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Jean Fleming Powers

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RETHINKING MORAL OBLIGATION AS A BASIS FOR CONTRACT RECOVERY

Jean Fleming Powers

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RETHINKING MORAL OBLIGATION AS A BASIS FOR CONTRACT RECOVERY

*Jean Fleming Powers**

I. INTRODUCTION

Contractual arrangements are private and consensual—the result of bargains made between parties—bargains that satisfy the consideration requirement[1] for enforcement. While the consideration requirement has its detractors,[2] as does the consensual nature of contract,[3] the bargained-for consideration requirement re-

* Professor of Law, South Texas College of Law, Houston, Texas; J.D., University of Houston Law Center, 1978; B.A., University of Texas at Austin, 1970. The author wishes to acknowledge the dedicated research assistance of Terri Durrett, South Texas College of Law, class of 2000, and the valuable secretarial assistance of Gloria Landrum.

1. For the proposition that there is such a requirement for enforcement, *see, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 4.1, at 168 (4th ed. 1998) ("Whatever the reasons, the common law usually requires that promises be made for a consideration if they are to be binding."); 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.2, at 61 (1990) ("Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration."); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 54, at 201 (3d ed. 1990) ("Although consideration is only one of the validation devices recognized to make a promise enforceable, it is often remembered as the dominant validation device . . . .").

2. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE, ch. 3, at 38 (1981) ("My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it."); *see also*, CALAMARI & PERILLO, *supra* note 1, § 4.1, at 167 ("The doctrine of consideration contains certain oddities which, in the opinion of many, interfere with the needs of modern society."); 1 FARNSWORTH, *supra* note 1, § 1.6, at 24 ("As a cornerstone for the law of contract, the doctrine of consideration has been widely criticized.").

3. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT (1974). Regarding the emergence of the doctrine of "contorts," a hybrid involving both contract and tort concepts, *see generally* Tad Armstrong, *Punitive Damages and Breach of Contract: Mr. Corbin, Say It Isn't So*, 85 ILL. B.J. 74 (1997); Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 SETON HALL L. REV. 390 (1997); Charles Miller, Comment, *Contortions Over Contorts: A Distinct Damages Requirement?*, 28 TEX. TECH L. REV. 1257 (1997); Matthew J. Barrett, Note, *"Contort": Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 510 (1985). *But see* Melvin L. Braziel, Jr., Article, *United We Stand: Organizing Student-Athletes for Educational Reform*, 4 SPORTS LAW J. 81, 98 (1997) ("However, courts are moving away from such 'contort' legal claims in favor of more traditional contract theory.").

See also, Peter Linzer, *Law's Unity—An Essay for the Master Contortionist*, 90 NW. U. L. REV. 183 (1995), in which the author, while noting that "thoughtful people have argued that the differences in contract and tort are meaningful," *id.* at 188, further posits that as "we move through less carefully negotiated transactions there are often many reasons to impose nonconsensual notions . . . much as tort rules do. In the extremely informal areas . . . the lines between tort and contract blur even more." *Id.* at 189.

Inroads have also been made in a greater willingness of both courts and legislatures to place limitations on what contractual arrangements can be made. For example, unconscionable contracts may be unenforceable by statutory law, under a state enactment of UCC § 2-302, or by common law, *see* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981), contracts against public policy may be regulated by statute, as seen in usury laws, regulatory restrictions on contracts, state deceptive trade practices acts, etc., or by common law, *see* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

mains a staple of contract law.[4] Yet traditional consideration analysis seems to sometimes leave deserving claimants without a remedy. Thus, a limited group of exceptions has been developed to correct this perceived failing of the doctrine.[5] For some situations, however, the deficiency is more perceived than real, and the solution adds confusion rather than clarity to the law. This is true for the "moral obligation" exception to the doctrine of consideration to allow a contract recovery under what admittedly may be compelling circumstances. There is much to be said for preserving as far as possible the underlying principles of contract law, and resisting the temptation to stretch contract law to provide redress for situations in which other doctrines work even better. The exception, by essentially dispensing with the consideration requirement, unnecessarily departs from the bargain requirement, and brings into the public arena the rather individual and personal decision of just what are the dictates of morality.

In the moral obligation cases, the temptation to use a contractual remedy arises largely from a concern that restitution may not work,[6] leaving no other remedy available. Yet restitution[7] often provides adequate remedies, and is actually more satisfactory than contract. As stated by Fuller and Perdue in their well-known article *The Reliance Interest in Contract Damages*[8]: "We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed?"[9] In these cases, the activity is directed toward compensating for unjust enrichment, and the contract, if there is one, is an agreement to settle the restitution claim. Courts create confusion and unpredictability in the law when they fail to

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4. Manwill v. Oyler, 361 P.2d 177, 178 (Utah 1961) ("The principle that in order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request is firmly implanted in the roots of our law."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); CALAMARI & PERILLO, *supra* note 1, § 4.2(a) ("It does not matter from whom or to whom the consideration moves so long as it is bargained for and given in exchange for the promise.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. e (1981)); 1 FARNSWORTH, *supra* note 1, § 2.2, at 61-62 ("Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration[,] . . . a requirement that the consideration be 'bargained for.'"); MURRAY, *supra* note 1, § 55, at 204 ("[T]here must be a 'bargained-for-exchange' of something which, in the eyes of the law, is of some value.").

5. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 82-95 (1981); 1 FARNSWORTH, *supra* note 1, §§ 2.8 and 2.19; FRIED, *supra* note 2, at 28 ("[S]tatutes in different jurisdictions have made a wide variety of particular promises binding without consideration . . . ."); MURRAY, *supra* note 1, § 67, at 291 ("Indeed, many scholars believe that consideration is so riddled with exceptions and has been modified by statute and the courts in so many ways that it has proven to be 'a rather awkward tool.'").

6. *See infra* text accompanying note 100. *Cf.* Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 605 (1969) ("[T]he second *Restatement* permits enforcement of the promise, making it unnecessary in some cases to decide a difficult question as to the limits on quasi-contractual relief.").

7. While the focus of this Article is on restitution as the basis of most "moral obligation" claims, as will be noted later in the Article, there are some fact patterns which seem to fit the moral obligation scenario, but closer examination reveals a tort cause of action underlying the promise to pay. Further, some of the cases can be analyzed under traditional contract theory. *See infra* note 194 and accompanying text.

8. L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936).

9. *Id.* at 52.

properly state the basis of the claim. As a result, some legitimate claims go unsatisfied, and there is needless litigation over claims that have no real legal basis.

II. THE CONTRACT ANALYSIS

A. *The Consideration Requirement and Its Exceptions*

The *Restatement (Second) of Contracts*, while defining contract in terms of remedies and duties, rather than consideration,[10] does recognize a consideration requirement,[11] unless one of the stated exceptions applies.[12] Thus, as Professor Eisenberg has noted, "a promise needs consideration to be enforceable unless it does not need consideration to be enforceable."[13] While stating it this way may make the rule sound somewhat absurd, there is really nothing inherently objectionable in having a general rule that has stated exceptions.[14] What is important is that the exceptions are logical and represent legitimate reasons for departing from the general rule, so that they do not begin to render the rule meaningless.

Many of the exceptions meet these requirements quite well. One such exception is the enforcement of a later promise to perform an unenforceable contract obligation that would have been enforceable but for a technical legal defense. A classic example of this is a promise to pay an antecedent debt, which is now legally barred by limitations.[15] The exception is logical and does little to undermine the doctrine of consideration, since the *contract* did in fact initially have consideration.[16] Since the only thing standing in the way of enforcement is a technicality,[17] it does not offend reason to allow enforcement under these circumstances.[18]

Likewise, exceptions for option contracts and charitable subscriptions actually have a doctrinal underpinning that seems to emanate from either consideration or reliance. For option contracts, for example, it is the irrevocability of the option

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10. The *Restatement* defines contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

11. *Id.* § 17(1).

12. *Id.* § 17(2).

13. Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 642 (1982).

14. For example, the parol evidence rule is generally recognized, 2 FARNSWORTH, *supra* note 1, § 7.2, at 192, but it has stated limitations and exceptions. *Id.* § 7.3, at 210-11.

15. RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981).

16. The Ninth Circuit recently approved an earlier California Court of Appeal finding that "the fact that all or part of a debt was barred by limitations did not mean that a transfer in payment of it *was not fair consideration*." *In re* Prejean, 994 F.2d 706, 708 (9th Cir. 1993) (citing United States Fid. & Guar. Co. v. Postel, 149 P.2d 183, 186 (1944)) (emphasis added). In *Prejean*, the court upheld a transfer of a security interest in satisfaction of a time-barred antecedent obligation that was challenged under that California Fraudulent Transfer Act. *Id.* at 709.

17. *See* MURRAY, *supra* note 1, § 67, at 292 ("[C]ourts are confident in characterizing a moral obligation as enforceable if it once was enforceable at law but are more than reluctant to discover an original moral obligation . . . as sufficient to validate a promise. . . . If there had been no antecedent legal obligation which was technically barred, however, there would be no basis upon which to discover an enforceable moral obligation.").

18. As stated by a Texas Court of Appeals, "The statute of limitations affects the remedy only but does not destroy the debt. Although the debt is barred by limitations there remains a moral obligation to pay which constitutes a good consideration." Lawrence v. Worthington, 484 S.W.2d 601, 603 (Tex. Civ. App.—Eastland 1972).

that does not require consideration—the ultimate contract not only requires consideration, but, if the option is to be enforceable without consideration, requires *fair* consideration.[19] Various theories support the enforcement of charitable subscriptions.[20] The most frequently advanced are *reliance* by the institution on the gift,[21] *consideration* in the reciprocal promises made by multiple subscribers,[22] and a *bargain* with the institution either for the charitable work itself[23] or for public recognition for the gift.[24] The *Restatement* exception simply dispenses with the requirement that any of these be found in a particular case, but allows enforcement for the general category.[25]

Noting the influence of reliance reasoning in charitable subscription cases raises a question regarding how reliance exceptions fit here. The reliance exceptions, specifically promissory estoppel,[26] have been the subject of much debate

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19. RESTATEMENT (SECOND) OF CONTRACTS § 87 (1981).

20. 1 FARNSWORTH, *supra* note 1, § 2.19, at 136; MURRAY, *supra* note 1, § 62, at 239-40 ("[O]ur courts have managed to discover one or another validation device to make the [charitable] promises enforceable.").

21. *See generally* 1 FARNSWORTH, *supra* note 1, § 2.19, at 136 ("[I]t has come to be recognized that such promises are enforceable when relied on by the charitable institution, without resort to the doctrine of consideration."); MURRAY, *supra* note 1, § 62, at 240 ("Another judicial initiative is found in those cases which enforce charitable subscription promises on the basis of detrimental reliance (promissory estoppel), i.e., the charity has relied on the promise(s) to its substantial detriment.").

22. 1 FARNSWORTH, *supra* note 1, § 2.19, at 136, citing Congregation B'nai Sholom v. Martin, 173 N.W.2d 504 (Mich. 1969) ("Sometimes [the courts] found that the subscriber had bargained with other subscribers for their similar promises, a finding that was encouraged if the first subscriber had appeared as the 'bellwether' of the flock and promised a large sum if others would pledge a stated amount."); MURRAY, *supra* note 1, § 62, at 240 ("Another imaginative effort is used by some courts which discover consideration in the mutual promises of subscribers . . . .").

23. Barnes v. Perine, 12 N.Y. 18, 24-25 (1854) ("I am of the opinion, however, that the liability of the defendant can be maintained, and the judgment of the court below upheld, upon doctrines recognized as sound and well established . . . that the agreement and evidence establish a request on the part of the defendant . . . to erect the new church edifice . . . in consideration of which the defendant's promise to pay [$150] was made. . . . The evidence . . . discloses a good consideration, in the acts done and obligations incurred by the promisee upon the strength of the promise of the defendant and at his request."); 1 FARNSWORTH, *supra* note 1, § 2.19, at 136 ("Sometimes courts found that the subscriber had bargained with the charitable organization, either for its act of proceeding with its work or for its promise to use the funds in the way specified by the subscriber."); MURRAY, *supra* note 1, § 62, at 240 ("[S]ome courts have stretched to find an implied promise on the part of the charity to continue its humanitarian work . . . [or] to use the funds in accordance with the terms of the subscription." (footnotes omitted)).

24. Allegheny Coll. v. Nat'l Chautauqua Bank, 159 N.E. 173, 175-76 (N.Y. 1927); MURRAY, *supra* note 1, § 62, at 239-40. ("[S]ome courts have stretched to find an implied promise on the part of the charity . . . to perpetuate the name of the donor in connection with a memorial she promised to establish.").

25. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) cmt. f (1981) ("American courts have traditionally favored charitable subscriptions . . . and have found consideration in many cases where the element of exchange was doubtful or nonexistent. Where recovery is rested on reliance in such cases, a probability of reliance is enough, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate."). *But cf.* Md. Nat'l Bank v. United Jewish Appeal Fed'n, 407 A.2d 1130, 1137-38 (Md. 1979) (rejecting the approach of the then draft version of the *Restatement (Second) of Contracts*, and refusing enforcement of a charitable pledge because it "was not made in consideration of the pledges of others," nor were other pledges made in consideration of it, nor was there any definite and substantial action or forbearance of the institution on reliance on the promise).

and analysis.[27] Any attempt to analyze the exceptions in relation to contract doctrine is beyond the scope of this article. For purposes of this Article, suffice it to say that there are sound reasons to enforce promises on which one has reasonably relied,[28] that reliance exceptions are in fact fairly generally accepted in modern contract law,[29] and are conceptually distinct from the moral obligation exception.[30]

The moral obligation exception, embraced by the *Restatement*[31] and some courts,[32] does not have the basis in either consideration or reliance that other exceptions have. It seems to be primarily result oriented, and doctrinally tied to restitution. There is in fact little to criticize in the *results* of most cases using the doctrine to provide recovery, but the legal basis for the result often provides little guidance for handling such claims in the future, perpetuates a lack of understanding and an underutilization of restitutionary remedies,[33] and can leave potential plaintiffs without redress. More consistent and satisfactory results will obtain leaving the doctrine of consideration intact in this area and basing any contract recovery on the settlement of the underlying claim.

B. The Problem with Past Consideration and Moral Obligation

1. Moral Obligation and Past Consideration Cannot Support a Promise

Past consideration is an oxymoron. If consideration is defined as that which is bargained for,[34] because one cannot bargain for the past, past behavior by definition cannot be consideration.[35] Even reliance, a recognized exception to the con-

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26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

27. *See, e.g.*, Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996).

28. In a classic case enforcing an uncle's promise to pay his niece $2,000, the court explained: "Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration." Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898).

29. *See* Holmes, *supra* note 27, at 265-66.

30. Enforcement based on moral obligation generally requires unjust enrichment of the promisor (defendant). *See* RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981). Recovery in reliance, on the other hand, while sometimes being limited by restitution, *see, e.g.*, *id.* § 90 cmt. d, is, in concept and by description, more focused on the reliance of the promisee (plantiff).

31. *Id.* § 86.

32. *See, e.g.*, Old Am. Life Ins. Co. v. Biggers, 172 F.2d 495, 499 (10th Cir. 1949).

33. "The important consequence, however, [of using a moral obligation basis for enforcement] is that the disposition to square promises relating to the past with consideration theory means that the decisional process, over the years, has expressed directly only an occasional interest in the effects of unjust enrichment." Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1124 (1971). *See also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989) ("Despite its importance, restitution is a relatively neglected and underdeveloped part of the law.").

34. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) ("To constitute consideration, a performance or a return promise must be bargained for.").

sideration requirement,[36] at least occurs *after* the promise, because of the promise, and is an expectable result of the promise.[37]

Likewise, the logical problems with the moral obligation exception have caused many courts to resist making such an exception.[38] In a very real sense, there is a moral obligation to keep all promises.[39] One who reneges on promises is generally seen as morally deficient, and not to be trusted. The moral person keeps promises. Thus, if "moral obligation" is enough per se, all promises would be enforced, and there would be no consideration requirement. As stated by the Utah Supreme Court:

> [I]f a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration. This is so, first because in nearly all circumstances where a promise is made there is some moral aspect of the situation which provides the motivation for making the promise even if it is to make an outright gift. And second, if we are dealing with moral concepts, the making of a promise itself creates a moral obligation to perform it.[40]

It is the concept of enforcement that is the key—the question is not whether people *should* keep promises, but whether, or when, the heavy hand of the law should be involved in ensuring that promises are kept.[41]

One wild card that is introduced when "moral obligation" is the test is the need to decide whose morals are to be used.[42] Courts may be justifiably chary of making such judgments.[43] Thus, in a New York case, a court refused the plain-

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35. *See* Restatement (Second) of Contracts § 86 cmt. a (1981) ("'[P]ast consideration' is inconsistent with the meaning of consideration stated in § 71 . . . .").

