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Materially Identical to Mistaken Payment

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Introduction

The archetype of unjust enrichment is a money transfer made by mistake.[1] It is difficult to overplay the impact of that archetype on legal theory and practice in this area of private law. In a seminal text on the subject,[2] Birks wrote that unjust enrichment was simply 'the law of all events materially identical to mistaken payment'[3]—a 'generic name' for that core case.[4] By generalising from mistaken payment, Birks prescribed a three-limbed test for restitutionary liability: money became 'enrichment'; transfer became a requirement for the enrichment to have been received by the defendant 'at the claimant's expense'; and mistake became a requirement for proof that the circumstances of enrichment rendered it 'unjust'.[5] That test prevails in and out of the courts.[6] Thus, the 'law of all events materially identical to mistaken payment' is the law of all events that unjustly enrich one party at another's expense.

Two questions have attracted wide and keen debate: first, 'what counts as an 'injustice'?; second, 'what amounts to a sufficient connection between claimant and defendant?'.[7] But the logic of *enrichment* is thought to be self-evident:[8] money is always valuable, so that receiving it is an 'incontrovertible benefit'

I am grateful for comments from Neil Duxbury, David Kershaw, Emmanuel Voyaikis and Charlie Webb.

1. As Chambers puts it: "The receipt of money is a specific type of enrichment, and its paradigm" Robert Chambers, "Two Kinds of Enrichment" in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) at 246 [Chambers, "Two Kinds of Enrichment"]. Birks derives the example from *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24: Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford University Press, 2004) at 5 [Birks, *Unjust Enrichment*]. I prefer the term "transfer" to "payment"; the latter implies an existing payment liability to be discharged.
2. Birks, *ibid*.
3. *Ibid* at 51. The same emphasis appears in Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) at 9 and in Robert Goff & Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966) at ch 1.
4. Birks, *Unjust Enrichment*, *supra* note 1 at 10.
5. *Ibid*.
6. To these, a fourth is now usually added: there must be no defences available to the claimant. See, e.g., *Banque Financiere de la Cite SA v Parc (Battersea) Ltd*, [1999] 1 AC 221 at 227 (HL) Lord Steyn [*Banque Financiere*] and *The Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2017] UKSC 29 at 24; [2017] 2 WLR 1200, Lord Reed [*Investment Trust*].
7. Two features have played a prominent role in that debate: (i) whether "mistake" is exemplary of the "absence of basis" for an enrichment, or one of a number of "unjust factors; and (ii) whether "at the expense of" should be conceived of causally, or as a tighter "direct transfer" between claimant and defendant.
8. Goff & Jones, *supra* note 3 at 14. Birks went so far as to say that it was "barely necessary to say anything about money received", Birks, *Unjust Enrichment*, *supra* note 1 at 53. See also, Chambers, "Two Kinds of Enrichment", *supra* note 1, for whom there are two kinds of enrichment (though Chambers does not deal with the core case directly).

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to the payee.[9] Thus, payment abstracts to enrichment and (at the first limb of Birks' test) the 'law of all events materially identical to mistaken payment' is the law of all events—whether title-transfer,[10] service,[11] or something else—that make the recipient 'better off'.

In this article, I argue that the focus on enrichment is misplaced.[12] What justifies a legal response to mistaken payment, and so allows us to generalise from that core case, is a defect in the legal transaction that links payor with payee. The role of value in this part of private law, like contract and torts, is secondary: where a legal response is justified, but correcting the injustice *in specie* is impossible or undesirable, the defendant must pay whichever money sum will most nearly achieve that goal.

In the first part, I address the process of abstraction *per se*. In order to generalise from mistaken payment, I show, we must explain which features help to justify restitution and in what way. In parts two and three, I make the negative case: whether we frame it as 'value' or 'benefit', the fact that the recipient is made 'better off' does not justify a legal response to mistaken payment;[13] it is not, therefore, the correct tool with which to abstract out from the core case.

In the fourth and final part, I make the positive case: restitution is justified by a defect in the legal transaction (payment, gift or other transaction) that links the parties. The payee is not liable because she has been 'enriched', but rather because she is the counterparty to a legal transaction which exhibits traits that there are institutional reasons to disavow. Any such transaction may be reversed *in specie* or 'substitutively', by way of a money sum equal to its value. Thus, the 'law of all events materially identical to mistaken payment' is the law of all defective legal transactions.[14] The role of enrichment is secondary: the receipt of value does not *justify* reversing a mistaken payment; it shapes the payee's duty to do the 'next best thing'.

Generalising From Payment

In the following Example 1, it is well established that (assuming the absence of any relevant defence) A can recover $5000 from B by way of an action for restitution:

9. Birks, *Unjust Enrichment*, *supra* note 1 at 53.
10. See, e.g., *Cressman v Coys of Kensington* [2004] EWCA Civ 47, involving the mistaken transfer of a number plate.
11. The leading case is now *Benedetti v Sawiris* [2013] UKSC 50.
12. For a different (property-focused) line of attack, see Peter G Watts, "'Unjust Enrichment'—the Potion that Induces Well-meaning Sloppiness of Thought" (2016) 69:1 Curr Legal Probs 289 [Watts, "'Unjust Enrichment'—the Potion"].
13. Or rather, does not bear on the *positive* reasons for restitution.
14. The focus in this article is on limbs (i) and (ii) of Birks' test: what counts as a relevant defect for the purposes of (iii) (which has been the subject of many other academic efforts) falls outside the parameters of this article.

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> Example 1: A instructs her bank (Bank 1) to transfer $5000 from her account to B's account with Bank 2, to discharge a payment liability that she does not, in fact, owe to B. Bank 1 complies: A's account is debited, and B's credited, with $5000.

This was Birks' 'core case' of unjust enrichment: the central example of a legal response that differs from the law of torts (because it does not depend upon any wrong),[15] and the law of contract (because it does not depend upon "any manifestation of consent")[16] is a money transfer made with the purpose of discharging a non-existent liability to pay the recipient.[17]

That case is conceptually and methodologically fundamental to the law of unjust enrichment: for Birks, unjust enrichment was "no more than a generic name for the receipt of a mistaken payment".[18] And the "elements of the generalisation",[19] from mistaken payment to unjust enrichment, were as follows:

> Receipt of a payment supposes a receipt of money, and receipt of money generalizes to *enrichment* . . . . Payment also supposes that the enrichment happens by transfer from another. Enrichment by transfer from another generalizes to enrichment *at the expense of* another. The mistake is or reflects the existence of the reason . . . why the payment has to be given up. The generic reason why an enrichment at the expense of another has to be given up is that it is *unjust*.[20]

He continued: "The utility of this generic restatement is that it enables us to look for and to recognize other examples which are materially identical to the core case, if any there be. In the same way 'dog' gathers to the labrador all the rotweilers, alsatians, spaniels, pointers, terriers, dalmatians, and so on."[21]

As a methodology, this is a tried and tested one. However, two points must be emphasised at the outset of our enquiry. First, we have a *choice* about how to characterise the core case: a labrador is a dog, but it is also a four-legged animal, a mammal, a household pet, and so on. In any successful taxonomic exercise, that choice will correspond with the objective of classification. Let us continue Birks' zoological theme and imagine that a newly-licensed zoo contains three animals: a zebra, a tiger, and a giraffe. Intending to build a harmonious environment for her animals, the zoo owner instructs the zoo keeper to house the zebra with any other animal that is 'materially identical' to it. The zookeeper now has a choice: if she categorises by reference to the characteristic 'herbivorous' or 'ungulate', she will house the zebra with the giraffe. But if she chooses 'coat pattern', she will house the zebra with the tiger, things will very likely end poorly for the zebra, and the zoo owner's objective will fail.

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15. Birks, *Unjust Enrichment*, *supra* note 1 at 9.
16. *Ibid* at 8.
17. Derived from *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24, which Birks discusses *ibid* at 5.
18. Birks, *Unjust Enrichment*, *supra* note 1 at 10.
19. *Ibid*.
20. *Ibid* [emphasis added].
21. Birks, *Unjust Enrichment*, *supra* note 1 at 10.

