

Enrichment at the Claimant's Expense

Attribution Rules in Unjust Enrichment

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1

The Exchange Capacity

Unjust enrichment has been described by Professor Burrows as resting upon a disruption to each of two parties' positions requiring correction.¹ This is a neat conceptual summary, but it lacks explanatory force if we do not first understand the meaning of 'position' in this context. Human beings are multifaceted, and a given legal system may be concerned with any one of several aspects of their condition, including the physical, emotional, psychological, cultural, religious, intellectual, and so forth. If all of these were relevant to unjust enrichment, then it could bite in many areas where most people would agree it should not. The good vibes of a nightclub, the cultural enlightenment of a museum visit, and the affectionate embrace of a friendly animal at a zoo may each be considered 'enriching' in a colloquial sense, but no one would say that they are within the scope of unjust enrichment. They are not the kind of enrichments that the law is concerned with. Similarly, if I happen to enjoy a good (albeit inappropriate) laugh at a man clumsily falling over in the street, then he has no claim in unjust enrichment against me, even though I have gained a beneficial experience from his misfortune.

The challenge is to understand why these things are so, and to understand where (if at all) such extraneous matters fit within an account of the law.² To understand the meaning and scope of 'enrichment' and 'loss' as they appear in the decided cases, we must first equip ourselves with a theoretical definition of what interests are relevantly within the law of unjust enrichment, and explain why they are so.

That is the aim of this chapter: to explain, from a theoretical standpoint, the interest that engages unjust enrichment. According to this book, the solution lies in the 'exchange capacity'; that is, the capacity we each have to participate in systems for exchanging things that are capable of being exchanged. The exchange capacity is, in turn, one aspect of a wider 'free will' that underlies the internal structure of private law generally. Furthermore, and looking past that internal structure, the exchange capacity directs attention to instrumental considerations

¹ See, eg, A Burrows, *The Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2011) 36.

² See also EJ Weinrib, 'The Structure of Unjustness' (2012) 92 *Boston University Law Review* 1067, 1071, where the 'enrichment at the expense of the claimant' requirement is described as having 'aspects' relating to the defendant and claimant.

that define the ambit of unjust enrichment.³ So understood, the exchange capacity explains both the formal structure of unjust enrichment and its substantive scope.

(A) Corrective Justice

In *Kingstreet Investments Ltd v New Brunswick (Finance)* the Supreme Court of Canada observed:⁴

Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions.

Corrective justice, so framed, is traceable to the work of Aristotle.⁵ In time, it has come to provide a normative account of the private law of obligations, including unjust enrichment. But corrective justice, in itself, cannot provide a complete account of the subject. It only explains why unjust enrichment bites in situations that are within its scope. It does not explain what that scope is in the first place, nor does it purport to do so.

(1) Corrective Justice and Unjust Enrichment

In *Nicomachean Ethics*, Aristotle advanced a theory of corrective justice that immediately seems to provide a blueprint for unjust enrichment:⁶

[W]hen something is subtracted from one of two equals and added to the other, the other is in excess by these two; since if what was taken from the one had not been added to the other, the latter would have been in excess by one only. It therefore exceeds the intermediate by one, and the intermediate exceeds by one that from which something was taken. By this, then, we shall recognize both what we must subtract from that which has more, and what we must add to that which has less; we must add to the latter that by which the intermediate exceeds it, and subtract from the greatest that by which it exceeds the intermediate. ... Therefore the just is intermediate between a sort of gain and a sort

³ See further H Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 811: 'The normative infrastructure of any private law doctrine should be responsive both to ... bipolarity constraints on the one hand, and to social values appropriate to the pertinent category of human interaction on the other.'

⁴ *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] SCC 1, [2007] 1 SCR 3, [32] (Bastarache J, the rest of the Court concurring).

⁵ See, eg, Aristotle, *Nicomachean Ethics* (Lesley Brown ed, David Ross tr, Oxford, Oxford University Press, 2009).

⁶ *ibid* 87. See further M Rush, *The Defence of Passing On* (Oxford, Hart, 2006) 144–46; M McInnes, 'The Measure of Restitution' (2002) 52 *University of Toronto Law Journal* 163, 186–96; L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115, 2135.

of loss, namely, those which are involuntary; it consists in having an equal amount before and after the transaction.

This theory is a tidy one of essentially arithmetical equality. As Professor Weinrib observes, however, it does not explain ‘what the equality is an equality of’, and so leaves corrective justice ‘opaque to the extent that the equality that lies at its heart is unexplained.’⁷ In *The Idea of Private Law*, Weinrib sought to provide the missing explanation by situating corrective justice theory within Kant’s philosophy of right. The equality of corrective justice, according to Weinrib, is ‘the equality of free wills in their impingements on one another.’⁸ Accordingly, the bilateral equality of corrective justice is of a normative character; a reflection, according to Weinrib, of the normativity extrinsic to all self-determining activity within Kant’s philosophy of right.⁹ Corrective justice is therefore about normative gains and losses:¹⁰

This equality is not itself factual: ... it does not refer to an equality in the amount or condition of the parties’ holdings. Rather, equality is a formal representation of the norm that ought to obtain between doer and sufferer. Action that conforms to this norm, whatever it is, maintains the equality between the parties, so that no complaint is justified. Action that breaches this norm produces a gain to the injurer and a loss to the person injured. Then the court ... restores the parties to the equality that would have prevailed had the norm been observed. The normative nature of the equality indicates that the variations from that equality are also normative.

Weinrib explained unjust enrichment in these terms.¹¹ As Professor Lionel Smith later observed, however, this explanation jars with corrective justice insofar as it presupposes some form of wrongdoing.¹² Private law liability, according to Weinrib, requires the violation of a norm of equality that exists between claimant and defendant; the correlativity of normative gains and losses justifying legal intervention is founded upon the violation of a duty.¹³ This sounds like a requirement of

⁷ EJ Weinrib, *The Idea of Private Law* (Cambridge, Harvard University Press, 1995) 57. See also JM Nadler, ‘What Right Does Unjust Enrichment Law Protect?’ (2008) 28 *Oxford Journal of Legal Studies* 245, 247–49.

⁸ Weinrib, *The Idea of Private Law* (n 7) 84.

⁹ *ibid.*

¹⁰ *ibid.* 117. To be clear, and despite its heavy influence upon this book (as well as upon other scholarly works on unjust enrichment), it should be noted that Weinrib’s theories do not occupy a monopoly position over corrective justice. Several other key jurists have worked on and contributed to the theory and its application within private law; perhaps most notably, Professor Jules Coleman and Professor John Gardner. See, eg, J Coleman, *Risks and Wrongs* (Oxford, Oxford University Press, 2002); J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1; J Gardner, ‘Corrective Justice, Corrected’ (2012) 12 *Diritto & Questioni Pubbliche* 9. To the extent that there are differences between the theories, their exploration is beyond the scope of this book. ‘Weinribian’ corrective justice is, in this sense, one of the basal assumptions about law for the purposes of this book. See above pp 11–12.

¹¹ Weinrib, *The Idea of Private Law* (n 7) 141. See further EJ Weinrib, *Corrective Justice* (Oxford, Oxford University Press, 2012) 200, Ch 6.

¹² Smith, ‘Restitution: The Heart of Corrective Justice’ (n 6) 2132–34.

¹³ *ibid.* 2125–26.

wrongdoing. It is now widely accepted, however, that unjust enrichment does not depend upon wrongdoing. Weinrib's account seems to conflict with this view. The problem therefore arises that unjust enrichment appears oddly beyond the scope of Weinrib's theory of corrective justice, despite it seemingly lying at the very base of Aristotelian corrective justice.¹⁴

The solution to this problem, according to Smith, lies in an elucidation of Kant's theory of right as not requiring wrongdoing.¹⁵

We still need to get from material to normative gains and losses to have liability under corrective justice. However, it appears, to put it crudely, that less normative work is required. Less is required in exactly this sense: when a single transaction, necessarily some kind of transfer, gives rise to both a material gain on the part of the defendant and a material loss on the part of the plaintiff, it is not necessary to find that the defendant did anything wrong to characterize that gain and loss as normative. It is enough to find that the plaintiff did not fully consent to the transfer. It may also be enough to find that the defendant's conduct was in some way unconscientious, even if it does not rise to the level of wrongdoing.

On this view, the normative gains and losses in unjust enrichment claims are not the product of wrongdoing. Instead, they represent the violation of a norm of equality based on the parties' wills. This view appears to have been subsequently adopted by Weinrib and expressed in his own terms.¹⁶

Mr Doyle, however, has argued that even this strict liability account of unjust enrichment does not work because it is inconsistent with Weinrib's own theory of corrective justice.¹⁷ First, he alleges that the strict liability account treats the claimant's normative loss as arising in abstract isolation and so without the bilateral quality *vis-à-vis* the defendant's enrichment necessary to explain unjust enrichment.¹⁸ Secondly, he argues that the strict liability account fails to treat the defendant as a Kantian self-determining agent in cases where a defendant does not know (and does not take the risk) that a benefit is being conferred non-gratuitously.¹⁹ As he explains:²⁰

Kantian responsibility is premised upon free choice as the condition that implicates the defendant's autonomy, rendering the imposition of liability consistent with his free will. If the defendant is oblivious to the non-gratuitous nature of the transfer, however, his acceptance of the enrichment does not constitute any choice at all because the possibility of returning the benefit to the plaintiff simply does not arise.

¹⁴ *ibid* 2135.

¹⁵ *ibid* 2139–40.

¹⁶ EJ Weinrib, 'Correctively Unjust Enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 52. See also EJ Weinrib, 'The Normative Structure of Unjust Enrichment' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Oxford, Hart, 2008) 44.

¹⁷ M Doyle, 'Corrective Justice and Unjust Enrichment' (2012) 62 *University of Toronto Law Journal* 229.

¹⁸ *ibid* 240.

¹⁹ *ibid* 244.

²⁰ *ibid* 245.

There are two problems with these arguments. First, they overlook the fact that a defendant's free will is accommodated elsewhere within the scheme of unjust enrichment. As we shall see later,²¹ the defence of change of position is also supported by considerations of corrective justice. Secondly, Doyle's argument is compelling only if Weinribian corrective justice is viewed in abstract isolation; that is, without regard to the necessity of a particular real-world relationship between two parties. For example, Doyle relies upon the example raised by Professor Stephen Smith of someone dropping a bag of money down a deep hole where he cannot retrieve it: he was entitled to the money, but that entitlement was not violated when he dropped it, and so he suffered no normative loss.²² The suggestion, however, is that on a Weinribian account of corrective justice, there is a normative loss. That is incorrect: as Lionel Smith makes clear,²³ the normative loss is premised upon the existence of a 'single transaction'. Precisely what that 'single transaction' is requires unpacking, and it is the aim of this chapter to do precisely that. But at least two points follow from the recognition of its necessity at this stage. First, neither the normative loss nor the normative gain arises in abstract. Secondly, the manner in which the defendant is treated as a Kantian self-determining agent depends upon how that real-world transaction is understood. As Weinrib has explained, the point is that defendant's participation (what he terms 'acceptance of the benefit as non-gratuitously given')²⁴ is a relational notion:²⁵

It refers to what is to be imputed to the defendant in the light of the plaintiff's non-gratuitous transfer of value. Although it is defendant-oriented, it does not treat the defendant in isolation from what the plaintiff did ... [A]s a member of the conceptual sequence that unites the transferor and transferee of value within an obligation-creating relationship, it is a structural feature of liability for unjust enrichment.

