What Renders Enrichment Unjust

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Mark P. Gergen*

I. An Ancient Idea of Justice

John Dawson saw better than most the idea of justice that is at the heart of much of the law of Restitution. He thought the idea was best expressed by the ancient Roman maxim: “For this by nature is equitable, that no one be made richer through another’s loss.” In the common law, this idea of justice has been obscured by a jumble of doctrine. “Our working method is to search out some such ground,” Dawson observed, referring to the traditional grounds for restitution, “if we cannot rest the award of restitution on one of them we are usually at a loss.” Dawson thought it best to leave the idea obscure. Once made explicit, he warned, the idea “has the peculiar faculty of inducing quite sober citizens to jump right off the dock.” He ascribed the idea’s power to its “strong appeal to the sense of equal justice [combined with] the delusive appearance of mathematical simplicity.” Dawson believed that the idea did not have to be made explicit to do justice by it in any event. Late in his life he wrote, “This highly volatile idea has the propensity . . . to filter through barriers. One must expect to find leaks in the barriers even when their foundations seem firm.” Dawson’s worry was that, if made an explicit principle of law, this idea of justice would unsettle people’s power to control their affairs through contract and gift. In his memorable metaphor, Dawson

* I would like to thank all of the Symposium participants and the members of the Texas Law Review.

1. JOHN P. DAWSON, UNJUST ENRICHMENT 3 (1951). The maxim is from Pomponius of the second century A.D. and was preserved in Dig. 12.6.14 (Pomponius, Sabinus 21) (Alan Watson ed., Peter Birks trans., 1998) (“For it is by nature fair that nobody should enrich himself at the expense of another.”). The Romans did not recognize unjust enrichment as a distinct heading of obligation. It has been suggested that Grotius was the first to see unjust enrichment as a distinct heading. Peter Birks, Definition and Division: A Meditation on Institutes 3.13, in THE CLASSIFICATION OF OBLIGATIONS 1, 19 (Peter Birks ed., 1997).

2. DAWSON, supra note 1, at 118.

3. Id. at 8.

4. Id.

warns that the idea leads us into a forest of enchantment\textsuperscript{6} where every disposition of wealth would be open to review with "inquiries into the effects of legal transactions not only on the immediate parties but on third persons and persons still further removed."\textsuperscript{7} Dawson said little about the reasons for staying on the law's time-worn narrow paths through this forest, perhaps because he thought the reasons self-evident. The narrow course reduces litigation, promotes finality and certainty, and encourages self-reliance.

Dawson's book, written over a half century ago, remains timely. His target was the \textit{Restatement of Restitution}, published in 1937, which embraced the general principle that he feared might lead us astray. Dawson's fears have not been realized in the United States. Since Dawson wrote, Restitution\textsuperscript{8} disappeared as a subject in American law schools, as did academic interest in private-law doctrine.\textsuperscript{9} But the \textit{Restatement} has had an impact in England, from whence its message is now being transmitted to the common-law world.\textsuperscript{10} Whether and how we should recognize unjust enrichment as a heading of obligation are very much live issues today.

Dawson also reminds us of a lost perspective on the law that we must regain if we are to make headway in understanding private law on its own terms. The modern fashion is to look to economics or to moral philosophy to explain the law, as if techniques for unraveling the law's subtleties could be found in the more pristine principles and rigorous techniques of these other disciplines. Legal "conceptualists," or formalists, are fighting back, but they risk falling into the old trap of believing that parsing the concepts of the law can resolve what are at bottom hard questions of morality and policy. Dawson's work challenges reductionism of either the philosophical or legal stripe. He teaches us to be skeptical about legal formulae. It was Dawson who warned about "that well-known ailment of lawyers, a hardening of the categories."\textsuperscript{11} But he also teaches us to be respectful of

\begin{enumerate}
\item Dawson, supra note 1, at 152.
\item Id. at 7.
\item I will capitalize "Restitution" when I refer to it as a body of law and use the lower case "restitution" when I refer to the remedy. For consistency's sake, I will also capitalize Contract, Equity, and Tort when referring to these as bodies of law.
\item Peter Birks describes the influence of the \textit{Restatement} on the work of Goff and Jones and his own work. Peter Birks, \textit{Equity, Conscience, and Unjust Enrichment}, 23 \textit{MELB. U. L. REV.} 1, 3-4, 7 (1999). Birks is a strong proponent of rationalizing Restitution around the principle of unjust enrichment.
\item John P. Dawson, \textit{Restitution or Damages?}, 20 \textit{OHIO ST. L.J.} 175, 187 (1959) (expressing this view in the course of arguing that the law should be more receptive to disgorgement of the breaching party's profits from breach as a remedy for breach of contract).
\end{enumerate}
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traditional formulae, and to be mindful of the possibility that behind them may lie something in human conscience—Dawson called it "a sense of justice"—that, while ineffable, is real.

The law of unjust enrichment is proof against economic reductionism. At its core, this body of law is about reversing accidental shifts of wealth, which is impossible to justify solely in economic terms. Utilitarian concerns are a reason to limit the law's reversal of accidental shifts of wealth; they do not justify it. Ultimately, we must look beyond the idea that it is wrong to profit from the misfortune of another, for it does not express a human value or instinct. It is not like the value we place on companionship or the instinct we have for possession. Rather, the idea is an artifact of human reason. More precisely, as Dawson hinted at the end of Unjust Enrichment, the idea is a product of our need to give a reasoned account of judgments that themselves are the products of more basic instincts and values. The likely wellsprings of the idea include human unhappiness over the role of chance in our lives, discomfort with change, the instinct for possession, dislike of human cunning, and, perhaps, just a touch of envy.

To make the case that Dawson's idea of justice is at the heart of the law of unjust enrichment, I must go where Dawson said we should not—into his forest of enchantment—to see what account can be given of the law of Restitution once this idea is put at its center. If we take this ancient idea of justice as a basis for obligation, then Restitution turns out to be not one body of law, but instead at least three (with some scraps left over). The other coherent parts cover restitution for wrongs and policy-based restitution. These other headings are justified by values other than those underlying the idea that it is wrong to profit from the misfortune of another. Similarities in terminology in these parts mask deep differences. The scraps are mostly cases in which Restitution provides a remedy for inadvertent economic injury, in effect doing the work of negligence.

12. Dawson, supra note 1, at 151. This penultimate paragraph of the book is appropriately ambiguous about human psychology. One might read Dawson as saying that certain substantive ideas of justice are innate to humans, or as saying that what is innate is the instinct to do what is thought just, which is itself a social construct.

13. See infra Part IV.

14. Dawson states:

It [the human ethical faculty, including a sense of justice] ensures that the disapproval of enrichment through another's loss, once formulated as a motive in particular cases, will tend to become an imperative. A useful and necessary principle becomes something more than a "general guide." In some of its aspects it is a rule. It seems so simple and so clearly just. Why should we not extend it?

Dawson, supra note 1, at 151.

15. Dawson emphasized the last two psychological traits. See Dawson, supra note 1, at 5-6.

16. This proposition is not novel. For instance, Birks separates restitution for wrongs from unjust enrichment. Birks, supra note 10, at 4-6.
The idea that it is wrong to profit from another’s misfortune is at work in what Peter Birks labels cases of enrichment by subtraction. Following a handful of American states and Canada, I label this heading enrichment by impoverishment, though it might be more accurate to call this the one true heading of unjust enrichment. There is only one categorical limitation upon claims under this heading. Consent by a person with power to allocate a resource will always bar a claim that the resource’s allocation to D rather than to P was unjust. Two other factors that bear on a decision to undo nonconsensual shifts of wealth are the comparative negligence of the parties and factual uncertainty regarding gain, loss, the association of gain and loss, and nonconsent. I will justify these factors and explore their relationship to show that it is possible to give a coherent account of the law of unjust enrichment that weaves all of these factors together around two competing ideas: that it is wrong to profit from the misfortune of another, and that we ought to be cautious about pursuing the first idea of justice when justice cannot be done by a rule to suppress litigation, promote certainty and predictability, and encourage self-reliance. This is the most accurate normative account of the law; whether it is the best formal account is another matter. That turns on how we answer the question posed by Dawson: Once we embrace this idea of justice as a legal precept, will it tend to overbear prudence? I turn to this question in the last section.

II. Other Headings of Obligation in Restitution

Under private law there is no obligation to share one’s good fortune with another person, no matter how undeserved the good fortune nor how deserving the other person. In this respect the law of Restitution, like Contract and Tort law, is a matter of corrective justice. Something


19. Saying this does not imply that public values or instrumental concerns are irrelevant. I will argue that instrumental concerns best explain why the law is stingy about reversing accidental shifts of wealth. For a different argument that the law of restitution for wrongs must ultimately be grounded
must connect D's gain with P in a way that gives P a rightful claim to the gain. There are several different bases in the law of Restitution for connecting D's gain with P. The precept that it is wrong to profit from another's misfortune connects D's gain with P because the gain came at P's expense. In cases under the heading of restitution for wrong, D's gain is connected to P because the gain is a product of a wrong committed by D against P. In cases under the heading of policy-based restitution, D's gain is connected to P because P conferred the gain upon D by an act that the law promotes through reward.

Key concepts have different meanings and serve different functions under the three headings. The elements of transfer or dispossession—the fact that D's gain came from P's hands or through the consumption of P's property—loom large under the heading of enrichment by impoverishment when, among other things, they serve to concretize and connect gain and loss. These elements play little role under the heading of restitution for wrongs. More concretely, while the law rarely protects against accidental loss of opportunity under the heading of enrichment by impoverishment, it regularly protects against theft of opportunity under the heading of restitution for wrongs.

While consent bars a claim under all three headings, the meaning of consent differs in each case. Although consent can be constructive under the heading of enrichment by impoverishment, it must be actual under the heading of restitution for wrongs. If P voluntarily places himself in a position in which he knows or should know that he might suffer a loss and D will reap a corresponding gain, then P cannot recoup the loss under the heading of enrichment by impoverishment. By comparison, a prin-

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20. See infra Part VII.
21. Indeed, in cases of enrichment by wrong, the fact that there has been a transfer from P to D—i.e., that what the wrongdoer took directly from P's hands—usually weakens P's claim for restitution, if it has any effect. The weakening effect occurs because this fact opens the door to an argument by D that P consented to the transfer. If the law recognized only possessory property interests, then infringement would entail something like a transfer, since P would have to have possessed the thing taken by D. However, the law recognizes nonpossessory property interests in intangibles.
22. See infra Part III.
23. A familiar instance of this is the liability of a corporate officer or director for misappropriation of a corporate opportunity. Guth v. Loft, 5 A.2d 503, 511 (Del. 1939) (stating that the opportunity must be "one in which the corporation has an interest or a reasonable expectancy").
24. See infra Parts IV-V.
pricipal's neglect in guarding against an agent's disloyalty does not bar a claim for restitution against a disloyal agent. Nor, generally, is neglect or undue gullibility a bar to a claim for fraud. I will explain the more subtle differences between the relevant states of mind under the headings of policy-based restitution and enrichment by impoverishment later in this Article.

Another difference is that the principal need not have suffered a loss to recover under the heading of enrichment by wrong. A wrong can take the form of an infringement by the defendant of the plaintiff's property right. If the defendant uses the plaintiff's property without permission and returns it unharmed, he is obligated to pay the use-value of the property even though the plaintiff was made no worse off by the use. Alternatively, a wrong can take the form of a breach by the defendant of a duty he owes the plaintiff, such as the breach of a fiduciary duty. An agent who exploits his position to earn a gain must disgorge that gain even if the principal could not have earned it himself.

Some final general points before I get down to specifics. The law of Restitution resembles the law of Torts in that it contains multiple

25. Youngblood v. Mock, 238 S.E.2d 250, 252 (Ga. Ct. App. 1977) (holding that the principal's failure to read document is not a defense to breach of fiduciary duty). Section 415 of the Restatement (Second) of Agency might be read as stating otherwise. See RESTATEMENT (SECOND) OF AGENCY § 415 (1958). But the principle stated there—that the liability of an agent for breach of duty can be avoided or reduced by the principal's contributory fault—is restricted to negligence or breach of contract by the agent and has not been applied to breach of fiduciary duty or disloyalty. See, e.g., Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 498-99 (Colo. 1989) (holding that the failure of an employer to pay bonuses does not terminate the employee's fiduciary duties despite the language in the Restatement (Second) of Agency).

26. Matter of Mayer, 51 F.3d 670, 675-76 (7th Cir. 1995) ("Common-law fraud does not have any reasonable-investigation requirement. In the standard formulation, contributory negligence is not a defense to an intentional tort"); see also RESTATEMENT (SECOND) OF TORTS, §§ 540-541 (1977) (stating that there is no duty to investigate the truth of a representation; only actual knowledge or obviousness of falsity will bar a claim of fraud).

27. See infra subpart II(B).


30. Whether breach of duty and infringement of property are conceptually distinct depends upon the content of the concepts of duty and of property. It is commonplace to define duties as running to specific individuals and to define property as a right that is good against the world. I separate the concepts to preserve this distinction.

31. See Reading v. Attorney-General, [1951] A.C. 507 (H.L.) (appeal taken from Eng.) (allowing the Crown to recover bribes paid to a sergeant to guide smugglers through army checkpoints in Cairo). The case is used as an example in RESTATEMENT (SECOND) OF AGENCY § 404 illus. 3. The larger principle is stated in § 403.

32. How precisely Torts should be broken down is itself debatable. It is customary to analyze and organize Tort law around the interests protected or around the concepts of intent, negligence, and strict liability. See James Gordley, The Common Law in the Twentieth Century: Some Unfinished Business,
headings of obligation—at a minimum, restitution for wrongs, policy-based restitution, and enrichment by impoverishment—that cannot be brought under a single heading of obligation without an enormous sacrifice in intelligibility. The headings of restitution for wrongs and policy-based restitution resemble principles of obligation in Tort and Contract in that the obligation is act-based. The “causative event,” to borrow a term from Birks, includes a wrongful act by D or a beneficial act by P. Obligation under the heading of enrichment by impoverishment is not act-based. It is based instead upon a state of affairs, specifically a shift of wealth between two persons. This shift in wealth need not be caused by an act of either individual. The affinity between the law of restitution for wrongs and policy-based restitution and the law of Torts and Contracts runs deeper. It is possible to give a thoroughly modern, and by this I mean utilitarian, account of obligation under these headings.

This cannot be said of obligation under the heading of enrichment by impoverishment. Under this heading utility operates as a limit to obligation, not as a justification for it.

A. Restitution for Wrongs

The restitution remedy in cases of enrichment by wrong is disgorgement. A wrongdoer must disgorge his gain from the wrong even if the gain exceeds the wronged person’s loss. Disgorgement is said to be difficult to justify on normative grounds. The utilitarian objects to requiring a person to disgorge wealth he creates on the ground that disgorgement reduces the incentive to create wealth. The nonutilitarian objects that disgorgement caters to the base instinct of jealousy of another person’s good fortune.

88 CAL. L. REV. 1815, 1827-31, 1836-41 (2000). In the United States, negligence is becoming the dominant part of Tort law. Common-law strict liability and products liability may be appended to negligence. These doctrines cover inadvertent physical injury to person or property and have similar rules on duty, legal cause, comparative fault, and damages. The torts protecting possessory interests in property (trespass and conversion) are quite different. A prima facie case does not require harm to P; innocent infringement is actionable, and the rules on legal cause are quite loose. The torts protecting economic interests are yet another category.

33. PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 17 (1985).
34. I do not mean to imply that utilitarian values best explain Contract and Tort law. Other accounts are possible.
35. 1 GEORGE E. PALMER, LAW OF RESTITUTION § 2.10 (1978) ("[T]he gain to the defendant need [not] be equated to the loss to the plaintiff, nor indeed [need] there . . . be any loss to the plaintiff except in the sense that a legally protected interest has been invaded."). The wrongdoer’s liability may exceed his actual gain under doctrines examined by Daniel Friedmann, Restitution for Wrongs: The Basis of Liability, in RESTITUTION: PAST, PRESENT AND FUTURE 133 (W.R. Cornish et al. eds., 1998), that do not allow the wrongdoer to deduct his expenses or that measure gain by what Friedmann calls “gain attributable to [the plaintiff’s] interest,” or the highest amount the wrongdoer could have realized. Id. at 152.
Actually, it is quite easy to justify disgorgement in either utilitarian or nonutilitarian terms. The utilitarian justifies disgorgement as a deterrent in the way of punitive damages.\textsuperscript{37} His argument proceeds as follows. First, he justifies a rule of conduct as a means to suppress harmful conduct. Second, he justifies disgorgement of gain as a way to compensate for underenforcement of that rule (which is likely to be a product of monitoring problems and enforcement costs). The argument for disgorgement is similar to that for punitive damages, but it is a bit easier to make. Disgorgement is easier to justify as a punitive sanction because there is an objective measure of damages—the wrongdoer's gain—that makes the penalty less uncertain. A common nonutilitarian strategy justifies disgorgement by advancing the principle that a person ought not profit from a wrong he commits.\textsuperscript{38} Another common strategy for justifying disgorgement when a wrong infringes a property right is grounded on the concept of property. A property-like entitlement is an entitlement that another person cannot exploit without the owner's consent. Ex ante, the law protects property through injunction. Ex post, the argument goes, the law protects property through a right to the infringer's profit,\textsuperscript{39} among other ways. The right to the infringer's profit can be justified either as a penalty for the infringer's violation of the entitlement (harkening back to the economic justification of disgorgement) or as an aspect of the entitlement itself.\textsuperscript{40} Just as an owner has the right to forbid even a socially beneficial use of his property, the argument goes, he has a right to any benefit from the use.

