The Status Theory: a Corrective Justice Account of the English Law of Unjust Enrichment

by

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Abstract

This thesis presents a corrective justice theory, which will be referred to as the
"status theory," of the normative foundations underlying the English law of
unjust enrichment. According to the status theory, the right to restitution
responding to an unjust enrichment is a Kantian status right, which is granted
to the plaintiff following the violation, by the defendant, of a particular
proprietary right belonging to the plaintiff. This proprietary right is a right to
set the agenda over value owned by the plaintiff and comprising the
enrichment. The Kantian status right resulting from the violation of the
plaintiff's right to set the agenda over his property may then be used to force
the defendant to disgorge unjust gains, comprised of either value or in rem
rights.
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Introduction

The purpose of this thesis is to present a corrective justice theory, which will be referred to as the "status theory," of the normative foundations underlying the English law of unjust enrichment.

The version of corrective justice guiding the status theory is set out by Ernest Weinrib in various articles and The Idea of Private Law. According to this conception, private law liability responds to, and attempts to undo, injustices comprised of normative gains (obtained by the defendant D) correlating to normative losses (suffered by the plaintiff P). Normatively, gains and losses "refer to discrepancies between what the parties have and what they should have according to the norm governing the parties' interaction." Relative to a baseline of equality, whereby the parties have "equal moral status" as "free and purposive beings," D obtains a normative gain, and P suffers a corresponding normative loss, upon D's breach of P's right to freedom as characterized by Immanuel Kant. So, in breaching P's right to freedom, D obtains a measure of freedom that D is not rightfully entitled to, while P loses a measure of freedom that P is rightfully entitled to.

By holding D liable to P, the private law reverses this injustice by causing "disgorgement of [D's] gain" and "reparation" of the infringement of P's right in that "the transfer of a single sum" of damages or restitution "annuls both [D's] normative gain and [P's] normative loss."

The positive law to be analysed is the English, or common law, unjust factors approach to unjust enrichment. According to this approach, liability for unjust enrichment results where (1) D is

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3 Weinrib, supra note 1 at 114.
4 Ibid at 122.
5 Ibid at 125.
6 Ibid at 125-126.
enriched (2) at P's expense (3) in a way that is unjust and (4) in the absence of applicable defences\(^7\). Unjustness is indicated by the presence of an unjust factor\(^8\).

Andrew Burrows has listed the following as unjust factors: mistake, duress, undue influence, exploitation of weakness, incapacity of the individual, failure of consideration, ignorance or powerlessness, fiduciary's lack of authority, legal compulsion, necessity, factors concerned with illegality, unlawful obtaining or conferral of a benefit by a public authority, and financial institutions and constructive notice\(^9\).

Despite the presence of an unjust factor, there will be no liability for unjust enrichment where D has an applicable defence. The most important defence is the change of position defence, which provides a defence to the extent that (1) D's position has changed as a consequence of, or in anticipatory reliance on, obtaining the benefit, and (2) the change is such that D would be worse off by making restitution than if not obtaining, or relying upon obtaining, the benefit\(^10\). However, the defence will not apply where D's change of position is made in bad faith\(^11\).

Before presenting the status theory, a number of competing theories will be reviewed. These include several non-corrective justice theories, as well as the corrective justice theory presented by Ernest Weinrib in *Corrective Justice*\(^12\).

The non-corrective justice theories to be reviewed include the implied contract theory, as well as the theories of Stoljar, Dietrich, Jackman, and Hedley.

\(^8\) Ibid.
\(^10\) Ibid at 117.
\(^11\) Ibid.
The implied contract theory asserted that restitution was justified because of an implied promise, made by D, to pay P. However, this theory is deficient because based upon a fiction and providing no reason for why such a promise should be implied\(^{13}\).

According to Stoljar's theory, much of the law of unjust enrichment was justified because, "without the claimant's consent, the defendant received property that at the time of receipt belonged to the claimant\(^{14}\). However, this theory is faulty because incapable of explaining those instances of unjust enrichment where title to the property passes from P to D\(^{15}\).

Dietrich and Jackman take similar approaches to one another in the sense that they largely reject the principle against unjust enrichment as an explanation for the law of restitution, instead asserting that such law is comprised of various discrete categories and principles.

According to Dietrich, the law of restitution is not explainable on the basis of the principle against unjust enrichment but is, rather, comprised of four separate categories: (1) fault-based liability; (2) liability based upon a principle of "just sharing"; (3) liability based upon a principle of "justifiable sacrifice"; and (4) liability based upon a "fair outcome\(^{16}\).

Similarly, Jackman argues that there are two principles, rather than a single principle reversing unjust enrichments, justifying the law of restitution (not including restitution for wrongs). The first principle involves the reversal of a non-voluntary transfer of money or another incontrovertible benefit, while the second principle involves the fulfillment of non-contractual promises where benefits have been voluntarily conferred on the promisor\(^{17}\).

\(^{13}\) Burrows, supra note 7 at 28.
\(^{14}\) Ibid at 29-30.
\(^{15}\) Ibid at 30.
\(^{16}\) Ibid at 32.
\(^{17}\) Ibid.
Hedley, also rejecting the principle reversing unjust enrichments, argues that "the law that is called the law of restitution is residual and falls just outside the established categories of contract, tort, and property"\(^\text{18}\) and that "most of that law can, and should, be returned to those categories"\(^\text{19}\).

Because none of the above theories relies upon the principle against unjust enrichment, restitution, it seems, does not instantiate corrective justice because not responding to D's violation of a duty not to be unjustly enriched at P's expense.

Nonetheless, Weinrib has attempted to theorize restitution resulting from unjust enrichment as an instance of corrective justice.

According to Weinrib's account, restitutionary liability resulting from unjust enrichment follows from the fulfillment of a factual strand of elements and a normative strand of elements.

The factual strand requires that (1) D is enriched (2) at P's expense, which will occur where there is a transfer of value (as opposed to an exchange of value)\(^\text{20}\). A transfer of value exists where P disposes of value to D without receiving compensatory value in return\(^\text{21}\). In contrast, an exchange of value exists where the disposition of value is compensated by an equivalent value moving in the opposite direction\(^\text{22}\).

The normative strand of elements requires that (1) P's objective intent in disposing of value to D is non-donative, while (2) D's receipt of such value is similarly done with objective non-donative intent\(^\text{23}\). Restitutionary liability results upon the convergence of P and D's non-donative wills

\(^{18}\) *Ibid* at 34.

\(^{19}\) *Ibid*.

\(^{20}\) *Weinrib, supra* note 12 at 218.

\(^{21}\) *Ibid* at 196.

\(^{22}\) *Ibid* at 194.

\(^{23}\) *Ibid* at 204.
because D cannot keep, as though it were given gratis, what was both transferred and received non-donatively\(^\text{24}\). Thus, the right to restitution is an in personam right established by the convergence of wills upon non-donativeness\(^\text{25}\).

However, there are multiple problems with Weinrib's theory (involving, for example, the change of position defence and the availability of proprietary remedies)—problems that are resolved only by the status theory.

The status theory matches Weinrib's theory, except for three key differences. First, while Weinrib requires D to accept the enrichment non-donatively, the status theory requires D to accept the enrichment in the absence of non-donative intent. Second, while Weinrib conceives of the right to restitution as an in personam right justified by the convergence of wills upon non-donativeness, the status theory conceives of the right to restitution as a Kantian status right arising upon the conflict between P's non-donative intent and D's lack of non-donative intent. And third, the status theory has a different conception of the change of position defence, arguing that such defence is justified for the same reasons as unjust enrichment liability (that is, to protect an owner's right to set the agenda over property).

The Kantian status right justifying restitution is, according to the status theory, premised upon a particular proprietary interest belonging to P over the enriching value. Specifically, this proprietary interest consists of agenda-setting authority, which is distinct from a right to exclusivity, over such value. Because it is distinct from a right to exclusivity, the loss of such exclusivity, upon D's receipt of the enriching value, does not violate P's agenda-setting authority, which thus persists to govern such value in D's hands.

Pursuant to his right to set the agenda for his property (consisting of value), P has non-donative intent either because (1) intending an exchange, rather than a transfer, of value; or (2) not freely

\(^{24}\) Ibid.

\(^{25}\) Ibid at 203-204.
intending to dispose of such value to D at all. Such non-donativeness is established by the presence of one of the unjust factors.

Regardless of the nature of P's non-donativeness, D's receipt or retention will breach P's non-donative agenda where such receipt or retention obtains, through D's acceptance of the benefit or the convergence of such benefit with D's purposes, in the absence of non-donative intent on D's part. D's receipt or retention lacking non-donativeness will breach P's non-donative agenda for his property because such property will, pursuant to D's lack of non-donativeness, be provided to D in an uncompensated transfer of value rather than in the exchange of value that P typically intends.

This violation of P's right (to set the agenda for his property) leaves P and D in a Kantian status relationship, which (1) precludes a damages award but (2) justifies an award of restitution.

A damages award is precluded because such award could never reflect even a potential agreement between P and D as to terms of compensation for P's disposition of value. This is because P is incapacitated, due to his property being in D's possession and ownership, from determining fair compensatory terms because prevented from taking his property and walking away from a bad offer. Because P's non-donative intent is rendered inoperative by P's inability to fairly bargain for compensation pursuant to such intent, P's non-donativeness could never be reflected or instantiated by an award of damages intending to compensate P for the violation of his non-donative agenda.

However, this same incapacity also justifies a restitutionary award. Because P is incapacitated from negotiating adequate terms of compensation with D, P is prevented from acting in his own best interest due to the power imbalance resulting from D's possession and ownership of P's property (the agenda-setting authority over which P retains because the right to exclude is not the same as such agenda-setting authority). In other words, P's normative loss consists of the lost capacity to act, pursuant to his (non-donative) agenda, in his own best interest regarding his property.
It is appropriate and justified, therefore, that the remedy be restitution because, by forcing D to
disgorge his gains, restitutionary liability transfers the benefit of D's receipt or retention, which is
initially done in D's own best interest pursuant to D's lack of non-donativeness, to P and thus
provides to P the benefit of a capacity to act in one's own best interest regarding property. The
remedy, therefore, provides to P a normative gain representing the very thing comprising his
normative loss. In this way, restitution resulting from unjust enrichment is an instance of
corrective justice.

The change of position defence is, pursuant to the status theory, considered to be a mirror image
of unjust enrichment liability. Just as P's non-donative agenda over his property is protected by
unjust enrichment liability, D's non-donative agenda over his property is protected by the change
of position defence. This is because D has, regarding his property consisting of his own money,
non-donative intent in the sense that D has no intention, due to his good faith ignorance of P's
claim, of providing to P such money upon a change of position that, unknown to D, will (absent
the change of position defence) provide to P a right to such money that would therefore be
transferred to P donatively in violation of D's non-donative agenda. Because D's non-donative
agenda over his property would be violated by a transfer to P in fulfillment of P's right to
restitution, D is protected, by the change of position defence, from having to provide such
restitution.
Chapter 1

Unjust Enrichment: The Challenge and the Law

1.1 The Challenge: a Corrective Justice Account of Unjust Enrichment

The objective of the status theory is to present a corrective justice account of the normative foundations underlying the law of unjust enrichment.

The point of corrective justice is to impose liability undoing injustice suffered by P at D's hand26. Pre-interaction, there is, between the parties, notional equality among those things that each party lawfully owns (i.e. P and D are equal in that both possess 100% of what they are lawfully entitled to); however, injustice occurs where, relative to this baseline, D realizes a gain corresponding to P's loss27. This gain is then undone, in restoration of the notional equality between P and D, by the imposition of liability depriving D of the gain that is then restored to P28.

Corrective justice has both a structure and a content. The structure is comprised of Aristotelian correlativity, while the content is comprised of Kantian personality. Correlativity relates to the nature of the connection (between the parties) and is "the most abstract representation of the terms on which the parties interact in private law"29. Personality relates to the nature of the

26 Ibid at 9.
27 Weinrib, supra note 2 at 349.
28 Ibid.
(connected) parties, and is "the most abstract representation of the parties themselves as interacting beings."\(^{30}\)

Where correlatively situated, D and P will be linked to each other as doer and sufferer, or the active and passive poles, of the same injustice whereby D gains the very thing that P loses such that D's gain is unjust only because of what P has suffered\(^{31}\). This gain, obtained by D via removal from P, may then be reversed by liability that is itself correlative in simultaneously taking from D and giving to P\(^{32}\).

The justificatory categories expressive of correlativeity are those of P's right and D's corresponding duty (not to interfere with that right)\(^{33}\) such that injustice consists in D doing or having something that is incompatible with P's right\(^{34}\). Right and duty are correlated where P's right is the basis of D's duty and where the scope of the duty includes the kind of right-infringement suffered by P\(^{35}\).

Nonetheless, while correlativeity indicates correspondence between P's right and D's duty, it does not provide the content for such right and duty (other than disqualifying, due to inconformity with correlativeity, justificatory considerations relating to only one, rather than both, of the parties\(^{36}\)). The content of P's right and D's duty must then be provided by Kantian right, or personality.

Personality is the conception of the person contemplated by Weinrib's version of corrective justice and is characterized by the capacity for purposive agency generally without regard for

\(^{30}\) *Ibid.*  
^{31} *Weinrib, supra* note 2 at 351.  
^{32} *Weinrib, supra* note 1 at 65.  
^{33} *Ibid* at 122.  
^{34} *Weinrib, supra* note 29 at 12.  
^{36} *Weinrib, supra* note 2 at 351.
particular purposes\textsuperscript{37}, such capacity being implicit within the rights and duties of private law\textsuperscript{38}: "In not requiring action for any particular purpose, personality reflects the structure of the law of obligations as a system of negative duties of non-interference with the rights of others"\textsuperscript{39}.

An injustice consisting of D's breach of his duty not to infringe P's corresponding right provides D with a normative gain, consisting of a measure of freedom (that D is not lawfully entitled to), removed from P's rightful entitlements and thus corresponding to a normative loss suffered by P. Such gain, being correlatively structured, may then be undone by liability, also correlatively structured, removing from D and granting to P the gain unjustly obtained in violation of P's right\textsuperscript{40}.

Note, however, that the above discussion of personality is preliminary, as the status theory holds that the right protected by unjust enrichment law is a specific kind of Kantian right-- called a status right-- that is introduced in greater detail below (in the section entitled "The Justification for Restitution: a Relationship of Status").

\textsuperscript{37} Weinrib, supra note 29 at 16.
\textsuperscript{38} Ibid at 20.
\textsuperscript{39} Weinrib, supra note 12 at 11.
\textsuperscript{40} Weinrib, supra note 1 at 125.
1.2 The Law: the Common Law Unjust Factors Approach

There are four elements to an action in unjust enrichment: (1) D must be enriched (2) at P's expense (3) in a way that is unjust and (4) in the absence of applicable defences.\(^41\)

With respect to D's enrichment, what is required is that D obtain a benefit, which may include money, goods or land; the use of money, goods or land; services; the crediting of a bank account; the discharge of a debt or other liability; the forgoing of a claim; or intangible property.\(^42\)

However, D is only enriched where (1) no reasonable person would deny that D has been enriched (i.e. by an "incontrovertible benefit"), (2) D chose the benefit, or (3) D, after having opportunity to reject the benefit, freely accepted the benefit with knowledge of P's expectation of compensation for it.\(^43\)

With respect to the enrichment coming at P's expense, what is required is that D obtain a benefit from P directly (rather than by way of a third party T); nonetheless, the benefit will come at P's expense where D obtains the benefit from T, who (1) holds the benefit on trust for P, or (2) acts as P's agent regarding the benefit, or (3) where P is subrogated to T's present or former rights against D.\(^44\) In any event, the enrichment does not come at P's expense where P disposes of the benefit to D pursuant to an objective of P's unconnected with D's enrichment.\(^45\)

To determine whether an enrichment is unjust, the common law uses the unjust factors approach, which reverses an enrichment only where there is an unjust factor (that is causally linked to the enrichment at P's expense).\(^46\) This is in contrast to the civil law's absence of basis approach.

\(^{41}\) Burrows, supra note 7 at 27.
\(^{42}\) Burrows, supra note 9 at 7.
\(^{43}\) Ibid.
\(^{44}\) Ibid at 8.
\(^{45}\) Ibid.
\(^{46}\) Burrows, supra note 7 at 91.
which reverses an enrichment only where there is no legal basis for the disposition. So, the
common law asks whether the enrichment is "unjust if... [there is an unjust factor]," running
directly opposite to the civil law, which asks whether the enrichment is "unjust unless... [there is
a legal basis]"47. The common law, then, presumes validity unless invalidity (i.e. an unjust
factor) is shown, while the civil law presumes invalidity unless validity (i.e. a legal basis) is
shown.

Under the common law unjust factors approach, the unjust factors may be divided into two
groups: in the first group are those factors indicating P's impairment, qualification or absence of
consent to D's enrichment, while the second group is comprised of those factors indicating that,
although P consented to D's enrichment, there is another valid (policy-related48) reason why the
enrichment is unjust49. The unjust factors in the first group are: mistake, duress, undue
influence, exploitation of weakness, incapacity of the individual, failure of consideration,
ignorance or powerlessness, and fiduciary's lack of authority50. The unjust factors in the second
group are: legal compulsion, necessity, illegality, and unlawful obtaining, or conferral, of a
benefit by a public authority51.

Note, however, that restitution will not generally follow, despite the presence of an unjust factor,
where P has a legal obligation to dispose of the enrichment to D52.

47 Ibid at 95.
48 Ibid at 86.
49 Burrows, supra note 9 at 5-6.
50 Ibid at 6.
51 Ibid.
52 Burrows, supra note 7 at 88.
Finally, to be liable in unjust enrichment, D cannot have an applicable defence, such as the change of position defence, the agency defence, the defence of a good faith purchaser for value without notice, illegality, or the affirmation defence53.

This thesis discusses two defences in particular: the change of position defence and the agency defence.

The change of position defence is the most important defence to an unjust enrichment action, and protects D to the extent that his position has changed as a consequence of, or in anticipatory reliance on, obtaining the benefit, and the change is such that D would be worse off by making restitution than if he had not obtained, or relied on obtaining, the benefit54. However, the defence is inapplicable where D's change of position is made in bad faith55.

The agency defence protects T's agent D who, without actual notice of P's right to restitution, transfers to T the benefit received from P56.

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53 Burrows, supra note 9 at 16-18.
54 Ibid at 16.
55 Ibid.
56 Ibid at 17.
Chapter 2

Theorizing Unjust Enrichment

2.1 Non-Corrective Justice Theories

There have been several attempts, which will be presented here in outline, to theorize unjust enrichment without resorting to corrective justice. In addition to the old implied contract analysis formerly favoured by the English courts (in cases such as *Sinclair v. Brougham*), this section will deal with theories put forward by Stoljar, Dietrich, Jackman, and Hedley.

Note, however, that because this thesis is concerned with constructing a corrective justice theory of unjust enrichment, these theories (not explicitly dealing with corrective justice) will be discussed only in brief, with deeper engagement coming only subsequently in the presentation and analysis of Weinrib's corrective justice account of unjust enrichment.

2.1.1 Implied Contract

According to the implied contract theory, the common law part of unjust enrichment, involving the actions for money had and received, money paid to the defendant's use, quantum meruit, and quantum valebat, was based upon an implied promise by D to pay P. Consequently, restitution for unjust enrichment was conceived as an adjunct to the law of contract rather than the result of an autonomous principle of unjust enrichment.

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57 *Sinclair v. Brougham* [1914] AC 398 [*Sinclair*].
58 *Burrows, supra* note 7 at 28.
59 *Ibid*.
60 *Ibid*.
So, in *Sinclair v. Brougham*\(^{61}\), an ultra vires and so void contract precluded a simple contractual right to repayment, leaving P to claim repayment in an action for money had and received, in response to which Lord Sumner asserted that "all these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay"\(^{62}\).