He adds that the defendant's 'acceptance is imputed when the law can reasonably regard the beneficial transfer as something that forwards or accords with the defendant's projects' and that such accordance is a juridical, not a subjective or psychological notion: 'what matters is the purpose ... as externally pertinent to the relationship of plaintiff and defendant'.²⁶

As we shall see in the sections that follow, the requisite conceptual unity between claimant and defendant, including the external pertinence of the latter's participation within that system, should be understood in terms of systems of exchange, and each party's exchange capacity.

²¹ See below pp 60–62.

²² Doyle (n 17) 240. See further S Smith, 'Justifying the Law of Unjust Enrichment' (2001) 29 *Texas Law Review* 2177, 2190. See also D Klimchuk, 'Unjust Enrichment and Corrective Justice' in J Neyers, M McInnes, and S Pitel (eds), *Understanding Unjust Enrichment* (Oxford, Hart, 2004) 130.

²³ Smith (n 15) and accompanying text.

²⁴ Weinrib, *Corrective Justice* (n 11) 203–04.

²⁵ *ibid* 203.

²⁶ *ibid* 208.

(2) The Limits of Corrective Justice

If we adhere to the theory of corrective justice outlined in the previous section, then the interest that engages unjust enrichment appears to be the parties' 'free will'. That, however, is pitched at too high a level of abstraction and generality to be of any real use. Many aspects of human life can be related back to free will, but seem to fall outside unjust enrichment. The man clumsily falling over in the street no doubt does so against his free will, but that does not mean he has a claim in unjust enrichment against the bystander who has enjoyed watching his tumble—even if the bystander is responsible for his fall. We face the same underlying question, albeit expressed slightly differently: what particular aspects of free will engage unjust enrichment?

This difficulty stems from the very purpose of corrective justice. Corrective justice is an exercise in legal formalism and so creates problems of substantive indeterminacy. It merely provides an internally consistent structure to private law, including unjust enrichment,²⁷ and is not a panacea capable of explaining the scope or substance of particular claims. Nor does it purport to do so.²⁸ As Weinrib explains, the so-called 'indeterminacy critique' of corrective justice is really beside the point:²⁹

[T]he autonomy of private law depends not on the determinacy of the rules laid down but on the immanence of corrective justice in private law conceived as justificatory—and thus as a normatively coherent—enterprise. The function of the posited private law is to express corrective justice through its doctrines and institutions, rather than to predetermine every case.

Such limitations are evident throughout a formalist analysis of private law. A good example, arising outside the context of unjust enrichment, is the gradual demise of tort claims for interference with domestic relations over the past century. Torts such as enticement and seduction were historically dominated by paternalistic concepts of family life, and were essentially based upon the notion that a husband or father had something approaching a proprietary interest in his wife or child.³⁰ Such claims, though socially archaic, do not conflict with a corrective justice view of private law; instead, corrective justice is silent about their social

²⁷ Weinrib, *The Idea of Private Law* (n 7) 4, 19, 117.

²⁸ *ibid* 222–27. So, in the particular context of unjust enrichment, corrective justice does not, for example, dictate that the quantum of a defendant's liability in restitution is capped by the quantum of the loss actually sustained by the claimant: *ibid* 119. See further below pp 89–96. See also, C Mitchell, P Mitchell, and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell, 2011), para 6-24: 'Theories of corrective justice are ultimately too abstract ... to generate clear cut answers to the sorts of concrete questions that the courts must face, when identifying the boundaries of the law of unjust enrichment.'

²⁹ Weinrib, *The Idea of Private Law* (n 7) 222. See further C Webb, 'Property, Unjust Enrichment, and Defective Transfers' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 336–39, 363–65.

³⁰ See generally JG Fleming, *The Law of Torts*, 9th edn (Sydney, Lawbook Company, 1998) 718–29.

appropriateness. In the case of the tort of enticement, for example, the point that corrective justice makes is not as to the rightness of the underlying assumption made about a husband's interest in his wife, but whether, given the acceptance of that underlying assumption as a protected norm, the husband should be able to maintain an action against the suitor who entices the wife away from the marriage. The answer that corrective justice provides is that he should: once the husband's interest is accepted as a norm that ought to be protected, the suitor is liable to him because his actions have interfered with that norm, producing a normative gain to the suitor and a normative loss to the husband that must be corrected. But the ambit of tort liability—that is, whether the husband's interest is a norm that *ought* to be protected—is not a matter for corrective justice. It is a matter of judgement that is made with regard to prevailing social norms and values. In the particular context of tort claims for interference with domestic relations, the relevant social attitudes are those of sexual equality and the progressive shift away from a paternalistic conception of family life.³¹

The challenge that arises in the context of unjust enrichment is to identify where relevant matters of judgement arise in determining the scope of liability; that is, how and where in our account of unjust enrichment do we shift from a formal description of its structure to a substantive description of its scope? The answer—according to Weinrib and others³²—lies within the concept of a 'transfer of value'.

(B) Debunking Transfer of Value

One of the aims of this book is to demonstrate the limited utility of the concept of 'transfer of value' in understanding unjust enrichment in clear and practical terms. That aim, however, is not quickly achievable. The language of 'transfer of value' pervades much of the judicial and academic literature on unjust enrichment, and the explanation of its shortcomings must proceed in stages. This is because 'transfer of value' is a composite concept, which takes in two ideas: 'transfer' on the one hand, and 'value' on the other.

With this point in mind, we must not allow ourselves to be distracted from the present inquiry: to understand the interest that engages unjust enrichment. That such claims are concerned with reversing defective 'transfers' between two parties may be true at a very high level of generalisation. As we shall see later in this book, however, describing a relationship between two parties as one of 'transfer'

³¹ *ibid* 719–20.

³² Weinrib, 'Correctively Unjust Enrichment' (n 16) 37; Weinrib, 'The Normative Structure of Unjust Enrichment' (n 16) 29–30. See also Smith, 'Restitution: The Heart of Corrective Justice' (n 6); Burrows, *The Law of Restitution* (n 1) 66; J Edelman, 'The Meaning of Loss and Enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of The Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 224; Rush, *The Defence of Passing On* (n 6) 100, 109–11.

from one party to the other is really expressive of a conclusion rather than of underlying reasoning: many unjust enrichment claims do not neatly fit the concept of a ‘transfer’.³³ But that is beside the point at this stage of this book. ‘Transfer’ describes the connection between the parties’ interests. The concern here is to explain *what* those interests are. The answer lies, not in the concept of ‘transfer’, but in the elucidation of concept of ‘value’ and of the concept of ‘exchange’ underlying it.

(C) Value and Exchange

‘Value’ is an important concept within unjust enrichment which, until relatively recently, was under-explained and imperfectly understood. Significant advances have, however, recently been made towards understanding the nature of value and the function it performs in unjust enrichment.³⁴ Weinrib, for example, has defined value as the treatment of different things in equivalent terms:³⁵

A judgement of value takes the form that such-and-such a quantity of one thing is equivalent to such-and-such a quantity of another thing. Value thereby relates different persons through the exchange of different things. Because value exists only in and through exchange with another, it is intrinsically relational.

Value is thus an abstract standard for the comparison and exchange of qualitatively heterogeneous things in quantitatively comparable and equivalent terms.³⁶ This ‘relational’ concept—according to which particular things are reducible to some single dimension or substance, notwithstanding their diversity—is different from ‘idiosyncratic’ value, which refers to the subjective valuation afforded by a given individual to an object in the light of his (or her) particular preferences, utilities, and choices.³⁷ It has been said that the latter is not relevant to unjust

³³ See below pp 120–124.

³⁴ See, eg, R Chambers, ‘Two Kinds of Enrichment’ in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009); J Penner, ‘Value, Property and Unjust Enrichment’ in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of The Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009); AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford, Hart, 2012).

³⁵ Weinrib, ‘The Normative Structure of Unjust Enrichment’ (n 16) 27. See also Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 14–23; P Benson, ‘The Unity of Contract Law’ in P Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge, Cambridge University Press, 2001) 188.

³⁶ See further Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 16.

³⁷ Benson (n 35) 195; Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 16–19. For the relationship between matters of preference, utility, choice, and budgetary constraints to the determination of consumer demand and value in economic theory, see, eg, HR Varian, *Intermediate Microeconomics: A Modern Approach* (New York, W W Norton & Company, 2009) Chs 2–5.

enrichment.³⁸ As Birks explains, the law ‘does not pretend to attempt the impossible task of finding out at what price the particular recipient of an unrequested benefit would have bought it’.³⁹

The two concepts—idiosyncratic value and relational value—may not, however, be so easily separable. Dr Lodder has observed that idiosyncratic value is a feature of relational value insofar as the latter represents an aggregation of the former: market price abstracts from the qualitative reasons underpinning the subjective judgements of multiple individuals a quantitatively heterogeneous and comparable value for exchange.⁴⁰ Within this observation there is a further important point about the relational quality of idiosyncratic value itself: an individual’s subjective judgement of value reflects that individual’s application of an abstract standard for the comparison of one thing for another thing in equivalent terms. For example, I may own a painting from which I derive personal pleasure and utility through its hanging on my living-room wall. If pressed, I may be able to assign that personal benefit a monetary figure (say, £1000). This is the idiosyncratic value of the painting to me, expressed in relational terms: one thing (the painting) is compared to another thing (money). Strictly speaking, this is a kind of relational value. But it is a *subjective* relational value, not an *objective* relational value. When we say that relational value matters in unjust enrichment, and idiosyncratic value does not, what we really mean is that what matters is objective value determined by the market, rather than our own subjective determinations of value. Birks’s remark above, to the effect that the law does not pretend to find the price that a particular recipient of a benefit would have bought it, is thus slightly misleading in this respect. The very process of asking what one person would have paid for a benefit presupposes the existence of a second person willing and able to sell that benefit. That is, it presupposes the existence of a market and, by necessity, the observation and application of market conditions to the process of price determination.

