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Epstein and Levmore: Objections from the Right?

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COMMENT

EPSTEIN AND LEVMORE: OBJECTIONS FROM THE RIGHT?

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The papers we are commenting on are quite different in subject and point of view. Richard Epstein's paper is a wide-ranging discussion of the role of benefit in private and public law, while Saul Levmore looks closely at one instance of benefit-based recovery. What the papers have in common is the question of when and why the focus of legal rules shifts from harm to benefit—from compensation to restitution.

Restitution is a slippery term, and it may help at the outset to clarify how it is being used here. In one sense of the word, restitution is a principle of responsibility that comes into play when one person benefits unfairly at another's expense. The common shorthand phrase for this idea is "unjust enrichment."[1] In the more technical sense of the word, restitution is a set of legal remedies that measure liability by gains received rather than losses imposed.[2] The two articles before us

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1. *See* JOHN P. DAWSON, UNJUST ENRICHMENT 1-8 (1951); 1 GEORGE PALMER, THE LAW OF RESTITUTION § 1.2 (1978). Professor Dawson said: "To the person who has suffered loss, the loss alone is a grievance. But if the loss can be located and identified in the gain received by another, the anguish caused by the loss will be felt as more than doubled." DAWSON, *supra*, at 5; *see also* RESTATEMENT OF RESTITUTION § 1 (1937) (discussing the principle of restitution); PALMER, *supra*, § 1.1 (1978) (same).

2. *See, e.g.*, RESTATEMENT OF RESTITUTION, *supra* note 1, §§ 150-59 (1937); DAN B. DOBBS, LAW OF REMEDIES 365-66 (2d ed. 1993); PALMER, *supra* note 1, §§ 1.2-1.4, 2.12. Most often, the effect of this measure of liability is to convert a liability rule into a property rule: If a wrongdoer expects to gain more than the victim will lose, a benefit-based measure of liability

are primarily about restitution in the first sense: unjust enrichment as a reason for imposing liability.

Unjust enrichment entered the legal vocabulary at a time when law was secure in its premises and was little troubled by the attentions of economists and other theorists.[3] Restitution was set in motion by the receipt of benefits, and the greatest difficulty was determining when retention of a benefit was unjust.[4] There were problems in measuring benefits,[5] but no one seemed to question that conferring a "benefit" meant something different from inflicting a "loss."[6] Now, in a climate more skeptical of legal formulas and more receptive to social science, the very notions of gain and loss on which unjust enrichment depends are open to question.[7] This problem surfaces in both of these articles, though in rather different ways.

I. RICHARD EPSTEIN ON THE BENEFIT PRINCIPLE

Our first comment on Richard Epstein's paper has to do with the problem of "baseline."[8] Gains and losses must be defined in reference to some state of affairs that serves as a neutral, or "baseline," position. Only with the aid of this baseline can we describe some events as

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provides a full deterrent rather than an option to act and bear the loss. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-10 (1972).

3. The *Restatement of Restitution*, published in 1937, gathered remedies for unjust enrichment together for the first time under the heading of restitution. *See* PALMER, *supra* note 1, § 1.1, at 4.

4. *See* RESTATEMENT OF RESTITUTION, *supra* note 1, § 1 cmts. a, c, § 2 cmt. a; PALMER, *supra* note 1, § 1.7, at 40-41. A benefit, according to the Restatement, is any form of "advantage." RESTATEMENT OF RESTITUTION, *supra* note 1, § 1 cmt. b.

5. Benefits can be valued in quite different ways, depending on the perspective from which they are viewed. *See* RESTATEMENT OF RESTITUTION, *supra* note 1, §§ 150-59. *Compare* Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946) (measuring benefit in terms of profit in a case of misappropriation) *with* Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969) (measuring benefit in terms of subjective value in a case of benefit conferred by mistake).

6. The restaters counted saving another from loss as one way of conferring a benefit, but they never suggested that refraining from harm could be a benefit. *See* RESTATEMENT OF RESTITUTION, *supra* note 1, § 1 cmt. b. They were content to assume a background state of affairs that would give meaning to the notion of "advantage."

