Restitution: The Heart of Corrective Justice

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I. Introduction

One of the central features of the law of restitution for unjust enrichment is, for many commentators, a puzzle. This is the phenomenon of liability without fault. A defendant can come under an obligation to the plaintiff without having done anything wrong. The primary goal of this Article is to provide an explanation of how such obligations can rightly be said to arise. This part of the argument attempts to build on Ernest Weinrib's developed theory of corrective justice, as set out in *The Idea of Private Law.*[1] The secondary goal of this Article is to apply this analytical framework so developed to some contested areas of unjust enrichment law to test the fit between the framework and the law. Particular attention will be paid to the difficult cases in which the initial recipient of an enrichment has passed it on to another person, who is now the defendant. These cases have caused difficulty in all legal systems. It will be argued that the common law's solution, properly understood, is consistent with corrective justice. Such remote recipients can be strictly liable, but only to the extent that they still hold an asset in which the plaintiff can establish a proprietary interest.

Weinrib presents his theory of corrective justice as capable of explaining the main features of private law. There are two difficulties with squaring this theory with the law of restitution.[2] First, the book does not

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1. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) [hereinafter WEINRIB, PRIVATE LAW]. This Article accepts Weinrib's overall framework for the analysis of corrective justice in private law, differing with it on some details. For a more general critique of Weinrib, see Martin Stone, *On the Idea of Private Law*, 9 CANADIAN J.L. & JURISPRUDENCE 235 (1996).

2. I assume, with Weinrib, that it must so square; in other words, any theory of private law that did not adequately explain the law of restitution would be incomplete.

clearly distinguish between the two distinct parts of the law of restitution: (a) claims that the defendant must disgorge some gain achieved through a wrong against the plaintiff ("disgorgement for wrongdoing") and (b) claims that the defendant must make restitution of a benefit received from the plaintiff ("autonomous" or "subtractive unjust enrichment").[3] The two kinds of claims are fundamentally distinct.[4] In disgorgement for wrongdoing, the plaintiff builds her claim on the wrongful conduct of the defendant. The plaintiff need not show a loss; her entitlement to the gain is based on her being the victim of the wrong. By contrast, in a claim in autonomous unjust enrichment, the plaintiff needs to show that the defendant's gain corresponds to a deprivation on the part of the plaintiff.[5] Moreover, such a claim does not depend on any wrongdoing; it is based on an autonomous cause of action, the elements of which do not include any fault on the defendant's part. This leads to the second difficulty: Weinrib's theory in general presupposes that private-law liability depends on wrongdoing by defendants. In this regard, it does not seem to square with the law of autonomous unjust enrichment.

The first problem has now been addressed by Weinrib himself. He has treated the problem of disgorgement for wrongdoing separately and provided a convincing explanation of how and to what extent it can be subsumed within his theory of corrective justice.[6] The primary aim of this Article is to address the second problem: fitting autonomous unjust enrichment within Weinrib's theory of corrective justice. It will be argued that it is possible to fit into Weinrib's theory an understanding of unjust enrichment liability that does not depend on any wrongdoing by the defendant. The secondary aim of this Article is to assess the proper scope of unjust enrichment, so understood.

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3. Weinrib's failure to make this distinction is elaborated in Mitchell McInnes, Unjust Enrichment: A Reply to Professor Weinrib (1999) (paper presented at the 29th Annual Workshop on Consumer and Commercial Law, on file with author).

4. *See* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 23-24 (rev. ed. 1989); Lionel D. Smith, *The Province of the Law of Restitution*, 71 CAN. BAR REV. 672 (1992).

5. The standard formulation of liability for autonomous unjust enrichment in the common law of Canada requires that the defendant have been enriched and that the plaintiff have suffered a "corresponding deprivation." *See, e.g.*, Reg'l Mun. of Peel v. Canada, [1992] 3 S.C.R. 762; Hunter Eng'g Co. v. Syncrude Can. Ltd., [1989] 1 S.C.R. 426, 471-72, 519; Pettkus v. Becker, [1980] 2 S.C.R. 834, 848. *Cf.* BIRKS, *supra* note 4, at 23-24. But note that Birks has moved away from this position, as will be discussed *infra* note 135 and text accompanying notes 183-208.

6. *See* Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES IN LAW 1 (2000) [hereinafter Weinrib, *Restitutionary Damages*]. *But see* Hanoch Dagan, *The Distributive Foundations of Corrective Justice*, 98 MICH. L. REV. 138 (1999). Also see Ernest J. Weinrib, *The Juridical Classification of Obligations*, *in* THE CLASSIFICATION OF OBLIGATIONS 37, 47 (Peter Birks ed., 1997), and the earlier important contribution of Kit Barker, *Unjust Enrichment: Containing the Beast*, 15 OXFORD J. LEGAL STUD. 457, 471-74 (1995).

II. Theory

A. *Weinrib's Theory of Corrective Justice*

Weinrib's theory of corrective justice is a magnificent intellectual achievement. Built upon Aristotle's *Nicomachean Ethics*,[7] mediated by the work of Kant, the theory shows us how to understand a large body of our private law as an internally intelligible system which protects and defends that which is common to all of us: our ability to make choices in our lives and our corresponding duty to allow others to do the same. A remarkable feature of the theory is that it understands private law in its own terms and on its own terms. It therefore permits the rejection of functionalist understandings, which view the role of private law as the promotion of some external goal, such as increasing economic efficiency or deterring undesirable conduct.

The theory is built on three foundational theses.[8] First, the correct approach to understanding private law as internally intelligible is a formal approach—one that insists that legal relationships have a certain form or structure. This makes the subject matter coherent on its own terms, as opposed to being coherent only by reference to some external desideratum. Second, the unifying structure of private law is Aristotle's conception of corrective justice. This provides the form that the first thesis requires. Third, the normative content of corrective justice (which Aristotle did not specify) is Kant's concept of right. Kant's understanding of the basis of ethical behavior is that we must treat others as ends in themselves, not as means for obtaining our own ends. It is this understanding that allows one to take the formal structure presented by Aristotle and use it to understand private law as it actually is.

Taking the themes in order, the formal characteristics of private-law relationships give them a unity and distinguish them from other relationships.[9] They make such relationships intelligible as an intellectual category. More importantly, they reveal a coherence which makes that category not arbitrary or accidental but intellectually unitary.[10] The critical formal or structural feature of private-law relationships is that they are bilateral. "For the private law relationship, intelligibility and coherence have one overriding focus: the direct nexus between the plaintiff and the defendant."[11]

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7. ARISTOTLE, NICOMACHEAN ETHICS 1131b25-1132b20 (Terence Irwin trans., Hackett Publ'g Co. 1985) (*circa* 350 B.C.).

8. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 18-19.

9. *See id.* at 26-28.

10. *See id.* at 32-36.

11. *Id.* at 43.

The second theme is Aristotle's theory of corrective justice. Weinrib explains that Aristotle's conception of justice was based on the idea of virtue as the mean between opposite excesses; he understood justice, like other virtues, as a mean, and he represented these conceptions of justice as mathematical formulae. When considering the justice of the assets one held, as opposed to the virtuousness of one's character, Aristotle's ideal of the virtuous mean became a standard of equality between persons.[12] Translated into distributive justice, or the just distribution of some good, justice requires that all people receive the proportion of that good that corresponds to their holding of whatever characteristic is the criterion of distribution. One achieves distributive justice when everyone is treated equally by receiving equal proportions of the distributed good.

Translated into corrective justice, or the just regulation of transactions, the concern is not with equality of proportions but equality of entitlement to pretransaction holdings. Corrective justice, in regulating a transaction, does not address whether or not pretransaction holdings conform to distributive justice, nor does it address the extent to which the parties possess characteristics that might be relevant under distributive justice. Corrective justice requires that pretransaction holdings be respected, and it is achieved when they are. If *D* takes ten units from *P*, then corrective justice is violated and requires that the units be returned. Hence, *D* will be ordered by the judge, "justice ensouled," to return the units.[13] Corrective justice is inherently bilateral; it explains why *this* defendant is liable to *this* plaintiff. This is in contrast not only to the multilateral orientation of distributive justice but also to functional understandings of private law. If negligence law existed only to provide a motivation for people to be careful, it would not require plaintiffs who had suffered loss in order to be activated; if it existed only as a compensation scheme, it would not require at-fault defendants.

> [B]ecause the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost. Without some conception such as Aristotle's, private law's linking of the particular parties becomes a mystery. For Aristotle, the defendant's gain at the plaintiff's expense justifies simultaneously diminishing the defendant's resources and augmenting the plaintiff's.[14]

Weinrib's final theme is Kant's conception of right, which requires that all persons treat one another as purposive, free-willed agents—as ends

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12. *Id.* at 58-63.

13. *Id.* at 65. This is Weinrib's translation of language from Aristotle's NICOMACHEAN ETHICS, 1132a22.

14. *Id.* at 64. The theme of correlativity is the subject of Weinrib's chapter 5. *Id.* at 114-44.

in themselves. This final theme performs two crucial roles. First, it fills a gap that Weinrib sees in Aristotle.[15] Weinrib suggests that Aristotle's account of corrective justice postulates a form of pretransactional equality between the parties, but never elucidates the nature of this equality. The parties need not be equal in virtue or in material wealth; however, there is some sense in which they are equal because it is the function of Aristotle's corrective justice to restore that equality when it has been upset. The parties are equal, Weinrib suggests, as self-determining agents. "Such agents are duty-bound to interact with each other on terms appropriate to their equal status."[16]

The other important role of Kant's concept of right is to bridge a gap between Aristotle's explication of corrective justice and much of private law. Aristotle's explication is easiest to understand in terms of takings. He represented it, with a diagram and text, in terms of two equal lines, representing the parties' pretransactional equality. To represent a transaction that violates corrective justice, a portion is taken from one line and added to the other.

> The judge restores equality . . . . For when [the same amount] is subtracted from one of two equal things and added to the other, then the one part exceeds the other by the two parts . . . . In this way, then, we will recognize what we must subtract from the one who has more and add to the one who has less [to restore equality]; for to the one who has less we must add the amount by which the intermediate exceeds what he has, and from the greatest amount [which the one who has more has] we must subtract the amount by which it exceeds the intermediate.[17]

This of course looks a lot like autonomous unjust enrichment,[18] but Aristotle knew that it did not apply so directly to personal injuries:

> For [not only both when one steals from another but also] and when one is wounded and the other wounds him, or one kills and the other is killed, the action and the suffering are unequally divided [with profit for the offender and loss for the victim]; and the judge tries to restore the [profit and] loss to a position of equality, by subtraction from [the offender's] profit. For in such cases, stating it without qualification, we speak of profit for, e.g., the attacker who wounded his victim, even if that is not the proper word for some cases, and of loss for the victim who suffers the wound. At any rate, when what

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15. *See id.* at 76-83.

16. *Id.* at 82.

17. ARISTOTLE, *supra* note 7, at 1132a25-1132b5.

18. *See* Reg'l Mun. of Peel v. Canada, [1992] 3 S.C.R. 762, 804 ("The concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted.").

> was suffered has been measured, one part is called the [victim's] loss, and the other the [offender's] profit.[19]

Weinrib's reading of Aristotle in the light of Kant allows him to show how "gain" *is* appropriate in such a case. Weinrib does this by understanding corrective justice as being concerned not with material gains and losses but with normative gains and losses.[20] And it is Kantian right that identifies normative gains and losses. "The correlative gains and losses of corrective justice compare what the parties have with what they ought to have under a Kantian regime of rights and corresponding duties."[21] The framework that Weinrib ultimately develops is Aristotle's corrective justice, seen through a Kantian lens.

In setting out the distinction between normative gains and losses on the one hand, and factual gains and losses on the other, Weinrib says that "[a]ll the possible combinations are recognized in sophisticated systems of private law."[22] He then sets out four combinations. First, he notes that a party may realize a normative gain but no factual gain, such as when he inflicts a negligent injury; clearly the party in question is the defendant, who is liable. Second, he says that a party may realize a factual gain but no normative gain, such as when his driveway has been paved mistakenly by another; again, he is referring to the defendant, and he says here that there will be no liability.[23] In his third case, a party may suffer a normative loss, but no material loss, as in the case of nondamaging trespass to land. Here the party is the plaintiff, who will be awarded nominal damages to vindicate a right. Finally, he supposes a party who suffers a factual loss but no normative loss, such as in the case of an injury inflicted without fault. Again, the party here must be the plaintiff; here there is no liability. So it is normative gains and losses that are crucial. All of the

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19. ARISTOTLE, *supra* note 7, at 1132a5-1132a11.

20. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 115-20.

21. *Id.* at 125.

22. *Id.* at 116.

23. There is a serious question whether this is right as a matter of corrective justice or positive law. A mistaken benefit is recoverable, regardless of the stupidity of the mistake or the innocence of the defendant. Cent. Guar. Trust Co. v. Dixdale Mortgage Inv. Corp., 24 O.R.3d 506, 520 (1994) (Ont. C.A.). Cases of mistaken payments make this clear. It is also true that many jurisdictions have "betterment" statutes confirming recovery for mistaken improvements to land. The only difficulty about liability in Weinrib's case is that the alleged benefit is in the form of an improvement to the defendant's land. This may raise a question about whether the defendant was enriched; but if he was, as Weinrib assumes he was, liability must follow just as in a payment of money. The most thoughtful Canadian judgment on the question of enrichment since *Regional Municipality of Peel v. Canada*, [1992] 3 S.C.R. 762, was in *Gidney v. Feuerstein*, 101 Man. R.2d 197 (1995) (Q.B.), reversed in a few poorly thought-out paragraphs by the Manitoba Court of Appeal, 107 Man. R.2d 208 (1995) (Man. C.A.). Weinrib's combination of a factual gain but no normative gain by the defendant could be better illustrated by a case of legitimate business competition, in which the defendant takes away the plaintiff's business, but there is no liability.

elements of Weinrib's developed theory of corrective justice—breach of duty generating normative gain, violation of correlative right causing normative loss, and reversal by liability—come together in the following passage:

> The defendant realizes a normative gain through action that violates a duty correlative to the plaintiff's right; liability causes the disgorgement of this gain. The plaintiff realizes a normative loss when the infringed right is within the scope of the duty violated; liability causes the reparation of this infringement. Since the normative gain is morally correlative to the normative loss, disgorgement of the gain takes the form of reparation of the loss. And because of the mutual moral reference of the infringement of the right and the breach of the duty, the amount of the gain is necessarily identical to the amount of the loss. Hence the transfer of a single sum annuls both the defendant's normative gain and the plaintiff's normative loss.[24]

This passage and others[25] show that Weinrib's central conceptualization of corrective justice includes the idea that it is activated only by wrongdoing. This idea will be questioned in what follows.

The scholarly accomplishment represented by Weinrib's work is magnificent. He has shown us the philosophical foundations of the view that private law is an internally consistent and internally intelligible discourse. On those foundations, he has built an intellectual edifice which synthesizes centuries of ethical and legal philosophy into a coherent system, on those foundations. We are greatly in his debt.

B. The Scope of Weinrib's Theory

Weinrib's book is called *The Idea of Private Law*. It is germane to consider what parts of the law his developed theory of corrective justice can explain. It would seem that not everything that is often understood within the rubric of "private law" is explicable by Weinrib's theory of corrective justice.

1. Property.—When we think of the law of property, we realize that it is composed of a number of different ideas related to the central concept of property. These ideas may include the initial creation of property rights, their transfer, and their protection or vindication. Weinrib's theory

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24. WEINRIB, PRIVATE LAW, *supra* note 1, at 125-26.

25. *See id.* at 9 ("Whatever our difficulty in defining private law or resolving particular issues within it, we are aware of a body of law possessing such characteristics as an allegation of wrongdoing, a claim by one person against another, an injury, a demand for redress . . . and so on."); *see also id.* at 56 n.2.

of corrective justice cannot explain the initial creation of property rights. Consider, for example, the first possession of a wild animal or the creation of a new thing from raw materials. We are likely to make the first possessor or the creator the owner. But this ownership is not explicable as a response to any breach of duty. There is no way to explain it through corrective justice. It is not a response to a normatively flawed bilateral transaction. It requires a different kind of explanation.[26]

There are other, less obvious, examples of the creation of property rights. If I hold a fee simple in land and grant you a lease, you hold an interest in the land that did not previously exist. It is similar if I grant you a security interest in the land[27] or if I declare myself trustee of the land for your benefit. In law, these are clearly new property rights. There is, however, at least an economic sense in which these can be seen as transfers of existing rights because there is a partial (lease, security interest) or full (trust) transfer of the economic value that I held at the beginning of the story. One of the attractions of Weinrib's theory of corrective justice is that it allows us—indeed it requires us—to understand the law on its own terms. This would suggest that we must understand these transactions as they are understood legally. Because they are creations of new rights of property, they are not explicable under corrective justice. In the end, it is not necessary in this Article to resolve whether we must understand these transactions as lawyers or as economists because it appears that either way the legal outcomes are not explicable through corrective justice. We have seen above that the case of initial creation is not so explicable. If the same is true of the case of transfers of property rights, then it will necessarily be true of these intermediate cases.

Take a clear case of transfer. If I own a car, I may transfer my ownership to you. The legal outcome—that you are the owner—is hardly the result of anyone's breach of duty. It might be argued, on the other hand, that a valid transfer is nothing more than a transfer of which corrective justice approves. All transfers are measured against the requirements of corrective justice. Some are found wanting, which generates liability; others are not, and so they stand. This does not

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26. However, many of the foundational concepts which underlie Weinrib's theory of corrective justice may also underlie a developed theory of the initial creation of property rights, in particular, what Weinrib calls Kantian right and what might also be called abstract right. *See* Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 584-91 (1992). Benson says that bodily integrity, original acquisition, and derivative transfer are "rooted in and reflect nothing save bare personality and abstract right." *Id.* at 601.

27. Most security interests, such as charges and statutory security interests in personal property, are new interests that encumber the debtor's ownership. Sometimes a security interest is created by a transfer of the debtor's interest with an obligation to retransfer, as in the classical mortgage. Even here a new interest is created, but on the debtor's side: the equity of redemption. In any event, transfers are dealt with in the next paragraph of the text.

actually provide any explanation of why a transfer should be permissible, but it might be suggested that this derives from one of Weinrib's building blocks, namely Kantian right. Nonetheless, there are two reasons why it seems we cannot explain transfers as transactions that do not violate corrective justice. The first is that transfers of property rights may require elements of publicity, because property rights by their nature affect third parties. This is also true in at least some of the intermediate cases identified in the previous paragraph. For example, physical delivery is required to transfer ownership of a tangible thing by way of gift.[28] In the case of land, the common law used to require a parallel ceremony,[29] and now most jurisdictions require some kind of registration. These requirements, existing at least in part to protect those who are not parties to the transfer,[30] cannot be explained within the logic of Weinrib's developed theory, which is adamantly bilateral.[31] The other reason, which will be developed below, is related to the first. The approach that all transfers are either approved under corrective justice and so upheld, or are inconsistent with corrective justice and so condemned, is not true to the law's structure. Over a wide range of cases, the transfer is effective as a transfer; the transferee becomes the holder of the rights in question, but there is some defect in the transfer, and a power arises to have it reversed, in specie or in money. That power, it will be argued below, is explicable as sourced in corrective justice. But this shows that it is too simplistic to suppose that the division between effective and ineffective transfers maps exactly onto the division between transactions approved and those condemned by corrective justice. Many transfers are effective as such but violate corrective justice and so are liable to be reversed. The law works this way because of the point made above, that the transfer inherently implicates third parties, at least potentially, so the bilateral logic of corrective justice cannot be enough to invalidate completely those transfers that corrective justice condemns.

