Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment

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1. Introduction

I have two aims in this paper: to reconsider the relation between property and actions in unjust enrichment, and to respond to a recent argument that actions in unjust enrichment cannot be actions in corrective justice. These two aims are related. I will argue that any analysis that regards actions in unjust enrichment as embodying principles of corrective justice requires supplementation by considerations that are, at bottom, proprietary in nature.[1]

Although the relation between property and unjust enrichment has been the subject of much debate, the bulk of that debate has focused on the *remedial* aspect of unjust enrichment. Thus, some have argued that no proprietary analysis of unjust enrichment is possible because the two sorts of claim are incompatible: if a plaintiff seeks to vindicate her title to something that is in the possession of a defendant—if, that is, the plaintiff seeks a proprietary remedy—then the plaintiff's action lies in property, not in unjust enrichment.[2] While this is an important debate, it is not my concern here. Instead, my concern in what follows is with making sense of the relation between property and the nature of the *cause of action* in unjust enrichment. Thus, I am not primarily concerned with the question whether actions in unjust enrichment give rise to a proprietary remedy. Rather, my goal is to argue, first, that

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1. While this view is not without precedent, neither is it uncontroversial. Among those who have advocated something like what I am calling a proprietary analysis of unjust enrichment are Samuel Stoljar, *The Law of Quasi-Contract*, 2nd ed. (Sydney, AU: The Law Book Company, 1989) and "Unjust Enrichment and Unjust Sacrifice" (1987) 50 Mod. L. Rev. 603; Daniel Friedmann, "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Colum. L. Rev. 504; Alan Brudner, *The Unity of The Common Law* (Berkeley: University of California Press, 1995); and Peter Jaffey, "Two Theories of Unjust Enrichment" in Jason Neyers, Mitchell McInnes & Stephen Pitel, eds., *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 139 and *The Nature and Scope of Restitution* (Oxford: Hart, 2000). See Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) for criticism of this view.
2. See, for example, Graham Virgo, "What is the Law of Restitution About?" in W.R. Cornish et al., eds., *Restitution: Past, Present, and Future* (Oxford: Hart, 1998) 312-18 and *The Principles of the Law of Restitution* (Oxford: Clarendon Press, 1999); R.R. Grantham & C.E.F. Rickett, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" (1997) N.Z.L. Rev. 668; Birks, *ibid.* at 15-16; and Andrew Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412. For arguments that actions in unjust enrichment give rise to a proprietary remedy as a matter of course, see Robert Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) and "Resulting Trusts in Canada" (2000) 38 Alta. L.R. 378. For a nice summary of this debate, see Stephen Pitel, "Characterisation of Unjust Enrichment in the Conflict of Laws" in Jason Neyers, Mitchell McInnes & Stephen Pitel, eds., *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 331.

there is no incompatibility in viewing actions in unjust enrichment as actions whose *grounds* are broadly proprietary in nature; second, that understanding unjust enrichment in this way does not threaten its theoretical coherence; and third, that understanding unjust enrichment in this way allows us to view actions in unjust enrichment as actions in corrective justice.

The paper proceeds as follows. After introducing some terminology, I briefly set out Aristotle's account of corrective justice. Next, I consider an argument for the conclusion that actions in unjust enrichment do not embody principles of corrective justice. After discussing one response to this argument, I turn to a distinction first proposed by Aquinas and argue that proprietary considerations can be used to rebut the argument in a manner that is consistent with principles of corrective justice. I respond to some objections to this proposal and conclude with some general remarks about property, corrective justice, and the nature of unjust enrichment.

2. Terminology

I begin with some terminological matters. For present purposes I will distinguish the concept of *unjust enrichment* from that of *restitution*. Following a number of authors, I will understand 'unjust enrichment' to refer to a certain sort of *action* in private law, or alternatively, to the *grounds of liability* for such an action.[3] I will understand 'restitution' to refer to a certain sort of *remedy*. Thus, I will sometimes talk of P having available to her a restitutionary remedy, or of D owing P a restitutionary duty, where the latter simply means that D is required by law to give back or give up something to P.[4]

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3. See, for example, Birks, *An Introduction to the Law of Restitution*, *supra* note 1, and "Misnomer" in W.R. Cornish et al., eds., *Restitution: Past, Present, and Future* (Oxford: Hart, 1998) 63; Lionel Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672; Mitchell McInnes, "Unjust Enrichment: A Reply to Professor Weinrib" (2001) 9 R.L.R. 29; Dennis Klimchuk, "Unjust Enrichment and Corrective Justice" in Jason Neyers, Mitchell McInnes & Stephen Pitel, eds., *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 111; and Pitel, "Characterisation of Unjust Enrichment in Conflict of Laws", *ibid.*

4. I should note two further things. First, the phrase 'restitutionary remedy' or 'restitutionary duty' is potentially misleading, and some authors have suggested that it ought to be avoided entirely. See, for example, the remarks of Lord Nichols of Birkenhead and Lord Hobhouse of Woodborough in *Attorney General v. Blake*, [2000] 4 All E.R. 385. Nonetheless, I will, for ease of exposition, talk of a defendant owing a restitutionary duty to a plaintiff.

   Second, I am not concerned here with the proper characterization of the content of what I am calling the restitutionary duty. On this matter there is room for disagreement. Peter Birks defines 'restitution' as follows: "Restitution is the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money." Birks, *An Introduction to the Law of Restitution*, *supra* note 1 at 13. Dennis Klimchuk, by contrast, means by 'restitution' "a remedy requiring the defendant to *give back* something to the plaintiff (or its value)[.]" Klimchuk, *ibid.* at 114. Some authors have insisted that a firm distinction ought to be drawn between the remedy of restitution, understood as a giving *back*, and the remedy of disgorgement, understood as a giving *up*. Here I have in mind in particular Lionel Smith. See Lionel Smith, "The Province of the Law of Restitution", *ibid.* and "Restitution" in Peter Cane & Mark Tushnet, eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 48. The distinction can be challenged: if P mistakenly provides D with services, and then seeks restitution in the form of money, is D being asked to give *up* the value of something to P or to give *back* the value of something to P? See, for example, *Deglman v. Guaranty Trust Co. and Constantineau* [1954] S.C.R. 725, 3 D.L.R. 785. Still, I am inclined to follow Smith in distinguishing between the remedies of restitution and disgorgement.

