Oxford Journal of Legal Studies 2021, Vol. 00, No. 0 pp. 1–28
https://doi.org/10.1093/ojls/gqab042

Mistaken Payments, Quasi-contracts, and the 'Justice' of Unjust Enrichment

Alexander Georgiou*

Abstract—The law of unjust enrichment has often been described as the law of events materially identical to a mistaken payment. By this, lawyers often mean that the cause of action in unjust enrichment is somehow shaped and grounded by the reason why the recipient of (some) mistaken payments morally ought to refund the payor. The difficulty, however, is that the normativity of mistaken payments remains a challenge to explain. This article aims to reinvigorate the view that the moral duty to return mistaken payments is grounded by a tacit agreement between the payor and payee that the payment was conditional (coupled with the failure of that condition). To do so, it critically examines the ways in which our intentions can be conditioned, and how those conditions are communicated in our agreements. The article concludes by examining what implications a conditions-based understanding might have for the law of unjust enrichment.

Keywords: unjust enrichment, restitution, conditional intention, implication.

1. Introduction

The cornerstone of the modern law of unjust enrichment, at least in England and Wales, is the mistaken payment. Peter Birks described it as the 'core case'[1] at the heart of a 'law of all ... materially identical [events]'.[2] But, if so, unjust enrichment law is built on shaky foundations: the normative force of a 'mistaken payment' remains far from settled.[3] In this article, I aim to put the law on a firmer footing; and, in doing so, I will suggest that the old 'heresy'[4] of 'quasi-contracts' was far closer to the truth than many would now accept.

The primary goal of this article is to give an account of when and why, morally speaking, the recipient of a mistaken payment ought to return the money to the payor (I suspect that few would deny that such a duty at least

*All Souls College, University of Oxford. Email: alexander.georgiou@all-souls.ox.ac.uk. I am grateful to Jordan English, Cécile Fabre, Emma Rawkins and Frederick Wilmot-Smith for their helpful comments on an earlier draft of this article.

[1] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2003) 3.
[2] ibid 3.
[3] See eg Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37 OJLS 844.
[4] Birks (n 1) 273.

sometimes exists).[5] In short, I argue that the moral duty to return mistaken payments is grounded by a tacit agreement between the payor and payee that the payment was conditional, coupled with the condition having failed.[6] The article proceeds in four main parts.

The first part situates the mistaken payment question within broader debates in the law of unjust enrichment. It also offers some brief criticisms of existing theories, drawn from the legal literature, although I do not develop these negative claims at length.

The second part examines the nature of conditional intention, in order to pre-empt a common objection to my core claim. It is sometimes said that 'tacit agreement' theses rely on implausible views about intentions. I argue that it is possible to hold an intention to act that is conditional upon some state of affairs, even where the would-be actor both (i) is not consciously aware of the condition and (ii) already believes that the state of affairs exists. Moreover, I show that these conditional qualifications on our intentions do not 'disappear' once we decide to act.

In the third part, I develop my main positive claims. I first aim to show that a payment was agreed to be conditional just if (i) the payee accepted the payment and (ii) the conditionality of the payment was communicated before the payment. I then argue that the conditionality of a payment is communicated if and only if the condition was either (i) expressly identified by the payor or (ii) would have been obvious to a person in the position of the payee given the circumstances. Taken together, this leads to the conclusion that the recipient of a mistaken payment comes under an agreement-based moral duty to return the money just when they become aware[7] of the failure of any of the conditions on which the payment was made.

The article concludes by examining some of the consequences that would result from reconceptualising the law of mistaken payments along these condition-based terms. The first is that this might lead us to re-examine our rejection of the old language of 'quasi-contract'. Second, a conditions-based analysis would require redrawing the boundaries of the law of 'unjust enrichment' *qua* 'the body of law grounded by the same moral principle as that

[5] Though some suggest that this is simply a duty of virtue, not a duty of right. See eg James Penner, 'We All Make Mistakes: A "Duty of Virtue" Theory of Restitutionary Liability for Mistaken Payments' (2018) 81 MLR 222. Although cf Stephen Smith, 'A Duty to Make Restitution?' (2013) 26 CJLJ 157, 176.

[6] I outlined these views in Alexander Georgiou, 'What's "Unjust" about Unjust Enrichment: An Answer at Last?' [2021] LMCLQ 63. For similar claims, see Paul Matthews, 'Money Paid under a Mistake of Fact' (1980) 130 NLJ 587; P Butler, 'Mistaken Payments, Change of Position, and Restitution' in P Finn (ed), *Essays on Restitution* (Law Book Co 1990); Felicity Maher, 'A New Conception of Failure of Basis' (2004) 12 RLR 96; Duncan Sheehan, 'Mistake, Failure of Consideration, and the Planning Theory of Intention' (2015) 28 CJLJ 155; Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) ch 5. I discuss below, in s 4, where I differ from Sheehan and Webb. Matthews, Butler and Maher all make claims in a decidedly more doctrinal spirit than my own.

[7] I do not discuss below this further requirement of knowledge on the part of the payee, although it strikes me as intuitively necessary. The best explanation is that knowledge of the failure of condition removes a reason against the payee being under a duty to repay, viz, that such a duty would be unduly onerous. See Wilmot-Smith (n 3) 855–6.

covering mistaken payments'. I suggest that this body of law includes what are currently called cases of 'mistake', 'failure of consideration' and '*Woolwich* liability', but no more. Finally, beyond unjust enrichment law, this approach might lend support to those who seek to revive the view that certain contractual doctrines—such as termination, frustration and mistake—are somehow based on conditional obligations.[8]

Of course, the connection between the moral claims I make in this article and the law of unjust enrichment is merely contingent. There is no conceptual necessity that unjust enrichment law is grounded or shaped by the moral reason(s) for the return of mistaken payments. Nevertheless, most unjust enrichment scholars—though by no means all[9]—presuppose that the legal duty[10] to return mistaken payments is at least broadly isomorphic with an equivalent moral duty (although this presupposition is often left unstated).[11] I proceed on the same assumption.

2. Setting the Scene

Although my focus in this article is on moral duties to return mistaken payments, it is helpful, for two reasons, to begin by outlining some of the legal debate in this area. The first is that there is no literature outside the legal context (at least of which I am aware) that tries to explain this moral duty—what theories we have must be extracted from the legal literature. The second is that I intend to explore later some of the implications my analysis might have if it were adopted by the law, and so it is useful to pre-contextualise some of the salient issues.

Received wisdom tells us that a claimant who wishes to recover a mistaken payment by bringing a claim in 'unjust enrichment' must satisfy the 'four-stage test'. The typical canonical formulation can be found in Lord Steyn's speech in *Banque Financière de la Cité v Parc (Battersea) Ltd*: '(1) Has [the defendant] benefited or been enriched? (2) Was the enrichment at the expense

[8] See eg Jordan English, 'Discharge of Contractual Obligations' (DPhil thesis, Oxford forthcoming). In a similar vein, see Frederick Wilmot-Smith, 'Failure of Condition' (DPhil thesis, Oxford 2014) 226–5. However, Wilmot-Smith adopts a less capacious understanding of conditional intention than my own (see further s 3B–C), which pushes him to also adopt a related justification based on the 'undermining of a background assumption'. He appears subsequently to have shifted in emphasis towards the latter explanation: see Frederick Wilmot-Smith, 'Termination after Breach' (2018) 134 LQR 307, 314.

[9] See eg Richard Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 150–1; Chris Wonnell, 'A Law and Economics Perspective on Restitution' in E Bant, K Barker and S Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar 2020) 203–5.

[10] There is some debate about whether the recipients of mistaken payments come under legal *duties* to make restitution or whether instead they come under legal *liabilities*: see eg Smith (n 5); Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019) 237–45. Although I think my conclusions bear on that debate, they are conceptually distinct inquiries—I do not propose to commit to a firm view on the latter. See further Wilmot-Smith, 'Failure of Condition' (n 8) 95–9.

[11] For a rare exception, see Tatiana Cutts, 'Unjust Enrichment: What We Owe to Each Other' (2021) 41 OJLS 114, 129–32. See similarly Peter Jaffey, 'Contract, Unjust Enrichment, and Restitution: The Significance of Classification' in P Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff 2007) 214–16.

of [the claimant]? (3) Was the enrichment unjust? (4) Are there any defences?'[12]

However, the four-stage test never received wholehearted support. Many have consistently opposed the idea that any single cause of action could ground recovery in all of the situations that have been described as 'unjust enrichments'. Chief amongst these long-standing critics are Steve Hedley[13] and Peter Watts.[14] They have been joined, more recently, by Robert Stevens[15] and Lionel Smith,[16] amongst others.[17] One concern is that, doctrinally, application of the four-stage test does not actually yield the results reached in many of the decided cases.[18] Another is that the body of law known as 'unjust enrichment' comprises situations too disparate to share a common moral reason for restitution; therefore, it is said, there equally cannot be a single cause of action that applies to all of these situations.[19]

These doubts have recently begun to take hold at the judicial level. Thus, in the Privy Council's advice in *Skandinaviska Enskilda Banken AB v Conway*, the Board suggested that the formulation in *Banque Financière* 'may not... readily accommodate all the situations where personal claims lie for restitution, and should not become a Procrustean bed'.[20] Lord Reed made similar remarks in *Investment Trust Companies v Revenue and Customs Commissioners*.[21] However, it is fair to say that this shift has been far from decisive.[22]

The debate concerning the nature of the cause of action runs parallel to attempts to *justify* the law of unjust enrichment.[23] Given the presupposition

[12] *Banque Financiere de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227. This is sometimes also—more accurately—called the 'three-stage' test, as the question of defences is conceptually distinct from the question whether a *prima facie* cause of action has been established.

