

**3900**  
**UNJUST ENRICHMENT AND QUASI-  
CONTRACTS**

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**Abstract**

This chapter presents an economic analysis of some of the most typical cases involving the law of restitution. It questions the economic utility of a generalized theory of unjust enrichment, but defends the economic wisdom of three of the most common categories of relief that have gone under that umbrella term (rescue situations, transfers that were not fully voluntary or informed, and benefit-based remedies for wrongs committed).

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**1. Scope of the Chapter**

This chapter presents an economic analysis of some of the most typical cases involving the law of restitution, which is generally defined as the class of all claims grounded in the unjust enrichment of the defendant (Goff and Jones, 1993, p. 3). Actions that seek damages based upon restitutionary principles at law are frequently characterized as quasi-contractual in nature. However, restitutionary remedies are also available in equity, as with the constructive trust that a court can impose on property to avoid the defendant's unjust enrichment. This article will question the economic utility of a generalized theory of unjust enrichment, but defends the economic wisdom of three of the most common categories of relief that have gone under that umbrella term.

The first of these sources of restitutionary or quasi-contractual relief involves plaintiffs who did something that purposely but unofficially benefitted defendants, such as a physician who provided emergency medical services to an unconscious patient (*Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907); *In re Crisan Estate*, 107 N.W.2d 907 (Mich. 1961)). An economic rationale could be that the law is seeking to provide an incentive for providers to render services that the recipients value more than their cost but that cannot be negotiated contractually by virtue of high transaction costs.

If the rescue is indeed efficient, one question is whether the potential rescuer should be under an affirmative duty to provide the service (Epstein,

1973, p. 190). Thus, this article will explore both restitutionary ‘carrots’ for rescuers and potential tort or criminal ‘sticks’ that might be imposed on nonrescuers.

The rescue situation, however, is by no means the only scenario in which restitutionary relief is available. This article will discuss two other broad patterns of cases. One pattern concerns transfers that were not fully voluntary or informed, as with payments of money by mistake or pursuant to a contract that has become impossible to perform. In such situations, plaintiff’s can often recover restitutionary recoveries from defendants, although defendants may be able to interpose defenses such as changed circumstances in reliance on the payments made. The economic theory here is that full divestiture of the plaintiff’s property as a consequence of mistake would encourage excessive care in the avoidance of mistakes or in the contractual transfer of possession. If the social cost of a mistaken or contractual transfer is small, it would not be wise to allow the private cost of the transfer to be large.

A third common restitutionary pattern is the benefit-based remedies for wrongs committed. For example, if the defendant converts property belonging to the plaintiff and uses the property to make some profit, the plaintiff may be able to ‘waive the tort and sue in assumpsit’ to recover the gain the defendant has made. The economic theory here is essentially one of deterring a defendant from bypassing market transactions where transaction costs are low enough to make such transactions feasible.

## 2. The Anomaly of Benefit-Based Liability

The essence of restitutionary claims is often said to be the focus on the defendant’s gain as opposed to the plaintiff’s loss (Dobbs, 1993, Sec. 4.1). From an economic perspective, this is immediately anomalous. Economic analysis generally sees legal intervention as a response to conduct that imposes *harm*, seeking to sanction or ‘price’ that behavior so as to reduce its incidence to more optimal levels. Barring some argument based upon envy or spite, the presence of a gain as such is not a reason for the law to become concerned (Wonnell, 1996, pp. 177-190). To the contrary, the defendant’s gain is normally a factor that cuts against the wisdom of trying to impose sanctions on the defendant for harms that the defendant may have caused.

For example, one imposes sanctions on a contract breacher because of the harm that breach inflicts on the promisee, but one might worry about excessively large sanctions that would deter even efficient breaches where the defendant’s gain from breach exceeded any harm caused (Posner, 1986, p. 882). Similarly, one imposes tort liability on an ultrahazardous activity because of its predictable harms or costs, but one is not led to embrace criminal sanctions, injunctions, or benefit-based liability against the blaster precisely

because of the gains that the defendants (and their contractual partners) are making from their blasting activity. And, of course, under Learned Hand's famous test of negligence in the *Carroll Towing* case, an action can be considered non-negligent and therefore escape liability precisely when the benefits from not taking care were larger than the expected harm (*United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)). Finally, the paradigm case of *damnum absque injuria* is the losses caused by fair competition, losses which are not compensable precisely because the gains made by defendants and their contracting partners from the ability to compete freely are so large.

