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Unjust Enrichment in Law and Equity

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Consider the following two cases:

1) In an oral agreement, A agrees to build a house for B for a price of $100,000. A builds the house. When A demands payment, B refuses on the ground that legislation requires building agreements to be in writing and signed by both parties with the consequence that the oral agreement between A and B is unenforceable.
2) A gives instructions to her bank to transfer $1000 from her account to B's account at another bank because A believes she owes B this money. A's bank complies with the instructions: A's bank account is debited $1000 and B's bank account is credited with $1000. A was mistaken; she did not owe B $1000. A demands the return of the money.

There was once a long-standing debate about how we should understand the grounds of liability in these kinds of cases. One theory was that liability could be justified, if at all, on the basis of what was called quasi-contract. There were two versions of this theory. On one version, quasi-contractual liability was the equivalent of liability on an implied-in-fact contract—that is, on an inference that the defendant actually promised to pay for the benefit received from the plaintiff.[1] On the other version of the theory, quasi-contractual liability was based on a contract implied-in-law—that is, independently of the will of the parties. But on what basis could a

[1]**Thanks to participants at Obligations X, the KCL-Notre Dame-Toronto Equity Workshop, the Canadian Private Law Theory Workshop, and particularly Alan Brudner, Christopher Essert, Samuel Bray, Larissa Katz, Irit Samet, Patricia McMahon, Simone Degeling, and an anonymous reviewer for helpful comments on this paper. Thanks also to Sophie Bender for research assistance.

Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1768) vol 3, 162; *Sinclair v Brougham* [1914] UKHL 585, [1914] AC 398.

contract be legally implied? In *Moses v. Macferlan*, Lord Mansfield provided an answer: "if the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract."[2] James Barr Ames developed this idea in an article published in the Harvard Law Review in 1888, arguing that a contract was implied-in-law in order to realize the "fundamental principle of justice that no one ought to unjustly enrich himself at the expense of another."[3] Once this theory of liability was embraced, reference to "quasi-contract" seemed to encourage conceptual confusion: the parties' agreement had nothing to do with it. As the authors of the *First Restatement of Restitution* argued, liability could be justified simply because "[a] person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust."[4]

Those who understood liability in terms of unjust enrichment have won the debate[5]; the term quasi-contract has fallen out of favour and the idea that liability in what we now call unjust enrichment is grounded in an implied agreement is widely regarded as an absurd fiction, even "heresy."[6] And yet, although the existence of liability for unjust enrichment is well-settled, the theoretical basis of the doctrine remains deeply contested. If the basis of liability is not an

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[2] *Moses v. Macferlan*, 2 Burr. 1005 at 1008, 97 Eng.Rep. 676 at 678.

[3] James Barr Ames, "The History of Assumpsit: Implied Assumpsit" (1888) 2 Harvard L Rev 53 at 64. For discussion see Andrew Kull, "James Barr Ames and the Early Modern History of Unjust Enrichment" (2005) 25 OJLS 297.

[4] Warren A. Seavey & Austin W. Scott, "Restitution" (1938) 54 L Q Rev 29 at 32.

[5] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 26–9 (Lord Atkin); *Fibrosa Spolka Akcyjna v Fairbairn, Lawson, Combe Barbour Ltd* [1942] UKHL 4, [1943] AC 32 at 61–4 (Lord Wright); *Lipkin Gorman (a firm) v. Karpnale Ltd* [1992] 4 All ER 512; *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725, [1954] 3 DLR 785 (SCC).

[6] Peter Birks and Grant McLeod, "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone" (1986) 6 OJLS 46 at 47. See also C Mitchell, P Mitchell, and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, 2016) 1-06.

For exceptions to this dominant position, see Steve Hedley, "Implied Contract and Restitution" (2004) 63 Cambridge LJ 435; Dan Priel, "In Defence of Quasi-Contract" (2012) 75 MLR 54; Alexander Georgiou, "Mistaken Payments, Quasi-Contracts, and the 'Justice' of Unjust Enrichment" (2022) 42 OJLS 606.

implied-in-fact agreement, what is it? Vague references to "natural justice" and "equity" fail to tell us anything about the nature of the injustice to which the law of unjust enrichment responds. They also, as we'll see, bury in a single formula the difference between two ways in which an enrichment at another's expense can be unjust. In this essay, I pry apart these ways and, in doing so, try to give needed precision to the notion of unjust enrichment.

I begin by defending quasi-contract as the normative foundation of one category of case in the law of unjust enrichment. This category is exemplified by situation 1 above, where services are performed under a contract that turns out to be unenforceable. Quasi-contract, I argue, is not a false theory of liability for unjust enrichment; it is, however, only a partial theory. There are cases, like the one exemplified in situation 2, where few would doubt that the defendant has been unjustly enriched at the plaintiff's expense, but that cannot be explained in terms of quasi-contractual liability. In *Moses*, Lord Mansfield was right to argue that there are cases of unjust enrichment whose normative foundation lies in equity;[7] but he was wrong to argue that *all* cases that were once thought of as quasi-contractual rest on equitable foundations. The law of unjust enrichment comprises two distinct principles, the common law of quasi-contract and the equitable doctrine of unjust enrichment, and each expresses a distinctive conception of what it means for the defendant to be unjustly enriched at the plaintiff's expense.[8]

[7] As will become clear, this article assumes, but is also part of an argument for, a normative distinction—and not merely a jurisdictional or historical distinction—between common law and equity. For a full elaboration of this normative distinction, see Alan Brudner, *The Unity of the Common Law* (rev ed, OUP 2013).

[8] Others have argued for different divisions within the law of unjust enrichment. See, for example, Peter Watts, "Restitution - A Property Principle and a Services Principle" (1995) 3 RLR 49; Peter Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000); Ben McFarlane, "Unjust Enrichment, Rights and Value" in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Oxford, 2010) 581; Lionel Smith, "Restitution: A New Start?" in P. Devonshire and R. Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart, 2018) 91; Robert Stevens, *The Laws of Restitution* (OUP, 2023).

Formal Freedom and Quasi-Contract

Underlying the traditional common law of property and contract is a conception of human freedom understood as the formal capacity for free choice, the capacity to stand back from instinct, impulse, or custom and choose what we will do.[9] The capacity for choice reveals a self, the choosing agent, that is distinct from all the things that are chosen for their contingent and instrumental value. The capacity for choice is a locus of human dignity. This dignity is found, not in any human achievement or excellence, but in the contrast between the choosing agent's absolute worth and the relative and contingent worth of the thing that happens to be chosen. Moreover, since the capacity for choice is an innate characteristic of human beings, it is equally present in each human being just in virtue of her humanity, regardless of circumstance, ability, talent, or virtue. The capacity for choice is thus a conception of human freedom, and a ground of human dignity and equality.

This conception of freedom, dignity, and equality generates an understanding of the rightful relation between human beings as a relation of mutual independence. Each human being is entitled to act from ends that are freely chosen and must recognize a like entitlement in everyone else. Since each human being is the equal of every other, no one can be forced to serve another's purposes, ends, or needs. The law of private transactions must therefore enforce a norm of non-interference, whereby each person may choose freely so long as his or her choice is compatible with others' right to do the same. But beyond the requirement that a choice be compatible with others' equal right to free choice, the *content* of each individual's choice, the particular purpose that he or she is trying to accomplish, must be legally irrelevant. What Kant

[9] For a defence of this claim see Brudner (n 7).

called "the matter of choice"[10]—what is chosen and why—is, on this conception of freedom, arbitrary and contingent. A particular thing is chosen because it happens to satisfy the agent's changing values, preferences, or needs; but it is always something that the agent could have in principle rejected. The matter of choice is therefore subjective, without public significance**,** and so incapable of generating obligations of assistance in other free agents. Agents must respect one another's capacity for choice, but they cannot be coerced for the sake of another's ends or needs.