Given these justifications, we would expect a duty that is enforced or an entitlement that is protected by the remedy of disgorgement also to be enforced or protected by the remedy of compensatory damages when the wronged person's loss from a wrong exceeds the wrongdoer's gain. Loss can be compensated either by allowing a Tort claim for the wrong or, as we shall see, by allowing a Restitution claim that is independent of the wrongdoer's enrichment.\textsuperscript{41} That there should be a compensatory remedy follows almost axiomatically under the utilitarian strategy justifying


\textsuperscript{38} See Ronald Dworkin, \textit{Taking Rights Seriously} 23 (1977) (invoking the principle that one should not be allowed to gain from one's wrongdoing to explain \textit{Riggs v. Palmer}, 22 N.E. 188 (N.Y. 1889)); Wonnell, supra note 36, at 191-96 (arguing that "the first step toward discouraging people from committing wrongs is to make sure they cannot benefit from them").

\textsuperscript{39} See Hanoch Dagan, \textit{Unjust Enrichment: A Study of Private Law and Public Values} 18 (1997) ("[P]rofits are the measure of recovery which vindicates the plaintiff's liberty to control the entitlement as part of her private sphere.").

\textsuperscript{40} See Ernest Weinrib, \textit{Restitutionary Damages as Corrective Justice}, 1 \textit{Theoretical Inquiries in Law} 1, 8-12 (2000).

\textsuperscript{41} See infra subpart III(B).
disgorgement as a means to compensate for underenforcement of some rule of conduct, the ultimate purpose of which is to suppress harm. Given this justification, it would be odd were there not an independent obligation to compensate for harm resulting from violations of the rule. As for the nonutilitarian strategy justifying disgorgement, if an act is a grave enough wrong to justify the exceptional remedy of disgorgement when the wrongdoer’s gain exceeds the wronged person’s loss, then it would seem that the act ought to be a grave enough wrong to justify the less exceptional compensatory remedy when the wronged person’s loss exceeds the wrongdoer’s gain. The shortcut justification of disgorgement for infringement conceives of this right as a panel in the great cloak of protection thrown over property. Again, it would be odd, given this conception of disgorgement, were the entitlement not protected from injury in the absence of enrichment to the infringer.

What I have said until now is a roundabout way to a familiar point. Under the heading of restitution for wrongs, disgorgement is usually a remedy to punish wrongs and vindicate rights that exist and are enforced outside of the law of Restitution. A payoff in taking this roundabout path to the familiar point is that it gives us a handle on understanding the occasional wrongs that are remedied only in the law of Restitution as something other than the product of historical accident, misclassification, or the general equivalence of gain and loss (which makes an independent, compensatory remedy unnecessary). Historically, breach of fiduciary duty was actionable in Restitution but not in Tort. Duress and abuse of a confidential relationship remain wrongs that generally exist only in Restitution.

Wrongs that exist only in Restitution involve an act of self-enrichment by the wrongdoer. When a wrong by its nature involves an act of self-enrichment, the natural response is to say “give it up” and to classify the


43. See In re Evangelist, 760 F.2d 27, 29-31 (1st Cir. 1985) (holding that breach of fiduciary duty actions “look less like a ‘tort’ or ‘contract’ and more like ‘restitution’”); Kann v. Kann, 690 A.2d 509, 518-22 (Md. 1997) (refusing to create a tort for breach of fiduciary duty). Perhaps this was an accident of history growing out of the equitable roots of fiduciary law. Breach of fiduciary duty was a wrong in Equity, and so it came to be seen as a wrong in Restitution before it was recognized as a wrong in Tort. In a moment I suggest another possibility. Wrongs of self-aggrandizement, of which breach of fiduciary duty may be one, may have arisen in Restitution because acquisition is evidence of self-aggrandizement.

44. Jamestown Farmers Elevator, Inc. v. Gen. Mills, Inc., 552 F.2d 1285, 1294 (8th Cir. 1977); Cimarron Pipeline Constr., Inc. v. United States Fid. & Guar. Ins. Co., 848 P.2d 1161, 1165 (Okla. 1993). See also Laycock, supra note 42, at 1284 (mentioning duress as the “leading example” of a case in which the “defendant may enrich himself by means that we condemn as unjust but for which we would not impose tort liability in the absence of enrichment”).
action in Restitution. It is easy to explain from a nonutilitarian perspective why an act of self-enrichment is an element of certain wrongs. I would classify abuse of a confidential relationship as such a wrong, if it is a wrong at all, on the view that it is far worse to harm a loved one in order to enrich oneself than it is to harm a loved one out of inadvertence. Duress might also be classified as such a wrong on the reasoning that it is sometimes wrong to injure or to threaten to injure others for selfish reasons even if the act is otherwise not wrongful. While it may not be wrong to tell someone of their spouse’s infidelity for altruistic reasons, it is wrong to threaten to do so for selfish reasons. It is the demand that the unfaithful spouse pay the threat maker not to tell that reveals the selfish motive behind his threat.45

As for a utilitarian explanation, the basic point is fairly simple: there often is utility in an arrangement in which an agent commits not to seek his own gain in acting for his principal, but the principal otherwise agrees to bear the risk of injury from neglect by the agent. The pervasiveness of such arrangements suggests their utility. This is roughly the obligation of a servant to a master and of a public servant to the public. This arrangement can be in the mutual interest of master and servant if the quality of the servant’s work is difficult to monitor and the master has other ways to discourage neglect of his interests by the servant (such as the power to fire a servant or a term conditioning the servant’s compensation upon success). The master will still want a legal remedy for self-dealing because self-dealing offers the servant gains that will offset the normal sanction of loss of compensation. There is less risk of false positives in enforcing a rule prohibiting only self-dealing because self-dealing stands out—particularly when it is defined in a way that requires an observable payoff to the servant.46 This is of comfort to the servant.

This way of looking at the matter also gives us a handle on understanding torts that are not punished by disgorgement when the tort-feasor’s gain from committing a tort exceeds the victim’s loss. Generally,

45. Mitchell Berman has given an intriguing account of extortion along these lines. See generally Mitchell N. Berman, The Evidentiary Theory of Blackmail: Taking Motives Seriously, 65 U. CHI. L. REV. 795, 877 (1998) (exploring, in the context of blackmail, the question of why “it is illegal to threaten what it is legal to do”).

46. It does not necessarily follow that the wrong ought to be actionable only to the extent that the obligor is enriched by the breach or that disgorgement is the appropriate remedy. The wrong can be defined in terms of the actor’s motive of self-enrichment and not the result. If we define the wrong in terms of motive, then a fruitless and ultimately destructive act of self-enrichment would be a wrong for which the victim could recover his loss. It makes practical sense to make enrichment a necessary element if actions can be indeterminately self-enriching to avoid making motive an issue when motive is inscrutable. More is necessary to justify the disgorgement remedy, for it is not obvious what the interest of the obligee is in precluding actions that profit the obligor at no harm to the obligee. In theory, self-enrichment could be made an element of a wrong, and the remedy would be no greater than the victim’s loss. Disgorgement is justified, much like punitive damages, on the reasoning that some acts of enrichment might escape detection or be too expensive to prosecute.
a tort ought to be remedied through disgorgement only when it merits punishment. Thus, negligence is not remedied in Restitution by disgorgement. Trespass and conversion are remedied in Restitution, but disgorgement is appropriate only if the infringement of a property interest is willful and not a matter of justified necessity. This accords with the rule in Tort law that only willful trespass and conversion are punished. Interference with contract or business relations should be punished by disgorgement only if the interference is of a quality that merits punitive damages.

Finally, this way of looking at the matter directs us to a fruitful area of inquiry. The question is when, if ever, a breach of contract is a wrong that merits the punitive sanction of disgorgement. One answer is that it never is. Restitution might serve only a compensatory function in the contractual setting and never a punitive one. This is true when Restitution is used, as it often is, to clean up after a contract that is rendered unenforceable by mistake, changed circumstances, indefiniteness, a statute of frauds, or some other ground that does not involve blameworthy or wrongful conduct. It is difficult to imagine a case in which a defective contract yields a gain to one party without a loss to the other. In imagining such a case—for example, A, in reliance upon an oral, unenforceable contract to sell his land to B, makes an improvement that A otherwise would not have made that greatly increases the value of the land—it is difficult to imagine the unharmed party (B, in my example) successfully demanding the other party’s gain, even though B could claim his lost contract was a cause of A's gain.

But the law sometimes punishes breach by requiring disgorgement. In most cases of restitution upon breach, the promisee sues in Restitution to get back what he gave to the promisor (the breaching party) when what the promisee gave is worth more than what he would have received on performance. In effect, the promisee seeks restitution to restore him to the position he was in before the contract was made. One could quibble about whether the remedy in these cases is punitive or compensatory. It is punitive if the wrong is characterized as the breach of contract; it is compensatory if the wrong is characterized as the making of the contract. There is no need to get hung up on this point, for there are a handful of cases in which the remedy is plainly noncompensatory. These are cases in which a promisor is required to disgorge a profit he made

48. The logic of this position is that, having breached the contract, the defendant cannot invoke it to deflect a claim by the plaintiff to recover what he gave the defendant. 1 PALMER, supra note 35, § 4.4 (defending Bush v. Canfield, 2 Conn. 485 (1818)). I discuss this point later. See infra text accompanying notes 157-59.
from the breach when that profit did not come from the promisee.49 One might argue that disgorgement upon breach, either in these cases or in the more general case, is inappropriate because it depends on a moralistic view of breach of contract that no longer holds, if it ever did. But the moralistic view of breach is too deeply woven into the law to pull it out so easily. An unfortunate consequence of the denial of the moralistic view of breach is that we are without the conceptual tools to talk intelligently about these cases.

B. **Policy-Based Restitution**

Under the heading of policy-based restitution belong the well-developed bodies of law on maritime salvage,50 attorneys' fees in class actions,51 contribution among joint tortfeasors,52 and noncontractual indemnity and subrogation.53 Under this heading also belong cases in

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49. 1 PALMER, supra note 35, § 4.9, collects a number of such cases, though, as Palmer notes, there are alternative grounds for many of these decisions (e.g., D's profit on breach might be the best measure of P's expectancy, P might have a property interest in the thing that D sold at a profit, or the breach might be breach of a fiduciary duty). Palmer concludes that "while the principle has not gained general acceptance, and is not likely to do so, it cannot be wholly rejected." Id. A striking case to the contrary is City of New Orleans v. Fireman's Charitable Ass'n, 9 So. 486 (La. 1891) (holding that a fire company that promised to provide a certain level of service to the City of New Orleans was not required to disgorge the profit it made from providing a lower level when the higher level of service turned out to be unneeded).

50. Frederic Woodward included maritime salvage with most of the other cases mentioned in an early collection under the category of dutiful intervention. FREDERIC WOODWARD, LAW OF QUASI CONTRACTS 308-35 (1913).

51. The Restitution roots of claims for attorneys' fees in class actions are explored in John P. Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 HARV. L. REV. 1597 (1974). Dawson argues that the law of unjust enrichment is not a sound basis for these claims if the claim is brought by the attorney and not by the client who funded the litigation benefiting the class. Dawson analogizes the claim to a claim to "gains to strangers through performance of the producer's own contract," which are "uniformly rejected." Id. at 1604 n.18. Charles Silver, A Restitutionary Theory of Attorneys' Fees in Class Actions, 76 CORNELL L. REV. 656, 693-705 (1991), responds that, if Dawson had correctly understood the modern practice of class actions, he would have concluded otherwise.

52. See generally 2 PALMER, supra note 35, §§ 10.5(d), 10.6 (distinguishing between the payment of a liquidated and unliquidated obligation, and classifying contribution cases with other cases in which A pays a debt of B under legal compulsion or to protect his own economic interests).

53. See generally BIRKS, supra note 33, at 93-98 (explaining subrogation's place in the law of Restitution). A federal case from last year illustrates one of the values of grounding even such commonplace rules as those regarding the right to indemnity or contribution on general principles. The case is Maryland Cas. Co. v. W.R. Grace & Co., 218 F.3d 204 (2d Cir. 2000). P1, P2, D1, and D2 were liability insurers of T, an asbestos manufacturer. P1 and P2 paid all T's defense costs through 1990 and 1991, at which points each settled with T for the indemnity limits. Id. at 208. T then pursued payment from D1 and D2, who eventually settled in 1994 and 1995 by paying the indemnity limits and T's defense costs after 1991. Id. P1 and P2 sued D1 and D2 for contribution for defense costs prior to 1990. After cutting through a maze of legal arguments, the court got to the heart of the matter: P1 and P2 could not show that they were any worse off, or that D1 and D2 were any better off, for D1 and D2's having sat on the sidelines through 1991. Id. at 212. All were obligated to pay
which a co-owner of property is given credit for his contribution in maintaining or improving the property in a partition action.\textsuperscript{54} American lawyers are likely to think of the rescue cases as emblematic of this heading, for unlike the others, these cases have no home outside the law of Restitution. An example is the case of a doctor who aids an unconscious accident victim.\textsuperscript{55} Less dramatic is the case of a sheriff who feeds and shelters livestock seized by mistake after he learns of the mistake but before he can communicate with their true owner.\textsuperscript{56} The \textit{Restatement of Restitution} rewards persons who provide life-saving services in emergencies\textsuperscript{57} and persons who preserve the property of another when the property comes into their possession lawfully,\textsuperscript{58} even if they are not a professional or an official. The \textit{Restatement} departs from the traditional reluctance of the common law to compensate Good Samaritans\textsuperscript{59} by substituting the precept that a beneficial act is compensated only if it was done with the expectation of compensation.\textsuperscript{60}

This part of the law of Restitution tends to be justified on utilitarian grounds.\textsuperscript{61} The argument is that the law promotes a beneficial act when the normal avenues of exchange are impaired.\textsuperscript{62} This is not a new argument. \textit{Justinian's Institutes} explains, speaking of the right to compensation accorded someone who looks after the affairs of an absent

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54. 2 PALMER, supra note 35, § 10.7(c).
55. See Comman v. Wisdom, 104 S.W. 164, 166 (Ark. 1907) (finding that there is a legal right to recovery in such a situation).
56. See Collins v. Lewis, 149 A. 668 (Conn. 1930) (ruling that an implied contract exists under the facts of the case).
57. RESTATEMENT OF RESTITUTION § 116 (1937) [hereinafter RESTATEMENT].
58. Id. § 117.
59. See, e.g., Glenn v. Savage, 13 P. 442, 448 (Or. 1887) (denying claim by \( P \) who saved \( D \)'s logs from being carried away by a river on the theory that \( P \) acted as a volunteer).
60. RESTATEMENT, supra note 57, §§ 116(a), 117(d).
61. The standard nonutilitarian justification that altruism deserves reward runs into the paradox that the reward taints the act of altruism. For a legal statement of the paradox, see Glenn, 13 P. at 448 (stating that "the law will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand"). Hanoch Dagan challenges the paradox. See Hanoch Dagan, \textit{In Defense of the Good Samaritan}, 97 MICH. L. REV. 1152, 1166-76 (1999). If I understand his argument, it is that people have divided selves—they are at once selfish and altruistic (or other-regarding)—and that the law might compensate the altruist for his expenses to allay the selfish instinct and also to celebrate altruism. The upshot of his argument is that the law ought to compensate the altruistic rescuer's cost but no more. \textit{Id.} at 1191-94. Whatever one thinks of this argument, it does not help explain the law's greater willingness to compensate self-interested acts benefiting others.
62. Saul Levmore, \textit{Explaining Restitution}, 71 VA. L. REV. 65, 69 (1985) (recognizing that although the law encourages private bargaining, it also "impels courts to recognize or create missing bargains"); Silver, supra note 51, at 663 (arguing that restitution should apply to the law of fee awards in class actions because class members are forced to pay for unrequested services).
person, that "[t]his was accepted as good policy, to ensure that the affairs of the absent were not left untended if they suddenly had to set off abroad without having time to make proper arrangements." 63

In all cases of policy-based restitution, the benefactor knowingly provides aid to the beneficiary without request. The real work in this body of law is done by the principles and rules that define when it has been judged good policy to compensate a beneficial act. There is no general principle. Rather, there are subprinciples and subrules that define particular circumstances in which compensation has been deemed good policy. At the most general level, it is necessary to distinguish the case of the doctor who aids the unconscious victim from the case of the co-owner who maintains common property. 64 The doctor has no economic interest in the act, apart from the compensation he may get from the beneficiary of his services. The co-owner who maintains common property acts to advance his own economic interests, and in doing so also advances the interests of his co-owners. These are different cases both legally and theoretically. In the case of rescue, there is a strict rule denying reward if the rescuer passed up a chance to bargain with the rescued. 65 This strict rule is justified because, absent natural barriers to bargaining, we would expect the rescued to agree to pay for an act of benefit only to himself if he thinks it worthwhile. This same strict rule does not apply in the case of the co-owner who maintains common property. This is justified because more than natural barriers may stand in the way of a mutually beneficial agreement to share expenses. There may also be strategic behavior in the nature of holding out or free riding.

The law is far from recognizing a general right to restitution to facilitate self-interested action benefiting others in the face of collective-

63. J. INST. 3.27.1 (Peter Birks & Grant McLeod trans., 1987).

64. The second preliminary draft of the Restatement (Third) of Restitution draws this important distinction by separating cases of "Benefits conferred in response to exigency" and cases of "Benefits conferred in pursuit of claimant's interest." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT topics 1-2 (Preliminary Draft No. 2, 1999). The Restatement of Restitution has a category similar to "Benefits conferred in response to exigency" under the heading "Benefits voluntarily conferred without mistake, coercion, or request." RESTATEMENT, supra note 57, ch. 5. The discussion of "Benefits conferred in pursuit of claimant's interest" is scattered under the general heading of "Coercion." Id. ch. 3.

