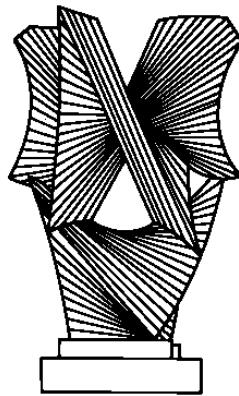


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The Ubiquity of the Benefit Principle

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The Ubiquity of the Benefit Principle

*Richard A. Epstein*¹

The Missing Piece of the Puzzle

The standard first year curriculum in an American Law School divides the private law materials into three main courses: property, torts, and contracts. This organization is not simply an arbitrary assemblage of categories, but reflects a powerful, if unarticulated view of the world. Property comes first, and in its initial and most distinctive portion involves the rules that assign the initial ownership, be it individual or collective, to persons, either singly or in common. The law of tort in all of its ramifications is concerned with the protection of ownership of person (which need not be acquired) and things from various forms of interference, most typically by force and fraud. Finally, the law of contract addresses the way in which these entitlements to labor and property may be voluntarily exchanged. Taken together, these rules allow one to start with the basic building blocks of nature and to develop the complex financial and legal arrangements on which all forms of business relationships depend.²

The scheme is not merely one of interest to common lawyers, but also to philosophers as well. David Hume's, *A Treatise of Human Nature*³ specifies "three fundamental rules of nature, *that of the stability of possession, of its transference by consent, and of the performance of promises.*" His list does not show a perfect correspondence to the traditional categories of property, tort and contract, but with only a little tugging and hauling the basic parallels come through. The stability of possession involves both rules of acquisition and protection; while the rules of transfer of property and the keeping of promises appear to cover the basic law of contracts, the former with respect to the transfer of property and the latter with both that and the rendition of personal services.⁴ The same tripartite division echoes more closely to the common law divisions in more modern work. Thus Robert Nozick's justly celebrated book *Anarchy, State and Utopia*⁵ argues that three distinct types of rules are necessary to offer a complete account of justice in individual holdings and entitlements. His rules of acquisition correspond to the

¹ James Parker Hall Distinguished Service Professor of Law, University of Chicago. I should like to thank Jay Wright for his usual able research assistance.

² For a summary of how the parts fit together, see Richard A. Epstein, *Simple Rules for a Complex World* (forthcoming 1995).

³ David Hume, *A Treatise of Human Nature*, Book III, Section VI (L.A. Selby-Bigge ed. 1888).

⁴ Hume's scheme would have been clearer if he had noted that the transference of property is a subset of keeping promises, just as the law for conveyancing in the standard property courses is a subspecies of contract. But while his classification is not perfect, his instincts are, as ever, sound.

⁵ Robert Nozick, *Anarchy, State and Utopia* (1974).

rules of first possession as they exist at common law; his rules of rectification correspond to the tort law; and his rules of exchange correspond to the law of contract.

However attractive this basic scheme from a legal and philosophical perspective, it is sadly incomplete because it does not give any explicit place to the law of restitution, or quasi-contract. This body of law is very old, and indeed has its first explicit development in the Roman texts,⁶ and was introduced in an explicit way into the common law by Lord Mansfield in *Moses v. MacFerlan*, under the familiar rubric of natural law, with an explicit nod to its Roman sources.⁷ The subject continues to be of vast importance in the day-to-day operation of modern legal systems. During the last part of the nineteenth century, with the treatises of first Keener and then Woodward,⁸ it assumed a fairly comprehensive form that has survived, relatively unscathed, to the present day.⁹ At one point restitution was a standard course in the upper year curriculum, but over time and with the ever greater expansion of public law subjects, it has slowly disappeared from view, being subsumed in a more general course on remedies, or taught in the interstices of the basic law of property, tort, and contract. But its ubiquity is a sign of its theoretical importance, so in this paper, I shall place the question, What is the role of the restitution principle? Front and center, and hope to show how the common law coach runs not on three substantive wheels, but on four.

⁶ See the explicit acknowledgment of the category in Justinian's Institutes, Book III, Title 13. The category of quasi-tort was also included but had no survival value. For discussion, see Max Radin, *The Roman Law of Quasi-Contract*, 23 Va. L. Rev. 241 (1937).

⁷ 2 Burr. 1005, 97 Eng. Rep. 676 (1760). He describes the heads of liability as follows:

[I]t lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to the laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obligated by the ties of natural justice and equity to refund the money.

Note that this definition is in some sense too narrow because it only deals with cases of restitution which asks for the restoration of money paid over. It could well be that the money is sought for some other reason (goods consumed by mistake) or that specific relief (the recovery of a thing) is demand as well, but under the same principles set out by Lord Mansfield. Note too that the monetary relief was as reflection of the common law limitations on the forms of damages, which are far less important in modern systems that unify common law and equitable actions. For an early categorization of the law of quasi-contract, see Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 Yale L.J. 533 (1912).

⁸ William A. Keener, *A Treatise on the Law of Quasi-Contracts* (1893); Frederic Campbell Woodward, *The Law of Quasi-Contracts* (1913). The term restitution seems to have gained popularity after the initial efforts, doubtless to disentangle the connection between contracts (of consensual origin) and quasi-contracts which were (well understood) to be quasi contractual.

⁹ See, e.g., George E. Palmer, *Restitution* (1978). The leading English treatise is Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* (3d ed. 1986).

The exercise is carried out in several stages. The first section of this paper investigates the elusive distinction between harms inflicted and benefits conferred, so critical to the basic divisions of the substantive law. The second section examines the linkage between the law of restitution and the creation of positive spillover effects. The third section then analyzes and compares the response to problems of necessity and mistake in both as it applies in both restitution and torts. The fourth section shows the hidden role that the restitution principle—how it accounts for benefits conferred by the defendant—has on the articulation of general tort principles. The fifth section then indicates the critical role that the restitution principle has in the public law. A brief conclusion follows.

I. Harms and Benefits: The Initial Baseline

It is commonplace in modern discussions to dispute the usefulness of the line between harm inflicted and benefit conferred, and by implication the distinction between restitution and tort, between as it were the harm principle and the benefit principle.¹⁰ So much is said to turn on the choice of the appropriate baseline by which these calculations are made. If *X* has a right to a full tuition scholarship to law school, then an award of half that amount inflicts harm to the extent that the support is not provided: the absence of a greater benefit is a harm inflicted. But if *X* has no right to any scholarship aid at all, then the half tuition scholarship is just what it sounds like: a benefit conferred, albeit a benefit smaller than one that could have been conferred. If *Y* leaves her land in tact so that a neighbor's land retains its support, there is a benefit conferred if the neighbor is not entitled to a lateral support easement. But if the easement is required by operation of law, then the baseline shifts; now not digging out the earth no longer confers as benefit on a neighbor who can count on such support as matter of right. The removal of earth now counts as an infliction of harm, even without any physical invasion.

The question of benefits and harms therefore is parasitic on the choice of baselines. And, to complete the argument, the choice of baselines is often said to be largely arbitrary. This philosophical line of argument is at odds with the unproblematic way in which most people make judgments about whether benefits have been conferred or harms inflicted. No one seriously argues (at least when tax dollars are at stake) that restitution is owed to persons who confer benefits on others by not subjecting them to criminal assaults even if they are able to do so. There are no good citizen awards (one hopes) for not murdering during the past calendar year. Indeed the weakness of the fashionable arguments about the inevitable crossover from harm to benefit lies not in the first step of the argument, that is, the proposition that some baseline must be established before judgments of this sort are allowed. Rather it comes in the second stage of the argument, in the

¹⁰ For my crack at the other side of the line, see Richard A. Epstein, *The Harm Principle—And How it Grew*, in *Philosophical Essays on the Law of Torts* (David Owen ed. forthcoming 1995).

insistence that the choice of baselines is largely arbitrary, or at least a function of some political theory which is heavily freighted in favor of the status quo.¹¹

To see why this last philosophical move is too pessimistic for its own good, recall for the moment the heavy dependence of the private law on its initial demarcation of property rights. Here the first order rule, while subject to refinement as in the lateral support case, is a rule of no physical invasion of the person, land or things of another. Boundaries may normally not be crossed, and those who cross them normally do so at some risk unless they can show some clear justification for their action.¹² The condition is in some sense so unremarkable that it is taken for granted unless and until one starts to think about the subject from a more systematic point of view. One notable effort in this regard is Donald Wittman's important 1984 paper which examined the question of whether the basic institutions of property and tort (or regulation and taxation) should be organized around the principle of Liability for Harm or that of Restitution for Benefit.¹³

One of Wittman's important observations was that the single constraint—create a set of optimal incentives for trade—yield insufficient information for selecting the optimal set of legal rules. To use his most instructive (and ludicrous) example, suppose that we think that the opportunity cost price for an apple is \$1. There are two ways that this price can be charged to *A* who wishes to buy an apple “owned” (the quotation marks should be because the conception of ownership quickly becomes Pickwickian) by farmer *B*, such that *A* will be worse off by \$1 for each apple so purchased. The first way is too obvious to comment on: *A* can buy the apples and pay *B* the cash. That solution presupposes that *B* has property rights and can exclude *A* at will. But the second is to have *B* pay *A* some sum for the apples *not* purchased. That sum owed is then reduced by \$1 for each apple that *A* decides to purchase. Thus if the initial sum owing from *B* to *A* is \$100, then when *A* decides to purchase one apple he gets only \$99 from *B*.

In a topsy-turvy world, however, the incentive effects of *A*'s decision to purchase are, when viewed in isolation, the same as they are in a world in which *A* must pay for each apple he buys. To the extent that *A* is made worse off by \$1 per

¹¹ See Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

¹² “It is an elementary principle, that every unauthorized, and thereby unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage, or as here, the shrubbery.” *Doughtery v. Stepp*, 18 N.C. 371 (1835). Note that the statement of law, while powerful is incorrect insofar as it ignores the body of privileges, not based on consent for entering property, and thus understates the importance of the restitution principle. See the discussion *infra* at page 14 25. The theme of boundary crossing, not coincidentally, plays a prominent role in Nozick's thought. See his *Anarchy, State and Utopia* (1974).

