
Volume 51, Issue 3 (Spring 2014)
Symposium in Honour of John McCamus,
Teaching and Scholarship
Guest Editors: Jamie Cameron & Stephanie Ben-
Ishai

Article 6

4-1-2014

The Justice in Unjust Enrichment

Dan Priel

Osgoode Hall Law School of York University, dpriel@osgoode.yorku.ca

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Civil Law Commons](#)

Special Issue Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Priel, Dan. "The Justice in Unjust Enrichment." *Osgoode Hall Law Journal* 51.3 (2014) : 813-858.

DOI: <https://doi.org/10.60082/2817-5069.2757>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss3/6>

This Special Issue Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

The Justice in Unjust Enrichment

Abstract

The question of what justice has to do with the law of unjust enrichment (if it has anything to do with it at all) has in recent years come to occupy scholars who have sought to explain the theoretical foundations of this area of law and its relationship with other branches of private law. A popular answer has been that the law of unjust enrichment, like the rest of private law, instantiates the politically neutral norms of corrective justice. In this article, I argue that this is not the case in two distinct senses. First, even on its own, corrective justice does not provide a satisfactory grounding for this area of law (or, for that matter, for other branches of private law). Second, parts of the law of unjust enrichment are explained by competing notions of justice. I consider some of them in this article, and I show that what all of them have in common is that they are grounded in considerations of distributive justice or that they are part of a political theory. In the concluding sections of the article, I offer a way of reconciling these political foundations of unjust enrichment law with private law's seeming indifference to distributive considerations. I do this by calling attention to the institutional constraints under which courts operate. I argue that while such constraints are essential for understanding private law adjudication, they do not challenge the political foundations of private law, and they undermine many of the practical recommendations for private law offered by corrective justice theorists.

Keywords

Unjust enrichment; Restitution; Justice, Administration of

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

The Justice in Unjust Enrichment

DAN PRIEL*

The question of what justice has to do with the law of unjust enrichment (if it has anything to do with it at all) has in recent years come to occupy scholars who have sought to explain the theoretical foundations of this area of law and its relationship with other branches of private law. A popular answer has been that the law of unjust enrichment, like the rest of private law, instantiates the politically neutral norms of corrective justice. In this article, I argue that this is not the case in two distinct senses. First, even on its own, corrective justice does not provide a satisfactory grounding for this area of law (or, for that matter, for other branches of private law). Second, parts of the law of unjust enrichment are explained by competing notions of justice. I consider some of them in this article, and I show that what all of them have in common is that they are grounded in considerations of distributive justice or that they are part of a political theory. In the concluding sections of the article, I offer a way of reconciling these political foundations of unjust enrichment law with private law's seeming indifference to distributive considerations. I do this by calling attention to the institutional constraints under which courts operate. I argue that while such constraints are essential for understanding private law adjudication, they do not challenge the political foundations of private law, and they undermine many of the practical recommendations for private law offered by corrective justice theorists.

* Associate Professor, Osgoode Hall Law School. An earlier version of this article was originally presented at the Symposium in Honour of John McCamus: Scholarship, Teaching and Leadership (7 February 2013), hosted at Osgoode Hall Law School, York University, Toronto. I thank the participants in the symposium in honour of John McCamus for their questions on a presentation of some of the ideas articulated in this article. Many thanks also to four anonymous referees for many comments and suggestions on an earlier draft. I have attempted to answer them within the constraints of an already overlong article.

Depuis un certain temps, les juristes se demandent quel est le rôle – si rôle il y a – de la justice en matière d’enrichissement injustifié et cherchent à expliquer les fondements théoriques du droit qui s’y rapporte ainsi que ce qui relie ce droit aux autres volets du droit privé. À première vue, on pourrait croire que le droit en matière d’enrichissement injustifié, tout comme le reste du droit privé, instancie les normes politiquement neutres de la justice commutative. Dans cet article, je prétends que ce n’est pas le cas pour deux raisons distinctes. D’abord, même par elle-même, la justice commutative ne constitue pas un motif satisfaisant pour ce domaine du droit (ni d’ailleurs pour les autres volets du droit privé). Deuxièmement, des notions concurrentes de la justice expliquent en partie le droit en matière d’enrichissement injustifié. J’en évoque quelques-unes dans cet article et je démontre qu’elles ont toutes en commun de procéder d’interprétations de la justice commutative, lorsqu’elles ne relèvent pas d’une théorie politique. Je propose en conclusion un moyen de réconcilier ces fondements politiques du droit en matière d’enrichissement injustifié avec l’indifférence que semble éprouver le droit privé pour la justice commutative. Pour y parvenir, j’attire l’attention du lecteur sur les contraintes institutionnelles qui encadrent le travail des tribunaux. Je prétends que, même si ces contraintes sont essentielles à la compréhension des jugements en droit privé, elles ne mettent pas en péril les fondements politiques du droit privé, mais sapent plusieurs des recommandations pratiques proposées à cet égard par les théoriciens de la justice commutative.

| | |
|---|-----|
| INTRODUCTION: THE WHIG INTERPRETATION OF UNJUST ENRICHMENT | 815 |
| I. UNJUST ENRICHMENT AS THE LEGALLY UNJUST | 817 |
| II. UNJUST ENRICHMENT AND CORRECTIVE JUSTICE | 821 |
| A. The Theoretical Failures of Corrective Justice | 823 |
| B. The Failure of Corrective Justice Accounts of Unjust Enrichment..... | 833 |
| III. UNJUST ENRICHMENT AS PROPERTY..... | 837 |
| IV. UNJUST ENRICHMENT AS FAIRNESS..... | 842 |
| V. UNJUST ENRICHMENT AS EQUITY..... | 849 |
| VI. UNJUST ENRICHMENT AS DISTRIBUTIVE JUSTICE | 852 |

THE FIRST ACADEMIC TALK I GAVE AT OSGOOD HALL LAW SCHOOL was part of a job interview, and it was about the law of restitution. There were the usual trepidations that come with this event. But I had another: I knew that in the audience there was likely to sit one of the world’s foremost experts on this area of law, John McCamus. And I had a vague suspicion he would not agree with my views. (He didn’t.) When I finished my presentation and we got to the “Q&A,” I waited for the moment when he would raise his hand to ask a question. When he did, he first kindly thanked me for choosing to talk about restitution—not the hottest of topics in today’s law school (especially in North America). He then went on to ask the question that, though presented in his characteristically

mild manner, made clear his disagreement. To be honest, like much else of that day, I cannot remember his question or my answer.¹ I ended up at Osgoode, so apparently he or the rest of the faculty did not deem this disagreement fundamental enough to ‘veto’ me. This is my opportunity to repay John for being a gentle critic.

Though John has not written much on the topic I have chosen for this article, I believe (and hope) that he would find himself agreeing more with this one than with my first attempt. For I think a theme running through much of John’s work on the law of restitution is that this area of law reveals a degree of complexity that cannot be captured in any single formula.² That, in a way, is also the theme of this article.

INTRODUCTION: THE WHIG INTERPRETATION OF UNJUST ENRICHMENT

Anyone who makes his or her first acquaintance with the law of restitution is taken on a tour to all its historical sites. Here on the left you see *Moses v Macferlan*.³ Down there on the right you see the first *Restatement*;⁴ further ahead is the first edition of Goff and Jones.⁵ This tour comes with a moving tale of darkness to light. Here is a characteristic statement: “The English law of restitution over the last fifteen years has seen the most remarkable transformation. The reasoning of the courts at all levels has been characterized by rigorous and enlightened analysis.”⁶ Sure, there are some dark forces (coming, contrary to

-
1. Those who want to judge the matter for themselves can turn to the now-published version of that article. See Dan Priel, “In Defence of Quasi-Contract” (2012) 75:1 Mod L Rev 54 [Priel, “Quasi-Contract”].
 2. See John D McCamus, “Forty Years of Restitution: A Retrospective” (2011) 50:3 Can Bus LJ 474 at 492-94.
 3. (1760), 2 Burr 1005, 97 ER 676 (KB) [*Moses* cited to ER].
 4. *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (St. Paul, MN: American Law Institute, 1937).
 5. Robert Goff & Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966).
 6. Andrew Burrows, “The Australian Law of Restitution: Has the High Court Lost Its Way?” in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) 67 at 68 [Burrows, “The Australian Law”].

biblical prophecy, from the south),⁷ but they are best ignored. Recently, Mitchell McInnes gave us that tour yet again and concluded sunnily that “there is now wide (though not universal) acceptance that restitution is triggered by unjust enrichment.”⁸ This doctrinal analysis is accompanied by an equally confident story about the justification of the law. On this question McInnes assures us that even though “there are differences of opinion[, t]o an extent that may be surprising ... most of those debates occur at the margins. On the core question, there is a general consensus, judicially and academically, that unjust enrichment operates on a model of *corrective justice*.”⁹ In short, this is a story of a slow but steady discovery of true principles that underlie an area of law, accompanied by an almost perfect congruence between judicial decisions, a conceptual framework (unjust enrichment), and a justificatory theory (corrective justice). I will call this view the “unjust enrichment orthodoxy.”

As others have shown, the historical story told by proponents of the unjust enrichment orthodoxy is by no means the only possible one.¹⁰ This article aims to show, in a similar fashion, that the philosophical story that accompanies it, the one supposedly accepted by “a general consensus,” is likewise more equivocal and ambiguous. I hope to show that the relationship between unjust enrichment and corrective justice is much less straightforward than the unjust enrichment orthodoxy would have us believe. First of all, contrary to the claim that there is virtual agreement on corrective justice as the basis of the law of unjust enrichment, I will argue that there are in fact several, somewhat overlapping, foundations for this area of law. Second, I will contend that beyond a banal and virtually vacuous sense, it is not true that “unjust enrichment operates on a model of corrective justice.” Whatever appeal corrective justice holds, it is not internal

-
7. See *ibid* at 85 (“the [Australian] High Court has lost its way in relation to the Australian law of restitution”). This statement is hard to square with the rest of Burrows’s views. See Andrew Burrows, *The Law of Restitution*, 2d ed (London: Butterworths LexisNexis, 2002) [Burrows, *Restitution* 2d]; Andrew Burrows, *The Law of Restitution*, 3d ed (Oxford: Oxford University Press, 2011) [Burrows, *Restitution* 3d].
 8. Mitchell McInnes, “*B.M.P. Global Distributions Inc. v. Bank of Nova Scotia: The Unitary Action in Unjust Enrichment*” (2009) 48:1 Can Bus LJ 102 at 103 [citations omitted]. For an effective critique of McInnes’s main thesis, see John D McCamus, “Unjust Enrichment, ‘Existing Categories’ and *Kerr v. Baranow*: A Reply to Professor McInnes,” (2012) 52:3 Can Bus LJ 390.
 9. Mitchell McInnes, “Resisting Temptations to ‘Justice’” in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) 100 at 107-08 [McInnes, “Resisting Temptations”] [emphasis in original] [citation omitted].
 10. See the text accompanying notes 116-17 in Part V, below.

to legal practice, but is rather adopted by proponents of the unjust enrichment orthodoxy for reasons that have little to do with the law of unjust enrichment itself.

I begin this article by considering the orthodoxy in more detail in Parts I and II. I first show that those who defend it simply in terms of what one finds in the cases necessarily import ideas not found in the cases themselves. It is at this point that corrective justice is presented as the missing link, the uniquely appropriate normative principle for justifying the law. Part II is dedicated to showing that this is not the case. I argue that there are many serious difficulties with the idea that we can explain private law in general, and unjust enrichment more specifically, in terms of corrective justice. The subsequent four Parts consider other foundations of parts of the law of unjust enrichment. Though different, I argue that what they all have in common is that they tie unjust enrichment to broader political or distributive considerations. Based on this finding, I address the question of why courts in private law litigation are not usually directly concerned with promoting distributive justice. I add one additional component to the story—namely, the institutional constraints under which courts work. In the concluding Part of the article, I explain why the approach considered here—distributive justice with institutional constraints—is different from, and superior to, the corrective justice approach.

I. UNJUST ENRICHMENT AS THE LEGALLY UNJUST

‘Unjust’ ... does not look up to an abstract notion of justice but down to the cases and statutes.¹¹

One need not get past the first page of the twentieth-century’s most famous book in political philosophy to read that “[j]ustice is the first virtue of social institutions.”¹² One need not get much further than the first page of the twentieth-century’s best known book on jurisprudence to read that “justice... is both a virtue specially appropriate to law and the most legal of the virtues.”¹³ But there is no need to appeal to the authority of Rawls or Hart to know that in an important sense law is related to justice. In some loose sense one might say that all law is concerned with the prevention of injustice, and in a looser sense, perhaps, that all law is concerned with preventing “unjust enrichments.” Does

11. Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford: Clarendon Press, 1989) at 99 [Birks, *Introduction*].

