

UNJUST ENRICHMENT

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1. The Theoretical Challenge

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."¹ In the past few decades, this principle of liability has recently become as firmly established in the common law jurisdictions as it has long been among civil law systems. Being a relatively new basis of liability, unjust enrichment is now the most dynamic of all areas of private law. Nonetheless, skeptical voices have continued to be heard. Scholars have contended that unjust enrichment adds little to the traditional arsenal of private law categories;² that the idea of unjust enrichment is either hopelessly circular or is a conclusion based on unmentioned normative values that do the real work;³ and that the principle of unjust enrichment submerges within a common framework types of claims that should be governed by diverse principles.⁴ Despite being recognized as never before, unjust enrichment remains the most embattled of the bases of liability in private law.

Two interrelated theoretical puzzles have fueled such expressions of skepticism. First, at the heart of unjust enrichment lies the mystery of what makes an enrichment unjust. This question concerns not merely the positive law, but the normative theory implicit in it, exposing a gap through which seep doubts about the nature and scope of the principle of unjust enrichment. Even proponents of unjust enrichment acknowledge the absence of a viable theory of the unjustness that grounds this form of liability.⁵ For many years the development of unjust enrichment was impeded by the suspicion that, once recognized as a category of liability, it would direct judges away from traditional legal reasoning to the amorphous

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¹ Restatement of Restitution (1937), s. 1.

² Steve Hedley, *Restitution: Its Division and Ordering* (2001).

³ Hanoch Dagan, *The Law and Ethics of Restitution* 19 (2004).

⁴ Peter Jaffey, Two Theories of Unjust Enrichment, in Jason W. Neyers, Mitchell McInnes, and Stephen P. A. Pitel, *Understanding Unjust Enrichment* 39 (2004); Christopher T. Wonnell, Replacing the Unitary Principle of Unjust Enrichment, 45 *Emory L. J.* 153 (1996).

⁵ A distinguished commentator on the law of restitution has lamented:

Lurking beneath the surface is an awkward question that needs to be answered by jurists: what is it that makes a particular enrichment unjust? It is a question which has not been answered in modern writing on the law of restitution. Indeed, most modern writing on the law of restitution is notable for its apparent indifference to theoretical issues. What is the notion of justice which underpins the law and its development? If this area of law is to be restyled the law of unjust enrichment, surely it cannot avoid openly addressing questions that relate to the conception of justice which underpins the law? Writers avoid the issue...

Ewan McKendrick, *Taxonomy: Does it Matter?*, in David Johnston and Reinhard Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 627, 654.

exercise of legal discretion on unspecified grounds that vary according to one's personal sense of justice.⁶ How, then, can the unjustness of the enrichment be conceptualized in a juridically disciplined manner?

Second, how do the principle's three elements (that the plaintiff has been "enriched," that the enrichment has been "at the defendant's expense," and that the enrichment was "unjust") as well as the defence of change of position fit together to form a coherent basis of liability? Historically, the prime impetus for the development of unjust enrichment has been to bring together various instances of restitutionary liability that the common law had assigned to separate compartments. This drive for unity across different kinds of transactions, however, would be pointless unless the principle provided unity within each transaction. For if the elements of liability are merely a potpourri of mutually inconsistent or indifferent considerations, liability would depend on the particular way in which the various considerations are balanced and combined in any given case or group of cases. Unjust enrichment would then provide merely a common label, not a common pattern of reasoning. Only by combining in a coherent set could the elements of unjust enrichment impart the unity of an overarching principle to the various situations that contemporary scholars of restitution claim fall under it.

Moreover, only when they are coherently unified do the individual elements themselves have a stable meaning. What counts as an "enrichment" of the defendant cannot be determined independently of what renders the enrichment "unjust" and "at the expense of the plaintiff". The idea of an enrichment presupposes a normatively relevant baseline against which the enrichment is measured, and what is normatively relevant has to refer to something to which the appropriate considerations of unjustness can intelligibly apply, and vice versa. The same is true of what it means for the enrichment to be realized "at the expense of" the plaintiff. As with other bases of liability, the meaning of each element conditions, and is conditioned by, the meaning of all the others. Each element is intelligible not on its own but through its place in the principle of unjust enrichment conceived as a unified whole.

The theoretical idea that reflects this concern with the inner unity of the principle of unjust enrichment, as well as of other principles of private law, is corrective justice. Indeed, in a recent judgment the Supreme Court of Canada remarked: "Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring their parties to their pre-

⁶ "[T]he adoption of this concept ... would clothe judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test is his individual perception of what he considered to be unjust." Martland J., dissenting, in *Pettkus v Becker* (1980), 117 DLR (3d) 257 (SCC). A similar note was sounded decades earlier in Holdsworth, *Unjustifiable Enrichment*, (1939) 55 LQR 37 at 49.

transfer positions.”⁷ Such an observation testifies to the intuitive plausibility of understanding liability for unjust enrichment as an instantiation of corrective justice. Unjust enrichment at another’s expense seems to be an obvious example of an injustice as between the parties, which a finding of liability then corrects by requiring restoration of the enrichment.

However, it is one thing to assert the intuitive plausibility of connecting unjust enrichment to corrective justice, and another to provide an adequate theoretical account of the connection. Such an account must show how liability for unjust enrichment manifests the three interwoven features that make up corrective justice.⁸ First, corrective justice, reflecting the bipolar nexus of plaintiff and defendant, signifies a normative structure in which the parties are correlatively situated. Second, because this structure requires a content that is itself informed by correlativity, the organizing features of the parties’ relationship are the plaintiff’s right and the defendant’s correlative duty. Third, rights and their correlative duties imply a conception of the parties as persons who interact with each other as free and equal agents, without the law’s subordinating either of them to the other. Accordingly, as an instantiation of corrective justice, liability for unjust enrichment should exhibit the correlative structure of the parties’ relationship, vindicate the plaintiff’s right as against the defendant, and affirm the parties’ freedom and equality. And so the question arises: how are these features of corrective justice implicit in liability for unjust enrichment?

In the recent scholarship on unjust enrichment, doubts about corrective justice flow from difficulties that supposedly pertain to the second of these features, the correlativity of right and duty. On the duty side, the difficulty rests on the defendant’s being obligated to make restitution despite his or her passivity in receiving the enrichment. This passivity means that the recipient cannot plausibly be regarded as a wrongdoer, that is, as someone who is to be subjected to liability as a consequence of having breached a duty owed to the plaintiff. One consequence of this is that liability in unjust enrichment is “strict” or without fault, and therefore at odds with the corrective justice account of tort law.⁹ Even this, however, understates the difficulty. In fact, the recipient has not merely not done wrong, but has not done anything at all: “there is no sense in which the defendant is the agent of the plaintiff’s misfortune.”¹⁰ Nor does it seem possible to say that the injustice consists in the act of withholding restitution. That would be an injustice only if the defendant were already under an anterior duty to make restitution. This is the duty that corrective justice is alleged to be incapable of grounding.

⁷ *Kingstreet Investments v. New Brunswick (Department of Finance)*, [2007] 1 SCR 3, para 32.

⁸ Above, Chapter One.

⁹ Mitchell McInnes, *The Measure of Restitution*, 52 UTLJ 163, 186-196 (2002).

¹⁰ Dennis Klimchuk, *The Structure and Content of the Right to Restitution for Unjust Enrichment*, 57 UTLJ 661, 677 (2007).

A parallel difficulty emerges in connection with the plaintiff's right. Cases of unjust enrichment deal with the transfer of money or goods or with the provision of services. In none of these cases does the plaintiff retain a proprietary right to the subject matter of the enrichment. Corrective justice postulates that liability vindicates some right of the plaintiff's. In cases of unjust enrichment, however, the enriching transaction seems to have wiped away that right, leaving the plaintiff with nothing to vindicate.¹¹

The challenge concerning the plaintiff's right moves from the premise that the unjust enrichment leaves the plaintiff without a proprietary right to the conclusion that the plaintiff has no right at all. This conclusion does not follow. The plaintiff may well have a non-proprietary right, that is, a right not *in rem* but *in personam*. Such a right, consisting in an entitlement against a particular defendant rather than against the world in general, is established through a transaction in which both parties participate. A paradigmatic instance is the right to contractual performance, which arises through a course of dealings (offer, acceptance and so on) between the parties and runs in favour of a particular promisee and against the particular promisor. In pointing to this instance of an *in personam* right, I am not proposing a revival of the pernicious view that a claim in unjust enrichment is based on an implied contract. However, I am suggesting that perhaps the reason that unjust enrichment could have been assimilated to contract for so long is that both bases of liability are of a kind that do not rest on a proprietary claim. Of course, one can make good on this suggestion only by specifying (as I hope to do) the elements in the parties' dealings that perform for unjust enrichment the function that such concepts as offer and acceptance do for contract.

The purpose of this chapter is to elucidate unjust enrichment as an *in personam* basis of liability that conforms to corrective justice. As in the case of contract, the parties to liability in unjust enrichment (so I shall argue) establish the correlative right and duty through the interaction in which they both participate. Being interactionally established, the *in personam* right stands in contrast to an *in rem* right, which the right-holder has prior to and independently of the defendant's wrong. With respect to both *in rem* rights and *in personam* rights, corrective justice undoes an injustice that consists in an inconsistency with the plaintiff's right that is imputable to the defendant. But there is this difference between them. The *in rem* right imposes a duty on the whole world; the defendant's particular duty arises out of membership in that world. The *in personam* right imposes a duty specifically on the defendant; this duty is the product of a right-establishing interaction with the plaintiff. To be sure, the *in personam* right is not a creation *ex nihilo*. It arises out of what is rightfully the parties': the parties to a contract, for example, have pre-existing rights to what they are exchanging. However, the juridical effect of the parties' interaction is to transform these pre-existing rights into components of a new relationship of right and duty.

¹¹ A sophisticated statement of this difficulty is found in Kimchuk, *ibid.*

How, then, does an unjustly enriching interaction establish a correlative right and duty of restitution? As the Supreme Court of Canada observed, unjust enrichment occurs “[w]hen a transfer of value between two parties is normatively defective.”¹² My focus is on the role of value in a corrective justice account of unjust enrichment. I intend to trace how value starts out as an entitlement of the plaintiff’s that is transferred to the defendant in a normatively defective way, with the result that the value must be retransferred to the plaintiff.

2. The Juridical Significance of Value

What is value and what is involved in its transfer? To address these questions I start with the account of value in Hegel’s *Philosophy of Right*. This account continues a tradition of enquiry about value that stretches back to Aristotle and was subsequently carried forward by Marx and others. Hegel’s remarks are particularly illuminating for issues of liability, because he treats value initially not as an economic concept but as a juridical one.

Hegel regards value as an incident of property. One is entitled to the value of something by virtue of one’s ownership of the thing that is the locus of the value. Hegel’s description of value as an object of ownership reflects commonplace notions drawn from contract and tort law, respectively, that the owner of anything alienable is entitled to realize its value through exchange¹³ and to be compensated to the extent of its value in the event of wrongful injury or deprivation.¹⁴ The owner of the thing owns the value in the sense that ownership of the thing carries with it an entitlement to something equivalent when the thing is exchanged or injured. Value is thus the potentiality that is actualized through a set of legal operations—exchange and liability—with respect to things that one owns. Indeed, unless it were possible to conceive of this potentiality as an entitlement of the thing’s owner, the transformation of an entitlement to what one owns into an entitlement to what is substituted for it through exchange or liability would make no sense. The entitlement to value thus marks the continuity through the process of exchange and the determination of liability of the owner’s entitlement to the thing owned.

