AN INQUIRY INTO THE PHILOSOPHICAL FOUNDATIONS OF THE DEFENDANT'S DUTY OF RESTITUTION IN UNJUST ENRICHMENT

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ABSTRACT

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The aim of this thesis is to uncover the philosophical foundations of the defendant's duty of restitution in the law of unjust enrichment. I argue that the current dominant account for the duty of restitution – that it is best explained by the model of corrective justice – is inadequate as it fails to accommodate two key features of an action in unjust enrichment, namely, the irrelevance of fault and the absence of causation. In place of corrective justice, I suggest three alternative models: distributive justice, equity, and commutative justice. The first two candidates ultimately prove unsatisfactory, but in their respective failures help identify certain fundamental elements of unjust enrichment. The third is the most promising, but care must be taken not to conflate it with corrective justice. I argue that corrective and commutative justice are not synonymous since, while corrective justice exemplifies an intrapersonal equality, the relevant form of equality for commutative justice is interpersonal. I define commutative justice as exemplifying the principle of equality in exchange, specifically, equality of the things exchanged. Unjust enrichment, I conclude, is a manifestation of inequality of exchange, of commutative *in*justice. Although commutative justice accurately describes situations of unjust enrichment, I admit that it cannot alone *justify* the existence or imposition of the duty of restitution on the defendant. Something more is required: a normative theory for preserving the *status quo* of initial entitlement distribution. As such, I canvas two alternative theories as exemplified by Hegelian and Aristotelian conceptions of property, respectively. These two theories map onto a corresponding distinction between private (pre-institutional) rights and public (post-institutional) values. I conclude that *given* the *legal* duty of restitution and the fact that it is difficult to conceptualize a private right that could justify this type of duty on the defendant, the Aristotelian understanding is preferable.

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I. INTRODUCTION

The broad objective of this thesis is to explore the contours of private law theory as it intersects with values traditionally attributed to the realm of public law – specifically, political values. More narrowly, I will conduct an in-depth analysis of the philosophical foundations of one particular area of private law, the law of unjust enrichment (restitution).

Compared with long-established heads of private law, such as contract or tort, the law of unjust enrichment is a less-established newcomer.[1] As such, in these initial stages, an outline of its main features, illustrated through the following hypothetical interaction between Will and Sue, is helpful:

> Sue, operating under the mistaken belief that she is indebted to Will, deposits $100 into Will's bank account.[2] Will is innocent of any fraud, duress, negligent misrepresentation or the like *vis-à-vis* Sue. He is unaware of Sue's mistaken belief and either honestly believes she was indebted to him for the sum of $100 or is ignorant of her payment into his account. Reasonable people will agree that Sue should, barring any further circumstances, such as Will's depletion of the value of Sue's deposit, be able in law to get her $100 back from Will. The law of unjust enrichment provides the legal mechanism to facilitate Sue's claim against Will.

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[1] Recognized in England in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL); in the United States, Restatement of the Law of Restitution (1937, American Law Institute); in Canada, *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785 (Supreme Court of Canada); and, in Australia, *Pavey Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (High Court of Australia).

[2] The following special situation generated by bank accounts should be noted: an account holder does not have a right to any particular money as symbolized by a credit to his account; rather, what he has is a right in action against the bank (a right *in personam*) for the amount of his deposit. For the purposes of this example, this special circumstance is not relevant, serves only to confuse, and so may be ignored. See: William Swadling, 'Unjust Delivery' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, Oxford 2006) 282.

Perhaps because of its relative youth, fertile academic debate surrounds the law of unjust enrichment. At present, the most heated doctrinal dispute is between those who ground the plaintiff's entitlement to restitution in some defect in her transfer (an unjust factor)[3] and those who ground it (and the unjust factors themselves) in the lack of legal basis for the defendant to retain the benefit (the absence of basis approach).[4] Other, less central, debates revolve around the appropriate measure of restitutionary awards (by either the defendant's gain or the plaintiff's loss),[5] the status of restitution for wrongs (either part of unjust enrichment or part of the law of wrongs),[6] and the role of equity.[7] Although my thesis will intersect with (and I hope illuminate) some of these central and non-central debates, none is my main concern. Rather, my focus is on *why* the defendant must transfer wealth back to the plaintiff – that is, on the *reason(s)* for the duty of restitution. This can also be stated in the converse as what grounds the plaintiff's ability to recover. This is different from the debate between the unjust factors and the absence of basis approaches alluded to above in that I am not so much concerned with how the case law is best interpreted, but rather in the philosophical foundations of the action.

A careful reader will notice that I am avoiding the term 'right' to refer to the plaintiff's ground of recovery *vis-à-vis* the defendant. In so doing, I do not mean to

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[3] Andrew Burrows, *The Law of Restitution* (2nd edn, Butterworths, London 2002); James Edelman, 'The Meaning of Unjust in the English Law of Unjust Enrichment' (2006) 14 Eur Rev Public L 309.

[4] Peter Birks, *Unjust Enrichment* (2nd edn, OUP, Oxford 2005) chapters 5-6; Sonja Meier, 'Unjust Factors and Legal Grounds' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, Cambridge 2002).

[5] Mitchell McInnes, 'The Measure of Restitution' (2002) 52 U Toronto L J 163, 179; Mitchell McInnes, 'At the Plaintiff's Expense: Quantifying Restitutionary Relief' (1998) 57 CLJ 472.

[6] Ian Jackman, 'Restitution for Wrongs' (1989) 48 CLJ 302; Peter Birks, 'Civil Wrongs: A New World' (*Butterworth lectures 1990-91*, Butterworths, London 1992); James Edelman, *Gains-Based Damages* (Hart Publishing, Oxford 2002).

[7] Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason Neyers, Mitchell McInnes, and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, Oxford 2004) 136-137.

suggest that the term is necessarily inappropriate in the context of unjust enrichment; rather, I avoid it in these initial stages because it begs the question. If I began by stating that the plaintiff has a right to restitution and the defendant a corresponding duty, I would be saying a number of things about their relationship that I have yet to demonstrate. In other words, for the moment, I would like to keep open the question of whether the law of unjust enrichment is in fact a legal manifestation of a right-duty relationship. My aim is to discover the justification for the defendant's duty of restitution, and it would presume the form of the answer to cast the question in terms of a right.

Despite avoiding the language of rights, I will refer throughout to the defendant's 'duty' or 'obligation'.[8] If the plaintiff's claim succeeds, the defendant is obviously legally obliged (by a court order) to pay the plaintiff restitution; therefore, it would be artificial to dodge this term. One could argue that, although legally obligated, he might not be *morally* so obliged, and thus I should also suspend usage of the terms 'duty' and 'obligation'. This objection, however, only serves to clarify my objective. While I am concerned with the normative foundations of this particular private law obligation, I nonetheless take the posited law as my starting point. In other words, my query is: *given* the existence and enforcement of the defendant's duty of restitution consequent an unjust enrichment, what normative theory furnishes it with the best explanation and justification? In addition, while it is conceptually possible to have a duty without a correspondent right, it is impossible to have a right without a duty.[9] It is sensible, for example, to assert that one has a duty not to harm

[8] For my purposes, the terms may be treated as synonymous.

[9] Some might counter that an individual's right to self-defense is a right without a corresponding duty. This, however, mischaracterizes the right to self-defense. The right to self-defense is a right to defend oneself and be free from the punitive repercussions for so doing. This is the interest protected. As

the environment, but the environment obviously does not hold a correlative right not to be harmed.[10] The very definition of a right – and here I adopt Raz' understanding, an adoption I will subsequently attempt to defend – is that which protects an interest sufficiently important to give rise to a duty in others.[11] To phrase this in more Razian terms, rights serve as the reasons for duties in others. Thus, a right necessarily entails a duty or duties in another or others.[12]

By suspending the long-held belief in the plaintiff's *right* to restitution for an unjust enrichment, we clear space for a more careful examination into the origins of the defendant's duty. The nature of the defendant's duty demands explication for the following reason: Unlike the majority of obligations in private law – here, I am thinking most specifically about torts and contract – where the duty on the defendant is negative (thou shall not 'breach the duty of care' or 'breach one's contractual obligations'), in unjust enrichment, the duty seems positive: the defendant shall 'return to the plaintiff the enrichment that came to him by way of the plaintiff's wealth.'[13] Since the defendant's duty in restitution is a duty to do something (return the benefit derived from the plaintiff's wealth) and it appears that the defendant need

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such, the duty that corresponds to the right to self-defense is the duty not to punish those who, absent the defense, would be considered to have committed a punishable offense.

[10] Supererogatory duties exemplify this, as well.

[11] Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 166.

[12] Raz, *The Morality of Freedom* (n 11) 171.

[13] Some might challenge my characterization of contract duties and argue that the duty to perform, because the defendant must *do* something, is positive in nature. I disagree. The flavor of contract's alleged 'positivity' derives from the norm-creating feature of contract. The parties create a new obligation (one that did not exist prior to their interaction). This new obligation is an obligation *to perform*, of performance. It is arguable that this is now a positive duty: the defendant must, to avoid breaching the contractual obligation, do something *vis-à-vis* the plaintiff. However, this duty can just as easily be explained negatively: the duty the defendant now has is that he *not* violate the new norm he helped create of bilateral performance. By contrast, a duty to enter into a contract would be a positive duty. That there is no such duty in private law is notable. In other words, once an obligation is generated, the duty is not to breach it, and this is a negative duty.

not do anything to create this apparent positive obligation, use of coercive state force through its legal institutions (the courts) requires stronger justification.[14] We must explain to the defendant why it is that absent fault, absent action, and absent consent (that is, absent the normal obligation-generating conditions) he must do something for the plaintiff.[15]

There are two potentially viable explanations: First, we could argue that the plaintiff has an antecedent right (against the defendant) to the return of the enrichment. Second, we could assert that the state has an interest in insuring certain ways of transferring wealth, that the transfer exhibited in an unjust enrichment undercuts these interests, and that procuring the enrichment back from the defendant is the most appropriate means to undo the transfer. Through a proper understanding of the normative foundations of the duty of restitution in unjust enrichment, I hope to shed light on the relationship and relative viability of these alternatives.

With few exceptions, the dominant explanation for the duty of restitution in unjust enrichment relies on the first explanation, namely, that the plaintiff has a right to restitution of her mistaken payment as against the defendant. In other words, the structure of the plaintiff and defendant's interaction is depicted as a correlative right-duty relationship: the plaintiff's right mirrors the defendant's duty. The model of

[14] I insert the relative term 'stronger' because state enforcement of negative obligations *also* requires a measure of justification. My point is that, while with negative obligations one can envisage the defendant as authorizing, through his fault or conduct or both, the state's use of force, with positive obligations this authorization is absent.

[15] One way to articulate the difference between the other obligations and that that arises from an unjust enrichment is through the Kantian conception of freedom as the naked capacity to choose *anything*. According to this Kantian conception, individuals are considered equals with respect to this abstract capacity to choose – we all have it and we all have it equally. The capacity is abstract because it is only a capacity; it is not the actualization of the capacity – not the exercise of the capacity to choose a particular thing. As such, the duty between private parties generally is one of non-interference with the other party's capacity to choose. Thus, the putative duty in unjust enrichment that requires the defendant to assist the plaintiff meet a particular end of hers (the return of her mistaken payment) appears to subjugate the defendant's bare capacity to choose (he is now constrained) to that of the plaintiff's (she now gets her desired end through the defendant's repayment).

justice normally employed to explicate this relationship is corrective justice. Consequently, corrective justice has thus far enjoyed a philosophical monopoly on the normative explanations for the duty of restitution in unjust enrichment. I will demonstrate that this dominance is undesirable: not only does it fail to describe accurately what is normatively salient in an action for unjust enrichment, but it may also inappropriately seal the law of unjust enrichment off from its political context.

In fact, the tenor of the scholarly treatment thus far of this area of law indicates precisely this isolationist approach. The law of unjust enrichment, in contrast to the other heads of private law – property, contract, and torts – has proved more resistant to contextual understanding, presenting itself as context-neutral, unconditioned by its political environs.[16] By revealing certain false presuppositions regarding unjust enrichment's theoretical foundations, I hope to cast doubt on this perceived political neutrality. With an eye to more generally problematizing the private/public law divide, I intend to illuminate an alternative understanding of unjust enrichment as a (legal) tool devised to promote and preserve specific political values.

The crux of my argument consists of two complementary theses, one negative and one positive, regarding the philosophical foundations of the law of unjust enrichment. My negative thesis is that corrective justice is an inadequate, inaccurate, and consequently distorting lens through which to understand the law of unjust enrichment – that is, alone it is unable to justify to the defendant his duty to restore to the plaintiff her mistakenly transferred wealth. Although I will posit a possible role for corrective justice, I will argue that it cannot explain the source of the duty of restitution for unjust enrichment. In the wake of this negative thesis, my positive thesis will suggest several potentially more promising alternative analyses to

[16] A similar argument may also be furthered with respect to social environs; however, this lies beyond the scope of this thesis.

corrective justice, specifically, a particular conception of commutative justice, one that stresses the principle of equality in exchange. In short, my inclination is that the law of unjust enrichment should not be viewed as a response to correct an injustice, but rather as a prophylactic tool of law aimed at preserving equality in exchange and equality in acquisition. These paired theses are crucial for my over-arching goal *vis-à-vis* the private/public law divide. If I can demonstrate that unjust enrichment is *not* a hermetic instance of corrective justice but instead a legal device created to preserve and protect the *status quo* of entitlement distribution, then the ('neutral') position that denies the relevance political values bear to this area of law becomes untenable.

To answer the question – does the model of corrective justice provide the best explanation and, hence, justification for the duty of restitution consequent an unjust enrichment – in the negative requires several interconnected arguments: First, I will articulate the *prima facie* reasons for the 'easy' fit between corrective justice and unjust enrichment. As such, I will devote the first portion of my initial chapter to a critical evaluation of prominent corrective justice theories and how they fit the characteristic features of unjust enrichment claims. I will note that two core features of unjust enrichment – absence of wrongdoing and absence of causation – present significant problems for a corrective justice analysis. Careful articulation of these problems forms the subject matter of the second half of this chapter. Applying an appropriately narrow conception of corrective justice, I will conclude that the problems of fit posed by unjust enrichment to the paradigm of corrective justice are not superficial, but are sufficiently serious to warrant looking elsewhere for a new explanatory model.

To this end, I will suggest three possible alternative explanations for the reasons for restitution in unjust enrichment: (1) that it is *distributive justice*,

understood as the justice of allocating benefits and burdens in accordance with some external criterion or criteria of distribution; (2) that it is motivated by equitable considerations, smoothing out the otherwise harsh 'ruliness' of the common law[17] – the harshness that results when a decision-maker is limited to making decisions solely in accordance with the letter of the law, that is, what the rules dictate;[18] and (3) that it is *commutative justice*, understood not as another name for corrective justice, but rather as the justice specifically suited to protecting the institutions of just exchange and original acquisition.

In my second chapter, I will assess the viability of the first and second of these alternative explanations, and conclude that both fail to explain the duty of restitution in unjust enrichment satisfactorily. The third, however, is more promising, and, as such, I will devote my third chapter to an exploration of its contours and its application to unjust enrichment. In my final chapter, I will return to my initial dilemma regarding the origin of, and hence explanation for, the duty of unjust enrichment: either as arising from a pre-institutional conception of rights and duties or as generated by the political machinery of the state through its legal institutions. Only with a clear view of how the duty of restitution functions – a view that has been clouded by blind loyalty to the exclusive explanatory force of corrective justice – can we venture to take a side in this final debate.

In sum, by examining the purported explanations for the reasons for the duty of restitution in unjust enrichment, I aim to accomplish two distinct, but interrelated goals. First, I intend to demonstrate the illegitimacy of explanations posited thus far, revealing them to be wedded to a perverted understanding of the nature of private law

[17] John Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 CLP 1, 17-18.

[18] Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' (n 7) 136-137.

as hermetically sealed off from political (public) considerations. Second, I hope to offer a more convincing justification for the duty's existence. By uncovering the accurate formal description of this duty – as explicated by and grounded in commutative, as opposed to corrective, justice – the true reasons for or against its legitimacy can be understood.

II. CHAPTER ONE: *Apparent Fit and Ultimate Irreconcilability*

In the first portion of this chapter, I will provide an analysis of the putative similarity between Aristotle's (or, more accurately, modern interpretations of Aristotle's) conception of corrective justice and the law of unjust enrichment. In the second portion, I will present arguments that corrective justice fails as a comprehensive model to explain the duty of restitution in unjust enrichment. I will conclude that if the fit between corrective justice and unjust enrichment is in doubt, so too should we question the hardness and fastness of the private/public divide in this area of law.

A source of difficulty for the corrective justice model lies not in corrective justice itself, but in the particular interpretation of it that has thus far been primarily adopted. A different interpretation would avoid some of these difficulties. While I insist that, under any interpretation, corrective justice on its own cannot adequately explain the duty of restitution for unjust enrichment, I do not conclude that it has no role to play, provided both it and its role are properly understood. Therefore, in the final portion of this chapter, I will articulate a more promising, minimal understanding of corrective justice and its limited role in explicating the duty of restitution.

A. An Apparent Fit

What is it that has led numerous scholars to assert (occasionally, in a cavalier 'isn't this so obvious as not to need any defense' manner) that the law of unjust enrichment is an easy area of private law for the paradigm of corrective justice to explain?[19] The answer lies in the *prima facie* striking similarity exhibited by the

[19] Kit Barker, although ultimately rejecting corrective justice as an exhaustive and sufficient explanation for unjust enrichment, admits that corrective justice provides a decent explanation for a

structure of the cause of action of unjust enrichment with Aristotle's conception of corrective justice presented in the *Nicomachean Ethics,*[20] a conception that many if not all modern corrective justice theorists explicitly reference and adopt.

