

The Laws of Restitution

I. INTRODUCTION

The message of Professor Robert Stevens' new book, *The Laws of Restitution* (Oxford 2023),¹ is clear: something has gone very wrong in the law of unjust enrichment. Contrary to orthodoxy, which claims (with differing degrees of conviction) that there is a certain unity to the subject, Stevens argues that the claims that have been grouped together under the label of "unjust enrichment" "are instead (depending on how you count them) seven or eight different kinds of private law claim, none of which have anything important in common with another" (p.3). The expression "the laws of restitution" is a hint to the reader: according to Stevens, there is no unified subject that can accurately be described as restitution of unjust enrichment. Certainly, a number of claims considered in the book are not concerned with the defendant's "enrichment" if that is understood, in its ordinary sense, to refer to the factual state of affairs of being better off.

This book is the spiritual successor to Stevens' ground-breaking article: "The unjust enrichment disaster" (2018) 134 LQR 574. That article had a profound impact on unjust enrichment scholarship and practice around the common law world and compelled unjust enrichment loyalists to defend the unity of their subject. Indeed, it led Professor Andrew Burrows, prior to his appointment to the Supreme Court, to publish "In defence of unjust enrichment" [2019] CLJ 521, in which he attempted to defend the orthodox approach in the face of "significant scepticism about the utility of recognising a law of unjust enrichment" (p.522). *The Laws of Restitution* represents the culmination of Stevens' long reflection and thinking about the subject(s).

The primary claim Stevens advances is not entirely new. Others have argued before that the "unjust enrichment" project is misguided: see eg S Hedley, "Unjust enrichment as the basis of restitution—an overworked concept" (1985) 5 LS 56; P Jaffey, *The Nature and Scope of Restitution* (Oxford 2000), 15–21; P Watts, "'Unjust enrichment'—the potion that induces well-meaning sloppiness of thought" (2016) 69 CLP 289; cf R Stevens, "Faute de mieux", in S Peari and W Swain (eds), *Rethinking Unjust Enrichment* (Oxford, 2023). But, as Professor Charlie Webb notes in his contribution to this review, one of the important aspects of Stevens' contribution is the identity of the messenger. Stevens is the Herbert Smith Freehills Professor of Private Law at the University of Oxford; he has taught unjust enrichment for 30 years, 10 of which were alongside Professor Peter Birks. At one point, Stevens was an acolyte of the unified approach to unjust enrichment. Stevens' crisis of faith is therefore significant. That such a prominent (former) supporter of the orthodoxy has reason to think something has gone wrong gives everyone interested in the subject pause for thought.

1. THE LAWS OF RESTITUTION. Robert Stevens, Herbert Smith Freehills Professor of English Private Law, University of Oxford. Oxford University Press, Oxford (2023) xviii and 420 pp., plus 13 Index. Hardback £90.

To mark the publication of the book, and its significant contribution to scholarship, the Oxford Private Law Research Group hosted a one-day symposium at Keble College at the University of Oxford on 28 October 2023. The symposium brought together students, practitioners, members of the judiciary and academics to discuss the ideas in the book and their practical implications. Panel members were not asked to prepare any written remarks but, in light of the valuable contributions made on the day, those able to do so were invited to provide short written comments. Those comments have been collected here in a review inspired by a similar article published to mark the publication of Birks' "orange book" (*Unjust Enrichment*, Oxford, 2003): see A Burrows et al, "The new Birksian approach to unjust enrichment" [2004] RLR 260.

We would like to take this opportunity to thank the contributors. We would also like to acknowledge Professors Ben McFarlane and William Swadling, whose support enabled the symposium to go ahead. And, last but certainly not least, we would like to thank Robert Stevens for providing such a stimulating read and "enriching" us all with this landmark contribution to a subject that many will continue to call unjust enrichment, though, if Stevens has his way, will in future be described as the subject formerly known as restitution of unjust enrichment.

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II. SUMMARY AND FOUNDATIONS

A view from the orthodox camp

I was at lunch in the Supreme Court and mentioned to Lord Reed that I had just received a copy of Stevens' book and noted that Lord Reed had written the foreword. "Before you read any further", he said, "you should pour yourself a very stiff whisky". As it happens, the heretical contents of Stevens' brilliant book were already very familiar to me from having taught with him for so many years on the Oxford BCL course.

A first general point is that, as soon as one opens the book, one encounters a fundamental paradox. Put simply, the book can only exist, and its contents only have any coherence, because it is an attack on the orthodox view. The very title *The Laws of Restitution* is, if Stevens were to be taken seriously, a misnomer. This is because, if one asks "what does he mean by 'Restitution' in his title?", it would appear that there is no answer he can give that links together all the supposedly disparate areas that he is considering. He cannot say that the areas looked at are all about "giving back" (or "giving up") something, because that would immediately lead to the view that one normally associates "giving back" with something that one has beneficially received. Therefore, by preserving "Restitution" in the title, the book appears to be ultimately about the laws of reversing benefits. Yet Stevens

wants us to accept that the book is not about that because, for him, there is no unity at all in the subject matter being discussed. The title really should be “The Laws which other people have mistakenly called ‘Restitution’ or ‘Unjust Enrichment’”.

It follows from this that it is hard to know where, if at all, one could teach this exposition of the law within a modern university syllabus or where it would be placed on any map of the English common law. Perhaps one could just fit it in as the residue of private law claims to be considered once one has dealt with, or mapped, contracts and wrongs. But, as is said on page 3, that “negative feature has no utility”. So I think the book takes us on a perilous descent into a wilderness of disparate areas that, as a matter of teaching and practice, will be hard to navigate. Splitting rather than unifying in the way that is being advocated is, I think, contrary to the way the common law is understood and develops.

One of the great features of the work of Birks was that it presented a scheme that was simple, elegant and rational. On any view, Stevens’ scheme is complex and, almost avowedly, inelegant. The usual retort to this is that one should beware simplicity and elegance. I accept that there are dangers in seeking simplicity. However, in my experience, lawyers and judges are desperately looking for clear and rational pictures of the law that can guide them. There are, therefore, problems with a scheme that I for one find difficult to understand and apply.

In overall terms, while I can accept some of the penetrating criticisms of the orthodox view of unjust enrichment or restitution, in particular those directed to an overly broad conception of “at the expense of”, the need to make refinements should not lead us, as Stevens would wish, to throw out the orthodox view altogether.

There is another general point which it is important to appreciate when considering Stevens’ work: he is a policy minimalist. My own view is that much of the common law cannot be properly understood without taking account of legal policy as well as principle. But Stevens would seek to eradicate policy reasoning wherever possible and again that can lead to a distorted view of the common law as understood and developed by judges. More specifically, it means that he has difficulty accepting the mix of principle and policy that explains how the concept of “at the expense of” works. One of his favourite gambits in the BCL classes was to shout “stamps” to what I was saying. But his beloved stamps example—*C* mistakenly destroys his own stamp thereby vastly increasing the value of *D*’s stamp (making its first appearance in this book at p.32)—is straightforwardly explicable as an example of an incidental benefit that, as a matter of policy, is not treated as being at the expense of *C*. Just as legal causation and remoteness in tort rest on the policy of needing to limit the defendant’s liability for factually caused loss, in order to prevent an unfair burden being placed on the defendant, so in this context there are “directness” limits drawn on “at the expense of *C*”, viewed as a matter of factual causation, in order to ensure that an unfair burden is not placed on a defendant in respect of reversing benefits gained. In general, the law of unjust enrichment does not reverse an incidental benefit because it is a secondary, and therefore an indirect, consequence of the claimant’s actions. Stevens finds it difficult to accommodate that type of policy reasoning.