36. *See* Restatement (Second) of Contracts § 90 (1981).

37. *Id.* cmt. b ("The promisor is affected only by reliance which he does or should foresee . . . .").

38. Manwill v. Oyler, 361 P.2d 177, 178-79 (Utah 1961); Schnell v. Nell, 17 Ind. 29, 32 (1861) ("A moral consideration, only, will not support a promise."); Kapsa v. Botsford (*In re* Estate of Voight), 624 P.2d 1022, 1025 (N.M. Ct. App. 1981) ("A moral obligation will support a subsequent promise in Illinois only when the moral duty was once a legal one. As Mr. Voight never had a legal duty . . . the only consideration for the promissory notes was the moral duty he felt. This is not sufficient to make the notes valid and enforceable in Illinois.") (citation omitted); Int'l Aircraft Sales v. Betancourt, 582 S.W.2d 632, 636 (Tex. Civ. App.—Corpus Christi 1979) ("Appellees argue that . . . the moral obligation is sufficient consideration for the contract. We disagree. Generally speaking, a moral obligation is not regarded as sufficient consideration to support a contract." The court then notes the exception for debts based on "antecedent consideration which the debtor is exempted from by virtue of a positive rule of law."); D--- D. C--- v. T--- W---, 480 S.W.2d 474, 478-79 (Tex. Civ. App.—Amarillo 1972) ("[I]n Texas, a moral obligation is not regarded as sufficient consideration for support of a contract."); Orsborn v. Old Nat'l Bank of Wash., 516 P.2d 795, 796-97 (Wash. Ct. App. 1973). *But cf.* N.Y. Gen. Oblig. § 5-1105 (providing for enforcement of written promises that express an otherwise valid consideration, even if that consideration is "past or executed").

39 . *See, e.g.*, Restatement (Second) of Contracts § 86 cmt. a (1981) ("The mere fact of promise has been thought to create a moral obligation, but it is clear that not all promises are enforced.").

40. Manwill v. Oyler, 361 P.2d at 178.

41. Randy E. Barnett, *Some Problems with Contract as Promise*, 77 Cornell L. Rev. 1022, 1024 (1992) ("[W]e are concerned, not with why persons ought to keep their word, but with why and therefore when coercion may be used by third parties, including the State, to compel promisors either to perform or pay damages when they fail to keep their word.").

42. *Cf.* Eisenberg, *supra* note 13, at 664 ("[W]hether the promisor is unjustly enriched in any other sense [other than legal] must turn on concepts of morality.").

tiffs' claim for reimbursement against the brother of a deceased neighbor for payments and obligations incurred for the neighbor's funeral expenses.[44] The plaintiffs incurred the expense out of a sense of duty or "mitzvah" after consultation with their rabbi, on the mistaken belief that the neighbor had died without surviving family.[45] It would seem that under these circumstances the brother would have a moral obligation to reimburse them, yet the court did not require reimbursement.[46] The judge, while not finding that Jewish law necessarily required the plaintiffs' actions, said that "even if Jewish law or custom required their acts, *I am required to apply the law of this State solely to determine what legal obligations may be imposed* upon the defendant."[47] Likewise, a Texas Court of Civil Appeals refused to enforce a father's promise to support his illegitimate child since he had no legal obligation to support the child under the law as it existed at the time.[48] If the dictates of religious law or the natural obligation of a parent to support his child can be viewed by courts to be insufficient "moral obligation" to make a promise enforceable, giving lip service to the concept of moral obligation can only add confusion and uncertainty to the law. The uncertainty arises not only from the different views that may be held as to what is an enforceable moral obligation, but whether there should be any enforceability based on moral obligation at all.

For those courts that do make determinations based on moral obligation, there is a real concern that they will tend to enforce their own view of morality, a perilous undertaking for those making law for a free and diverse society.[49] That this is so is illustrated by examining a law review article suggesting that it is the promise itself, more than the underlying obligation, which provides the basis for enforcement in the moral obligation cases.[50] The authors speak of a fictional character's "moral culpability in failing to keep his word."[51] However, the promise he purportedly made was a promise to leave his wife for another woman.[52] In the view of many people, the moral culpability would be in the making, rather than the breaking, of such a promise.[53] In fact, such a promise, even if otherwise enforceable, would be unenforceable under the *Restatement*, as being in contravention of public policy,[54] and appears not to be the type of contract contemplated by the

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43. Lord Mansfield apparently did not find this concern sufficient to negate moral obligation as a reason to enforce a promise. In his view, "[w]here a man is under a moral obligation, which no Court of Law or Equity can inforce, and promises, the honesty and rectitude of the thing is a consideration." 1 FARNSWORTH, *supra* note 1, § 2.8, at 79 (quoting Hawkes v. Saunders, 1 Cowp. 289, 290, 98 Eng. Rep. 1091 (K.B. 1782)).

44. Schoenfeld v. Ochsenhaut, 452 N.Y.S.2d 173, 174-75 (N.Y. Civ. Ct. 1982).

45. *Id.* at 174.

46. *Id.*

47. *Id.* (emphasis added) (citation omitted).

48. D--- D. C--- v. T--- W---, 480 S.W.2d 474, 478-79 (Tex. Civ. App.—Amarillo 1972).

49. "[T]here seems to be no consensus as to what constitutes a 'moral obligation.'" RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a (1981).

50. Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1049-50 (1992).

51. *Id.* at 1048 (discussing the promise made by a character in Woody Allen's film *Crimes and Misdemeanors*).

52. *Id.* at 1045-46.

53. While the discussion of the fictional scenario was apparently more illustrative than strictly contractual, *see id.* at 1047, it does give a striking example of the complexities of making decisions on a moral basis.

"moral obligation" exception in the *Restatement*.[55] The difficulties encountered in trying to use moral obligation as a basis for enforcement indicate that enforcement is better found in restitution or possibly tort, with any promissory enforcement being under a contract supported by the consideration of the claim settlement.

2. *The Rationale for the Exception*

If consideration is important in contract enforcement, then there must be some important reason to create an exception to the requirement. What is that reason in the moral obligation cases? As noted earlier, if it were just moral obligation, since under most moral codes one is obligated to keep one's word,[56] we could dispense with the consideration requirement entirely.[57] Thus there must be more. In fact, even if moral obligation in a more narrow sense than the moral obligation to keep *all* promises were used as the criterion, that still would not explain the results of the cases, or even the Restatement rule.

Two classic cases often used to illustrate the parameters of the exception are *Mills v. Wyman*,[58] in which recovery was denied, and *Webb v. McGowin*,[59] in which it was allowed. In *Mills*, the plaintiff Mills cared for Levi Wyman, defendant's twenty-five-year-old son, in his last illness.[60] Defendant wrote a letter to plaintiff, after all expenses had already been incurred, promising to pay for the care.[61] When the elder Wyman subsequently refused to keep his promise, Mills sued.[62] The court found the promise to be without consideration and unenforceable.[63]

In *Webb*, the plaintiff Webb, while clearing the upper floor of a mill, as required by his job, saw that a pine block he was about to drop would hit J. Greeley McGowin, possibly killing him.[64] To avert certain disaster, Webb instead jumped down with the block to divert its path.[65] Unfortunately, Webb was seriously injured in the process.[66] The grateful McGowin promised to pay Webb $15 every two weeks for the rest of Webb's life, which he did for as long as McGowin him-

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54. Under the *Restatement (Second)*, a promise detrimental to the marital relationship is unenforceable on grounds of public policy. RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981). Likewise, the *Restatement* would refuse enforcement on a "moral obligation" argument. *Id.* § 86 cmt. a, illus. 3.

55. *Cf. id.* (providing the following example: "A has immoral relations with B, a woman not his wife, to her injury. A's subsequent promise to reimburse B for her loss is not binding under this Section.").

56. *See* FRIED, *supra* note 2, at 16 ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.").

57. *See, e.g.*, William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 116 (1978) (stating that moral obligation "is not an illuminating term: why should not every promise be viewed as resting on—or if need be creating—a moral obligation, and hence enforced?").

58. 20 Mass. (3 Pick.) 207 (1825).

59. 168 So. 196 (Ala. Ct. App. 1935).

60. Mills v. Wyman, 20 Mass. at 209.

61. *Id.*

62. *See id.*

63. *Id.*

64. Webb v. McGowin, 168 So. at 196.

65. *Id.* at 196-97.

66. *Id.* at 197.

self lived.[67] However, his executor refused to pay after McGowin's death.[68] In this case, the court granted enforcement of the promise, stating that this was not a case of "mere moral obligation," but a case of receipt of a "material benefit constituting a valid consideration."[69]

Thus, the court stated what is sometimes called the "material benefit rule,"[70] and sometimes described as a "moral obligation" exception to the consideration requirement.[71] To understand the rule, it is important to consider why it was crafted, and where the line is to be drawn when there has been no apparent bargaining. In other words, why do we want to craft a rule that leaves Mills without recovery, while providing recovery to Webb? And, more importantly, is there not a more cogent and predictable way to reach the desired result?[72]

One possibility is that we want to enforce the obligation in *Webb* because McGowin subsequently acted on his promise to pay, whereas Wyman did not. But for McGowin's unfortunate demise during Webb's lifetime, the payments would likely have continued.[73] As that appears to have been McGowin's intent, it is tempting to provide a legal mechanism to effectuate that intent. There are two problems with succumbing to this temptation. First, it is problematic *to enforce* promises simply because the promisor's continued commitment to the promise, without more, seems to evidence a desire for enforceability. Evidence of the continued "embracing" of the promise, standing alone, is insufficient to dispose of the consideration requirement.[74] Second, it is inconsistent with contract theory generally to allow a promisor *to defeat* enforcement by simply changing his mind after the contract has been formed.[75]

Further, where enforcement would mean the continuation after death of payments that were being made voluntarily during life, the decision impacts the law of testamentary transfers.[76] In fact, as in *Webb*, many important decisions have been made as a result of suits against executors and administrators who, in the exercise of their fiduciary obligations, have refused to make payments promised by their

67. *Id.*

68. *Id.* at 198.

69. *Id.*

70. *See, e.g.*, MURRAY, *supra* note 1, § 67, at 298.

71. *See, e.g.*, 1 FARNSWORTH, *supra* note 1, § 2.8, at 75.

72. Professor Fried describes the court's machinations allowing recovery to Webb as "a process of reasoning too strained to repeat." FRIED, *supra* note 2, at 33.

73. The payments continued throughout, and, indeed, somewhat past, the lifetime of McGowin. Webb v. McGowin, 168 So. at 197.

74. *See, e.g.*, Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094-95 (R.I. 1982) (holding that promise to pay pension, unsupported by consideration, is unenforceable).

75. *See* 1 FARNSWORTH, *supra* note 1, § 3.2, at 161 ("According to the orthodox catechism, there is a definite moment in time when a party becomes contractually bound on a promise. At that moment there is an abrupt transition from no liability to liability based on the promisee's expectation interest.").

76. *See* 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS § 61, at 218 (Bowe-Parker Revision 1960):

> An inter vivos transfer or transaction requires that some interest or control, however small, be surrendered and that some right in another party come into being at the time of the transaction. If a purported inter vivos conveyance has no effect whatsoever until death and involves absolutely no surrender or divestiture of control, use, power or interest in the property involved, and creates no present duty or liability upon the maker and no rights in others, there exists no reason to consider it as inter vivos for it

testators and decedents.[77] However, if the goal is to effect a particular distribution of property after death, the appropriate vehicle to do that is a properly executed will,[78] a valid trust to that effect, or an otherwise enforceable contract. An enforceable contract will generally survive death.[79] Yet it is intellectually dishonest to designate something a contract *only because* we want it to survive death. Statutes regulating testamentary transfers play a long established role in our common law tradition,[80] and reflect a policy of taking great care to protect the testator's expressed intent and preventing after-death suppositions about what the testator "would have wanted."[81] It is important to make decisions that withstand contractual analysis, and that cannot be said to be end-runs around the law of wills.

Second, if the contractual reasoning is sound, the agreement will also survive lifetime challenges. Once a contract is formed, it is no longer the prerogative of one party to decide whether to perform, or continue to perform. To fail to perform is to breach. And if the promise is the contract forming event, what happens later—whether enthusiastic performance or a refusal to perform—is irrelevant for formation purposes. There is no reason why the actual beginning of the promised performance should be any more binding than the promise itself, considering that both happen after the benefit has been received. If the performance ceases, the subsequent change of heart does not negate the contractual obligation. If McGowin had changed his mind after making payments for several years, the likelihood of enforcement should not be any less.

Further, the court's explanation of its decision, taken at face value, suggests

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> squarely meets the very definition of testamentary disposition and ought to come under the requirements of the statute of wills. It is a very common practice for courts to strike down illusory inter vivos transactions as void on the ground that they accomplish nothing until death, are testamentary in nature, and therefore should be denied effect for want of execution according to testamentary formalities.

77. *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898); Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

78. The formalities required for testamentary transfers have been adopted for important policy reasons. 2 BOWE & PARKER, *supra* note 76, § 19.4, at 66 ("The purpose of these statutes [regulating formalities of will execution] is to make it certain that testator has a definite and complete intention to pass his property, and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another."). If those requirements are to be relaxed, it is for the legislatures to decide. *See id.* § 19.4, at 65 ("If the testator has not complied with the statutes which regulate the execution of the will, his intention to pass his property . . . has no legal effect . . . .").

79 . A notable exception, contracts requiring personal performance by the now deceased promisor, RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981) (excusing performance where made impracticable by certain events) and § 262 (defining the death of a person necessary for performance as such an event), would rarely be invoked in the situation under review here, since the moral obligation claim arises in the case of a claim for a money payment, or other compensation for a benefit conferred. The first twelve illustrations in § 86 of the *Restatement (Second)* involve claims for money, and the last, illustration 13, being a claim for an entire estate, would inevitably involve some money, along with other tangible property. *Id.* § 86.

80. 2 BOWE & PARKER, *supra* note 76, §§ 19.2-.3.

81. *See* 4 BOWE & PARKER, *supra* note 76, § 30.2, at 6 ("Under most Wills Acts, it is from the words of the will that testator's intention is to be deduced. Evidence extrinsic to the four corners of the will may be used in aid of construction . . . [but e]ven if [additional] direct declarations of intent were available . . . no attention could be paid . . . to such intention for it would directly compete with the words of the testamentary document.") (footnote omitted).

that there is in fact more to the decision than the desire to continue, after death, payments McGowin voluntarily made in life. The court focuses on the material benefit to McGowin,[82] the harm to Webb,[83] and the sufficiency of moral obligation to support a promise,[84] rather than on the fact that McGowin had continued to embrace his promise.

So if the distinction is not the fact that one promisor embraced his promise, while the other repudiated it, what is it? Why was the court not persuaded to enforce Wyman's promise in *Mills*? If Wyman had said to Mills, prior to Mills' provision of care, "If you will care for my son, I will pay you," the promise would be enforced. Under those facts, the promise to pay is the result of a bargain. Wyman promised to pay, he got what he wanted in return for his promise, and he expects to, and should, pay. It matters not that he had no legal obligation to provide care for his son. One can bargain for what one wants, not just for the fulfillment of legal obligations. But if Mills provided the benefit without the expectation of payment, there is no bargained-for promise. The after-the-fact promise is not enough to create a legal duty.[85]

Yet in deciding that, we are somewhat uncomfortable. We are uncomfortable in the first instance because we are not kindly disposed to those who make promises and do not keep them. Nonetheless, contract law does not make the full force of the law and the legal system available to victims of "mere" promise-breakers.[86] In situations like *Mills*, however, we are doubly uncomfortable. We are uncomfortable not only with letting Wyman off the hook because he broke his promise, but also with the idea that as between a father and a kind-hearted total stranger, the total stranger will bear the entire burden of young Wyman's care in his final days. Yet we accept with resignation the premise that legally Wyman had no more duty to provide this support than a total stranger,[87] and leave Wyman answerable only to a higher authority, free of legal consequences from his breach of promise. As the *Mills* court observed,

> Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.
>
> A deliberate promise . . . cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it.[88]

So what is it about *Webb* that pushes the claim "over the edge," if you will?

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82. Webb v. McGowin, 168 So. 196, 197-98 (Ala. Ct. App. 1935).

83. *Id.* at 198.

84. *Id.*

85. *See* Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982) ("Valid consideration furthermore must be bargained for. It must induce the return act or promise. To be valid, therefore, the purported consideration must not have been delivered before a promise is executed, that is, given without reference to the promise.").

86. *See, e.g.*, Mills v. Wyman, 20 Mass. (3 Pick.) 207, 211 (1825).

87. *Id.* at 209 (noting that Levi Wyman, at the time when the services were rendered, "was twenty-five years old, and had long left his father's family.").