(i) Aristotle's Conception of Corrective Justice[21]

Unlike other virtues – such as, honesty, charity, and courage – justice is characteristically other-regarding.[22] Justice is always towards another, 'another's

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number of legal rules in the context of unjust enrichment: 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason Neyers, Mitchell McInnes, and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, Oxford 2004); Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 OJLS 457, 463; Andrew Botterell, 'Property, Corrective Justice and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 Canadian J L and Jurisprudence 275; Abraham Drassinower, 'Unrequested Benefits in the Law of Unjust Enrichment' (1998) 48 U Toronto L J 459; John Gardner, 'What is Tort Law For?'<http://www.law.yale.edu/yclp/papers.html> accessed 18 August 2008, 18-19, and at 41: 'The norm of corrective justice that applies in the law of unjust enrichment … needs a relatively independent account [from that he has provided for tort law]. I do not think it is too hard to come up with'; Mitchell McInnes, 'The Measure of Restitution' (2002) 52 U Toronto L J 163, 187: 'Taken together, unjust enrichment and restitution epitomize the principle of corrective justice', and at 194: 'the facts that underlie the action in unjust enrichment and the response of restitution epitomize the bipolarity upon which corrective justice is based'; Stephen Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa L Rev 449, 451, 454; Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas L Rev 2115, 2133-36: 'The case of restitution is the easy case [for corrective justice]: it really is a transfer that needs reversing'; Ernest 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 Publishing, Oxford 2008) 21; and Ernest Weinrib, 'The Juridical Classification of Obligations' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford 1997) 37, 44, 47-48.

[20] W D Ross (tr), Aristotle, *Nicomachean Ethics* (The Modern Library, New York 1947).

[21] The majority of modern corrective justice theorists who adopt an Aristotelian conception of corrective justice do so in the context of tort law: Larry A Alexander, 'Causation and Corrective Justice: Does Tort Law Make Sense?' (1987) 6 L and Philosophy 1; Jules Coleman, *Risks and Wrongs* (Cambridge University Press, Cambridge 1992); Jules Coleman, 'The Mixed Conception of Corrective Justice' (1992) 77 Iowa L Rev 427; Jules Coleman, *Markets, Morals and the Law* (Cambridge University Press, Cambridge 1988); Jules Coleman, 'Corrective Justice and Wrongful Gain' (1982) 1 J Legal Studies 421; Richard Epstein, 'Causation and Corrective Justice: A Reply' (1979) 8 J Legal Studies 477; John Gardner, 'Backward and Forward with Tort Law' in J Keim, M O'Rourke, and D Shier (eds), *Law and Social Justice* (The MIT Press, Cambridge, Mass. 2005); James Gordley, 'Equality in Exchange' (1981) 69 California L Rev 1587; Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Mass. 1995); and Ernest Weinrib, 'Corrective Justice' (1992) Iowa L Rev 403.

[22] John Gardner identifies a further distinguishing feature of justice in that, unlike the other virtues, it has no exclusive subject matter of its own (John Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 CLP 1, 9).

good'.[23] Famously, Aristotle identifies two forms of (particular) justice – two ways in which interpersonal relationships can be regarded as just:

> Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that which plays a rectifying part in transactions between man and man.[24]

Here, '(A)' refers to distributive justice, the distribution of social goods by the state according to some externally imposed principle of distribution, and '(B)' refers to corrective justice, where the justice is transactional in nature, concerning the relations between persons. As a logical consequence of its transactional nature, as exemplified by an exchange between 'man and man', '(B)' better represents the form of justice concerned with the preservation of rights through the rectification of a wrong that has arisen between two parties. By contrast, justice in the sense mandated by '(A)' imports considerations that fall outside the relationship between persons and hence requires an external power to make a choice with respect to what will function as the determinant for division of burdens and benefits.[25]

For some theorists, notably Ernest Weinrib, the legal relevance of the distinction between '(A)' and '(B)' is plainer when it is viewed as marking out two categorically different forms of equality corresponding to public and private

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[23] Aristotle (n 20) Book V, Chapter 1, 1130a4; Weinrib, *The Idea of Private Law* (n 21) 59. It is perhaps worthy of note that Plato in the *Republic* devotes great attention to the just person, the just soul. This seems to contradict the point that justice is always other-directed. However, Plato's tripartite division of the soul – reason, spirit, and appetite – reveals that his conception of justice is nonetheless relational: justice lies in each part's relation to another part and not in the 'justness' of one part on its own. (See: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) 162).

[24] Aristotle (n 20) Book V, Chapter 2, 1130b25 – 1131a.

[25] An 'external power' is something or someone that is empowered to make a decision, without necessary exclusive reference to the two parties in dispute, in regard to what ought to be the criterion for distribution of benefits and burdens.

considerations of justice, respectively.[26] The introduction of the variables, 'X' and 'Y', as representing two abstract persons, helps illuminate the form equality takes from the perspective of distributive justice. Alongside 'X' and 'Y', let us posit some external principle to serve as the criterion of distribution: public-spiritedness in the service of the *polis*, to take an appropriately Aristotelian example. The more 'X' or 'Y' partakes in this criterion of distribution, the larger the share of the social goods (represented by the lower case letters, 'x' and 'y') will 'X' or 'Y' deserve. Thus, the form of equality for distributive justice can be represented as the following ratio: X : Y = x : y.

By contrast, corrective justice requires no external principle of distribution for its form of equality. This equality is an equality between two parties to a transaction.[27] Aristotle's instructive illustration for this form of equality is a series of three lines:

A_____E_____A'

B_____B'

D_____C_____F_____C'

Line BB' represents the baseline, which is the starting position that is shared by lines AA' and CC'. Imagine that CC' takes from AA' a segment, AE', and adds it to itself as represented by segment DC. Imagine a point F that is on the line DCC' such that CF is equivalent to AE. We can now say that DCC' is greater than EA by DC plus CF. To arrive at the equality necessary to return to the equal starting point of AA',

[26] Weinrib, *The Idea of Private Law* (n 21).

[27] Peter Benson presents a different conception of this equality. He asserts that it is not the equality between the two parties that is relevant, but rather the equality of the one party's holdings at T_1 (before the interaction) and his holdings at T_2 (after the interaction). Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa L Rev 515, 540-541 (fn 53).

BB', and CC', we must detach DC from line DCC' and reattach it to line AA' (now the abbreviated line, EA').

(ii) The Elements of an Unjust Enrichment Claim

The gist of the cause of action in unjust enrichment is that the defendant, through no necessary fault or action of his own, has come into possession of something of the plaintiff's, which the plaintiff did not transfer with effective consent.[28] To put it in legal terms, (1) the defendant receives a benefit (is enriched) (2) from the plaintiff (at the plaintiff's expense) (3) that is unjust for the defendant to retain.[29]

(iii) Prima Facie *Coherence*

I think it is now apparent why so many theorists have concluded that reasons of corrective justice provide the appropriate explanation for the duty of restitution for unjust enrichment, but it is helpful to make this more explicit by phrasing the cause of action in the Aristotelian language of corrective justice:[30] The plaintiff's holdings are exemplified by line AA'; the subtraction from the plaintiff's wealth, line AE; the addition to the defendant's holdings, line DC; the operation of the restitutionary duty,

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[28] I am leery of saying 'with defective consent' because it is an oversimplification. It, for example, does not fit unjust enrichment cases where the unjust factor – i.e., what triggers restitution – is failure of consideration as result of a subsequent finding that a contract duly entered into is now void. In these cases, there is good consent that grounded the contract in the first instance. See: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

[29] Proponents of the unjust factors approach construe 'unjust' to entail the presence of one or more of the common law acknowledged unjust factors (mistake, duress, failure of consideration, ignorance, and undue influence). What is unjust about the transfer is the plaintiff's consent was either somehow vitiated or impaired. By contrast, proponents of the absence of basis approach locate the 'unjustness' in the lack of legal justification for the defendant's retention of the benefit – that is, the transfer cannot be explained by contract, gift, or some other legal ground.

[30] Notably, this adoption of the Aristotelian language of corrective justice is not limited to legal theorists only; judges also have explicitly invoked it: *Regional Municipality of Peel v Canada* [1992] 3 SCR 762, 804, where McLachlin J. [as she then was], speaking for the Supreme Court of Canada, stated, '[t]he concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted.'

the transfer back of DC from line DCC' to EA'. Thus, the parties, CC' and AA', are restored to the position they occupied before the unjust subtraction; they are restored to the baseline of BB'.[31]

The at times uncritical adoption of the corrective justice framework for unjust enrichment can further be attributed to the comparative difficulty theorists have encountered when attempting to apply this framework to the law of torts, in particular, negligence. The most challenging obstacle for viewing negligence as an instance of corrective justice is the lack of equivalence between the plaintiff's loss and the defendant's gain.[32] That is, in the typical negligence action, while the defendant's breach of his duty of care *vis-à-vis* the plaintiff results in (material) loss to the plaintiff, the defendant very rarely will reap any consequent material benefit from his injurious behavior. By contrast, in unjust enrichment, the loss of the plaintiff is *identical* to the gain of the defendant. It is precisely what the plaintiff has lost by

[31] To phrase this in terms of Benson's conception of equality, the defendant's holdings at T_1 (CC'), because of the enrichment become D(CF)C', which is greater than CC'. Restoration of the equality, that is, restoration of the defendant to his original position, requires a subtraction (line DC) to bring him back to his pre-transactional baseline. Likewise, the plaintiff's baseline position changes, due to the transaction, from AA' to EA', where AA' > EA' by AE. To restore the plaintiff to her pre-transactional position of equality requires an addition of the equivalent of AE. In other words, according to Benson, it is not the relative equality between the plaintiff and the defendant that matters, but the intrapersonal equality of each over time with regard to their respective pre-transactional baselines. As I will demonstrate in greater detail later, this distinction between Benson's and Weinrib's conceptions of the form of equality at work in corrective justice is illuminating *vis-à-vis* the difference between the equality at play in corrective and commutative justice. There is something formally different between the relative equality presented by Weinrib, which deals with interpersonal equality, and the intrapersonal conception presented by Benson. Moreover, I will demonstrate that Benson's understanding is the correct one for corrective justice. By contrast, Weinrib's understanding of equality, in fact, maps onto the understanding of reciprocity mandated by equivalence in exchange. Corrective justice works to correct a wrong, while commutative justice works to correct an imbalance. An imbalance is different from, though related to, a wrong as a wrong is a type of imbalance, but an imbalance is not necessarily a wrong.

[32] Weinrib's proposed solution to this alleged lack of equivalence between gain and loss is to treat the relevant gain and loss as normative, not material – that is, as an infringement of the plaintiff's right caused by the defendant's overstepping his sphere of rightful freedom of action. For Weinrib, the material aspect of the loss is only a manifestation of the infringement of right and functions as a means to quantify damages. (Weinrib, *The Idea of Private Law* (n 21) 115-120). For a trenchant criticism of this argument, see: Perry (n 19) 482-488.

virtue of the 'mistransfer' that the defendant has gained: line segment DC is identical to AE; in fact, it *is* line AE.

B. Ultimate Irreconcilability

With the alluring reasons for the *prima facie* coherence of unjust enrichment and corrective justice thus presented, I can turn now to my negative thesis: that corrective justice is an unsuitable and ultimately distorting lens through which to understand unjust enrichment. The lack of fit is exemplified by two pairs of opposing requirements: (i) while a wrong is required by corrective justice, it is irrelevant for unjust enrichment; and (ii) while an action is required by corrective justice, it is irrelevant for unjust enrichment.

(i) Absence of Wrong

Corrective justice requires, it seems, a wrong to be *corrected*.[33] In other words, the defendant has *wronged* the plaintiff and it is this wrong and its sufficiently proximate consequences (causal and legal) that must be rectified. The mechanism for achieving this is corrective justice. Unjust enrichment, by contrast, involves no wrongdoing. The defendant is merely an innocent recipient of the plaintiff's wealth. As I have alluded to previously, given that the defendant's duty of restitution might appear overly onerous, a positive obligation to insure the plaintiff against loss, we need a strong reason to justify the availability of state machinery to recognize and enforce it. In the absence of wrongdoing, therefore, what can compel the defendant (or, more accurately, what can justify a court to compel the defendant) to return this wealth? In other words, what background norm does the defendant violate in an

[33] I recognize that 'correction' can also imply the correction of an imbalance. I will deal more directly with the possibility of different senses of correction and what their analysis reveals in Chapter 3.

unjust enrichment situation so as to trigger the operation of corrective justice and the defendant's consequent duty to restore the plaintiff to her pre-transactional state?

To phrase this inquiry somewhat differently, what we are searching for is the normative link between the plaintiff and the defendant that explains the defendant's particular duty to retransfer the mistaken payment. One possibility could be that it is the fact that the mistaken payment *is* and remains the plaintiff's that provides the reason for the defendant's duty to return it (that is, return it to its rightful owner). This is the proprietary link explanation.

One criticism of this explanation is that if we can establish that the plaintiff retains her proprietary interest in that which was mistransferred, then we are no longer talking about unjust enrichment. Instead we are in the realm of 'hard-nosed property rights'.[34] Property rights, it is further argued, are not protected by the law of unjust enrichment, which only comes into play once property has passed, but rather by various property torts (for example, the tort of conversion).[35] Notably, the late Peter Birks rejected this position – that property and unjust enrichment are mutually exclusive categories. According to Birks' classificatory schema, unjust enrichment is a causative event and property, a response; therefore, it is conceptually possible that they coexist. In other words, property rights (rights *in rem*) can be responses to an unjust enrichment in the same way that personal rights (rights *in personam*) are. Thus, the subsistence of a pre-existing proprietary right does not necessarily negate

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[34] *Foskett v. McKeown* [2001] 1 AC 102 (HL), [2000] 2 WLR 1299 (Lord Browne-Wilkinson). See, as well: Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 Modern L Rev 905, 909; Graham Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP, Oxford 2006); and Graham Virgo, 'Change of Position: The Importance of Being Principled' [2005] 13 Restitution L Rev 34, 50 where he argues that the better interpretation of *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) is as a restitutionary claim, properly grounded on the vindication of the claimant's continuing proprietary rights, rather than unjust enrichment. Against Virgo and *Foskett*, see: Peter Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 CLP 231.

[35] William Swadling, 'Unjust Delivery' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, Oxford 2006) 289.

the availability of a claim in unjust enrichment. According to Birks, the following examples, drawn from the paradigm case of loss and finding, make this clear:

> My wallet drops out of my pocket as I am cycling to the law faculty. You pick it up. There are plenty of other examples. A thief picks my pocket. Trustees who hold shares for me give them away to someone else, or they sell them to a buyer who is not a bona fide purchaser for value without notice of their being sold in breach of trust. I make a payment because of a mistake so fundamental as absolutely to nullify my intention to transfer. In all these cases, the pre-existing proprietary right continues to subsist. It subsists at the moment of the defendant's receipt, and, although it will in some subsequent events be destroyed, it may continue to subsist indefinitely.[36]

Birks concluded that unjust enrichment has a role to play in such scenarios where property has not passed.[37]

While doctrinally significant, this debate about proprietary restitution requires no further attention, nor does it require me to declare any particular allegiance. What is notable, however, is that neither Birks nor his detractors argue that a proprietary link between the plaintiff and the defendant is the sole justification for liability in unjust enrichment. By contrast, Andrew Botterell has recently advocated something very similar to this. Botterell suggests that the plaintiff's claim in unjust enrichment is based on the fact that the mistransferred wealth was at one time the plaintiff's. Thus, for him, a proprietary link serves as the linchpin for the plaintiff's claim against the defendant.[38] Jennifer Nadler's criticism of Botterell is decisive and I fully endorse it here:

> …it is not clear why the fact that the plaintiff *was once* the owner of the property now alienated should ground any continuing rights in that property. A person who gave a gift, or made an exchange, was also once the owner of the property now alienated. It is clear, however, that this fact does not ground

[36] Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] New Zealand L Rev 643.

[37] Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' (n 36) 659.

[38] Botterell (n 19) 290 and 294.

> any continuing proprietary rights in these cases. The idea of past proprietary claim thus cannot do the work Botterell wants it to do.[39]

The relationship to third parties also casts doubt on the proprietary link analysis. Consequent an unjust enrichment, the defendant generally obtains legal title to the mistransferred asset in question.[40] That is, against the rest of the world, he is seen as the thing's rightful owner.[41] As result, if he transfers it to another acting in good faith and for valuable consideration, then this transfer is deemed effective. Not only is it considered effective, but this transfer will also serve to trump any subsequent claim of the plaintiff to the asset itself or its value. It its difficult to reconcile the claim that the plaintiff's proprietary interest persists and entitles her to recover with the fact that a third party can overrule her claim.[42]

With the proprietary explanation addressed, albeit briefly, we can turn to a more promising account, that presented by Lionel Smith, of how the plaintiff and the defendant can be seen as normatively connected absent the defendant's fault. Lionel Smith argues that Weinrib's conception of corrective justice, a conception that closely adheres to the Aristotelian account outlined in 'A*(i)*', requires wrongdoing and hence is incompatible with unjust enrichment, but recommends that corrective justice, more specifically, Aristotelian corrective justice, nonetheless remains the appropriate

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[39] Jennifer Nadler, 'What Right Does Unjust Enrichment Law Protect' (2008) 28 OJLS 245, 253 (fn 25).

[40] For a more fine-tuned analysis of this assertion with respect to money, in particular, see: David Fox, 'The Transfer of Legal Title to Money' [1996] Restitution L Rev 60.

[41] For an eloquent breakdown of the incidents and meanings of ownership see: A M Honoré, 'Ownership' in A G Owen (ed), *Oxford Essays in Jurisprudence* (OUP, Oxford 1961).

[42] The same argument applies to the defense of change of position. Here, the defendant, in good faith, expends, destroys, or otherwise disenriches himself of the plaintiff's wealth. In such situations, the plaintiff's claim to restitution will fail. A full discussion and analysis on the many issues raised by this defense fall outside the scope of this thesis.

paradigm for unjust enrichment.[43] Given his dismissal of the ability of Weinrib's understanding of corrective justice to accommodate the duty of restitution in unjust enrichment, Smith's aim is to explain how this duty can emerge independent of wrongdoing. If Smith is correct and we can understand the duty in unjust enrichment independent of wrongdoing yet still retain the corrective justice framework, then his argument poses a serious challenge to this portion of my negative thesis – that, because unjust enrichment is not about wrongdoing, corrective justice is incompatible with it. For this reason, Smith's conception of how unjust enrichment fits the paradigm of corrective justice merits careful examination.

