense discussed above. Mistakes may generate nonreciprocal harms due to the relative infrequency and gravity of the harm they threaten. In such cases, the commitment to equal freedom is violated because losses of security and increases in liberty are not equally distributed. An especially conspicuous type of nonreciprocal harm occurs when a specific type of mistake creates characteristic risks of non-negligent harm (think, for example, of the reliance or even the justified expectations of a good faith taxpayer on a non-negligent tax refund). Subjecting this type of mistake to negligence liability leaves its characteristic harms on those unfortunate enough to suffer it. This allocation of harm creates an inequality of freedom and is presumptively unfair. The costs of such mistakes should be distributed among those who benefit from the creation of these non-negligent risks.

When the harm can be more fairly (that is, proportionately) distributed among the beneficiaries of the risky activity, they should all be required to share its cost equally. A one-sided liability regime – which is a form of strict liability – can achieve this more equitable outcome. If the mistaken parties either are in a position to purchase insurance or are capable of self-insuring against liability, the law should allow recipients to deduct any reliance costs they have incurred irrespective of the negligence of the parties or the lack thereof, or, in appropriate cases, prescribe a rule of

[56] *See id.* at 6–7, 16, 42–43 (relying on George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972)). Keating does not explicitly endorse comparative fault. *See id.* at 61–62. Comparative fault follows, however, any plausible account that uses a Rawlsian or Kantian perspective to consider the choice between contributory negligence and comparative negligence when the parties are equally likely to be the injurer or the victim. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 Yale L.J. 697, 727 (1978); Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. Rev. 1067, 1097 (1986); David Haddock & Christopher Curran, *An Economic Theory of Comparative Negligence*, 14 J. Legal Stud. 49, 67 (1985). *But see* Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, *in* Philosophical Foundations of Tort Law 467, 470–74 (David G. Owen ed., 1995).

no restitution that fully protects even their expectations. Alternatively, if recipients are typically in a better position to insure or self-insure and if mistaken parties and recipients are members of the same community of risk, a rule of no liability for harm (i.e., unlimited restitution irrespective of any detrimental reliance) is more appropriate.[57]

B Minimizing social costs

Multiparty mistakes in the real world – that is, mistakes that are potentially costly and potentially avoidable – require, as we have seen, allocating the burden of precautions. In economic terms, precautionary burdens should be allocated in a way that minimizes the social costs of mistakes.[58] After briefly presenting these costs, this section attempts to derive cost-beneficial restitution rules.

The costs of mistakes

Following the traditional economic analysis of accidents law,[59] existing literature identifies the pertinent costs as the costs of mistakes, the costs of avoiding mistakes, and the administrative costs of determining who bears these costs.[60] Section A discussed the direct costs of mistakes – the potential reliance and frustrated expectations they may generate. It further introduced the factor of the parties' abilities to insure against such harm, which is also of economic importance given people's risk aversion.[61] The following paragraphs discuss the two remaining variables: mistake-avoidance costs and administrative costs.

Mistake-avoidance costs

Detrimental reliance – the most conspicuous harm of mistakes – is, at least theoretically, avoidable if either the mistaken party, the recipient, or both take enough precautionary measures. The law can induce the parties to

[57] *See* Keating, *supra* note 35, at 13, 16, 19, 21–22, 29.

[58] *See* Beatson, *supra* note 27, at 138. *See also* Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 662 (2d ed. 1993); Gergen, *supra* note 1, at 3.

[59] The *locus classicus* of the economic analysis of torts is, of course, Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970).

[60] *See, e.g.*, Beatson, *supra* note 27, at 138, 141; Peter K. Huber, *Mistaken Transfers and Profitable Infringement on Property Rights: An Economic Analysis*, 49 La. L. Rev. 71, 78–90 (1988).

[61] *See* Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 Tex. L. Rev. 63, 70–71 (1987).

take such measures by assigning to them all or part of the harm. But both avoiding mistakes and avoiding detrimental reliance entail expenditures of money, time, and effort. Therefore, to evaluate the efficiency of allocating the harm between the parties (an allocation that would arguably produce incentives to minimize such harm[62]), the parties' relative avoidance capacities should be assessed.

The most important, although, as we will see below, not the only, factor for assessing the parties' avoidance capacities is each party's relative ability to take precautions. These precautions may take the form of either ordinary prudence – carefully checking conferrals or receipts of payments or other benefits – or more systemic and institutionalized measures similar to quality control in manufacturing.[63]

Administrative costs

Mistakes doctrine may be costly to adjudicate. Recall, for example, the significant difficulty of determining the recipient's detrimental reliance. A legal regime that carefully fine-tunes incentives and allocates risks, but is prohibitively costly to administer, cannot withstand economic scrutiny. First, adjudication costs are a deadweight loss. Second, excessive adjudication costs may distort potential litigants' decisions to sue.[64]

Therefore, liability rules should also be shaped in a manner that minimizes the parties' resort to the court system as well as the litigation costs involved in determining the rights and liabilities that result from mistakes.[65] This prescription invites "simple, clear, and decisive liability rules" that both "discourage people from bringing meritless lawsuits" and "lower litigation costs by decreasing the number of issues, the amount of relevant evidence, the number of required court appearances, and the amount of prelitigation legal counseling."[66]

[62] For a skeptical view of the incentive effect of mistakes law, see Gergen, *supra* note 33, at 1967. I find Gergen's skepticism exaggerated, although I certainly share the view that this incentive effect is limited insofar as individuals are concerned. *See infra* text accompanying note 97.

[63] Cooter & Rubin, *supra* note 61, at 73.

[64] *Id.* at 78–82; *see also* Beatson, *supra* note 27, at 147–49, 173.

[65] Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 Mich. L. Rev. 95, 100–02 (1991).

[66] Cooter & Rubin, *supra* note 61, at 78. A regime that *always* allows the costs of mistakes to remain where they fall – namely, with the recipient – is even more efficient from the administrative costs point of view. But it is clearly inefficient as a whole, partly because it eliminates the incentive for mistaken parties – who are, at least in some cases, good mistakes-avoiders – to take precautions. *Id. But see* Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 Hastings L.J. 1, 5–8 (1991).

Two categories

Mistakes doctrine needs to find the appropriate balance between precision in inducing efficient precautions and burdensome litigation costs. Administratively efficient mistakes rules are both over- and under-inclusive *vis-à-vis* norms that induce optimal cost avoidance[67] and are thus bound to yield both over- and under-deterrence. To determine whether the savings in administrative costs are worthwhile, the law of mistakes must balance these savings against the economic impact of further fine-tuning the mistake-avoidance effects of the doctrine.

There is no general solution to this dilemma.[68] The balance must be informed by the degree of the rule's divergence from optimal deterrence (of its quality as a proxy). It should also take into account both the frequency and the gravity of harm involved. In cases where the sum at stake is relatively small and the number of cases relatively high, it is reasonable to prefer a clear rule, even if it is relatively crude. By contrast, in cases where much more is at stake, producing the correct solution from the viewpoint of optimal avoidance may be more important, especially if the expected number of cases is not too high.[69]

These guidelines give us the first clue to an important distinction within the economic analysis of mistakes: the distinction between regular, "private" contexts and institutional contexts.[70] Institutional contexts, for our purposes, notably include cases in which citizens or consumers pay money to, or receive money from, taxing authorities or financial institutions as well as cases of mistaken payment from one institution to another. As was just implied, in institutional contexts, administrative costs are often significant mainly because of the frequency of payments. Furthermore, as we will see below, other characteristics of institutional contexts further justify devoting a separate discussion to this category. Cases that involve an institution on the one side and an individual on the other are

[67] Over- and under-inclusiveness are the most fundamental features of precise rules in comparison to vague standards. The literature on "rules versus standards" is vast. For some important accounts, see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991); Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 Cal. L. Rev. 541 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 Cal. L. Rev. 509 (1994).

[68] *But cf.* Cooter & Rubin, *supra* note 61, at 79.

[69] *See* Kaplow, *supra* note 67, at 571–77.

[70] *But see* R. J. Sutton, *Mistaken Payments: An Inner Logic Infringed?*, 37 U. Toronto L.J. 389, 399–400 (1987) (arguing that under the rule of law, private individuals and institutions should always be treated alike).

characterized by both a systemic asymmetry in the parties' mistake-avoidance capacities and (as suggested in section A) a systemic asymmetry in the parties' abilities to insure or self-insure, thus affecting also the direct costs of mistakes. (Moreover, in most of these cases, the amount of money paid and received is – from the point of view of financial institutions or public authorities – small relative to the total volume of their financial transactions.) Cases of mistaken payments by one institution to another are usually typified by the parties' ability, being repeat players, to price their respective responsibilities, and the efficiency of concentrating avoidance efforts with the party which is, in most cases, significantly better situated for the task.

Private contexts

Consider first mistakes in private, noninstitutional contexts. In these types of cases neither the mistaken party nor the recipient is, *a priori*, a better cost-avoider or better able to insure against the harm of mistakes. Furthermore, while there is some concern about administrative costs in private contexts, this concern is not as urgent here as it is in the institutional context. As the following discussion shows, private contexts call for a legal regime of fault-based liability for mistakes. More precisely, the most efficient rule in private contexts allocates the recipient's reliance loss – the best available proxy to the harm of the mistake – based on the comparative negligence of the parties.

Rejecting one-sided alternatives

Two possible rules are inappropriate for the private context: (1) the Roman law rule, which is still adhered to in Austria, France, and Italy, of *unlimited restitution* that does not allow the recipient to raise any change-of-position defense[71] and (2) its mirror image, a *simple change-of-position* rule, that always allows recipients to retain the amount required to leave them just as well off as they would have been if the mistaken party had never conferred upon them the benefit. Each of these rules is a form of strict liability. The unlimited-restitution rule always requires recipients to bear any harm caused to them by the mistake; the simple change-of-position rule always makes the mistaken party fully liable to the recipient for her reliance loss.

[71] *See* 2 Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law: The Institutions of Private Law 275–76 (Tony Weir trans., Oxford Univ. Press, 2d rev. ed. 1987).

If we were to choose between these two rules only, we would probably prefer the former. As Peter Huber explains, there is some asymmetry between the two rules. The simple change-of-position rule puts all the pressure on the mistaken party and no pressure on the recipient. By contrast, an unlimited-restitution rule induces the recipient to take efficient precautions, but it does not leave the mistaken party indifferent toward such a contingency. The mistaken party is still likely to prefer that the mistake be avoided because of expected litigation or negotiation costs and the risk of the recipient's insolvency.[72] (Huber goes further than that, worrying about cases in which the recipient may try to induce mistaken transfers, conceal any doubts she may have respecting her entitlement, or spend the money received as soon as possible.[73] But as Jack Beatson argues, in all of these contingencies the recipient will be unable to show that her reliance was bona fide and deserving of protection, and her defense will be accordingly rejected.[74])

Still, the mistaken party's incentives under the unlimited-restitution rule are pretty limited, at least in comparison to fault-based regimes in which she has something to lose, even if the recipient is solvent, in addition to her litigation or negotiation costs. Therefore, unless we know that the recipient is clearly the cheapest cost-avoider, such that any precautions on the mistaken party's side are clearly superfluous, even the unlimited-restitution rule, not just the simple change-of-position rule, is inferior relative to fault-based rules that induce both parties to take significant precautions.[75]

The intermediate alternatives

The fault-based alternatives seem much better suited to broad application: that is, to being the default rule for all mistakes in private contexts, in which we have no reason to believe that one party rather than the other is the cheapest cost-avoider and in which we wish to induce both parties to exercise some caution. (Notice that I have just mentioned two distinct requirements: even if no one party is the cheapest cost-avoider, it is sensible to choose only one if their prevention efforts essentially overlap;[76] but if – as I assume – there is little such overlap in the parties' possible inquiries, inducing both of them to take precautions is preferable.[77]) Three main possibilities need to be considered here:

[72] *See* Huber, *supra* note 60, at 80–83. *See also* Eisenberg, *supra* note 13, at 1589–91.
[73] *See* Huber, *supra* note 60, at 80, 83–84.
[74] *See* Beatson, *supra* note 27, at 140.
[75] *See* Cooter & Rubin, *supra* note 61, at 74.
[76] *Cf.* Calabresi, *supra* note 59, at 158.
[77] *See* Haddock & Curran, *supra* note 56, at 54.

(1) A rule that allows the recipient a change-of-position defense subject to *contributory fault*. This rule, which is applicable in Germany, imposes the burden of the recipient's reliance loss on the mistaken party unless the recipient could have avoided the loss by exercising due care.[78]

(2) A rule that allows the recipient a change-of-position defense subject to *relative fault*. This is the alternative adopted by the first Restatement of Restitution, which allows the recipient to shift the entire burden of her reliance loss to the mistaken party if the recipient was "no more at fault for [her] receipt, retention or dealing with the subject matter than was the [mistaken party]."[79]

(3) A rule that allows a change-of-position defense subject to *comparative fault* that is in line with the by now predominant tort rule in American law (and elsewhere).[80] This liability-dividing rule, which is applicable in New Zealand,[81] apportions the recipient's reliance loss between the parties "according to their comparative contribution to the occurrence of the loss, or, more precisely, according to the comparative efficacy of the marginal avoidance opportunities that each failed to take" when both parties have fallen below the standard of care.[82]

[78] *See* 1 B. S. Markesinis, W. Lorenz & G. Dannemann, The German Law of Obligations 762–67 (1997); Zweigert & Kötz, *supra* note 71, at 274–75; Phillip Hellwege, *The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study*, 7 Restitution L. Rev. 92, 108 (1999); Michael Jewell, *The Boundaries of Change of Position: A Comparative Study*, 8 Restitution L. Rev. 1, 5 (2000). *See also* Andrew Burrows, The Law of Restitution 523 (2d. ed. 2002) (recommending such a rule for English law).

[79] Restatement, *supra* note 2, §§ 69(2), 142(2); *see also, e.g.*, G. H. L. Fridman, Restitution 460–61 (2d ed. 1992). This rule resembles the tort law "slight–gross" rule, used only in Nebraska and South Dakota, in which negligence on the part of the plaintiff bars her recovery unless her negligence was slight compared to the defendant's relatively gross negligence. *See* Cooter & Ulen, *supra* note 56, at 1078.

[80] *E.g.*, Restatement (Third) of Torts: Apportionment of Liability § 7 cmt. a (2000); Tai-Yeong Chung, *Comparative Negligence, in* 1 The New Palgrave Dictionary of Economics and the Law 352, 352 (Peter Newman ed., 1998). Modified versions of this rule, which is actually the most popular form of comparative fault in the United States, allow the defense of comparative negligence only if the plaintiff was equally or less negligent than the defendant. *See* Cooter & Ulen, *supra* note 56, at 1077–78. The current analysis, like most academic literature, does not distinguish between these variants.

[81] *See* Thomas v. Houston Corbett & Co., [1969] NZLR 151; National Bank of New Zealand v. Waitaki Int'l Proc. (NI), [1999] 2 NZLR 211. For a critical view, see Dextra Bank & Trust Co. v. Bank of Jamaica [2002] 1 All E.R. 193, 207 (Comm); Peter Birks, Unjust Enrichment 196 (2003); Ross B. Grantham & Charles E. F. Rickett, Enrichment and Restitution in New Zealand 357–60 (2000).

[82] Beatson, *supra* note 27, at 143.

Considerations of optimal cost-avoidance alone cannot determine which of these rules is the most efficient. As long as (1) the fault standard is set at the level encouraging efficient precautions, (2) the parties' abilities to take precautions are equal, and (3) the parties are perfectly informed, each of the possible fault rules encourages both parties to take efficient precautions.[83] But as Robert Cooter and Thomas Ulen show – in what has come to be the conventional wisdom of the economic analysis of apportioning liability in torts – once the unrealistic assumption of full information is relieved, comparative fault is the most efficient negligence rule.[84]

Under a regime of fault-based liability for the harm of mistakes, potential parties to mistakes cases always act under evidentiary uncertainty because of the inherent vagueness of the fault standard and the risk of court errors. This evidentiary uncertainty distorts the parties' incentives with regard to their investments in precautions. More precisely, given the significant costs associated with an erroneous finding, it is rational for transferors and transferees to take more precaution than the legal standard requires to allow courts a margin of error in determining fault. If a mistake occurs, the actor's costs will jump dramatically if she is found negligent. Under evidentiary uncertainty, each party is rationally expected to overinvest in (the relatively lower) prevention costs in order to minimize the exposure to such significantly higher costs. Thus, while overinvestment in precautions is particularly likely when the parties are risk-averse, even risk-neutral parties are likely to overinvest.[85]

The extent to which the parties are likely to overinvest in precautions depends on the applicable fault rule. Contributory fault (and, to a lesser

[83] *See generally* Aaron S. Edlin, *Due Care*, *in* 1 The New Palgrave Dictionary of Economics and the Law 653, 653–54 (Peter Newman ed., 1998).

[84] Cooter & Ulen, *supra* note 56, at 1086–94; *see also* Haddock & Curran, *supra* note 56, at 56–66. Comparative negligence is indeed cited with approval several times in The New Palgrave Dictionary of Economics and the Law. *See, e.g.*, Chung, *supra* note 80, at 353; Edlin, *supra* note 83, at 655. *See also* Donald Wittman et al., *Learning Liability Rules*, 26 J. Legal Stud. 145, 159–60 (1997). The existing conventional wisdom of the economic analysis of accidents law is still disputed. *See, e.g.*, Oren Bar-Gil & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence* 5 Am. L. & Econ. Rev. 433 (2003); Richard S. Markovits, On the Allocative Efficiency and Distributional Desirability of Shifting from Contributory to Comparative Negligence: A Critique of the Literature and Some Very Partial and Preliminary Third-Best Analyses (unpublished manuscript). I cannot possibly purport to settle the dispute. Insofar as either the analysis or the empirical assumptions underlying the economic analysis of accident law turns out to be wrong, the account of mistakes should be changed correspondingly.

[85] *See* Cooter & Ulen, *supra* note 56, at 1089, 1094.

extent, relative fault) makes potential recipients particularly vulnerable to court errors and thus gives them, under evidentiary uncertainty, excessive incentives to take additional precautions. (On the other hand, under a regime of contributory fault the incentive of mistaken parties to overinvest is minimized.) By comparison, comparative fault gives both parties only moderate incentives to take additional precautions.[86] Where the parties' abilities to take precautions are more or less equal – as is usually the case in noninstitutional, private contexts – comparative fault minimizes the total amount of excessive precautions taken by the parties.

Turning to administrative costs, it seems clear that contributory negligence is the superior rule because this regime focuses only on the recipient's precautions, while both relative fault and comparative fault require the introduction of two additional legal issues: the mistaken party's precautions and the parties' relative degrees of fault.[87] It is difficult to compare the administrative costs of a relative-fault regime with those of the comparative-fault regime. Relative fault requires a lexical ordering of the parties' fault, whereas comparative fault requires a more precise estimation of the parties' respective contributions to the unhappy contingency that led to the recipient's reliance loss. When one party is clearly more at fault than the other, a comparative-fault rule requires higher litigation costs than a relative-fault rule. But where it is difficult to assess which party was more at fault, the relative-fault rule, which does not allow the court to divide the loss between the parties, is bound to entail higher litigation costs. Because it is difficult to guess which type of case is more typical, it is difficult to assess whether a relative-fault or a comparative-fault regime is more costly to administer overall. Thus, the only clear conclusion regarding administrative costs is that of the relative superiority of a contributory-fault regime.

In private contexts, in which the administrative costs are likely to be less significant than the other costs of mistakes, this superiority cannot determine the issue and is outweighed by the inferiority of contributory negligence in inducing optimal incentives. Furthermore, when administrative costs are indeed significant, a more dramatic solution is needed, namely, eliminating the need to figure out the recipient's reliance loss and

[86] *Cf.* Chung, *supra* note 80, at 353.

[87] *Cf.* Huber, *supra* note 60, at 87. This observation is literally undisputed in the tort literature. *See, e.g.*, Chung, *supra* note 80, at 354; Daniel L. Rubinfeld, *The Efficiency of Comparative Negligence*, 16 J. Legal Stud. 375, 393–94 (1987). In that context it has also been empirically verified. *See* Marianne M. Jennings, *The Impact of Alternative Negligence Defense Rules on Litigation Behavior and Tort Claim Disposition*, 5 BYU J. Pub. L. 33, 34 (1991).

the need even to address the question of fault, as suggested below with regard to institutional contexts. Once the law opts for a fault regime and addresses the issues of the recipient's reliance loss and her fault (as it does under a contributory-fault rule), the additional issues of the mistaken party's fault and the parties' relative degrees of fault, while not negligible, seem to be marginal. Hence, overall, comparative fault is the most efficient liability regime.

Institutional contexts

Institutional contexts have distinctive features that set them apart from private contexts. I have already noted the advantages of prescribing a one-sided liability in cases of inter-institutional liability. The following discussion focuses on the other type of institutional contexts: disputes between individuals (consumers or citizens in the typical case) and institutions (notably financial institutions or tax authorities). The economics of these cases are very different from those of mistaken payments in private contexts.

Payments from institutions

The most efficient liability rule for allocating the harm of mistakes pertaining to payments from institutions is a rule of strict, capped individual liability – a rule of fixed and rather limited restitution. Under this rule, individuals are strictly liable up to a relatively low, fixed limit, and institutions are liable for the remaining amount of the mistaken payment.[88] As Robert Cooter and Edward Rubin argue, capped individual liability best responds to the unique features of most institutional cases.[89]

Consider first the issue of administrative costs. As may be recalled, minimizing costly litigation and overcoming underenforcement (especially for small losses by individuals) are particularly important in the institutional context because of the high frequency of payments. This concern with administrative costs suggests that the complex fault-liability regime,

[88] Cooter & Rubin, *supra* note 61, at 97. This type of rule is established by both the federal legislation that regulates the payment function of credit cards and the Electronic Funds Transfer Act. *Id.* at 90.

[89] *See id.* at 99–123. Cooter and Rubin actually advocate a slightly different rule that "requires a fact-finding inquiry to determine whether a particular dispute involves bilateral precaution, in which case the cap on liability would apply, or unilateral precaution, in which case the financial institution or the consumer would be liable without limit." *Id.* at 90. Because I believe that most cases of mistakes involve bilateral precaution, I find this preliminary inquiry superfluous.

based on multiple-factor standards with recovery calculated on the basis of individualized determinations of detrimental reliance, should not be adopted in institutional contexts. Instead, mistakes law should opt for a simple, strict, easily administrable regime. One option is the capped-individual-liability rule, which avoids complex determinations of both reliance losses and parties' faults.[90]

Capped individual liability is not the only mistakes rule that minimizes administrative costs.[91] To see the advantage of capped liability, we need to take a closer look at some asymmetries between individuals and institutions relevant to both the direct costs of mistakes and the mistake-avoidance costs. The direct-costs-of-mistakes factor supports the asymmetry of capped individual liability because institutions are usually better positioned than individuals to insure, self-insure, or otherwise spread the losses that cannot be avoided.[92]

The factor of mistake-avoidance costs also supports the capped-individual-liability rule. To start with, both individuals and institutions are in a position to avoid most losses, and each can often avoid some group of losses at the least expense. The avoidance capacity of individuals is most conspicuous in contexts where their precaution serves some other purpose simultaneously, such as balancing one's checkbook. By the same token, putting a burden of mistake-avoidance on financial institutions

[90] *See id.* at 90.

[91] Another regime that also minimizes administrative costs is the traditional English rule that permits recovery if the mistake is a mistake as "to a fact which, if true, would make the person paying liable to pay the money." Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 182 (Gareth Jones ed., 6th ed. 2002) (quoting *Aiken v. Short*, 156 Eng. Rep. 1180, 1182 (Ex. 1856)). Such liability mistakes were distinguished from mistakes as to facts which, if true, "would merely make it desirable that he pay the money." *Id.* (quoting *Aiken*, 156 Eng. Rep. at 1182). The traditional English rule was subject to an estoppel defense, which, whenever applicable, operated as a shield from the entire claim. Thus, as Jack Beatson observed, this rule allowed courts to avoid the complex question of reliance losses and the attendant litigation costs in all cases. Furthermore, the traditional English rule can also be understood as a proxy that points in a rough-and-ready way toward the cheapest cost-avoider without expressly addressing difficult questions of the parties' faults. *See* Beatson, *supra* note 27, at 144–45, 150–52, 156, 169, 173. Beatson's analysis, however, cannot fully vindicate the English traditional rule because the proxy it suggests is rather crude and because it is applicable in private contexts as well. In private contexts, the concern of administrative costs is arguably not severe enough to justify deviations from the more accurate fault-based rules. This concern may justify the repudiation of the traditional rule by later English courts, which favored more substantive tests, such as whether the fact is "fundamental" or "destroyed the intentions of the payer to pay the money." Goff & Jones, *id.*, at 182.

[92] *See* Cooter & Rubin, *supra* note 61, at 71–73, 90.

would in many cases add only marginal costs to their existing practices. Yet, there is no symmetry: the mistake-avoidance capacities of institutions are usually superior and accordingly a rule that allocates asymmetrical liabilities to individuals and institutions corresponding to their differing mistake-avoidance capacities is appropriate.[93]

To see why institutions are systematically superior in avoiding mistakes, realize that an inquiry into avoidance capacities that looks solely at the parties' existing capacities to take precautions misses two important factors: (1) whether imposing liability can induce a party to develop technological innovations that reduce the cost of precautions and the frequency of losses; and (2) how great the incentive effect of legal rules is given the parties' responsiveness, which is in turn a function of their knowledge and understanding of the law and their ability to take it into account while making cost-benefit analyses.

Factoring these two additional components into avoidance-capacity analysis lends support to the conclusion that institutions are systematically better avoiders of mistakes costs.[94] First, not only can institutions take some precautions that are usually different from those that individuals can take, institutions can also, more importantly, develop technological innovations and bureaucratic procedures that may yield further mistake-reduction. (This includes making contractual arrangements that allocate the costs of mistakes to individuals who deal with such institutions as in the case of insurers, where beneficiaries of insurance policies may agree to allowing restitution in cases of payments notwithstanding some doubt as to the insurer's liability, so that insurers will be less reluctant to pay out in doubtful cases.[95]) Second, the responsiveness of individuals to liability for not exercising due care in their dealing with financial institutions (or tax authorities) is very limited. The complexity of modern life renders individuals dependent upon various outsiders, notably of the institutional type. Daily functioning in the modern era requires a certain degree of trust in the proper operation of these institutions in the expectation that they act competently and dutifully.[96]

Setting the liability limit of the individual payor at the efficient level given these two variables is a major challenge that requires significant

[93] *See id.* at 74–77, 89–90. [94] *See id.* at 89–92. [95] *See* KREBS, *supra* note 12, at 38.

[96] *See* Menachem Mautner, *Contract, Trust, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQ. L. 545, 554–56 (2002).

empirical work. But, even absent such work, one generalization can be stated: namely, the cap should be a function of the individuals' relative avoidance capacities, taking into account their responsiveness to legal rules.

Finally, this analysis is fortified by our cautionary note respecting the use of the recipient's detrimental reliance as a proxy to the harm of the mistake. I have used this proxy in my discussion of private contexts notwithstanding the (disturbing) fact that it may leave recipients with the uncompensated harm of frustrated expectations because where both parties are symmetrically situated this is nonetheless the best law can do. The institutional context allows a different solution – the capped-individual-liability rule – which protects (most of the) expectations of innocent individual recipients of mistaken payments by relieving the difficult burden of establishing their detrimental reliance.[97]

Payments to institutions

Most of the analysis of optimal rules for payments from institutions applies also, *mutatis mutandis*, to payments to institutions. Nevertheless, mistaken payments by consumers or citizens to financial institutions and tax authorities should be governed in most cases by a different rule, one of unlimited restitution not subject to the recipient institution's change-of-position defense.

Recall that mistakes are potentially detrimental to recipients when they trigger (irrevocable) expenditures that would not have been made but for the mistake. The discussion thus far assumes that the benefit conferred makes a large enough addition to the recipient's wealth to trigger an increase in consumption. But as Beatson persuasively claims, most payments by consumers or citizens to financial institutions or tax authorities make no difference to the recipient's perceived wealth. In most such cases – leaving aside small financial institutions and governments of small municipalities – the institutional recipient is less likely to increase consumption when its income goes up by a very small proportion.[98] When, in all likelihood, no harm is expected, it would be wasteful to induce consumers or citizens to take costly precautions, especially given the superior mistake-avoidance capacity of institutions.

[97] *Cf.* Ariel Porat & Alex Stein, Tort Liability under Uncertainty (2001).
[98] Beatson, *supra* note 27, at 144.

C Mistaken payments

It is time to move from theory to doctrine. This section discusses the doctrine governing mistaken payments in general. The next section deals with the important context of improper tax payments. In both cases, I engage theory and doctrine, and in both – although to different degrees – the theory yields some suggestions for reform. It is helpful to begin this discussion by looking at the significant convergence between the implications of sections A and B.

The prescriptions of the theory

Understanding mistaken payments as cases of involuntariness and thinking about them as potential costly accidents require, as we have seen, very different analyses, focusing respectively on balancing conflicting claims of autonomy and on minimizing costs. It is therefore not surprising that the conclusions of my autonomy-based analysis and those of its efficiency counterpart diverge in some important details. But these differences should not obscure the significant points of convergence between the two analyses.

Both analyses divide the universe of mistaken payments into those that should be governed by strict liability and those that should be subject to comparative negligence. More precisely, both analyses prescribe the strict-liability rule for cases in which there is some asymmetry between the mistaken party and the recipient, while recommending the comparative-negligence regime in more symmetrical cases. These similarities may help mediate between and combine the lessons of sections A and B.

Thus, it is possible at this stage to point to the optimal regime for mistaken payments scenarios that involve, on the one hand, an individual, and, on the other hand, an institution equipped (or potentially equipped) with sophisticated mistake-avoidance capabilities as well as a superior ability to insure or self-insure. Both analyses suggest, by and large, that the institution should be strictly liable, especially when mistakes are frequent and of only moderate magnitude from the institution's point of view, while rather infrequent, but significant from the viewpoint of the individual. Thus, in cases of mistaken payments to institutions, both accounts recommend a rule of unlimited restitution. Likewise, institutions should bear the lion's share of liability for the harm caused by mistaken payments that they make.

In the case of mistaken payments from institutions, there are some differences in detail between the two accounts. The autonomy-based analysis is indeterminate between a rule of no restitution and a rule that allows unsuspecting individual recipients to deduct the entire amount of any detrimental reliance that they incur. The economic analysis would allow institutions some limited, fixed restitution, taking into account individuals' expected avoidance capacities, properly discounted by their responsiveness to legal liability.

Sections A and B also indicate that in other (noninstitutional) types of mistaken payments, the recipient's detrimental reliance should be allocated according to the parties' comparative negligence. This regime is suitable when the mistakes are of moderate magnitude for both parties, and where neither the mistaken party nor the recipient of the payment systematically enjoys a significant advantage in avoiding the mistake or in spreading its costs among the beneficiaries of the activity that generates the harm of these mistakes. Furthermore, both analyses are careful not to impose superfluous burdens on potentially mistaken parties by unnecessarily limiting their liberty and by inefficiently inducing redundant precautions. Therefore, both analyses recommend looking carefully at whether a mistaken payment actually generates an irrevocable harm before any liability is assigned to the mistaken party – that is, before limiting her entitlement to restitution.

The new Restatement

The new Restatement rightly treats mistaken payments as the most general category of mistakes. The Restatement prescribes a presumption of restitution.[99] It convincingly rejects the notorious distinction between mistake of fact and mistake of law.[100] It also justifiably sets aside any materiality requirement.[101] Finally, as we will see below, the Restatement helpfully prescribes distinct rules for cases such as mistaken conferrals of noncash benefits and mistaken improvements of property in a way that is sensitive to the differing accommodations of the parties' interests in different contexts of mistakes.[102]

[99] ALI Draft, *supra* note 2, §§ 5, 6.
[100] *Id.* § 5 cmt. g.
[101] *See id.* § 5 cmt. e. *Cf.* Virgo, *supra* note 29, at 148–62; Krebs, *supra* note 12, at 51.
[102] *See also* Mark P. Gergen, The Restatement, Third Restitution and Unjust Enrichment at Midpoint (unpublished manuscript).

Insofar as mistaken payments are concerned, however, the Restatement does not yet indicate the particular regime governing the allocation of harm. It mentions that the mistaken party's *prima facie* claim in restitution "is subject to affirmative defenses" and that the most frequent of these defenses "refers to the recipient's change of position,"[103] but it does not specify the precise conditions under which the presumption of restitution can be reversed. Rather, it relegates this task to (yet to be written) chapter 9 of the new Restatement, dedicated to restitutionary defenses.[104] The Restatement explains that "the workings of the law are more clearly visible if claim and defense are analyzed separately."[105] I have explained in chapter 2 my general objections to this strategy.[106] Here it is enough to see more specifically why the separation of claim and defense may actually obstruct a principled discussion of the law of mistakes.

Consider the new Restatement's general rule regarding mistakes. This rule sets a presumption of restitution and justifies this presumption with the first of the three autonomy-based reasons presented in section A: "[T]he mistake that will potentially invalidate a transfer is one that to some degree frustrates or obstructs the normal exercise of judgment by the transferor," resulting in "a transaction that in some material respect is unintended."[107] The Restatement acknowledges the recipient's concern with respect to "[t]he stability of payment transactions (and of all other transfers)," but it claims that this concern is protected "by the affirmative defenses identified in chapter 9."[108] The new Restatement further insists that the viability of the mistaken party's claim does not depend on her level of care or the reasonableness of her conduct: "[T]he role of restitution for mistake is to protect property against unintended dispossession."[109] "[B]ecause rights of ownership are not diminished by an owner's negligence," such negligence is also irrelevant to restitution claims.[110]

These statements are confusing. The Restatement acknowledges the importance of the stability concern. But, maybe because it relegates this concern to a different rule, it does not appreciate that stability is an autonomy-based concern of the recipient, which parallels the interest of the mistaken party in correcting her involuntary transfer. This point is crucial for the analysis of mistakes because it sets the stage for a discussion

[103] ALI Draft, *supra* note 2, § 6 cmt. j. [104] *Id.* at xx. [105] *Id.* § 6 cmt. i.
[106] *Supra* p. 33. [107] ALI Draft, *supra* note 2, § 5 cmt. c.
[108] *Id.* § 5 cmt. e. [109] *Id.* § 5 cmt. f.
[110] *Id.* § 5 cmts. e, f. Some of the Restatement's discussion of the more particularized types of mistakes nonetheless explicitly considers loss allocation. *See infra* text accompanying notes 163 & 182.

of the fair distribution of the harm potentially caused by mistakes. This discussion should reconcile liberty and stability and has nothing to do with "rights of ownership."

As we have seen, just as with the economic analysis of mistakes which the Restatement seems to ignore, this autonomy-based analysis generates some important doctrinal distinctions: a regime that adequately accommodates a commitment to reconcile mistaken parties' liberty with recipients' security and an attempt to minimize social costs yields a bifurcated regime including different rules for private and institutional contexts. It is hard to imagine that such a fine-grained doctrine can be set in chapter 9 of the Restatement, where the change-of-position defense will be stated abstractly, outside the context of mistakes and in a way that should also apply to the other, very different restitutionary contexts.[111]

Restatement or revision?

Even if I am correct thus far, this critique of the new Restatement may be unfair if the prescriptions of my theory are far removed from the existing law. Restating the doctrine in a way that brings its rules closer to its underlying commitments is one thing; revising it radically is another. And while a revision may be necessary, it may be beyond the mandate of a Restatement project.

Because the mandate of this book is different, I could have sidestepped the issue by presenting my suggested prescriptions as a call for reform (as I do, for example, in the next section regarding improper tax payments). But, at least to some extent, this would probably be a mistake because it would ignore the extent to which existing law – while not explicitly recognizing the distinctions I have been proposing – is somewhat more receptive to the theory than one might think. I *do not* claim that these doctrinal seeds show that the existing doctrine mirrors my suggestions (notably, I have no indication from the case-law for a preference of a comparative-fault regime over the first Restatement's rule of relative fault). My only claim is that the need for a disparate treatment of institutions and individuals is actually felt by some courts deciding cases, and that these courts already have, to some extent, acted upon this unarticulated intuition in the directions that were recommended above. If this claim is correct, then this section can be read as an attempt to vindicate the results of this line of cases – which, in most other accounts, appears to

[111] *Cf.* Smith, *supra* note 18, at 2196.

be somewhat ill-founded and unprincipled – by supplying them with the appropriate doctrinal vocabulary and normative underpinnings.

Consider the case of *Goodbody & Co. v. Sultan*.[112] The plaintiff, a broker, sold the shares belonging to Eduardo and – as per Eduardo's instructions – gave Sultan, the defendant, a check for the proceeds. As per these instructions, Sultan kept $4,500 – an amount Eduardo had owed him for some time – and mailed the rest (more than $16,000) to Eduardo in Venezuela. Eventually, it turned out that Eduardo's shares were actually worthless, and Goodbody sought restitution. The court refused to grant restitution because "Sultan changed his position as a result of Goodbody's mistake . . . [and] should not be required to bear the burden of attempting to collect the money from Eduardo in Venezuela – a highly dubious undertaking, particularly in view of the history of the loan. Neither should Sultan be required to return the $4,500 which he used to satisfy the debt."[113]

The money Sultan mailed to Eduardo falls within the rubric of irrevocable change of position. But the remainder – which Sultan kept in satisfaction of Eduardo's debt – is different. In order to say that Goodbody's mistake triggered a detrimental reliance here, one must show that had Goodbody not misled Sultan to rely on Eduardo's shares, Sultan could have found some other way to collect his debt which had been about five years past due (a way which is no longer available: Eduardo is in Venezuela again), so that requiring Sultan to return the $4,500 to Goodbody would constitute a prejudice. But two facts of this case raise doubts about this conceptualization of the $4,500 as a reliance loss: first, by the time Sultan received the check Eduardo was already in Venezuela; second, it is at least the court's impression that "the only way Sultan could get repaid was for Goodbody to sell the stock which Eduardo deposited with Goodbody in an account opened in Sultan's name." Joining these two facts together raises the suspicion that Goodbody's mistaken payment had no detrimental effects whatsoever on Sultan's predicament insofar as the collection of his debt from Eduardo is concerned; that things would not have been any different but for the mistaken payment; that Sultan could not have collected his debt anyway.

Goodbody can be dismissed as an error in applying the change-of-position defense. But a more charitable reading is also possible. The court

[112] 346 F.Supp. 1375 (S.D. Fla. 1972).

[113] A possible solution in similar contexts – allowing the mistaken payor to pursue the payee's claim against the debtor (see FRIEDMANN, *supra* note 48, at 1191–92) – is not viable in this case: the prospect of recovery from Eduardo seems to be very dim.

describes Goodbody as "a large brokerage firm" with ample "access to the value of all listed and unlisted stock." It further indicates that in this case Goodbody "had ample time to make any investigation it found necessary," and that it took Goodbody fifteen months to discover the mistake (which was caused by its confusion between First Southern Corporation and First Southern Company), while it should have discovered this mistake immediately. Thus, the court concludes that Goodbody "was guilty of an inexcusable lack of due care." Notice that canonical statements of the law, which both the Restatement and the *Goodbody* court mention, insist that the payor's negligence does not, by itself, bar her restitution claim insofar as the recipient cannot show that it caused her some specific detrimental reliance. Therefore, the only charitable reading of *Goodbody* is as a case that – while giving a nod to the traditional statement of the law – in fact applies a different rule: one that is sensitive to the asymmetry between individuals and institutions and accordingly heightens the bar for recovery of mistaken payments from institutions.

Goodbody is not an isolated case. Other courts use various techniques – overlooking the requirement of causation (as in *Goodbody*), skirting the irrevocability of the defendant's reliance, or "creatively" finding compromises – in order to preclude restitutionary recovery in asymmetric cases. Consider first the "technique" of overlooking causation. In the context of a mistaken payment by an insurer, one court accepted without inquiry the defendant's testimony that he could not have kept his daughter in treatment without the insurer's extended (mistaken) payments and would have had to withdraw her.[114] While the former claim may have been correct, the latter, more dubious one – that but for the mistaken payment the recipient would have withdrawn his daughter from treatment, rather than liquidate his holdings, for example – is also crucial for a strict causation inquiry. The court did not seem bothered by the implausibility of that crucial fact. While nodding to the "logic" of the insurer's position, the court preferred the "equitable" solution, emphasizing the insurer's responsibility for the overpayment.[115]

Similarly, a vivid illustration for bending the irrevocability inquiry (the second technique for precluding restitutionary recovery in asymmetric cases) occurred where one court considered a defendant's reliance on the

[114] *See* Lincoln Nat'l Life Ins. Co. v. Rittman, 790 S.W.2d 791, 792, 794 (Tex. App. 1988).

[115] For other examples of "loose" causation inquiries, see Hibbs & Company v. First Nat'l Bank of Alexandria et al., 112 S.E. 669, 675–76 (Va. 1922); Hilliard v. Fox, 735 F.Supp. 674, 678–79 (W.D. Va. 1990).

receipt of mistaken pension payments. The defendant left his job of many years, and spent the money on buying a house and paying bills. Substituting value with value or with the incontrovertible benefit of dispensing with nondiscretionary expenses are classic examples of revocable reliance which does not create a change of position. And yet the court insisted that forcing the defendant to make restitution would be inequitable: "In purchasing a home [the defendant] did not simply 'acquire something of value.' In purchasing a home, [he] was closing one chapter in his life and starting over again in another. Thus, even if he sold his home to repay the money, he could not be put back in the position he was in when he made the decision to leave [his job]."[116]

Finally, some cases stretch the settlement doctrine to cover situations that do not easily fall into the paradigm of a dispute or a controversy which the compromise resolves.[117] By calling a regular insurance payment – rendered after the standard process of claim submission and review – a compromise, these cases avoid the change-of-position inquiry in its entirety and allow the insured recipient to retain the insurer's mistaken payment with impunity.[118]

Reconstructing the bona fide creditor defense

As it turns out, the *Goodbody* court could possibly have found a doctrinal home for its decision without manipulating the detrimental reliance inquiry. Sultan might have benefitted from the bona fide creditor defense, codified in Section 14 of the first Restatement. Unlike the change-of-position defense, the bona fide creditor defense allows a recipient who takes money in good faith believing it to be a discharge of an existing obligation to keep the mistaken payment, even where it is clear that the recipient's position has not been detrimentally changed due to the mistake.[119]

[116] New England Mutual Life Ins. Co. v. Hastings, 733 F.Supp. 516, 520–21 (D. R.I. 1990).

[117] For this canonical understanding of the settlement doctrine, see Pilot Life Ins. Co. v. Cudd, 36 S.E.2d 860, 865 (S.C. 1945).

[118] *See* Great Am. Ins. Co. v. Weyl, 94 F.2d 31 (3d Cir. 1938); General Accident Fire and Life Assurance Corporation, Ltd. v. Mae N. Batterson, 14 N.J. Super. 436 (N.J. Super. Ct. Ch. Div. 1951); Meeme Mutual Home Protective Fire Insurance Company v. Lorfeld, 216 N.W. 507 (Wis. 1927); New York Life Insurance Company v. Chittenden & Eastman and C. W. Waldeck, 112 N.W. 96 (Iowa 1907); Tower Insurance Company v. Carpenter, 556 N.W.2d 384 (Wis. Ct. App. 1996).

[119] *See, e.g.*, Gen. Elec. Capital Corp. v. Cent. Bank, 49 F.3d 280 (7th Cir. 1995). *See also* Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. Rev. 919,

This defense was obscure for many years – which may explain its absence from the *Goodbody* opinion – until it was revived in some high profile cases of mistaken wire transfers.[120] In recent years the bona fide creditor defense has also become increasingly important in restitution litigation between hospitals and insurance companies. Kull aptly describes this "steady stream of cases":

> Hospital treats Patient, submitting bill to Insurer. Acting in the mistaken belief that Patient is insured, Insurer pays Hospital. In fact Patient has no insurance, and Insurer was under no liability either to Patient or to Hospital. On discovering the facts, Insurer has a prima facie entitlement to restitution from both Patient and Hospital. The claim against Patient is usually worthless. Recovery against Hospital is consistently denied, the accepted view being that Hospital's status as a bona fide creditor gives it an affirmative defense.[121]

Kull suggests that the bona fide creditor defense is premised, on the one hand, on the role of protecting expectations as a means for promoting stability and security and, on the other hand, on the loosened protection for the ownership of money.[122] But this suggestion is not persuasive because neither consideration is unique to mistakes cases where the recipient is a creditor. Neither consideration can explain what makes a creditor special, i.e., why a recipient who is a creditor should prevail in circumstances in which almost all other recipients, because there was no detrimental reliance, would not. (Kull is aware of this puzzle; he even explicitly admits that the interest of finality "is true of every restitution defendant, many of whom are denied an affirmative defense."[123]) To be sure, recipients who are creditors may be able to establish their good faith receipt rather easily or at least more easily than other types of recipients. But this observation cannot be a sufficient basis for a categorical distinction between recipients who are creditors and recipients who are not.

930–36 (2001). As an aside, the bona fide creditor defense should not be confused with the good faith for value defense which, as we will see (*infra*, at pp. 256–57), requires a restitution defendant to demonstrate that she had given new value which approximates the value of the right under dispute. As the text implies, restitution defendants seek redress from the bona fide creditor defense exactly in cases where they cannot show any such value. Where, for example, the mistaken payment has instigated a binding (thus detrimental) discharge of a debt, there would be no need to resort to the bona fide creditor defense.

[120] *See, e.g.*, Banque Worms v. BankAmerica Int'l, 570 N.E.2d 189 (N.Y. 1991).

[121] Kull, *supra* note 119, at 942. For a recent exception, in which such a defense was rejected, see Wilson v. Newman, 617 N.W.2d 318 (Mich. 2000).

[122] Kull, *supra* note 119.

[123] *Id.* at 920, 949.

I do not purport to supply an alternative justification for the bona fide creditor defense because I see no principled way to justify this unique, and fortuitous, treatment of recipients who are creditors. As we have seen, there is no reason to limit the scope of this defense to recipients who happen to be creditors. (Instructively, in the only two cases where the bona fide creditor defense was rejected based on the fact that the recipient was not a creditor, the recipient's good faith was also somewhat questionable.[124]) Likewise, there is no justification to apply this defense against mistaken parties who are individuals (where a fault-based allocation of detrimental reliance is the superior regime). And yet, the cases that resurrected the bona fide creditor defense – which are all embedded in the institutional context, mostly where the mistaken party is a bank or an insurance company[125] – reflect the same judicial intuition that this chapter defended: that a no-restitution rule should apply where the mistaken payor is an institution. My analysis sanctions the results of these cases. They deny restitution of mistaken payments in institutional contexts, where, by and large, the mistaken party is the cheapest cost-avoider and risk-bearer. They employ a bright-line rule, thus avoiding a costly case-by-case inquiry into the difficult questions of reliance and fault.[126] If this is indeed the best explanation of these cases, it calls for a rule that better reflects this normative premise: one that does not unduly prefer creditors over other recipients, and that is explicitly limited to payments from institutions (thus barring this defense in private contexts as well as in cases of payments from individuals to institutions).

Kull objects to analyzing this line of cases as premised on the identification of the payor as the superior loss-avoider and risk-bearer. He points out that in these cases the important loss the law of restitution needs to assign is exogenous to the parties (mistaken payor and recipient), namely: that these cases involve triangular situations, where what is at stake is the ability to collect from an intermediate party – the patient in the paradigm case of the insurer–hospital litigation – who is judgment-proof. The cases, insists Kull, "cannot be justified by reference to superior risk bearing, because the risk in question does not correlate to the loss

[124] *See* Blue Cross Health Services v. Sauer, 800 S.W.3d 72 (Mo. App. 1990); Bank of America v. Sanati, 14 Cal. Rptr. 2d 615 (Cal. App. 1992).

[125] *See* Andrew Kull, *Regional Digest*: *USA*, 8 Restitution L. Rev. 439, 443 (2000).

[126] This statement is somewhat of a simplification: in some banking cases, the UCC statutory scheme seems to distort this desirable allocation of risk by preventing an innocent payor from recovering the money from the intermediary – the error-laden bank. *See* UCC § 4A-303 cmt. 2 (2002).

being assigned." Furthermore, the transaction that produced the loss was between the recipient and a third party, and the loss it generated occurs irrespective of the payor–recipient transaction. Thus, adds Kull, properly understood, there is in fact no transaction in which the institutional payor enjoys a comparative advantage in loss avoidance *vis-à-vis* the recipient.[127]

Kull's second point is only partially correct. While there are cases in which the payor's loss-avoidance capacity could not have helped avoid the loss – Eduardo's debt to Sultan, for example, was made years before Goodbody's intervention – other cases may be different. Notably, insofar as the unavailability of restitution in the context of mistaken payments by insurers to hospitals will affect the level of care exercised by insurers, hospitals will not supply patients services for which they cannot pay. Kull's first point – the fact that the loss assigned is usually measured by the transaction between the recipient and a third party – is correct (although the claim that the intermediate party is judgment-proof is exaggerated[128]). But this characteristic of the cases is an artifact of the unjustified limitation of the defense to creditors. More importantly, as we have seen, part of the point of a rule of no restitution – of imposing strict liability on institutional payors – is exactly to relieve recipients from the need to show a detrimental reliance that was caused by the mistaken payment.

In the case of inter-institutional payments, setting aside the requirement of detrimental reliance is justified because of the ability of the parties, as repeat players, to price their respective responsibilities, and the efficiency of concentrating avoidance efforts with the party which is, in most cases, significantly better situated for the task.[129] In the context of a payment from an institution to an individual, relieving recipients of the need to show detrimental reliance is justified by the recipients' overriding

[127] Kull, *supra* note 119, at 922, 948–49; Kull, *supra* note 41, at 1239–41.

[128] For cases in which the intermediate party appears to be judgment-proof, see *Banque Worms, supra* note 120, 570 N.E.2d. 189 (N.Y. 1991); City of Hope Nat'l Med. Ctr. v. Superior Court, 10 Cal. Rptr. 2d 465 (Cal. App. 1992); Credit Lyonnais New York Branch v. Koval, 745 So.2d 837 (Miss. 1999); Mfrs. Hanover v. Chemical Bank, 159 N.Y.S.2d 704 (N.Y. App. Div. 1990); Trustmark Life Ins. Co. v. Univ. of Chicago Hosp., 207 F.3d 876 (7th Cir. 2000). For cases in which it is unclear whether the intermediate party is judgment-proof, where in fact it seems that the plaintiff would stand a good chance of recovering from the intermediate party, see Credit Lyonnais-New York v. Washington Strategic Consulting Group, 886 F.Supp. 92 (D.D.C. 1990); Federated Mut. Ins. Co. v. Good Samaritan Hosp., 214 N.W.2d 493 (Neb. 1974); Lincoln Nat'l Life Ins. v. Brown Schools, 757 S.W.2d 791 (Tex. App. 1990); National Benefits Adm'r v. Mississippi Methodist Hosp. and Rehab. Ctr., 748 F.Supp. 459 (S.D. Miss. 1990); St. Mary's Med. Ctr. v. United Farm Bur., 624 N.E.2d 939 (Ind. App. 1993).

[129] *Cf. Gen. Elec. Capital Corp., supra* note 119, 49 F.3d at 284.

autonomy claim. Individuals should be entitled to rely in good faith on (reasonable) payments from an institution without keeping a record of their deviant expenditures, as well as to make (yet unfulfilled) plans based on what they perceive to be their wealth.

Monroe Fin. Corp. v. DiSilvestro[130] may help demonstrate these points. DiSilvestro spent most of the plaintiff's mistaken payment on redecorating and home improvement equipment (furniture and appliances). Applying the irrevocability requirement, the majority concluded that most of this expenditure did not amount to detrimental reliance, at least when considering the possibility of flexible fashioning of the restitution order to minimize the defendant's burden, by, for example, ordering her to deliver the purchased items plus the cash amount that she did not spend. The dissent implied that the majority ignored or discounted certain disadvantages the recipient still incurred, concluding that only when the recipient applied the money "in a way which [s]he was otherwise required to" could we say that she would not be prejudiced by a restitution order. This proposition is surely exaggerated in its own terms. Yet, there is a more charitable reading of the *DiSilvestro* dissent. The plaintiff firm was "a professional stockbroker" endowed with "professed expertise" and liable for "self-induced negligence." In this institutional context the recipient – a private individual – should not be required to keep a paper track of every expenditure, and furthermore she should be able to develop uninterrupted expectations with regard to what she perceived in good faith to be her wealth.

D Improper tax payments

Cases of improper tax payments – "taxes [that] have been paid twice, or assessed on nonexistent property, or erroneously assessed as the result of someone's clerical error," as well as taxes "found to be unconstitutional or otherwise illegal"[131] – are in most (although not all) cases transfers induced by "the erroneous belief, usually shared by the parties, that a tax has been validly and correctly assessed when in fact it has not."[132] But improper tax payments constitute a distinct category, which is subject to its own set of rules. These rules present a unique challenge to the theory of this chapter because in this context there is an unambiguous

[130] 529 N.E.2d 379 (Ind. Ct. App. 1988).
[131] ALI Draft, *supra* note 2, § 6 cmt. g.
[132] *Id* § 19 cmt. a.

and significant gap between doctrinal rules and normative justifications. Thus, this section does not attempt to utilize the theory to explain the doctrine or even restate it in the best light. Rather, it uses the theory in an unabashedly reformist form.

The law

The new Restatement helpfully summarizes the difficulties currently facing claims in restitution to recover improper tax payments. Excepting the federal government, to which an unqualified rule of unlimited restitution applies, the right of restitution of taxpayers against the government is very limited.[133] Whereas restitution is usually available to recover a payment made by an individual taxpayer pursuant to a valid tax statute, restitutionary claims that derive "from a purported tax liability that has been accurately assessed on the basis of a tax later determined to be unlawful" are usually "disfavored as a matter of public policy and unavailable as a matter of law."[134]

Moreover, tax refund claims are subject to onerous procedural prerequisites,[135] the most notorious of which is that the disputed payment must have been made under protest.[136] This requirement applies even when the taxing authority had actual notice that the legality of a particular tax was being contested, as well as when the taxpayer had no occasion to protest because she was not aware of the mistake or illegality in question. In addition, when the taxpayer passes on the improper tax to third parties – notably customers – relief is usually denied.[137] Finally, like any other recipient, a taxing authority may raise the defense of change of position. Its defense on this score, however, "is broader than in the typical contest between private parties."[138] Courts do not require a taxing authority actually to "demonstrate that in disbursing revenues improperly collected it had undergone an irrevocable change of position."[139] The taxpayer is even precluded from rebutting the legal presumption of governmental detrimental reliance by providing evidence that the tax authority actually

[133] *Id.* § 19 cmts. d, f, i, statutory note. [134] *Id.* § 19 cmt. d.

[135] For a detailed account of the procedural obstacles to obtaining refunds, see John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73, 108–25 (1999). In some cases, these procedural requirements appear so arbitrary and unfair that courts strain to avoid applying them. *See, e.g.*, Brookside Mem'ls, Inc. v. Barre City, 702 A.2d 47, 50 (Vt. 1997).

[136] ALI Draft, *supra* note 2, § 19 cmt. i. [137] *Id.* § 19 cmt. f. [138] *Id.* [139] *Id.*

did not change its consumption decisions even respecting fees received from protesting taxpayers.[140]

The new Restatement openly admits that these features make this category of restitution claims unique. The Restatement does not challenge this state of the law, however, but rather advocates "a more transparent and descriptively accurate disposition of this category."[141] This approach discards unsatisfactory distinctions and requirements: namely, the distinction between a mistake of fact and a mistake of law, and the requirement of protest. Instead, the Restatement suggests rationalizing the law's restrictive approach by reference to "considerations peculiar to the context of taxation and municipal finance."[142] Specifically, claims in restitution for improper tax payments may threaten to undermine the stability of public revenues, thus disrupting orderly fiscal administration or resulting in undue public hardship. The new Restatement recognizes the significance of this rationale and sanctions the divergent ways that courts and legislatures accommodate the concern for the stability of public revenues within their current, restrictive practices.

I agree that the category of improper tax payments is indeed exceptional. This exceptionalism, however, pushes in the opposite direction from that suggested by the current law and justified by the new Restatement. (The Restatement itself recognizes that "the public nature of the underlying obligation furnishes significant additional justifications for restitution, independent of the principles supporting restitution for overpayments in private transactions.")[143] Rather than justifying the current approach to restitution, which is restrictive compared to other cases of mistaken payments, the unique characteristics of this category require the adoption of a much more liberal attitude.[144] In fact, in all but very rare cases, these characteristics point to a rule of *unlimited restitution for improper tax payments.*[145]

[140] *See* ERA Aviation, Inc. v. Campbell, 915 P.2d 606, 613 (Alaska 1996).

[141] ALI Draft, *supra* note 2, § 19 cmts. d, f. [142] *Id.* § 19 cmt. f. [143] *Id.* § 19 cmt. a.

[144] *See* Friedmann, *supra* note 48, at 877–78; Peter Birks, *Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights*, *in* Essays on Restitution 164, 201–04 (P. D. Finn ed., 1990); Andrew Burrows, *Public Authorities, Ultra Vires and Restitution*, *in* Essays on the Law of Restitution 39, 58 (Andrew Burrows ed., 1991). English law has gone a long way in this direction. *See* Burrows, *supra* note 78, at 435–54; Goff & Jones, *supra* note 91, at 669–79.

[145] Conversely, in the mirror-image case of Social Security overpayments, the statutory rule justifiably prescribes an outright no-restitution regime for mistaken payments to "persons without fault." Social Security Act of 1935, 42 USC § 404(b) (1994); *see also* 2 Harvey L. McCormick, Social Security Claims and Procedures § 531 (4th ed. 1991).

Reform

To see why a rule of unlimited restitution for improper tax payments would be in order, recall the objection to restitution for improper tax payments: the public interest in allowing a taxing authority to fashion its budget appropriations and expenditures with minimal uncertainty regarding possible liabilities. This rationale reduces the entire range of defenses and qualifications detailed above to the familiar change-of-position defense,[146] emphasizing the public recipient's interest in the stability of its affairs. A recipient's interest in stability is undoubtedly important and may indeed justify qualification of a mistaken party's claim in restitution. However, it is difficult, if not impossible, to justify this interest in autonomy terms when the recipient is a tax authority. Furthermore, in many, if not all cases of improper tax payments, the stability of the public finance is not threatened.[147] Therefore, there is no justification to override the mistaken party's liberty interest and no good economic reason to induce her to take precautionary measures.

First, it is rather incredible to maintain that fiscal disruptions can be caused in cases of isolated mistaken payments under a valid tax statute or in cases of improper tax payments under an invalid statute when the recipient is a very large governmental body.[148] In both cases, the mistaken payments are only a tiny fraction of the tax authority's wealth or income, making the detrimental effect of the mistake improbable.[149] Furthermore, as the new Restatement mentions in passing, the reason a taxing authority could rarely demonstrate an irrevocable change of position is that "so long as it retains the power to tax, it might levy new taxes with which to refund the old ones."[150] Moreover, even with no new taxes,

[146] *See* Friedmann, *supra* note 48, at 878.

[147] *Cf.* Frédéric Bachand, *Restitution of Unlawfully Levied Taxes: Survey and Comparative Analysis of Developments in Canada, Australia, and England*, 38 Alta. L. Rev. 960, 985 (2001).

[148] *See, e.g.*, Rural Mun. of Storthoaks v. Mobil Oil Can. Ltd., [1976] 2 S.C.R. 147, 164–65 (Can.).

[149] *But cf.* 3 George E. Palmer, The Law of Restitution § 14.20, at 246–58 (1978).

[150] ALI Draft, *supra* note 2, § 19 cmt. f. The first Restatement suggests that when restitution of an overpayment from a small municipality is of significant magnitude and there has been some shifting in the population between the time of the mistaken payment and the taxpayer's claim of restitution, awarding restitution may be "inequitable to the new taxpayers." Restatement, *supra* note 2, § 142 cmt. b. This is a weak argument, applicable in only a small segment of cases. Moreover, insofar as it should have made a difference, this argument should also apply to other non-governmental bodies and in various other legal contexts. It thus was appropriate for the new Restatement to discard this claim.

"state finances are necessarily robust mechanisms able to cope with a wide range of unexpected events . . . [including] significant differences between projected and actual revenues," and in most cases a refund obligation "poses no threat to the stability of state finance."[151] Finally, even in cases where a change-of-position defense is plausible on its face – for example, in a small governmental unit in which restitution can indeed cause a fiscal shock – there are ways to minimize the public recipient's harm without jettisoning taxpayers' claims in restitution. For instance, the taxing authority might be required to pay restitution in installments rather than pay in one lump sum,[152] or laches could prevent claims when a delay has resulted in the buildup of a claim and consequent prospect of fiscal disruption.[153]

Insofar as the improper tax payment is indeed harmless – as it usually is – the question of allocating the harm does not arise, and unlimited restitution should apply as a matter of course. But even in the rare cases where the allocation-of-harm issue does arise, there are good reasons to assign liability solely to the taxing authority. As the new Restatement maintains, payment of improper taxes is involuntary: "no one intends to pay a tax in excess of a liability that is both accurately and lawfully assessed."[154] This observation and the two other autonomy-based reasons for the liberal presumption of restitution explored in section A point to a rule of unlimited restitution in the improper-tax-payments context. Improper payment of taxes is a typical example of a harm that should be distributed among the beneficiaries of the activity, irrespective of the fault of the parties. (Notice that while the risk of improper tax payment may be equally distributed in society, the harm is not: not everyone ends up paying improper taxes.) This outcome is achieved by an unlimited-restitution rule holding the taxing authority – the party best able to insure or self-insure against the risk of restitution and to spread it equitably – strictly liable. Moreover, any restriction of the restitutionary claims of taxpayers is presumptively unfair as it disrupts the statutory allocation of the common burden.[155] This unfairness is likely not to be random, but rather regressive, because the restrictions for obtaining restitution are likely to prejudice "small taxpayers who lack access to professional tax advice."[156]

[151] Coverdale, *supra* note 135, at 83; *see also* Beatson, *supra* note 27, at 164–65.
[152] *See* Coverdale, *supra* note 135, at 131–32.
[153] *See* William J. Woodward, Jr., *"Passing-on" the Right to Restitution*, 39 U. Miami L. Rev. 873, 929 (1985).
[154] ALI Draft, *supra* note 2, § 19 cmt. c.
[155] *See id.* § 19 cmt. c.
[156] Coverdale, *supra* note 135, at 106.

Similar conclusions emerge from an efficiency analysis. To be sure, a no-restitution rule for improper tax payments saves some administrative costs. But these costs are likely to be rather low under a simple unlimited restitution rule. More importantly, they are, in all likelihood, outweighed if we consider the asymmetric avoidance capacity of taxpayers and tax authorities. Recall that in most institutional contexts this factor lends support to a rule of a capped individual liability for the harm caused by the mistake. Claims in restitution for improper tax payments require a particularly low, if not nominal, cap. First, taxing authorities enjoy distinct advantages in mistake-avoidance because of their unique expertise and economies of scale. Thus, it "would be wasteful to give a large number of citizens rather than one public authority the incentives to spend on error avoidance."[157] Second, given the complexity of these mistakes and the professional knowledge often required to discover them, the responsiveness of most taxpayers – everyone except wealthy individuals and big corporations – to the allocation of liability is probably limited. Therefore, taxpayers should incur no burden of identifying defects in the tax statutes under penalty of losing their rights if they do so.[158]

Finally, the restitutionary liability of the taxing authority should probably not be curtailed even if the taxpayer passes on the illegal or inapplicable tax to its customers. Unless the elasticity of the demand for the taxpayer's products is low – in other words, unless its consumers see few substitutes for its product so that raising the price will cause a relatively slight fall in demand – a taxpayer suffers a loss even if it passes on the tax. Whether a taxpayer explicitly collects the tax from its customers or not, it is bound to include this new cost of doing business in the price of what it sells. Therefore, in both cases, its sales are likely to fall as a result of the higher prices charged. The lost profits caused by decreased sales are the harm

[157] Beatson, *supra* note 27, at 144–45; *see also* Jaffey, *supra* note 16, at 205–06; Coverdale, *supra* note 135, at 79–82. Saul Levmore advances a contrary argument. For him, "the governmental taxing unit that receives overpayments may be assumed to be a selfless cost-avoider, checking for mistakes to a degree that is socially optimal even in the absence of restitution." *See* Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65, 74 (1985). This is a rather romantic conception of public authorities, which disregards the influence of parochial interest groups. *See, e.g.*, Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 27–29 (1997); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 70–76, 81–86 (1998). Furthermore, even if this conception of tax authorities were valid, Levmore's argument by no means calls for a conclusion that each and every taxpayer should take costly precautionary measures.

[158] *Cf.* Coverdale, *supra* note 135, at 107.

of the improper tax. This harm, to be sure, is not necessarily equal to the amount of the tax paid, but limiting restitution to the taxpayer's lost profits would entail prohibitive litigation costs. Furthermore, because it is difficult to see customers making restitutionary claims for their share, this portion of the wrongfully imposed taxes would, in all likelihood, remain with the taxing authority as a windfall. This scenario generates a systemic, and rather undesirable, incentive for the taxing authority to experiment with improper taxes. By contrast, an unlimited-restitution rule would consistently deprive the taxing authority of all illegal tax money, thus eliminating any profit motive on its behalf.[159]

E Noncash benefits

Mistaken conferrals of noncash benefits, notably services, raise unique questions. Unlike in cases of mistaken payments, in many noncash benefits cases the mere conferral amounts to consumption.[160] This creates a difficulty because, as the new Restatement explains, there are two cumulative problems: valuation and illiquidity. Regarding noncash benefits, "[n]either market value, nor cost to the provider, reveals the value to the recipient where the transfer is nonconsensual. Even where value may be established with confidence, the illiquidity of a given benefit . . . makes a liability to pay that value in money potentially disadvantageous to the recipient."[161]

Where problems of valuation and liquidity exist, liability in restitution may prejudice the recipient. This prejudice derives from significant variations in the subjective valuations of people as opposed to institutions. Those variations are a function of a person's ability to pay and his or her personal tastes.[162] Where these variations are genuine and significant, the harm of the mistake amounts to the entire benefit mistakenly conferred.

An important task of mistakes doctrine in this context is to set aside categories of cases in which there are actually no difficulties of valuation or liquidity so that the regular rules governing mistakes can apply. The new

[159] *See* Paul Michell, *Restitution, "Passing-On," and the Recovery of Unlawfully Demanded Taxes: Why* Air Canada *Doesn't Fly*, 53 U. Toronto Fac. L. Rev. 130, 158–61, 172–79 (1995); Woodward, *supra* note 153, at 916–18; Mitchell McInnes, *"Passing On" in the Law of Restitution: A Re-Consideration*, 19 Sydney L. Rev. 179, 199–203 (1997). English and Australian courts have firmly rejected the passing-on defense. *See* Birks & Mitchell, *supra* note 31, at 620.

[160] *Cf.* Grantham & Rickett, *supra* note 81, at 146; Abraham Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 U. Toronto L.J. 459, 471–72 (1998).

[161] ALI Draft, *supra* note 2, § 9 cmt. d.

[162] On "subjective devaluation," see *infra* section 5.C.

Restatement identifies four such cases – where "(a) specific restitution is feasible; (b) the benefit is subsequently realized in money or its equivalent; (c) the recipient has revealed a willingness to pay for the benefit; or (d) the recipient has been spared an otherwise necessary expense"[163] – and correctly prescribes that in these cases restitution for the value of noncash benefits mistakenly conferred should be granted. There is only one – albeit rather important – addendum I would suggest for the Restatement list. Because subjective valuation rarely applies to institutions, restitution should also be readily available following the mistaken conferral of noncash benefits by individuals to institutions.[164]

Other cases of noncash benefits – where there *are* genuine difficulties of valuation and illiquidity – require special treatment. At times these difficulties may be resolved with some remedial creativity, such as by devising "a judgment granting restitution in an indefinite amount, to be realized at such time as the valuation and illiquidity problems are resolved by a subsequent sale."[165] In many other cases even such remedial creativity cannot ameliorate the greater potential harm of requiring recipients to make restitution. In these cases there are factors weighing heavily in favor of a rule of no restitution.

The desirability of a no-restitution rule in such cases is most clearly seen from the perspective of efficiency. As Peter Huber explains, unless the recipient induced the mistake or knew about it and failed reasonably to prevent its occurrence, there is a good economic rationale for a no-restitution rule for noncash benefits.[166] A no-restitution (strict liability) rule concentrates all the legal pressure on prospective providers of such benefits, inducing them prospectively to acquire information about the object of the service and the prudence of rendering this service. One-sided allocation of the risk of mistakes is plausible in these cases because mistaken providers of services are clearly the cheapest cost-avoiders.

[163] ALI Draft, *supra* note 2, § 9(1) & cmt. c. *See also* Gareth Jones, *Restitutionary Claims for Services Rendered*, 93 L.Q. Rev. 273, 284–94 (1977).

[164] There may be cases in which subjective valuation occurs with institutions as well. *See, e.g.*, Mich. Cent. Ry. v. State, 155 N.E. 50, 50–51 (Ind. Ct. App. 1927). In that case, a carload of coal that was consigned to one buyer was mistakenly delivered by the railroad to an Indiana state prison and was burned before the mistake was discovered. The railroad settled with the original consignee for the market value of the coal and sued the State of Indiana for the value of the coal consumed. The prison's coal requirements at that time were provided under a long-term supply contract at a rate much below the market value. The court upheld an award for the railroad limited to that lower rate. Cases such as this one are exceptional, and do not seem to justify a specific rule.

[165] ALI Draft, *supra* note 2, § 9 cmt. d.

[166] *See* Huber, *supra* note 60, at 94–97; *see also* Joachim Dietrich, Restitution: A New Perspective 227 (1998) (arguing for this result on fairness grounds).

The potential provider of services or her agents can typically direct mistake-avoidance measures to a limited, known quantity of services and their prospective objects. In contrast, potential recipients face an indefinite variety of mistakenly rendered services, many of which do not leave them an opportunity for direct personal avoidance. Given the general advantage of providers in avoiding mistakes – especially when they are professionals who render the same kind of service regularly and thus enjoy economies of scale in their control systems – a no-restitution rule seems appropriate.

A no-restitution rule is also supported to some extent by an autonomy-based analysis. Because in cases of noncash benefits the conferral amounts to consumption, the recipient's interest in stability arises with full force immediately and does so with respect to the entire value of the conferred benefit. In many cases, especially when the mistaken provider of the noncash benefit is an institution, such provider is in a position to insure or self-insure against liability. By contrast, in most of the cases in which subjective devaluation occurs – namely, when the mistaken conferral was indeed harmful – the recipient is a private individual who usually is not in a position to insure or self-insure. Given this disparity, the law should opt for a no-restitution, strict-liability rule.

In line with this analysis, the new Restatement, like the first Restatement,[167] reverses the presumption of restitution and prescribes that, when noncash benefits are at stake, restitution is granted only in the handful of cases in which the analysis above does not apply. If "(a) the recipient had notice of the claimant's mistake, yet failed to take reasonable steps to avert the resulting transfer; or (b) the recipient contributed substantially to the claimant's mistake," then the resulting loss would be "allocated between the parties in accordance with respective fault."[168] In all other cases, the Restatement adopts a regime of *no restitution* that holds the mistaken party, who is typically the cheapest and, in fact, the only practical cost-avoider as well as being the superior insurer or self-insurer, strictly liable for the harm of the mistake.[169]

F Improvements of property

Cases in which a mistaken party conferred a benefit that improved the property of the recipient present a challenge to the doctrine of mistakes.

[167] *See* Restatement, *supra* note 2, §§ 40 & cmts. a, f, 41 & cmt. a. *See also* Restatement (Second) of Restitution § 5 cmt. a (Tentative Draft No. 1, 1983).
[168] ALI Draft, *supra* note 2, § 9(2) & cmt. e. [169] *Cf. id.* § 9 cmt. c.

On its face, this is but a subcategory of the noncash benefits family, and a presumptive hostility toward the mistaken supplier seems appropriate. But mistaken improvements are different from other cases of mistaken provisions of services. Whether the improvement is achieved with or without tangible goods as inputs, the mistaken improvement of property, by definition, permanently increases the value of the recipient's property.[170] While the owner may still be unable or genuinely uninterested in paying for the improvement, in many such cases there will be someone else – the improver – who is interested in buying the improved property from the owner. This unique, seemingly technical characteristic suggests that in cases of mistaken improvements there is a way to dissolve the harm of the mistake, thus avoiding the need to allocate it. Hence, the "Betterment Acts," enacted in most US jurisdictions, give an owner a choice between paying the value of the improvement and selling the land to the improver at its unimproved value.[171] This solution requires rather demanding litigation costs: both the restitution and sale options entail complex valuation questions. However, as Saul Levmore notes, this difficulty shrinks proportionately with the value of the disputed benefit.[172]

As the new Restatement indicates, the Betterment Acts are well suited to cases of occupying improvers and absentee owners who hold the property purely for investment. But where an owner "is the occupant of the property or has formed particularized expectations with respect to its possession, granting the same buy/sell remedy to the improver might well be intolerably harsh toward the owner."[173] In these circumstances the sheer possibility of an involuntary exchange – forcing a landowner either to pay for an improvement that she did not bargain for, may not want, and may not be able to afford, or to sell the land for an amount to be determined by a court – constitutes a harm.[174] Land that is not held solely for commercial purposes is frequently perceived as a symbol of the owner's self, a resource through which an owner reflects her personality. This reflection justifies owners' personal attachments to their land and explains why deprivation of one's land – including, presumably, forced transfers resulting from a restitution-or-sell rule – is likely to be perceived as a violation, a diminution of the self, rather than as merely a financial setback.[175]

[170] *Cf.* Huber, *supra* note 60, at 97–98.
[171] ALI Draft, *supra* note 2, § 10 cmt. b.
[172] *See* Levmore, *supra* note 157, at 85–87.
[173] ALI Draft, *supra* note 2, § 10 cmt. b.
[174] 2 Palmer, *supra* note 149, § 10.9; *see also* S. J. Stoljar, The Law of Quasi-Contract 57–58 (2d ed. 1989); Kelvin H. Dickerson, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37, 53 (1985).
[175] These issues are discussed in more detail in Section 7.A.

The core problem of the common law of mistaken improvements of property, which typically applies side-by-side with the statutory scheme of the Betterment Acts,[176] is thus the allocation of this particular harm in the hard case of nonabsentee owners. The law must decide whether to impose a problematic forced transfer on landowners who do not view their land as sheer investment or to deny the improver's claim for restitution, typically leaving the improver with a substantial monetary loss. Unlike the typical case of mistaken provision of services, it is hard to point to one party as the more obvious or cheaper mistakes-avoider or as the clearly better insurer. In most cases of nonabsentee owners, neither side enjoys a clear advantage in spreading the loss or insuring or self-insuring against mistaken improvement of property.

The parties' relative mistake-avoidance capabilities in these improvement cases are also dependent on context. Given the limitations of land registration, it is frequently not easy for the improver to prevent the unfortunate mistake, at least in cases of mistakes that relate to the improver's title or the location of the improver's property. Still, avoidance is also not easy for the landowner who is the recipient in the unfortunate drama, although the longer the period over which the improver's acts extend and, in particular, the longer the time needed to prepare for the actual improvement, the lower the owner's avoidance costs are.[177]

In such a situation, both the autonomy- and the efficiency-based analyses recommend a liability regime of comparative fault. The new Restatement seems to follow this path: an improver is not entitled to restitution if she knew that the improvements were made on the property of another or if she "neglected a reasonable opportunity to avoid the nonconsensual transfer."[178] In contrast, "an owner who is aware of the improver's mistake, yet stands by and permits the work to proceed" is fully liable in restitution for the benefit realized by the improvement.[179] In between these easy cases, the new Restatement adopts a fault-based, case-by-case approach with some significant remedial flexibility (regarding its nature, extent, and timing).[180] This approach seems to use a comparative-fault test,[181] instructing courts to adjust their remedial responses according to

[176] *See* ALI Draft, *supra* note 2, § 10 cmt. b, statutory note.
[177] Huber, *supra* note 60, at 99.
[178] ALI Draft, *supra* note 2, § 10 cmt. e.
[179] *Id.*
[180] *See id.* § 10 cmts. a, g.
[181] *See id.* § 10 cmts. e, g. The cautious language of the text derives from some ambiguity between comment e, which refers only to the care applied by the mistaken improver, and comment g, which explicitly mentions the responsibilities of both parties.

the respective faults of the parties.[182] Like the Betterment Acts, this solution is costly to administer. However, given the significant value of the resource (land), these administrative costs cannot be determinative.[183]

To conclude: both autonomy and utility justify a presumption of restitution following mistaken conferrals of benefits. Restitution is a corrective measure that can reinstate the commands of the mistaken party's will, thus expanding her freedom of action and securing the integrity of her self. Restitution is also *a priori* justified from an economic viewpoint, because, as long as no harm can reasonably be expected from allowing restitution, it is inefficient to induce potential mistaken parties to take precautionary measures. With regard to improper tax payments, there are no good reasons to overturn the presumption of restitution.

Many other cases are more difficult, however. These are cases where unlimited restitution might threaten the security and stability of recipients, thus undermining their ability to lead their own lives. In these cases, a regime of unlimited restitution might also result in an inefficient allocation of avoidance responsibilities, inducing too little precaution from potential mistaken parties and too much from potential recipients. In these more difficult cases – the vast majority of real-life mistakes – the law must carefully look at both sides of the legal drama. It must balance the mistaken party's liberty interest with the recipient's security interest. It should also look at ways to minimize the costs of mistakes, the costs of their avoidance, and the system's administrative costs. In many cases, these analyses require a regime of comparative negligence. But when there is a significant disparity in the parties' avoidance capacities and abilities to spread the costs of mistakes among the beneficiaries of the activity that generated those mistakes, holding one party strictly liable for the harm caused by mistakes is more appropriate.

[182] *See id.* § 10 cmts. e, g. *See also* Andrew Kull, *Mistaken Improvements and the Restitution Calculus, in* Unjustified Enrichment: Key Issues in Comparative Perspective 369, 375–81 (David Johnston & Reinhard Zimmermann eds., 2002).

[183] *Contra* Charles Cato, Restitution in Australia and New Zealand 42–43 (1997).

4

Other-regarding conferrals of benefits

In 1880, in Dalles City, Oregon, a large and valuable load of lumber fell into the Columbia River and was about to be carried away by the current. Since Savage, the owner of this lumber, was absent from the scene, Glenn – who, at that time, was doing construction work for Savage – "furnished help and did service" in saving the lumber "from being washed away and lost." Seven years later, the Supreme Court of Oregon rejected Glenn's claim that Savage owed him the reasonable value of his services as well as of the services of the workmen he employed in saving the lumber. The Court did not deny that these services had been "meritorious, and probably beneficial, to Savage," but it nonetheless insisted that the services "could not create a legal liability on the part of Savage." "To make him liable," the Court ruled, "he must either have requested the performance of the service, or, after he knew of the service, he must have promised to pay for it." Otherwise, the law deems "an act done for the benefit of another, without his request, as a voluntary act of courtesy, for which no action can be sustained." Were it otherwise, the Court explained, the result would be "ruinous litigation, and the overthrow of personal rights and civil freedom"; people would lose control over their private businesses: no one would be "free from the interference of strangers, perhaps idlers, drunkards, and perhaps enemies," who may "under such pretences," draw people "from business into litigation." Furthermore, if the law were otherwise, it would do "violence to some of the kindest and best effusions of the heart to suffer them afterwards to be perverted by sordid avarice." The law must not permit "meritorious and generous acts" to be "afterwards converted into a pecuniary demand."[1]

Since the seminal case of *Glenn v. Savage*, there has been little change in the basic approach of the common law to good samaritans who render help in response to another's need without any preexisting duty to intervene. Restitutionary claims of good samaritans are treated with reluctance

[1] Glenn v. Savage, 13 P. 442 (Or. 1887) (quoting Force v. Haines, 17 N.J.L. 385, 387 (1840)).

and, where the protected interest is proprietary, even with hostility.[2] This approach is evidenced in the epithets directed at good samaritans as strangers, volunteers, officious meddlers, intermeddlers, or interlopers.[3] These derogatory epithets usually indicate that the plaintiff's claim is doomed to fail.[4]

Section A summarizes the state of the law, including the important, but modest, ways in which the doctrines of involuntary bailees and maritime salvors as well as the new Restatement depart from the "long standing judicial reluctance to encourage one person to intervene in the affairs of another by awarding restitution of benefits thereby conferred."[5] Sections B and C take a critical look at the two rationales suggested in *Glenn* – and reiterated in contemporary treatments of the subject[6] – for this reluctance: the concern for preserving personal liberty and the claim that altruism should be reward enough in itself. I contend that rather than being antagonistic to claims of good samaritans, these premises provide reasons for allowing (in appropriate circumstances) these restitutionary claims. Along the way, I also show why, in many good samaritan settings, restitution – a remedy that offsets "pre-legal" countervailing incentives for potential good samaritans – is superior to either punishments (the imposition of positive duties to rescue and assist) or rewards. Restitution can promote beneficence without opening the philosophical "can of worms" involved in the imposition of positive duties to rescue and assist backed by criminal or civil sanctions.[7]

[2] *See, e.g.*, 2 George E. Palmer, The Law of Restitution § 10.3 (1978 & Supp. 1998); G. H. L. Fridman, Restitution 271, 276–78 (2d ed. 1992); Keith Mason & J. W. Carter, Restitution Law in Australia 254 (1995).

[3] *See* John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183, 1184 (1966).

[4] *See* Restatement of Restitution § 2 (1937) ("A person who officiously confers a benefit upon another is not entitled to restitution therefor."); Restatement (Second) of Restitution § 2 (Tentative Draft No. 1, 1983) (similar rule). In many cases where recovery has been allowed for other-regarding conferrals of benefits, there has been a strong and direct public interest in the performance of that service, such as where a close relative of a deceased has paid funeral expenses and seeks reimbursement from the estate. *See, e.g.*, Restatement of Restitution § 115 cmt. b (1937); John P. Dawson & George E. Palmer, Cases on Restitution 48 (2d ed. 1969). This chapter focuses on cases in which no such direct public interest exists.

[5] Palmer, *supra* note 2, at 359.

[6] *See, e.g.*, Andrew Tettenborn, The Law of Restitution in England and Ireland 209 (3d ed. 2002).

[7] *See, e.g.*, Liam Murphy, *Beneficence, Law and Liberty: The Case of Required Rescue*, 89 Geo. L.J. 605, 607–08, 660–61 (2001).

More particularly, I maintain that both liberty and altruism justify allowing some good samaritan claims for reimbursement of expenses incurred as well as for compensation for services rendered or for certain damages suffered by the benefactor as a consequence of her act. I argue that in certain circumstances liberty justifies – even mandates – the offsetting of countervailing incentives faced by potential good samaritans, thus "neutralizing" any worry they may have *ex ante* that their other-regarding intervention ultimately would cause them actual loss.[8] Liberty therefore requires restitution whenever it is evident (at the time when the potential benefactor must decide whether or not to act) that the beneficiary's expected gain from intervention exceeds the expected costs of the intervention, provided that there is no reasonable way for the beneficiary to communicate actual consent. In line with the civil law association of altruism with the doctrine of *negotiorum gestio*, which deals with good samaritan interventions,[9] I contend that a commitment to fostering altruism also requires a favorable, rather than a hostile, legal response to altruistic interventions.

The second half of this chapter delineates the contours of a restitutionary doctrine that seriously renounces *Glenn*. I examine three doctrinal issues: the significance of the intervention's success; the benefactor's claim to remuneration for her time, effort, and expertise; and her right to compensation for losses she may have incurred due to her intervention. With regard to all three questions, I demonstrate that discarding *Glenn* necessitates reforms that go beyond the modest liberalization of the new Restatement, reversing the baseline norm governing cases of other-regarding conferral of benefits.

Because the doctrine of good samaritan intervention is not a very frequently applied segment of law, the practical impact of my argument may be rather marginal. Claims of good samaritans have nonetheless captured the interest of private law scholars.[10] This interest seems to be entailed

[8] *Cf.* Ross B. Grantham & Charles E. F. Rickett, Enrichment and Restitution in New Zealand 227–28 (2000). Because I analyze the doctrine from a prospective viewpoint, I omit any reference to the moral debt of gratitude. On gratitude, see A. John Simmons, Moral Principles and Political Obligations 163–83 (1979).

[9] *See, e.g.*, Alain A. Lavasseur, Louisiana Law of Unjust Enrichment and Quasi-Contracts 68–69 (1951); Samuel J. Stoljar, *Negotiorum Gestio, in* 10 International Encyclopedia of Comparative Law ch. 17, at 13 (1984); Cheryl L. Martin, *Comment, Louisiana State Law Institute Proposes Revision of* Negotiorum Gestio *and Codification of Unjust Enrichment*, 69 Tul. L. Rev. 181, 212 (1994).

[10] *See, e.g.*, John P. Dawson *Negotiorum Gestio: The Altruistic Intermeddler* (pt. 1), 74 Harv. L. Rev. 817 (1961) [hereinafter Dawson (pt. 1)]; John P. Dawson, *Negotiorum Gestio: The*

by a sense that the social significance of the legal prescription for these cases cannot be reduced to its direct behavioral impact; the significance of this apparently inconsequential doctrine lies in the broader expressive and cultural ramifications of the social choices it embodies.[11]

Steve Hedley's critique of my account (in its earlier incarnation) – that I provide no evidence for "unmet needs . . . that would be likely to be met if [my] proposal were implemented"[12] – ignores this symbolic effect of good samaritan law. It also misses the possibility that these cultural consequences may feed back into the doctrine's direct material consequences. The dynamics of the interaction between law and culture is still a puzzle. But my modest assumption of a mutual reinforcement between legal rules and social norms was recently reinforced by Mark West's comparative study of finders law and practice in Japan and the United States. "[T]he available evidence," West concludes, "suggests that conceptions of correct behavior are strongly intertwined with the legal environment into which one is socialized."[13] If this is correct in the context of finders law, it seems plausible to assume that good samaritan law also has some – probably indirect (that is: triggered by the doctrine's cultural significance) – impact on the behavior of potential benefactors; that law's traditional hostility toward restitutionary claims of good samaritans might have discouraged potential benefactors from intervening.[14]

A Good samaritans, involuntary bailees, and maritime salvors

The *Glenn* decision captures the traditional attitude toward a good samaritan who protects another's property,[15] and was applied by other courts as well even in cases, like *Glenn*, of real emergency. Thus, one court denied

Altruistic Intermeddler (pt. 2), 74 HARV. L. REV. 1073 (1961) [hereinafter Dawson (pt. 2)]; Edward W. Hope, *Officiousness* (pt. 1), 15 CORNELL L.Q. 25 (1929); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Mitchell McInnes, *Restitution and the Rescue of Life*, 32 ALBERTA L. REV. 37 (1994); F. D. Rose, *Restitution for the Rescuer*, 9 OX. J. LEGAL STUD. 167 (1989); Robert A. Long, Jr., *Note, A Theory of Hypothetical Contract*, 94 YALE L.J. 415 (1984).

[11] *Cf.* Murphy, *supra* note 7, at 608–10. I discuss this matter below: pp. 104–05.

[12] STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERING 77–78 (2001).

[13] Mark D. West, *Losers: Recovering Lost Property in Japan and the United States*, 37 L. & SOC'Y REV. 369, 414 (2003).

[14] *See* McInnes, *supra* note 10, at 44–45; Rose, *supra* note 10, at 178.

[15] PALMER, *supra* note 2, at 369.

restitution, stating that "[i]f a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action."[16] Similarly, another court stated that "in cases of flood, as in those of conflagration . . . services rendered voluntarily to preserve another man's property from destruction are presumed to be gratuitous and give no cause of action."[17]

But alongside this harsh approach, American law has always been more hospitable to other-regarding interventions where the protected interest was life or health as well as where the benefactor was either an involuntary bailee or a maritime salvor. Recently, the new Restatement set the stage, albeit in a somewhat modest fashion, for reforming the *Glenn* rule even further. Still, as we shall see, none of these doctrines – existing and suggested – is sufficient if the law is to facilitate, as it should, good samaritan interventions.

Good samaritans protecting life or health

The *Glenn* doctrine does not apply in regard to life and health. Good samaritans whose intervention is aimed at rescuing life are treated somewhat more favorably than benefactors who preserve only a proprietary interest of another. As the new Restatement prescribes:

> A person who performs, supplies, or obtains professional services reasonably necessary for the protection of another's life or health has a claim in restitution against the other if the circumstances justify the claimant's decision to intervene without a prior agreement for payment or reimbursement. Restitution under this Section is measured by a reasonable charge of the services provided.[18]

While generally receptive to this type of good samaritan claim, even this traditional rule includes important limitations on their right of recovery. Notably, while leaving some narrow room for exceptions, the right is limited to the provision of professional services, and the recovery does

[16] Bartholomew v. Jackson, 20 Johns. N.Y. 28, 28 (N.Y. Sup. Ct. 1822).