[13] See eg Steve Hedley, 'Unjust Enrichment as the Basis of Restitution—an Overworked Concept' (1985) 5 LS 56.

[14] See eg Peter Watts, '"Unjust Enrichment"—the Potion that Induces Well-Meaning Sloppiness of Thought' (2016) 69 CLP 289.

[15] Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574.

[16] Lionel Smith, 'Restitution: A New Start?' in PDevonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2018).

[17] See eg Kit Barker, 'Unjust Enrichment in Australia: What Is(n 't) It?' (2020) 43 MULR 903. For a selection of replies, see Peter Birks, 'Unjust Enrichment—a Reply to Mr Hedley' (1985) 5 LS 67; Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521; Pablo Letelier, 'A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims' (2020) 136 LQR 121.

[18] See especially Stevens (n 15). My remarks in Georgiou (n 6) 66–8 were also in this spirit. I hope to discuss in a future article the implications, as a matter of legal methodology, of claims such as these.

[19] The assumption being, of course, that each cause of action ought to represent one and only one moral reason for legal intervention. See Jaffey (n 11) 214–15; Stevens (n 15) 575–7; Smith (n 16) 92; and Frederick Wilmot-Smith, 'Reasons? For *Restitution*?' (2016) 79 MLR 1116, 1117–21.

[20] *Skandinaviska Enskilda Banken AB v Conway* [2019] UKPC 36, [80].

[21] *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [41]. See similarly *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [19] (Lord Clarke).

[22] See eg *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33, [18] (Lord Burrows).

[23] The literature on this question is far too voluminous to provide even a representative sample. Amongst many others, see Prince Saprai, 'Restitution without Corrective Justice' (2006) 14 RLR 41; Kit Barker, 'Responsibility for Gain: Unjust Factors or Absence of Legal Ground?' in CEF Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing 2008); Ernest Weinrib, 'Correctively Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009); Webb (n 6); Wilmot-Smith, 'Should the Payee Pay?' (n 3); Penner (n 5); Tatiana Cutts, 'Materially Identical to Mistaken Payment' (2020) 33 CJLJ 31; and Cutts, 'Unjust Enrichment' (n 11).

that 'unjust enrichment' is a cause of action unified by, and reflecting, a common justification, these two debates are closely intertwined. Therefore, most attempts focus—as I do—on justifying the 'core case' of restitution of mistaken payments. And, as I indicated above, many theories identify the reason(s) why the law should require restitution of mistaken payments with the reason(s) why payees should return mistaken payments.

At the highest level of abstraction, there are two groups of theories justifying duties to return mistaken payments (which mirror two theories of the cause of action in unjust enrichment). The first focus on the impact of the payor's mistake on their consent, coupled with the fact that the payee has been 'enriched'; the second focus on the absence of a 'basis' or 'reason' for the mistaken payment.

I intend to say very little about vitiated-consent theories, although I do mean to reject them. Criticisms of the major sub-categories of such theories are already well canvassed in the literature: most writers' positive accounts have been put forward alongside rebuttals of other similar theories. Moreover, Wilmot-Smith also recently subjected many existing vitiated-consent theories to searching scrutiny.[24] I therefore intend, rather than rehearsing these familiar criticisms, to put forward my positive claim as a more palatable alternative to existing models. If I am right in what follows, I see no further need, nor room, for justifications based on vitiated consent.

I do, however, wish to say a little more about 'absence of basis' theories—which I also reject—since these have received comparatively less examination as justificatory (as opposed to doctrinal)[25] theories. Stevens's formulation of this justification is perhaps the clearest:[26]

> If the recipient knows from the outset that there is no justifying reason for the [payment] ... [or] initially believes that there is a good reason for the [payment], or does not care, and the claimant can now show that there was not ... the defendant must make restitution.

Despite the references to the recipient's state of mind, the absence of a 'good reason' carries all of the load here. Stevens's conditions, taken together, cover the ground of possible states of mind—therefore, the claim is really that the mere absence of a 'good reason' for the payment, coupled with eventual knowledge, justifies a duty to repay.

I am not sure I entirely grasp the normative force of the 'absence of a good reason' for a payment.[27] Stevens's claim seems to be that payments require

[24] Wilmot-Smith, 'Should the Payee Pay?' (n 3).

[25] See eg Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); Helen Scott, 'Restitution of Extra-contractual Transfers: Limits of the Absence of Legal Ground Analysis' (2006) 14 RLR 93.

[26] Stevens (n 15) 581. In the interest of fairness, I should note that I doubt Stevens would claim that his justification is concerned with *moral* duties to return mistaken payments. However, I think an argument of this kind is at least a plausible candidate explanation of such a duty, and I will consider it as such.

[27] I am grateful to Rob Stevens for discussing this with me.

positive justification (ie a good reason), else they ought to be reversed by the making of restitution. However, it is not clear why this should be the case.

One possible answer is that this premiss is supposed to follow as a matter of logical inference. The *presence* of a good reason for a payment would seem to count (perhaps decisively) *against* an obligation to repay; might the suggestion be that the absence of such a reason counts in favour of an obligation to repay? If so, the argument commits the fallacy of the inverse. Consider the more obviously problematic argument:

> All cats have four legs. My dog, Bobby, is not a cat. Therefore, Bobby does not have four legs.

This example is formally identical to the argument:

> All good-reason payments should not be repaid. A particular payment was not a good-reason payment. Therefore, that particular payment *should* be repaid.

The first argument is invalid and so, *mutatis mutandis*, is the second.

Alternatively, and probably more plausibly, Stevens's requirement that payments be justified by a good reason might be based on further unstated moral principles (rather than pure logical inference). However, it is far from clear what these might be. Ordinarily, doing something for 'no good reason' has no moral, or legal, consequence.[28] Stevens's account therefore at least needs to be supplemented by some explanation of why payments are the kinds of thing which require positive justification. In what follows, however, I aim to show that we can justify a duty to return mistaken payments without the need to commit to that position.

3. Conditions and Intentions

My overarching claim is that, when we pay one another, we almost always tacitly agree that the payment is conditional upon certain states of affairs being true. To take an example: I claim that, in the leading case of *Kelly v Solari*,[29] the insurance payment made by the Argus Life Assurance Company (of which Mr Kelly was a director) was agreed to be conditional upon the payment being due. As the payment was not due, the condition failed, and Mrs Solari was therefore (*prime facie*)[30] required to return the money.

This view is often criticised on the grounds that it involves intentions the parties never held. In *Kelly v Solari*, it is plausible that Mr Bates and Mr Clift (who paid Mrs Solari as agents of Argus) never considered the possibility that the money was not due. How, then, it is rhetorically asked, could their

[28] For further discussion, see Barker, 'Responsibility for Gain' (n 23).

[29] *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24.

[30] The case was sent for a retrial to determine whether Mrs Solari could resist repayment on the basis that Argus's agents knew all along that the payment was not due (which would, if factually correct, have afforded her a defence).

intention to pay her have been conditional? And if their intention to pay was unconditional, how could any agreement—a product of the parties' common intentions—have included a condition? So (it is said) the implausibility of these kinds of conditional intentions is fatal to tacit agreement theories.

This concern ultimately resolves into two distinct questions. First, can one hold a conditional intention if one currently accepts that the condition is satisfied? Second, can one hold a conditional intention even when not consciously aware of the condition? In this section, I aim to avoid the common objection to my overarching claim by showing that the answer to both questions is 'yes'; and that, therefore, people like Mr Bates and Mr Clift can (and do) hold merely conditional intentions to pay.

A. Background Conditions

The first limb of the objection was that if Messrs Bates and Clift believed that the insurance payment was due to Mrs Solari, they could not have had a *conditional* intention to pay her only if the money was due. Their belief (or acceptance)[31] that the money was due somehow precludes this being a condition of their intention to pay.