Following Weinrib, Smith argues that it is the question of normative loss and gain that is relevant for private law liability, not material loss and gain. Moreover, these normative gains and losses must be causally linked – the plaintiff's normative loss must be causally connected to the defendant's normative gain.[44] Smith grounds the normative content of this loss or gain in the Kantian concept of free self-determining agency. The case of unjust enrichment, according to Smith, is the case 'in which the defendant has achieved a material gain, the plaintiff has suffered a material loss and each party has achieved or suffered the normative equivalent.'[45] Material loss and gain alone is not sufficient, even if causally linked, because if it were, all gifts and all gains and losses flowing from fair business competition would attract liability.[46] The normatively salient feature in unjust enrichment is the

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[43] Lionel Smith (n 19) 2127 and 2135-36. As Smith asserts (at 2141), with respect to unjust enrichment, '[t]here is a nexus of exchange between the parties. The nexus gives 'articulated unity' to their bilateral relationship in a transaction which is paradigmatically within Aristotle's conception of corrective justice.'

[44] Lionel Smith (n 19) 2138.

[45] Lionel Smith (n 19) 2139.

[46] Lionel Smith (n 19) 2139-40.

plaintiff's defective (or conditional) consent.[47] The normative loss suffered by the plaintiff is that she did not fully assent to the transfer of her wealth to the defendant – that is, this transfer was not an expression of her will as a free and self-determined agent.[48] Next, Smith must show how the defendant achieves a normative gain given the absence of his wrongdoing. Smith argues that what grounds the restitutionary duty is the nexus of the defective transfer that links the defendant to the plaintiff because the plaintiff's loss and the defendant's gain (both normative and material) are two sides of the same coin.[49]

One difficulty with Smith's analysis is that it is not clear that just because the material gain and loss are identical – two sides of the same coin – so too are the normative gain and loss. For Smith, the plaintiff's normative loss is her loss of the freedom to assent to the transfer of wealth. Smith does not make it clear how this is mirrored in the defendant's gain, but we can envision to take the following form: if the transfer is not reversed, what the defendant normatively asserts is his right to wealth, wealth which the plaintiff did not freely transfer, and this does sound like a normative gain that corresponds to the normative loss.

Stephen Smith, however, finds Lionel Smith's thesis unconvincing. He argues that the defendant's possession of a thing does not in itself trigger a right to get it back; the mere fact of receipt is not itself an injustice. Without some further argument, mistaken payment to another is normatively identical to dropping money down a bottomless pit. In neither scenario can the plaintiff's loss be described as

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[47] Smith expands this normative feature subsequently to include the defendant's shoddy behavior. Other triggers for unjust enrichment – that is, ones not related to the plaintiff's defective consent or the defendant's unconscientious behavior – such as policy factors, Smith characterizes as violations of a non-Kantian norm, but are matters of corrective justice. Lionel Smith (n 19) 2144.

[48] Lionel Smith (n 19) 2141.

[49] Lionel Smith (n 19) 2141.

normative. If no new normative relationship is generated when we merely lose possession of money, how can the normative significance of the loss change merely because the hole I dropped my money down turns out to be someone else's bank account?[50] Moreover, to say that the defendant's election to retain the plaintiff's wealth violates the latter's right, a prior account of an antecedent duty to return the benefit is required. To state that the wrong lies in the failure to return simply begs the question of why the retention is unjust in the first place.[51]

Although Stephen Smith's hole example is initially persuasive, there is a normative difference when the 'hole' turns out to be another person. This normative salience derives from the Kantian idea of self-determining agency.[52] A *hole*'s 'refusal' to return your money in no way contradicts one's status as a self-determining agent. By contrast, a *person*'s refusal to do so does. What is essential to self-determination is not only the ability to pursue one's projects freely, but also recognition from other self-determined beings that you are a person with such projects. Hence, a not-person's (a thing's) 'non-recognition' of your personhood has no impact on one's status as an autonomous agent, while a not-thing's (a person's) does. Moreover, in denying the ability of another to pursue her aims, an agent can be seen as saying one of two things: either (i) this other is not like me, that is, not a person, or (ii) if this person is like me, then neither of us possesses the capacity to pursue our goals. A third possibility – 'I am a person who can pursue my own ends, but she, although a person just like me, cannot' – is self-contradictory. By refusing to transfer back the plaintiff's wealth, the defendant denies the plaintiff's right as a self-

[50] Stephen Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Texas L Rev 2177, 2189-90.

[51] Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason Neyers, Mitchell McInnes, and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, Oxford 2004) 131.

[52] An idea that Lionel Smith explicitly endorses.

determining agent to choose how to dispense with her wealth. In so doing, he acts inconsistently with the categorical imperative – to act in such a way that one wills one's action to be made a universal law. The defendant thus logically denies his own right to choose freely how to dispose of his wealth.[53]

Although Lionel Smith's theory can escape from Stephen Smith's criticism, it cannot avoid the following problem. His theory cannot adequately explain the duty of restitution for an unjust enrichment by saying that it arises from the *violation* of corrective justice. To say that it does anticipates a *wrong*; moreover, as I will show subsequently, even if this were correct, it is not the wrong of violating the norm of corrective justice that the duty of restitution 'corrects'. The normative salience of Lionel Smith's argument depends on the Kantian conception of agency and, moreover, the *violation* of this conception. The duty of restitution emerges from the refusal of the defendant to respect the plaintiff's right to dispose of her wealth freely. This wrong appears predicated on fault. As noted previously, while a hole may dispossess a plaintiff of her wealth, it cannot contradict her status as a self-determining agent; only another self-determining agent may do this. Thus, for Lionel Smith, it cannot be the mere receipt of the plaintiff's wealth that generates the duty of restitution, but also the defendant's wrongful behavior in refusing to give it back. Hence, one could assert that we are no longer in the realm of unjust enrichment, but in the field of tort law since we are focused on the wrong of the defendant *vis-à-vis* the plaintiff. In summary, we return full circle to our original problem: why is it unjust for the defendant to retain the plaintiff's wealth? Absent wrongdoing, what grounds the defendant's duty?

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[53] As I will briefly discuss toward the conclusion of this chapter, this is also the crux of McBride and McGrath's thesis: Nicholas J McBride and Paul McGrath, 'The Nature of Restitution' (1995) 15 OJLS 33.

(ii) Absence of Doing

In the absence of any fault to link the plaintiff and defendant, one looks for some other normatively salient feature of the interaction to justify the imposition of liability. Strict liability provides a possible alternative to wrongdoing. In torts of strict liability no fault is required, only doing. A prime example of the shift from fault to causation can be seen in strict liability torts like *Rylands v Fletcher*,[54] where, although the defendant is not at *fault*, understood as acting negligently *vis-à-vis* the plaintiff's person or property, he is nonetheless liable by virtue of the sheer fact of his (extraordinarily or abnormally) dangerous activity.[55]

Rather than provide the solution, however, emphasis on strict liability reveals the next flaw in the argument that unjust enrichment is an instance of corrective justice. This is because the defendant in an action for unjust enrichment does not need to *do* anything to attract liability.[56] The defendant is not the *cause* of the plaintiff's loss. In fact, generally, it is the plaintiff who is the causal author of her own misfortune; the defendant is nothing more than a passive recipient. It is the plaintiff who is the active party; the doer and sufferer are the same person (the plaintiff).[57] This poses problems for a corrective justice analysis that grounds the

[54] (1865) 3 H&C 774 (Ex D); (1866) LR 1 Ex 265 (Ex Ch); (1868) LR 3 HL 330 (HL).

[55] For support of this view – that strict liability is best understood as a response to the abnormally dangerous behavior of the defendant – see: James Gordley, 'Takings: What Does Matter? A Response to Professor Peñlaver' (2004) 31 Ecology L Q 291. Ronald Coase, however, famously criticized the relevance of causation in tort law, explaining that both plaintiff and defendant are the cause of a tortious injury in the sense that both are the 'but for' causes (Ronald Coase, 'The Problem of Social Cost' (1960) 1 J L and Economics 1).

[56] Klimchuk (n 51) 120.

[57] Klimchuk (n 51) 120.

normative connection between the defendant and plaintiff on the fact that the parties are, respectively and correlatively, the doer and sufferer of the same injustice.[58]

As was the case with the modified argument from fault – that failure to return constituted the wrong – so too can we run a modified argument from doing – that the failure or refusal to return constitutes the relevant doing. This argument too is flawed since it entails a positive obligation to act, a duty foreign, even anathema, to private law where the essential characteristic of one's obligations is that they are negative: not to do ϕ. The exception (or apparent exception) lies in voluntary undertakings, for example, contract. However, even acting under a contract is not a positive duty to act or benefit; rather it is a negative duty, a duty not to breach one's contractual obligation, voluntarily assumed.[59] To argue that the defendant is under an obligation, such as the one in contract, to return the plaintiff's mistakenly transferred wealth is to imply a voluntary obligation where one never existed; it would reinstate the implied contract fallacy into the law of unjust enrichment.

That our duties in private law are negative is supported not only by the common law but also by its theoretical underpinnings grounded in the tradition of liberal philosophy. It is easier to justify state interference with individuals when they have done something – either committed a wrong or entered a contract, for example – than when they have not. To compel action is to trump the individual's essential autonomy. This can be justified if an individual acts in such a way as to authorize this subsequent compulsion. For example, if D negligently slams into P's car, it should come as no surprise to him that he is responsible to pay compensation for the damage caused. The outcome of his behavior – be it positive or negative – belongs to him.

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[58] Weinrib, *The Idea of Private Law* (n 21) 65.

[59] The same reasoning can apply to mandatory injunctions.

Recognizing this is part of respecting him as a self-determining agent.[60] By contrast, if we were to make a third party – a party removed from the accident – compensate the plaintiff, this purely positive obligation of beneficence undercuts the third party's ability to control her own life choices. Thrusting liability on her that is unconnected to her misdeeds or even deeds fails to treat her as a self-determining agent. Likewise, unless we can show some normative nexus between the plaintiff and defendant in situations of unjust enrichment, imposing liability on the defendant, although as a matter of degree less arbitrary than the third person responsibility example outlined above, risks appearing similarly undeserved.

C. Potential Objections

Those who argue for corrective justice's fit with unjust enrichment might take issue with my characterization of corrective justice so far. Thus, in its defense, I must confront its potential strongest opponent: Ernest Weinrib. Weinrib offers a broader view of corrective justice than that ultimately recommended here and, as I will argue, in so doing deprives corrective justice of its natural meaning: as *corrective*. I will suggest that it is this view of corrective justice, or moderate variations thereof, that unjust enrichment scholars adopt (implicitly or explicitly) when they invoke corrective justice as the paradigm for unjust enrichment. At this juncture, it is also appropriate to take the time and space to consider Weinrib's theory of how corrective justice relates to unjust enrichment. In place of Weinrib's robust version of corrective justice, I will suggest the possibility of a more minimal version, one posited by John Gardner. I will argue that if corrective justice is to have a role to play in unjust enrichment, it should be understood in this way. Following my criticism of Weinrib, I will present what this limited role might be, reveal certain problems with it, and

[60] See: Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530.

demonstrate how it indicates what the truly relevant issue in analyzing the philosophical foundations of unjust enrichment is: the proper identification of the relevant norm underlying unjust enrichment.

(i) Weinrib

Weinrib offers a robust and comprehensive version of corrective justice. For Weinrib, corrective justice not only governs (is the guiding justificatory principle for) the obligation of the defendant to compensate the plaintiff for her wrongfully induced loss, but also determines the wrong itself. In other words, the tort itself is considered a corrective injustice since it disrupts the normative equality of the defendant and plaintiff, rendering the latter worse off (normatively) than the former.[61]

Before presenting what I take to be a decisive criticism of Weinrib's general theory of corrective justice, Weinrib's most recent contribution to the scholarship on the philosophical foundations of the law of unjust enrichment deserves attention. Given that Weinrib believes all of private law is explicable by corrective justice and unjust enrichment is considered a recognized head of private law, it is not surprising that Weinrib argues that the law of unjust enrichment and the duty of restitution are likewise best understood as manifestations of corrective justice.[62]

Weinrib identifies three main features of corrective justice: (1) the correlative situation of the parties, (2) the correlativity of the plaintiff's right and the defendant's duty, and (3) the Kantian idea of self-determining personhood.[63] Unjust enrichment, he urges, reflects all three features when it is understood as a non-gratuitous transfer of value that passes from the plaintiff to the defendant. The linchpin of Weinrib's

[61] Lionel Smith also appears to adopt this view of corrective justice (n 19) 2123 and 2131.

[62] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 25.

[63] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 43-44.

theory is the concept of value. Value, Weinrib argues, is owned by the owner of the property in which it inheres.[64] If a transfer is effective, then value moves rightfully from the transferor to the transferee. If the transfer is not effective, then value has not rightfully moved. This latter situation Weinrib identifies as unjust enrichment.

Defective transfer, Weinrib recognizes, is not in itself sufficient for the duty of restitution to arise; something more is needed, namely, obligation-creating conditions: 'Underlying the obligation-creating conditions is the idea that the parties each have an entitlement to what is one's own until one freely parts with it.'[65] The plaintiff's claim is thus that she has not freely parted with the value. However, the plaintiff's claim alone is not sufficient. The defendant also must meet an obligation-creating condition or else the equality of the parties as self-determining agents is denied. The defendant's condition is that he 'accepted the benefit as non-gratuitously given.'[66] Thus, in relation to the absence of the plaintiff's 'donative intent' lies the presence of the defendant's acceptance of a non-gift, knowing it not to be a gift.

There are two specific problems with Weinrib's analysis. First, his argument takes much of its force from its negative comparison of the law of unjust enrichment to the law of gifts. Borrowing the term coined by Abraham Drassinower, Weinrib goes so far as to call the law of unjust enrichment the law of 'non-gifts.'[67] Weinrib

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[64] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 27. For an argument against Weinrib, that value is not, nor can it logically be, owned by the owner of the property in which it inheres, see: J E Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' from Philosophical Foundations of the Law of Unjust Enrichment – King's College London, School of Law – Conference 11 & 12 April 2008, 3. Referenced with author's permission.

[65] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 35.

[66] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 37.

[67] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 26. See: Abraham Drassinower (n 19).

states that the law of gifts exemplifies corrective justice.[68] I am not sure how this is so. Gift consists of three constitutive features: (1) the subject matter – the thing given, (2) the act of delivery, and (3) the respective intentions of the giver and recipient to give and to receive a gift. Weinrib asserts that gift and unjust enrichment share these structural elements. Yes, gift can be understood as exhibiting a correlative structure – the plaintiff must have the intention to give and the defendant a correlative intention to accept, for example – but correlativity alone is not sufficient for corrective justice. Moreover, even correlativity itself is limited in gift. The right to give does not line up with the duty to accept. In fact, we can dispute whether or not either is appropriately characterized as a right or duty, respectively.[69] Thus, if gift is the just converse of unjust enrichment, but gift does not exemplify the *structure* of corrective justice, and gift and unjust enrichment share the same structure, how can unjust enrichment be an exemplification of corrective injustice? Moreover, it is difficult to see what, if anything, calls for correction in the law of gift.

Weinrib could respond that gift exemplifies corrective justice in that it is a transfer that respects the requirements of corrective justice. In gift the excess value transferred was done so freely and is thus compatible with the respect of agents as free and self-determining. Transfers that are inconsistent with this Kantian ideal are ones that exhibit corrective injustice; therefore, those that are consistent with it are manifestations of corrective justice. As I will discuss shortly, I have misgivings about treating a defective transfer itself as a corrective injustice – as a violation of the norm

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[68] Weinrib, 'The Normative Structure of Unjust Enrichment' (n 19) 26.

[69] Perhaps, a better understanding would be that they are liberties. In other words, the giver is free to give and the receiver to accept. To say you have a liberty (also referred to as a privilege in Hohfeldian language) is to say you have no duty not to do ϕ. The giver has no duty not to give, and the receiver, no duty not to accept. Interestingly, in unjust enrichment scenarios, we might say that the receiver has a duty not to accept. I think Weinrib would agree with this analysis. (See: W Cook (ed), Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, New Haven 1919).

of corrective justice. However, for the moment, we can mention another difficulty with conceptualizing just transfers as corrective justice. This is a difficulty highlighted by Lionel Smith. Smith argues that Weinrib's theory of corrective justice does not encompass either the original or the derivative acquisition of property or contractual rights. Corrective justice, simply put, is not the source of the right.[70] Corrective justice is characterized as the just relation that comes into play consequent a breach of some antecedent duty, for example, the duty to take reasonable care with respect to a person or property. Ownership of property or possession of a contractual right is not explicable as a response to a breach of a duty. In both cases, moreover, corrective justice might not be satisfied – the will of the transferee might be somehow defective – but the contract is nonetheless valid although subject to the transferee's power of avoidance. Hence, it is difficult to argue that gift (structured similarly to property and contract in this way, as a source of rights) exemplifies corrective justice. A gift does not owe its origin to a response to a breach of duty and breach of duty is the appropriate province of corrective justice.

The second difficulty with Weinrib's new theory, a difficulty also present in his past ruminations on this topic, is his understanding of when the duty of restitution arises. For him, it does not arise upon receipt, but upon the defendant's knowing acceptance of the benefit as non-gratuitously given. Thus, Weinrib requires the defendant to *know* (in the objective sense of ought to know) that the benefit was not intended. Not only does this contradict the case law, where liability arises upon the moment of receipt (that is, without knowledge),[71] but it also transforms unjust

[70] Lionel Smith (n 19) 2122-2135 and 2135.

