

Illegality after *Patel v Mirza*

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Restitution or Confiscation/ Forfeiture? Private Rights versus Public Values

ROBERT SULLIVAN*

I. Introduction

A. A Highly Unlikely Case

C is a large-scale drug dealer who has managed to evade conviction for his offences. For several years, D has supplied C with premium grade, uncut cocaine. C orders a large consignment of the drug and pays £2,000,000 to D. Shortly afterwards, someone whom C considers reliable tells him that the cocaine he has ordered has been adulterated and is worth far less than the amount he has paid. C contacts D and calls their transaction off. D refuses to return the money, truthfully assuring C that the drugs are uncut, premium grade and will be delivered whenever C asks for them. C seeks advice from his solicitor E. After confirming that D has sufficient resources, accessible by way of injunctions, to satisfy judgment and costs, E instructs counsel to prepare an action in restitution, for a payment from D to C of £2,000,000.

The case is heard before Justice F. He is concerned and puzzled. Why has the Crown Prosecution Service stayed its hand? C and D should have been arrested he feels and, after trial and conviction, the money in D's hands, being the proceeds of crime, would have been subject to statutory confiscation.¹ Alternatively, the Director of the Assets Recovery Agency could have brought civil forfeiture proceedings to take the money from D as money acquired from unlawful conduct.² He considers each of those outcomes to be far more seemly and appropriate than

* Thanks to Alan Bogg, Sarah Green and Andrew Simester for help with this chapter.

¹ Proceeds of Crime Act 2002 (POCA), ss 75–76.

² *Ibid*, s 240.

giving judgment for £2,000,000 to C. He is mindful that the press and broadcast media will cover the case, and fears that any judgment in favour of C would attract widespread and justified moral criticism. However, C has brought his action to court without provoking any intervention from either agency. Justice F is aware that Lord Neuberger advised on analogous facts, in *Patel v Mirza*,³ that a judge hearing a restitutionary claim should not be influenced by the possibility that the sum claimed by the claimant may be the subject of statutory confiscation/forfeiture proceedings.⁴ Justice F considers that he has no choice other than to try the case C has brought before him.

In the light of the Supreme Court's decision in *Patel v Mirza*, Justice F finds for C. Turning first to the majority judgment of Lord Toulson, he is startled by its methodology⁵ and concerned by the thought that a rule-based approach to illegality has been superseded by a discretionary regime based on an open list of various factors. But because it is the majority judgment,⁶ he submits to the new dispensation, concluding that a finding for C is within its terms.⁷ F is well aware that large scale drug dealing is far more serious than the agreement in *Patel v Mirza* to bet on the price of shares using insider information. Moreover, he notes that Lord Toulson briefly referenced drug dealing as wrongdoing that might defeat an otherwise valid proprietary claim.⁸ But Lord Toulson also said that it would be 'rare'

³ *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. Patel advanced Mirza some £620,000 as part of an agreement pursuant to which Mirza would bet on the price of shares in the Royal Bank of Scotland (RBS), on the basis of insider information: a conspiracy to commit a crime under s 52 of the Criminal Justice Act 1993. The betting did not take place because the expected insider information never materialised.

⁴ *Ibid* [185]: 'I should take some persuading that the common law should be influenced by the fact that POCA is or is not being invoked in any particular case, although the civil courts should not make any order, or at least permit the enforcement of any order if its effect would run counter to the provisions of the POCA or to any step which was being contemplated under POCA by the relevant authorities'. It is not entirely clear how this adds up. Lord Neuberger seems to be saying that the civil law judge should not be influenced by the presence or absence of statutory confiscation/forfeiture proceedings but at one and the same time should not stymie the operation of POCA. It should be noted that a judgment in civil proceedings is treated as a recovery order in confiscation forfeiture proceedings: POCA, s 278(8). Lord Mance spoke at [198] of 'complications' arising if a benefit claimed received under an illegal transaction is capable of forfeiture but, as no submissions had been made on the matter, he did not elucidate further.

⁵ Described by Lord Mance as 'tearing up the previous law and starting again': *ibid* [208]; and by Lord Sumption as 'a revolutionary step': *ibid* [261]. For further discussion see below at n 76 and accompanying text.

⁶ Lady Hale, Lord Kerr, Lord Wilson, and Lord Hodge in agreement. Lord Neuberger's judgment is essentially a majority judgment too in that although he disposed of the case on a narrow ground (restitution of money paid for a transaction that was not carried out), he went out of his way to express his agreement with the broader terms of Lord Toulson's judgment. Confusingly, Lord Neuberger insisted that Lord Toulson's range of factors approach was a rule-based approach. Yet it is difficult to comprehend how decisions based on a balancing exercise informed by an open list of various factors is anything other than the exercise of discretion.

⁷ For the justification and terms of the scheme see *Patel* (n 3) [101]–[121].

⁸ *Patel* (n 3) [110]: 'There may be circumstances which a court would refuse to lend it assistance to an owner to enforce his title, as for example, where to do so would be to assist the claimant in a drug trafficking operation.'

for a claimant's criminality to defeat a claim of unjust enrichment if the claimant could prove that the defendant had no entitlement to receive and retain the money subtracted from the claimant.⁹

Justice F also took note that Lord Neuberger, who joined with the majority in approving Lord Toulson's judgment, considered that the gravity of C's crime (he instanced being a party to murder or robbery) should not be any barrier to a successful claim in restitution. For Lord Neuberger, indeed, this would apply even when the murder or robbery had been carried out.¹⁰ This put at rest a concern Justice F had about a potentially significant difference between the facts of the case before him and the facts of *Patel v Mirza*. In *Patel*, the agreement to bet on the price of Royal Bank of Scotland (RBS) shares never came to fruition as the price-sensitive information was not forthcoming, whereas in the case before him the drugs were available but refused. The fact that Lord Neuberger paid no heed to the difference between incomplete and completed transactions afforded Justice F confidence that the range of factors approach could accommodate the case before him.

In our hypothetical case, although ostensibly applying the range of factors approach, Justice F was much influenced by the minority, ruled-based judgments, which concurred with the outcome favoured by the majority but adopted different reasoning.¹¹ Justice F took from the minority a simple criterion: namely, whether D had any entitlement to retain the money paid to him by C. If lacking that entitlement, D must restore C to his pre-payment position, a process described as rescinding or unravelling the transaction yet an exercise in restitution rather than contract.¹² The moral condition of C was irrelevant. On either the majority or the minority approach, however, Justice F recognised the significance of the fact that he was in no sense adjudicating a dispute concerning the quality of goods supplied. The resolution of the case at hand was an enclosed exercise in the private law of restitution, with no connection to anything other than the rules of restitution. Justice F was particularly struck by the fact that Lord Sumption countenanced a restitutionary claim to recover the price paid in advance for a killing. Lord Sumption advised against determining restitutionary claims of this kind by reference to the gravity of the background offence involved.¹³ This, for Justice F,

⁹ *Patel* (n 3) [121].

¹⁰ *Patel* (n 3) [176]: 'Thus, if the claimant paid a sum to the defendant to commit a crime, such as a murder or a robbery, it seems to me that the claimant should normally be able to recover the sum, irrespective of whether the defendant committed, or even attempted to commit the crime.'

¹¹ Lord Mance; Lord Clarke; Lord Sumption.

¹² Although as Peter Birks explained, the difference in substance between rescinding a contract on the one hand and restoring the parties to their pre-payment position by way of a restitutionary remedy on the other is essentially non-existent: P Birks, 'Recovering Value Transferred under an Illegal Contract' (2000) 1 *Theoretical Inquiries in Law* 155.

¹³ *Patel* (n 3) [254]: 'I would also reject the dicta ... to the effect that some crimes may be so heinous that the courts will decline to award restitution in any circumstances. There are difficulties about distinguishing between degrees of illegality on what must be inevitably be a purely subjective basis. If I pay £10,000 to a hitman to kill my enemy, he should not kill my enemy and should not have £10,000.'

gave intellectual ballast to his finding for C, delivered in the language of the ‘range of factors’ approach.