The final aspect of property law which we may consider is the protection and vindication of property rights. There are, in theory at least, three different claims that I can make if you are in possession of something that I own without my consent or any other excuse.[32] First is the direct

28. This is true even if the gift is an undivided share of a horse. *See* Cochrane v. Moore, 25 Q.B.D. 57 (Eng. C.A. 1890). A sale of goods is treated differently by the common law, but some civilian systems require delivery here, too.

29. A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 119 (2d ed. 1986).

30. Of course, one justification for formality in transfers is to caution the transferor.

31. Even transfers of purely personal rights, such as debts, may in some systems or in some cases require formal steps which generate publicity. Again, this is partly because at least one other party is involved, namely the account debtor, to say nothing of the transferor's creditors.

32. *See* Peter Birks, *Property and Unjust Enrichment: Categorical Truths*, [1997] N.Z. L. REV. 623, 645 (proposing a model with three claims: the *vindicatio*, a personal claim for wrongful interference, and unjust enrichment).

assertion of my ownership. I can say, "that thing is mine," trusting that it will follow that "and therefore you must give it to me" or at least "and therefore you must give its value to me."[33] Next, I can say, "you committed a wrong by asserting dominion over that thing, which was mine at the time, and therefore you must compensate me," or, possibly, "and therefore you must disgorge your wrongful gain."[34] Here the claim is in its own terms an allegation of wrongdoing. It is also a claim about the past; it does not depend on any state of affairs obtaining at the moment it is made. Finally, I might say, somewhat less transparently, "you were unjustly enriched by the receipt of that thing and must make restitution to me (of it, or its value)."[35] Like the claim of wrongdoing, it is a claim about the past, although a legal system could allow or require it to be made in the form, "you were and remain unjustly enriched." But it does not allege a wrong.

The goal will be to consider whether these claims are explicable under corrective justice, beginning with the direct assertion of ownership. Civilian systems know it well, under the Roman name *rei vindicatio*, sometimes modernized (as in Quebec, in both English and French) to *revendication*. The old common law knew it, too, in the forms of the writ of right for land and detinue for things. As understood in their origins, neither of these involved an allegation of wrongdoing. In the modern common law, such a claim is usually available for land; for things, its availability is somewhat variable among jurisdictions, largely depending on historical accident. The availability of a claim having a particular form is effectively a matter of procedure; it is a question of the kind of allegations that are cognizable in court.[36] Every legal system recognizes ownership interests, but it does not follow that every system must allow a claim of the form "that thing is mine." This is the sense in which it is said that English

33. If the right is by way of security, the allegation will be "that thing is security for my debt," and it will follow that "and therefore you must give it or its value to me, up to the debt I am owed but no more."

34. *See* Birks, *supra* note 32, at 645.

35. *See id.*

36. The availability of specific relief is conceptually a separate issue from the one under discussion. It is possible that in response to a successful plaintiff's *vindicatio*, the court would not order specific delivery but only make a money award. In Roman law, as with detinue in the common law, the option whether to return the thing or pay money actually belonged to the defendant. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVIL TRADITION 940-41 (1996). Conversely, in response to the establishment of a wrong, such as a wrongful taking, the court may have the power to order specific redelivery. Most common-law courts now have discretion to make such an order, deriving from either or both of a statutory intervention and the willingness of the court of Chancery to make such an order in appropriate cases. However, there is no way to ask for such an order except by a recognized pleading, so the availability of specific delivery does not make a *vindicatio*.

law lacks any *vindicatio* for moveable things;[37] but, although detinue has been abolished in England, Wales, and Northern Ireland,[38] it exists in other common-law jurisdictions and does offer a *vindicatio* for tangible movables.[39] Another example of the *vindicatio* is replevin. Historically, this is not actually a claim to be made in court but a judicial process allowing repossession by an officer of the court pending litigation.[40] In that role, it does not actually constitute a cause of action. Rather, replevin alters the status quo just as it could be altered by self-help repossession, or by interpleader, where a disinterested third-party transfers the disputed thing into court. If the plaintiff or the court is in possession of the thing at the time of trial, by whatever means, then if the court concludes that the thing belongs to the plaintiff, the plaintiff will end up with it. Strictly speaking, none of this makes a *vindicatio*; the plaintiff must still make a recognized claim at trial, and the pretrial process does not shed light on

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37. 2 ENGLISH PRIVATE LAW 500-01 (Peter Birks ed., 2000).

38. *See* Torts (Interference With Goods) Act, 1977, c. 32, § 2(1) ("Detinue is abolished."); JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 452 (3d ed. 1990) (stating that "[t]he precise meaning of this terse enactment is unclear").

39. It is clear that detinue was originally a *vindicatio*. *See* BAKER, *supra* note 38, at 441-42. It fell into desuetude largely because defendants could resist by waging law, effectively swearing that the plaintiff's claim was unfounded. Compurgators ("oath-helpers") were needed as well. *See id.* at 5-7. Wager of law was abolished in England in 1833, although it had been made redundant two centuries earlier by developments in pleading which allowed plaintiffs to use forms of claim that did not permit defendants to wage their law; these actions, forms of trespass, would instead be resolved by a jury. Following the abolition of wager of law, detinue became usable again, and it is sometimes said that it became a tort. By this, it is meant that the claim had changed from "that thing is mine" to "you committed a wrong by not returning my thing when I demanded it." *See id.* at 451 (stating that "detinue was regarded in modern times—save by purists—as a tort"). But this seems largely referable to a nineteenth-century instinct that any noncontractual claim must be tortious. Certainly, the courts insist that detinue retains features that are nontortious. *See* Gen. & Fin. Facilities Ltd. v. Cooks Cars (Romford), Ltd., [1963] 1 W.L.R. 644, 650 (Diplock, L.J.) (stating that "the action in detinue partakes of the nature of an action *in rem* in which the plaintiff seeks specific restitution of his chattel"); United States v. Moffitt, Zwerling & Kemler, P.C., 875 F. Supp. 1190, 1198 (E.D. Va. 1995), *rev'd on other grounds*, 83 F.2d 660 (4th Cir. 1996) (asserting that "the crux of a detinue action is that a defendant currently possesses property that rightly belongs in a plaintiff's hands"). The truth seems to be that modern detinue is a mixture of *vindicatio* and tort. Evidence of its *vindicatio* function is that if the property needs to be valued, it is valued at the date of trial, and also the rule that the claim lapses if the defendant transfers the disputed thing to the plaintiff or into court. Evidence of the tort function is that the claim can include not only recovery of the thing (or its value) but also damages for its wrongful retention before recovery. On all of these points, see *General & Finance Facilities Ltd.*, [1963] 1 W.L.R. 644, and LEWIS N. KLAR, TORT LAW 75-76 (3d ed. 1996).

40. Common-law jurisdictions seem generally to provide for this process, although the extent to which it is used varies widely. It seems quite common in the United States. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 5.17, at 583-84 (2d ed. 1993). In the U.K., where the word "replevin" is confined to wrongful distress for unpaid rent, the corresponding general process exists but is little used. *See* ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 456-57 (2d ed. 1994) (noting that a court may grant interlocutory delivery in tort matters). Common-law Canada is closer to the U.K. in this regard. *See* J.B. BERRYMAN ET AL., REMEDIES: CASES AND MATERIALS 940 (3d ed. 1997).

what claims are ultimately justiciable.[41] We can notice that in the U.S., the word "replevin" has been extended beyond the pretrial process to refer to the claim that the plaintiff actually makes at trial, which is effectively a claim in detinue; that is, a *vindicatio*.[42] Still other options exist. Historically, only courts of equity could make declarations of right. In the modern world, courts can grant declarations as to legal rights just as much as equitable ones.[43] To ask the court to declare that one is the owner of a thing is effectively to assert a *vindicatio*.[44] We can also consider the claim in "money had and received," which is still in use in some common-law jurisdictions. In form, this asserts that the defendant owes the plaintiff money, and the debt is said to arise because the defendant received money "to the use of the plaintiff." Those words, obscure to the modern reader, can be satisfied in a number of ways, including that the defendant made a profit by doing wrong to the plaintiff or that the defendant innocently received a mistaken payment from the plaintiff.[45] It seems quite possible that they could also be satisfied by showing that the money received by the defendant belonged to the plaintiff; it will be shown below that in modern English law, this claim is used in exactly this way and has been for many years.[46]

So the common law seems to know the *vindicatio* in various guises. What is common to all of them is a claim of the form, "that thing is mine; therefore you must give it (or its value) to me." The first part of the claim, "that thing is mine," has nothing to do with corrective justice. It lacks any element of bilateralism; it is a statement of a universal truth, or at least a truth that purports to be universal within the legal system in which it is made. To substantiate it, I will need to tell a story about original or derivative acquisition, or both. More interesting is what follows: "and therefore you must give it to me." This can be understood as a statement of an obligation[47] or, following Hohfeld, as simply an unpacking, as it

41. To the extent that the activation of the pretrial process requires judicial evaluation of the claim, *see* BURROWS, *supra* note 40, and DOBBS, *supra* note 40, one could argue that it represents an embryonic *vindicatio*.

42. "Detinue is nearly identical to the action of replevin." *Moffitt*, 875 F. Supp. at 1197 (citing 66 AM. JUR. 2D, *Replevin* § 5 (1973)). In other common-law jurisdictions, replevin is not considered an action.

43. BURROWS, *supra* note 40, at 462-65; 1 DOBBS, *supra* note 40, § 1.2, at 9.

44. *See* Metals & Ropes Co. v. Tattersall, [1966] 2 Lloyd's Rep. 166 (Eng. C.A.) (granting on consent an order for specific delivery); Banque Belge pour l'Étranger v. Hambrouck, [1921] 1 K.B. 321 (Eng. C.A. 1920).

45. LIONEL D. SMITH, THE LAW OF TRACING 333-35 (1997); *see* D. Fox, *Legal Title as a Ground of Restitutionary Liability*, 8 RESTITUTION L. REV. 465 (2000); James Edelman, *Money Had and Received: Modern Pleading of an Old Count*, 8 RESTITUTION L. REV. 547 (2000).

46. *See infra* section III(E)(2).

47. Peter Birks, *Misnomer*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 1, 22-23 (W.R. Cornish et al. eds., 1998) (positing that the obligation should be understood as generated by the receipt of another's asset).

applies to the individual defendant, of the earlier statement, "that thing is mine."[48] Weinrib would probably favor the former view,[49] and he would understand the obligation as arising from corrective justice. This seems to be correct, but there is one difficulty of fit. The claim does not depend on an allegation of wrongdoing, and Weinrib's elucidation of corrective justice seems to require a breach of duty.[50] One might say that it is a breach of duty to retain something that belongs to another, and this breach is wrongful; however, the duty being breached (the duty to return the thing) must be created independently of its breach. In other words, even if there is a wrong in refusing to return my thing once you know it is mine, it can hardly be the case that you have no obligation to return it until you commit that wrong.[51] You cannot commit a wrong by not returning it unless you independently have an obligation to return it; the obligation is not created by wrongdoing. The wrong of breaching the obligation seems superfluous.[52] It would only have independent relevance

48. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 91-101 (Walter Wheeler Cook ed., 1978); ROSS B. GRANTHAM & CHARLES E.F. RICKETT, ENRICHMENT AND RESTITUTION IN NEW ZEALAND 34 (2000) (stating that "[t]he plaintiff's right to recover is already provided for through the property rights inherent in his or her title").

49. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 175-77.

50. *Id.* at 125-26.

51. It may be arguable that the obligation to return is not complete until the defendant is aware of the plaintiff's right. Different lawyers may understand different things by the statement that the defendant is obliged to return the thing. If by that we mean that the defendant now ought to return the thing and so acts wrongly in not returning it, then it does not seem sensible to suggest that this state of affairs can obtain when the defendant has no awareness of the claim (for example, in a case in which he has inadvertently walked home with the plaintiff's umbrella and has not yet noticed or been told of his mistake). In this sense, the defendant's knowledge is necessary to perfect the obligation; before knowledge, the defendant is only under a kind of Hohfeldian liability, while anyone with knowledge of the facts holds a Hohfeldian power to convert the defendant's liability into an obligation. This is arguably reflected in detinue's requirement that the plaintiff have made a demand for the return of the thing. *See* Clayton v. Le Roy, [1911] 2 K.B. 1031 (Eng. C.A.). It is also consistent with Klar's view that a demand should not be necessary in a case in which the defendant is already aware of the plaintiff's rights and refuses to honor them. *See* KLAR, *supra* note 39, at 72-73. The significance of this step, the defendant's acquisition of knowledge, should not be overstated. For the reasons given in the text, it is clear that the knowledge which on this view is necessary to constitute the obligation does not constitute wrongdoing or allow us to say that the obligation is created by or requires wrongdoing. A parallel case from the law of wrongs illustrates the minor role that the defendant's knowledge plays. Assume that the defendant has driven his car negligently, damaging the plaintiff's property, but the defendant did not notice the damage he caused. On the same analysis, we might not wish to say that the defendant's obligation to pay compensation is constituted before he even knows of the damage; but, when we seek to explain the source of his obligation, we do not view the defendant's knowledge as having significant explanatory force. Again, the same kind of analysis could be applied to a case of a demand loan during the period after the loan has been advanced but before the demand has been made. It is true that the debtor's obligation is not yet perfected; the loan is not due, but even before the demand, both the creditor and the debtor would view the loan as an asset and a liability, respectively. I am grateful to Steve Smith for helping me to sharpen my thoughts on this point, which is also germane to the analysis on unjust enrichment below.

52. As we will see below, this argument also applies in the realm of unjust enrichment. *See* Peter Birks, *The Concept of a Civil Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 31, 48-49 (David G. Owen ed., 1995).

if it allowed the plaintiff to claim more than just his thing and to reach, for example, to compensation for consequential losses.[53] But here we are only seeking to understand the obligation to return the thing.

We might try to solve the problem by saying that the defendant commits a wrong merely by being in possession of something which belongs to another, but this would be a very denatured idea of wrongdoing, which Weinrib rejects.[54] This would not advance the argument, because again the wrong must be a breach of a duty to return the thing, and it is the source of this duty that we are seeking. In any event, we must, with Weinrib, take the law on its own terms. In this case, that means that this claim must be understood as not based on wrongdoing. The relationship between corrective justice and wrongdoing is the focus of subpart II(C) which follows; the discussion there, although primarily referring to unjust enrichment, will also be relevant to the idea that the obligation to return another's thing arises from corrective justice but does not depend on wrongdoing.

The other two claims are based on unjust enrichment and wrongdoing. This demonstrates what we all know, that to some extent the protection of property is effected by other areas of the law. We do not normally think of unjust enrichment or wrongs (torts) as part of the law of property. It also demonstrates that "property" does not even belong in a series with "wrongs" and "unjust enrichment": those are legal causes, and property is a legal effect.[55] Whether those claims can be understood through corrective justice will be addressed when we deal with wrongs and with unjust enrichment.

To summarize, if the law of property is understood to comprise the creation and transfer of property rights, then Weinrib's theory of corrective justice has no role to play in the law of property. If property law is understood to extend to the protection of property rights through their direct vindication, then while it seems that corrective justice should be the underlying principle, Weinrib's explication of that principle seems not to fit the case because his theory depends on wrongdoing.

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53. It is in this sense that detinue seems to have a tort function as well as a *vindicatio* function. *See supra* note 39. It vindicates ownership and also responds to the wrong of refusing to return another's thing.

54. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 181-82.

> In judging an action by its effects, strict liability treats the defendant's agency as an incoherent normative phenomenon . . . the act turns out to be wrongful—and therefore impermissible—because of the effect that completes the action. The agent is conceded a capacity for purposiveness that, when harm occurs, turns out to have been morally incapable of being exercised and therefore to have been no capacity at all.

Id. The crucial point is that strict liability is an irrational standard *for wrongdoing* because it does not give the defendant a meaningful choice.

55. *See* Birks, *Property and Unjust Enrichment*, *supra* note 32, at 623, 625-31. However, for an explanation of how this traditional organization can be justified, historically and logically, see 1 ENGLISH PRIVATE LAW, *supra* note 37, at xxxv-li.

2. Contract.—Weinrib's discussion of contract is difficult.[56] It appears under the heading "The Reparation of Contract Losses" and begins by asserting that "[b]oth tort law and contract law rectify losses through corrective justice. . . . The difference between tort law and contract law lies in the origin of the right."[57] This suggests that Weinrib sees liability for *breach* of contract as explicable through corrective justice. He then goes on to provide an account of how the principles of contract *formation* can be understood as possessing the same features as are found in relationships of corrective justice: unity, bipolarity, and equality. The difficulty with the account is that it can be read as suggesting that contract *formation* is explicable as based on corrective justice. It would, however, not make sense to view the formation of a contract as the legal response to a transaction which failed to satisfy the requirements of corrective justice. A contract is not something that arises to rectify an injustice, and no more than in transfers of property is it possible to say that a formed contract is simply a transaction which does not violate corrective justice. First, more strongly than in that context, this would not explain enough. It is not enough to say that the transaction is not unjust; a positive justification is required for the enforcement of contracts.[58] The creation of contractual rights is not just a transfer of a preexisting entitlement; it is the creation of a new entitlement, *ex nihilo*. The property transfer context raised issues of third-party publicity, which do not generally arise in contract formation. The other point noticed there also applies here: just as a transfer can be valid as a transfer and yet fail to satisfy corrective justice, so too a contract can be valid as a contract, and yet fail to satisfy corrective justice. This is the case when a contract is voidable for duress or misrepresentation. One party, the victim of the duress or misrepresentation, has the power to avoid the contract, but this is at her option. That power is explicable as sourced in corrective justice (even though it does not require a wrong, as the case of innocent misrepresentation shows). So, the division between transactions that create contracts and those that do not does not map exactly onto the division between transactions approved and those condemned by corrective justice. This lack of fit is essential if the victim is to have a choice about whether to exercise the power of avoidance.

Corrective justice cannot explain the formation of contracts, but liability for breach of contract can. As Weinrib shows, once the contract is formed, the plaintiff's right to receive performance is an entitlement

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56. WEINRIB, PRIVATE LAW, *supra* note 1, at 136-40.

57. *Id.* at 136.

58. *See* Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 314-36 (1995) [hereinafter Benson, *Public Basis*]; Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS (Peter Benson ed., 2001) [hereinafter Benson, *Contract Law*].

which binds the defendant.[59] When the defendant infringes that entitlement, corrective justice is violated. The plaintiff suffers both a material and a normative loss, relative to her entitlement. The loss is normative because it is inflicted in violation of her Kantian right. The defendant may not achieve any material gain, but he achieves a normative gain, by causing a loss in violation of his Kantian duty to respect the plaintiff's entitlement. Compensation follows.

3. Noncontractual Wrongs.—The law of wrongs which are not breaches of contract also fits well into Weinrib's developed theory. Indeed, tort law clearly is Weinrib's paradigm. The path that begins with Aristotle, winds through Kant, and culminates in *The Idea of Private Law* is to some extent a search for the conceptual framework which will link ordinary tort law, in which plaintiffs suffer losses but defendants achieve no gains, to Aristotle's pregnant but undeveloped notion of corrective justice, expressed in straightforward terms of loss and gain.[60]

The example given earlier was that you are in possession of a thing that belongs to me. One way in which the law allows me to respond is to make a claim of the form, "you committed a wrong by asserting your dominion over that thing, which was mine at the time; therefore, you must compensate me (or disgorge your profit)." This claim does not depend on the defendant's still having the thing or even on the thing's continued existence. When a defendant wrongfully causes a loss, the plaintiff suffers losses both material and normative, the latter because the loss was caused by an infringement of her Kantian right. The defendant achieves a normative gain because he has acted in violation of his Kantian obligation to respect the plaintiff's self-determining agency. Aristotle's corrective justice is thus activated and compensation follows. Although the matter is somewhat obscure in *The Idea of Private Law*, Weinrib has explained elsewhere how this applies equally when the defendant achieves a profit through doing wrong to the plaintiff; that is, cases of disgorgement for wrongdoing.[61] The defendant has achieved a material gain that is also a normative gain if it was achieved through the violation of duty.[62] The

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59. WEINRIB, PRIVATE LAW, *supra* note 1, at 136, 139.

