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EXPLAINING RESTITUTION

*Saul Levmore**

THERE is probably no greater set of surprising results and inconsistent maxims in private law than that formed by cases dealing with claims for payment made by providers of “nonbargained benefits” to silent or disclaiming recipients. These cases are ordinarily assembled under the umbrella labelled “restitution,” although they also refer to or include claims of unjust enrichment, quasi-contract, and quantum meruit. At an athenatic level, the law of nonbargained benefits is most easily described with a general rule and a long list of exceptions that seem on the verge of consuming the rule.¹ The rule is, of course, that “volunteers” or “officious intermeddlers” do not recover in restitution even if they can prove their expenses or the value of their provisions.² Energetic provider P, who mends R’s fence, wastes his time if he seeks restitution through the legal system.³ But P will sometimes recover

* Professor of Law, University of Virginia. I am grateful for suggestions received at workshops at the University of Virginia, University of Pennsylvania, and Northwestern University law schools. I am especially grateful to Robert Scott for his suggestions and comments on an earlier draft.

¹ Two notable bright spots in the vast literature that are useful for the uninitiated reader are the introductory material in 1 G. Palmer, *The Law of Restitution* § 1 (1978) (stressing the equivocal character of “unjust enrichment,” “benefits,” and “volunteer,” and the sometimes unstated connections between the development of restitution at law and in equity), and Dawson, *The Self-Serving Intermeddler*, 87 *Harv. L. Rev.* 1409 (1974) (analyzing situations in which the gains to strangers are produced through an actor’s self-interest).

² See *Restatement of Restitution* § 2 (1937) (intermeddler may not recover); Wade, *Restitution for Benefits Conferred Without Request*, 19 *Vand. L. Rev.* 1183 (1966) (setting out the restrictions on recovery to develop a theory of when “enrichment” is “unjust”).

There is a good deal of literature on the treatment of restitution claims in Roman law and under civil law in general. Civil law countries can be described as more sympathetic to the volunteer provider, although the gap between common and civil law may be narrowing. See generally Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 *Harv. L. Rev.* 817 (1961) (appraising the utility of the *negotiorum gestio* doctrine as a solution to volunteer-provider problems). The present article does not pretend to explain or analyze this material, although readers familiar with the subject will see that most of the themes developed in these pages are applicable to the civil-law tradition.

³ Nonbargaining providers such as P may be motivated by the hope that if they provide a useful service or improvement the recipient will compensate them out of a sense of obliga-

in cases of mistake, as when P thinks he is working on his own property;⁴ in an emergency, as when the fence prevents the escape of R's animals;⁵ or through wrongful conduct on the part of R, as when R threatens P to gain free labor.⁶

Other exceptions to the general rule may also be regular enough to be classified. Providers under compulsion, those who complete tasks begun by contractual providers, and those who perform part of their own contracts often escape being branded as volunteers.⁷ A variety of industry-specific rules may also rescue the nonbargaining provider. Physicians regularly recover for emergency services, even when their efforts do not save the nonbargaining patient.⁸ Lawyers enjoy exceptional opportunities to recover from silent "clients" who benefit from a "common fund" created or preserved by the claimant-attorney.⁹ Contributors to construction projects may rely on mechanics' lien statutes to recover from enriched owners with whom they did not bargain.¹⁰ If the contributor is a cotenant who pays for improvements to the property, he may under the rules of partition recover his expenses or the value of the improvement upon dissolution of the partnership.¹¹ That this incomplete list of exceptions to the nonrecovery norm is itself qualified at virtually every point¹² reflects the remarkably uneven terrain of resti-

tion, gratitude, or hope that this or some other provider will again show initiative and undertake such a project.

⁴ See *infra* notes 39-40 and accompanying text (mistaken improver of property); 2 G. Palmer, *supra* note 1, § 10.3 (finding very few cases in which a total stranger recovered for protecting another's property). Efforts to summarize the law more precisely by distinguishing among mistakes of law, fact, and performance are in my view only modestly successful. See, e.g., 2-3 *id.* (attempting over the course of two volumes to classify various types of mistake).

⁵ See Restatement of Restitution § 114 (1937) (restitution given if the provider acts unofficiously and with intent to charge and if the provisions were immediately necessary to prevent serious bodily harm or suffering).

⁶ See Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 *Colum. L. Rev.* 504, 551-56 (1980) (award of restitution as deterrence to wrongdoers).

⁷ See *infra* notes 78-83, 90-92, 95 and accompanying text.

⁸ See *Cotnam v. Wisdom*, 83 *Ark.* 601, 104 *S.W.* 164 (1907); *Matheson v. Smiley*, [1932] 2 *D.L.R.* 787 (Man.) (noted in *Recent Cases—Physicians and Surgeons—Recovery for Unsolicited Services Rendered in an Emergency*, 46 *Harv. L. Rev.* 528, 528 (1933)).

⁹ See *Central R.R. & Banking Co. v. Pettus*, 113 *U.S.* 116 (1885); *Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 *Harv. L. Rev.* 1597 (1974).

¹⁰ See *infra* notes 51-53 and accompanying text.

¹¹ See *infra* notes 18, 35-37 and accompanying text.

¹² Lawyers who create common funds, subcontractors who operate in a jurisdiction with a

tution law. Without a theoretical approach it is impossible to describe the law's attitude toward nonbargained benefits in a way that would generate confident predictions about the decisions.

The familiar schizophrenia in legal scholarship between positive and normative postures must be confronted as the level of inquiry is shifted toward explaining rather than summarizing the many pockets of the law of restitution. The major arguments presented in this article may be attractive features of a normative theory of restitution; possible contours of such a theory are sketched in the conclusion. The bulk of this article, however, is directed toward developing perspectives that describe, predict, or explain the circumstances in which restitution for nonbargained benefits is allowed and those in which such restitution is denied.

My approach to restitution views the cases as presenting the question of whether to create bargains where the parties have not done so. This approach illuminates the asymmetrical structure of private law. Restitution occupies the crucial ground between its much-studied neighbors, tort and contract. Restitution deals with nonbargained benefits; tort law with nonbargained harms; contract law with bargained benefits and harms. Whereas the law of torts regularly "creates" bargains by assigning liability where the parties would have exacted payment if able to bargain, the law of contracts (and restitution) does not obviously intervene and create bargains among strangers who might be expected to wish for such agreements. The law of benefits is apparently not the counterpart of the law of harms. Located at the intersection of tort and contract law, restitution offers an opportunity to inspect this asymmetry between the law's treatment of harms and its treatment of benefits.

One caveat may disappoint readers familiar with this area of the law: the analysis considers the potential for restitution as an all-or-

mechanics' lien act, and cotenants in partition often will not recover. See, e.g., *Weinberg v. Goldenberg's, Inc.*, 81 F. Supp. 353 (D.D.C. 1948) (denying recovery to attorney who prevented depletion of a fund); *Strong v. Taylor*, 82 Ala. 213, 2 So. 760 (1886) (refusing recovery for legal resistance against creditors' claims against estate); *In re Estate of Brannan*, 66 Misc. 2d 283, 321 N.Y.S.2d 49 (Surr. Ct. 1971) (denying fees where lawyer successful in opposing probate of one will and securing probate of another); 53 Am. Jur. 2d *Mechanics' Liens* §§ 310-311 (1970 & Supp. 1984) (waiver and estoppel may prevent lienholder from recovery); 59 Am. Jur. 2d *Partition* § 42, at 806 (1971) ("bare fact" of improvements by a cotenant does not necessarily give right to an equitable allowance in partition).

nothing proposition. Little attention is paid to the amount of restitution when granted, or to related questions such as the tracing of commingled funds or the imposition of constructive trusts.¹³ My concern is with the general question of when courts intervene to impose obligations where there have been no private contractual arrangements, not with the secondary question of the precise details of such obligations. I hope that the disadvantages of inexactness are more than offset by the powerful themes that such a rough approach can suggest.

Part I sketches four possible explanations of restitution law. These explanations are theses or variables that illuminate the distinction between circumstances in which restitution is denied and those in which it is provided. Part II explores a variety of claims for restitution and examines the descriptive power of the explanations offered in Part I. Although the explanations are not mutually exclusive, this article emphasizes the usefulness of two of these theses, which I label the market-encouragement and the wealth-dependency explanations. The second of these is particularly interesting because it suggests that the law is responsive to a serious objection to the economic analysis of legal rules. Through these explanations I argue that although restitution is hardly the neatest of fields, it is also not the chaotic mass that it first appears to be. A sophisticated use of law and economics tools and an understanding of the limitations of these tools yield a powerful positive theory of restitution.

I. FOUR EXPLANATIONS OF AWARDS AND DENIALS OF RESTITUTION

A theme so prevalent in contract and tort law theory that it sometimes passes unmentioned is that legal rules reflect parties' abilities to bargain. Our legal system rests on the belief that citizens generally know what is in their own interests and that it is in society's interest to accept and encourage private agreements. It is hardly novel to suggest, for example, that tort liability rules are bargain-substitutes. The polluter, liable in nuisance for the harm imposed on numerous neighbors, could presumably—in the absence of tort law and all impediments to bargain—have been

¹³ For information on these related questions, see Restatement (Second) of Restitution §§ 30-41 (Tent. Draft No. 2, 1984).

bought out or bribed by neighbors.¹⁴ The real and hypothetical bargains created and sustained by property and liability rules are so well-known—and well-challenged—that there is no need here for another rehearsal.

But an awareness of impediments to bargain is only a first step toward understanding restitution law. The inability to bargain does a fair job of explaining, for instance, restitution in cases of emergency. The law would obviously not encourage bargaining by refusing recovery to the doctor who provides emergency medical care¹⁵ or to the relative who pays bills associated with a decedent's last illness and funeral before the appointment of a guardian or executor.¹⁶ Restitution in cases of mistake, on the other hand, is not easily explained by the law's fondness for bargains. If, contrary to prevailing law, debtors could not retrieve overpayments or disbursing agents could not recover payments made for mistaken claims, debtors would protect themselves with more paperwork, and disbursing agents would demand more proof before paying claims.¹⁷ It does not require great faith in the usefulness of economic analysis in law to believe that the flat denial of restitution in these cases would lead to an inefficiently high level of care. Thus, although the general law of restitution seeks to encourage private bargaining rather than to replace it with judicial intervention, a counterforce in the law impels courts to recognize or create missing bargains. This article seeks to illuminate this counterforce by exploring four possible explanations for it. The first two explanations are familiar perspectives with which to approach a seemingly incoherent area of law. But in that restitution has, for the most part, remained a frontier untouched by analytic tools familiar elsewhere, they are displayed here in their most flattering settings.

A. Valuation Difficulties

The law's disinclination to create bargains when the parties have failed to do so may derive from the sense that courts have no par-

¹⁴ For the classic exposition, see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972).

¹⁵ See cases cited *supra* note 8.

¹⁶ See *In re Estate of Bends*, 589 S.W.2d 330 (Mo. Ct. App. 1979); see also Restatement (Second) of Restitution § 3 comment a (Tent. Draft No. 1, 1983) (suggesting restitution for benefits conferred through a justifiable response to exigency).

¹⁷ See *infra* notes 23, 56 and accompanying text.

ticular talent at valuing services and other benefits in monetary terms. Restitution may be socially beneficial because it motivates providers to do what the community wishes but finds difficult to agree on because of high transaction costs. Nonetheless, the social desirability of an expanded law of restitution would require courts to value benefits accurately. To the extent that benefits are overvalued, overencouraged providers may intermeddle. In short, the law may be seen as normally disallowing restitution claims because of valuation difficulties, but sometimes allowing claims for nonbargained benefits when the valuation task is easy and when the benefit appears to be one that the parties would have bargained for in the absence of freerider problems and transaction costs.

Consider, as an example of the explanatory power of this theme, the contrast between the denial of restitution to the noncontractual improver of real property who builds a fence while hoping that the owner will be suitably grateful, and the grant of restitution in the limited but striking case of an improving cotenant seeking restitution in partition.¹⁸ The valuation explanation is clear: in partitioning a cotenancy, a court must as a matter of course ascertain the value of the property in question (except in the rare instances where physical partition into segments of obviously equivalent worth is possible). Although the partition may not require the valuation of the components of the property, evaluating the improvement will probably require little additional work for the partitioning court. If the property is normally held for rent, measuring a recent improvement on the basis of the increased rental income is especially easy. Once valuation is under way the law can afford to recognize the provider of nonbargained benefits.

It might be argued that measuring restitution by the recipient's enrichment rather than by the provider's cost¹⁹ is evidence that valuation is not a major explanatory theme. However simple it is in some cases to separate the value of an improvement from the known value of an entire property, it would be easier to ask for proof of the provider's actual cost. But cost recovery creates the moral hazard of idiosyncratic intermeddling. The provider who thoroughly enjoys an octopus-shaped swimming pool may have

¹⁸ See *infra* notes 35-37 and accompanying text.

¹⁹ See *Martinez v. Martinez*, 638 P.2d 834 (Colo. Ct. App. 1981); *Miller v. Miller*, 222 Kan. 317, 564 P.2d 524 (1977); *Chance v. Kitchell*, 99 N.M. 443, 659 P.2d 895 (1983).

spent far more on its construction than is reflected in the property's increased value. There is no reason why the less-theatrical cotenant should pay for this nonbargained benefit.

To be sure, restitution could be based on the lesser of net enrichment and cost. This rule would create little if any added valuation difficulty, and there is good reason to think, when cost is lower than value added, that a bargain between cotenants would have yielded an agreement to share costs rather than to assign the increase in value to one party. Even when cost is greater than value added, it may be that had the parties bargained they would have agreed to share costs because they expected a more substantial increase in value from what turned out to be a poor investment. And a rule that awarded restitution for the lesser of cost and enrichment—unless the provider demonstrated that his intended enrichment was not idiosyncratic—would sometimes generate unmanageable fact-finding difficulties. The partition cases can be read as supporting either rule: recovery for net enrichment or for the lesser of provider's cost and recipient's enrichment.²⁰ Inasmuch as both rules bring out the explanatory power of the valuation perspective, there is little point in extended discussion here of the rules' relative advantages.

Nevertheless, the valuation theory fails to explain important pockets of the law granting restitution, such as the ability of lawyers to collect from common funds²¹ despite the difficulty of evaluating their expenses and charging them to the funds' beneficiaries. A second, broader shortcoming of the valuation explanation is that it accepts without explanation the traditional subject matter demarcations in law. Despite enormous valuation difficulties, tort law regularly awards recoveries to the victims or "recipients" of harms. The typical tortious injury is at least as difficult to value as the average noncontractual benefit. I call this anomaly the "harm-benefits asymmetry" in the law: the legal remedies available to victims of harms are far superior to those enjoyed by analogous providers of nonbargained benefits. Restitution would surely be denied to W who, while purifying his own ground water, cleans up neighbors' wells. Yet W would of course be liable for the harm imposed

²⁰ Professor Palmer agrees but is also unable to cite a convincing string of cases. 2 G. Palmer, *supra* note 1, § 10.7, at 429-30.

²¹ See *infra* notes 69-71 and accompanying text.

on neighbors if he in economically negligent fashion polluted usable wells while working on his own property. Similarly, if M often recommends H's services so that H enjoys increased profits, H owes no restitution—whether or not M is paid by those seeking advice. Yet if M defames H's business, H can collect for lost income.²² The law appears ready to create missing bargains in tort where harms are concerned, but is reluctant to do so in restitution where benefits are at stake. That tort law fails to fill in all missing bargains cannot obscure the basic asymmetry between the treatment of nonbargained harms and benefits. Valuation theory illuminates a subset of these cases, but cannot explain the fundamental asymmetry.

Thus, the notion of valuation difficulties leads to mispredictions in many pockets of restitution law. Some of these mispredictions are described later in this article. But because the valuation thesis completely misdescribes the harms-benefits asymmetry and because it is, after all, already a familiar theme in legal scholarship, this article does not concentrate on the valuation thesis.

B. The Search for the Better Bargainer

The notion that many legal rules can be interpreted as economically efficient is a familiar and powerful one. Applying the notion of economic efficiency to tort and contract law often involves a search for the party best able to control a situation: legal liability is imposed to induce that party to minimize waste. In fact, all of the explanations of restitution put forward in this article may be viewed as part of this quest for efficient behavior and in particular for the party most likely to be induced by a legal rule to behave in a way that society or the involved parties (were they to bargain) would like. The valuation perspective, for example, depicts the law of restitution as granting or denying recovery on the basis of whether it is more efficient to reduce costs of bargaining or costs of judicial valuation. The decision to deny restitution can thus be seen as a means of encouraging the party most in control, the provider, to enter bargains in which the price of his provision is explicitly determined.