However, this reasoning "was fictional and said nothing about why the promise should be implied"\(^{63}\). Thus, in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*\(^{64}\), Lord Browne-Wilkinson overruled *Sinclair v. Brougham*, saying that

> Subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay...In my judgment, Your Lordships should now unequivocally and finally reject the concept that the claim for monies had and received is based on an implied contract. I would overrule *Sinclair v. Brougham* on this point\(^{65}\).

As the implied contract theory was the main reason why the English law of unjust enrichment was not considered to result from an autonomous principle of unjust enrichment\(^{66}\), the explicit rejection of such theory paved the way for recognition of an autonomous cause of action premised upon reversing benefits unjustly received.

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\(^{61}\) *Sinclair*, supra note 57 at 452.

\(^{62}\) *Ibid*.

\(^{63}\) *Burrows*, supra note 7 at 28.

\(^{64}\) *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 [*Westdeutsche*].

\(^{65}\) *Ibid* at 710.

\(^{66}\) *Burrows*, supra note 7 at 28.
2.1.2 Stoljar

In The Law of Quasi-Contract\textsuperscript{67}, S.J. Stoljar argues that "much of the law that has traditionally been classified as quasi-contractual, for example that dealing with recovery of money paid by mistake or under duress, is best viewed as giving the claimant a remedy because, without the claimant's consent, the defendant received property that at the time of receipt belonged to the claimant"\textsuperscript{68}.

In Stoljar's own words:

Instead of P claiming recovery of money merely on the ground that D is unjustly enriched... we can now say that D's enrichment is indeed unjust—unjust precisely because D retains money without title, having got it without P's consent, so that P retains his proprietary-right to it. So if D were to dispute P's claim, P has this in reply: 'I claim this money because it is mine.' Certainly D is also unjustly enriched, but in stating that he is, we are not so much responding to a sense of justice outraged by D's holding an undue benefit (though we may do that too) as affirming that D is retaining money which, being non-consensually or non-transactionally received by him, rather belongs to P. The injustice here lies in the retention of money that demonstrably belongs to someone else\textsuperscript{69}.

In the first edition of his text, Stolar presents his theory "as the antithesis of unjust enrichment thinking" but, in the second edition, considers such theory to be "a more concrete clarification of what is meant by unjust enrichment"\textsuperscript{70}.

\textsuperscript{68} Burrows, supra note 7 at 29-30.
\textsuperscript{69} Stoljar, supra note 67 at 7.
\textsuperscript{70} Burrows, supra note 7 at 30.
However it is characterized, Stoljar's proprietary theory accounts for only a fraction of those claims which may be considered to be part of the law of unjust enrichment. While he is able to account, by applying his proprietary theory, for all claims lying in money had and received (e.g. "claims for money paid by mistake or under compulsion, claims against wrongdoers or fiduciaries as well as claims that follow money into the hands of successive transferees"\(^71\)), Stoljar cannot account for claims for services or claims resulting from a contract that is "unenforceable or otherwise ineffective or has broken down"\(^72\).

Furthermore, as Burrows has pointed out, Stoljar's theory fails to explain all those enrichments consisting of property that has passed to the defendant (as occurs, for example, where P attempts to recover money on a total failure of consideration)\(^73\).

In this way, Stoljar's theory presents an interesting comparison with the status theory because, as will be seen, both theories are proprietary in nature; however, importantly, it is only the status theory, and not Stoljar's theory, which is capable of explaining, on the basis of the principle against unjust enrichment, cases involving services, void contracts, and enrichments the property rights to which have passed to the defendant.

### 2.1.3 Dietrich

In *Restitution: A New Perspective*\(^74\), Joachim Dietrich argues that the principle against unjust enrichment provides an unsatisfactory explanation for the law of restitution. Rather, the law of restitution may be broken down into four categories, at least three of which are not significantly

\(^{71}\) *Stoljar, supra* note 67 at 18.

\(^{72}\) *Ibid.*

\(^{73}\) *Burrows, supra* note 7 at 30.

concerned with the reversal of unjust enrichment\textsuperscript{75}: (1) fault-based liability: breach of contract-like or tort-like duties; (2) common interests: the consequences of unprovided for contingencies; (3) justifiable sacrifice: allocating the costs of justifiable conduct; and (4) innocent recipients of money and services\textsuperscript{76}.

In the first category ("fault-based liability"), "liability rules are activated by conduct of the defendant"\textsuperscript{77}. Here, "a defendant's conduct will have resulted in some detriment to a plaintiff, who may have incurred financial loss, performed services, paid money, entered a contractual relationship he or she may otherwise not have, or in some way changed his or her position detrimentally"\textsuperscript{78}.

Within this category are two sub-categories of liability rules: (1) liability rules "principally concerned with conduct which, contract-like, amounts to an assumption of an obligation or of a risk by a defendant"\textsuperscript{79}; and (2) liability rules where "the principal concern is with tort-like conduct causing loss to a plaintiff"\textsuperscript{80}.

In the first sub-category,

...the parties will have reached some mutual agreement or at least tacit understanding which results in a plaintiff acting upon an expectation as to the defendant's future conduct. Although such an agreement or understanding may not in law amount to a legally enforceable contract... the courts will nevertheless give at least limited recognition to the relationship should the defendant subsequently breach his or her agreement or contract-like duty resulting in losses to the

\textsuperscript{75} Ibid at 93.
\textsuperscript{76} Ibid at vii-viii.
\textsuperscript{77} Ibid at 94.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid at 95.
plaintiff as measured by reference to the plaintiff's original position\textsuperscript{81}.

In the second sub-category, the remedy aims to restore, consistently with the tort-like nature of a defendant's conduct (which may include conduct "akin to negligence or fraud, or an abuse of position or power"\textsuperscript{82}), the plaintiff to his or her status quo ante\textsuperscript{83}. Such restoration may be achieved by compensatory remedies, specific restitution of money or property, or the rescission of contracts entered into\textsuperscript{84}.

In the second category of liability rules ("common interests"), "obligations may arise despite the absence of any conduct on a defendant's part which has caused the problems which a plaintiff seeks to have remedied"\textsuperscript{85}. Nonetheless, the plaintiff and defendant may, where sharing a common interest, "owe a responsibility to share losses and gains arising as a result of some unprovided for contingencies which affect their common interest"\textsuperscript{86}. So, the unprovided for contingency results "in burdens being borne by one party but not the other, or benefits being obtained by one party but not the other"\textsuperscript{87}. In such cases, the law responds by imposing a principle of "just sharing"\textsuperscript{88}. This category covers situations where, for example, contracts are frustrated, domestic partnerships have failed, or where the law imposes an obligation to make contribution to another\textsuperscript{89}.

\textsuperscript{81} \textit{Ibid} at 94.
\textsuperscript{82} \textit{Ibid} at 95.
\textsuperscript{83} \textit{Ibid}.
\textsuperscript{84} \textit{Ibid}.
\textsuperscript{85} \textit{Ibid}.
\textsuperscript{86} \textit{Ibid}.
\textsuperscript{87} \textit{Ibid} at 96.
\textsuperscript{88} \textit{Ibid}.
\textsuperscript{89} \textit{Burrows, supra} note 7 at 32.
In the third category of liability rules ("justifiable sacrifices"), such rules respond to "circumstances in which the law considers that a plaintiff's unsolicited intervention in another's affairs is justifiable". As a result, any costs reasonably incurred by the plaintiff (during such intervention) are "allocated to the defendant where the law considers the defendant to be the more 'appropriate' party in the circumstances to bear those costs". This category includes, for example, salvage of a sinking ship and interventions by a rescuer of an accident victim.

The fourth category of liability rules ("innocent recipients") is characterized by the lack of any of the factors providing, in the first three categories, the foundations for the imposition of obligations upon a defendant. These factors are, recall, the conduct of the defendant, the common interests of a plaintiff and a defendant, and the promotion of desirable social goals. Instead, the concern here is with "circumstances in which money, good or services of a plaintiff have been conferred on an 'innocent' defendant not legally responsible for such conferral." Included in this category are mistaken payments of money, mistaken improvements of another's land or goods, the mistaken payment of another's debt, and the mistaken performance of another's duty.

While the principle against unjust enrichment may seem to apply to this fourth category, Dietrich points out that (1) unjust enrichment "appears to be a statement of a conclusion... which does not indicate the processes of reasoning followed to reach that conclusion" and (2) substantial difficulties arise if unjust enrichment is interpreted as explaining service cases (in addition to money cases) since mistaken transfers of things other than money "are often difficult to analyse.

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90 Dietrich, supra note 74 at 96.
91 Ibid.
92 Ibid.
93 Ibid at 97.
94 Ibid.
95 Ibid.
96 Ibid at 98.
in terms of the receipt of a benefit and, where recovery is allowed, in terms of benefit disgorgement.\textsuperscript{97}

Dietrich's theory thus presents a foil of sorts to the status theory, which attempts to integrate, under the heading of restitution for unjust enrichment, many of the obligations that Dietrich has assigned to distinct categories not justifiable by the principle against unjust enrichment. For example, Dietrich's distinction between money and non-money cases (in his fourth category) is (as will be seen) answered, in the status theory, by a Hegelian interpretation of property whereby both money and labour may be owned as property and thus may be transferred to a defendant who is thereby unjustly enriched in generation of restitutionary liability.

\section*{2.1.4 Jackman}

In \textit{The Varieties of Restitution}\textsuperscript{98}, Ian Jackman concerns himself with three questions, two of which relate to autonomous unjust enrichment (with the third relating to restitution for wrongs). These two questions are, first, "in what circumstances is a person liable to repay money received from another, in the absence of any contractual or tortious duty to do so?"\textsuperscript{99}; and second, "in what circumstances is a person liable to remunerate or reimburse another for benefits in kind provided by that other person, again in the absence of any contractual or tortious duty to do so?"\textsuperscript{100}.

The answers to these questions reject a "so-called unifying principle" of unjust enrichment, instead holding that the first question is explained by a principle of reversing non-voluntary

\textsuperscript{97} Ibid.
\textsuperscript{99} Ibid at 1.
\textsuperscript{100} Ibid.
transactions, and the second question by a principle of fulfillment of non-contractual promises.  

The first principle (reversing non-voluntary transactions) involves such unjust factors as mistake, failure of consideration, duress, undue influence, necessity, and compulsory discharge of another's liability.  The second principle (of fulfillment of non-contractual promises) involves, for example, restitution "of the value of benefits in kind conferred under invalid or discharged or anticipated contracts".

However, Jackman's approach has been criticized by Burrows, who points out, in response to Jackman's first principle (reversing non-voluntary transactions), that the answer to the question "why does the law reverse non-voluntary transfers of money or other incontrovertible benefits?" is that such transfers unjustly enrich the defendant at the claimant's expense.  In other words, despite Jackman's argument to the contrary, his first principle ultimately does rest upon a principle of reversing unjust enrichments.  In response to Jackman's second principle (of fulfillment of non-contractual promises), Burrows argues that such principle is actually linked to the first principle because "benefits in kind, such as services, may benefit a particular defendant even though the benefit is not incontrovertible" and, once Jackman's two principles are linked by benefit in this way, "it naturally follows that, whether or not the law should move to enforcing non-contractual promises as Jackman advocates, the law should (and does) accept the (less controversial) position of reversing the value of unjust benefits in kind received at the claimant's expense."  

101 Ibid.  
102 Burrows, supra note 7 at 32.  
103 Ibid at 33.  
104 Ibid.  
105 Ibid.
Thus, like Dietrich's theory, Jackman's theory may be answered (by Burrows or by the status theory) if it can be shown that such apparently disparate principles can be reconciled under the unifying heading of restitution for unjust enrichment.

2.1.5 Hedley

Steve Hedley argues against a unified principle of unjust enrichment, responding to the "bold conjecture," that much of the liability unexplained by property, contract, and tort, "requires a new principle, elevating 'unjust enrichment' from the ranks of vague moralistic notions to a precise concept in its own right," by arguing that "rather than searching for a new principle outside 'property,' 'contract' and 'tort,' we need to expand our understanding of those concepts to accommodate the neglected areas"106.

With respect to direct transfers of benefits (including mistaken transfers), Hedley concludes that restitution of such benefits should be viewed, as they traditionally were, as akin to contract107, arguing that "the only mechanism for placing a generally-accepted figure on the value of benefits is the market, which in legal terms means contract"108.

Hedley also deals with cases of indirect enrichment, which involve, in addition to profits made from wrongs (which are not considered by the status theory to be part of the law of unjust enrichment), subrogation, recoupment, and proprietary remedies.

With respect to subrogation and recoupment, Hedley argues that "these liabilities form a self-sufficient grouping in themselves, understanding of which is not enhanced by describing them as

107 *Ibid* at viii.
designed to remove 'unjust enrichment'\(^{109}\). Rather, Hedley asserts that subrogation relies upon a general principle, subject to only a few, narrow defences, that "P may exercise whatever remedies C would, but for P's payment, have had against D"\(^{110}\).

As for proprietary remedies, such remedies should not be considered in "enrichment" terms, but rather simply as part of the law of property\(^{111}\). Indeed, "'Enrichment' seems ultimately to be an attempt to talk of property without distinguishing very carefully between the differing types of property, to treat property as the mere clothing for wealth"\(^{112}\).

However, Hedley's approach has been criticised by Burrows, who points out that some of Hedley's work "adopts an approach to law that appears to reject, or to downplay, the importance of principled reasoning" and, as a result, "undermines the importance of like cases being treated alike"\(^{113}\). This threatens coherence, which is "lost if categories and ideas are unprincipled and if particular areas are analysed separately without the discipline of referring to underlying and wide-ranging principles that link different areas together"\(^{114}\).

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\(^{109}\) Ibid.

\(^{110}\) Ibid at 120.

\(^{111}\) Ibid at 149-150.

\(^{112}\) Ibid at 149.

\(^{113}\) Burrows, supra note 7 at 34.

\(^{114}\) Ibid.
2.2 Weinrib's Corrective Justice Theory

2.2.1 Overview of Elements

Ernest Weinrib's theory of unjust enrichment, as set out in Corrective Justice\textsuperscript{115}, represents a compelling, highly sophisticated corrective justice account of the normative foundations underlying the law of unjust enrichment.

In Weinrib's theory, liability for unjust enrichment arises upon the fulfillment of four conditions, which are organized into two strands, one factual and the other normative.

The factual strand, consisting of two conditions, determines whether there has been enrichment, and links P and D as transferor and transferee of value, such that the first condition is fulfilled where P transfers value to (as opposed to exchanges value with) D, while the second condition is fulfilled where D receives the value transferred from P. These two conditions are correlative, as P's loss (of value) and D's gain (of value) are linked by the transfer of value from one to the other\textsuperscript{116}. Where both conditions are met, D will be (1) enriched (2) at P's expense as required by the positive law\textsuperscript{117}.

An exchange of value occurs where a disposition of value is compensated by the movement of an equivalent value in the opposite direction. For example, an exchange of value will exist where P provides X, worth $20, to D in return for Y, which is also worth $20. In contrast, a transfer of value occurs where the disposition of value is not compensated. So, where P provides X, worth $20, to D in return for Y, which is worth $10, there will be a transfer of $10 worth of value from P to D.

\textsuperscript{115} Weinrib, supra note 12.

\textsuperscript{116} Ibid at 196-197.

\textsuperscript{117} Ibid at 196.
The normative strand, also consisting of two conditions, determines whether there has been unjustness, and links P's will with D's will upon the non-donativeness of the transfer of value from P to D. Here, the first condition is fulfilled where P's transfer of value to D is non-donative (i.e. undertaken pursuant to an intention to not give something for nothing), while the second condition is fulfilled where D's receipt of the value transferred is also non-donative (i.e. undertaken pursuant to a constructive acknowledgment that the value gained was not transferred gratuitously)\(^\text{118}\). These two conditions, like the two in the factual strand, are also correlative to each other, as P's non-donativeness in transferring value is met by D's non-donativeness in receiving value\(^\text{119}\).

Like the conditions that each contains, the factual strand and the normative strand are correlative to each other:

Only because what is transferred is value—that is, something for which the transferor receives nothing in exchange—does the issue of the injustice of its retention revolve around whether the value was given and received non-donatively. Thus, the correlativity both of the transfer and of its normative defectiveness come together in an integrated ensemble of liability-creating elements\(^\text{120}\).

When all four conditions are met, an in personam right to a causality of D's will (consisting of a forced retransfer of value) is granted to P to undo the unjust enrichment. This right is generated because D cannot retain, as though it were given donatively, that which was both transferred and accepted non-donatively\(^\text{121}\).

\(^{118}\) Ibid at 203-204.

\(^{119}\) Ibid at 203.

\(^{120}\) Ibid at 228.

\(^{121}\) Ibid at 204.
2.2.2 Objectivity

The conditions within each of the factual strand and the normative strand are determined objectively.

Within the factual strand, because the transfer from P to D consists of value, P's loss and D's gain are determined objectively given the nature of value: "Because value abstracts from the parties' particularity, neither value nor its transfer is determined subjectively. Whether a person who gives another something of value has in return received something of equivalent value is an objective question"122.

Within the normative strand, P's non-donative transfer and D's non-donative receipt are also determined objectively: "In accordance with their relational significance, the two obligation-creating conditions have reference to the juridical world of public meaning that the two parties share"123. With respect to P, the notion of donativeness "goes beyond subjective intent to include situations in which, whatever the transferor's subjective intent, the background legal categories justify the imputation of an intention to bestow a gift"124. Similarly, with respect to D, "the idea of acceptance draws on the public meaning of the parties' interaction. What matters is not the defendant's inner psychological state, but the judgments and assumptions about the parties' interaction that can reasonably be made against the background of the legal structure in which they operate"125.

This objectivity is important because it facilitates imputing acceptance upon D via Weinrib's three situations of acceptance.

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122 Ibid at 198.
123 Ibid at 206.
124 Ibid.
125 Ibid at 208.
2.2.3 Non-donative Receipt: Three Situations of Imputed Acceptance

As mentioned above, one of the liability-creating conditions, within the normative strand, is that D accept the enrichment as non-donatively given.

D's non-donative acceptance has two functions: first, D's acceptance, coupled with P's correlative non-donative transfer, establishes the in personam right to a retransfer granted to P; and second, D's acceptance on non-donative terms negates the possibility that the obligation to retransfer to P is raised behind D's back.

The first function, establishing the in personam right to a retransfer, is fulfilled upon the convergence of P and D's wills upon the non-donativeness of the transfer. Because the right is in personam, it must arise through an interaction between P and D, which is precisely what happens where P's non-donative transfer is met by D's non-donative receipt in a process akin to offer and acceptance in contract. Because the enrichment is both transferred and received non-donatively, D cannot retain it as though it were given donatively, as doing so would contradict the public expression of P and D's wills with respect to the transfer. Consequently, this convergence of wills generates an obligation, as between P and D, for D to retransfer value to P, as such retransfer reflects the non-donative terms on which P gave, and D received, the enrichment.

The second function, the negation of an imposition, behind D's back, of an obligation to retransfer, is fulfilled upon D's non-donative acceptance because such acceptance, given the convergence of the benefit with D's purposes, reasonably expresses D's purposes regarding the benefit which, being accepted non-donatively, may be retransferred to P in consonance with the terms on which D accepted it. Said differently, a retransfer, which is consistent with a non-donative transfer but inconsistent with a donative transfer, will not be imposed upon D behind his back where D has accepted the non-donative terms on which the benefit was transferred and pursuant to which it may therefore be retransferred.
There are three situations through which non-donative acceptance may be imputed upon D: the first situation applies where D "knows or takes the risk that the benefit is non-gratuitously given and yet requests it or acquiesces in it by foregoing the opportunity to refuse it"\(^1\); the second situation applies where D, given the nature of his activities and projects, has no reason to reject the benefit transferred\(^2\); finally, the third situation applies where the benefit consists of a non-donative payment of money\(^3\).