¹³ In a paper of that name: Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. Legal Stud. 57 (1984). For further elaboration on the baseline question, see Gordon, *Of harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. Legal Stud. 449, 452-462 (1992).

apple purchased in each regime, his incentive to consume at the margin is the same in both systems. So in a zero transaction cost world, where administrative costs just don't matter, the two legal rules appear to have the same effect on the level of consumption, except perhaps if there is some wealth effect, which from a distance looks quite small.¹⁴

Wittman then goes on to explain that administrative costs do make a difference, and the decisive difference at that. Part of these costs are incurred to determine that the sum B must pay A equals \$100 for apples not purchased. But how is that baseline number determined? Perhaps we should increase, or decrease, it: after all B may have 101 apples. Unfortunately, we have no set of institutions that can ever settle on this (or any other) number, just as we need no special reflection to accept the zero baseline of the conventional system. Matters get still more confused if additional persons are added to the system. In the conventional world, no one confers a benefit on B from not taking his apples. But in the topsy-turvey world, if A confers this benefit on B by refusing to take the apples, then C and D must do the same thing: so that the more productive B is with his labor, the more he owes to the entire world. The implicit assumption that only two persons are possible trading partners makes Wittman's second ("benefit conferred") scenario far more plausible than it is. But as B shells out cash to C through Z , he can take some comfort that he will never be insolvent: presumably when it comes to shampoo or roof tiles he could be paid in return by the producers of those goods who likewise have similar obligations to multiple persons. In fact in a society in which m individuals each produce one distinct good (i.e., a society without firms or a division of labor), all of us could collect in $m - 1$ cases, only to lose it all in the one case where we produce. The ideal strategy would be to get out of production altogether so as to keep the baseline payments from others, without having to incur the enormous losses of production. Wittman is surely right when he says that the administrative costs of this rival system dwarf those conceivable under the current regime, but he seems to be wrong when he says that the incentive effects are quite the same: with multiple parties the system is sufficiently zany that it could not survive; and if it did, one pessimistic equilibrium is that no one would produce anything—perfect equality and total starvation.

The improbable outcomes of Wittman's odd property systems have an important philosophical message to which baseline skeptics should pay heed. One of the most common arguments against any consequentialist or broadly utilitarian system is that it is indeterminate in its recommendation for legal rules. The effort to argue that in the usual case a nontaking is conferring a benefit on those left

¹⁴ A wealth effect here refers to the differences in patterns of consumption that depend on the wealth of the party faced with marginal choices. See Ronald H. Coase, *The Firm, the Market, and the Law* 170-174 (1988). For the position that these are somewhat more important in understanding the choice of legal rules, see Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 *J. Legal Stud.* 225 (1991).

alone shows that this conclusion is manifestly false on the issues that concern us most—the delineation of property rights in transactions for ordinary goods and services. As ever, there is a political moral here as well. It is often said that the rich and successful are not entitled to keep their wealth because others have contributed to their enterprise by not destroying it. But if the basic norm is one of noninterference, then no one should be paid for observing it, but should be taxed or punished for violating it. Only if one is agnostic on baseline questions, is it necessary to ask whether all persons have to pay their assailants to be free of the risk of rape or murder, a conclusion that creates endless transactional complications.

One historical example shows the point. In California and other western states, the last half of the nineteenth century was marked by constant battles between the forces of open range (whereby landowners were under a duty to “fence out” cattle from their land) and closed range (whereby cattle owners were under a duty to “fence in” their cattle to keep them from trespassing).¹⁵ If the question of baselines were of little or no consequences, the choice of rules should not matter all that much, save for the partisan aspirations of farmers and ranchers. But the differences are not those that arise simply in a zero sum game. Thus Kenneth Vogel has rightly observed the radical asymmetry between the two rules: a rule that requires landowners to fence out roving cattle makes it difficult for the landowner to buy off some ranchers in order to preserve the land for agricultural use.¹⁶ The alternative system allows the landowner to permit some cattle owners to use the land without opening to all simultaneously. Again the asymmetries are very large in the consequences that they generate for an overall evaluation of the law.¹⁷

The robustness of the common law baselines also indicates that the modern constitutional doubts over the harm/benefit distinction, both in academic and judicial work, is again sadly overstated.¹⁸ The philosophical skepticism on choice of baselines takes a particular transaction out of its larger context, and ignores the massive difference in allocative consequences from saying treating *A* did not harm

¹⁵ *Garcia v. Sumrall*, 121 P.2d 640 (Ariz. 1942).

¹⁶ See Vogel, *The Coase Theorem and California Animal Trespass Law*, 16 *J. Legal Stud.* 149 (1987).

¹⁷ Why then ever allow the open range? The answer has to be only use it when the number of persons who want to devote their land to agriculture is so small that it is cheaper to bear the risks of excessive straying, relative to the transaction costs of allowing selective entry. It follows that open range statutes will lose popularity as population increases, which is roughly as things move. See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes*, 42-45 (1991).

¹⁸ For some of the guilty parties in this line of thought, see Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *Harv. L. Rev.* 1165, 1196-1201 (1967), and see the decisions of Scalia, J. and Kennedy J. in *Lucas v. South Carolina Coastal Council*, 505 U.S., 112 S. Ct. 2886 (1992). I have criticized their excessive reliance on the reasonable expectations model in Richard A. Epstein, *A Tangled Web of Expectations: Lucas v. South Carolina Coastal Council*, 45 *Stan. L. Rev.* 1369 (1993).

B may always be used as a verbal equivalent for *A* conferred a benefit on *B*. It is therefore for good reasons that we accept a set of boundary conditions that treats acquisition as the root of ownership and requires other individuals to pay for what they wish, in the ordinary sense of that term, to purchase. Once these baselines are established, the next question is under what circumstances, and with what results to we allow individual conduct that falls outside the rules of this simple game begins with the initial baseline—“buy don’t take.” Indeed the general law of “privilege” is intelligible precisely because it starts with this simple common law baseline and then identifies in a cautious way the special circumstances in which some modification is required.¹⁹ But the strength of the common law baseline lies in the fact that it is serviceable over a wide range of cases, so that matters of privilege, while important both practically and theoretically, are confined and infrequent and are never allowed to dominate the overall system.

II. Positive and Negative Externalities

The decided preference for “buy, don’t take” should quickly put us in a tort frame of mind. The basic interactions of taking something from the possession of another are policed under a rubric of “shame on you if you take,” not “thank you for not taking.” But there is still the question of how a system of restitution—one that calls for compensation for benefits conferred—fits into the overall scheme of legal arrangements. In order to see how the problem arises, it is useful to ask this question: to what extent can it be said that individual actions only “concern” an actor, or that voluntary exchanges only concern the parties to them. For those actions that fall into either of these categories we are saying in effect that we don’t have to worry about the law of tort, or for that matter the law of restitution. We can now have actions that *on net* make either one or (by contract) more persons better off than before. Since no one else is left either better or worse off in consequence of what is done, the private gains to the individual actor or to the trading partners travel effortlessly to the bottom line: since these private gains match up one-to-one with social gains they should be encouraged.

Yet there are *no* individual actions that “concern” only one individual or the small group of individuals that has entered into voluntary arrangements.²⁰ Every transaction has innumerable consequences—positive and negative—with respect to the fortunes and satisfactions both of the individual actor, his trading partners, and of many other individuals. The grand question for the legal system is how ought this endless array of internal and spillover effects to be taken into account. The first approximation to that question raises a parallel to the issues that were of concern to Wittman: one could have a rule that said that we register *all* gains and losses to all parties, including all externalities from individual actions, positive or negative, on some comprehensive utility scale, and then require the individual

¹⁹ See *infra* at 22.

²⁰ For discussion, see Richard A. Epstein, *The Harm Principle*, *supra* note 9.

actor, or group of actors to internalize all of these costs as he does his own private costs and benefits. In principle, that procedure would require payment to those who have lost from the exercise while allowing the exaction of some sort of fee from those who have benefited from it. The class of actions that survive in this world are those for which the gains in the actor's satisfaction, coupled with the collections from strangers, are sufficient to fund payments to those who are left worse off in consequence, and still leave something left over for the actors themselves. In a Coasean world of zero transaction costs, any questions of evaluation of benefits and costs, the processing of claims, or collection and distribution of funds, would be a trivial matter, so using this broad definition of externality sets the perfect foundation for determining legal entitlements.

Of course, this proposed plan of action is manifestly unworkable as a legal program when transaction costs are both positive and substantial. In this state of affairs, it becomes necessary to allow for some liberty of action in a world of inevitable spillovers, both positive and negative: it cannot be that each action has to be justified to all other persons. It is not that there is no cost in ignoring the complications of private actions, and behaving as though the only gains and losses that matter are those which are naturally borne by the actor himself. When (net) positive spillovers are ignored, then private benefits understate social benefits, so it becomes likely that too little of the good or service will be produced, even if reputation and informal persuasion fill in part of the gap left by a tolerant legal order. Yet when (net) negative externalities are ignored, too much of the good will be produced, even after the same set of reputational and informal sanctions do their work. Most importantly, the most common cases are those in which individual actions produce both negative and positive externalities simultaneously, so that it is unclear whether excessive or insufficient production of the activity is undertaken. Thus playing a guitar in the airport corridors, building a house on a hillside, or ringing a bell on Sunday, may be pleasing to some and a source of offense to others, always in varying proportions with widely different intensities.²¹

What then are the respective provinces of tort and restitution in a world of abundant externalities? The law of tort seeks to identify the class of negative externalities that should be taken into account; the law of restitution or quasi-contract for its part is directed toward the positive class of externalities. In each case the decision is done against a backdrop of a presumption that the action in question is one that otherwise produces *net* gain for the actor, for otherwise that action would not be undertaken by a self-interested individual. It is also understood that most people are willing to choose actions that promise net gains to themselves even if they impose substantial losses on others. The connection between gain and loss was perceived at least as early as Aristotle who urged that the commission of many acts involved both a benefit that has been received by an

²¹ See *infra* at 35-36.

actor and a harm that has been inflicted on another person, only to be uncertain about how to deal with the gain in many cases. Consider one famous passage from the *Nicomachean Ethics*:

For it makes no difference whether as good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; for in the case also in which one has received and the other has inflicted a wound, or one has slain and the other has been slain, the suffering and the action have been unequally distributed; but the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant. For the term “gain” is applied generally to such cases, even if it be not a term appropriate to certain cases, e.g., to the person who inflicts a wound—and “loss” to the suffered; at all events when the suffering has been estimated, the one is called loss and the other gain.²²

Here Aristotle tries to make it appear as though every case falls into the easy category where the gain to the wrongdoer equals the loss to the victim, so that restoration is easy. This model works well enough when money received when someone is defrauded can be restored (with interest). But it works far less well in the wounding case where the “gain” may take many forms: e.g., the business advantages of not having to skate against Nancy Kerrigan, or the simple reduction in the cost of precautions. When gain does not equal loss, the tort impulse has the measure of damage equal to the loss, which *ex post* is usually larger than the other gain, even if the gain from lower precautions is certain and the losses are only a remote.