Similarly, to exalt relational value (be it subjective or objective) within unjust enrichment is not to ignore the reality that people can and do desire things in their own right and for reasons of utility unrelated to exchange. Because idiosyncratic value reflects an amalgam of individual preference, utility, and choice,⁴¹ a concern for relational value (as an aggregation of idiosyncratic value) is capable of promoting and protecting these idiosyncrasies, albeit indirectly and to the limited extent that they are manifested within systems of exchange. To completely understand this point requires some knowledge and appreciation of economic

³⁸ See, eg, *Benedetti v Sawiris* [2010] EWCA Civ 1427 [145] (Eherton LJ); *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351, [17] (Lord Clarke), [101] (Lord Reed). See also Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 18–43. This is not, however, to deny the significance of a defendant’s own ‘freedom of choice’ within unjust enrichment. See generally Lodder Ch 5. See further below pp 62–66.

³⁹ P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Oxford University Press, 2005) 54.

⁴⁰ Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 17.

⁴¹ See generally Varian, *Intermediate Microeconomics: A Modern Approach* (n 37) Chs 2–5.

theory, the detailed description of which is beyond the scope of this book. In essence, though, the key point to appreciate is that, in microeconomic theory, an individual's demand for something is derived from his utility function as a representation of preference subject to budgetary constraint. So while individual preference, utility, and choice are not susceptible to market analysis in their own right, they do feature within the determination of demand and price of those things that are susceptible to market analysis. This is particularly important in understanding the scope of unjust enrichment because it explains how the matters outlined at the start of this chapter should be treated. The pursuit of things like good vibes, cultural enlightenment, affection, and laughter may influence our individual preference, utility, and choice: we want things that will deliver us these sort of idiosyncratic benefits, and so their existence influences our individual demand for such things which, in aggregate, shapes the operation of systems of exchange.

Returning to the example of the painting, the sources of my pleasure and utility in respect of it may be many and varied: it may have sentimental value to me as a gift from an old friend; it may remind me of scene from my childhood, or; I may simply like the contrasting colours and brush-strokes. Whatever their source, these benefits are reflected in the idiosyncratic value of the painting to me, and not in its relational value. When I assign them a subjective relational value (again, say £1000) I am taking the position that I am prepared to forgo those benefits in exchange for £1000. I do not, however, derive pleasure and utility from the £1000 in its own right,⁴² but rather from the use to which that money can be put in acquiring something else from which I can derive pleasure and utility. The same logic applies to objective relational values determined by the market: if the market value of the painting is merely £500, then my idiosyncratic value is promoted and protected to the extent that this sum will enable me, as closely as possible, to enter the market and purchase a substitute painting and so derive equivalent pleasure and utility. Clearly there is a margin for imbalance and imperfection. If, on the one hand, the painting is the work of a master, then its market value will greatly exceed my own idiosyncratic value, in which case I will have the benefit of a surplus. If, on the other hand, the painting is a cheap copy, the market value will not necessarily reflect the utility and pleasure I derive from its sentimental character. The point about such imbalances and imperfections, however, is that they are not rooted in strict, abstract, or legal logic, but in the pragmatic operation of markets as systems of exchange operating in a real social context.

⁴² This is assumed to be generally true: people do not possess money for its own sake, but for the purpose of using money to acquire goods, services, and experiences that will advance their pleasure and utility. Of course, there are always possible exceptions in both reality and fiction. For example, the fictional Disney character, 'Scrooge McDuck', derived pleasure from the act of swimming in his money in a large enclosed 'money bin'. See further B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 *Oxford Journal of Legal Studies* 81, 93–94.

(1) The Necessity of Exchange

The existence of some mechanism of exchange is therefore critically important to the relational concept of value. This is because value is an abstract concept, rather than something that is capable of being possessed in its own right: value must be realised.⁴³ And for it to be realised, one thing with value must be exchanged for another thing; the value of such-and-such a quantity of one thing is realised by exchanging it for such-and-such a quantity of another thing. Value is, in this sense, a progressive concept based upon exchange: I realise the value of one thing by exchanging it for another thing, and I realise the value of that thing by exchanging it, and so on.⁴⁴

Not everyone agrees with this exchange-centred concept of value. Lodder, for example, argues that exchange value is ‘simply one relational measure of the monetary value of a thing’ and that ‘it is perfectly possible to place a relative value on something for which there is no market’.⁴⁵ He explains:⁴⁶

For example, the value of a non-transferable asset, such as an unassignable lease, may be measured by the present future value of the income that will be generated from its use, ie rent. Alternatively, a thing may be valued by the capital value of its component parts. The difference between these valuation approaches can be demonstrated by the valuation of share capital, which can be measured by its exchange value, the present value of its future dividend income or the capital value of the asset-share on dissolution of the company.

Lodder is correct that there are many things that cannot be exchanged in and of themselves, and that we must therefore look at their products or components to assign them a relational value. But this does make exchange irrelevant in these situations. It merely shifts the focus of what is being exchanged. In the case of shares, for example, their exchange value on the share market, the present value of their future dividend income, and the capital value of their asset-share on dissolution of the company are each the result of a comparison between those products and money. When we say, for example, that a company share is worth ten pounds because that is the present value of future dividend income, we mean that we are prepared to exchange our entitlement to dividends in the future, for money in our pockets today. All relational values depend upon exchange.

It is worth observing that, in the majority of cases, exchange is expressed in monetary terms. This is because money is ‘a universal medium of exchange’⁴⁷ and therefore has a homogeneous quality that satisfies the abstract standard in clear

⁴³ Penner, ‘Value, Property and Unjust Enrichment’ (n 34) 309.

⁴⁴ See further *ibid* (n 34) 309: ‘One owns the property, not its exchange value. When one realises the exchange value, what one must *relinquish* is one’s property. One never has the two of them at the same time.’

⁴⁵ Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 17.

⁴⁶ *ibid* 17–18. See also Mitchell, Mitchell, and Watterson, *Goff & Jones* (n 28) para 4.04.

⁴⁷ *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) 799 (Robert Goff J). See also Birks, *Unjust Enrichment* (n 39) 53.

and uniform terms. This does not mean money is value; merely that it acts as both a measure and store of value.⁴⁸ It is certainly plausible to conceive of exchanges (and, therefore, relational values) arising without reference to money.⁴⁹ For example, I may have an arrangement with my mechanic according to which he services my car in exchange for my legal services. Neither of us need have gone through the exact process of considering how much our services are worth in money terms and matching that precisely to the measure of the other's services. Money is the universal medium of exchange, but that does not mean it is the sole and necessary medium.

(2) Formal to Substantial

Corrective justice, as we have observed above, is concerned with the distinct aim of presenting private law as a 'justificatory—and thus as a normatively coherent—enterprise'.⁵⁰ It addresses what Weinrib has described as 'the central theoretical question for any liability regime': 'Why is it that the law connects a particular plaintiff with a particular defendant?'⁵¹ While this is an important theoretical question for unjust enrichment, it is certainly not the *only* theoretical question. Matters of actual substance and scope are also important, and necessarily require consideration of matters external to the structure of unjust enrichment. The external account of unjust enrichment is therefore just as important as the internal account.⁵²

Professor Dagan's position exemplifies this reality. He admits that private law should be able to justify the structure of claims, including the identity of the parties, and the type and degree of the liability that is imposed.⁵³ But, he insists, this does not mean that private law has an inner intelligibility decipherable without recourse to social values:⁵⁴

Quite the contrary: the pivotal role of private law in defining our mutual legitimate claims and expectations in our daily interactions undermines the legitimacy of a private law regime that ignores these values. For this reason, the parties' *ex ante* entitlements, from which this correlativity must be measured, are best analysed by reference to our social values.

⁴⁸ Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 19.

⁴⁹ *ibid.*

⁵⁰ See above Weinrib, *The Idea of Private Law* (n 29) and accompanying text.

⁵¹ EJ Weinrib, 'Restoring Restitution' (2005) 91 *Virginia Law Review* 861, 868.

⁵² See generally, S Hedley, 'Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century' in A Robertson and TH Wu (eds), *The Goals of Private Law* (Oxford, Hart, 2009) 195.

⁵³ H Dagan, 'Restitution's Realism' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of The Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 65. See also Dagan (n 3) 813.

⁵⁴ Dagan (n 53) 65–66. See further H Dagan, *The Law and Ethics of Restitution* (Cambridge, Cambridge University Press, 2004) 6–9.

Dagan's realism (or, 'value instrumentalism'⁵⁵) is not irreconcilable with Weinrib's corrective justice, precisely because each is ultimately concerned with a different theoretical question: corrective justice with the justificatory internal structure of private law, and realism with its external social context. Indeed, Dagan does not dismiss corrective justice from his account of private law, but instead presents his theory as a middle ground operating between two extremes: a private law scheme completely devoid of social values on the one hand, and the 'full-blown instrumentalisation of private law'—according to which civil suits are just a mechanism whereby the state authorises private parties to enforce the law—on the other.⁵⁶

The reason why this matters in the present context is that reliance upon 'value' within a corrective justice account of unjust enrichment achieves precisely this middle ground. It transforms the formal, structural, and internal account of unjust enrichment based upon corrective justice into a substantive description of its scope based upon external criteria. This is because value presupposes exchange⁵⁷ and exchange presupposes a system in which exchanges can occur: what we commonly refer to as a 'market'.⁵⁸ Many definitions of market are possible, ranging in purpose and degree of complexity⁵⁹—reflecting the diversity of exchanges that are possible. The number of participants in a market may range from many millions to only a handful, or even just two: a possibility of exchange limited to just one other person is still a possibility of exchange. Adopting a precise and exhaustive definition of markets, however, is not important. What matters is the underlying and common feature that markets embody legitimate exchange. That legitimacy is a product of social, moral, and legal considerations beyond the internal structure of private law and of unjust enrichment.⁶⁰ The key point is that exchange is not internally explicable from within unjust enrichment. It is external to it.

⁵⁵ D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 93–94.

⁵⁶ Dagan, 'The Limited Autonomy of Private Law' (n 3) 812–13.

⁵⁷ Weinrib, 'Correctively Unjust Enrichment' (n 16) 35.

⁵⁸ *ibid* 38: 'Whether a person who gives another something of value has in return received something of equivalent value is an objective question, the answer to which is systemically determined by exchanges within a competitive market.'

⁵⁹ See, eg, D Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford, Oxford University Press, 2010) 3. Dr Satz sets out a functional description of markets as important forms of social and economic organisation, allowing people who are otherwise completely unknown to one another to cooperate together in a system of voluntary exchange. Cf G Hodgson, 'Markets' in TB Veblen and E Mandel (eds), *New Palgrave Dictionary of Economics*, 2nd edn (Basingstoke, Macmillan, 2008): 'A market is defined as an institution through which multiple buyers or multiple sellers recurrently exchange a substantial number of similar commodities of a particular type. Exchanges themselves take place in a framework of law and contract enforceability. Markets involve legal and other rules that help to structure, organize and legitimize exchange transactions.'