After dealing with the right to use one’s property, Hegel makes the following observations about the notion of value:

A thing in use is an individual thing, determined in quantity and quality and related to a specific need. But its specific utility as *quantitatively* determined, is at the same time *comparable* to other things of the same utility, just as the specific need which it serves is at the same time *need in general* and thus likewise comparable in its particularity

¹² Above, n. 1.

¹³ G. W. F. Hegel, *Elements of the Philosophy of Right*, s. 77 (Allen Wood, ed., 1991)

¹⁴ *Ibid.* s. 98.

with other needs. Consequently, the thing is also comparable with things which serve other needs. This *universality*, whose simple determinacy arises out of the thing's particularity in such way that it is at the same time abstracted from this specific quality, is the thing's *value*, in which its true substantiality is *determined* and becomes an object of consciousness. As the full owner of the thing, I am the owner both of its *value* and of its use.¹⁵

Hegel here draws attention to three characteristics of value. First, value is quantitative. This is apparent from the contrast between value and use. Use involves reference to the specific qualities that a thing has that allow it to satisfy the specific needs of the specific person using it. I can make use of my shoe, for example, because my shoe has certain qualities: a concave shape into which my foot fits, a flexible material that will bend as I lift and lower my foot, a slightly curved sole that facilitates locomotion, and so on. Only with such qualities can the shoe satisfy the needs of movement and protection that the shoes serve. In contrast, when I enquire into the value of the shoe, my interest is entirely quantitative: to how many units of something else is the shoe equivalent? The movement of our attention from use to value is thus a movement from quality to quantity.

Second, value is relational. As is indicated by the enquiry into the number of units of something else to which the shoes are equivalent, value relates a thing to other things by quantitatively comparing them. The value of my shoes is not at issue so long as these shoes are considered exclusively on their own. Attention shifts to the shoes' value when I compare the shoes, say, to food by wondering how many loaves of bread the shoes equal.¹⁶ Value is thereby a quantitative representation of the relation between the shoes and the loaves.

Third, such quantitative comparison presupposes abstraction from the particular uses to which the compared items are put and from the particular needs that they serve. Nothing can have value that another cannot put to some particular use or that does not serve another's particular need. When quantitatively compared, however, these diverse uses and needs implicitly share a common dimension of commensurability as instances of usefulness and need generally. For instance, shoes and loaves of bread serve the particular needs of ambulatory comfort and nutrition respectively, which, *qua* particular needs, are not intrinsically related to each other. In their particularity they are incomparable. Accordingly, if so many shoes are to be treated as equivalent to so many loaves, then the needs served by shoes and bread, or the uses that satisfy these needs, figure in this equivalence only through the general idea of need or usefulness in which they participate as instances. Abstraction from the particularity of need and use is the

¹⁵ Ibid. s. 63 (emphasis in original).

¹⁶ The example is Aristotle's: *Nicomachean Ethics* v, 1133a23.

presupposition of value's functioning as a medium of quantitative comparability between qualitatively different things.

These three characteristics of quantity, relation and abstraction are reciprocally entailed in the idea of value. The presence of each is demanded by the presence of the other two. Value's quantitative character requires abstraction from one thing's particular use to the usefulness that allows that thing to be quantitatively compared to another. If the value of shoes is represented by the formula that so many shoes equal so many loaves, each characteristic of value pauses on a different aspect of the shoes' valuation. Quantity looks to the numbers modifying the things being compared. Relation looks to the fact that the quantification of shoes is here stated comparatively by reference to the number of loaves that the shoes equal. Abstraction from the particularity of need and use looks to what is presupposed in conceiving of the relation between two particular items, such as shoes and loaves, in terms of their quantitative equality.

Value refers to the possibility of exchange and is concretized through the process of exchange. In exchange the owners of things of value determine what is to be exchanged for what and how many units of one thing are to be given for how many units of the other. They thereby give expression to the relational and quantitative characteristics of value. They do so, however, not merely in fulfillment of their own particular needs or in anticipation of the particular uses they will make of what they receive through exchange, but as participants in a world of value that abstracts from those needs and uses.

Because value treats particular needs and uses as instantiations of need and usefulness in general, the quantitative comparison between the two things being exchanged is systematically linked to quantitative comparisons between these things and other things. By abstracting from the particularity of need or use, value becomes indifferent to the particularity of the things being exchanged and can therefore be expressed through the comparison of any thing of value with any other thing of value. If I wish to exchange a pair of shoes for loaves of bread, the number of loaves that I receive is a function not merely of the relationship between shoes and loaves, but also of the relationship between shoes or loaves and anything else for which they might possibly be exchanged. Even if I want bread and someone else wants shoes at the end of the day, we can each reach our desired destinations through a series of exchanges involving other commodities. The value of my shoes and the value of another's bread exist in equilibrium with the value of other things. The formula that so many shoes equal so many loaves can be expanded to include the equality of these numbers to so many of any other thing of value. Value thus reflects the possibility of equalizing all things of value with one another, and equating any given thing of value with all other things of value.¹⁷

¹⁷ I. I. Rubin, *Essays on Marx's Theory of Value* 109 (1972).

Consequently, the quantification of equivalents in exchange is beyond the power of the exchanging parties alone. The value to be attached to things that they exchange is determined not by the either party's subjectivity or by the relationship between their respective subjectivities. Rather, value reflects the relationship between all possible exchanging parties with respect to all possible exchangeable things. Equivalence in exchange is an objective rather than a subjective idea. In the formula "so many shoes equal so many loaves," the quantities do not represent merely what the owners of the shoes and the loaves, as persons who wish to satisfy their particular needs, accept from each other. Given the abstracting characteristic of value, the quantities of shoes exchanged for loaves represent what the shoes and the bread are objectively worth relative to each other.

Value is thus the medium for measuring whether what was received is quantitatively equivalent to what was given. The difference between these two marks the extent to which one party gave the other something for nothing. Only if there is such a difference does the transaction constitute a transfer of value.

The reason for this is as follows. When dealing with transfers, one must distinguish between things that have value and value itself. The transfer to another of a thing that has value does not necessarily mean that there has also been a transfer of value. Take the example of exchange. When I exchange a certain quantity of shoes for a certain quantity of food, I no doubt have transferred something of value, the shoes, and received something of value in return, the food. But if the food is of equal value to the shoes, no value has been transferred. Exchange on such terms features the reciprocal transfer of things of value but not the transfer of value itself, since it keeps constant the value to which each party is entitled. Exchange demonstrates that value "is distinct from the external things which change owners in the course of the transaction,"¹⁸ because in an exchange external things are transferred but value is not. To be sure, I would not engage in this exchange unless the food I received was more useful or valuable to me than the shoes I surrendered. But the value that is expressed in and through the exchange abstracts from me as a particular person with a particular preference for this amount of food rather than that amount of shoes. What matters to value in exchange is not the value to me in isolation, but value as determined by the intrinsically relational process of exchange among those trading shoes and food.

Only to the extent that the transfer is gratuitous, that is, involves no receipt of equivalent value, does the transfer of a thing of value become a transfer of value as well. If I transfer shoes but receive in return nothing or food of less value (like the Homeric hero who foolishly "exchanged gold

¹⁸ Hegel, above n. 13, s. 77.

armor for bronze armor, a hundred oxen's worth for nine"),¹⁹ then I have transferred not only the shoes as things of value but value itself. In contrast to what happens in an exchange, the transaction does not preserve intact the amount of value that I have, because there is no equivalence of value in what was given and received. Through this gratuitous transfer the value of what is rightfully mine has been diminished and the value of what is rightfully the transferee's has been increased by the amount of value that has been transferred without reciprocation. In the language of unjust enrichment, the transferee has been enriched at my expense. This does not mean, of course, that the transferee is obligated to return the enrichment. That further consequence depends on whether the retention of that enrichment is unjust, that is, whether the transfer occurred under conditions that generate an obligation to restore the transferred value.

Being unreciprocated, the transferred value of the shoes thus has a double aspect. On the one hand it is an incident of the transferee's proprietary right in the shoes. As is the case with every owner, the transferee who becomes the owner of the shoes also thereby becomes entitled to their value. If the transferee sells the shoes, the transferee is entitled to keep the value realized through the sale. If the shoes are tortiously destroyed or converted, the transferee is entitled to receive from the wrongdoer their equivalent value as compensation. Because the transferee's right to the shoes (and the consequent entitlement to their value) is good against the whole world, I am not differently situated with respect to this value than is everyone else.

On the other hand, the transferred value in the shoes is also a component of the normative relationship, unshared by anyone else, between me as transferor and the transferee. Even if the transfer of the shoes (and therefore of their value) is valid from a proprietary standpoint, the gratuitousness of the transfer raises a distinct issue of justice between us as parties to the transaction. Because the law assumes that persons generally act to further their own ends rather than another's, it seeks to ensure that I truly intended the transfer to be gratuitous. And conversely because the law does not allow obligations to be created behind another's back, restitution of the transferred value has to be consonant with the free will of the transferee. Thus, aside from the passage of title in the shoes, the question arises whether the circumstances of the gratuitous transfer of the value in the shoes are such that the transferee is under an obligation to restore this value to me. These circumstances pertain to the relationship between the two of us as participants in the transfer of value rather than the relationship between the transferee, as the new owner of the shoes, and everyone else. Put more technically, although I have lost the *in rem* right to the shoes (and thus to their value), one can still ask whether the conditions of transfer were such that I now nonetheless have, as against the transferee, an *in personam*

¹⁹ Homer, *Iliad* vi, 235-236

right to their value. It is this aspect of the transferred value that engages the principle of unjust enrichment.

Exchange and transfer of value are thus mutually exclusive notions. Exchange features a movement of things of value from each party to the other. It does not, however, feature any movement of value. In contrast, a transfer of value occurs when one party gives the other something of value, but in return receives nothing or something of lesser value. This transaction transfers not only a thing of value, but also value itself, for through this interaction one party loses and the other party gains value

This contrast between a transfer of value and a transfer of a thing of value is the consequence of the inherently relational nature of value. Characterized as it is by quantitative comparability that abstracts from the qualitative differences between things of value, value equates an amount of one thing to an amount of another. Value is not concerned with any thing on its own but with the quantitative relationship between one thing and another. Whether a transfer of value has occurred thus depends not on the movement of any single thing of value, but on whether that movement has been matched by the reciprocal movement of some other thing of equivalent value. This reciprocal movement is a contingent matter. When it occurs, one has an exchange in which things of value have been transferred but not value itself. When it does not occur, one has a transfer of value.

3. The Transfer Elements of Liability

I now turn to the juridical significance of treating unjust enrichment as involving a transfer of value, understood as the giving of something (whether objects or labour) for nothing. How is the idea of a transfer of value actualized through the requirements for liability? These requirements reflect the idea to the extent that it provides a structure to which they conform. They also construct the idea by endowing with legal specificity what would otherwise be an abstraction. Several points deserve notice.