I'll call the conception of rightful relations that I've just described formal right.[11] Others have shown that formal right illuminates much of the common law of property, contract, and tort.[12] I'll now argue that formal right can justify and explain the standard cases of what was once called quasi-contract. By the term quasi-contract I refer to cases that would have fallen under the old common law money counts, in particular, *quantum meruit* and *quantum valebant*, money laid out, and money had and received.

Formal Freedom and the Law of Quasi-Contract

Quantum meruit and *quantum valebant* are actions that allow the plaintiff to recover money for services performed (*quantum meruit*) or goods delivered (*quantum valebant*). In order to understand these claims, consider the following examples. A says to B: "if you mow my lawn once a week for the month of July, I will pay you $100." B replies: "I accept your terms." This is an express contract since the offer, acceptance, and consideration are all expressly stated. Suppose now that A instead says to B: "please mow my lawn once a week for the month of July." B mows the lawn for the month of July. In this case, there is no express promise to pay for

[10] Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge, UK: Cambridge University Press, 1991) s. 6-230.
[11] Following Brudner (n 7).
[12] See, for example, Brudner (n 7); Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard U Press, 2009); Ernest Weinrib, *The Idea of Private Law*, (2nd ed, OUP 2012).

lawn mowing. Nevertheless, there is no doubt that this too constitutes a contract. It is a contract implied-in-fact: given the arm's length relationship between the parties and the exchange economy that we live in, it goes without saying that the service was to be paid for.[13]

Now, what if the request for and receipt of a benefit take place in circumstances where the positive law makes it impossible to find an implied-in-fact contract? Consider the facts of *Scott v. Pattison*.[14] The defendant orally agreed to work as a farm labourer for the plaintiff. He was to earn a weekly wage for one year beginning 5 days after the agreement was made. As a contract that would not be completed within one year from the time it was agreed upon, the contract was unenforceable under the Statute of Frauds. Nevertheless, when the plaintiff sued the defendant for his wages, the court found that the defendant, because he requested services that were rendered by the plaintiff, was liable in *quantum meruit*, that is, he was liable to pay a reasonable sum in exchange.

It may be impossible to find an implied-in-fact contract, not only because (as in the previous example) the positive law says that the contract between the parties is unenforceable, but also because the parties have explicitly stated that their agreement is still "subject to contract" or because the contract between the parties was conditional and the condition has failed. For example, in *Cobbe v. Yeoman's Row Management*,[15] a developer went to considerable expense in obtaining planning permission for a piece of land owned by the defendant pursuant to the terms of a land development agreement that was "subject to contract." Although the contract

[13] The standard example, used in the seventeenth century, was of a man who took cloth to a tailor to be made into a robe. The court said that he was agreeing to pay for the work although nothing was said about payment. See *The Six Carpenters' Case* (1610) 8 Co Rep 146 at 147. And see JH Baker, "The Use of Assumpsit for Restitutionary Money Claims 1600-1800" in EJH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker & Humblot, 1995) 38.

[14] [1923] 2 KB 723. *Pavey and Matthews Pty. Ltd. v. Paul* (1987) 69 A.L.R. 577 and *Deglman v Guaranty Trust Co of Canada* (n 5) have the same structure.

[15] [2008] UKHL 55.

never materialized, the developer nevertheless recovered his expenditure on a *quantum meruit* basis. In *Barnes v Eastenders Group*,[16] the Crown Prosecution Service (CPS) believed that the Eastenders Group company was guilty of tax fraud. The CPS obtained a court order to appoint a receiver to run the company and appointed the plaintiff, who was to be paid from the Eastenders Group property. However, the order appointing the receiver was declared invalid based on the finding that there was no plausible case of fraud. The receiver incurred significant expenses in performing his role, but the invalidity of his appointment meant that he had no entitlement to be paid from the Eastenders Group property. The receiver nevertheless recovered the value of the provided services from the CPS because "expenses incurred by the receiver were at the request of the CPS and there has been a failure of the basis on which the receiver was asked and agreed to do so."[17] Although the contract was conditional and the condition failed, the receiver was paid on a *quantum meruit* basis.[18]

Formal right can provide the justification for the outcomes in these non-contractual *quantum meruit* cases that I have described. Human beings, being free and equal, are not entitled to one another's service and, outside the relationships between friends and family, they may not presume that others are acting unilaterally for their benefit—giving something but asking nothing in return. We can call this principle the law's presumption against gifts.[19] From this it follows

[16] [2014] UKSC 26.

[17] *Ibid* at para 116.

[18] Both *Cobbe* and *Barnes* are discussed in a similar context in Stevens (n 8) 113 and 311.

[19] Swadling argues that the only true presumption is part of the law of proof – a true presumption, he says, allows one proved fact to establish a second fact without proof, usually because the second fact is the most plausible inference to draw from the proved fact. As an example, he offers the presumption of legitimacy when a child is born to a person while that person is married. See William Swadling, "Explaining Resulting Trusts" (2008)124 LQR 72 at 74. This is not the sense of presumption I intend when I refer to a legal presumption against gifts, because I do not mean that proof of a request allows the inference that the parties had an agreement. I mean that as a normative matter (and not as a matter of factual or linguistic interpretation), a request for a benefit is legally construed as an agreement to pay for it, unless the benefit is explicitly requested as a gift. In that sense, what I am referring to is a legal presumption against gift.

that a request for a service is, from the law's point of view, implicitly an agreement to pay for it; and the receipt of the requested service therefore generates a debt obligation. In the non-contractual *quantum meruit* cases we are considering, where the factual promise to exchange is unenforceable, the defendant's request for the service nevertheless constitutes a legally implied agreement to pay its reasonable value and the receipt of the service creates an enforceable debt. To be clear, the agreement to pay is implied-in-law, not implied-in-fact; that is, it is implied on normative, not factual grounds.[20] But the finding of an implied-in-law agreement to pay rests, not on a vague sense of what would be just and fair under the circumstances, but rather on the confluence of the defendant's request for the benefit and the legal presumption against gifts. An obligation to pay for a benefit requested and received can thus be derived, not only from an express or implied-in-fact promise to exchange, but also from the principle that no one is entitled to a presumption of gift in the context of an arm's length relationship.

It is important to distinguish the liability that arises from an agreement implied-in-law—quasi-contractual liability—from contractual liability. In the context of quasi-contractual liability, there is no obligation to keep one's promise or fulfill another's expectation. The remedy in *quantum meruit*, for example, is the reasonable market value of the benefit conferred, not its

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The doctrine of resulting trust is an obvious example of this presumption, but it is not the only one. Another example is the stringency of the law of gift. A gift must be intended as a gift and received as a gift. See *Hill v. Wilson*, (1873) L.R. 8 Ch. App. 888. As I argue below, the common law money counts are another illustration. Other scholars have recognized the legal presumption against gifts and drawn out its implications in various contexts. See, for example, Ripstein (n 12) 115 n 7; Ernest Weinrib, *Corrective Justice* (OUP, 2012) 208; Peter Benson, *Justice in Transactions* (Harvard, 2019) 181-182, 387-388.

[20] This was recognized very early on. See *Arris and Arris v. Stukeley* (1677/78) 2 Mod 260, 86 ER 1060 and discussion in Tariq Baloch, *Unjust Enrichment and Contract* (Hart Publishing, 2009) 21 and 40. Baloch persuasively demonstrates that seventeenth and eighteenth century judges understood quasi-contract as a contract implied-in-law; it was not until the nineteenth century that judges made the mistake of thinking that a contract could only be implied-in-law if it could also be implied-in-fact. The paradigmatic example of this type of thinking is *Sinclair v Brougham* (n 1).

agreed upon value.[21] Moreover, the one who requests the benefit can change his or her mind up until the moment the request is fulfilled, and the one of whom the request is made is under no obligation to confer the benefit requested. In quasi-contract, the obligation on the defendant is not to *fulfill a promise to exchange* but merely to *perfect an exchange* that has already been partly executed at his or her request, so that the transaction between the parties is rendered consistent with the principle that no free agent is entitled to another's unilateral service.