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There are various ways in which we might frame the objective of legal classification—perhaps to help the courts to determine which remedy to award in a given case, or (at a higher level of abstraction) to facilitate the identification of remedial gaps and normative inadequacies, so as to make the system as a whole predictable and just. Whichever we choose, it should be clear that those engaged in the study and practice of law must be able to distinguish like from unlike—not merely at the level of some factual similarity between the cases (e.g., each concerns zoos, employment, medicine etc.)—but at the normative level.[22] This suggests the second point, which concerns the *way* in which we classify, in law: what we need, when we conduct the taxonomic exercise, is a clear understanding of the reasons that justify a particular legal response—in our case, the obligation to retransfer money received.[23]

By his second book on the subject, Birks was alive to this task, of identifying reasons for restitution: "the task of the word 'unjust'", he said, "is to understand the reasons, however few or many they may be, which are neither contracts nor wrongs but are nevertheless sufficient in law to generate a right to restitution of an enrichment obtained at the claimant's expense".[24] And in seeking out rational unity, it bears emphasis that the term 'reason' is polysemic; in what follows, it will be important to bear in mind that the reason (justification) for awarding a particular claim may differ from the claimant's reason (motivation) for seeking it.[25] Carving out a domain for a particular area of law by abstracting from a particular case—in ours, a transfer of money to discharge a non-existent liability to pay—must be conducted according to the first type of reason. In short, "we need to grasp the reasons *justifying* claims following mistaken payments before we can abstract out".[26]

Of course, this prompts other questions, such as just how similar two reasons need to be to justify putting them in the same category:[27] if 'materially identical' means 'normatively similar', then how similar will do? Those questions are difficult, and I cannot engage with them here. The purpose of this part is simply to make clear that what we are looking for, when we determine what counts as 'materially identical' to mistaken payment, is the justification for restitution.

We saw above that Birks extrapolated the tripartite enquiry from three features of payment: money became 'enrichment'; transfer became 'at the expense of'; and mistake became 'injustice'. That generalisation precipitated the first three limbs of the four-stage test that governs our modern law of unjust enrichment:

22. See, e.g., Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press, 2016) at 102.
23. *Ibid* at 46; Robert Stevens, "The Unjust Enrichment Disaster" (2018) 134 Law Q Rev 574 at 576 [Stevens, "Unjust Enrichment Disaster"].
24. Birks, *Unjust Enrichment*, *supra* note 1 at 16.
25. Summers draws this distinction in his paper, Andrew Summers, "In Defence of Description: Private Law for Positivists" (Paper presented at the London School of Economics, 25 April 2017) [unpublished].
26. Frederick Wilmot-Smith, "Reasons? For Restitution?" (2016) 79:6 Mod L Rev 1116 at 1120 [emphasis added] [Wilmot-Smith, "Reasons?"].
27. Or, how different to justify separating them.

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"(a) Has the defendant been benefited, in the sense of being enriched? (b) Was the enrichment at the claimant's expense? (c) Was the enrichment unjust? (d) Are there any defences?".[28]

A great deal of attention has been paid to the validity of the second and third steps of Birks' generalisation, but almost none to the first: indeed, Birks thought it "barely necessary to say anything about money received".[29] Money is always valuable; thus (it is said), the receipt of money is an "incontrovertible benefit".[30] At the first stage of Birks' test, therefore, 'the law of all events materially identical to the receipt of a mistaken payment' is the law of all events that make the recipient 'better off'.

In what follows, I consider whether, according to the criteria set out in this part, Birks was correct to extract a generic concept of enrichment from the core case.

Value

Above, I exemplified Birks' 'core case' of unjust enrichment as follows:

> Example 1: A instructs her bank (Bank 1) to transfer $5000 from her account to B's account with Bank 2, to discharge a payment liability that she does not, in fact, owe to B. Bank 1 complies: A's account is debited, and B's credited, with $5000.

According to Birks, that core case involved a clear transfer of value from A to B, thereby providing an 'obvious' tool with which to abstract out:

> In our core case a mistaken payee receives money. The generalisation enlarges the receipt of money to enrichment, precisely with a view to finding out whether the logic which explains restitution of a mistaken payment still works in cases in which what is received is not money. The answer may seem obvious, and in a sense it is. What works for money must work for value received in other forms.[31]

In what follows, I consider whether the concept of value is indeed an adequate criterion for our task of generalisation, understood as a process of identifying those events which are normatively similar to mistaken payment. I proceed in three parts: first, I set the conceptual parameters of the idea that value is 'transferred' from A and 'received' by B in Example 1; second, I consider two problems of scope created by using value, so defined, to generalise from that core case. By way of conclusion, I argue that, though value invariably motivates

28. *Banque Financiere*, *supra* note 6 at 227 and *Investment Trust*, *supra* note 6.
29. Birks, *Unjust Enrichment*, *supra* note 1 at 53.
30. *Ibid*.
31. Birks, *Unjust Enrichment*, *supra* note 1 at 49. See also, Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) at 192 [Weinrib, *Corrective Justice*]. The search for a "transfer of value" now underpins the judicial approach to identifying the requisite connection between the parties: see, e.g., *Investment Trust*, *supra* note 6 at 43.

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the claim to restitution, it does not bear on the positive (justificatory) reasons for a legal response to mistaken payment; it is not, therefore, the correct tool with which to abstract out from that core case.

What is Value?

The idea that value may be 'transferred' by a claimant and 'received' by a defendant is both well-used (in the academic literature and in the courts),[32] and highly contentious. Definitional equivocation has impeded efforts to identify the proper conceptual territory of unjust enrichment: for some (we will see), the term refers to a particular 'abstract' way of framing the economic fallout of the impugned event;[33] for others it describes the market price of goods and services,[34] independent of any action that may be taken to realise that price. In this section, I begin by characterising our core case; in those that follow I consider how the concept of value mediates the extension of principles of unjust enrichment to other cases. I argue here that there are two, limited, ways in which we may meaningfully understand the claim that Example 1 exemplifies a transfer of value from A to B: the first describes the effect of the impugned transaction on the relative net purchasing power of A and B; the second describes its effect on the exchange value of specific assets to which each is entitled.

There have been very many attempts to define value, as a precursor to explaining how it interacts with the justification for restitution. Though exposition varies, all accounts draw on the ideas of an 'abstract',[35] 'relational'[36] standard for rendering dissimilar things functionally commensurable. Weinrib, whose attempt is perhaps best-known, begins with the assertion that "value refers to the *possibility* of exchange and is *concretized* through the process of exchange",[37] and continues to the nub of his account:

> By abstracting from the particularity of need or use, value becomes indifferent to the particularity of the things being exchanged and can therefore be expressed through the comparison of anything of value with any other thing of value. If I wish to exchange a pair of shoes for loaves of bread, the number of loaves that I receive is a function not merely of the relationship between shoes and loaves, but also of the relationship between shoes or loaves and anything else for which they might possibly be exchanged.[38]

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32. See, e.g., *Investment Trust*, *ibid*; *Menelaou v Bank of Cyprus* [2015] UKSC 66 at para 30, [2016] AC 176, Floyd LJ; Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (Sweet & Maxwell, 2011), s 6-01.
33. See, e.g., Wienrib, *Corrective Justice*, *supra* note 31 at 192; Stephen Watterson, "'Direct Transfers' in the Law of Unjust Enrichment" (2011) 64:1 Curr Legal Probs 435.
34. See, e.g., Andrew Lodder, *Enrichment in the Law of Unjust Enrichment* (Hart, 2012) at 17.
35. See, e.g., Lionel Smith, "Restitution: The Heart of Corrective Justice" (2001) 79:7 Tex L Rev 2115 at 2142; James Edelman, "The Meaning of Loss and Enrichment" in Chambers, Mitchell & Penner, *supra* note 1 at 226; Lodder, *supra* note 34 at 17.
36. See, e.g., Weinrib, *Corrective Justice*, *supra* note 31 at 192; Lodder, *ibid* at 17.
37. Weinrib, *Corrective Justice*, *ibid*.
38. *Ibid*.

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This indifference to particularity allows us, he says, to conclude that: "If I transfer shoes but receive in return nothing or food of less value… then I have transferred not only the shoes as things of value but value itself".[39]

This is confusing, for several reasons. First, if value refers to the *possibility* of exchanging an asset,[40] it is extremely difficult to see how it is able to move independently of the asset: 'this asset can be exchanged' is a description of what can be done with this asset, nothing more. Second, if value is made *concrete* through exchange, that process has no effect on the relational equation: the asset was (*ex hypothesi*) worth exactly what was received in return; that is its realised price. Last, there is absolutely nothing universal or abstract about the conclusion that shoes and loaves stand in a quantitative relationship with respect to one another; with only a pattern of exchange *inter se* to draw upon, the outcome of this comparison does not permit us to draw any conclusions about the value of each commodity relative to any other thing with which it might be compared.

Let us take these ideas—value, exchange, abstractness and transfer—in turn. If one asset is regularly exchanged for another in a particular ratio, we can make a statement about the relative values of those assets. What allows us to make general statements about the price of assets *without* any such pattern of exchange is their comparison to a third thing, which is money. That value-scale allows us to say: '*n* is worth *x*', where we can substitute *n* for any commodity, and *x* for any price. This statement—'*n* is worth *x*'—is a statement about exchange or 'market' value.