[17] Watson v. Ledoux, 8 Rand. La. 68, 68 (La. 1853). *See also, e.g.*, Merritt v. American Dock & Trust Co., 13 N.Y.S. 234 (N.Y. Sup. Ct. 1891).

[18] Restatement (Third) of Restitution and Unjust Enrichment § 20 (Tentative Draft No. 2, 2002) [hereinafter ALI Draft]. *See also id.* cmt. a. A similar rule appears in the first Restatement: Restatement of Restitution § 116 (1937).

not cover any losses incurred due to the intervention.[19] Sections E and F challenge both limitations (as well as the measure of recovery advocated by the new Restatement).

Involuntary bailees

The first Restatement allows some claims "to restitution for services rendered or expenditures incurred" in preserving another's things or credit. Recovery under this rule is forthcoming, however, only if the claimant "was in lawful possession or custody of the things or if [s]he lawfully took possession thereof," i.e., where she finds herself in the position of an involuntary bailee.[20] This category covers both cases in which the claimant's possession of the property entails a duty of care for the property, and cases where the claimant is an "agent by necessity," such as where a contractor performs an emergency service, which was not covered by the building contract, for the protection of the building.[21] (As an aside, notice the similarity between this case and the facts of *Glenn v. Savage*.) Other established situations within the limited contours of agency of necessity include claimants "who take possession because of an emergency, such as finders and persons performing acts necessary to protect property after the death of the owner."[22] The justification for restitution in these cases is typically provided in terms of an implied request by the owner.[23] The first Restatement cautiously opens the door to other cases of unsolicited services "if rendered or incurred in the unofficious protection of the interests of another,"[24] but neither the case-law nor the Restatement includes any example that deviates from this limited set of situations.

The traditional availability of restitution to involuntary bailees is informative given the instability of the boundary between an involuntary bailee and a good samaritan. Understandably, at times previous privity – as in the classic cases of agency by necessity – may mitigate the concern of

[19] *See also* ALI Draft, *supra* note 18, § 20 cmt. b & illus. 7. Strangely, with respect to protection of property, the new Restatement does not exclude "injury to be compensated" from the factors determining the measure of recovery. *Id.* § 21 cmt. a.

[20] Restatement of Restitution § 117 (1937).

[21] *See* Berry v. Barbour, 279 P.2d 335 (Okla. 1954).

[22] Restatement of Restitution § 117 cmt. b (1937). *See also* Palmer, *supra* note 2, at 371–74; Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 448–52 (Gareth Jones ed., 6th ed. 2002); Graham Virgo, The Principles of the Law of Restitution 315–19 (1999); Neil Allen, *Necessity, Incapability, and Emergency, in* The Law of Restitution 351, 366–68 (Steve Hedley & Margaret Halliwell eds., 2002).

[23] *See, e.g.*, Reeder v. Anderson's Administrators, 4 Dana Ky. 193, 193 (Ky. Ct. App. 1836).

[24] Restatement of Restitution § 117 cmt. a (1937).

strangers thrusting unwelcome benefits on people. Courts may feel more at ease extending an existing contractual relationship to cover a useful intervention that cannot realistically be subject to an explicit contract than creating a contract in similar circumstances.[25] But this distinction is a matter of degree: there are cases in which, notwithstanding the lack of previous privity, an equal degree of confidence in ascribing an implied request to the beneficiary can be reached given the desirability of the good samaritan's intervention and the impracticability of communicating with the putative beneficiary. The traditional doctrine itself affords restitution in some cases of this sort, as in the case of finders.

Maritime salvors

For almost three millennia maritime law has recognized the doctrine of salvage, according to which "the mariner who acted voluntarily to save property from peril on the high seas has been entitled to a reward."[26] To succeed in a salvage claim, the mariner must show that:[27] (1) there was "a marine peril placing the property at risk of loss, destruction, or deterioration"; (2) its salvage service was "voluntarily rendered and not required by an existing duty or a special contract";[28] and (3) the salvage effort was "successful, in whole or in part." No request for the service or express acceptance is required for the claim to be valid: "It is enough if under the circumstances any prudent [person] would have accepted."[29] These principles were adopted by the 1989 International Salvage Convention and are by and large endorsed by standard form salvage contracts.[30]

[25] *See* Saul Levmore, *Obligation or Restitution for Best Efforts*, 67 S. Cal. L. Rev. 1411, 1421 (1994).

[26] Margate Shipping Co. v. M/V JA Oregon, 143 F.3d 976, 985 (5th Cir. 1998). For the pertinent history, see 3A Martin J. Norris, Benedict on Admiralty § 1 (7th ed. 1991).

[27] 3 Thomas J. Schoenbaum, Admiralty and Maritime Law 358 (3rd ed. 2001).

[28] Daniel Friedmann argues that there may be exceptional cases in which restitution may be available even if a duty to rescue is statutorily prescribed, where the proper interpretation of such a rule does not imply the imposition of the duty free of charge. *See* Daniel Friedmann, *Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution, in* Essays on the Law of Restitution 247, 254–55 (Andrew Burrows ed., 1991).

[29] Merritt & Chapman Co. v. U.S., 274 U.S. 611, 613 (1927).

[30] *See* F. D. Rose, *Restitution and Maritime Law, in* Unjust Enrichment and the Law of Contract 367, 379 (E. J. H. Schrage ed., 2001). One difference which was introduced by the Convention (at Article 14) is a "special compensation" which "is payable where a salvor minimises environmental damage and is not otherwise paid for this service." *Id.*

Admiralty law has never been shy of admitting that this reward is given "as an inducement to seamen and others to embark in such undertakings to save life and property."[31] The traditional criteria for determining the amount of a salvage award, laid out by the Supreme Court in *The Blackwall* case, cater to this rationale by looking at the salvors' investment in labor, skills, equipment, and risk, as well as the value of the property saved and the degree of danger from which it has been rescued.[32]

There is some debate as to whether maritime salvage law is part of the law of restitution. But there is no doubt that the similarity between maritime salvors and terrestrial benefactors makes salvage doctrine relevant to the analysis of restitutionary claims.[33] And yet, the distinctive features of maritime salvage should not be underrated. Unlike your typical good samaritan case of a bystander benefactor, maritime salvage is situated in a commercial setting,[34] and is frequently performed by professional salvors, skilled and equipped to undertake the complicated task of beneficial intervention at sea, and doing so as their primary vocation.[35] As one recent case unashamedly states, "[i]t is profit, not principle, that is the driving force behind the law of salvage."[36]

Traditional maritime law has taken the distinction between profit-based salvage and humane intervention too far by denying recovery from "pure life salvors" (who save life when no property is saved).[37] This harsh rule is no longer applicable. In a leading case, the Second Circuit made a distinction between a reimbursement of expenses and a reward. Reimbursement, the court explained, does not make "assistance to an ailing seaman a matter of negotiation, rather than moral duty." Quite the contrary, it is likely to "encourage seamen aboard large vessels to perform their moral obligation to their brethren on smaller ships without fear that their benevolence will result in unreasonable expenses to their ship's

[31] The Blackwall, 77 U.S. (10 Wall) 1, 14 (1869). [32] *Id.*

[33] *See, e.g.*, ALI Draft, *supra* note 18, § 21 cmt. e; Rose, *supra* note 30, at 375–76, 380.

[34] *Cf.* Peter Birks, An Introduction to the Law of Restitution 307–08 (paperback ed. with revisions 1989); Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234, 248–49 (Eng. C.A. 1886). The new Restatement suggests that the most salient difference between the two legal settings derives from the easiness with which admiralty law solves the problem of valuation, claiming that frequently no similar solution is available for emergency services inland. ALI Draft, *supra* note 18, § 21 cmt. f. But if the measure of recovery for such services suggested in section E is adopted, this difficulty disappears.

[35] *See* Joachim Dietrich, Restitution: A New Perspective 193 (1998); Christopher T. Wonnell, *Unjust Enrichment and Quasi-Contracts, in* 2 Encyclopedia of Law and Economics 795, 799 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[36] *Margate*, *supra* note 26, 143 F.3d at 979–80, 987.

[37] Schoenbaum, *supra* note 27, at 382.

owners."[38] Both the distinction between the terrestrial bystander and the maritime salvor, as well as the intricate relationship between benevolence and pecuniary recovery, are important for the discussion that follows.

The new Restatement

Thus far, I have indicated the three types of restitution claimants that – while similar to *Glenn* – receive a more friendly legal treatment. The new Restatement takes these exceptions to the baseline norm of no restitution an important, but insufficient, step forward.[39]

The Restatement helpfully omits reference to the traditional epithet of officiousness, referring in its stead to its functional explanation – the incomparable superiority of contract to restitution as a means of regulating transfers. It conceptualizes cases in which restitution is allowed as involving circumstances where contracting is impractical, so that the reversal of "the usual sequence of nongratuitous exchange" – conferring a benefit first, then demanding payment for its value – is justified.[40] Furthermore, unlike in the first Restatement, the new stated rule regarding the protection of another's property is not limited to involuntary bailees, but rather applies in any case where "the circumstances justify the claimant's decision to intervene without a prior agreement" and "it is reasonable for the claimant to assume that the defendant would wish the action performed."[41]

But there is less to this shift than meets the eye as the new Restatement's doctrine leaves too many obstacles on the good samaritan's path to recovery. First, under its doctrine recovery is available only if the intervention turns out to be successful.[42] Second, the Restatement ratifies the traditional "gratuity" rule, which dismisses restitution claims for "services, however valuable, that the provider has rendered without intent to charge."[43] The gratuity rule is the means used by courts to deny recovery from non-professional benefactors who are presumed to act gratuitously.[44] The use of *Glenn v. Savage* as an illustration for this rule may

[38] Peninsular & Oriental, etc. v. Overseas Oil Carriers, Inc., 553 F.2d 830, 836 (2d Cir. 1977).

[39] *Cf.* Mark P. Gergen, The Restatement, Third Restitution and Unjust Enrichment at Midpoint (unpublished manuscript).

[40] Restatement (Third) of Restitution and Unjust Enrichment § 2 cmt. f (Discussion Draft, 2000).

[41] ALI Draft, *supra* note 18, § 21. [42] *See id.* § 21 & cmt. d. [43] *Id.* § 21 cmt. c.

[44] *See* Restatement of Restitution § 114 cmt. c (1937); Restatement (Second) of Restitution § 3 cmt. c (Tentative Draft No. 1, 1983). The gratuity presumption has been vigorously attacked. *See, e.g.*, Gareth Jones, Restitution in Public and Private Law

imply an even stricter doctrine.[45] Third, recovery may be limited by the idiosyncratic valuation of the benefit by the restitution defendant.[46]

As we will see, these limitations leave intact many of the "pre-legal" disincentives for potential good samaritans. They thus reinstate the worry potential good samaritans have, under the *Glenn* approach, that their well-intended services ultimately will leave them with uncompensated expenses or damages incurred while performing these services. If the law is to encourage such services – if it is to be tailored to offset these disincentives – then all three limitations of the new Restatement are inappropriate. (Notice that the terms "encourage" and "encouragement" are employed below as shorthand for this more precise meaning of offsetting these "pre-legal" countervailing disincentives faced by good samaritans.)

But before I can suggest such a liberalized doctrine, I need to explain why the law should discard its traditional reluctant stance – which maintains the "pre-legal" state of affairs in which claims of potential benefactors are not guaranteed – and encourage good samaritan intervention. Sections B and C offer two answers to this question: one relies on the (hypothetical) will of the beneficiary; the other is premised on the value of altruism.

B Autonomy and beneficial interventions

The new Restatement shares the traditional concern with "making an owner pay for something he either does not want or does not value at the cost of providing it,"[47] echoing the dictum that once "one cleans another's shoes," the other has no option but to "put them on."[48] This concern is based on a commitment to the value "of self-determination, or autonomy, in incurring obligations."[49] This ideal – which was also prominent in chapter 3 – is indeed valuable. But it does not justify the anti-interventionist rules currently prevalent in most Anglo-American jurisdictions and essentially ratified by the new Restatement. To understand why, it helps to begin

147 (1991); Ross A. Albert, *Comment, Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85, 97–98, 101–07 (1986).

[45] ALI Draft, *supra* note 18, § 21 illus. 7. [46] *See id.* § 21 cmt. d.

[47] *Id.* § 21 cmt. a. [48] Taylor v. Laird, (1856) L.J. Ex. 329, 332.

[49] RESTATEMENT (SECOND) OF RESTITUTION § 2 cmt. a (Tentative Draft No. 1, 1983). *See also, e.g.*, *Falcke*, *supra* note 34, 34 Ch. D. at 248; 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 4.1(2) at 563, § 4.9(2) at 682–83 (2d ed. 1993); Lee J. Aiken, *Negotiorum Gestio and the Common Law: A Jurisdictional Approach*, 11 SYDNEY L. REV. 566, 598 (1988).

with the familiar account of requiring restitution for unsolicited benefits in the name of a "hypothetical contract."

The hypothetical contract theory

Hypothetical contract theorists claim that courts should allow recovery to unsolicited interveners – courts should impose a hypothetical contract on the beneficiaries – if they can reasonably conclude that at the point in time when the benefit was conferred, the beneficiary would have agreed to pay for it had she been able to communicate her express wishes. This requirement implies that recovery is justified only if two conditions are met: (1) prohibitive transaction costs – usually due to the unavailability of the beneficiary or the need for an immediate intervention – preclude the possibility of negotiating an express agreement before conferring the benefit; and (2) the imposed transaction mimics the assumed (*ex ante*) intentions of the beneficiary – that is, the transaction is to her advantage (when its expected benefits are compared with its expected costs).[50]

Hypothetical contract theorists are divided with respect to such idiosyncratic preferences as the preference to benefit from one's own efforts rather than from the unsolicited efforts of others. One view – endorsed, as may be recalled, by the new Restatement – is that the "court-imposed transaction [must make] the involuntary parties subjectively better off, not merely . . . [increase] their wealth." Therefore, any subjective objection, even if based on idiosyncratic or accidental characteristics of the defendants, should be "a fatal response to a proposed hypothetical agreement."[51] Against this view, proponents of a more expansive doctrine maintain that the courts should not even allow evidence of idiosyncratic preferences of the beneficiary and should adhere instead to an "idealized contract of the kind that rational and informed parties would have perceived as mutually beneficial had they had that opportunity."[52]

[50] *See* Richard A. Posner, Economic Analysis of Law 135–36 (6th ed. 2003); Long, *supra* note 10, at 420–24. *Cf.* Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement 79–84 (2000).

[51] Long, *supra* note 10, at 424.

[52] Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 Emory L.J. 153, 212–14 (1996); Wonnell, *supra* note 35, at 795, 798. *Cf.* Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. Legal Stud. 477, 490, 492 (1979).

Interestingly, traditional common law applies this objective approach for claims of involuntary bailees.[53]

These views are at odds in terms of their doctrinal implications, but they share an underlying assumption. The restrictive approach insists that the hypothetical contract story be premised upon the value of liberty and suggests that abandoning the subjective utility calculus in favor of an objective standard of cost-benefit analysis violates this value. The expansive approach unabashedly admits that a hypothetical contract imposed where the twofold requirement doctrine is met cannot be supported by liberty, and thus justifies it only on efficiency grounds: encouraging "value-creating activities" where "market alternatives" are unavailable.[54] This section challenges the implicit assumption of both approaches, claiming that autonomy – and not only efficiency – justifies a doctrine that admits good samaritan claims for restitution whenever the above two (objective) conditions are met. If correct, this conclusion is particularly significant given that no such accommodation is available respecting the more familiar forms of facilitating beneficial intervention via torts or criminal law (at least where the protected interest is proprietary).[55]

The Restatement's ideal

The ideal of self-determination, or autonomy, in incurring obligations echoes the liberal value of negative liberty. It is premised on the belief that independence ("freedom from") is essential to personal development and autonomy.[56] Because each individual is distinct and unique, each should be able to choose her goals and the means of achieving them voluntarily.[57] People should enjoy – the law should guarantee them – a private moral sphere that is free from forcible human interference. Boundary crossing, trespassing on the individual's moral space, should be viewed with suspicion and, preferably, deterred. Individuals should be entitled to control their resources as long as they do not harm others in exercising such control. Their actual consent – express or implied, but, in all events, actual

[53] *See* Restatement of Restitution § 117 (c) (1937). *See also* Jones, *supra* note 44, at 148–49.

[54] *See* Wonnell, *supra* note 52, at 216–17.

[55] Indeed, even proponents of a duty to rescue limit its application to cases of extreme distress, notably clear danger to a person's life or limb.

[56] *See* Isaiah Berlin, *Two Concepts of Liberty, in* Four Essays on Liberty 118, 122, 124 (1969). *But see generally* Charles Taylor, *What's Wrong with Negative Liberty, in* Philosophy and the Human Sciences (Philosophical Papers 2) 211 (1985).

[57] *See* Charles Fried, *Is Liberty Possible?, in* Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy 89, 94–95 (Sterling M. McMurrin ed., 1987).

and not legally imposed – should be the prerequisite to any legitimate transfer of, or interference with, any of their resources.[58]

This normative commitment explains the instinctive caution with which common law treats good samaritans[59] (although it does not justify the extent of its hostility toward their claims). Instances of unsolicited benefits threaten potential beneficiaries' control over their resources. A strong commitment to negative liberty means that each person should be the gatekeeper of their own affairs; that contract is the only legitimate way of effectuating any external interference, especially where it is performed at the expense of the beneficiary. A person's actual – and not idealized – consent should, in this view, be the sole judge of the desirability of any external interference in her affairs.

Strong and weak hypothetical contracts

These commitments point to the difficulties with claims of idealized or hypothetical contracts, which are currently in vogue in normative discourse. They explain, for example, the resistance to using a hypothetical contract as justification for the desirability of wealth maximization as an all-encompassing normative foundation of law. The consent that is attributed to individuals in order to accord a contractarian validation to wealth maximization is not only hypothetical, it is often counterfactual – that is, attributed to individuals whose actual preferences it is unlikely to reflect.[60] One reason for this is that, due to the marginal utility of money, wealth maximization systematically improves the condition of the better-off, but may also systematically hurt the worse-off.[61]

[58] *See, e.g.*, Steven Lukes, Individualism 66 (1973); Robert Nozick, Anarchy, State, and Utopia 57, 71–73 (1974); F. A. Hayek, *Freedom and Coercion, in* Liberty 80, 81–82, 89, 95–98 (David Miller ed., 1991).

[59] *See* Jones, *supra* note 44, at 139; P. B. H. Birks, *Negotiorum Gestio and the Common Law*, 24 Current Legal Probs. 110, 112 (1971); Hope, *supra* note 10, at 29, 31. Similar concerns inform the traditional common law regime regarding pre-contractual duties. *See, e.g.*, Nili Cohen, *Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate, in* Good Faith and Fault in Contract Law 25 (Jack Beatson & Daniel Friedmann eds., 1995).

[60] *See* Jules L. Coleman, *Efficiency, Utility and Wealth Maximization, in* Markets, Morals and the Law 95, 127–29 (1988); Ronald Dworkin, *Why Efficiency?, in* A Matter of Principle 267, 275–80 (1985).

[61] *See, e.g.*, Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer–Seller Relationships*, 43 Stan. L. Rev. 361 (1991); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Legal Stud. 227, 240 (1980).

But the hypothetical contract discussed in this section is different, as it is *not* evidently counterfactual.[62] Although it has never been expressed by the parties, it is idealized in only a weak sense. The hypothetical consent of a potential beneficiary is supported by reasonable assumptions regarding their utility function: the hypothetical contract must facilitate a cost-beneficial intervention in her affairs and is enforced only because prohibitive transaction costs prevented actual negotiation. Furthermore, an implicit, third condition under the hypothetical contract theory can help show the weak sense of idealization required. According to this condition – helpfully mentioned by the new Restatement[63] – any external indication of the beneficiary's objection (idiosyncratic as it may be) to the beneficial interference, which the benefactor should have reasonably noticed before conferring the benefit, necessarily mandates the denial of the good samaritan claim.

Indeed, unlike stronger forms of hypothetical contracts and similar to the "implied requests" of the traditional doctrine of involuntary bailees, ours is a modest technique that is intended to assess, in circumstances where there is no better method, what the best course of action would be from the perspective of the potential beneficiary herself. This weak form of a hypothetical contract does not violate autonomy. In fact, it may even be required by this very normative commitment.[64]

Weak hypothetical contracts and autonomy

To see why, consider the choice faced by a court in a good samaritan case: it can either afford relief or refrain from doing so. If it declines, it acts to deter (for most – rational and not particularly other-regarding – potential benefactors) interferences, which are, from the *ex ante* perspective of the beneficiary, cost-beneficial.[65] The reason for this deterring effect is that when negotiation is impractical, a potential benefactor would fear that the beneficiary – whom she does not know and can presume to be rational and not particularly other-regarding – would refuse *ex post* to reimburse her for her expenses, from which the beneficiary has already benefitted. Without a legal guarantee, a potential benefactor, who needs to decide whether to intervene without being able to rely on the beneficiary's

[62] *Cf.* Birks, *supra* note 34, at 195.
[63] *See* ALI Draft, *supra* note 18, § 20 cmt. b & § 21 cmt. d.
[64] *Cf.* Ronald Dworkin, *Justice and Rights, in* Taking Rights Seriously 152 (1977).
[65] *See* Donald Wittman, *Good Samaritan Rule, in* 2 The New Palgrave Dictionary of Economics and the Law 202 (Peter Newman ed., 1998).

binding commitment of reimbursement, must take into account that her good intention could be abused. This would, at least at the margin, deter beneficial interventions. In most cases, where the potential beneficiary is rational, this result would frustrate, rather than enhance, her preferences.

It is difficult to see why the law, in the name of a commitment to autonomy, should support this disappointing outcome. Once the third (no observable objection) and first (prohibitive transaction costs) conditions of the hypothetical contract theory are fulfilled, the defendant cannot be said to be deprived of any meaningful choice.[66] The choice to encourage or discourage interventions that are objectively beneficial (as assured by the second condition) must be made, in any event, by the law. Should the law undermine the preferences of the majority of beneficiaries (by discouraging beneficial interferences) in the name of preventing any boundary crossing when it cannot be absolutely certain that the beneficiary would have voluntarily consented? Should it do so even where beneficiaries have no way of communicating their (frequent) approval or (in the rare cases of idiosyncratic beneficiaries) disapproval?

These questions must be answered in the negative. Whilst wariness of boundary crossings – the commitment to negative freedom – is important for people's autonomy, it is not autonomy's ultimate prescription (at least not in the liberal tradition).[67] Rather, negative freedom serves the more fundamental purpose of self-determination. In many cases – such as in the context of my discussion of mistakes in chapter 3 – promoting the means (negative freedom) does not clash with, and indeed facilitates, achieving the end (self-determination). But where promoting the means threatens to undermine the end, the legal norms that best promote negative liberty must retreat and give way to those norms that best promote the individual's more essential interest to act on her goals and aspirations.

Cases of good samaritan intervention in which all three conditions of the hypothetical contract theory are met belong to the latter category and thus the court-imposed contract of intervention in consideration of restitution of expenses is justified.[68] A doctrine guided by such a theory surely burdens idiosyncratic beneficiaries with the cost of making an

[66] *See* 1 Dobbs, *supra* note 49, § 4.9(5) at 699.

[67] *See* H. L. A. Hart, *Between Utility and Rights, in* Essays in Jurisprudence and Philosophy 198, 206–07 (1983); Will Kymlicka, Contemporary Political Philosophy 120, 123–25 (1990).

[68] *Cf.* Peter Birks & Charles Mitchell, *Unjust Enrichment, in* 2 English Private Law 525, 582–83 (Peter Birks ed., 2000).

effective notice of their preferences, and is therefore inferior from their perspective to the current regime, which protects them against any boundary crossing by potential good samaritans. But in most cases discouraging good samaritanism would frustrate the end of ensuring that an individual's preferences determine the fate of everything within her moral space. Courts may be concerned that their *ex post* evaluation of the benefactor's *ex ante* estimation of the expected efficiency of her intervention may be prone to error. They may understandably increase somewhat the margin of error to ensure that the contract they are imposing corresponds to the beneficiary's *ex ante* interests. But this caution is a far cry from a blanket rejection of good samaritans' claims for restitution.

C Altruism and restitution

Glenn's second argument against restitution to good samaritans is that altruism should be its own reward.[69] As an English court had held almost a century earlier, "perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude."[70] The new Restatement shares this view when it explains its denial of restitution for nonprofessional rescuers (using the presumption of gratuity) by saying that the imposition of such liability "transforms an act of self-sacrifice into a contentious exchange of value."[71] I beg to differ.

Restitution as institutionalized limited altruism

Two accounts of altruism can inform our discussion. In one view altruism arises from the human capacity to view oneself simultaneously from both the personal and the impersonal standpoints. This capacity is premised on "a recognition of the reality of other persons, and on the equivalent capacity to regard oneself as merely one individual among many," all of whom are included in a common world and are persons in as full a sense as oneself.[72] Another view emphasizes the human need for social solidarity, communal concern, and a sense of togetherness, and thus our

[69] *See* Restatement (Second) of Restitution § 3 cmt. c (Tentative Draft No. 1, 1983); *see also, e.g.*, John D. McCamus, *Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution*, 11 Ottawa L. Rev. 297, 302 (1979).

[70] Nicholson v. Chapman, 126 Eng. Rep. 536, 539 (1793).

[71] ALI Draft, *supra* note 18, § 20 cmt. b. *See also* Hedley, *supra* note 12, at 77.

[72] *See* Thomas Nagel, The Possibility of Altruism 3, 19, 82, 88, 100, 144 (1970).

natural tendency to understand any other-regarding requirement as a way of contributing to a community we regard as our own.[73] These views differ in many respects. But they converge in finding that the justification for responding to others' claims is in the importance we attach (or should attach) to others, whether as atomized human beings or as fellow members of our constitutive community – whether due to rational deliberation or to innate emotions. In short, the appeal of other-regarding ideas derives from the other-regarding element of the self. (The third explanation of altruism – empathy towards others[74] – will play an important role in the analysis of restitution in the context of informal intimacy in chapter 6. Empathy, however, is hardly relevant to the context of rules dealing with strangers providing assistance, which are directed at a very broad range of beneficiaries.)

I propose to understand a doctrine that is favorable to good samaritans as a form of institutionalized limited altruism: a legal device that calls for other-regarding action and seeks to inculcate other-regarding motives; an institutional design that responds to and supports the other-regarding perspective of human beings.[75] Such a doctrine regards us as "divided selves": individuals who have both a personal perspective – preoccupied with self-interest – and an impersonal or communitarian perspective (depending on one's preferred theory of altruism), which is the source of other-regarding action. This doctrine appeals to our other-regarding standpoint, seeking to foster this "ecological niche" for altruistic behavior and altruistic motives.[76]

A restitutionary doctrine that favors good samaritan claims does not require self-sacrifice. It merely encourages people to be aware of others'

[73] *See* Michael J. Sandel, Liberalism and the Limits of Justice 143 (1982); Robyn M. Dawes et al., *Cooperation for the Benefit of Us – Not Me, or My Conscience, in* Beyond Self-Interest, 97, 99 (Jane J. Mansbridge ed., 1990); David Miller, *Distributive Justice: What the People Think*, 102 Ethics 555, 560–62, 570–72 (1992).

[74] *See* Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life, in* Beyond Self-Interest, *supra* note 73, at 3, 20; Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, in* Beyond Self-Interest, *id.* at 25, 31–34.

[75] *Cf.* Nagel, *supra* note 72, at 79. Expanding the notion of self-interest to incorporate other-regarding motives would only obscure an important distinction. *See, e.g.,* Christopher Jencks, *Varieties of Altruism, in* Beyond Self-Interest, *supra* note 73, at 53, 55.

[76] *See* Thomas Nagel, Equality and Partiality 10–32 (1991); Brian Barry, Theories of Justice 283–85, 357–66 (1989); Amitai Etzioni, The Moral Dimension: Toward a New Economics 63, 85, 253–54 (1988); Jane J. Mansbridge, *Preface to* Beyond Self-Interest, *supra* note 73, at ix, xiii; Jane J. Mansbridge, *On the Relation of Altruism and Self-Interest, in* Beyond Self-Interest, *id.* at 133 [hereinafter *On the Relation*].

distress; to be prepared to set aside pursuit of their nonwelfare interests for the benefit of others, knowing that any actual sacrifice they may make through intervention is only temporary, and will be relatively easily reversed.[77] This altruism is limited; it does not expect unreserved subordination of an agent's self-interest. It is a somewhat calculated altruism: a willingness to benefit the other, but at the other's own expense.[78] Yet, insofar as our relationships with strangers are concerned, it is virtuous enough.[79] Furthermore, there is nothing hypocritical or half-hearted in this modest form of altruism. As Jean Hampton explained, selflessness or self-denial is anathema to true altruism. While human "saints" are often revered by those whom they beneficially serve, their exclusion of their own self (and their own needs) from moral deliberation is tantamount to an inappropriate loss of the self they ought to be developing. Indirectly, they may even be harming the very people for whom they care by teaching "the permissibility of their own exploitation by submitting to, and even supporting, their subservient role."[80]

Altruism and law

Consider now the *Glenn* challenge. As a virtue, altruism defines moral goodness in terms of "the excellence of the agent's character." Beneficial consequences can be achieved with or without excellence of character. When an action leading to such consequences is "self-initiated and proactive" it is virtuous, that is, genuinely altruistic. But when it is instead "reactive" – driven by external incentives – no virtue and, therefore, no altruism is involved. By meddling with issues that are better left to the moral domain, law can only "reduce the moral worth of human action," making altruism increasingly unnecessary, relegating it to "the dustbin of supererogatory."[81] The best course of action for a legal system interested in inculcating altruism is inaction.

[77] *See* John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382, 385 (1976); *cf.* Ernest J. Weinrib, *Rescue and Restitution*, 1 S'VARA: J. PHIL. & JUDAISM 59, 64–65 (1990).

[78] *See* Stoljar, *supra* note 9, at 14, 24, 149.

[79] *Cf.* NAGEL, *supra* note 76, at 37–38; JAMES S. FISHKIN, THE LIMITS OF OBLIGATION (1982).

[80] Jean Hampton, *Selflessness and the Loss of Self, in* ALTRUISM 135, 136, 148, 164 (Ellen Frankel Paul et al. eds., 1993).

[81] Douglas J. Den Uyl, *The Right to Welfare and the Virtue of Charity, in* ALTRUISM, *supra* note 80, at 192–93, 197, 205, 222–23; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200 (1973).

This is a broad argument in which, notwithstanding any quantitative distinctions, any form of legal intervention – whether discouraging noninterference, rewarding successful interventions, or offsetting the prelegal incentives facing potential good samaritans – can be interpreted as a device for promoting compliance with some public (external) policy;[82] thus, any such intervention has devastating implications for the virtue of altruism. But is, indeed, altruism extraneous to law? Is institutionalizing altruism necessarily destructive? I believe that such conclusions are too extreme and probably misguided.

To understand why, notice that these challenges perceive law merely as a set of incentives that serves as the basis for the prediction of some external reaction, hostile or favorable, to deviation from or compliance with its dictates. Echoing the infamous predictive theory of law,[83] they disregard the "internal point of view," according to which legal norms are taken as bases for claims, demands, and criticism; standards and guides for conduct and judgment.[84] Furthermore, these challenges ignore the possibility that law – like other major social practices and institutions – may help preserve, sustain, and reinforce a certain equilibrium between the self-regarding and the other-regarding perspectives of agents in a relevant legal community.[85]

Once we recognize these normative and cultural effects of law, we need to think of legal norms that encourage good samaritanism as a public expression of our bonds of concern and solidarity with others.[86] Even if the direct beneficial conduct engendered by such external incentives cannot be deemed altruistic, the public expression of (limited) altruism as the proper standard for conduct and judgment is to some extent internalized by the agent as well as by her community and prompts

[82] *Cf.* Roger Cotterrell, The Politics of Jurisprudence 62 (1989); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 Mod. L. Rev. 421, 433–34 (1990).

[83] *See* Oliver Wendell Holmes, *The Path of the Law, in* Collected Legal Papers 167 (1920).

[84] *See* H. L. A. Hart, The Concept of Law 79–88 (1961); Joseph Raz, *The Relevance of Coherence, in* Ethics in the Public Domain: Essays in the Morality of Law and Politics 261, 280–81 (1994).

[85] *See* Mansbridge, *On the Relation*, *supra* note 76, at 138; *see also* Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective, in* Local Knowledge: Further Essays in Interpretive Anthropology 167, 218–19 (1983); Duncan Kennedy, A Critique of Adjudication 63, 227–28 (1997); Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life, in* Law in Everyday Life 21, 27–32, 51–54 (Austin Sarat & Thomas R. Kearns eds., 1993); Cass R. Sunstein, *Preferences and Politics*, 20 Phil. & Pub. Aff. 3, 8–10 (1991).

[86] *Cf.* Robert Nozick, The Examined Life 288–92 (1989).

future self-initiated – that is, genuinely altruistic, virtuous – beneficial actions.[87]

Phrased so broadly, this conclusion is problematic because in many cases law's normativity might be undermined by its coerciveness.[88] Legal regulation might create resentment, causing people to form negative attitudes with regard to the source of this threat (the coercive law), thus undermining the potential transformative function of such law,[89] and impeding the inculcation of altruistic motives. To perform effectively its value-shaping function, law must "bargain against the people's [preexisting] preferences."[90] In most cases, legal norms may successfully affect people's values only if they are not overly ambitious.[91] Neither the goals of the legal norm nor the means it employs should be perceived as unreasonable, and therefore offensive, if the norm is to have actual transformative consequences.

Encouraging good samaritanism by securing restitution of the costs of benevolent interventions is precisely the moderate legal device needed to inculcate altruism. Restitution is less coercive and less demanding than the more resolute legal norms, which encourage beneficial interferences by establishing positive duties of assistance and by imposing criminal or civil sanctions in cases of nonperformance. Restitution is thus a reasonable device for promoting limited altruism, an attitude toward others that calls for other-regarding action and motives without challenging the predominance of the self-regarding standpoint of agents.[92] Allowing restitution for good samaritans may mitigate, if not eliminate, any resentment toward the law's altruistically oriented interference. Restitution is also unlikely to reduce the public recognition accorded to altruistic rescuers and, therefore, would not cause any decrease in the incidence rate of intervention.[93] Finally, restitution avoids tainting the motives of potential benefactors

[87] *See* Lynn Stout, *Other-Regarding Preferences and Social Norms* 30 (Georgetown University Law Center, Business, Economics, and Regulatory Policy and Public Law and Legal Theory Working Paper No. 265902, 2001). *See also, e.g.*, Leon Shaskolsky Sheleff, The Bystander: Behavior, Law, Ethics 181 (1978).

[88] *Cf.* Meir Dan-Cohen, *In Defense of Defiance*, 23 Phil. & Pub. Aff. 24 (1994).

[89] *See* Viola C. Brady, *Note, The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 Ind. L.J. 551, 560 (1980).

[90] Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 54–55 (1979).

[91] For a similar claim, see Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607 (2000).

[92] *Cf.* Stout, *supra* note 87, at 17–18, 31.

[93] *See, e.g.*, Landes & Posner, *supra* note 10, at 94; Levmore, *supra* note 10, at 885–86.

with any possibility of tangible gain (a topic I address in more detail in section E below). In sum, contrary to the *Glenn* dictum (endorsed by the new Restatement), restitution can promote – rather than do violence to – "the kindest and best effusions of the heart."[94]

Three conceptions of altruism

While the altruism rationale and the autonomy rationale are different, their doctrinal implications can coincide. Such concurrence would result if the "other," whose interests must be taken into consideration under the altruistic rationale, were to be defined exclusively in terms of the beneficiary's autonomous will. In that case, concern (or rather respect) for that other would require strict adherence to the doctrinal recommendations of the autonomy rationale.

But altruism can refer to other understandings of people's vital interests. In such a rival understanding autonomy is not the only valuable interest. Concern for other people requires taking into account the whole spectrum of human interests, particularly their well-being; and at times (where the individual's choice is substantially non-optimizing), this must be done even if it is to the dissatisfaction of the beneficiary.[95] Such a sympathetic understanding of (and response to) another's predicament may require that the benefactor make a paternalistic decision and act in accordance with the beneficiary's true interests, contrary to her explicit, implicit, and hypothetical preferences.[96] Given the antagonism between paternalism and freedom of choice,[97] it is likely that such an understanding of altruism would yield distinct doctrinal recommendations.

[94] Nothing in the text denies that in cases of extreme distress – clear danger to a person's life – the more resolute and coercive devices of tort and criminal law may yield superior behavioral consequences. In such limited cases, it is also possible that liability for noninterference would not be considered as excessive legal coercion.

[95] *See* Richard J. Arneson, *Paternalism, Utility, and Fairness*, 43 Rev. Intl. de Phil. 409, 435 (1989).

[96] *See* Robin West, *Taking Preferences Seriously, in* Narrative, Authority, and Law 299, 319–30 (1993); *see also* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 638–42, 647 (1982).

[97] *See* Gerald Dworkin, *Paternalism, in* Paternalism 19, 20, 23, 27–29 (Rolf Sartorius ed., 1983). For a view that in some contexts (not ours) paternalism is not necessarily incompatible with a commitment to individual choice, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is not an Oxymoron* (University of Chicago Public Law and Legal Theory Working Paper No. 43).

Finally, there is an intermediate interpretation of the altruistic rationale, which perceives the interest of promoting concern for others as an important social value and acknowledges law's impact in inculcating this value. This approach can justify legal devices that encourage beneficial interventions – and thus arguably inculcate communal concern – even where it is not clear that the intervention corresponds with the beneficiary's will. As a form of nonpaternalistic altruism, this approach would not encourage interventions where the beneficiary's disapproval is – explicitly, implicitly, or hypothetically – clear. In borderline cases, however, where it is hard to ascertain the preferences of the expected beneficiary, an approach that seeks to inculcate concern for others would reject the presumption of noninterference implied by the autonomy rationale and would adopt the opposite presumption, according to which the law seeks to encourage beneficial interventions.

By now, I hope that *Glenn*'s spell has been effectively dissipated. Rather than rejecting all good samaritan claims for restitution, both autonomy and altruism support these claims in appropriate cases. These two rationales yield a spectrum of alternatives for a new doctrine of good samaritan intervention. At one end of this spectrum lies the autonomy rationale, together with the altruistic rationale interpreted as respect for others, which are both guided by the benefactor's (*ex ante*) preferences. They mandate restitution if, and only if, in the given circumstances, (1) it was impractical to inquire into the actual preferences of the expected beneficiary, (2) there is no external indication that she disapproves of the court-imposed contract of intervention in consideration of restitution of expenses, and (3) the intervention was clearly (*ex ante*) cost-beneficial to her. At the other end of this spectrum lies the "altruism as a concern for other people's genuine interests" rationale. To the extent that Anglo-American law would be willing to adopt this rationale, it would require decisionmakers to consider which types of human predicaments justify legal overriding of people's preferences. Between these two poles lies a third approach, which – in the name of the social value of inculcating concern for others – allows restitution even if the interference involved was not as clearly advantageous to the beneficiary as what is required under the autonomy rationale.

If the law of restitution is seriously to repudiate *Glenn*'s infamous legacy, its choices are along this spectrum, far removed from the modest tinkering of the new Restatement. But alongside this reform, one aspect of the existing doctrine needs to be left intact: the traditional differentiation between

protection of life or health and protection of property. The significance of bodily integrity for our physical well-being, and the fact that our body is both the physical embodiment of our selves and the utmost reflection of who we are,[98] carry normative significance. Even the traditional doctrine allows restitutionary claims for services rendered in rescuing another's life or health, notwithstanding certain types of objections (irrational or uninformed) on the part of the beneficiary.[99] This paternalism is misplaced where the protected interest is not life or limb, but merely proprietary in nature.[100] With respect to proprietary interests, the normative choice that a liberal law faces is only between the pure autonomy rationale and the intermediate stance that gives weight also to the social interest in inculcating altruism.

With this proposed distinction in mind, I turn to some doctrinal implications, beginning with the question of the significance of the intervention's success.

D The significance of the intervention's success

Recall that – except with regard to an intervention directed at saving life[101] – Anglo-American law (recently affirmed by the new Restatement) provides restitution to good samaritans only if their effort to protect the defendant's interest met with actual success. A fruitless intervention, even if reasonable, so the argument goes, cannot be said to produce "any net value for the defendant"[102] (that is, any enrichment), and in any case, "a reasonable [person] could say that [s]he would only have been willing to pay for a result, not an attempt."[103] In contrast, the rule under civil law systems (endorsed in the common law world by Gareth Jones[104]) is that

[98] *See, e.g.*, Russell W. Belk, *The Ineluctable Mysteries of Possessions, in* To Have Possessions: A Handbook on Ownership and Property 17, 19 (Floyd W. Rudmin ed., 1991); Ernst Prelinger, *Extension and Structure of the Self*, 47 J. Psychol. 13, 18 (1959).

[99] *See* Restatement of Restitution § 116 (c), (d) & cmt. b & illus. 2–4 (1937). For a recent example, see, e.g., Credit Bureau Enterprises, Inc. v. Pelo, 608 N.W.2d 20, 25–28 (Iowa 2000).

[100] *Cf.* Mason & Carter, *supra* note 2, at 242.

[101] *See* Cotnam v. Wisdom, 104 S.W. 164, 166 (Ark. 1907); Matheson v. Smiley, [1932] 2 D.L.R. 787, 791 (Can.); Restatement of Restitution § 116 illus. 1 (1937); ALI Draft, *supra* note 18, § 20 cmt. c.

[102] Wade, *supra* note 3, at 1186–87.

[103] Andrew Burrows, The Law of Restitution 319 n.10 (2d ed. 2002); *see also* Restatement of Restitution § 117(1)(e) & cmt. d (1937).

[104] *See* Jones, *supra* note 44, at 149–50. *See also* Mason & Carter, *supra* note 2, at 238, 240.

the good samaritan is not required to demonstrate "ultimate success," as long as she can show that she acted with "reasonable diligence."[105]

The latter approach is preferable. To start with, success is not required from the viewpoint of altruism. The merit in intervention is the benefactor's willingness to incur inconvenience or danger in responding to another's need and, therefore, is not dependent upon success.[106] Furthermore, requiring actual success is likely to generate unfortunate incentive effects that undermine the (hypothetical) preferences of potential beneficiaries. Making success the prerequisite for restitution reduces the expected recovery of potential benefactors to below their actual expenses. It thus produces a disincentive for other-regarding interventions. Because potential benefactors can rarely be certain in advance that their intervention will succeed, such a requirement might deter them from undertaking a costly intervention in assisting a stranger.[107] For this reason, the beneficiary's advantage of not having to pay for an unsuccessful intervention is likely to be outweighed (*ex ante*) by the disadvantage of depriving her of sources of potential assistance. There may be cases where the other-regarding motives of a particular potential benefactor would suffice to induce intervention, even if the law conditions recovery on success.[108] But because these are the exceptions to the rule – most people are unwilling to take the risk of incurring a material sacrifice for a stranger – potential beneficiaries would opt for the legal norm that is most advantageous to them, i.e., the one that does not require success.

Yet, some authors – notably Andrew Burrows and Saul Levmore – still justify the requirement of success.[109] They point to the fact that success is also required under maritime law.[110] They add a twofold argument: (1) that without the requirement of success there would not be enough

[105] *See* Sieg Eiselen & Gerritt Pienaar, Unjustified Enrichment 280 (1993); Lavasseur, *supra* note 9, at 93–97; F. H. Lawson et al., Amos and Walton's Introduction to French Law 194 (2d ed. 1963); Dawson (pt. 1), *supra* note 10, at 823; Paolo Gallo, *Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile, in* Unjust Enrichment: The Comparative Legal History of the Law of Restitution 275, 279 (E. J. H. Schrage ed., 1995); R. D. Leslie, *Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor*, 1983 Jur. Rev. 12, 15–16; Stoljar, *supra* note 9, at 99. For a similar rule in Talmudic civil law, see Jonathan Blass, Jewish Law for Israel: Unjust Enrichment Law 118 (1991) (Heb.).

[106] *See, e.g.*, Kleinig, *supra* note 77, at 386.

[107] *See* Dawson (pt. 2), *supra* note 10, at 1115; McInnes, *supra* note 10, at 62.

[108] *See* Landes & Posner, *supra* note 10, at 95.

[109] *See* Burrows, *supra* note 103, at 319–20; Levmore, *supra* note 10, at 894.

[110] *See* Mason & Carter, *supra* note 2, at 244. For maritime law, see, e.g, Rose, *supra* note 30, at 374.

incentive for benefactors who have begun to intervene, but have encountered difficulties, to press on and succeed, and not to stop at halfhearted attempts;[111] and (2) that the difficulty with the disincentive effects of the requirement of success can be remedied, as it is in maritime law, by adjusting the amount of recovery received by successful benefactors, so that *ex ante* potential benefactors are as motivated as they would be if they were to receive only restitution in all intervention attempts.[112]

Both prongs of this counterargument are misconceived. While the concern with regard to halfhearted efforts is real, focusing on it is counterproductive from the perspective of the potential beneficiary. Given the disincentive effect of requiring success, the advantage of protection against halfhearted attempts is insignificant. Because most potential benefactors are deterred from intervening due to the fear of incurring financial loss, requiring success has the far more likely consequence of discouraging potential benefactors from making any effort whatsoever, contrary to the preferences of most potential beneficiaries.[113]

This problem could have been solved if the second claim made by proponents of the success prerequisite were valid, because then, the best of both worlds can be realized. But there is an important difference between good samaritans and maritime salvors that makes this happy result unlikely. Maritime salvors are typically professional. Interventions are their business. Therefore, as long as their expected recovery exceeds the cost of their intervention (as it is under maritime law, which combines substantial positive rewards in cases of successful intervention with a rule of no recovery – not even of expenses – where there is no success), they will intervene whenever such intervention is expected to be beneficial and, at the same time, will be motivated enough to complete their task successfully.[114] But insofar as your typical good samaritan – a bystander – is concerned, the possibility of extracting a positive reward is unlikely similarly to offset the risk of incurring uncompensated expenses and losses in cases of failed attempts. The good samaritan's intervention is not part of an enterprise, which is self-insured against failed transactions. If the law were not to provide her with external insurance – a guarantee that she would not be materially worse off due to her other-regarding intervention – the typical bystander, who is likely to be risk averse respecting such a contingency, would abstain from intervening, even if faced with the possibility of positive recovery.

[111] *See* Burrows, *supra* note 103, at 319–320; Levmore, *supra* note 10, at 894.
[112] *See* Levmore, *supra* note 10, at 894.
[113] *Cf.* McInnes, *supra* note 10, at 62 n.152.
[114] *See* Landes & Posner, *supra* note 10, at 101; Rose, *supra* note 10, at 176, 198.

As we have seen, because the likely consequence of requiring success is deterrence of potential benefactors, this requirement runs counter to the potential beneficiary's hypothetical preferences. This is the case when proprietary interests are at stake, because even risk-neutral potential beneficiaries object to such deterrence. This is even more so the case when an intervention is aimed at saving life or limb, with regard to which most potential beneficiaries are risk averse. Success should not be a prerequisite for good samaritan claims, and the concern of halfhearted attempts should be addressed as part of the inquiry as to the good samaritan's reasonable diligence, so that her claim will be rejected if the intervention's failure is a result of her inappropriate withdrawal.

I do not deny that where a good samaritan's attempt has failed, she cannot point to any actual enrichment of the beneficiary.[115] And although some have attempted to reconceptualize enrichment so as to include also the advantage of such attempts,[116] I find no need to do so. I concede that the concept of enrichment can be interpreted so as to support either of the conflicting doctrinal rules with regard to the requirement of success. This result does not disturb me, because – as elaborated in chapter 2 – for me the prevention of unjust enrichment is the (loose) framework of the law of restitution and not its normative underpinning.[117] Only by directly resorting to the pertinent normative considerations – in our case, reference to autonomy and of altruism – should and can doctrinal dilemmas be resolved.

Rejecting the requirement of actual success by no means implies that the *ex ante* likelihood of success is irrelevant to the good samaritan claim. Quite the contrary, the (*ex ante*) appeal of an intervention for potential beneficiaries is a function of the magnitude of the expected damage the intervention is likely to prevent and the expected cost of intervention. Therefore, interventions are less appealing as the probability of success decreases.[118] In terms of civil law doctrine, the *ex ante* likelihood of success seems an integral part of the inquiry as to whether the benefactor acted

[115] *See* Wonnell, *supra* note 52, at 169–70.

[116] *See* Peter Birks, *Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity*, 1985 Jur. Rev. 227, 250; Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1201–02 n.27 (1995).

[117] For a narrower claim that insists that cases of good samaritan intervention are different from other paradigmatic cases of unjust enrichment and, therefore, are not necessarily concerned with the enrichment of the beneficiary, see Garry A. Muir, *Unjust Sacrifice and the Officious Intervener, in* Essays on Restitution 297, 297–98 (Paul D. Finn ed., 1990); Stoljar, *supra* note 9, 22, at 41.

[118] *See* Hanoch Dagan, *In Defense of the Good Samaritan,* 97 Mich. L. Rev. 1152, 1184–86 (1999).

with "reasonable diligence," namely: whether the intervention was to the advantage of the beneficiary from her perspective at that point in time.[119]

This may prompt a final attempt to salvage the requirement of actual success by seeing success as a proxy for desirable *ex ante* interventions.[120] Levmore, who raises this idea, explains that an actual success requirement helps bypass an error-prone judicial determination under the "reasonable diligence" rule that necessitates an assessment of *ex ante* desirability. I am not convinced that actual success is a plausible proxy for determining whether the good samaritan should have attempted the task because it ignores the fact that a good chance of success does not always result in success. But even if we assume that success is a good proxy for desirable interventions, it should be rejected for a familiar reason: the disincentive effect of the requirement of success makes any advantage it may have in screening interventions relatively negligible.

E The benefactor's claim for remuneration

Common law allows good samaritan claims for remuneration for time, effort, and expertise only with respect to preservation of life or limb and only to trained professionals whose services fall squarely within the realm of their vocations (the typical case is the off-duty physician who provides assistance in an emergency situation).[121] Civil law – which originally disallowed any remuneration for services and limited recovery to only the sum of the outlay – currently concurs with the common law regarding the latter limitation, but not the former one, so that professional services rendered in an *ex ante* beneficial intervention for the preservation of another's proprietary interest also trigger a valid claim for recovery.[122] The new Restatement, as may be recalled, follows suit.

[119] *See* Ernest G. Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law*, 13 Cornell L.Q. 190, 196 (1928).

[120] *See* Levmore, *supra* note 25, at 1430, 1437, 1442.

[121] *See Cotnam*, *supra* note 101, 104 S.W. 164 (Ark. 1907); *Matheson*, *supra* note 101, [1932] 2 D.L.R. 787 (Can.); Jones, *supra* note 44, at 163; George B. Klippert, Unjust Enrichment 110–11 (1983).

[122] *See* Lavasseur, *supra* note 9, at 80–84; Lawson et al., *supra* note 105, at 194; William J. Stewart, The Law of Restitution in Scotland: Being Mainly a Study of the Personal Obligation to Redress Unjust Enrichment 168 (1992); Dawson (pt. 2), *supra* note 10, at 1083, 1118–19; D. C. Fokkema & A. S. Hartkamp, *Law of Obligations, in* Introduction to Dutch Law for Foreign Lawyers 93, 108 (J. M. J. Chorus et al. eds., 2d rev. ed. 1993); Leslie, *supra* note 105, at 21–22; Lorenzen, *supra* note 119, at 209; Martin, *supra* note 9, at 198.

The measure of recovery in successful good samaritan claims for remuneration in common law is likely to be "reasonable" or fair market value of the services rendered.[123] Yet, there is some disagreement with respect to the valuation of such reasonable value.[124] *Cotnam v. Wisdom* held that a court should not consider prevailing practices (in this case, the custom of physicians to graduate their charges according to the patient's ability to pay) that may indicate what the benefactor's colleagues would have charged for the service rendered.[125] Although recently reaffirmed by the new Restatement,[126] this view is controversial, and opposing it is the claim that any practice that affects the reasonable market value of the services rendered should be taken into account.[127]

The overly restrictive doctrine

To see the indefensibility of the common law's limitations, I begin with the familiar distinction between accounting costs and opportunity costs. Accounting costs are the out-of-pocket expenditures incurred consequent to a certain course of action. Often the cost of our choices – respecting investment, consumption, or any other matter that requires allocation of scarce resources between competing ends – greatly exceeds the accounting cost. The true cost of a decision is its opportunity cost: the cost of the next best alternative that one must relinquish in order to take one action rather than another.[128]

This simple fact easily repudiates the traditional civil law dichotomous treatment of expenditures and services. Allowing a benefactor reimbursement only for explicit costs she has incurred cannot be justified, because excluding remuneration for the benefactor's "loss of profitable time" leaves intact in many cases some of the intervention's cost.[129] Neither autonomy nor altruism justifies such a disincentive. For *ex ante* beneficial interventions, potential beneficiaries would prefer that possible benefactors be assured that their reasonable costs – either in the form of accounting costs or in terms of opportunity costs – will be covered, so that they are not discouraged from rendering assistance. (From the perspective of

[123] *See* Restatement of Restitution §§ 116 cmt. a, 113 cmt. g, 117 cmt. c (1937); ALI Draft, *supra* note 18, § 20 cmt. c.

[124] *See* Palmer, *supra* note 2, § 10.4.

[125] 104 S.W. 164, 166–67 (Ark. 1907).

[126] ALI Draft, *supra* note 18, § 20 illus. 8.

[127] *See* McInnes, *supra* note 10, at 67 n.178.

[128] *See* Robert Cooter & Thomas Ulen, Law and Economics 30 (3d ed. 2000).

[129] *Cf.* Antony M. Honoré, *Law, Morals and Rescue, in* The Good Samaritan and the Law 225, 237–38 (James M. Ratcliffe ed., 1981).

the beneficiary, it is immaterial whether the benefactor subcontracts all of the tasks involved and submits them as expenses[130] or whether she intervenes by herself.)[131] By the same token, compensating benefactors for the true costs of their interventions does not undermine altruism. Serving the interests of others when no self-interest is furthered in so doing is virtuous enough.

The same reasons militate against the common law limitation of allowing recovery only in cases where life and limb are at risk. There may be a stronger public interest in promoting intervention for the protection of life and limb justifying particularly strong means of encouragement, such as positive rewards.[132] But this does not mean that where proprietary interests are at stake, there is no justification for any encouragement. On the contrary, as we have seen, both autonomy and altruism justify covering all types of costs that a benefactor invests in her intervention as long as they are *ex ante* reasonable. The common law rule allowing remuneration only for intervention to preserve life and limb must be repudiated. The new Restatement is correct in discarding this unjustified distinction.

Similar considerations act to cast doubt on the conventional rule – in both common law and civil law – that limits the right to remuneration to professionals. Of course, in certain circumstances, intervention by nonprofessionals should be discouraged. Where a more qualified person is available, ready, and able to act, the law justifiably disallows any claim for restitution.[133] This requirement – that the benefactor be the most suitable person to act – is surely desirable: the services of the most competent person available are preferable because her services are likely to yield the most effective result.[134] But what if no professional is present and an available nonprofessional is competent enough to undertake the task at hand? Her intervention in such circumstances may be desirable (if it is *ex ante* cost-beneficial). Leaving some of her true costs uncovered by disallowing any recovery for her opportunity cost would result in an inappropriate disincentive. In short, preference for professionals is appropriate, but it is fully guaranteed by the requirement that the benefactor be the most competent person to act. No further discouragement of intervention by nonprofessionals is warranted. The blanket dismissal of claims of such

[130] *See* Restatement of Restitution §§ 116 cmt. a, 113 cmt. h (1937).
[131] *See, e.g.*, Stewart, *supra* note 122, at 168.
[132] *But cf.* Jones, *supra* note 44, at 163.
[133] *See, e.g.*, Restatement of Restitution §§ 116 cmt. a, 114 cmt. b (1937); Restatement (Second) of Restitution § 3 cmt. b (Tentative Draft No. 1, 1983); Burrows, *supra* note 103, at 316; Jones, *supra* note 44, at 147–48; Muir, *supra* note 117, at 313–14.
[134] *See, e.g.*, Murphy, *supra* note 7, at 621.

good samaritans for remuneration for the time and effort they expended in performing *ex ante* beneficial intervention is unjustified.[135]

Some authors nonetheless justify such a dismissal by reference to the prohibitive administrative costs of quantifying the remuneration due to nonprofessionals who, by definition, do not sell equivalent services in the market.[136] This critique might have undermined my conclusion if the only available measure of recovery were the reasonable market value of the services rendered. But this is not the appropriate measure of recovery for the time, effort, and expertise invested in good samaritan interventions.

The measure of recovery

Awarding good samaritans the fair market value of their services seems a reasonable mechanism – although not the only possible option[137] – if we focus on evaluating the enrichment of beneficiaries. But if we focus, as we should, on the pertinent rationales – autonomy and altruism – a different measure of recovery emerges. As we have seen, at least with respect to proprietary interests, both rationales point to the intervention's cost to the benefactor, rather than its benefit to the beneficiary.[138] (As I mentioned above, cases of life rescue may justify a higher measure of recovery.) Only the benefactor's opportunity cost – which is actually, in many cases, easily determinable[139] – both eliminates any disincentive for *ex ante* beneficial interventions and guarantees that the benefactor will not extract from her intervention any positive reward, that is actual profit, above and beyond the benefactor's opportunity cost.

The line between eliminating disincentives via restitution and creating incentives via positive rewards is a fine line. Certain extra-legal factors,

[135] *Cf.* Boudewijn Bouckaert & Gerritt DeGeest, *Private Takings, Private Taxes, Private Compulsory Services: The Economic Doctrine of Quasi Contracts*, 15 Int'l Rev. L. & Econ. 463, 485 (1995).

[136] *See* Landes & Posner, *supra* note 10, at 109–10; McInnes, *supra* note 10, at 67. *See also* ALI Draft, *supra* note 18, § 20 cmt. b.

[137] For the multiplicity of measures of recovery under the heading of the beneficiary's gain, see chapter 7.

[138] *Cf.* Mason & Carter, *supra* note 2, at 244. South African law seems to apply such a measure of recovery. *See* D. J. Joubert & D. H. Van Zyl, *Mandate and Negotiorum Gestio, in* 17 The Law of South Africa 30, at 30–31 (W. A. Joubert & T. J. Scott eds., 1983); J. P. Van Nikerk, *Salvage and Negotiorum Gestio: Explanatory Reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage, in* Unjustified Enrichment 148, 173 (T. W. Bennett et al. eds., 1992).

[139] Consider an example of a passer-by lawyer who stumbles upon an emergency situation where her opportunity cost is usually determined according to her hourly charge.

such as private gratitude and public acclaim, may suggest that the benefactor's return from an intervention is positive even under a legal rule that merely erases the pre-legal disincentives.[140] By contrast, other factors may reduce the expected return under a restitution rule: the possibility that a court will not perceive the intervention as reasonable, the litigation costs, the possible difficulties in collection, and the possibility of the beneficiary's insolvency. It is difficult to balance all these additional considerations; at the end of the day, they may cancel one another. But even if they do not, my claim that positive rewards are more problematic than restitution in the good samaritan context would still be correct.

One problem with positive reward from the point of view of the beneficiary's autonomy is that the possibility of extracting a profit out of an intervention may become a significant consideration for potential benefactors, encouraging interventions in cases where the cost of intervention exceeds the expected benefit. Although such interventions involve the risk of dismissal of the benefactor's claim, the possibility of a positive reward may, nonetheless, encourage some to take their chances. (A possible solution to this overinvestment difficulty – limiting recovery to the expected benefit of the intervention – is too prone to judicial errors.) More generally, as Robert Long maintains, because law's imposed contract is hypothetical from the perspective of the beneficiary only – the benefactor is the active party – a commitment to autonomy implies that a "price" closer to the benefactor's cost, i.e. a measure of recovery that leaves a greater share of the hypothetical contract surplus in the hands of the beneficiary, must be preferred.[141] (Some have actually gone further than that, suggesting that positive rewards would encourage potential "benefactors" to create a demand – a risk or danger – for their own services.[142] But the possibility of a deliberate creation of an emergency can be handled in other, more straightforward, ways, such as by forfeiture of the award and imposition of civil or criminal sanctions.)[143]

A reward-based doctrine is also pernicious to the virtue of altruism because it might commodify the intervention. The likelihood of profits may be perceived as a commercialization of the activity, thus diluting the moral significance of beneficial interventions.[144] Not any kind of payment taints the moral implications of a beneficial action; altruism, after all, does not require material self-sacrifice. But encouraging interventions that are motivated by the pursuit of profits is likely to undermine the potential

[140] *See* Levmore, *supra* note 10, at 882.
[141] *See* Long, *supra* note 10, at 431–32.
[142] *See* Levmore, *supra* note 10, at 886–87.
[143] *See* Rose, *supra* note 10, at 194.
[144] *Cf.* Leslie, *supra* note 105, at 22.

cultural effects of good samaritan law in inculcating altruism (as opposed to merely facilitating beneficial consequences). I am not arguing that there is a natural or conceptually necessary limitation to the amount of utility that an actor can obtain and still preserve the moral significance of her act. There are contexts in which positive payoffs coexist with an appreciation of the intrinsic virtue of the action (consider the way in which excellence in one's profession sometimes coexists with generous monetary returns). But the context of good samaritanism does not currently afford such a convenient coexistence. One reason for this may be that such a coexistence is usually achieved by dissociating the action from the payoff, thus preserving the ambivalent understanding of commodified (paid-for or otherwise profitable) and noncommodified (altruistically given) action.[145] It is hard to see how such dissociation can be achieved in our context. Therefore, reimbursement of costs (or the equivalent thereof) seems to be the maximum measure that can be awarded without obliterating the potential shaping effect of good samaritan law.

For these reasons the opportunity cost of an intervention is the most defensible measure of recovery. It is, of course, the only available remedy where nonprofessional benefactors are concerned, but it is no less appropriate in cases involving professional benefactors. The fair market value of the services rendered frequently can serve as a reasonable proxy for the professional benefactor's opportunity cost. But there are circumstances where the professional benefactor's opportunity cost would be less than the customary fee. Presumably there may also be cases in which the most suitable person to act is a professional whose opportunity costs are greater than the customary fee. The law is baffling with regard to cases of such divergences between the benefactor's fee schedule and the prevailing fee for such services. My analysis suggests that the former alternative – which has been hinted at in the case-law, but frequently criticized in the literature – is more desirable.[146]

F The benefactor's claim to compensation for losses

Lastly, I turn to the question of whether a good samaritan should be entitled to compensation for damages to her property or her body that she suffered as a result of her (*ex ante*) beneficial intervention. As with other issues, common law takes a reluctant (if not hostile) stance: except

[145] *See* Margaret Jane Radin, Contested Commodities 102–14 (1996).

[146] *See* Anthony T. Kronman & Richard A. Posner, The Economics of Contract Law 61 (1979).

in cases where some negligence on the part of the beneficiary caused the emergency that "invited" the intervention, common law consistently refuses to require her to compensate her benefactor for any damages due to the intervention.[147] (I do not address possible proceedings the benefactor may launch against the person responsible (if any) for creating the emergency. I also assume that both the benefactor and the beneficiary are uninsured.) This rule is left intact in the new Restatement.

The traditional rule has come under criticism from scholars who have denounced the significance of the beneficiary's negligence[148] and have decried the extreme libertarian ("mind your own business") premise underlying this legal doctrine.[149] At times, reference has been made to civil law, which takes a much more liberal approach and manipulates the possible causes of action in order to indemnify, at least in cases of *ex ante* beneficial intervention aimed at life preservation, the rescuer (or her dependents) for such losses.[150] But this approach has also been criticized. Where the damage caused by the intervention is severe – the extreme case being the benefactor's death – the compensation involved may be huge, and notwithstanding the moral appeal of the claim of the benefactor or her dependents, it seems harsh to lay the entire loss on the shoulders of the imperiled beneficiary who is at no fault.[151]

William Landes and Richard Posner suggest a seemingly easy solution to this difficulty by claiming that there is no need to permit benefactors to obtain compensation for damages they incur:

> If the probability of serious injury to the [benefactor] is slight *ex ante*, then the expected cost of [her intervention] will not be substantially higher than if there were no danger, while if the probability of a serious injury to the [benefactor] is high *ex ante*, the net expected benefits from the rescue attempt are apt to be small or even negative. In neither case is there a substantial basis for seeking to alter the level of (altruistically induced) rescues by always giving the [benefactor] a right to compensation for [her] injury.[152]

[147] *See, e.g.*, JONES, *supra* note 44, at 154–55, 164–67.

[148] *See* Levmore, *supra* note 10, at 898–99.

[149] *See* Honoré, *supra* note 129, at 236.

[150] *See* LAVASSEUR, *supra* note 9, at 128–29; Dawson (pt. 2), *supra* note 10, at 1108–12; Fokkema & Hartkamp, *supra* note 122, at 108; Stoljar, *supra* note 9, at 42, 144–46; Andre Tunc, *The Volunteer and the Good Samaritan, in* THE GOOD SAMARITAN AND THE LAW, *supra* note 129, at 43, 51–54.

[151] *See* JONES, *supra* note 44, at 166; Dawson (pt. 2), *supra* note 10, at 1114–15; Stoljar, *supra* note 9, at 149–51.

[152] Landes & Posner, *supra* note 10, at 111–12.

Unfortunately, this happy outcome (from potential beneficiaries' point of view) is incorrect: Landes and Posner ignore the intermediate – and, therefore, probably most frequent – cases in which the expected injury is not slight, so that compensation is not superfluous, but is still not too high, and the intervention is, therefore, not (*ex ante*) undesirable. Thus, the dilemma of the benefactor's potential losses is genuine, and without easy solution.[153]

Yet, a relatively satisfactory solution that can accommodate these hard cases, as well as both the extreme categories referred to by Landes and Posner, does exist. I conclude this chapter with a description of such a solution, borrowed from the Israeli statutory mechanism. This scheme can be interpreted as responding to the normative foundations of the law of good samaritan intervention. It is also responsive to the criticism leveled at the traditional common law doctrine as well as to the reluctance toward its civil law counterpart.

Israeli law accords differential treatment to the benefactor's proprietary losses and her bodily injuries. If "damage is caused to the property of the benefactor in consequence of [her intervention], the Court may order the beneficiary to pay compensation to the benefactor if it considers it just to do so in the circumstances of the case."[154] By contrast, good samaritans who sustain bodily injuries while acting to save the life or property of another are entitled, in certain conditions, to compensation from public funds, which are administered as part of the social security apparatus.[155]

[153] One may also try to support the traditional rule by reference to the likely unwillingness of potential beneficiaries to include in an explicit contract with (professional) salvors a provision requiring them to compensate such salvors for their possible damages, insisting that law's hypothetical contract should likewise refuse to impose such a liability. While seemingly compelling, this argument also fails because it assumes a salvor can – and usually does – insure against such damages, spreading the costs of such insurance amongst its customers. As section D shows, such an assumption holds for professional salvors and fails for good samaritans.

[154] Unjust Enrichment Law, § 5(a), 1979, 33 LSI 44–45, (1978–79) (Isr.) *translated in* 1 Restitution L. Rev. 213, 214 (1993).

[155] *See* The National Security Law (Consolidated Version), § 287(5), 1995, 1522 LSI 207, 210 (1995) (Isr.); *see also* Life-Saving Operations (Soldier Casualties) (Benefits) Law, §2, 1965, 19 LSI 314 (1964–65) (Isr.). A similar rule applies in Austria and has been strongly recommended by leading authorities. *See* Jones, *supra* note 44, at 167; Dawson (pt. 2), *supra* note 10, at 1121 & n.112; Honoré, *supra* note 129, at 236–37. For less comprehensive schemes in other countries, see John P. Dawson, *Rewards for the Rescue of Human Life?, in* The Good Samaritan and the Law, *supra* note 129, at 63, 75–67, 88; Stoljar, *supra* note 9, at 151–52; Wade, *supra* note 3, at 1188 n.26.

The justification for allowing compensation, in certain circumstances, for damages sustained to a benefactor's property due to her intervention is similar to the reason why reimbursement and remuneration are in place: a no-compensation rule creates a disincentive for a possible beneficial intervention, contrary to the hypothetical preferences of the beneficiary.[156] But a simple analogy between these two issues is too hasty. At times, where the intervention has been performed by a professional who sues and recovers remuneration for her services, the benefactor's fee schedule already incorporates a risk premium, so that no further compensation is necessary to offset the disincentive effect of the risk of damages.[157] Moreover, even if no such double counting is involved, restitution and compensation are still somewhat different, at least with respect to cases of protecting proprietary interests. In the context of reimbursement of the costs of an intervention, which are relatively fixed *ex ante*, the beneficiary's possible risk aversion to the damage that the intervention was aimed at preventing may lead the law to adopt a lax interpretation of the reasonable diligence requirement, allowing restitution even if the expected benefit of the intervention is somewhat dubious.[158] The context of possible benefactor damages is different, because the contingency of excessive damage to the benefactor is often just as risky as the occurrence of the damage that the intervention is meant to prevent (recall that I focus now on interventions that protect proprietary interests).[159] Therefore, even risk-averse beneficiaries would opt for a rigid interpretation of the reasonable diligence requirement. With no paternalistic overriding of beneficiaries' hypothetical preferences when proprietary interests are at stake, the law should follow suit. The benefactor should be compensated for proprietary losses that resulted from her intervention only if the intervention is *ex ante* cost-beneficial.

This analysis does not apply with respect to interventions aimed at protecting life or limb. The risk aversion of potential beneficiaries respecting bodily injuries is typically greater than their risk aversion in the context of monetary losses, even if significant, as in the case of beneficiaries who

[156] *See, e.g.*, Honoré, *supra* note 129, at 236.

[157] *See* Albert, *supra* note 44, at 118.

[158] The reason for this is that risk-averse people are willing to pay a premium, or incur a certain, minimal loss, in order to insure themselves against contingencies that may affect significant portions of their wealth. *See, e.g.*, Steven Shavell, Economic Analysis of Accident Law 186 (1987).

[159] The text assumes that the extent of uncertainty of the two risks involved – losing the interest that is at peril and being exposed to tortious liability – is similar as well. If this assumption is relaxed and the beneficiary is risk averse, the comparison of the expected risks, suggested in the text below, is not sufficient, and due consideration must also be given to the relationship between their standard deviations.

may be found liable for their benefactors' damages. Therefore, regarding bodily injuries, the lax, rather than the rigid, interpretation of the reasonable diligence requirement best reflects their hypothetical preferences. Furthermore, insofar as the law would apply some version of the paternalistic interpretation of the altruistic rationale with regard to the individual's interest in her bodily integrity, we could find further justification for encouraging interventions aimed at protecting these interests.

Why should not the same rule apply to the benefactor's bodily injuries? Is it justified to exempt beneficiaries from liability for bodily damage to their own benefactors and shift the cost to the public pocket? It seems to me that the answer to this question – the need for a unique public law solution when a benefactor has suffered bodily injury – derives from the fact that this is the most extreme, and hence most troubling, instance in which both the common law no-recovery rule and its civil law counterpart of (relatively) easy recovery are unsatisfactory. Leaving such a benefactor to her own devices is not an acceptable solution: it undermines altruism, and, usually, it also contradicts the hypothetical preferences of potential beneficiaries. As critics of the civil law approach frequently comment, however, compensation for bodily injury is typically high, and imposing such a prohibitive liability on an innocent beneficiary – even where the intervention corresponds with her hypothetical preferences[160] – seems just as unacceptable an outcome. It might also frequently leave the injured benefactor with insufficient recovery because the typical beneficiary presents insolvency risks when faced with such liabilities. The socialization of the risks of good samaritan interventions averts all these undesirable results. Moreover, the "public subsidy" of altruistic interventions that lead to bodily injury of benefactors – spreading the cost of mutual aid over the whole community in these extreme circumstances – can be interpreted as (at least a symbolic) reaffirmation of the public interest in inculcating the virtue of altruism.[161]

The spirit of *Glenn v. Savage* has dominated the common law for too long. It has entailed a hostile attitude toward claims made by good samaritans. It has distorted the doctrine in vital aspects – establishing the undesirable requirement of success, applying an overly narrow scope of admission of

[160] The difficulty with exacting restitution from the beneficiary is even stronger when the intervention was not justified in terms of her hypothetical preferences but, rather, only due to the law's paternalistic stance.

[161] *Cf.* Sheleff, *supra* note 87, at 135; Dawson (pt. 2), *supra* note 10, at 1121.

claims for remuneration for time, effort, and expertise, and insisting on a blanket refusal of any compensation to benefactors for damages they incur consequent to their intervention. But the justifications of *Glenn v. Savage* are singularly weak: neither autonomy nor altruism justify the common law's reluctance with regard to the monetary claims of good samaritans. Both values mandate – albeit for different reasons and in differing degrees – reform of the prevailing rules.

5

Self-interested conferrals of benefits

Shifting gear from good samaritans to restitution claimants who conferred a benefit in the pursuit of their own self-interest raises a theoretical puzzle. On the face of it, these claimants – think, for example, of a class action member who pays her lawyer's fee, a mortgagee who pays its mortgagor's taxes in order to prevent foreclosure,[1] or one of several tortfeasors who settles with the victim[2] – can raise none of the reasons for restitution used in either chapter 3 or chapter 4. Their will has not been vitiated; on the contrary, they typically act with some deliberation and intent. They are not (necessarily) do-gooders: in fact, as the title of this chapter indicates, their claim is characterized as deriving from actions that are aimed at being self-serving. And while they can generally show that they have conferred a benefit on the defendant, the defendant can typically invoke the strongest defense – according to both law and theory – of restitution defendants in the good samaritan setting: in some cases she actively indicated her unwillingness to pay for the benefit; in many others, she could at least have been asked (no emergency made communication impracticable). Why should such restitution claimants ever be allowed – even encouraged – to "officiously meddle" (as the common epithet goes) in the defendant's affairs? And why is it that such self-interested claimants actually fare relatively well in the common law of restitution (at least as compared to their other-regarding counterparts)?[3]

Answering these questions is not only important in order to explain better and justify existing restitutionary doctrine. It is also crucial in order to evaluate its boundaries. Getting these boundaries right has recently become a matter of some legal urgency. This exciting development emerged out of a new pattern of litigation. Governments started suing

[1] *See* George E. Palmer, The Law of Restitution § 10.5(a), at 23 (1978 & Supp. 1998).

[2] *See id.* § 10.6(c), at 410–11. The case of a joint tortfeasor who settles only her share is more complex. *See* McDermott, Inc. v. AmClyde, 511 U.S. 202, 216–17 (1994).

[3] *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment Int. Note to Ch.3 Topic 2 (Tentative Draft No. 2, 2002) [hereinafter ALI Draft].

industries for costs they incurred in ameliorating their citizens' injuries, arguably caused by the defendant industries, as well as in preventing (or reducing) the risk of such future injuries. The tobacco litigation by the states and the settlement of that litigation (the largest ever) is the most prominent example of this pattern. A similar pattern is developing in the gun industry, where more than thirty suits have been brought against manufacturers.[4] Industries waiting in the wings for this treatment include the lead-based paint makers,[5] and perhaps even brewers, distillers, and fatty food sellers.[6] These claims (at times implicitly) assume – as I assume in this chapter – that consumers or third parties have actually been harmed by the product at issue, be it cigarettes, guns, etc., and have valid claims against the pertinent industry.[7] Given an underlying industry tort liability, the question arises as to the validity of the *governments'* restitutionary claims against that injurious industry.

This chapter takes on the theoretical challenge of restitutionary claims by self-serving claimants with an eye toward this important practical challenge presented by the contemporary frontier of American mass litigation between governments and injurious industries. Section A presents the traditional doctrine (which by and large this chapter defends and justifies) and explains how the government–industry litigation challenges its boundaries. Sections B–E explore the conditions and limitations under which restitutionary claims for unrequested benefits in the paradigm of this chapter should be – and, as a matter of black-letter law, usually are – recognized, thus answering the theoretical puzzle stated above. In these sections I claim that restitution for self-interested conferrals of unsolicited benefits can help to overcome free-riding problems that may hinder jointly beneficial actions. But restitution is not (and should not be) granted for all cases in which it can help cope with such difficulties. Restitution is properly denied where courts are ill-equipped to address free-riding behavior, as well as in categories of cases in which defendants have a legitimate conflicting concern with either the recipient's subjective devaluation of the

[4] *See* Robert L. Jackson, *Cincinnati's Suit Against Gun Makers Is Reinstated*, L.A. Times, June 13, 2002, at A17.

[5] *See* Thomas Grillo, *Lead-Paint Trial a Closely Watched Affair*, Boston Globe, Sept. 15, 2002, at H1.

[6] *Cf.* Jonathan Turley, Commentary, *Betcha Can't Sue Just One*, L.A. Times, July 26, 2002, at B15.

[7] This is, to be sure, a debatable matter. For conflicting views respecting the liability of the tobacco industry to smokers, compare Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for* Ex Post *Incentive-Based Regulation*, 109 Yale L.J. 1163 (1998) with Kip Viscusi, Smoking: Making the Risky Decision (1992).

conferred benefit or the plaintiff's likely conflict of interests. This theoretical (explanatory and justificatory) model – which is firmly grounded, as I hope to show, in our commitments to both autonomy and utility – will guide my resolution (in section F) of the innovative and challenging government–industry litigation.

A Tormented boundaries

Established categories and their loose-ends

The new Restatement sets out the prevailing restitution rules following the self-serving conferrals of benefits. The doctrine "combines a broadly negative proposition with a series of important exceptions."[8] The negative proposition is the denial of restitution to a "person whose intentional and self-interested course of action confers an unrequested benefit on another."[9] The Restatement notes the standard exceptions to this rule – "cases in which a self-interested intervention *is* frequently made the basis for a valid claim in restitution" – and correctly points to the protection of the claimant's property interest, the performance of joint obligation, and the performance of independent obligations as the three most important categories.[10]

A claimant whose "reasonable and necessary expenditure to maintain or protect an interest in property relieves a second person of an obligation, or spares the second person an otherwise necessary expense, by virtue of that second person's interest in the same property" has an established claim to restitution.[11] The actor's benefit-conferring intervention – by, for example, paying taxes or mortgage payments, or making necessary repairs – is justified by the need to avoid prejudice to her own interests given the existing "link" or "nexus" between the parties' interests; typical examples are of co-tenants, owners of the surface and mineral estates, or a lessee and a lessor.[12] (The maritime doctrine of general average is similar and similarly uncontroversial, if we set aside taxonomical doubts regarding its classification within the law of restitution. This doctrine relates to "certain extraordinary sacrifices made or expenses incurred to

[8] ALI Draft, *supra* note 3, § 23 cmt a. [9] *Id.* § 23.

[10] *Id.* at xvi, § 23 cmt. a, §§ 24–26. Another canonical example is the creation, preservation, or enlargement of a common fund. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 (Council Draft No. 4, 2002).

[11] ALI Draft, *supra* note 3, § 24 & cmt. a.

[12] *Id.* §24 cmts. a–b & illus. The question of the appropriate scope of these restitutionary remedies in the context of co-ownership is revisited in section 6.D.

avert a peril that threatens the entire voyage." The party sustaining the loss confers a common benefit, and the law allows her to seek proportionate contribution from all who participate in the maritime venture.[13])

Another "easy" case is of a restitution claimant who "performs all or part of an obligation for which [she] and [the] defendant are jointly and severally liable to a third person" where the performance discharges or reduces "an enforceable obligation of the defendant to the third person" and where "as between the claimant and the defendant, the performance or the part thereof with respect to which the claimant seeks restitution is primarily the responsibility of the defendant."[14] If the relationship between the claimant and defendant is not fixed by contract, these claims for indemnity (when – as between the parties – the defendant is solely responsible for the liability in question, as in cases where the claimant is only vicariously liable) and contribution (when the claimant – for example, one of several tortfeasors – paid more than her share of a common liability) are similar to those of the first category just mentioned. In both cases the parties' interests are linked, and the claimant's conferral of benefit – in this context: the payment of more than her share in the common liability – is but a means to protect her own self-interest.[15]

These two rules are fixed points in the law of restitution, subject to little doubt or debate. But around each of these easy cases of restitution there is a significant penumbra of hard cases.[16] Thus, insofar as the rule regarding

[13] *See* 2 Thomas J. Schoenbaum, Admiralty and Maritime Law 386–96 (3d ed. 2001); F. D. Rose, *Restitution and Maritime Law, in* Unjust Enrichment and the Law of Contract 367, 371 (E. J. H. Schrage ed., 2001). Schoenbaum comments that while originally "the purpose of general average was to avoid unjust enrichment through equitable contribution, today it serves rather to spread the risks of loss, similar to insurance." Schoenbaum, *id.* at 387. This chapter shows that rather than a dichotomy, the latter explanation – of risk spreading, or more precisely of the *desirability* of spreading the costs of averting the common peril amongst the parties to the maritime venture – is the underlying reason for considering the other unjustly enriched at the expense of the party sustaining the loss.

[14] ALI Draft, *supra* note 3, § 25. *See also* Restatement (Third) of Torts: Apportionment of Liability §§ 22–23 (2000).

[15] ALI Draft, *supra* note 3, § 24 & cmt. a & § 25 & cmts. a & b. For English law, see Charles Mitchell, The Law of Contribution and Reimbursement 7 (2003).

[16] H. L. A. Hart famously coined the distinction between core and penumbra. *See* H. L. A. Hart, The Concept of Law 123, 141–42, 144 (1961). But my use of these terms is different from Hart's. For Hart, the distinction derives from the linguistic characteristics of any given norm. For me – following the realist legacy – the difference between core (easy cases) and penumbra (hard cases) is a matter of the persuasion of the legal community which is (or at least should be) reflective of the relative difficulty of justifying these two types of cases. *Cf.* Ronald Dworkin, Law's Empire 352–54 (1986).

protection of property interests is concerned, the required nexus between the parties' interests "may also exist where the interest of one or both parties is less than full ownership." It is enough that the claimant has an equitable interest – such as the interest of a holder of a mortgage who "pays another party's debt to avoid foreclosure or attachment of a prior lien that would prejudice the payor's security" – and her interest may even be contingent or disputed. By contrast, restitution is denied, for example, from a neighbor who benefits from a necessary repair of an earthen dam that protects the lots of both claimant and defendant because they hold no interest in the same property.[17]

The boundaries surrounding restitutionary claims following a common liability are even murkier, as we can learn from the new Restatement's summary of the doctrine of equitable subrogation. Equitable subrogation may provide restitution to claimants (subrogees) who render a performance to a third person (the subrogor) "for which the defendant would have been liable had the third party asserted claim against the defendant directly." As between the litigating parties, "the performance or the part thereof with respect to which the claimant seeks restitution is primarily the responsibility of the defendant." But, unlike indemnity and contribution, in cases of equitable subrogation the restitution claimant and defendant do not necessarily share a common liability. Nonetheless, the required nexus can exist – even absent any explicit agreement between subrogee and subrogor – if the claimant acted "in the performance of an obligation owed independently to the third person, or otherwise in the reasonable protection of the claimant's own interests."[18] Where such a nexus applies, the subrogee is allowed to step into the shoes of the subrogor and get restitution from the defendant (who is primarily responsible for the loss).[19] Typical cases are of insurer subrogees, but insurance cases do not exhaust subrogation.[20] Furthermore, while "an entire stranger to the underlying transaction" will not be able to establish such a nexus, the purported subrogee's performance need not be one for which it was (even potentially) liable as a matter of law as long as "it is revealed to

[17] ALI Draft, *supra* note 3, § 24 cmts. c & d & illus. 14.

[18] *Id.* § 26 & cmt. a.

[19] *See, e.g.*, Andrew Burrows, The Law of Restitution 104 (2d ed. 2002); Peter Birks & Charles Mitchell, *Unjust Enrichment, in* 2 English Private Law 525, 605 (Peter Birks ed., 2000); F. Joseph Du Bray, *A Response to the Anti-Subrogation Argument: What Really Emerged from Pandora's Box*, 41 S.D. L. Rev. 264, 265 (1996); Keith E. Edeus, Jr., *Subrogation of Personal Injury Claim: Toward Ending an Inequitable Practice*, 17 N. Ill. U. L. Rev. 509, 511 (1997).

[20] *See, e.g.*, ALI Draft, *supra* note 3, § 26 cmt. d; Cox v. Wooten Bros. Farms, Inc., 610 S.W.2d 278 (Ark. App. 1981).

be primarily [its] responsibility."[21] The Restatement does not attempt to delineate the exact boundary between such "acceptable" subrogees and "strangers" who are not entitled to restitution.

Pushing the boundaries: the tobacco litigation

The recent wave of governmental litigation against injurious industries makes the question of the proper scope of restitution in our area particularly acute. Consider the litigation of states against the tobacco companies to recover the preventive and ameliorative costs they incurred due to tobacco-related illnesses of their states' residents.[22] The states asserted a long list of causes of action such as fraud, antitrust, and conspiracy, but – as James White and I show elsewhere – most (if not all) of these causes of action either are invalid or are equitable subrogation in disguise, as the primary focus of the suits was to force the tobacco industry to pay for the additional health-care costs incurred by the states because of their residents' smoking.[23]

Fitting the states' claims into the doctrine of equitable subrogation is not an easy task.[24] These claims are unconventional in three important respects. First, the payment for which equitable subrogation is sought – such as the additional health-care costs governments have incurred as a result of smoking-related illnesses – is not based on the payor's obligation; this payment is, at least to some degree, discretionary. Second, the claim is not based on direct payments to the alleged subrogors, but rather on expenditures made in preventing and ameliorating their harms. Third, part of the claim refers to costs which have not yet been incurred by the governments. The alleged subrogors of the future health-care costs are still healthy (indeed, some are yet to be born). These peculiarities make the decision to allow or curtail states' restitutionary recovery against

[21] ALI Draft, *supra* note 3, § 26 cmt. c.

[22] *See* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. Rev. 354, pt. I (2000). Cities and municipalities, as well as some foreign countries, union health funds, and other insurers, also sued for costs incurred for treatment of residents with tobacco-related illnesses. *See id.* at 363. All these suits accompany the relatively more traditional suits of health-care providers. *See generally* Mark C. Weber, *Taking Subrogation Seriously: The Blue Cross–Blue Shield Tobacco Litigation Reconsidered*, 67 Brook. L. Rev. 381 (2001).

[23] *See* Dagan & White, *supra* note 22 at 373–76 n.90.

[24] *Cf.* Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors? Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 Tul. L. Rev. 727 (2002).

the industries, as well as the specific conditions and limitations of this cause of action in case it is allowed, an important test case for the scope and outer limits of the law of restitution in our context. (Another question, which will be only sketchily addressed, relates to the interaction of the common law doctrine of equitable subrogation with specific statutory interventions.)

Beyond officiousness and unjust enrichment

The conventional legal discourse regarding restitution for unrequested benefits revolves around the terms "unjust enrichment" (the claimants' favorite) and "officiousness" (the term favored by defendants). It is often maintained, for example, that equitable subrogation rectifies unjust enrichment.[25] But a reference to unjust enrichment is not very helpful for delineating the boundaries of restitution.[26] Pointing to the principle of prevention of unjust enrichment does not tell us when the claimant's (the purported subrogor's) enrichment is "unjust." Recall that not every payment of someone else's debt – which, by definition, leads to someone's enrichment – triggers subrogation. If the payor is considered a "volunteer," the payor does not have a right to equitable subrogation.[27]

The scope of equitable subrogation, the distinction between payments that should be deemed unjust enrichment and payments that fall under the volunteer rule, requires a normative inquiry. Only such an inquiry can provide a principled distinction between those unrequested benefits which justify the granting of restitution, when we would say that it would be unjust for the defendant to retain the benefit, and other unrequested benefits which are not thus privileged, in which case we will label the payor a volunteer (and the payment officious) and refuse to grant restitution.

[25] *See, e.g.*, Peter Birks, An Introduction to the Law of Restitution 95–96 (paperback ed. with revisions 1989); Burrows, *supra* note 19, at 113; John P. Dawson & George E. Palmer, Cases on Restitution 59–60 (2d ed. 1969); 1 Dan B. Dobbs, Law of Remedies § 4.3(4), at 604–05 (2d ed. 1993); Ross B. Grantham & Charles E. F. Rickett, Enrichment and Restitution in New Zealand 423–31 (2000); Charles Mitchell, The Law of Subrogation 4, 9 (1994); 1 Palmer, *supra* note 1, § 1.5(b), 23–24; John F. Dolan, *A Study of Subrogation Mostly in Letter of Credit and Other Abstract Obligation Transactions*, 64 Mo. L. Rev. 789, 791–92 (1999).

[26] *See, e.g.*, Michael S. Quinn, *Subrogation, Restitution, and Indemnity*, 74 Tex. L. Rev. 1361, 1367 (1996).

[27] *See, e.g.*, G. H. L. Fridman, Restitution 401 (2d ed. 1992); Palmer, *supra* note 1, at 23; Henry N. Sheldon, The Law of Subrogation 360 (1893).