These putative conditions—those which the actor already takes to be true—are sometimes called 'background conditions'.[32] There are some who hold that nearly all of our intentions are subject to a wide array of such conditions.[33] To paraphrase Bratman's example—I might intend to surprise my partner with lilies tomorrow, but I surely don't intend to do so if I discover in the interim that she is allergic to them.[34] However, many[35] doubt the existence of background conditions altogether; they claim that a background condition on an intention is merely part of the 'complex web of beliefs' within which we form intentions.[36]

This section rejects four arguments offered by those who doubt the existence of background conditions. It then proposes that we can only make sense

[31] On 'acceptance' and its relationship to belief, see Michael Bratman, 'Practical Reasoning and Acceptance in a Context' (1992) 101 Mind 1.

[32] Gregory Klass, 'A Conditional Intent to Perform' (2009) 15 Legal Theory 107, 109–10.

[33] JC Smith, 'Intention in Criminal Law' (1974) 27 CLP 93, 115; Luca Ferrero, 'Conditional Intentions' (2009) 43 Noûs 700, 700; Klass (n 32) 107–8; Sheehan (n 6) 162–3; Webb (n 6) 128–9; John Child, 'Understanding Ulterior *Mens Rea*: Future Conduct Intention Is Conditional Intention' (2017) 76 CLJ 311, 319–21. For similar conclusions in the context of promises, see John Rawls, *A Theory of Justice* (rev edn, Harvard UP 1999) 303; Ian Ayres and Gregory Klass, *Insincere Promises: The Law of Misrepresented Intent* (Yale UP 2005) 26.

[34] Michael Bratman, 'Simple Intentions' (1979) 36 Philosophical Studies 245, 245.

[35] See eg Kenneth Campbell, 'Conditional Intention' (1982) 2 LS 77, 89–92; Donald Davidson, 'Intending' in D Davidson (ed), *Essays on Actions and Events* (2nd edn, Clarendon 2001) 95; Kirk Ludwig, 'Conditional Intentions' in K Ludwig (ed), *From Individual to Plural Agency: Collective Action I* (OUP 2016) 51; Wilmot-Smith, 'Reasons? For *Restitution*?' (n 19) 1126–7 (and see at greater length Wilmot-Smith, *Failure of Condition* (n 8) 58–76); Jens Gillessen, 'Reasoning with Unconditional Intention' (2017) 42 Journal of Philosophical Research 177.

[36] JPW Cartwright, 'Conditional Intention' (1990) 60 Philosophical Studies 233, 236.

of the role intentions play in our practical reasoning if we accept that our intentions can be, and often are, subject to background conditions.

(i) Challenges to 'background conditions'

(a) Irrelevance to contingency planning

Ludwig makes a functional attack on background conditions. He suggests that 'conditional intentions are the upshot of contingency planning',[37] from which he reasons that a condition 'must be something that is *not settled for the agent*' because 'if one knows that a condition obtains, it is not a contingency'.[38]

The conclusion follows his premiss, but the truth of his premiss—for which he offers little defence—strikes me as questionable. Although conditional intentions undoubtedly have a role to play in contingency planning, they also play other important roles in our practical reasoning. In particular, as I argue below, conditional intentions are important in ensuring the mutual consistency of our plans.

(b) Implausibility of expression

A second objection is that background conditioned intentions sound, when expressed, rather odd. Campbell puts the point mostly vividly:[39] 'If suffering from a draught, only a paranoic would decide not that he should close the window but that he should close the window only if nothing unexpected happened before he reached it.'

However, the implausibility here stems not from the intention itself, but rather from its expression. A person who consciously thought such a thing to themselves would, ordinarily, certainly be odd indeed (and *a fortiori* a person who expressed such an intention outwardly to someone else). But there is no reason to suppose we consciously process every aspect of our intentions[40]—indeed, psychological economy suggests we ought not to do so. Similarly, there are also often good reasons not to express outwardly every facet of our intentions—often, many aspects of our intentions will be neither relevant to the communicative context nor informative to our interlocutor (and will therefore be a waste of the time and effort of all parties to the conversation). When we focus in on solely whether such an intention would be an odd one to act upon, most—perhaps all—of the sting is taken out of the example.

(c) Lack of informativity

A third objection is that background conditional intentions are less informative than their unconditional equivalents. Davidson gives the following example:[41]

[37] Ludwig (n 35) 46.
[38] ibid 51 (original emphasis).
[39] Campbell (n 35) 90.
[40] See further s 3C below.
[41] Davidson (n 35) 100.

> I intend to eat a hearty breakfast tomorrow. You know, and I know, that I will not eat a hearty breakfast tomorrow if I am not hungry. And I am not certain I will be hungry, I just think I will be. Under these conditions it is not only not more accurate to say, 'I intend to eat a hearty breakfast if I'm hungry', it is less accurate … If you knew only that I intended to eat a hearty breakfast if I was hungry, you would not know that I believe I will be hungry, which is actually the case. But you might figure this out if you knew I intend to eat a hearty breakfast tomorrow.

The answer, again, is that we cannot cleanly test the plausibility of our intentions by the usefulness of expressing such an intention. One reason to express an intention is to inform, and so 'informativity' is relevant to how we choose to express ourselves. However, the purpose of *holding* an intention is to plan, not to inform; and so informativity has no role to play in determining whether or not a putative intention is (or can be) held.

(d) Changes of mind

The most vigorously defended objection to background conditions is that they render 'changes of mind' impossible.[42] In short, the argument is that:

(1) It is impossible to explain changes of mind if all of our intentions are subject to background conditions.
(2) People do, in fact, change their mind.
(3) ∴ our intentions are *not* subject to background conditions

The first premiss is defended along the following lines: suppose that I currently plan to go for a walk at 3 pm, but we can know with certainty that I will not wish to go if it is raining. We could describe my current intention unconditionally ('I will go for a walk at 3 pm') or conditionally ('I will go for a walk at 3 pm [ONLY IF] it is not raining). Suppose further that 3 pm comes around and, to my great misfortune, it *is* raining. If we think I held a conditional intention, then I can continue to hold that intention despite the rain—the intention merely exerts no rational pressure upon me, as its condition does not obtain. Therefore, it is said, I need not 'change my mind' about going for the planned walk. In contrast, if we think I held an *unconditional* intention, I must now abandon that intention in light of the circumstances. And so, it is said, only the latter analysis can explain changes of mind.

There are, however, two problems with this defence of premiss (1).

First, even if the argument worked, it would only rule out changes of mind following events which we know *from the start* would cause us to reconsider our plans. It cannot exclude situations where our *ex ante* predictions about our preferences are falsified. For example, suppose in the above example that I planned to go for a walk at 3 pm with a conscious ambivalence about whether

[42] See eg Campbell (n 35) 89–90; Cartwright (n 36) 237–8; Wilmot-Smith, *Failure of Condition* (n 8) 64–5; Ludwig (n 35) 56. It is implicit also in John Finnis, 'Conditional and Preparatory Intentions' in J Finnis (ed), *Intention and Identity: Collected Essays Volume II* (OUP 2011) 222, 224.

or not it would rain (precluding, therefore, any background 'no rain' condition to my intention). Now suppose that I leave the house at 3 pm and discover that—contrary to expectations—I *do* mind the rain after all. Here I clearly have changed my mind.

The second, more far-reaching, problem is that we actually need not deny that there has been a change of mind in the example where I held a conditional intention to go for a walk at 3 pm. We might instead suppose that the phrase 'change of mind' refers not only to the abandonment of intentions, but also includes situations where we do not act because a background condition does not obtain.[43] Admittedly, this would do some violence to the phrase 'change of mind'—what changes here is only our pre-existing beliefs, not our 'minds' (ie intentions). But if, as I hope to show in the following section, there are compelling reasons to accept background conditions as genuine internal conditions, this minor mangling may have to be a price worth paying.

(ii) Background conditions and the planning theory of intention

The main argument in favour of recognising genuine background conditions on intentions is that they account for the rational pressure our intentions exert upon one another. One of the three basic norms of rational intention is 'agglomerativity', viz, that our intentions must not be incompatible with one another.[44] This requirement plays an important role in demonstrating the existence of background conditions on our intentions; there are some situations in which it is difficult to explain an intuitive agglomerativity problem between intentions unless we accept than one or more of those intentions is subject to some kind of background condition.[45]

To illustrate this, let us stipulate the following facts:

(1) I would like to go and watch the screening of a new movie on Monday night.
(2) I would not like to do so if I have not finished marking essays by Monday afternoon (as this would mean I would have to mark them upon my return from the cinema).
(3) I firmly believe that I will have finished marking essays by Monday afternoon.

On the basis of these facts, we might suppose I hold one of two intentions:

(UI): I intend to go and watch the movie on Monday night.

[43] See eg Klass (n 32) 112.

[44] This theory of intention was first articulated by Michael Bratman, *Intentions, Plans, and Practical Reasons* (Harvard UP 1987) and developed in several of Bratman's works thereafter. A helpful short summary can be found in Sheehan (n 6) 159–60.

[45] See similarly Michael Bratman, 'Davidson's Theory of Intention' in M Bratman (ed), *Faces of Intention* (CUP 1999) 221–2; Ferrero (n 33) 716–17; Klass (n 32) 131–2.

