

RESTITUTION WITHOUT CORRECTIVE JUSTICE

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I. INTRODUCTION

In recent times it has been claimed that corrective justice can justify from a moral point of view the duty to make restitution in private law.¹ I doubt that it can. The purpose of this article, however, is not to try to show that corrective justice cannot explain the duty to make restitution in private law at all. Rather, its purpose is the more limited one of showing that there is one case in which restitution is awarded in private law that definitely cannot be given a moral justification in terms of corrective justice.

Why does this matter?² There are, after all, exceptions and hard cases for any theory of law. The reason for why it matters is that the case of restitution that corrective justice definitely cannot explain is the case of the mistaken payment. The mistaken payment is the case that unjust enrichment lawyers, lawyers who use the concept of unjust enrichment as a legal explanation for the duty to make restitution, regard as unjust enrichment's central or core case.³

This is problematic for some of these unjust enrichment lawyers. It is problematic because some of these lawyers have nailed their colours to the mast of corrective justice as *the* moral foundation for unjust enrichment.³ Yet, corrective justice, I will argue, does not justify their central case.

Part II of this article will show why it is that the case of the mistaken payment is generally regarded to be unjust enrichment's central case. Part III will argue that corrective justice cannot explain the right to restitution in the case of the mistaken payment. The final part of the article, part IV, will conclude with a discussion of what

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¹ The claim has been made most notably by corrective justice's leading advocate Ernest Weinrib: E.J. Weinrib, *The Idea of Private Law* (London 1995), pp. 140–142; E.J. Weinrib, "The Gains and Losses of Corrective Justice" (1994) *Duke Law Journal* 277; E.J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 *Theoretical Inquiries in Law* 1.

² A. Burrows, *The Law of Restitution*, 2nd ed., (London 2002), p. 130. Cf P. Birks, *Unjust Enrichment*, 2nd ed., (Oxford 2005), ch. 1.

³ Included in this group are: A. Burrows, *The Law of Restitution*, p. 455; A. Burrows, "Contract, Tort and Restitution – A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217, 256; G. Virgo, *The Principles of the Law of Restitution* (Oxford 1999), p. 5; L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 *Texas Law Review* 2115; M. Rush, *Passing On to Disimpoverishment: A Loss Based Defence in the Law of Unjust Enrichment* (Oxford forthcoming), ch. 7. R.B. Grantham and C.E.F. Rickett, *Enrichment and Restitution in New Zealand* (Oxford 2000), pp. 43–46; K. Barker, "Unjust Enrichment: Containing the Beast" (1995) 15 *O.J.L.S.* 457, 468–474; K. Barker, "Understanding the Unjust Enrichment Principle in Private Law" in J.W. Neyers, M. McInnes and S.G.A. Pitel (eds.), *Understanding Unjust Enrichment* (Oxford and Portland Oregon 2004), pp. 97–101.

the options are, in light of my critique, for those unjust enrichment lawyers who have argued that corrective justice is the moral foundation for unjust enrichment.

The article is, therefore, not so much intended as an attack on the corrective justice principle itself (although, of course, indirectly, it is) but, rather, more as an attack on those unjust enrichment lawyers who argue that corrective justice is the moral justification for unjust enrichment.

II. UNJUST ENRICHMENT'S CORE CASE

If you are paid money by mistake you have a duty (defences aside) to return that money or its value to the mistaken payer. This is true even in the case where you are an innocent recipient of the money, *i.e.*, you had no idea that the money being paid to you was being paid because of a mistake.⁴

Why is this generally regarded to be unjust enrichment's core case? Two reasons are usually given. The first of these is that in a case where C pays D money by mistake it is impossible to say that D has a duty to return that money because D promised or agreed to give the money back. In other words, it is impossible to say that the reason for why there is a duty to return the money is because of the existence of a contract. Absent a promise or an agreement there is no contract.

Nor is it possible to say that the reason for why D has a duty to return the money is because D did something wrong to C. To say that D did something wrong is to say that D breached a duty that she owed to C. However, to say that D had a duty not to receive a mistaken payment from C makes no sense. For this may well have been a duty that D through no fault of her own simply could not have complied with. Therefore, there is no question that D's liability arises because of the existence of a tort, or an equitable wrong, or because of a breach of contract. There was no wrong.⁵

The result of this is that the two reasons for why obligations to pay are usually imposed in private law, *i.e.*, because of the existence of a contract or because of a wrong, are absent in this case. Some other explanation is needed. This brings us on to the second reason for why it is that the mistaken payment is generally regarded to be unjust enrichment's core case.