The position of the new Restatement on this front is curious. The Restatement correctly explains that the language of officiousness (or "volunteer") is but an "epithet" that represents normative concerns, rather than a meaningful substantive requirement. Officiousness stands for a preference for contract. The crucial question in our type of restitution cases is accordingly whether the circumstances are such that the claimant's failure to make an effective contract should be excused. The concern, more precisely, is that a recipient of an unrequested benefit should not be required to pay for something she "was entitled either to acquire on different terms or to refuse altogether."[28] This notion of "transactional autonomy" is familiar from our discussion in the previous two chapters. The concern of the defendant's subjective devaluation of the unrequested benefit indeed plays an important role in explaining and justifying our doctrine and is the focus of section C below.

The Restatement brings this normative concern to the fore by discarding the "volunteer" (or officiousness) conclusory language. But these epithets are only one side of the conventional discourse (just like, as we shall shortly see, subjective devaluation is only one part of a rather complicated normative story). While avoiding the volunteer epithet, the new Restatement frequently resorts to the language of unjust enrichment: restitutionary claims for unrequested and self-interested benefits are available, the Restatement prescribes, "as necessary to prevent unjust enrichment."[29] This chapter, like this book as a whole, avoids this question-begging reference to unjust enrichment as a justification. Instead, it proposes an account of the normative considerations that guide much of the existing law and can help set the boundary between "unjust enrichment" and "officiousness."

B Restitution from free-riders

In this section, I argue that, at its core, the law of restitution for unrequested and self-interested benefits deals with the provision of collective goods: cases in which the parties' interests are sufficiently locked in

[28] Restatement (Third) of Restitution and Unjust Enrichment § 2(4) & cmt. f (Discussion Draft, 2000); ALI Draft, *supra* note 3, at Int. Note to Ch.3 Topic 2 & § 23 cmts. a & d. S.R. Scott argues that the concept of subjective devaluation is but a modern rationalization of the traditional judicial fear of officiousness and favors eliminating this concept from restitutionary theory. *See* S. R. Scott, *Restitution and the Argument of Subjective Devaluation: When is an Enrichment not an Enrichment?*, 15 N.Z.U. L. Rev. 246 (1993). With the Restatement, I believe that this gets the matter precisely backwards.

[29] ALI Draft, *supra* note 3, at § 24 & cmt. e, §§ 25–26.

together so that the claimant cannot reasonably pursue its self-interest without conferring a benefit on the defendant. The recipient of such a benefit is deemed *unjustly* enriched because she is a free-rider. The often neglected role of the law of restitution in addressing extreme pathological cases of free-riding is, in other words, the solution to the puzzle with which this chapter began.[30] Restitution, however, solves this problem of collective action only in types of cases where free-riding may frustrate the possibility of achieving the collective good itself. Such intervention is appropriate – indeed salutary – where, first, the judiciary is institutionally competent to consider the impact of free-riding behavior and to tailor rule-based responses and, second, its rules do not unduly interfere with the defendant's autonomy.

Solving detrimental free-riding behavior by awarding restitution

In the two core cases of protecting one's property interests and performing a joint obligation, the benefit involved is collective with respect to the members of a group (e.g., the co-owners or joint tortfeasors), causing the parties' interests to be "locked in" together.[31] In both categories, furthermore, it is impossible or infeasible to exclude any of the relevant actors from benefitting from the other's payment; therefore, both categories are particularly vulnerable to free-riding: individuals may refuse to pay their share, motivated solely by the expectation that others' efforts will generate the very same good free of charge (or more cheaply).[32]

Free-riding always entails distributive effects: the free-rider pays less than her proportionate share in the collective endeavor. But the distributive consequences of free-riding are not necessarily objectionable.[33] Consider, for example, cases where the free-rider is able to receive a benefit free of charge because her stake in the collective enterprise is relatively small. In these circumstances the free-rider's nonparticipation may not frustrate

[30] It is also the answer to some critiques of our doctrine, which may sound compelling only until the alternative of leaving these cases unregulated is considered. *See, e.g.*, Andrew Tettenborn, The Law of Restitution in England and Ireland 23 (3d ed. 2002).

[31] *See, e.g.*, John P. Dawson, Unjust Enrichment: A Comparative Analysis 36, 140 (1951) [hereinafter Unjust Enrichment]; Sheldon, *supra* note 27, at 4–5; John P. Dawson, *The Self-Serving Intermeddler*, 87 Harv. L. Rev. 1409, 1418 (1974) [hereinafter *Self-Serving*]; Daniel Friedmann & Nili Cohen, *Payment of Another's Debt*, *in* 10 International Encyclopedia of Comparative Law ch. 10, at 42 (1991).

[32] *See* Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 Ethics 616, 621 (1982).

[33] *But cf.* Jonathan Hilliard, *A Case for the Abolition of Legal Compulsion as a Ground for Restitution*, 61 Cambridge L.J. 551, 554 (2002).

the possibility of achieving the collective good when there is another single member of the group who is likely to derive sufficient benefits from the collective good to justify paying the entire cost of supplying it alone.[34] Where the parties' stakes in the collective enterprise roughly correlate with their socio-economic predicament, the distributive consequences of many cases of this type may be rather happy, at least from an egalitarian point of view.

Furthermore, even if we ignore the possible distributive benefits of free-riding, its prohibition would sometimes be undesirable. As Wendy Gordon insists, "if deliberate uses of others' efforts always triggered an obligation of payment, it would cause paralysis." No culture could exist "if all free riding were prohibited within it" because culture "is interdependence, and requiring each act of deliberate dependency to render an accounting would destroy the synergy on which cultural life rests." Moreover, no community could exist because community is defined as interdependence: "persons learn from each other, sell complementary products, build on a common heritage."[35]

The value of interdependence in our economic and cultural life may explain the denial of restitution in the context of some famous examples, such as a tourist hotel which benefits businesses in its vicinity[36] and a developer who undertakes improvements which enrich neighboring lot owners,[37] as well as in the many cases in which fluctuations in market values and market conditions render one's property more valuable.[38] Where an activity that generates positive externalities is sufficiently profitable or where mutually beneficial agreements for sharing the costs of a collective endeavor are sufficiently likely, there is no particular reason to require restitution.

While it is important to remember that not all free-riding is wrong, one should not be too complacent with free-riding where such behavior

[34] *See* Mancur Olson, The Logic of Collective Action – Public Goods and the Theory of Groups 41 (2d ed. 1971).

[35] Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. Legal Stud. 449, 468 (1992) [hereinafter *Of Harms and Benefits*]; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 167–68 (1992) [hereinafter *On Owning Information*]. *See also* Dawson, *Self-Serving*, *supra* note 31, at 1412, 1415.

[36] *See, e.g.*, James Gordley, *The Principle Against Unjustified Enrichment, in* Gedächtnisschrift Für Alexander Lüderitz 213, 220–21 (K. Luig et al. eds., 2000).

[37] *See* Green Tree Estates v. Furstenberg, 124 N.W.2d 90 (1963).

[38] *See* Daniel Friedmann, *Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free Riding*, 36 Loy. L.A. L. Rev. 831, 840 (2003).

may frustrate the possibility of achieving the collective good. As already implied, this contingency is the expected outcome if no single member of the group is likely to derive sufficient benefits from that good to justify paying the entire cost of supplying it alone, and no coalition of members can feasibly divide the costs among members.[39] Under such circumstances, restitution may be an attractive tool for forcing the parties involved to pay their proportionate share of the collective good, overcoming the free-rider problems that otherwise might cause the collective benefit to be underproduced.[40] Restitution of unrequested and self-interested benefits will be awarded, in other words, where it is a necessary form of "mutual coercion" for solving a collective action problem that would have otherwise deterred a utility-enhancing act.[41]

(As an aside, the difficulties posed by free-riding for collective action were recognized by jurists long before the recent law-and-economics scholarship, as the following example demonstrates. Rabbi Yair Hayyim Bachrach of Germany (d. 1701) addressed the validity of a stipulation in a contract between some members of a community and an expert in *shofar* (ram's horn) blowing, according to which the ritual service was to be performed only in the name of the paying members of the community. In his opinion, R. Bachrach noted that applying the general rule of Jewish law that exempts defendants in cases where "one benefits and the other sustains no loss"[42] – pareto-superiority in modern language – would have meant that the stipulation could not operate to deprive non-paying members from the spiritual benefits of the contract. But R. Bachrach was also attentive to the detrimental incentive effect – free-riding, as we now call it – of applying the general rule in these circumstances. His result was unavoidable: the contracting members were allowed to restrict the group of spiritual beneficiaries of the *shofar* blowing to themselves only.[43])

Justifying law's intervention

My reference to restitution as a means of mutual coercion seeks to capture the sense in which restitutionary recovery in "pure" cases of free-riding

[39] *See* Olson, *supra* note 34, at 41.

[40] *See* Arneson, *supra* note 32, at 621; Christopher T. Wonnell, *Unjust Enrichment and Quasi-Contracts, in* 2 Encyclopedia of Law and Economics 795, 797–98 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[41] *Cf.* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1248 (1962).

[42] For an analysis of the rule and its exceptions, see Hanoch Dagan, Unjust Enrichment: A Study of Private Law and Public Values 109–29 (1997).

[43] R. Yair Hayyim Bachrach, Responsa Havat Yair, Resp. 186.

behavior – where there is no concern of subjective devaluation of the collective benefit involved (a concern which is the focus of the next section) – does not offend people's autonomy. To see why, recall that free-riding is one species of collective action problem. Collective action is a generic term describing the difficulty faced by a group of self-interested individuals where the promotion of their self-interest requires cooperation. Even if they all agree on both their collective purpose and the best means to promote it, they may still face difficulties in achieving it, because for each of them the individual interest supersedes their collective good.[44] Situations of collective action are often formalized as a multi-person prisoner's dilemma with an incentive structure facilitating non-cooperative behavior and generating tragic outcomes.[45]

To be sure, in some contexts, people who have a large enough chance of future interactions may rationally cooperate even with prisoner's dilemma incentives, so that no legal intervention is needed in order to overcome this difficulty.[46] For cooperative results to emerge, however, the game must be iterated. More specifically, it should typically repeat indefinitely; at the minimum, its horizon needs to be sufficiently distant (otherwise a domino effect quickly makes defection the dominant strategy for everyone from the outset).[47] A typical means for achieving this condition is a limitation of the parties' liberty to exit their mutual interaction.[48] The solution of locking people into relationships in order to solve collective action difficulties is inapplicable in some contexts (as in the collective action between joint tortfeasors). But even where it is theoretically possible (as in the case of co-owners), it is inappropriate given the liberal commitment to enable individuals to determine their own group associations

[44] *See, e.g.*, Olson, *supra* note 34, at 2, 8, 10–11, 21, 51, 60–61; Russell Hardin, Collective Action 9–10 (1982); Michael Taylor, The Possibility of Cooperation 3 (1987).

[45] *See, e.g.*, Hardin, *supra* note 44, at 25–30. Michael Taylor maintains that some collective action problems track the payoffs structure of other games – Chicken and Assurance – which are somewhat more amenable to a cooperative solution. *See* Taylor, *supra* note 44, at 18–19 & ch.2. The resolution of this debate is unnecessary for my purposes here.

[46] *See, e.g.*, Hardin, *supra* note 44, at 145–50, 164–67. For a famous demonstration, see Robert Axelrod, The Evolution of Cooperation (1984).

[47] *See, e.g.*, R. Duncan Luce & Howard Raiffa, Games and Decisions 94–102 (1957); Martin J. Osborne & Ariel Rubinstein, A Course in Game Theory 135 (1994); Anthony de Jasey, Social Contract, Free Ride: A Study of the Public Goods Problem 63–66 (1990). For certain (partial) solutions, see Hardin, *supra* note 44, at 173–87, 211–13.

[48] *See* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 Yale L.J. 549, 576–77 (2001).

and to remain in the groups they choose out of their free choice only.[49]

Restitution is much less offensive to autonomy. Of course, if one is committed to a view of autonomy as negative liberty, then there can (almost) never be a legitimate reason to impose liability on a defendant where the claimant can show neither a harm the defendant inflicted on her, nor the defendant's consent to the exchange.[50] But as we have seen in chapter 4, a better conception of autonomy understands this "personal gatekeeping" not as an ultimate value, but rather as an instrumental value, which in many cases – as in the context of mistakes – indeed promotes the end of self-determination.[51] Here (like in the context of good samaritan restitutionary claims) acknowledging the instrumental, and thus subordinate, role of personal gatekeeping requires our commitment to personal gatekeeping to retreat in certain circumstances, so that the means of gatekeeping will not undermine the end of self-determination. (Even Richard Epstein, a strong advocate of libertarian legal theory, acknowledges the need for legal regulation to overcome social prisoners' dilemmas.[52])

More precisely: overriding restitution defendants' explicit disinterest in participating in (paying for) the collective action can be justified from autonomy if but only if two conditions apply.[53] First, it must be objectively clear that (1) such defendants' proportionate benefit exceeds the cost to them of contributing the proportionate share of the cost of supplying the benefit, and that (2) law's intervention is required in order to facilitate the pertinent jointly beneficial collective action. Second, the defendants must be unable to point to any credible nonstrategic motive for not contributing to the collective good. Together, these two conditions ensure that potential restitution defendants are *subjectively* better off receiving the collective benefits and paying than doing without the benefits entirely, and thus cannot legitimately object to the restitutionary

[49] *See* Albert O. Hirschman, Exit, Voice, and Loyalty 19–21 (1970); Leslie Green, *Rights of Exit*, 4 Legal Theory 165, 176 (1998); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 Pol. Theory 6, 11–12, 15–16, 21 (1990).

[50] *See, e.g.*, Robert Nozick, Anarchy, State, and Utopia 95 (1974); Jules L. Coleman, Risks and Wrongs 166–69 (1992).

[51] *See supra* section 4.B.

[52] *See* Richard A. Epstein, Bargaining with the State 76 (1993).

[53] *See* Arneson, *supra* note 32, at 621–22. For an application to the context of the provision of legal services, see Charles Silver, *A Restitutionary Theory of Attorney's Fees in Class Actions*, 76 Cornell L. Rev. 656 (1991).

obligation. The first condition refines the circumstances that were discussed in the previous subsection as detrimental free-riding behavior: where law's abstention, rather than intervention, is likely to frustrate people's goals and aspirations that require collective action. The second condition ensures that the divergence of the explicit preferences of the defendant (objection) from what we assume to be her self-interest (participation) derives from the payoff structure, in which she and the other participants of the collective action are locked in, making defection the dominant strategy,[54] rather than from her genuine subjective preferences.

I next discuss in some detail this second condition and the ways in which it is translated into restitution rules. But before I can do this, I must address an important objection, which was recently raised by the new Restatement.

The Restatement's objection and the institutional lessons

The new Restatement is aware of the analysis of restitution for unrequested and self-interested benefits as a solution to free-riding difficulties, but it seems to reject it. The Restatement notes an "important cost" of law's protection of "property rights and contractual freedom," namely: "the invitation to strategic behavior and 'free riding' on the part of an owner whose contribution to an enterprise is being sought." It characterizes the distributive consequences of free-riding as "a kind of unjust enrichment," a characterization that implicitly assumes a baseline which, as indicated above, is at the very least not unavoidable. The Restatement further acknowledges the more serious difficulties of free-riding in frustrating mutually advantageous projects. But it insists that both of these consequences "are ordinarily tolerated as necessary consequences of rights incident to private property." The Restatement uses some familiar examples in which restitution has been denied to vindicate this descriptive claim. These are various types of cases – such as the famous *Ulmer v. Farnsworth* scenario where the claimants' pumping of water from their own quarry unavoidably drained water from the defendant's quarry[55] – in which "a physical proximity or a coincidence of objectives make it impossible for the claimant to pursue a self-interested purpose without at the same time conferring specific and quantifiable benefits on the defendant." The Restatement does not dispute that at times the costs of systemic

[54] *See* Douglas G. Baird et al., Game Theory and the Law 31–35 (1994).
[55] Ulmer v. Farnsworth, 15 A. 65 (Me. 1888).

bargaining failures of the kind addressed in this section may be "judged to be too high," but it nonetheless insists that in these cases the legal response is outside the law of restitution, in a regulatory scheme in which typically public authorities are empowered "to levy assessments on benefitted property."[56]

The Restatement's objection is unpersuasive, but it points to important limitations of restitution as a response to free-riding. Insofar as this objection is founded on a normative concern for the autonomy of restitution defendants, it merely anticipates the concern of subjective devaluation that can – indeed should – be incorporated into the analysis. Moreover, as we have just seen, facilitating cooperation in cases of "pure" collective action problems that might frustrate mutually beneficial action (and not merely generate disproportional contributions) is not only based on concerns of efficiency, but is also an important autonomy-enhancing device.

An alternative reading of the Restatement's objection is institutional, rather than normative. As such, this objection does not doubt the importance of curbing free-riding behavior where it is detrimental, but rather doubts the desirability of allowing the judiciary to take up this task, pointing to the comparative advantage of legislation on this front. This institutional critique is more promising than its normative counterpart, but it nonetheless fails to undermine the free-riding rationale of restitution in our context.

The institutional critique is more promising because in certain cases there are important advantages to legislative solutions to free-riding. Consider cases of free-riding on other people's investments in creating valuable intangibles, such as the use made by International News Service (INS) of uncopyrighted news collected and publicly disclosed by its competitor, Associated Press (AP).[57] While the Supreme Court's injunction barring INS from copying news from AP until its commercial value has passed away is still considered good law, this case is now read much more narrowly as an incident of unfair competition.[58] One – not the only – reason for the difficulties with a broader *INS v. AP* doctrine is institutional: as Justice Brandeis noted in his dissent, a legislative scheme (frequently in the form of detailed regulations) is a much better device than a case-by-case judge-made doctrine for setting the proper

[56] ALI Draft, *supra* note 3, § 23 cmt. b & illus.
[57] Int'l News Service v. Associated Press, 248 U.S. 215 (1918).
[58] *See* Restatement (Third) of Unfair Competition § 38 & cmt. c (1995).

boundaries of ownership of information (as a response to free-rider difficulties) in a way that is best conducive to people's liberty and the general welfare.[59]

The claim that in *some* contexts courts are ill-equipped to consider the impact of free-riding behavior and to tailor appropriate responses is an important limitation of the theory of restitution for unrequested and self-interested benefits as a solution to free-riding difficulties.[60] It is, however, a far cry from the proposition that judges are always, or even in general, incompetent to deal with these issues. Take the canonical examples of restitution in the context of protecting one's property interests and performing a joint obligation. Both doctrines were developed by courts and sensibly so, because both deal with contexts in which courts have no distinct institutional disadvantage. Thus, while the institutional concern can, and should, be added to the normative limits (discussed above and below) for using restitution as a response to free-riding, the institutional argument cannot justify the new Restatement's blanket dismissal of the free-riding rationale.

I do not ignore the cases cited by the Restatement where restitution was refused notwithstanding their possible characterization as manifestations of detrimental free-riding. But these cases[61] do not undermine the desirability of judicial utilization of restitution law in addressing systemic concerns for detrimental free-riding. Rather, their better interpretation suggests a much narrower limitation on the regulation (judicial or legislative) of detrimental free-riding, namely: its rule-based character. While precise rules – as opposed to vague standards – are not always optimal due to their inherent over- and under-inclusiveness,[62] a rule-based regulation of detrimental free-riding is still generally preferable. As Gordon explains, individualized inquiries in this context tend to be particularly difficult. After all, litigated restitution cases may imply that the free-riding at issue is not detrimental, because in these cases – as in

[59] *INS*, *supra* note 57, 248 U.S. at 262–67. *See also, e.g.*, Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 (2d Cir. 1929); Niva Elkin-Koren & Eli M. Salzberger, *Towards an Economic Theory of Unjust Enrichment Law*, 20 Int'l Rev. L. & Econ. 551, 560–63 (2000); Gordon, *On Owning Information*, *supra* note 35, at 195, 259 n.419, 272–73, 281.

[60] *Cf.* Mark Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927, 1941 n.66 (2001).

[61] I am not sure that the *Ulmer* case noted above – which is the Restatement's first illustration – actually belongs to this category, because, as we will shortly see, it can be explained by reference to (one form of) subjective devaluation.

[62] *See supra* p. 54 and note 67.

Ulmer – the restitution claimant has "already engaged in the valuable activity." As long as a restitution court is dealing with an isolated fact pattern, it is difficult for the court to determine "if there exists a substantial class of people, like the claimant, who have not yet engaged in the valuable activity but would do so if restitution were assured." This uncertainty justifies a refusal of restitution in such isolated fact-specific cases. But it does not justify abstention where a court identifies classes of situations in which free-riding is systemically detrimental and with respect to which the judicial modes of inquiry and available remedial responses seem adequate, and maybe even superior *vis-à-vis* their regulatory alternative.[63] As this section shows, the free-riding rationale is, in fact, (part of) the best explanation of the canonical examples of restitution of unrequested and self-interested benefits by people who protect their property interests or perform a joint obligation. And, as we know, the Restatement itself considers these to be the most firmly established categories. This explanation can thus help refine the proper boundaries of these categories, as well as potentially be (part of) the normative foundation of new categories.

C On subjective devaluation

Restitution is not always awarded even in cases of locked-in interests (and thus possible free-riding), because – as the new Restatement correctly notes – in many (categories of) cases, recipients of unrequested and self-interested benefits have reasons to object to the involuntary exchange restitution claimants try to impose on them. In this and the next section I maintain that a restitution defendant's legitimate objection can be based on one of two concerns: the defendant's subjective devaluation of the conferred benefit or the plaintiff's likely conflict of interests. Both concerns may signal that allowing restitution might generate an unwarranted interference with the recipient's genuine preferences as well as a utility-reducing transfer. Therefore, considerations of both autonomy and utility justify the denial of restitution in these cases. (Yet, as we will see, there are some differences between the recommendations of these different normative commitments which entail some divergence in the specific rules they endorse for delineating the scope of subjective devaluation.)

[63] *See* Gordon, *Of Harms and Benefits*, *supra* note 35, at 474–75; Wendy J. Gordon, *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-by-Case Response to Market Failure*, 8 J.L. & Info. Sci. 7, 11–12 (1997).

The principle of subjective devaluation

Consider first the concern with subjective devaluation of the benefit received. Where the benefit involved is easily reducible to money, valuation is unproblematic.[64] Difficulties arise, however, where noncash benefits are involved. People's valuations of these types of benefits vary significantly inter-subjectively depending both on varying abilities to pay for the benefit and on personal tastes. Where valuations are subjective, it is impossible to know whether a recipient of a benefit who refuses to pay its worth is trying to free-ride, or genuinely expressing her subjective utility function in which the conferred benefit is either not valued or is valued for less than its market value. Accordingly, restitution is generally inappropriate.[65]

Cases of potentially subjective devaluation raise notorious difficulties of proof which reduce the confidence that restitution would induce a utility-enhancing action.[66] Utility most clearly objects to restitution where the utility loss to the defendant had she been forced to make restitution outweighs the gain to the plaintiff from the action which restitution could have facilitated. There are also, to be sure, harder cases. Thus, theoretically aggregate utility is not offended if the gain to the plaintiff from the action at issue outweighs the utility loss to the defendant from making restitution payment. But delineating the scope of these cases requires courts to strike utility tradeoffs, thus raising the notorious problem of interpersonal comparisons of utility. The administrative costs of the tradeoff and, more importantly, the costs of judicial errors suggest that utility requires at least a presumption against restitution even in such hard cases.

The injunction of autonomy is somewhat sharper. Even where we are relatively certain that, all in all, the action is indeed jointly beneficial, awarding restitution in cases of potentially subjective devaluation insults the liberal commitment to individual free choice.[67] As Birks insists, awarding restitution in such cases amounts to a subordination of people's choices to "obligatory market valuation," thus disrespecting

[64] *See. e.g.*, ALI Draft, *supra* note 3, § 23 (a); Birks, *supra* note 25, at 117.

[65] *See, e.g.*, Birks, *supra* note 25, at 109, 131; Peter Birks, *In Defense of Free Acceptance, in* Essays on the Law of Restitution 105, 127 (Andrew Burrows ed., 1991); Birks & Mitchell, *supra* note 19, at 539; Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65, 74–79 (1985); Andrew G. Spence, *In Defense of Subjective Devaluation*, 43 McGill L.J. 889, 891–93 (1998).

[66] Clearly, this is Levmore's concern. *See* Levmore, *supra* note 65, at 75.

[67] *See* Mitchell McInnes, *Enrichment Revisited, in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004).

"people's freedom to order their own priorities."[68] In cases (or types of cases) where the revealed preferences of the restitution defendant claiming officiousness seem genuine, one cannot easily refute the defendant's claim that she preferred to invest money in the acquisition of some other benefit more clearly to her liking. Recall that unlike cases of restitution to good samaritans, in cases of unrequested and self-interested benefits restitution amounts to "an obligation to exchange money for nonmoney values that there has been no opportunity to refuse" which *cannot* be justified by the impracticability of communicating with the defendant.[69] Prescribing restitution in such circumstances "would play havoc with one's self-determination and one's pocketbook."[70] Therefore, subjective devaluation is an effective defense to restitution for unrequested and self-interested benefits.

The case of *Board of Directors v. Western National Bank* illustrates these difficulties. Apartment owners in a residential development that combined both single-family homes and apartments protested at having to participate in the costs of maintaining the development's common areas. Although there was no doubt that this maintenance positively affected the value of the apartments, the court ruled that the apartment owners were not obligated to contribute.[71] The homeowners who conferred an unrequested benefit on the apartment owners were deemed volunteers. This result is justified because the apartment owners may have preferred different expenditures from the homeowners. The family homes were likely to be occupied on a relatively long-term basis by their owners, whereas the apartments were leased-out and for shorter periods. Therefore, the apartment owners may have had "cheaper tastes" even if the maintenance had undisputed value to the property.

[68] *See* Birks, *supra* note 25, at 109–10, 228; Birks, *supra* note 65, at 129, 145. *See also* 1 Dobbs, *supra* note 25, § 4.9(2), at 683; Graham Virgo, The Principles of the Law of Restitution 65–66 (1999); John D. McCamus, *The Self-Serving Intermeddler and the Law of Restitution*, 16 Osgoode L. Rev. 515, 520, 575 (1978); Mitchell McInnes, *Incontrovertible Benefits in the S. Ct. of Canada; Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, 23 Can. Bus. L.J. 122, 123, 128 (1994).

[69] ALI Draft, *supra* note 3, at § 23 cmt. b. The "no opportunity to refuse" consideration raises also the question of the proper role of "free acceptance" in restitutionary claims. For a succinct summary of the debate see Burrows, *supra* note 19, at 20–25. *See also infra* section 6.D.

[70] Gordon, *On Owning Information*, *supra* note 35, at 200. *See also* Gordon, *Of Harms and Benefits*, *supra* note 35, at 456, 463–64, 466.

[71] Board of Directors v. Western Nat'l Bank, 487 N.E.2d 974, 978–79 (Ill. App. 1985).

The scope of subjective devaluation

There are, however, cases where the beneficiary's objection is clearly strategic, namely: motivated purely by an attempt to free-ride another person's investment in the pursuit of a jointly beneficial action. Consider *Cox v. Wooten Brothers Farms, Inc.* Wooten purchased an interest in land and agreed to assume its assignors' obligations on a note to a bank. Four years later – in order to be able to refinance its operation and obtain an additional loan from the bank – Wooten paid off the entire debt, both the part assigned to it and the part which represented the pro rata responsibility of Cox. As the court noted, it was only at that time that "Cox decided she was no longer indebted to anyone." The court appropriately allowed Wooten's claim.[72]

The lesson from *Cox* can be generalized. *Cox* is but a vivid example for one broad and important category of cases in which the parties' interests are sufficiently locked in together where there is no room for the concern of subjective devaluation. In this category of cases, the unrequested benefit reduces or satisfies an expense which is not discretionary to the beneficiary, so that the beneficiary (the defendant) is free neither to refuse nor to value subjectively. As the Restatement notes, where the essence of the claim is that the claimant has performed the defendant's preexisting obligation, the latter's transactional autonomy is not infringed in any real sense – in a legal environment, such as ours, with a liberal attitude toward the free alienability of claims – because rather than subjecting her to a forced exchange, restitution merely substitutes one obligee for another.[73]

This category of nondiscretionary expenditure is now a generally recognized form of "incontrovertible benefit" that defeats, as such, the subjective devaluation objection.[74] This does not mean, of course, that the

[72] *Cox*, *supra* note 20, 610 S.W.2d 278. For another recent example, see Federal Ins. Co. v. Maine Yankee Atomic Power Co., 183 F.Supp.2d 76 (D. Me. 2001).

[73] ALI Draft, *supra* note 3, § 23 (b), (c) & cmts. b, d, § 26 cmt. c. *See also* Dawson, Unjust Enrichment, *supra* note 31, at 141.

[74] *See* Jack Beatson, The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution 32–33 (1991); Birks, *supra* note 25, at 117; Burrows, *supra* note 19, at 20; 1 Dobbs, *supra* note 25, § 49.3(3), p. 685; Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 24, 27 (Gareth Jones ed., 6th ed. 2002); Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement 94 (2000); Keith Mason & J. W. Carter, Restitution Law in Australia 48 (1995); Virgo, *supra* note 68, at 73–75; McInnes, *supra* note 68, at 124, 128; Mayo Moran, *Rethinking* Winnipeg Condominium: *Restitution, Economic Loss, and Anticipatory Repairs*, 47 U. Toronto L. Rev. 115, 135 n.54 (1997); Spence, *supra* note 65, at 894.

notion of nondiscretionary expenses is free from ambiguities. There are very few expenses which are strictly inevitable. In most cases, deciding whether an expenditure is nondiscretionary requires addressing the question whether the probability is high enough that the defendant would have incurred the expense in the normal course of events.[75] Furthermore, as is often the case, law's answer to this question is frequently based on broad categories, rather than case-by-case inquiries. The distinction between improvements to the defendant's existing interest (where restitution is usually denied) and its preservation (where it is much less forthcoming) is a case in point.[76] Although the line between improvements and preservation is often murky, a defendant's objection to an investment in an improvement is more likely to express her genuine valuation rather than be a strategic holdout.

Drawing the precise boundaries of the broader category of incontrovertible benefits is more complicated. Saul Levmore suggested a tripartite taxonomy: subjective devaluation does not occur (benefits are incontrovertible) where: (1) the recipient has infinite wealth; (2) the recipient is a profit-making enterprise where subjective preferences have little role; and (3) the nonbargained benefit is easily translated into wealth.[77] While the first category is somewhat fanciful and the second may be disputed, Levmore's third category is all-important. Easy translatability to wealth – for which a nondiscretionary expenditure is arguably a prominent example – indeed solves both the efficiency and the autonomy concerns of an unrequested benefit.[78] This test of easy liquidity is helpful, but still not precise enough as it leaves open a debate between Birks and Goff and Jones. Birks adopts a strict view which requires that the benefits at issue have been realized – actually converted into money.[79] By contrast, Goff and Jones assert that potential realizability in money should be sufficient.[80]

To illustrate the significance of this debate compare the *Board of Directors* case discussed above with *Okoboji Camp Owners Cooperative v.*

[75] *See* McInnes, *supra* note 67.

[76] *See* Dagan & Heller, *supra* note 48, at 586–88; Friedmann, *supra* note 38, at 850.

[77] Levmore, *supra* note 65, at 75–78.

[78] *See, e.g.*, Mitchell McInnes, *The Measure of Restitution*, 52 U. Toronto L.J. 163, 165–67 (2002).

[79] *See* Birks, *supra* note 25, at 121–24. Recently Birks opted for a more tender approach. *See* Peter Birks, Unjust Enrichment 50 (2003).

[80] *See* Goff & Jones, *supra* note 74, at 25. *See also* Peter D. Maddaugh & John D. McCamus, The Law of Restitution 42 (1990).

Carlson,[81] in which similar facts led to the opposite outcome. In *Okoboji* two landowners in a subdivision refused to pay for certain services provided by a cooperative association in which they were not members. There was no dispute that they neither "avail themselves of the recreational facilities that the cooperative offers" nor "use the internal private roads of the subdivision." And yet – although such obligation was not enshrined by either a servitude or a contract – the association's restitutionary claim was accepted: "We are convinced," held the court, "that, irrespective of the use that defendants make of the cooperative's facilities, the availability of these facilities benefits both defendants by conferring added value to their properties."[82] While satisfying the Goff and Jones' realizability test, this observation, in and of itself, would not have been sufficient to trigger restitutionary liability under Birks' more demanding requirement.[83]

The choice between these two alternative tests requires a choice between the utility and autonomy premises of subjective devaluation as a ground for the denial of restitution. If utility is of the essence, realizability seems to suffice because even if the recipient has no appreciation of the conferred benefit, it is enough that the market does in order to ensure that restitution does not generate a utility loss. There may be hard cases as in, for example, where a landowner in an *Okoboji*-like context subjectively values her house for much more than its market value with or without the cooperative improvement (to which she attributes no or little value). Imposing an immediate restitutionary liability on such a defendant may cause a utility loss if it requires her to liquidate her property at its (lower) market value. But even in these (rare?) cases, potential realization seems to ensure the efficiency of a restitutionary liability as long as the plaintiff's remedy comes in the form of an equitable lien to be realized at the moment of realization, rather than immediate monetary payment.

By contrast, insofar as the principle of subjective devaluation is understood in terms of a liberal respect for the subjectivity of value – for people's right to order their own priorities – such potential realization does not ameliorate the affront of restitution.[84] As Graham Virgo notes, "in that

[81] 578 N.W.2d 652 (Iowa Sup. 1998). [82] *Id.* at 654.

[83] Andrew Kull correctly observes that if a comparable subdivision were to be created afresh, "the power of assessment claimed for the association would be firmly anchored in enforceable covenants and servitudes," and that the court's decision in *Okoboji* may be explained by – and thus limited to – these "overtones of democratic majority rule" in such contexts of private governments. *See* Andrew Kull, *Regional Digest*: *USA*, 7 RESTITUTION L. REV. 268, 269 (1999).

[84] *See* Birks & Mitchell, *supra* note 19, at 541–42; Spence, *supra* note 65, at 913, 919.

situation the defendant does not have free choice whether or not to accept the benefit, and there is no acceptable basis on which we can exercise that choice for him or her." Therefore, realizability should suffice to constitute an incontrovertible benefit only "where it is inevitable that the defendant will exercise the benefit, for in such situation there will be no free choice to exercise."[85]

As usual, where the injunctions of utility and autonomy diverge, law faces a difficult choice. But maybe this choice can become somewhat easier if we recall Levmore's observation that for profit-making enterprises subjective preferences have little role to play. While this is probably an overstatement, it does correctly indicate that insofar as the recipient is a profit-making enterprise, utility concerns can more easily trump autonomy. Thus, while Virgo's claims seem particularly strong for individual recipients of unrequested benefits, the position of Goff and Jones is more defensible with respect to restitution defendants who are profit-making enterprises.

Further implications of subjective devaluation

Whatever the precise scope of the objection from subjective devaluation is, it is important to realize its effect on both the measure of recovery and the recipient's defenses. First, an effective objection from subjective devaluation can reduce the recovery of the restitution claimant to the extent that the defendant's valuation is lower than the claimant's cost of performance (which in many cases will be measured by the market value).[86] An important case in this respect is of claims for indemnity, contribution, and subrogation, where the claimant's recovery for its (reasonable) outlay in discharge of the defendant's obligation – which is, as such, a nondiscretionary expenditure and thus an incontrovertible benefit – is capped by the amount by which the claimant's intervention indeed reduced the defendant's obligation.[87]

(The measure of recovery of the lesser of the defendant's *ex post* benefit and the claimant's *ex ante* cost of investment has recently been criticized as inefficient, providing "too little recovery which under-compensates the

[85] Virgo, *supra* note 68, at 79. *Cf.* Burrows, *supra* note 19, at 19.

[86] *See* Virgo, *supra* note 68, at 97; Kit Barker & Lionel Smith, *Unjust Enrichment, in* Law's Future(s) 411, 420 (2000).

[87] *See* ALI Draft, *supra* note 3, § 25 cmt. f & § 26 cmt. g. *See also, e.g.*, John D. Ingram, *Priority between Insurer and Insured in Subrogation Recoveries*, 3 Conn. Ins. L.J. 105, 107 (1996).

investing party and creates insufficient incentives to invest."[88] This critique is convincing insofar as it relates to contexts of costly actions that create *uncertain* benefits *and* where arguments from subjective devaluations are out of place. Contexts in which subjective devaluation is a viable concern are importantly different. In such contexts, a lesser-of rule fine-tunes recovery so that it is specifically tailored to protect the defendant's autonomy and preserve aggregate utility.[89])

The principle of subjective devaluation also affects defenses. In this context, subjective devaluation stands for the concern that the defendant is not prejudiced by the substitution of a new creditor (the restitution claimant) for her original creditor. The law of restitution addresses this concern by generally allowing the defendant to raise against the claimant any defense – such as setoff, laches, immunity, etc. – that was available to her against her original creditor.[90] The law further allows such restitution defendants the same procedural advantages – e.g., burden of proof – as they had in the original suit.[91] The most important exception to this rule concerns the limitations defense. Equitable subrogees are appropriately held subject to any valid defenses against their subrogors, including to the same limitation period that would have governed the claim by the subrogor against the restitution defendant.[92] By contrast, in cases of indemnity or contribution, prevailing doctrine has the statute of limitations start running only when the claimant actually made the payment or furnished the performance that reduces or extinguishes the defendant's preexisting liability.[93] A commitment to the principle of subjective devaluation means that the restitution defendant's resulting exposure to a claim of indemnity or contribution long after the prescription of her underlying obligation is wholly unjustifiable. (The reason usually given for the difference between equitable subrogation and indemnity/contribution – that the former is a

[88] *See* Omri Ben-Shahar and Robert A. Mikos, *The Elusive Boundary Between Cost-Based and Benefit-Based Liability in Private Law* 3, 5 (University of Michigan Olin Working Paper No. 01-04).

[89] *Contra* Ben-Shahar and Mikos, *id.* at 42–43.

[90] *See* David Johnston & Reinhard Zimmermann, *Unjustified Enrichment: Surveying the Landscape, in* Unjustified Enrichment: Key Issues in Comparative Perspective 3, 19–20 (David Johnston & Reinhard Zimmermann eds., 2002); Robert H. Jerry II, Understanding Insurance Law § 96(g)(1), at 613 (2d ed. 1996); Sheldon, *supra* note 27, at 8; Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337, 1346 (1997); Quinn, *supra* note 26, at 1363; Spence, *supra* note 65, at 897.

[91] *See* Stephenson v. McClure, 606 S.W.2d 208, 212 (Mo. App. 1980).

[92] *See* ALI Draft, *supra* note 3, § 26 cmt. h.

[93] *Id.* § 25 cmt. h.

derivative claim, and the latter an independent one[94] – has little, if any, normative bearing on the question at issue.)

Subjective devaluation and market encouragement

Levmore claims that in addition to the concern of subjective devaluation there is another, distinct reason for the denial of restitution in cases of unrequested and self-interested conferral of benefits. In certain cases, allowing restitution to intervening providers hinders well-developed or "thick" markets composed of many active buyers and sellers. If bypassing the market mechanism would still allow providers of services – through the availability of restitutionary claims – to receive some prevailing price for their services, upfront bids will be discouraged. When some suppliers have the capacity to be more efficient than others, this would be an unfortunate result as it discourages competitive bidding, thus "thinning" the market. Our commitment to encourage thick markets in order to encourage efficient and competitive suppliers, claims Levmore, explains law's tendency to deny restitution in such cases even if there is no real difficulty from the point of view of the desirability of the conferred benefit to the recipient.[95]

Elizabeth Milnikel persuasively criticizes this analysis. Milnikel claims that this market encouragement account does not explain why full denial of restitution is necessary, where in fact limiting restitution to reimbursement of the claimant's expenses could have been enough to deter intermeddling sufficiently: "Depriving interlopers of profits would set up the economic incentives correctly to avoid economic evils." Milnikel further insists that much of the law that Levmore explains by means of market encouragement can be explained by arguments from subjective devaluation.[96] Milnikel supports her second critique with many examples. I will add here one example: the *Ulmer* case which has already been introduced in the previous section.

Ulmer serves as a prime example for Levmore. He insists that subjective devaluation is not a credible claim there. First, the claimants' pumping of water from their own quarry, which unavoidably drained water from the defendant's quarry, made it productive. This benefit is easily translatable into wealth. (Notice the implicit endorsement – not surprising for a theory whose concern with subjective devaluation is utility-based – of the Goff

[94] *See, e.g., id.* § 25 cmt. h & § 26 cmt. h. [95] *See* Levmore, *supra* note 65, at 79–80.
[96] Elizabeth Milnikel, Discouraging Market Encouragement (unpublished manuscript).

and Jones' position in their debate with Birks.) Second, apparently there was a local custom under which quarry owners such as the defendant paid drainers a "commission" for lime extracted as a result of the unrequested drainage. This local business custom could further reinforce the possibility of objective valuation. Therefore, for Levmore, the court's conclusion that "the benefit accruing to the defendant . . . was merely incidental"[97] calls for another type of justification – the market encouragement thesis: "Ulmer may have been far from Farnsworth's first choice of a provider. A grant of restitution would encourage self-selection rather than market-selection of providers." The imposed draining of Ulmer's quarry is a substitute for a similar bargained-for provision. "Where the provision is likely to be a substitute for something the recipient would or could have done either on his own or through the marketplace, the market encouragement perspective explains the denial of restitution."[98]

Notice, however, that this market encouragement claim quickly collapses into a form of subjective devaluation, at least in the Birksian, choice-focused understanding of this principle: the reason why we find the bypassing of the market in this case troublesome is that Ulmer's choice of provider matters. The thinning of the market is objectionable because it may eradicate the ability of potential recipients to express their subjective preferences of providers. Levmore's observation as to the effect of the denial of restitution in this type of case as a means of encouraging thick markets is correct. But the reasons why we care about market encouragement are the very same reasons that make subjective devaluation an important normative concern.[99]

D On conflicts of interests and contractual background

Conflicts of interests

A second objection of defendants arises from potential "agency costs" of the benefactors. (Agency costs include "loss by the principal from decisions by the agent which deviate from the decisions which would have been made by the principal if he had had the same information and

[97] *Ulmer*, *supra* note 55, 15 A. at 66. [98] Levmore, *supra* note 65, at 111–13.

[99] This analysis preserves the correlativity framework of private law (discussed *infra* section 7.B) in this context. Levmore's market encouragement thesis – whose premise is that even if the plaintiff has no legitimate complaint, restitution should be denied for the public welfare – clearly deviates from the maxim of correlativity.

talents as the agent."[100]) In addition to benefitting the locked-in group, the benefactor may have incentives to act in ways that advance only its own interests or, at least, in ways that are more committed to its own interest than to those of its purported beneficiary. A defendant may be rightly concerned that the restitutionary claim partially seeks restitution for benefits conferred only (or mostly) upon the benefactor. In many cases the benefactor's interests in a jointly beneficial action differ from those of the defendant and most such differences do not trigger the denial of restitutionary recovery. But in cases that raise concerns of clear conflicts of interests with some evident urgency, restitution for unrequested and self-interested benefits may not be forthcoming. Allowing restitution to a plaintiff whose self-serving commitment might overwhelm her pursuit of the jointly beneficial action is too likely to end up offending the recipient's autonomy and may even generate utility-reducing outcomes.

While this agency-costs objection deserves special attention – partly because it is generally overlooked in the literature – it is admittedly related to both the locked-in analysis of section B and the subjective devaluation analysis of section C. Where agency costs exist, they usually indicate that the parties' interests are not identical, so that although they partly converge, there is also a significant divergence. If the conflicting interests overwhelm the converging interests, imposing liability in restitution would actually create inefficient free-rider problems because the interests of the "benefactors" are then subsidized at the expense of the locked-in group. Furthermore, in such circumstances restitution defendants have a valid claim of subjective devaluation.

The case of *McNeilab, Inc. v. North River Ins. Co.*[101] illustrates this dilemma. In *McNeilab*, an insured pharmaceutical company sought restitution from its own liability insurer for a recall undertaken after product-tampering incidents. Its theory, based on the celebrated *Leebov* case,[102] was that the recall was expected to benefit the insurer by preventing third-party damages for which the insurer would be liable. The agency-costs

[100] 1 The New Palgrave: A Dictionary of Economics 39 (John Eatwell et al. eds., 1987).

[101] 645 F.Supp. 525 (D.N.J. 1986).

[102] Leebov v. United States Fidelity & Guar. Co., 165 A.2d 82 (Pa. 1960). In *Leebov* a builder excavating a project site sacrificed his own trucks by driving them into position as retaining barriers, in order to prevent landslide damage into neighboring property. The claimant successfully sought recovery from his liability insurer for the value of the trucks, arguing that the insurer had benefitted because the damage done to the neighboring property would have triggered a claim under the liability insurance policy.

problem explains the court's denial of the claim.[103] The court noted that the insured undertook the recall in the most expensive manner possible and had thus achieved far more than limiting the insurer's potential liability to tort victims. The recall had actually increased the company's profitability by substantially promoting its goodwill.[104] Recall efforts typically involve such moral hazards due to the intrinsic mixture of collective benefits in the form of liability reduction and goodwill promotion to the insured. In such situations, where we might have particular reason to believe that the benefits provided contain such a mixture, restitution should be strictly limited to the collective aspect of the benefit. In cases where such a sorting is infeasible, a restitutionary remedy should not be (and is not) available.

The impact of contractual background

McNeilab is important not only because it illustrates the conflict-of-interests objection, which is my main focus in this section. *McNeilab* is also instructive because of its lesson regarding the resolution of cases of unrequested and self-interested benefits that emerge in a context of some (explicit or implicit) pre-existing contractual allocations of rights and responsibilities. The court's holding relied on its view that recall costs were not covered as part of the insured's liability policy given that the manufacturer had not actually been held liable for any of the drug-tampering deaths. This conclusion was not based only on the sheer lack of explicit language in the policy – no language was present in *Leebov* as well – but also on the fact that McNeilab had at one time carried a recall insurance, but had decided by the time of the recall that such insurance was prohibitively expensive.[105]

The high cost of recall insurance is in all probability explained by the problem of conflict of interests and therefore the contractual background in *McNeilab* does not undermine its relevance to our context. And yet *McNeilab* should also serve as a cautionary note to the impact of contract on restitution – a preview to chapter 8, if you will. The contractual background is not always as evident as it is in this case, and its

[103] Saul Levmore has argued that the court's denial of coverage stems from the law's policy to allow restitution for unrequested benefits only if the intervention turns out to be *ex post* efficient. *See* Saul Levmore, *Obligation or Restitution for Best Efforts*, 67 S. CAL. L. REV. 1411, 1433 (1994). A requirement of *ex post* success, however, is indefensible. *See supra* section 4.D.

[104] *See McNeilab*, *supra* note 101, 645 F.Supp. at 527.

[105] *See id.* at 528, 546.

implications do not always converge with the implication of the "pure" restitutionary analysis of this chapter.[106] But when an unrequested and self-interested benefit has been conferred in a context where rights and responsibilities have been contractually allocated, this allocation must be taken into account.[107] Ignoring such contractual allocations of rights and responsibilities is likely to distort the parties' incentives and might reduce their aggregate welfare. More fundamentally, where the parties are already tangled in a contractual web of rights and responsibility, the notion of free-riding – which is the starting point for both the autonomy and the utility accounts of restitution – can only be judged by reference to these background rights and responsibilities.

Consider, for example, *Robinowitz v. Pozzi*.[108] A lawyer (Robinowitz) sought restitution for the benefit he provided another team of lawyers (Pozzi) who won a case on appeal that he had taken to trial. They used his file in their preparation, and he sought a portion of the lawyers' fees they received from the client (Olson). Most of the court's analysis in its rejection of this restitution claim is unconvincing, illustrating the dangers of the traditional reference to unjust enrichment as an argument rather than a conclusion. The court emphasized the "unjust retention element" of the quasi-contract claim, and went on, unproblematically, to conclude that "plaintiff could not reasonably expect that he would be entitled to share in the recovery that belongs to defendants and resulted from their efforts."[109] The last part of this sentence is only partly true; but its partial falsehood is not determinative because we know that the mere fact that the defendants were benefitted by Robinowitz's work does not in any event automatically lead to recovery. The first part of the sentence I have just quoted begs the question under debate: who is entitled to the recovery?

Still, Robinowitz's claim was correctly rejected. But the reason lies in one seemingly redundant fact the court mentions: Olson, we are told, "was free to employ any attorney to pursue an appeal, assuming he wished to do so."[110] In other words, the terms of the Olson–Robinowitz contractual arrangement allowed Olson to dismiss Robinowitz without obligation to pay for his work to that point.[111] Once we realize that this is the way Olson and Robinowitz allocated risks and benefits, the rest of

[106] *See* ALI Draft, *supra* note 3, § 21 cmt. f.

[107] This does not mean that the sheer existence of a contractual background necessarily implicates the contingency of the conferred benefit. *See, e.g.*, *Federal Ins. Co.*, *supra* note 72, 183 F.Supp.2d at 83–86.

[108] 872 P.2d 993 (Ore. App. 1994). [109] *Id.* at 996. [110] *Id.*

[111] *See* Andrew Kull, *Regional Digest: USA*, 3 RESTITUTION L. REV. 230 (1995).

the answers follow rather trivially: Olson cannot be said to be unjustly enriched by Robinowitz's work because in their original contingent fee contract Robinowitz agreed to perform such work without compensation; and we should not conclude that Pozzi – the appeal lawyer – has been unjustly enriched, because such a conclusion would lead to appeal lawyers passing on their liability to their clients, which would ultimately disturb the allocation of risks and benefits between clients and their first-instance lawyers.

E Third-party effects

Cases in which the parties' interests are locked together and there are no expected differences between their preferences based on taste, wealth, or conflicts of interests are easy; in these cases restitution is generally – and rightly – awarded as a matter of course.

Consider for example the cases of liability insurers who pay their insured's loss and turn to the tortfeasor for equitable subrogation. It is now easy to see why this is considered a core (easy) equitable subrogation case.[112] The interests of the insurer and the tortfeasor are locked together. If the insurer's coverage had been considered "voluntary" – that is, if we had concluded that the tortfeasor had not been unjustly enriched – then, assuming we did not allow victims to recover twice (which would result in insurers transferring their higher costs to insureds in the form of higher premiums),[113] both the tortfeasors and the insurers would have an incentive to refuse to pay. This is because the first to pay would carry the burden irrespective of their substantive rights.[114] Allowing insurers to seek equitable subrogation from tortfeasors removes this incentive. Equitable subrogation is the way to solve the collective action problem of insurers and tortfeasors. And as long as the right of tortfeasors to contest

[112] *See* Friedmann & Cohen, *supra* note 31, at 21.

[113] *See* Ronald C. Horn, Subrogation in Insurance Theory and Practice 25 (1964). *Cf.* Simone Degeling, Restitutionary Rights to Share in Damages: Carer Claims at Common Law 191–230 (2003) (discussing the law of restitution's policy against accumulation).

[114] A similar reasoning of "locked-in" interests applies, for example, in the context of contribution claims of a joint tortfeasor who discharges the entire liability by settlement and seeks contribution. Claimants are much more likely to settle, or to settle on more lenient terms, if they settle their entire claim, given the considerable advantage to claimants of such settlements over partial settlements which leave part of their claim against other defendants pending. On contribution claims in these contexts, see Mitchell, *supra* note 15, at 230–34.

liability and damages is preserved in the equitable subrogation suit, they have no legitimate reason to complain. First, no difficulty of subjective devaluation arises because the non-bargained-for benefit is already in monetary terms and satisfies an expense that is nondiscretionary to the tortfeasor. Second, payment by the insurer appears to provide few benefits to the insurer apart from the collective benefit of satisfying the duty to pay the victim.[115] Hence, no systemic concern of conflicts of interests justifies a denial of restitution.

But there are also borderline cases. A typical hard case arises where the parties' interests are not as clearly locked in. In these cases, third-party effects become significant. Thus, in the context of equitable subrogation – one of the most important open-ended areas of our doctrine – restitution may be justified even in such peripheral cases if there are third parties affected by the subrogee's decision whether to provide the benefit.

A good example comes from *In re Air Crash Disaster*.[116] On August 16, 1987, Northwest Flight 255 crashed and 156 people were killed. A jury found the airline, Northwest, liable for 100 percent of the injuries and deaths caused by the crash, and exonerated McDonnell Douglas, the manufacturer of the airplane. McDonnell Douglas had previously paid considerable amounts of money to settle certain claims arising out of the incident. After the verdict, it sought recovery from Northwest pursuant to the doctrine of equitable subrogation. The Sixth Circuit accepted this theory of recovery.

The court held that "equitable subrogation is especially well-suited to allow recovery by an innocent settling party from the actual wrongdoer," as long as it can demonstrate that it was not "a mere volunteer." The volunteer issue here frequently implies – as we have seen – the question of how closely the payor's and tortfeasor's interests were tied together. In this case, it would have been possible for McDonnell Douglas to have protected its own interests without conferring the unrequested benefits on Northwest. But the court dismissed the claim that McDonnell Douglas was a volunteer, noting that the money it paid was "in response to the threat of litigation." Given McDonnell Douglas' ultimate lack of liability, this reason seems a flimsy basis on which to conclude that McDonnell Douglas and Northwest were sufficiently bound together to justify a restitutionary recovery.

[115] One additional benefit is the goodwill benefit of being recognized as someone with whom it is easy to do business.

[116] 86 F.3d 498, 511–13, 549–50, 552 (6th Cir. 1996).

The result of *In re Air Crash Disaster* is correct, but for reasons beyond the relationship between the two parties. The court praised McDonnell Douglas' "strategy" to "compensate the injured parties and focus the controversy between Northwest and McDonnell Douglas," a strategy which "provided prompt payments for the special plaintiffs and reduced their legal expenses." Preventing McDonnell Douglas "from recovering after it has been exonerated," explained the court, would have deterred "parties harboring any hope of innocence from settling," thus undermining public policy.

The court's concern for third-party effects explains why this borderline case is justifiably covered by equitable subrogation. Between a payor and a tortfeasor, cases of payments to victims by nonliable original defendants are on the periphery of equitable subrogation. But in the context of nonbargained coverage of harm inflicted by someone else's wrong, the law must also consider possible third-party effects.[117] These effects should allow equitable subrogation claims to succeed especially where (as in the case at hand) no serious concerns regarding either subjective valuation or conflicts of interests arise.[118]

Attention to third-parties' interests also explains why the "volunteer rule" rarely influences insurance subrogation cases.[119] Subrogation is available for insurance payments which are "favored by public policy," even if they are not in performance of a legal duty. As long as the nature of the loss is within the basic scope of the policy coverage, an insurer who pays a claim should not be treated as a volunteer, even if it acts in the face of judicial authority suggesting that applicable exclusion would enable it to deny liability.[120] This expansion of insurance subrogation is justified because if insurers had not been permitted to recover colorable claims paid, even if, in the end, these claims were not covered, they would

[117] *See* ALI Draft, *supra* note 3, § 26 cmt. c. *Cf.* Jaffey, *supra* note 74, at 95; Mitchell, *supra* note 15, at 59, 126, 137; Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights 288–89 (2002).

[118] The proviso is particularly important insofar as one is committed to the correlativity of plaintiff entitlement and defendant liability as a cornerstone of private law. *See infra* section 7.B. The proviso somewhat ameliorates the difficulty of considering the interests of third parties in violation of the maxim of correlativity.

[119] *See* Quinn, *supra* note 26, at 1381. *See also* Robert E. Keeton & Alan I. Widiss, Insurance Law § 3.10(d)(3), at 249 (1988); Friedmann & Cohen, *supra* note 31, at 13–14, 43, 47.

[120] State Farm Fire & Cas. Co. v. East Bay Mun. Util. Dist., 62 Cal. Rptr. 2d 72, 75, 77 (Ct. App. 1997). *See also, e.g.*, Continental Ins. Co. v. Federal Ins. Co., 266 S.E.2d 351, 352 (Ga. Ct. App. 1981).

have been more hesitant in accepting claims. An expansive approach to insurance subrogation, by contrast, helpfully encourages them "to err on the side of caution when rejecting claims."[121]

Appreciating the concern of the interests of third parties helps settle the contested boundaries of equitable subrogation. Equitable subrogation should be (and is) allowed even where the parties' interests are not strongly enough locked in to present a core case, if there are substantial concerns for third-party effects and as long as there are no significant concerns regarding subjective devaluation or conflict of interests.

F The governments' subrogation claims

The consideration of third-party effects completes this chapter's account of the normative underpinnings of restitutionary claims for unrequested and self-interested benefits. It is time now to conclude by applying this account to the innovative pattern of restitution claims of governments against industries, such as the tobacco and gun industries, for the governments' expended preventive and ameliorative costs.

Testing the theory

Our discussion suggests three stages of analysis. First, we must ask whether the interests of the governments and the industries are locked together. Second, we need to look at the possible objections of the industry, which did not bargain for the unsolicited benefits conferred (indirectly) on it. Finally, if we reach the conclusion that these two tests classify this case as peripheral, we should inquire into the third-party effects of the decision in order to determine whether to classify it within equitable subrogation.

At first blush, the locked-in investigation seems simple. The states' health-care costs, preventive and ameliorative, benefit the tobacco industry by limiting the detrimental consequences to citizens, thus diminishing the extent and amount of potential damages that could be suffered by the industry through the injured citizens' suits[122] (which I assume to be legally valid). But recall the unique features of this type of case: the additional health-care costs governments have incurred as a result of smoking-related illnesses are not based, as they are in core cases, on the payor's legal

[121] Quinn, *supra* note 26, at 1380. *See also, e.g.*, *State Farm Fire & Cas. Co.*, *supra* note 120, 62 Cal. Rptr. 2d at 76–77.

[122] *Cf.* City of New York v. Lead Indus. Ass'n, 644 N.Y.S.2d 919, 924–25 (App. Div. 1996); Moran, *supra* note 74, at 135.

obligation to pay; furthermore, these payments were not directly made to the alleged subrogors (the injured citizens), but are rather expenditures made in preventing and ameliorating their harms. The indirectness of the government payments calls into question how closely the governments' and industries' interests are locked together. Just as in *In re Air Crash Disaster* and in cases of insurers' coverage of uninsured harms, part of the states' costs was discretionary. (While the states must pay for a percentage of Medicaid, other preventive and ameliorative costs they have incurred, such as the antismoking programs undertaken in California and Florida, are discretionary.)

Next, consider the legitimate objections of the defendants. First, it is difficult to think of any complaint arising from subjective devaluation concerns. The situation of the tobacco and gun industries in this respect is analogous to that of tortfeasors in typical insurance subrogation claims. The industry's original liability to injured citizens caps its exposure to equitable subrogation. Moreover, the industry has a right to contest its liability, raising whatever defenses it would have had against the injured citizens, most prominently assumption of risk, causation,[123] and statutes of limitation.[124] The government further needs to establish the reasonableness of the amounts spent, showing that its preventive and ameliorative measures actually reduced the industry's liability, and is entitled only to the damages attributable to the loss which it actually covered (which probably precludes damages for pain and suffering, punitive damages or statutory penalties to which the injured citizens might have been entitled from the industries). In these circumstances the industry has no legitimate complaint of subjective devaluation. The unrequested benefit indirectly conferred on the tobacco and gun manufacturers is, from their perspective, already in monetary terms, and it reduces a nondiscretionary

[123] Equitable subrogation may look like a trick to avoid causation in relieving plaintiffs from establishing specific damages resulting from the specific negligent acts of specific defendants. The pertinent question here is whether this relaxation of the causation requirement goes beyond the existing tort law mechanisms – burden shifting, market share and enterprise liability, and alternative tort liability – that already go a long way in forcing tortfeasors to internalize the costs of negligence where individual liability would otherwise be very difficult to prove. *See, e.g.*, Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 Cardozo L. Rev. 1891 (1997); Richard Delgado, *Beyond* Sindell: *Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 Cal. L. Rev. 881 (1982).

[124] Insofar as the underlying citizens' claim is for fraud, their reliance may also be a necessary element of the industry's liability.

expense. Thus – and subject to these conditions – the governments' subrogation cases present an easy case of incontrovertible benefit.

The second objection, that of agency costs, raises a valid concern regarding that part of the governments' claims that refers to costs which they have not yet incurred. When a government recovers for costs to be incurred at some time in the future, it may have significant incentives to pursue benefits that would not accrue to the injurious industry as much as to the government – money free from political costs. This concern is mitigated by the equitable subrogation rule, which limits the subrogee's recovery to the cost it actually incurred, prohibiting recovery in advance.[125] Correspondingly, governments should be limited to a judgment of liability with actual payments being made periodically and to the extent of their actual additional – strictly preventive or ameliorative – costs. (The majority rule actually prohibits the subrogee any recovery at all until it has made the entire payment.[126] But this rule is impractical when applied to a government's claim against an industry because it is difficult to determine what constitutes full or partial payment. The better rule in our context is thus the minority rule that permits *pro tanto* subrogation based on partial payment.[127]) One can assume that the governments' claims for money spent to treat those who are actually already sick (past injuries) would take priority over their claims for ameliorative costs (present injuries), and that both of these would take priority over the governments' claims for preventive costs (future injuries). Periodic claims for actual payments should also make sure that this priority is not upset.[128]

But even if we set aside the concern of agency costs, the governments' equitable subrogation claims still look peripheral given the relatively tenuous locked-in nature of the interests of governments and industries as

[125] *See* United States v. P/B STCO 213, 756 F.2d 364, 370 (5th Cir. 1985); MADDAUGH & MCCAMUS, *supra* note 80, at 165; Saul Litvinoff, *Subrogation*, 50 LA. L. REV. 1143, 1176 (1990).

[126] *See, e.g.*, Shelter Ins. Cos. v. Frohlich, 498 N.W.2d 74, 78 (Neb. 1993); Westendorf v. Stasson, 330 N.W.2d 699, 703 (Minn. 1983).

[127] *See* KEETON & WIDISS, *supra* note 119, § 3.10(b)(1), at 233–37; Quinn, *supra* note 26, at 1387.

[128] The pay-as-you-go nature of subrogation also obviates arguments about whether the states have, on the whole, actually saved money through the early deaths of smoking citizens. For conflicting views respecting the net benefit argument, compare WILLARD G. MANNING ET AL., THE COSTS OF POOR HEALTH HABITS 28 (1991), with Hanson & Logue *supra* note 7, at 1247–60. *See also* Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1146–52 (2003).

indicated above. Third-party effects should therefore determine whether to allow or disallow a claim to recover those costs in equitable subrogation. These effects, more specifically, justify a relatively generous attitude to equitable subrogation.

The significance of such effects has been considered in a similar context in *City of New York v. Lead Industries Ass'n.*[129] In that case, New York City sued five major manufacturers of lead-based paint and their trade association to recover costs expended in inspecting, testing, monitoring, and abating the hazard arising from the use of the lead paint, in testing children at risk of lead poisoning, and in treating the victims of such poisoning. The defendants moved for dismissal of these claims, but the appellate court refused to grant dismissal, deciding that these claims set forth a viable cause of action.

Under New York statute, the government was required to alleviate hazards caused by lead pigments the defendants manufactured. But the court did not rely on that duty. Rather, it focused on Section 115 of the Restatement of Restitution, which provides that performance of another's duty where there is an immediate necessity "to protect 'public decency, health or safety'" gives rise to restitution. "The thrust of the complaint," said the court, "is that plaintiffs took the immediate action necessary to protect the health and safety of the residents of their buildings, particularly children, from the well recognized hazards of lead paint which had been manufactured and marketed by defendants." The court decided that the reasonable costs of the plaintiffs' preventive and ameliorative measures were recoverable, emphasizing that "the salutary goals" of the restitutionary remedy – which are "particularly relevant" for abatement costs – "are furthered when preventive and ameliorative steps to abate the hazards at the earliest opportunity are immediately taken to limit the disastrous consequences to children that would ensue from continued exposure to lead paint."

Andrew Kull correctly criticized the court for allowing indemnity, rather than equitable subrogation: "the required nexus for indemnity is the existence of a joint liability to a third party, [but] the paint manufacturers were not . . . under any liability to anyone."[130] This might have been a serious defect, since – as we have seen – indemnity may

[129] 644 N.Y.S.2d 919 (App. Div. 1996). For other cases, in the context of asbestos abatement, that adopted (and at times declined to adopt) a similar approach, see Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 Ga. L. Rev. 847, 910 & n.305 (1999).

[130] Andrew Kull, *Regional Digest: USA*, 5 Restitution L. Rev. 198, 203 (1997).

(unjustifiably) allow a much longer limitation period than subrogation. But it is doubtful whether the City would have been less successful with equitable subrogation. In passing, the court mentions that "individual children suffer injury from continuing exposure to paint," implying that, unlike the City's direct claim, the inhabitants' suits are not time-barred.[131] Because the City would substitute for the direct claimants, the City's equitable subrogation claim would not be dismissed on limitation grounds.

Be this as it may, *City of New York* illustrates how the public duty owed to third parties by governments in responding to harms should be as compelling a ground for equitable subrogation recovery as the policy in favor of encouraging insurers to pay claims to tort victims. The court correctly interpreted the "immediacy" language of Section 115 of the Restatement generously and did not require short-term emergency to justify the government's action. A government may recover as long as the action was taken to promote public health and welfare.[132]

The bilateral relationship between the governments and the industries in these types of cases is set at the periphery of equitable subrogation. But the interests of an untold number of third-party beneficiaries require the availability of restitutionary claims regarding governments' preventive and ameliorative costs. Public authorities should be able to respond in an efficient manner to any threat to the public health or safety, without worrying that the provision of services would unjustly (and inefficiently) insulate those who are responsible for these threats from liability and unjustifiably shift the burden of their wrongdoing to the public purse.[133]

A note on statutory interventions

Having defined the possible liability of industries such as the tobacco or gun manufacturers to governments in equitable subrogation, I now turn to the possible impact of specific statutory interventions.[134] Statutory interventions that may affect a government recovery in subrogation against an injurious industry raise complex questions that cannot be addressed

[131] *See Lead Indus. Ass'n, supra* note 122, 644 N.Y.S.2d at 925.

[132] *See also United States v. P/B STCO 213, supra* note 125, 756 F.2d at 371.

[133] *See Lead Indus. Ass'n, supra* note 122, 644 N.Y.S.2d at 925; *see also* Wyandotte Transp. Co. v. US, 389 U.S. 191, 205 (1967).

[134] This question should be distinguished from the problem of a court's determining when a statutory cause of action should be read to allow contribution among violating parties. *See* Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286, 288, 293–94 (1993).

adequately here. Yet, a brief comment on one form of statutory intervention may be appropriate.[135]

In several states, legislatures have passed statutory subrogation provisions whose scope does not coincide with the scope I ascribed to equitable subrogation. These statutes typically allow the relevant state government to proceed with a subrogation claim free of one or more of the industries' traditional defenses,[136] or at least to create a lien in favor of the government.[137]

These legislative interventions raise the complicated issue of the relationship between statutory rules and preexisting common law: whether the new statute should be read as a clean slate that erases any prior common law rules, if the language of the text so suggests,[138] or whether it should be read with these rules in the background, trying to accommodate its content to a "chain novel" understanding of legal evolution.[139] Courts have interpreted these interventions into the common law variously.[140] Given the jurisprudential stakes, I do not try to resolve this general question, although I note the general affinity of the approach of this book to the chain novel understanding of legal evolution. In any event, the analysis of this chapter shows that whatever one's views on these issues, a statutory enactment that changes the common law rules in favor of the enacting state should be interpreted narrowly, presuming no preemption, particularly when the amended rules go to the heart of the premises of equitable subrogation.[141]

[135] Another type of intervention involves states' prohibitions – backed by criminal sanctions against municipal actors – of municipal claims against the gun industry. *See* H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 Tex. Rev. L. & Pol. 433, 489 (2001); Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247, 1265 (2000). Evaluating these prohibitions requires an analysis of these states' home rule and of complex questions of democratic theory and institutional competence that are well beyond the scope of this book.

[136] *See* Fla. Stat. Ann. § 409.910 (Supp. 2002); Mass. Gen. Laws Ann. ch. 118E, § 22 (1994 & Supp. 2002). *See also* David A. Hyman, *Tobacco Litigation's Third-Wave: Has Justice Gone Up in Smoke?*, 2 J. Health Care L. & Pol'y 34 (1998).

[137] *See* Iowa Code Ann. § 249A.6 (Supp. 2002); Md. Code. Ann., Health-Gen. I § 15–120 (1994 & Supp. 2001).

[138] *See* Antonin Scalia, A Matter of Interpretation 24 (1997).

[139] *See* Dworkin, *supra* note 16, at 313, 338.

[140] *See, e.g.*, James J. White, *Rights of Subrogation in Letters of Credit Transactions*, 41 St. Louis U. L.J. 47, 54 (1996).

[141] The federal government's suit to recoup medical costs from the tobacco industry is a particularly rich example of the interplay between statutes and common law in a government's assertion of its rights. The bases for the federal claims are the Federal Medical Care Recovery Act (MCRA), 42 USC §§ 2651–2653 (1994), the Medicare Secondary Payer

The risks of subrogation

Thus far I have claimed that, at least absent statutory intervention, equitable subrogation should allow governments to recover public funds which were spent on the prevention or amelioration of citizens' injuries caused by a defendant industry. Equitable subrogation supplies the proper doctrinal home for these claims as it is tailored to address cases in which the law needs to facilitate legitimate unrequested conferrals of benefits. The traditional defenses and limitations of equitable subrogation help overcome any possible complaint of the industry from subjective devaluation or conflicts of interests. The significant third-party effects justify this liberal approach respecting the scope of equitable subrogation, namely: upholding these government claims notwithstanding the attenuated degree to which the government's and the industry's interests are locked in together.

Equitable subrogation doctrine further addresses another potential problem that arises where the resources of alleged tortfeasors are limited. If the subrogor and the subrogee cannot both recover in full, the subrogor – the injured party – takes first.[142] This points to a potential competition between the governments who seek to recover their ameliorative and preventive costs and the citizens who seek remedy for their direct harms. This aspect of the triangular relation between governments, citizens, and injurious industries is unlikely to affect the equitable subrogation suit because the defendants are unlikely to have standing to claim that they are not liable to the subrogees since – given their limited resources – the subrogors must take precedence. (Rather, the defendants should admit liability and ask the court for instructions as to whom they should pay.) This competition between governments and citizens does raise, however, broader issues that need not be addressed here in any detail. And yet because of its significance a brief account may be in order.[143]

The problem of competition between governments–subrogees and injured citizens–subrogors is vividly demonstrated by the saga of tobacco

Program of the Social Security Act, 42 USC § 1395y(b)(2)(B)(ii) & (iii) (1994), and the civil provisions of the Federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 USC §§ 1961–1968 (1994 & Supp. III 1997). I am doubtful about the merits of the first and third causes of action, but find the second cause of action viable. *See* Dagan & White, *supra* note 22, at 402–06 n.201.

142 *See* Greenblatt, *supra* note 90, at 1341, 1351.

143 This issue may be particularly relevant regarding the gun industry given its relatively limited resources. *See* David E. Rosenbaum, *Echoes of Tobacco Suit in Gun Battle*, N.Y. Times, March 21, 1999, at A32. *See also* Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, N.Y. Times, June 24, 1999, at A18.

litigation and settlement which epitomizes some of the dangers of allowing governments to pursue restitutionary claims against injurious industries.[144] The difficulty arises in the context of a government–industry settlement – like the tobacco settlement – in which there is a temptation to take assets from and pass costs on to the citizens. An analysis of the tobacco settlement, for example, shows that some of the *quid pro quo* given by the states to the tobacco manufacturers is actually at the expense of third parties: competitors (and hence future consumers) and injured smokers. The latter externality is of particular concern. It may occur when government settlements with defendant industries include provisions limiting the settling defendants' future tort liability to private litigants: capping injured citizens' compensatory claims, and barring punitive damages awards and class actions. Indirect evidence for the same phenomenon is the receipt by a government of funds in excess of spent costs and their spending of such funds on causes that have nothing to do with the injured citizens' interests.[145]

Hence, governments' equitable subrogation claims are both salutary and dangerous. My main claim in this section is that allowing these claims is beneficial, for it allows governments to pursue their public responsibilities in preventing and ameliorating injuries to their citizens without fear that the public will bear more than its fair share of the cost. Properly asserted, government equitable subrogation claims insure the correct internalization of the true costs of an industry's products. But this liberal approach to equitable subrogation must be accompanied by a proper legal protection against the governments' temptation to collusion and conversion. Happily enough, takings law can provide such a protection by affording citizens a valid claim against governments, at least respecting any interference with their compensatory claim. Establishing such a cause of action requires a detailed account of takings law and theory which is wholly beyond the scope of this book.[146]

[144] The remainder of this section is a brief summary of parts I & III of Dagan & White, *supra* note 22.

[145] *Id.* at pt. I. Some general purpose expenses may justifiably set off past preventative and ameliorative costs that were (unjustifiably) borne by the public. But insofar as these states' expenditures exceed those past costs with the remainder not preserved by the governments for the benefit of future injured citizens, they may point out the fact that even with no explicit sacrifice of the injured smokers' interests, the states received – and are now spending – money in excess of what they deserve as subrogees.

[146] *See* Dagan & White, *supra* note 22, at pt. III. *See also* Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741 (1999); Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 Mich. L. Rev. 134 (2000).

To conclude: the innovative and difficult cases of governments' subrogation claims following their efforts in ameliorating or preventing citizens' injuries caused by an industry are, in many respects, different from the mundane cases of protecting one's property interests and performing joint obligations. The theory of this chapter attempts to explain the easy cases and help resolve the hard ones. Enrichments, in our context, are deemed unjust when the recipient of the benefit is a free-rider whose defection from the collective action might frustrate the possibility of achieving the collective good. But even in these cases restitution is not always awarded. It is, in fact, denied (and rightly so) where the recipient can raise a legitimate conflicting concern from either her subjective devaluation of the conferred benefit or the benefactor's conflict of interests. Finally, in this context, hard cases arise where the parties' interests are not clearly locked in. In these cases, consequences for third parties become significant and may justify restitutionary recovery for unrequested, self-interested conferrals of benefits.

6

Restitution in contexts of informal intimacy

The preceding chapters, as well as the ones to follow, correspond by and large to the accepted categories of the law of restitution. This chapter is different. It covers an amalgam of restitutionary rules, claiming that together they have a coherent and normatively appealing theme that goes unobserved by the existing literature.

The structure of the chapter follows this goal. Sections A–C discuss the three doctrines I seek to integrate: unjust enrichment between cohabitants, restitution for the supply of necessaries, and rescission of gifts due to undue influence.[1] These three doctrines do not easily fit into the familiar categories of restitution.[2] The conferrals of benefits addressed by these seemingly unrelated doctrines can be properly characterized neither as sheer pursuit of self-interest (like the cases discussed in chapter 5) nor as acts of good-samaritanism (like the cases analyzed in chapter 4). As we will see throughout sections A–C, they are better characterized as different aspects of the legal facilitation of relationships of long-term reciprocity.

More precisely, this chapter shows how the law of restitution supports the liberal vision of community. By community I refer to "any group of people who share a range of values, a way of life, identify with the group and its practices and recognize each other as members of that group." In identifying themselves with a community, individuals commit themselves to it: they endorse and promote its projects and regard their own

[1] In all three cases I leave aside any proprietary consequences. A discussion of restitution in the context of competition with third parties must await section 7.G below.

[2] The new Restatement, for example, deals with these three doctrines under three different topics. Cohabitation cases are dealt with as part of the law governing benefits conferred in pursuit of the claimant's interest; necessaries doctrine is placed within the law of benefits conferred in exigent circumstances; and the section dealing with undue influence is part of a topic entitled "other instances of defective consent." *See* Restatement (Third) of Restitution and Unjust Enrichment § 28 (Council Draft No. 4, 2002) [hereinafter ALI Draft]; Restatement (Third) of Restitution and Unjust Enrichment § 22(1)–(2) (Tentative Draft No. 2, 2002); Restatement (Third) of Restitution and Unjust Enrichment § 15 (Tentative Draft No. 1, 2001).

well-being as intimately linked to its flourishing. This commitment is (at least partly) voluntarily chosen – hence the liberal qualifier – due to the value of such communities for individuals, and as long as they continue to be sources of such value. This value is both instrumental and intrinsic. Communal activities yield economic gains as well as other goods which constitute valuable ways of life. Being a part of such a community is also a means for individual self-respect, allowing individuals to be at ease in the world.[3]

By weaving the threads of three seemingly unrelated restitutionary doctrines, sections A–C show that the law of restitution serves an important role in the legal treatment of such valuable intimate communities. Unjust enrichment claims facilitate informal intimate relationships by protecting interpersonal relationships of reciprocity, trust, and reliance and shielding the parties to such relationships against the lingering risks of opportunism and abuse of trust. Exposing this unappreciated role of restitution helps address some suggested reforms of the doctrines relating to cohabitation and necessaries. It also motivates my discussion (in section D) of whether law's facilitation of a liberal community of informal intimacy should stretch in new directions. This inquiry reconceptualizes the terms of the existing debate as to whether the doctrine of contracts implied by law should be broadly (or strictly) circumscribed and whether the restitutionary rules between co-owners should be liberalized. It may also help resolve these pending legal questions.

A Unjust enrichment between cohabitants

Frambach v. Dunihue is an unusual case involving "an amazing account of human relationships."[4] It is also an unusually telling restitution case. It is a story of two families who became increasingly friendly: Dunihue, a widower with seven children, and the Frambachs with four children. The relationship between the parties significantly warmed up in September 1960 after they waited out a hurricane in the Frambachs' small home: "the relationships which developed as the storm howled proved so interesting and the two families so congenial that the Frambachs and Dunihues decided to see if the two families could live together." Apparently,

[3] *See* Andrew Mason, Community, Solidarity, and Belonging: Levels of Community and Their Normative Significance 21, 23, 51–52, 59 (2000); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 Yale L.J. 549, 572–74 (2001). *Cf.* Joseph Raz, The Morality of Freedom 193, 198–207 (1986).

[4] 419 So.2d 1115, 1116–17 (Fla. App. 1982).

this experiment was a success: after Dunihue enlarged the house, they all lived together for nineteen years: "it was just one family and whatever money was available was used wherever it was most needed. Very often the three shopped together for clothes, furniture, and automobiles." But one day everything dramatically changed: "Mrs. Frambach called Dunihue at work and told him to come get his things and get out. He was given thirty minutes to comply. The reason for the sudden end to the friendship was not clear."

The trial court accepted Dunihue's claim for an undivided one-half interest in the parcel on which the Frambachs' home was located. It determined that "the two families had operated as a single family" and that "the association of the parties was almost as close as though there had been a single wife and two husbands." Accordingly, the trial court found that "the pooling of assets and commingling of everything into a common pot was to assure Dunihue that he would have a home as long as he lived and that it would award Dunihue an equitable lien in the home." Furthermore, the trial court concluded that "because of the way they treated everything through the years, they really are just as though this was a divorce. And we are dividing up the property between a wife that had two husbands, so to speak. That's why I think the only fair thing to do is to make them tenants in common right down the middle."

The Florida Court of Appeals disagreed, emphasizing that there was no evidence of a promise to deed a portion of the Frambachs' property to Dunihue in return for the improvements or evidence of actual payments by Dunihue as part of the purchase price. The Court remanded the case to the trial court with an instruction to "determine the value of the respective contributions of Dunihue and the Frambachs." This could be accomplished, explained the Court of Appeals, by comparing the respective fair market value (or cost) of the improvements attributable to Dunihue and the fair market value (or cost) of the services rendered by the Frambachs to him during the nineteen years the parties lived together. If, but only if, such a comparison demonstrates that "Dunihue's contributions exceed the value of the benefits received by him from the Frambachs, an equitable lien in this amount should be imposed to prevent the unjust enrichment of the Frambachs."

The approach of the *Frambach* court is emblematic of the way the law of restitution regulates cohabitation in America. The various restitutionary headings courts employ in this context – unjust enrichment, resulting trust, constructive trust, *quantum meruit*, and contract implied by

law[5] – are used as the main source of possible recovery for a cohabitant whose contribution was extraordinarily asymmetric. While restitution is downplayed by the literature on cohabitation,[6] it is, in fact, an important source of recovery between cohabitants absent an explicit contractual arrangement.

As we will see, some jurisdictions significantly diverge from this norm, either in the direction of equating cohabitants with married couples, or in the opposite direction of disallowing any recovery (even contract-based) between unmarried cohabitants, or allowing recovery only if the parties have reduced the terms of their economic relationship to writing. Furthermore, at times courts cloak the restitutionary contribution-based cause of action within a strained contract-implied-in-fact theory even in cases where there is no real or convincing evidence of the parties' intent. And yet all these "noises" should not obscure the big picture: although the differences between states frustrate any attempt to identify the majority position of the American law of cohabitation, it is safe to state that the restitutionary regime of balancing significant net surpluses after a cohabitation relationship comes to an end represents the middle-of-the-road approach between assimilating cohabitation into marriage and deterring (if not penalizing) cohabitating couples.

This section has two tasks: clarifying the role of the law of restitution as the main source of contribution-based recovery between ex-cohabitants, and defending the doctrine by reference to its role in facilitating relationships of long-term informal intimacy.

Restitution as a source of contribution-based recovery

While the facts of *Frambach* are admittedly esoteric, its restitutionary formula, basing both liability and measure of recovery on the existence of

[5] *See, e.g.*, Bright v. Kuehl, 650 N.E.2d 311 (Ind. Ct. App. 1995) (unjust enrichment); Hay v. Hay, 678 P.2d 672 (Nev. 1984) (resulting trust); Maria v. Freitas, 832 P.2d 259 (Haw. 1992) (constructive trust); Suggs v. Norris, 364 S.E.2d 159 (Ct. App. N.C. 1988) (*quantum meruit*); Boland v. Catalano, 521 A.2d 142 (Conn. 1987) (contract implied by law). For a classification of earlier cases, see Carol S. Bruch, *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial–Legislative Interaction*, 29 Am. J. Comp. L. 217, 222–23 nn.21–24 (1981).

[6] *See, e.g.*, Ira Mark Ellman, *"Contract Thinking" was Marvin's Fatal Flaw*, 76 Notre Dame L. Rev. 1365, 1365 n.3 (2001). In Canada restitution law has appeared most frequently in the context of cohabitation (and marriage). *See, e.g.*, Ralph E. Scane, *Relationships "Tantamount to Spousal," Unjust Enrichment, and Constructive Trusts*, 70 Can. Bar. Rev. 260, 261 (1991).

a significant asymmetric contribution – or, in other words, a significant net surplus – represents the mainstream position of American cohabitation law.[7]

Consider *Watts v. Watts*,[8] one of the leading cases in this area.[9] In *Watts*, the Supreme Court of Wisconsin considered the circuit court's dismissal of the plaintiff's complaint seeking an accounting of the defendant's personal and business assets accumulated during the twelve years of the parties' nonmarital cohabitation relationship. The Court was quick to agree with the dismissal insofar as the complaint was premised on the applicable provision of the marriage dissolution statute which does not extend to unmarried cohabitants.[10] The Court held, however, that the plaintiff's contractual and restitutionary claims were in principle recoverable.[11]

In addressing the plaintiff's claim of a breach of an express or an implied-in-fact contract between the parties, the Court emphasized the length of the parties' cohabitation, as well as their "joint ownership of property and the filing of joint income tax returns," which signal for the Court that "the parties intended their relationship to be in the nature of a joint enterprise, financially as well as personally." Regarding the unjust enrichment theory of recovery, the Court followed the approach of "many courts" according to which "unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both." The Court held that the plaintiff's allegations "that she contributed both property and services to the parties' relationship," that "because of these contributions the parties' assets increased," and that "she was never compensated for her contributions," are "sufficient to state a claim for recovery based upon unjust enrichment."[12]

[7] *See* Ann Laquer Estin, *Ordinary Cohabitation*, 76 Notre Dame L. Rev. 1381, 1395, 1399–1403 (2001). For a recent example see Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000).

[8] 405 N.W.2d 303 (Wis. 1987).

[9] The most famous cohabitation case is probably Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). But "[w]ith all its celebrity, the Marvin decision stands more as a cultural icon than as a legal watershed." Estin, *supra* note 7, at 1383.

[10] 405 N.W.2d at 307–09. The same reason also underlies the Court's rejection of the plaintiff's estoppel theory. *Id.* at 309.

[11] The Court also affirmed the plaintiff's partition theory, but its own discussion shows that this theory is derivative of a finding of a viable entitlement of the plaintiff based on either the contractual or the restitutionary theory. *See id.* at 316.

[12] *Id.* at 313–14.

The next episodes of the *Watts* drama were a jury trial and an appeal. The jury was asked two questions. The first question was whether the parties "had 'an implied contract to share in any increase in wealth during their relationship,' and, if so, '[w]hat sum of money will compensate' her." The jury's response – that there was an implied contract, but that the plaintiff's remedy was "zero" – revealed an ambiguity in this question: as the Court of Appeals noted, there was evidence to support the jury's answer if the question is read as referring to an intent to share as long as the parties continued to maintain the relationship. But if – and this matter was not fully tried below – the intent was to share even though the relationship would end, the zero recovery seems misplaced. Thus, the Appeals Court decided that there must be a new trial on this issue. The second question submitted to the jury was "whether [the defendant] was 'unjustly enriched' by [the plaintiff], and, if so, '[w]hat sum of money will compensate' her." The jury gave a positive response to this question and set the recovery at $113,090.08. The Court of Appeals affirmed, explaining that although no testimony on the value of the specific services performed by the plaintiff was presented, "there was sufficient evidence to support the jury's finding that [the defendant] was unjustly enriched by [the plaintiff's] efforts by $113,090.08, which is a little less than $12,000 a year." The Court pointed to "extensive evidence" concerning the services performed by the plaintiff for the defendant "in the upkeep of their home as well as in . . . his business." Moreover, there was evidence that the defendant himself valued the plaintiff's services as 10 percent of the increase in his net worth, and the jury's award followed approximately this figure.[13]

Watts illustrates the two doctrinal propositions on which the analysis of this section is founded. First, courts tend to make loose references to the cohabitants' intention to share. But in *Watts* – and in many other cases[14] – these references are either sheer rhetoric or a prelude for a dismissal. The contractual framework is merely rhetorical in cases where courts use only flimsy "evidence" for implying a contract, "stretching

[13] 448 N.W.2d 292 (Wis. App. 1989). The *Watts* drama ended with a settlement for about $250,000. *See* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. Rev. 695, 710 n.59.

[14] *See* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 6 Reporter's Notes cmt. b, 930–35 (2002) [hereinafter ALI Principles]; George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R. 5th 219, 372–91, § 8 (1999 & Supp. 2001).

contract doctrine beyond recognition in order to justify a remedy."[15] The Wisconsin Supreme Court's move of inferring the intention to share one's entire estate from jointly owning some specific property is a typical example. People who enter into cohabitation relationships may indeed share many of their financial resources, and when they place property in joint names and accept joint management, law can reasonably attribute to them an intent to share these goods. But this attribution regarding specific goods is a far cry from a presumption of an intent to share each other's net worth.

Alternatively, when a court – like the Wisconsin Appeals Court – takes seriously the task of divining the defendant's intent, it requires the plaintiff to show her cohabitant's intention to share his lot with her not only while they are together, but also if they split. It also looks for more specific intentions as to the scope of sharing (which assets should be divided?) and the degree of sharing (which percentage does he intend her to have?). This puts an insurmountable burden on the plaintiff, which means in most cases that her claim is doomed to fail. As Ira Ellman explains, because "couples do not in fact think of their relationship in contract terms," a rule that "directs courts to decide their disputes by looking for a contract is unlikely to find one."[16] Furthermore, an intent-based inquiry tends to yield an outcome of no recovery, especially in (the not infrequent) cases where there is a power relationship between the parties that allows the man to capture systematically a disproportionately high share of the benefits of their relationship (including power, prestige, self-esteem, opportunities for self-development, and both physical and economic security), and bear a disproportionately low share of its costs.[17] Given the pervasive gender subordination in society, this unhappy consequence of intent-based liability in the cohabitation context exacerbates the difficulties of the contractual theory and bolsters the role of its unjust enrichment alternative.

One may still contest this dismissal of the contractarian account of cohabitation, arguing that contract is rich enough to deal with cohabitation because in filling contractual gaps, specifically about dissolution, law

[15] Ellman, *supra* note 6, at 1371. *See also, e.g.*, Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights 203–05 (2002); Scane, *supra* note 6, at 270.

[16] Ellman, *supra* note 6, at 1368–69. *See also, e.g.*, Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 Mich. L. Rev. 47, 49–50 (1978).

[17] *See* Susan Moller Okin, Justice, Gender, and the Family 135–36, 138 (1989).

always refers to fair-minded parties. I do not dispute this claim as long as it is clear that the answers of such fair-minded parties will change according to their understanding of their social context. Fair-minded married couples, I argue below, should adopt a rule of equal division of the marital estate, broadly defined. By contrast, fair-minded parties to an arm's-length transaction that failed – the paradigmatic case of "general" contract law (and the focus of chapter 8) – may be more self-interested and prescribe entitlements to remedies only to the extent that they facilitate their instrumental goals. Cases of cohabitants (and of other relationships of informal intimacy) fall in between spouses and strangers. Accordingly, the appropriate fair-minded response in these cases is situated in between these two poles. Because, as we will see below, this response largely conforms to the restitutionary contribution-based formula, it is pragmatically helpful to match this intermediate form of human interaction with its supporting doctrinal scheme.