²² See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts* § 111, at 779 (5th ed. 1984).

Another economic argument that may at first appear attractive to students of restitution is the least-cost-avoider or better-bargainer thesis. In tort and contract settings the least-cost-avoider is often the party physically or contractually in control of a situation, such as the manufacturer of a dangerous product or the supplier of goods to a relatively passive customer. In restitution the least-cost-avoider is ordinarily the provider. Thus, a better-bargainer explanation of the harms-benefits asymmetry would run as follows. A potential harmdoer knows his likely victims and therefore can avoid harmdoing or can bargain with potential victims to avoid liability, secure a property right, or induce mitigating behavior. When W pollutes the groundwater, his knowledge about the pollutant's source, location, and impact makes him the better bargainer, or the least-cost-avoider. The provider of benefits is a better initiator of bargaining than the passive recipient, who does not know what is headed his way. W, whose water-purification project casts positive externalities, is a better initiator of bargaining than the passive recipients of cleaner water, because the latter have inferior knowledge of the project's timing, costs, alternatives, and impact.

Unfortunately, although the better-bargainer explanation may elucidate the harms-benefits asymmetry—the frequent imposition of tort liability and denial of restitution—it does not explain the cases that grant restitution to nonbargaining providers. For instance, restitution is generally granted to a debtor who mistakenly more than repays his debt but is generally not granted to a taxpayer who similarly errs by making overpayments to a taxing authority.²³ The valuation hypothesis explains the first of these rules, in that (interest rates aside) it is simple to evaluate a fifty dollar overpayment as requiring fifty dollars of restitution. But the valuation explanation mispredicts the second rule; tax revenues are also in a convenient currency and appear to present no more valuation difficulties than do other overpayments. The better-bargainer hypothesis may, however, account for this second rule, the denial of restitution to the mistaken taxpayer, because it may explain the

²³ See 3 G. Palmer, *supra* note 1, §§ 14.5(a), 14.20 (the mistaken debtor enjoys restitution; the taxpayer whose payments were motivated by an invalid statute is often denied restitution; and the taxpayer who makes an isolated error of fact is sometimes denied restitution); see also Birks, *The Recovery of Carelessly Mistaken Payments*, 25 *Current Legal Prohs.* 179 (1972) (general rule in England is that the maker of even carelessly mistaken payments is entitled to restitution).

overarching doctrine of sovereign immunity. Inasmuch as it has no self-interest or selfish nature, the government is assumed to be by nature sensitive to social costs and benefits. Hence, the government may never be deemed negligent. Similarly, the governmental taxing unit that receives overpayments may be assumed to be a selfless cost avoider, checking for mistakes to a degree that is socially optimal even in the absence of restitution. Nevertheless, the better-bargainer explanation does not similarly predict the first rule, the award of restitution to the debtor who mistakenly overpays. Debtors *may* be more efficient recordkeepers than creditors are, so the rule fits the least-cost-avoider approach, but if the law were the other way around, a least-cost-avoider advocate would argue that creditors are better recordkeepers. In short, the better-bargainer explanation is unhelpful, although it does not mispredict the legal rule.

As will become clear, this is a familiar pattern: the better-bargainer notion may be worth exploring as a general explanation for the harms-benefits asymmetry and as the source of specific explanations for denials of restitution, but is not helpful in understanding grants of restitution. In surveying the law of restitution it will often be plausible to argue *ex post* that the decisions encourage the better bargainer. But it is rarely possible to identify in advance which recipients of nonbargained benefits are better bargainers than their providers. And it is not possible to predict through this explanation when the law will grant restitution to nonbargaining providers. Indeed, the better-bargainer explanation misinforms the description of some areas of restitution law.²⁴

C. *The Problem of Wealth Dependency*

A serious limitation on the policymaking potential of economic analysis is that individuals' valuations of goods and services are based on willingness and ability to pay with a currency that is not distributed equally among all potential bidders. The rich have more votes in the marketplace than the poor. This inequity may be an indispensable incentive to work and produce. Nevertheless, interpersonal comparisons and most policy judgments are seriously

²⁴ See, e.g., *infra* notes 40-41, 74 and accompanying text.

flawed where revealed preferences are partly a function of individuals' wealth.

Valuation is also skewed by the legal system's award of entitlements. An entitlement changes an actor's ability to express preferences and can therefore make comparisons senseless.²⁵ Homeowner D may pay more for his uninterrupted view of the mountains than E, his next-door neighbor, will pay for the right to erect a huge antenna blocking D's view. But D's ability and willingness to pay for a view may derive in part from the value of his property created by a legal system that makes E bargain with D before E may build his antenna. If property ownership implied only the exclusive right to sleep and build fires, D might regularly pay neighbors to support his aesthetic tastes. A prosperous E might demand a small fortune not to build an antenna, whereas D, with many obligees, might have few bits left with which to bargain. In either legal system, the utility to D and E cannot be perfectly measured on the basis of market information. So any attempt to resolve the conflict between D and E through a cost-benefit analysis based on a single set of market prices will inevitably be distorted.

A "taste" component is buried within the wealth effect just described. Consumption choices depend not only on wealth but also on tastes; differences among persons lead some to value certain goods at or above their market prices, but others to value the same goods below their market prices. On the other hand, if consumer C had infinite wealth, he would not seriously object to paying the market price for a nonbargained provision, because he would either appreciate the item in question or simply let it age harmlessly. In short, the phenomenon built upon in this essay is that consumption decisions and therefore bargains depend to some extent on individuals' wealth and tastes. For convenience, I refer to this notion as "wealth dependency."

The wealth dependency of bargaining and the distributive importance of legal entitlements are critical and yet easily overstated. In the illustration above, D and E seek to satisfy personal tastes that do not translate easily into money. But if E were a telecommunications business, then—assuming a well-functioning credit market—the utility of the antenna to E could be easily valued. If pushed to the limit, E would offer D some amount just below the

²⁵ See Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *Stan. L. Rev.* 387 (1981).

predicted amount of profits to be generated by the antenna. And if E were originally endowed with the right to erect the antenna, E would ask this same amount of any D who wanted to purchase the uninterrupted view.²⁶ Wealth dependency is a problem in the measurement of relative preferences among individuals who have not only different tastes but also different abilities to express their tastes. When projects are profitable, rather than merely taste-filling, they generate their ability to be expressed and valued. In this sense, a preference that can be turned into money is *not* wealth dependent. Business has no taste.

Utility measurements based on market prices are also skewed because personal preferences may be created by, as well as expressed by, wealth. D may not know how much he values scenic vistas until he experiences such luxuries. Taste may be a function of wealth. If so, a cost-benefit analysis on the basis of market prices would be warped in yet another way. For the most part the discussion that follows will assume away this possibility. Note, however, that this problem is unlikely to apply to a profit-seeking

²⁶ If the profit potential of the antenna is \$100, for example, E will pay up to \$100 for construction rights—and, presumably, a lender will advance such funds to a cash-poor E. These potential profits also dictate the amount E will ask to forgo the project.

The economically inclined reader will note that the discussion passes over secondary wealth effects. The money that a profit-seeking E is willing to pay for the property is derived from the ability to pay enjoyed by E's customers (or by some customers down the chain), who are not profit seeking. Thus, the assignment of the property right to E gives those customers more wealth, so that the amount E would ask to give up the property right is greater than the amount that E would offer to acquire the right if it were assigned to another party. The justification for ignoring the inevitability of the wealth-dependency problem—or, more accurately, for arguing that there is *less* of a wealth-dependency problem when the bargainer is a profit-seeking enterprise—is as follows. Wealth dependency is of lesser importance the smaller the fraction of any person's wealth is at stake. A property right worth between \$10 and \$20 (its worth depending on where it is initially assigned) is theoretically impossible to value because of the "offer-asking," or wealth-dependency, problem. As a practical matter, however, one can hope that the legal assignment does not matter (in the behavioral sense) because the parties involved will bargain and because \$10 is likely to have only a tiny effect on the outcome of a bargain. Just as a very wealthy person can be expected to choose what movie to see regardless of relative prices, so too most people who go to court can be expected to bargain over small legal rights (those worth \$10) in a way that is little influenced by the wealth effect of the initial assignment of the legal right. Thus, although profit-seeking E's willingness to pay derives from consumers' willingness to pay, these consumers are numerous, and what E sells is a small part of any of their budgets. For any one of them the offer-asking differential is very small. Consequently, the wealth-dependency problem will also be relatively small. For this reason, the discussion in the remainder of this article speaks as if there is no wealth-dependency problem when a profit-seeking enterprise is at issue. I am indebted to my colleague Tom Bergin for raising this point.

enterprise, because such an enterprise is likely to want more profits even before experiencing them. Finally, there is a distinct psychological aspect to wealth dependency.²⁷ Economic actors may be more concerned with tangible losses than with missed opportunities of equal or greater value. Although this is an issue worth exploring, I set it aside in this article, noting only that the psychological reaction to nonbargained benefits may differ from the reaction to tangible losses and missed opportunities.

The concept of wealth dependency offers a neat and rigorous way to say simply that a recipient may genuinely not want a benefit that is forced upon him, even though its market value may be greater than the amount of restitution sought by the provider. A homeowner whose previously unusable water is purified by a nonbargaining neighbor can maintain that the value of purification is wealth dependent. If he were wealthier the homeowner would include water purification among his basket of purchases, but at his present income level the benefit is almost worthless. By contrast, the homeowner whose well water is polluted by an economically negligent neighbor can argue that the polluter could have been induced not to pollute and that a recovery for harm is necessary to reach the "bargain" result in future cases. The homeowner is unambiguously worse off when his usable water is polluted but not unambiguously better off after a forced purchase of additional pure water.²⁸ The wealth-dependency notion thus offers a general explanation of the harms-benefits asymmetry.

On the other hand, the wealth-dependency problem disappears and restitution need not be denied where the nonbargained benefit is easily translated into wealth. The recipient then has no claim

²⁷ See Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. Cal. L. Rev. 669, 678-95 (1979); Kennedy, *supra* note 25, at 401-03. I will continue to assume that profit-oriented E makes decisions based on the monetary value of the antenna project and that there is no wealth-dependency problem. As will become clear, this assumption is hardly convenient; it creates an obstacle to the descriptive power of this explanation. See *infra* text accompanying notes 101-24 (exploring descriptive difficulties involving profit-seeking recipients).

²⁸ Obviously, the polluter may suffer from a wealth-dependency problem that the law could alleviate by granting the legal right to pollute, subject to the homeowner's decision and ability to bargain. The law of harms simply cannot avoid running into some wealth-dependency problems—although such problems may often be trivial. On the other hand, where benefits are concerned, only by intervening and granting restitution does the law create a wealth-dependency problem.

that the benefit is worthless to him. Recall the law's grant of restitution to the debtor who mistakenly more than repays a debt.²⁹ If A owes B \$100 but pays B \$150, restitution of fifty dollars, the market value of this nonbargained benefit, does not raise a wealth-dependency problem. The requirement of restitution in this case is therefore fitting. Whereas the homeowner could claim that the benefit to him of purified water was less than any restitution claimed by the provider, even if the claim were for the lower of cost and market value, creditor B cannot, without straining credulity, claim that receiving fifty dollars is worth less than giving up that amount. Similarly, recall the general denial of restitution to the improving cotenant and the availability of restitution to the improving cotenant in partition. Both results may be explained by the wealth-dependency thesis. The cotenant recipient ordinarily may be deemed to have preferred other expenditures over the improvement to the cotenancy. The wealth-dependency problem is plausible, and restitution is fittingly denied. But partition solves the wealth-dependency problem. In partition the property is generally reduced to monetary terms, often by sale to an outsider or to one of the cotenants. The recipient, whose share of the improvement's value is deducted from his share of the property's total value, cannot claim to have been forced to purchase a good that he does not value, because he has received in partition the monetary equivalent of his share of the improvement. The grant of restitution in partition is therefore neatly explained by the wealth-dependency thesis. In short, the law can be described as denying restitution for nonbargained benefits when a wealth-dependency problem is plausible, but allowing restitution when no wealth dependency problem exists.

Although the discussion in Part II will bear out the success of the wealth-dependency explanation, this explanation cannot successfully reach all areas of the law of restitution. In particular, whenever a recipient has previously contracted to receive a good or service, no wealth-dependency argument can be raised against an intervening nonbargaining provider. The contract solves the wealth-dependency problem by providing evidence that this recipient desires the good in question at the market or contract price. Nevertheless, the law does not generally provide restitution to such

²⁹ See *supra* note 23 and accompanying text.

an intermeddler.³⁰ The explanation that follows, that of “market encouragement,” is a means of understanding and describing cases where restitution is denied despite a prior contract revealing the recipient’s interest in the nonbargained provision. The market-encouragement thesis can therefore be viewed as a companion to the wealth-dependency explanation. Indeed, the two explanations together may well describe the vast terrain of restitution.

D. Market Encouragement

Efficient resource allocation requires a well-developed or “thick” market composed of many active buyers and sellers. The denial of restitution to intervening providers encourages a complex, thick market.

To understand this point, imagine a world in which restitution claims are always granted. For example, where P repairs R’s car soon after R has contracted to bring his car to Q’s repair shop, P will be entitled to restitution. Assume that nonbargaining provider P bears the burden of proof on work quality and the existence of the contract with Q (which overcomes any wealth-dependency claim by R) and that P asks only Q’s price. If “copycats” like P learn to expect reimbursement at Q’s price, they will soon decline to seek out R and bid for his business. Instead, they will hold back and freeride on Q’s bidding efforts, particularly where the contract price reached by Q and R is greater than that prevailing in a competitive market formed through bidding by P, Q, and other potential providers. One can easily imagine that this restitution-granting world would be characterized by thin markets. A few potential providers, like Q, will seek out potential recipients and make contractual arrangements, but many potential providers, like P, will hold back.

If the price reached by Q and R in this thin market is lower than the market-clearing price that would prevail in a thick, competitive market, then presumably Q is a relatively efficient provider, as is any P who can duplicate Q’s contract and its price. The price that Q and R agree on is constrained, of course, by Q’s realization that the higher the price, the more likely that copycats will work to

³⁰ Indeed, the existence of a prior contract only increases the likelihood that the intervening provider will be regarded as officious. This discussion ignores the additional complexity of a suit for tortious interference with the first provider’s contract.

learn of the deal and intervene.³¹ Over time buyers' needs will be unsatisfied at the prevailing price because not enough providers will be able to meet this low price. These unsatisfied potential recipients will no longer be willing to wait for providers but will offer more money to induce bids. Thus, even in this thin market prices will eventually rise as more buyers compete for suppliers.

If Q and R's price is above the prevailing rate, the market will still be thin in a world that grants restitution to intermeddlers. Any P will be happy to intervene and grab the prize of restitution. But because the price is high, there is no guarantee that either P or Q is an efficient supplier. Moreover, this market will not quickly clear at the competitive price, because there is every incentive for some efficient suppliers to hold back and serve as occasional copycats at the high price rather than as regular suppliers at the competitive price. In short, a system that rewards copycats discourages up-front bids and sustains thin markets, which do not encourage efficient suppliers.

The denial of restitution to the copycat, P, can thus be explained as *market encouraging*. Note that taken alone the wealth-dependency explanation mispredicts the denial of restitution to P. The prior contract between Q and R demonstrates the latter's interest in the repair job and the price that he is willing to pay for it. It is insufficient to argue that restitution law simply protects R's "free choice" of suppliers, inasmuch as the law often grants restitution and even more often imposes tort liability in ways that deprive recipients of free choice.³²

Encouraging a complex market is beneficial only when some suppliers have the capacity to be more efficient than others. It would make little difference whether the law encouraged or discouraged copycats if all potential suppliers were as efficient as Q. It is the existence of complex markets that gives the market-encouragement thesis its power to explain grants as well as denials of restitution.

³¹ We need to know the rules for breach of contract in this hypothetical world in order to know whether it is Q or R who seeks to lower the probability of copycatting. For example, if R owes Q nothing if P does the job and R must pay P exactly the same price that Q could have collected, then it is presumably Q who wishes to preserve some work for himself. The argument in the text must thus be articulated differently depending on the rules of contract law, but is otherwise really independent of these rules.

³² Birks, *supra* note 23, and McCamus, *The Self-Serving Intermeddler and the Law of Restitution*, 16 *Osgoode Hall L.J.* 515 (1978), adopt the free-choice approach.