First, at the most general level the idea of a transfer of value is reflected in two of the requirements for liability under the principle of unjust enrichment, that the defendant be enriched and that the enrichment be at the expense of the plaintiff. Understood as aspects of a transfer, these two requirements are not mutually independent elements but the integrated moments of a single bilateral phenomenon. Unjust enrichment deals not with maintaining the wealth of one party or another against an increase or decrease in the value of their respective resources, nor even with a matching increase and decrease in each party's wealth, but with a relationship between the parties that can ground the liability that one of them may have to the other. The idea of a transfer establishes the requisite relationship by pointing to an enrichment that has moved from the plaintiff to the defendant. Accordingly, the "enrichment" and "expense" mentioned in the principle of unjust enrichment are terms of mutual relation, each requiring the other in

order to function as constituents of liability. They refer not to gains and losses *simpliciter*, that is, to one person being better off and another person being worse off than before, but to the connection of each to the other through the giving and receiving of value.

Second, enrichment at the expense of another should be understood as structured by the immediacy of the link between the parties as transferor and transferee of value. The notion of a transfer thereby defines the ambit of liability, preventing liability that is either too restrictive or too expansive. Liability is too restrictive when the plaintiff's claim is disqualified on the grounds of absence of enrichment even though value has been transferred to the defendant. An example is the now fading suggestion that the plaintiff's passing on to third parties of the loss from the transfer excludes recovery of the value from the transferee.²⁰ Liability is too expansive when the plaintiff's claim is allowed even though the parties are not related as transferor and transferee. An example is the view that the relationship between the parties can be indirectly established through the remotely causal stages of the enrichment's transmission.²¹

Third, not every benefit realized from the action of another involves a movement of value. For value to move, the enriching action must be directed toward something that is the defendant's. If the purpose and intended effect of the action refer only to the plaintiff and the plaintiff's property, the value remains with the plaintiff even though the defendant has been advantaged as a result. The absence of liability for incidental benefits illustrates this. In a typical case of incidental benefit, the plaintiff acts with reference to what is his or her own property or in the exercise of his or her own rights but in the process happens to confer a benefit on a neighbour. Classic examples are the cutting down of a wood that obscures a neighbour's prospect or building a wall that happens to shield a neighbour's house from windstorms.²² Because the work was done not on the defendant's property but on the plaintiff's property and for the plaintiff's own purposes, nothing has occurred that can be construed as a transfer of value from the plaintiff to the defendant.²³ One can phrase this conclusion in the terms of the principle of unjust enrichment by saying that the defendant's enrichment has not come at the plaintiff's expense.²⁴ What this means is that by virtue of the labour's having been expended on the plaintiff's property and for the

²⁰ For criticism of the "passing on" defence, see Michael Rush, *The Defence of Passing On* (2006).

²¹ Peter Birks, "At the Expense of the Claimant": Direct and Indirect Enrichment in English Law," in David Johnston and Reinhard Zimmermann, *Unjust Enrichment: Key Issues in Comparative Perspective* 493, 518 (2002).

²² *Ruabon Steamship v. London Assurance*, [1900] A.C. 6 at 12 (H.L.).

²³ Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, (2003) 36 *Loyola of Los Angeles L. Rev.* 831, at 845 ("recovery is denied simply because the nature of the benefit consists of an increase in value without a transfer of property or labor.")

²⁴ *Edinburgh and District Tramways Ltd. v. Courtenay*, [1909] SC 99, at 106.

plaintiff's purposes, the value of the labour has been retained by the plaintiff and has not passed to the defendant.²⁵

Fourth, conceiving of the enrichment as a transfer of value casts doubt on the appropriateness of terms like "subjective devaluation" and "incontrovertible benefit." In the current treatment of unjust enrichment, these terms qualify the segment of the analysis that deals with enrichment. "Subjective devaluation"²⁶ suggests that a benefit may not qualify as an enrichment if a defendant can plausibly assert that, despite the benefit's objective value, he or she subjectively attaches no value to it. Once enrichment is understood as signaling a transfer of value, however, subjective devaluation cannot go to determining whether there has been an enrichment. Because value abstracts from the parties' particularity, neither value nor its transfer is determined subjectively. Whether a person who gives another something of value has in return received something of equivalent value is an objective question, the answer to which is systemically determined by exchanges within a competitive market. Value, therefore, cannot be subjectively devalued. Nor can subjective devaluation be defeated by subjectively revaluing the benefit on the ground of its incontrovertibility. At bottom, subjective devaluation is not about the nature of the enrichment, but about the transferee's freedom to make one's own choices.²⁷ This is of course an important consideration, but it concerns not the existence of an enrichment but the justness of the defendant's retaining it.

Fifth, because one can transfer only that to which one has a right, the notion of a transfer of value recognizes that the transaction enriched the defendant with what was initially within the plaintiff's entitlement. Recall Hegel's observation that "as full owner of the thing, I am owner both of its *value* and of its use."²⁸ The enrichment is at the plaintiff's expense not merely because the transaction had an adverse effect on the plaintiff, but because that effect operates on value as an incident of what the plaintiff owned on entering the transaction.²⁹ The plaintiff's right to the value at the inception of its transfer is the precondition of the claim that the value should be retransferred to the plaintiff once the transfer is shown to be defective.³⁰

²⁵ "When a person does something on somebody else's property, in the mistaken idea, it may be, that it is his own, then the *jactura* is obvious enough. He has expended money, or something else, which has passed into other persons' property. But here nothing has passed." Ibid.

²⁶ Birks, , *An Introduction to the Law of Restitution* (1985), 109.

²⁷ McInnes, Enrichment Revisited, in Jason Neyers, Mitchell McInnes, and Stephen G. A. Pitel , above n. 4, 175.

²⁸ Above n.13.

²⁹ Conversely, the plaintiff cannot complain of the diversion to the defendant of a benefit that lacked this status—for example, customers' patronage for which the defendant successfully competes; James Gordley, *Foundations of Private Law* 425 (2006).

³⁰ See Brian Fitzgerald, Ownership as the Proximity or Privity Principle in Unjust Enrichment Law, (1995) 18 U. Queensland LR 166, at 172:

If the plaintiff did not own the property in which the value inhered and emanated before the unjust enriching event, then it is incomprehensible ... to say that value has been subtracted from P and

Sixth, although it originates in the plaintiff's pre-transfer right to the thing of value, the plaintiff's claim is to the retransfer of the value independently of that thing. Ownership of the thing of value involves a relationship between the transferee and the rest of the world; the claim to the value independently of the thing of value involves a relationship between the transferee and the transferor. The bilaterality of the transfer endows the value with a juridical significance that is separate from the one it has as an incident of a thing of value. This is because, due to its quantitative, relational and abstract character, value is transferred not through the movement of any particular thing from transferor to transferee, but through the absence of a reciprocal movement of something of equivalent value from the transferee to the transferor. What is crucial is the giving of something for nothing not the title to what was given. This is why the plaintiff's lack of a proprietary right to the thing that embodied the value does not undermine the claim to the value's retransfer.

Seventh, the idea that enrichment at the expense of another denotes a transfer of value casts light on what renders an enrichment unjust. As noted at the outset, a perennial apprehension raised by opponents of unjust enrichment is that "unjust" is too amorphous a qualifier of enrichment to yield a juridically manageable basis of liability. This apprehension is unfounded. Once the enrichment is understood as a transfer of value, the familiar idea of a transfer determines the nature of the applicable unjustness. A transfer of value is unjust if its conditions are not consistent with the norms of justice that govern transfers generally. Unjust enrichment is, on this view, concerned not with justice at large, but with the specific and narrowly legal issues of just transfer. To be sure, the fact that the object of the transfer is value rather than some particular asset introduces special considerations; just as value's being the object of transfer implies a special notion of what a transfer is—the non-receipt of an equivalent—so it also implies special notions of what makes such a transfer normatively defective. Such special considerations, however, do not make the enquiry into the justness of the enrichment amorphous. The law's task remains that of drawing out the legal implications of justice in transfer, given the object of the transfer. To this task I now turn.

4. Justness in the Transfer of Value

What considerations make a gratuitous transfer defective? I propose to address this question by comparing gifts and unjust enrichment. The two are similar in that both feature the giving of something for nothing, gift through the requirement of delivery and unjust enrichment through the notion of enrichment at another's expense. They are, however, dissimilar in several respects. A gift involves the transfer of a particular object, whereas unjust

transferred to D. Ownership, then, is the starting point of any claim in unjust enrichment because it tells us who holds value at the start and in turn who can come into court and claim loss of value.

enrichment involves the transfer of value. Value is the antithesis of particular objects, in that it abstracts from their particularity to the quantitative comparison between them. Moreover, defectiveness in the transfer of a gift prevents a change in property rights, leaving intact the *in rem* relationship between the owner of the object and everyone else, whereas defectiveness in the transfer of value creates in the transferor an *in personam* right to have the transferee restore the value. Defectiveness in the transfer of gifts is well-understood from the long and settled jurisprudence about gifts. Defectiveness in the transfer of value is more mysterious, and its jurisprudence more fluid and controversial. Accordingly, it makes sense to begin with the conception of defectiveness operative for gift, and then focus on how that conception is modified when applied to transfers of value.

So far as gifts are concerned, justice in transfer requires that the gift manifest the will of both the donor and the donee. "In order to make it a gift, it must be made out not only that it was given as a gift but that it was received as a gift."³¹ On the donor's side, the delivery of the gift must be accompanied by a donative intent; on the donee's side, the gift must be accepted as donatively given. The giving of the gift for nothing forms the terms of the transfer, which is effective only if both parties subscribe to them. However, if (for example) the transferor really intended a loan rather than a gift, or if the transferor intended a gift but the transferee treated it as a loan³² or refused to accept it, then the transfer is normatively defective, so that the proprietary right remains with or reverts to the transferor.³³

Donative intent and acceptance are thus the legal concepts through which justice in transfer expresses the freedom of both of the parties. To be effective, a transfer must connect the parties in a way that they both consent to. The donor is entitled to what is his or her own until freely parting with it. Similarly, the donee is entitled not to be subjected even to the beneficence of another unless he or she finds such beneficence acceptable. Of course, one can usually presume acceptance of the conferral of a benefit. However, if the evidence shows that the intended transferee does not accept the transfer as gratuitous, the law does not force a conferral against the transferee's will. The transferee may graspingly desire the gift of something for nothing, and the transferor may benevolently desire to give something for nothing, but neither of them can impose his or her will on the other party. They each remain free from subjection to the purpose of the other unless they accede to that purpose.

Accordingly, in the case of gifts, the unwillingness of either party renders the transfer defective. A transfer purports to move the ownership of a specific object from the transferor to the transferee. This movement can

³¹ Hill v. Wilson, L.R. 8 Ch. App. 888 (1873).

³² The situation in Hill v. Wilson, *ibid.*

³³ Hill, The Role of the Donee's Consent in the Law of Gift, 117 LQR 127 (2001).

be interrupted by a lack of the relevant intent as the object purports either to exit the transferor's ownership or to enter the transferee's.