This leads me to my second proposition: that restitutionary claims in the context of cohabitation are contribution-based.[18] This criterion is different from other criteria of restitutionary recovery that apply in other contexts, such as the restoration of property or its value. This difference might have presented trouble for a theory that conceives of restitution as a homogeneous body of law. This book takes, however, the almost opposite stance: defining the scope of the law of restitution loosely as including cases of benefit-based liability or benefit-based recovery and referring to unjust enrichment as a loose starting point for a normative inquiry. In this scheme, it is only expected that – like in other restitutionary contexts – the decision of what makes a cohabitant's enrichment unjust, thus triggering a benefit-based recovery, requires a baseline that needs to be defended normatively.[19] (The alternative would be an open-ended judicial inquiry based "upon fairness or unjust enrichment,"[20] which – for reasons discussed in chapter 2 – must be rejected.[21]) While the criterion of contribution is not the only (or even the most frequent) alternative

[18] *See, e.g.*, *Salzman*, *supra* note 7, 996 P.2d 1263; Pederson v. Anibas, 2001 WL 969176 (Wis. Ct. App. 2001); Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. Ct. 1999); Lawlis v. Thompson, 405 N.W.2d 317 (Wis. 1987); Pickens v. Pickens, 490 So.2d 872 (Miss. 1986). *See also* Joachim Dietrich, Restitution: A New Perspective 162–64 (1998); Rotherham, *supra* note 15, at 209.

[19] *See* Patrick Parkinson, *Beyond* Pettkus v. Becker: *Quantifying Relief for Unjust Enrichment*, 43 U. Toronto L.J. 217, 217–18, 232–33, 239–40 (1993); Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 3, 27–28 (1989).

[20] Linzer, *supra* note 13, at 707. *Cf.* ALI Draft, *supra* note 2, § 28 cmt d.

[21] *See also* Mitchell McInnes, *The Measure of Restitution*, 52 U. Toronto L.J. 163, 206 (2002).

for measuring a defendant's unjust gain, there is no conceptual difficulty with its application.

As usual, the desirability of this criterion must be judged normatively. Before I turn to this inquiry, however, it is important to refine the exact version of contribution theory applied by the American common law of cohabitation. Ann Laquer Estin's account – which is echoed by the new Restatement – captures the doctrine's main contours. As she observes, "courts frequently grant relief to a former cohabitant who . . . made a substantial equity investment in real estate or personal property titled in the other partner's name." Existing case-law also provides recovery for services that go beyond "the ordinary give-and-take of a shared life," such as "services performed for a partner's business" and "services invested in home construction or renovation." But beyond these categories of contribution, no recovery is available: first, this contribution-based recovery is limited "to the more extraordinary cases in which one partner has made a very substantial investment of time or money in the other partner's business or assets"; second, unlike with cases of married couples, "an unmarried cohabitant does not have the type of claim to a share of the other partner's earnings."[22] These two doctrinal limitations, which are taken up in the remainder of this section, help uncover the two most important features of restitution in the cohabitation setting.

Restitution and long-term reciprocity

Consider first the threshold to restitution of "extraordinary benefit." This threshold has been presented as a solution to the "difficult measurement problem of mutual benefit conferral." This problem is unique to the restitutionary contexts of this chapter that typically arise not out of specific events, but rather out of ongoing relationships that may last in some cases many years, in which each party confers benefits on the other. Because it is difficult to quantify and compare these mutual benefits with any precision, it makes sense to look for extraordinary benefits, namely: contributions by the restitution claimant that exceed those which people in intimate relationships usually make, "over and above what is perceived as normal."[23] Furthermore, the threshold of extraordinary benefits also

[22] Estin, *supra* note 7, at 1399–1402. *See also* ALI Draft, *supra* note 2, § 28(2) & cmts. a, d, e, f. *Cf.* Ingeborg Schwenzer, *Restitution of Benefits in Family Relationships, in* 10 International Encyclopedia of Comparative Law ch. 12, at 57, 61–62 (1971).

[23] Parkinson, *supra* note 19, at 222, 226. *See also, e.g.*, Schultz v. Kelly, 581 N.W.2d 594 (Wis. Ct. App. 1998).

serves as a doctrinal solution for the indeterminacy generated by two conflicting legal presumptions: that services within the household are gratuitous (which justifies the retention of any benefits deriving from them), and that people expect to get paid for their services (which may justify restitution).[24] I appreciate the role of the extraordinary benefits threshold as a solution to these technical and doctrinal problems; but I claim that it also serves a more fundamental role, which helps explain why the extraordinary benefits threshold is indeed a desirable solution for these difficulties.

A legal regime that prescribes the scope of legal intervention at a threshold of extraordinary benefits (and extraordinary burdens) typifies categories of cases in which law seeks to inculcate a social ideal of long-term reciprocity, the regulative principle of informal liberal communities.[25] On the one hand, setting the threshold at the level of extraordinary benefits rejects the strict (typically short-term) accounting that applies in other social settings, thus refusing to reduce the cohabitants' relationship to monetizable exchanges, seeking instead to preserve and inculcate their sense of mutual responsibility. On the other hand, by limiting the degree of acceptable asymmetrical benefits to the ordinary – by requiring rough equivalence of benefits (or burdens) – such a regime takes proper account of the limits of solidarity and the dangers of opportunism.

The concept of long-term reciprocity is particularly befitting where the parties were members of an informal close-knit community, such as in a cohabitation relationship.[26] The claimant enjoyed various benefits for which she was not required to pay directly, and thus also should bear certain obligations toward her community. Requiring restitution for any benefit she conferred on other members of this community – her cohabitant, in our context – which was not offset by a *quid pro quo* of the very same magnitude reflects, and might inculcate, an atomistic social vision. This social vision underplays the significance of belonging to a community, perceives our membership in purely instrumental terms, and insists that our mutual obligations as members should be derived either

[24] *See* Linzer, *supra* note 13, at 706. *See also, e.g.*, Casad, *supra* note 16, at 48, 55–56; Scane, *supra* note 6, at 277. As an aside, the failure of these two presumptions should not be surprising as they are intention-based and are thus vulnerable to the difficulties of a contractarian account of cohabitation discussed in the previous section.

[25] The discussion of long-term reciprocity draws on some of my previous work on property. *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771–73 (1999); Dagan & Heller, *supra* note 3, at 576–79.

[26] *See* Ellman, *supra* note 6, at 1373–75; Schwenzer, *supra* note 22, at 3.

from our consent or from their being to our advantage.[27] Put differently, a regime of full restitution for any net surplus defines the cohabitants' obligations as exchanges for monetizable gains, thus commodifying the parties' relationship.[28]

In contrast, rough long-term reciprocity presupposes – or, maybe, attempts to inspire – a different social vision. This vision perceives people as fundamentally social beings, situated in relation to others, embedded in communities as well as in ongoing relationships of give-and-take.[29] These networks of constructive relationships are understood to be the source of some obligations to others, even where these are not fully and voluntarily articulated and are not accompanied by an immediate and equivalent *quid pro quo*,[30] as long as some roughly equivalent *quid pro quo* is forthcoming.

But a regime of (rough) long-term reciprocity is sufficiently cautious not to establish a system of complete noncommodification: a rule of no remedy.[31] While seemingly utopian, the no-remedy regime is likely to yield detrimental consequences in our non-ideal world. Long-term interpersonal relationships in liberal environments are particularly vulnerable to opportunistic behavior because of the liberal commitment to free exit, which is (correctly) perceived as a prerequisite to a self-directed life.[32] Strong exit – such as the legal ability of each cohabitant to leave the relationship at will – might invite opportunism and threaten trust and cooperation. This risk is acute where vigilant retaliation is difficult due to differences in payoffs from round to round and to exogenous, non-strategic reasons to exit. Both of these factors that may undermine trust and cooperation are prominent in the context of cohabitation. Like marriage, cohabitation at times invites increased vulnerability to the possibility of exit – which is relatively easy with cohabitation – because it often requires long-term, relationship-specific investments that create asymmetrical reliance on the continuation of the

[27] *See* Charles Taylor, *Atomism, in* Philosophy and the Human Sciences (Philosophical Papers 2) 187, 187–88 (1985). *See also* Robert Nozick, Anarchy, State and Utopia 171–72 (1974).

[28] *See* Margaret Jane Radin, Contested Commodities 5, 118 (1996).

[29] *See* Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 Representations 162 (1990).

[30] *See* Michael J. Sandel, Liberalism and the Limits of Justice 143 (1982); Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 653–55 (1988).

[31] Compare the restrictive approach to cohabitation discussed at the end of this section.

[32] *See* Leslie Green, *Rights of Exit*, 4 Legal Theory 165, 176 (1998).

parties' relationship, and hence a peculiar vulnerability if that reliance is disappointed.[33]

A restitutionary regime that provides remedy for significant asymmetric contributions serves as an anti-opportunistic device that can reassure prospective parties that they will not be abused for cooperating. Such a restitutionary doctrine needs to be properly attuned, so that it includes both cases of extraordinary asymmetrical contributions in short-term relationships, and cases in which the manifest asymmetry is the product of the long-term accumulation of less heroic one-sided contributions. In this way, the potential of restitutionary recovery can serve as a formal "safety net" that enables parties, without taking prohibitive individual risks, to gain the benefits that flow from trusting one another. With such a safety net in place, cohabitants can enter into relationships of mutual reliance that they may otherwise perceive as too risky. In an imperfect world, where we can never absolutely trust one another, a background legal regime of restitution for significant asymmetric contributions can effectively reinforce the parties' mutual trust and facilitate their willingness to cooperate without focusing on the grave vulnerability that such trust can engender.[34]

A difficult question arises as to the precise measure of restitutionary recovery. The case-law and literature suggest two formulas. The first requires a calculation of the reasonable value of the claimant's extraordinary services, or, more precisely, of the net surplus of her significantly asymmetric contribution. The second formula apportions the total net enrichment of the defendant according to the respective contributions of the parties.[35] While seemingly a technical matter, the choice between these two measures implies a choice between two entitlements, to a reasonable remuneration or to a share in the profits, which is to say, between treating the claimant as the defendant's hired help or as his partner.[36] Insofar as law is indeed committed, as I believe it is (and should be), to

[33] *See* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1264–65 (1998); Scane, *supra* note 6, at 278.

[34] Such vulnerability is particularly exacerbated in a social setting of pervasive gender discrimination, because in such an environment the ordinary mechanisms of entry and exit are not sufficiently effective to protect the parties from subordination, which threatens the personhood of one partner and undermines the collective goods of cohabitation as a locus of membership and identification.

[35] *See* Maglica v. Maglica, 78 Cal.Rptr. 2d 101, 102, 104–06 (Cal. Ct. App. 1998); Scane, *supra* note 6, at 281–83, 304–05.

[36] *See* Parkinson, *supra note* 19, at 222–23.

conceptualizing the cohabitants' individual contributions as part of the collective enterprise, the latter alternative – of an entitlement to a portion of the net increase of the defendant's enrichment in proportion to the claimant's contribution – is preferable.[37]

Commentators who discuss restitutionary claims of cohabitants as part of a unified, uncontextualized regime of restitution agonize over some incongruence between the terms of these claims and the general framework of restitution for the conferral of unsolicited benefits, particularly the defense of subjective devaluation.[38] On its face a cohabitant–defendant seems to have a plausible subjective devaluation defense, because in many cases he did not actually understand his cohabitant to expect payment.[39] Some have argued that this is a significant failure of the prevailing doctrine that renders recovery in cohabitation cases "an unexplained [and thus arguably illegitimate] redistribution of the parties' accumulated wealth."[40] Others, more favorable to restitution in the cohabitation setting, tried to explain away the difficulty by maintaining that the defendant "should have realized he would incur some obligation should the mutual contributions fall into serious disequilibrium."[41]

The latter claim seems stretched and apologetic, but the conclusion of the former does not follow. There is no need to pigeonhole the cohabitation cases into the doctrine governing the type of cases discussed in chapter 5.[42] The defense of subjective devaluation is essential in those cases, where the plaintiff and the defendant are typically strangers and should therefore be able to make independent choices and employ independent utility functions. But contexts of informal intimacy, where the parties pursue joint goals together, are different in exactly this sense. Because in these contexts the autonomy of the plaintiff need not – indeed does not and should not – be understood as independence from the defendant,[43] courts are correct to ignore the "difficulty" of subjective devaluation.

[37] *See* Dagan & Heller, *supra* note 3, at 584, 589.

[38] On subjective devaluation, see *supra* section 5.C.

[39] *See* Scane, *supra* note 6, at 267, 273–74, 276.

[40] John Mee, The Property Rights of Cohabitants: An Analysis of Equity's Response in Five Jurisdictions 226 (1999).

[41] Casad, *supra* note 16, at 58–59.

[42] *Cf.* ALI Draft, *supra* note 2, § 28 cmt. c; S. M. Waddams, *The Relation of Unjust Enrichment to Other Concepts, in* Unjust Enrichment and the Law of Contract 411, 426 (E. J. H. Schrage ed. 2001).

[43] This does not mean that autonomy is an irrelevant concept in this context, but rather – as I imply above and claim in more detail in section C below – that it should be understood in terms of non-subordination.

I do not deny, of course, that some cohabitants may prefer to structure their worldly affairs in a business-like, accounting-based fashion. These cohabitants can always opt out from the more cooperative default regime set by the law of restitution. Setting the latter, rather than the former, as the background, default regime can be justified on quite a few grounds.[44] It seems plausible that such a regime reflects the preferences of most cohabitants, and can thus be understood as a majoritarian default rule. But even if it does not, this choice of a default regime is justified based on its information-forcing consequences: it forces the partner who demands a contract that is more atomistic than the default to reveal something about his unobservable "type" to the other partner.[45] (Imposing such a costly signaling is justified because it diminishes the vulnerability of the latter who may otherwise detrimentally rely on a more cooperative approach to the relationship.) Finally, this default can be described as a normative default, expressing an ideal vision of a relationship of informal intimacy, hoping to direct cohabitants' mutual expectations in normatively desirable ways.

To conclude: by avoiding the extreme alternatives of full restitution for every asymmetric contribution and of no restitution for any such contribution, a regime of rough long-term reciprocity – translated to the restitution threshold of extraordinary benefits – seeks to recognize, preserve, and foster the noncommodified significance of membership in a community alongside the more calculated, thus commodified, aspect of it. Long-term reciprocity insists that membership in a community (in our context, cohabitation) should not be reducible to a market relationship by urging us to adhere to our plural and ambivalent understandings of membership – as both a source of mutual advantage and a locus of belonging.[46] In this way, long-term reciprocity facilitates the cohabitants' collective pursuit of joint ends, encouraging a relationship of trust, mutual support, cooperation, and reliance, while protecting the parties from the risks of unilateral selflessness.[47]

[44] For the classification of default rules used in this paragraph, see Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390–91 (1994).

[45] In commercial settings there is a concern that such information-forcing might deter efficient contracting around by parties who wish to maintain the benefit of private information. *See* Kathryn E. Spier, *Incomplete Contracts and Signalling*, 23 RAND J. ECON. 432 (1992). But surely this concern is less acute (if it exists at all) in the context of cohabitation.

[46] *Cf.* RADIN, *supra* note 28, at 102–14.

[47] *Cf.* ROTHERHAM, *supra* note 15, at 223.

Between cohabitation and marriage: contribution vs. equal sharing

A contribution-based restitutionary regime fosters a community, but this community is very different from a marital community. To see this point, recall the second limitation of cohabitants' restitutionary claims, which – unlike claims of spouses in divorce proceedings – do not include any entitlement to share the other partner's earnings. More precisely, unlike former spouses, cohabitants are not deemed entitled to an equal share of the net increase of the defendant's enrichment. As the *Frambach* court intimated, the entitlement of a cohabitant is based strictly on contribution, and is not subject to the requirement of equal sharing that typifies marriage.[48]

The cornerstone of the contemporary law of marital property – the one rule that seems least disputed (at least as a theoretical matter) by courts, commentators, and lay people alike – is the rule of equal division upon divorce.[49] In *Properties of Marriage*, Carolyn Frantz and I demonstrate that this core norm is premised on an ideal of marriage as an egalitarian liberal community, which is the regulative principle of marital property law. The ideal of marriage in this conception is egalitarian in the sense that, absent an express agreement to the contrary, no spouse has a recognized controlling interest in the property that (partially) constitutes the marriage, and correspondingly in marital decisions. This egalitarian component of marriage is justified by reference to the pervasiveness of marriage in the spouses' lives, which raises the specter of subordination. Because subordination in marriage is a threat to a spouse's basic personhood, as well as to the communal nature of marriage as a plural self, the marital community is properly bounded by a commitment to equality.

This commitment to equality might skew, to some extent, the spouses' incentives to invest in their relationship because a rule of equal sharing does not fully protect each spouse's investment.[50] But marital property law has a point in *not* protecting every spousal investment. If spouses are only willing to invest in the marriage because they know for sure that their investment will be fully repaid, they are already outside the communal ideal of marriage. Marital property law has little interest in encouraging

[48] This subsection draws on Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 81–94, (2004).

[49] *See, e.g.*, Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 Cal. L. Rev. 291, pt. III (1987).

[50] This claim should not be overstated: spouses have plenty of reasons *to* invest in the marital community, even beyond the point where their investment is protected.

the investment of a spouse who will be willing to contribute more than half the effort for a joint project only if she knows she will reap more than half the reward.

There is indeed a stark difference between the regulative principle of marriage as an egalitarian liberal community and contribution theory which is, as we have seen, the regulative principle of the restitutionary doctrine governing cohabitation. Appreciating this difference is key to understanding the role of restitution law in constructing (or reflecting) the relationship between cohabitants. Contribution-based recovery is decidedly inegalitarian: it relies on the notion that each partner deserves what are singularly the fruits of his or her labor.[51] This principle of desert-for-labor is prominent in liberal societies which generally attach central importance to people's purposeful, value-creating activity and to awarding these active individuals property rights (or wages) in return.[52] Such a commitment "rests on a conception of persons as agents who, by their actions in the world, are responsible for changes in the world and deserve or merit something as a result."[53]

Reward in proportion to individual contribution or merit is incongruous with the ideal of marriage as an egalitarian liberal community. To be sure, equal sharing may be actively introduced in the life of the cohabitants and contribution is not wholly irrelevant for married couples. Thus, on the one hand, as we have seen, where cohabitants place property in joint names and accept joint management, the law (correctly) presumes their intent to share these goods. On the other hand, the ethics of contribution is not wholly absent from marriage: as members of a marital community, spouses are expected to contribute similar efforts to the collective enterprises of marriage. But these similarities should not obscure the differences between these two legal regimes. Sharing resources that were gained during the tenure of marriage is the default rule in marriage whereas in cohabitation it applies only if and insofar as evidence of actual intent is forthcoming. By the same token, while contribution is the default formula for setting the cohabitants' entitlements, marital property law insists on not quantifying the spouses' contributions. This unique

[51] *Cf., e.g.*, Allen M. Parkman, Good Intentions Gone Awry: No-Fault Divorce and the American Family (2000); Katherine B. Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 Duke J. Gender L. & Pol'y 203 (2001).

[52] *See* Steven Buckle, Natural Law and the Theory of Property 150–51 (1991); Stephen R. Munzer, A Theory of Property 255–56, 286–87 (1990).

[53] Munzer, *supra* note 52, at 255–56.

feature of the community of marriage sets it apart from any other community, including cohabitation, in which quantification is not necessarily problematic.

Eliminating informal cohabitation

The restitutionary doctrine that allows recovery for a significant asymmetric contribution facilitates the functioning of cohabitation as an intermediate institution, in between marriage and arm's-length dealings. It also reflects the middle-of-the-road position of American law. There are, however, other approaches representing competing persuasions that challenge my characterization of cohabitation as the prime example of an informal liberal community.

On the one hand, some states apply a restrictive approach to cohabitation, which takes two forms. One version – most clearly applied by Illinois and Georgia – refuses to afford any remedies to knowingly unmarried cohabitants.[54] Another version, which can be found, for example, in Minnesota and Texas, allows recovery only if the cohabitant's claim is based on a written and signed agreement.[55]

The first version of the restrictive approach is surely based on an unabashed hostility toward the institution of cohabitation, perceiving it as a threat to marriage.[56] Precluding any recovery between cohabitants makes cohabitation a risky enterprise, thus discouraging people from engaging in such a relationship, channeling heterosexual couples to formal marriage and undermining the status and success of same-sex couples.

The second version is somewhat more subtle. It may be motivated by the usual justifications for formality: requiring the parties to exercise a heightened degree of foresight.[57] But whatever its motivation is, its effect

[54] *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979); Philips v. Blankenship, 554 S.E.2d 231, 233, 237 (Ct. App. Ga. 2001).

[55] *See* In re Estate of Palmen, 588 N.W.2d 493, 495 (Minn. 1999); Zaremba v. Cliburn, 949 S.W.2d 822, 826–27 (Tex. App. Fort Worth 1997). A milder nuance of this second version also allows oral express contracts, but not implied contracts. *See* Margolies v. Hopkins, 514 N.E.2d 1079, 1080–81 (Mass. 1987); Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982); Morone v. Morone, 413 N.E.2d 1154, 1154–55, 1157 (Ct. App. N.Y. 1980); Tarry v. Stewart, 649 N.E.2d 1, 7 (Ohio Ct. App. 1994).

[56] For a strong view along these lines, see Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 B.Y.U. L. Rev. 1189, 1224–27.

[57] *See* Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941).

on cohabitation seems to be similar to the effect of the first version of the restrictive approach.[58] Explicit contracting is difficult for people who are emotionally involved: romance and hardheaded business bargaining are not easily blended together.[59] This may explain why explicit contracts between cohabitants are very rare and even in the marital context are not very frequent.[60] Therefore, even if a requirement of form does not deter cohabitation, it at least transforms it: explicit contractual arrangement is the antidote to informal intimacy. In jurisdictions that follow this path, law puts people in intimate contexts that fall short of marriage in a position where they need to choose between formalizing their relationship (by either getting married or setting their respective entitlements in a formal contract) and becoming unreasonably vulnerable to their partners.

Consider now the opposite approach recently presented by the *ALI Principles of the Law of Family Dissolution*.[61] The basic view of the ALI – which accords with the approach taken by the state of Washington[62] – is that "the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage."[63] Thus, the ALI suggests applying the marital regimes of property division and of "compensatory payments" to "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."[64]

Grace Ganz Blumberg – who, together with Ellman, is primarily responsible for this part of the *ALI Principles* – maintains that because these relationships "are indistinguishable from marriage, except for the legal formality of marriage," it is "increasingly implausible to attribute special significance to the parties' failure to marry."[65] Thus, while the approach

[58] *Cf.* Frances Olsen, *Asset Distribution After Unmarried Cohabitation: A United States Perspective, in* Dividing the Assets on Family Breakdown 89, 95 (Rebecca Bailey-Harris ed., 1998).

[59] *See, e.g.*, Stephen D. Sugarman, *Dividing Financial Interests on Divorce, in* Divorce Reform at the Crossroads 130, 141–42 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

[60] See respectively Ellman, *supra* note 6, at 1367–68 n.17; Frantz & Dagan, *supra* note 48, at 97.

[61] *See* ALI Principles, *supra* note 14, § 6.

[62] *See id.* § 6.03 Reporter's Notes cmt. b, at 933. A few other decisions by other state courts follow a similar approach. *Id.* at 934.

[63] *See id.* § 6.02 cmt. a, at 914–15.

[64] *See id.* §§ 6.01, 6.04–6.06.

[65] Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 Notre Dame L. Rev. 1265, 1296–97 (2001). *Cf.* McInnes, *supra* note 21, at 207.

of the ALI is very different from the restrictive approach, they both share an important property: both would eliminate cohabitation as a distinct social institution.

There are good reasons to oppose both extremes and to preserve cohabitation as a unique institution and the core example of an informal liberal community. The restrictive approach is indefensible in a social context where cohabitation is an increasingly acceptable institution: in 1998 there were 5.9 million cohabiting couples in America (11 percent of the number of married couples).[66] Penalizing cohabitants along the lines of the restrictive approach is incompatible with basic liberal tenets of allowing people to pursue their own conception of the good, including the shape and content of their most intimate associations.

But, excepting the context of same-sex cohabitation, this critique does not vindicate the other extreme approach, espoused by the ALI. Applying marriage-like rules to same-sex cohabitation is justified only because of the unjustified exclusion of same-sex couples from the social institution of marriage. Equating cohabitation with marriage in such cases is particularly unproblematic where domestic partnership registration is available, as such registration can function to trigger all the sharing obligations of marriage. But same-sex couples are less than 30 percent of the total number of cohabitants and relatively constant, while the number of opposite-sex cohabitants is ever-increasing.[67] With respect to opposite-sex cohabitants, there are good reasons not to equate cohabitation to marriage.[68]

To see why, consider Estin's taxonomy of these cohabitants as including three main groups: couples who "view cohabitation as transition to marriage"; couples who "make a deliberate decision to reject marriage"; and couples who remain unmarried as "a response to circumstances."[69] While it is hard to know what would be the most appropriate default regime for the third group, it is pretty clear that duplicating the marital regime is inappropriate for the first two groups. Transitory cohabitation should not be equated with marriage: imposing a full-blown equal sharing

[66] *See* ALI Principles, *supra* note 14, at § 6.03 Reporter's Notes cmt. a, at 928; Estin, *supra* note 7, at 1384; Blumberg, *supra* note 65, at 1296.

[67] *See* Blumberg, *supra* note 65, at 1267–68.

[68] Questions regarding the obligations of cohabitants towards their children are obviously very different. I see no reason for distinguishing the parental obligations of married couples from those of unmarried couples.

[69] *See* Estin, *supra* note 7, at 1385–87.

regime on couples who use cohabitation in order to test their relationship en route to marriage undermines their ability to do such experiments.[70] By the same token, where marriage is legally available, the decision (of members of the second group) not to enter into marriage and undertake the marital obligations of equal sharing is significant. A liberal law should not lightly impose the legal incidents of marriage on cohabitants who have chosen not to marry.[71]

Furthermore, for these two groups of cohabitants, the restitutionary contribution-based regime sketched in this section seems particularly promising. On the one hand, rather than assimilating cohabitation into marriage, this regime preserves cohabitation as a distinct type of intimate association. But, on the other hand, unlike the restrictive approach, this distinct regime does not pose obstacles to the parties' relationship of trust and reliance. On the contrary, the combination of restitutionary liability for significantly asymmetrical contributions with a relatively favorable presumption as to the parties' intent to share (which is properly triggered if property is placed in joint names or under joint management) constitutes a reciprocity-facilitating framework which is conducive for a community of intimates.[72]

B Restitution for the supply of necessaries

The doctrine

As the new Restatement prescribes, a person who pays another's debt for necessaries or performs (or obtains performance of) another's duty to supply necessaries to a third person has, in appropriate cases, a claim in

[70] I am grateful to Landon Jones for this point.

[71] *See, e.g.*, Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame L. Rev. 1435 (2001); Shachar Lifshitz, *Married Against Their Will? A Liberal Analysis of the Legal Aspects of Cohabitation*, 25 Tel-Aviv U.L. Rev. 741, 765–80, 809–24 (2002) (Heb.). The application of marriage-like rules to instances of "common law marriage," where unmarried couples consider themselves legally married or hold themselves out as legally married to the world, is more acceptable. Because they have called upon legal marriage, these parties can hardly be said to be taken off guard by the application of that institution to them.

[72] This regime is actually not so different from the operative rules proposed by the *ALI Principles*. This may be surprising given the divergence between the normative presuppositions of these two regimes. The explanation for this puzzle lies in the – mistaken, in my view – adherence of the *ALI Principles* to contribution theory with respect to the property relationship between married couples. *See generally* Frantz & Dagan, *supra* note 48.

restitution against the other.[73] More precisely, restitution is forthcoming if "the circumstances justify the claimant's decision to intervene without a prior agreement for payment or reimbursement," and in case of payment if "there is no prejudice to the defendant in substituting a liability in restitution for the original obligation in contract," and in case of performance if the intervention is "urgently required for the health or welfare of the third person."[74] These limitations echo the concerns of defendants' autonomy we have encountered in the previous two chapters. As the Restatement explains, the different limitations on payments and performances reflect the different burdens intervention might impose on potential restitution defendants: "Where the burden of liability is relatively light – for example, a simple substitution of one creditor for another – the constraints that will justify an unrequested intervention may be correspondingly modest." But where "restitution may impose a far more burdensome liability" – such as, "where the claimant's recovery substitutes a money debt for an unliquidated obligation that the defendant . . . might have elected to satisfy in some other or less expensive way" – a more demanding threshold for intervention (urgency) is justified.[75]

These limitations of restitutionary claims for necessaries should be familiar by now. What requires some further analysis is the justification for sanctioning the claimant's intervention in the defendant's affairs in the first place. Neither the concern for the welfare of the potential restitution defendant (which explains recovery by good samaritan interveners), nor collective action problems (which justify recovery in cases of self-interested intervention) exist in the case of necessaries. The conventional explanation, cited by the Restatement, is that the claimant's intervention in supplying necessaries "is primarily justified by the benefits of prompt action to protect the interests of third parties."[76] More precisely, necessaries doctrine focuses on the supply of, or payment for, food, clothing, housing, medical care, utility bills, and the like that a spouse or a parent fails to supply to her spouse or child. In such cases, the necessaries doctrine allows the spouse (or child) to purchase or receive the

[73] *See* ALI Draft, *supra* note 2, § 22(1)–(2). *See also* Restatement of Restitution § 113 cmt. d (1937).

[74] ALI Draft, *supra* note 2, § 22(1)–(2). Following the same concerns, the measure of recovery in these cases is "the extent to which a legally enforceable obligation of the defendant has been discharged or reduced, or . . . the costs reasonably incurred by the claimant in the performance thereof, whichever is less." *Id.* § 22(4).

[75] *Id.* § 22 cmt. a. [76] *Id.* § 22 cmt. a.

goods or services at issue from a supplier, charging the other spouse (or parent).[77]

My focus in this section is on the rationale for sanctioning interventions by strangers for the supply of necessaries to family members. I claim that the reason – or at least a reason – for this position of the law is closely related to the reciprocity-enhancing reason underlying cohabitants' restitutionary claims. (The Restatement acknowledges the existing familial focus of the necessaries doctrine, but maintains that the same "logic of unjust enrichment" applies in other contexts as well.[78] I am not sure what the "logic of unjust enrichment" is. Furthermore, because for me the most important justification of the doctrine is limited to the familial context, I would be hesitant with respect to its expansion to cover debts that go beyond this context.) As usual, understanding the normative significance of the doctrine helps settle some doctrinal details as to the scope, the nature, and ultimately the desirability of this restitutionary liability.

Necessaries and reciprocity

In order to appreciate the role of the doctrine of necessaries, it should be properly situated in the regime of marital property during the pendency of marriage.

Marital property in the United States takes two basic forms. A system of community property applies, in one version or another, in nine states.[79] The basic principle of community property is that spouses are equal owners of all property acquired during marriage due to either's effort, regardless of how the property is nominally titled. Three basic rules structure the governance of community property during marriage. For transactions that involve substantial amounts of money (such as a community real estate or business) or resources that reflect the group-identity of the

[77] *Id.* § 22 cmts. c & g; HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 266 (1988).

[78] *See* ALI Draft, *supra* note 2, § 22 cmt. c.

[79] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington favor the Continental tradition of community property. *See* DAVID WESTFALL, FAMILY LAW 231 (1994). A somewhat similar system was promulgated in 1983 in the Uniform Marital Property Act (UMPA) – see UNIF. MARITAL PROPERTY ACT Prefatory Note, 9A ULA 19 (Supp. 1984) – a version of which was later adopted by Wisconsin, WIS. STAT. ANN. §§ 766.001–766.979 (2001 and Supp. 2002). Alaska – a common law jurisdiction – enacted a statute that enables spouses (proactively) to elect to hold their property as community. *See* ALASKA STAT. § 34-77-030 (2000).

marital community and the personhood of its members (again, the marital residence, but also its contents) an emerging rule of joint management applies. With respect to other decisions – the vast majority of daily transactions regarding the marital estate – joinder does not apply. A number of these are subject to sole management (or exclusive management authority of one spouse) which is appropriate in some commercial contexts, where spouse specialization and the ability of outsider transactors to deal with a single, clear decisionmaker may be sufficiently important. Finally, community property law leaves residual room for equal management: decisions regarding marital property that can be made by either one of the spouses.[80]

The other forty-one jurisdictions are governed by a common law/ equitable division regime. By now there is hardly a difference between the community property and the common law systems insofar as the scope and the division of the marital estate upon divorce are concerned. But there is a major difference – and one of particular importance for our purpose – with respect to the rights of the spouses during an intact marriage. In common law states these rights are determined according to the formal title and marital status is irrelevant. Thus, during marriage many resources that would be part of the marital estate for the purposes of divorce are governed by the general property rules of joint tenancy, tenancy in common, or fee simple (if only one spouse is the title owner). The formal, recorded owner has the sole authority to sell, mortgage, or even give away the property without the consent of his spouse.[81]

The difference between the two regimes is not insignificant. By granting each spouse an immediate half interest in all the marital property estate, the community property form recognizes the special relationship between the spouses and reinforces each spouse's sense of equal participation in the marriage; during an intact marriage, each spouse is an owner by right, and that right derives from the parties' marital status. In this way, community property law vindicates the ideal of equal sharing, which is, as I claimed above, the most fundamental imperative of the marital ideal of an egalitarian liberal community. The common law regime is deficient in this respect, because – excepting where the spouses proactively transfer their resources to the form of tenancy by the entirety – they are treated as

[80] *See* Frantz & Dagan, *supra* note 48, § II.D.

[81] *See, e.g.*, J. Thomas Oldham, *Management of the Community Estate During Marriage*, 56 L. & Contemp. Probs. 99, 99–100 (1993).

proprietors in their relationships with one another, and the nonpropertied spouse is placed in a dependent, subordinate position.[82]

The doctrine of necessaries somewhat ameliorates this deficiency. By enabling creditors, in certain circumstances, to collect from the nonrecipient spouse, the necessaries doctrine affirms, as Margaret Mahoney observed, "economic sharing is marriage." Mahoney conceptualizes economic sharing in the traditional sense of support, and thus understands the necessaries doctrine as an "indirect method of enforcing support duties in marriage." For her, the necessaries doctrine "gives limited recognition to the de facto financial sharing aspect of most marriages" by indirectly enforcing family support obligations that courts are reluctant to enforce directly in suits between spouses during marriage.[83]

I do not want to dismiss the role of the necessaries doctrine in protecting dependent spouses, which is particularly compelling in the context of last-illness expenses. But I believe that this protective understanding – which is suggestive of the traditional spousal relationship of dependency[84] – need not exhaust the ways in which necessaries restitutionary law promotes sharing in marriage. By expanding creditor collection possibilities to both spouses, the necessaries doctrine creates a de facto limited realm of individual management and consumption; it indirectly enables the nonpropertied spouse to act on behalf of the marital unit as a whole. Thus, the necessaries doctrine (imperfectly) mimics the sphere of equal management in community property regimes.[85] This sphere is important for marriage: it preserves the ability of each spouse to act in the world as an individual, thus supporting the liberal prong of the ideal of marriage as an egalitarian liberal community. It may also reinforce the spouses' mutual trust, reciprocity, and caring by providing them with opportunities to demonstrate to one another their concern about each other's happiness and well-being.[86]

[82] *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21, 24–25, 27 (1994). On tenancy by the entirety, see Hanoch Dagan, *The Craft of Property*, 92 Cal. L. Rev. 1517, 1524, 1529–30, 1541–43 (2003).

[83] Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. Fam. L. 221, 231–32, 240–42, 244–45, 260 (1983–84). *See also, e.g.*, Clark, *supra* note 77, at 265.

[84] *Cf.* Craig Rotherham, *Subrogation, in* The Law of Restitution 131, 149–50 (Steve Hedley & Margaret Halliwell eds., 2002).

[85] *See, e.g.*, Jersey Shore Medical Center – Fitkin Hospital v. Estate of Baum, 417 A.2d 1003, 1009 (N.J. 1980).

[86] *See* Frantz & Dagan, *supra* note 48, at 126.

Scope and nature of liability

Appreciating the reciprocity-enhancing (and the protective) role of the necessaries doctrine can help settle some doctrinal questions regarding the scope and nature of liability in restitution in this area.

The issue of the scope of the restitutionary liability for necessaries raises conflicting approaches in two respects. First, there is some uncertainty whether necessaries refer to things necessary to sustain biological life, which yields a restrictive list of covered expenses, or to what is "reasonably necessary" (or "suited") for the particular family given its wealth, social status, and past practices.[87] Second, there is also uncertainty whether liability attaches only if the defendant spouse willfully refused to provide support for the other.[88] The reciprocity-enhancing rationale calls for a broad reading of the doctrine on both fronts. If the point of doctrine is not (only) to help destitute individuals (as in its protective reading), but rather to serve as a limited form of a sphere of equal management of marital property (a second-best to its community property counterpart), then its scope must be determined according to the particular circumstances of the couple at hand and it should not be contingent upon the mala fides of the restitution defendant.

Insofar as the nature of the restitutionary liability for the supply of necessaries is concerned, there are some competing alternatives: (1) primary liability upon the spouse who incurred the necessary expense with the other secondarily liable; (2) joint and several liability upon both spouses for expenses incurred by the other; (3) primary liability upon the non-dependent spouse, with the receiving spouse becoming liable only if the creditor's claim cannot be satisfied; (4) a hybrid regime of joint and several liability where both spouses work outside the home, and of primary liability on one spouse where the other is a homemaker or earns substantially less; or (5) making the spouses jointly liable with a right of reimbursement on the part of the dependent spouse.[89] Both the reciprocity and the protection rationales reject both the first and the last of these alternatives.[90] The choice among the other three alternatives depends on the relative weight of these competing justifications: while the hybrid regime

[87] *Cf.* Clark, *supra* note 77, at 257.

[88] *See* Mahoney, *supra* note 83, at 238, 240.

[89] *See id.* at 232, 252–53.

[90] Unless the expenses at issue are last-illness expenses, in which case the issue is converted into a competition between the non-receiving spouse and the decedent's estate. As Mahoney argues, in such a competition "the equities may favor the former." *See* Mahoney, *supra* note 83, at 254.

(4) seems best from the point of view of the protective rationale, the reciprocity justification favors joint and several liability (2).

The future of the necessaries doctrine

Contemporary courts and commentators (correctly) agree that in its original form, whereby only husbands are responsible for the necessary expenses of the family, the necessaries doctrine is predicated upon a gender-based classification, and is thus unconstitutional.[91] There is, however, some debate as to whether this unconstitutionality should be remedied by eliminating the doctrine in its entirety, or by expanding its application (at least prospectively) to both spouses. Seven state supreme courts opted for the former alternative and abrogated the doctrine.[92] But most states – either through statutory intervention[93] or via common law adjudication[94] – adopted the latter alternative of extending the doctrine to treat spouses in a nondiscriminatory fashion.

The reciprocity-based rationale for the necessaries doctrine supports this majority position. This admittedly new normative premise of the doctrine helps it "enter on a new career"[95] of facilitating a (limited) marital

[91] *See, e.g.*, Clark, *supra* note 77, at 265–66; Mahoney, *supra* note 83, at 237.

[92] *See* Emanuel v. McGrif, 596 So.2d 578 (Ala. 1992); E. Connor v. Southwest Florida Regional Medical Center, Inc., 668 So.2d 175 (Fla. 1996); Condore v. Prince George's County, 425 A.2d 1011 (Md. 1981); North Ottawa Community Hospital v. Kieft, 578 N.W.2d 267 (Mich. 1998); Govan v. Medical Credit Services, 621 So.2d 928 (Miss. 1993); Schilling v. Bedford County Memorial Hospital, Inc., 303 S.E.2d 905 (Va. 1983); Medical Center Hospital of Vermont v. Lorrain, 675 A.2d 1326 (Vt. 1996).

[93] *See* Colo. Rev. Stat. § 14-6-110 (2002); Conn. Gen. Stat. § 46b–37 (2001); Haw. Rev. Stat. § 572–24 (2002); Iowa Code Ann. § 597.14 (1996 & Supp 2003); La. Civ. Code Ann. art. 2372 (1986 & Supp. 2003); Minn. Stat. Ann. § 519.05 (1990 & Supp. 2003); N.D. Cent. Code § 14-07-08 (2002); Ohio Rev. Code Ann. § 3103.03 (2003); Okla. Stat. tit. 43, § 209.1 (2001); S.D. Codified Laws 25-2-11 (1999 & Supp. 2003); Tenn. Code Ann. § 47-18-805 (2001); Tex. Family Code Ann. § 2.501 (1998 & Supp. 2003); Wash. Rev. Code § 26.16.205 (1997 & Supp. 2003); Wyo. Stat. Ann. § 20-1-201 (2003).

[94] *See* Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1 (Ind. 1993) (Indiana); St. Francis Regional Medical Center v. D. Bowles, 836 P.2d 1123 (Kan. 1992) (Kansas); St. Luke's Episcopal–Presbyterian Hospital v. Underwood, 957 S.W.2d 496 (Mo. Ct. App. 1997) (Missouri); Jermunsun v. Jermunsun, 592 P.2d 491 (Mont. 1979) (Montana); North Carolina Baptist Hospitals, Inc. v. G. Harris, 354 S.E.2d 471 (N.C. 1987) (North Carolina); Cheshire Medical Center v. W. Holbrook, 663 A.2d 1344 (N.H. 1995) (New Hampshire); Medical Business Associates, Inc. v. Steiner, 588 N.Y.S.2d 890 (N.Y. App. Div. 1992) (New York); Landmark Medical Center v. Gauthier, 635 A.2d 1145 (R.I. 1994) (Rhode Island); Trident Regional Medical Center v. Evans, 454 S.E.2d 343 (S.C. Ct. App. 1994) (South Carolina).

[95] Oliver Wendell Holmes, The Common Law 5 (1881).

sphere of equal management, thus promoting the ideal of marriage as an egalitarian liberal community. Imperfect as it is, the necessaries doctrine is an important means to ameliorate the deficiencies of the regime governing marital property in common law jurisdictions. With no legislative or judicial reform adopting community property principles on the horizon in these states, eliminating the necessaries doctrine would have undermined this role, while expanding it to both spouses vindicates the viability of a nonhierarchical communal ideal of marriage.

C Rescission of gifts due to undue influence

The doctrine

Where a gift (or, for that matter, a nongratuitous *inter vivos* transfer) is induced by undue influence, it is subject to rescission and the recovery, by the transferor or her successor in interest, of the benefits conferred. Undue influence, as per the definition of the new Restatement, is "excessive and unfair persuasion between parties who occupy, with respect to the transaction in question, a confidential relation or a relation of dominance on one side and subservience on the other . . . the effect of which [is] that the free will of the transferor is overcome by the will of the person exerting undue influence."[96] The Restatement explains that this doctrine "has no application to any transaction that is the product of arm's-length negotiation." Rather, it deals with a limited number of suspect transfers from certain "susceptible persons" – notably the elderly[97] – to persons "to whom they have placed special confidence" or "to whom they are otherwise subservient."[98]

Confidential relations for the purposes of undue influence law may be of one of two kinds. "The first comprises specific relations that are characterized as fiduciary as a matter of law," such as "the relations of principal and agent, trustee and beneficiary, guardian and ward, and attorney and client."[99] The second type of confidential relation is not presumed as a matter of law, but rather may arise, as a matter of fact, in certain settings, such as between parent and child (or vice versa), between spouses, siblings, or other relatives, between religious adherents and their spiritual

[96] ALI Draft, *supra* note 2, § 15.
[97] *See, e.g.*, Fiona R. Burns, *Undue Influence Inter Vivos and the Elderly*, 26 Melbourne U.L. Rev. 499 (2002).
[98] ALI Draft, *supra* note 2, § 15 cmt. b.
[99] *Id.* § 15 cmt. b. For illustrative cases, see *id.* at Reporter's Note b.

leader, as well as between close friends and neighbors. Once a challenged transfer is found to take place in a context of confidential relation, it is presumed, in most jurisdictions, to be the result of undue influence and is invalidated unless the transferee rebuts this presumption.[100]

Settled as it may sound, undue influence law is experiencing an identity crisis. Two questions are particularly prominent: (1) does undue influence law focus on the plaintiff's impaired consent, or is it mostly about the defendant's unconscientious behavior? (2) can (and should) the tendency of the case-law toward "family protectionism" be accommodated in the doctrine, or is it instead evidence of some fundamental difficulties with the concept of undue influence? I examine both issues, suggesting that the reciprocity-facilitating theme of this chapter can dissolve the first question and help resolve – or at least better address – the second.

Between impaired consent and abuse of power

Consider first the controversy as to the nature or focus of undue influence: is it more like mistake (a matter of impaired consent), or more like unconscionability (a matter of abuse of power)?

The first view is presented by Peter Birks and Chin Nyuk Yin.[101] They claim that undue influence is "about impaired consent, not about wicked exploitation"; that the basis of undue influence is the impairment of the plaintiff's judgment in deciding to transfer the benefit in question, rather than the illegitimate, abusive, or unconscionable behavior of the defendant. One important implication of the plaintiff-sided nature of undue influence is that recovery may be available even where it is difficult to describe the defendant's behavior as unconscientious, such as where it "merely reflects the *modus vivendi* [in some communities] of unchallenged inequality" between spouses. Relatedly, a plaintiff-sided undue influence liability avoids the risk of condemning (or at least embarrassing) defendants who are free from any fault.

[100] *Id.* § 15 cmt. b & c. *See also, e.g.*, Peter Birks & Charles Mitchell, *Unjust Enrichment, in* 2 English Private Law 525, 555 (Peter Birks ed., 2000); S. M. Cretney, *Mere Puppets, Folly and Impudence: Undue Influence for the Twenty First Century*, 2 Restitution L. Rev. 3, 6 (1994). Different jurisdictions have different formulas for the terms of such a rebuttal. *See* ALI Draft, *id.* § 15 cmt. c.

[101] *See* Peter Birks & Chin Nyuk Yin, *On the Nature of Undue Influence, in* Good Faith and Fault in Contract Law 57, 58, 61, 68, 72, 78–79 (Jack Beatson & Daniel Friedmann eds., 1995). Some courts also occasionally focus on the subversion of the grantor's will as more important than the wrongful act of the grantee. *See, e.g.*, Guill v. Wolpert, 218 N.W.2d 224, 235 (Neb. 1974).

Rick Bigwood disagrees and advocates a "defendant/conduct- oriented" conception of undue influence.[102] Undue influence in this view is one species of objectionable advantage-taking or exploitation. Therefore, "the focus of the law must be on misconduct by the stronger party," rather than "on the mere existence of subjective 'involuntariness' on the part of the assent-rendering party." The plaintiff's vulnerability – usually in the form of letting down her guard through the concession of an unusual degree of trust and reliance – is a prerequisite for this exploitation. But the reason for legal interference is that "a defendant chooses, freely and knowingly, to benefit from the relative position of power resulting from such vulnerability" by making the self-serving transfer "appear to be a reasonable thing to do in the circumstances." Because undue influence controls against "the use, *in wrongful ways*, of power advantages," the law should openly admit that the word "undue" represents condemnation.

One curious feature of this debate is that while insisting on these opposing views, each side seems to realize that its proposed one-sided focus is partial. Bigwood acknowledges that the distinction between impaired consent and exploitation is "superficial" as these concepts "are inextricably linked." He further states that the "added dimension of impropriety" in undue influence derives from the fact that it involves an "attack *from within*."[103] Birks and Chin, in turn, distinguish undue influence – in which the plaintiff's impaired judgmental capacity arises "from morbid dependence on the other" or "an abdication of judgment to a confidant" – from non-relational disadvantages. As they explain, the plaintiff's weakness "is that, *within the relationship*, by reason of excessive dependence, he or she lacks the capacity for self-management." Birks and Chin further point to the existence of "a series of subtly different relational conditions which impair autonomy": different degrees of submissiveness, subservience, and abdication of judgment, such as religious enthusiasm and sexual fixation. Moreover, they recognize that "[d]ependence and influence are two sides of the same coin," and that accordingly undue influence

[102] Rick Bigwood, *Undue Influence: "Impaired Consent" or "Wicked Exploitation*," 16 Ox. J. Legal Stud. 503, 504, 507–12 (1996) [hereinafter "*Impaired Consent*"] ; Rick Bigwood, *Undue Influence in the House of Lords: Principles and Proof*, 65 Mod. L. Rev. 435, 436–37 (2002) [hereinafter *House of Lords*]. Some courts also occasionally emphasize the wrongful act of the grantee over the subversion of the will of the grantor. *See, e.g.*, Reddaway v. Reddaway, 329 P.2d 886, 890 (Or. 1958).

[103] *See* Bigwood, *"Impaired Consent," supra* note 102, at 504; Bigwood, *House of Lords, supra* note 102, at 438.

cases involve both an exceptional degree of reduced autonomy on the part of one and a parallel exceptional degree of control or influence on the other.[104]

The new Restatement is even more ambiguous. On the one hand the Reporter states that "the consistent object of the doctrine is to safeguard the exercise of the transferor's independent volition," and accordingly pigeonholes undue influence as a species of defective consent.[105] But, on the other hand, the Restatement admits that in the vast majority of cases a confidential relation means dominance and subservience and that the undue influence doctrine is used in order to protect the subservient party from being taken advantage of by the dominant party.[106]

An embarrassing bias?

Ray Madoff maintains that much of the law in action in the context of wills does not fit the conventional account of undue influence as autonomy-protecting and overreaching-preventing (the two sides of the debate we have just covered). Rather than focusing on the vindication of the true will of the transferor (testator), at times the doctrine actually defies such a will by declining to give effect to its clear manifestations where, by failing to provide for the testator's family, they deviate from certain accepted societal norms. These troubling cases, Madoff insists, are not merely misapplications of the doctrine. Rather, their intent-defying outcome is built into the doctrine's most fundamental rule: the dichotomy between confidential relationship and natural bequest. This dichotomy explains the reluctance of courts to characterize a parent–child relationship of dependence as confidential, as they perceive such dependence as natural. By contrast, similar dependencies on people outside the formal family structure – a paradigmatic case is the helpful neighbor who becomes increasingly involved in the transferor's life – are deemed unnatural and suspicious and thus constitute confidential relationships triggering a presumption of undue influence.[107]

Melanie Leslie seeks to salvage undue influence law from this critique.[108] She concedes that "when a testator's will primarily benefits

[104] Birks & Chin, *supra* note 101, at 67, 69–70, 85–87, 89 (emphases are mine).

[105] *See* ALI Draft, *supra* note 2, § 15 cmt. a & Reporter's Note.

[106] *Id.* § 15 cmt. b.

[107] Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 575–77, 582, 584–86, 591, 601–06 (1997).

[108] Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 565–66, 571, 578, 583, 585–92, 608–09, 620, 625, 630, 634–35 (1999).

someone who is not one of the testator's closest relatives, courts are hesitant to give effect to the will" and that the decisions mostly depend on whether the "testator's decision to disinherit closest family members is justifiable in light of social norms." Rather than criticizing these outcomes, Leslie celebrates them, claiming that they help satisfy the implied understanding of family members who enjoyed a trust-based relationship that they will inherit. Inheritance, in this view, is but "the final act of giving that flows naturally from the reciprocal, trust-based relationship enjoyed during life." This reciprocity-based expectation also explains why in family settings where no trust-based relationship was functioning – either because it never existed or because the family members failed to comply with the reciprocity norm which characterizes family relationships – family members will not enjoy the courts' protection and the testator's intent will be fully validated, thus satisfying the reasonable expectations of a non-relative beneficiary who "stepped in to fulfill the role that family ordinarily would provide."

Leslie contends that "by implying a promise to reciprocate by leaving relatives a share of her estate," courts mirror and support a well-entrenched social practice of reciprocity with no explicit accounting, where imbalances may be sustained for a period of time, thus signaling and reinforcing the parties' trust. Furthermore, she seems happy with the fact that courts manipulate the doctrine in order to achieve these outcomes. In her view, "a rule that reveals and emphasizes the reciprocal nature of family obligations might devalue family relationships" whereas the current doctrine, "which emphasizes testamentary intent and autonomy while enforcing implicit family understandings," gets the correct results with no undesirable introduction of the language of commodification into the realm of personal relationships.

Undue influence, reciprocity, and free agency

Leslie's analysis introduces the idea of long-term reciprocity into the legal discourse regarding undue influence. In what follows, I take her analysis as my starting point in interpreting the doctrine as part of the law of informal intimacy (but depart from this analysis in some crucial points). I consider whether, and if so under which conditions, a reciprocity-enforcing understanding of undue influence can be justified given its intent-defying potential. Relatedly, I claim that a reciprocity-based understanding of the doctrine dissolves the apparent divide between impaired consent and abuse of power, but only after the terms of this debate – free agency and

unconscientious behavior – inform the reciprocity-based reconstruction of undue influence law.

I begin with Madoff's objection to family protectionism.[109] Madoff concedes that in a pre-industrialized environment of a family enterprise and shared living space a legally imposed intergenerational contract might have been necessary for sustaining the social fabric. But in contemporary society the family is no longer an important unit of production and the dominant mode of intergenerational wealth transmission is in education. Nowadays law's family protectionism is objectionable. Today family relationships are not always co-extensive with caring relationships, and relationships outside the traditional family structure – notably, but not only, between same-sex couples who cannot marry according to present law[110] – are, at times, filled with love and care. By privileging the spouse and blood relatives unless they have done something to deserve disinheritance, contemporary undue influence law makes its seemingly descriptive generalizations about family and non-family relationships prescriptive.

This is a serious charge. But it need not be fatal to more subtle reciprocity-facilitating doctrine. Undue influence law need not – indeed, should not – collapse into a sheer reinforcement of the existing family structure as the only available locus of trust-based relationships. It can avoid this trap by beginning the legal analysis with an evenhanded inquiry as to the identity of the people with whom the transferor had a trust-based, family-like relationship for a significant period of time.[111] Favoring these people – whether they are members of the transferor's close family or not – is justified by the reciprocity-facilitating rationale Leslie identifies: a doctrine that is tilted in their favor helps ameliorate the fact that a will reflects the state of late affection by giving some counterweight to the relationships the transferor had over her lifetime. Courts can unobjectionably presume that these people are family members because, in fact, this is probably the case in the majority of cases. But this presumption should be defeated not only in case of a significant failure or wrongdoing on behalf of these family members. It should also be rebutted if the transferor developed more significant trust-based relationships with others. In this way, members of the traditional family can remain the presumptive

[109] *See* Madoff, *supra* note 107, at 608–11, 624–29.

[110] *See* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. Pitt. L. Rev. 225 (1981).

[111] *Cf.* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. Rev. 199, 268–71 (2001).

beneficiaries of a reciprocity-facilitating doctrine of undue influence, but the ultimate beneficiaries must be the people with whom the transferor actually enjoyed a relationship of trust and long-term reciprocity.

Such a doctrine requires courts to determine the identity of the privileged group by examining the quality of the transferor's nonstandard relationships, looking at their longevity and frequency and to past patterns of sincere interdependency.[112] Such a particularized inquiry requires an open admission of the reciprocity-enhancing goal of the law. *Pace* Leslie, such an admission is not necessarily detrimental (and there is always something to be said, at least *a priori*, in favor of more legal transparency). Leslie presents the threat of commodification in terms of all-or-nothing, and in this binarism any admission that some *quid pro quo* is expected devalues a personal relationship of intimacy and commitment, harmfully transforming a constitutive relationship into a market exchange. But as we have seen in the previous sections, this binarism is false. There is no reason to think that people do not or cannot appreciate – as Leslie does – the complex mixture of other-regarding and self-regarding motives of parties in a relationship of long-term reciprocity. Therefore, rather than suppressing the more calculated aspect of the relationship, law needs to accommodate it without sacrificing the noncommodified significance of the relationship.

Admittedly, preserving a notion of desert in an informal context is always complicated. In the cohabitation context we have seen that the restitution threshold of extraordinary benefits can be helpfully understood as a means for this very goal. In the current context such an incomplete commodification can be achieved only if the transfer is not reduced to an enforced monetary reward for care: if it is not an entitlement of sorts. This means that the transferor must have the power to violate even *justified* expectations of the people with whom she enjoyed a long-term relationship of trust and reciprocity (family members or others). Such space of individual choice is important for liberal reasons, relating to free agency and people's right to form, revise, and pursue their own life-plans; in a way, it constitutes the right to exit from intimate relationships (limited by certain immutable support obligations).[113] Alongside this intrinsic significance, choice is also important instrumentally. As Kenneth Karst

[112] *See* Trent Thornley, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 Ind. L.J. 513, 544–45 (1996).

[113] *See, e.g.*, Estate of Gersbach v. Warren, 960 P.2d 811, 818 (N.M. 1998); Gmeiner v. Yacte, 592 P.2d 57, 63 (Idaho 1979).

maintains, part of what makes an intimate association meaningful is that the parties know that it is entered into and remained in only by choice.[114] Therefore, allowing the transferor to opt out of accepted expectations of reciprocity is grounded not only in notions of autonomy, but also in the (liberal) ideal of community.

Implicit in my analysis thus far is a second necessary component of a viable reciprocity-based undue influence doctrine: that the law should respect transferors' eccentric preferences – even where they are unfair – as long as they are authentic. This condition reintroduces notions of free agency into undue influence law; it allows, in other words, the terms in which the doctrine is usually stated to serve as more than the window-dressing they seem to be in both Madoff's and Leslie's accounts. Yet, if the free-agency-enhancing role of undue influence doctrine is not to swallow its reciprocity-enhancing function, our ideals about free agency must be informed in this context by our ideals of community.[115] Thus, free agency in this context cannot, should not, and indeed does not, mean independence. Undue influence is deduced neither from the benefactor's sheer dependence, nor from the beneficiary's emotional appeals and persuasion, but only from the substitution of the will of the former by the will of the latter.[116] In other words, in the context of undue influence, free agency stands in opposition to corruption of the liberal ideal of community by any form of subordination. Every conception of community requires people to invest in one another beyond what would serve their narrow self-interest. But, as we have seen in chapter 4, the liberal ideal of community does not endorse – in fact, it even condemns – the negation or loss of the individual self. Submission, subservience, and subordination are both a threat to the transferor's individual personhood and an antithesis of the (liberal) ideal of a genuine community.[117]

An example can help demonstrate the significance and the implications of competing views of Madoff and Leslie as well as of my own approach.[118]

[114] *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637–38 (1980). *See also, e.g.*, MARILYNN FRIEDMAN, WHAT ARE FRIENDS FOR? (1993).

[115] *Cf.* Thornley, *supra* note 112, at 529–30, 540–41.

[116] *See* SUSANNA BLUMENTHAL, LAW AND THE MODERN MIND: THE PROBLEM OF CONSCIOUSNESS IN AMERICAN LEGAL CULTURE, 1800–1930 at 352–62 (Ph.D. Diss., Yale University, 2001). *See also, e.g.*, PETER JAFFEY, THE NATURE AND SCOPE OF RESTITUTION: VITIATED TRANSFERS, IMPUTED CONTRACTS AND DISGORGEMENT 193–94 (2000).

[117] *Cf.* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 151, 153 (1993).

[118] The example is a mixture of the facts, and follows the holdings, in Principal Mut. Life Ins. Co. v. Morgan, No. 297CV8-EMB, 1997 WL 78676 (N.D. Miss. Nov. 3, 1997), *aff'd*, 162 F.3d 1159 (5th Cir. 1998) and Diamond v. Creager, 2002 WL 313137 (Ohio App. 2 Dist).

Dr. George McReynolds executed four change of beneficiary forms for his life insurance policy, worth over $500,000. The original form designated his male partner Joe Granger as the sole beneficiary. After his partner died, George named his mother Rose McReynolds as the beneficiary. Through his church, George subsequently met Jane Johnson and became very close to her due to their common interests and activities. When George became seriously ill with AIDS a few years later, Jane helped care for him and was a close companion. George executed a new change of beneficiary form in which he named Jane as the sole beneficiary. When George's health deteriorated severely, he required in-home care. Jane arranged for Michelle Garber to provide George with daily in-home care. Michelle started to care for George in twelve-hour shifts. As George's health continued to decline, Michelle began assuming other responsibilities beyond her hired duties: she took over the housekeeping because she was not satisfied with the regular cleaner, she asked the doctor about George's substantial use of pain medication and helped set up his complicated medication schedule, and as his eyesight declined she helped him sign checks for household purchases. During this period George became increasingly feeble, relying on Michelle's help for more and more activities. After three months of Michelle's caretaking, George changed the life insurance plan to benefit Michelle instead of Jane. He passed away two weeks later. A will contest over George's life insurance proceeds ensued.

If law follows Leslie's approach, George's mother Rose would be privileged (there is no evidence that she ill-treated him), while non-relatives Jane and Michelle would have to overcome the attendant presumption against their claims. In contrast, if law follows Madoff and refuses to allow any category of persons to benefit from a presumption, George's last expression of intent would probably be sustained. As long as the prior beneficiaries are unable to prove that George's last designation was not intentional, they will lose out to Michelle, the housekeeper-cum-caretaker. Neither outcome is satisfactory. On the one hand, Rose should not prevail because the privilege of family members should be (in my approach) only presumptive. Jane should be able to rebut this presumption if an evenhanded inquiry revealed that she had a closer and more significant trust-based relationship with George than did his mother. This seems to be the case: Rose's designation as a beneficiary appears to be an interim choice between two more significant companions, Joe and Jane. On the other hand, if law is to facilitate reciprocity, Jane, and not Michelle, should ultimately prevail. The expectation of reciprocity developed between Jane and George through their close and long

friendship can be protected by allowing Jane – as George's non-traditional closest companion – to be favorably privileged by undue influence law. This can be achieved if George's debilitated state and, even more significantly, high dependence on Michelle when he named her beneficiary would suffice in order for Jane successfully to invalidate this last-minute designation.

In addition to demonstrating my position with respect to the proper protection for people with whom a transferor had a trust-based relationship, this example also shows how the free will inquiry in the undue influence analysis can (and should) focus – in line with judicial practice and the new Restatement's recommendation – on the question of dominance and subordination in the relationship between grantee and grantor.[119] This focus explains (indeed vindicates) the Restatement's ambivalence toward the distinction between the impaired consent and the wicked exploitation schools. If the point of undue influence law is to prescribe the outer limits of reciprocity-based givings, and thus of reciprocity-based relationships,[120] it must look at the relationship between the parties, and thus – by definition – can be neither solely plaintiff-based nor solely defendant-based.[121] The unique role of undue influence arises exactly where the transferor did not sufficiently lack in terms of her overall judgment, as in incapacity or mistake, and the transferee's behavior was not entirely unconscientious, as in duress. This follows the judicial practice, which typically does not perceive a dichotomy between the elements of wrongful act by the grantee and subversion of the will of the grantor, but rather

[119] *See* Burns v. Lucich, 638 S.W.2d 263, 270 (Ark. Ct. App. 1982); Molko v. Holy Spirit Ass'n, 762 P.2d 46, 64 (Cal. 1988); Makin v. Campbell, 1988 WL 50703, at 11 (D.Del. May 18, 1988); Roberts-Douglas v. Meares, 624 A.2d 405, 419 (D.C. 1992); Scurry v. Cook, 59 S.E.2d 371, 373 (Ga. 1950); Fisher v. Estate of Welch, 534 N.W.2d 109, 112 (Iowa Ct. App. 1995); First Nat'l Bank v. Curran, 206 N.W.2d 317, 322 (Iowa 1973); Eldridge v. May, 150 A. 378, 379 (Me. 1930); Wright v. Roberts, 797 So.2d 992, 998 (Miss. 2001); Mullins v. Ratcliff, 515 So.2d 1183, 1191–92 (Miss. 1987); Seylaz v. Bennett, 74 A.2d 309, 311 (N.J. 1950); Spallina v. Giannoccaro, 469 N.Y.S.2d 824, 827 (N.Y. App. Div. 1983); Brosgol v. Joy, 441 N.Y.S.2d 542, 548 (N.Y. App. Div. 1981); Bullard v. Crawley, 294 S.E.2d 897, 900 (S.C. 1987); Brown v. Weik, 725 S.W.2d 938, 945 (Tenn. Ct. App. 1983); Galiber v. Bryan, 1990 WL 30564, at 3 (D.V.I. 1990). *See also, e.g.*, Black's Law Dictionary 1528 (6th ed. 1990); Malcolm Cope, Monash Studies in Law: Duress, Undue Influence and Unconscientious Bargains 69 (1985); 4 George E. Palmer, The Law of Restitution § 19.2, at 102 (1978).

[120] *See* Ross B. Grantham & Charles E. F. Rickett, Enrichment and Restitution in New Zealand 93 (2000).

[121] *See* Graham Virgo, The Principles of The Law of Restitution 252–53 (1999).

includes both factors in the definition of undue influence.[122] Thus, for example, in our hypothetical, Jane should prevail even though she cannot show that George's mental faculties were on the borderline (as she probably should if the focus is on impaired consent). By the same token, she should not be required to prove that Michelle was outrageously manipulative (as she probably should if the focus is on wicked exploitation).[123] Because undue influence is – as even Birks and Chin and Bigwood admit – thoroughly relational, it should be enough for Jane to show that, looking at the two sides simultaneously, George was subordinated to Michelle in his last months.

Conceptualizing undue influence as a *relational loss of self*[124] also helps to address the cases that Birks and Chin are worried about: where spouses' relationship of excessive domination and subordination reflects the *modus vivendi* of their community. A liberal law should acknowledge many types of norms of cultural communities. But norms that systematically subordinate members of such communities and thus threaten to curtail their autonomy (and ultimately undermine the value of their community) should not be similarly sanctioned.[125] As corruptions of the liberal ideal of community they may justifiably give rise to complaints of undue influence.

It should be acknowledged that sustaining the liberal commitment to individual autonomy in allowing eccentric gifts and disinheritances as long as they are not tainted by the transferor's subordination might damage the doctrine's reciprocity-enhancing function. After all, with free choice back in the picture, the doctrine validates transfers even if their beneficiaries are not family members or, in appropriate cases, other people with whom the transferor enjoyed a relationship of trust and reciprocity. As I just claimed, this validation is essential for sustaining the noncommodified aspect of trust-based relationships. Still, a legal regime that affords no remedy for flagrantly unfair violations of reciprocity might undermine

[122] *See, e.g.*, Raimi v. Furlong, 702 So.2d 1273, 1287 (Fla. Dist. Ct. App. 1997); Bye v. Mattingly, 975 S.W.2d 451, 457 (Ky. 1998); Strauser v. Dayton, 762 S.W.2d 862, 864 (Mo. Ct. App. 1989); Macaulay v. Wachovia Bank, 569 S.E.2d 371, 378 (S.C. Ct. App. 2002); In re Estate of Butts, 102 S.W.3d 801, 803 (Tex. App. 2003); Estate of Kessler v. Davis, 977 P.2d 591, 602 (Wash. Ct. App. 1999).

[123] *See, e.g.*, Cope, *supra* note 119, at 79; 1 Dan B. Dobbs, Law of Remedies § 10.3, at 658 (2d ed. 1993).

[124] *See* Birks & Mitchell, *supra* note 100, at 554.

[125] *See, e.g.*, Susan Moller Okin with respondents, Is Multiculturalism Bad for Women? (J. Chen et al. eds., 1999).

such relationships by making them too risky and vulnerable to abuse. Fortunately this difficulty can be remedied without reinstating the objectionable entitlement approach which rewards a testator's supporters with a right to a share of her bounty.[126] Instead, it is enough that people with whom the transferor enjoyed a relationship of long-term reciprocity will not end up as victims of an opportunistic (or simply capricious) repudiation of the norms of reciprocity. This outcome, in turn, can be achieved if in such cases – where the disinheritance is the outcome of eccentricity, rather than undue influence – the law of restitution will provide recovery for significant uncompensated expenses (in money or otherwise). Such restitutionary claims – already recognized by existing law – are both necessary and sufficient in order properly to protect parties to a trust-based relationship from the contingency that the other (or his/her executrix) will act opportunistically by denouncing any obligation to reciprocate. In an imperfect world, where we can never be absolutely sure that such an unfortunate contingency is impossible, this restitutionary remedy can help facilitate long-term relationships of informal liberal communities.

Existing law already supports the availability of restitutionary recovery in these types of cases. Thus, in one case a son paid various bills of his mother who resided with him for several years; he paid the physician's and hospital bills for her last illness, funeral bills, and real estate taxes. He also paid her bills for the last seven or eight years of her life, because, as a next of kin, he felt that it was his obligation to do so. In allowing the son's restitutionary claim, the court repeatedly mentioned the relationship of the parties: she was his mother, she lived with him, and he paid her bills for years. In another case restitutionary recovery was again available for a child who gave up "an established home and move[d] into the home of the parent, not for purposes of reestablishing a family relationship, but for the purpose of rendering services of extraordinarily burdensome nature, over a long period of time."[127]

In conclusion: a reciprocity-facilitating doctrine of undue influence should employ a presumption that privileges the transferor's closest family

[126] *Cf.* Frances H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 Wis. L. Rev. 1199, 1243–44.

[127] *See respectively* Estate of Bends, 589 S.W.2d 330 (Mo. App. 1979); Adams v. Underwood, 470 S.W.2d 180, 186 (Tenn. 1971). *See also* Restatement (Second) of Restitution § 3 cmt. a (Tentative Drafts, 1983–84) (if the claimant and the benefactor "were members of a family, or otherwise closely associated, the requirements of need and exigency will not be stringently applied.") *But cf.* Clark v. Gale, 966 P.2d 431, 440 (Wyo. 1988).

members, but this presumption should be rebutted not only by reference to these people's ill-deeds, but also by showing that the transferor had in fact trust-based, family-like relationships with others. This privilege, however, should not be conceptualized as an entitlement, so that even justified expectations for reciprocity may be frustrated by the application of the free will of the transferor in idiosyncratic ways. As long as the will of the actual beneficiary did not substitute for the will of the transferor, no finding of undue influence is warranted. Instead, in those hard cases disinherited individuals should recover in restitution for uncompensated expenses that were not reciprocated.

D The scope of the law of informal liberal community

Thus far I have shown that a common thread runs through the disparate claims of unjust enrichment between former cohabitants, restitution for the supply of necessaries, and rescission of gifts due to undue influence. All three doctrines already support the liberal vision of community, that is, a relationship of trust and reliance which is based on long-term reciprocity rather than unilateral selflessness.

As always, analyzing the doctrine through the prism of its normative underpinnings is not only helpful for understanding its existing content, it can also yield suggestions for its prospective growth. Thus, focusing on the community-facilitating function of these doctrines has already generated suggestions for reform: reinforcing cohabitation's position as a signal example of informal liberal community, filling gaps in the law of necessaries, and reconstructing the doctrine of undue influence, thus resolving (or at least ameliorating) its identity crisis.

Recognizing the potential community-facilitating function of rules of restitution also raises a question of the scope of the restitutionary law of informal intimacy. This section starts exploring the proper scope of the law of informal intimacy via an inquiry into the appropriate domain of the doctrine of contracts implied in law and of restitutionary claims between co-owners. It analyzes the current disagreements about these issues as disputes about the reach of a community-facilitating restitution law.

Liberalizing restitutionary claims between co-owners

Consider first the law of co-ownership. In *The Liberal Commons*, Michael Heller and I observed a sharp dichotomy between the way co-ownership

is regulated by American law and by Continental systems.[128] For the purposes of this book, the relevant issue is a commoner's claim for contribution from the other commoners for investing in the common property. American law is relatively receptive to claims for accounting or contribution for payments of taxes, mortgages, and other necessary charges made by one commoner on behalf of the others.[129] But if one commoner makes necessary repairs without the others' consent, most courts are much less forthcoming, allowing the investing commoner to receive contribution only at partition, or through a setoff in the (rare) case where a court requires an investing commoner to account for rents and profits.[130] By contrast, in the Continental tradition any commoner may unilaterally undertake any investment – even if not urgent and with no requirement of the other commoners' prior approval – reasonably required to prevent harm to the resource and to protect the commoners' continued ownership or possession. In such cases the investing party is entitled to an immediate pro rata contribution from each of the other commoners.[131]

The Continental regime is superior if one believes – as Heller and I do – that facilitating trust-based relationships between commoners is valuable; in other words: that the realm of informal intimacy can and should extend to cases of co-ownership. Investment in a commons resource can be a public good with respect to other commoners. Hence, it invites free-riding: individuals may refuse to pay their share, motivated solely by the expectation that others' efforts will generate the same good free of charge (or at

[128] This subsection builds on Dagan & Heller, *supra* note 3, at 578–79, 586–88, 609–13, 621–22.

[129] *See, e.g.*, 2 American Law of Property, § 6.17, at 73–74 (A. James Casner ed., 1952). Some jurisdictions have adopted a rule that if the tenant who paid taxes is in possession and the value of his or her use and enjoyment equals or exceeds such payment, then there is no cause of action for contribution. *Id.* at 76. This modification is not uniformly applied. *See* W. W. Allen, Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 A.L.R.2d 388, § 19 (1957).

[130] On the complex, conflicting, and multifarious approaches to cotenants and repairs, consult 2 American Law of Property, *supra* note 129, § 6.18, at 77–80; Roger A. Cunningham et al., The Law of Property § 5.9, at 215–16 (2d ed. 1993); 2 Palmer, *supra* note 119, at § 10.7, at 430; Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants*, 21 Ariz. L. Rev. 1015, 1019–20 (1979); John P. Dawson, *The Self-Serving Intermeddler*, 87 Harv. L. Rev. 1409, 1422–24 (1974). English law also does not allow for immediate contribution even with respect to basic maintenance and other necessary expenses. *See, e.g.*, Kevin Gray, Elements of Land Law 479 (2d ed. 1994). The doctrine of ouster does not significantly extend the realm of restitution: *see* Dagan & Heller, *supra* note 3, at 612 n.244.

[131] *See* § 748 BGB, *translated in* The German Civil Code 122 (Ian S. Forrester et al., trans., 1975) (Germany); Israel Land Law § 32, 1959, 23 LSI 288 (1968–69).

least more cheaply). Free-riding can generate underinvestment that would harm any commons and would demoralize any community. A contribution rule avoids these detrimental outcomes by protecting a cooperating commoner from the others' possible opportunism by insuring that parties who invest today will not be exploited tomorrow.

As in other contexts of ongoing interactions, a contribution rule would be too cumbersome to invoke on a daily basis.[132] But in contexts of informal intimacy such ongoing accounting would and should, in any event, be handled through informal norms: Robert Ellickson's influential study teaches us that members of communities expect others to keep only a rough account of the outstanding credits and debits attributed to the numerous aspects of their multiplex relationship. For as long as the aggregate account does not become radically unbalanced, community members should not be concerned if particular subaccounts are not balanced. They are expected to put up with minor imbalances as long as their future interactions are expected to provide adequate opportunities for evening up accounts.[133] The investment-protection regime is thus not supposed to be deployed on a regular basis both because it would be costly and because in the context of an ongoing relationship of trust and cooperation people perceive recourse to law as unnecessary, unneighborly, or even hostile.[134] Rather, the restitution legal rule functions as a background norm in the parties' relationship, so its mere existence simultaneously encourages efficient levels of investment (by inducing investments that would have otherwise been too risky and too open to free-riding) and inculcates productive trust among commoners.

Alongside other legal rules concerning the use and management of the common resource which are beyond the scope of this book, this formal restitution rule can help facilitate the commoners' cooperation. (Trust, explains Philip Pettit, "builds on trust" and may "grow with use."[135]) Restitution enables commoners, without taking prohibitive individual risks, to gain the significant benefits that may flow from a well-functioning co-ownership, one that is understood as a realm of (limited, to be sure) informal intimacy. Some of these benefits are economic: the efficiency gains from pooling resources, such as economies

[132] *Cf.* 2 American Law of Property, *supra* note 129, § 6.18, at 78.

[133] Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 56 (1991).

[134] *See* Anderson, *supra* note 117, at 157; Ellickson, *supra* note 133, at 60–64, 69, 76, 274; Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. Rev. 321 (2001).

[135] Philip Pettit, *The Cunning of Trust*, 24 Phil. & Pub. Aff. 202, 209–10 (1995).

of scale, risk-spreading, and specialization. Others are social and psychological: the benefits from working together, taking part in successful collective enterprises, and enriching interpersonal relationships through common tasks. In a well-functioning co-ownership these different types of benefits tend to be mutually reinforcing: interpersonal capital facilitates trust, which, in turn, gives rise to economic success. And economic success tends to strengthen trust and mutual responsibility.

Heller and I criticize the American law of co-ownership for making the continuing existence of a commons a risky enterprise for commoners: under current law, commoners who make repairs take a significant risk that they will not be reimbursed; alternatively, they are led to partition as the only available avenue to recoup their investment expenditures. But we do not propose to equate co-ownership to cohabitation, which is, at least in my account, the core example of informal intimacy. An important distinction involves the issue of improvements. In line with the Continental regime – and, in this respect, also the common law[136] – the restitutionary rule for co-ownership Heller and I recommend covers expenses aimed at preserving the commons, but it does not extend to improvements. Though the line between improvements and preservation is murky at times, improvements seem more likely to deviate from the parties' original understanding of their common endeavor. In the context of co-ownership – where the parties' informal cooperative enterprise is far less comprehensive than it is in cohabitation – this means that improvements may legitimately raise concerns of subjective devaluation. A commoner who refuses to participate may not try to free-ride, but rather express her subjective preferences and genuine valuations, which, in this context, should be respected. Therefore, insofar as improvements are concerned, the obligation to contribute should be postponed – as it universally is – until partition, which liquidates the commons and resolves concerns arising from conflicting subjective valuations.[137]

[136] *See, e.g.*, 2 American Law of Property, *supra* note 129, § 6.18, at 81; 2 Palmer, *supra* note 119, § 10.7, at 429–30; Dawson, *supra* note 130, at 1424–26.

[137] The "anti-underinvestment" rule advocated in the text is minimal and, if applied broadly, rather crude and suboptimal. Improvements may be part of the parties' original understanding. And even where they were not foreseen, improvements may be, in some cases, the most beneficial course of action (for example, investing in insurance now may be more efficient than covering uninsured liabilities later). Similarly, there are cases in which even repairing a resource is a losing proposition; such a resource is best left to deteriorate. *See* Merritt B. Fox & Michael A. Heller, *Corporate Governance Lessons from Russian Enterprise Fiascoes*, 75 N.Y.U. L. Rev. 1720, 1727–33 (2000). These defects can be remedied if, in addition to the liberalization of restitution, American co-ownership law adopts the

Expanding or restricting the scope of contracts implied by law

The doctrine of contracts implied by law can, if generously applied, expand the realm of contexts in which reciprocity-based relationships are supported by the law. Peter Linzer's recent account of restitution as a means for rough justice may be interpreted along these lines.[138] Linzer maintains that there are many relational issues, even in purely business relationships, and that these relational factors lead people to trust each other and fail to set their arrangements out clearly and precisely. He believes that law should substitute for careful drafting even in such contexts by being "a gap-filler, not just of provisions in a contract, but of a contract at all."[139]

The American law of restitution can facilitate such a regime if it subscribes to the view of Goff and Jones, according to which the free acceptance of services or goods by a defendant triggers restitutionary liability as long as the defendant had an opportunity to reject and knew that the goods or services were to be paid for.[140] We have seen that restitutionary recovery between cohabitants is established even where the last condition (awareness of the plaintiff's intent to charge) does not necessarily apply. If business interactions, especially of the relational (long-term) kind, are to be understood as another example of trust-based relationships, this construction of the law seems attractive.

The role of free acceptance in the law of restitution is a matter of some dispute. Andrew Burrows insists that while free acceptance can indicate the defendant's indifference to the (objective) benefit rendered, it does not properly respect the individuality of value. Therefore, he claims that restitution should not be triggered by the sheer fact that the defendant freely accepted the benefit. Only if the defendant bargained for that benefit,

other prescription of *The Liberal Commons*: subjecting the management of the commons resource to a regime of democratic governance. In this framework, the rules that allow contribution for preservation, but not for improvements, apply only absent a majority decision. They constitute a realm of action in which any single commoner can act autonomously on behalf of the group and are accordingly limited to undisputed investments. Until the community reaches some agreement on how risk-averse it is going to be, these rules assume that it is maximally risk-averse, so that individual investment is reimbursable only when it can be characterized as a protection against erosion. In such a case, differences in subjective valuations are unlikely.

[138] On the other, probably more central, aspect of Linzer's theory – viewing unjust enrichment as a source for judicial equity in individual cases – see *supra* p. 13.

[139] Linzer, *supra* note 13, at 760–61, 775–76. *Cf.* Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am. U. L. Rev. 547, 550–51 (1986) (suggesting abandonment of the distinction between implied-in-fact contracts and implied-in-law contracts).

[140] *See, e.g.*, Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 20 (Gareth Jones ed., 6th ed., 2002).

"thereby manifesting a positive desire, and willingness to pay, for it," is restitutionary liability warranted.[141]

The literature deals with the question whether liability can be triggered by a freely accepted benefit, or only by a benefit that was bargained for by the defendant, as a general question regarding the enrichment element of liability in restitution.[142] Loyal to the realist framework of this book, I suggest treating this question more contextually, namely: allowing different answers for different categories of cases. I do not think that Burrows' objection should necessarily undermine the restitutionary doctrine of cohabitation because, as I claimed above, it is antithetical to intimate relationships. By the same token, however, the fact that the bargained-for requirement is not raised in cohabitation cases cannot vindicate Linzer's position insofar as it relates to the very different social context of relationships of business transactors.

In other words, I propose to translate the abstract debate between Goff and Jones and Burrows into a debate as to the proper scope of the law of informal intimacy. By liberalizing the grounds of restitutionary liability the Goff and Jones position helps expand the scope of relationships which the law treats as instances of informal intimacy where interpersonal trust can be facilitated by a background regime of guaranteed reciprocity. Contrariwise, Burrows' position puts business and commerce outside the scope of informal intimacy, implying that insofar as arm's-length, impersonal dealings between strangers are concerned, interactions are properly conducted "on an explicit, quid pro quo basis that serves to guarantee mobility" and "defines a sphere of freedom from personal ties and obligations."[143] Rights and obligations, in the context of market relations, must be firmly rooted in the parties' intentions: expressed or implied (in fact, of course); and the law has no business in second-guessing the preferred contractual scheme of such commercial parties.[144]

Chapter 8 discusses in more detail the choice between these two competing visions of commercial transactions. The specific subject matter of chapter 8 – the content of the entitlement a promisee should have in a

[141] Andrew Burrows, The Law of Restitution 21 (2d ed. 2002).

[142] For other important interventions in this debate, see, e.g., Peter Birks, *In Defense of Free Acceptance, in* Essays on the Law of Restitution 105 (Andrew Burrows ed., 1991); Michael Garner, *The Role of Subjective Benefit in the Law of Unjust Enrichment*, 10 Ox. J. Legal Stud. 42 (1990).

[143] *Cf.* Anderson *supra* note 117, at 145.

[144] *Cf.* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 Fordham L. Rev. 407, 479 (1999).

commercial contract – is of little relevance here. But the larger theme is the same: the need to choose between competing conceptions of commerce and business. In one conception commercial interactions are instruments for facilitating the commercial parties' preferences, which typically coincide with the dictate of efficiency. In the other conception even commercial interactions constitute a zone of trust, solidarity, and sharing.

American case-law implicitly reflects this realist account of the choice at issue. The cases do not refer to either the notion of free acceptance or the requirement of a bargained-for benefit. More importantly, by and large they do not substantively reflect either Goff and Jones' position or that of Burrows. On the one hand, most cases do not require that the parties actively negotiated conferral of the benefit, and at times even impute to the defendant the knowledge that payment is expected.[145] This (implicit) rejection of the strict approach to restitution may be based on the courts' appreciation of the possible trust-building benefits of restitution even in commercial contexts.[146] But, on the other hand, courts are hesitant to expand restitution in ways that would impede the efficient conduct of business.[147] Thus, restitution is not to be awarded where an express contract covers the subject matter at issue,[148] or where restitutionary

[145] *See, e.g.*, Great Plains Equipment, Inc. v. Northwest Pipeline Corp., 979 P.2d 627, 640 (Idaho 1999); Po River Water and Sewer Co. v. Indian Acres Club, 495 S.E.2d 478, 482 (Va. 1998); Paffhausen v. Balano, 708 A.2d 269, 272 (Me. 1998). *But see, e.g.*, Pioneer Roofing, Inc. v. Westra/Construction, Inc., 200 WL 1779257, at 7 (Wis. Ct. App. 2000).

[146] *See, e.g.,* Abington Constructors, Inc. v. Madison Paper Indus., 2000 WL 620203, at 7 (1st Cir. March 21, 2000); Media Servs. Group v. Bay Cities Communications, Inc., 237 F.3d 1326, 1331 (11th Cir. 2001).

[147] *Cf.* Omri Ben-Shahar & Robert A. Mikos, *The Elusive Boundary Between Cost-Based and Benefit-Based Liability in Private Law* (University of Michigan Olin Working Paper No. 01-04). Ben-Shahar and Mikos suggest that expanding the doctrine of contracts implied in law is likely to yield efficiency losses given the frequent overlap between the claims of contract implied in fact and contract implied in law. Because different measures of recovery apply in these types of cases – the former triggers liability for the market value of the plaintiff's services, while the latter is often based on the actual benefit the defendant received – permitting both claims allows providers of services to recover the greater of their costs and the recipients' benefit, which means that their recovery exceeds the expected value of their investment.

[148] *See* Valley Juice Ltd. v. Evian Waters of France, Inc., 87 F.3d 604, 610 (2d Cir. 1996); County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc., 747 A.2d 600, 610 (Md. 2000). Of course, at times doubts arise as to whether the subject matter is covered by the contract. These doubts are resolved with an eye to the underlying concern of respecting the parties' intentions expressed through their bargained-for contract. *See, e.g.*, *Abington*, *supra* note 146, 2000 WL 620203, at 6–7.

recovery may retroactively upset the parties' allocation of business risks,[149] or finally where conferring a benefit is part of a business practice in which those seeking to secure a deal frequently expend efforts in the hopes of increasing the likelihood of that occurrence.[150]

Restitution rules in the context of cohabitation, necessaries, and undue influence are not easily accommodated into the familiar categories of the law of restitution. Their uncomfortable fit is dissolved once their common function in facilitating relationships of long-term reciprocity is revealed. Realizing that these doctrines are parts of a larger coherent body of law that facilitates informal liberal communities can stabilize the rules of these doctrines. It also offers a better analysis of other doctrinal questions. Here I considered debates regarding the rules governing co-ownership and contracts implied in law, which turn out to be debates about the proper scope of the law of informal liberal community.

[149] *See, e.g.*, Production Process Consultants, Inc. v. Hubbell Steel Corp., 988 F.2d 794, 797 (7th Cir. 1993).

[150] *See, e.g.*, *Valley Juice*, *supra* note 148, 87 F.3d at 610; Landcom v. Galen-Lyons Joint Landfill Comm'n, 259 A.D.2d 967, 968 (N.Y. App. Div. 1999); Creations Unlimited v. Alaska, 965 P.2d 1, 15 (Alaska 1998).

7

Wrongful enrichments

The celebrated case of *Olwell v. Nye & Nissen*[1] has become one of the legends of the law of restitution. Olwell sold his interest in an egg-packing corporation to Nye & Nissen. By the terms of the sale, he was to retain full ownership in an egg-washing machine formerly used by that corporation. Olwell stored the machine in a space adjacent to the premises occupied by Nye & Nissen. Nye & Nissen, without Olwell's knowledge or consent, took the egg-washer out of storage and used it for the next three years in the regular course of its business. Olwell was not materially damaged, since the egg-washing machine was not harmed by Nye & Nissen's operation during that period, and Olwell never claimed title to it. Hence, Olwell sued Nye & Nissen in quasi-contract, waiving his conversion suit. He sought to recover the profits that inured to Nye & Nissen as a result of its wrongful use of the machine. The Supreme Court of Washington held that, though no material harm had been done, Nye & Nissen was nonetheless liable for the benefit it had captured. More precisely, given the scarcity of labor immediately after the outbreak of World War II, the Court ordered Nye & Nissen to pay Olwell its ill-gotten gain measured by the amount saved in labor costs by using his machine.[2]

Olwell is an exciting case because it vividly demonstrates the potential bite of restitutionary claims in cases of wrongful enrichments. In 1997 I published a book – *Unjust Enrichment: A Study of Private Law and Public Values*[3] – that offered (what I now call) a realist account of this part of the law of restitution, looking at the law governing wrongful enrichments through the lens of its social, economic, and cultural meanings and ramifications. I cannot restate the details of my account here, nor do I feel any need to do so. Instead, I use this chapter in order to confront

[1] 173 P.2d 652 (Wash. 1946).

[2] Nonetheless, the Supreme Court eventually reduced the judgment that was based on this calculation, because it exceeded the amount prayed for by the plaintiff.

[3] Hanoch Dagan, Unjust Enrichment: A Study of Private Law and Public Values (1997).

my account with (in my view) its most prominent alternative: Ernest Weinrib's 1999 *Restitutionary Damages as Corrective Justice*,[4] and extend my theory to certain doctrinal questions that I did not address in *Unjust Enrichment*.