⁶⁰ See generally Satz, *Why Some Things Should Not Be for Sale* (n 59); M Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York, Farrar, Straus and Giroux, 2012).

(3) Adjustment to Money

That the external quality of exchange explains the scope of the law of unjust enrichment is evident from repeated insistence that unjust enrichment is concerned with monetary value. Birks, for example, defined unjust enrichment as ‘the law of all events materially identical to the mistaken payment of a non-existent debt.’⁶¹ He then explained that the logic of such liability could not stretch beyond acquisitions measurable in money,⁶² or to the point ‘where adjustment in money is unthinkable.’⁶³ The Supreme Court of Canada has similarly observed, on several occasions, that the law of unjust enrichment takes a ‘straightforward economic approach’ to questions of enrichment and corresponding deprivation,⁶⁴ and that ‘without a benefit ... which can be restored to the donor *in specie* or by money, no recovery lies for unjust enrichment.’⁶⁵

These qualifications to money are important because, money being a universal medium of exchange, adjustment into money provides a yardstick by which we can determine the acceptability of treating claims as part of unjust enrichment. That adjustment in money is ‘unthinkable’ is not a conclusion derived from within unjust enrichment, but is instead derived from external considerations.

Consider again the possible arrangement I might have with my mechanic: if we agree that he will service my car in exchange for me drafting his will, then he may have a claim in unjust enrichment for the value of his services if I fail to perform my side of the bargain. But he will not have a claim (at least in unjust enrichment) if our agreement is for the possession of his child, and I reneged on my side of the bargain after taking receipt. As Birks bluntly put it:⁶⁶

[P]arents turn to courts to recover abducted children ... Although contrary practices obtain in a particularly unpleasant sector of the underworld, there is no situation whatever in which the law allows an individual or a court to turn them into money.

Unjust enrichment does not include the recovery of children because it does not permit their translation into money, and it does not permit their translation into

⁶¹ Birks, *Unjust Enrichment* (n 39) 3.

⁶² *ibid* 51.

⁶³ *ibid* 52.

⁶⁴ See, eg, *Kerr v Baranow, Vanasse v Seguin* [2011] SCC 10, [2011] 1 SCR 269 [37] (Cromwell J); *Garland v Consumers' Gas Co* [2004] SCC 25, [2004] 1 SCR 629 [31] (Iacobucci J); *Peter v Beblow* [1993] 1 SCR 980 (SCC) 990 (McLachlin J).

⁶⁵ *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762 (SCC) 790 (McLachlin J). See further M McInnes, ‘*Hambly v Trott* and the Claimant’s Expense: Professor Birks’ Challenge’ in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Sydney, Thomson Reuters, 2008) 128–129. It is worthwhile observing that this was also essentially the position adopted by Lord Reed in *Benedetti (UKSC)* (n 38) at [96]–[119], and that his Lordship relied upon the Canadian authorities in support (at [118]).

⁶⁶ Birks, *Unjust Enrichment* (n 39) 51.

money because that entails acceptance of markets that are socially, morally, and legally reprehensible (among other things).⁶⁷

Many things can and do influence the legitimacy of exchange, markets, and so the recognition of value. And they can do so in different ways. Consider, for example, the illegitimacy of a purported market for illegal goods and services—such as that for assassins and assassinations. No doubt there are (in darker sectors of society) persons willing and able to offer and obtain such services and so carry out exchanges. But no claim by an assassin (in unjust enrichment or otherwise) could ever succeed against his employer. Unjust enrichment does not recognise value in those situations because they raise deeper social, moral, ethical, and legal concerns. Lord Mansfield's classic statement in *Holman v Johnson* captures this relationship neatly:⁶⁸

No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

Interesting distinctions arise in this context. First, the application of Lord Mansfield's point to unjust enrichment varies depending upon which side of the illegal or immoral act one stands. In *Chapman v Haley*,⁶⁹ for example, the plaintiff had paid the defendant \$300 for ten-fold that amount in counterfeit currency. The defendant failed to deliver. The court held that the \$300 paid to the defendant could not be recovered: the law would not aid the recovery of money paid for an illegal purpose. The \$300 clearly enriched the defendant; the recovery of money is the archetypal unjust enrichment claim. But overriding policy considerations defeated it. If the facts had been reversed, however, and a claim brought by the defendant for the plaintiff's failure to pay upon delivery of the counterfeit currency, dismissal of the claim could also have been on the basis that receipt of the counterfeit money was not enriching in the sense required by law. The policy against illegal and immoral conduct would bite at the point of recognising value: counterfeit currency, assassinations, illicit substances, slave labour, and other immoral and illegal enterprises may all have value within black markets that exist within the underworld, but recognising the existence of these markets within the context of legal claims is repugnant to social, moral, and legal concerns. Without

⁶⁷ In this respect it is noteworthy that, with different social norms, comes a different ambit of private law claims. Roman law, for example, treated ownership of slaves (including children) as acceptable. Restitutionary claims in respect of slaves and the value of slave labour were therefore possible. See, eg, *The Digest of Justinian* (Alan Watson tr, Pennsylvania, University of Pennsylvania Press, 1998) 12.6.65.8.

⁶⁸ *Holman v Johnson* (1775) 1 Cowp 341, 98 ER 1120 (KB) 343.

⁶⁹ *Chapman v Haley* 117 Ky 1004, 80 SW 190 (1904) (CA Kent).

a recognised market, there can be no exchange, without exchange there can be no value, and without value there can be no unjust enrichment.

A second distinction lies in the reasons why a market may be considered repugnant. On the one hand, it may be that the particular object of exchange is reprehensible or offensive, as in the case of counterfeit currency, assassinations, illicit substances, and slave labour. On the other hand, the object of exchange may be inherently good, but its marketability and exchange reprehensible. No one denies that children are cherished in society, but the idea of a market for them attracts significant disapprobation. And each of us is familiar with the utility of our kidneys, but their trade under market conditions remains a social and ethical taboo. Indeed, the underlying complexity of the policies that inhibit markets can be illustrated well by private law claims involving human tissues.⁷⁰ In *Moore v Regents of the University of California*,⁷¹ for example, doctors developed a multi-million dollar cell line obtained from Mr Moore's tissue without his informed consent. A majority of the court held that liability of the doctors in conversion could not extend to the gains embodied in the cell line because that would hinder socially important medical research, implicating policy concerns far removed from the traditional private disputes in which the law of conversion had developed.⁷² The same policies would apply, *mutatis mutandis* it seems, to a claim in unjust enrichment.⁷³ The point is not that human tissue is inherently objectionable, but that there are strong social and ethical objections to the legal recognition of markets for its exchange.

This is not to suggest that reprehensibility and illegality are the only bases for denying the existence of markets. A further possibility is that the particular thing in question may be so subjective in nature that any attempt to conceive of a market in respect of it is simply confounding or nonsensical.⁷⁴ Love and other emotions are one example: they are so personal that they cannot be reliably measured, detected, or understood so as to be susceptible to exchange, markets, and market analysis. The most that can be said of love and other emotions is that they influence individual preference, utility, and choice that drive demand for things that are susceptible to exchange. They are not, however, susceptible to exchange in and of

⁷⁰ For more detailed discussion see, eg, Satz, *Why Some Things Should Not Be for Sale* (n 59) Ch 9; R Hardcastle, *Law and the Human Body* (Oxford, Hart, 2007); L Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue' (2002) 22 *Legal Studies* 102. See further MJ Radin, *Contested Commodities* (Cambridge, Harvard University Press, 1996).

⁷¹ *Moore v Regents of University of California* 51 Cal 3d 120, 793 P 2d 479 (1990) (SC Calif).

⁷² *ibid* 135–36, 143–45 (Panelli J; Lucas CJ, Eagleson and Kennard JJ concurring).

⁷³ See further Dagan, *The Law and Ethics of Restitution* (n 54) 240–45; M Traynor, 'The Unjust Enrichment Claim in *Moore v Regents*' (1990) 9 *Biotechnology Law Report* 240. Cf *Greenberg v Miami Children's Hospital Research Institute Inc* 264 F Supp 2d 1064 (2003) (USDC, Southern District of Florida) where the Court declined a motion to dismiss a claim in unjust enrichment brought by the donors of human tissue and fluids against the doctors who had received those materials and used them to isolate a gene causing disease, and then obtained a patent and attempted to license it. For criticism and comment, see American Law Institute, *Restatement of Law Third: Restitution and Unjust Enrichment* (2012) ('*Third Restatement*') § 11 comment (b).

⁷⁴ See further the examples considered above at p 19 and below at pp 50–51.

themselves. It may even be the case that, being so personal in nature, attempts to market something like love would be met with disapprobation similar to attempts to market children and body parts. Irrespective of how one reaches the conclusion, however, the ultimate point is the same: without a market, there can be no exchange, without exchange there can be no value, and without value there can be no unjust enrichment.

(D) What Interest Engages Unjust Enrichment?

The aim of this chapter is to explain the interest that engages unjust enrichment: why does unjust enrichment bite in some cases, but not in others? Equipped with an understanding of the corrective justice foundations of unjust enrichment, and the important roles played by value and exchange within that scheme, we are now in a better position to confront this issue. As a penultimate step, however, it is useful to explain why certain other concepts do not provide the right answer. Three of these are considered below.

First, though it is a linchpin concept within unjust enrichment, the relevant interest is not ‘value’. This is because value is an attribute of things, not of people. People do not ‘own’ or ‘have’ value: at most, they have the ability to realise the value of things through the mechanism of exchange.⁷⁵

Secondly, it is unhelpful to describe the relevant interest as ‘wealth’. Wealth is an abstract conception of someone’s net worth, taking into account both their assets and liabilities.⁷⁶ It is ‘an abstract fund netting tangible and intangible assets held against valuable obligations owed to others.’⁷⁷ So, unlike value, wealth *is* an attribute of people and so we can sensibly speak of unjust enrichment as interested by wealth. The problem, however, is that ‘wealth’ does not go far enough. If unjust enrichment were concerned only with the protection of a person’s wealth, then the performance and receipt of services could not form the subject matter of claims. That is not the law.⁷⁸ Nor is it conceptually or theoretically consistent for claims in respect of services to be so excluded from unjust enrichment. Services have value because they are capable of being compared and exchanged in a market, but they do not comprise a person’s wealth. Lodder gives the example of the receipt of a valuable haircut which, of itself, does not alter the defendant’s stock of rights or assets.⁷⁹ Nor, on the other side of the barber’s chair, is it sensible to talk of the barber as ‘wealthy’ by virtue of his ability to cut hair. The mere ability to perform a service is not part of a person’s wealth: nothing accrues to the

⁷⁵ Penner, ‘Value, Property and Unjust Enrichment’ (n 34) 308–09.