Turning now to some specific points on the central themes in Chapter 1, Stevens divides much of the law, and indeed most of what was originally called the law of quasi-

contract, into “unjustified performance” and “conditional performance”. We are told (at p.9) that unjustified performance is the largest category and that it is concerned with a performance rendered by the claimant to the defendant for “no reason”. The classic example is a mistaken payment. Then, moving on to conditional performance, we are told (at p.10) that this is the next largest category but that it has a quite different justification. This category is concerned with a performance rendered under an agreement where the parties have stipulated that the performance is conditional and that condition has failed. The condition must have been agreed between the parties but the right to restitution is not itself contractual.

Clearly these two categories of case are what, on the orthodox view, constitute unjust enrichment where the unjust factors are based on, respectively, impaired consent or a failure of basis (traditionally referred to as failure of consideration). The principal difference between the formulation in this book and the orthodox view is Stevens’ emphasis on “performance” and his view that it is irrelevant whether the defendant is enriched or not.

I find the stress on “performance” difficult. What does performance mean? Certainly, we speak of performance of a contract where one has agreed to do something and the performance is then assessed according to what has been agreed. But, if one takes the insurance company’s payment to the widow by mistake (thinking that there was a contractual obligation to do so) in the leading case of *Kelly v Solari* (1841) 9 M&W 54; 152 ER 24, it seems an odd use of language to describe that payment as a performance by the company to the widow when it was mistaken in thinking that there was any contractual obligation to pay. On the contrary, the company by paying has precisely not performed in any way that it agreed to do because it had not agreed to pay in the particular circumstances. Similarly, it seems odd to describe the restitution or repayment of the money as the objective valuation of that performance. Certainly, there has been a mistaken payment by the company to the widow but this does not seem to be helpfully captured by the word “performance”. When later in the book Stevens comes to expand on this, he is forced to accept that performance is a term of art which has three necessary elements: action, towards the defendant, that is accepted by the defendant (p.37). But this then adds a further complication as to why acceptance of the performance is necessary and what is meant by that.

Of course, what Stevens is anxious to do is to find a concept that avoids referring to the defendant as having been enriched by the mistaken payment. He reinforces this by saying (p.9) that there is no need for any *consequent* enrichment of the defendant as a result of the payment or services. However, the orthodox view does not require there to be a consequential enrichment separate from the payment or services. The payment is, or the services are, the enrichment. The objective enrichment may be subjectively devalued but that is a question going to enrichment and is not a question of whether there has been a performance.

The reason why it is realistic to talk about enrichment may be explained by asking what the following have in common: payments to *D*, the rendering of services to *D*, the transfer of goods or land to *D*, giving *D* the opportunity to use money, goods or land, or discharging a liability of *D*. It is surely an obvious answer that those are all examples of objective benefits to *D* (albeit that they may be subjectively devalued by *D*). And it

is with those situations that the cases on the law of unjust enrichment have principally been concerned.

At a normative level, Stevens relies on an acceptance of performance because, as he explains at pp 19–21, he believes that the necessary correlativity for rights (that is the need for bilateral reasons) requires some conduct by the defendant as well as by the claimant. However, as I see it, the necessary correlativity in the law of unjust enrichment is uniquely supplied by the fact that the defendant's enrichment has been at the expense of the claimant. The two are tied together and, assuming an unjust factor, provide the bilateral reason for restitution. There is no need to turn to the notion of an acceptance of performance.

Therefore, looking across the two main categories articulated by Stevens, I see nothing to persuade me that one is dealing with the law on valuing accepted performances rather than the law on restitution of unjust enrichments.

The rejection of an enrichment analysis is further problematic when one comes to consider Stevens' approach to the leading defence of change of position. That is essentially an enrichment-based defence and, on the orthodox approach, is applicable only to claims for unjust enrichment. Yet we are told (p.15) that “[i]ts central justification is to ensure that an innocent person is left no worse off by a claim to reverse an unjustified performance between the parties”. But, if one is not concerned with enrichment, why should one be concerned with protecting the defendant? Stevens provides no convincing answer.

To conclude, the book is a very stimulating read and one that all of us in the orthodox camp need to think carefully about. I therefore end by congratulating my dear and long-standing friend, and former student, on a great achievement.

Andrew Burrows
Justice of the Supreme Court of the United Kingdom

Better late than never

There is no single, unitary law of unjust enrichment or restitution; the cases we find grouped together under these headings share no common rationale or principle. Such is the central claim of *The Laws of Restitution*.

Is this news? Unjust enrichment is, so its advocates have long insisted, a source of rights and liabilities of the same order and importance as contract and torts. The supposed achievement of unjust enrichment was to have discerned the essential likeness of a body of cases which were not only factually diverse but doctrinally disparate. And, by collecting these essentially like cases together, we were now better positioned to ensure they received the like treatment they merited. For this to be true, these cases needed to be alike in their rationale, giving expression to, as Stevens puts it, some common principle of justice. Yet unjust enrichment advocates consistently refused to offer any account of the reasons they thought underpinned these claims and, with this, their claim that these were indeed like cases went undefended. Meanwhile, those who did address this question all came to the same sceptical conclusion: they were not.

Stevens' principal argument against unjust enrichment accounts is that they offer the wrong sort of reason. Private law rights are bilateral and this means that the reasons which justify them must be bilateral too. And so, for Stevens, we will not find the reason for restitution of, say, mistaken payments in the fact of the claimant's state of mind when making the payment, for this leaves the defendant out of the picture. But the idea that the structure of private law rights dictates the sorts of reason which may properly bear on them is a (popular) non-sequitur, and the bilaterality of private law overstated: see C Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford, 2016), 57–60. True, the liability of, say, a recipient of a mistaken payment is not just a liability to give up the sum received but a liability to give it up to the payor at the latter's behest. But, if an attempt to justify these claims fails, it fails on its merits—on its inability, in the end, to identify *good* reasons for *this* liability—not because there is some formal limit on the sort of reasons to which private law claims might respond. In any event, Stevens is too generous here to unjust enrichment: its problem is not that it gives us the wrong sort of reason but that—as its proponents were only too happy to tell us—it identifies none at all.