88. *Id.* at 210-211. One can only wonder if Wyman would have refused to pay had he realized how many generations of law students would read about and discuss his now-infamous parsimony.

Again we are uncomfortable with the breaking of a promise (especially when, as noted earlier, the promise is broken by a surrogate for the original maker). Also again, we are uncomfortable that a kind-hearted volunteer should not be compensated for the service he has provided, here, as opposed to those who will receive property from the estate.[89] But in *Webb* we have a third reason to be uncomfortable. In *Mills*, while there was in fact no unjust enrichment of the *father*, there clearly was such enrichment of McGowin. In fact, in *Mills*, if Wyman had had a legal obligation to support his son—if his son were a minor, for example—then he *would* owe Mills *in restitution* for the benefit conferred on him in supplying that which Wyman was legally obligated to supply.[90] This enrichment requirement is key to contractual enforcement of promises based on previously received benefits under the *Restatement (Second)*, which enforces such promises only "to the extent necessary to prevent injustice"[91] and not if "the promisor has not been unjustly enriched."[92] Considering that the claim is so integrally bound to the concept of restitution, and so at odds with the concept of contract, one wonders why the basis of the claim is in contract, rather than in restitution. There is in fact an ongoing discussion in the literature of this very issue.[93] While there is forceful support for promissory[94] justifications for enforcement of such promises, there is also considerable recognition of the restitutionary basis for enforcement, with the importance of the subsequent promise being to address any objection due to a lack of intent[95] or to provide help in dealing with the difficult valuation question.[96]

89. In other words, Webb, who has "earned" the money by his sacrifice, has a more compelling claim to it than the estate beneficiaries who simply receive it due to the largesse of the deceased, or to their relationship to him. *See* Linzer, *supra* note 3, at 191 (acknowledging that the argument could cut the other way in that other family members "might not be pleased at losing what they viewed as their rightful share, but [suggesting that] justice and fairness would support" the claim of the deserving plaintiff who has conferred a benefit at some cost to herself). Since the inquiry will focus on the circumstances of the *particular case*, rather than looking to a rule designed to work for *most* cases, the results will generally be more just.

90. *See* RESTATEMENT OF RESTITUTION § 113 (1937). There are the further qualifications that the person "act[] unofficiously and with intent to charge." *Id.*

91. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

92 . *Id.* § 86(2).

93. *See, e.g.*, Eisenberg, *supra* note 13, at 663-64; Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1310-12 (1980). Professor Fried, discussing the "tendency to merge promise into its adjacent concepts" as applies to the relation between contract and restitution, criticizes the "explaining away" of the importance of promise by injecting restitution analysis. FRIED, *supra* note 2, at 25. The analysis proposed in this Article preserves the philosophical basis of each doctrine. Further, Professor Fried concludes that there are in fact "breaches of promise for which restitution is the correct principle of relief." *Id.* (footnote omitted). *See also*, Henderson, *supra* note 33, at 1124-26. Henderson notes: "[T]he technique of moral obligation only roughly and sporadically effectuates a policy of preventing unjust enrichment. . . . But a broad recognition of the restitution interest is not likely to occur under the label of moral obligation." *Id.* at 1126.

94. Thel & Yorio, *supra* note 50, at 1052 ("The thesis of this Article, however, is that when courts give a remedy for the breach of a promise based on felt moral obligation they do not act to give the promisee her due, but instead to enforce a promise that is important to the promisor.").

95. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d (1981) ("A subsequent promise in such a case . . . may negate any danger of imposition or false claim. A positive showing that payment was expected is not then required."). Professor Henderson, however, while finding much to criticize in the law's failure to adequately respect the restitution interest in these situations, Henderson, *supra* note 33, at 1124-26, focuses on providing a remedy for those situations

III. THE RESTITUTIONARY ANALYSIS

A. Rationale

1. Increasing Predictability and Fairness

The underlying basis for enforcement of promises based on moral obligation is found in restitution,[97] and sometimes in tort.[98] The promise, if accepted (either expressly or by conduct indicating assent), then places a value on the underlying claim, and will be enforceable in contract. The consideration for that contract is the release of the earlier restitution or tort claim.[99] When the focus is on the reasons for the recovery, it becomes apparent that the contract stretch is less satisfactory. The drafters of the *Restatement* concede that the conceptual basis for the exception is in restitution, and suggest that it is the difficulties that are sometimes encountered in restitution that make the contract remedy necessary. The comments to section 86 contain the following rationale:

> Although in general a person who has been unjustly enriched at the expense of another is required to make restitution, restitution is denied in many cases in order to protect persons who have had benefits thrust upon them. . . . In many such cases a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails. . . . Enforcement of the subsequent promise sometimes makes it unnecessary to decide a difficult question as to the limits on quasi-contractual relief.[100]

Nothing is gained if "difficult question[s] as to the limits on quasi-contractual relief" are traded for difficult questions as to the limits of moral obligation. Not only does it make more sense for the recovery to be in restitution, because unjust enrichment seems to be the basis for the distinction between cases in which recovery is allowed and those in which it is not,[101] but also a rule based in restitution would treat claimants more fairly. If the recovery is only in contract, the claimant who never received a promise will have a much more difficult time receiving compensation, since the possibility of contractual recovery will leave less incentive to explore and develop restitutionary remedies.[102] If the court does not "buy" the

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in which a promise has been made to compensate for the enrichment, *id.* at 1184. "Once it is understood that objections to a remedy in quasi-contract are supported primarily by slender assumptions about intervention and neighborliness, a following promise ought on many occasions to tip the scales in favor of the policy of unjust enrichment." *Id.*

96. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d ("A subsequent promise in such a case may remove doubt as to the reality of the benefit *and as to its value* . . . .") (emphasis added); *but cf.* Landes & Posner, *supra* note 57, at 116 ("The objection to restitution in rescue cases . . . that the courts should not try to write contracts for people who have failed to agree on terms; if the necessary terms are supplied by the rescue victim's promise, this objection disappears.").

97. *See infra* text accompanying notes 159-60.

98. *See infra* note 162 and accompanying text.

99. *See* 1 FARNSWORTH, *supra* note 1, § 2.12, at 102.

100. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b (1981). Regarding the problems of thrusting benefits upon the rescued, and difficulties of valuation, *see infra* Parts III.A.4 and V.B.1, respectively.

101. *See supra* notes 91-93 and accompanying text.

contractual argument, when that avenue to recovery is denied, there may be none other to take its place.

The impact on fairness to claimants is illustrated by considering one specific kind of moral obligation claim—the claim made by rescuers, or Good Samaritans. Recovery was denied, for example, in *Harrington v. Taylor*,[103] in which the plaintiff intervened to prevent the defendant's wife (herself a previous assault victim of the defendant) from decapitating him or similarly grievously injuring him with an axe.[104] As a result of her intervention, plaintiff's hand was badly mutilated.[105] Defendant's subsequently promised payment having been suspended by him, plaintiff sued for enforcement of the promise.[106] The court denied enforcement, stating that "a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."[107]

Contractually, the reasoning is sound. Clearly there was no bargain for the act, so there would appear to be no consideration.[108] But just as clearly, the defendant received a material benefit and was enriched, to the detriment of the plaintiff. Is it not reasonable to assume that had there been time, if we could stop action momentarily so that the parties could bargain, that defendant *would have* willingly promised to pay plaintiff to save his life? And is it not also reasonable to assume an intention of the rescuer to be compensated for significant costs in providing the rescue?

What is it about restitution that should preclude recovery by the Webbs of the world if they have not received a promise? Surely they have conferred a benefit.[109] And is it not in a sense "unjust" to allow the McGowins to receive that benefit at such cost to the Webbs without compensating them in some way?[110] So why do we not compensate through restitution, regardless of promise? It is said that we do not because, without a subsequent promise, Webb acted as a "volunteer" without expectation of compensation.[111] Yet the argument places too much importance on actual conscious mental state than is warranted by restitutionary theory. The intent in contract is actual. That in quasi-contract is implied as a matter of law. As the Supreme Court of New Hampshire stated in 1873:

> The cases put it [the recovery in quasi-contract] on the ground of an implied

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102. *Cf.* Laycock, *supra* note 33, at 1293 ("Lawyers too often overlook restitutionary rights and remedies."). This is not to say, however, that there are not powerful arguments being made for a restitutionary remedy in cases of this nature. *See generally* Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85 (1986).

103 36 S.E.2d 227 (N.C. 1945).

104. *Id.* at 227.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

109. It has been suggested that a restitutionary recovery in *Webb* is justified. Albert, *supra* note 102, at 96 ("A credible argument can be made that *Webb* is consistent with restitutionary doctrine as traditionally formulated.").

110. *See* FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI CONTRACTS § 7 (1913) (noting the two essential elements that must be shown to establish quasi-contractual obligation are "(1) [t]hat the defendant has received a benefit from the plaintiff [and] (2) [t]hat the retention of the benefit by the defendant is inequitable.").

111. *Id.* § 201, at 314.

> contract; and by this is not meant . . . an actual contract,—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury,—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. . . . It is doubtless a legal fiction, invented and used for the sake of the remedy.[112]

In his book, *The Law of Quasi-Contracts*, the late Professor Woodward identified four chief characteristics of quasi-contracts:

> 1. They are paramount or irrecusable, as distinguished from consensual or recusable, obligations. That is, they are imposed by law without reference to the assent of the obligor.
>
> 2. They are particular, as distinguished from universal, obligations. That is, they are imposed because of a special state of facts and in favor of a particular person, and do not rest upon one at all times and in favor of all persons.
>
> 3. They are based upon equitable considerations, but had their origin in the courts of law and are enforced by so-called legal remedies.
>
> 4. They require that the obligee shall be compensated, not for any loss or damage suffered by him, but for the benefit which he has conferred upon the obligor.[113]

Each of these factors comports with restitutionary recovery for volunteers in appropriate situations, even though Professor Woodward himself did not draw that conclusion in his book.[114] The first characteristic supports recovery for the emergency volunteer who did not obtain consent, because this recovery does not require consent. The second supports the flexible approach suggested herein. The "equitable considerations" in the third add necessary guidance in deciding when and to what extent compensation will be required. The fourth characteristic goes specifically to the measurement of that compensation, which will be discussed in Part IV of this Article.

2. *Problems with the Professional/Volunteer Dichotomy*

Professor Woodward rejected the idea of compensation for the nonprofessional volunteer out of hand, stating that "there is an irrebuttable presumption, based either upon considerations of policy or upon knowledge of normal human conduct, that the service is intended to be gratuitous."[115] This rejection has become fairly hardened in the law of restitution.[116] Yet on closer analysis, neither policy considerations nor "knowledge of normal human conduct" compel a conclusion that compensation is not expected under certain circumstances. Therefore, rather than an irrebuttable presumption, an examination of the actual circumstances of each case in light of the basis of restitutionary recovery will produce better re-

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112. Sceva v. True, 53 N.H. 627, 630 (N.H. 1873) (discussing contract implied in law for an insane person to pay for necessaries provided in good faith).

113. WOODWARD, *supra* note 110, § 3, at 5 (footnote omitted).

114. *Id.* § 199.

115. *Id.* § 201, at 314.

116. *See, e.g.*, 1 DAN B. DOBBS, LAW OF REMEDIES § 4.9(1), at 680 (2d ed. 1993) ("If there is a black-letter rule for unsolicited benefits it is that 'volunteers' and 'officious intermeddlers' cannot recover restitution. The Restatement says a volunteer is one who confers a benefit without mistake, coercion or request." (footnotes omitted)).

sults.[117]

When the injured and unconscious accident victim is ministered to by a doctor, his promise to pay is implied as a matter of law, though he never regains consciousness—a legal fiction.[118] If the pine block fell on McGowin, and he was ministered to by a physician, the physician could recover in restitution even if McGowin were incapable of consent.[119] The assumption is, were he capable of consent, he would consent to, and even request, treatment.[120] Is it not just as reasonable to assume that if a bargain could be struck in that split second in which the decision to prevent the log from hitting him in the first place is made, the rescued party would accept help and willingly agree to pay for it, and the rescuer would expect reasonable compensation if the cost of the rescue becomes burdensome? Professor Farnsworth has recognized the burden involved in services to preserve life or prevent disaster as a reason to allow compensation in stating that the "presumption [that the benefit was conferred gratuitously] may be rebutted if the services are excessively burdensome to the person rendering them, as when, for example, they continue for days or even weeks."[121] He refers to the *Mills* facts, and concludes that Mills may have had a claim under restitution on this theory against the *son*,[122] as to whom Mills was also a volunteer. There does not seem to be any reason why the "excessively burdensome" nature of the rescue could not come from a burden based on an injury caused by the rescue as well as from the time frame required.

The inflexibility that results from putting too much emphasis on a bright line distinction between professional and lay volunteers,[123] with the attendant focus on the intent to charge,[124] creates unnecessary problems. In fact, some courts seem almost perverse in finding a lack of intent in order to deny payment to those who acted as nonprofessional volunteers. As stated over a hundred years ago by the Supreme Court of Oregon, in denying recovery to a volunteer who had preserved the property of the defendant in an emergency:

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117. In criticizing the "volunteer" rule, Professor Dobbs states: "To a large extent the terms [volunteer, intermeddler, and officious] are merely conclusory aphorisms; they are alternate and easy ways of stating the end result, not reasons for that result." *Id. See also* Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152, 1154 (1999) ("In most cases, good samaritans are described by the courts as 'mere' strangers, volunteers, officious meddlers, intermeddlers, or interlopers. Needless to say, use of these derogatory epithets usually indicates that the plaintiff's claim is doomed to fail." (footnotes omitted)).

118. Cotnam v. Wisdom, 104 S.W. 164, 165 (Ark. 1907).

119. *See id.*; *see also In re* Estate of Crisan, 107 N.W.2d 907, 910 (Mich. 1961).

120. *See* 1 DOBBS, *supra* note 116, § 4.9(5), at 700 ("[T]he treatment [by the doctor] represents our best guess about what his [the unconscious defendant's] choice would be.").

121. 1 FARNSWORTH, *supra* note 1, § 2.20, at 152.

122. *Id.* at n.29 (discussing Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825)).

123. For an example of the strict view that once prevailed that no action would lie for the nonprofessional volunteer, see WOODWARD, *supra* note 110, § 201, at 314.

> It seems to be taken for granted that at the common law there is no legal obligation, independent of contract, to pay for *nonprofessional* services rendered, in an emergency, in the preservation of life. . . . [T]here is an irrebuttable presumption, based either upon considerations of policy or upon knowledge of normal human conduct, that the service is intended to be gratuitous.

Id. (emphasis in original).

124. RESTATEMENT OF RESTITUTION § 116 (1937).

> The law will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand; it would be doing violence to some of the kindest and best effusions of the heart, to suffer them afterwards to be perverted by sordid avarice.[125]

Is this to say that professional volunteers are motivated by "sordid avarice"—or that lay volunteers must have the nature of their kindnesses protected even against their own expressed preferences? Neither seems to be a satisfactory conclusion.

It seems plausible that one reason for the disparate treatment of professionals and nonprofessionals is the significant cost to a professional's skill. The fact that the professional has invested so heavily in gaining his expertise normally "reduces the likelihood that altruism alone" would underlie the rescue,[126] supporting a finding of an intent to charge.[127] Without training—long and expensive training—few of us know how to treat physical trauma. Most of us know how to jump off a platform with a pine block. Yet there is significant cost to Webb's action—a cost actually dearer than the years and expense of medical training.

Further, the difference could stem partially from a feeling that if we are to charge medical personnel with a duty to act with requisite skill, finding them liable if they do not, it is only fair that they be compensated for the work they do. Cost to medical personnel is two-fold: cost in training, and cost in potential liability. Yet the common law does not inherently create greater liability for medical personnel. The general rule stated in the *Restatement (Second) of Torts* is that a person is liable to another for negligent performance of services to another to protect the other's "person or things" whether or not the undertaking was done "gratuitously or for consideration."[128] Of course, this general rule notwithstanding, the potential liability risk may be greater for professional "volunteers," given that the professional will likely be held to a higher standard in rendering the service.[129] However, statutes often provide protection to volunteers in the emergency rescue situation.[130] The protection may apply only to professionals,[131] or may apply regardless of whether the volunteer is a professional or not.[132] Further, it may turn more on the capacity in which the service is provided than on the title or training of the volunteer. Regardless, the protection apparently reflects policy decisions that fa-

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125. Glenn v. Savage, 13 P. 442, 448 (Or. 1887). For a criticism of *Glenn*, see Dagan, *supra* note 117, at 1153-55.