The first situation is justified because, by accepting or failing to take the opportunity to reject the benefit, D "expresses [his] free will with respect to [the benefit] and assumes responsibility for the implications of its non-gratuitous nature. Accordingly, by compelling a retransfer of the value, the law is not acting inconsistently with [D's] will"\(^4\).

The second and third situations are justified because each involves D receiving an incontrovertible benefit\(^5\) which, converging with D's purposes either by forwarding a prior project (in the case of the second situation) or any purpose that D might have (in the case of the third situation), indicates that D has accepted not only the benefit itself but also the non-donative terms of its transfer. This is because D, receiving an incontrovertible benefit representing a gain of something for nothing, has no reason to assume the benefit was given gratuitously\(^6\) and therefore "imposing an obligation to make restitution would not violate the defendant's freedom of choice"\(^7\).

\(^1\) Ibid at 210.  
\(^2\) Ibid at 211.  
\(^3\) Ibid at 212.  
\(^4\) Ibid at 210-211.  
\(^5\) Ibid at 212-213.  
\(^6\) Ibid at 208.  
\(^7\) Ibid at 212.
Thus, where D has imputedly accepted the benefit under one of the three situations of acceptance, a subsequent duty to retransfer to P is generated without disregarding D as a free will equal to P.

2.2.4 The Right to Restitution and the Nature of Unjustness

P's right to a retransfer, generated upon "the unity of the parties' wills with respect to the non-gratuitousness of the original transfer,"\(^{133}\) is an in personam right to a causality of D's will forcing D to retransfer the value of the benefit to P\(^{134}\).

Such a right fits within Kant's three-part taxonomy of private rights, which is organized according to "the kinds of relations that can link a person to an external object of choice"\(^ {135}\). The three types of rights comprising this taxonomy are rights of (1) substance, (2) causality, and (3) community (or status). A right to substance is a right in rem (i.e. a property right)\(^ {136}\). A right to causality is a right in personam, with contract rights being the paradigmatic example\(^ {137}\). A right to community (or status) is a right "to another person's status, insofar as one has the right to make arrangements about that person"\(^ {138}\).

Within this taxonomy, the right generated by unjust enrichment, being (according to Weinrib's theory) an in personam right, fits within the second category. As it is a right to a causality rather

\(^{133}\) *Ibid* at 225.

\(^{134}\) *Ibid*.

\(^{135}\) *Ibid* at 223.

\(^{136}\) *Ibid*.

\(^{137}\) *Ibid* at 224.

\(^{138}\) *Ibid* at 225.
than a right to substance, the unjust enrichment right entitles P to a causality of D's will (consisting of a forced retransfer of the value of the benefit) rather than a right entitling P to the value itself\(^{139}\).

The nature of this right reflects the nature of the underlying injustice: "The issue of justice as between the parties that arises from a transfer of value centers on the normative defectiveness of a transfer in which the transferee retains for nothing what was both given non-gratuitously and accepted as non-gratuitously given"\(^{140}\). Consequently, "the question of what renders an enrichment unjust is... an enquiry not into justice at large but into the justice that is specific to the transfer of something for nothing"\(^{141}\).

The principle of justice in transfer (as opposed to justice at large) is that "one is entitled to what one owns until one freely parts with it"\(^{142}\). The point of liability is to "assure that the transfer and retransfer of value is in accordance with the parties' freedom of will"\(^{143}\). The basis of liability is that "the process of giving something for nothing was intended by neither party and therefore has to be reversed"\(^{144}\). In this way, an enrichment is unjust where its retention conflicts, in violation of P and D's status as free and equal persons, with the (non-donative) terms on which P and D freely transferred and received the enrichment.

\(^{139}\) Ibid at 222.
\(^{140}\) Ibid at 220.
\(^{141}\) Ibid.
\(^{142}\) Ibid at 203.
\(^{143}\) Ibid at 227.
\(^{144}\) Ibid at 226.
2.2.5 Changes of Position and Other Items

Weinrib's theory of unjust enrichment provides a unique conception of various sub-topics within unjust enrichment. The four items that will be discussed here are: (1) incidental benefits; (2) subjective devaluation; (3) indirect transfers; and (4) the change of position defence.

With respect to incidental benefits, pursuant to Weinrib's theory, the absence of liability for such benefits is justified on the basis that some benefits realized from the action of another involve no movement of value, with movement being a necessary ingredient for liability. In a situation involving an incidental benefit, then, the "purpose and intended effect of the action refer only to the plaintiff and the plaintiff's property" so that "the value remains with the plaintiff even though the defendant has been advantaged as a result". Here, D has not been enriched at P's expense (and so no liability will follow).

With respect to subjective devaluation, the usual analysis (in which subjective devaluation relates to the determination of enrichment by negating D's gain where D subjectively attaches no value to it) is upset so that the significance of devaluation actually relates to the question of unjustness. This movement (from the factual strand to the normative strand) is justified because enrichment, being understood as a transfer of value, can never be determined subjectively since value, by its very nature, abstracts from particularity. Consequently, subjective devaluation, which cannot relate to the determination of enrichment (because such determination, being objective, is contrary to the very subjective nature of devaluation), relates only to the unjustness of retaining such enrichment because "at bottom, subjective devaluation is not about the nature of the enrichment, but about the transferee's freedom to make his or her own choices".

145 Ibid at 197.
146 Ibid at 198.
147 Ibid.
With respect to indirect transfers, Weinrib's theory, because it conceives of enrichment at the expense of another not as "mutually independent elements" but rather as being "structured by the immediacy of the link between the parties as transferor and transferee", precludes liability, for being too expansive, where P's claim "is allowed even though the parties are not related as transferor and transferee". Accordingly, liability will not follow where D's receipt comes by way of a third party T rather than directly from P.

Finally, with respect to the change of position defence, the typical interpretation, in which the defence is conceived as going to the determination of enrichment, is altered such that the defence applies "not because it disenriches but because it precludes an obligation-creating condition". The obligation-creating condition that is negated by the defence is D's imputed acceptance of the enrichment.

Weinrib's interpretation of the change of position defence applies to situations where the initial enrichment is monetary, and depends on two factors: first, whether the change of position is made in bad faith; and second, whether the monetary enrichment is spent on something that becomes entangled in D's entitlements.

So, P non-donatively transfers X value (as money) to D, who receives X value as an incontrovertible benefit under the third situation of imputed acceptance. However, subsequent events can confirm or disconfirm D's imputed acceptance. With respect to confirmation, once D learns of P's non-donativeness, his non-donative acceptance is confirmed because he has notice of "the very circumstances that grounded its imputation". D's knowledge of P's non-donativeness precludes application of the change of position defence because "the defendant

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148 *Ibid* at 196.
149 *Ibid* at 197.
150 *Ibid*.
151 *Ibid* at 215.
152 *Ibid*. 
would be spending money that [he] knew or should have known [he] was obligated to return to the plaintiff" and so the change of position would be made in bad faith\textsuperscript{153}. With respect to disconfirmation, where D changes position prior to knowing of P's non-donativeness, "the circumstances supporting the imputation of acceptance that was available previously no longer obtain"\textsuperscript{154} and so the defence may apply.

Where the defence applies, it does so "insofar as the spending of the enrichment entangles it in the recipient's entitlements"\textsuperscript{155}. If the enrichment is used to purchase something separate from D's other entitlements, then restitution can be made of the disentangled value\textsuperscript{156}. However, where the enrichment is used to purchase something entangled with D's other entitlements, then the value is irrecoverable\textsuperscript{157}. This is because "an obligation to restore such an enrichment would not be consistent with the defendant's freedom of choice"\textsuperscript{158} since such enrichment could not be made an independent object of choice due to its entanglement.

2.2.6 Problems with Weinrib's Theory

There are multiple problems with Weinrib's account of unjust enrichment.

The Problematic Change of Position Defence

Weinrib's treatment of the change of position defence is problematic because incoherent, as demonstrated by the following sequence.

\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
\textsuperscript{155} Ibid.
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid at 216.
\textsuperscript{158} Ibid.
First, in Weinrib's theory, imputed acceptance signals the non-donative nature of D's receipt: "what the recipient accepts is not the benefit conceived statically at the time the acceptance becomes operative, but rather the benefit as transferred. This includes... the transfer's non-donativeness"\textsuperscript{159}.

Second, imputed acceptance signalling D's non-donative receipt can occur even where D "has not turned his mind to this issue" (of non-donativeness)\textsuperscript{160}.

Third, where D has failed to turn his mind towards the issue of non-donativeness, he will, in actuality, be unaware of P's non-donativeness regarding the disposition (because awareness of a fact requires the turning of one's mind towards that fact).

Fourth, combining the first three items above leads to the conclusion that D's non-donativeness can be established, upon D's imputed acceptance, even where D is actually unaware of, by failing to turn his mind towards, P's non-donative intent.

Fifth, where D changes position in good faith ignorance of P's claim (such good faith indicated by D's ignorance of P's non-donativeness because it is this non-donativeness that facilitates P's claim), the change of position defence will apply to protect D because "the circumstances supporting the imputation of acceptance that was available previously no longer obtain"\textsuperscript{161}.

Yet this fifth item, in light of the first four items, presents a problem: how could an imputation of D's non-donative acceptance that, pursuant to the fourth item, does not rely upon D's knowledge of P's non-donative intent, be replaced/disconfirmed, pursuant to the fifth item, by D's lack of knowledge of P's non-donative intent (evidenced by a good faith change of position)? In other words, if D's non-donative acceptance justifying restitution obtains even absent D's knowledge of P's non-donative intent, then how could D's subsequent lack of knowledge, evidenced by a good

\textsuperscript{159} \textit{Ibid} at 209.
\textsuperscript{160} \textit{Ibid} at 208.
\textsuperscript{161} \textit{Ibid} at 215.
faith change of position, of P's non-donativeness negate or disconfirm D's non-donative acceptance that never relied upon such knowledge in the first place?

This sequence demonstrates that, contrary to Weinrib's explanation, the change of position defence cannot operate by negating, through D's ignorance of P's non-donativeness, D's non-donative receipt justifying restitution because such non-donativeness may be initially established even absent D's knowledge of P's non-donative intent.

There is another problem with the change of position defence, as conceived by Weinrib's theory, related to D's non-donative acceptance.

In explaining the good faith requirement in the change of position defence, Weinrib notes that "Once the recipient is made aware that the unspent money was given by mistake, acceptance of the money as non-gratuitous becomes conclusive because the recipient now has notice of the very circumstances that grounded its imputation". However, with respect to situations of acceptance two and three, whereby liability depends upon receipt of an incontrovertible benefit (such as money), "the defendant can be held liable even if unaware of the benefit".

Accordingly, where D is held liable even absent awareness of the benefit, then liability can result even where D lacks knowledge rendering "conclusive" D's non-donative acceptance of the benefit. But, this leads to the following question: where D lacks knowledge rendering conclusive his non-donative acceptance, does the imposition of liability obtain despite D's non-donative acceptance being inconclusive? Or is there something else, other than knowledge of the mistaken disposition, rendering conclusive D's non-donative acceptance? If so (i.e. if there is something else rendering conclusive D's non-donative acceptance), then why would knowledge

162 Ibid.
163 Ibid at 216.
164 Ibid at 215.
of the mistaken payment (also rendering conclusive D's non-donative acceptance) ever be necessary?

**Failure to Account for Proprietary Remedies**

Weinrib’s theory is problematized by the fact that P can receive in rem rights in remedy of an unjust enrichment (the availability of such rights being discussed, in depth, in the section below entitled "The Form of the Restitution Remedy: Value or In Rem Rights").

Weinrib argues that P's right to a retransfer is an in personam right resulting from the convergence of P and D's wills upon the non-donativeness of the original disposition. But, if P's right to a retransfer is in personam, then how can P obtain in rem rights, as the positive law prescribes, in response to an unjust enrichment? Kant notes that “The familiar moral and legal idea that two persons cannot, through their agreement, change the rights of a third who is not a party to their agreement holds more generally”\(^\text{165}\).

By characterizing P's right to a retransfer as being in personam and resulting from the convergence of P and D's wills, Weinrib's theory (necessarily) ignores the possibility of in rem rights awarded in restitution of unjust enrichment, instead arguing that "the plaintiff's right is not to the value as such, but to a retransfer of the value. The object of the right is an action by the defendant, not a thing"\(^\text{166}\).

This analysis is thus inconsistent with and cannot account for P's receipt of in rem rights in remedy of unjust enrichment following, for example, an unauthorized substitution whereby D exchanges the unjust enrichment X for the unauthorized substitute Y, rights to which are granted to P as a restitution remedy\(^\text{167}\).

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\(^{166}\) *Weinrib, supra* note 12 at 222.

\(^{167}\) *Burrows, supra* note 7 at 169.
Saprai's Critique

Prince Saprai has criticized Weinrib's theory of unjust enrichment by raising various issues that cannot be answered by such theory.

Saprai's first critique identifies a non-sequitur in Weinrib's theory related to Weinrib's assertion that restitution for unjust enrichment is an instance of corrective justice. This assertion is summarized by Saprai:

Corrective justice theorists make the claim that liability in private law is triggered when an unjust gain is made by a defendant which correlates to a loss made by the claimant. The gains and losses are caused by an injustice committed by the defendant. The result of this is that a pre-transactional equality that existed between the two parties is disrupted. The defendant is required to restore the balance that existed between the parties before the defendant's act of injustice disrupted it... the post-transaction imbalance between the parties is caused by the defendant breaching a duty that she owed to the claimant. The defendant makes a 'normative' gain by breaching a duty that was owed to the claimant and the claimant loses normatively because her rights are infringed because of the breach of duty committed by the defendant.\(^{168}\)

Consequently, "to violate one's duty or to interfere with another's rights (the two are the same thing) is to act in a way that is inconsistent with another's freedom"\(^{169}\). Advocates of corrective justice argue that, in unjust enrichment, there is a breach of duty arising upon D's retention of a mistaken payment because such retention compromises, due to the mistake or vitiation of P's intention, P's capacity for self-determining agency\(^{170}\).

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\(^{168}\) Prince Saprai, "Restitution without Corrective Justice" (2006) 14 Restitution L.R. 41 at 5.

\(^{169}\) Ibid.

\(^{170}\) Ibid at 6.
However, "it is difficult to see how a defendant by retaining a mistaken payment compromises the claimant's capacity for self-determining agency or freedom"\textsuperscript{171}.

One response might assert that P's rights are infringed where D retains a mistaken payment because D fails, by retaining the payment, to treat P "as a human being with equal status to the defendant"\textsuperscript{172}. More specifically, where D knows that P has disposed of his money pursuant to a mistake, there is a "necessary contradiction" in D retaining those assets because doing so invokes a right of ownership (over such assets)\textsuperscript{173} that is problematic:

The recipient asserts a right to do what she pleases with her own assets. However, in invoking this right the defendant should concede that other similarly placed individuals also have this right. By retaining the assets the defendant does not make this concession because the defendant necessarily denies that the claimant has a right to do what she wishes with her assets. The claimant's right is denied because the claimant did not consent to the transfer of her assets to the defendant... So, according to this argument, the wrong or breach of duty consists in denying the equal status of the transferor\textsuperscript{174}.

But, notes Saprai, this response is based on a non-sequitur: just because D retains a mistakenly transferred asset, while possibly indicating an assertion of a right of ownership over such asset, does not mean that D asserts "a right to do with one's assets as one pleases"\textsuperscript{175}. Indeed, in refusing to give up an enrichment mistakenly disposed of, D "may only be asserting the following right: 'the right to keep those assets that are mistakenly transferred'"\textsuperscript{176}.

\textsuperscript{171} Ibid.
\textsuperscript{172} Ibid.
\textsuperscript{173} Ibid.
\textsuperscript{174} Ibid.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid.
The problem is that a right to keep those mistakenly transferred assets (1) does not imply that "one has a right to do what one pleases with one's property"\textsuperscript{177}, and therefore (2) cannot explain "how the defendant can be said by retaining the mistaken payment to compromise the claimant's capacity for self-determining agency"\textsuperscript{178}.

Saprai's second critique involves the prohibitively onerous nature of D's duty as characterized by Weinrib, who "presupposes that we have a duty not to receive a mistaken payment or, alternatively, a duty not to know that we have received a mistaken payment"\textsuperscript{179}. This presupposition arises because it is only in this way that it can be said that "the recipient of a mistaken payment is in breach of a duty"\textsuperscript{180}. The problem is that this duty is "simply too onerous"\textsuperscript{181}: "Duties can only be imposed on us to the extent that it is possible for us to comply with them (ought implies can). A duty not to receive a mistaken payment is almost impossible to comply with"\textsuperscript{182}.

Third, Saprai argues that "Even if we assume that it is wrongful to receive a mistaken payment or to know that you have received a mistaken payment it is not clear why this wrong requires the recipient to make restitution of the payment to the mistaken transferor"\textsuperscript{183}. In other words, even if D "makes a normative gain correlated to the claimant's normative loss, this does not in itself explain why the defendant should be required to make restitution to the claimant"\textsuperscript{184}.

\begin{itemize}
    \item \textsuperscript{177} Ibid.
    \item \textsuperscript{178} Ibid at 7.
    \item \textsuperscript{179} Ibid.
    \item \textsuperscript{180} Ibid.
    \item \textsuperscript{181} Ibid.
    \item \textsuperscript{182} Ibid.
    \item \textsuperscript{183} Ibid at 9.
    \item \textsuperscript{184} Ibid.
\end{itemize}
Fourth, Saprai notes that Weinrib seems to "regard transfers of value as prima facie bad, or at least as something about which we should be distrustful"\textsuperscript{185}. But this distrust is questionable because the law "enforces gifts and in contract law does not require consideration to be adequate"\textsuperscript{186}. Furthermore, even if the law is suspicious of gratuitous transfers, "Weinrib does not explain why it should be," which is problematic as "his project is to justify the existing structure of unjust enrichment from a normative point of view"\textsuperscript{187}.

As will be seen (in the "Conclusion: Challenge Resolved" section below), although these critiques may undermine Weinrib's theory of unjust enrichment, they present no challenge to the status theory.

\textsuperscript{186} Ibid at 8.
\textsuperscript{187} Ibid.
2.3 The Status Theory

2.3.1 Overview of Elements

The status theory matches Weinrib’s theory of unjust enrichment except for three key differences: first, while Weinrib’s theory requires D to accept the enrichment non-donatively in order to establish an unjust enrichment, the status theory requires that D accept the enrichment without non-donative intent (i.e. without intent to compensate P for the disposition); second, in Weinrib’s theory, the nature of the right to restitution established by an unjust enrichment is an in personam right arising via the convergence of P and D’s wills upon the non-donativeness of the transfer, whereas under the status theory, the right to restitution is a status right belonging to P, enforceable against D, and established by virtue of P’s vulnerability to D positioning the parties in a status relationship justifying restitution; and third, unlike Weinrib's theory, the status theory considers the change of position defence to be a mirror image of unjust enrichment liability in the sense that it responds to D's property rights just as unjust enrichment liability responds to P's property rights.

So, the elements of an unjust enrichment action, according to the status theory, consist of a factual strand (determining whether there has been an enrichment) and a normative strand (determining whether the enrichment is unjust); however, unlike in Weinrib's theory, in the status theory, the normative strand is fulfilled by D's lack of non-donative intent (rather than by the presence of non-donative intent).