60. Although it might not be fair to characterize Weinrib's theory on the basis of what others say about it, I was struck by a feature of the laudatory comments by two leading scholars which appear on the dust jacket of *Private Law*. G.T. Schwartz says in part, "*The Idea of Private Law* presents a position about tort law which in my view is essential . . . . Weinrib stands out among those who have analyzed tort law from a justice perspective." G.P. Fletcher says in part, "[Weinrib] makes a significant contribution by arguing the importance of understanding tort law by reference to its own internal structure."

61. *See generally* Weinrib, *Restitutionary Damages*, *supra* note 6.

62. Weinrib's view is that this requires an examination of the incidents of the plaintiff's right, so that, for example, a gain made in the course of acting negligently is not a normative gain and does not violate corrective justice. *Id.* at 11. It would appear that this reasoning could apply to generate

plaintiff has not necessarily suffered any material loss but may have suffered a normative loss if her Kantian right was infringed. (This is the mirror image of the everyday negligence case, in which the defendant has no material but only a normative gain.) Again, corrective justice is violated, requiring the defendant to give the gain to the plaintiff.

There is one complication worth mentioning, which is that the wrong in my example is one of strict liability. Weinrib focuses on negligence, with its requirement of fault, but property-protecting wrongs have a very attenuated element of fault. For land, the *vindicatio* in the guise of the writ of right was overtaken as the means of recovering land by ejectment, which is in form an allegation of wrongdoing (although subsequent intervention has regenerated a *vindicatio* in many jurisdictions).[63] For things, detinue was largely overtaken by the tort of conversion.[64] Ejectment, conversion, trespass to land, and trespass to chattels all are allegations of wrongdoing, but they do not require that the defendant have any knowledge of the plaintiff's right; they only require volition.[65] This strict-liability wrongdoing can be questioned within the theory of corrective justice. Weinrib in general deprecates the idea that strict liability can perform the normative work that wrongdoing does within his theory. He spends some time on examples of strict liability which the common law accepts, endeavoring to show that each is consistent with this theory, although he does not mention the property torts.[66] It may be that these strict liabilities can only be justified pragmatically. For long periods, the common law lacked any effective *vindicatio*; the protection of property through torts such as conversion and ejectment was necessitated by the procedural shortcomings of detinue and the writ of right. If there is no *vindicatio*, and property is protected only by the law of wrongs, it seems that a denatured understanding of wrongdoing is required to ensure that the

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disgorgement in at least some cases of profitable breach of contract, if (following Benson, *Public Basis*, *supra* note 58, and Benson, *Contract Law*, *supra* note 58) the right to performance is viewed as a patrimonial entitlement of the promisee. *See* Attorney-General v. Blake, [2001] 3 W.L.R. 625, 637B (H.L. 2000) (appeal taken from Eng.).

63. *See* 1 DOBBS, *supra* note 40, § 5.10(1), at 534-35 (discussing ejectment retained with statutory modifications). In the U.K., a statutory action to recover land has replaced ejectment, under Rules of the Supreme Court, Order 113. R.S.C. O.113, r.1(1)-8. Ejectment overtook the writ of right because it was far less cumbersome for plaintiffs. SIMPSON, *supra* note 29, at 144-72.

64. *See* BAKER, *supra* note 38, at 441-52 (explaining that detinue was procedurally unattractive to plaintiffs, particularly because it allowed defendants to wage their law).

65. The interaction required varies subtly among the different torts, which is one reason why there has been statutory intervention in some jurisdictions (for example, the Torts (Interference With Goods) Act, 1977, c. 32, § 2(1) (Eng.)), and calls for the same in others. A good account of the differences is in LAW REFORM COMMISSION OF BRITISH COLUMBIA, REP. NO. 127, REPORT ON WRONGFUL INTERFERENCE WITH GOODS (1992).

66. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 184-203.

protection will be adequate.[67] Assume that you have come into possession of my thing without fault, thinking honestly that it is yours; you have bought it in good faith. If the law gives me no claim by which to assert my ownership, and if unjust enrichment is unavailable except against a direct transferee, then my only hope is to allege a wrong. Unless the wrong is one of strict liability, it is possible that my ownership will be unprotected unless and until you become aware of my claim, or, on a different fault standard for the wrong, until a court declares my ownership.[68] There is an informative contrast with equity: equitable proprietary rights, as under a trust, can be directly vindicated through the declaration of a trust and any consequent orders required to give it effect. It is probably no coincidence that wrongful interference with equitable proprietary rights depends on genuine fault.[69]

4. Unjust Enrichment.—In the case in which you have my thing, the last way I might frame my claim would be to say, "you were unjustly enriched by the receipt of that thing and must make restitution to me (of it, or its value)." According to Weinrib, the claim in unjust enrichment is explicable under corrective justice. I fully agree with this, subject to the same observation made about the *vindicatio*: the claim does not depend on wrongdoing, and Weinrib's theory of corrective justice seems to require that the defendant has committed a wrong. Weinrib is not entirely consistent on this point. His general explanation of his developed principle of corrective justice makes wrongdoing by the defendant central.[70] When he addresses unjust enrichment, he seems to accept that it is strict liability, but not consistently.[71] He does not discuss it (except parenthetically) when he is addressing strict liability generally, even though he goes to

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67. Strict liability as a standard for wrongdoing is, in general, incompatible with corrective justice because it is inconsistent with treating the defendant as a self-determining agent; a choice with hidden consequences is no choice at all. *See supra* note 54 and accompanying text. The only way to fit the property torts with this is to treat everyone who deals with property as making a choice to take a risk that it belongs to someone else. This smacks of legal fiction and seems to carry little normative weight. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 166 ("[A]n excessively general risk description would also fail to capture the wrongfulness, but with the opposite effect of implicitly delegitimizing action.").

68. The modern law recognizes various manifestations of the *vindicatio*. *See supra* notes 39-46 and accompanying text. However, this has come about through the re-emergence of detinue, the widened availability of replevin in the U.S., the extension of the declaratory jurisdiction to common-law rights, and the development of the action for money had and received. All of these events postdated the emergence of strict liability wrongs, which was complete for land by the end of the seventeenth century, *see* SIMPSON, *supra* note 29, at 147-48, and for things by the early eighteenth century. *See* BAKER, *supra* note 38, at 450-51.

69. *See generally* Lionel Smith, *Unjust Enrichment, Property and the Structure of Trusts*, 116 LAW Q. REV. 412, 428-34 (2000).

70. *See supra* text accompanying note 24.

71. See WEINRIB, PRIVATE LAW, *supra* note 1, at 140, 197-98.

some length to explain the validity of some rather more obscure instances of strict liability at common law.[72] Part of the difficulty may come from the failure to separate autonomous unjust enrichment from disgorgement for wrongdoing; but even if Weinrib had more clearly stated that wrongdoing is not required for liability in autonomous unjust enrichment, it remains true that he never reconciles this with the centrality of wrongdoing to his theory. It is for this reason that McInnes says, "Weinrib's analysis of unjust enrichment is legally untenable."[73]

The claim that liability in autonomous unjust enrichment does not depend on wrongdoing might require some explanation. In the classic case of a mistaken payment, it means that liability arises at the instant of receipt, whether or not the defendant is aware of the plaintiff's mistake. It may be that a demand by the plaintiff is needed to perfect the defendant's obligation.[74] It might be argued that this shows that the obligation is founded on wrongdoing: the defendant, on becoming aware of what has happened, comes under a duty to repay, and it is wrong for him not to repay. But, even if knowledge is required to perfect the obligation, it cannot be required in the character of wrongdoing any more so than in the case of the *vindicatio*. We might consider it a form of wrongdoing for a defendant to refuse to repay on demand, but this wrongdoing cannot be that which creates the duty to repay. The wrongdoing is in not repaying when you have a duty to repay; the duty must predate its breach.[75] A much more serious difficulty, even in theory, with this view is that it destroys all of the law of unjust enrichment in a stroke. If liability in unjust enrichment requires wrongful conduct by the defendant, it is just another tort. Its existence in every developed legal system is a recognition that some liabilities do not depend on wrongdoing. The law of unjust enrichment has developed an internal logic independent of wrongdoing, and it has done this for good reason: the law is incomplete without it.[76]

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72. *See id.* at 184-203. The parenthetical discussion is part of the explanation of the incomplete privilege to interfere with property. *Id.* at 197-98.

73. *See* McInnes, *supra* note 3, at 37.

74. For the theoretical argument in favor of such a requirement, see *supra* note 51. The cases in unjust enrichment are divided, some requiring a demand and some not. *See* RESTATEMENT OF RESTITUTION § 63 (1937) [hereinafter RESTATEMENT]; LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 195-96, 851-52 (Gareth Jones ed., 5th ed. 1998). Jones notes that the defendant will effectively always have notice, at the very latest by the initiation of the claim. *Id.* at 195-96. Whether some earlier notice is required to perfect the obligation is likely to come up only in relation to matters such as limitation periods.

75. Birks, *supra* note 52, at 48-49. Birks notes that we could have a civil wrong completed by knowingly failing to make restitution, but this would be redundant unless the plaintiff were seeking more than restitution, such as consequential losses (or presumably disgorgement for profitable wrongdoing).

76. On the question of completeness, see Lionel Smith, *Property, Subsidiarity, and Unjust Enrichment*, *in* COMPARATIVE LAW OF UNJUST ENRICHMENT (Reinhard Zimmermann & David

And of course, we must, with Weinrib, take the law on its own terms. The law of unjust enrichment, on its own terms, does not understand liability as turning on defendants' wrongdoing. Autonomous unjust enrichment requires that the defendant have been enriched, that the plaintiff have suffered a corresponding deprivation, and that there be some reason why restitution should be ordered.[77] When the last of these is in place, liability arises.[78] If the reason for restitution is in place at the moment of a payment, as in mistaken payments, then liability arises just then. Interest is payable immediately, instead of when the defendant became aware of a problem.[79] The limitation period also will begin to run.[80]

Sometimes, the reason for restitution is not mistake, which vitiates the plaintiff's intention to transfer wealth, but rather that the plaintiff's intention to transfer wealth was conditional, and the condition failed. The root case of unjust enrichment in Canada, *Deglman v. Guaranty Trust Co. of Canada*,[81] is of this kind. Services were rendered by the plaintiff under an agreement that the defendant would leave the plaintiff a house by will, but the house was not left. The agreement was not enforceable for lack of writing; the plaintiff's contractual claim, valued by his expectation interest, was therefore denied.[82] However, he was allowed a claim in unjust enrichment for restitution of the value of the services. The reason for restitution was that the services were conferred not under a mistake but on a basis that there was to be a counterperformance. That basis failed and thus the value of the services was recoverable. But, the basis did not fail until the defendant died; wills are ambulatory, so until the defendant died, it could not be said whether she would leave the house to the plaintiff. Only when she died without leaving the house did the basis fail, and only

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Johnston eds., forthcoming 2001), *available at* http://ouclf.iuscomp.org/articles/smith.htm. So necessary is unjust enrichment that codified civilian systems that omitted it from the code have felt the need to produce a whole body of extra-codal law, an extraordinary development in that context. This is true of at least France (*see* CHRISTIAN P. FILIOS, L'ENRICHEISSMENT SANS CAUSE EN DROIT PRIVÉ FRANÇAIS: ANALYSE INTERNE ET VUES COMPARATIVES 45-52 (1999)), Quebec (*see* Cie. Immobilière Viger Ltée. v. Lauréat Giguère Inc., [1977] 2 S.C.R. 67, 75-77),and Italy (*see* ZIMMERMANN, *supra* note 36, at 883 n.304); the latter two have since produced recodifications that include unjust enrichment (CIVIL CODE arts. 1493-1496 (Que.); C.C. arts. 2041-2042 (Italy)).

77. The Canadian formulation of the claim actually purports to require for the third element that there be "no juristic reason" for the enrichment. *See supra* note 5. There are good reasons, however, to read this as meaning that there must be a positive reason for reversing the enrichment. *See* BIRKS, *supra* note 4, at 99; JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 117-18 (1951); Lionel Smith, *The Mystery of "Juristic Reason,"* 12 SUP. CT. L. REV. 2D 211 (2000).

78. *See, e.g.*, Air Can. v. Ontario, [1997] 2 S.C.R. 581, paras. 77-82.

79. Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs, [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.).

80. Subject only to the possibility that there is a requirement of a demand. *See supra* note 51.

81. [1954] S.C.R. 725.

82. *Id.* at 735.

then did the claim arise; only then did the limitation period start to run.[83] The claim could not sensibly be seen as based on wrongdoing unless the wrong was a breach of promise; the promise being unenforceable, this would be incoherent.

5. Conclusion on Weinrib's Theory.—What is the reach of Weinrib's theory of corrective justice? On its own terms, it is not a theory of private law but rather a theory of civil wrongs. It magnificently explains liability for noncontractual wrongs, such as torts and equitable wrongdoing, reaching not only compensation for loss but also disgorgement of gains. It also covers the wrong of breach of contract. In other words, it explains how duties can arise from wrongdoing. It does not explain or justify the creation and transfer of proprietary rights. It does not explain or justify the creation of contracts, nor by extension other consensually assumed obligations such as the fiduciary obligations of a trustee, nor does it explain or justify the transfer of personal rights by those to whom the corresponding obligations are owed.

There is no particular reason why anyone should expect a theory of corrective justice to explain any of those things. However, there are two matters that Weinrib's theory does not reach, but which it seems it should. These are the obligation of a person to return a thing that belongs to another and the obligation to make restitution for unjust enrichment. These are not the same thing: a defendant may be obliged in unjust enrichment to return a thing or its value, even though the thing does not belong to the plaintiff. And, there are many examples of restitution claims in which the defendant does not even receive any property from the plaintiff; these include cases in which the enrichment is based on services, on the discharge of the defendant's debt, or on the promotion of the defendant's security interest. Moreover, the obligation to return a thing that belongs to another necessarily extends to any transferee of the thing; by contrast, it will be argued below that the law confines unjust enrichment liability to direct transferees from the plaintiff and that corrective justice dictates this result.

Weinrib's theory does not reach these obligations because it is heavily dependent on wrongdoing by the defendant as violating corrective justice and so creating a duty of reparation. The reason that it seems that the theory *should* reach them is that they are at the heart of corrective justice. Aristotle's theory of corrective justice is phrased in terms of reversing unjust transfers.[84] Weinrib solved the intractable problem of how to fit this transfer reasoning to cases of loss without gain (or gain without loss).

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83. *Id.* at 736.

84. *See supra* text accompanying note 17.

The case of restitution is the easy case: it really is a transfer that needs reversing. How was it missed in Weinrib's analysis? How can it be accommodated? And when is corrective justice violated in the absence of wrongdoing by the defendant, so creating a duty of restitution?

C. *Fitting Strict Liability Within Corrective Justice*

1. The Omitted Case.—First we may ask, how was it missed? To understand this, we can return to Weinrib's distinction between material gains and losses and normative gains and losses. Weinrib says that "[a]ll the possible combinations are recognized in sophisticated systems of private law."[85] He then sets out four combinations.[86] In fact, there appear to be sixteen. Without questioning the conclusion that normative gains and losses are determinative in corrective justice, it is pertinent to observe other combinations which not only illustrate Weinrib's point but also further elaborate the richness of sophisticated private law. If we assume that there are two parties, *P* and *D*, we can simplify somewhat by excluding consideration of gains on the part of the plaintiff (of which she is not likely to complain) and losses on the part of the defendant (of which the plaintiff is not likely to complain).[87] Thus, we only consider plaintiff's losses and defendant's gains; but each party can realize either, both, or neither of a material or a normative version of gain (in the case of the defendant) or loss (in the case of the plaintiff). Four combinations for each party quadrate to generate a total of sixteen possibilities. We can describe them with the notation *X(Y,Z)*. *X* is a party, either *P* or *D*. *Y* represents the material position; it is either 1, to represent a material loss (for *P*) or gain (for *D*), or 0, to represent no such material loss or gain. *Z* represents the normative aspect in the same way.

Hence Weinrib's first case, a standard negligence injury, has the defendant realizing a normative gain but no factual gain: *D*(0,1). Although Weinrib does not specify the plaintiff's status, the injury means that the plaintiff suffered a material loss, and the wrongfulness of the injury means it was also a normative loss: *P*(1,1). In Weinrib's second case, mistaken improvement to property, he gives *D*(1,0) but no liability. It is probably incorrect that there should be no liability even though the defendant gained from the plaintiff's mistake.[88] We can substitute another case to make Weinrib's point: the defendant enters into legitimate business competition with the plaintiff, making a profit at the expense of the plaintiff. Again, *D*(1,0), and no liability. To fill out the case, we consider *P*. *P* suffers

85. WEINRIB, PRIVATE LAW, *supra* note 1, at 116.
86. *Id.*; *see also supra* text accompanying note 22.
87. There might be a counterclaim, but in that claim *P* would be *D* and vice versa.
88. *See supra* note 23.

material loss, but not normative loss: $P(1,0)$. Weinrib's third case was illegal but nonharmful trespass to land. P suffered no factual, but only a normative, loss: $P(0,1)$. D's condition is not specified; we may assume D did not achieve a material gain, but only a normative one: $D(0,1)$. Weinrib's final case was harm caused without fault: $P(1,0)$. Again, we may assume that D had no material gain, and in the absence of fault, no normative one: $D(0,0)$.

If we are to consider the omitted cases, we can begin with three observations. First, in any case in which either Y or Z is 1,[89] it must be that the other party is causally implicated in the factual or normative loss or gain so represented. There must at least be a causal link between the parties, or else there would be nothing on which even to begin to build a claim. Second, from the nature of Weinrib's theory (and in particular his formal conception of the bilateral, correlative normative relationship between plaintiff and defendant in corrective justice) it is impossible to have liability in a case in which the plaintiff suffered a normative loss while the defendant achieved no normative gain, or a case in which the defendant achieved a normative gain while the plaintiff suffered no normative loss.[90] This state of affairs can only occur through normatively unrelated transactions, which do not engage corrective justice. An example is the case of a defendant who is careless and whose carelessness causes loss to the plaintiff, but who does not breach any duty to the particular plaintiff.[91] This could be represented as $P(1,0)$, $D(0,1)$; although the defendant was at fault, and this caused the plaintiff to suffer a material loss, the plaintiff did not suffer a normative loss. Mere causal connection cannot generate normative responsibility.[92] All cases in which the second term (normativity of loss or gain) is unequal between P and D reflect a lack of normative relationship between the parties. There can be no liability. Leaving those aside for now, we cut the sixteen possible cases down to eight.[93]

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89. That is, in every case except the trivial $P(0,0)$, $D(0,0)$, which means that nothing of interest happened.

90. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 171-83.

91. *See id.* at 158-67. The most famous example, used by Weinrib, is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

92. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW, at lxxiv-vii (2d ed. 1985) (rejecting Epstein's theory of strict liability for harm); David Morris Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228, 264-80 (1982).