Moreover, that value scale permits us to substitute *n* for a *person*: we can express the net purchasing power of an individual as the sum of all the exchange values of her assets, minus her liabilities. This statement—'A is worth *x*'—is a statement about *wealth*. Thus, the implication of the term 'abstract' varies according to the type of value described: exchange value is value abstracted from a particular person,[41] made to describe the price of a particular thing (or group of things); wealth is value abstracted from a particular commodity,[42] made to describe the purchasing power of a particular person (or group of persons).

It has been pointed out elsewhere that market value is *realised*, not transferred, in any purchase of goods or services.[43] The owner of an asset has the potential to sell; when value is 'concretised' through exchange, the vendor receives the price, and the buyer title to the asset. Thus, title to the asset is transferred, its value realised. But there remain two meaningful ways in which one might speak of a 'transfer of value'. First, the 'transfer of value' entailed by Weinrib's transfer of shoes for 'nothing, or food of less value' describes the effect that the transaction has on the relative net purchasing power of transferor and transferee. So too

39. *Ibid* at 194.
40. Called "exchange potential" elsewhere: Tatiana Cutts, "Tracing, Value and Transactions" (2016) 79:3 Mod L Rev 381 at 395-96.
41. And from the use to which a particular person might put the asset.
42. Or from a particular asset or liability.
43. See also James Penner, "Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds" in Chambers, Mitchell & Penner, *supra* note 1 at 311.

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in our Example 1: an immediate consequence of the bank transfer from A to B is that A is less wealthy, and B more so. As long as we are precise about the connotations of the concept, 'transfer of value' provides a plausible description of examples such as these.

Weinrib's example can only be understood as a transfer of value in this sense—a transfer of wealth from one party to another. But it does not follow that the idea of a transfer of exchange value is *always* impermissible.[44] In our Example 1, differently from Weinrib's, there is a causal relationship between the impugned event and the exchange value of A and B's respective bank debts. And here is the second sense in which—so long as we define concepts and exemplary cases with case—we might meaningfully speak of value-transfers: 'transfer of value' describes the effect of the transaction on the exchange value of specific assets to which A and B are each entitled.

So, exchange value is the price of a thing or service; exchange value is realised in any purchase of goods or services, but it may be 'transferred' from A to B in the limited sense that an event may cause a correlative decrease and increase in the value of specific assets to which each is entitled. Wealth is the net worth of an individual; wealth may be 'transferred' from A to B in the limited sense that an event may cause a correlative decrease and increase in their respective net worth.

Underinclusion

We have seen that the core case involves a 'transfer of value', understood either as a correlative causal increase and decrease of purchasing power (wealth), or a correlative causal increase and decrease in the value of A and B's respective bank accounts (exchange value). The first difficulty with using value, in either guise, as the criterion for our task of generalisation is one of underinclusion: that tool excludes cases that are widely understood to fall well within the ambit of unjust enrichment.

Let us begin with the following example:

> Example 2: B asks A, a builder, to build a wall for her. A agrees, and performs the work on the basis that a further agreement will be reached as to remuneration. No such agreement is reached, and B refuses to pay.

To focus analysis, let us make two assumptions: (i) that the wall-building has no impact on the value of B's property; and (ii) that, if A had not agreed to perform the work, C would have built the wall without charge. Thus, A's service does not make B wealthier than she was prior to the service (in this sense, it is a 'pure service');[45] nor does it make B wealthier than she would have been if the service had not been provided at all (and she had sourced the work

44. Compare Penner, *ibid* at 306.

45. See, e.g., Andrew Burrows, *The Law of Restitution*, 3rd ed (Oxford University Press, 2011) at 47 [Burrows, *The Law of Restitution*]; Mitchell McInnes, "Enrichments and Reasons for Restitution: Protecting Freedom of Choice" (2003) 48:3 McGill LJ 419 at 428 [McInnes,

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from C).[46] Nevertheless, it is well established that, all other things being equal, A will succeed in her claim for a *quantum meruit* (literally, 'earned sum').[47] B requested the work on the basis that it was to be paid for, and A performed the work on the same basis; if B does not pay, it is generally accepted that there is a 'failure of consideration' or 'failure of condition',[48] and a reason for requiring B to pay. It is widely understood that this remedy belongs to the generalised law of unjust enrichment. Yet, if the service has no impact on B's wealth, nor on the value of any asset belonging to B, the steps to this conclusion cannot be accounted for by reference to the concepts of value with which we have dealt thus far.

Lodder argues that the concept of exchange or 'market' value provides the missing connection between the core case and Example 2: "there can be no doubt", he says, "that the performance of services involves a transfer of value recognised by the market"—[49] so that in our Example 2, B 'receives value' from A, and (in the presence of an unjust factor) must pay for it. The argument is appealing in its simplicity:

P: Services have a market value;
P2: A performs a service for B;
∴ B receives value.

Thus, if B does not pay for that service, it would seem that she is enriched unjustly at A's expense. Yet, we saw above that exchange value is *realised*, not transferred, in any purchase of goods or services.[50] The step from *P* to conclusion appears persuasive only by eliding two ways in which the term 'market value' may be used to describe a particular thing or service, *n*: (i) predicting the sum of money that will be transferred to obtain *n*; and (ii) describing the sum of money that is in fact transferred to obtain *n*. These sums may be identical: the price at which bread is offered for sale in my local supermarket is the price that I pay. But they often differ: an estate agent may value my house at $500,000; the market conditions and circumstances of sale may mean that it fetches a price of $400,000. It is then true, both that the price of the house was $500,000 (predicted value) and that the price of the house was $400,000 (realised value).

This distinction is crucial in Example 2. We may make a prediction about the value of A's service: perhaps people in the neighbourhood in which A and B live generally pay for $50/hour for building work of this kind, and it will take 10 hours to complete. Thus, the price of wall-building is $500 (predicted value). If B in fact pays A $400, the price (realised value) is $400. And if B pays A nothing, the

"Enrichments"]; Jack Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press, 1994) at 21-44.

46. Given that she could have acquired the service gratuitously.

47. See, e.g., Burrows, *The Law of Restitution*, *supra* note 45 at 47; *Benedetti*, *supra* note 11 at 190.

48. For the latter, see Frederick Wilmot-Smith, "Reconsidering Total Failure" (2013) 72:2 Cambridge LJ 414.

49. Lodder, *supra* note 34 at 87. See also McInnes, "Enrichments", *supra* note 45 at 428.

50. See text to *supra* note 43.

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realised value of the service is $0. That people *generally* pay $500 for wall-building gave us a prediction, which the facts have disproved.

We may nevertheless insist that A's service *was* valuable—that the prediction, informed by general practice, has some normative power in these circumstances. But if we do, we are not expressing the (clearly false) conclusion that the realised value of the service is greater than $0; we are expressing a different conclusion, which is that we think B *should* have paid A. To say, then, that B should have paid because there was a 'transfer of value' from A to B is wholly and irremediably circular.

To put this another way: the transfer of value in Example 1 involves a comparison between the position in which A and B were prior to the transfer and the position in which they are after it; if we say that there is a 'transfer of value' in Example 2 we are making a different comparison, between the position in which A and B are after the service, and the position in which they would have been if B had paid. These are different exercises, which require different justifications.

Two conclusions are available at this juncture: either the notion of 'value received' is underinclusive, and something else is needed to permit us to generalise from Example 1 to Example 2, or the legal response to Example 2 does not belong within the generalised law of unjust enrichment.

Overinclusion

We have already seen that Example 1 straightforwardly exemplifies a transfer of value from A to B. If the concept of 'value received' excludes many iterations of the core case, the second issue of scope is the inverse of the first: in certain important respects, value seems to be *overinclusive*. In particular, viewed through the lens of value-transfers, there seems to be no difference between Example 1 and the following Example 3:

> Example 3: There are only two Penny Red stamps left in the world. A has one (Stamp One), B has the other (Stamp Two). A accidentally defaces Stamp One; this causes Stamp One to become worthless, and Stamp Two to quadruple in value.[51]

Each involves an unjust transfer of value in each of the senses identified above: A's asset is worth less and B's more in consequence A's mistaken act; A's balance sheet is impoverished, and B's healthier, in consequence of A's mistaken act. Yet few would think it appropriate for B to be required to compensate A for her mistaken act; that (we might think) simply casts the net too wide.[52]

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51. A version of this example has long been used in academic discourse. See, e.g., Stevens, "Unjust Enrichment Disaster", *supra* note 23 at 578; Andrew Burrows, "Interest" in Graham Virgo & Sarah Worthington, eds, *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2017) at 267; Lionel Smith, "Restitution: A New Start" in Peter Devonshire & Rohan Havelock, eds, *The Impact of Equity and Restitution in Commerce* (Hart, 2018).

