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# BOOK REVIEWS

## 'By the Ties of Natural Justice and Equity'

**A review of Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009), 446pp, Hbk £60, ISBN 978-0199567751.**

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I.

Several years ago a colleague of mine, having heard that I was working on a paper on the foundations of unjust enrichment, expressed befuddlement. Why, he asked, do philosophers of law go on so about unjust enrichment? Why the concern about whether the positive law of unjust enrichment reflects deep-seated principles of corrective justice? In his view unjust enrichment gives rise to no doctrinal problems, nor to any philosophical puzzles. Rather, in certain cases, for broad reasons of policy and distributive fairness, courts simply hold that defendants should be stripped of gains, and that those gains should be awarded to plaintiffs. There is nothing philosophically deep or interesting about this, he concluded, and no bedrock principles about corrective justice are involved. Rather, it is policy all the way down.

Some might find this view of unjust enrichment, and the general picture of legal reasoning implicit in it, attractive. But it seems to me that far from answering interesting or important questions this approach simply sweeps them under the rug: for what is it about those particular cases that lead courts to respond in the ways in which they do? In particular, what determines whether a transfer or exchange that leads to an enrichment is the sort of transfer or exchange that needs reversing? These are the sorts of questions that are at the core of Robert Chambers, Charles Mitchell and James Penner's impressive collection *Philosophical Foundations of the Law of Unjust Enrichment*. And the answers given to those questions by the

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contributors invariably illuminate and challenge. It is remarkable how much philosophical sophistication is brought to bear on the topic of unjust enrichment. Also remarkable is the fact that, with the exception of Hanoch Dagan, all contributors appear to be of the view that core issues concerning corrective justice are raised by the phenomenon of unjust enrichment. The volume as a whole reveals a field of legal inquiry that has matured significantly since 1932, when the topic was first recognised by the American Law Institute's *Restatement of Restitution*, and in my view should be required reading for anyone interested in the nature of unjust enrichment, and in the normative foundations of private law generally.

The book contains 14 significant scholarly papers and is divided into four sections: one entitled 'Normative Foundations'; one entitled 'Enrichment'; one entitled 'Unjust Enrichment and Property'; and one entitled 'Reasons for Restitution'. The papers are of a uniformly high quality and hang together quite well. In a review of this sort it is difficult to summarise and discuss each paper individually (and in any case, such discussion is not needed given the editors' helpful introduction). So what I propose to do instead is describe in some detail the problem that unjust enrichment poses for proponents of corrective justice, and then turn to an evaluation of some papers that address this problem. I will focus primarily on Ernest Weinrib's wonderful 'Correctively Unjust Enrichment'. There are several reasons for this. First, it sets the tone for the entire collection; second, whatever its shortcomings may be—and many think that those shortcomings are significant—it is deep and stimulating and important; and third, it illustrates just how difficult the project of explaining the foundations of unjust enrichment is.

## II.

But first: what counts as a case of unjust enrichment? Legal doctrine is relatively straightforward in holding that unjust enrichment requires three things: (i) a benefit and (ii) a corresponding detriment for which (iii) there is no legal justification. I will therefore follow the Supreme Court of Canada in assuming that an action in unjust enrichment consists in an *enrichment* of the defendant; a corresponding *deprivation* on the part of the plaintiff; and a *lack of juristic reason* for the enrichment.[1]

In thinking about this framework, however, it is worth drawing attention to a distinction between two kinds of unjust enrichment: unjust enrichment by wrongdoing and subtractive, or autonomous, unjust enrichment. It is easy enough to see why we might want to say that a thief is unjustly enriched at the expense of another when he steals a car. It is also clear why somebody who has defrauded another person of money, property, or services might be required to pay it back: he has committed a wrong, and in order to make it as if the wrong had never happened, repayment in an amount equal to the value of the gain is required. However, these are not what are normally thought of as cases of unjust enrichment, since these sorts of situations are already covered by criminal law or by other areas of private

1 See *Pettkus v Becker* [1980] 2 SCR 834; *Garland v Consumers' Gas Co* [2004] 1 SCR 629.

law via, for example, the tort of conversion. Consequently, most judicial and academic interest is centred on autonomous unjust enrichment (AUE), where what is characteristic of AUE is that the enrichment involves no wrongdoing on the part of the defendant.