126. Landes & Posner, *supra* note 57, at 110.

127. RESTATEMENT OF RESTITUTION § 116 cmt. a (1937), referencing *id.* § 114 cmt. c.

128. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

129. The *Restatement* recognizes that a lower level of competence may be acceptable for gratuitously rendered services where the recipient recognizes that the volunteer is not an expert, or where the nature of the emergency indicates that action is necessary even without optimum skill for the service performed. *Id.* § 323 cmt. b.

130. 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 306, at 453 (1981) (noting that many states have enacted "'good Samaritan' statutes . . . excusing physicians from civil liability in rendering care in an emergency").

131. *Id.*

132. *Id.* ("[O]ther jurisdictions extend the immunity to all persons who administer emergency care at or near the scene of the emergency." (citing Dahl v. Turner, 458 P.2d 816 (N.M. Ct. App. 1969)). *See, e.g.*, Texas's "Good Samaritan Law," TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 (Vernon Supp. 2001), which provides essentially that one who in good faith administers emergency aid is not liable in damages unless "the act is wilfully or wantonly negligent."

vor rescue.[133] Given all the variables, potential liability seems to be an unsatisfactory basis for the disparate treatment of professionals and nonprofessionals in this context.

This is not to say that lay volunteers should necessarily be treated the same as professionals. The professional volunteer will sometimes receive payment where the lay volunteer would not, simply due to the realities of measuring the benefit. If the victim receives properly administered medical care, even though the result is unsuccessful, he has received something that has recognized value, and for which he could (and should) compensate the provider.[134] We assume the defendant would have wanted the *opportunity* for a favorable result, and that opportunity has been provided in a legally and popularly recognized way. Failed rescue attempts by nonprofessionals often will not pass this "recognized value" test. The value of the nonprofessional rescue is generally in the result, not the attempt.[135] Further, where there is little cost to the lay volunteer's actions, restitution is unlikely to be justified.[136]

3. Support in the Restatement of Restitution

The *Restatement of Restitution*, which generally seems to support the dichotomy,[137] in fact can, on careful analysis and given appropriate facts, be read to support restitution for the lay volunteer. The support does not come from section 116, which clearly provides recovery for medical personnel in appropriate circumstances,[138] and further seems to provide little basis for recovery for volunteers due to its "intent to charge" language.[139] Further, it might be a stretch to characterize Webb's action as the supplying of "things or services" for which that section provides. Yet, if a right to compensation is not found under the reasoning of section 116, it is not necessary to conclude that compensation is to be denied. It makes more sense to look elsewhere in the *Restatement* for some basis for compensation. Section 112 in fact seems to work very nicely. That section provides that, although a "person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution," there is an exception "where the benefit was conferred under circumstances making such action *necessary for*

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133. *See, e.g.*, 61 AM. JR. 2D, *supra* note 130, § 306, at 453 (explaining the exception for physicians by noting that "fear of malpractice suits may have made doctors reluctant to render emergency care in the case of accidents, and with the public welfare in mind many states have enacted 'good Samaritan' statutes to encourage the prompt treatment of accident victims by excusing physicians from civil liability in rendering care in an emergency." (citing Dahl v. Turner, 458 P.2d 816 (N.M. Ct. App. 1969))).

134. RESTATEMENT OF RESTITUTION § 116 cmt. a, illus. 1 (1937).

135. *But see* Dagan, *supra* note 117, at 1179-83 (rejecting success as a prerequisite for restitutionary recovery in order to provide incentive for nonprofessional rescuers).

136. See discussion *infra* Part V discussing valuation generally, and particularly Part V.C, regarding the significance of the actual enrichment and the "cost" to the volunteer.

137. The illustrations dealing with allowing or denying restitution for the preservation of the life or health of another all specifically refer to the claimant as a physician or surgeon. RESTATEMENT OF RESTITUTION § 116, illus. 1-4 (1937).

138. *Id.* illus. 1, 2, 4 (providing examples where restitution is appropriate); *id.* illus. 2, 3 (providing examples where restitution is not appropriate).

139. *Id.* § 116 (1937) ("A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if (a) he acted unofficiously *and with intent to charge* therefor, . . ." (emphasis added)).

the protection of the interests of the other or of third persons."[140] The comment makes it even clearer that situations like *Webb* may be contemplated, and that it is not necessary to fit one of the specific sections, such as section 116. The comment states:

> [A] person or his belongings may be in such jeopardy that a stranger is privileged to intervene and to recover for his salvage services. Sections 113-117 state the rules *with respect to specific types of such situations.* These rules have become crystallized and represent the *types* of situations in which the unasked-for conferring of a benefit has been regarded as unofficious. *Other similar situations may arise in which the desirability of permitting restitution is equally great* and, *if so, restitution should be granted* in accordance with the principle that *compensation* for benefits conferred *is denied only to officious intermeddlers or to persons who do not desire or who manifest no desire to have compensation for their services.*[141]

Further, focusing on section 116 leads to an unwarranted emphasis on intent to charge. While an intent *not* to charge can *negate* recovery in quasi-contract, an affirmative intent to charge is not necessarily *required* for a quasi-contractual recovery. For example, if a thief steals a watch and sells it, the owner can seek restitution of the amount the thief received for the watch.[142] While the owner's claim may be labeled a "quasi-contract" claim, the underlying basis for the claim is the commission of a tort, not any contract even remotely contemplated by the parties[143] or any intent to charge. His claim in restitution is simply a result of making an advantageous choice of remedies.[144] The victim recovers *in restitution* based on the unjust enrichment, not because there was any "intent to charge."

4. Protecting Autonomy and Preventing Hardship

When restitution is used substantively to create a remedy where there is no underlying tort or contract at all,[145] it is especially important that the defendant's autonomy interest be protected[146] and that the recovery not result in undue hardship to the defendant who, in fact, never actually sought the benefit.[147] The claimant who has acted officiously has no right to restitution—each individual has the right to decide what benefits he wants and for which he is willing to pay.[148] However, in a true rescue situation, questions of autonomy or of officiousness should not delay us long. Most people would want to be rescued, and there will be little

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140. *Id.* § 112 (emphasis added).

141. *Id.* cmt. b (emphasis added).

142. 1 DOBBS, *supra* note 116, § 4.1(3), at 565.

143. *Id.*

144. The plaintiff in such a situation has the option to sue in tort for his loss, or for restitution to prevent unjust enrichment. So, for example, if the watch the thief stole is worth $100, but the thief sold it for $200, the plaintiff would presumably prefer the restitutionary recovery preventing the $200 gain, rather than the tort compensating for the $100 loss. *Id.* § 5.18(1), at 923. *See also id.* § 1.1, at 5. Of course, the fact that the watch was sold for $200 could be evidence that that is its value, making the recovery $200 under either theory. *Id.* § 4.1(1), at 554.

145. Dobbs refers to such situations as benefits "conferred without mistake or contract" where there is no fault or breach by the defendant, but nonetheless the defendant is arguably unjustly enriched. *Id.* § 4.1(2), at 560.

146. *Id.* at 563.

147. *Id.*

148. RESTATEMENT (SECOND) OF RESTITUTION § 2 cmt. a (1937). *See also* Dagan, *supra* note 117, at 1161-62 ("[A]ctual consent . . . should be the prerequisite to any legitimate transfer of, or interference with . . . resources. . . . Instances of unsolicited benefits threaten potential beneficiaries' control over their resources.").

reason for the rescuer to believe otherwise. If, under the facts of the particular case, the rescue can be seen as officious, the defense would still be available to negate liability.[149] This would rarely be the case, however. Officiousness is defined as "interference in the affairs of others not justified by the circumstances."[150] Where a serious emergency is involved, "interference" is patently justified.

If it is actually *known* to the volunteer that the person, for reasons not generally applicable, does not want to be helped, whether by rescue or otherwise, there is no claim for restitution.[151] Since this discussion focuses on non-medical persons, the thorny questions of medical treatment for the unconscious person who has religious objections to such treatment do not generally arise.[152] There may be questions raised when a rescue of a person attempting suicide is involved, but policy reasons favoring life would likely dictate recovery, or would at least inform the decision-making process in the same way they would in a medical rescue.[153]

5. Policy Considerations

Where the benefit is provided at significant personal harm or cost to the plaintiff, providing compensation seems to be good public policy.[154] Allowing compensation not only encourages rescues[155] but prevents the rescued person from reaping the benefit of the rescue at the expense of another with no obligation to provide compensation. This "encouragement" is accomplished consistently with legal reasoning: the enrichment is manifest, and compensation is provided only where circumstances indicate that it is "unjust."[156] To refuse recovery is to not only refuse to encourage rescue, but to actively discourage it. As one author put it:

> There is no neutrality. If the law does not encourage rescue, it is sure to discourage it. If it does not compensate, it will indirectly penalize. If the rescuer who suffers injury or incurs expense or simply expends his skill goes without compensation, the law, so far as it influences conduct at all, is discouraging rescue.[157]

Not only does the traditional view arguably "penalize" rescue, it tends to penalize expressions of gratitude and expressed intentions to compensate. If the only basis for enforcing the claim in one case and not in another is the promise made, then those who are not moved to make such a promise may escape making any compensation for benefits received, while those who felt a moral obligation that motivated a promise may incur a significant legal obligation based only on that

149. RESTATEMENT OF RESTITUTION § 116 cmt. a (1937).

150. *Id.* § 2 cmt. a.

151. *Id.* § 116 cmt. b.

152. *See id.* § 114 cmt. b, illus. 7 (noting that the surgeon who attends to a woman over her objections based on her religious denomination is not entitled to restitution from her husband). The illustration is in the section dealing with the performance of another's duty to a third person in an emergency, but the rule is also applicable to § 116. *See id.* § 116 cmt. a.

153. *See, e.g.*, Rockville General Hospital v. Mercier, No. CV 90 44838 S, 1992 WL 335218 (Conn. Super. Ct. Nov. 9, 1992) (involving recovery in the medical rescue context).

154. "[L]ife rescue is an act worthy of society's encouragement." Albert, *supra* note 102, at 124.

155. Dagan, *supra* note 117, at 1156 ("Restitution . . . can serve as an instrument for encouraging potential benefactors to render necessary assistance.").

156. *See infra* Part IV.B.

157. Albert, *supra* note 102 at 85 (quoting Antony M. Honoré, *Law, Morals, and Rescue*, *in* THE GOOD SAMARITAN AND THE LAW 225, 232 (James M. Ratcliffe ed. 1966)).

promise. Such a result is not only inconsistent with contract theory, since it enforces promises made without consideration, and inconsistent with restitution theory in basing the decision for recovery on a promise rather than unjust enrichment analysis, but again places a heavier burden on those who display what many would consider noble and societally beneficial motives.

B. The Effect of Factual Variations on Recovery

Assuming we are satisfied that a benefit has been conferred, as it apparently was in *Webb*, and that the benefit may require compensation based in restitution, the question is when should compensation be granted and when should it not be? It is helpful to consider a few variations on the *Webb* facts. Assume that McGowin walks in just after Webb has let go of a pine block. It appears to be headed straight for McGowin, if McGowin pursues his present course. Webb sees the problem and shouts, "Look out!" McGowin jumps back, and his life is saved. A relieved McGowin promises to give Webb $10,000. Is this promise enforceable? It would seem not. Even though the same "enrichment" of McGowin occurs here as occurred in the actual case, it does not here appear to be "unjust." The promise may be heartfelt, but the enforcement should be based on restitutionary principles, not on the promise. There is little reason to assume one would expect compensation where so little cost is involved,[158] but significant reason to make that assumption where the cost is great. This is especially so since we are dealing not with actual intent, but intent presumed in law. As stated by Justice Cardozo in a famous discussion of presumed intent: "Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication."[159] For the restitutionary claim the intent is presumed—and it is reasonable and probable that only costly benefits will merit compensation.

Suppose now that Webb is acting carelessly in tossing off the pine block without looking—that he knows people frequently pass by, and has been repeatedly cautioned that he must look before throwing pine blocks down. Now when we hear that he has jumped with the block to avoid killing McGowin, our response might be: "And well he should have! He created the danger, he should alleviate it."[160] If he is hurt in the process, and McGowin is enriched, the enrichment again does not seem unjust.

On the other hand, if McGowin has entered into an area of known danger, has been clearly warned that pine blocks will be falling from above, and Webb has no reason to know or expect that anyone will be there, Webb's claim against McGowin is compelling. Now McGowin's carelessness caused the situation in which he was at risk. Certainly it would be unjust here not to allow recovery. In fact, in this

158. *See infra* note 345 and accompanying text.

159. Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921).

160. "The person who by his tort imperils another has a duty to attempt to rescue the victim. He is responsible for the damages his tort causes." Carter v. Taylor Diving & Salvage Co., 341 F. Supp. 628, 630 (E.D. La. 1972).

scenario the claim will likely be in tort,[161] with the contract, if there is one, again being found in the consensual "settling" of the claim. As the court stated in a New York case in which the plaintiff was injured rescuing the defendant from the path of his own negligently parked car: "May not a lack of self protective care be negligent towards any person in whose vicinity one exposes oneself to an undue risk of injury? We think so."[162]

The factors underlying the claim are more likely to be addressed fully if the focus is on that claim rather than on the promise. Where the claim is based on the negligence of the defendant, the claim is properly in tort. Where there is no tort, but there is a real benefit unjustly enriching the defendant (and there are no factors to *negate* intent), the recovery should be in restitution.

IV. Comparing the Suggested Approach with the "Promise for Benefits Received" Approach

A. *General Principles*

How does the foregoing analysis fit with section 86 of the *Restatement (Second) of Contracts*, which provides enforcement of promises for "benefits received?" It fits nicely with the intended coverage of the section (produces the desired results), but does so more logically. Where the benefit received produces a legitimate claim in restitution (or when there is a claim in tort), then the settlement of the claim will be an enforceable contract based on consideration, as settlement of an uncertain claim constitutes consideration.[163] This will be true even if ultimately the claim is found to be invalid, as long as there was "an honest and reasonable belief in its [the claim's] possible validity,"[164] or, under the *Restatement* view, the forbearing party believes it may be valid.[165]

Further, if the promised performance is not forthcoming, the plaintiff could presumably sue on the promise or on the original obligation. The settlement of the claim would be an accord, which would not be satisfied until the full terms of payment had been satisfied.[166] If there were a breach of the accord, the plaintiff should have the choice of claims on which to sue.[167] Where there is no claim to

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161. The New York Court of Appeals, in a well known case finding liability to the rescuer who is injured trying to rescue put in peril by the defendant, stated: "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable." Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921). *See also* Carter v. United States, 248 F. Supp. 105, 107 (E.D. Okla. 1965) (citing *Wagner*).

162. Carney v. Buyea, 65 N.Y.S.2d 902, 908 (N.Y. App. Div. 1946); *see also* Talbert v. Talbert, 199 N.Y.S.2d 212 (N.Y. Sup. Ct., Special Term 1960). In finding liability even though the defendant was rescued from an apparent suicide attempt, the *Talbert* court said, "the defendant owed a legal duty to those in the immediate vicinity who might attempt to rescue him from his self-imposed plight. . . . It is sufficient [for a finding of liability] that the situation in which defendant placed himself was a dangerous one and invited rescue." *Id.* at 215, 216.

163. Restatement (Second) of Contracts § 74(1)(a) (1981).

164. Fiege v. Boehm, 123 A.2d 316, 321 (Md. 1956).

165. Restatement (Second) of Contracts § 74(1)(b) (1981).

166. *Id.* § 281.

167. *See id.* § 281(2) ("If there is such a breach, the obligee may enforce either the original duty or any duty under the accord.") and *id.* cmt. b.

settle however, there is no consideration for the promise and the promise will not be enforceable.[168] The settlement analysis will also generally support the *Restatement* goal of not enforcing the promise beyond reasonable compensation,[169] but in a clearer manner. If the promisor has made a promise of payment that is far beyond what would be viewed as reasonable recovery in restitution or tort, it appears less likely that the promise is intended to be a settlement of that claim than that it is just a gratuitous promise.[170] Therefore, the contract would be unenforceable as being without consideration, and only the underlying restitution or tort claim would be enforced. So, rather than purporting to enforce a questionable contract on terms other than those agreed to by the parties,[171] the claim is enforced according to its true basis and value. This of course comports with the apparent intended goal of the *Restatement*—to prevent unjust enrichment, not to enforce the promise.

This approach also avoids the potential for "penalizing" rescuees for mere expressions of gratitude, while retaining what seems to be the *Restatement*'s ultimate goal in looking at the promise. As stated in the comments, "a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails."[172] Thus, if the reason for denial of relief is that no legally recognizable benefit has been conferred, as in the *Mills* example, there is still no recovery in spite of the promise. But if there is a benefit conferred—the "material benefit" discussed in *Webb* and other cases—then the claim is actually in restitution, with the promise serving only to negate a finding that the action was gratuitous.