Second, I will be primarily concerned in what follows with so-called autonomous or 'subtractive' unjust enrichment, that is, enrichment without wrongdoing.[5] The intended contrast is with enrichment by wrong where, for example, a defendant realizes a gain as a result of tortious misconduct. Furthermore, in talking about actions in unjust enrichment, I will adopt the terminology of the Supreme Court of Canada.[6] Thus, I will assume that an action for unjust enrichment consists of three elements: first, an enrichment of the defendant; second, a corresponding deprivation on the part of the plaintiff; and third, the absence of any juristic reason for the enrichment. Although there is considerable debate about the meaning of some of the elements of this account, I will take its basic structure for granted in what follows.[7]

To put these definitions to work, consider a paradigm case of autonomous unjust enrichment: payment by mistake.[8] P mistakenly gives D $100, thinking that in so doing she is discharging a debt to D. D has realized an enrichment in the amount of $100, P has realized a corresponding deprivation, and there is no juristic reason for D's enrichment—P, for example, was under no legal obligation to give D $100.[9] Let us further assume that D cannot avail herself of any defence, either of ignorance,[10] of passing on,[11] or of change of position.[12] We can then say that because

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5. See Birks, *ibid.* at 23-25.
6. *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, and *Garland v. Consumers' Gas Co.* [2004], 1 S.C.R. 629, 2004 SCC 25. See also the language of Dickson J. (as he then was) in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.
7. In particular, it is by no means clear what constitutes a 'juristic reason.' For a nice discussion of the complexities of this issue, see Lionel Smith, "The Mystery of 'Juristic Reason'" (2000) 12 Sup. Court L. Rev. (2d) 211.
8. The classic case is *Kelly v. Solari* (1841), All E.R. Rep. 320; 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24. See also *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32 (H.L.). It is common to distinguish mistaken payments from mistaken gifts. A mistaken payment can be viewed as mistake in relation to one's liability to pay. A gift, on the other hand, can be viewed as a voluntary transfer of property without any agreed-upon recompense. Although the basis for restitution is debated, it seems clear that the law will sometimes order the recipient of a mistaken gift to return it or make restitution to the donor. The simplest view is that the law will order restitution so long as the donor can prove that the mistake caused the gratuitous transfer, that is, if the donor can prove that she wouldn't have transferred the property but for the mistake. For a statement of this view see R. Goff & G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 2002) at 193. For present purposes, I will not distinguish between mistaken gifts and mistaken payments since it seems to me that the considerations of the present paper apply to both cases. For a thorough discussion of these issues see Tang Hang Wu, "Restitution for Mistaken Gifts" (2004) 20 J. Contract L. 1.
9. Again, I do not want to enter into a discussion of the nature of a juristic reason. On some views, to say that there is no juristic reason for the enrichment is to say that there is no reason why the plaintiff should have conferred the benefit on the defendant in the first place, while on other views to say that there is no juristic reason for the enrichment is to say that there is no reason why the defendant should retain the benefit already conferred. In *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, the Supreme Court of Canada seemed to adopt a position on juristic reason that incorporates both of these views.
10. See Nicholas J. McBride & Paul McGrath, "The Nature of Restitution" (1995) 15 Oxford J. Legal Stud. 33 for an explanation of the defence of ignorance. For an opposing view, see Lusina Ho, "The Nature of Restitution-A Reply" (1996) 16 Oxford J. Legal Stud. 517.
11. *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.*, [1976] 2 S.C.R. 147, 55 D.L.R. (3d) 1.
12. *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161. See also *Lipkin Gorman v. Karpnale*, [1992] 4 All E.R. 512 (H.L.).

D has been unjustly enriched at P's expense, D has incurred a restitutionary duty to return the $100 to P.[13] In short: if D is enriched, and if P suffers a corresponding deprivation, and if there is no juristic reason for the enrichment, then D has been unjustly enriched (at P's expense) and will incur a restitutionary duty to P. These are the elements of an action in unjust enrichment.

3. Corrective Justice

I turn now to a brief discussion of Aristotle's account of corrective justice.[14] In the *Nicomachean Ethics*, Aristotle distinguishes two forms of justice, distributive justice and corrective justice.[15] Distributive justice, according to Aristotle, has to do with the distribution of benefits or burdens to individuals according to some criterion of merit or worth. Corrective justice, on the other hand, is concerned solely with "rectification in transactions" between individuals.[16] Aristotle likens corrective justice to a mean between two extremes and states that the goal of corrective justice is to return parties to that intermediate position.[17] To achieve this intermediate position we must, according to Aristotle,

> subtract from the one who has more and add to the one who has less [to restore equality]; for to the one who has less we must add the amount by which the intermediate exceeds what he has, and from the greatest amount [which the one who has more has] we must subtract the amount by which it exceeds the intermediate...[18]

The key idea here is that corrective justice seeks to return individuals to a pre-transactional equality. The notion of a 'pre-transactional equality' is sometimes explained by reference to the manner in which a correctively unjust transaction is rectified. As Ernest Weinrib puts it,

> [a] remedy directed at only one of the parties does not conform to corrective justice... The remedy consists in simultaneously taking away the defendant's excess and making good the plaintiff's deficiency. Justice is thereby achieved for both parties through a single operation in which plaintiff recovers precisely what the defendant is made to surrender.[19]

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13. There might be a question as to whether the restitutionary duty arises when P mistakenly pays the $100 to D, or whether it arises instead only after P mistakenly pays the $100 to D *and* D becomes aware of the mistake. I take no stand on this issue here. For more on this issue see McBride & McGrath, *supra* note 10, and Ho, *supra* note 10.

14. My reading of Aristotle on this matter owes much to Dennis Klimchuk, *supra* note 4; to James Gordley, "Tort Law in The Aristotelian Tradition" in David Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 131; and, most obviously, to the work of Ernest Weinrib. See in particular Ernest Weinrib, "Corrective Justice" (1991-2) 77 Iowa L. Rev. 403; "The Gains and Losses of Corrective Justice" (1994) 44 Duke L. J. 277; *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995); and "Corrective Justice in a Nutshell" (2002) 52 U.T.L.J. 349.

15. Aristotle, *Nicomachean Ethics*, trans. by Terence Irwin (Indianapolis, ID: Hackett, 1985). Although this variety of justice is sometimes called 'rectificatory justice' or 'commutative justice', I will label it 'corrective justice' in what follows.

16. *Ibid.* at 1131a.

17. *Ibid.*

18. *Ibid.* at 1132b. Brackets in original translation.

19. Weinrib, "Corrective Justice in a Nutshell," *supra* note 14 at 350.

Put otherwise, the idea is that "[i]n bringing an action [in corrective justice] against the defendant, the plaintiff is asserting that the two are connected as doer and sufferer of the same injustice."[20] Aristotle elaborates on this idea as follows:

> For [not only both when one steals from another but also] and when one is wounded and the other wounds him, or one kills and the other is killed, the action and the suffering are unequally divided [with profit for the offender and loss for the victim]; and the judge tries to restore the [profit and] loss to a position of equality, by subtraction from [the offender's] profit. For in such cases, stating it without qualification, we speak of profit for, e.g., the attacker who wounded his victim, even if that is not the proper word for some cases, and of loss for the victim who suffers the wound. At any rate, when what was suffered has been measured, one part is called the [victim's] loss, and the other the [offender's] profit.[21]

About this passage Aquinas says "too little is clear."[22] The passage therefore repays close attention.

A number of things about the passage are worth noting. First, the examples chosen by Aristotle to illustrate the principle of corrective justice concern what we would now call torts—in particular, intentional batteries. Thus, in describing corrective justice, Aristotle seems to be concerned with describing cases in which a wrongful act is committed. Second, Aristotle talks about one party doing something, and the other party suffering something, which suggests that corrective justice must have, at its heart, a certain structure of action. Third, Aristotle contrasts the terms 'gain' and 'profit' with 'harm' and 'loss.' Finally, recall that according to Aristotle the purpose of corrective justice is to rectify a certain kind of injustice. Consequently, it is important to remember that the core of corrective justice is a remedial one.

4. Measuring the Gains and Losses of Corrective Justice

Although I am concerned in this paper with the relation between corrective justice and the cause of action in unjust enrichment, thinking about how Aristotle's account of corrective justice applies to actions in negligence will afford us a better idea about how unjust enrichment might fit into the framework of corrective justice.

