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What's Wrong with Restitution

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WHAT'S WRONG WITH RESTITUTION?

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The law of restitution has developed out of the law of quasi-contract and the law of constructive trust. Inadequate attention to the logic and coherence of doctrines in the law of restitution, however, renders this new law as opaque and confused as its predecessor. This is largely due to the remedial mentality of the common law. The remedy to the remedial mentality is to concentrate future efforts in stating doctrine on defining rights, not remedies. The precedent for this type of change in method is the transformation that occurred in contract and tort over the past 100 years, inspired, in part, by civilian theories of private law.

The right that generates the remedy restitution is the cause of action in unjust enrichment. It arises where there has been a non-consensual receipt and retention of value, that is, a receipt and retention of value that occurs without "juristic reason." "Non-consensual" means by mistake, by theft or by finding.

There are a number of problems in the method of the common law tradition which stand in the way of recognizing this simple formulation: (a) The inherent expansiveness of "restitution" and "unjust enrichment" if these terms are not rigorously defined; (b) The lack of serious competition for the expansive versions of the subject, on a number of fronts; (c) The lack of a clear direction in the efforts to reform the law of quasi-contract and constructive trust; (d) The deeply embedded nature of the quasi-contract thinking; (e) Poor analysis in some areas of the law of contract and (f) Tort; and (g) The lack of an explicit agency of reform in the tradition.

Le droit en matière de restitution émane du droit du quasi-contrat et du droit de la fiducie d'interprétation. Mais l'attention insuffisante accordée à la logique et à la cohérence des doctrines du droit en matière de restitution rend ce nouveau droit aussi opaque et flou que le précédent, ce qui est largement attribuable à la mentalité remédiatrice du common law. La façon de contrer cette mentalité est d'axer les efforts futurs de définition de la doctrine sur la définition des droits et non des réparations. Ce changement dans la façon de procéder a son origine dans la transformation survenue dans le droit contractuel et le droit de la responsabilité délictuelle au cours des cent dernières années, et inspirée, en partie, des théories civiles de droit privé.

Les actions en matière de restitution ont pour objectif de remédier à l'enrichissement sans cause, c'est-à-dire la réception injuste et la rétention d'une valeur sans motif juridique et sans consentement — à la suite d'une erreur, d'un vol ou d'une découverte fortuite.

La méthode de la tradition de common law comporte certains problèmes qui empêchent de reconnaître cette simple formulation: a) le caractère expansif inhérent de la restitution et de l'enrichissement sans cause; b) l'absence de concurrence sérieuse pour les versions expansives du sujet sur plusieurs fronts; et c) l'absence de direction claire de la réforme du droit du quasi-contrat et de la fiducie d'interprétation; et g) l'absence d'une agence explicite de réforme dans la tradition.

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I. INTRODUCTION

> The proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth. The notion that law exists as a means to an end has been commonplace for at least half a century. There is, however, no justification for assuming, because this attitude has now achieved respectability, and even triteness, that it enjoys a pervasive application in practice. Certainly there are even today few legal treatises of which it may be said that the author has throughout clearly defined the purposes which his definitions and distinctions serve. We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed? Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomforting relevance to legal science.[1]

Lon Fuller and William R. Perdue wrote these words over sixty years ago. They form the first paragraph of their celebrated article, "The Reliance Interest in Contract." The concepts introduced and developed in that article – the "reliance interest" in particular, but also, the "restitution interest" and the "expectation interest" – and the role given these concepts in their theory of contract damages, have had a profound influence on the development of private law in the English-speaking world. There have been few similarly innovative private law concepts — one thinks of "security interest," "unconscionability," "inequality of bargaining power," "the oppression remedy" — that have had as much impact on the development of the law as the "reliance interest."

It is suggested in the introduction to this paper that the argument of "The Reliance Interest in Contract" rests on four related errors that have, over the years, been responsible for as much harm in the development of Anglo-American private law as the arguments in the article originally sought to remedy.[2] These same errors, which are

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1 L. Fuller & W.R. Perdue, "The Reliance Interest in Contract" (1937) 46 Yale L. J. 52 at 52, (1937) 46 Yale L.J. 373.

2 The original contribution sought to remedy the common law's (and the *Restatement's*) preoccupation with expectation damages and restitution and its consequent distortion of the availability of reliance damages. It did this in part by analyzing the kinds of loss that can occur on a breach of contact and the logical relationship among the various kinds of loss. All of this was original and path-breaking. The article also argued that the reliance interest is mainly promissory and therefore, wherever the impulse to protect it occurs, there generally is a promise, even if the law does not consider that promise legally binding or enforceable. That was also an original and

characteristic of Anglo-American legal reasoning generally, have had a singularly negative influence on the development of the law of restitution. In starting with the errors of two eminent American jurists, it is not our intention to isolate their article for any particular blame. Although the arguments expressed in it constituted a highly original contribution to the private law scholarship of its time, much of what Fuller and Perdue wrote was a reformulation or a clearer articulation of already existing common law thinking on contract damages. Their method of argument was characteristically of the common law tradition. "The Reliance Interest in Contract" was and remains a milestone in common law scholarship as much because of its resonance with existing themes and currents of thought, as for the quality and originality of the thought.

The first mistake is contained in the opening claim just quoted. They state that the key to the resolution of most problems in the law of contract damages is to be found in the "purposes" or "functions" of contract law. Still early in the argument, they express this thought in the following way: it is "impossible to separate the law of contract damages from the larger body of motives and policies which constitutes the general law of contracts."[3] To be sure, it would be misguided to maintain that social, economic and moral contexts of contract law are irrelevant to its explanation or understanding. It is hardly debatable that the precise scope of contractual ordering in society is something about which there is much choice and that in this determination issues relating to the proper purposes of contract law should be addressed. That said, however, the starting point of any *legal* inquiry into the law of contract ought to be with the form or idea of contract, not, as Fuller and Perdue suggest, with its function.[4] Stated differently, in an investigation of damages in contract, one should start with what contract is, not why contract is.[5] Yet Fuller and Perdue expressly set this formal question aside as a "conceit" based on a naive belief in the possibility of "manipulating" legal concepts.[6]

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valuable contribution.

3 Fuller & Perdue, *supra* note 1 at 53.

4 The notion that the law of contract and the law of contract damages is explicable entirely in terms of some social policy was picked up in subsequent writings. See *e.g.*, P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon, 1979); L.M. Friedman, *Contract Law In America, A Social and Economic Case Study* (Madison: University of Wisconsin Press, 1965); G. Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974); M.J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University, 1977); and I.R. Macneil, *The New Social Contract: An Inquiry Into Modern Contractual Relations* (New Haven: Yale University Press, 1980). See also, C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981) at 3, where he wrote: "[I]t is a point of some of these critics ... that the search for a central or unifying principle of contract is a will-o'-the-wisp, an illusion typical of the ill-defined but much excoriated vice of conceptualism. These critics hold that the law fashions contractual obligation as a way to do justice between, and impose social policy through, parties who have come into a variety of relations with each other...."

5 Similarly, modern social policy analysis is built on fairly rigorous definitions of the foundational precepts. These are assumed or expressly supplied and include the first law of demand in economics and the impossibility theorem in social choice theory.

6 Maybe all that Fuller & Perdue, *supra* note 1, meant by this is that legal concepts available in the common law tradition at the time of the writing of that article were unhelpful in understanding law and solving disputes, and that the purposes of contract law referred to throughout their article are

This functional orientation in their argument leads to two further errors. In setting out to discover the purposes "which may be pursued in awarding contract damages,"[7] Fuller and Perdue claimed it did not matter

> how the suit in such a case be classified, whether as contractual or quasi-contractual, whether as a suit to enforce the contract or as a suit based upon a rescission of the contract. These questions relate to the superstructure of the law, not to the basic policies....[8]

Thus setting the formal questions to one side, they proceeded to identify the three "purposes" of contract damages: the protection of the plaintiff's restitution interest or the prevention of unjust enrichment; the protection of the plaintiff's expectation (gross and net) interest; and the protection of the plaintiff's reliance (essential and incidental) interest. They observed that the first may be a special case of the third. In a peculiar passage they said:

> If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.[9]

This is peculiar because it suggests that claims to judicial intervention are capable of quantification.[10] The first of these aforementioned errors is the dual transformation in

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really just what we are referring to here as the cause of action for breach of contract. The instrumentalist rhetoric of their analysis might be explicable on the basis that it was the fashion of the time. Certainly, the first point – about the inadequacy of available legal concepts – is true, but is perennially true and dealing with it is one of the tasks of the academic lawyer. Perhaps their aspiration was the same as Lord Wright expressed in the following passage from a contemporaneous article on a related topic: "One result must be that a large part of the cases in the books become superannuated, as dealing with obsolete views of forms of action.... The student of English law must learn to distinguish what appertains to the substance of the law. He cannot now excuse himself from a logical analysis of causes of action." See L. Wright, "Case Comment on *United Australia, Ltd.* v. *Barclays Bank, Ltd.*" (1941) 57 L.Q. Rev. 184 at 198. But in the end, we have opted for a less charitable reading of their intention on this score, partly because of subsequent events and partly because their rhetoric against formalism is so strong. See, *e.g.*, their second paragraph which reads: "In no field is this more true than in that of damages. In the assessment of damages the law tends to be conceived, not as a purposive ordering of human affairs, but as a kind of juristic mensuration. The language of the decisions sounds in terms not of command but of discovery. We *measure* the *extent* of the injury; we *determine* whether it was *caused* by the defendant's act; we *ascertain* whether the plaintiff has included the *same item* of damage twice in his complaint. One unfamiliar with the unstated premises which language of this sort conceals might almost be led to suppose that Rochester produces some ingenious instrument by which these calculations are accomplished." See Fuller & Perdue, *supra* note 1 at 52.

7 Fuller & Perdue, *ibid.* at 53.

8 *Ibid.* at 54.

9 *Ibid.* at 56.

10 J. Dawson made a similar point in *Unjust Enrichment, A Comparative Analysis* (Boston: Little, Brown & Co., 1951) at 5: "But if this loss can be located and identified in the gain received by another, the anguish caused by the loss will be felt as more than doubled." The idea underlying these two observations is that the justness of a plaintiff's claim where there is an unjust enrichment is perhaps more obvious than where the claim is based in civil responsibility or contract. We are

the discussion from (1) the nature of contract to a discussion about the nature of remedies for breach of contract, and then (2) from the nature of the remedies available for a violation of rights to a discussion of the interests protected by those remedies. It is contended that this is a move away from the category of corrective justice to something else, perhaps desire, perhaps distributive or discretionary justice. The difficulty this move creates is that it subsequently becomes logically problematic to express the idea that the nature of the remedy is necessarily determined by the nature or kind of right violated and the manner of its violation. The second error of this functional approach is the isolation of "restitution" as an organizing idea in private law. Fuller and Perdue identify it as an interest in the context of contract law, but it subsequently became a category of private law obligation in its own right.[11] These two ideas together invert and contort the Latin maxim — *ubi jus, ubi remedium* — into "here is a remedy, what is the explanation?" The direction of inquiry is subsequently diverted from a search for the proper formulation of the rights to the search for "explanations" for remedies.

The last mistake of this seminal article is the argument that the justification for expectation damages is especially problematic because expectation damages do not correspond to any plausible interpretation of compensation. They claim that expectation damages are therefore an instance of distributive justice, not corrective justice, and in protecting the expectation interest, the law "ceases to act defensively or restoratively, and assumes a more active role."[12] In their search for a justification for expectation damages, they settled on a two-part "juristic" explanation.[13] The first part of this explanation is that protecting "expectation" serves as a surrogate for protecting what they clearly perceived to be the more important reliance interest, since the promisee's reliance on the promise includes the promisee's forgoing other opportunities. This is the opportunity cost of contracting with the promisor. The second part of the explanation is that protecting reliance in this way serves to promote it and that, in turn, facilitates commerce. This juristic explanation is complemented by an "economic" explanation to the effect that the distinction between present and promised value is eliminated in a credit economy and, therefore, the expectancy created by a promise in present property which is injured on breach. Since this second argument assumes that a promise is legally enforceable, it does not explain why a promise is legally enforceable. Instead, Fuller and Perdue, saw the juristic and economic arguments as complementary and as constitutive of the foundations of contract. Their mistake was their failure to discern

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not sure that this is true, but it might be. The victim of a theft certainly has an appealing argument for the return of the stolen article. The appeal of that claim may or may not be stronger or more obvious than the appeal of the claim made by the victim of a broken promise to at least the value of the promise, and the appeal by the claim of the victim of somebody else's carelessness to compensation for the loss caused.

11 There were many other influences in this development besides that of Fuller & Perdue. For the origins of the terminology, see, *e.g.*, L. Hand, "Restitution or Unjust Enrichment" (1897) 11 Harv. L.R. 249 and *Restatement of the Law of Restitution, QuasiContracts and Constructive Trusts* (St. Paul: American Law Institute, 1937) at 1-10 [hereinafter *Restatement of Restitution*].

12 Fuller & Perdue, *supra* note 1 at 56.

13 *Ibid.* at 58-64.

the true "form of contract" and in light of that, the essentially unproblematic nature of expectation damages.

It is "trite," as they said, to recognize that there are reasons for having contract law, there are reasons why individuals make contracts, that contract law can be explained, and that people have and pursue interests. It is equally true, but not, in the common law tradition, necessarily trite, to observe that the thing we have — "contract" — is capable of definition prior to its use. Contract is constitutive of rights not interests, the characteristic (but not sole) right it creates is the right to the prestation[14] of the promise — the "expectation interest." The remedial response of "restitution" is inadequate as an organizing idea in law because it names something that follows a violation of a right and therefore, logically, must come after a description of rights.[15] Fuller and Perdue, however, said to the contrary:

> If these ancient boundaries were erased, it would become possible to analyse the general problem of the legal sanction to be given expectancies created by words or conduct in terms of the policies involved, and it would be perceived that these policies cut across distinctions in the "nature" of the obligation. This would in turn promote a desideratum already recognized, — that the obvious (though generally unexamined) interrelations of contract, deceit, estoppel, and warranty be brought into some coherent pattern.[16]

Yet the coherent pattern for which they searched lies in the very "nature" of the obligation which they, and others following them, set aside at the outset.