12. John Rawls, *A Theory of Justice*, revised ed (Cambridge: Harvard University Press, 1999) at 3.

13. HLA Hart, *The Concept of Law*, 3d ed (Oxford: Oxford University Press, 2012) at 7.

the area of law called “unjust enrichment” have any more special connection with justice? Somewhat surprisingly, Peter Birks, the most prominent defender of the unjust enrichment orthodoxy, thought the answer was “No”:

It should be obvious... that ‘unjust’ can never be made to draw on an unknowable justice in the sky. Nor is there any reason to doubt the ability or will of the judges to cut short a barrister unwise enough to advance an upward-looking argument of that kind. In the phrase ‘unjust enrichment’ the word ‘unjust’ might, with a different throw of the dice, have been ‘disapproved’ or, more neutrally, ‘reversible’. Those words might have been better in being more obviously downward-looking to the cases. The essential point is that, whatever adjective was chosen to qualify ‘enrichment’, its role was only to identify in a general way those factors which, according to the cases themselves, called for an enrichment to be undone. No enrichment can be regarded as unjust, disapproved or reversible unless it happens in circumstances in which the law provides for restitution. The answer to the fear of uncertainty is not to reject the word but to deal firmly with any argument which attempts to detach it from the law.¹⁴

He added that “as soon as steps are taken to bring [the principle against unjust enrichment] down to earth it begins to say nothing other than that the law ought not to be ignored. Thus ‘unjustly enriched’... must mean: ‘enriched in circumstances in which the law says that there should be restitution’.”¹⁵

Though Birks has radically changed his opinion on other matters, going so far as to say that much of what he had written earlier on the topic should be burned,¹⁶ on this matter he has remained steadfast: “For the most part [unjust enrichment] merely gathers up the law’s reasons, not being contracts or wrongs, why an enrichment should be given up to a person at whose expense it was received.”¹⁷ He conceded that the term “unjust enrichment” is “weakly normative”; however, he added that “[b]ut for the need to retain a trace of normativity, one might just as well speak of pink enrichment.”¹⁸ Another prominent proponent of the unjust

14. Birks, *Introduction*, *supra* note 11 at 19. As he says later, when a court decides that there was enrichment but it was not unjust, it means that “it did not happen in circumstances held in authority to call for it to be undone.” *Ibid* at 20.

15. *Ibid* at 23. See also *ibid* at 19 (“whatever adjective was chosen to qualify ‘enrichment’, its role was only to identify in a general way those factors which, according to the cases themselves, called for an enrichment to be undone”). McInnes has similarly endorsed “[t]he traditional model of common law reasoning, based upon the power of precedent.” McInnes, “Resisting Temptations,” *supra* note 9 at 127.

16. Peter Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) at xii [Birks, *Unjust Enrichment*].

17. *Ibid* at 274.

18. *Ibid* at 274, 275.

enrichment orthodoxy, Andrew Burrows, has expressed a similar view: The law of unjust enrichment, he said, has to do “with what the law regards as unjust enrichment” and not with “what any one individual or commentator may think is unjust enrichment.”¹⁹ In a different formulation, the term unjust, he said, “is a reference to what the decided cases show to be *legally* unjust.”²⁰

Taken literally, this approach is circular: The law reverses non-voluntary transfers because they are manifestations of unjust enrichment, while the principle against unjust enrichment is that non-voluntary mistaken payments should be reversed since this is what the courts recognized as unjust enrichment. It is therefore unsurprising that the orthodoxy’s proponents do not really abide by it. When Birks presents us with what he called the “core case” of unjust enrichment, we are supposed to take it at face value and not ask why it is part of the law.²¹ It is, in effect, an axiom of the system, which, for all of Birks’s opposition to reliance on intuition in legal reasoning,²² is his only grounding for liability in his core case.²³

The doctrinalist’s reply will be that he need not rely on any normative principles except those already found in the cases, and that when he criticizes a new case, he does so only on the basis of those values found in, or gleaned from, past decisions. But this is not true. To begin with, there is no doubt that proponents of the unjust enrichment orthodoxy take the core case to be correct whether or not it is adopted by the courts.²⁴ Burrows’s view that he only represents the principles as found in the law is particularly hard to square with the fact that various aspects of what he considers the correct understanding of the law have been rejected by most courts in common law countries. For example, Burrows accuses those who believe that proprietary restitution is not about unjust enrichment of

19. Burrows, *Restitution* 3d, *supra* note 7 at 4.

20. Burrows, *Restitution* 2d, *supra* note 7 at 42 [emphasis added]. For a similar view, see Ross Grantham & Charles Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart, 2000) at 18-20.

21. See Birks, *Unjust Enrichment*, *supra* note 16 at 6-8.

22. See e.g. Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26:1 UWA L Rev 1 at 23 (“[j]ustice is impeded and endangered by unrestrained intuition”) [Birks, “Equity in the Modern Law”].

23. For a more detailed argument for this conclusion see Dan Priel, “The Law and Politics of Unjust Enrichment” (2013) 63:4 UTLJ 533 at 542-44 [Priel, “Law and Politics”].

24. Thus, McInnes does not think that courts’ judgments develop the legal principle against unjust enrichment and adapt it to changing circumstances. He thinks that the principle against unjust enrichment is fixed and those courts that do not follow his understanding of it manipulate and abuse it. McInnes, “Resisting Temptations,” *supra* note 9 at 101, 114.

“adopt[ing] too narrow a view of the principle against unjust enrichment.”²⁵ But on the very same page, just a few lines below this quote, we learn that a majority in a House of Lords decision adopted exactly this view.²⁶ Now, if the content of the principle against unjust enrichment (in English law) is to be found in the “decided cases,” then by definition the House of Lords cannot be mistaken in determining the scope of the unjust enrichment principle. If there is nothing more to the law of restitution than what one finds in “decided cases,” then the House of Lords is free at any given moment to decide to change the scope of the principle; and if the new decision is inconsistent with the previous principle, then we must conclude that in its new decision the House of Lords decided to amend the old principle or replace it with a new one. If Burrows is to be faithful to his methodology of informing us of what is in the cases, he must dutifully report that change. He may consider this a change for the worse and argue against it, but this, to use Burrows’s own words, would be nothing more than what “any one individual or commentator may think is unjust enrichment.”²⁷ If, on the other hand, Burrows thinks a House of Lords decision can be mistaken on the scope of unjust enrichment, then he must think that the principle against unjust enrichment stands outside or goes beyond court decisions, even if it is based on them.

Such principle could be understood as a kind of Dworkinian “best interpretation” of past cases.²⁸ On this reading, there is always space between what past cases say and the best interpretation of those cases; there is also space between what courts think is the best interpretation of past cases and what actually is the best interpretation of past cases (or, if that is any different, what one takes to be the best interpretation of past cases).²⁹ Adopting this view, however, amounts to an abandonment of the claim that the principle against unjust enrichment is grounded in the “decided cases” alone. Any attempt at identifying the best interpretation of past cases will have to determine which of the plethora of available cases are landmark cases and which are not, what makes those cases so significant, which cases are correct, and which are wrongly decided.

25. Burrows, *Restitution* 2d, *supra* note 7 at 64. Burrows reiterates this view in Burrows, “The Australian Law,” *supra* note 6 at 70.

26. Burrows, *Restitution* 2d, *supra* note 7 at 64.

27. Burrows, *Restitution* 3d, *supra* note 7 at 4.

28. See generally Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986). The idea of general principles derived from the mass of cases is older than Dworkin’s work by several centuries.

29. It is unclear whether Dworkin saw these as different. See Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006) at 42.

That, however, is exactly what many of those who reject the unjust enrichment orthodoxy (among them, the High Court of Australia) have done.³⁰ To think them wrong is to think that their interpretation of past cases is wrong. After we have discounted the possibility that one side made a mistake due to ignorance, the only other plausible explanation for divergence in interpretations of past cases is unstated normative principles.

All this is, admittedly, an old and familiar point, which some proponents of the unjust enrichment orthodoxy might concede: To extract the legal principles implicit in legal cases, one must engage in normative inquiry. It is at this point that corrective justice comes to the aid of the doctrinal scholar, for it is often presented as the most appropriate (some would say, only appropriate) standard for identifying the best interpretation of past cases.

II. UNJUST ENRICHMENT AND CORRECTIVE JUSTICE

The corrective justice perspective, or at least the version of it I will consider here, seeks to fill the normative hole left by those who claim to base their account exclusively on what is found in the cases. In many ways these two approaches are complementary.³¹ Those who stay close to the cases have often embraced corrective justice because it makes (or seems to make) legal doctrine and doctrinal scholarship respectable; proponents of corrective justice, in turn, have often alleged that corrective justice is most faithful to private law practice.

To support this claim, defenders of corrective justice as the foundation of unjust enrichment law must show that corrective justice is independent and normatively attractive. By “independent” I mean that it is not reducible to a

30. For two examples, see Peter Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (Oxford: Hart, 2000); Joachim Dietrich, *Restitution: A New Perspective* (Sydney: The Federation Press, 1998).

31. For works that argue for this complementarity, see e.g. Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) at 28-29 [Beever, *Rediscovering*]; Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 299 [Weinrib, *Corrective Justice*] (“legal education is inevitably concerned with the activity of ‘judges, legislators, and practitioners,’ ... in order to reflect upon the meaning and intelligibility of their activity”); Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 48 [Smith, *Contract Theory*] (“[r]ights-based theories of contract law [which understand it through a scheme of corrective justice] remain the traditional and, at least among legal actors, the orthodox way of answering the normative question about contract law”). See also Lionel Smith, “Restitution: The Heart of Corrective Justice” (2001) 79:7 *Tex L Rev* 2115 at 2117 [Smith, “Restitution”] (“[a] remarkable feature of [Weinrib’s theory of corrective justice] is that it understands private law in its own terms and on its own terms”).

different normative principle; by “normatively attractive” I mean that a legal institution created with the aim of protecting that principle will be morally desirable. Corrective justice scholars draw on legal practice on both questions. On the first, they heavily rely on appellate decisions to argue that they embody or instantiate corrective justice as a distinct normative principle. In other words, here legal practice is used as evidence for the claim that corrective justice is an independent normative principle. More interesting for our purposes is the use made of legal practice with regard to the second question. Here we are told that because corrective justice is the only principle that is “internal” to, or “immanent” in, the practice, it is wrong to assess private law by any other normative standard. The distinction between internal and external considerations is thus of immense practical significance, because by castigating certain considerations as “external,” proponents of the corrective justice approach seek to exclude competing normative principles from debates about the justification of private law without having to address them on their merits.

This preference for the “internal” perspective has obvious links with the idea we encountered in the previous section, that unjust enrichment law is concerned with the “legally unjust.” To its proponents, the adage that corrective justice theory understands private law “on its own terms” has meant that they could go on doing more or less what they have always done without concerning themselves with economics or with moral and political philosophy.³² Corrective justice and doctrinal scholarship meet at another point. The emphasis on immanent critique implies that virtually the only normative standard available for evaluating and critiquing particular decisions is their fit within the broader set of legal decisions. This emphasis on internal coherence fits well with the doctrinal lawyer’s approach that seeks to explain the mass of cases as coherently derived from a small set of principles.

Despite these attractive features of corrective justice accounts of private law, there are, I think, many reasons to reject them. The topic deserves a more extended treatment than I can give it here; therefore, I limit myself mostly to the

32. We can in fact distinguish between two ways of linking the two. There are those who start with the law, who seek to interpret the mass of cases, and who are happy to have philosophical imprimatur for what they have been doing all along as long as it lets them go on doing that without worrying too much about philosophy. For them, then, corrective justice is used as a label that makes little or no positive contribution to their thinking but which serves as a useful shield against challenges to their accounts coming from non-doctrinal sources. Others start with a philosophical account that they claim is exemplified in a small number of “seminal” cases. To make this divide more concrete, in the law of restitution the work of Burrows is an example of the first approach, while (in very different ways) the works of Birks and Weinrib are examples of the second.

claim of immanence of corrective justice and its supposed normative significance. In the remainder of this section I first raise some doubts about corrective justice theory in general; in the second subsection I consider some further problems with corrective justice in the context of the law of unjust enrichment.

A. THE THEORETICAL FAILURES OF CORRECTIVE JUSTICE

The alleged internality of corrective justice accounts of private law is arbitrary, question-begging, unjustified, and normatively incomplete. It is arbitrary because determining what counts as an internal argument—one that takes legal concepts seriously—assumes a clear demarcation between the sort of arguments one finds in the courts and the external, “functional” arguments, found in (interdisciplinary) legal scholarship. But the boundary between arguments one can make in front of a court and those one cannot is blurry and frequently shifting. Proponents of corrective justice fail to acknowledge that many of the arguments they present as external have their origins in judicial opinions, or if not that, that they have been adopted by (some) courts. Some of the most influential judges of the common law world of the last century—those whose judicial opinions and extra-judicial writings are still read, followed, and discussed—have been explicit in thinking of law, including private law, as a means for promoting goals external to the practice. Even if the arguments these judges employed could have been classified at one point as “external,” having been invoked in judicial decisions or in influential extra-judicial writings, these arguments have been “internalized” and incorporated into mainstream legal discourse. It is arbitrary to denigrate legal economists for not giving due respect to concepts like “cause,” or “fault,” while ignoring the fact that “incentive,” “internalization,” and even “transaction costs” are now part of “internal” legal discourse, frequently found not only in academic discussions, but also in judicial opinions.³³

Furthermore, even if we could make a clear distinction between internal and external arguments, the view that insists on limiting available arguments or concepts available to academic legal discourse to those one could use “before a court”³⁴ is politically problematic. It implies that if someone—a practicing

33. See Robert Cooter & Thomas Ulen, *Law & Economics*, 5th ed (Boston: Pearson Addison Wesley, 2008) at viii (pointing out that economic concepts like “incentive effects, opportunity costs, risk aversion, transaction costs, free-riding, the prisoner’s dilemma, asymmetric information,” and many others, are now part of legal discourse). And if I may add a small *tu quoque*, I suspect many lawyers would find the Kantian jargon extensively used by corrective justice scholarship utterly alien and far less comprehensible than the economic one.