A familiar example illustrates the central points. Suppose that due to D's negligence a snail finds its way into a ginger beer bottle and P suffers psychological harm as a result of drinking the beer.[23] In Aristotle's terminology, P has suffered a harm or loss, and D has realized a profit or gain. But what are we to make of this? It is easy enough to identify the gain when D *steals* something from P: D's gain is P's loss, namely, the thing stolen (or its value). But in many cases tortfeasors realize no obvious gain at all; indeed, when D strikes P it is not obviously appropriate to talk of gains or losses at all. This might seem to show that Aristotle's

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20. *Ibid.*
21. Aristotle, *supra* note 15 at 1132a. Brackets in original translation.
22. St. Thomas Aquinas, *Commentary on the Nicomachean Ethics*, trans. by C.I. Litzenger (Chicago, IL: Henry Regnery Company, 1993) at 411.
23. *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 (H.L.).

account of gains and losses is unworkable. But this would be too quick. For—the example of stealing notwithstanding—it is clear that Aristotle's gains and losses cannot be factual or economic in nature. To assume otherwise would be to assume, as Weinrib puts it,

> that gain and loss refer to the difference in the parties' wealth before and after the injustice. But since...the baseline for the parties' gain and loss is their initial equality, this assumption would imply that corrective justice presupposes—absurdly—an initial equality in the parties' wealth.[24]

So let us talk instead of *normative* gains and losses.[25] We can then say that when D wrongs P, P has realized a normative loss, and D a normative gain, which entails that the pre-transactional relation between P and D is one of *normative* equality. In other words, Aristotle's key idea is that corrective justice seeks to return individuals to a pre-transactional normative equality.

But still, what does it mean to say that D's wounding P constitutes a *normative* gain? Perhaps this: if D upsets the pre-transactional normative equality between P and D, then D "realizes a gain solely in the sense of having more than he or she ought to have as a matter of corrective justice."[26] But how does this help? We want to understand *corrective justice* in terms of normative gains and losses, but we are told that normative gains and losses amount to nothing more than having more or less of what one ought to have *according to corrective justice*. The argument seems circular.[27]

It seems to me that we can best understand Aristotle's talk of gains and losses if we recall his remark that "when what was suffered has been measured, one part is called the [victim's] loss, and the other the [offender's] profit."[28] This suggests that the plaintiff's harm *is* the defendant's gain in the sense that, "[b]y voluntarily harming the plaintiff, [the defendant] has chosen to use the plaintiff's resources for his own ends. The pre-existing equality that corrective justice seeks to restore is a state in which each party achieves his own goals out of his own resources."[29] The gains and losses of corrective justice are normative because they are intimately linked to rights: to realize a normative gain is to use a person's means—in the form of her body or her property or her capacities—without her consent. Such unconsented to use can take two forms: the defendant could deprive the plaintiff of her means, or

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24. Weinrib, "Corrective Justice in a Nutshell," *supra* note 14 at 354.

25. For this sort of interpretation, see Weinrib, "The Gains and Losses of Corrective Justice," *supra* note 14.

26. Weinrib, "Corrective Justice in a Nutshell," *supra* note 14 at 354-55.

27. But see Peter Benson, "The Basis of Corrective Justice and its Relation to Distributive Justice." (1992) 77 Iowa L. Rev. 515; Jason Neyers, "The Inconsistencies of Aristotle's Theory of Corrective Justice" (1998) 11 Can. J. L. & Jur. 311; and Dennis Klimchuk, "On the Autonomy of Corrective Justice" (2003) 23 Oxford J. Legal Stud. 49.

28. Aristotle, *supra* note 15 at 1132a. Brackets in original translation.

29. James Gordley, "Tort Law in the Aristotelian Tradition" *supra* note 14 at 138. For similar interpretations see, among others, Weinrib, *supra* note 14; Klimchuk, *supra* note 3; and Martin Stone, "The Significance of Doing and Suffering" in Gerald Postema, ed., *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 131. For criticism of this idea, see Kenneth Simons' review of *The Idea of Private Law* (1996) 81 Cornell L. J. 698.

the defendant could use those means for purposes that the plaintiff has not authorized. If we assume that persons have a right that they and their means not be used in ways to which they would not consent, then in using the plaintiff's means for his own ends, the defendant is violating the plaintiff's rights. Thus, on this view, to suffer a normative loss is to have a right infringed or violated.[30] I suggest that it is in this sense that normative gains and losses amount to nothing more than having more or less of what one ought to have *according to corrective justice*. To have *more* than what one ought to have according to corrective justice is to have appropriated somebody else's means for one's own ends, that is, to have violated the rights of another person. And to have *less* than what one ought to have according to corrective justice is to have had one's means appropriated by another, that is, to have had one's rights violated.

5. The Puzzle

As we have seen, it is no small matter to interpret Aristotle's talk of gains and losses. It should therefore come as no surprise to learn that Aristotle's presentation of corrective justice gives rise to disagreement and a puzzle. The disagreement concerns the status of some of the features of Aristotle's presentation of corrective justice—in particular, his use of examples drawn from tort law, and his emphasis on the defendant's doing something. In brief: are those features essential to Aristotle's account? As I noted above, some commentators have argued that tort actions in negligence exemplify the Aristotelian conception of corrective justice.[31] Other commentators have argued to the contrary that actions in unjust enrichment—*not* actions in negligence—are paradigmatic forms of actions in corrective justice.[32] For example, Mitchell McInnes has said that

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30. Thus, it seems to me to be a mistake to place too much emphasis on Aristotle's talk of *gains*. A better way of conceiving of things is to think of corrective justice as being concerned with resources or means, and the variety of ways in which those resources and means can be appropriated or misappropriated. Thus, for example, if you have a right to your means—which may include your property, your body, or your capacities—then you have a right to have those means intact as against your neighbour's use of her means, as well as a right to set the terms on which others may use those means. It is permissible for me to build up my chimney even if doing so would cause your fire to smoke whenever you light it. For in doing so I do not interfere with anything to which you have a right. See, for example, *Bryant v. Lefever* (1879), 4 CPD 172. It is permissible for you to loan me your car; but it is not permissible for me to take your car without your consent. It is permissible for you to allow me to punch you in the nose; but it is not permissible for me to punch you in the nose without your consent. On this view, I misappropriate your means if I use them without your consent. I don't misappropriate (merely) by damaging, I misappropriate by violating your right. That is why Aristotle's talk of gains and losses is potentially misleading, since it encourages the search for a gain in every case, where what we really ought to be looking for is the misappropriation of resources or means, which may or may not correspond to a material gain. I am indebted to discussion with Arthur Ripstein here.

31. See, in particular, Weinrib, *The Idea of Private Law*, *supra* note 14.

32. It could be, of course, that *both* tort actions in negligence and actions in unjust enrichment are paradigmatic examples of actions in corrective justice. (An apple and an orange could both be paradigmatic instances of the more general kind *fruit*; a dog and a cat could both be paradigmatic instances of the more general kind *pet*.) However, it seems that the parties to the debate do not view things in this manner. Mitchell McInnes certainly does not. See Mitchell McInnes, "The Measure of Restitution" (2002) 52 U.T.L.J. 163 at 194.