For all the weaknesses in Aristotle’s treatment, it does set up the theoretical unity in the assessment of gains and losses by raising the questions in tandem. It is puzzling therefore to see that these two bodies of law are so often discussed as though they fall into separate compartments. But a unified approach seeks to work out the connections between them, and to use the insights that are obtained to explain why as a body of doctrine the law of restitution, while part of the system, is less central to the operation of the private law system than the law of tort, but still critical to its complete understanding nonetheless.

If all the effects of a given action were confined to the actor, then there would be little reason for the law to disentangle benefits from harms. The person could engage in that exercise himself while choosing his course of action. The legal problem therefore is to deal with the effects, both negative and positive, that individual actions have on others. Here the basic question is to pick out those

²² Aristotle, *Nicomachean Ethics*, Book V, Ch. 4.

spillovers to which the legal system will (at some positive cost) generate a response, and those consequences, positive or negative, that are best left outside of it. In essence we proceed by identifying those cases that fall at the extremes of either easy inclusion or exclusion, and then feel our way to the mass of cases that fall somewhere in the middle.

In dealing with the law of restitution, one of the first tasks is to be sure that the remedies that are afforded are part and parcel of a system capable of sensible administration of justice. One constraint is that the class of benefits conferred (remember the baseline case of exclusive owners with transfer by voluntary sale is solved) for which compensation is required must be small enough to be manageable. At this point, the quasi-contract term is suggestive if only because the law seeks to mimic contractual transactions where explicit voluntary arrangements cannot at low cost provide the same relevant benefits.²³ By implication, when voluntary transactions are available, it is best that they be allowed to operate. It is better that you ring my doorbell for permission before cutting my lawn instead of cutting the lawn and then ringing the doorbell demanding compensation for the cut grass. Even if I am out of town, the intermeddling is “officious” because I could have well guarded against the prospect of an untended garden by hiring a gardener on a long-term contract to take care of matters whether I am at home or not. So “first do, and then pay” has no more attraction than the incentive schemes that Wittman has imagined for the nonpurchase of goods from strangers. To give but one mundane example it is a sign of social disintegration when strangers start washing your front windows when your car is stopped at a red light, only to demand payment with the implicit of damage if payment is not forthcoming. No exception to the general rule here.

The question still arises, however, as to what cases fall into the exceptions from this general rule that benefits should be provided through voluntary transactions. Here we can take a leaf from the account of voluntary action given by Aristotle in Book V of his *Nicomachean Ethics*. Aristotle’s basic position is that all actions are presumed voluntary until we can show otherwise, and that the two major causes for revising that original estimation are actions that are done under necessity and under mistake.²⁴ The source of the compulsion could be natural events or the actions of other individuals; and so too with the source of mistake. But however induced both of these conditions undermine the normal robust assumption that people ought to be responsible for the consequences of their own acts. It is useful to recall how these conditions work.

Compulsion. Compulsion (or necessity) imposes a constraint on the domain of choice so that people who act are not free, not in the trivial sense of having actions

²³ A familiar theme, stressed in Guido Calabresi & A. Douglas Melamed: *Property Rights, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972); Richard A. Posner, *Economic Analysis of the Law* 133-134 (4th ed. 1992).

²⁴ Aristotle, *Nicomachean Ethics*, Book III, 964 (Richard McKeon ed. 1941).

that are caused (for all motivated actions are caused in some sense) but in the sense of laboring under external constraints that alter their choices in ways that (1) are sufficiently infrequent so that they may be singled out, and (2) sufficiently dramatic so that the distinction is rendered workable in practice.

It is worth noting that Aristotle's account dovetails fairly closely with the common law. His two instances of compulsion represent the act of a God and of a third party, both of which deny that the defendant did the act. Aristotle also recognizes that actions done in fear of greater harm fall into a difficult case, as indeed they do at common law, most notably in the famous cases of *Weaver v. Ward*²⁵ and *Smith v. Stone*.²⁶ Thus in *Gilbert v. Stone*,²⁷ the companion case to *Smith*, the defendant entered plaintiff's land in order to escape pursuit by a third party. The court held that he was liable for the trespass but that the party who compelled his entry could not be sued. Aristotle is uncertain as to whether liability should attach because the action was voluntary in one sense (i.e., the product of individual volition) but involuntary in another (i.e., the product of external compulsion). He writes:

Those things, then, are thought involuntary, which take place under compulsion or owing to ignorance; and that is compulsory of which the moving principle is outside, being a principle in which nothing is contributed by the person who is acting or is feeling the passion, e.g., if he were to be carried somewhere by a wind, or by men who had him in their power.²⁸

Aristotle's account is quite sketchy, for it does not address either the issue of multiple causation and relative responsibility that lie at the heart of the common law doctrines of proximate causation. Focusing on these issues, moreover, allows us to escape the Aristotle's dilemma of either treating actions done under compulsion as though they were either fully voluntary or wholly without moral responsibility.

The key to the discussion is to draw a strong distinction between principles of absolute or ultimate responsibility on the one hand and relative responsibility on the other.²⁹ When the question is one of relative responsibility the question to be asked is only whether *as between the parties to the dispute*, the edge should be given to either the plaintiff or the defendant. In principle the repeated application of principles of relative responsibility should allow a strict hierarchy to be established among all actors who are involved in a given dispute. All that is

²⁵ *Weaver v. Ward*, Hobart 134, 80 Eng. Rep. 284 (K.B. 1616) (no trespass "as if by force a man take my hand and strike another").

²⁶ *Smith v. Stone*, Style 65, 82 Eng. Rep. 533 (K.B. 1647) (no trespass, if carried onto land of another).

²⁷ Style 72, 82 Eng. Rep. 539 (K.B. 1647).

²⁸ Aristotle, *Nicomachean Ethics*, Book III, 964 (R. McKeon ed. 1941).

²⁹ See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 174-177 (1973).

necessary are successive comparisons in which the loser of the initial dispute then tries his luck against some other defendant, on the same question of relative responsibility. If there are n possible parties to a dispute, then in principle $n-1$ actions should establish the relevant hierarchy, such that any person with lesser responsibility is allowed to sue any person with greater responsibility. The question of rank ordering is critical whenever any party is insolvent, for in a system of relative responsibility, the party with greater responsibility is liable to those with less, notwithstanding that he does not have an action over against a party with greater responsibility. Absolute responsibility, in contrast, only looks at the two extremes. It assumes that all parties are solvent and present in a single litigation. Under those circumstances all the middlemen, so to speak, drop out of the equation, so that the party who is injured has one and only one action, that against a party with the greatest responsibility.

This distinction is of greatest importance in the simple case where A compels B to enter C 's land. If the only question is the relative responsibility, then C can recover from B , for while C did nothing at all, B did enter C 's land. Precisely because A is not amenable to suit the action should be allowed. But under a system of absolute responsibility, however, C can only recover from A , and B drops out entirely given the excuse that external compulsion supplies to his conduct. Recall now that B is Aristotle's man who acts under compulsion, and the ambivalence that Aristotle observes becomes understandable because in a system of relative responsibility B is responsible to C but may have an action over against A . In a moral system, the imperfections of the real world do not impinge on matters of accountability, so that only A is responsible. The older common law rules that allowed suits by C against B , but not against A thus show the tension between the ease of proof within a tort system and the matter of ultimately responsibility: the true culprit escapes. Yet even that judgment is contingent on the question of whether B could have an action for indemnity against A , an issue on which there is, as best as I can recall, very little authority in the early cases, but for which an action is easily allowable under the more expansive twentieth century notions of proximate causation.³⁰

Mistake. Likewise, mistake is said to negate voluntary action because it leads people to place the wrong values, positive and negative, on the choices that they make, and hence leads them to do things that they later regret when the true state of affairs comes to light. Just as necessity can arise from natural events or the actions of third parties, so too with mistake: Mistake may be the result of a simple misunderstanding or it may be induced by mischief and fraud of other

³⁰ See, e.g., *Union Stock Yards Co. v. Chicago, Burlington & Quincy Rr. Co.*, 196 U.S. 217 (1905), which generally denied actions for indemnity, but would allow it where the wrongs of the two parties were not of equal degree. Note that many modern systems would excuse B entirely because of the external compulsion.

individuals. The differences between these two cases seems reasonably clear. Where the mistake is induced by the misrepresentation of a third party, then one party is wholly passive and innocent, while the other party is not passive and may have acted either negligently or fraudulently. But the cases of joint innocent mistake remain the most difficult for both moral and legal systems, for there is reason to believe that the foundations on which conduct has been undertaken or bargains made have been removed, yet it is often difficult to assign responsibility for them.³¹

III. Conventional Grounds for Restitution

A. Necessity and Compulsion

It is very clear that the categories of compulsion, or necessity, and mistake have genuine purchase power in the law of tort, where they are usually invoked in order to alter the usual rule that allows the owner of property to exclude others at will from the premises.³² The better solution is the one that calls for the creation of a conditional privilege, whereby the thing can be taken or used so long as compensation is made for the rental value of the property and the damage so caused.³³ That approach adopts the “take now, pay later’ approach for these transactions. It also gives rise to the question of whether one should treat this as a case of restitution for benefit conferred instead of simply as a matter of liability for harm caused.³⁴ The point behind this intuition is that there is no necessary correlation between the harm caused to the owner of the property and the (far greater) short term gain that is obtained by the party using the property under conditions of necessity. But on this point too the better answer has been that the restitution measure creates an undeserved windfall, and that all persons are better off with the knowledge that they can use the property of others in times of necessity without having to forfeit a monetary sum equal to the value that they attach to their own life or good health.³⁵ The theory of restitution does not make good sense when the benefits conferred are done so by happenstance or chance—or indeed by the decision of the user of the property and not its owner.