I turn now from the gratuitous transfer of a specific object dealt with by the law of gift to the transfer of value, also gratuitous, dealt with by the law of unjust enrichment. Here too donative intent figures in justice in transfer. If the transferor intended a transfer of value, that is, intended to benefit the transferee for nothing, then (assuming, as is almost invariably the case, that the benefit is acceptable to the transferee) the transfer complies with justice, and cannot be reversed on the ground of unjust enrichment. It is not unjust for value donatively transferred to be irretrievable.³⁴ In the terminology of the Canadian jurisprudence, donative intent counts as a "juristic reason" for the enrichment.³⁵ Another such juristic reason is that the benefit was conferred in fulfillment of a valid obligation owed to the transferee or in the settlement of an honest claim made by the transferee, for it is not inconsistent with justice in transfer for the transferee to retain what the transferor was obligated to give.³⁶ Thus, when donative intent is present, the transfer of value conforms to justice in transfer no less than does the transfer of a specific object through gift.

However, in the absence of donative intent by the transferor, justice in transfer requires that the transfer of a specific object through gift be treated differently from the transfer of value. The absence of donative intent is sufficient to render a gift defective because the failure of the object rightfully to leave the ownership of the donor keeps intact the transferor's entitlement to what was given. For transfers of value, however, the absence of donative intent is not sufficient to render the transfer defective. Because a transfer of value involves the transfer of a thing of value without receiving an equivalently valued thing in return, the thing that embodies the value—and therefore the value that is an incident of owning that thing—has already irrevocably entered the ensemble of the transferee's entitlements.³⁷ Unlike the defectiveness in the case of gift, which interrupts the movement of a specific object from transferee to transferor, defectiveness in the case of a

³⁴ Donative intent includes risk-taking, that is, the conferral of a benefit under circumstances in which the transferor hopes for remuneration but knows that the transferee is not obligated to give it.

³⁵ *Peter v Beblow*, [1993] 1 SCR 980, at 987.

³⁶ In *Peter v Beblow*, *ibid.*, McLachlin J. listed the following considerations among those going to juristic reason:

- (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?
- (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?

The presence of a valid obligation is a ground for supposing that, despite the brilliance of the judgment, *Moses v MacFerlan*, 97 E.R. 676 (K.B., 1760) was incorrectly decided, as subsequent cases held; see *Dublin v Building and Allied Trade Union*, [1996] 2 ILRM 547 (S.C.). If one excludes the possibility of MacFerlan's contractual obligation, Moses was in effect a risk-taker who, by incurring the obligation entailed in endorsing the notes, gave MacFerlan the benefit of his own potential liability under circumstances in which MacFerlan was not obligated to abstain from availing himself of that liability.

³⁷ Similarly, in the case of pure services, the transfer of value has left no residue that is independent of the totality of the transferee's entitlements.

transfer of value creates a claim that value that has already moved with the thing that embodies it be restored to the transferor. If the claim succeeds, it has to be satisfied out of assets that rightfully belong to the transferee. In contrast to gifts, the transferor's claim is not that the transferee never received the value but that, having received for nothing what was not intended to be gratuitously given, the transferee is not entitled to retain the value. Consequently, the duty of the transferee to restore value cannot be determined solely by one-sided reference to the absence of donative intent on the part of the transferor.

In dealing with the defectiveness of a transfer of value, the law has to observe a strict equality in its treatment of plaintiff and defendant.³⁸ The basis of the plaintiff's claim is that, in the absence of donative intent on her part, the transfer of something for nothing has deprived her of value that belonged to her without her having freely parted with it. If the plaintiff's lack of donative intent were to suffice for liability, defendants in turn would be deprived of what belongs to them without their having freely parted with it. The principle of justice in transfer, that one is entitled to what one owns until one freely parts with it, would thereby be inconsistently asserted for plaintiffs and denied for defendants. To vindicate justice in transfer, the law must apply it equally to both parties.

5. Acceptance

Accordingly, a finding that the defendant cannot retain an enrichment made at the plaintiff's expense has to be based on considerations that implicate both of the parties in their relationship to each other. In this connection two ideas, one normative and the other contextual, are relevant. The normative idea is that, with respect to the beneficial transfer, the wills of the two parties are so related to each other as to converge on the reason for not allowing the defendant to retain the benefit. On the plaintiff's side, this reason consists in the absence of an intention (or of an obligation) to give the defendant something for nothing. On the defendant's side, the reason consists in the defendant's acceptance of the benefit as non-gratuitously given. Acceptance here refers not to an express affirmation by the defendant but to the integration of the benefit into the defendant's purposes. It is present when the beneficial transfer is consonant with the defendant's projects, so that the defendant can plausibly be regarded as satisfied with the non-donative transfer of value. If the plaintiff did not intend to give something for nothing, and if the defendant accepted the benefit as not having been given for nothing, then an obligation to restore the value arises. The plaintiff cannot retain gratis what was neither given gratis nor accepted as given gratis.

³⁸ For an exposition of this point, see Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 UTLJ 459, at 477 (1998).

The contextual idea is that of entanglement. Entanglement occurs when the benefit can no longer be separated from what the defendant is otherwise entitled to. The provision of a service is a paradigmatic example. A benefit, once entangled, can no longer be an independent object of the defendant's choice. Nor can the benefit be returned to the plaintiff in its disentangled state. Because the benefit has merged into the defendant's entitlements, the defendant can no more be required to part with it or its value than she can be required to part with whatever else she owns. The only circumstance in which this does not hold is if defendant has accepted the benefit as non-donatively transferred. Then the wills of the parties converge on the non-donativeness of the transfer, precluding the defendant from retaining it as if it were a gift.

The classic instance of entanglement appears in a famous statement by Chief Baron Pollock: "One cleans another's shoes; what can the other do but put them on? ... The benefit of the service could not be rejected without refusing the property itself."³⁹ In this graphic example, the benefit has been so completely entangled in the recipient's property, that the cleaning of the shoes cannot be treated as an object of choice that is independent of his use of them. If one assumes, as Chief Baron Pollock clearly does, that the shoes were cleaned without the owner's knowledge, to compel the owner to make restitution of the value of the cleaning would be to hold her liable for owning shoes whose condition was changed without her consent. Nor can the mere wearing of the shoes count as an acceptance, for this would derogate from the pre-existing entitlement of the owner, as having exclusive dominion over the shoes, to owe nothing to anyone else through their lawful use. Entanglement means not merely that the transferred value has been absorbed in to the totality of the defendant's entitlements—this happens to all unjust enrichments—but that within that totality it cannot be separated from the other components, as here the cleanness of the shoes cannot be separated from the shoes themselves.

Entanglement sets the context within which acceptance operates to link the parties' wills to the non-donative transfer. Once entanglement occurs, the defendant can be held liable only if the non-donatively transferred benefit was accepted. In contrast, the situation prior to entanglement allows for an additional option, at least in theory. Although acceptance may also be present prior to entanglement, as where the defendant requests a benefit or acquiesces in its conferral, this is not the sole circumstance of liability. So long as the benefit remains disentangled, the defendant can be held liable even if the defendant's situation or conduct can be construed as a rejection of the benefit. Because the rejected benefit is still separately available for return without affecting what the defendant is otherwise entitled to, no impediment exists to returning the value that neither party wants transferred.

³⁹ Taylor v. Laird (1856), 156 E.R. 1203.

Leaving aside the unusual case of rejected benefit, one may say that there are two obligation-creating conditions for liability. The plaintiff-oriented condition is that the benefit was non-donatively transferred. The defendant-oriented condition is that the benefit was accepted as non-donatively given. Although these obligation-creating conditions are each oriented to a different party, they share a common focus that normatively links the plaintiff as transferor of value and the defendant as transferee of value. Because a transfer of value is the giving of something for nothing, the common focus is on how the parties stand with respect to the gratuitousness of what one gave and the other received. The point of these two conditions is that their joint presence renders the obligation to restore the transferred value consonant with the free will of both parties.

These two conditions do not refer to disconnected moments. Rather, to accept the benefit is to accept it as given. In the movement of the value from the plaintiff to the defendant, the non-gratuitousness with which the plaintiff transfers the value is completed by the defendant's acceptance of the transfer as non-gratuitous. Because acceptance is relevant to liability as a relational phenomenon, the juridically pertinent notion of acceptance is of the benefit considered not in isolation, but as it has arisen through the interaction of the parties—with the absence of donative intent being crucial to that interaction. Acceptance establishes a relationship not of the defendant to the benefit, but of the defendant to the plaintiff through the benefit. If the benefit has been given as a gift, the acceptance of it is as a gift, and no liability follows. But if the benefit has been non-donatively given, the consonance of the benefit with the defendant's will marks an acceptance as non-donatively given.

When the benefit is accepted by the defendant on the same non-donative basis with which the plaintiff gave it, the defendant cannot justly retain it as if it had been given and accepted as a gift. The two obligation-creating conditions thereby have an analogous function in the law of unjust enrichment to that of offer and acceptance in the law of contract: they link the wills of the parties to each other through the subject matter of the transaction, so as to establish an *in personam* legal relationship between them. In the contractual context, the parties' wills converge on the contractual performance offered by the promisor and accepted by the promisee, with the effect of creating a contract between them. In the unjust enrichment context, the parties' wills converge on the non-gratuitous transfer of value, with the effect of creating not a contract, but a right to the retransfer of the value. Because it connects the defendant's will to the intention of the plaintiff in conferring the benefit, acceptance is a relational idea.

In accordance with their relational significance, the two obligation-creating conditions have reference to the juridical world of public meaning that the two parties share. On the plaintiff's side, the notion of donative intent is an extended one. It goes beyond subjective intent to include

situations in which, whatever the transferor's subjective intent, the background legal categories justify the imputation of an intention to bestow a gift. In this extended sense, donative intent draws on the public meaning that the plaintiff's action has in the relationship between the parties. Imagine, for example, that the plaintiff makes an unrequested improvement to property that he knows belongs to another in the hope of being compensated for his labour. Subjectively, he may have no intention of giving a gift. But because his action takes place within a legal regime under which, as he knows or ought to know, only the owner has the right to determine whether to improve one's property, the improver can be taken to know that his action cannot obligate the owner to pay for the improvement. Accordingly, the law treats his action as the bestowal of a gift. The background legal category of property, which recognizes in the owner the exclusive power to improve the condition of what is owned, justifies the law's viewing the improvement as the expression of a donative intent. In this example the imputation of donative intent is based not on what is subjectively within the plaintiff's mind, but on how the plaintiff's conduct is to be publicly understood and categorized in relation to the defendant's property. Accordingly, one can conclude that having transferred the value free of any obligation on the transferee, the improver is a risk-taker with respect to the hoped-for compensation.⁴⁰ Conversely, however, if the improver mistakenly thinks that the property is his own or that that he is improving it at the owner's request, donative intent can no longer be imputed to him. Because the improver is unaware that his improvement was not authorized, he cannot be held to what is implied by the knowledge that the power to improve property is exclusively the owner's. For the improver who acts out of mistake or ignorance, an obligation-creating condition is in place.

On the defendant's side also, acceptance of the enrichment as non-gratuitously given refers to the absence of donative intent in the transfer of value. It imbues this absence of donative intent on the plaintiff's part with a relational significance by connecting it to an imputed expression of the defendant's free will. The non-gratuitousness of the transfer—the consideration at the heart of unjust enrichment—thereby embraces and normatively links the parties. If the defendant can be regarded as having accepted a benefit as non-gratuitously given, then in fairness the benefit cannot be retained gratis. Nor can the defendant be compelled to give something in exchange for that benefit as if there were a contract between the parties, since the benefit was not given as part of an enforceable exchange or with the intention to create a contractual relationship. All that the defendant can do is return the value, so as to avoid keeping as a gift what was neither given nor accepted as a gift.