> [u]njust enrichment...is not premised upon wrongdoing. As a result—ironically, in light of the position taken by some scholars—restitution is the paradigm of corrective justice...the facts that underlie the action in unjust enrichment and the response of restitution epitomize the bipolarity upon which corrective justice is based.[33]

However, if *this* is the disagreement then one might be excused for thinking that it is not a particularly important one: what hangs on whether, on Aristotle's account, negligence rather than unjust enrichment is the paradigmatic form of corrective justice if *both* are examples of corrective justice? What makes the disagreement important is that other commentators have argued not only that the passage from Aristotle with which we began supports the view that tort actions in negligence exhibit the structure of corrective justice, but also that *for those very same reasons* actions in unjust enrichment cannot be actions in corrective justice. This, then, is the puzzle: how can the view that actions in unjust enrichment have the structure of corrective justice be reconciled with Aristotle's presentation of corrective justice in the *Nicomachean Ethics*? Must we view unjust enrichment as embodying, not only a distinct basis of liability, but also a structure of justice that is distinct from the structure outlined by Aristotle? It is to these important questions that I now turn.

6. Klimchuk's Argument

In order to sharpen this discussion, I will focus on a recent argument of Dennis Klimchuk's for the conclusion that actions in unjust enrichment do not embody the structure of corrective justice.[34] Klimchuk's argument can be represented as follows:

(K1) For all private law actions A, if A has the structure of corrective justice, then A has the structure of Aristotelian corrective justice.

(K2) Actions in unjust enrichment do not have the structure of Aristotelian corrective justice.[35]

So:

(K3) Actions in unjust enrichment do not have the structure of corrective justice.

I agree that the inference from (K1) and (K2) to (K3) is valid, and I am prepared to grant (K1) for the sake of argument.[36] My focus will therefore be on (K2). In what follows, I will provide some reasons for thinking that (K2) is false and hence, that Klimchuk's argument is unsound.

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33. McInnes, *ibid.* See also McInnes, "Unjust Enrichment: A Reply to Professor Weinrib," *supra* note 3.

34. See Klimchuk, *supra* note 14.

35. Throughout, Klimchuk is interested in the case of mistaken payment since, for him, this is a paradigm case of autonomous unjust enrichment. See Klimchuk, *ibid.* at 112.

36. I am prepared to grant it because, as with Klimchuk, I think it is very probably true. Among Klimchuk's reasons for accepting this premise are, first, that most scholars writing on corrective justice have the Aristotelian account in mind, and second, that liability for unjust enrichment seems to be precisely the sort of liability that Aristotle had in mind in his presentation of corrective justice. See Klimchuk, *ibid.* at 113-14.

Klimchuk's argument for (K2) depends on the claim that actions in unjust enrichment lack two essential features of Aristotelian corrective justice. The first feature is action. In actions in corrective justice the defendant must *do* something, since it is precisely the defendant's acting wrongfully towards the plaintiff that correlatively links her to the plaintiff's suffering. As we have seen, this condition is easily enough met by tort actions in negligence. The problem however, says Klimchuk,

> is that, in the case of a mistaken payment, the defendant is not only faultless; again, she need not have *done* anything. That is, in the case of mistaken payment, the doer and the sufferer are the same person. This matters because...it is the fact that the same event can be described as a suffering on the plaintiff's part and as a doing on the defendant's part that explains why the remedy...takes the form of a transfer for money from the defendant to the plaintiff. But restitution for mistaken payment cannot be anchored that way.[37]

In other words, if we take the defendant's doing something to be essential to an action's being an action in Aristotelian corrective justice, and if actions in unjust enrichment lack that feature, then they will fail to exhibit the structure of Aristotelian corrective justice.

The second essential feature of Aristotelian corrective justice that Klimchuk thinks actions in unjust enrichment lack is that in an action in unjust enrichment there is nothing about the defendant's action that from the plaintiff's perspective "impugns the transaction."[38] This objection is a bit harder to understand. By hypothesis, in cases of mistaken payment the defendant has not done anything. And yet according to Aristotelian corrective justice there must be *something* about what the defendant has or has not done that leads to the conclusion that the transaction in question is correctively unjust. But what could that feature be? Surely nothing having to do with what the defendant has done, for by now familiar reasons. And while it might be thought that "insofar as [the plaintiff] was labouring under a mistake, the plaintiff's autonomy was compromised in a way in which the law ought...to take an interest," the problem is that "nothing that the defendant does counts as an interference with the plaintiff's autonomy."[39] So this objection amounts to the claim that even if the transaction is a transaction in corrective justice, because the defendant has not done anything, there is nothing that impugns the transaction, and so nothing that makes the transaction a correctively unjust one.

In short, Klimchuk has two reasons for thinking that (K2) is true. First, he argues that the defendant has not done anything that allows her to be correlatively linked to the plaintiff. And second, he argues that nothing that the defendant has done or failed to do impugns the transaction. In either event, an essential feature of Aristotle's account of corrective justice is missing. So, Klimchuk concludes, actions in unjust enrichment are not actions in corrective justice.

On its face, this is a persuasive argument. Certainly the fact that the defendant fails to *do* anything in a case of mistaken payment should give us pause, especially

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37. *Ibid.* at 120.
38. *Ibid.*
39. *Ibid.*

given the way that Aristotle presents his account of corrective justice in the *Nicomachean Ethics*. For what could possibly link defendant and plaintiff except the fact that they are doer and sufferer of the same wrong? And if that feature is missing from cases of unjust enrichment, then isn't the correlativity that is essential to Aristotelian corrective justice missing as well?

7. Two Responses

Given the structure of Klimchuk's argument, there would appear to be two ways to respond to it. First, one could argue that Klimchuk's emphasis on action is misplaced. Alternatively, one could accept that the emphasis on action is reasonable enough, but hold that in cases of unjust enrichment the defendant *does* do something that impugns the transaction.

I will consider the second response first. The response is that by knowingly retaining the enrichment the defendant does something that impugns the transaction. But as Klimchuk convincingly argues, this will not do. The problem is not that by accepting and retaining the enrichment the defendant cannot act improperly. For, as Mitchell McInnes puts it, in certain cases "the defendant's free acceptance can be construed as a breach of duty to abstain from conduct that is inconsistent with the plaintiff's right to part with her possessions only upon certain conditions."[40] Nor is the problem that in retaining the benefit the defendant fails to act. On the contrary, his retention undoes his claim to passivity. Rather, the problem is that the retention of the enrichment constitutes a wrong to the plaintiff only if "the retention of the benefit would be unjust."[41] And this puts the cart before the horse. We want to know *why* it would be unjust for the defendant to retain the enrichment. Granted, if the enrichment is rightfully the plaintiff's then the defendant's failure to give it back constitutes a breach of her restitutionary duty. But merely to point to the defendant's retention of the enrichment is not to answer the question as to *why* the enrichment is rightfully the plaintiff's, or why the defendant's retention of it violates a restitutionary duty owed to the plaintiff.

In addition, it is not clear that an action in unjust enrichment crystallizes only when the defendant *knowingly* retains the enrichment. Cases of incontrovertible benefits illustrate this principle.[42] In such cases the defendant is enriched when the plaintiff confers on her a benefit that no reasonable person can deny, and this can occur without the defendant's knowledge. This suggests that the knowing retention of a benefit cannot by itself be sufficient to impugn a transaction.