B. Limiting the Claim to Unjust Enrichment

That this approach is consistent with the *Restatement* position is emphasized by examining two of the *Restatement* illustrations that indicate modified enforcement in situations of disproportionate value. Illustration 12 assumes A, a 60-year-old woman, has rendered household services for B, an 80-year-old multimillionaire, for several years.[173] B promises, in writing, to pay her $25,000 for the services, which have a reasonable value of $6,000.[174] The *Restatement* position is that the promise is binding to prevent injustice, the amount promised not being of disproportionate value.[175] Illustration 13, however, alters the facts to the extent

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168. *See id.* cmt. d.

> The enforceability of the accord is governed by the rules applicable to the enforceability of contracts in general. The obligee's promise to accept the substituted performance in satisfaction of the original duty may be supported by consideration because that performance differs significantly from that required by the original duty . . . or because the original duty is in fact doubtful or is believed by the obligor to be so . . . .

Id. cmt. d.

169. *Id.* § 86.

170. "Disparity in value, with or without other circumstances, sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense." *Id.* § 79 cmt. d.

171. Under the *Restatement* view, the promise is binding only "to the extent necessary to prevent injustice," *id.* § 86(1), and is not binding "to the extent that its value is disproportionate to the benefit." *Id.* § 86(2)(b).

172. *Id.* § 86 cmt. b.

173. *Id.* § 86 cmt. i, illus. 12.

174. *Id.*

175. *Id.*

that the promise is now oral, and is for B's entire estate.[176] Now A, according to the *Restatement*, is limited to the reasonable value of her services.[177] Under the approach suggested by this Article, the result would in this case be the same, but for a different reason. In Illustration 12, A would have a legitimate claim for the value of her services, which, although subject to estimation, is unliquidated at present and obviously open to dispute. It is not at all unreasonable, given that she has a valid unliquidated claim determined only in hindsight to be worth about $6,000, that someone in B's financial situation would realistically pay $25,000 in settlement of the claim.[178] However, where B orally promises to leave A his entire estate (worth three million dollars) for services of a value generally in the range of $6,000, the clear indication is that he does not do so to settle a claim, but simply to make a gift to A.[179] Therefore the gift is unenforceable, and A is left to her claim in restitution, which would be measured by the reasonable value of her services.

The restitution claim does not then depend on the promise, and in fact would be good without any promise at all as long as the other requirements of restitution are met (such as no intent to make a gift and no objection to the service—both givens in the hypothetical here[180]). When the claim is based on the appropriate analysis, those claims in which there is no promise, or difficult proof related to the promise, are more likely to be addressed. Further, those who received a promise, but never agreed to settle their claim for the amount promised, would be free to pursue their restitution or tort claim, and not be limited to an amount unilaterally determined by the defendant in promising payment.

This leaves one thorny concern. Assume a promise as in *Webb*, voluntary payment under that promise for a period of years, death of the promisor, and an executor who balks at payment after the promisor's death. Under both the "settlement of the restitution claim" reasoning advanced, and under the *Restatement*'s "moral obligation" reasoning, there is a current breach of contract for which the plaintiff can seek relief. Under the *Restatement* provision, this would seem to be true even if the promised amount is disproportionate to the value of the rescue since it is the *remedy* that is limited to an amount not "disproportionate to the benefit."[181] The breach of contract is current, and the lawsuit is timely.

It is possible, on the other hand, that using the settlement reasoning and the argument that a disproportionate amount is not in settlement of the claim at all, but simply a promise based on gratitude there is no current contract claim, only a restitution claim that may be time-barred. This in fact is unlikely to prevent recovery for two reasons. First, if there is anything to indicate a settlement, it could be

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176. *Id.* illus. 13.

177. *Id.*

178. This is not to judge whether it is a "good" or "bad" settlement, just that under these circumstances it appears to *be a settlement*, and not a bogus recitation of consideration to disguise an unenforceable gift.

179. The fact that the promise is oral in this example, a fact about which the *Restatement* offers no explicit comment, further supports the conclusion that this promise was not seriously intended as a binding settlement of a claim.

180. The illustration states that B "has often assured A that she will be well paid for her services." RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. i, illus. 12 (1981). In fact, B's assurances may indicate a claim *in contract*, with the settlement being of the amount due under the contract, rather than for the value in restitution.

181. *Id.* § 86(2).

enforced as such, since it is a contract with real consideration, and since the adequacy of that consideration is not a matter for court intervention.[182] The claim is timely since the cause of action does not accrue until the breach occurs[183] (the payments stop). Second, even if there is no indication of a settlement, and the restitution claim is arguably time-barred, the willing payment in the meantime could serve to estop the payor from raising the statute of limitations or laches as a defense,[184] allowing enforcement on the correct analysis.

C. *Applying the Analysis to the* Restatement *Illustrations*

1. *Introduction*

It has been suggested herein that the general purposes behind section 86 can be better accomplished using more traditional legal analysis. Some of the illustrations (and/or cases) on which the illustrations are based have been discussed to support this point.[185] Further consideration of the illustrations underscores the suitability of restitution and contract-with-consideration analysis.

2. *The Contract Analysis*

Regarding traditional consideration reasoning, illustration 2, like illustration 1 (based on *Mills v. Wyman*[186]), simply illustrates the point that contracts without consideration are generally unenforceable, and that neither "past consideration" nor "moral obligations based solely on gratitude or sentiment [are] sufficient of themselves to support a subsequent promise."[187] The more informative illustra-

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182. *Id.* § 79 ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged . . . .").

183. *See, e.g.*, Al-Abood v. El-Shamari, 217 F.3d 225, 233 (4th Cir. 2000) ("Under Virginia law, . . . a cause of action for breach of contract occurs at the time of the breach."); Nettles v. AT&T, 55 F.3d 1358, 1362 (8th Cir. 1995) ("The damage must be actually sustained and capable of ascertainment before the right to sue arises and the statute of limitations begins to run.") (citing Business Men's Assurance Co. of America v. Graham, 891 S.W.2d 438, 445 (Mo. Ct. App. 1994)); T&N PLC v. Fred S. James Co. of New York, Inc., 29 F.3d 57, 59 (2d Cir. 1994) ("Under New York law, a cause of action for breach of contract accrues and the statute of limitations commences when the contract is breached." (citing Ely-Cruikshank Co. v. Bank of Montreal, 615 N.E.2d 985, 986 (N.Y. 1993)).

184. *See* Beynon Building Corp. v. Nat'l Guardian Life Ins. Co., 455 N.E.2d 246 (Ill. App. Ct. 1983), in which the court found that the statute of limitations defense can be defeated by an estoppel argument. The court stated:

> Estoppel exists independent of those things set forth in the statute itself as causing suspension. If a party's conduct has reasonably induced another to follow a course of action that otherwise would not have been followed and that would be to the latter's detriment . . . an estoppel arises to prevent injustice . . . . Although there is ordinarily no duty to apprise an adversary of his rights, one cannot justly or equitably lull his adversary into a false sense of security, causing him to subject his claim to the bar of the statute, and then plead the very delay caused by his course of conduct.

Id. at 252.

185. Illustration 1 is based on *Mills v. Wyman*, and illustration 7 is based on *Webb v. McGowin*, both discussed extensively in this Article. Illustration 3 is discussed briefly *supra* at notes 54-55 and accompanying text, and illustrations 12 and 13 are discussed *supra* at text accompanying notes 173-77.

186. 20 Mass. (3 Pick.) 207 (1825).

187. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a (1981).

tions are those in which the promise is found to be enforceable. Illustration 4 is one such example. The illustration is as follows:

> A is employed by B to repair a vacant house. By mistake A repairs the house next door, which belongs to C. A subsequent promise by C to pay A the value of the repairs is binding.[188]

On its face, this illustration seems to be a good example of the promise removing the objection to recovery under a restitutionary analysis.[189] As one might expect, however, the court in the case on which the illustration is based[190] used a "moral obligation" analysis.[191] The obvious concern in a mistake situation is that a benefit is forced upon someone who may not have wanted it,[192] and would not have chosen to receive it or pay for it.[193] The promise seems to take care of those concerns by indicating both acceptance of the benefit and willingness to pay. This supports the result under either a section 86 or a restitutionary analysis, making section 86 at best redundant. Yet ultimately the result in the case was upheld on appeal by finding a contract with consideration.[194] There had been a fact finding that some of the improvements mistakenly made were in fact capable of being removed and taken back by the plaintiff.[195] The owner made the promise to pay in exchange for the plaintiff's agreement not to remove them, thus creating a contract with bargained-for consideration.[196]

The result in illustration 8 is likewise supported by a more traditional contract analysis. The illustration is as follows:

> A submits to B at B's request a plan for advertising products manufactured by B, expecting payment only if the plan is adopted. Because of a change in B's selling arrangements, B rejects the plan without giving it fair consideration. B's subsequent promise to reimburse A's expenses in preparing the plan is binding.[197]

The illustration is based on a 1922 Virginia case, in which the defendant, a seller of insecticides, requested that the plaintiff prepare an advertising plan for its products.[198] As both the illustration and the actual case indicate, the contract

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188. *Id.* cmt. c, illus. 4.

189. *See id.* cmt. b.

190. Drake v. Bell, 55 N.Y.S. 945 (N.Y. Spec. Term 1899).

191. *Id.* at 946.

192. *Cf.* WOODWARD, *supra* note 110, § 188. In discussing mistaken improvements by the occupant of real property, the author states that "a more serious objection to recovery (and one that has not been given the attention it deserves) is the hardship that must sometimes result to the owner if he is compelled to pay for improvements which, though they may enhance the value of his property, he does not want." *Id.*

193. *See generally*, 1 DOBBS, *supra* note 116, § 4.9(2), at 683.

194. Drake v. Bell, 61 N.Y.S. 657, 658 (N.Y. App. Div. 1899). The court said:

> We do not find it necessary to inquire whether, under the peculiar circumstances of this case, the moral obligation to pay, coupled with the value bestowed upon the property and the enjoyment of the premises by the defendant, is sufficient to constitute a legal consideration for the promise to pay. . . . Leaving these [unattached] articles constituted a present consideration of value, moving . . . to the defendant at the time when the promise to pay was made. That this furnished a consideration for the promise is elementary.

Id.

195. *Id.* at 657.

196. *Id.* at 657-58.

197. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. e, illus. 8 (1981).

198. Haynes Chem. Corp. v. Staples & Staples, Inc., 112 S.E. 802 (Va. 1922).

contemplated that B (the defendant) would give the plan fair consideration,[199] which the defendant's board failed to do.[200] That, of course, was a breach of contract. While there apparently was a subsequent promise to pay for the services,[201] which appears to have been considered by the trial court,[202] the real basis of the decision is a finding of a promise implied in law.[203] The plaintiff was unable to realize the gain expected from the contract[204] due to the defendant's breach. The court considers this circumstance in finding an implied promise to pay—a promise implied in law.[205] This, of course, sounds like a restitution analysis. I submit, however, that a contract analysis would be appropriate here. Under the facts, it was a condition of plaintiff being awarded the advertising campaign that the board be satisfied with the plan, but the board was obligated to give the plaintiff's plan fair consideration. When it failed to give the plan the required consideration, it was in breach of contract,[206] for which damages would be payable. Since reliance is an appropriate damage measure for breach of contract,[207] and especially appealing here since any attempt to prove the commissions the plaintiff would have made from the campaign would pose certainty problems,[208] it is apparent that enforcement of the promise to pay for the reliance expenditures is consistent with the usual contract recovery. There is no need to resort to any "past consideration" argument.

3. *The Restitution Analysis*

In illustration 4, discussed in the previous section, the facts make the restitution argument even more compelling. After the improvements were made, the owner was able to let the property, which was then in salable condition.[209] Clearly there was a benefit conferred, and the benefit was accepted by the owner. Thus,

199. *Id.* at 804.

200. *Id.* at 804-05.

201. The general manager, on informing the plaintiff that its services would not be required, stated, "[Y]ou did a good job; your work was fine; and we feel you ought to be recompensed, and we would like for you to send us a bill for your expenses." *Id.* at 804.

202. One of the jury instructions included a reference to the promise. *Id.*

203. *Id.* "Where one renders services for another at the latter's request, the law, in the absence of an express agreement, implies a promise to pay what those services are reasonably worth, unless it can be inferred from the circumstances that those services were to be rendered without compensation." *Id.* (citing Briggs v. Barnett, 61 S.E. 797 (Va. 1907)).

204. Although the plaintiff did not initially expect compensation for the plan, he expected to realize a profit from the commissions to be earned if and when he was selected to handle the ad campaign. *Id.* at 803.

205. *See id.* at 805:

> In view of such conduct on the part of the defendant it connot be "inferred from the circumstances" that the services of the plaintiff, so far as concerns the expenses incurred by it, were to be rendered without compensation, and we are of the opinion that the law implies a promise to pay any reasonable amounts expended by the plaintiff in complying with the request of the defendant to prepare the plans.

Id. at 805. *See also* 2 FARNSWORTH, *supra* note 1, § 3.10, at 210.

206. *See* RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981) ("When performance of a duty under a contract is due any non-performance is a breach.").

208. *Id.* § 349 ("As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest . . . .").

208. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

209. Drake v. Bell, 61 N.Y.S. 657, 657 (N.Y. App. Div. 1899).

even if the bargain discussed above had not occurred, recovery would have been appropriate under a restitution analysis. It is true, however, that the illustration does not reveal these additional facts, and seems to state a more general application. Yet real cases have context, and one can imagine a scenario that would fit the illustration, but in which restitution would be inappropriate due to, for example, indications that the repairs do not actually benefit C, that C is unable to pay for or realize the benefit and the like. In such a case, however, it would seem that recovery would in fact be inappropriate under section 86, since it would not be "necessary to prevent injustice."[210]

Illustration 5 can also be explained by a restitution analysis. The illustration provides:

> A pays B a debt and gets a signed receipt. Later B obtains a default judgment against A for the amount of the debt, and A pays again. B's subsequent promise to refund the second payment if A has a receipt is binding.[211]

Whether restitution works in this situation depends in part on the facts of the case, which are somewhat sketchy in the illustration, and, in fact, in the case on which it is based.[212] If A paid twice by mistake, not realizing until after paying the judgment that he had already paid before, his right to restitution seems clear.[213] The case becomes more complicated if A knew at the time of the lawsuit that he had already paid the judgment, and simply failed for some reason to raise the defense. In that case, his right to restitution would depend on other factors, such as why he did not raise the defense, whether or not B had knowledge of the previous payment, or made any misrepresentations in that regard, or whether other factual errors were involved in A's failure to raise the defense.[214] On the other hand, if A simply neglected to locate or present his receipt at the time of the lawsuit, knowing full well of its existence and availability (or mistakenly assuming its non-existence or non-availability), the *Restatement of Restitution* would deny his restitution claim, since granting it would allow him to "reverse positions with the claimant, thereby being enabled to select his own time and place for litigation . . . ."[215] However, under factual variations in which *restitution* would be denied based on policy considerations related to finality of judgments, it could be argued convincingly that those same considerations would militate against a *contract* recovery and in fact recovery would not be "necessary to prevent injustice."[216] The case on which the illustration is based, however, does not suggest any of these facts, but bases its holding on the injustice of allowing the double recovery to stand.[217] If

210. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

211. *Id.* § 86 cmt. c, illus. 5.

212. Bentley v. Morse, 14 Johns. 468 (N.Y. Sup. Ct. 1817).

213. "A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty . . . is entitled to restitution of the excess." RESTATEMENT OF RESTITUTION § 20 (1937). *See also* 1 DOBBS, *supra* note 116, § 4.9(2), at 683 ("The easiest cases for restitution of unsolicited benefits are those in which the plaintiff mistakenly gives the defendant cash or a specific chattel."); and *id.* § 4.9(3), at 686 ("The cases . . . allow restitution of mistaken cash payments or overpayments in the absence of some independent reason to deny it.").

214. *See* RESTATEMENT OF RESTITUTION § 27 cmt. a (1937).

215. *Id.*

216. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

217. Bentley v. Morse, 14 Johns. at 468 ("The debt having been paid, the recovery in the former action was clearly unjust . . . .").

the claim is in restitution rather than contract, the developed principles of law for restitution claims would control and produce a more satisfactory result.