If not unjust enrichment, then what? Stevens' sceptical forebears offered differing accounts. Some have taken the view that a chunk of cases at unjust enrichment's core are best understood as protecting the claimant's interest in whatever it was that the defendant received from them. If I pay you cash by mistake, we find the reason for restitution in the fact the money was mine and that I did not intend you, in the circumstances, to have it: see eg P Jaffey, *The Nature and Scope of Restitution* (Oxford, 2000); Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (2016). For Stevens these cases are better understood as concerned with “unjustified performance”. It just so happens that, in these cases, the performance is a property transfer and the reason it is unjustified is that the claimant lacked any effective intention to make it. The property theories do a better job of explaining the justice of these claims and the interests they protect. Another group of cases have sometimes been accounted for on (broadly) contractual grounds: see eg S Hedley, “Implied contract and restitution” [2004] CLJ 435. I do work for you, at your request and on the shared understanding that I am to be paid for it. However, either we reach no final agreement on the precise terms of my payment or the agreement we do reach is, for one reason or another, legally ineffective. In allowing me to recover a reasonable fee for my work, the law, so it has been argued, nonetheless sees that the agreed basis of my work is upheld. Stevens explains these cases as based on an idea of conditional performance: my work was done on the agreed condition it would be paid for, my claim ensures this. Here too Stevens is closer to the prior sceptics than he would care to admit.

One of the sorrier features of unjust enrichment scholarship is that sceptical views were never taken seriously by the unjust enrichment in-crowd and, as a result, received no serious response. Unjust enrichment sceptics were regarded as little better than flat-earthers; why waste time considering their arguments when their conclusions were so obviously wrong? And so unjust enrichment lawyers continued to spread the word, the sceptics barely referenced in the literature, routinely ignored in the classroom. The real significance then of *The Laws of Restitution* is less the message than the messenger.

Stevens is a serious guy, his credentials impeccable, until recently a committed Birksian, and indeed the closest we have to Birks in verve and sway. Now, and only now, unjust enrichment loyalists are scrabbling around for a defence for their subject. They will not find one.

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Performance-based unjust enrichment: a legal transplant from Germany?

As Stevens explains in Part VIII of this book, his performance-based classification is substantially closer to German law than what Birks proposed when he sought to explain all of unjust enrichment with absence of basis. Stevens is in line with German law by focusing the absence of basis approach on enrichment by performance, thus excluding in particular *negotiorum gestio*, most cases of improvement of somebody else's property, and also cases of payment of somebody else's debt (see G Dannemann, *The German Law of Unjustified Enrichment and Restitution* (Oxford, 2009), 13–18).

Having to align his classification with English case law, it was difficult for Stevens to avoid some path dependency, causing some rebranding of the prevailing unjust factor approach, which in turn kept one element of its predecessor model of a quasi-contractual promise to return an enrichment. English case law is very good at effectuating change through incremental development, but less good at discarding old baggage.

This rebranding occurs in the book by reallocating the two most important unjust factors to two different types of performance-based claims. Cases where restitution is allowed under the unjust factor of “mistake” thus become cases of “unjustified performance” (Part II), whereas failure of consideration is rebranded as “conditional performance” (Part III). While “unjustified performance” makes mistake superfluous, “conditional performance” falls short of likewise abolishing all relevance of a failure of consideration.

This distinction is quite different from German law, where “unjustified performance” covers all situations where some value has been shifted deliberately but where, at least in hindsight, there was no legal basis for this shift. In Roman law terminology, this covers all of the *condictiones indebiti*, *ob causam finitam* and *ob turpem vel iniustam causam*, whereas Stevens' “unjustified performance” covers less than the *condictio indebiti*.

Some other unjust factors can easily be outsourced to what Stevens sees as a different law of restitution, such as “legal compulsion”, which relates to payment of another's debt, or “necessity” for *negotiorum gestio* (Part IV). There remain, however, several unjust factors which are very clearly associated with performance-based enrichments but are more difficult to integrate in Stevens' classification. Illegality is treated within Part VII on countervailing reasons, where it cannot cover illegality as an unjust factor. Incapacity as an unjust factor is relegated to Part V on property and trusts, which fails to cover non-proprietary restitution on the basis of this factor.

We now come to the last pocket of “quasi-contract”. Central to establishing unjust enrichment as an autonomous area of law was the insight that unjust factors are not derived from contract law but are autonomous. Mistake in unjust enrichment is much wider than

mistake or misrepresentation in contract law, and failure of consideration is much wider than termination or frustration of contracts.

However, there is one area where quasi-contract, to borrow a phrase from Maitland, still rules us from its grave. The unjust factors of “duress” and “undue influence” are not autonomous. While even the most stupid mistake can suffice, and occasionally also a mistake which is just as fictitious as quasi-contracts, situations in which rational actors are pressurised into making unjustified payments under protest, neither admitting nor creating liability, are treated as if they had entered into a fictitious contract of settlement. Such quasi-contracts can be rescinded only under contract law rules, those on duress or undue influence.

In Stevens’ classification, these should be cases of unconditional “unjustified performance”, to be returned for want of a legal basis. Instead, he rebrands the unjust factors of duress and undue influence as a defence of consent. Anybody who pays an unjustified demand under pressure without mistake or reservation consents to the demand and therefore deserves not to recover. If applied to tort law, such a notion of consent would produce disastrous results: there would be no consent to a life-saving operation if a patient were mistaken about the zodiac sign of the surgeon (causative mistake) but valid consent to unnecessary surgery if the patient had succumbed to the surgeon’s lawful threat to stop treating this patient altogether. Such grudging consent thus becomes Stevens’ answer to the “grudging gift” that Birks employed to justify his absence of basis approach.

Stevens aims “to ensure that no further books on this topic are written” (p.3). My inkling and hope are otherwise. However, his book is certainly full of insights, very thought provoking and highly readable, with quite a number of parallels to German law. At the same time, this is, and rightly so, a very English book about English law.

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III. PERFORMANCE

Unjustified performance

We are in the age of disruptions, and the latest is in the form of legal and intellectual disruption introduced by Stevens in *The Laws of Restitution*. Stevens argues that a core part of the law of unjust enrichment (most notably the claims based on mistake) are concerned with “unjustified performance”. In each case, it is to be asked if there has been a “performance” by the claimant for the defendant that has been accepted by the latter.

Two points are of note. First, the connection between the claimant and the defendant—the work that is done by the “at the expense of” inquiry under the Birksian framework of analysis—is constituted by the requirements of a performance by the claimant that is directed towards the defendant. Second, the justification for requiring a defendant to reverse the performance is grounded in their having no

entitlement to the claimant's performance, and importantly is not grounded in any concept of vitiated consent.

On the degree of connection between the parties that is required, the prevailing English approach is that enunciated in *Investment Trust Companies v HMRC* [2017] UKSC 29; [2018] AC 275, which, as a general rule, requires a "direct transfer of value". But included within this rule are a number of situations that the law regards as "equivalent" to a direct transfer (*ibid.*, [50]). Amongst the examples of sufficient indirect dealings listed by the Supreme Court, the "single scheme" exception proves to be the most difficult. Focusing on "economic reality" of the transactions leads to too much restitution; focusing on the "transactional reality", on the other hand, may be unduly technical. Stevens' proposed approach may not fare better. This is because the concept of a performance by the claimant (ie that it must be their action) and the requirement that it is directed towards the defendant are not concerned only with factual events. Agency—in fact, I would argue a stretched notion of agency—is employed by Stevens to show when an action by a third party might be regarded as an action by the claimant. Would Stevens agree with the denial of restitution in *Tecnimont Arabia Ltd v National Westminster Bank Plc* [2022] EWHC 1172 (Comm); [2023] Bus LR 106? Who rendered the performance in the international inter-bank transfers? Further, Stevens cannot quite explain the decision in *Relfo Ltd (in liq) v Varsani* [2014] EWCA Civ 360; [2015] 1 BCLC 14, which he treats as an outlier case and which is separately discussed under the heading "Complex payments" (p.39). The term "complex" says little about how to rationalise the outcome in *Relfo*; on the contrary, it suggests that there is difficulty in explaining it. Complexity, an amorphous concept, does not explain why the need to apply "tracing" rules could be waived in that case.