Weinrib is the most eloquent advocate of the corrective justice approach to private law.[5] His paper is the first full-blown attempt by a leading corrective justice theorist to conceptualize the law of restitution in terms of corrective justice, which many restitution scholars, even before Weinrib's intervention, found intuitively appealing.[6] Weinrib's approach to wrongful enrichments is premised on important claims about the nature of private law, in short that it is a realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms.[7] These claims are also implicit in a few more recent papers that seek to explain other restitutionary doctrines in terms of corrective justice.[8] Thus, while this book cannot address the corrective justice accounts of other restitutionary categories, such as mistakes or unrequested benefits, this chapter's analysis of Weinrib's account of the category of wrongful enrichments should provide some preliminary hints regarding these accounts as well.

Weinrib's premise – which I share – is that the common law is a justificatory practice. Like my *Unjust Enrichment* (as well as this book), Weinrib's *Restitutionary Damages* is committed to suggesting a set of underlying principles that can account for at least the bulk of the prevailing doctrine.[9] Furthermore, we both seek to identify principles with some justificatory power. Thus, both of our accounts agree that a private law theory must be measured according to its success in the dimensions of fit and of justification.[10]

[4] Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 Theoretical Inq. L. 1 (1999).

[5] *See* Ernest J. Weinrib, The Idea of Private Law (1995).

[6] For earlier claims that restitution theory must be based on corrective justice, see Kit Barker, *Unjust Enrichment: Containing the Beast*, 15 Ox. J. Legal Stud. 457, 468–74 (1995); Gregory Bordan, *The Law of Construction Privileges: Corrective Justice or Distributive Justice*, 2 Can. J.L. & Juris. 57, 67 (1989); Andrew S. Burrows, *Contract, Tort and Restitution – A Satisfactory Division or Not?*, 99 L.Q. Rev. 217, 256 (1983).

[7] *See* Weinrib, *supra* note 5, at 11–14.

[8] *See* Abraham Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 U. Toronto L.J. 459 (1998); Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 Tex. L. Rev. 2115, 2140 (2001). For a recent critique, see Dennis Klimchuk, *Unjust Enrichment and Corrective Justice*, *in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004).

[9] *See* Dagan, *supra* note 3, at 6–8; Weinrib, *supra* note 4, at 5–6.

[10] *See supra* chapter 1.

I dedicated much of *Unjust Enrichment* to a detailed survey of the rules governing wrongful enrichments in American law, Talmudic civil law, and international law. This survey shows that my theory helps explain a significant portion of the relevant doctrine. Like any theory, this theory cannot purport to account for the doctrine in its entirety, and thus – in cases of gaps between theory and practice – it should be used in directing future legal evolution.[11] Thus, critics of *Unjust Enrichment* who emphasized the potential explanatory force of the legal community's ethos, as opposed to the broader normative values,[12] may be correct, but somewhat beside the point. Stiff legal customs, like the internal dynamics of the legal community and the self-interest of lawyers, can sometimes explain certain aspects of the law. But they can rarely justify it, and are therefore irrelevant for a theory that attempts to present law in its best possible light. It is thus no wonder that neither Weinrib nor I consider those factors.

It is, in any event, impossible to reproduce here my doctrinal overview in order to compare my theory to Weinrib's in terms of fit. Instead, this chapter focuses on the dimension of justification and on four extensions of the doctrinal domain. I begin with an analysis of our competing frameworks. Section A sketches (with a few updates) the core claims of my *Unjust Enrichment*, and section B outlines Weinrib's competing account in his *Restitutionary Damages*. Section C encounters these accounts on the theoretical level. It isolates from Weinrib's account a valuable lesson for any attempt at private law theorizing, including my own, namely: that a correlation between the defendant's liability and the plaintiff's entitlement is an important component of private law. I concede that by overlooking this implication of the "private" nature of private law, realist scholars have too frequently blurred the distinction between private law and regulation. I also acknowledge that correlativity may require a refinement of my earlier account. In particular, I now counsel caution toward any measure of recovery that relies on society's condemnation of antisocial

[11] While *Unjust Enrichment* mentions the reformist potential – as opposed to the explanatory power – of my account (see DAGAN, *supra* note 3, at 7), it might have downplayed its significance. In one context this chapter explicitly remedies this deficiency: while *Unjust Enrichment* merely reports the availability of a *proceeds* measure of recovery for certain cases of "trespass and conversion" (*id.* at 74–75), this chapter criticizes this punitive measure (*infra* pp. 225–26). By the same token, I now recognize that my account of the restitutionary rules involving infringements of people's reputation and dignity (*id.* at 89–93) should have been presented more clearly as a yield of the theory's potential for arbitrating between competing views and for criticizing certain conventional wisdom.

[12] *See* Hector L. MacQueen, *Unjust Enrichment*, 47 INT'L & COMP. L.Q. 740, 741 (1998); Craig Rotherham, *Unjust Enrichment and the Autonomy of Law: Private Law as Public Morality*, 61 MOD. L. REV. 580, 587, 588 (1998).

behavior. Nevertheless, I maintain that Weinrib is wrong in his claim that private law has an inner intelligibility that can be deciphered without recourse to public values. An account such as Weinrib's that attempts to explain and justify private law in isolation from its surrounding social values is question-begging at best and obfuscatory at worst. Correlativity is essential to private law, but it is situated on a normative and distributive foundation.

The second half of this chapter turns from theory to a study of four doctrinal questions that I did not address in *Unjust Enrichment*.[13] Sections D–G look at the issues of joint infringements, breach of fiduciary duties, misappropriation of body parts, and restitution of gains from slave labor. The analysis of these issues helps demonstrate the pitfalls of some of Weinrib's central theses, the importance of his correlativity thesis, and the comfortable accommodation of the correlativity thesis within the basic parameters of *Unjust Enrichment*. These sections illustrate, in other words, that while correlativity is an important aspect of claims for wrongful enrichments, it does not absolve us from considering the more fundamental normative questions which determine private law's initial entitlements.

A The distributive foundation of restitutionary claims

Unjust Enrichment studies cases in which *A* holds a (fungible or incorporeal) resource that *B* appropriates or encroaches upon, to her own advantage and (in some cases) to *A*'s harm. This paradigmatic case covers a wide variety of resources: land and chattels; copyrights, trademarks and patents; trade secrets, contractual relations and performances, and precontractual expectations; individual reputation and dignity, commercial attributes of personality, and even identity and physical integrity. *Unjust Enrichment* searches for the normative underpinnings of these appropriation cases. The explanatory power of its theory is examined both intraculturally (across these resources within American law) and interculturally (through a comparative study of Jewish law and international law).[14]

[13] There are, to be sure, further aspects of wrongful enrichment law, notably restitution for crimes. *See, e.g.*, Gareth Jones, *Stripping a Criminal of the Profits of Crime*, 1 THEORETICAL INQ. L. 59 (2000).

[14] For an application of this theory to the various restitutionary schemes in newly emerging market economies, see Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999).

The measures of recovery that are available in cases of appropriation range from requiring that *A* receive compensation for the *harm* she has suffered (either by reducing the value of *A*'s resource or by diverting an income she could have otherwise secured) to awarding *A* the *profits* realized by *B* at *A*'s expense. They also include several intermediate possibilities – most significantly, awarding *A* the *fair market value* of the resource involved.[15] The various remedies accomplish varying degrees of protection of the plaintiff's entitlement. I claim that the choice among these pecuniary remedies is not a matter of legal technicality or of pure conceptual analysis. Instead, it requires a choice among varying conceptions of the plaintiff's entitlement.[16] This choice, in turn, is a normative one that implicates the prevailing background ethos of the society at issue and is deeply influenced by the society's complex conceptions of self and of community.[17]

For example, a *profits* remedy discourages potential invaders from circumventing the bargaining process and appropriating the protected interest without first securing its holder's consent. Thus, the measure of *profits* deters nonconsensual invasions. Entitling the resource holder to any net profit the invader may have acquired from the appropriation effectively undoes the forced transfer. Therefore, a *profits* remedy implies that transfers are legitimate only by obtaining the plaintiff's *ex ante* consent, thereby vindicating the cherished libertarian value of control over one's entitlements.

[15] Recently, James Edelman, Daniel Friedmann, and Peter Jaffey suggested similar distinctions. Edelman distinguishes "restitution damages" and "disgorgement damages." *See* James Edelman, Gain-Based Damages: Contract, Tort, Equity and Intellectual Property 65–78 (2002). Friedmann distinguishes between "normal" and "actual" measurements of gain. *See* Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 Tex. L. Rev. 1879, 1880–83 (2001). Jaffey distinguishes between the use claim and disgorgement. *See* Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement 136–38 (2000). In all cases, these terms stand (roughly) for *fair market value* and *profits*, respectively. While I have no specific objection to these alternative terminologies (what's in a name?), I still prefer the vocabulary of measures of recovery developed in *Unjust Enrichment* that leaves space for the other remedial alternatives which the law of restitution offers.

[16] *Cf.* Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step, in* Jurisprudence: Realism in Theory and in Practice 3, 22 (1962); Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 Vand. L. Rev. 1541, 1542 (1998).

[17] Ethos talk, to be sure, is often messy and subject to disputes. However, it is possible to identify in every society – at least on the level of generality in which the law operates – some central tendencies that substantially define its political culture.

Prescribing a remedy of *fair market value* is importantly different. *Fair market value* is what the defendant would presumably have had to pay to the plaintiff had she not circumvented the bargaining process, even if we take the plaintiff's consent to the transfer for granted. As a remedy, it does not deter appropriations; at times, it may even encourage them. *Fair market value* measures – since no better proxy is available – an entitlement's objective level of well-being or utility to its holder. (The only meaning of "objective" here is that the protected utility does not include any psychological utility which an owner may derive from the mere fact of her control over the resource.) *Fair market value* aims at securing for the plaintiff (merely) the value of the utility that the appropriated resource embodies. Thus, an award of *fair market value* vindicates the utilitarian value of well-being.

Finally, limiting recovery to compensation for the *harm* suffered allows *B* (the appropriator) a share of the entitlement of *A* (the resource holder), as long as *B* does not actually diminish *A*'s estate. A *harm* pecuniary remedy vindicates, I maintain, the value of sharing.[18] In the contexts in which it applies – where the benefit of *B*'s use of *A*'s entitlement is in avoiding a loss, rather than reaping a profit[19] – the *harm* measure can be understood as a form of limited institutionalized altruism: a legal device that calls for other-regarding action and seeks to inculcate other-regarding motives.[20]

By defining the cause of action, wrongful enrichments doctrine prescribes which nonconsensual resource appropriations are wrongful and thus justify monetary recovery. Conversely, it also determines which appropriations are permissible, such that the invasion does not necessarily require a remedy. Moreover, in cases of impermissible appropriations, the doctrine further allocates the appropriate measures of recovery. In all these respects, the rules of restitution affect the ability of each individual to make specific claims regarding resources, constituting a society-wide distribution of burdens and benefits. (The claim that private law entitlements constitute such a distributive scheme should not

[18] Admittedly, there may be contexts in which sharing will be effectuated even by an award of *fair market value*. This is the case where fair market value is used in order to force a monopolist to share her resource, such as in the case of eminent domain or a compulsory market-priced licensing of pollution-control patents. *See, respectively*, Roger A. Cunningham et al., The Law of Property 512 (2d ed., 1993); Paul Gormley, Comment, *Compulsory Patent Licenses and Environmental Protection*, 7 Tul. Envtl. L.J. 131, 141 n.42 (1993). Neither of these cases belongs to the law of restitution.

[19] The classic example is Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

[20] On limited institutionalized altruism, see *supra* section 4.C.

be confused with the discredited contention that in evaluating individual cases judges should pursue redistribution in the pursuit of distributive justice.[21])

The justification for any allocation is rooted in the underlying rationales identified above – control, well-being, or sharing – which serve as the criteria according to which entitlements in resources are distributed to their holders. But once these rationales are identified, one can readily see that the distributive scheme constituted by the doctrine not only assigns claims regarding the use of some specific resources. Rather, it also allocates claims to certain primary social goods with respect to these same resources: individual (negative) liberty, individual security in one's wealth, and social responsibility (i.e., responsibility for other members of one's society) for one's fate. *Unjust Enrichment* claims and demonstrates that there is an important correlation between this second-order distributive scheme and the larger normative ethos of the society at issue: the distributive scheme underlying the law of unjust enrichment corresponds with the level of control, well-being, and sharing that the relevant legal community seeks to accord its members.

As a final refinement, my account explains (and demonstrates) that differences in the social perceptions of particular resources yield different measures of recovery. Resources are protected to differing degrees because a community regards different resources as variously constitutive of their possessor's identity. Some resources are held merely instrumentally and are thus entirely fungible. Other resources are importantly different: their deprivation transcends the financial set-back involved; it is experienced as a violation and a diminishing of the self. The law justifiably respects these differences because perceiving resources as an extension of the self fosters people's moral development by imposing consistency and stability upon their resolutions, plans, and projects, thus facilitating a sense of self-discipline, maturity, and responsibility. Accordingly, the more closely a resource is attached to its holder's identity in her society, the greater emphasis law places on negative liberty. In contrast, as resources are viewed merely as valuable assets that have no direct bearing on the identity of their holder, the focus shifts toward the other-regarding standpoint of the agent, and correspondingly, the applicable rationale is closer to the sharing pole.

[21] *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 Yale L.J. 472, 501 (1980); *contra* Weinrib, *supra* note 5, at 78–80; Richard W. Wright, *The Principles of Justice*, 75 Notre Dame L. Rev. 1859, 1890–91 (2000).

Appropriations that invade the plaintiff's identity, physical integrity, or land trigger a rather severe measure of recovery, which allows the plaintiff to choose between the fair market value of the resource or of its unauthorized use and the net profit gained by the invader. By contrast, there are resources the invasion of which triggers pecuniary recovery only if the defendant employed improper means. Thus, the sheer appropriation of trade secrets or precontractual expectations triggers no liability.[22] In between these poles we find several other interesting points. For example, the appropriation of copyright allows the plaintiff to choose between the fair use value of the copyright at issue and a proportional part of the defendant's profits.[23] The appropriation of patents allows a plaintiff only the measure of recovery of its fair use value.

B Restitutionary damages as rectification

In *Restitutionary Damages* Weinrib sets forth three fundamental theses about the nature of private law: the significance of correlativity to private law, the isolation of private law from social values, and the idea of property as the doctrine's nonideological premise. Weinrib derives at least two specific (and important) doctrinal propositions from these three foundational theses: that gain-based recovery should not be available as a remedy for all torts, and that different measures of recovery should apply for unauthorized alienation and unauthorized use. This last claim also explains Weinrib's critique of the *Olwell* decision.

Thesis 1: the significance of correlativity to private law

As a justificatory practice, Weinrib argues,[24] the common law must account for "the central idea of private law": that a liability of the defendant is, by that very circumstance, the entitlement of the plaintiff. For Weinrib, this bilateral logic of private law requires correlativity between the defendant's liability and the plaintiff's entitlement, as well as between the plaintiff's entitlement and the remedy. Thus, "the reasons that justify

[22] One way to explain the focus on the propriety of means in the context of precontractual expectations is to say that here the law is not aimed at protecting rights, but rather at preserving the integrity of the competitive framework. *See* Ofer Groskopf, *Protection of Competition Rules via the Law of Restitution*, 79 Tex. L. Rev. 1981, 1994 (2001).

[23] For a critique of copyright's restitutionary damages rule, see Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 Emory L.J. 1 (1999).

[24] Weinrib, *supra* note 4, at 3–5.

the protection of the plaintiff's right [must be] the same as the reasons that justify the existence of the defendant's duty," so that the injustice to the plaintiff is "the defendant's doing or having something that is inconsistent with a right of the plaintiff." Because "the plaintiff's suit is [conceptualized as] an attempt to vindicate a right that the defendant has unjustly infringed," the remedy must also be "a vindication of that right."

In other words, the plaintiff must be "entitled to receive the very sum that the defendant is obligated to pay" for the same reason that she has an "entitlement to be free from suffering injustice at the defendant's hands." As a rectification of the injustice to the plaintiff, the remedy must mirror the injustice by responding "only to the factors that are constitutive of the injustice." In order for such a connection to exist "between the remedy that the plaintiff can claim and the wrong that the defendant has done," the applicable measure of recovery must be "the notional equivalent at the remedial stage of the right that has been wrongly infringed."

Proposition: not all tortfeasors are liable for gains

Weinrib claims[25] that the correlativity thesis contradicts "the Goff–Jones principle" according to which "[i]f it can be shown that the tortfeasor has gained a benefit and that benefit would not have been gained but for the tort, he should be required to make restitution."[26] The new Restatement proposes a similar rule of a full disgorgement of profits arising from any conscious wrong.[27]

Weinrib objects to such an (almost) automatic gain-based liability for wrongs, claiming that a mere historical connection between the wrong – the infringed right – and the gain cannot be sufficient to establish the plaintiff's entitlement to recovery. In order to be deemed wrongful, thus triggering restitution, the gain "must be . . . an incident of the entitlement" that has been infringed, inseparable from the reason "for considering the defendant's conduct to have been wrongful in the first place." Only then does the gain constitute "the continuing embodiment of the injustice between the parties," carrying with it "the immediate implication

[25] Weinrib, *supra* note 4, at 8–9, 11–12.

[26] Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 784 (6th ed. 2002).

[27] *See* American Law Institute, Restatement (Third) of Restitution and Unjust Enrichment § 3 & cmts. (Discussion Draft, 2000). *See also, e.g.*, Edelman, *supra* note 15, at 86, 244; Graham Virgo, The Principles of the Law of Restitution 497 (1999); Mark Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927, 1933 (2001).

of disgorgement." Gain-based recovery is therefore justified only when the gain realized by the defendant lies within the entitlement that the defendant has violated. Since automatic gain-based recovery disregards the normative quality of the gain, it must be rejected.

Thesis 2: the isolation of private law from social values

The isolation of private law from social values is an important cornerstone of Weinrib's conception of private law in general, and of the law of restitution in particular.[28] It is this thesis that establishes him as the most outspoken challenger of any realist account of private law. Weinrib believes that the correlativity thesis necessitates

> a repudiation of the notion that restitutionary damages are occasions for the promotion of social purposes extrinsic to the relationship between the parties. Purposes such as punishment or deterrence (or broader purposes such as the promotion of economic efficiency or of other goods), even if they otherwise seem desirable, cannot be accommodated to the correlative nature of private law justifications and therefore cannot explain the most characteristic and pervasive features of private law.[29]

Thesis 3: the idea of property as a value-free premise[30]

Weinrib's own analysis of wrongful enrichments doctrine is again said to be derived – as a logical necessity – from the correlativity thesis. The "idea of property," as he refers to it, is the necessary premise of restitution for wrongs, because it satisfies "the need to account for the plaintiff's entitlement to restitutionary damages as a response to the defendant's wrongful impingement on the plaintiff's right." Property responds to this need – and it does so in a way that is determinate enough – since "the idea of property includes within the proprietor's entitlement the potential gains from the property's use or alienation."

For Weinrib, the law's protection of proprietary rights encompasses the protection of property as a source of gain. The "right to profit," and hence any gains which are actually produced is "as much within the entitlement of the proprietor as the property itself." Therefore, "an unauthorized gain

[28] *See* Weinrib, *supra* note 5, at 3–14.

[29] Weinrib, *supra* note 4, at 37. *See also* Weinrib, *supra* note 5, at 212, 214.

[30] Weinrib, *supra* note 4, at 6–7, 12, 24. *See also, e.g.*, Ross B. Grantham & Charles E. F. Rickett, Enrichment and Restitution in New Zealand 485 (2000).

is an injustice [which is undone only] when the gain is restored to the owner of the object from which the gain accrued." Property is thus both a sufficient and a necessary condition for the availability of gain-based recovery: "only the idea of property weaves the plaintiff's entitlement to gain into the fabric of the defendant's duty"; any gains realized outside of the plaintiff's entitlement need not be restored, because they are "not an element of the duty but a benefit realized from the nonperformance of the duty."

Proposition: different measures of recovery apply to unauthorized alienation and unauthorized use[31]

Because correlativity requires that the measure of recovery should make good the defendant's failure to carry out her duty to the plaintiff, there is in Weinrib's view a necessary distinction between unauthorized alienation and unauthorized use. In the case of unauthorized alienation, the plaintiff is entitled to choose either the value of the thing alienated or the price the defendant received, since "the possibility of a purchaser who is willing to pay more than the market price" is "fully within the owner's entitlement." In contrast, in cases of unauthorized use, the value of that use – and nothing more than that – is within the ambit of the plaintiff's entitlement. This is, explains Weinrib, why gain-based recovery is not, and should not be, available for nuisance or for negligence.

This last proposition also triggers Weinrib's critique of the *Olwell* court. "Basing the damages in *Olwell* on the cost of hand-washing the eggs," Weinrib explains,

> implies that the defendant was under an obligation to the plaintiff to wash the eggs by hand. This is absurd. The plaintiff had a right in the machine but no right in hand-washed eggs. The only relevant duty that the defendant owed the plaintiff was not to use the machine. Accordingly, the damages should have been set at the value of the use.

Weinrib does not deny that but for the encroachment "the defendant would have had the eggs washed by hand." But he insists that "that is no concern of the plaintiff." None of the alternatives to using the machine forms the basis for calculating the damages, because none is directly relevant to the injustice between the parties. Because the injustice to Olwell "consists in the unauthorized use of [his] property, the damages are to

[31] Weinrib, *supra* note 4, at 16–17, 19–22.

be calculated with reference to the value of the use." The benefit of the savings gained by using the plaintiff's property rather than an alternative is "external to the juridical relationship" and therefore irrelevant. Depriving the defendant of its net profits promotes the *social* purpose of deterrence. But deterrence cannot be accommodated within the correlative nature of private law justifications.

C The benefits and costs of corrective justice

Weinrib's correlativity thesis is an important contribution to private law theory. This section uses this valuable lesson in order to refine my earlier account of the field. But both the isolation thesis and the property thesis are deficient. Thus, this section also claims that corrective justice without a distributive foundation cannot provide any justification for wrongful enrichments doctrine. Finally, my analysis of Weinrib's theses about private law lends support to one of his doctrinal propositions, but leaves the other unfounded.

The impossibility of a nondistributive private law

For me, the most fundamental difficulty with *Restitutionary Damages* lies in the property thesis. For Weinrib, the idea of property serves as a value-free premise of our doctrine because, for him, property rights, and only property rights, necessarily include the right to profit.[32] Accordingly, the appropriator's gain is an integral part of the relationship of injustice between the parties – and thus relevant to liability and remedy – if and only if the infringed right is proprietary.

This is too strong a presupposition. Some right to the income from property, once called "a surrogate of [the right to] use," is indeed a prevalent incident of the liberal conception of ownership.[33] However, this descriptive observation cannot yield Weinrib's proposition that the right to income is *essential* to property. As I argued in chapter 2,[34] the concept of property is too controversial and has too many manifestations

[32] *Cf.* Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 Iowa L. Rev. 515 (1992).

[33] *See* Antony M. Honoré, *Ownership, in* Making Law Bind: Essays Legal and Philosophical 161, 169–70 (1987). While Honoré includes the right to income in his descriptive account, nothing in his canonical account suggests that it is a necessary incident: quite the contrary.

[34] *See supra* pp. 20–22.

and configurations in our own law to be able to answer the specific type of questions wrongful enrichments doctrine needs to resolve.[35] The indeterminacy of property is not a complexity that makes Weinrib's theory difficult to administer on the margins.[36] Rather, an essentially contested concept like property cannot firmly justify his theory, even at the core. As we have seen, not all (or any) of the gains derived from property are *necessarily* within its owner's entitlement. Likewise, as Weinrib concedes, at times the entitlement to profit is an element of rights that we do not classify as proprietary.[37]

Weinrib's account of property, which is based on his interpretation of Hegel's property theory, perceives property as the embodiment of the agent's freedom of will. Hence, the limits of one person's embodiment are the limits of another person's freedom.[38] The notion of a containment relation between resources and selves, from which emerges the metaphor of an absolute and uniform presence of the self in each and every resource one holds, is obscure. Instead of following this interpretation of the personhood theory of property, and without taking any view respecting which is the correct understanding of Hegel,[39] *Unjust Enrichment* follows other neo-Hegelian accounts of property, that insist that the intensity of our connection of reflection-and-attachment with resources we possess varies according to the particular resource.[40] With Weinrib, these accounts recognize that certain interpersonal interactions – those involving the relationship between strangers regarding constitutive resources – should be governed by such a model of libertarian rights. But, unlike Weinrib's account, they do not insist on the *exclusivity* of this construction of human interaction, allowing, for example, the utilitarian model of rights to form the baseline for the interaction between two commercial firms regarding patents.[41]

[35] *Cf.* Peter Schlechtriem et al., *Restitution and Unjust Enrichment in Europe*, 2&3 European Rev. Private Law 377, 402 (2001).

[36] *Contra* Weinrib, *supra* note 4, at 33 n.50.

[37] *See id.* at 32–33.

[38] *See* Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 Cardozo L. Rev. 1283, 1286–87, 1289–94, 1303 (1989); *see also* Peter Benson, *Philosophy of Property Law, in* The Oxford Handbook of Jurisprudence and Philosophy of Law 752, 764, 807–08, 812 (Jules Coleman & Scott Shapiro eds., 2002).

[39] For a competing interpretation of Hegel's theory of property, see Alan Brudner, The Unity of the Common Law: Studies in Hegelian Jurisprudence 40–85 (1995).

[40] *See* Margaret Jane Radin, *Property and Personhood, in* Reinterpreting Property 35 (1993); Jeremy Waldron, The Right to Private Property 343–89 (1988). *See also* Meir Dan-Cohen, *The Value of Ownership*, 9 J. Pol. Phil. 404, 426–29 (2001).

[41] *See infra* section D.

In any event, my point here is not that the property theory I endorse is superior to Weinrib's. Rather, all that is required for my current purposes is the more modest contention that Weinrib's account of property is but one possible – in my view, not very plausible – understanding of the concept of property. Because the choice among rival conceptions of property is normative and entails distributive consequences, the possibility of a nondistributive conception of property which Weinrib celebrates does not undermine the impossibility of a nondistributive private law.[42]

Even if Weinrib could come up with a persuasive account as to why the right to profit is essential to private property, this concept would still not do, because it is hard to imagine that this account could prescribe which of the various ways to measure such profit should apply. This is, however, the degree of specificity that wrongful enrichment doctrine requires, especially from any theory committed to *fit*. Cases apply not only net *profits*, *fair market value*, and *harm*, which are discussed above, but also three additional gain-based measures of recovery that are analyzed in some detail in *Unjust Enrichment* – an intermediate measure I call *proportional profits*, a measure of the greater of *fair market value* and *profits*, and a punitive measure permitting the recovery of the invader's *proceeds*. The "idea of property" cannot arbitrate between these six possible measures of recovery.

The rejection of the property thesis leads immediately to the rejection of the isolation thesis – that private law can be isolated from social values. The "idea of property" is itself value-laden and distributive: each additional stick in the owner's bundle of rights, and any expansion of an existing stick, is *ipso facto* a burden on nonowners.[43] Thus, there is no way to arbitrate amongst the different available conceptions of property without some sort of a normative apparatus or social vision. Property is not a panacea that can miraculously detach private law from social values.[44] Property is not a uniform, sterile conception. Rather, it is an open-textured concept. The doctrinal choice among its multiple configurations is in itself implicated in – and is a construction of – social values. It is a distributive scheme.

[42] *Cf.* Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 6–9 (1943).

[43] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975.

[44] *Cf.* James Gordley, *The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib*, 1 Theoretical Inq. L. 39, 41, 45, 48 (1999); Robert L. Rabin, *Law For Law's Sake*, 105 Yale L.J. 2261, 2270 (1996); Kenneth W. Simons, *Justification in Private Law*, 81 Cornell L. Rev. 698, 737 (1996); Stephen A. Smith, *The Idea of Private Law*, 112 L.Q. Rev. 363, 365 (1996).

The right to profit – itself a concept that can be interpreted in various ways – is not essential to property, nor is property the only type of right that can encompass this right to gain. Weinrib's account simply begs the question of what is the content of the plaintiff's entitlement.[45]

This deficiency is worrisome. The property and the isolation theses create an illusion that we can determine which enrichments are wrongful (or unjust) and precisely how the injustice should be reversed with no need for any further normative deliberation. Using the contested concept of property as the source for resolving the difficult distributive questions that the law of restitution poses serves only to obscure the social meanings of these legal choices, as well as their broader distributive and expressive implications. Thus, the property and the isolation theses inhibit the normative discourse that is required for making such choices and threaten to undermine the very premise of private law as a justificatory practice.

Situating correlativity on a distributive foundation

While Weinrib's property and isolation theses are fundamentally flawed, the following paragraphs argue that Weinrib's correlativity thesis is important for any justificatory theory of private law, and thus incorporate it into my realist account. As we will see, however, correlativity requires only a marginal modification of *Unjust Enrichment* because, by and large, the theory outlined in section A does not resort to purposes that are external to the parties' relationship. More generally, because the social vision respecting the parties' relationship necessarily defines the parties' *ex ante* entitlements (which, in turn, prescribe the available remedies), correlativity must be situated on a distributive foundation.[46]

I find the correlativity thesis normatively appealing. In my view, correlativity is important for private law because as a coercive mechanism private law adjudication must be a justificatory practice. This means that private law judges should be able to justify to the defendant each and every aspect of their state-mandated power. Weinrib's exposition of the unique characteristics of private law as a bilateral interaction between a particular plaintiff and a particular defendant in which one party's triumph is the other's defeat, helps delineate law's justificatory burden. Private law needs to be able to justify to the defendant both the identity of the

[45] *Cf.* Simons, *supra* note 44, at 717.

[46] For a similar view in the tort context, see Peter Cane, *Distributive Justice and Tort Law*, 2001 N.Z. L. Rev. 401.

beneficiary of any liability imposed on her and the exact magnitude of that payment. The correlativity thesis answers exactly this concern by insisting that the defendant's liability and remedy correspond to the plaintiff's entitlement.[47] This correlativity between the two parties is what distinguishes private law from regulation, whereby individuals are penalized for harms committed against society. This distinction is too often blurred by legal realists who tend to perceive civil suits as "a mechanism whereby the state authorizes private parties to enforce the law."[48]

To see the significance of correlativity to private law, consider the *proceeds* measure of recovery, which I analyze in *Unjust Enrichment* as a means for vindicating the resource holder's control *and* expressing society's condemnation of the invader's antisocial behavior. (This condemnation explains the punitive forfeiture of part of the defendant's own estate, which results from disallowing the deduction of her expenses.[49]) Condemnation is – in most cases, at least – external to the parties' relationship.[50] Social condemnation cannot be easily condensed into the scope of the plaintiff's entitlement; usually there is no reason to think that the plaintiff is entitled to society's disapproval of the defendant's behavior. As Weinrib correctly insists, taking correlativity seriously precludes assertions that the plaintiff's right is simply the "analytic reflex" of the defendant's duty (or vice versa).[51]

This conclusion does not necessarily rule out certain forms of aggravated damages from private law. Weinrib recently explained that when aggravated damages are awarded for an injury done to the plaintiff which is aggravated by malevolence that injures the plaintiff's proper feelings of dignity and self-worth, they still fulfill their "transactionally specific" role.[52] Similarly, James White and I claimed that insofar as a seemingly

[47] *Cf.* Mitchell McInnes, *Unjust Enrichment: A Reply to Professor Weinrib*, 9 Restitution L. Rev. 29, 37 (2001).

[48] Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 Wis. L. Rev. 131, 154. This distinction is particularly blurred in some law and economics accounts of the common law. *See, e.g.*, Richard A. Posner, Economic Analysis of Law 383–85 (6th ed. 2003).

[49] Another type of punitive approach to the measurement of the defendant's gain occurs in cases where recovery for misappropriated shares is based on their highest value between the date of the wrong and the date of the trial. *See* Friedmann, *supra* note 15, at 1884.

[50] Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 Chi.-Kent L. Rev. 55, 90–91 (2003).

[51] Weinrib, *supra* note 5, at 124.

[52] *See* Weinrib, *supra* note 50, at 91, 98. Similarly, Marc Galanter and David Luban claim that punitive damages can be a proper response to the defendant's contempt for the plaintiff's value relative to the defendant's; that they can reassert "the truth about the relative value

confiscatory portion of a monetary award is calculated in a way that vindicates the plaintiff's control given a systematic and significant probability of under-enforcement (of her own right!), punitive damages can still function as a legitimate private law remedy.[53] In both cases aggravated damages properly respond to the defendant's wrong by vindicating the plaintiff's entitlement to (respectively) well-being and control. Because many other measures of recovery that deviate from the *fair market value* of the invaded interest and the *profits* gained by the invasion cannot, however, be similarly accommodated within the framework of private law, the correlativity thesis justifies a healthy suspicion toward such remedies, including in particular the *proceeds* measure of recovery.[54]

Subject to this important, but relatively marginal, lesson of caution toward the measure of *proceeds*, however, correlativity leaves *Unjust Enrichment* intact. Correlativity, in other words, is preserved even when the normative and distributive foundation of corrective justice is acknowledged.[55] To see how, consider the two most frequently used measures of recovery available in cases of appropriations: *profits* and *fair market value*. The *profits* measure reflects and reverses a breach of the plaintiff's entitlement to control the resource, while the *fair market value* reflects and reverses a breach of her entitlement to the well-being embodied by the resource. The claims to control and well-being, which I do not associate with (or dissociate from) the concept of property, are part and parcel of the plaintiff's entitlement. These claims – I called them "rationales" – entail

of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer." Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1432 (1993).

[53] *See* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. Rev. 354, 420–22 (2000). Technically, this would require that the level of damages imposed should equal the defendant's profits divided by the probability of liability. *See* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1148 (1997); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 888–89, 895–96 (1998); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 Mich. L. Rev. 2185, 2237 (1999).

[54] Surprisingly, Weinrib theorizes that proceeds recovery can be consistent with correlativity, because denying a willful defendant credit for her expenses denies her the right to claim a protected interest in her own property, the right she herself denied the plaintiff. Thus, Weinrib finds the disgorgement of the entire proceeds correlated to the infringement of the plaintiff's rights. *See* Weinrib, *supra* note 4, at 25–31. But Weinrib does not successfully distinguish the extra liability from criminal punishment, and he bases his theory on an inaccurate description of his example cases. *Cf.* Dagan, *supra* note 3, at 73–75.

[55] *Cf.* Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 Ox. J.Legal Stud. 471, 481–82 (1996).

the applicable measures of recovery in the very strict way the correlativity thesis requires.

Thus, where the law seeks to vindicate the control of a resource holder – where it applies the libertarian model of rights – it should effectively deter potential infringements. This can be achieved by making the plaintiff entitled to *profits* from conscious infringements. (Notice that where a defendant is unconscious of the infringement or reasonably believes that her claim is superior, she will not be deterred by a *profits* – or any other, for that matter – measure of recovery. Thus, even where law seeks to vindicate the resource holder's control, and not only her well-being, a *profits* measure of recovery against such a defendant may not be justified, and is indeed usually denied.[56]) Where a *profits* measure of recovery is appropriate, deterrence is entailed by an entitlement to control and is thus, *pace* Weinrib, intrinsic to the parties' relationship. By contrast, where the only legitimate claim of the plaintiff respecting the resource is to the well-being which it embodies, she is entitled (only) to the *fair market value* of its use or alienation. In such a case of a utilitarian entitlement, even an intentional circumvention of the market should not trigger any additional recovery.

If we are not to legislate by definitions, we must acknowledge that both alternatives – as well as other possible measures of recovery and their corresponding rationales – are possible for both proprietary and nonproprietary interests alike; a normative discussion is needed in order to choose amongst these options. Furthermore, insofar as these rationales of control and well-being (as well as of sharing and two rationales which I have not discussed here – well-being and control, and well-being and hypothetical consent) are concerned, Weinrib's distinction between what he calls internal relationship between the particular parties and external social purposes is misleading. The fear of imposing external social values on a defendant, who thus becomes an instrument for society's broader goals, is groundless because these goals – the social visions respecting the parties' relationship – *inevitably* define their *initial* entitlements.[57] It is only based on these distributive choices that the injunction to correlate the defendant's liability and remedy to the plaintiff's entitlement is intelligible (and normatively desirable).

[56] *See* Dagan, *supra* note 3, at 75. *Cf.* Weinrib, *supra* note 4, at 27–28 (an innocent infringer does not signify a denial of the owner's right to control the resource at issue).

[57] *Cf.* Ariel Porat, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 Theoretical Inq. L. 161, 172, 174 (1999).

As my discussion of social condemnation demonstrates, I do not dispute the importance of the internal–external distinction insofar as it springs from the injunction of correlativity. But the constraints that this distinction imposes are much less severe than Weinrib believes them to be. As long as the public purpose (or social value) is capable of informing the *ex ante* distribution of people's entitlements, it is not external to the parties' relationships. While it is problematic to endow individuals with the entitlement to society's condemnation, it is perfectly sensible to endow them with entitlements to either the well-being embedded in their resource or the control over it (or both). A proper demarcation of the internal–external divide must therefore distinguish punishment from deterrence and reconceptualize deterrence as what is strictly required to vindicate control.[58]

To conclude: private law is structured as a drama between plaintiff and defendant, and Weinrib is correct to insist that if it is to retain its nature as a justificatory practice, this feature of private law requires correlativity between the defendant's liability and the specific measure of recovery imposed on her on the one hand, and the plaintiff's entitlement on the other hand. However, this concession does not entail the isolation thesis, which is impossible and dangerous. The *ex ante* entitlements from which this correlativity must be measured are best analyzed through a public lens. Moreover, the fact that correlativity is indeed such a significant feature of private law highlights the importance of the distributive choices underlying private law. Correlativity tells us that these choices define the parties' legitimate claims and expectations of each other in their daily interactions. Thus, it emphasizes the pivotal role of private law in inculcating the public values it embodies.[59]

Weinrib's doctrinal propositions

I turn now to consider Weinrib's two doctrinal propositions, beginning with the claim that different measures of recovery must apply to unauthorized alienation and unauthorized use. Weinrib insists that *profits* from beneficial unauthorized *alienation* should be available to plaintiffs because

[58] Some writers still confuse the deterrent effect of a *profits*-based recovery with punishment. *See, e.g.*, Steve Hedley, Restitution: Its Division and Ordering 85 (2001); Jaffey, *supra* note 15, at 336–38; Gergen, *supra* note 27, at 1395–97; Friedmann, *supra* note 15, at 1888–89.

[59] *See* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 Mich. L. Rev. 134, 148–52 (2000).

they are intrinsic to the concept of property. But when unauthorized *use* is at issue, only the value of this use is within the ambit of the plaintiff's entitlement, and therefore the only available measure of recovery must be *fair market value*.

This line of reasoning, however, is open to the same critique as the property thesis, because it assumes a certain content of the owner's bundle of rights. Property is much too indeterminate and value-laden a concept to yield such precise conclusions. Different conceptualizations of the owner's entitlement would yield – still within the dictates of correlativity – other conclusions. Furthermore, there are good reasons why the law adopts other conceptualizations of the owner's entitlement that yield different conclusions. As seen above, with regard to ownership of certain resources – those constitutive to their holders' identity – we may well want to preserve the owner's control against both unauthorized alienation and unauthorized use. By the same token, for other resources – of a more fungible nature – we may want to limit the owner's entitlement to the well-being embodied in the holding.

I do not deny that Weinrib's distinction between unauthorized alienation and unauthorized use could have been reflected in the remedies available by law. However, my survey of American law in *Unjust Enrichment* demonstrates that the rule often differs according to the nature of the resource at issue (constitutive or fungible), while the distinction between unauthorized use and alienation plays (almost) no role. There are resources, such as land, with regard to which both unauthorized alienation and unauthorized use (with, admittedly, the exception of nuisance where recovery is indeed limited to *fair market value*) allow the owner to pursue the invader's *profits*.[60] For other resources, such as patents, *fair market value* is the only available measure of recovery irrespective of the mode of encroachment.[61] Hence, not only the justification dimension, but also the fit dimension resists Weinrib's suggested distinction between unauthorized alienation and unauthorized use.[62]

Rejecting this proposition means that the choice between the measure of recovery applied in *Olwell* and the one supported by Weinrib is normative, rather than conceptual. Weinrib's conceptual objection fails because

[60] See DAGAN, *supra* note 3, at 73–78. In *Unjust Enrichment*, I suggested that this exceptional measure of recovery for nuisance is one important example with regard to which an economic explanation seems the most convincing. *See id.* at 78–89 & n.28.

[61] *See id.* at 87–89. *See also infra* section D.

[62] Furthermore, in some contexts, such as with patents, infringement necessarily means an unauthorized use.

a *profit*-based award may be aimed at vindicating the resource-holder's control, which is (in such cases) part and parcel of the content and meaning of her entitlement. In other words, where we opt for structuring the entitlement of the holders of a certain resource around the model of libertarian rights, deterrence is an entailment of the entitlement to control, and is thus intrinsic, rather than extrinsic, to the relationship between plaintiff and defendant. The choice between *fair market value* and *profits* – between preserving well-being and deterring wrongful enrichments – is normative, not conceptual. Both measures of recovery, as well as the other possible measures of the defendant's enrichment, may be within the entitlement of the resource holder, and thus cannot be ruled out by reference to the central characteristic of private law litigation, that it is limited to facts of the two-party relationship.

Ruling out Weinrib's objection does not necessarily vindicate *Olwell*. *Olwell* may be a mistake. But if so, it is not as a result of a conceptual confusion. Rather, it may seem mistaken on the view that an owner of a chattel – or at least an owner of a commercial chattel such as an egg-washing machine – should not have been accorded an entitlement to control her resource; that, for example, a protection of the well-being embodied in such a resource is more appropriate. In order to criticize *Olwell*, in other words, it is necessary to resort to explicit normative persuasion.

This disagreement notwithstanding, I have no difficulty subscribing to Weinrib's other doctrinal proposition. I agree that gain-based recovery is not, and should not be, available as a matter of course for any wrong. Because gains are not a necessary component of the invaded party's entitlement, and given the correlativity thesis which I am happy to endorse, gain-based recovery should not be available across the board. A much more subtle analysis is required in order to determine when gain-based recovery should apply.[63] Neither the mere commission of a tort, as in the "automatic gain-based liability of wrongdoers doctrine" which Weinrib criticizes, nor the distinction between unauthorized dealing with the plaintiff's resource and unauthorized use of such resource, as Weinrib suggests, can supply even an approximate answer. Only a normative inquiry as to whether the protected interest of holders of this type of resource should include complete control over it, can help resolve this doctrinal quandary.

[63] *Cf.* Hedley, *supra* note 58, at 118.

D Joint infringements

At this point, I turn to the first of four specific issues within the broad field of wrongful enrichments which were not addressed by *Unjust Enrichment*: joint infringements, to be followed by discussions of breach of fiduciary duties, misappropriation of body parts, and restitution of gains from slave labor. For each of the first three issues we have in American law a leading authority – two from the United States Supreme Court, and the other from the Supreme Court of California; the fourth issue is currently the subject of heated public debate and high-profile litigation. In the remainder of this chapter I will analyze the three leading cases and a stylized (simplified) version of the fourth issue. This analysis can demonstrate the pitfalls I identified in the isolation and property theses, the importance of the correlativity thesis, and the comfortable accommodation of the correlativity thesis within my realist analysis of the law of wrongful enrichments.

Consider first *Aro Manufacturing v. Convertible Top Replacement Co.*[64] Ford had made convertibles for two years without a license to use the top-structure, which CTR had patented. Aro, also without a license, made replacement fabric tops for the Ford convertibles during that time. Aro was thus a contributory infringer of CTR's patent. In a settlement with Ford (the direct infringer) CTR recovered a sum that the Supreme Court assumed represented the royalty CTR would have received had it licensed Ford in the first place. Afterward, CTR claimed that it was still entitled to recover Aro's profits from the infringing sales before it licensed Ford. In a careful opinion, written by Justice Brennan, the Court made two important points.

First, the Court discussed the 1946 Amendment to the Patent Act,[65] which had eliminated the recovery of *profits* as such and allowed recovery of damages only. This discussion makes clear that after the Amendment, a patentee's only entitlement respecting her patent is to her "pecuniary position." Once she is made "just as well off" as she would have been had the defendant never infringed the patent, she has no legitimate complaint left.[66] Indeed, as mentioned earlier, *Aro* and subsequent cases make clear that only compensatory damages, as measured by the patentee's lost profits or by a reasonable royalty, are recoverable by the patent owner.

[64] 377 U.S. 476 (1964).
[65] Act of August 1, 1946, ch. 726, § 1, 60 Stat. 778 (codified at 35 USC § 70 (1946)).
[66] *See Aro*, *supra* note 64, 377 U.S. at 509–10.

The infringer's *profits*, as such, cannot be recovered. A reasonable royalty, i.e., the *fair market value* of a license to the infringed patent, is the only gain-based recovery to which a patentee is entitled.[67] Indeed, although few would doubt the classification of the patent holder's entitlement as proprietary, this does not necessarily mean – as Weinrib's property and isolation theses maintain – that it includes the right to profit. This exclusion of the *profits* remedy is compatible with the relatively fungible nature of patents. Although they reflect some personal ingenuity and style, at the core, patents are utilitarian solutions to practical needs.[68] The unavailability of *profits* for patent infringements corresponds to the account suggested in *Unjust Enrichment*.

My analysis of this aspect of *Aro* may be criticized on two grounds.[69] First, it may be claimed that I am making too much out of a Supreme Court decision and an act of Congress that blundered away from the previously available profits-based remedy for conscious infringement, and that – especially given the fact that neither institution has made its choice in terms of my suggested analysis – it would be better to say that the "real" (or the better) US patent law is to be found in the older cases. Second, my claim that patent infringements should be viewed only in terms of welfare-deprivation, and thus trigger only a *fair market value* monetary liability, may seem inaccurate given that courts are authorized to "increase the damages up to three times the amount found or assessed."[70]

While neither of these challenges undermines my analysis, they both help refine my claims. The first challenge suggests that my analysis puts too great a weight on the newer jurisprudence and that in fact, given the older one, the state of the law is somewhat uncertain as to the availability of *profits*-based recovery. (Any stronger interpretation of this challenge must be rejected unless one is willing simply to assume that the pre-*Aro* courts' decisions express a better understanding of restitution.) But if this is the case, then the choice between *Aro* and pre-*Aro* law must hang on the normative appeal of these two proposed rules. Thus, in order effectively to undermine *Aro*, one needs to challenge my (admittedly reconstructive) account of its normative underpinnings – as a manifestation of the distinction which runs through the law of wrongful enrichments between conscious infringements of constitutive resources that should give rise to

[67] For an extended discussion see DAGAN, *supra* note 3, at 87–89.
[68] *See id.* at 66–68.
[69] I am grateful to Andrew Kull for these challenges.
[70] 35 U.S.C. § 284 (2000). *See* Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 J. CONTRACT L. 93, 102–03 n.22 (1997).

a *profits*-based recovery and similar infringements of fungible resources that should not – or alternatively make a normative case for the pre-*Aro* doctrine that ignores this distinction.[71]

This response can help address the second challenge as well. Because the statutory criteria for allowing increased damages, as well as for the size of the increase, are somewhat unclear, the case-law on this matter is conflicting. Some cases hold that "[t]he paramount determination in deciding to grant enhancement and the amount thereof is the egregiousness of the defendant's conduct."[72] Other cases, however, imply that a sheer consciousness of the infringement may suffice.[73] My analysis of *Aro* can be read as a critique of this last approach to increased damages for patent infringement and an endorsement of the view that only egregiousness, culpability, or unethical commercial conduct should trigger increased damages.

Be this as it may, building on its conclusion that a patent infringement triggers only a reasonable royalty measure of recovery, the Supreme Court proceeded to its second point. The Court pointed out the fundamental difference between cases of joint infringers in which *profits* are the remedy (as was the case in patent law prior to the Amendment), and cases in which recovery is limited to *fair market value* (as was the case in patent law as of 1946).[74] In the former case (before 1946), it held, the entitlement holder can recover from every infringer the *profits* she has derived from the infringement. (This is still the law with respect to copyright, where liability includes an element of *profits.*[75]) However, where recovery is limited to *fair market value,* as it is in the case of patents (as of 1946), payments made by one infringer diminish the amount of the claim against the others. After a patentee is put in the position she would have occupied had there been

[71] Furthermore, if one focuses on the reasons that actually motivated Congress to make the 1946 Amendment – e.g., the litigation costs of an actual-gain-based recovery – one must ask why they apply only to patents, as distinguished from other types of intellectual property such as copyright. One way to read my account in this section is as an answer to this question.

[72] Read v. Portec, Inc., 970 F.2d 816, 826 (Fed. Cir. 1992). *See also, e.g.*, Hoechst Celanese Corp. v. BP Chems. Ltd., 78 F.3d 1575, 1583 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 911 (1996); Mahurkar v. C. R. Bard, Inc., 79 F.3d 1572, 1581 (Fed. Cir. 1996), *cert. denied*, 119 S.Ct. 874 (1999).

[73] *See, e.g.*, Comark Communications, Inc. v. Harris Corp., 156 F.3d 1182, 1190 (Fed. Cir. 1998); SRI Int'l, Inc. v. Advanced Tech. Labs., Inc., 127 F.3d 1462, 1464–65 (Fed. Cir. 1997).

[74] *See Aro*, *supra* note 64, 377 U.S. at 505.

[75] *See* Melville B. Nimmer, 3 Nimmer on Copyright § 12.04[C][3] (1978 and Aug. 2002 section update).

a consensual transaction at the market price, she may not recover any further.[76]

This rule, which allows recovery of *profits* from each one of the joint infringers, but caps recovery at *fair market value* when *profits*-based recovery is excluded, may seem incoherent. (Commentators who address the issue of joint wrongful enrichments suggest a general rule that allows gain-based recovery from every infringer.[77]) But the Supreme Court's distinction can be explicated and justified by the account of *Unjust Enrichment*. Where the plaintiff's entitlement is limited to the preservation of her well-being, so that no *profits*-based recovery is available, the accumulative recovery from multiple defendants should indeed not exceed *fair market value*. On the other hand, if the law is interested in vindicating control of the entitlement holder over her resource, it must secure an effective deterrence. This can be achieved only by insisting that each defendant be liable for the amount it has gained by the infringement.[78]

In both cases, the defendant's liability is prescribed – as the correlativity thesis requires – by the content of the plaintiff's entitlement. However, contrary to the isolation and the property theses, in both cases the content of the entitlement cannot be determined without a normative choice.

E Breach of fiduciary duties

Snepp v. United States[79] is the leading case on restitutionary recovery for breach of fiduciary duties.[80] Snepp was a CIA agent who published a book about certain CIA activities without submitting it to the agency's prepublication review. The government conceded that no confidential information

[76] *See Aro*, *supra* note 64, 377 U.S. at 512. For a recent application, see Omniglow Corp. v. Unique Industries, Inc., 184 F.Supp.2d 105, 121 (D. Mass. 2002). One argument that the Court used, which is irrelevant for my purposes, is that an additional recovery from the contributory infringer might extend the patent monopoly to unpatented elements. *See Aro*, 377 U.S. at 508.

[77] *See* Andrew Burrows, *Reforming Non-Compensatory Damages, in* The Search for Principle: Essays in Honour of Lord Goff of Chieveley 295, 307 (William Swadling & Gareth Jones eds., 1999); Charles Mitchell, *Joint and Several Restitutionary Liabilities*, 10 Restitution L. Rev. 87, 90–91 (2002).

[78] A very different problem occurs where there are a number of victims of the same wrong. Where a *profits*-based recovery is available, a difficulty may arise with respect to the proper method of allocating the defendant's gains among the potential plaintiffs. *See, e.g.*, Virgo, *supra* note 27, at 468–69.

[79] 444 U.S. 507 (1980).

[80] For the related category, of breach of confidence, which is outside the scope of this section, see, e.g., Francis Gurry, Breach of Confidence (1984).

had actually been revealed. But such a publication was nonetheless an unequivocal violation of an express term of Snepp's employment agreement. The Supreme Court approved the imposition of a constructive trust on Snepp's profits from the book, allowing the CIA to receive all these gains. The premise of this remedial response was the "extremely high degree of trust" which reposed in Snepp. Given the fiduciary relationship between Snepp and the CIA, the Court held that there should be a remedy that "is tailored to deter those who would place sensitive information at risk."[81]

Writing for the dissent, Justice Stevens expressed three major objections.[82] First, he insisted that restitution was misplaced because Snepp was not unjustly enriched (and constructive trusts – he added – have nothing to do with deterrence). Snepp's profits did not derive in any way from his breach: they were not the product of Snepp's failure to submit the book to a prepublication review. On the contrary, had he performed this duty, the government would have been obliged to give its clearance, and the very same profits would have been gained.

Justice Stevens' second objection was that the CIA's protected interest – the confidentiality of its classified information and sources – was not compromised: Snepp's book did not contain any such information. The failure to submit it to prepublication approval was not to be regarded as a breach of Snepp's fiduciary duty as long as no confidentiality had been breached; rather, in such circumstances, there was but a breach of contract, which did not justify any *profits*-based recovery. A breach of a covenant that supports a fiduciary duty should not be regarded as a breach of that duty.

Finally, the dissenters' last concern was that restitution would "enforce a species of prior restraint on a citizen's right to criticize his government." The remedy was risky because the reviewing agency might "misuse its authority to delay the publication of a critical work or to persuade an author to modify the content of his work beyond the demands of secrecy."

In *Restitutionary Damages,* Weinrib analyzes the issue of restitutionary recovery for breach of fiduciary duties in terms that agree with the dissent's first and second objections. Weinrib suggests that the duty of loyalty is a necessary element of a fiduciary relationship in which one person's interests are entirely subject to another's discretion. This duty, he explains,

[81] *Snepp*, *supra* note 79, 444 U.S. at 510, 515–16. [82] *See id.* at 518–19, 521, 523, 526.

> becomes for purposes of this relationship an entitlement of the beneficiary. Since the meaning of this duty of loyalty is that the fiduciary cannot profit from the relationship, gains can be regarded as the material embodiment of the breach of duty . . . Seen in this light, the fiduciary's liability to disgorge profits is not an example of a policy of deterrence impacting the relationship from the outside, but is rather the remedial consequence that reflects the nature of the obligation owed by the fiduciary on the beneficiary.[83]

If we take this line of reasoning to its logical conclusion, we will reach the dissent's first two arguments. Since no duty of loyalty was actually infringed – no confidential information disclosed – there is no gain which "embodies" such breach and must thus be disgorged; there is, in other words, no unjust enrichment.[84]

This conclusion, however, is much too fast. To be sure, I have no quarrel with Weinrib's understanding of the fiduciary's duty of loyalty as constitutive of the fiduciary relationship.[85] The duty of loyalty is the distinctive feature of fiduciary law – the entailment of the vulnerability of the beneficiary to the fiduciary's discretion in using or working with a critical resource (such as information) belonging to the beneficiary.[86] But identifying the beneficiary's entitlement to the fiduciary's loyalty is only the first – albeit all-important – step of the analysis. A necessary second step is a choice of the extent to which the beneficiary has control over her entitlement to the fiduciary's loyalty and, thus, of the beneficiary's capacity to deter breaches of such loyalty. Such deterrence is, again, not "impacting the relationship from the outside," as it is characterized by Weinrib. Rather, it is an implication of the fiduciary relationship which is "characterised by vulnerability and susceptibility to abuse."[87] Deterrence here is merely the remedial correlative of a rather uncontroversial normative judgment

[83] Weinrib, *supra* note 4, at 33–34. *Cf.* Jason Brock, *The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment*, 58 U. Toronto Fac. L. Rev. 185 (2000).

[84] *Cf.* Sarah Worthington, *Reconsidering Disgorgement for Wrongs*, 62 Mod. L. Rev. 218, 236 (1999).

[85] *See also, e.g.*, P. D. Finn, *The Fiduciary Principle, in* Equity, Fiduciaries and Trusts 1, 54 (T. G. Youdan ed., 1989). *Cf.* Peter Birks, *The Content of Fiduciary Obligation*, 34 Isr. L. Rev. 3, 11–12, 20–22, 28–29 (2000).

[86] *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1402, 1404, 1407–11, 1449 (2002). While I find Smith's account of the fiduciary relationship helpful, I am not sure it can solve the notoriously difficult issue of defining the fiduciary relationship (*see, e.g.*, Jaffey, *supra* note 15, at 401–02, 411–14). Fortunately, such a definition is not required for the purposes of this section.

[87] Edelman, *supra* note 15, at 85. *See also, e.g., id.* at 216, 244; Peter Birks, An Introduction to the Law of Restitution 332–33 (paperback ed. with revisions 1989); Virgo, *supra* note 27, at 453–54, 518.

regarding the beneficiary's entitlement to the fiduciary's loyalty.[88] This may explain why restitution for breach of fiduciary duty is so entrenched in Anglo-American law that it is rarely seriously disputed.[89]

The availability of a *profits*-based recovery is therefore a function of the deterrence issue. But deterrence in the context of fiduciary relations turns out to be an intricate matter.[90] There are some contexts – particularly of the corporate kind – where courts leave fiduciaries who breached their duty of loyalty with some part of the gain. Such under-deterrence may be beneficial in order "to spur the fiduciary to discover and exploit opportunities,"[91] given the availability of market devices that provide the fiduciary "with incentive compensation to align her interest with that of the [beneficiary]."[92] By contrast, in the "core" cases of fiduciary relationships – think, for example, of trustees, guardians, or CIA agents such as Snepp – the fiduciary's duties are (and should be) more stringently enforced given the unavailability of such market devices.[93] The so-called chilling effect of such *profits*-based liability in these cases is of limited concern because what it means is that agents are deterred, as they should be in these contexts, from intentionally engaging in risky transactions.[94]

Moreover, insofar as the latter type of fiduciary cases are concerned, it is doubtful whether the regular remedy for vindicating *control* – the fiduciary's *profits* – is sufficient. As Robert Cooter and Bradley Freedman explain, two structural characteristics of the fiduciary relationships make deterrence difficult in these cases.[95] First, the beneficiary's interests

[88] *Cf.* Edwin Simpson, *Conflicts, in* Breach of Trust 75, 95 (Peter Birks & Arianna Pretto eds., 2002).

[89] *See, e.g.*, Andrew Burrows, The Law of Restitution 503 (2d ed. 2002); Robert Chambers, *Liability, in* Breach of Trust, *supra* note 88, at 1, 25–26; Note, *Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery*, 92 Yale L.J. 128, 134–36 (1982).

[90] *See* Robert Cooter and Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045 (1991). *Contra* I. M. Jackman, The Varieties of Restitution 122 (1998).

[91] *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & Econ. 425, 436 (1993).

[92] Roberta Romano, *Comment on Easterbrook and Fischel, "Contract and Fiduciary Duty"*, 36 J. L. & Econ. 447, 449–50 (1993). *Cf.* J. D. Davies, *Keeping Fiduciary Liability within Acceptable Limits*, 1998 Singapore J. Legal Stud. 1, 7. More generally, the intensity of the fiduciary obligation varies, and should vary, inversely with the potential of self-help on the part of the beneficiary. *See* Smith, *supra* note 86, at 1406, 1443, 1482–86.

[93] *See* Romano, *supra* note 92, at 449–50.

[94] *See* Saul Levmore, *Unjust Enrichment, in* 3 New Palgrave Dictionary of Economics and the Law 644, 645 (1998).

[95] *See* Cooter and Freedman, *supra* note 90, at 1046–47. The limitation of the scope of their account to this sub-category of fiduciaries is mine.

are subject to the fiduciary's discretion; the fiduciary should control and manage the asset in the beneficiary's best interest. Second, the asset's management involves risk and uncertainty and thus requires continual recalculations to determine the most productive course of action. This need for dynamic management precludes the possibility of dictating the behavior of the fiduciary by specific and easily enforceable rules. Furthermore, the standard prescribed by the duty of loyalty – that the fiduciary should not appropriate the beneficiary's (fungible or informational) asset or some of its value – is also difficult to enforce, because profitable misappropriation is likely to be difficult to prove.

The asymmetrical information concerning acts and results inherent to the fiduciary relationship makes it difficult for the beneficiary to distinguish bad luck from the fiduciary's misappropriation.[96] Due to the hardships of detection and proof, the *profits* remedy may be insufficient to vindicate the beneficiary's control over her entitlement to loyalty. The beneficiary's entitlement – and not any other reason exogenous to the parties' relationship – requires some "reinforcement" of the *profits* remedy if it is to vindicate control. In response, the distributive scheme underlying fiduciary law can grant the beneficiary entitlements that are not as central to the fiduciary relationship as loyalty, such as reporting requirements or the appearance of propriety. The difficulties of enforcement are inherent to the fiduciary relationship and thus may properly influence the definition of the beneficiary's entitlement.

This explains why "[f]iduciary law creates a cluster of presumptive rules of conduct . . . [that] restrict the permissible scope of a fiduciary's behavior whenever possible conflicts of interest arise between the [beneficiary] and the fiduciary."[97] This bundle of rules – the most fundamental of which are the rule against conflict of interest and the rule against secret profits[98] – facilitates the proof of appropriation. This is accomplished by inferring disloyalty from appearances, either through conclusively presuming appropriation or by requiring the fiduciary to prove that she did not misappropriate the principal's asset.[99] These rules raise the enforcement

[96] *See id.* at 1051–52. *See also, e.g.*, Hedley, *supra* note 58, at 99–100.

[97] Cooter and Freedman, *supra* note 90, at 1053–54.

[98] *See* Restatement of Restitution §§ 138, 190–200 (1937). *See also, e.g.*, Goff & Jones, *supra* note 26, at 713–36; Virgo, *supra* note 27, at 524–30.

[99] *See* Cooter and Freedman, *supra* note 90, at 1054. *See also, e.g.*, Rick Bigwood, *Undue Influence: "Impaired Consent" or "Wicked Exploitation,"* 16 Ox. J. Legal Stud. 503, 510 (1996). For a strong support of the latter alternative (shifting the burden of proof, rather than setting a conclusive presumption), see Gareth Jones, *Unjust Enrichment and the Fiduciary's Duty of Loyalty*, 84 L.Q. Rev. 472, 487, 489 (1968).

probability and help to solve the deterrence problem. In order to vindicate properly the beneficiary's entitlement in the fiduciary's loyalty, the law treats these ancillary duties as themselves fiduciary duties and gives the beneficiary the right to a strong remedy for breaches of these entitlements.[100]

At this point we can appreciate the inadequacy of the dissent's first two objections, as well as of Weinrib's account which echoes them. Snepp was obliged to notify the CIA before publishing information relating to his CIA activities. If this obligation is properly understood as an ancillary duty for which a *profits* remedy is appropriate, Snepp's profits did embody the breach of that duty. Once we appreciate that deterrence may be entailed by the beneficiary's entitlement and that effective deterrence may require ancillary rules of presumptive and strict liabilities governing certain aspects of fiduciaries' conduct, we can no longer dismiss out of hand the possible availability of a *profits* recovery for breaching a "merely" ancillary obligation. And once this recovery may be thus required by the beneficiary's entitlement, the "no unjust enrichment" argument becomes wholly question-begging. To say that the fiduciary has not been unjustly enriched is to assume that the beneficiary is not entitled to the profits gained by the breach of such ancillary obligation, thus posing the very question the principle against unjust enrichment purports to resolve.[101] As we have seen once and again, treating unjust enrichment as an argument is a recipe for confusion.

This does not mean that any breach of the fiduciary's obligations should trigger restitutionary recovery. Deciding which obligations should be deemed ancillary to the fiduciary's duty of loyalty and whether they should be backed up by a conclusive presumption of appropriation or by shifting the balance of proof to the fiduciary requires a detailed analysis which is not necessary here.[102] For our purposes, it is enough to emphasize that these are questions regarding the *initial* allocation of entitlements between fiduciaries and beneficiaries and are thus both distributive and – at the same time – internal to the relationships between each fiduciary and her beneficiary.

[100] *Cf.* R. C. Nolan, *Conflicts of Interest, Unjust Enrichment and Wrongdoing, in* RESTITUTION – PAST, PRESENT AND FUTURE 87, 105 (W. R. Cornish et al. eds., 1998).

[101] *Cf.* J. C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 53–56 (1981).

[102] For an economic analysis of this question, see Cooter and Freedman, *supra* note 90, at 1064–74.

This conclusion can help us better understand the debate in *Snepp*, but it cannot yield a value-free resolution. The relationship of agents like Snepp with the CIA are deemed fiduciary due to the trust the agent enjoys respecting the CIA's confidential information. Because the agent's duty of loyalty is aimed at preserving and vindicating the CIA's control over the dissemination of such information, the obligation to submit materials to prepublication review is a reasonable ancillary rule of conduct that can secure this control.

This, however, does not necessarily tilt the scales in favor of restitution in cases like *Snepp*. A difficult question still remains of whether the breach of this ancillary duty should lead to a conclusive presumption of appropriation (as the majority's view implies) or merely to a shift of burdens that would require the fiduciary to prove that she did not misappropriate (in which case no restitutionary recovery is appropriate in *Snepp* given that no confidential information had been revealed). The most informative consideration for the resolution of this question lies in the dissent's third concern, namely in our normative judgment respecting prior restraint on the free speech of the CIA agents[103] (this concern does not apply – it is important to emphasize – in many other fiduciary cases).[104]

Thus, just like in cases of the appropriation of resources such as land, patents, or copyright, correlativity cannot solve the difficult distributive decisions law needs to make in order to set the entitlements in the first place. These decisions necessarily rely on considerations of a clearly "public" nature. There is no way to isolate private law from public values.

F Misappropriation of body parts

In *Moore v. Regents of the University of California*,[105] a physician failed to inform his patient of his intent to conduct research on certain cells he had taken from the patient, and subsequently used them in lucrative medical research. A majority of the California Supreme Court held that the patient was not entitled to any portion of the generated profits and

[103] A court making this normative decision might also consider the unusual situation in *Snepp*, where the beneficiary is more powerful relative to the fiduciary than in most such relationships. Perhaps such a powerful beneficiary does not need control over its fiduciaries' ancillary duties, because it is better positioned than other beneficiaries to detect and to prove breach.

[104] For a (somewhat stretchy) attempt to justify the *Snepp* rule with a contractarian analysis, see Easterbrook & Fischel, *supra* note 91, at 444–45.

[105] 793 P.2d 479 (Cal. 1990).

that his sole cause of action was under breach of the physician's disclosure obligation.

The majority accepted that patients must have the right to make informed decisions respecting their tissues. It nonetheless insisted that conversion law did not apply, and that the full disclosure doctrine would sufficiently protect these interests.[106] These conclusions complement each other, because if the patients' entitlement is fully protected by the disclosure doctrine, allowing the conversion (or restitutionary) claim would result in a "windfall,"[107] thus deviating from the injunction of the correlativity thesis.

The two dissents challenged both aspects of this move. Justice Mosk demonstrated that the disclosure doctrine cannot adequately vindicate a patient's entitlement to control his tissues, because it carries only a marginal prophylactic effect.[108] While in many other contexts the disclosure doctrine sufficiently protects against unconsented-to invasions, it is of little help here because, in order to recover, the patient must prove that the physician's failure to inform caused his injury.

Justice Broussard focused on the other side of the doctrinal framework, criticizing the majority's analysis of conversion. If we agree on the patient's right to control the future use of his organ, we should have no difficulty in applying the traditional law of conversion, he insisted, because conversion protects against not only improper interference with possession, but also "unauthorized use . . . or improper interference with [the] right to control the use."[109] I need not take a position on this part of the debate, because this prong of the dissent's argument is actually unnecessary. Even if conversion is unavailable, a gain-based recovery can still be available under the independent heading of restitution, which is of course my sole focus in this section. (To be sure, in Anglo-American law, cases of wrongful enrichment are rooted in the archaic concept of *waiver of tort* which views restitution as a parasitic claim, an alternative to tort damages; but by now restitution has gained an independent status.[110])

[106] *See id.*, 793 P.2d at 483–85. [107] *See id.*, 793 P.2d at 488–96.

[108] *See id.*, 793 P.2d at 519–21 (Mosk, J., dissenting).

[109] *Id.*, 793 P.2d at 502 (Broussard, J., concurring and dissenting).

[110] *See* John A. Artukovich & Sons v. Reliance Truck Co., 614 P.2d 327, 329 (Ariz. 1980); In re Hillsborough Holdings Corp., 207 B.R. 299, 305–06 (1997); Scott v. Rosenthal, 2000 U.S. Dist. LEXIS 18275 at 26–30 (S.D.N.Y. 2000); Restatement (Second) of Restitution § 1 cmt. a, § 45(2) & cmt. f (Tentative Drafts, 1983–84). *See also* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504 (1980); Daniel Friedmann, *Restitution for Wrong: The Basis of Liability, in* Restitution – Past, Present and Future: Essays in Honour

These challenges seem devastating. Indeed, if we are committed to vindicating patients' right to control their bodies – to be the sole decisionmakers respecting their tissues – nothing short of a *profits* remedy is appropriate. Only *profits* – in my account – are, in language borrowed from Weinrib, "the notional equivalent at the remedial stage of the right [to control] that has been wrongly infringed."[111]

Even the dissenting justices in *Moore* did not take the commitment to the patient's control to this logical conclusion. Justice Mosk, for example, develops "an analogy to the concept of 'joint inventor'" which would prevent the researcher's unjust enrichment by giving a monetary reward to the donor proportionate to the (objective) value of his relative contribution.[112] Insofar as the enrichment is said to be unjust (wrongful) due to the violation of the patient's right to control, this solution – of awarding the intermediate measure I call *proportional profits* – is inadequate, because this measure does not properly secure the plaintiff's control.[113] *Proportional profits* reconstruct a mutually benefitting transaction for which the plaintiff's consent was neither obtained nor expressed.[114] At most *proportional profits* can thus be analyzed as a vindication of the plaintiff's hypothetical consent. This may well be good enough for "intermediate" resources like copyright, but – at least insofar as contemporary American law is concerned – is still shy of the control-vindicating *profits* remedy

of Gareth Jones 133 (W. R. Cornish et al. eds., 1998); Jack Beatson, *The Nature of Waiver of Tort, in* The Use and Abuse of Unjust Enrichment 206, 210–24, 242–43 (Jack Beatson ed., 1991). *Contra* Neil Andrews, *Civil Disgorgement of Wrongdoers' Gains: The Temptation to Do Justice, in* Restitution – Past, Present and Future: Essays in Honour of Gareth Jones, *id.*, at 155.

111 Weinrib, *supra* note 4, at 4–5.

112 *See Moore*, *supra* note 105, 793 P.2d at 512–13, 517 (Mosk, J., dissenting); *id.*, 793 P.2d at 505 (Arabian, J., concurring). *See also, e.g.*, Friedmann, *supra* note 15, at 1899; Michael Orlando, Moore *Revisited: State Sponsored Biotechnological Research and the Takings Clause*, 23 Whittier L. Rev. 437, 464 (2001).

113 *See* Dagan, *supra* note 3, at 19–21, 82–85, 73–78.

114 In this way, *proportional profits* are different from *fair market value*. Because a restitution claimant could have obtained *fair market value* for her resource in the market, the fact that she did not voluntarily sell it usually demonstrates that she did not want to. By contrast, in at least some cases, it is somewhat more plausible, or at least not contrary to the facts of the case, to say that, if she had been given the opportunity, she *would have* consented to a bargain which could have secured her a proportional share of a profitable enterprise. (Notice that this argument assumes that the defendant's *profits* are greater than *fair market value*, so that splitting the difference is a more favorable remedy from the plaintiff's standpoint than *fair market value*. While this is not always the case as a matter of fact, this assumption implies that *proportional profits* are an intelligible measure of recovery only when *profits* exceed *fair market value*. And indeed *proportional profits* are awarded only where this measure exceeds *fair market value*.)

which applies with respect to misappropriations of land. Hence, Justice Mosk's normative commitment requires an even more rigid result than he acknowledges.

This tentative conclusion suggests that if we believe that patients should enjoy an unqualified control over the future use of their tissues, a *profits* measure of recovery should be available. On its face, this is an unavoidable conclusion, at least within the parameters of the realist account of *Unjust Enrichment*. As Justice Mosk said in his dissent, "our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona."[115] Our body is not merely the physical embodiment of our self, but is also the utmost reflection of who we are – the literal external projection of our personalities. Our body is a resource we are most anxious to control.[116]

Three objections to this conclusion were nonetheless raised by the *Moore* majority.[117] One concern was that allowing this claim is tantamount to a recognition of the right to sell body tissues for profit, thus raising the notorious question of a "market for body parts." Another objection was that the specific cells in question, as it turned out, were not at all constitutive of one's personality. Unlike a name or a face, they have the same molecular structure in every human being; they were not at all unique to Moore. Hence, the argument goes, there is no need to sanctify the control of the holders over such cells.

Finally, *Moore*'s justices were also reluctant to draw the logical conclusion from their commitment to the patient's control over her tissues, due to the policy consideration not to threaten medical research and progress by restricting access to necessary raw materials. The majority maintains that had Moore's claim been accepted, "the socially useful activities of innocent researchers" would have been subject to liability whether or not they participated in, or knew of, the infringement of the patient's right. From this point of view, absolving the direct appropriator from liability is merely an unfortunate, but inevitable, by-product of the need to protect such third parties. Insofar as the cause of action in restitution is concerned, however, the majority's assertion that a separate defense for third parties is impossible is probably wrong: the restitutionary rule

[115] *Moore*, *supra* note 105, 793 P.2d at 515 (Mosk, J., dissenting).

[116] *See* Dagan, *supra* note 3, at 64; *see also, e.g.*, Stephen R. Munzer, *Human Dignity and Property Rights in Human Body Parts, in* Property Problems From Genes to Pension Funds 21, 28 (1997).

[117] *See Moore*, *supra* note 105, 793 P.2d at 490, 493–94, 497–98. *See also, e.g.*, Jonathan Kahn, *Biotechnology and the Legal Constitution of the Self: Managing Identity in Science, the Market, and Society*, 51 Hastings L.J. 909, 917 (2002).

of bona fide purchase supplies such a defense for innocent third parties who relied on a wrongdoer's voidable title.[118] Thus, if this third objection is not to be treated as a sheer doctrinal mistake, it should stand for the proposition that the interest in medical research and progress is overwhelming enough to justify the unconsented-to use of Moore's cells by his physician: the direct appropriator.[119]

The first two objections help to refine my account; the third challenges the limits of Weinrib's correlativity thesis, which this chapter endorses. Notwithstanding the majority's assertion, the first concern – the non-commodification of the human body – is not compromised by a profits pecuniary remedy for misappropriations. As a starter, note that vindicating a person's right to exclude others from her body does not entail as a matter of conceptual necessity the legitimization of the alienability of body parts.[120] More importantly, the market inalienability rule, entailed by the concern of commodification,[121] is actually based on the same consideration – of the body's constitutive role for people's identity – as the *profits* measure of recovery, which deters infringements. A market inalienability rule goes further than a *profits* rule since it not only deters others' violations, but also restricts the holder's control. But this does not challenge the constitutive character of the resource at issue. On the contrary, it signals that this resource is so essential to personhood that even the entitlement holder should not commodify it. As Justice Broussard noted, the majority's decision does not elevate the human tissues above the marketplace, but merely shifts the right to their commercial exploitation to wrongdoers.[122]

[118] *See* Restatement of Restitution §§ 13, 172 (1937). Thus, Justice Broussard was correct to insist that the need to protect third parties does not justify the absolution of the appropriator. *See Moore*, *supra* note 105, 793 P.2d at 504.

[119] Another question raised by the majority – whether a victim of misappropriation can sue for the product of the appropriated asset, rather than the asset itself – is also moot. *See Moore*, *supra* note 105, 793 P.2d at 489, 492. The law of restitution again supplies a convenient, although admittedly troubled, tool – the tracing doctrine – for overcoming such difficulties. *See infra* section 9.A.

[120] This is an entailment of the Hohfeldian understanding of property rights as bundles which can be disaggregated. *See* Hohfeld, *supra* note 43, at 746–47. For an extended treatment of the bundle metaphor and its relation to the forms of property, see Hanoch Dagan, *The Craft of Property*, 92 Cal. L. Rev. 1517, 1532–35 (2003).

[121] *See* Margaret Jane Radin, Contested Commodities 21, 125–26 (1996).

[122] *See Moore*, *supra* note 105, 793 P.2d at 506 (Broussard, J., concurring and dissenting). *Cf.* Charles M. Jordan, Jr. & Casey J. Price, *First* Moore, *Then* Hecht: *Isn't it Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 Real Prop. Prob. & Tr. J. 151, 168–69 (2002).

The second objection – respecting the indistinctiveness of the plaintiff's cells – similarly helps to refine our analysis. Notice that similar charges can be applied with regard to almost all of the components of most of the resources we consider as constitutive, such as a copyright or the family home. Indeed, a disaggregation of any resource into its components would deprive it of its symbolic meaning. Hence, if we think that these symbolic meanings serve important human values, this strategy must be unacceptable. We must look at the resource as a whole – here, the human body – to decide what should be the content of the holder's entitlement.

Consider finally the majority's third objection. Research is a socially useful activity that we, as a society, wish to encourage. And, assuming that the appropriation (or misappropriation) of body parts generates such positive externalities, we may wish to reconsider – in this context only – our devotion to people's control over their tissues. This is a radical statement, surely difficult to swallow; but given the failure of the first two objections, it is the only proposition that can explain the decision in *Moore*.

If the policy of facilitating medical research is the ultimate rationale of *Moore,* it signals a departure from the correlativity thesis. In many other cases I discuss in this chapter, social concerns dictate a limited entitlement for certain resource holders – and thus limited causes of action against potential invaders – without violating correlativity. This seems difficult in the context of body parts. People usually enjoy (and should enjoy) a rather rigid, *control*-type entitlement, with its entailed *profits*-based recovery, respecting their body parts. And yet, even the dissent in *Moore* is not willing to take this initial allocation of entitlements too seriously in a case of a physician's misappropriation that yields significant medical progress. The difficulty for correlativity in this case is that the physician's implied privilege cannot be explained in terms of her relationship with the patient, but must rather involve public considerations – looking at the patient's relationship with society as a whole – that are exterior to the relationship between plaintiff (the patient) and defendant (the physician).

Thus, insofar as the California Supreme Court's rule is appealing (or, for that matter, the position of the dissent), it suggests that there may be extreme cases – here, where the interest in facilitating medical research, so vital to people's health, is at stake – in which private law, as a justificatory practice, should accommodate larger public concerns which cannot be condensed into the correlativity framework. This means that although correlativity should generally guide private law, it should not be thought of as an absolute side-constraint.

G Gains from slave labor

One of the most publicly salient and fiercely debated uses of restitution in recent years has emerged out of a series of suits, issued by victims of slavery (or their descendants) against corporations that benefitted from their (or their ancestors') wrongful enslavement. The first wave of this litigation included close to forty lawsuits of former slave laborers, forced to work by the Nazis, which were filed against numerous German (and American) companies that had (ab)used their labor in factories and camps in Germany, Austria, and throughout occupied Europe during World War II.[123] These lawsuits were never fully litigated, following a settlement for nearly $5 billion.[124] Soon thereafter, similar cases were settled with the Austrian government and Austrian industry.[125]

The most important impact of the relative success of the Holocaust restitution cases was in the context of the African-American reparations movement. While there is a rich history of claims for reparations for African Americans,[126] it was only in 2002 that a number of lawsuits were filed by descendants of slaves seeking reparations from private corporations, which were alleged to have unjustly profited from the institution of slavery. The plaintiffs claimed that the defendants – or their predecessors-in-interest – made illicit profits by, for example, using slave labor for production and construction, insuring slave owners "against the loss of their human chattel," and making loans to slave traders. The plaintiffs sought restitution of these ill-gotten gains.[127] In January 2004, a Federal

[123] For helpful surveys and references, see Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-era Litigation in American Courts*, 80 Wash. U. L.Q. 795, 805–27 (2002); Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in American Courts 59–109 (2003); Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 Harv. Int'l L.J. 503 (2002).

[124] United States–Germany Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, US–Ger., 39 I.L.M. 1298 (2000). As a matter of fact, the suits were not exactly settled, but this subtlety is of no significance for the purposes of this section. *See* Anthony J. Sebok, *Unsettling the Holocaust, Part II*, Aug. 29, 2000, at http://writ.news.findlaw.com/sebok/20000829.html.

[125] United States–Austria: Joint Statement and Exchange of Notes between the United States and Austria Concerning the Establishment of the General Settlement Fund for Nazi-era and World War II Claims, January 17, 2001, US–Aus., 40 I.L.M. 565 (2001).

[126] *See* Randall Kennedy, A History of the Idea of Reparations for African Americans (the 43rd Thomas M. Cooley Lectures, University of Michigan Law School, November 7, 2002).

[127] See In re African-American Slave Descendants Litigation, 2004, WL 112646, at 6–9 (N.D. Ill. Jan. 26, 2004). The specific remedies sought are "accounting, constructive trust, restitution, disgorgement, compensatory and punitive damages." *Id.* at 6.

District Judge dismissed the claim without prejudice, but an amended complaint may still be forthcoming.[128]

This section addresses this pattern of restitutionary claims in an abstract way, looking at the question of the availability of gain-based recovery for wrongful enslavement from the viewpoint of restitution theory, rather than purporting to provide an assessment of the likelihood of success of these complex cases. I set aside a number of complicated questions, some of which were crucial for the current dismissal of the African-American slave descendants' case. Thus, I assume – skirting daunting problems of proof – that a plaintiff can link a specifically named defendant to the enslavement of her ancestors and identify the ill-gotten profits made by that defendant from this wrong; and I do not address the question of whether descendants (as opposed to the victims of slavery) should have the standing for pursuing restitution. I also disregard the potentially powerful claim by the corporate-defendants in the US Slavery case, that because slavery was legal before emancipation, they are entitled to profits earned through slave labor and slave trade.[129] Finally, I ignore the important institutional question that is related to this inquiry: whether judges should be involved in settling these controversies, or whether they should be left to the representative branches of the government, and (somewhat relatedly) bracket the issue of the modality of the remedy for these types of social wrongs, notably whether it should be individual-based or group-based.[130] Each of these topics raises difficult questions that cannot be fairly addressed within the scope of this section.

[128] See Mike Robinson, *Judge Dismisses Slave Reparations Case*, Find Law Jan. 26, 2004, at http://news.findlaw.com/ap_stories/other/1110/1-26-2004/20040126100006_33.html.

[129] I discuss the last two issues elsewhere. *See* Hanoch Dagan, *Restitution and Slavery*, 84 B.U. L. Rev. (forthcoming 2004).

[130] As the text implies, I do not argue in what follows that private law restitutionary claims are preferable to a possible public law inquiry which focuses on the role of the government in slavery and seeks remedial measures for the infringed group, rather than payments to individuals. *See, e.g.*, Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. Third World L.J. 429, 468–71 (1998); Charles J. Ogletree Jr., *Litigating the Legacy of Slavery*, New York Times, March 31, 2002, at A9. For a strong "internal" critique of group reparations for African Americans, see John McWhorter, *Against Reparations*, New Republic, July 23, 2001, at 32. For a general discussion of design alternatives for reparations, see Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 725–746 (2003). Note that the form of class action may entail in any event some of the features of a remedial social program, as was the case in the settlement of Holocaust slavery litigation. *See* Vagts & Murray, *supra* note 123, at 529–30.

In what follows, I focus on what I deem to be potentially the most devastating challenge to the use of restitution law in the general context of such horrible human rights violations: that the use of unjust enrichment is strategic and potentially degrading. As I hope to show, this concern is premised on a specific understanding of the law of restitution which unduly emphasizes its connection to property and under-appreciates its normative and distributive underpinnings. The concern seems misplaced once this faulty understanding – which is closely related to the property thesis and the isolation thesis criticized above – is set aside, and the law of wrongful enrichments is understood along the lines of the realist and unashamedly distributive account advanced in this chapter. In this understanding, the law of restitution incorporates important normative lessons that can guide the settlement of these difficult issues, whether they end up litigated by courts or addressed in the court of public opinion.

On legal strategy and its costs

Anthony Sebok describes the restitution claims of the Holocaust and Slavery cases as a smart strategy with some hidden, but potentially significant, costs.[131]

The unjust enrichment claim, Sebok maintains, is "the only viable strategy" for these cases for two main reasons. First, the statute of limitations, which is likely to forestall – especially in the context of American Slavery – a harm-based lawsuit, may be tolled for a gain-based lawsuit. The "injuries that resulted from forced labor and physical abuse were known to the victims at the time they occurred," and even if the limitation period were to be extended for the period in which African Americans were not allowed meaningful access to the courts, tort suits are likely to be time-barred. By contrast, the plaintiffs' claim that until recently descendants of slaves had no way to discover the defendants' ill-gotten profits is more likely to sidestep the problem of limitation. The second advantage of unjust enrichment relates to questions of proof: the

[131] Anthony J. Sebok, *Prosaic Justice*, Legal Affairs, Sept./Oct. 2002, at 51–53 [hereinafter *Prosaic*]; Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. Ann. Surv. Am. L. 651 (2003) [hereinafter, *Reparations*]; Anthony J. Sebok, *Should Claims Based on African-American Slavery be Litigated in the Courts? And if so, How?*, Dec. 4, 2000, at http://writ.news.findlaw.com/sebok/20001204.html [hereinafter *Slavery*]; Anthony J. Sebok, *The Brooklyn Slavery Class Action: More Than Just a Political Gambit*, Apr. 9, 2002, at http://writ.news.findlaw.com/sebok/20020409.html [hereinafter, *Brooklyn*].

corporate-defendants of the Slavery litigation "are the same legal entities today as they were in 1800"; moreover, as "creatures of bureaucracy," "corporations often have well maintained records," which "make it relatively easy to track how a dollar wrongfully gained 200 years ago was reinvested until today."

But the possible advantages of unjust enrichment, Sebok maintains, may end up generating a Pyrrhic victory. Shifting from human rights to unjust enrichment might commodify the wrongs of the Holocaust and of Slavery because it necessitates the use of the "quotidian language of property and restitution law." The language of tort law, if it were applicable, could have the virtue of conveying the message that the wrongs of Slavery "were not just inflicted by governments; they were quintessentially motivated by the greed and cruelty of private persons." But the language of restitution is different. As implied by the famous dictum of Lord Mansfield in one of the foundational cases of restitution law – that restitution is required where it is "obliged by the ties of natural justice in equity to refund the money represented by the intangible thing [defendants] took"[132] – restitution claims are not about forcing the slaves to labor, but rather about failing to pay for the work they did. According to this critique – which echoes concerns that were raised by some "internal" critics of the Holocaust restitution cases[133] – resorting to restitution law requires buying into a vocabulary of "lost wages." Thus, these claims commodify the horrors of the Holocaust and of Slavery by implying that the wrong committed is the retention of property that has been wrongfully taken, rather than the violation of human rights, the destruction of culture, and the oppression of people. Therefore, Sebok concludes that "employing a legal tactic that frames the right to freedom in terms of the right to property" may end up degrading the human values at stake and sapping the moral language of the reparations movement.[134]

[132] Moses v. Macferlan, 97 Eng. Rep. 676, 681 (K.B. 1760).

[133] *See* Abraham H. Foxman, *The Dangers of Holocaust Restitution*, Wall Street J., Dec. 4, 1998, at A18; Gabriel Schoenfeld, *Holocaust Reparations – A Growing Scandal*, Commentary, Sept. 2000, at 25, 34.

[134] Along these lines, Sebok suggests that the Slavery restitution claim is not sufficiently attentive to possible backlashes from conceptualizing human rights violations as property-based, such as the offensive claim that African Americans somehow benefitted from slavery. *See* Anthony J. Sebok, *The Horowitz Slavery Ad Controversy, and the Problem with Conceptualizing Human Rights Violations as Property-Based*, March 26, 2001, at http://writ.news.findlaw.com/sebok/20010326.html. *See also* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L. 497, 522–23 (2003).

Restitution of profits and human rights

The concern that restitution claims might trivialize the most horrible violations of human rights by reducing them to prosaic grievances about unpaid wages must be taken seriously. Early English cases in which restitutionary recovery was allowed for the old tort of "seduction" – which seem, on first sight, supportive of the availability of restitution for unpaid wages – can demonstrate these risks. These early nineteenth-century cases hold that an employer whose apprentice was "seduced" away by another is entitled to restitution of the *fair market value* of the apprentice's labor.[135] Lord Mansfield's reasoning for allowing restitution in *Lightly v. Clouston* resonates the commodification concern: because the employer is entitled to the labor of his apprentice, "he is consequently entitled to an equivalent for that labour, which has been bestowed in the service of the Defendant . . . This case approaches as nearly as possible to the case where [the Plaintiff's] goods are sold, and the money has found its way to the pocket of the Defendant."[136]

Given the commodification of human labor embedded in such restitutionary claims for seduction of employees, it is no wonder that there are no modern authorities for such actions.[137] As early as 1913, Frederic Woodward rejected the availability of restitution in these cases, and since his time restitution has been available for wrongful interference with contractual relationships only in very limited circumstances.[138] Woodward explained his rejection of restitutionary recovery – in line with the correlativity thesis – by reference to the employer's limited entitlement to her employee's labor, saying that "from the moment in which the contract is broken the master is not entitled to the labor of his servant."[139] The point here is not that labor cannot be an interest whose taking triggers

[135] *See* Lightly v. Clouston, (1808) 1 Taunt. 112, 127 E.R. 774; Foster v. Stewart, (1814) 3 M. & S. 191, 105 E.R. 582. *See also* James v. Le Roy, Bayard, M'evers, 6 Johns. 274 (1810); Bowes v. Tibbetts, 7 Me. 457 (1831). *Cf.* Fail and Miles v. McArthur, 31 Ala. 26 (1857).