This is part of the answer to the question, What counts as a case of unjust enrichment? But another issue needs to be addressed, namely: What it is that actions in unjust enrichment aim to rectify or remedy? In particular, does the law of unjust enrichment seek to strip defendants of wrongful gains? Or does it seek to reverse unjust transfers? It would appear that the law seeks to do the latter. Consider *Edwards v Lee's Administrators*, where the defendant charged admission to a cave, part of which was located under the plaintiff's property. There the court held that the defendant had to disgorge part of his profits based on the fact that the defendant had committed the wrong of trespass.[2] In *Edwards* the defendant was therefore stripped of a wrongful gain, but not on the basis of an action in unjust enrichment. That suggests that actions in unjust enrichment form a subset of actions that involve gain-based remedies. What is normatively problematic from the perspective of the law of unjust enrichment, we might say, is not the fact that the defendant was unjustly enriched, but that the transfer by which the defendant was unjustly enriched was legally defective or problematic.[3]

Charlie Webb bolsters this point in his interesting paper, 'Property, Unjust Enrichment, and Defective Transfers'.[4] Consider the familiar case of *Bradford v Pickles*.[5] The town of Bradford received a significant amount of its municipal water from a natural spring that flowed underneath the defendant's land. The defendant proceeded to divert the water from the spring for work on his own land (although the hunch was that his true motive was to encourage the town to either purchase his land or pay him to refrain from interfering with the flow of water from the natural spring). The result was that less water flowed to the town, and the town sought an injunction to prevent the defendant from continuing his water-diverting activities. The injunction, however, was denied.

So much, so familiar. What is interesting, however, is what happens when we subject the facts of *Bradford v Pickles* to an unjust enrichment analysis. It seems clear that the defendant, by diverting the water and using it for his own purposes, was enriched, and that the enrichment was at the expense of the town. It is also clear that the enrichment was not intended by the town, which is to say that there was no juristic reason for the enrichment. All the same, there is little inclination to say in this case that there was an unjust enrichment. Why? Because the town had no legal right or normative entitlement that the defendant's conduct violated: there was nothing that the defendant acquired to which the town could point and say, that is

2 *Edwards v Lee's Administrators*, 96 SW (2d) 1028 (Ky CA 1936).

3 For fuller articulation of this argument, see Lionel Smith, 'The Province of the Law of Restitution' (1992) 71 *Canadian Bar Review* 672.

4 See also the discussion in Kit Barker, 'The Nature of Responsibility for Gain' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 157 ff.

5 [1895] AC 587.

ours. Or as Webb puts it, *Bradford v Pickles* illustrates the proposition that in order to give rise to a cause of action in unjust enrichment 'the benefit received by the defendant must be one to which the claimant was exclusively entitled, one which the law had reserved for him' (351). The claimant must, in other words, have an initial right to the contested benefit.