Consider now the common law money count known as money laid out. Money laid out applied in situations where the plaintiff made a payment to a third party at the request of the defendant. For example, in *Widdrington v. Goddard*,[22] the defendant asked the plaintiff, a fellow at the University of Cambridge, to care for and tutor his son. The plaintiff spent money on food, drink, clothing, and lessons for the son and when the defendant refused to reimburse the plaintiff for his expenditures, the plaintiff succeeded in his suit for money laid out. The parallel with *quantum meruit* and *quantum valebant* is clear. Since the law does not presume that one person confers a gift on another, the defendant's request that the plaintiff expend money on the care of his son is deemed to include an implicit agreement to reimburse for money laid out; and when the plaintiff spent the money as requested, a debt obligation arose in the defendant.

The common law money count known as money had and received arose in cases where the defendant was in possession of money that rightfully belonged to the plaintiff. Money had and received is different from the other money counts we have so far considered in that it did not depend on the defendant's requesting a benefit from the plaintiff. Rather, the foundation of

[21] *Deglman v Guaranty Trust Co of Canada* (n 5) is an illustration. Services were performed by a nephew for his aunt pursuant to an agreement that she would bequeath him her house in exchange. The agreement was unenforceable under the Statute of Frauds. The remedy for the disappointed nephew was not the fulfillment of the agreement—he did not get the promised house—but rather the reasonable value of the services he performed.
[22] (1664) B&M 472.

money had and received was that the defendant received money that belonged to the plaintiff and subsequently promised to repay it.[23] The promise to repay was sometimes real;[24] in other cases it was a fiction. But it was a fiction that could be justified on the same normative grounds discussed above.[25] In cases of money had and received, the defendant agreed to collect money from a third party on the plaintiff's behalf or received money from the plaintiff on the understanding that it was to be used for the plaintiff's benefit.[26] Since the law never presumes a gift, an agreement under which the defendant acquires money that belongs to the plaintiff is assumed to either discharge an existing debt obligation or, if none exists, to create a debt obligation. The defendant may not have explicitly agreed to repay the money, but she agreed to receive the money from the plaintiff, and the law, never presuming a gift, treated that as an implied agreement to repay it. This provides a justification for the fact that claims in money had and received recited a promise by the defendant that the plaintiff did not have to prove,[27] for the promise to repay was implied on normative grounds, not factual ones.[28]

The most important thing to notice about the quasi-contractual claims just discussed is that they all required positive action on the part of the defendant. There was no liability for a benefit that was not either requested or received subject to an agreement on terms.[29] For

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[23] David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 1999, 2006) 271; James Edelman, "Money Had and Received: Modern Pleading of an Old Count" (2000) 8 RLR 547 at 550.

[24] Edelman (n 23) 566.

[25] Of course, it has been said many times that the purpose of the fiction was to fit new causes of action into the old forms of action. I do not mean to deny that. But I argue that the fiction can be justified on normative grounds and not merely instrumental ones.

[26] Baker (n 13) 35 n. 16.

[27] Birks and McLeod (n 6) 47.

[28] See *William Lacey (Hounslow) Ltd v. Davis* [1957] 2 All ER 712; Baloch (n 20) 34-35.

[29] As Baker writes: "[s]omeone who intervened in another's affairs to confer an unrequested benefit was as likely to be taken as a wrongdoer as to be thought worthy of reward." JH Baker, "The History of Quasi-Contract in English Law" in WR. Cornish, Richard Nolan, Janet O'Sullivan, and Graham Virgo (eds), *Restitution Past Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 38. See also David Ibbetson, "Unjust Enrichment in England before 1600" in Schrage (n 12) 147.

example, if A mows B's lawn without B's request, A cannot thereby make B liable in *quantum meruit*. If A pays off B's debt owed to C without B's request, A cannot not thereby make B his debtor and claim in money laid out.[30] Just as the equality of free agents generates a presumption against gift, so it also generates the principle that one cannot unilaterally foist liability on another.[31] Liability arises from actions on the part of the defendant that are inconsistent with the equality of free agents and their equal rights to sovereignty over their person and property. Liability without action on the part of the defendant would, contrary to the equality of free agents, allow one agent to subordinate another to her purposes and needs. For example, if I could, without your request, paint your house and thereby make you liable to pay me for my services, I would be in control of how you spend your money. If I could, without your request, pay off your creditor and thereby become your creditor myself, I could force you to do business with me against your will. Since no one can assert a right to determine how others' resources are to be spent, if A confers a benefit on B in the absence of a request or an agreement on terms, A is assumed to be taking a risk as to whether she will be paid, and B is at liberty to pay or not. Just as the equality of free agents generates a presumption of exchange when benefits are requested or received subject to an agreement on terms, so it generates a presumption of risk-taking by the one who confers a benefit in the absence of a request or an agreement on terms.

Cases of liability in money had and received for a mistaken payment may seem to be counter-examples. They may seem to be cases of liability for purely passive defendants who find themselves enriched by a payment they neither requested nor agreed to receive. It is therefore important to point out that the early cases of liability in money had and received for a mistaken

[30] *Hunt v. Bate* (1568) 3 Dyer 272a.

[31] As Lord Justice Bowen argued, "liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will." *Falcke v. Scottish Imperial Ins. Co.* (1886) 34 Ch D 234 at 248.

payment did not have this character. In the early cases, the defendant was not the passive recipient of the plaintiff's money; rather, the defendant *requested* money from the plaintiff and the plaintiff paid it, on the mistaken assumption that it was owed.[32] The request for money on the part of the defendant was the positive action that could generate the liability to repay, for the court could say that the money was paid subject to an agreement that it was due; and if the money was not due, the request for the payment could be interpreted as creating a debt obligation. In *Kelly v. Solari*[33], the defendant applied to the Argus Assurance company for payment on her deceased husband's life insurance policy. The policy had lapsed due to non-payment of the quarterly premium, but the directors of the company did not notice the lapse and paid the defendant. After discovering their mistake, they succeeded in recovering the payment from the defendant in an action for money had and received. Few have noticed that in this famous case of mistaken payment, Baron Parke understood that for liability to cohere with the normative foundation of money had and received, a "demand" for the money by the receiving party was necessary.[34] In the absence of a demand for the money, the recipient would be nothing but a passive beneficiary and liability would make her the instrument through which the plaintiff is allowed to correct her own errors. Liability in quasi-contract therefore required action on the

[32] See, for example, *Hewer v. Bartholomew* (1598) Cro. Eliz. 614; *Cavendish v. Middleton* (1628) Cro. Car. 141; *Bonnel v. Foulke* (1657) 2 Sid. 4 (translation available in William Keener, *A Selection of Cases on the Law of Quasi-Contracts* (Baker, Voorhis & Co, 1888) 70.

