

An important theoretical account of private law explains it in terms of corrective justice. Ernest Weinrib in particular has argued that private law is the instantiation of a particular form of corrective justice; one which invests the Aristotelian notion with elements of Kant's concept of right. The early battleground for Weinrib's theory was tort law. A debate has also occurred in contract law, thanks in large part to the work of Peter Benson. More recently, the focus has shifted to consider whether Weinrib's theory can account for another major area of the private law, unjust enrichment. This article argues that Weinrib's theory cannot explain the duty to restore which arises in cases where the defendant plays no role in the sequence of events that result in the conferral of the enrichment.

Keywords: corrective justice, unjust enrichment, Ernest Weinrib, restitution, correlativity, *Nicomachean Ethics*, Kantian right, Aristotle, Kant

I Introduction

The purpose of this article is to assess the extent to which Professor Ernest Weinrib's theory of corrective justice is able, in light of its recent further development, to explain the law of unjust enrichment. It is divided into four substantive sections. Part II provides an overview of Professor Weinrib's theory of private law and describes the conceptual implications his analysis has for the law of unjust enrichment. In *The Idea of Private Law*,¹ Weinrib argues that private law should be understood as the manifestation of a specific conception of 'corrective justice.' A brief account of the Aristotelian and Kantian principles which underlie his theory, however, reveals an apparently formidable obstacle: Weinrib's elucidation of corrective justice seems to require a breach of duty by the defendant. This is at odds with the nature of liability in unjust enrichment which, on the orthodox account, arises immediately from the

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¹ Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) [Weinrib, *Idea*].

moment of receipt without the need to establish a breach of duty or even knowledge of the fact of enrichment. Although Professor Lionel Smith has, in response to these difficulties, offered an alternative corrective-justice explanation of unjust enrichment liability,² it is not one which is at all helpful to Weinrib, since it is fundamentally inconsistent with his understanding of correlativity.

Part III considers Weinrib's more recent efforts to reconcile his theory with the law of unjust enrichment.³ In two essays, Weinrib defends a corrective justice account of the normative foundations of unjust enrichment that does not depend upon the defendant's breach of duty. There are two steps to his account. The first is an articulation of a specific concept of 'value' as the substance of the transaction that corrective justice seeks to rectify. Value is not a kind of asset, but a relational concept that represents the relative worth of a thing realizable through exchange under competitive conditions. Value is transferred when one party gives another something of value but receives nothing or something of lesser value in return. The mere fact of a transfer of value is, of course, insufficient to give rise to liability in unjust enrichment, and so Weinrib's second step is to describe the conditions that generate an obligation to restore the transferred value. They are, first, the plaintiff's lack of donative intent in conferring the enrichment and, second, the defendant's acceptance of the enrichment as having been conferred non-donatively. As a result, Weinrib argues, the obligation to restore the enrichment is consistent with the free will of both parties. In this article, however, it is argued that the defendant's 'acceptance' of the enrichment on these terms is, at least in cases where the defendant is not causally implicated in the conferral of the enrichment, highly counterfactual and, more importantly, inconsistent with the Kantian significance of choice.

Corrective justice postulates that liability vindicates some right the plaintiff has against the defendant. Weinrib has argued that the parties to an action in unjust enrichment jointly create the right to restitution through an interaction in which they both participate. This right is established, Weinrib says, through the unity of the parties' wills with

² Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Tex L Rev* 2115 [L Smith].

³ Ernest Weinrib, 'The Normative Structure of Unjust Enrichment' in Ross Grantham & Charles Rickett, eds, *Structure and Justification in Private Law* (Oxford: Hart, 2008) 21 [Weinrib, 'Normative Structure']; Ernest Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles Mitchell, & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) 31 [Weinrib, 'Correctively'].

respect to the non-donative quality of the transferred value. In Part iv, it is contended that the reasoning that leads to this conclusion is flawed, as it proceeds from an inappropriate analogy with Kant's explanation of contract right. It is also found to involve a revival of the notion that a claim in unjust enrichment is based on an implied promise to repay and should for this reason, if for no other, be regarded with suspicion.

In Part v, the conclusion inevitably reached is that Weinrib is unable to offer a convincing explanation of the restitutionary duty which arises in cases of unjust enrichment. The account he provides is internally inconsistent, highly counterfactual, and reflects a doctrinal position which has long since been abandoned. The admittedly more difficult question is whether *any* corrective-justice account of unjust enrichment is possible. The answer to this must, however, await another day. The sole purpose of this article is to explain why Weinrib's theory of corrective justice should not be accepted as explaining restitutionary recovery for unjust enrichment. While it is always easier to criticize than create, criticism is an important, and often necessary, precursor to the discovery of truth.

Before proceeding any further, however, it is necessary to state more clearly the terms on which the following debate is to proceed. First, the discussion is limited in its scope to a consideration of restitutionary liability arising from an autonomous claim in unjust enrichment. This may be contrasted with restitutionary liability premised upon criminal, tortious, or contractual wrongs. Although it has been recognized that there may be some overlap between these two types of claims,⁴ they remain separate, having distinct doctrinal foundations and attracting different remedial responses.⁵ While these cases have their own conceptual and theoretical difficulties,⁶ their consideration is beyond the scope of this article.

Second, in this article, following Weinrib, liability is considered fault-based if it requires the breach of a prior obligation owed to the plaintiff and strict if it does not, this being a necessary implication of the Kantian element of his theory of corrective justice. This definition of fault has its

4 Mitchell McInnes, 'Enrichment Revisited' in Jason Neyers, Mitchell McInnes, & Stephen Pitel, eds, *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 165 at 168 [McInnes, 'Enrichment Revisited'].

5 Peter Birks, 'The Role of Fault in the Law of Unjust Enrichment' in William Swadling & Gareth Jones, eds, *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford: Oxford University Press, 1999) 235 at 236 [Birks, 'Role of Fault'].

6 See, in this regard, Ernest Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theor Inq L* 1 [Weinrib, 'Restitutionary'].

parallel in the Austinian maxim that ‘every right of action arises from an injury or violation of some other right.’⁷ While the distinction between fault-based and strict liability can be defined in a variety of ways⁸ and the extent to which unjust enrichment incorporates competing notions of fault is a contested issue,⁹ the specialized definition of fault implicated by Weinrib’s analysis is adopted throughout so that an evaluation of his theory may occur on its own terms.

Lastly, throughout the article, I will take as my example of the central unjust enrichment case an uninduced mistaken payment,¹⁰ as it is both the most common in practice and the one which brings the autonomy of the action in unjust enrichment into sharpest relief.¹¹ In such a case, it is uncontroversial that the restitutionary obligation is imposed without the need to establish a breach of a prior obligation owed to the plaintiff.¹²

7 John Austin, *Lectures on Jurisprudence*, 5th ed (London: Lawbook Exchange, 2005) at 764.

8 See Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart, 1997) at 45–9. ‘Fault’ may include a spectrum of conduct stretching from actual dishonesty and *mala fides* by the defendant through to mere carelessness. At the heart of such conceptions of fault is an examination of the propriety or otherwise of the defendant’s conduct in establishing the existence of a *prima facie* claim.