Our intention in this paper is to offer a partial answer to the question that is the title of this paper: What is Wrong with Restitution? The thesis of this paper is that the body of law that is called "restitution" is lacking a description of the right or rights that ground its remedy. The start with "The Reliance Interest in Contract" is relevant because the errors identified there are the principal errors in this area of law. The first, the exclusive, or at least premature, preference for function over form, is not as theoretically advanced in the law of restitution compared to the law of contract. This is partly because the underlying form has not been fully identified and therefore, is not as easily corrupted. The functional explanations one finds in the law of restitution are less grand, more intuitive: restitution lawyers speak of "policy" reasons or doctrinal "rigidity" or historical error in their explanations, as opposed to, say, "efficiency" reasons. The second error is the failure to construe judicial responses as merely vindications of prior rights. The third related error is the tendency to focus on remedies, and restitution in particular, as a subject worthy of study in itself. Here, the irony of our present difficulties is especially poignant. The antidote that the legal community now

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[14] A prestation is the "object of an obligation ... that the debtor is bound to render to the creditor and which consists in doing or not doing something." See Art. 1373 *Civil Code of Quebec* [hereinafter C.C.Q.].

[15] As P. Birks argues the word "restitution" cannot stand in the same series as "contract" or "tort." "Contract" and "tort" denote "events" which trigger legal responses while "restitution" denotes a response triggered. See P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 9-12 [hereinafter Birks, *Introduction*].

[16] Fuller & Perdue, *supra* note 1 at 419.

applies to remedy the doctrinal confusion inherited from the quasi-contract and constructive trust fictions is in fact the very poison from which it suffered — the preoccupation with remedies. The fourth error is the failure of the common law to discern the true nature of the "restitution" argument, the cause of action in unjust enrichment and, therefore, the unproblematic nature of the subject. In short, all of these related errors arise from the view that the controlling or master normativity in private law is to be found at the level of judicial remedies, when, in fact, remedies are driven entirely by rights and circumstances. Name the right, define it, and the rest is mere application in light of the circumstances. More juris, less prudence.

The argument of the paper is divided into two parts. The first part outlines a preferable way of thinking about private law doctrine and, in particular, the law of restitution. The second part identifies specific doctrinal barriers in the way of moving to the preferable structure. All of these doctrinal barriers, more or less, have arisen because of the way we think about private law.

The preferred way is the way of the civil law tradition, but solely as a matter of mentality, not doctrinal outcomes. The precedent for this leap from common law to civil law epistemology is the leap common lawyers made a century ago when they adopted the ideas of contract and tort from the civil law to rationalize the law in these areas.[17] The next steps in this process are more difficult for a variety of reasons. Some of these will emerge as we progress through the arguments in this essay. Essentially, the theme is that the move out of quasi contract and the constructive trust is stalled because of tradition's pragmatic and functional mentality.

It might be thought that if even a quarter of what is about to be said is true, the common law tradition is on the verge of some sort of disaster. That, however, is not a part of the argument, nor does it necessarily follow. Perhaps the worst that will happen is that civilians will continue to be amused by the poverty of our legal reasoning, which is very clearly conveyed to them as much by the incoherence of our legal doctrines, as by the defection of common law legal academics to other disciplines for sources of intelligibility. The argument presented here is concerned largely with the common law as an intellectual tradition and therefore with intellectual vices and virtues, such as coherence, consistency and intelligibility. These virtues probably contribute less to the efficacy or justness of the law than other factors, such as the judge's respect for the facts, his or her desire to establish an authentic narrative of the case, and his or her regard for justice. Even though giving reasons and deciding like cases alike is of some

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[17] For a description of this process, see J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991) [hereinafter Gordley] at 134 ff. See also, A.W.B. Simpson, *History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975) and A.W.B. Simpson, "The Horowitz Thesis and the History of Contracts" (1979) 46 U. Chi. L. Rev. 533. For an argument that civil law tradition significantly informed the common law in earlier times, see P. Vinogradoff, *Roman Law in Medieval Europe*, 2d. ed. (Oxford: Clarendon Press, 1929) at 97 where the author states: "Civil law did not become a constituent element of English common law acknowledged and enforced by the courts, but it exercised a potent influence on the formation of legal doctrines during the critical twelfth and thirteenth centuries...."

importance, these tasks need only be done or achieved, most of the time, to a reasonable standard. One of the few virtues of the common law methodology is that few judges ever take its output — the ratios of decisions — seriously enough to be led into serious error.

II. REMEDYING THE REMEDIAL MENTALITY

A. SOURCES OF OBLIGATION, ETC.

Common law doctrine and its study have undergone numerous momentous changes over the past two hundred years. These changes have been influenced by a variety of factors, some internal and some external to the law. A list of the obvious ones includes: changes in the organization of legal education and changes in the organization of the practice of law; developments in English legal philosophy and the ready incorporation of some of these developments into private law doctrine; the influence of the civil law and civilian thinking, especially in the law of obligations;[18] and the Judicature Acts.[19] There is a cultural dimension to the developments — it is possible to speak of American, English, Canadian and Australian traditions or patterns of thinking. But there are plenty of indications of trans-national influence and a growing recognition in most jurisdictions that the value of a precedent is not solely a function of its source. In some areas of private law theory, the arguments transcend national culture so that we have "tort theory" and "tort theorists" and a "law of contract," with no explicit or implicit adjectives that situate the subject studied in any particular legal culture. Much of this trans-national common law, though, still shows its distinctive Anglo-American roots.[20] The nature of these processes, their causes and sources are diverse. Many of the developments will remain of exclusive interest to academic lawyers, with few consequences for the practice of private law, others will not: judges now regularly cite academic scholarship in Canada; the Restatements[21] and the Uniform Commerical Code were largely academic projects; and everyone has heard of Richard Posner and the theory of efficient breach.

The law of restitution has remained, in large measure, impervious to the progressive elements in these developments. Very few changes have occurred in the law of restitution over the past two hundred years which are not capable of being accounted for by the gradual evolution that one would normally expect from a precedent-based system of law. Civil responsibility and contract, by contrast, have been at the centre of the developments and have undergone enormous transformations. To explain why they

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18 Gordley, *ibid.* at 34 ff.

19 *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict. c. 66. See also, the *Courts of Justice Act*, R.S.O. 1984, c. 11.

20 Nicely captured in the phrase "traditional splendid isolation" of Anglo-saxon legal science. See J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992) citing an Italian reviewer of a collection of essays for Tony Honore, at xv.

21 Besides the *Restatement of Restitution*, *supra* note 11, other influential Restatements include: *Restatement of the Law of Contracts* (St. Paul: American Law Institute, 1932), *Restatement of the Law (Second) of Torts*, 2d ed. (St. Paul: American Law Institute, 1965) and *Restatement (Second) of Agency* (1957).

are further advanced one might begin by looking to developments in private law in the nineteenth century, where borrowing from civil law writing aided in the development of greater doctrinal integrity. This, in turn, led to the earlier achievement of consensus on the structures of contract and civil responsibility and the possibility of scholarship about their details, meaning, implications and legitimacy.[22] It is probably also true that these subjects are of much greater relevance to society generally in the sense that contracts and the occasions of civil responsibility occur more frequently in society than the occasions — whatever they may be — that give rise to a need for restitution. John Dawson argued that the principle against unjust enrichment is always a latecomer in legal systems.[23] A test of the overall accuracy of the general thesis that contract is further advanced than restitution might be the following: What argument is there in the law of restitution that is at once as intuitively shocking and intellectually appealing as the theory of efficient breach?[24] That the theory of efficient breach shocks is a measure of the strong appeal of the underlying moral principle that promises are to be kept. It appeals to us, nonetheless, because the English tradition of private law has been questioning the nature and justification of expectation damages for so long — since "the Reliance Interest in Contract" — that a theory that seems to explain them so elegantly has to be, at the least, of compelling interest. Restitution, by contrast, lacks both a foundational moral principle and doctrinal structure stable enough to throw up such a good basic issue. The fact that it names a legal response, in the same way that "damages" or "injunctions" do, and that it is available as a remedial response in contract, tort, Equity, and elsewhere, as well as in "restitution," is preciously emblematic of this difficulty.

In the case of restitution, and related areas such as property law and some of Equity, there is still a clear and distinct forms-of-action mentality. Almost all the modern

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22 But even in these more advanced areas of the common law, there are sometimes failures to discern structure. Three examples are sale, partnership and fiduciary duties. (1) On sale: As late as 1976 it was thought relevant and pertinent to make the following remarks on the relationship between sale and contract: "In principle it is not easy to see why the law relating to contracts for the sale of goods should be different from the law relating to the performance of other contractual obligations.... Sale of goods law is but one branch of the general law of contract. It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law." *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H.*, [1976] 1 Q.B. 44 at 71 (C.A.), Roskill, L.J. See also the decision of Lord Wilberforce in *Reardon Smith Line Ltd.* v. *Hansen-Tangen* (The "Diana Prosperity"), [1976] 2 Lloyd's Rep. 621, 3 All E.R. 570 (H.L.). (2) On partnership: Contrast the clarity of the C.C.Q. on partnership with obscurity of the partnership acts in the various common law provinces. In the latter the foundational idea of mutual agency is barely recognizable. (3) On fiduciary duties: The prevailing view is that the trust and other fiduciary duties are not sourced in contract, but in "equity." That view confuses the distinction between the source of an obligation (contract) and its nature or essence (the obligation of loyalty) maintaining that the latter requires positing (Equity) to be imperative. See, *e.g.*, H.A.J. Ford & W.A. Lee, *Principles of the Law of Trusts* (Sydney: Law Book Co., 1983) at 35-38 for a brief history of the "not-contract" error.

23 Dawson, *supra* note 10 at 39-40.

24 See R. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998). Or the theory that the function of tort law is to reduce the cost of accidents, see G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970).

writers, despite their acceptance of the "principle" against unjust enrichment, accept it to a significant extent.[25] John Dawson likewise observed:

> English law is riddled with distinctions, not only between law and equity, but between money and goods and other types of interests, between *jura in re* and *jura in personam*, between money in bags or stockings and money in bank accounts. The old forms of action have greater influence now than before their abolition in 1873. When one reads modern English discussions of the subject, one has the sensation of being suddenly transported to the Middle Temple in 1603 to overhear some fresh debate on *Slade's Case*.[26]

The root cause of the problem is that there are few explicit foundational principles in the common law and fewer still that are native to it. As a precedent-based normative system, its dominant concept of systemic integrity is that like cases be treated alike. Many of its internal organizing ideas are therefore, of necessity, based either on (1) apparent commonalities within a selected group of cases — assumpsit, the common counts, and restitution are pertinent examples in the present context or (2) historical continuity, with Equity and the trust as pertinent examples in the present context. The method is sometimes described as pragmatic, flexible, and conducive to certainty and evolutionary development. Holmes' dictum that experience, not logic is the life of the law is the motto.[27] The main engine of explicit change within the system as a whole, and within restitution in particular, is "policy" or "equity" in the face of "new circumstances," often bolstered by overtly historicist arguments.[28] Fictions and plain

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25 This can be seen in the organization of some of the leading textbooks which still adopt, of necessity (in order to state the law) the old forms of action classification of doctrines. See, *e.g.*, L. Goff & G. Jones, *The Law of Restitution*, 4th ed. (London: Sweet & Maxwell, 1993) [hereinafter Goff & Jones, 4th ed.]; and see P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990) and A. Burrows, *The Law of Restitution* (London: Butterworths, 1993). See also A. Burrows & E. McKendrick, *Cases and Materials on the Law of Restitution* (Oxford: Oxford University Press, 1997). A major exception is Birks, *Introduction*, *supra* note 15.

26 Dawson, *supra* note 10 at 16.

27 A similar point is made by B.S. Markesinis, "Judge, Jurist in the Study and Use of Foreign Law" (1993) 109 L.Q. Rev. 622 at 623: "... the English judicial mind is at its best when handling, defining and re-defining complex case law rather than when it is forced into theorising system building and deductive reasoning. For the English judge would, instinctively, feel much sympathy for Goethe's words 'Grey, my dear friend, is all that theory is, and green the golden tree of life' until, that is, he is reminded that these words are put into the mouth of Mephistopheles, at which stage judicial caution may lead him to invoke the words of the more respectable Mr. Justice Holmes ... when he claimed that the life of the law has not been logic, it has been experience."

28 For example, late twentieth century common law writers often dismiss nineteenth century doctrine for being classical liberal and individualistic and, as if it followed, therefore, closed to the possibility of claims in unjust enrichment. One author — the caricature is so common one hesitates to cite anyone in particular — has stated that "historically the common law's attitude towards one who mistakenly provided non-monetary benefits to another ... was tight fisted and fiercely individualistic." See also McLachlin J. in *Peel (Regional Municipality)* v. *Canada*, [1992] 3 S.C.R. 762, 98 D.L.R. (4th) 140 [hereinafter *Peel*], and Dickson J. in *Hydro Electric Commission of the Township of Nepean* v. *Ontario Hydro*, [1982] 1 S.C.R. 347, 132 D.L.R. (3d) 193 [hereinafter *Nepean* v. *Ontario Hydro* cited to S.C.R.]. This type of characterization is unfortunate because it engenders the belief that all "old" law is tainted because of political ideology, rather than accepting the more plausible hypothesis that doctrinal errors occurred then, as now, because of misguided

ignorance in the face of impossible complexity are two engines of implicit change. But there are few inward turns to the implicit form or logic at the foundations of the thought. In a not too flattering sense, the common law is practical and pragmatic: it is *ad hoc* or 'situationist.' Yes, it responds, often creatively and sensibly, to problems when they arise and it has a rich armoury of "tools" to do the job. But the total resulting product is as though a thousand well-equipped carpenters, without a plan and whose only means of communication and coordination is the actual work they produce, combined together to build a hotel.[29] The impression is of a system that is rich in ideas, methods and ways of organizing itself, but deficient in understanding. Although this description is not true of contract and tort, it is true, depressingly so, of restitution. What is needed in the law of restitution is a formal structure.