Consider, for example, one type of "substitute" performer: a junior creditor who makes a mortgage payment that is the responsibility of a nonperforming senior creditor. The transaction is in common currency and, counterfeiting aside, no potential bidder has a comparative advantage in making a payment. Everyone would charge ten dollars to pay off a debt of ten dollars. Here there is no need to encourage relatively efficient suppliers, for there are none. Thus, the availability of restitution to such a substitute performer does not compromise allocative efficiency.³³ This result is also easily predicted by at least two of the other three explanations; the market-encouragement notion, as the reader might anticipate, is more interesting in describing denials rather than in describing grants of restitution.³⁴

³³ See generally Dawson, *supra* note 1, at 1437-38 (explaining that courts variously describe this transaction as an assignment, a subrogation, or an equitable lien).

³⁴ The concept of "search encouragement" is related to that of market encouragement. Consider once again P's intervening performance when Q and R had a prior contract. Q's original contract with R may have been the product of Q's advertisement, previous service, or discovery of R's needs. Arguably, if P can intermeddle and collect restitution (valued on the basis of a Q-R agreement), then P will waste energy following innovators and snatching their clients, and Q will either lose his incentive to find customers or will waste effort hiding his discoveries. This is not to suggest that the law perfectly preserves the innovator's incentives by denying restitution to intervenors. But at the margin it is reassuring to know that once a contract is reached another provider cannot preempt the arrangement without securing the recipient's agreement. Goodwill and custom can continue to reward entrepreneurs. Search encouragement thus provides a parallel ground for expecting the denial of restitution to a nonbargaining provider. The notion also explains the harms-benefits asymmetry: there is no "search" in need of reward in the provision of harms.

A purist (or careful reader) may well suggest that restitution be expanded rather than denied in order to stimulate desirable search. Let P come along and get restitution for the benefit provided to R without a bargain, but then let Q sue P for the value of the search provided by Q that benefited P. But it is fair to insist that Q's burden of proof would be costly and that the administrative costs associated with such an incentive system prevent its enactment. The valuation explanation thus reappears and argues against the expansion of restitution in this setting.

Search encouragement also explains the award of restitution where an unmistakable nonbargain improver of property toils under the owner's eyes. See, e.g., 2 G. Palmer, *supra* note 1, § 10.9, at 453-54. The provider's search is clearly encouraged by this rule: by freeriding on the search and outbidding the real searcher the provider has seized a job opportunity and forestalled the possibility that anyone else could get the job. Restitution may also serve the purpose of deterring the recipient from strategically remaining silent in the hope that the provider's work can be described as flawed or with some expectation that the court will find the provider to be intermeddling. But this notion of deterring strategic recipients is unhelpful in predicting case results. If the law denied restitution one could simply insist that the law deters strategic behavior by the nonbargain provider who hopes that a court will find him to be mistaken or the owner to have contracted. Note that the law *could* deter

In sum, four explanations of restitution law are commendable. They can be labelled according to the problems or goals that they address: valuation difficulties, the search for the better bargainer, wealth-dependency problems, and the need to encourage thick markets. Because the latter two are more powerful and because they are not immediately self-evident, the balance of this article takes their exploration as its primary task. Comments about the utility and disutility of the valuation and better-bargainer explanations are, for the most part, left to the margin.

II. TOPICS IN RESTITUTION

An attempt to survey a large area of law must necessarily suffer from either underinclusion or repetition. The discussion that follows is, if anything, biased against the very themes—wealth dependency and market encouragement—that I endorse. This article tries to give a feel for the breadth of restitution law and to analyze every important area that is not neatly predicted by the suggested perspectives. The types of providers surveyed in this section include improvers of property, mistaken payors, creators of common funds, and substitute performers and other volunteers. Although

such strategic behavior with a rule that the provider collects half of his costs. It is arguable that quantum meruit is just such a comparative-negligence sort of rule, inasmuch as it must often give the provider little more than the cost of materials. As promised, I do not pursue such investigations of the extent of restitution because although it might be sensible to try to deter antisocial behavior by both providers and recipients, the law so often entirely denies restitution (when it might compromise) that we would not predict much by interpreting the cases as attempting to deter strategic behavior. The search-encouragement explanation is similarly retired at this point, despite the sensible goal it ascribes to the law, because of its very limited application.

There is yet something else to worry about in a world that encourages copycats like P to intervene in Q and R's contract. If P can intervene, then either Q or R or both, depending on what contract rule governs damages after the Q-R contract is breached, will strongly prefer immediate completion of the contract. For example, if only Q suffers after P usurps his contract, Q will pay for or demand that guards be hired to ward off P, will raise his price to account for the probability of such usurpation, or will raise his price because he must forgo or defer other work that he would otherwise do before the work that R needs. In short, advance contracts would be discouraged by a rule that gives restitution to copycats because providers would fear intervention before they can complete the contract. Unfortunately, this notion of not discouraging advance contracts is, like the better-bargainer explanation, unhelpful in explaining circumstances where restitution is granted rather than denied. Although the balance of this article ignores the search-encouragement and advance-contract-encouragement explanations, the reader who is more comfortable with these notions than with that of market encouragement is invited to incorporate the former into the latter.

there is no convenient way to order the topics sampled below, I defer discussion of a number of subjects that turn out to be governed by independent considerations. These subjects are poor proving grounds for explanations of restitution because the cases are best viewed as reflecting distinct concerns. Finally, this article will address the special claims of providers to profit-seeking recipients.

A. *Improvers of Property*

1. *The Improving Cotenant in Partition*

It is convenient to begin with a provider who enjoys restitution, the improving cotenant seeking recovery in partition.³⁵ As we have seen, there is normally no wealth-dependency problem in the partition of a cotenancy because the benefit is easily or already monetized.³⁶

The market-encouragement thesis is more provocative. The denial of restitution outside of partition is easily explained because agreeable cotenants, A and B, would look to the market for improvers when considering improvements to their property. Only rarely will they choose the eager cotenant A to do the work. The denial of restitution to an improving cotenant who acts without the agreement of his cotenant thus encourages a thick and efficiency-promoting market. The exception for cotenants in partition may also be explained by market encouragement. Partition may be viewed as a sign of the cotenants' inability to reach agreements. If both cotenants believe that the improvement is needed but A wishes to do the work himself, he can veto B's attempt to use the market. B can similarly block the employment of A. Because neither can use the market without the other's consent, the denial of restitution to cotenants, who in partition are at odds with one another, would not serve the goal of market encouragement. Moreover, because A bears at least half of all expenses even when restitution is granted, it is arguable that he already has at least some

³⁵ Where partition is not requested, restitution is unavailable. *Bras v. Bras*, 463 F.2d 413 (10th Cir. 1972) (denying recovery for unilaterally imposed improvements); *Brusco v. Brusco*, 241 Or. 550, 407 P.2d 645 (1965) (granting restitution in partition); see also *Dawson*, supra note 1, at 1424 (explaining the partition rule—at least when the nonimprover brings suit for partition—as requiring equity of one who seeks equity).

³⁶ See supra text accompanying note 18.

incentive to employ the most efficient provider (who may, after all, be himself). Note that this negative application of the market-encouragement perspective carries smoothly through cases of physical partition, in which restitution is granted by an appropriate drawing of boundaries.³⁷ The dissolution of the joint venture is once again a sign that denial of restitution to the holdout-improver would not have encouraged the market.

2. *Mistaken Improvers of Property*

The general rule denying restitution to a nonbargaining improver who mistakenly labored on the recipient's property is easily explained by both the wealth-dependency and the market-encouragement themes. Suppose P erects a building on R's land, believing that the land is P's. The building may be undesirable to a wealth-constrained R even at a less-than-market price, and P's work may displace that of a more efficient improver whom R might have employed when he became ready to develop his property.³⁸ Denial of restitution thus both encourages the market and preserves R's wealth-dependent valuation of the benefit. Of course, if the denial of restitution does not lead to fewer "mistaken" improvements, the market-encouragement explanation is not useful for these cases, although the wealth-dependency notion retains its predictive power. The situation becomes more complicated, however, when one considers the emerging trend, or at least the increasing likelihood, that mistaken improvers of real property—but

³⁷ Occasionally a simple physical partition will be possible, as when the property can fairly be divided down the middle. Yet the courts still manage to award restitution for the cotenant's nonbargained improvement. See, e.g., *Carter v. Brewton*, 396 So. 2d 617 (Miss. 1981) (deciding that physical partitioning should be done so that the improver's share contains the improvement). The better-bargainer explanation mispredicts these cases because the partitioning process does nothing to change the identity of the least-cost-avoider. The nonbargaining improver is most readily regarded as the better bargainer, yet restitution is granted.

³⁸ Although the valuation thesis also explains the denial of restitution in this setting, the better-bargainer explanation is less helpful. It may sometimes be fair to suggest that a particular P or R is the better bargainer, so that restitution is denied (or granted) in order to encourage the bargain. But generalization is difficult. One cannot intuit in the abstract whether or not the mistaken improver is more often the least-cost-avoider—whether the costs of his bargaining activity, induced by the denial of restitution, outweigh the social benefits of encouraging unbargained improvements by the award of restitution. The cases in which the law does grant restitution to the mistaken provider do not seem to contain facts that would suggest that the recipient was the better bargainer.

not of chattels—will gain restitution.³⁹ Whether the mistaken improver of real property recovers only in equity, or only after the recipient has first claimed damages in trespass, or only if the owner chooses not to have the improvement undone, the possibility that real property and chattels will continue to be treated differently is intriguing.⁴⁰

The valuation hypothesis offers one explanation for the distinction drawn between real property and chattels in these cases. A recurring sort of real property case in which restitution is awarded to the improver concerns tracts of undeveloped land. A, owner of tract 58, builds a house on B's tract 59, mistaking it for his own.⁴¹ Arguably, A and B could swap parcels after the mistake is discovered; valuation difficulties disappear if the tracts are interchangeable. But rarely are the two plots (58 and 59) perfect substitutes.⁴² On the other hand, the cases lend some support to the notion that valuation difficulties are more readily overlooked by courts when substantial funds are at stake. The valuation problem shrinks as administrative costs cease to overwhelm the value of the disputed

³⁹ Compare *Shick v. Dearmore*, 246 Ark. 1209, 442 S.W.2d 198 (1969) (allowing mistaken welldriller to remove casing and pipe—thus encouraging payment and bargain on part of recipient-landowner); *Pull v. Barnes*, 142 Colo. 272, 350 P.2d 828 (1960) (allowing restitution to mistaken improvers if removal not feasible); *Meyers v. Canutt*, 242 Iowa 692, 46 N.W.2d 72 (1951) (granting relief under the umbrella of a legislatively developed a “betterment act” that gave limited protection to improving occupants); *Hardy v. Burroughs*, 251 Mich. 578, 232 N.W. 200 (1930) (granting restitution to the mistaken improver who was not protected by a betterment act), with *Winney v. Leuci*, 189 Misc. 441, 74 N.Y.S.2d 585 (1947) (denying claim against owner by improver who had purchased automobile from a thief); 2 G. Palmer, *supra* note 1, § 10.9, at 454 (“No American case seems to have given relief to one who mistakenly repairs or improves the chattel of another.”). Palmer must have in mind cases concerning nonprofessional improvers. See *Bordelon Motors, Inc. v. Thompson*, 176 So. 2d 836 (La. Ct. App. 1965) (auto repair shop recovers in quantum meruit for repairs valued at three times those authorized by car owner); *Walden v. Vera's Auto Body Serv.*, 94 Misc. 2d 792, 405 N.Y.S.2d 400 (Civ. Ct. 1978) (automobile owner was liable for repairs where repairer was unaware of fraud practiced by employees).

⁴⁰ The better-bargainer explanation is contradicted by the fact that the improver of real property can examine records and titles. Consequently, if the law is to treat improvers of real property and chattels differently, the mistaken improver of chattels should fare *better* than a similar improver of real property. From a market-encouragement perspective, it is difficult to see why *any* mistaken improver should recover.

⁴¹ See *Taliaferro v. Colasso*, 139 Cal. App. 2d 903, 294 P.2d 774 (1956) (improver who owned lot 21 built on lot 20).

⁴² In fact, I have found only one case that calls for a straight swap and no other case in which the facts indicate that such a swap might be equitable. See *Voss v. Forgue*, 84 So. 2d 563 (Fla. 1956) (ordering exchange of deeds of two lots as relief to landowner who mistakenly constructed on adjacent lot).

nonbargained benefit. In the real property cases courts are more inclined to intervene when an entire structure has been misplaced than when a building has been misplaced by only a few inches.⁴³ Conversely, a mistaken improver of chattels—such as a stereo repair shop that confuses the requests of two customers and replaces old fuses and repairs damaged cabinetry when asked only to do the former—does not excite judicial intervention because the value at stake is generally much less than in real property cases. And, interestingly, most of the (albeit rare) cases in which restitution has been granted to mistaken improvers of chattels involve very expensive repairs.⁴⁴

The grant of restitution in the real property improvement cases may also be explained by the wealth-dependency thesis. When intervening on behalf of the mistaken improver, courts occasionally offer the recipient the choice of paying for the improvement or selling the improved property to the nonbargaining provider at a price equal to the unimproved property's value.⁴⁵ It is difficult to imagine a clearer implicit adoption of the wealth dependency idea. The recipient can either accept the benefit or return to his previous position. When the market for unimproved goods works well and inexpensively such a restitution-or-sell remedy is elegant. B, the recipient of an unwanted structure, can sell tract 59 to A at its unimproved price and then commit the proceeds from this sale to another unimproved tract. The wealth-dependency problem is solved only if such substitution is possible. Although real property is normally regarded as unique, where A can plausibly err it is reasonable to guess that the tracts are not unique but are close enough substitutes to permit the solution of both the valuation and wealth-dependency problems.

⁴³ See *Cautley v. Morgan*, 51 W. Va. 304, 41 S.E. 201 (1902) (emphasizing "cost" of only six inches of ground in denying relief to plaintiff who had misplaced boundary wall). But where the improver oversteps a boundary so that someone else seeks recovery from the improver, courts will take a few inches quite seriously—as they must to prevent frequent "mistakes" of this sort. *Magnolia Constr. Co. v. McQuillan*, 94 N.J. Eq. 736, 121 A. 734 (1923); *North v. Bunn*, 128 N.C. 196, 38 S.E. 814 (1901).

⁴⁴ See *Walden v. Vera's Auto Body Serv.*, 94 Misc. 2d 792, 405 N.Y.S.2d 400 (Civ. Ct. 1978) (mechanic awarded \$3,758 for repairs to car); *De Groff v. Carhart*, 97 Okla. 145, 223 P. 180 (1924) (\$1055 automobile repair charges); *Greenwood v. Bennet*, 3 W.L.R. 691 (Can. C.A. 1972) (improvements doubled value of vehicle). But see *Bordelon Motors, Inc. v. Thompson*, 176 So. 2d 836 (La. Ct. App. 1965) (recovery of \$207 for repairs to automobile).

⁴⁵ See, e.g., *Somerville v. Jacobs*, 153 W. Va. 613, 170 S.E.2d 805 (1969) (mistaken improver entitled to receive the value of benefit bestowed or to purchase the improvement and the underlying land by paying only the value of the land).

These theses do not explain, however, why the restitution-or-sell remedy is not available in cases concerning mistaken improvements of chattels. Consider the mistaken repair of the stereo cabinet. There are two distinct reasons why the restitution-or-sell remedy would be unsatisfactory. First, the remedy might generate a moral hazard: potential improvers may make more "mistakes" if they expect to be satisfied with the compensation determined by the courts. The corresponding danger for real property improvements of considerable value is much less. Only rarely can a non-bargaining improver of real property plausibly claim to have made a mistake. Owners are more often present when work begins on their real property than when repairs are made to their chattels. Moreover, written agreements—or at least agreements stipulating the location of work—are of relatively lower cost for real property, in that the improvements are of greater magnitude. So it is not surprising that professional improvers rarely seek restitution after mistaken work on real property.