9 See e.g. Birks, ‘Role of Fault,’ supra note 5; Graham Virgo, ‘The Role of Fault in the Law of Restitution’ in Andrew Burrows & Lord Rodger of Earlsferry, eds, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 83 [Virgo]; Kit Barker, ‘The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora’s Box’ in Robert Chambers, Charles Mitchell, & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) 146 at 162ff [Barker, ‘Nature of Responsibility’]. Barker points out that usually in the paradigmatic restitutionary case (i.e. the most common one in practice, the uninduced mistake) the defendant is *responsible* for both the gain and the loss in the sense of having brought these phenomena about by conduct. This is not to say, however, that by this conduct he or she must necessarily be at fault. Fault and responsibility are different. Barker’s purpose is to show how the concept of responsibility (and Honoré’s theory of responsibility, in particular) might be used to understand the basis of those restitutionary liabilities which are strict. See more generally AM Honoré, *Responsibility and Fault* (Oxford: Hart, 2002).

10 More particularly, I will take as my example a payment made under the mistaken belief that it was owed to the payee. It is the most uncontroversial example of a mistake because the consensus appears to be that, in contrast with, for example, mistakes concerning the payee’s identity or the amount transferred, a liability mistake does not prevent title from passing; Ross Grantham & Charles Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart, 2000) at 135–6.

11 The defendant has committed no tort, no contract may be imputed to the parties and, at least in liability mistake cases, the plaintiff cannot invoke his property rights on his behalf.

12 Birks, ‘Role of Fault,’ supra note 5 at 237; L Smith, supra note 2; McInnes, ‘Enrichment Revisited,’ supra note 4 at 207, 209; Ross Grantham, ‘The Equitable Basis of the Law of Restitution’ in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney, NSW: Lawbook, 2005) 349 at 351; Virgo, supra note 9 at 85, 96.

The cause of action accrues immediately at the moment of receipt of the enrichment,¹³ without the defendant having participated in, or even being aware of, the conferral of the enrichment.¹⁴ Interest is calculated from this date¹⁵ and any applicable limitation period begins to run.¹⁶

The difficulty for the law of unjust enrichment, however, is that it is not immediately clear why a passive and often unknowing recipient of an enrichment should be subject to a legal obligation to benefit another. 'Ought' implies 'can'¹⁷ and so it makes no sense to blame someone for failing to return a benefit when that person is either not aware of receiving the benefit or honestly believes that they are entitled to it. To say that a person has an obligation to make restitution from the moment of receipt of a mistaken payment lacks normative force; it is no more than a prediction that the person may be subject to a court ordering them to do so.¹⁸ For the law of unjust enrichment to be valid, it must be grounded in a defensible legal theory. If fault in the Austinian sense is not the catalyst for liability in claims for unjust enrichment, the logical question that remains to be answered is, what is?

Consider also, *Royal Brunei Airlines Sdn Bhd v Tan*, [1995] 2 AC 378 (PC) at para 70 (Lord Nicholls); *Dubai Aluminium Co Ltd v Salaam*, [2003] 1 AC 366 (HL) at 397 (Lord Millett, with whom Lords Hutton and Hobhouse agreed); *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285 (FCA) at 301 (Finkelstein J); *Criterion Properties Plc v Stratford UK Properties LLC*, [2004] 1 WLR 1846 (HL) at 1848 (Lord Nicholls); *OEM Plc v Schneider*, [2005] EWHC 1072 (Ch) at para 33 (Peter Smith LJ).

- 13 '[A]s soon as the mistaken payment is received, the cause of action is complete': Peter Birks, 'Rights, Wrongs and Remedies' (2000) 21 Oxford J Legal Stud 1 at 1; *Kleinwort Benson Ltd v Lincoln City Council*, [1999] 2 AC 349 (HL) at 385 (Lord Goff); Stephen Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Tex L Rev 2177 at 2181 [S Smith, 'Justifying']; L Smith, *supra* note 2 at 2133–4; McInnes, 'Enrichment Revisited,' *supra* note 4 at 208.
- 14 As where money is paid into a bank account; see Peter Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) at 6–7.
- 15 See e.g. the decision in *Woolwich Equitable Society v Inland Revenue Commissioners*, [1993] AC 70 (HL).
- 16 Robert Goff & Gareth Jones, *The Law of Restitution*, 7th ed (London: Sweet & Maxwell, 2007) at 43-004.
- 17 Immanuel Kant, 'On the Proverb: That May Be True in Theory but Is of No Practical Use' (1793) in T Humphrey, ed, *Perpetual Peace and Other Essays* (Indianapolis: Hackett, 1983) 61.
- 18 S Smith, 'Justifying,' *supra* note 13 at 2182, 2185–6. This was the point of Hart's critique of Austin's 'command' theory of law. See HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 79–88. See also Ronald Dworkin, *Law's Empire* (Oxford: Hart, 1986) at 62–4.

II *Weinrib's idea of private law*

Weinrib presents his theory of corrective justice as capable of explaining the main features of private law. The theory is built on three foundational theses. First, the correct approach to understanding private law is a formal approach, one that insists that legal relationships have a certain form or structure. This makes the subject matter coherent on its own terms as opposed to being coherent only with reference to some external consideration. Second, the unifying structure of private law is Aristotle's conception of corrective justice. This provides the form that the first thesis requires. Third, the normative content of private law is Kant's concept of right.¹⁹

A ARISTOTLE

According to Weinrib, the key to understanding private law rests on the elucidation of its interior justificatory structure, being the form that reasons for holding one party liable to another must take. Reasons to alter or maintain people's positions relative to each other are reasons of *justice*, but there is more than one kind of relativity between people's positions. There is, as Aristotle said, the 'arithmetic' relativity of corrective justice as well as the 'geometric' relativity of distributive justice.²⁰ Central to Weinrib's theory is the contention that corrective justice exhibits the structure of justifications that pertain to the bipolar relationships of private law.²¹ In Aristotle's classic account, corrective justice concerns the maintenance and restoration of the notional equality with which two parties enter a transaction.²² An injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss. The law corrects this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party.²³ Diagrammatically, we can represent the pre-transactional equality of the parties as:

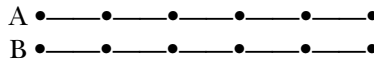


Figure 1

¹⁹ Weinrib, *Idea*, supra note 1 at 18–9; L Smith, supra note 2 at 2117.

²⁰ Aristotle, *Nicomachean Ethics*, 2d ed, translated by Terence Irwin (Indianapolis, IN: Hackett, 1999) Bk 5 at ch 4 [Aristotle].

²¹ See in particular Ernest Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 *Duke Law Journal* 277 [Weinrib, 'Gains and Losses']; Weinrib, *Idea*, supra note 1; Weinrib, 'Restitutory,' supra note 6; Ernest Weinrib, 'Correlativity, Personality and the Emerging Consensus on Corrective Justice' (2001) 2 *Theor Inq L* 107; and Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *UTLJ* 349 [Weinrib, 'Nutshell'].

²² The term is used broadly to include both voluntary and involuntary transactions.

²³ Weinrib, 'Nutshell,' supra note 21 at 349.

their post-transactional inequality as:

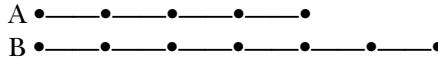


Figure 2

and corrective justice's restoration of the pre-existing equality as:

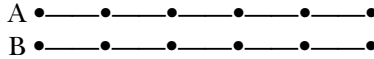


Figure 3

In the context of unjust enrichment, the shift from Figure 1 to Figure 2 can straightforwardly represent a mistaken payment, and the shift from Figure 2 to Figure 3 the restitution of the money by the payee to the mistaken payer. However, it is clear that the mere coincidence of factual enrichment and corresponding deprivation cannot be enough to trigger liability in corrective justice; the shift from Figure 1 to Figure 2 no less represents A giving a gift to B, or B winning over some of A's customers through successful (and legitimate) business competition.²⁴ Thus, while corrective justice perfectly describes the process through which a transfer is undone, it does not explain *why* some transactions are reversible and others are not. The root of the problem lies in the fact that, while Aristotle's account of corrective justice postulates a form of pre-transactional equality between the parties, he never articulates the nature of this equality.