³¹ See Goff & Jones, 87-136. for extensive discussion of mistake of law and fact. E. Allan Farnsworth, *Contracts* 677-700 (2d ed. 1990).

³² *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908). (“It is clear that an entry upon the land of another may be justified by necessity. . . .”)

³³ *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

³⁴ See, e.g., Robert Keeton, *Conditional Fault in the Law of Torts*, 72 *Harv. L. Rev.* 401 (1959) (arguing that the benefit in *Vincent* conferred on the boatowner was the avoidance of loss of the boat).

³⁵ For a discussion of the tradeoff between holdout and externality in connection with the necessity cases, see Richard A. Epstein, *Bargaining with the State* 54-58 (1993).

It is a far different situation, with very different legal consequences, when some organized effort by one party is necessary to save or salvage the property of others, when immediate necessity prevents the formation of some contract between them. Here a risk adjusted rate of return for the activities, capped by some substantial fraction of the property saved, becomes the legal norm.³⁶ That result is one that is most conspicuous in the law of salvage, where the rescuers have to bear substantial costs to keep their fleet at the ready. Nonetheless the same principles seem to apply in other contexts as well, where an immediate necessity prevents the formation of a voluntary contract suitable for saving of life and limb.

The famous case of *Cotnam v. Wisdom*³⁷ confirms just that instinct by allowing a restitution remedy for a physician who gave surgical treatment that did not save an unconscious man who had been mortally injured when thrown from a street car. Here a remedy was allowed because there was no risk of bypassing a voluntary market, and little risk of providing services that the victim himself would have refused if competent to bargain. It is perhaps a somewhat closer case as to whether the fees should be allowed only in those cases where the services were successful and not otherwise. The advantage of tying the payment to outcome is that it helps guard against the provision of medical services in hopeless cases, solely to extract a fee from the helpless victim. Yet on the other side, it is evident that in ordinary fee for service medicine the payment to physician is not typically conditioned upon the soundness of the diagnosis nor the success of the treatment. It is paid for the rendering of services in good faith, irrespective of the outcome. In nonconsensual settings, the risk of unwanted services is a greater possibility, but not so powerful as to justify a switch of rules to one that looks at outcomes only. Instead it seems better to monitor this question directly within the context of a rule that allows for payment of routine fees, and thus refuse the fees on the ground that there was no reasonable basis for provision—an easy judgment only where the patient was certain to die no matter what heroic measures were adopted.

Cotnam v. Wisdom is also interesting for its evaluation of the damage remedy. Fees for services rendered are not set by heaven, and here the plaintiff set his fee after making inquiries as to the net worth of the decedent, with the obvious intention of acting like a price-discriminating monopolist. The court held, rightly in my view, that this information had to be ignored, and the reasonableness of fees had to be set independent of the knowledge of defendant's wealth. In so doing it

³⁶ See 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); Richard A. Epstein, *Holdouts and Externalities: One More Salute to Ronald Coase*, 36 J. Law & Econ. 553 (1993). Note too that restitution runs against the hull so that the salvor obtains priority over a ship's mortgagee. The rule makes it possible for the salvor to negotiate without regard to the state of the title. Note too that the benefit is also conferred upon the first mortgagee whose security could well be worthless at the bottom of the sea. See Saul Levmore, *Explaining Creditor Priorities*, forthcoming.

³⁷ 104 S.W.2d 164 (Ark. 1907).

mirrored the outcome of a competitive market in which price discrimination is not possible no matter what the absolute or relative wealth of the purchaser.³⁸ In fact the question of overcharging for emergency services on a spot contract is not an issue of isolated importance, but is indeed one of major institutional importance, for virtually all routine accidents present the same risk that matured in *Cotnam*.³⁹

It is important, however, to be aware of the limits on generalization on this question. In this issue, Saul Levmore addresses just this issue in an instructive comparison of two cases in his contribution to this issue.⁴⁰ In *Leebov v. United States Fidelity & Guaranty Co.*,⁴¹ the plaintiff was a builder who used his trucks to shore up a construction site in order to prevent major landslide damage to nearby properties. His trucks were destroyed in the successful operation, and the value of the property saved was far greater than the losses averted, losses for which the defendant insurer would have been held surely liable under its insurance policy. Although the losses were in some sense voluntary, they occurred in a setting dominated by necessity and the insurance company was doubtless far better off paying for the trucks than the tort losses. Liability for necessity seems to make sense.

The further question, however, that Levmore asks is whether recovery in restitution makes sense where success does not validate the initial decision to shore up the hillside, that is, in those cases where *both* the trucks are lost and the neighboring property is destroyed. Here we do not have the advantages found in *Cotnam v. Wisdom*, namely of a consistent pattern of voluntary transactions against which to measure the reasonableness of the behavior in this case. But if the question here is whether one can detect any form of opportunism on the part of Leebov, or any collateral motive for doing the act, the answer appears to be no. The conduct here is exactly what the insurer would have wanted, playing the

³⁸ A point that was intuitively grasped by the court in *Cotnam* which quoted with approval the following sensible passage from *Robinson v. Campbell*, 47 Iowa 625 (1878). "There is no more reason why this charged should be enhanced on account of the ability of the defendants to pay than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work."

³⁹ Just this problem, for example, was common in England when personal injuries were treated by physicians who were reimbursed under the poor law for their actions. Where the person injured was treated by physicians under contract with the local township, the costs incurred were small. But when someone had the misfortune to be injured away from his home base, the charges demanded could be inordinate. See A.W.B. Simpson, *Priestley v. Fowler*, (Mss with author) 33-41. The basic rule settled upon was that treatment for the "casual poor" those who were injured away from home fell on the parish in which the injury took place. The advantages of the rule were two. It offered a clear rule, and it assured prompt treatment that could be otherwise denied if the local parish sought to move the hapless victim home in order to escape the charges in question. Applied uniformly the burdens equaled out, so there was a form of restitution of sorts, between parishes.

⁴⁰ See Saul Levmore, *Obligation or Restitution for Best Efforts*, So. Calif. L. Rev. (forthcoming 1994). See also his earlier paper, Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65 (1985).

⁴¹ 165 A.2d 82 (Pa. 1960).

odds. It is important not to overstate the issue because unlike *Cotnam*, a fairly detailed contract of insurance regulated the issue,⁴² and it could have stated that Leebov took this actions at his own risk, just as most insurance contracts for damage to the insured's property or liability on it require that the insured take loss-reducing precautions in the maintenance of property both before and after coverage is extended. Still it is a good guess that the right answer is one that treats the cost of good faith but unsuccessful efforts to prevent the landslide as compensable under a restitution theory.

Levmore's companion case, *McNeilab v. North River Insurance Co.*,⁴³ arose out of the Tylenol tampering cases of the early 1980's. After Johnson & Johnson (the maker of Tylenol) learned of the first instances of tampering, it removed all its Tylenol capsules from the market even though the Food and Drug Administration did not require any recall. The removal campaign has widely been hailed as the master response to a crisis situation, for it left Tylenol with public praise and a higher market share than before the incident took place. As an outgrowth to the episode, however, McNeilab sought to recover its recall expenses under its insurance policy, forcing in effect the comparison between its case and *Leebov*. Levmore notes the obvious distinction between the two cases: with *Leebov* the extra precaution was successful, while with *McNeilab* only a few additional tablets laced with cyanide were discovered. He then notes that in situations of this sort, it is tempting to infer that the recall was not prompted by a fear of liability ex ante because it did not reduce that liability ex post.

While this is surely part of the situation, several other pieces to the puzzle have to be noted. *Leebov* did not present any overarching concern with public good will or regulatory response, both of which deal with losses that are generally outside the scope of liability coverage. In addition, there was ample time for a consultation with the insurer before embarking on a \$100 million recall campaign, and as Levmore notes, recall insurance is available for a separate premium, which militates against providing for it under the standard liability policies. The failure of the outcome and the presence of a manifest collateral motive differentiate this case from *Leebov*. All in all, there is sufficient reason to believe that the conduct undertaken by McNeilab was not conduct which ex ante was in the joint interest of both the insurer and the insured, so that necessity in question (such as it was) did not justify the imposition of the loss in question. As with the law of tort, restitution cases can only be understood if a sharp distinction is drawn between restitution in cases of benefits conferred on strangers, and restitution in the context of ongoing, if incomplete contractual arrangements.⁴⁴

⁴² On this contract/restitution overlap, see Andrew Kull, Restitution as a Remedy for Breach of Contract, So. Calif. L. Rev. (forthcoming 1994).

⁴³ 645 F. Supp. 525 (D.N.J. 1986).

⁴⁴ On which again see Kull, supra note 41.