34. Stephen A Smith, “Taking Law Seriously” (2000) 50:2 UTLJ 241 at 248.

lawyer, a judge, an academic, or even a member of the general public—wishes to introduce an idea that is currently deemed “external” to legal discourse into it, she cannot. The only rationale I can think of for such a view is the belief that the introduction of novel concepts into the law from the outside would be, (almost) inevitably, a change for the worse. There is a name for such a view: conservatism, the view that favours only “organic,” incremental changes to political institutions. That is what the view in question amounts to, even when it is called “self-understanding.”³⁵

To see how arbitrary the distinction between internal and external may be, consider that some of the concepts now considered thoroughly internal to private law and essential for understanding it from within were not always seen that way.³⁶ To mention just one striking example, Lord Atkin’s decision in *Donoghue v Stevenson*,³⁷ nowadays treated by corrective justice scholars as a classic of the common law and a shining example of the correct method of explicating principles immanent in the law, was harshly criticized by some of its contemporaries for departing from existing doctrine and introducing into the law alien ideas, both in the sense that they were not until then part of the law,³⁸ and in the deeper sense that they were foreign to the underlying philosophy of English law.³⁹

There is another aspect to the arbitrariness of the demand that theoretical explanations of private law be immanent. Common law reasoning freely relies on folk, or common-sense, morality. Now, if folk morality is external to the law, then the claim that the law is properly developed only by working through legal materials is manifestly false; if, on the other hand, folk morality is internal to the law, then all of it is “eligible” for lawyers’ use. As it happens, folk morality

35. See Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) at 32 [Weinrib, *Private Law*]. The relationship between contemporary corrective justice and this form of conservatism deserves a longer discussion. I will only note here that Weinrib draws inspiration for his ideas from Michael Oakeshott, the thinker who defended precisely this version of conservatism. See *Ibid* at 230.

36. See Percy H Winfield, “Duty in Tortious Negligence” (1934) 34 *Colum L Rev* 41 at 44-58 (arguing that “duty” became part of tort law only during the nineteenth century).

37. [1931] UKHL 3, [1932] AC 562.

38. See AL Goodhart, “The Foundation of Tortious Liability” (1938) 2:1 *Mod L Rev* 1 at 4. Goodhart challenged Pollock for confusing “what a civilised law of tort ought to contain” with what “could be found in the modern common law.” But the view Pollock enunciated was remarkably similar to Atkin’s “neighbour principle.” See *ibid* at 2.

39. See e.g. PA Landon, Book Review of *The Elements of the Law of Torts* by A Raymond Blackburn & Edward F George, (1945) 61:2 *Law Q Rev* 203 at 206. Based partly on the fact that the majority was comprised of two Scots and a Welshman, Landon described *Donoghue* as founded on a “Celtic ideology” foreign to English common law.

is a ragbag of ideas, some consequentialist in nature, others less so. Unless there is a non-tendentious method for keeping some of it out, it follows that both non-consequentialist and consequentialist ideas must be treated as equally internal. The practical implication of this point is that, in the same way corrective justice scholars can claim to take some undeveloped moral ideas they find in legal practice and give them normative rigour and detail not found in legal materials themselves, then economically-minded theorists can do so too with the consequentialist rationales frequently found in the cases without their efforts being deemed external. More concretely, if Lord Atkin's opinion in *Donoghue* can be seen as an explication of philosophical ideas from Aristotle (let alone Kant and Hegel), then the judgments of Baron Bramwell can be seen to reflect economic ideas coming from David Ricardo.⁴⁰ Just as corrective justice scholars relied on a few central cases to develop a theory thought to reveal the underlying structure of all of private law, other scholars can pick (and have picked) other cases that reflect their favoured perspective and reconstruct from them a large-scale account for an entire area of law.

The internal approach is also question-begging, for even if we could identify certain considerations as genuinely internal, they would be so only from a particular perspective, *i.e.*, the perspective of the practicing lawyer. We thus read in a work seeking to explicate contract law doctrine from the internal perspective that it presents the view of "legal actors," defined as "those who participate officially in making and applying the law,"⁴¹ and in another work that the "inner normativity of the law [of negligence] is exclusively corrective justice and does not involve economic efficiency," because that is "the central [perspective] for a lawyer."⁴² Though asserted as self-evident truths, these claims are highly questionable. The corrective justice perspective is, at best, the perspective of the appellate advocate and judge, a minuscule sliver among legal practitioners, whose

40. Except that Bramwell actually cited Ricardo. See *Archer v James* (1859), 2 B & S 61 at 96, 121 ER 998 (Exch). For more on economic thinking in Bramwell's decisions, see PS Atiyah, "Liability for Railway Nuisance in the English Common Law: A Historical Footnote" (1980) 23:1 JL & Econ 191. More generally, English utilitarianism and free market ideology have had a much greater direct influence on the development of English common law than German philosophy. See generally PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at s II. Cf. Philip A Hamburger, "The Development of the Nineteenth-Century Consensus Theory of Contract" (1989) 7:2 LHR 241 at 270, 291. Since English utilitarianism is one of the intellectual ancestors of modern economic analysis of law, the latter has at least as good a claim to reflect the common law "from within" as does German idealist philosophy.

41. Smith, *Contract Theory*, *supra* note 31 at 14.

42. Beaver, *Rediscovering*, *supra* note 31 at 34 [citation omitted].

views of the law may not adequately reflect prevailing views in the broader legal world.⁴³ Moreover, even if we learn, for example, that a non-instrumentalist perspective on contract is the one taken by lawyers, why should we privilege this perspective over, say, that of the contracting parties, who may well think of the contract as nothing more than a means for getting something or as a way of reducing their exposure to certain risks? Weinrib writes that “[t]he rationality of corrective justice is entirely immanent” and “no extrinsic purpose intrudes.”⁴⁴ But extrinsic purposes often “intrude” into the thinking of those who use contracts and contract law. Arguably, they enter into contracts for exactly such reasons. It is never explained by proponents of corrective justice why their perspective should not play a role in shaping contract law. Similarly, in tort law we may ask why the perspective of the lawyer should be privileged over that of the tort victim. The latter would often be devastated to learn that all she has is a bipolar relation with the person who caused her harm. Without a third party of some sort—an employer, an insurance company, the state—her tort claim, no matter how ironclad on corrective justice principles, is likely to be worthless.

One way of putting this point is to ask: As between the lawyer’s internal point of view and the contracting party’s internal point of view, why should the lawyer’s perspective prevail? Once this question is posed, another, perhaps more subversive, presents itself: Why should there even be a distinct lawyer’s perspective? To be sure, every profession tends to create its own jargon, its own way of doing things. This is perhaps an inevitable result of humans’ limited cognitive capacities and their need for fairly simple procedures that enable quick and simple resolutions to a host of recurring problems. But to privilege that perspective is to turn a side effect of human practices into the essence of law. Law does not exist to provide an intellectual pursuit for academic lawyers, who find aesthetic pleasure in discovering where certain axioms lead them by the force of “logic”⁴⁵ or conceptual analysis.⁴⁶ Law and lawyers are there, presumably, to

43. See *e.g.* Richard Lewis & Annette Morris, “Tort Law Culture: Image and Reality” (2012) 39:4 *JL & Soc’y* 562.

44. Weinrib, *Private Law*, *supra* note 35 at 212.

45. The term is in quotation marks because it is misleading. There is nothing illogical about a law that said, for instance, that the remedy to contracts breached during the first half of the month is specific performance and the remedy to contracts breached during the second half of the month is damages. Similarly, complaints about legal solutions entailed by the concept of, say, contract or property are really just normative arguments in disguise. This point is further explained in Part II(b), below.

46. *Contra* Allan Beaver, “Formalism in Music and Law” (2011) 61:2 *UTLJ* 213 at 238 [Beaver, “Formalism”] (“[d]o we not sometimes revel in the law’s intricacies and delight in its complexities? Is it not true that much of the pleasure of studying the law comes from such?”) [citation omitted].

provide a service to the community. If society is unhappy with any area of law, it can discard it. And what can be done at wholesale with regard to large areas of law (contract, tort) can also be done at retail with regard to any particular doctrine (consideration, fault). Privileging the lawyers' perspective (if it exists) is justified to the extent that it serves the broader society, but if there is a conflict between that perspective and the perspective of the ones who seek to have law for the sake of achieving a certain goal, clearly it is the latter that should (normally) prevail.⁴⁷ If one settles on a single perspective from which to evaluate these areas of law, the most plausible is that of the particular political community in which these laws are in place. This perspective is usually believed to be represented, however imprecisely, by democratic representative bodies, not by the partial perspective of a guild. Defenders of corrective justice rarely address these broader political implications of their insistence on the immanence of the law. To the extent one finds an attempt at an answer, it is that abandoning the lawyer's perspective would be "a surrender of the notion that law is an academic discipline."⁴⁸ But even if this is true (and for the record, I do not think it is true), if this is a price that needs to be paid for improving society's welfare, it is a price well worth paying.

The third problem with corrective justice accounts, closely connected to the problem just mentioned, is that they are unjustified, or perhaps more accurately, non-justifying: They do not provide good considerations for shaping private law institutions. As mentioned earlier, the insistence on the "immanence" of corrective justice accounts implies that the primary normative standard for evaluating the law is its internal coherence. Thus, we are told, for instance, that "if the rationale for the imposition of a restitutionary obligation was simply that that was serving other substantive ends, the law of restitution could not be rationalised as a coherent subject. Its content would be at most a policy-oriented jumble."⁴⁹ To begin, as a descriptive matter law may well be "a policy-oriented jumble." All law, and the common law in particular, is the product of the efforts of thousands of people with different views, working in different parts of the world and in different eras. To expect that what emerges from their joint efforts will be, on its own, coherent, is a fantasy. (Even those who explain the common law on an invisible hand or spontaneous order model do not claim that the

47. Normally, but not always. Considerations of legality, the most distinctly and uniquely legal of values, should sometimes prevail. But legality is itself justified by considerations that have little to do with preservation of the lawyer's perspective.

48. Allan Beever & Charles Rickett, "Interpretive Legal Theory and the Academic Lawyer" (2005) 68:2 Mod L Rev 320 at 336. See also Beever, "Formalism," *supra* note 46 at 232-33.

49. Grantham & Rickett, *supra* note 20 at 44-45; see also Weinrib, *Corrective Justice*, *supra* note 31 at 30-31.

result is coherent, only that it is superior to planned efforts.) It is this messy background that gives the academic lawyer an opportunity to try to impose order and make sense of the various strands and ideas, and inevitably there is more than one way of doing so. The coherentist model must then be evaluated as one normative candidate competing with others for the task of organizing law's raw materials and for choosing the appropriate methods for deciding cases. For coherence even to be a candidate for this effort, it has to be fairly clearly defined; unfortunately, while corrective justice accounts proclaim their greater coherence over alternatives, what makes an account coherent is hardly ever explained. Here is one possible candidate for an account's coherence: An account is more coherent to the extent that it ultimately relies on fewer normative concepts. By this standard some economic theories of law can claim greater coherence than any non-economic account, for they single-mindedly pursue the maximization of a single aim, and it is exactly this aim that gives economic accounts their unity.

It is sometimes suggested that an account is more coherent if the same principles justify taking from the defendant and giving to the plaintiff, and that only corrective justice theories pass this test. Only in corrective justice accounts, the reason why the defendant (and not anyone else) is required to pay is the mirror image for the reason why the plaintiff (and not anyone else) is entitled to receive the payment. This is the idea of correlativity, which "underlies the most obvious and general feature of liability, that the liability of the defendant is always a liability to the plaintiff."⁵⁰ This claim is true in reference to litigation, but in this sense it is uncontroversial, even trivial: It is a losing defendant (and not someone else) who is liable to the successful plaintiff. The correlativity idea is significant only if it can explain the basis of liability, and here correlativity is on far shakier ground. Weinrib argues that correlativity implies that "if the law gave money to the plaintiff without taking it from the defendant, the injustice done by the defendant would remain uncorrected."⁵¹ That this is not the case—that private law is unconcerned with the question where the compensation for the successful plaintiff comes from—indicates that beyond litigation, private law is not intrinsically concerned with correlativity.