⁷⁶ Birks, *Unjust Enrichment* (n 39) 69; Chambers, ‘Two Kinds of Enrichment’ (n 34) 250–52.

⁷⁷ Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 32.

⁷⁸ See, eg, *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752.

⁷⁹ Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 33.

barber until he actually performs and either has money in his hands, or at least a debt owed to him by the customer.⁸⁰ Unjust enrichment is not wholly engaged by ‘wealth’ because that concept does not completely align with the concepts of value and exchange.

A third possibility has been suggested by Dr Webb, who argues that ‘a sizeable chunk’ of unjust enrichment claims can be explained on the basis that the law is concerned with the claimant’s exclusive entitlement to the benefit received by the defendant.⁸¹ As he explains:⁸²

The law sets down individuals’ entitlements to items and sources of wealth. Sometimes the law allocates such items to a person or group, giving a right to the sole enjoyment of that wealth and with it a right to exclude others from its enjoyment. At other times, the law makes no such allocation. Where no such exclusive entitlement is granted, any person is free to share in it, so far as he is able to, but without any right that others should not similarly benefit. Where, by contrast, the claimant can show that, at the very least *vis-à-vis* the defendant, he was exclusively entitled to the asset or benefit the defendant received, this then gives us a reason to allow the claimant to recover that asset or benefit from the defendant.

The difficulties with this approach mirror those with respect to ‘wealth’. Indeed, wealth appears to be an inherent feature of Webb’s thesis as set out above. Exclusive entitlement, however, is too narrow a concept. It does not fit with valuable services, which cannot exist in any meaningful sense prior to their performance. It is nonsensical to speak of people having an exclusive entitlement to their own services. The most that can be said is that people have an exclusive entitlement to decide whether or not they perform a service, which is another way of saying they have the freedom to perform or not. If that is correct, however, then it makes more sense to describe the relevant interest engaged in terms of some sort of personal interest or freedom, rather than ‘wealth’ or ‘exclusive entitlement’.

(1) The Exchange Capacity

The challenge posed by the task of identifying the interest engaged by unjust enrichment is to frame a personal attribute that fits the logic and framework of corrective justice, value, and exchange. To do so, however, we need look no further than the innards of value and exchange. Value, as we have seen, presupposes a system of exchange. A system of exchange requires participants and, importantly, participants free to engage, and capable of engaging, in that system. It follows that the interest protected by unjust enrichment claims is one of exchange; a freedom

⁸⁰ See further Penner, ‘Value, Property and Unjust Enrichment’ (n 34) 311.

⁸¹ Webb, ‘Property, Unjust Enrichment, and Defective Transfers’ (n 29) 351–52. See also J Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford, Oxford University Press, 2006) 424–26.

⁸² Webb, ‘Property, Unjust Enrichment, and Defective Transfers’ (n 29) 351.

to engage in the systems of exchange that underpin the concept of value.⁸³ In other words, the interest protected is an exchange freedom or ‘exchange capacity’.

This immediately begs two further questions. The first is: exchange of what? The answer lies in recalling the external quality of value and of systems of exchange. Unjust enrichment is engaged by the capacity to exchange those things for which there exists a recognised system of exchange. This is not bootstrap reasoning. It reflects the reality that value is the product of judgements external from the structure of unjust enrichment.⁸⁴

To keep matters simple, we could express the exchange capacity as the freedom to exchange ‘assets, liabilities, and services’. But we should not allow that to excite further definitional controversy as to what is and what is not an ‘asset’, a ‘liability’, or a ‘service’. These are mere labels, and do not provide substantial insight into what is and what is not part of unjust enrichment. What matters is whether a system of exchange exists for the relevant thing in question, not whether that thing can be described as an ‘asset’, ‘liability’, or ‘service’, or something else completely. This, ultimately, is not a legal question but a social and economic one.

A useful example is the time value of money: it is not an ‘asset’ or even a ‘right’ in any strict sense of those terms. The highest that can be said is that reflects an incident of the property rights inhering in the principal sum. It is probably *sui generis* in this respect, but that does not mean it cannot be subjected to analysis in unjust enrichment terms. Indeed, it has been so analysed by the House of Lords.⁸⁵ This follows the logic of the market: having money for a period of time is something of value in addition to the principal sum. It has a price reflecting a system of exchange, which rests upon the exchange capacity, and engages unjust enrichment analysis. The advantage of conceiving unjust enrichment claims in exchange capacity terms is that it cuts through heterogeneous categories (such as assets, services, and use value) to present a unified picture of the law, which is precisely the point of unjust enrichment scholarship in the first place.⁸⁶

The second question that arises from the identification of the exchange capacity is: what aspects of exchange are engaged by unjust enrichment? Exchange is necessarily a two-sided concept, encompassing both the giving and receipt of the thing exchanged. These two sides conform to the bilateral quality of corrective

⁸³ Cf J McGhee, ‘The Nature of the Enrichment Enquiry’ in J Edelman and S Degeling (eds), *Unjust Enrichment in Commercial Law* (Sydney, Thomson Reuters, 2008) 90–92. The exchange capacity also features prominently as a reinforcing concept in the *Third Restatement* (n 73). At various points within the Restatement, the protection that is inherent within unjust enrichment is reinforced by the idea that liability will not extend to cases of ‘forced exchange’. See, eg, *Third Restatement* (n 73) §2(4) comment (e), 9 comment (b), §10 comment (a); 50(3). See also *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27, (2008) 232 CLR 635, [80] observing the statement by Bowen LJ in *Falcke v Scottish Imperial Insurance Co* (1887) LR 34 Ch D 234 (CA), 248: ‘Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.’

⁸⁴ See above pp 30–35.

⁸⁵ *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [29] (Lord Hope).

⁸⁶ See above pp 1–11.

justice, and unjust enrichment is the concern of both. As we shall see in chapters two and three: ‘enrichment’ concerns receipt by the defendant, while ‘loss’ concerns giving by the claimant. Furthermore, many important aspects of unjust enrichment are explicable according to a theory of unjust enrichment based upon the exchange capacity, including: the change of position defence, the quantum of restitution, the correct approach to so-called subjective devaluation and revaluation, and the rejection of the passing on defence. And though it is beyond the stated scope of this book, because the exchange capacity is predicated upon a freedom to exercise that interest, it directs our attention to the necessity of a defect in the exercise of that freedom for a claim to succeed; that is, to the ‘unjust factor’ inquiry within unjust enrichment.

(2) Free Will

The exchange capacity is one manifestation of free will, which, as we have observed, has been advanced by Weinrib as the underlying rationale of liability on a corrective justice theory of unjust enrichment based upon Kant’s philosophy of right. We have also observed, however, that free will is pitched at too high a level of abstraction and generality to explain the subject matter of claims.⁸⁷ The exchange capacity overcomes this problem because it reduces the general rationale to more concise terms that are particular to unjust enrichment, surpassing the limitations inherent in justifying it by free will alone. This is because ‘exchange’ externalises the analysis of claims and provides substance to the structure of unjust enrichment.

Moreover, that the exchange capacity is one manifestation of the larger freedom of will concept is important to how we situate unjust enrichment relative to other areas of the private law of obligations that are also internally justifiable according to corrective justice. Free will can be manifested in several forms other than the exchange capacity, including personal integrity, proprietary entitlement, and contractual entitlement.⁸⁸ But it is only the exchange capacity that engages unjust enrichment as distinct from tort or contract. For example, suppose, on the one hand, that D commits battery by pushing C to the ground. Corrective justice is capable of explaining why D is liable to provide reparation in tort for C’s injuries as follows.⁸⁹ Prior to D’s battery, C’s free will was manifested in the form of personal integrity; that personal integrity was the embodiment of C’s Kantian right, correlative to a duty upon D not to interfere with it. D’s battery violated C’s personal integrity and, with the materialisation of injury, the only way left for D to satisfy his obligation of non-interference is to undo its effects.⁹⁰ Suppose then,

⁸⁷ See above p 24.

⁸⁸ See generally Weinrib, *The Idea of Private Law* (n 7) 127–28, 133–44.

⁸⁹ *ibid* 135.

⁹⁰ Klimchuk, ‘The Normative Foundations of Unjust Enrichment’ (n 55) 87.

on the other hand, that rather than C suffering injury from D's battery he was left unscathed by his fall, though D experienced great amusement from the sight of C's falling to the ground and clambering back to his feet. Does C have a claim in unjust enrichment reflective of D's enjoyment? The answer is no: D's amusement is not a benefit in the economic or pecuniary sense required by unjust enrichment. Personal amusement may influence individual utility, and therefore also influence demand for something within a market. But the fact that utility can be derived from something does not mean there is a market for it—as cases involving children, body parts, and illegal substances demonstrate.⁹¹

The exclusion of non-economic or non-pecuniary benefits from the scope of unjust enrichment is also expressive of a more basal point. If a benefit cannot be expressed in economic or pecuniary terms, then that indicates that there is no system of exchange for that benefit. No system of exchange means no exchange capacity, and without an exchange capacity, unjust enrichment has nothing upon which to bite.

Herein lies a possible basis of theoretical distinction between claims based upon unjust enrichment and those based upon tort or contract. The reason why economic and pecuniary measurement matters so much in unjust enrichment, but less so in contract,⁹² and even less so in tort,⁹³ is that each kind of claim is concerned with a different manifestation of the overarching free will interest: tort with what we might call 'personal and proprietary integrity'; contract with what we might call freedom to contract or contractual entitlement; and unjust enrichment with the exchange capacity.⁹⁴ Only in the last case is economic and pecuniary expression essential, that being the means by which we recognise a system of exchange, and with that system the necessary exchange capacity. This does not mean that economic and pecuniary interests are the exclusive domain of unjust enrichment. Harm to the person, damage to property, and loss of contractual entitlement are all regularly measured in economic and pecuniary terms, but each represents the violation of a theoretically different manifestation of free will.

It is not the intention of this book to identify exactly what the theoretical bases of each of contract and tort are, and thereafter neatly and precisely to cordon off the theoretical boundaries of each from the other, as well as from unjust

⁹¹ See above pp 32–35.

⁹² Non-pecuniary damages (such as for mental distress, damages to reputation, and loss of enjoyment) are available in contract in limited circumstances. See, eg, *Addis v Gramophone Co* [1909] AC 488 (HL); *Jarvis v Swan's Tours* [1973] QB 233 (CA); *Watts v Morrow* [1991] 1 All ER 937 (CA); *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL); *Farley v Skinner (No 2)* [2001] UKHL 49, [2002] 2 AC 732. Though these are exceptional, the fact that they are possible is illustrative of the point that the ambit of contractual damages is different from that of liability for unjust enrichment.