The factual strand has two elements, which are fulfilled where (1) D is enriched (2) at P's expense. The normative strand also has two elements, which are fulfilled where (1) P's non-donative intent (whereby P intends an exchange, rather than a transfer, of value) is (2) met by D's lack of non-donative intent (whereby D imputedly accepts the enrichment without intending to compensate P for such receipt).
D is enriched at P's expense where there is a transfer of value from P to D (as opposed to an exchange of value between P and D). Recall that an exchange of value occurs where a disposition of value is compensated by the movement of an equivalent value in the opposite direction, while a transfer of value occurs to the extent that the disposition is not compensated.

Only transfers, and not exchanges, of value trigger unjust enrichment liability because only transfers of value may conflict with P's non-donative intent (whereby P intends an exchange of value) in generation of a status relationship of vulnerability justifying restitution.

Unjustness (i.e. fulfillment of the normative strand of elements) is signalled by the mismatch between P's non-donative intent (established by an unjust factor) and D's lack of non-donative intent, which is indicated by D's imputed acceptance either in conjunction with donative intent (i.e. intent to receive a transfer of value from P) or in the absence of an intent to compensate P (i.e. no intent to exchange value with P).

This mismatch is possible only where P has non-donative intent (potentially conflicting with D's lack of non-donative intent) indicated by an unjust factor. In this way, each of the non-policy related unjust factors (considered by the status theory to be: mistake, failure of consideration, exploitation of weakness, duress, necessity, undue influence, and incapacity) can be considered different variations of the same theme: P disposes of the enrichment X value to D in the absence of an intention that D obtain X value without compensating P (i.e. in the absence of an intention to transfer value to D). For example, in mistake, P chooses to dispose of X value to D in order, typically, to discharge a debt owed to D. Because he intends to obtain something—the discharge of his debt—by disposing of X value to D, P intends to be compensated for the transaction, and so has non-donative intent (even though the transaction is, in actuality, a transfer of value because P is mistaken about the existence of the debt). In failure of consideration, P initially intends, in evidence of non-donativeness, on disposing of X value in return for D's compensatory consideration. In neither case does P intend D to receive X value without providing compensation to P (i.e. in neither case does P intend a transfer of value to D).
With respect to D's receipt in the absence of non-donative intent, such lack of intent will be established where the enrichment converges with D's purposes (under any of the three situations of acceptance) without D actually intending on P receiving compensation for the disposition. Note that D's receipt justifying restitution does not require D to have an intent to not compensate P (although such an intent will suffice to establish a lack of non-donative intent), but rather only requires D to lack an intent to compensate P. This explains how D's lack of non-donativeness justifying restitution can be established not only where D imputedly accepts under situation of acceptance one (whereby D chooses to retain the enrichment and not compensate P) but also where D imputedly accepts under situations of acceptance two or three (whereby the enrichment converges with D's purposes in the absence of an intention to compensate P). D's imputed acceptance (under the three situations of acceptance) does not signal non-donativeness on D's part because the status theory, unlike Weinrib's theory, does not view transfers of value as inherently suspicious.

Even where D's lack of non-donativeness is established, in the absence of actual knowledge of receipt, by imputed acceptance under situations of acceptance two or three, restitutionary liability will not be raised behind D's back (i.e. not be raised in violation of D's status as a free will) because, in those situations, the enrichment converges with D's purposes as a transfer of value (given D's lack of intention to compensate P) just as it would where D's purposes are forwarded in the presence of actual knowledge of such receipt. In this way, D obtains the same normative gain (i.e. the forwarding of his purposes) regardless of whether D actually chooses to receive the enrichment or whether the enrichment is received without an actual choice on D's part. Because D's normative (and unjust) gain obtains regardless of whether D makes an actual choice to receive the enrichment, D can be held liable for such unjust gain regardless of whether D has made an actual choice. Said differently, because the consequences of D's actual choice (i.e. the receipt of a transfer of value furthering D's purposes) are here the same as the consequences of a non-choice, holding D responsible for the consequences of a non-choice does not deprive D of anything that he would not also be deprived of where he has made a choice, and so does not
deprive D of anything in contradiction with D's capacity for choosing. D's capacity for choosing not being violated, restitutionary liability does not disregard D's status as a free will.

The mismatch in intentions between P and D incapacitates P from exercising his agenda-setting authority over X value, leaving P vulnerable to D who, de facto, can impose and forward his own agenda upon the enrichment that he now owns and possesses. Where P is inherently vulnerable to D in this way, P is incapacitated from acting in his own best interest regarding his property, and so the law imposes upon D a duty to act in P's best interest by disgorging the enrichment, obtained in furtherance of D's own best interest, to P and thus providing to P the very thing normatively lost—the benefit of a capacity to act in one's own best interest regarding property.

2.3.2 The Property Interest Underlying the Unjust Enrichment Cause of Action

This section argues that P can recover in unjust enrichment only where having a particular proprietary interest in the enrichment X value prior to disposing of X value to D. This proprietary interest takes the form of agenda-setting authority over X value, which is granted to P by virtue of either (1) P's ownership of legal and beneficial title over X (where X is a thing) or (2) P's ownership of (a portion of) his own labour X (where receipt of X benefits D as a service).

Unjust enrichment liability results from the violation, arising upon D's receipt of X value in the absence of non-donative intent, of P's agenda-setting authority over X value.

Put differently, liability follows, not upon mere fulfillment of the factual strand (whereby D must be enriched at P's expense by the receipt of X value), but rather only where there is also fulfillment of the normative strand (whereby P's non-donativeness is met by D's lack of non-donativeness). Fulfillment of these two strands will often occur simultaneously (because D may lack non-donative intent towards the enrichment from the very moment of receipt); however, this
need not be the case since it is also possible for the normative strand to be fulfilled only
subsequent to D's initial receipt of X value, which will occur where such receipt is initially
pursuant to a non-donative intent on D's part, with D's lack of non-donativeness arising (in
fulfillment of the normative strand indicating unjustness) only afterwards.

This distinction is conceptually important, not only because it enables precise identification of
the moment that the enrichment becomes unjust, but also because it demonstrates how the nature
of D's gain (and thus the nature of P's remedy forcing D to disgorge his gain) varies depending
on what is actually obtained by D at the moment unjustness arises.

That P has agenda-setting authority over a thing X (which is necessary for P to also have agenda-
setting authority over X value, which is the authority violated by D's receipt in the absence of
non-donative intent) by virtue of owning legal and beneficial title to X is supported by Larissa
Katz's argument presented in "Exclusion and Exclusivity in Property Law"188.

Katz argues that P's ownership of X is an exclusive right that, rather than obligating D to exclude
himself from X, provides to P agenda-setting authority over X: "What it means for ownership to
be exclusive is just that owners are in a special position to set the agenda for a resource.
Ownership's exclusivity is simply an aspect of its nature as a position of agenda-setting authority
rather than itself the essence of ownership"189. Accordingly, ownership does not require that
"others keep out so much as fall in line with the agenda the owner has set"190.

P's right to exclude others from his property is not the same as P's agenda-setting authority. For
instance, a rogue D could fail to possess X (i.e. abide by P's intention to exclude D from X) while
still violating P's authority to set the agenda for the property:

Consider the classic story of the rogue who fraudulently
mortgages or sells off another's property. The rogue's fraud, if

189 Ibid at 4.
190 Ibid at 5.
effective against the true owner, would usurp the owner's exclusive authority to decide when to dispose of his property and so would attack at the very heart of ownership, but it need not involve any invasion of the boundaries of the thing itself. Exclusion rules are on their own thus ineffective to protect the owner's exclusive possession from the rogue's machinations\textsuperscript{191}.

In this way, "exclusion rules do not adequately preserve the owner's exclusive authority to set the agenda for a resource against [...] fundamental challenges"\textsuperscript{192}.

The existence of an owner's right to set the agenda for his property is demonstrated by adverse possession and trespass.

To receive in rem rights following an adverse possession, it is insufficient for D to merely possess without the true owner P's permission. Rather, such rights will be granted to D only where his use of P's property is also inconsistent with P's plans for the property\textsuperscript{193}. The inconsistent use test thus "insulates the true owner against squatters so long as the latter's use of the land does not interfere with her agenda"\textsuperscript{194}. In other words, so long as not interfering with P's agenda for X, D cannot threaten P's ownership merely by possessing and using the property.

This point is further supported by the law of trespass. In Didow v. Alberta Power Ltd\textsuperscript{195}, the Alberta Court of Appeal held that power lines hanging over P's property constituted a trespass, not because P had a right to exclude D but rather because the power lines protruded into air space "reasonably necessary for ordinary or potential uses of land"\textsuperscript{196}. Thus, trespass results where D's

\begin{itemize}
\item\textsuperscript{191} Ibid at 33.
\item\textsuperscript{192} Ibid at 34.
\item\textsuperscript{193} Ibid at 25.
\item\textsuperscript{194} Ibid at 26.
\item\textsuperscript{195} Didow v. Alberta Power Ltd. (1988), 60 Alta. L. R. (2d) 212.
\item\textsuperscript{196} Katz, supra note 188 at 41.
\end{itemize}
use of P's property, rather than merely existing, is also inconsistent with P's agenda for that property.

Similarly, in *State v. Shack*\(^{197}\), a farm owner P brought a claim for trespass against two social workers D who had entered P's property despite P's refusal of requests for such entrance. The court found that no trespass had occurred because D's entrance onto the property was consistent with P's farming agenda; had the visits interfered with P's farming agenda, they would have constituted trespass.

P's agenda-setting authority is not limited to X things; rather, it additionally provides to P authority over X where X is (a portion of) P's labour. This is supported by the Hegelian argument that P has ownership over his own labour where such labour is separable from P's personality generally: "Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being"\(^{198}\).

Importantly, P's agenda-setting authority over X, where X is a thing or P's labour, extends to provide to P agenda-setting authority over X value (i.e. value, adhering to X, equivalent in worth to the objective worth of X). This is pursuant to another Hegelian notion, which is described by Weinrib: "Hegel regards value as an incident of property. One is entitled to the value of something by virtue of one's ownership of the thing that is the locus of the value"\(^{199}\).

\(^{197}\) *State v. Shack* 277 A.2d 369 (N.J. 1971).
\(^{199}\) *Weinrib, supra* note 12 at 190.
In contrast, James Penner has argued that "it is incoherent to say that to own property is to own the value of it, for value is realized by the actions of the owner; it is not something the owner possesses"\(^{200}\). However, this argument is incorrect.

Penner's argument is incorrect because it wrongly asserts that value in property is realized only upon use of such property. That this assertion is wrong is demonstrated by the benefits of non-use: where P owns a piece of land, he does not need to use that land in order to derive a benefit from it. Rather, by owning a piece of land but not using it, P prevents others from using the land which, given P's non-use, remains in its present condition (insofar as humans do not alter its present condition). This provides the valuable benefit of conservation to the world (of which P is a part) by preventing human exploitation of such land causing harm to the environment.

Penner's argument is correct only if we assume that there is no value in conservation (or, if there is value in conservation, that P somehow does not benefit from it)—which is an unreasonable assumption given our current knowledge of climate change, and its attendant harms, caused by human activity.

Indeed, Hegel is explicit in asserting that full ownership includes not only a right to use but additionally a right to value as distinct from use:

A thing in use is a single thing determined quantitatively and qualitatively and related to a specific need. But its specific utility, being quantitatively determinate, is at the same time comparable with [the specific utility of] other things of like utility. Similarly, the specific need which it satisfies is at the same time need in general and thus is comparable on its particular side with other needs, while the thing in virtue of the same considerations is comparable with things meeting other needs. This, the thing's universality, whose simple determinate character arises from the particularity of the thing, so that it is eo ipso abstracted from the thing's specific quality, is the thing's value, wherein its genuine substantiality becomes determinate and an object of consciousness. As full

owner of the thing, I am eo ipso owner of its value as well as of its use.\textsuperscript{201}

It is, as argued below, P's agenda-setting authority over X value that is violated upon an unjust enrichment in justification of a restitutionary remedy.

### 2.3.3 The Unjust Enrichment

This section argues that P's disposition of X value to D (whereby D is enriched at P's expense) becomes an \textit{unjust} enrichment where, in fulfillment of the normative strand of elements, P's non-donative intent in effecting the transaction is met by D's receipt or retention in the absence of non-donative intent.

P has non-donative intent regarding the disposition of X value to D where he intends to effect an exchange, rather than a transfer, of value, or where he lacks a free intention to dispose of X value at all. D lacks non-donative intent where he receives or retains X value, under one of the three situations of imputed acceptance, without intending P to receive compensation for the disposition.

Importantly, an exchange of value requires two things: (1) that D receive value from P and then (2) compensates P for the disposition of such value. D's receipt of value (alone or adhering to X) is a necessary component of an exchange because, absent D's receipt, anything that D subsequently provides to P will not be compensation (in facilitation of an exchange) for the disposition but will, rather, represent a separate transfer of value from D to P.

With this in mind, the sequence of events leading to an unjust enrichment may be summarized as follows.

\textsuperscript{201} Knox, \textit{supra} note 198 at para 63.
First, P, having agenda-setting authority over X value, disposes of X value to D such that D is enriched by a transfer of value at P’s expense (in fulfillment of the factual strand of elements of an unjust enrichment).

However, second, because P has non-donative intent regarding the disposition of X value, he (typically) intends to effect an exchange, rather than a transfer, of value (pursuant to his agenda-setting authority over X value). An exchange of value, recall, consists of two elements whereby D (1) must receive X value from P and then (2) compensates P for the disposition of such value. Thus, in intending to effect an exchange of value (in accordance with his non-donative intent), P intends both that D receive X value (which, where adhering to X, indicates that P also intends that D receive X itself) and that P be compensated for the disposition received by D.

Third, D receives X value, under one of the three situations of imputed acceptance, without intending P to be compensated for the disposition, and thus in the absence of non-donative intent (conflicting with P’s non-donative intent). However, this imputed acceptance both provides to D legal and beneficial title to X, as well as generates unjust enrichment liability forcing D to disgorge X value (or value equivalent to X value) to P.

D's imputed acceptance provides to D in rem rights to X because the agendas, regarding X value, of both P and D are fulfilled by D's receipt of such rights. P's non-donative agenda is fulfilled because, pursuant to such agenda, P intends D to receive X and X value (because this is the first element of an exchange of value that P intends). D's agenda, lacking non-donativeness, is similarly fulfilled because D's purposes are also forwarded by the receipt of X and X value.

For example, an unjust enrichment will arise where (1) P has non-donative intent in the sense of having an intent to effect an exchange, rather than a transfer, of value, and (2) D lacks non-donative intent in the sense of having an intent to receive a transfer, rather than an exchange, of value. Here, even though there is an unjust enrichment, D will still receive in rem rights to X and X value because both P's non-donative agenda and D's agenda lacking non-donativeness are fulfilled by such receipt: P's agenda is fulfilled because P intends an exchange of value, the first
element of which requires D to receive X and X value (such receipt then being compensated); D's agenda is fulfilled because D intends a transfer of value, which also requires D to receive X and X value (such receipt then being uncompensated). In this way, P and D's agendas converge upon D receiving X and X value, and it is only on the question of whether compensation is to be provided for the disposition that their agendas diverge.

This explains how P can recover in unjust enrichment even though D receives in rem rights to the enrichment.

Importantly, because P's agenda-setting authority is exercised, rather than breached, by D's receipt of X and X value, such authority persists to govern X value even though X now belongs to D. This is possible because, as argued above, exclusivity is distinct from agenda-setting authority such that the mere fact that D is no longer excluded from X (as D now owns and possesses X) does not displace P's agenda-setting authority over X value.

So, D, upon his receipt or retention of X value (alone or adhering to X), lacks non-donative intent regarding the disposition of X value. This lack of non-donativeness exists where D receives or retains X value without actually intending P to be compensated for the disposition of X value which is thus obtained by D in a transfer, rather than an exchange, of value. Under situation of acceptance one, D lacks non-donative intent because he has donative intent (whereby he intends to receive a transfer, rather than an exchange, of value). Under situations of acceptance two and three, D lacks non-donative intent because having no intention of compensating P for his loss. So, situation of acceptance one represents an affirmation of a transfer of value, while situations of acceptance two and three each represents a negation of an exchange of value, with acceptance under any of the three situations of acceptance then conflicting with P's non-donative intent to effect an exchange of value.

D's receipt or retention lacking non-donativeness thus marks the moment the enrichment becomes unjust (in fulfillment of the normative strand of unjust enrichment elements) because it is upon this moment that P's agenda-setting authority over X value, pursuant to which P intends
to receive compensation for the disposition of X value, is confounded because such value is subject to D's purposes despite D having no intention that P receive compensation (which will therefore not be provided to P). More specifically, because P's non-donative agenda for his property X value is to effect an exchange of value, D's receipt of X value, where D lacks an intention to compensate P, will violate P's agenda because X value becomes subject to D's purposes in an uncompensated transfer rather than an exchange of value.

This analysis is consistent with the Kantian conception of the nature of the wrong in property: "the wrong in property is that of interfering with another's ability to set and pursue such ends as he has set for himself"\textsuperscript{202}.

Fourth, because D never or no longer intends to compensate P for the disposition of X value, D realizes an unjust gain comprised of a de facto capacity to set the agenda for X value (whereby such value is received or retained by D in a transfer, rather than an exchange) in contravention with P's non-donative agenda, which still persists, of using X value in an exchange, rather than a transfer, of value. D is thus unjustly enriched by a freedom that he does not rightfully have—he can, de facto, set the agenda for X value (or, have his purposes forwarded by X value) because owning and possessing X value (alone or adhering to X, which may also be owned by D) without compensating P, despite the fact that P properly retains (because not extinguished by the disposition to D) the right to set such agenda. P's loss is, correspondingly, the loss of agenda-setting authority over X value which, because D owns and possesses X and/or X value and lacks intention to provide compensation in return, can no longer be fulfilled by the disposition (that remains a transfer of value) of X to D.

P and D are thus left in circumstances wherein P is vulnerable to D because having property rights (i.e. agenda-setting authority over X value) that cannot be exercised in the face of, and are therefore subject to, D's receipt/retention of X value in the absence of non-donative intent,

\textsuperscript{202} Ripstein, supra note 165 at 76.
incapacitating P from using his rights to further his own best interest in effecting an exchange of value pursuant to his non-donative intent.

These circumstances, I will argue, represent a status relationship justifying the imposition of restitutionary liability upon D.

2.3.4 The Justification for Restitution: a Relationship of Status

The relationship of vulnerability between P and D is a Kantian status relationship justifying the imposition upon D of a duty, in the form of restitutionary liability, to act in P's best interest.

In order to understand Kantian status relationships, it is necessary to understand Kant's larger conception of law and legal rights within which such relationships are situated and contextualized.

Kant's conception of law begins with the Universal Principle of Right, which says that "an action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with universal law."\(^{203}\) The Universal Principle of Right demands "that each person exercise his or her choice in ways that are consistent with the freedom of all others to exercise their choice."\(^{204}\)

The Universal Principle of Right generates innate right (i.e. no positive act is required to obtain innate right\(^ {205}\)), which is just the individualization of the Universal Principle and is characterized

\(^{203}\) Ibid at 13.
\(^{204}\) Ibid at 35-36.
\(^{205}\) Ibid at 35.
by freedom: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every human being by virtue of his humanity". Innate right is each person's entitlement "to exercise his or her own freedom, restricted only by the rights of all others to do the same under universal law". Essentially, then, innate right is the right that no person be the master of another.