[136] *Lightly, supra* note 135, (1808) 1 Taunt. at 114. *See similarly Foster, supra* note 135, (1814) 3 M. & S. at 200.

[137] 1 George E. Palmer, The Law of Restitution § 2.6, at 85 (1978 & Supp. 2003:1) (Palmer mentions one 1952 New Jersey decision in which the availability of such an action was assumed).

[138] *See* Dagan, *supra* note 3, at 102–05. *See also* Anne-Catherine Hahn, Tortious Interference with Employment Contracts: A Property Right over Employees? (unpublished manuscript).

[139] Frederic Campbell Woodward, The Law of Quasi Contracts 458 (1913). *See also* Sir P. H.Winfield, The Law of Quasi-Contracts 99–100 (1952); R. M. Jackson, The History of Quasi-Contract in English Law 80 (1936).

restitution:[140] as we have already seen in several contexts covered by previous chapters, an enrichment may be deemed unjust when it takes the form of services.[141] Rather, the refusal to treat an employer's interest in her employee's labor as an interest the appropriation of which triggers restitution is premised on a refusal to sanction Lord Mansfield's implicit assumption that an employee cannot terminate at will her employer's entitlement to control her labor even where such termination causes her employer no harm. This implicit proposition is rejected for similar reasons that contracts of employment are not specifically enforced and that an employer cannot obtain an injunction prohibiting a defaulting employee from working for all other employers during the remainder of the promised period of employment.[142] Like an enforcement of an employment contract or a general injunction, restitutionary claims for seduction of employees may undermine people's ability to exit an undesirable working situation as well as their ability to start afresh.[143] In short, restitutionary recovery in such cases is undesirable because it denies the inalienability of people's right to control their labor, thus conflicting with our liberal commitment to individual autonomy.

Allowing restitution to a former employer for the value of labor indeed unduly commodifies the employee's labor. But this conclusion does not entail that allowing the laborer herself restitution for the value of her labor that was wrongfully appropriated by the defendant is also morally dubious. The concern of the noncommodification of human labor is not compromised in the latter context because restitution to the laborer actually vindicates her inalienable entitlement to be the ultimate decisionmaker

[140] *Contra* Palmer, *supra* note 137, at 87.

[141] *See supra* sections 3.E, 4.E, 6.A. For the minority position, according to which the provision of services cannot lead to restitutionary liability, see Jack Beatson, *Benefit, Reliance and the Structure of Unjust Enrichment, in* The Use and Abuse of Unjust Enrichment, *supra* note 110, at 21, 31–44; James E. Penner, *Basic Obligations, in* The Classification of Obligations 91, 110 (Peter Birks ed., 1997).

[142] *See* Friedmann, *supra* note 110, at 520, 528. *See also* Restatement (Second) of Contracts § 367 (1981); Arthur v. Oakes, 63 F. 310, 317–18 (7th Cir. 1894); Stephen Waddams, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning 114 (2003).

[143] Todd D. Rakoff, *Enforcement of Employment Contracts and the Anti-slavery Norm, in* Human Rights in Private Law 283, 292–95 (Daniel Friedmann & Daphne Barak-Erez eds., 2001). *See also* Arthur L. Corbin, Contracts 5A § 1204 (1950); Robert S. Stevens, *Involuntary Servitude by Injunction: The Doctrine of* Lumley v. Wagner *Considered*, 6 Cornell L.Q. 235 (1921); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 Soc. Phil. & Pol'y 179, 197–98 (1986). *But cf.* Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 Stan. L. Rev. 87 (1993).

as to the use of her labor. Denying restitution for the wrongful appropriation of human labor in such context would not elevate human labor above the marketplace, but rather shift the entitlement to its beneficial use to the wrongful appropriator. (Notice how the commodification concern in the slave restitution cases is similar to – and similarly misguided as – the commodification concern in *Moore*.) Moreover, as Weinrib's correlativity thesis indicates, because recovery in restitution cases is "the notional equivalent at the remedial stage of the right that has been wrongly infringed," ill-gotten gains are "integral to the continuing relationship of the parties as the doer and sufferer of an injustice." In other words, "the gain stands not merely as a sequel to the wrong but as its present embodiment." Restitution is thus necessitated in order to remove the gain "that thus embodies the injustice done by the defendant to the plaintiff."[144]

For these reasons, insofar as the difficulty of commodification is concerned, the identity of the plaintiff – an employer whose employee works elsewhere or the laborer herself insisting on the removal of gains made due to her enslavement – is crucial. The employee seduction claims should not be sanctioned by law because they constitute undue commodification of human labor. In contrast, the slave restitution cases should be recognized notwithstanding the fact that they cash in on human labor because this cause of action properly vindicates, rather than undermines, people's inalienable right to control their own labor. Without the material aspect of restitution, a purely expressive (noncommodified) response to these human rights violations – such as an apology – might end up as hollow rhetoric.[145] Restitution provides a credibility check to human rights law, thus preserving its integrity and moral significance.

This conclusion is fortified if we remember that various measures of recovery in wrongful enrichment cases vindicate different types of entitlement. Restitutionary recovery which is measured – as in the patent context – by the *fair market value* of the wrongful use stands for a utilitarian entitlement. But restitutionary recovery which is measured – as in the context of land[146] – by the greater of *fair market value* and *profits* stands for a very different type of entitlement. Since *fair market value* secures the plaintiff's well-being, and *profits* secure her control, applying this measure of recovery in our context stands for an entitlement that vindicates both

[144] Weinrib, *supra* note 4, at 4–5, 11. *Cf.* Vivian Grosswald Curran, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims*, 25 Fordham Int'l L.J. 107, 132 (2001).

[145] For a particularly stark view of law as pure rhetoric, see Thurman W. Arnold, The Symbols of Government (1935).

[146] *See* Dagan, *supra* note 3, at 73–78.

the laborer's claim to the utility of her labor and her autonomy-based claim to be the ultimate decisionmaker with respect to its use.[147]

Therefore, if we take seriously the view that enslavement is not merely about lost wages but rather also, indeed mainly, about the wrongful appropriation of people's inalienable right to control their labor, the proper remedy must be the stringent measure of the greater of *fair market value* and *profits*.[148] This conclusion fits my claim that – *pace* Weinrib's property thesis – restitution for wrongful enrichment is neither entailed by nor necessarily limited to property. Finally, this conclusion undermines Sebok's suggestion, which triggered this section, according to which the very commitment to appreciate fully the horrors of slavery entails the rejection of restitutionary claims by victims of slavery.

Understanding slavery unjust enrichment claims along these lines need not deny – how could it deny? – that restitution implicates the material aspects of human labor. But it shows that restitution is not *only* about money; that an award of ill-gotten gains to victims of slavery allows (even stabilizes) the coexistence of both commodified and noncommodified meanings of human labor.[149] Because – like many other forms of legal regulation, including the practice of compensation for torts[150] – these claims have both meanings, they break out from the potentially devastating choice of allowing gains that were earned by such horrible means to be left with the perpetrators of such horrors (or their accomplices) and commodifying these atrocities.[151] It is exactly because of its characteristic as an *incomplete* commodification of slave labor that restitution may be an appropriate basis for resolving these cases of grave wrongful enrichments.

No one can guarantee that the pecuniary side of restitution will not end up overwhelming its role as a vindication of violated rights. Judgments about these issues of social meaning, after all, are always contextual and

[147] *Id.* at 21. *But see* Friedmann, *supra* note 15, at 1893.

[148] Recall that one implication of using this measure of recovery is that there is no need to allocate responsiblity between the various contributors to the wrong of enslvement, as they would each be liable, in any event, for the amount they wrongfully gained. *See supra* section 7.E.

[149] *See also* Randall Robinson, The Debt: What America Owes to Blacks 224 (1999); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 390, 394–96 (1987).

[150] *See* Radin, *supra* note 121, at 184–91. *See also, e.g.*, Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 Harv. J. Legis. 1, 57 (2002).

[151] *Cf.* Radin, *supra* note 121, at 102–10.

changing.[152] This fragility of the possible coexistence of the noncommodified meanings of restitution alongside its commodified meaning in the context of such cases as the Holocaust and Slavery – two of the most heinous human rights violations – highlights the significance of a proper understanding of restitutionary claims for wrongful enrichments.

Limitations, good faith purchase for value, and distributive justice

Describing the choice of restitution as a legal strategy implies that restitution is used as a maneuver that might distort the otherwise appropriate allocation of entitlements: if successful, restitution might unduly allow plaintiffs to avoid the statute of limitations and further entail a rather arbitrary choice of defendants. The question of whether the choice of restitution as the cause of action indeed solves the limitation problem is complex,[153] but its resolution can safely be sidestepped: because the critique of restitution as a mere strategy assumes that restitution is not time-barred, my evaluation of this critique should make the same assumption.[154]

In his critique, Sebok correctly mentions that although the limitation barrier may be set aside by the use of restitution, this cause of action may be subject to another equitable defense: bona fide purchasers for value are shielded from restitution. This defense may explain the plaintiffs' choice of defendants, which in this view is opportunistic and morally arbitrary. The Slavery restitution suit "avoids naming individual property

[152] *See* Radin, *supra* note 121, at 204–05.

[153] A restitutionary claim for wrongful enrichment is usually treated as contractual for the purposes of limitations. *See* Palmer, *supra* note 137, § 2.3 p. 63. See also, in the context of the Holocaust restitution litigation, Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 473–75 (D.N.J. 1999). If the benefit has been fraudulently concealed, the limitations period does not start running until the plaintiff discovers or could discover the facts showing the existence of a claim. *See* Restatement (First) of Restitution § 148(2) & cmt. f (1937). Some states extend this rule also to cases where, while no purposeful concealment occurred, the plaintiff was nonetheless in ignorance, without any lack of diligence on his part, of the pertinent facts. *See, e.g.*, Schuck v. Bramble, 122 Md. 411, 414–15 (Md. App. 1914). Equitable tolling can further toll the statute of limitations where justice demands, which usually requires an element of (further) wrongdoing by the defendant. *See* Rashidi v. Am. President Lines, 96 F.3d 124, 128 (5th Cir. 1996). To the best of my knowledge, there is no case-law on the question whether a statute of limitations can be tolled by the emergence of new evidence previously unknown because of undeveloped technologies. For what is probably the most favorable case from the plaintiffs' point of view, see Bonder v. Banque Paribas, 114 F.Supp.2d 117, 134–35 (E.D.N.Y. 2000).

[154] It should be noted that limitation was one of the reasons for the dismissal of the African-American slave descendants' claim. *See* In re African-American Slave Descendants Litigation, 2004 WL 112646, at 32–42 (N.D. Ill. Jan. 26, 2004).

owners, despite the fact that there are countless people in the United States today who own land, buildings, and other assets that originally belonged to slave owners," because most of these owners of tainted property "acquired those assets without knowing about their illegal origin" and are thus protected by the bona fide purchaser defense. By contrast, the defendant corporations cannot raise the bona fide purchaser defense so easily "since an ongoing corporation that existed in 1850 is considered the same 'person' it was when it received its ill-gotten gains." Thus, the choice of defendants is entailed by the fact that "the law concerning the obligations of successor corporations makes it easier to sue a company that has been sold and merged twenty times than a tenth-generation Virginian."[155]

As with the concern from commodification, I do not find the claim that restitution is a mere strategy to be convincing. And yet, like the former critique, the faults of this criticism of the Slavery restitution claims are importantly informative. To appreciate this significance, consider the point about the avoidance of limitations periods as a maneuver that upsets the proper allocation of legal entitlements. Some may want to dismiss this point by referring to limitations as a technical matter, implying that while the statute of limitations may be a useful pragmatic device, prescription always undermines, or at least compromises, justice. According to this view, the avoidance of a limitations period is an enabling step for confronting the real equities of a case.[156]

This response, however, misses at least some of the point of the limitations defense. In discussing the related context of historic illegitimate takings of land from indigenous populations, Jeremy Waldron explains that prescription is a legal means for vindicating the normative significance of the passage of time. Entitlements are vulnerable to prescription because changes in background social and economic circumstances affect the strength of people's claims to the exclusive use or possession of any given resource. Thus, an initially legitimate acquisition may become illegitimate or have its legitimacy reduced at a later time due to change of circumstances. By the same token, an act that counts as an injustice in one set of circumstances may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the interim. This does not imply that aboriginals, for example, have no valid claim, but

[155] *See*, Sebok, *Prosaic, supra* note 131, at 51; Sebok, *Reparations, supra* note 131, at 655; Sebok, *Brooklyn, supra* note 131; Sebok, *Slavery, supra* note 131.

[156] *See, e.g.*, Forum, *Making the Case for Racial Reparations*, Harper's Magazine, November 2000, 37 at 39–40.

rather that their claim should not focus on the correction of the historic injustice done to their ancestors, because this injustice may have been superseded by changes in circumstances. Instead, their morally justified claim has a prospective focus, seeking poverty relief and a more equal distribution of resources.[157]

Waldron's argument, which I find convincing, should not be too easily duplicated in the context of human rights violations. After all, human rights are different from property rights exactly in the sense that they attach equally to all people, thus avoiding the need for an ongoing check of their allocation.[158] And yet Waldron importantly exposes the hidden distributive dimension of all claims for repairing historic injustices:[159] the inevitability of making value judgments balancing the moral importance of present claims with past injustices.[160] Statutes of limitations are rather crude means for such a complex intergenerational balancing, although in some contexts they may still be the best available tool for the task.[161] By contrast, the doctrine of good faith purchaser for value – which is too often presented as an arbitrary, technical tool for resolving difficult conflicts between remote parties[162] – may offer a more refined proxy for these inevitable distributive choices, a proxy which may suggest a plausible direction for a contemporary vindication of grave historic wrongs.

The good faith purchaser doctrine requires the defendant seeking to override the title of an original owner to demonstrate that she had given value – that is, new value which approximates the value of the right purchased – without notice of the original owner's conflicting claim.[163] As Menachem Mautner explains, these requirements embody important

[157] *See* Jeremy Waldron, *Superseding Historic Injustice*, 103 Ethics 4, 20–26 (1992); Jeremy Waldron, *Redressing Historic Injustice*, 52 U. Toronto L.J. 135, 151–57 (2002). *See also, e.g.*, Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. Phil. 439, 459 (1990).

[158] *See, e.g.*, Universal Declaration of Human Rights, art. 1, Dec. 10, 1948, U.N. Doc. A/810 at 71 (1948).

[159] *See also* Westley, *supra* note 130, at 467.

[160] *See also* Tyler Cowen, *Discounting and Restitution*, 26 Phil. & Pub. Aff. 168, 185 (1997).

[161] For an example of courts' sense that limitations periods are imperfect means for balancing the equities between theft victims and third parties, see O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980).

[162] *See* Restatement of Restitution § 13 cmt. a (1937); Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1233–34 (1995). When it is justified, the bona fide purchaser defense is usually said to be premised on the (external) concern of "the protection of the market." *See, e.g.*, Craig Rotherham, *General Defences and Interest, in* The Law of Restitution 512 (Steve Hedley & Margaret Halliwell eds., 2002).

[163] *See* Restatement of Restitution §§ 13, 172–76 (1937).

concerns of both efficiency and justice.[164] The first, good faith, requirement guarantees that the purchaser could not have prevented the occurrence of the conflict. In other words, denying priority from purchasers who act with actual knowledge or presumed suspicion is both an incentive that puts pressure on the party who is the cheapest cost avoider of the legal accident, and a proper retributive measure which is inflicted upon one who – by failing to prevent the conflict, while she could easily do so – fails to show respect for the autonomy of potential competing parties. The second requirement, that the purchaser parted with value in acquiring legal title in the asset, or detrimentally relied on her purchase, can be rationalized as a proxy for relative suffering or need, indicating that her losses, in case the original owner prevails, at least equal the original owner's likely losses if the disputed asset is allocated to the purchaser. Both efficiency and the need criterion of distributive justice mandate an allocation that minimizes the losses suffered by victims of such legal accidents.[165]

This account suggests that, rather than yielding an arbitrary selection of defendants, the restitutionary framework channels plaintiffs to defendants that should indeed be vulnerable to their claims. The plaintiffs' lawyers may have been motivated by the finer points of the law of restitution, and not by deliberate moral distinctions between potential defendants. But these finer points are not sheer legal technicalities. Instead, they embody a fine-tuned balancing of the equities in cases of conflicts between remote parties. Thus, this seemingly technical framework may be appropriate for the hard cases this section explores, where, on the one hand, the wrong triggering the enrichment violated core human rights, but on the other hand, some of its ill-gotten gains are held by people who acquired the property at issue in good faith and for full value and who are by no means responsible for slavery or its legacies.[166] Targeting only recipients of tainted gains who are not good faith purchasers for value is not an opportunistic manipulation of legal technicalities, but rather an implication of restitution law's plausible resolution of a difficult, but inevitable, distributive decision.

[164] *See* Menachem Mautner, "*The Eternal Triangles of the Law*": *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95 (1991). While I have a few qualms with Mautner's account – see Dagan, *supra*, note 120, at 1546–48 – none of my critique affects the discussion of this section.

[165] Mautner also explains that casting this restitutionary defense as a precise rule, rather than a vague standard, helps minimize litigation and uncertainty costs, which might have overwhelmed a system in which both the least cost avoider and the least vulnerable party are determined on a case-by-case basis.

[166] *See, e.g.*, Wendy Kaminer, *Up From Reparations*, AMERICAN PROSPECT, May 22, 2000, at 38.

I do not suggest that all individual owners of tainted property should be automatically immune from restitution. There may be cases in which the owners have not spent value in purchasing the property, as, for example, where they (and their ancestors) inherited it. But even in these cases, owners may be able to show that they made significant expenditures *in reliance* on their ownership such that it would be inequitable to compel restitution. Spending in good faith reliance on one's ownership is thus a sensible stand-in for value[167] if value stands as a proxy for balancing the parties' hardships.[168] By the same token, I do not deny that there may be hard cases with respect to corporate defendants. A corporation which captured wrongful gains from slavery is kept present and accountable by virtue of having a legal personality with unlimited life, and yet it might have turned over its stockholding completely. It may seem unfair to impose on the new stockholders the cost of the corporation's past misdeeds based solely on its fictitious institutional continuity. But the fact that the characteristics of a corporation are legal artifacts does not render them unreal, nor does it imply that they should be ignored.[169] Like any other legal artifact – such as property, contract, or marriage – a corporate entity serves certain human values. If, in the name of these values, corporate actors (and thus, indirectly, their stockholders) should enjoy the advantages of an entity status and unlimited life, it is unclear why they should not also be accountable for their historic conduct. In any event it seems unjustified that whatever this "package deal" of institutional continuity prescribes in other contexts of past corporate liability should not apply in our context.

[167] *See* RESTATEMENT (SECOND) OF TRUSTS § 292 cmt. j (1959) ("If . . . [the donee before he has notice of the trust] makes extraordinary expenditures with the money, this may be such a change of position that it would be inequitable to hold him liable for the money."); RESTATEMENT OF RESTITUTION § 173(1) (1937) ("The rules as to what constitutes value in the Restatement are the same as the rules stated in . . . the Restatement of Trusts."). *See also* DANIEL FRIEDMANN, THE LAW OF UNJUST ENRICHMENT 1148 (2d ed. 1998) (Heb.).

[168] Allowing such an expansion of the defense of bona fide purchaser helps resolve a debate regarding the potential availability of the change-of-position defense in contexts of wrongful enrichment. The conventional wisdom is that this defense is unavailable for wrongdoers. *See, e.g.*, RESTATEMENT OF RESTITUTION §§ 69(3)(a), 142(3)(a) (1937). Some have argued that the change-of-position defense should be available where restitution is being sought against *innocent* wrongdoers, such as indirect recipients who are still deemed converters. *See, e.g.*, Andrew Burrows, *Quadrating Restitution and Unjust Enrichment: A Matter of Principle*, 8 RESTITUTION L. REV. 257, 264 (2000). Once reliance can substitute for value in the context of the bona fide purchaser defense, the objectors' reservation with regard to the conventional view is fully addressed.

[169] *Cf.* Dagan, *supra* note 120, at 1534.

Thus, I conclude that the demand of making restitution of benefits gained from enslaving other people is not foreign to American law. On the contrary, it reflects what may be a core normative lesson of the law of wrongful enrichments, epitomizing cases in which this doctrine is used to vindicate people's most fundamental rights to freedom and dignity. I further conclude that the distinction between direct wrongdoers and remote parties who are good faith purchasers of an ill-gotten property reflects a sensible legal solution for the daunting difficulties of properly addressing grave historic injustices. While there may be good reasons for assigning legislators, rather than judges, with the task of prescribing the specific modality of the remedy for these types of social wrongs, this modality can – indeed, should – be informed by these fundamental principles to which American law is (rightly) committed.

Weinrib is correct to insist that cases of wrongful enrichment – like other restitutionary cases, and for that matter private law as a whole – should not be analyzed as just another mode of regulation, indistinguishable from a host of other public law regimes. Private law is a distinctive forum in which a judge allocates resources between two private citizens. Hence – as the correlativity thesis insists – the judge needs to be able to justify every aspect of her ruling in terms of the plaintiff's entitlement.

However, corrective justice theorists, such as Weinrib, tend to ignore the subtleties of the law's possibilities in assigning entitlements. Allocating entitlements with respect to resources requires normative choices that must be – if we understand law as a justificatory practice – normatively defended. These choices involve social, economic, and cultural consequences and thus must be justified, in these very terms, not only to the directly affected parties, but also to the public as a whole. Suppressing these choices undermines the legitimacy of private law, rather than preserving its unique character.

The inevitable choices that wrongful enrichments doctrine must make render the corrective justice account of this (or any other) body of law – as a realm in and of itself, with an internal logic that is isolated from social values – impossible. However, because the normative choices discussed in this chapter shape the parties' background entitlements, they do not deprive restitutionary cases of their nature as encounters between a particular plaintiff and a particular defendant.

8

Restitution in a contractual context

The theme of this chapter is that restitution claims that arise in a contractual context should respect the contractual allocation of risks and benefits. Whether we think of such claims as based on the contract, or insist that they have an independent doctrinal source grounded in unjust enrichment, their analysis should not ignore the contractual setting in which these claims are situated.[1] This prescription requires close attention to the facts of the case at hand that may point to certain explicit or implicit consensual allocations of risks and benefits. It also entails an inquiry into the best allocation of risks and benefits between contractual parties that law should prescribe absent a specific consensual opt out.[2] Either way, an enrichment-based claim that is not attentive enough to the implications of the contractual background is likely at best to obscure the pertinent questions, and at worst to lead the doctrine astray.

The proposition that awards of restitution should be attentive to any contractual background is widely accepted in American law.[3] There is less agreement as to the implications of this proposition, partly because of disagreements as to which values should guide law in prescribing contractual default rules. Most of the attention (and the disagreements) of

[1] *See* Jack Beatson, *Restitution and Contract: Non-Comul?*, 1 Theoretical Inq. L. 83 (2000); Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1209 & n.54 (1995); Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 J. Contract L. 93, 110 (1997); Lionel Smith, *Property, Subsidiarity and Unjust Enrichment, in* Unjustified Enrichment: Key Issues in Comparative Perspective 588, 615, 619 (David Johnston & Reinhard Zimmermann eds., 2002).

[2] Recall that section 5.D anticipated these two variants in discussing, respectively, the *McNeilab* and the *Robinowitz* cases. *See supra* pp. 150–52.

[3] *See, e.g.*, US v. Applied Pharmacy Consultants, 182 F.3d 603 (8th Cir. 1999); BTA Oil Producers v. MDU Resources Group, 642 N.W.2d 873, 882 (N.D. 2002); Moeller v. Theis Realty, 683 S.W.2d 239, 240 (Ark. App. 1985).

courts and commentators focuses around three categories of restitution cases that involve a contractual context.[4]

The first, probably most difficult case, involves the traditional common law rule that does not require a promisor who has made a profit through her breach of the contract to render such gain to the breached promisee. Recently, courts and commentators have raised doubts regarding the desirability of this rule, and some have even advocated making restitutionary recovery, aimed at a disgorgement of the promisor's "wrongful" profits, a supplement to the traditional contract remedies for breach.[5] The significance of this challenge, which constitutes the bulk of this chapter, goes beyond its immediate subject, because as it turns out, its analysis necessitates a discussion of the two competing visions of contract: as either an instrumental device for the promotion of the parties' self-interest or a locus of interpersonal cooperation.

Sections B and C rely on the presentation and elaboration of these two competing accounts in addressing the two other prominent questions of the interaction of restitution and contract: first, whether a promisee can sue in restitution for the value of what she gave under a contract, which was breached by the promisor, even in cases where the contract was already known to be a loser; second, whether an unpaid subcontractor can "leapfrog" her contract with the general contractor and seek restitution from the owner who benefitted from her performance.[6]

A Restitutionary recovery for breach of contract

The debated case

A contracts to purchase from *B* identifiable goods for a sum of $100,000, which is the fair market value of the goods at all relevant times. *B*'s cost of production is $90,000; hence, her expected profit is $10,000; *A*'s expected

[4] For the rules governing other restitutionary claims in contractual and semi-contractual settings, see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 31–37 (Preliminary Draft No. 5, August 2003).

[5] As the text implies, I bracket the terminological controversy and use the terms "restitutionary recovery" and "disgorgement of profits" interchangeably.

[6] Recently, some innovative – and highly dubitable – lower court cases suggest the possibility of a fourth front: restitution claims for a disgorgement of profits gained by the defendant due to the plaintiff's performance. For a powerful critique, see Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2029–44 (2001).

profit from the transaction is $5,000. *B* breaches the contract and does not supply the goods to *A* but, rather, to *C*, who desperately needs the promissory resource and therefore is willing to pay $125,000. Although this resource is not a unique good, *A* is not able to obtain equivalent goods at the market. *A* files a claim for monetary recovery, insisting that the recovery should not be limited to $5,000, which is merely his "expectation interest." Instead, *A* demands the extra profit *B* procured due to the breach ($25,000), insisting that but for the breach, *B* could not have sold the goods in question to *C* and could not have gained the extra profit.[7]

The traditional common law approach does not generally allow recovery of the promisor's profits from breach of contract.[8] Unless that breach also involves a breach of fiduciary duty, a promisee is entitled to her promisor's profits only in exceptional cases: where either the profits can be said to approximate the promisee's lost profits,[9] or where the contract at issue is for the sale of "unique goods," most notably land.[10]

Still within the traditional paradigm, Allan Farnsworth suggested allowing restitutionary recovery in cases of "abuse of contract," namely: if as a result of the breach, the promisee is left with a skimped performance and no opportunity to obtain a substitute. A typical example is

[7] One may worry whether general conclusions can be drawn from this specific example of goods which are generic but are not readily obtained on the market. *See* James Gordley, *A Perennial Misstep: From Cajetan to Fuller and Perdue to "Efficient Breach,"* Issues in Legal Scholarship, Symposium: Fuller and Perdue (2001): Article 4, at 21, available at http://www.bepress.com/ils/iss1/art4. However specific this example is, and whatever its difficulties in other contexts may be, it is the only one in which the question of restitutionary recovery arises: where unique goods are involved, the availability of restitutionary recovery is not controversial (see *infra* note 10); where, by contrast, the goods are readily available at the market, restitutionary recovery does not exceed the promisee's expectation interest.

[8] *See* Restatement (Second) of Contracts § 370 & cmt. a & illus. 4 (1981) (in order for a party to be entitled to restitution of a benefit, that benefit must have been conferred by it on the other party; the fact that the benefit "simply derived from the breach is not enough"). *See also, e.g.*, Coca-Cola Bottling v. Coca-Cola, 988 F.2d 386, 409 (3d Cir. 1993); Kerin v. US Postal Service, 116 F.3d 988, 993–94 (2d Cir. 1997); E. Allan Farnsworth, Changing Your Mind: The Law of Regretted Decisions 118 (1998); 1 George E. Palmer, The Law of Restitution § 4.9 (1978 & Supp.).

[9] *See, e.g.*, YJD Rest. Supply v. Dib, 413 N.Y.S.2d 835 (1979); Samuel J. Stoljar, *Restitutionary Relief for Breach of Contract*, 2 J. Cont. L. 1 (1989).

[10] *See, e.g.*, Timko v. Useful Homes Corp., 168 A. 824 (N.J. Eq. 1933); Palmer, *supra* note 8, § 4.9(a); Stephen W. Waddams, *Profits Derived from Breach of Contract: Damages or Restitution*, 11 J. Cont. L. 115, 121 (1997); Law Commission, *Aggravated, Exemplary and Restitutionary Damages* 159 (LCCP No. 132, 1993). In these cases, recovery includes also specific performance. *See, e.g.*, Gareth Jones & William Goodhart, Specific Performance 91–94, 112–16 (1986); Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 355–65, 369–76 (1978).

a case of a contractor who secretly substitutes cheaper materials for the more expensive ones contracted for. Because in such cases courts usually limit the promisee's recovery to the diminution in value of the structure, which may be far less than the cost of reconstruction, the breach leaves the promisee with no opportunity to purchase the performance she desired.[11] Similar cases, which also fit into Farnsworth's category of abuse of contract, may come up in the context of service contracts. One such case, which attracted the attention of restitution scholars, involved a firefighting service contract between a firemen's association and a city. After the contract expired, the city discovered that the association had not provided the stipulated number of firemen and horses and the promised length of hosepipe. It turned out that although the association had saved itself substantial expense by the breach, it had not failed to put out any fires in consequence.[12]

Against this relatively limited suggestion for expanding the availability of restitutionary recovery, consider the recent introduction of a possible dramatic expansion by making restitution a general remedy for breach of contract that can supplement, as a matter of course, traditional contract remedies. Such a rule has been adopted by the Israeli Supreme Court in *Adras Building Material v. Harlow & Jones GmbH*, which is considered a landmark restitution case.[13] In American law this rule has been

[11] *See* E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1382–92 (1985). *Cf.* Ernest J. Weinrib, *The Juridical Classification of Obligations, in* THE CLASSIFICATION OF OBLIGATIONS 37, 51 (Peter Birks ed., 1997).

[12] *See* New Orleans v. Firemen's Charitable Ass'n, 9 So. 486 (La. 1891).

[13] C.A. 20/82, Adras Building Material v. Harlow & Jones GmbH, 42(1) P.D. 221, 3 RESTITUTION L. REV. 235 (1995). *See also* Daniel Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 L.Q. REV. 383 (1989). For the leading English cases on the subject, see Surrey County Council v. Bredero Homes, [1993] 3 All E.R. 705 (restating the traditional approach); Attorney General v. Blake [2001] 1 A.C. 268, 284–85 (H.L.) (holding that restitutionary recovery for breach of contract should be available "only in exceptional circumstances," where "the plaintiff had a legitimate interest in preventing the defendant's profit-making activity"; the effect of this case is unclear given that the breached obligation "was akin to a fiduciary obligation" which triggers, as we have seen, a profits-based recovery as a matter of course: David Johnston & Reinhard Zimmermann, *Unjustified Enrichment: Surveying the Landscape, in* UNJUSTIFIED ENRICHMENT, *supra* note 1, at 3, 11; thus, the narrow interpretations of *Blake* – in Experience Hendrix LLC v. PPX Enterprises Inc. [2003] 1 All E.R. 830 (Comm) and in AB Corp. v. CD Co. (the "Sine Nomine") [2002] 1 Lloyd's L. Rep 805, 807 (Arb. Trib.) – should not be surprising). Australia adheres to the traditional approach: Hospital Products v. US Surgical, (1984) 156 C.L.R. 41, 67–76, 118–19, 136–150; Hospitality Group v. Aust. Rugby, 110 F.C.R. 157, 196 [2001]. The Canadian Supreme Court has recently opened the door, in an obiter, to

introduced in a long obiter in *EarthInfo v. Hydrosphere*, where the Colorado Supreme Court presented restitutionary recovery for breach of contract as an entailment of the "principle of the law of restitution that one should not gain by one's own wrong."[14] The Court left the question of the specific circumstances in which restitutionary recovery for breach of contract should be available to the discretion of trial courts, instructing them to take into account "the nature of the defendant's wrong, the relative extent of his or her contribution, and the possibility of separating this from the contribution traceable to the plaintiff's interest." In any event, the Court held that a conscious and substantial breach justifies such a remedy. Finally, Andrew Kull, the reporter for the new Restatement of Restitution, has also recently followed the expansive approach to restitutionary recovery for breach of contract.[15] In Kull's view, where a promisor "withholds a performance for which he has a fixed and negotiated price, calculating that he can improve the existing bargain by responding in damages instead of rendering the promised performance," restitutionary recovery appropriately condemns such a calculation and seeks to frustrate it by foreclosing any possibility of the calculated breach being profitable.

(Kull refers to such cases as "instances of profitable and opportunistic breach," thus seemingly echoing Richard Posner's endorsement of restitution in cases of opportunistic breach. But Posner's proposed rule is much more limited. He denounces restitution in cases of efficient breach, and embraces it only where the promisor took advantage of the promisee's vulnerability in a case of sequential performance.[16] This strict economic meaning of opportunism implies that restitution is appropriate only if performance requires one side to invest in assets specifically tailored to the transaction, rendering that party vulnerable to exploitation after she

the possibility of gain-based recovery for breach of contract. *See* Bank of America Canada v. Mutual Trust Co., 211 D.L.R. (4th) 385, 394–95, 402–03 [2002].

[14] EarthInfo v. Hydrosphere Resource, 900 P.2d 113, 117–21 (Colo. 1995). The ruling in *EarthInfo* is an obiter because this case did not involve a disgorgement of profits gained by the defendant through breach, but rather of profits the defendant secured due to the plaintiff's performance. *See* Kull, *supra* note 6, at 2023–25.

[15] *See* Kull, *supra* note 6, at 2021 n.1, 2044–52. For a similar view, advocating the availability of disgorgement of benefits gained through "cynical" breaches of contract, see James Edelman, Gain-Based Damages: Contract, Tort, Equity and Intellectual Property 154–55, 158, 189 (2002); Peter Birks, *Restitutionary Damages for Breach of Contract:* Snepp *and the Fusion of Law and Equity*, L. Mar. & Comm. L.Q. 421 (1987).

[16] *See* Richard A. Posner, Economic Analysis of Law 118–20 (6th ed. 2003).

has taken such costly steps or has forgone unique alternatives. Because, without an *ex ante* assurance, transactions that require sequential performance may be too risky, parties are said to endorse restitution that can effectively deter the other party's opportunism.[17])

This section compares the normative desirability of the traditional approach with that of its revolutionary counterpart.[18] It focuses exclusively on the commercial context in which this matter is most frequently considered. I start by dismissing two claims that are said to support restitutionary recovery for breach of contract: the prevention of the promisor's unjust enrichment and the protection of the promisee's property rights. I then turn to a more detailed discussion of the most important considerations that were offered in this debate: the value of promise-keeping, the promotion of efficiency, and the obligation of performing contractual obligations in good faith. I show that promise-keeping does not inform the current debate, that efficiency supports the traditional approach (although *not* for the reasons that are commonly given for this proposition), and that good faith considerations support a third possible rule, namely, one which divides the profits between the parties. Two conclusions follow: first, that the revolutionary approach that would make restitutionary recovery a broadly available remedy for breach of contract does not survive normative scrutiny; second, that the choice between the traditional rule and its alternative, profits-splitting, rule requires a normative choice between, respectively, an instrumental conception of contract and a more cooperative vision of the relationship between (commercial) contractual parties.

[17] *Cf.* G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 228–31 (1991). This claim is, in fact, debated. Some argue that using law to redress even this strict sense of opportunism could do more harm than good: that in most cases reputational concerns are sufficient to police opportunistic behavior, and that restitution might backfire by inducing groundless lawsuits. *See id.* at 231–32.

[18] Andrew Kull suggested to me that the most salient feature of the profitable breach issue in the case-law is the fact that it is (or at least was) a non-issue, thus challenging my characterization of the rival approaches as "traditional" vs. "revolutionary." I find little reason to object here because if Kull is right, the normative analysis of this section is even more urgent than it is according to my own reading of the state of the law. Kull seems to read existing law on the issue as ambivalent and unfocused and to argue that his proposed rule can shed a new light on the existing cases. If, but only if, a rule that allows restitution is normatively better, he would indeed be correct. The discussion that follows suggests, however, that no plausible normative case for a full-disgorgement remedy for breach of contract can be made and that, for this reason, Kull must be wrong.

Unjust enrichment; property

Courts and commentators frequently associate the rule favoring widely available restitutionary recovery for breach of contract with the prevention of the promisor's unjust enrichment.[19] But as we have seen once and again, the reference to unjust enrichment is a conclusion that must be grounded in normative considerations, rather than a value capable of justifying restitution. It is particularly easy to see why unjust enrichment is question-begging in a contractual setting: the claim that restitutionary recovery would eliminate the promisor's unjust enrichment simply assumes that the promisee is entitled to the reallocation profits.

If assigning the reallocation profits to the promisee is indeed justified, then surely their appropriation by the promisor does amount to an unjust enrichment. But this is a trivial conclusion, because had it been more justified to assign the profits to the promisor, we would have said that the enrichment had not been unjust. Furthermore, an enrichment is not necessarily unjust simply by virtue of being the consequence of an unjust act.[20] Thus, even if a promisor's non-performance is wrongful, as the *EarthInfo* court suggests, her resulting enrichment is not necessarily unjust: if there are good reasons for concluding that the promisor, and not the promisee, is entitled to the reallocation profits, then even if breach of contract is a wrong, the promisor's retention of the profits is not unjust enrichment. Once again we see that unjust enrichment cannot serve as an argument in favor of either position; the attempt to found restitutionary recovery on unjust enrichment is hopelessly circular.

Another popular argument amongst restitution scholars in favor of a broad restitutionary rule for breach of contract relies on an analogy between contractual rights and property rights (especially in land). The breaching promisor takes for herself the contractual right that is included amongst the promisee's assets, and by doing so gains a benefit which belonged to the promisee. This reasoning suggests treating breach of contract as a species of wrongful enrichment, and insists that as such

[19] *See, e.g.*, *Adras* (trans.), *supra* note 13, at 263, 267–68, 274; *EarthInfo*, *supra* note 14, 900 P.2d at 115, 118; Harvey McGregor, *Restitutionary Damages, in* Wrongs and Remedies in the Twenty-First Century 203, 214–15 (Peter Birks ed. 1996); Stephen A. Smith, *Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement*, 115 L.Q. Rev. 245 (1999).

[20] *Contra* Peter Jaffey, *Efficiency, Disgorgement, and Reliance in Contract: A Comment on Campbell and Harris*, 22 Legal Stud. 570, 574 (2002).

it requires a deterring *profits*-based measure of recovery.[21] But analyzed in this framework (as understood in chapter 7) – that is: looking at the degree to which a typical holder is attached to the appropriated resource, which is the result of the extent of his self-investment in that resource – the traditional rules, rather than their revolutionary alternative, seem clearly preferable.

Commercial goods, with respect to which no restitutionary recovery is available, are held for instrumental purposes, and are, thus, fungible resources that are not constitutive of their holder's identity.[22] Unique goods – such as land – are very different: traditionally, land has been one of the most prominent objects of property rights in Western culture, accorded a unique status as a symbol of the self and as a resource closely linked to personal freedom, rank, and power.[23] Furthermore, while there is no doubt that contracts are significant forms of wealth in modern industrialized societies, they are also the consummate example of a characterless good. At most, one can speak of the promisee's expectation to develop a personal connection to the promissory resource; but such an expectation – and even the justified reliance it may entail – cannot be equated with an existing constitutive connection to a resource.[24] These two distinctions – between commercial goods and unique goods, and between contractual rights and property rights – lend some support to the traditional rules that reject claims for the defendant's actual profits as a result of the breach

[21] *See, e.g., Adras* (trans.), *supra* note 13, at 240, 269–70; Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504, 513–27 (1980); Kull, *supra* note 6, at 2044–45; Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach,"* 24 Canadian Business L.J. 121, 129–32 (1994–95).

[22] *See, e.g.*, Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 Mich. L. Rev. 95, 123–24 (1991).

[23] Herbert McClosky & John Zaller, The American Ethos: Public Attitudes toward Capitalism and Democracy 138 (1984); Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. Ill. L. Rev. 319, 320; Russell W. Belk, *Possessions and the Extended Self*, 15 J. Consumer Res. 139, 153 (1988); Clare Cooper, *The House as Symbol of the Self, in* Environmental Psychology: People and Their Physical Settings 435, 437–38 (Harold M. Proshansky et al. eds., 2d ed. 1976); Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & Soc'y 580 (2002); E. Doyle McCarthy, *Toward a Sociology of the Physical World: George Herbert Mead on Physical Objects*, 5 Studies in Symbolic Interaction 105, 116–17 (1984); Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 992, 1013 (1982).

[24] *See* Margaret Jane Radin, *Residential Rent Control*, 15 Phil. & Pub. Aff. 350, 360–62 (1986); Craig Rotherham, *The Recovery of Profits of Wrongdoing and Priority in Insolvency: When Is Proprietary Relief Justified?*, 1 Company Financial and Insolvency L. Rev. 43, 45 (1997).

of a regular contract, while allowing restitutionary recovery where unique goods (notably land) are at stake. To be sure, one may justifiably insist on a distinction between "personal land" – e.g., the family home or farm – and "fungible land" used solely for commercial purposes, and claim that the way in which the law treats the latter should not be influenced by the social meaning of the former.[25] Nonetheless, personal land lies at the core of the social meaning of land, at least in Western culture.

Promise-keeping

It is often maintained (or implied) that assigning the reallocation profits to the promisee is aimed at deterring profitable breaches of contract, thus vindicating the moral prescription of promise-keeping.[26] I acknowledge the normative importance of promise-keeping. However, the value of promise-keeping cannot mediate the controversy over the entitlement to reallocation profits, at least with respect to informed and sophisticated commercial parties.

To see why, consider Charles Fried's theory of *Contract as Promise*.[27] The commitment to keeping promises, explains Fried, is rooted in the trust that a promise invokes regarding the future actions of the promisor, a trust which, in its turn, is justified by reference to the convention of promising. This convention increases our autonomy because it expands our options in the long-run by enabling us to achieve objectives that we can only succeed in accomplishing with the cooperation of others. For Fried, the utility of promising in general does not suffice to establish an individual's obligation of promise-keeping. Instead, this obligation springs from the fact that the promisor intentionally invokes a convention whose function is "to give grounds – moral grounds – for another to expect the promised performance." To renege on a promise is, therefore, to abuse the trust and thus the vulnerability of the promisee, both of which the promisor

[25] First clues to such a distinction can be found in Hawkes Estate v. Silver Campsites [1994] 7 W.W.R. 709, 721 [B.C.]; *see also* Centex Homes Corp. v. Boag, 820 A.2d 194 (Sup. Ct. N.J. 1974).

[26] *See, e.g.*, *Adras* (trans.), *supra* note 13, at 241, 276, 279; Peter Birks, *Profits of Breach of Contract*, 109 L.Q. Rev. 518, 519 (1993); Friedmann, *supra* note 21, at 515; Gareth Jones, *The Recovery of Benefits Gained from a Breach of Contract*, 99 L.Q. Rev. 443, 454 (1983); Kull, *supra* note 6, at 2050; Andrew Phang & Pey-Woan Lee, *Rationalising Restitutionary Damages in Contract Law – An Elusive or Illusory Quest?*, 17 J. Contract L. 240, 266–69 (2001).

[27] Charles Fried, Contract as Promise: A Theory of Contractual Obligation 7–17 (1981).

freely invited; it amounts to wrongful exploitation of another individual. In short, contracts – like promises more generally – must be kept because promising is "a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise."

While Fried's account of the moral value of promise-keeping is an attractive one, it cannot generate concrete normative guidelines regarding issues such as the content and scope of contractual obligations and the proper remedies for breach. As Richard Craswell explains, promise-keeping dictates that the promisor fulfill the obligations prescribed by the combination of the express language she used and the legal background rules that "fill out the details of what it is [she] has to remain faithful to, or what [her] prior commitment is deemed to be." Hence, the value of promise-keeping "cannot guide the legal system in deciding which background rules to adopt in the first place." Unless the scope of the promisor's obligation or the consequences of non-performance are explicitly defined by the promise itself, the law must resolve these issues. With the exception of a background rule that would render performance totally optional, the value of promise-keeping is neutral in relation to any possible set of background rules. Promise-keeping requires that the promised course of conduct is made "non-optional to some degree"; it does not dictate any particular degree of non-optionality. Correspondingly, while promise-keeping requires that some sort of sanction be imposed in cases of non-performance, it does not entail any preference of one remedy over another.[28]

Three objections may be raised in an attempt to show that – Craswell's claims notwithstanding – the value of promise-keeping does entail a preference to a broad restitutionary rule. Alas, at least in the commercial context, none of these counterclaims is persuasive.

Consider first the claim that as long as the parties did not include any explicit exemption in their contract, the value of promise-keeping

[28] Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490, 504, 515–16, 518 (1989). *See also* PATRICK S. ATIYAH, PROMISES, MORALS, AND LAW 127–29 (1981); ROSS B. GRANTHAM & CHARLES E. F. RICKETT, ENRICHMENT AND RESTITUTION IN NEW ZEALAND 482 (2000); David Charney, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1831, 1818 (1991). Other theories of promising are also subject to the same criticism. *See* Craswell, *id.* at 495–503. As an aside, even if the contractual obligation is conceptualized as necessarily unconditional and unqualified, the promisee's entitlement to the promisor's profits from breach need not follow. *See* Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 70–85 (2003).

requires that the promisor perform the obligations to which she explicitly committed herself, and therefore supports any remedy, including restitution, that removes the temptation to breach and increases the likelihood of performance.[29] While seemingly appealing, this claim quickly falls into the familiar "literalist trap." It infers from the explicit words of the contractual parties that performance – unless otherwise indicated – is unqualified and unconditional. It thus implies that the content of a contract can be easily identified merely by referring to the plain language of the parties' promises. But utterances (in our context, promises) cannot be interpreted without regard for the external circumstances surrounding them. Language, in and of itself, does not require that we continue the phrase "I will supply X at date Y" with "upon any event," rather than with "unless contingencies A, B, or C occur, in which case I will compensate you (for example) for your expectation interest." Therefore, the content of the contractual promise cannot be determined purely by a literal interpretation of the contract.[30]

It is possible that in commercial settings, parties typically prefer a close textual interpretation of their carefully drafted contracts. Alan Schwartz and Robert Scott, for example, present such a case for a textualist interpretive approach to commercial contracts. They argue that commercial parties "commonly prefer adjudicators to be accurate on average in ascertaining the meaning of their agreement." For this reason they conclude that commercial parties would "want courts to make interpretations on the smallest evidentiary bases that will support on average accurate interpretations."[31] But if this is the case, then it is our knowledge of the characteristics of the commercial context, rather than the intrinsic linguistic meaning of these contracts, that entails the textualist approach. This reason for preferring a textualist interpretation approach matters for our purposes, because – as I will show in the next subsection – commercial parties are unlikely to prefer restitutionary recovery for breach of contract.

[29] *See Adras* (trans.), *supra* note 13, at 271, 276; Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L.Q. Rev. 628, 632 (1995).

[30] *See* Atiyah, *supra* note 28, at 89; Felix S. Cohen, *Field Theory and Judicial Logic, in* The Legal Conscience 121, 122–28 (Lucy Kramer Cohen ed., 1960); Ronald Dworkin, Law's Empire 350–54 (1986); Stanley Fish, *Fish v. Fiss, in* Doing What Comes Naturally 120–25 (1989); Owen M. Fiss, *Conventionalism*, 58 S. Cal. L. Rev. 177, 186 (1985). Even proponents of textual interpretation do not claim for acontextual interpretation (although they are, at times, mistakenly taken to be so claiming). *See* Andrei Marmor, Interpretation and Legal Theory 130–31 (1992); William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621, 655 (1990).

[31] Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale. L.J. 541, 618 (2003).

But maybe contractual obligations are deemed unqualified and require enforcement by means of restitutionary recovery not due to the literal meaning of the words used, but rather due to the conventional expectations or understandings within the relevant community of discourse.[32] According to this view – my second possible counterclaim – because most contractual parties assume that the promisor's performance is unconditional and unqualified, subject only to events of frustration, a failure to perform absent an explicit contractual exemption amounts to a breach of promise, which justifies severe legal responses such as the imposition of restitutionary recovery.[33]

Even if this assumption regarding the conventional expectations of contractual parties is accurate, however, it still is doubtful whether it can call into question the content-neutrality of promise-keeping insofar as sophisticated and legally well-informed parties are concerned. The background understandings of such parties involve both conventional expectations and legal rules dealing with contract enforcement and recovery of damages. Because, within this commercial community, the expectations generated by what is promised are, to an extent, the result of law's prescriptions, any reference to conventional expectations is circular, and is likely to reinforce the weight of the existing legal prescriptions artificially.[34] I do not deny that taking into account the parties' existing expectations can justify a conservative bias respecting the defaults that should apply to existing contracts. But even this narrow and restricted implication of the existing expectations story does not support – in fact, it rather objects to – a revolutionary change in the traditional rules.[35]

Consider finally the claim that, even if a broad restitutionary recovery rule cannot be supported from the point of view of the contracting parties and their promises, it is still laudable as a public manifestation of the importance of promise-keeping and thus as providing moral guidance to the general public. This counterclaim assumes that the public focuses on the "primary" obligation of a contract when deciding whether the contract has been performed or breached. It further assumes that because the

[32] *Cf.* Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 874–97 (1992).

[33] *See* Friedmann, *supra* note 29, at 629, 637–38.

[34] *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829, 835 (1983); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195, 212–14 (1987); Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory, in* Jurisprudential Foundations of Corporate and Commercial Law 12, 21 (Jody Kraus & Steven D. Walt eds., 1999); Jeffrey Standen, *The Fallacy of Full Compensation*, 73 Wash. U. L.Q. 145, 165 (1995).

[35] *See* Standen, *supra* note 34, at 164–65.

public does not appreciate the possibility of the existence of any conditions or qualifications, whether explicit or implied in fact or in law, it perceives any non-performance of a primary obligation as disrespect for promise-keeping and a devaluation of its importance.

Both the contractual parties and the general public indeed understand non-performance of a primary obligation as a breach of contract where the contract is for the supply of a unique good.[36] Recall, however, that in these cases traditional doctrine also treats the primary obligation as unqualified, and accordingly allows the promisee restitution of the promisor's profits. The debate over restitutionary recovery for breach deals exclusively with other types of contracts, particularly with commercial contracts. It is doubtful that the binaric conception of contract as an unqualified and unconditional obligation reflects the popular understanding of the nature of such commercial transactions.[37]

But even if it is an accurate depiction of the public understanding of contract, it does not merit the normative weight that the third counter-claim ascribes to it. If the law were to respond to such (mis)understandings of contract and impose excessive costs on parties who wish to craft a more complex and nuanced framework of cooperation, it would harm contractual parties. Furthermore, even if we concentrate solely on the interests of those who understand the contract only in dichotomous terms, this misunderstanding should not be accorded substantial weight. It would be more appropriate for the law to repudiate such an inadequate conception of contract, thus encouraging people to develop a better appreciation of the potential of contracts in allocating risks and opportunities, and thereby increase their personal autonomy. Thus, even insofar as the moral education of the public is concerned, the unqualified and unconditional conception of contract undermines the potential of contract in expanding our options, thus undermining, rather than vindicating, the very value of promise-keeping.

Efficiency

Efficiency is a particularly attractive criterion for assigning contractual rights and duties given an instrumental conception of contract

[36] *See* Jeff Sovern, *Toward a Theory of Warranties in the Sales of Homes: Housing the Implied Warranties Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 Wis. L. Rev. 13, 36–37.

[37] *See* Atiyah, *supra* note 28, at 108, 137–38, 142.

that understands the contractual relationship in the classical, adversarial model of self-interested exchange. Efficient rules maximize the parties' contractual surplus, whereas inefficient ones only increase transaction costs and thus impede the parties' efforts at cooperation. Inefficient default rules are obviously undesirable from the promisor's point of view. Moreover, as Schwartz and Scott explain, they are also (*ex ante*) undesirable from the promisee's perspective, at least insofar as commercial parties are concerned. The reason for this is that the cost that the promisor is expected to incur – and, hence, the additional price she will charge the promisee – due to an inefficient sanction for non-performance (for example) is, by definition, greater than the expected benefit the promisee is likely to derive from such a remedy. Because the share of each commercial party of the contractual surplus is set exogenously – it is a function of its ability to finance its projects and of its opportunity costs – a promisee will also be better off without having to pay the additional price the promisor will charge for such an inefficent default.[38]

Economic analysis of contract law recommends that contractual duties and liabilities be ascribed to the party who can bear them most cheaply and that contractual rights and opportunities should be assigned to the party likely to utilize them most efficiently. Hence, the conventional economic justification of the traditional rule is that the promisor is likely to derive more utility than the promisee from the entitlement to the profits of the breach because the promisor is generally in a better position to exploit opportunities to redirect the promissory resource. The reason given to support this claim is that the promisor is generally better informed regarding possible profitable reallocations and can actually sell the promissory resource to alternative users. Whereas the traditional rule provides the promisor with an incentive to redirect resources efficiently, a broad restitutionary rule tends to diminish this incentive, because under the latter rule, a promisor who recognizes such an opportunity is required to renegotiate with the promisee in order to be released from her obligation. By dissociating the opportunity for profitable reallocation from the legal entitlement to utilize it, a broad restitutionary rule structures the renegotiation between the promisor and promisee as a bilateral monopoly entailing significant transaction costs that reduce the surplus from the

[38] *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISCIPLINARY L.J. 389, 392, 399, 402–03, 416 (1994); Schwartz & Scott, *supra* note 31, at 552–54. This also explains why contractual parties should be allowed to opt out of many contract rules, especially those that govern the applicable remedies for breach. *See, e.g.*, Charney, *supra* note 28, at 1855.

reallocation and, thus, the promisor's expected gain (indeed, in extreme cases, the promisor may even forgo the efficient reallocation altogether). The traditional rule, which avoids such undesirable results, is therefore the more efficient rule and, consequently, more favorable to commercial parties.[39]

This analysis is premised upon the rationale that the incentive for (that is, the expected benefit from) attaining efficient resource-allocation, and hence for searching for alternative buyers, should be assigned to the party in the best position to find them. It further assumes that the promisor, presumed to be in the business of selling this particular type of promissory resource, is such a "best finder." However, this is not necessarily the case. While there are, of course, cases in which such an assumption is valid (where the promisor is a merchant and the promisee a consumer), nonetheless, there are also numerous instances in which the promisee in fact has access to the market, and this access is not inferior to that of the promisor. At times this access may even be superior.[40] A common example of such a case is where the promisor is a producer and the promisee a wholesaler or a retailer, such that it is at least questionable as to whether the promisor, rather than the promisee, is the best finder of efficient reallocations.

These difficulties make the conventional economic analysis unsatisfactory. Furthermore, it is difficult to see how this "best finder" analysis can be redeemed. Making an ad hoc analysis of the relative accessibility of each party to the market in each individual case is not an acceptable solution as it is bound to entail *ex post* heavy litigation costs and thus *ex ante* uncertainty inhibiting the ability to plan, so vital in the commercial context. Another option – choosing the rule that most commercial parties prefer (or, more precisely, the one that would be cheapest overall to bargain around by the relevant contracting parties) – is also not very promising given the complex inquiries and comparisons that would be needed. Finally, it is possible to imagine a regime that divides cases into two categories, so that the traditional rule would typically apply where the promisor tends to be the best finder, and its revolutionary counterpart where the promisee is usually in the better position to find efficient

[39] *See* Hugh Collins, The Law of Contract 369–70 (2d ed. 1993); Sidney W. DeLong, *The Efficiency of a Disgorgement as a Remedy for the Breach of Contract*, Ind. L. Rev. 737, 743–45 (1989); Farnsworth, *supra* note 11, at 1381–82.

[40] *See* Alan Schwartz, *The Case for Specific Performance* 89 Yale L.J. 255, 284–87 (1979); Daniel Friedmann, *The Efficient Breach Fallacy* 18 J. Legal Stud. 1, 5 (1989); G. M. Cohen, *The Fault Line in Contract Damages* 80 Va. L. Rev. 1225, 1292–1304 (1994).

reallocations. Although such a regime does minimize the difficulties of the preceding alternatives, it is also problematic. First, it does not resolve cases in which the typical best finder is not easily identified.[41] Moreover, it entails a difficult delineation process which, in turn, entails litigation costs and commercial uncertainty and inhibits certainty and finality.

But while the economic argument with respect to which party is the best finder is probably unhelpful, there is another economic argument that supports a preference for the traditional rule. This argument focuses on the difficulties of proving the scope of the promisor's profits. The traditional contract remedies, which are aimed at compensating the promisee for her loss, require information that tends to be available to the promisee-plaintiff. In contrast, the data required for establishing restitutionary recovery are much less accessible to her. In order to recover the promisor's profits, the promisee is required to submit evidence regarding another's affairs. More specifically, restitution requires that difficult judgments be made regarding causation as well as attribution of specific profits (and, presumably, also costs) to one specific transaction out of all the undertakings of the promisor.[42] Contractual rights that rely on information that can be verified only at a prohibitively high cost are inefficient. They entail high litigation costs that are burdensome *ex post* and, even more significantly, create an *ex ante* uncertainty – which is bound to be exacerbated by the discretionary approach of the *EarthInfo* court – that commercial parties dislike.[43] Hence, even in cases where the promisee is, in fact, the best finder of alternative transactions, law should resist any attempt to apply a profits remedy to breaches of contract.

The conventional approach to difficulties of proof in this context leads to the opposite conclusion, i.e., to preferring a broad restitutionary rule. That approach perceives the profits from breach as a substitute for the losses for which traditional contract remedies fail to compensate due

[41] A possible solution for such cases may be, as George Cohen has suggested, to prescribe a rule that allows the first party who finds such a transaction (and notifies her counterpart) to receive its benefits. This rule would encourage both parties to search simultaneously for a profitable reallocation. *See* Cohen, *supra* note 40, at 1295–97. However, such competition over the alternative transaction may be inefficient insofar as there is some overlap between the markets that the parties approach.

[42] *See* Farnsworth, *supra* note 11, at 1350; DeLong, *supra* note 39, at 772–73; Standen, *supra* note 34, at 171; Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, *supra* note 10, at 170; Waddams, *supra* note 10, at 120.

[43] *See* Collins, *supra* note 39, at 367; Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. Legal Stud. 271, 279–80 (1992).

to proof difficulties.[44] There are indeed cases where the profits that the promisor obtained from her breach can help the assessment of the promisee's lost profits (for example, cases where both parties operate in similar markets and with comparable skills), so that restitutionary recovery is an appropriate solution for the difficulty of undercompensation in cases where there is no well-defined and easily discoverable market price. As noted above, these are exactly the cases in which traditional doctrine grants such an award. But if restitution is to serve as a second-best measure of lost profits, it should not be available where the promisor's profits are *not* a good – or even reasonable – proxy of the promisee's loss, and thus not a suitable solution for undercompensation.[45] In such cases (such as where the promisor sells in a different market or where, by the time the promisee covers in the market, the market price equals the contract price) liquidated damages are more appropriate than restitution. Only liquidated damages – which allow a promisee to assess (*ex ante*) the circumstances in which she may be undercompensated due to losses that can be verified *ex post* only at a prohibitively high cost – can credibly solve the difficulties to the promisee of proving the promisor's profits, and thus her potential undercompensation.[46] Therefore, not only can difficulties of proof not provide the rationale for awarding restitutionary recovery as a substitute for uncompensated losses, but, as I argued earlier, the difficulties involved in proving the promisor's profits generally render restitution an inefficient remedy for breach of contract.

(Notice that this analysis coexists with a much more permissive attitude toward the remedy of specific performance than is now available. Specific performance is desirable because it is free from difficulties of proof and because promisees are likely to pursue it only when damages are truly undercompensatory; in other cases they would rather have damages than specifically enforce a performance of a contract that requires them to deal

[44] *See, e.g.*, EDELMAN, *supra* note 15, at 169; PETER D. MADDAUGH & JOHN D. MCCAMUS, THE LAW OF RESTITUTION 436–38 (1990); Richard O'Dair, *Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections*, 46 CUR. LEGAL PROBS. 113, 123–28 (1993).

[45] *Cf.* Mindy Chen-Wishart, *Restitutionary Damages for Breach of Contract*, 114 L.Q. REV. 363, 367–68 (1998); Janet O'Sullivan, *Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations, in* UNJUSTIFIED ENRICHMENT, *supra* note 1, at 327; Konrad Rusch, *Restitutionary Damages for Breach of Contract: A Comparative Analysis of English and German Law*, 118 S. AFR. L.J. 59, 77 (2001).

[46] *See* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Damages: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990).

with a hostile promisor, and hold their affairs in suspension while awaiting this relief.[47] The economic case against restitutionary recovery for breach of contract nicely coheres with this case for specific performance. Therefore, at least from an economic standpoint, restitutionary recovery should not follow, as a matter of course, from the availability of specific performance.[48])

To be sure, there may still be valid economic reasons for a moderate expansion of restitutionary recovery along the lines of Farnsworth's suggestions, because the potential advantage of restitution in deterring breach in the cases he defines as abuse of contract may outweigh their administrative costs. Contractual parties are likely to endorse a rule that assures promisees against skimped performance. This is true because such an assurance is more valuable to promisees than it is expensive to promisors. The value of this assurance to a potential promisee is at least the price difference between the superior materials and the inferior materials (otherwise she would have specified the cheaper materials), and she might value it by more. In contrast, the cost of such assurance to the promisor – the expected value of her potential benefit from using cheaper materials without being detected until reconstruction becomes unfeasible – is the difference between these cost savings and the diminution in market value caused by the substitution. This cost at most equals the cost savings, and could be less. Thus, while promisors are likely to charge a premium for forgoing the option of skimped performance if Farnsworth's suggested remedy is adopted, promisees, in their turn, may be willing to pay such a premium.[49]

[47] *See* Schwartz, *supra* note 40.

[48] Restitution jurisprudence is divided on this front. *Compare., e.g., Surrey County Council, supra* note 13, [1993] 3 All E.R. at 708–13, 714–16 *and* David Howarth, *Profits from Breach of Contract, in* The Law of Restitution 209 (Steve Hedley & Margaret Halliwell eds., 2002), *with* Jack Beatson, *What Can Restitution Do for You, in* The Use and Abuse of Unjust Enrichment 1, 15–17 (Jack Beatson ed., 1991), Graham Virgo, The Principles of the Law of Restitution 515–17 (1999), *and* S. M. Waddams, *Breach of Contract and the Concept of Wrongdoing*, 12 S.C.L.R.(2d) 1, 11 (2000). As an aside, a focus on verification costs may also justify limiting the pecuniary measures available to a promisee for her expectation interest to the contract/market differential, as opposed to the more direct measure of expectation interest that looks at the difference between the buyer's valuation and the contract price (or at the seller's lost profits). *Cf.* Schwartz & Scott, *supra* note 31, at 607.

[49] *See* Farnsworth, *supra* note 11, at 1386–87; DeLong, *supra* note 39, at 749–50.

Good faith

The instrumental understanding of contract that makes efficiency a particularly attractive criterion is not, however, the only possible conception of contract. The norm of good faith performance[50] (in one of its possible readings) offers a counter-vision of modern contract law. In this view the contractual relationship (even in commercial settings) is perceived not only as a locus of competition or an instrument for the allocation of risks and the production of wealth, but also as a zone of mutual cooperation and confidence, dependence and vulnerability. This conception of the contractual relationship requires the parties to protect one another and care for each other. They are not required to prioritize the interests of the other side; but the pursuit of their self-interest must be constrained. Contractual parties must respect the legitimate interests of their fellow contractors; their obligations to their partners may go beyond what they explicitly committed themselves to.[51]

Contractual default rules can help inculcate this cooperative view of contract insofar as they have some value-shaping effect on the parties' preferences regarding the norms and values that frame their relationship. Although the parties can reverse defaults at will, opting out of a default is costly, due, for example, to the potential discomfort involved in the mere discussion of the possibility of non-performance with a cooperative obligation.[52] Defaults can be designed to the end of promoting cooperative values in contractual settings only if they deviate from the parties' *ex ante* preferences moderately, so that the parties may choose not to change them. Such rules will remain intact and will play their role not only in regulating the parties' specific transaction, but also in shaping their future

[50] *See* Restatement (Second) of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

[51] *See* John Adams & Roger Brownsword, Key Issues in Contract 200–02, 215, 217, 220, 223–25, 301–03 (1995); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 632, 639, 641–44 (1983); Hugh Collins, *The Transformation Thesis and the Ascription of Contractual Liability, in* Perspectives of Critical Contract Law 293, 306–07 (T. Wilhelmsson ed., 1993); Feinman, *supra* note 34, at 837; Gordon, *supra* note 34, at 206–08. For a different conception of good faith, see Steven J. Burton & Eric G. Andersen, Contractual Good Faith: Formation, Performance, Breach, Enforcement 40–60 (1995).

[52] *Cf.* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 595–96 (1982); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum. L. Rev. 1710, 1755–65 (1997).

preferences regarding both values and default rules.[53] (Some are reluctant to acknowledge that contract law is a medium for adapting preferences, raising the concern of a slippery slope to tyranny.[54] But this view is overstated and misplaced. While the value-shaping power of default rules is rather limited, every contract law regime – from a highly regulated one to the most facilitative possible – serves, intentionally or inadvertently, either to reinforce or to modify a certain perception of the pertinent contractual constituents and their relationships with one another.)

The cooperative counter-vision of the contractual relationship rejects both the traditional rule limiting the promisee to her expectation interest, and the broad restitutionary rule that allows a promisee to recover her promisor's net profits from the breach. The traditional rule must be rejected because it ignores the injunction to share both unexpected difficulties and unexpected benefits as they arise over the course of the contractual relationship. When the opportunity to sell at the better price materializes, the proper thing for the promisor to do, under this conception of contract, is to contact the promisee, make sure profits expected from breach are greater than the promisee's expected loss, and – if indeed it turns out that the alternative transaction is more efficient – share these profits with the promisee. The traditional rule is inappropriate because it implicitly sanctions the promisor's unilateral pursuit of her own interests, irrespective of the relationship she has already established with her contractual partner. It thus undermines the conception of contract as an area of interpersonal trust, solidarity, and sharing.[55]

However, the cooperative conception of contract also entails rejecting a rule that entitles the promisee, as a matter of course, to the net profits the promisor derived from the breach.[56] Such a rule would effectively deter profitable deviations from the contract. But a promisee who stubbornly insists on performance, where non-performance will not harm her in any way and performance would cause the promisor to lose a profitable opportunity, must be perceived – from the perspective of a cooperative understanding of contract – as abusing her rights. A broad restitutionary

[53] *See* Charney, *supra* note 28, at 1867–68; Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608 (1998).

[54] *See, e.g.*, Michael J. Trebilcock, The Limits of Freedom of Contract 251 (1993).

[55] *See* Adams & Brownsword, *supra* note 51, at 228–31, 302; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1734 (1976); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947, 968–69 (1982); Trebilcock, *supra* note 54, at 142.

[56] *Contra Adras* (trans.), *supra* note 13, at 241; Keith Mason & John W. Carter, Restitution Law in Australia 712–13 (1995).

recovery grants a promisee a position of threatening leverage that can enable her to demand that the promisor purchase her release at a prohibitively high price and, at times, may even impede efficient reallocation of the promissory resource altogether. A rule that enables people to prevent others from improving their situations without any detrimental effect on anyone else cannot be required by (or correspond to) the values of trust, solidarity, and sharing.[57]

(On the surface, the question of whether the promisee has in such a case any legitimate complaint is dependent upon the legal allocation of entitlements, so that if the law adopts a broad restitutionary rule, insisting on performance cannot be considered bad faith. However, allocating the entitlements in such a case is not a "zero-sum game" – a promisor who knows that her promisee is entitled to any gains she may secure from an alternative sale might not bother to look for such beneficial transactions. Hence, adopting such a rule is tantamount to the law acquiescing to the practice of stubbornly standing upon one's rights.)

Rejecting both the measures of the traditional rule and its revolutionary counterpart, the cooperative conception of contract requires a third alternative. The appropriate measure of recovery according to this conception cannot be a rule of "all or nothing," as are the two rules considered thus far, since any such binary rule is antithetical to the prescription of sharing unexpected difficulties and benefits. The cooperative conception of contract requires a different rule, which divides between the parties the efficiency gain of the reallocation (that is, the difference between the promisor's gain from the breach and the promisee's expectation interest).[58] This rule does not give the promisee the power to veto the beneficial alternative transaction; it does not encourage her to take a threatening hold out stance. At the same time, this alternative does not disregard the parties' special commitment toward one another as contractual partners either. It requires that the promisor consider the interests of the promisee: in addition to compensating her for her expectation interest, the promisor is required to share with her this unexpected benefit.

[57] *See similarly* Robert W. Gordon, *Macaulay, Macneil, and Discovery of Solidarity and Power in Contract Law*, 1985 Wis. L. Rev. 565–69; Anthony T. Kronman, *A New Champion for the Will Theory*, 91 Yale L.J. 404, 416 (1981).

[58] Other authors have also proposed such a division. *See* Daniel Friedmann, *Good Faith and Remedies for Breach of Contract, in* Good Faith and Fault in Contract Law 399, 411–12 (Jack Beatson & Daniel Friedmann eds., 1995); William Goodhart, *Restitutionary Damages for Breach of Contract*, 3 Restitution L. Rev. 3, 12–13 (1995).

Implementing this approach can take two main forms: a precise rule dividing the reallocation profits into equal shares between the parties, or a vague standard that would leave the division formula to the discretion of the court. The choice between these two types of norms is not easy. A rule that defines *ex ante* the parties' rights – even if it requires them to share – may still be viewed as too strict according to the cooperative (good faith) conception of contract. A standard that allows ad hoc judicial determinations may thus seem preferable, as it enables courts to assess the parties' behavior from the time that the beneficial opportunity came to their attention, and perhaps also any specific contribution one party or the other made.[59] But, as may be recalled from chapter 3, there are also significant drawbacks to vague standards. In the commercial setting, the most significant drawback is the damaging effect such standards have on the ability of the contractual parties to predict, and thus upon the accordance of the cooperative conception of contract with the preferences of these parties. Vagueness in our context might also be detrimental to good faith itself. If an *ex post* judicial determination of the parties' obligations is required every time a beneficial alternative transaction arises, then in many cases the economically stronger party – who can afford tedious and costly proceedings – will prevail. In contrast, the more precise rule mitigates the parties' conflict of interests when beneficial opportunities arise and stabilizes their relationship at that delicate point in time.[60] (Even a precise profits-splitting rule may not be favored by typical commercial parties, because of its cumbersome administrability.[61] But because its deviation from their preferences is not as dramatic as with a vague standard, they may contract around it less frequently.)

Be that as it may, the gap between the recommendations of the instrumental conception of contract (which supports the traditional doctrine) and the more cooperative alternative (which endorses a norm of division) may explain the persistent debate over the availability of restitutionary recovery for breach of contract as a general remedy of wide applicability. Unlike the modest suggestions of expanding the common law rules

[59] *See* Collins, *supra* note 39, at 38–39.

[60] For the value of precise rules (and rigid rights) in facilitating trust and cooperation, see Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights, in* Liberal Rights 370, 373–74, 376, 385, 387 (1993); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1793–94 (1996); Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. Rev. 531, 537–38, 540–41, 546, 550 (1995).

[61] *Cf.* O'Dair, *supra* note 44, at 132–33.

in cases of abuse of contract and opportunistic breaches – which may be justified from an instrumental perspective, and seem easily supported from a cooperative one – any further expansion compromises the traditional instrumental conception of contract.[62] Thus, while a revolutionary rule that allows a promisee the entire reallocation profits gained by the promisor through the breach is not sanctioned by any plausible normative criterion, the choice between the traditional rule and one favoring equal division requires a choice between two competing visions of contract.

B Losing contracts

Equipped with an account of the two competing understandings of contract I can turn now to a much more concise discussion of the two other main issues concerning the boundaries of contract and restitution, starting with the debate regarding the use of restitution in the special case of losing contracts.[63] The typical difficulty arises in the context of construction contracts.[64] The owner (or the general contractor) breaches after the contractor (or subcontractor) has partially performed. Following the breach, the contractor (or subcontractor) terminates its own performance and seeks restitution measured by the market value of its part performance. The motivation for pursuing such a *quantum meruit* restitutionary claim rather than seeking recovery of its expectation interest is that in a losing contract the expectation interest – measured by the unpaid contract price minus the cost of completion – is negative.[65]

The opposing positions

The majority rule, adopted by the Restatement of Contracts, allows such market-value restitution. This rule enables a party who is about to incur a loss if the contract is fully performed to escape this expected loss, and

[62] *Cf.* Richard Nolan, *Remedies for Breach of Contract: Specific Performance and Restitution, in* Failure of Contracts: Contractual, Restitutionary, and Proprietary Consequences 34, 37–40, 55–56, 59 (Francis D. Rose ed., 1997); Mitchell McInnes, *Disgorgement for Breach of Contract: The Search for a Principled Relationship, in* Unjust Enrichment and the Law of Contract 225, 236 (E. J. H. Schrage ed., 2001).

[63] For a survey, see Andrew Skelton, Restitution and Contract (1998).

[64] For another example that arose in another context, where the restitutionary recovery allowed a nonbreaching party to avoid a loss of $156 million, see Mobil Oil Exploration v. United States, 530 U.S. 604 (2000). For a commentary, see Andrew Kull, *Regional Digest: USA*, 10 Restitution L. Rev. 221, 229 (2002).

[65] Cases are collected in 1 Palmer, *supra* note 8, § 4.4.

typically – that is: in cases where the value of its partial performance is less than the actual costs it has incurred – even to get some net profit. The Restatement precludes restitutionary recovery if the nonbreaching party has completed performance, so that the entitlement of market-value restitution for partial performance provides greater reward for less work.[66] (If a contract is divisible – so that "parts of the performance to be exchanged on each side are properly regarded as a pair of agreed equivalents" – market-value restitution is precluded for the completed parts of the contract.[67])

A minority position – recently endorsed by the new Restatement of Restitution[68] – deviates from the rule of the Restatement of Contracts and allocates *part* of the loss of the contract to the plaintiff. Some of the courts in this camp use the contract price as a cap for restitutionary recovery.[69] Others follow the "contract rate restitution rule," limiting the plaintiff's right to restitution even further by applying a cap that apportions the contract price according to either the proportion of work done to the whole work, or the proportion of the cost incurred in part performance to the total cost the plaintiff would have incurred in full performance.[70] Finally, some courts that nominally follow the rule of the Restatement of Contracts use the contract price as probative evidence in ascertaining damages in *quantum meruit*.[71]

Unjust enrichment; contract

A common claim in support of the majority rule is that respecting the contractual allocation of risks and liabilities, along the lines of the minority position, would permit the breaching party to insist on the

[66] *See* Restatement (Second) of Contracts § 373 & cmt. d (1981). *See also, e.g.*, E. Allan Farnsworth, Contracts 851–52, 855–59 (3d ed. 1999); John Edward Murray, Jr., Murray on Contracts 782–83, 827–28 (4th ed. 2001).

[67] *See* Restatement (Second) of Contracts § 373 cmt. c (1981). *See also* Eric G. Andersen, *The Restoration Interest and Damages for Breach of Contract*, 53 Md. L. Rev. 1, 63–101 (1994).

[68] *See* Restatement (Third) of Restitution and Unjust Enrichment § 38 (Preliminary Draft No. 5, August 2003).

[69] *See, e.g.*, Wuchter v. Fitzgerald, 163 P. 819, 820 (Ore. Sup. Ct. 1917); Johnson v. Bovee, 574 P.2d 513, 514 (Colo. App. 1978). *See also* Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 513 (6th ed. 2002).

[70] *See, e.g., respectively*, Noyes v. Pugin, 27 P. 548, 549–50 (Wash Sup. Ct. 1891); Kehoe v. Rutherford, 27 A. 912, 914 (N.J. Sup. Ct. 1893).

[71] *See, e.g.*, Constantino v. American S/T Achilles, 580 F.2d 121, 122–23 (4th Cir. 1978).

terms of the very contract which she wrongfully brought to an end.[72] This view, however, commits the same mistake I cautioned against in the previous section by equating a breach of contract with wrongful enrichment and then making a conclusory assertion regarding the appropriate allocation of the gain generated by the commission of such a wrong.[73]

The fallacy of such a move has been presented by Kull, whose attitude to the use of unjust enrichment as an argument is, as we have seen on several occasions, generally favorable. Kull shows the conclusory nature of such an argument in the least disputable case of restitution in the context of a losing contract, namely: where a buyer pays in advance for goods that a seller does not bother to deliver notwithstanding the fact that between the time of the contract and the time of delivery the market price for the purchased goods has fallen.[74] It is tempting to say that the buyer should get all her money back, because limiting her to the expectation interest would make the seller unjustly enriched at her expense, as the latter gave nothing in exchange for the money she would have been able to retain if it were not for a broken promise. But this argument is misconceived. As Kull explains, the seller in such a case does give the essence of what she undertook to give by making herself liable for the specified goods for future delivery at a fixed price, thus giving the buyer a right "to any profit that might be

[72] *See, e.g.*, Boomer v. Muir, 24 P.2d 570, 577 (Cal. App. 1933); United States v. Algernon Blair, 479 F.2d 638, 641 (4th Cir. 1973); WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 299 (1893); 1 PALMER, *supra* note 8, at 392, 401; Beatson, *supra* note 1, at 99, 104–05. As an aside, while *Boomer* is the canonical example for the majority rule, Mark Gergen claims that it stands for another rule, and a rather unobjectionable one: that people who perform a disputed obligation are entitled "to recover the cost if the performance was not due and performance avoids a loss without unduly complicating litigation." *See* Mark P. Gergen, *Restitution as a Bridge Over Troubled Contractual Waters*, 71 FORDHAM L. REV. 709, 741 (2002). Gergen joins the critique of the majority rule, using *Algernon Blair* as a prime example for its deficiencies. *Id.* at 731–32.

[73] *Cf.* SKELTON, *supra* note 63, at 66. A similar conclusory assertion underlies the traditional view that the breaching party cannot seek restitutionary recovery. *See* FARNSWORTH, *supra* note 66, at 575. This view has been repudiated by many modern courts, and by the RESTATEMENT (SECOND) OF CONTRACTS § 374 (1981) which prescribes a default rule that allows the party in breach to seek "restitution for any benefit that he has conferred on the other party by way of past performance or reliance." *See also, e.g.*, UCC § 2-718 (2002); Lancelloti v. Thomas, 491 A.2d 117 (Pa. 1985). The modern rule seems easily preferable to its traditional counterpart: even if we accept the (contestable) premise that a breach of contract is a wrong that needs to be deterred, the forfeiture prescribed by the traditional rule is a rather crude device for the task. Promisees (and surely also promisors) are unlikely to endorse such a background rule.

[74] The canonical example is Bush v. Canfield, 2 Conn. 485 (1818). *See also* UCC § 2–711(1) (2002).

produced by a market advance." In exchange, the seller received the mirror image of this right: a right "to any profits produced by a market decline." Because the seller's risk was the price of her potential profit, "it can hardly be said that the seller, having borne the risk, is unjustly enriched if [s]he obtains the reward." Kull ultimately endorses restitution in such a case as a desirable default rule. But, as he maintains, what makes it a proper default rule is not the prescription of preventing unjust enrichment, but rather this rule's correspondence to "the *ex ante* preferences reasonably imputed to the parties," given its virtue of inexpensive administrability, which is in turn due to the facts that the partly performed transaction is easily reversed and that rescission of the contract is simple.[75]

The critique of unjust enrichment as a reason for market-value restitution for a partially performed losing contract can be fortified even if we look solely at the breaching party's enrichment.[76] Familiar restitutionary principles should allow her to invoke the concept of subjective devaluation in support of her refusal to pay more than the value she placed on the performance in the discharged agreement.[77] Of course, in cases involving money, subjective devaluation does not undermine restitution, thus supporting the uncontroversial rule that allows the nonbreaching party who provided a monetary benefit to use restitution in avoiding the consequences of a bad bargain.[78] But in other cases a commitment to respect subjective valuations renders market-value restitution unacceptable. Scholars disagree as to precise implications of this claim: one argues that recovery should be restricted to a *pro rata* share of the contract price; another suggests a broader contextual inquiry which requires, at times, rejecting the subjective devaluation claim.[79] But the important point here is that restitution theory itself does not dismiss the relevance of the contract for assessing unjust enrichment.

[75] *See* Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. Cal. L. Rev. 1465, 1476, 1483–84, 1499–505 (1994).

[76] *See* Andrew Burrows, The Law of Restitution 346 (2d ed. 2002); Skelton, *supra* note 63, at 3, 70–71, 78; Andrew Tettenborn, The Law of Restitution in England and Ireland 143 (3d ed. 2002); Virgo, *supra* note 48, at 103; Peter Birks, *In Defense of Free Acceptance,* in Essays on the Law of Restitution 105, 135–37 (Andrew Burrows ed., 1991); Peter Birks & Charles Mitchell, *Unjust Enrichment, in* 2 English Private Law 525, 563 (Peter Birks ed., 2000); Mitchell McInnes, *The Measure of Restitution*, 52 U. Toronto L.J. 163, 214–16 (2002); Greg Tolhurst, *Discharge of Contract for Breach, in* The Law of Restitution, *supra* note 48, at 489.

[77] On subjective devaluation, see generally section 5.C.

[78] McInnes, *supra* note 76, at 216.

[79] *See, respectively*, McInnes, *supra* note 76, at 215; Skelton, *supra* note 63, at 102–03.

While supporters of the majority rule invoke (unsuccessfully) the concept of unjust (or wrongful) enrichment, its opponents tend to invoke the concept of contract as a reason for rejecting market-value restitution. But this move is similarly unconvincing. Opponents claim that because restitution for breach is a contractual remedy, a plaintiff who would have lost on a contract should not be compensated as if she had made a profitable bargain. Accordingly, they insist that the defendant's gain does not stem from the plaintiff's wrong, but rather from the parties' bargain.[80] While seemingly relying on the contractual allocation of risks, this view actually assumes that the parties' allocation of risks in cases of breach of a losing contract follows – as if it were a matter of pure logical deduction – their allocation of rights and responsibilities of contract performance.[81] But there is, in fact, no reason for this to be the case.

Henry Mather's attempt to criticize the majority rule based on a liberal commitment to minimal coercion, causal responsibility, and consent suffers from the same tautological difficulty. A liberal legal system, Mather claims, should impose liability only to the extent necessary to rectify the plaintiff's harm unless greater liability is reasonably required for purposes of deterrence or was contractually consented to by the plaintiff herself. Market-value restitution violates this injunction, in his view, because it exceeds the plaintiff's harm, seems an inappropriate method of deterrence, and goes beyond the defendant's consent.[82] But as Bernard Gegan correctly maintained, Mather's claim ends up begging the question by assuming, rather than defending, the scope of the plaintiff's protected interest, and thus the proper measure of compensation.[83] This failure of the liberal values underlying contractual liability to resolve the doctrinal debate regarding restitution in losing contracts should not be too surprising at this stage. As the previous section demonstrated, these values tend

[80] *See* Joseph M. Perillo, *Restitution in the Second* Restatement of Contracts, 81 Colum. L. Rev. 37, 44–45 (1981). *See also, e.g.*, Joachim Dietrich, Restitution: A New Perspective 138 (1998); John Carter, *Restitution and Contract Risk, in* Restitution: Developments in Unjust Enrichment 137, 156–57 (Mitchell McInnes ed., 1996); Nicholas Rafferty, *Contracts Discharged Through Breach: Restitution for Services Rendered by the Innocent Party*, 37 Alta. L. Rev. 51, 72 (1999).

[81] *Cf.* Beatson, *supra* note 1, at 99; Peter Birks, *Restitution after Ineffective Contracts: Issues for the 1990s*, 2 J. Contract L. 227, 232 (1990).

[82] *See* Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L.J. 14, 29–36 (1982). *See also* Peter Birks, Unjust Enrichment 52 (2003).

[83] *See* Bernard E. Gegan, *In Defense of Restitution: A Comment on Mather*, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller, 57 S. Cal. L. Rev. 723, 732–33 (1984).

to be indifferent regarding most rules about the content of the contractual obligations and the remedies for its breach.

Identifying the best default rule

Just as with the question of restitutionary recovery for breach of contract, identifying the most desirable default rule respecting restitution in cases of losing contracts requires an explicit normative inquiry. Two accounts attempt such an inquiry and seem particularly powerful: one opposing the majority rule, another celebrating it.

Kull insists that the most efficient risk allocation, and thus the one that contracting parties would likely prefer, is that the nonbreaching party should not be placed in a better position than she would have been in had performance been completed. Otherwise – as where market value restitution is available – the parties will be led to engage in inefficient "strategic maneuvering." The promisor in a losing contract would find herself in the awkward position of preferring the possibility that the promisee would materially breach the contract or repudiate it, so that she will be released from her expected loss. She is thus induced to engage in constantly provoking a breakdown in the contractual relation, which may be interpreted later as the promisee's default.[84] (Such a misinterpretation can be especially expected in cases of long-term construction or manufacture contracts which call for prolonged, multifarious, and interdependent performance given the typical difficulty in ascertaining who committed the first material breach.) But an alert promisee is likely to be aware of this possibility, and would thus do her best to avoid this outcome and safeguard her favorable bargain. She would therefore engage in excessive precaution and over-performance. Because both investments – in provocations and in precautions – are inefficient, typical parties would not have opted for the majority rule.[85] Kull's account seems appealing not only

[84] Theoretically, such a promisor could also renegotiate a release with the promisee, in which the parties will share the gains of such a release. *See* FOUNDATIONS OF CONTRACT LAW 125 (Richard Craswell & Alan Schwartz eds., 1994). Such a renegotiation is, however, likely to be burdened by significant transaction costs given the parties' bilateral monopoly.

[85] *See* Kull, *supra* note 75, at 1471–72, 1476–78, 1481–83, 1498–99, 1505–10. The extent of such inefficient investments is a function of the payoff from succeeding in such a strategic game. Under the market-value restitution rule this payoff is significant. Furthermore, the payoff becomes increasingly significant to the extent that the contract has been performed, because it enables the losing party to escape *ab initio* the whole of the contractual exchange, and not just the part that remains executory (as would have been the case under a contract-rate restitution rule).

from an instrumental perspective on contracts, but also from its more cooperative counterpart. After all, a regime that induces the parties to engage in such strategic behavior has very little to commend itself for if good faith is our litmus test.

This analysis assumes that the contract ended up a losing one by virtue of the promisor's underestimation of her costs of performance. Wendy Gordon and Tamar Frankel challenge this assumption, suggesting that the intuition underlying the majority rule is that in many cases the promisor's completion of her job has some importance in and of itself. These contracts only seem to be losing ones. In fact, they reflect calculated discounts offered by the promisor either due to the seasonal fluctuations of her costs of performance, or in exchange for certain non-price benefits she expects to gain from completion, such as enhanced reputation or potential future dealings with the promisee. These non-monetizable advantages from completion make market-value restitution a proper compensatory remedy; one that reflects the totality of her expectation interest. Applying this measure does not encourage inefficient and strategic provocations (and precautions), as Kull maintains, because the promisor has no payoff from inducing breach. On the contrary, the only-monetizable-expectation-interest measure of recovery is the one that might yield strategic maneuvering (although in the inverse direction).[86]

The choice between these two accounts is not easy, and it may be tempting to adopt a bifurcated regime that allows market-value restitution in, but only in, the categories identified by Gordon and Frankel. The problem with this suggestion, however, is that in many cases the categorization of individual cases requires unverifiable information, and is thus vulnerable to judicial error and manipulation by the parties. (Consider, for example, claims by plaintiffs that their diligent performance of a losing contract was motivated by their desire to improve their reputation, and not by an attempt to provoke the other party in order to avoid a badly calculated deal.) Gordon and Frankel insist that deep discounts are good signals for the existence of noncash benefits and that a loss which is a result of an unanticipated, sudden change in market price after contract formation indicates a "true" losing contract.[87] While in some extreme cases these proxies can help, many others are likely to be more muddy. Furthermore,

[86] *See* Wendy Gordon & Tamar Frankel, *Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. Cal. L. Rev. 1519, 1523–27, 1529–37, 1540–49, 1560 (1994). *See also* Maddaugh & McCamus, *supra* note 44, at 428; Skelton, *supra* note 63, at 78–85.

[87] *See* Gordon & Frankel, *supra* note 86, at 1534–35, 1557.

in many cases the promisee may simply lack, at the time of contracting, the information needed for identifying cases of discount for noncash benefits.