Illustration 6 is also easily explained using restitution analysis. The illustration provides:

> A finds B's escaped bull and feeds and cares for it. B's subsequent promise to pay reasonable compensation to A is binding.[218]

The illustration is based on a Vermont case[219] in which the defendant's bull escaped and found its way into the pasture of the plaintiff, who then cared for it. The plaintiff ascertained the identity of the owner, and contacted him.[220] The defendant promised to pay for the reasonable value of the plaintiff's services, but failed to do so.[221] When the plaintiff sued, the court allowed payment for the services subsequent to the promise on a consideration theory.[222] As to the services prior to that time the court considered the "past consideration" and "moral obligation" arguments, seeming to be unimpressed by the past consideration objection.[223] The court decided that recovery here would not be in conflict with recovery allowed in cases involving a promise made to perform a previous legal obligation. The telling statement by the court is the one indicating that recovery is allowed here because "the defendant has received a valuable pecuniary benefit at the expense of the plaintiff[,]"[224] a classic requirement for restitution.[225] The facts of the case actually perfectly fit the basis for restitution set out in section 117 of the *Restatement of Restitution*, which allows restitution for a benefit conferred by preserving another's things.[226] The requirements of the section are lawful possession, and no fault in making the services necessary[227] (apparent from the facts here), the necessity of rendering the services before the owner could be contacted[228] (animals require food and water, for example, and the plaintiff did not know who the owner was, and was unable to immediately communicate with him even when he found out[229]), no reason to believe the owner would reject the act[230] (none was indicated here[231]), intent to charge[232] (intent easily inferred from the facts here), and acceptance by the owner[233] (clear from the owner's early and repeated prom-

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218. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 6 (1981).

219. Boothe v. Fitzpatrick, 36 Vt. 681 (1864). Actually, in that case, part of the enforcement of the promise is based on contractual consideration since the plaintiff continued to care for the bull after notification was given to the defendant that he had the bull, was caring for it, and expected payment. *Id.* at 682-83.

220. *Id.* at 681.

221. *Id.* at 681-82.

222. *Id.* at 683.

223. "[T]he promise is binding, though made upon a past consideration." *Id.* at 683.

224. *Id.* at 684.

225. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." RESTATEMENT OF RESTITUTION § 1 (1937).

226. *Id.* § 117.

227. *Id.* § 117(1)(a).

228. *Id.* § 117(1)(b).

229. Boothe v. Fitzpatrick, 36 Vt. at 681.

230. RESTATEMENT OF RESTITUTION § 117(1)(c) (1937).

231. *Compare* Bailey v. West, 249 A.2d 414, 415 (R.I. 1969), in which the owner made clear, upon receipt of bills for care of a horse, that he did not desire anything to be done on his account.

232. RESTATEMENT OF RESTITUTION § 117(1)(d) (1937).

233. *Id.* § 117(1)(e).

ise to pay[234]). Therefore, the contract recovery is redundant at best.

The result in illustration 9 likewise can be reached under a restitution analysis. In that illustration,

> A contributes to B, an insurance company, on the understanding that B is not liable to reimburse A but that A will be reimbursed through salary and commissions. Later A withdraws from the company and B promises to pay him ten percent of premiums received until he is reimbursed. The promise is binding.[235]

The illustration is based on a 1949 Tenth Circuit case, *Old American Life Ins. Co. v. Biggers*,[236] in which A (Biggers) made a contribution of capital to B (an insurance company), generally under the terms stated in the illustration.[237] The understanding between A and B was never that the contribution was gratuitous,[238] but only that there would be no legal liability as such, since such liability would have caused the insurance company to be insolvent, and therefore not qualified to do business.[239] The understanding that A would nonetheless be repaid was apparent in the agreement that he would be reimbursed through salary and commissions.[240] The agreement was reached at A's insistence, when changes contemplated (and then made) would result in A giving up much of his control of B's decisions.[241]

The court first determined that the agreement could not be enforced under traditional consideration theory.[242] No personal services were contemplated, no legal claim was being released, and the release of control as president and as a fiduciary could not be consideration.[243] The court then discussed a "trend of modern authorities" that if the claimant has

> conferred an actual, material, or pecuniary benefit on the promisor, and not merely a detriment to the promisee, and the promisee expected to be compensated therefor and did not intend it as mere gift or gratuity, and the benefit received had not constituted the consideration for another promise already performed or still legally enforceable, a moral obligation arises which will support a subsequent executory promise where there was originally no contract . . . .[244]

The language used by the court to describe the benefit includes the restitution requirements that an actual benefit be conferred,[245] that the benefit not be conferred gratuitously,[246] and that the compensation is not already determined by a bargain between the parties.[247] In fact, for these circumstances, it is hard to imagine a better description of the requirements for restitution. That restitution is the

234. Boothe v. Fitzpatrick, 36 Vt. at 682.

235. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. e, illus. 9 (1981).

236. 172 F.2d 495 (10th Cir. 1949).

237. *Id.* at 497-98.

238. While there was testimony that the advances "were, in fact, donations and did not create any legal liability," *id.* at 498, the court held that Biggers nonetheless "expected that, if the Insurance Company prospered . . . he would eventually be indirectly repaid . . . ." *Id.* at 499.

239. *Id.* at 497.

240. *Id.*

241. *Id.* at 497-98.

242. *Id.* at 499.

243. *Id.*

244. *Id.*

245. RESTATEMENT OF RESTITUTION § 1 cmt. a (1937).

246. *See id.* cmt. c.

247. *Id.* § 107(1). The promise, being made without consideration, would not constitute a "bargain" determining the amount of the benefit. *See* Old Am. Life Ins. Co. v. Biggers, 172 F.2d at 499.

real goal of compensation in *Biggers* is further underscored by the fact that the court allows the so-called enforcement of the promise "only to the extent of such obligation [the moral obligation based on the benefit conferred] and no further, and . . . when payments made under the contract equal the amount of the donations, the contract will terminate."[248]

Likewise, in *Park Falls State Bank v. Fordyce*,[249] also cited in the *Restatement* in connection with this illustration, the court makes the following statement in support of enforcement of a similar promise: "One ought, in morals, to make return for things of value not intended as a gift that he has accepted, and he ought in morals to do what he knowingly and advisedly gave one acting for his benefit and to his own hurt to understand he would do."[250] The statement, at its inception, again describes a sound basis for a restitution claim, and at the end describes a possible implied (in fact) contract.[251]

Illustration 11, based on a 1909 Washington case, *Muir v. Kane*,[252] confounds simple analysis. It is in fact unclear whether the reasoning proposed in this Article would support the result in *Muir*. However, to the extent the reasoning would not support the result, it would support a more legally sound result. The illustration provides as follows:

> By statute an agreement authorizing a real estate broker to sell land for compensation is void unless the agreement or a memorandum thereof is in writing. A, a real estate broker, procures a purchaser for B's land without any written agreement. In the written sale agreement, signed by B, B promises to pay A $200, the usual commission, "for services rendered." The promise is binding.[253]

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248. Old Am. Life Ins. Co. v. Biggers, 172 F.2d at 500 (footnote omitted).

249. 238 N.W. 516 (Wis. 1931).

250. *Id.* at 518.

251. While the statement is very consistent with restitution or contract-with-consideration theory, *Park Falls* actually may better be explained under a ratification theory. One of the assignments of error by the bank had to do with the bank's denial of a ratification by the bank, *id.* at 518, which the court did not address since it found that the action was supported by consideration. *Id.* at 520. The court in its opinion does, however, compare the transaction here to another ratification situation, the ratification of a contract by a minor after reaching majority, *id.* at 519, a concept based in contract theory without the need of a "moral obligation" exception, *see* RESTATEMENT (SECOND) OF CONTRACTS § 85 cmt. b, illus. 2 (1981). Further, ratification seems to fit quite well given that, since the promised action had already been performed, there would have been no basis to question enforcement but for the special relationship between the bank and the board of directors, *see* Park Falls State Bank v. Fordyce, 238 N.W. at 519-20, and ratification is a recognized concept in board actions. *See, e.g.*, BLACK'S LAW DICTIONARY 1268 (7th ed. 1999) ("ratification, n.1. Confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done the board of directors' ratification of the president's resolution."). As the court noted in *Park Falls*:

> A natural person, not standing in the relation of a trustee, may make a gift if he wants to. But a trustee may not make a gift of trust property nor may the officers of a bank make a gift of its funds, and if either be done, no reason is perceived why action will not lie for rescission and recovery.

Park Falls State Bank v. Fordyce, 238 N.W. at 520. Here, since the limited power of the board allowed the transaction to be questioned, the power of the board to ratify also should allow the transaction to be validated, again without the need to use moral obligation as the legal justification.

252. 104 P. 153 (Wash. 1909).

253. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. g, illus. 11 (1981).

The statutory requirement is in the nature of a statute of frauds provision.[254] One way of dealing with a statute of frauds objection is to find that the statute has in fact been satisfied. In *Muir*, the promise to pay was in fact in writing, it was just not written at the time of the initial agreement.[255] Under statute of frauds analysis generally, this should not be a problem.[256] The statute does not require any particular form of writing,[257] or that the writing be in existence at the time the contract is entered.[258] It would seem then, that this would be a fairly easy way to deal with the issue under contract analysis, and the moral obligation analysis would be unnecessary. While this analysis seems to work for the illustration, however, the suggestion that the statute has been satisfied by the writing was specifically rejected by the court in *Muir*.[259] If this rejection is due to some misapprehension of the court as to the nature of the writing required[260] or to the primary purpose of the writing requirement, which is "to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made,"[261] then the decision is simply aberrational, and should not be the reason for a rule of law that is otherwise not supportable. There is in the case evidence that the court is aware of the evidentiary purpose of the statute,[262] but chooses the moral obligation rationale over the equally reasonable, and ultimately preferable, satisfaction of the statute rationale. However, it is possible that the case is not so easily dismissed.

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254. Muir v. Kane, 104 P. at 154. The contract is not one that is within the traditional classes of contract generally considered to be covered by the Statute of Frauds as set out in the *Restatement*, *see* RESTATEMENT (SECOND) OF CONTRACTS § 110(1) (1981); *see also* 2 FARNSWORTH, *supra* note 1, § 6.2 at 87, but is the same type of statute, and, in fact is one of the common provisions that "many states have added . . . covering other types of agreements." *Id.* § 6.2 at 89 ("Another [such provision] covers contracts to pay brokers for arranging the sale of real estate . . . .").

255. Muir v. Kane, 104 P. at 153-54.

256. *See* RESTATEMENT (SECOND) OF CONTRACTS § 133 ("[T]he Statute may be satisfied by a signed writing not made as a memorandum of a contract.") and § 136 ("A memorandum sufficient to satisfy the Statute may be made or signed at any time before or after the formation of the contract.") (1981).

257. RESTATEMENT (SECOND) OF CONTRACTS § 131 cmt. d (1981) ("[U]nder the traditional statutory language any writing, formal or informal, may be sufficient . . . . Neither delivery nor communication is essential. . . . Writing for this purpose includes any intentional reduction to tangible form."); *see also*, 2 FARNSWORTH, *supra* note 1, § 6.7, at 130-32.

258. 2 FARNSWORTH, *supra* note 1, § 6.7, at 132 ("The memorandum may be made either before or after the formation of the contract.").

259. Muir v. Kane, 104 P. at 154 ("Manifestly, if the writing sued upon was intended as an agreement authorizing the respondent to sell real estate of the appellants, it is faulty in the particulars mentioned, and so far deficient as not to warrant a recovery even if a sale had been made thereunder.").

260. The court explains the deficiency in the writing as follows:

> It is clear that this writing was not intended as an agreement authorizing the respondent to sell the real property mentioned. In fact, it was executed after that service had been performed, and is an agreement in writing to pay a fixed sum for a past service, not a service to be performed in the future.

Id. The explanation seems to suggest that the court is considering factors that generally will not render the writing insufficient. *See, e.g.*, RESTATEMENT OF RESTITUTION § 117(1)(c) (1937); Boothe v. Fitzpatrick, 36 Vt. 681, 681 (1864).

261. RESTATEMENT (SECOND) OF CONTRACTS § 131 cmt. c (1981).

262. Muir v. Kane, 104 P. at 154 (stating that the "statute was intended to prevent frauds and perjuries, and to accomplish that purpose, it is required that the evidence of the contract be in writing . . . .").

Although the primary purpose of the statute of frauds may be evidentiary,[263] it in fact serves other functions for some particular provisions,[264] such as the cautionary function[265] and the channeling function.[266] To the extent that the provision could be seen as serving a cautionary function—a function not specifically mentioned by the court in *Muir*, but arguably involved in cases such as this[267]—then using a later writing to satisfy the statute would abrogate its effectiveness in that regard, and may not be justified.[268] However, using a subsequent promise for enforcement would be subject to the same objection. If there are policy reasons to deny effect to the later writing, the same reasons would militate against giving effect to a later promise.[269] Likewise, if the statute itself prescribes additional requirements for the memorandum, something that is not readily apparent from a reading of *Muir*, then those requirements should control.[270] Again, allowing a later promise to be used instead of the required writing would seem to allow circumvention of the statute at least as much as allowing a later writing would.

Another option that could be considered—the obvious option given the premise of this Article—is restitution for the benefit conferred. Again, the general approach in Statute of Frauds cases would indicate that this is a good option. The *Restatement (Second) of Contracts* deals with this question in a provision that begins with the very helpful (to the plaintiff) language providing that a "party who would otherwise have a claim in restitution under a contract is not barred from restitution for the reason that the contract is unenforceable by him because of the Statute of Frauds . . . ."[271] However, the section ends with less supportive language for the agent in the case: "unless the Statute provides otherwise or its purpose would be frustrated by allowing restitution."[272] Whether there is a specific statutory prohibition is not clear in *Muir*, but the court in fact seems to find no purpose frustrated by payment of the promised amount,[273] which would suggest

263. 2 FARNSWORTH, *supra* note 1, § 6.1, at 85 ("[The statute's] original purpose was evidentiary, providing some proof that the alleged agreement was actually made, and all its provisions perform this function to some degree.").

264. *Id.* ("A few provisions perform other functions as well.").

265. For example, "the suretyship provision performs and important cautionary function, by bringing home to the promisor the significance of the promise and preventing ill-considered and impulsive promises." *Id.*

266. *Id.* ("The land contract provisions performs a significant channeling function, by furnishing a simple test of enforceability to mark off unenforceable agreements from enforceable ones.").

267. Professor Farnsworth cites *Muir* in a footnote criticizing the use of post-acceptance documents to satisfy the statute when the statute has a cautionary function. *Id.* § 6.7, at 133 n.17.

268. *See id.*

269. "If a subsequent promise to perform the unenforceable 'moral' obligation is regarded as enforceable in its own right, the statute may be circumvented. This has been done in the case of a subsequent promissory note, not itself a sufficient memorandum, given to a broker with an unenforceable claim for services." *Id.* (citing, *inter alia*, Muir v. Kane, 104 P. 153 (Wash. 1909)).

270. The *Restatement*'s description of the requisites of the writing is prefaced by the caveat, "Unless additional requirements are prescribed by the particular statute . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 131 (1981).

271. *Id.* § 375.

272. *Id.*

273. *See* Muir v. Kane, 104 P. at 154 ("There is no moral delinquency that attaches to an oral contract to sell real property as a broker.").

that there would likewise be no objection to restitution. However, it has been suggested that recovery in restitution in such situations should not be allowed, as restitution "based on the reasonable value of the broker's services . . . would differ little, if at all, from the amount provided in the unenforceable contract. [Thus, brokers should be] denied . . . the right to restitution lest the provision be circumvented."[274] Again, if this is the concern, it is unclear why recovery based on moral obligation is any less a circumvention of the statute. It seems that the better result would be to decide what the statutory purpose is, what the effect of enforcement would be on that purpose, and allow or deny based on that determination, not based on some vague distinction between an obligation based on "moral imperative" as opposed to unjust enrichment.

Illustration 10 likewise may or may not be supported by the suggested analysis, but the court's reliance on a moral obligation concept in the case on which the illustration is based[275] seems to have prevented it from addressing important considerations in whether to enforce the promise. The illustration is as follows:

> A digs a well on B's land in performance of a bargain with B's tenant C. C is unable to pay as agreed, and B promises to pay A the reasonable value of the well. The promise is binding.[276]

Again, the illustration provides support for the idea that the restitutionary analysis will produce the correct result. The situation is similar to mistaken improver cases. Traditionally, in such cases (where the improver of real estate makes improvements thinking he, or someone with whom he has contracted, has title to the land), the improver was not entitled to recovery for the value of the improvements,[277] although the rule was relaxed by some courts allowing payment in equity for those trespassers against whom the owner was seeking equitable relief,[278] or an offset by the improver against the damages owed for the trespass.[279] Some courts, however, now allow a claim for affirmative relief for the good faith trespasser who has added valuable improvements to the land.[280] To the extent that the improvement was made under a good faith mistake (to obviate the defense of officiousness),[281] and added value to the land that the owner could realize and enjoy for his particular purposes,[282] it would seem to be in keeping with restitutionary

274. 2 FARNSWORTH, *supra* note 1, § 6.11, at 176.

275. *See* Edson v. Poppe, 124 N.W. 441 (S.D. 1910).

276. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. f, illus. 10 (1981).

277. 1 DOBBS, *supra* note 116, § 5.8(3), at 794.