For Weinrib, this equality is merely a formal representation of the norm that ought to obtain between the two parties. Action that conforms to this norm, whatever it is for any transaction, preserves the equality between the parties, so that no complaint is justified. Action that breaches this norm produces a gain to one (the one who acts) and a loss to the other (the one who is acted upon); liability then restores the parties to the equality that would have prevailed had the norm been observed. On this analysis, the terms 'gain' and 'loss' are merely a way of representing the injustice that liability rectifies.²⁵ They are theoretical constructs that highlight the role of *correlativity* as the organizing idea implicit in the relationship between the two parties to a corrective injustice. Through the unjust transaction which disrupts the equality of the parties, the defendant gains precisely what the plaintiff has lost. As equality refers to the norm to which the interaction between the parties ought

²⁴ Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason Neyers, Mitchell McInnes, & Stephen Pitel, eds, *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 111 at 116 [Klimchuk].

²⁵ Weinrib, 'Gains and Losses,' *supra* note 21 at 285–6.

to conform, so 'gain' and 'loss' refer to a correlatively structured violation of that norm. Such correlativity is fully satisfied when the defendant's action wrongs the plaintiff; that is, when, in Aristotle's words, the parties are respectively the 'doer' and 'sufferer' of the same injustice.²⁶

At the most fundamental level, therefore, corrective justice is the justificatory structure applicable to the possible asymmetry present in human action – the possibility that one person's 'doings' are instances for another of 'being done to.' Because the 'doing' of one is the same as the other's 'being done to,' the justificatory considerations of corrective justice simultaneously implicate both parties. Thus, corrective justice is the formal justice of *correlativity*. Aristotle explicitly associates this notion of justice with 'equality' to represent the fact that it abstracts from all moral considerations except those that pertain to the correlativity of 'doing' and 'being done to' as such. However, while liability under corrective justice requires that one person have wronged another, it does not supply a definition of wrongful conduct. As Posner has observed, corrective justice in its Aristotelian conception is a *form* of justice which does not necessarily entail any particular substantive *content*.²⁷

B KANT

Weinrib gives corrective justice the content it lacks by invoking Kant's concept of right.²⁸ While a great deal has been written with respect to the philosophical bases of Weinrib's idea of private law,²⁹ this article accepts his reading of Kant for the purpose of argument and concentrates instead on the practical implications of his analysis. Thus, for present purposes, it is both inappropriate and unnecessary to engage in a detailed exposition of the logic behind the categorical imperative.

According to Kantian analysis, the parties' equality lies in their status as 'self-determining agents.' Self-determination refers to an individual's capacity for purposive activity without being obligated to exercise that capacity toward any particular end. A self-determining agent is thus able to construe different ends and to choose freely among them. Moreover, these agents are duty-bound to interact with each other on terms

²⁶ Aristotle, *supra* note 20, Bk 5 at ch 4.

²⁷ Richard Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 J Legal Stud 187.

²⁸ Weinrib, *Idea*, *supra* note 1 at 76–83.

²⁹ The literature is voluminous: Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford J Legal Stud 471 [Cane, 'Corrective']; John Gardner, 'The Purity and Priority of Private Law' (1996) 46 UTLJ 459; Robert Rabin, 'Law for Law's Sake' (1996) 105 Yale LJ 2261; KW Simons, 'Justification in Private Law' (1996) 81 Cornell L Rev 698–743; Stephen Smith, 'Review: *The Idea of Private Law*' (1996) 112 Law Q Rev 363; Martin Stone, 'On the Idea of Private Law' (1996) 9 Can JL & Jur 235.

appropriate to their equal status. Thus, in exercising free choice, a person is morally required to recognize the same ability in others and so must exercise his choice in a manner that is consistent with a similar choice by others.³⁰ In Weinrib's words, '[O]ne's reason for acting [must] be capable of being conceived in universal terms without contradiction.'³¹ This is the 'Universal Principle of Right.'³² Injustice consists in a failure to observe that precept.

As the equality of the parties is premised on their status as 'self-determining agents,' the transactional 'gains' and 'losses' which corrective justice is concerned to redress must likewise be understood in terms of Kantian right. As Weinrib understands corrective justice as being concerned with *normative* rather than *material* gains and losses, they represent correlatively structured violations of the universal principle of right. A normative loss thus occurs when the plaintiff is denied the freedom inherent in self-determining agency, and a normative gain occurs when the defendant acts in a manner inconsistent with the self-determining agency of the plaintiff.³³

The Kantian conception of rights and duties flows naturally from these principles. The plaintiff's right consists in his ability to insist that the defendant exercise her choice of action in a manner that is consistent with his ability to do the same. 'Rights,' in that sense, 'are the juridical manifestation of the freedom inherent in self-determining agency.'³⁴ Action is consistent with the freedom of others when it is compatible with their rights. Moreover, rights give rise to duties insofar as they entail a 'moral capacity to put others under obligations.'³⁵ 'The right represents the moral position of the plaintiff; the duty represents the moral position of the defendant.'³⁶ It follows from the universal principle of right that rights and duties are *correlative*; they concurrently mark out those entitlements and spheres of action that are necessary for the expression of self-determination.

The conjunction of right and duty thus fulfils the requirement of correlativity within corrective justice. Just as corrective justice highlights the normative significance of the correlativity of doing and suffering, so

³⁰ Weinrib, *Idea*, supra note 1 at 82.

³¹ *Ibid* at 91.

³² Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge, UK: Cambridge University Press, 1996) at 6:230 [Kant]. Page citations are to volume 6 of the Prussian Academy edition of Kant's works, upon which Gregor's translation is based. These page numbers appear in the margin of Gregor's translation.

³³ Weinrib, *Idea*, supra note 1 at 133.

³⁴ *Ibid* at 122.

³⁵ *Ibid* at 123.

³⁶ *Ibid* at 291.

the plaintiff's right and the defendant's corresponding duty are the normative categories expressive of that correlativity. Injustice consists in the defendant's doing something that is inconsistent with a right of the plaintiff.³⁷ Right and duty are normatively correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right-infringement that the plaintiff suffered.

C THE PROBLEM OF STRICT LIABILITY

For Weinrib, therefore, a corrective injustice arises if, and only if, the defendant has breached a duty to the plaintiff.³⁸ This follows necessarily from the fact that a disruption in the normative equality of the parties (a corrective injustice) occurs only where the defendant acts in a manner inconsistent with the plaintiff's self-determining agency; juridically, this is manifested as a breach of duty owed to the plaintiff.³⁹

Liability which is not premised upon the defendant's breach of duty is generally impermissible in private law because it fails to satisfy the requirements of correlativity.⁴⁰ To be correlative, the right and duty that underlie a private-law action must cohere and be operative at the moment when the defendant's conduct infringes the plaintiff's interests. They must be identified separately; one cannot be simply the reflex of the other.⁴¹ Under strict liability, however, the defendant is not subject to a duty to abstain from the act that infringes the plaintiff's right. The availability of

³⁷ Weinrib, 'Restitutionary,' supra note 6 at 4.