The second reason is that the mistaken payment is a clean unjust enrichment case. It is clean not only in the sense that there is no question that liability is based on some other cause of action, *i.e.*, contract or tort, but it is clean in the sense that the facts of the mistaken payment case cleanly satisfy the criteria for the cause of action in unjust enrichment. The criteria for the cause of action in unjust enrichment are: (1) that the defendant be enriched, (2) at the expense of the claimant, and (3), that the enrichment be

⁴ *Kelly v. Solari* (1841) 9 M&W 54, 152 E.R. 24.

⁵ P. Birks, *Unjust Enrichment*, pp. 8–9.

unjust (or, alternatively, that there be a reason for restitution that is not a contract or a wrong).⁶

In the case where money is mistakenly paid to another there is no question that the recipient of the money is enriched. There is no question because money is the very measure of value.⁷ Therefore, with respect to the first criteria for liability in unjust enrichment, the mistaken payment case is a clean or easy case.

The second criteria for liability in unjust enrichment, is that the gain made by the defendant be at the expense of the claimant. In the core mistaken payment case there is no question that the gain made by the defendant is not at the expense of the claimant. It is at the claimant's expense in the sense that the gain is a subtraction from the claimant's wealth. The gain is drawn or comes from the claimant's wealth. It corresponds to the claimant's loss.

Therefore, the second criterion for liability in unjust enrichment, the at the expense of criterion, is cleanly satisfied in the core mistaken payment case. No one denies the truth of the fact that the defendant in the core mistaken payment case is enriched at the expense of the claimant.

The third and final criterion for establishing the cause of action in unjust enrichment is that the enrichment be unjust. There is no disagreement that in the case of a mistaken payment the enrichment at a claimant's expense is unjust.

There are two dominant and competing interpretations of why an enrichment at another's expense is unjust. One interpretation is that such an enrichment is unjust if there exists in the circumstances of the particular case a recognised ground for restitution. These grounds have been described as 'unjust factors'⁸ or as 'grounds for restitution'.⁹ It is universally agreed and it is trite law that a mistake is an unjust factor or ground for restitution.¹⁰ The reason usually given for why mistake is a well-recognised ground for restitution is that the mistake makes the transfer of the benefit non-voluntary.¹¹ The basic reason for restitution in the mistake case then is that the claimant did not mean for the defendant to have the benefit in question.¹² The claimant's intention was vitiated by the mistake.¹³

⁶ *Ibid.*, at pp. 39-40. G. Jones (ed.), *Goff and Jones on Restitution*, 6th ed., (London 2002), para. [1-017]. K. Mason and J. Carter, *Restitution Law in Australia* (Sydney 1996), para. [203].

⁷ P. Birks, *An Introduction to the Law of Restitution* (Oxford 1985), p. 108.

⁸ P. Birks, *An Introduction to the Law of Restitution*, p. 8. A.S. Burrows, *The Law of Restitution*, p. 42. K. Mason and J. Carter, *Restitution Law in Australia*, para. [227].

⁹ G. Virgo, *The Principles of the Law of Restitution*, p. 9.

¹⁰ G. Virgo, *The Principles of the Law of Restitution*, p. 120; P. Birks, *An Introduction to the Law of Restitution*, p. 101. A. Burrows, *The Law of Restitution*, p. 42. G. Jones (ed.), *Goff and Jones on Restitution*, para. [1-053]. K. Mason and J. Carter, *Restitution Law in Australia*, para. [227]. *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 A.C. 349, 408-409, *per* Lord Hope.

¹¹ P. Birks, *An Introduction to the Law of Restitution*, p. 100. G. Jones (ed.), *Goff and Jones on Restitution*, para. [1-053]. G. Virgo, *The Principles of the Law of Restitution*, p. 50. A. Burrows, *The Law of Restitution*, p. 130.

¹² P. Birks, *An Introduction to the Law of Restitution*, p. 100.

¹³ *Ibid.*, at p. 101. G. Virgo, *The Principles of the Law of Restitution*, p. 120.

The unjust factors or grounds for restitution approach to unjust can be contrasted with the civilian absence of basis¹⁴ or absence of juristic reason approach.¹⁵ According to this approach any enrichment that cannot be justified has to be given up. The onus is on the defendant to explain the enrichment. The enrichment can only be explained if it falls within a recognised explanation. There must be a putative explanation for the enrichment if it is to be kept.¹⁶ The underlying assumption of this approach is that enrichments are received with particular purposes in mind. If those purposes succeed then the enrichments can be rendered explicable. If they do not they cannot be. Such purposes include discharging obligations, making gifts, satisfying conditions, or making new contracts.¹⁷