7. *See, e.g.*, Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57 (1984) (discussing baselines from an economic point of view). Professor Dawson seemed to anticipate this when he said that "[n]ot much reflection is required for one to discover that at every point in this complex equation there are judgments of fairness and social policy, even before one faces the critical question, when is enrichment 'unjust'?" John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 177 (1959).

8. Epstein discusses this in part II of his paper. Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1371-76 (1994).

harms and some as benefits. Thus if *A* is legally entitled to an object, *B*'s use of it is a benefit to *B*. If *B* is entitled to the object, *A*'s withholding it is a harm to *B*.[9]

Epstein does not deny this. He acknowledges that harms and benefits are "parasitic on the choice of baselines" and gives the example of a tuition scholarship: If the amount of the scholarship is reduced, is this a case of harm or of lesser benefit?[10] The interesting point is that in the early sections of his paper, Epstein seems to say that correct baselines can be discovered analytically, at least if we start from a utilitarian position.[11]

That claim is too broad. Utility may have something to say about the assignment of entitlements and duties that define what counts as a gain or a loss.[12] For example, Epstein offers the problem of trade in apples: We say that *A* must pay *B* for taking *B*'s apples, and not that *B* must pay *A* for not taking apples. This choice can easily be explained in terms of utility, because the second system (treating not-taking as a compensable benefit) would be very costly to administer and might stifle the production of goods.[13]

Yet there are other "baseline" problems in which the line between harm and benefit, or action and inaction, is not so easily amenable to utilitarian resolution. At least, the line cannot be defended by utilitarian logic alone, without the aid of some preliminary assumptions. The best known example is the problem of incompatible land

9. *See, e.g.*, Calabresi & Melamed, *supra* note 2, at 1090-91. We have deliberately chosen an example from private law, and our discussion of baselines is focused on private law. The problem of selecting baselines becomes more complex when the benefit (or harm) at issue is a certain level of government activity or support. *See, e.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 75-103 (1993) [hereinafter EPSTEIN, BARGAINING WITH THE STATE]; Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989). In the public context, it probably is not possible to establish baselines without the aid of a normative theory of the proper role of government. *See* Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

10. Epstein, *supra* note 8, at 1371-72.

11. Epstein says that:

> One of the most common arguments against any consequentialist or broadly utilitarian system is that it is indeterminate in its recommendation for legal rules. The effort needed to argue that in the usual case a nontaking is conferring a benefit on those left alone shows that this conclusion is manifestly false on the issues that concern us most—the delineation of property rights in transactions for ordinary goods and services.

Epstein, *supra* note 8, at 1374; *see* EPSTEIN, BARGAINING WITH THE STATE, *supra* note 9, at 25-38 (making a similar suggestion).

12. *See* Calabresi & Melamed, *supra* note 2, at 1096-98.

13. Epstein, *supra* note 8, at 1373-74; *see* Wittman, *supra* note 7, at 69-70.

uses: *B*'s apple crop is stunted by smoke from *A*'s factory next door. Efficiency alone cannot explain the intuition that the factory is causing harm, because a rule that *B* must pay for the benefit of smoke-free air would in principle produce the same level of smoke prevention.[14]

Perhaps more important are the cases in which a utilitarian calculation might, in theory, yield an optimal baseline, except that human reason is not up to the task.[15] For example, suppose *A* is in a position to prevent impending harm to *B* at little cost or risk to *A*. Is *B* entitled to assistance from *A*, or is *A*'s assistance a benefit for which *B* must pay? A quick calculation suggests that a legal duty to rescue would encourage efficient behavior by *A* and that private bargaining is unreliable.[16] But if we look more closely and consider problems of uncertainty and aversion to risk, costs begin to appear. Those who prefer not to attempt rescues may give up valuable activities to avoid potential liability.[17] Those who like to be seen as altruists may lose interest in performing rescues if rescue is known to be a legal duty.[18] When a rescue is called for and none occurs, proof of legal responsibility may be costly and inaccurate.[19] How does all this add up? The

14. If cost-justified measures are available to abate the smoke, they will be employed. Either *A* will undertake them at his own expense (if *B* is entitled to no smoke), or *B* will pay *A* to take them (if *A* is entitled to emit smoke). *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729-33 (1973); Frank I. Michelman, *Property, Utility, & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-1201 (1967); *see also* Lucas v. Carolina Coastal Council, 112 S. Ct. 2886, 2896-98 (1992) (recognizing the baseline problem).