Other useful distinctions can be drawn. For example, when the benefactor supplies necessities to a third party in the performance of a legal duty of the beneficiary, there is no requirement that he obtain the beneficiary's agreement. Instead, there is a requirement that the beneficiary be in breach of his legal duty at the time of the intervention. Id. § 113 cmt. f.

65. RESTATEMENT, supra note 57, § 116(d) (stating the rule that one who aids another without being asked will recover in Restitution only if "it was impossible for the other to give consent"); id. § 117(1)(b) (stating the rule that one who preserves another's property without being asked will recover in Restitution only if "it was reasonably necessary that the services should be rendered . . . before it was possible to communicate with the owner by reasonable means").
action problems. The right to restitution arising from payment of a common liability is hemmed in by various formal rules that have no parallel in the law on improvements to common assets. Once we go beyond cases involving common interests in identifiable assets or liabilities to more diffuse collective goods, we run into a general principle denying restitution when one person acts to benefit himself and, as a consequence, also benefits another. The different treatment of common assets and common liabilities is not easy to justify. Any line drawn between common assets or liabilities and other types of collective goods will be arbitrary, but the necessity of drawing some fairly bright lines ought to be uncontentious. A reward has diminishing incentive value as it becomes more doubtful or costly to collect.

This discussion suggests that, if the law is to develop in this area, it will be by the incremental task of identifying new and discrete subcategories of cases in which restitution can be justified. One new category may be emerging. These are cases in which performs a disputed obligation under his contract with while reserving his rights, but with the protection of a reimbursement agreement. Recent English and Texas cases reach opposite results in these circumstances. The English case allowed a tenant to recover a disputed rental payment. The Texas case refused to

66. Dagan and White describe what they believe such a general principle might look like. Hanoch Dagan and James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. REV. 354, 385-90 (2000). They argue that a restitution reward for unsolicited benefits is justified if "the parties' interests are locked together and there are no expected differences between their preferences based on taste, wealth, or conflicts of interest." Id. at 390. Surely this is too broad. Common-law courts should intervene to overcome collective-action problems only if other mechanisms, including political action, are not available.

67. For example, under English common law a claim for contribution will lie only if discharged B's debt to T under compulsion of law. Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 389-93 (5th ed. 1998). There also may be a requirement that the liability be "in solidum," which, I gather, means that there must be sufficient commonality between A and B's obligation to T. Id. The Restatement classifies indemnity and contribution under the general heading of "Coercion" alongside duress and undue influence. Restatement, supra note 57, ch. 3, topics 1-3. But coercion is not really necessary for contribution or indemnity. Payments made in settlement of claims not yet filed may be recovered if "the settlement made with the injured person was reasonable under the circumstances." Id. § 86 cmt. d. English law is similar on this point if a claim comes under the Civil Liability (Contribution) Act of 1978. Goff & Jones, supra, at 418. Palmer argues that American law has long departed from a requirement of coercion "to include cases in which nonpayment would or might eventually have presented a threat to the interest, but the threat was not immediate nor would it necessarily have an adverse effect on the payor's interest." 2 Palmer, supra note 35, § 10.5.

68. See, e.g., Ulmer v. Farnsworth, 15 A. 65, 66 (Me. 1888) (holding that a quarry owner whose draining of his quarry also drained quarries of two neighbors cannot recover in Restitution for the benefit he conferred on the neighbors). Dawson highlights this wonderfully illustrative case in Dawson, supra note 5, at 1418-19.

69. Nurdin & Peacock Plc. v. DB Ramsden & Co. Ltd., [1999] 1 W.L.R. 1249 (Ch.) (allowing lessee to recover money paid on mistake of law grounds). This is error. The doctrine of mistake does not protect someone who acts or contracts in the face of uncertainty. Thus it will not protect the tenant who paid rent knowing the obligation was contested. Were the law otherwise, every payment made
allow a liability insurer to recover a settlement payment made in the face of a coverage dispute. It is a mistake to classify these cases with the rescue cases, because $P$ acts to protect his own interests in the event it turns out that he is wrong on the underlying contract dispute. The Texas court held that the insurer could not recover the settlement payment absent a reimbursement agreement with the insured. The facts of the Texas case illustrate what is troublesome about this rule, which the court might well have borrowed from the rescue cases. The insurer had sought such an agreement from the insured only to be rebuffed and was faced with the prospect of losing what it judged to be a very good settlement offer from the claimant if it did not act unilaterally. The decision should not be too harmful in the context of liability insurance because insurers may rewrite the insurance contract to get around it. But if generalized to all contracts, a rule that a disputed obligation is performed at the risk of the performer, absent a reimbursement agreement, might tend to aggravate disputes and discourage action that is in the parties’ joint interest.

The heading of enrichment by impoverishment is distinct from the heading of policy-based restitution on the relevant state of mind. $P$ will recover under the heading of policy-based restitution only if he aided $D$ with an expectation of compensation. $P$ will recover under the heading of enrichment by impoverishment only if he did not intend to make a gift. These are different states of mind, as a famous old Alabama case, Webb v. McGowin, illustrates. Webb hurled himself out a window to save McGowin, thereby crippling himself for life. Webb could not recover in tacit settlement of a disputed legal claim could be recovered when the truth of the matter was resolved.

70. Tex. Ass’n of Counties County Gov’t Risk Mgmt. Pool v. Matagorda County, No. 98-0968, 2000 WL 1867945 (Tex. Dec. 21, 2000). The dissent analogized the case to Buss v. Superior Court of Los Angeles County, 939 P.2d 766 (Cal. 1997), which allowed an insurer to recover the cost of defending uncovered claims in a “mixed” action combining covered and uncovered claims. Tex. Ass’n of Counties, 2000 WL 1867945, at *7 (Owen, J., dissenting). The cases can be distinguished on the point that under California law an insurer has a duty imposed by law to defend both covered and uncovered claims in a mixed action. An insurer has no duty to pay to settle an uncovered claim. See Buss, 939 P.2d at 776.


72. Id. at *1.

73. I do not mean to imply that a general rule allowing recovery in these cases is desirable. It may be difficult to draw and maintain a line between these cases and cases in which a party to a contract exceeds its terms in performing and then seeks payment for the excess work. The paradigm is the case of the repairman who knowingly exceeds his orders and who everyone agrees should not recover. For such a case, see J.L. Carpenter Co. v. Richardson, 172 A. 226, 227 (Conn. 1934) (denying recovery for labor and materials when a speedboat repairman knowingly exceeded the repairs agreed to by the boat’s owner).

74. 168 So. 196 (Ala. App. 1935) (holding that a moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit).
under the heading of policy-based restitution because he did not expect compensation when he leapt out the window. His recovery is not barred under the heading of enrichment by impoverishment, for neither did Webb intend to make a gift. 75 He acted on impulse to save another with no time to give thought to the consequences of his act beyond the moment.

Not only impulsive acts distinguish the absence of an expectation of compensation from the presence of an intent to make a gift. Consider a familiar case. D and P pool their resources to build a household. When they separate, P sues to recover the value of tangible contributions she made to acquire assets held in D's name. It is odd to say that P made these contributions expecting compensation. She expected the relationship to continue, not that D would be in her debt. But if P expected a continued relationship, and if this expectation was reasonable under the circumstances, 76 it is equally odd to say that P intended to make a gift to D. 77 P could not recover under the heading of policy-based restitution, but she might recover under the heading of enrichment by impoverishment.

There are different normative goals under the two headings. When we ask whether a benefactor ought to recover from a beneficiary under the heading of policy-based restitution, we ask whether the law ought to compensate people who act as the benefactor did to encourage such action. The perspective is forward-looking and the goal usually utilitarian. The paradigmatic case of enrichment by impoverishment is a mistaken transfer of funds. The law does not restore funds to the transferor to encourage mistaken transfers. It only excuses his mistake. The law restores funds because it is thought to be unjust for the transferee to profit from the transferor's bad luck.

A preliminary draft of the new Restatement of Restitution organizes the law under the headings of intentional transfers and nonintentional transfers 78 rather than under the headings of policy-based restitution and

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75. For a case recognizing that an expectation of compensation is necessary for a quantum meruit claim but not an unjust enrichment claim, see Gidatex v. Campaniello Imps., Ltd., 49 F. Supp. 2d 298, 303-04 (S.D.N.Y. 1999). See also Jeffs v. Stubbs, 970 P.2d 1234, 1246-47 (Utah 1998) (distinguishing intent to make a gift from absence of expectation of compensation).

76. You might argue that expectations of permanency in a relationship are never reasonable outside the bonds of marriage, but this is really a judgment of policy and not a judgment based on people's actual expectations.

77. Stubbs, 970 P.2d at 1234, makes the point on somewhat exotic facts. Ps were members of a religious movement who built improvements on land held in trust by the movement. Their continued occupancy was threatened as a result of a schism in the movement. The court held that relief is not barred on the ground that the work was done gratuitously, because the claimants expected they could remain on the land as long as they wished. Id. at 1246-47.

78. See Restatement (Third) of Restitution and Unjust Enrichment ch. 2 (Preliminary Draft No. 2, 1999). Rather than using the label "nonintentional transfer," the preliminary draft refers to "Transfers subject to avoidance," a category which includes "Transfers induced by mistake,"
enrichment by impoverishment. Because cases of policy-based restitution and enrichment by impoverishment almost always involve a loss to P and a gain to D,79 it is possible to make these subcategories of a larger category defined by a transfer of wealth. This larger category of wealth transfers is then divided between intentional and unintentional wealth transfers.

A danger in the draft Restatement's organizational scheme is that it groups together normatively distinct cases.80 The Restatement puts cases where the law of Restitution is used to clean up after defective contracts with cases of policy-based restitution under the heading of voluntary transfer.81 The reasoning is that performance under a defective contract is an intentional transfer. One could question this classification of mutual mistake cases like West Coast Airlines,82 where P sold cans that it thought to be empty which actually contained valuables.83 P did not intentionally transfer the valuables hidden in the cans.84 This may seem a quibble because in most defective contract cases P knows what he is doing to benefit D when he performs, it is just that the contract under which he performs is not enforced for one of several reasons.85 While one could say that the transfer is intentional in such a case, that would miss the point. The transfer is intentional but P is mistaken about a crucial assumption in making the transfer. For example, in Upton-On-Severn Rural District

79. There is an argument that obligation under the heading of policy-based restitution does not require actual enrichment. There is slender common-law authority compensating unsuccessful rescue when life is at stake. Restatement, supra note 57, § 116 cmt. a, illus. 1 (tracking the logic of Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907)). The civil law's approach is more generous. See Dagan, supra note 61, at 1179. But enrichment may be found in all of these cases in the opportunity for gain provided to the beneficiary.

80. The grouping of fraud, misrepresentation, and duress alongside mistake clouds the essential distinction between restitution for wrongs and restitution when D did not commit a wrong.

81. The draft Restatement describes these as cases of "benefits conferred pursuant to an ineffective exchange." Restatement (Third) of Restitution and Unjust Enrichment xii (Preliminary Draft No. 2, 1999).


83. Id. at 835.

84. Id.

85. There may not be a writing as required by the statute of frauds, the contract may be fatally indefinite, there may be a mutual misunderstanding on a material term, or there may be radically changed circumstances making further performance impossible, impractical, or of frustrated purpose. It is probably a mistake to group these cases together. When D disavows a contract he made by seizing on a formal defect, in particular the lack of a writing required under a statute of frauds, there is a sense that he has committed enough of a wrong that he ought to be liable to P for whatever cost P incurred in performing, even if P's costs exceed D's gain. See, e.g., Joseph M. Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1209 n.13 (1973) (arguing that the purpose of the quasi-contract doctrine is to make restitution for unjust enrichment possible).
Council v. Powell,86 Upton mistakenly believed that Powell lived in its fire district and was entitled to its services without further payment. The difficulty follows from asking whether the transfer was intentional, rather than asking whether P intended to be in a position where D gained at his expense. Once the issue of intent is framed the second way, Upton appears as a mistake case, as it should.87 The questions one asks are the same questions asked in other cases of enrichment by impoverishment: Did Powell gain at Upton’s expense?88 Did Upton consent? Was Upton negligent in not protecting itself from this accidental loss?

III. Enrichment By Impoverishment

Into Dawson’s forest of enchantment. Let enrichment mean any material89 improvement in D’s condition and impoverishment mean any material worsening in P’s condition.90 D’s gain and P’s loss are associated if one would not have occurred without the other. One event

87. The draft of the Restatement classifies mistaken gifts as mistaken transfers in the parallel case where the mistake goes to assumptions upon which the gift is made. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11-6 cmt. e (Preliminary Draft No. 2, 1999). This draft of the Restatement affirms the traditional reluctance of the law to reverse gifts when the mistake goes to facts inducing the gift, but it recognizes that some such mistakes can be rectified.
88. Only Powell’s gain seems to be in doubt. Had the mistake not been made, he would have been served for free.
89. That D takes pleasure from P’s painful pratfall does not give rise to a claim of unjust enrichment. It is more accurate to say that the law of unjust enrichment does not compensate for psychological gains and losses—not that psychological considerations are irrelevant, for psychological considerations can figure into the determination that an event unjustly enriches D while harming P when a remedy can be fashioned on some basis other than an award of money for psychological harm. A misrepresentation can be material because of purely psychological considerations. See Gray v. Baker, 485 So. 2d 306, 308 (Miss. 1986) (discussing the possibility that a conveyance from A to B may be rescinded where B, according to prior arrangement, conveyed property to A’s enemy C). See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 13 cmt. e (Preliminary Draft No. 2, 1999) (“To establish a right to rescind under this Section, it is sufficient to show that the transferor’s consent has been improperly derived.”).
90. For some recent cases holding that enrichment must be by impoverishment, see Motor City Bagels, L.L.C. v. Am. Bagel Co., 50 F. Supp. 2d 460, 478 (D. Md. 1999), and Coury v. Robison, 976 P.2d 518, 521 (Nev. 1999). For the moment I assume that the worsening in P’s welfare need not be through the loss of a thing in which P has an ownership or property right. Kull proposes that P must have an ownership right in the thing he loses of a sort that the law protects from appropriation generally or from appropriation in the specific way by which D enriched himself. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2-3 cmt. d (Preliminary Draft No. 1, 1998). To see the merit in Kull’s position, consider the case where D uses his land profitably in a way that decreases the value of neighbor P’s land without constituting a nuisance or trespass. Kull would say this is not unjust enrichment of D because P’s property right was not infringed upon by D’s use of his land. This seems to me an abstract way of saying that shifts in well-being occasioned by conflicting uses of lands are adjudicated under the law of trespass and nuisance and not the law of unjust enrichment. Cf. R.O. Corp. v. John H. Bell Iron Mountain Ranch Co., 781 P.2d 910, 912-13 (Wyo. 1989) (rejecting an unjust enrichment claim on the basis of the “fence out” rule, which barred a trespass claim where D’s cattle feed on P’s unfenced land).
need not have caused the other in the sense that it preceded the other and was a force in bringing the other about. Defining the nexus between gain and loss in terms of association rather than causation allows for cases where D's gain and P's loss are caused by an event that is not caused by either party. If T causes D to be enriched at P's expense, the law may require restitution by D though his role was passive. 91

Cases under this heading redress nonconsensual shifts in wealth that are usually accidental. The element of accident makes these cases seem negligence-like. There are two key differences from the law of negligence. First, P may look to D to compensate his loss not because D was at fault in bringing about the loss or caused the loss, but because D gained from P's loss. Second, P's loss can be entirely economic; indeed, it usually is. The loss need not be associated with an injury to P's person or property. The paradigmatic case of a mistaken transfer of money by P to D illustrates both points.

Usually enrichment by impoverishment results from the transfer of a thing of value from P to D. The value of the thing transferred defines D's gain and P's loss, while the transfer associates gain and loss. I do not limit the concept of enrichment by impoverishment to transfer, at least not at this early stage. 92 P's lost opportunity is a form of impoverishment 93 and D's saved expense is a form of enrichment. 94 Formulating the abstract precept at the head of this body of cases in terms of loss and gain and not in terms of transfer is a key move. If we were to instead define this heading of obligation in terms of transfer, then we might well make less of the element of enrichment and come up with a more genuinely restitutionary precept that would restore to P what was once his, sometimes without regard to P's impoverishment or D's enrichment.

The concept of enrichment by impoverishment has enormous scope. On one continuum, it is broader even than the principle of prima facie


92. The same goes for the concept of "free acceptance," of which Birks makes a great deal. See Birks, supra note 33, at 265. That D freely accepted a thing strengthens P's claim for restitution. Free acceptance allays concerns with the valuation of D's gain, or, if there really is a loss because D sets an abnormally low value on what he received, it makes it seem that D is at fault for that loss. The latter case is not strictly within my concept of enrichment by impoverishment. See infra notes 173-76 and accompanying text.

93. See Birks, supra note 33, at 133-38. Birks calls this "interceptive subtraction."

94. See 3105 Grand Corp. v. City of New York, 42 N.E.2d 475, 476-77 (N.Y. 1942); Birks, supra note 33, at 129 (arguing that the saving of an expense may count as enrichment).
Tort, which covers knowing infliction of harm. That D’s gain was at P’s expense need not have been known or even knowable to D. D need not cause P’s loss. Shifts in wealth caused by third persons are within the concept. Indeed, the shift need not be caused by any human agent. An act of God that enriches D while hurting P is within the concept. Enrichment by impoverishment occurs when, during a flood, a crevasse opens a levee on one bank of a river devastating people behind it, but sparing people behind the other bank whose levee was near breaking. It occurs when a parent prefers one child over another in passing on wealth. It occurs when a legislature prefers one group over another in allocating benefits or burdens.