³⁸ Weinrib, *Idea*, supra note 1 at 9: 'Whatever our difficulty in defining private law or resolving particular issues within it, we are aware of a body of law possessing such characteristics as an allegation of wrongdoing, a claim by one person against another, an injury, a demand for redress . . . and so on'; *ibid* at 56–113, synthesizing Aristotle's conception of corrective justice with Kant's philosophy of right for the proposition that the equality of corrective justice propounded by Kant is the equality of free wills in their impingements on one another and 'the disturbance of equality in Aristotle's account [is] the defendant's wrongful infringement of the plaintiff's rights'; *ibid* at 125–6: 'The defendant realizes a normative gain through action that violates a duty correlative to the plaintiff's right . . . The plaintiff realizes a normative loss when the infringed right is within the scope of the duty violated; liability causes the reparation of this infringement'; and *ibid* at 134, arguing that 'the defendant must have committed an act that violates a duty incumbent on the defendant and thus can be regarded as an act of wrongdoing.'

³⁹ *Ibid* at 133.

⁴⁰ *Ibid* at 82. While conceding that private law may contain isolated instances of strict liability, Weinrib maintains that such anomalies are, given his premise of correlativity, 'demonstrably incoherent': Mitchell McInnes, 'Unjust Enrichment: A Reply to Professor Weinrib' (2001) 9 RLR 29 at 38 [McInnes, 'Unjust'].

⁴¹ Weinrib, *Idea*, supra note 1 at 124.

relief is premised entirely upon the infringement of the plaintiff's interests, without regard to the character of the defendant's conduct. His duty, which arises only after an injury has been inflicted, takes the form of an obligation to repair the consequences of the operative event.⁴² It envisages 'right without duty'⁴³ and fails to respect the defendant's status as a self-determining agent because he is held responsible merely because a certain event occurred and not because he exercised his capacity to choose to perform a particular act.⁴⁴

In this regard, Weinrib's conceptualization of corrective justice does not seem to square with the law of autonomous unjust enrichment which, as we have seen, does not depend on an allegation that the defendant has breached a duty owed to the plaintiff. Expressed in Kantian terms, the ground for restitution arises exclusively by reference to the plaintiff's status as a self-determining agent and entirely disregards the defendant's capacity for free choice. Weinrib has attempted to address this apparent difficulty in his more recent writings, to which we will turn in Part III.

D A STRICT-LIABILITY ACCOUNT OF CORRECTIVE JUSTICE

Lionel Smith has, in response to these difficulties, argued that corrective justice is violated without wrongdoing in cases of autonomous unjust enrichment.⁴⁵ For Smith, the mere existence of a defective transfer creates a corrective injustice. 'It is enough,' he argues, 'to find that the plaintiff did not fully consent to the transfer'⁴⁶ because

[i]f the transfer is normatively flawed from the plaintiff's end, then the plaintiff suffers a normative loss. Because the defendant's enrichment is nothing other than the plaintiff's normative deprivation, the defendant's material gain is also a normative gain. Hence, corrective justice is violated, and a duty to make restitution arises without the need to find any breach of duty on the part of the defendant.⁴⁷

Smith appears to reason as follows: owing to the impairment of his consent, the transfer is a normative loss for the plaintiff, and the material loss in which that normative loss is manifested is a material gain for the defendant; so, just as the plaintiff's normative loss is his material loss, the defendant's material gain is a normative gain at the plaintiff's expense.⁴⁸

⁴² McInnes, 'Unjust,' *supra* note 40 at 38.

⁴³ Weinrib, *Idea*, *supra* note 1 at 179.

⁴⁴ *Ibid* at 178–9.

⁴⁵ L. Smith, *supra* note 2 at 2139–43.

⁴⁶ *Ibid* at 2140.

⁴⁷ *Ibid* at 2142.

⁴⁸ Klimchuk, *supra* note 24 at 129.

The problem with Smith's argument lies in the first step, in the claim that it follows from the transfer being 'normatively flawed' from the plaintiff's side that he suffers a 'normative loss.'⁴⁹ As noted earlier, *normativity* is correlative. This follows from the fact that the norm we are concerned with, the universal principle of right, is inherently bilateral. It thus makes no sense to say that the transfer was 'normatively flawed from the plaintiff's end.'⁵⁰ A loss cannot be *normative* in the abstract; it is premised upon another's failure to act in a manner that is consistent with the plaintiff's self-determining agency. Juridically, this is manifested as a breach of duty owed to the plaintiff, something which is not apparent in a case of mistaken payment. Put another way, because of the correlative nature of the norm, a normative loss automatically implies a normative gain and vice versa. Correspondingly, the absence of one necessarily entails the absence of the other.

As Professor Stephen Smith points out, it would follow from Lionel Smith's account that a person suffers a normative loss if he drops a bag of money down a deep hole where he cannot retrieve it. He was, *ex hypothesi*, entitled to the money, but no entitlement he held with respect to it was violated when he dropped it, so he suffered no normative loss.⁵¹

III Weinrib's idea of unjust enrichment

Although Weinrib's analysis of strict liability in *The Idea of Private Law* pertains primarily to tort, it also forms part of his generalized conception of private law. With respect to the cause of action in unjust enrichment, however, his position is equivocal. While he notes that restitution may be available even in the 'absence of wrongdoing by the defendant,'⁵² he also repeatedly insists that liability is triggered by some form of fault.⁵³

⁴⁹ Ibid at 130.

⁵⁰ L Smith, *supra* note 2 at 2142.

⁵¹ S Smith, 'Justifying,' *supra* note 13 at 2190; Klimchuk, *supra* note 24 at 130.

⁵² Weinrib, *Idea*, *supra* note 1 at 140; see also *ibid* at 197: '[R]estitution does not necessarily presuppose wrongdoing.'

⁵³ For instance, *ibid* at 134: '[T]he plaintiff's claim for restitution of a factual gain succeeds if the defendant's gain is realized through *breach of a duty* correlative to the plaintiff's right'; *ibid* at 141: '[T]he enrichment itself represents something that is rightfully the plaintiff's. Because its *retention* by the defendant is an *infringement of the plaintiff's right* the defendant has a duty to restore it to the plaintiff. Liability is the juridical confirmation that, *by holding on to the factual gain*, the defendant *breaches a duty* that is correlative to the plaintiff's right' [emphasis added]; see also McInnes, 'Unjust,' *supra* note 40 at 38–9.

In two more recent essays, Weinrib has addressed the issue of unjust enrichment's 'fit' with his model of corrective justice directly.⁵⁴

Central to his explication is a specific concept of 'value.'⁵⁵ Value represents the relative worth of a thing realizable through exchange under competitive conditions.⁵⁶ Value is an incident of one's ownership of the thing, as ownership carries with it an entitlement to realize that value through exchange.⁵⁷ In Hegel's words, '[A]s the full owner of the thing, I am owner both of its *value* and of its use.'⁵⁸

Value is transferred when one party gives another something of value but in return receives nothing or something of lesser value.⁵⁹ An exchange of two things of equal worth does not, therefore, involve a transfer of value. A transfer of value is gratuitous: the defendant is getting something for nothing. Value on this understanding is distinct from the external things that change owners in the course of a transaction.⁶⁰

An initial observation may be made with respect to the consequences this analysis has for the notion of subjective devaluation and its counterpart, incontrovertible benefit. According to the conventional analysis, they are directed to establishing the defendant's enrichment: by the former, the defendant asserts that a benefit does not qualify as an enrichment because he (subjectively) attaches no value to it; by the latter, the plaintiff asserts that the defendant is prevented from denying the benefit's objective value. However, once enrichment is understood as signaling a transfer of value, both claims become untenable. Value abstracts from the particular use that a person might subjectively want to make of a thing given its particular qualities. Whether a person who gives another something of value has in return received something of equivalent value is an objective question, the answer to which is determined by exchanges within a competitive market.⁶¹ Weinrib does not deny that the

⁵⁴ Weinrib, 'Normative Structure,' supra note 3; and Weinrib, 'Correctively,' supra note 3.