Assuming we overcome these difficulties, the question still remains: Why should we choose coherence (as understood by proponents of corrective justice) over other normative standards? Even if it were true that lawyers have used this normative standard for evaluating the law in the past, this is not, by itself, a reason to continue to do so in the future. There must therefore be some other basis for

50. Weinrib, *Corrective Justice*, *supra* note 31 at 18.

51. *Ibid* at 88.

preferring coherence to other normative standards. Yet it is difficult to find a satisfying answer to the question, “Why coherence?” Weinrib explains that “[t]he reason coherence functions as the criterion of truth is that legal form is concerned with immanent intelligibility. Such an intelligibility cannot be validated by anything outside itself, for then it would no longer be immanent.”⁵² All this, however, is an assertion followed by a reformation of the coherence criterion (“legal form is concerned with immanent intelligibility”), not an explanation of why it is desirable. One important but neglected implication of this view is that the vast domain of public law is unintelligible (because incoherent) and as such (presumably) unjustified. Though this claim is never explicitly made, it seems to follow from coherentist arguments, as there is no suggestion that the same internally coherent structure that governs private law exists in public law as well. (Weinrib speaks of the “idea” of private law, not the idea of law in general.⁵³) The only way to avoid the conclusion that the entirety of public law is unjustified is by saying that public law is governed by different normative criteria than private law. But if that is the case, it follows that we can get over the normative demand for internal coherence in private law by declaring that we re-establish it as a branch of public law.

Can defenders of corrective justice still maintain that their view explains the law as it is better than any other view? The problem with this view is that even proponents of corrective justice and coherence admit that the cases do not match their views, and some even openly admit that the coherence they are talking about is to be found by ignoring what judges say.⁵⁴ What is said to be coherent is not the law as found in legal materials, but a more idealized form of law reconstructed by the theorist. This just means, however, that when corrective justice theorists talk about “the law,” they refer to something else: what is more commonly called “morality.” What proponents of this view really believe is that morality is coherent and that the law should imitate morality. This implies that it is not internal coherence that justifies the law, but rather the familiar idea that law is justified to the extent that it corresponds with true moral principles. The coherence of the law in such an account is just a by-product of the fact that morality is (deemed to be) coherent. When law matches morality, it thereby

52. Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97:6 Yale LJ 949 at 972 [Weinrib, “Legal Formalism”].

53. Weinrib, *Private Law*, *supra* note 35.

54. See *e.g.* Beever, “Formalism,” *supra* note 46 at 219-20; Beever & Rickett, *supra* note 48 at 327.

becomes coherent because morality happens to be coherent—not because coherence provides an independent, immanent justification for the law.

This view, however, suffers from two serious flaws. First, to hold this view is to abandon the claim that corrective justice is immanent to the law, or, if you will, to make this claim trivially true: for any theorist can posit some idealized form of law to which her account is internal. In effect, this view achieves its internality by re-labelling the corrective justice theorist's account of what law should be as "the (true) law." Second, in this formulation of corrective justice, coherence is no longer a justificatory aim, but rather an unjustified assumption—the assumption that true morality is perfectly coherent. On this view, coherence is not the real justification of private law, and even less so is the theory's correspondence with the case law. The justification of private law institutions lies in their correspondence with a particular non-consequentialist view of morality.⁵⁵ Whether this non-consequentialist view is defensible is not a matter that can be settled here (if it can be settled anywhere), but very few defenders of private law as corrective justice bother to defend it. Even if one thinks this view is defensible, the claim that a certain area of law should simply imitate certain moral requirements does not follow. The state is legitimately concerned with its resources not being squandered, and that concern is true of all its actions, not just those classified as "public law." Put differently, the facilitation and enforcement of certain moral requirements has costs, including opportunity costs. Therefore, congruence with moral requirements is never a complete justification for any area of law. This point has one interesting implication: Since such cost considerations are different from the ones involved in the non-consequentialist morality that corrective justice scholars claim is the foundation of private law, it follows that in the real world, private law institutions are necessarily incoherent. (Ironically, when such cost considerations are taken into account, founding substantive doctrines of private law on social welfare has the potential of making the law more coherent.)

Matters become even worse for the coherentist once it is realized that private law does not exist on its own. There is little point in labouring to make private law as coherent as possible if it comes into contact (as it constantly does in the conditions of modern life) with other social institutions, which are not based on the same principles—however coherent those may be. This implies that the

55. On occasion Weinrib says so himself: "[C]orrective and distributive justice provide the structures of justification *and then insist that legal reasoning conform to those structures*" [emphasis added]. Ernest J Weinrib, "The Jurisprudence of Legal Formalism" (1993) 16:3 Harv JL & Pub Pol'y 583 at 590-91.

perfect coherence of private law would clash with the “policy-oriented jumble”⁵⁶ in other parts of the law. Thus, the effect of insisting on coherence within private law alone, even assuming it could be achieved, would not be overall coherence; it would simply be to push the incoherence out of the corrective justice scholar’s sights.

All this is true even if one concedes much to proponents of the view that private law is concerned with corrective justice, but I hope it is clear that I see no good reason to believe that. For my part, I cannot see any other reason for using law other than the pursuit of “substantive ends” or “policies,” including “jumbles” of more than one aim at a time.⁵⁷ The law, as I said above, does not exist to give academic lawyers an opportunity to pursue their aesthetic pleasure or pursue intellectual puzzles, so in the choice between a law that is more coherent and one that enhances society’s welfare, choosing the latter should be obvious. And since doing the latter is a complicated task that may call for conflicting prescriptions, it should not come as a surprise that parts of the law may appear “incoherent.” No doubt, there are all kinds of reasons not to overload laws with too many different aims, to make them simple and consistent, but such aims too are grounded in external reasons—complex laws are difficult to follow and are likely to be expensive to enforce. Such considerations, however, do not lead to the conclusion that any given area of law (however “area of law” is defined) may only be committed to the pursuit of a single aim.

This leads me to the fourth problem with corrective justice accounts, namely that they are normatively incomplete.⁵⁸ Coherence is a standard for assessing different options within the confines of the practice. But that cannot be the whole justification of private law—because we do not have to have private law. So a complete justification of private law, even if it can be based on considerations of corrective justice from within, is incomplete unless it is supplemented by a justificatory story of the considerations that favour a corrective justice-based practice over another. It is exactly because of the alleged immanence of corrective justice that it can say nothing on that question. Since private law must be justified in both senses, coherence cannot logically be the sole standard for assessing private law.

56. Grantham & Rickett, *supra* note 20 at 45.

57. *Ibid* at 44-45.

58. The argument in the text is developed in much greater detail in Dan Priel, “The Impossibility of Independent Corrective Justice” (3 March 2014) [unpublished, on file with the author] at ss 3-4 [Priel, “Independent Corrective Justice”].

Defenders of the corrective justice view might concede this point but argue that it does not affect the cogency of their position. First, they might say in reply, corrective justice remains the only relevant normative standard for the lawyer. But the real justificatory test for any law is not whether it can be justified from the perspective of the lawyer, but whether it can be justified all things considered. Even if the lawyer is somehow “barred” from asking the broader justificatory questions (although it is not clear why), others (including, of course, ordinary citizens) can ask them. Defenders of corrective justice might reply that society may choose to abolish its tort law and replace it by a social insurance scheme, but so long as tort law remains on the books, that institution should be justified according to the principles of corrective justice. But this too is a faulty argument. The mistake in this argument is that it assumes that society can only choose between private law grounded in corrective justice and something else, and that if it chooses to go with private law, then it must ground it on corrective justice, because that is what careful conceptual analysis of the nature of private law reveals. But conceptual analysis cannot provide any assistance in this argument. Assume we somehow discovered the true nature of tort law (there is, in my view, no such thing, but I grant this for the sake of argument), and assume further that that nature has been perfectly captured by the writings of corrective justice theorists. There is nothing that stops us from adopting “schmort” law, an area that looks something like tort law, except that it is not founded on corrective justice. It is clearly not impossible to imagine the possibility of schmort law, and as schmort is (by definition) not tort law, it can be assessed against whatever external normative standard we wish for it. On this view, the only question we must ask is whether we should have tort law or schmort law. We can make schmort law, if we wish, consciously and purposely, a “jumble”⁵⁹ of different policies and diverse normative ideas. An argument in favour of tort law and against schmort law (and there is an infinite number of possible schmort laws) cannot be based, by hypothesis, on any of the “internal” normative arguments given in favour of tort law. Hence, even if we accept that corrective justice is the relevant standard for assessing tort law from within, the “external” normative question remains inescapable.

This challenge immediately raises another one: How do we know—how can we know—that the present practice we call “tort law” is really an instantiation of tort law and not of any one of the many possible schmort laws? After all, proponents of corrective justice admit that the law often fails to correspond to their favoured theory. Their response is that this is because those engaged with the development of the law have an incomplete understanding of the ideal

59. Grantham & Rickett, *supra* note 20 at 45.

form to which that practice belongs. But, in saying this, such critics assume that the practice of tort law today is a failed attempt at having tort law, rather than a less failed attempt at having schmort law. Since legal practitioners are not always entirely self-conscious about what they are doing, it is not clear how this question could be definitively answered; but it is precisely the many criticisms offered by corrective justice scholars of legal practice that lend support to the view that private law today is not an attempt to match their ideal of private-law-as-corrective-justice that they have identified. If this is the case, much of the normative critique based on the inconsistency of the practice with the conceptual strictures of corrective justice becomes irrelevant.

B. THE FAILURE OF CORRECTIVE JUSTICE ACCOUNTS OF UNJUST ENRICHMENT

What I have said so far has considered corrective justice generally and has had relatively little to say on corrective justice accounts of unjust enrichment. In this section I build on that general discussion to consider some more specific problems with the corrective justice view applied to the law of unjust enrichment.

I begin with the claim that the corrective justice perspective is the only one proper for legal analysis because it is the only one that is properly “immanent” in the law. At the level of doctrinal categories, I need not belabour the point that has been made many times before that the modern emergence of unjust enrichment law as a distinct legal category has required much novel terminology and much moving and refitting of old cases into new legal categories imported from outside the common law.⁶⁰ And while the legal categories had to be imported from other legal systems, the source of the underlying normative principles is, at least sometimes, easily traced to folk morality. Take, for instance, the recent case of a Dutch academic psychologist who admitted to making up the results of dozens of experiments published in prestigious academic journals. After his fabrications were discovered, he published a book partly, he said, in order to come to terms with what he had done. But the book, we are told, “angered many in the Netherlands who thought it dishonorable of him to try to profit from his

60. See e.g. Steve Hedley, *A Critical Introduction to Restitution* (London: Butterworths, 2001) at 13-19; Steve Hedley, *Restitution: Its Division and Ordering* (London: Sweet & Maxwell, 2001) at 7-8; Peter Jaffey, “Classification and Unjust Enrichment” (2004) 67:6 Mod L Rev 1012 at 1022 (arguing that Birks’s approach was “employed in support of an argument for a far-reaching transformation of the common law”). See also *Roxborough v Rothmans of Pall Mall Australia Ltd.*, [2001] HCA 68 at para 72, 208 CLR 516 (Austl).

misdeeds.”⁶¹ Those dismayed by the book were not enunciating a legal principle, but a moral one.

Some corrective justice scholars would, I think, rule out reliance on such accepted moral principles as external to the law’s own immanent rationality. Weinrib, for instance, stated that the “rationality of law lies in a moral order immanent to legal order.”⁶² But it is exactly this principle—that one should not benefit from one’s own wrongdoing—that has been mentioned as the normative basis for some of the “landmark” decisions in the area of unjust enrichment.⁶³ And if folk moral principles are eligible for inclusion in the law, then so are “economic,” or broadly consequentialist, principles (*e.g.*, “people respond to incentives,” “there is no point crying over spilt milk,” “private property is justified because it gives incentives to individuals to protect and develop it”). Economists are human too. And so it is in no way a manipulation of the conceptual nature of corrective justice or the law of unjust enrichment to challenge the orthodoxy’s view that in mistaken payment claims the plaintiff’s negligence in handling her money is irrelevant.⁶⁴

At another point the insistence on the internal point of view and on legal categories creates a tension within the corrective justice view. The prevailing view among corrective justice scholars is that all of private law can be explained in terms of corrective justice.⁶⁵ But if a single normative principle explains what lawyers consider to be different branches of the law, governed by different normative standards (strict liability in contract and unjust enrichment, fault in much of tort law), then either corrective justice becomes almost devoid of meaning or it is difficult to maintain that the corrective justice view accords “internal” legal categories the respect they presumably only get from corrective

61. Yudhijit Bhattacharjee, “The Mind of a Con Man”, *The New York Times Magazine* (28 April 2013) MM44 at MM52.

62. Weinrib, “Legal Formalism,” *supra* note 52 at 955. Consistently with this attitude Weinrib criticized various non-instrumental moral-based accounts of private law as external. See Weinrib, *Private Law*, *supra* note 35 at 50–55.

63. See *e.g.* *Attorney General v Blake*, [2000] UKHL 45, [2001] 1 AC 268 at 278. *Cf. Riggs v Palmer* (1889) 115 NY 506, 22 NE 188 at 190; John D McCamus, “The Self-Serving Intermeddler and the Law of Restitution” (1978) 16:3 Osgoode Hall LJ 515 at 522 (“a review of the self-serving intermeddler cases suggests that a central element in the sense of injustice that fuels the unjust enrichment principle is a simple moral aversion to the ‘free ride’. It is perceived to be unjust simply to profit at another’s expense”).

64. For this view from proponents of the unjust enrichment orthodoxy, see *e.g.* McInnes, “Resisting Temptations,” *supra* note 9 at 128–29; Birks, *Unjust Enrichment*, *supra* note 16 at 6.

