Reasons? For *Restitution*?

Book review of Charlie Webb, *Reason and Restitution* (OUP 2015)

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The Book

The law of unjust enrichment is a subject of intense doctrinal debate. While it has received increasing theoretical attention, deep disagreement remains about its conceptual and normative roots. Charlie Webb's *Reason and Restitution*,[1] the product of many years' work, provides a feature-length theoretical discussion of mistaken payments, generally taken to be a central case of unjust enrichment. We should take it seriously. I found the book's arguments engaging and thought-provoking, even when I disagreed with its conclusions; I would recommend it to anyone interested in private law theory or the law of unjust enrichment.

Unlike so many of today's monographs, it is difficult to pin the book down to one big idea. Each chapter makes interesting claims about theory or law. The central themes of the book are its methodology and its account of the interests at stake in mistaken payments cases. Webb's principal aim is to understand what reasons justify restitution of mistaken payments; only *then*, he claims, can we ask what other claims belong in this group, or whether those claims belong under the banner of 'unjust enrichment.' I will first examine some general issues in private law theory's methodology, explaining why Webb sees things as he does—as will become clear, that is the 'reasons' half of my title. In the second half of the paper, I turn to Webb's substantive claims about mistaken payments; that is the 'restitution' half of my title.

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*All Souls College, Oxford. I am grateful to Robert Stevens for discussions on some of the ideas developed in this review and also to Charlie Webb for his extremely helpful comments on a draft.

[1] Charlie Webb, *Reason and Restitution* (Oxford University Press 2016).

Method

The methodology of private law theory has become a topic of quite some debate. Webb's own approach is, as I will explain, unorthodox. Perhaps for that reason, he provides a substantial defence of his approach; he may have feared being dismissed as eccentric if he charged ahead with the substantive claims without the methodological throat-clearing.[2]

I will discuss three distinct issues. The first is the nature of legal classification. This discussion is important to explain why Webb approaches things as he does. The second is the value of a classificatory category for legal arguments: if we can say that some norm is part of (for example) the law of unjust enrichment, what (if anything) follows? I join Webb in rejecting classificatory categories as tools of legal reform, but also suggest that his own account may face similar difficulties. Finally, I consider a meta-theoretical issue: when we do this kind of legal philosophy, what enterprise are we engaged in? Here I am more openly combative with Webb. Mine is, however, a sectarian view; many will reject my premises. I aim therefore to bring out some more general features of Webb's project, and legal philosophy in this domain.

Classification

Three Types

After *Lipkin Gorman v Karpnale*, it has become doctrinal orthodoxy to refer to the 'law of unjust enrichment.'[3] This presupposes that the phrase 'unjust enrichment' labels, as Webb puts it, 'a distinct ground of legal claims and liabilities'.[4] Many would begin their book by identifying some set of claims which, pre-theoretically, is part of the law of unjust enrichment, and would then ask what, if anything, unites those claims. Webb starts instead where Peter Birks once did, with mistaken payments. To see why, I need to say a little more about methods of classification and where Webb's own model fits in. There are a number of mutually consistent ways in which legal norms can be grouped together. Each will highlight different features of the law. The approach adopted will affect which norms belong in the group. For example, we could group together the law according to some factual context: 'computer law', 'employment law', etc.

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[2] In an ideal world, this discussion would be a silent prelude to the main theses. Not only is the treatment of methodology curtailed by the substantive ambitions of the book, the substantive arguments are themselves curtailed by the methodological discussion. Ours is, alas, not an ideal world.

[3] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[4] Webb, *Reason and Restitution* (n 1) 3.

This will be a successful classification so long as it assists in the presentation of the law. I will distinguish three types of classification; these, as I will go on to explain, have all been deployed to understand 'unjust enrichment.' (Webb's preferred model is the third.)

The first way in which a set of claims can be distinguished is according to their normative shape. I use the term 'normative shape' as an umbrella to group together two related, but distinct, methods. One groups legal norms according to the type of act they require, as where scholars group gain-based responses or injunctions.[5] Another groups norms according to the form of the legal relation instantiated, as where scholars distinguish duty-imposing from liability-imposing norms.[6] For either of these approaches, a token claim is correctly placed in a category just in case it fits the category's normative shape. The law on disgorgement for breach of contract, for example, belongs in books on gain-based responses.

The second way of grouping norms is according to their formal structure. For instance, Robert Stevens writes that

> A tort is a species of wrong. A wrong is a breach of a duty owed to someone else ... The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.[7]

This proposes a formal unity for tort; it groups together the duties and liabilities arising from breaches of duty.

The norms in this second set can be unified even if they are justified by quite different reasons or protect different interests. On Stevens' model of torts, for example, the norms are unified regardless of the reasons for the primary rights: contractual rights arise due to voluntary undertakings; rights to physical integrity arise regardless of voluntary undertakings.[8] This suggests a third way to distinguish claims, according to the reasons which justify the claims. One set is distinct from another, on this approach, if its members (the legal claims) are justified by the same reason or sufficiently similar reasons. Many people, for example, believe that the law of contract concerns rights which arise because

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5 For exampleJames Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart 2002); Steven Gee QC, *Gee on Commercial Injunctions* (6th edn, Sweet & Maxwell Ltd 2016). I hesitate to call this the *remedial response*: such a category could group primary obligations, too.

6 For example, Stephen Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 127; Stephen Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law and Jurisprudence 157.

7 Robert Stevens, *Torts and Rights* (OUP 2007) 2.

8 Stevens, *Torts and Rights* (n 7) 11.

of voluntary undertakings. Webb is interested in this third sense of unity: as I have said, his aim is to understand what reasons justify restitution of mistaken payments. Why just them? To answer that, we need to see the problems scholars have encountered classifying the law of unjust enrichment.

Which Type is 'Unjust Enrichment'?

The most influential proponent of a classification-led analysis in law was Peter Birks, a key figure in the intellectual movement to recognise unjust enrichment as an independent category of law. His influential idea was that '[t]he rights which people bear ... derive from ... wrongs, consent, unjust enrichment, and others.'[9] He labelled these categories 'events,' which he sometimes appeared to regard as empirical facts; he enjoined us to understand 'from what physical events rights arise.'[10] This is not a promising start.[11] If a wrong is a breach of a right, it is not empirical; rights do not exist in the natural world.

Birks' understanding of unjust enrichment was not, however, conceptually flawed. Initially, he pursued the first classificatory strategy: 'Restitution and unjust enrichment,' he wrote, 'identify exactly the same area of law. The one term simply quadrates with the other.'[12] This defines unjust enrichment by reference to the type of act required: all norms which justify a restitutionary response are norms of unjust enrichment.[13] There is no conceptual objection to organising the law in that way. However, Birks became dissatisfied because he came to reject this classificatory approach. No longer was he satisfied to group claims which share the same response; he increasingly sought a rational unity.[14]

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9 Peter Birks, 'Equity in the Modern Common Law: An Exercise in Taxonomy' (1996) 26 UWA Law Rev 1, 8.