The entire question of whether payment in necessity cases should be dependent on success is one that yields to no dominant outcome in cases of genuine uncertainty. In principle we could make the parties indifferent to the choice of rule by altering the level of compensation paid when success occurs. But there is an enormous difference between a probability of 0.1 and 0.001; yet after the fact it is often not possible to decide which type of long shot was brought home a winner. In addition, if the multiple for compensation becomes too large, the solvency constraint begins to bite. Few surgeons use contingent fees for surgery in successful cases, and it seems unlikely that it should be adopted here. Yet before wedding one's self to a rule that predicates a remedy solely on the rendition of services, recall that (unlike *Leebov* and *McNeilab*) the salvor cases are all contingent on success, but subject to a clear upper bound of 50 percent of the cargo and hull saved. The size of the transactions, the publicly verifiable nature of the evidence, the collateral motives of the intervenor all play their part in the analysis. Yet why should we expect otherwise. In the area of voluntary contracts there is no dominant solution. Sometimes payment is contingent on performance; often it is not. The law of restitution could hardly achieve a uniform solution that is simpler than that observed in voluntary arrangements directed to this very question.

B. Mistake

The second category of cases that falls under the rubric of restitution involves cases of mistake. Yet here too there is an instructive parallel to the tort side of the problem. Consider the case where the defendant cuts and harvests the plaintiff's trees, thus committing the wrongs of trespass and conversion.⁴⁵ The widely known doctrine of waiver of tort permits the plaintiff to tie recovery not to the loss suffered, but to the benefit obtained by the defendant.⁴⁶ Some early cases took the line that the tort could be waived only in the event that the trees were sold, thereby establishing their market value.⁴⁷ But while resale is surely the easy case, there is no reason in theory why it should be the only case: if the timber is kept or used by the plaintiff, the gain obtained is more difficult to monetize, but nothing in the law of unjust enrichment suggests that the plaintiff should not be allowed to prove up those damages if they are substantially greater than the tort recovery. The reason why waiver of tort is invoked is to prevent the defendant from making a profit by bypassing the tort system, and the extraction of full benefit operates as the equivalent of injunctive forms of relief.⁴⁸ Clearly, further modifications are,

⁴⁵ See for discussion, Oliver Wendell Holmes, *The Common Law* 97 (1881). For the rule which holds a converter liable when property is taken under an innocent and excusable mistake, see *Maye v. Tappan*, 23 Cal. 306 (1863).

⁴⁶ On which generally see Goff & Jones at 605-623.

⁴⁷ See, e.g., *Jones v. Hoar*, 22 Mass. 285 (1827).

⁴⁸ See, e.g., *Braithwaite v. Akin*, 56 N.W. 133 (N.D. 1893).

and should be made for those conversions made in bad faith, where the defendant is not permitted to reduce the amount paid by the costs of cutting and collecting the trees, that is, by an amount equal to the benefit that his wrong conferred upon the plaintiff who no longer need expend his own labor to achieve the same result.⁴⁹ The rules that are applied to mixture of goods by honest mistake, wherein each side is given compensation in proportion to the benefits contributed to the joint enterprise, carry over without losing a beat to the instant situation.⁵⁰

Yet just as the law of necessity need not be moored to the law of tort, so too with the law of mistake. One early mention of quasi-contract in the Roman law is in a text of Gaius, which speaks of money paid over by mistake to discharge a debt that was not owed. The explanation given was that the action to recover the money so paid could not be in contract, since there was no promise to return money that had been paid in order to discharge, not create an obligation.⁵¹ The explanation for the rule is easy to see, for if the money is not returned, then the transaction will become *de facto* a gift, even though the mistake negatives any donative intent by the defendant. As with the case of conversion it is easy to imagine situations in which the remedy of restoration is not so easy to implement. If goods delivered by mistake are converted or consumed, then the appropriate remedy is the restoration of like goods to plaintiff, or that failing, a payment of the reasonable price for the goods in question.

IV. Restitution and Tort.

A. The Matching Principle

Thus far I have assumed that the impulse toward restitution manifests itself in the creation of some special remedy for a plaintiff who has conferred some benefit upon plaintiff where a voluntary transaction was not possible and a gift not intended. But not all situations in which benefits are conferred are appropriate for the invocation of the restitution remedy. Legal actions are always costly to bring, and those for restitution may be especially complicated, especially if the benefit conferred upon another party takes the form of a reduction in cost difficult to measure. In addition, in many cases the intention is to make a gift of services for which no direct compensation is expected.

⁴⁹ For discussion, see Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 *J. Legal Stud.* 1, 17-21 (1987) (noting the relationship between conversion cases and inducement of breach of contract).

⁵⁰ For the early statement of the rules, see Justinian's *Institutes*, Book II, Title I, 25-34.

⁵¹ See Gaius, *Institutes*, III, 91. "He too who receives what is not due to him from one who pays in error comes under a real obligation. . . . This sort of obligation, however, appears not to be founded contract, because one who gives with an intent to pay means to untie rather than to tie a bond." Note that the real obligation to which Gaius had just referred was the contract of *mutuum*, that is, an loan of goods with a promise to restore like kinds and numbers.

Yet even when the benefit conferred does not create some direct right of action, it may be taken into account by indirection, namely exerting its influence on principles of liability applicable under the law of torts. The prospective rescue or assistance may go astray, and when it does the question is whether the putative rescuer has become an unhappy tortfeasor responsible in damages for the party that he would assist. That result can surely occur, but even so, there seems to be a clear pattern in the tort cases where conferring a benefit, or even attempting to do so, diminishes the anticipated liabilities on the would-be rescuer. A rescuer may not be able to recover under a theory of restitution, but will, if sued, be able to use the benefit conferred to *lower* the standard of liability used for judging his conduct under the tort law. The principle is in fact one of fairly broad application in all cases of bodily injury or property damage, whether in the context of strangers or contractual parties. It is instructive to look at some of the patterns here.

The key to the analysis is the same as before: any given action is likely to generate a whole bundle of consequences, some negative and some positive, some borne by the actor and some borne by others. While the distribution of costs and benefits is not strictly determined, the forces of individual self-interest tell us a good deal about its shape in the ordinary case. In the absence of legal liability most people will arrange their affairs so that they will be able to internalize the benefits of their actions while dropping any harmful consequences into the laps of others. The case for a system of strict liability rests on the dominance of one recurrent and pervasive *matching* principle: the party that seeks to obtain the benefit of certain actions is the one who, pro tanto, should bear the liability for the losses that those actions cause. The great advantage of this principle is that it spares the trier of fact the difficult after-the-fact task of seeking to determine what level of care was appropriate in light of the external peril and the private gain: the cost benefit analysis of the Hand formula provides no magic way to estimate the benefits that are difficult to measure under the law of restitution.⁵² In place of such difficulties, the strict liability rule identifies the party whose conduct inflicts losses on another, and forces him to bear these losses as though they were inflicted on himself.⁵³

⁵² See *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (per Learned Hand, J.). The commentary on the formula has been exhaustive. For its most notable early defense, see Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29 (1972).

⁵³ Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151, 158 (1973). “The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own.” Note that this explanation slides past the Coasean difficulty, analyzed above, of deciding what action is a cause of what harm, and acts as though the use of force against another person meets that standard. The issue is of little relevance here because the same problem of causation applies no matter whether one uses a negligence or strict liability standard, or for that matter any other. See Epstein, *supra* note 35 at 577-79. For an effective criticism of my position, see Ernest Weinrib, *Causation and Wrongdoing*, 63 *Chi.-Kent L. Rev.* 407 (1987); see also, Richard A. Epstein, *Causation—In Context: An Afterword*, 63 *Chi.-Kent L. Rev.* 653 (1987), in turn criticizing Weinrib for the belief that the negligence principle is defensible as some kind of necessary truth.

B. Consensual cases.

Yet it would be a mistake to assume that some inflexible law of nature requires that defendants seek to internalize all benefits and externalize all costs. There are many situations, both contractual and with strangers, where the distribution does not follow this standard mode, and it is precisely in these settings that the greatest deviations from strict liability are found. To begin with some consensual cases, the traditional categories of bailment, incorporated from the Roman Law through the great decision in *Coggs v. Bernard*,⁵⁴ were heavily sensitive to the planned distribution of benefits and burdens. A priori, it may not be possible to determine where the benefits from bailments writ-large will flow. If the bailor seeks safe-keeping for goods that the bailee is not allowed to use, the benefit runs to the bailor. If the bailee is to use the bailor's fine china at his own tea party, then the benefit runs to the bailee. If the bailment is to allow the bailee to perform a task for a partnership between the two, then it is joint. The risk of loss, at least under the classic English and Roman conceptions was responsive to these variations in benefit and tended to trump a powerful but constant fact, that the bailee was always in possession, and hence better able to avoid the risk. Instead the risk of loss follows the distribution of benefits: where the bailment was for the bailee, then the rule was strict responsibility, save for loss by the enemies of the Crown or vis maior. When benefits were for the bailor, then good faith efforts; for both, then ordinary negligence. The party that receives the greater benefit bears the greater burden—unless there is some contractual stipulation to the contrary.

Other consensual areas may also involve similar sliding scales. The traditional distinction between invitee, licensee and trespasser is one that to some extent tracks the benefits that both sides derive from a broad class of transactions.⁵⁵ The invitee enters a commercial establishment with an eye toward mutual gain; the licensee does so at the pleasure of his host, where hospitality dominates commercial exchange; and the trespasser seeks to gain by his wrong against the owner. The traditional classification on the subject had the standard of care move in lockstep with the distribution of benefits: the invitee was owed a duty of reasonable care, including reasonable inspections; the licensee was owed a duty to warn about concealed traps or defects, without any independent duty of inspection. The trespasser took all risks in the premises except those which were deliberately or willfully set for his destruction. The modern impulse tends to diminish the categorical nature of this classification, and thus tracks the similar trend for bailment: one standard of reasonable care may be applicable to the circumstances of these different cases.⁵⁶ But the shift in standards may be somewhat less important than meets the eye, for it is always open for a successful

⁵⁴ 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704).

⁵⁵ See Restatement (Second) of Torts, §§328E—350. For a succinct account of the classical distinctions, see *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358.