⁵⁵ In both these essays, Weinrib elaborates a Hegelian theory of value by which a thing is abstracted from the particularity of its use to a potentiality that is actualized through exchange and other legal operations with respect to the thing. For present purposes, it is not necessary to go into the detail of this theory. All that is important is to note that ownership of a thing connotes ownership of its particularity (the thing) *and* its potentiality (its exchange value).

⁵⁶ Weinrib, 'Correctively,' supra note 3 at 34.

⁵⁷ Weinrib, 'Normative Structure,' supra note 3 at 27.

⁵⁸ Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed by Allen Wood, translated by HB Nisbet (Cambridge, UK: Cambridge University Press, 1991) at 63 [Hegel].

⁵⁹ Weinrib, 'Correctively,' supra note 3 at 36.

⁶⁰ Hegel, supra note 58 at 77.

⁶¹ Weinrib, 'Correctively,' supra note 3 at 38.

considerations underlying subjective devaluation and incontrovertible benefit are significant; but he locates them elsewhere in the unjust enrichment analysis, as affecting the unjustness of the enrichment.

The idea of a transfer of value is reflected in two of the requirements for liability under the principle of unjust enrichment: that the defendant must be enriched, and that the enrichment must be at the expense of the plaintiff. Value is an incident of what the plaintiff owns upon entering the transaction and so the notion of a transfer of value recognizes that the defendant is enriched with what was initially within the plaintiff's entitlement.⁶² This does not mean, of course, that the transferee is obligated to return the enrichment. That further consequence depends on whether the transfer occurred under conditions that generate an obligation to restore the transferred value.⁶³

Weinrib posits two 'obligation-creating conditions'⁶⁴ that generate the restitutionary duty. The common focus is on how the parties stand with respect to the gratuitousness of what one gave and the other received. The point of these two conditions is that their joint presence renders the obligation to restore the transferred value consonant with the free will of *both* parties.⁶⁵ The condition applicable to the plaintiff is that the transfer of value was not *intended* to be gratuitous; it was not intended as a gift to the defendant.⁶⁶ On the defendant's side, the obligation-creating condition consists in *accepting* the transfer of value as non-gratuitously given; that is, given without donative intent. If the plaintiff did not act with donative intent, and if the defendant accepted the benefit as given without donative intent, then an obligation to restore the value arises. The defendant cannot retain *gratis*, it is said, what was neither given *gratis* nor accepted as given *gratis*.⁶⁷ All of the elements of Weinrib's developed theory come together in the following passage:

So understood, the elements of liability 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

62 Ibid.

63 Weinrib, 'Normative Structure,' *supra* note 3 at 30.

64 His term: *ibid* at 35.

65 Weinrib, 'Correctively,' *supra* note 3 at 41.

66 Weinrib, 'Normative Structure,' *supra* note 3 at 35.

67 Weinrib, 'Correctively,' *supra* note 3 at 41.

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.⁶⁸

There are three stages to the above analysis. First, there is the fact of a transfer of value from the plaintiff to the defendant. Second, the plaintiff has transferred value without an intention to do so (i.e., non-gratuitously). Third, the defendant accepted the transfer of value on the basis that it was conferred non-gratuitously. The parties' wills are said to 'converge' on the non-gratuitousness of the transfer of value with the effect of creating a right to the retransfer of the value.⁶⁹

It is evident that the idea of 'acceptance' in this account carries an extended meaning. Like the concept of acceptance in contract law, acceptance of a transfer of value 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 assumptions of private law.⁷⁰ Weinrib identifies two kinds of situation in which the defendant can be said to have 'accepted' a transfer of value as given non-gratuitously. The *first situation* occurs where the transfer of value is not yet 'entangled' in what the defendant is otherwise entitled to,⁷¹ and the defendant knows (or takes the risk) that the transfer of value is non-gratuitously given and yet requests it or forgoes the opportunity to refuse it. The fact that the transfer of value is not (or not yet) entangled in the defendant's pre-existing entitlements is significant because it enables the defendant to make the receipt of the transfer of value the object of a separate choice. In such circumstances, the defendant's action or inaction in the face of the non-gratuitous conferral can be equated with an acceptance of the transfer of value as made non-donatively.⁷² By expressing his free will with respect to the receipt of a transfer of value which he knows to be given non-gratuitously, the defendant assumes responsibility for the implications of its non-gratuitous nature.⁷³ This analysis may, I suggest, be provisionally accepted as offering an internally consistent explanation of the

68 Ibid at 45 [footnotes omitted].

69 Weinrib, 'Correctively,' supra note 3 at 43.

70 Ibid at 43; Weinrib, 'Normative Structure,' supra note 3 at 37.

71 Pure services, such as the cleaning of another's shoes, are the classic example of such a situation; see *Taylor v Laird* (1856), 25 LJ Ex 329 at 332 (Pollock CB).

72 Weinrib, 'Normative Structure,' supra note 3 at 38–9.

73 Weinrib, 'Correctively,' supra note 3 at 43.

duty to restore that arises in such cases.⁷⁴ The first situation, however, covers only a fraction of the cases that are now regarded as forming part of the law of unjust enrichment; and, of course, among those that are not covered is our paradigmatic case, the uninduced mistaken payment.

In the *second situation* are cases where the defendant does not know (and is not taking the risk) that the transfer of value is being conferred non-gratuitously.⁷⁵ Weinrib's view is that acceptance of the transfer of value as non-gratuitously given can nevertheless be imputed to the defendant. The underlying basis for this imputation is the notion that the private law is a legal regime through which parties act for their own purposes and have no obligation to benefit each other.⁷⁶ 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.⁷⁷ Accordingly, awareness of the receipt of a transfer of value carries with it acceptance that it was given non-gratuitously; that is, without donative intent.

Several implications of this analysis are worth noting. First, it is clear that acceptance here presupposes that the defendant knew that value was transferred; that is, that something was received without the reciprocal transfer of something of equivalent value. It will, therefore, not be imputed where the defendant accepts the transfer of value (for instance) in the mistaken belief that it is made in discharge of a (non-existent) obligation owed to him. The nature of the legal regime as one in which parties act in their own self-interest and are not under an obligation to

⁷⁴ See e.g. *Degelman v Guaranty Trust Co of Canada*, [1954] SCR 725 (SCC); *Pavey and Matthews Pty Ltd v Paul* (1987), 162 CLR 221 (HCA).