A second reason that restitution-or-sell is unavailable for mistaken improvers of chattels is that unimproved substitutes are hard to find. The customer whose stereo is excessively repaired is unlikely to find a stereo with comparably damaged cabinetry in which to plow the proceeds from a restitution-or-sell remedy. The absence of such substitutes makes the valuation task inherent in the restitution-or-sell remedy more difficult. It is no accident that the exceptional cases in which the mistaken improver of chattels is granted restitution involve motor vehicles where the used market is quite active and enough funds may be at stake to overwhelm any remaining valuation concerns.⁴⁶

3. *Unpaid Subcontractors*

Unpaid subcontractors are nonbargaining providers in the sense that they have bargained not with the ultimate recipient of their work effort but with an intermediary who later refuses to pay for their labor. The problem arises most frequently in two settings. In one the subcontractor looks beyond the general contractor (who has not paid the sub) to the owner of the improved property, who

⁴⁶ See 2 G. Palmer, *supra* note 1, § 10.9, at 454-55; cases cited *supra* note 44.

is pleased with the work carried out. In the other setting the sub has been disappointed by the tenant or other occupant who ordered the improvement and, again, looks to the owner for restitution. Without legislative intervention the unpaid provider will generally be denied restitution in both settings, even if the owner has not yet paid the general contractor the entire contractual amount and even if the owner approves of the provider's work.⁴⁷

At first glance, neither market encouragement nor wealth dependency explains the denial of restitution. That the provider was denied restitution despite being selected in the market contradicts the market-encouragement notion. And although the wealth-dependency notion explains an owner's freedom from liability when his tenant has ordered the improvement, it does not explain the cases in which the owner employs the general contractor and has thus revealed his preferences and his valuation of these preferences.⁴⁸

If one focuses on pre-contract credit checking, however, the efficiency of the common-law rule begins to appear somewhat plausible—albeit in a way that sets apart the analysis of these unpaid performers from that of other restitution claimants. The common-law rule denying restitution places credit risks on subcontractors. The rule thus not only encourages credit checking of general contractors by subcontractors, but also causes subcontractors to incorporate risk premiums in their arrangements with general contractors. If the law were to grant restitution and turn nonbargaining owners into project insurers, subcontractors would presumably lower this premium.

A credit-oriented legal rule is familiar to observers of corporate law. The doctrine of limited liability and the strength of the corporate veil, especially in the face of claims by creditors who had contracted with a debtor corporation and later tried to reach the as-

⁴⁷ See *Alexander v. Alabama W.R.R.*, 179 Ala. 480, 60 So. 295 (1912); see generally Dawson, *supra* note 1, at 1445-50 (analyzing the barriers to a restitution recovery for gains to a third party from performance of a contract in states without a mechanics' lien statute).

⁴⁸ Note that the prior contractual arrangement between the provider and the general contractor or tenant provides a useful benchmark for valuation, assuming that the latter's disappearance from the scene is unexpected. In addition, because it is not obvious whether owners or subcontractors are better risk bearers or better monitors of intermediaries, the better-bargainer approach appears unhelpful.

sets of shareholders,⁴⁹ resemble the law's protection of the enriched owner from unpaid subcontractor's claims. The rule of limited liability has no behavioral effect where there are no transaction costs; parties bargain with the rule in mind. The lesser the net worth of a separately incorporated enterprise, the higher the risk premiums that suppliers and other creditors will demand (through interest rates, prices, or other compensation), unless they are given assurances that extend outside the incorporated entity. In the real world, however, the rule does affect the information requirements of potential creditors. The supplier that deals with a local subsidiary of a multinational conglomerate, with assets and serious liabilities in many industries and locations, will save substantial search costs (reflected in the risk premium charged the debtor-subsidiary) if the subsidiary is separately incorporated and the rule of limited liability is robust. Similarly, the denial of restitution by the noncontracting owner to the unpaid subcontractor limits the amount of information relevant to the subcontractor's original bargain. The denial of restitution to unpaid subcontractors thus may decrease search costs. Parties that wish to shift risks (and increase searches) can do so on their own by arranging for a performance bond or by including the owner in the original contract—much as creditors of corporations may arrange for personal guarantees by the shareholders of the debtor.⁵⁰

None of this discussion is meant to imply that the denial of restitution in these settings is necessarily economically efficient. Subcontracts may be so small and numerous that credit searching is impractical. The discrete risks may be undesirable yet difficult to diversify. Moreover, despite its concern with efficiency, society may as a distributional matter prefer subcontractors to uninformed other creditors of the general contractor or the occupant. Either or both of these factors is surely behind mechanics' lien

⁴⁹ See Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499 (1976).

⁵⁰ If the law knew how most parties would choose to allocate the risk, then an "off-the-rack" rule would save transaction costs. But among contractors, owners, and subcontractors no one category would predominate as risk bearer. The best result may well be to deny restitution to the subcontractor and hope that the parties will bargain on their own for the right set of guarantees and prices. It would be more difficult for them to bargain around a rule that granted restitution, just as it is easier for a small debtor corporation and its creditors to bargain for liability beyond the corporate veil than it is for a large corporation and its creditors to bargain for liability that is narrower than the corporation's bounds.

statutes that turn an owner's property, to which the subcontractors contribute, into a security device that insures the general contractor's promises.

These statutory restitution schemes may profitably be sifted through the familiar perspectives on restitution. Consider three characteristics of mechanics' lien statutes. First, most such statutes provide security for the price due on each subcontract, even if the aggregate amount exceeds the price agreed to by the owner.⁵¹ Second, very few empower the provider to look beyond the value of the property to the owner's personal fortune.⁵² Third, virtually none appears to allow recovery by a provider who contracted directly with a nonowner occupant from an owner who neither knew of the work nor required that it be done.⁵³

The first of these rules strikingly supports the valuation perspective and contradicts the wealth-dependency idea. Were the providers' claims limited by the extent of the owner's express consent, courts would be forced to divide up the primary contract price among the various providers when the sum of these providers' fees exceeded the single contract price. The rule dispensing with this limitation allows courts to rely on the presumed arms' length negotiations between the general contractor and the providers, but does so at the cost of introducing a wealth-dependency problem for owners, who might be forced to pay more than they wished for an improvement.

Curiously enough, the second and third rules appear to alleviate this wealth-dependency problem. The ceiling on restitution formed by the value of the property worked on limits any wealth-dependen-

⁵¹ See Dawson, *supra* note 1, at 1452 & n.128 (discussing majority and minority rules). The owner who really fears forced consumption can insure by demanding that the general contractor be bonded by a surety, who will step into the general contractor's shoes and complete the contract. The surety's victory through subrogation over previously perfected secured parties, which is somewhat of a puzzle in commercial law, can thus be understood as part of a package comprised of considerations regarding wealth-dependency problems and mechanics' lien acts. For a description of the conflict between secured parties and sureties, see A. Schwartz & R. Scott, *Commercial Transactions* 697-704 (1982).

⁵² See Note, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 *Yale L.J.* 138, 141-42, 145 n.37 (1958) (lien is just that and does not extend beyond "secured" property except in a few states).

⁵³ See *id.* at 157. Even if the general contractor has been employed by the owner (as contrasted to a tenant without authority), some statutes require claimants to be "subcontractors," as contrasted to mere suppliers, and look to a claimant's degree of privity with the owner to make such determination. See *id.* at 147-48.

dency problem and, more interestingly, may be an informal means of identifying recipients wealthy enough to minimize or escape wealth-dependency difficulties.⁵⁴ Similarly, the third rule alleviates the wealth-dependency problem because although there is no guarantee that the recipient-owner wanted the improvement at the higher aggregate price, at least there is evidence that the owner wanted this improvement at *some* price. These rules, which absolve the owner of liability when ignorant of the project and set a ceiling on restitution, also lessen the moral hazard of providers' colluding with tenants or even with general contractors.⁵⁵

⁵⁴ It is useful to contrast two illustrations. First, imagine a handsome residence, worth \$300,000. Its owners contract for an \$80,000 addition, and the general contractor disappears after subcontracting \$130,000 worth of work. Under the rules described in the text, the subcontractors will probably be able to recover because their claims do not reach the ceiling of \$300,000. The expensive residence is presumably what the statutes mean by the "property" worked on and indicates to the courts that the owners are persons of means. Although the wealthy do not wish to consume everything because they too have wealth-dependency problems, it is more probable that they want the improvement at issue.

On the other hand, imagine a public project, such as a bridge, contracted for by a governmental unit that is careful about its budgetary outlays. If the general contractor agrees to excessive contracts with subcontractors or colludes with them, then the second rule described in the text is all that stands between the subcontractors and most of the government's assets. Here the property worked on is the land on which the bridge is built; it offers very little to the disappointed subcontractors. This result is sensible from a wealth-dependency perspective because there is every reason to think that governments would not have bargained for an improvement more expensive than that explicitly agreed upon. Their "wealth" is of a different sort and they often operate close to budgetary limits. The providers can protect themselves by requiring a payment bond, and the government can call for a performance bond that will insure against any surprises. Indeed, it appears that mechanics' lien statutes, sureties, and the rules of interaction between surety interests and security interests under Article 9 of the Uniform Commercial Code offer the tools necessary for parties to structure any sort of risk-allocation that they desire.

⁵⁵ An intermediary who is certain that the owner, who will be liable under the mechanics' lien act, will be unable to bring him to court may be tempted to collude with subcontractors in the hope of receiving side payments in return for setting high prices in the subcontracts.

Note that the readiness with which restitution is granted for improvements that the recipient was compelled to acquire (by statute, for example) is easily described by the wealth-dependency explanation. See, e.g., *George L. Schnader, Jr., Inc. v. Cole Bldg. Co.*, 236 Md. 17, 202 A.2d 326 (1964), discussed *infra* text accompanying note 80; see also Wade, *supra* note 2, at 1195-97 (restitution may be available where recipient's duty under law or contract is fulfilled by an appropriate person). Like it or not, the recipient cannot claim that the consumption was unnecessarily forced. The other explanations do poorly. There remain valuation difficulties in reimbursement, the provider could easily have initiated a bargain, and competition in the market for efficient provision of the required good or service is hardly encouraged by a first-come-first-employed rule.

B. Mistaken Payors

The mistaken overpayer of a monetary debt is generally afforded restitution.⁵⁶ The analysis is straightforward. There is no market-encouragement issue because it is hard to imagine that some drawers of checks are more efficient than others; there is no wealth-dependency problem so long as the illusion of wealth did not change the recipient's consumption or tastes.⁵⁷ Courts' inquiries regarding the extent to which mistaken recipients have "changed position" indicate sensitivity to the wealth-dependency problem.⁵⁸

Another mistaken provider is the insurer that pays out the proceeds of a policy for a mistaken claim⁵⁹ or to the wrong party. The insurer is regularly entitled to restitution. Indeed, a court's usual sympathy for payees who have "changed position" (suffered wealth-dependency problems) is likely to be overcome by the realization that if insurers were denied restitution they would delay their payouts until they were certain of the relevant facts, creating numerous wealth-dependency difficulties for beneficiaries.⁶⁰ Thus,

⁵⁶ See *supra* note 23 and accompanying text. Restitution is also afforded when the payment is not so much mistaken as conservative—that is, when one party has paid another's obligation in order to head off some undesirable outcome, such as foreclosure. See Dawson, *supra* note 1, at 1437-40 (discussing cases involving payments by junior mortgagees, partial owners, lessees, spouses, and potential heirs). These cases are discussed further *infra* text accompanying notes 79-80.

⁵⁷ See *supra* text accompanying notes 27-28. There is also no valuation problem because the mistake is already in a familiar currency and interest is generally not sought.

⁵⁸ See 3 G. Palmer, *supra* note 1, § 16.8(e), at 523-27. I am indebted to Jack Beatson for drawing my attention to this doctrine.

The better-bargainer explanation is perhaps less useful here than are the other perspectives. The question of whether payors or payees could be best induced by the rule of law to avoid these losses is a difficult one. Payees typically enjoy economies of scale but payors often control the facts. In the typical consumer credit case, for example, the payee-business can afford computerized recordkeeping, but the payor-consumer is more likely to recall the transaction. In any event, I regard the better-bargainer explanation as relatively unhelpful because the other explanations are better able to predict the assignment of liabilities and windfalls.

⁵⁹ The insurer (and possibly the insured) may be mistaken as to the occurrence of a loss, the scope of coverage, the payment of premiums, or the very existence of a contract.

⁶⁰ See *Phoenix Indem. Co. v. Steiden Stores, Inc.*, 267 S.W.2d 733, 735 (Ky. 1954); see generally 3 G. Palmer, *supra* note 1, §§ 14.10-14 (discussing mistake as to the scope or coverage of insurance contracts and erroneous computation of paid up or extended insurance). Although a fair number of cases deny restitution, these often involve facts indicating that the insurer's payout incorporated a discount for the possibility that a mistake might be discovered. See, e.g., *Great Am. Ins. Co. v. Weyl*, 94 F.2d 31 (3d Cir. 1938) (denying restitution where mistake discovered after six years and agreement called for return of payment if mistake discovered within one year).

these mistaken payments are easily viewed in the same ways as are other mistaken provisions.⁶¹

The curious exception to this rule is that restitution is generally denied to the mistaken taxpayer.⁶² In some cases the mistaken taxpayer has provided the fisc with a windfall, as by paying a tax that was illegally enacted.⁶³ In other settings the mistaken payment benefits not the fisc but another citizen who truly owed the tax.⁶⁴

⁶¹ Of course, the valuation, better-bargainer, and market-encouragement explanations also describe the results in these cases.

A less familiar but more interesting sort of mistake concerns premiums paid for a void insurance policy. Consider, for example, the sort of case that confronts beginning students of contracts: a fire insurance claim is denied because the destroyed goods were kept in a vault that did not meet the standards specified in the relevant policy. Litigation by the disappointed insured is often unsuccessful. See, e.g., *Hammond v. Niagara Fire Ins. Co.*, 92 Kan. 851, 142 P. 936 (1914) (denying recovery for fire loss because insured failed to keep and produce books as agreed). But will recovery by the insured of past premiums be allowed? Here is a contract that has failed to provide coverage for all the years that both parties thought it in effect. Indeed, in some cases paid-in premiums plus interest may exceed the immediate claim, so that the plaintiff-insured ought to prefer an interpretation of the insurance contract that denies his present claim if such denial is accompanied by a grant of restitution for the useless premiums. Such restitution will normally not be granted by the courts where the insurance was partially effective. See, e.g., *Buehler Corp. v. Home Ins. Co.*, 358 F. Supp. 15 (S.D. Ind. 1973), *aff'd*, 495 F.2d 1211 (7th Cir. 1974) (restitution denied for back premiums, although one insured building was not covered for lack of sprinkler system). This rule can be viewed as sensible within the valuation perspective: the insured has received protection against so many other potential losses that it would be difficult to determine the fraction of the premium that was useless.

It is interesting to note that by contrast, restitution for paid-in premiums is granted when the entire policy turns out to have been useless—as when the policyholder is deemed not to have had an insurable interest. Restitution is also granted for life insurance policies. In these cases only one risk is at issue and courts consequently are not called on to allocate premiums among covered and uncovered losses. See, e.g., *Holland v. Pyramid Life Ins. Co.*, 199 F.2d 926, 928 (5th Cir. 1952).

Finally, note that these legal rules may simply not matter in a perfect market. The typical insured is indifferent between a rule requiring the return of premiums and one denying restitution for these mistaken premiums so long as the insured's errors are accidental, inasmuch as the latter rule will lead to slightly lower premiums overall.

⁶² Restitution is more often denied the more widespread the mistake, as when the statute itself is invalid. See cases cited *infra* note 63.

⁶³ See *New York Pub. Interest Research Group, Inc. v. Steingut*, 40 N.Y.2d 250, 353 N.E.2d 558, 386 N.Y.S.2d 646 (1976); see generally *Field, The Recovery of Illegal and Unconstitutional Taxes*, 45 *Harv. L. Rev.* 501 (1932) (explaining methods that a taxpayer may use to prevent the collection of an illegally enacted tax or to recover the tax if he has already paid it); *Pannam, The Recovery of Unconstitutional Taxes in Australia and the United States*, 42 *Tex. L. Rev.* 777 (1964) (discussing the rule in Australia and the United States that taxes collected under an unconstitutional statute are generally not recoverable).