Even if we adopt the absence of basis or juristic reason approach to unjust we can see that a mistaken payment will still be regarded as unjust for the purposes of establishing a cause of action in unjust enrichment. The reason is that according to this approach an enrichment has to be given up where either there is no putative basis for the enrichment or where the putative basis falls away. In the core mistaken payment case we can say that the basis of the transfer was, for example, the discharge of an obligation. In fact there was no obligation. In these circumstances the putative basis falls away. Therefore, the recipient of the payment cannot bring herself within a recognised category of explanation, *i.e.*, discharge of an obligation. The defendant has no entitlement to the enrichment and has, therefore, to give it up.¹⁸

It is apparent, therefore, that whichever of the two dominant approaches to unjust is adopted the case of a mistaken payment is clearly a case that meets the criterion. It is universally accepted that a mistake is an unjust factor and it is universally accepted that where a payment is made in discharge of a non-existent debt the basis of that payment fails. Whichever approach is adopted the result is the same: where there is a mistaken payment the defendant has an obligation to make restitution to the defendant.

It is, therefore, clear why it is that the case of the mistaken payment is generally regarded to be unjust enrichment's core case. Though there is considerable

¹⁴ P. Birks, *Unjust Enrichment*, Part III. R. Goff and G. Jones (eds.), *Goff and Jones on Restitution* 3rd ed. (London 1993), pp. 29–51. *Woolwich Equitable Building Society v. IRC* [1993] A.C. 70; *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1994] 4 All E.R. 890, *per* Hobhouse J.

¹⁵ Dickson J., in *Rathwell v. Rathwell* [1978] 2 S.C.R. 436, 455, 83 D.L.R. (3d) 289; *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257; P.D. Maddaugh and J.D., McCamus, *The Law of Restitution* (Ontario 1990), p. 32, pp.45–46.

¹⁶ P. Birks, *Unjust Enrichment*, p. 43.

¹⁷ *Ibid.*, at pp. 102–103.

¹⁸ *Ibid.*, at p. 103. Peter Jaffey argues that the absence of basis approach (or, at least, Peter Birks' account of it) confines recovery for mistake to mistakes as to the legal effect of a transfer. He argues that it would exclude recovery in cases of mistaken gifts. These are cases where a gift was intended but where the claimant was mistaken about a fact that prompted her to make it. In these cases the intention to make a gift is fulfilled. P. Jaffey, "Classification and Unjust Enrichment" (2004) 67 (6) M.L.R. 1012, 1029. If Jaffey is right about this there is good reason to confine the core case to the case of a mistaken payment of a non-existent debt. Peter Birks does indeed confine the core case to this set of facts: P. Birks, *Unjust Enrichment*, ch. 1. However, Andrew Burrows does not: A. Burrows, *The Law of Restitution*, p. 130. There is also, of course, good reason, if Jaffey is right, to reject the absence of basis approach (or, at least, Birks' rendition of it).

controversy over whether certain cases meet the criteria for the cause of action in unjust enrichment there is no such uncertainty over whether the case of the mistaken payment does. It clearly meets the three criteria for the cause of action in unjust enrichment. There is no doubt that the receipt of a mistaken payment is an unjust enrichment at the expense of the claimant.

Further, there is no way in which it can be said that the duty to make restitution in this case is grounded on the existence of another source of legal obligations and rights, *i.e.*, contract or tort. Unjust enrichment appears to be the only explanation for why there is a duty to repay in this case.

III. CORRECTIVE JUSTICE

Corrective justice theorists make the claim that liability in private law is triggered when an unjust gain is made by a defendant which correlates to a loss made by the claimant. The gains and losses are caused by an injustice committed by the defendant. The result of this is that a pre-transactional equality that existed between the two parties is disrupted. The defendant is required to restore the balance that existed between the parties before the defendant's act of injustice disrupted it.

According to one account of corrective justice the post-transactional imbalance between the parties is caused by the defendant breaching a duty that she owed to the claimant. The defendant makes a 'normative' gain by breaching a duty that was owed to the claimant and the claimant loses normatively because her rights are infringed because of the breach of duty committed by the defendant. According to this account there is a norm that governs the interaction between the parties. The norm determines the entitlements of the two parties. Where the norm is violated one party gets more and the other less than they were entitled to.¹⁹ Therefore, a normative imbalance results. The doer of the harm is required to undo the harm or the resultant imbalance between the parties by compensating the claimant with money.²⁰

What justifies the norms that govern the interactions between parties? The norms exist in order to ensure that an agent's action is consistent with the freedom of others who may be affected by the action of the agent: 'Action is therefore consistent with the freedom of others when it is compatible with their rights.'²¹ Therefore, to violate one's duty or to interfere with another's rights (the two are the same thing) is to act in a way that is inconsistent with another's freedom. Freedom at one and the same time justifies the duty and the right.²²

It is difficult to see how this breach of duty or wrongdoing conception of corrective justice can explain the duty to make restitution of a mistaken payment. There is, on its face at least, no breach of duty or wrongdoing on the part of the recipient of the mistaken payment. However, defenders of this conception of corrective justice argue

¹⁹ E.J. Weinrib, *The Idea of Private Law*, p. 283.