B. How Helpful is *Patel v Mirza* to Criminals? Some Preliminary Thoughts

In the world of drug commerce, self-help, frequently of a drastic kind, is the remedy of first resort when a large-scale buyer or seller is disappointed with his counterpart.¹⁴ A good reason, some might think, to encourage drug commerce disputes to be settled in the civil courts. *Patel v Mirza* gives us no new grounds on which to think that transactions involving the acquisition of illegal drugs can be enforced through the courts. Admittedly, the range of factors approach reaches, prima facie, beyond restitutionary claims to the treatment of illegality in contract, tort, and trusts, and this was a point of particular importance to Lord Kerr.¹⁵ However, Lord Neuberger, who fully endorsed the range of factors approach, nonetheless was adamant that transactions with direct criminal objectives, or with objectives that could not be accomplished without committing a crime, could not be enforced as civil courts could not undermine the proscriptions of the criminal law.¹⁶ The minority offered no observations favouring the enforceability of contracts with illegal objectives. For criminals and aspirant criminals, *Patel v Mirza* is best read as speaking about, and only about, getting back money from criminal associates, on the basis of unjust enrichment, with no implications for enforcing contracts with illegal objectives. The range of factors approach, however, may offer more scope to do justice in cases where the claimant is economically exploited when doing legitimate work—for instance, working in a restaurant—but is contravening the criminal law by the very fact of working.¹⁷

When finding for Patel, the Supreme Court showed no interest in what kind of person Patel was and made no inquiry into the provenance of the £620,000 he paid to Mirza, pursuant to a criminal conspiracy to bet on the price of RBS

The fact that when it comes to the point he is unwilling or unable to kill my enemy does not give him any legal or moral entitlement to keep the £10,000. If he does kill him the rational response is the same’. So it would seem according to Lord Sumption that C can get what he paid for, the unlawful killing of V by D, and then sue D in restitution to get his money back. In *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1 [60], Lord Sumption stated the following: ‘the law of illegality is a vindication of the public interest as against the legal rights of the parties. The policy is one of judicial abstention by which the judicial power of the state is withheld where its exercise in accordance with the ordinary rules of private law would give effect to advantages derived from an illegal act’. A narrow response could be to say that C is not seeking any advantage from the killing, merely recovering money to which D had no valid claim but that ill accords with the tone and sentiment of Lord Sumption’s words.

¹⁴ The facts of *R v Harmer* [2001] EWCA Crim 2930, [2002] Crim LR 401 provide a typical example.

¹⁵ *Patel* (n 3) [139]–[141].

¹⁶ *Patel* (n 3) [160].

¹⁷ See further n 67 and accompanying text.

shares with the advantage of inside information.¹⁸ In the Court of Appeal, Patel was described as a wealthy man and we learn that he socialised with other wealthy persons and had a range of interests, including dealing in shares and property, acquiring jewellery and watches, and playing poker.¹⁹ Being a party to a criminal conspiracy did not lead to any unseemly prying into his financial affairs by either the Court of Appeal or Supreme Court. Gloster LJ took this circumspection to an extreme degree, finding any reference to his ambition to gamble on the price of RBS shares with the benefit of illicitly obtained price sensitive information a distraction, preferring to describe his arrangement with Mirza as an agreement to speculate in shares.²⁰

Would a court treat our drug-dealer claimant C with the same politesse extended to Patel? We will never know. Such a case shall not come before the civil courts because of the practical certainty of prosecution that would follow C's confession to large-scale drug dealing. But bear with this unlikely hypothetical just once more. In this iteration, the sitting judge is Justice G, who takes a very different approach. At the outset of the trial, she takes the keenest interest in the drug dealing history of the parties.²¹ She notes that the £2,000,000, when in the hands of D, was the proceeds of drug trafficking and subject to the statutory schemes of post-criminal trial confiscation of the proceeds of crime²² and the statutory scheme of civil forfeiture for money acquired by unlawful conduct.²³ G takes judicial notice of the probability that the money, when originally in the hands of C, may well have been profit made from previous drug dealing. She quickly adjourns the case to seek advice from the relevant police authority, the Crown Prosecution Service, and the Assets Recovery Agency regarding what they might want to do about C and D. She does not expect to see C and D in her court again. Justice G is confident that the criminal law will take its proper course, with both men going to prison, stripped of all their drug related assets. She considers that outcome far superior to assisting C to recover the value of the money he paid to D. Further, she considers that, as a High Court judge, it was her judicial duty to assist the criminal justice system, to imprison these men and confiscate their criminal assets.

C. Which Approach: Justice F or Justice G?

Justice F would have preferred not to give judgment for C. He would have liked not to have heard the case. Yet he thought it his duty as a judge to hear the case.

¹⁸ Contrary to s 52 of the Criminal Justice Act 1993.

¹⁹ *Patel v Mirza* [2014] EWCA Civ 1047, [2015] Ch 271 [3]–[6].

²⁰ *Ibid* [89].

²¹ Judges may raise matters relating to illegality on their own motion: see *Patel* (n 3) [262] (Lord Sumption).

²² POCA, ss 75–76.

²³ POCA, s 240.

In his view, enforcement of the criminal law and associated processes such as confiscation/forfeiture was a matter for the criminal law and criminal prosecutors. It was not for him as a civil judge to involve himself in those matters. Civil courts, he thought, existed to vindicate rights recognised by civil law. Civil law rights were there to be enforced by any right holder, irrespective of the character of the claimant. Unhindered access to civil courts was vital: claimants should not have to worry that the court that they came to for civil justice would, in effect, hand them over to criminal justice. The civil law required that C be given restitution. What the criminal justice authorities might decide to do about C and his alleged crimes was entirely a matter for them.

Justice G, by contrast, accepted that the criminal law would from time to time intrude into civil litigation. The whole debate about illegality and its effect on civil law entitlements concerned those intrusions, which could not be ignored when the facts of a claim implicated the claimant in breaches of the criminal law. She was well aware that a dominant theme in *Patel v Mirza* was to diminish the frequency and impact of these intrusions. But she disagreed with the minority judgments which rendered irrelevant the gravity of the claimant's criminal wrongdoing in claims for restitution. For her, the range of factors approach of the majority could accommodate disallowance of a restitutionary claim, otherwise well founded, on the basis of the claimant's criminal wrongdoing. She considered that the wrongdoing of C to be so heinous as to rule out categorically any restitutionary relief for C. That would leave the equally heinous D considerably enriched. To avoid that, she did the best that she could to have the money that C paid to D confiscated /forfeited by the responsible agencies.

The minority judgments in *Patel v Mirza* clearly support the approach of Justice F in theory and in practice, and the majority judgments in practice. In none of the judgments is there any interest in the prospect of a criminal prosecution with respect to their criminal conspiracy between the claimant and defendant. Neither is there any reference to the possible relevance of the criminal and civil statutory confiscation/forfeiture regimes to the £620,000 held by Mirza, money which was clearly the proceeds of a crime²⁴ and also subject to civil forfeiture.²⁵ The focus is entirely on the claimant's right to restitutionary relief against the defendant. The point being made, even laboured, is that the restitutionary success of Patel may seem unexceptionable to private lawyers if his dispute with Mirza is seen as a private matter which does not engage with a wider public interest. This narrow

²⁴ Money or property to be a proceed of a crime must be a benefit arising from conduct that constitutes the offence: POCA, s 75(5)(a). C paid the money to D as part of a transaction that was a criminal conspiracy. It could conceivably be argued that when D initially came into possession of the money it was not the proceeds of a crime but stake money for commission of the crime that was the object of the conspiracy. But it surely became the proceeds that D gained from his joint offence with C when he refused to pay back the money. In any event, even in the unlikely event of the stake money argument succeeding, the money would still be subject to civil forfeiture, see n 25.