93. We might describe the eight excluded cases by considering first $P(0,0)$, a plaintiff who has suffered no factual or normative loss and so has no cognizable grievance; combined with $D(1,1)$, we have perhaps a case of profitable, but harmless negligence; combined with $D(0,1)$, we have a case of a whistle-blower plaintiff suing a defendant whose wrong has harmed some other party. $P(1,0)$ represents a plaintiff who has suffered a loss but has no normative grievance; combined with $D(1,1)$, we have a briber who attempts to sue the person whom he bribed; the combination with $D(0,1)$ is discussed in the text. Cases combining $P(Y,1)$ with $D(Y,0)$ indicate a plaintiff who does have a

The third observation is that liability depends on normative gain and loss.[94] There will be no liability unless $P(Y,1)$, $D(Y,1)$, regardless of Y in each case, but there will be liability in that case, again regardless of Y. Hence, there are four liability cases and four cases of no liability. Weinrib includes two no-liability cases in his examples: $P(1,0)$, $D(1,0)$, which we have reinterpreted as the case of legitimate competition, and $P(1,0)$, $D(0,0)$, which is faultless harm. Another is the trivial case $P(0,0)$, $D(0,0)$, which basically means that nothing of any significance happens. The last no-liability case is $P(0,0)$, $D(1,0)$, which might be captured by a case in which D mistakenly pays for life insurance on P's life, of which D is the beneficiary; when P dies, D benefits, but there is no liability.[95]

Weinrib includes two liability cases in his examples: $P(1,1)$, $D(0,1)$, which is faulty harm, and $P(0,1)$, $D(0,1)$, which is trespass to land causing no damage. The two liabilities which Weinrib does not include in his examples, therefore, are $P(1,1)$, $D(1,1)$; and $P(0,1)$, $D(1,1)$. It seems fair to say that, for whatever reason, these permutations were not fully addressed in *The Idea of Private Law*. The second case concerns profitable wrongdoing, such as taking a bribe in breach of fiduciary obligation without causing any loss to the principal. The defendant has a material gain, and the plaintiff no material loss; the defendant's gain is also normative, having been realized in breach of a duty. The plaintiff, although suffering no material loss, has a normative loss through the infringement of her legally protected interest. Weinrib has now more comprehensively addressed this case.[96] The first case is satisfied by a

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grievance, but not against this defendant. If we first take $P(0,1)$, we have a plaintiff with no factual loss; combined with $D(0,0)$, this might be a case in which D is forcibly transported onto P's land, causally implicating D in a trespass against P, but without any normative gain to D. In $P(0,1)$, $D(1,0)$, we might have a case in which some party, W, has made a profit by doing wrong against P, without causing any loss; subsequently, D derives a benefit in a way that is causally related but not wrongful against P, perhaps through profitable trading with W. Finally, $P(1,1)$ is a plaintiff who has a factual loss and a normative grievance, but with $P(Y,0)$, the grievance is against someone else. Combined with $D(0,0)$, we have a case in which D is causally but not normatively implicated in a harmful wrong to P; perhaps D's property was stolen and used to harm P. Combined with $D(1,0)$, we have a case in which D has a factual gain which is linked, causally but not normatively, to a loss of the plaintiff. This case, in which no claim can be allowed, is satisfied by more than one factual configuration, some of which are discussed later in this Article. One is the case of a plaintiff who confers a benefit on the defendant under the plaintiff's contract with a third party; another is the case of the defendant who receives wealth not directly from the plaintiff but only remotely through one or more intermediaries (in the absence of the plaintiff's having any proprietary right in the wealth).

94. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 116-17.

95. *See* Payer v. Peerless Plating Rack Co., 19 O.R.3d 105, 116-17 (1994) (Ont. Gen. Div.), *aff'd*, 37 O.R.3d 781 (1998) (Ont. C.A.) (holding that the defendant, having mistakenly paid for life insurance on the plaintiff's life, was unjustly enriched but could keep the insurance proceeds because there was no deprivation to the plaintiff). *See also* Hunter Eng'g Co. v. Syncrude Can. Ltd., [1989] 1 S.C.R. 426, 464-81.

96. *See* Weinrib, *Restitutionary Damages*, *supra* note 6, at 24-31.

case of subtractive unjust enrichment, such as a mistaken payment. The plaintiff suffers a material loss by being poorer in the amount of the transfer; the defendant has a corresponding enrichment, and the loss and gain are both normative because the transfer is not valid under Kantian right. The first case is also satisfied by a situation in which the defendant is in possession of something which belongs to the plaintiff—where a *vindicatio* would lie.

So, the case to be explored is that in which the defendant has achieved a material gain, the plaintiff has suffered a material loss, *and* each party has achieved or suffered the normative equivalent. The issue to be addressed is how these conditions can be satisfied in the absence of wrongdoing by the defendant. It appears that Weinrib solved the more difficult cases while bypassing the less difficult one. The case with which *The Idea of Private Law* is mainly concerned is faulty harm: how can the defendant be understood, within Aristotle's model, to have achieved a "gain" when all he has done is cause a terrible loss? The answer lies in Weinrib's elucidation of Kant. There also lies the answer to the mirror image problem of disgorgement for wrongdoing: how can the plaintiff be said to have suffered a normative loss when her material position is unaffected?

These are the difficult cases. The easier case is one in which the defendant has really, materially, achieved a gain, and the plaintiff has really, materially, suffered a loss, through a single transaction. Simply put, this is much closer to an exact fit with Aristotle's undeveloped model.[97] We are not finding a normative gain in the absence of a material gain, nor are we finding a normative loss in the absence of any material loss. We have both material gain and material loss. True, it is still necessary, usually via an inquiry into Kantian right, to conclude that there was some defect with the transfer.[98] Otherwise, all gifts would be reversible, and business competition would always generate liability. We still need to get from material to normative gains and losses to have liability under corrective justice. However, it appears, to put it crudely, that less normative work is required. Less is required in exactly this sense:

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97. *See* Reg'l Mun. of Peel v. Canada, [1992] 3 S.C.R. 762, 804.

98. One critique of Weinrib's theory is that Aristotle's contribution is superfluous; Kant effectively does all the work. *See* Stephen A. Smith, *The Idea of Private Law*, 112 LAW Q. REV. 363, 367 (1996) (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995)); Stone, *supra* note 1, at 254. Weinrib's answer in *Private Law*, *see supra* note 1, at 129, would also be an answer to the reverse point (made in Steven R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 480 (1992)) that there is no particular reparation logically associated with the violation of a Kantian norm as such. The formal Aristotelian structure gives the measure of the reparation for the violation of a Kantian norm. The core cases of unjust enrichment and the *vindicatio*, in which the bilateral transfer from plaintiff to defendant is normatively essential to liability without wrongdoing, may also provide an answer to the critique that Kant does all of the work.

when a single transaction, necessarily some kind of transfer, gives rise to both a material gain on the part of the defendant and a material loss on the part of the plaintiff, it is not necessary to find that the defendant did anything wrong to characterize that gain and loss as normative. It is enough to find that the plaintiff did not fully consent to the transfer. It may also be enough to find that the defendant's conduct was in some way unconscientious, even if it does not rise to the level of wrongdoing. Moreover, it may be enough to find that even if the plaintiff's consent were intact, and the defendant behaved well enough, nonetheless some other normative factors are sufficient to generate liability under corrective justice.[99]

2. *The Vindicatio.*—One manifestation of Weinrib's omitted case is the case in which you are in possession of something that belongs to me. Corrective justice requires you to give it back, without any need to characterize you as a wrongdoer. It is clear that you have a material gain, and I have a material loss. My normative loss is also clear enough. If I own something, then it is an external manifestation of my ability to act as a self-determining agent.[100] To be deprived of it when I still own it is therefore a violation of my Kantian right. On your side, your gain is normative because you are in possession of something that is an external manifestation of my own Kantian freedom. It is inconsistent with Kantian right for you, as a self-determining agent, to deny me the same status. The normative loss and gain are perfected without any wrongdoing.[101]

There is a crucial point here. Weinrib stresses that the plaintiff's normative loss (the violation of her Kantian right) and the defendant's normative gain (the breach of his Kantian duty) must be identified separately: one cannot be simply the reflex of the other.[102] In this regard, duty is not a reflex of right, nor is right a reflex of duty. That is why defendants must generally do something wrong to violate corrective justice; strict liability would envisage "right without duty."[103] It appears that this is simply not the case in our example, in which you are in possession of something I own. Your duty *is* a reflex of my right. Unlike

99. These three families of reasons for restitution were set out by BIRKS, *supra* note 4, at 99-108.

100. *See* WEINRIB, PRIVATE LAW, *supra* note 1, at 128-29.

101. To reiterate a point made earlier, it might be wrongful for you to fail to return something when you know it is mine, but that wrong is the violation of an obligation that must exist before it is wrongfully breached; the source of the obligation cannot be the wrong of breaching it. The wrong adds nothing to the analysis if we are just thinking about the obligation to return it. It may be necessary to rely on the wrong if, for example, the plaintiff seeks compensation for consequential loss. *See supra* text accompanying note 52.

102. WEINRIB, PRIVATE LAW, *supra* note 1, at 124.

103. *Id.* at 179. *See generally id.* at 171-83.

in a case of negligence or breach of contract, your duty and my right are united in the identity of the thing owned by me but possessed by you. Both my right and your duty are locked up therein. It is the nexus of our bilateral relationship. It is an "articulated unity."[104] You realize both a material and a normative gain when you acquire that thing simply because it is mine. Corrective justice is violated, and a duty of restitution is created without wrongdoing.[105]

3. Unjust Enrichment.—The simplest case of unjust enrichment liability is the mistaken payment. The plaintiff, thinking she owes the defendant $100, pays that amount, but in fact she does not owe anything. But the transfer takes effect as such, so that the defendant becomes the owner of the money.[106] There is an enrichment of the defendant, a corresponding deprivation of the plaintiff, and a reason for restitution in the plaintiff's mistake. The material gains and losses are clear. The plaintiff has also suffered a normative loss because she did not fully assent to the transfer of wealth; the transfer was made on the basis of bad information. It was not a free expression of self-determining agency. The question is how we can say that the defendant achieved a normative gain without doing anything wrong. As we should expect, the answer appears to lie in the constitutive elements of unjust enrichment liability, which differentiate it from civil wrongs. Unjust enrichment includes both a material gain by the defendant and a material loss by the plaintiff. Moreover, the loss and gain do not come together by random chance. They are two sides of the same coin—that coin being a transfer of wealth from plaintiff to defendant. There is a nexus of exchange between the parties. This nexus gives an "articulated unity"[107] to their bilateral relationship in a transaction which is paradigmatically within Aristotle's conception of corrective justice. The transactional unity is far tighter than in a case of carelessness causing loss or profitable wrongful conduct. The single transfer of wealth, lost by the plaintiff and gained by the defendant, functions normatively just as the owned thing in the case of the *vindicatio*.

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104. *Id.* at 123.

105. In other words, gain and loss generate injustice without wrongdoing, a possibility that Weinrib, focusing as he does on wrongdoing in corrective justice, seems to find puzzling. *See* Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 286-87 (1994).

106. It is absolutely clear that the claim lies even if property passes. Of course, that is when it is most needed. It is not settled whether this is actually a requirement of the claim as it appears to be in civilian systems. *See* Smith, *supra* note 69, at 425-28. In a case in which the plaintiff retains ownership, civilian systems, having a prominent *vindicatio*, generally allow the enrichment claim only for loss of use, while the *vindicatio* recovers the asset or its capital value. *See generally* Smith, *supra* note 76.

107. WEINRIB, PRIVATE LAW, *supra* note 1, at 123.

Before the transfer, the wealth is an external projection of the plaintiff's agency. If the transfer is normatively flawed from the plaintiff's end, then the plaintiff suffers a normative loss. Because the defendant's enrichment is nothing other than the plaintiff's normative deprivation, the defendant's material gain is also a normative gain. Hence, corrective justice is violated, and a duty to make restitution arises without the need to find any breach of duty on the part of the defendant.[108]

However, it should be stressed that, unlike in the case of the *vindicatio*, there need not be anything that passed from plaintiff to defendant. The transfer of wealth might have been in the form of services, or the payment of the defendant's debt, or the saving of the defendant's health or property through the consumption of food or other property of the plaintiff.[109] It might have been in the promotion of the defendant's mortgage above that of the plaintiff, through a mistaken discharge.[110] And, even if there were something that passed, after the transfer it belongs to the defendant. In unjust enrichment, the nexus between the parties is not a particular tangible thing belonging to the plaintiff but possessed by the defendant; instead, it is a flow of wealth, measured abstractly even if it was locked up in a tangible thing, which has moved from the plaintiff's patrimony to that of the defendant.

The same understanding can apply to other reasons for restitution. It applies directly to other vitiations of the plaintiff's consent, such as transfers of which the plaintiff was entirely ignorant or which she was compelled to make.[111] These same reasons can undermine contracts. If the plaintiff makes a contract under a mistake induced by the defendant, it is voidable at the election of the plaintiff, even if the defendant did no wrong.[112] The contract satisfies the rules of contract formation, just as the transfer of wealth in a mistake case may satisfy the rules of transfer. But, it is violative of corrective justice, even without wrongdoing, so the plaintiff has the power to undo it.[113] Sometimes the plaintiff's consent to

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108. Barker, *supra* note 6, at 468-71.

109. *See, e.g.*, Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) (defendant's boat was saved in a storm by damaging the plaintiff's dock).

110. *See* Cent. Guar. Trust Co. v. Dixdale Mortgage Inv. Corp., 24 O.R.3d 506 (1994) (Ont. C.A.).

111. *See* Stoltze v. Fuller, [1939] S.C.R. 235.

112. Redgrave v. Hurd, [1881] 20 Ch. D. 1 (Eng. C.A.).

113. In such a case, however, a mistake must be more than merely causative, which is all that is required in an extracontractual transfer. *See Cent. Guar. Trust Co.*, 24 O.R.3d at 519-520 (holding that the plaintiff's mistake allowed recovery even if it was caused by the plaintiff's own carelessness, and even if the defendant was unaware of it). If it is to allow a contract to be set aside, it must be a mistake which the other party induced, that is, a misrepresentation. That the defendant induced the mistake seems to be enough to deprive him of his normal entitlement, under the rules of contract formation, to have the formation conclusively judged on the basis of objective appearances.

a transaction is not so much defective as merely conditional. An example is the *Deglman* case.[114] The same reasoning will cover these cases.[115]

It is also possible that, even though the plaintiff's consent to a transfer was not vitiated, the transfer will violate corrective justice on the basis of the defendant's unconscientious conduct which does not rise to the level of wrongdoing. The theory of "free acceptance" is controversial.[116] But because of the inherently bilateral nature of unjust enrichment law, focusing as it does on a transfer from plaintiff to defendant, we have seen that if the transfer was normatively flawed from the plaintiff's side, it follows that it was flawed from the defendant's side and violates corrective justice. The same reasoning should work in reverse. If some conduct of the defendant is enough for us to say that the acquisition of the benefit was in violation of Kantian right, then the transfer violates corrective justice. In fact, the disputes about free acceptance can be understood, at least in part, to be a dispute about exactly what conduct on the part of the defendant will constitute a violation of Kantian right. On one view, it is shabby conduct to watch a plaintiff conferring a benefit while knowing the plaintiff is not intending to make a gift, and to forego an opportunity to disabuse her of her vain hope of recompense. On another view, non-feasance (in the absence of a duty of affirmative action) is never normatively objectionable.

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114. Deglman v. Guar. Trust Co. of Can., [1954] S.C.R. 725, 728-29 (holding that a nephew was entitled to restitution for services he performed for his aunt, even though her oral promise of land for those services was barred by the statute of frauds). The claim is often called "total failure of consideration" in this context, but this is misleading because it does not depend on the existence of a contract. *See* Clarke v. Moir, 82 N.S.R.2d 183, 191 (1987) (N.S. S.Ct. Trial Div.) (ordering that after an uncle gave all of his money to his niece to take care of him for life, the niece had to return the balance of the money after he moved out sixteen months later). Even if there were a contract, it does not require that there have been no consideration in the contractual sense; it only requires a failure of counterperformance. Palachik v. Kiss, [1983] S.C.R. 623 (enforcing a wife's promise to give her husband a one-half interest in a duplex in return for the husband maintaining the property and making monthly payments). The claim could be better called "failure of basis." *See* BIRKS, *supra* note 4, at 223.

115. One difference between conditional consent and mistake or compulsion is that a claim based on a failure of basis cannot be totally plaintiff-sided. A mistake claim can be based on a mistake of which the defendant had no knowledge, but a "secret basis" will not generate a claim when it fails. For example, I make a gift to you which, in my own mind, is conditional on receiving a valuable gift in return. If that does not materialize, there can be no claim in unjust enrichment. The reason for this is perhaps that in such claims, the plaintiff's consent is conditioned by a future event, as to which she knows she is taking a risk. It is not like the case of mistake, in which the plaintiff's mistake has denied her the opportunity to make an informed choice. Kantian right dictates that the plaintiff cannot deliberately impose a risk on the defendant; so, a basis must be mutually understood.

116. The most recent defense, which cites the earlier attacks, is Peter Birks, *In Defence of Free Acceptance*, *in* ESSAYS ON THE LAW OF RESTITUTION 109 (Andrew Burrows ed., 1991). Canadian courts frequently apply the doctrine in cohabitational property disputes. *See* Pettkus v. Becker, [1980] 2 S.C.R. 834, 849; Sorochan v. Sorochan, [1986] 2 S.C.R. 38, 46.

Some reasons for restitution turn on neither a shortcoming in the plaintiff's consent to the transfer, nor on any shabby conduct by the defendant. Birks calls these "policy-based restitution."[117] Even these claims seem explicable under corrective justice. The crucial difference is that the flaw in the transaction, which makes the material gain and loss into a normative gain and loss, is not a violation of Kantian right.[118] Rather, it is a violation of some other norm. Often it is a norm of public law. For example, the law in England and Wales is that a payment of tax under *ultra vires* legislation is recoverable, even if the plaintiff made no mistake and was under no compulsion, and the defendant did nothing wrong.[119] This liability supports the constitutional principle that there should be no taxation without legislative authority. The public-law nature of this liability is made clear by the opposite rule which has been suggested for Canada, that to protect the public purse from "fiscal chaos," there should be a bar to recovery of any taxes paid pursuant to *ultra vires* legislation.[120] Similarly, claims might be allowed to encourage people to withdraw from illegal transactions.[121] In other cases, the policy is less clearly public, but ultimately it appears to be so. For example, assume that both the plaintiff and defendant are under a legal liability to pay a sum of money to a third party, but between plaintiff and defendant, the defendant is primarily liable; the plaintiff is a surety or in the character of one. If the plaintiff pays the third party, she has an action in unjust enrichment against the defendant.[122] This is usually classified in the texts as a case of pressure,

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117. BIRKS, *supra* note 4, at 294.

118. This kind of claim therefore provides an especially strong example of the utility of Aristotle's formal conception of corrective justice, independent of the idea of Kantian right which is, in other cases, its normative compass. *See* Barker, *supra* note 6, at 468-71. If that is right, then Weinrib's position would presumably be that only in cases of material gain *and* corresponding material loss can non-Kantian norms be plugged into Aristotle's model to turn the material gain and loss into a normative gain and loss. Such cases have a built-in element of correlativity so that the bilateral essence of corrective justice is not compromised by appeal to non-Kantian norms. Turning this around, Weinrib might say that Kantian right is the only normative structure which is able, for the purposes of corrective justice, to generate a bilateral, correlative normative nexus between the plaintiff and the defendant, in the *absence* of a nexus of material transfer, that is, in cases of loss without gain or gain without loss. If it were generally permissible to plug in non-Kantian norms, then all private law claims could be understood to be within Aristotle's corrective justice even if they arose to promote some functional goal, such as wealth maximization. *See generally* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981). Alternatively, to preserve the paramountcy of Kantian right, Weinrib might deny that these cases of policy-based unjust enrichment are explicable under corrective justice; but they do exist, and they look very much like Aristotle's model.

119. *See* Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs, [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.).

120. Proposed obiter by three of six judges in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, but now doubted by the majority in *Re Eurig Estate*, [1998] 2 S.C.R. 565, 586-87.