Acceptance is thus a relational notion. It refers to what is to be imputed to the defendant in the light of the plaintiff's non-gratuitous transfer

⁴⁰ Birks, above n. 26, 101-103.

of value. Although it is defendant-oriented, it does not treat the defendant in isolation from what the plaintiff did. It is not one “unjust factor” in a list of unjust factors. Nor does it point to a moral failure consisting in the defendant’s unconscientious receipt of something for which he or she wants to avoid payment.⁴¹ Rather, as a member of the conceptual sequence that unites the transferor and transferee of value within an obligation-creating relationship, it is a structural feature of liability for unjust enrichment. Within that relationship the defendant’s acceptance of the beneficial transfer as non-gratuitous and the plaintiff’s lack of donative intent are correlatives.

As with donative intent, the idea of acceptance draws on the public meaning the parties’ interaction. What matters is not the defendant’s inner psychological state, but the judgments and assumptions about the parties’ interaction that can reasonably be made against the background of the legal structure in which they operate.⁴² In particular, the defendant who receives something for nothing has no reason to assume that the benefit was given gratuitously. Private law is a legal regime through which parties act for their own purposes without subordinating to others their freedom or the means for realizing it. The law does not presume—and therefore those subject to the law are not entitled to presume—that someone has chosen to transfer value gratuitously, thereby surrendering the means for pursuing one’s own ends. To be sure, a person may on occasion identify another’s interest with one’s own and therefore confer gratuitous benefits on the other. However, such donative intent must be established for each particular case, and not assumed to be the general rule. Except when the enrichment was intended and accepted as a gift, the defendant can be regarded as assuming that no benefit is given gratuitously, even if the defendant has not turned his mind this issue.

Acceptance is imputed when the law can reasonably regard the beneficial transfer as something that forwards or accords with the defendant’s projects. The imputation of acceptance thereby connects the law’s construction of the defendant’s will both to the transferred value and to the terms on which it was transferred. In this context the will—the capacity to set and pursue one’s own purposes—is a juridical, not a subjective or psychological notion: what matters is the purpose not as internally formed but as externally pertinent to the relationship of plaintiff and defendant. Awareness of the benefit and acting with respect to it is sufficient but not necessary to indicate acceptance; a benefit can be consonant with the defendant purposes even if these are lacking. Acceptance goes, accordingly, not to the defendant’s particular psychological state, but to what the law can reasonably impute to the defendant, given the defendant’s purposes and the law’s background assumptions about the significance of donative intent. Of

⁴¹ For “free acceptance” as an unjust factor or as a signal of unconscientious receipt, see Birks, *ibid.*, 114, 266; Birks, In Defence of Free Acceptance, in Andrew Burrows (ed.), *Essays on the Law of Restitution* 105 (1991).

⁴² Compare Deane J.’s reference to “a benefit actually or constructively accepted” in *Pavey v. Matthews Proprietary Ltd. v. Paul* (1986), 162 C.L.R. 221, at 257.

course, any defendant might subjectively prefer to keep the transferred value rather than return it to the transferor. Nonetheless, by imputing acceptance of the enrichment as non-gratuitously given, the law indicates its view of how the defendant's will can reasonably be regarded as standing with respect to what was received, with the implication that the defendant has no right to retain it for the service of his projects as if it had been given gratuitously.

One might think that, because acceptance can occur subsequent to receipt of the benefit,⁴³ ascribing a structural role to acceptance is inconsistent with the cause of action being complete upon receipt. This, however, misapprehends the effect of acceptance. What the recipient accepts is not the benefit conceived statically at the time that the acceptance becomes operative, but rather the benefit *as transferred*. This includes not only the transfer's non-donativeness but also its occurrence at a particular point of time. The acceptance, in other words, is of the transfer whose subject matter is the benefit, not of the benefit standing alone, for it is the transfer that links the parties to each other. Thus, even when the acceptance comes after the benefit's receipt, its effect is retrospective to the time of the receipt. This is why the moment of enrichment can reasonably be regarded as the time from which judgment interest⁴⁴ and the statute of limitations⁴⁵ run.

6. Situations of Acceptance

The consonance of the benefit with the defendant's purposes can arise in three ways: through action by the defendant with respect to the benefit, through a specific project of the defendant's that the benefit forwards, or through a benefit—money—that fits with any project that the defendant might have. These different ways form the various situations in which acceptance can be imputed to the defendant.

In the first situation the defendant knows or takes the risk that the benefit is non-gratuitously given and yet requests it or acquiesces in it by foregoing the opportunity to refuse it. Some of the best-known cases in the law of restitution illustrate this: the plaintiff performs a service for the defendant under an unenforceable contract, which serves as evidence both of the defendant's request for the service and of the plaintiff's non-donative intent in providing it;⁴⁶ or the defendant has been enriched by the plaintiff's labour in a quasi-spousal relationship although he knew or ought to have known that the benefit was given to him not as a personal gift but as an reflection of the full integration of their economic well-being;⁴⁷ or the owner

⁴³ For example, *McDonald v. Coys of Kensington*, [2004] 1 W.L.R. 2775 (C.A.)

⁴⁴ *Woolwich Equitable Society v Inland Revenue Commissioners*, [1993] AC 70.

⁴⁵ Goff and Jones, *The Law of Restitution*, s. 43-004 to s. 43-006 (7th edition, 2009)

⁴⁶ *Deglman v. Guarantee Trust Co. and Constantineau*, [1954] S.C.R. 725; *Pavey and Matthews v. Paul*, above n. 41.

⁴⁷ *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, at 274:

“lies by” when he knows that another is expending money to improve the property on the mistaken supposition of his own title.⁴⁸ The same holds if after receipt the defendant refuses to restore a non-gratuitously given benefit that is easily returnable.⁴⁹ In such cases, the defendant’s action or inaction in the face of the non-gratuitous conferral can be regarded as an acceptance of those benefits as given without donative intent.⁵⁰

By failing to take the opportunity to reject a benefit, one both expresses one’s free will with respect to it and assumes responsibility for the implications of its non-gratuitous nature. Accordingly, by compelling a retransfer of the value, the law is not acting inconsistently with the defendant’s will; such liability does not fall foul of Lord Justice Bowen’s famous dictum that “[l]iabilities are not to be forced upon people behind their backs.”⁵¹ Rather, the law is merely following through on how the defendant’s will is related to the plaintiff’s through the transfer of value. For example, a defendant who is aware that another is bestowing an apparently gratuitous benefit and does not intervene to prevent it takes the risk that donative intent is absent. By allowing the enrichment to occur, the defendant manifest his volition with respect to it. If it turns out that the plaintiff indeed had no donative intent (for example, if plaintiff was improving the defendant’s land on the mistaken impression that it was his own), then the defendant’s failure to prevent the transfer can be considered an acceptance of that benefit as non-gratuitously given.

In the second situation for imputing acceptance, the law treats the defendant as having accepted the beneficial transfer because, given the nature of the defendant’s activities and projects, the defendant has no reason not to accept it. For example, the defendant holds property destined for a particular use or disposition that is forwarded by the benefit that the

[W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to know of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

⁴⁸ Ramsden v. Dyson, (1866) L.R. 1 H.L. 129.

⁴⁹ McDonald v. Coys of Kensington, [2004] 1 W.L.R. 2775 (C.A.); at para 37-38, Mance L.J. describes the defendant’s action in keeping the personalized mark as a choice and as the exercise of a deliberate preference.

⁵⁰ Is sometimes thought that this notion of acceptance through inaction is in tension with the absence of tort liability for omissions; see Mead, Free Acceptance: Some Further Considerations, 105 L.Q.R. 460, 463-464; (1989); Simister, Unjust Free Acceptance, [1997] L.M.C.L.Q. 103, 118-120. Properly understood, however, the absence of tort liability is not about inaction as such but about conferring a benefit to which the recipient has no right; see Benson, The Basis for Excluding Liability for Economic Loss in Tort Law, in David G. Owen, Philosophical Foundations of Tort Law 427, 447-449 (1995). In the unjust enrichment context, the imputed acceptance through the defendant’s inaction does not reflect a duty to bestow a gratuitous benefit on the plaintiff, but goes rather to whether the defendant’s non-gratuitously given benefit can be treated as non-gratuitously accepted. Indeed, there is a deep harmony between the absence of liability for nonfeasance and the requirement of acceptance: both actualize the parties’ freedom of choice by expressing the law’s antipathy to gratuitous benefits that are not gratuitously intended.

⁵¹ Bowen LJ in Falcke v Imperial Insurance Co (1886), 34 Ch D 234 (CA).

plaintiff non-gratuitously conferred;⁵² or the plaintiff discharges an obligation owed by the defendant;⁵³ or a director exercises his skill to the advantage of the corporation although in breach of his fiduciary duty.⁵⁴ In such instances the issue is not whether the defendant as a rational maximizer is better off with the benefit in some global sense, but whether the benefit forwards the specific purposes implicit in the defendant's antecedent activities. If it does, then requiring restitution of the transferred value is, from the public standpoint of the parties' relationship, consistent with the defendant's free will.

Under the heading of "incontrovertible benefit" the second kind of situation is conventionally treated as establishing the enrichment rather than the unjustness of retaining it. In this respect incontrovertible benefit is the counterpart of subjective devaluation. But as with subjective devaluation, the considerations for postulating an incontrovertible benefit go not to whether a transfer of value has taken place but to whether the defendant's retention of the transferred value is consonant with the parties' free will. The point of invoking incontrovertible benefit is to show that imposing an obligation to make restitution would not violate the defendant's freedom of choice: "[t]he principle of incontrovertible benefit ... exists when freedom of choice as a problem is absent."⁵⁵ If this is the case, it should be situated where it structurally belongs: as an obligation-creating condition pertaining to value transferred without donative intent.

A difference between these two situations is that in the first, but not in the second, the entanglement of the benefit with the defendant's entitlements is a barrier to recovery. The reason for this is that the two situations relate the defendant's will to the benefit received in different ways. In the first situation, instanced by request or acquiescence, the defendant's acceptance has to be referable to the benefit as such without cutting into the use that the defendant is otherwise entitled to make of what she owns. Therefore, the defendant's will has to be specifically directed to the benefit independent of the defendant's use of the owned thing. Once the benefit becomes entangled in the defendant's entitlements without indication of the defendant's acceptance, the defendant is not liable for enjoying the benefit through the use of what belongs to her. In the second kind situation, in which the benefit is incontrovertible, the acceptance is imputed because the benefit forwards the use that the defendant would otherwise have made. Unlike the first situation, here the actual or prospective use shows the consonance of the benefit with the defendant's projects, and is therefore the

⁵² *Lac Minerals v. International Corona Resources* (1981) 64 D.L.R. (4th) 14 (S.C.C.) (defendant developed mine and constructed mill on plaintiff's mining property); *Greenwood v. Bennett*, [1973] 1 Q.B. 195 (C.A.) (improvements to a car that was to be sold).

⁵³ *Brooks Wharf & Bull Wharf v Goodman Bros.*, [1936] 3 All E.R. 696 (C.A.).

⁵⁴ *Phipps v. Boardman*, [1967] 2 A.C. 46.