²⁵ POCA, s 240. Not only are proceeds of unlawful conduct subject to forfeiture but also any money intended to be used in unlawful conduct: s 240(1)(b).

frame of reference is underscored by returning to Lord Sumption's clear statement that a person can claim the money he has paid to a person who kills for money notwithstanding that the service paid for has been delivered. This, his Lordship advises, raises no cause for practical concern because in the real world both claimant and defendant would be arrested and tried for murder and the money paid to the killer confiscated post-conviction under the Proceeds of Crime Act 2002.²⁶ Quite so. But there is more to say.

II. Engaging with the Criminal Justice System

A. A Presumption in Favour of Confiscation/Forfeiture

The practical concern that the decision in *Patel v Mirza* arouses does not centre on the prospect of restitutionary successes to be enjoyed by drug dealers, the hirers of contract killers, and the like. If in some unimaginable set of circumstances, a truly heinous criminal should appear as a claimant seeking restitutionary relief for financial and proprietary losses from a former partner in crime, losses incurred in circumstances related to the crime, the claim should not be tried. Like our imaginary Justice G, the presiding judge should adjourn proceedings and alert the relevant authorities if the claimant has yet to be prosecuted for his crime.

In reality, such hypothetical cases will not occur. However, it does not follow that they should not be discussed. A Supreme Court's acceptance that heinous criminals may have private law entitlements arising from their criminal conduct and enforceable against their criminal associates sets a tone. It makes it more likely that restitutionary claims by lesser criminals will be entertained. One has in mind particularly claims brought by persons with the means to engage in civil litigation, who have committed crimes in financial and commercial settings, as in *Patel v Mirza* itself. It will be argued in this chapter that if the claimant has committed a crime that does not put him in very low moral standing,²⁷ and seeks restitution from a co-criminal, the judge should seek to inform himself about what action the relevant criminal justice authorities have taken, or intend to take, against each party to the litigation in terms of prosecution, confiscation and forfeiture. In other words, the fact that the money claimed could alternatively be confiscated/forfeited should raise a presumption in favour of those outcomes. If it is clear that the criminal justice authorities have not stirred themselves and there is no prospect of future action, it may well be the case that the restitutionary proceedings

²⁶ *Patel* (n 3) [254].

²⁷ Of course, persons in very poor moral standing do not lose their civil and legal rights if not presently incarcerated, but the question here is one of allowing civil claims to be brought *on the back of* the very conduct that put them in such poor standing.

should be permitted. That should certainly be the case on facts such as *Patel v Mirza*. That is not to deny that insider trading should not be a criminal offence but the fact that the criminal conspiracy was not implemented and no profits made favours the return of the money to Patel in the absence of confiscation/forfeiture proceedings.²⁸

Objection may be raised to this presumption in favour of confiscation/forfeiture over restitution on the ground that in many circumstances restitution will in substance amount to confiscation by any other name.²⁹ In *Patel v Mirza*, at least Mirza was not allowed to cling onto a large amount of money he had no shred of entitlement to hold. Against that, the argument will be made below that the best outcome on the facts of the case may have been to deny both parties the money. Because a civil court hearing a private law dispute has no jurisdiction to order payment of the money into public funds,³⁰ the most it can do is to adjourn and seek advice about whether confiscatory/forfeiture proceedings will be brought. There is an argument for law reform here, as we shall note below. Even without statutory intervention, however, it is submitted that any conception of the legal system of England and Wales as a coherent entity requires a *prima facie* presumption in favour of confiscation/forfeiture over restitution where the money claimed is the proceeds of crime and both parties are implicated in the crime.

Defending this claim requires some prior discussion of the relationship between the civil law and criminal law when facts arise that concern both. Let us turn to that relationship now.

B. Criminal Law and Civil Law: Conflict and Primacy

In *Patel v Mirza*, there are frequent references to the integrity and cohesion of the legal system of England and Wales. The range of factors approach of the majority judgments allows for the possibility that safeguarding integrity may require refusing restitutionary relief that would otherwise be given even if such an outcome would be rare.³¹ It should not be overlooked that the range of factors approach

²⁸ It is accepted that differentiating between a person who wishes to make money from, say, a paedophile website (see section III below) and a person who wishes to profit from insider trading involves a scalar and not a binary judgment, and such judgments are open to debate. But such debates are at the heart of moral discourse, a discourse that should not merely be closed down by Lord Sumption's assertion that they are irreducibly subjective (see n 13) and should not deflect no-nonsense, private law reasoning.

²⁹ Any sum of money awarded against the defendant in civil proceedings will be treated as a recovery order in any ensuing confiscation forfeiture proceedings relating to the conduct that gave rise to civil liability: POCA, s 278(8).

³⁰ In *Nelson v Nelson* [1995] HCA 25, a majority of the High Court of Australia agreed that a claimant must account to the public for any profit made at the public expense as a condition for obtaining restitutionary relief but similar innovation seems unlikely in England and Wales.

³¹ *Patel* (n 3) [121] (Lord Toulson, for the majority).

may be less receptive to the presence of illegalities in the context of claims in tort and contract.

The separate branches of the law of England and Wales are not silos; they are connected parts of a whole. That implies a degree of coherence and harmony between the substantive and procedural rules of the various branches of law operative in that jurisdiction. Granted, the same facts can sometimes legitimately give rise to contrasting outcomes within different areas of the law. For instance, in *Ashley v Chief Constable of Sussex*,³² it was ruled that an actionable assault in tort occurred when police used force on C to make an arrest while lacking a reasonable belief that C was dangerous and armed. In the earlier criminal proceedings, it was held that there was no criminal assault because D and his associates genuinely believed, if unreasonably, that V was armed and dangerous.³³ Similarly, in *Wacker*³⁴ and *Willoughby*³⁵ it was held that the fact that D and V were engaged in a joint and dangerous criminal enterprise did not preclude a finding that D owed a duty of care to V for the purposes of imposing liability for gross negligence manslaughter. It was assumed in each of these decisions that V's dependents could not have maintained a civil action against D because V was killed while acting in a criminal manner alongside D.³⁶ These divergences do not threaten harmony; they merely reflect the fact that different normative standards may be appropriate for a duty to compensate, on the one hand, as contrasted with the infliction of punishment on the other.

From time to time, however, apparent conflicts do arise between the civil law and the criminal law in the treatment of the same subject matter: that is, divergences which are hard to reconcile with the notion of an over-arching unity of the legal system. A well-known example is the decision of the House of Lords in *Hinks*.³⁷ D was a carer of V, a vulnerable and lonely man. She ruthlessly and dishonestly exploited his generosity, enriching herself considerably. It was assumed that V, despite his low intelligence, had decisional competence, and it was assumed that his gifts to D were valid dispositions of his money and property. For the minority that blocked any finding of theft against D, on the basis that the definition of theft required D to appropriate property belonging to another. The acts charged as appropriations by D were merely the acceptances of valid gifts, not appropriations of another person's property. The majority took the radical step

³² *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962.

³³ The leading cases are *Williams (Gladstone)* [1987] 3 All ER 411 (CA) and *Beckford v The Queen* [1988] AC 130 (PC). Controversially, the fact that the person using force is a police officer or a member of the armed forces does not raise the standard to a reasonable belief rather than a genuine belief.

³⁴ *R v Wacker* [2002] EWCA Crim 1944, [2003] QB 1207.

³⁵ *R v Willoughby* [2004] EWCA Crim 3365, [2005] 1 WLR 1880.

³⁶ The majority judgments in *Patel v Mirza*, whose range of factors approach goes beyond restitutionary claims, could countenance a successful tort claim by a criminal wrongdoer against a joint wrongdoer if by applying that approach the conclusion is reached that the claimant has suffered a wrong which should be compensated.