121. BIRKS, *supra* note 4, at 299-303.

122. *See* Brook's Wharf & Bull Wharf Ltd. v. Goodman Bros., [1937] 1 K.B. 534 (Eng. C.A. 1936).

under the subcategory "legal pressure."[123] The problem with this is that pressure only generates liability if it is illegitimate.[124] The third party, using or threatening legal process against the plaintiff, does not use an illegitimate form of pressure.[125] In fact, the claim will lie even if the plaintiff had yet to come under any legal liability.[126] It does not rest on faulty consent but simply on the law's ensuring that the burden of the liability falls on the right person. Corrective justice does not resolve the question of who is the "right person." In the case of a guarantor and a primary debtor, the right person is the primary debtor. That may be by agreement, in which case the allocation merely reflects the agreement. As we have seen, a contract is not a product of corrective justice, although it is clearly a private-law matter reflecting Kantian right. If there is no agreement, the same result will follow, apparently because the primary debtor is the one who had the benefit of the loan. Assigning burdens to go with benefits appears to be distributive justice, although again the context here is private law. The role of distributive justice is even clearer in the case of multiple coguarantors: the "right" result is that they should bear the burden equally,[127] unless their guarantees have different limits, in which case their burdens must reflect the proportions of their guarantee limits.[128] So in all of these cases of policy-based unjust enrichment, we seem to have a relationship which fits Aristotle's formal structure, but the normative input that identifies the transfer as violative of corrective justice is non-Kantian.

Finally, this reasoning can also help us to understand the interaction of contract law with unjust enrichment claims. In general, we find that all systems have a rule that excludes unjust enrichment claims when there is a subsisting contract between the parties. When we look more closely, we see this is an oversimplification.[129] Unjust enrichment claims are sometimes allowed in the presence of a valid contract because the contract does not speak to the status of the benefit in question.[130] In other cases, unjust enrichment claims are denied, even though the parties' contract no

123. GOFF & JONES, *supra* note 74, at 439-40.

124. Gordon v. Roebuck, 9 O.R.3d 1, 3 (1992) (Ont. C.A.).

125. Unless the threat of legal process amounts to extortion. *See* Stoltze v. Fuller, [1939] S.C.R. 235, 240.

126. *See* Stimpson v. Smith, [1999] Ch. 340 (Eng. C.A.). *Stimpson* was actually a case in which one coguarantor had discharged the guaranteed debt and sought contribution from the other coguarantor. He succeeded, even though he had paid before being legally liable to do so.

127. The result is the same even if, at the time the guarantees were given, the guarantors were unaware of one another. Dering v. Earl of Winchelsea, 126 Eng. Rep. 1276 (Ex. 1787).

128. Ellesmere Brewery Co. v. Cooper, [1896] 1 Q.B. 75 (Div'l Ct. 1895).

129. *See* Smith, *supra* note 76, at text accompanying notes 100-15; *see also* Jack Beatson, *Restitution and Contract: Non-Cumul?*, 1 THEORETICAL INQUIRIES IN LAW 83 (2000).

130. Hoffman v. Sportsman Yachts Inc., 89 D.L.R.4th 600 (1992) (Ont. C.A.).

longer exists, because the now-discharged contract does speak to the status of the benefit in question.[131] The true principle is that unjust enrichment claims, based on defective consent, are not allowed when there is a consensual distribution of risks and rewards. That consensual distribution is normatively operative to validate any transferred benefits and eliminate any prospect of normative gain or loss.[132]

III. Practice

This part of the Article focuses on the practical implications of this understanding of unjust enrichment and its relationship with corrective justice. It is somewhat notorious that problems of unjust enrichment liability become much more complicated when more than two parties are involved. This section will be devoted mainly to the implications of the theory set out above for some such problems.

A. Loss Not Equal to Gain

One practical implication should be mentioned first, as it applies even to two-party cases. What is to happen if the material loss of the plaintiff is not equal to the material gain of the defendant? This can happen, for example, when services are rendered by mistake. The defendant's enrichment may be less than the plaintiff's loss because the defendant may not value the particular services very highly.[133] The reverse might also be true, when the plaintiff lost little by performing the service, perhaps because there was no opportunity cost. Another example comes from *Vincent v. Lake Erie Transportation Co.*,[134] in which the defendant's boat was saved in a storm by damaging the plaintiff's dock. It is arguable that the gain in saving the boat was much greater than the loss, the damage to the dock. The problem has not been much addressed in the common law,

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131. Rillford Inv. Ltd. v. Gravure Int'l Capital Corp., 118 Man. R.2d 11 (1997) (Man. C.A.).

132. One consequence of this is that a policy-based claim *can* be made even in the presence of such a bargain because the normative flaw in the transaction is not inconsistent with the consensual bargain. *See* Smith, *supra* note 76, at text accompanying notes 111-15. Another consequence is that it provides a positive reason for excluding unjust enrichment claims (at least those that are not policy-based) when there is a bargain. *But see* Stephen A. Smith, *Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement*, 115 LAW Q. REV. 245 (1999); D.P. Visser, *Rethinking Unjustified Enrichment: A Perspective of the Competition Between Contractual and Enrichment Remedies*, [1992] ACTA JURIDICA 203, 205, 231-36.

133. The general rule in unjust enrichment is that the defendant's enrichment is measured according to his subjective preferences. *See* BIRKS, *supra* note 4, at 109-14. This can be understood as based on reasoning similar to that which justifies the defense of change of position, as explained in the next section: the plaintiff's claim being based on a violation of her Kantian right, she must respect equally the defendant's Kantian right; this implies that the defendant's valuation of the enrichment generally governs.

134. 124 N.W. 221 (Minn. 1910).

but some commentators assume that the defendant's gain is the measure of recovery; after all, they say, this part of the law is not about compensating plaintiffs but about taking away enrichments. This is an oversimplification, explicable only in the light of a continuing conflation of autonomous unjust enrichment and disgorgement for wrongdoing.[135] In the latter, of course, the defendant's gain is the measure of recovery; the plaintiff need not have any material loss. The normative basis of autonomous unjust enrichment is quite different. It is just as incorrect to say that it is about defendants' gains as it would be to say that it is about plaintiffs' losses.[136] It is about both; more precisely, it is about defective transfers.[137] In autonomous unjust enrichment, corrective justice is violated without wrongdoing. Defendants come under liabilities to pay without having done anything worthy of censure. This extraordinary state of affairs is explicable only by remembering that there has been a normatively flawed transfer. The transfer, not just the loss or the gain, is crucial to the foundation of this strict liability. It unites the parties and, because of the flaw, turns a material loss into a normative loss and a material gain into a normative gain. It follows that the measure of the transfer is the measure of the claim. In other words, the lesser of plaintiff's loss and defendant's gain

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135. *See* Peter Birks, *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, *in* COMPARATIVE LAW OF UNJUST ENRICHMENT (Reinhard Zimmerman & David Johnston eds., forthcoming 2001), text accompanying note 24, *available at* http://ouclf.iuscomp.org/articles/birks.htm ("German authors remind their readers that this is enrichment law, not impoverishment law."). The German doctrine is unhelpful here because German law is institutionally constrained to conflate unjust enrichment with disgorgement for wrongdoing; the *BGB* (*German Civil Code*) allows only compensation for wrongdoing. *See* BASIL S. MARKESINIS, ET AL., THE LAW OF CONTRACTS AND RESTITUTION 715 (1997) ("[R]estitutionary [disgorgement] damages are not recognized as a general measure of damages in German law."); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, (1995) 15 OXFORD J. LEGAL STUD. 403, 418 (explaining that in German law "an action in delict requires proof of damages" (meaning loss)). The German law that provides disgorgement of gains is therefore necessarily treated as part of unjust enrichment law, which therefore includes both disgorgement of gains and restitution of defective transfers, leading to the conclusion that plaintiffs in unjust enrichment need not have suffered any loss. Interestingly, the German law of disgorgement does not require legal wrongdoing, in the sense of conduct which, if harmful, would generate an obligation to compensate; it requires only an "encroachment" on the plaintiff's right. *See* MARKESINIS, *supra*, at 744. This can be squared with the argument in this Article only by understanding such an encroachment to be a violation of Kantian right and duty and hence normatively wrongful on the part of the defendant, even though the legal system avoids calling it a civil wrong (because such a label would entail compensation for loss caused). Just as there may be some normative violations which allow compensation for loss but not disgorgement of gains (negligence may be an example: Weinrib, *Restitutionary Damages*, *supra* note 6, at 6 n.6 (referring to the German doctrine on availability of restitution)), so German law recognizes some normative violations as allowing disgorgement of gains but not compensation for loss. Indeed, English law allows disgorgement of gains but not compensation for loss in the case of an unknowing breach of copyright. Copyright, Designs and Patents Act, 1988, c. 48, §§ 96-97 (Eng.); MARKESINIS, *supra*, at 744.

136. *See* Smith, *supra* note 4, at 696-98.

137. *See* Smith, *supra* note 69, at 414-25.

sets a limit.[138] The only way for a plaintiff to claim a loss she suffered, which does not correspond to a defendant's gain, would be to rely on wrongdoing, as in an ordinary tort case. The converse is also true: the only way for a plaintiff to claim a defendant's gain which did not correspond to a loss of the plaintiff would be to rely on wrongdoing, as generating disgorgement for the wrong.

B. Change of Position

The defense of change of position usually, but not necessarily, involves a third party. The defense allows the defendant to resist the claim, in whole or in part, on the basis of some other transaction, usually occurring after the defendant's enrichment. Naturally, there must be some connection with the transaction that generated liability in unjust enrichment. The usual connection is reliance: thinking that the wealth belonged to him, the defendant made expenditures he would not otherwise have made.[139] Of course, the defendant is disentitled from making this argument after he knows or ought to know that the wealth must be returned because from that point he can no longer establish reasonable reliance. One might ask how this defense, invoked by some dealing to which the plaintiff is not a party, can be squared with the bilateral nature of corrective justice. The explanation is that Kantian right requires the plaintiff to recognize the defendant's status as a self-determining agent. Before the defendant has any reason to suspect he is liable to a claim in unjust enrichment, he cannot be faulted for behaving as a self-determining agent, including through consuming that which he reasonably believes to be his own wealth. The plaintiff, whose claim is generally founded on Kantian right, must accept that the logic of Kantian right has implications for the defendant as well.[140] The defendant's reliance expenditures therefore reduce his

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138. This is the law of Quebec. *See* Art. 1493 C.C.Q. This is also the law of France. 2 JACQUES FLOUR & JEAN-LUC AUBERT, LES OBLIGATIONS 55-56 (8th ed. 1999). The reaction of some authors against this rule can be understood as based on reasons similar to those that apply in German law. *See supra* note 135. For example, Christian Filios suggests that the example of German law should be followed to permit disgorgement for wrongdoing. *See* FILIOS, *supra* note 76, at 248.

139. *See, e.g.*, Rural Mun. of Storthoaks v. Mobil Oil Can. Ltd., [1976] 2 S.C.R. 147; 3 GEORGE E. PALMER, LAW OF RESTITUTION § 16.8, at 523-27 (1978).

140. Care must therefore be taken with statements that the defense is concerned with whether the defendant was (or remains) enriched and not with whether the enrichment is unjust. *See, e.g.*, PETER BIRKS, RESTITUTION—THE FUTURE 99-100 (1992). This is true in the sense that the defense is measured exactly by the extent to which the defendant has changed his position; it is not all-or-nothing. It is also true in the sense that the defense need have nothing to do with the defect in the original transfer, that is, the factor which made the original enrichment unjust. But, it is misleading if it suggests that the defense is not based ultimately on an inquiry into justice. A defense could be truly and exclusively based on enrichment only if it were available to every defendant regardless of his state of mind. *See* GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 726 (1999). This is also why we cannot explain the defense of change of position by simply appealing to the principle

normative gain and hence his liability. It is important to note that because reliance establishes the connection between enrichment and expenditure, the expenditure on which the defendant relies need not be the very wealth received from the plaintiff.

Another version of the defense may be called the "disaster" version. Here, the defendant shows that the wealth received from the plaintiff has been consumed by some disaster; for example, it was deposited in a bank, which then went bankrupt.[141] As before, there must be some connection between the original enrichment and the transaction presented as constituting the defense. In this variant, the connection is not reliance, but rather that the wealth consumed was the very wealth received.[142] This explains why this version of the defense is available even in the case of a defendant who knew that the wealth must be refunded.[143] Again, this seems consonant with corrective justice. The plaintiff must acknowledge the defendant's status as a self-determining agent who acts in the world. Having put the defendant in possession of some wealth, the plaintiff can demand that it be returned, but she cannot demand that the defendant be the plaintiff's insurer against every possible peril. She can only demand that the defendant be as careful with the wealth as she, the plaintiff, would be if in possession of another's property. This is parallel to the case in which you are in possession of my pen; in general, you are not liable for failure to return it if it was destroyed by some event beyond your reasonable control, no more so than you would liable for a fall in its market value.[144] This explains why this version of the defense is only available to a defendant who has taken reasonable care with the wealth which he knew had to be returned.[145]

The argument above grounds the defense of change of position on a kind of Kantian reciprocity. If the plaintiff's claim is founded on Kantian right—on her status as a self-determining agent—she must reciprocally recognize the Kantian autonomy of the defendant. This justifies both

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discussed above, that the defendant's liability is always the lesser of the plaintiff's impoverishment and the defendant's enrichment.

141. Nat'l Bank of N.Z. v. Waitaki Int'l Processing (NI) Ltd., [1999] 2 N.Z.L.R. 211 (C.A.); *see* GOFF & JONES, *supra* note 74, at 818-28; Richard Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 135, 147-48 (Peter Birks ed., 1995); 3 PALMER, *supra* note 139, § 16.8, at 527-29.

142. Or its traceable value. SMITH, *supra* note 45, at 36-37. This would be a case in which the tracing rules were employed for a purpose other than establishing a proprietary right in the traceable proceeds so identified.

143. If the defendant did not know, the case could be explained within the reliance version just discussed.

144. Fairley & Stevens (1966) Ltd. v. Goldsworthy, 9 N.S.R.2d 600 (1973) (N.S. S.Ct. Trial Div.) (updating *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703)); *see* KLAR, *supra* note 39, at 73. In fact, it would seem to follow from my argument that even the reliance version of the defense should be available to a claim in detinue.

145. *Nat'l Bank of N.Z.*, [1999] 2 N.Z.L.R. at 211; SMITH, *supra* note 45, at 36-37.

versions of the defense. It was argued above that unjust enrichment claims which are policy-based are not based on Kantian right. It is significant to observe that there is an emerging current of thought that the defense of change of position may not be available to policy-based claims in the same way that it is available to other claims.[146] That would be consistent with the view advanced here.

C. *Third-Party Contracts*

A recurring problem is the case in which the plaintiff confers a benefit on the defendant, pursuant to the plaintiff's contract with some third party. For example, the plaintiff improves a house under a contract with the occupier. Later, the plaintiff finds out that the occupier cannot pay and that the occupier is not actually the owner of the house. Can the plaintiff recover in unjust enrichment from the owner? The answer is generally no, even if the defendant was enriched, and even if the plaintiff was under a mistake, say as to who owned the house.[147] A more common case involves a subcontractor, working on the owner's building under a contract with the general contractor. We try to protect subcontractors with such things as liens, holdbacks, and statutory trusts, partly for the very reason that we do not let them claim in unjust enrichment against the owner if the general contractor cannot pay.[148] We might explain the nonrecovery by saying that this is a case of indirect enrichment, in which the subcontractor enriches the general contractor and then the general contractor transfers the enrichment to the owner. But, on a plainer view, it is direct enrichment; the subcontractor enriches the owner by improving his building. If we are to say that the owner's enrichment really comes from the general contractor, we need to provide a justification for this conclusion. Birks argues that the subcontractor's contract with the general contractor is sufficient to conclude that the owner's enrichment is at the general contractor's expense.[149] The problem with this is that in unjust enrichment, I am not disqualified from saying an enrichment was at my expense merely because I was obliged to a third party to provide it. This

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146. *See* Smith, *supra* note 69, at 442 n.125; *see also* ANDREW TETTENBORN, LAW OF RESTITUTION IN ENGLAND AND IRELAND 254 (2d. 1996). If the general rule that a defendant's enrichment is measured by his subjective valuation is, like the defense of change of position, based on a kind of Kantian reciprocity, *see supra* note 133, it may similarly follow that in policy-based claims, this general rule will be displaced and enrichment should be measured objectively.

147. Nicholson v. St. Denis, 8 O.R.2d 315, 320 (1975) (Ont. C.A.); John P. Dawson, *Indirect Enrichment*, *in* IUS PRIVATUM GENTIUM 789, 805 (Ernst von Cæmmerer et al. eds., 1969) [hereinafter Dawson, *Indirect Enrichment*]; John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1444-50 (1974); Smith, *supra* note 76, at text accompanying notes 53-78.

148. Similarly, we do not let a stevedore claim in unjust enrichment against the freight owner where the charterer who retained the stevedore cannot pay. Furncan Marine Ltd. v. Ship MV Woodlands (Cargo Owners), 81 F.T.R. 278, 284-85 (1994) (Fed. Ct. Trial Div.) (Can.).

149. Birks, *supra* note 135, at text accompanying notes 28-43.

is demonstrated by the simple case in which I have guaranteed your debt, and I pay the debt. I can recover from you because your enrichment was at my expense.[150]

Another explanation is that in our case, the subcontractor having voluntarily contracted with the general contractor to confer the benefit, the normative nexus between the subcontractor and the owner is broken. The owner has a material gain, and the subcontractor a material loss; the subcontractor has a normative loss if there is some defect in his consent to the transaction. But the voluntariness of the subcontractor in entering the transaction means that, somewhat exceptionally, the normative gains and losses do not follow the material ones. The subcontractor's contract, even though it is with another party, negates any claim *against the owner* that the transfer was normatively flawed.[151] The owner has no normative gain, in his bilateral relationship with the subcontractor. It is a case of $P(1,1)$, $D(1,0)$.[152]

There is an interesting question about whether this reasoning will operate in a case in which the "contract" between the subcontractor and the general contractor turns out to be void. In German law, the enrichment claim is still excluded, which seems consonant with the analysis above.[153] The common law has not come to a firm conclusion. One could take the

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150. Birks's view, however, seems to have the following advantage. If it is the owner who is enriched by the subcontractor's work, it seems to follow that the general contractor is not enriched, because one impoverishment cannot generate two enrichments without violating the logic of transfer. But if the general contractor is not enriched, then in a case in which the contract between general contractor and subcontractor is void, there could be no unjust enrichment claim by the subcontractor against the general contractor. However, this is the very person whom we require the subcontractor to sue, by our rule that denies the subcontractor a claim against the owner. One solution would be to say that this kind of performance does enrich two people: it enriches the owner by improving his land, and it enriches the general contractor by discharging his contractual obligation. This still seems to contravene the logic of transfer, and, in any event, we would still want the subcontractor to have a claim in unjust enrichment against the general contractor even if the contract between general contractor and owner were void; so, there must be a sense in which the general contractor is enriched which does not rely on the discharge of his contractual obligation. The solution appears to lie in the extended idea of enrichment which arises when a person genuinely requests or bargains for action by another (as the general contractor requests and bargains for the work done by the subcontractor). In such a case, by a kind of estoppel reasoning, the person making the request is not allowed to deny that he was enriched by the requested work, even if in objective terms he was not enriched. Because this reasoning is based on the defendant's own conduct, it can also override the normal rule, *see supra* note 133, that enrichment is measured by the defendant's subjective preferences. *See* BIRKS, *supra* note 4, at 114-16; ANDREW BURROWS, THE LAW OF RESTITUTION 14-16 (1993); GOFF & JONES, *supra* note 74, at 18-22.

151. At least if the flaw were from the plaintiff's side; a claim based on unconscientious receipt, or a policy, would presumably be viable. This encompasses the case (which we have identified as policy-based) of the guarantor who pays the debt and claims against the primary debtor. This is a case of a benefit conferred under the plaintiff's valid contract with a third party, but every legal system grants recovery here.