(BCI): I intend to go and watch the movie on Monday night [ONLY IF] I have finished marking essays.

Now, suppose that a friend suggests that we go to the movie together. And, because he is particularly keen both that he watch it on Monday and that we watch it together, he asks me to *promise* to go with him whether or not I finish marking. Despite (3), it seems clearly irrational for me to make this promise. The reason it seems irrational is because the promise, combined with my standing intention to honour my promises, would cause me to adopt the following further intention:

(PI): I intend to go and watch the movie on Monday night [IF] (I have finished marking essays [OR] I have not finished marking essays).

The problem is easy to locate if we suppose I initially held the background conditioned intention (BCI). These two intentions—(BCI) and (PI)—clearly cannot be agglomerated.

In contrast, the solution is not as clear if we suppose I initially held the unconditional intention (UI). On this analysis, we need instead to locate the intuitive irrationality in the tension between my new intention (PI) and my desire in (2). In other words, we have to explain the irrationality on the basis that I come to intend something I do not want. This answer is problematic, because there clearly *are* situations where I can rationally intend something I do not desire. For example, continuing the example above, I might well intend to mark essays on Monday morning, even though I would much rather sleep in instead. So any defence of (UI) requires a further account of when it will, and when it will not, be irrational to intend something which I do not desire.

B. Subconscious Conditions

A different, although related, concern with the tacit agreement thesis I intend to defend is that it requires that there be some aspects of our intentions of which we are not consciously aware. For example, it is said that Mr Bates and Mr Clift might never have turned their mind to whether the payment to Mrs Solari was owed, and so could not have had a *conditional* intention to pay—their intention, some say, must have been unconditional.

I will call conditions of this kind 'subconscious conditions'. Many subconscious conditions are background conditions—the most common reason for us not to consciously reflect on something is if we already take it to be true. And, as with background conditions, many doubt the existence of subconscious conditions.[46] The debate over their existence is, however, hampered by their

[46] See eg Campbell (n 35) 90; Cartwright (n 36) 242. Jay Wallace, 'Normativity, Commitment, and Instrumental Reason' (2001) 1 Philosophers' Imprint 1, 22 appears to make a similar claim; however, it is clear that his denial of subconscious conditions only extends to those which the actor could not ascertain upon reflection.

frequent conflation with background conditions. Despite their significant overlap, the two cannot be fully equated.[47]

The conflation of subconscious and background conditions means that many of the arguments I considered above have also been deployed to doubt the existence of subconscious conditions on intentions—I will not repeat that discussion here. However, another common objection to subconscious conditions is that 'there can be no finite list … of circumstances that might cause us to stay our hand',[48] and therefore 'it is quite certain that we could not enumerate individually the possible [conditions]'.[49] Thus, Davidson says, our intentions must not be conditional on such things, else we would 'never get [our] intentions right'.[50] The unstated premiss of this challenge seems to be that we can, necessarily, articulate our intentions—in full—at any point. If true, this would deny the possibility of subconscious conditions on our intentions.

Let us suppose that there is indeed some 'enumerability condition' for something to count as an intention. One candidate formulation of that condition, which seems to be what Davidson and Cartwright have in mind, is:

> **(E1)**: An agent must be cognisant of the full content of all of their intentions at any point in time.

However, (E1) seems implausibly strong. As Bratman notes, there are other situations in which we can mistakenly believe we intend one thing when in fact we intend another. So, for example:[51]

> On Monday, I form the intention to go shopping after I finish teaching for the week. I believe that my final classes are on Thursday; therefore, I believe I intend to go shopping on Thursday. In fact, I have another set of classes on Friday; and I therefore actually intend to go shopping on Friday.

My intention to go shopping on Friday seems also to fail (E1). So, as long as we believe I can hold such an intention under these circumstances, we must accept that (E1) is too strong.

This conclusion seems consistent with what we know of our general planning ability: conscious reflection and precise articulation of intention are unnecessarily demanding for 'agents with limited psychological resources'.[52] Sometimes it is just as good—if not better—to muddle along with an imperfectly articulated formulation of our present intentions.

[47] Klass (n 32) 113.
[48] Davidson (n 35) 94. See also 99–100.
[49] Cartwright (n 36) 240. See similarly Richard Scheer, 'Conditional Intentions' (1989) 12 Philosophical Investigations 52, 57.
[50] Davidson (n 35) 99.
[51] Michael Bratman, 'Intention, Belief, Practical, Theoretical' in S Robertson (ed), *Spheres of Reason: New Essays in the Philosophy of Normativity* (OUP 2009) 38. See also Klass (n 32) 113; Child (n 33) 323–4.
[52] Bratman, 'Intention, Belief, Practical, Theoretical' (n 51) 39.

A more plausible formulation of an 'enumerability condition' on our intentions is:

> **(E2)**: An agent must be able, upon reflection, to ascertain the content of any of their intentions at any point in time.[53]

However, (E2)—which seems true—can no longer perform the work necessary to rule out subconscious conditions. There are many candidate subconscious conditions which satisfy (E2). For example, suppose Messrs Bates and Clift in fact never consciously turned their minds to whether the payments were due to Mrs Solari; still, they unquestionably would have immediately replied 'No' if they had been asked 'Would you still pay her if the money wasn't due?'

It might be objected that the external prompting involved in the hypothetical question put to Bates and Clift goes beyond causing them to reflect upon an intention they already hold. But the hypothetical prompting should not be allowed to mislead: being prompted to articulate or reflect upon our intentions does not cause us to change them; it only forces us to focus on the salient part of the intention in question. To see what this is, consider Jordan, who intends to go for a run in the afternoon. Suppose Jordan is asked 'Would you still go for a run if there were a tiger on the loose?'[54] Jordan, testily, replies 'No'. If prompting Jordan to turn his conscious mind towards the possibility of a prowling tiger required him to form a new intention (ie to abandon 'I intend to run' *simpliciter* and instead adopt 'I intend to run [ONLY IF] there is no prowling tiger'), we would have to say that there is some respect in which Jordan has changed his mind—but clearly, this is not the case. Else we would be revising our intentions with every fanciful situation brought to our attention.

C. Acting on Conditional Intentions

If we accept that payors can, in principle, hold intentions to pay that are subject to subconscious background conditions, then it seems clear that intentions to pay will in fact *always* be conditional on at least one 'reason-giving' fact. In other words, payors will always hold intentions to pay that are conditional on at least one of the reasons for which they are paying being true. Were it otherwise, we would have to, implausibly, suppose that payors intend to pay even where none of their reasons for paying obtain. What, then, happens when a given payor chooses to act upon their conditional intention to pay? Does their intention become, at that point, unconditional? I think not. In this section, I will argue that payors still only intend the payee

[53] See similarly Wallace (n 46) 22.
[54] This example is borrowed from *James Scott & Sons Ltd v R&N Del Sel* 1922 SC 592, 597 (Lord Sands).

to keep the money under the same conditions that qualified the payor's original intention to pay.[55]

Let us begin at the moment the would-be payor first comes to accept that the condition is satisfied. The payor does not, at this point, acquire an unconditional intention. The condition simply moves into the cognitive background (ie becomes a background condition).[56] The converse would lead to absurd results in situations where someone incorrectly comes to accept that a condition obtains and then later realises the truth—they would be rationally committed to acting by their now-unconditional intention, despite the original conditionality of their intention. Of course, those who deny the existence of background conditions would say simply that the individual would 'change their mind', and abandon their unconditional intention, once they discover their mistake. I explained above why I think the background conditions analysis is preferable.

Equally, intentions do not cease to be conditional when their holders choose to act upon them.[57] Consider Webb's example:[58]

> I want to kiss Erika. But I only want to kiss her if she herself wants to be kissed ... [W]hen this intention is then acted on, it doesn't at that point become unconditional. Satisfied that Erika is happy to be kissed, I kiss her. But my intention remains to kiss her only if—or, now, only because—she consents.

The continued conditionality is obvious here. If Erika were to withdraw her consent mid-kiss, we would expect that (all else remaining equal), Webb would continue to hold a conditional intention to kiss Erika [ONLY IF] she consents. We know that the intention did not become unconditional when Webb began to kiss Erika; and, equally, we can tell that the intention was not simply abandoned *in toto* when Erika withdrew her consent (therefore, if she were to once again consent, Webb would once again wish to kiss Erika). One might suggest that the intention to kiss Erika become unconditional once the kiss began, and 'reverted' to a conditional intention upon the failure of the condition; however, there seems to be no compelling reason to adopt this more complicated explanation other than the denial of background conditions.

[55] This is not, I hasten to add, to say that payees will *in fact* only be entitled to keep the money under those conditions. I deal in the next section with the question when it is that payees will be bound to the payor's intentions—in short, my answer is: only when those conditions were communicated to, and accepted by, the payee.