A strong objection to defining a precept of law in such broad terms is that it does almost no normative work. Too much is left to be done to distinguish meritorious claims from unmeritorious ones. Another way of putting this objection is that a broad precept of enrichment by impoverishment puts too many dispositions of wealth into question. This, you may recall, was Dawson’s concern.

Let me offer three preliminary responses to this objection. First, we need to broadly define the precept at the head of this body of law to cover all of the cases in which the law affirmatively reverses accidental shifts of wealth. There is only one additional categorical limitation. Consent will always bar a claim. The other limiting considerations—the plaintiff’s

95. On the history of this principle, which intertwines with the history of the interference tort, see Mark P. Gergen, Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response, 38 ARIZ. L. REV. 1175, 1206-18 (1996).

96. See Peter Birks, Restitution: Dynamics of the Modern Law, 46 CURRENT LEGAL PROBS. 157, 160 (1993). The concept of enrichment is narrower on another continuum—enrichment by impoverishment has, in addition to the element of harm to P, the element of gain to D.

97. See id. at 160 (arguing that it would be “asinine” to make a plaintiff who had mistakenly transferred wealth to the defendant prove that the defendant had known he was not entitled to receive the transfer). McBride and McGrath express disagreement. See Nicholas J. McBride & Paul McGrath, The Nature of Restitution, 15 OXFORD J. LEGAL STUD. 33, 38-39 (1995). Nevertheless, their position is untenable. They insist that D must know he has been enriched at P’s expense, but find sufficient notice in P’s filing a claim demanding what is rightly his. Id. The consequence is that the knowledge requirement bars a claim only if D dies (or, perhaps, becomes incompetent) before the claim is filed.

98. During floods, Mississippi levees were patrolled by armed men to prevent people from dynamiting the levee. New Orleans saved itself in the great flood of 1927 by persuading state and federal officials to dynamite the levee protecting St. Bernard and Plaquemines Parishes. JOHN M. BARRY, RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA 222-58 (1998).

99. The idea that it is wrong to profit from the misfortune of another helps to explain many instances where the law stays or alters the movement of its hand to prevent enrichment by impoverishment. An example is the doctrine of undue hardship that justifies the denial of injunctive relief. When granting an injunction would inflict a large loss on the enjoined party while providing a small benefit to the enjoining party, it puts the enjoining party in a position to extract an excessive payment from the enjoined party. Another example is the doctrine of forfeiture in Contract that stays the enforcement of conditions. Yet another example is the doctrine in Contract of measuring damages by loss in value rather than remedial cost when remedial cost is much greater than the promisee’s loss on breach.
negligence, directness, and factual uncertainty regarding gain, loss, association, and consent—do not translate into broad categorical rules.

Second, this broad formulation of the concept may conform to our underlying instincts of justice. In cases that are within the scope of the concept of enrichment by impoverishment, but far outside the scope of the law of unjust enrichment, we are likely to feel that an injustice has occurred but think it best that the law not try to remedy the injustice for compelling institutional or prudential reasons. Thus, many think it is unjust for a legislature nakedly to prefer one group over another in doling out government’s benefits and burdens.100 The common law does not remedy this injustice for obvious institutional and prudential reasons. Common-law courts do not police the legislature. But a blatant legislative preference is still thought to be an injustice. Similarly, many think it unjust for a parent to prefer one child over another without good reason. Courts tread lightly here out of respect for parental autonomy, though they will act to redress undue influence.101

Third, adopting a naturalized definition of the concept at the top of this part of the law helps us to separate factual from normative issues, which illuminates why the law does not reverse many accidental shifts of wealth. The move is similar to a move made in negligence law in the middle of the twentieth century to isolate normative issues in causation analysis from factual issues by separating cause in fact from proximate or legal cause.102 The naturalized definition forces us to consider the reasons behind the element of transfer—why does it matter that D’s gain

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101. Mitchell Berman, in conversation, suggests that our sense that an injustice has occurred in these cases is a product of our commitment to equal treatment and nothing more. He is correct to the extent that we believe the injustice lies in the action of the legislature or the parent, not in the result. Sunstein’s theory of naked preferences elides the distinction between voters and legislators, for he defines the evil as capture of government by a selfish majority. Sunstein, supra note 100, at 1689. In a representative democracy, voters do not act directly. Indeed, the key actors may be neither voters nor the legislature, but instead may be political parties.

102. The move is open to Hart and Honoré’s objection to a purely natural definition of causation in that it does not conform with common usage of the concept. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 3-4 (2d ed. 1985). We do not say that Hitler’s grandparents “caused” the Holocaust though their decision to bear children is a but-for cause. Kull might make a related point regarding successive fraud victims. See infra notes 103-07 and accompanying text. We might not say an early target of a Ponzi scheme is enriched at the expense of the later targets, though in a natural sense he is, because the gain restores him to his earlier position. These points are not the same at bottom. We do not say that Hitler’s grandparents caused the Holocaust because they did nothing abnormal that we perceive as having made a difference in the event. See Jane Stapleton, Perspectives on Causation, in OXFORD ESSAYS IN JURISPRUDENCE 61, 72-74 (Jeremy Horder ed., 4th ser. 2000). This flows from using the language of causation to assign responsibility in the sense of fault. D’s obligation in unjust enrichment does not depend upon his being at fault. It depends on his enrichment, which we may tend to conceive as an improvement from a prior position.
came from P's hands? It also opens our eyes to the relevance of P's negligence.

A. The Illusory Normativity of Enrichment and Impoverishment

Andrew Kull has said that the enrichment determination is inescapably normative.\footnote{Andrew Kull, Rationalizing Restitution, 83 CAL. L. REV. 1191, 1235-36 (1995).} I think he is wrong, but in an interesting way that reveals something striking about the normative structure of the law of Restitution. Kull's argument is that we can determine whether a person's welfare has been improved only after we establish a baseline from which to measure.\footnote{Logically, it must be possible to say the same thing about the determination of impoverishment, though in Kull's example of successive fraud victims it would seem odd to say that Paul has not been impoverished since he is clearly worse off than he was at some prior time. If Scoundrel, in defrauding Paul, takes something coming to Paul but not yet in his hands, the baseline drawing problem reappears.} The choice of a baseline, Kull says, is inescapably a normative question. To make this point Kull uses the case of successive fraud victims: Scoundrel defrauds Peter to pay Don, who Scoundrel earlier defrauded.\footnote{See Kull, supra note 103, at 1234-36. In Kull's example, Scoundrel directs Peter to pay the money to Don. I omit this fact because I do not think it is relevant to the point being made here. It is relevant to associating Peter's loss with Don's gain.} Whether Don has been enriched, Kull reasons, depends on how we define his baseline position. Is Don's baseline before or after he was defrauded by Scoundrel?\footnote{An argument similar to Kull's can be made regarding the need to identify an end-point at which enrichment is measured. This argument is more devastating to my attempt to make enrichment a factual issue. The problem arises when there is a transitory improvement in D's welfare. For example, P mistakenly deposits into D's bank account money, which D loses at the races. Or, P, a physician, provides emergency relief to unconscious D at an accident, but D dies. In the second case, which is modeled after Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907), restitution is given for policy-based reasons to encourage rescue. In cases like Cotnam, where an act the law wants to encourage has an uncertain payoff, it makes sense to compensate the benefactor based on the value of the chance he provided the beneficiary. In other cases of policy-based restitution, compensation may be predicated upon success, and the benefactor may be paid a premium for bearing risk. The case of lost, mistakenly transferred funds presents a harder problem. If the transferee is at fault (for example, he knew or should have known the funds were not his to spend), then his obligation to repay the funds can be explained on the basis of fault. See infra notes 173-76 and accompanying text. But what if the transferee is utterly without fault? One answer is that the absence of enrichment bars a claim for restitution. This is true as a general matter under the doctrine of change of position. But it is not categorically true. For administrative reasons the law cannot always determine D's benefit in fact. For example, if D spends mistakenly transferred funds on a vacation that he would not otherwise have taken, he would not be allowed to avoid liability by arguing that the vacation was an unpleasant experience. The problem is analogous to the case in Tort where D disables P and then, in a later unrelated event, P suffers an injury that would have been disabling in any event. In principle, P should recover only for the injury up to the time of the second disabling event, for that is the actual loss that D inflicted upon P. See Jobling v. Associated Dairies Ltd., [1982] A.C. 794 (H.L. 1981) (appeal taken from Eng.). But not every such future event can be considered.} Under my naturalized concept, we can say Don is enriched if but for Peter's loss, Don would have been worse
The issue of enrichment is uncertain if Scoundrel might have repaid Don from some other source, but this uncertainty is factual, not normative in origin.

Kull's way of thinking about the enrichment determination is unusual if we look at the common law more generally. Outside of the law of Restitution, in deciding whether a legally significant event had a legally significant effect, we usually hold everything in the world constant except for the event and then ascertain the event's effects. For example, in negligence law, to determine whether Careless's breach of a duty (the legally significant event in negligence law) physically injured Wounded (the legally significant effect in negligence law), we hold everything constant except for Careless's breach of duty and ask whether Wounded would have been physically injured had the breach not occurred. Analysis proceeds in the same way in Contract law determining damages for breach, and it proceeds in the same way in other parts of Tort law. The baseline is the state of the world without the legally significant event. In negligence law, the determination of Wounded's compensable loss has a normative aspect in that it follows from the definition of Careless's duty and breach, which are normative issues. But the normative judgment is supposed to be made in the determination of duty and breach, not in the determination of loss.

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107. I assume Scoundrel had no other means of paying Don. I think the real force of Kull's example lies in its appeal to what I call the status quo bias in the common law. Peter's claim for restitution may seem weak in Kull's example because we perceive that we are using restitution to allocate a loss between Peter and Don. This is because Don ends up no better off than he had been in the past. Don's argument that it is fair that he keep the money would be weaker if the money put him in a better position than he ever had been. For example, if Scoundrel, in the style of Robin Hood, had taken from Peter to give to Don out of the blue, Peter would be able to get restitution even if Don is utterly blameless and Peter was himself at fault in being gulled so long as Don has not changed his position in a detrimental way.


109. The general goal of contract remedies is to put the promisee in the position he would have been in had the promise been performed. Restatement (Second) of Contracts §§ 344(a), 347 (1981). In doing so we hold everything in the world constant except the breach of promise and ask what position the promisee would have been in had the promise been performed. Id. § 344, cmt. b illus. 5 (giving as an example the case in which the promisee has no damages because, as events turned out, performance of the promise was valueless to him).

110. The choice in an action for fraud in the inducement of contract between "benefit-of-the-bargain" damages and "out-of-pocket" damages, which may seem like a counter-example, illustrates the point. The out-of-pocket measure seeks to put the plaintiff in the position he would have been in had the contract that was induced by the misrepresentation not been made. The benefit-of-the-bargain measure seeks to put the plaintiff in the position he would have been in had the representation been true. The two measures of damages can be explained as a consequence of two different ways of comprehending the wrong in fraud in the inducement. The out-of-pocket measure comprehends the wrong as making the misrepresentation. The benefit-of-the-bargain measure comprehends the wrong as the falsity of the representation. On the two measures generally, see Restatement (Second) of Torts § 549 (1977); 2 Dan Dobbs, Law of Remedies § 9.2(1) (2d ed. 1993).
Kull's way of thinking is not unusual in the law of Restitution. The pivotal event is a state of the world—the enrichment of D at P's expense—rather than an act that renders a state of the world unjust. In this respect, the law of unjust enrichment is unlike Tort law in which the pivotal event is the breach by D of a duty to P. All of the great attempts at systematizing the common law of unjust enrichment—Seavey and Scott's *Restatement,* Goff and Jones's treatise, Palmer's treatise, and Birks's book—try to give the law a structure like Tort law by organizing it around events that make enrichment unjust. But these efforts always seem a bit forced. There is none of the conceptual apparatus in the law of Restitution that we would expect to find in a body of law that takes the general form of the principle “event x causing outcome y gives rise to an obligation of D, who was an agent of x (or otherwise responsible for event x), to make amends for y.” It lacks a cause-in-fact theory and a theory of legal cause to connect x to y. It even lacks well-worked-out rules and standards of conduct to define x (x being an event from which any resulting enrichment of B would be unjust). At the very least, we have a long way to go if we are to organize the law of unjust enrichment like Tort law around categories of events that create obligations if the proscribed results ensue. In Tort law, the events are called wrongs and the proscribed result is injury. We might say the concept of enrichment by impoverishment makes the causal event of D's gain P's loss. But it is a bit odd to speak of P's loss as a causal event, because it need not precede or be a force behind D's gain. The causative event is the combination of gain and loss, but what this event causes is the obligation to make restitution.

This is not to say that normative considerations do not bear on the determination of the fact of enrichment when either valuation or causation is doubtful. They do, greatly. If Painter paints Owner's home unasked, the relative negligence of Painter and Owner will bear significantly on the determination of enrichment, a paint job being difficult to value and impracticable to return. The problem of valuation looms large in the law of unjust enrichment. Problems of valuation explain why the law has

111. *Restatement,* supra note 57.
112. Goff & Jones, supra note 67.
113. 1 & 2 Palmer, supra note 35.
114. Birks, supra note 53.
115. This is not to say that it would be impossible to organize the law of unjust enrichment around categories of events. For example, were we to make the occurrence of a nonconsensual transfer from P to D an essential element of a claim for restitution under the heading of enrichment by impoverishment, then we could organize this part of the law around the causative event of a nonconsensual transfer.
116. 2 Palmer, supra note 35, § 10.10, at 461 (citing Olin v. Reinecke, 168 N.E. 676 (Ill. 1929)).
different rules for money (which has an objective value), goods (which tend to be returnable if they are not valued by the recipient), and services or improvements (which tend neither to have an objective value nor to be returnable). It may seem odd that fault influences the resolution of doubtful facts. In American Tort law this influence is commonplace. Judges often resolve doubtful facts against a tortfeasor by saying that it is better that he bear the brunt of factual uncertainty than the innocent victim when the tortfeasor's negligence created the factual uncertainty. The influence of fault on the resolution of doubtful facts seems less odd in Tort law than in the law of unjust enrichment (or than in Contract law, for that matter) because Tort analysis usually begins from the observation that the defendant acted wrongfully. Restitution under the heading of enrichment by impoverishment is not directed at wrongful conduct, so it may seem odd to inject the matter of fault in resolving factual doubt. Later in the Article, I explain why this is not odd at all.

B. The Relevance of Impoverishment

A recent essay by Birks questions whether impoverishment is necessary for unjust enrichment. The law in Canada and in some American states speaks of "enrichment by impoverishment." The Restatement of Restitution states that when gain and loss do not coincide, the usual measure of recovery is the lesser amount, unless a wrong was committed by D, in which case the measure of damages is the greater amount. But unjust enrichment does not require impoverishment in

118. Id. § 39.
119. Id. §§ 40-42.
121. Fault comes in the back door in Contract, most prominently as a justification for awarding reliance damages when expectation is uncertain. See L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182, 189 (2d Cir. 1949) ("[I]t is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other.").
123. See Smith, supra note 18, at 2116 n.5 (collecting Canadian cases).
124. For American cases on enrichment by impoverishment, see supra note 17. For recent cases rejecting a claim for restitution because P neither suffered a loss nor a wrong, see Motor City Bagels, L.L.C. v. Am. Bagel Co., 50 F. Supp. 2d 460, 477 (D. Md. 1999); Coury v. Robison, 976 P.2d 518, 521 (Nev. 1999).
125. RESTATEMENT, supra note 57, § 1 cmt. e. For Palmer's views, see 1 PALMER, supra note 35, § 2.10. Palmer states that the plaintiff usually will have suffered a loss but that is not essential, and the key to the matter is whether "a legally protected interest [of the plaintiff's] has been invaded." Id. § 2.10.
Germany, according to Birks. He notes that recent English and Australian cases seem to incline in the German direction.

Birks does not adequately explain why impoverishment ought to be unnecessary for unjust enrichment. True, as Birks notes, this is "enrichment law, not impoverishment law." But this wordplay ignores the troublesome adjective. It is the law of unjust enrichment. Impoverishment may come in as an element because it is P's loss that makes D's enrichment unjust. Also true, as Birks observes, a trespasser or other wrongdoer is made to disgorge gains in excess of the wronged person's loss. But the innocent beneficiary of a mistake or accident is not a wrongdoer. In his contribution to this Symposium, Birks insists upon the separation of unjust enrichment and wrongful enrichment. Disgorgement is justified in cases of enrichment by wrong because the wrongdoer commits an act that merits punishment or because he infringes upon the plaintiff's property right. In cases under the heading of enrichment by impoverishment, D does nothing considered a wrong or an infringement upon P's property rights. Often D does nothing at all. The case of mistaken improvement is emblematic. A landowner may be required to make restitution though he was ignorant of the improvement and though it was his property that was trespassed upon.