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

[34] McBride and McGrath have a different interpretation of this passage from *Kelly*. They think that Baron Parke meant that there was no obligation on the recipient of the money to return it until the *payor* demanded it back, that is, until the payor drew the recipient's attention to the mistake. See Nicholas McBride and Paul McGrath, "The Nature of Restitution" (1995) 15 OJLS 33 at 38. But in the case report, the lawyers describe Mrs. Solari's request for the money as a bona fide "demand" and, as I have argued above, the cases of money had and received for mistaken payments that preceded *Moses v. Macferlen* involved a demand for the money by the *recipient*. See *Kelly v. Solari* (n 33) 58 and H.G. Hanbury, "The Recovery of Money" (1924) 40 LQR 31 at 35.

part of the defendant that could be construed as an agreement to exchange (requesting a benefit from the plaintiff) or as an agreement to repay (receiving money from the plaintiff on terms).[35]

We are now in a position to understand the meaning of quasi-contractual liability. Where the defendant makes a request for and receives services, goods, or money, or receives money on terms, there is a free choice that the defendant can be held responsible for, a free choice that can be interpreted in a manner that renders it consistent with the equality of other free agents. The implied contract in cases of quasi-contract has been called an "absurd fiction" and an "abhorrent lie,"[36] but these criticisms are misplaced. Although there were judgments that wrongly treated the quasi-contractual relation as an implied-in-fact contractual relation, it was also widely recognized that the implied contract in cases of quasi-contract is implied on normative, not factual, grounds[37]; the implied-in-law contract is not a lie but a legal presumption, derived from a conception of the parties' equality. Moreover, we can see why the label quasi-contract, though perhaps liable to cause confusion with contract, is nevertheless an appropriate name for this form of liability. "Contract" is appropriate because the obligation to pay derives from an agreement to pay or repay; yet the liability is only "quasi" contractual because the agreement to pay or repay is neither express nor implied from the facts, but is rather implied by law—either from the

[35] There is an exception to this rule. Where emergency service is provided to a person who is unable to request it (because she is unconscious, for example), courts have found that the recipient is liable to pay for the service received. See *Cotnam v. Wisdom* (1907) 104 SW 164. This exception to the request requirement is explicable in terms of formal right. Freedom understood as the capacity for free choice means that there is no thing that a free agent could not in principle reject; accordingly, there is no thing that a free agent can be legally presumed to want. However, the free agent's life and limb are the pre-conditions for free choice and action in accordance with what is freely chosen. There is thus one request that the common law can presume any free agent would make of another and that is the request that her life and limb—her capacity for free agency—be preserved. In this case only—where emergency action is required to save life or limb—*both* the agent's request for the service and the agreement to pay its reasonable value may be legally implied.

[36] Baker (n 29) 41.

[37] Baloch (n 20).

defendant's request for and receipt of a benefit or from the defendant's agreement to receive the plaintiff's money on terms.

One might describe the defendant in these cases of quasi-contract as unjustly enriched at the expense of the plaintiff. But the foregoing analysis allows us to give a precise account of what "unjust," "enrichment," and "at the expense of" mean in the context of quasi-contractual obligations. "Unjust" is to be understood in the following way. From the perspective of formal right, the only basis for the defendant's receipt of a requested benefit (goods, services, or money) from the plaintiff is either exchange or debt. There is no other legal basis for the enrichment because the law will not presume a gift in the context of arm's length transactions. The defendant's failure to complete the exchange or repay the debt implicitly asserts a right to the plaintiff's unilateral service and is thus inconsistent with the principle of mutual respect for free agency. This is the injustice, the interpersonal wrong, to which quasi-contract responds. The correction of the wrong requires the fulfillment of the basis for the defendant's receipt of the benefit, that is, a payment of the value of the services or goods requested and received or a repayment of the debt.

Enrichment, in this context, is, like the conception of right that underlies it, formal. Enrichment means that the defendant has received something from the plaintiff, on the basis of a request or agreement, but has given nothing in return. The defendant may be enriched in this formal sense whether or not the defendant *retains* a benefit or is factually advantaged. For example, in *Planché v. Colburn*[38], the defendants hired the plaintiff to write two volumes that were to be part of a children's book series, for a fee of 100 pounds per volume. After the plaintiff worked for two months on research for the volumes, the defendants decided to abandon the

[38] (1831) 8 Bing. 14.

project. Since the plaintiff did not have a completed manuscript, he did not deliver anything to the defendants. Nevertheless, the plaintiff recovered fifty pounds on a *quantum meruit* basis. This case allows us to see that the enrichment in cases of quasi-contract may be purely formal.[39] The enrichment lies in the fact that the defendants requested work from the plaintiff and he did what was requested. It does not matter that the defendant does not retain a benefit because in quasi-contract, the gist of the action is not that the defendant *has* something of the plaintiff's; the gist of the action is that the one-sided transaction between plaintiff and defendant is incompatible with the *equality* of free agents. And, as *Planché* illustrates, a transaction may be one-sided whether or not the defendant is, as a factual matter, advantaged.

Similarly, "at the expense of the plaintiff," in cases of quasi-contract, means that the plaintiff has given something that was hers—goods, services, or money—to the defendant, on the basis of a request or an agreement on terms, and received nothing from the defendant in return. It does not matter whether the plaintiff has recouped this loss by passing it on to another party. The question is whether the transaction between plaintiff and defendant is consistent with the equality of free agents; there is no question of whether, factually speaking, the plaintiff is disadvantaged.

The Limits of Quasi-Contract

In *Moses v. Macferlan*, decided in 1760, Lord Mansfield famously rationalized the action for money had and received in terms of equitable principles, thus laying the groundwork for what is now known as the law of unjust enrichment. Lord Mansfield argued that the action for money had and received was "founded in the equity of the plaintiff's case," and was a "kind of equitable action, to recover back money, which ought not in justice to be kept." This language presents a

[39] See also *Brewer Street Investment v. Barclays Woolen Co* [1954] QB 428; *William Lacey (Hounslow) Ltd v. Davis* (n 28).

puzzle. If money had and received was a common law money count, developed in the common law courts, why did Lord Mansfield argue that its normative foundation was equitable?[40] The answer, I believe, is that *Moses* did not fit within money had and received understood as a quasi-contractual relation.[41] Consider the facts of that case. Moses owed Macferlan 26 pounds, which he did not pay.[42] Macferlan sued Moses in a collection action. The claim went to arbitration, and they reached a settlement. Moses agreed to pay Macferlan 20 pounds and also endorsed to him four promissory notes totalling 6 pounds that had been made out to Moses by someone named Jacob. The endorsement meant that Macferlan could sue either Moses or Jacob on the notes, and Macferlan therefore promised, in writing, that he would collect the money from Jacob and not sue Moses. It seems that Macferlan did not succeed in recovering the 6 pounds from Jacob and so—contrary to his promise—he sued Moses on the notes in the Court of Conscience, which was something like a small debts court. The Court of Conscience said that it lacked jurisdiction to hear evidence of a promise that was collateral to the action on the notes, and found Moses liable

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[40] This puzzle is also noticed by Hector L. MacQueen and W. David H. Sellar, "Unjust Enrichment in Scots Law" in Schrage (n 12) 315.

There is a question as to what meaning Lord Mansfield attached to the word equity. Birks argues that by equity, Mansfield meant "fairness," not the work of the Courts of Chancery, and this seems to be the dominant view. Peter Birks, *Unjust Enrichment* (2nd ed, OUP 2005) 290; Samuel Bray, "A Student's Guide to the Meanings of Equity" https://osf.io/sabev/download. However, others argue that when used in common law decision-making during Mansfield's time, 'equity' often referred to principles that were imported from Chancery and this may well have been the meaning that Mansfield intended. See Warren Swain, *The Law of Contract 1670-1870* (Cambridge, 2015) 110; Warren Swain, "Unjust Enrichment and the Role of Legal History in England and Australia" (2013) 36 UNSWLJ 1030; and, for example, *Straton v. Rastall* (1778) 2 TR 366 at 370. Moreover, Ben Kremer's careful study of Mansfield's jurisprudence on the action for money had and received shows that he repeatedly referred to the action as akin to a "bill in equity" and grounded in "conscience." See Ben Kremer, "The Action for Money Had and Received" (2001) 17 Journal of Contract Law 93. This language—especially the technical reference to a "bill in equity"—certainly suggests that Mansfield understood himself to be importing into the common law principles (though not necessarily *doctrines*) that had their origins in the Courts of Chancery. Whatever meaning Mansfield had in mind, the essential point is that money had and received was a settled common law doctrine and its rationalization in terms of "equity" and "conscience"—concepts foreign to the common law's mode of reasoning—invites an explanation.