Let me now turn to the first response. This response holds that Aristotle's emphasis on action is misleading because there can be tort liability even where there has been no action at all. I have in mind here cases of nonfeasance giving rise to liability. Two things can be said in response. First, it is a mistake to equate nonfeasance with inaction: the distinction between misfeasance and nonfeasance does not track the

40. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib," *supra* note 3 at 40.
41. *Restatement of Restitution* (1937), Section 1(a).
42. See *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 98 D.L.R. (4th) 140.

act/omission distinction perfectly and so there is no quick route from nonfeasance to inaction or omission. But second, and perhaps more importantly, it is arguable that even in those cases where nonfeasance *is* taken to be sufficient to ground an action in negligence, the nonfeasance is part of broader action on the part of the defendant. Let me try to explain what I mean by this.

A defendant's nonfeasance can constitute grounds for liability to a plaintiff only if, by virtue of some previous action, the defendant owes a duty of care to the plaintiff. Take, for example, *Depue v. Flatau*.[43] There the plaintiff Depue fell ill at dinner but was not allowed to stay overnight at defendant Flatau's home. Flatau instead loaded Depue into his sleigh and sent him on his way. The night was bitterly cold, however, and Depue never made it home, and as a result Depue lost several fingers to amputation, and suffered other health problems. Flatau was held liable for Depue's injuries because, first, he had assumed a legal duty for the safety of his guest when he invited Depue into his home for dinner and, second, because he had failed to act appropriately given that duty. Similarly, in *Horsley v. MacLaren* a passenger, Matthews, onboard MacLaren's boat fell overboard, and another passenger Horsley jumped in the water to rescue him.[44] Both died. The court held that MacLaren was under a legal duty to take reasonable care for the safety of his passengers, and that it was this duty that required him to act.[45] In both cases, the issue of nonfeasance, or inaction, arises only against a prior backdrop of action. Only if the defendant acted so as to incur a legal duty towards the plaintiff is the defendant's nonfeasance actionable. In short, the point is that it is not clear that nonfeasance involves lack of action in the manner in which the objection suggests that it does.[46]

8. A Kantian Response

If the preceding discussion is on the right track, then it would seem that more is needed to respond effectively to Klimchuk's argument. Pointing to the defendant's retention of the enrichment is insufficient absent a reason for thinking that the retention is itself correctively unjust. Nor is it clear that action *is not* essential to tort actions in negligence. Consequently, a more searching response is needed if actions in unjust enrichment are to be understood as actions in Aristotelian corrective justice. I have two responses in mind.

The first is a Kantian one that has at its core considerations having to do with personal autonomy. Ernest Weinrib has done much to articulate and defend this

43. *Depue v. Flatau et al.* 111 NW 1 (Minn. SC 1907).
44. *Horsley v. MacLaren* (1971), 22 D.L.R. (3d) 545 (SCC).
45. The court disagreed on the outcome of the case, however. Justice Laskin, in dissent, held that MacLaren had negligently handled his boat during the course of the rescue, and should be found liable. Justice Ritchie held, on the other hand, that MacLaren's handling of the boat was not negligent given the nature of the emergency. Both agreed that MacLaren was under a legal duty to provide for the safety of his passengers.
46. For a more searching discussion of this issue, see Ernest Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L. J. 247; and Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law" in David Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 427.

view.[47] According to Kant, we are self-determining beings, which means that we are individuals capable of setting our own ends. We act autonomously in setting those ends just in case we act without external compulsion.[48] To the extent that the law seeks to protect our autonomy, it seeks to protect our capacity to set our own ends. Thus, if I act under a mistake, I do not manifest a capacity to set *my* ends, since the ends set are not necessarily ones I would have chosen had I been in possession of full information. It is tempting to conclude that this is (part of) the reason why a mistaken payment is problematic from the point of view of private law: such a transaction does not manifest or reflect the autonomy of the person who is making the payment. Note that this analysis does not require that the defendant have done anything. The mere fact that the plaintiff has failed to manifest her autonomy is sufficient to render the plaintiff's action problematic.

The point can be made in terms of 'donative intent.' Private law does not require that individuals confer gratuitous benefits on others. But if in a case of mistaken payment the defendant were allowed to retain the enrichment, the plaintiff would, in effect, be required to confer on the defendant a benefit, contrary to what the law proscribes. In articulating this idea of donative intent, Weinrib says the following: "only if the donor acts in execution of a donative intent is the transfer of the benefit an expression of right. Unilateral transfers, such as mistaken payments, that are not the product of donative intent are juridically ineffective, regardless of the absence of wrongdoing."[49]

While this analysis is sophisticated and attractive, I have some reservations about it. One problem is that the account makes it difficult to make sense of the juridical distinction between a mistaken payment and a bad choice. The law protects the former but not the latter. But if the problem with mistaken payments has to do with incomplete knowledge—I fail to realize that I've already repaid my debt to you, or that I don't in fact owe a debt to you at all—then it would seem that if I make a poor choice due to ignorance that is as much a violation of my autonomy as is a mistaken payment. A second problem with the view is that—again—it is hard to see how anything done *by the defendant* could result in the plaintiff's autonomy being compromised. The simplest way to make this point is to highlight the by now familiar fact that in cases of mistaken payment the defendant has not done anything at all. But if she has not done anything, then *a fortiori* she has not done anything that might interfere with the plaintiff's autonomy.[50]

Finally, and relatedly, the focus on donative intent obscures the fact that mistake does not seem to have the same effect in other areas of the law. Mistake, for example,

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47. See Weinrib, *The Idea of Private Law*, *supra* note 14, and Ernest Weinrib, "Right and Advantage in Private Law" (1989) 10 Cardozo L. Rev. 1283.

48. The emphasis on *external* compulsion is important, since it is arguable that when we act out of respect for the moral law, we act with *internal* compulsion.

49. Weinrib, *The Idea of Private Law*, *supra* note 14 at 140-41. For further discussion of this and other issues related to mistaken payments, see Abraham Drassinower, "Unrequested Benefits in the Law of Unjust Enrichment" (1998) 48 U.T.L.J. 459, and Tang Hang Wu, "Restitution for Mistaken Gifts," *supra* note 8.

50. Nor is it clear how the defendant's *lack* of action could constitute an interference with the plaintiff's autonomy.

does not always operate to negate a contract. Consider in this respect *Bell v. Lever Brothers*.[51] Lever Brothers Ltd. hired Bell in 1926 for a term of five years. Three years later, in 1929, the Levers agreed to pay Bell $30,000 to terminate his employment contract. Unbeknownst to the Levers, however, Bell had from 1927 onwards been dealing in and making a profit from the very business in which the Levers were engaged. Had the Levers known of Bell's actions at the time, they would never have entered into the termination agreement. The Lever Brothers therefore sued to recover the $30,000. The House of Lords, however, analyzing the case as one of mistake, refused to order Bell to return the money. To be sure, the House of Lords was careful to distinguish cases in which mistake does serve to negate or nullify consent, as where there is a mistake with respect to the parties to a contract or to the existence of the subject matter of the contract. Still, this does not affect the point that mistake does not automatically negate a contract, which suggests that mistake is not something that the law views as making problems for autonomy in general.[52]

9. Aquinas and the Thing Taken

Although there is much more that could be said about the Kantian response, I propose to set it aside for the time being and look at a different response to Klimchuk's argument. This different response finds its inspiration in some of Thomas Aquinas' remarks.