10 Peter Birks, 'Unjust Enrichment and Wrongful Enrichment' 79 Texas Law Review 1767, 1778. See, too, Birks, 'Equity in the Modern Common Law: An Exercise in Taxonomy' (n 9) 10; Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (Clarendon 1997) 1. For a possible influence of Birks' approach, see Joseph Raz's aim to 'identify law on the basis of non-evaluative characteristics only.' Joseph Raz, *Practical Reason and Norms* (Hutchinson 1975) 165.

11 Webb, *Reason and Restitution* (n 1) 35. For a thorough discussion, see Stevens, *Torts and Rights* (n 7) 285–88; Charlie Webb, 'What is Unjust Enrichment?' (2009) 29(2) Oxford Journal of Legal Studies 215.

12 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 17.

13 A. Kull, the Reporter for the *Restatement Third: Restitution and Unjust Enrichment*, still endorses this thesis: American Law Institute, *Restatement Third: Restitution and Unjust Enrichment* (American Law Institute Publishers 2011).

14 This is clearest in his work from Peter Birks, 'Misnomer' in William Cornish and others (eds), *Restitution: Past, Present and Future* (Hart 1998) to Peter Birks, *Unjust Enrichment*

He wrote, for example, that '[w]here there is an unjust enrichment, the reason why restitution is obligatory is never a contract and never a wrong.'[15] He went on:

> The task of the word 'unjust' [in 'unjust enrichment'] ... is to understand the reasons, however few or many they may be, which are neither contracts nor wrongs but are nevertheless sufficient in law to generate a right to restitution of an enrichment obtained at the claimant's expense.[16]

The quadration analysis was manifestly insufficient to do that: restitutionary responses might be justified by quite distinct reasons. So Birks argued that the law is unified by collecting those claims for restitution where an enrichment is transferred 'without basis.'[17] Assuming we can grasp the concept of a basis, this seems a possible method for presenting the law. Is it, however, a reasons-based classification? On the taxonomy I proposed above, it seems to be more group two than group three; if however, the concept (absence of basis) is also a reason for the restitutionary response, there may be no need to choose.[18] Regardless of the best way to understand the model, Webb is right to point out that, if Birks' ambition was a reasons-based classification, he owed us an account of the reasons that underpin its claims. Yet in the passage I have quoted, unjust enrichment is defined, as it were, by subtraction. The quadration thesis collected every instance of restitutionary liability. He now collects every instance of restitution *apart from* those which arise by contract or wrongdoing. Again, there is no intrinsic objection to classifying cases in this way. But there is no reason to assume that the remaining category will have any rational unity.[19]

Webb is attuned to these difficulties; his criticisms of Birks are a powerful part of the book. He aims to complete Birks' project, to understand the justifying reasons of various legal claims. He begins with mistaken payments rather than the broader category of unjust enrichment in part because of a sense that, if there is rational unity anywhere, it can be found there: mistaken

(2nd, OUP 2005). For discussion, see Webb, *Reason and Restitution* (n 1) 46–8.

15 Birks, *Unjust Enrichment* (n 14) 8.

16 Birks, *Unjust Enrichment* (n 14) 16.

17 Birks, *Unjust Enrichment* (n 14); Robert Stevens, 'Is There a Law of Unjust Enrichment?' In S Degeling and J Edelman (eds), *Unjust Enrichment and Commercial Law* (Thomson 2008).

18 This is suggested by Stevens, 'Is There a Law of Unjust Enrichment?' (n 17) 15: unjust enrichment's 'claim to separate existence can only be made good by its conceptual unity as a single reason why a defendant should be obligated to make restitution to a claimant of a gain made.'

19 Stevens, 'Is There a Law of Unjust Enrichment?' (n 17) 15; Webb, *Reason and Restitution* (n 1) 38–9.

payments are widely taken to be a core case of unjust enrichment; therefore, they offer reasonable prospects for those who seek rational unity. Those who seek a broader category of unjust enrichment might be able to—as Birks once thought—abstract out from this 'core case.'[20] But, Webb would say, we need to grasp the reasons justifying claims following mistaken payments before we can abstract out. All this is very powerful.

What is Rational Unity?

We now have some idea what Webb's project is about. I have, however, talked rather carelessly about 'rational unity'. We should also ask *how* unified any category should be to count as unified. A category's unity might be, as Peter Birks said, that of 'a loose confederacy, like the law of tort, or a closely knit family, like the law of contract.'[21] Suppose that we have two rules of law, R1 and R2, and we want to know whether these rules should be classified as part of a category, C. To make the example concrete, suppose that the question is whether battery (R1) and defamation (R2) are best understood as part of the law of tort (C). One possibility, the close knit family, is that these rules should be classified together only if the same reason justifies both R1 and R2.[22] On this view of the unity of legal categories, battery and defamation do not belong together. The reason why punching me on the nose is wrong is distinct from the reason why defaming me is wrong; different interests are protected by these torts, and these interests can be assimilated only by a sectarian reductionism. Another possibility, the confederacy, is that rules should be classified together if the reasons justifying R1 and R2 are sufficiently similar. On this analysis, battery and defamation can be classified together: the different reasons are in many senses similar, both concerning (for example) innate human interests. Again, neither view of rational unity has *a priori* priority.

The confederacy faces its own challenges. By virtue of what is one reason similar to another reason? Assuming two reasons are similar, *how* similar should they be to warrant grouping them together? How unified, in other words, is unified *enough*? These questions are not entirely unrelated to Webb's project, though he does not examine them.[23] His question is how far the mistaken

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20 Birks, *Unjust Enrichment* (n 14) Chapter 1.

21 Birks, *Unjust Enrichment* (n 14) 16.

22 e.g. Stevens, 'Is There a Law of Unjust Enrichment?' (n 17) 15.

23 There are hints: he says that '[u]njust enrichment's distinctiveness as a ground of private law liability lies in the distinctive reasons it provides.' (Webb, *Reason and Restitution* (n 1) 243.) Reason*s*, not reason. He also considers whether unjust enrichment could have 'a place alongside contract and tort as a basic organizing category of the law' (*ibid*. 34). If

payment case extends. Ultimately, as I will explain, he claims that mistaken payment cases are sufficiently similar to theft to warrant equal treatment but sufficiently distinct from the mistaken provision of services to be separated (101, 114–117). Yet to make a claim like this, surely you need to know what counts as a legitimate extension? That, in turn, depends upon an answer to these questions, of unity. I will return to the particular example, of services, below.