65. See *e.g.* Weinrib, *Private Law*, *supra* note 35 at 20, 133–42; Smith, “Restitution,” *supra* note 31. *Cf. Beever*, *Rediscovering*, *supra* note 31 at 71.

justice accounts. The first possibility is real and explains part of the appeal of corrective justice. The term “corrective justice” neatly captures something about private law litigation. People go to court when they believe that their legal rights have been violated, and they ask the court to correct the wrong. Unfortunately, this is not a sufficiently discriminating idea: It is true of most litigation, including much public law litigation.⁶⁶ If, on the other hand, we take the other route, then the immanence critique, so often used by corrective justice scholars against other views, can be turned against corrective justice. Lawyers in the common law have not traditionally considered private law as a separate category,⁶⁷ nor have they thought that all of its branches share a single underlying principle. Lawyers often struggle to find unity within a single branch of private law (this is especially true of tort law), so they would be surprised to learn that all branches of private law share a single normative basis (and probably even more surprised to learn that this unity can be discerned by carefully reading the works of an eighteenth-century German philosopher).

Corrective justice scholars must therefore navigate between the Scylla of maintaining the unity of private-law-as-corrective-justice at the cost of vacuity and the Charybdis of recognizing the doctrinal diversity of private law at the cost of undermining the claim that all of it can be explained in terms of corrective justice. We can see two rather different attempts at doing so within the law of unjust enrichment. One is captured in the statement that “[r]estitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions.”⁶⁸ This approach is put even more succinctly by

66. This was recognized in *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 at para 101 (“public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to *them*. ... This is not a reward so much as a vindication of the particularized claim brought by *this* person in assertion of *his* or *her* rights. Corrective justice suggests that the successful applicant has a right to a remedy”) [emphasis in original].

67. In fact, at least in the common law world, the division between private and public law does not have deep historical roots. See JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*, revised ed (Oxford: Clarendon Press, 2000) at 7-8. For my attempt at explaining why it has come to play a more central role in the common law more recently, see Dan Priel, “The Political Origins of English Private Law” (2013) 40:4 *JL & Soc’y* 481 [Priel, “Political Origins”].

68. *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 at para 32, [2007] 1 SCR 3 [Kingstreet].

Lionel Smith when he called restitution “the heart of corrective justice.”⁶⁹ The appeal of this view is that the paradigmatic case of unjust enrichment—mistaken payment—involves the return (“restitution”) of wealth not controlled by the person who should have control over it; in doing so, some normative flaw is corrected. But if this is the heart of corrective justice, it is difficult to see how most tort cases (apart from a few torts like conversion) fit within it, as these often involve cases in which property is damaged or destroyed, not taken. In short, avoiding the over-inclusive version of corrective justice, the one that covered virtually all litigation, seems to lead to an under-inclusive one, in which it is difficult to encompass the different branches of private law.

This leads us to the other possible route of avoiding the challenge of vacuity. This view sees tort liability as the heart of corrective justice and seeks to fit unjust enrichment law within it. That is the approach adopted by Ernest Weinrib. Since on his model of corrective justice, tort liability must normally be based on the defendant’s fault, he attempted to explain liability for unjust enrichment in similar terms. Here is his summary of his position:

[T]he normatively defective transfer of value relates the parties as will to will regarding the gratuitousness of the transfer, so as to establish in the plaintiff an *in personam* right (and to impose a correlative duty on the defendant) to have the value retransferred. Liability signifies that the defendant’s retention of the value in the face of the two obligation-creating conditions that render the transfer defective is inconsistent with this right. *Such retention makes the defendant and the plaintiff the active and passive poles, respectively, of an injustice between them...* The point of liability is to assure that the transfer and retransfer of value is in accordance with the parties’ freedom of will. Hence the law construes as normatively defective a transfer of value in which the transferor did not intend to give something for nothing and in which the transferee accepted what was transferred as not having been given for nothing.⁷⁰

The italicized sentence provides the link to Weinrib’s fault-based theory of corrective justice: When a “defective transfer” has taken place, an individual gains control of wealth to which she is not entitled. When this happens, retention serves as the act necessary for creating the bipolar relation of doer and sufferer

69. Smith, “Restitution,” *supra* note 31 at 2115. See also *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at 804 [*Peel*] (“restitution, more narrowly than tort or contract, focuses on re-establishing equality as between two parties”).

70. See Weinrib, *Corrective Justice*, *supra* note 31 at 227 [second emphasis added]. See also *Peel*, *supra* note 69 at 804. *Cf.* Kit Barker, “The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora’s Box” in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) 146. Barker has somewhat similar aims, but he reaches them in quite a different way and is sceptical of Weinrib’s solution. See *ibid* at 164-65. There is some overlap between Barker’s criticisms and the ones discussed in the text.

that is, according to Weinrib, the central ingredient of corrective justice liability. The main problem with such an account, however, is that for retention to serve as the requisite wrong to satisfy Weinrib's view, it should be the case that it would be wrong for the person in question to retain the wealth in question. The reason why this is so can be gleaned from the rest of this passage, and the last sentence in particular: Restitution is due when there was no intention to transfer wealth, which, normally, is a necessary condition for a transfer of wealth. I will consider this idea in more detail in Part III, below, but in general, this argument depends on a view of what constitutes a valid transfer of wealth. On this view, it is the lack of a valid transfer that explains such cases, not unjust enrichment. And an answer to the question of what counts as a valid transfer, I will argue, cannot be provided by corrective justice. If this is true, the language of unjust enrichment is not necessary and the principle of corrective justice is not sufficient to explain the law's reaction to mistaken payments.

Though by no means comprehensive and somewhat telegraphic, I hope this discussion highlights some of the difficulties with the corrective justice approach to unjust enrichment. That would have been reason enough to work on refining the theory of corrective justice if it had been the only plausible contender for explaining liability in cases of unjust enrichment. In the remainder of this article, I aim to show that this is not the case.

III. UNJUST ENRICHMENT AS PROPERTY

The Rain it raineth on the just,

And also on the unjust fella.

But chiefly on the just, because

The unjust hath the just's umbrella.⁷¹

[A]s a general rule, it is perceived to be unjust that one party should gain a windfall benefit at another's expense, unless a gift was intended.⁷²

-
71. See Lord Bowen in Susan Ratcliffe, ed, *Oxford Essential Quotations* (Oxford: Oxford University Press, 2012), at 239 online: Oxford Reference <<http://www.oxfordreference.com>>.
72. John D McCamus, "Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution" (1979) 11:2 *Ottawa L Rev* 297 at 299.

There is an intuitive and simple relationship between many claims in unjust enrichment and everyday, common-sense notions of property. To put the matter simply, in many unjust enrichment cases the reason why we think liability should be imposed is because the object in question does not belong to its current possessor. This claim works on at least three levels: the justificatory, the explanatory, and the doctrinal. If someone mistakenly takes someone else's property, she does not thereby gain ownership of it, and is therefore not entitled to hold it. An enrichment is deemed unjust because the person enriched is not entitled to it. Indeed, to the extent that the word "restitution" is used outside strictly legal contexts, this is usually its meaning. As an example, consider the title of a recently published book, *Restitution: A Family's Fight for Their Heritage Lost in the Holocaust*.⁷³ This book retells the story of one Canadian family's battles to recover what they perceive to be their own property, taken from their ancestors during the Holocaust.

Whatever complexity there is in the relationship between property and unjust enrichment, it exists mostly at the level of legal doctrine. To the extent that plaintiffs can assert legal title to their property, unjust enrichment drops out of the picture. Unjust enrichment is needed as a doctrinal corrective for cases of mismatch between legal title and what may be termed "moral title," an assessment of who really should own a particular piece of property. This implies that at the justificatory level the law recognizes that legal title is not the ultimate determinant of property rights, that it is moral notions of property and rightful ownership that explain unjust enrichment, not the other way around. It is because of our views of what it takes to earn or lose property that we conclude that the defendant has been unjustly enriched in a particular instance but not in another. Whatever the need may be for distinguishing at the doctrinal level between cases of proprietary restitution (where legal title remains with the plaintiff) and those of unjust enrichment restitution (where legal title passes to the defendant), the underlying rationale motivating both is typically the same.

73. See also Patricia Cohen, "Museums Faulted on Restitution of Nazi-Looted Art", *The New York Times* (1 July 2013) C1. The article discusses "governments[]" and museums[]" ... special responsibility to repair the damage caused by the wholesale looting of art owned by Jews during the Third Reich's reign," and gives the example of "a family ... seeking to recover art once owned by [their ancestor]." One of the museums in question has asserted its right to some disputed paintings by asserting that it does 'in fact have good title to the works [in dispute] in [its] collection.' *Ibid.* This is not to say that "restitution" in the context of the Holocaust appears only in this sense. Another set of claims was based on the notion of unpaid slave labour. This is closer to the idea of "unjust enrichment as fairness" that will be discussed in Part IV, below.

At the explanatory level, highlighting the connection to property explains various doctrinal features of this area of law that may otherwise seem puzzling. Why is someone who has been enriched by another liable to give up the enrichment despite doing nothing wrong? Because the enrichment in question is not his. Why is liability strict? For the same reason. Why does liability arise at the moment of enrichment and not at the moment of learning of it? Again, notions of property provide an easy answer. Why does the plaintiff's fault not matter? Because carelessness is not (normally) sufficient for losing one's property.⁷⁴

At the explanatory level, it often looks as though unjust enrichment only provides a different vocabulary for what otherwise could have been explained in the language of property. Recall the words of the Supreme Court of Canada, quoted in Part II(b), above: "When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions."⁷⁵ In the language of unjust enrichment, when the transfer of value is "defective" one party is unjustly enriched at the expense of another (or is enriched without legal basis) and is therefore required by law to give up that enrichment. In the language of property we could say that the defectiveness of the transfer failed to adequately transfer the ownership over the property, and therefore the defendant must give back what is not properly his or hers. It is only against such a prior judgment that we conclude that if left without a legal response, the defendant will enjoy an unjust enrichment.

To see the extent to which the unjust enrichment story often piggybacks on our views on property, imagine that our views on property were such that we would have considered mild carelessness in the maintenance of one's property as sufficient grounds for losing it. As a concrete example, imagine that our property regime were such that neglecting one's property for more than ten minutes would have the legal effect of rendering the property unowned and open for anyone to appropriate. Such a property regime, whether desirable or not, is

74. The link to property is also illustrated in mistaken payment cases where the defendant did not benefit from the mistake but was nevertheless required to pay restitution. See *e.g.* *Baylis v Bishop of London*, [1913] 1 Ch 127 (CA (Eng) [*Baylis*]). Without this link to property, legal doctrine is difficult to explain. McInnes argues that when a court is "merely [required] to reverse a transfer between the parties. ... much less reason to intervene" is required. In such cases, "[t]o ensure that enrichments do not remain unjust, liability is strict." McInnes, "Resisting Temptations," *supra* note 9 at 103-04. But, first, quantifying remedies in restitution cases is not always so simple. More importantly, that the remedy requested is simple does explain why the basis of liability should be strict. McInnes begs the question why some faultless receipts are unjust and need to be reversed.

75. *Kingstreet*, *supra* note 68 at para 32.

surely conceivable. Such a change would have had an obvious effect on the scope of the law of unjust enrichment, and that change would have been completely explicable in terms of the change in our property regime.

The point can also be illustrated by considering Lionel Smith's attempt at defending restitutionary liability on corrective justice grounds:

Before [a] transfer [of wealth], the wealth is an external projection of the plaintiff's agency. If the transfer is normatively flawed from the plaintiff's end, then the plaintiff suffers a normative loss. Because the defendant's enrichment is nothing other than the plaintiff's normative deprivation, the defendant's material gain is also a normative gain. Hence, corrective justice is violated, and a duty to make restitution arises without the need to find any breach of duty on the part of the defendant.⁷⁶

When property law defines what counts as a valid transfer of wealth, it thereby also defines what counts as a defective transfer. It is in the latter situations that we can say that the law must be used to prevent unjust enrichment. But such a statement is wholly parasitic on property law. The unjust enrichment terminology ("normative deprivation," "material gain" and so on) does not contribute to our understanding of the issue. At most, one can say that unjust enrichment provides an explanation of the remedy—it explains why in such cases the wealth or its value (and typically neither more nor less) is returned to "its owner." But even this is something that can be explained in terms of our notions of property. An owner is entitled to have control and possession of her property. If for some reason she no longer has such control, she is entitled to regain it and the law will assist her in doing so.

Finally, there are judicial statements that support this understanding of unjust enrichment. In *Kelly v Solari*,⁷⁷ a case that Birks has often mentioned as embodying the principle against unjust enrichment,⁷⁸ Baron Parke explained that in the case of money paid by mistake, "the receiver was not entitled to it, nor intended to have it."⁷⁹ Turning to the early years of the twentieth century, we find one of the clearest statements of the proprietary approach: "[B]oth an action founded on a jus in re, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of

76. Smith, "Restitution," *supra* note 31 at 2142 [citation omitted].

77. (1841), 9 M & W 54, 152 ER 24 (Exch) [*Kelly* cited to M & W].