These facts strongly suggest that 'unjust enrichment' is never going to have the unity as a field that might be possessed by other great categories of the law such as tort and contract (Wonnell, 1996). The conclusory label 'unjust' hides the nature of the harm that warrants legal intervention. And there must be some special, rather than general reason, to regard 'enrichment' as an integral part of the wrong rather than as a factor in complete or partial mitigation of the wrong.

This article suggests that 'unjust enrichment' is really a shorthand for three essentially different concepts. The first is the theory of rewarding those who intentionally confer positive externalities on others with the fruits that could have been earned by contract had transaction costs been lower. The second is the idea of incomplete divestiture of property. The third is the notion of deterring the conscious bypassing of available market options.

### 3. Hypothetical Contracts for Rescuers; Duty to Rescue

One situation in which the law has awarded 'restitutionary' remedies involves the plaintiff who rescued the defendant's person or property and seeks compensation for costs incurred in the rescue. Physicians are frequently awarded their reasonable fee when they render emergency medical services to unconscious patients. Other situational rescuers are sometimes given compensation for their out-of-pocket costs, although many providers of services are denied compensation for having acting 'officiously' (Dawson, 1961). If tort law penalizes the imposition of negative externalities, this branch of restitution law rewards the creation of positive externalities (Epstein, 1994, p. 1377).

Dramatic rescues from death or serious bodily injury are not the only example of this class of remedies. In continental countries, a party can recover in '*negotiorum gestio*' for costs incurred in repairing storm damage to the house of a neighbor who was out of the country. Co-owners of property are often allowed to make necessary repairs or maintenance expenses on the common property and to bring actions against their co-owners for compensation. A party who creates a common fund, such as a class-action plaintiff or her attorney, can often recover in restitution from others benefited by the plaintiff's action. Although less dramatic than the rescue cases, the

essential principles of these cases are the same. Transaction costs of a voluntary transaction are high, whether because of unavailability of a party or bilateral monopoly conditions, and the Kaldor-Hicks efficiency of the service is sufficiently obvious that the risk of judicial error appears tolerably low (Bouckaert and De Geest, 1995, p. 485). It is certainly true that not all providers of valued services are entitled to compensation from the enriched recipients. Courts tend to deny recovery to those who 'intermeddle' or provide services officiously. When transaction costs are low enough to enable a voluntary transaction, there is no efficiency advantage to allowing parties to provide services without consent and then to demand compensation after the fact.

It is somewhat doubtful that the principle involved in the rescue cases is one of benefit-based liability at all (Levmore, 1994, p. 1427). The physician who performs emergency medical services is not really asking for a benefit-based remedy. If the service was ineffective, the plaintiff can recover although the defendant derived no benefit. And if the service was effective, the benefit derived is the value of the defendant's extended life, which is not awarded. Nor should it be, from the standpoint of efficiency, for such a 'rescue' which provided no benefit to the defendant would encourage the defendant, who controls the regular use of herself and her property, to exercise excessive care to avoid the need to be 'rescued' (Wittman, 1985, p. 182). The plaintiff's regular fee is normally a good measure of the defendant's benefit because it is a reflection of alternatives available to the defendant; if many people are willing to perform a service for a particular fee, any one service provider cannot benefit the defendant by more than the fee she could have paid instead. However, in the rescue context, there may have been no other service providers, so the plaintiff's regular fee is no longer an indication of the extent of the defendant's benefit (Wonnell, 1996, pp. 169-171).

Instead, the principle of the rescue cases is essentially one of hypothetical contract, imposing on the defendant the contract which would have been consented to had the transaction costs been lower (Long, 1984, pp. 415-416). It is properly denied when the plaintiff had no contractual intent, as when the services were offered with the intention of extending them as a gift. The label 'quasi-contract' has a bad reputation with restitution scholars, because the notion of 'contract' is so misleading in describing why the defendant is liable in the case of mistaken transfers or in the case of willful conversions (Goff and Jones, 1993, p. 6). In the rescue setting, however, the contract analogy seems apt, as long as one remembers that the consent is hypothetical and indicative only of how the parties would have contracted had the opportunity been available.