278. *Id.* at 795; RESTATEMENT OF RESTITUTION § 42(1) (1937).

279. 1 DOBBS, *supra* note 116, § 5.8(3), at 795-96; RESTATEMENT OF RESTITUTION § 42(1) (1937).

280. 1 DOBBS, *supra* note 116, § 5.8(3), at 796. *See generally id.* at 796-800.

281. As noted by Professor Dobbs, in considering such cases, one must continue to be mindful of the intermeddler rules, "under which one is not permitted to foist a benefit upon another and then claim restitution for its value. These rules reflect a commitment to the autonomy of individuals, who must be free to choose for themselves whether they wish to have a benefit." *Id.* at 800.

282. Professor Dobbs, in discussing a flexible approach by the state of California, notes with apparent approval the statute's requirement that "the court . . . take into account the landowner's own plans for development of the land, presumably with the idea that the landowner should not be liable for improvements that will have no value for his intended purposes." *Id.* at 797. He then suggests that such an approach, "which requires a balancing of a number of issues, chief of which, however, is the landowner's right to decide how to use the land and whether the benefit is acceptable," is the "most just solution" to the problem. *Id.* at 800.

philosophy to allow recovery. As this situation is analogous, one could argue for restitution under these facts with the same limitations. In fact, if the improver made the improvements under the mistaken belief that the lessee was in fact the owner, the above analysis could perfectly explain the recovery in restitution, with the later promise supplying not only proof that the improvement was acceptable to the owner for his purposes, but also an agreement as to the value of the improvement.

However, the illustration again is thin on facts, as is *Edson v. Poppe*,[283] the case on which it is based. Yet, in making a decision as to recovery, the facts can be very important, such as the just mentioned importance of knowing the improver's belief as to the ownership of the property. Additionally, if the improver knew the lessee was not the owner, but thought he had the authority to have the work authorized on the owner's behalf, then the decision would turn on questions such as agency, apparent authority, and ratification, making recovery under a contract with consideration a possibility.

On the other hand, if the improver knows the lessee is a lessee, and is not acting on the owner's behalf (albeit with the owner's blessing), the restitution analysis is different. In such a situation, restitution is likely to be denied, and for good reason. One must keep in mind the reason for the restitutionary recovery—unjust enrichment. While it might be unjust for a landowner to keep a valuable improvement made at the expense of even a mistaken improver,[284] it is not necessarily unjust for him to keep an improvement made by his lessee.

For example, in *Siskron v. Temel-Peck Enterprises, Inc.*[285] the lessee contracted with a contractor to make certain improvements to his property that the lessee was required to make under the terms of his lease.[286] When the lessee did not pay, and the contractor sued the lessor for restitution, the court denied recovery.[287] The lessor, "having had no suitable opportunity to accept or decline the benefits, could not be held liable in restitution for the benefits conferred."[288]

Although the result seems right, the justification seems lacking. The benefits conferred were apparently exactly those required by the contract,[289] so it should be no objection to say that they were somehow forced upon the lessor. The real reason to deny restitution in such a situation is that, while the lessor did receive a benefit, it is not unjust under these circumstances for him to retain it.[290] In nego-

283. 124 N.W. 441 (S.D. 1910).

284. 1 DOBBS, *supra* note 116, § 4.9(5), at 703-04.

285. 216 S.E.2d 441 (N.C. Ct. App. 1975).

286. *Id.* at 442-43.

287. *Id.* at 445.

288. *Id.*

289. *See id.* at 443.

290. Compare with *Kossian v. American Nat'l Ins. Co.*, 62 Cal. Rptr. 225 (Cal. Ct. App., 5th Dist. 1967), in which plaintiff sought restitution from defendant, who became the owner of certain real property after foreclosure of the deed of trust, for work done on the property (clean-up after fire destroyed part of the improvements) pursuant to a contract with the then owner in possession of the property. *Id.* at 226. The plaintiff was successful in his claim, but only to the extent of the double recovery received by defendant due to gaining the benefit of the work, and also payment on certain fire insurance policies protecting defendant's interest. *Id.* at 228. As the court said in that case: "Had the circumstances been simply that defendant, by foreclosure, took the property improved by plaintiff's debris removal, there would be a benefit conferred upon defendant by plaintiff, but no unjust enrichment." *Id.* at 226.

tiating the lease with the lessee, part of the consideration received by the lessor is the lessee's promise to maintain the premises, for which the lessor presumably gave valuable consideration in return. Thus, the lessor had already "paid for" the improvements, the contractor entered into the agreement expecting no payment from the lessor, and there is nothing unjust in the retention of the benefit by the lessor. The injustice of nonpayment is caused solely by the lessee, and that is where the contractor's remedy lies.

Nothing in *Edson* suggests whether the improvement in that case was one required to be made under the terms of the contract. If it had been required, the restitution result should be the same in that case. Further, under the same facts, it would seem that recovery should also be denied under section 86, because, since the promisor is not "unjustly enriched,"[291] recovery would no longer be justified. If, however, as is likely the case, this was not a requirement under the contract, we are left with a case in which an improver made improvement to the property, with the expectation of payment (albeit from another party) and has already sustained a loss in expenditure of time, labor, and materials. This improver seeks recovery from an owner who has, by his own admission, gained a benefit that is acceptable to him for his purposes, and for which he has paid nothing. In such a situation, a good argument for restitution can be made, with the amount the owner agreed to pay supplying the amount of the claim. Further, to the extent that the availability of restitution under the circumstances is questionable, the promise could be seen as one in settlement of both the liability[292] and the amount.[293] Again, recovery is then based on the actual circumstances of the case and the promise, and not on some vague notion of when there is a moral imperative behind the promise.

V. VALUATION

A. Valuation in Nonrescue Situations

As previously noted, one of the problems with a restitutionary analysis is the potential difficulty encountered in valuation. Yet, when the claim is based on a contract of settlement of the underlying tort or restitution claim, valuation is not a problem. The contract amount becomes the value of the claim. Assuming the contract is enforceable, the need to consider what is "necessary to prevent injustice" or whether the "value is disproportionate to the benefit" is obviated.[294] When the promise is *not* the basis of enforcement, then traditional tort damage or restitution principles will control. Any discussion of tort damages is clearly beyond the scope of this article, but there are principles to be applied in that body of law that will aid in determining damages. Likewise, for more traditional restitutionary

291. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981).

292. *See id.* § 74 cmt. b ("The policy favoring compromise of disputed claims is clearest, perhaps, where a claim is surrendered at a time when it is uncertain whether it is valid or not.").

293. *See id.* cmt. c ("An undisputed obligation may be unliquidated, that is uncertain or disputed in amount. The settlement of such a claim is governed by the same principles as settlement of a claim the existence of which is doubtful or disputed.").

294. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) (indicating the quoted limitations on the claim). Of course, disparities in value may still have some bearing on the initial question whether the offer was in fact an offer of settlement at all, or a mere expression of donative intent motivated by gratitude. *See supra* text accompanying notes 170-72.

claims, such as the value of medical services,[295] construction projects,[296] care of animals,[297] and the like, there is ample authority to consult on these matters. They are generally mentioned here only for comparative purposes.

B. Valuation in Rescue Situations

1. Evaluating the Valuation Options

It is in the volunteer cases that, in spite of all the compelling arguments in favor of restitution, one is tempted to abandon support for the remedy when confronted with the question of how to evaluate the benefit conferred. Restitution in general is a complicated field, providing few easy answers,[298] and is especially difficult to grapple with in rescue situations. In fact, as Professor Eisenberg suggests, claims presumably are often considered to indicate moral rather than legal obligations partly "because of the severe difficulty in many such cases of measuring the value of the benefit . . . ."[299]

Ross Albert, in his *California Law Review* Comment, suggests basing recovery on out-of-pocket expenses, in which he includes loss or injury to the rescuer,[300] for nonprofessional rescuers,[301] while continuing to pay professional rescuers based on the usual cost of services.[302] The suggestion certainly has the advantage of being fairly concrete and therefore more amenable to proof. In fact, another approach that he rejects—allowing the recovery of expenses, but not losses, involved in the rescue,[303] is also quite provable, but in many cases would be woefully inadequate.[304]

Professor Eisenberg, on the other hand, suggests measuring recovery as the lesser of either the promised amount or an amount representing "fair" compensation considering the "underlying obligation, the value of the benefit, and the promisee's cost."[305] Under this approach, it is only the promised amount that is relatively easily susceptible of proof. In fact, applying the Eisenburg test to the

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295. *See* WOODWARD, *supra* note 110, § 110, at 314-15.

296. *See* RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981).

297. *See* RESTATEMENT OF RESTITUTION § 117 cmt. b, illus. 3 (1937).

298. As Professor Dobbs so aptly put it, "[m]ost generalizations about restitution are trustworthy only so long as they are not very meaningful, and meaningful only so long as they are not very trustworthy." 1 DOBBS, *supra* note 116, § 4.1(1), at 551.

299. Eisenberg, *supra* note 13, at 663. *See also* Albert, *supra* note 102, at 122; Landes & Posner, *supra* note 57, at 110.

300. Albert, *supra* note 102, at 123. The Comment discusses three alternative ways of dealing with the difficulty of measurement of the benefit: (1) Holding that "virtue is its own reward" and denying recovery, (2) allowing recovery for the "expense" of the rescue, but not for the losses occasioned by that rescue, and (3) using "a tort-like measure of the rescuer's injuries to assess the rescuee's enrichment." *Id.* at 122-23. Albert endorses the third approach, with some adjustments, *see infra* text accompanying notes 311-13, thereby indicating that his out-of-pocket measure is more akin to a tort out-of-pocket measure than an accounting of expenses. *Id.* at 123.

301. *Id.* at 124.

302. *Id.* at 87.

303. *Id.* at 123 (citing R. GOFF & G. JONES, THE LAW OF RESTITUTION 263, 272-73 (2d ed. 1978)).

304. "Goff and Jones's theory would give only trivial compensation for the most needy rescuers." *Id.*

305. Eisenberg, *supra* note 13, at 664.

Restatement illustrations discussed earlier,[306] the woman who provided the services would presumably be limited to the reasonable value of her services whether she had been promised $25,000 or the entire $3,000,000 estate.

The *Restatement (Second) of Contracts* uses a fourth approach—allowing recovery of the promise "to the extent necessary to prevent injustice."[307] This rule again sets up an alternative scheme: one alternative being the more easily provable promised amount, and the other alternative being the more nebulous "just" amount. The difference between this and Eisenberg's approach seems to be in both the description of the alternative to the promised amount and the circumstances under which it is granted. As Eisenberg points out, a complete reading of the *Restatement* section,[308] along with the comments and illustrations, indicates that, unlike his "lesser of" approach, the *Restatement* approach would enforce promises for an amount *greater than* the amount of the benefit as long as the result is "just."[309] This is borne out by the illustration in which the woman recovers on the $25,000 promise for $6,000 worth of services.[310]

Of the four approaches discussed, only the first two ostensibly avoid the more difficult aspects of valuing the benefit conferred. However, the "expenses, not losses" approach does so at the risk of under-compensation while the out-of-pocket expense rule does so at the risk of over-compensation. The over-compensation may result since out-of-pocket expenses may or may not actually benefit the recipient of the services. Thus, the author of this approach, aware of the possible inequities, suggests tempering the award to the extent "the harm the rescuer suffered . . . was totally disproportionate to the potential harm threatening the rescuee"[311] and to the extent the award would "impose an undue hardship on the rescuee's resources,"[312] and barring recovery if "the rescuer's intervention was not justified or was unreasonable, or if the rescuer was negligent."[313] While these adjustments make for a fairer result, they undercut what had appeared to be a high degree of certainty. Further, they do so without offering any clear doctrinal basis for the recovery measure.

Under both the Eisenberg and the *Restatement* approach, which rely heavily on concepts such as the "value of the benefit"[314] and the prevention of "injustice,"[315] the difficult valuation questions often still remain for the nonprofessional rescuer. They nonetheless remain for good reason—the desire to produce a just result.[316] It is not suggested here that that goal is not a worthy one, nor that ease of

306. *See supra* text accompanying notes 173-75.

307. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

308. Subsection (2) states that "a promise is not binding under Subsection (1) . . . to the extent that its value is disproportionate to the benefit." *Id.* § 86(2)(b).

309. Eisenberg, *supra* note 13, at 664 n.73 (suggesting that the "'disproportionate to the benefit'" language, along with Comment i and Illustration 12, would allow a recovery *greater than* the benefit as long as it was not *disproportionate to* the benefit).

310. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. i, illus. 12 (1981).

311. Albert, *supra* note 102, at 124.

312. *Id.* at 123.

313. *Id.*

314. Eisenberg, *supra* note 13, at 664.

315. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

316. *Id.* § 86 cmt. i ("In other cases a promise of disproportionate value may tend to show unfair pressure or other conduct by the promisee such that justice does not require any enforcement of the promise.").

calculation should take precedence. It is, rather, suggested that finding a suitable measure in an admittedly difficult situation is better accomplished by conceding that there will be some difficulties in valuation, but reaching a result by carefully considering the restitutionary basis of the recovery.

2. *The Restitution Alternative*

It is not enough to simply concede difficulty of measurement in restitution without proposing at least some guidance as to how that difficulty is to be addressed. Two methods of measuring restitution are recognized in contract law: the extent by which the recipient's assets have been increased,[317] and the cost to replicate the benefit in the open market.[318] Professor Dobbs, in describing the "main options for measurement of the benefit" includes two similar measures, along with a "use value" of the benefit received, and two measures not applicable here: gains realized on sale or transfer of the asset and profits earned by use of the asset received.[319] The increased asset measure, the cost to replicate measure, and the use value measure warrant examination. It is important in evaluating the options to consider that where benefits are thrust upon another without any prior agreement, a more conservative valuation method may be most appropriate.[320]

In many cases, the cost to replicate in the market will be a more generous measure than increased assets or even use value. For example, if one has his home improved by adding a swimming pool, new roof, updated bathroom, etc., the cost of the improvement will normally exceed the increased value of the home,[321] or any measurable use value of the home. However, in the rescue situation, the result could well be just the opposite. For example, in the professional rescue situation, the professional who saves a life might, under the use value approach, be paid for the prospective value of the life saved (for example, earning capacity for the remainder of that person's life) or, under the increased assets approach, for the value of a healthy, functioning body versus one that functions poorly or not at all.[322] Even the attempt to describe the value underscores the absurdity and futility of trying to measure it this way, as well as the potential for enormous recoveries

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317. 1 DOBBS, *supra* note 116, § 4.5(1), at 628-29. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 371(b) (1981).

318. 1 DOBBS, *supra* note 116, § 4.5(1), at 629. While there are other measures set out with these two, the other three deal with factors such as gains realized on sale, profits realized from use of the asset, rental values, etc., all of which seem to be a little too commercial for serious discussion here. *See* RESTATEMENT (SECOND) OF CONTRACTS § 371(a) (1981).

319. 1 DOBBS, *supra* note 116, § 4.1(4), at 566-67.

320. See *Beacon Homes, Inc. v. Holt*, 146 S.E.2d 434 (N.C. 1966), in which the court found restitution to the "mistaken improver" to be appropriate, but only for the amount by which the value of the property of the recipient had been increased. *Id.* at 439.

> It is as contrary to equity and good conscience for one to retain a house which he has received as the result of a bona fide and reasonable mistake of fact as it is for him to retain money so received. We, therefore, hold that where through a reasonable mistake of fact one builds a house upon the land of another, the landowner, electing to retain the house upon his property, *must pay* therefor *the amount by which the value of his property has been so increased.*

Id. (emphasis added).

321. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. a, illus. 1 (1981).

322. *See* 1 FARNSWORTH, *supra* note 1, § 2.20, at 157 ("[When a] physician saves the life of an unconscious patient . . . the net enrichment . . . [is] the value of that person's total life expectancy.").

under this measure.[323] In fact that is not how medical services are priced in such situations under restitution theory,[324] nor, for that matter, when contractually set.[325] A doctor's fee is measured more by the value of the service performed, in terms of what it would cost to replicate in the market,[326] than by the "value" of the life saved. Thus, even where there is no contract, the fee is the amount one would presumably agree to pay.[327]

The conclusion fits conceptually with the basis of the recovery. Recovery is based on the "contract" implied in law.[328] The duty to pay is based on a "mere fiction of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered"[329]—a fair compensation for the doctor's "time, service and skill."[330] Further, to say that the entire earning or enjoyment value of the rest of the defendant's life is conferred by the plaintiff is to ignore the defendant's own talents, efforts, outlook, and other contributions.[331] To the extent the benefit in future earnings or life enjoyment exceeds the reasonable fee, there is no injustice. The recipient, who in fact has himself contributed much to the value of his remaining life, then pays only a fair price for the benefit of the service performed. The difficulty in the nonprofessional rescue situation is largely due to the fact that there is no readily ascertainable amount for the value of the nonprofessional service. That fact, however, should neither prevent recovery, nor divert us from consideration of the true basis for the recovery.