²⁰ *Ibid.*, at p. 288, and p. 295.

²¹ *Ibid.*, at pp. 290–291.

²² *Ibid.*, at p. 291.

that there is in fact a breach of duty on the part of the recipient. Their argument is that when a mistaken payment is made the mistake or vitiation of the claimant's intention compromises the claimant's capacity for self-determining agency (or compromises the claimant's freedom). The recipient of the mistaken payment by retaining the vitiated transfer ends up compromising the claimant's capacity for self-determining agency and, therefore, infringes her rights. Because of this the recipient has a duty to return the benefit.²³

However, it is difficult to see how a defendant by retaining a mistaken payment compromises the claimant's capacity for self-determining agency or freedom. If the claimant dropped her money down a drain we would not say that the drain was infringing her rights.²⁴ Why is it according to this account true that a recipient of a mistaken payment does infringe the claimant's rights? One answer to this question is that the claimant's rights are infringed where a defendant retains a mistaken payment because the defendant fails, by retaining the payment, to treat the claimant as a human being with equal status to the defendant. It is this treatment that constitutes the infringement of the claimant's rights or the compromising of the claimant's capacity for self-determining agency.

How can it be said that the defendant fails to treat the claimant equally when the defendant receives a mistaken payment? The argument is that because of the mistake the claimant does not consent to what happens to her money. The claimant chose, for example, to pay off a debt, but ended up making a gift. In a case where a defendant knows that she has received the claimant's mistakenly transferred assets there is a "necessary contradiction" in the defendant retaining those assets. This is because the recipient invokes a right of ownership over those assets. The recipient asserts a right to do what she pleases with her own assets. However, in invoking this right the defendant should concede that other similarly placed individuals also have this right. By retaining the assets the defendant does not make this concession because the defendant necessarily denies that the claimant has a right to do what she wishes with her assets. The claimant's right is denied because the claimant did not consent to the transfer of her assets to the defendant.²⁵

So, according to this argument, the wrong or breach of duty consists in denying the equal status of the transferor. The trouble with this argument, however, is that it is based on a non-sequitur. The argument is that by retaining a mistaken payment you invoke a right of ownership over the assets, this is the right to do what one pleases with one's own assets. It may well be true that by retaining a mistakenly transferred asset one asserts a right of ownership over the asset. However, this does not mean that one asserts a right to do with one's assets as one pleases. To suggest that it does suggests that one is invoking a very thick conception of ownership. But one need not do so. By refusing to give up a mistakenly transferred asset one may only be asserting the following right: 'the right to keep those assets that are mistakenly transferred'. Such a right does not imply that one has the right to do what one pleases with one's property. It may well imply various ownership rights. But the only right that it denies to the

²³ *Ibid.*, at pp. 140–142.

²⁴ S.A. Smith, "Justifying the Law of Unjust Enrichment", 79 *Texas Law Review* 2177, 2190.

²⁵ N. J. McBride and P. McGrath, "The Nature of Restitution" (1995) 15 *O.J.L.S.* 33, 39–40.

claimant in such a case is the right to get back assets that are mistakenly transferred. There is no contradiction here. The defendant is simply saying that she has the right to keep assets that are mistakenly transferred, and this implies that if she mistakenly transfers those assets (or any other assets she may have) she has no right to get them back. There is nothing inconsistent about the idea that someone is an 'owner' of a thing or that someone has rights against others over a thing but that those rights do not include the right to get back that which is mistakenly transferred.²⁶

This account fails to adequately explain how the defendant can be said by retaining the mistaken payment to compromise the claimant's capacity for self-determining agency. There is a further and deeper problem with this particular corrective justice account of the duty to return a mistaken payment. The trouble with the account is that it presupposes that we have a duty not to receive a mistaken payment or, alternatively, a duty not to know that we have received a mistaken payment. Only in this way can it be said that the recipient of a mistaken payment is in breach of a duty and, therefore, doing something wrong. However, such a duty is simply too onerous. Duties can only be imposed on us to the extent that it is possible for us to comply with them (ought implies can). A duty not to receive a mistaken payment is almost impossible to comply with. If C mistakenly pays money into D's bank account without D's knowledge there is little that D could have done to have prevented C from paying the money into the bank account. If D is under a duty not to receive a mistaken payment then D is almost destined to be in breach of it. It seems that the only way that D can comply with the duty is by giving up on having a bank account. However, there are two problems associated with D giving up on having a bank account: first, her not having a bank account does not mean that there are no other ways in which she may end up receiving mistaken payments, *e.g.*, someone secretly puts a five pound note into her wallet. Secondly, a duty that requires D to give up on having a bank account, something that is absolutely central to the pursuit of autonomy and hence a good life in modern society (bank accounts are needed for savings, work payments, mortgages, *etc.*), demands too much from D. It requires D to seriously compromise her interest in autonomy for the sake of another despite the fact that she is not and will not be a cause of harm to that other.