152. *See supra* note 88 and accompanying text.

153. Smith, *supra* note 76, at text accompanying notes 53-68 and notes 100-15.

view that if the contract is void, it has no normative relevance;[154] but, there is much to be said for the German view, because the normative relevance of the contract is not so much in its legal status as a contract, but rather in the voluntary nature of the subcontractor's interaction with the general contractor. This conclusion would also square with our treatment of the simpler two-party case; there, we saw that it is merely shorthand to say that unjust enrichment claims are excluded by a subsisting contract between the parties.[155] The truth is that they are excluded by an applicable, consensual distribution of risks and rewards, which may be absent even in the presence of a contract and which may be present even in the absence of a contract.

D. Indirect Impoverishment: Passing on Impoverishment

There is some controversy about whether a defendant should be allowed to resist a claim in unjust enrichment with a defense of "passing on." This defense says that the plaintiff did not really suffer the loss, because she shifted it to someone else; there was some kind of reimbursement from a third party to the plaintiff. Most commonly, the case is about the recovery of improperly collected taxes, and the defendant taxing authority argues that the plaintiff business passed the burden of the tax on to its customers. Courts are divided on whether such a defense is valid.[156] Academics who have examined the question seem uniformly of the view that while the defense makes some sense in principle, it is extremely difficult to apply in practice, and this may be reason enough to reject it.[157]

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154. This appears to be the position of Birks, *supra* note 135, at text accompanying notes 34-43.

155. *See supra* text accompanying note 129.

156. The U.S. cases, which show a range of approaches but frequently allow the defense if the facts support it, are discussed in William J. Woodward, Jr., *"Passing-On" the Right to Restitution*, 39 U. MIAMI L. REV. 873 (1985). Three of six judges of the Supreme Court of Canada favored the defense in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 1202-03, stating that the law of restitution is not intended to provide windfalls to plaintiffs who have not suffered a loss, but it did not prevent recovery in the companion case, *Canadian Pacific Airlines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133 (allowing recovery of tax on aircraft and parts). Subsequent cases have struggled to reconcile these holdings, also taking the view that a sometimes complex factual inquiry is required. *See, e.g.*, Cherubini Metal Works Ltd. v. Nova Scotia, 137 N.S.R.2d 197 (1995) (N.S. C.A.); Gainers Inc. v. Canadian Pac. Ltd., 120 D.L.R.4th 143 (1994) (Alb. C.A.); Allied Air Conditioning Inc. v. British Columbia, 87 B.C.L.R.2d 207 (1993) (B.C. C.A.). The defense was rejected in *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.*, (1994) 182 C.L.R. 51 (Austl.). In England, it was left open in *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.), but later rejected in *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 (Eng. C.A. 1996).

157. *See, e.g.*, Francis Rose, *Passing On*, *in* LAUNDERING AND TRACING 261 (Peter Birks ed., 1995); Mitchell McInnes, *"Passing On" in the Law of Restitution: A Re-Consideration*, 19 SYDNEY L. REV. 179 (1997); Paul Michell, *Restitution, "Passing On," and the Recovery of Unlawfully Demanded*

What is the corrective justice analysis? It is not enough to say that because it is a transaction with a third party, the passing on is irrelevant between plaintiff and defendant. If that were enough, there could be no defense of change of position. The analogy with that defense implies that there must be a link between the plaintiff's impoverishment and the reimbursement which the plaintiff has received from whatever quarter. However, a causal link is not generally enough. The recipient of a mistaken payment from a plaintiff lawyer could hardly raise the defense by showing that the plaintiff, finding money tight after making the payment, raised his hourly rate by ten dollars and eventually recouped the amount. Similarly, a plaintiff had no right of recovery when, before suing the defendant, it had reimbursed another party that clearly had held a right to restitution against the defendant.[158] This must imply that the other party's claim could not have been met by the defense of passing on, arising out of the reimbursement. There could be no defense in such cases, even though the "passing on" transaction was clearly entered into as a response to the transaction which is later seen to be an unjust enrichment. The plaintiff's normative loss has not been reduced.

One can ask whether this reveals a dissonance with change of position; in that case, the defendant is allowed to bring into account dealings with third parties, so reducing his normative gain, as long as there is a rational connection between such dealings and the enrichment transaction on which the plaintiff relies. As we saw, the basis of both versions of the defense of change of position is that the plaintiff whose claim is based on Kantian right must recognize the defendant's Kantian right—that is, the defendant's status as a self-determining agent who acts in the world. The plaintiff must allow account to be taken of the defendant's dealings with wealth which the defendant reasonably thought was his own, and the plaintiff must allow account to be taken of supervening disasters. The logic of passing on seems different. The same reasoning, based on reciprocity, cannot be applied. The defendant now wants to bring into account conduct of the *plaintiff*, but is hard pressed to show why this conduct must be brought into the normative account. Unlike the case of change of position, it no longer seems that the logic of the plaintiff's claim requires it. The plaintiff's claim is based on a transfer that is inconsistent with her Kantian right. It follows from this that the extent of liability must be consistent with respect to the defendant's Kantian right (that is the justification for the defense of change of position). It does not follow that other conduct of the plaintiff

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Taxes: Why Air Canada *Doesn't Fly*, 53 U. TORONTO FAC. L. REV. 130 (1997); Woodward, *supra* note 156.

158. The Queen v. M. Geller, Inc., [1963] S.C.R. 629.

that is causally related to the transfer must be brought into account against the will of the plaintiff. One might say that if an unjust enrichment claim requires a loss on the part of the plaintiff, then an inquiry into passing on is necessary, as an inquiry into the extent of that loss.[159] However, this does not follow.[160] An ordinary claim for loss based on a tort requires a loss on the part of the plaintiff; it does not follow, however, that every transaction which the plaintiff has entered into as a result of the tort, and which mitigates her loss, inures to the benefit of the defendant. Quite the reverse: "collateral benefits" are generally ignored.[161]

Thus, the defense, it seems, should be generally unavailable, just as it is generally unavailable for claims for compensation based on wrongs. It is interesting to observe that almost every case in which it has been deployed, successfully or not, has a public-law basis.[162] Most of the cases are about wrongfully collected taxes, and the defense is deployed by the taxing authority, which claims that the plaintiff passed on the tax to its customers. We can first note a clear case in which recovery will be denied: when the court concludes that the plaintiff was not even the taxpayer but only acted as a collection agent.[163] The implication is that there can be recovery at the suit of the true taxpayer, the customers of the original unsuccessful plaintiff. It is often said that this is not so much passing on but an acknowledgement that the plaintiff only acted as an agent of the defendant.[164] Leaving that case aside, it would seem to follow similarly that in any case in which passing on as such is allowed as a defense, the implication must be that the proper plaintiff is the person who bore the burden of the defendant's enrichment, typically customers of the original plaintiff. There is some difficulty with this, however; if they sue the defendant, are they not liable to be met by the argument that they paid pursuant to a contract with a third party, namely the original unsuccessful plaintiff? According to the principles discussed in the previous section, this is enough to defeat their claim, even, it seems, if the contract (or the

159. As many have pointed out, such an inquiry is often intractable in any event, since passing on in the form of raising prices will have some indeterminate negative effect on demand for the plaintiff's product, thus reducing its revenue. *See, e.g.*, Michell, *supra* note 157, at 158-61.

160. Birks, *supra* note 135, text accompanying note 24, sees the rejection of the defense of passing on as supporting his argument that the plaintiff need not have suffered a loss, although he admits it is explicable otherwise. The Court of Appeal, rejecting passing on in *Kleinwort*, [1997] Q.B. at 380, seemed nonetheless to accept that in unjust enrichment the plaintiff must have suffered a subtraction.

161. *See* BURROWS, *supra* note 40, at 119-32; 1 DOBBS, *supra* note 40, at 266-69; S.M. WADDAMS, THE LAW OF DAMAGES 235-49 (3d ed. 1996).

162. In rejecting the defense in *Kleinwort*, the Court of Appeal left open whether it would be available in a case of wrongly collected taxes. *Kleinwort*, [1997] Q.B. at 388-91, 393-94.

163. *See* Canadian Pac. Airlines Ltd. v. British Columbia, [1989] 1 S.C.R. 1133; Twentieth Century Sporting Club v. United States, 34 F. Supp. 1021, 1023 (Ct. Cl. 1940).

164. *See* Woodward, *supra* note 156, at 878-80; McInnes, *supra* note 157, at 203-04.

part of it dealing with the taxes) is unenforceable. This in turn suggests that the defense cannot be allowed.

The ordinary logic of unjust enrichment law would seem to preclude the defense of passing on. Its persistent appearance in the public law context is perhaps only explicable on the ground that such cases do not always accord with the ordinary logic. As we have seen, the basis of the claim may be a policy that is independent of Kantian right.[165] Because of this, the defendant taxing authority may not have the benefit of the defense of change of position.[166] This public-law context may well be a factor in the willingness of some courts to depart from ordinary principles. It certainly seems to be a factor in the willingness of some legislators to enact versions of the passing-on defense for the benefit of taxing authorities, sometimes with the addition of a variation in the burden of proof.[167]

E. Indirect Enrichment: Passing on Enrichment

The really difficult cases are those of indirect enrichment, in which the defendant has received the enrichment, not directly from the plaintiff, but remotely, through one or more intermediaries. Many years ago, John Dawson made a call for the common law to reassess itself on this score.

> The main difficulty is that we do not recognize any basic or clear distinction between direct and indirect enrichment. Our own processes of growth have obliterated any clear lines of this kind. Both through quasi-contract and constructive trust we give remedies for enrichment very indirectly received. It is true that such situations are not normal. . . .[168]

> The German limitations on recovery of third-party enrichment suggest to me that we should take another look at "privity." The term itself was unfortunate, for it was a transparent attempt to limit quasi-contract recovery by a test imported from express contract. The "want of privity" objection has been beaten down almost everywhere; the grant of the quasi-contract remedy creates whatever privity is needed.[169] Yet through that unhappy term the earlier courts were expressing a dimly felt sensation that it was a mistake to

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165. *See supra* note 117 and accompanying text.

166. *See supra* note 146 and accompanying text.

167. *See* United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386 (1934); 2 ENGLISH PRIVATE LAW, *supra* note 37, at 635; *See* Michell, *supra* note 157, at 161-65.

168. DAWSON, *supra* note 77, at 122.

169. *Cf.* Smith, *supra* note 69, at 420.

> become involved in these multi-party confusions where quasi-contract would short-circuit a series of interconnected transactions, without joinder of the parties involved at intermediate stages. The use of quasi-contract seems convenient and often is, but no great need is served, and if nonrepresented parties have interests left unprotected, the attempt to short-circuit will merely multiply the confusion. These considerations are very inadequately expressed by the conception "want of privity." We should be able to express them in other terms and to re-establish the notion that it is unwise and risky to cut across successive payments or transfers, to bring back the gain to the person who appears to be ultimately entitled.[170]

Let us try to express these considerations in other terms. The implications of the views so far presented are these. Strict liability in unjust enrichment depends on both a material gain to the defendant and a material loss to the plaintiff. Moreover, the loss and the gain must be two sides of the same coin; there must be a transfer of wealth from plaintiff to defendant. Only in this way can we justify liability through a one-sided normative flaw in the transaction. In the absence of a nexus between the parties generated by a transfer of wealth, the only way to activate corrective justice is by another kind of nexus, a violation of Kantian right and duty. Mere causal connection between plaintiff and defendant is not enough—any more than it is in negligence[171]—because it does not carry enough normative force.

In understanding indirect enrichment, we need to put aside cases that only look like indirect enrichment. Assume that a third party, *X*, pays money to the defendant in such a way that the payment discharges an obligation previously owed by *X* to the plaintiff.[172] There are three parties, but these facts show a direct transfer of wealth from the plaintiff to the defendant. Unless some features of the transaction between *X* and the defendant activate legal policies to protect transactional security—that is, something like bona fide purchase—then the plaintiff will have a claim against the defendant. Another type of case is only a subset of this. The plaintiff enriches *X* in a way that generates a liability in unjust enrichment. *X* then makes a payment to the defendant, the circumstances of which are such that *X* satisfies the requirements of the defense of change of position and so becomes immune to a claim by the plaintiff. This is the same kind of case: discharging one's debt by paying someone who is not actually the

170. *See* DAWSON, *supra* note 77, at 126-27.

171. *See* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

172. For examples of how this can happen, see Lionel D. Smith, *Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction*, 11 OXFORD J. LEGAL STUD. 481, 487-504 (1991).

creditor.[173] As before, this is a two-party case, in which the payment by *X* to the defendant has the twin effects of enriching the defendant and impoverishing the plaintiff, in other words, effecting a transfer of wealth directly from plaintiff to defendant. Subject to defenses, the defendant is liable. This liability is not a case of indirect enrichment.[174]

1. Tracing.—The clearest situation in which a claim can be made against a remote party is when the plaintiff is able to show that she holds ownership rights in a thing received by the defendant. This will allow either or both a *vindicatio* or an allegation of wrongdoing against the defendant. Neither of these claims is a claim in autonomous unjust enrichment. In our law, we have a more mysterious possibility, which is that if you possess something I own (call it *A*), and you transfer it away in exchange for something else (call it *B*), then I can claim ownership of *B*.[175] Sometimes it can be difficult to decide whether one asset was purchased with the value in another, but this is largely a matter of the detailed working out of the implications of the basic case.[176] After the plaintiff has ownership rights in the new asset, of course, they operate against third parties much like any other ownership rights, and so they can generate liability of remote recipients. Also, as with other ownership rights, they carry with them the benefit that if the owned thing rises in value, this benefit accrues to the owner. The effects of our law of tracing are unsurprising, once we grant that the plaintiff has ownership rights in a substitute asset. Are these results inconsistent with the theory being presented in this Article? This would be the case only if claims to traceable substitutes are built on the same corrective justice foundations as those claims in autonomous unjust enrichment which reverse defective transfers of wealth.[177]

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173. This principle, turning a three-party case into a two-party case, cannot be activated by a showing that it was merely factually likely that the enrichment would have come to the plaintiff had it not gone to the defendant. *See* Hunter Eng'g Co. v. Syncrude Can. Ltd., [1989] 1 S.C.R. 426; Smith, *supra* note 172, at 487. Otherwise, unjust enrichment law would be turning probabilities or opportunities into entitlements.

174. This might be thought to weaken the argument in Birks, *supra* note 135, at text accompanying notes 76-93, which relies on a number of cases like this to argue for a general liability of remote recipients linked only causally to the plaintiff.

175. This was dramatically illustrated in *Foskett v. McKeown*, [2000] 2 W.L.R. 1299 (H.L.) (appeal taken from Eng.). As that case made clear, the plaintiff can choose not to assert ownership of the substitute, but only a security interest in it. *Id.* at 1325-27. If the plaintiff's original interest was by way of security, she can assert a security interest in the substitute. *Id.* at 1322-40.

176. *See generally* SMITH, *supra* note 45, at 119-32 (explaining the exercise of tracing assets).

177. This is assumed without argument in Birks, *supra* note 135, who uses a number of tracing cases to argue in general that the plaintiff in unjust enrichment need not have suffered a loss because such cases reveal (a) liability of remote recipients and (b) liability in excess of plaintiff's loss.

The justification for this kind of ownership of substitutes is a thorny question.[178] Civilian systems tend not to permit it. It does not depend on any wrongdoing, either by the recipient[179] or even by the person making the substitution.[180] For this reason, and because it takes away what would otherwise be an asset of the substitutor acquired with wealth belonging to the plaintiff, it looks like unjust enrichment. But if it is, it seems clearly to be a different kind of unjust enrichment.[181] One might say that when the substitutor transfers away asset *A* in exchange for asset *B*, asset *B* is acquired, in a sense, "at the expense of" the plaintiff, because it is acquired by the use of the plaintiff's asset. But this is a very different meaning of "at the expense of" from the one we normally use in autonomous unjust enrichment. Although there was a transfer of wealth from the plaintiff to the substitutor when the latter acquired asset *A*, there is not another transfer when the substitution is made. The substitutor does not get asset *B* as a transfer from the plaintiff, the owner of *A*; rather, he gets *B* from (at the expense of) some third party.[182] We might say that "at the expense of" should be understood broadly to include direct transfers and also unauthorized abstractions from another's patrimony.[183] However, if "at the expense of" identifies two different parties in the same set of facts, as it does in our example, it seems clear we are using it in two different senses that are mutually exclusive. We are not just widening it to encompass defendants not within a narrower sense; we are making it incoherent by imprecision and equivocation. Moreover, the plaintiff's rights in asset *B* do not depend on any inquiry into reasons for restitution; they are automatic.[184] The difference is perhaps clearest when we consider the nature of the tracing rules, which tell us when asset *B* counts as the traceable product of asset *A*. These rules depend on transactional links, not on causation.[185] It is necessary and sufficient that asset *B* was acquired with the value in asset *A*. If those transactional rules identify asset *B* as the traceable product of asset *A*, it is irrelevant whether *B* would have been acquired in any event, so that its acquisition is not a causal outcome of the acquisition of asset *A*.[186] Conversely, if those

178. SMITH, *supra* note 45, at 303-10.

179. *Foskett*, [2000] 2 W.L.R. at 1299.

180. *In re* Diplock, [1948] Ch. 465 (Eng. C.A.).

181. Smith, *supra* note 69, at 414-25.

182. This is made perfectly clear if we imagine that the third party reclaims asset *B* from the substitutor, say on the basis that he transferred it by mistake.

183. This is the gist of Birks's *At the Expense of the Claimant*. *See supra* note 135.

184. This is not only the holding in *Foskett* but also in every other case of claims based on tracing.

185. This was the central issue in *Foskett*; the court chose the transactional approach, which is the law in all jurisdictions that allow such claims. *See* SMITH, *supra* note 45, at 315-20.

186. *See* Foskett v. McKeown, [2000] 2 W.L.R. 1299 (H.L.) (appeal taken from Eng.).

transactional rules do not identify asset *B*, then it is irrelevant that the acquisition of asset *B* was a causal outcome of the acquisition of asset *A*.[187] The transactional approach fits only with an understanding that property rights in a substitute asset arise as a response to a dealing, not necessarily wrongful, with the original asset. It is the outcome of a (logically contingent) decision about how robustly ownership rights will be protected; under this regime, they are not lost upon unauthorized alienation of the subject matter but are effectively transferred to substitutes. Of course, if this works for a single substitution, it works for multiple substitutions. This feature of our law is not based on corrective justice any more than any rule that creates property rights is based on corrective justice.[188]

In the context of this regime, though, the liabilities of third parties who receive such substitute assets are based on corrective justice, just as in the case of their receipt of original assets. They are based either on wrongful interference or on *vindicatio*. These are liabilities connected with a particular asset, unlike unjust enrichment, which is triggered by transfers of wealth understood abstractly.[189] The manifestations of these liabilities are usually through claims based on trusts arising by operation of law. The wrong-based liability for interference with original trust property is called "knowing receipt" of trust property.[190] The same liability can be imposed on a remote recipient who receives a traceable product.[191] The *vindicatio* is through a declaration of trust, that is, a declaration that the defendant holds the asset in question in trust for the benefit of the plaintiff.[192]

2. Liability for Indirect Enrichment Without Property Rights?.—This finally brings us to the most difficult case. The discussion is best understood in the context of a particular dispute. In *Lipkin Gorman v. Karpnale Ltd.*,[193] the plaintiffs were a firm of solicitors.[194] The rogue,

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187. The opposite has occasionally been suggested. *See generally* Simon Evans, *Rethinking Tracing and the Law of Restitution*, 115 LAW Q. REV. 469 (1999); Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in U.C.C. 9-306*, 68 CORNELL L. REV. 172 (1983). However, the argument has never been very successful. *See* Smith, *supra* note 45, at 315-20. It is based on the same misunderstanding that my argument here attempts to refute.