[41] See also Swain, "Unjust Enrichment and the Role of Legal History in England and Australia" (n 40) 1045.

[42] For this context see Ben Kremer, "Equity and the Common Counts: The Development of the Action for Money Had and Received" in John Goldberg, Henry Smith, and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge U Press, 2019) and Gummow J's discussion of the case in *Roxborough v Rothmans of Paul Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516.

to Macferlan. In accordance with the judgment, Moses paid Macferlan 6 pounds. Moses then brought an action for money had and received against Macferlan to recover the 6 pounds and it is in the context of that suit that Lord Mansfield delivered his famous judgment.

Counsel for Macferlan objected that money had and received was not the appropriate form of action in this case because "no assumpsit lies, except upon an express or implied contract: but here it is impossible to presume any contract to refund money, which the defendant recovered by an adverse suit."[43] Of course counsel was correct that it was impossible to find an implied-in-fact promise by Macferlan to refund the money he had been awarded in his suit against Moses. But even if we adopt the implied-in-law understanding of quasi-contract that I described above, the presumption against gift will not generate an obligation to refund in Moses' case. As the factual background makes clear, Moses did not confer a unilateral benefit on Macferlan–the notes were given in the fulfillment of a debt owed by Moses to Macferlan. In demanding payment on the notes and retaining the money legally awarded, there is no sense in which Macferlan was asserting a right to receive something for nothing. Of course the background context—in which Macferlan promised Moses that he would not sue on the notes—gives rise to a sense of unfairness. We want to say that Moses' intention in endorsing the notes to Macferlan was to have Macferlan sue Jacob and that Macferlan knew of this intention and agreed to the arrangement. Nevertheless, the notes were endorsed by Moses to Macferlan voluntarily, as part of a reciprocal exchange. The common law, attentive to the voluntariness of action and formal reciprocity in exchange, but indifferent to the particular purposes an agent pursues through agreements to exchange, can see no injustice in a case like *Moses*.

[43] (n 2) 1008.

As I have already suggested, there is another well-recognized case of unjust enrichment whose injustice the common law cannot see. It is the case of a mistaken payment involving a passive beneficiary. In the case where A mistakenly believes she owes a debt to B and gives instructions to her bank to transfer $1000 to B's account, B neither requests the payment nor agrees to receive it on terms. B simply finds that she has been enriched and there is no action on B's part to which the presumption of exchange or debt can attach.[44]

However, some scholars have argued that in this scenario, B's "acceptance" of the money—for example, authorizing her bank to accept deposits on her behalf—is the positive act that can justify liability to repay it.[45] This strategy does not succeed. Liability is relational and the act that generates liability must be relational too. This is the idea behind both Stevens' claim that the defendant's liability in unjust enrichment is justified where the plaintiff's performance is "the doing of *both* parties"[46] and Weinrib's statement that a plaintiff's right against a defendant must arise through "a transaction in which both parties participate."[47] So, when we are looking for an act by the defendant that can justify liability, we are not looking for *any* act; we are looking for an act that links the plaintiff and defendant as participants in a transaction. In *Kelly v. Solari*, Mrs. Solari *requested* payment *from* the insurance company and the company paid her on

[44] Others have noticed the problem of the beneficiary's passivity in the case of the mistaken payment. See, for example, Mitchell McInnes, "The Measure of Restitution" (2002) 52 UTLJ 163 at 189; Dennis Klimchuk, "The Structure and Content of the Right to Restitution for Unjust Enrichment" (2007) 57 UTLJ 661 at 677; Stephen A. Smith, "A Duty to Make Restitution" (2013) 26 Can J L & Jurisprudence 157 at 171.

[45] Weinrib (n 19) 204; Ernest Weinrib, "The Corrective Justice of Liability for Unjust Enrichment" in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Elgar, 2020) at 178; Rob Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574 at 581-582.

Weinrib also argues that we can impute acceptance to the beneficiary where the benefit is consonant with her purposes, which will nearly always be the case with a mistaken money payment. But consonance with the beneficiary's purposes cannot establish *acceptance* of a benefit any more than contractual acceptance of an offer could be established by the fact that, given her purposes, the offeree ought to welcome the offer. Liability of the defendant to the plaintiff requires *an action* that is a manifestation of the defendant's free agency.

[46] Stevens (n 8) 37 (emphasis added).

[47] Weinrib (n 19) 189.

the *shared understanding* that it was due. As I argued above, it was Mrs. Solari's request that could justify liability in money had and received when it turned out that the shared understanding was false. But where A mistakenly deposits money in B's bank account, B acquires possession of the money (by authorizing her bank to accept deposits) but does not accept the money *from* A; and there is, of course, no understanding between A and B about the terms on which the money is given. What we have in this case is not a transfer—not interrelated acts of giving and accepting, each directed toward the other—but rather two disconnected, unilateral acts. A, without B's request or agreement, puts her money in B's possession with the intention of alienating it; and B, without any interaction with A, demonstrates a willingness to acquire money found in her possession, for example, by authorizing her bank to accept deposits. As between payor and payee, there is no interaction, no transaction, no relation of will-to-will.[48] From the standpoint of liability, the payee is purely passive. She does nothing that can ground an implied-in-law agreement to a debt relation with the payor.

[48] There might be two challenges to this claim. First, one might think that property cannot be acquired non-transactionally outside the context of first possession. But consider the situation of one who finds abandoned property. Suppose A leaves her property on the street with the intention of abandoning it and B subsequently takes possession of the abandoned property. Here there can be no doubt that B has a superior possessory right to A and that the right has been acquired non-transactionally. So, when Stevens says that "[i]f I dump a bundle of used £10 notes on your doorstep, intending them to become yours, the cash remains mine without co-operation on your part," the word "co-operation" is ambiguous. A cannot foist property on B against B's will, so nothing becomes B's property unless B indicates a willingness to acquire it. If this is what co-operation refers to, then co-operation is required for the acquisition of a property right. But if co-operation refers to a *transactional relation* between A and B, then it is not required, as the case of abandoned property demonstrates. See Stevens (n 45) 582. Likewise, Georgiou (n 6) 621 is right that "we cannot, in life or in law, pay people against their will." But this only means that the acquisition of money requires an act by the payee; the act of acquisition may nevertheless lack the relational character that *liability* demands.

Second, one might think that this claim is inconsistent with a basic principle of agency law, namely, that a principal (in this case, the payee) may enter into transactional relations with a third party (the payor) through an agent (the bank). But although the bank may act as agent for the payee in accepting deposits—so that acceptance of deposits is attributable to the payee—it is clear that the bank-payee agency relationship does not extend to the acceptance of *terms*. If A writes to the bank and offers to deposit money in B's account if B agrees to repay the money at the end of the month, it is obvious that the bank, as a general rule, has no authority to accept that debt relation on B's behalf. The bank's authority is simply to take in the deposit and all matters relating to terms—to the basis for the payment—must be settled by the interactions between the payee and the payor. And if, as between payee and payor, there is neither a request for the money nor an agreement on terms, the bank's narrow authority to take in deposits is no basis for foisting a debt relation on the payee.

The non-transactional character of the mistaken payment to a passive beneficiary is only a part of the problem here. There are cases of common law liability where the defendant may be purely passive. The old action for trover is an example.[49] The key to trover, however, was that the plaintiff could assert a property right vis-à-vis the defendant. In trover, the claim was not that the defendant had *done* something inconsistent with the plaintiff's sovereignty over her own property; it was that the defendant *had* something inconsistent with the plaintiff's sovereignty over her own property.[50] At common law, we can say, B is under an obligation to set things right for A only if B has either wronged A (by committing a tort, or by breaching a contractual or quasi-contractual obligation) or if B is in possession of an asset to which A has superior legal title.[51] In the case of the mistaken bank transfer made to a passive recipient, however, neither of these conditions is fulfilled. The recipient's passivity precludes a finding of wrongdoing. Moreover, at common law, title to the mistaken payment lies with B, not A. In the case where A intends to give a particular sum of money to B and puts that sum in B's possession, property in the money passes to B even if A was mistaken in the beliefs underlying her intention;[52] for A has voluntarily parted with the money, leaving B with the best possessory right to it. This is another illustration of the common law's attention to the voluntariness of action and its indifference to the purposes action is intended to actualize.