Rescuers are not always treated well by the courts. Courts may dismiss rescuers as intermeddlers too frequently, leading to an inefficiently low number

of rescue attempts (Wade, 1966, p. 1212). One situation in which rescuers fare somewhat better is in admiralty, where successful rescuers are often awarded a considerable fee for their efforts. The need for professional rescuers to engage in investments in rescue-related equipment may partially explain the sympathy accorded to such rescuers in admiralty. It has been argued that the structure of compensation for rescuers in admiralty closely approximates the terms of a transaction that the parties would have made with the rescuer had a transaction been possible (Landes and Posner, 1978, pp. 103-104).

An interesting question is whether rescues, if they are clearly efficient, should be required rather than left to the law of quasi-contract. An award that was substantial enough to clearly exceed the plaintiff's costs should be sufficient to inspire rescue. If restitutionary awards are generous, a duty to rescue could be superfluous, but by the same token it would appear to be a harmless supplemental incentive.

The most serious problem with penalties (especially when pursued to the exclusion of liberal restitutionary awards) is their indirect effects on incentives. A person who realizes that her talents and properties can be conscripted to help others will not have as much incentive to develop those talents and properties in the first place or have them in a place where they could be useful to others, although the empirical significance of this problem will vary with the circumstances (Levmore, 1986, pp. 889-892). This problem might be quite unimportant where the cost of the rescue was trivial, as with the paradigm case of the person who refused to throw a rope to a drowning swimmer.

The incentive problem with mandatory rescue as opposed to restitutionary regimes is essentially a problem of governmental knowledge. To impose an efficient duty to help, one would need to know about the previous choices available to potential rescuers and what effect the prospect of liability might have on those choices. To create a hypothetical contract, one can instead ignore past choices, as a mutually beneficial transaction should not deter others similarly situated from making the choices which would place them in a position to be of service to others.

This is not to say that a duty to rescue would always be inefficient. Where one party is both a better avoider of the loss and a better insurer against uncertain outcomes, it may be an express or implied part of a contract that one will provide rescue services when needed by the other. This may explain why the law sometimes imposes a duty to rescue between parties in a 'special relationship' with each other such as common carriers or innkeepers and their guests (Prosser and Keeton, 1984, Sec. 56, pp. 376-377). Another possible case for an efficient rescue duty would be a setting in which one was equally likely to be a rescuer or a rescuee. In that case, a party may actually be encouraged to be in a position where she can be of service, as an unintended byproduct of wanting to be somewhere that others would have a duty to rescue if one got into

trouble (Hasen, 1995, p. 141).

Another potential problem with a duty to rescue is that the would-be rescuee loses some of her incentive not to be in a position that would require rescue (Wittman, 1981, p. 89). In principle, this should be accounted for in saying that the duty is truly an efficient one, for if the rescuee is a cheaper cost-avoider, the would-be rescuer's duty would not be efficient (Calabresi and Hirschhoff, 1972, pp. 1060-1061). However, this would once again require considerable knowledge on the part of the state as to the steps that could have been taken by would-be rescuers and rescuees.

If knowledge of decisions available in prior periods is unavailable, the safer course may be to try to construct mutually beneficial bargains by generous rewards extended to rescuers, at least where there is no reason to fear that a plaintiff may have induced the demand for her own rescue services (Levmore, 1986, p. 886). It is true that a restitutionary award, by making rescues more likely, will increase the incentive of potential rescuees to act in ways that will require their rescue, but because rescuees will be forced to pay for the service rendered to them, the effect will be considerably smaller than that generated by a duty to rescue.