52. See now *Investment Trust*, *supra* note 6.

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Of course, this does not demonstrate that value-centric accounts cannot ground a *prima facie* duty to effect restitution in cases such as Example 3; it might yet be that there exist some relevant countervailing exculpatory reasons. Let us turn, then, to the question of justification.

Normatively Similar to Mistaken Payment

Elsewhere in private law, the justification for a legal response is attributed to the breach of a bilateral (tortious or contractual) duty: the defendant, in such a case, is singled out as the actor culpable of the injustice that is remediated by an award of damages.[53] The corrective conundrum at the heart of unjust enrichment is this: why should a payee be required to effect restitution in any case in which she is *not* culpable of the injustice that the restitutionary award remediates?[54]

For Birks, that reason lay squarely in the notion of economic advantage. There is, he said, a "peculiar normativity of extant gain":[55] whilst "strong facts are needed to justify unpleasant outcomes of the kind which will leave you worse off", the claimant who seeks restitution of an unjust enrichment "is not trying to make you worse off. He seeks only that you should give up the gain obtained at [his] expense. He asks that you return to the position you would all along have been in had you not received . . . money to which you were not entitled".[56] Thus, Birks argued, there is something uniquely compelling about the enrichee's capacity to effect restitution without suffering loss.[57]

This claim, that restitution makes the defendant no worse off, is a popular one.[58] But we have already seen that this is not true. In Example 1, B *will* be made worse off by the obligation to effect restitution—to the tune of precisely $5000:

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53. Dennis Klimchuk, "Unjust Enrichment and Corrective Justice" in Jason Neyers, Mitchell McInnes & Stephen Pitel, eds, *Understanding Unjust Enrichment* (Hart, 2004) at 119. See further, *Investment Trust*, *supra* note 6 at 120; John Gardner, "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30:1 Law & Phil 1 at 22; Zoë Sinel, "Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment" (2011) 31:3 Oxford J Legal Stud 551; Weinrib, *Corrective Justice*, *supra* note 31 at 187-88.

54. Klimchuk, "Unjust Enrichment and Corrective Justice", *ibid* at 120; Gardner, *ibid* at 22; Sinel, *ibid*; Weinrib, *Corrective Justice*, *ibid*; Stevens, "Unjust Enrichment Disaster", *supra* note 23 at 577; L Smith, "Restitution: A New Start", *supra* note 51; James Penner, "We all make Mistakes: A 'Duty of Virtue' Theory of Restitutionary Liability for Mistaken Payments" (2018) 81:2 Mod L Rev 222 at 224.

55. Birks, *Unjust Enrichment*, *supra* note 1 at 207.

56. *Ibid*.

57. *Ibid* at 208—"the peculiar normativity of extant gain".

58. Chambers argues that "the recipient of a mistaken payment is the only person in the world who can save the payer from loss without bearing the cost of doing so": Robert Chambers, "Proprietary Restitution and Change of Position" in Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith, eds, *Defences in Unjust Enrichment* (Hart, 2016) at 119. See also, J Beatson & W Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36:2 UTLJ 149 at 150; Mitchell McInnes, "Enrichment Revisited" in Neyers, McInnes & Pitel, *supra* note 53 at 169; Chambers, "Two Kinds of Enrichment", *supra* note 1 at 267; Stephen A Smith, "A Duty to Make Restitution" (2013) 26:1 Can JL & Jur 157 at 172 [SA Smith, "Restitution"].

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> Example 1: A instructs her bank (Bank 1) to transfer $5000 from her account to B's account with Bank 2, to discharge a payment liability that she does not, in fact, owe to B. Bank 1 complies: A's account is debited and B's credited with $5000.

Restitution makes B 'no worse off' only if we compare her post-restitution position with her pre-transfer position;[59] to be salvageable, the 'no harm' thesis must be a claim, not that B is made no worse off than she currently is, but that B is made no worse off than she is *entitled to be*.[60] And here is the normative gap: Birks' thesis assumes the just baseline; it does not give us any (justificatory) reason for why B is only 'entitled to be' in the pre-transfer position. It therefore provides no help in determining *when* the defendant in a particular case is only entitled to be in that position.

The negative case is a straightforward one: if B were *not* made economically better off by the transfer, the obligation to effect restitution would be too onerous; in this sense, the presence of value removes a reason *against* restitution.[61] But the relationship between value and the positive case for restitution is less obvious. Let us return to Example 3:

> Example 3: There are only two Penny Red stamps left in the world. A has one (Stamp One), B has the other (Stamp Two). A accidentally defaces Stamp One; this causes Stamp One to become worthless, and Stamp Two to quadruple in value.

In such a case, there is a transfer of wealth from A to B, impugned by A's mistake; if B were required to pay A the value of Stamp One, she would not merely be 'no worse off' than her pre-transfer position, she would be *better* off. Nevertheless, B is not liable to A—not because there is some reason limit liability, or otherwise to preclude a claim—but because there is no justificatory reason for A's claim.[62] Unlike bodily integrity, or the interest in controlling a specific physical resource, economic integrity is not an interest for which the law seeks to provide any blanket exclusionary protection.[63]

There are good and obvious reasons for this. Let strengthen the case for liability, and imagine that B is an active agent of her own enrichment at A's expense:

> Example 3.2: A owns a stamp shop, Shop 1, which is adjacent to B's stamp shop, Shop 2. A mistakenly doubles her advertised prices. B discovers and decides to exploit A's mistake, drawing attention to the disparity in stamp prices between

59. Frederick Wilmot-Smith, "Should the Payee Pay?" (2017) 37:4 Oxford J Legal Stud 844 at 849 [Wilmot-Smith, "Should the Payee Pay?"].
60. *Ibid* at 848-49.
61. For McBride, this is the extent of the normative role of value: see also, Nicholas McBride, *The Humanity of Private Law: Part I: Explanation* (Hart, 2018) at 197 [McBride, *Humanity of Private Law*].
62. See also Frederick Wilmot-Smith, "Taxing Questions" (2015) 131:4 Law Q Rev 531 at 534.
63. As Watts puts it, "mere preservation of our wealth against erosion by others has not been a protected interest": Watts, "'Unjust Enrichment'—the Potion", *supra* note 12.

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> Shop 1 and 2 on her social media account. As a result, A loses her capital investment of $50,000, and B's net profit for the relevant period is inflated by $50,000.

Here, B deliberately actuates (or exacerbates) A's loss for her own gain. *Still* there is no justification for requiring B to give up any part of it—quite the opposite.[64] B's behaviour is precisely what a society built upon principles of largely untrammelled enterprise encourages. The point is a straightforward one: in supporting fluid commerce, the common law *endorses* enrichment at another's expense, except in a limited range of special circumstances.[65] Without more, it is not necessary to justify conduct that brings about a gain to the defendant, *even if* the claimant suffers a corresponding loss.[66] There is, in short, no 'peculiar normativity of extant gain'.

It is, of course, without doubt that the transfer of value will almost always *motivate* the claim for restitution: in this sense, it is part of the claimant's reason for seeking restitution. But I emphasised in part one that the process of abstraction is conducted according to reason as *justification*. And in this respect, we have not yet identified which features of Example 1—which are not shared by Examples 3 and 3.2—justify B's liability to effect restitution.

Benefit

It is universally accepted in the legal scholarship,[67] and in the courts,[68] that the receipt of money is a kind of 'incontrovertible benefit'. There are twin facets to this idea: first, because money (as paying power) can always be used to the recipient's advantage, the recipient of money "cannot be heard to argue that the money is not a benefit to him or her in respect of which no liability should lie";[69] second, "a person who receives a payment of money is presumed to be enriched by at least the amount of receipt".[70] It is in the first idea—that the recipient of money is always and inexorably enriched—that we find our second serious contender for the criterion with which we are to abstract out: benefit is an inescapable feature of the central case, so (the argument goes) benefit must be a central driver of B's obligation to effect restitution.[71] Thus, when it comes to identifying other events

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64. For so long as she does not stray across the boundary to tortious conduct.
65. See, e.g., *OBG Ltd v Allan* [2007] UKHL 21 at 142, [2008] 1 AC 1 (HL) Lord Nicholls.
66. See also Peter Watts, "Unjust Enrichment" (2005) 121 Law Q Rev 163 at 166.
67. See *ibid* at 53. See, e.g., Burrows, *The Law of Restitution*, *supra* note 45 at 48; Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (Sweet & Maxwell, 2016), s 4-28.
68. See, e.g., *Peel (Regional Municipality) v Canada*, 1992 SCC 3 at 796, [1992] 3 SCR 762, McLachlin J; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 799, Goff J.
69. David Fox, *Property Rights in Money* (Oxford University Press, 2008) at 9, s 1.29.
70. *Ibid*. On the nature of presumptions, see William Swadling, "Explaining Resulting Trusts" (2008) 124 Law Q Rev 72.
71. Benefit predominates in the post-2003 literature (see, e.g., Mitchell, Mitchell & Watterson, *supra* note 67 at pt 4 ("Enrichment"); Burrows, *The Law of Restitution*, *supra* note 45 at ch 3 ("Benefit")) and is the preferred approach to enrichment in cases that concern services (see, e.g., *Benedetti*, *supra* note 11).