As to demonstrating that there is no entitlement to the plaintiff's performance, Stevens argues that we need first to think about what good reasons there may be for the performance (p.78). In addition to enforceable obligations and unenforceable obligations, Stevens includes "convention" as a good reason. But the brief discussion found on p.79 does not present a sufficiently compelling case. The term "convention" could refer to a customary practice of a particular trade or a social convention that has emerged by reason of the regularity of a certain type of behaviour. Showing that a convention exists does not explain why it constitutes a good reason for entitlement. Whilst customary practice of a particular trade generally exists for commercial convenience and to reduce the costs of specific negotiations, there could be a variety of reasons as to why a social convention exists. In the case of tipping restaurant staff discussed by Stevens, in some societies, this is to ensure that the service staff are properly remunerated for their work because tips constitute a substantial part of their wage. In other societies, it may be to encourage the virtue of generosity, in which case to deny restitution where a tip has been paid mistakenly seems to go against the very reason for the existence of the convention. Further, Stevens says that "good reasons" are "objective reasons of entitlement to the performance made, that apply to both parties" (p.79). In the context of social conventions, this raises the question whether the parties need to be part of the same community or, at the minimum, that both know or can reasonably be expected to know about the existence of the convention.

Disruption can be both a threat and an opportunity. As much as Stevens seeks to threaten the Birksian enterprise of a unified law of unjust enrichment, and irrespective of whether he has succeeded in his mission, he has presented us with an opportunity to appraise the subject's key underpinnings through fresh lenses.

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The concept of "performance" and its limits

I agree with many of Stevens' propositions, in particular that there is a distinct category of restitution after a performance has been rendered, that it is the performance that must be reversed and not an enrichment, and that restitution is, in principle, based on a lack of entitlement. My main criticism concerns Stevens' notion of "performance".

First, Stevens correctly maintains that, if a principal pays the recipient with the help of an agent, the agent performs towards the principal and the principal performs towards the recipient (pp 33, 36, 41–43). In cases such as *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] 1 Lloyd's Rep 225; [1980] QB 677, where the agent bank mistakenly assumes the existence of an order by its client, Stevens says that the payment of the bank cannot be a performance towards its client, so it has to be a performance towards the recipient (p.45). However, the lack of a valid order cannot change the fact that the bank by its payment intends to fulfil an obligation towards its client. It therefore "performs" towards its client. Of course, it does not follow that the bank can recover from its client: Since there was no valid order, it did not confer anything on its client. Instead, the bank can recover from the recipient. However, this is restitution outside performance.

Stevens' notion of performance therefore goes too far. The bank's intention is the same as in the case of a valid order: it pursues a purpose towards its customer, not towards the recipient. In the same way, the recipient intends to receive a payment from the client, not from the bank. It does not "accept" a performance by the bank. For Stevens, however, every bank transfer involves an automatic acceptance (p.50). This idea of a performance, which can exist even if the payor does not pursue a purpose towards the recipient and even if the recipient's "acceptance" merely consists in having a bank account, is unhelpful. Its only purpose seems to be to restrict restitution outside money payments.

Secondly, outside payment cases, Stevens correctly maintains that the mere fact that the claimant's actions have caused the defendant to be enriched is not enough to justify restitution even if the defendant was not entitled to the enrichment (eg, the rising heat case at p.29). He therefore requires a request or an acceptance by the defendant (p.46).

Stevens seems to say that it is easier to assume such a request in the case of a conditional than in the case of an unjustified performance (pp 49, 81). Some kinds of performances, namely inactions, indeed only seem to be actionable if the performance is conditional (*cf* pp 38, 132–133).

Conditional performances require an agreement that the entitlement to the performance is conditional. The request or acceptance is usually part of this agreement. Such an agreement does not necessarily have to be a valid contract: informal, incomplete, or unenforceable agreements suffice (pp 69, 111–114).

Where a contract is avoided, eg for misrepresentation, the request or acceptance is, in Stevens' view, also invalidated. In order to explain why restitution of services is nevertheless possible, Stevens resorts to the idea that, before rescission, the claimant was legally obliged to perform to the defendant (p.81). This liability forms a bilateral reason for restitution (*cf* pp 20–21) and serves as a substitute for the agreement. However, it seems that this explanation does not work where the contract that has been caused by misrepresentation is unenforceable for other reasons, since the claimant was in this case never legally obliged to perform.

Where the contract is void from the beginning, Stevens seems to think that there cannot be an extant agreement and therefore no acceptance justifying restitution for services (*cf* pp 81, 123–124, 384). This proposition is difficult to maintain in light of cases such as *Craven-Ellis v Canons Ltd* [1936] 2 KB 403.

In my view, the distinction between void (no acceptance) and unenforceable (acceptance possible) contracts is tied to the question whether restitution can be claimed after full performance, not to the question whether restitution of services is possible. If, as Stevens correctly maintains, there can be an acceptance without a valid contract, there can also be an acceptance where the contract is invalidated or void. Restitution should then depend on the reason for the invalidity. Where I perform services to someone who misled me about their ability to pay, the acceptance on their side should be valid. In contrast, where someone misrepresents to me that the law requires me to paint my house white and I therefore contract with them to do so and later rescind the contract, my acceptance should arguably not count.

Finally, for Stevens, there is generally no restitution outside performances because the justification for recovery cannot be wholly claimant-sided (pp 46, 48–49). In contrast, German law accepts “claimant-sided” restitution in cases where the claimant, without “performing” towards the defendant, directly confers a benefit on them. Since direct conferrals of benefits are difficult without co-operation, the situations where such claims are conceivable are limited. They come down to directly improving another's property, discharging another's obligation, and direct money payments that are not performances, in cases such as *Simms*. Restitution is then generally confined to the amount of the claimant's expenses. The benefit on the side of the defendant forms a justification for shifting the claimant's loss, at least in part, to the defendant.

It is true that German law is more liberal in granting restitution to mistaken improvers and to claimants performing another's obligation. However, these cases represent a category of claims that English law needs to tackle as well. Stevens does mention the improvement and discharge cases in his book (pp 50, 153–172, 264–288) but does not integrate them into a structure. For example, he allows restitution claims in the discharge cases, arguing that we are not imposing any new obligation upon the defendant beyond what they were already obliged to do (pp 153–154). However, restitution can, in the result, convert the defendant's obligation to perform a service into a monetary obligation and can also deprive them of defences. A better argument is needed why, in these cases, restitution should be possible in that way.