It is at this juncture that the civil law tradition is helpful. The civilian mentality is rationalist. It consciously constructs and deploys structures of ideas — universal and particular, principle and instantiation, substance (or essence) and attributes, rule and application — systematically in the articulation of its rules. Civil codes are an obvious product of this mentality; one can readily understand that such comprehensive expressions of the principles of private law can only be achieved through a well-structured articulation. "Obligation" is a general abstract idea, developed in detail doctrinally by academic writers and in civil codes in a number of directions. First it is defined and its form is identified.[30] Then it is articulated horizontally by providing analysis of its temporal and logical modalities, and the modes of its transfer, alteration, performance and extinction. It is also articulated vertically, down through its various sources, or efficient causes, in contract, civil responsibility, and unjust enrichment (and others, including, importantly for present purposes, *negotiorum gestio*), and from there down further to nominate contracts or nominate torts.[31] Paradoxically, rationalism proves more pragmatic than pragmatism because its emphasis on coherence tends to guarantee economy of thought and of concepts, and because it is prudently parsimonious in its deployment of logical and normative necessity. It thus leaves vast room for contingencies and circumstances in application. The law, as a consequence, can be stated in surprisingly few propositions.[32]

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allegiance to unnecessary legal fictions and separate categories of rules (*viz.*, quasi-contract, Restitution and Equity).

[29] A more charitable explanation is given by F.H. Lawson when he commented the common law is "less of a formal system of thought than a diffused wisdom derived from the collective tradition of a profession and from long personal experience in the handling of legal problems." See F.H. Lawson, *The Rational Strength of English Law* (London: Stevens & Sons, 1951) at 29.

[30] Art. 1371 C.C.Q.: "It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act [*e.g.*, a contract], a cause which justifies its existence."

[31] The C.C.Q. starts with Obligations in general (Arts. 1371-1372), then proceeds to define Contract and Civil Responsibility (Art. 1377 ff. & 1457) and then finally defines special rules for nominate contracts such as sale, gift, lease, employment and mandate (see *e.g.*, 1708-2643, 1806-1841, 1851-2000, 2085-2097 & 2130-2185) and nominate cases of civil responsibility for children, animals and buildings (see *e.g.*, Arts. 1459, 1466 & 1467).

[32] For example, general liability for fault is set out in Art. 1457 C.C.Q. which states: "Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another." Similarly, Art. 1382 *Code Civil* [hereinafter

Another range of ideas classifies the legislative participation in the articulation of private law into rules of logically different types. The legislator may attempt to state the essential characteristics or the real definition of an institution: the contract of sale, for example, by stating that sale is translative of title.[33] This type of rule is imperative not because it is posited, but because it is, plain and simply, true. The legislator may also state imperative rules declarative of some underlying public policy, or in civilian terminology, "public order."[34] Provisions "of public order" do not concern the form of a legal institution, but rather their legitimate use and proper social and economic content and operation. For example, contracts may not be used for purposes inimical to the common good.[35] A legislated rule may also be suppletive. If addressed to private law actors, a suppletive rule is one that, in the absence of facts indicating an explicit or implied contrary intention, will be taken as the actors' intention. In effect, suppletive rules of this type are estimations by the legislator of what is typically intended by people in a given range of circumstances. If addressed to an adjudicator, a suppletive rule suggests a solution to a given range of cases ready-made for the circumstances in the absence of facts indicating a contrary solution. It is an "off-the-shelf" application of a rule to a set of circumstances.

Another useful idea distinguishes between juridical facts and juridical acts.[36] Obligations have their source (efficient cause) in one or the other. The first, juridical fact, is a state of affairs to which the law attaches the legal consequence that an obligation is owed, *e.g.*, fault causing loss raises an obligation of reparation. The second, is an act manifesting the will of a private law actor, *e.g.*, a promise or a will. The classification of juridical acts and facts is a classification of fact situations, for legal purposes, useful because it facilitates explication.

The concept of cause of action in the common law tradition identifies a related range of ideas. A cause of action is a general argument for judicial intervention. One might

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C. civ.]. says "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à la réparer."

33 Thus, as Art. 1708 C.C.Q. states: "Sale is a contract by which a person, the seller, transfers ownership of property to another person, the buyer, for a price in money which the latter obligates himself to pay." Therefore, the "essence" of the contract of sale is "title for price," and every contract that is to be considered a contract of sale must instantiate this essence.

34 As Art. 9 C.C.Q. states: "In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order." See also, Art. 6 *C. Civ.*, which states: "On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs."

35 An example of a public order provision can be found in Art. 25 C.C.Q., which states: "The alienation by a person of a part or product of his body shall be gratuitous; it may not be repeated if it involves a risk to his health." Or Art. 1131 *C. civ.*, which states: "L'obligation sans cause, ou sur fausse cause, ou sur une cause illicite, ne peut avoir aucun effet."

36 Art. 1372 C.C.Q., defines the source of obligations as the following: "An obligation arises from a contract or from any act or fact to which the effects of an obligation are attached by law." This, however, is generally seen as an incomplete expression of all possible sources. See J.-L. Baudouin, *Les obligations*, 4th ed. (Cowansville, Que.: Yvon Blais, 1993) at 31-32. Therefore, this bipartite classification of juridical act and juridical fact is the preferred solution in Quebec and in France. See, *e.g.*, Baudouin, *ibid.* at 31-33 and P. Malaurie & L. Aynès, *Cours de Droit Civil*, t. 2, 3d ed. (Paris: Éditions Cujas, 1994) at 75.

think in terms of two main ones, civil responsibility and unjust enrichment, or three, the third being breach of contract.[37] Contract and civil responsibility were obvious candidates for nineteenth century common lawyers. Promises and civil responsibility have moral force and respond to time-honoured convictions about justice. If X promises to do something, X is obliged. If X is responsible for injury to his neighbour, X is obliged.[38]

These collectively are some of the foundational ideas in private law argument.[39] Like the elementary models of the economist or public choice theorist, these ideas constitute the simple normative reality on which complex and useful sciences of human action are built.

Our task in this essay is not to identify or define all the possibilities of coherent classification. Rather it is to use this way of thinking, and the main ideas mentioned — obligation, imperative and suppletive rules, juridical fact and act, and causes of action in civil responsibility, unjust enrichment and for breach of contract — in a critique of restitution. Since the recourse is to mentality and key structural ideas, there is no suggestion that any specific doctrinal solution reached by civilians is necessarily good or right, nor is there any suggestion that the common law would benefit from codification.[40] Rather, the argument is that there is much to learn from this way of reasoning.[41]

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37 The reason for doubt here is that a breach of contract might more properly be considered as merely an instance of civil responsibility. One might also divide civil responsibility further into its constituent elements, such as intentional torts and negligence. The simple two-part classification, however, makes considerable sense. If one thinks of the structure of private law argument, there is, at the point of judicial intervention, a claimant (creditor) and a respondent (debtor). The claimant's argument is either he has suffered some harm for which the respondent is responsible (due to fault, breach, or because it was caused by something or someone in the respondent's control) or that the respondent has some thing or some value which he must return to the claimant.

38 As Lawson has argued: "[T]he chief value of the study of the Civil Law for common lawyers is to show the importance of clear cut concepts, to demonstrate ... how a well devised set of principles and concepts can provide the elements for innumerable combinations, which fit almost every conceivable state of facts." See F.H. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan, 1953) 53 at 66 [hereinafter *Common Lawyer*].

39 For present purposes, it is not necessary to define how the causes of action relate to each other initially, for example, whether they are mutually exclusive conceptually and/or in application. The common law has taken steps in clarifying the relationship between contract and civil responsibility. See *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 and *Henderson* v. *Merrett Syndicates Ltd.*, [1994] 3 All E.R. 506 (H.L.). The interrelation between unjust enrichment and these two other fundamental cause of actions is still problematic. See the discussion of these problems in Part III, *infra*. The civil law of Quebec delineates a theory of the proper spheres of the three causes of action, creating a hierarchy of obligations, see Arts. 1458 & 1494 C.C.Q., which are interpreted as limiting a plaintiff to (1) her remedies in contract to the exclusion of civil responsibility and (2) to her remedies in contract or civil responsibility before recourse can be had to unjust enrichment.

40 A code is just a "philosophical system reduced to statutory form, coherent and rigorous." Therefore, a code is not necessary for such a system to exist.

41 See *e.g.*, J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford: Stanford University Press, 1985) at 2, where he states that "A legal tradition, as the term applies, is not a set of rules of law about contracts,

In restitution there are only particulars — contribution, recoupment, waiver of tort, equitable acquiescence, equitable tracing, legal tracing, confidential information — and only a nascent form, the "principle" against unjust enrichment. The task is to move from this stifling reality to a more intelligible organization.

B. THE CAUSE OF ACTION IN UNJUST ENRICHMENT

The first step is to start with a definition of the cause of action in unjust enrichment. The definition that is implicit in much of the English language writing on the subject is this: the plaintiff argues that the defendant has received something of value from the plaintiff unjustly and which the defendant should therefore return. "Unjust" means non-consensual. There are only three ways a transfer can occur non-consensually: theft, mistake and finding. The meaning of theft is clear. Only mistakes which show that a relevant juridical act, either onerous or gratuitous, was not intended, are relevant. Finding relates to situations where the defendant "finds" himself enriched at the plaintiff's expense, but where there is no taking or theft on his part and no giving or transfer on the part of the plaintiff. In each of these, the plaintiff argues for the return of the value still retained. The justice of the plaintiff's argument is readily apparent: "That's mine, give it back!" In a sense, John Dawson was mistaken — unjust enrichment is among the first principles to emerge in a legal system since "*novel disseisin*" and "*detinue sur trover*" are two of the oldest writs in the common law system and they are, in essence, merely instantiations of the more general argument. What arrives late, of course, is the abstraction and generalization to the cause of action in unjust enrichment. The late arrival is possibly due to the fact that claims to vindicate property rights and mistaken payment doctrines are generally adequate to address most unjust enrichment claims in earlier societies with less sophisticated economies. Unjust enrichment is, simply, the non-consensual transfer and retention of value, just as contract is promise and breach of promise, and tort is fault.

The suggested definition rules out a number of arguments right at the outset. First, the plaintiff must suffer a loss that corresponds to the defendant's gain and the plaintiff can therefore never recover more than that loss by virtue of this argument. Therefore, unjust enrichment is not about punishing.[42] Second, it is not necessary to show any blameworthiness or culpability in the defendant in order to establish the entitlement to restitution. The defendant can be perfectly innocent as he is in the cases of finding and

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corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught." A traditional explanation of the differences between the two systems is given by Lord Macmillan in "Two Manners of Thinking" in *Introduction à l'Étude du Droit comparé: Recueil d'Études en l'honneur d'Édouard Lambert* (Paris: Société anonyme du recueil Sirey, 1938). The common law is described as inductive, favouring casuistry, traditional, concrete, procedural, empirical, formalistic, and preferring distinctions. The civil law is described as deductive, general, rational, abstract, substantive, universal, anti-formalistic, and preferring interpretation.

42 Although, in the appropriate circumstance the plaintiff may have an argument supporting a punitive damage claim much as he/she would have under any other private law cause of action.

mistaken payment. In other words, unjust enrichment is not about fault. Conversely, however, if there is a theft there will be concurrent claims in tort and unjust enrichment. Third, the defendant's will with respect to the circumstances under which the receipt occurred is almost entirely irrelevant. It is not a necessary part of the argument to show that the defendant asked for anything from the plaintiff or that the defendant freely accepted anything from the plaintiff.[43] In other words, the cause of action in unjust enrichment is not about promising. Fourth, since the argument establishes a right to the return of what the defendant still retains, the defendant cannot be made to pay or return anything, by virtue of this argument, if she is no longer enriched. If she still has a portion of the value, she cannot be made to pay more than she has. Therefore, the change of position defense is central to unjust enrichment.[44] Concomitantly, the unjust enrichment claim, like the simple property claim, entails, by virtue of the retention element, a bankruptcy priority, since the trustee in bankruptcy retains what the defendant retained on the eve of bankruptcy. Formulated as a cause of action, unjust enrichment provides a complete argument justifying a coercive intervention into the affairs of the defendant to reverse an enrichment.

Under this definition, unjust enrichment is merely a generalization of the ideas underlying a simple property claim. The key elements of both are the fact that the plaintiff does not agree to the defendant's receiving an enrichment from him and that the defendant still retains the enrichment. To transfer title or the entitlement to an enrichment, the transferor must intend to transfer the right. That intention is missing only in the circumstances of mistake, theft and finding.[45]

An alternative definition of unjust enrichment regards the simple property claim as logically or substantively distinct, not as an instance. There are two arguments that can be advanced in support of this view, but first, it needs to be said that the distinction does not and cannot lie in a supposed right of an owner to get his property back, since in modern private law systems he has no such right. Whether he gets it back is a matter for the court's discretion exercised mainly on the basis that returning the property is the most efficacious manner, under the circumstances, to effect justice. The two plausible points of distinction are: (1) It is not permissible to defend against a simple property claim to say the defendant gave good consideration innocently in exchange to a third party to obtain possession of the plaintiff's property (there is no *bona fide* purchaser for value defence); and, (2) It is not permissible for a defendant to a simple property claim

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[43] The fact the plaintiff did request or freely accept may be relevant on the question whether the receipt was of any benefit to him/her.