⁶⁴ See, e.g., *Stone v. White*, 301 U.S. 532 (1937); *McMillan v. O'Brien*, 219 Cal. 775, 29

In either case both the wealth-dependency and market-encouragement perspectives suggest restitution—yet restitution is frequently denied.⁶⁵ As we have seen, the common-law rule of sovereign immunity and the better-bargainer theory that arguably underlies it may explain this result.⁶⁶

Despite case law in their favor, many taxing institutions voluntarily refund overpayments or grant credits for unlegislated revenues.⁶⁷ Moreover, if taxing authorities did not do so, there would no doubt be substantial political pressure for statutory relief. Thus, it is fair to characterize actual practice as fitting the wealth-dependency explanation. Small governmental units, which are least able to predict the total risk of mistaken receipts and therefore most likely to have wealth-dependency problems if forced to return payments, are precisely those that will use the common-law rule that favors them.⁶⁸ Larger units with no such wealth-dependency problem may instead be expected to ignore the option allowed them under the law and agree to return mistaken payments. Note, finally, that the rule adopted by small governmental units

P.2d 183 (1934). Professor Palmer supports the rule but unfortunately does not distinguish the equities at stake from those present in other cases of mistaken payments. See 3 G. Palmer, *supra* note 1, § 14.19. Palmer notes that providers are more likely to win when seeking to recover from enriched taxpayers than from enriched governmental units. It is conceivable that this judicial treatment simply matches the practical reality, described in the text, that many governments voluntarily refund mistaken tax payments.

⁶⁵ The valuation explanation also incorrectly suggests the grant of restitution. One might retreat to the better-bargainer explanation, asserting that each citizen can keep track of obligations to the state more easily than the state can monitor many responsibilities. This argument is misconceived, however, inasmuch as the explanation is ultimately one of comparative cost avoidance. The state is almost certainly a better pooler of risks than any individual even if we assume away the state's economies of scale in detecting mistakes. It is by no means clear what sort of bargain would be struck in the absence of transaction costs.

⁶⁶ See *supra* text accompanying notes 23-24.

⁶⁷ See 3 G. Palmer, *supra* note 1, § 14.20, at 250; sources cited *supra* note 63; see also I.R.C. § 6402 (1984) (Secretary may credit overpayments against tax liabilities and shall refund the balance to the overpayer).

⁶⁸ I have not found a single income, estate, or property tax case involving a state (as opposed to a city or county). Mistaken payments to states are at least as likely as such payments are to smaller units; larger governmental units probably simply return the money as a regular practice. Readers familiar with the area will note that I have avoided discussion of state and local sales taxes. There is indeed a fair amount of litigation in which, after B has turned over sales tax revenues to the state that B collected from A, A realizes that the tax was not owed and unsuccessfully seeks to recover from the state. These cases may be governed by predictable transaction-cost calculations, inasmuch as sales taxes are more difficult than most to monitor and A can easily discover its own liability. Alternatively, the law may be nervous that A will be able to recover that which B never remitted to the state.

may not matter much. Because the retention of overpayments will eventually result in a lower overall tax rate, voting taxpayers are probably indifferent between a rule granting restitution and one denying it. The rule chosen may matter even less in the context of taxation than it usually does in bargaining situations, because even small governmental units may find it sensible to return mistaken payments. To withhold restitution would encourage potential taxpayers (like insurers) to withhold payments until they are virtually certain of liability.

In sum, most mistaken provisions of money, as contrasted to provisions of improvements and services, are restored in restitution—as one would expect after considering the suggested perspectives. The restitution of mistaken money payments involves no valuation or market-encouragement problems. Mistakenly paid money least often involves wealth dependency and valuation problems; nonbargained services most often involve such difficulties. Nonbargained improvements to property sometimes present wealth-dependency and valuation problems, but sometimes are easily monetized. In general, then, we can expect—and indeed find—the mistaken provider of money to be more successful in restitution than the mistaken improver of property, who is in turn more successful than the mistaken provider of services.

C. *Attorney-Creators of Common Funds*

Anyone unfamiliar with this area of the law is apt to be shocked by judicial creation of “missing bargains” to compensate lawyers. Imagine A, B, and C, children of deceased T, who will share equally in the estate after a sizeable bequest to F. C employs lawyer L to argue that the bequest to F had been greatly enlarged in a codicil written after T became incompetent. If L is successful, he will almost surely be able to charge A and B, who have passively gained by reason of L’s efforts.⁶⁹ The law appears to imagine a missing bargain, forcing a class action on nonbargainers. L is especially apt to recover when he can point to a “common fund”—that is, a clear pool of monetary benefits—that he has generated.⁷⁰ In-

⁶⁹ See *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (lawyers who successfully represented a group of creditors collected fees from other creditors who benefited from the suit); see also cases cited in Dawson, *supra* note 9, at 1615 n.55.

⁷⁰ See 2 G. Palmer, *supra* note 1, § 10.8; Dawson, *supra* note 9, at 1601-12.

asmuch as the heirs may have been unable to bargain as much because of holdout problems as because of communication costs, it is perhaps less surprising that the lawyer who creates a common fund may even collect from recipients who specifically rejected the lawyer's services or, perhaps, who held out in order to enjoy them gratis.⁷¹ By contrast, the law does not normally offer intellectual property rights to lawyers who develop novel arguments and establish precedents that are used by later "recipients." Restitution for such benefits would clearly be denied.⁷²

I have chosen the fund-providing lawyer's successful claim as the central illustration of this section because it comes as a surprise to most readers. Similar success is enjoyed by a provider who hires a lawyer and then seeks contribution from peers, or "class" members who benefited from the lawyer's services.⁷³ The similarity of these two claims (one by a lawyer and the other by an employer of a lawyer) may make the first seem less startling to a Coasian reader. After all, if L and his client, C, know that the legal rule will require nonbargaining recipients A and B to pay restitution to L, then L will agree to work for C at a lower-than-usual fee. This point may make the cases seem more sensible and may diminish the suspicion that recovery in this area is simply indicative of judges' professional empathy for lawyers. But the likely effect of the rule on L's explicit fee structure should not obscure the noteworthy interventionist posture of courts faced with the nonbargained provision of legal services. The occasional reconstruction of a missing bargain in a way that spreads the expense and, no doubt, encourages the provision of legal services is unlike the treatment afforded other nonbargained benefits. The law's intervention here is in striking contrast to its posture toward the nonbargaining purifier of the neighborhood ground water and, in fact, closely resembles its approach to nonbargained harms.

To the extent that courts look for "funds" rather than for less

⁷¹ See Dawson, *supra* note 9, at 1646 n.161 (citing cases).

⁷² See *id.* at 1610; see also discussion *infra* note 74 (noting possibility that such arguments might be independently discovered later and that contributions of any one precedent to legal victory might be uncertain).

⁷³ See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Trustees v. Greenough*, 105 U.S. 527 (1881); see also Dawson, *supra* note 9, at 1606 n.25 (citing cases). Dawson suggests that the rule granting restitution to lawyers derived from the cases granting restitution to their clients for creating a common fund. *Id.* at 1602-03.

tangible benefits created by nonbargaining lawyers, the wealth-dependency explanation is dramatically successful. Landowners may well budget their wealth in ways that preclude their enjoyment of purified ground water supplied at a fee, but beneficiaries who are provided with a supplementary inheritance—in monetary form—can hardly claim that they would be better off without the bonanza that remains after a fee to the provider is subtracted. The “common fund” doctrine is thus as close as we come to an explicit adoption of the wealth-dependency notion.⁷⁴

In reality, however, this “success” of the wealth-dependency perspective is dated. In much nonbargained “public interest” litigation of the last twenty-five years—including derivative suits, taxpayer suits, civil rights suits, and assorted class actions—restitution has been extracted from freeriders even when the benefit provided was not reducible to money.⁷⁵ Recipients are accordingly compelled to buy legal services much as tortfeasors are forced to “buy” the right to impose harms. Indeed, little now re-

⁷⁴ The better-bargainer explanation is either misleading or unhelpful in describing this area of restitution. Nonbargaining recipients such as A and B are unlikely to be better initiators of a bargain than the lawyer, just as scattered recipient neighbors are unlikely to be better bargainers than W who purifies the community's ground water. One might insist that holdout problems and other transaction costs are more serious (or, perhaps, are *taken* more seriously) in the context of legal services. But inasmuch as freeriding tendencies among recipients vary greatly from case to case, such insistence depletes the better-bargainer perspective of its descriptive power.

The valuation explanation of restitution is more attractive in understanding the success of the nonbargaining provider-lawyer. Valuation difficulties may be overcome by judges' expertise, real or imagined, in valuing the provision and indeed the advisability of lawyers' services. Judges are accustomed to calculating and reviewing legal fees in a variety of settings, including bankruptcy litigation, derivative suits, and a broad range of class actions. Indeed, it would be surprising if judges were suddenly disinclined to second-guess lawyers' fees, given that judges are ready to second-guess their fellow guild members' substantive decisions in some contexts. See, e.g., *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (modifying business judgment rule and second-guessing corporate managers when corporation's decision involves litigation strategy). In any event, the particular expertise that judges may have in valuing the work of lawyers is compatible with the judicial inclination to provide restitution for the nonbargaining lawyer-provider.

One might wonder why courts do not go further and intervene on behalf of lawyer-providers whose clever arguments are copied or simply cited by other advocates. One possibility is that restitution for use of legal arguments is inappropriate because these ideas could have been developed independently. Evaluating the proximate contribution of one lawyer's argument to another lawyer's success would also be difficult. See *infra* text accompanying notes 111, 113.

⁷⁵ See Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 *Harv. L. Rev.* 849 (1975).

mains of the harms-benefits asymmetry in this area. The wealth-dependency notion is no longer very useful in describing recoveries by or for nonbargaining lawyers unless one shifts to the plausible but trivial view that judges see legal services—like medical services and funeral expenses—as necessities and not as mere consumption possibilities. Of course, this suggestion may simply be another way of saying that judges afford special treatment to their fellow guild members.

The market-encouragement perspective is also interesting but decreasingly useful. C's employment of lawyer L may be taken as a sufficient use of the market. C has already looked for the best and least expensive provider, so restitution from A and B prevents their freeriding on the arrangement between C and L but does not bypass the market for legal services. The market-encouragement explanation thus provides a useful insight into all those cases where some reasonably careful "shopper" contracted for the provider's services. Arguably, if courts expect lawyers to take solicitation and champerty rules seriously, the influence of a careful shopper can always be presumed, so that the market is sufficiently encouraged in this area. Of course, to the extent that modern "public interest" litigation is initiated by aggressive lawyers who seek plaintiffs rather than await them, the market-encouragement explanation also loses its vitality.

The wealth-dependency and market-encouragement explanations thus have limited utility in describing current law in this area. At best, one might insist that at some point in the past both perspectives were quite useful. But whether because of judicial favoritism, a conception of legal services as necessities, or the sheer seductiveness of the common-fund doctrine, courts expanded the restitution remedy far beyond its original borders.

Once one realizes nonbargaining lawyers' special good fortune in restitution law, it becomes clear that here the efficient magnitude of restitution is a more subtle question than it is in many other contexts. Physicians can recover every time they labor on behalf of a nonbargaining recipient,⁷⁶ but lawyers generally recover only if they win their cases. In deciding whether to take a case they must discount the fees recoverable by the probability of success. Thus, lawyers will be discouraged from providing legal services if restitu-

⁷⁶ See cases cited *supra* note 8 (physicians in emergency situations).

tion is afforded only for winners' expenses and normal fees. A variety of instruments are available to encourage the "right" amount of legal services and to overcome the freerider problem among beneficiaries. First, courts could deny restitution to losers but give an extra reward or a multiplier to winners, so that lawyers assessing public interest cases prospectively would still be induced to litigate these matters. Second, courts could dispense with the requirement that a benefit be provided and simply reward both winning and losing lawyers for having provided the "necessity" of legal services, much as physicians are granted restitution for emergency medical services whether or not the patient recovers. Third, courts could do both: grant generous legal fees to winners and erode the benefit requirement so that many losers recover as well. This third route appears to be the one that courts have travelled.⁷⁷ The weakening of the common-fund requirement and the obsolescence of the wealth-dependency and market-encouragement explanations may not have been inevitable, but once judges considered the vitality of the incentive system and overcame strong feelings against restitution for nonbargained benefits, it became fairly certain that a mixed, even chaotic, system such as the one now in place would emerge.

⁷⁷ On the granting of generous fees to winners, see *In re Osofsky*, 50 F.2d 925 (S.D.N.Y. 1931) ("generous allowance" to attorney who successfully increased bankruptcy estate); *Dawson*, supra note 75, at 876 (noting increased use of percentage-of-benefit formula in determination of fee awards). On the erosion of the benefit requirement, see *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959) (looking back to a benefit obtained by a prior mandamus proceeding brought in state court); *Fletcher v. A.J. Indus.*, 266 Cal. App. 2d 313, 324, 72 Cal. Rptr. 146, 153 (1968) (results of the action were to "maintain the health of the corporation and raise the standards of 'fiduciary relationships and of other economic behavior'") (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 365, 101 N.W.2d 423, 426 (1960)); *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 366, 101 N.W.2d 423, 426 (1960) (finding a "wholesome effect" on management to be a benefit); *In re Atwood's Trust*, 227 Minn. 495, 35 N.W.2d 736 (1949) (benefit of resolving uncertainty surrounding trust); *Monroe v. Winn*, 19 Wash. 2d 462, 142 P.2d 1022 (1943) (benefit found despite loss of suit to remove trustees, because their confirmation aided settlor's purpose and because suit clarified administrative questions regarding future management of the trust); see also 2 G. Palmer, supra note 1, § 10.8, at 433 (noting that some cases abandon any requirement of economic benefit); *Dawson*, supra note 75, at 865-66 (same).

*D. Substitute Performers, Part Performers, and Volunteers**1. Substitute Performers*

The substitute performer, who fulfills someone else's duty, ordinarily receives restitution.⁷⁸ Often the substitution is with respect to a financial obligation: a cotenant may pay more than his share of taxes, for example.⁷⁹ Such cases are easily explained through three perspectives: valuation (money is easy to value); wealth dependency (money is an indisputable benefit); and market encouragement (no one is better than anyone else at paying money).

In some cases the substitution is in the provision of services. Such cases are less common than those dealing with substitute payments of monetary obligations and are, of course, more interesting grist for this article. For these cases the market-encouragement explanation is strikingly successful. In one interesting case a county had contracted with provider A, who failed to perform; B, who had an interest in the work's completion, paid the county to do the work. B eventually received restitution in the form of a subrogation claim against A.⁸⁰ B avoided creating a market encouragement problem by not doing the work himself. But even where the substitute provider performs rather than puts the task out to bid or uses a provider already selected in the marketplace, the circumstances may be such that it is difficult to imagine a better provider. Consider, for example, the parent who fulfills the school board's obligation of transporting children to school.⁸¹ The parent is likely to be a careful and well-located provider, so that restitution is fitting. Although the market is "thinned," the effect is in favor of, rather than at the expense of, an efficient provider.

Analytically, the market-encouragement explanation can be pushed further. If a noncontractual provider is unsure *ex ante* of his ability to collect in restitution, presumably he will take care not to be inefficient when deciding whether to do the task himself and

⁷⁸ See Restatement (Second) of Restitution § 3 (Tent. Draft No. 1, 1983). The restitution may be in the form of contribution or subrogation, but this article continues to suppress the details of recovery.

⁷⁹ See Dawson, *supra* note 1, at 1437-42.

⁸⁰ *George L. Schnader, Jr., Inc. v. Cole Bldg. Co.*, 236 Md. 17, 202 A.2d 326 (1964).

⁸¹ For cases granting restitution, see *Sommers v. Putnam County Bd. of Educ.*, 113 Ohio St. 177, 148 N.E. 682 (1925); *Rysdam v. School Dist. No. 67*, 154 Or. 347, 58 P.2d 614 (1936). But see *Bruggeman v. Independent School Dist. No. 4*, 227 Iowa 661, 289 N.W. 5 (1939).

when choosing someone else to do it. Not every parent who fills in for the school bus driver expects to gain restitution. An ambiguous rule may therefore encourage the market *ex ante* nearly as well as a rule denying restitution would do. Occasional cases granting restitution to efficient substitute providers therefore do not terribly discourage efficient markets and do not denigrate the market-encouragement thesis.

Some may question the explanatory power of the market-encouragement idea on the basis of an assumption that substitute providers who seek restitution are a self-selected set, more aggressive than most and therefore not intent on choosing the most efficient provider because they were unafraid *ex ante* of being denied restitution. This prediction is not supported by the case law. Often the substitute provider who gains restitution is a fairly obvious substitute. For example, the landowner who constructs a road to halt trespassing may recover from the county highway department; the relative who arranges a burial recovers from the decedent's estate. These providers are likely either to be comparatively efficient or to have become involved merely by chance. It is unlikely that these providers are aggressive, calculating intermeddlers.