The conventional way of resolving such difficulties of information asymmetries in contractual settings is by using information-forcing rules that induce the better-informed party to reveal her unobservable or unverifiable information.[88] This method seems applicable to our context as well. It implies that a contractor who expects non-price benefits should disclose her subjective valuation of these benefits by, for example, explicitly providing that breach prior to completion would trigger market value restitution. Rather than requiring a costly (and uncertain) *ex post* categorization of the case, this approach would adopt Kull's rule as the default[89] and encourage parties whose contracts fall within Gordon and Frankel's account to opt explicitly for a market-value restitution (or any other demanding) remedy for breach. The parties, rather than the court, can thus address, evaluate, and regulate the various concerns that are implicated in such non-monetizable benefits.[90]

C Leapfrogging contracts

Consider finally the case of unpaid subcontractors.[91] The subcontractor contracts with the general contractor to provide services or supply goods. Through performing this contract, the subcontractor confers a benefit

[88] *See supra* p. 177.

[89] While this means that I prefer the minority position to the Restatement of Contracts rule, I am more ambivalent as to the choice between the contract-price restitution rule and the contract-rate restitution rule. For a summary of some difficulties in each of these approaches, see Skelton, *supra* note 63, at 66–68.

[90] As a (less desirable) alternative, the claim for compensation for non-monetizable benefits of which the plaintiff is deprived by the breaching party's repudiation should be subject to the usual foreseeability regime prescribed in Restatement (Second) of Contracts § 351 (1981) – the most celebrated information-forcing contract rule – according to which damages are recoverable only for losses that the party in breach had reason to foresee as a probable result of the breach when the contract was made either because it follows from the breach in the ordinary course of events, or as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know. *Cf.* Gordon & Frankel, *supra* note 86, at 1526, 1536–37.

[91] For a collection of cases, see J. R. Kemper, Annotation, *Building and Construction Contracts: Right of Subcontractor who has Dealt only with Primary Contractors to Recover against Property Owner in Quasi Contract*, 62 A.L.R.3d 288 (1975 & Supp. 2002). For a recent case involving a sub-broker, see Reisenfeld v. Network Group, Inc., 277 F.3d 856, 860–63 (6th Cir. 2002). For some interesting historical notes, see Daniel Friedmann, *Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free Riding*, 36 Loy. L.A. L. Rev. 831, 862–63 (2003).

on a third party – an "owner" – who has contracted with the general contractor. In the paradigm case, the subcontractor is unable to recover in contract from the general contractor, and thus seeks to leapfrog directly to the owner and recover payment in *quantum meruit*.[92]

The first Restatement of Restitution seems to bar such a recovery. It holds that "a person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person."[93] This traditional approach has been contested both in the literature[94] and by an increasing number of courts.[95] Typically, these courts allow the subcontractor's restitutionary claim to leapfrog the contract "provided that it pled and proved two elements to establish that the enrichment of the owner was unjust – that the subcontractor had exhausted all remedies against the general contractor and still remained unpaid, and that the owner had not given consideration to any person for the improvements furnished by the subcontractor."[96]

Some courts and commentators seek to justify the traditional approach by the lack of "privity" between the subcontractor and the owner.[97] Asserting privity, however, begs the question of whether a restitutionary cause of action – which, of course, is not dependent on the existence of contractual

[92] As the analysis below should make clear, my use of the term "leapfrogging" does not imply that the problem with the subcontractor's claim against the owner is its indirectness. The problem with the subcontractor's claim against the owner is the way it undermines the contracts that exist between the owner and the general contractor and between the general contractor and the subcontractor, not the absence of a contract between them.

[93] Restatement of Restitution § 110 (1937).

[94] *See* John P. Dawson, *The Self-Serving Intermeddler*, 87 Harv. L. Rev. 1409, 1457–58 (1974); 2 Palmer, *supra* note 8, at 1007; Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?*, 79 Tex. L. Rev. 2055 (2001).

[95] For a collection of cases, see Rendleman, *supra* note 94, at 2074 n. 83. The new Restatement suggests that with today's courts the traditional approach is "a distinct rarity." *See* Restatement (Third) of Restitution and Unjust Enrichment § 29 Reporter's Note to cmt. a (Council Draft No. 4, 2002) [hereinafter ALI Draft].

[96] Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co., Inc., 695 So.2d 383, 388 (1997). Some courts allow restitutionary claims only in circumstances where the owner misled, defrauded, or somehow induced a detrimental change of position in the contractor. *See, e.g.*, Haz-Mat Response, Inc. v. Certified Waste Serv., Ltd., 910 P.2d 839, 847 (Kan. 1996). These cases do not diverge from traditional doctrine.

[97] *See, e.g.*, Virgo, *supra* note 48, at 106–13; Rendleman, *supra* note 94, at 2062 n.24. A similar approach, according to which recovery should be denied because the subcontractor did not expect to be paid by the owner, was adopted by the Texas courts. *See* Rendleman, *id.*, at 2066 n.47. *See also* Daniel Friedmann, *Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution, in* Essays on the Law of Restitution 247, 274 (Andrew Burrows ed., 1991).

privity – should be allowed in such a case: restitution can be capacious enough to eliminate an intermediate step and to encompass indirect benefits.[98] By contrast, proponents of the competing approach frequently invoke the principle of the prevention of unjust enrichment as the ultimate reason for allowing restitutionary recovery.[99] As usual with the use of unjust enrichment as an argument, this assertion is begging the question of the proper allocation of entitlements.

One reason to follow the first Restatement and disallow leapfrogging is that allowing the subcontractor to recover in these circumstances might subvert the insolvency regime (or any other system of priorities that affects the interests of third parties).[100] One typical motivation for the subcontractor to seek restitutionary recovery is the general contractor's insolvency. If the subcontractor recovers in full from the owner who has not paid the general contractor, the owner's payment to the subcontractor will be offset from the owner's debt to the general contractor, so it will no longer be a debt that the owner owes to the general contractors bankruptcy estate. Thus, allowing restitutionary recovery to the subcontractor leaves less money for the general contractors other unsecured creditors. While the subcontractor is able in this way to recover in full, the other unsecured creditors of that general contractor receive only a percentage of their claims; a smaller percentage than they would have been able to recover but for the subcontractor's successful leapfrogging.[101] The interaction between restitutionary causes of action and the bankruptcy policy of ratable distribution raises formidable questions that will be the focus of the next chapter. But our case seems rather simple. It is hard to justify an outcome that would treat a subcontractor of an insolvent general contractor better than its other creditors.

But there are cases in which the defaulting party is not insolvent, so that awarding restitution would not prejudice the interest of any third party.[102] Doug Rendleman's analysis of the subject focuses on these cases. Rendleman suggests that the effect of actual or potential bankruptcy distribution should be taken into account by courts on a case-by-case basis, and not be used as a reason for a blanket denial of a "leapfrogging restitution."

[98] *See generally* Peter Birks, *"At the Expense of the Claimant": Direct and Indirect Enrichment in English Law, in* UNJUSTIFIED ENRICHMENT, *supra* note 1, at 493; Rendleman, *supra* note 94, at 2062, 2066.

[99] *See, e.g.*, Rendleman, *supra* note 94, at 2063, 2073–74, 2080–81.

[100] Birks, *supra* note 98, at 523.

[101] *See* Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 267 (Mo. App. 1984); Dawson, *supra* note 94, at 1447; Rendleman, *supra* note 94, at 2078.

[102] The new Restatement suggests that this is the situation in most cases. *See* ALI Draft, *supra* note 95, § 29 Reporter's Note to cmt. e.

Absolute rules that always bar restitution, he maintains, "frustrate a court's pursuit of unjust enrichment." Therefore, Rendleman advocates substituting the first Restatement's rule with a judicial contextual inquiry "about whether to grant or deny a plaintiff's claim for restitution and . . . how to measure it." In addition to the question of whether the subcontractor's restitutionary claim implicates the subversion of bankruptcy policies, a court should take into account the value placed by the owner on the subcontractor's performance (as can be learned from the owner's contract with the general contractor), thus obviating concerns of subjective devaluation on the part of the owner. Furthermore, in order to prevent the subcontractor from obviating the credit risk she voluntarily assumed in her contract with the contractor, Rendleman suggests capping this amount also by the fair market value of the improvement.[103]

The new Restatement seems to follow suit. The Restatement allows restitution following the performance of a contract with a third person "as necessary to prevent unjust enrichment." Retention of a given benefit in this context amounts to an unjust enrichment, the new Restatement prescribes, if "absent liability in restitution, the claimant will not be compensated for the performance in question, and the recipient will retain the benefit of the claimant's performance without paying for it," and only insofar as such liability does not conflict with any established system of priorities, does not subject the recipient to a forced transfer, and does not "subject the recipient to an obligation from which it was understood by the parties that the recipient would be free."[104]

On its face, this new scheme seems attractive, especially if the contextual inquiry it prescribes also includes an analysis of the possible claims or defenses the owner might have had against the general contractor. (As we have seen in chapter 5, a commitment to the autonomy justification of the subjective devaluation rule requires allowing the recipient also to raise such possible defenses.[105]) Is it not true then that, in these carefully circumscribed circumstances, the owner "received a windfall benefit,

[103] *See* Rendleman, *supra* note 94, at 2067–68, 2076–81. *Cf.* Daniel Visser, *Searches for Silver Bullets: Enrichment in Three-Party Situations, in* UNJUSTIFIED ENRICHMENT, *supra* note 1, at 526, 550–52, 566–67. The description of Rendleman's proposal in the text implicitly accepts his critique of commentators who maintain that leapfrogging should be categorically denied because the subcontractor freely assumed the credit risks she now tries to obviate. As Rendleman correctly maintains, this claim of voluntary assumption of risk "posit[s] more of the legal conclusion than the legal argument" because without an explicit provision, an assumption of risk can be deduced "if positive law says that [the subcontractor] assumes it." Rendleman, *id.*, at 2075.

[104] ALI Draft, *supra* note 95, § 29.

[105] *See supra* pp. 146–47.

something for nothing?"[106] Would not her retention of the benefit for which she agreed to pay the general contractor be in these circumstances unjust?[107]

Notwithstanding the seeming appeal of the new Restatement's approach, I prefer the traditional approach of the categorical dismissal of any attempt to leapfrog a contract with a restitutionary claim. My reason for this stems from an analysis of the desirable contractual allocation of entitlements, and is thus situated within the larger theme of this chapter regarding the significance of such allocation for analyzing restitutionary claims in contractual contexts.[108]

On its face, this analysis is already incorporated into the new Restatement's contextual inquiry. The new Restatement's rule already denies claims "where the imposition of liability in restitution would overturn an existing allocation of risk or limitation of liability previously established by contract," or "when the imposition of liability would alter the basis of the underlying transaction, subjecting [the owner] to an obligation from which the parties understood that [she] would be free." The Restatement seems to assume, however, that this will be the case only rarely and that "frequently" the imposition of a restitutionary liability from the owner to the subcontractor "will not contradict or undermine preexisting contractual dispositions regulating the three-cornered transaction that brings the parties together."[109] I beg to differ.

To see why, compare the implications of the alternative approaches. Under a jurisdiction that adopts the rule of the new Restatement, rational subcontractors are likely to give some discount to the general contractor for the additional security given to them in the form of potential restitutionary recovery from the owner in case of the general contractor's default. By the same token, rational owners under this regime are likely to require some discount from the general contractor in order to reflect the risk of being exposed to the contingency of subcontractors' restitutionary claims. By contrast, under the majority rule, owners are likely to pay a bit more to the general contractor, an additional consideration that can be attributed to their release from the possibility of litigation with the subcontractors. Some of this additional payment is likely to be rolled over from the general

[106] *Commerce, supra* note 96, 695 So.2d at 389.

[107] *See* Rendleman, *supra* note 94, at 2075.

[108] None of the discussion that follows should be read to apply in the (rare) case where the subcontractor's claim against the general contractor is based on fraud, duress, and the like. On this issue, see Friedmann, *supra* note 97, at 269.

[109] ALI Draft, *supra* note 95, § 29 cmt. a.

contractor to the subcontractors, who – under the traditional rule – do not have such functional suretyship in the form of a potential leapfrogging restitution claim against the owner.

The question of which of these two possible allocations of risk should be adopted as the default regime ultimately turns on the question of whether the value of the potential recovery from the owner to the subcontractor exceeds the cost of such exposure to the owner. I suspect that it does not. Owners who use the services of a general contractor are willing to absorb an additional payment to such an intermediary exactly in order to avoid dealing directly with numerous providers of goods and services. The exposure to multiple suits in case of the general contractor's default is likely to be just as daunting to such owners as the need to handle all these providers of goods and services. This is especially the case given that typically the subcontractors' claims will be invoked after a period of time in which the owner indeed dealt only with the general contractor, and is thus likely to lack the information required in order to assess the subcontractors' claims properly.

One may worry whether this analysis is not a mere academic speculation.[110] One potential challenge to my analysis comes from the analogy to claims of sureties. A cautious owner is likely to ask the general contractor to obtain sureties, and the surety will invariably be subrogated to claims against the owner in the event the owner has not paid the full contract price. No surety bond can be expected to exclude this liability in subrogation. Another potential critique relies on the fact that the new Restatement's protective regime for subcontractors may be seen as a natural extension of mechanics' liens. A mechanics' lien typically provides security for the price due to each subcontract over the owner's property to which a subcontractor contributes.[111] While there are various reasons why subcontractors may nonetheless lack a mechanics' lien – a particularly significant one is the lack of notification to the owner – one may argue that in an appropriate context restitutionary recovery should be available to a subcontractor who did not perfect her lien.[112] In this view, the existence of the mechanics' lien statute reflects a legislative judgment that restitution to the subcontractor is appropriate, and this has some relevance to the owner's imputed bargain with the general contractor. Finally, my analysis of that hypothetical contract may seem suspect because it may

[110] I am grateful to Andrew Kull for challenging me on this front.
[111] *See, e.g.*, Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65, 89–90 (1985).
[112] *See* Rendleman, *supra* note 94, at 2068–73.

be understood as implying that the owner would bargain and pay for the remote chance of a windfall in the form of getting a bargained-for performance without paying for it, at the expense of the subcontractor.

My claim, however, is not that the owner bargained for a remote windfall, but rather that she bargained for immunity from the hassle of having to deal with multiple subcontractors. The challenger's claim about surety bonds is helpful here in elucidating the difference: a surety's subrogation, by definition, merely substitutes one contractual partner (the general contractor) with another (the surety) and does not introduce any of the informational disadvantages I discuss.[113] Claims of subcontractors are fundamentally different and may subject an owner to lengthy and costly litigation for which she is not informationally equipped. Finally, rather than undermining my analysis, the law in action regarding mechanics' liens actually vindicates it. In practice, "owners on which property improvements are being made (along with banks and other institutions that finance construction) typically protect themselves from mechanics' liens by releasing the funds only when all subcontractors have signed 'lien waivers'."[114] As Dan Dobbs claims, the reluctance of owners to guarantee that the general contractor pays the subcontractors, as evidenced by the prevalent practice of contracting around the statutory mechanics' lien, is a good indication of the parties' preferred arrangement.[115] In other words: rather than an academic speculation, my analysis provides a plausible explanation of the observed behavior of owners (which – absent such an explanation – may indeed seem curious if we think of it in terms of paying for a remote windfall). The rule of the new Restatement ends up exacerbating the transaction costs that the undesirable statutory mechanism of the mechanics' lien imposes on contracting parties.[116]

Be this as it may, the pertinent question is, again, the proper allocation of entitlements. If the better allocation is along the lines of the traditional

[113] *Cf.* Dawson, *supra* note 94, at 1444, 1448, who describes the owner's prejudice in terms of the need to pay someone other than the contract partner she has chosen.

[114] *See* Charles L. Knapp et al., Problems in Contract Law 205 (4th ed. 1999). *See also* George M. Cohen Constr. Co. v. Four Seasons, 567 P.2d 965, 969 (1977).

[115] *See* 1 Dan B. Dobbs, Law of Remedies § 4.9(4), at 698–99 (2d ed. 1993).

[116] To some extent, the new Restatement is aware of the concern that motivated the discussion of the text. The Restatement acknowledges that "the greater the defendant's involvement in the transaction between the [subcontractor] and the [general contractor], the easier it should be to establish the necessary benefit." *See* ALI Draft, *supra* note 95, § 29 cmt. b. But if the analysis above is correct, it is safer to assume, as a default, a case of minimal involvement and, correspondingly, use the first Restatement rule of no liability as the default.

rule, as I think it is, then the owner actually paid for her release from litigation with subcontractors, and is therefore not unjustly enriched. (And, in all likelihood, at one point or another, the general contractor or her trustee in bankruptcy will collect whatever the owner owes her.) Rather than a windfall, her release from such litigation is exactly what she bargained for. Contrariwise, if for some reason my analysis is wrong, and the proper allocation of default entitlements is more in line with the position of the new Restatement, then surely the owner would be unjustly enriched if the subcontractor is not allowed to reach her by using a leapfrogging restitutionary claim; but this would be a trivial implication of the reasons that justify such an alternative allocation of entitlements.

While the three topics discussed in this chapter do not exhaust the rules that stand at the intersection between restitution and contract, their analysis should suffice to bring home a general point. Contract law need not dominate the law of restitution in the sense that the sheer application of the former shuns the latter. But whenever a restitutionary claim arises in a contractual background, a careful analysis of the contractual allocation of risks and benefits is required. Such an analysis obviously necessitates a careful look at any explicit consensual ordering. But it should also incorporate an inquiry into the optimal defaults: the best allocation of the parties' entitlements, given the pertinent normative commitments that should guide law's background default rules.

9

Restitution in bankruptcy

Most of this book is dedicated to showing that the normative underpinnings of various restitutionary doctrines can, and should, inform the future evolution of the law. It is my hope that by now the reader shares (or at least appreciates) the potential of this optimistic posture, which was presented in chapter 1 and applied thereafter. This chapter, which focuses on the last paradigm case of restitution, shows the limits of such an enterprise.

Traditional doctrine grants restitution claimants in bankruptcy – creditors who can identify their property (or trace its proceeds) in the debtor's estate, and show that it was obtained as a consequence of a voidable transfer (in the typical case: of the debtor's fraud) – a valuable trump. If this restitution claimant succeeds in asserting that such an identifiable asset is subject to a constructive trust in her favor, she can simply reclaim what is deemed to be equitably hers. Thus, this fortunate claimant gets, in effect, a priority, escaping the destiny of other unsecured creditors whose claims are only partly satisfied.

This important role of restitution in bankruptcy has recently become a subject of fierce debate among courts and commentators alike. Critics insist that because constructive trust is a remedy, imputing restitution claimants with equitable ownership is but a fiction, and a rather awkward one, given the wonderful intricacies of transactional tracing. This fiction is said to be damaging because it obscures the real work of the doctrine in conferring priority in a non-principled way, thus undermining the Bankruptcy Code's system of ratable distribution. Defenders believe that abrogating, or at least severely curtailing the scope of the traditional doctrine of constructive trust – as the Sixth Circuit, the most prominent proponent of these critiques, has recently done[1] – is nothing short of heresy.[2]

[1] *See* In re Omegas Group, Inc., 16 F.3d 1443 (6th Cir. 1994).

[2] *See* Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 Am. Bankr. L.J. 265, 269 (1998).

Respect for state law, as well as the concept of property and the principle against unjust enrichment, are frequently invoked in attempting to vindicate the traditional doctrine and reinvigorate its continuing application notwithstanding these contemporary attacks.

This chapter studies the claims of both camps and finds them lacking.[3] It concludes that the critics are far too hasty in mocking the role of constructive trusts in bankruptcy and cautions against zealously jettisoning this doctrine. This conclusion fits, of course, the reconstructive tenor of the preceding chapters. But the reconstructive effort of those chapters cannot be duplicated here because the defenses offered for the traditional doctrine are hopelessly unsatisfying. To be sure, the resilience of the preferred status given to constructive trusts is not simply a bizarre legal anomaly. Distorted as it has become over the years, this preference reflects a strong intuition that does survive normative scrutiny, namely: the idea that involuntary creditors should not be pooled together with voluntary ones. But this piece of ancient wisdom – the lesson of constructive trust law, if you will – cannot be easily used as the guide for the further development of the law because it runs against the grain of too many of its rules, notably the entrenched denial of priority to tort victims.[4]

Thus, I end up with a mixed bag. On the one hand, I conclude with disappointment that the contemporary debate regarding the status of restitution claimants in bankruptcy cannot be settled on its own terms because it reveals a deep difficulty in prevailing bankruptcy (or, for that matter, debt collection) law and policy. Although the current uncertainty is partly the outcome of the ambiguous statutory framework, the profound difficulties that exist are unlikely to disappear by mere legislative clarification.[5] But, on the other hand, I do find an important lesson in the traditional role of constructive trusts in bankruptcy: a potential affirmation of the

[3] In Canada, constructive trust is used "as a mechanism for the division of property upon marriage breakup." David M. Paciocco, *The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors*, 68 Can. Bar Rev. 315, 325 (1989). Because US courts deal with this matter through other doctrinal means, this chapter does not address questions of marital property and should not be read as applicable in this context. I discuss the division of property upon divorce at some length elsewhere. *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 99–106 (2004).

[4] *Cf.* A. J. Oakley, Constructive Trusts 18–19 (3d ed. 1997).

[5] *Cf.* Robert J. Keach, *The Continued Unsettled State of Constructive Trusts in Bankruptcy: Of* Butner, *Federal Interests and the Need for Uniformity*, 103 Comm. L.J. 411, 412, 447–49 (1998).

claim – which bankruptcy law has thus far resisted – that calls for a preferred class of involuntary claimants.[6]

A The constructive trust as a trump

Traditional doctrine allows a preference whenever "improperly converted assets of a trust estate are traced into the fund for distribution." The theory which is supposed to explain this rule is "that such assets never have become a part of those of the trustee but at all times have remained, whether in their original position or substituted form, the property of . . . the trust beneficiary, and therefore the trustee's general creditors are not entitled to any share in their distribution." Thus, the doctrine confidently concludes that the claim of a trust beneficiary in such a case "is not really for a preference . . . but rather for the reclamation of his own property."[7] Therefore, a successful constructive trust claimant is protected from the trustee's strong-arm avoidance power, as well as from the debtor's discharge, which means "an immediate turnover of the trust *res* to [her] free and clear of the claims of other creditors." This is a valuable trophy: when a debtor's estate is immediately or eventually liquidated, unsecured creditors usually receive only a few cents in the dollar. Even in the few cases of successful reorganization of corporate debtors, the creditors' mean recovery is typically only 20 or 30 cents in the dollar.[8] These high stakes may explain the proliferation of attempts to assert constructive trusts.[9]

In order to convince the bankruptcy court to impose a constructive trust, a restitution claimant must satisfy two cumulative conditions. First, she must show that her claim belongs to the privileged class of claims that can trigger a constructive trust. Second, she should be able to identify her property in the insolvent debtor's estate.[10] If both conditions apply, traditional doctrine holds that the identified property is not part of the debtor's

[6] *See, e.g.*, David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1643–50 (1991).

[7] In re Erie Trust Co., 191 A. 613, 614 (Pa. 1937).

[8] *See* Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 861–62 (1996).

[9] Keach, *supra* note 5, at 414, 426. As an aside, at times constructive trusts are claimed defensively, rather than offensively, in an attempt to establish that property transferred to the claimant was held in trust by the debtor and thus the transfer is not avoidable. Both the goal and the effect of making such a successful defensive claim are identical to those of its offensive counterpart. *See id.* at 411–12.

[10] *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 669 (3d ed. 2002).

estate, because – in the language of Section 541(d) of the Bankruptcy Code – it is "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest."[11]

The constructive trust originated in cases involving breaches of fiduciary obligations by errant trustees.[12] But today the doctrine's scope of application is much wider, including all cases where "the claimant can show that identifiable property in the hands of the debtor was obtained from the claimant in consequence of the debtor's fraud or the claimant's mistake."[13] To be sure, in the typical case of a fraud or misappropriation victim, the constructive trust is not the only available recourse. Section 523 of the Code provides some alternative remedy by denying an individual debtor discharge for many intentional torts, including conversion, embezzlement, and fraud.[14] But having the possibility of continuing to collect from the future earnings of an individual debtor is a far cry from walking away with one's debt fully satisfied. Furthermore, this remedy does not work for corporate defendants unless the claimant can pierce the corporate veil to sue the officers directly responsible. In a typical case of corporate defendants, even their fraud debts are discharged upon plan confirmation, unless the Chapter 11 proceedings resulted in the liquidation of the debtor, in which event the nondischargeability of the debts is worthless.[15] This significant gap between the statutory route which – at most – denies discharge, and the background route of applying the uncodified constructive trust exception to the fundamental bankruptcy

[11] 11 USC § 541(d). For a thoughtful analysis of the pertinent "statutory maze," see Kull, *supra* note 2, at 291–300. Kull criticizes the prevailing placement of the issue within § 541(d), insisting that the real issue is "whether the avoidance powers under the strong-arm clause (§544(a)) permit the trustee to take property for the estate free of what would otherwise be a valid restitutionary claim." *Id.* at 269. Some courts pick up yet a third possible doctrinal placement for the constructive trust controversy: the Bankruptcy Code's definition of "claim" in Section 101(5). For a survey and critique, see Ashley S. Hominer, *Constructive Trusts in Bankruptcy: Is an Equitable Interest in Property More Than Just a "Claim"?*, 19 Bank. Dev. J. 499 (2003). Because nothing in the analysis of this chapter turns on the statutory placement of the controversy over constructive trusts in bankruptcy, it uses the prevalent presentation of the problem.

[12] *See* Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 Cornell L. Rev. 172, 186–88 (1983).

[13] Kull, *supra* note 2, at 265.

[14] See alternatives (2), (4) & (6) of 11 USC § 523(a). *See also Omegas, supra* note 1, 16 F.3d at 1452; In re Dow Corning Corp., 192 B.R. 428, 432–33 n.7 (Bankr. E.D. Mich. 1996); Kull, *supra* note 2, at 271 n.17.

[15] *See* 11 USC § 1141(d) (2000).

rule of ratable distribution, explains the strictness which courts typically apply in setting the boundary between the privileged type of cases (fraud, misappropriation, etc.) and ordinary commercial activities of debtors on the eve of their bankruptcy.[16]

But being the "right type" of creditor is not enough. In order to impose a constructive trust on the debtor's estate or any specific part thereof, the restitution claimant needs also to identify her property or trace its proceeds in the debtor's estate. While simple identification is straightforward, tracing – identifying specific property held by the debtor as a substitute for the claimant's rightful property and thus a proper subject matter of her claim[17] – is much more complicated. A detailed account of tracing doctrine is beyond the scope of this book.[18] For our purposes, a brief restatement of the most fundamental tracing principles should suffice.

Prevailing tracing doctrine requires a claimant to point to an unbroken transactional chain between the purported substitute property and the claimant's original property.[19] This link can be established where the substitute property was acquired in a direct exchange for the misappropriated property. Or it can be established where the claimant's property becomes a part of an "indistinguishable mixture of value" through either the acquisition of an asset (or a group of assets) "partly with the value being traced and partly with other value," or "the acquisition of indistinguishable intangible assets," such as investments in commingled bank accounts.[20] Cases of commingled accounts are particularly intricate: in this context courts have developed a set of devices facilitating the claimant's ability to trace. The most important of these are two presumptions: (1) that – insofar as expenditures (or particularly unsuccessful investments) are concerned – the debtor spends her own money first; and (2) that – insofar as profitable (or relatively successful) investments are concerned – the debtor invests the claimant's money first.[21] Both presumptions are counterfactual, defying the debtor's actual intent (although neither can defy chronological possibilities, as indicated by the lowest intermediate balance rule). The combined effect of these two presumptions is, as Douglas

[16] *See, e.g.*, In re North American Coins & Currency, 767 F.2d 1573 (9th Cir. 1985). For a collection of cases, see Keach, *supra* note 5, at 422–24.

[17] *See* Lionel Smith, The Law of Tracing 6 (1997). [18] *See id.* at 119–279.

[19] *See* Oesterle, *supra* note 12, at 173–74. [20] Smith, *supra* note 17, at 176.

[21] A third presumption is that, as between innocent claimants, the debtor withdraws against the sums first deposited.

Laycock shows, that once claimants "trace their money into a commingled account, anything that was possible is presumed in their favor, however unlikely."[22]

A specific rule is carved out in cases involving the so-called Ponzi scheme, namely: "a fraudulent investment program in which the returns to investors are comprised of nothing more than the principal investment made by other investors," which typically collapses after the swindler uses some of the invested money for personal use.[23] In these cases all the victims of the same fraud are treated as a class and share *pro rata* in all the assets that any one of them can identify as (or trace to) his or her property.[24] As Andrew Kull explains, "[b]etween claimants similarly situated, the equities of restitution (like the equities of bankruptcy) favor ratable distribution."[25]

B Critiques

The role of constructive trusts in bankruptcy – which is, of course, the principal function of the doctrine – is probably the most criticized doctrine of the law of restitution. Some of the criticism targets the means which the law uses in order to impose constructive trusts, insisting that the rules of transactional (or "form-to-form") tracing lead to arbitrary distinctions between indistinguishable claimants. Another, more radical line of criticism targets the enterprise in its entirety, challenging the normative underpinnings of restitution law's uncodified priority scheme. This growing dissatisfaction culminated in the important *Omegas* case in which the Sixth Circuit – which thus far has been followed by the Eighth Circuit[26] – severely curtailed the law of constructive trusts.

[22] Laycock, *supra* note 10, at 674–75. Lionel Smith insists that the rules of tracing "can be understood without any recourse to conclusive presumptions, which are legal fictions." Rather, these rules "subordinate the interests of wrongdoers, and attempt to deal equitably with everyone else." Smith, *supra* note 17, at 278.

[23] Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 Am. Bankr. L.J. 157, 158 (1998).

[24] *See, e.g.*, US v. Durham, 86 F.3d 70, 73 (5th Cir. 1996); US v. Real Prop. Located at 13328 & 13324 State Highway 75 North, 89 F.3d 551, 553 (9th Cir. 1996).

[25] Kull, *supra* note 2, at 285.

[26] *See* Keach, *supra* note 5, at 441–42. Since Keach's article, the Tenth Circuit had the opportunity to indicate how it stood with respect to *Omegas*, but ducked the question, deciding the case on issues other than the existence of a constructive trust. *See* Hill v. Kinzler (In re Foster), 275 F.3d 924, 927 n.2 (10th Cir. 2001).

Criticizing transactional tracing

Dale Oesterle vividly describes the tracing doctrine as "a crude standard" for singling out those victims of misappropriations whose assets have augmented the debtor's wealth to the benefit of her creditors, and just as crude "a rule of thumb for calculating the extent of a defendant's gain from a wrongful appropriation." The doctrine originally made sense as a "fictional extension" of the interest of beneficiaries in the trust *res* according to which their "fluid equitable ownership . . . survived through changes in the form of the trust property," first due to proper *res* management and later due to unauthorized changes in form. But tracing law has since gone astray, creeping "inexorably into disorderliness," and functioning as "a complicated facade for a rough doctrine of causation." For Oesterle, the source of the difficulty lies in the doctrine's focus on transactional links, rather than causal links, between misappropriated property and substituted property.[27]

There are two related aspects of this problem. One difficulty of our tracing rules is their consistent overstatement of the extent of the debtor's wrongful gain in cases where courts allow constructive trust. Where the claimant cannot show that but for the appropriation the debtor would not have made a particular transaction, the objective gain of a misappropriation has nothing to do with the genealogy of the debtor's transactions. Rather, the debtor's ill-gotten gain is best measured as an interest in the value of the appropriated property.[28] Furthermore, even if it is established that the debtor would not have bought the traceable property but for the misappropriation (because, for example, she lacked the wealth and borrowing capacity needed for such a purchase), the traceable property does not always accurately measure her ill-gotten gains because it fails to credit her for her contribution (in time or money) to the creation or augmentation of the value of the traceable product.

Another, even more disturbing, systemic error lies in the indefensible distinctions prescribed by tracing law. The primacy of a transactional link over a causal link, shows Oesterle, generates an arbitrary disparate treatment of similarly situated claimants. The ability (or inability) of a restitution claimant to establish an unbroken transactional link to a

[27] Oesterle, *supra* note 12, at 186–91, 198–210. *See also* Simon Evans, *Rethinking Tracing and the Law of Restitution*, 115 L.Q. Rev. 469 (1999).

[28] Oesterle notes that this critique does not apply to the case of a disobedient trustee or fiduciary – the historical origin of the doctrine – because she misappropriates not only property, but also her investment services.

specific *res* of the debtor is frequently a matter of sheer luck. Again, instead of being obsessed with tracing the claimants' properties in the debtor's estate, a more sensible approach would focus on causation between the appropriated properties and the debtor's net wealth. In this view – which at times has been applied by courts, but by now is generally repudiated – tracing should be permitted if, but only if, it can be proven that the debtor's estate is swollen by an enrichment gained at the expense of a fraud or misappropriation victim.

Craig Rotherham extends the critique of the arbitrariness of the results reached by existing transactional tracing by offering an explanation for the "bizarre" rhetoric of this doctrine which metaphorically implies the existence of "some mysterious essence that passes from one asset to another." The key to explaining this "odd discourse" of following a thing through changes of form, he claims, lies in an appreciation of its role in defusing the tension between our recognition of a remedy that redistributes property and the commitment we wish to preserve to the inviolability of property. Tracing the claimant's property in order to vindicate her equitable ownership is a sheer rhetorical device aimed at concealing the fact that the imposition of a constructive trust does not merely enforce a preexisting proprietary relationship between the claimant and an asset, but rather establishes new property rights. The "obfuscatory notions" of tracing law misrepresent its function as a mere unproblematic preservation of the *status quo* – "the observance of existing entitlements" – whereas in fact the law alters and redistributes the parties' entitlements in relation to the assets in question. By obscuring and suppressing the dissonance between a remedy that gives rise to new property rights and the traditional reluctance to countenance the judicial redistribution of property, tracing law stifles the possibility of a normative examination of the desert of restitution claimants to priority in bankruptcy. Furthermore, because the notions of equitable ownership, constructive trusts, and tracing impose their own logic on the doctrine, they inevitably distort its rational application, which may explain the predominance of the transactional approach to tracing, in contrast to the more rational – albeit not easily workable – causal approach, the so-called "swollen assets theory."[29] Another consequence of the attempt to suppress the distributive aspect of the doctrine

[29] Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights 1–3, 38–39, 44, 46, 57–60, 77, 89–112, 114–20, 126, 327 (2002).

is the meaningless debate on whether the constructive trust arises at the time of the debtor's wrong or only when the order imposing it is entered.[30]

Redeeming bankruptcy's ratable distribution

An even more radical critique of constructive trust law comes from some American bankruptcy courts, led by the landmark *Omegas* case of the Sixth Circuit.[31] Citing Woody Allen in *Annie Hall*, the court began its opinion by analogizing creditors of bankrupt debtors to "restaurant patrons who not only hate the food, but think the portions are too small" which explains the quest of these "hungry creditors" to "get a little more than the next fellow." In order to preserve the integrity of the principle of ratable distribution against these attempts, the court held that Section 541(d) of the Bankruptcy Code should not be "invoked as an equitable panacea whenever a bankruptcy court thinks a claimant has been particularly burdened by a debtor's bad faith or bad acts."

The particular target of this critique is the constructive trust doctrine. "To permit a creditor, no matter how badly he was 'had' by the debtor, to lop off a piece of the estate under constructive trust," insisted the court, "is to permit that creditor to circumvent completely the Code's equitable system of distribution." The court presented the constructive trust as "anathema to the equities of bankruptcy." Unlike a real trust, "[a] constructive trust is a legal fiction, a common law remedy in equity that may only exist by the grace of judicial action." While in the case of an express trust the debtor who served as a trustee had no rights in the trust estate prepetition, a constructive trust "does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment 'impressing' defendant's property or assets with a constructive trust." Therefore, the Sixth Circuit held that except in cases where "a court has already impressed a constructive trust upon certain assets in a separate prepetition proceeding, or a legislature has created a specific statutory right to have particular kinds of assets held as if in trust," the interest of restitution claimants seeking the imposition of constructive trusts for alleged fraud committed against them by the debtor "is not an 'equitable

[30] *See id.* at 58–59; Keach, *supra* note 5, at 413, 417–18.

[31] *Omegas, supra* note 1, 16 F.3d at 1445, 1449–53. As an aside, the claimant's petition in that case should have been rejected under the traditional rules as well. *See id.* at 1450 n.7; Laycock, *supra* note 10, at 672; Kull, *supra* note 2, at 271, 273–75.

interest' in the debtor's estate existing prepetition, excluded from the estate under §541(d)."[32]

The *Omegas* court did not deny that the imposition of a constructive trust may be appropriate in (the relatively rare case of) a bilateral conflict in which a fraud or misappropriation victim sues the offending debtor. But it insisted that because in the (more typical) bankruptcy context, the constructive trust claimants take from competing unsecured creditors, rather than from the debtor, the latter's fault should be irrelevant. Because the assertion of a constructive trust is nothing but a claim, it should not be accorded any preferential treatment *vis-à-vis* the claims of other unsecured creditors, all of whom – tort victims, suppliers, customers, employees, etc. – are injured by the debtor's acts and omissions. Subordinating the interest of maximizing the debtor's estate to the interest of these restitution claimants unduly privileges one type of creditor in frustration of the policy of ratable distribution.[33]

This "bombshell of a holding"[34] inevitably generated some initial confusion.[35] Thus, two important cases of the Sixth Circuit that followed *Omegas* attempted to fine-tune the rationale and delineate the scope of this innovative doctrine. In *McCafferty* the court addressed the question "whether a portion of a husband's state government pension awarded to his former wife in a divorce decree is a dischargeable debt in the husband's subsequent bankruptcy proceeding."[36] The court accepted the wife's constructive trust argument and thus held that her share in the pension benefits was "not eligible for discharge because it was never part of the bankruptcy estate."

[32] *See also* Mario Cuevas, *Bankruptcy Code Section 544(a) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail*, 21 Seton Hall L. Rev. 678 (1991).

[33] As John Glover notes, "[t]he main 'victims' of an expanded constructive trust are the trustee's unsecured creditors." *See* John Glover, *Bankruptcy and Constructive Trusts*, 2 Austrl. Bus. L. Rev. 98 (1991). *See also, e.g.*, Steve Hedley, Restitution: Its Division and Ordering 176–77 (2001); R. M. Goode, *The Right to Trace and Its Impact on Commercial Transactions II*, 92 L.Q. Rev. 528, 565 (1976).

[34] Keach, *supra* note 5, at 437.

[35] *See Dow Corning, supra* note 14, 192 B.R. 428.

[36] In re McCafferty, 96 F.3d 192, 193 (6th Cir. 1996). Because this is not a support obligation, it does not fall within the § 523(a)(5) exemption dealing with debts for alimony, maintenance, or support to a child or a (former) spouse. *Id.* at 195. As the court noted, Ms. McCafferty might have benefitted from the exception of § 523(a)(15) – which deals with other types of debts "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree," and the like – if it had been in effect at the time. On this provision, see 4 Collier on Bankruptcy ¶ 523.21 (15th ed. 2002).

The *McCafferty* court carefully distinguished the position of the wife here from that of the restitution claimants in *Omegas*. First, the court explained that the imposition of a constructive trust might be appropriate when the property at issue is not subject, in any event, to distribution to creditors and therefore does not implicate the ratable distribution policy. Thus, because the pension benefits at stake are beyond the reach of the husband's creditors, even in bankruptcy, recognizing the wife's constructive trust would not hinder the bankruptcy policy of ratable distribution. Second, the court invoked *Omegas*' exception of property which is already impressed by a judicial prepetition constructive trust. Although the divorce decree did not include "the magic words 'constructive trust'," awarding the wife a separate property interest in a portion of her husband's pension rendered her, under the applicable state law, "the equitable owner of the retirement plan to that extent. Thus, this property interest never became part of the bankruptcy estate."[37]

In the *Newpower* case the Sixth Circuit further clarified its doctrine.[38] This was a hard case for the court because, on the one hand, it dealt with one of the core cases of constructive trust, embezzlement, but on the other hand, unlike *McCafferty*, there was no prepetition judicial order imposing such a constructive trust. The debtor embezzled funds from the claimant-corporation, in which he was a shareholder and a director, and used some of the stolen money to purchase for himself (and for others) certain goods. The court unanimously decided that the debtor's bankruptcy estate has no property interest in money which the debtor embezzled from the claimant because the owner never intends title to pass to a thief or an embezzler.[39] Thus, such funds are not part of the bankruptcy estate.

The *Newpower* court was divided with respect to property that the debtor purchased with the stolen money. The dissent held that under *Omegas* these proceeds of the embezzled funds become part of the bankruptcy estate: because "the good faith seller from which the thief purchases property intends to pass both title and possession to the thief," the debtor obtains good title to these goods, "which thereby become part of his estate." The majority disagreed, holding that the claimant may be able to redeem these properties as well with a proper state court judgment

[37] *McCafferty, supra* note 36, 96 F.3d at 195–99. *See also* In re Morris, 260 F.3d 654, 666–68 (6th Cir. 2001).

[38] In re Newpower, 233 F.3d 922, 926–37 (6th Cir. 2000).

[39] As an aside regarding embezzlements, the court's reasoning is not very satisfying even in its own terms. In many cases, the embezzler will have some sort of authority that may mean that where money is siphoned, title passes.

acknowledging its (prepetition) equitable ownership in the proceeds of its stolen funds. The court took pains to distinguish this claimant from the *Omegas* claimants whose alleged equitable ownership was not similarly treated. One distinction the court mentioned – the fact that the claimant *initiated* a state court action prepetition – seems to suggest a modest expansion of the *Omegas* prepetition exception.[40] Another distinction, which seems more crucial for the majority, is that the claimant was a victim of a theft, rather than of an egregious commercial dealing with the debtor. A victim of theft does not lose its equitable title in the proceeds of its stolen funds: to decide otherwise would allow a thief "unilaterally to convert stolen funds . . . into property of the bankruptcy estate simply by purchasing goods from an unknowing seller."

Criticizing the critiques

The critique of the means (transactional tracing) and the end (priority in bankruptcy) of constructive trust law is powerful. But it also suffers from important pitfalls. Thus, while transactional tracing rules admittedly fall short of accurately measuring the claimant's contribution to the debtor's estate, Oesterle's alternative of a causal ("swollen assets") inquiry is likely to be speculative and costly, if not impossible, to administer. Given these difficulties, the mechanical transactional tracing rules can be understood as proxies or rules of thumb for this more precise method. As a second-best solution – which may be improved – the transactional approach provides "a rough measure of the value added to the debtor's estate" without incurring these costs.[41]

This response does not, of course, vindicate the traditional rules against the radical *Omegas* criticism of the very attempt to allow restitution claimants to get the entirety of the value added to the debtor's estate. But this radical challenge is also fraught with difficulties. To see these difficulties, it is best to begin with a brief appraisal of the Sixth Circuit's emerging alternative doctrine.

[40] Doctrinally, this expansion can rely on the Bankruptcy Code provisions according to which at times property rights can be perfected post-petition and such perfection does not violate the automatic stay. *See* 11 USC §§ 546(b)(1), 362(b)(3).

[41] *See* Rotherham, *supra* note 29, at 112–14, 125; Kull, *supra* note 2, at 283–84; Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1218–19 & n.84 (1995); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. Ill. L. Rev. 297, 333. *Cf.* Smith, *supra* note 17, at 316–18; Peter Birks, *Overview: Tracing, Claiming and Defenses, in* Laundering and Tracing 289, 290, 292 (Peter Birks ed., 1995).

Omegas, *McCafferty*, and *Newpower* point to three circumstances in which constructive trusts are still allowed in bankruptcy. One exception is rather straightforward. Because the rationale of the *Omegas* doctrine is the bankruptcy maxim of equality of distribution among creditors,[42] allowing the imposition of constructive trust on an offender's estate is understandable – indeed, justifiable – where this rationale is not implicated (as was held in *McCafferty*). The two other exceptions to the *Omegas* rule are more difficult. Consider first the prepetition exception. If strictly applied, this exception seems very narrow because, *McCafferty* notwithstanding, it is hard to imagine many other circumstances "in which a restitution claim against a soon-to-be-insolvent defendant could proceed to judgment before the filing of a bankruptcy petition."[43] The *Newpower* reformulation of this exception – replacing the date of the constructive trust decree with that of raising it – makes the exception more viable.[44] But this "timetable tinkering" also vividly brings to light the arbitrariness of allowing or dismissing claims for preferential treatment in bankruptcy solely on the basis of timing and sequence of events which have nothing to do with the equities of the parties.[45]

The most telling exception comes from *Newpower*'s second (and probably ultimate) rationale. The *Newpower* majority correctly observed the difficulty with allowing a thief's disposition of a stolen property (or the lack thereof) to determine the status of the rightful owner of that property in the thief's bankruptcy. Thus, given the uncontested conclusion that stolen property is not part of the bankruptcy estate, the *Newpower* majority found itself invoking the notion of equitable ownership as the conceptual placeholder for the claimant's interest in the proceeds of its stolen funds. A critic may ridicule the Sixth Circuit for resorting to the very fiction its landmark *Omegas* holding was supposed to clear away and, at the same time, undermining *Omegas*' commitment to the bankruptcy policy of ratable distribution. A more charitable reading of *Newpower* would suggest that this case merely stands for the proposition that the ratable distribution policy is irrelevant insofar as other people's property

[42] *Dow Corning, supra* note 14, 192 B.R. at 440–41.

[43] Kull, *supra* note 2, at 272 n.19.

[44] Shifting the date back to the time at which the equitable ownership was raised may also ameliorate a potential defect with a rule that refers to the date of the decree. Privileging only claims of constructive trusts which proceeded to judgment prepetition encourages potential restitution claimants to postpone filing for the debtor's bankruptcy. This incentive runs counter to bankruptcy policy of motivating creditors to file at the optimal moment for the group of creditors as a whole.

[45] *See* ROTHERHAM, *supra* note 29, at 62; Kull, *supra* note 2, at 272 n.19.

is concerned: that a converted property – or, for that matter, the proceeds of a converted property – is on a par with property the debtor happens to possess as a lessee, a bailee, or a trustee.[46]

While intuitively satisfying, this response reveals a deep difficulty with the emerging Sixth Circuit doctrine and ultimately with the *Omegas* radical critique of the traditional doctrine. The equitable title of a victim of theft – or, for that matter, the title of a lessor, a bailor, or a beneficiary of an express trust – is no less of a fiction than the traditional constructive trust.[47] In all of these cases a judicially created artifact is invoked in order to privilege one claimant over the other creditors. Just like the constructive trust permitted in favor of victims of fraud or of mistaken transferors under the traditional doctrine, the equitable title of the privileged claimants under the Sixth Circuit doctrine is not pre-legal. Like the notorious traditional doctrine, the emerging Sixth Circuit alternative does not rely on any natural distinction between claimants. Therefore, that alternative doctrine is no less in need of normative justification than the traditional doctrine it seeks to replace. The *Omegas* radical departure from the traditional rules does not spare decisionmakers from the onerous task of making distinctions between claimants who are subject to the ratable distribution norms and claimants who deserve a preferential treatment.[48] No doctrine can bypass this challenge.

This fact, in and of itself, does not undermine the emerging Sixth Circuit doctrine. But it shows that because all legal concepts and rules are artifacts, the artificiality of constructive trusts proves nothing and cannot be a fatal blow to the traditional doctrine. The fact that a fraud victim's claim to a constructive trust – or the claim of the victim of theft to equitable title in the proceeds of her stolen property, or simply to the title in the very funds stolen from her – is described linguistically in fictitious terms is not, in and of itself, a condemning argument.[49] Rotherham may be correct to accuse the fictitious rhetoric surrounding the constructive trust doctrine for obscuring the distributive choices made by the law and inhibiting its normative scrutiny. (Indeed, in too many cases courts entirely fail even to attempt to assess the claimant's desert *vis-à-vis* other unsecured claimants, and discuss a request for the imposition of a constructive trust solely

[46] *Cf.* Begier v. IRS, 496 U.S. 53, 59 (1990); Kull, *supra* note 2, at 288.

[47] *Cf.* Lionel Smith, *Constructive Trusts and Constructive Trustees*, 58 Cambridge L.J. 294 (1999); Kull, *supra* note 2, at 287–89.

[48] *Contra Dow Corning, supra* note 14, 192 B.R. at 441 n.15.

[49] *See* Lon L. Fuller, Legal Fictions 38–40 (1967). *Cf.* Peter Birks, Unjust Enrichment 262–64 (2003).

in terms of her claim against the offending debtor.[50]) But the *Omegas*' conclusion does not follow; the claim that the doctrine's workings need to be exposed and its distributive choices examined does not entail that the line it draws between more and less preferred creditors is necessarily undesirable.[51]

This criticism of *Omegas* radicalism does not guide our choice between the two competing doctrines. Instead, it points out (once again) the inevitable role of normative justification for a satisfying resolution of acute doctrinal difficulties.[52]

C Apologies

Having cleared the way from the spurious accusation of artificiality, I turn now to examine the most prominent attempts to justify the role of the constructive trust as a trump in bankruptcy. Courts and commentators use an amalgam of justifications, but four stand out as particularly prominent:[53] deference to state law entitlements; the essence of property; preventing unjust enrichment; and the involuntariness of restitution claimants. In this section I address the first three reasons and show that, rather than providing normative justifications, they end up either question-begging or pushing the normative difficulty elsewhere. The next section focuses on the last, and most promising, justificatory premise.

State law

Thomas Jackson suggests an appealing and seemingly simple solution to the constructive trust puzzle.[54] The analysis of constructive trusts, he claims, "should start and stop with an examination of whether the priority

[50] *See, e.g.*, Hicks v. Clayton, 136 Cal. Rptr. 512 (Cal. Ct. App. 1977).

[51] *Cf.* Jerome Frank, Law and the Modern Mind 41–44 (1930).

[52] *Cf.* Bruce A. Ackerman, Private Property and the Constitution 5 (1977).

[53] There are also other claims, but they hardly deserve any critical treatment. Thus, for example, inferring a constructive trust "because of the inadequacy of common law remedies" is surely question-begging, as this factor by itself presents no reason for the restitution claimant's preferential treatment. *See* Glover, *supra* note 33, at 121; Charles Rickett, *Of Constructive Trusts and Insolvency, in* Restitution and Insolvency 188, 202 (Francis Rose ed., 2000).

[54] Thomas Jackson, *Statutory Liens and Constructive Trusts in Bankruptcy: Undoing the Confusion*, 61 Am. Bankr. L.J. 287, 288–91, 293, 297–99 (1987). This treatment of constructive trusts is one aspect of Jackson's broader theory of bankruptcy, according to which state law should provide the pertinent distributive norms. *See* Thomas Jackson, The Logic and Limits of Bankruptcy Law (1986).

thereby granted" has force and effect irrespective of bankruptcy's collective proceedings. This approach follows from the role of bankruptcy law as a procedural debt-collection device, aimed at solving "the deficiencies of individualistic 'grab' remedies without interfering with the value of the underlying entitlements or leading to undue forum shopping." Thus, the reason that the residual claimants in bankruptcy have no access to goods on lease to or under bailment with the debtor is that these goods are considered to be owned, as a matter of nonbankruptcy law, by the lessor or bailor even though the debtor is in possession of them. This outcome remains the same whether the inquiry is phrased in terms of identifying the property of the estate or of prescribing the entitlement of the lessor or bailor to prevail over the other claimants of the debtor.

Jackson is aware, of course, that the Supreme Court allows ignoring nonbankruptcy law if "some federal interest requires a different result."[55] But he insists that the bankruptcy policy of ratable distribution cannot serve as the redeeming federal interest because it proves too much given the multiplicity of nonbankruptcy entitlements encumbering the debtor's estate, which entail preferential treatment of some claimants and which are fully respected, as a matter of course, by bankruptcy law. Thus, in criticizing the practice of some circuits, which allow federal bankruptcy law to tinker with the circumstances under which a constructive trust will be imposed under state law (either in narrowing its scope,[56] or in expanding it[57]), Jackson concludes that "[n]othing in bankruptcy law or logic suggests that constructive trusts should be analyzed distinctly."

I have no qualms with Jackson's general point about the virtues of the neutrality of the bankruptcy proceedings *vis-à-vis* individual debt collection. But his intervention is still unhelpful for restitution lawyers. As a matter of positive law, state law often presents no obvious answer, but rather requires "an elaborate interpretive dance to determine what priorities it commends."[58] More importantly, Jackson's sensible prescription that constructive trust should be recognized in bankruptcy in the same circumstances in which it is recognized outside of bankruptcy only pushes the question one step backwards. Once the rhetorical layer of the traditional doctrine is exposed and constructive trust is analyzed for what it

[55] Butner v. United States, 440 U.S. 48, 54–55 (1979).

[56] *See North American Coins, supra* note 16, 767 F.2d at 1575, 1577 (9th Cir. 1985). For a collection of cases, see Keach, *supra* note 5, at 428–33.

[57] *See* In re Columbia Gas Systems, Inc., 997 F.2d 1039, 1056 (3d Cir. 1993). For a collection of cases, see Keach, *supra* note 5, at 433–36.

[58] Lawrence Kalevitch, *Setoff and Bankruptcy*, 41 Clev. St. L. Rev. 599, 601 n.6 (1993).

primarily is – a debt-collection trump against the other creditors of the debtor that mostly matters in bankruptcy (or when the debtor approaches insolvency)[59] – accepting Jackson's approach merely puts the question of the desert of restitution claimants to such a priority in front of state courts, rather than bankruptcy judges.

Constructive trust as a vindication of property

One suggestion for a substantive source for answering this normative decision refers to the concept of property. Andrew Kull, for example, treats the interest of restitution claimants seeking the imposition of a constructive trust as a background "state-law property right" which should be respected in bankruptcy.[60] Kull's point is not merely a recitation of Jackson's neutrality account. Rather, loyal to his understanding of restitution as a response to "a transfer without an adequate legal basis," he insists that a constructive trust is properly imposed under the traditional doctrine as the necessary implication of the law's treatment of such a transfer as "ineffective to shift property rights in the thing transferred." Similarly to the way an express trust divides legal and equitable interests as per the parties' intentions, a constructive trust divides legal and equitable interests as per the law's disapproval of fraud, mistake, or coercion as means for transferring ownership. In both cases, the division of property interests should not lead to the confiscation of the beneficiary's interests in case of the trustee's insolvency. Thus, a declaration of a constructive trust is merely a "judgment of property out of place"; a reaffirmation of the claimant's rightful ownership. Therefore, "the claimant's property right necessarily antedates its judicial acknowledgment."[61]

Kull is correct insofar as he insists that shielding the property of a beneficiary of an express trust from the reach of the trustee's creditors is no more obvious than shielding the equitable interest of a victim of

[59] *See* Kull, *supra* note 2, at 290.

[60] Kull explains the omission of a reference to these background rights by the fact that no one expects to be a prospective restitution claimant and thus people are "unlikely to obtain legislative help." *Id.* at 269, 302.

[61] *See id.* at 265, 276–79, 281–82, 284, 287, 301. *Cf.* Gbolahan Elias, Explaining Constructive Trust 141–44 (1990); Peter Jaffey, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement 276–77, 280–81, 322 (2000); Graham Virgo, The Principles of the Law of Restitution 601–02, 628–35 (1999); Ross Grantham & Charles Rickett, *Tracing and Property Rights: The Categorical Truth*, 63 Mod. L. Rev. 905, 906–07, 909 (2000).

fraud.[62] But his conclusion that if the former is correct then so must be the latter does not follow. As we have seen, the fact that both are legal artifacts successfully deflates the *Omegas* strategy of dismissing the role of constructive trusts in bankruptcy as a mere fiction. But rather than according obvious correctness to both cases, their similarity as legal artifacts presses the necessity of normative justification of both. The only alternative to such a normative inquiry is an open-ended judicial discretion which is particularly objectionable in our context.[63] (This conclusion renders illusory Peter Birks' claim that "technical conceptual questions," such as "whether the plaintiff has a proprietary interest, and, if so, from what moment that interest takes its priority," can be resolved by lawyers without answering the question – which he describes as "impossible" – "whether a claim deserves priority in insolvency."[64])

Furthermore, a conclusion of such a normative inquiry (assuming this is its conclusion) that an express trust beneficiary is entitled to prevail over the other claimants of the debtor – or that the trust *res* is not part of the debtor's estate (which is, as Jackson correctly insists, another phrase for the same conclusion) – does not necessarily strengthen the case of restitution claimants.[65] The fact that in both cases we may describe the claimant's interest in proprietary terms can, but need not, entail the same conclusion when such interest is confronted with the claims of the debtor's other creditors in bankruptcy. If our considered judgment would be that restitution claimants are as deserving as beneficiaries of an express trust then indeed the same outcome would follow. But we cannot know that until we engage in the actual justificatory work.[66]

[62] *See also* ROTHERHAM, *supra* note 29, at 84. *But cf.* Andrew Burrows, *Proprietary Restitution: Unmasking Unjust Enrichment*, 117 L.Q. REV. 412, 417–18 (2001); Roy Goode, *Property and Unjust Enrichment, in* ESSAYS ON THE LAW OF RESTITUTION 215, 219–220, 240 (Andrew Burrows ed., 1991); Rickett, *supra* note 53, at 190, 205; Lionel Smith, *Unjust Enrichment, Property, and the Structure of Trusts*, 116 L.Q. REV. 412, 424 (2000); Lionel Smith, *Tracing in Bank Accounts: The Lowest Intermediate Balance Rule on Trial*, 33 CAN. BUS. L.J. 75, 81–82, 88, 91 (2000).

[63] *See* Peter Birks, *The Remedial Constructive Trust*, 115 L.Q. REV. 681 (1999).

[64] *See* Peter Birks, *The End of the Remedial Constructive Trust*, 12 TRUST L. INT'L 202, 214–15 (1998). By the same token, while Birks is correct in saying, in a similar context, that "law requires that like consequences be provoked by like events" – Peter Birks, *Proprietary Remedies in Context*, 119 L.Q. REV. 156, 161 (2002) – the implicit suggestion that this task can be accomplished without resort to a normative analysis is a non-sequitur.

[65] *Cf.* David Stevens, *Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things, Pt. II*, 39 U. TORONTO L.J. 325, 326–27, 350 (1989).

[66] *Cf.* JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 32 (1951).

What about the law's considered judgment generally to vindicate (and remedy) complaints of fraud, coercion, or mistake? Is not this indisputably correct judgment – which would surely allow the original owner to prevail over the debtor – sufficient to justify treating the equitable interests of restitution claimants as not part of the debtor's estate, thus allowing such claimants to prevail over the other creditors of the debtor?[67] Maybe; but again not necessarily. Law's decision that an original owner should prevail over the swindler, for example, is rather easy because there are very few (if any) reasons for allowing swindlers to have their way. But this decision cannot simply be duplicated to the context of a conflict with the swindler's creditors, rather than with the swindler herself. The original owner's desert *vis-à-vis* the swindler – her characterization as an involuntary creditor – may, indeed should, inform the normative assessment of her claim *vis-à-vis* the creditors. But while the original owner–swindler conflict presents an easy case, the original owner–creditors' case is, as we will see in the next section, a much harder one.

Kull seems to suggest that the concept of property itself requires law's resolution of the latter conflict to follow from its resolution of the former. But the concept of property does not in fact necessitate such a convergence.[68] Because property constitutes a set of "legal relations between persons with respect to a thing,"[69] a given property right does not imply "one *joint* duty of the *same* content resting on all," but may mean, at times, different duties for different duty-holders.[70] In other words, the meaning of property varies with the divergent categories of social settings in which it is situated (as well as the categories of resources which are subject to property rights).[71] There is nothing in the concept of property that necessitates lumping the answer to the original owner–swindler question with the answer to the original owner–creditors question – either inside

[67] *See* Peter Jaffey, In rem *Claims to Wealth and Surviving Value*, 55 Cur. Legal Probs. 263, 264 (2002).

[68] *Cf.* Robert Chambers, *Tracing and Unjust Enrichment, in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004) (claims based on tracing cannot be understood as a mere continuation of a pre-existing right that has become attached to a new asset, or as a normal feature of all property rights, or as one of the ways in which those rights are enforced).

[69] Restatement (First) of Property § Scope, introductory note (1936).

[70] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 742–43, 747 (1917). *See also* Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 614, 655 (1988).

[71] *Cf.* United States v. Craft, 122 S. Ct. 1414 (2002); Hanoch Dagan, *The Craft of Property*, 92 Cal. L. Rev. 1517, 1531–32 (2003).

or outside bankruptcy – given that these questions arise in different social settings and may raise different concerns.[72] (The concept of property, in other words, fails again to answer difficult doctrinal questions; property does not have a necessary or uniform meaning, which constructive trust law merely enforces.) Placing claims of dispossessed owners ahead of those of others who have suffered wrongs and those of disappointed contractual creditors requires a justification.[73] To suggest otherwise is to reintroduce the confusion between the debtor's wrongdoing and the relative equities of restitution claimants and the other creditors. The concept of property should not serve as (yet another) rhetorical device that obscures, rather than illuminates, the difficult distributive decision presented by restitution claims in bankruptcy.[74]

For this reason Judge Easterbrook was correct to criticize the justificatory power of the assertion that the estate should not "benefit from property that the debtor did not own."[75] Allowing the estate to benefit from such property "is exactly what the strong-arm powers are about: they give the trustee the status of a bona fide purchaser for value, so that the estate contains interests to which the debtor lacked good title. The estate gets what the debtor could *convey* under local law rather than only what the debtor *owned* under local law."[76] The strong-arm powers deal, of course, with a different issue: they permit the creditors to come ahead of a transferee from the debtor who has not perfected her transfer. But the trustee's strong-arm powers are still relevant for demonstrating the incongruity between the entitlements of claimants *vis-à-vis* the debtor and their entitlements *vis-à-vis* the debtor's creditors. (This incongruity is *not* unique to bankruptcy: as we have seen in section 7.G, nonbankruptcy law also gives precedence to bona fide purchasers from a swindler over the rightful owner of a disputed resource.)

To be sure, a personhood theory of property[77] might have supplied a substantive, non-circular justification of giving precedence to dispossessed creditors. But, as Emily Sherwin correctly maintains, constructive trusts extend far beyond what could be justified along these lines even

[72] *Cf.* Goode, *supra* note 33, at 568; 2 Dan B. Dobbs, Law of Remedies: Damages–Equity–Restitution 593–594 (2d ed. 1993).

[73] Rotherham, *supra* note 29, at 78.

[74] *Cf.* Glover, *supra* note 33, at 120. This critique of the use of the concept of property to justify priority applies, *mutatis mutandis*, to substitute concepts – such as a "proprietary base" – that some scholars invoke for similar purposes. *See, e.g.*, Smith, *supra* note 17, at 299, 302, 304–05, 319. For a critique, see Rotherham, *supra* note 29, at 335.

[75] *Cf.* Kull, *supra* note 2, at 282 n.45.

[76] Belisle v. Plunkett, 877 F.2d 512, 516 (7th Cir. 1989).

[77] *See supra* section 7.A.

if we set aside the personhood theory's inability to support the rules of tracing products of the dispossessed property. "Property for personhood does not encompass all assets a person might associate with herself, but only those that are closely tied to her identity."[78] This means, first and foremost, that property for personhood does not sanction priority insofar as the misappropriated resource is money. Furthermore, personhood concerns are not implicated where the improper means by which the swindler dispossessed the restitution claimant out of her property affected the terms of the bargain, rather than the claimant's willingness to dissociate herself from the property at issue. Therefore, in the vast majority of constructive trusts cases the personhood theory of property is simply irrelevant.[79]

Unjust enrichment as the foundation of equitable ownership

Some scholars find the proprietary reasoning criticized above as "a mask to what in truth is the reversal of unjust enrichment."[80] Rotherham, for example, believes that showing "that a particular enrichment acquired unjustly at the expense of the plaintiff has resulted in a swelling of the assets available for distribution in the defendant's insolvency provides a plausible basis for elevating the plaintiff's claim." For him the traditional precedence given to restitution claimants can be reaffirmed if only we set aside the question-begging reference to property notions and openly admit that their priority over the other creditors is premised on "considerations of unjust enrichment" that properly shape the redistribution of property rights. These considerations, Rotherham believes, are particularly compelling because they properly address the equities between the claimant and its real rivals: the debtor's unsecured creditors. "For where the plaintiff's loss is matched by a corresponding gain in pool of assets available for distribution in the defendant's bankruptcy, to give the plaintiff priority to the extent of that gain will do no more than return the plaintiff and the defendant's creditors to the situation that they would have enjoyed if not for the defendant's enrichment." Thus, "according

[78] Sherwin, *supra* note 41, at 335.

[79] One notable exception to the text's generalization is cases involving the breakdown of intimate relationships. *See, e.g.*, Rotherham, *supra* note 29, at 235–38.

[80] Burrows, *supra* note 62, at 412. *See also, e.g.*, Austin W. Scott, *Constructive Trusts*, 71 L.Q. Rev. 39, 41 (1955); Restatement (Second) of Restitution § 30(1) & cmt. b (Tentative Draft No. 2, 1984).

unjust enrichment claims priority will effect corrective justice between the plaintiff and the defendant's unsecured creditors."[81]

Similarly, Sherwin finds this unjust enrichment/corrective justice notion an important, albeit not an exclusive, justificatory premise for the role of constructive trusts in bankruptcy. It is important for – even "the foundation" of – a constructive trust claim: if a court places one creditor ahead of the general creditors "it must be because general creditors would be unjustly enriched by sharing in the property." Hence, the main goal of constructive trusts is to nullify "the unjust enrichment" which is "present among the assets to be divided among competing creditors." Constructive trusts serve the purpose of denying the general creditors "a share of the property that would not be available but for the debtor's unjust gain at the constructive trust's claimant's expense." It removes *ipso facto* "both a loss to the plaintiff and a corresponding gain to the defendant," and this "correlation of gain and loss," in its own turn, explains the "strong appeal" of such restitutionary claims "in terms of fairness and corrective justice."[82]

Supporters of this line of analysis take pains to distinguish restitution claimants from tort victims. Rotherham finds a good case, based "on the justice of competing claims," for the different treatment of these types of creditors. Restitution claimants can connect their loss to a corresponding gain in the debtor's estate, and thus can claim that their priority – the award of restitution – will merely restore the *status quo ante*. By contrast, the paradigmatic tort victim seeks a reallocation of the cost imposed on her by the debtor's negligence. In between these two arguably easy categories there are cases of wrongful enrichment (discussed in chapter 7) which justify particular caution. Victims of acquisitive wrongs who can show "a correspondence of gain and loss" may benefit from the same favorable treatment of "pure" restitutionary claimants. The claim to priority of other victims of wrongful enrichments, in contrast, is "weak" because they cannot accurately identify "the extent to which insolvent defendants' estates have been enriched by their wrongdoing."[83] Similarly, Vanessa

[81] Rotherham, *supra* note 29, at 80–81, 109–11, 178.

[82] Sherwin, *supra* note 41, at 330–33, 364. *See also, e.g.*, Evans, *supra* note 27, at 476–77; Vanessa Finch & Sarah Worthington, *The* Pari Passu *Principle and Ranking Restitutionary Rights, in* Restitution and Insolvency, *supra* note 53, at 1, 10–11, 15–16. *Cf.* Chambers, *supra* note 68. Rotherham also mentions "assumption of risk" as an additional consideration. *See* Rotherham, *supra* note 29, at 85–86.

[83] Rotherham, *supra* note 29, at 80–81, 178, 181. *See also* Finch & Worthington, *supra* note 82, at 10–11.

Finch and Sarah Worthington criticize allowing claimants of wrongful enrichment a priority to the extent of their disgorgement claim for the debtor's wrongful gain because such disgorgement is aimed at deterring wrongdoing and thus "delivers a windfall to the claimant."[84]

Members of the unjust enrichment school of constructive trust law, including Rotherham, admit that the correspondence of gain and loss is not enough to justify priority. After all, no one argues that contract claimants – who have voluntarily assumed the position of unsecured creditors and took the risk of the defendant's subsequent bankruptcy – are (or should be) entitled to priority, even though they also can show that their performance to the debtor without a payment generated a corresponding gain and loss.[85] Therefore, in addition to showing a correspondence of gain and loss, it is undisputed that restitution claimants who seek priority must also found their grievance on an absence or a vitiation of consent.[86] Rotherham helpfully indicates another role for involuntariness as the ultimate justification of the desert of restitution claimants to priority. The elevated status of restitution claimants, in his view, "is driven by a plausible intuition that to allow creditors to have recourse to assets gained without plaintiffs' real consent would show a lack of respect for the autonomy of such plaintiffs."[87] In other words, restoring the *status quo* is appealing because (and insofar as) it vindicates the liberal maxim of respecting people's autonomy.

These important refinements are the first of many objections that eventually lead to the collapse (once again) of unjust enrichment as an argument. While these propositions imply that involuntariness supplements unjust enrichment (correspondence of gain and loss), it can – indeed should – supplant it. To see why, recall the justification given to the disparate treatment of restitution claimants and tort victims: that only the former can point to a gain in the debtor's estate which corresponds to their loss.[88] This argument can be read in two ways; unfortunately, both fail.

[84] Finch & Worthington, *supra* note 82, at 13–14, 20.

[85] Sherwin, *supra* note 41, at 331, 336. *See also, e.g.*, W. J. Swadling, *Property and Unjust Enrichment, in* Property Problems: From Genes to Pension Funds 130, 143 (J. W. Harris ed., 1977). At times "the contract creditor may be able to trace the benefit of her performance to specific assets." Sherwin, *id.* at 336.

[86] *See* Burrows, *supra* note 62, at 425–28. *See also, e.g.*, Roy Goode, *Proprietary Restitutionary Claims, in* Restitution – Past, Present and Future: Essays in Honour of Gareth Jones 63, 77 (W. R. Cornish et al. eds., 1998).

[87] Rotherham, *supra* note 29, at 81.

[88] *See also, e.g.*, Smith, *supra* note 17, at 295, 297–98; Goode, *supra* note 86, at 67.

One interpretation of this swollen asset theory focuses on the causal link between a restitution claimant's loss and the assets available for distribution in the debtor's bankruptcy, insisting that it would be unfair to allow the debtor's other unsecured creditors to get a higher dividend due to that claimant's misfortune. But a similar sense of unfairness exists respecting tort victims, given the causal link between their loss and the size of the debtor's estate. The debtor's estate is augmented to the extent of their just compensation, and it seems unfair for the debtor's other unsecured creditors to benefit from these victims' misfortune of not being able to collect what is their due from the debtor prior to its bankruptcy. (The fact that such a tort victim cannot identify her entitlement in the debtor's estate is surely of no consequence: most typical restitution claimants cannot do so either, a failure which, as we have seen, has no necessary detrimental consequences because they can still resort to the prevailing tracing rules.) Both restitution claimants and tort victims have been victimized by the debtor in a way that none of the other creditors have been. It is unfair to both to allow the other unsecured creditors to collect before they do.

The second reading of the swollen asset theory seems more promising. Restitution claimants are said to be more deserving than tort victims because their entitlement positively increases the size of the debtor's estate. For this reason, the argument goes, allowing restitution claimants to recover fully would not leave the debtor's estate in a worse state than it was but for their misfortune (precluding such a recovery would unjustly enrich the debtor's other unsecured creditors). This interpretation of the swollen assets theory recruits the ethics of contribution, according to which people responsible for value added are entitled to a reward, implying that because restitution claimants (unlike tort victims) contributed to the debtor's estate, it is fair for them to be favorably privileged. As we have seen in chapter 6, contribution theory has some normative bite in certain contexts of allocating gains. But as Emily Sherwin and Steven Walt correctly claim, contribution theory does not have much normative weight in our context. Priority for restitution claimants means a greater loss for other, non-contributing creditors, and contribution arguments are silent respecting such questions of loss allocation. In order to justify the priority of restitution claimants based on their contribution, proponents of the unjust enrichment school must show not only why these claimants are entitled to a reward, but also (1) what that reward should be, and (2) why it should come at the expense of other creditors.[89]

[89] *See* Steven Walt & Emily L. Sherwin, *Contribution Arguments in Commercial Law*, 42 Emory L.J. 897, 898–905, 922–35, 942–52 (1993). Another possible distinction between

It is difficult to see how these two challenges can be successfully addressed, and therefore I conclude that restitution claimants and tort victims are similarly situated. For this reason, the special treatment accorded by members of the unjust enrichment school to wrongful enrichment claimants is also misplaced. Insofar as claims for disgorging ill-gotten gains are appropriate, these gains represent (vindicate) – as we have seen in chapter 7 – the victim's entitlement and thus should not be labeled as windfalls. Therefore, there is also no reason for Rotherham's concerns about evidentiary difficulties in identifying the extent to which the debtor's estate has gained by such wrongdoings. After all, identifying the gain of the estate in cases of fraud or misappropriation is also anything but easy, and the prevailing tracing rules are, at best, a reasonable proxy. Furthermore, bankruptcy law and practice is replete with rules of thumb that help evaluate the worth of contingent claims, such as the claims of victims of assault or defamation.[90]

If my arguments thus far are correct then a claim of correspondence of gain and loss cannot perform the one task attributed to it: distinguishing restitution claimants from tort victims. Thus, the unjust enrichment language has no normative bite. The liberal commitment to voluntariness and autonomy ends up as the (one and only) justification for priority. The significance of involuntariness does not rely on (nor is it helpfully supplemented by) the principle of unjust enrichment. On the contrary, our judgment as to when the debtor's estate would be deemed unjustly enriched by a claimant is (solely!) informed by our liberal commitment to voluntariness (recall the uncontroversial exclusion of contract creditors from that group).

Worse still, the unjust enrichment reasoning – the reference to correspondence of gain and loss – is not only unhelpful for priority decisions. This redundant addendum is not innocuous, because it serves as a rhetorical device that obscures the indefensibility of the distinction between, for

typical constructive trust claimants – think of victims of the debtor's fraud – and tort claimants may focus on the intentionality of the debtor. This approach may try to rationalize constructive trust law as a sister of the law of fraudulent transfers: while the latter targets attempts by a debtor prior to bankruptcy to upset the ratable distribution outcome by transferring things to privileged creditors, the former can be understood as targeting the debtor's attempt to undermine ratable distribution by taking things from unprivileged ones. This suggestion fails, however, almost immediately because it does not account for a core aspect of constructive trusts law: the exclusion of "simple" breaches of contracts.

[90] *See* 4 COLLIER ON BANKRUPTCY, *supra* note 36, ¶ 502.04; Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 468–71 (1998); David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 WAKE FOREST L. REV. 1119 (1997).

example, victims of the debtor's fraud or misappropriation – the paradigmatic types of constructive trust claimants – and victims of her assault, defamation, or negligence. After all, once we admit that the compelling justification for priority starts and ends with involuntariness, it is impossible for us to deny that the very same justification applies – at least with the same force, if not more – to victims of assault or defamation (and even negligence).[91]

D The lesson of constructive trusts

In her leading contribution to the law of constructive trusts, Sherwin concludes that a combination of three reasons may explain the special appeal of a restitution claim traceable to specific assets of a debtor in relation to the claims of other creditors: first, "the correspondence of an unjust gain to the defendant with a loss to the claimant"; second, "the presence of the gain among the assets to be divided among creditors"; and third, "the position of the claimant as an involuntary creditor."[92] The preceding section argues that Sherwin's first two reasons fail to provide any support to restitution claimants' request for priority, nor do they gain any normative appeal by being connected to involuntariness.

One possible conclusion from this failure is a vindication of the Sixth Circuit's radical departure from the traditional doctrine. This time, the conclusion would not be premised on the ultimately inconsequential assertion that a constructive trust is a "mere" legal artifact. Rather, the eradication, or severe curtailment, of the traditional doctrine would be justified by its normative failing (although this failing does not, in and of itself, render the emerging Sixth Circuit's alternative doctrine normatively justifiable). There is nothing logically flawed with this path. Nonetheless, I believe that it is an unfortunate approach because abandoning the traditional doctrine might discard a valuable normative lesson along with the indefensible parts of the doctrine.

This lesson is captured by Sherwin's third reason: the fact that restitution claimants "did not extend credit voluntarily to the debtor," nor did they have "the opportunity to demand compensation for the risk of insolvency in the form of price or interest, or protection by means of collateral."[93] In Kull's words, all the restitution claimants seeking a

[91] *Cf.* Oesterle, *supra* note 12, at 210–11; Glover, *supra* note 33, at 122.

[92] Sherwin, *supra* note 41, at 364–65.

[93] *Id.* at 336. *See also, e.g.*, 1 George E. Palmer, The Law of Restitution § 2.14(c), at 184–85 (1978); Rotherham, *supra* note 29, at 82; Virgo, *supra* note 61, at 600; David M.

constructive trust in bankruptcy require is the invalidation of transfers which are "insufficiently voluntary" on the part of the transferor. To reject their claims from inclusion in the group of unsecured creditors "would therefore result in an involuntary transfer, accomplished in two stages, from claimant to creditors."[94] Even the radical Sixth Circuit (implicitly) acknowledged the moral significance of a claimant's involuntariness by carving out an exception for the most outrageous cases of involuntary transfers, namely: cases of theft and embezzlement.[95]

In the final analysis, the only justification for the imposition of constructive trusts that survives normative scrutiny is the idea that involuntary creditors should not be pooled together with voluntary ones. This reason, which echoes the liberal commitment to personal autonomy – a recurring theme in the law of restitution, as we have seen throughout this book – indeed explains and justifies a distinction between restitution claimants and the typical unsecured creditors, that is contract creditors. In other words, using involuntariness as the litmus test offers a principled way for accommodating the competing demands of two pertinent, and potentially competing, normative concerns: determining "what dealings are proper between persons" and allocating the "common stock" of the bankrupt's estate.[96] This core judicial intuition, which is buried under the complex technical niceties of constructive trust law, may explain the persistence of the traditional doctrine and the outcry of scholars against the excesses of the *Omegas* court.

Placing involuntariness at the center of the law of constructive trusts creates some problems of line-drawing,[97] which inevitably invite lawyers to "spend prodigious amounts of time and effort" in attempting to transmute "the lead of a breach of contract claim into the gold of a constructive trust and, in turn, into the platinum of cash."[98] But these are familiar difficulties in law, and some plausible distinctions may well be drawn. Sherwin correctly claims that when the basis of the claim "shifts from theft to fraud

Wright, The Remedial Constructive Trust 145–46 (1998); A. J. Oakley, *Proprietary Claims and their Priority in Insolvency*, 54 Cambridge L.J. 377, 387, 402 (1995); S. R. Scott, *The Remedial Constructive Trust in Commercial Transactions*, Lloyd's Mar. & Comm. L.Q. 330, 355 (1993).

94 Kull, *supra* note 2, at 278, 282. *See also, e.g.*, Smith, *supra* note 17, at 308; Jeffrey Davis, *Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy*, 41 U. Fla. L. Rev. 1, 72 (1989); Glover, *supra* note 33, at 121.

95 *See supra* p. 308.

96 *Cf.* I. M. Jackman, The Varieties of Restitution 136–37 (1998).

97 *Cf.* Hedley, *supra* note 33, at 170.

98 *See* In re Huber Oil Co., Inc., 12 F.3d 426, 431 (5th Cir. 1994).

or fiduciary misconduct or abuse of confidence, the distance between a constructive trust claimant and a voluntary contract creditor narrows."[99] Law can – as it always does – draw a sensible line between the voluntary and the involuntary without being too impressed by the (philosophically suspect[100]) claims of a slippery slope.

A somewhat more difficult question arises with respect to restitution claimants who are mistaken transferors. The traditional doctrine includes them within the privileged class of claims that can trigger a constructive trust.[101] This seems justified because, as we have seen in chapter 3, one prominent reason for restitution for mistake is the transferor's involuntariness.[102] And yet, allowing creditors to have recourse to assets gained by the debtor through a claimant's mistake is not as offensive as it is in the case of victims of fraud. The affront to the autonomy of "those who suffer from self-induced mistakes" may be particularly acceptable in cases of mistaken transferors who could have avoided their predicament by the application of some additional precaution. Still, because the subdivision of the mistakes category may lead to difficult (and costly) exercises of hair-splitting, it would be sensible for an involuntariness-centered doctrine to follow Rotherham's advice and include all mistakes within the privileged category.[103]

The really difficult problems of a reinvigorated constructive trust doctrine which seeks to vindicate properly the liberal commitment to voluntariness lie elsewhere. To start with, if involuntariness is a necessary and sufficient condition to accord one type of unsecured creditor a priority over the other, there is no reason to give any significance to the divergent abilities of restitution claimants to identify or trace their *res*. Rather, the specific rule that currently applies with respect to victims of Ponzi schemes, which treats all such victims as a preferred class,[104] should become the general rule. If involuntariness is our sole test, then there is no good reason to discriminate between different restitution claimants.[105]

Even more significantly, adopting involuntariness as the watershed for priority requires a broad reform of bankruptcy law in its entirety. When

[99] Sherwin, *supra* note 41, at 336. *See also, e.g.*, Smith, *supra* note 17, at 296; Kull, *supra* note 2, at 274.

[100] *See* David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 Ox. J. Legal Stud. 629 (2001).

[101] *See, e.g.*, In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994).

[102] *See* Kull, *supra* note 2, at 282. *See also, e.g.*, Daniel Friedmann, *Payment Under Mistake – Tracing and Subrogation*, 115 L.Q. Rev. 195, 198 (1999).

[103] *See* Rotherham, *supra* note 29, at 83, 151–52.

[104] *See supra* p. 302.

[105] *Cf.* George L. Gretton, *Constructive Trusts II*, 1 Edinburgh L. Rev. 408 (1997).

analyzed in terms of involuntariness – its most (read: only) compelling normative underpinning – constructive trust law is radically underinclusive. Current doctrine does not place many involuntary creditors, such as the victims of assault, defamation, and negligence mentioned earlier, ahead of other creditors.[106] But as we have seen, there is no principled way to justify the preference of restitution claimants over tort victims. In order to preserve the core normative premise of constructive trust law – the unfairness of lumping together involuntary claimants with unsecured consensual creditors of an insolvent debtor – an overall reform of bankruptcy law is thus required. Nothing short of such a reform can bring peace to this troubled intersection of restitution and bankruptcy.

Although it would be an exaggeration to suggest that such a reform is on the cards insofar as the agenda of decisionmakers is concerned, it is instructive to note that in recent years – the very years in which the role of constructive trusts in bankruptcy has been attacked more and more – scholars have expressed increasing dissatisfaction with the status of tort victims as unsecured creditors in corporate bankruptcy. David Leebron's call for giving tort claimants priority over both secured and unsecured financial creditors is typical.[107] The gist of Leebron's economic reasoning is that the current subordination of claims of tort victims exacerbates the negative externality of limited liability of corporations by (1) inviting more unjustified tort risks, and (2) unduly decreasing the incentive of debtholders to monitor corporate tort risks, notwithstanding their comparative advantage in monitoring both asset levels and liability exposure or requiring the lender to have an appropriate liability insurance. This externality is ultimately borne by tort victims who – unlike typical consensual creditors – cannot diversify their losses.[108] Leebron's analysis

[106] *See* Sherwin, *supra* note 41, at 336–37. *See also, e.g.*, SMITH, *supra* note 17, at 310, 314; Gretton, *supra* note 105, at 411; Paciocco, *supra* note 3, at 325; Swadling, *supra* note 85, at 143.

[107] *See also* Francis H. Buckley, *The Bankruptcy Priority Puzzle*, 72 VA. L. REV. 1393, 1411–12, 1415–19 (1986); Kathryn R. Heidt, *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in Toxic Waste Bankruptcies*, 40 RUTGERS L. REV. 819, 851–62 (1988); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1903–1916 (1994); Christopher M. E. Paniter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1080–83 (1984). *Cf.* Bebchuk & Fried, *supra* note 8, at 882–83; Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1313, 1319–20 (1997).

[108] Leebron, *supra* note 6, at 1643–50. Leebron is aware of the disadvantage of his proposal when tort liabilities are high in relation to asset levels, in which case a sharing regime would better preserve the financial creditors' incentive to monitor the debtor. But he

can be read as an efficiency-based support for the autonomy-based intuition underlying the law of constructive trusts. Alternatively, the analysis of this chapter can be read as an internal support for Leebron's proposal, showing its long – albeit hidden and somewhat distorted – legacy in law.

Either way, the subsequent literature identified some of the questions that may bear on the efficiency of Leebron's proposal and may ultimately help identify a preferable way for the law to distinguish between involuntary claimants and consensual creditors. Three issues seem particularly important. First, some have questioned whether such proposals will not do more harm than good, arguing that the expected detrimental impact on the credit market – in particular regarding the cost of secured credit – "would swamp the benefits of increased distributions in bankruptcy for the promoted classes of creditors."[109] Second, some scholars propose other mechanisms – different from granting priority in bankruptcy – that arguably better address the externalities Leebron identifies, notably unlimited shareholder liability for corporate torts and mandatory insurance.[110] Finally, Lucian Bebchuk and Jesse Fried suggested that the externality regarding tort victims is merely the tip of an iceberg. The correct distinction in their view is between "adjusting" and "nonadjusting" creditors, namely: creditors that cannot or do not adjust the terms of their loan to reflect the effect on this loan of all the arrangements the borrower enters into with other creditors. For Bebchuk and Fried, nothing short of a partial – as opposed to full – priority to secured claims in bankruptcy can ameliorate the systemic incentive to "'sell' the nonadjusting creditors'

believes that the additional contribution to lenders in these circumstances – where the risks are likely to be well known, in any event, and thus "could easily be monitored through judicial process of governmental oversight" – is "probably small." *Id.* at 1645–46.

[109] Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 Cornell L. Rev. 1349, 1356 (1997). Leebron anticipated this challenge. His response, which I find persuasive, is that it is unlikely that privileging tort creditors will dramatically affect the credit market, because secured creditors will continue to enjoy the benefits of priority over unsecured financial creditors. *See* Leebron, *supra* note 6, at 1648–49. *See also* Bebchuk & Fried, *supra* note 107, at 1328–36.

[110] *See respectively* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1887–90, 1931–32 (1991); S. Shavell, *The Judgment Proof Problem*, 6 Int'l Rev. L. & Econ. 45, 54–55 (1986). *See also* Douglas G. Baird, *The Importance of Priority*, 82 Cornell L. Rev. 1420, 1429–31 (1997); Susan Block-Lieb, *The Unsecured Creditor's Bargain: A Reply*, 80 Va. L. Rev. 1989, 1994–97 (1994).

share in bankruptcy to the secured lender in exchange for a lower interest rate."[111]

Addressing these objections and identifying the optimal way of remedying the *a priori* unjustified predicament of involuntary (or should it be nonadjusting?) claimants in bankruptcy require an in-depth analysis of our entire system of debt collection and corporate finance. This enterprise is well beyond the scope of this book. More importantly, the fact that developing a coherent doctrine that fully vindicates the one (and only) valuable lesson of the tormented doctrine of constructive trusts implicates these broad considerations and entails such wide-ranging consequences may account for the disarray of the law of constructive trusts. Other restitutionary doctrines, discussed in the preceding chapters, can – and, I have argued, should – develop along the lines of the common law tradition of a great human laboratory that continuously improves itself in an "endless process of testing and retesting" which effaces mistakes and eccentricities and preserves "whatever is pure and sound and fine."[112] Because a broad and ambitious reform of the accepted bankruptcy scheme is not within the institutional competence of the judiciary, this happy predicament – which is the driving force of this book – is not available to constructive trust law. Given that this first-best alternative is outside the docket of scholars (and judges) of the constructive trust, they are left with the unsatisfying choice between the unsettling traditional doctrine and its not-much-more-inspiring Sixth Circuit alternative. Constructive trust law is not only the last segment of the law of restitution to be studied in this book. It also exemplifies the limits of this book's constructive optimistic methodology.

[111] *See* Bebchuk & Fried, *supra* note 8, at 859, 864–71, 882–83, 907–08; Bebchuk & Fried, *supra* note 107, at 1295–96. *Cf.* Finch & Worthington, *supra* note 82, at 3–7, 20.

[112] Benjamin N. Cardozo, The Nature of the Judicial Process 178–79 (1921).

10

Reasons for restitution

While restitution receded from the American academic landscape and was marginalized in the law school curriculum, courts continued to develop the doctrine, facing new problems and refining the rules dealing with benefit-based civil liability.[1] In fact, some of the most high-profile cases of recent years (and the years to come) are cases of restitution: multi-million dollar mistaken wire transfers, subrogation claims of various governmental bodies against an increasing number of injurious industries, and the unjust enrichment claims of slave laborers (or their descendants) against corporate defendants that captured ill-gotten gains from their enslavements are only a few of the most salient examples.