²⁶ One (broadly Kantian) argument against my reply here is that there is a side-constraint against the invocation of a thin conception of ownership, on the ground that if everyone invoked this conception there would be bad economic consequences. Thank you to Michael Rush for making this point. There are two ways to reply to this: first, it is unproven that there would be bad economic consequences. Secondly, this argument is a cloak for the introduction of economic or consequence led reasoning to justify the imposition of duties not to receive mistaken payments. The justification for the duty is not *ultimately grounded* in treating people as equal moral beings. Rather, the justifications for these duties lie in their positive productive relationship to states of affairs: P. Foot, "Utilitarianism and the Virtues" (1985) 94 *Mind* 196, 196; A. Sen, "Rights and Agency" (1982) 11 *Philosophy and Public Affairs* 3, 4-5. The argument against the application of consequence led reasoning to justify moral obligations cannot be pursued here but it is enough to say that this sort of reasoning has the potential to destroy the pursuit of valuable ends and personal relationships: J. Raz, *Engaging Reason* (Oxford 1999), p. 287; J. Raz, "The Force of Numbers" in A. O'Hear (ed.), *Modern Moral Philosophy* (Cambridge 2004); M. Stocker, "The Schizophrenia of Modern Ethical Theories" (1976) 73 *The Journal of Philosophy* 453; T.M. Scanlon, *What We Owe to Each Other* (Cambridge, Massachusetts, and London 2000), p. 162, pp. 164-165. Further, consequence led moral theories end up denying that people have moral standing: M. Nussbaum, "Plato on Commensurability and Desire" (1984) 58 *Proceedings of the Aristotelian Society* 55, 72.

One objection to this argument against there being a duty not to receive a mistaken payment is that if the argument is right it ends up denying not only the legitimacy of duties requiring one not to receive mistaken payments but the possibility of strict liability.²⁷ The reply to this objection is that the argument presented here does not rule out strict liability. It only denies the existence of overly onerous duties such as the duty not to receive a mistaken payment. By doing that it does not deny that moral justifications can be given for duties to make restitution in cases of mistaken payments and nor does it deny that remedies can be justified in strict liability cases. Further, it does not deny that primary duties can be constructed in many standard instances of strict liability, *e.g.*, vicarious liability and liability for the manufacture of dangerous products in tort law. It is possible to distinguish these strict liability tort cases from the duty not to receive a mistaken payment case. In the tort cases it is plausible to say that there is a duty on the defendant not to do something (or to do something, in the case where liability is based upon an omission to act). So, for example, in the case of dangerous products liability, it is plausible to say that there is a duty on the defendant not to cause others loss by manufacturing dangerous products. The reason for why the existence of such a duty is plausible is that the defendant can comply with this duty by giving up on the dangerous activity. Moreover, she can comply with this duty without seriously compromising her autonomy. There are other things that the defendant can do with her life apart from manufacture these products. There are other things the defendant can do to make money. The same is not true in the case of the duty not to receive a mistaken payment. Here, I doubt that the defendant can do or refrain from doing anything to comply with the duty. As has been argued above even giving up on a bank account is not enough. Secondly, even if it were possible to comply with the duty not to receive a mistaken payment, the cost in terms of an individual's autonomy is too great, as Stephen Smith argues to comply with such a duty "the activity that has to be given up is life itself".²⁸

Alternatively, it can be argued that the duty to repay a mistaken payment is perfected once the defendant has knowledge that she has received a mistaken payment. The defendant may acquire knowledge when the claimant makes a demand for the return of the payment. The duty to repay having been perfected the defendant commits a wrong by not returning the payment. However, even if the refusal to repay is a breach of duty and, therefore, a wrong, there must exist a duty to repay that predates its breach. The existence of that duty to repay cannot be explained by wrongdoing.²⁹

²⁷ Mindy Chen-Wishart raised this objection.