We are now in a position to see why the law of unjust enrichment poses problems for corrective justice. Corrective justice in Ernest Weinrib's sense—and this is the sense on which I will focus in what follows—is based on two ideas, one derived from Aristotle and one derived from Kant. The Aristotelian idea is that in a correctively unjust situation defendant and plaintiff are related as doer and sufferer of the same wrong. This idea can be glossed as saying that in a correctively unjust situation, there is bilaterality or correlativity between defendant and plaintiff. However, although Aristotelian corrective justice articulates a certain conceptual structure governing relations between individuals in correctively just and unjust transactions, it does not say what it means for one person to wrong another. Consequently, it leaves the normative content of the bilateral structure open. What Kant adds to Aristotle's idea, according to Weinrib, is the claim that what makes a bilateral or correlative transaction wrongful is that in acting the defendant breaches a duty owed to, or violates a right of, the plaintiff, where the rights and duties thereby identified are derived from a conception of individuals as free and equal persons. Putting these ideas together yields the following: a corrective injustice arises when the defendant has breached a duty owed to the plaintiff.[6] The normative significance of this reciprocal or bilateral relationship is reflected primarily at the level of reasons: any reasons for supposing that the defendant has done something wrong must at the same time be reasons for thinking that the plaintiff has suffered a wrong, and any reasons for thinking that the defendant is liable must at the same time be reasons for thinking that the defendant is liable to a particular plaintiff. But in paradigm cases of AUE there is arguably no breach of a duty on the part of the defendant, since in paradigm cases of AUE there is no wrongdoing. And that suggests that the reasons for supposing that the law should reverse a transfer from plaintiff to defendant cannot be reasons based on corrective justice since, absent wrongdoing on the part of the defendant, there would appear to be no normatively significant features of the situation that the plaintiff can point to as the basis of her claim in unjust enrichment.

The puzzle raised by AUE can therefore be presented as follows: the following three propositions, each independently plausible, together form an inconsistent triad.

1. Every legal cause of action involves the violation of a right.
2. In AUE defendant has done nothing wrong.
3. In AUE defendant has an obligation to return the benefit received.

6 See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

Consider a paradigm case of AUE, namely a mistaken payment: P repays a debt to D twice over, forgetting that she has already made payment; or P pays money into D's bank account, thinking that it is her own. In such a situation, (2) is arguably true: because there is nothing that D has done—D is simply the unwitting recipient of P's mistaken payment—D cannot be said to have done anything *wrong*. But if (1) is also accepted then it follows that (3) must be false: D has no obligation to return the benefit received. And yet this is not the law. On the other hand, if we assume that (2) and (3) are true, then (1) must be false: the cause of action must be based on something other than the violation of a right. And finally, if both (1) and (3) are true, then it must be the case that (2) is false: defendant must have committed a wrong, since otherwise there that is what it means to violate a right.

The problem, of course, is that there are very good reasons to accept both (1) and (2). Why accept (1)? Because it has an impeccable legal pedigree—see Austin's *Lectures on Jurisprudence*—but, more importantly, because it reflects the idea that, unless liability is to be strict, a plaintiff must be able to point to a wrong on the part of the defendant in order to establish the requisite normative link underlying liability. Why accept (2)? Again, because it seems implausible to suppose that the defendant, in having money transferred into her bank account, has committed a wrong. (It is no good to say that the defendant's wrong consists in a refusal to return the benefit when asked to do so, since doctrine holds—infuriatingly, some might say—that the cause of action in unjust enrichment is complete as soon as the mistaken payment or benefit is received.[7])

Might liability in unjust enrichment be strict? It might. But two problems with such a proposal can be identified. The first problem, at least for proponents of corrective justice, is that strict liability is of dubious coherence. Correctively unjust transactions are based on the idea that the defendant has breached a duty owed to the plaintiff; as a result, it cannot allow for the possibility that a defendant might incur liability where no wrong has been committed. But this is precisely what strict liability envisages. In Weinrib's terminology it is an example of a 'right without a duty' and so is inconsistent with corrective justice. It may be that corrective justice can tolerate small pockets of strict liability, but what it cannot do is contemplate the possibility that an entire form of private law liability—unjust enrichment—might be strict. So simply calling liability in unjust enrichment strict and leaving it at that is not an option that corrective justice theorists will find appealing.