[71] See: *Air Canada v Ontario (Liquor Control Board)* [1997] 2 SCR 581, [77]-[82] (Supreme Court of Canada). Liability begins upon the moment of receipt in unjust enrichment. Furthermore, it is at this moment as well that (a) interest begins to run (see: *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL)) and (b) the limitation period starts. Although not

enrichment into a wrong: knowing receipt of the value of another, known not to be gratuitously given.

Thus, unjust enrichment loses its unique status and becomes a species of tort. Hence, Lionel Smith's criticism of Weinrib's earlier attempts at aligning unjust enrichment with corrective justice still rings true: Weinrib's version of corrective justice requires a wrong. For Weinrib, if there is no wrong (even in the minimal sense required here: knowing retention of another's wealth), then it does not respect the defendant as an equal self-determining agent to require payment of the mistransferred wealth back to the plaintiff.

A critical interlocutor may respond here: 'So what? Perhaps, unjust enrichment *is* just another type of wrong. Perhaps it is treated separately for heuristic not conceptual reasons in the same way (for the same reason) that the topic of breach of contract is found in books on contract even when, conceptually, it is a tort.' Could this be said of unjust enrichment? Blind classificatory allegiance to separate categories in private law is inadvisable; however, there is something to the distinction between civil wrongs and unjust enrichment. This difference lies in their respective basic structures and is best exemplified through an analysis of primary and secondary rights and duties.[72]

A hallmark of fault-based liability is the non-identity of the primary and secondary rights and duties. A primary right consists in that activity or state of affairs that is itself protected. Corresponding to this, a primary duty is the injunction against interfering with that right. For example, the primary duty in negligence law is that one not cause damage to another person's self or property (the possible subject

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damning in itself, such a complete lack of accordance with the case law should be treated with suspicion.

[72] For one of the first proponents of this distinction see: Robert Campbell (ed), John Austin, *Lectures in Jurisprudence* (3rd edn, John Murray, London 1869) Lecture XLV.

matters of the primary right) by virtue of a failure in one's duty of care. A secondary right is the right to be compensated (receive a remedy) when one's primary right is violated, when someone breaches his primary duty. In other words, the *trigger* for a primary duty is the existence of a primary right. To borrow Raz' terminology, a duty is an *exclusionary reason* for action; it is a reason for an agent not to act on at least some reasons that counsel violation of the right.[73] By contrast, the trigger for a secondary (remedial) right is the *breach of the primary duty* not to interfere with the primary right.[74]

The content of the primary and secondary rights and duties in unjust enrichment is identical.[75] If we were to articulate a primary duty in unjust enrichment, it would be as follows: 'give back to its rightful owner that which is not yours in justice to retain'. Breach of this duty would entail an identical (in content) secondary duty: 'give back to its rightful owner that which is not yours in justice to retain.'

In addition to indicating a salient difference between the law of wrongs and the law of unjust enrichment, this identity poses a problem for the corrective justice proponents when we understand corrective justice as limited to its literal meaning of

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[73] Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 181. If one has a duty to ϕ, then one has a reason not to act on some of the reasons one might have had to not-ϕ.

[74] See: Peter Birks' event-based classification (Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP, Oxford 1995)) and how it elides this difference between primary and secondary rights. This is the source of Robert Stevens' criticism in Robert Stevens, *Torts and Rights* (OUP, Oxford 2007) 286. See as well: Rafal Zakrzewski, *Remedies Reclassified* (OUP, Oxford 2005) for his reconceptualization (reclassification) of primary and secondary rights. For Zakrzewski, primary and secondary rights are both types of substantive rights. I take no issue with this characterization. Substantive rights are rights that exist prior to a trial. In contrast, Zakrzewski identifies remedies (which he analyzes as either replicative and transformative) as rights that arise after (as result of) a trial. That is, after a primary or secondary right has been infringed, threatened to be interfered with, or continued to be infringed, remedial rights created by courts may arise.

[75] Mitchell McInnes, 'The Measure of Restitution' (n 19) 190. McInnes here points out this identity is evidence that liability in unjust enrichment is strict, not wrong-based.

correction.[76] Correction implies a wrong to be corrected, a tort to be unbent. What calls for correction is a breach of a duty, a violation of an obligatory norm. Once the primary right is infringed, the plaintiff will seek a remedy through enforcement of her secondary right – the right to be compensated. If we apply this structure to unjust enrichment, we encounter a dilemma: either there is no breach of a duty to be corrected (the defendant has done nothing and has committed no wrong) or the defendant has breached the remedial duty to deliver the plaintiff's wealth back. On the first horn of this dilemma, no secondary duty can arise since no primary right has been violated. Rather, if we posit for the moment that there is in fact a primary right involved in unjust enrichment, we enforce a primary right. As such, corrective justice has no role to play.[77] On the second horn, although there is a role for corrective justice, we are not talking about unjust enrichment, but of wrongs. If we begin to conceive of unjust enrichment in these terms – as a breach of a primary duty to pay back, giving rise to a secondary obligation of restitution – then we are no longer considering it as (conceptually) separate from the law of wrongs; rather, we are treating it as a tort.

Tort is a breach of a duty. Here, we cannot enforce the primary right because it, by definition of the tort itself, has already been violated; therefore, the next best thing is damages. By contrast, in unjust enrichment what appears to be enforced is a

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[76] For the contrary viewpoint, see: Mitchell McInnes, 'The Measure of Restitution' (n 19) and, in particular, his discussion of primary and secondary duties at 190-191. For the argument that unjust enrichment can be viewed both as a primary *and* a secondary right (a remedy), see: Stephen Smith, 'The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?' (2003) 36 Loyola of Los Angeles L Rev 1037.

[77] This commits me to saying that corrective justice has nothing to do with the law of trespass and nuisance as these areas of law involves the direct enforcement of a primary right, the right to not have one's possession of property interfered with and the right to quiet and peaceful enjoyment of one's land, respectively. I am content with this commitment, although I do not have the space in this thesis to defend it fully.

primary right.[78] Interestingly, failure to make restitution – fulfill the obligation to restore the plaintiff's wealth – never gives rise to damages.[79] If the defendant does not fulfill his duty to restitute, then no *new* duty emerges; he is still under the same (identical in content – he must pay the money back) duty of restitution.

In sum, the structure of corrective justice, conceived of as correction of a wrong, simply does not fit the structure of unjust enrichment. While the former necessarily involves the creation of a new (secondary) obligation to make good (insofar as possible) the breach of the duty, the latter involves no breach of duty and no creation of a secondary obligation. Rather, unjust enrichment appears to entail only the enforcement of the primary obligation itself – to return to the plaintiff her mistransferred wealth.

With Weinrib's theory of unjust enrichment rejected, we can attend to more decisive criticisms of his general theory of how corrective justice functions. Once the flaws of his theory of corrective justice are fully exposed, we will be in a better position to evaluate the merits of an alternative, more promising, theory of corrective justice. In a trenchant review of Weinrib's monograph, *The Idea of Private Law*, John Gardner argues that Weinrib's understanding of corrective justice leads to an infinite regress of corrective injustices:

> In Weinrib's own words, 'corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours.' But this position is obviously untenable: it generates an infinite regress. … reasons of corrective justice are reasons to restore the parties to the relative positions they were in before, or would have been in apart from, some

[78] Zakrzewski agrees (n 74) 81. I use the term primary right here, but should not be read as endorsing it as the explanatory force behind the duty of restitution. It is appropriate here since it is used in the context of revealing to corrective justice theorists a conceptual difference between the law of civil wrongs and unjust enrichment that they would accept.

[79] Stephen Smith, 'Why Unjust Enrichment is Like Tort Law' at 2 from Philosophical Foundations of the Law and Unjust Enrichment – King's College London, School of Law – Conference 11 & 12 April 2008, 3. Retitled July 2008: 'Torts and Unjust Enrichments'. Referenced with author's permission.

> transaction between them. Corrective injustice consists in action against such reasons. But if the transaction which gives rise to reasons of corrective justice must also itself count as a corrective injustice, then it too must have involved action against reasons to restore the parties to the relative positions they were in before, or would have been in apart from, some further transaction. And so on ad infinitum.[80]

In other words, to say that corrective justice corrects a corrective injustice, as Weinrib does, is to identify the relevant norm as the norm of corrective justice. A tort, a breach of contract, and an unjust enrichment are not easily characterized as corrective injustices. They are not breaches of the duty to allocate back; they do not subvert the reasons to return parties to the *status quo*. A corrective injustice could be the failure or refusal to pay damages pursuant to a court order, but this is not the paradigm case of an action in private law.

(ii) Gardner

Gardner provides a more promising account of corrective justice. He limits corrective justice to its remedial role. A wrong is not a corrective injustice, but a failure to compensate post-wrong is. This failure violates the norm of corrective justice because it is an action against reasons to restore an injured party to her pre-transactional position. The norm of corrective justice for Gardner consists in providing the 'next-best' solution for violation of any norm, not just the norm of corrective justice. It is the justice of adding and subtracting, of allocating back.

It can therefore be seen how easily Gardner's understanding of corrective justice might fit unjust enrichment. Following an unjust enrichment we want an allocation back from the defendant to the plaintiff of the latter's mistransferred wealth. Yet, it is Gardner's insistence that corrective justice is responsive, remedial – responsive to a wrong – that nonetheless renders his conception of corrective justice

[80] John Gardner, 'Review: The Purity and Priority of Private Law' (1996) 46 U Toronto L J 459, 469-470.

alien to unjust enrichment. To repeat, there is no breach of duty to repair in unjust enrichment; there is no next-best alternative to enforcing the primary duty; rather it is a straightforward enforcement of the primary duty itself.

While I think that Gardner's theory of corrective justice misunderstands and so mischaracterizes the nature of the putative right and duty involved in unjust enrichment, his theory nonetheless can be understood as providing an accurate and intelligible picture of the *remedy* of restitution. To put it simply, whatever norm it is that is disrupted in unjust enrichment – and I will present in Chapter Three what I consider this norm to be – when the defendant returns to the plaintiff the latter's wealth, he does so in accordance with reasons of corrective justice, understood narrowly as reasons for allocating back. The simplicity of this analysis favors its validity. However, it is not the whole picture and it is not the interesting picture. What we want to explain in unjust enrichment is *why* the defendant has these reasons to give back. Corrective justice is not the source of these reasons, although it may accurately describe their nature. Before considering potential alternative answers to this why, let us examine more fully Gardner's theory of corrective justice as applied to the action for unjust enrichment.

Unlike Weinrib, Gardner has yet to articulate his own comprehensive vision of how his theory of corrective justice relates to unjust enrichment. However, we can construct what it might look like from his comments in 'What is Tort Law For?' and from Prince Saprai's recent work, which explicitly adopts Gardner's theory of corrective justice and applies it to the law of unjust enrichment. Gardner asserts in 'What is Tort Law For?' that

> [t]he moral norm of corrective justice that we need to use in explaining the law of unjust enrichment is another matter. To give an action for unjust enrichment, recall, no wrong need have been committed, no norm need have been violated. So there is no violated norm that hangs around demanding

> second-best conformity. The norm of corrective justice that applies in the law of unjust enrichment therefore needs a relatively independent account. I do not think it is too hard to come up with. But the job nevertheless remains for another day.[81]

Prince Saprai undertakes this job, arguing that corrective justice cannot provide the moral justification for the paradigm case of unjust enrichment, the mistaken payment case.[82] Saprai explicitly adopts Gardner's understanding of corrective justice.[83] As he asserts, the salient feature of corrective justice norms is that they are concerned with regulating allocation back from *A* to *B*. Such norms, however, fail to provide a particular justification for this allocation back.[84] Saprai criticizes Weinrib's conception, according to which the breach of the equality of the plaintiff and defendant constitutes a violation for corrective justice to remedy, because he notes that unjust enrichment characteristically involves no wrong.[85] He further rejects McBride and McGrath's thesis that impairment of the plaintiff's consent with what she can do with her wealth is the necessary condition for the defendant's obligation to pay her restitution. For McBride and McGrath, the breach of the duty is the 'denial of the equal status of the transferor.'[86] By failing to pay restitution, the defendant contradicts his own status as an individual who is free to dispose of his wealth as he sees fit. Saprai notes several problems with McBride and McGrath's thesis, but the most compelling is that, if it were true, it would require an onerous duty on the defendant: either a duty not to know that he has received a

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[81] Gardner, 'What is Tort Law For?' (n 19) 41.

[82] Prince Saprai, 'Restitution Without Corrective Justice' [2006] 14 Restitution L Rev 41.

[83] Saprai (n 82) 42.

[84] Saprai (n 82) 53.

[85] Saprai (n 82) 45.

[86] Saprai (n 82) 46.

mistaken payment or a duty not to receive a mistaken payment.[87] It is impossible for the defendant to satisfy either of these duties; therefore, since 'ought implies can', McBride and McGrath must have mischaracterized the duties at stake in unjust enrichment.[88]

At the heart of Saprai's argument, however, lies his conviction that corrective justice is not capable of justifying the particular remedy of restitution. He cites this as part of its more general failure to explain secondary obligations.[89] Borrowing imagery from Gardner,[90] Saprai posits,

> [e]ven if the defendant violates a pre-transactional norm that obtains between the parties by retaining a mistaken payment and, therefore, makes a normative gain correlated to the claimant's normative loss, this does not itself explain why the defendant should be required to make restitution to the claimant. Why should not the defendant instead just be made to make an apology, or to make compensation, or be punished, or be required to disgorge (give up) the gain to charity. Corrective justice does not have enough tools in the box to say why. Moreover, corrective justice cannot even say why there should be *any* remedy at all. The fact that there is a normative gain and a corresponding normative loss does not justify imposing any remedial obligation whatsoever on the defendant's shoulders. Any impulse to make the defendant remedy the breach just becomes, therefore, "irrational crying over spilt milk".[91]

Saprai concludes that corrective justice does or might have something to do with unjust enrichment, but only in the taxonomic sense; it is, he argues,

> …valuable as a way of classifying a distinct set of norms, *ie* those norms that regulate the transfer back of something from one party to a bipartite transaction to the party from whom it came. Allocations back are only correctively *just* to the extent that they are grounded on valid reasons for allocating back. To the extent that they are not, then the allocation is

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[87] See text to n 53. An example of an additional problem Saprai finds is that it would only be a contradiction if the defendant asserted a right to get the assets back that he mistakenly transferred. Saprai (n 82) 46.

[88] Saprai (n 82) 47.

[89] Saprai (n 82) 48.

[90] Gardner, 'Review' (n 80).

[91] Saprai (n 82) 48.

> correctively *unjust*. Corrective justice itself will only matter morally to the extent that particular sorts of considerations attach to it. That is, to the extent that there are a set of considerations or reasons that are specifically tied to problems of corrective justice.[92]

While I cannot be certain Gardner would wholly endorse Saprai's analysis of the relationship between unjust enrichment and corrective justice, it seems likely that for the most part he would. More importantly, the reason why Saprai's analysis is unconvincing is the same reason Gardner's conception of justice in general fails to satisfy. Saprai asserts that corrective justice cannot be a moral justification, that it can do no moral justificatory work and is limited to the realm of formal, taxonomic analysis. Yet, it is hard to accept that corrective justice can be a morally neutral or perhaps even bad form of justice that we would be better off without. Corrective justice is always a reason for doing something – be it compensation, disgorgement, or perhaps, restitution. It might not be the only reason, and it might not even be the prevailing (undefeated) reason. It is not necessarily indefeasible. However, it is never a bad or a morally neutral reason. It makes no sense to say, 'we should *not* pay compensation after injury because it is correctively *just.*' This is obviously nonsense. To say, 'we should pay compensation because it is correctively just,' on the other hand, is sensible. It provides, at minimum, a good moral reason for action.

Earlier I dismissed Stephen Smith's analogy that unjust enrichment is normatively identical to dropping money down a hole. There is, I argued, a salient normative difference between a hole and another agent. While it is nonsense to make a moral claim on a hole since a hole *qua* hole can neither respect nor disrespect one's status as a self-determining agent, the same is obviously not true of a fellow self-determining agent. Smith's argument, however, illuminates a potential difficulty with Gardner's theory. If corrective justice is only about allocating back and has no

[92] Saprai (n 82) 52.

necessary normative content, then there is no difference between accidentally transferring money to a person and dropping it in a pit. If we are suspicious of Smith's example, which we should be, then we ought also be suspicious of a theory of corrective justice that accords with it. Gardner's theory of corrective justice, however, might be able to withstand this criticism. His understanding of corrective justice is not solely about 'allocations back', but 'allocations back *to another*'. This is because justice is by its nature always toward *another*, another moral being.

Gardner's conception of corrective justice, defined as the reasons for allocation back, is sufficiently minimal, making it hard to say that it can have *no* role in unjust enrichment. My argument here is that, while it might have a role to play in identifying the reasons for the remedy of restitution, it does not help us to understand better the origin of the duty of the defendant in unjust enrichment. Reasons of corrective justice are not sufficient to explain this duty; we need something more, namely, an understanding of the norm that underlies unjust enrichment.

Before I continue, I must acknowledge a serious challenge to my argument thus posited, one that I have in fact used against other unjust enrichment theorists. If I am saying that there is an underlying norm in unjust enrichment, the violation of which generates the duty of restitution, then it seems I leave myself open to the criticism that I have destroyed the autonomy of unjust enrichment, reducing it to the law of wrongs. My response is that we should be wary of confusion about what is meant by 'wrong'. There are at least two different understandings of wrong at work in the law of torts and the law of unjust enrichment. The wrong that is irrelevant in unjust enrichment, the fault of the defendant, remains irrelevant even if we use the language of 'wrong'. The wrong in unjust enrichment, thus understood, is a breach of some background norm. As such, it is similar to strict liability torts, where fault is not

required. One could posit that as negligence torts are to strict liability torts so too are strict liability torts to unjust enrichment in that the degree of agent-related fault decreases. Negligence torts represent the highest degree of fault – wrong in doing and wrong in doer – strict liability torts the next degree – wrong in doing – and unjust enrichment the last – neither wrong in doing nor in doer. A norm can be breached, I will show, without fault and without doing. This is the essential character of unjust enrichment. My tasks for the remainder of this thesis are twofold: to identify correctly the character of this norm and to elicit the background reasons that support it.