15. On the limitations of human reason, their effects on the application of political philosophy to law, and the consequent advantages of indirect strategies of governance, see, e.g., Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985); Christopher T. Wonnell, *Compatibilism & the Controversy Over End States: A Reply to Professor Waldron*, 12 HARV. J.L. & PUB. POL'Y 885 (1989); Christopher T. Wonnell, *Four Challenges Facing A Compatibilist Philosophy*, 12 HARV. J.L. & PUB. POL'Y 835 (1989); Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123 (1987).

16. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.9, at 174 (1986); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 428-29 (1985).

17. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 143-46 (1987); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, & Other Rescuers: An Economic Study of Law & Altruism*, 7 J. LEGAL STUD. 83, 119-24 (1978) [hereinafter *Salvors*]; Saul Levmore, *Waiting for Rescue: An Essay on the Evolution & Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 886, 889-90 (1986).

18. *Salvors*, *supra* note 17, at 93-100, 121-22, 124; Levmore, *supra* note 17, at 885-86, 889-90.

19. *See* LANDES & POSNER, *supra* note 17, at 146; *Salvors*, *supra* note 17, at 124; Levmore, *supra* note 17, at 933-38, 939-40; Paul H. Rubin, *Costs & Benefits of a Duty to Rescue*, 6 INT'L REV. L. & ECON. 273 (1986). A restitution alternative would avoid some of these difficulties, but it would not be fully effective without a premium, and calculation of the premium raises

utilitarian theorist cannot be sure; nor can the theorist be sure he has accounted for all the possible consequences of changing the existing baseline distribution of rights and duties.

Thus, we agree with Epstein that law relies inevitably on baselines to distinguish harm from benefit, but we doubt that the choice of baseline can always be explained or defended by utilitarian calculation.

What does not follow from this, however, is the dismal conclusion that the baselines on which law relies are arbitrary,[20] nor the dangerous conclusion that baselines are in need of wholesale expert remodeling.[21] Quite the opposite: If no baseline is "natural," then it would be arbitrary to overturn (without good reason) the structural assumptions that support an existing system of law.

In other words, the best way out of the baseline dilemma, and perhaps the only way out, is to concede that we are not working on a fresh slate.[22] Law works within a system of ongoing and interconnected social institutions, with established conventions that give content to notions such as harm and benefit. There are conventional understandings about property boundaries and causation that can tell us, for example, whether a factory is harming a landowner or merely failing to provide a benefit.[23] We may not know exactly how or why

problems of its own. *See Salvors*, *supra* note 17, at 91-93; Levmore, *supra* note 17, at 886-89, 891-94.

20. *See, e.g.*, Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Joseph William Singer, *The Player & the Cards: Nihilism & Legal Theory*, 94 YALE L.J. 1 (1984). This position is either futile or completely destructive of the enterprise of law.

21. *See, e.g.*, Christine A. Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279, 1324-32 (making sex differences "costless" in the workplace); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 70-95 (1987) (arguing that judges act as representatives, standing in for others and symbolizing society itself); Cass R. Sunstein, *Neutrality In Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 13-48 (1992) (describing a conception of equality that accommodates beneficial partisanship on behalf of women); Roberto M. Under, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 576-602 (1983) (describing internal directional change).

22. *See* EDMUND BURKE, *Reflections on the Revolution in France*, *in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 424 (Peter J. Stanlis ed., 1963); LON L. FULLER, *Means & Ends*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 47-64 (Kenneth I. Winston ed., 1981). Burke was concerned with political institutions generally; Fuller was particularly interested in law and its role within a system of social institutions.