Rebutting Birks's arguments does not establish the moral relevance of loss to unjust enrichment. The Roman maxim "For this by nature is equitable that no one be made richer through another's loss" asserts the relevance of loss; it does not justify it. Lionel Smith and Hanoch Dagan try to fill in this lacuna in their articles in this Symposium by drawing on liberal moral theory and utilitarianism. Neither succeeds. But perhaps

126. Birks, supra note 122, at text accompanying note 23. The Markesinis treatise suggests that German law is not clear on this point and concludes that the issue is largely terminological, given the focus on undoing performance in German law, since "[i]t is difficult to see how [performance by the plaintiff] should occur without any loss in assets, any labour, or any other disadvantage on the side of the plaintiff." B.S. MARKESINIS ET AL., THE LAW OF CONTRACTS AND RESTITUTION: A COMPARATIVE INTRODUCTION 722-23 (1997).

127. The English case is Kleinwort Benson Ltd. v. Birmingham City Council, [1997] Q.B. 380 (Eng. C.A. 1996). In that case, a bank recovered money paid to a municipality on a swaps contract it had no power to enter into even though it had hedged against the risk of payout and so suffered no loss. Id. at 384-94. The Australian case is Comm'r of State Revenue v. Royal Ins. Austl. Ltd., (1994) 126 A.L.R. 1 (Austl.). In that case, a seller recovered overpaid taxes even though it had passed on the taxes to its customers. Id. at 3-20.

128. Birks, supra notes 22-23 and accompanying text (citing and translating German authors).

129. Birks, supra note 42, at 1783. Birks says that this represents a change in his views since his book. But while in the book he treats enrichment by wrong as a species of unjust enrichment, he also clearly recognizes the distinction between enrichment by wrong and enrichment by subtraction. See BIRKS, supra note 33, at 6, 24, 313.

130. Smith invokes stellar ancient and modern authority—Aristotle, Kant, and Ernest Weinrib. He reasons that enrichment by impoverishment is an easy case for corrective justice because
modern moral philosophy is the wrong place to look. This idea that it is wrong to profit from another’s misfortune may rest on more primitive instincts or values.

The best rebuttal to Birks is found in the law and in our own intuitions.131 The law persistently treats P’s loss as the basis or measure of recovery if D is not a wrongdoer. For example, in mistaken improvement cases, the improver recovers only his cost if the value of the improvement is greater.132 One court explained that “the owner is not unjustly enriched more than the improver’s cost.”133 Tracing rules that

experiences a material loss and D experiences a material gain, a conjunction of events that, Smith asserts, is prima facie unjust unless P consents. Smith, supra note 18, at 2139-40. Smith does not justify the key assertion that an unconsented-to change from an existing distribution of material goods is unjust. Why privilege a particular distribution of material goods because it existed at one point in time?

Smith also has in mind a narrower principle of justice than my concept of enrichment by impoverishment. He reasons that his principle of corrective justice does not apply to indirect enrichment except in the case in which P’s property passes through the hands of T to D. The proviso conflates moral reasoning and legal reasoning. The concept of property is like the concept of unjust enrichment or the concept of enrichment by impoverishment. It exists mostly in the legal realm and is a function of diverse moral considerations. The element of directness in the law of enrichment by impoverishment is mostly of prudential or pragmatic value—it bars one sort of very troubling claim (leapfrogging), see infra notes 199-223 and accompanying text, and helps to associate D’s gain with P’s loss. See infra Part VII.

Dagan draws on liberal theory and utility in his article on mistaken transfers. Hanoch Dagan, Mistakes, 79 TEXAS L. REV. 1795, 1803 (2001). I discuss utility infra notes 186-90 and accompanying text. The simplest form of the argument for reversing mistaken transfers based on liberal values is that reversal preserves individual autonomy and control over resources. Dagan, supra, at 1797-1809. Liberal values are, at best, of attenuated relevance to explaining why the law reverses accidental shifts in wealth in general, or mistaken transfers in particular. Liberal values are usually invoked to justify providing each individual with the resources necessary to actualize their potential as a person of moral integrity and to protect their dominion over resources that are constitutive of self. It is a great leap from doing this to preserving all material holdings from accidental loss. In taking this leap, Dagan seizes upon the psychological harms of the experience of loss and insecurity. But, as Dagan recognizes, there are offsetting interests on the side of D, because requiring D to make restitution diminishes his holdings and because the prospect of such legal interventions creates insecurity. Perhaps the argument is that P has a greater psychological interest than D in resources that are shifted by mistake, because P is likely to have held the resources longer and to have acquired them in a less problematic way. But we are talking about fairly ephemeral psychological effects that pale in comparison to the real and psychological costs of recourse to law and litigation.

131. The idea that it is wrong to profit from another’s loss reverberates throughout the law. It is present in some of the most famous cases in which judges have stretched the law to do what they think is just. See Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910) (holding, creatively, that though D’s trespass on P’s property was justified by necessity, D was liable for the damage caused to P’s dock by D’s boat during a storm); Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972) (holding, in a burst of creativity, that where Developer built around a feedlot Owner’s land and then obtained an injunction on the ground of nuisance against operation of the feedlot, Developer was liable for Owner’s moving expenses).

132. See, e.g., Madrid v. Spears, 250 F.2d 51, 57 (10th Cir. 1957); Massey v. Tyra, 234 S.W.2d 759, 763 (Ark. 1950); Meyers v. Canutt, 46 N.W.2d 72, 80 (Iowa 1951). See also J.E. Macy, Annotation, Measure and Items of Recovery for Improvements Mistakenly Placed or Made on Land of Another, 24 A.L.R.2d 11, § 16, at 44-47 (1952) (collecting cases).

133. Madrid, 250 F.2d at 54.
allow a plaintiff to recover a larger sum than he lost apply only if the defendant is a wrongdoer. This point is most starkly drawn in cases in which \( D \) is the innocent beneficiary of \( T \)'s wrong.\(^{134}\)

The English and Australian cases cited by Birks as imposing obligation where \( P \) suffered no loss (and \( D \) committed no wrong) involve non-consensual transfers and unusual facts negating the transferor's loss. In the English case, the City Council hedged its bets so that the payout it made to the investment bank on an ultra vires swap was offset by a payoff it received from another company.\(^{135}\) In the Australian case, a company passed the cost of overpaid taxes on to its customers.\(^{136}\) Such decisions do not establish the irrelevance of impoverishment at a fundamental level. There are abundant reasons not to inquire into the existence or precise magnitude of a loss in common cases of enrichment by impoverishment for which there is an established rule. For a catalog of such reasons, we need look no further than negligence law.\(^{137}\)

Finally, ask yourself if the fact that the plaintiff suffered a loss influences your evaluation of the equities of a claim for which there is no established rule. Recall poor Webb who hurled himself out of a loft to save McGowin's life. Would Webb's claim have been as compelling to you if he had he been able to save McGowin at no harm to himself by hurling a bushel out of the loft? One justice of the Alabama Supreme Court said no. He said that the true basis for the decision was that "the compensation is not only for the benefits which [McGowin] received, but also for the injuries to the property or person of [Webb] by reason of the services rendered."\(^{138}\)

### C. Some Oddities: Restorative Restitution Without Enrichment

An objection to organizing the law of unjust enrichment around the precept of enrichment by impoverishment is that the precept does not account for instances in the law in which the obligation to make restitution is independent of the enrichment of the defendant.\(^{139}\) One area in which

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134. 1 PALMER, supra note 35, § 2.20 (citing Marosis v. Alamo Amusement Co., 60 S.W.2d 876 (Tex. Civ. App. 1933), in which the right to recover the profit on an investment in stock turned on a finding that the defendant knew it was purchased with misappropriated funds).


137. Negligence law obviously overcompensates through the collateral source rule. This rule, which usually operates to allow recovery of losses compensated by insurance, is traditionally justified on two grounds: (1) it preserves the insurer's right to subrogation, and (2) it preserves to the injured party the benefit of insurance for which he has paid. See DOBBS, supra note 120, § 380, at 1058-59. Negligence law overcompensates less obviously through a simplified causation analysis.

138. Webb v. McGowin, 168 So. 199, 200 (Ala. 1936) (Foster, J., writing for the court to explain the denial of certiorari).

139. Another objection is that it reconfigures the analysis in cases in which \( D \) obtains an asset of
this occurs is in administering contracts. When a contract is broken, the promisee can elect restitution as a remedy rather than expectation damages, and it is well-established that this restitution remedy gives him the value of what he gave the breaching promisor, independent of the promisor's actual enrichment.\footnote{140} There is also a restitution remedy when a contract is unenforceable under the statute of frauds. In such cases, the party repudiating the contract may be made to restore the other party to his original position, even though he gained nothing from the performance.\footnote{141} An American case from the 1920s is at the extreme in stretching the law of Restitution to compensate losses.\footnote{142} Buyer asked Owner to paint a house, among other repairs, before it was conveyed.\footnote{143} After the repairs, Buyer refused to go through with the conveyance.\footnote{144} The contract was held unenforceable on grounds of indefiniteness because important terms were missing.\footnote{145} Nevertheless, Owner was allowed to recover for the cost of the work he did at Buyer's request in Restitution despite the self-evident fact that the work was of no value to Buyer.\footnote{146}

Andrew Kull has argued that we need not classify these as Restitution cases anymore because Contract and Tort law have evolved to the point that they have the capacity to compensate losses on formally deficient or broken contracts when compensation is thought appropriate.\footnote{147} I agree (subject to a caveat having to do with gifts\footnote{148}), though there would be a value from \(P\) but he is not enriched. Examples are legion: \(D\) relinquishes a valuable claim he has against \(T\) in return for cash from \(P\) (\(D\) is enriched only to the extent that the cash exceeds the value of the claim he relinquishes); \(P\) gives a thing of value to \(D\), who is \(T\)'s agent, and \(D\) passes the thing on to \(T\) (\(D\) is enriched not at all); or \(D\) purchases an asset owned by \(P\) that is in \(T\)'s possession from \(T\) for cash (\(D\) is enriched only to the extent that the value of the asset exceeds the price paid). At the present time, claims for restitution in such cases may be barred through affirmative defenses such as change of position and bona fide purchase. I would reject such claims because there was no enrichment. Still, we might permit these arguments to be made through affirmative defenses because they involve facts that \(D\) best knows.

\begin{enumerate}
\item \footnote{140}\textsc{Arthur L. Corbin, Corbin on Contracts} § 1112, at 599-600 (1964).
\item \footnote{141}See Joseph M. Perillo, \textit{Restitution in a Contractual Context}, 73 COLUM. L. REV. 1208, 1219-25 (1973) (collecting cases allowing \(P\) to recover against \(D\) for services rendered to \(T\) under a contract with \(D\) that is unenforceable under a statute of frauds).
\item \footnote{142}Kearns v. Andree, 139 A. 695 (Conn. 1928).
\item \footnote{143}Id. at 696.
\item \footnote{144}Id.
\item \footnote{145}Id.
\item \footnote{146}Id. at 697 (holding that \(D\) was estopped from denying the benefit to himself because he had requested the work).
\item \footnote{147}Kull, \textit{supra} note 103, at 1204-10.
\item \footnote{148}There needs to be some doctrinal basis for returning the value of a gift to a donor when a gift is defective or a condition to a gift is breached. The obligation of a donee to return a defective gift or a gift with an unmet condition can be independent of his enrichment. \textit{See Restatement, supra} note 57, § 57 cmt. a. Contract law as presently conceived is poorly suited to this task because gifts are not thought to impose contract-like obligations on the donee.
\end{enumerate}
charming irony in having a concept of "quasi-enrichment" in Restitution to get around the stodginess of Contract law. A benefit to removing these cases from what we might then more accurately call the law of unjust enrichment is that it makes clearer that $P$ has a stronger claim for relief from an unbargained-for loss under a contract when he can point to an associated unbargained-for benefit to $D$. That is, it makes it clearer that enrichment matters. This is true even in Contract law. Courts often creatively construe or even undo contracts to prevent one party from unexpectedly gaining a windfall at the other's expense, even when the parties are sophisticated and bargain as equals. They rarely creatively construe or undo contracts to reallocate unexpected losses between such parties.

Another general area in which $D$ is required to make restitution independent of enrichment is when an asset belonging to $P$ is damaged or lost while in $D$'s hands. According to the Restatement of Restitution, a person is required to compensate the owner for damage to an asset in his possession only if his conduct was tortious or he was more at fault than the owner. When conduct in acquiring, damaging, or losing an asset is tortious, compensatory damages can be awarded in Tort. In such cases, the restitutioinary remedy is redundant. Money is a problem. More precisely, the problem is finding a place in the common law for claims regarding lost money when the person who lost another's money is not guilty of fraud, breach of fiduciary duty, or some other wrong. Negligence will not lie for a purely economic loss. In most American

150. Other areas in which restitution is given without enrichment are discussed elsewhere in this Article. See supra subpart II(A) and infra notes 177-78 and accompanying text.
151. Restatement, supra note 57, ch. 7, introductory note & § 128.
152. One of the more troubling cases is that of the innocent converter. If $T$ steals $P$'s property and sells it to unsuspecting $D$ for a price equal to its value, then $D$ is obligated to return the property to $P$, or to pay for its value if he cannot return it, though he is innocent in the conversion. Whatever one thinks of the merits of this result, it can be reached in Tort rather than in Restitution. The conversion remedy need not be limited to the value of the property at the time of the conversion because conversion may be analyzed as a continuing wrong. Thus, the converter can be liable for appreciation even if the property is eventually destroyed. Id. § 128 cmt. f.
153. Bailment may also be a problem. So may be cases in which a person owns property that has been converted by use but has not been harmed, yet does not have a possessory interest in that property at the time of the use. See John A. Artukovich & Sons, Inc. v. Reliance Truck Co., 614 P.2d 327, 329 (Ariz. 1980) (stating that the conversion claim failed because $P$ had leased equipment wrongfully used by $D$ to $T$).
Restitution is the traditional remedy to recover lost money. We might move these cases to Tort by expanding the most nearly applicable tort doctrine, but these changes can have undesirable collateral consequences. For example, conversion seems a promising theory of recovery when money is lost by one who holds it for another. We could eliminate the bar to a conversion claim by eliminating the requirement that money converted be in the form of an identifiable fund. But if courts are not scrupulous in insisting that the plaintiff in a conversion action have a possessory interest in the money that is taken, then some breaches of contract and some forms of interference with contract will become actionable as conversion. Nonpayment of money held on account may become actionable as conversion, as may acquisitive interference in the payment of money held on account. Even nonpayment of a debt or acquisitive interference in the payment of debt may become actionable as conversion. Because liability for conversion is strict—a person must return property in his possession to the true owner, and is responsible for any harm that comes to the property, even though he honestly and reasonably believes the property to be his own—some inadvertent breaches of contract and inadvertent acts of interference would thereby become tortious.

I go into this odd bit of detail to make two general points. One is that important details in the law are lost when we systematize the law around general precepts. Historically, the disorderly character of Restitution made it possible to sweep many of these oddities into it. If we systematize Restitution, then space will have to be found for them elsewhere. The second point is that there is no clean, functional division between the law of Contracts, Torts, and Restitution. The law of Restitution does some of the work normally done by negligence. And, as just noted, a concern for enrichment by impoverishment animates parts of Contract law.

IV. Nonconsent

Effective consent always bars a claim under the heading of enrichment of impoverishment. It must be so; otherwise, the law would enable people to renege on gifts and losing wagers. When consent is negated by D's fraud or duress, or when D takes P's property without his

155. The explanation for the requirement is that, without, it money would not be a chattel capable of conversion. See United Merchs. & Mfrs., Inc. v. Sanders, 508 So. 2d 689, 692 (Ala. 1987); In re Thebus, 483 N.E.2d 1258, 1260 (Ill. 1985).

156. Birks has proposed a fourth category of miscellaneous causative events—meaning, roughly, a basis of private obligation—after consent, wrong, and unjust enrichment. Birks, supra note 10, at 6-9.

157. I use the term "wager" as shorthand for a zero-sum contract in which one person's gain is another's loss.
knowledge or consent, the case is better classified under the heading of restitution for wrong. What is left under the heading of enrichment by impoverishment are mostly cases of mistaken or accidental shifts in wealth. Also under this heading are cases in which $D$ is enriched by a wrong committed by an actor independent of $D$.

Consent looms so large as an issue in the law of unjust enrichment that it has been said that, at its heart, this body of law is about reversing unconsented-to transfers. A comparison with Tort law is illuminating on this point. While it is not unheard of, it sounds a bit odd to say that Tort law is about rectifying unconsented-to injuries. Tort law, rather, is about rectifying injuries. Historically, consent has been no more than a defense in Tort, and one that is hard to make out. Consent plays a peripheral role in Tort for two basic reasons. First, we think people usually do not freely and intelligently consent to physical injury or consent to bear the risk of physical injury from someone else's imprudent conduct. Second, we believe physical security is an inalienable right. Consent looms larger in the law of unjust enrichment because people often do freely and intelligently make gifts and wagers. And the object of $D$'s gain and $P$'s loss almost always is considered alienable.

Still, apparent gifts and wagers to the side, the posture of the law is to doubt consent when there is a transfer of wealth. This doubt is manifested in contract law. In administering contracts that do not by their nature seem to be wagers, courts strain to avoid an outcome in which one party is enriched at the other's expense. Contract-law doctrines used by courts to achieve this end (but not this end exclusively) include the doctrines of excuse that apply in cases of changed circumstances (impossibility, impracticability, frustration of purpose, and mistake), the presumption against forfeiture, the rule against penal stipulated-damages clauses, and the doctrine of good faith. Underlying these cases and doctrines is the assumption that many contracts are cooperative ventures and not wagers.