In his *Summa Theologica*, Aquinas says that

> [w]ith regard to a man who has taken another's property, two points must be considered: the thing taken, and the taking. By reason of the thing taken, he is bound to restore it as long as he has it in his possession, since the thing that he has in addition to what is his, should be taken away from him, and given to him who lacks it according to the form of [corrective] justice.[53]

James Gordley expands on Aquinas' point in the following way:

> Aquinas explained that when one person had acquired or interfered with another's property, he might be liable for two different reasons. First, he might be liable for the way in which he did so (*acceptio rei*): he might have acted wrongfully, against the owner's will, in which case he was liable whether or not he still had the property; or he might have acted with the owner's consent, in which case whether he was liable depended on the kind of voluntary agreement they had made. Secondly, he might be liable merely because he had another's property, regardless of how he had come by it (*ipsa res accepta*). According to Aquinas, [corrective] justice required that he give it back.[54]

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51. *Bell v. Lever Brothers Ltd.*, [1932] A.C. 161 (H.L.). See also *Solle v. Butcher*, [1950] 1 K.B. 671.

52. Another case illustrating this point is *R. v. Clarence* (1888), 22 Q.B.D. 23 in which the accused, knowing he had gonorrhea, had sex with his wife, who contracted the disease as a result. Although the husband was charged with criminal assault, a majority of the court held that mistake or lack of knowledge was not sufficient to vitiate the wife's consent.

53. St. Thomas Aquinas, *Summa Theologica*, Second Part of the Second Part (QQ1-189), Question 62, Art. 6, online: http://www.ccel.org/a/aquinas/summa/SS/SS062.html#SSQ62OUTP1.

54. James Gordley, "Restitution without Enrichment? Change of position and *Wegfall der Bereicherung*" in David Johnston & Reinhard Zimmermann, eds., *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press, 2002) 227 at 228.

As applied to the present case, the idea is this. Klimchuk argues that actions in unjust enrichment cannot have the structure of corrective justice because there is nothing about the way in which the defendant has been enriched that impugns the transaction. But that consideration, if accepted, would only seem to go to the *manner* in which the defendant has been enriched—to the taking or acquisition of the thing, in Aquinas' terminology. Consequently, it is open to argue that the defendant owes a restitutionary duty to the plaintiff because of the very fact of the enrichment, that is, because of the thing taken. On this view, the basis for a claim in unjust enrichment would be proprietary in nature, since it would focus primarily on the thing taken, and only secondarily, if at all, on the manner in which the thing taken was acquired.

For ease of exposition I will call this the *proprietary analysis of unjust enrichment*. Caution is warranted, however. For this analysis of unjust enrichment is not the same as what is sometimes called the proprietary analysis of restitution. As Roy Goode puts it, "[p]roprietary restitution involves the raising of a new proprietary right in an asset in favour of P to reverse an unjust enrichment obtained by D at P's expense."[55] Restitution, again, is a remedy, a response to an event, whereas unjust enrichment is an action or event giving rise to restitution. Again, what I am interested in are the grounds giving rise to an action in unjust enrichment, *not* the remedy fashioned by private law to respond to such an event. And the claim I will be pursuing is that those grounds can be usefully thought of in proprietary terms.

10. The Proprietary Analysis of Unjust Enrichment

I will be arguing that it is worth taking the proprietary analysis of unjust enrichment seriously, even though on its face it might seem to be a non-starter. I say this for several reasons. First, because there may be cases where title to the enrichment has passed from the plaintiff to the defendant, in which case it might be supposed that the plaintiff can no longer assert a proprietary claim. And second, because it might be argued that there can be no proprietary right or interest involved in actions in unjust enrichment since, as Peter Birks puts it, if one were to assume otherwise "the law of property and the law of restitution [would] merge into one lump, too large to handle and, worse, analytically impure[.]"[56] If this were to occur, "[t]he whole law of real property would come into the law of restitution on the back of the action [in unjust enrichment]."[57]

Powerful as they are, however, I think that these two objections rest on a mistaken understanding of what it means to call a claim proprietary in nature, at least in the present context. In responding to these objections, the main point on which I wish to insist is a distinction between a cause of action and the underlying right involved in that action. By way of illustration, consider two sorts of cases: trespass, and restitution based on the appropriation of real property interests.

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55. Roy Goode, "Proprietary Restitutionary Claims" in W.R. Cornish et al., eds., *Restitution: Past, Present, and Future* (Oxford: Hart, 1998) 63 at 64.
56. Birks, *supra* note 1 at 16.
57. *Ibid.*

First, suppose D trespasses on P's property. Were P to bring an action against D, P would have a *personal* action against D for trespass. The underlying right involved in such an action, however, would be *proprietary*, since it would arise out of D's appropriation of or interference with P's property. Or second, consider a case where the defendant profits from the appropriation of the plaintiff's property interest. In *Wrotham Park Estate*,[58] the defendant D built homes in violation of a restrictive covenant. The plaintiff P brought an action seeking a mandatory injunction for the demolition of the homes. While the injunction was refused by the Court on the grounds that it would be a waste of much needed houses, the Court held that P was entitled to damages equivalent to the gains or profits realized by D for its breach of the covenant, the measure of which was the amount of money P might reasonably have demanded from D for a relaxation of the restrictive covenant. Again, the fact that a personal action arose out of an appropriation of a property interest illustrates that the two are not incompatible.

Let me be clear: I am not suggesting that these examples by themselves show that actions in unjust enrichment must have a proprietary basis. For in each of the examples the defendant clearly *does* something wrong—trespassing, or intentionally appropriating a property right—that is by hypothesis missing in cases of mistaken payment. Rather, the examples are intended to establish that a claim or an action can be *in personam* even if the underlying right giving rise to it is proprietary.

11. The Meaning of 'Proprietary'

But what does it mean to call (the grounds of) a claim proprietary? Peter Jaffey usefully distinguishes two such senses. Following Jaffey, let us call a plaintiff's claim proprietary in the first sense if it "constitutes an assertion of ownership of property as against the defendant."[59] To call a claim proprietary in this sense is to assert something about the *content* of the claim. It is to assert that the plaintiff has a property right to some object that is good as against the whole world, and not (merely) a claim against the defendant.

On the other hand, let us call a claim proprietary in the second sense if it "arises from the claimant's ownership of the property."[60] To call a claim proprietary in the second sense is to assert something about the *basis* of the claim. It is to assert that the reason for the plaintiff's claim is based on the plaintiff's ownership rights. The two assertions are distinct. While a claim that is proprietary in the first sense is to be contrasted with a personal claim, such as a claim for damages, a claim that is proprietary in the second sense does not go to whether the claim is *in personam* as opposed to *in rem*, nor does it say anything about what the appropriate remedy is. Instead, it goes to the *grounds* or *basis* for the claim. In this second sense, "'proprietary' is equivalent to 'contractual' or 'tortious' in identifying the basis of the

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58. *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.*, [1974] 1 W.L.R. 798 (Ch. D.). See also *Jagger v. Sawyer*, [1995] 2 All E.R. 189 (C.A.) and, more controversially, *Phillips v. Homfray* (1883), 24 Ch. D. 439.