[44] See Art. 1495 C.C.Q., which states: "An indemnity is due only if the enrichment continues to exist on the day of the demand." But see, *Lipkin Gorman* v. *Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) [hereinafter *Lipkin Gorman*] where it is argued that the change of position defense is purely discretionary.

[45] Duress and other sorts of compulsion short of theft do not vitiate transfers in the same sense as these because in cases of duress and compulsion the owner does indeed intend, however reluctantly, the relevant juridical act. Such an owner may seek the court's intervention, but the basis of that intervention is not unjust enrichment. It is tort. The characteristic remedy for the compulsion claim is to unwind the faulty transaction. That remedy is the most efficacious way to repair the harm caused.

to argue a change of position as a result of some expenditure subsequent to receipt if in fact he still retains the plaintiff's property. Since these two prohibited arguments are generally available to unjust enrichment defendants, it could be that the categories unjust enrichment and property do not relate as general principle and instance. Alternatively, and in our view preferably, when a plaintiff asserts that the defendant may not make either of the two arguments, the plaintiff's assertion can be seen and should be seen as the (peculiar) doctrinal content, in the context of nonconsensual transfers of material objects, of the retention requirement of the unjust enrichment claim.

Although an interesting question, no attempt to resolve the nature of the simple property claim will be made here since it does not make a great deal of difference for the remaining arguments in the essay which hypothesis is chosen. It might be said of the first view, in passing and in closing (and perhaps unfairly), that it is additionally objectionable for the extrinsic reason that it is the legal manifestation of the equally objectionable moral and political ideology of possessive individualism. Possessive individualism regards the person as somehow in the things that he owns, as opposed to merely relating to others through the medium of things. It is an ontologically extravagant and probably false understanding of the idea of freedom.

III. DOCTRINAL BARRIERS

There are many doctrinal barriers impeding the emergence of a cause of action in unjust enrichment in the common law and therefore, there is more than one thing wrong with the law of restitution. We illustrate this claim by breaking it down into the following problems: (a) The inherent expansiveness of "restitution" and "unjust enrichment" if these terms, especially the latter, are not rigorously defined; (b) The lack of serious competition for the expansive versions of the subject, on a number of fronts; (c) The lack of a clear direction in the effort to reform of the law of quasi-contract and the constructive trust; (d) The deeply embedded nature of some of the quasi-contract thinking; Poor analysis in some areas of the law of (e) contract and (f) tort; and, (g) The lack of an explicit, internal mechanism of structural reform in the common law tradition. There is no cumulative progression in the analysis through these seven points. Each could stand on its own. Some of the later arguments, however, assume assent to some of the earlier, generally simpler claims.

A. INHERENT EXPANSIVENESS OF A POORLY FORMULATED PRINCIPLE

The status and meaning of "unjust enrichment" in English law is not clear. This lack of clarity has been exploited in recent years, in at least three ways, to expand its applicability far beyond its proper domain.

(1) Most courts and modern writers do not identify unjust enrichment as a cause of action. Instead, they appeal to the vague "principle" that "restitution is based on unjust

enrichment."[46] Those who identify it as a "principle" do not typically define the meaning or role of "principles" in private law argument: What is a principle? What other principles are there of equivalent significance to unjust enrichment? When is it appropriate in private law argument to appeal to principles? If definitive answers to these types of question are not provided, the normative power of "unjust enrichment" becomes purely a function of the will of the speaker. On the "progressive" extreme, it will be treated as the foundation of all or much of private law. Due to its very close relationship with the concept of property and the centrality of that concept to all private law argument, it can, in a sense, be seen to operate everywhere in private law.[47] As with the principle that promises are to be kept and the principle that one person should not harm the person or property of another, all, or almost all, of private law could with some plausibility, be made to look like applications of the principle of unjust enrichment: failure by one contracting party to reciprocate the performance of the other looks like unjust enrichment, as does the failure of the tortfeasor to pay compensation. On the "orthodox" extreme, it will be discarded as far too vague to be of any use at all in private law argument.

The tendency in English law down to the 1970s was to take the orthodox view. This doctrinal orthodoxy, most would now acknowledge, led to impossible confusion in the law of quasi-contract and constructive trusts. Since the 1970s, the progressive view has gained ascendancy. Now, there are law school courses and many texts on the law of restitution *based* on the principle against unjust enrichment. The danger of the progressive view is that it is inherently expansionist, by leaving the term "principle" unspecified.

(2) Logically, however, the progressive version must ultimately incorporate the principle into private law argument as a cause of action. Logically, the progressive view must be that the principle's normative role is as a general argument that fully justifies the use of coercive force by the state against the defendant. The progressive view cannot execute on its responsibility to make this position clear because it does not have, in the common law tradition, the full range of normative terminology to explicate the principle as a cause of action. Although the tradition does have the idea of cause of action, it is otherwise too empirical in its epistemology to identify clearly the normative structures at work in private law argument. This empirical mentality, clothed as a modern or enlightened view, is a second element in the expansive tendency of "unjust enrichment." Under the guise of a liberator from orthodoxy, and thus appealing to reform instincts in all of us, it blusters into unclaimed doctrinal territory after unclaimed territory, claiming each as its own, oblivious to deeper juridical realities. In the process

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[46] Quote taken from S. Hedley, "Unjust Enrichment as the Basis of Restitution — An Overworked Concept" (1985) 5 Legal Studies 56 at 56. For a general articulation of this belief, see Maddaugh & McCamus, *supra* note 25 at 31-64, Burrows & McKendrick, *supra* note 25 at 1, Burrows, *supra* note 25 at 1-6, L. Goff & G. Jones, 4th ed., *supra* note 25 at 1-16, and Birks, *Introduction*, *supra* note 15 at 16-22.

[47] This is one of the attacks made by S. Hedley in attempting to show why unjust enrichment is not the only explanation of the law of Restitution. He argued, following Professor Atiyah "that unjust enrichment *exerts influence* over many branches of the law, while providing the *complete explanation* of none." See S. Hedley, *ibid.* at 58-59. See also Atiyah, *supra* note 4 at 768.

it invents concepts — more fictions — to subdue the conquered territory so that it plausibly conforms to the logic of the cause of action in unjust enrichment.

(3) The principal mechanism of the imperialistic advance is the failure of the progressive view to *define* "unjust." Instead of defining unjust, the progressive view merely identifies or lists "unjust factors." The longest list of these is in Andrew Burrows' and Ewan McKendrick's book *Cases and Materials on the Law of Restitution*.[48] According to this source, the "unjust factors" are: mistake, ignorance, duress, exploitation, legal compulsion, illegitimate pressure, undue influence, necessity, failure of consideration, illegality, incapacity, *ultra vires* demands by public authorities, and retention of the plaintiff's property without his consent. Other authors would add free acceptance to this list.[49] These factors are operative in the law of contract and civil responsibility as well as the law of unjust enrichment. For most of them there is some controversy over how they operate to justify a claim for relief. This is a perennial problem in private law scholarship. The current common law, as one might expect, is rather *ad hoc* and haphazard in its work in this area. There is no common terminology and it is readily accepted that each of these may operate differently in different doctrinal contexts.[50]

Variations in logic and content across the categories of private law, although a serious problem, is not the main difficulty. Many of these factors, no matter what their proper content, do not belong in unjust enrichment. In the cause of action in unjust enrichment the only "unjust factors" (we say) are mistake, taking and finding[51] because these are the only instances where the enrichment is non-consensual. "Unjust," in this view of the subject, is *defined* as "without juristic reason." The progressive view of "unjust" is to leave it undefined. Since all of private law is about justice, all of private law (it says) belongs to unjust enrichment. Anything can be, and in fact has been, added to the subject.

The irony in all this is that we regard ourselves as moving the law to a higher plain of intelligibility by collecting all of this doctrine into one new category — unjust enrichment or restitution — but in fact all we are doing is arranging old doctrines in a new way. It is no better, intellectually speaking, than an alphabetical order, or for that matter, *Bullen and Leake*.[52] The progressive view does not seek to escape its empirical mentality, even if it feels better about itself for having liberated the law from one system of unintelligible organization only to imprison it in another. In the meantime,

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48 *Supra* note 25 at 91.

49 Goff & Jones, 4th ed., *supra* note 25 18 ff. See also P. Birks, "In Defence of Free Acceptance" in A.S. Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) at 105.

50 On duress and compulsion as vitiating factors, see J.C. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991) at 113-17; P. Atiyah, "Economic Duress and the 'Overborne Will'" (1982) 98 L.Q. Rev. 197 and P. Birks, "The Travails of Duress" (1990) 3 Lloyd's Mar. & Comm. L.Q. 342.

51 For a fuller development of this argument see D. Stevens "Knowing Assistance and Knowing Receipt in the Supreme Court of Canada" (forthcoming, B.F.L.R.).

52 E. Bullen & S.M. Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3d ed. (London: Stevens and Sons, 1868).

and this is a second irony, the development or emergence of the cause of action in unjust enrichment is frustrated by the imperialism of the principle against "unjust" enrichment, and the law becomes, like its orthodox predecessor, more and more confusing.

B. WEAK COMPETITION

This expansive tendency is not adequately resisted by other areas of private law. The reason a claim to include a doctrine under the banner of unjust enrichment might seem plausible or persuasive, is that alternative candidates are not up to the competition. There are several instances of this problem.

(1) One particularly injurious doctrinal tendency is to formulate the definition of restitution or unjust enrichment so that the subject captured by these terms includes those victimizations of the defendant that result in a gain by the defendant that does not correspond to any patrimonial loss in the plaintiff.[53] An example is the duty of a trustee to account for the profits made in breach of the trust even though the breach did not result in any loss to the plaintiff. This convergence of radically different types of argument under the same rubric is unfortunate. In many of the cases where these types of enrichments are forced to be given up, the intervention is clearly a punitive measure justified out of a need to protect a special class of legal relationship.[54] There is no point confusing things by calling it unjust enrichment. The private law of punitive interventions requires greater integrity.

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[53] An example of this wide definition of restitution can be seen in the following observations: "the law of restitution is sharply divided as between restitution for wrongs and autonomous unjust enrichment. Restitution for wrongs is a remedial inquiry about the availability of restitutionary (*i.e.* gain-based) damages for wrongs. This part of the law of restitution can equally be considered to be part of the law of wrongs and part of the law of remedies. However, autonomous unjust enrichment is a study of causes of action in unjust enrichment. The word 'autonomous' is put in to make it clear that here the cause of action arises, not in the law of wrongs (torts, breaches of contract, breaches of equitable or statutory duty, but in the independent category of unjust enrichment." P. Birks & R. Chambers, "The Restitution Research Resource 1994" (1994) R.L.R. Supp. at vi-vii.

[54] See *e.g.*, *Boardman* v. *Phipps*, (1966), [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.) (plaintiffs allowed to recover profits that trustee obtained through an innocent breach of trust); *Reading* v. *A.-G.*, [1951] A.C. 507, 1 All E.R. 617 (H.L.) (crown permitted to retain "profits" made by disloyal officer who escorted contraband through Cairo streets in full uniform); *A.-G. for Hong Kong* v. *Reid*, [1994] 1 A.C. 324 (P.C.) (government given proprietary interest in three properties purchased by defendant with bribes obtained in breach of his duty as public prosecutor); *Snepp* v. *United States*, 444 U.S. 507, 100 S. Ct. 763 (1980), rehearing den. 445 U.S. 972, 100 S. Ct. 1668 (1980) (in breach of a contract that required prepublication review, a CIA agent was found to hold the profits from sale of book as a constructive trustee). Canadian courts have become more likely to explicitly recognize the punitive aspects involved in certain areas of traditional restitution. For example, see *Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 at 453 [hereinafter *Hodgkinson* cited to S.C.R.] where La Forest J. states: "The law of fiduciary duties has always contained within it an element of deterrence.... In this way the law is able to monitor a given relationship society views as socially useful...." (Cited with approval in *Soulos* v. *Korkontzilas*, [1997] 2 S.C.R 217, 146 D.L.R. (4th) 214, McLachlin J.).

(2) Another harmful tendency is the inclusion in the law of unjust enrichment of that body of doctrine dealing with the division of assets after the dissolution of a matrimonial or quasi-matrimonial union.[55] It is a mistake to include these cases within the cause of action of unjust enrichment. Marriage is a unique institution instantiating a distinctive human good and range of values. It requires its own legal logic. Certainly, whatever legal terms are developed for matrimonial relationships will bear affinities to other areas of private law. The marriage vow is like a contract and the marriage relationship is like a partnership. However, treating it in exactly the same terms as economic relations is degrading for it and confusing for private law. The private law governing marriage and the family requires greater integrity.

(3) The cause of action in unjust enrichment is also over-expanded by the temptation of the courts to resort to it where sounder resolutions are precluded or seem to be precluded by other rules. *Deglman* v. *Guaranty Trust Co. of Canada*[56] is a straightforward example of the problem. It is also an instructive one because it is the case in Canada which first recognized a cause of action in unjust enrichment. There the court accepted that the aunt had indeed made a promise to the nephew, but held that the promise was unenforceable by virtue of the Ontario *Statute of Frauds*.[57] The nephew recovered in any event. The court said the reason was the principle of unjust enrichment, yet the moral and legal force of the nephew's argument rested *entirely* on her promise to pay. Had she not promised, he would not have recovered. The decision is better and more clearly justified as a case of relief in contract, based on that promise. The statute's sanction of "unenforceability" need not have been interpreted as requiring that the promise be completely ignored, only that it not be fully enforced. The restriction of the nephew's recovery to his reliance loss, and not his expectation loss, could have been justified as the effect of the statute on the contract. Instead, and unfortunately, unjust enrichment was called in aid, to the detriment of both it and contract law.