188. *See supra* section II(B)(1).

189. Smith, *supra* note 69, at 414-25.

190. Citadel Gen. Assurance Co. v. Lloyds Bank Can., [1997] 3 S.C.R. 805.

191. *See* El Ajou v. Dollar Land Holdings Plc., [1994] 2 All E.R. 685 (Eng. C.A. 1993).

192. *See* Foskett v. McKeown, [2000] 2 W.L.R. 1299 (H.L.) (appeal taken from Eng.); *In re* Diplock, [1948] Ch. 465 (Eng. C.A.).

193. [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.).

194. *Id.* at 568.

Cass, was a partner.[195] He extracted money from the firm's trust account, called a "client account" in England, to support his gambling habit.[196] He withdrew more than £200,000 and gambled it away at a casino belonging to the defendant.[197] Under English law, a gambling contract is unenforceable;[198] the legal effect in this case was that the defendant was treated as a donee, not a purchaser for value. Because the money in the account was held in trust, and indeed, Cass as a partner was one of the trustees, it goes without saying that the withdrawn money was held in trust. Because the defendant was a donee, it could not take the money clear of the preexisting trust interest. Two obvious possibilities exist: if and to the extent that the plaintiffs could locate in the coffers of the defendant the traceable proceeds of the withdrawals, they could obtain a declaration that those proceeds were held in trust and should be returned. This is, effectively, a *vindicatio*. The other possibility would be based on wrongdoing: the plaintiffs could have said that the defendant committed a wrong by dealing with money that belonged beneficially to another. This wrong, however, depends on a level of fault; it must be true that the defendant knew, or ought to have known, about the trust. The difficulty with the first course is the tracing exercise; with the second, the proof of fault.

The plaintiffs did neither of these things. They sued the defendant for "money had and received to the use of the plaintiff."[199] This obscure form of words tells us very little about how we should understand the claim being made; it is the name of a subspecies of *indebitatus assumpsit*, one of the old forms of action. It applies to claims that are clearly unjust enrichment claims, like mistaken payments, but also to other kinds of claims.[200] In any event, it is a common-law claim that does not depend on trusts. The plaintiffs succeeded. If we try to work out the basis of the liability in less opaque terms, we have a difficult job. There are at least three current theories. Each finds some support in the judgments, but each has some difficulty. One theory says it is just a case of the receipt of another's property; it has nothing to do with unjust enrichment.[201] The liability is strict just as in conversion, and just as in conversion it arises at the moment of receipt. The strength of this theory is that the judgments refer to the money gambled away by Cass as "their money" and "their

195. *Id.*
196. *Id.*
197. *Id.* at 569.
198. Gaming Act, 1845, 8 & 9 Vict., c. 109, § 18 (Eng.).
199. *Lipkin Gorman*, [1991] 2 A.C. at 553.
200. SMITH, *supra* note 45, at 333-35; *see also* Edelman, *supra* note 45, at 547; Fox, *supra* note 45, at 465.
201. *See* GRANTHAM & RICKETT, *supra* note 48, at 34-35; VIRGO, *supra* note 140, at 593-94.

property." They also make it clear that the reason that the plaintiffs needed to trace from their bank account into the cash withdrawn was to establish exactly this: that the defendant received the plaintiffs' money. The weaknesses are that the judgments expressly put the liability in terms of unjust enrichment and go on to allow the defendant a defense of change of position, which is not available in conversion. The judgments also have an express finding that Cass himself was the legal owner of the money he withdrew; this finding, in fact, negated liability in conversion, which the plaintiffs would have preferred, because it was not subject to the defense.[202] So this theory does not fit the judgments or the result, and it must be rejected.

Another theory is that the case has nothing to do with the assertion of property rights by the plaintiff and is just a case of unjust enrichment, which illustrates the possibility of liability for indirect enrichment.[203] The defendant was liable in unjust enrichment, at the moment of receipt. This fits with the unjust enrichment language of the judgments, the availability of the defense of change of position, and the holding that the cash belonged to Cass. It does not, however, explain the concern with tracing and with what was said to flow from tracing—namely, that the plaintiffs could establish some kind of title to the money paid to the defendant. The argument is that the tracing exercise shows that the defendant was enriched "at the expense of" the plaintiff, in that it shows a causal connection.[204] But, as we have seen, that is a very different sense of "at the expense of" from the one we normally use. In that normal usage, the defendant's enrichment was "at the expense of" Cass because of a nexus of transfer from Cass to the defendant. Similarly, the only enrichment which was "at the expense of" the plaintiffs was Cass's.[205] But the normative flaw in the plaintiffs' enrichment of Cass cannot somehow create a normative link to the defendant when there is nothing but causation between the plaintiff and the defendant, no more than it can do so in negligence.[206] The defendant had a material gain, and the plaintiffs a material loss; the plaintiffs' loss was normatively flawed, making it a normative loss. But in the absence of a nexus of exchange and

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202. *Lipkin Gorman*, [1991] 2 A.C. at 548. The defendant was liable for conversion of a bank draft Cass had procured; the amount of cash involved in the main claim dwarfed the value of this draft. *Id.*

203. Birks, *supra* note 135, at text accompanying note 77.

204. *See* Birks, *supra* note 135, at text accompanying note 89.

205. Lipkin Gorman v. Cass (Ch.D. May 19, 1985) (unreported).

206. *Cf.* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928). In *At the Expense of the Claimant*, *supra* note 135, text following note 90, Birks says exactly the opposite: his causal argument "merely asserts that, subject to bona fide purchase and change of position, an unjust enrichment in the immediate recipient is an unjust enrichment in one who received through the immediate recipient and because of his receipt." But, the justice of this is never made clear.

therefore of any normative nexus between the parties, the defendant's gain was not normative.[207] This view also misunderstands the role of tracing: as we have seen, the tracing inquiry is not causal. If Cass had gambled his own money, there could be no liability, regardless of causal connection.[208] Again, there is a serious lack of fit with the judgments because they clearly focus on tracing as a way of showing that the plaintiffs had some ownership rights in the money.

I have favored a kind of intermediate position.[209] This agrees with the first view in saying that the liability was based on the receipt of an asset in which the plaintiffs had a proprietary right. It seems clear that this was a crucial step in the case. It would not have been enough for Cass to have gambled with his own money, not even if this was causally made possible by the misappropriations. Tracing requires transactional links, not causal links. This account also says that the defendant's liability can be understood as based on unjust enrichment. However, it cannot be unjust enrichment as we normally understand it because the defendant did not receive a transfer of wealth from the plaintiffs. The plaintiffs were not connected to the defendant through a nexus of transfer. In the discussion of tracing, it was suggested that there might be another kind of unjust enrichment, in which "at the expense of" did not mean "by transfer from" but rather "by (nonwrongful) interference with the asset of" the plaintiff. There, this concept was posited as generating ownership rights in substitute assets. One way of understanding *Lipkin Gorman* is that the same concept is at work, generating a personal right at the moment of receipt by the defendant. The liability is strict, as is transfer-based unjust enrichment, and as is the liability for wrongful interference with common-law rights of property.[210] But as a kind of unjust enrichment, the claim is susceptible to the defense of change of position. This theory fits the most salient aspects of the judgments, including their insistence that the liability was in unjust enrichment and that the defendant received the plaintiffs' money in some sense. A weakness of this theory is that it posits a hitherto unknown kind of common-law property right. If the defendant became liable at the moment it received, then the plaintiffs must have had a common-law property right in the money at that moment. But what was it? It was not ownership, because Cass was held to be the owner and because otherwise

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207. There is a normative link if the asset received by the defendant belonged to the plaintiff, but the theory under discussion purports to generate liability in the absence of that link. This is therefore another case of $P(1,1)$, $P(1,0)$, such as the subcontractor suing the owner. *See supra* subpart III(C).

208. It was accepted on all sides that there could be no liability for that sum of money, £20,050, which the plaintiffs could not prove to be traceably derived from their own bank account.

209. *See* Smith, *supra* note 69, at 414-25.

210. *See supra* section II(B)(3).

the defendant would have been liable in conversion. It was some innominate right.[211]

In the light of the discussion of corrective justice in this Article, it seems that there is a serious flaw with both of the theories based on unjust enrichment, that is, the second and third theories. The earlier discussion showed that the crucial feature of unjust enrichment, which justifies strict liability in the absence of wrongdoing, is the nexus of defective exchange between plaintiff and defendant. In the absence of that nexus, the plaintiff must find another way to make the defendant liable. Of course, it is always possible that there was wrongdoing; here, there is no need for a nexus of exchange, as Weinrib has shown. So, if the defendant wrongfully interferes with the plaintiff's asset, there will be a violation of corrective justice. But there is no wrongdoing in *Lipkin Gorman*. It was suggested above that proprietary rights can be established in traceable proceeds by showing a nonwrongful interference with the plaintiff's asset, but that result is not based on a breach of corrective justice. My own idea, that the same kind of nonwrongful interference with another's asset can generate an obligation of restitution at the moment of receipt, therefore seems to be left without foundation.[212] It cannot be made to fit the requirements of corrective justice because it does not require either wrongdoing or a nexus of transfer.

There is only one other possible explanation: the *vindicatio*, a claim to vindicate property rights held at the time of the claim. Here, too, corrective justice can be violated without wrongdoing, because there is a nexus of a different sort in the form of the vindicated asset. Can *Lipkin Gorman* be understood with this idea? It seems that it can. All of the theories set out above are based on the premise that the defendant became strictly liable at the moment of receipt, subject to the defense of change of position. But in fact, nothing in the judgments supports the assumption that liability arose at the moment of receipt; it is quite the reverse, as we will shortly see. Moreover, if liability arose at the moment of receipt, there would be not only a difficulty of justification with corrective justice, as described above, but also a tremendous puzzle about the law as it is. On all of the theories discussed above, a recipient of money who is not a good-faith purchaser for value without notice can be made strictly liable, subject only to the defense of change of position, as long as the plaintiff (i) was legally the owner of the money in its original form, (ii) did not consent to its removal, and (iii) can trace his original value into the money

211. *See* SMITH, *supra* note 45, at 335-39.

212. This was the import of my analysis of *Lipkin Gorman* in *Unjust Enrichment, Property, and the Structure of Trusts*, but I expressed some doubt. *See* Smith, *supra* note 69, at 432 n.80.

received by the defendant. If that were generally the case, then every large-scale, international fraud would be argued by plaintiffs in terms of *Lipkin Gorman*. This would relieve plaintiffs from the burden of proving fault, which is necessary when they rely on trust theories because the wrongful receipt of trust property requires a level of cognition. But all of the cases, even after *Lipkin Gorman*, are argued in "knowing receipt of trust property."[213]

If *Lipkin Gorman* is a *vindicatio*, what is the property right being vindicated? We have seen that Cass owned the money he paid. Birks has long argued that proprietary claims to traceable proceeds do not arise at the moment of substitution but depend on the exercise of a power.[214] Thus, in bringing the claim, the plaintiff exercises the power and vindicates the property right which thereby vests in her.[215] Then we do not need an innominate interest; the property simply vests wholly in the plaintiff. Whatever the interest or power over traceable proceeds, we have seen that the question when such an interest or power arises is not one that corrective justice can solve; but, just as in tracing cases handled via trusts, it seems that an unauthorized substitution will generate the interest or the power. Then we can read *Lipkin Gorman* as merely requiring the defendant to return to the plaintiffs the subject matter of the plaintiffs' right. Much of the language in the judgments supports this reasoning, as does other case law. First, take *Clarke v. Shee*,[216] relied on heavily in *Lipkin Gorman*. The plaintiff's servant, Wood, took bank notes belonging to the plaintiff and bought lottery tickets with them from the defendant.[217] The transaction was illegal, so Wood was not a bona fide purchaser.[218] Lord Mansfield said:

> [T]he money and notes which Wood paid to the defendants, are the identical notes and money of the plaintiff. Where money or notes

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213. *See* El Ajou v. Dollar Land Holdings Plc., [1994] 2 All E.R. 685 (Eng. C.A. 1993); *see also* Bank of Credit and Commerce Int'l (Overseas) Ltd. v. Akindele, [2000] 3 W.L.R. 1423 (Eng. C.A.); Houghton v. Fayers, [2000] Lloyd's Rep. Bank 145 (Eng. C.A. 1999); Trustor AB v. Smallbone (No. 2), No. Chan. 1999 0787/3, 2000 WL 544171 (Eng. C.A. May 9, 2000); Twinsectra Ltd. v. Yardley, [1999] Lloyd's Rep. Bank 438 (Eng. C.A.).

214. BIRKS, *supra* note 4, at 393-94.

215. However, when a defendant is liable for a wrong in receiving the traceable proceeds, as in the cases cited above, *see supra* note 213, it seems that as a matter of logic the plaintiff must have had the interest at the moment of the defendant's receipt. Trust interests arising by operation of law, therefore, seem to arise at the moment of substitution. The difference is not surprising given the systematically different behavior of legal and equitable property rights, and more importantly their different effects on third parties. *See* SMITH, *supra* note 45, at 356-61; Smith, *supra* note 69, at 428-36.

216. 98 Eng. Rep. 1041 (K.B. 1774); *see also* Calland v. Loyd, 151 Eng. Rep. 307 (Ex. 1840).

217. *Clarke*, 98 Eng. Rep. at 1041-42.

218. *Id.* at 1043.

> are paid *bonâ fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *malâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. . . . Here the plaintiff sues for his identified property, which has come to the hands of the defendants iniquitously and illegally, in breach of the Act of Parliament. Therefore they have no right to retain it; and consequently the plaintiff is well entitled to recover.[219]

This language certainly seems to be describing a *vindicatio.* Another case which featured prominently in *Lipkin Gorman* was *Banque Belge pour l'Étranger v. Hambrouck.*[220] Here, a rogue misappropriated the plaintiff's money and paid some of it to Spanoghe, who was a donee. When the frauds came out, the balance in her account was £315, although she had received much more than that. Her bank was named as a defendant until it paid this amount of money into court. The plaintiff sought a declaration that the money belonged to it. The case does not suggest that the defendant was liable for the full amount that she received, although to be fair the plaintiff did not seek such an order. Here is what Millett, J., as he then was, said about it in *Agip (Africa) Ltd. v. Jackson*:

> I think that at first instance I am bound to regard that case as authority for the proposition that an action for money had and received is not limited to the immediate recipient or his principal but may be brought against a subsequent transferee into whose hands the money can be followed *and who still retains it.* But it is no authority for the proposition that it lies against a subsequent transferee who has parted with the money, and I doubt that it does. At this remove the action begins to take on the aspect of a proprietary claim rather than the enforcement of a personal liability to account. Should it be sought to impose personal liability on a person who has parted with the money, recourse can be made to equity which has developed appropriate principles by which such liability can be determined. The alternative is to expose an innocent transferee who has dissipated the money to a claim at law where none would exist in equity and to make that liability depend on the fortuitous circumstance that the money had not been mixed with other money prior to its receipt by him. Such a difference in outcome cannot be justified as reflecting the fact that in one case the defendant is being required to account to the former legal owner while in the other he is accounting merely to an owner in equity, for the equitable remedies are available to the

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219. *Id.*
220. [1921] 1 K.B. 321 (Eng. C.A.).

> former legal owner who has been deprived of his property as the result of a breach of fiduciary obligation.[221]

This brings us to *Lipkin Gorman*[222] itself. Although it is usually understood to be based on the idea that the defendants became liable at the moment of receipt, consider these passages from the speech of Lord Templeman:

> The club was enriched as and when Cass staked and lost to the club money stolen from the solicitors amounting in the aggregate to £300,000 or more. But the club paid Cass when he won and in the final reckoning the club only retained £154,695 which was admittedly derived from the solicitors' money. The solicitors can recover the sum of £154,695 which was *retained* by the club if they show that in the circumstances the club was unjustly enriched at the expense of the solicitors. . . . In my opinion in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched *and remained* unjustly enriched. . . . If the club was in the same position as a donee, the club nevertheless in good faith allowed Cass to gamble with the solicitors' money and paid his winnings from time to time so that when the solicitors sought restitution, the club only *retained* £154,695 derived from the solicitors. The question is whether the club which was enriched by £154,695 *at the date when the solicitors sought restitution* was unjustly enriched. . . . At the date when the solicitors claimed restitution the club had recovered all its own money and were left with £174,745 net winnings. The club is entitled to assert and the solicitors cannot disprove that £20,050 of the net winnings was money which had belonged to Cass. There remained £154,695 which must have been money stolen from the solicitors. My conclusion is that the club has no right to retain stolen money received by the club from the thief. *Repayment by the club to the victim, limited to the net amount of stolen money which the*

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221. *Agip (Africa) Ltd. v. Jackson*, [1990] 1 Ch. 265, 287-88 (1989) (emphasis added). The reference to mixing is probably a red herring, inasmuch as "common-law tracing" should no more be stifled by mixing than "equitable tracing." SMITH, *supra* note 45, at 162-74. This means that Mr. Justice Millett's concerns, which are concerns about liabilities that do not accord with corrective justice, must be taken even more seriously than he supposed. It should also be noticed that elsewhere in his judgment, Mr. Justice Millett said that liability arises on receipt by the defendant and is *not* generally discharged where he has parted with the money. *Jackson*, [1990] 1 Ch. 265, 282, 285. This was affirmed on appeal. *Agip (Africa) Ltd. v. Jackson*, [1991] Ch. 547, 563 (Eng. C.A. 1990). To reconcile these seeming inconsistencies, the references to liability arising on receipt must be understood to be references to defendants who receive directly from the plaintiff and who are liable in subtractive unjust enrichment.

222. Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.).

> *club retains*, will not inflict a net loss on the club as a result of the transactions between the club and the thief. In the present case money stolen from the solicitors by Cass has been paid to and is now *retained* by the club and ought to be repaid to the solicitors. The solicitors will recover part of their stolen money and the club will only lose the winnings the club was not entitled to make out of the solicitors' money.[223]

Although this can be read as premised on strict liability for the sums received, it can surely more fairly be read as based on a liability to repay that which is retained. Here is what Lord Goff said, after discussing *Clarke v. Shee*:

> It is to be observed that the present action, like the action in *Clarke v. Shee* and *Johnson*, is concerned with a common law claim to money, where the money in question has not been paid by the appellant directly to the respondents—as is usually the case where money is, for example, recoverable as having been paid under a mistake of fact, or for a consideration which has failed. On the contrary, here the money had been paid to the respondents by a third party, Cass; and in such a case the appellant has to establish a basis on which *he is entitled to the money. This (at least, as a general rule) he does by showing that the money is his legal property*, as appears from Lord Mansfield's judgment in *Clarke v. Shee* and *Johnson*. If he can do so, he may be entitled to succeed in a claim against the third party for money had and received to his use, though not if the third party has received the money in good faith and for a valuable consideration. The cases in which such a claim has succeeded are, I believe, very rare (see the cases, including *Clarke v. Shee* and *Johnson*, collected in Goff and Jones, *The Law of Restitution*, 3d ed. (1986), p. 64, note 29 [now 5th ed. (1998), pp. 97-98, note 59]). This is probably because, at common law, *property in money, like other fungibles, is lost as such when it is mixed with other money.* Furthermore, it appears that in these cases the action for money had and received is not usually founded upon any wrong by the third party, such as conversion; nor is it said to be a case of waiver of tort. It is founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money—or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money.[224]

Again, Lord Goff seems to be thinking more about the plaintiffs' establishing current ownership, rather than a liability which arose in the

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223. *Id.* at 559-60, 563 (emphasis added).
224. *Id.* at 572 (emphasis added).

past, at the moment of the defendant's receipt. Consider his comment that most such claims fail because the plaintiff loses its property rights upon mixing. This is probably not actually right;[225] but, if it were right, it would be totally irrelevant if the liability arose on receipt. Two more cases can be mentioned. One is *F.C. Jones & Sons (Trustee in Bankruptcy) v. Jones*.[226] Here, a partnership went bankrupt, and its property vested in the trustee. The defendant nonetheless received checks in the amount of £11,700, drawn by a partner on the partnership account, and paid them into another account with a commodities broker.[227] She speculated successfully so that her account grew to £50,760; this money was paid into a deposit account at another firm, Raphaels. The trustee in bankruptcy claimed the account; Raphaels interpleaded, and paid the money into court. The trustee's claim succeeded on the basis that the money in court belonged to the trustee.[228] Finally, *Trustor AB v. Smallbone*[229] involved an international fraud on a large scale. Money was misappropriated from Trustor AB and paid to Introcom (International) Ltd. and other parties. Before the trial, Introcom had repaid such money as remained in its account; one question was its personal liability for the much larger sums it had received earlier. Sir Richard Scott, V.C., said:

> Under English law the owner of the moneys, Trustor, is entitled to restitutionary remedies. Trustor's remedy to recover the money *still held in Introcom's account* was a straightforward common law remedy for money had and received. . . . In addition, Trustor is entitled, under English law, to treat Introcom as a constructive trustee of the money it received from the Trustor account.[230]

All of these cases suggest that, in circumstances of misappropriation, the victim may assert not only a trust interest in the traceable proceeds, but also an interest recognized by the common law. The nature of this interest is something of a mystery, but its creation, as with the creation of any property right, is not governed by corrective justice. If the plaintiff can show interference with assets he owns at common law, he can invoke the strict-liability property torts. If he can only show that the plaintiff received the traceable proceeds, he will not have these torts, but he will, it seems,

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225. *See* SMITH, *supra* note 45, at 162-74.