⁷⁵ We might, in fact, identify four situations. If we take the variables to be the defendant's knowledge of the gratuitousness of the transfer of value ('knowledge') and the entanglement of the benefit in what the defendant is otherwise entitled to ('entanglement'), the possibilities are (1) knowledge and no entanglement; (2) no knowledge and no entanglement; (3) knowledge and entanglement; and (4) no knowledge and entanglement. However, there are only two results of significance: where the circumstances are such that the defendant makes a *choice* to accept a benefit as non-gratuitously given and where the defendant is unable to make such a choice. Where the defendant is unaware that the benefit was transferred non-gratuitously or where the benefit is entangled in his other entitlements, no such choice is possible. Therefore, possibilities (2), (3), and (4) produce the same result. Possibilities (2) and (4) are Weinrib's 'second situation.' He does not consider possibility (3) separately, but I consider this 'third situation' below; see text accompanying notes 83–4 *infra*.

⁷⁶ Weinrib, 'Correctively,' *supra* note 3 at 43.

⁷⁷ *Ibid.* This must, of course, be a complete fiction. If it were not, then the defence of change of position would surely fail in every case. There are also significant weaknesses in the notion of 'imputed' acceptance from the Kantian perspective. This is discussed below, but see also Barker, 'Nature of Responsibility,' *supra* note 9 at 163, 167 for a critique.

benefit others *cannot*, in these circumstances, ground an imputation of knowledge that the transfer of value was intended non-gratuitously. This is because it is incapable of grounding the necessarily prior imputation of knowledge that a transfer of value occurred at all. The defendant positively (albeit mistakenly) believes that the plaintiff *was* under an obligation to benefit him and so accepts the enrichment on the basis that it is not a transfer of value at all. On Weinrib's account then, the obligation to restore does not arise until the defendant acquires knowledge not only of the fact of receipt but also of the fact that the receipt constitutes a transfer of value.⁷⁸

Second, we are told that the defendant is not entitled to assume from the fact of a transfer of value that it was given gratuitously; awareness of a transfer of value thus justifies the imputation to the defendant of knowledge that it was conferred non-gratuitously. It is thus irrelevant that the defendant accepted the transfer of value, for example, in the mistaken belief that it was intended as a gift or in circumstances where he has not turned his mind to the issue. This proposition, however, cannot be reconciled with Weinrib's theory of corrective justice. Acceptance that a transfer of value was made non-gratuitously is relevant, on Weinrib's account, because it signals the exercise of a *choice* by the defendant.⁷⁹ Kantian responsibility is premised upon free choice as the condition that implicates the defendant's autonomy, rendering the imposition of liability consistent with his free will. If the defendant is oblivious to the non-gratuitous nature of the transfer, however, his acceptance of the enrichment does not constitute any choice at all because the possibility of returning the benefit to the plaintiff simply does not arise. As Oliver Wendell Holmes, Jr., writes, '[A] choice which entails a concealed consequence is as to that consequence no choice.'⁸⁰ This condition also reflects the correlative structure of Weinrib's theory. A defendant who acts

⁷⁸ This is consistent with Weinrib's position although it is not elaborated fully; see Weinrib, 'Normative Structure,' supra note 3 at 38; *ibid* at 43–4.

⁷⁹ Weinrib, 'Normative Structure,' supra note 3 at 38: 'By allowing the enrichment to occur, the defendant is expressing her free will with respect to it'; Weinrib, 'Correctively,' supra note 3 at 43: '[A]cceptance occurs when one does not take the opportunity to reject a benefit that one knows to be (or takes the risk of being) non-gratuitously provided, thereby both expressing one's free will with respect to it and assuming responsibility for the implications of its non-gratuitous nature. Acceptance of the enrichment as non-gratuitously given shows that by compelling a retransfer of the value, the law is not acting inconsistently with the defendant's will'; *ibid* at 44: 'Because it signals the exercise of a choice, acceptance is not imputed when the transferred value is so entangled in the defendant's pre-existing entitlements that it cannot be made the object of a separate choice.'

⁸⁰ Oliver Wendell Holmes, Jr. *The Common Law* (Boston: Little, Brown, 1881) at lecture 3; Weinrib, *Idea*, supra note 1 at 180.

in ignorance of the features of a situation that characterize an action as the 'doing to another' does not, strictly speaking, do that thing. The 'doing' and 'being done to' are, from his perspective, related only coincidentally. Respect for the defendant's status as a self-determining agent consequently demands that he be given a meaningful opportunity to exercise a choice as to whether or not to accept the enrichment. Accordingly, the only tenable position is that liability in unjust enrichment does not arise until the defendant chooses to *retain* a benefit, despite *actual* knowledge of *both* the enrichment *and* the fact that it was not intended by the plaintiff to be gratuitous.⁸¹

This, however, doesn't quite collapse the second situation into the first. In the first situation, acceptance occurs when the defendant requests, or does not take the opportunity to reject, a benefit that he knows to be (or takes the risk of being) non-gratuitously provided. In the second situation, it is the defendant's retention of the transfer of value after becoming aware of the lack of donative intent with which it was conferred that constitutes an 'acceptance' of it as non-gratuitously given.⁸² I suggest that it is easier to regard the imposition of a duty to restore a benefit as consistent with the defendant's free will in the former case, where he has caused, or had the power to prevent, the conferral of the benefit. In such circumstances, the defendant's autonomy is sufficiently implicated in the conferral of the benefit that we might appropriately attribute to his actions the normative significance of 'choice.' It is unclear, however, whether the defendant's *retention* of a benefit can perform the same work. Unlike the first situation, the retention of the benefit does not indicate anything about the defendant's state of mind because he is not involved in the sequences of events that resulted in the conferral of the enrichment. In such circumstances, it is questionable whether the defendant's autonomy is sufficiently affected to justify the imposition of a positive obligation to return the benefit.

81 McInnes, 'Unjust,' *supra* note 40 at 39. See also Nicholas McBride & Paul McGrath, 'The Nature of Restitution' (1995) 15 *Oxford J Legal Stud* 33 at 38: 'Being unjustly enriched is not sufficient to give rise to the restitutionary duty . . . [T]he restitutionary duty should not arise before the defendant has acquired knowledge of his being unjustly enriched'; S Smith, 'Justifying,' *supra* note 13 at 2194: '[I]n principle, fault is necessary before a court makes an order in an unjust enrichment case. Fault here means having knowledge of the transfer and subsequently failing to do what is reasonable once one is aware of having received another's property'. Smith's account is distinct, however, because even when the defendant obtains notice of a defect in the transfer, it is argued that he has, in principle, no positive duty to return the benefit, merely a negative duty not to prevent the plaintiff from recovering it. This, Smith says, is more consistent with the harm principle.

82 Or so I have suggested is the only position consistent with the Aristotelian and Kantian principles that underlie Weinrib's theory.

Third and finally, Weinrib claims that because it signals the exercise of a choice, acceptance is not imputed when the transferred value is so entangled in the defendant's pre-existing entitlements that it cannot be made the object of a separate choice.⁸³ He nevertheless recognizes an exception to this proposition and maintains that, regardless of whether the benefit is entangled or not, we can treat the defendant as having accepted it where it forwards or accords with the specific purposes implicit in his use of or plans for that thing. We can impute the defendant's acceptance in *third circumstances*, we are told, because he has no reason *not* to accept the benefit as non-gratuitously given.⁸⁴ This, however, appears to involve a contradiction. If we are imputing to the defendant an acknowledgement that he is not entitled to the benefit, in what sense does it forward or accord with his purposes? The imputation appears to remove the very basis for making it in the first place. In any case, it is difficult to see how this is consistent with a respect for the defendant's free will. At the very least, the assumption that acceptance can be imputed by the receipt of value, on the basis that this is bound to forward the defendant's purposes, reveals something about acceptance in the Weinribian world that is surely inconsistent with the Kantian significance of choice.