A second problem with the proposal is that even if it is accepted that liability in unjust enrichment is strict, we are still owed an account of what fundamental right such a form of liability is protecting. What I mean is this. Consider trespass to real property, where liability is strict in the following sense: it doesn't matter whether I knew that I was traipsing across *your* lawn when I crossed it; since the lawn is yours you have a property right that I not walk on it, and it is that right that the law of trespass seeks to protect. Similarly, it doesn't matter whether I was negligent in allowing hazardous material that was kept on my property to flow onto yours; you have a right to enjoy your land free from the intrusion of such material onto it, and

7 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL), 385 (Lord Goff).

it is that right that the rule in *Rylands v Fletcher* seeks to protect. In both cases we can therefore identify a fundamental right that explains why liability might be strict. But what is the fundamental interest that underlies the claim that liability in unjust enrichment might be strict? The answer is unclear. It presumably has something to do with autonomy or freedom of choice. But to the extent that such an interest is at work in articulating the normative basis of negligence, ie, fault-based, liability, it is not particularly helpful to appeal to it in order to identify the normative basis of a form of liability that is held to be strict.

In short, the puzzle posed by unjust enrichment is perfectly general, and gives rise to fundamental questions about the nature and scope of liability in private law. In particular, it raises in a stark manner the following question: How can a defendant be (non-strictly) liable to a plaintiff if the defendant has done nothing wrong? The challenge for proponents of corrective justice is to show either that there is a kind of wrong committed by the defendant that renders her conduct blameworthy, or that fault in the Austinian sense is not the appropriate ground of liability in unjust enrichment.

## III.

Let me turn now to what is surely the cornerstone paper in Chambers, Mitchell and Penner's collection, Ernest Weinrib's 'Correctively Unjust Enrichment'.

The goal of Weinrib's paper is to account for actions in AUE within the framework of corrective justice. We have already seen that the framework combines an Aristotelian structure of liability with a Kantian account of wrongdoing to yield the idea that in corrective justice liability is correlatively structured and depends on the twin concepts of right and duty. And we have also seen why AUE presents problems for this view of liability in private law, since in a typical claim in AUE the defendant has not done anything that can plausibly count as a breach of a duty owed to the plaintiff (32). Weinrib's working premise in 'Correctively Unjust Enrichment' is that the law of unjust enrichment is concerned with *transfers of value*. As a result, we need to pay close attention to the concept of *value*, as well as to the concept of a *transfer*. Value here has a very particular meaning. Says Weinrib, '[v]alue refers to the possibility of exchange under competitive conditions and is concretized through the process of exchange' (35). Value is thus relational, since it is defined through the process of exchange; value is objective, since the value that a given thing has is determined by or realised through exchange under competitive market conditions; and value is also abstract, in the sense that it is distinct from things that have value, and also from the particular uses to which those things can be put. Indeed, as Weinrib says, '[a]bstraction from the particularity of need and use is the presupposition of values functioning as a medium of quantitative comparability between qualitatively different things' (35).

Turning to the concept of a transfer of value, value is only transferred on Weinrib's account when something is given for nothing. When two things of equal value

are exchanged no value is transferred (although the things in which value inheres are transferred or exchanged). It is only when a thing of lesser value is exchanged for a thing of greater value that value is transferred from one party to another. In other words, value is transferred when the transferor does not receive something of equal value in exchange. A transfer of value is thus a kind of *gratuitous transfer*. As we have seen, however, not all gratuitous transfers are legally problematic. (Think back to *Bradford v Pickles*, where as a result of the diversion of water value was transferred from the plaintiff to the defendant—the defendant received something for nothing—but the transfer did not occur in a legally questionable manner.) In particular, one way for value to be transferred in a permissible way is for something to be given as a gift. A gift is a gratuitous transfer accompanied, on the donor's side, by donative intent and on the donee's side by acceptance of the gift as donatively given. To be sure, transfers that are the focus of the law of unjust enrichment are not gifts, but the idea that animates Weinrib is that the sorts of considerations applicable to the law of gifts might illuminate the law of unjust enrichment.