Arguments for Reform

I have distinguished three methods of classifying legal norms: according to their shape, their structure and their justifying reasons. These methods are not conflicting; they are simply different. Classificatory schemes are sometimes proposed as mere ordering devices, 'looking down to the cases.'[24] Yet, as Weinrib points out,

> The point of postulating the category of unjust enrichment to begin with was to bring various instances of restitutionary liability ... under a single unitary principle. The interpretation of 'unjust' as simply referring back to those instances would effectively dissolve that principle.[25]

Scholars have not treated their categories as inert; they have used them to criticise and propose reform of the law. These claims often proceed, as it were, via the classification or category. I will explain and criticise this form of argument, before suggesting that Webb's approach is superior.

It is sometimes claimed, for example, that R1 and R2 should be understood as part of C, as where Peter Birks argued that mistaken payments and failure of consideration claims are a part of the category 'unjust enrichment'. It is a function of C, the reformer insists, that some further feature, D, should be available for all members of the set. For example, they might claim that change of position should be available as a defence to any claim. The law is such that D is available for R1 but not for R2. So, the reformer argues, the

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he is happy with tort as a category, he must be happy with the confederates. For what it is worth, the leading textbook (Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th, Sweet & Maxwell 2011) paras 1-08) and the Supreme Court (*Barnes v Eastenders Group* [2014] UKSC 26, [2014] AC 1 at [102]) have endorsed confederation as the unity when discussing the law of unjust enrichment.

24 Birks, *An Introduction to the Law of Restitution* (n 12) 23. See, for example, Peter Birks, 'Restitution and the Freedom of Contract' (1983) 36 Current Legal Problems 141, 159.

25 Ernest J Weinrib, 'The Normative Structure of Unjust Enrichment' in Ross Grantham and Charles Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 22.

law should be changed: we should recognise D for R2. A cursory glance at the doctrinal scholarship of the last few decades will observe this move in action.[26] Unjust enrichment scholars have depended on this kind of argument: unitary rules of enrichment and 'at the expense of' have been applied to claims previously thought distinct; the defence of change of position has been applied more broadly, and so on. There are, however, real puzzles about how it is supposed to work.[27] If D should be available for any claim that is part of C, and D is not available for R2, surely R2 has been incorrectly classified? The point, more generally, is that any reformist suggestion can be taken as a flaw not of *the law* but of the classification *of* that law.

This argument is most puzzling when the category is a confederate classification. Partners to a confederacy can claim few things of each other. A confederacy is, by its nature, more tolerant of distinctions between its members; we can infer less, then, from the fact of membership.[28] If there is some feature which all members of a confederacy ought to possess, and some putative member does not possess it, the logical conclusion is that the doctrine is not a member of the confederacy. When the members of some set fail to share some feature, either it is incorrect to infer from the classification that the rules of the doctrine should be the same or the classification itself is mistaken. Consider the claim: 'change of position should be available for claims in unjust enrichment.' Suppose that failure of consideration does not admit change of position and yet is generally classified as a claim in unjust enrichment. Our conclusion might be, first, that members of the unjust enrichment category are not, *eo ipso*, subject to change of position; or we might conclude that failure of consideration is not part of the law of unjust enrichment. What grounds could there be, however, for changing the rules of failure of consideration?[29]

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[26] e.g. Andrew Burrows, 'Remedial Coherence and Punitive Damages in Equity' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005).

[27] Shapiro's distinction between identity and implication may be a helpful analogy: Scott Shapiro, *Legality* (Harvard University Press 2011) 8–10.

[28] The Diagnostic and Statistical Manual of Mental Disorders (DSM) gives a list of nine criteria to define depression. A patient counts as depressed, and thus (in many countries) qualifies for medical care, if they manifest five of the nine criteria. This means that A might have symptoms 1-5 and B might have symptoms 5-9. Both count as 'depressed', although they only share one characteristic. It looks mistaken, therefore, to assume that both A and B should be treated in the same way *in virtue of* their classification as depressed. (If, however, all nine criteria are an epiphenomenon of the same underlying cause, a single prescription might work.)

[29] My point here is not that arguments for reform cannot be made; it is that the argument *for* reform is not strengthened by means of classifying the claims together. R1 and R2 are part of C, on these claims, in virtue of their being justified by some reason (or set of

Scholars often try to get around this by endorsing 'interpretive' legal theory. Popularised by Steve Smith, interpretive theories seek to explain

> why certain features of the law are important or unimportant and by identifying connections between those features—in other words, by revealing an *intelligible order* in the law, so far as such an order exists.[30]

Interpretive theories are usually distinguished from descriptive theories, which are said to report the positive law, and prescriptive theories, which are said to be 'accounts of what the law should be',[31] of the 'ideal law.'[32] Interpretive theories are supposed to split the difference: they portray some area of law in its 'best light', but they must still be portraying *this* law. The rub is that interpretive theories apparently license a species of interpretation which goes beyond the interpretive materials, reforming from within those materials. And, so, interpretive theory is supposed to square the circle to which I have alluded. R2 can be said to be part of C if it bears a close enough relation to C; C then exerts force over R2, allowing the interpreter to junk those parts of R2 which fail to live up to C's ideal type. (One might say an interpretive theory is prescriptive, but its prescriptive materials are limited to those nascent in the practice interpreted.) Something like that, at any rate, is the basic idea. (The idea is more utilised than analysed.)

Webb rejects interpretive theory out of hand. Scholars can, he says, describe the law. Descriptive theorists are limited to 'faithful, uncritical reporting of the laws and practices to which it is directed' (7). Or they can prescribe what the law ought to be. However, 'there is no proper stopping point' (pace the interpretivist's apparent contention) 'short of a full inquiry into the goods and values [laws] protect and promote' (7, cf 17). Webb's is the second approach; he aims to give general statements of justified rules and of the considerations judges should have in mind when they decide cases. His consideration of the mistaken payment case leads him to numerous theses of practical import. If a claimant pays a defendant money by mistake, and the defendant spends that money on a winning lottery ticket, the claimant should be entitled to the winnings; not so,

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reasons), r. My claim is: any argument for reform needs only r, not C, in its premises.

30 Stephen Smith, *Contract Theory* (OUP 2004) 5. Smith's theory uses claims made by Ronald Dworkin in his theory of law, but Dworkin's claims are, as Webb says, quite distinct: Webb, *Reason and Restitution* (n 1) 14, fn19. The method seems to be influenced by Rawls' 'reflective equilibrium': John Rawls, *A Theory of Justice* (Harvard University Press 1971) 42–5. Its relation is, however, difficult to tease out; no serious work has been done exploring the connection.

31 Smith, *Contract Theory* (n 30) 4.

32 Smith, *Contract Theory* (n 30) 4.

however, if the defendant uses different money (even if she would not otherwise have purchased the ticket) (185-192).[33] Remote recipients should always be liable when they receive money traceably linked to the claimant's initial payment, even if the claimant's title has long since been destroyed (200).[34] Change of position should apply to all claims, whether personal or proprietary (219-223). I will not examine all these claims in detail, though all repay study. I want, instead, to bring out two features of general interest.