²⁸ S. A. Smith, "Justifying the Law of Unjust Enrichment" 2177, 2183. Michael Rush has pressed me further on my reply to the Chen-Wishart objection. Rush argues that though it may be possible for me to distinguish vicarious liability and liability for the manufacture of dangerous products from the duty not to receive a mistaken payment, he seriously doubts that it is possible for me to distinguish other examples of strict liability, for example, liability for conversion or trespass. Rush is right to think that these cases cannot be distinguished. However, to repeat, this does not mean that liability in these cases cannot be justified morally. My argument only denies that there can exist duties to, say, not receive mistaken payments or duties not to receive another's goods. It does not deny that liability in these cases can be justified on other non-breach of duty related grounds.

²⁹ L. Smith, "Restitution: The Heart of Corrective Justice" 2127, 2133. P. Birks "The Concept of a Civil Wrong" in D.G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1995), p. 31, and pp. 48-49.

There is one final problem with this particular corrective justice account of the duty to return a mistaken payment. Even if we assume that it is wrongful to receive a mistaken payment or to know that you have received a mistaken payment it is not clear why this wrong requires the recipient to make restitution of the payment to the mistaken transferor. This reflects a deeper failure on the part of corrective justice theory to explain secondary obligations (*i.e.*, obligations that arise after a breach of duty). Even if the defendant violates a pre-transactional norm that obtains between the parties by retaining a mistaken payment and, therefore, makes a normative gain correlated to the claimant's normative loss, this does not in itself explain why the defendant should be required to make restitution to the claimant: 'Why isn't this impulse to 'disgorge' just irrational crying over spilt milk on both sides?'³⁰

According to the account of corrective justice that we have so far been considering the injustice that disrupts the pre-transactional equality that exists between the parties is a wrong or a breach of duty. However, there is an alternative account of corrective justice that does not rely on wrongdoing or breach of duty.³¹ According to this account injustice as a concept embraces more than just wrongdoing. The argument is that there are reasons that can make transactions unjust that do not rely upon wrongdoing. So, in the mistaken payment case, the fact that the claimant's intention to make the transfer is vitiated makes the transaction unjust and is, therefore, a reason for the defendant to make restitution of the payment. The vitiation of the claimant's intention is according to this theory an 'individualistic' reason for why the gain made by the defendant should not have been made and for why the defendant should make restitution of that gain to the claimant: "corrective justice embraces the broad objective of rectifying *individual injustices*, not simply the (narrower) concern to rectify *wrongdoing*".³²

This approach to corrective justice is troubling for two related reasons: the first reason is that to say that in a mistaken payment case the transaction is unjust and that the defendant should make restitution because the claimant did not consent to the transaction is very close to saying what many textbook writers say about why there is a duty to make restitution.

As has already been stated above when money is mistakenly paid there are two dominant approaches adopted by the law as to why the 'unjust' requirement for the cause of action in unjust enrichment is satisfied. On the one hand there are those who say that the unjust requirement is satisfied because due to the mistake the transfer made was non-voluntary.³³ The mistake vitiated the claimant's intention to make the transfer. Alternatively, it is argued that the unjust requirement is satisfied in the mistaken

³⁰ J. Gardner "The Purity and Priority of Private Law", (1996) 46 University of Toronto Law Journal 459, 474. S.R. Perry, "The Moral Foundations of Tort Law" (1991-1992) 77 Iowa Law Review 449, 479-480.

³¹ K. Barker, "Unjust Enrichment: Containing the Beast" 457, 468-471. L. Smith, "Restitution: The Heart of Corrective Justice" 2115, 2136-2146. M. Rush, *Passing On to Disimpoverishment: A Loss Based Defence in the Law of Unjust Enrichment*, ch. 7. This approach is inspired by R.A. Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law" (1981) 10 Journal of Legal Studies 187, 202.

³² K. Barker, 'Unjust Enrichment: Containing the Beast' 457, 470.

³³ P. Birks, *An Introduction to the Law of Restitution*, p. 100. G. Jones (ed.), *Goff and Jones on Restitution*, para. [I-053]. G. Virgo, *The Principles of the Law of Restitution*, p. 50. A. Burrows, *The Law of Restitution*, p. 130.

payment case because the purpose of the transfer failed.³⁴ The purpose of the transfer was, for example, to discharge an obligation, however, no obligation was in fact discharged because no obligation in fact existed. As a result of the failure of the purpose of the transfer the defendant cannot explain the enrichment and must, therefore, give it back.