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Failure of condition

Part II of the book (Unjustified Performance), typified by *Kelly v Solari* (1841) 9 M&W 54; 152 ER 24, involves reversals of a performance by the claimant (*C*) towards the defendant (*D*) for no good reason. By contrast, Part III (Conditional Performance) involves reversing a performance rendered under an *agreement* because *D*'s entitlement to the performance from *C* was agreed to be conditional, and that condition has failed.

For Stevens, “conditional performance” claims have a “quite different justification” (p.10). It is the (failed) condition—located within the agreement, objectively construed—that ultimately justifies *D*'s obligation to make restitution to *C*, not “unjust enrichment” as a larger umbrella principle.

Why then is this not just contract law? Because not all agreements are contracts, and conditional performance claims exist for non-contractual agreements. Stevens demonstrates this with examples of agreements “subject to contract”, informal agreements between spouses, agreements unenforceable because of want of formality, agreements unenforceable for want of consideration, and agreements insufficiently certain or complete to amount to a contract.

Change of position

Stevens argues that conditional performance claims are of a different species from unjustified performance claims. He points to the change of position defence. It seems to me that there are two distinct arguments here. One is more avowedly normative. The second is less so; it is based on an inference as to the best explanation of the positive law as it currently stands.

The normative argument is that the justification or ground for the right to restitution—the agreement—must also govern the defences applicable against said ground. Thus, Stevens concludes that even though unjustified performance claims can (or perhaps should) be met with a change of position defence, conditional performance claims cannot (or should not). To allow such a defence would be to re-write the parties' agreement.

The second argument is that, if these claims were indeed species of the same genus, then we could draw analogies between them. But Stevens thinks that we cannot draw these analogies. Hence, he concludes that they are species of a different genus and no “unjust enrichment” umbrella unites them. Presumably Stevens thinks these claims are disanalogous because, as a matter of the positive law in England, the courts have not allowed change of position in “failed condition” claims: see eg *Goss v Chilcott* [1996] AC 788; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549. However, it may be doubted whether this premise remains true: see *Banca Intesa Sanpaolo SPA v Comune di Venezia* [2022] EWHC 2586 (Comm), [393–425] and [2023] EWCA Civ 1482, [191–196], decided after publication of the book.

Stevens' disaggregation may cause difficulties reconciling concurrent claims arising on the same facts. Suppose that in *Kelly v Solari*, Mrs Solari had innocently changed her position by going on holiday. Must she repay her mistaken insurer? On the orthodoxy, there are concurrent unjust factors of mistake and failure of basis; both parties acted on a shared but false assumption as to an existing state-of-affairs. Does this mean that

change of position is also precluded as a defence to the mistake (read now: “unjustified performance”) claim? Or does Mrs Solari’s innocence mean we should “forgive [her] the burden of restitution”, so that change of position should apply to both the unjustified performance and conditional performance claim? For Stevens, the change of position defence provides an immunity from suit, and is meant to protect innocent defendants from being left worse off (“innocent” in the sense that the defendant’s moral responsibility for what the claimant seeks to reverse is low and there is no wrongdoing on their part). It is worth considering whether Stevens’ preferred justification for a change of position defence, and its legal effect, is consistent with his view of conditional performance claims.

Terminability and discharge

Stevens gives another reason for disaggregation. In unjustified performance claims it is necessary first to invalidate any extant contract that covers the performance in question—in his terminology, to “nullify” or “negative” any reason (read: basis) for *C*’s performance towards *D*. But, in conditional performance claims, the presence of an extant agreement is an essential element. Termination is not. Termination is a red herring and is neither sufficient nor necessary for restitution: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

However, Birks conceived of “terminable” or frustrated *contracts* as “subsequent failures” of an initially valid contract. He thought that they should be put alongside contracts voidable for misrepresentation, duress or undue influence at the base of a pyramid, with “absence of basis” at its apex: P Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005). Imprecision led to inaccuracy. *Pace* Birks, Stevens emphasises how termination, like frustration, discharges only specific *obligations* under a contract—and not the “contract”. Accrued obligations are left unaltered.

By focussing on the conditionality of obligations and disregarding defendant enrichment, Stevens provides a powerful new analysis of the frustration cases and the Law Reform (Frustrated *Contracts*) Act 1943. It is well worth reading in full and mulling over. When doing so, readers should also bear in mind Stevens’ argument that “unjust enrichment” is a misnomer, because what is restituted in these cases is a performance by the claimant towards the defendant, which the defendant accepted. What is restituted is not the performance’s consequence, ie the consequential gain or enrichment of the defendant.

I suspect Stevens’ view on the basis of frustration would strike most contract lawyers as anachronistic or unorthodox. For him, frustration occurs *because* of the agreement; parties have *agreed* to defeasible obligations, defeasible because subject to a condition (subsequent). Therefore, restitution of payments should be governed by the agreement, and the same principles as those applicable outside the context of frustration should apply.

This causes him trouble with unforeseeable events: how can parties have agreed, at the time of agreement, to attach as a condition to their performance, an event which they could not and did not foresee? Frustrating events are typically unforeseeable. It also conflicts with *Roxborough*, which Stevens wants to say is correctly decided. As Gleeson CJ, Gaudron and Hayne JJ held there (at [20]):

Although an attempt was made by the appellants to invoke an implied agreement under which they could claim repayment of any unpaid tax, it was artificial and unconvincing. The parties made no agreement, express or implied, about what was to happen if the tax was held to be invalid. If there is here a right to enforce repayment upon the basis of a failure of consideration, it is because, in the circumstances, the law *imposes* upon the respondent an obligation to make just restitution for a benefit derived at the expense of the appellants. (Emphasis added.)

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IV. PROPERTY AND TRUSTS

Property

Two particular aspects of the book's treatment of "Property" will be examined in this section: ignorance and rescission.

Ignorance

Stevens' insistence on speaking throughout the book of rights with respect to (physical) things when discussing legal property rights is to be applauded. A failure to make this distinction is a feature of much writing in unjust enrichment, with Birks, Burrows and other commentators talking of the mistaken transfer of "cars" or "land" simpliciter, rather than the transfer of *rights* with respect to cars or land. This allows them to say that an unjust enrichment claim can arise in favour of someone whose pocket is unknowingly picked, the "unjust factor" being "ignorance", the thinking being that such a claim is analogous to *Kelly v Solari*. If a mistaken transfer of money generates a claim, then a transfer of which the claimant is completely ignorant should do so too. However, once we think in terms of rights, then it is clear, even within Birks' own four-stage structure, that the thief's enrichment is not at the victim's expense—the thief's title has not come from the victim. Stevens gets to the same conclusion through a different route. For him, the pickpocket case has nothing to do with *Kelly v Solari*, because that case involved a performance from claimant to defendant, whereas there is no performance from the victim to the thief. Any claim against the thief would instead be dependent on an interference with C's pre-existing right, something not a feature of cases of mistaken payments. That must be right.