[56] See eg Bratman, 'Simple Intentions' (n 34) 248–50 (including fn 7); Ferrero (n 33) 709–11. To similar effect, albeit admitting the possibility that the actor *may* choose to adopt an unconditional intention upon coming to accept satisfaction of the condition, see also Hector-Neri Castañeda, 'Conditional Intentions, Intentional Actions, and Aristotelian Practical Syllogisms' (1982) 18 Erkenntnis 239, 250–5; Gideon Yaffe, 'Conditional Intention and *Mens Rea*' (2004) 10 Legal Theory 273, 280–1. Cf Bruce Vermazen, 'Objects of Intention' (1993) 71 Philosophical Studies 223, 243–7; Ludwig (n 33) 56–7.

[57] Cf Child (n 33) 317–18. The argument that follows, I think, falsifies Child's claim. See also Castañeda (n 56) 250–5 for an answer to what I take to be Child's central argument, viz, the problem of how conditional intention can motivate action.

[58] Webb (n 6) 127–8.

The same continued conditionality is true also of instantaneous actions (such as payments). Here, of course, there is no continuing act which one can cease midway, and so the conditionality is less obvious. But the same psychological mechanics that cause conditions to persist into continuing actions are equally at play here. Consider:

> I intend to jump into a pool of water [ONLY IF] the water is warm. A mischievous friend, who is already in the pool, tells me that it is. And so, believing them, I jump.

As I hit the icy cold water, at least one of the thoughts which will pass through my head is likely to be 'This is *definitely not* what I wanted!' The intuition that I fell short of doing what I wanted shows that the condition continued to qualify my intention: I intended to jump into a *warm* pool, not to jump into the pool *simpliciter*.

The same is true of conditional intentions to pay. If I intend to pay you in the future [ONLY IF] certain conditions obtain, then those conditions qualify my intention at the moment of payment as well. I intend you to have the money, but only provided that those conditions obtain; otherwise, I do not.

4. Conditions and Agreements

So far, I have sought to show that nearly all intentions (including intentions to pay) are conditional, and that these conditions persist even once the actor begins acting. The consequence is that payors only actually intend for payees to have—and, by extension, to keep—the payment in certain circumstances.

However, a payor's conditional intention cannot be a full explanation of the duty to return mistaken payments: we cannot unilaterally require others to participate in the fulfilment of our intentions (ie unilaterally impose duties on others to act as we intend, simply by holding certain intentions). If I make a gift of £100 to a friend while thinking privately to myself 'This payment is conditional on the fact that all of my students submitted their work on time this week', I am not entitled to the money back when I later discover that three of the emails purporting to submit work had in fact attached blank documents. The position is no different even where the supposed duty bearer knows of the relevant intention: suppose I am in a supermarket. A stranger overhears me saying that I intend to cook roast chicken tonight. However, the stranger had also planned to buy chicken and, unfortunately, only one remains in stock. Are they under a duty, given their knowledge of my intention, not to do so? Clearly not.

It is in this respect that my claims differ most sharply from those of Charlie Webb and Duncan Sheehan, both of whom base their account *directly* on the payor's conditional intention.[59] My concern with claims of this kind is that a

[59] See Sheehan (n 6) 164–5; Webb (n 6) 128–31.

privately qualified intention is not the right kind of thing to justify (moral or legal) duties. The idea of a duty necessarily 'involve[s] ... irreducibly second-personal notions'[60]—duties can only be grounded by the sorts of bilateral reasons which would justify a relationship of second-personal 'accountability'.[61] As the two examples I give above show, a unilateral intention is insufficient to ground this kind of accountability.[62] The aim of this section is, therefore, to identify when it is that payees *will* come under duties in respect of payors' intended conditions.

A. Acceptance

The key to understanding when and why a payor's conditional intention to pay will bind the payee is the idea of 'acceptance'. In short: the payee must accept (ie agree to) the condition—agreement, of course, being one uncontroversial way in which we can come under duties to one another. Such agreement will occur when the condition forms part of the offer to pay, which the payee accepts by accepting the payment.

Perhaps it is initially unnatural to think of agreements to pay and be paid (to which a condition might be annexed)—we tend to focus on payment as an act of the payor alone. But we cannot, in life or in law, pay people against their will. A necessary condition of a valid payment is that the payee accept the payment. This phenomenon is hard to observe outside the law: what counts as a 'valid payment' is less cleanly delineated outside the law, and there are fewer contexts in which we care to know about the validity of payments. Therefore, this section focuses on legal examples—the assumption, which I hope is warranted, is that these legal rules broadly align with our equivalent moral intuitions.

There is a considerable body of authority which shows that transfers of legal rights are not effective without the consent of the transferee[63] (and, in the core case at least,[64] payments are transfers of rights). For example, in *Townson v Tickell*, the Court of King's Bench held that a reversionary estate in land could not be devised to a person who did not assent to take such a title.[65] Abbott CJ stated that 'the law is certainly not so absurd as to force a man to

[60] Stephen Darwall, 'Law and the Second-Person Standpoint' in S Darwall (ed), *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (OUP 2014) 171.

[61] I cannot defend this admittedly controversial claim here. However, for an excellent discussion, see Stephen Darwall, *The Second-Person Standpoint* (Harvard UP 2006) chs 4 and 5. On the question of second-personal accountability in the context of defences, see n 111.

[62] For a similar challenge, see Sonja Meier and Reinhard Zimmermann, 'Judicial Development of the Law, *Error Iuris*, and the Law of Unjust Enrichment—a View from Germany' (1999) 115 LQR 556, 562–3.

[63] For a fuller discussion, see Jonathan Hill, 'The Role of the Donee's Consent in the Law of Gift' (2001) 177 LQR 127.

[64] The core case being, to my mind, the transfer of a title to banknotes by delivery of the banknotes. Bank transfers are somewhat more complicated, but I think there are good reasons of consistency to treat them as subject to analogous rules.

[65] *Townson v Tickell* (1819) 3 B & Ald 31, 106 ER 575.

take an estate against his will'.[66] By the same token, in *Hill v Wilson*, Mellish LJ stated that

> in order to make out a gift, it must be shewn, not only that the cheque was sent as a gift, but that it was *received as a gift*. It requires the assent of both minds to make a gift as it does to make a contract.[67]

Granted, in *Standing v Bowring*[68] it was held that a transfer of bonds by the plaintiff into the joint names of herself and the defendant was effective notwithstanding that the defendant was unaware of the transfer. However, provided that 'acceptance' is understood capaciously—so as to encompass failures to disclaim once the transferee is in a position to disclaim—*Standing v Bowring* is not inconsistent with *Townson v Tickell* or *Hill v Wilson*. Indeed, this is foreshadowed by Holroyd J's statement in *Townson* that 'a [gift], being prima facie for the [donee's] benefit, he is supposed to assent to it, until he does some act to shew his dissent. The law presumes that he will assent until the contrary be proved'.[69] It follows, therefore, that all valid payments have been accepted by the payee (or their agent).[70]

Accepted transfers are, by their nature, acceptances of that which was offered. If I purport to agree to an offer, but do so on terms different to the offer itself, then I have not 'accepted' the offer; instead, I have made a counter-offer. We see this clearly in the law of contract[71] (and Mellish LJ said the same of offers to pay money in *Hill v Wilson*),[72] but it is not a uniquely legal phenomenon: one would certainly get strange looks if one purported to accept an invitation to a bar by saying 'That sounds excellent—I haven't seen a movie in ages!' Therefore, insofar as the offeree needs to rely on there being a valid transfer, they must concede that they have agreed to the offer which was made; otherwise, there is no agreement at all. Without an agreement, there is no valid transfer; and without a valid transfer, the offeree has no justification for keeping what was *ex hypothesi* never validly given to them—they are caught on the horns of a dilemma.

And so, ultimately, the question on what conditions a payment was accepted depends upon the conditions on which the payment was offered. In this regard, life and law once again mirror one another: offers are communicative

[66] ibid 36, 576–7.
[67] *Hill v Wilson* (1872–73) LR 8 Ch App 888, 896 (emphasis added).
[68] *Standing v Bowring* (1885) 31 Ch D 282.
[69] *Townson v Tickell* (n 65) 38, 577.
[70] The caveat is of considerable practical importance: in many modern transactions, banks act as agents for their customers in accepting transfers.
[71] See eg *Hyde v Wrench* (1840) 3 Beav 334; *Butler Machine Tool Co v Ex-cell-o Corp (England)* [1979] 1 WLR 401, 404 (Lord Denning MR).
[72] *Hill v Wilson* (n 67) 896: 'it is not an extraordinary thing that a man should offer to make a present to his friend and that the friend should say, in answer, "I am much obliged to you for the money … but I cannot take it as a gift, I can only take it as a loan." If the person who had advanced the money acquiesced in this, the ultimate agreement would be for a loan … [However,] the person who sent the money might in his turn say: "I do not choose to have it taken as a loan; you must take it as a gift or not at all." In that case, if the person to whom the money was sent did not return it, but kept it, of course it would be a gift.'

acts—they are concerned with what we outwardly express, not what we privately think to ourselves.[73] From this we can infer that the recipient of a payment will have accepted, and will therefore be bound by, all those conditions which the payor conveyed to them before acceptance.