³⁷ *R v Hinks* [2001] 2 AC 241.

of holding that the criminal law could legitimately differ from the civil law in the matter of when property passed. Essentially, they ruled that, because of D's dishonesty, V retained ownership in the money and property he passed to her for the purposes of the criminal law, notwithstanding that the civil law might regard D as the owner of the property stolen from V.³⁸

On the face of it, the majority decision in *Hinks* generates an irreconcilable difference between the civil law and criminal law, with no mechanism for reconciliation. However, the facts of the case can be used to demonstrate what might be termed the functional primacy of the criminal law over the civil law in conflicts of this kind. If instead of spending a large part of the money she obtained from V, D had paid it and left it in her bank account, the entirety of the money and property would have been subject to statutory confiscation.³⁹ A better outcome for V would be compensation and, indeed, the Court convicting D ordered D to make a payment of £19,000 to V.⁴⁰ It is no defence against a confiscation or compensation order to demonstrate that the money in the account came from valid gifts from D.

Suppose, however, on another variation of the facts of *Hinks*, that no compensation order was imposed at the time because D had managed to conceal her assets. Her bank account only comes to light some years after her conviction, whereupon V brings an action in restitution to recover the money he paid to her. It might well be that the court would find that the payments were valid gifts: as a matter of civil law the court would not be bound to apply the singular view of the majority in *Hinks* that property in the money remained with V after he had given it away. But as a matter of comity between criminal law and civil law, a civil court could not brush to one side the fact that the House of Lords had found that D stole V's money. The court would be obliged to find that D was unjustly enriched and to order restitution to V. To do otherwise would be to undermine the criminal law.

It is submitted that the criminal law would also be undermined if a civil court were to entertain a claim to recover the fee paid for a killing or the money paid over to buy illegal drugs. Partly, this is a matter of public confidence in the legal system as a whole: the general public would be unlikely to comprehend how relief could be given for losses incurred in connection with serious crimes. At least for serious crimes, their commission should disallow as a matter of public policy any restitutionary relief to persons implicated in the crime regarding any money or

³⁸ The decision was widely criticised on the ground that, special statutory exceptions apart, what constitutes property is a matter for the civil law, necessarily so because the criminal law lacks the conceptual resources to determine who owns what. However, *Hinks* aligns with a long-established tendency to override the civil law rather than allow dishonest conduct to go unpunished. 'On any view it is wrong to introduce into this branch of the law [theft] questions whether particular contracts are void or voidable on the ground of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract': *R v Morris* [1984] AC 320 (HL) 334 (Lord Roskill). For a strong defence of the decision in *Hinks*, see A Bogg and J Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 *Legal Studies* 402.

³⁹ At that time under the Proceeds of Crime Act 1995.

⁴⁰ Cf Powers of the Criminal Court (Sentencing) Act 2000, ss 130–34.

property involved in the offence. This is not to say that the defendant should keep his gain if he has the means to pay it back. It should be confiscated and the civil law should do all that it reasonably can to implement the process of statutory confiscation/forfeiture. Yet should that effort fail, the courts should not assist such a claimant through the civil law. Hence, for instance, if C pays D a sum of money to set up a profit-making paedophile website, a project that does not come to fruition, and for some reason there is no prospect of confiscation/forfeiture proceedings against D, it would be better to let the loss fall where it lies than to deploy the authority of the state to support C's case, a case that originates in profoundly wrongful conduct.

It might be objected that this distinction between crimes that should disallow restitutionary claims and those crimes which merely raise in certain circumstances a presumption favouring confiscation/forfeiture over restitution when practicable, is too fuzzy to be workable. Why precisely does involvement in a commercial paedophile website disallow restitutionary relief that would otherwise be forthcoming, whereas a conspiracy to make illegal bets on share prices merely raises a presumption in favour of confiscation/forfeiture over restitution? One might be tempted to answer that the former gives rise to feelings of 'intolerance, indignation and disgust', feelings not aroused by illegal betting. That answer may raise alarm because the quoted phrase is, of course, the words used by Lord Devlin to justify the criminalisation of consensual, gay sex.⁴¹ But as everyone should know by now, there is nothing at all wrong with consensual, gay sex. By contrast, the lifelong harms that may befall children subjected to sexual interactions with adults are too obvious to spell out here. These harms can be factually described in plain terms and will arouse strong, negative emotions on the part of the recipients of such descriptions. There is nothing untoward about such reactions. They can safely be relied upon to identify crimes that are heinous. This is unproblematic, provided the crimes cause physical or mental harms, serious financial and property losses, or transgressions of human rights.⁴²

III. Presumptive Confiscation/Forfeiture

It is submitted that for lesser crimes much the same public policy considerations apply, albeit they may be less pressing. Had it been the case that the defendant

⁴¹ P Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1965).

⁴² In *Patel* (n 3) [254], Lord Sumption rejected the idea that a crime might be so heinous as to deny to such an offender restitutionary relief on the ground that any differentiation between offences, 'must inevitably be on a purely subjective basis'. But differentiating between degrees of wrongdoing in terms of the type of offence and the particulars of the offence is core business for a sentencing judge and the subject of much work by sentencing councils. For a sophisticated account of the factors that make for gradations of wrongdoing, see A von Hirsch and N Jareborg, 'Gauging Criminal Harms: A Living Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

Mirza was successfully prosecuted for criminal conspiracy and the money he had taken from Patel confiscated post-trial, or forfeited by way of civil forfeiture proceedings, that would have put paid to any restitutionary claim by Patel, as it would no longer be plausible to claim that Mirza was unjustly enriched. The prioritising of statutory confiscation/forfeiture over Patel's right to restitutionary relief against Mirza seems appropriate. Of course, such an outcome leaves Patel considerably out of pocket. But he was a party to the conspiracy to commit a serious criminal offence. It is not obvious in such circumstances why payback to him is better in terms of morality and policy than paying into public funds the sum of money he voluntarily paid to Mirza in order to make criminal gains.⁴³

Being a co-conspirator with Mirza should make a large difference to the legal and normative position of Patel. For decades, it has been public policy to confiscate criminal gains, decreasing the attractions of a criminal lifestyle or adventures in crime.⁴⁴ The fact that a sum of money held by D could be confiscated rather than its value restored to C should not in itself raise a presumption in favour of confiscation/forfeiture. The claimant may well be the victim of the defendant's crime as in *Hinks*, with a strong claim to priority over state confiscation. Even in cases where there is a degree of collusion between C and D in breaching the criminal law, as when D hires C for work in circumstances where they both know that C's immigration status precludes her from taking work, restitutionary relief for fair payment for work done should be available where C has been exploited.⁴⁵ But where the claimant is a joint principal, co-conspirator, or accomplice in the defendant's crime, and commission of the crime is the very point of their collaboration, a strong presumption should arise in favour of statutory confiscation/forfeiture. A presumption is not a rule: even in these circumstances there may be good reason to set the presumption aside, for example where the claimant's input was rendered under duress. On facts where the presumption should arise, there is nothing to prevent civil courts adjourning and seeking advice from the appropriate criminal justice authorities.

In *Patel v Mirza*, any notion that the Court might step aside by way of adjournment to inquire after the possibility of confiscation/ forfeiture proceedings against Mirza was never on the radar, let alone an option declined. There is no explicit discussion in any of the judgments of the idea that a statutory confiscation/forfeiture order against Mirza would be a better outcome than a payment to Patel. From the

⁴³ In *Patel* (n 19) [71], Gloster LJ was inclined to the view that Patel was unaware that betting on the price of shares with undisclosed price sensitive information was illegal: [2014] EWCA Civ 1047, [71]. She offers no evidence for this presumption and such unawareness seems at odds with membership of a financially astute social circle. See further n 19 above.

⁴⁴ The confiscation provisions Drug Trafficking Act 1986 were confined to the drug trade; confiscation of the proceeds of other crimes was introduced by the Criminal Justice Act 1988 and developed further by the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995. The two regimes were consolidated by the Proceeds of Crime Act 2002 (as amended by the Serious Crime Act 2015) and civil forfeiture for money and property obtained by unlawful conduct was introduced.