D. Chapter One Conclusion

Although superficially similar, unjust enrichment and corrective justice, as the arguments in this chapter have together aimed to demonstrate, exhibit substantially different structures, rendering corrective justice on its own a distorting model for understanding the duty of restitution in unjust enrichment. A consequence of this newfound freedom to look outside the corrective justice framework is the loosening of the grip of the isolationist trend in private law theory. Corrective justice, as understood specifically by Weinrib, eschews considerations external to the parties before the judge – that is, matters of public policy are pointedly excluded. The result is a presentation of private law, in general, and unjust enrichment, in particular, as politically neutral and without context. With the monopoly of corrective justice in doubt, we may now question this political exclusion. A further consequence, however, is that we are left again with our initial question: how is this obligation explained and justified? In the chapters to follow I will explore some potential alternative responses to this query.

III. CHAPTER TWO: *Potential Alternatives*

At minimum, in light of the arguments from the preceding chapter, we can no longer unthinkingly explain or justify the duty to make restitution in unjust enrichment through a corrective justice analysis. Hence, we must seriously consider alternative explanations. The aim here is to identify the normative foundations of the defendant's duty of restitution in unjust enrichment. In other words, we are looking for the *source* of this duty. What is it that provides valid reasons (corrective justice reasons) for the allocation back?

Three contenders stick out: unjust enrichment might be a matter of distributive justice, equity, or commutative justice.[93] Of these three, the third is the most promising and as such constitutes the driving force for my positive thesis: that the law of unjust enrichment is a prophylactic tool whose role is to ensure the application of the commutative justice principle of equality in exchange with respect to transfers of wealth between individuals. It is the violation of the norm of commutative justice that triggers corrective justice reasons to allocate back. In this chapter, however, I will canvas and evaluate variations of the first and second alternatives, leaving analysis of the third for Chapter Three. These inquiries are fruitful as they illuminate key features of unjust enrichment that must be accounted for.

A. Unjust Enrichment as Distributive Justice

To recall from the first portion of my previous chapter, distributive justice exhibits a categorically distinct form from corrective justice. It is not the 'direct'

[93] In a real sense all private law matters brought before a court of adjudication exhibit the structure of distributive justice in a localized sense: a scarce good (winning or losing the dispute) is allocated between a defined group (the defendant and the plaintiff) according to some criterion – meeting the cause of action or successfully defending against it. However, this structure of distributive justice does not mean that the reasons for making the order are necessarily reasons of distributive justice. In other words, if the plaintiff deserves judgment in her favor, this could be because of reasons of corrective or commutative justice, not distributive. (See: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) 179).

justice between 'man and man', but a mediated justice, governed by an external criterion, singling out some incarnation of merit. The equality of distributive justice is thus a proportion: in so much as one person exhibits the characteristic merit does he deserve the burden or benefit to be divided. Injustice here results when one deserving of more gets less or one deserving of less gets more. Some salient features of distributive justice – in contrast to corrective justice – can be elicited from this formal description. First, an external (that is, external to the transaction between the two parties) determination of what is *worthy*, what is considered meritorious – honor, work, intelligence, *inter alia* – is required. Second, and following from this, the characteristics of the parties (of the objects of justice) – that is, not only the characteristics of the transaction – are relevant for the justice of the allocation. To state the distinction in more minimalist terms, though both forms of justice concern the allocation of burdens or benefits, corrective justice is the justice of allocation by subtraction and addition and distributive justice, the justice of division.[94]

In what follows, I will articulate and evaluate three incarnations of distributive justice, demonstrating how each could apply to unjust enrichment. While different in substance, all share the same form and so may appropriately be considered to fit under the genus of distributive justice.

(i) Law and Economics

The first (and obvious) way distributive justice can be said to explain the duty of restitution of an unjust enrichment is by reference to its specific economic consequences. The question to be asked here is whether, by enforcing such liability, we efficiently maximize wealth (or some other chosen end good). This, in essence, is the law and economics approach advocated must famously by Richard Posner.

[94] John Gardner, "What is Tort Law For?" <http://www.law.yale.edu/yalp/papers.html> 11 accessed 18 August 2008.

Relative to the other heads of private law, economic analysis of the law of unjust enrichment is scarce. Beatson and Bishop's co-authored work, however, presents one notable exception. Their thesis, to put it simply, is that just as the law of torts (negligence) strives to minimize the social costs of accidents, so too does the law of unjust enrichment function to minimize the social costs of mistakes.[95] As Beatson and Bishop note, '[m]istakes are wasteful, but avoiding them can be expensive.'[96] In essence, liability under Beatson and Bishop's model is justified if the costs of taking precautions to ward off mistaken payments are less than the reliance and adjudication costs of reversing said payments.[97]

While Beatson and Bishop's economic reduction of the law of unjust enrichment carries some appeal, it is not the most viable law and economics candidate as two trenchant criticisms reveal. First, Beatson and Bishop's arguments may be characterized as armchair reasoning as their model is notable for its lack of empirical support.[98] Second, this methodological criticism is echoed in the more general skepticism about the general law and economics presumption, one adopted by Beatson and Bishop, that the law is able to provide incentives to take efficient precautionary measures.[99]

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[95] J Beatson and W Bishop, 'Mistaken Payments and the Law of Restitution' (1986) 36 U Toronto L J 149, 150 (also published in: J Beatson (ed), *The Use and Abuse of Unjust Enrichment* (OUP, Oxford 1991). For criticism of Beatson and Bishop et al. see: Tang Hang Wu, 'The Role of Negligence and Non-Financial Detriment in the Law of Unjust Enrichment' [2006] 14 Restitution L Rev 55.

[96] Beatson and Bishop, 'Mistaken Payments' (n 95) 150.

[97] Beatson and Bishop, 'Mistaken Payments' (n 95) 159.

[98] R J Sutton, 'Mistaken Payments: An Inner Logic Infringed' (1987) 37 U Toronto L J 389, 411.

[99] Mark Gergen, 'What Renders Enrichment Unjust?' (2001) 79 Texas L Rev 1927. Against Gergen, one could argue that the law might reflect efficient decisions or precautions even if it does not create them. This challenge, however, requires extensive empirical evidence to support it. Such evidence is notably missing in Beatson and Bishop's account.

These criticisms do much to discredit Beatson and Bishop's interpretation of law and economics, but not necessarily the discipline's application to unjust enrichment as such. Hanoch Dagan has a stronger argument for the applicability of law and economics to unjust enrichment.[100] According to Dagan, unjust enrichment represents a compromise between the competing interests of the payor's liberty to make a mistake and the payee's security of receipt. As such, Dagan views unjust enrichment as distributing the risk and harm of mistaken payments between payor and payee. Thus, Dagan offers a more robust economic analysis than Beatson and Bishop, one that takes into account not only efficiency, but autonomy as well.

If, however, our concern is not solely efficiency, but also includes autonomy-related concerns, two questions emerge: (1) what autonomy concerns – what factors – are important; and (2) what do we do when concerns of efficiency and those of autonomy conflict?[101] In response to the former, Dagan provides a scheme of factors that are relevant for analyzing mistakes, organized around the relative ability of each party to be the cheaper cost avoider.[102] Yet, question (2) remains a problem, exemplifying the problem of incommensurability. Dagan admits claims will inevitably conflict and will need to be balanced, but maintains that, provided the balance is an informed one, this is acceptable. Some commentators appear swayed by

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[100] Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, Cambridge 2004).

[101] I should be careful here to note that many economists would not equate wealth-maximization with efficiency. Autonomy concerns would be included in the determination of whether a given law, say, were efficient. That is, the *process* by which an outcome is reached can be reflected in its efficiency. In-depth evaluation of this issue, however, lies outside the ambit of my thesis.

[102] For example, a commercial party is in a better position to gather information so as not to make a mistake than is a private party. As an aside, while initially intuitively appealing, I am not sure this argument proves convincing. Given the diffuse nature of corporate responsibility and general lack of accountability in corporate governance structures, one might expect an individual, minding her own resources, would be in a better position to avoid mistakes, although, notably, not in a better position to insure against them once they occur.

this reasoning.[103] I, however, am not. While Dagan offers us perhaps not the worst scenario, I doubt that it is near the best. Even if informed, such a choice among conflicting – if not, incommensurable – principles gives rise to uncertainty. Uncertainty of this sort (that is, not mere penumbral uncertainty, but core uncertainty) is anathema to law as it undercuts one of the core principles of the rule of law: that law functions as a guide for human behavior.[104] To have two criteria of distribution – autonomy and utility – will lead to likely conflict.[105] If we can agree that one of law's key functions is to avoid or resolve such conflict, then any theory that permits or encourages these conflicts (even if in an informed manner), and provides no formula for deciding between them, should be rejected.

(ii) Localized Distributive Justice

One way to move beyond Dagan's framework is to dispense with efficiency as an authoritative criterion for distribution and focus solely on autonomy as it manifests in the presence or absence of fault. This is essentially what Stephen Perry, in the context of tort law, calls the 'localized distributive argument for fault'.[106] To put it simply, according to Perry, liability in tort should be determined as between the defendant and the plaintiff by which party is responsible (outcome-responsible) for the loss.[107]

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[103] Andrew Tettenborn, 'Review of Hanoch Dagan's *The Law and Ethics of Restitution*' [2005] 13 Restitution L Rev 245, 247.

[104] Joseph Raz, *The Authority of Law* (Clarendon Press, Oxford 1979) 210 -229.

[105] It should be noted that Dagan in fact has three factors that make a moral claim: autonomy, utility, and community. Rather than decreasing the likelihood and intensity of conflict, the third factor only adds to it.

[106] Stephen Perry, 'The Moral Foundations of Tort Law' (1991-1992) 77 Iowa L Rev 449, 497.

[107] With respect to 'outcome responsibility', see: Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530.

Klimchuk tentatively imports Perry's structure into unjust enrichment, calling it 'internal distributive justice.'[108] According to this account, the errant payee is treated as someone who has merely lost her money and this loss is then 'distributed' between the two parties to the transaction. Klimchuk leaves it to us to expand on his account. What could be the appropriate criterion for distribution as between the payor and payee? If it is causation, then it seems the payor should have to bear her whole loss as she is the one who caused it. If it is fault, and the payor was negligent (which is often the case),[109] then again the payor is more legitimately held liable than the innocent recipient as it is the payor who was negligent (mistaken), not the payee. However, we could argue that the vitiation of consent signaled by mistake (or other unjust factor) is sufficient to render the payor not (outcome) responsible for her mistaken payment. Yet, the exercise, remember, is a comparative one. Therefore, as between the payor and payee, the payor is, as the one who made the payment, more (outcome) responsible than the payee. In sum, this model does not explain the duty of restitution in unjust enrichment; in fact, it undercuts it.

(iii) Procedural Distributive Justice

There is a further, final, more intuitive alternative conception of how distributive justice might be at work in unjust enrichment. Psychological studies have shown that people judge the distribution of entitlements according to some previously held understanding of distributive justice.[110] When a distribution is effected by a

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[108] Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason Neyers, Mitchell McInnes, and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, Oxford 2004) 133-134, where he calls it the 'internal … distributive justice account.'

[109] *Kelly v Solari* (1841) 9 M &W 54 (Court of Exchequer), 152 ER 24.

[110] Elizabeth Hoffman and Matthew Spitzer, 'Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice' (1985) 14 J Legal Studies 259; Hoffman and Spitzer, 'The Coase Theorem: Some Experimental Tests' (1982) 25 J L and Economics 73; and

means that violates this intuitive understanding of distributive justice, the outcome is not seen as just.

In a study conducted by Hoffman and Spitzer, the authors flipped a coin between two participants.[111] The winner of the coin toss could choose a non-cooperative outcome of his own, that is, could choose an outcome that gave him $12 and his co-participant $0. In the alternative, he could opt to cooperate with the coin toss loser and to obtain, as between them, the greater total of $14, to be divided between them. According to cooperative game theory, the parties will choose to cooperate and divide the sum $13 to $1, with the coin toss winner receiving the greater sum. Each in this situation would experience a $1 increase in their respective values from what could be achieved in the first alternative, the alternative of non-cooperation. However, in the study, participants, although choosing the cooperative alternative, chose to split the $14 evenly - $7 to $7. As Spitzer and Hoffman in a subsequent paper declared, '[i]n effect, each winner of a coin flip agreed to take $5 *less* than the $12 that he could have obtained *without* the other subject's cooperation.'[112] The authors concluded from this study – and a subsequent one involving games permeated by language of moral desert – that subjects behave in accordance with a theory of distributive justice (a Lockean one based on desert) that deems the coin flip an unjust way to distribute property entitlements.[113]

We can apply this analysis to unjust enrichment as a variation of how unjust enrichment can be conceived as distributive injustice. Unjust enrichment here is like

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Philip Brickman, 'Adaptation Level Determinants of Satisfaction with Equal and Unequal Outcome Distributions in Skill and Chance Situations' (1975) 32 J of Personality and Social Psychology 191.

[111] Hoffman and Spitzer, 'The Coase Theorem' (n 110).

[112] Hoffman and Spitzer, 'Entitlements' (n 110) 260.

[113] Hoffman and Spitzer, 'Entitlements' (n 110) 273.

a coin toss – it is not a just way of allocating entitlements, hence we intuitively object to the outcome it dictates if not remedied. In other words, the mistaken payment that the plaintiff loses and the defendant gains does not move to the defendant based on some prior meritorious characteristic or behavior. Rather, its movement is by chance; it is arbitrary. In contrast to Klimchuk's localized distributive justice, procedural distributive justice is not about the fairness of the loss lying where it falls, but instead the fairness of the procedure that dictates how loss or gain should be divided, hence the name I give it of 'procedural distributive justice'.

The obvious difficulty of arguing that procedural distributive justice explicates the duty of restitution in unjust enrichment is that, although it highlights that the allocation of entitlements post-unjust enrichment is unfair, it does not accurately describe or justify the remedy. Dividing the mistaken payment equally between the plaintiff and the defendant would not satisfy the plaintiff's claim in unjust enrichment to get *all* of her money back. This reveals the true disconnect between procedural distributive justice and unjust enrichment: while procedural distributive justice's concern lies with initially unowned assets, unjust enrichment's subject matter is owned wealth. The subject matter in unjust enrichment is not the subject matter of initial acquisition, but of derivative acquisition. It is derivative acquisition that has failed or been in some way defective in unjust enrichment. In sum, unjust enrichment is about already owned assets.

It might be objected that I have taken the coin toss example too literally, that procedural distributive justice need not favor an *equal* distribution of a mistaken payment. One could, for example, envision two procedures for distributing owned property: consensual transfers (only), or consensual transfers (plus mistaken transfers). We could argue that the first is, of the two, the just procedure of

distribution. The difficulty that arises now is that we must go beyond the procedure itself and employ some substantive argument for why it is the just alternative. The procedure itself does not assist us in uncovering the substantive reasons behind its distributive criterion.

(iv) Conclusion on Distributive Justice

While distributive justice – in any of the incarnations canvassed above – does not seem to explain best the duty of restitution in unjust enrichment, the inquiry has not been pointless. What we can glean from this failure is the intuitive negative reaction to arbitrary or inefficient distributions of wealth. Reacting to this perceived injustice, scholars have tried to articulate distributively just ways of confronting unjust enrichments. However, what is clear from the preceding is that the injustice at work in unjust enrichment is not distributive in character. There is no external criterion – efficiency, autonomy, or merit – that adequately serves to mediate between the plaintiff's and the defendant's respective claims in unjust enrichment.

Difficulties in defining what sort of injustice is at work in unjust enrichment has lead some scholars and judges to posit that it is a *general* sort of injustice best characterized as an equitable injustice. In the next section I will evaluate the merits of this position.

B. Unjust Enrichment as Equity

Equity is a notoriously difficult concept to define; some might venture that this indeterminacy *is* in fact its precise meaning. Before I entertain the various meanings of equity that can perhaps be used to elicit an explanation of the duty of restitution, it is essential to take care to mention one common meaning that I do not wish to invoke: Equity with a capital 'E' – that is, the rules whose historical origins lie with the Court of Chancery in England. There are two reasons for this exclusion.

First, there is no longer a separate law of Equity in England.[114] Equity is now fused with the common law. Second, the origin of the law of unjust enrichment, despite the equitable ring of 'unjust', lies not in Equity's Courts of Chancery, but in the Courts of King's Bench, that is, the common law courts.[115] Consequently, my concern is with equity with a lower case 'e'. Even with this constraint, equity can nonetheless have a variety of different meanings; I will canvas two: equity as individualized justice and equity as fairness.[116]

(i) Aristotelian Equity – Individualized Justice

In the *Nicomachean Ethics*, Aristotle defines equity thus: 'And this is the nature of the equitable, a correction of law where it is defective owing to its universality.'[117] Klimchuk specifies with respect to unjust enrichment that, according to the Aristotelian account, unjust enrichment is seen as an ameliorative (equitable) sphere of law that tempers the otherwise harshness of the general rule of private law that losses lie where they fall unless some other criterion (such as fault or causation – neither of which, as we have seen, has a role to play in unjust enrichment) can justify a shift.[118]

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[114] Judicature Act 1875.

[115] *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676.

[116] Emily Sherwin in her invaluably helpful essay, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' (2001) 79 Texas L Rev 2083, isolates three: (1) as a principle of Aristotelian equity, providing correction when normally just rules produce unjust results in particular cases; (2) as a Dworkinian legal principle, one that plays a direct role in judicial decision making; and (3) as a common theme in unjust enrichment, which may shape a judicial order but does not play a determinative (authoritative) role. While Sherwin's classification is helpful, I choose not to adopt it wholesale. This is in part because I do not share her fear of Dworkinian principle-determined judicial reasoning. Moreover, it is because the two models of equity I elaborate on cover the field of how equity is used in cases and articles on unjust enrichment – that is, it is generally either viewed as particular ameliorative judicial discretion or as unbounded fairness.

[117] W D Ross (tr), Aristotle, *Nicomachean Ethics* (The Modern Library, New York 1947) Book V, Chapter 10, 1137b25.