However, the Universal Principle of Right is silent with respect to rights to external objects of choice, and so there must be some extension of the Principle if it is to justify such rights:

The Universal Principle of Right does not presuppose the existence of "usable" things other than your own person that can be used for setting and pursuing purposes. If nothing other than each person's own bodily powers could be used to set and pursue purposes, free beings would remain in a condition only of innate right. Once the possibility of using usable things is introduced, however, the Universal Principle of Right must apply to the terms on which those things can be used. If persons can set and pursue purposes by using something other than their own bodies—if there are things that persons have the physical power to use—they must be entitled to do so, unless such an entitlement would restrict the freedom of others to use what is theirs to set and pursue their own purposes.

In response to the silence of the Universal Principle regarding external things, Kant introduces the postulate of acquired rights, which extends the Universal Principle to rights over external things. The postulate of acquired rights holds that a person may exercise his innate right through a positive choice bringing external things under control in a way that is consistent with the free

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206 Ibid.
207 Ibid at 36.
208 Ibid.
209 Ibid at 62.
purposiveness of others\textsuperscript{210}. Accordingly, acquired rights must be established through an affirmative act (unlike innate right) and there cannot be anything about the object (of the right) that limits who might acquire it by performing the affirmative act\textsuperscript{211}; so long as the object (of the right) can be rightfully acquired and has not yet been acquired (by another), then P can acquire it\textsuperscript{212}.

There are three types of acquired right: property rights, contract rights, and status rights. The three types of acquired right reflect the three basic ways in which two people can interact: first, property rights reflect P and D acting independently, each pursuing his own purposes; second, contract rights reflect P and D acting interdependently and consensually; and third, status rights reflect P and D acting interdependently and non-consensually\textsuperscript{213}. As the status theory holds that the right protected by unjust enrichment law is a status right, it is to this type of acquired right that we shall now turn.

Kantian status relationships exist where "persons find themselves in a relationship in which one party is not in a position to consent either to the existence of that relationship or to modification of its terms"\textsuperscript{214}. Where such a relationship exists, D has the right to set the purposes towards which P's means will be used; however, because P cannot consent to the relationship, D must pursue only those purposes that are in P's best interest.

Perhaps the most prominent example of a status relationship is that between parents and children:

Kant notes that parents bring children into the world of their own initiative and without the consent of the children. As a result, children are nonconsenting parties to a relationship in which they find themselves. Further, so long as they are

\textsuperscript{210} \textit{Ibid} at 58.
\textsuperscript{211} \textit{Ibid} at 60.
\textsuperscript{212} \textit{Ibid}.
\textsuperscript{213} \textit{Ibid} at 21.
\textsuperscript{214} \textit{Ibid} at 73.
children, they are not competent to consent. Nor are they competent to exit the relationship. Precisely because the children are nonconsenting parties, parents may not use their children in pursuit of their own ends. Instead, they are subject to a duty to act for the benefit of those children, where the benefit is understood in terms of enabling the children to become purposive beings\textsuperscript{215}.

Similarly, in unjust enrichment, P does not, due to his non-donative intent, consent to the relationship with D as transferor and transferee of value (rather, he typically consents merely to a relationship between himself and D as exchangers of value). Nor can P modify the terms of such relationship because incapable, due to D's ownership and possession of X value, of regaining X value that is therefore left in D's hands uncompensated and so provides X value to D on terms of transfer, in contravention of P's non-donative intent, rather than terms of exchange.

This status relationship has two consequences: (1) P is precluded from obtaining compensation in response to the violation of his agenda-setting authority over X value; however (2) restitution is justified because responding to the inherent asymmetry of the status relationship.

Indeed, "Relations of status are inherently asymmetrical, and so can only be made rightful by restricting the freedom of the right holder to act for the purposes of the other person"\textsuperscript{216}. So, because status relationships are inherently asymmetrical, they cannot be remedied by compensatory terms.

This conclusion is demonstrated by the situation here. The asymmetry manifests as a power imbalance between P and D whereby P is incapacitated, due to D's ownership and possession of X value, from acting in his own best interest (pursuant to his non-donative intent which is thus confounded) by obtaining the best possible bargain for the disposition of X value. P is incapacitated from acting in his own best interest because incapable of taking his property (which now belongs to D) and walking away from a bad offer (of compensatory terms); in

\textsuperscript{215} Ibid at 71.
\textsuperscript{216} Ibid at 79.
contrast, D's best interest is already furthered by the disposition of X value that, if left untouched, will be made on terms of transfer rather than terms of exchange. Thus, the disposition as it stands reflects D's lack of non-donativeness rather than P's non-donativeness. Because D's best interest is already forwarded by the disposition of value, he is left without incentive to disrupt the status quo by offering adequate terms of compensation to P, who is consequently forced to either accept bad compensatory terms or to leave in place the status quo ungoverned by any compensatory terms at all (i.e. leaving the disposition in place as a transfer of value pursuant to D's lack of non-donativeness but contrary to P's non-donativeness). Because resulting from such a power imbalance, any compensatory terms seemingly consented to by the parties could never reflect a true convergence of intentions (which is precluded here because P's consent to bargain is, unlike D's, impaired by P's inability to act in his own best interest) but rather only replicate the power imbalance between them.

This power imbalance incapacitating P from self-determining proper compensatory terms also precludes the imposition, by law, of compensatory terms in the form of a damages award. P's vulnerability cannot be resolved by compensatory damages imposed by law because P, incapacitated from self-determining adequate compensatory terms, does not (because cannot) exercise his non-donative intent which therefore could never be reflected by compensatory terms, in the form of damages, imposed by law upon the parties. Said differently, because P's non-donative intent (pursuant to which P might consent to compensatory terms) is here inoperative in preclusion of actually determining such terms, there is nothing (no operative intent) that could be reflected or instantiated by a damages award aimed at compensating P. Certainly, "in determining the appropriate remedy, right does not ask what parties would have agreed to, because they did not agree, and it would be inconsistent with the freedom of the aggrieved party to hold him or her to the terms of an agreement that was never entered into". This analysis reveals the extent of the flaw in the old implied contract theory of unjust enrichment: not only do P and D not form any agreement, implied or otherwise, whereby D is to

\[217 \text{ Ibid at 83.}\]
compensate P, but P and D could not form such agreement due to the power imbalance between them.

However, while the asymmetry of the status relationship precludes a compensatory award of damages, it also justifies the imposition of a restitution remedy. Once more, "Relations of status are inherently asymmetrical, and so can only be made rightful by restricting the freedom of the right holder to act for the purposes of the other person"\textsuperscript{218}. Because incapacitated from acting in his own best interest in his relations with D, P's best interest can be forwarded only by restricting D's freedom through the imposition of restitutionary liability forcing D to act in P's best interest.

Restitution, whereby D disgorges to P either X value (or value equivalent to X value) or in rem rights to X, forces D to act in P's best interest because it transfers the benefit of receipt, which is initially done in D's best interest, to P. In other words, the disgorgement to P of X value (or value equivalent to X value) or in rem rights to X represents P's best interest because placing P in the same position occupied by D upon D's receipt, which is done in D's own best interest, of X value. This is entirely appropriate as "the property exists for the benefit of its owner" and so "the only way to redress another's use of it is to treat that use as though it were done solely for that person's benefit"\textsuperscript{219}. In this way, P's best interest is forwarded by receiving X value (or value equivalent to X value) or in rem rights to X from D just as D's best interest was forwarded by receiving X value from P.

Accordingly, the remedy is gain-based and, while not necessarily factually compensatory (because not corresponding to P's factual loss), is normatively compensatory in the sense that P receives the very thing comprising his normative loss: the benefit of a capacity to act in his own best interest regarding X value. Indeed, "Should you use my property in pursuit of ends I do not

\textsuperscript{218} Ibid at 79.
\textsuperscript{219} Ibid at 83.
share, I am entitled to the proceeds of that pursuit, as I would have been had it been done rightfully, that is, on my behalf\textsuperscript{220}.

### 2.3.5 The Form of the Restitution Remedy: Value or In Rem Rights

There are actually two stages involved in reversing an unjust enrichment: first, P must obtain the right to restitution (i.e. what I am characterizing as P's status right forcing D to act in P's best interest by disgorging his gains), and then, second, P must exercise that right to restitution\textsuperscript{221} to obtain a retransfer, from D, of either X value (or value equivalent to X value) or in rem rights to X.

Although the typical remedy for an unjust enrichment is a status right to a retransfer of X value or value equivalent to X value (such remedy always being available in response to an unjust enrichment), it is, exceptionally, also possible for the status right to restitution to be exercised so as to provide to P in rem rights over X or X's unauthorized substitute Y.

In rem remedies will be available where: (1) property to which P's remedial in rem right might attach remains with D and (2) the injustice is initial such that there is no time during which D has unfettered rights to X. This is pursuant to Birks' theory of when in rem rights are awarded as a remedy to unjust enrichment\textsuperscript{222}.

Three situations will be discussed: first, where in rem rights are awarded following an initial (rather than subsequent) injustice; second, where in rem rights to Y are awarded to P following

\textsuperscript{220} \textit{Ibid}.

\textsuperscript{221} \textit{Burrows, supra} note 7 at 14.

\textsuperscript{222} \textit{Ibid} at 174-175.
D's unauthorized substitution of X value (alone or adhering to X) for Y; and third, where P is subrogated to T's present or former rights, which may be personal or proprietary, against D.

Note that, even where in rem rights are justified as the form of restitution, P can always exercise his status right so as to obtain a retransfer of X value (or value equivalent to X value), not because D's gain does not consist of in rem rights, but rather because such retransfer of X value (or value equivalent to X value) may, where P chooses, be substituted for a proprietary remedy.

The first situation, whereby P obtains a proprietary remedy in X following an initial (rather than subsequent) injustice, is explained by reference to the nature of D's gain operative at the time unjustness arises.

Where the unjustness of the enrichment arises immediately upon D's receipt of X value adhering to X, P can exercise his status right to obtain an in rem remedy consisting of proprietary rights to X. This is because here, D's gain at the time unjustness arises is a gain of X value adhering to title over X. Because D's gain of X value is manifested as a gain of title over X, D can be forced to disgorge in rem rights over X since D's rights are, from the very start, obtained via an injustice, precluding D from complaining when those rights are awarded to P in response to the unjust enrichment.

Where the unjustness of the enrichment arises only subsequent to D's initial receipt (which occurs where D's initial receipt is done with non-donative intent) of X value adhering to X, P can exercise his status right to obtain only a retransfer of value equivalent to X value. This is because here, D's gain at the time of unjustness is not title to X, but rather only value equivalent to X value. D's unjust gain does not consist of title to X because such in rem rights will have already been obtained previously pursuant to both P and D's non-donativeness negating the status relationship of vulnerability signalling unjustness. D's unjust gain, rather, consists of value equivalent to X value because, upon D's subsequent lack of non-donativeness arising, D obtains de facto agenda-setting authority over X value in furtherance of D's own purposes, which will be furthered by value equivalent to the X value used to purchase such furtherance. Because D's
unjust gain consists of value equivalent to X value (rather than adhering to title to X), this is also what P obtains in remedy of unjust enrichment.

With respect to unauthorized substitutions, P can obtain in rem rights to the substitute Y in response to the unjust enrichment occurring upon D's (unauthorized) exchange of X value (alone or adhering to X) for Y.

Here, D's unauthorized substitution of X value for Y represents a second unjust enrichment, in which the value lost ("at P's expense") is not X value (as in the initial unjust enrichment) but rather value equivalent to the integrity of P's initial status right (granted to P following the initial unjust enrichment) against D.

So, first, P non-donatively disposes of X value (alone or adhering to X) to D, who receives such value without non-donative intent in generation of the status right entitling P to restitution (either in the form of X value, value equivalent to X value, or in rem rights to X).

Second, P, now owning the benefit of D's obligation to retransfer X value (or value equivalent to X value) or in rem rights to X, has non-donative intent regarding such benefit because intending to give up, by exercising, his status right in exchange for D's disgorgement of X value (or value equivalent to X value) or in rem rights to X.

Third, D contracts with T whereby D provides X value (alone or adhering to X) to T in exchange for the unauthorized substitute Y. This amounts to a second unjust enrichment because it represents a transfer of value from P to D that is unjust.

The unauthorized substitution comes "at P's expense" because P's initial status right, whereby P can recover X value (or value equivalent to X value) or in rem rights to X from D so long as D retains X value (or value equivalent to X value) or in rem rights to X to disgorge to P, becomes subject to D's bankruptcy upon such unauthorized substitution. This is because P's initial status right, prior to D's transaction with T, can be used by P to force D to disgorge either X value itself (or value equivalent to X value) or in rem rights to X; however, once D rids himself of X value
(alone or adhering to X) and then goes bankrupt (and so has neither X value nor value equivalent to X value nor X itself), P cannot use his status right to force D to disgorge anything because D does not have anything that could be disgorged. P thus loses a measure of security upon D's unauthorized substitution in the sense that P's initial status right becomes subject to D's bankruptcy.

D's gain is a gain of the unauthorized substitute Y.

Because the unauthorized substitution provides to D a gain coming at P's expense, the factual strand of elements is fulfilled.

The normative strand (determining unjustness) is also fulfilled because P's non-donative intent over his property, the initial status right, is met by D's lack of non-donative intent regarding his gain of Y. Recall that P has non-donative intent regarding his initial status right because he intends on giving up, by exercising, such right in exchange for D's disgorge of X value (or value equivalent to X value) or in rem rights to X. D lacks non-donative intent because, intending to retain Y for himself, D has no intention of compensating P for the loss of security P suffers upon D's transaction with T.

Fourth, D's gain arising upon the unauthorized substitution (i.e. the second unjust enrichment) is comprised of title to Y because this is what D gains in exchange for X value (alone or adhering to X) in breach of P's non-donativeness. Because D's gain at the time unjustness arises is comprised of title to Y, this (i.e. in rem rights to Y) is what P properly receives in response to the (second) unjust enrichment consisting of an unauthorized substitution.

With respect to subrogation, P may obtain both personal and proprietary remedies.

Subrogation, whereby P may step into the shoes of T so as to have the benefit of some or all of T's former or present rights and remedies against D\textsuperscript{223}, may be either contractual or non-

\textsuperscript{223} \textit{Ibid} at 145.
contractual, but will only reverse unjust enrichment where non-contractual. The discussion here is therefore limited to non-contractual subrogation.

T's rights, to which P is subrogated, against D may be in personam or in rem, and may be extinguished (prior to P's subrogation) or subsisting\(^\text{224}\). Subrogation to extinguished rights occurs where P has discharged (or P's money has been used to discharge) D's liability to T, allowing P to take over some or all of T's former rights against D\(^\text{225}\). Subrogation to subsisting rights occurs where P takes over T's rights, which have not been extinguished, against D\(^\text{226}\).

Subrogation to extinguished rights will be demonstrated by analysing lenders' subrogation rights and bankers' subrogation rights, while subrogation to subsisting rights will be demonstrated by analysing subrogation rights of creditors of a business carried on by trustees.

With respect to lenders' subrogation rights, P will be subrogated to T's rights against D where P lends money to the borrower D, who uses the money to pay off his debt to the third party T but cannot repay the loan from P\(^\text{227}\). Here, there is an unjust enrichment arising upon D's discharge of his obligations to T.

Such discharge comes "at P's expense" because D, rather than retaining or investing X value in facilitation of repayment to P, rids himself of X value without receiving any money in return, and so, upon his bankruptcy, cannot repay P. More specifically, P loses value in that, prior to D's discharge of his obligations to T, P's right to repayment is secured by D's good faith efforts to retain or invest X value in facilitation of repayment to P; however, upon D's discharge of his obligations to T, P's right to repayment is no longer secured by D's good faith efforts to repay P.

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\(^{224}\) Ibid at 146-147.

\(^{225}\) Ibid at 146.

\(^{226}\) Ibid at 147.

\(^{227}\) Ibid at 150-151.
because D has rid himself of X value in exchange for no money, and so intentionally subjects P's right (to repayment) to D's bankruptcy.

D obtains a gain in the form of the discharge of his obligations to T.

P has non-donative intent regarding his right to repayment because intending to give up, by exercising, such right in exchange for the repayment. D has donative intent (and so lacks non-donative intent) because, in discharging his obligations to T, D obtains no money that could then be used to repay P, and so subjects P's right (to repayment) to D's bankruptcy without providing P with any compensation for P's loss of security.

Where D discharges a secured obligation to T, P is subrogated to T's secured rights, amounting to a proprietary remedy for unjust enrichment, against D because this is what corresponds to D's gain, which is also proprietary. D's gain, upon the discharge of a secured obligation, is proprietary because D's rights to the secured property thereby become unfettered by T's security interest, providing to D the benefit of full (i.e. unfettered) ownership.

In contrast, where D discharges an unsecured obligation, P is subrogated to T's unsecured rights, and so does not receive a proprietary remedy in unjust enrichment, which is appropriate because D's gain is not proprietary. Rather, because the discharged obligation is unsecured, D's gain consists only of value equivalent in worth to the debt owed. Because there is no secured property, D has no property rights that become unfettered, upon the discharge of the debt, in affording D the benefit of full ownership.

With respect to bankers' subrogation rights, the banker P will be subrogated to T's rights against D where P, acting erroneously on what it believes to be the valid mandate of its customer D, pays money to T which discharges D's liability to T\textsuperscript{228}. Here, there is a transfer of value from P to D because P loses that value used to discharge D's debt while D gains the benefit of such discharge. P has non-donative intent because intending to receive, in exchange for the value given to T,

\textsuperscript{228} Ibid at 158.
fulfillment of the valid mandate of its customer D. D has donative intent (and so lacks non-donative intent) because, the mandate not being valid, D receives the enrichment absent fulfillment of such valid mandate (which does not exist).

And, as in situations involving lenders' subrogation rights, P will receive a proprietary remedy where T's rights against D are secured, but will receive only a personal remedy where such rights are unsecured. Once more, this is because D's gain, where T's rights are secured (but not where they are unsecured), consists of the benefit of full ownership (that results from the discharge of T's security interest) over previously fettered property.

With respect to subrogation rights of creditors of a business carried on by trustees, the creditors P may be subrogated to the trustee T's (subsisting) indemnity rights against the beneficiaries D. This will occur where the trustee T fails to repay P, who he has dealt with in running the business.\(^\text{229}\)

Note that subrogating P to T's rights against D does not here raise obligations behind D's back, even though it is T, and not D, who receives the enrichment from P. This is because D, being beneficiary under a trust operated by T trustee, is enriched where T fails to repay P such that the enrichment converges with D’s purposes (under situation of acceptance two, as D must be taken to have a prior purpose of benefitting from the trust in which he is beneficiary). Such convergence constituting imputed acceptance, unjust enrichment liability is not imposed upon D behind his back.

Restitutionary liability is justified because, following the loan from P to T, P has a right to repayment against T; however, once T fails to repay P, there is an unjust enrichment.

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\(^{229}\) Ibid at 165.
Upon failing to repay P, there is a transfer of value from P to T: P's right to repayment is confounded by T's failure to repay (and so such failure "comes at P's expense"), while T (and thus D as beneficiary) gains free use of that value which otherwise would be used to repay P.

P has non-donative intent because intending to give up, by exercising, his right to repayment in exchange for such repayment. D lacks non-donative intent because not intending to provide to P any compensation for the loss of fulfillment of P's right to repayment.

As for the form of restitution, note that a trustee properly carrying on a business for the benefit of the beneficiaries is "generally entitled to be indemnified by the beneficiaries for personal loss and has a lien over the trust assets to secure compensation"230. However, where T fails to repay P, it is P, and not T, that suffers personal loss and so the justification for indemnity (including the right to a lien over trust assets) applies not to T but to P. It is therefore appropriate that P is subrogated to T's rights, which include the proprietary lien, against D in response to such personal loss.

2.3.6 Indirect Dispositions

With respect to indirect dispositions, whereby P indirectly disposes, either through D or an alienation, of X value to T, the issue is whether P can recover from T in unjust enrichment or whether such recovery is barred because T's enrichment does not come "at P's expense"231.