First, Webb's rejection of interpretive theory, and his proposal of an alternative model, should challenge those who endorse interpretive theory to provide a thorough defence of their model. The most promising analysis might be to take issue with the taxonomy of classifications I have proposed. I have spoken - in a manner Webb abets, though perhaps does not endorse - as if there is a clear distinction between what the law on some question is, and the reasons in favour of the law being that way. Perhaps that is a mistake. Law-making is a rational business and the reasons given for some particular rule might affect whether the rule itself is justified. The precise same rule might, in other words, be justified in one jurisdiction but not in another, depending on the reasons given for the creation of the rule. Webb can, doubtless, agree with this. The interpretivist's distinctive claim is that a lawyer can be concerned with those reasons internal to the law, not any possible reason which might have been put forward for the law, and can derive reformist proposals from those reasons alone. Perhaps they can, if they consider those reasons, and combine them with the injunction to treat like cases alike, that may lead to the kind of argument interpretivists endorse.[35] Perhaps, when everyone is clear about the argument, there would not be so much distance between Webb's descriptive lawyer, faithfully and uncritically reporting the law, and the sensible interpretivist. The interpretivist will clarify what reasons are internal to the law, and work with those.[36] These remarks

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33 See *Trustee of FC Jones and Son (a firm) v Jones* [1997] Ch 159 (CA).

34 See *Investment Trust Companies (In Liquidation) v Revenue and Customs Commissioners* [2008] EWCA Civ 1449, [2015] STC 1280; discussed in Frederick Wilmot-Smith, 'Taxing Questions' (2015) 131 Law Quarterly Review 531.

35 For discussion of the maxim, see Rawls (n 30) 208–09; Webb, *Reason and Restitution* (n 1) 43–45. There are perhaps two claims concealed by the maxim in question. One is the claim that if two cases are alike in all salient matters, the same considerations bear on them. That is analytic and may be what Webb has in mind at Webb, *Reason and Restitution* (n 1) 44. Another is the idea of rational consistency, that once one case has been decided one way, a similar case should receive similar treatment. This is much more interesting, is not analytic and is not discussed by Webb. It is, however, this second idea I have in mind as a way of rescuing interpretivism.

36 Compare Ben McFarlane's suggestion, that 'sometimes you have to look a legislator or judge in the eye and have the courage to tell him exactly why he is right': Ben McFarlane,

are avowedly tentative—I am far from sure I understand what people have in mind when they say they are doing 'interpretive' work—and very much, I hope, in tune with the spirit of Webb's project. The entire methodological baggage of private law theory is ripe for thorough reexamination: none of the stated approaches to interpreting the law is without difficulty; each would benefit from more systematic study. For Webb's next book, perhaps.

Second, Webb's approach—rightly, I believe—means that the classification drops out of arguments for reform. For him, the world looks like this. We have two rules, R1 and R2; both rules are justified (on the close knit model) by some reason, r. Suppose that some defence, D, should be available to resist any claim justified by r. If R2 does not have the particular defence, the defence should be made available. Classification of R1 and R2 is unnecessary for this argument; indeed, classification itself can do no work.[37] This seems powerful; it means that Webb's arguments about the law, which I have already mentioned, deserve close scrutiny. Even so, a similar question does arise about how we can infer that R2 is justified by r, given that D is not available. Is it possible to say that R2 is justified by r without begging the question of whether D is available? I am not sure. Dropping the classificatory intermediate step is important, then, but there is still work to do in this domain.

Legal Legal Theory?

When legal philosophy is discussed by lawyers and philosophers simultaneously, they often disagree (albeit often *sub silentio*) about the nature of the enterprise. Lawyers care more than philosophers about explaining individual propositions of law. The objection from the lawyers is: 'it is no theory of the law of X if the theory yields conclusions inconsistent with the law of X.' Taken to its logical conclusion, this is absurd. In one *Monty Python* sketch, Anne Elk gives her theory of the brontosaurus: 'All brontosauruses are thin at one end, much MUCH

The Structure of Property Law (Hart 2008) v. This is seems more consonant with Webb's project. There is an interesting question here about which category, if either, is closest to the judicial role. 'Interpretive' lawyers' method openly attempts to engage in the reasoning of appellate courts, neither stating what the law already is nor free to say what, in a perfect world, it should be. Webb's principal claim, which seems right, is that this latter role cannot hive itself off from all-things-considered questions of justification. The million dollar question is what, if anything, there is to this intermediate ground of reasoning.

37 Perhaps we should distinguish between two kinds of claims. One can point to r and follow that reason through to its logical conclusion: this will justify some rules, but not others. This method cannot, however, say that the law is wrong on some matter: to know whether it is wrong, we need to know about all the possible reasons for the rule of law.

thicker in the middle, and then thin again at the far end.' Simply restating the facts (be they empirical, with brontosauruses, or legal) is not offering a theory. A *theory* of X must in some sense go beyond a statement of X; yet if it goes too far beyond X, with insufficient attention to the legal propositions, it is no longer a theory *of X*. All legal theory, then, faces the question of how legal it should be.

There is a spectrum of views. To caricature, at the philosophers' end you have theories which bear no relation to the law whatsoever; at the lawyers' end you have law which bears no relation to theory whatsoever. Individual theorists inhabit different places on the spectrum. My own tastes are often, though not always, more consonant with the philosopher's than the lawyer's. For example, I think there is much to Weinrib's statement of his own enterprise:

> The aim is to identify the most abstract unifying conceptions implicit in the law's doctrinal and institutional arrangements and to enquire into the rationality that inheres in the law's processes.[38]

Philosophy, on this conception, is not the handmaid of practising lawyers, a tool to crack hard cases; its primary end is understanding, no more. Its province is explaining the logical, conceptual or normative foundations of some area: the abstraction of the inquiry is such that its conclusions will rarely say whether this or that claimant should win in an individual case. (Philosophy might say that some area of law is morally indefensible, though it usually does not take a philosopher to work that out.)