23. Epstein himself has relied on conventional understandings in regard to causation. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 164 (1973) [hereinafter Epstein, *Strict Liability*] (arguing that causation "is dominant in the law because it is dominant in the language that people, including lawyers, use to describe conduct and to determine responsibility"). And he seems to return to them as a way of resolving the problem of church bells. *See*

these understandings first arose, yet the law rightly relies on them in laying down rights, duties, and liabilities.

This is by no means an argument against all change. First, the conservative point is strongest in respect to those baselines that are of central importance to the common law—assumptions that serve as the conceptual starting points for large bodies of rules. Precisely what falls into this category may be a difficult question, but surely some baseline assumptions are so deeply embedded in the system of law that they could not be reversed without significant consequences.[24]

Second, even the most central baseline assumptions should not be taken as immutable. We should be aware of the assumptions we are making, and we should alter them when we are sure we can do better.[25] But there is reason to proceed cautiously, bearing in mind that structural changes within a system of interdependent legal and social institutions will have unforeseen consequences across the system. The task is not, and never can be, to invent a system of legal and social relations from scratch. And we ought surely to be wary of those who would "remake the world anew" in accordance with some particular grand theory, whether utilitarian or otherwise.[26]

Once past the problem of baseline, Epstein gives a persuasive description of the ways in which the benefit principle ripples through private law. On the public law side, he suggests that a citizen's obligation to the state, whether to pay taxes or to make other sacrifices,

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Epstein, *supra* note 8, at 1400-1402 (arguing that customary tolerance to bells marks the boundary of compensable harm).

24. The subject of entitlement, or the incidents of particular entitlements, can be altered without causing structural damage to the system of law. Courts can recognize a privilege to enter property under conditions of necessity without abandoning the assumption that private ownership carries with it the power to exclude. But suppose it were decreed that owners can no longer exclude others from their property, or that personal efforts are collectively owned, so that *A* may require *B* to perform any service that benefits *A* more than it costs *B*. What would follow for the common law?

25. Here there may be something to be learned from "deconstructionist" skepticism, although not from the anarchic or autocratic prescriptions that often accompany it.

26. For a sobering view of Jeremy Bentham, father of utilitarianism, see Gertrude Himmelfarb, *The Haunted House of Jeremy Bentham*, *in* VICTORIAN MINDS 32 (1968). Marxism has been the leading theory for "remaking the world anew" in the twentieth century. The human catastrophes wrought by the Soviet Marxist experiment are chronicled in, e.g., ROBERT CONQUEST, THE GREAT TERROR (1968); ROBERT CONQUEST, KOLYMA: THE ARTIC DEATH CAMPS (1978); and ROBERT CONQUEST, HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE (1986); and of course in ALEXANDER I. SOLZHENITSYN, THE GULAG ARCHIPELAGO (Thomas P. Whitney trans., 1973).

ought to be a sort of "restitution" for benefits received; hence the citizen ought not to be subjected to such obligations unless "*for each government action, taken separately*, there is reason to believe that state coercion provides each citizen with equal or greater benefits."[27] Whenever the government imposes a duty on any citizen without conferring a benefit of at least equal value, the government must provide "just compensation" to that citizen.

In order for the "restitutionary" view of a citizen's duties to be a meaningful constraint on state power, Epstein insists that the baseline for considering whether a citizen has been helped or hurt by the imposition of a particular duty must be the citizen's actual situation before the duty is imposed, not, say, what the citizen's situation would be in the "state of nature" if the taxing authorities disappeared entirely. Epstein's focus here is firmly on the individual (What benefit is each individual getting from a particular government program, such that the individual is obliged to make the sacrifice for it?) unlike, interestingly, Epstein's reliance on collective-minded utilitarian social calculus in justifying the baselines of harm and benefit in common law principles of property.

No individual should be subjected to state coercion, says Epstein, unless the citizen receives an equivalent benefit either from the government action itself or by way of compensation on the side. Indeed, he says, this "strong restitution theory" ought to be "the centerpiece of any sound system of political order."[28] We agree that "just compensation" is one principle that a decent state will take into account when imposing sacrifices on its citizens, but we think that in any real political community other considerations will sometimes trump that principle.