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that are 'materially identical to' the central case, the claimant must show that the defendant is or was benefited by the impugned event.[72]

In what follows, I argue that money is not an incontrovertible benefit, and that benefit is not a pre-requisite of liability—either in the core case of mistaken payment, or in cases that fall within the ambit of the generalised law of unjust enrichment. Finally, I argue that there are good reasons why restitutionary liability does not hinge on proof of benefit to the defendant.

Money

For Edelman, the core case exemplifies a particular type of benefit received: a "transfer of value to a defendant is only an enrichment", he says, "if the consequence is *desire*".[73] And in the core case, Edelman argues, we may take desire for granted: "If the receipt is money, then no difficulties arise because a defendant that desires anything with a commercial value *must* desire money. . . . [By contrast the] desire for non-money benefits must be evidenced by conduct".[74] We can call this first version of benefit 'subjective benefit': put crudely, I am benefited whenever I get what I want.

I shall assume that Edelman does not mean to suggest that an individual who desires a commodity such as food necessarily desires money; though it is regularly bought and sold, food can be obtained without the interposition of money, and an individual who wants food may not be prepared, nor need, to purchase it. Instead, I shall assume that he intends to convey the idea that, because money is the mechanism by which an individual who generally engages with the commercial world is able to obtain access to the things that she wants (i.e. money is paying power), any individual who *does* engage with the commercial world must desire money.

That is manifestly true as a general statement about the way in which people think and behave, but we cannot move so readily from the general to the particular in order to support an absolute statement to that effect. Benefit is not an abstract phenomenon, and it varies for reasons other than the characteristics of the individual on the receiving end. A great deal of socio-economic research has been conducted into the way in which individuals behave with respect to money received from different sources (so-called 'ear-marking' practices) to a single conclusion: the *circumstances* of receipt can have a stark effect on desire for and use of money.[75] We do not, then, need to posit a recipient who rejects the commercial world entirely to challenge the core assumption that the receipt of

72. Burrows, *The Law of Restitution*, *supra* note 45 at 47. This, it is argued, provides a way of accommodating "pure services" within the law of unjust enrichment.
73. Edelman, *supra* note 35 at 226 [emphasis added].
74. *Ibid* at 228 [emphasis added]. See also, Mitchell, Mitchell & Watterson, *supra* note 67.
75. See also Viviana A Zelizer, *The Social Meaning of Money* (Princeton University Press, 1994) at 3-5, demonstrating that: "Not all dollars are equal". See also, Nigel Dodd, *The Social Life of Money* (Princeton University Press, 2014) at 286.

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money is 'incontrovertibly beneficial'. A more routine variation of Example 1 will do:

> Example 1.2: B is estranged from her mother, A, who is an abusive alcoholic. A transfers $5,000 into B's bank account, mistakenly believing that her child maintenance arrears are owed to B (in fact, they are owed to B's father, C). When she discovers the credit, B is angry and upset, and vows never to spend the money.

However she feels about money generally—perhaps she is particularly strapped for cash, and would ordinarily be delighted for such a windfall—B did not and does not desire this money sum. And this is the point: the fact that an individual is *ordinarily* content to receive money does not legitimise the conclusion that she is subjectively benefited by receipt of *this* money. Money may usually benefit its recipient; money may usually benefit B, but B is not benefited by this money transfer.

We might insist that B is benefited in some sense that does not hinge on her desire for the particular payment received from A. Burrows argues that the receipt of money is a paradigmatic example of an "*objective* positive benefit".[76] There are, he says, certain "objective benefits that are so obviously beneficial that . . . no reasonable man could seriously deny that he has been benefited"; of these "the receipt of money is the most obvious example". Thus, "If one receives $100 one cannot deny that one is benefited or that . . . the value of the benefit is $100".[77] This notion of 'objective benefit' might be framed in one of two ways: I am benefited by whatever I receive that will make my life go better, even if I do not desire it; or I am benefited by whatever I received that *would* make my life go better (even if I do not desire it), if I were to act reasonably.

According to Webb, benefits are "subjective in their essence": "the benefit I get from a particular [event] is the improvement that it makes to the life I lead, through its accordance with my tastes and preferences, through its facilitation or furtherance of my objectives".[78] Yet, there is a sense in which one's objectives can be furthered *even if* the event does not accord with one's preferences, so that the last two clauses come apart: life-saving surgery, or an intervention to halt a life-threatening drug addiction, would generally be thought to improve one's life even if one did not desire the surgery or intervention—perhaps even if it contravenes deeply-held beliefs.[79]

I do not think that Burrows means to suggest that money belongs in that list;[80] nor do I think that Goff and Jones intended this to be understood by their assertion

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76. Burrows, *The Law of Restitution*, *supra* note 45 at 45 [emphasis added]. See also, Birks, *Unjust Enrichment*, *supra* note 1 at 59.
77. Burrows, *ibid at 48.*
78. Webb, *supra* note 22 at 109.
79. This has long been a concern in treating Jehovah's Witnesses who require blood transfusion, particularly where the treatment required is for a child. See, e.g., *An NHS Trust v Child B* [2014] EWHC 3486.
80. Burrows, *The Law of Restitution*, *supra* note 45 at 46.

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that there is a causal relationship between money's function as a medium of exchange and money's status as an incontrovertible benefit.[81] It should be obvious that these two things—paying power and benefit—are causally connected where and because the individual in receipt of money employs it to get the things that she wants. Dworkin put this particularly colourfully: "Money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper".[82] In Example 1.2, we know that B does not intend to spend the money that she received from A. Thus, the payment will not further her objectives.

Let us turn, then, to the idea that B *would* be benefited if she were to act reasonably.[83] I shall leave to one side its normative merit; for present purposes, it is enough to argue that, in the circumstances of our Example 1.2, it is very difficult to mount a successful argument that B should spend the money to her advantage: given the context, B's decision to leave the sum untouched sits well within the range of rational responses to A's unsolicited payment. Thus, A's payment neither makes B's life go better, nor would make her life go better, if she were to act reasonably. The receipt of money is not an incontrovertible (subjective or objective) benefit to B.[84]

At the outset of this part, I borrowed Fox's formulation of 'incontrovertible benefit': the mistaken payee "cannot be heard to argue that the money is not a benefit to him or her in respect of which no liability should lie".[85] I have argued that a particular payment may not be a benefit to the recipient, but I have not sought to doubt the conclusion that (absent a defence) the payee *will* be required to effect restitution of a payment that is attended by a qualifying mistake. It is no answer to A's claim for restitution in Example 1.2 that B did not want the money, and does not intend to spend it. To this extent, Fox draws the correct conclusion from an incorrect premise: the reason why a recipient of money cannot raise 'lack of benefit' to disqualify the claim for restitution is not that the receipt of money is always a benefit to her, but that benefit to her is not a prerequisite of the claim.

Services

We saw above that benefit has been employed as the mediating concept through which principles of unjust enrichment are extrapolated from money to account for liability in other cases: if benefit can be taken for granted in money cases, it may be proven in others. Let us return to Example 2.

81. Mitchell, Mitchell & Watterson, *supra* note 67 at 14.
82. See Ronald Dworkin, "Is Wealth a Value" (1980) 9:2 J Legal Stud 191 at 201.
83. Which is to say, according to the balance of reasons that apply to her.
84. Note that some commentators prefer to treat "incontrovertible benefit" as a presumption: James Edelman & Elise Bant, *Unjust Enrichment*, 2nd revised ed (Hart, 2016) ch 4.III.B.
85. Fox, *supra* note 69 at 9, s 1.29.

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> Example 2: B asks A, a builder, to build a wall for her. A agrees, and performs the work on the basis that a further agreement will be reached as to remuneration. No such agreement is reached, and B refuses to pay.

According to Edelman, the reason for B's liability in such a case is the same as that which grounds B's liability in Example 1: if B may be assumed to desire money, the request *proves* that she desired A's service;[86] thus, B receives a benefit for which she should be accountable to A.[87]

There are, however, two reasons to doubt the conclusion that request evidences desire (and so, benefit) in these cases. First, benefit is not a pre-requisite to A's claim: let us suppose that the wall-building work in Example 2 causes an unwanted obstruction to B's view of the sea; B must nevertheless make good on her representation that she will pay. Of course, it might be argued that the request precludes B from arguing that she did not desire the work on such facts, so that request is *irrefutable* evidence of desire. But here is the second reason to doubt Edelman's conclusion: if request merely *evidences* benefit (irrefutably or otherwise) the presence of both desire and benefit ought to, but does not, render the absence of a request nugatory. Let us vary Example 2:

> Example 2.2: A is short on cash. Knowing that C is wealthy and generous, A decides to clear the obstruction to C's sea-view, by demolishing a wall in front of her house. A mistakenly demolishes a wall in front of No. 14, which belongs to B.