⁴⁵ See further at n 67.

trial onwards, it did not occur to any of the judges sitting in the case to contact the Financial Conduct Authority or the National Crime Agency⁴⁶ in order to ascertain whether they were aware of the share dealing intentions shared by Patel and Mirza, and if not to apprise the authorities of it and seek advice as to their intentions. The fact that the claimant was a party to a conspiracy with the defendant to commit a serious criminal offence counted for nothing in practical terms in the majority judgments and for nothing doctrinally in the minority judgments. Perhaps, though, there are implicit reasons in the judgments? When those judgments are examined more closely, good reasons may be found to disregard the crime of Patel and find for him.

A. The Majority Judgments in *Patel v Mirza*

Under the range of factors approach, three overarching principles are in play when considering whether allowing a restitutionary claim would undermine the integrity and coherence of the legal system. These principles are:

- a) to consider the underlying purpose of the prohibition transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim will have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.⁴⁷

On the face of it these three principles provide an ample space to consider whether public interest should, on the particular facts, temper the enforcement of private law rights.

Of the three principles, the first is key to the argument favouring a presumption in favour of confiscation/forfeiture rather than restitution for claimants implicated in the crime of the defendant and where the claim is to be restored to the original position. Lord Toulson gave no consideration whatever to the underlying purpose of the offence of insider trading save for repeating Gloster LJ's brief reference to it as an offence of market abuse.

Of course, it could be argued that the prohibition in question—the statutory proscription of insider trading—was not transgressed. There was a conspiracy to bet on the future price of RBS shares with the benefit of undisclosed price sensitive information but such information never came to hand and therefore there was no breach of the statutory provisions.⁴⁸ But it would be casuistic to press this point. For every indictable offence, it is an offence to conspire towards⁴⁹ or attempt the

⁴⁶ The agencies concerned with the prosecution and confiscation/forfeiture of profits from the offence of insider trading.

⁴⁷ *Patel* (n 3) [120] (Lord Toulson).

⁴⁸ Criminal Justice Act 1993, s 52.

⁴⁹ Criminal Law Act 1977, s 1.

offence⁵⁰ unless the provision creating the offence expressly excludes these forms of inchoate liability. There was clearly evidence of a conspiracy to bet on undisclosed, price sensitive information. Furthermore, there are statutory offences of general application of assisting and encouraging the crime of another.⁵¹ Patel was clearly guilty of the statutory inchoate offences, and maybe guilty of attempt too.⁵² In the case of inchoate liability there is something to be said for letting the offender off the hook if a voluntary withdrawal is made from the criminal project prior to the commission of the substantive offence; but there was no change of heart in this case, merely a mission failure. Patel's payment to Mirza was the product of a direct intent on his part to commit a crime. This was not peripheral to a larger scheme; it was the reason why he parted with his money. As a contractual arrangement, it was clearly unenforceable.⁵³ Discouragement of schemes of this sort is surely in the public interest. Some discussion of why insider trading is a serious criminal offence was surely up for discussion before deciding whether Patel could or could not get restitution to the value of £620,000.

The essential concern of the offence of insider trading is to build trust in the operation of securities markets, aspiring to create a transparent market where all traders have the same terms of access to information relevant to the pricing of securities. This aspiration is particularly important for traders acting for principals with financial responsibilities to the general public such as banks, insurance companies, pension funds, and the like. Closely allied to this is a strong sentiment that those with access to information not available generally to other market professionals should not enrich themselves or their private clients by way of privileged access to price sensitive information.

The Financial Conduct Authority reports on suspected cases of insider trading. These reports provide strong evidence that insider trading is alive and well.⁵⁴ Traders who acquire or dispose of securities using nominee companies registered in certain overseas jurisdictions that offer tight privacy for clients using their financial services need not dwell on the prospect of prosecution. There have been only a tiny number of prosecutions relative to the number of reported, suspicious price movements.⁵⁵ Even the simpler arrangements of Patel and Mirza would likely not have come to light but for their falling out. Patel, obviously, a man of means,

⁵⁰ Criminal Attempts Act 1981, s 1.

⁵¹ Serious Crime Act 2007, ss 44–66.

⁵² Giving money to Mirza was the last act that Patel needed to do but the fact that Mirza had several steps left to take raises a doubt as to whether he did something 'more than merely preparatory' to the offence of insider trading within Criminal Attempts Act 1981, s 1.

⁵³ *Patel* (n 3) [267] (Lord Sumption).

⁵⁴ In 2013, the Financial Conduct Authority (FCA) reported 1,200 cases of suspected insider trading; 1,400 in 2014 and 1,600 in 2015: FCA, *Annual Report 2015/16*, 54.

⁵⁵ Over 90% of the suspected insider trading cases reported on by the FCA reach the 'reasonable suspicion' threshold that the authority sets for enforcement purposes. The 2015/16 annual report, reports on just one prosecution brought for the offence, albeit a notable prosecution of a senior investment banker and a chartered accountant who received, respectively, sentences of 4.5 years and 3.5 years of imprisonment: *ibid* 55.

was seeking to enrich himself further by exploiting in a clandestine way his access to undisclosed price sensitive information. Had things gone the way that he had hoped, large amounts of money would have been made by criminal means available only to a financial elite, a benefit received on highly tax efficient terms, a benefit unrelated to any legitimate skill or talent. Given sufficient financial resources, and reliable and discreet personal contacts, making large sums of money from insider trading is like falling off a log. It is disappointing that a Supreme Court, operating in a jurisdiction where banking and financial services are highly prominent in the economy, did not reflect on such matters at a time when disparities in wealth and life chances are having such a political impact. No judge found it worthy of comment that the opportunity to bet on RBS shares came by way of the involuntary contributions of the UK taxpayer.

A strong presumption favouring statutory confiscation/forfeiture of the money held by Mirza should have arisen on the facts of *Patel v Mirza*. Clearly, that is not the view of the majority. Lord Toulson makes a passing reference to statutory confiscation of the proceeds of crime⁵⁶ but, as we have noted, thought it would be a 'rare' occurrence for the crime of the claimant to undermine a right to restitution.⁵⁷ Inadvertently, or otherwise, this sends out a remarkable message to well informed offerors of large bribes for commercial gains, market manipulators, insider traders, fraudsters in commercial and financial settings, tax evaders, and the like. For instance, it says to the corporate offeror of a hefty bribe that the bribe can be recovered, particularly if the bribe fails as an inducement. Lord Toulson took a critical view of *Parkinson v College of Ambulance*.⁵⁸ While castigating bribery ('bribes of all kinds are odious and corrupting'), he went on to say that in the case of bribes to political parties, charities and holders of public office, views might have changed since *Parkinson*: 'it might be regarded as more repugnant to the public interest that the recipient should keep it than that it should be returned'.⁵⁹ Yet in the criminal law of bribery, the offeror and taker of a bribe are in equal case. They are both guilty of the core offence of bribery.⁶⁰ They are in equal case morally, two sides of the same coin. Because bribery is odious and corrupting (and very damaging and destabilising in many countries across the world),⁶¹ there should be a strong presumption in favour of confiscating or forfeiting bribes, rather than paying them back to the briber.

Admittedly, it was in some ways understandable that Patel's claim was as it were, waved through without any checking of his credentials. Insider trading is arguably a victimless offence, in that there is no direct victim. Even the largest profits are

⁵⁶ *Patel* (n 3) [108].

⁵⁷ *Patel* (n 3) [121].

⁵⁸ *Parkinson v College of Ambulance* [1925] 2 KB 1 (KB). The plaintiff had made a large donation to the College and failed to get his money back when the anticipated knighthood was not forthcoming.

⁵⁹ *Patel* (n 3) [118].

⁶⁰ Bribery Act 2010, ss 1–2.