⁵⁶ See, e.g., *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

defendant or plaintiff's attorney, as the case may be, to indicate how the status of the plaintiff influences the reasonableness of the care that is owed to her—a case by case recreation of the original categories, which in many jurisdictions still retain their original vitality today.

Medical malpractice situations involve much the same considerations. The physician who operates does so for the joint benefit of both sides; indeed his benefit is from payment; the operation is cost for him and benefit for his patient. The standard of ordinary care, so dominant in medical malpractice cases, reflects this distribution of benefits and costs, and reflects further the inordinate difficulty of asking plaintiff to fund *ex ante* payments under a strict liability rule, which is likely to generate far greater payoffs, given the intrinsic risk inherent in all dangerous medical procedures.⁵⁷ Once again the mixed distribution of benefits and costs leads away from the strict liability rule applicable in the paradigmatic stranger case.

Some similar strands are found in the area of products liability, where the sale of a product generates both benefits and risks to the plaintiff. A product that carries with it positive risk may be a good product nonetheless, if the risk imposed is smaller than the risk that the plaintiff would face if forced to use some riskier alternative. That mixture of benefits and losses has led most modern courts to abandon strict liability rules in favor of some intermediate standard of care, usually couched in cost/benefit if not negligence language. I think that there is much to be said against the undifferentiated cost benefit standards so dominant in these contexts, and have elsewhere defended the more extensive use of a customary standard against the more *ad hoc* balancing tests.⁵⁸ But for these purposes the critical point is that the element of implicit benefit to the product user is what again drives the courts away from a strict liability standard, as the general thesis predicts.

Even here, however, it is critical not to be too dogmatic about the overall outcome of the situation, for construction defect cases are often governed by strict liability rules instead of say, a rule that places the burden of proof for negligence on the defendant.⁵⁹ But these all present defendants with a relatively easy choice:

⁵⁷ Strict liability rules for medical malpractice have been occasionally suggested, see *Clark v. Gibbons*, 426 P.2d 525 (Cal. 1967) (per Tobriner, J.); but when the proposal has been put into action, even on a limited scale, it has been usually condemned, see, e.g., *Helling v. Carey*, 519 P.2d 981 (Wash. 1964); overturned by statute Wash. Rev. Code, §4.24.290. See generally, J. Jerry Wiley, *The Impact of Judicial Decisions on Professional Conduct: An Empirical Study*, 55 So. Cal. L. Rev. 345 (1981). Likewise there is an enormous reluctance to infer any contract for cure in this setting; see *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973) (per Kaplan, J.). The rejection of strict liability under contract goes a long way to explain why the principle is never adopted under the ostensible tort substitutes.

⁵⁸ Richard A. Epstein, *The Path to the T.J. Hooper: Of Custom and Due Care*, 21 J. Legal Stud. 1 (1992); see also, Richard A. Epstein, *The Risks of Risk/Utility*, 48 Ohio St. L. J. 469 (1987).

⁵⁹ See Restatement (Second) of Torts §402A.

greater inspection produces fewer defects, an option that is just not available in the design defect type of case, where any mistakes infect the entire product line. With this said, the ease of the strict liability standard in construction defect cases probably redounds to the benefit of the defendant that adopts it: the greater the security against defects of this sort, the higher the price that can be commanded. Most manufacturers *want* to have strict warranties on such matters as purity and contamination. The opposite standard creates a marketing disaster (think again of Tylenol) that is far greater than the tiny liabilities for breach of warranty.

C. Stranger Cases

The consensual cases, then, show a genuine willingness to calibrate the defendant's duty to his anticipated level of gain. In principle, there is no reason for the rules in stranger cases to necessarily ape the default rules adopted in consensual situations. But by the same token there is little reason for the rules in stranger cases to deviate from them either. The stranger case is characterized by the lack of any direct interaction between the soon-to-be plaintiff and the soon-to-be defendant before the infliction of harm in the particular case. These cases therefore are, almost by definition, high transaction cost cases. If the default rules in consensual situations afford some information as to how persons act in low transaction cost settings, then why not follow their lead unless and until some good lead suggests a deviation. The effort therefore to tailor the losses to match the implicit distribution of benefits can be applied here, and in many practical situations it is.

Yet there are clear exceptions to a general rule, of which the rescue cases, which figure so prominently in the law of restitution generally, are perhaps the most prominent. These cases typically arise in contexts of necessity, where the identity of the rescue beneficiary has a good deal to do with the level of care to which the defendant is held. Thus in the standard case of private necessity, the defendant avails himself of the plaintiff's property in order to save himself. The situation is more dramatic than the usual case of private gain and external loss, chiefly because that no one wants to second-guess the defendant's basic decision, that is, no one wishes to enjoin the self-rescue that has taken place. But the ability of the one party to force himself upon a neighbor only reinforces the basic instinct behind strict liability: the defendant's interest here is not merely to reduce its own cost at the risk of some harm to a neighbor. It is to take the neighbor's property and to use or destroy it for his own benefit. Right though the decision may be, but right as well is it to adhere to the original strict liability standard, which is probably the dominant standard in cases of this sort.

Yet the strict liability standard starts to give way with change in the distribution of benefits from rescue. Thus where defendant seeks to rescue *plaintiff's* property from near certain destruction, then the right response (although

one not always followed in the early cases)⁶⁰ is to reduce the standard of care for the defendant, to one of good faith, to induce the effort to rescue in the first place. Unlike the classical situation of private necessity just discussed above, self-interest will impel potential rescuers to stay away from danger unless protected from the additional risk of liability. The lower standard of care, usually one that requires only conduct in good faith, protects against just that risk. And the strong emergency exception to the usual rules on battery allows virtually any good faith contact.⁶¹

A similar situation is covered by the doctrine of public necessity, that is, where the defendant acts for the benefit of some third party.⁶² Here again a stringent doctrine of liability creates the private incentive to shy away from some socially beneficially act,⁶³ while the lower standard of good faith liability (which still protects others against malicious decisions) increases the likelihood of favorable intervention in the first place.⁶⁴ The reduction of the standard of tort liability still leaves an imbalance in the system: plaintiff now suffers a loss while third persons have benefited, but a better remedy is a direct action for restitution against the persons who received as benefit that was scarcely intended as a gift by its passive maker. And whether such action lies depends less on the power of the theory and more on its administrative complications. It is surely possible, on a sound restitution theory, to impose a special assessment on persons whose property has been spared to cover prorata the losses of those whose property has been sacrificed. By way of example the entire institution of general average contribution, of such importance in the admiralty context, serves as a response to the perils of the sea. The costs of jettisoning some cargo overboard are to be borne proportionately by all who benefit (owner of the hull included).⁶⁵ Superior incentives are created when benefits and losses are brought into alignment by the operation of the legal rule.

Still other situations involve a somewhat more concealed operation of the benefit principle. One nice illustration of the point is *Brown v. Kendall*, in which Chief Justice Shaw opts strongly for the negligence principle.⁶⁶ The standard

⁶⁰ See, e.g., *The Tithe Case*, Y.B. Trin., 21 Hen. 7, f. 26, 27, 28, pl. 5 (1506), discussed at length, in Epstein, *supra* note 52 at 579-581.

⁶¹ *Kennedy v. Parrott*, 90 S.E. 2d 754 (N.C. 1956).

⁶² See, e.g., Restatement (Second) of Torts, §§196 & 262. See also, *United States v. Caltex*, 344 U.S. 149 (1952) (destruction of oil refineries about to be captured by the Japanese in World War II).

⁶³ The most famous illustration is still the refusal of the good Mayor of the City of London to order the tearing down of the Inns of Court for fear of liability, in consequence of which half a city was burned. See the discussion in *Respublica v. Sparhawk*, 1 U.S. (1 Dallas. 357, 362 (Pa. 1788)).

⁶⁴ See the recognition of the qualified privilege in *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Kent State killings; qualified immunity for Ohio Governor Rhodes).

⁶⁵ For discussion, see Landes & Posner, *supra* note 35, and Epstein, *supra* note 35 at 582-584.

⁶⁶ 60 Mass. (6 Cush.) 292 (1850).

reading of *Brown* treats the case as one of general application—the level of care is to be proportionate to the perceived peril, as the theory of negligence would have it.⁶⁷ At this most general level, Shaw is guilty of the charge that he addresses the wrong question: to be sure, a hunter should take far greater care in shooting in a crowded city than in an open marsh, but the decisive legal question lies not in setting the standard of care, but in deciding who should bear the residual risks that remain when reasonable care, however defined, is taken. The mere fact that this risk shrinks as one moves from city to country scarcely affords a decisive reason for shifting that (smaller) risk from defendant to plaintiff.

Yet anchored more closely to its facts, the outcome in *Brown v. Kendall* rests on firmer foundations than this general critique of the negligence principle suggests. The defendant was breaking up a fight between two dogs, one owned by him and one owned by the plaintiff. The plaintiff was looking on, saw the risk, and did not get out of the way of the moving stick that took out his eye. One line of defense therefore is a cross between assumption of risk and contributory negligence, which would not be available (at least under a strict liability system) if the plaintiff had been a total stranger to the situation.⁶⁸ But another goes more directly to the standard of care imposed on a defendant where his actions are undertaken (as in the ordinary bailment case) for both sides. The defendant, if successful in the rescue, might not be able to charge the plaintiff something for his exertions, but he can receive compensation in the indirect way mentioned earlier: by moving down from strict liability to negligence, not because of a general rule liability rule, but in response to the joint benefits generated by his actions.

The power of the joint benefit point is apparent also in cases that start with the strict liability principle. Thus the “true rule” in *Rylands v. Fletcher* is “that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”⁶⁹ In this context, the critical phrase of Blackburn’s familiar incantation are the words “for his own purposes.” The strict liability rule is confined to cases where the defendant seeks to obtain all the benefits from filling the reservoir, leaving others at risk for the harms from flooding. The clear

⁶⁷ “A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city.” *Id* at 296.