Perhaps B has been intending to arrange precisely such a service, and is delighted with the result; nevertheless, she is not required to pay A. That the action is regarded as a benefit by B and would be regarded as a benefit to most people, is irrelevant: benefit does not generate a liability to pay for unrequested work.[88]

There is a justification for requiring the service user to pay *if* she gives the reasonable impression that she will; if she does not, the service provider cannot unilaterally impose upon her an obligation to pay—even if the service is a benefit to her. Benefit is not necessary, nor is the unjust provision of a benefit sufficient, to justify an obligation to effect restitution. In our Example 2, it seems, request is not *evidence* of desire; rather, it is in some sense constitutive of the reason for paying.[89]

Normatively Similar to Mistaken Payment

On the face of it, benefit looks like a very odd candidate for justifying the obligation to effect restitution—in the core case, or in any claim for restitution

86. See, e.g., Edelman, *supra* note 35 at 228.
87. Assuming the presence of an unjust factor.
88. See *Ruabon Steamship Co Ltd v London Assurance (The Ruabon)* AC 6 (HL) and *Edinburgh Tramways Co Ltd v Courtenay* 1909 SC 99.
89. For one argument about what that relationship is, see Edelman, *supra* note 35 at 239.

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of an extant gain. The task of unjust enrichment scholars, as I have put it, is to explain why an innocent party should be required to give up something that she values in order to remediate an injustice of which she was not culpable (which I have called the 'corrective conundrum').[90] The more the defendant values the object of restitution—the more it contributes to her objectives—the stronger are the reasons for maintaining the status quo, and the more powerful must be any countervailing reasons for restitution. In short, if it plays any normative role, benefit to the recipient makes it *more* difficult, not less, to justify the obligation to effect restitution.

Webb argues that the core methodology of unjust enrichment scholarship has not been sound—that the process of abstraction from payment to enrichment has been conducted in error, that error being "to think that a set of like claims could be identified simply by their factual likenesses, and not by their reasons".[91] I have argued that, when we take seriously the search for reasons for a legal response to mistaken payment, we find that the concepts of value and benefit that underpin the generalised model of enrichment do not play the central role that has been ascribed to them. In what follows, I turn to the positive task—of identifying what (if not her enrichment) grounds the mistaken payee's restitutionary liability, and so allows us to determine what counts as 'materially identical' to that core case.

Payment

Thus far, I have argued that the concepts of benefit and value do not help us to isolate the normatively-significant features of our core case of mistaken payment:

> Example 1: A instructs her bank (Bank A) to transfer $5000 from her account to B's account with Bank B, to discharge a payment liability that she does not, in fact, owe to B. Bank A complies: A's account is debited and B's credited with $5000.

In this part, I argue that we should focus instead on the *legal status* of payment: what justifies restitution in our core case is a defect in the legal mechanism—payment, gift, or other transaction—that connects claimant with defendant. That legal mechanism may be reversed *in specie* or (more often) substitutively, by payment of a sum equal to its value. Thus, value plays a smaller role than that which Birks imagined for it: it does not operate on the justification for reversing a mistaken payment; it shapes the defendant's substitutive duty, to do the 'next best thing'.

90. See also, Edelman, *ibid* at 120; Gardner, *supra* note 53 at 22; Sinel, *supra* note 53; Weinrib, *Corrective Justice*, *supra* note 31 at 187-88.
91. Webb, *supra* note 22 at 102.

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Property

I am not the first to question the centrality of value in justifying restitution; prominent alternatives ground the right to restitution in property.[92] The argument (though polymorphous) may be epitomised as the claim that liability in unjust enrichment "rests on the claimant being able to show that what he seeks to recover in fact "belongs" to him, having a better "title" to it than the person from whom recovery is sought"[93]—where 'title' describes an allegation that, though ownership may pass, the interest that it supports nevertheless justifies restitution.[94] The idea at the heart of such theories is that there is a specific *thing* which may be allocated and, in correcting the imbalance encapsulated by the idea of an 'unjust enrichment', allocated *back*. This thing-centricity manifests methodologically, and (we will see) as a particular solution to the corrective conundrum that I set out above.

Webb, who offers the fullest property theory of unjust enrichment, presents his argument by way of a 'two-tier' theoretical structure: his starting point is the idea that a system of private property entails allocating authority over scarce resources; such a system demands rules that protect an owner's authority to control the use and disposition of the relevant asset, and this (says Webb) "means providing him with redress where that asset comes into another's hands without his consent"[95] (construed broadly to include impairments of consent).[96] Thus, the justification for unjust enrichment is parasitic upon the justification for the particular allocation of authority over scarce resources that is entailed by a community's system of property;[97] it does not "permit consideration of the reasons for granting individuals such authority in the first place".[98]

Above, we saw that the theoretical problem at the heart of unjust enrichment is the lack of any obvious justification for the restitutionary liability of a non-culpable recipient.[99] The solution offered by property theorists has two linked facets. The first is the idea that the owner's interest in determining the disposition of her asset succeeds its non-consensual disposition and (so it goes) is compromised for so long as the asset remains in the recipient's hands;[100] in this sense there is an *ongoing* infringement of the claimant's autonomy. The second frames

92. See, e.g., Samuel Stoljar, "Unjust Enrichment and Unjust Sacrifice" (1987) 50:5 Mod L Rev 603; Peter Jaffey, "Two Theories of Unjust Enrichment" in Neyers, McInnes & Pitel, *supra* note 53; Andrew Botterell, "Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment" (2007) 20:2 Can JL & Jur 275; Ben McFarlane, "Unjust Enrichment, Rights and Value" in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Hart, 2012); Dan Priel, "The Justice in Unjust Enrichment" (2014) 51:3 Osgoode Hall LJ 813, 837-42; Watts, *supra* note 63 at 289; Webb, *supra* note 22.
93. Stoljar, *ibid* at 603.
94. Webb, *supra* note 22 at 74.
95. *Ibid* at 90.
96. *Ibid* at 122.
97. Priel draws something like this distinction in his between fairness and equity: Priel, *supra* note 92 at 844-52.
98. Webb, *supra* note 22 at 93.
99. How to justify the restitutionary liability of a non-culpable recipient.
100. Wilmot-Smith, "Reasons?", *supra* note 26 at 1131-32.

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the restitutionary response as a way of 'allocating back' the same property, or its near-equivalent. In this way, the recipient is isolated as the right person to effect restitution, and restitution is identified as the right mechanism for undoing a bilateral harm. In Botterell's words:

> In some cases a defendant and plaintiff are correlatively linked by virtue of being doer and sufferer of the same wrong. But this is inessential to the view, for a defendant and plaintiff can be correlatively linked by virtue of the thing taken. That the defendant now has what properly belongs to the plaintiff is sufficient for such correlativity.[101]

Various issues arise from this thesis;[102] the one that concerns us here is an issue of scope, and it can be put simply. The vast majority of money transfers do not involve the transfer of any *thing*; rather they involve a correlative change in the liabilities of participating banks.[103] The solution universally-proffered by property theorists has been to draw a strong analogy between bank money and cash. For for some, that analogy is silently-assumed.[104] For others, amongst whom Webb is most thorough, it is dealt with more openly:

> [W]hile a transfer of funds is in one sense notional, since there need be nothing which passes from me to you or from my bank to yours and there is instead simply a series of discrete steps taken by the parties in performance of their discrete contracts with one another . . . each of these steps is connected to the next as essential elements of a single transaction, which the single intended effect of my paying you.[105]

Thus, whilst Webb acknowledges that a bank transfer is not a cash transfer, he argues that it "serves the same function".[106] To analyse this argument properly, it is important to be clear to which 'function' the claim to equivalence refers. A bank transfer certainly transfers money; to this extent it is functionally equivalent to any other form of money transfer—coin or fiat. But for Webb's argument to work, it must be possible to show that a bank transfer is also equivalent to a *property* transfer. And here, the argument faces two problems.