158. See McBride & McGrath, supra note 97, at 43. Consent may be given by a person other than $P$. When $T$ prefers $D$ over $P$ in making a gift, $T$'s consent bars a restitution claim by $P$ against $D$. More generally, $T$'s preference of $D$ over $P$ in the allocation of a benefit or burden does not give $P$ a claim, though $D$ gained at $P$'s expense, as long as $T$ acts within his authority and without imposition or mistake. See BIRKS, supra note 33, at 136.

159. This may be changing as it becomes more common to analyze Tort law in economic terms. From an economic perspective, free bargains regarding the risk of physical injury ought to be treated no differently than other bargains. For a strong argument to this effect, see Paul H. Rubin, Courts and the Tort-Contract Boundary in Product Liability, in THE FALL AND RISE OF FREEDOM OF CONTRACT 119, 139 (F.H. Buckley ed., 1999) (arguing that "[e]conomic analysis indicates that free bargaining over liability and damages standards in products liability cases . . . serves efficiency goals").

160. See Gergen, supra note 149, at 46 (describing how these doctrines can be used to "relieve[ a party from a significant and unexpected loss under a contract when such relief would leave the other party in a position no worse than she would have been in had the contract not been made").
The issue of restitution as an alternative remedy for breach of contract relates to the issue of consent because the promisor's breach arguably makes any transfer to him from the promisee nonconsensual. If one accepts the principle that unjust enrichment is the product of a nonconsensual transfer, then a restitutionary remedy for breach would follow logically. Stephen Smith uses essentially this reasoning to argue that there should be no fundamental breach requirement for restitution. His view is that (1) Restitution is a basis for obligation independent of Contract and (2) that, once the conditions for obligation in Restitution are met (this being, in his mind, a nonconsensual transfer), contract-law considerations are beside the point.

Smith's working premise is wrong. General statements of law, such as the statement that Restitution reverses nonconsensual transfers, are useful in understanding the law but harmful if carried too far. A principle that condemns nonconsensual transfers does not express the prudential concerns that justify denying restitution in many cases that come within the principle, and, if applied mechanically, would lead us astray deep into Dawson's forest of enchantment. As for the requirement of fundamental breach, there are many good reasons why Contract law strives to preserve the value to each party of their bargain upon breach, trying to put the promisee in the same position he would have been in on performance (but no better) while doing this in a way that imposes the least burden on the breaching promisor. It would be odd if this ceased to be a goal because the label of a claim changed from Contract to Restitution. Of course, it does not. The doctrine of fundamental breach serves these goals, as do other doctrines in the law of Restitution. Contract law and the law of Restitution are not perfectly consistent—Restitution will put the promisee in a better position than he would have been in through performance—but this is a product of different rules at the working level of these two bodies of law, not different goals at the top.

162. He also gets the principle at the head of the law of unjust enrichment wrong. His principle requiring a nonconsensual transfer is not really a principle of unjust enrichment at all. The breaching party's obligation to return what he got from the other party is independent of his enrichment. See supra note 140 and accompanying text. This criticism is to some extent a quibble. It accepts Smith's working premise that the goal should be to identify a general principle of obligation to cover all of the law of Restitution or unjust enrichment, and then to work out that principle's logical implications. If this were our goal, then a great deal could be said for putting a principle aimed at nonconsensual transfer at the head of the law.
163. Restitution is not available if a liquidated amount of cash is owed. For example, Oliver v. Campbell, 273 P.2d 15, 20 (Cal. 1954) applied the rule of § 350 of the first Restatement of Contracts, that restitution is unavailable to a plaintiff who has fully performed and is owed a liquidated sum on the contract. RESTATEMENT OF CONTRACTS § 350 (1932). The second Restatement has adopted this rule also. See RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981).
V. Neglect to Guard Against a Loss

P's failure to guard against an accidental loss to D may bar a claim for restitution. On the surface, the law may seem otherwise. No less of an authority than the Restatement of Restitution says that, as a general matter, P's lack of care will not bar a claim for restitution. But this general proposition is subject to so many qualifications that it ends up being less than a half-truth. The law is indifferent to P's neglect only when there is a hard and fast rule because the facts of enrichment, impoverishment, association, and nonconsent are not in doubt. An example is the case in which P transfers to D money or a returnable thing in circumstances making it clear that the transfer fulfills no obligation of P's and P has no possible gift motive. In such cases, P's negligence in making the transfer is not an issue.

Introduce factual uncertainty so restitution cannot be done by rule and the result often flips—restitution is likely to be denied as a matter of course—unless it happens that D is at fault. Thus, traditionally, a mistaken improver could not recover unless the landowner was at fault because he had reason to know of the improver's mistake and failed to use due care to correct it.

Restitution is not always done or denied by rule. As decisions become more fact-specific, the issue of comparative negligence rises to the surface of the law to be worked out case by case. Take the case of a mistaken transfer in which the transferee spends the money on something of uncertain value. The Restatement of Restitution tells us that in this situation, if there is possible prejudice to the transferee, then "unreasonable delay" by the transferor in seeking restitution will bar a claim. It adds that the transferee's change of circumstances "may be a defense... if [his] conduct was not tortious and he was no more at fault for his receipt, retention or dealing" with the money than the transferor.

The issue of negligence intertwines with the issue of consent when a party seeks to be excused from a contract and recover benefits he provided

164. RESTATEMENT, supra note 57, § 59.
165. Id. § 15 cmt. b. Some cases deny recovery of mistaken payments against an innocent payee when the payor did not exercise reasonable diligence. See, e.g., Terra Nova Ins. Co. v. Assocs. Commercial Corp., 697 F. Supp. 1048, 1052 (E.D. Wis. 1988) ("The insurer is not entitled to recover an improper payment unless it can show [that] it was not aware of the true facts... by reasonable diligence.") (Quoting 18 COUCH ET. AL., COUCH ON INSURANCE §§ 74:205 (2d rev. ed. 1983)).
166. RESTATEMENT, supra note 57, § 42 cmt. a (noting "the rule... is harsh to the one making the improvements by mistake").
167. For cases stating that recklessness or neglect to investigate a risk bars a claim of unjust enrichment, see TRW Title Ins. Co. v. Sec. Union Title Ins. Co., 153 F.3d 822, 829 (7th Cir. 1998), and United States v. Burczyk, 556 F.2d 394, 397 (7th Cir. 1977).
168. RESTATEMENT, supra note 57, § 64.
169. Id. at § 69(2).
to the other party because of a mistake regarding the contract's meaning, its value, or the cost or practicability of performance. A few categorical rules of excuse aside,\textsuperscript{170} excuse is rare in cases in which people make mistakes in contracting. Outside the ambit of these rules, there is a general principle in favor of enforcing a contract if the risk or problem was apparent when the contract was made. This principle can be justified on the grounds of apparent assent. The failure to hedge a contract for an apparent risk makes the contract seem like an implicit wager on that risk. It also has been justified on the reasoning that the law does not protect people from risks from which they neglected to protect themselves.\textsuperscript{171} By combining the issues of consent and neglect, we can state a principle broader than the contract cases: the law does not reverse enrichment by impoverishment if \( P \) voluntarily places himself in a position in which he might reasonably expect \( D \) to gain at his expense and \( P \) neglects to take available measures to protect himself from that outcome.\textsuperscript{172}

\( D \)'s neglect can strengthen a restitution claim\textsuperscript{173} but for a different reason than \( P \)'s neglect weakens a claim. Liability is imposed on negligent \( D \), not because he is enriched, but rather because his neglect harmed \( P \). We see this in the fact that negligent \( D \) must compensate \( P \)'s loss though his gain is less than \( P \)'s loss. Thus, when enrichment is uncertain, \( D \)'s neglect is said to justify resolving that uncertainty against him.\textsuperscript{174} Birks

\begin{footnotesize}
\textsuperscript{170} These rules cover several situations. See \textit{Restatement (Second) of Contracts} \textsection{} 153 (covering such things as clerical errors in communications); \textit{id.} \textsection{} 262 (covering death of the service provider in the context of a service contract); \textit{id.} \textsection{} 263 (covering, inter alia, destruction of identified goods in a sale of goods, destruction of the means of delivery in a sale of goods, and destruction of the property that is the object of a contract of repair or improvement).
\textsuperscript{171} See \textit{Center v. Mad River Corp.}, 561 A.2d 90, 93 (Vt. 1989) (concluding that "it was well within [the plaintiff's] power to protect himself from this legitimate business risk" and therefore declining to rule in his favor).
\textsuperscript{172} Neglect or consent is a better basis for \textit{Gidatex v. Campaniello Imp., Ltd.}, 49 F. Supp. 2d 298 (S.D.N.Y. 1999). \( P \) had a license to sell \( D \)'s wares in the United States. Through a long and heated dispute, it lost the license except at four stores. To undercut \( P \)'s sales at these stores, \( D \) opened competing stores in the same locations. At this point, \( P \) brought a suit for unjust enrichment claiming that its efforts in promoting the wares benefited \( D \). The court reasoned that the expense of promoting the wares logically could not have made \( P \) worse off because, being rational businessmen, they would not have incurred the expense had it not been to their benefit. \textit{id.} at 304-06. But this ignores the effect of \( D \)'s preemptive opening of competing stores. Better reasoning is that, in spending money to promote the wares in the face of a dispute about who had a right to the United States market, \( P \) undertook the risk that the benefit would inure to \( D \) and not itself.
\textsuperscript{173} The claim of a mistaken improver is strengthened if the landowner is more at fault than the improver because the landowner could have known of the improver's mistake and had a chance to prevent it. Fair warning to the transferee that money he spent was not rightfully his may strip him of the defense of change of position.
\textsuperscript{174} Usually doubts about enrichment are resolved against \( P \). Birks's useful formulation is that enrichment is found absent "free acceptance" only if "no reasonable man would say that the defendant was not enriched." \textit{Birks, supra} note 33, at 116. In Birks's terminology, free acceptance means that the defendant allowed something to come his way knowing it was not his to have. \textit{Id.} at 114.
\end{footnotesize}
explains that having irresponsibly used $P$'s resources, $D$ must pay their objective or market value though the value to him may be less. In other words, $D$ must bear the loss resulting from his irresponsible use of the resources. Payment of market value is required even when it is clear that the value to $D$ is much less. In these cases, the law of Restitution is doing work usually done by the law of negligence and conversion.

The table shows how the quality of $D$'s conduct relates to his obligation in Restitution.

<table>
<thead>
<tr>
<th>Heading</th>
<th>Quality of $D$'s conduct towards $P$</th>
<th>$D$'s obligation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enrichment by wrong</td>
<td>Usually selfish</td>
<td>Disgorge own gain or compensate $P$'s loss, whichever is greater</td>
</tr>
<tr>
<td>Restorative restitution</td>
<td>Negligent</td>
<td>Compensate $P$'s loss without regard to own gain</td>
</tr>
<tr>
<td>Enrichment by impoverishment</td>
<td>Blameless</td>
<td>Compensate $P$'s loss out of own gain</td>
</tr>
</tbody>
</table>

Under the heading of enrichment by impoverishment, liability is imposed not because the defendant acted in a blameworthy manner—either wrongfully or negligently—but rather on the idea that it is wrong to profit from another’s misfortune. It truly is liability without fault insofar as the defendant is concerned.

Andrew Kull’s mapping of modern American mistaken-improvement cases neatly fits this scheme. Kull observes that if the landowner is innocent he pays the lesser of the improver’s loss or the landowner’s gain from the improvement. I would put these cases under the heading of enrichment by impoverishment. If the landowner has been negligent, he compensates the improver for his loss even though the landowner’s gain is less. Here, Restitution does the job of negligence. If the landowner is

\[175. \text{ Id. at 116.}\]
\[176. \text{ RESTATEMENT, supra note 57, § 152.}\]
\[177. \text{ Andrew Kull, Mistaken Improvements and the Restitution Calculus (Oct. 7, 1999)}\]
\[\text{(unpublished manuscript, on file with the Texas Law Review).}\]
\[178. \text{ Id. at 5.}\]
guilty of conscious wrongdoing, he disgorges his gain even though the improver's loss is less.

Not all cases fit so neatly. Sometimes it requires the combination of loss, gain, and D's fault or neglect to make a claim good. Consider the case in which T neglects to file papers that would enable P to collect on a claim against D. T is not liable for P's loss, absent an undertaking by him to assist D in the matter. Nor, typically, will D have to pay on the claim though he profited from P's bad luck (and T's neglect). But if T, acting as D's agent, neglects to file papers that would enable P to collect against D, then P may recover without an undertaking by T or D to assist him.\footnote{79}

The doctrine of abuse of a confidential relationship straddles two and maybe all three categories. Abuse of a confidential relationship involves exploiting the trust of a close family member or friend to gain profit for oneself.\footnote{180} The element of self-profit makes abuse of a confidential relationship seem akin to duress, suggesting that the doctrine is a species of enrichment by wrong. But it is debatable whether abuse of a confidential relationship is the sort of wrong that justifies the penalty of disgorgement.\footnote{181} The doctrine fits poorly in the other two categories, 

\footnotetext{179}{\citeauthor{Carr v. Maine Central R.R.}, \textit{102 A. 532 (N.H. 1917)}, while ostensibly a negligence case, is illustrative. One allegation was that the defendant railroad negligently failed to file papers with the railroad commission that would have enabled the plaintiff to collect an overcharge from the railroad. The court ruled that, provided that the plaintiffs could show that the defendant accepted the papers evidencing their claim for the purpose of forwarding them to the commission, and then did or omitted to do something the average man would not have done or omitted, they can recover all the damage they sustained as a result of such failure, provided no fault of theirs contributed to produce their loss. \textit{Id.} at 533.}

\footnotetext{180}{Traditionally, abuse of confidential relationship was classified with breach of fiduciary duty. The trend towards characterizing breach of fiduciary duty as a tort, making neglect of fiduciary duty a wrong carrying an obligation to compensate the principal for his loss, makes it necessary to separate the two concepts unless we also want to make it a wrong to neglect the economic interests of close family or friends. \textit{See} Mark P. Gergen, \textit{The Jury's Role in Deciding Normative Issues in the American Common Law}, 68 FORDHAM L. REV. 407, 475-84 (1999).}

\footnotetext{181}{Punitive disgorgement seems unjustified when the doctrine is used to prevent unjust enrichment resulting from the rupture of informal sharing relationships. Consider \textit{Small v. Badenhop}, 701 P.2d 647 (Haw. 1985). Ps owned a large parcel and a small adjoining parcel of residential land in Hawaii that they hoped to subdivide and develop with Ds, who were friends. \textit{Id.} at 650, 652. In 1965, Ps were unable to make a balloon payment of approximately $16,000 that they owed on the larger parcel. \textit{Id.} at 651. Ds made the payment, taking fee simple in the parcel, and telling Ps they would protect their equity. \textit{Id.} Ps transferred the smaller parcel to Ds for a nominal sum. \textit{Id.} at 652. At the time the parcels were worth around $45,000. \textit{Id.} at 654 n.11. Ps had invested around $8,500 in the two parcels. \textit{Id.} at 654. After it proved to be impossible to subdivide the two parcels, Ds built a house in 1970. \textit{Id.} at 653. Ps sued in 1980 after Ds refused to formalize their informal understanding. \textit{Id.} In 1983, at the time of the trial, the land was worth without the house $172,000. \textit{Id.} at 654 n.11. The opinion tells the lower court to give Ps an equitable lien on the property but does not discuss the amount. \textit{Id.} at 656. If the lien were to be calculated with the goal of making Ds disgorge their profit from the relationship, then the amount might be the value of the property (unimproved) in 1983 minus Ds' $16,000 investment plus interest. The better course is to try to divide the appreciation in the value of the land considering the parties' relative contribution.}
though at its heart it may serve a compensatory purpose, because it is
directed at what most people would think is blameworthy conduct. In
addition, the doctrine often protects against loss of opportunity, which
again makes it seem a species of enrichment by wrong. In the canonical
case, a child exploits a parent’s trust to induce the parent to prefer him
over a sibling in passing on wealth.

VI. The Hinge of Negligence

Why P’s neglect to guard against an accidental loss to D will bar a
claim for Restitution requires explanation. Generally, in private law, a
person is liable for negligence only if it results in harm to others. This is
a root principle of negligence law.182 We might also discern this
principle in Contract law doctrines that excuse a contract on grounds of
unilateral mistake, and even a broken gratuitous promise, so long as the
other party did not detrimentally rely on the contract or the promise.183
When P’s neglect leads to the enrichment of D at P’s expense, P harms no
one but himself. Restitution would redress that harm without leaving D
any worse off if he has not changed his position in the interim. Why
should P’s neglect to protect himself from loss bar Restitution? The
answer is that the harm that is the hinge of fault lies in the operation of
the law itself. Litigation imposes large immediate transaction costs on
the parties. These costs include not only the obvious direct economic costs,
but also noneconomic costs to the extent that litigation embitters human
relations, and indirect economic costs to the extent that uncertainty
regarding ownership of resources impairs their use.