⁵⁵ *Regional Municipality of Peel v. Her Majesty the Queen in the Right of Canada* (1992), 98 D.L.R. (4th) 140 (S.C.C.), quoting *Gautreau, When Are Enrichments Unjust?* (1988-1989), 10 *Advocates Quarterly* 258, at 271.

reason for regarding the benefit as accepted. Because the will need not be directed to the benefit independently of the use, the benefit's inextricable entanglement with what the defendant is otherwise entitled to use poses no barrier to liability. Thus, the distinction between the two situations is that in the first, acceptance is independent of use and, accordingly, cannot operate on an entangled benefit, whereas in the second, acceptance occurs through use, thereby rendering entanglement irrelevant.

Finally, the third situation for imputing acceptance is the non-donative payment of money. The peculiarity of money is that, as the universal medium of exchange,⁵⁶ it forwards any and every specific purpose that the defendant might have. The payment of money, therefore, is an incontrovertible benefit.⁵⁷ To be sure, in unusual circumstances a defendant might reject such a benefit, for example, if the mistaken payment makes the defendant ineligible for means-based government services.⁵⁸ But until spent, money is not entangled in the defendant's other entitlements and so can be returned even if rejected. Thus whether it is accepted or rejected, the defendant is under an obligation to make restitution.

Aside from such unusual circumstances, money is an incontrovertible benefit. As such it differs in two ways from the non-monetary instances of incontrovertible benefit. First, acceptance is imputable for a non-monetary benefit only if, given the benefit's particular qualities, it forwards some particular project that the recipient has. In contrast, except in unusual circumstances, money, forwards the recipient's projects, whatever they are. Second, whereas in the case on non-monetary benefit the imputed acceptance arising from the benefit's incontrovertibility operates despite being entangled in the defendant's other entitlements, money has no such entanglement. However, the receipt of the money may lead the recipient to spend it on projects that she would not otherwise have undertaken, that is, to make the extraordinary expenditure that constitutes a change of position.⁵⁹ Accordingly, a benefit that subjects the defendant to liability while in the form of money may, when spent, become entangled in the defendant's entitlements. The imputation based on money's being the universal medium of exchange is then no longer appropriate. As long as the money is unspent, the defendant's position is no different than what it would be in the second situation. Once the defendant changes position by making an extraordinary expenditure that entangles the benefit in the defendant's entitlements, the defendant's position is not different from that of the person with the cleaned shoes in the first situation.

⁵⁶ B. P. Exploration Co (Libya) v. Hunt (No. 2), [1979] 1 W.L.R. 783 at 799 (Goff J.)

⁵⁷ Virgo, *The Principles of the Law of Restitution*, Second Edition 75 (2006).

⁵⁸ Consider the situation in Ontario (Ministry of Community & Social Services) v. Henson (1987), 28 E.T.R. 121 (Ont. Dist. Ct.), affirmed on appeal (1989), 36 E.T.R. 192 (Ont. C.A.). I am grateful to Jason Neyers for pointing this out.

⁵⁹ Rural Municipality of Storthoaks v. Mobil Oil Canada, (1975), 55 D.L.R. (3d) 1 (SCC).

This account requires that change of position through expenditure, like incontrovertible benefit, should be regarded as going to the unjustness, not the existence, of the enrichment. Change of position is now conventionally explained in terms of enrichment, that the defendant has been “disenriched.”⁶⁰ The explanation is not without difficulty. The consumption of the value is the exchange of the transferred value for some good to which the consumer attaches a still greater value. At the general level one may ask why such consumption negates the legal effect of the original transfer. Nor is the idea of disenrichment unambiguous. If I have spent the mistaken payment on a trip around the world,⁶¹ I am still enriched by what I did with the money—I now have the recollection of adventure and discovery, the slides and photographs, the seemingly inexhaustible store of conversational material—even though the money is no longer in my bank account. What has occurred is a transformation of the enrichment, not its disappearance.

A more particular form of this difficulty is that the defence of change of position sometimes applies even when one can still discern the enrichment among the defendant’s assets. Say that the defendant, having received a mistaken payment from the plaintiff, makes the extraordinary expenditure of throwing out her old shoes and buying a shining new pair. If the defendant had no notice of the mistake at the time of the purchase, the defence of change of position is available even though the defendant seems to remain enriched.⁶² The argument to this conclusion on enrichment grounds is that, the defendant’s choice to buy new shoes having been vitiated by her mistaken belief about her resources, she can subjectively devalue the shoes.⁶³ This preserves the relevance of the defence to enrichment, at the cost of oddly saying that the defendant can subjectively devalue what she decided what was worth purchasing.

Even in its own terms this argument, with its reference to the vitiation of the defendant’s choice, is about freedom of choice, not enrichment. The impression that the change of position in this instance is about enrichment is the product of the idea that subjective devaluation is also about enrichment. At bottom, however, subjective devaluation is (as is widely acknowledged) really about freedom of choice. Clarity about the structure of unjust enrichment requires that issues of freedom of choice be treated as going to the unjustness of retaining the value rather than to the occurrence of the transfer. This applies also to change of position through expenditure, which

⁶⁰ Birks, above n. 26, 208; at 261 Birks allows that there may turn out to be “very rare” examples of unjust-related change of position.,

⁶¹ Lord Templeman’s example in *Lipkin Gorman v. Karpnale*, [1992] 4 All E.R. 512, at 517. .

⁶² Cf. *RBC Dominion Securities v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.). I have substituted new shoes for new furniture in order to bring the case close to Pollock C.B.’s famous comment.

⁶³ Birks, Overview: Tracing, Claiming and Defences, in Peter Birks (ed.), *Laundering and Tracing*, 289 at 331-2 (1995).

constitutes a defence not because it disenriches but because it precludes an obligation-creating condition.⁶⁴

Accordingly, the legal consequences of a mistaken payment can be conceptualized as follows. A payment made by mistake lacks donative intent, thereby fulfilling the first obligation-creating condition. Given that money forwards any purpose that the recipient has, the recipient is incontrovertibly benefitted and (except in unusual circumstances that do not affect the final result) has no reason not to be viewed as accepting it. However, subsequent events can confirm or disconfirm the acceptance that would have been imputable on payment. Once the recipient is made aware that the unspent money was given by mistake, acceptance of the money as non-gratuitous becomes conclusive because the recipient now has notice of the very circumstances that grounded its imputation. Notice to the defendant that the payment was mistakenly made cuts off the possibility of the defendant's subsequently spending the money in a way that would constitute a change of position, because the defendant would be spending money that she knew or should have known she was obligated to return to the plaintiff.

Conversely, when the recipient changes position prior to knowing the payer's mistake, the circumstances supporting the imputation of acceptance that was available previously no longer obtain. Change of position operates as a defence insofar as the spending of the enrichment entangles it in the recipient's entitlements. If it has been spent to purchase something separate from the defendant's other entitlements, the value remains disentangled; restitution can be made of the secondhand value of what was purchased.⁶⁵ If, however, the expenditure has consumed the value in such a way that nothing separately ascribable to it remains, then the enrichment is irrecoverable. Whether the defendant has spent the money on getting her old shoes cleaned or on replacing the old shoes with a new pair of clean shoes, her situation is no different from that person whose shoes are mistakenly cleaned by another. An obligation to restore such an enrichment would not be consistent with the defendant's freedom of choice. Pollock C.B.'s observation, that the benefit could not be rejected without refusing the property itself, applies.

The three situations described in this section correspond to the three ways of aligning the defendant's projects with the benefit bestowed by the plaintiff. The first aligns the project with a specific benefit that the defendant wishes to attain either by request or by non-rejection. The prospect of the benefit is what causes it to be incorporated into the defendant's purposes.

⁶⁴ The notion that change of position involves the defendant's disenrichment is more apposite to the case of the innocent recipient of a mistaken payment that is subsequently stolen or lost. There the defence is applicable even if the defendant had knowledge of the mistake. See *National Bank of New Zealand Ltd. v Waitaki International Processing (NI) Ltd.*, [1999] 2 NZLR 211, 228-229 (CA).

⁶⁵ This is Lord Templeman's example of the purchased automobile in *Lipkin Gorman v. Karpnale*, [1992] 4 All E.R. 512, at 517.

The second is the converse of this: it aligns the benefit with a specific project that is otherwise evident in the defendant's activities. Because of the defendant's particular purposes the benefit that forwards them is regarded as accepted. The third deals with money as the all-purpose means for forwarding any project and with the consequences of transforming the money received through expenditure on a specific project.⁶⁶ In all of these situations, the benefit that the plaintiff non-donatively gives fits the purposes that the defendant pursues. This fit is the basis for imputing acceptance to the defendant.

One might object that only in the first kind of situation, and not in situations of incontrovertible benefit, is acceptance genuinely present. If so, acceptance cannot be a general feature of liability for unjust enrichment. Acceptance (so the objection would go) involves acting out of awareness of the existence or potential existence of the benefit. This is how acceptance operates in cases of request or acquiescence. In situations of incontrovertible benefit, in contrast, the defendant can be held liable even if unaware of the benefit. If the point of acceptance is to implicate the defendant's will so that, in the words of Lord Justice Bowen's famous dictum mentioned earlier, "[l]iabilities are not to be forced upon people behind their backs,"⁶⁷ the defendant's ability to choose whether or not to take the benefit cannot be dispensed with. Acceptances that are constructed or imputed on the basis of the consonance of the benefit with the defendant's projects will not do

The answer is that in this context the will has a relational, and not merely an interior, significance. Only on this basis is it appropriate to corrective justice, which conceives of liability's norms as interactional, rather than as unilaterally applicable to one or the other of the two parties. Accordingly, the role of the benefit in motivating the defendant's conduct is not the sole relevant factor. What matters is the connection between the defendant's will and the benefit bestowed by the plaintiff. This connection can take different forms. There is no reason why the difference between aligning purpose with benefit (situation one) and aligning benefit with purpose (situations two and three) should matter to the plaintiff's liability. What is relationally significant is the idea that includes all three situations: the benefit that the plaintiff non-donatively gives fits the purposes that the defendant pursues. The imputation of acceptance merely expresses the relational significance that all the situations share.

⁶⁶ These different ways of aligning the benefit bestowed by the plaintiff and the projects pursued by the defendant seem to constitute a more or less exhaustive taxonomy. The only addition necessary for completeness is the converse of the third situation. The third situation features a possible movement from the universality of money to the specificity of change of position through expenditure. The converse is a movement from the specificity of the benefit to a transformation of the benefit into money. This last possibility corresponds to Birks's view that a benefit becomes incontrovertible when realized in money; Birks, above, n. 1, 221.

⁶⁷ Above n. 51.

As for Lord Justice Bowen's dictum about not forcing liability behind a person's back, the objection proves too much. If the dictum is understood as applying only to situations in which the defendant was aware of the benefit, then incontrovertible benefit would not give rise to liability at all, regardless of whether incontrovertible benefit was seen as going to enrichment or unjustness. But although doubt is sometimes cast on the soundness of the doctrine of incontrovertible benefit on the grounds that it amounts to a forced exchange,⁶⁸ the doctrine is now solidly entrenched in the law. Consequently, unless one thinks that either the dictum or the doctrine of incontrovertible benefit is wrong, the two have to be brought into harmony. This harmony is achieved if one recognizes that because liability for an incontrovertible benefit is based on the defendant's purposes, it does not operate behind the defendant's back.