⁶¹ N Kochan and R Goodyear, *Corruption: The New Corporate Challenge* (London, Palgrave MacMillan, 2011).

made by way of valid contracts because the fact that a contract for dealing in securities contravenes the offence of insider trading⁶² does not make the contract void or unenforceable.⁶³ Moreover, no insider trading actually took place. It is easy to see why Patel's criminal conspiracy threw no long shadow, particularly for a court where the main business of the majority was to clear away as much as possible of the bramble bush of illegality and civil law claims. And a sense of realism tells us that there will not be any restitutionary claims brought by drug dealers, hirers of contract killers, and the like.

But the indulgence extended to Patel was still a mistake. The prospect of other white-collar criminals with the resources to litigate recovering stake money from co-criminals, money that could and should have been in the public interest confiscated/forfeited, cannot be discounted. In *Patel v Mirza* consideration should have been given to the importance of the offence of insider trading in advanced economies and the fact that the money held by Mirza could have been subjected to confiscation/forfeiture. Juridically, it is perfectly possible to use the discretionary framework adopted by the majority in *Patel v Mirza* in a way that gives more weight to the public interest in the confiscation/forfeiture of the proceeds of crime. The crunch is likely to come if and when a restitutionary claim is brought by a claimant whose criminal conduct, along with that of the defendant, has caused significant financial losses to innocent third parties.

B. Factors Favouring Overriding the Presumption

This still leaves open the question whether, even if one agrees that a presumption in favour of confiscation/forfeiture arose on the facts of *Patel v Mirza*, there were considerations in favour of overriding the presumption and finding for the claimant. Losing £620,000 would be a body blow for most people, however wealthy. As Lord Toulson observed, civil courts do not, save exceptionally, dole out punishment and the sum lost would have been well in excess of any fine for the conspiracy. But what if the Financial Conduct Authority had taken an interest in the conspiracy and Patel and Mirza had been jointly tried? And what if after conviction confiscation proceedings followed and the money received from Patel was taken away from Mirza? That would have put paid to any restitutionary proceedings by Patel against Mirza. That would be unfortunate for Patel but it would be a stretch to say this was a form of punishment. It was just the consequence of becoming involved in seeking criminal gains, and thereby generating a risk that the money he gave to his partner in crime might be confiscated/forfeited. There is a strong public interest in stripping criminals of their gains. But that same policy does not weigh in favour of compensating Patel.

⁶² Criminal Justice Act 1993, s 52.

⁶³ *Ibid* s 63(2). The provision deals only with the acquisition and disposal of securities. The arrangement between Patel and Mirza for the latter to make spread bets on RBS shares if and when inside information came to hand was not enforceable: *Patel* (n 3) [267] (Lord Sumption).

There is also a suggestion in the case that Patel was unaware that the contemplated transaction was a criminal activity.⁶⁴ By and large the criminal law does not allow an excuse based on mistake of law, even reasonable mistake of law.⁶⁵ A broader view is more suited to civil proceedings. If there were good reasons why Patel thought there was no legal impediment to his share betting, that should count strongly in favour of overriding the presumption. (In effect, this would be to allow a reasonable mistakes defence against prioritising forfeiture; it may be that similar latitude could be afforded to other genuine mistakes induced by the deception of the other party.) As it happens, in the disposition of the case it did not seem to matter one way or another what Patel believed about the legal propriety of his proposed betting on RBS shares. On the face of it, Patel moved in a circle that was well informed about finance and investment opportunities.⁶⁶ It would be surprising if he did not know of the illegality of insider trading.

What other factors might weigh in favour of overriding a presumption in favour of confiscation/forfeiture? First and most importantly, consideration should be given to the possibility that the claimant had a defence to the crime that he committed with the defendant or to which he was a party. And the criminal proof rules should apply: if the claimant can raise a reasonable possibility that he was subject to duress, or made a genuine mistake of fact, was entrapped, and so forth, the presumption should be displaced. If it should be in the interests of the defendant to dispute these claims, they should be disproved beyond any reasonable doubt. It is a more open question whether civil law defences should apply to the claimant's entry into an agreement or arrangement that is tainted by illegality. Suppose, for instance, that the claimant entered into the illegal agreement under conditions of economic duress or undue influence. Should that assist his restitutionary claim? If the answer is positive, then the burden of proving the civil law defence, on a balance of probabilities, should lie on the claimant.

A civil court should not be too astute to find that the money claimed should come within a presumption favouring confiscation/forfeiture. This will be particularly in point where the claimant has provided otherwise legitimate work or services to the defendant but, in a context of inequality and limited options, has gone along with arrangements with the defendant to contravene laws on such matters as work prohibitions relating to immigration status, reportable income for tax purposes, the evasion of minimum wage levels, and health and safety requirements. There is much to be said in these contexts for a sharp distinction to be made between fair payment for work done, legitimate work, and ancillary illegalities. It does not follow from the premise that C was not permitted to work, that she should not be paid for the work done. The exploited worker should be

⁶⁴ In the Court of Appeal, Gloster LJ thought that might have been the case: see n 43.

⁶⁵ AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 6th edn (Oxford, Hart Publishing, 2016) 705–11.

⁶⁶ See n 19.

able to resist any demand that his or her earnings should be confiscated and be able to recover by way of restitution any shortfall between the payment made by the employer and the fair rate for the job.⁶⁷ It would be rough justice indeed if exploited workers are stripped of such money they have made, however paltry: the contrast between their lot, and the comfort the legal system delivered for Patel would be unseemly.⁶⁸

This line of argument is challenged by section 24B of the Immigration Act 1971.⁶⁹ This refashions the offence of illegal working committed if the worker is subject to immigration control and without permission to work, takes work. Following a conviction for this offence, the prosecutor is obliged to consider whether the defendant should be committed to the Crown Court to confiscate his or her earnings. Though confined to breaches of immigration law, the message sent out could be that all other forms of employment illegalities instanced above entail earnings subject to confiscation. Such a conclusion would be too quick, particularly for cases of exploitation. Section 24B requires the prosecutor to consider confiscation proceedings, not to bring proceedings. Particularly in cases of employment of any duration, the argument can still be made that the payment reflects the work done, the workers immigration status no more than the backdrop. There is no warrant for saying that the money earned by persons without work permits is not their money and has always, in some sense, belonged to the state.

⁶⁷ In *R v Lewis* (Somerset Assizes, January 1922) in JWC Turner (ed), *Kenny's Outlines of Criminal Law*, 18th edn (Cambridge, Cambridge University Press, 1962) 352, D obtained work as a school teacher by lying about her qualifications. She was acquitted of obtaining money by false pretences on the ground that the money earned came from working and not by lying. See too *R v Clucas* [1949] 2 KB 226 (CCA). There are strong normative grounds for this kind of causal analysis in a restitutionary claim for fair payment, where a worker's lack of legal entitlement to work is exploited by the employer. *V v Governing Body of Addey and Stanhope School* [2004] EWCA Civ 1065, [2004] 4 All ER 1056, if taken in isolation, would suggest a harder line: the claimant was not even permitted to argue unlawful racial discrimination when dismissed from his teaching post on the ground that he was not entitled to work in the UK. Yet in *Mohammed Alaga & Co Ltd* [2000] 1 WLR 1815C the claimant, received by way of restitution, fair payment for services rendered even though he was unwittingly a party to an illegal fee-sharing arrangement. In *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889, C was aware of her lack of permission to work but the Supreme Court (particularly Lord Wilson) was sensitive to her dire circumstances and allowed a claim for damages based on unlawful racial discrimination arising from her work circumstances and the manner of her dismissal. Because the ground of C's appeal was confined to the scope of the statutory tort of discrimination, the Supreme Court lacked jurisdiction to order fair payment for work done. But in *Patel v Mirza* (n 3) [74], Lord Toulson countenanced the success of a *quantum meruit* claim on facts such as in *Hounga*. Provided the contract of employment is not directly sued upon, there seems a fair prospect that in the kind of case under discussion such earnings that C has made will not be confiscated/forfeited and fair payment ordered by way of restitution. But see n 69 and accompanying text.