Suppose that a gratuitous transfer lacks donative intent, or is non-donatively transferred. Then the transfer is at least partly normatively defective. Does this mean that if a plaintiff non-donatively transfers value to a defendant, the defendant is under an obligation to retransfer the value to the plaintiff? It does not, first, because from the perspective of corrective justice the reason for imposing liability must be correlative, and second, because the mere fact that a plaintiff has non-donatively transferred value to a defendant does not automatically implicate the defendant in that transfer. Consequently, Weinrib says that in order for a transfer of value to be correctively just, the gratuitous transfer must manifest the will of both the donor and the donee (40). With respect to a gift, this means that, on the part of the donor, the gift must be freely given—that is, it must manifest donative intent. And it means that, on the part of the donee, the gift must be accepted as a gift, ie, it must be accepted as manifesting donative intent. 'Donative intent and acceptance are thus the legal concepts through which justice in transfer expresses the freedom of both parties' (40). Finally, if we apply this general approach to unjust enrichment, we arrive at the conclusion that an action in AUE requires a transfer of value where the donor lacks donative intent, and where the donee accepts the value or benefit as non-gratuitously given. These conditions generate a right to the retransfer of the value of the correctively unjust initial transaction.

Weinrib sums up the foregoing in the following passage:

> So understood, the elements of liability [in unjust enrichment] form a sequence. The first stage in this sequence is to determine whether the plaintiff gave the defendant something for nothing — a stage formulated legally as the defendant's enrichment at the plaintiff's expense and theoretically as a transfer of value. If something was indeed given for nothing, one then moves to a series of questions that address the justice of the defendant's retaining what was given. The first of these questions is whether the plaintiff intended either a gift or the discharge of an obligation to the defendant. An affirmative answer means that the claim is defeated. A negative answer, concluding that the plaintiff gave something for nothing but had no donative intent, leads to the final question in the sequence: did the defendant accept the transferred value as non-donatively given? An affirmative answer to this question means that the defendant cannot justly retain the enrichment and is under an obligation to restore it to the plaintiff. (45)

Returning to our three propositions,

1. Every legal cause of action involves the violation of a right.
2. In AUE defendant has done nothing wrong.
3. In AUE defendant has an obligation to return the benefit received.

It seems to me that Weinrib is best interpreted as accepting (2) and (3), but rejecting (1). In accepting a gratuitous transfer of value knowing that it was non-donatively given the defendant has committed no legal wrong. Nonetheless, the defendant must acknowledge all the same that he is under a duty to retransfer the value that has been transferred to him to the plaintiff, since the transfer of value is normatively defective. Then again, perhaps it is better to interpret Weinrib as accepting (1) and (3) but rejecting (2), and holding that in accepting a gratuitous transfer of value knowing that it was non-donatively given the defendant has acted badly. To be honest, I am not sure what hangs on whether Weinrib is viewed as rejecting (1) or (2).

As one would expect from Weinrib, the approach is elegant and the argumentation impressive, and what emerges is an insightful and sophisticated picture of the normative structure of AUE. Weinrib's argument is also strengthened by the fact that he is up front about his theoretical commitments. For example, Weinrib is committed to the idea that private law must treat individuals as embodying free will. But he also accepts Lord Bowen's admonition that 'liabilities are not to be forced on people behind their backs'.[8] These assumptions act as constraints, since they mean that his solution to the puzzle raised by AUE must generate a duty to retransfer, but in a way that is consistent with a view of defendants as autonomous individuals. Indeed, it is this very tension—between the fact that the cause of action is complete once the enrichment is received, and Lord Bowen's powerful idea against the unknowing imposition of liabilities or duties—that makes the basis of liability in unjust enrichment so difficult to explain and understand.