War is the most obvious occasion. Human history suggests that a political community must sometimes fight if it wants to survive. When a state goes to war, some of its soldiers will die. And war almost always means conscription, especially if the war goes on for any great length of time. In wartime, in other words, the state requires some citizens to sacrifice life itself.[29] No "just compensation" can be provided to those who will die. Thomas Hobbes, at least, suggested that a citizen's life is the one thing that the Leviathan cannot ask the citizen

27. Epstein, *supra* note 8, at 1406.

28. *Id.*

29. For a military historian's assessment of the experiences and motivations of front-line soldiers through the ages, see JOHN KEEGAN, THE FACE OF BATTLE (1976).

to give up.[30] But that proviso is surely inconsistent with the general tendency of Hobbes' vision, however logical it might be as a matter of social contract theory.[31] In practice, there has to be considerable question about the viability of any political community that cannot sometimes demand the very lives of some of its members.

Big public building projects are a slightly (sometimes *only* slightly) less tragic example.[32] Building a highway or an airport or a large park often means that some people's neighborhoods and lives will be broken up. Many such people will not have a Lockean property interest in physical assets "taken" for the project.[33] It seems to us that a decent society will give some thought to the consequences of such projects and will try to minimize the damage. But if a society wants highways, airports, parks, or indeed anything it does not already have, some people and some communities are liable to suffer. How is such suffering to be quantified in order to send out compensation checks?

Epstein might say that compensation is owed only when the citizen has suffered the "taking" of a Lockean property right.[34] But every public undertaking will call forth far broader demands for reparations if restitution and "just compensation" are truly the central public values of a society. In such a society, it would scarcely be possible to restrict legal restitution to people whose Lockean property had suffered a "taking," because the moral effect of enshrining restitution so centrally would be to encourage political demands for "compensation" even where Lockean property interests are ambiguous or nonexistent. In that sort of atmosphere, desirable public projects are apt not to be undertaken, and would-be air travellers had better hope that

30. THOMAS HOBBES, LEVIATHAN 111-12 (1651) ("If the Soveraign command a man . . . to kill, wound, or mayme himselfe, or not to resist those that assault him . . . yet hath that man the Liberty to disobey"; hence "to avoid battell, is not Injustice, but Cowardise.").

31. Indeed, after arguing that no contract, including the social contract, can oblige a person to sacrifice life, Hobbes adds illogically "[b]ut he that inrowleth himselfe a Souldier, or taketh imprest [i.e. conscription] mony . . . is obliged, not onely to go to the battell, but also not to run from it, without his Captaines leave." *Id.* at 112.

32. This might be called the Robert Moses problem. *See* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974) (arguing that Moses planned and built extraordinary public works in New York, but at great social cost).

33. *See* JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ch. 5, §§ 27-34 (Lester Dekoster ed., 1978) (developing a theory of property from the axiom that people properly own their bodies, and hence have property rights in external things as well when they add their labor to these things).

34. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (discussing Lockean property rights).

a municipal airport was built in the pre-restitution age, because no one will try to build one now.[35]

Our point is not to reject restitution as a principle of public law, only to take it down a peg or two from the position Epstein suggests for it. In a real, functioning, political community, restitution is one principle that ought to be taken seriously: it is a principle that honors the individual and ensures against wholesale confiscations. But there is a countervailing principle that sometimes ought to prevail: that is the collective principle, the idea that collectivity may require sacrifice. There are times when it is right for a society to demand sacrifices for any number of reasons, including defense, public works, and social justice. Sacrifice, by definition, claims no compensation. And it is nonegalitarian as well: In a real community, or even in a private relationship, the sacrifices people have to make are hardly ever equal ones.

Epstein insists that the public law and private law dimensions of restitution are closely linked. If our reservations about restitution as a principle of public law are valid, what are the implications for private law? We suspect there may be none. But then, we are perhaps more inclined than Epstein to think that the public and private spheres are different, and that public and private law ought sometimes to proceed on different principles.