[118] Klimchuk (n 108) 136-137.

Sherwin characterizes this position as follows: 'unjust enrichment should be understood as a principle of individualized, fact-specific decision making, capable of overriding otherwise applicable rules', giving judges the power to disregard generally just rules when their generality produces bad results.[119] Sherwin is unconvinced of the appropriateness of equity thus understood as explicating unjust enrichment because, first, there is no reason gains-based liability should be subject to more judicial discretion than loss-based; and, second, there is nothing *particular* about unjust enrichment that makes it well-suited to be a vehicle for equity.[120] In sum, she concludes, as follows:

> A conflation of restitution with individualized decision making will both impair the practical value of doctrinal rules governing restitution and obscure the trade-off between rules and particularized justice that runs through fields of law.[121]

For the moment, let us agree with Sherwin and move on to the next candidate:

(ii) Equity as what is Fair and Just

Equity in this sense is understood less as individualized justice, tempering the harshness of a rule, and more as general justice, as an 'equitable principle'. It is this understanding of equity that is most often invoked by judges in case law:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for which, *ex aequo bono*, the defendant ought to refund…
>
> [The action] lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's

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[119] Sherwin (n 116) 2094. This should not be read as Sherwin's position on the role of equity. In fact, she is quite clear to reject the Aristotelian account.

[120] Sherwin (n 116) 2100 and 2103.

[121] Sherwin (n 116) 2103.

> situation, contrary to laws made for the protection of persons under those circumstances.
>
> In one word, the gist of this kind of action is, that the defendant, upon the circumstance of the case, is obliged by the ties of natural justice and equity to refund the money.[122] (emphasis added)

There are two senses of equity that can be gleaned from equity in this second incarnation. The first is equity as obliging the defendant – it is inequitable for him to retain the enrichment. The second sense is equity as empowering or obliging the judges, allowing them or mandating them to move beyond the strict rules of law and apply more general principles of fairness. What is at the core of both these senses is the idea of equity as synonymous with fairness. The focus of this thesis is on what explains and justifies best the duty of restitution and such an explanation or justification could come either from exploring the defendant's obligation, independent of the court, or from the court's jurisdiction to determine the existence of this duty and impose it. I am interested in providing solutions to both questions; however, in this section, my concern rests with the latter, with the court. I will return, however, in my final two chapters to evaluate the nature and possible consequences of the difference between the defendant's immediate obligation to the plaintiff to pay restitution and the defendant's intermediate(d) obligation, as sanctioned by the court, to pay restitution to the plaintiff.

To elicit more precisely what this imprecise concept of equity means, it is helpful to illustrate it through a brief critical analysis of cases from a particular jurisdiction that has made liberal use of the language of equity, the Supreme Court of Canada (SCC). Although the SCC strives to confine its meaning of equity as equity

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[122] *Moses v MacFerlan* (n 115) 680-681 (Lord Mansfield). For further helpful isolation excerpts of and commentary on key quotations from Lord Mansfield's dicta about unjust enrichment and equity, see: Keith Mason, 'What has Equity to Do with Restitution? Does it Matter?' [2007] 15 Restitution L Rev 1.

in the Aristotelian sense, in fact, the constant application of equitable considerations has reduced it not to individualized justice, but 'palm tree justice.'[123]

As Ross Grantham argues in his comment on the recent SCC unjust enrichment case, *Pacific National Investments v Victoria*,[124]

> [t]he fundamental objection to the characterization of the law of restitution as 'equitable' in this sense, therefore, lies not in the choice of formulatory language *per se*, but in the invitation apparently held out by concepts such as 'equity' and 'fairness' to judges, scholars and claimants to substitute their own intuitions for reasons and principles. A formulation of the law of restitution that relies upon the discretion of individual judges thus offers no *legally* relevant basis, other than the raw coercive power of the state, upon which the judicial determination that the defendant's retention of the wealth in question is unconscientious should be privileged over the defendant's determination that he or she is entitled to keep it.[125]

More recently, in a criticism of *Garland v Consumers' Gas Co.*[126], Mitchell McInnes directly accuses the SCC of retreating into palm tree justice.[127] McInnes, quoting from Justice Iacobucci's judgment, '[A] consideration of the factors will suggest that there was a juristic reason in the particular circumstances … but which does not give rise to a new juristic reason that should be applied in other factual circumstances'[128], concludes, '[t]hat [it] seems an excellent definition of palm tree justice.'[129]

What is specifically wrong about palm tree justice? Simply put, it violates the spirit of the rule of law. Plaintiffs and defendants should be able to have a reasonable

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[123] *Pettkus v Becker* (1980) 117 DLR 3d 257, 262; [1980] 2 SCR 834, 859 (Justice Martland).

[124] [2004] 3 SCR 757, 2004 SCC 75.

[125] Ross Grantham, 'Absence of Juristic Reason in the Supreme Court of Canada' [2005] 13 Restitution L Rev 102, 108.

[126] (2004) 237 DLR (4th) 385, [2004] 1 SCR 629, 2004 SCC 25.

[127] Mitchell McInnes, 'Unjust Enrichment and Palm Tree Justice: *Garland v. Consumers' Gas Co.*' (2004-2005) Canadian Business L J 103, 126.

[128] *Garland* (n 126) [46].

[129] McInnes, 'Unjust Enrichment and Palm Tree Justice' (n 127) 126.

idea of what the law is before they act – whether this action consists in committing the actionable deed itself, electing to take out third party insurance, or deciding whether to settle or go to court. If an area of law like unjust enrichment becomes known as ultimately determined by judicial discretion – where judges may create and apply a 'new juristic reason', one inapplicable to ensuing cases, in such an *ad hoc* manner – then certainty is lost. Thus, unjust enrichment understood as such unbounded equity runs against the rule of law, with judges basing their decisions on private reasons, instead of public ones.[130]

(iii) Individualized Justice Reconsidered

It is this specter of judicial discretionary remedialism that sends supporters of the rule of law scurrying from using equity to explicate unjust enrichment. Yet, let us revisit Aristotle's understanding of equity to see if this version did not in fact offer, in its original formulation, constraints on its operation; constraints that would safeguard against unbounded discretionary remedialism.

There are two such possible constraints. First, equity is only permitted where the law as applied is too harsh, and, second, where by its application in a particular case it defeats the general purpose for which it was initially created. The first contender can be readily dismissed as too vague and too open to remedial discretionism. What is too harsh? Who decides? Based on what criteria? The second, however, is more viable. It constrains equity's application in a principled and understandable way. If a particular application of a generally just law would undermine the very reason for the law in the first place, then departure from the general rule in such a case is not only unobjectionable to, but is also possibly required by the rule of law.

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[130] Grantham, 'Absence of Juristic Reason' (n 125) 108.

Nonetheless, equity, even understood in this more constrained way, fails to provide a satisfactory account of the general duty to restore to a plaintiff her mistaken payment in unjust enrichment. Understood in a modified way, equity should only apply in rare cases where the general rule does not work justice. More significantly, equity is not specific to the law of unjust enrichment; it may apply to all areas of law equally. Thus, it is difficult to see how even this more palatable understanding of equity can explain or justify the particular duty of restitution.

C. Chapter Two Conclusion

In sum, neither distributive justice nor equity, in any of their respective and various incarnations, satisfactorily explains the duty to restore a mistaken payment to the plaintiff. The most promising distributive justice candidate failed to account for a key feature of the law of unjust enrichment: that the assets in question are already owned; while the most promising equitable solution proved too general for the task of justifying the particular duty on the defendant (or the court's jurisdiction to impose this duty). Although failures, these failures are instructive. In particular, what are now highlighted are some specific features of unjust enrichment and the duty of restitution that must be taken into account if a theory is to prove persuasive. These are: (1) a focus on wealth that is already owned, (2) an aversion to arbitrary distributions, (3) the irrelevance of fault, (4) the irrelevance of causation, and (5) the requirement of something more than general fairness. In the following chapters, I will attempt to construct the philosophical foundations of the duty of restitution in light of these features.

IV. CHAPTER THREE: *Commutative Justice*

To review, in Chapter One I argued that corrective justice fails to explain or justify the duty of restitution in unjust enrichment, although I have left it a limited role at the remedial stage. In Chapter Two, I investigated two alternatives to the corrective justice model, namely, distributive justice and equity, finding them both unsatisfactory. Here, in this third chapter, it is my thesis that commutative justice, properly understood, constitutes the best explanation for the source of the duty of restitution in unjust enrichment. To defend this, my positive thesis, three main arguments are necessary: First, I must define what I do not mean by commutative justice. This argument will contain a necessarily in-depth analysis distinguishing commutative justice from its commonly alleged synonymous concept, corrective justice. Second, I must clarify what it is I do mean by commutative justice, briefly here, the form of justice governed by the principle of equality in exchange. Third, I must demonstrate how this form of commutative justice best fits the structure of liability in unjust enrichment.

In this chapter's final portion, I will acknowledge and explore the limitations of commutative justice's role *vis-à-vis* unjust enrichment – in particular, its inability by itself to *justify* the duty of restitution. This final section ties into my broader thesis, to be addressed in my final chapter: that through the better understanding of unjust enrichment, achieved by viewing it as commutative justice, we can finally begin to see the political value(s) upon which the defendant's duty to pay restitution in unjust enrichment is founded, namely, the preservation of the *status quo* with respect to entitlements.

A. Commutative Justice – A Definition

(i) What is not meant

There is one main sense of commutative justice that I do not adopt: commutative justice as a synonym for corrective justice.[131] In light of my rejection of the exclusive explanatory force of corrective justice, it should not be surprising that I would not wish what I view as its more promising alternative to be considered identical to it. I recognize that 'corrective' and 'commutative' are generally treated in the literature as synonyms for the Aristotelian form of justice that stands formally opposed to distributive justice. I aim to challenge this assumed synonymy and carve out a distinction between the principles of and reasons for commutative and corrective justice. I will argue that, while corrective justice is better left to the domain of rectifying wrongs through allocation back at the remedial stage (responding to breaches of duties), commutative justice is better understood as preserving equality in acquisition and exchange (in preserving primary duties *before* they are breached).

Unlike corrective justice, commutative justice is not concerned with correcting a wrong. While corrective justice's role, as I have confined it, is limited to explaining our secondary obligations *given* a primary rights infringement, commutative justice's

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[131] A second meaning of commutative justice I am not invoking is John Finnis'. According to Finnis, commutative justice encompasses all interactions between individuals. To comprehend what is wrong with Finnis' conception of commutative justice, it is helpful to understand first how he defines distributive justice. Finnis defines distributive justice as the form of justice confined to providing responses to problems of allocating subject matters that are essentially common in nature (the common stock) among individuals. Next, he defines commutative justice as relating to problems 'which arise in relations and dealings between individuals and/or groups, where the common stock and what is required for communal enterprise are not directly in question.' John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) 166. My objection to Finnis' definition is that while he marks out a salient feature for distributive justice, he fails to do likewise for commutative justice, leaving it as apparently 'everything else' that is not better characterized as distributive justice.

A third meaning of commutative justice I do not endorse is that expounded by 20th century Catholic natural lawyers, according to whom the notion of 'equalization of values', which is central to commutative justice, is based on the mutual recognition of the inalienable right to private property since, only if this right is recognized, will individuals be able to fulfill god's divine plan. (See: William R White, 'The Natural Law and Commutative Justice' (1956) 2 Catholic Lawyer 31, 31-34). My thesis' search is for secular philosophical foundations, not divine.

ambit encompasses protecting those primary rights *qua* primary rights.[132] Unlike corrective justice, commutative justice is not concerned with the 'next best' solution; rather, its province lies in ensuring the best solution. This conceptual distinction is the reason there is room for both corrective and commutative justice in unjust enrichment. While commutative justice, as I will show, helps to explain the origin of the duty to pay restitution in unjust enrichment, corrective justice retains a role at the remedial stage, giving the defendant reasons to make up for his breach of the commutative justice norm.

Robert Stevens also supports this view:

> In English, the language of 'correction' presupposes the wrongfulness of the conduct, and consequently, the primary right the violation of which needs correction. I have a right that you do not punch me on the nose; prior to your doing so, there is nothing to correct. Where a primary right is specifically enforced, for example through an injunction or specific performance, it is inapt to describe this as justified in terms of *corrective* justice. There is no imbalance which is being remedied: the court is simply enforcing the *status quo*.[133]

Yet, there is something a bit too easy about Stevens' characterization of corrective justice. The flaw is this: while it is true that generally when we speak of 'correction', we mean the correction of a wrong, an error, a typo, a mistake, this is not all that we can mean. We may also quite legitimately say we are correcting an imbalance, an inequity, or a misallocation.

I propose that a better way to understand corrective justice, so that it might encompass the various meanings of correction it entails, is as an individual's relationship with a norm, an obligation, a duty. When an individual infringes, violates, or impairs this duty, he must correct it. He must make up the normative

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[132] I should note that corrective justice can also have a role with respect to secondary rights violations – such as, a failure to pay compensation due for a primary rights violation – but that such violations do not represent the core case.

[133] Robert Stevens, *Torts and Rights* (OUP, Oxford 2007) 328.

space between him and the fulfillment of the duty. Since only compliance with the duty can yield a perfect fit between his behavior and the norm that governs it, and this, given the antecedent breach that triggers corrective justice, is temporally speaking impossible, corrective justice is about the next-best alternative.

What is striking about this reconceived version of corrective justice is that it is stripped of its plaintiff-defendant correlativity in a certain respect, in the respect of correlative equality. While it remains true that the duty breached by the defendant is correlated to the plaintiff's right, the relative equality is not between the defendant and the plaintiff, but between the defendant at T_1 and the defendant at T_2 – that is, before and after the transaction. Against Weinrib, the rights involved in corrective justice are not rights to equality *vis-à-vis* the other party to the transaction, but rights to equality between one's pre- and post-transactional statuses. Just as the defendant has normative space between him and his duty, the plaintiff thus also has normative space between her and her rights. This is the same normative space as between the defendant and his duty; however, the relationships are distinct. To state this more formulaically: P ←(normative space)→ RIGHT: D ←(normative space)→ DUTY. Thus, the plaintiff's normative space between her holdings and the holdings she has a putative right to bears no necessary relationship to the defendant's normative space between his holdings and his duty, although the spaces will be proportionate. The defendant could have a duty irrespective of the plaintiff's right, although the converse would not be true. In unjust enrichment, the fact that generally the plaintiff's loss and the defendant's gain are equivalents (are, in fact, identical) confuses this conceptual distinction.

By contrast, commutative justice's concept of equality is essentially relational as between the plaintiff and defendant. What matters is the plaintiff's holdings at T_1

and the defendant's holdings at T_1. When the defendant at T_2 is enriched and the plaintiff correspondingly and simultaneously disenriched, there is a disruption in the equality of the relative holdings between the parties. There is a 'correction' here, but it is between the plaintiff and the defendant and is unmediated by the defendant breaching a duty he owes to the plaintiff. The defendant does not have to make up for the normative space between him and his obligation unless we are to construe an anterior positive duty to reject mistransferred wealth, such a duty lying outside the appropriate ambit of private law. In other words, while the necessary relationships in corrective justice are between the defendant and his obligation and between the plaintiff and her right, this is not the case in unjust enrichment, where the necessary relationship is between the plaintiff's holdings and the defendant's. Thus, no right need be infringed and no duty need be breached for an inequality to arise, an injustice that subsequently demands correction.

I will return to address further implications of this distinction between corrective and commutative justice shortly, but for now what is important to take away from this discussion is that I am not using and have good reasons for not using commutative justice as a synonym for corrective justice.

(ii) What is meant

The inspiration for the form of commutative justice I ultimately defend is found in Kant's *Metaphysics of Morals*, where he defines commutative justice as follows: 'the *justice* that holds among persons in their exchanges with one another.'[134] Simply put, commutative justice is not synonymous with corrective justice, but with the justice of exchange.

[134] Mary Gregor (tr), Immanuel Kant, *The Metaphysics of Morals* (1797) (Cambridge University Press, Cambridge 1996) [§36] 78.

Thus, the question we must now ask is: what is the justice that underscores exchanges? A few potential candidates stand out, namely, the justice of consent, of efficiency, or of merit. We could say, for instance, that an exchange is unjust if it is not voluntary, if it is inefficient, or if the recipients come away with more or less than they each deserved. All of these explanations appear to fit claims of unjust enrichment, where often the plaintiff characterizes her complaint along the lines that she did not consent to the transfer, that to permit such exchanges as valid would undermine the efficiency of transactions, or that the defendant did not deserve the benefit bestowed upon him. There is truth to these alternative explanations; however, I propose in their stead that the best explanation for the justice of exchange lies in the equality of the objects of the exchange. This response is superior as it can encompass autonomy, efficiency, and desert concerns while simultaneously singling out the most salient feature of unjust enrichment: inequality in transaction.

Before demonstrating this relative superiority, however, a fuller explanation of what this 'equality' is as it arises in exchanges is necessary. In a transaction between two persons, there are four related items (*relata*): the two persons and the two things that are the objects of exchange. In particular, our attention must focus on what it is that is the subject matter of this unequal exchange – that is, which pair of the four *relata*. As was the case before, so too now is it helpful to return to Aristotle's *Nicomachean Ethics* to understand the structure of the relation of equality in exchange. Aristotle comes closest to its discussion not in his chapter on corrective justice nor in his chapter on distributive justice, but rather in Chapter 5 of Book V, the subject of which is reciprocity – or more precisely the form of justice that is a form of reciprocity in the context of a voluntary exchange of goods.