In contrast, the law ordinarily denies restitution to substitute providers who self-select. In one example, the losers of a contest for control of a corporation continued to manage the business while litigating their ouster. They then sought—and were denied—restitution for their managerial services supplied during this interim period.⁸² The denial of restitution ratified the stockholders' judgment that these providers were inefficient. The market-encouragement perspective thus explains both the grant and the denial of restitution in substitute-provider cases. Restitution is most certain when the substitute provider appears efficient and unlikely to have self-selected; restitution is unavailable when the market has sought to *discourage* the party claiming restitution.⁸³

⁸² *Saltz Bros. v. Saltz*, 122 F.2d 79 (D.C. Cir. 1941); cf. *Perlmutter v. Timely Toys, Inc.*, 8 A.D.2d 834, 190 N.Y.S.2d 107 (1959) (denying recovery for services supplied by a holdover tenant in the period between time sued for eviction and final eviction).

⁸³ It may appear that the valuation perspective also describes these substitute provider cases. After all, preexisting arrangements (including pricing agreements) between the recipients and nonperformers may solve the valuation problems that are normally present in cases involving nonbargained benefits. Even when the substitute provider performs only a portion of the original task, the case may already be in court for the purpose of evaluating the

2. *Rescuers and Other Volunteers*

Viewed out of context, the common law's disinclination to reward most rescuers—and its equal reluctance to punish failure to rescue⁸⁴—seems inexplicable and perhaps unfortunate in a private law system that can otherwise be said to regulate social obligations. The rescuer who seeks to recover expenses after risking life and property creates only a minor valuation problem, comes on the scene too late to interfere with any bargaining, presents no wealth-dependency problem inasmuch as rich and poor alike would normally choose to be rescued, and does not create a market-encouragement issue because the victim can hardly call in a more efficient rescuer. The law's refusal to reward rescuers thus appears no more or less puzzling in the shadow of restitution than it does in the familiar framework of tort, contract, and criminal law.

Two familiar avenues of escape from this anomaly are available. First, one can adopt certain behavioral assumptions and suggest that many socially useful rescuers will materialize if they know that they will be glorified as heroes, whereas many potential rescuers would be discouraged even from strolling on beaches if they

contribution and claim of the nonperformer. Alternatively, the nonperformer and recipient may have agreed on the former's contribution. Either way, calculating the value of the substitute's provision should be relatively simple. Moreover, this perspective may be extended to explain the denial of restitution in cases where the market sought to discourage the provider, such as the case in which holdover corporate managers sought restitution for management services provided in the holdover period. See *Saltz Bros. v. Saltz*, 122 F.2d 79 (D.C. Cir. 1941), discussed *supra* text accompanying note 82. In these circumstances there is no market value for the substitute provisions simply because there is no market for them.

But the valuation perspective is much less useful than may first appear, for if it describes the trees it does so at the expense of the forest. Why not always expect restitution to be granted when there is a preexisting contract? If A contracts to tend to B's lawn and C intervenes and does the job, there is no valuation problem (assuming that A and B agreed on a price), yet C does not recover. There is little point in suggesting that the analysis recognize a "free choice" theme that, added to the valuation perspective, might explain the denial of restitution to C. All substitute providers interfere with "free choice," and many other nonbargaining providers, including some lawyers and mistaken improvers, gain restitution despite interfering with the free choices of recipients.

⁸⁴ See Wozzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273 (1983) (explaining society's general disinclination to impose criminal sanctions for the failure to rescue). But see Minn. Stat. Ann. § 604.05 (West Supp. 1984) (making it an offense to fail to give aid in an emergency, if aid can be rendered without danger to giver or others); Vt. Stat. Ann. tit. 12, § 519 (1973) (person who, without danger or peril to himself or others, can render aid to a person he knows to be exposed to "grave physical harm" must do so).

feared liability for nonrescue.⁸⁵ Note that the ability of salvors at sea to recover later for their nonbargained efforts is consistent with this assumption.⁸⁶ Because glory-seeking passers-by are unlikely on the high seas, the positive inducement of restitution will not discourage those who seek glory rather than reward. Second, one may explain that the law's treatment of volunteers reflects a moral consensus, real or wishful, that extremely good and bad deeds are unlikely to be influenced by or simply should not be regulated by economic incentives. In any event, the ability of rescuers and other volunteers to gain restitution may be described less as a blow to the descriptive power of the themes in this article (and indeed to familiar behavioral views of the common law) and more as deriving from independent principles or behavior peculiar to rescuers.

My own view, to be developed more fully in a separate essay, sets rescuers apart from other providers on different grounds. The law's reluctance to assign tort liability for failure to rescue may be caused by the presence, in the typical case, of numerous potential rescuers. Arguably, the law does not wish to encourage the confusion created by many heroic attempts when only one is needed. Moreover, the law wants to discourage potential rescuers from delaying rescue in the expectation that someone else will do the job. Indeed, those unusual cases that impose a duty to rescue often concern defendants with unique rather than coextensive tragedy-avoiding potential.⁸⁷ The existence of multiple potential rescuers

⁸⁵ See Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. Legal Stud.* 83 (1978).

⁸⁶ See G. Gilmore & C. Black, *The Law of Admiralty* § 8-1 to -14 (2d ed. 1975). In admiralty salvors of property not acting under a preexisting duty are entitled to a salvage award. Life salvors, however, receive an award only if there is salvaged property from which such an award can be made. Life salvors are given awards in cases where property is also saved because absent such incentives they might choose to salvage property rather than save lives. See *id.* § 8-1, at 532. When no property is salvaged, however, the incentive to render aid may be sufficient without an award: the value of the saved life will so greatly exceed the costs of rendering aid that altruism will make a monetary incentive unnecessary. See Landes & Posner, *supra* note 85, at 104-05. In contrast, property salvage may be expensive, and without the assurance of an award salvors might not perform an economically efficient level of salvage. Yet salvage awards are not limited to quantum meruit recovery, *id.* at 101, for as is the case with lawyers, salvors only recover if they are successful, and must receive more than the costs incurred in a particular rescue to be compensated for unsuccessful rescue attempts.

⁸⁷ See, e.g., *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (finding landlord liable for assault by intruder in unguarded hallway); *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychiatrist

makes it difficult to design a comparative negligence rule that does not encourage potential rescuers to flee the scene in an effort to avoid negligence liability, and it may be difficult to prove causation of non-rescue if such a rule were established. These concerns may underlie tort law's normal absolution of nonrescuers. It is a small additional step to argue that the denial of liability for nonrescue is well matched by the denial of restitution for rescue.⁸⁸

Conversely, when liability for nonrescue is imposed by law or by professional ethics, as it is upon physicians encountering medical emergencies, then restitution for rescue may be granted as well. The ability of doctors to recover for their services (even when the patient dies) is predictable without an appeal to the valuation, wealth-dependency, and market-encouragement perspectives.⁸⁹ Only rarely will many physicians be at the scene of an accident; thus, the imposition of liability for failure to rescue does not cause over- or underdeterrence. This tangential suggestion explaining the law's general failure to award restitution to rescuers is simply another means of arguing that the law's treatment of volunteers derives from independent considerations.

3. *Part and Substantial Performers*

Restitution plays an important role in sorting out the aftereffects of uncompleted contracts. When, for instance, a contractor agrees to complete a structure by a specified date but fails to do so, three types of judicially imposed results may follow. First, a court may find that although the contractor did not comply strictly with the contractual terms, it "substantially performed," so that recovery under the contract is allowed, less some amount that rep-

liable for failure to warn third party of patient's intent to murder her); see also 33 U.S.C. §§ 367-368 (1982) (in collisions between vessels at sea the master of each vessel has duty to render aid to the other vessel); Woozley, *supra* note 84, at 1290-91 (selective enforcement is one problem with criminal liability for duty to rescue: the existence of multiple potential rescuers may make it unfair to impose duty on any particular individual).

⁸⁸ Again, admiralty law departs from this general rule. When there is a duty to rescue no award for salvage can be claimed; salvage awards are only given in cases where the salvor could not have been held civilly or criminally liable for a failure to rescue. See G. Gilmore & C. Black, *supra* note 86, § 8-2, at 535.

⁸⁹ Landes and Posner explain restitution for the physician on the basis of the ease of valuation, given that equivalent services are sold in the market, and the higher opportunity cost of affluent physicians, who may be less likely to stop and help without payment. Landes & Posner, *supra* note 85, at 110.

resents the buyer's cost of completion or loss in value.⁹⁰ Second, a court may simply characterize the contractor's performance as a "wilful" breach and deny recovery despite the partial completion of the project.⁹¹ Third, a court may adopt a compromise position, allowing recovery for the value of the work done, for the contractor's costs, or for the lesser of cost and value.⁹² Because many projects will be valued at more than the sum of their labor and raw components, the first and third results are not equivalent. It is the third and most common position that is reached through the doctrinal tools revealed in the language of restitution, unjust enrichment, or quantum meruit.

I will argue that independent considerations again account for courts' selection from among these alternatives. Before describing these considerations, it is worthwhile to discuss why the perspectives on restitution offered in this article fail to explain this outcome. The valuation perspective is unhelpful. Courts concerned with their ability to value parts of contracts would have adopted an all-or-nothing rule: the contract is either fulfilled or breached.⁹³ A simplistic least-cost-avoider framework is also of little help as a predictive tool in the present era. The subcontractor's failure to complete performance has generally been caused by increased opportunity costs or changes in the costs of supplies. Renegotiation could spare breach. As with all one-on-one bargaining situations, however, it is difficult even in concrete cases to know which party needs more encouragement to renegotiate or to mitigate. It is

⁹⁰ The classic American case is *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) (use of wrong pipe in construction of a home entitles owner to recovery for difference in value, which would be nominal). See generally E. Farnsworth, *Contracts* § 8.12, at 590-93 (1982) (discussing the doctrine of substantial performance).

⁹¹ See, e.g., *Glazer v. Schwartz*, 276 Mass. 54, 57, 176 N.E. 613, 614 (1931) ("where the default is wilful there can be no recovery"). Such a result would be rare today. Cf. U.C.C. § 2-601 (1978) (buyer's rights on improper delivery); Priest, *Breach and Remedy for the Tender of Nonconforming Goods under the Uniform Commercial Code: An Economic Approach*, 91 *Harv. L. Rev.* 960 (1978) (suggesting that courts have interpreted nonconforming tender provisions of U.C.C. in a manner consistent with cost minimization).

⁹² See, e.g., *Britton v. Turner*, 6 N.H. 481 (1834) (enriched party obliged to pay reasonable worth of services received when breaching party left work two months before promised); see generally E. Farnsworth, *supra* note 90, § 8.14 (contrasting *Britton* with the traditional view denying restitution to the party in breach).

⁹³ The law may have in fact passed through an all-or-nothing phase, and thus the valuation perspective is a useful resource for historians. See E. Farnsworth, *supra* note 90, § 8.14, at 600-03.

pointless to insist that the recipient is always the better bargainer, on the grounds that he has both unrevealed preferences and the ability to find another provider to complete the project, because the subperformer almost certainly enjoys a comparative advantage in completing the project. The subperformer's advantage means that the law could promote efficiency if it always required the payment of damages for noncompletion, as long as the parties have specified in advance any idiosyncratic features of the project. The law would thus ensure that the subcontractor efficiently allocates elsewhere the resources that were to be devoted to performance. Given that the law sometimes gives quantum meruit (no value added) or even no recovery to the subperformer, a least-cost-avoider perspective is either unhelpful or insufficient as a descriptive tool.⁹⁴

The wealth-dependency notion is unreliable in this context because it fails to distinguish cases that award restitution to subperformers from those that do not. If the project cannot be completed in a way that keeps the total cost at or below the original contract price—a reasonable assumption in light of the subperformer's noncompletion—a wealth dependency problem exists. A person who will pay x dollars for y would not necessarily pay $\frac{3}{4}x$ for $\frac{3}{4}y$. Hence, those cases that allow partial recovery to the subperformer cannot be characterized as presenting no wealth-dependency problem.

The market-encouragement perspective is also either misleading or unhelpful. The disappointed recipient has of course already chosen the subperformer from the pool of available providers, so the

⁹⁴ Cost minimization surely influences the decisions, but *ex ante* one would be hard pressed to predict the outcomes of these cases with a least-cost-avoider approach. On the other hand, the better-bargainer explanation may point precisely to the problem at hand even as it offers little in the way of broad predictive power. At one level the better-bargainer explanation is unsatisfactory because the one-on-one bargain between the breacher and the recipient varies so much across settings and markets. What is generally at stake is a renegotiation motivated by increased opportunity costs or changes in the costs of supplies. Presumably the law needs to be fine-tuned—*ex ante* where it counts—to discourage opportunistic behavior and to encourage one or the other party to renegotiate or otherwise mitigate. See generally Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967 (1983) (discussing problems of encouraging joint cost minimization and emphasizing the inadequacy of a general rule when substitute markets are imperfect). The discussion in the text thus does not deny that cost minimization is an influence in these subperformer decisions. Instead, the discussion stresses an "independent consideration," also in the least-cost-avoider family, that may be at stake in these cases.

grant of restitution would not discourage the market. In rare cases the recipient could insist that the provider was chosen precisely for his talents relevant to the uncompleted portion of the project. Because it is difficult to determine when that is really the case, the market encouragement notion may best be regarded as unhelpful rather than misleading. Readers familiar with contract law may note that the judiciary's taste for divisibility, or severability,⁹⁵ accompanied by restitution for the subperformer through apportionment of the original contract, is not nearly as supportive of the market-encouragement notion as it is of the valuation theme. One can be the preferred provider of a package of three tasks and yet not be the first-choice provider of any one or two of the three tasks.

The independent consideration that overwhelms other perspectives in understanding these subperformance cases is the possibility that parties who have bargained may have sought to establish an incentive scheme that reflects and supports their needs and goals. Contractual terms, especially prices, may offer incentives that serve much the same purpose as penalty clauses without incurring nearly the same risk of judicial disapproval. Imagine an employer B who seeks an employee to accompany him on a long trip and is willing to pay \$1000 for the job. B fears that the employee will leave when the task is three-quarters completed because of boredom, unexpected opportunities, or even a premeditated plan to seize another opportunity. B would have difficulty specifically enforcing a contract for personal services. B could contract for a \$400 payment from the employee should the latter leave early, but given the judicial hostility toward penalties B worries that he will be unable to demonstrate that the \$400 is reasonable compensation for his assuming the risk of hiring someone else to complete the task at a difficult time or in a difficult location.⁹⁶ B's

⁹⁵ See, e.g., *Carrig v. Gilbert-Varker Corp.*, 314 Mass. 351, 50 N.E.2d 59 (1943) (building contractor recovers for 20 houses completed despite refusal to build 15 others agreed on); see generally E. Farnsworth, *supra* note 90, § 8.13 (discussing doctrine of divisibility).

⁹⁶ See 1 G. Palmer, *supra* note 1, § 5.12. In general, deposits can be viewed as option purchases. Upon receiving a deposit, the seller will generally stop looking for another buyer and will incur other costs. Of course, *ex post* the seller may profit from the buyer's withdrawal, perhaps because a second buyer materializes and pays even more. Fortunately, at least some courts have little trouble finding the first buyer's deposit nonrefundable. See, e.g., *Quillen v. Kelley*, 216 Md. 396, 140 A.2d 517 (1958).

ends (which *ex ante* are often shared by the potential employee) can also be achieved by a positive incentive scheme: B may pay higher weekly wages at the end of the trip than at the beginning, or B may even pay all wages at the end if B's costs to complete are very high. I do not mean to suggest that an employer who so fashions compensation is never exploiting inexperienced bargainers. But there may be good reasons for end-loaded pay arrangements, and the utility of these arrangements would be ruined by a court's insisting on pro-rata restitution for the employee's pre-breach efforts. Courts may not be able to distinguish exploitation from valid incentive systems. But a sympathetic court may support the parties' drafting decisions (especially if the court is not called on to reverse explicitly the inherited hostility toward penalty clauses) by denying restitution or quantum meruit recovery. In any event, the likelihood that at least some of the cases denying restitution may be explained as an end-run around the hostility to penalty clauses muddies the area so much that it cannot be regarded as a testing ground for the perspectives on restitution considered throughout this article.⁹⁷

⁹⁷ One might wonder whether a correlation exists between a jurisdiction's treatment of penalty clauses and its attitude toward restitution for the subperformer. Unfortunately, the sample of conveniently focused cases is insufficiently large to show any correlation. Similarly, the law's treatment of money deposits put down by subperformers or nonperformers is not clear enough to serve as an important proving ground for the various visions of restitution. Generally speaking, a defaulting purchaser will be entitled to a return of a deposit when a concerned court views the forfeit of such deposit as a penalty that exceeds the seller's reasonable expenses. The Uniform Commercial Code establishes a presumption that contracts calling for the forfeiture of small deposits are reasonable. U.C.C. § 2-718 (1978) (unless seller establishes damages, a defaulting buyer is entitled to a refund of money paid in excess of 20% percent of total contract price or \$500, whichever is smaller).