Still another potential problem with the duty to rescue concerns administrative costs. Parallels can be drawn to the great costs of trying to enforce against consensual or victimless crimes, where lack of evidence is a serious problem unless one resorts to very aggressive law enforcement techniques. The person who was not rescued may be deceased and unavailable as a witness, while other witnesses to the nonrescue may be equally culpable as nonrescuers and thus unwilling to bring forward their information (Rubin, 1986, p. 274). And if multiple nonrescuers were involved, there will be difficulties in assessing relative responsibility. There may be some incentive gain from the purely symbolic effect of creating a largely unenforceable legal duty to rescue, although this would have to be traded off against any losses that might occur in the feelings of altruism or heroism that might result from the perception that one was performing only a legal duty (Rubin, 1986, p. 275).

The economic argument for a duty to rescue - somewhat uncertain, as noted above, at least for rescues of nontrivial cost - should be distinguished from the broader social or utilitarian argument for redistribution from those with surplus resources to those with greater need for the resources. The economic argument asserts that each rescue is a Kaldor-Hicks efficient transaction, and can add that rescue situations are sufficiently unpredictable that a general duty of rescue might well be in everyone's *ex ante* interest to accept. The redistributive argument would assert that people have a duty to do their part for others in dire need even if the economic value of their resources (as contrasted with their utility) is not higher in the rescuee's hands, and despite the fact that the rescuer may have no reasonable expectation of receiving reciprocal benefits. In normal

circumstances, a welfare state would be the sensible mechanism for coordinating such a duty, but in rare emergency cases the person who should act might be sufficiently individuated that a private law rescue duty could supplement the system of taxation and public protection. At least some commentators appear to make both the economic and the redistributive arguments for a duty to rescue (Weinrib, 1980, pp. 272, 292). The redistributive argument of course suffers from the more general moral hazard problems of welfare states in altering behavior by shielding people from the consequences of their choices.

#### 4. Incomplete Divestiture

Suppose that the plaintiff pays money to the defendant by mistake, perhaps having miscounted the money or misidentified the defendant's account number. What is the economic rationale for requiring the defendant to return the money?

The essential idea is that the plaintiff is in a position to make decisions over her own property, and the law should create an incentive to optimize these decisions. There may be a modest social cost created if the plaintiff is careless in directing her money, as the mistake must then be identified and corrected at some administrative effort. Ideally, the property holder should be liable for these costs in order to ensure that she takes proper care to avoid mistakes. However, it would not be efficient to punish mistakes with full divestiture of the plaintiff's rights to the value of the money. Such a rule would impose a private cost on the plaintiff much larger than the social cost of correcting a mistake. The plaintiff would be induced to exercise too much care to avoid her mistake (Huber, 1988, p. 99). Moreover, the defendant would have a perverse incentive not to correct, or even potentially to cause, the plaintiff's mistake.

In the case of money, the social cost of the mistake is usually small, although it may be large if the defendant took actions in detrimental reliance on what reasonably appeared to be new wealth. In other situations, the social cost of mistake may be quite substantial. A common pattern involves a plaintiff who constructs a building by mistake on the defendant's land (*Madrid v. Spears*, 250 F.2d 51, 54 (10<sup>th</sup> Cir. 1957); *Rzeppa v. Seymour*, 203 N.W. 62, 63 (Mich. 1925)). As the defendant did not ask for the building, it may be worth considerably less than the value of the plaintiff's labor and materials invested in the project (Dickinson, 1985, pp. 62-63).

Older cases tended to deny recovery to the plaintiff builder on the theory that the defendant should not be made worse off by being required to pay for an improvement she did not want (*Producers Lumber & Supply Co. v. Olney Bldg. Co.*, 333 S.W.2d 619 (Tex. Civ. App. 1960)). This approach, however, does create an incentive for the plaintiff to exercise excessive care in avoiding mistakes, and for the defendant to exercise insufficient care to avoid such

mistakes by the plaintiff.

Many recent cases have granted a restitutionary recovery for the plaintiff who constructs a building on the defendant's land by mistake. The problem with this approach is that the social cost of the mistake is difficult to measure. The illiquidity of the newfound wealth imposes different costs on different types of parties, depending upon their overall preferences and financial situation (Kull, 1997). Perhaps the best approach would be for the courts to make generous assumptions about the amount of harm that will be caused by the illiquidity, and to award the plaintiff an amount that one can assert with considerable confidence will not make the defendant worse off from the overall transaction.