⁶⁸ The presumption in favour of confiscation/forfeiture from the defendant rather than restitutionary relief to the claimant should not arise on the facts, for example, of *Mohamed v Alaga* (n 67); neither *Hall v Woolston Hall Leisure* [2001] 1 WLR 225 (CA); nor *Hounga v Allen* (n 67).

⁶⁹ Interpolated by s 34 of the Immigration Act 2016. I am grateful to Alan Bogg for alerting me to this provision.

IV. An Entitlement-Based Approach: The Minority Judgments in *Patel v Mirza*

The minority judgments offer a distinctive, rule-based restitutionary regime that allows recovery whatever the gravity of the crime committed by the claimant. Conceptually, there is a wide difference between the two approaches. For the minority, even restitution from heinous crimes becomes possible. Any wrongdoing of whatever gravity was merely the backdrop to the restitutionary claim. Upholding that claim implies no condonation, let alone endorsement, of the underlying criminal conduct of the claimant and defendant. All that was happening was a restoration of the status quo ante, an exercise in private law which raised no necessity for any kind of moral judgment.

Even in the majority judgment of Lord Toulson, paying back bribes or sums advanced for illegal speculation in shares is merely to ‘unravel’ such arrangements, putting things back to the way they were and should be: wiping the slate clean. Such a characterisation underplays the assistance that was given to Patel, the successful claimant. Patel retained no legal or equitable interest in the money he transferred to Mirza. When Patel paid over the money, he lost legal and equitable title to the money and conferred ownership on Mirza.⁷⁰ By finding for the claimant the Court did more than ‘unravel’: it helped Patel out of the hole he had dug for himself. For the minority, there is a strict legal right to unravel the transaction if it can be shown that the defendant was not legally entitled to receive the original payment.

Attempts in the Court of Appeal to argue that Patel retained the equity in the money he transferred to Mirza on the basis of a constructive or resulting trust failed⁷¹ and were not rehearsed again before the Supreme Court. Certainly, none of the judgments in that Court are founded on any legal or equitable interest that Patel retained in the money transferred. So, it is not as if the legal/equitable ownership of the money that obtained pre-trial is confirmed by the Court, and then rulings made to ensure that this legal/equitable state of affairs regulates the rights of the parties to the money. No, the ownership of the money has passed to Mirza and the remedy sought by Patel is an *in personam* legal right, enforceable against the defendant, to restore its value. And that confirms that some notion of justice as between the parties, and only the parties, is at work. The minority judgments are not merely passively noting existing property rights and giving effect to an existing state of affairs. To be sure, justice to anyone is not served by allowing Mirza to retain the money or its value. But, that can be avoided without paying money to Patel. Surely before coming to the rescue of Patel some consideration of his merits should have been made.

⁷⁰ For further discussion of the lack of any legal or equitable interest possessed by Patel in the money he transferred to Mirza, see n 71 below and accompanying text.

⁷¹ *Patel* (n 19) [17]–[18].

The extreme segregation between the criminal law and the civil law explicit in the minority judgments is best exemplified by Lord Sumption's contract killing example. As we know, if faced with a claimant reclaiming the fee for a contract killing carried out as paid for, the only question to be asked is whether the defendant killer has a legal right to retain his fee. No worries for Lord Sumption about putting this theory into practice, because as he noted such a case would not actually come to court as criminal justice interventions would head off the case.⁷²

But consider this scenario, based loosely on a real case.⁷³ C pays D a large sum to kill V, C's wife, an assignment carried out. The enhanced fee reflected the promise made by D that under no circumstances would he reveal the involvement of C in the event of D's arrest. Subsequently, C and D are successfully prosecuted for murder, principally because D, when questioned by police, made a full confession, implicating C. On release from prison, the embittered C promptly⁷⁴ brings a restitutionary claim against D (also now released), to recover the fee.⁷⁵ No possibility of intervention by criminal justice agencies can arise on these facts: C has been convicted of the crime and served his time. As D had no right to accept a fee for the service he offered, it would seem to follow post *Patel v Mirza* that C will get back the money he paid to D. In the spirit of that decision, any sense of moral outrage at this outcome is to miss the point. The award to C is merely a technical exercise in private law. Yet the payment that C made to D is the very thing that made C a murderer as accomplice to D's act of killing. To allow C to recover this money undermines the criminal law's denunciation of intentional killing. The money should be taken away from D, to be sure. But it should not be given to C.

V. What Next? Precedent and Law Reform

In asking this question, the focus is not on possible developments across the range of the impact of illegality on otherwise valid and enforceable civil law entitlements following *Patel v Mirza*. The field of speculation is limited to restitutionary claims that seek an *in personam* remedy in cases where the claimant and the defendant are implicated in a crime and where the sum claimed was part of the *res gestae* of the crime and could be subject to statutory confiscation/forfeiture.

⁷² *Patel* (n 3) [254].

⁷³ In *R v Giannetto* [1997] 1 Cr App Rep 1 (CA), D1 hired D2 to kill V, D1's wife. On one version of events, neither proved or disproved, D1 killed V himself because of a failure of nerve by D2. D1 was convicted of murder on the basis that if he did it himself he was a principal or alternatively an accomplice to murder if D2 killed V. If the first version of events were true, one might understand (if not approve) of a desire on the part of D1 to get his money back.

⁷⁴ Meeting any attempt to non-suit on the basis of limitations.

⁷⁵ C will be serving a life sentence for murder and will be released on licence. It is very unlikely to be a condition of his release that he must forgo enforcing his legal rights.

A. Precedent

Normally, one would assume that the majority judgments would prevail and the flexible range of factors approach of the majority would prevail over the rule-based orthodoxy of the minority. However, the jurisprudential boldness of Lord Toulson's judgment, as remarked by Lord Mance and Lord Sumption,⁷⁶ raises some uncertainty whether the majority approach will ultimately prevail. The major task set by the terms of his majority judgment is to put illegality on a new and improved footing, 'dealing with defects in the common law'. This pre-occupation with law reform is also found in *Jogee*,⁷⁷ where the Supreme Court, with Lord Toulson (and Lord Hughes) very much to the fore, effectively abolished the criminal law doctrine of joint enterprise. Two binding House of Lords decisions stood directly in the way, decisions unconstrained by contrary binding authority and buttressed by strong persuasive authority.⁷⁸ Lord Toulson and Lord Hughes did not distinguish these cases nor overrule them by invoking the Practice Statement.⁷⁹ After examining the history of joint enterprise liability, they dismissed the House of Lords cases as being flawed 'by an incomplete and in some respects erroneous reading of the previous case law':⁸⁰ a conclusion driven by their interpretation of the totality of joint enterprise history⁸¹ and by dissatisfaction with outcomes in some cases that for them unduly extended secondary liability.

There are parallels in *Patel v Mirza*. Lord Toulson referenced his earlier reforming judgment in *Jogee*. He bemoaned the reluctance of Parliament to reform the law relating to illegality and civil law claims.⁸² Troublesome and arguably binding cases were neither distinguished nor finessed,⁸³ and there was no resort to the Practice Statement.⁸⁴ The law under review is found not fit for purpose and change is made by moving from rules to discretion.

⁷⁶ See n 5.

⁷⁷ *R v Jogee* [2016] UKSC 8, [2017] AC 387.

⁷⁸ *Powell v English* [1999] 1 AC1 (HL); *R v Rahman* [2008] UKHL 45, [2009] 1 AC 129. Joint enterprise liability was endorsed, though not applied on the facts by the Supreme Court in *R v Gnango* [2012] 1 AC 827 and the line of authority rested on advice to the Privy Council given by Sir Robin Cooke in *Chan Wing Sui* [2011] UKSC 59, [1985] AC 168.

⁷⁹ That the Supreme Court is bound by decisions of the House of Lords is not in doubt. 'The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the court's own name. That is because it has as much effect in this court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by section 40 of the Constitutional Reform Act 2005': *Austin v Mayor and Burgesses of Southwark* [2010] UKSC 28, [2011] 1 AC 355 [25] (Lord Hope).