The *Deglman* phenomenon is a problem of what might be called "vitiated" or, perhaps more tellingly, "bastard" doctrine — a doctrine whose true "parent" is forced, for the sake of appearances, to remain anonymous. The court in *Deglman* was faced with what it considered to be a rule of unimpeachable and unquestionable authority. After all, it was enacted four centuries ago! That rule seemed to preclude a just resolution to the case. Instead of confronting that rule directly, however, the court by-passed it with an invention. Appearances were saved, but the doctrine created was vitiated.

Restitution is full of such doctrines. In *Sinclair* v. *Brougham*,[58] the deposit contracts were void for being *ultra vires* the building society, yet the building society had been

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55 Although harmful, this inclusion is understandable given the fact that these types of cases have been the most influential in the development of the Canadian version of the unjust enrichment principle. See, *e.g.*, *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, 117 D.L.R (3d) 257 [hereinafter *Pettkus*] and *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1 [hereinafter *Sorochan*].

56 [1954] S.C.R. 725, 3 D.L.R. 785. [hereinafter *Deglman*].

57 *The Statute of Frauds*, R.S.O. 1990, c. S-19 [hereinafter *Statute of Frauds*].

58 [1914] A.C. 398 (H.L.) [hereinafter *Sinclair* v. *Brougham*].

in the business of banking for forty years. In *Craven-Ellis* v. *Cannons Ltd.*[59] the contract was void because the board of directors of the defendant company had not been properly constituted at the date the contract was entered into, yet the plaintiff did the work that the corporation required to be done. In *Pavey and Matthews Pty Ltd.* v. *Paul*,[60] (as in *Deglman)*, the contract was not enforceable because of a failure to comply with a statutory writing requirement, yet the plaintiff had done all the work expected under the contract. In *Thurstan* v. *Nottingham Permanent Benefit Building Society*[61] the mortgage entered by the infant was void, yet the money was advanced under the loan contract. In all these cases there was no doubt whatsoever that the underlying relationships were contractual. However, in all of them, a statutory rule said, or seemed to say, that the contract was not real. The judicial effort was to escape from contract to another basis of liability. In the process, many vitiated doctrines were created: unjust enrichment got off to a bad start in *Deglman*; tracing in equity was corrupted in *Sinclair* v. *Brougham*; subrogation was corrupted in *Thurston*; and modern writers have invented doctrines such as free acceptance, total failure of consideration, and incontrovertible benefit to make the invented solutions conform in some plausible manner to the logic of unjust enrichment. The alternative was, and is, to develop doctrines that address the problem of clumsy statutory sanctions directly. The sanctions should usually be read as a direction that the court is not necessarily bound to apply all of the terms of the contract. In sorting out the relationship between the parties. In the appropriate case, the court should impose a solution that conforms in part with the terms of the contract, and in part with specified fairness criteria based on the goals of the statute and common sense.[62] The resort to vitiated doctrines comes at great cost. It promotes confusion. The new concepts that have to be invented to achieve the artificial results limit the ability of subsequent jurists to define a proper conception of unjust enrichment. The private law governing clumsy legislative interventions requires greater integrity.

(4) The common law has a weak and deficient theory of sources of obligation since no court has ever been, nor ever will be, seized of the question. Its theory is deficient because in the prevailing, largely implicit, view, there are only three sources of obligation: contract, tort, and unjust enrichment. As in the case of vitiated doctrines, if for some reason contract and tort are not available to explain an inherited doctrine, there is a temptation to make it fit into unjust enrichment as a sort of default category. As civilian experience shows, there is no *prima facie* reason why the sources should be restricted to these three.

An example of a doctrine that is difficult to classify in any of the three is the doctrine of "necessitous intervention." The common law currently provides a remedy

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59 [1936] 2 K.B. 403 (C.A.) [hereinafter *Craven-Ellis*].

60 (1987), 162 C.L.R. 221 (H.C. of A.) [hereinafter *Pavey*].

61 [1902] 1 Ch. 1 (C.A.) [hereinafter *Thurstan*].

62 See, *e.g.*, Art. 1437 *C.C.Q.* which provides that "An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced." A contract of adhesion is defined in Art. 279 C.C.Q. as "a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable."

to the doctor who attempts to save the life of an unconscious suicide.[63] Clearly not contract or tort, the obligation to pay the doctor for his services must therefore, it is currently thought, be unjust enrichment. "Necessity," in this view of the doctrine, is called into play the role of "unjust factor," but its relevance as such is, frankly, difficult to understand. What does the fact that the service was necessary and provided in an emergency have in common with the other unjust factors? In mistake, theft and finding, there is a total absence of any intention to transfer a right, yet in the case of necessity, the doctor clearly does intend to help the suicide. Here, the vagueness of the unjust enrichment principle is called in aid and the juridical challenge of defining fundamental terms ignored.

The alternative is to regard the doctrine as *sui generis*, as belonging to a different category of argument altogether. The *negotiorum gestio* doctrine in the civil law tradition bears some affinity to the common law doctrine of necessitous intervention. Importantly, for present purposes, it is typically positioned as being a source unto itself. It is not difficult to see why since the doctrine does so much private law work at once. It simultaneously solves the authority, immunity and indemnity issues arising in the context of certain voluntary interventions of one person into the affairs of another.[64] The obligation of the owner to indemnify the *gestor* that arises under this doctrine is definitely not contractual or delictual in nature, but it is not positioned as unjust enrichment either. It is *negotiorum gestio*. One very plausible, deeper explanation for the owner's obligation to indemnify is the virtue of gratitude: if the *gestor*'s intervention meets the stringent conditions established in conventional formulations of the doctrine, very clearly the owner ought to be grateful for the intervention and graciously pick up the tab. The court's order tells the defendant to do the decent thing. If the common law were to look at it that way it might begin to see the logic of necessity, not as an "unjust factor," whatever that may mean, but as an indication of an occasion for gratitude. Moreover, with the significance of the doctrine thus revealed, the criterion itself could widen beyond necessitous circumstances to something like opportune circumstances, and widen further still to place obligations on the *gestor* that the affair be managed well, both as a civil responsibility and a condition of gratitude.[65] The private law theory of sources of obligation requires greater integrity.

There is no general theory of obligations in the common law and no current inclination or agency to develop one. Hence, all that part of the law of obligations

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[63] *Matheson* v. *Smiley*, [1932] 2 D.L.R. 787, 1 W.W.R. 758.

[64] See Arts. 1482-1490 C.C.Q., and Arts. 1372-1374 *C. civ.*

[65] See Art. 1482 C.C.Q., which states: "Management of the business of another exists where a person, the manager, spontaneously and under no obligation to act, voluntarily and opportunely undertakes to manage the business of another, the principal, without his knowledge, or with his knowledge if he was unable to appoint a mandatary or otherwise provide for it." For an apparently (but not really) related group of cases — agency of necessity — explicable on the basis of implicit contract, see *China Pacific S.A.* v. *Food Corporation of India*, (*The Winson*) (1981), [1982] A.C. 939, [1981] 3 All E.R. 688 (C.A.); *Tetley* v. *British Trade Corporation* (1922), 10 Ll. L.R. 678; *Poland* v. *John Parr & Sons* (1926), [1927] 1 K.B. 236, [1926] All E.R. Rep 177 (C.A.); and *Firm of Gokal Chand-Jagan Nath* v. *Firm of Nand Ram Das-Atma Ram*, [1939] A.C. 106, (1939-1940) 3 M.L.R. 272 (P.C.).

dealing with modalities, transfer, performance and extinction is without intelligible organization, or hope of acquiring one. Instead, it is reasoned, if the doctrine is not obviously about contract or tort, it must be unjust enrichment.

The doctrine of recoupment provides a useful example. Recoupment allows the plaintiff to recover from the defendant an amount paid to another that benefited the defendant. Currently, it is thought to be available on the basis of unjust enrichment. The doctrine is conventionally stated in the form of a four-part rule: (1) there must have been some legal compulsion operating on the plaintiff at the time of payment; (2) the plaintiff cannot have exposed himself or herself to the compulsion officiously; (3) the plaintiff's payment must have discharged an obligation owed by the defendant; and, (4) as between the plaintiff and the defendant, the defendant was primarily liable on the obligation.[66] The central case of its applicability is in the law of suretyship.[67] The central doctrinal question is the nature of the surety's right to recover from the principal debtor. The conventional view argues unjust enrichment as the solution, with legal compulsion playing the role of "unjust factor." But, of course, it makes no sense to say that the fact that the surety is legally compelled to pay is a ground for making anyone else pay. The compulsion here is not like the duress exerted on the reluctant bargainer because the force applied against the surety is entirely legal. The two cases of compulsion bear no legal resemblance: one is illegal and therefore a tort, and the other is perfectly legal.

The better argument is that the whole operation is happening over in the law of contract and in the part of the general theory that deals with the transfer of obligations. The common law is missing a clear concept of *transfer* of obligations by "subrogation." Additionally, in this example, it is missing a notion of nominate contracts as well as an understanding of the nominate contract of suretyship. The surety recovers from the debtor either because the debtor promised to indemnify him or because the creditor is obliged by the contract of suretyship to transfer the principal claim. The subrogation that occurs in this latter instance has nothing to do with unjust enrichment.

The inability of the common law to correctly identify the basis of the surety's claim against the principal led to a serious error in the very famous English decision of *Owen* v. *Tate*.[68] In that case, the court held that a surety who voluntarily entered into the

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66 See *Owen* v. *Tate*, [1976] 1 Q.B. 402 (C.A.) at 407, Scarman, L.J. [hereinafter *Owen*] for an influential formulation. Montgomery J. in the Ontario High Court decision in *Peel (Regional Municipality)* v. *Ontario* (1988), 49 D.L.R. (4th) 759, 64 O.R. (2d) 298 (H.C.J.) altered the second condition by requiring the payment not be made foolishly, as opposed to requiring that the exposure to liability not be made officiously. For thorough discussions of recoupment, see Maddaugh & McCamus, *supra* note 25 at c. 29 and Goff & Jones, 4th ed., *supra* note 25 at c. 12-14.

67 We do not follow through with a demonstration that similar misunderstandings lie behind the other applications of the doctrine of recoupment (and of subrogation), but this could be done for most of the applications except, perhaps, *Exall* v. *Partridge* (1799) 8 T.R. 308, 3 Esp. 8 and *Brook's Wharf and Bull Wharf, Ltd.* v. *Goodman Bros.*, [1937] 1 K.B. 534, 106 L.J.K.B. 437 (C.A.). But since these are anomalous cases, they should not be permitted to distort the analysis of the central cases of suretyship.

68 *Owen*, *supra* note 66.

obligation to guarantee a debt of the principal debtor could not, once he had paid that debt, recover it from the principal debtor because there was no compulsion. The surety was without remedy because he had voluntarily undertaken the obligation to guarantee the debt. One writer explains the decision approvingly in the following terms:

> Elements A and B [of the recoupment test, namely that there has been compulsion and that the plaintiff did not officiously expose himself to the compulsion] can be seen to go to whether the enrichment is reversible.... The main ground for reversibility is compulsion. Moreover, as in other contexts, recovery may be denied where the plaintiff acted officiously; to discourage the imposition of unwanted liabilities, the law will not consider an enrichment to be reversible if it was conferred officiously. To put it another way, the officious plaintiff can hardly rely on compulsion as making the enrichment reversible; no one is compelled to be officious.[69]

What is overlooked in this passage — which is representative of the usual explanation — is that the surety's claim against the principal debtor arises out of the implicit assignment of that debt from the creditor to the surety. That assignment occurs when the surety pays the money due on the indemnity. The creditor is obliged to convey the debt because it is of the "essence" of the contract of suretyship that he do so.[70] Phrased differently, if the creditor were to retain title to the debt of the principal debtor as well as receive the indemnity, that creditor would be over-indemnified because she would own not only the benefit of the actual performance of the promise to indemnify, but also the debt. Since the surety is obliged only to *indemnify* the principal creditor, it is immaterial how the surety undertook the obligation to guarantee the debt. What matters is the nature of the contract of indemnity and the obligation of the creditor to assign the debt to the surety once the surety pays. Unjust enrichment is irrelevant. The law stating the general theory of obligations requires greater integrity.

C. THE LACK OF CLEAR DIRECTION FOR REFORM

An example that illustrates the disastrous state of English law in this area and one that sets the pattern of the arguments in this section is the long and tedious history of the "mistake of law" rule. That history began with an error made in 1815 with the formulation of the rule in *Bilbie* v. *Lumley*.[71] It continued through a century and a half of convoluted exceptions, circumventions and fictions to avoid the rule, and concluded with its final rejection by a series of decisions or statutes all over the Commonwealth.[72] The private and governmental time, energy and resources (judicial,

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69 L.D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997).

70 See Arts. 2333 & 2336 C.C.Q. See also, Art. 2356 C.C.Q., which states: "A surety who has bound himself without the consent of the debtor may only recover from him what the debtor would have been bound to pay, including damages, if there had been no suretyship...."

71 (1802), 2 East 469, 102 E.R. 448.

72 See, *e.g.*, New Zealand *Judicature Amendment Act*, 1958, s. 94A; *Air Canada* v. *British Columbia* (1989), 59 D.L.R. (4th) 161, [1989] 4 W.W.R. 97 (S.C.C.); *David Securities Pty. Ltd.* v. *Commonwealth Bank of Australia* (1992), 175 C.L.R. 353 (H.C. Aust.) [hereinafter *David Securities*]; and *Willis Faber Enthoven (Pty.) Ltd.* v. *Receiver of Revenue*, [1992] 4 S.A. 202. However, "some commentators have postulated that the very tenacity of the [mistake of law] rule is sufficient proof of its reasonableness." See *Nepean* v. *Ontario Hydro*, *supra* note 28 at 359,

law reform commissions,[73] university) that were spent in dealing with the *Bilbie* v. *Lumley*[74] error is scandalous. That history is as good an indication, as any, that the doctrines in this area of law are corrupt. The problem for illustration in this part is that even if we sense that this is true, the common law lacks a strategy to get out of the difficulties, so it flounders about from *ad hoc* solution to *ad hoc* solution.