Here, Aristotle's formula for fair exchange is instructive: 'There will, then, be reciprocity when the terms have been equated so that as farmer is to shoemaker, the amount of shoemaker's work is to that of the farmer's work for which it exchanges.'[135] As Scott Meikle persuasively argues, we should not interpret this passage as the proponents of what he dubs the 'Standard View' do to mean that 'as farmer is to shoemaker' represents an inequality that sets the stage for determining how many shoes should be given for food (or a house, as in Meikle's example).[136] Rather, the farmer and shoemaker are, for the purposes of evaluating the justice of the exchange, equal. The inquiry here is not one into the equality of the persons, but of the things exchanged: 'The enquiry deals only with the ratio in which products are exchanged; persons are irrelevant.'[137]

Thus, like corrective justice and unlike distributive justice, commutative justice understood as fair exchange considers the parties to the transaction, for the purposes of evaluating the justice of the transaction, as equals. Commutative justice, however, is different from corrective justice in that it is concerned not with the justice of *correcting* the bad exchanges, but rather with the prior procedure necessary to determine what a fair exchange is.[138] This, however, is notably different from 'procedural distributive justice', discussed in Chapter Two. There, the justness of the procedure was determined by whether it accorded with some external principle, for

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[135] W D Ross (tr), Aristotle, *Nicomachean Ethics* (The Modern Library, New York 1947) 1133a30-35.

[136] Scott Meikle, 'Aristotle on Equality and Market Exchange' (1991) 111 J of Hellenic Studies 193, 193.

[137] Meikle, 'Aristotle on Equality and Market Exchange' (n 136) 194. For the contrary view – that equality in exchange is in fact about equality of persons – see: James Bernard Murphy, 'Equality in Exchange' (2002) 47 American J of Jurisprudence 85.

[138] Meikle, 'Aristotle on Equality and Market Exchange' (n 136) 195.

example, desert. Here, by contrast, the focus is on the *form* of the exchange – that is, whether the exchange itself, judged by its internal features, is just.

In unjust enrichment the ratio of the products exchanged is, by definition, unequal. To borrow characters from Aristotle, the shoemaker accidentally bestows upon the farmer five shoes, but receives nothing back. We would not say the farmer has breached any particular duty to the cobbler or that the latter has any right to the shoes that he has freely (but nonetheless accidentally) parted with. However, the exchange is on its face unequal and can be reversed if governed by the principle of commutative justice.

What is essential to this understanding of commutative justice is the principle of equality in exchange with respect to the objects of exchange. To put this point negatively, what is significant is the absence of a gratuitous transfer of value. If it can be shown that unjust enrichment serves this role, as understood through the lens of commutative justice, then we can begin to see unjust enrichment for what it truly is: a tool to promote and preserve the *status quo* of existing entitlements. Understood as the guardian of equality in exchange, what unjust enrichment may be seen as promoting is the *political* value that redistribution should not be undertaken by individuals *vis-à-vis* other individuals.

A difficulty arises here with respect to the law of gifts since what is a gift but an individual redistribution of wealth independent of state control? Rather than damning, this objection helps clarify what the precise objection is to individual redistributions. It is not individual redistribution *per se* that is objectionable, but accidental (arbitrary) redistribution. A gift is essentially a voluntary act. In contrast, unjust enrichment, in its paradigm case, is involuntary. Thus, there exist policy reasons in favor of gift that do not arise in defense of unjust enrichment. Gift,

understood thus, is an extension and manifestation of respect for self-determination of individuals.[139]

Let us return here to the other possible candidates to explicate justice in exchange, namely, voluntariness, efficiency, and merit. Both merit and efficiency, while legitimate grounds for initial distributions of assets, encounter resistance when applied to bilateral transactions. We would object to allocations of already-owned assets between two persons based on reasons that a particular character trait of one meant he deserved it more and the other less. Similarly, we would object to the transfer of already-owned assets from the original owner to another based on reasons that the new owner would make more efficient use of them. To justify such allocations involves the logic of distributive justice and the requirement of an external power to determine where benefits and burdens should lie. As I demonstrated in Chapter Two, the logic of distributive justice does not fit claims of unjust enrichment. Voluntariness, at first glance, appears more viable, however, two difficulties with this explanation emerge. First, what we take issue with in situations of unjust enrichment *initially* is the disparity in things exchanged. That someone has perhaps consented to the disparity serves as a reason to defeat our original reasons against the allocation. Second, voluntariness, in the context of unjust enrichment, results in a wholly plaintiff-centered analysis. The defendant, we can easily argue, is just as much acting without consent insofar as he did not consent to the mistaken payment.[140]

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[139] Gordley explains the gift exception somewhat differently. He argues that gifts are a notable, but not unprincipled, exception to this principle. Since the essential intent of a gift is to effect a gratuitous transfer of value, the normal reasons for non-violation of the principle of equal exchange are defeated in order to serve the specific values of gift. In other words, the presumption against inequality in exchange mandated by commutative justice is rebuttable. James Gordley, 'Equality in Exchange' (1981) 69 California L Rev 1587, 1619.

[140] It becomes clear now why Weinrib insists on the defendant's knowledge that the benefit he receives is non-gratuitously given.

One particular benefit of understanding commutative justice, the justice of exchange, to be concerned with the equality of the things exchanged is that it assists in making plain the dual role played by commutative and corrective justice in unjust enrichment. The following example helps illustrate this. Here, the relevant norm is one of distributive justice, and its violation triggers reasons of corrective justice. At a fancy restaurant, my partner and I are splitting an equally fancy bottle of wine. We intend to split the total bill equally and it is the policy of the restaurant to divide purchased beverages 50:50. The waiter over-pours my share – her claim is not one of corrective justice, but of distributive justice.[141] Although in a sense the imbalance is to be 'corrected', the claim is one based on a distributive injustice, not a wrong in the sense with which we are concerned with in corrective justice – that is, as a breach of a duty a particular defendant owes to a particular plaintiff not to infringe his primary rights. In other words, the norm breached is a norm of distributive justice and the example is an instance of distributive injustice, even though the reasons for allocating back are reasons of corrective justice – reasons to ensure the next-best solution to having never breached the norm in the first place.

While we would say that the waiter has an antecedent duty to pour the wine equally, we would not say in unjust enrichment cases that the defendant has an antecedent duty not to receive gratuitous transfers of value from the plaintiff. In this sense, the norm of commutative justice is not a *personal* norm, applying specifically to the parties to an interaction; rather, it hovers above all 'transfers' as a template to assess their justice. Anticipating a further objection, it is not appropriate to say now that the norm in unjust enrichment scenarios could just as easily be distributive as

[141] Note that the situation would be different if we were splitting said wine at home and had agreed beforehand to split it evenly and one of us over-poured her own glass. This scenario is more analogous to a breach of contract than state division of benefits.

commutative. As noted in Chapter Two, distributive norms do not address the problem of vested rights, that is, of assets already held.

We may now posit that the relevant norm in unjust enrichment is the norm of commutative justice. When this norm is violated, correction – the call for the 'next best' solution – is mandated. Thus, corrective justice, as Gardner understands it, as an allocation back, remains relevant. What I object to is the understanding of the defendant's duty of restitution as grounded in corrective justice. The duty does not originate in corrective justice, but in commutative justice. The source of his duty, in other words, is not to correct an injustice but not to disrupt equality in exchange.

B. Possible Objections

(i) Wrong?

I return now to an earlier challenge that this analysis of unjust enrichment confounds it with the category of wrongs. While not inimical to an analysis of 'wrong', the type of imbalance corrected in unjust enrichment, would require a very broad understanding of wrong to encompass it. We should be wary of adopting this understanding since it could expand our notion of acceptable duties in private law, making it such that we have a duty to maintain equivalence in exchange in all our dealings. This is certainly not the case, as money-lending regimes surely demonstrate. In the Aristotelian circuit of Money-Commodity-Money' (M-C-M'), also known as retail trade or *kapelike*, the vendor at the beginning of the circuit has M. He trades M for C (that is, he buys a commodity with money). He then sells C for M', M' represents a greater or lesser (if the market is against him) value of money.[142] Aristotle, notably, although not without some ambivalence and hesitation, condemns *kapelike* because the vendor not only receives an excess (M'), but also aims to get

[142] Scott Meikle, 'Aristotle and the Political Economy of the Polis' (1979) 99 J of Hellenic Studies 57, 65.

said excess. This reveals one of two things: either inequality in exchange is not sufficient for commutative injustice, or the inequality we are looking for is not captured by the M-C-M' circuit.

The truth lies in the latter possibility. The inequality in M-C-M' is not the type of inequality we find objectionable. Although a rigorous discussion of its pivotal role in determining lack of equivalence in exchange lies outside the scope of this thesis, I would be remiss if I did not take some space at this juncture to discuss the nature of value and how it functions in unjust enrichment. Value is the means by which qualitatively different things can be compared. I can say one cow is the same as one horse, for example, only through the mediating concept of value. In essence, what I am saying is that the value of the cow is equivalent to that of the horse. Value contains both subjective and objective meanings. The cow, for example, might be particularly (subjectively) valuable to me because of my love of all things dairy, but valueless (subjectively) to you because of your lactose intolerance. Regardless of our subjective valuations, the cow has an objective value: what it is worth when exchanged (in the market, for example).[143] The objective value of a thing is what permits it to be compared with qualitatively different things. Thus, to return to our M-C-M' example, one of the reasons there is no unjust enrichment here is because there has been no transfer of value: M → C represents no value gain or loss and C → M' equally represents no value loss or gain. The owner of M paid the value (objective) for C and then as the new owner of C exchanged it again for its new

[143] I take market value to be our world's manifestation of objective value. I recognize that market value is more accurately termed 'intersubjective value' – that is, the combination of the buyer and seller's subjective valuations. The term objective value, however, is more suitable for my purposes since my aim is not to discover the true ontological value of a Horse, say, but to find what its 'objective' value (understood in contrast to the buyer's and seller's respective subjective valuations) is as between the two parties to the transaction.

market value, M'. There is no injustice when the value of the thing (C) increases or decreases over time or across transactions.[144]

Moreover, Aristotle's ultimate negative judgment with respect to the M-C-M' circuit reveals that whether an inequality in exchange is deemed unjust is crucially dependent upon the political-social factors that contextualize the given exchange form. What was considered unjust in Aristotle's sense of the political economy – aiming for excess (for profit), that is, retail trade – now represents the dominant (and for the most part positive) social-economic norm. We, in other words, have policy reasons to value M-C-M', just like we have reasons to value gift. Notably, such reasons are not present in unjust enrichment scenarios.

Weinrib also asserts that value lies at the heart of unjust enrichment. Given my earlier rejections of Weinrib's theory of corrective justice and its application to unjust enrichment, it is appropriate here to consider briefly where we still disagree. Weinrib is correct in identifying nongratuitous transfer of value as the trigger of 'unjust' in unjust enrichment – that is, what sets it apart from M-C-M' – but fails to comprehend the true nature of the parties' relationship. While value accurately describes the nature of the relationship between the things, corrective justice's conception of equality does not accurately describe the nature of the duty between the plaintiff and defendant. The equality relevant in unjust enrichment is interpersonal, not intrapersonal – that is, it is between the defendant and plaintiff, not between the defendant and a norm or the plaintiff and a right. Thus, commutative justice assesses the equivalence of value between things and corrective justice governs the equality

[144] What if, however, the end buyer of C could have purchased it from its initial seller at the increased value (M')? Is this now an injustice? As I will demonstrate, this determination depends on the social-political context in which the transaction occurs.

between an agent's action and a given norm, requiring allocation back if there is an unjustified imbalance.

A further reason why unjust enrichment should not be conceived broadly as a duty to *correct* an unbalanced exchange is that it would result in an unpalatably onerous duty for defendants under private law. The imbalance corrective justice appropriately concerns itself with is a breach of a duty. If we were to conceive of equivalence in exchange as a defendant's duty in unjust enrichment, this would be too expansive a duty, one that it is impossible for defendant to keep. Since ought implies can, we cannot justify imposing such a duty on the defendant.

(ii) Voluntary?

Viewed as equivalence in exchange, we can see how, *prima facie*, commutative justice fits well with the structure of unjust enrichment, which can now be reconceived as an exemplification of a lack of equivalence in exchange. One apparent flaw in understanding this through an Aristotelian lens, however, is that Aristotle's concern in Chapter 5 of Book V is with 'voluntary' exchanges, such as contract. By contrast, unjust enrichment is better understood as an involuntary transaction. This objection, however, does not undermine the relevant similarity between the objects of exchange in both structures. In fact, the involuntariness of the exchange in unjust enrichment makes the case stronger for equivalence in the objects' value – there can be no consent to a lesser value if there is no consent to the exchange in the first place. To put this point somewhat differently, our focus is on the value equivalence of the objects of the exchange. A lack of equivalence constitutes a violation of commutative justice. Whether this violation is manifest in the law of unconscionability in contract or the law of unjust enrichment is a doctrinal matter, not one of justice, as the underlying principle is the same.

C. Summary of A and B

Apart from its accuracy in explaining the origin of the duty of restitution in unjust enrichment, what else recommends the commutative justice analysis? Commutative justice is superior to corrective justice in the context of explaining the duty of restitution in unjust enrichment because it corresponds with unjust enrichment lack of fault requirement. It is superior to distributive justice because it can conceive of parties as equals – that is, claims of the relative moral worth of the plaintiff *vis-à-vis* the defendant are irrelevant. Finally, it is superior to equity because as an articulated specific norm of equality in exchange it is not nearly as prone to accusations of discretionary remedialism. With these advantages in mind, let us now reflect on some of the limitations of a commutative justice analysis.

D. Limits to the Commutative Justice Analysis

To argue that unjust enrichment is explained or, more accurately, described best by commutative justice understood as equality in exchange is insufficient justification for the duty of restitution in unjust enrichment. True, it provides a more accurate description than corrective justice, distributive justice, or equity of the structure of this liability, but a description of a duty cannot be sufficient justification for its imposition. In other words, while it is helpful to understand that the reason for the duty of restitution in unjust enrichment is to preserve equality of exchange understood through the lens of commutative justice, in order to justify this duty we must reveal why it is that equality of exchange *should* be preserved.

The following sets help to illustrate this limitation: Let us say that the plaintiff's holdings at T_1 are (0,1), where '0' represents the status of the plaintiff as a moral being (a mathematically empty formal feature in both corrective and commutative justice – in contrast to distributive justice) and '1' represents her

entitlements, and the defendant's holdings at T_1 are also (0,1). At T_2 an event of unjust enrichment occurs and as result the plaintiff's holdings are now (0,0) and the defendant's (0,2). What we require is some theory to explain why it is at T_3 (the remedial stage) that the defendant now has a duty to restore the *status quo*, that is, to transfer one unit of entitlement from his holdings to the plaintiff's in order to return them both to their relative positions at T_1: the plaintiff (0,1) and the defendant (0,1). To posit that the explanation is equality in exchange is merely to describe the phenomenon, not justify it.

It is particularly important that we justify the imposition of this duty on the defendant since, as mentioned earlier, unjust enrichment for all its 'unjustness' requires no wrong and no action need be committed by the defendant. Moreover, some have argued that the defendant's having done nothing to incur this duty other than receive (often unknowingly) the plaintiff's wealth makes the duty of restitution tantamount to a duty to confer a benefit – such a positive duty is considered extremely rare and exceptional in private law.

In order to justify the duty to return the plaintiff and defendant to their initial starting points at T_1, we need an account that justifies this initial distribution of entitlements – that is, that justifies the situation at T_1. T_1 is – we must realize, precisely what the law of unjust enrichment protects.[145] There are two potential explanations for why the *status quo* of T_1 should be protected (and thus reinstated at

[145] In the alternative, we could assert that what is being protected is the procedure parties must follow for a valid exchange to exist – that is, it must be equal or voluntary or equal and voluntary. Next, we would have to justify the procedures in place for determining valid exchanges. I choose to focus on the end-state that is preserved, but I recognize that an alternative focus could be on the procedure adopted to reach that state. That this alternative exists does not undercut my thesis, however, as my overarching goal has been to remove the accepted wisdom about unjust enrichment – that is, shed doubt on the corrective justice model – so that we can examine the political and social aims at the heart of this area of law. That there may be more than one such aim at work does not contradict my central point.

T_3): one is based on the theory of G W F Hegel and the other on that of Aristotle.[146] One is based on a sufficiently important private interest (a right in Razian terms) that creates a duty in another or others to remedy unjust enrichments and the other on some public interest in maintaining equality in exchange. In the following and final chapter, I will explain each and how whichever path one chooses affects one's understanding of the divisions between private and public, on the one hand, and pre-institutional and institutional, on the other.

[146] I do not mean to suggest that Hegel and Aristotle present the *only* two possible accounts. Notably, Robert Nozick and John Rawls, respectively, put forward their own theories with respect to initial distribution and its justification. Space does not permit this more comprehensive analysis. Moreover, as they represent opposing ends of the spectrum, my choice to focus on Hegel and Aristotle is appropriate.

V. CHAPTER FOUR: *Normative Justification(s) of the Duty of Restitution*

In this final chapter, I hope to develop further my argument from the preceding chapter that commutative justice cannot alone morally justify the duty of restitution for an unjust enrichment. Something more is needed. As unjust enrichment, understood through the lens of commutative justice, appears specifically concerned with the maintenance of the *status quo*, we must search for a theory that explains why this state of affairs deserves such protection. Specifically, what is required is a particular moral theory concerning individual holdings – that is, property entitlements. I will outline two candidates, exemplified by Hegelian and Aristotelian views on property, respectively. Each can be seen as grounding the duty of restitution consequent an unjust enrichment in diametrically opposed sources.

My aim is to discover further evidence to help determine whether the defendant's duty in unjust enrichment to pay the plaintiff restitution is grounded in some anterior right of the plaintiff or in something else. A corrective justice analysis, as it has thus far been conducted in the literature, supports the former: that the plaintiff has an individual right for which the defendant has a correlative duty.[147] That the defendant has a duty, I have posited, is not conclusive of the existence of the plaintiff's right. This duty might have other grounds. Thus, in this chapter I will present competing arguments with respect to these grounds – whether they are in fact based in the plaintiff's right or some other, perhaps, public interest.

[147] For a recent attempt to deny the aptness of corrective justice analysis while at the same time beginning from a starting point of an anterior right held by the plaintiff see: Jennifer Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28 OJLS 245.