These two dominant approaches to the unjust criterion both hint at moral justifications for why there is a duty to return a mistaken payment. However, that is all they do. They hint. On their own they do not sufficiently morally justify the duty to return a mistaken payment. Apart from offering these hints at justifications in the context of discussing the unjust requirement many textbook writers on the law of restitution simply assume that the duty to return a mistaken payment is morally justified. This is true of Andrew Burrows, Goff and Jones, Graham Virgo and Mason and Carter.³⁵

So, for proponents of corrective justice to say that the reason for why restitution should be made in the mistaken payment case is because the claimant did not consent to the transaction does not add anything to the explanation that the law gives us for why there is a duty to make restitution in the mistaken payment case. It is far from being a moral justification. It only hints at one. We need to know more about why the vitiation of the claimant's intent matters morally and why this has implications for the defendant.³⁶

The second problem with this account of corrective justice is the 'individualistic' nature of the reason given for why the transaction is unjust. Because the reason is individualistic it fails to connect the two parties. This is one of the great virtues of the breach of duty account of corrective justice. The parties are connected because the defendant breaches a duty owed to the claimant. At best in the mistaken payment case the non-wrongdoing account of corrective justice only explains the presence of a normative loss on the claimant's side. There may, therefore, be a reason for why that

³⁴ P. Birks, *Unjust Enrichment*, pp. 102–103.

³⁵ Peter Birks is not included in this list although his early work suggests that he should be. This is because in his most recent work, the second edition of *Unjust Enrichment*, he does offer an explanation for the duty to return money mistakenly paid. He argues that it is self-evidently true that there is a moral duty to return a mistaken payment. He relies on an intuition to make his claim: P. Birks, *Unjust Enrichment*, p. 6, P. Birks, "Failure of Consideration and its Place on the Map" (2002) *Oxford University Commonwealth Law Journal* 1, 8–9. There are duties that are self-evidently true or self-evidently morally justified. For example, the duty not to inflict gratuitous pain is self-evidently morally justified. It is so basic or fundamental a duty as not to require further deliberation or argument. In fact, it may be impossible to inquire any deeper into the rational force of such a duty. Is the duty to return a mistaken payment like the duty not to inflict gratuitous pain? It is not. The reason for why it is not is that it is not at all self-evident that where money is mistakenly paid that it should be paid back. This is because in the core case the mistaken payer will have been careless in making the payment. The recipient of the payment will have been entirely innocent. Therefore, between the two arguably the recipient should be entitled to keep the payment. It is possible, therefore, to displace or at the very least cast doubt on the intuition, if indeed there is one, that the recipient has a duty to return the money. If doubt can be cast on that intuition then the duty to return a mistaken payment is not self-evidently true. Unlike the duty not to inflict gratuitous pain argument is needed to justify the duty. Birks does not in any of his work give such an argument.

³⁶ S.A. Smith, 'Justifying the Law of Unjust Enrichment' 2177, 2190.

loss should be undone. However, this does not mean that it is a reason for the defendant to undo that loss.³⁷ It is suggested by defenders of this conception that the parties are sufficiently connected because of the correlativity between the material gain made by the defendant and the material loss suffered by the claimant.³⁸ However, the connection that we are interested in is a normative connection. This is because we are interested in imposing a duty on the defendant. The fact that one party gains at another's expense does not in itself have normative implications (though it is based on normative presuppositions, *i.e.*, that the property belonged to or was legitimately held by the claimant).³⁹ It is just a fact.⁴⁰

IV. CONCLUSION – MOVING FORWARD

So, what are the options, in light of this critique of corrective justice as the moral foundation for restitution for mistaken payments, for those unjust enrichment lawyers who have already pinned their hopes on corrective justice as the moral foundation for unjust enrichment? There are, three options: the first of these is to abandon the mistaken payment as unjust enrichment's core case. The mistaken payment case could be replaced by a case where it is more plausible to carve out the existence of a primary duty. One example of such a case is the case where restitution is awarded against a defendant for unconscionable dealing. These are cases where one of the parties to a transaction is at a special disadvantage, due to, for example, ill health, old age, poverty, *etc.*, and the other party knowingly takes advantage of that special disability. It is perfectly plausible to say that when agents have the opportunity to transact with specially disadvantaged others they are under a duty not to take unfair advantage of those others.⁴¹

The trouble with this option, however, is that it means accepting that though those cases of unjust enrichment that can be plausibly understood in terms of breaches of duty or wrongdoing are morally justified, others, such as, the duty to return a mistaken payment are not. Some extreme adherents to the corrective justice justification of unjust enrichment may think that this is a price worth paying. However, it is unlikely that mainstream unjust enrichment lawyers will. For one, it may mean that unjust enrichment's application criteria will have to change. If the reason for restitution in unjust enrichment cases is because of a breach of duty, then, presumably, the focus of unjust enrichment lawyers in uncovering their legal domain should be on the conduct of the defendant rather than other concerns, for example, the lack of consent on the claimant's part, or the failure of a transaction's purpose or basis, or some public policy justification. Unjust enrichment's empire would shrink dramatically. That in and of itself is not necessarily a bad thing. However, the reason for why most mainstream unjust enrichment lawyers would resist that de-colonization is that if unjust enrichment ceases to be the reason for restitution in cases involving mistaken payments, or in public policy cases, *etc.*, it is unclear what the reason actually is. By taking unjust enrichment

³⁷ E.J. Weinrib, *The Idea of Private Law*, p. 289.