The law of restitution should be revived in the American legal academia *not* because it will otherwise disappear. Benefit-based claims are not likely to go away as long as they play a role in real-life problems such as the allocation of risks and responsibilities for mistakes, the solution of systematic collective action problems, the facilitation of relationships of informal intimacy and of good samaritan behavior, and the vindication of people's (various types of) rights against potential infringers. Sophisticated lawyers are likely to keep on pressing restitutionary claims in these as well as other cases, such as contract disputes and insolvencies, in an attempt to serve their clients' best interests. Courts are likely to go on using their typical methods of following and distinguishing precedents as well as drawing analogies from prior solutions in addressing new questions, relying on their comparative institutional advantages: "the wisdom of experience," "the illumination which only immediacy affords and the judiciousness which reality alone can induce."[2]

The law of restitution should be revived in the American legal academia because law schools and legal scholarship play an important role in the life of the law. Law school (at its best) is the place where law is studied

[1] *Cf.* John P. Dawson, Unjust Enrichment: A Comparative Analysis 150–51 (1951).
[2] Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928).

as a liberal art, combining the true, the beautiful, and the good, as Karl Llewellyn named the "threefold cord" of technical skills, evaluative prisms, and commitment to service.[3] Too many American lawyers and judges dealing with restitution cases have not had the advantage of exposure to the field in such a unique environment. Legal scholarship, in turn, is an arena for reflectively articulating legal doctrine, applying interdisciplinary insights, and constantly challenging accepted axioms. Even during the last four "dark" decades of American restitution law, many scholars have made significant contributions to the field, and much of this book builds on their invaluable insights (as well as, obviously, those of scholars in other common law jurisdictions, where restitution is increasingly flourishing). But an impressionistic comparison to the splendid bodies of American scholarship in contracts, torts, property, or any other well-established legal field suffices in order to predict the exciting potential of a reinvigoration of restitution in American legal academia.

In these pages I have tried to vindicate the theoretical potential of the law of restitution, showing that a normative inquiry into its various paradigms can bring clarity and coherence to the doctrines and help direct their future development. The three common normative themes that run through this book – autonomy, utility, and community – are core commitments of any liberal legal system, and it is therefore not surprising that they inform the American law of restitution. But as (realist) lawyers, we are never content with such broad generalization. Rather, our attention is always focused on more subtle nuances: the contextual balancing between these reasons for restitution and their translation into specific legal rules. Much of this book focuses exactly on these matters.

Thus, while the commitment to autonomy is probably the most prominent normative underpinning of American restitution law, its manifestations are complex and divergent. The value of autonomy presents a core challenge to the law of mistakes. Mistakes law needs to accommodate two aspects of autonomy: the reign of free will and its spontaneity on the one hand, and the ability to rely on the security and stability of one's holdings on the other. Autonomy is also a core concern in cases of unsolicited conferrals of benefits. But its implications there are far from being obvious. I have tried to show that rather than justifying the common law traditional hostility to the good samaritan, autonomy requires a much more receptive attitude, and that in contexts of informal intimacy

[3] *See* Karl N. Llewellyn, *The Study of Law as a Liberal Art, in* Jurisprudence: Realism in Theory and in Practice 375, 381–82, 385, 391, 394 (1962).

autonomy is (and should be) understood in the much narrower sense of nonsubordination. Less dramatically, I have shown that where people's interests are locked in, autonomy requires a doctrine which is able to discriminate between opportunistic free-riders and non-strategic defendants who legitimately insist on their subjective valuation. Autonomy runs through the other chapters as well. Insofar as wrongful enrichments are concerned, autonomy provides the best explanation (and justification) of profits-based measures of recovery, which are particularly appropriate for infringements of people's constitutive resources. Surprisingly, in contractual settings, the commitment to individual autonomy entails very different conclusions: an application of the instrumentalist conception of contract vindicates the traditional rule which precludes restitutionary recovery for breach of contract. Finally, the liberal commitment to autonomy is the best explanation for the resiliency of constructive trusts as a trump in bankruptcy, although it can neither explain the existing doctrine nor guide its further judicial development.

Alongside autonomy, utility – frequently translated in law as efficiency – also ranks high in some restitution doctrines. Efficiency justifies applying rules of strict liability as crude proxies in cases of institutional mistakes, thus vindicating the emerging practice with respect to mistaken payments of banks and other financial institutions and severely undercutting the rationalizations of rules that limit restitution of mistaken tax payments. Efficiency is also an important instrument (as opposed to an end) in assessing default rules regarding restitution claims in contractual settings as well as in figuring out the hypothetical will of potential beneficiaries in cases of emergency. In contrast, while in some wrongful enrichment cases efficiency seems beside the point (the slave labor cases might serve as the paradigm example), in other cases people's entitlements seem to be appropriately utilitarian and the remedial response for their misappropriation is properly moderate. Finally, although this book did not attempt to resolve the economic debate as to the implication of reforming bankruptcy law by clearly privileging all involuntary claimants (and not only the subset of restitution claimants), there is no doubt that the efficiency or inefficiency of such proposals should be an important component in this decision.

The third normative commitment – shorthanded here as community – entails more limited implications in restitutionary doctrine, and yet I would not want the reader to get the (wrong) impression that I find community to be less important. In fact, for me one of the most important contributions of restitutionary doctrine is the subtle reinforcement it provides

to the fragile communities of informal intimacy through rules governing unjust enrichment between cohabitants, restitution for the supply of necessaries, and rescission of gifts due to undue influence. Furthermore, one of my main reasons for endorsing a reform of the baseline norm regarding restitutionary claims of good samaritans is exactly my view that even in these contexts – which typically involve interactions between strangers – a more receptive restitutionary doctrine can importantly express and facilitate our bonds of concern and solidarity with others. Finally, while I doubt whether the communal conception of contract as a zone of mutual cooperation and confidence should apply in pure commercial contexts, it may be appealing and informative for other settings that are situated on the borderline between arms-length dealing and informal intimacy.

Although I believe that the commitments to autonomy, utility, and community are widely shared in our liberal legal environment, I must admit, as a legal realist, that my contextual balancing between these reasons for restitution and my proposals for translating them into specific restitutionary rules are matters of judgment and thus may be a subject of some debate. I welcome such a debate, hoping that it will contribute to the long-overdue resurrection of restitution in America.

BIBLIOGRAPHY

Restatements

Restatement of Restitution (1937)

Restatement (First) of Property (1936)

Restatement (Second) of Contracts (1981)

Restatement (Second) of Restitution (Tentative Draft No. 1, 1983)

Restatement (Second) of Restitution (Tentative Draft No. 2, 1984)

Restatement (Second) of Trusts (1959)

Restatement (Third) of Restitution and Unjust Enrichment (Discussion Draft, 2000)

Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 1, 2001)

Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 2, 2002)

Restatement (Third) of Restitution and Unjust Enrichment (Council Draft No. 4, 2002)

Restatement (Third) of Restitution and Unjust Enrichment (Preliminary Draft No. 5, August 2003)

Restatement (Third) of Unfair Competition (1995)

Restatement (Third) of Torts: Apportionment of Liability (2000)

Annotations

Allen, W. W., Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 A.L.R.2d 388 (1957)

Blum, George L., Annotation, *Property Rights Arising from Relationship of Couple Cohabitating Without Marriage*, 69 A.L.R. 5th 219 (1999 & Supp. 2001)

Kemper, J. R., Annotation, *Building and Construction Contracts: Right of Subcontractor who has Dealt only with Primary Contractors to Recover against Property Owner in Quasi Contract*, 62 A.L.R.3d 288 (1975 & Supp. 2002)

Books

Ackerman, Bruce A., Private Property and the Constitution (1977)

Adams, John & Brownsword, Roger, Key Issues in Contract (1995)
Alexander, Larry & Sherwin, Emily, The Rule of Rules: Rules, Principles, and Dilemmas of Law (2001)
Anderson, Elizabeth, Value in Ethics and Economics (1993)
Arnold, Thurman W., The Symbols of Government (1935)
Atiyah, Patrick S., Promises, Morals, and Law (1981)
Axelrod, Robert, The Evolution of Cooperation (1984)
Bailey-Harris, Rebecca ed., Dividing the Assets on Family Breakdown (1998)
Baird, Douglas G. et al., Game Theory and the Law (1994)
Barker, Kit & Smith, Lionel, Law's Future(s) (2000)
Barry, Brian, Theories of Justice (1989)
Bazyler, Michael J., Holocaust Justice: The Battle for Restitution in American Courts (2003)
Beatson, Jack, The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution (1991)
Beatson, Jack & Friedmann, Daniel eds., Good Faith and Fault in Contract Law (1995)
Bechtler, Thomas W. ed., Law in Social Context: Liber Amicorum Honouring Professor Lon L. Fuller (1978)
Bennett, T. W. et al. eds., Unjustified Enrichment (1992)
Bentham, Jeremy, The Theory of Legislation (Ogden, C. K. ed., R. Hildreth trans., 1931)
Berlin, Isaiah, Four Essays on Liberty (1969)
Birks, Peter, The Foundations of Unjust Enrichment: Six Centennial Lectures (2002)
An Introduction to the Law of Restitution (paperback ed. with rev. 1989)
Unjust Enrichment (2003)
Birks, Peter ed., The Classification of Obligations (1997)
English Private Law (2000)
Laundering and Tracing (1995)
Wrongs and Remedies in the Twenty-First Century (1996)
Birks, Peter & Chambers, Robert, Restitution Research Resource (2d ed. 1997)
Birks, Peter & Pretto, Arianna eds., Breach of Trust (2002)
Blass, Jonathan, Jewish Law for Israel: Unjust Enrichment Law (1991) (Heb.)
Blumenthal, Susanna, Law and the Modern Mind: The Problem of Consciousness in American Legal Culture, 1800–1930 (Ph.D. Diss., Yale University, 2001)
Bouckaert, Boudewijn & De Geest, Gerrit eds., Encyclopedia of Law and Economics (2000)

Brint, Michael & Weaver, William eds., Pragmatism in Law and Society (1991)
Brudner, Alan, The Unity of the Common Law: Studies in Hegelian Jurisprudence (1995)
Buckle, Steven, Natural Law and the Theory of Property (1991)
Burrows, Andrew, The Law of Restitution (2d ed. 2002)
Burrows, Andrew ed., Essays on the Law of Restitution (1991)
Burton, Steven J. & Andersen, Eric G., Contractual Good Faith: Formation, Performance, Breach, Enforcement (1995)
Calabresi, Guido, The Costs of Accidents: A Legal and Economic Analysis (1970)
Cane, Peter & Tushnet, Mark eds., The Oxford Handbook of Legal Studies (2003)
Cardozo, Benjamin N., The Nature of the Judicial Process (1921)
Casner, A. James ed., American Law of Property (1952)
Cato, Charles, Restitution in Australia and New Zealand (1997)
Chorus, J. M. J. et al. eds., Introduction to Dutch Law for Foreign Lawyers (2d rev. ed. 1993)
Christman, John, The Myth of Property: Toward an Egalitarian Theory of Ownership (1994)
Clark, Homer, The Law of Domestic Relations in the United States (1988)
Cohen, Lucy Kramer ed., The Legal Conscience: Selected Papers of Felix S. Cohen (1960)
Coleman, Jules L., Markets, Morals and the Law (1988)
Risks and Wrongs (1992)
Coleman, Jules & Shapiro, Scott eds., The Oxford Handbook of Jurisprudence and Philosophy of Law (2002)
Collier on Bankruptcy (15th ed. 2002)
Collins, Hugh, The Law of Contract (2d ed. 1993)
Cooter, Robert & Ulen, Thomas, Law and Economics (3d ed. 2000)
Cope, Malcolm, Monash Studies in Law: Duress, Undue Influence and Unconscientious Bargains (1985)
Corbin, Arthur L., Contracts (1950)
Cornish, W. R. et al. eds., Restitution – Past, Present and Future: Essays in Honour of Gareth Jones (1998)
Cotterrell, Roger, The Politics of Jurisprudence (1989)
Craswell, Richard & Schwartz, Alan eds., Foundations of Contract Law (1994)
Cunningham, Roger A. et al., The Law of Property (2d ed. 1993)
Dagan, Hanoch, Unjust Enrichment: A Study of Private Law and Public Values (1997)
Dawson, John P., Unjust Enrichment: A Comparative Analysis (1951)

Dawson, John P. & Palmer, George E., Cases on Restitution (2d ed. 1969)
de Jasey, Anthony, Social Contract, Free Ride: A Study of the Public Goods Problem (1990)
Degeling, Simone, Restitutionary Rights to Share in Damages: Carer Claims at Common Law (2003)
Dietrich, Joachim, Restitution: A New Perspective (1998)
Dobbs, Dan B., Law of Remedies: Damages–Equity–Restitution (2d ed. 1993)
Torts and Compensation: Personal Accountability and Social Responsibility for Injury (2d ed. 1993)
Dworkin, Ronald, Law's Empire (1986)
A Matter of Principle (1985)
Taking Rights Seriously (1977)
Dyzenhaus, David & Moran, Mayo, Calling Power to Account: Law's Responses to Past Injustice (2004)
Eatwell, John et al. eds., The New Palgrave: A Dictionary of Economics (1987)
Edelman, James, Gain-Based Damages: Contract, Tort, Equity and Intellectual Property (2002)
Eiselen, Sieg & Pienaar, Gerritt, Unjustified Enrichment (1993)
Elias, Gbolahan, Explaining Constructive Trust (1990)
Ellickson, Robert C., Order Without Law: How Neighbors Settle Disputes (1991)
Epstein, Richard A., Bargaining with the State (1993)
Etzioni, Amitai, The Moral Dimension: Toward a New Economics (1988)
Farnsworth, E. Allan, Changing Your Mind: The Law of Regretted Decisions (1998)
Contracts (3d ed. 1999)
Finn, Paul D. ed., Essays on Restitution (1990)
Finnis, John, Natural Law and Natural Rights (1980)
Fish, Stanley, Doing What Comes Naturally (1989)
Fishkin, James S., The Limits of Obligation (1982)
Frank, Jerome, Law and the Modern Mind (1930)
Fridman, G. H. L., Restitution (2d ed. 1992)
Fridman, G. H. L. & McLeod, James G., Restitution (1982)
Fried, Barbara, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement (1998)
Fried, Charles, An Anatomy of Values: Problems of Personal and Social Choice (1970)
Contract as Promise: A Theory of Contractual Obligation (1981)
Friedman, Marilynn, What Are Friends For? (1993)
Friedmann, Daniel, The Law of Unjust Enrichment (2d ed. 1998) (Heb.)

Friedmann, Daniel & Barak-Erez, Duphne eds., Human Rights in Private Law (2001)
Fuller, Lon L., Legal Fictions (1967)
Geertz, Clifford, Local Knowledge: Further Essays in Interpretive Anthropology (1983)
Gilmore, Grant, The Death of Contract (1974)
Goff, Lord of Chieveley & Jones, Gareth, The Law of Restitution (Gareth Jones ed., 6th ed. 2002)
Grantham, Ross B. & Rickett, Charles E. F., Enrichment and Restitution in New Zealand (2000)
Gray, Kevin, Elements of Land Law (2d ed. 1994)
Gurry, Francis, Breach of Confidence (1984)
Hardin, Russell, Collective Action (1982)
Harris, J. W. ed., Property Problems: From Genes to Pension Funds (1977)
Hart, H. L. A., The Concept of Law (1961)
Essays in Jurisprudence and Philosophy (1983)
Hedley, Steve, Restitution: Its Division and Ordering (2001)
Hedley, Steve & Halliwell, Margaret eds., The Law of Restitution (2002)
Herzog, Don, Without Foundations: Justification in Political Theory (1985)
Hirschman, Albert O., Exit, Voice, and Loyalty (1970)
Holmes, Oliver W., Collected Legal Papers (1920)
The Common Law (1881)
Honoré, Antony M., Making Law Bind: Essays Legal and Philosophical (1987)
Horder, Jeremy ed., Oxford Essays in Jurisprudence (4th ser. 2001)
Horn, Ronald C., Subrogation in Insurance Theory and Practice (1964)
Hume, David, A Treatise of Human Nature (L. A. Selby-Bigge, 2d ed. 1978)
Jackman, I. M., The Varieties of Restitution (1998)
Jackson, R. M., The History of Quasi-Contract in English Law (1936)
Jackson, Thomas, The Logic and Limits of Bankruptcy Law (1986)
Jaffey, Peter, The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement (2000)
Jerry, Robert H. II, Understanding Insurance Law (2d ed. 1996)
Johnston, David & Zimmermann, Reinhard eds., Unjustified Enrichment: Key Issues in Comparative Perspective (2002)
Jones, Gareth, Restitution in Public and Private Law (1991)
Jones, Gareth & Goodhart, William, Specific Performance (1986)
Joubert, W. A. & Scott, T. J. eds., The Law of South Africa (1983)
Kairys, David ed., The Politics of Law: A Progressive Critique (2d ed. 1990)

KEENER, WILLIAM A., A TREATISE ON THE LAW OF QUASI-CONTRACTS (1st ed. 1893)
KEETON, ROBERT E. & WIDISS, ALAN I., INSURANCE LAW (1988)
KELMAN, MARK, A GUIDE TO CRITICAL LEGAL STUDIES (1987)
KENNEDY, DUNCAN, A CRITIQUE OF ADJUDICATION (1997)
KLIPPERT, GEORGE B., UNJUST ENRICHMENT (1983)
KNAPP, CHARLES L. ET AL., PROBLEMS IN CONTRACT LAW (4th ed. 1999)
KRAUS, JODY & WALT, STEVEN D. EDS., JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (1999)
KREBS, THOMAS, RESTITUTION AT THE CROSSROADS: A COMPARATIVE STUDY (2001)
KRONMAN, ANTHONY T. & POSNER, RICHARD A., THE ECONOMICS OF CONTRACT LAW (1979)
KYMLICKA, WILL, CONTEMPORARY POLITICAL PHILOSOPHY (1990)
LAVASSEUR, ALAIN A., LOUISIANA LAW OF UNJUST ENRICHMENT AND QUASI-CONTRACTS (1951)
LAWSON, F. H. ET AL., AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW (2d ed. 1963)
LAYCOCK, DOUGLAS, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (3d ed. 2002)
LEVINSON, PAUL ED., THE BRAMBLE BUSH (1930)
THE CASE LAW SYSTEM IN AMERICA (Gewirtz, Paul ed., Michael Alsandi trans. 1933, 1989)
IN PURSUIT OF TRUTH (1982)
LLEWELLYN, KARL N., THE COMMON LAW TRADITION (1960)
JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE (1962)
LUCE, R. DUNCAN & RAIFFA, HOWARD, GAMES AND DECISIONS (1957)
LUIG, K. ET. AL. EDS., GEDÄCHTNISSCHRIFT FÜR ALEXANDER LÜDERITZ (2000)
LUKES, STEVEN, INDIVIDUALISM (1973)
MADDAUGH, PETER D. & MCCAMUS, JOHN D., THE LAW OF RESTITUTION (1990)
MANNING, WILLARD G. ET AL., THE COSTS OF POOR HEALTH HABITS (1991)
MANSBRIDGE, JANE J. ED., BEYOND SELF-INTEREST (1990)
MARKESINIS, B. S. & DEAKIN, S. F., TORT LAW (4th ed. 1999)
MARKESINIS, B. S., LORENZ, W. & DANNEMANN, G., THE GERMAN LAW OF OBLIGATIONS (1997)
MARMOR, ANDREI, INTERPRETATION AND LEGAL THEORY (1992)
MARTIN, MICHAEL, LEGAL REALISM: AMERICAN AND SCANDINAVIAN (1997)
MASHAW, JERRY L., GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)
MASON, ANDREW, COMMUNITY, SOLIDARITY, AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE (2000)
MASON, KEITH & CARTER, JOHN W., RESTITUTION LAW IN AUSTRALIA (1995)

Mautner, Menachem, The Decline of Formalism and the Rise of Values in Israeli Law (1993) (Heb.)
McClosky, Herbert & Zaller, John, The American Ethos: Public Attitudes toward Capitalism and Democracy (1984)
McCormick, Harvey L., Social Security Claims and Procedures (4th ed. 1991)
McInnes, Mitchell ed., Restitution: Developments in Unjust Enrichment (1996)
McMurrin, Sterling M. ed., Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy (1987)
Mee, John, The Property Rights of Cohabitants: An Analysis of Equity's Response in Five Jurisdictions (1999)
Miller, David ed., Liberty (1991)
Minow, Martha et al. eds., Narrative, Violence, and the Law (1992)
Mitchell, Charles, The Law of Contribution and Reimbursement (2003)
The Law of Subrogation (1994)
Munzer, Stephen R., Property Problems from Genes to Pension Funds (1997)
A Theory of Property (1990)
Murray, Jr., John Edward, Murray on Contracts (4th ed. 2001)
Nagel, Thomas, Equality and Partiality (1991)
The Possibility of Altruism (1970)
Newman, Peter ed., The New Palgrave Dictionary of Economics and the Law (1998)
Neyers, Jason et al. eds., Understanding Unjust Enrichment (forthcoming 2004)
Nimmer, Melville B., Nimmer on Copyright (1978 and Aug. 2002 section update)
Norris, Martin J., Benedict on Admiralty (7th ed. 1991)
Nozick, Robert, Anarchy, State and Utopia (1974)
The Examined Life (1989)
Oakley, A. J., Constructive Trusts (3d ed. 1997)
Okin, Susan Moller, Justice, Gender, and the Family (1989)
Okin, Susan Moller with respondents, Is Multiculturalism Bad for Women? (Chen, J. et al. eds., 1999)
Olson, Mancur, The Logic of Collective Action – Public Goods and the Theory of Groups (2d ed. 1971)
Osborne, Martin J. & Rubinstein, Ariel, A Course in Game Theory (1994)
Owen, David G. ed., Philosophical Foundations of Tort Law (1995)
Palmer, George E., The Law of Restitution (1978 & Supp. 1998)
Parkman, Allen M., Good Intentions Gone Awry: No-Fault Divorce and the American Family (2000)

Paul, Ellen Frankel et al. eds., Altruism (1993)
Porat, Ariel & Stein, Alex, Tort Liability under Uncertainty (2001)
Posner, Richard A., Economic Analysis of Law (6th ed. 2003)
Proshansky, Harold M. et al. eds., Environmental Psychology: People and Their Physical Settings (2d ed. 1976)
Purcell, Jr., Edward A., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973)
Radin, Margaret Jane, Contested Commodities (1996)
Reinterpreting Property (1993)
Ratcliffe, James M. ed., The Good Samaritan and the Law (1981)
Raz, Joseph, Ethics in the Public Domain: Essays in the Morality of Law and Politics (1994)
The Morality of Freedom (1986)
Robinson, Randall, The Debt: What America Owes to Blacks (1999)
Rodell, Fred, Woe Unto You, Lawyers! (1939)
Rose, Francis ed., Failure of Contracts: Contractual, Restitutionary, and Proprietary Consequences (1997)
Restitution and Banking Law (1998)
Restitution and Insolvency (2000)
Rotherham, Craig, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights (2002)
Rudmin, Floyd W. ed., To Have Possessions: A Handbook on Ownership and Property (1991)
Sandel, Michael J., Liberalism and the Limits of Justice (1982)
Sarat, Austin & Kearns, Thomas R. eds., Law in Everyday Life (1993)
Sartorius, Rolf ed., Paternalism (1983)
Scalia, Antonin, A Matter of Interpretation (1997)
Schauer, Frederick, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991)
Schoenbaum, Thomas J., Admiralty and Maritime Law (3d ed. 2001)
Schrage, E. J. H. ed., Unjust Enrichment: The Comparative Legal History of the Law of Restitution (1995)
Unjust Enrichment and the Law of Contract (2001)
Scott, Robert E. &. Leslie, Douglas L., Contract Law and Theory (2d ed. 1993)
Shapo, Marshall S., The Law of Products Liability (3d ed. 1994)
Shavell, Steven, Economic Analysis of Accident Law (1987)
Sheldon, Henry N., The Law of Subrogation (1893)
Sheleff, Leon Shaskolsky, The Bystander: Behavior, Law, Ethics (1978)
Simmons, A. John, Moral Principles and Political Obligations (1979)
Singer, Joseph William, Entitlement: The Paradoxes of Property (2000)
Skelton, Andrew, Restitution and Contract (1998)

Smith, Lionel, The Law of Tracing (1997)
Stewart, William J., The Law of Restitution in Scotland: Being Mainly a Study of the Personal Obligation to Redress Unjust Enrichment (1992)
Stoljar, Samuel J., The Law of Quasi-Contract (2d ed. 1989)
Sugarman, Stephen D. & Kay, Herma Hill eds., Divorce Reform at the Crossroads (1990)
Swadling, William & Jones, Gareth eds., The Search for Principle: Essays in Honour of Lord Goff of Chieveley (1999)
Taylor, Charles, Philosophy and the Human Sciences (Philosophical Papers 2) (1985)
Taylor, Michael, The Possibility of Cooperation (1987)
Tettenborn, Andrew, The Law of Restitution in England and Ireland (3d ed. 2002)
Thomson, Judith J. & Dworkin, Gerald eds., Ethics (1968)
Trebilcock, Michael J., The Limits of Freedom of Contract (1993)
Virgo, Graham, The Principles of the Law of Restitution (1999)
Viscusi, Kip, Smoking: Making the Risky Decision (1992)
Waddams, Stephen, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning (2003)
Waldron, Jeremy, Liberal Rights (1993)
The Right to Private Property (1988)
Walzer, Michael, Interpretation and Social Criticism (1987)
Spheres of Justice: A Defense of Pluralism and Equality (1983)
Waters, Donovan W. M. ed., Equity, Fiduciaries and Trusts (1993)
Weinreb, Lloyd L., Criminal Law (5th ed. 1993)
Natural Law and Justice (1987)
Weinrib, Ernest J., The Idea of Private Law (1995)
West, Robin, Narrative, Authority, and Law (1993)
Westfall, David, Family Law (1994)
Wilhelmsson, T. ed., Perspectives of Critical Contract Law (1993)
Winfield, Sir P. H., The Law of Quasi-Contracts (1952)
Woodward, Frederic Campbell, The Law of Quasi Contracts (1913)
Wright, David M., The Remedial Constructive Trust (1998)
Youdan, T. G. ed., Equity, Fiduciaries and Trusts (1989)
Zweigert, Konrad & Kötz, Hein, An Introduction to Comparative Law: The Institutions of Private Law (Tony Weir trans., 2d rev. ed. 1987)

Law review articles

Abbot, Everett V., *Keener on Quasi-Contracts – I*, 10 Harv. L. Rev. 209 (1896)
Keener on Quasi-Contracts – II, 10 Harv. L. Rev. 479 (1897)

Adler, Libby & Zumbansen, Peer, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 Harv. J. Legis. 1 (2002)

Aiken, Lee J., *Negotiorum Gestio and the Common Law: A Jurisdictional Approach*, 11 Sydney L. Rev. 566 (1988)

Albert, Ross A., *Comment, Restitutionary Recovery for Rescuers of Human Life*, 74 Cal. L. Rev. 85 (1986)

Altman, Andrew, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 Phil. & Pub. Aff. 205 (1986)

Andersen, Eric G., *The Restoration Interest and Damages for Breach of Contract*, 53 Md. L. Rev. 1 (1994)

Arneson, Richard J., *Paternalism, Utility, and Fairness*, 43 Rev. Int'l de Phil. 409 (1989)

The Principle of Fairness and Free-Rider Problems, 92 Ethics 616 (1982)

Bachand, Frédéric, *Restitution of Unlawfully Levied Taxes: Survey and Comparative Analysis of Developments in Canada, Australia, and England*, 38 Alta. L. Rev. 960 (2001)

Baird, Douglas G., *The Importance of Priority*, 82 Cornell L. Rev. 1420 (1997)

Bant, Elise & Creighton, Peter, *The Australian Change of Position Defence*, 30 W. Austrl. L. Rev. 208 (2002)

Bar-Gil, Oren & Ben-Shahar, Omri, *The Uneasy Case for Comparative Negligence*, 5 Am. L. & Econ. Rev. 433 (2003)

Barker, Kit, *Unjust Enrichment: Containing the Beast*, 15 Ox. J. Legal Stud. 457 (1995)

Barnett, Randy E., *Contract Remedies and Inalienable Rights*, 4 Soc. Phil. & Pol'y 179 (1986)

The Sounds of Silence: Default Rules and Contractual Consent, 78 Va. L. Rev. 821 (1992)

Beatson, Jack, *Restitution and Contract: Non-Comul?*, 1 Theoretical Inq. L. 83 (2000)

Bebchuk, Lucian Arye & Fried, Jesse M., *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 Yale L.J. 857 (1996)

The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics, 82 Cornell L. Rev. 1279 (1997)

Bebchuk, Lucian Arye & Png, I. P. L., *Damage Measures for Inadvertent Breach of Contract*, 19 Int'l Rev. L. & Econ. 319 (1999)

Belk, Russell W., *Possessions and the Extended Self*, 15 J. Consumer Res. 139 (1988)

Ben-Shahar, Omri & Mikos, Robert A., *The Elusive Boundary Between Cost-Based and Benefit-Based Liability in Private Law* (University of Michigan Olin Working Paper No. 01-04)

Benson, Peter, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 Iowa L. Rev. 515 (1992)

Berger, Lawrence, *An Analysis of the Economic Relations Between Cotenants*, 21 Ariz. L. Rev. 1015 (1979)

Bernstein, Lisa, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996)

Bigwood, Rick, *Undue Influence in the House of Lords: Principles and Proof*, 65 Mod. L. Rev. 435 (2002)

Undue Influence: "Impaired Consent" or "Wicked Exploitation," 16 Ox. J. Legal Stud. 503 (1996)

Birks, P. B. H., *Negotiorum Gestio and the Common Law*, 24 Current Legal Probs. 110 (1971)

Birks, Peter, *The Content of Fiduciary Obligation*, 34 Isr. L. Rev. 3 (2000)

The End of the Remedial Constructive Trust, 12 Trust L. Int'l 202 (1998)

Profits of Breach of Contract, 109 L.Q. Rev. 518 (1993)

Proprietary Remedies in Context, 119 L.Q. Rev. 156 (2002)

Recovering Value Transferred Under an Illegal Contract, 1 Theoretical Inq. L. 155 (2000)

The Remedial Constructive Trust, 115 L.Q. Rev. 681 (1999)

Restitution after Ineffective Contracts: Issues for the 1990s, 2 J. Contract L. 227 (1990)

Restitutionary Damages for Breach of Contract: Snepp *and the Fusion of Law and Equity*, L. Mar. & Comm. L.Q. 421 (1987)

Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity, 1985 Jur. Rev. 227

Unjust Enrichment and Wrongful Enrichment, 79 Tex. L. Rev. 1767 (2001)

Block-Lieb, Susan, *The Unsecured Creditor's Bargain: A Reply*, 80 Va. L. Rev. 1989 (1994)

Blumberg, Grace Ganz, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 Notre Dame L. Rev. 1265 (2001)

Bordan, Gregory, *The Law of Construction Privileges: Corrective Justice or Distributive Justice*, 2 Can. J.L. & Juris. 57 (1989)

Bouckaert, Boudewijn & DeGeest, Gerritt, *Private Takings, Private Taxes, Private Compulsory Services: The Economic Doctrine of Quasi Contracts*, 15 Int'l Rev. L. & Econ. 463 (1995)

Brady, Viola C., *Note, The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 Ind. L.J. 551 (1980)

Bratton, William, *Two Observations on Holocaust Claims*, 24 Hastings Int'l & Comp. L. Rev. 321 (2001)

Brock, Jason, *The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment*, 58 U. Toronto Fac. L. Rev. 185 (2000)

Brophy, Alfred L., *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L. 497 (2003)

Broyles, James E., *Knowledge and Mistake*, 78 Mind 198 (1969)

Bruch, Carol S., *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial–Legislative Interaction*, 29 Am. J. Comp. L. 217 (1981)

Buckley, Francis H., *The Bankruptcy Priority Puzzle*, 72 Va. L. Rev. 1393 (1986)

Burns, Fiona R., *Undue Influence Inter Vivos and the Elderly*, 26 Melbourne U.L. Rev. 499 (2002)

Burrows, Andrew, *Contract, Tort and Restitution – A Satisfactory Division or Not?*, 99 L.Q. Rev. 217 (1983)

Proprietary Restitution: Unmasking Unjust Enrichment, 117 L.Q. Rev. 412 (2001)

Quadrating Restitution and Unjust Enrichment: A Matter of Principle, 8 Restitution L. Rev. 257 (2000)

Caldwell, Lynton K., *Land and the Law: Problems in Legal Philosophy*, 1986 U. Ill. L. Rev. 319

Cane, Peter, *Corrective Justice and Correlativity in Private Law*, 16 Ox. J. Legal Stud. 471 (1996)

Distributive Justice and Tort Law, 2001 N.Z. L. Rev. 401

Casad, Robert C., *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 Mich. L. Rev. 47 (1978)

Chambers, Robert, *Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery*, 92 Yale L.J. 128 (1982)

Charney, David, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1831 (1991)

Chen-Wishart, Mindy, *Restitutionary Damages for Breach of Contract*, 114 L.Q. Rev. 363 (1998)

Ciolino, Dane S., *Reconsidering Restitution in Copyright*, 48 Emory L.J. 1 (1999)

Cohen, Felix S., *Field Theory and Judicial Logic*, 59 Yale L.J. 238 (1950)

Modern Ethics and the Law, 4 Brook. L. Rev. 33 (1934)

Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935)

Cohen, G. M., *The Fault Line in Contract Damages* 80 Va. L. Rev. 1225 (1994)

Cohen, Henry, *Change of Position in Quasi-Contracts*, 45 Harv. L. Rev. 1333 (1932)

Cooter, Robert D., *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143 (1997)

Cooter, Robert D. & Freedman, Bradley J., *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045 (1991)

Cooter, Robert D. & Rubin, Edward L., *A Theory of Loss Allocation for Consumer Payments*, 66 Tex. L. Rev. 63 (1987)

Cooter, Robert D. & Ulen, Thomas S., *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. Rev. 1067 (1986)

Coverdale, John F., *Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73 (1999)

Cowen, Tyler, *Discounting and Restitution*, 26 Phil. & Pub. Aff. 168 (1997)

Craswell, Richard, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99 (2000)

Contract Law, Default Rules, and the Philosophy of Promising, 88 MICH. L. REV. 489 (1989)

Deterrence and Damages: The Multiplier Principle and its Alternatives, 97 MICH. L. REV. 2185 (1999)

Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer–Seller Relationships, 43 STAN. L. REV. 361 (1991)

Cretney, S. M., *Mere Puppets, Folly and Impudence: Undue Influence for the Twenty First Century*, 2 RESTITUTION L. REV. 3 (1994)

Croley, Steven P., *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998)

Cuevas, Mario, *Bankruptcy Code Section 544(a) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail*, 21 SETON HALL L. REV. 678 (1991)

Curran, Vivian Grosswald, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims*, 25 FORDHAM INT'L L.J. 107 (2001)

Dagan, Hanoch, *The Craft of Property*, 92 CAL. L. REV. 1517 (2003)

In Defense of the Good Samaritan, 97 MICH. L. REV. 1152 (1999)

Just Compensation, Incentives, and Social Meanings, 99 MICH. L. REV. 134 (2000)

Restitation and Slavery, 84 B.U. L. REV. (forthcoming 2004)

Takings and Distributive Justice, 85 VA. L. REV. 741 (1999)

Dagan, Hanoch & Heller, Michael A., *The Liberal Commons*, 110 YALE L.J. 549 (2001)

Dagan, Hanoch & White, James J., *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354 (2000)

Dan-Cohen, Meir, *In Defense of Defiance*, 23 PHIL. & PUB. AFF. 24 (1994)

The Value of Ownership, 9 J. POL. PHIL. 404 (2001)

Davies, J. D., *Keeping Fiduciary Liability within Acceptable Limits*, 1998 SINGAPORE J. LEGAL STUD. 1

Davis, Jeffrey, *Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy*, 41 U. FLA. L. REV. 1 (1989)

Dawson, John P., *Negotiorum Gestio: The Altruistic Intermeddler* (pt. 1), 74 HARV. L. REV. 817 (1961)

Negotiorum Gestio: The Altruistic Intermeddler (pt. 2), 74 HARV. L. REV. 1073 (1961)

Restitution Without Enrichment, 61 B.U. L. REV. 563 (1981)

The Self-Serving Intermeddler, 87 HARV. L. REV. 1409 (1974)

Delgado, Richard, *Beyond* Sindell: *Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881 (1982)

DeLong, Sidney W., *The Efficiency of a Disgorgement as a Remedy for the Breach of Contract*, IND. L. REV. 737 (1989)

Dickerson, Kelvin H., *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37 (1985)

Dolan, John F., *A Study of Subrogation Mostly in Letter of Credit and Other Abstract Obligation Transactions*, 64 MO. L. REV. 789 (1999)

Dow, Steven B. & Ellis, Nan S., *The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4*, 65 IND. L.J. 779 (1990)

Drassinower, Abraham, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 U. TORONTO L.J. 459 (1998)

Du Bray, F. Joseph, *A Response to the Anti-Subrogation Argument: What Really Emerged from Pandora's Box*, 41 S.D. L. REV. 264 (1996)

Duxbury, Neil, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421 (1990)

Easterbrook, Frank H. & Fischel, Daniel R., *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425 (1993)

Edeus, Jr., Keith E., *Subrogation of Personal Injury Claim: Toward Ending an Inequitable Practice*, 17 N. ILL. U. L. REV. 509 (1997)

Eisenberg, Melvin A., *Mistake in Contract Law*, 91 CALIF. L. REV. 1573 (2003)

Elkin-Koren, Niva & Salzberger, Eli M., *Towards an Economic Theory of Unjust Enrichment Law*, 20 INT'L REV. L. & ECON. 551 (2000)

Ellman, Ira Mark, *"Contract Thinking" was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001)

The Theory of Alimony, 77 CAL. L. REV. 3 (1989)

Enoch, David, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 OX. J. LEGAL STUD. 629 (2001)

Epstein, Richard A., *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979)

A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973)

The Ubiquity of the Benefit Principle, 67 S. CAL. L. REV. 1369 (1994)

Eskridge, William N., *The New Textualism*, 37 UCLA L. REV. 621 (1990)

Estin, Ann Laquer, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001)

Evans, Simon, *Rethinking Tracing and the Law of Restitution*, 115 L.Q. REV. 469 (1999)

Farnsworth, E. Allan, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985)

Feinman, Jay M., *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983)

Fiss, Owen M., *Against Settlement*, 93 YALE L.J. 1073 (1984)

Conventionalism, 58 S. CAL. L. REV. 177 (1985)

Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982)

The Supreme Court, 1978 Term – Foreword: The Forms of Justice, 93 HARV. L. REV. 1 (1979)

Fletcher, George P., *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972)

Foster, Frances H., *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001)

Linking Support and Inheritance: A New Model From China, 1999 WIS. L. REV. 1199

Fox, Lorna, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & Soc'y 580 (2002)

Fox, Merritt B. & Heller, Michael A., *Corporate Governance Lessons from Russian Enterprise Fiascoes*, 75 N.Y.U. L. Rev. 1720 (2000)

Frantz, Carolyn J. & Dagan, Hanoch, *Properties of Marriage*, 104 Colum. L. Rev. 75 (2004)

Friedmann, Daniel, *The Efficient Breach Fallacy* 18 J. Legal Stud. 1 (1989)

Payment Under Mistake – Tracing and Subrogation, 115 L.Q. Rev. 195 (1999)

The Performance Interest in Contract Damages, 111 L.Q. Rev. 628 (1995)

Restitution for Wrongs: The Measure of Recovery, 79 Tex. L. Rev. 1879 (2001)

Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504 (1980)

Restitution of Profits Gained by Party in Breach of Contract, 104 L.Q. Rev. 383 (1989)

Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free Riding, 36 Loy. L.A. L. Rev. 831 (2003)

Fuller, Hoffman F., *Mistake and Error in the Law of Contracts*, 33 Emory L.J. 41 (1984)

Fuller, Lon L., *Consideration and Form*, 41 Colum. L. Rev. 799 (1941)

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

Galanter, Marc & Cahill, Mia, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994)

Galanter, Marc & Luban, David, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993)

Gallie, W. B., *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society (New Series) 167 (1956)

Garner, Michael, *The Role of Subjective Benefit in the Law of Unjust Enrichment*, 10 Ox. J. Legal Stud. 42 (1990)

Gegan, Bernard E., *In Defense of Restitution: A Comment on Mather*, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller, 57 S. Cal. L. Rev. 723 (1984)

Gergen, Mark P., *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 Fordham L. Rev. 407 (1999)

Liability for Mistake in Contract Formation, 64 S. Cal. L. Rev. 1 (1990)

The Restatement, Third Restitution and Unjust Enrichment at Midpoint (unpublished manuscript)

Restitution as a Bridge Over Troubled Contractual Waters, 71 Fordham L. Rev. 709 (2002)

What Renders Enrichment Unjust?, 79 Tex. L. Rev. 1927 (2001)

Giglio, Francesco, *A Systematic Approach to "Unjust" and "Unjustified" Enrichment*, 23 Ox. J. Legal Stud. 455 (2003)

Glover, John, *Bankruptcy and Constructive Trusts*, 2 Austrl. Bus. L. Rev. 98 (1991)
Goode, R. M., *The Right to Trace and Its Impact on Commercial Transactions II*, 92 L.Q. Rev. 528 (1976)
Goodhart, William, *Restitutionary Damages for Breach of Contract*, 3 Restitution L. Rev. 3 (1995)
Gordley, James, *A Perennial Misstep: From Cajetan to Fuller and Perdue to "Efficient Breach,"* Issues in Legal Scholarship, Symposium: Fuller and Perdue (2001): Article 4, at 21, available at http://www.bepress.com/ils/iss1/art4
The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib, 1 Theoretical Inq. L. 39 (1999)
Gordon, Robert W., *Macaulay, Macneil, and Discovery of Solidarity and Power in Contract Law*, 1985 Wis. L. Rev. 565
Unfreezing Legal Reality: Critical Approaches to Law, 15 Fla. St. U. L. Rev. 195 (1987)
Gordon, Wendy J., *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-by-Case Response to Market Failure*, 8 J.L. & Info. Sci. 7 (1997)
Of Harms and Benefits: Torts, Restitution, and Intellectual Property, 21 J. Legal Stud. 449 (1992)
On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 Va. L. Rev. 149 (1992)
Gordon, Wendy & Frankel, Tamar, *Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. Cal. L. Rev. 1519 (1994)
Gormley, Paul, Comment, *Compulsory Patent Licenses and Environmental Protection*, 7 Tul. Envtl. L.J. 131 (1993)
Grantham, Ross B. & Rickett, Charles E. F., *On the Subsidiarity of Unjust Enrichment*, 117 L.Q. Rev. 273 (2001)
Tracing and Property Rights: The Categorical Truth, 63 Mod. L. Rev. 905 (2000)
Green, Leslie, *Rights of Exit*, 4 Legal Theory 165 (1998)
Greenawalt, Kent, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 Colum. L. Rev. 359 (1975)
Greenblatt, Jeffrey A., *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337 (1997)
Gretton, George L., *Constructive Trusts II*, 1 Edinburgh L. Rev. 408 (1997)
Grey, Thomas C., *Freestanding Legal Pragmatism*, 18 Cardozo L. Rev. 21 (1996)
Groskopf, Ofer, *Protection of Competition Rules via the Law of Restitution*, 79 Tex. L. Rev. 1981 (2001)
Haddock, David & Curran, Christopher, *An Economic Theory of Comparative Negligence*, 14 J. Legal Stud. 49 (1985)
Hadfield, Gillian K., *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 Cal. L. Rev. 541 (1994)
Hahn, Anne-Catherine, Tortious Interference with Employment Contracts: A Property Right over Employees? (unpublished manuscript).

Hand, Learned, *Restitution or Unjust Enrichment*, 11 Harv. L. Rev. 249 (1897)
Hansmann, Henry & Kraakman, Reinier, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879 (1991)
Hanson, Jon D. & Logue, Kyle D., *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 109 Yale L.J. 1163 (1998)
Hardin, Garrett, *The Tragedy of the Commons*, 162 Science 1243 (1962)
Harris, Steven L. & Mooney, Jr., Charles W., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 Cornell L. Rev. 1349 (1997)
Hedley, Steve, *Unjust Enrichment*, 54 Cambridge L.J. 578 (1995)
Unjust Enrichment: A Middle Course?, 2 Ox. U. Comm. L.J. 181 (2002)
Heidt, Kathryn R., *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in Toxic Waste Bankruptcies*, 40 Rutgers L. Rev. 819 (1988)
Heller, Michael & Serkin, Christopher, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 Mich. L. Rev. 1385 (1999)
Hellwege, Phillip, *The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study*, 7 Restitution L. Rev. 92 (1999)
Hilliard, Jonathan, *A Case for the Abolition of Legal Compulsion as a Ground for Restitution*, 61 Cambridge L.J. 551 (2002)
Ho, Lusina, *The Nature of Restitution – A Reply*, 16 Ox. J. Legal Stud. 519 (1996)
Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917)
Holdsworth, W. S., *Unjustifiable Enrichment*, 217 L.Q. Rev. 37 (1939)
Hominer, Ashley S., *Constructive Trusts in Bankruptcy: Is an Equitable Interest in Property More Than Just a "Claim"?*, 19 Bank. Dev. J. 499 (2003)
Hope, Edward W., *Officiousness* (pt. 1), 15 Cornell L.Q. 25 (1929)
Houser, Barbara J., *Chapter 11 as a Mass Tort Solution*, 31 Loy. L.A. L. Rev. 451 (1998)
Huber, Peter K., *Mistaken Transfers and Profitable Infringement on Property Rights: An Economic Analysis*, 49 La. L. Rev. 71 (1988)
Hyman, David A., *Tobacco Litigation's Third-Wave: Has Justice Gone Up in Smoke?*, 2 J. Health Care L. & Pol'y 34 (1998)
Ingram, John D., *Priority between Insurer and Insured in Subrogation Recoveries*, 3 Conn. Ins. L.J. 105 (1996)
Jackson, Thomas, *Statutory Liens and Constructive Trusts in Bankruptcy: Undoing the Confusion*, 61 Am. Bankr. L.J. 287 (1987)
Jaffey, Peter, *Efficiency, Disgorgement, and Reliance in Contract: A Comment on Campbell and Harris*, 22 Legal Stud. 570 (2002)
In rem *Claims to Wealth and Surviving Value*, 55 Cur. Legal Probs. 263 (2002)
Jennings, Marianne M., *The Impact of Alternative Negligence Defense Rules on Litigation Behavior and Tort Claim Disposition*, 5 BYU J. Pub. L. 33 (1991)

Jewell, Michael, *The Boundaries of Change of Position: A Comparative Study*, 8 RESTITUTION L. REV. 1 (2000)

Jones, Gareth, *The Recovery of Benefits Gained from a Breach of Contract*, 99 L.Q. REV. 443 (1983)

Restitutionary Claims for Services Rendered, 93 L.Q. REV. 273 (1977)

Stripping a Criminal of the Profits of Crime, THEORETICAL INQ. L. 59 (2000)

Unjust Enrichment and the Fiduciary's Duty of Loyalty, 84 L.Q. REV. 472 (1968)

Jordan, Jr., Charles M. & Price, Casey J., *First* Moore, *Then* Hecht: *Isn't it Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151 (2002)

Kahan, Dan M., *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000)

Is Ignorance of Fact an Excuse Only for the Virtuous?, 96 MICH. L. REV. 2123 (1998)

Trust, Collective Action, and Law, 81 B.U. L. REV. 321 (2001)

Kahn, Jonathan, *Biotechnology and the Legal Constitution of the Self: Managing Identity in Science, the Market, and Society*, 51 HASTINGS L.J. 909 (2002)

Kalevitch, Lawrence, *Setoff and Bankruptcy*, 41 CLEV. ST. L. REV. 599 (1993)

Kaplow, Louis, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992)

Karst, Kenneth L., *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980)

Kay, Herma Hill, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987)

Keach, Robert J., *The Continued Unsettled State of Constructive Trusts in Bankruptcy: Of* Butner, *Federal Interests and the Need for Uniformity*, 103 COMM. L.J. 411 (1998)

Keating, Gregory C., *Fairness and Two Fundamental Questions in the Tort Law of Accidents* (University of Southern California Law School, Olin Working Paper No. 99-21).

Kenaan, Hagi, *Subject to Error: Rethinking Husserl's Phenomenology of Misperception*, 7 INT'L J. PHIL. STUD. 55 (1999)

Kennedy, Duncan, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982)

Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976)

Key, Paul, *Change of Position*, 58 MOD. L. REV. 505 (1995)

Kleinig, John, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382 (1976)

Korobkin, Russell, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998)

Kovacic, Candace S., *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547 (1986)

Kronman, Anthony T., *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980)

A New Champion for the Will Theory, 91 YALE L.J. 404 (1981)
Paternalism and the Law of Contracts, 92 YALE L.J. 763 (1983)
Precedent and Tradition, 99 YALE L.J. 1029 (1990)
Specific Performance, 45 U. CHI. L. REV. 351 (1978)
Wealth Maximization as a Normative Principle, 9 J. LEGAL STUD. 227 (1980)

Kull, Andrew, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. REV. 919 (2001)
Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts, 79 TEX. L. REV. 2021 (2001)
Mistake, Frustration, and the Windfall Principle of Contract Remedies, 43 HASTINGS L.J. 1 (1991)
Rationalizing Restitution, 83 CAL. L. REV. 1191 (1995)
Regional Digest: USA, 3 RESTITUTION L. REV. 230 (1995)
Regional Digest: USA, 5 RESTITUTION L. REV. 198 (1997)
Regional Digest: USA, 7 RESTITUTION L. REV. 268 (1999)
Regional Digest: USA, 8 RESTITUTION L. REV. 439 (2000)
Regional Digest: USA, 10 RESTITUTION L. REV. 221 (2002)
Restitution and the Noncontractual Transfer, 11 J. CONTRACT L. 93 (1997)
Restitution as a Remedy for Breach of Contract, 67 S. CAL. L. REV. 1465 (1994)
Restitution in Bankruptcy: Reclamation and Constructive Trust, 72 AM. BANKR. L.J. 265 (1998)
Restitution's Outlaws, 78 CHI.-KENT L. REV. 17 (2003)
The Simplification of Private Law, 51 J. LEGAL EDU. 284 (2001)

Landes, William M. & Posner, Richard A., *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978)

Laycock, Douglas, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989)

Leebron, David W., *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991)

Leiter, Brian, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997)

Leslie, Melanie B., *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551 (1999)

Leslie, R. D., *Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor*, 1983 JUR. REV. 12

Levmore, Saul, *Explaining Restitution*, 71 VA. L. REV. 65 (1985)
Obligation or Restitution for Best Efforts, 67 S. CAL. L. REV. 1411 (1994)
Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations, 72 VA. L. REV. 879 (1986)

Lifshitz, Shachar, *Married Against Their Will? A Liberal Analysis of the Legal Aspects of Cohabitation*, 25 TEL-AVIV U.L. REV. 741 (2002) (Heb.)

Linzer, Peter, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. Rev. 695

Litvinoff, Saul, *Subrogation*, 50 La. L. Rev. 1143 (1990)

Llewellyn, K. N., *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355 (1940)

Long, Jr., Robert A., *Note, A Theory of Hypothetical Contract*, 94 Yale L.J. 415 (1984)

LoPucki, Lynn M., *The Unsecured Creditor's Bargain*, 80 Va. L. Rev. 1887 (1994)

Lorenzen, Ernest G., *The Negotiorum Gestio in Roman and Modern Civil Law*, 13 Cornell L.Q. 190 (1928)

Lytton, Timothy D., *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247 (2000)

Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors? Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine, 76 Tul. L. Rev. 727 (2002)

Macaulay, Stewart, *Restitution in Context*, 107 U. Pa. L. Rev. 1133 (1959)

Macneil, Ian R., *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947 (1982)

MacQueen, Hector L., *Unjust Enrichment*, 47 Int'l & Comp. L.Q. 740 (1998)

Madoff, Ray D., *Unmasking Undue Influence*, 81 Minn. L. Rev. 571 (1997)

Mahoney, Margaret M., *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. Fam. L. 221 (1983–84)

Margalit, Avishai & Raz, Joseph, *National Self-Determination*, 87 J. Phil. 439 (1990)

Markovits, Richard S., On the Allocative Efficiency and Distributional Desirability of Shifting from Contributory to Comparative Negligence: A Critique of the Literature and Some Very Partial and Preliminary Third-Best Analyses (unpublished manuscript)

Martin, Cheryl L., *Comment, Louisiana State Law Institute Proposes Revision of* Negotiorum Gestio *and Codification of Unjust Enrichment*, 69 Tul. L. Rev. 181 (1994)

Mather, Henry, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L.J. 14 (1982)

Matsuda, Mari J., *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987)

Mautner, Menachem, *Contract, Trust, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 Theoretical Inq. Law 545 (2002)

"*The Eternal Triangles of the Law*": *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 Mich. L. Rev. 95 (1991)

McBride, Nicholas J. & McGrath, Paul, *The Nature of Restitution*, 15 Ox. J. Legal Stud. 33 (1995)

McCamus, John D., *Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution*, 11 Ottawa L. Rev. 297 (1979)

The Self-Serving Intermeddler and the Law of Restitution, 16 Osgoode L. Rev. 515 (1978)

McCarthy, E. Doyle, *Toward a Sociology of the Physical World: George Herbert Mead on Physical Objects*, 5 Studies in Symbolic Interaction 105 (1984)

McDermott, Mark A., *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 Am. Bankr. L.J. 157 (1998)

McInnes, Mitchell, *Incontrovertible Benefits in the S. Ct. of Canada; Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, 23 Can. Bus. L.J. 122 (1994)

The Measure of Restitution, 52 U. Toronto L.J. 163 (2002)

"Passing On" in the Law of Restitution: A Re-Consideration, 19 Sydney L. Rev. 179 (1997)

Restitution and the Rescue of Life, 32 Alberta L. Rev. 37 (1994)

Unjust Enrichment: A Reply to Professor Weinrib, 9 Restitution L. Rev. 29 (2001)

Mechem, Philip, *A Realistic Treatment of Restitution*, 25 Iowa L. Rev. 187 (1939)

Menkel-Meadow, Carrie, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663 (1995)

Merrill, Thomas W., *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000)

Michell, Paul, *Restitution, "Passing-On," and the Recovery of Unlawfully Demanded Taxes: Why* Air Canada *Doesn't Fly*, 53 U. Toronto Fac. L. Rev. 130 (1995)

Miller, David, *Distributive Justice: What the People Think*, 102 Ethics 555 (1992)

Milnikel, Elizabeth, Discouraging Market Encouragement (unpublished manuscript)

Mitchell, Charles, *Joint and Several Restitutionary Liabilities*, 10 Restitution L. Rev. 87 (2002)

Moran, Mayo, *Rethinking* Winnipeg Condominium: *Restitution, Economic Loss, and Anticipatory Repairs*, 47 U. Toronto L. Rev. 115 (1997)

Murphy, Liam, *Beneficence, Law and Liberty: The Case of Required Rescue*, 89 Geo. L.J. 605 (2001)

Nedelsky, Jennifer, *Law, Boundaries and the Bounded Self*, 30 Representations 162 (1990)

Neuborne, Burt, *Preliminary Reflections on Aspects of Holocaust-era Litigation in American Courts*, 80 Wash. U. L.Q. 795 (2002)

Newton, Natika, *Error in Action and Belief*, 19 Philosophia 363 (1989)

O'Dair, Richard, *Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections*, 46 Cur. Legal Probs. 113 (1993)

Oakley, A. J., *Proprietary Claims and their Priority in Insolvency*, 54 Cambridge L.J. 377 (1995)

Oesterle, Dale A., *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306*, 68 Cornell L. Rev. 172 (1983)
Oldham, J. Thomas, *Management of the Community Estate During Marriage*, 56 L. & Contemp. Probs. 99 (1993)
Oliphant, Herman, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928)
Orlando, Michael, Moore *Revisited: State Sponsored Biotechnological Research and the Takings Clause*, 23 Whittier L. Rev. 437 (2001)
Paciocco, David M., *The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors*, 68 Can. Bar Rev. 315 (1989)
Paniter, Christopher M. E., Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 Stan. L. Rev. 1045 (1984)
Parkinson, Patrick, *Beyond* Pettkus v. Becker: *Quantifying Relief for Unjust Enrichment*, 43 U. Toronto L.J. 217 (1993)
Partlett, David F. & Weaver, Russell L., *Restitution: Ancient Wisdom*, 36 Loy. L.A. L. Rev. 975 (2003)
Perillo, Joseph M., *Restitution in the Second* Restatement of Contracts, 81 Colum. L. Rev. 37 (1981)
Pettit, Philip, *The Cunning of Trust*, 24 Phil. & Pub. Aff. 202 (1995)
Phang, Andrew & Lee, Pey-Woan, *Rationalising Restitutionary Damages in Contract Law – An Elusive or Illusory Quest?*, 17 J. Contract L. 240 (2001)
Polinsky, A. Mitchell & Shavell, Steven, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998)
Porat, Ariel, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 Theoretical Inq. L. 161 (1999)
Porat, Ariel & Stein, Alex, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 Cardozo L. Rev. 1891 (1997)
Posner, Eric A., *Tobacco Regulation or Litigation?*, 70 U. Chi. L. Rev. 1141 (2003)
Posner, Eric A. & Vermeule, Adrian, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689 (2003)
Postema, Gerald J., *On the Moral Presence of Our Past*, 36 McGill L.J. 1153 (1991)
Pound, Roscoe, *A Comparison of Ideals in Law*, 47 Harv. L. Rev. 1 (1933)
A Survey of Social Interests, 57 Harv. L. Rev. 1 (1943)
Prelinger, Ernst, *Extension and Structure of the Self*, 47 J. Psychol. 13 (1959)
Quinn, Michael S., *Subrogation, Restitution, and Indemnity*, 74 Tex. L. Rev. 1361 (1996)
Rabin, Robert L., *Law For Law's Sake*, 105 Yale L.J. 2261 (1996)
Rachlinski, Jeffrey J. & Jourden, Forest, *Remedies and the Psychology of Ownership*, 51 Vand. L. Rev. 1541 (1998)
Radin, Margaret Jane, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982)
Residential Rent Control, 15 Phil. & Pub. Aff. 350 (1986)
Rafferty, Nicholas, *Contracts Discharged Through Breach: Restitution for Services Rendered by the Innocent Party*, 37 Alta. L. Rev. 51 (1999)

Regan, Jr., Milton C., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame L. Rev. 1435 (2001)

Rendleman, Doug, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 Ga. L. Rev. 847 (1999)

Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?, 79 Tex. L. Rev. 2055 (2001)

When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom, 36 Loy. L.A. L. Rev. 991 (2003)

Robinson, Mike, *Judge Dismisses Slave Reparations Case*, Find Law Jan. 26, 2004, at http://news.findlaw.com/ap_stories/other/1110/1-26-2004/20040126100006_33.html

Roe, Mark J., *Backlash*, 98 Colum. L. Rev. 217 (1998)

Romano, Roberta, *Comment on Easterbrook and Fischel, "Contract and Fiduciary Duty"*, 36 J. L. & Econ. 447 (1993)

Rose, Carol M., *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601 (1998)

Trust in the Mirror of Betrayal, 75 B.U. L. Rev. 531 (1995)

Rose, F. D., *Restitution for the Rescuer*, 9 Ox. J. Legal Stud. 167 (1989)

Rotherham, Craig, *The Recovery of Profits of Wrongdoing and Priority in Insolvency: When Is Proprietary Relief Justified?*, 1 Co. Fin. & Insolvency L. Rev. 43 (1997)

Unjust Enrichment and the Autonomy of Law: Private Law as Public Morality, 61 Mod. L. Rev. 580 (1998)

Rubin, Edward L., *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 Wis. L. Rev. 131

Rubinfeld, Daniel L., *The Efficiency of Comparative Negligence*, 16 J. Legal Stud. 375 (1987)

Rusch, Konrad, *Restitutionary Damages for Breach of Contract: A Comparative Analysis of English and German Law*, 118 S. Afr. L.J. 59 (2001)

Salsburg, David S. & Williams, Jack F., *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 Wake Forest L. Rev. 1119 (1997)

Scane, Ralph E., *Relationships "Tantamount to Spousal," Unjust Enrichment, and Constructive Trusts*, 70 Can. Bar. Rev. 260 (1991)

Schlechtriem, Peter et al., *Restitution and Unjust Enrichment in Europe*, 2&3 European Rev. Private Law 377 (2001)

Schwartz, Alan, *The Case for Specific Performance* 89 Yale L.J. 255 (1979)

The Default Rule Paradigm and the Limits of Contract Law, 3 S. Cal. Interdisc. L.J. 389 (1994)

The Myth that Promisees Prefer Supracompensatory Damages: An Analysis of Contracting for Damage Measures, 100 Yale L.J. 369 (1990)

Proposals for Products Liability Reform: A Theoretical Synthesis, 97 Yale L.J. 353 (1988)

Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies, 21 J. Legal Stud. 271 (1992)

Schwartz, Alan & Scott, Robert E., *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541 (2003)

Schwartz, Gary T., *Contributory and Comparative Negligence: A Reappraisal*, 87 Yale L.J. 697 (1978)

Scott, Austin W., *Constructive Trusts*, 71 L.Q. Rev. 39 (1955)

Scott, Elizabeth S. & Robert E., *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998)

Scott, S. R., *The Remedial Constructive Trust in Commercial Transactions*, Lloyd's Mar. & Comm. L.Q. 330 (1993)

Restitution and the Argument of Subjective Devaluation: When is an Enrichment not an Enrichment?, 15 N.Z.U. L. Rev. 246 (1993)

Seavey, Warren A. & Scott, Austin W., *Restitution*, 213 L.Q. Rev. 29 (1938)

Sebok, Anthony J., *The Brooklyn Slavery Class Action: More Than Just a Political Gambit*, Apr. 9, 2002, at http://writ.news.findlaw.com/sebok/20020409.html

The Horowitz Slavery Ad Controversy, and the Problem with Conceptualizing Human Rights Violations as Property-Based, March 26, 2001, at http://writ.news.findlaw.com/sebok/20010326.html

Prosaic Justice, Legal Affairs, Sept./Oct. 2002, at 51

Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two, 58 N.Y.U. Ann. Surv. Am. L. 651 (2003)

Should Claims Based on African-American Slavery be Litigated in the Courts? And if so, How?, Dec. 4, 2000, at http://writ.news.findlaw.com/sebok/20001204.html

Unsettling the Holocaust, Part II, Aug. 29, 2000, at http://writ.news.findlaw.com/sebok/20000829.html

Shavell, S., *The Judgment Proof Problem*, 6 Int'l Rev. L. & Econ. 45 (1986)

Sheehan, Duncan, *What Is a Mistake?*, 20 Legal Stud. 538 (2000)

Shell, G. Richard, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 Vand. L. Rev. 221 (1991)

Shepherd, J. C., *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. Rev. 51 (1981)

Sherman, Jeffrey G., *Undue Influence and the Homosexual Testator*, 42 U. Pitt. L. Rev. 225 (1981)

Sherwin, Emily, *Constructive Trusts in Bankruptcy*, 1989 U. Ill. L. Rev. 297

Restitution and Equity: An Analysis of the Principle of Unjust Enrichment, 79 Tex. L. Rev. 2083 (2001)

Two- and Three-Dimensional Property Rights, 29 Ariz. St. L.J. 1075 (1997)

Silbaugh, Katherine B., *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 Duke J. Gender L. & Pol'y 203 (2001)

Silver, Charles, *A Restitutionary Theory of Attorney's Fees in Class Actions*, 76 Cornell L. Rev. 656 (1991)

Simons, Kenneth W., *Justification in Private Law*, 81 Cornell L. Rev. 698 (1996)
Singer, Joseph W., *Legal Realism Now*, 67 Cal. L. Rev. 467 (1988)
The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975
The Reliance Interest in Property, 40 Stan. L. Rev. 611 (1988)
Smith, D. Gordon, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399 (2002)
Smith, Lionel, *Constructive Trusts and Constructive Trustees*, 58 Cambridge L.J. 294 (1999)
Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach," 24 Can. Bus. L.J. 121 (1994–95)
Restitution: The Heart of Corrective Justice, 79 Tex. L. Rev. 2115 (2001)
Tracing in Bank Accounts: The Lowest Intermediate Balance Rule on Trial, 33 Can. Bus. L.J. 75 (2000)
Unjust Enrichment, Property, and the Structure of Trusts, 116 L.Q. Rev. 412 (2000)
Smith, Stephen A., *Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement*, 115 L.Q. Rev. 245 (1999)
The Idea of Private Law, 112 L.Q. Rev. 363 (1996)
Justifying the Law of Unjust Enrichment, 79 Tex. L. Rev. 2177 (2001)
Taking Law Seriously, 50 U. Toronto L.J. 241 (2000)
Sovern, Jeff, *Toward a Theory of Warranties in the Sales of Homes: Housing the Implied Warranties Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 Wis. L. Rev. 13
Spence, Andrew G., *In Defense of Subjective Devaluation*, 43 McGill L.J. 889 (1998)
Spier, Kathryn E., *Incomplete Contracts and Signalling*, 23 Rand J. Econ. 432 (1992)
Standen, Jeffrey, *The Fallacy of Full Compensation*, 73 Wash. U. L.Q. 145 (1995)
Sterling Burnett, H., *Suing Gun Manufacturers: Hazardous to Our Health*, 5 Tex. Rev. L. & Pol. 433 (2001)
Stevens, David, *Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things, Pt. II*, 39 U. Toronto L.J. 325 (1989)
Stevens, Robert S., *Involuntary Servitude by Injunction: The Doctrine of* Lumley v. Wagner *Considered*, 6 Cornell L.Q. 235 (1921)
Stoljar, Samuel J., *Restitutionary Relief for Breach of Contract*, 2 J. Cont. L. 1 (1989)
Stout, Lynn, *Other-Regarding Preferences and Social Norms* (Georgetown University Law Center, Business, Economics, and Regulatory Policy and Public Law and Legal Theory Working Paper No. 265902, 2001)
Sullivan, Kathleen M., *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992)
Sunstein, Cass R., *Preferences and Politics*, 20 Phil. & Pub. Aff. 3 (1991)

Sunstein, Cass R. & Thaler, Richard H., *Libertarian Paternalism is not an Oxymoron* (University of Chicago Public Law and Legal Theory Working Paper No. 43)

Sutton, R. J., *Mistaken Payments: An Inner Logic Infringed?*, 37 U. Toronto L.J. 389 (1987)

Thomas, Tracey A., *Justice Scalia Reinvents Restitution*, 36 Loy. L.A. L. Rev. 1063 (2003)

Thornley, Trent, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 Ind. L.J. 513 (1996)

Unger, Roberto M., *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983)

Vagts, Detlev & Murray, Peter, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 Harv. Int'l L.J. 503 (2002)

Vandevelde, Kenneth J., *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 Buff. L. Rev. 325 (1980)

Waddams, S. M., *Breach of Contract and the Concept of Wrongdoing*, 12 S.C.L.R.(2d) 1 (2000)

Waddams, Stephen W., *Profits Derived from Breach of Contract: Damages or Restitution*, 11 J. Cont. L. 115 (1997)

Wade, John W., *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183 (1966)

Wade, Jonathan, *The Change of Position Defence in Restitution*, 52 U. Toronto L. Rev. 275 (1994)

Waggoner, Lawrence W., *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21 (1994)

Waldron, Jeremy, *Redressing Historic Injustice*, 52 U. Toronto L.J. 135 (2002)

Superseding Historic Injustice, 103 Ethics 4 (1992)

Vagueness in Law and Language: Some Philosophical Issues, 82 Cal. L. Rev. 509 (1994)

Walt, Steven & Sherwin, Emily L., *Contribution Arguments in Commercial Law*, 42 Emory L.J. 897 (1993)

Walzer, Michael, *The Communitarian Critique of Liberalism*, 18 Pol. Theory 6 (1990)

Wardle, Lynn D., *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 B.Y.U. L. Rev. 1189

Weber, Mark C., *Taking Subrogation Seriously: The Blue Cross–Blue Shield Tobacco Litigation Reconsidered*, 67 Brook. L. Rev. 381 (2001)

Weinrib, Ernest J., *Punishment and Disgorgement as Contract Remedies*, 78 Chi.-Kent L. Rev. 55 (2003)

Rescue and Restitution, 1 S'vara: J. Phil. & Judaism 59 (1990)

Restitutionary Damages as Corrective Justice, 1 Theoretical Inq. L. 1 (1999)

Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283 (1989)

West, Mark D., *Losers: Recovering Lost Property in Japan and the United States*, 37 L. & Soc'y Rev. 369 (2003)
West, Robin, *Three Positivisms*, 78 B.U. L. Rev. 791 (1998)
Westley, Robert, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. Third World L.J. 429 (1998)
Whelan, Fredrick G., *Property as Artifice: Hume and Blackstone*, 22 NOMOS 101 (1980)
White, James J., *Rights of Subrogation in Letters of Credit Transactions*, 41 St. Louis U. L.J. 47 (1996)
Wittman, Donald et al., *Learning Liability Rules*, 26 J. Legal Stud. 145 (1997)
Wonnell, Christopher T., *The Contractual Disempowerment of Employees*, 46 Stan. L. Rev. 87 (1993)
Replacing the Unitary Principle of Unjust Enrichment, 45 Emory L.J. 153 (1996)
Woodward, Jr., William J., *"Passing-on" the Right to Restitution*, 39 U. Miami L. Rev. 873 (1985)
Worthington, Sarah, *Reconsidering Disgorgement for Wrongs*, 62 Mod. L. Rev. 218 (1999)
Wright, Richard W., *The Principles of Justice*, 75 Notre Dame L. Rev. 1859 (2000)
Yntema, Hessel E., *Jurisprudence on Parade*, 39 Mich. L. Rev. 1154 (1941)
Zamir, Eyal, *The Inverted Heirarchy of Contract Interpretation and Supplementation*, 97 Colum. L. Rev. 1710 (1997)

Book chapters

Allen, Neil, *Necessity, Incapability, and Emergency, in* The Law of Restitution 351 (Steve Hedley & Margaret Halliwell eds., 2002)
Andrews, Neil, *Civil Disgorgement of Wrongdoers' Gains: The Temptation to Do Justice, in* Restitution – Past, Present and Future: Essays in Honour of Gareth Jones 155 (W. R. Cornish et al. eds., 1998)
Anscombe, G. E. M., *The Two Kinds of Error in Action, in* Ethics 279 (Judith J. Thomson & Gerald Dworkin eds., 1968)
Barker, Kit, *Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons, in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004)
Barker, Kit & Smith, Lionel, *Unjust Enrichment, in* Law's Future(s) 411 (2000)
Beatson, Jack, *Benefit, Reliance and the Structure of Unjust Enrichment, in* The Use and Abuse of Unjust Enrichment 21 (Jack Beatson ed., 1991)
Mistaken Payments in the Law of Restitution, in The Use and Abuse of Unjust Enrichment 137 (Jack Beatson ed., 1991)
The Nature of Waiver of Tort, in The Use and Abuse of Unjust Enrichment 206 (Jack Beatson ed., 1991)

What Can Restitution Do for You, in The Use and Abuse of Unjust Enrichment 1 (Jack Beatson ed., 1991)

Bechtler, Thomas W., *American Legal Realism Revaluated, in* Law in Social Context: Liber Amicorum Honouring Professor Lon L. Fuller 3 (Thomas W. Bechtler ed., 1978)

Belk, Russell W., *The Ineluctable Mysteries of Possessions, in* To Have Possessions: A Handbook on Ownership and Property 17 (Floyd W. Rudmin ed., 1991)

Benson, Peter, *Philosophy of Property Law, in* The Oxford Handbook of Jurisprudence and Philosophy of Law 752 (Jules Coleman & Scott Shapiro eds., 2002)

Birks, Peter, *Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences, in* Restitution: Developments in Unjust Enrichment 49 (Mitchell McInnes ed., 1996)

In Defense of Free Acceptance, in Essays on the Law of Restitution 105 (Andrew Burrows ed., 1991)

"At the Expense of the Claimant": Direct and Indirect Enrichment in English Law, in Unjustified Enrichment: Key Issues in Comparative Perspective 493 (David Johnstone & Reinhard Zimmermann eds., 2002)

Overview: Tracing, Claiming and Defenses, in Laundering and Tracing 289 (Peter Birks ed., 1995)

Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights, in Essays on Restitution 164 (P. D. Finn ed., 1990)

The Role of Fault in the Law of Unjust Enrichment, in The Search for Principle: Essays in Honour of Lord Goff of Chieveley 235 (William Swadling & Gareth Jones eds., 1999)

Birks, Peter & Mitchell, Charles, *Unjust Enrichment, in* 2 English Private Law 525 (Peter Birks ed., 2000)

Birks, Peter & Chin Nyuk Yin, *On the Nature of Undue Influence, in* Good Faith and Fault in Contract Law 57 (Jack Beatson & Daniel Friedmann eds., 1995)

Burrows, Andrew, *Public Authorities, Ultra Vires and Restitution, in* Essays on the Law of Restitution 39 (Andrew Burrows ed., 1991)

Reforming Non-Compensatory Damages, in The Search for Principle: Essays in Honour of Lord Goff of Chieveley 295 (William Swadling & Gareth Jones eds., 1999)

Carter, John, *Restitution and Contract Risk, in* Restitution: Developments in Unjust Enrichment 137 (Mitchell McInnes ed., 1996)

Chambers, Robert, *Liability, in* Breach of Trust 1 (Peter Birks & Arianna Pretto eds., 2002)

Tracing and Unjust Enrichment, in Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004)

Chen-Wishart, Mindy, *In Defense of Unjust Factors: A Study of Rescission for Duress, Fraud and Exploitation, in* Unjustified Enrichment: Key Issues in Comparative Perspective 160 (David Johnston & Reinhard Zimmermann eds., 2002)

Chung, Tai-Yeong, *Comparative Negligence, in* 1 The New Palgrave Dictionary of Economics and the Law 352 (Peter Newman ed., 1998)

Cohen, Felix S., *Field Theory and Judicial Logic, in* The Legal Conscience 121 (Lucy Kramer Cohen ed., 1960)

Cohen, Nili, *Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate, in* Good Faith and Fault in Contract Law 25 (Jack Beatson & Daniel Friedmann eds., 1995)

Coleman, Jules L., *Efficiency, Utility and Wealth Maximization, in* Markets, Morals and the Law 95 (1988)

Collins, Hugh, *The Transformation Thesis and the Ascription of Contractual Liability, in* Perspectives of Critical Contract Law 293 (T. Wilhelmsson ed., 1993)

Cooper, Clare, *The House as Symbol of the Self, in* Environmental Psychology: People and Their Physical Settings 435 (Harold M. Proshansky et al. eds., 2d ed. 1976)

Cover, Robert, *Violence and the Word, in* Narrative, Violence, and the Law 203 (Martha Minow et al. eds., 1992)

Dawes, Robyn M. et al., *Cooperation for the Benefit of Us–Not Me, or My Conscience*, in Beyond Self-Interest 97 (Jane J. Mansbridge ed., 1990)

Dawson, John P., *Rewards for the Rescue of Human Life?, in* The Good Samaritan and the Law 63 (James M. Ratcliffe ed., 1981)

Den Uyl, Douglas J., *The Right to Welfare and the Virtue of Charity, in* Altruism 192 (Ellen Frankel Paul et al. eds., 1993)

Dworkin, Gerald, *Paternalism, in* Paternalism 19 (Rolf Sartorius ed., 1983)

Dworkin, Ronald, *Justice and Rights, in* Taking Rights Seriously 152 (1977)

Pragmatism, Right Answers, and True Banality, in Pragmatism in Law and Society 359 (Michael Brint and William Weaver eds., 1991)

Why Efficiency?, in A Matter of Principle 267 (1985)

Edlin, Aaron S., *Due Care, in* The New Palgrave Dictionary of Economics and the Law 653 (Peter Newman ed., 1998)

Finch, Vanessa & Worthington, Sarah, *The* Pari Passu *Principle and Ranking Restitutionary Rights, in* Restitution and Insolvency 1 (Francis Rose ed., 2000)

Finn, P. D., *The Fiduciary Principle, in* Equity, Fiduciaries and Trusts 1 (T. G. Youdan ed., 1989)

Fish, Stanley, *Fish v. Fiss, in* Doing What Comes Naturally 120 (1989)

Fokkema, D. C. & Hartkamp, A. S., *Law of Obligations, in* Introduction to Dutch Law for Foreign Lawyers 93 (J. M. J. Chorus et al. eds., 2d rev. ed. 1993)

Fried, Charles, *Is Liberty Possible?*, *in* Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy 89 (Sterling M. McMurrin ed., 1987)

Friedmann, Daniel, *Good Faith and Remedies for Breach of Contract, in* Good Faith and Fault in Contract Law 399 (Jack Beatson & Daniel Friedmann eds., 1995)

Restitution for Wrong: The Basis of Liability, in Restitution – Past, Present and Future: Essays in Honour of Gareth Jones 133 (W. R. Cornish et al. eds., 1998)

Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution, in Essays on the Law of Restitution 247 (Andrew Burrows ed., 1991)

Friedmann, Daniel & Cohen, Nili, *Payment of Another's Debt*, *in* 10 International Encyclopedia of Comparative Law ch. 10 (1991)

Gallo, Paolo, *Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile, in* Unjust Enrichment: The Comparative Legal History of the Law of Restitution 275 (E. J. H. Schrage ed., 1995)

Geertz, Clifford, *Local Knowledge: Fact and Law in Comparative Perspective, in* Local Knowledge 167 (1983)

Goode, Roy, *Property and Unjust Enrichment, in* Essays on the Law of Restitution 215 (Andrew Burrows ed., 1991)

Proprietary Restitutionary Claims, in Restitution – Past, Present and Future: Essays in Honour of Gareth Jones 63 (W. R. Cornish et al. eds., 1998)

Gordley, James, *The Principle Against Unjustified Enrichment, in* Gedächtnisschrift Für Alexander Lüderitz 213 (K. Luig et al. eds., 2000)

Gordon, Robert W., *New Developments in Legal Theory, in* The Politics of Law: A Progressive Critique 413 (David Kairys ed., 2d ed. 1990)

Hampton, Jean, *Selflessness and the Loss of Self, in* Altruism 135 (Ellen Frankel Paul et al. eds., 1993)

Hart, H. L. A., *Between Utility and Rights, in* Essays in Jurisprudence and Philosophy 198 (1983)

Hayek, F. A., *Freedom and Coercion, in* Liberty 80 (David Miller ed., 1991)

Holmes, Oliver Wendell, *The Path of the Law, in* Collected Legal Papers 167 (1920)

Honoré, Antony M., *Law, Morals and Rescue, in* The Good Samaritan and the Law 225 (James M. Ratcliffe ed., 1981)

Ownership, *in* Making Law Bind: Essays Legal and Philosophical 161 (1987)

Howarth, David, *Profits from Breach of Contract, in* The Law of Restitution 209 (Steve Hedley & Margaret Halliwell eds., 2002)

Jaffey, Peter, *Two Theories of Unjust Enrichment, in* Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004)

Jencks, Christopher, *Varieties of Altruism, in* Beyond Self-Interest 53 (Jane J. Mansbridge ed., 1990)

Johnston, David & Zimmermann, Reinhard, *Unjustified Enrichment: Surveying the Landscape, in* Unjustified Enrichment: Key Issues in Comparative Perspective 3 (David Johnston & Reinhard Zimmermann eds., 2002)

Joubert, D. J. & Van Zyl, D. H., *Mandate and Negotiorum Gestio, in* 17 The Law of South Africa 30 (W. A. Joubert & T. J. Scott eds., 1983)

Klimchuk, Dennis, Mack v. Canada (Attorney-General) *and the Structure of the Action in Unjust Enrichment, in* Calling Power to Account: Law's Response to Past Injustice (David Dyzenhaus and Mayo Moran eds., 2004)

Unjust Enrichment and Corrective Justice, in Understanding Unjust Enrichment (Jason Neyers et al. eds., forthcoming 2004)

Kronman, Anthony T., *Mistake, Disclosure, Information, and the Law of Contracts, in* Foundations of Contract Law 160 (Richard Craswell & Alan Schwartz eds., 1994)

Kull, Andrew, *Mistaken Improvements and the Restitution Calculus, in* Unjustified Enrichment: Key Issues in Comparative Perspective 369 (David Johnston & Reinhard Zimmermann eds., 2002)

Langbein, John H., *The Later History of Restitution, in* Restitution – Past, Present and Future: Essays in Honour of Gareth Jones 57 (W. R. Cornish et al. eds., 1998)

Levmore, Saul, *Unjust Enrichment, in* 3 New Palgrave Dictionary of Economics and the Law 644 (1998)

Llewellyn, Karl N., *A Realistic Jurisprudence; The Next Step, in* Jurisprudence: Realism in Theory and in Practice 3 (1962)

The Study of Law as a Liberal Art, in Jurisprudence: Realism in Theory and in Practice 375 (1962)

Mansbridge, Jane J., *On the Relation of Altruism and Self-Interest, in* Beyond Self-Interest 133 (Jane J. Mansbridge ed., 1990)

The Rise and Fall of Self-Interest in the Explanation of Political Life, in Beyond Self-Interest 3 (Jane J. Mansbridge ed., 1990)

McCamus, John D., *Unjust Enrichment: Its Role and Its Limits, in* Equity, Fiduciaries and Trusts 129 (Donovan W. M. Waters ed., 1993)

McDermott, Peter, *Mistaken Payments, in* The Law of Restitution 371 (Steve Hedley & Margaret Halliwell eds., 2002)

McGregor, Harvey, *Restitutionary Damages, in* Wrongs and Remedies in the Twenty-First Century 203 (Peter Birks ed., 1996)

McInnes, Mitchell, *Disgorgement for Breach of Contract: The Search for a Principled Relationship, in* Unjust Enrichment and the Law of Contract 225 (E. J. H. Schrage ed., 2001)

Muir, Garry A., *Unjust Sacrifice and the Officious Intervener, in* Essays on Restitution 297 (Paul D. Finn ed., 1990)

Munzer, Stephen R., *Human Dignity and Property Rights in Human Body Parts, in* Property Problems From Genes to Pension Funds 21 (1997)

Nolan, R. C., *Conflicts of Interest, Unjust Enrichment and Wrongdoing, in* Restitution – Past, Present and Future 87 (W. R. Cornish et al. eds., 1998)

Nolan, Richard, *Change of Position, in* Laundering and Tracing 135 (Peter Birks ed., 1995)

Remedies for Breach of Contract: Specific Performance and Restitution, in Failure of Contracts: Contractual, Restitutionary, and Proprietary Consequences 34 (Francis Rose ed., 1997)

O'Sullivan, Janet, *Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations, in* Unjustified Enrichment: Key Issues in Comparative Perspective 327 (David Johnstone & Reinhard Zimmermann eds., 2002)

Olsen, Frances, *Asset Distribution After Unmarried Cohabitation: A United States Perspective, in* Dividing the Assets on Family Breakdown 89 (Rebecca Bailey-Harris ed., 1998)

Penner, James E., *Basic Obligations, in* The Classification of Obligations 91 (Peter Birks ed., 1997)

Perkinson, H. J., *Education and Learning from Our Mistakes, in* In Pursuit of Truth 126 (Paul Levinson ed., 1982)

Radin, Margaret Jane, *Property and Personhood, in* Reinterpreting Property 35 (1993)

Rakoff, Todd D., *Enforcement of Employment Contracts and the Anti-Slavery Norm, in* Human Rights in Private Law 283 (Daniel Friedmann & Daphne Barak-Erez eds. 2001)

Raz, Joseph, *The Relevence of Coherence, in* Ethics in the Public Domain: Essays in the Morality of Law and Politics 261 (1994)

Rickett, Charles, *Of Constructive Trusts and Insolvency, in* Restitution and Insolvency 188 (Francis Rose ed., 2000)

Rose, F. D., *Restitution and Maritime Law, in* Unjust Enrichment and the Law of Contract 367 (E. J. H. Schrage ed., 2001)

Rotherham, Craig, *General Defences and Interest, in* The Law of Restitution 512 (Steve Hedley & Margaret Halliwell eds., 2002)

Subrogation, in The Law of Restitution 13 (Steve Hedley & Margaret Halliwell eds., 2002)

Sarat, Austin & Kearns, Thomas R., *Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life, in* Law in Everyday Life 21 (Austin Sarat & Thomas R. Kearns eds., 1993)

Schwartz, Alan, *Karl Llewellyn and the Origins of Contract Theory, in* Jurisprudential Foundations of Corporate and Commercial Law 12 (Jody Kraus & Steven D. Walt eds., 1999)

Schwenzer, Ingeborg, *Restitution of Benefits in Family Relationships, in* 10 International Encyclopedia of Comparative Law ch. 12 (1971)

Sen, Amartya K., *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, in Beyond Self-Interest 97 (Jane J. Mansbridge ed., 1990)

Simons, Kenneth W., *Contributory Negligence: Conceptual and Normative Issues, in* Philosophical Foundations of Tort Law 467 (David G. Owen ed., 1995)

Simpson, Edwin, *Conflicts, in* Breach of Trust 75 (Peter Birks & Arianna Pretto eds., 2002)

Smith, Lionel, *Property, Subsidiarity and Unjust Enrichment, in* Unjustified Enrichment: Key Issues in Comparative Perspective 588 (David Johnston & Reinhard Zimmermann eds., 2002)

Restitution, in The Oxford Handbook of Legal Studies 48 (Peter Cane & Mark Tushnet eds., 2003)

Smith, Stephen A., *Towards a Theory of Contract, in* Oxford Essays in Jurisprudence 107 (Jeremy Horder ed., 4th ser. 2001)

Stoljar, Samuel J., *Negotiorum Gestio, in* 10 International Encyclopedia of Comparative Law ch. 17 (1984)

Sugarman, Stephen D., *Dividing Financial Interests on Divorce, in* Divorce Reform at the Crossroads 130 (Stephen D. Sugarman & Herma Hill Kay eds., 1990)

Swadling, W. J., *Property and Unjust Enrichment, in* Property Problems: From Genes to Pension Funds 130 (J. W. Harris ed., 1977)

Taylor, Charles, *What's Wrong with Negative Liberty, in* Philosophy and the Human Sciences (Philosophical Papers 2) 211 (1985)

Tolhurst, Greg, *Discharge of Contract for Breach, in* The Law of Restitution 489 (Steve Hedley & Margaret Halliwell eds., 2002)

Tunc, Andre, *The Volunteer and the Good Samaritan, in* The Good Samaritan and the Law 43 ((Janer M. Ratcliffe ed., 1981)

Van Nikerk, J. P., *Salvage and Negotiorum Gestio: Explanatory Reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage, in* Unjustified Enrichment 148 (T. W. Bennett et al. eds., 1992)

Visser, Daniel, *Searches for Silver Bullets: Enrichment in Three-Party Situations, in* Unjustified Enrichment: Key Issues in Comparative Perspective 526 (David Johnstone & Reinhard Zimmermann eds., 2002)

Waddams, S. M., *The Relation of Unjust Enrichment to Other Concepts, in* Unjust Enrichment and the Law of Contract 411 (E. J. H. Schrage ed., 2001)

Waldron, Jeremy, *When Justice Replaces Affection: The Need for Rights, in* Liberal Rights 370 (1993)

Weinrib, Ernest J., *The Juridical Classification of Obligations, in* The Classification of Obligations 37 (Peter Birks ed., 1997)

West, Robin, *Taking Preferences Seriously, in* Narrative, Authority, and Law 299 (1993)

Wittman, Donald, *Good Samaritan Rule, in* 2 The New Palgrave Dictionary of Economics and the Law 202 (Peter Newman ed., 1998)

Wonnell, Christopher T., *Unjust Enrichment and Quasi-Contracts, in* 2 Encyclopedia of Law and Economics 795 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000)

News articles

Butterfield, Fox, *Lawsuits Lead Gun Maker to File for Bankruptcy,* N.Y. Times, June 24, 1999, at A18

Forum, *Making the Case for Racial Reparations*, Harper's Magazine, November 2000, at 37

Foxman, Abraham H., *The Dangers of Holocaust Restitution*, Wall Street J., Dec. 4, 1998, at A18

Grillo, Thomas, *Lead-Paint Trial a Closely Watched Affair,* Boston Globe, Sept. 15, 2002, at H1

Jackson, Robert L., *Cincinnati's Suit Against Gun Makers Is Reinstated*, L.A. Times, June 13, 2002, at A17

Kaminer, Wendy, *Up From Reparations*, American Prospect, May 22, 2000, at 38

McWhorter, John, *Against Reparations*, New Republic, July 23, 2001, at 32

Ogletree, Jr., Charles J., *Litigating the Legacy of Slavery*, N.Y. Times, March 31, 2002, at A9

Rosenbaum, David E., *Echoes of Tobacco Suit in Gun Battle*, N.Y. Times, March 21, 1999, at A32

Schoenfeld, Gabriel, *Holocaust Reparations – A Growing Scandal*, Commentary, Sept. 2000, at 25

Turley, Jonathan, Commentary, *Betcha Can't Sue Just One,* L.A. Times, July 26, 2002, at B15

Other

American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002)

Black's Law Dictionary (6th ed. 1990)

Dig. 12.6.14 (Pomponius, Sabinus 21) (Alan Watson ed., Peter Birks trans., 1998)

Kennedy, Randall, A History of the Idea of Reparations for African Americans (the 43d Thomas M. Cooley Lectures, University of Michigan Law School, November 7, 2002)

R. Yair Hayyim Bachrach, Responsa Havat Yair, Resp. 186

INDEX