⁹³ Several torts protect non-pecuniary interests, including those for physical, mental, and reputational harm to the person.

⁹⁴ See further Weinrib, *The Idea of Private Law* (n 7) 127–29.

enrichment. Nor is it necessarily desirable (or even possible) to do so.⁹⁵ The point, instead, is to identify a theoretical and normative framework in which to situate unjust enrichment as a useful legal concept. Understood in this way, there is significant potential for doctrinal overlap between unjust enrichment and other concepts precisely because there is significant theoretical overlap. The recognition and protection of property in tort, for example, includes rights in respect of alienation and exchange. And if contract is conceived, for example, as facilitating the exercise of the exchange capacity, then the boundary between unjust enrichment and contract will be particularly blurred at times. Just as contract facilitates the free engagement of the exchange capacity, unjust enrichment alleviates its defective engagement. Contract and unjust enrichment may, in this way, be two sides of one conceptual coin within private law.⁹⁶

A single act of interference may thus cut across several manifestations of free will.⁹⁷ It is, therefore, unsurprising to find cases in which conceptually different claims may be available on the same facts. As Birks explained, restitution is multi-causal,⁹⁸ and there is a difference between claims for restitution based upon unjust enrichment and claims for restitution based upon the commission of a wrong.⁹⁹ Furthermore, the different claims can arise on one set of facts. *Edwards v Lee's Administrators* was one such case.¹⁰⁰ The claimant's estate was awarded one-third of the profits made by the defendant from exhibiting a cave, one-third of which extended under the claimant's land. This result can be explained as restitution for the wrong of trespass: the defendant's profits embodied the violation of the claimant's proprietary integrity, founding a claim in tort for restitution of the gain.¹⁰¹ Alternatively, the case is explicable as one of restitution for unjust enrichment: the defendant's profits embodied the violation of the claimant's exchange capacity; that is, the freedom to permit the defendant or someone else to use the cave in

⁹⁵ See generally S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge, Cambridge University Press, 2003) Chs 1 and 11; S Waddams, 'Classification of Private Law in Relation to Historical Evidence' (2003) 6 *Current Legal Issues* 265. See also S Hedley, 'The Shock of the Old: Interpretivism in Obligations' in CEF Rickett and RB Grantham (eds), *Structure and Justification in Private Law* (Oxford, Hart 2008) 213; W Gummow, 'Unjust Enrichment, Restitution and Proprietary Remedies' in PD Finn (ed), *Essays on Restitution* (Sydney, Lawbook Co, 1990) 49–52; R Goff, 'Appendix: The Search for Principle' in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord of Chieveley* (Oxford, Oxford University Press, 1999) 318.

⁹⁶ See further *Third Restatement* (n 73) 479.

⁹⁷ Klimchuk, 'The Normative Foundations of Unjust Enrichment' (n 55) 83–84.

⁹⁸ Birks, *Unjust Enrichment* (n 39) 25–28.

⁹⁹ *Sempra Metals* (n 85) [116] (Lord Nicholls), [230]–[231] (Lord Mance). See also Burrows, *The Law of Restitution* (n 1) 9–12. It should not be forgotten, however, that restitution can follow other events that are neither 'wrong' nor 'unjust enrichment'. As Birks explained, 'If ... I ask you to lend me £50, the loan gives you a restitutionary right which is by origin contractual. The contract of loan obliges me to give up value received': Birks, *Unjust Enrichment* (n 39) 25.

¹⁰⁰ *Edwards v Lee's Administrators* 96 SW 2d 1028 (1936) (CA Kent). See further Birks, *Unjust Enrichment* (n 39) 84.

¹⁰¹ Weinrib, *The Idea of Private Law* (n 7) 142.

exchange for something else (represented in that case by money as the universal medium of exchange).¹⁰²

Proprietary torts, like the trespass in *Edwards v Lee's Administrators*, tend to muddy the relationship between unjust enrichment and other claims precisely because the exchange capacity engaging unjust enrichment is also bound up in notions of proprietary integrity. The problem is an acute one given English law's reluctance to award restitution for wrongs in non-proprietary torts cases.¹⁰³ Even if, however, restitution were generally available as a remedy in non-proprietary torts cases (such as for assault, defamation, and false imprisonment) it seems clear, on the approach to unjust enrichment advocated in this book, that dual analysis would not be possible. This is because the kinds of interest protected by those torts and other wrongful conduct are not susceptible to legitimate exchange.¹⁰⁴ An extreme example of this point arose in *Rosenfeldt v Olson*,¹⁰⁵ where a convicted child murderer (of eleven children) had offered to lead the police to the bodies in return for the payment of \$100,000 to his wife and child. The police paid the money to a trustee, and the parents of the murdered children subsequently brought a claim in respect of it. The British Columbia Court of Appeal held that no claim was available because the parents had not suffered a 'corresponding deprivation' in respect of the money paid. The parents had suffered the terrible loss of their children, but that did not entail an infringement of their exchange capacity.¹⁰⁶ The most that could be said of the \$100,000 is that it was the product of wrongdoing, and therefore should (contrary to the Court's holding) have been paid over to the parents standing in the position of the murdered children's estate.¹⁰⁷

¹⁰² *Vincent v Lake Erie Transport Company* 109 Minn 456, 124 NW 221 (1910) (SC Minn) is another worthwhile case to consider in this context. The defendant's ship was moored to plaintiff's dock for the purposes of unloading cargo. A violent storm developed and so, despite the unloading being complete, the master maintained the ship's moorings to a dock to preserve her. During the storm the ship was constantly lifted and thrown against the dock, causing damage. *Third Restatement* (n 73) (at §40, illustration 9) suggests that a defence of necessity precluded a finding of tortious liability, thereby limiting restitution to the rental value plus costs of repair. Cf Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (n 95) 86–87.

¹⁰³ See generally *Stoke-on-Trent City Council v W&J Wass Ltd* [1988] 1 WLR 1406 (CA); *Halifax Building Society v Thomas* [1996] Ch 217 (CA); *Forsyth-Grant v Allen* [2008] EWCA Civ 505; *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390.

¹⁰⁴ See above pp 33–35.

¹⁰⁵ *Rosenfeldt v Olson* (1986) 25 DLR (4th) 472 (BCCA).

¹⁰⁶ See also *Brennan v Gardy Estate* [2011] BCSC 1337, where the plaintiff had cohabitated with his friend and provided domestic services prior to the latter's death. In a claim against the friend's estate, the plaintiff argued that he had suffered a 'corresponding deprivation' in the form of harm to his health brought about by living in a mouldy basement and with a furnace that leaked carbon monoxide. The relevance of this harm was rejected by the Court: the corresponding deprivation had to be rooted in an economic analysis, in that case satisfied on the basis of the plaintiff's unremunerated services (at [24]–[26]).

¹⁰⁷ See further G Jones, *Restitution in Public and Private Law* (London, Sweet & Maxwell, 1991) 69–70. Cf *Third Restatement* (n 73) §45, illustration 20, note *i*.

Two important points follow recognition of the potential for overlap. First, the reason why restitution for wrongdoing and restitution for unjust enrichment can be described as ‘in the alternative’ is that each responds to a different manifestation of the same underlying interest: the claimant’s freedom of will as understood within the scheme of private law justified by corrective justice and Kant’s philosophy of right. Secondly, the theoretical basis for dual analysis can explain why, in certain cases, dual analysis ought not be possible. *Rosenfeldt v Olson* is a clear (and extreme) example; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*¹⁰⁸ is another example, perhaps less obviously. The defendant had built houses on its land in breach of a restrictive covenant, and the claimant estate company sought a mandatory injunction that they should be demolished, which was refused on grounds of wastefulness, though damages in lieu were awarded. Those damages were calculated as the sum of money that might reasonably have been demanded by the claimant from the defendant ‘as a *quid pro quo* for relaxing the covenant’, which Brightman J assessed to be five per cent of the defendant’s anticipated profits.¹⁰⁹ The basis of such ‘*Wrotham Park* damages’—whether they be compensatory or restitutionary—is a matter of ongoing controversy in judicial opinion¹¹⁰ and academic commentary.¹¹¹ Nor is it clear whether, within the restitutionary sphere, the particular award in *Wrotham Park* can be explained on an unjust enrichment basis as distinct from a wrongs basis. On the one hand, as the primary judge observed, the claimant owed obligations to existing residents that prevented it from relaxing the covenant.¹¹² It was not free to exchange the covenant—in the sense of relaxing it in exchange for something else. Without an exchange capacity, there was no possibility of dual analysis in unjust enrichment. On the other hand, adopting what might loosely be described as an ‘efficient breach’ theory of contract, one could say that the defendant was free to exchange the covenant, albeit with the attendance of certain consequences against their favour *vis-à-vis* the covenant holders.¹¹³ What matters for the purposes of this book is that, whichever view we take, it is on

¹⁰⁸ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).

¹⁰⁹ *ibid* 815–816.

¹¹⁰ See, eg, *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830; *WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445.

¹¹¹ See, eg, Burrows, *The Law of Restitution* (n 1) 635–40; T Cutts, ‘*Wrotham Park* Damages: Compensation, Restitution or a Substitute for the Value of the Infringement of the Right?’ [2010] *Lloyd’s Maritime and Commercial Law Quarterly* 215; J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford, Hart, 2002) 99–102; R Sharpe and S Waddams, ‘Damages for Lost Opportunity to Bargain’ (1982) 2 *Oxford Journal of Legal Studies* 290.

¹¹² *Wrotham Park* (n 108) 815.

¹¹³ This complexity resonates with the earlier observation that factors external to the structure of unjust enrichment claims influence the scope of their application. A further possible argument is that the treatment of breach of contract (and the related intentional tort of inducing breach of contract) as a civil wrong indicates that such a freedom is illegitimate for exchange purposes, and so excludes characterisation of the case as one based upon unjust enrichment.

the analysis of the claimant's exchange capacity that the characterisation of the case as one of unjust enrichment stands or falls.

(3) Quantification

The exchange capacity is not quantifiable in its own terms. The defendant who is enriched does not have 'more' exchange capacity, and a claimant who suffers a loss does not have 'less' exchange capacity. That is not how the exchange capacity works. Nor has it been the aim of this chapter to suggest that it does. We observed earlier that corrective justice is pitched at too high a level of abstraction to adjudge which situations are within the law of unjust enrichment.¹¹⁴ The aim of this chapter has been to shift the analysis down a level to the point where that adjudication is possible, and it has been proposed that it is helpful to conceptualise unjust enrichment as consisting of relevantly connected disruptions to each party's exchange capacity.

However, this still tells us nothing about how claims are to be quantified. For that we must shift down a further level in abstraction to 'value'. Value is the quantified expression of exchange systems and so of the exchange capacity. Disruptions to a party's exchange capacity are quantified by value determined according to the relevant system of exchange. In short, quantification follows the logic of exchange, rather than the strict or abstract logic of law.