I say all this not to defend my own conception of legal philosophy but to explain why I was dissatisfied with one aspect of Webb's book. At times, as I have said, Webb makes very specific claims about what the law ought to be or how it ought to be understood. He also makes some quite general claims, for example about the nature of conditional intentions. Most of the discussion is pitched somewhere in between doctrinal and philosophical analysis. Key concepts in the English law of unjust enrichment are discussed, but in a more abstract and theoretical fashion than is customary. I was not always enamoured of this discussion because it did not closely attend either to the law or to the philosophy. An example from one of Webb's more interesting suggestions may bring out my complaint. Orthodoxy holds that, when a claimant pays away money by mistake, her intention to make the transfer is 'vitiated.' Restitution follows because the consent to make the transfer was, in some sense, deficient. Transfers by mistake are thus distinguished from transfers on a condition (which usually fly under the flag of 'failure of consideration'). In transfers made on a

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[38] Ernest J Weinrib, 'Private Law and Public Right' (2011) 61 University of Toronto Law Journal 193, 193.

condition, there is no flaw in the transferor's intention when the condition fails; the flaw arises only if restitution does not follow.[39] If I give you my umbrella on the condition that it is raining, and you return it on discovering it is not raining, there is no defective transfer; there would be a defective transfer only if you retained the umbrella notwithstanding the failure of the condition. Webb rejects this orthodox view. He reasons that mistaken payments are best seen as instances of conditional intentions, with payment being made on condition the money is due.[40] Restitution following a mistaken payment, therefore, 'ensures that my intentions are in fact upheld' (130).

The conclusion is of obvious interest. But it is of interest to lawyers and philosophers for different reasons and must be treated differently depending on the audience. For lawyers the question soon becomes practical: what difference does it make? Webb has some suggestions. In *Pitt v Holt*, shares were transferred to a fund intended to support a disabled patient; this triggered a substantial tax liability.[41] Restitution was sought—and awarded. Lord Walker gave a tautologous definition of the grounds of liability: 'a causative mistake of sufficient gravity'.[42] Many philosophers of action, most famously Thomists, distinguish ends and side-effects in intentions. When I walk around in my new shoes, I do not intend to wear the soles down; that is a side-effect. Armed with his reclassification of mistake cases as covert conditional intentions, and this distinction between ends and side-effects, Webb suggests that *Pitt v Holt* was incorrectly decided. The tax liability 'in no sense thwarts [the claimant's] plans in making the transfer.' The claimant's intention was not that the shares should be received only if no tax liability arose: 'the transfer was not part of some tax mitigation scheme, the possible tax implications of the transfer were simply not factored into [the] proposal.' It follows that the claimant's 'aims in making the transfer were ... achieved. They simply had an unwanted, unintended side effect' (135). Webb does not dedicate the time lawyers would require for this explanation to be helpful. The ideas are developed quite quickly and their implications are not drawn out. That is by design: Webb is, he would say, not writing a textbook. I will return to the merits of this design shortly.

Consider the same discussion from the philosopher's angle. The literature on intentions is vast and Webb, perhaps rightly, makes no real attempt to en-

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39 This point is nicely made by Kenneth Campbell, 'Conditional Intention' (1982) 2 Legal Studies 77, 89 (reply to Koffmann).

40 See, further, Paul Matthews, 'Money Paid under Mistake of Fact' (1980) 130 New Law Journal 587 and Peter Butler, 'Mistaken Payments, Change of Position and Restitution' in Paul Finn (ed), *Essays on Restitution* (Thomson Reuters 1990).

41 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

42 *Pitt v Holt* (n 41) [122].

gage with it.[43] He does, however, make unorthodox claims. It is customary to distinguish two ways in which an intention might be said to be conditional. As Cartwright made the distinction, 'A condition is internal when it is part of the content of the intent, and it is external when it is a condition of the formation of the intent.'[44] This language is infelicitous because these are two ways in which an *intention* can be conditional. 'Internal' conditions are genuine conditional intentions; 'external' conditions are a ragbag of different concepts, none of which makes the intention itself conditional. Suppose that I decide to go to the market to go to the market to buy berries; I also decide to buy avocados if there are ripe ones. There are two types of intention here. I intend to buy berries only because I believe there are berries to buy. This is what Cartwright would call an 'externally conditional' intention. I find that unhelpful language, though the distinction with the second intention is clear. The second intention is to buy avocados *only if* there are ripe ones. This is an 'internal' condition. Within the ragbag of external conditions are mistakes. If it turns out that there are no berries to buy, I will not buy any. That is not because my intention was initially conditional but because my reason for forming the intention is undermined by my mistake. My discussion here is very brief, but, if nothing else, it shows an assumption in the literature that there is a distinction of importance between intentions formed due to a mistake and internally conditional intentions (even if these are all called conditions in a lot of the literature). That is, I believe, a supposition Webb aims to destroy; his analysis of the conditional intentions in the unjust enrichment context collapses the distinction.[45] Will any philosopher be convinced by his chapter? Again, I doubt it.[46] Again, however, this is by design: Webb is, he would say, not writing a philosophy book.

So what kind of book is it? Finding the right place between doctrinal and philosophical analysis is one of the key questions legal theorists face. A few

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43 For example, the section on 'Intention and Plans' makes no reference to the work of Michael Bratman.

44 JPW Cartwright, 'Conditional Intention' (1990) 60 Philosophical Studies 233, 235. See, further, JW Meiland, *The Nature of Intention* (Methuen & Co 1970) 15–17; Campbell (n 39) 84–85; Luca Ferrero, 'Conditional Intentions' (2009) 43 Noûs 700, 701–02.

45 Webb, *Reason and Restitution* (n 1) 128–29. His treatment of the background conceptual issues is at Webb, *Reason and Restitution* (n 1) 127–8 and he is clearly aware of Cartwright's distinction, because he cites the paper: Webb, *Reason and Restitution* (n 1) 128, fn 12. I find the treatment difficult to follow: that may be in part because Webb follows the literature in talking of conditions as a monolith.

46 Ferrero, 'Conditional Intentions' (n 44) makes very similar claims; see, however, Kirk Ludwig, 'What Are Conditional Intentions?' (2015) 4(6) Methode 30; Luca Ferrero, 'Ludwig on Conditional Actions' (2015) 4(6) Methode 61, 71–2.

things are clear. First, to talk to judges you have to speak their language.[47] The book may do this; I am not sure. I suspect, however, that judges are more likely to be moved by works which make more of an effort to engage with the doctrinal law. (So much the worse for them, perhaps.) Second, to talk to philosophers, one has to speak *their* language. It is difficult to speak to both groups at once without one's claims being lost in translation. Is there a position in between these two extremes? Can there be a distinctively *legal* philosophy? I hope so, and Webb's book is an excellent candidate for the title; yet my discomfort with its cocktail of law and philosophy goes to show that I remain unconvinced.

Substance

Webb's book is, to repeat, replete with arguments; anyone interested in the law of unjust enrichment will find a lot to think about. I will here consider what I see as the most important claims in the book about the justification of mistaken payment cases.

Why Consent Matters

The law of unjust enrichment seems, at least in paradigm cases, to be concerned with the transferor's consent to make a transfer.[48] It asks whether there was a mistake, whether the transfer was occasioned by duress, and so on. Why is consent accorded that status?

Webb opens his account as follows:

> Whether I consent to a particular enrichment you take from me matters only where my consent is a condition of your entitlement to receive and retain that enrichment? (63).