The first is that the breadth of this conceptual territory threatens to undermine any claim to the normative peculiarity of property. Recall that the argument for isolating the defendant lies in the idea that her retention of the transferred property amounts to an ongoing infringement of the claimant's autonomy. That justification does not extend to cases involving the provision of a service; in Webb's words, "once the services are provided, our freedom of action isn't implicated either way".[107] Yet, it is difficult to see why bank transfers do not warrant similar

101. Botterell, *supra* note 92 at 292.
102. Which are considered in Wilmot-Smith, "Should the Payee Pay?", *supra* note 59 at 849-51.
103. See also Wilmot-Smith, "Reasons?", *supra* note 26.
104. Stoljar, *supra* note 92.
105. Webb, *supra* note 22 at 99.
106. *Ibid*.
107. *Ibid* at 105.

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treatment: a bank transferee receives no thing in respect of which her transferor might retain some dispositional interest; it is not clear, then, how her freedom of action is implicated post transfer. If the notion of property *is* extended to these cases, the distinction between services and property is greyed, and—at the least—the claim to an ongoing autonomy-cost appears correlatively weak.

Webb tries a second tack; he argues that the restitutionary response to the provision of a service simply is not "solving some problem of allocation, in the same way as the rules of private property are directed towards the allocation of assets and entitlements".[108] This may be true, but herein lies the second problem for Webb's argument, which is that the restitutionary response to Example 1 does not seem to solve such a problem *either:* once more, the bank's liability to pay is enforceable by way of a contractual claim; a bank transfer involves an alteration in the liabilities of participating banks. If the justification for unjust enrichment is parasitic upon, and precludes consideration of, the reasons for granting individuals authority over scarce resources, it is not clear how we are to make the case for accommodating mistaken bank transfers within the law of unjust enrichment

All of this casts doubt on that core methodological claim—that it is possible to justify, and to set the contours of, unjust enrichment without engaging with the reasons for granting individuals the peculiar form of authority that precipitates a restitutionary response to a defective transfer. In what follows, I engage with those reasons by way of a two-part argument: (i) the power to transfer title is a subset of a broader set of facilitative powers, which exist within a legal framework that is designed to support certain valuable social practices; (ii) unjust enrichment discharges a safeguarding, or 'channelling' function, ensuring that that legal framework supports only those practices which embody these relational virtues.

Transactions

Above, I argued that there is no need to justify or remediate a windfall gain, even if there is some causally correlative loss.[109] But the circumstances are different where the impugned event involves an exercise of political authority: there *is* a need to justify the law's intervention to alter the duties to which an individual is subject. Where the law acts facilitatively, to support gifts and bargains, its claim is one from voluntariness: individuals are equipped to "pursue ends of their choice"[110]—to achieve new objectives, or existing objectives better—where they can engage the legal machinery to trigger a range of interpersonal rights and duties.[111] That legal machinery is not infinitely malleable: individuals cannot

108. *Ibid* at 310.
109. Text to *supra* note 63.
110. Joseph Raz, The Authority of Law: Essays on Law and Morality (Clarendon Press, 1979) at 170 [Raz, Authority of Law].
111. *Ibid* at 169. See further on unjust enrichment and self-determination Jennifer Nadler, "What Right Does Unjust Enrichment Law Protect?" (2008) 28:2 Oxford J Legal Stud 245 at 264.

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draw on the support of the law for *any* arrangement, and are required to follow particular formulae whenever they do. In this way, the law creates "frameworks within which individuals must make their arrangements and pursue their objectives",[112] thereby supporting and protecting certain valuable social practices—undertaking voluntary obligations, granting rights, alienating wealth, paying debts and so on.[113] This ability to shape legal relations is what I will call the normative power to transact: a legal transaction—property transfer, payment or something else—is the bilateral change in legal relations that follows from the voluntary exercise of a normative power.

Some transactions meet the formal requirements for validity, but—for reasons of excessive influence or pressure, mistake or lack of capacity—fail to embody those relational virtues. By providing a protocol and machinery for unwinding certain transactions, the law of unjust enrichment ensures that goal (supporting valuable social practises) and legal reality (securing the real-world effects of promises, gifts, payments etc) align. To this extent, the mess that the law of unjust enrichment clears up is a mess "of the law's own making".[114] And the harm thereby fixed is not an individual harm; it is an *institutional* harm.[115] The defendant is implicated in that 'clearing-up', not because her act or omission impairs the claimant's autonomy (though it may), but because that institutional harm cannot otherwise be avoided: both sides of the change in legal relations of which the transaction is constituted stand in a relationship of material equivalence.

Nevertheless, the claimant is not forced to impugn a transaction with which she is content;[116] the harm that restitution would address manifests only to the extent that a party—once cognisant of her mistake or freed from any improper pressure or influence—remains 'trapped' by the consequences of the relevant transaction.[117] Finally, it must be emphasised that nothing in this justification for restitution warrants an 'all or nothing' approach to defects in consent; the question may properly be asked in each case which is the greater institutional harm—to unwind an imperfect transaction (thereby freeing the parties from its

112. Raz, *Authority of Law*, *supra* note 110 at 170.

113. In this sense, the ability to reverse defective transactions may be one part of the law's armoury to "protect the practice of undertaking voluntary obligations": Joseph Raz, "Promises in Morality and Law" (1982) 95 Harv L Rev 916 at 936 [Raz, "Morality and Law"]. But it may also protect other practices, some of which Nicholas McBride lists in "Restitution and Unjust Enrichment: The Coming Counter-Revolution" (Paper delivered at the Obligations VIII Conference at the Cambridge Private Law Centre, July 2016) [unpublished].

114. SA Smith, "Restitution", *supra* note 58; McBride also puts it thus in his [unpublished] "Restitution and Unjust Enrichment: The Coming Counter-Revolution", *ibid.* Compare Penner, *supra* note 54 at 240.

115. On the role of the law of contract in preventing such institutional harm, see further Raz, "Morality and Law", *supra* note 113.

116. Thus, she is awarded the power to affirm, avoid or demand that the transaction be treated as wholly void.

117. McBride, *Humanity of Private Law*, *supra* note 61 at 193: "Only one thing could redeem [a gift made under duress or undue influence] which is A's affirming the gift when A frees herself from B's domination".

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effects), or to allow the transaction to stand (at once sending a cautionary message to transacting parties, and reassuring donees of their security of receipt).[118]

Some have argued that this sort of 'channelling' function is the sole province of what is typically called 'rescission', and cannot extend to restitution in the context of bank payments.[119] The assumption underpinning that claim is that a bank transfer is *not* a legal transaction, understood (as I have put it here) as the bilateral change in legal relations that follows from the exercise of a normative power; it is merely an alienation of wealth.[120] I do not agree. Let us assume that A and B are customers of separate banks—Bank 1 and Bank 2, respectively. A bank transfer from A to B is a legal transaction, in the following form: A issues a payment instruction to Bank 1; Bank 1 alters the content of its payment liability to A, and issues a payment instruction to Bank 2; this is effected either by debiting Bank 1's account with Bank 2 or by adjusting the balances of each with some common banker; finally, Bank 2 credits B's account. Thus, A and B are each on the receiving end of the steps that participating banks take to alter their legal positions to give effect to A's payment instruction. Some have described the legal mechanics of a bank transfer as a loss and acquisition of rights; elsewhere, it has been described as an alteration (reduction or accretion) to A and B's rights.[121] Either way, the transfer is a legal mechanism distinct from an asset transfer, which connects A and B because participating banks act as agents on their behalf.

We are now in a position to identify those events which are, according to the criteria set out here, 'materially identical to mistaken payment'. The upshot of the argument in this part has been that—though it neither benefits, nor conveys value to, B—the following Example 4 is normatively similar to mistaken payment:

> Example 4: A has two stamps. Stamp One is a valuable British Penny Red. Stamp Two is a valueless forgery. Mistakenly believing it to be valuable, A gives B Stamp Two. B accepts the gift to avoid offence, but has no interest in stamps.[122]

A's assertion is that she executed a legal transaction (gift) that was rendered defective by her mistake; A may be permitted to unwind the transaction, and set in train another attempt to achieve her goals.

By contrast (though it benefits B and may cause a correlative increase to the value of her property) Example 2 is *not* 'materially identical' to mistaken payment:

> Example 2: B asks A, a builder, to build a wall for her. A agrees, and performs the work on the basis that a further agreement will be reached as to remuneration. No such agreement is reached, and B refuses to pay.

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118. *Ibid*.
119. *Ibid* at 192-93.
120. *Ibid* at 193.
121. Banks are not strictly subject to any payment obligation until the customer's instruction is made, so that the term 'right' must be understood broadly here.
122. For a detailed rationalisation of the rules concerning rescission of gifts (and the claim that causative mistakes ground rescission) see Birke Häcker, "Mistaken Gifts After *Pitt v Holt*" (2014) 67:1 Curr Legal Probs 333.