The essence of the plaintiff's claim is not that the defendant has been enriched. If for some reason the plaintiff's building looked particularly good on the defendant's land, there is no reason to require the defendant to disgorge the gains received in excess of the costs the plaintiff has incurred (*Madrid v. Spears*, 250 F.2d 51, 54 (10<sup>th</sup> Cir. 1957); *Rzeppa v. Seymour*, 203 N.W. 62, 63 (Mich. 1925)). Rather, the plaintiff's essential claim is *harm* caused by the incomplete divestiture of property.

It would clearly be undesirable to allow the plaintiff to retain formal title to the building while the defendant retained formal title to the underlying land. This would create serious problems of bilateral monopoly and accompanying high transaction costs of breaking the compulsory (Wonnell, 1996, p. 197). Property, however, is a bundle of severable sticks, and the fact that necessity compels the divestiture of the plaintiff's physical rights to the property does not mean that the plaintiff must also lose her rights to the value of that property.

Incomplete divestiture is the counterpart to the more familiar idea of incomplete privilege (Bohlen, 1925). A defendant who is caught in a storm and needs to use the plaintiff's docking facilities is not confronted with legal rules designed to prevent use of the plaintiff's property, such as criminal sanctions, injunctions, or benefit-based liability. However, the defendant remains liable for the costs imposed, as an incentive for the defendant to take the potential for such emergencies into account in evaluating how to make use of her own property. (*Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221, 222 (Minn. 1910)). Necessity compels the yielding of exclusive physical rights to the property (and the right to charge any price made possible by free contract) but it does not compel the yielding of the plaintiff's rights to the value of the property. 'Restitution' in these cases is essentially the same principle, but where the plaintiff rather than the defendant is the active party, and accordingly where the law must remain alert to the possible harms caused by the activity in question.

Contracts provide the backdrop for many restitutionary remedies. In some circumstances, especially important in losing contracts, the courts may allow a restitutionary recovery as an alternative to standard expectation principles of

damages. This is quite a problematic idea, as it allows the plaintiff to escape the allocation of a risk that the contract may have efficiently placed (Kull, 1994, pp. 1465-1470). It also gives the plaintiff a perverse incentive to induce the defendant to breach a contract, or to jump on breaches of uncertain materiality as excuses for rescission. However, in some situations it seems likely that the parties would have wanted a restitutionary recovery, especially where the defendant completely failed to perform and the plaintiff's restitutionary interest is much easier to calculate than her expectation (Kull, 1994).

Restitution is also granted in many cases to the breaching party to a contract (*Restatement of Restitution*, 1937, Sec. 108(b)). As a general idea, this is simply a way of ensuring that the non-breaching party receives her expectation interest, but only her expectation interest, upon breach. It is therefore justified by the general economic argument that favors expectation damages and disfavors punitive damages, involving the principle of efficient breach and the desire to avoid high-transaction-cost bargaining over the surpluses from breach between bilateral monopolists (Posner, 1986, pp. 106-107). On the other hand, in some circumstances it may be difficult to calculate the expectation interest, with the result that a restitutionary recovery for the breaching party threatens to undercompensate the nonbreacher and thereby underdeter breach.

Parties sometimes provide for forfeitures of down payments without regard to actual damages as an implicit recognition of this phenomenon of restitutionary awards leading to undercompensation of the nonbreaching party. The general argument that contracts are presumed efficient (at least between informed parties) would argue for the enforcement of such bargained for forfeitures.

Finally, restitution is often granted in the case of broken contracts, such as those held to be unenforceable under the Statute of Frauds (*Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913)), or those that become impossible to perform through some intervening condition or statute. Again, we face a case of incomplete divestiture of property. The parties parted with their goods or services on assumptions that have proved to be invalid. If the court were to simply leave the parties where it finds them, the parties would have incentives to strategically and uneconomically delay the transfer of physical possession of resources involved in the contracting process (Bouckaert and De Geest, 1995, p. 475).