To assess this claim, we need to say a little more about what is meant by 'condition' here. An unjust enrichment lawyer might ask, for some particular transfer, whether my consent *is* such a condition. That is a factual question about the state of the law. (It might, for example, allow me restitution of all gains any

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47 For some interesting reflections, see Robert Reed, 'Theory and Practice' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016).

48 Not everyone agrees with this diagnosis; for an 'absence of basis' theorist, consent is perhaps not the basic concern of the law. Partly for this reason, Webb's book will appeal to a common lawyer; a Civilian would be surprised by a lot of the discussion.

people anywhere derive from my mistaken performance of services. My consent would then, factually, be a condition of your entitlement to receive and retain those gains.) Let's call that kind of condition a 'factual condition'. A lawyer, judge or theorist might instead ask whether my consent *ought to be* such a condition. (If you reject the condition proposed in the previous parenthetic remark as absurd, you have made such a judgement.) Let's call that kind of condition a 'normative condition'. With this distinction, one might call for law reform in the following, cumbersome and unlettered but hopefully clear, fashion: 'sure, it is not a *factual* condition of your entitlement that I consented to the transfer—but the law is wrong! It is a *normative* condition of your entitlement that I consented!'

Which kind of condition has Webb in mind in the passage quoted? He must mean a normative condition. He aims, recall, to reveal the real goods in unjust enrichment law (never mind what the law actually is). The passage I have quoted is, then, true because tautologous. Consent matters when it is a condition of your entitlement; it is a condition of your entitlement when my consent matters. So far, so good. Webb goes on to point out that 'there are countless occasions in which it is not such a condition; where you are free to take the benefit of my actions whether I like it or not' (63). To reason with these two claims, 'condition' must have the same content here as it does in the first quote; otherwise the argument would be invalid for equivocation. The condition must, then, be normative, not factual. No appeal to law will help.

Webb proceeds to argue for this second claim with facts about the law. He introduces his defence with the following example:

> I forget to turn off the heating in my flat when I go away over Christmas. This heats your flat above, saving you money on your own heating bill. I have no claim to restitution (62).[49]

That is because,

> while the law recognizes and protects my freedom to perform the action of flicking the switch, it doesn't recognize any distinct freedom to control who gains from the taking of that action, however it was taken (64).

Something has gone wrong. Who cares what the cases say? For Webb's argu-

[49] Another aside. Those, like Peter Birks and Andrew Burrows, who reject property theories see these cases as marginal. It is obvious, for them, that there is no claim; we can figure out why later on, perhaps with a gerrymandered exception. For Webb, these cases are central: they show what is going on in all other cases. The same dialectic is visible in debates over the status of *Wrotham Park Estate Company Limited v Parkside Homes Ltd* [1974] 1 WLR 798 (QB). Some (e.g. Burrows) regard the case as marginal; others (e.g. Stevens) see it as giving the game away.

ment, they don't matter.

All this is easily rectified. We can read the heating case as an intuition pump, a claim about what the law ought to be, one most lawyers (until recently) would endorse.[50] Insofar as we have an argument, it remains that consent is a normative condition of a transfer's validity when consent matters. Tautologies are true, of course, and truth is a good start. Stating the tautology also has an important implicature: it suggests, *pace* orthodoxy, that consent does not *always* matter. The argument's burden must be carried by an explanation of *why* consent matters in individual cases. Here we get to the heart of Webb's thesis.

Property Interests

The Big Idea

Consent matters, Webb says, when there is a property interest (or some analogous interest) which the law should protect. In those cases,

> the decision as to how that asset was to be applied, which encompasses decisions concerning the transfer of title to and beneficial use of that asset, were, by virtue of his own title and the interest it recognizes, the claimant's to make (82).

When I have a property interest in an asset, that interest includes the ability to decide who gets title to and beneficial use of the asset. When I pay you money by mistake, my decision is impaired. And if I did not choose

> that the power to use and decide on the disposition of that asset should become yours ... there is here sufficient reason to reject your claim to that asset and to allow me to recover (93).

Consent matters, Webb claims, because it is a precondition of the valid transfer of property.

Here's a way to motivate this idea. I lose my £5 note in the street; you pick it up and buy a beer. You commit conversion. Due to a causative mistake, I pay you £5 using a £5 note. No conversion is committed (because title to the note passes), but I get a claim to restitution of the money. What's the difference? Very little, Webb says. The reason why you are liable to make restitution of £5 of value in the second case is the same reason why you are a convertor in the

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50 Webb has confirmed that this is as he intended. I include this discussion in case others are similarly led astray. I say 'until recently' because of the recent explosion of 'at the expense of' in cases like *Investment Trust Companies (In Liquidation) v Revenue and Customs Commissioners* (n 34) and *Bank of Cyprus UK Limited v Menelaou* [2015] UKSC 66: these cases reinterpret the 'at the expense of' criterion such that any gain causally connected to a loss is *prima facie* caught by the law.

first case: my interest in the note. The idea is that when I pay you money by mistake, although legal title to the note passes, my normative interest in the note survives; the claim for restitution vindicates that normative interest. More completely, the argument is:

> (1) the claimant, as legal title holder of the relevant asset prior to its transfer, was authorized to determine who may receive and use that asset; (2) though the asset is now in the defendant's possession, it came into his hands only by virtue of a decision of the claimant's which was qualified or, in some way, impaired; (3) there is then good reason to treat the claimant as *still* the person authorized to determine the asset's use and disposition; *but* (4a) if we were to allow the claimant to assert a continuing title to that asset, this may create problems for third parties who have dealt with the defendant on the reasonable assumption that the asset now in his hands is his to dispose of; *and* (4b) if we were to allow the claimant to reclaim that asset ahead of the defendant's other creditors in the event of the defendant's insolvency, this would unreasonably prejudice those other creditors; *so* (5) it is reasonable, all things considered, to limit the claimant to recovery of a sum of money of equal value, leaving the asset in the defendant's hands and his to dispose of (75–76).[51]

Although elegantly presented, numerous theorists have, as Webb acknowledges (86), proposed similar theories.[52] It has also been given short shrift by others.[53] The traditional objection to these theories is that the claimant's title cannot explain the defendant's liability or duty when the claimant no longer has title. Andrew Burrows, for example, writes that property theories are 'seriously

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51 Although I say that this is the argument, Webb presents merely as one for consideration; his treatment in the book indicates that he gives qualified endorsement, at the least.

52 e.g. Samuel J Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 Modern Law Journal 603; Peter Jaffey, 'Two Theories of Unjust Enrichment' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004); Andrew Botterell, 'Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 Canadian Journal of Law & Jurisprudence 275; Jennifer Nadler, 'What Right does Unjust Enrichment Protect?' (2008) 28 Oxford Journal of Legal Studies 245; Ben McFarlane, 'Unjust Enrichment, Rights and Value' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2012); Smith, 'A Duty to Make Restitution' (n 6); Dan Priel, 'The Justice in Unjust Enrichment' (2014) 51 Osgoode Hall Law Journal 813, 837–42.