That the harm that is the hinge of fault in the law of unjust enrichment
lies in the operation of the law explains some odd features of the law.184
One of these was just observed. P’s neglect does not bar a claim for
restitution when Restitution is done by rule. When restitution is done by
rule, it minimizes the harm in the operation of the law and so makes
neglect less of an issue. Also odd is the principle that the law does

182. The usual explanation is historical, focusing on the development of negligence out of the
action on the case in which damages had to be pled and proved. W. PAGE KEETON ET AL., PROSSER
AND KEETON ON TORTS § 30, at 165 (5th ed. 1984).
183. On gratuitous promises, see RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). On
unilateral mistake, see id. § 153.
184. Distaste for litigation explains an odd feature of traditional Contract law. English courts and
some American courts used to pursue a “do-nothing” policy when faced with contracts that events make
impractical or fruitless to perform. They did not enforce a disrupted contract, but neither did they try
to undo what had been done. For further discussion of the early common-law treatment of impractical
contracts, see E. ALLAN FARNsworth, CONTRACTS § 9.6 (3d ed. 1999). This approach seems difficult
to defend on normative grounds. The allocation of gain and loss between the parties becomes a matter
of chance because it turns on the position that the parties happened to be in when the disruption
occurred, leading to an outcome that we know the parties did not intend. The one virtue in this policy
is that it reduces litigation.
not aid people who neglect to protect themselves from risk of a loss by insurance or other devices. This principle presupposes that the harm that makes neglect culpable lies in the operation of the law itself. Neglecting to erect private safeguards that would eliminate the need for recovery of a loss through a lawsuit is blameworthy only if we think that there is harm in seeking redress through the law. Transposing this principle to the law of negligence shows its oddity. In negligence, where compensation is rarely done by rule, this principle would justify denying compensation to an injured person if he neglected to insure against the injury. The position of negligence law is the opposite. Insurance against a loss will not bar its recovery in negligence under the collateral-source rule.\(^{185}\) Even when a tortfeasor and his victim stand in a contractual relationship in which it would be easy for them to contract for compensation outside the negligence system, the general view is that their contract does not displace negligence law.\(^{185}\)

These days private law tends not to be thought of as harmful in its operation because we have become accustomed to thinking of it as having regulatory value in altering human conduct in positive ways, especially in economically desirable ways. These regulatory gains offset the costs of litigation and legal uncertainty. Thus, negligence law is thought to reduce the incidence of accidental injuries that can efficiently be avoided. But much of the common law is best explained by a strong distaste for litigation. This is the reason behind the law’s traditional unwillingness to enforce indefinite agreements,\(^{187}\) not the sometimes-stated reason of respect for individual autonomy,\(^{188}\) which is implausible on its face. This also best explains the many traditional Contract law rules that simplify the administration of contracts at the expense of accuracy. Grant Gilmore darkly depicted something of the spirit of traditional Contract doctrine when he observed that it “seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything.”\(^ {189}\) The cost of resort to law is why Holmes endorsed the view “that loss from accident must lie where it falls,”\(^ {190}\) a view that now seems hardhearted. In his words, “the cumbrous and expensive machinery ought not be set in

\(^{185}\) Dobby, supra note 120, at 1058-59.

\(^{186}\) This view is most plainly instantiated in doctrines disfavoring exculpatory clauses. Richards v. Richards, 513 N.W.2d 118, 121 (Wis. 1994).

\(^{187}\) Restatement of Contracts § 32 (1932) (stating the requirement of certainty in the terms of an offer).

\(^{188}\) See Joseph Martin, Jr. Delicatessan, Inc. v. Schumacher, 417 N.E.2d 541, 543 (N.Y. 1981) (observing, in defense of the doctrine of indefiniteness, that the right to contract is a “liberty” that is necessarily “accompanied by [the] freedom not to contract”).

\(^{189}\) Grant Gilmore, The Death of Contract 14 (2d ed. 1995).

\(^{190}\) Oliver Wendell Holmes, The Common Law 94 (1881).
motion unless some clear benefit is to be derived from preserving the status quo. State interference is an evil, where it cannot be shown to be good.\textsuperscript{191}

Restitution under the heading of enrichment by impoverishment cannot be justified on economic grounds. Perhaps this is obvious. There is no improvement in social welfare in shifting wealth from one person to another, unless wealth is redistributed downwards, which is not the job of private law.\textsuperscript{192} If there is social utility in a policy of reversing accidental shifts of wealth, it lies in the possibility that the prospect of reversal by law may induce people not to take more costly measures to guard against the risk of loss.\textsuperscript{193}

For example, it is conceivable that the rule that allows banks to recover mistaken transfers of funds encourages spending by banks in handling funds transfers closer to the socially optimal level. Reliance on the strategy of reversal by law is efficient from the private perspective of the bank if the cost of recovering funds discounted by the probability of a mistaken transfer exceeds the cost avoided by the next best measure for reducing the risk of mistaken transfers. This might well be true of accidental fund transfers when the funds have not left the transferee’s account because reversal can be nearly automatic. But the social benefit of reversal by law is less than the private benefit. Reversal by law imposes transaction costs on the other party if it is not automatic, and, if reversal involves recourse to the civil justice system, it imposes costs on society; private precaution usually involves one-sided costs. Thus, people have an incentive to overrely on reversal by law because some costs of this option are external. A policy conditioning reversal by law on $P$ not being negligent counteracts this effect. But there is another inefficiency in reversal by law that a rule of contributory negligence does not guard against. $P$ is not negligent if there is no viable alternative means to avoid a loss, but in this case there is no social benefit in reversal by law because

\textsuperscript{191} Id. at 96.

\textsuperscript{192} For an argument that private windfalls are rarely worth recapturing (made in the context of a larger argument for taxing public windfalls because they are an efficient source of revenue), see Eric Kades, Windfalls, 108 YALE L.J. 1489, 1504-31 (1999).

\textsuperscript{193} This statement is a greatly condensed version of my analysis of why parties might find it in their interest to use open terms in contracts. See Mark P. Gergen, The Use of Open Terms In Contract, 92 COLUM. L. REV. 997 (1992). The basic point is that if a risk is small enough, and the cost of taking precautions against it is great enough, it can be prudent to wait for the risk to occur to resolve it even if the resolution requires litigation. I reason that people might enter into contracts with open performance terms as the best way to handle risks that might affect their individual payoff on a contract, but parties to the contract need not be resolved to decide if performance is jointly worth pursuing. I extend this analysis to contract-law doctrines that enable courts to reconstruct contracts that do not by their terms invite a court to define the obligation. See Gergen, supra note 149, at 81-98. I do not conclude that these doctrines are efficient, but only that they are not demonstrably inefficient. Even this weak endorsement of the doctrines does not carry over to the unjust enrichment setting.
the legal remedy produces no reduction in loss-avoidance expenditures. If you add on top of this the higher cost of litigation when reversal is uncertain, and then take a realistic view of human behavior (that people tend to assess low probability risks imperfectly, underestimating the probability of unfamiliar events while overestimating the probability of familiar events,\(^{194}\) that they tend to respond to the law imperfectly,\(^{195}\) and that once in a legal dispute they tend to be over-optimistic about their chances\(^{196}\)), the possibility that the law of unjust enrichment efficiently fine-tunes the precautions that people take against accidental losses without undue litigation expense begins to seem wildly unrealistic.

I do not want to belabor this point because it seems obvious. To put it in a nutshell in the hard language of economics, litigation under the heading of enrichment by impoverishment is a deadweight loss to society unless one counts satisfying human instincts of justice as a welfare gain. It is a costly fight over wealth that does little to produce rules or standards to guide future behavior in an efficient direction, except insofar as the rules and standards produced deter future litigation. To my mind, this is not an indictment of this body of law because it serves ends of justice other than efficiency. It does explain why concerns of utility operate as a limit on restitution under the heading of enrichment by impoverishment, and, to bring us back to the point where I began, why \(P\)'s neglect to take available means to protect himself from a loss bars a claim under the heading of enrichment by impoverishment when restitution cannot be done by rule.

**VII. Indirect Enrichment**

Little systematic attention has been paid in the common law to the question of whether the lack of a direct connection between \(D\)'s gain and \(P\)'s loss weakens a claim of unjust enrichment.\(^{197}\) Usually when we speak of indirect enrichment we mean that a third party had a role in the affair.\(^{198}\) George Palmer calls these “three-party problems” and provides


\(^{196}\) Korobkin & Ulen, *supra* note 194, at 1091-95 (collecting studies about overconfidence generally and in the litigation context in particular).

\(^{197}\) Birks makes this point before taking on the issue. *See* Birks, *supra* note 122, and text accompanying notes 51-53.

\(^{198}\) The issue of indirectness does not depend upon there being a human intermediary. It might arise in any case where the connection between \(P\)'s loss and \(D\)'s gain is attenuated.
What Renders Enrichment Unjust?

a typology that organizes some of the sorts of cases in which indirectness is said to be an issue.\textsuperscript{199} One type of case is the mistakenly misdirected gift or payment: \( T \) gives or pays to \( D \) what he meant to give or pay to \( P \).\textsuperscript{200} Birks labels these cases as instances of interceptive subtraction.\textsuperscript{201} A second category from Palmer is the case in which \( P \) mistakenly discharges \( D \)'s obligation to \( T \).\textsuperscript{202} Yet another category from Palmer involves cases in which \( D \) is compensated twice by \( T \) and \( P \) for the same loss.\textsuperscript{203} Palmer cites as an example the “frequent” case where a vendor of property that is damaged while under contract for sale nominally has both the right to be paid by an insurer for the damage and the right to receive the full contract price from the buyer.\textsuperscript{204} Palmer thinks the vendee ought to recover the insurance proceeds to prevent unjust enrichment of the vendor at his expense.\textsuperscript{205}

Palmer’s typology omits the most significant category of third-party claims. These are cases where \( P \) performs a contract with \( T \) in a way that benefits \( D \). When \( T \) breaches and cannot be made to pay, \( P \) looks past him to \( D \) for compensation.\textsuperscript{206} Birks calls this “leapfrogging.” For example, a contractor who improves property for a tenant sues the owner for his compensation after the tenant fails to pay for the work. Opponents of claims for indirect enrichment often have such a leapfrogging in mind. As Dawson observes, apparently thinking of such cases, “without a requirement of directness or privity every defaulted loan would potentially give rise to a claim for unjust enrichment by the lender against third persons to whom the borrower transferred the loan proceeds.”\textsuperscript{207} Birks notes another, more sympathetic, case of leapfrogging, in which \( P \) mistakenly deposits funds in \( T \)'s account and \( T \) makes a gift of the funds to \( D \), whom \( P \) then sues to recover the funds.\textsuperscript{208} Yet another sympathetic variant is Kull’s case of successive fraud victims, where Scoundrel defrauds \( P \) to obtain funds to repay a debt he owed to \( D \).\textsuperscript{209}

Palmer finds nothing troubling about granting restitution in any of the cases he identifies. Such openness to third-party enrichment claims is in the

\begin{enumerate}
\item 199. 2 PALMER, supra note 35, § 21 (entitling the chapter “Three-Party Problems: Restitution of Benefits by the Defendant from a Third Person”).
\item 200. 2 id. § 21.
\item 201. See Birks, supra note 33, at 133.
\item 202. 2 PALMER, supra note 35, §§ 22.1, 22.2.
\item 203. 2 id. § 23.
\item 204. 2 id. § 23.2 n.6 (collecting cases pro and con).
\item 205. 2 id. § 23.2.
\item 206. These cases would seem to belong in Palmer’s typology of cases where \( P \) performs a contract with \( T \) to benefit \( D \). What Palmer considers here is cases where \( D \) is a third-party beneficiary of a contract breached by \( T \). 2 id.
\item 207. DAWSON, supra note 1, at 123-24. In Dawson’s example, the benefit is incontrovertible because the loan is used to feed the defendants on the restitution claim.
\item 208. Birks, supra note 122, at para. 62.
\item 209. Kull, supra note 103, at 1234-36.
\end{enumerate}
common-law tradition. As Dawson observes, "the common law has no requirement of directness, so common-law courts "give remedies for enrichment very indirectly received." Dawson goes on to say that common-law courts reject most claims of third-party enrichment. But this reference is only to the most problematic case of third-party enrichment, the case of "leapfrogging" over the counter-party to a contract. Dawson contrasts the common-law approach with that of German law, which, at the time he wrote, cabined a general principle against unjust enrichment by a requirement of directness.

Dawson thought there was a connection between the recognition of a general principle and the expression of an element of directness. He reasoned that a general principle of unjust enrichment tends to be couched in terms that require a direct connection between D's gain and P's loss to eliminate some of the principle's more troubling and far-reaching applications. Birks tells a similar story about German law, but more pointedly. He suggests the German Civil Code may have been written in reaction to an infamous contemporary French decision allowing leapfrogging over the counterparty to a contract. Those who try to systematize the common law of unjust enrichment around a single principle tend to couch that principle in terms of transfer or dispossession. Thus, McBride and McGrath make dispossession an element when they define unjust enrichment as "enrichment derived from the employment of another's property without that other's consent." Even Birks and Kull, who mean nothing in particular by the word, use the terminology of transfer in mapping unjust enrichment. The two central chapters of Birks's book

210. Dawson, supra note 1, at 122. The treatises of Goff and Jones and of Palmer recognize that sometimes the common law does require restitution of benefits gained from third parties. See Goff & Jones, supra note 67, at 38-40; Palmer, supra note 35, at 40-41, 44.
211. Dawson, supra note 1, at 127-29.
212. Id. at 120-27. Today in German law, this work is done by a requirement that enrichment occur by P's performance of an act for D. See Gerhard Dannemann, Unjust Enrichment By Transfer: Some Comparative Remarks, 79 Texas L. Rev. 1837, 1846 (2001). The primary basis in the German Civil Code for finding unjustified enrichment is that a person "obtains something by performance by another person." See § 812 BGB. Enrichment "in another way at the expense of this person" is on a subsidiary basis. On the latter clause and its scope, see 1 B.S. Markesinis et al., The German Law of Obligations 717-20, 740-41 (1997). The authors explain that by "making Leistung (performance or transfer) the watershed in restitution... German law has described the largest possible coherent group of enrichment cases where restitution is required without having to resort to an examination of more specific unjust factors or equity." Id. at 718.
213. Dawson, supra note 1, at 120-27.
216. Birks allows for the possibility of what he calls "Interceptive Subtraction." Birks, supra note 33, at 133-38. For a further discussion, see supra note 93 and accompanying text. Kull uses the term "transfer" loosely to encompass the same concept.
are captioned “non-voluntary transfer.” Kull’s outline for the new Restatement (Third) of the Law of Restitution organizes the law under the headings of involuntary and voluntary transfers.

The concepts of directness and its cousin, privity, are poorly suited to getting at the quite different concerns raised in different types of three-party enrichment cases. Cases of interceptive subtraction—for example, T pays funds intended for P to D—raise the issue of how far the law of unjust enrichment ought to go in protecting expectancy and opportunity. Outside a few well-established categories, courts disfavor claims of unjust enrichment for loss of expectancy or opportunity, even though they sometimes cannot state a sound, principled basis for denying the claim. A recent Wisconsin case provides an example of a court struggling to find a reason to deny an unsympathetic claim. In that case, a magazine sweepstakes entry form was sent to Employer’s office. His surname was on the form even though the form was meant for his Secretary, who subscribed to the magazine. Secretary’s first name was on the form. Secretary crossed out Employer’s surname and replaced it with her own, submitted the form, and won the prize. The court rejected Employer’s claim for the winnings, but it could give no better reason than the untenable proposition that for a claim for restitution to lie, the benefit must have been obtained “‘by some form of unconscionable conduct.’” Were this true, the law would never reverse a mistaken transfer. An Iowa court did better on more tragic facts. Husband and Wife were close to finalizing a divorce when Wife was killed in an accident. Wife had no will, so Husband inherited all of her property, not just the half he was to receive in the divorce. The court rejected a suit by Wife’s kin to recover what would have been theirs but for the accident, reasoning that the “mere wishes or expectations of a party [could not] provide the basis for an unjust enrichment claim.” This principle can be justified by the factual problems in assessing lost expectancy and opportunity, and perhaps by the view that there is an intrinsic harm in dispossession that is missing when the plaintiff complains of the loss of a bird not yet in the hand. But

217. Id. at chs. VI, VII.
219. An example is restitution to the intended donee of a gift. For examples, see id. § 11 cmt. f. An instance in which restitution is given against D when P makes a transfer to T is the case of a mistaken payment of a debt. The payor has a restitution claim against the debtor. See id. § 7 illus. 12-13.
221. Id. at 185 n.9 (quoting Wilhars v. Wilhars, 287 N.W.2d 779, 783 (Wis. 1980)).
222. In re Estate of Peck, 497 N.W.2d 889 (Iowa 1993).
223. Id. at 890.
224. Even economists have come to recognize the psychological value of possession, though they consider this trait an anomaly and they tag it with such labels as “the endowment effect” and “the status
it is a mistake to elevate this statement into a categorical rule because, in some instances, the law of unjust enrichment does protect expectancy and opportunity.

At the heart of many leapfrogging cases is the question of which party before the court ought to bear the loss from their dealings with a third party who is insolvent and sometimes a scoundrel. Whole bodies of law are centrally devoted to solving this sort of problem, principally insolvency law (on priority among creditors) and property law (on the good faith purchaser). Competing claims of priority to assets of an insolvent can be cast in the language of unjust enrichment when the asset being fought over has passed from the hands of P to the hands of D through the hands of insolvent T and it is apparent that T could not have obtained the means to pay D from some other source. Courts reject most such claims and properly so. Birks argues: "[P] must accept the risks of dealing with his chosen contractual counterparty. The insolvency regime would be subverted if [P] could find ways of leapfrogging an insolvent [T]."

Birks's first argument, echoing the principle we saw earlier, asserts that the law of unjust enrichment does not protect people from the normal risks of contracting. One could quibble about the applicability of this principle in a case where the contract has been breached to bar a claim against someone who is not a party to the contract. If we were to pursue this issue, I expect that we would find ourselves facing Birks's second argument that the law of unjust enrichment ought to be subsidiary to insolvency law, which is likely to have detailed rules on the matter.