78. See *e.g.* Birks, *Unjust Enrichment*, *supra* note 16 at 8-9.

79. *Kelly*, *supra* note 77 at 59.

property which does not belong to him.”⁸⁰ There are other, more recent, judicial statements that similarly explain parts of what the unjust enrichment orthodoxy classifies as part of unjust enrichment law as belonging to the law of property.⁸¹

One implication of all this is that since the boundaries of legal title and the way it passes are jurisdiction-specific, the boundaries of the law of unjust enrichment will correspondingly differ between jurisdictions according to the rules on legal title accepted in a particular legal system at any given time.⁸² It does not follow from what I have just said that the legal rules that have been classified under the banner of “unjust enrichment” need be discarded. Legal doctrine is the product not only of internal pressures for providing solutions to novel situations; it is also affected by broader societal and political constraints. By this, I do not mean merely the familiar idea that the content of the law reflects the society in which it is created. I mean, rather, that even at the more abstract level, due to different social and political backgrounds, legal systems develop different structural solutions in response to similar pressures. These institutional differences affect the role of courts, the relationship between courts and legislatures, the extent to which courts will see themselves as players in addressing politically controversial questions, and so on. All these are questions on which different legal systems have taken different stances. There is, I think, a rather clear divide between English and American law on the matter (with Canada, characteristically, adopting a midway position). On this view, the law of unjust enrichment (as opposed to a principle against unjust enrichment) is the product of a particular legal-political tradition, and within that tradition it may come to serve a useful role. What makes this view distinctive is that it traces the explanation for this area of law neither to some principle of interpersonal morality nor to the internal logic of the law, but to local, contingent constraints within which different legal systems operate.

Beyond this, does this link to property undermine the suggestion that unjust enrichment law can be fully explained by notions of corrective justice? I believe it does. The link to property shows why unjust enrichment must ultimately be

80. *Sinclair v Brougham*, [1914] AC 398 at 436, [1914-15] All ER Rep 622 HL, Lord Dunedin. Around the same time we also find the idea that in cases of mistaken payment, “[t]he question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back.” *Baylis*, *supra* note 74 at 140. This suggests that regardless of the plaintiff’s fault, the defendant cannot keep the money. That nicely fits a proprietary reading of such cases.

81. *Foskett v McKeown*, [2000] UKHL 29, [2001] 1 AC 102 at 127, Lord Millett. This view prompted Burrows’s ire. See *supra* note 7 and accompanying text.

82. *Cf.* Priel, “Law and Politics,” *supra* note 23 at 557-61.

grounded in distributive justice. There have been attempts to ground property fully in notions of corrective (or commutative) justice, but they are unsuccessful. The concept of “property” is connected to a complex network of other concepts, such as justice, fairness, desert, autonomy, and others. As history and political theory show, a change in any of those (as well as changes in environmental conditions, such as technology, scarcity, and so on) has implications on what counts as property, what one can do with it, whether one can transfer it to others (and under what conditions), what happens to it after one’s death, and so on. Theories of corrective justice, even as presented by their most enthusiastic supporters, do not deal with these matters.⁸³

IV. UNJUST ENRICHMENT AS FAIRNESS

Fairness is what justice really is.⁸⁴

[T]he law of unjust enrichment...[has] the concept of restoration of property, money, or services unfairly retained...at its core.⁸⁵

In this Part and the next one I distinguish between two very close conceptions of unjust enrichment that are not often kept apart: that unjust enrichment reflects ideas of fairness, and that unjust enrichment brings notions of equity into the law. There is a simple reason why the two are treated together: Courts will seek

83. Here I agree with Hanoch Dagan. See Hanoch Dagan, *The Law and Ethics of Restitution* (New York: Cambridge University Press, 2004) at 19-20. See also Dan Priel, “Private Law: Commutative or Distributive?” (2014) 77:2 Mod L Rev 308 at 319-21 [Priel, “Private Law”]. It might be argued in response that there is an innate notion of property that is fairly widely accepted and independent of theories of distributive justice and instead grounded in notions of possession. See e.g. Jeffrey Evans Stake, “The Property ‘Instinct’” (2004) 359 Phil Transactions Royal Soc’y London B 1763. Whether this is indeed the case is, obviously, a controversial question that cannot be addressed here. Even if true, this sense of property falls far short of a justification of property; it does not easily correspond with much that is nowadays considered property by law; and in any case, it in no way vindicates theories of corrective justice.

84. See Potter Stewart in Lawrence J Peter, *Peter’s Quotations: Ideas for Our Time* (New York: William Morrow, 1977) at 276. Potter Stewart was an Associate Justice of the United States Supreme Court.

85. *Peel, supra* note 69 at 798, McLachlin J.

to “override” the law by appeal to equity when the result strikes them as unfair.⁸⁶ Nevertheless, for the sake of clarity and because the considerations arising are somewhat different, I will treat separately the idea that substantive norms of fairness lie behind unjust enrichment, and the thought that unjust enrichment serves as a device for reaching a “just” outcome by overriding established legal rules when they lead the law astray.

The relationship between justice and fairness is familiar and has been prominent in moral and political philosophy at least since John Rawls put it at the heart of his theory of justice.⁸⁷ But unlike Rawls, who explicitly tied his theory of justice as fairness to distributive justice and applied it to institutions, in this context I refer to fairness as a moral principle recognized to apply in the relations among individuals.⁸⁸ In this sense unfairness involves different responses to similar actions or states of affairs; by the same token, in this sense fairness requires similar responses to similar actions or states of affairs. More generally, fairness requires a proportionate relation between actions and responses. If, to give a simple example (although, as we shall see, one that is potentially misleading), two people make similar contributions to a joint enterprise, they are treated fairly to the extent that they are similarly compensated; if one makes a greater contribution, her compensation should be greater in proportion to her contribution. Fairness on this view is closely tied to desert.

The best demonstration of the prevalence of norms of fairness comes from the much-studied ultimatum game. Experimental variations of this game show that many people consider it unfair to divide a sum of money unequally between two people when neither has made any contribution (so that neither can be deemed

86. That the two are not always kept separate is seen, for example, in *Garland v Enbridge Gas Distribution Inc*, 2004 SCC 25, [2004] 1 SCR 629 at para 44 [*Garland*] (restitution involves “an equitable remedy that will necessarily involve discretion and questions of fairness”); *Sharp v Kosmalski*, 40 NY (2d) 119, 351 NE (2d) 721 at 724 (NY CA 1976) (“[t]his case seems to present the classic example of a situation where equity should intervene to scrutinize a transaction pregnant with opportunity for abuse and unfairness. It was for just this type of case that there evolved equitable principles and remedies to prevent injustices”); Peter Linzer, “Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts” [2001] *Wis L Rev* 695 at 703 (finding through “some of [the] solutions [in certain cases] ... principles that can be applied generally to dealings that don’t fit into a neat system of rules but nonetheless call out for a fair and just solution”)

87. See Rawls, *supra* note 12 at 111-12.

88. See Jonathan Haidt, “The New Synthesis in Moral Psychology” (2007) 316 *Sci* 998 at 999.

more deserving than the other),⁸⁹ but that these judgments change dramatically when one participant is perceived to have “earned” the money.⁹⁰

This makes some fairness judgments very easy to apply to certain legal situations, which is why they are prevalent in the law. Following precedent may be justified by the fact that it encourages similar treatment of similar cases, regardless of the appropriateness of the precedent itself. Similarly, even when a person unquestionably committed a crime, many would consider it unfair if she is the only person prosecuted for the crime when others acted in a similar fashion, or if the punishment imposed on her is significantly out of line with what was imposed on others.⁹¹

Notions of fairness also provide a ready explanation for various unjust enrichment doctrines.⁹² Consider two of the leading unjust enrichment cases in Canadian law. In *Deglman v Guaranty Trust Co of Canada*⁹³ the plaintiff provided services to a woman under an unenforceable contract. He nevertheless succeeded in a claim against her estate for the services rendered on the basis that if he were left with no remedy the estate would be unjustly enriched. *Pettkus v Becker*⁹⁴ dealt with a claim by a woman, Rosa Becker, against her former partner for a share of the property they worked on together. Despite the fact that legal title to the property was held exclusively by Pettkus, the Court, relying on unjust enrichment, awarded half of it to Becker.

If you asked people on the street to explain the outcomes of these cases, I venture to guess that many would reply that any other result would have been unfair to the plaintiffs. In both cases the plaintiff provided work whose value is relatively easy to assess (on the basis of the contract price in *Deglman*, on the

89. See Werner Güth, Rolf Schmittberger & Bernd Schwartze, “An Experimental Analysis of Ultimatum Bargaining” (1982) 3:4 J Econ Behav & Org 367.

90. See Elizabeth Hoffman et al, “Preferences, Property Rights, and Anonymity in Bargaining Games” (1994) 7:3 Games & Econ Behav 346; Bruno S Frey & Iris Bohnet, “Institutions Affect Fairness: Experimental Investigations” (1995) 151:2 J Institutional & Theor Econ 286.

91. Scalia put this point nicely: “Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.” Antonin Scalia, “The Rule of Law as a Law of Rules” (1989) 56:4 U Chicago L Rev 1175 at 1178. He clearly uses “justice” here in the sense of fairness. (Just think how the denied child is likely to react.)

92. See Priel, “Quasi-Contract,” *supra* note 1 at 71-76.

93. [1954] SCR 725, 3 DLR 785 [*Deglman* cited to SCR].

94. [1980] 2 SCR 834, 117 DLR (3d) 257 [*Pettkus* cited to SCR].

basis of the comparative contribution of the former couple in *Pettkus*). Getting less than that value (let alone nothing) will be seen by many as unfair. There can be little doubt that something like this was also on the justices' minds when deciding these cases. In *Degelman*, the Court explained that when the contract was unenforceable, "the law imposed upon [the woman], and so on her estate, the obligation to pay the fair value of the services rendered to her."⁹⁵ In *Pettkus*, the Court explained the outcome in terms of a general norm of fairness: "The extent of the interest [to which the plaintiff is entitled] must be proportionate to the contribution... . Where the contributions are unequal, the shares will be unequal."⁹⁶ Applying this principle to the facts of the case, the Court stressed that "[a]ny difference in quality or quantum of contribution [between Pettkus and Becker] was small."⁹⁷ They both worked on what, regardless of legal title and their marital status, was a joint enterprise and both made roughly equal contributions. Such an unequal distribution as claimed by Pettkus was easy to judge as unfair.

In cases such as *Pettkus*, fairness norms and property norms are closely intertwined. Based on a common-sense Lockean conception of property acquisition, ownership should be given to those who, through their effort and labour, took raw materials and improved them.⁹⁸ As we have seen, the Court took the view that Pettkus and Becker made roughly similar contributions to a single household. Such cases also lend themselves to the complementary judgment of

95. *Degelman*, *supra* note 93 at 735. See also *ibid* at 729.

96. *Pettkus*, *supra* note 94 at 852-53. Interestingly, in later cases there was no longer a requirement of showing that the plaintiff and defendant made roughly equal contributions to the household, only that the plaintiff's work in the household—whatever it was—enabled one spouse to make whatever earnings he made while the other took care of the household. See e.g. *Sorochan v Sorochan*, [1986] 2 SCR 38 at 50, 29 DLR (4th) 1. The narrower fairness-based view is clearly exemplified in the overturned decision of the Alberta Court of Appeal. See *Sorochan v Sorochan* (1984), 36 Alta LR (2d) 119 at 119, 44 RFL (2d) 144 (CA) ("[t]here is absolutely no evidence that there was any appreciation to the value of the land resulting from the plaintiff's efforts"). See also *ibid* 120 ("[t]here is no link between the acquisition of the property in question and the plaintiff's labour").

97. *Pettkus*, *supra* note 94 at 853.

98. Cf. Elizabeth Hoffman & Matthew L Spitzer, "Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice" (1985) 14:2 J Legal Stud 259 at 261 (claiming on the basis of experimental evidence that people tend to divide property among themselves "in accord with the Lockean theory of earned desert"). For a somewhat different perspective on the relationship between property and fairness, see *West v Knowles*, 50 Wn (2d) 311, 311 P (2d) 689 at 692-93 (Sup Ct Wash 1957). Justice Finley stated that the "rule ... that the party who has title, or in some instances who is in possession, will enjoy the rights of ownership ... often operates to the great advantage of the cunning and the shrewd." As such, exclusive focus on legal title (instead of the broader notions of ownership I called moral title) may be unfair.

fairness—namely that awarding Pettkus the entire value of the household would amount to a windfall gain for him, and that would be unfair too. The Court comes close to making this point explicit when it says:

For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute.⁹⁹

We can apply a similar standard to mistaken payment cases. Here, the same broadly Lockean idea that ties the justification of private property to effort would balk at the thought that one should gain property with no effort. In other words, in cases of mistaken payment not only did the plaintiff, being at most careless, not do enough to lose her property, but also—and independently—it may seem unfair for the defendant to gain property when he made no effort to acquire it.