In each of the following four examples the law moves from one mistaken formulation to another. Often the new formulation is more seriously mistaken than the old. Always the move from old to new is justified explicitly as reform-minded, on the express basis that the older formulation is deficient. The innovator, however, fails to recognize that the innovation he proposes is equally or more seriously flawed, often in exactly the same way. Liberation thus results in a new captivity, but the new captivity is worse not only because the mistake is sometimes more serious, but more importantly because the mistake is understood as a liberal or progressive move. As long as the new captivity is felt as liberation, its pernicious effect cannot be recognized. Scrutton L.J.'s famous remarks in *Holt* v. *Markham*[75] illustrate the pattern of the error, its reform-minded mentality, and its ultimate cause:

> [T]he whole history of this particular form of action has been what I may call a history of well meaning sloppiness thought. I do not propose to repeat the very pungent criticisms which Lord Sumner has made upon that now discarded doctrine of Lord Mansfield in *Baylis* v. *The Bishop of London* or in *Sinclair* v. *Brougham*, but I respectfully entirely agree with what he says in the former case: "To ask what course would be ex aequo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried.... Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'"[76]

Here, in the name of clarity of thought and legal certainty, Scrutton L.J. rightly criticizes intuitive justice, but he then goes on to embrace and entrench the quasi-contract fiction which was, and continues to be, the source of as much harm to the legal values of clarity and certainty as the intuitive justice he quite properly denigrated.

The cause of the mistake is the lack of a clear and defensible definition of the cause of action in unjust enrichment. The pattern is exhibited in the following four cases. In a way, of course, this is the error of the law of restitution as a whole: common lawyers

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Dickson, J.

[73] The English Law Commission, Consultation Paper, No. 120, *Restitution of Payments Made Under a Mistake of Law* (1991) discusses thoroughly, and makes recommendations with respect to, recovery of payments made under mistaken law. See also, Law Reform Commission of British Columbia, "Report on Benefits Conferred under a Mistake of Law" (Victoria: Province of British Columbia, 1981); Law Reform Commission of South Australia, "Report Relating to the Recoverability of Benefits Obtained by Reason of Mistake of Law" (1984); and New South Wales Law Reform Commission, "Restitution of Benefits Conferred Under Mistake of Law" (Sydney: The Commission, 1987).

[74] *Supra* note 71.

[75] [1922] All E.R. 134, [1923] 1 K.B. 504 (C.A.) [hereinafter *Holt* v. *Markham* cited to K.B.].

[76] *Ibid.* at 513.

have abandoned Lord Scrutton's false paradigm, quasi-contract, only to adopt another, restitution. This is thought to be a progressive development but in fact it is more of the same: both name a remedy when what is required is the definition of a right.

(1) The first example is the early twentieth century case, *Sinclair* v. *Brougham*,[77] together with the reception that case received and continues to receive in contemporary thinking on equitable tracing. A building society carried on a *ultra vires* banking business for more than forty years. When the building society was ordered to be wound up, the question arose as to which group of claimants, the outside creditors, the unadvanced shareholders, or the depositors, would have priority to the assets of the building society. The decision is famous for its refusal to recognize a cause of action in unjust enrichment in the common law. As Viscount Haldane stated on this point:

> [T]he Common law of England really recognizes (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising quasi ex contractu, it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed.[78]

On that basis, the court concluded that to find a quasi-contract it was necessary that a real contract be possible on the facts. Since a real contract was impossible, the depositors' personal claim in quasi-contract to recover the deposits was refused. However, Viscount Haldane went on to hold that the depositors were entitled to the assets of the building society remaining after the payment of the outside creditors, these to be shared on a pro rata basis with the unadvanced shareholders. Viscount Haldane, explaining the application of a proprietary remedy, said the money "never really ceased to be theirs" and that it continued to belong "to them in equity."[79] The building society, while prohibited from being a debtor in contract and quasi-contract, was in this phase of the argument transformed by virtue of the operation of these equitable doctrines into a fiduciary. Yet, remarkably, here is the same fiction — a legally binding "consensual" relationship imposed by law — that is set aside as not available in the first half of Viscount Haldane's decision. The result, as well as the reasoning, is odd: had the contracts with the depositors been valid, they would have ranked ahead of the unadvanced shareholders and equally with the creditors, yet the presumably stronger proprietary claim which forms the basis of the decision results in their ranking after the creditors.

Today, no one doubts that the point made by Viscount Haldane in the first quoted passage is false in at least two respects: (1) there are claims in unjust enrichment at common law; and (2) since the contractual nature of the action quasi ex contractu is a

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[77] *Supra* note 58.

[78] *Ibid.* at 415. Similarly, as late as 1978, Lord Diplock stated: "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law." *Orakpo* v. *Manson Investments Ltd.*, [1978] A.C. 95, [1977] 3 All E.R. 1 (H.L.) at 7, Diplock L.J. [hereinafter *Orakpo*].

[79] *Supra* note 58 at 415-16.

fiction, it is not constrained by the restriction he imposed on it.[80] While modern writers recognize that the decision was in error in this way, the decision still stands as authority on the doctrine of equitable tracing.[81] Thus, even as the modern law is liberated from the fiction of quasi-contract, the same fiction is embraced and entrenched more deeply in the form of result-oriented fiduciary relationships.[82] The damage is far more severe, since what is corrupted by this fiction is more fragile and precious.

(2) In *United Australia, Ltd.* v. *Barclays Bank, Ltd.*[83] Lord Atkin dealt with the nature of the waiver of tort doctrine. In that case, the defendant bank argued that once the plaintiff had chosen to pursue the recipient of the proceeds of a stolen cheque, it could no longer pursue the bank which cashed the cheque for conversion. The bank's argument was that the plaintiff had chosen to affirm that the thief was its "agent" and therefore, the ultimate recipient was liable in quasi-contract as a "borrower." The trial court and the Court of Appeal both felt obliged, the former reluctantly, to adopt this line of reasoning, in part because of the reasoning in *Sinclair* v. *Brougham*. Lord Atkin in the House of Lords attacked the quasi-contract fiction in the following famous passage:

> These fantastic resemblances of contract invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.[84]

Yet, even as he liberated the law from the quasi-contract error, he was implanting another. He construed the waiver of tort argument as an argument about a choice of remedies available to plaintiffs. The modern writers picked up on this idea of an election of remedies, and the question for scholarship subsequently became what torts, then what wrongs, can be waived.[85] This question is pursued because it is thought that

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[80] The principle against unjust enrichment was not recognized in England until *Lipkin Gorman*, *supra* note 44. Similarly, the quasi-contract fiction was not unequivocally and finally rejected until *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council*, [1996] 2 W.L.R. 802 (H.L.) [hereinafter *Westdeutsche*].

[81] *Supra* note 69.

[82] In the course of arguing that *Sinclair* v. *Brougham*, *supra* note 58, should not be totally overruled, Lord Goff in *Westdeutsche*, *supra* note 80, said at 813: "recourse can at least be had to *Sinclair* v. *Brougham* as authority for the proposition that, in such circumstances, the lender should not be without a remedy. Indeed, I cannot think that English law, or equity, is so impoverished as to be incapable of providing relief in such circumstances.... But for the present the case should in my opinion stand, though confined in the manner I have indicated, as an assertion that those who are caught in the trap of advancing money under ultra vires borrowing contracts will not be denied appropriate relief."

[83] [1941] A.C. 1 (H.L.) [hereinafter *United Australia*].

[84] *Ibid.* at 29.

[85] S. Hedley, "The Myth of 'Waiver of Tort'" (1984) 100 L.Q. Rev. 653 and Goff & Jones, 4th ed., *supra* note 25 at 720 ff. On the issue of the election remedies, see *Mahesan* v. *Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374, [1978] 2 All E.R. 405 (P.C.); *Tand Min Sit* v. *Capacious Investments Ltd.*, [1996] 1 A.C. 514 (P.C.); *Island Records Ltd.* v. *Tring International plc*, [1995] 3 All E.R 444 (Ch.); and P. Birks, "Inconsistency between Compensation and Restitution" (1996) 112 L.Q. Rev. 375.

the quasi-contract, now unjust enrichment argument, permits the plaintiff to recover more than would be recoverable if the plaintiff were restricted to the plaintiff's tort claim for the loss caused by the tort. This line of thinking is misguided in two respects. It is misleading to ask about the availability of a remedy on any terms other than the terms provided by the cause of action that justifies it. Define that first, and the waiver question is redundant. If unjust enrichment is properly defined as non-consensual receipt and retention, then, at most, there are two causes of action supporting the plaintiff's recovery where there has been a theft, each of which requires proof of the same loss. The second error is to think that the plaintiff's recovery in private law, in the absence of reasons justifying a punitive element to the award, can ever be greater than the loss caused the plaintiff by the defendant. Modern writers embrace these two ideas even as they praise the liberation of the law from the quasi-contract fiction.

(3) The third example is in the law relating to "mistaken payment." The leading Canadian decision was for many years, and perhaps still is, *Royal Bank of Canada* v. *R.*[86] In that case, an influential formulation establishing the right of a plaintiff to recover for a mistaken payment was set out.[87] Dysart J. established a four part rule: 1) the mistake must be honest; 2) the mistake must have been between the payer and the receiver of the money; 3) the facts believed, if true, must have imposed a obligation on the plaintiff to pay; and 4) the receiver of the money has no legal, equitable, or moral right to retain it. In that case, the second condition was difficult to satisfy since the mistaken transaction occurred between the plaintiff and a third party who had induced the plaintiff to believe the money was owed to the payee, the province. Dysart J. held that the second condition was met by virtue of the fact the payee kept the money after it was asked to return it. In doing so, the payee was held to have retroactively adopted the actions of the third party, thereby turning him into their "agent." Note that if the second part of the test can be satisfied in this way, then the second part of the test is entirely redundant because there will never be a mistaken payment case where it cannot be satisfied.[88]

In 1979, Lord Goff fully re-examined the doctrine governing recovery of payments made under a mistake of fact. He completely reformulated the test rightly leaving out the "as between" requirement and the requirement that the mistaken fact if true entailed a legal obligation in the payer to pay.[89] Even as he liberated the law by removing two redundant and misleading parts, he added at least four new unnecessary elements. Lord Goff said the rule is that the plaintiff is entitled to recover payments made under a mistake of fact where the mistake of fact caused the plaintiff to make the payment. However, he also said that rule established only a *prima facie* right to recover and the plaintiff's claim would fail if: 1) the payer had intended the payee should have the money at all events; 2) the payment was made for good consideration; and 3) the payee

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[86] [1931] 2 D.L.R 685, 1 W.W.R. 709 (Man. K.B.) [hereinafter *Royal Bank*, cited to D.L.R.].

[87] The test is set out in *ibid.* at 688-89. For a recent decision where the four part, *Royal Bank* rule was applied, see *Bank of Nova Scotia* v. *Passero & Passero* (1990), 74 O.R. (2d) 78 (D.C. Ont.).

[88] See Maddaugh & McCamus, *supra* note 25 at 210.

[89] *Barclays Bank Ltd.* v. *W.J. Simms Son & Cooke (Southern) Ltd.*, [1980] Q.B. 677 [hereinafter *Barclays Bank*].

had changed his position. Four features of his formulation of the mistake rule merit comment. (a) Upon analysis, his first proviso against recovery is redundant since if, under the *prima facie* test, the payment was really caused by the mistake, then it can never be true that the payee intended the payer to have the money at all events. (b) Lord Goff used the word "consideration" to express the second proviso. He thus gave that term yet another function in English private law, and more seriously he thus reintegrated contract ideas back into the test. The consideration in his test need not move to the payor since, as in the case before him, the payee's argument was that he had accepted the payment in discharge of a debt owed him by another party, the bank's customer. It is not unlikely, however, that others will confuse his sense with the traditional contract sense of consideration.[90] The payee's point in this phase of the argument is that the enrichment is no longer retained because simultaneously with the receipt there was a change of position. Confusingly, this formulation is just a special instance of the third proviso. (c) The third proviso derives from the basic logic of the unjust enrichment argument — that the enrichment must be retained — but it is positioned by Lord Goff as an additional consideration available on a somewhat discretionary basis, as though it were optional. (d) Lord Goff drew a distinction between the type of mistake which renders a transfer of title in money void and the kind of mistake which grounds a right to recover the money in the law of mistaken payment. He said: "The kind of mistake that will ground recovery [in restitution] is far wider than the kind of mistake which would vitiate intention to transfer property."[91] With respect, is the point here simply that in the case of currency, subject to a few exceptional cases, possession is title? Does not the same point apply to money that is stolen? Are there different types of theft? In other words, is not the distinction sought after here one between the different following (title) rules of a peculiar kind of thing (currency), and not between different types of mistake? Why, in any event, burden English law with yet another distinction if the outcome of both mistake doctrines is the same, namely a right to recover the amount paid by mistake in priority to all other claims against the recipient?

(4) A fourth misleading innovation has occurred in the definition of the elements of the defendant's side of the argument in an unjust enrichment claim. The defendant's argument is that he is not required to return more than he has. If a valuation is required in effecting restitution, that valuation must therefore be effected from the defendant's, as well as the plaintiff's, point of view. In the controversial case of services, no defendant is required to pay more than the services are worth to him and assessing that worth takes into account, among other things, issues of affordability and spending priority.

Approaches which are overly inclusive in their definition of unjust enrichment — which do not put some of the services cases into *negotiorum gestio* or into contract and civil responsibility where they properly belong — have been obliged to be less generous in the formulation of the defendant's side of the argument. Unless they give less to the defendant by way of defense, many intuitively meritorious cases might result

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[90] See the majority decision in *David Securities*, *supra* note 72 for an example.

[91] *Barclays Bank*, *supra* note 89.

in a denial of recovery on their theory of the subject. This strategy distorts the definition of the cause of action.