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A's assertion is not that some legal transaction has occurred, which she would like to unwind. Rather, it is that *no* legal transaction has occurred, but that there is a reason why the law should require B to pay A. In short, it is an argument for *recognising* a transaction, not reversing one. We might yet put the case for normative similitude at its strongest; perhaps the point of such an award is to protect the practice of promising, by preventing people from "letting it appear that they have promised when they have not".[123] But if this is so—and I cannot discharge that justificatory burden *in toto* here—that support is of a different kind from that which we have considered in this section: its purpose is not to ensure that the only transactions with real-world effects are those that embody the values that the law supports;[124] its purpose is to actuate the real-world effects of transactional representations that have induced reliance.

This is important, not least because recent attempts to reconceive unjust enrichment have gone to great lengths to accommodate Example 2. Echoing Weinrib's earlier claims,[125] Stevens argues that the justification for holding B in Example 1 and Example 2 liable is exactly the same, and it lies in the notion that in each case the claimant's 'performance' has been 'accepted' by the defendant.[126] Stevens is driven to this claim by our corrective conundrum—the demand for an explanation for why the defendant should pay for a performance that is (apparently) unilaterally unjust. For Stevens, the defendant's actions render the injustice relevantly bilateral, thereby (so it goes) evading an objection from the categorical imperative:

> [T]he payment of a sum of money can be made only if accepted by the recipient. This meets the objection that the defendant is not responsible for the state of affairs that requires correction. It is not the case, and cannot be, that the justification for recovery is wholly "claimant sided". Such an approach would be immoral. We would be using the defendant as a means to an end, requiring them to correct an injustice that was not of their doing.[127]

The difficulty with this step, for which Stevens offers no answer, is that it remains wholly unclear what contribution the mere *act* makes to the reason for restitution. Locating liability in an actual agreement (express or implied) would exclude from unjust enrichment many iterations of its core case, and Stevens tells us that 'acceptance' is intended to encompass the steps that the receiving bank takes to actuate a payment instruction on facts akin to Example 1.[128] Yet, when acceptance is isolated in this way from the communication of an intention to pay—isolated, indeed, from

123. Raz, "Morality and Law", *supra* note 113 at 936.
124. Nicholas McBride has called this the "channeling" function: McBride, *Humanity of Private Law*, *supra* note 61 at 189.
125. Ernest J Weinrib, "The Structure of Unjustness" 92 Boston U L Rev 1067 at 1073.
126. Stevens, "Unjust Enrichment Disaster", *supra* note 23 at 580-82. See also L Smith, "Restitution: A New Start" in Peter Devonshire & Rohan Havelock, *supra* note 51.
127. Stevens, "Unjust Enrichment Disaster", *ibid*.
128. *Ibid* at 582. Weinrib, too, argues that "acceptance" extends beyond an actual agreement to pay, and can be "imputed": Ernest J Weinrib, "Correctively Unjust Enrichment" in Chambers, Mitchell & Penner, *supra* note 1 at 43.

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any knowledge of a defect in the claimant's consent—we are no better equipped to answer our question: if the mistaken payee commits no bilateral wrong (breach of duty, abuse or power or position) why must she pay?[129] The payee *acts*,[130] but we have no account of what impugns that act, thereby implicating her in the injustice which restitution would correct.

I have argued for a narrower account of the reason for restitution in Example 1: B is liable, not on account of some act or omission through which A is harmed, but because she is the counterparty to a legal transaction which exhibits traits that there are institutional reasons to disavow. That justification includes defective legal transactions that do not transfer value; it excludes services that fall short of legal transactions.

Value and Restitution

Above, I argued that the reason for restitution is a reason for reversing a legal transaction. Sometimes, that means what it says: the claimant is permitted to reverse the transaction *in specie*. More often, the claimant is entitled to a personal remedy that acts as a substitute for specific restitution: the defendant must give up a money sum that matches the value of the defective legal transaction. It is worth emphasising this point, because some have described personal restitution as restitution 'of value': it is always restitution *of money*; the amount of money is dictated by the value of the transaction.

In such a case, value does not *justify* a legal response to the defective payment; it gives shape to the defendant's duty to do the 'next best thing' to reversing it *in specie*. This difference is best exemplified by way of a comparison with the law of torts:

Example 5: B steals A's $10 note.

The justification for a legal response to Example 5 is not 'B received $10 worth of value'; it is that B breached an obligation to A. In one sense, it is possible to give effect to an *in specie* response to the relevant injustice; B can return the note. But in another important sense, that ship has sailed: B cannot un-breach the duty that she owed to A; giving the note back simply remediates the consequences of B's wrong, and prevents any further infringement of A's right. And if B does *not* give the note back of her own volition, the law of torts ordinarily demands that she do the 'next best thing': B must pay A its value. Similarly, the justification for a legal response to Example 1 is not 'B has received $5000 worth of value'; it is that A's payment to B was defective. This time, a true *in specie* response to the

129. See further Wilmot-Smith, "Should the Payee Pay?", *supra* note 59 at 857-61. Klimchuk argues that in such cases "the defendant's acceptance is so constructive that it no longer serves to explain her liability": Dennis Klimchuk, "The Normative Foundations of Unjust Enrichment" in Chambers, Mitchell & Penner, *supra* note 1 at 90.

130. Or the bank, on her behalf.

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relevant injustice *is* possible: the normative imbalance is constituted by the transaction *per se*, which *can* be reversed. Nevertheless, B is usually permitted to do the 'next best thing': B may pay A a money sum that matches the value of the impugned transaction.

As the language of substitutive remedies has been used elsewhere in private law, it is important to be clear about the parameters of the substitutive response to a defective payment. Stevens argues that Example 5 may precipitate two different kinds of legal response, the combination of which "can be seen as the law's attempt to reach the 'next best' position to the wrong not having been committed by him in the first place":[131] (i) "substitutive damages", which are awarded "as a substitute for the right infringed"; and (ii) "consequential damages" which are "compensation for the loss to the claimant . . . consequent upon [the] infringement".[132] I am not using 'substitutive' in Stevens' narrow sense; rather, I am using it in the broader sense, to describe the law's attempt to reach the closest position to the injustice not having occurred. So, the substitutive response to a defective transaction is the financial equivalent to precisely that which is impossible in Example 5—undoing the injustice *in specie*.

One final point must be made with respect to the mechanics of the substitutive response to our core case. It is very easy to distinguish specific from substitutive restitution in Example 5: the claim to title to the note is very different from a claim to its value. But the distinction is much subtler in Example 1. Substitutive restitution requires B to pay A $5000, which B may do by: (i) transfer from the receiving account; (ii) transfer from a different account; or (iii) giving A a pile of cash. But specific restitution demands (i): the participating banks must reverse the debit and credit. This is important: arguments about the scope of proprietary restitution are premised on the idea that specific restitution of a bank transfer takes the form of a claim to the receiving account, which is a trust. There is nothing in the logic of unjust enrichment that justifies such a claim: reversing the payment *in specie* is not a proprietary claim.

There is a second way in which value shapes the restitutionary response, to which I alluded above: if, because of some innocent disbursement made in consequence of receipt, requiring B to pay A $5000 will make her worse off than she was prior to the transaction, B's liability may be reduced or extinguished. That is the operation of the change of position defence, and it reflects the negative version of Birks' 'no harm' thesis: if the payee *will* be made worse off, there is a reason for rejecting or reducing the claim.

Thus, value plays a negative justificatory role in our core case: B will not be required to effect restitution (in full or at all) if doing so will make her worse off than her pre-transfer position. It also plays a positive non-justificatory role, in giving substance to B's duty to do the 'next best thing' to reversing the payment *in specie*. But it plays no role in the positive justificatory reason for why it is that the law intervenes at all, to undo the defective transaction.

131. Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at 59.
132. *Ibid* at 60.

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Conclusion

There is nothing self-evident about the way in which we determine what counts as 'materially identical' to a mistaken payment. In this article, I have argued that the role of benefit and value in that core case has been overstated. What justifies the legal response to mistaken payment, and so allows us to abstract out, is a defect in the legal mechanism that connects payor with payee. Thus, for the purposes of unjust enrichment, the mistaken gift of a worthless stamp is 'materially identical' to a mistaken payment; the mistaken provision of a beneficial service is not.

In one sense, this article sets up a challenge to the idea that the label 'unjust enrichment' is an apt name for 'the law of all events materially identical to the receipt of a mistaken payment'. However, three reasons militate against that linguistic coup: first, the label is thoroughly entrenched in both academia and practice; second, the dominance of the substitutive remedy means that value will almost always shape the restitutionary response to a defective transaction; finally, the primary goals of this article have been at once less factious, and (I suggest) more important—to endorse classificatory exercises that promote the role of *justifying* the legal response; and to show the dangers of trying to take shortcuts. Money merits study, and the rewards of such efforts reach substantially further than the central case.

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