The reason this matters is Birks' attempt to transpose this unjust enrichment explanation to equity, to show that cases insisting on fault for recipient liability were wrong in treating "equitable property" differently to "legal property". However, if the pickpocket example does not generate an unjust enrichment claim at law, then Birks' logic once again does not work. We can say either that the defendant's enrichment (the title previously held on trust) does not come from the beneficiary or, with Stevens, that there was no performance from beneficiary to recipient. Either way, there should be no unjust enrichment claim in such cases, and in *Byers v Saudi National Bank* [2023] UKSC 51, [30], [102], counsel on

both sides were right not to pursue an argument based on unjust enrichment before the Supreme Court.

Rescission

According to Birks, where rights are transferred pursuant to a contract and one party to that contract has the power to set it aside for some reason, eg, fraudulent misrepresentation, duress, undue influence or breach of fiduciary duty, the power to do so is proprietary, because its exercise either causes the right itself to revest (at law) or turns the recipient into a trustee (in equity). The contracting party has a “power *in rem*”, arising as a response to either unjust enrichment or wrongdoing.

Stevens does not see the power to rescind at law as arising as a response to unjust enrichment: “the title to goods that revests because of rescission of a contract ... has nothing properly to do with ‘unjust enrichment’” (p.211). However, whilst it is true that the title which revests has nothing to do with unjust enrichment, this misstates Birks’ position; he said, instead, that it was the giving to the contracting party of a power to avoid the contract and thereby to revest title that was such a response. Can that not be lined up against the “right” to be repaid a mistaken payment arising in cases such as *Kelly v Solari*? In that sense, are they at least not cousins? Stevens is frustratingly silent on the source of the power to rescind, seemingly thinking that it has something to do with the rules on formation of contracts. However, it is difficult to say that it is the rules governing offer and acceptance, because the contracts in such cases are valid until set aside. If the law gives the defrauded party the power to rescind, it must come from somewhere, and a species of unjust enrichment (or wrongs) seems at least a plausible source.

As to rescission in equity, Stevens agrees with the orthodoxy that the order of the court turns the recipient into a trustee. The reason for him is that the defendant, now being under a duty to reconvey a particular right, is under a duty not to use it for his own benefit, which generates a trust. Such thinking is problematic. First, it is not supported by the cited authorities, the reasoning of which instead speaks of “the beneficial interest” re-vesting. Second, the trust in these cases backdates to the point of transfer; yet, if driven by a duty on the transferee not to use the right for their own benefit, which duty arises only on the making of the court order, Stevens’ trust cannot backdate. A better explanation of this trust is therefore needed.

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Trusts

In Chapters 12 and 13, Stevens argues that “unjust enrichment” explanations for trusts are unnecessary and unhelpful. They are unnecessary because the creation of such trusts do not depend on whether *D* was enriched by “value” and unhelpful because they fail to explain the different conditions required for the creation of such trusts (for example, *D*’s knowledge of certain facts).

Instead, Stevens advances an alternative account, which takes the following steps:

1. The reasons for equitable proprietary rights must fit their form.
2. A beneficiary's (*B*'s) rights under a trust have a specific form: *B* has rights in relation to specific rights of the trustee (*T*) and, correlatively, *T* has duties in relation to those specific rights.
3. The content of *T*'s duty is not to use the identifiable specific rights for *T*'s own benefit.
4. This duty of *T* is both a necessary and sufficient condition for a trust.
5. *T* owes such a duty only where they know of the facts creating that duty.
6. Where *D* has a duty to convey a specific right to *C* and knows the facts creating that duty—whether that duty arises from contract or wrongdoing or is restitutionary—then, because *D* has a duty to convey that specific right to *C*, *a fortiori* *D* must be under a duty not to use the specific right for *D*'s own benefit. This simply is a trust.
7. The duty to convey explains why *D*'s enjoyment of a specific right is restricted: this reason fits the form of *B*'s equitable proprietary rights under the trust; policy reasons do not.

Although Stevens describes this account as “mainly analytical and descriptive rather than normative” (p.262), he does offer reasons for why these trusts arise. Why trusts arise “piggybacks” onto the reasons for restitution found elsewhere in the book: unjustified performance and conditional performance. Where *C* obtains a right to restitution in unjustified performance and conditional performance cases that is of the correct form, on Stevens's analysis, this just is a trust (Step 6).

If accepted, Stevens's argument would have significant practical consequences for the positive law. It would substantially increase the availability of proprietary restitution, particularly in unjustified performance cases. Stevens himself accepts that his account applies even where *C* transfers only specific rights to cash to *D*. A mistaken payment of money can thus generate a trust once *D* knows of the mistake. He thus effectively endorses Lord Browne-Wilkinson's interpretation of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 715. One might question why proprietary restitution should be so readily available. Where the rights transferred by *C* to *D* are not unique, why should *C* have all the benefits of a trust, including protection against *D*'s insolvency and rights to substitutes?

The analysis relies heavily on a precise understanding of trusts (Steps 3 and 4), which Stevens develops in this book and in earlier work with Professor Ben McFarlane. If the duty identified in Step 3 is a sufficient condition for a trust, then a trust should exist whenever the duty is present. Might agency provide a counter-example? An agent has authority (a power) to act for his principal and owes duties to the principal not to use that specific power for his own benefit. However, agency is not a trust, contrary to Steps 3 and 4.

It is also doubtful whether it is necessary for the creation of a trust that *T* knows of the facts creating his core duty (Step 5). Express trusts may be settled without the trustee's knowledge: *Smith v Wheeler* (1671) 1 Vent 128; 86 ER 88; *Siggers v Evans* (1855) 5 El & Bl 367; 119 ER 518; *Mallott v Wilson* [1903] 2 Ch 494. Likewise, resulting trusts may

also arise when the resulting trustee has no knowledge of the relevant facts, eg in *Re Vinogradoff* [1935] WN 68 (where the trustee-granddaughter was four years old); *Birch v Blagrove* (1755) Amb 264; 27 ER 176; *Childers v Childers* (1857) 1 De G&J 482; 44 ER 810. A better analysis may be that *T* owes the duty not to use the rights for their own benefit even without knowledge of the facts creating that duty, but that that duty cannot be enforced against *T* until they acquire knowledge. If so, the question may then be whether such an unenforceable duty can be described as a trust.

Finally, if Step 6 is true, then, whenever *D* owes such duties, a trust should arise. But there is at least one counter-example. Where *D* gratuitously promises in a deed (ie *D* covenants) to convey a right to *C* in the future, no trust arises: see eg *Re Plumtre's Marriage Settlement* [1910] 1 Ch 609; *Re Pryce* [1917] 1 Ch 234; *Re Kay's Settlement* [1939] Ch 329; cf *Fletcher v Fletcher* (1844) 4 Hare 67; 67 ER 564. Stevens regards this example as an exception to the general rule in Step 6. He explains it on the basis that Equity does not recognise any duty owed by *D*. This reasoning, based on Equity's exceptionalism, is questionable. There is evidence that *D* does still owe a duty at common law to convey the right to *C* which, if breached, will give rise to substantial damages: *Re Cavendish-Browne's ST* [1916] WN 341. If so, then *D*'s common law duty to convey should similarly mean that *D* is under a duty not to use the specific rights for *D*'s own benefit. On Stevens' account, *D* should hold the rights on trust, but the law says otherwise.