II. SAUL LEVMORE ON RESTITUTION FOR "BEST EFFORTS"

Levmore's paper presents a very interesting puzzle, which may only be explainable in terms of conventional baselines.[36] He has noticed a group of cases in which courts seem willing to intervene to encourage one party to take reasonable (cost-justified) steps to protect the interests of another. The setting is a contractual relation, in which an opportunity unexpectedly arises for one "contractual acquaintance" to avert potential harm to the other's assets.[37] The courts have entered cautiously into this area, through what Levmore

35. Any resemblance between the restitution-minded dystopia we are envisioning and actual, fractious, litigious, contemporary America is less than entirely coincidental.

36. Careful readers may discern that the authors are not economists. It is not our object to challenge Levmore's economic analysis; we simply offer a few supplemental suggestions from outside the economic field.

37. Saul Levmore, *Obligation or Restitution for Best Efforts*, 67 S. CAL. L. REV. 1411, 1412-13, 1415-16 (1994).

calls a "restitution half-step": a remedy of reimbursement for precaution-takers who succeed in preventing a loss.[38]

This remedy raises two questions. First, why restitution—why have courts treated this as a case of benefit rather than harm and declined to impose damage liability for failure to act? Second, why is the remedy available only in case of a successful outcome, and not to all who have taken cost-justified steps to prevent harm?

We can assume that the object of judicial intervention in this area is to encourage parties who are in a position to prevent loss to take cost-justified precautions. The threat of a damage remedy would surely seem more effective for this purpose than the prospect of restitution, at least without a premium added to enhance the incentive to act. Yet as Levmore notes, the courts have shown no inclination to move to a stronger remedy.

Levmore identifies a number of potential costs associated with a damage remedy, which might explain the preference for restitution. Yet he does not seem quite satisfied that the case against damages has been made.[39] A damage remedy would involve the court in difficult fact-finding, particularly on issues of causation.[40] Yet as Levmore himself points out, courts regularly deal with problems of this kind. A damage remedy also might cause potential defendants to avoid information about impending dangers.[41] This is a problem, yet perhaps not a substantial one, since one of the conditions Levmore proposes at the outset is that the danger be unanticipated.[42] It is also possible that a restitution remedy would come into play more often than a damage remedy, and hence would be more costly to administer in the long

38. *Id.* at 1429-30. There are a number of reasons why courts are reluctant to encourage unsolicited services, such as the discouraging effect of judicial intervention on market transactions, and the possibility that wealth effects will bring judicial remedies into conflict with the parties' preferences. *See* Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 74-82 (1985). Presumably these difficulties apply not only to restitution remedies for unsolicited benefits, but also to damage liability imposed for failure to take beneficial action. But in most of the cases Levmore describes here—cases in which the precaution-taker is specially situated to perform the service, the service is clearly beneficial, and the need for the service was unanticipated—the dangers of intervention are minimal. *See* Levmore, *supra* note 37, at 1416-17.

39. Levmore, *supra* note 37, at 1420-21, 1425.

40. *Id.* at 1424-25.

41. *Id.* at 1425-26; *see also* LANDES & POSNER, *supra* note 17, at 143-46 (explaining that a rule imposing liability upon a person for failing to rescue a stranger will cause people to avoid potential accident sites); *Salvors*, *supra* note 17, at 119-24 (same); Levmore, *supra* note 17, at 886, 889-90 (recognizing this effect).