53 Dennis Klimchuk, 'The Structure and Content of the Right to Restitution for Unjust Enrichment' (2007) 53 University of Toronto Law Journal 661, 665; Dennis Klimchuk, 'The Normative Foundations of Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 87–89; Zoë Sinel, 'Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment' (2011) 31 Oxford Journal of Legal Studies 551, 551–52; Andrew Burrows, *The Law of Restitution* (3rd, OUP 2011) 30.

deficient' because 'in only a limited number of cases does the property in the money not pass to the payee.'[54] Webb replies, as others before,[55] in the following way: he first distinguishes legal interests (roughly, the title to the thing in question) from 'normative' interests. Normative interests are the reasons why the law accords me a legal interest in the note (66–70). I can still have a normative interest in a thing belonging to another even if I have no legal interest: if your father killed my father and stole his art, I might be thought to have a moral entitlement to the art even if the legal system recognises it as yours. That seems obviously right.

Two Problems

It follows that the theory is not conceptually flawed. At least two problems remain. First, Webb's assessment of the account seems overblown. He says that

> the provision of a body of claims that responds to unauthorized transfers follows as a matter of rational necessity from the fact of according individuals ... authority [over assets] (92).

And that

> the law of unjust enrichment is a necessary element of any system of private property (94).

These are very strong claims. Would there really be *no such thing* as private property if there were no law of unjust enrichment? That depends in part on what you take the content of the law of unjust enrichment to be. It is important to see that Webb does not here take 'unjust enrichment' to be the category conventionally so-called, mistaken payments and so on. Instead, he means that body of law which protects private property (and property interests). It includes, for example, claims in conversion. This might make the claim appear true, but trivial; yet I still think it is false. If we take a system of private property to be fundamentally concerned with the rights recognised, not the remedies for infringements of those rights, a system of private property would exist so long as property rights were recognised. Unauthorised transfers might then be *prevented*, if not unwound; there would then be a system of private property even if no claims were provided to restore unauthorised transfers. Perhaps there is nothing to be gained from this kind of disagreement about essentialism, so let me leave this problem to one side.

Second, less trivial, Webb is on the horns of a dilemma. His account either covers only a tiny portion of mistaken payment cases or risks losing its status

54 Burrows, *The Law of Restitution* (n 53) 30.

55 e.g. Jaffey (n 52); Priel (n 52) 838.

as a property theory. This requires some introduction. When I pay you £10 by mistake with a £10 note, my right to the note transfers to you. There is, therefore, a meaningful sense in which you have something which was once mine: you own a thing (the note) which I used to own. That, however, is virtually never the form mistaken payments take; they are usually payments made through bank accounts. When I pay you £10 via an online transfer, it is tempting, but wrong, to understand the transaction in the same manner. If I have '£100 in the bank,' that means my bank must pay me £100 on demand. My bank account is a debt. I own the debt; I do not own £100. So, as Webb says, when I pay you £10 in an online transfer

> there is no true transfer at all

because

> There is nothing you receive which was previously held by me (98).

Webb has two options. First, he could deny that his account covers payments made through bank accounts; his account would then justify restitution of tangible assets, nothing more.[56] This would be coherent. Quite some care would be called for in presentation; payments through bank transfer are, for many people, central cases of 'mistaken payments.' That is, however, not a problem with the theory itself. It would also make the subject of the book practically vanishingly small. Philosophers do often dedicate exhaustive energy to fact patterns which rarely arise, as for example with the various byzantine iterations of the Trolley Problem. This energy is usually dedicated to throw light on some broader principle, though; yet if Webb took this first option, his account would tell us little of general interest. Finally, the first option would leave some of Webb's broader claims without motivation. He argues, for example, that the property account of mistaken payments gives us a reason to distinguish mistaken payments from the mistaken provision of services. All he could possibly establish on this first strategy is that services cases are in one way different from a very specific class of mistaken payments.

Perhaps for these reasons, Webb endorses the second option. This claims that bank transfers are covered by the property account. His reason is that

> though the bank holds no cash earmarked for me, my account represents funds that are ... truly at my disposal. When your account is credited as a result of my instructing my bank to pay you, this increase in the funds now at *your* disposal comes about by virtue of the application of those funds (98).

56 Although Webb mostly concerns himself with mistaken payments, his account presumably is intended to extent to all tangible assets: Webb, *Reason and Restitution* (n 1) 97.

If sound, this risks collapsing the line Webb means to draw between property and services cases. I should now say something more about services cases. My family once rented a house by a lake in upstate New York. On the first morning, my sisters and I walked to what we thought was our dock. It was covered with guano. We spent the morning cleaning the dock. Just as we finished, a man named Don arrived and asked why we were doing this. We explained. He replied that the dock was his, not ours: the dock for our house was the next one along. We had improved the value of a thing to which Don had a right but had transferred no rights to him. Such examples, services cases, have historically been treated differently by the law - and one of the points of a property account is to explain why.[57] Webb's account seems to have some promise: where there is the transfer of a right (as with the £10 payment), there is some identifiable thing in your hands to which I used to have a right; at the end of our unhappy upstate story, Don had no right which we used to have. His dock was simply nicer than it had been before.

This gives us three paradigms: payment with a bank note, payment via a bank transfer, and the provision of a service. To retain its distinctiveness *qua* property theory, Webb's account depends upon the bank transfer case being closer to the bank note case than it is to the services case; the reason why there is restitution in the bank transfer case must not also justify restitution in a services case. (It is important to recall here my discussion of unity, of the similarity of reasons. A key question is whether the reasons which justify restitution in the bank note case also justify restitution in the bank transfer case and the services case. This requires an explanatory choice, between the confederacy and the close knit family, and an evaluative argument, concerning the similarity of reasons.) There is a clear factual distinction between the bank note case and the other two: in the bank note case, a right is transferred; not so in the other two. The bank transfer and services cases are not identical either. In the bank transfer case, the change in the value of my right is direct; in the services case, the right changes in value indirectly, through its valuation on a market. Some claim that these three paradigms should be understood together. These people claim that none of these distinctions is sufficient to warrant distinct treatment. What is Webb's response?

His property rationale, he writes, can

> stretch beyond the receipt of physical things to cases where the defendant's enrichment is found in his acquisition of some intangible asset or advantage to which the claimant was similarly entitled (104).

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57 For a helpful discussion of the proper quantification of the value of services, see Webb, *Reason and Restitution* (n 1) 107–8.

That is why bank transfers are in. And

> When it comes to services, the question is whether the law recognizes us as having a similar interest in and authority over the benefits that others may derive from our actions (104).