59. Jaffey, "Two Theories of Unjust Enrichment," *supra* note 1 at 147.

60. *Ibid.*

claim."[61] This distinction is relevant because in saying that a claim in unjust enrichment is proprietary we are saying that it is a proprietary claim in the *second* sense. As Jaffey explains, "[t]he claim at common law to recover a mistaken payment is personal, and so it is not a proprietary claim in the first sense. It may be that this has led some people to think that is cannot be an ownership-based or proprietary claim in the second sense, but this is clearly not the case."[62] For it is clear that the reason that the plaintiff is demanding the return of the mistaken payment from the defendant is that the money was once the plaintiff's. It is *that* proprietary claim that is the basis of the action.

Compare in this respect Samuel Stoljar's remark that the point of the proprietary analysis of unjust enrichment is not

> that unjust enrichment should become part of the "law of property," neither that quasi-contractual recovery of money is like the recovery of an ordinary *res*, for clearly it is not. The point is rather that the recovery of anything, whether money or land or chattels, rests on the claimant (P) being able to show that what he seeks to recover in fact "belongs" to him, having a better "title" to it than the person (D) from whom recovery is sought. P, more particularly, has to show that D came to the money ("had and received it") without any transmissive consent from P, whether consent in the form of a gift or contract or bailment or some trust established by P.[63]

By way of illustration, consider the following remark of Birks' which is intended to establish that actions in unjust enrichment cannot be proprietary: "most restitutionary rights are not property rights at all; they are personal rights (*in personam*), as opposed to proprietary rights (*in rem*)."[64] Even if we set aside the distinction between unjust enrichment and restitution, this remark clearly conflates the two senses of 'proprietary' that Jaffey is at pains to distinguish. In the first sense of 'proprietary,' Birks is certainly correct: actions in unjust enrichment are not (typically) proprietary claims, since they are directed against a person. But it does not follow from this that actions in unjust enrichment cannot be proprietary in the second sense of 'proprietary.' On this analysis, an action in unjust enrichment would thus be an *in personam* claim, the grounds or basis of which would be proprietary. As Stoljar might put it, the plaintiff would be asserting as against the defendant that her title is superior to the defendant's, and hence, that the thing taken properly *belongs* to her.

To return, once more, to the case of mistaken payment: what is it about such cases that gives rise to a claim for restitution? According to Jaffey,

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61. *Ibid.*

62. *Ibid.*

63. Stoljar, "Unjust Enrichment and Unjust Sacrifice," *supra* note 1 at 603. Stoljar goes on to say that "[a] basic theme running through our private law, perhaps any system of private law, surely is that, apart from assets distributed by public allocation or by operation of law, things or money cannot validly pass from one person to another without the former's sufficient consent either before or after the event. This is what property essentially means, at least importantly means among other things." *Ibid.*

64. Birks, *supra* note 1 at 15. But of course some restitutionary rights *are* proprietary in nature, as when a remedy of constructive trust is ordered by the courts. See again *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

> [b]ecause the money transferred belonged to the claimant, it is implicit in his or her right of ownership that he or she should be able to recover the money (or its value) from anyone who has received it other than through a valid exercise of his or her power as owner to transfer it. The relevance of the mistake is that by virtue of the mistake the power was not validly exercised...and so the payment was invalid. Thus a more meaningful characterization of the claim is that it arises from the claimant's original ownership of the money transferred.[65]

If, as I have been suggesting, this is the way to make sense of Aquinas' claim that a demand for restitution can be based on the thing taken, then it turns out that in viewing actions in unjust enrichment as actions in corrective justice we are led to the conclusion that their basis is, at least in part, proprietary in nature.

12. A Further Objection

As I said, this is a view that I believe is worth taking seriously. It seems to me to be intuitively plausible and theoretically satisfying, and it allows us to make sense of the idea that actions in unjust enrichment have the structure of actions in corrective justice.

Still, there is an obvious objection to it. I have been suggesting that by focusing on the thing taken rather than on the taking itself, we can rebut Klimchuk's argument against (K2). But this opens up the following rejoinder: even if a distinction between the taking and the thing taken is granted, it is still unclear how the thing taken can serve as the grounds of an action in unjust enrichment. For let T be a transaction involving some object X that gives rise to an action in unjust enrichment. Assume that prior to T, plaintiff P had X and defendant D did not. And assume that after T, D has X and P does not. But from these facts about X, the thing taken, nothing follows about whether T was a correctively unjust transaction. Perhaps P intended to give X to D as a gift, in which case T would be a correctively just transaction. Then again, perhaps P mistakenly gave X to D, thinking that D was somebody else, in which case T would be a correctively unjust transaction. The objection, in short, is that the thing taken, by itself, is too coarse to ground a claim in unjust enrichment. So we are again left asking what could possibly impugn the transaction and render the enrichment correctively unjust. And again, the only plausible suggestion is that it must be something that the plaintiff or the defendant has *done*. But that is just to say that what we ought to be focusing on is, in Aquinas' terminology, the *taking* rather than the thing taken. Thus, the response, in brief, is that the appeal to the thing taken is entirely idle.

This is a powerful objection. But let us recall what the proprietary analysis does and does not commit its proponents to. Recall that the proprietary analysis amounts to the claim that an action in unjust enrichment is based on the claim that the disputed object in question more properly belongs to plaintiff than to defendant. It is in this sense that the action is proprietary. In order to evaluate this claim, however, it will often be necessary to determine what the plaintiff and the defendant did with

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65. *Ibid.*

respect to the disputed transaction. Did the plaintiff indicate that the transaction was one of gift? Did the defendant take active steps to retain the alleged benefit? Suppose P mistakenly puts an object in D's mailbox, but that D finds the object before P can retrieve it. And suppose P now asks for the object back, and D refuses. What is the basis of the action here? Does it rest on D's retention of the object? On P's mistake in putting it in D's mailbox? I would suggest that insofar as both facts are relevant to determining who has better title to the object, both are relevant to the question whether D has been unjustly enriched.

On the proprietary analysis, P will succeed in her action if she can show that she has better title to the object than does D. This is not affected by the fact that in order to *ascertain* whether P has better title we must look, in part, at what P and D did. P and D provided evidence in support of the claim that D was unjustly enriched at P's expense, but they do not constitute or ground that claim. Moreover, to point to P's mistake in the transaction does not amount to an adoption of the Kantian view that the mistake vitiates P's autonomy, and hence, that D must return the disputed object, or its value in money, to P. Rather, P's mistake is evidence that title was improperly transferred to D and thus, that the object properly belongs to P.[66]

13. Conclusion

To recapitulate, I have been arguing that if we take seriously Aquinas' distinction between the taking and the thing taken, and if we understand the thing taken in broadly proprietary terms, then Klimchuk's argument against (K2) fails, and with it his argument that actions in unjust enrichment cannot have the structure of corrective justice. With respect to Klimchuk's first objection—namely, that in cases of mistaken payment the action cannot have the structure of Aristotelian corrective justice because defendant has not *done* anything—the response suggested by Aquinas' distinction is that the emphasis on action in Aristotelian corrective justice is not mandatory. In some cases a defendant and plaintiff are correlatively linked by virtue of being doer and sufferer of the same wrong. But this is inessential to the view, for a defendant and plaintiff can be correlatively linked by virtue of the thing taken. That the defendant now has what properly belongs to the plaintiff is sufficient for such correlativity. With respect to Klimchuk's second objection—namely, that there is nothing that the defendant has done or has failed to do that impugns the transaction—the