Despite its ingenuity, however, there remain problems with Weinrib's account. First, consider the concept of acceptance. This concept plays a crucial role in Weinrib's account. For according to it the right to retransfer arises only if the defendant has accepted the transfer of value as non-donatively given. Acceptance here includes an epistemic component: a defendant accepts a transfer only when the defendant knows or is aware that the transfer has occurred (43). Crucially, however, acceptance for the purposes of AUE is constructive rather than actual:

> acceptance of a benefit as non-gratuitously given is a juridical rather than a subjective or psychological idea. It goes to what can be imputed to the defendant on the basis of the public meaning of the parties' interaction given the underlying assumption of private law … One can, therefore, impute to those who interact within this regime awareness that any benefit received from another was not intended to be given gratuitously. Accordingly, enjoyment of a benefit for which one knows that no equivalent was exchanged carries with it acceptance of the benefit as non-gratuitously given. (43)

8 See *Falcke v Imperial Insurance Co* (1886) 34 Ch D 234 (CA).

But this raises at least three problems. These problems have mostly to do with the somewhat slippery notion of *awareness* employed by Weinrib. First, consider a case where a defendant unknowingly receives a benefit—a small amount of money ends up in her bank account by mistake. Weinrib would say that despite her ignorance we can impute to such a defendant acceptance of the benefit as non-gratuitously given, and that this imputation is consistent with her free will. But this seems doubtful. A distinction needs to be drawn between imputing awareness of, or belief in, the proposition that benefits received from another are not intended to be given gratuitously, and imputing awareness of a particular receipt. In the unknowing receipt case it seems to stretch the concept of knowledge or awareness to the limit to say that where without her knowledge a small amount of money ends up in a defendant's bank account by mistake, she will nonetheless be fixed with knowledge or awareness of the transfer. Weinrib's argument only gets us to the conditional proposition that *if* an individual enjoys a benefit that she knows was non-gratuitously given *then* she accepts the benefit as non-gratuitously given. But because cases of unknowing receipt are cases in which the antecedent of such a conditional is false, the imputation of the acceptance condition in such cases fails as well.

Second, consider a case where a defendant knows that an exchange has been made, but believes that exchange has been made to discharge a debt that, in fact, does not exist. In such a case it is also difficult to impute to the defendant the sort of knowledge or awareness that appears to be required to generate the remedial right to retransfer. However, this is not because the defendant in such a situation is unaware of the existence of the transfer or exchange, but rather because the defendant in such a situation does not believe, and so does not know, that *value* has been transferred.[9] But where a defendant remains unaware that there has been a transfer of value, it is implausible to say that his retention of it manifests a genuine choice on his part. And yet on Weinrib's Kantian-inspired account of private law this is precisely what the law seeks to protect, *viz*, our status as self-directing and autonomous agents. Thus, it seems that even by Weinrib's own lights liability in unjust enrichment should arise only when the defendant actively *chooses* to retain a benefit that she knows was non-gratuitously given. But this is not the law.

This leads to a third problem, concerning the relationship between the retention of the benefit and the remedial right to retransfer. As Weinrib conceives of it, the remedial right at issue in cases of AUE is a right to the retransfer of value. And as I have suggested, is seems to make the most sense to think of that right as arising out of the defendant's choice to retain, or to refuse to return, the benefit knowing that it was non-gratuitously transferred. Now, the remedial right to the retransfer of value is a right *in personam*, a right of the plaintiff's as against the defendant. And that *in personam* right arises, says Weinrib, when the wills of the plaintiff and the defendant 'converge on the non-gratuitousness of the transfer of value' (42–43). I have already noted one reason for scepticism about this proposal: how should we react where a defendant mistakenly believes that there has not, in fact, been a

9 I rely here on Matthew Doyle's argument in 'Corrective Justice and Unjust Enrichment' (2012) 62 *University of Toronto Law Journal* 229.