A. Hegel

Hegel's starting point with respect to property lies in his conception of freedom (as the embodiment of right) and its essential relationship to personhood. Property, for Hegel, and the capacity for private property rights are not justified by their practical good effects. It is not something that requires external justification. Instead, property – or the capacity to have property – is necessary for self-actualization.

Hegel begins the first stage of his *Philosophy of Right*, entitled 'Abstract Right', with an articulation of the absolutely free will at the stage of the subject's 'consciousness of himself as a completely abstract ego.'[148] One sees oneself as a person – as a subject that can abstract from all particularities. Personality, for Hegel, 'essentially involves the capacity for rights.'[149] These rights are external embodiments of freedom.[150] In abstract right they are abstract in that they are the rights of the free personality as an abstract self. This conception of rights leads Weinrib to say that particularity plays no role at this stage of freedom.[151] We are concerned here only with the rights of a universal nature: those that abide by the maxim '[b]e a person and treat others as persons.'[152]

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[148] T M Knox (tr), G W F Hegel, *Philosophy of Right* (1821) (OUP, Oxford 1967) [35R].

[149] Hegel (n 148) [36].

[150] Hegel (n 148) [29].

[151] Hegel (n 148) [37]; Ernest Weinrib, 'Right and Advantage in Private Law' (1989) 10 Cardozo L Rev 1283, 1286.

[152] Hegel (n 148) [36].

To make explicit what is implicit – the capacity to have rights – the free personality must possess things.[153] In property, the free personality is affirmed as master over things. The independence of things is canceled by the person's exertion of his free will over them. In property, however, there lies a latent problem. Property, as a unilateral act of taking possession, cannot truly affirm ownership – that is, one's status as an owner. In effect, property cannot actualize that which it had as its initial goal: the vindication of a person as a person, a rights-bearer. This is because although one exerts one's right of ownership – be it possession, use, or alienation – by oneself, for that act to have significance, it must be recognized by another. In other words, the significance of what one has done as an owner has no significance absent the presence of another. Moreover, this other is not required to be present – that is, nothing compels her presence as witness to your ownership activities. Therefore, the property owner is at the mercy of a contingent presence of the other (a presence which he seems both to need and not need for the exertion of his right to property).

To summarize, the only way to be affirmed as an owner is through recognition by another – another person. A right must thus be created that requires the will of the other; therefore, the other's recognition of one as an owner must be necessarily entailed by the creation of the right. Such recognition is achieved through contract. To gain affirmation as an end, an individual must alienate possessions in order to gain

[153] I do not intend that the word 'must' here be interpreted to mean the necessity that everyone in fact own actual property. Rather, the force of this necessity applies to the requirement that everyone have the *capacity* to own property. For a different perspective on this, see: Jeremy Waldron, *The Right to Private Property* (Clarendon Press, Oxford 1988) 343 -389. A greater elaboration of this debate is beyond the scope of this thesis; however, it is not unhelpful to reflect briefly on why I choose to adopt the stance I do. If we were to adopt Waldron's interpretation, then this would ineluctably lead to the positing of a positive duty on the free personality in abstract right: a duty to acquire property. As such, the negative attitude that necessarily permeates abstract right would be abandoned. Hence, a more coherent interpretation is that there can be no such positive duty and all imperatives of abstract right can remain, therefore, essentially negative prohibitions.

recognition as a property owner through exchange where each person recognizes the other as an owner of property.[154]

Thus, unjust enrichment is not seen as preserving initially just distributions, but as preserving some aspect of the self's ability to actualize.[155] Unjust enrichment law is understood as protecting an individual right in the same way as say tort law protects an individual's right to the security of his person and property. What the nature of this right is is in fact hard to determine. The newest formulation of this belongs to Weinrib. His idea is that it is a right not to be subjected to non-gratuitous transfers of value. When an agent mistakenly pays over money to another, she loses her right to control the disposition of her wealth as she chooses. The defendant, in receiving the non-gratuitous transfer of value, knowing it to be non-gratuitously given, falls under a duty to the plaintiff to return its value. As we can see, the interest in preserving the *status quo* – which is nonetheless effectuated by this conception of unjust enrichment – is concealed by the language of individual rights.

B. Aristotle

The leading proponent of the Aristotelian justification for the preservation of the *status quo* is James Gordley.[156] Gordley argues that private property is justified for pragmatic reasons: 'My conclusion is that all these rules can be explained by the

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[154] For a modern proponent of this view, see: Peter Benson, 'Abstract Right and the Possibility of a Nondistributive Concept of Contract: Hegel and Contemporary Contract Theory' (1989) 10 Cardozo L Rev 1077.

[155] Alan Brudner, *The Unity of the Common Law* (University of California Press, Berkeley 1995) 113-114 and Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Mass. 1995) understand this in terms of the agent's bare capacity to choose – his abstract freedom. Nadler, by contrast, while arguing from within the same Kantian-Hegelian vein, argues that the right is one of self-determination, not the bare capacity for choice but rather the ability to exercise this choice in achieving particular ends. Nadler (n 147).

[156] James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP, Oxford 2006).

considerations that Aristotle and Aquinas gave for instituting private property: to provide incentives for useful work and to prevent quarrels.'[157]

Thus, for Gordley, the initial state of affairs, T_1, is deemed distributively just. Therefore, no arbitrary departure from it is warranted and in fact any such departure is unjust. Gordley characterizes such arbitrary departures as 'chance losses and gains' that 'may be either forfeitures or windfalls', which are unexpected, by which he means 'that the loss was not certain to occur at the time he paid.'[158] Individuals, Gordley further argues, should not be engaged in redistribution – this is the exclusive function of the state.[159] As a consequence, corrective or commutative (Gordley treats the terms as synonymous) justice's role is to preserve the distributions allocated through distributive justice.

Hence, the interest served by the law of unjust enrichment and the defendant's duty of restitution does not find its source in a correlative right of the plaintiff. It is not the plaintiff's interest in the *status quo* that is the ground, the reason, for the defendant's duty. Instead, what grounds the duty is a public interest in retaining what is perceived as an initially just *status quo*. If unjust enrichment is understood in this light, one upshot is that we can no longer in good faith view it as hermetically sealed off from political decisions. Rather, it is blatantly a tool for enforcing such past decisions with respect to property division and ensuring that the distributions intended by said decisions are not disrupted by accidental individual dispositions.

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[157] Gordley (n 156) 154.

[158] Gordley (n 156) 105.

[159] One criticism of Gordley's position lies in Raz' understanding of the dynamic aspect of rights, which means that the same right may generate a number of duties owed by different people, including the state and not excluding private individuals. Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 171.

To be sure, this is a 'thin' sense of political, but at least it is explicitly political. By understanding unjust enrichment as only a matter of individual right, we ignore its role in preserving the *status quo* and the underlying assumptions of this preservation – that the original distribution of assets was a just one and that the political institutions charged with its governance are also legitimate. In order to raise any form of challenge to these assumptions (something that is beyond the scope of this thesis to accomplish), we must first be aware that they are actually being made and an understanding of unjust enrichment as solely an incarnation of private right hides them from view.

A helpful way to understand the difference between Hegelian and Aristotelian accounts is through the pre- *versus* post-institutional divide. While Aristotle's conception of property rights can exist only in an institutional setting as they must be created by the state, Hegel's can be seen to exist prior to all institutions, including and in particular, law.

C. A Decision

Let us now examine both the Aristotelian and Hegelian conceptions of the (moral) underpinnings for the law of unjust enrichment through the lens of a less controversial conception of rights, Raz' interest theory of rights. Raz' theory is appropriate since his aim is to formulate a conception of rights that is not necessarily wedded or inimical to any particular moral or political theory:

> A successful philosophical definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why. The definition may advance the case of one such theory, but if successful it explains and illuminates all. In this spirit I shall … propose a definition of rights…[160]

[160] Raz, *The Morality of Freedom* (n 159) 166.

According to Raz, a right exists to protect interests that are sufficiently important so as to justify imposing a duty on another(s) to respect it: '"X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'[161] Hence, through the Razian lens, we must ask what interest or interests are being protected by a law that reverses transfers such as those characterized as unjust enrichments?[162] Are these interests political as Gordley would assert or individual as a Hegelian would argue? To put it simply, the answer is both; however, *given* the fact of law as an institution, Gordley's understanding is more accurate and helpful for understanding the real reasons behind the law itself.

We can thus say, yes, we may have pre-institutional rights that are essential to our conception of personhood; however, when we enter (which we must, unless we all plan on living on oil rigs in the middle of the ocean) into the institution-filled world, these rights *change* and may contradict one another. It is impractical to conduct a state of nature analysis of rights in the courtroom. To find the true owner of the thing requires an investigation that in Kant's words 'would go on to infinity in an ascending series.'[163]

Moreover, given the nature of the duty thus isolated in unjust enrichment as a duty to preserve equivalence in exchange, it is difficult to conceive of its corresponding right in the context of private law. To say that the plaintiff has a right to equivalence in exchange exigible against the defendant subjugates the defendant's

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[161] Raz, *The Morality of Freedom* (n 159)166.

[162] A comprehensive catalogue of what these interests might be, though an inviting and interesting project, unfortunately, lies outside the scope of this thesis.

[163] Mary Gregor (tr), Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, Cambridge 1996) [§39] 81.

particular interests to those of the plaintiff. He, in other words, would now be under a positive duty to act *for* the plaintiff's interests. If, however, we couch the duty in a *public political* interest in maintaining the *status quo* through the principle of equality in exchange, the logic of subjugation changes. Although the defendant must still act in a way that appears to be for the plaintiff's benefit, he does not act for reasons dictated by the plaintiff – that is, he does not return the mistaken payment because of the plaintiff's interest in his so doing. It is not the plaintiff's will that overrides the defendant's, therefore, but rather some larger political interest generated by the general will. In sum, the defendant's duty of restitution in unjust enrichment does not originate in a particular right of the plaintiff *vis-à-vis* him, but in the political interests of the state.[164]

D. Conclusion for Chapter Three

Let us return now to the initial motivating inquiry of this chapter: what is the moral foundation for equality in exchange? I have canvassed two alternatives. First, that the interests served are those of the individual connected to rights of personhood. Second, that the interests served are those of the state, the body politic. While both are true in their own spheres, it is the latter that is the more convincing in the field of law. Law by definition is a human political institution. There is no such thing as law (as lawyers would understand it) in the state of nature. While there may be rights, there is no institution to ensure and protect these rights. Agents have the bare capacity to choose, to identify themselves as not-thing, and perhaps are even able to get other like individuals through agreement and exchange to recognize them as such as well; however, the individual has no means by which to get the state to recognize him as

[164] Those who wish to preserve some role for the plaintiff's right here could argue that the plaintiff still has a right, but it is one which is now exercisable against the state, not the defendant. It is beyond the scope of this thesis to explore this idea further here.

such, since there is no state. The principle of equality in exchange describes the maintenance of the *status quo*. Individuals alone are unable to fulfill any duty to maintain this initial state of affairs. State intervention – through the courts, for example – is required. Thus, unjust enrichment understood as best explained as an instantiation of commutative justice requires state institutions for its existence. As such, an understanding of unjust enrichment that begins with the plaintiff's right will prove ultimately misleading.

VI. CONCLUSION

Let us return here to our initial objection to the exclusive use of corrective justice as the sole explanation for the duty of restitution in unjust enrichment: that it hived off this area of private law from its public context. As the private/public distinction constitutes the theoretical landscape for my concluding arguments, it is necessary to provide a sketch of its shape.[165]

A glance at a first year law curriculum provides a useful starting point for a definition of private law. Traditionally, topics such as contracts, torts, and property are classified under the more general heading of private law. The defining characteristic of these topics is that they all involve the interaction between two private (that is, non-state) parties, voluntary in the case of contracts and involuntary in the case of torts.[166] What is distinctive of these categories of private law is that they do not involve the state.

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[165] Though skepticism of a sharp divide between private and public law should be encouraged, lest we risk reifying the separateness and mutual exclusivity of the spheres, the distinction is not without merit. It serves a heuristic taxonomic function, enabling students and practitioners of law to divide their subject matter rationally and may provide valuable assistance to our understanding of the logic of the subject matter it delineates. (See: Nicholas J. McBride, 'The Classification of Obligations and Legal Education' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford 1997) 71. For an example of a work that takes this understanding of the importance of classification to heart see: Rafal Zakrzewski, *Remedies Reclassified* (OUP, Oxford 2005). Furthermore, even if the definitions it entails are not watertight, provided that its core meaning is one reasonable people can agree on, it serves, *qua* definition, the goals of stability and consistency that are vital to legal argument and practice. (See: Peter Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford 1997) 2 and 6).

[166] There is, I must note, debate about the 'voluntariness' of contract and the putative pivotal role of consent. As Steve Hedley observes, the bulk of a contractual agreement consists not of terms voluntarily chosen by the parties, but rather of default (background) rules imposed by the law (Steve Hedley, *Restitution: Its Division and Ordering* (Sweet and Maxwell, London 2001) 59, 68, and 84; see also: Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 Michigan L Rev 489). Although there is truth to this argument, the voluntary/involuntary distinction separating contractual liability from tortious is nonetheless sound. The event that generates the plaintiff's standing to sue in contract is a voluntary act: the defendant's agreement to be bound to the plaintiff to perform a particular obligation in the future. This act changes the normative relationship of the parties by virtue of their respective reflection on the particular power of the voluntary act that effects this change. By contrast, in tort law, while we can characterize the defendant's negligent act, say, as 'voluntary' (as in, not automatistic), we cannot say (as we can in contract) that it is pursued for the very reason to alter the defendant's normative position *vis-à-vis* the plaintiff. Rather, the plaintiff's

In contrast, subjects such as criminal and constitutional law, by definition, involve the direct action (or inaction) of the state. I recognize that the moment parties to a dispute take their matter before a court of law, the apparatus of the state is automatically and necessarily involved through its legal institution, the court; however, in contrast to criminal, constitutional, and administrative (regulatory) law, the state in private law disputes is not a direct party to the dispute. Another way to articulate this distinction is to say that while private law concerns revolve around the rights as between individual parties to a specific transaction, public law always imports a broader concern about public welfare, the common good. While this is a too all-encompassing statement, it serves to set up what, for some, seems to be a blurring of the boundaries between these two areas of law: the transplanting of public law principles concerning public welfare into the purportedly closed interactions between private parties that constitute private law disputes.

The major illustration of the intrusion of political concerns involves situations where the public interest in the outcome of the dispute takes precedence over the private rights of the individuals involved. One rationale for strict tort liability can serve as an example. According to this view, liability is imposed, in the absence of wrongdoing, for the sake of public safety. Thus, an external aspect – that is, something that is not defined by the relationship between the two parties to the dispute – appears to play a controlling role in judicial treatment of torts of strict liability. In other words, a concern about the distribution of losses supplants the model tort structure of correction of (compensation for) a wrong. The law of unjust

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standing to sue in tort law comes not from the defendant's reflective self-imposition of liability, but from a court's external imposition of liability upon him. Another, perhaps more accurate, way to articulate the distinction between voluntariness in tort and in contract is that in contract voluntariness constitutes (is part of) the very reason for the duties of the parties. By contrast, in tort law voluntariness does not constitute the reason for the duty, but instead serves to remove a potential objection to the imposition of said duties.

enrichment poses a similar challenge as it is triggered by the plaintiff's loss (or, perhaps, more accurately, by the defendant's gain), irrespective of the fault of the party who receives the benefit. Liability in unjust enrichment is said to be strict;[167] therefore, for a corrective justice analysis to prevail, something other than fault must unite the plaintiff and defendant. For example, in recent Canadian jurisprudence, policy concerns about what is considered 'unjust' indicate a potential shift toward the importation of public law principles into this area of private law.[168]

A consequence of the isolation of values of corrective justice from political context is the sealing off of spheres of private law – those governed exclusively by the logic of corrective justice – from arenas of public law. Although not without advantages (for example, its pedagogic utility), this consequence is undesirable.[169] Through this critical analysis of the theoretical foundations of the law of unjust enrichment, I hope not only to have discovered a satisfactory account of this particular area of law, but also to have challenged the strict divide between private and public law.

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[167] In support of this view: Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas L Rev 2115, 2163; Mitchell McInnes, 'The Measure of Restitution' (2002) 52 U Toronto L J 163, 190; Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP, Oxford 1995) 48-49; Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1, 28. In opposition: Nicholas McBride and Paul McGrath, 'The Nature of Restitution' (1995) 15 OJLS 33, 47. For criticism of McBride and McGrath on this point: Lusina Ho, 'The Nature of Restitution – A Reply' (1996) 16 OJLS 517, 518-519.

[168] For criticism of this Canadian trend see: Mitchell McInnes, 'Unjust Enrichment and Palm Tree Justice: *Garland v. Consumers' Gas Co*' (2004-2005) Canadian Business L J 103; Mitchell McInnes, 'Taxonomic Lessons for the Supreme Court of Canada' in Ross Grantham and Charles Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, Oxford 2008).

[169] In fact, as Ernest Weinrib has stated recently, this feature of corrective justice – its isolation from social and political values – is precisely the source of its appeal: 'because it reflects that rationality immanent in the legal relationship between the parties, corrective justice is rooted in private law and in its distinctive normative concerns. It is, therefore, resistant to the amorphous invocation of moral and political values that, so it was feared, the recognition of unjust enrichment as a distinct category of liability would let loose.' Ernest 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 Publishing, Oxford 2008) 44.

Corrective justice, I have shown, is not the exclusive comprehensive explanation for the duty of restitution in unjust enrichment. While, if understood narrowly as the justice of allocations back, reasons of corrective justice can explain the defendant's actual transfer back of the plaintiff's mistransferred wealth, it does not explain why such reasons arise. I have argued that the best explanation for the source of these reasons lies neither in corrective justice, nor distributive justice, nor justice as equity, but in commutative justice understood as the principle of equality in exchange. This conclusion led me to inquire further into what interests supported this principle, specifically, whether the interests were better understood as grounded in individual (private) rights or in public concerns. Given the institution of law, I have aligned myself with the latter, while recognizing the possibility of the existence (at least conceptual) of the former.

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