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230 Ibid.
231 Ibid at 69.
The general rule is that P cannot recover from T in unjust enrichment where the enrichment is provided to T indirectly because such enrichment does not come "at P's expense". However, P can recover from T where T's enrichment comes by way of P's agent or trustee D.

The status theory justifies these rules, such justification being demonstrated by five scenarios: first, where D mistakenly disposes of X value to T despite intending to dispose of X value to P; second, where P and D enter a contract pursuant to which T is to receive X value from P; third, where T receives X value following P's alienation of X value; fourth, where P non-donatively disposes of X value to D, who receives X value without non-donative intent prior to disposing of X value to T (pursuant to gift or contract); and fifth, where T receives X value from P by way of P's agent or trustee D.

P can recover from T in only the fifth scenario.

In the first scenario, where D disposes of X value to T despite intending to dispose of X value to P, P cannot recover from T. Here, T's enrichment does not come "at P's expense" (and so P cannot recover from T in unjust enrichment) because P does not have any proprietary interest that is lost upon T's enrichment. Rather, P has only an expectation of receiving X value from D, and so D's disposition to T, while confounding P's expectation, does not remove from P any property or rights and so does not come "at P's expense."

The second scenario, where P and D enter a contract pursuant to which T is to receive X value from P, does not allow P to recover from T in unjust enrichment. Here, T's enrichment does not come "at P's expense" because P is compensated for the disposition to T and therefore suffers no net loss. P is compensated for his disposition of X value to T because, such disposition representing P's consideration in the contract with D, P is compensated for T's enrichment by

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232 Ibid at 70.
233 Burrows, supra note 9 at 44.
234 Burrows, supra note 7 at 70.
receipt of D's consideration, which D is not freed from providing due to P's failure (which does not here obtain) to perform, provided in exchange for P's consideration. D's consideration, being exchanged for P's consideration (consisting of the disposition to T), compensates P for the loss of X value and so such loss does not represent a transfer of value coming "at P's expense."

In the third scenario, T receives X value following P's alienation of X value. Here, no liability arises because T's gain does not come "at P's expense." This is because P, by alienating X value, has, by the time T obtains such value, already lost that which otherwise would be lost upon T's receipt. Because T's receipt does not deprive P of anything that P has not already deprived himself of, such receipt does not come "at P's expense" and so does not generate unjust enrichment liability.

The fourth scenario, where P non-donatively disposes of X value to D, who receives X value without non-donative intent prior to disposing of X value to T, also does not allow P to recover from T. This conclusion results from the nature of the relationship between P and D.

Here, because D's receipt of X value in the absence of non-donativeness conflicts with P's non-donative intention, there is an initial unjust enrichment between P and D providing to P an initial status right to a retransfer of X value (or value equivalent to X value).

Then, D's disposition of X value to T amounts to a second unjust enrichment as between P and D. This is because there is a transfer of value from P to D that is unjust. There is a transfer of value because, through D's disposition to T, P's status right (to a retransfer) becomes subject to D's bankruptcy (because, if D were to become bankrupt, D would have neither X value nor value equivalent to X value that could be used to satisfy P's initial status right), and so P loses a measure of security. D obtains fulfillment of his purpose of disposing of such value to T.

This transfer of value is unjust because D's donativeness (and thus lack of non-donativeness) in effecting the disposition to T conflicts with P's non-donative agenda regarding his initial status right. P has non-donative intent regarding his initial status right because intending to give up, by exercising, such status right in exchange for D's disgorgement of X value or value equivalent to
X value. However, D's intent is donative because, by giving up X value to T, D fulfills his own purposes without intending to compensate P for P's loss.

Because there is a second unjust enrichment, there is a new status relationship (between P and D) justifying the grant to P of a new status right allowing P to force D (subject, of course, to the change of position defence) to disgorge value equivalent to X value.

This new status right allows P to force D to disgorge value equivalent to X value because D's disposition to T, representing the second unjust enrichment, provides D with a gain comprised of fulfillment of his purpose, such purpose being forwarded by an extent equivalent in worth to the price of fulfillment (i.e. X value), of providing X value to T. P's second status right consequently provides to P a right to recover value equivalent to X value because this is what D gains upon the second unjust enrichment.

With respect to the relationship between P and T, because value equivalent to X value is, by definition, equal to X value, D's disposition to T does not represent a transfer of value from P to T because such disposition provides to P compensation in the form of the second status right (to value equivalent to X value). In other words, because D's disposition to T both confounds P's right to X value and provides P with a right to value equivalent to X value, such disposition is compensated and so does not represent a transfer of value indicating T's enrichment "at P's expense." T's enrichment not coming "at P's expense," P cannot recover from T in unjust enrichment.

However, in the fifth scenario, the situation changes because here T's receipt, rather than following P's alienation or non-donative disposition to D of X value, comes by way of P's agent or trustee D. This scenario may be distinguished from the fourth scenario above.

In the fourth scenario, because P has an initial status right against D that is confounded by D's disposition to T, P receives, in response to such disposition representing a second unjust enrichment between P and D, a second status right against D. Because P's loss of (the integrity of) his initial status right against D is compensated by the receipt of the second status right
against D, the disposition from D to T does not, as between P and T, represent a transfer of value.

However, in this fifth scenario, P does not have an initial status right against D (because D obtains X value from P, not in unjust enrichment, but pursuant to agency or trusteeship) that is confounded, in generation of a second status right against D, by D's disposition to T. Not being granted a second status right against D in compensation for the loss suffered upon the disposition to T, such disposition represents a transfer of value between P and T and thus comes "at P's expense."

So, there is a transfer of value between P and T because, upon D's disposition to T, P loses X value (because P's agent or trustee D loses X value) while T gains X value. And, because P obtains, via D's disposition to T, no status right against D, such disposition is not compensated and so is not an exchange of value precluding unjust enrichment liability. Being a transfer, rather than an exchange, of value, the disposition to T comes "at P's expense" and so T may be liable to P in unjust enrichment.
Chapter 3

Applying the Status Theory and Resolving the Challenge

3.1 Applying the Status Theory: Unjust Enrichment

Liability

The status theory may be demonstrated by examining how it operates in relation to various unjust factors. The unjust factors that will be discussed are mistake, failure of consideration, exploitation of weakness, duress, necessity, undue influence, and incapacity.

3.1.1 Mistake

In mistake (which is the central unjust enrichment situation\(^{235}\)), P pays money, worth X value, to D as a result of a mistaken belief that, for instance, a debt was owed to D. Can P recover X value from D in unjust enrichment?

The basic rule is that, in this situation, P is prima facie entitled to recover X value as money paid under a mistake of fact or law:

The principle stated in *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.* [1980] Q.B. 677, 695-696, that a person who has paid money to another under a mistake of fact is prima facie entitled to recover it, should equally apply where the money is paid under a mistake of law, so that all common law claims for money paid under a mistake, whether of fact or of law, should be recoverable, subject only to the

\(^{235}\) *Ibid* at 203.
defences of change of position and settlement of an honest claim.\textsuperscript{236}

This rule applies even if the mistake is the result of P's negligence: "if [the money] is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."\textsuperscript{237}

However, this claim may fail "if the payer had intended that the payee should have the money at all events (irrespective of whether the fact was true or false) or was deemed in law to have so intended"\textsuperscript{238} or "if the payment had been made for good consideration, and in particular if the money had been paid to discharge, and did discharge, a debt owed to the payee (of a principal on whose behalf he was authorized to receive payment) by the payer or by a third party by whom he had been authorized to discharge the debt."\textsuperscript{239}

These rules are explained by the status theory.

P is prima facie entitled to restitution upon a mistaken payment because the payment, resulting from a mistaken belief on P's part, is granted to D non-donatively. P has non-donative intent because he intends to receive something—here the discharge of a debt—in compensation for the payment to D, and so the payment is not made donatively. This non-donativeness then conflicts with D's subsequent acceptance in the absence of non-donative intent, which obtains because D, having no obligation to do so, has no intention of compensating P by discharging any debt. The conflict between P's non-donativeness and D's lack of non-donativeness thus amounts to a status relationship of vulnerability justifying restitution.

\textsuperscript{236} Kleinwort Benson Ltd. v. Lincoln CC [1999] 2 AC 349 at 354 [Kleinwort]
\textsuperscript{237} Kelly v. Solari (1841) 9 M & W 54, as per Parke B.
\textsuperscript{238} Barclays Bank Ltd. v. WJ Simms [1979] 3 All ER 522 at headnote.
\textsuperscript{239} Ibid.
In the first exception, whereby P intends D to have money worth X value regardless of any mistaken belief, restitution will not follow because P does not have the non-donative intent required for liability. This is because here, P intends D to retain the enrichment, even if such retention fails to discharge a debt owed to P. Because P intends D to keep the enrichment without necessarily receiving compensation (i.e. the discharged debt) in return, P does not have the requisite non-donative intent. Where intending D to retain the enrichment regardless of mistake, P's intent, being donative (i.e. lacking non-donativeness), converges rather than conflicts with D's acceptance lacking non-donativeness, and so there is no incongruence of intentions and thus no status relationship justifying restitutionary liability.

The second exception, whereby P is not entitled to prima facie recovery where receiving good consideration for the payment, is similarly explained. Here, P cannot recover because the transaction, providing to P good consideration (e.g. the discharge of an obligation) for the payment, is not a transfer of value but rather an exchange of value. And, an exchange of value is insufficient to ground unjust enrichment liability which responds only to transfers of value that are unjust.

So, in the first exception, the transaction, being a *transfer* of value, can be accepted by D in the absence of non-donativeness; however, P's non-donativeness is unestablished, and so D's acceptance (lacking non-donativeness) does not necessarily conflict with such (unestablished) non-donative intent in justification of restitutionary liability. Said differently, restitution will not follow because, although the transaction is necessarily a transfer of value, P may have donative (rather than non-donative) intent matching D's acceptance (lacking non-donativeness) in preclusion of any conflict between intentions justifying liability. In the second exception, P necessarily has non-donative intent, but the transaction, possibly consisting of an exchange (rather than a transfer) of value, is not necessarily in conflict with P's non-donativeness (because an exchange of value will further, rather than violate, P's non-donative intention) and so cannot be said to violate P's agenda in generation of restitutionary liability.
An additional scenario, introduced by Robert Stevens, involves a disposition of value over which no title passes to D. So, P disposes of X value to D despite actually intending on disposing of X value to T. This will occur, to use (one version of) Stevens' example, where P intends on making a gift of $50 to his brother T, but instead actually makes the gift of $50 to a complete stranger D who closely resembles his brother. Here, "the claimant's mistake is so extreme, a mistake as to the recipient's identity, that no title to the note will pass".

According to the status theory analysis, that title does not pass to D is appropriate given that P has non-donative intent, not in the sense that he intends an exchange of value with D, but rather in the sense that he intends no disposition to D at all (rather, he intends only a disposition to his brother T). In this way, the justification for D's receipt of title is absent, and so D's failure to receive title is fitting. More specifically, the justification for D's receipt of title being, according to the status theory, P's non-donative intent whereby P intends an exchange of value consisting of D (1) receiving the enrichment (including title) and then (2) compensating P for such receipt, the absence of P's intent to exchange value means there is no reason for D to receive title pursuant to the first element of such (unintended) exchange.

Both Birks and Stevens argue that the fact that pre-existing title persists does not preclude a claim in unjust enrichment, a conclusion also affirmed by the status theory. This is because all elements of an unjust enrichment claim are nonetheless made out: there is a transfer of value from P to D (in fulfillment of the factual strand of elements) because P loses $50 and D gains $50; P has non-donative intent, with respect to D, because he intends no disposition of X value to D at all (rather, he intends a disposition to T only) and thus intends no transfer of value to D; yet, D's receipt of $50 lacks non-donativeness (and thus conflicts with P's non-donativeness) because

D has no intention of compensating P for his loss of $50. All elements of an unjust enrichment being satisfied, P can receive restitution from D despite title not passing.

### 3.1.2 Failure of Consideration

In situations involving failure of consideration (i.e. where P disposes of X value to D in expectation of compensation in the form of a performance that, in fact, never materializes and so fails)\(^{243}\), P can typically recover from D. Three scenarios will be discussed, the first involving contracts discharged for breach, the second involving anticipated contracts failing to materialize, and the third involving contracts formally defective (i.e. unenforceable for want of formality).

Note that, because failure of consideration is defined as the failure of an expected performance\(^{244}\), and performance can be expected even absent a binding contract (for example, where a contract is anticipated but fails to materialize), it is not necessary for there to be an initial consideration establishing a binding contract in order for there to be restitution for failure of consideration.

The status theory analysis of these three situations of failure of consideration is consistent with the argument made by James Edelman, that restitution is properly awarded following a failure of consideration only where, objectively, P's intention, in providing to D a thing or service, is to effect an exchange (rather than a transfer) of value\(^{245}\). This is, in substance, identical to the analysis proposed by the status theory, whereby restitution following a failure of consideration

\(^{243}\) Burrows, supra note 7 at 319.

\(^{244}\) Ibid.

\(^{245}\) Andrew Burrows and Edwin Peel (eds), Contract Formation and Parties (Oxford: Oxford University Press, 2010) at 159-160.
obtains only where P has non-donative intent or, in other words, only where P intends an exchange, rather than a transfer, of value.

The party in breach "does not normally have a right to restitution for failure of consideration where a contract has been terminated (by the innocent party) for breach"²⁴⁶.

This is because, where P breaches, the disposition of X value becomes a transfer of value pursuant to both P and D's agendas (P's agenda being donative and D's agenda lacking non-donativeness) in preclusion of the conflict of intentions representing a status relationship justifying restitution. Here, P chooses to breach, establishing a donative intention (replacing P's prior non-donative intent indicating a desire to be compensated by D's performance) according to which P will no longer be compensated by D's performance because breach, once accepted by D, frees D from any obligation to perform. So, by choosing to free D from the obligation to perform, P chooses to transform the expected exchange of value into a transfer of value in demonstration of donative intent. D, because no longer obligated to perform, lacks non-donative intent because no longer having any intention to compensate P for the disposition.

Consequently, D's possession of X, being uncompensated, is consistent with both P and D's agendas. This convergence of agendas then precludes the conflict of intentions resulting in a status relationship of vulnerability justifying restitution.

In contrast, P may recover following D's breach. Where D breaches, P's intention is not donative (and thus does not converge with D's lack of non-donativeness in preclusion of the status relationship justifying restitution) because P's non-donative intent, whereby he intends to receive D's performance as compensation, persists even after D's choice to breach. P evidences his continuing non-donative intent by (1) accepting D's breach in order to receive X value (rather than to receive nothing in demonstration of donative intent) back from D in rescission; or (2) refuting D's breach, instead holding D to the contract and forcing him to pay compensation (i.e. damages) to P for breach. In either case, P has non-donative intent because demonstrating a

²⁴⁶ Burrows, supra note 9 at 86.
desire to receive compensation, either in the form of X value (where P accepts D's breach and ends the contract) or damages (where P holds D to the contract). Having non-donative intent facilitates the incongruence with D's donative receipt (which indicates a lack of non-donativeness and is evidenced by D's breach indicating an intent to no longer compensate P by performing) signalling the birth of a status relationship of vulnerability justifying restitution.

With respect to anticipated contracts failing to materialize, restitution may, as a result of failure of consideration, follow P's disposition of X value to D made in reasonable reliance upon a contract that fails to materialize. In this regard, the analysis is indistinguishable from the analysis of restitution resulting from mistake:

I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously and, in both cases, the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total price which would become payable when the expected contract was made. In both cases, when the beliefs of the parties were falsified, the law implied an obligation—and, in this case, I think the law should imply an obligation—to pay a reasonable price for the services which had been obtained.

This passage makes clear that in both mistake and failure of consideration (regarding a contract failing to materialize), P's recovery in unjust enrichment depends upon the parties' intentions. P will have non-donative intent, in facilitation of restitution for unjust enrichment (because such non-donativeness will conflict with D's lack of non-donativeness in forming a status relationship), regarding dispositions undertaken pursuant to expected contractual obligations, but will have donative intent, in preclusion of restitutionary liability (because such donativeness will

247 *William Lacey Hounslow Ltd. v. Davis* [1957] 1 WLR 932 at 939.
converge with D's lack of non-donativeness in preclusion of a status relationship), regarding dispositions that are not expected to be compensated by performance pursuant to the expected contract.

So, where P disposes of X value to D in the belief that doing so would fulfill contractual obligations to be subsequently established, P has non-donative intent because expecting to receive D's performance of obligations (set out in the expected contract) as compensation for such disposition. D receives X value from P but, because the contract never materializes, he does not intend to perform any such contractual obligations compensating P for the disposition of X value. Consequently, any non-donative intent, pursuant to the expected contract, that D has upon the disposition is therefore removed because D now possesses X value without intending to compensate P pursuant to the contract that never materializes. This conflict between P's non-donativeness and D's lack of non-donativeness creates P's vulnerability to D signalling the existence of a status relationship justifying restitution.

Regarding contracts unenforceable for want of formality, P can recover from D in unjust enrichment:

...in the present case...a line of authority was discovered which...was concerned with contracts for annuities which were void if certain statutory formalities were not complied with. They were not therefore concerned with contracts void by reason of the incapacity of the parties. Even so, they were concerned with cases in which payments had been made, so to speak, both ways; and the courts had to decide whether they could, in such circumstances, do justice by restoring the parties to their previous positions. They did not hesitate to do so... With this precedent before him, Hobhouse J felt free to make a similar order in the present case; and in this he was self-evidently right248.

248 Westdeutsche, supra note 64 at 967.
An illustration of this rule is provided by *Deglman v. Guaranty Trust Co of Canada and Constantineau*\(^{249}\), in which D, pursuant to an unenforceable (because not complying with the Ontario Statute of Frauds 1950) oral agreement, agrees to leave a house for P in her will if P performs services worth X value for D. P performs the services with non-donative intent (because expecting to receive compensation pursuant to the contract), but D, freed by defective formalities from having to perform in compensating P, fails to dispose of the house to P. So, P non-donatively labours on D's behalf because intending to receive compensation, in the form of D performing her promise to dispose of her house to P, yet D, objectively freed by formal defects from performing, retains X value on donative terms indicating a lack of non-donativeness. The conflict between P's non-donative intent and D's absent non-donative intent leaves the parties in a status relationship forcing D to disgorge X value to P.

### 3.1.3 Exploitation of Weakness

As for the unjust factor of exploitation of weakness, restitution in unjust enrichment responding to such exploitation takes the form of rescission of an unconscionable contract. This is because facts fulfilling the requirements for contractual unconscionability will also fulfill the requirements for unjust enrichment liability resulting from exploitation of weakness.

Unconscionability justifying rescission of contract has three elements: (1) that P has a mental or circumstantial weakness; (2) disadvantageous terms; and (3) a lack of independent advice to

\(^{249}\) *Deglman v. Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785.
P. There may also be a fourth element, requiring D to know of P's weakness and to act in bad faith by taking advantage of such weakness.

A contract completed in fulfillment of these elements will also fulfill the unjust enrichment elements for exploitation of weakness.

The factual strand requirements that (1) D be enriched (2) at P's expense (i.e. that there be a transfer of value) are fulfilled by the disadvantageous terms of an unconscionable contract that consequently represents a transfer of value, equal to the difference in worth between P's consideration and D's consideration, from P to D.

P has the requisite non-donative intent regarding the transferred value because, having a mental or circumstantial weakness (and lacking independent advice) precluding knowledge of the objective inequality of the bargain, his performance does not, because cannot, evidence intent to effect the transfer of value the existence of which he is unaware of. Furthermore, if P had donative intent (in preclusion of a finding of non-donativeness), then he would, instead of receiving D's consideration as (what he thinks to be sufficient) compensation for the disposition of his consideration, merely dispose of such consideration to D without accepting anything in return. The fact that P does accept and receive D's consideration, then, supports P's non-donativeness.