42. Levmore, *supra* note 37, at 1416-17. If the danger is easily foreseen, the parties can negotiate a proper allocation of risk. *Id.* at 1417-18.

run. With a damage rule in place, most actors would take precautions as required by the rule, and so avoid legal sanctions. Under a regime of restitution, many would take precautions and claim reimbursement, and at least some of those claims would come before the courts for valuation.[43]

The half-step limitation (the requirement of success) further undercuts the effectiveness of restitution as a means of shaping conduct. The half-step remedy is reserved for those who are at once altruistic, competent, and lucky.[44] This makes it a remarkably weak device for encouraging "best efforts" to prevent loss.[45] The requirement of success might be explained on the ground that courts find it difficult to calculate the efficiency of precautions from an *ex ante* perspective, and prefer to rely on *ex post* success as a proxy.[46] But again, courts frequently engage in calculations of efficiency, in contract as well as in tort.[47]

It seems fair to say, then, that economic arguments in favor of a limited restitution remedy as a means of encouraging loss prevention in contract settings are not conclusive. It is at least plausible that a damage remedy would create stronger incentives for efficient behavior without a marked increase in cost and with no greater effect on market transactions. This suggests that something other than efficiency (or at least something other than first order efficiency) is at work, which has prevented the courts from imposing a duty to act with accompanying liability in damages.

The explanation may simply be that courts are respecting certain "baseline" assumptions that have a prominent place in the system of private law and cannot be displaced without wide-ranging consequences. One such assumption, which Levmore posits as a reason for the courts' cautious approach to "best efforts," is the divide between

43. *See* Wittman, *supra* note 7, at 62-63.

44. Actors must be altruistic because by definition, it is against the actors' interest to act under this rule unless the probability of success is 100%. They must also be competent in order to succeed, and they must be lucky because even if they are competent, success is not guaranteed.

45. A damage remedy also depends on the outcome of the actors' efforts (or lack of efforts): It applies only when actors are unlucky. *See infra* text accompanying notes 47-48. Yet in the case of a damage remedy, outcome-dependency means only that the actors can choose to take the risk that no loss will materialize. In the case of restitution, outcome-dependency gives actors a reason not to take the risk at all.

46. Levmore, *supra* note 37, at 1438.

47. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS 869-907 (2d ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

contract and tort law.[48] In the particular cases Levmore describes, those in which one party to a contract has a unique and unexpected chance to preserve the other's property from harm, there may be little reason for courts to take a grudging "contract" attitude toward judicial intervention. Yet more generally, the categories of contract and tort are useful points of reference that serve to alert courts to the effects of their decisions on private bargaining. If the boundaries between them become too obscure, this benefit will be lost.

We would point to two other conventional baselines that may have some bearing on Levmore's puzzle. First is the notion of self-ownership, which can help to explain the choice of restitution over damages.[49] If "best efforts" are characterized as a benefit for which the recipient must pay, the actor controls his efforts and can choose without penalty whether to apply them in the other's interests. If the actor is held liable for failing to act, his efforts belong, in a sense, to the other. Thus, a restitution remedy is faithful to the notion that individuals own their labor and efforts and cannot be made to donate them involuntarily to another. This principle of self-ownership may or may not be defensible on philosophical grounds,[50] and it may give way

48. Levmore, *supra* note 37, at 1430, 1442-43; *see, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 300-303 (1881); Richard A. Epstein, *Beyond Foreseeability*, 18 J. LEGAL STUD. 105 (1989); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 905-06 & n.12 (1985).

49. *See* LOCKE, *supra* note 33, § 27. Another way to describe this intuition is to say that the freedom to choose when and why one acts is essential to individual liberty, subject only to the constraint that one must not interfere affirmatively with the liberty of others. *See* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 39 (1977); Epstein, *Strict Liability*, *supra* note 23, at 198-200, 203-04. Epstein says: "Once forced exchauges . . . are accepted, it will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to produce desired benefits and the sphere in which those benefits can be procured as of right." Epstein, *Strict Liability*, *supra* note 23, at 199.

50. For criticism of Locke's theory of self-ownership and appropriation, see, e.g., BECKER, *supra* note 49, at 36-41; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 177-83 (1988). For criticism of libertarian baselines, see, e.g., Anthony T. Kronman, *Contract law & Distributive Justice*, 89 YALE L.J. 472, 475-83 (1980) (criticizing the libertarian focus on voluntariness in determining whether a contract is valid); *see also* Ronald M. Dworkin, *Foundations of Liberal Equality*, *in* XI TANNER LECTURES ON HUMAN VALUES 1, 36-37 (1988) (arguing that justice requires compensation for lack of "personal resources"); JOHN RAWLS, A THEORY OF JUSTICE 72 (1971) (arguing that natural distributions of talent and ability are morally arbitrary). *But cf.* Larry Alexander & William Wang, *Natural Advantages & Contractual Justice*, 3 LAW & PHIL. 281, 291-97 (1984) (defending the coherence of libertarian theory).