Again, the area is so laced with concern for unconscionable behavior that it is difficult to extract any strong currents on the subject of restitution for nonbargained benefits. Indeed, it often appears that courts identify penalties inappropriately, by measuring deposits not against the *ex ante* risk of nonsale but rather against the *ex post* reality of resale, where the seller's lost interest may be the only apparent loss. See, e.g., *Silverman v. Alcoa Plaza Assocs.*, 37 A.D.2d 166, 323 N.Y.S.2d 39 (1971) (creating law in favor of defaulting purchasers while stressing vendor's ability to resell property at same price). In any event, the possibility that payment schedules reflect the law's hostility toward penalties is sufficient to characterize this area as overwhelmed by a consideration other than any of the four perspectives on restitution pursued in this article.

E. Profit-Seeking Recipients

The fact that restitution is often denied to the nonbargaining provider of benefits to a profit-seeking enterprise appears to weaken the the wealth-dependency and market-encouragement perspectives. Suppose that a customer provides a manufacturer with a profitable idea. Because it is difficult to know which party should be encouraged to press for an *ex ante* agreement, the better-bargainer viewpoint is unhelpful in explaining the denial of restitution in this setting. Neither party could have bargained for an outcome that they did not expect. Nor does the valuation perspective explain the denial of restitution, if we imagine that the provider asks only for his readily measured expenses or for a customary commission. It initially appears fruitless to turn to the wealth-dependency notion. After all, why should a manufacturer or other profit-seeking enterprise ever be thought likely, *ex ante*, to reject a profitable provision? Although persons may choose some consumption items over others because each consumption decision reduces the funds available for other items, profit-seeking enterprises by definition welcome all profitable provisions and can even borrow against the future income from the provisions to pay the provider. The market-encouragement notion also seems to contraindicate the denial of restitution. When a provider supplies a profit-seeking enterprise with a profitable addition that the enterprise was unaware of, the enterprise could not have searched the market for a more efficient provider.⁹⁸ How can we then explain the law's frequent disinclination to grant restitution to the nonbargaining provider to a profit-seeking enterprise?

1. Nonbargained Referrals

Consider first one type of case that forms a substantial subset of the cases in which a nonbargaining provider to a profit-seeking enterprise is denied restitution. Imagine that provider P, without any urging by recipient R, unexpectedly meets travelers at an airport and with some effort convinces them to accept his transportation

⁹⁸ When, for example, a nonbargaining provider drills for land owned by oil company E, the denial of restitution is explained because E might have found a better driller if left to develop the oil on its own. But when E is given an idea that it did not know to exploit on its own, there is no market encouragement problem.

and recommendation that they register at Hotel R. R is experiencing slack demand and can service additional customers with little extra cost. Although the valuation thesis is only of secondary concern to our analysis, we may make the denial of restitution in this case even more puzzling by imagining that P asks only for a customary commission or his expenses. R refuses to pay either; P sues in restitution and is unsuccessful.

The denial of restitution in this setting seems to weaken the wealth-dependency thesis in that we know that R would ordinarily pay for this service and will be left with a net profit after paying P. One independent consideration explaining the denial of restitution may be that the law resists creating an agency relationship between R and P, because R would then be held responsible for any wrongs committed by P. I prefer not to follow this route for three reasons. First, in many contexts, including the one hypothesized above, R so often pays agents whom it barely knows that it is unconvincing to argue that R would not consent *ex ante* to profitable relationships with strangers. Second, the courts could easily suppress the doctrine of *respondet superior* while extending restitution. Third, this argument assumes the harms-benefits asymmetry by positing that the law will impose liability for harms but be unwilling to manufacture missing bargains where benefits are concerned.

Another independent consideration better explains the denial of restitution to self-appointed referral agents such as P: the fact that P may harm another enterprise to benefit R. Suppose that P encourages customers to patronize business R1 by slandering business R2. Here we seem to have a striking example of the harms-benefit asymmetry, for P will be denied restitution from R1 even though R2 can collect from P without proof of actual damage.⁹⁹ If P were granted restitution for the referral service that benefits R1, P would seek recovery every time he rendered such service. On the other hand, R2 will only rarely learn that P has defamed R2, for word must get back to R2 from customers that P has approached. In short, unless punitive damages are available to R2 (and they are for good reason unavailable¹⁰⁰), opportunistic intermeddlers will try to reallocate customers from R2 to R1, knowing that restitution

⁹⁹ See *supra* note 22 and accompanying text (damages given for defamation of business).

¹⁰⁰ Such punitive damages could conceivably chill speech.

from R1 will greatly exceed defamation payments to R2. The enforcement asymmetry in these situations forces the harms-benefits asymmetry on the law. The law's denial of restitution for nonbar-gained referrals is thus sensible and in no way vitiates the wealth-dependency or market-encouragement perspectives.

2. *Provision of Goods or Physical Services to Profit Seekers*

The wealth-dependency notion survives the law's denial of restitution to providers of clients to profit-seeking recipients, where the grant of restitution would encourage opportunists to take advantage of the enforcement asymmetry described above. But the wealth-dependency notion cannot survive the denial of restitution where there is no such enforcement asymmetry. Where provisions are in the form of goods or labor the provider cannot pass on his costs without risking detection and prosecution. For example, whereas P can refer customers to R1 simply by defaming R2, P cannot easily provide a structure for R1 by secretly removing one from R2. Where P's provisions of goods or labor neither suggest the danger of P's profiting from an enforcement problem nor create valuation or wealth-dependency problems, the denial of restitution may be explained by the market-encouragement perspective.

Consider, for example, *Ulmer v. Farnsworth*,¹⁰¹ where plaintiff's pumping of water from his own quarry unavoidably drained water from defendant's neighboring quarry and made it productive. Plaintiff was denied restitution for the benefit conferred even though there appears to have been no wealth-dependency problem.¹⁰² The case may be neatly explained on the basis of market encouragement: Ulmer may have been far from Farnsworth's first

¹⁰¹ 80 Me. 500, 15 A. 65 (1888).

¹⁰² The case is discussed in the text because it is a classic. Its specific analysis is complicated by two facts that go unmentioned by the restitution commentators. First, plaintiff's and defendant's quarries were separated by yet another quarry. We are not told whether the provider was able to extract payment from the middle quarry, although it is possible that the middle quarry was deeper than plaintiff's so that water from it would not have entirely drained to plaintiff's pumps. Thus, there may have been reason for the court to assume that the defendant was not simply holding out for a free ride. Moreover, there was apparently a wonderful local custom under which quarry owners such as the defendant paid drainers (providers) a "commission" for lime extracted as a result of the nonbargained drainage. The decision thus really stands for a judicial unwillingness to enforce local business customs—a posture that may be defensible only under the market-encouragement perspective.

choice as a provider. A grant of restitution would encourage self-selection rather than market-selection of providers. Indeed, this may be true of most cases of benefits in the form of goods or physical labor. Whereas referrals are welcome *additions* to a profit-seeker's business, the draining of a quarry or the provision of other goods or services is best viewed as a *substitute* for similar bargained-for provisions. The denial of restitution to the nonbargaining providers of such substitutes is thus sensible and predictable under the market-encouragement perspective.

If the preceding point is convincing, the denial of restitution for providers to profit-seeking enterprises does not generally conflict with the major argument of this article. Where the provision is likely to be a substitute for something the recipient would or could have done either on his own or through the marketplace, the market-encouragement perspective explains the denial of restitution. And if the nonbargained provision is a referral service—which is often by nature not a substitute but an addition to the profit-seeker's business—then the denial of restitution is often explained by the enforcement asymmetry described earlier.¹⁰³

A word of caution is in order with regard to the utility of the market-encouragement perspective in situations such as that in *Ulmer*. Had the court granted restitution, this article could explain the result on the basis of the familiar notion that courts will create bargains that parties were unable to make because of high transaction costs or freerider problems. Where neighbors seek to alleviate floodwater or groundwater problems, there is every reason to worry that a neighbor will seek to freeride on the efforts of others. Legal intervention is appropriate in just such settings; the parties themselves could be expected, *ex ante*, to welcome such judicial intervention much as they expect it from tort law. In short, in *Ulmer* it is as likely that both parties wanted the draining work done and that one hoped to freeride as it is likely that the passive recipient disagreed with his neighbor's choice of a provider. As a predictive tool, then, the thesis advanced in this essay is not very useful for cases such as *Ulmer*: the "missing bargain" and "market encouragement" notions are pitted against one another, so that decisions for and against restitution are equally plausible. Of course, if the decisions were all consistent, one or the other notion would be

¹⁰³ See *supra* pp. 110-11.

more descriptively powerful. Note, however, the twist that where the legal rule is in doubt or where the parties expect the courts to deny restitution, the argument for restitution becomes quite strong. If Ulmer does not expect reimbursement,¹⁰⁴ the market-encouragement problem is diminished because he has as much interest as anyone in finding the most efficient provider.

3. *Submission of Ideas*

We are left, then, with cases in which the recipient is a profit-seeker (so that there is no wealth-dependency problem); in which there is no danger of the provider's opportunism (no enforcement asymmetry); and in which the provision is not an item or service that substitutes for provisions chosen in the marketplace (no market-encouragement problem). For the most part, this set of requirements describes cases in which the provider offers a novel idea to the recipient. There is no wealth-dependency problem where a nonbargaining provider supplies a profitable idea because by hypothesis the recipient enjoys a net profit even after the court-determined provider's fee is subtracted from gross profits. Restitution also does not create a market-encouragement problem. As long as the idea is novel, there is no competitive market to which the recipient might turn. Except in the rare instances where they stumble across the same innovation or problem at the same time, producers of fresh ideas do not appear to compete with one another.¹⁰⁵ Moreover, ideas are additions to rather than substitutes for the recipient's store of provisions: receiving one idea will not normally preclude the recipient's choosing to receive another. In short, the case for restitution—be it normative or descriptive—seems strongest when the benefit is an idea and when the recipient is a profit-seeking enterprise, because in these circumstances neither the market-encouragement nor the wealth-dependency problem is likely to arise.

Indeed, the provider who submits an idea to a profit-seeking en-

¹⁰⁴ The statement in the text is of hypothetical and analytic interest only, given that local custom must have given Ulmer more than faint hope. See *supra* note 102.

¹⁰⁵ There is, of course, a valuation problem in granting restitution to the provider of an idea, inasmuch as the submitter's fee must be set by courts rather than by markets. Because the law often recreates missing bargains despite substantial valuation difficulties, it seems appropriate, once again, to discount this problem.

terprise is more likely to recover than are most other nonbargaining providers. Courts granting restitution sometimes describe the recipient as having impliedly contracted to pay the provider by accepting the submission.¹⁰⁶ In *Liggett & Meyers Tobacco Co. v. Meyer*,¹⁰⁷ for example, the provider recovered for his submission of an idea for billboard advertising. The recipient had not responded to the provider's letter containing the idea and a request for compensation, but the court reasoned that the subsequent use of the idea in print advertising constituted acceptance of the offer. Similarly, in *Nash v. Alaska Airlines*¹⁰⁸ plaintiff suggested an insignia and asked for payment if his idea were used. Plaintiff recovered the value of his services after the defendant used plaintiff's idea in fashioning its advertising.

These cases become explicable upon consideration of the sorts of offers by providers and responses by nonbargaining recipients that are likely to be made. If restitution were regularly granted to the provider of an idea to a profit-seeking enterprise, resources might be wasted by recipients' dodging ideas tossed their way. Such behavior apparently occurs: some businesses send brochures to all idea-submitters, announcing, for example, that a special office in the firm awaits the submitter's agreement to waive any claim to compensation (or to waive compensation beyond some specified level or formula) before the office will consider the merits of the submission.¹⁰⁹

Why would profit-seeking firms dodge profitable ideas? These firms may actually be quite willing to receive and pay for new ideas, but they prefer contractual arrangements to avoid court-determined fee structures, litigation costs (which could, of course, be

¹⁰⁶ See generally E. Kitch & H. Perlman, *Legal Regulation of the Competitive Process* 474-76 (2d ed. 1979) (discussing the protection of ideas disclosed in situations where the disclosing person might reasonably expect compensation if the idea is used).

¹⁰⁷ 101 Ind. App. 420, 194 N.E. 206 (1935).

¹⁰⁸ 94 F. Supp. 428 (S.D.N.Y. 1950).

¹⁰⁹ S. Lieberstein, *Who Owns What Is In Your Head?* 242-48 (1979), reproduces a portion of a Gillette Company pamphlet that discourages submitters of nonpatented ideas by explaining that "[i]f we were to consider all ideas sent to us . . . we would run certain obvious risks," *id.* at 245, and by specifically declining to review inherently unpatentable ideas, including suggestions for advertising, new product uses, and new products. *Id.* at 245. "[O]ur only advantage [in reviewing such submissions] would be in the early use of an idea before our competitors might adopt it. . . . [We] could at best attain only a short-lived competitive advantage at the risk of misunderstanding and even legal claims." *Id.*

sensibly assigned to the loser of the lawsuit), and settlement strategies of providers who are aware of the first two considerations. The "right" legal rule thus depends on whether these costs exceed the costs of soliciting ideas and of making explicit arrangements with strangers. Firms may also wish to dodge ideas that may turn out to be identical or similar to ideas that the firm would generate on its own, fearing that courts may not appropriately discount the restitution award by this possibility. It is possible, however, that courts would recognize the treacherousness of the discounting process as well as the jury's assumed tendency to award complete recovery, and may prefer to deny recovery altogether.

It will not do to insist that restitution be denied on the basis of the costs of the dodging exercise, however, because these costs may be offset by the benefit to firms that desire outside submissions. If restitution were regularly denied to nonbargaining submitters, then enterprises desiring submissions from strangers would have to expend resources in search of providers and their ideas. Moreover, because substantial obstacles stand in the way of contractual arrangements, denial of restitution will not necessarily succeed in encouraging parties to contract among themselves. If restitution is unavailable, submitters will not want to disclose their ideas until they have obtained promises,¹¹⁰ and recipients will not want to make promises until they have examined the ideas. To avoid this stalemate, one might expect the law to provide restitution for the nonbargaining submitter where the submission is novel. A novel idea is unlikely to be developed independently by the recipient and also unlikely to be a substitute for something known to the recipient. Restitution would thus fulfill the market-encouragement hypothesis. One would further expect the law to deny restitution where the submitter knows the recipient or is otherwise able to contract with him.

Because the novelty of ideas is normally debatable, it is difficult

¹¹⁰ In *Bristol v. Equitable Life Assurance Soc'y*, 132 N.Y. 264, 30 N.E. 506 (1892), a provider was denied restitution on the ground that the provider lost his property interest in the idea upon disclosing it to the company. Although the case is a fair example of the language used by courts when reaching a result unfavorable to the nonbargaining provider, it is probably best explained as reflecting the court's sense that the provider's idea was obvious, and indeed was based on "a common sense plan of advertising," *id.* at 267, 30 N.E.2d at 507, so that the defendant would have developed the idea on its own in a short time. See *infra* text accompanying note 111.

to evaluate whether the cases conform to the first expectation. Moreover, where uniqueness is demonstrable, the submitter can sometimes avail himself of copyright or patent law rather than attempt to develop precedent in the law of restitution.¹¹¹ The cases more easily satisfy the second expectation, that restitution for the nonbargaining submitter of ideas is less likely the more established the submitter's relationship with the recipient. Consider the rather common situation where P, in quest of a long-term contract with R, provides suggestions, designs, or other necessities to R, who eventually turns down P's services and employs Q instead.¹¹² Q, who may be a competing architect or public relations expert, for example, may have been able to underbid P in part because of information developed by P and supplied to Q by R. In these cases, the denial of restitution to P (from R or Q, but generally P sues R) is initially shocking but on second glance explicable. P, who provides ideas in his quest for a substantial contract with R, could announce in advance that he charges for his time or for his submissions or opinions. P may add that these charges will be returned as credits in any long-term contractual arrangements that R agrees to. R's acceptance of the ideas then creates a contract.