3. *The Fundamental Difference Between Volunteers and Professionals*

At first blush, it appears that the cost to replicate the service in the market—the reasonable value of the service—would be most consistent with restitution theory in the volunteer situation, just as it is for professionals. The reasoning against using either an increased assets or use value measure are just as persuasive for a claim by a lay volunteer as for one by a professional. Yet the cost to replicate in the market is problematic. In trying to use it as a measure, we are left with the

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323. "[W]here emergency surgery is performed which saves the life of the recipient, it is conceivable that the increase in the value of his continued existence could be measured in astronomical sums." MURRAY, *supra* note 1, § 126, at 726.

324. *Id.* Professor Farnsworth, after noting that the net enrichment is the value of the life, further notes that that value "far exceeds the cost avoided (i.e., the cost of such medical services on the market)," concluding that the latter is the prevailing measure. 1 FARNSWORTH, *supra* note 1, § 2.20, at 156-57.

325. It is likely that any contract by which a medical professional sought payment based on the value of the life saved could be modified or avoided on grounds of unconscionability. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

326. *See* 1 FARNSWORTH, *supra* note 1, § 2.20, at 157.

327. *See* 1 DOBBS, *supra* note 116, § 4.9(5), at 700 ("[T]he doctor-plaintiff is acting in accord with the bargain we believe would have been struck.").

328. *See, e.g.*, Cotnam v. Wisdom, 104 S.W. 164, 165-66 (Ark. 1907).

329. *Id.* at 167.

330. *Id.*

331. The reasoning would be similar to that justifying courts' reluctance to require a defendant to disgorge certain profits "because at least some of the profits would almost always be attributable to the defendant's efforts or investment." 1 DOBBS, *supra* note 116, § 4.1(4), at 567.

uncomfortable situation of placing a value on something for which there is no market. Medical services are bought and sold daily, and on large scale, so setting a market price for the service is not too discomfiting.[332] There is no market for jumping off platforms with pine blocks in order to save a life. And even if there were, would we assume a successful rescue, and a catastrophic result for the rescuee, the result in retrospect, or would we assume a "bargain" based on probabilities without knowledge of actual outcomes? If the former, the idea of even a fictional bargain for it strains credulity, especially since it is quite likely that the rescuer had likely not fully contemplated the cost.[333] If the latter, there is a great danger of either over- or under-compensation.[334] The problems certainly underscore the reluctance to get into the matter at all. In fact, this examination emphasizes the fundamental difference between the recovery for professionals and volunteers—the fact that recovery for professionals is for a service that has a market value, based on the implied-in-law contract that the court makes for the parties for payment for that service,[335] but that for the volunteer the basis for recovery is not in the same sense based on an implied "agreement." Rather, for the volunteer, there is the pure claim for the prevention of unjust enrichment—the claim for recovery to prevent the defendant's unjust enrichment at the plaintiff's expense.

C. Back to the Basics—the Reason for the Recovery

Dobbs' major measures for recovery just discussed[336] are, after all, just that—the *major* measures. They are not the *only* measures. Restitutionary recovery is very much case and fact specific. The difficulties courts have had in dealing with the volunteer situation underscores its uniqueness, and explains why it does not easily fit into a recovery "pigeon-hole." However, a claim for restitution does not need to fit into a neat category to be valid.[337] There are many times valuation problems are overcome to the extent necessary to provide a needed remedy,[338] and difficulties of valuation should not prevent recovery for volunteers.[339] Thus, a

332. *See* Albert, *supra* note 102, at 100-01.

333. *Id.* at 97-98 ("In the usual case, a nonprofessional rescuer will have given no thought to possible compensation or even have estimated the extent of his expenses until after the services have been rendered.").

334. That is, over- or under-compensation relative to the actual value.

335. *See* Cotnam v. Wisdom, 104 S.W. at 165-66.

336. *See supra* text accompanying notes 319-20.

337. "[R]estitution is open-ended; it is not limited definitionally to [defined categories.]" 1 DOBBS, *supra* note 116, § 4.1(1), at 553.

338. Discussing the accuracy of damages measures, Professor Dobbs states:

> We know the market measure may fail to identify all losses, because it closes out the account between the parties at the date the defendant's contract or tort duty was breached and we know that subsequent events could give a very different picture. But almost the same is true with consequential damages, to which is added the uncertainty involved in overt judicial speculation about the course of future events. With consequential damages we lost the convenience of "closing the account" in order to prove losses that occur later; the plaintiff can claim damages into the future as far as hope and fear can travel. But an estimate for the entire future must be made by trial time, and events the day after the trial may prove the estimate wholly wrong. Substitution cost damages may also be inaccurate.

Id. § 3.3(8), at 317.

339. As Dobbs further states: "Accuracy in measurement is a desirable goal, but it should not lead us to forget the definitional and policy elements involved, nor the limits of the enterprise." *Id.*

court faced with a restitutionary recovery under these facts is faced with the basic question of what benefit has been conferred, and to what extent it is unjust.

In a nonprofessional rescue situation such as the one in *Webb*,[340] one potential measure, the value of the life that has been saved,[341] should again be rejected,[342] not because of the difficulty of measuring the value,[343] but because, as noted, it is not appropriate due to the fact that it ignores the defendant's own contributions to the value of his life. The entire benefit was not conferred by the plaintiff. This standard was rejected in a *California Law Review Comment*, as being "both problematic and excessive."[344] It is a difficult exercise for which there is no justification. The restitution concept does not provide compensation for *all* enrichment, but only for that which is "unjust." The key, then, is to identify what enrichment is unjust.

As suggested earlier, the law is not likely to be moved to compensate one who shouts "Look out!" with the full value of the life that is thereby saved, even if it could be proved without a doubt that the shouted warning absolutely saved the person's life. The enrichment is real, but other factors also contributed to the value of the remaining life, and, without cost to the "rescuer," the retention of the benefit is not unjust.[345] It is not at all unreasonable to presume that a reasonable person would render such a service voluntarily, rejecting any notion of compensation.

If this means that a cost to the rescuer is required for compensation, the reasoning seems to lead inexorably to the suggestion of out-of-pocket expenses (including expenses occasioned by physical injury caused by the rescue). Yet in reaching this hypothesis, we seem to be moving in circles. The out-of-pocket measure has already been rejected as potentially overcompensating the rescuer.[346] Such overcompensation is inconsistent with the concept of restitution, which, by definition, contemplates an "enrichment"—a benefit—and provides recovery for no more than the amount of the benefit.[347] Further, the recovery on the out-of-pocket basis looks more like a reliance or tort recovery than a restitutionary one, but it is being applied in a non-contractual, non-tort context.

Again, one must return to the underlying basis for the recovery. As noted by Fuller and Perdue, the restitution interest generally involves "a combination of

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340. Webb v. McGowin, 168 So. 196, 196-97 (Ala. Ct. App. 1935).

341. *See* Albert, *supra* note 102, at 120 ("The usual restitutionary measure of recovery is the value of the benefit conferred. In a rescue context, this benefit is the rescuee's continued life or health.").

342. *See* Laycock, *supra* note 33, at 1285 (noting that for rescue cases generally, "we might expect rescued persons to pay the cost of the rescue, but no one expects them to pay the value of their lives."). Professor Laycock does not appear to differentiate in this statement between professional and nonprofessional rescues.

343. *See supra* notes 298-99 and accompanying text.

344. Albert, *supra* note 102, at 120.

345. In this situation, there is no injustice only because the rescue was without cost to the rescued. This is not to say, as Professor Eisenberg seems to, that it cannot be said that any person whose life or property is rescued is unjustly enriched. Eisenberg, *supra* note 13, at 664 ("What is unjust about needing and receiving rescue?"). Of course there is nothing unjust in needing and receiving rescue—the injustice is in retaining the benefit that was conferred at great cost to the rescuer without providing compensation.

346. *See infra* text accompanying notes 310-12.

347. *See* Challenge Air Transp., Inc. v. Transportes Aereos Nacionales 520 So.2d 323, 324 (Fla. Dist. Ct. App. 1988) ("It is axiomatic that there must be a benefit conferred before unjust enrichment exists.").

unjust impoverishment with unjust gain," with such cases presenting the strongest "claim to judicial intervention . . . since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two."[348] In fact, the two-unit analysis, while not being appropriate in all cases,[349] is important to the determination of unjust enrichment in these cases.[350] For the benefit to count, there must be the corresponding unit of harm, and for the harm to count, there must be the corresponding unit of benefit. In other words, if the rescuer takes an action with rescue in mind that in fact does nothing for the would-be rescuee, either because it is simply ineffective, or because there was never any danger, the injury may be in some sense "unjust," but there is no enrichment. On the other hand, if a life is saved at no cost to the rescuer, there is enrichment, but it is not unjust. As noted by Professor Laycock, "[w]e can clear logical and doctrinal hurdles by saying that their enrichment is unjust only to the extent of plaintiff's cost . . . ."[351] The question is not just what ultimately is the benefit, but what is the *rescue worth.* As noted previously, shouting "Look out," while indisputably valuable, is not something one should have to pay for—it is the minimum one should do for one's fellow man. However, permanent crippling injuries are something else. What would a reasonable person pay another for sustaining such injuries to save the life of the rescued? What is it "worth," considering both the cost and the benefit? While these questions may be difficult to answer, they are not impossible. And for the cases where the parties have already placed a reasonable value on them, by way of "settling" the restitutionary claim, they can be enforced in a straightforward manner.

It helps to be mindful not only of the unjust enrichment concept, but also of the quasi-contractual nature of restitutionary remedies. One of the problems is in trying too much to use a "contract" model for a quasi-contractual recovery. There is no real contract, no real bargain, no valuation by the parties.[352] The restitution is for the benefit conferred, which assumes one must look at what happened, not what might have happened.[353] If I must pay in restitution for the services of a contractor, I pay for the value of the structure built, not what might have, or even should have, been built.[354] If I pay in restitution for the value of jumping off a

348. Fuller & Perdue, *supra* note 8, at 56 (citing ARISTOTLE, NICOMACHEAN ETHICS, 1132*a*-1132*b*). *See also*, RESTATEMENT OF RESTITUTION § 1 cmt. d (1937) ("Ordinarily the benefit to the one and the loss to the other are co-extensive . . . .").

349. "There are situations, however, in which a remedy is given under the rules applicable to this Subject, where the benefit received by the one is less than the amount of the loss which the other has suffered." RESTATEMENT OF RESTITUTION § 1 cmt. e (1937). *See also*, Laycock, *supra* note 33, at 1287-89.

350. As noted earlier, restitution rules can often change when the facts change. Certainly there are cases where there is no loss corresponding to the enrichment, such as the example of the thief who sells the watch he stole for more than it was worth. *See supra* text accompanying note 143. However, in that example, the enrichment of the thief is obviously unjust due to the fact that he is a thief. The enrichment of the rescued individual is unjust *only* in the sense that it came at a significant cost to another.

351. Laycock, *supra* note 33, at 1285.

352. "The most important thing about this implied in law or quasi contract is that it is not a contract in any sense." 1 DOBBS, *supra* note 116, § 4.2(3), at 580.

353. "Restitution is . . . available to a party only to the extent that he has conferred a benefit on the other party." RESTATEMENT (SECOND) OF CONTRACTS § 370 cmt. a (1981).

354. *See id.* § 371 cmt. b, illus. 1 (giving two possible restitution measures, neither of which are derived from either the contractor's costs or the contract price).

platform with a pine block, I should pay for the "value" based on the result, both to me and to my rescuer.

One might be inclined to protest at this point that basing recovery in any way on what happened to the rescuer sounds more like reliance than restitution, which has no place in a restitutionary recovery. However, taking the contractor example, it becomes apparent this is not so. Assume a contractor has improved my property, and seeks recovery in restitution for a breach of contract by me before the contract is completed. In such a situation, he may seek restitution based on the cost to replicate in the market.[355] Assume both myself and my contractor would have initially expected that the work for which I must now pay could be done for $5,000, but in fact it cost the contractor much more. If it cost him more because he is an inefficient contractor, then it still may be true that another contractor would do it for $5,000, and that is an appropriate restitutionary measure. But if it cost him more because it was in fact a bigger job than either of us realized it would be, presumably another contractor, realizing the magnitude of the job, would charge more. That greater amount is the cost to replicate in the market, and is generally recoverable under the circumstances described.[356] Likewise, restitution for Webb or another volunteer in his situation, should be judged based on the magnitude of his undertaking as viewed from the standpoint of what happened, not what the risks might have looked like prospectively.

Going back to the cost to replicate in the market, one would ask what a potential rescuee would pay for the particular action on the part of the rescuer. Assume the hypothetical value of a life is $10,000,000. The rescuer loses his life trying to keep the rescuee from breaking his arm. While the detriment is real, and presumably valued at $10,000,000, the benefit is not worth $10,000,000. Thus, the "value" of the benefit conferred would be measured by the value of being spared a broken arm, not by the result. Presumably, if one could bargain for this result, the rescued person would not have bargained for a rescue service for which the cost was so dear. Conversely, assume the rescuer breaks his arm to save the life of the rescued. Now it is in a sense the benefit—the life saved—that is worth $10,000,000. But it was not conferred by a performance worth $10,000,000. If one had to pay for a broken arm to save a life, presumably it would be at a lesser rate. Smoke detectors save lives, but few of us would have them if they cost $10,000,000! Life is, after all, fragile and there are many risks lurking out there. Each cannot be protected against for a cost equaling the value of the life saved.

Further, since restitution is the measure, for those cases in which the plaintiff is relying entirely on restitution for recovery, the protections that are available to defendants, such as protection against undue hardship, would be available to protect against an unjust result.[357] Of course, where the claim is a contractual one for

355. *Id.* § 371(a). If the cost to replicate is greater than the addition to wealth, "a party seeking restitution for part performance is commonly allowed the more generous measure . . . ." *Id.* § 371 cmt. b.

356. I have specifically assumed a nonbreaching contractor, and a breach before substantial performance has been completed, to allow for this result. The more generous measure discussed in the previous note does not apply when the party seeking restitution is in breach. *Id.*

357. *See* 1 DOBBS, *supra* note 116, § 4.1(2), at 563 ("Innocent defendants must be protected . . . where they would be placed under significant hardship if restitution is required of them."); *see also id.* § 4.9(1), at 680, n.7.

the settlement of whatever restitution or tort claim the plaintiff may have had, then the contract, for which the defendant has already freely bargained, would provide the amount of the recovery.[358]

It is true that the suggested restitutionary measure is not particularly generous to the volunteer. Nonetheless, there is good reason to not too liberally measure the obligations the law imposes where there has been no actual agreement, and no wrongdoing.[359] In many cases, there will be the contract to set the value, so that valuation by the court is unnecessary. And the grateful recipient of a volunteer's services is always free to bestow whatever remuneration he wishes upon his benefactor. A gift given will not be taken away—it is only the unfulfilled promises that will be subject to the restriction.

VI. CONCLUSION

The doctrine of consideration, while not the only enforcement mechanism for contracts, and not without problems, is well-entrenched in contract law, and does provide important guidance in deciding which promises are enforceable and which are not. Departures from the doctrine should be made only for good reason, and should be based on understandable and predictable guidelines. The recovery based on promises for benefits received (or moral obligation, or material benefits) is superfluous to the extent it mirrors the restitutionary recovery, and the availability of a contract recovery could detract from the development, understanding, and use of restitution doctrine. The recovery should be in restitution, making the law more predictable, and avoiding confusion of contract doctrine. If the recovery goes beyond restitution, confusion and inconsistency are inevitable, since the concept of "moral obligation" provides no real guidance beyond the restitutionary concepts.

It is suggested then, that moral obligation analysis be abandoned and that courts enforce recovery in restitution—or tort or contract. Recovery would not depend on whether there is an express promise but on the appropriateness of a remedy under existing doctrines in those substantive areas of law. Any promise made, if it is found to have any legal efficacy at all, should be seen either as evidence of the acceptance of the benefit, and approval of the value suggested, or as an offer to settle the underlying claim in restitution or other law. This approach is not only more consistent and doctrinally true to contract theory, but also recognizes the legitimacy of recovery in restitution, the possibility of recovery in tort or other contract doctrine, and potentially allows recovery for those who have a legitimate claim but might be barred from recovery under a contracts doctrine.

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358. "Where the parties did in fact contract with reference to the same general subject matter, the contract itself . . . should control." *Id.* § 4.9(4), at 694.

359 . In some cases, the lack of agreement, mistake, or tort, may in fact be reason to deny restitution at all when necessary "to protect the defendant's right to choose for himself what benefits he wants." *Id.* § 4.1(1), at 553-54.