Services cases are out because, Webb claims, there is no such interest. (This last passage is not quite right. It does not matter whether the law recognises a 'similar interest', but whether it ought to.)

I find Webb's argument for *why* there is no such interest in a services case difficult to follow. 'If I pay you by mistake,' he writes,

> I can't go on exercising my authority over that money unless it is returned and, unless I recover *something*, my interest in determining its disposition comes to nothing. But where I mistakenly perform some beneficial service for you, my on-going freedom of action isn't compromised if I am denied a claim to the benefits you derived. I remain as free as I was before to choose my actions (104).

All this is true but does not distinguish money from services. After Don disabused me and my sisters of our assumption, we were free to go to work on our dock; our 'on-going freedom of action' was not compromised. But the question concerns our actions *while we scrubbed Don's dock*. Our powers to work are in one sense more enduring than the contents of our wallets: we can spend all our money, but our powers to work remain as long as we are alive (and not badly injured, and so on). But think of a billionaire paying £10 by mistake. She cannot exercise her freedom over that note, but remains as free as she ever was to choose what to do with her remaining lucre. Just so, my sisters and I after cleaning Don's dock. We cannot exercise our freedom over that time when we were working on his dock; but, disabused of our mistake, we were as free as ever to choose what to do with our remaining time. Was our freedom of action compromised in the time working on the dock? A good argument that it wasn't is this: it was our own damn fault that we got the docks wrong. (I made no attempt to claim restitution from Don. My guess is that his response would have been along those lines.) That argument, however, applies just as much in all mistaken payment cases (bank transfer or not).

A crucial premise of Webb's argument is the fact that, when we perform a service, we do not transfer a thing. His argument may be that a money award following a mistaken provision of services would be crying over spilt milk. 'Once the services are provided, our freedom of action isn't implicated either way,' Webb writes (105). A service cannot be returned. Neither can a bank transfer, though; so this does not distinguish the two. Another passage suggests that it might not be irrational to provide a remedy in services cases, only that such a remedy

> would not be solving some problem of allocation, in the same way as the rules of private property are directed towards the allocation of assets and entitlements (310).

Again, bank transfers do not concern the allocation of assets or entitlements; they concern the value of pre-existing entitlements (in the same way the right Don had to his dock was increased in value by our morning's work). I am unsure, then, why the reasons applicable to services cases are supposedly distinct from bank transfer cases. I may be misreading or misunderstanding Webb's argument.[58] Or perhaps he would, if pressed, retreat to the first option and deny that his account covers bank transfers. I have been open about my thoughts and difficulties so readers can make their own minds up.[59]

Unjust *Enrichment*?

Webb comes, he claims, to fulfil, not destroy, the law of unjust enrichment. However, in an important passage, he writes that these supposedly vanilla cases of unjust enrichment are

> ill characterized as cases of unjust enrichment. To the extent that they are concerned with gains, they are concerned with losses too (177).

He explains:

> These claims arise to secure or to protect the claimant's interest in the asset, an interest that anticipates its receipt by the defendant. So it is true to say that the defendant is liable on account of what he received. But he is liable for what he received because it was something to which the claimant was already, in this way, entitled (177–78).

And adds that,

> though the effect of these claims and the orders they support is often to remove some enrichment from the defendant and though their proper measure is often the measure of the defendant's gain, it is better to see these cases as concerned, in the first instance, neither with gains nor with losses, but with entitlement to the very thing received (178).

This goes to the heart of his theoretical enterprise. His principal claim is that these cases are about vindicating the claimant's underlying property interest and

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58 Is the distinction that in the bank transfer case two entitlements change in value—one up, one down—whereas in the services case only one (the beneficiary's) changes in value?

59 Interested readers should attend to Webb, *Reason and Restitution* (n 1) 104–10, which includes the argument for this, mixed with an argument about the nature of benefiting.

not, therefore, about benefits. I have already suggested some difficulties with the principal thesis. There is a broader consideration—it is not really a criticism, but it is worth our attention. Let's think about cases where the defendant either never received or does not retain any thing to which the claimant had a pre-existing title. (Set bank transfer cases to one side; we've spent enough time on them already.) Webb suggests the following hypothetical: I pay you £100 and you use those notes to pay your phone bill. You would have paid the bill even if I hadn't paid you the money. What now? Webb reasons that

> requiring you to make good my loss doesn' t set back your interests. By using the £100 I paid you to pay your phone bill, you were able to save £100 of your own. If you now have to pay me £100 you are left in the same position you would have been in had I not made the payment to you, no better but no worse off (195).

True enough. But so what? You might reply that you would rather keep the money. What then?

> to the extent of this gain, requiring you to make good this harm leaves you worse off only by offsetting an advantage which ought not to have come your way, an advantage you made through (unknowingly) doing me harm (196).[60]

Peter Birks never delved deep into these puzzles. The closest he got to an argument is his claim that the mistaken payor

> is not trying to make you worse off. He seeks only that you should give up the gain obtained at [his] expense. He asks that you return to the position you would all along have been in had you not received from [the payor] money to which you were not entitled.[61]

This form of reasoning is widely endorsed. What, if anything, distinguishes it from Webb's argument? The principal distinction is that Webb is concerned with compensating a loss. Even so, his argument for why it is permissible to compensate *on the facts just given* depends on something like Birks' counterfactual. Yet that counterfactual is a very different kind of consideration from Webb's property thesis. Birks' claim—I hesitate to call it an argument—focusses on the fact that the defendant has made a gain. Can that matter? Both Webb and Birks think so, yet neither give much justification for their assertion. (Webb has an easy reply to this charge: unlike Birks, his book is not about benefit-based obligations; his argument principally concerns compensation and he can, if need

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60 I can see no justification for the claim that the change of position does the plaintiff harm; but I do not think that an essential element of this argument.

61 Birks, *Unjust Enrichment* (n 14) 7.

be, simply retract the claim above.)

Do we need to consider these arguments to assess Webb's account? In one respect, no: everything Webb says about the rationale of mistaken payment cases can be true, even if there is some distinctive, benefit-based rationale for the law in this area. Yet we cannot conclude that the claimant's property interest is fundamental to these legal claims until we have a better account of why it might be that there is some distinctive problem (if, indeed, there is a problem) in someone *gaining* through the loss of another.

Conclusion

Charlie Webb's *Reason and Restitution* stands as a landmark in the philosophy of this branch of law. It is the most complete of the 'property' family of accounts and provides a thorough and exacting treatment of private law methodology. I have had quarrels with Webb's claims, though we agree on a great deal; often I have simply called for more work on particular issues. If I can offer no pithy summary of my own views of Webb's conclusions, that is because its claims evade a simple riposte. I have tried to show my admiration of the book not by proclaiming it but instead by engaging with the book—showing it is indeed worth attention.