The conclusion of the foregoing discussion is that a claim to money intentionally but mistakenly paid to a passive beneficiary cannot be a property claim;[53] it can only be a debt claim.

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[49] The action has been subsumed in the modern tort of conversion.

[50] As Ibbetson writes, in a claim of trover, the only question is whether the defendant has the plaintiff's thing. See Ibbetson (n 23) 107.

[51] See also Klimchuk (n 44) 673.

[52] David Fox, "The Transfer of Legal Title to Money" (1996) 4 RLR 60.

[53] Many deny that property has passed in the mistaken payment on the ground that the plaintiff did not *voluntarily* part with her property. For some examples see McBride and McGrath (n 34) 36; Mitchell McInnes, "Enrichment Revisited" in JW Neyers, M McInnes, and S Pitel (eds), *Understanding Unjust Enrichment* (Oxford: Hart, 2004)

But this puts us back to the original problem: the plaintiff cannot unilaterally foist a debt relation on the defendant. Without a claim of debt or superior title, the payor can point to nothing in the beneficiary's retention of the mistaken payment that is inconsistent with the formal equality of free agents.[54] If there is an injustice in this case, the common law cannot see what it is.

Finally, consider the case of a mistaken gift. Suppose A makes a gift of $10,000 to her elder daughter in order to place her in the same financial position as her younger daughter, forgetting that she had already gifted her elder daughter $10,000 several years earlier. At common law, A cannot not recover the money from her daughter in money had and received.[55] If A intends a gift to B and voluntarily makes a gift to B, the common law can see no reason to undo the transfer. The common law, as I have argued, presumes exchange, not gift. But if a gift is intended, respect for the individual's sovereignty over her property demands legal respect for that choice. And once the gift has been delivered and accepted, it becomes the property of the donee. Of course, the donor wants to say that her purpose in making the gift has been frustrated. In the example above, she intended to equalize her daughters' positions and instead has, by her mistake, made one of her daughters better off. But as I argued above, the common law is

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165 at 169. But this view conflates volition with the purpose of volition and ignores the thin sense of voluntariness demanded by the common law. In the paradigmatic case of a mistaken payment, A intends to transfer X amount to B and does so. A's deed is thus voluntary, not coerced. The fact that A paid the money under a mistaken belief that it was owed goes to A's purpose, not to the voluntariness of A's deed. As an expression of formal right, however, the common law is concerned with free choice but indifferent to the purposes chosen. Thus, as far as the common law is concerned, title has passed.

[54] See also Dennis Klimchuk, "Unjust Enrichment and Corrective Justice," in Neyers, McInnes, Pitel (n 53) 111 at 124-132.

[55] In his essay on money had and received, first published in 1802, Sir William Evans writes: "But a mere error in the motive for transferring a sum of money, does not necessarily induce a right to reclaim it, if there is no error with respect to the nature of the act…Therefore if I gratuitously give a person a sum of money under the notion that he has rendered me some valuable service, and afterwards discover that the notion was ill founded: this affords me no right to reclaim it, because I intended a donation, though that intention was induced by an erroneous supposition." William Evans, "An Essay on the Action for Money Had and Received" (1998) 6 RLR 1 at 8. See also Samuel Stoljar, "Contract, Gift, and Quasi-Contract" [1959] Sydney L Rev 33 at 36; *Morgan v Ashcroft*, [1938] 1 KB 49 (CA).

concerned with the voluntariness of action but not with the purposes action is intended achieve. It is concerned with whether a choice is free, but not with whether a free choice actualizes the goal that motivated it. Accordingly, there is no remedy in money had and received for the mistaken gift.

The examples of *Moses*, mistaken payments to a passive beneficiary, and mistaken gifts reveal the limits of quasi-contractual liability. Quasi-contract responds where one has conferred a benefit on another on the basis of a request or an agreement on terms but has received nothing in return. But, as we have seen, one may unintentionally confer a benefit on another in circumstances that fall outside that narrow sphere. We might be tempted to regard these cases as bad luck for plaintiffs and windfalls for defendants that neither implicate the law nor call for legal intervention, but that would be a mistake. In each case, it is the common law that gives legal effect to the plaintiff's act of alienation and so saddles the plaintiff with an outcome she did not intend. In *Moses*, the common law enforces the promissory notes as the fulfillment of a debt obligation, though neither Moses nor Macferlan intended that Moses should be liable to Macferlan. In the cases of mistaken payments and mistaken gifts, the common law enforces a voluntary alienation of ownership and validates the defendant's claim of title although the benefit to the defendant was not intended. If there is an injustice in these cases, it lies, not in the defendant's action, but in the common law's exercise of coercive power with indifference to the

way in which action may misfire as an expression of the agent's purposes.[56] It is thus no wonder that in *Moses*, Lord Mansfield found the solution to this problem in equity.[57]

Autonomy, Equity, and Unjust Enrichment

Implicit in the formal capacity for free choice that we have so far been considering is a richer human capacity. The capacity to stand back from need, impulse, or social pressure and choose what I will do contains within it the potential for autonomy, for acting from an end that I give to myself and for making choices in the pursuit of a plan or purpose that is mine. If we recognize the potential for autonomy implicit in the formal capacity for free choice and adopt autonomy as our conception of human freedom, mistakes, thwarted intentions, and frustrated expectations take on moral significance, for they threaten the individual's ability to see her life as the reflection of self-authored projects and plans rather than of her contingent circumstances, limited knowledge, or vulnerability to chance.

Freedom conceived as autonomy not only has consequences for the moral significance of defeated purposes, intentions, and expectations; it has consequences for their legal significance as well. An autonomous life is a life, not only expressive of self-chosen purposes and goals, but also governed only by laws one could impose on oneself, by laws that could be self-chosen.[58] But a law that forces one to serve purposes that are not one's own is inconsistent with autonomy

[56] The focus on the injustice that arises when *the law* forces one to serve purposes that are not one's own allows us to distinguish between the cases I have been describing and for example, the case where A forgets to turn off his heating while away on vacation and inadvertently heats B's apartment above, increasing A's heating bill and reducing B's. For the example, see Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP, 2016) 62. The enrichment in this case has nothing to do with the law and so does not implicate law's self-imposability (see the discussion in the next section); accordingly, it calls for no legal intervention. The same can be said of Robert Stevens' stamp example, in which A accidentally destroys his own rare stamp thus causing B's identical rare stamp to increase in value. See Stevens (n 45) 578.

[57] For discussion of what equity means in this context see n 40.

[58] GWF Hegel, *The Philosophy of Right* (TM Knox tr, OUP 1967) para 132.

and so could not be self-imposed by the autonomous individual. Thus, where freedom is conceived as autonomy, the relationship between action and outcome, between a free choice and the purpose it was intended to actualize, rises to *legal* significance. This is what we see in equity's ancient jurisdiction over mistake,[59] and it is what we see in what I will now call the equitable doctrine of unjust enrichment.