IV *The right to restitution*

A *THE NATURE OF THE RIGHT*

There is, however, an obvious difficulty in justifying the imposition of liability by reference to the defendant's *retention* of an enrichment. Corrective justice postulates that liability vindicates some right the plaintiff has against the defendant. The difficulty lies in identifying the right which is infringed, and correlative duty breached, by the defendant's retention of the enrichment. Failure to return the enrichment can only be regarded as infringing the plaintiff's right if there is a pre-existing normative expectation that the enrichment should be returned.⁸⁵

⁸³ Weinrib, 'Correctively,' supra note 3 at 44. What Weinrib must mean is that the defendant's retention (or receipt) of a benefit, *where he knows that it was conferred non-gratuitously*, cannot function as acceptance when the transferred value is so entangled in the defendant's pre-existing entitlements that it cannot be made the object of a separate choice. If the defendant is unaware that the benefit was transferred non-gratuitously, his imputed acceptance of it on those terms proceeds on a basis which has nothing to do with the exercise of a choice in any meaningful sense. To then say that his acceptance is precluded because the benefit cannot be made the object of a separate choice is illogical.

⁸⁴ Weinrib, 'Normative Structure,' supra note 3 at 39–40; *ibid* at 43–4.

⁸⁵ Barker, 'Nature of Responsibility,' supra note 9 at 146, 165.

Put another way, if the defendant's refusal to return the enrichment is to be regarded as a breach of duty, there must exist a duty to return that predates the refusal. It cannot be the case that the defendant is under no duty to return the enrichment until that duty is breached. Anchoring the plaintiff's claim in the defendant's retention of the disputed enrichment is tantamount to explaining the duty to make restitution in terms of *its* (the duty to make restitution's) breach.⁸⁶ The defendant's refusal cannot be that which creates the duty to return the enrichment.

This is not to say that knowingly retaining an enrichment which one is under a pre-existing duty to restore might not itself be 'wrongful' and trigger a distinct legal liability based on an infringement of the plaintiff's right, but a prior legal obligation to restore the enrichment is still required and has to be explained independently. As a *form* of justice with no *a priori* attachment to a particular normative content, corrective justice is incapable of grounding this antecedent obligation. It therefore remains to be seen whether Weinrib's commitment to Kantian right and free agency as supplying the normative content of the private law can account for the defendant's primary obligation to restore an enrichment.

B KANTIAN CLASSIFICATION OF RIGHTS

Kantian right identifies two broad sets of legal rights necessary for the expression of self-determination: innate right and acquired right. The first, innate (or natural) right, is the right each person has by virtue of their very existence, so that one does not have to do anything to acquire it.⁸⁷ 'There is only one innate right,' says Kant, 'freedom [independence from being constrained by another's choice], insofar as it can coexist with the freedom of every other in accordance with a universal law.'⁸⁸ One's physical embodiment is a manifestation of this right, and the law, therefore, recognizes duties not to inflict harm on the person of another, whether intentionally or negligently.⁸⁹

In contrast, acquired rights concern objects external to the person and are rights one obtains through an appropriate act of acquisition.⁹⁰ Through the acquisition of an external object one becomes connected with the object in such a way that another's action with respect to it can

⁸⁶ Klimchuk, *supra* note 24 at 121.

⁸⁷ Weinrib, 'Correctively,' *supra* note 3 at 48.

⁸⁸ Kant, *supra* note 32 at 6:237.

⁸⁹ Weinrib, *Idea*, *supra* note 1 at 128. The standard of care is the quality of voluntariness necessary for the defendant's action to function as an expression of his will.

⁹⁰ Kant, *supra* note 32 at 6:258.

count as an infringement of one's rights.⁹¹ Whereas there is only one innate right, there are three classes of acquired right, which, for Kant, are exhaustive of the ways of relating persons to external objects: the first is the right to a thing, to corporeal objects in space (property); the second is the right against a person, the right to coerce a person to perform an action (contract); and the third is the 'the right to a person akin to a right to a thing,' in which Kant includes spouses, children, and servants.⁹² Kant refers to these as rights of substance, causality and community, respectively.⁹³

According to Kant, the existence of property is required for the implementation of the innate right to freedom. Importantly, this conclusion entails the existence of private property but not any particular distribution of private property. As specific property rights are not innate they must be acquired. Since the claim to any particular thing would limit the freedom of others, however, property rights cannot be claimed unilaterally but only with the multilateral consent of all others. Property, then, is a social creation, depending upon the mutual acceptability of claims.⁹⁴ For Weinrib, this explains an important feature of property rights, as rights *in rem*, that distinguish them from rights *in personam*: a property right is good against the whole world because it presupposes a general will of all under which everyone recognizes the legitimacy of anyone else's rightful acquisition.⁹⁵

The second acquired right, contract right, involves the possession by one person of the 'deed' of another.⁹⁶ One person is able to control the choice of another in order to apply the other's causal powers to some end. For this reason, Weinrib refers to it as the right to the 'causality of another's will.'⁹⁷ The right is not created by the unilateral action of the promisor, for this would be inconsistent with the freedom of the promisee. Rather, according to Kant, the contract right is created by 'the united choice of two persons'; being the promisor's making and promisee's acceptance of the promise.⁹⁸ Unlike the general will that is presupposed in property rights, the united will that establishes the contract right creates an entitlement against a particular defendant rather than

91 Weinrib, 'Correctively,' supra note 3 at 48–9; Kant, *ibid* at 6:245.

92 Kant, supra note 32 at 6:247–8.

93 *Ibid* at 6:247.

94 Frederick Rauscher, 'Kant's Social and Political Philosophy' in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, 2008) at para 5.

95 Weinrib, 'Correctively,' supra note 3 at 48–9.

96 Kant, supra note 32 at 6:274.

97 Weinrib, 'Correctively,' supra note 3 at 49–50.

98 Kant, supra note 32 at 6:271.

against the world in general: it creates a right *in personam* rather than *in rem*.⁹⁹

Within this taxonomy, Weinrib argues that liability for unjust enrichment reflects the plaintiff's *in personam* right to the performance of a particular deed by the defendant, the deed being the defendant's re-transfer of the value to the plaintiff.¹⁰⁰ The paradigmatic instance of such a right is the right to contractual performance. As in the case of contract, the parties to liability in unjust enrichment establish correlative right and duty through an interaction in which they both participate. This right is established, Weinrib says, through the unity of the parties' wills with respect to the non-gratuitousness of the transferred value.¹⁰¹ This is reflected in the two 'obligation-creating conditions' that generate the restitutionary duty: where the non-gratuitousness with which the plaintiff transfers the value is matched by the defendant's acceptance of it as non-gratuitous, the benefit can be regarded as given and accepted on the same non-donative basis.¹⁰² The two conditions thus have an analogous function in the law of unjust enrichment to that of offer and acceptance in the law of contract. In the contractual context, the parties' wills converge on the contractual performance offered by the promisor and accepted by the promisee, with the effect of creating a contract between them. In the unjust-enrichment context, the parties' wills converge on the non-gratuitousness of the transfer of value, with the effect of creating a right to the retransfer of the value.¹⁰³

The success of this argument depends, of course, upon the extent to which the parties' dealings in unjust enrichment (the obligation-creating conditions) perform the same function that the concepts of offer and acceptance do in contract. There are several reasons for thinking that they cannot do so.