The attraction of relying on notions of fairness in such cases is obvious. Understood this way fairness is a narrow normative standard, often easy to apply to particular situations. Compared to other normative standards, it appears less politically charged. “That’s unfair” is a judgment children make long before they develop any views on distributive justice. It may appear to correspond to a corrective justice interpretation of unjust enrichment because it looks formal: It does not require us to make an independent assessment of the “real” value

99. *Pettkus*, *supra* note 94 at 852. A similar perspective is found in *ASHIR Import, Production & Distribution v Forum Avisarim and Consumption Products Ltd* (1998), 52:4 Piskei Din 289 (Supreme Court of Israel) [*ASHIR*]. For a brief case note in English, see Daniel Friedmann, Case Comment on *ASHIR Import, Production & Distribution v Forum Avisarim and Consumption Products Ltd*, (2000) 8 RLR 412. The case involved defendants who copied various products designed by the plaintiffs. For reasons that need not detain us, the plaintiffs could not successfully sue for violation of their intellectual property or in the tort of passing off. Yet a majority of the court held that the plaintiffs were entitled to a remedy in unjust enrichment. One of the justices for the majority made the link between justice, fairness, and property in the following terms (*ibid* at 490-91, Zamir J [translated by author]):

My sense of justice is that it is appropriate to protect a person whose intellectual property was taken by another by means of imitation for the sake of making a profit... For a product to count as intellectual property ... it must be novel, not just new; it must be the result of real effort, of talent and resources, not an imitation of an existing product; that it will make a substantial contribution, not merely a trifling one, to existing knowledge or to existing products. If a product embodies all this, and for this reason it succeeds on the market, it is unjust that another person will copy the product, as it is, completely and knowingly, and will take some of the profits that the original manufacturer expects and deserves.

of individuals' contributions, only a comparison of their relative contributions against their relative rewards.¹⁰⁰

That is why cases like *Degelman* and *Pettkus* appear (to us) easy to justify. In the first we compare the situation as it was with the one in which the contract is enforceable and judge unfair the case in which the plaintiff remains unremunerated for his services;¹⁰¹ in *Pettkus*, even more clearly, we compare the relatively equal contributions of the two members of the household and judge it unfair when they end up with such unequal shares upon its dissolution. Cases where fairness norms are therefore particularly helpful are those that are on the borderline of contract, because in such cases there is often a relatively easy comparator.

Nevertheless, fairness is no panacea. We make fairness judgments by comparison to a baseline, but we typically have no way of saying whether the baseline itself is justified. Thus, while it is easy to say that there is something unfair when two people committed a similar crime but are treated differently, it is difficult to answer in the abstract what the right punishment appropriate for a certain crime is. Similarly, if we had been asked for the fair value of the work that Pettkus had put into his household, most of us would likely have had difficulty offering any reasoned response; lacking a comparator, it is possible that many of us would have considered the value of the entire household a fair amount for the work he has done. It is only because of the existence of Becker in the story that his earnings strike us as unfair. This point has by now been further demonstrated in numerous psychological studies that have shown how difficult it is for people to make judgments of fairness when the two items compared differ by more than a single factor.¹⁰²

Second, even when appearing obvious and straightforward, fairness judgments depend on implicit assumptions about the relevant standard for a fair evaluation of entitlements. For example, our views on *Pettkus* depend on the

100. Indeed, one defender of a corrective (or commutative) justice view of private law has recently stated that formalist theories are “attempts to show that the law aims to, and if operating properly does, achieve fairness between the parties.” Beever, “Formalism,” *supra* note 46 at 235. Incidentally, that would show that, contrary to formalists' avowals, state-provided private law is instrumental, for it is not logically necessary to have such a state institution to achieve fairness. See Priel, “Private Law,” *supra* note 83 at 326-28.

101. Cases where the fairness perspective fits unjust enrichment particularly well are on the borderline with contract. I would happily call them quasi-contractual. See Priel, “Quasi-Contract,” *supra* note 1 at 57-65.

102. For psychological experiments demonstrating how judgments of fairness can be manipulated, see Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, revised ed (New York: Harper-Collins, 2009) at 1-54; William Poundstone, *Priceless: The Myth of Fair Value (and How to Take Advantage of It)* (New York: Hill and Wang, 2010).

judgment that the standard for evaluating the parties' fair earnings depends on their respective contribution to the household, and this judgment is not itself straightforward or obvious. There is a reason why *Pettkus* made it to the Supreme Court: It reflected changing ideas about gender roles in society and the family. When we say that Pettkus and Becker were "similarly situated" we assume that their genders are irrelevant to the situation at hand. That is a value judgment that cannot be determined by examining only the relationship between the parties to the litigation.

Similarly, without a way of translating the respective efforts of different employees to a single scale, it becomes very difficult to compare the differential efforts of, say, a company executive and a manual labourer in order to assess whether their respective salaries are fair or not. Capitalist economies have developed the standard of willingness to pay for making such comparisons: The executive is 'fairly' paid many times more than a manual labourer because employers are willing to pay the executive many times more than they are willing to pay the manual labourer. But using this standard for determining fair compensation is neither natural nor politically neutral. To accept it means treating certain considerations as relevant and others as irrelevant for comparing the executive and the labourer. When these implicit value judgments are brought to light, the apparent simplicity and narrowness of fairness disappears. In the context of unjust enrichment, and of private law more generally, it casts doubt on the suggestion that private law is simply concerned with "fairness between the parties,"¹⁰³ because judgments of fairness between the parties hide unstated broader judgments that go well beyond the parties.

I have sought to show that some decisions classified as part of unjust enrichment are grounded in normative principles other than corrective justice. It is, of course, open to defenders of the unjust enrichment orthodoxy to reject such outcomes to the extent that they cannot reconcile them with corrective justice. McInnes does just that in his discussion of *Pettkus*.¹⁰⁴ If the disagreement is with the outcome the Supreme Court has reached, then he cannot maintain the view that corrective justice is apolitical and as such more appropriate than other forms of justice to private law. Assuming McInnes considers the moral position of the Court in *Pettkus* to be correct, his disapproval of the decision can be understood in one of three ways: (a) though *Pettkus* was motivated by well-meaning moral ideas, Becker should have lost, because there is no way of reaching that outcome

103. Beever, "Formalism," *supra* note 46 at 235.

104. McInnes, "Resisting Temptations," *supra* note 9 at 119-20.

while remaining faithful to the principle of corrective justice; (b) the outcome of *Pettkus* is right, but the Court should have reached it via a different legal route; (c) the outcome the Court reached is desirable, but it should have been left for the legislature to devise a legal solution for it. To adopt (c) is to express a (political) view about the proper role of courts, not a view about the “nature” or “idea” of private law. To adopt (b) is to admit that some parts of private law are not governed by corrective justice. If that is so, the force of the claim that unjust enrichment can only be concerned with corrective justice looks rather weaker. (a) is question begging. It is warranted only if one accepts the proposition McInnes seeks to prove, namely that the law of restitution is grounded in corrective justice.

V. UNJUST ENRICHMENT AS EQUITY

The branch of the law which was formerly called quasi-contract has recently tended to change its name to Unjust Enrichment. ... Its new name is useful because it emphasises the moral origin of the various rules comprised under this heading.¹⁰⁵

[U]njust enrichment remedies and the ideas that underlie them contribute insight and bring needed corrections to doctrines framed without primary reference to them. My own conclusion is that restitution remedies in our law have a roving commission. The generalizations now built around them and the techniques they provide have implications that reach in every direction, in unsuspected ways. No area is marked off as exempt.¹⁰⁶

There is a view of restitution that is in many respects in competition with the historical story told by proponents of the unjust enrichment orthodoxy briefly mentioned in the beginning of this article. This view seeks to explain this area of law in terms of equitable norms. Like the account offered by proponents of the unjust enrichment orthodoxy, this story starts with *Moses v Macferlan*,¹⁰⁷ but it emphasizes other parts of that decision, in particular Lord Mansfield’s statement that the “gist” of the claim for money had and received is that the defendant “is obliged by the ties of natural justice and equity to refund the money.”¹⁰⁸ To some proponents of this view, this judgment reflects the role equity has historically played in relation to the common law—as an invitation to soften the rigour

105. AL Goodhart, *English Law and the Moral Law* (London: Stevens and Sons, 1953) at 127.

106. John P Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little, Brown and Company, 1951) at 116-17.

107. *Moses*, *supra* note 3.

108. *Ibid* at 681. For a contrast, see Peter BH Birks, “English and Roman Learning in *Moses v. Macferlan*” (1984) 37:1 *Curr Legal Probs* 1; WMC Gummow, “*Moses v. Macferlan* 250 Years On” (2011) 68:3 *Wash & Lee L Rev* 881.

of strict legal rules when their application to particular cases seems to sanction outcomes perceived as unjust.¹⁰⁹ A strong statement of this position is found in a decision from the Supreme Court of Israel, where one of the justices writing for the majority opined that “unjust enrichment law is a kind of super-law available whenever a person should have a cause of action and a remedy and no other law provides it for him.”¹¹⁰ *Pettkus* contains an almost equally strong statement: “The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.”¹¹¹ Even outside such sweeping statements, we may have already encountered this understanding of unjust enrichment in the earlier discussion on property. There, unjust enrichment was invoked to explain the basis for liability in cases where legal title has passed but the plaintiff retained what I called “moral title.” This view can only make sense on the assumption that legal title is not the ultimate determinant of property. If even one’s legal title could be held to be overridden by the law of unjust enrichment, then the claim that the latter is a kind of “super-law” overseeing the rest of private law looks less odd.

This view of unjust enrichment is hard to reconcile with corrective justice. In the first place, this approach counters the view that unjust enrichment is a legal domain of equal standing to contract and tort that typically exists alongside them, not in order to correct them. The corrective justice approach, as we have seen, has been committed to a seemingly precise model of “legal justice,” and the equity-based approach clearly challenges it. Indeed, the unjust-enrichment-as-equity approach is particularly dangerous to the corrective justice view, because it suggests that those branches of private law are ultimately similarly open-ended and subject to “external,” free-standing considerations of justice of the kind that has been once disparagingly described by the English Court of Appeal as “that vague jurisprudence which is sometimes attractively styled ‘justice as between man and man’.”¹¹² Finally, this approach breaks down the boundaries between private and public law and with it the hope for maintaining corrective justice as a self-contained form of justice.

109. See *e.g.* Linzer, *supra* note 86 at 697, 760. For a general discussion of various possible interpretations of this view, see Emily Sherwin, “Restitution and Equity: An Analysis of the Principle of Unjust Enrichment” (2001) 79:7 *Tex L Rev* 2083 at 2091-104.

110. *ASHIR*, *supra* note 99 at 421, Strasbourg-Cohen J. See also *ibid* at 425-26, 431.

111. *Pettkus*, *supra* note 94 at 850-51. See *Peel*, *supra* note 69 at 802-03. Here, this reading of unjust enrichment was rejected.

112. *Baylis*, *supra* note 74 at 140.

While defenders of the unjust enrichment orthodoxy acknowledge that the law of unjust enrichment has its origins in that body of law called “equity,” they have rejected out of hand the suggestion that this area of law should be understood as some kind of expansive “super-law” that hovers above the rest of private law.¹¹³ However, it is simply not true that this perspective has not been part of the law of unjust enrichment, both as articulated in the courts and in academic commentary.¹¹⁴ More importantly, this perspective helps reveal an implicit aspect of its apparent opposite—the corrective justice view. For what is at stake in this dispute? It is not, as I think it is typically portrayed, the “nature” of equity or of its relationship to the common law; nor is it a historical claim about the effects of their fusion. On their own these questions cannot be given any definite answer; they are open to different interpretations, because different lawyers and judges have held different views about them. More importantly, these interpretations are derived from one’s views on deeper questions, namely the proper role of courts and the proper relationship between law (and legal institutions) and politics.

These are the matters that really are at stake in this debate, and these are not conceptual questions. There is no way one can discern the true nature of law or politics by conceptual analysis, and then derive the correct relationship between them; similarly, there is no conceptual answer to the question whether courts with extensive powers to change existing legal rules (either on an ad hoc basis or in general) undermine democracy or support it. The concept of “democracy” is a loose enough idea to accommodate both these possibilities. These are political questions about how judges should decide cases, about the role and limits of the judiciary within a democratic polity. If you wish, this is a debate about the “nature” of law (so long as it is understood as a political, not a conceptual, question).¹¹⁵ Whatever is one’s view on these questions, they cannot be answered by appeal to a conceptual inquiry about the true nature of unjust enrichment law. On the contrary, it is only after these political questions have been answered on the basis of a political argument that the answers to the conceptual questions fall into place. If we have been convinced that it would be good for courts to be granted broad law-changing power, it matters little whether we label it “the

113. See *e.g.* Birks, “Equity in the Modern Law,” *supra* note 22 at 16-25. See also McInnes, “Resisting Temptations,” *supra* note 9 at 129.

114. See the discussion (extending well beyond restitution) in Joshua Getzler, “Patterns of Fusion” in Peter Birks, ed, *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 157.

115. As it should be. See Dan Priel, “Is There One Right Answer to the Question of the Nature of Law?” in Wil Waluchow & Stefan Sciaraffa, eds, *Philosophical Foundations of the Nature of Law* (Oxford: Oxford University Press, 2013) 322 at 336-43.

power to prevent unjust enrichment,” “the power to do equity,” “the power to ensure justice,” “judicial activism,” or anything else.