Thinking about the significance for autonomy of an agent's purposes and the ways purposes may be frustrated in outcomes sheds new light on *Moses v. Macferlan*, cases of mistaken payments made to passive beneficiaries, and mistaken gifts. In *Moses* we can say that, in this particular case, the legally forced payment on the notes, though valid at common law, allows Macferlan to extract from Moses a benefit that, on their shared understanding, was not intended. In the case of a mistaken payment made to a passive beneficiary, the plaintiff acted with, for example, the intention of fulfilling a debt obligation. She did not intend to confer a unilateral benefit on the defendant. In the case of the mistaken gift, the plaintiff intended a gift that was to fulfill a particular purpose and that purpose was thwarted by the plaintiff's error. In all of these cases, action fails as an expression of the plaintiff's purposes. Equity, concerned for autonomy and so attentive to the relationship between action and outcome, provides the corrective: it reverses the plaintiff's alienation of the unintended benefit.[60] In *Moses*, Lord Mansfield declared that Macferlan was "obliged by the ties of natural justice and equity to refund

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[59] See, for example, *Gee v. Spencer* (1681) 1 Vern 32; *Morris v. Burroughs* (1737) 1 Atk 399 at 402; *Bingham v. Bingham*, (1748) 1 Ves Sen 126. See also Henry Homes of Kames, *Principles of Equity* (Edinburgh: Adam Neilland and Co, 1800; 1st ed 1766) 104-106 (which begins with a letter to Lord Mansfield); Joseph Story, *Commentaries on Equity Jurisprudence* vol 1 (Boston, Mass: Little, Brown, and Company, 1836); Ibbetson (n 20) at 73, 210.

Brudner (n 7) argues that equity, in contrast to the common law, conceives of freedom, not merely as the formal capacity for choice, but as autonomy, as the actualization of that capacity in a life reflective of a thought-out scheme of commitments and values. This accounts for equity's special jurisdiction over mistake.

[60] Klimchuk has also suggested that we might need to think about equitable principles in order to understand the justification for liability in the case of a mistaken payment made to a passive beneficiary. See Klimchuk (n 54) 136-137.

the money."[61] In the case of a mistaken payment made to a passive beneficiary, courts draw on equity's jurisprudence of mistake and require the beneficiary to make restitution to the payor.[62] In the case of a gift that fails as an expression of the donor's intention, equity will set the gift aside.[63]

It might be objected that the plaintiff's unilateral mistake cannot ground the defendant's liability because this would force the defendant to minister to the plaintiff's needs, contrary to the equality of free agents.[64] This is correct. But in cases of equitable unjust enrichment, the plaintiff's mistake grounds a right, not vis-à-vis the defendant, but vis-à-vis the court. The plaintiff's right is a right that *the court* not enforce a law that compels her to serve purposes that are not her own and that cannot, consistently with her autonomy, be self-imposed. The court does not compel the defendant to serve the plaintiff; it merely reverses an alienation of property that it cannot in justice enforce.[65] The defendant's duty in cases of equitable unjust enrichment is to

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[61] At 1012.

[62] *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1979] 3 All ER 1025. Keener writes of the mistaken payment**:** "as the legal title is passed with plaintiff's consent without a contract in fact on the part of the person receiving it to transfer it back, the plaintiff's claim, if any he has, must be an equitable one." See William A. Keener, "Recovery of Money Paid Under Mistake of Fact" (1887) Harvard L Rev 211 at 212. See also Joseph Story, *Commentaries on Equity Jurisprudence* at paras 1255 and 1256 (speaking of equity's ancient jurisdiction over money paid by mistake); Swain, "Unjust Enrichment and the Role of Legal History in England and Australia" (n 40) 1046.

[63] *Lady Hood of Avalon v. Mackinnon* [1909] 1 Ch 476; *Gibbon v Mitchell* [1990] 1 WLR 1304; *Pitt v. Holt* [2013] UKSC 26, [2013] 2 AC 108.

[64] Stevens (n 45) has made this argument. Klimchuk refers to this as the puzzling "unilaterality" of restitution for unjust enrichment in Dennis Klimchuk, "The Normative Foundations of Unjust Enrichment" in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of Unjust Enrichment* (Oxford: OUP, 2009) 81 at 89.

[65] If it is the plaintiff's autonomy that grounds liability in unjust enrichment, it might be asked why the defendant is made to pay rather than, for example, a public fund. See Kit Barker, "The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box" in Chambers, Mitchell, and Penner (n 64) 146 at 166. But the plaintiff's complaint is not that she has suffered a loss, which could of course be compensated from a public fund. The plaintiff's complaint is that the law is enforcing her alienation of property with indifference to her autonomy and is therefore incapable of self-imposition by the autonomous individual. The only remedy for that complaint is the court's refusal to enforce the alienation of property in the particular case.

obey the court order reversing the transfer; the defendant's duty is not to cure the plaintiff's error.

We can describe the defendant in the cases we have been considering as unjustly enriched at the plaintiff's expense and give an account of the meaning of these words in the context of equitable unjust enrichment. The injustice in cases of equitable unjust enrichment does not lie in the defendant's retaining something that belongs to the plaintiff or in the defendant's breaching an obligation owed to the plaintiff. Rather, the injustice lies in the common law's indifference to the way action can misfire as an expression of intention with the consequence that one is forced, by a legal determination, to serve purposes that one cannot regard as one's own.

The idea of "enrichment" has been subjected to analysis in terms of "subjective devaluation" and "incontrovertible benefit." The idea is that it would be unfair to regard the defendant as enriched if she received a benefit that she does not subjectively regard as beneficial.[66] On the other hand, it is generally accepted that there are some benefits that cannot be subjectively devalued; money, it is argued, is an "incontrovertible benefit" because it can be made to serve any purpose the individual may have.[67] We are now in a position to see that this is the wrong framework for thinking about enrichment. Suppose A mistakenly paints B's house. Since equitable unjust enrichment does not force the defendant to pay for a benefit but rather requires the court to refuse the enforcement of an alienation of property, the question of whether B likes or doesn't like the paint colour is beside the point. The only question is whether the court can reverse A's error. In this case, no reversal is possible—the labour and materials cannot be returned—and there is no basis for ordering the defendant to pay for a service she did not

[66] See discussion in Graham Virgo, *The Principles of the Law of Restitution* (3rd ed, OUP, 2015) 69-72.
[67] See, for example, Birks (n 40) 59; Charles Mitchell, "Unjust Enrichment" in Andrew Burrows (ed), *English Law Private* (OUP, 2013) 1031 at 1038-9.

request.[68] A payment of money is different, not because everyone is presumed to want money, but because it is usually an alienation of property that can be straightforwardly reversed.[69]

In the context of quasi-contract, I argued that "enrichment" is formal, that it does not require that the defendant have *retained* the benefit that the plaintiff conferred upon her. It is enough that the defendant has requested and received something from the plaintiff, but has given nothing in return. Things are different in the context of equitable unjust enrichment. Because there is nothing to justify *the defendant's* liability in equitable unjust enrichment, the court must ensure that a return of the benefit conferred is consistent with the principle that no free agent is under an obligation to minister to the needs of another. This generates the change of position defence. Suppose A mistakenly transfers $1000 to B's bank account and B, innocent of the mistake but discovering that she has more money at the end of the month than she thought she would, goes on a vacation she would not have purchased but for the extra $1000 she found in her possession. In this case, a court will not order B to refund the money because doing so would force B to pay a price—to make herself worse off—for a benefit she neither requested nor agreed to receive on terms.[70] The defendant, we can now see, is enriched in equitable unjust enrichment when she receives an unrequested benefit from the plaintiff that can be straightforwardly returned without allowing the plaintiff's needs to set the agenda for the defendant's resources.

Enriched "at the expense of the plaintiff" means that the plaintiff conferred on the defendant a benefit she did not intend to confer. Thus, the plaintiff must have had something that

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[68] This thought may be behind the judgment in *Blue Haven* [2006] UKPC 17, a case where the mistaken improvement to land was clearly an "incontrovertible benefit" but there was no possibility of reversal and the claim in unjust enrichment did not succeed.