First, we have already seen that a right to the causality of another's will involves the possession by one person of the 'deed' of another.¹⁰⁴ In contract, the causality in question – the deed whose performance is the content of the promisee's right – is the promisor's contractual performance: his *promise*. The right to contractual performance is created through the contract-forming steps of the promisor's making and the promisee's acceptance of the promise. In Kantian terms, the parties thereby express their 'united wills' with respect to the causality that is to form 'an active

⁹⁹ Weinrib, 'Correctively,' *supra* note 3 at 32, 49–50.

¹⁰⁰ *Ibid* at 46.

¹⁰¹ *Ibid* at 50–1.

¹⁰² *Ibid* at 42–3.

¹⁰³ *Ibid*.

¹⁰⁴ Kant, *supra* note 32 at 6:274.

obligation on the means of' the promisor:¹⁰⁵ it links the wills of the parties to each other through the subject matter of the transaction. It is in this sense that the parties' wills are said to 'converge' on the contractual performance offered by the promisor and accepted by the promisee, with the effect of creating a contract in those terms between them. This is reflected in the doctrinal requirement that the offer must contain all the terms of the contract to be made and must request an acceptance that assents precisely to those terms.¹⁰⁶

In unjust enrichment, the causality in question is the defendant's re-transfer of the value to the plaintiff. This right is apparently created when the plaintiff's non-gratuitous transfer of value is matched by the defendant's acceptance of it as having been transferred non-gratuitously. But to say that the parties' wills 'converge on the non-gratuitousness of the transfer of value,'¹⁰⁷ as Weinrib does, is ambiguous as to its consequences.¹⁰⁸ It does not tell us what the deed, whose performance is the content of the plaintiff's right, must be. The object of the plaintiff's right is an action by the defendant, not a thing; it is a right not to the value, but to a retransfer of the value.¹⁰⁹ The missing link, which we must deduce, is that the right is created where the plaintiff transfers the benefit on the basis that the defendant will retransfer it to the plaintiff and the defendant accepts the benefit on that same basis. The parties' wills must converge, not on the non-gratuitousness of the transfer of value per se, but on the obligation to retransfer the value. Only in this way is it possible to say that the parties have expressed their 'united will' with respect to the causality that is to form an 'active obligation on the means' of the defendant; and only in this way can the parties create a right to the retransfer of the value consistent with Kant's articulation of causality.

This agreement is, of course, a complete fiction. The transfer of value is neither given by the plaintiff nor accepted by the defendant on the basis that it would be repaid. Accordingly, what this analysis entails, despite Weinrib's protestations,¹¹⁰ is revival of the notion that a claim in

105 Weinrib, 'Correctively,' supra note 3 at 49–50.

106 Peter Benson, 'The Unity of Contract Law' in Peter Benson, ed, *The Theory of Contract Law: New Essays* (Cambridge, UK: Cambridge University Press, 2001) 118 at 139.

107 Weinrib, 'Correctively,' supra note 3 at 42–3, 47, 50–1.

108 Not only this. It is also problematic to speak of the parties' wills 'converging' on an *absence* of will to transfer without reciprocity. Similarly, in what sense can the plaintiff be said to have intended a non-intention? The parties' wills can be said to converge in the way Weinrib argues only in the loosest and most abstract sense, a sense which Kant would undoubtedly have regarded as insufficient to create a right to the causality of another's will.

109 Weinrib, 'Correctively,' supra note 3 at 48.

110 *Ibid* at 32.

unjust enrichment is based on an implied promise to repay. This is a view which has long been rejected and Weinrib's theory should, for this reason, if for no other, be regarded as suspect. More fundamentally however, and for reasons which have already been canvassed at length, it is clear that the parties' actions lack the necessary quality of choice that would enable them to function as expressions of will with respect to the retransfer of the value. For example, in the paradigmatic case of unjust enrichment, it is not possible to regard the plaintiff as having transferred the mistaken payment to the defendant on the basis that it would be repaid, *precisely* because his consent was defective. He, in fact, transferred it on the basis that it would *not* be repaid. Likewise, if the defendant is unaware that the plaintiff is making the payment non-gratuitously,¹¹¹ it is impossible to regard him as having accepted it subject to an obligation to repay.

V Conclusion

It is thus an inescapable conclusion that, while Weinrib presents his theory of corrective justice as capable of explaining the main features of private law, such an ambitious claim is not within his reach. While his theory may elegantly explain liability for non-contractual wrongs, such as tortious and equitable wrongdoing, and breach of contract, it struggles to explain liability in cases of autonomous unjust enrichment where the defendant has not actively participated in the sequence of events which led to the conferral of the enrichment. The bulk of what modern theorists would consider to form the law of unjust enrichment therefore lies beyond the ambit of his theory. Moreover, in the attempt to explain the right to restitution, Weinrib has relied on the same fictitious agreement to repay which obscured the law of unjust enrichment for so long.

According to Weinrib, corrective justice, as understood in terms of Kantian right, is a theory of the *structure* of private law. Under corrective justice, liability is the juridical manifestation of the logic of correlativity. He argues, nevertheless, that the content of private law cannot be understood in terms of moral principles except those which underpin the structure of private law; that is, those which are consistent with the logic of corrective justice. He argues that corrective justice and distributive justice are 'categorically different' and that distributive justice is alien to and inconsistent with private law interpreted as a coherent normative

¹¹¹ This is the second and third situation of imputed acceptance identified earlier; where the defendant is not causally implicated in the conferral of the enrichment. See text accompanying footnotes 75 to 77 and 83 to 84 respectively.

practice. It follows for him that any substantive definition of rights and wrongdoing cannot rest on a *combination* of corrective and distributive justifications.

I agree with Weinrib that a proper explanation of private law must account for what he calls its ‘correlativity’ – that is, the fact that private law is a system of correlative rights and obligations as between ‘doers and sufferers of harm.’ In my view, however, the formal notion of ‘correlativity’ does not tell us *what* rights or entitlements the plaintiff has but rather constrains the structure of liability once the right is recognized.¹¹² In so far as Kantian natural right is a moral repository for notions of personal responsibility for harm, it is reasonable to suggest that it forms part of the substantive content of the private law. However, it is not the only source; distributive considerations are also relevant. Nevertheless, there are undoubtedly limits to the types of normative criteria that can sensibly be used to fill out the structure of private law without introducing radical incoherence between its structure and its ends. The law’s structure places constraints upon the purposes it can coherently achieve.¹¹³ A detailed consideration of the policy arguments consistent with the structure of corrective justice is well beyond the scope of this article, but it seems reasonable to insist, with Professor Cane, that they concern the relative positions of the two parties.¹¹⁴

¹¹² This view in large measure follows those of Peter Cane, ‘Distributive Justice and Tort Law’ (2001) 4 NZL Rev 401; Cane, ‘Corrective,’ supra note 29; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge, UK: Cambridge University Press, 2004); and Anthony Kronman ‘Contract Law and Distributive Justice’ (1980) 89 Yale LJ 472.

¹¹³ Kit Barker, ‘Theorising Unjust Enrichment: Being Realist(ic)?’ (2006) 26 Oxford J Legal Stud 609 at 619.

¹¹⁴ Cane, ‘Corrective,’ supra note 29 at 481.

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