transfer of value in the first place? Should we impute knowledge, and by extension, acceptance of the benefit as non-gratuitously given to him? But set that worry aside. The deeper worry is that it appears that a defendant's refusal to retransfer the value—equivalently, a choice to retain the value, or benefit—can only count as a breach of an obligation on the part of the defendant if there exists a prior expectation that, where the initial transfer was defective, the value would be retransferred. But this suggests that what the parties' wills converge on is not the non-gratuitousness of the transfer but the assumed *obligation* to retransfer value if the transfer in question was, in fact, non-gratuitous. But this seems dangerously close to saying that liability in unjust enrichment is premised on a hypothetical contract or agreement imposed on a non-contracting party to return a benefit in order to avoid unfairness or injustice. In other words, it appears that Weinrib's account of unjust enrichment succeeds only by reviving the concept of quasi-contract. Dennis Klimchuk, in his helpful 'The Normative Foundations of Unjust Enrichment' makes a very similar point. Consider a case where a defendant accepts a transfer as non-gratuitously given. How does that fact bear on her liability in unjust enrichment? It seems that on Weinrib's account liability arises as a result of the imputation to her of the fact that she does not have a right to retain the value of the transfer. But again, this is tantamount to saying that she must be regarded, in law, as having accepted that she is under an obligation to make restitution. But if that is the correct analysis it would appear that the concept of accepting a transfer of value as non-gratuitously given plays no role in justifying the imposition of the duty to make restitution. That duty, it seems, *is* imposed on the defendant 'behind her back' and so is arguably inconsistent with her status as a self-determining agent.

## IV.

These are very complicated issues, of course. Nonetheless, despite the ingenuity of his account in 'Correctively Unjust Enrichment' it would appear that Weinrib has not provided convincing reasons to think that actions in AUE are actions in corrective justice. But are there other things that proponents of corrective justice can say in defence of this idea? There are, but they come at a cost.

One option is to return to the idea that in some sense, liability in AUE is based, at bottom, on considerations having to do with property. Charlie Webb advances this view in 'Property, Unjust Enrichment, and Defective Transfers'; it is also discussed, critically, by Stephen Smith in 'Unjust Enrichment: Nearer to Tort than Contract'. The idea, in a nutshell, is that liability in AUE arises not as a result of a wrong done by the defendant, but rather because the plaintiff retains a property interest in the object, or service, that has been transferred to the defendant.[10] This residual property interest is what underlies the plaintiff's right of retransfer, and is

10 See eg Andrew Botterell, 'Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 *Canadian Journal of Law and Jurisprudence* 275; Peter Jaffey, 'Two Theories of Unjust Enrichment' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004).

best understood in proprietary terms, in the sense that it is on the basis of that interest or right that the plaintiff can say, That thing is mine. Clearly, much depends on what 'property interest' amounts to in this context. The standard argument against this sort of view is that whatever else it means 'property interest' cannot mean '*legal* property interest', since doctrine has it that in many cases of AUE the legal title to goods passes from plaintiff to defendant.[11] So 'property interest' must mean something else, such as 'equitable property interest'. But this makes trouble for the view, since an action in AUE is not an action in equity; it is an action at common law. The upshot is that there seems to be a gap between the claim that notwithstanding the passage of title the plaintiff retains a property interest in the disputed good or service and the claim that on the basis of that property interest the defendant has a common law obligation to return the good or service, or its value, to the plaintiff. Moreover, if the source of liability in AUE stems from proprietary factors, then it might be worried that actions in AUE aren't really autonomous, since the basis of their liability is ultimately found in considerations having to do with property rather than in an autonomous realm of actions in unjust enrichment.

To this it might be replied: So what? That is, what hangs on whether the cause of action in unjust enrichment has a proprietary basis or not? Conversion, which is clearly a tort, has a proprietary basis; so does trespass to land. But we do not think that it is a mistake to call them torts, or that tort law becomes incoherent if those causes of action are counted among our list of nominate torts.