These considerations are not, strictly speaking, concerned with distributive justice, but they are clearly political: They derive from an account of the desirable structure of state institutions. (The answer to these questions may itself be derived from a theory of distributive justice, although I take no stand on this question here.) It follows that the corrective justice view of private law is not, as presented by its defenders, independent of politics;¹¹⁶ it is, in fact, grounded in a particular political view about the proper allocation of power between the legislature and the courts. This is not a matter on which there is general agreement among private law scholars or among judges. Nor is it a question on which conceptual analysis, attention to legal doctrine, or adherence to precedent can provide much help.¹¹⁷

VI. UNJUST ENRICHMENT AS DISTRIBUTIVE JUSTICE

Unjust enrichment law is based on fundamental conceptions of social (distributive) justice. They reflect society and law’s attitude regarding appropriate interpersonal behaviour.¹¹⁸

At its core... the theory that determines which enrichments are just and which unjust, and furthermore prescribes the appropriate remedial response for unjust enrichment—is distributive.¹¹⁹

So far I have made four main points. First, I have argued that it is not true that there is widespread agreement that the foundations of the law of unjust enrichment lie in the notion of corrective justice. As a matter of fact, there are many other possible explanations of the foundation of the various doctrines gathered under

-
116. See *e.g.* Weinrib, *Private Law*, *supra* note 35 at 210-14. See also McInnes, “Resisting Temptations,” *supra* note 9 at 127 (calling this “law’s true essence”). *Cf.* Beever, *Rediscovering*, *supra* note 31 at 7.
117. It may well be political in another sense, which I do not explore here. I have argued elsewhere that many arguments presented by corrective justice scholars presented as politically neutral are actually committed to a right-wing view. See Dan Priel, “Torts, Rights and Right-Wing Ideology” (2011) 19 *Torts LJ* 1. In this regard, McInnes’s dislike for “social justice” (which, like Hayek, he repeatedly puts in scare quotes) is notable. See McInnes, “Resisting Temptations,” *supra* note 9 at 100, 114.
118. *AShIR*, *supra* note 99 at 451, Barak P. For an earlier statement to the same effect, see *Adras Building Material Ltd v Harlow & Jones Gmbh*, (1995) 3 RLR 235 at 271-72, Barak J (Supreme Court of Israel). This is an English translation of the decision. For the original publication, see (1988) 42:1 *Piskei Din* 221.
119. Hanoch Dagan, “Just and Unjust Enrichments” in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart, 2009) 423 at 429.

the banner of unjust enrichment. Perhaps this should not be surprising given the way that much of the law of restitution came to be formalized in the common law, through redrawing of the boundaries of other areas of law. Second, I have argued that all those other approaches are in one way or another inconsistent with corrective justice, at least as presented by proponents of the unjust enrichment orthodoxy. The links between unjust enrichment and property, equity, and fairness are, inevitably, links to questions of political and distributive justice. Third, I have tried to show that the casual references to corrective justice found in a few cases do not amount to an endorsement of the corrective justice perspective as understood by the unjust enrichment orthodoxy. These brief references are often mentioned together with those other ideas that are inconsistent with corrective justice, and therefore one should be careful in reading too much into them. Finally, and most controversially, I have argued that to the extent that one can make sense of corrective justice accounts of unjust enrichment, it is by interpreting them not, contrary to the way they are presented, as apolitical, but rather as motivated by certain political views. If this is true, then the debate between corrective justice proponents of unjust enrichment and their opponents is not a debate between proponents of a “pure,” conceptual, non-political vision of private law and a “corrupted” political one; rather, it is a debate in which both sides take a stand on moral and political questions. Ignoring these questions does not make for a theory that is more properly legal, or more adequate for use in the courtroom; it makes for a theory whose political underpinnings are hidden from view.

All this is just another way of saying that corrective justice is not by its nature an independent form of justice.¹²⁰ Or, put somewhat differently, distributive justice does not cease to matter in those aspects of life designated as “private law.” If private law is treated as independent of distributive justice, this is not because it is governed by different principles of justice, but because of institutional limitations imposed from without on the kind of considerations courts should take into account when deciding cases. In fact, even the designation of certain parts of the law as “private law” is the product of such external considerations, not a conceptual truth.¹²¹

These conclusions will surely strike some readers as extreme, implausible, or just plain wrong. I therefore rely again here on a point I made earlier in this

120. *Contra* Beever, *Rediscovering*, *supra* note 31 at 67. This point is further developed in Priel, “Independent Corrective Justice,” *supra* note 58; Priel, “Private Law,” *supra* note 83 at 326-28.

121. *Cf.* Priel, “Political Origins,” *supra* note 67.

article. Suppose I am completely wrong about my views on conceptual analysis; suppose that the true nature of unjust enrichment and the rest of private law can be identified and explained by means of politically neutral conceptual analysis; and suppose that that inquiry revealed that the true nature of unjust enrichment (and private law more generally) is to be understood in terms of corrective justice. That would not make much of a difference, and corrective justice theorists would still have to offer a normative justification for unjust enrichment. This is because it would still be an open question whether we should have unjust enrichment law (grounded in corrective justice) or an alternative (however it is called) that bears some resemblance to unjust enrichment law but is justified by other considerations. Since such an alternative is logically possible, even under these assumptions the choice between corrective justice-based private law and any of a host of alternatives remains open. Indeed, if we accept the view that corrective justice is apolitical, then by hypothesis it is silent on this question, which implies that proponents of corrective justice still have to offer a political justification in support of the view they favour. And since we can simply redefine all the debates that purport to be on the true nature of unjust enrichment as debates on whether to have unjust enrichment-as-corrective-justice or a possible alternative (for example, one that takes the plaintiff's fault into account), we would end up facing exactly the same (normative) questions. In other words, even if, contrary to the view presented here, there is a fact of the matter on the "true," or "genuine," nature of unjust enrichment, that would not make any of the political questions go away.

I have not yet mentioned two powerful arguments that proponents of the corrective justice perspective can still present to their opponents. The first is empirical. Even if we acknowledge that courts do not rigorously follow the corrective justice orthodoxy, they still (so the argument would go) are much closer to it than to any of its alternatives. Private law disputes do not normally involve any attempt to assess the relative wealth of the parties, and even more rarely try to determine whether a judgment for the plaintiff or the defendant is going to move us closer to a more just distribution of resources. To be sure, on many theories of distributive justice the mere fact that a defendant is poor does not immediately imply that she has suffered some distributive injustice. But that courts in private law disputes do not consider this question at all seems hard to reconcile with the view that private law is about distributive justice.

The second argument is more theoretical. On most accounts,¹²² certainty is one of the most important requirements of the rule of law. Whatever controversies may exist on questions of corrective justice, they are small in comparison to the scope of disagreement on questions of distributive justice. To the extent that (the rule of) law depends on certainty, opening private law to questions of distributive justice will imply the demise of private law. It is not just that it will no longer be private; it will no longer be law. This worry has on occasion resonated with the courts. In *Pettkus*, for example, Justice Martland expressed the worry that unjust enrichment would become a free-for-all “palm tree justice” without the benefit of any guidelines. By what test,” he asked, “is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.”¹²³ In response to this concern, Justice Martland has sought to demonstrate that it was possible to reach the outcome favoured by the majority “without recourse to concepts of unjust enrichment and constructive trust.”¹²⁴ Since then, even though Canadian courts have often adopted the language of unjust enrichment, time and again they felt obliged to reassure us that in invoking unjust enrichment they were not simply relying on their personal sense of justice.¹²⁵

These concerns, though substantial, prove less than they purport to. What they miss is the distinction between political theory and institutional design. The two are obviously related—different views on the justification of democracy may well lead to different institutional structures—but they are not the same. In our context, the distinction may imply that though we may think that the state should pursue a certain goal, some or all of its institutions should refrain from directly pursuing it. This may be so for various (partly overlapping) reasons: political legitimacy, protection of rights (freedom, equality) or other goals (diversity, fraternity), expectations, unwieldy costs, expertise and division of labour, the self-defeating nature of the direct pursuit of some goals, and possibly others. A proponent of the view that unjust enrichment is grounded in distributive justice will argue that all these considerations belong to the level of institutional structure and institutional design, leaving intact the claim that unjust enrichment, together

122. Though perhaps not all. See Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 9-32.

123. *Pettkus*, *supra* note 94 at 859, Martland J. Interestingly, in the French translation, “palm tree justice” is rendered as “la justice distributive.” *Ibid.*

124. *Ibid.*

125. See *e.g. Kingstreet*, *supra* note 68 at para 38; *Garland*, *supra* note 86 at para 40; *Zaidan Group Ltd v London (City)* (1990), 71 OR (2d) 65, 64 DLR (4th) 514 at 518 (CA).

with the whole of private law, are not founded on an independent form of justice (“corrective” or “commutative”), but on distributive justice.

I wish to conclude with a few brief remarks about the source of philosophers’ attraction to corrective justice. A familiar argumentative strategy in private law theory is to first try to identify, fairly independently of the law, what we owe to each other as a matter of morality. It is then assumed that the law should be shaped to match what morality requires. The law is thus to be assessed by its conformity to these pre-existing moral standards: Contract law is modelled on the morality of promising, and tort law is to match the moral norms of the pre-political community of strangers stranded on a desert island. Call this view the “imitation model.” The imitation model is responsible for the popularity of the view that private law is explicable in terms of corrective justice and not distributive justice, because it seems easier to explain various private law doctrines as morality-made-legal, not as the product of distributive justice that is more commonly (although not universally) thought to come into place where a political community is in place.

For reasons I cannot address here, I think the imitation model, despite its familiarity and popularity, is largely mistaken. This is easy to show for the vast areas of law for which there is no pre-legal moral equivalent (the law of corporations is an obvious example, as are many parts of the law called “regulation”), which is why legal philosophers have had very little to say about them. But the same is true of criminal law, tort, contract, or unjust enrichment. These areas of law must be understood and justified in terms of the state’s legitimate use of force. The imitation model is, I think, of limited significance within such an account. (This, of course, does not preclude individuals from treating each other on the basis of their notions of pre-existing morality.) Be all that as it may, even on this standard picture there is a gap between what morality requires and what the law can do, as a result of the institutional constraints under which courts find themselves. Two kinds of constraint are particularly familiar: the technical and the political. In the former category we find claims about judges’ incompetence in dealing with certain questions; in the latter, the argument is that considerations of political legitimacy suggest judges should refrain from deciding certain matters, even if they are competent to decide them. Taking both kinds of consideration on board seems to provide an argument against distributive justice-based accounts of private law. The reason why judges do not normally address questions of distributive justice is because they are not provided with the requisite evidence to decide on these matters, deciding such matters would be too complex and time-consuming, and applying the evidence to particular cases would be potentially too capricious.

These, I must admit, are valid concerns and they provide support for conclusions that bear obvious resemblance to those made by proponents of corrective justice on seemingly conceptual grounds.

The reader who has made it all the way here may now feel somewhat short-changed. After being so critical of corrective justice accounts, I seem to let everything in through the back door of institutional constraints. If nothing else, the reader may ask (and with good reason): Does it matter whether unjust enrichment is based on corrective justice or on distributive-justice-with-institutional-constraints? The answer is that it does. It matters exactly because the latter approach lets in various considerations and possible doctrinal solutions that the corrective justice accounts have ruled out on conceptual grounds. Though much of the work on corrective justice is presented as “conceptual,” it has normative aims. Those are particularly clear in discussions about the role of courts and the limits of adjudication. But they are also in view in discussions on substantive doctrines. Having identified the true nature of private law (or so they believe), corrective justice scholars then stand guard against what they perceive as alien (non-corrective) intrusions that would threaten private law’s normative purity. In tort law, arguments based on corrective justice have been used to challenge doctrines like market share liability, enterprise liability, strict liability, punitive damages, and so on. In the law of unjust enrichment such arguments have been used to challenge efforts to use the law for the sake of promoting various goals that are perceived to be inconsistent with the corrective justice structure of the law. My claim here is not that all these doctrines are necessarily desirable; it is that to show them undesirable takes more than showing them inconsistent with corrective justice.

That the questions should be discussed at the level of institutions rather than at the level of the “nature” of the domain has another important implication: Courts are not the only institution involved in the making and shaping of the law, including private law. If some considerations are perceived as alien to private law, they remain so regardless of the body that introduces them. But if the reasons for excluding certain considerations are grounded in the institutional limits of courts, it makes perfect sense to consider whether they could be introduced by bodies that operate under quite different institutional constraints, namely legislatures. Legislatures can incorporate distributive considerations into the law, especially when those are introduced as rules that are fairly easy for courts to apply without having them violate the institutional constraints under which they operate. If designed as fairly precise rules, they do not require the courts to engage in complicated evaluations that are thought inimical to incorporating

distributive justice in the courts. And since introduced by legislation, they do not suffer from the legitimacy concerns one may have with judicially-created norms. Another important implication of the argument suggested here is that if institutions rather than substantive normative principles are the source of the constraint, then one possible solution can be to change the institution empowered to decide a certain matter. There is, plainly, room for much discussion on all this, one that cannot be undertaken here. But I hope these concluding remarks should provide a starting point for analyzing private law in a way that is not hampered by the distracting constraints of corrective justice.