D's lack of non-donativeness, with respect to the value transferred, exists because D receives such value without providing, nor intending to provide, compensation in return. D fails to provide compensation in return because, his consideration being worth less than P's consideration, D's performance cannot eliminate the transfer of value resulting from the difference in worth between the two considerations. And, because D does not, unlike P, suffer from a mental or circumstantial weakness precluding knowledge of the transfer of value, D's

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250 Burrows, supra note 7 at 300.
251 Ibid.
performance is not pursuant to a mistaken understanding that he is effecting, in demonstration of non-donativeness (and thus in preclusion of restitutionary liability), an exchange of value. Where D has also taken bad faith advantage of P's weakness (which, as mentioned above, may arguably be a requirement for unconscionability), he will have actual knowledge of the disadvantageous terms representing a transfer of value, and so his receipt of P's consideration pursuant to such terms indicates a donative intention (indicating a lack of non-donative intent) to receive a transfer.

However, P cannot recover where owing X value to D under a legal obligation\textsuperscript{252}. This is because such a legal obligation renders the disposition an exchange of value, and so precludes a transfer of value and thus precludes restitutionary liability. There is an exchange of value because P disposes of X value to D in exchange for the discharge of his legal obligation.

### 3.1.4 Duress

P may recover from D in unjust enrichment for duress where D is enriched because of D's illegitimate (usually because unlawful\textsuperscript{253}) threat: "if a trade union makes two demands, one of which is legitimate and the other of which is not, the existence of the legitimate demand does not preclude the employer from recovering money paid under duress in complying with the illegitimate demand"\textsuperscript{254}.

\textsuperscript{252} Burrows, supra note 9 at 80.
\textsuperscript{253} Ibid at 70.
\textsuperscript{254} Universe Tankships Inc of Monrovia v. International Transport Workers' Federation [1982] 2 All ER 67 at headnote.
This illegitimate threat may be express or implied: "In cases of compulsion, a threat which constitutes the compulsion may be expressed or implied..."\textsuperscript{255}.

However, restitution will not follow where the enrichment was owed to D under a legal obligation: "...the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him"\textsuperscript{256}.

Where the illegitimate threat is a threat to break a contract, the enrichment is unjust only if P had no reasonable alternative to giving in to the threat:

The ingredients of actionable duress are that there must be pressure... whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim... in determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include... whether the victim had any realistic practical alternative but to submit to the pressure\textsuperscript{257}.

These rules are explained by the status theory. To demonstrate this, four scenarios will be considered: first, where D places P under economic duress by making an illegitimate threat; second, where D places P under economic duress by making a legitimate threat; third, where D makes an illegitimate threat to break a contract with P where P has no reasonable alternative to giving in to D's threat; and fourth, where D makes an illegitimate threat to break a contract with P where P does have reasonable alternatives to giving in to D's threat.

An example representing the first scenario, in which P can recover in unjust enrichment, involves D illegitimately threatening to steal P's boat unless P provides X value to D. Here, unjust enrichment liability results because there is a transfer of value that is unjust.

\textsuperscript{255} Woolwich Equitable Building Society v. IRC [1993] AC 70 at 165.
\textsuperscript{256} Kleinwort, supra note 236 at 408.
\textsuperscript{257} DSND Subsea Ltd. v. PGS Offshore Technology AS [2000] All ER (D) 1101 at para 131.
There is a transfer of value because P loses X value, which is gained by D, who does not compensate P for such gain because retraction of D's threat provides to P nothing that P does not already have. Indeed, because stealing is illegal, P already has legal protection from D's threat, and so D's retraction of such threat provides no protection to P that P did not already have. Because the disposition of X value is uncompensated, it represents a transfer of value.

P's intention regarding the disposition of X value is non-donative because, in responding to D's threat, such disposition is undertaken with intent to purchase relief from such threat. This intention is indicated by fulfillment of the causation requirement: "the defendant's enrichment is unjust if the claimant has enriched the defendant because of an illegitimate threat"\textsuperscript{258}.

D's receipt of X value is not done with non-donative intent because D does not intend, by retracting his threat, on providing P with anything that P does not already have (because, as mentioned, P already has legal protection from D's threat due to the illegality of stealing).

The conflict between P's non-donativeness and D's lack of non-donativeness leaves the parties in a status relationship justifying restitution.

The second scenario, involving economic duress resulting from a legitimate threat, is exemplified by D's threat to sue P unless P provides X value to D\textsuperscript{259}. Here, P cannot recover in unjust enrichment because there is no transfer of value (leaving unfulfilled the factual strand of elements required for liability).

There is no transfer of value because P's disposition of X value represents an exchange of value. This is because, in exchange for P's disposition of X value, D retracts his threat and thereby provides to P something that P did not already have. P does not already have protection from D's threat because it is not illegal for D to sue P, and so D's retraction provides to P something new.

\textsuperscript{258} Burrows, supra note 9 at 70.
\textsuperscript{259} Burrows, supra note 7 at 281.
in compensation for P's disposition of X value which is thus rendered an exchange of value in preclusion of unjust enrichment liability.

In the third scenario, (1) D threatens to break his contract with P unless P provides X value to D, and (2) P has no reasonable alternatives to giving in to D's threat. Here, P can recover in unjust enrichment because there is a transfer of value that is unjust.

There is a transfer of value because P loses X value, which is gained by D, who does not provide to P any compensation for the disposition. D does not provide any compensation to P because not providing to P anything that P does not already have. P already has legal protection from D's threat (because he has a contractual right to D's performance), and so D's retraction of his threat to break the contract does not provide anything new to P.

P has non-donative intent because, D's threat providing the reason for P's disposition of X value, P intends an exchange of value whereby he disposes of X value in return for relief from D's threat.

D lacks non-donative intent because D does not intend on providing to P, in return for P's disposition of X value, something that P does not already have. As mentioned, P already has protection from D's threat, and so D's retraction does not provide to P anything new in compensation for the disposition of X value. D thus lacks non-donative intent, which conflicts with P's non-donative intent in a relationship of vulnerability justifying restitution.

In the fourth scenario, (1) D threatens to break his contract with P unless P provides X value to D, and (2) P does have reasonable alternatives to giving in to D's threat. Here, following contract formation, D threatens to breach unless P provides X value to D. However, P, for whatever reason, has here reasonable alternatives to giving in to D's threat. P nonetheless then chooses to give in to D's threat (and disposes of X value to D) rather than to pursue such reasonable alternatives. Here, there is no unjust enrichment liability because the availability of reasonable alternatives renders the disposition an exchange of value which therefore does not come "at P's expense." There is an exchange of value because P receives, in exchange for the
disposition of X value, not anything provided by D (because retraction of D's threat provides nothing to P that P did not already have), but rather fulfillment of P's own purposes for preferring to dispose of X value rather than to pursue reasonable alternatives. To this end, "Even if the benefit obtained by the defendant is directly from the claimant, the enrichment is generally not at the claimant's expense if the benefit was merely incidental to the furtherance by the claimant of an objective unconnected with the defendant's enrichment"\(^{260}\)

In all scenarios, P cannot recover where owing X value to D under a valid legal obligation. This is because here, there is no transfer of value (and so no fulfillment of the factual strand of elements) but rather only an exchange of value whereby P disposes of X value in exchange for the discharge of his legal obligation.

### 3.1.5 Necessity

D may be liable in unjust enrichment where P, necessarily intervening in response to a threat of imminent harm to D's health or assets, enriches D by supplying or paying for goods or services, or by discharging a liability of D's\(^ {261}\). This is the position taken by Burrows in \textit{A Restatement of the English Law of Unjust Enrichment}:

> It has traditionally been thought that, in contrast to the position in civil law, necessitous interveners have bleak prospects of recovery under English law. Nevertheless there are several areas where such recovery has been granted and, adopting the typical common law methodology, the approach taken in the Restatement is to treat these as underpinned by a general principle that allows recovery for necessitous intervention\(^ {262}\).

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\(^{260}\) \textit{Burrows}, supra note 9 at 8.

\(^{261}\) \textit{Ibid} at 104.

\(^{262}\) \textit{Ibid}.
However, unjust enrichment liability should not follow where P (1) has a contractual or statutory duty to intervene, or (2) intends, at the time of intervention, that no payment would be sought for the intervention.\footnote{263}

The status theory, like Burrows, conceives of necessity as an unjust factor justifying restitution for unjust enrichment. Restitution for necessitous intervention responds to unjust enrichment because such intervention represents a transfer of value from P to D that is unjust.

There is a transfer of value from P to D because P, by necessarily intervening, disposes of X value (in the form of goods or services, or the cost of discharging D's liability) which is then obtained by D (receiving such goods or services, or the discharge of liability), who then fails to provide compensation for the disposition.

P's intention regarding the disposition of X value is non-donative in the sense that P intends to receive, in exchange for the disposition, the discharge of a moral obligation (to take reasonable steps to prevent imminent harm from manifesting into loss to another person).

D's receipt of X value lacks non-donative intent because D does not intend on P receiving compensation for the disposition of X value.

This conflict of intentions generates the status relationship of vulnerability justifying restitution.

This situation is distinct from the situation where P disposes of X value to a charity D (in which case there is no unjust enrichment) because, with respect to the disposition to charity, D's receipt is non-donative (in congruence with P's non-donativeness and thus in preclusion of unjust enrichment liability). This is because, by running a charity, D intends on forwarding a moral cause, and thus considers charitable donations to be pursuant to, and thus discharging, moral obligations. In contrast, in cases of necessity, there is no reason to conclude that D considers contributions to his proprietary or bodily well-being as forwarding a moral cause (perhaps D

\footnote{263} \textit{Ibid.}}
merely considers his well-being to be a pragmatic cause) and thereby discharging a moral obligation. Absent an intent to compensate P by facilitating a discharge of moral obligations, D's receipt lacks non-donativeness in generation of restitutionary liability.

The exceptions, whereby P cannot recover in unjust enrichment if having (1) a contractual or statutory duty to intervene or (2) an intention that no compensation would be sought for the disposition of X value, are also explained.

P cannot recover if having a contractual or statutory duty to intervene because, where such duty exists, P's disposition of X value is compensated by the discharge of such legal obligation, and thus represents an exchange, rather than a transfer, of value. And, a transfer of value being required for unjust enrichment liability, the absence of such transfer precludes restitutionary liability resulting from the unjust enrichment that does not obtain.

Similarly, P cannot recover if having an intention that no compensation would be sought for the disposition of X value. Where P has an intention that no compensation be sought for the disposition, P intends to effect a transfer of value (because a transfer of value is defined as a disposition for which no compensation is provided) and so has donative intent in preclusion of the non-donative intent required to establish an unjust enrichment.

3.1.6 Undue Influence

D's enrichment will be unjust where P has enriched D while under undue influence, which will occur where P's judgment is not free and independent of another person\textsuperscript{264}. Such an unjust enrichment gives rise to the restitutionary remedy of rescission\textsuperscript{265}.

\textsuperscript{264} Ibid at 75.
\textsuperscript{265} Burrows, supra note 7 at 286.
In the words of Lord Nicholls:

The objective is to ensure that the influence of one person over another is not abused... If the intention [to enter into the transaction] was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as an expression of a person's free will\(^{266}\).

There is a rebuttable presumption of undue influence if (1) P was in a relationship of influence with D or another person T, and (2) the transaction in question was disadvantageous to P in the sense that it was not readily explicable on ordinary motives\(^{267}\). D may rebut this presumption by proving that P exercised free and independent judgment, which may be accomplished by showing that P "obtained the fully informed and competent independent advice of a qualified person, such as a solicitor"\(^{268}\).

Furthermore, undue influence does not render the enrichment unjust if the benefit was owed to D by P under a valid legal obligation\(^{269}\).

These rules are explained by the status theory.

P has non-donative intent, not in the sense that he intends an exchange, rather than a transfer, of value, but rather in that he lacks an intention to dispose of X value at all. P lacks such intention because his judgment, pursuant to which he apparently chooses to dispose of X value to D, is not free and clear of the undue influence of another person.

\(^{266}\) Royal Bank of Scotland v. Etridge (No. 2) [2002] 2 AC 773 at 795.

\(^{267}\) Burrows, supra note 9 at 75.

\(^{268}\) Ibid.

\(^{269}\) Ibid.
This explains why the remedy is rescission (i.e. why D does not receive title). Unlike situations in which P's non-donativeness is comprised of an intention to exchange value, here, where P's non-donativeness is established by a lack of intent to dispose of X value to D at all, the justification for D's receipt of title (that is, the fulfillment of the first element of an exchange of value intended by P) is absent and so D does not receive title given P's right to rescission arising upon D's receipt lacking non-donativeness (which obtains because D has no intention of compensating P for the enrichment).

D may rebut the presumption of undue influence by showing that P exercised free and independent judgment following, for example, receipt of competent and qualified independent advice. Where receiving such advice, P can be taken to both (1) understand the true nature of the disposition (i.e. as a transfer of value) and to (2) intend such disposition (given the absence of a clouded judgment). Intending to effect a transfer of value, P lacks the non-donativeness that is essential to unjust enrichment liability, which, consequently, will not follow.

Undue influence will not render the enrichment unjust if the benefit was owed to D by P under a valid legal obligation because, where the benefit is owed under such obligation, P's disposition of X value will represent an exchange, rather than a transfer, of value in preclusion of fulfillment of the factual strand of elements required for restitutionary liability. Such disposition will be an exchange of value because P will receive, in exchange for the disposition of X value, the discharge of his legal obligation.

### 3.1.7 Incapacity

D's enrichment is unjust if P is an individual who enriched D while under an incapacity\(^{270}\). P enriches D while under an incapacity if the enrichment results from a contract, gift or other

\(^{270}\) *Ibid* at 83.
transaction which is invalid because P was under 18, or lacked mental capacity, or was intoxicated, when the transaction was entered into. However, P's incapacity does not render the enrichment unjust if the benefit was owed to D by P under a valid legal obligation.

Two scenarios will be discussed; first, where P disposes of X value to D pursuant to an invalid (due to incapacity) contract; and second, where P disposes of X value to D pursuant to an invalid (due to incapacity) gift.

Where P disposes of X value to D pursuant to an invalid contract, D will be liable because there is a transfer of value that is unjust.

There is a transfer of value because P disposes of X value to D, who receives X value but, because the contract is invalidated by P's incapacity, does not, because need not, provide compensation to P in the form of consideration.

P has non-donative intent, not in the sense of intending an exchange of value, but rather in the sense of not intending any disposition at all. P lacks intent to dispose of X value at all because he is incapacitated from forming such intent.

D's receipt lacks non-donativeness because D, having no obligation to provide consideration pursuant to the invalid contract, has no intention of compensating P for the disposition.

The conflict of intentions between P's non-donativeness and D's receipt lacking non-donativeness generates the status relationship of vulnerability justifying restitution.

In contrast, were P capacitated to contract, then unjust enrichment liability would not follow. This is because, although P would have non-donative intent (in the sense of intending an

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exchange of value), the disposition of X value to D, being pursuant to a not-invalidated (by incapacity) contract, would be compensated by D's consideration required by such contract and so would converge, rather than conflict, with P's non-donative intent to exchange.

In the second scenario, where P disposes of X value to D pursuant to an invalid (due to P's incapacity) gift, P can recover because there is a transfer of value that is unjust.

There is a transfer of value because P disposes of X value, which is received by D, who provides no compensation to P for the disposition.

P's intent is non-donative, once again, not in the sense that P intends an exchange of value, but rather in the sense that P lacks intent (due to P's incapacity to form such intent) to dispose of X value at all.

D's receipt lacks non-donativeness, in generation of unjust enrichment liability, because D has no intention of compensating P for the disposition.

In contrast, were P capacitated to gift X value to D, there would be no unjust enrichment liability because P's intention, which would not be confounded by incapacity, would be donative because P would intend on disposing of X value to D in a transfer of value. D's donative receipt of X value transferred from P would then converge, rather than conflict, with P's donative intent to effect such a transfer and so would not result in the status relationship of vulnerability justifying restitution.

In neither scenario (where P is incapacitated) does D receive title to the enrichment, a circumstance both due to, and consistent with, P's incapacity. D's failure to receive title is due to P's incapacity because such incapacity invalidates the contract or gift that can therefore no longer provide to D such title. D's failure to receive title is consistent with P's non-donativeness because P, not intending to dispose of X value at all, does not intend an exchange of value and so does not intend D to receive title pursuant to the first element of an exchange of value.
P's incapacity does not render the enrichment unjust if the benefit was owed to D by P under a valid legal obligation because, were it so owed, P's disposition of X value would amount to an exchange, rather than a transfer, of value because P would receive a discharge of his legal obligation in exchange for X value. And, where the disposition is compensated as an exchange of value, the factual strand of elements required for unjust enrichment liability will be unfulfilled, and so liability will not follow.
3.2 Applying the Status Theory: Unjust Enrichment Defences

3.2.1 The Change of Position Defence

D will make out the change of position defence where his position has changed as a consequence of, or in anticipatory reliance on, obtaining the benefit of the transfer. However, the defence will only apply where D’s change of position has been made in good faith, and a subsequent retransfer to P would make D worse off than if he had never obtained (or relied on obtaining) the benefit transferred. Bad faith exists where D rids himself of the enrichment while knowing of P's restitution claim.

The three scenarios to be discussed are: first, where D (1) changes position by making a good faith expenditure and (2) would be made worse off than if never obtaining X value from P; second, where D (1) changes position by making a good faith expenditure and (2) would not be made worse off than if never obtaining X value from P; and third, where D makes a bad faith expenditure.

The change of position defence is available in only the first scenario.

The justification for refusing restitution due to the application of the defence mirrors the justification for awarding such restitution in the first place; while the initial liability (i.e. the imposition of unjust enrichment duties upon D) is justified in response to P's vulnerability to D and D's rights, the subsequent negation of liability by operation of the defence is justified in

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273 Ibid at 117.
275 Burrows, supra note 9 at 117.
276 Ibid at 121.
response to D's vulnerability to P and P's rights. Just as P's incapacity to act in his own best interest leads to a gain-based remedy forcing D to act in P's best interest, D's incapacity to act in his own best interest leads to what is, in effect, a gain-based outcome that is in D's best interests.

In the first scenario, where D changes position in good faith and would be worse off, if forced to provide restitution to P, than if never obtaining X value, the change of position defence applies to protect D.

There are two possible routes to application of the defence here. First, where D, in reasonable expectation of receiving the enrichment from P, uses his own funds to make an expenditure in good faith ignorance of P's potential restitutionary claim to the enrichment; and second, where D uses the enrichment itself to make a good faith expenditure.

The first route triggers application of the change of position defence to protect D in response to his vulnerability to P. Here, D, in reasonable reliance upon receiving X value from P, changes position by spending his own funds consisting of value equivalent to X value. D makes this expenditure non-donatively, expecting to be compensated for it by the receipt of X value from P. However, P's disposition of X value to D, once made, need not compensate D (where P recovers X value in unjust enrichment) and thus potentially transforms, in conflict with D's non-donativeness, D's intended exchange of value into a transfer of value.

P's disposition of X value to D need not compensate D for the expenditure of (his own resources comprised of) value equivalent to X value because such disposition, being non-donative, conflicts with D's donative acceptance (which obtains because D intends to keep X value for himself in compensation for his prior expenditure of value equivalent to X value) and thus generates the unjust enrichment duty upon D pursuant to which P can choose to recover X value from D. Where P does recover X value from D in unjust enrichment, D will, as a result of his interactions with P, suffer a net loss of value equivalent to X value: D uses his own funds, equivalent to X value, on the expenditure, which cannot be compensated by D's receipt of X value from P because such receipt triggers P's right to restitution depriving D of such
compensation that must be disgorged accordingly. In other words, D loses value equivalent to X value in the expenditure, gains X value from P in compensation for such loss, but then must disgorge X value to P in unjust enrichment, leaving D with a net loss of value equivalent to X value.