B. Communication

Of course, people are not usually in the habit of enumerating in advance every condition under which they would want a payment returned. However, when we communicate, we often manage to express far more than the literal (semantic) meaning of the words we use. Take Grice's famous example of the following reference letter written by a teacher in support of a student applying for a philosophy job:[74]

> Dear Sir,
>
> Mr. X's command of English is excellent and his attendance at tutorials has been regular.
> Yours, etc.

The literal meaning of what has been said is plain. But, of course, that is not all that the teacher has managed to express. There is, in other words, a distinction between what is said (ie the literal meaning of the words used) and what is expressed or communicated.

The aim of this section is to determine when a condition will have been communicated to a payee, such that if they accept the payment they will also have accepted the condition. Although the precise mechanisms by which implied communication takes place are hotly debated by philosophers of language, I hope that what follows is sufficiently uncontroversial as to be acceptable to at least most participants in that debate.[75] In outline, my claims are as follows:

1. Almost all offers to pay expressly or impliedly convey a purpose for which the payment is being made.
2. The expression of the purpose in these circumstances is 'perfected'; that is, it conveys that the payment is being made if *and only if* the purpose obtains.
3. That the payment is being made only if the purpose obtains entails that the payment should be returned if the purpose does not obtain.
4. In some cases, especially with gifts, clarity is aided by identifying constitutive elements which make up the purpose.

[73] For legal examples, see: *Smith v Hughes* (1870–71) LR 6 QB 597, 607 (Blackburn J); *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [17] (Longmore LJ); *Air Studios (Lyndhurst) Limited t/a Air Entertainment Group v Lombard North Central Plc* [2012] EWHC 3162, [5] (Males J).

[74] Paul Grice, 'Logic and Conversation' in P Grice (ed), *Studies in the Way of Words* (Harvard UP 1989) 33.

[75] I also focus exclusively on English, though I hope that my main conclusions also hold in other linguistic contexts.

(i) Expression of purpose

Most of the time, when we pay one another, we manage to communicate to each other the purpose for which the payment is made. Few people receive money thinking 'I have no idea why I've been given this'. But rarely do we communicate our purpose in paying clearly with our express words. It would be an unusual person who said 'Here is the money I owe you, which I am paying you because I owe it to you and I would like to discharge that debt'. It would be far more common to say, elliptically, 'Here is the money I owe you' or 'Here's that £50 for Friday's dinner'.

In the most straightforward cases, the payment is essentially 'earmarked' for a particular purpose. If a payment is made over and described as 'that money I borrowed last summer' or 'your Christmas present', there is little challenge in seeing that the payor means to express that the money is being paid *in order to* pay off the debt or make the gift.[76] In these cases, what is literally said is something like:

> This money *is* [the money I owe you]/[the money I am gifting to you].

But the speaker also conveys:

> I am giving you this money because [I owe it to you]/[I want to gift it to you].

In these cases, the difference between the literal meaning of the words and the supposed implication is more apparent than real. There are no particular banknotes[77] out in the world which are, specifically, the banknotes one person owes another independent of appropriation of the notes by the former to that purpose. Money becomes 'the money I owe you' just in virtue of the fact that I am paying it to you because I owe it to you. Moreover, this interpretation is supported by the conclusions drawn above regarding conditional intentions—if nearly all of our intentions to pay are in fact conditional, it is natural for a payee to interpret communicated offers to pay in light of that fact (and therefore to favour readings which reflect the underlying conditionality of which they are reasonably aware).[78]

A more challenging set of cases involve 'pure' payments—that is, payments that are not coupled with any express words. The most practically important, in the sense of being common, are payments by bank transfer that are not accompanied by a 'payment reference'. Similarly, we might consider the situation where I hand you a wad of cash saying simply 'Here you go'. Clearly, in these cases, the purpose for which the payment is made is not conveyed by the express designation of the payment. However, not all communicative acts

[76] More abbreviated designations do not pose particular problems. If I receive a bank transfer with the payment reference 'Christmas', there is little difficulty in my filling in the ellipsis so as to understand the payor to have conveyed '[your] Christmas [gift]'.

[77] And the same goes for 'money' in a bank account, although the idea is somewhat harder to accurately express concisely given the juridical nature of bank accounts.

[78] See also Butler (n 6) 113–15.

are speech acts. We can also communicate by conduct—a mournful sigh or a roll of the eyes both convey meaning perfectly adequately without the use of express words. So too can the very act of making a payment. In all but the rarest of cases, the fact that I have made a payment shows that, and therefore conveys that, I had *some* purpose in making the payment—people do not usually do anything without a reason. The surrounding context is then usually sufficient for us to work out what that purpose might be. So if a friend who owes me money suddenly exclaims 'Oh! Here you go!' and hands me the amount they owe me, I can probably infer that their aim in doing so was to pay off their debt. Or if I receive a bank transfer of £50 from one of my uncles on Christmas Eve, I can again probably infer that the money was paid as a gift. Indeed, even where context does *not* point to a clear purpose—for example, where I receive an undesignated bank transfer from a stranger—I can still draw fairly reliable inferences: people do not usually pay money to strangers without a word of explanation, and so the purpose of the payment was probably to pay somebody else.[79]

An objection to this analysis is that it places too much weight on what can be inferred from context. I certainly accept that not everything which can be inferred from a communicative act in context is conveyed by that act. So, for example, if I were to say 'He's an excellent basketball player' while pointing to a photograph of David Beckham, you might well infer that I know very little about both football and basketball—but this is certainly not an idea which I *expressed* by saying 'He's an excellent basketball player'. However, the boundary between contextual inferences that are expressed by the communicative act and those that are not is not a simple one to draw. It is not simply a question of what the speaker intended to convey.[80] If I say 'My sister is ill', I do not necessarily intend to convey to you that I have a sister (perhaps I mistakenly believe you already know this), but I convey it nonetheless. Perhaps a better benchmark, albeit somewhat vague, would be to say that a speaker conveys a proposition that is deducible by contextual inference if and only if that proposition is relevant to the subject matter of the communication. On this approach, however, the contextual inferences that I propose above seem to fall on the right side of the line.

(ii) 'Perfection' of the purpose

My task in this section is to show that 'I am paying because X' invites the inference of 'I am paying because *and only because* X'.[81] I refer to this linguistic

[79] Involuntary payments (such as bank transfers effected by computer glitch) pose unique problems, and I am not sure the duty to return such payments is governed by the same principles that govern ordinary payments.

[80] I am prepared to assume, *arguendo*, that there are at least some instances of 'pure' payments in which the payor has no intention to communicate their purpose in making the payment by their act of paying (eg where they think the purpose is already known to the payee).

[81] I suspect that what follows hold true also of expressions involving other cognate offering verbs, such as 'offering', 'agreeing', 'transferring' etc.

phenomenon as 'perfecting' the expression of the purpose, as I draw heavily here on parallels with the analogous phenomenon known as 'conditional perfection'.

Conditional perfection is the phenomenon whereby some 'if' statements are naturally read as expressing 'if and only if' statements. Geis and Zwicky's original example was: [82]

> If you mow the lawn, I'll give you five dollars.

Which would, at least absent a contextual reason for interpreting otherwise, usually be understood as expressing:

> If, *and only if*, you mow the lawn, I'll give you five dollars.

Conditional perfection is observable in a relatively wide range of circumstances, including commitments ('If I have enough money, I'll go away on holiday'), threats ('If you don't give me your wallet, I'll kill you') and commands ('If the alarm sounds, call the police').[83]

There is a substantial consensus that conditional perfection is one kind of 'generalised conversational implicature'.[84] Generalised conversational implicatures are, of course, a subset of conversational implicatures, which are in turn a subset of impliedly communicated content. One leading theory of the communication of implied content is the Gricean idea that implicatures derive from the operation of a 'Co-operative Principle'; that is, the idea that one should 'make your conversational contribution such as is required ... by the accepted purpose or direction of the talk exchange in which you are engaged'.[85] Implicatures then result from interpreting communicative acts in light of 'maxims',[86] which flow from this Co-operative Principle. For example, consider the following exchange:[87]

> A: I am out of petrol.
>
> B: There is a garage around the corner.

This is said to invoke Grice's maxim of relevance, in that A can infer that B was expressing the idea that B thought the garage around the corner might be

[82] Michael Geis and Arnold Zwicky, 'On Invited Inferences' (1971) 2 Linguistic Inquiry 561, 562.

[83] For a fuller discussion, see William van Belle and Ingrid van Canegem-Ardijns, 'Conditionals and Types of Conditional Perfection' (2008) 40 Journal of Pragmatics 349, 352–61. Note that van Belle and van Canegem-Ardijns claim that there is no conditional perfection in cases of background conditionals (365–6), but they do not use this term in the same sense in which I use it.