7. The Sequence of Elements

The obligation-creating conditions of lack of donative intent and acceptance echo the conditions for the defectiveness of gift, with the exception that they are cumulatively necessary for rendering the transfer defective rather than alternatively sufficient. As noted earlier, to make out a gift, what is given as a gift has to be received as a gift.⁶⁹ When these two conditions are present, the donee acquires the right to the gifted object; when either of them is absent, the object remains the donor's. Unjust enrichment has aptly been called the law of non-gifts.⁷⁰ An obligation to make restitution arises when what is given as a non-gift is accepted as a non-gift, that is, when the plaintiff's unintended transfer of something for nothing is matched by the defendant's acceptance of what was transferred as something that was not intended to be given for nothing. This non-gratuitousness on both sides of the relationship between the transferor and the transferee of value triggers a reversal of the transfer, because the transferee cannot retain the value on terms other than those on which it was given and accepted.

So understood, the elements of liability form a sequence. The first stage in this sequence is to determine whether the plaintiff gave the defendant something for nothing—a stage formulated legally as the defendant's enrichment at the plaintiff's expense and theoretically as a transfer of value. If something was indeed given for nothing, one then moves to a series of questions that address the justice of the defendant's retaining what was given. The first of these questions is whether the plaintiff intended either a gift or the discharge of an obligation to the defendant.⁷¹ An

⁶⁸ Tettenborn, *Law of Restitution in England and Ireland* (2nd edition, 1993), 20-22.

⁶⁹ Above n. 31.

⁷⁰ Drassinower, above n. 38, at 478.

⁷¹ The obligation at issue must be one that is owed to the defendant and not to some third party. Because the law's interest is in the relationship between the transferor and the transferee of value, only the plaintiff's discharge of an obligation to the defendant entitles the defendant to retain the benefit. Accordingly, *Owen v. Tate*, [1976] 1QB 402 (C.A.) was wrongly decided. As a favour to a friend, the

affirmative answer means that the claim is defeated. A negative answer, concluding that the plaintiff gave something for nothing but had no donative intent, leads to the final question in the sequence: did the defendant accept the transferred value as non-donatively given? An affirmative answer to this question means that the defendant cannot justly retain the enrichment and is under an obligation to restore it to the plaintiff.

The leading Canadian case of *Deglman v. Guarantee Trust Co. and Constantineau*⁷² illustrates this sequence. The plaintiff agreed to perform incidental services for his aunt in return for an oral promise that the aunt would leave him a certain property in her will. The aunt died without doing so. The aunt's promise was unenforceable under the Statute of Frauds. Nonetheless, the nephew succeeded in getting restitution of the value of the services provided. The first stage was satisfied because the performance of the services at the aunt's request was a transfer of value. Turning to the question of justice in transfer, one might be tempted to think that, on the sequence that I have suggested, the claim should have been dismissed on the ground that this transfer of value was in fulfillment of a contractual obligation to the aunt, an obligation that was not voided but merely rendered unenforceable by the statute. However, for purposes of unjust enrichment, the relevant question is not whether the plaintiff was obligated to do certain acts, but whether he was obligated to transfer value, that is, to do those acts without receiving their quantitative equivalent in return. Although the nephew was contractually obligated to provide the services, he was not contractually obligated to provide them for nothing, as if he had made a gratuitous promise under seal. When the aunt died without leaving the property to the nephew in her will, what the parties intended as an exchange of services for property was revealed to be a transfer of value, to which the nephew had not obligated himself. Nor did the plaintiff transfer the value donatively. Although the unenforceable contract could not be the basis for compelling performance, it showed that the services were not provided gratuitously.⁷³ Similarly (although the Court did not expressly make this point), the contract showed that the aunt accepted the services on the assumption that she was not getting them for nothing.⁷⁴ Because the aunt accepted as non-gratuitous the services that the nephew performed on a non-gratuitous basis, her estate could not retain their value as if they had been given for free.

plaintiff substituted his personal guarantee for security given by the friend for a bank loan to the defendant, and then unsuccessfully sued for reimbursement when the security was applied to part of the debt. The plaintiff intended to benefit his friend, not to give a gift to the defendant. Moreover, since the plaintiff's obligation on the guarantee was to the bank not the defendant, it supplied no reason for the defendant to be entitled to retain the benefit of having its debt to the bank reduced to the extent of the plaintiff's payment.

⁷² [1954] SCR 725.

⁷³ "[T]he services were not given gratuitously but on the footing of a contractual relation: they were meant to be paid for." Justice Rand, *ibid.* at 728; compare Justice Deane's observation in the parallel Australian case that "it will ordinarily be permissible for the plaintiff to refer to the unenforceable contract as evidence, but as evidence only, on the question whether what was done was done gratuitously." *Pavey & Matthews Proprietary Ltd. v. Paul*, *above*, n. 42, at 257.

⁷⁴ *Ibid.*

Compared to the conventional understanding of unjust enrichment, this description of the structure of unjust enrichment shifts considerations usually associated with enrichment (subjective devaluation, incontrovertible benefit, change of position) to the obligation-creating conditions that make retention of the enrichment unjust. A consequence of the conventional placement is that the overloading of the “enrichment” slot within the principle of unjust enrichment involves the emptying of the “unjust” slot. It is then hardly surprising that the nature of the unjustness becomes a mystery. Once the “unjust” slot has been refilled in the way I have suggested, the meaning of unjustness in the context of unjust enrichment follows from the nature of enrichment at another’s expense as a transfer of value. A transfer of value is the giving or doing of something for nothing. The issue of justice as between the parties that arises from a transfer of value centers on the normative defectiveness of a transfer in which the transferee retains for nothing what was both given non-gratuitously and accepted as non-gratuitously given. The question of what renders an enrichment unjust is, therefore, an enquiry not into justice at large but into the justice that is specific to the transfer of something for nothing.

8. The Kantian Conception of the *In Personam* Right

Liability for unjust enrichment reflects the plaintiff’s *in personam* right to have the defendant retransfer the value. In this section I explore the *in personam* nature of this right, drawing on Kant’s taxonomy of private law. As was noted in the first section of this paper, the identification of the plaintiff’s right in cases of unjust enrichment has aroused considerable perplexity, especially among those who are skeptical about the relevance of corrective justice to unjust enrichment. Although Kant never discussed (and was presumably unaware of) unjust enrichment as a ground of liability, his account of the *in personam* right might assist in dissolving the perplexity.

To what does the plaintiff assert a right in an action for unjust enrichment? Since liability entails a retransfer of value, two possible answers are available, depending on how one thinks of the relationship between the retransfer and the value. On one view, the plaintiff asserts a right to the value, with the retransfer being merely the mechanism for getting it. On the second view, the plaintiff asserts a right to the retransfer, with the value being merely the object of the retransfer.

On the first view, the plaintiff simply asserts his or her right in the value as originally owned, on the ground that this right survives the defective transfer, just as the donor’s right in what is given survives the defective gift. The action for unjust enrichment would be conceived as a kind of action for conversion or as kind of *vindicatio* of a special asset that consists in the

value. It would then turn out that that liability for unjust enrichment does refer not to a distinctive principle but to a novel kind of asset.⁷⁵

I think that this is not the best way to conceptualize the plaintiff's right. The value returned to the plaintiff is not, as the subject matter of a right, identical to the value that the plaintiff originally held: the original value was an incident of the thing of value, whereas the value returned to the plaintiff is independent of the thing of value, which now rightfully belongs to the defendant. Moreover, one cannot conclude that the defectiveness of the transfer of value means that the value remains the transferor's, as in the case of gift. In the gift context, defectiveness of transfer refers to the role of *either* party's will in blocking the movement of title in the object of the gift. In contrast, in the unjust enrichment context, defectiveness of transfer refers to the joint role of *both* parties' wills, precisely in order to take account of the movement of title in the thing of value. Indeed, if the transferor had a continuous right to the value, it is hard to see why the transferee's acceptance of the benefit should be indispensable to the transferor's assertion of that right. In view of this dissimilarity between gift and unjust enrichment in what makes a transfer defective, one cannot straightforwardly argue that defectiveness of transfer means that what was purportedly transferred, whether a specific object or value, continues to be owned by the transferor.

Instead of looking at value as a static object of ownership that remains the transferor's through the defectiveness of the transfer, I suggest that one regard value more dynamically, as the content of a process of transfer and retransfer. The significance of the plaintiff's entitlement to the value at the inception of the transaction is that value counts as the possible object of a transfer, and—if the obligation-creating conditions are present—as the possible object of a retransfer, thereby making justice in transfer applicable to value. The normative defectiveness that compels a retransfer itself partakes of the dynamism of the process of transfer and retransfer, because the transferor's right to have the value retransferred is established not by reference to the transferor's intent alone, but through the convergence of the parties' wills on the transfer's non-gratuitousness.

In unjust enrichment the plaintiff's right is not to the value as such, but to a retransfer of the value. The object of the right is an action by the defendant, not a thing. The right arises through the will-to-will relationship of the parties, that is, through the unity of their wills when the plaintiff's unintended transfer of something for nothing is matched by the defendant's acceptance of the transfer as an unintended giving of something for nothing. When this non-gratuitousness appears on both sides of the relationship between the transferor and the transferee of value, the law reverses the transfer, because the transferee cannot retain the value on terms other than those on which it was given and accepted. The reversal of the transfer in

⁷⁵ Klimchuk mentions this possibility, above n. 10, at 680.

response to the obligation-creating conditions is the plaintiff's right and the defendant's correlative duty.

This right to have the defendant perform an act can be presented in Kantian terms. The matter of the plaintiff's right in the unjust enrichment context is what Kant called a causality of the defendant's will, and its form is a *ius personale* (or, as we would put it, a right *in personam*).⁷⁶ I now want to set out more fully what this means.

Kant's conception of the *in personam* right emerges from two layers in his classification of rights. The first is the division between innate and acquired right. Innate right is the right that one has by virtue of one's very existence, so that one does not have to do anything to acquire it.⁷⁷ One's physical embodiment is a manifestation of this right. One does not acquire one's body through the performance of any act of acquisition. Indeed, the notion of such an act would be self-contradictory. Because an act involves the use of one's body, the act of acquiring one's own body would presuppose that one had a right to one's body prior to the act that acquired it. Kant specifies that the only innate right is one's freedom, that is, one's independence from constraint by the action of another, though this right has several aspects (bodily integrity, freedom of speech and thought, immunity from reproach until one has wrongly affected another's rights, the innate equality of not being bound by others more than one can in turn bind them, and so on). The ensemble of the aspects that constitute one's innate right comprises what is internally one's own in one's relations with others.

In contrast, acquired rights are rights to objects external to the person, which become one's own through an appropriate act of acquisition. Because these objects are distinct from the person and are acquired through an act of the will, Kant calls them "external objects of choice."⁷⁸ Through the acquisition of an external object of choice one becomes connected with the object in such a way that another's action with respect to it can count as an infringement of one's rights. An acquired right is thus a relation between a right-holder and an external object of choice that places others under a duty to the right-holder with respect to that object of choice. Whereas there is only one kind of innate right, there are as many kinds of acquired rights as there are ways of relating a person to an external object of choice.