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Tracing

Stevens disputes the unjust enrichment explanation for tracing as “at best, otiose”, as there is no “performance” (payment) from the claimant to the defendant-recipient of the traceable substitute, no causal link, and the right received by the defendant is not always enriching (pp 191, 211, 259–261). For him, the claimant's relief is grounded in their prior right to the property claimed. Building on this view, he considers the concept of common law tracing absurd: an owner's claim to the recovery of stolen property hinges on the owner's prior right to it, but the owner has no prior right to its substitute; that right belongs to the defendant (pp 206–209).

Whether Stevens is right about the irrelevance of unjust enrichment to tracing hinges, in great part, on his conception of performance, which has been considered above in the contribution by Professors Sonja Meier and Man Yip. As for the idea of common law tracing, it may not survive Stevens' persuasive criticisms, which echo those of Hafeez-Baig and English (M J Hafeez-Baig and J English, *The Law of Tracing* (Sydney, 2021), pp 64–97).

Nonetheless, victims of theft need not despair, as Stevens champions an expansive view of the trust and equitable tracing, contending that, because thieves must relinquish possession of stolen property, they become a trustee of their inferior title acquired by possession (p.245). The “because” here is likely to raise a few eyebrows. Whilst an express trustee must also deliver up trust property, it does not follow that whoever is required to do

so becomes a trustee. A thief might need to do so simply because the thief has an inferior title to that of the owner.

Having rejected the unjust enrichment explanation, Stevens applies the late Professor John Gardner's continuity thesis to explain equitable tracing. Stevens argues that, when trustees make an unauthorised substitution, the reasons for their original duty persist and create a new duty to do the next-best thing, which is to hold the substitute on trust for the beneficiary (p.243). His next—crucial—move is to extend Gardner's duty of next-best compliance beyond defaulting trustees to the recipients of trust property, including innocent volunteers. Stevens acknowledges that, whilst innocent volunteers have no duty to refrain from selling trust property for their own benefit, once they have acquired notice after the sale, they must hold the sale proceeds on trust, as it is too late for them to comply with the original duty in relation to the property sold (p.244).

These propositions need some unpacking. Gardner used the reason for the wrongdoer's original duty to justify the wrongdoer's reparative duties, not those of some other persons outside the relevant private law relationship (J Gardner, *From Personal Life to Private Law* (Oxford, 2018), 111–112, 116–117). It is therefore unclear why the reasons for a trustee's original duty to a beneficiary would generate a duty of next-best compliance for parties outside the trust relationship, including innocent recipients. A more orthodox application of the thesis would be to focus on the original duty of the innocent recipients themselves. However, Stevens accepts that they had no original duty when they innocently sold the property. It is puzzling how that non-duty (and lack of wrongdoing) could generate a duty of next-best compliance with respect to the proceeds of sale after notice is acquired.

Another important question is what next-best compliance entails for an innocent recipient. Suppose the recipient innocently expends labour and money researching investment opportunities, and then sells the trust property and uses the proceeds to purchase company shares that triple in value within a year, outperforming the market by a wide margin. It is not immediately obvious why the duty of next-best compliance should compel the recipient to relinquish the shares without recompense for their labour and expenses. After all, the recipient will be worse off than before if required to restore the substitute in full. In light of these questions, the continuity thesis adds very little to analysing difficult issues in the law of tracing.

A better view is that the innocent recipient's proprietary liability is conditional on their acquiring notice. Until they acquire notice, the innocent recipient's rights to the trust property are not subject to the limitation that they do not deal with the property in a manner inconsistent with the terms of the trust. Therefore, they will not be held liable for innocently substituting or dissipating trust property. However, this does not mean that they can override the claimant's right to enforce the trust in respect of the substitute that they have retained, as they are not Equity's Darling. Once the innocent recipient acquires notice, they are subject to this limitation, even if the retained substitute is worth more than the original trust property.

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V. WRONGDOING

Like the whole book, Part VI, on “Wrongdoing”, addresses a miscellany of claims. There is, however, an important principle that runs through it: the justification for any money order that may arise from a wrong needs to be found in the reasons that justified the right that the wrongdoer breached. It is because those reasons are not uniform that the justifiable money orders reveal miscellany.

In Chapter 16, on Profits, then, we read that profit-stripping makes sense for intellectual property wrongs, and for breaches of confidence, because these rights exist for the purpose of allocating the benefits that arise from the exploitation of the relevant idea or information. It makes sense also for the unauthorised gains of fiduciaries, because the fiduciary profit-stripping rule is not a remedy for wrongdoing, but a rule of attribution that creates a primary right to the unauthorised profit. However, gain-based awards are not usually available for other contractual rights, because it was no part of the purpose of the duty to allocate profits to the claimant. This leads Stevens to argue that the only possible support for the award of profits in *Attorney General v Blake* [2001] 1 AC 268 is that the relevant profits were attributable to what was effectively a breach of a duty of loyalty. In the same way, he argues that gain-based awards are not generally available for torts, because the purpose of the duty breached was to prevent harm, not to allocate profit. The chapter ends with a discussion of waiver of tort, in the particular setting of a claim to the proceeds of an unauthorised sale by the defendant of the claimant’s asset. Here the full gain is recoverable, for reasons to which I will return.

Chapter 17 on Damages argues that the only way to make sense of so-called “negotiating damages” is as general damages: not compensation for consequential loss, but compensation for the infringement of a right, and moreover of a right whose purpose supports such an award. Thus, in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2018] 1 Lloyd’s Rep 495; [2019] AC 649, the Court was correct to deny such damages, because the purpose of the contractual duty not to compete was only to save the claimant from possible losses caused by competition.

I would make two comments. The first is that, while I understand the principle that it is the purpose of the violated right that dictates and controls the possible remedial outcome, I find it more difficult than Stevens to be confident about the purposes for which different rights exist. There is typically no such label on the tin. The other comment relates to counterfactuals: I find it less obvious than Stevens seems to do to identify what is the “right” counterfactual. He repeatedly reasons through counterfactuals, sometimes (as in the intellectual property context) to show us that the attribution of profits there does *not* work via a counterfactual analysis, and sometimes (as in waiver of tort) to show how a counterfactual analysis justifies an award measured by the price received (or perhaps retained, as both seem to appear on p.331) by the defendant on the sale of the claimant’s asset. In that setting, he says (p.329): “as between plaintiff and defendant, the plaintiff has a better entitlement to the proceeds produced in exchange for his right than does the defendant. ... *The relevant counterfactual is the position the defendant would have been in if the action had been authorised in advance*”, (emphasis added).

This, Stevens argues, allows the claimant to claim the price received without relying on the wrong. (Could he instead have used a version of the reasoning that he uses in relation to tracing, which does not depend on counterfactuals?) But why is *this* the relevant counterfactual? The defendant's action would have been lawful if it had been authorised in advance with the defendant's being allowed to keep 10 per cent of the proceeds, or indeed all of them. On the same page he says that a claimant cannot recover on this basis from a defendant who has merely made use of the claimant's thing. But why can such a claimant not say that the relevant counterfactual is the position that the claimant would have been in if the action had been authorised in advance, for a reasonable fee?