226. [1997] Ch. 159 (Eng. C.A. 1996).

227. The checks were written and paid before the trustee was appointed, but under pre-1986 English law, his title to the assets of the bankrupts "related back" to the act of bankruptcy, which happened before the checks were written.

228. Millett, L.J. said that the claim would have prevailed even in the bankruptcy of the defendant. His view was that the trustee could have recovered directly from Raphaels, because the debt represented by the deposit account was vested in the trustee. *F.C. Jones & Sons*, [1997] Ch. 159 at 170. Lord Justice Nourse based recovery on *Clarke v. Shee*. *Id.* at 172.

229. No. Chan. 1999 0787/3, 2000 WL 544171 (Eng. C.A. May 9, 2000).

230. *Id.* para. 60 (emphasis added).

have a *vindicatio*: he will be able to make the defendant liable in respect of that which the defendant retains at the time the claim is brought. This could be realized through a claim for a declaration, or through detinue or replevin; or, in the case of money, through the action for money had and received.[231] The liability of remote recipients cannot be understood as based on autonomous unjust enrichment, in its usual role of reversing defective transfers, nor should such liability be understood as based on a strict liability that arises at the moment of receipt of another's property. These liabilities would not be consistent with corrective justice. Unjust enrichment liability crucially depends on a nexus of transfer between the plaintiff and the defendant, which is lacking in such cases. Strict liability based on receipt by a remote recipient would be structurally like a liability for wrongdoing, that is, lacking a nexus of transfer between the plaintiff and the defendant, but it would be missing the element of wrongdoing that is necessary under corrective justice to justify liability in such a case.[232] The inappropriateness of such a liability is clear from the passage from Millett, J. in *Agip (Africa) Ltd. v. Jackson*.[233] It is also made clear by the simple fact that, although *Lipkin Gorman* is generally understood as allowing strict liability for remote receipt of traceable proceeds, it has never been applied in this way since it was decided. That general understanding seems flawed.

Three counterarguments must be addressed. One argument is that the claim in money had and received only alleges a debt, not a continuing right of property. This may seem formalistic, but my argument is to a large extent formal, just as corrective justice is a formal understanding of justice.[234] My claim is that against a remote recipient who has done nothing wrong, the only *form* of claim that is appropriate is the form, "that is mine." If the claim in "money had and received to the use of the plaintiff" cannot be understood as such a claim, this would be a defect in my argument. It is true that money had and received only alleges a debt, but debts arise for all sorts of reasons: consent, wrongdoing, and unjust enrichment. Debts can also arise through the retention of another's thing.

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231. It must also be true that this *vindicatio* would lie in respect of the plaintiff's original asset. *See* Clarke v. Shee, 98 Eng. Rep. 1041 (K.B. 1774). However, in such a case the defendant is likely to be liable in conversion, which is more attractive from the plaintiff's point of view because liability attaches at the moment of conversion and is not subject to a defense of change of position. Where the asset in question was money, the plaintiff could choose between conversion and money had and received to make the defendant liable for a wrongful dealing; there was no real difference in the days before the development of the defense of change of position. *See* Calland v. Loyd, 151 Eng. Rep. 307 (Ex. 1840); Holiday v. Sigil, 172 Eng. Rep. 81 (K.B. 1826); *see also* Edelman, *supra* note 45, at 561-66.

232. In *Lipkin Gorman*, Lord Goff explicitly stated that the defendant could not retroactively be made a wrongdoer by the plaintiffs' claim. Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, 573 (H.L.) (appeal taken from Eng.).

233. [1990] 1 Ch. 265 (1989). *See also supra* note 221 and accompanying text.

234. *See supra* subpart II(A).

A claim can still be a *vindicatio*, that is, a claim of the form, "that thing is mine," even if it is the case that if the claim succeeds, the result will only be that the defendant will owe the plaintiff a debt measured by the value of the thing.[235] It is a common mistake to think that a claim can only be a *vindicatio* if it generates specific recovery, and it is a further mistake to go on to infer that any claim that generates only a debt cannot be based on an existing right of property.[236]

"Money had and received to the use of the plaintiff" can therefore function as a *vindicatio* if it is true that *one* of the ways for a plaintiff to show that the money received earlier is now held "to the use of the plaintiff" is to show that the money now belongs to the plaintiff.[237] There is certainly a historical justification for this because when it was originally coined, the phrase "to the use of the plaintiff" was understood to allege the same "use" that was the forerunner of the modern trust.[238] It also seems to be the best way to understand what is otherwise a difficult passage in Lord Goff's speech in *Lipkin Gorman*.[239]

Another counterargument to this understanding of *Lipkin Gorman* is that in the case itself, the plaintiffs did not have to trace beyond the moment of receipt by the defendant to establish how much of the plaintiffs' money (or its traceable proceeds) the defendant still held. The tracing exercise was conducted only to the moment of receipt by the defendant; the

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235. *See supra* note 36.

236. It was perhaps to counter this mistake that Millett, L.J., as he then was, said in *F.C. Jones & Sons (Trustee in Bankruptcy) v. Jones*, [1997] Ch. 159, 168 (Eng. C.A. 1996), that the common law recognizes proprietary claims but not proprietary remedies.

237. We already know that there are many ways for a plaintiff to show that the money is had and received "to her use," corresponding at least to wrongdoing and subtractive unjust enrichment. *See* SMITH, *supra* note 45, at 333-35; *see also* Edelman, *supra* note 45, at 547.

238. In this regard, the roots of the action for money had and received "to the use of the plaintiff" lie in the common-law action of account, the development of which was contemporaneous with the flourishing of the use. BAKER, *supra* note 38, at 412, 419; John H. Baker, *The History of Quasi-Contract in English Law*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 37, 48-49 (W.R. Cornish et al. eds., 1998). Since the present article was written, Fox has elaborated in detail the historical reality of the vindication of property rights through the action for money had and received. Fox, *supra* note 45.

239. *See* Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.). Lord Goff said:

> So, in the present case, [i] the solicitors seek to show that the money in question was their property at common law. But [ii] their claim in the present case for money had and received is nevertheless a personal claim; [iii] it is not a proprietary claim, advanced on the basis that money remaining in the hands of the respondents is their property.

Id. at 572. I have added the numerals to assist in analysis. It seems that (iii) is inconsistent with (i), and (iii) is certainly inconsistent with the passage set out above. *See supra* note 224 and accompanying text. Clearly, he intended in (ii) to stress that the claim only gave rise to a debt. The best way of understanding (iii) seems to be in contrast with this: the claim was not one for specific delivery but only for a debt. The best way of understanding (i), especially in conjunction with the passage set out above, *see supra* note 224, is as a statement that the debt described in (ii) arises because the defendant was in possession of something that belonged to the plaintiff.

only subsequent inquiry was into the defense of change of position. This seems to support the argument that liability arose at the moment of receipt, subject to defenses. To respond to this, we must first observe that the defense of change of position seems properly available to proprietary claims to traceable proceeds, which is the proposed understanding of *Lipkin Gorman*.[240] The extent of liability, on my model, is therefore the wealth owned by the plaintiffs but possessed by the defendant at the time of the claim, less any change of position. The judgments seem to be working from the same model, as demonstrated by the extracts set out above. The only substance to the counterargument is this: there should have been some inquiry about whether any of the plaintiffs' money received by the defendant was dissipated before the claim. But that is exactly the inquiry that was undertaken when the defense of change of position was addressed. So the objection narrows to a matter of the burden of proof: according to my approach, it was for the plaintiffs to prove how much of their wealth was still held by the defendant at the time of claim, but in the case, this was viewed as a matter of defense. The burden of proof was a nonissue in *Lipkin Gorman*, as all of the relevant figures were agreed.[241] The response to this counterargument shows that the practical difference

240. It was argued above, *see supra* section II(B)(1), that proprietary claims based on tracing are not explicable as sourced in corrective justice. This does not entail that they cannot be subject to the defense of change of position. The defense, it was argued, *see supra* subpart III(B), involves respect for the defendant's Kantian right and must be allowed to every claim that is founded on the plaintiff's Kantian right. An adequate explanation of proprietary claims to traceable proceeds must start from the plaintiff's Kantian right, as reflected in her pretransaction property holdings. *See supra* note 26. The point of the argument in section II(B)(1) is that the explanation must then go on to address other issues beyond corrective justice because the creation of any proprietary right implicates third parties. Most writers agree that the defense should be available to proprietary claims to traceable proceeds. *See, e.g.*, Nolan, *supra* note 141, at 175-85; Peter Birks, *Overview*, *in* LAUNDERING AND TRACING 289, 326-27 (Peter Birks ed., 1995); SMITH, *supra* note 45, at 384-85. Indeed the implication of my argument is that the defense, or something like it, should be available in respect of a *vindicatio* of original assets (as opposed to traceable proceeds) because that claim is also founded on a Kantian right. The "disaster" version is recognized in detinue but apparently not yet the "reliance" version. *See supra* note 144.

241. It also seems possible that the failure of the court to address the question of tracing from the moment of the defendant's receipt until the time of claim was the result of a misunderstanding. In the Court of Appeal, counsel for the plaintiffs had argued that he could trace the plaintiffs' value to the time of the claim. Lipkin Gorman v. Karpnale Ltd., [1989] 1 W.L.R. 1340, 1350 (Eng. C.A.). In argument before the House of Lords, counsel submitted that liability was complete upon receipt. Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, 553, 557 (H.L.) (appeal taken from Eng.). But this submission in the House of Lords was based on the judgment of the Court of Appeal in *Agip (Africa) Ltd. v. Jackson*, [1991] Ch. 547 (Eng. C.A. 1990), which had been decided after the Court of Appeal's judgment in *Lipkin Gorman*. As we have seen, *see supra* note 221, the statement by the Court of Appeal in *Agip* that liability was complete upon receipt must be understood as referring to a case of direct transfer between the plaintiff and the defendant, not to a case (such as *Lipkin Gorman*) of an indirect recipient. For indirect recipients, Millett, J. said at trial in *Agip* that the principle was quite different, *see supra* note 221, and the Court of Appeal did not comment on this statement.

between my model and one based on liability at the moment of receipt may, in many cases, simply be a question of the burden of proof; but this can be an important issue in many cases, particularly when the defendant is bankrupt.[242] Moreover, it is surely important to have a model of liability that stands up to scrutiny in terms of a coherent notion of justice.

The final counterargument, which comes from high authority, also relates to change of position and the burden of proof.[243] If plaintiffs are limited against remote recipients either to claims based on wrongdoing or claims to vindicate existing rights of property, a gap is said to arise. Assume that a defendant nonwrongfully receives the plaintiff's property. He then consumes it, still unaware of the problem, perhaps spending the money on a special holiday. Now there can be no *vindicatio*, nor is there any other liability. If he would not have taken the holiday but for the enrichment he received, the facts fit the defense of change of position, and his nonliability bothers no one. But, what if he were going to take that holiday anyway? The argument is that it would be improper for him to escape liability on such facts. Although he no longer has the plaintiff's specific asset, he remains enriched in a "bottom line" way because he would have used other assets to pay for the trip in any event. But, if the plaintiff's only claim is in the nature of a *vindicatio*, it seems that there will be no liability.

The key to meeting this objection is to note that it appears to jump between two modes of juristic analysis. Against this remote recipient, unjust enrichment, with its abstract conception of enrichment, appears to be unavailable because there is no nexus of transfer. The only way to generate a liability is to focus not on abstract enrichment but on property rights that inhere in specific things. The plaintiff's only juristic link to the defendant is that the defendant received a specific thing in which the plaintiff had rights. But the specificity of property rights has consequences: the rights stand or fall with their subject matter. This means

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242. At trial in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1994] 4 All E.R. 890 (the point was not mentioned in the appeals, [1994] 1 W.L.R. 938 (Eng. C.A. 1993), [1996] A.C. 669 (H.L.)), it was held that the burden of proof in tracing after receipt could properly be reversed against a solvent wrongdoer. This may be correct, Lionel Smith, *Tracing*, *in* LESSONS OF THE SWAPS LITIGATION 233, 236-38 (Peter Birks & F. Rose eds., 2000), but it could not apply in the case of a defendant who was not a wrongdoer (like the defendant in *Lipkin Gorman*), and it is clear on authority that it does not apply in insolvency. It may also be observed that the effect of placing the burden of proof on the plaintiff may be diminished (at least outside of insolvency or death of the defendant) by the effect of the rules of pretrial discovery, especially because noncompliance with these can itself be enough to count as wrongdoing which will justify the reversal of the burden. *See* Gray v. Haig, 20 Beav. 219, 52 E.R. 587 (M.R. 1855).

243. Lord Nicholls of Birkenhead, *Knowing Receipt: The Need for a New Landmark*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 231-37 (W.R. Cornish et al. eds., 1998); Peter Birks, *The Burden on the Bank*, *in* RESTITUTION AND BANKING LAW 189, 207-08 (Francis D. Rose ed., 1998).

outcomes can seem unfair.[244] If everyone on my street parks in the road, but only my car is destroyed by fire or stolen, this might seem very unfair; but it is a consequence of what we mean by "mine" and "yours," and there is no way to spread the loss. In our case, the defendant's destruction of the property was innocent; as far as corrective justice is concerned, it is just as though the thing were destroyed by an act of God. No claim based on ownership can be made.

However, the loss of this juristic link between plaintiff and defendant is not necessarily the end of the analysis. The point of the objection is that the defendant remains enriched in a "bottom line" or abstract way. This is not relevant to a claim based on ownership of a particular thing; we are concerned with abstract enrichment only in claims based on defective transfers of wealth, that is, subtractive unjust enrichment. The key to meeting this objection is to see that on the facts presented, even though there can be no *vindicatio*, a claim in subtractive unjust enrichment can be made. A famous German case is instructive. In the "case of the young bulls,"[245] the plaintiff's bulls were stolen by a thief. The thief sold them to the defendant, who ran an abattoir. At that moment, the bulls still belonged to the plaintiff, and he could have brought a *vindicatio.* However, the defendant turned the bulls into meat products. Under the rules of *specificatio* (the making of a new thing), this meant that the defendant owned the meat products, even though the plaintiff had been the owner of the bulls up to the moment before they were processed. Hence, the plaintiff could not now have a *vindicatio* against the defendant. Nonetheless, he succeeded in unjust enrichment. The *specificatio*, which transferred ownership from plaintiff to defendant, generated an unjustified transfer of wealth from plaintiff to defendant. The same is true of the example in the counterargument now being addressed. The consumption of the plaintiff's money by the defendant impoverishes the plaintiff, whether or not the consumption satisfies the defense of change of position. If the consumption does not satisfy the defense of change of position and leaves the defendant enriched, even in an abstract way, then the facts reveal a transfer of wealth from plaintiff to defendant: a two-party case of unjust enrichment by subtraction. Just as in the case of the young bulls, the defendant is liable.

This further shows that the practical difference between the approach based on corrective justice and that based on strict liability of remote recipients is fairly small, turning largely on the locus of the burden of

244. In LIONEL D. SMITH, THE LAW OF TRACING, *supra* note 45, at 303-04, this is called the "Principle of Unfairness."

245. BGHZ 55, 176 (F.R.G.). For an English translation of this German Supreme Court case, see 1 B.S. MARKESINIS ET AL., THE GERMAN LAW OF OBLIGATIONS 786 (1997).

proof. But the difference is important if we want the law to be based on a sound theory of justice. The response to this final counterargument confirms the general rule: there can be no liability to a remote recipient who is not a wrongdoer, unless the facts reveal either a proprietary link or a nexus of transfer between plaintiff and defendant. If there is a proprietary link, the liability is in the nature of a *vindicatio*. If there is a nexus of transfer, then the defendant is not really a remote recipient; he was directly enriched and can be liable in subtractive unjust enrichment.

IV. Conclusion

The insistence on structural aspects as crucial to liability may strike some as pedantic. However, a defendant cannot be made liable simply because she has a gain, the plaintiff has suffered a loss, and there is some kind of causal connection between the two. More is required. The liability of any party, a remote or immediate recipient or not a recipient at all, can of course be justified by wrongdoing. In the case of remote recipients of property, that might be wrongful interference with equitable interests under a trust or with assets legally owned. If there is no wrongdoing by the defendant, the possibilities for liability are sharply limited by corrective justice. One possibility is autonomous unjust enrichment, but this simply will not work against a remote recipient. The requirement that the defendant's gain correspond directly with the plaintiff's deprivation is not arbitrary or technical but rather plays a crucial role in showing a violation of corrective justice without wrongdoing. This liability cannot be available against a remote, third-party recipient. Only one possibility remains in the absence of wrongdoing: that the defendant remains in possession of the plaintiff's asset. In our system, though not as a matter of corrective justice, ownership rights extend to traceable proceeds, so "the plaintiff's asset" may be something the plaintiff has never seen before. In either case, the *vindicatio* will lie, consistently with corrective justice.

After discussing the desirability of drawing a doctrinal distinction between direct and indirect enrichment, Dawson said:

> It seems to me, then, that the distinction in German law between "direct" and "indirect" enrichment provides a limitation that we have partially adopted. But the fact remains that we have only partially adopted it and it is too late to impose it in a clear and decisive way, even if we were persuaded that we should. We therefore lack an essential safeguard, one that permits great generosity within the limits it defines.[246]

246. DAWSON, *supra* note 77, at 127.

In *Regional Municipality of Peel v. Canada*,[247] McLachlin, J. said:

> While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice. . . . It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant. This limit is also recognized in other jurisdictions. For example, German restitutionary law confines recovery to cases of direct benefits . . . .

So Dawson's pessimism may not have been justified. If justice demands such a distinction, it can be incorporated. This Article has argued that justice does demand it and has tried to show that the law has more than adequate tools on the workbench to get the job done.

247. [1992] 3 S.C.R. 762, 797-98. This passage is consistent with the passages from Lord Millett's judgment in *Agip (Africa) Ltd. v. Jackson*, [1991] Ch. 547 (Eng. C.A. 1990), *see supra* note 221, and Lord Goff's speech in *Lipkin Gorman*, *see supra* note 224, both of which suggest that remote recipients can be made liable only when there is a proprietary link to the plaintiff.