Within acquired right, then, a further division can be made into the kinds of relations that can link a person to an external object of choice. This division expresses the concepts of the understanding that are exercised in judgments about relation. Kant holds that there are three such concepts:

⁷⁶ Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans.), in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, 6:259-260 (numbers refer to the pagination in the standard German edition of this work).

⁷⁷ *Ibid.* at 6:237-238.

⁷⁸ Kant, above n. 76, at 6:247.

substance, causality and community.⁷⁹ Substance is that which subsists through the variations of the properties that inhere in it, as an apple subsists through its alterations in colour as it ripens and then decays. Causality is unidirectional determination of a consequence by its ground. Community is the reciprocal determination of the different parts of a whole. Consequently, every right that connects a person to an external object of choice must be a right either to a substance or to a causality or to a community.⁸⁰

First, substance is the object of a right *in rem*. A right *in rem* is a property right, which by connecting the right-holder to a substance puts all others under a correlative duty to abstain from that substance. Because it is a right to a substance, the entitlement of the right-holder remains intact whatever changes are undergone by the object of the right; if I own the apple, it remains mine even when it turns from green to red and from red to brown. A property right is good against the whole world because it presupposes a general will of all under which everyone recognizes the legitimacy of anyone else's rightful acquisition.⁸¹ Acquisition restricts the freedom of others with respect to the acquired object; it therefore cannot be achieved simply by the acquirer's unilateral action on that object. Accordingly, a notionally universal consent to the system of property rights is required for rightful acquisition under the category of substance. Thus, a property right imposes a correlative duty on everyone to adhere to the general will recognizing a system of property rights; the generality of the duty merely reflects the generality of the will that any particular property right presupposes.

Next, causality is the object of a right *in personam*. Contract is the paradigmatic example of a right to a causality.⁸² What the promisee acquires through contract is the right to the promisor's performance of a particular deed, that is, a right to the causality of the promisor's will. The capacity to determine performance of this deed becomes part of the promisee's patrimony. In Kant's words, the promisee acquires "an active obligation on the freedom and means of the other."⁸³ Thus, the contract provides the rightful basis for the unidirectional determination of the promisor's will in fulfillment of the promisee's right. Such a right does not arise through the initiative of either party alone, as that would be inconsistent with the freedom of the other. Rather, the contractual right is jointly established by both parties through contract-forming steps—the promisor's making and the promisee's acceptance of the promise⁸⁴—that express their united will. Unlike the general will of all that is presupposed in proprietary rights, the united will that establishes a right to the causality of another's deed creates a duty that runs between the two parties whose wills are united. Accordingly,

⁷⁹ Kant, *Critique of Pure Reason* A80/B106.

⁸⁰ Kant, above n.76, at 6:247.

⁸¹ *Ibid.* at 6:256, 261

⁸² *Ibid.* at 6:271-274.

⁸³ *Ibid.* at 6:274

⁸⁴ These are Kant's terms (*ibid.* at 6:272) for what common lawyers call offer and acceptance.

the distinction between an *in rem* and an *in personam* right lies not solely in the number of persons that they respectively bind⁸⁵ but in the different relational categories of substance and causality that they respectively instantiate.

Finally, community. The object of this kind of right is another person's status, in so far as one has the right to make arrangements about that person.⁸⁶ Among Kant's examples are relationships between spouses and relationships between parents and children. In these relationships there is a reciprocal determination of rights and duties. The parent, for instance, has a right to manage and develop the child, but the parent is simultaneously under a duty to care for the child until the child matures. The right and the duty are not independent of each other, but are the mutually entailed aspects of the same relationship. A contemporary example of such status-based reciprocal determination is the fiduciary relationship; the fiduciary has the right to make arrangements about another, but because of that very right is subject to the obligation not to profit from the relationship or to allow interest to conflict with duty.

Kant regarded these three categories as exhausting our understanding of relation. When these categories are applied to law, a right in what is external to oneself places others under a correlative duty by being either an *in rem* right to a particular substance, an *in personam* right to cause the other to perform a deed, or a status right of a community within which rights and duties are reciprocally determining.

Within this taxonomy, liability for unjust enrichment is an instance of the plaintiff's *in personam* right to a causality of the defendant's will. The causality in question—the deed whose performance is the content of the plaintiff's right—is the defendant's retransfer to the plaintiff of the value. This right is established through the unity of the parties' wills with respect to the non-gratuitousness of the original transfer. Just as the promisor's making and the promisee's acceptance of the promise establish a right to contractual performance, so the plaintiff's non-donative transfer of value and the defendant's acceptance of the value as non-donatively given establish the plaintiff's right to the value's retransfer.

This understanding of unjust enrichment views liability under the category of causality, not substance. The basis of the liability is not that the plaintiff has retained ownership in the transferred value, but that the plaintiff has acquired a right to have the defendant retransfer the value.

Value plays a double role for external objects of choice. On the one hand, value inheres in a thing of value considered as a substance, so that the

⁸⁵ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale LJ* 710, at 718 (1917) (distinguishing between "paucital" rights *in personam* and "multital" rights *in rem*, with the latter made up of a great number of the former).

⁸⁶ Kant, above n. 76 at 6:259, 276-284.

transfer of the thing of value is also a transfer of the value that inheres in it. Unjust enrichment is indifferent to this value, which can be recovered only through the assertion of a property right to the thing of value. On the other hand, value is the content of a process of transfer in which something is given for nothing. This transfer gives rise to a relationship particular to the two parties to it. When neither of them treats the value as the content of a transfer—that is, when the transferor does not intend to make value the content of a transfer and when the transferee accepts the value as not having been the content of a transfer—then the law undoes the process of transfer by requiring restitution of the enrichment. The point of the liability is not that value, as an attribute inhering in the substance of what was given to the defendant, did not pass. It *did* pass along with the substance in which it inheres. Rather, the basis of liability is that the process of giving something for nothing was intended by neither party and therefore has to be reversed. The convergence of the parties' wills with respect to the non-gratuitousness of the transfer establishes the transferor's right to a retransfer, which is a causality of the transferee's will.

In the light of the Kantian categories of relation, one can understand as follows the opening words of the *Restatement of Restitution*, that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."⁸⁷ Enrichment at the expense of another refers to the transfer of value. The unjustness refers to the non-donative terms on which the plaintiff has given and the defendant has accepted this transferred value. This non-donativeness on both sides signifies the relationship of will to will that establishes that the plaintiff's *in personam* right (and the defendant's correlative duty) to the retransfer of the value. The Restatement calls the duty to retransfer the value a "require[ment] to make restitution." Making restitution is the performance that constitutes the content of the *in personam* right as a causality of another's will.⁸⁸

9. Corrective Justice Revisited

I mentioned at the outset that corrective justice has three interwoven features: the correlative structure of the parties' relationship, the presence of a right and a correlative duty, and the conception of the parties as free and equal persons. In this section, I sum up by noting how the account of unjust enrichment that I have offered conforms to all these features of corrective justice.

The challenge to corrective justice in the unjust enrichment context revolves around supposed difficulty of formulating the right and the

⁸⁷ *Restatement of Restitution*, above n. 1.

⁸⁸ Compare Ross B. Grantham and Charles E. F. Rickett, *Enrichment and Restitution in New Zealand* 470 (2000):

In a case of subtractive enrichment, where the relevant right is defined in terms of the principle of restorable enrichment, the primary right *must* be the right to restitution. Where a restorable enrichment occurs, the plaintiff's primary right is to restitution from the defendant.

correlative duty. In response, I have suggested that the normatively defective transfer of value relates the parties as will to will regarding the gratuitousness of the transfer, so as to establish in the plaintiff an *in personam* right (and to impose a correlative duty on the defendant) to have the value retransferred. Liability signifies that the defendant's retention of the value in the face of the two obligation-creating conditions that render the transfer defective is inconsistent with this right. Such retention makes the defendant and the plaintiff the active and passive poles, respectively, of an injustice between them.

In this conception of liability the parties are conceived as free and equal persons. The point of liability is to assure that the transfer and retransfer of value is in accordance with the parties' freedom of will. Hence the law construes as normatively defective a transfer of value in which the transferor did not intend to give something for nothing and in which the transferee accepted what was transferred as not having been given for nothing. These obligation-creating conditions treat the parties as equals by insisting that both of them are entitled to what rightfully belongs to them until they freely part with it.

Moreover, both the notion of a transfer and the circumstances under which the retention of what was transferred is unjust display the requisite correlativity. First, the requirement that the defendant's enrichment has to be at the plaintiff's expense, constructs the transaction between the parties as a transfer of value from the plaintiff to the defendant. The notion of a transfer links the parties to each other by situating them in correlative positions as transferor and transferee. Liability undoes this transfer by obligating the defendant to restore the value to the plaintiff. Transfer thus marks out the two particular parties to the legal relationship by establishing between them the nexus of value given and received.

Second, the notion of unjustness with respect to the transfer is also correlatively structured. Whether the transferee's retention of the value is unjust depends on how the parties' wills are related to each other through the gratuitousness of the transfer. The transferor's giving of value without donative intent and the transferee's acceptance of that value as non-donatively given triggers the obligation to restore the value, because the transferee cannot retain for nothing a benefit that was neither given nor accepted as gratuitous. Thus, the enquiry into whether the enrichment was unjust situates the parties correlatively as transferor and transferee of what was not gratuitously transferred. Consequently, the interaction between the parties as the non-gratuitous transferor and transferee of value establishes a correlative right and duty of restitution.

The notion of a transfer and the circumstances under which the retention of what was transferred is unjust are conceptually linked. The unifying thread lies in the idea that a transfer of value consists in giving something to another for nothing. Only because what is transferred is value,

that is, something for which the transferor receives nothing in exchange, does the issue of the injustice of its retention revolve around whether the value was given and received non-donatively. Thus, the correlativity both of the transfer and of its normative defectiveness come together in an integrated ensemble of liability-creating elements.

The correlative situation of the parties is also observed through the way that liability works to remedy the lack of justice in transfer. Just as the unjustness of the enrichment lies in normative defectiveness of the transfer of value, so the correction of this injustice consists in the retransfer of the value. The retransfer that rectifies the injustice has the same subject matter, the same correlative structure, and the same correlatively situated parties as did the defective transfer.

The consequence of these considerations is that liability for unjust enrichment fully conforms to corrective justice. This should astonish no-one. Corrective justice is nothing more than a theoretical account of the obvious normative link between the parties within a regime of liability. This link, of course, is present in unjust enrichment no less than in other areas of liability.

Indeed, corrective justice has always been implicit in the revival of interest in unjust enrichment throughout the common law world. Decades ago the formulators of the first *Restatement of Restitution* justified their project on the ground that unjust enrichment unifies a variety of doctrines under a legal concept that works justice between the parties.⁸⁹ Corrective justice is merely the theoretical construct that reflects this justification for the development of the law of unjust enrichment. Corrective justice does this by capturing the fairness and coherence of justice between the parties and by providing the unifying structure under which various doctrines can be understood as instantiations of a single principle. To the extent that the development of the law of unjust enrichment has remained true to the Restatement's aspirations, an elucidation of the corrective justice of this basis of liability does no more than confirm in theory what everybody already assumes in practice.

⁸⁹ Warren Seavey and Austin Scott, *Restitution*, 54 LQR 29 (1938).