To induce parties to use optimal timing in contracts, transfers should be undone if no social harm has been caused (by, for example, affixing resources to projects that no longer have value). If harm has been done, the problem is more complex, and might be addressed by asking which of the parties is more efficiently situated to have prevented or insured against that harm (Posner and Rosenfield, 1977, p. 83).

### 5. Disgorgement for Bypassing Viable Market Options

Another use of the restitutionary idea is as an alternative remedy for wrongs. For example, a person who intentionally converts property belonging to another is liable in tort for the harm caused, but may also be liable in restitution for the benefit received from her own use of the ill-gotten property. It is said that the plaintiff can 'waive the tort and sue in assumpsit' to recover gains larger than the plaintiff's loss (Palmer, 1978, Sec. 2.10). Restitution can be awarded against those who procured the plaintiff's property 'through imposition (express or implied), or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances' (*Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (1760)). Willful takers of intellectual property belonging to the plaintiff have often found themselves affected by this principle (Gordon, 1992).

Is this remedy an exemplar of the broader principle that a person should not 'profit from a wrong'? (*Restatement of Restitution*, 1937, Sec. 3). From an economic perspective, this depends greatly on how 'wrong' is defined. If wrong is confined to well-defined, easily avoidable conduct that unambiguously imposes more harm than benefit, it would certainly be true that efficiency would require that the defendant not be permitted to profit from the wrong. The law needs to deter such conduct, and disgorgement is the minimum sanction sufficient in principle to effectuate such deterrence. Of course, in this case, economic analysis would see no reason for trying to put the defendant on her own indifference curve between right and wrong conduct (Wittman, 1985, p. 182). If the behavior is clearly defined and unambiguously inefficient, punitive damages or criminal sanctions may be in order, or certainly liability for harm caused (by definition larger than the benefit received). Thus the disgorgement principle, while valid, would be properly submerged in the law beneath more severe penalties.

On the other hand, if wrong is defined as conduct that the law ought to sanction, it is no longer true that we would want a rule that a person should not 'profit from a wrong'. In economic theory, sanctions are imposed because the behavior in question *might* be inefficient, or because the precise behavior involved is inefficient but is difficult to distinguish before the defendant's action is taken from other behavior, the inefficiency of which is less clear. In such cases the liability needs to be measured by harm caused rather than benefit derived. Harm-based liability gives the defendant the incentive to undertake the activity if and only if her benefits truly exceed the harm caused. Benefit-based liability would make the defendant indifferent to the costs imposed on the plaintiff (as these did not affect remedies) and to the benefits she herself derived (as these would be taken away in any event) (Wittman, 1985, p. 173).

One should not expect, therefore, any robust general principle of law that involves disgorgement of gains received. Gains in themselves are not objectionable; they serve to mitigate wrongdoing. Gains should be disgorged in cases where the actual remedies are likely to be considerably more severe, so that the disgorgement idea is unnoticed. When other penalties are inappropriate, this is usually because of factors that make the disgorgement idea inappropriate as well.

There is one situation, however, where disgorgement is clearly appropriate. This is the conscious bypassing of readily available market alternatives. This behavior is clearly inefficient, because even if the defendant had more valuable uses for the property in question than the plaintiff, she could, by definition, have obtained those efficiencies by consensual means. Moreover, many takings are clearly inefficient, and the litigation costs of distinguishing those that are from those that are not are likely to dwarf the transaction costs of a voluntary move of the property.

An interesting question is whether this principle should result in a defendant's duty to disgorge gains made by a breach of contract (Farnsworth, 1985, p. 1369). The theory would be that a promise constitutes property of the plaintiff, and that the defendant has converted that property by retaining the benefits of refusing to perform. On the other hand, the contract breach setting is one of bilateral monopoly, and the parties might have considerable difficulty agreeing on a voluntary distribution of the gains from breach. Where that situation obtains, a disgorgement rule might threaten to undermine the gains from breach entirely, or result in their dissipation through haggling over their distribution (Posner, 1986, p. 118). The traditional rule disfavoring disgorgement remedies for breach of contract may well be efficient for that reason, although it should certainly yield in the face of evidence that the contracting parties intended a disgorgement remedy to apply.

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