P's choice to recover in unjust enrichment, then, represents de facto agenda-setting authority (over value equivalent to X value in D's hands) facilitating determination of whether D's expenditure of his own property will be rendered an exchange of value (occurring where P fails to recover in unjust enrichment because D will thereby be allowed to keep X value in compensation for the loss of value equivalent to X value) or a transfer of value (where P successfully seeks restitution resulting in D's net loss of value equivalent to X value). In this way, whether the use of D's resources (i.e. value equivalent to X value) is pursuant to D's own non-donative intent depends, not upon D and D's discretion, but upon P and P's discretion. Where P chooses to exercise his right to recover in unjust enrichment, D's expenditure will become a transfer of value contrary to D's non-donative intent; where P fails to recover in unjust enrichment the expenditure becomes an exchange of value consistent with D's non-donative intent.

D and his capacity to use his resources, pursuant to his own best interests, in an exchange of value is therefore subject and vulnerable to P's discretion (as to whether to exercise his right to restitution) amounting to de facto agenda-setting authority over D's resources (i.e. value equivalent to X value). Consequently, D is left in a status relationship with P just as P is left in a status relationship with D in situations generating unjust enrichment liability. This status relationship, mirroring those generating unjust enrichment liability and forcing D to act in P's best interest (by disgorging X value), forces P to act in D's best interest by allowing D, pursuant to the change of position defence, to retain X value in furtherance of D's non-donative intent. Said differently, P, being in a relationship of status whereby D is vulnerable to P, cannot use his de facto agenda-setting authority to benefit himself by obtaining a restitution remedy.
transforming D's intended exchange of value into a transfer of value contrary to D's non-donative intent. P is thus precluded from such recovery by application of the change of position defence.

The second route arises where D uses the enrichment (rather than his own resources) to make a good faith expenditure, and a retransfer to P would make D worse off than if D had never received X value. Here, the change of position defence applies once again to protect the vulnerable and incapacitated D.

Once D accepts, in the absence of non-donativeness, the enrichment X value transferred by P non-donatively, P gains his status right allowing him to force D to retransfer X value. However, D, due to good faith ignorance of P's claim, is unaware of such obligation, believing the enrichment to be a windfall at his disposal.

D's subsequent expenditure of X value, amounting to a change of position, takes the form of an alienation (to nobody) or a transfer of value (to T). This expenditure, following imposition of unjust enrichment duties upon D (whereby D must retransfer X value to P), represents a second unjust enrichment because there is a transfer of value that is unjust.

There is a transfer of value because P loses a measure of security, as his initial status right becomes subject to D's bankruptcy. This is because, by changing position, D rids himself of X value which can no longer be disgorged to P pursuant to P's initial status right. Upon D's bankruptcy (whereby D lacks value equivalent to X value), D therefore possesses neither X value nor value equivalent to X value, and so cannot disgorge anything in satisfaction of P's initial status right. D's gain consists of de facto agenda-setting authority over P's initial status right (such authority being worth value equivalent to X value because X value is the value of P's status right governed by such authority) because P's capacity to exercise such right becomes subject to D's discretion (as to whether to change position).

This transfer of value is unjust because P's non-donative intent over his initial status right is met by D's lack of non-donative intent. P has non-donative intent because intending to give up, by exercising, his status right in exchange for a restitution remedy. D lacks non-donative intent
because not intending to compensate P for the change of position that D does not realize, due to his good faith ignorance of P's claim, represents a loss to P.

However, D has, with respect to P, non-donative intent over his property, consisting of value equivalent to X value. D has non-donative intent regarding this property because D has no intention of disgorging to P value equivalent to X value following the change of position. D has no intention of disgorging such value to P because, being ignorant of P's status right, D does not realize that his change of position will amount to a second unjust enrichment providing to P a second status right allowing P to force D to disgorge his gains. Yet, if P were allowed to exercise his second status right, P would thereby donatively receive restitution in contradiction with D's non-donative agenda over his property (consisting of value equivalent to X value).

In other words, if D were here held liable, he would be forced to use his property in a transfer of value to P in violation of D's non-donative intent (generated by D's good faith ignorance of P's claim) whereby D does not intend to transfer value equivalent to X value to P following the change of position. Because D cannot act, with respect to his own property, in his own best interest pursuant to his non-donative intent, D is justifiably protected by the change of position defence.

In this way, the change of position defence represents a mirror image of unjust enrichment liability because, just as unjust enrichment liability protects and vindicates P's non-donative agenda over his property (consisting of X value), the change of position defence protects and vindicates D's non-donative agenda over his property (consisting of value equivalent to X value).

The second scenario, involving D's unauthorized substitution, following D's initial unjust enrichment, of X value for Y, was discussed above in the section on the form of the remedy (i.e. value or in rem rights); however, it will now be revisited to demonstrate why the change of position defence does not here apply to prevent P from obtaining in rem rights to Y in response to D's change of position (i.e. D's unauthorized substitution) amounting to a second unjust enrichment. This change of position amounts to a second unjust enrichment because P's non-
donative intent, whereby he intends to give up, by exercising, his status right in exchange for disgorgement of X value, is confounded because, upon the change of position, such status right becomes subject to D's bankruptcy. This second unjust enrichment justifies the grant to P of a second status right allowing P to force D to disgorge his gain of Y.

P's second status right may be enforced against D (i.e. the change of position defence will not apply) because such enforcement would not represent a status relationship of vulnerability between D and P (whereby D is vulnerable to P) and thus would not count as an unjust enrichment (of P) in its own right. This is because, even if P exercises his second status right by forcing D to disgorge in rem rights to Y, D will not suffer any net loss. And, absent a net loss, D's disgorgement to P does not represent a transfer of value contrary to D's non-donative intent. Absent contradiction of D's non-donative intent, D is not vulnerable to P and so there is no justification for application of the change of position defence protecting D.

D suffers no net loss, even where P exercises his second status right, because D's resources will remain constant despite disgorgement of in rem rights to Y: D obtains X value (in the initial unjust enrichment), then spends X value (on the change of position) to gain Y but, because the change of position amounts to a second unjust enrichment, D is forced to disgorge Y to P. In other words, D obtains X value and loses X value, and obtains Y and loses Y. Consequently, D's gains and losses cancel each other out, leaving D's resources in a constant state in preclusion of a transfer of value and thus in preclusion of an unjust enrichment of P. Because P would not be unjustly enriched by exercising his second status right against D, P may enforce such right without interference from the change of position defence.

This analysis explains why P is not prevented, by the change of position defence, from recovering in rem rights to Y upon D's unauthorized substitution of X value for Y.

In the third scenario, where D changes position in bad faith, the change of position defence does not apply to protect D who must, consequently, disgorge to P any gains obtained via the change of position.
Here, P disposes of X value to D, who receives such value without non-donative intent in generation of P's status right to a retransfer of X value. D, having bad faith knowledge of P's claim, then makes an expenditure consisting of a transfer of value (in relinquishment or gift).

Because he knows of P's claim, D knows that his change of position, subjecting P's initial status right to D's bankruptcy, will violate P's non-donative agenda over P's property (i.e. over P's status right that P intends to exercise, or give up, in exchange for D's retransfer of X value) and thus amounts to a second unjust enrichment granting to P a second status right. Consequently, D has donative intent regarding his property (value equivalent to X value) because, knowing that a change of position will grant to P a restitutionary remedy, D knows that his expenditure of X value will necessarily grant to P a right to force D to disgorge value equivalent to X value. This is what D must disgorge because his gain consists of furtherance of his purposes (in changing position) by an extent equal to X value. D's donative intention in making the expenditure thus converges, rather than conflicts, with P's donative receipt (of value equivalent to X value) pursuant to P's second status right in preclusion of the conflict of intentions amounting to a status relationship of vulnerability (whereby D is vulnerable to P) justifying application of the change of position defence. Accordingly, the change of position defence does not here apply to protect D who is not vulnerable to P.

3.2.2 The Agency Defence

Where P disposes of X value to T by way of T's agent D, D will, pursuant to most cases dealing with restitution following dispositions to agents, be protected by the agency defence to the extent that D, having obtained X value as an agent, has (1) disposed of X value to T (2) without actual
notice of P’s right to restitution\textsuperscript{277}. Note that, upon D’s initial receipt of X value (on T’s behalf), both D and T are prima facie liable, such liability then being subject to defences\textsuperscript{278}.

The status theory, like Burrows’ analysis\textsuperscript{279}, considers the agency defence to be, in substance, merely the change of position defence as applied to the specific context where D receives, on behalf of his principal T, the enrichment X value from P.

Being an instance of the change of position defence, the justification for the agency defence is the same as the justification for the change of position defence; that is, to protect D’s agenda-setting authority over his property (mirroring, like the justification for the change of position defence, the protection afforded to P, over P’s agenda-setting authority, by unjust enrichment liability). Here, D’s property (over which D has agenda-setting authority) is value equivalent to X value.

There are two scenarios that illustrate the operation of the agency defence: first, where D, having obtained, on behalf of D’s principal T, the enrichment X value from P, subsequently disposes of X value to T without notice of P’s right to restitution (arising upon D’s receipt of X value); and second, where D, following receipt of X value, disposes of X value to T with notice of P’s right to restitution. It is only in the first scenario, and only with respect to D, that the agency defence applies.

In the first scenario, D, having obtained, without non-donative intent, the enrichment X value non-donatively disposed of by P, disposes of X value to T without notice of P’s right to restitution. Here, upon D’s receipt and prior to D’s disposition to T, both D and T are liable to P; however, after D’s disposition to T, only T, and not D, is liable to P in unjust enrichment. D is not liable following the disposition to T because protected by the agency defence.

\begin{footnotes}
\footnotetext[277]{Ibid at 124.}
\footnotetext[278]{Burrows, supra note 7 at 565.}
\footnotetext[279]{Ibid.}
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First, P non-donatively disposes of X value to D, who receives X value without non-donative intent because not intending to compensate P for the disposition. This amounts to an initial unjust enrichment between P and D, and between P and T. There is an initial unjust enrichment between P and D because P loses X value non-donatively, while D gains possession of X value without intending to compensate P; there is an initial unjust enrichment between P and T because P loses X value non-donatively, while T gains legal and beneficial title over X value without intending to compensate P. Consequently, P is granted an initial status right which can be used against either D or T to obtain a retransfer of X value.

Second, D, in good faith ignorance of P's claim, disposes of possession of X value to T. This disposition represents a second unjust enrichment between P and D. There is an unjust enrichment between P and D because there is a transfer of value that is unjust. There is a transfer of value because, upon D's disposition of possession of X value to T, (1) P suffers a loss consisting of a lost measure of security because P's status right is now subject to D's bankruptcy, and (2) D realizes a gain consisting of free usage of the enrichment provided to T. There is unjustness because P has non-donative intent regarding his initial status right (because P intends to effect an exchange of value by giving up, through the exercise of, his initial status right in exchange for D's restitution), while D lacks non-donative intent because disposing of the enrichment to T without intending to compensate P. D does not intend to compensate P because, having good faith ignorance of P's claim, D does not realize that the disposition to T causes P loss in generation of a second status right entitling P to restitution.

D's gain of de facto agenda-setting authority over X value amounts to a gain of value equivalent to X value because free usage of X value is, objectively, equivalent in worth to X value. Because D's gain consists of value equivalent to X value, this is what P may obtain from D by the potential exercise of his second status right.

Note that, because D's disposition to T does nothing to negate P's capacity to exercise his initial status right against T, such status right persists to allow P to recover X value from T following D's disposition.
So, P can (1) seemingly exercise his second status right against D (to receive disgorgement of value equivalent to X value), or (2) exercise his initial status right against T (to get a retransfer of X value).

However, third, P cannot enforce his second status right against D because D is protected by the agency defence. D is protected by the agency defence because, if P were entitled to use his second status right against D to get disgorgement of value equivalent to X value, P would be unjustly enriched at D's expense. This is because, were P entitled to exercise his second status right against D, there would be an unjust transfer of value from D to P.

There would be a transfer of value because D loses, and P gains, value equivalent to X value. And, this transfer would be unjust because D's non-donativeness would be violated by P's receipt (of the restitution remedy disgorged pursuant to P's second status right) in the absence of non-donative intent. D has non-donative intent regarding value equivalent to X value because, being ignorant of P's claim, D does not realize that his disposition to T grants to P a second status right pursuant to which P could recover from D value equivalent to X value. And, P lacks non-donative intent because receiving, pursuant to his second status right, value equivalent to X value from D without intending to compensate D for such receipt. This conflict of intentions (whereby D has non-donative intent over value equivalent to X value, while P lacks non-donative intent regarding receipt of such value) would then represent a status relationship in which D is vulnerable to P. Consequently, in order to avoid this unjust enrichment (of P at D's expense), the agency defence applies to protect D from the vulnerability D would suffer were P entitled to exercise his second status right.

The second scenario is the same as the first, except that D's disposition to T is done with actual notice of P's initial status right. Because D knows of P's initial status right, D knows that disposing of X value to T will cause P loss in the sense that P's status right will become subject to D's bankruptcy, and so will amount to a second unjust enrichment pursuant to which D will have to disgorge value equivalent to X value. Because D knows that disposing of X value to T will result in disgorgement of his own property (i.e. value equivalent to X value) to P, D's
intention regarding such property is donative. And, because D's intention regarding his property is donative, the transfer of such property to P, pursuant to P's second status right, will not amount to an unjust enrichment in its own right because P's donative receipt of such transfer will not conflict with D's non-donative intention (that does not here exist because D's intent is donative rather than non-donative). The agency defence is therefore justly inapplicable, and D will be liable upon his disposition to T made with actual notice of P's right to restitution.
3.3 Conclusion: Resolving the Challenge

In conclusion, the status theory represents a corrective justice account of unjust enrichment that is not threatened by any of the critiques undermining Weinrib's theory.

The status theory represents a corrective justice account of unjust enrichment because it conceives of restitutionary liability for unjust enrichment as resulting from and reversing the normative imbalance, occurring upon D's breach of P's right, whereby D obtains a normative gain corresponding to P's normative loss.

P's right is the right to set the agenda over P's property X value, while D's duty is the duty not to interfere with this right. P exercises his right to set the agenda over X value by non-donatively disposing of X value to D in an intended exchange of value, while D breaches P's right by receiving such disposition without intending to provide compensation for the disposition that is thus rendered a transfer, rather than an exchange, of value contrary to P's non-donative intent. This results in D obtaining a normative gain corresponding to P's normative loss: D gains a measure of freedom, consisting of de facto agenda-setting authority over X value (which will, accordingly, be received in a transfer absent restitutionary liability) corresponding to P's loss of freedom, manifesting as the loss of agenda-setting authority over X value (pursuant to which P intends only an exchange of value).

P's status right (forcing D to act in P's best interest by retransferring to P either X value, value equivalent to X value, or in rem rights to X) reverses the normative imbalance because it provides to P, not factual compensation (corresponding to P's factual loss), but normative compensation in the sense that P gains, through restitution, the very thing comprising his normative loss: the benefit of a capacity to act in his own best interest regarding his property X value. This is what P receives through restitution because, by obtaining D's gains, P obtains the benefit of such receipt initially done in furtherance of D's own best interest.
Importantly, the status theory is also unthreatened by any of the critiques undermining Weinrib's theory.

The change of position defence, rather than incoherently operating (as it does in Weinrib's theory) by negating, through D's ignorance of P's non-donativeness, D's non-donative receipt (which is incoherent because such non-donative receipt may be established even absent D's knowledge of P's non-donative intent), operates instead (in the status theory) by providing a mirror image of unjust enrichment liability whereby D's agenda-setting authority over his property is protected by the preclusion, due to application of the defence, of restitutionary liability that, absent the defence, would violate D's agenda-setting authority.

The status theory also cannot be faulted for failing to account for proprietary remedies. Unlike Weinrib's theory, which conceives of P's right to restitution as an in personam right, the status theory conceives of P's right to restitution as a status right forcing D to act in P's best interest by disgorging his gains, which may be instantiated as value or as in rem rights (amounting to a proprietary remedy), to P.

The status theory is similarly untroubled by any of Saprai's critiques levelled at Weinrib's theory.

First, Saprai's critique, that it is a non-sequitur to argue that retention of a mistaken payment invokes a right of ownership allowing one to do what one pleases with one's own assets, cannot touch the status theory because, by Saprai's own admission, refusal to give up a mistakenly transferred asset "may only be asserting the following right: 'the right to keep those assets that are mistakenly transferred". This admission negates any threat, represented by Saprai's non-sequitur argument, to the status theory because, according to the status theory, D's retention of "those assets that are mistakenly transferred" is, where unaccompanied by an intention to provide compensation, sufficient to breach P's agenda-setting authority over X value in generation of a restitutionary remedy. This is because P's agenda for X value is to dispose of X value in an

280 Saprai, supra note 168 at 6.
exchange, rather than a transfer, of value. So, D's retention of X value in the absence of intent to compensate P is sufficient to breach P's agenda-setting authority and thereby justify restitution, precluding any need to additionally establish D's right to do what he pleases with his own assets. Because the status theory does not depend on the establishment of any right of D's to do what he pleases with his property (rather, it depends only on D receiving such property without intending to compensate P), the failure, due to the non-sequitur, to establish such right is immaterial.

Second, Saprai's critique, that Weinrib's account presupposes a duty, (almost) impossible to comply with, to not receive a mistaken payment (or, alternatively, a duty not to know that a mistaken payment has been received), does not threaten the status theory because the status theory does not presuppose that D has such a duty. On the contrary, D's receipt of a mistaken payment is considered to be pursuant to both P and D's agendas for the enrichment. Such receipt is pursuant to P's non-donative agenda because P typically intends an exchange of value, the first element of which requires D to receive the enrichment.

Instead, the status theory holds that D has a duty to avoid breaching P's agenda-setting authority over his property X value, which is not "simply too onerous" because D can avoid such breach merely by intending to provide P with compensation for the disposition of X value (as such non-donative intent will converge with P's non-donative agenda for his property in preclusion of restitutionary liability).

Third, Saprai's critique, that it is unclear why a wrong consisting of receiving a mistaken payment (or of having knowledge of such receipt) should generate a right to restitution, does not threaten the status theory. This is because, according to the status theory, restitution is justified, not by D's receipt of a mistaken payment, but rather by the status relationship of vulnerability between P and D whereby P is incapacitated from acting in his own best interest regarding his property. Restitution, then, is justified because providing to P the very thing comprising his normative loss: the benefit of a capacity to act in one's own best interest regarding property. This is what restitution provides because transferring to P the benefit of D's gain originally received in D's own best interest.
Finally, Saprai's critique, that it is unclear whether and why the law does or should regard transfers of value with suspicion, does not undermine the status theory because the status theory does not rely upon an assertion that the law is suspicious of transfers of value. According to the status theory, the disposition of X value is not questionable merely because a transfer of value, but is, rather, questionable because the nature of the disposition, which happens to be a transfer, conflicts with P's non-donative intention. In other words, transfers of value are not inherently suspect or unjust in the air—they become unjust where indicating a violation, due to the conflict between P's non-donativeness and D's lack of non-donativeness (regarding such transfer), of P's agenda-setting authority according to which P intends to effect an exchange or lacks any intention to dispose of value at all. Accordingly, the status theory does not depend upon either the fact that or the reason why transfers are viewed by the law with suspicion, and so the failure to establish such fact or reason is irrelevant to the validity of the status theory.
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