Another possibility considered by some contributors (see in particular Hanoch Dagan's 'Restitution's Realism' and Kit Barker's 'The Nature of Responsibility for Gain') is that the duty to retransfer value (in Weinrib's terminology) or to rectify correctively unjust transfers might flow from a kind of internal or localised distributive justice that holds between plaintiff and defendant.[12] Very roughly, a form of justice is distributive if it is based on a general norm or standard that is designed to guide the proper allocation of goods or resources. Usually, this has a broad application: societal resources should be taken from some people and given to others based on instrumental considerations of fairness, say, or utility. So it is with taxation. But when we turn to paradigmatic examples of private law a distributive account of liability seems out of place. We do not require Smith to transfer money to the injured Jones because Smith has deep pockets or because Jones is a charming fellow; rather, compensation is required because *Smith wronged Jones*. And indeed, the idea that there might be a kind of localised distributive justice in the case of unjust enrichment is in tension with this view, resting as it does on the claim that what grounds the duty to retransfer is a norm that applies to both plaintiff and defendant, without being based on wrongdoing. As Klimchuk puts it, in cases of localised distributive justice

11 See *Kelly v Solari* (1841) 152 ER 24.

12 See also Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004). The phrase 'localized distributive justice' is due to Stephen Perry; see his 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449.

> the distributive claim is localised in *two* senses. First, it is limited to the parties to the transaction. Second, it rests on a norm whose scope is limited to the structure of the disputed transfer … something like 'as between a mistaken payer and the payee, the former has the superior claim to the thing transferred'.[13]

This is an intriguing idea, since it allows us to make sense of the intuition that what we are trying to do in cases of AUE is to do justice *between the parties* while at the same time making room for the possibility that what counts as justice between the parties—what constitutes the justification for requiring a retransfer of value—depends on more than considerations of corrective justice alone. In effect, the defendant is acting as an insurer for the plaintiff: if the plaintiff makes a liability mistake, the defendant is obligated to return the mistakenly transferred asset. But again, the source of this obligation is not a wrong done by the defendant, but rather a particular view of what is just or fair as between the parties to that particular transaction.

Attractive though the view may be, however, Barker notes several problems for it, the most important being that it again seems to get the structure of liability in unjust enrichment wrong. And this is because, as we have repeatedly seen, liability in AUE arises immediately upon receipt of a mistaken payment, rather than at the point at which the defendant refuses to repay. It also makes trouble for the correlative structure of actions in private law. For while it may explain why the defendant is a good person to respond to the plaintiff's loss, it doesn't explain why the defendant is the *only* person who can do so. Moreover, while it might be argued that this is a virtue of the localised distributive justice paradigm—on the grounds that it allows for the possibility that somebody other than the defendant might be called upon to rectify the defective transfer—it is doubtful that this is what justice requires. For a plaintiff who defectively transfers value to a defendant might very well complain, upon learning that the disputed value will be returned to her by somebody other than the defendant, that that is not what she asked for; what she asked for is that the *defendant*, who was unjustly enriched at her expense, retransfer the value.

## V.

There is much more in this collection that is worthwhile. In addition to the papers discussed above there are papers on unjust enrichment and trusts arising by operation of law, ie, constructive and resulting trusts (Lionel Smith), as well as on unjust enrichment and tracing (James Penner). There are discussions of the nature of enrichment (James Edelman, and in a separate piece, Robert Chambers). And there is a discussion of the relationship between the law of unjust enrichment and claims to recover money paid as tax that was not due (Charles Mitchell and Peter Oliver). There is much else besides. What is abundantly clear is that this collection significantly advances our understanding of the philosophical foundations of unjust enrichment and reveals what many have long suspected: that as an area of

13 Klimchuk, *ibid*, 134.

legal inquiry it is intellectually challenging, doctrinally important, and theoretically fascinating. It also suggests to me that my colleague got it wrong: whatever else the law of unjust enrichment is, it is not and cannot be policy all the way down.