One such innovation is the concept of "incontrovertible benefit."[92] Incontrovertible benefit was invented to deal with the difficult case of *Craven-Ellis*.[93] In that case, a contract between the plaintiff and the defendant corporation was void because the defendant corporation's board was improperly constituted at the date the contract was entered into. Commentators on the decision (although not the court in the decision itself) have argued that *quantum meruit* was not available on the facts because there had been no free acceptance — there was no board to freely accept — yet the plaintiff did the work that the corporation required. Hence, it is argued that there is a need for the concept of "incontrovertible benefit" to show enrichment.

The case would be solved today, under modern corporation law, with provisions such as §128 of the *Ontario Business Corporations Act* which states that acts done by directors are not invalidated by reason only that there is some defect in their appointment.[94] *Craven-Ellis*, as suggested above, may therefore be another instance of vitiated doctrine: the deficient understanding of English private law of the corporation led to corruption in another area to accommodate justice.[95]

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92 L. Goff & G. Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) at 144 [hereinafter Goff & Jones, 3d. ed.] where they argue that restitution should be available when "it can be shown that the defendant has gained a financial benefit readily realisable, without detriment to himself, or has been saved an inevitable expense." The concept has two parts: it covers cases where the benefit has been conferred in the form of services to land or a chattel with the resulting increase in value in the defendant's patrimony isolated in the chattel or land improved; and situations where services are provided and nothing of tangible value can be found in the defendant's patrimony that represents the value of the services, for example, where the plaintiff gives some performance to the defendant. See J. Beatson "Benefit, Reliance and the Structure of Unjust Enrichment" (1992) 40 Curr. Legal Prob. 71 for a definition of pure services. The writers generally recognize that there is no explicit recognition of the concept incontrovertible benefit in the common law but they often cite that the concept has been implicitly recognized. But almost all if not all of the decisions cited in support of the concept — *Canada Steamship Lines Ltd.* v. *Canadian Pacific Ltd.* (1979), 7 B.L.R. 1 (Ont. H.C.J.); *Re Jacques* (1967), 66 D.L.R. (2d) 447 (N.S. Co. Ct.); *Craven-Ellis*, *supra* note 59; *Carleton (County)* v. *Ottawa (City)*, [1965] S.C.R. 663, 52 D.L.R. (2d) 220; and *Boulton* v. *Jones* (1857), 157 E.R. 232; 112 H. & N. 564 (Q.B.) — are cases that could readily be shown to be instances of a "vitiated" doctrine whose results could be more accurately justified on other grounds.

93 *Supra* note 59.

94 *Ontario Business Corporations Act*, R.S.O. 1982, c. 4, s. 128. Another example would be the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44, §16 (3) [hereinafter *C.B.C.A.*] which says: "No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act."

95 Similarly other examples of its application might more convincingly be addressed by other doctrines. The situations that remain do not require the idea of incontrovertibility. For example, Goff and Jones, 4th ed., *supra* note 25 at 30, give the example of a supplier of oil delivering it to the defendant's house instead of the house of the defendant's neighbour with whom the supplier has a contract to supply oil. Thus, on these facts, value was transferred by the plaintiff to the defendant by mistake but the oil is consumed and there is nothing apparently in the defendant's patrimony corresponding to the benefit. Few people would disagree that the defendant has received a benefit. The question is whether the defendant is allowed a change of position defense. But to argue change of position the defendant would have to argue that the receipt of oil from the

"Incontrovertible benefit" is corrupting because it is a contradiction in fundamental terms: in private law, as in the market, valuations (benefits) are subjective, not "objective" in the way "incontrovertible" suggests. Incontrovertible benefit is therefore likely to mislead adjudicators on the critical elements on the defendant's side of the argument in unjust enrichment. The self-contradictory concept may have been invented in part to indicate that there are cases where defendants may not tell the whole truth about their valuation of the enrichment. Even so, it adds nothing to the argument. We can just say, in the appropriate case and as a matter of fact, we do not believe the defendant.

D. THE DEEPLY EMBEDDED NATURE OF THE QUASI-CONTRACT THINKING

The complaint here is that much of unjust enrichment thinking remains contaminated with contract ideas about liability. The single most important doctrinal element in this claim is quasi-contract, but other contract-like doctrines have had an influence as well. Three examples are provided.

1. CHANGE OF POSITION

There is a lingering view in the law that one encounters from time to time that the defense of change of position has something to do with estoppel.[96] There is also a view, held even by those who agree that change of position has nothing to do with estoppel, that the acceptance of the change of position argument into the law of restitution is somehow optional, or at least an additional question that has to be separately addressed.[97] Both of these views are based on an inadequate conception of unjust enrichment as a source of obligation and therefore, are distorted doctrines. The point in contention where a defendant argues change of position is whether he still retains the enrichment received at the plaintiff's expense, and therefore, whether he is or is not liable under a "non-consensual receipt and retention of value at the plaintiff's expense" argument. To show "non-retention," the defendant must demonstrate that, simultaneously with, or subsequent to the receipt, there has been a consumption, dissipation or destruction of value that would not have occurred but for the receipt.

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plaintiff caused him to consume oil that he would not otherwise have consumed. On the facts, that is not the case and therefore the defendant has not changed position — the defendant would have purchased and consumed oil even had the plaintiff not supplied it. In such a manner a simple analysis based on finding a receipt and a retention of value establishes a claim in the plaintiff. The only remaining question is the quantum of the benefit. In conformity with the suggestion made above, the quantum could not be established at a higher amount than the subjective value of the oil to the plaintiff and the defendant.

[96] Estoppel fixes the representing party with the truth of his statement. Logically, this type of argument is subject to a number of plausible interpretations, but a main one is that the representing party is treated this way because he is taken to have warranted (promised) implicitly that his statement is true.

[97] See, *e.g.*, *Lipkin Gorman*, *supra* note 44, *Barclays Bank*, *supra* note 89, and *R.* v. *Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd.*, [1988] A.C. 858, 1 All E.R 961 (H.L.).

The failure to recognize the nature of the change of position argument in each of the two ways suggested has led to two distortions. Regarding the second, there is a recent formulation of the defense in the House of Lord's decision in *Lipkin Gorman*.[98] In that decision, Lord Goff, who is in the camp of those who believe that English law ought to recognize a defense of change of position,[99] formulated its availability (as he did in *Barclay's Bank*), as discretionary: "[T]he defense is available to a person whose position has so changed that it would be *inequitable* in all the circumstances to require him to make restitution, or alternatively to make restitution in full."[100] One can accept that a first formulation of a doctrine might be cautious and leave some scope for judicial discretion and development, so perhaps it is unfair to criticize this formulation for lacking conviction or commitment. There is also, one suspects, an element of hedging here: one difficulty lurking in the background is that any new formulation of change of position should not permit a defendant to be exonerated where, as in *Larner* v. *London County Council*,[101] there had been some element of wrongdoing on the part of the defendant. However, a proper formulation of the defense could easily address this fear by acknowledging that the defense is available only where the plaintiff's argument is based solely on unjust enrichment. Where the plaintiff also has a argument based on fault, such as theft or duress, the defense of change of position is irrelevant.[102] Therefore, plaintiffs in positions similar to those in *Larner* would be protected.

The first distortion due to the estoppel connection is the more serious one. There are two parts to an estoppel argument. The first is that the person estopped has made some representation of fact; and the second, that the other party has relied on the representation to his detriment. At a minimum, the estoppel argument precludes the first person from denying the truth of the representation to the extent that such denial would result in a reliance loss.[103] The defense of change of position is similar but different in at least one very important respect. When a defendant argues change of position it is not a necessary part of his argument that he show that the change of position occurred as a result of his or her reliance on some representation made by the plaintiff. All the defendant need show is that had the defendant not received the value from the plaintiff, the defendant would not have suffered some subsequent patrimonial loss. For example, if a bank teller mistakenly overpays the bank's customer at the teller's wicket and the customer walks out the door and is immediately robbed of all the money in his possession, the customer can argue change of position since had the customer not received the money, the theft of the money could not have occurred.

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98 *Supra* note 44.

99 Previous authority was against it, see, *e.g.*, *Baylis* v. *Bishop of London*, [1913] 1 Ch. D. 127 (C.A.).

100 *Lipkin Gorman*, *supra* note 44 at 580 [emphasis added].

101 [1949] 2 K.B. 683 (C.A.).

102 See, *e.g.*, *Restatement of Restitution*, *supra* note 11 at §142(3) which states: "Change of circumstances is not a defense if (a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortious."

103 Hence its classification here as contract or contract-like. The person estopped is treated as warranting the truth of the representation.

The defense of change of position has been mixed up with estoppel arguments in the law because of the historic unavailability of unjust enrichment as a source of obligation. Estoppel was the only available doctrine that came close to expressing the necessary ideas, so it was pressed into service.[104] But the doctrine, naturally enough, gives a distorted presentation of the necessary elements.

In *Avon County Council* v. *Howlett*,[105] the court held that the fact of payment itself is the representation that is required in order to generate an estoppel argument. This is an extraordinarily odd doctrine: what the law gives with the mistaken payment claim it immediately takes away with the estoppel argument, provided there is some detrimental reliance.[106] The court also held that any detrimental reliance of the defendant at all, even if it did not result in the defendant consuming, dissipating or destroying all the value in a way that he would not have but for the receipt, entailed that the plaintiff was estopped from pleading that the representation was false and therefore, the plaintiff's claim failed. If this logic were followed it would be a rare unjust enrichment claim that would succeed.

There is no need, as already suggested, to find any representation whatsoever in order to generate a change of position defense. Further, the change of position argument is of avail only to the extent of the change of position. It is important to be clear about this and the only way to be clear about it is to cast the defense as a necessary element of the cause of action in unjust enrichment, and not as estoppel. It is true that there is often a very important connection between the fact of payment (or in the misguided estoppel construal, the "representation implicit in the fact of payment") and the defendant's change of position. The connection, however, is logically different from the "representation-inducing-reliance" argument of the estoppel doctrine. It is illustrated in the example of the teller's overpayment to the bank customer — the defendant can clearly show that, but for the payment, there would not have been the subsequent loss of the money paid by mistake.

To take another example, consider the facts of the recent Supreme Court of Canada decision in *Kenora (Town) Hydro Electric Commission* v. *Vacationland Dairy Co-operative Ltd.*[107] In that case, the defendant paid for its hydro at a lower rate than required, relying on the plaintiff's mistaken bills. The defendant has to show that it relied on those statements which purportedly established the state of accounts between the plaintiff and defendant. This reliance helps show that it was the money mistakenly not collected that was subsequently spent. But this argument is not an estoppel argument since the point of picking out the fact of payment or the "representation" in it is not, as in an estoppel argument, to fix the plaintiff with the responsibility for the

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104 *Jones (R.E.), Ltd.* v. *Waring and Gillow, Ltd.*, [1926] A.C. 670, 95 L.J.K.B. 913 (H.L.) [hereinafter *Jones* v. *Waring*]; *Holt* v. *Markham*, *supra* note 75; and, *Skyring* v. *Greenwood and Cox* (1825), 4 B. & C. 281, 6 D. & R. 401 [hereinafter *Skyring*].

105 [1983] 1 W.L.R. 605, [1983] 1 All E.R. 1073 (C.A.) [hereinafter *Avon*].

106 One of the judges would have allowed the plaintiff to go on to argue the retention of the money not spent was recoverable because retaining it was unconscionable. So the law gives, takes away, then gives back the claim! See the decision of Cummings-Bruce, L.J. in *Avon*, *ibid.*

107 [1994] 1 S.C.R. 80, 110 D.L.R. (4th) 449 [hereinafter *Kenora*].

truth of the statement. Rather, the point is to show which funds were dissipated. If that point is not appreciated, then the defense of change of position remains under a cloud, unnecessarily distorted.[108] An example of the continuing tendency to distortion can be found in the formulation of the doctrine by Justice Major:

> The defense of estoppel [earlier in the paragraph, he speaks of the defense of estoppel or change of position] is thus an expression of what the common law has considered to be sufficient justification to release a defendant from liability in the pursuit of fairness.[109]

Our suggestion is that it is not a question of fairness at all, rather it is a question of whether or not the cause of action in unjust enrichment is made out on the facts of the case.

2. THE DEFENDANT'S WILL AND FREE ACCEPTANCE

In the cause of action as defined, the quality of will required of the defendant and plaintiff is essentially different from what is required in a contract argument. Formation of a contract requires that there be a *consensus ad idem*. That requirement makes sense from a functional perspective, since contract is valued just because it facilitates coordination and cooperation. Of course, intrinsically it makes sense simply because that is what a contract is. By contrast, in unjust enrichment the wills of the parties are important on three entirely different questions: first, we need to know whether the transfer of value occurred without the consent of the plaintiff; second we need to know whether and how the plaintiff values the benefit transferred so we can establish the quantum of the loss suffered; and third, we need to know whether and how the defendant values the benefit received and still retained.

Some modern writers argue that "free acceptance" of the benefit by the defendant is relevant in the analysis of a claim in unjust enrichment. "Free acceptance" is defined as occurring when a defendant stands by and accepts a transfer of value from a plaintiff, who he knows expects payment, without intervening to stop the plaintiff or to tell the plaintiff that he has no intention of paying. Historically, a *quantum meruit* action for the value of services rendered to the defendant required that the defendant have requested or, at the least, freely accepted the services. Modern writers have picked up on this strain of quasi-contract reasoning and have argued that free acceptance establishes both that the transfer of value was unjust and that the receipt of value, usually in the form of services, was of value to the defendant. For some, this latter application additionally entails that the defendant is precluded from arguing that the value received is worth less to him than it was to the plaintiff. The concept that the defendant's valuation is relevant is sometimes referred to as "subjective devaluation," and it is said that where there is free acceptance, there can be no subjective devaluation.