⁶⁸ For which, see *The Thorns Case*, Y.B. Mich. 6 Ed. 4, f. 7, pl. 18 (1466): “So, too, if a man makes an assault upon me and I cannot avoid him, and in my own defence I raise my stick to strike him, and a man is behind me and in raising my stick I wound him, in this case he shall have an action against me, and yet the raising of my stick to defend myself was lawful and I would him me invito.” (Per Brian, counsel for plaintiff). The Restatement, following the negligence orthodoxy takes the opposite line, and finds liability “only if the actor realizes or should realize that his act creates an unreasonable risk of causing such harm.” Restatement (Second) of Torts §75.

⁶⁹ *Fletcher v. Rylands*, L.R. 1 Ex. 265, 279 (1866) (per Blackburn, J.).

negative implication of Blackburn's proposition is that the strict liability rule is relaxed when it no longer offers the ideal match of benefits to burdens. The proof of this particular pudding came quickly with *Carstairs v. Taylor*,⁷⁰ a case where rats ate through gutters that the defendant installed in his building for his own benefit and that of the plaintiff tenant. The presence of the mutual benefit was held to take the case out of the rule in *Rylands* and to lead to the adoption of some negligence standard in its stead.

The distribution of benefits and harms is also critical to the law of nuisance. Nuisances are difficult to bring within the framework of a single liability rule because they come in so many sizes and shapes.⁷¹ In the simplest case, the defendant operates a factory or mill that spews forth waste and filth that causes harm to a neighbor. Where that single source of pollution causes substantial levels of external harm, the matching principle holds that the defendant should be strictly liable for the harm that ensues, even if no injunction is granted against the injuries in question. The case is little different from one in which the defendant shoots or otherwise strikes a hapless plaintiff. But as the cases become more complex, the distribution of benefits and burdens shift, rendering the strict liability principle far less attractive.

In other nuisance cases, the benefit principle has a more subtle, almost underground, operation. One of the great problems of many nuisance-like activities is that they generate *both* external harms and external benefits. Thus to revert to an earlier illustration, the playing of a church bells may create genuine disturbance to those within close range of them, while at the same time they may provide nice music or background atmosphere to those who are located some distance away. In principle, distance from the bells works as a rough proxy for the harm or the benefit that their ringing creates: quite close, the harm dominates; at the mid distance, the benefits; at the remote distance no one can hear them at all. The question is what system of liability will generate the greatest level of net benefits from its operation, summed over all persons. One possible approach, which is convenient only in a zero-transaction cost world—is to tax all persons who enjoy the bells and use the fund so-collected in order to pay benefits to the parties at close distance who are forced to endure the din. If the funds collected are large enough to compensate the losers, and leave the church satisfied with its position, then ringing the bell may be said to make sense from a social point of view because the compensation system in place leaves someone better off, and no one worse off than before. Indeed it is not strictly necessary that the church take in more money than it pays out. Even if it takes in less, it may be willing to pay the difference if that cost is lower than the benefits which it enjoys. The costless

⁷⁰ L.R. 6 Ex. 217 (1871).

⁷¹ For a good overall summary of the area, see *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682 (N.C. 1953).

system of collection and transfers overcomes any distributional objection to the bellringing practice.

Yet the manifest difficulty with this scheme of assessment and payments is that the church has no effective method to collect its reward for the benefit that its bellringing confers. Doctrinally, the objection is that the church transfers no specific property to the fortunate souls who enjoy the church bells at a distance. With that the obvious peg for restitution is knocked out from under,⁷² so that what remains are diffuse but real benefits that are hard to value and impossible to collect, at least at reasonable cost. Alas the church creates some positive externalities for which it must go uncompensated. The issue then is what should be done on the negative side of the line, for those inconvenienced by the din. One impulse is just to say “tough” to the church: its failure to collect from one group is its own problem, so it must pay for its losses to others even though it cannot capture its gains. But that approach has difficulties of its own: the losses themselves could be small relative to the costs of collection, and in the aggregate small relative to the gains that the church bells generate to others. Putting negatives on the church’s liability ledger but ignoring the positives creates a divergence between the overall social benefit and the losses that are recorded on the church’s private ledger. One second-best solution accordingly denies the church’s obligation to compensate the losers precisely because it in turn cannot collect its compensation from the winners.

Yet that solution too has limitations of its own, which loom ever larger as the size of the uncompensated losses increase. It is perhaps for this reason that one well-known opinion on the issue⁷³ splits the difference and ties compensation to the size of *Rodgers v. Elliot* the loss, “determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience”⁷⁴ The upshot was that a plaintiff who was recovering

⁷² The Restatement of Restitution §522 (1937). “[R]estitution implies both a loss by him and a receipt of something by another, . . .” where that something is usually a “receipt of property.”

As an illustration of this restrictive condition, see *Phillips v. Homfray*, 24 Ch. Div. 439 (1883). There defendant mined some of plaintiff’s minerals and used and abandoned wayleave beneath plaintiff’s land for shipping his own ore. It was held that restitution was allowed for the minerals taken, but that the action for the use of the wayleave did not descend on the owner’s death because it constituted only a savings of expenses and not the conferring of a discrete thing which descended on death. The economic logic here assumes that eliminating a liability should be treated differently from the receipt of a benefit, although the beneficiary under a will is indifferent between these two modes of enrichment. The efficiency of the common law, as a positive matter, is not evident from the decision. For criticism of Lord Bowen and a defense of the dissent by Baggallay, L.J., see Goff & Jones, at 608-614, “If 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, in our view, be required to make restitution, however the tort is characterized.” *Id.* at 613.

⁷³ 15 N.E. 768 (Mass. 1888).

⁷⁴ *Id.* at 771.

from a serious case of sunstroke in his nearby house could not recover from the church manager for ringing the bell in his customary fashion, even after he received a warning from the plaintiff's doctor as to the anticipated nature of the loss. In essence, the boundary lines for property had shifted, as if by prescriptive right, so that the customary sounds of the bells were no longer an actionable invasion, given that they had long been tolerated in the community, by among others the plaintiff himself.

The case here causes some conceptual difficulty if this particular injury is taken in isolation from its larger context, for normally the extrasensitive condition of the plaintiff affords a defendant no defense: you take your victim as you find him.⁷⁵ But that usual case is not decided against the widespread distribution of benefits and burdens that are found when church bells ring. So long as there is some belief that the customary patterns produce a net benefit on aggregate, then individual damage actions cannot be allowed to set the balance astray. The right response lies in other directions. One prospect is for compensation to be supplied by other means: a reduction in local real estate taxes is a convenient mechanism for achieving that result, with the shortfall picked up by those who benefit, assuming of course a unified taxing district that may not exist. Then once the expectations are set, the harm is minimized when individuals sort themselves by location: persons sensitive to noise move furthest from the church; and persons who are not move closer. When mass phenomena are involved, each person cannot act as though there were no counterweight to any autonomy claim. No one can demand pure air and choose to live in East Los Angeles. *Rodgers* has the right approach once benefits and burdens are taken simultaneously taken into account.

The shadow role of the benefit principle is relevant in other nuisance contexts as well, where again the choice of legal role is dependent on the magnitude and frequency of certain types of harms. "The live and let live doctrine" applies to situations where many small nuisances take place simultaneously.⁷⁶ In each case there is good reason to believe that the benefit from causing the nuisance is greater than the harm sustained by its being caused: most people would tolerate a little noise if the alternative requires them to remain absolutely silent. Since these nuisances are widespread, the distribution of benefits and harms shifts dramatically, at least when a *market basket* of these actions is considered together. Now the benefits created will dominate the harms inflicted, both in the aggregate and, to a high probability, for each person. It is as though, therefore, each person is compensated for the harm inflicted by the like power to inflict harms on others, so that the benefits generated obviate the need for any cash compensation, and lead one to a position in which the rigors of a strict liability rule are displaced, not by some rule of negligence, but by a total privilege to engage in these acts short of

⁷⁵ See, e.g., *Smith v. Brain Leech & Co., Ltd.*, [1962] 2 Q.B. 405; and that old standby, *Vosburg v. Putney* 50 N.W. 403 (Wis. 1891).

⁷⁶ *Bamford v. Turnley*, 3 B.&S. 67, 83, 122 Eng. Rep. 27, 32-33 (Ex. 1862).

malice. The reciprocal negative easements of support, follow the same principle. The harms inflicted by restricting the ordinary use of property are more than offset by the gains obtained when others are subject to parallel limitations on their own use. Here the benefits match costs without any form of legal intervention, so that gains and losses are allowed to remain where they lie, but only so long as malice is not part of the overall picture.

V. The Public Face of the Benefit Principle

In this section I want briefly to complete the sketch of the scope of benefit principle by noting its critical role in public and constitutional law contexts. The intention here is to be impressionistic, not systematic. My goal is to note how and why the restitution principle comes to the fore in discussions of political theory.

One great movement in politics might be described as reductionist. Is it possible to explain theories of political obligation by resort to only three wheels of the common law coach—property contract and tort. The basic goal of this reductionist program is to avoid the charge that something special is afoot in political theory by showing that ordinary conceptions of obligation, usable in private contexts allow one to account for the power that the state has over its citizen and the obligation of the citizen to obey the state. The efforts to find the source of political obligation in consent—immortalized in the phrase of the Declaration of Independence, that our leaders rule only with the consent of the governed represents one such effort. And the countless observations that the appeal first to express consent, then to tacit consent or implied consent, simply substitutes assertion for theory, and fiction for description. The consent that one demands and finds in ordinary contracts cannot justify the powers of coercion that the state exerts over its individual members.

More generally, the nub of the issue is that the grounds for political obligation—what does a citizen owe to the state—cannot be satisfactorily explicated solely by resort to principles of property, contract, and tort. Private property explains how individual things can be reduced to private ownership and common property preserved. Contract explains how labor and property may be exchanged. Tort protects labor, property, and the exchange relationship from interference by others. Yet so ubiquitous an institution as taxation, in any of its protean forms, cannot be accounted for by property, contract, and tort standing alone, or indeed by all three taken together. Repeated efforts to talk about “social contracts” as though they were simple generalization of ordinary contracts for selling property or hiring labor fail: no one believes that the requisite consent from so many disparate people, past, present and future could be, or has been, acquired. The social contract, it has been said, is not worth the paper it is not written on, and modern efforts to work out that theory have all emphasized the

hypothetical nature of the consent which drives the underlying transaction.⁷⁷ But just because the obvious theories fall short, can we reject all forms of taxation, or must we expand our repertoire of tools to determine which forms of taxation are legitimate and which are not?