Whatever the difficulties of the Lockean argument for private property rights, the intuition that labor is a basis of desert is powerful and widely held. *See, e.g.*, Edwards v. Sims, 24 S.W.2d 619, 621-23 (1929) (Logan, J., dissenting); BECKER, *supra* note 49, at 48-56 (describing variations on a Lockean theory).

to overriding objectives.[51] Yet it is an organizing principle of our system of property law, and one that could not be abandoned without serious cost.[52] Because self-ownership has a foundational place in the institution of private property, courts have reason to honor it at the expense of a small gain in efficiency.[53]

The second legal convention that bears on Levmore's problem is the connection between legal responsibility and the outcome of one's actions. The apparent limit on restitution for best efforts, that the claimant must succeed in preventing a loss, mirrors the structure of tort liability. Just as restitution depends on success, a damage remedy comes into play only when harm has occurred in fact. Both remedies depend on the outcome of the actor's conduct, and not simply on its reasonableness or efficiency at the time of action. Of course the incentives that follow are quite different: Restitution allows the actor to decline taking the risk, while damages force the actor either to act or to assume the risk of loss. Yet both remedies reflect the moral intuition that we are responsible for the *outcome* of our acts, even when the outcome is partly fortuitous.[54] Right or wrong, this principle is another of the organizing assumptions of our legal system, and one that could not easily be overturned.[55]

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51. *See* Levmore, *supra* note 17, at 896-97, 899-900 (describing statutory liability of hospitals and physicians, and listing "special relationships" to which a duty of assistance may attach).

52. *See* Frank E. Denton, *The Case Against a Duty to Rescue*, 4 CAN. J.L. & JURIS. 101, 126-131 (1991) (explaining the difficulty of incorporating nonfeasance into the law of negligence); *see also* Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713, 727-30 (1989) (explaining the advantages of a rule of self-ownership).

53. On the relationship between utilitarian theory and rights that excuse the holder from utilitarian calculation in particular cases, see, e.g., Kent Greenawalt, *Utilitarian Justifications for Observance of Legal Rights*, *in* NOMOS XXIV: ETHICS, ECONOMICS, & THE LAW 139, 146-47 (1982); R.M. Hare, *Utility & Rights: Comment on David Lyons's Essay*, *in* NOMOS XXIV: ETHICS, ECONOMICS, & THE LAW 148, 152-56 (1982); David Lyons, *Utility and Rights*, *in* NOMOS XXIV: ETHICS, ECONOMICS, & THE LAW 5, 113-35 (1982).

54. *See* Tony Honore, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L.Q. REV. 530, 539-45 (1988); Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 399 (1992); *see also* Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS 24 (Thomas Nagel ed., 1979) (explaining the difficulty of separating the will from its consequences).

55. For an interesting debate over the wisdom and efficiency of tort system based solely on *ex ante* fault, without regard to outcome, see Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Christopher Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990); Kenneth Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 120-22 (1990); *see also* STEPHEN R. PERRY, *Risk, Harm & Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David Owen ed., forthcoming) (discussing risk as harm).

We have suggested that courts have settled for a less efficient remedy than they might select because they are reluctant to upset conventional understandings about tort and contract, self-ownership, and outcome-responsibility. Yet it may not follow that the courts are proceeding in a manner that frustrates efficient allocation of resources. Some of the "baseline" conventions we have mentioned, or at least the existence of some reliable baselines, may be preconditions to efficiency.[56] Whether or not an economic case could be made from the outset for adopting the particular legal conventions we have mentioned, they cannot be discarded now without significant costs. So perhaps the puzzle is less a puzzle than it seems.

56. *See supra* note 15.