Explicit contractual "restitution" of this kind is common. Automobile repair shops often charge a fee for estimating repair costs; sporting equipment retailers often rent goods to demonstrate their features and allow the rental price as a full credit against the purchase price. There is no reason to provide restitution through legal intervention when a provider chooses to give an estimate or a trial period without charge. The law need only recreate bargains when there is reason to think that the parties are prevented by transaction costs from drawing up such bargains on their own. Note that it is not irrational for P to submit ideas or to offer trial periods without requiring compensation. P may simply decide that

¹¹¹ Copyright and patent law are, of course, not useful when the innovation is only an idea, but melodies and lyrics, for example, are in concrete form and obviously suitable for statutory protection.

¹¹² See, e.g., *Maple Island Farm, Inc. v. Bitterling*, 209 F.2d 867 (8th Cir. 1954) (no recovery for preliminary business counselling services performed with hope of obtaining long-term employment); *Scott v. Maier*, 56 Mich. 554, 23 N.W. 218 (1885) (architect who volunteers his services with the chance of future employment cannot recover for preliminary sketches that were not accepted); *Pick v. Bartelstone*, 33 Misc. 762, 67 N.Y.S. 908 (App. Div. 1900) (no recovery where sketches were delivered with a view to obtaining a work order).

the best way to attract R's patronage is to provide free services that demonstrate P's talents. In any event, it is clear that restitution for the nonbargaining provider should not be available when there is no reason to think that a bargain is missing.

I am left, then, with the prediction (or normative conclusion) that restitution will be granted to the nonbargaining submitter who would have had difficulty bargaining with the recipient, who provides an idea that generates profit for a profit-seeking recipient, and whose idea is so exceptional that it would not have been developed in-house or purchased from a competing provider.¹¹³ In addition, courts may decline to award restitution when such an award would be likely to stimulate submissions that could not be honestly declined by the recipient except at great cost. The case law may not neatly conform to this description—especially because reasonable people will disagree about which ideas are exceptional and unique—but the not infrequent ability of strangers to recover for the submission of profitable ideas is consistent with the market-encouragement and wealth-dependency explanations.

4. *Nonbargained Precautions*

The opportunity for a provider to bargain in advance for compensation from a profit-seeking recipient is a theme that also helps us understand the law's treatment of the insured provider who works to prevent a loss that would be covered by his insurer. The cases are generally of two types. A provider with first-party insurance, such as property insurance, takes nonbargained preventative measures, such as calling in a proprietary firefighting company.¹¹⁴ Alternatively, a provider with third-party liability insurance takes expensive steps to mitigate or forestall a still larger loss that would have been borne by the insurer.¹¹⁵ If recovery is available in these settings, we must also consider whether restitution should be available to an insured whose precautionary efforts are reasonable but unsuccessful.

¹¹³ Compare, e.g., *Blase v. Pedlow*, 183 Cal. App. 2d 367, 6 Cal. Rptr. 635 (1960) (no recovery where plaintiff put property in working order so that he and defendant could conduct business together), with *Desny v. Wilder*, 46 Cal. 2d 715, 299 P.2d 257 (1956) (reversing summary judgment denying restitution to submitter of screenplay).

¹¹⁴ See *Farmers Mut. Fire Ins. Co. v. McMillan*, 217 Tenn. 125, 395 S.W.2d 798 (1965) (denying restitution for cost of using private fire department); see *infra* note 122.

¹¹⁵ See *Leebov v. United States Fidelity & Guaranty Co.*, 401 Pa. 477, 165 A.2d 82 (1960).

Consider the importance of ex ante bargaining in the most interesting of these provocative cases, *Leebov v. United States Fidelity & Guaranty Co.*¹¹⁶ In *Leebov* the insured, a builder protected by liability insurance, was excavating a project site when faced with a landslide. He drove his trucks against the bottom of the hill, pounded stakes in the ground to secure the trucks as barriers, called his insurer for advice, and, working under the direction of an engineer, halted the slide.¹¹⁷ Where the contract is silent, does the provider recover his expenses from the insurer, given that the provider saved the insurer large liability claims? The better-bargainer hypothesis is unhelpful in this situation because the identity of the better bargainer no doubt varies between provider and recipient, depending on the circumstances, and is impossible to ascertain in advance. Although the ongoing relationship between insurer and insured must often present mitigation or comparative negligence questions, we do not always know how the parties would have allocated prevention costs.¹¹⁸ The valuation perspective is also unhelpful because it does not enable us to distinguish this provider from any intermeddler, in that the services provided are no more or less difficult to value than those provided by intermeddlers. The wealth-dependency and market-encouragement perspectives are more useful. The wealth-dependency perspective suggests that restitution be awarded because the insurer is a profit-seeking recipient. Nor does there appear to be any market-encouragement problem, because it is hard to imagine that the recipient would have preferred to assemble and bring in some other work crew.

The analysis differs for non-emergency precautions, such as vitamins and surgery that forestall a claim on a life insurance policy,

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 479-80, 165 A.2d at 83-84.

¹¹⁸ One could argue that the better-bargainer explanation predicts recovery. Parties such as this insurer and insured will obviously wish that they had bargained to mitigate losses efficiently; in the absence of an explicit bargain they might be expected to "agree" to reimburse the mitigator. On the other hand, the court could simply say there was a duty to mitigate, so that the insured would not recover for his mitigation efforts and also would not collect on his insurance policy for a loss caused by his failure to mitigate. The analysis is complicated somewhat because some insurance policies specify payments to the insured who attempts to prevent a covered loss. In marine insurance such agreements, called "sue and labor" clauses, are ancient, common, and may reimburse the insured for precautions even when the casualty is not forestalled. See G. Gilmore & C. Black, *supra* note 86, § 2-10, at 75. Note, finally, that this point in the argument is reached whether one starts from a mitigation perspective or from a comparative negligence framework.

or repairs that are likely to prevent a covered automobile accident. In the *Leebov* case immediate action was necessary if the landslide was to be prevented. When more time is available there is no need to grant restitution—that is, to create a missing bargain in order to regulate social obligations—because the parties will arrange on their own to prevent large losses. Consider, for example, an insured who is considering installing a sprinkler system on his premises. His insurer may offer a reduction in fire insurance premiums that finances or partly finances the precautionary measure. If the insurer refuses to reduce premiums the insured will pay for the sprinklers on his own or look for a competing insurer that will subsidize the improvement. Alternatively, if the insured does not voluntarily take precautions, the insurer may *require* installation of a sprinkler system or may raise premiums or refuse to renew the insurance if the insured fails to install the required system. In any case, there is time to bargain before the precaution must be taken. Judicial intervention is unnecessary because the parties will reach the sensible result on their own. To be sure, the nearer in time the bargaining is to the threatened risk, the more likely will opportunistic bargainers be able to shift the costs of precaution or mitigation. But the precaution will normally be taken if it is efficient to do so, whoever must pay for it.¹¹⁹

The denial of restitution to an insured who took precautions when time allowed for bargaining can also be explained by the market-encouragement perspective. Even if the insurer agreed to finance the entire sprinkler system, the insurer would hardly consent to an absolute reimbursement plan, because such a plan would give the insured no incentive to shop for the least expensive or most efficient system or installer. By hypothesis, time permits such shopping.¹²⁰ By way of contrast, in *Leebov* the insured had to

¹¹⁹ Of course, the law may reverse the wealth distribution accomplished in last-minute bargaining on the grounds of duress or undue influence. Restitution itself generally has behavioral implications. If restitution is always denied, some behavior (litigation, water purification, idea formulation) will not take place, even though *ex ante*—or in a world free of transaction costs—the behavior would be regarded as desirable.

¹²⁰ But see *Bankers Trust Co. v. Hartford Accident & Indem. Co.*, 518 F. Supp. 371 (S.D.N.Y. 1981), where the insured fixed broken fuel pipes beneath its warehouse and thus saved the liability insurer claims that would have arisen from the pollution of the East River. Restitution was granted. In these circumstances there was arguably no market-encouragement problem because the insured's participation would in any event be needed to repair pipes beneath its own warehouse. Certainly, if the insurer alleged that the insured

rush his trucks into position, but then consulted with the insurer and with a recommended engineer before taking additional steps,¹²¹ thereby alleviating the market-encouragement problem and "enabling" the court to award restitution.

Nonetheless, even with time to bargain a farsighted insurer may not as a practical matter be able to negotiate a contract that ensures that the insured will take emergency precautions at the insured's own expense. The insurer can enforce a contract that requires the insured to install a sprinkling system at his own expense because the insurer can inspect the premises or ask to see the insured's receipts for the purchase. But the insurer cannot monitor the precautionary measures taken in emergencies. By requiring the insured to pay for these precautions, the insurer risks the moral hazard that the insured will stand by and allow disaster to strike, and then claim that the landslide was a total surprise that allowed no time for mitigating efforts.¹²² Consequently, in creating a detailed insurance bargain *ex post* for less-than-perfectly farsighted parties, we can be sure that the bargain they would have reached would have encouraged steps to halt landslides and would have promised payments from the insurer to the loss-preventing provider to alleviate the moral hazard just described. The frequent interpretation of marine insurance contracts in this manner¹²³ supports this conclusion, inasmuch as a contract requiring certain precautions at sea to be underwritten by the insured would present a moral hazard. Indeed, this argument suggests that where mitigating efforts are difficult to monitor, restitution for reasonable nonbargained precautions should be granted, even when such precautions prove, *ex post*, to have been unnecessary or futile.¹²⁴

undertook wasteful or extravagant repairs, the case might have been decided differently.

¹²¹ *Leebov v. United States Fidelity & Guaranty Co.*, 401 Pa. 477, 480, 165 A.2d 82, 84 (1960).

¹²² This problem of strategic behavior makes what we call mitigation issues different from and richer than comparative negligence problems. Unfortunately, *Farmers Mut. Fire Ins. Co. v. McMillan*, 217 Tenn. 125, 395 S.W.2d 798 (1965), also involved an emergency measure and yet denied restitution. See *supra* note 114. The case (and the insurer's behavior) seem absurd unless the insurer was trying to encourage the formation of a public firefighting institution.

¹²³ See Note, *Allocation of the Costs of Preventing an Insured Loss*, 71 *Colum. L. Rev.* 1309, 1310-15, 1318-20 (1971).

¹²⁴ For a discussion of *ex ante* and *ex post* incentives, see Goetz & Scott, *supra* note 94.

III. CONCLUSION

As a descriptive or predictive matter there are obvious limitations on the usefulness of the approach to nonbargained benefits suggested in this article. Perhaps the most serious obstacle to an elegant, comprehensive summary of restitution law is the problem of distinguishing volunteers from other nonbargaining providers. Even if the argument advanced earlier in this article is entirely convincing, and the denial of restitution to volunteers or rescuers follows from the freedom from liability enjoyed by those who decline to volunteer, there remains the task of distinguishing volunteers from providers who expect compensation or at least some probability of compensation after a day in court. Inasmuch as professional providers are safely regarded as profit-seekers rather than as volunteers, it is useful, in seeking to predict the cases that grant restitution, to look for profit-seeking parties, be they recipients or providers.

Physicians, lawyers, landlords, skilled craftsmen, and taxpayers figure prominently in the cases that grant restitution; it is no accident that these actors are professional providers who normally demand compensation for their services or payments. The market-encouragement perspective will often rescue the positivist observer, because classic volunteers such as neighbors or passers-by often provide services in settings where the denial of restitution coincides with the likelihood that the recipient would not have chosen this provider in an open market. By contrast, restitution is likely where the market is unlikely to be thickened by a denial of recovery. For example, in the famous case of *Chase v. Corcoran*,¹²⁵ the finder of a boat adrift in a river recovered for storage and necessary repairs after the owner eventually claimed his boat. There is arguably no market-encouragement problem in such circumstances because the finder will be aware that the boat may become his own and that he must then absorb the costs of storage and repairs. The finder thus has a fair incentive to use an efficient provider. *Chase v. Corcoran* also does not present a wealth-dependency problem, because it is arguable that the provider made only necessary repairs and that, ultimately, the boat could be said to finance the

¹²⁵ 106 Mass. 286 (1871).

repairs. Thus, the case is easily explained by the perspectives emphasized in this article.

On the other hand, it would not be surprising to find a court denying recovery in such a situation with some comment about the difference between moral and legal duties. Indeed, Professor Palmer reports that in English law finders simply cannot recover for services provided.¹²⁶ The peculiar—even if explicable—treatment afforded volunteers thus requires a successful predictor to guess correctly the occasions on which a nonbargaining provider who presents no wealth-dependency or market-encouragement or special valuation problem will nevertheless be regarded as a volunteer motivated by loftier rewards than the prospect of restitution. Aside from this trap, the predictor armed with the perspectives advanced in this essay will find them extraordinarily useful in describing a great number of cases that involve restitution for nonbargained benefits.

The bulk of this essay describes in passing the law's sensitivity to the most serious objections to the legal scholarship that focuses on the incentive effects of legal rules. Their normative value is another issue. Readers would probably disagree about the extent to which valuation difficulties, least-cost-avoiders, and market-encouragement effects should influence results; nearly all readers may wish that the law be more inclined to grant restitution when no wealth-dependency problem exists than when such a problem presents itself. These perspectives may not only clarify the values at stake in these areas but also guide choices by suggesting appealing alternatives. Consider, for example, a case in which P, employed as a carpenter on R's premises while R is travelling abroad, repairs gaping holes cut in the roof by firemen extinguishing a blaze.¹²⁷ Alternatively, imagine that neighbor N learns of holes cut in R's roof by firefighters and hires a carpenter to repair the roof. Restitution for P is correctly predicted by the wealth-dependency perspective (given the fact that such repairs are necessary to prevent still greater financial losses by R); by the better-bargainer perspective (because R cannot choose a provider); and by the market-encouragement perspective (because R's choosing P for one job

¹²⁶ 2 G. Palmer, *supra* note 1, § 10.3, at 372 n.11.

¹²⁷ *Berry v. Barbour*, 279 P.2d 335 (Okla. 1954). The court first determined, *id.* at 337, that the fire could not be traced to the provider's negligence.

signals P's fitness for a related task). By contrast, restitution for N would be contradicted by the market-encouragement perspective, and, in fact, N will not recover.¹²⁸ But the market-encouragement perspective can take us beyond the descriptive mode as it suggests a different and perhaps a morally more appealing strategy for N. Neighbor N, who genuinely seeks to help the absent R with the holes in R's roof, could respond to the market-encouragement problem by communicating with two or three professional providers, selecting the most attractive or even deciding that he can do the work more economically on his own. Either way, N will have overcome the distinction that can ordinarily be drawn between N and P. Indeed, N should argue that his "comparison-shopping" behavior demonstrated that he was not a volunteer but a profit seeker who expected restitution. This last illustration leaves open the question of the extent to which a nonbargaining provider like N should expend resources both in trying to communicate with R and in comparing the services of professional providers. N's ability to recover these communication and comparison costs from R is also problematic, especially if the costs are futile. Apart from physicians' services and occasional nonbargained precaution cases, restitution is normally denied where the recipient does not actually enjoyed any benefit. Fortunately for N, R will nearly always return to a completed repair job and courts will be unlikely to separate preparative from reparative expenses.

Despite the occasional potential for normative application of the tools developed in this article, I emphasize the broad and sometimes remarkable descriptive success of the suggested themes. This essay has displayed these themes throughout a range of restitution claims. In fact, most of the examples were selected precisely because they presented the most significant challenges to these themes. The bulk of everyday nonbargained benefit cases, which involve advice giving, professional repair services, neighborly property maintenance, and similar provisions, are neatly explained by the wealth-dependency and market-encouragement perspectives.

It is always difficult to know what to make of descriptive keys that unlock areas of the law that first appear internally inconsistent and confusing. Not only do judges not use language that rings of "market encouragement" and "least cost avoidance," but

¹²⁸ See 2 G. Palmer, *supra* note 1, § 10.3, at 373.

also—perhaps more surprisingly—judges do not rely on arguments involving wealth dependency or valuation in support of their results. Instead, the decisions pull out a familiar string of citations, aphorisms, and arguments from a tangle of two or three predictable cords. One court stresses the unjust enrichment of the recipient (and grants restitution) while another emphasizes the intermeddling of the provider (and denies restitution), and neither court explains the reason for its patterned response. The perspectives provided in this article should begin to describe these cases more conveniently and coherently and may even provide tools with which to decide such cases as they arise.