For most people the answer is no: political obligation there must be—strong enough to account for a state and its power to tax, but not so strong as to leave nothing left to individual discretion and control. With that conclusion reached, the question is how to build down toward the foundations. The decisive building block of the system is the theory of restitution for benefits conferred. The state provides benefits to the individuals within its jurisdiction and meets its own payroll by collecting taxes from the parties who are so benefited. It is allowed to force the exchanges because voluntary exchange cannot yield the desired outcomes so long as anyone and everyone is allowed to hold out for more than a proportionate share of the gain from social organization. The necessity here is not that of a raging storm or an impending car crash. It stems from the massive desire to obtain social improvements that better all, but which cannot be reached by voluntary exchange. Over and over again political writers such as Locke and Blackstone point to *necessity* as the foundation of property and hence of the political institutions organized to defend property.⁷⁸ They do so in ways that strengthen the stark opposition between necessity and consent by insisting that the presence of the former renders the latter unnecessary. When they speak of necessity, they anchor their own theories to the benefit principle of the law of restitution: the state may recover the costs of conferring benefits on its citizens, and it may recover the costs of its service by using the coercive power of taxation. Hence the benefit conferred by political bodies becomes the basis for citizen obligations of allegiance and support.

Nor is there any reason to be surprised why the idea of restitution assumes so extensive a role in political discourse. Under the private law, the principles of restitution reach their maximum power in circumstances where voluntary transactions do not function well: cases of necessity and mistake set the stage for invoking the principle. In the public context necessity does not relate to the need

⁷⁷ See John Rawls, *A Theory of Justice* (1971) for the most notable exercise in modern contractarian theory. See also James Buchanan, *The Limits of Liberty* (1975).

⁷⁸ “And will anyone say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belong to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in *commons*, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which *begins the property*; without which the common is of no use. And the taking of this or that part, which does not depend on the express consent of all the commoners.” Locke, *Second Treatise on Government* §28. Note the tension: consent is not the basis of the right of property, although it is the basis of the political obligations. What Locke lacked was a systematic appreciation of the scope and role of the restitution principle when coordination problems were acute, as is the case when the consent of *all* the commoners is required for any of them to eat.

in two person situations to violate exclusive rights in order to stave off imminent peril. Rather it stems from the stalemate that can easily emerge with time when cooperative efforts of huge numbers of persons are necessary to make the state go. While competitive markets can function well when only a small fraction of the total community participate, the political order requires unanimous participation of all lest the violence of one undercut the stability of expectations that is the hallmark of both private property and stable governments. Although the source of the necessity may differ, the legal response to it is the same: the principle of compensation for benefits conferred takes over where the principle of voluntary exchange leaves off.

It is one thing to state this familiar theory and another to make sure that it operates in the most effective manner possible. The critical question often depends on the identification of before and after, which brings us back again to the baseline problem with which this paper began. One possible approach is to ask whether the individual is better off with the creation of the state than he was without it, no matter what is done after the creation of the state. So if the state of nature carries with it serious inconveniences, the movement to a political order could well improve the welfare of all individuals from—to pick numbers—a pre-state figure of 1 to a post-state figure of 10. At the second stage it passes a statute that reduces the welfare of one group to 5 while advancing that of another, a bare majority, to 12. This second maneuver here is not problematic for the winners, but it raises serious issue for anyone concerned with the overall social picture, given that total losses outweigh total gains.

Is that second action legitimate under a theory of restitution? If the state of nature is the baseline, then the losers at round two cannot complain because they are still better off than they were in the state of nature. With that said the level of political discretion is enormous, for no matter what shifts in fortune are brought on by state action, all its movements are legitimate until the level of protection that any person or group receives falls below the level of security that he could obtain for himself unilaterally in a state of nature. Locke himself was aware of this extreme risk and reserved the right of revolution precisely to forestall that contingency.⁷⁹ But his solution does not address the problem at hand, for the right of revolution would not, and could not be exercised when state power moves an individual from 10 to 5: who would give up four more units of welfare to protest the five that have already been lost. Clearly far better social results will be obtained if the gains from the first maneuver could never be used as a setoff to the losses that are subsequently imposed by government action. What additional protections should be added to the mix?

⁷⁹ Locke, *Second Treatise*, ch. 19, esp. §222, treating the dissolution of government as the sole remedy for a breach of trust by the legislature or the executive. No mention is made of remedies that stop particular acts of oppression without overturning the government altogether.

So the question is how to make sure that shifts of this sort do not take place, without relying on a remedy so drastic that like poison gas or nuclear weapons, it will rarely if ever be used. The trick here is to find a way to insure that *for each government action, taken separately* there is reason to believe that state coercion provides each citizen with equal or greater benefits than the burdens imposed. The restitution principle has to apply to each action, not just to the total program. On this view once the state moves one group from 1 to 10 by the formation of the political order, so 10 now becomes the new baseline against which further state actions are measured. Improvements from the state of nature do not remain in political solution but become vested a matter of private right: they establish a new baseline against which further action is measured. On that view this second tax could not be passed, although other taxes with greater net gain and even distribution could be passed.⁸⁰

From this it is possible to see how a powerful theory of takings with just compensation—a strong restitution theory—becomes the centerpiece of any sound system of political order.⁸¹ The first move in the game is to recognize that all variations in the bundle of rights associated with property, whether for one individual or many, yield some net benefit that justifies the use of public force. Where the legislation itself provides some benefit in kind, then no additional compensation is necessary for those persons who might claim themselves aggrieved: once the state is formed the holdout problem is not allowed to shipwreck additional maneuvers that promise some overall advantage. But often state initiatives will have profound disparate impact, and where that happens cash compensation becomes the benefit conferred on the individual to justify the imposition of state power. In principle, the way in which costs and benefits are netted out is critical to the operation of the successful system, but the public law need only follow the procedures that were used and applied in dealing with the complicated nuisances cases in which large numbers of persons were both benefited and harmed by a common practice.

Stated most simply, the drill undertaken with church bells in *Rodgers v. Elliot* is just a precursor of the identical problems that arise when roads and highways are built, and must be funded by either general taxes or special assessments. Yet in some cases, compensation for the land taken need not be made in cash, because the enormous increase in value (through access to markets) of the lands retained by the original owner afford compensation *in kind*. In principle one would like to impose the taxes and payments in ways that equalized the gain across the affected individuals in proportion to their contribution, but often the measurement

⁸⁰ Thus if the winners benefited from an expenditure by more than the losers lost, the program could go forward with a transfer payment. For a discussion of taxation and the maximization of surplus, see Richard A. Epstein, *Bargaining with the State*, ch. 9 (1993).

⁸¹ For my fuller defense, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

problems require the use of crude proxies (assessments by front footage) to reach second best solutions.⁸² But no matter what is done, and how it is done—tasks that take us too far afield here—one point should become clear. The principles of restitution are a two-edged sword. No theory of the state can do without them, but by the same token no sound theory can go beyond them. Bluntly stated, no theory of limited government is viable unless it incorporates at its heart a theory of restitution: the government must confer some benefit of equal value on the parties against whom it seeks to exercise its coercive force.

Indeed we can go further: it seems clear that one can trace the decline of the modern theories of taxation to the severance of its linkage to the private law theories of restitution. The connection is evident in the nineteenth century thought, as when Thomas Cooley summed up the issue in a single sentence: “Taxation is the equivalent for the protection which the government affords to the person and property of its citizens; and as all alike are protected, so all alike should bear the burden, in proportion to the interests secured.”⁸³ So simple, so smart. Cooley conceives of each person as having rights relative to the government, and his insistence that the burden be in proportional to the interest secured is an effort to make constrain discretion in the imposition of government burdens. Cooley’s view allows for no social or common good independent of the interests of groups and individuals in society, and his principle of lockstep advancement insures that the social power of taxation cannot be used to advance the welfare of some but to prejudice others, such as the differential impact created by the second tax in the example above.

Yet the modern view of the benefit principle erodes it from within it. Thus Justice Stone writing a half-century later misses the major risk in one of the most chilling assertions of modern constitutional law:

The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.⁸⁴

His version of the benefit principle mistakenly holds that the *only* baseline that matters is the state of nature, so that the losses created by the second enactment are fully set off by the gains received on the organization of society: in his world it is possible to drive people from 10 to 5, or even to 2, so long as they are not driven

⁸² Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in the Nineteenth Century America*, 12 *J. Legal Stud.* 201 (1984).

⁸³ Thomas Cooley, *Constitutional Limitations* 613 (5th ed. 1883).

⁸⁴ *Carmichael v. South Coal & Coke, Co.*, 301 U.S. 495, 522-523 (1937).

below one. His reference to the advance of the “common good” obviates the need from determining the welfare of the society by looking at the welfare of all of its members, one at a time, and summing over all persons, a point well understood by Cooley who spoke of society as a collection of individual citizens, not as some entity that floats above human kind. For Stone, losers are not allowed to protest unless they are willing to exit society altogether, which they will not so long as the state of nature (or migration elsewhere) is fraught with perils. The expansion of government power consequent on the adoption of Stone’s view is enormous, for the benefit principle that lies at the heart of a theory of restitution is corrupted from within rather than repudiated from without. It follows once again that the failure to incorporate or understand the benefit principle has its largest payoff in the public law, where the principle is so much in evidence, and in neglect. There is simply no short cut that allows the evaluation of the social worth of any legal rule or government action apart from the consequences that it has on the population as a whole. And the strongest confirmation of the secure place of restitution in the private law is its indispensable place in any sound theory of public law.

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