Difficult cases put the second point to the test. Birks cites a number of unjust enrichment cases that allow P to leapfrog his contract with T to recover from D when D received the benefit of P's performance gratuitously. One lesson we might draw from insolvency law or property law is that there is no absolute bar to such claims. For example, a donee of a scoundrel stands in a weaker position than a creditor or claimant who gave something of value to the scoundrel under insolvency quo bias." See, e.g., Russell Korobkin, Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms, 51 VAND. L. REV. 1583, 1584 (1998).

225. Analogous issues are raised when an unjust enrichment claim is used by a putative third party beneficiary to a contract. For a recent case rejecting such a claim under a standard of enrichment by impoverishment, see Apache Corp. v. MDU Res. Group, Inc., 603 N.W.2d 891 (N.D. 1999).

226. Birks, supra note 122, para. 79.


228. See Birks, supra note 122, at text accompanying notes 65-86; Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.), was analyzed as such a case on the premise that the defendant casino was a donee of the money embezzled by the plaintiff's partner.
law and property law. The observation that insolvency and property law are open to such claims begs the real question, which is whether the law of unjust enrichment ought to afford a creditor or claimant greater rights against a donee than does insolvency law or property law. This question cannot be answered in the abstract.

Palmer's other categories of three-party cases raise no special concerns. Consider the case where P mistakenly pays D's debt to T. P is not leapfrogging T and with him insolvency or property law. P suffers an out-of-pocket loss, not a lost opportunity or expectancy. Usually the debt is discharged with money so valuation of gain and loss is not much of an issue. D is not made worse off because P steps into T's shoes as a creditor subject to any defense D would have had against T. To define unjust enrichment in terms of a transfer from P to D only raises unnecessary difficulties in such cases.

VIII. A Question of Form: Justice by Principle or By Rule-Tethered Intuition?

I come back to the question at the heart of Dawson's Unjust Enrichment. Should we try to systematize the law of Restitution around a general precept along the lines of the Roman maxim? The problem at bottom is the familiar one of determining the ideal level of generality at which to formulate principles of law.232 If we were committed to a single theory of the good, then we might put a single principle expressing that theory at the head of the law. But people hold multiple, incommensurable theories of the good. A common solution in the law is to state a general principle in open-ended evaluative terms, such as reasonableness, injustice, or unconscionability, which can encompass multiple theories of the good. Such a precept does not deserve to be called a principle. It is an invitation to a judge or a juror to decide a case based on his own values or his

229. 11 U.S.C. § 548(a)(2) (regarding the right of Bankruptcy Trustee to avoid a transfer within one year of petition for which Debtor did not receive "reasonably equivalent value" if Debtor was insolvent at the time of transfer or had a sufficient prospect of insolvency).

230. In American property law, only a good faith purchaser or creditor may assert rights under a recording statute against a prior conveyee who failed to record his interest in the disputed property. See, e.g., CAL. CIV. CODE § 1214 (West 2001).

231. The other is the case where T and P both fully compensate D for a loss. See 4 PALMER, supra note 53, § 21 (entitling the chapter "Three-Party Problems: Restitution of Benefits by the Defendant from a Third Person").

232. See supra note 1 and accompanying text.

perception of the values of others. If such a morally open-ended legal precept is to have any bite at all, it can operate only in a local area like negligence, where we believe obligation ought to be determined case by case on a morally open-ended basis. While this is sometimes done in the law, it is unusual.

Another common solution is to state a principle in formal and nonsubstantive terms that abstract from cases within the principle.\(^{234}\) The definition of unjust enrichment in terms of a nonconsensual transfer from \(P\) to \(D\) has something of this quality. By nature, such formal principles must be local in operation. Even within their local area, such formal principles misfire for the same reasons formal rules misfire. The principle is opaque to the values it serves and therefore fails to properly serve those values.

Dawson's solution to this problem was to put the idea of justice that he thought animated the law of unjust enrichment on the table, but only as one idea against others, and then to put the idea back in the bag with the others while recommending that we follow the time-worn and narrow paths of the law.\(^{235}\) This puts him in the uncomfortable position of advocating a system of formal rules over a system of formal principle. Formal rules are likely to be even more opaque to the values they serve than is a principle with some formal elements, and, to that extent, formal rules are likely to serve those values less effectively. One reason for Dawson's position is that the precept that it is wrong to profit from the misfortune of another is overbroad. Generally, it is better that the law not try to reverse nonconsensual transfers when reversal cannot be done by rule because of the interests in minimizing litigation, promoting finality and certainty, and encouraging self-reliance. Embracing a precept decrying accidental shifts in wealth is a step in the other direction.

Dawson's argument is more complex. He argued there would be a loss not just of certainty, but also of justice in a system organized around the Roman maxim because of the shackles that would have to be placed on

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234. One rarely finds another possible approach in the law, which is to state one theory or value to the exclusion of others. This approach privileges the stated theory of the good or value over others. The idea that it is wrong to profit from the misfortune of another, if stated as a principle of law, would mislead by privileging that idea of justice, and ultimately the values it serves, over other ideas and values, in particular utility. Putting the principle of efficiency or utility at the head of the law misleads in a different direction. A monistic principle of justice can work only in a local area where we believe the stated good or idea of justice should dominate. United States law on freedom of speech shows some of the pitfalls inherent in this approach.

235. The theme that "adoption of this principle as a 'rule' of law would carry us far afield" runs throughout Dawson's book. DAWSON, supra note 1, at 7. But the end of the book strikes a more hopeful note: "Our own compilers, Professors Seavey and Scott, could scarcely have had the intention of leading us into the wilderness... We have done much and can do more to fortify ourselves. If we know the forest is enchanted we have not too much to fear." Id. at 151-52.
the principle if it were made explicit. A virtue of the common-law approach, Dawson noted, is that it obliterates the "distinction between direct and indirect enrichment" and so eliminates "a needless restraint on beneficial remedies." He also noted the corresponding vice of the common law's rule-bound approach, which is that it makes us "less generous than we could otherwise afford to be" in cases that would come within a general principle but fall outside the common-law rules.

Dawson's first point sets a fair amount of store by the ability of judges to decide cases correctly without becoming too entangled in rules. Leon Green, perhaps the leading American Torts scholar of his era (and Dawson's contemporary), said this explicitly in discussing the law of fraud:

"The elaborate formula with its multitude of sub-formulas . . . permit[s] the judge to range as freely as his judgment dictates. . . . The point to be stressed here is that whatever sort of judgment is desired, the formulas which have been evolved and their coteries of attendant phrases provide the most flexible accommodation without in the least impairing their own integrity or that of the judicial process. A science of law could ask little better by way of intellectual machinery for handling these varied and difficult cases."

Green and Dawson are making somewhat different points. Green is saying that judgments regarding deceitful conduct are not reducible to formulae. Dawson is saying that judgments regarding unjust enrichment too easily reduce to a formula, the principle "that no one be made richer through another's loss," which tends to overawe judgment because of its "strong appeal to the sense of equal justice" and the "delusive appearance of mathematical simplicity." What Green and Dawson share is a fair degree of trust in the moral intuition of judges and a fair degree of skepticism about the value of formulae.

This may not seem to be an intellectually respectable position today. In a recent essay, Birks gives short shrift to the argument that there should
be a space in the law for what he calls "intuitive conscience." His arguments, boiled down, are that reliance on intuitive conscience is an invitation to laziness, that it is illegitimate in a "complex, plural society," that it invites abuse of power, and that it is a "rejection of the rule of law." Birks’s arguments seem directed at the excesses of Critical Legal Studies and the view that law does not (or ought not) constrain judgment in any meaningful way. This view is despicable. It inaccurately depicts both what the law is and what it ought to aspire to be. But rejecting this extreme view does not require endorsing the polar view that all legal decisions of a moral sort are, or even ought to be, reducible to a formula that does not require a contestable moral or normative judgment at the point of application. There are some areas in the law, like negligence, where we may want moral judgments to be made case by case, and not just because the moral judgments are intensely fact dependent. The dilemma in the law of unjust enrichment is that we want decisions to be reducible to rules, but those rules fall short of doing justice to our instincts and to the principle that the best account of the law puts at its center.

To my knowledge, Birks has not taken a firm position on what judges should do in this gap between rule and principle. One could read him as saying in An Introduction to the Law of Restitution that a judge ought to reject a claim that does not fit within the traditional rules. He says, near the beginning of the book, that “[n]o enrichment can be regarded as unjust . . . unless it happens in circumstances in which the law provides for restitution.” But I doubt that Birks really means to say that the set of cases in which courts may order restitution closed sometime before 1985, the date of the first edition. He says what he does to persuade English judges to adopt unjust enrichment as an organizing concept. The English

243. Birks, supra note 10, at 20-22. I have not read the book he is responding to. He may be right on with regard to his target.

244. Id.

245. For a particularly silly example of this type of argument, see Joseph William Singer, The Reliance Interest in Property, 40 STAN. L. REV. 611 (1988), which moves from the banal observation that the law protects the reliance interest in many loosely cabined ways to the radical conclusion that therefore a judge could enjoin the closing of a plant because of the reliance of the workers and the community upon it.


247. Birks addresses the issue of judicial discretion at some length in Birks, supra note 28, at 16-17, 22-24. He is quite critical of it for largely the same reasons he is critical of intuitive conscience. Does this mean that Birks would limit restitution to the traditional grounds? If so, then what purpose is served by identifying the more general principle of unjust enrichment? If not, how are judgments outside the traditional grounds nondiscretionary? These questions remain unanswered.

248. BIRKS, supra note 33, at 19.
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bench had been notoriously stodgy about the matter. Lord Mansfield's invocation of the heavens of natural law in Moses v. Macferlan in 1760 may have put the fear of God in English judges' hearts. Birks drains the blood from the adjective "unjust" to reduce resistance to using unjust enrichment as an organizing principle. He does not quite say that a judge must reject a novel claim of unjust enrichment. He says, rather, that there is no reason "to doubt the ability or the will of the judges" to ignore "upward-looking" arguments. This leaves open the possibility that a judge may allow a novel claim if he thinks it just. The implication is that what is to be distrusted is "upward-looking" arguments to nonlegal norms. Birks does not foreclose the possibility of "inward-looking" arguments to norms immanent in the law, such as the precept that it is wrong to profit from the misfortune of another.

To get at the real difference between Birks's and Dawson's positions, it is useful to take a step back and consider the different ways we can organize a field of law. A field of law need not be organized around a general principle, and general principles can work in different ways. Here are four possibilities ordered by the strength of the general principle and the openness of the law to novel claims.

I. A strong general principle of prima facie obligation. The law of negligence is an example of this approach. The prima facie principle covers action foreseeably causing physical injury. In addition, for obligation to attach, the action must be unreasonable. What is reasonable tends to be decided on an ad hoc basis, in the United States by a jury, with little effort to be systematic or consistent.

II. A weak general principle of prima facie obligation. The law of tortious interference is an example. The prima facie principle covers action knowingly causing economic injury. In addition, for obligation to attach, the action must be unjustified or improper. What is unjustified or improper can be decided on an ad hoc basis, but rules are preferred, and value is placed on being systematic and consistent.

253. See Gergen, supra note 95, at 1175.
III. A general heading of obligation without a principle of prima facie obligation. The law of unfair trade practices is an example.254 A claim that falls outside the established categories of unfair trade practices is met with skepticism, but it is understood that larger, undefined ideas of fairness lie behind these categories and that a novel claim may be decided on their basis in an exceptional case. Claims that ground on general ideas of fairness are rare.

IV. No general heading of obligation. The law on inadvertent economic injury is an example.255 There is no liability for inadvertent economic injury except within established duties, which tend to be tightly drawn. The space for novelty is small and lies at the margins of these rules.

By now it is uncontroversial (even in England) that the law of unjust enrichment is, and ought to be, open to novel claims.256 This puts option IV off the table. Option I also can be put off the table. A few American cases to the side,257 there is no case support for putting the issue of whether enrichment is unjust to a jury under a general instruction that asks whether it would be reasonable or fair to require the defendant to compensate the plaintiff's loss out of his own gain.258 Dawson advocated an approach that is along the lines of option III. Perhaps Birks and others who would systematize restitution around a principle of unjust enrichment might choose an approach along the lines of option II. They have not said.

My suspicion is that Birks would prefer an option between II and III of a mostly inert general principle, meaning a general principle used to organize and understand the law, but with little normative force. The history of the tort of interference with business relations offers a cautionary tale regarding the possibility of maintaining an inert principle in the law.259 The interference tort descends from the work of Oliver Wendell

254. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1(a) cmt. g (1993); Gergen, supra note 246, at 467.

255. BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE 5-6 (1994) (observing that in American law, unlike that of the United Kingdom, economic negligence tends not to be thought of as a "subject of analysis" but instead it is seen as separate categories each with "a separate history and . . . a suitable subject for specific analysis").

256. For cases explicitly stating that the law is open to novel claims of unjust enrichment, see Murdock-Bryant Constr., Inc. v. Pearson, 703 P.2d 1197, 1202 (Ariz. 1985) (en banc) (allowing Sub to collect from co-venturers of General when Sub underbid because of General's misrepresentation regarding the extent of work to be done; the co-venturers were not liable for misrepresentation on other grounds), and Jeffs v. Stubbs, 970 P.2d 1234, 1244-45 (Utah 1998).

257. This handful of cases includes Gulf Life Ins. Co. v. Folsom, 907 F.2d 1115, 1119-20 (11th Cir. 1990) (following Gulf Life Ins. Co. v. Folsom, 349 S.E.2d 368, 372 (Ga. 1986), and Anderson v. Delisle, 352 N.W.2d 794, 796 (Minn. Ct. App. 1984)).

258. See Gergen, supra note 246, at 472-74.

259. For a fuller account of this history, see Gergen, supra note 95, at 1200-18.
Holmes and Frederick Pollock in the last quarter of the nineteenth century. Holmes and Pollock argued that Tort law was open to novel claims of wrong that did not fit within the existing torts. To capture this quality of openness and to organize Tort law, they proposed as a general principle that to knowingly injure another was prima facie a tort unless the actor could justify his injurious act. Holmes and Pollock recognized that this principle did not itself help judges resolve novel claims. The principle, rather, was meant to free judges just a bit. Over time, Holmes's and Pollock's principle of prima facie tort evaporated as an active general principle while leaving the residue of a categorical tort (of somewhat smaller dimension) that applied to knowing injury to contract or business relations. We now know it as the tort of interference with business relations. The application of this tort has become fairly routinized to the point where in the United States the issue of the impropriety of interference (what Holmes and Pollock called the issue of justification) has been given to the jury to decide when there is no settled rule. Meanwhile, claims that fall outside the established tort are rejected out of hand. The lesson is that over time general principles tend either to evaporate or to harden into formulae that judges apply mechanically as if the formulae did not require them to make difficult moral judgments.

In the end, there is no way to predict whether we will be better off in the long run if we embrace the precept that it is wrong to profit from the misfortune of another as being at the heart of a significant part of the law of Restitution. If we are to embrace it, then we must do so warily, mindful of the enormous gap between what the precept calls upon the law to do and what the law can prudently do. The American law of negligence suggests a technique for tethering the principle. We might insist that a novel claim of unjust enrichment be framed within a newly announced rule that applies beyond the immediate case. This is the flip side of the American law of negligence. A judge must allow a claim of negligence to go to the jury if there is arguably imprudent conduct that foreseeably caused physical harm, unless the judge decides the defendant was under no duty to the plaintiff. Such a no-duty decision must be made in the form of a rule.260 Ad hoc no-duty decisions are forbidden. Turning this around, we might insist there be no ad hoc unjust enrichment decisions, meaning that every decision must refer to a rule, albeit sometimes to a new rule.

While this is only a matter of technique or form, and not a substantive limitation, technique matters a great deal. Psychologically, the rule-making mindset—which is forward-looking, systematic, and prudential—tempers the backward-looking instincts of justice that lie behind the idea that it is wrong to profit from another's misfortune. The judge will be forced to think about what sort of claims may follow in the wake

260. See Gergen, supra note 246, at 431-32.
of the one before her if she grants it, and think about how her rule fits alongside existing rules. Practically, insisting upon a rule makes it more risky and more costly to bring novel claims because rules announced by lower courts are prone to being upset upon appeal, raising the specter of the need for retrial and multiple trips through the legal system to get a novel claim tried and affirmed under the correct rule. In the United States, to insist that a claim be grounded on a rule makes it clear that the normative question of what is unjust enrichment is for the judge and not the jury to decide. A requirement that decisions be rule-based would be even more constraining if rules were required to score high on the qualities of generality, permanency, objectivity, and clarity. But this is more than can be expected.

If I side with Birks over Dawson in favor of stating unjust enrichment around a general principle (and, in fact, I am so inclined), it is for a reason that Dawson did not anticipate. Dawson’s advice not to systematize Restitution around a principle of unjust enrichment assumes a familiarity of judges and lawyers with technical legal doctrine that no longer exists. To combat this ignorance we need to provide a coherent account of the law of unjust enrichment that is expressed in terms that resonate with human sensibilities. We no longer have the luxury of suppressing the idea of justice that is at the heart of the law of unjust enrichment, for expecting lawyers to hold in mind a body of doctrine that has no evident animating principle demands more faith in the law than today’s lawyers possess.

261. For laments about the widespread ignorance regarding Restitution, see Laycock, supra note 42, and Kull, supra note 103. For a striking example of such ignorance from a court, see Waldrop v. S. Co. Servs., Inc., 24 F.3d 152, 157 (11th Cir. 1994) (describing restitution as a doctrine in Equity). Cf. RESTATEMENT, supra note 57, 5-6 & § 4.