[69] This is also true where what is mistakenly given to the beneficiary is a material object, like a license plate. See *McDonald v. Coys of Kensington* [2004] EWCA Civ 47, where the court focused on the fact that the mistakenly transferred license plate was "readily returnable."

[70] *Lipkin Gorman (a firm) v. Karpnale Ltd* (n 5) at 517 and *Restatement (Third) of Restitution and Unjust Enrichment* § 65 (2011).

was hers (property, money, labour) which she alienated to the defendant due to a mistake. The validity of the alienation at law comes at the expense of the plaintiff's autonomy and it is this that grounds the plaintiff's claim against the court.

Against the Fusion of Quasi-Contract and Equitable Unjust Enrichment

I have argued that quasi-contract and equitable unjust enrichment are distinct doctrines that rest on distinct normative foundations. Nevertheless, it might be wondered why we shouldn't continue to regard the doctrines as unified under an over-arching principle that is broad enough to capture them both, namely, that one who has been unjustly enriched at the expense of the other ought to make restitution. There are two reasons to reject the fusion of these two doctrines.

First, there is a doctrinal reason. I have argued that quasi-contractual obligations are interpersonal obligations to interact on terms consistent with the equality of free agents. Breach of these obligations justifies a finding of liability. However, equitable unjust enrichment is not a doctrine of interpersonal obligation. It is a doctrine specifying which alienations of property *a court* can enforce consistently with the requirement that laws be capable of self-imposition by autonomous human beings. A finding of equitable unjust enrichment justifies a court order reversing the transfer, and the court order justifies a duty in the defendant to obey it; but it does not justify a finding of *liability* because the defendant has breached no obligation owed to the plaintiff. This distinction has an important doctrinal implication. The change of position defence must be available for equitable unjust enrichment, but not for quasi-contract. In equity, the defence ensures that a court order undoing the effects of the plaintiff's mistake does not make the defendant—who has not wronged the plaintiff and is not liable to the plaintiff—worse off for the

sake of the plaintiff's autonomy. The change of position defence thus functions like other familiar equitable doctrines, for example, the refusal to order specific performance where it will cause undue hardship to the defendant and the refusal to enforce a pre-existing equitable interest against a bona fide purchaser for value without notice.

On the other hand, change of position cannot be a defence to quasi-contractual liability, just as it cannot be a defence to any other form of liability. In a claim of damages for conversion, it is no defence that the defendant gifted the property to a friend. In a claim of contract damages for consequential loss, it is no defence that the defendant, relying on a limitation clause that turned out to be unenforceable, did not expect to pay so much and spent her money on something else.[71] When we are dealing with breach of an interpersonal obligation, a change of position defence would make the vindication of the plaintiff's right contingent upon the defendant's subjective choices and circumstances; it is therefore inconsistent with the equality of the parties.[72]

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[71] See also Robert Stevens, "Is there a Law of Unjust Enrichment?" in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, 2008) 11 at 13.

[72] On the account I have offered, *Baylis v. Bishop of London*, [1913] 1 Ch 127 is a case of quasi-contract since money was paid by mistake following a demand for the money by the recipient. The court was therefore correct to say that the recipient's having spent the money (even with no knowledge of the mistake) was no defence to liability. The same is true of *Durrant v. Ecclesiastical Commissioners for England and Wales* (1880) 6 QBD 234.

The claim that change of position is no defence to breach of a quasi-contractual obligation will no doubt seem controversial. However, many agree that if A transfers money to B pursuant to a contract that turns out to be unenforceable, it is no defence to A's claim for repayment that B spent the money on an extravagant purchase she would not have otherwise made. They argue that this is because B is aware of the conditional nature of the payment. See Ross Grantham, "Change of Position-Based Defences" in Bant, Barker, and Degeling (n 45) 430; Lionel Smith, "Defences and the Disunity of Unjust Enrichment" in A. Dyson, J. Goudkamp, and F. Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart, 2016) 27 at 46; Stevens (n 8) 359. But I have argued that in *all* cases properly understood as quasi-contractual, the presumption against gift means that the recipient of the benefit can be charged with awareness of—even agreement to—the conditional nature of the transfer. The provision of requested goods or services is, from a legal point of view, implicitly conditional on payment; likewise, the payment of money by A to B at the request of C is implicitly conditional on C's re-payment; and the payment of money pursuant to a request or an agreement on terms is implicitly conditional on its re-payment or its use in accordance with the agreed upon terms. So, if imputed knowledge of the condition is accepted as a limit on the application of change of position, it should be accepted that change of position cannot apply to cases of quasi-contract.

Second, there is a justificatory reason for rejecting fusion. Those who are interested in the justification for legal coercion have reason to eschew rationalizations of legal doctrines that rely on vague references to what is "unjust" or "unconscionable." These words draw multiple cases and categories together under a single label, but only by avoiding the central question of what, besides an intuition, makes a particular interaction unjust or unconscionable. Once we focus on this question in the context of the law of unjust enrichment, we find two different answers—two different justifications for a legal remedy, based on two different conceptions of human freedom. The separation of quasi-contract and equitable unjust enrichment makes these justifications transparent and is therefore demanded by any systematic effort to show that private law is justified. On the other hand, the fusion of quasi-contract and equitable unjust enrichment under a principle of "unjust" or "unconscientious" retention of a benefit—language that sounds justificatory but is too vague to justify anything—obscures the doctrines' distinctive normative foundations, and so lends support to the view that private law does nothing but conceal a subjective and intuitive judicial choice.

Conclusion

In *Moses v. Macferlan*, Lord Mansfield used money had and received, a common law money count, to provide relief in a case where an action's outcome failed to align with the actor's intention. In the *First Restatement of Restitution*, Seavey and Scott gathered together all cases, quasi-contractual and equitable, under the single principle that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other."[73] These two influential acts of fusion between common law and equity have caused a great deal of

[73] Seavey and Scott (n 4) at 31–32.

confusion in the scholarship and jurisprudence on unjust enrichment. With the fundamental differences between quasi-contract and equitable unjust enrichment obscured, scholars and judges have struggled to find the single principle or core case that unifies liability in what is now called the law of unjust enrichment. Focusing on the defendant's retention of a benefit excludes cases like *Planché* where the defendant retains nothing at the plaintiff's expense. Focusing on the defendant's having received something from the plaintiff without giving anything in return in circumstances where no gift was intended excludes cases of mistaken gifts, where gifts are intended. Focusing on what is objectively implicit in the defendant's request for a benefit or agreement to receive money on terms excludes cases involving purely passive beneficiaries.

We can therefore understand why Robert Stevens has recently described the whole effort as a "disaster."[74] But we can resolve the puzzles of unjust enrichment by rejecting the fusionist claims that started them all, that is, by distinguishing cases of quasi-contract (the common law money counts) from cases of equitable unjust enrichment, and recognizing that each has a distinctive normative foundation. Quasi-contract, like other common law doctrines, is grounded in respect for the freedom and equality of agents conceived as beings with the capacity for free choice. Quasi-contract is concerned with the objective significance of external acts like requests and agreements on terms; it is not concerned with the frustration of the plaintiff's particular purpose in acting. Equitable unjust enrichment, like other equitable doctrines that attend to mistakes, expectations, and intentions,[75] rests on a concern for individual autonomy. It recognizes that a court, as a public institution attuned to law's self-imposability, cannot enforce

[74] Stevens (n 45).

[75] For similar arguments in the context of contractual mistakes and equitable doctrines more generally, see For similar arguments in the context of contractual mistakes and equitable doctrines more generally, see Jennifer Nadler, "A Theory of Mistaken Assumptions in Contract Law" (2021) 71 UTLJ 32 and "What is Distinctive about the Law of Equity?" (2021) OJLS 854.

an alienation of property with indifference to the way it may fail as an expression of the individual's purposes and reasons for action.