[84] Though Geis and Zwicky did not share this assessment: Geis and Zwicky (n 82) 565.

[85] Grice (n 74) 26. The main competing account is the 'relevance theory'—see eg Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (Basil Blackwell 1986); Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (Blackwell 2002)—which focuses ultimately on the efficiency of cognition. Although my discussion in the main text is in Gricean terms, I think very similar moves could be made within a relevancy theory framework in order to reach the same conclusions.

[86] Stephen Levinson, *Presumptive Meanings: The Theory of Generalized Conversational Implicature* (MIT 2000) 31–9 presents a convincing distillation of the Gricean maxims.

[87] Grice (n 74) 32.

open, and have petrol to sell, on the basis that otherwise B's contribution to the conversation was irrelevant. Implicatures so derived are usually described as either 'particularised' (where they arise only in specific contextual assumptions that do not invariably, or even normally, obtain) or 'generalised' (where they arise *except* in specific contextual assumptions that do not invariably, or even normally, obtain).[88] As I mentioned, conditional perfection is usually treated as an instance of the latter kind.[89]

However, there are two different accounts of the way in which the perfection implicature is constructed. One account, defended by Levinson[90] and Horn,[91] is that conditional perfection responds to the maxim that one should be relevant. The idea is that in a sentence such as 'If you mow the lawn, I'll give you five dollars', the antecedent ('If you mow the lawn') is irrelevant if the speaker would give the listener five dollars anyway. Therefore, we interpret the antecedent as describing a necessary, as well as a sufficient, condition in order to make it contribute relevant information. The other account, defended by van der Auwera[92] and de Cornulier,[93] is that conditional perfection instead responds to the maxim of quantity (essentially, be as informative as one is able within the constraints of relevance). Here, the claim is that 'I'll give you five dollars no matter what' is a more informative claim than 'If you mow the lawn, I'll give you five dollars', and should therefore be preferred if true—the corollary being that where the latter is employed, the interlocutor infers that the *stronger* ('no matter what') claim was not made because not true or not thought to be true.

I intend to remain neutral on the debate between these two explanations; both, I think, are apt to support the point I wish to make—namely, that the reasons that support conditional perfection also support perfection of the 'because' clause in offers to pay. Whichever explanation one endorses applies, *mutatis mutandis*, if one substitutes the 'because' clause in 'I am paying you because X' for the antecedent of 'If X, I'll pay you'.

(iii) Perfected purposes and conditional payments

If we accept that expressions of 'I am paying you because X' usually implicate 'I am paying you because and only because X', most of the remaining claims I wish to make follow fairly straightforwardly. First, 'I am paying you because and only because X' clearly entails, by biconditional elimination, the proposition 'I am paying you only because X'. And I assume it is uncontroversial

[88] This particular way of expressing the distinction is drawn from Levinson (n 86) 16.
[89] ibid 119–20.
[90] ibid.
[91] Laurence Horn, 'From *If* to *Iff*: Conditional Perfection as Pragmatic Strengthening' (2000) 32 Journal of Pragmatics 289.
[92] Johan van der Auwera, 'Pragmatics in the Last Quarter Century: The Case of Conditional Perfection' (1997) 27 Journal of Pragmatics 261; Johan van der Auwera, 'Conditional Perfection' in A Athanasiadou and R Dirven (eds), *On Conditionals Again* (J Benjamins 1997).
[93] Benoît de Cornulier, '*If* and the Presumption of Exhaustivity' (1983) 7 Journal of Pragmatics 247.

that 'I am paying you only because X' is synonymous with 'If not for X, then I wouldn't be paying you'—the word 'because' denotes a causal relationship, and the phrase 'if not for' (and its cognate 'but for') indicates the kind of counterfactual comparison typically associated with causal judgments.

The only remaining controversial move is from 'If not for X, then I wouldn't be paying you' to 'If not X, then I don't want you to keep the money' (or 'If not X, then I want the money back'). There are two differences in these two formulations.

The first difference is the shift from the subjunctive mood in the former expression to the indicative mood in the latter expression. Typically, subjunctive conditional statements imply the falsity of their antecedent (in my example, that it is not the case that not-X, ie that it is true that X), whereas indicative conditional statements treat the truth of their antecedent as an open question.[94] What this shows is that the subjunctive is a strictly more informative expression than the indicative—it expresses both the conditional relationship and the speaker's opinion about the truth of the antecedent. Therefore, an utterance of a subjunctive conditional seems to entail its less informative indicative cousin in the same way that an utterance of 'I ate a red apple' entails 'I ate an apple' (and so the latter can be inferred from the former).

The second difference between the two formulations is the one which is more obvious on a first reading: the consequent of the conditional shifts from a claim about a counterfactual present ('I wouldn't be paying you') to one about the future ('I want the money back').[95] In this context, at least, the latter can be inferred from the former. The key is that 'I wouldn't be paying you' is simply one way in which the payor can express a particular state of affairs in which the payor has the money, and not the payee. But that state of affairs can be created even *after* the payment is made, by the payee paying back the money (as opposed to not receiving it in the first place). And nothing has been communicated to the payee to suggest that the fact of the payment being made affects what state of affairs the payor desires in the event that the purpose of the payment does not obtain. When the payor is in the process of paying over the money, the 'I wouldn't be paying you' formulation is simply the most natural way for the payor to express their desire that the payee only have the money if the purpose obtains—but the idea expressed is the more general idea that the payee is only supposed to have (ie to receive *and to keep*) the money[96] where the purpose obtains.

[94] See eg Stuart Hampshire, 'Subjunctive Conditionals' (1948) 9 Analysis 9. But cf the limited challenge to this view in eg Alan Anderson, 'A Note on Subjunctive and Counterfactual Conditionals' (1951) 12 Analysis 35.

[95] Note that, because of the shift from the subjunctive to indicative, it is ambiguous whether or not this future-directed statement is counterfactual.

[96] Note that the phrase 'the money' is somewhat misleading. The implication is not that the payee should pay back the very money received. Where bank transfers are involved, this would in any event be impossible. But even when the payment is made by cash, and the very same notes could in principle be returned, in most cases the claimants will be indifferent—both objectively and subjectively—about the exact notes involved. The

(iv) Gifts

A final gloss is needed in relation to gifts. In some cases, the expressed purpose of a payment will be to make a gift (something like 'I am paying you because it is desirable that I make a gift to you'). By the reasoning above, this amounts to an expression that the payor would not be paying—or, if they have paid, would want the money back—if it were not desirable to be making a gift. The difficulty[97] here is that the condition is too vague. A person who agrees to take a gift on the condition of the desirability of gifting cannot reasonably be understood to have agreed that the gift they are receiving is subject to unknowable unilateral conditions. Instead, the better view is that the recipient only takes subject to the known, or reasonably knowable, conditions which would impact the donor's desire to gift.[98] In other words, the statement 'I want to make a gift' implicates something akin to 'I want to make a gift (subject to the usual conditions under which people in these conditions want to make gifts)', but no more; so if the payor has a condition which is not reasonably knowable to the payee, they must communicate it by their express words if they wish for the payee to agree thereto.

5. Implications

As I mentioned, this is not, primarily, an article about the current state of English law. In fact, to the best of my knowledge, a conditions-based analysis of this sort has only been expressly endorsed in one case,[99] and that reasoning was overruled on appeal.[100] Nonetheless, I think it is interesting to conclude by exploring some of the consequences which might result if English law *did* adjust its approach to 'unjust enrichment' along the lines I propose above. The remarks which follow are, however, offered somewhat tentatively, as space precludes the full exploration thereof.

implication instead must be that an equivalent sum of money will be repaid. (This 'indifference' claim should not, however, be taken as explaining why the law does not have a general requirement of restitution *in specie* of mistakenly transferred rights; this may well depend on some different justification.)

[97] For a similar challenge to the 'conventional' enrichment-and-vitiated-consent view, see Meier and Zimmermann (n 62) 562–3.

[98] There are traces of similar thinking in Birks's revised absence-of-basis analysis, albeit focusing on 'risk-taking' by the payor rather than identifying to what the defendant agreed; see Birks, *Unjust Enrichment* (n 1) 142: 'The question is always whether the purpose for which the transfer was made was achieved. In deciding what that purpose was, great care has to be taken to see whether the claimant knowingly took the risk that his primary purpose might not be achieved … but there is no need to communicate the purpose to a recipient to whom it is or appears to be manifest.'

[99] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1989] 1 WLR 137, 146–7 (Nolan J). I argued in Georgiou (n 6) that some parts of Foxton J's judgment in *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 also lean towards this approach.

[100] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 150–2 (Lord Keith) and 199 (Lord Slynn). Lord Goff also tentatively agreed (at 170) that Nolan J's analysis should be rejected.