(E) The Exchange Capacity and Liability for Unjust Enrichment

If we were to plot the movements in abstraction that have occurred within this chapter, our starting point would be the highly abstract arithmetic equality set out by Aristotle's theory of corrective justice. Relying on the extensive contributions of Weinrib, we could then drop down to the less abstract free will and Kantian self-determining agency. From there we would then drop further to the exchange capacity that is particular to unjust enrichment, and finally to the concept of value according to which claims are actually quantified. The main contribution of this chapter, therefore, has been to identify the exchange capacity as the necessary step in reducing claims from highly abstract concepts such as corrective justice and free will, to the quantifiable concept of value.

As we shall see in chapters two and three, the exchange capacity is, in this way, crucial to correctly defining and quantifying enrichment and loss within unjust enrichment. Enrichment and loss are the relevant disruptions to each of the

¹¹⁴ See above pp 24–25.

defendant's and the claimant's positions respectively. And while the experiences of enrichment and loss are different (gaining is patently not the same as losing), that does not mean that the two concepts are isolated or independent from each other. They are not; they are closely related because they reflect the same interest: the exchange capacity. Unjust enrichment defendants and claimants are actors within the one system of exchange, and each has an exchange capacity within that system that is engaged when one is enriched at the expense of the other.

As we shall see later, in Part II, this close relationship between enrichment and loss necessitates a broad test for attribution in unjust enrichment that is supported by the case law: the 'but for' counterfactual between enrichment and loss. That the test for attribution in unjust enrichment is broad should not be surprising in the light of the breadth of the exchange capacity and the free will that guides it.

Importantly though, a broad test of attribution in unjust enrichment does *not* equate with (or lead to) a general expansion of liability in unjust enrichment. Attribution in unjust enrichment is not liability in unjust enrichment. As explained in the Introduction to this book, it is one part of a larger methodological scheme for understanding unjust enrichment cases. Neither the exchange capacity nor the rules of attribution are dogmatic formulae that rule the scope of unjust enrichment liability. Indeed, it is a core thesis of this book that there are matters beyond the issue of attribution that qualify liability in unjust enrichment cases. As we shall see in Part III, some of these may be explicable with reference to the exchange capacity, though others may not be. And whatever way they are explained, it may even be that clear and independent recognition of these qualifications—that is, separated from the broad test of attribution—ultimately leads to a general contraction of liability in unjust enrichment as cases are decided with a concern that unjust enrichment not stultify or undermine existing principles of law.

(F) The Remedy for Unjust Enrichment

As explained in the Introduction, this book is not about the nature of the remedies for unjust enrichment. A great deal has been written elsewhere about that issue and, in particular, the extent to which specific restitution should be available against a defendant who has been enriched at the expense of the claimant.¹¹⁵ The issue is notoriously difficult, and it may ultimately turn out that the dilemma is incapable of resolution according to a single analytical framework. It would

¹¹⁵ This book prefers the terminology of 'specific' restitution to that of 'proprietary' restitution because the latter fails to capture the variety of legal relief and mechanisms capable of being understood as restitutionary in character. These include trusts, rescission, rectification, subrogation and equitable liens. See Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 64. See also E Bant and M Bryan, 'A Model of Proprietary Remedies' in E Bant and M Bryan (eds), *Principles of Proprietary Remedies* (Sydney, Thomson Reuters, 2013) 212.

therefore be naïve for a book of limited size and scope as this to attempt to answer it definitively.

At the same time, however, it is impossible to ignore certain ramifications for the remedy question that follow the approach to attribution advanced by this book. Important consequences follow, in particular, from recognition that the exchange capacity, informed by considerations of corrective justice, provides the normative basis of unjust enrichment. Dr Harding has neatly explained the relationship between the two points:¹¹⁶

[W]hat is required by a norm of corrective justice depends not only on the constituents of that norm—*viz* the specification of an impugned transaction, and the demand to ‘allocate back’ by subtractive and additive means so as to cancel the transaction—but also on the reasons why the norm has the constituents in question, including the reasons in light of which the transaction is impugned. ... Thus, where a norm of corrective justice stipulates restitution of a mistaken payment, whether or not restitution should take the form of a personal order or a constructive trust depends in part on the reasons for worrying about mistaken payments.

(1) Personal Restitution

Harding goes on to suggest (as though to foreshadow the arguments presented in this chapter) that if the rationale for restitution of mistaken payments is based upon ‘the value of people exercising autonomy in respect of money understood, not as an asset in specie, but rather as a medium of exchange’ then proprietary or specific restitution may do more than is required by the norm of corrective justice existing at large.¹¹⁷ Similarly, Edelman J (writing extra-judicially) has remarked that unjust enrichment is not wide enough to countenance the remedy of a constructive trust:¹¹⁸

I had previously held [the view that a trust should be created as a response to unjust enrichment where a person makes a mistaken payment of money to another]. But it is not correct. Whether or not a trust should arise for some other reason, no case has ever yet recognised that such a trust arises as a consequence of unjust enrichment. ... [Such an approach] would involve an unjustified re-interpretation of earlier cases to be cases of unjust enrichment. The law of unjust enrichment is not that broad. The rationale of restitution of an unjust enrichment—to reverse a transfer of value—is perfectly satisfied by an order that the recipient repay what was received. The best way to reverse a transfer of money is to order that the recipient repay money.

This is the outlook preferred by this book: personal restitution, being an order that the defendant pay the claimant a sum of money, is the remedy that should

¹¹⁶ M Harding, ‘Constructive Trusts and Distributive Justice’ in E Bant and M Bryan (eds), *Principles of Proprietary Remedies* (Sydney, Thomson Reuters, 2013) [2.20], referring also to Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (n 10).

¹¹⁷ Harding, ‘Constructive Trusts and Distributive Justice’ (n 116) [2.20].

¹¹⁸ J Edelman, ‘Restitution of Rights’ in E Bant and M Bryan (eds), *Principles of Proprietary Remedies* (Sydney, Thomson Reuters, 2013) [3.90].

generally follow a finding of unjust enrichment.¹¹⁹ Such an award restores each party's exchange capacity to its pre-unjust enrichment position. As chapter two explains, a defendant is enriched when and insofar as he receives something valuable that he does not have to pay for, and as chapter three explains, a claimant suffers a loss when and insofar as they lose the opportunity to charge for something valuable. Personal restitution eliminates the enrichment and the loss by ordering the defendant to make the missing payment.¹²⁰ An order that does more than this is necessarily based upon considerations external to corrective justice, the exchange capacity, and unjust enrichment as explained by this book. So it is with specific restitution: if the underlying unity upon which unjust enrichment cases are based is the exchange capacity, then the analysis which that unity supports runs out before we get to a specific remedy.¹²¹

(2) Specific Restitution

It would, however, take matters too far to suggest that specific restitution is *never* possible as a response to unjust enrichment. At least two points weigh against such a hard-line approach. First, though limited unjust enrichment analysis may be incapable of supporting a remedy beyond personal restitution, there is no reason why an expanded analysis, reliant upon further considerations, cannot do so. Secondly, the wholesale rejection of specific remedies for unjust enrichment jars with a number of cases that have explicitly relied upon unjust enrichment to justify such remedies.

(a) *Additional Considerations*

It has already been observed that unjust enrichment is commonly analysed according to five questions:¹²² (1) Was the defendant enriched? (2) Was it at the expense of the claimant? (3) Was there an unjust factor? (4) Is the remedy personal or specific? (5) Are there any defences? The existence of the fourth question in particular leaves analytical space for a consideration of matters that may influence the nature of the appropriate remedy, beyond the inquiry into whether the defendant has been enriched at the expense of the claimant in circumstances that are unjust.¹²³ It is not the intention of this book to list those matters exhaustively, nor is it to

¹¹⁹ See further *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 [55] (Lord Clarke), [81] (Lord Neuberger).

¹²⁰ *Benedetti (UKSC)* (n 38) [100] (Lord Reed).

¹²¹ Indeed, if restitution of rights were achieved by the imposition of trust following unjust enrichment, that remedy would exceed the goal of restoring the parties to their pre-unjust enrichment position insofar as the subject matter of the trust would be new rights conditioned upon different obligations to those existing previously. See Edelman, 'Restitution of Rights' (n 118) [3.80].

¹²² See above p 2.

¹²³ See below p 48.

suggest a means of reducing them to a single line of inquiry. Rather, the point is to show that such an outlook has a degree of support, and so the possibility of specific remedies cannot be completely cut off by the exchange capacity view of unjust enrichment.

A key situation to consider is that of a trust arising in respect of money paid by mistake. In *Chase Manhattan*¹²⁴ the plaintiff New York bank was instructed to pay two million dollars to another New York bank for the account of the defendant, which carried on business in London. The money was paid, but then a second payment was made in error. The defendant was later wound up. The plaintiff sought a declaration that the defendants received the moneys as trustees, thus entitling the plaintiff to trace the mistaken payment and recover its traceable proceeds. Goulding J held that the plaintiff could, in principle, trace the money in equity on the basis that a party who pays money by mistake retains a continuing proprietary interest in that money and the conscience of the recipient is subjected to a fiduciary duty to respect it.¹²⁵ This reasoning was rejected by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*.¹²⁶ His Lordship did, however, agree with the *outcome* in *Chase Manhattan* on the basis that the defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys, and that the retention of the moneys after that time could well have given rise to a constructive trust.¹²⁷ The acquisition of knowledge of the mistake engaged the equitable jurisdiction to award proprietary relief.

Another illustrative case is *Neste Oy v Lloyds Bank plc*.¹²⁸ The plaintiffs were the owners of three ships, and from time to time employed a company (PSL) as their agents when one of their vessels entered a UK port. Matters were arranged so that the plaintiffs transferred funds into PSL's account at the defendant bank as an agency fee and to enable it to meet necessary expenses associated with the ships. Over several weeks, the parties entered into six such transactions. Shortly afterwards, the directors of the corporate group to which PSL belonged agreed that the group and its companies could not meet credit as it fell due and should therefore cease trading immediately, and receivers were appointed. The plaintiffs (through their bank) sought to cancel the sixth payment and to get a refund of the amount by which PSL's account had been credited, but it was too late. When the defendant later sought to set-off the money in PSL's account against the debts owed to it, the plaintiffs contended that sums received by PSL into that account were not available for set-off because they were held by PSL on trust. Bingham J held that a trust arose in respect of the sixth payment (and only the sixth payment) because it had been made at a time when the corporate group had already resolved that it and its

¹²⁴ *Chase Manhattan NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (Ch).

¹²⁵ *ibid* 119–20.

¹²⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, [1996] 2 WLR 802 (HL) 714 (Lord Browne-Wilkinson).