66. There is another objection that should be addressed. It might be objected that the proprietary analysis of unjust enrichment only applies to objects or things transferred, and so cannot be extended to cases in which one person provides another with a service. For in what sense can it be said that A's doing something for B is susceptible to a proprietary analysis? How can that sort of transaction be captured by the proprietary analysis of unjust enrichment? However, I think that this objection can be dealt with if we view the provision of services as one way in which one person's means or capacities are transferred to another. In providing another person with a service—by shining his shoes, or walking his dog, or helping out around his house—I am transferring to that person something that is mine, namely my means and capacities. To this extent, mistakenly shining somebody else's shoes is on a par with mistaken payment, since in both cases there is a transfer from person A to person B of something that is properly thought of as belonging to A. Thus, there would appear to be no bar to extending the proprietary analysis of unjust enrichment to cases in which services rather than goods are transferred from one person to another.

response, again, is that the emphasis on the defendant's action or inaction is misleading. Given Aquinas' distinction, we can think of the impugned transaction either in terms of the taking, or in terms of the thing taken. But to look only at the defendant's action or inaction is to focus exclusively on the taking and to ignore the possibility that what impugns the transaction is the thing taken.

I admit that this proposal is speculative. Nonetheless, I persist in thinking that actions in unjust enrichment have the structure of corrective justice and that the basis of such actions is proprietary. Although it might be thought that this is inconsistent with Aristotelian corrective justice, I think otherwise. Let me briefly try to indicate why.

First, Aquinas clearly thought that he was working within a broadly Aristotelian framework, which suggests that corrective justice can be supplemented with proprietary considerations and still remain corrective justice. This is not demonstrative, but neither is it insignificant. Second, recall that on Aquinas' view the action that has its grounds in the thing taken is an action requiring a corrective remedy. As James Gordley says, on Aquinas' view a man "might be liable merely because he had another's property, regardless of how he had come by it (*ipsa res accepta*). According to Aquinas, [corrective] justice required that he give it back."[67] Third, we have seen that the Aristotelian framework requires supplementation of some sort in order to make sense of actions in unjust enrichment and respond effectively to Klimchuk's argument, and there is no reason to believe that such supplementation cannot take a proprietary form. And fourth, the remedy for such a proprietary claim has the right form to be a remedy in corrective justice. For by forcing defendant to return the enrichment in which plaintiff has or had a proprietary interest, "[j]ustice is thereby achieved for both parties through a single operation in which plaintiff recovers precisely what the defendant is made to surrender."[68] In short, the proprietary analysis of unjust enrichment would appear to have all the elements necessary for it to be viewed as having the structure of a claim in corrective justice.

One final issue remains. I have been arguing that supplementing Aristotelian corrective justice with proprietary considerations allows us to respond to Klimchuk's argument. But in doing so, I seem to be committed to saying that in the case of mistaken payment, the plaintiff's mistake somehow impugns the transaction. (For what, other than the plaintiff's mistake, could entail that the thing taken belongs to the plaintiff?) Earlier, however, I suggested—in connection with the Kantian response to Klimchuk's argument—that from the perspective of corrective justice this idea is problematic. I said this because it is not clear that the plaintiff's mistake in any way vitiates her autonomy. But how else could the mistake impugn the transaction except by negatively affecting the plaintiff's autonomy? And if this *is* what impugns the transaction, then why isn't the Kantian response to Klimchuk's argument sufficient? Why does it need further *proprietary* supplementation, especially when that supplementation does not seem to go to the reason for thinking that the transfer has been impugned?

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67. Gordley, *supra* note 54 at 228.
68. Weinrib, "Corrective Justice in a Nutshell," *supra* note 14 at 350.

I believe that the following response is appropriate. Suppose that P mistakenly enriches D by conferring upon D a benefit. The Kantian idea is that the mistake vitiates P's autonomy. But this can mean only two things. Either the vitiation amounts to the claim that title was never transferred in the first place, in which case P retains a proprietary interest in the enrichment; or the vitiation means that although title was transferred, it should not have been transferred, that is, that the benefit should remain with the plaintiff. But note that both interpretations are proprietary in the relevant sense. The first amounts to the claim that the basis for recovery resides in a *present* proprietary claim: P demands that D return what rightfully belongs to P at this very moment. The second amounts to the claim that the basis for recovery resides in a *past* proprietary claim: P demands that D return what ought properly belong to P. In both cases, however, it is a proprietary claim in Jaffey's second sense of 'proprietary' that grounds the action for recovery.

But can this be right? It might be objected that I am appealing to a notion of property that is incapable of doing the work I am asking it to do.[69] I have been suggesting that the cause of action in unjust enrichment can be thought of as being proprietary in nature, and that this is compatible with such actions being viewed as actions in corrective justice. I argued for this conclusion on the grounds that actions in unjust enrichment involve the plaintiff asserting as against the defendant a proprietary interest in the disputed object—the 'thing taken', in Aquinas' terminology. And from this I concluded that the plaintiff's claim is that she has better title to the object than does the defendant. But—goes the objection—this conflates two senses of 'proprietary', a weak sense and a strong sense, and only the strong sense is interesting or important. The weak sense is the sense in which somebody can be said to have a proprietary interest in some thing T by virtue of once having had title to, or possession of, T. The strong sense is the sense in which somebody can *now* be said to have better title to T than somebody else. The problem is that the strong sense does not follow from the weak one: a person can have had a proprietary interest in something without presently having title to that thing. Consequently, if the plaintiff merely had at some time in the past a proprietary interest in some disputed object that is now in the possession of the defendant, this does not adequately capture the grounds of a present action in unjust enrichment, since no conclusion about who presently has better title to that thing can be inferred from any past proprietary interest that the plaintiff might have had.

My response to this objection is to deny that the weaker sense of 'proprietary' is uninteresting or unimportant from the perspective of the law of unjust enrichment. For even if the inference from the plaintiff's having a proprietary interest in a disputed object to the plaintiff's having better title to the disputed object is resisted, the idea that the cause of action in unjust enrichment might arise out of a proprietary interest is nonetheless worth taking seriously, for at least two reasons. First, it is worth taking seriously if one is trying to make sense of the idea that actions in unjust enrichment are actions in corrective justice, as I have been trying to do. But second, it is also interesting because it suggests that the cause of action in unjust enrichment

69. This objection was put to me by Stephen Pitel.

may involve a conception of title that is closer to that of equitable or beneficial title than it is to that of legal title. Conceptually, the idea would be that a plaintiff's assertion that a defendant has been unjustly enriched at the plaintiff's expense can be understood along the following lines: the plaintiff retains something like the beneficial title to—or more weakly, a right to the value of—the disputed good, even if legal title has passed (as in the case of a mistaken payment). And again, conceptually the idea would be that the retention of such a right somehow derives from a prior proprietary interest. In sum, I would argue that, far from being empty, the broad notion of property with which I have been operating is conceptually important, and ought to be taken seriously.

To be sure, it may be that the resources of the Kantian view are sufficient to rebut Klimchuk's argument. Or it may be that the argument cannot be rebutted after all and that actions in unjust enrichment cannot be viewed as actions in corrective justice. However, I am cautiously optimistic that the distinctions drawn above lend support to a view according to which actions in unjust enrichment are actions in corrective justice because of the thing taken.