A. Quasi-contract

The first, and rather startling, conclusion is that English lawyers have been too quick to dismiss the language of quasi-contract. The idea that the liability to return mistaken payments is akin to contractual liability dates back to Roman law.[101] It featured prominently in English cases until the development of Birks's theory of 'unjust enrichment'.[102] However, it has since decidedly fallen out of favour. Birks described it as a 'heresy'[103] and, in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson stated that the House of Lords 'should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract'.[104] But, if what I have suggested above is correct, then the claim to recover mistaken payments genuinely ought to be regarded as a form of agreement-based liability—and the language of 'quasi-contract' was perhaps not so far wide of the mark after all.

B. The Scope of 'Unjust Enrichment'

Equally, if English law were to adopt this approach to the recovery of mistaken payments, it would have to reassess how it defines the elements of the cause of action in 'unjust enrichment' and the factual scenarios that claim covers.

I have already suggested a plausible conditions-based formulation of the cause of action: the claimant can recover if and only if:

1. the defendant has accepted something;
2. that thing was offered conditionally;
3. the condition was communicated to the defendant, either expressly or impliedly, before the defendant's acceptance of the thing; and
4. the condition does not obtain.

My focus now is on what kinds of cases traditionally thought to fall within the label 'unjust enrichment' would in fact fall within such a cause of action. I take the categories of these cases at a relatively high level of abstraction; the question to what extent my conditions-based analysis maps onto the results of specific decided cases is one for another article.

I suspect that much of what I have said is generalisable to most cases of 'mistake'. Mistaken transfers of rights other than rights to money are straightforward; I think that the analysis above applies in almost identical terms.

[101] Inst 3.27.1–6; D.44.7.5. For a detailed, albeit sceptical, look at the history of 'quasi-contract', see Peter Birks and Grant McLeod, 'The Implied Contract Theory of Quasi-contract: Civilian Opinion Current in the Century before Blackstone' (1989) 6 OJLS 46.

[102] John Baker, 'The History of Quasi-contract in English Law' in WR Cornish and others (eds), *Restitution: Past, Present, and Future* (Hart Publishing 1998) 50 suggests that *Bonnell v Fowke* (1657) 2 Sid 4 was the first use of *indebitatus assumpsit* to recover a mistaken payment.

[103] Birks, *Unjust Enrichment* (n 1) 273.

[104] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 710.

Mistaken services, on the other hand, are slightly more complicated—unlike mistaken transfers of rights, mistaken services are not reversible: I cannot, for example, un-sing a song I have sung for you.[105] However, in most contexts, I suspect that paying for the service will come sufficiently close to attempting to 'reverse' the service that, given it is the best the recipient of the service can do, it ought to count for practical purposes as reversing the service.

Beyond 'mistake', the obvious parallel is with cases of 'failure of consideration'. The essential difference here is temporal: 'mistake' cases cover situations where the condition did not obtain at the time of acceptance, whereas 'failure of consideration' cases are those where the condition was supposed to (but did not) obtain at some point *after* acceptance.[106] Once that distinction is borne in mind, I see no difficulty in fitting both within a common framework.[107]

Finally, I also suspect that a conditions-based analysis could apply in so-called *Woolwich* cases.[108] Indeed, a conditions-based approach was adopted at first instance in *Woolwich* itself.[109] The case concerned the Income Tax (Building Societies) Regulations 1986. The claimant building society believed that the Regulations were *ultra vires*, but nevertheless paid sums levied by the defendant thereunder so as to avoid negative publicity. The payments were expressed to be made 'without prejudice to any right to recover any payments made pursuant to the Regulations which may arise as a result of legal proceedings'.[110] These payments were offered conditionally upon the money being due. The fact that Woolwich did not believe that the money was due does not change this—the 'without prejudice' notice shows that the payments were not made to bring to an end any dispute over the liability, as does the fact that Woolwich did in fact challenge the validity of the Regulations. We see a similar analysis in other cases involving disputed liabilities which do not involve *ultra vires* levies.[111]

[105] I owe this example to Stevens (n 15) 583.

[106] There are some notable exceptions: see eg *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215, where payments made under a void swaps contract were held to be recoverable for 'failure of consideration' even though the condition (the validity of the contract) did not obtain *ab initio*. Another such case is *School Facility Management* (n 99), and I outlined in my note thereon (Georgiou (n 6)) why I think these cases support a conditions-based theory of unjust enrichment.

[107] Others have already defended similar claims, as a doctrinal matter, elsewhere. See Matthews (n 6); Butler (n 6) 108–24; Maher (n 6) 101–4.

[108] A similar argument is to be found in Maher (n 6) 108–9.

[109] *Woolwich Equitable Building Society* [1993] (n 100) 146–7.

[110] *Woolwich Equitable Building Society* [1989] (n 99) 142.

[111] See eg *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1266–9; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714. There is a good discussion of these cases in Gerhard Dannemann, 'Unjust Enrichment as Absence of Basis: Can English Law Cope?' in Burrows and Rodger (n 25) 373–6. I should add: I mentioned above that duties are fundamentally second-personal. The same is not necessarily true of defences. A claimant who believes that there is a risk that money they plan to pay is not due but pays anyway cannot later recover the money on the grounds that, objectively, the offer to pay was objectively conditional on the money being due. Their subjective consent to the risk of the money not being due raises a defence of *volenti non fit iniuria*.

I am less convinced that other areas of the law which have, at one point or another, been described as 'unjust enrichment' can be brought within a conditions-based framework. Most obviously, those cases which involve infringements of proprietary or equitable rights involve no agreement whatsoever between claimant and defendant—if you mistakenly pick up my suitcase at the airport, the reason you must return it has nothing to do with an agreement between us; it is simply that the suitcase is mine.[112] Similarly, cases of duress do not seem to involve a meaningful agreement between the parties that the money is paid conditionally. Cases of undue influence are somewhat more borderline; however, I doubt that we can point to any communicative act which conveys the proposition that the payor is paying of their own free and independent decision.

C. Beyond Unjust Enrichment

The final point to note is that the preceding analysis, if correct, potentially has important implications for the communication of implied conditions—as well as other implied communication—elsewhere in the law. It has, at various points, been suggested that the law on contractual frustration,[113] termination for breach[114] and common mistake[115] are all justified by an implied agreement between the contracting parties. That view has now largely fallen out of favour.[116] However, the capacious view of implied communication and conditional intention defended in this article may help to avoid the primary challenge to this view, viz, that the parties did not turn their minds to the circumstances in question.

6. Conclusion

To keep that which was given by mistake is surely, intuitively, 'unjust'. The recipient 'ex æquo ot bono … ought to refund'[117] it. But this simple intuition is far from simple to explain. The dominant view endorsed by English academics and judges—the 'peculiar normativity of extant gain'[118]—is far from

[112] The same answer cannot be given for mistaken payments. That a payment has been made means, *ex hypothesi*, that the money is no longer 'mine'. To pay money simply is to make 'my money' yours. And neither English law nor morality has ever recognised an equivalent to the 'determinable fee simple' (ie a grant of a fee simple which automatically reverts to the grant upon the happening of a certain contingency) in the case of money.

[113] See eg *Taylor v Caldwell* (1863) 3 B & S 826, 833–4; 122 ER 309, 312; *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 403 (Earl Loreburn) and 422 (Lord Parker).

[114] Lord (Kenneth) Diplock, 'The Law of Contract in the Eighties' (1981) 15 UBC Law Rev 371, 377.

[115] See eg *Bell v Lever Brothers Ltd* [1932] AC 161, 225 (Lord Atkin); *Solle v Butcher* [1950] 1 KB 671, 691 (Lord Denning MR); John Smith, 'Contracts—Mistakes, Frustration, and Implied Terms' (1994) 110 LQR 400.

[116] See eg *James Scott & Sons Ltd v R&N Del Sel* (n 54) 597 (Lord Sands); *Davis Contractors v Fareham Urban District Council* [1956] AC 696, 720–1 (Lord Reid) and 728 (Lord Radcliffe); *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 687 (Lord Hailsham).

[117] *Moses v Macferlan* (1706) 2 Burr 1005, 1012; 97 ER 676, 680.

[118] Birks, *Unjust Enrichment* (n 1) 208.

unproblematic. And the rather more civilian notion of 'enrichment *sine causa*' raises at least as many questions as it answers.

Perhaps a more palatable answer, albeit one which has to date garnered little academic or judicial support, is that the law of events materially identical to mistaken payments is, in fact, the law of agreed conditionality. The aim of this article has been to reinvigorate the 'tacit agreement' theory of unjust enrichment by subjecting the underlying concepts of 'intention' and 'communication' to deeper philosophical examination.

It may be that the conditions-based account of unjust enrichment best fits the results and rules we find in the decided case. I suspect it may, although that is a discussion for another time. But, if we are serious about the law of unjust enrichment reflecting the interpersonal 'justice' between the payor and recipient of a mistaken payment, then there is much to be said for reconceptualising the law in conditions-based terms.