⁸⁰ *Jogee* (n 77) [79].

⁸¹ Lord Toulson's historical account is contested by F Stark, 'The Demise of 'Parasitic Accessorial Liability': Judicial Law Reform, Not Common Law Housekeeping' (2016) 75 *CLJ* 550.

⁸² *Patel* (n 3) [114].

⁸³ Most notably *Tinsley v Milligan* [1994] 1 AC 340 (HL) and *Les Laboritaires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430.

⁸⁴ A contrast may be made with the orthodox approach of the Supreme Court in *Knauer v Ministry of Justice* [2016] UKSC 9, [2016] AC 908, where a House of Lords authority is identified as in the way of

Essentially, Lord Toulson was employing a quality-of-law test in both *Jogee* and *Patel v Mirza*. If the law under review fails the test, it must be changed. In theory, this manner of adjudication by way of critique can be taken up by judges high or low in the judicial hierarchy but in practice, it is a privilege likely to be available only to a judge who can command a majority in the Supreme Court. On that basis, the range of factors approach may well prevail for the kind of case under discussion. Yet it is in point to glance briefly at the reception of *Jogee*, a reception affected by the radical approach to past authority. The High Court of Australia and the Final Court of Appeal for the Special Administrative Region of Hong Kong both rejected *Jogee*, staying with joint enterprise as established common law doctrine.⁸⁵ The reception in England and Wales is also instructive. In two important decisions of the Court of Appeal there is, on the face of it, a complete acceptance that, post-*Jogee*, joint enterprise liability is consigned to history.⁸⁶ But the actual dispositions in each of these cases sit far more comfortably with the presence of joint enterprise liability than with its absence.⁸⁷

Paying lip service to the majority judgments in *Patel v Mirza* while in substance following the minority judgments, is perfectly feasible. As no consideration was given to the criminal conduct of the claimant by the majority, judges in the future could do the same, whatever the gravity of the wrongdoing. They need only cite Lord Toulson to the effect that the claimant's crime of whatever nature will rarely defeat a restitutionary claim.⁸⁸ Effectively, the only question to be asked then becomes whether the defendant has any right to remain enriched: the approach of the minority judgments.

It would be a pity if this becomes the state of play. Whatever reservations may be had concerning the manner of adjudication which led to the adoption of the range of factors assessment of the claimant's entitlement to restitution, the discretionary scheme can accommodate the presumption in favour of confiscation/forfeiture that has been argued for here.⁸⁹ The parallel with *Jogee* should not be overdrawn. In *Jogee*, clearly stated law, well-embedded by binding authority, was overturned, essentially because it was taken to be unsatisfactory. By contrast, the law relating to illegality was barely coherent, if one moved from the outcomes in particular cases to mapping a corpus of law. Besides, the idea of moving from rules to discretion was not novel. There was already strong academic support

the decision the Court wished to make, analysed in doctrinal terms and accepted as binding and then formally departed from by invoking the Practice Statement.

⁸⁵ *Miller v The Queen* [2016] HCA 30; *HKSAR v Chan Kam Shing* [2016] HKCFA 87.

⁸⁶ *R v Anwar* [2016] EWCA Crim 551, [2016] 4 WLR 127; *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104.

⁸⁷ A point made with great clarity and incision by Justice Ribeiro in *HKSAR* (n 85) [80]–[93].

⁸⁸ *Patel* (n 3) [121].

⁸⁹ Particularly, as one of the three principles that must inform the open list of factors to be taken into account is 'to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim': *Patel* (n 3) [121].

for that way forward⁹⁰ which greatly influenced Lord Toulson and some judicial support too.⁹¹

To be sure, when applying the range of factors approach, the majority did not actually pause to consider the nature and gravity of the claimant's crime. But there is no rule precluding such consideration on similar facts in a future case. If a judge were to take a more critical interest in the claimant's wrongdoing, and make a presumption in favour of confiscation/forfeiture (say with regard to a claimant who wants his stake money back from his criminal partner following a miscarried fraudulent scheme), that would seem to be perfectly in accord with the discretionary framework set down by the majority. A judicial discretion allows a large latitude, save for manifestly unreasonable decisions.

B. Statutory Intervention

Of course, when a presumption does arise and is acted on, a civil court lacking a general jurisdiction to make confiscation orders can only do its best. For one reason or another, the relevant criminal justice authorities, when alerted, may decide not to go forward with prosecution, confiscation or civil forfeiture proceedings. In such a case, the civil court is on its own. The best option may well be to find for the claimant rather than leave the defendant enriched, save where the claimant's crime was heinous.

That is hardly ideal. It would be best if the prioritising of confiscation/forfeiture over restitution should be the subject of statutory intervention. Legislation should be brought before Parliament to provide that any sum of money potentially subject to statutory confiscation/forfeiture should presumptively be confiscated or forfeited whenever a claimant making a restitutionary claim for that money is a joint principal, conspirator, or party to the crime that formed the basis for exposure to confiscation/forfeiture. The most straightforward way of embedding such reforms would be by extending the High Court's general civil jurisdiction to encompass statutory confiscation/forfeiture orders. This would vest in the High Court the existing powers of statutory confiscation and forfeiture that at present can only be invoked at hearings dedicated to those issues, so that a High Court could directly access these powers if appropriate when disposing of a restitutionary claim. It would be for the court itself to decide when the presumption in favour of confiscation/forfeiture should be overridden in favour of restitution. Legislative reform of this kind would prevent courts from totally disregarding the claimant's crime (as the minority judgments sought to do in *Patel v Mirza*), and to

⁹⁰ A Burrows, *Restatement of the English Law of Contract* (Oxford, Oxford University Press, 2016) 221 ff.

⁹¹ The judgment of Lord Wilson in *Hounga v Allen* (n 67) to some extent prefigures the move from rules to discretion.

recalibrate the majority's 'range of factors approach' in *Patel v Mirza* so that, rather than considering that the crime rarely matters, the position is that crime always matters but not necessarily conclusively.

VI. Conclusion

Our attention in this chapter has been on restitution. The majority and minority judgments in *Patel v Mirza* unite to reduce almost to vanishing point the impact of illegality on restitutionary claims. It remains to be seen what impact the case will have beyond that sphere, to matters such as the enforcement of contracts and trusts. But whatever may be the case in those areas, the almost complete disregard of the claimant's criminal conduct is not necessary to secure a workable system of restitution.

To claim that paying heed to the claimant's criminality might amount to the civil law's denying an otherwise valid restitutionary claim by 'drawing up its skirts and refusing all assistance to the plaintiff'⁹² is an unhelpful image on several counts. To allow the likes of hirers of contract killers to minimise their losses through restitution is an affront not only to the coherence of the legal system but to common decency. Doubtless such heinous cases will never see the light of day, but the fact that the success of such claims is countenanced as doctrinally possible shows graphically the extent to which private law reasoning can enter an enclosed world of its own.⁹³

The range of factors approach adopted by the majority in *Patel v Mirza* can easily accommodate, giving greater salience to the claimant's criminality without the complexities that arise from casting fine grained distinctions as rules of law. Judges can make this change but statutory intervention would be better.

⁹² *Patel* (n 3) [150] (Lord Neuberger).

⁹³ Which is not to imply that there is anything cloistered or unworldly about keeping the criminal law out of the reckoning. Disputes often arise in the context of multi-national parties to large scale contracts concerning armaments, aerospace, oil concessions, construction and the like. The large scale acquisition of arms and aircraft by the Saudi Arabian Government known as the Al Yamamah contracts gave rise to consistent allegations of huge sums paid to commercial agents and downstream disappointments on the part of contractors who considered they had not got what they paid for: See Kochan and Goodyear (n 61) 67–73. Such contractors would be much better placed to recover losses before a court unconcerned with the line between commission and corruption.