Philosophers say, if I understand them well, that counterfactuals may be neither true nor false. "If I had dropped my pen, it would have fallen to the floor". That seems true, partly because (1) the "if" part is not conceptually very far from the actual world, and partly because (2) the "would have" part is tightly linked to the "if" part (N Stoljar, "Vagueness, counterfactual intentions, and legal interpretation" (2001) 7 *Legal Theory* 447, 457–459). But, if the link between the two parts is less direct, the whole counterfactual may be impossible of assessment: "If I had dropped my pen, I would have cursed." Conversely, if we violate (1), then the counterfactual may be true or false, but only trivially: "If Michelangelo had been an insect, he would not/would still have painted the Sistine Chapel" (N Stoljar, "Essence, identity, and the concept of woman" (1995) 23 *Philosophical Topics* 261, 270; see also 286–287). If we violate both (1) and (2), it may again be impossible to say that the counterfactual is either true or false: "If Michelangelo had been a one-armed Canadian, he would still have painted the Sistine Chapel."

In law, reasoning with counterfactuals seems to require that they be true. In litigation, issues about (2) may play out as questions of proof, including who bears the burden of proving what would have happened in the counterfactual world where the wrong did not occur (see *Rainbow Industrial Caterers Ltd v Canadian National Railway Co* [1991] 3 SCR 3). It may seem odd to talk about "proving" what would have happened in a world that does not exist (proving non-facts); but, even before that, we must make a decision in relation to (1): that is, which non-existent world will be our guide. In relation to many wrongs, there may be a large number of hypothetical worlds in which the wrongdoer is not a wrongdoer. In a case of negligent misrepresentation, do we suppose that the defendant told the truth, or said nothing, or took more care (in which case they *might* have said the same inaccurate thing)? My colleague Professor Janet O'Sullivan likes to make the point that you can get to negotiating damages as consequential loss if the counterfactual is a world in which the defendant acted lawfully not by doing nothing—that is one counterfactual world—but by getting, and paying for, permission to do whatever it was that he or she did. If that is a valid move—and it does not seem that far from Stevens' argument for waiver of tort—then such damages would be much more widely available. If it is not, I for one would like to see a theory of how we identify the "right" counterfactual. Are we required to choose the counterfactual lawful conduct that is somehow *closest* to what happened in the real world?

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VI. COUNTERVAILING REASONS

Part VII of the book deals with “countervailing reasons”. The founding proposition of Chapter 19 is that illegality is not a defence, still less a defence specific to the law of unjust enrichment. Acts that are *mala in se* (theft, murder, bribery etc) should be treated according to the rule in *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120: where a party to litigation seeks to rely upon the commission of such an offence, the court should refuse to lend them its assistance. On the other hand, in the case of acts that are *mala prohibita*, the courts should rely on the ordinary principles of statutory interpretation to determine whether benefits rendered under an illegal contract can be recovered (the distinction between acts that are *mala prohibita* and *mala in se* roughly tracks that between offences created by legislation and those recognised by judges at common law). In cases where the statute contains no express provisions regarding restitution, this entails determining the purpose underlying the prohibition and whether that purpose would be advanced or stultified by restitution. There are no considerations specific to unjust enrichment at work here; rather, it is statutory interpretation “all the way down” (p.408).

Determining the underlying purpose of a statute and whether it requires or precludes restitution is not straightforward. This approach is likely to generate uncertainty, and therefore litigation, a difficulty that Stevens underplays. But his approach does dispense with what he identifies as the problem of incommensurability arising from the approach of the majority in *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd’s Rep 300; [2016] Lloyd’s Rep FC 435; [2017] AC 467. Equally, regarding acts *mala in se*, it is difficult to argue with Stevens when he says, “A legal system that gets itself into the position that bribes that do not succeed in their purpose are recoverable in court actions, or (even more extraordinarily) the recovery of payments for unsuccessful hit jobs actionable, is one that has confused itself” (p.406); cf *Patel v Mirza*, [176] (Lord Neuberger) and [254] (Lord Sumption), as well as [116] (Lord Toulson).

Turning back to Chapter 18, which deals with defences available against (what are generally understood as) unjust enrichment claims, I confine my remarks to change of position and consent.

Stevens argues that change of position is a defence in the proper sense rather than a denial of the enrichment element of the claim. More specifically, it is an immunity that seeks to ensure that innocent defendants are not left worse off by the restitution of unjustified performances. It does this by evaluating the conduct of both parties in order to allocate fairly the loss of the benefit received by the defendant. Thus, it lies “where the defendant’s moral responsibility for what the plaintiff seeks to reverse is low” (p.356).

However, if change of position is to be understood in this way, why does inducement by the defendant of the claimant’s mistaken belief that they owed the money not preclude change of position in English law? And why do English courts not care about inadvertent fault on the part of the defendant—whether they should have realised that the payment had been made under the influence of a mistake—or indeed on the part of the claimant, eg where they made the payment under the influence of a careless mistake? (cf in particular *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818; *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193). Stevens goes to

some lengths to distinguish responsibility from culpability, arguing that only the former is relevant to the defence as he understands it (pp 357–358). But why?

As for consent, where the claimant knowingly pays a sum that he does not owe, this gives rise to a privilege, eliminating the defendant's duty to make restitution. "Consent is here playing the same role as a defence as it plays in the law of torts (*volenti non fit iniuria*) and contract (waiver)" (p.73). Proof of mistake on the part of the claimant serves in turn to rebut this defence. In this way Stevens seeks to accommodate the rule—firmly established in English law—that on facts such as those at issue in *Kelly v Solari* it is for the claimant to show that they made the performance in question under the influence of a mistake. The exact nature of the relationship between consent and mistake is, however, unclear. On the one hand, the mistake in *Kelly v Solari* is said to "rebut a potential defence", showing that "the plaintiff did not consent to the state of affairs that he now seeks to correct" (p.76). Elsewhere, it is said that mistake in this role serves to "vitiating" (p.369) the claimant's consent: "if the [plaintiff] was making a mistake in paying (or was subject to duress or unjust influence) then they did not truly consent" (p.73). Thus, on the one hand mistake is understood to pre-empt a potential defence of consent, while on the other hand it is said to negate the claimant's apparent consent.

Both versions of the thesis are open to criticism. The claimant's mistake in *Kelly v Solari* cannot be understood to have vitiated their consent to the payment of an amount not owed: on those facts, mistake (the claimant believed the money to be due) and consent (the claimant knew that it was not due) are mutually exclusive. The mistake at issue in that case did not serve to vitiate the claimant's apparent consent in the way that mistake, duress or undue influence vitiate waiver or consent in the context of contract or tort: in *Kelly v Solari*, there was no apparent consent at all. If, on the other hand, mistake is to be understood as a technique for rebutting a potential defence of consent, the question arises why the law should assume consent as its starting point and then require the claimant to displace it through proof of mistake? Surely it would make better sense to assume mistake and require the defendant to displace that through proof of actual consent? (as German law does—*cf* BGB, § 814). Thus, while Stevens is surely right to emphasise mistake's role as a proxy for the absence of any entitlement to the benefit on the part of the defendant (he calls this "negating mistake", pp 72–74), in my view his account of mistake as a reply to consent requires further clarification.

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