¹²⁷ *ibid* 715.

¹²⁸ *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658 (QB).

group companies should cease trading immediately, at a time when PSL had not paid for the services for which the sums had been remitted and at a time when in all the circumstances there was no chance that PSL could deliver the services in question. According to Bingham J, PSL could not in good conscience retain the payment and accordingly a constructive trust was to be inferred.¹²⁹

These cases suggest that additional considerations of knowledge and conscience are relevant in granting a specific remedy that goes beyond personal restitution. However, such matters do not seem to fit within a scheme of unjust enrichment premised on strict liability. At the very least, the cases demonstrate that something else is necessary for the award of a specific remedy. Knowledge and conscience are two factors, but they are certainly not mandatory or unique. Other cases involving the award of specific remedies, such as the award of a bailee's possessory lien following the performance of a service with respect to goods,¹³⁰ suggest that the range of additional considerations (and the motivations behind them) is broad indeed.

None of this is to suggest that unjust enrichment must completely drop out of the picture where specific remedies are concerned. Quite the contrary: the point is that these additional considerations *complement* a finding of unjust enrichment, and justify a remedy that surpasses the ordinary award of personal restitution. In *Kerr v Baranow*,¹³¹ for example, the award of proprietary remedies following unjust enrichment was described by the Supreme Court of Canada as appropriate in (some) cases when a monetary award is inappropriate or insufficient.¹³² By its nature, such a finding cannot be made without first deciding that a monetary award is available as a remedy for an established claim. The nature and function of this complementary relationship is beyond the scope of this book. It may be that certain factors favouring the award of a specific remedy have at their core a concern for the parties' exchange capacities in circumstances where, owing to the unique nature of the case, personal restitution will not suffice to restore them adequately.¹³³ Other factors may be motivated by historical or policy-based concerns. Whatever the case, the possibility of specific remedies following unjust enrichment cannot be completely dismissed.

(b) *Judicial Reliance*

The second reason why specific restitution cannot be completely dismissed as a response to unjust enrichment is that there are cases in which unjust enrichment

¹²⁹ *ibid* 666.

¹³⁰ See, eg, *Spencer v S Franes Ltd* [2011] EWHC 1269 (QB).

¹³¹ *Kerr v Baranow, Vanasse v Seguin* (n 64).

¹³² *ibid* [50] (Cromwell J). See further Edelman, 'Restitution of Rights' (n 118) [3.80].

¹³³ There is much to be said, in this respect, for a comparison between the possible like-justifications for specific restitution of rights and those for the specific performance of obligations under contract. See further Edelman, 'Restitution of Rights' (n 118) [3.80]. See also Bant and Bryan, 'A Model of Proprietary Remedies' (n 115) [12.90]–[12.180].

analysis has been expressly employed to justify remedies in the nature of specific restitution. Rescission, for example, was described by Robert Goff LJ as ‘a straightforward remedy in restitution ... by which the unjust enrichment of the [defendant] is prevented.’¹³⁴ Most notable, however, is the description of subrogation by English Courts as a remedy for unjust enrichment.¹³⁵

In *BFC v Parc (Battersea)*¹³⁶ the claimant lent money to Parc for the latter to pay off a debt. That debt was secured by a charge over Parc’s property, and the defendant held a second charge over that property. The claimant had not obtained security for its loan to Parc, but was promised that no one in the corporate group to which Parc belonged (which included the defendant) would seek repayment of their loan ahead of it. The defendant, however, was not bound by that promise. Following Parc’s insolvency the claimant sought to be subrogated to the initial security that its loan moneys had been used to discharge. Subrogation was granted to prevent the defendant being enriched by the improvement in its position as second chargee. It was also tailored so as to avoid putting the claimant in a better position than that which it might otherwise have then been able to occupy: subrogation to the charge was granted only insofar as it gave the claimant priority over the defendant. The House of Lords explained that subrogation was designed to prevent unjust enrichment.¹³⁷ The case is not unique in this respect.¹³⁸

That subrogation has been described in these terms creates a problem for those who argue that restitution for unjust enrichment can only ever be personal. One could attempt to explain away the problem as an instance in which courts are relying upon the pattern of unjust enrichment to reason from one subrogation case to the next; that is, the underlying rationale of subrogation is yet to be explained, but until it is, the structure of unjust enrichment analysis provides a useful yardstick for determining, in the light of previous subrogation cases, if and when subrogation should be an available remedy. That will probably not carry the day: the courts have demonstrated that unjust enrichment analysis is considered to be the rationale of subrogation, rather than a useful pattern of reasoning.

¹³⁴ *Whittaker v Campbell* [1984] QB 318 (DC) 327. See generally Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (n 34) 119–33; B Häcker, ‘Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model’ [2009] *Cambridge Law Journal* 324, 329.

¹³⁵ That should be contrasted with the position in Australia, where the description of subrogation as a remedy for unjust enrichment has been disavowed and the utility of unjust enrichment analysis generally in the field of subrogation doubted: see *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 [85]–[98] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ); M Leeming, ‘Subrogation, Equity and Unjust Enrichment’ in J Glistler and P Ridge (eds), *Fault Lines in Equity* (Oxford, Hart, 2012) 28; D Ong, *Ong On Subrogation* (Federation Press, 2014) Ch 4.

¹³⁶ *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL).

¹³⁷ *ibid* 226–27 (Lord Steyn), 236 (Lord Hoffman), 238 (Lord Clyde), 245–46 (Lord Hutton).

¹³⁸ See especially *Bank of Cyprus UK Ltd v Menelaou* (UKSC) (n 119), [50] (Lord Clarke), [91] (Lord Neuberger), but cf [108]–[109] (Lord Carnwath); *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 [31]–[49] (Neuberger LJ). See also *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104 (Lord Diplock); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 335 (Millett LJ); *Menelaou v Bank of Cyprus plc* [2013] EWCA Civ 1960 [17]–[21] (Floyd LJ).

The better view is that subrogation, where it is awarded to prevent unjust enrichment, is an example of a specific remedy for unjust enrichment justified by additional considerations of the kind warranting the conclusion that a monetary award is inadequate. In *BFC v Parc (Battersea)*, for example, the defendant's enrichment was described as its 'improved position as chargee' following the payment of Parc's debt with the money loaned to it by the claimant. The relative position of a chargee has an economic significance, and is susceptible to exchange insofar as a chargee may attempt to negotiate an improvement in that position. The chargee's exchange capacity is thus engaged, and the situation therefore susceptible to unjust enrichment analysis. Expressing that capacity in quantifiable terms, however, may be so difficult that a monetary award is incapable of correcting the parties' positions. The improved position of the defendant in *BFC v Parc (Battersea)* could not be reliably reduced to monetary terms, and so a tailored remedy specific to the particular enrichment was necessary and appropriate.

(G) Enrichment and Loss

This chapter began with the observation that certain everyday beneficial experiences are outside the scope of unjust enrichment. Equipped with the knowledge that it is the exchange capacity that determines that scope, we are now in a position to explain why this is so. The good vibes of a nightclub, the cultural enlightenment of a museum visit, and the affectionate cuddle at the zoo—all of these things may be 'enriching' in a colloquial sense. They influence our individual preferences, utilities, and choices, but they are not susceptible to market analysis in their own right. There is no market for good vibes, cultural enlightenment, or affection. These things cannot be expressed in pecuniary or economic terms because there is no system for their exchange in their own right. No system for exchange means no exchange capacity, and without an exchange capacity, unjust enrichment has nothing upon which to bite.

This does not mean that the proprietors of nightclubs, museums, and zoos have no recourse to unjust enrichment. Society recognises markets for entry to nightclubs, museums, and zoos and the service of entertainment each provides. This is reflected by the fact that each may legitimately charge patrons an entry fee, and it is the saving of that fee that can found an unjust enrichment claim in the case of the patron who fails to pay.¹³⁹ The fee reflects the relational value of entry: the comparison and exchange of qualitatively heterogeneous things in quantitatively comparable and equivalent terms, where the relevant 'things' being so compared are entry on the one hand, and money (as a universal medium of exchange) on the other. The relational value of entry is, in turn, derived from the aggregate of

¹³⁹ See further below pp 58–60, 85–86.

individuals' preferences, utilities, and choices—and it is within the derivation of those matters that the colloquially 'enriching' character of good vibes, cultural enlightenment, and affection are relevant. Patrons of museums, nightclubs, and zoos demand admission to those places because they derive utility from them, and the proprietors of such places can take advantage of that demand by charging a fee for admission. Demand thus lies between individual utility and the exercise of the exchange capacity. The fee charged does not reflect individual utility in abstract: the benefit we each may (or may not) derive from dancing at nightclub, exploring a museum, or petting an animal at the zoo. Such benefits are relevant to the determination of market price insofar as they reflect individual utility and preference and are therefore a feature of demand and price determination within markets. But utility and preference are not the subject matter of markets in their own right. I may, for example, be especially fond of the vibes experienced at one particular night club, and may therefore be prepared to pay more for entry into that nightclub compared to another. That is a reflection of my personal utility and preference, but it does not mean that the relevant market is one for utility and preference in respect of nightclub vibes. The market is for nightclub entry. There is no market for good vibes: to speak of one is as nonsensical as speaking of a market for love. Likewise the other beneficial experiences: though good vibes, cultural enlightenment, and soft cuddles are inherently good things, we either shirk at, or are confounded by, any attempt to market them in their own right. They are not the subject of systems of exchange and so do not engage unjust enrichment.¹⁴⁰

Unjust enrichment was described, at the very start of this chapter, as resting upon 'a disruption of both the claimant's and the defendant's position which requires correction'.¹⁴¹ What this chapter has shown is that these 'disruptions' can be understood at a particular level of normative abstraction as affecting the parties' ability to exchange one thing for another. The challenge that now arises is how to square this theoretical account of unjust enrichment with the doctrinal requirements of claims. In this respect, each disruption has a name: for the defendant, it is 'enrichment'; for the claimant, it is 'loss'. It is to each of these concepts, and their relationship with the parties' underlying exchange capacities, to which this book now turns.

¹⁴⁰ Mitchell, Mitchell, and Watterson, *Goff & Jones* (n 28) para 4.03 has hit upon this same point using further examples: 'The law pays no attention to the cultural, religious, intellectual or emotional value of a benefit, unless they affect its financial value. So, for example, a claim might lie for the monetary value of services, such as psychiatric counselling, which make the defendant happier. But the reason why such services are relevantly valuable is not because of their effect on the defendant's emotional well-being, but because they can be bought and sold on the market. The affection and companionship of family members also make people happier, but these cannot be bought and sold, and the law does not recognise claims for benefits of this kind.'

¹⁴¹ Burrows, *The Law of Restitution* (n 1) 68.