³⁸ L. Smith, "Restitution: The Heart of Corrective Justice" 2115, 2139.

³⁹ E.J. Weinrib, *The Idea of Private Law*, p. 284.

⁴⁰ J. Finnis, *Natural Law and Natural Rights* (Oxford 1979), pp. 36–42.

⁴¹ R. Bigwood, *Exploitative Contracts* (Oxford 2004), ch. 6.

away as an account of these cases, one leaves a gaping hole. To the extent that unjust enrichment is a *plausible* alternative to this hole, why not use it? Surely, it is better than saying that the law has no idea why restitution is awarded in these cases.

There is a second reason for why this option should be rejected. It is that even if it is possible to show that there are cases where restitution is awarded that can plausibly be understood as cases where the defendant has breached a primary duty owed to the claimant, the breach of that primary duty or the ‘transactional-norm’ that obtains between the parties does not explain why a secondary obligation to make restitution should be imposed on the defendant. Corrective justice theory in general struggles to justify secondary obligations.

A second option available to unjust enrichment lawyers is that they abandon the corrective justice principle altogether as a moral justification for unjust enrichment. This would mean that unjust enrichment lawyers could hold on to their core case, that they could hold on to ‘claimant-sided’ (or non-defendant sided) application criteria for the unjust enrichment principle, that they could help to rid the law of unseemly gaps, and that they could give up worrying about how to justify secondary obligations. However, even though there may be less in the way of legal gaps if this option is pursued, there will be a gaping moral gap. As Andrew Burrows says on the very first page of his *The Law of Restitution* unjust enrichment “is, and must be, morally justified”.⁴² If unjust enrichment is morally justified, abandoning corrective justice does not relieve unjust enrichment lawyers of the responsibility of offering a plausible moral justification for the doctrine. For, morally justified, as Burrows says, it *must* be.

There is a third option: the hybrid. The hybrid, like most hybrids, purports to offer the best of both worlds and for that reason it will no doubt appear to be a very tempting dish. According to this option unjust enrichment lawyers could hold on to their core case and the claimant sided application criteria of their doctrine, and at the same time use corrective justice to justify some unjust enrichment cases, *e.g.*, restitution for unconscionable bargains, or for breach of contract. The cases that corrective justice cannot justify, *e.g.*, mistaken payment cases, should be justified by other means. In this way the unjust enrichment doctrine would be justified by a variety of moral principles, corrective justice being just one of them. Pursuit of this option would probably prove to be the worst possible case scenario. The reasons for this are: first, that the difficulty still exists that corrective justice cannot explain the secondary obligation to make restitution, secondly, the justifications that we give for unjust enrichment, as has already been argued, affect the application criteria of the doctrine, in particular, they affect the reason for why enrichment’s are considered to be unjust. The fact that corrective justice is inherently defendant sided has already been alluded to. The result of this would be that there would exist a competing and un-unified list of reasons for why enrichments are considered unjust. Unjust enrichment law would effectively break up. In many cases it will be unclear which moral principle and hence which application criterion applies (so, for example, in unconscionable dealing cases, will the result be determined by corrective justice, defendant sided, considerations or by the considerations of whatever principle that justifies restitution in mistaken payment

⁴² A. Burrows, *The Law of Restitution*, p. 1.

cases?) with the result that there will be considerable uncertainty relating to what the law is, the inevitable result of which will be inconsistent and haphazard law-making. The promise of unjust enrichment as a unifying legal doctrine would evaporate.

After consideration of these three options it appears clear that unjust enrichment lawyers who have in the past defended unjust enrichment in terms of corrective justice would be well-advised to adopt the second option and drop corrective justice all together and search elsewhere for the moral justification that unjust enrichment no doubt has. The reasons for this are related to a deep worry that corrective justice cannot explain secondary obligations in private law. They certainly cannot explain why on breach of a primary obligation not to, say, receive a mistaken payment, the recipient of such a payment should make restitution of it or its value to the mistaken payer. The second reason is that pursuit of the second option is the best way to preserve the unity and utility of unjust enrichment. Unjust enrichment should be defended because through it unjust enrichment lawyers have made massive strides in lending stability, consistency and rationality to law. To the extent that those unjust enrichment lawyers who have advocated corrective justice as the moral foundation of unjust enrichment law continue to persist with it as a justification they do a great disservice to what has up to now been their own good work.