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[108] Examples of this distortion can be seen in *Jones* v. *Waring*, *supra* note 104, *Holt* v. *Markham*, *supra* note 75, and *Skyring*, *supra* note 104.

[109] *Kenora*, *supra* note 107 at 111, Major J.

Both aspects of the free acceptance argument — as an unjust factor and as determinative on the valuation question — have been criticized convincingly by several authors.[110] On the first application, as an unjust factor, it is likely that the only basis for imposing liability on a freely accepting defendant is either that the circumstances of the free acceptance constituted an implicit promise by the defendant to pay the plaintiff *i.e.*, contract, or the circumstances of the transaction were such that the defendant was under some duty to intervene and advise the plaintiff of the plaintiff's error, *i.e.*, civil responsibility. For the first interpretation to be true, there would have to have been some communication, probably implicit, by the defendant to the plaintiff for the minds to meet.[111] The circumstances would have to be somewhat unusual for the second to occur since the circumstances would have to raise in the defendant a positive duty to act in the interest of the plaintiff by disabusing him of his mistaken impression that the defendant would pay him. One apparent difficulty with the second application — on the valuation question — is that it conflates the issue of receipt with the issue of valuation of the receipt and the valuation of the value retained. Another is that it misconstrues the relevance of and/or overstates the weight to be attached to the fact that the defendant freely accepts the transfer: at most, the defendant's free acceptance is merely evidence — not necessarily strong and certainly not conclusive evidence — that the defendant values a receipt in some way.

These theories concerning the relevance of free acceptance to the law of unjust enrichment are used to help explain cases where the value transferred was in the form of services and occasionally goods. Usually, in addition to the free acceptance argument concerning the establishment of the "unjust factor," there are other "unjust factors," invariably mistake. For example, the value may have been transferred under a mistaken belief that the plaintiff was the owner of the thing improved or affected by the services, or the plaintiff may have believed that the value was being transferred under a valid contract which imposed a legally enforceable obligation on the defendant to reciprocate.[112] Occasionally too, the arguments are deployed where there has been a discharge or breach of a contract. As some of the arguments below on the doctrine of

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[110] G. Mead, "Free Acceptance: Some Further Considerations" (1989) 105 L.Q. Rev. 460; and A.S. Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 L.Q. Rev. 576.

[111] This inability to see a contract is caused by the very weak recognition in the common law mentality of what may for present purposes be called implicit terms — terms not expressed by the parties, but readily inferred from the circumstances. This lack of recognition is one of the root causes of the free acceptance problems and is a reason why this contract solution might seem so radical to some common lawyers. But see, *Sinclair* v. *Purdy*, 186 N.Y. 245 (C.A. 1923) at 213, Cardozo J. citing himself in *Wood* v. *Lucy, Lady Duff-Gordon*, 164 N.Y. 576 (C.A. 1917) where he states that: "Though a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed." Or the *Restatement of the Law of Contracts*, *supra* note 21, § 5 comment (a): "Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent."

[112] If there truly is no contract, then the performance is mistaken in the requisite way. Thus, the law of performances pursuant to "defective contracts" ought to be divided into those cases, like *Deglman*, identified above, where there really is a contract that cannot be fully enforced, and those where there is no contract at all. That project would have to sort through the *ultra vires* cases carefully, since that doctrine too, is somewhat suspect, as the modern reforms of it in the modern corporations statutes show. See *Ramsden* v. *Dysen* (1866), L.R. 1 H.L. 129, 12 Jur. (N.S.) 506.

total failure of consideration demonstrate, there are better arguments in contract that remain fully available but that have been, in this context and in large measure, overlooked. Hence, as the criticisms advanced by others have shown, free acceptance as an unjust factor is redundant because the difficulties presented by these fact situations can be handled by other more relevant principals. With respect to its application as an "unjust factor," our suggestion is that it is another example of the harm done to the law of unjust enrichment by the contractual connection. In this instance, an element of a contract argument was transposed, mistakenly, into unjust enrichment doing harm to both causes of action. At best, the most that might be said of the doctrine of free acceptance is that on the benefit to the defendant issue, it is a relevant but inconclusive contribution when the benefit is in the form of services.

3. OFFICIOUSNESS AND THE PLAINTIFF'S WILL

A related problem happens on the plaintiff's side of the claim. Some modern writers would restrict the plaintiff's right to recover to cases where the plaintiff can prove that he was not "officious."[113] The relevance and import of the concept officiousness, or more widely, "voluntariness" is not always made clear. It is sometimes used as the contrary of "involuntary" or "vitiated," and therefore negatively contributing to the definition of "unjust" or "without cause." In this use, it is redundant and inaccurate. It is redundant because all cases where recovery ought to permitted should be sufficiently described by whatever is chosen as the definition of "unjust" or "without cause." If those who maintain that the concept has some utility are defining unjust to mean "involuntary," then it adds little to their definition by also saying "and voluntary transfers are not recoverable." It is inaccurate because, according to the definition advanced in Part II, at least, unjust does not really mean "involuntary," but more narrowly, non-consensual. A fully voluntary act is an expression of free will; a consensual act, however, may be coerced or motivated by error. Only if there is no consent, can there be unjust enrichment.

The term voluntary causes some additional difficulties because it is sometimes used in a second sense. For example, in *Morgan* v. *Ashcroft*,[114] "voluntary" was used synonymously with "gratuitous" (or at least with "not legally obligated") so that a voluntary payment made by mistake, which would be a contradiction in terms in the first sense, was held irrecoverable.

Where does this term come from? The suggestion is that it is part of the mix-up with contract. The mistake was to apply classifications of qualities of will — voluntary (free of coercion and error in motive) and gratuitous (liberal intention) — that are perfectly valid and useful in contract law to the law of unjust enrichment, where they are of only

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[113] Maddaugh & McCamus, *supra* note 25 at 681 ff. See also, the *Restatement of Restitution*, *supra* note 11 at § 2 which states: "A person who officiously confers a benefit upon another is not entitled to restitution therefor."

[114] [1938] 1 K.B. 49, 106 L.J.K.B. 544 (C.A.) [hereinafter *Morgan*].

limited relevance. The remedy to this confusion is to focus simply on whether the transfer was "without cause."[115]

Can this be done? Can the current law of unjust enrichment do without these two concepts of voluntary? There are three current uses of the term: the common law situations which would be treated as (1) *negotiorum gestio*, (2) suretyship, or (3) gift in a civil law system.[116] (a) It is used in the first sense in the common law's proto-doctrine of *negotiorum gestio*. It functions to exclude useless and unnecessary, *i.e.*, "officious" interventions. Although an adequate doctrine of *negotiorum gestio* would have to establish which managements attract the doctrine, "officiousness," does not draw the right line, at least if the civilian experience is any guide. In any event, as has already been suggested, *negotiorum gestio* has very little to do with unjust enrichment. (b) In recoupment, it is also used in the first sense. "Officious" sureties cannot recover from the debtor. That, at least, is what *Owen* v. *Tate* says. We have already argued that this view is part of a larger error, and that the decision in *Owen* v. *Tate* is incorrect. (c) That leaves gift, where it is used in the second sense. The argument that true gifts are not recoverable in unjust enrichment hardly merits its own special doctrine. The suggestion that mistaken gifts are not recoverable in unjust enrichment must be false. So it appears the cause of action in unjust enrichment does not require doctrines that describe the plaintiff's will as "voluntary" or "involuntary." Simply ask, was it a transfer, gratuitous or onerous, without cause, *i.e.* by mistake, theft or finding?

E. PROBLEMS IN THE DEFINITION OF CONTRACT

Even though much of the effort over the past several decades has been addressed at reversing the damage caused by the quasi-contract fiction, there are important elements of the fiction which still survive. This was the point of the previous section. What is less often noticed is the injury that the law of contract suffers through its historic association with quasi-contract and the ever expanding notion of restitution as an organizing idea. There are two characteristic modes of this problem. (1) Often a traditionally available remedial response is not obviously explicable as an instance of contract liability, so in the decades-long re-organization of contract law, it gravitates to the quasi-contract half. Perhaps the most important example of this phenomenon is the modern rendering of the total failure of consideration argument. (2) Often the common law's understanding of contract is confused because it lacks the concept of

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[115] In the civil law the term used to denote this cause of action is traditionally "*Enrichissement sans cause*" or enrichment without cause, see, *e.g.*, Malaurie & Aynès, t. 5, *supra* note 36 at 541. In Quebec the term now used — "*Enrichissement injustifié*" — more closely resembles the common law's formulation, see, *e.g.*, Baudouin, *supra* note 36 at 335. In any case, the tendency to define what is "without cause" or "justified" remains. For example, Art. 1494 C.C.Q., *supra* note 14 states: "Enrichment or impoverishment is justified where it results from the performance of an obligation, from the failure of the person impoverished to exercise a right of which he may avail himself or could have availed himself against the person enriched, or from an act performed by the person impoverished for his personal and exclusive interest or at his own risk or peril, or with a constant liberal intention."

[116] See Arts. 1482-90 (*negotiorum gestio*), 2333-66 (suretyship) & 1806-41 (Gift) C.C.Q., *supra* note 14 and Arts. 1372-75 (*negotiorum gestio*), 2011-43 (suretyship) & 893 ff. (Gift) *C. civ.*

special contract and the family of ideas that goes with it. Two examples of this phenomenon are the special contract of suretyship and the fiduciary obligation. We will examine (1) the tfc problem in some detail and (2) the fiduciary obligation problem very briefly.

1. QUASI-CONTRACT'S REVENGE: TOTAL FAILURE OF CONSIDERATION

The clearest example of a common law doctrine that should be in the law of contract but has ended up in the law of restitution, is total failure of consideration (tfc). Tfc is an instance of what might be called the "restitution" fiction: the view that if the remedy provided by an old doctrine looks like restitution, the source of the obligation must be unjust enrichment. It is suggested the error happens in the following way.

Many modern writers treat a total failure of consideration — the complete or "total" failure of the defendant to reciprocate with the expected consideration, namely, the performance of his promise — as an unjust factor. As just formulated, the notion itself contains the essential clue to its proper classification. Since the doctrine is about disappointed expectations, and since the vast majority of expectations protected at law are those fostered by legally enforceable promises, the solution to this difficulty must be found in contract. However, the writers who take a different view construe the plaintiff's prior giving of his own performance, historically a price, as a conditional giving. In order to keep the prestation, the money paid as a price, the defendant must perform.[117] When the defendant breaches, the right to keep the money is lost and the defendant must return it, otherwise he is unjustly enriched (money had and received upon a consideration which has wholly failed). Alternatively, but to the same effect, it is said that the plaintiff may rescind the contract *ab initio* for breach, and get his prior performance back in restitution. The principal error here is to treat a performance given in expectation of a reciprocal performance as a conditional transfer of property.

In the usual case, a plaintiff who performs in expectation of a reciprocation remains the contract creditor he was prior to the performance. The only change that has occurred is that he has taken a further risk of the defendant's creditworthiness through his essential reliance. It is the "return" of this "cost" that is sought under the tfc doctrine. Historically, the central case of the doctrine is the case where the plaintiff's prior performance is the payment of a price. Keeping this key fact in mind, it is easy to show that the argument supporting recovery is a simple contract damage argument,

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[117] In a recent JCPC decision, *Kensington* v. *Unrepresented Non-allocated Claimants*, [1994] J.C.J. No. 19 (P.C.) [hereinafter *Kensington*], counsel for the plaintiff took this corruption of contract into unjust enrichment a step further. In *Kensington*, a proprietary claim was rejected where the seller had breached his obligation under a contract of sale. The buyers' counsel argued that a proprietary claim was available on the basis of mistake. The mistake alleged was that the buyers believed that the sellers would perform their promises to purchase gold bullion on their behalf. They also, of course, attempted to argue that they were entitled to a proprietary interest in the money they had paid in advance on the basis that, since they had received nothing, a tfc, they were entitled to rescind the contract and get their money back.

not a restitution argument.[118] In a simple contract claim (one involving no consequential loss), a party who has performed and received nothing in exchange is entitled only to the other party's performance in full. The valuation of that performance is effected from the plaintiff's point of view since the objective of the court's intervention is to compensate the plaintiff for the loss caused him by the breach. What is the money value of the defendant's performance from the plaintiff's point of view? One very good measure of the money value to the plaintiff of the other party's performance is the price the plaintiff agreed to pay for it. Therefore giving "that price" "back" is a very effective means of quantifying just compensation. In reality, though, it is not a giving back, it is an award of damages for breach where the loss is measured by the price given.

This is not to suggest that there are not instances where a prior performance is actually (implicitly or explicitly) given conditionally. But even in these situations, the prior performing party, unless there is also a trust, bailment or other such fiduciary relationship consensually created, accepts the further credit risk imposed by the other party's promise to return the prior performance if the condition for its return (breach) obtains. Under this less usual scenario, it is fundamental that the prior performance be of a type that can in fact be returned. Money and goods fit this description, but services never do. One important conclusion that follows from both sets of analysis (*i.e.*, the usual and less usual cases) is that since the whole argument is based in contract, the plaintiff is thereby restricted by contract valuations. In other words, the point always is to compensate for the loss caused by the breach.

How did the unjust enrichment construal of tfc get started? As is so often the case with the common law, this mistaken doctrine was initially a case of vitiated doctrine — a doctrine that was pressed into service to do justice under circumstances where the common law was clearly inadequate. The starting point in the modern thinking on tfc is Lord Atkin's decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*[119] The plaintiff had paid £1,000 in advance on a contract with an English company which had promised, in return, to sell machinery to the plaintiff for £4800. The contract was frustrated by the outbreak of war and before any part of the defendant's promise had been performed. The House of Lords allowed the plaintiff to recover the money paid in advance on the basis of tfc. Lord Wright, in one of the leading statements in English jurisprudence, rationalized the right to recover as being based on the principle of unjust enrichment: "any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit...."[120] This was the first occasion on which tfc had been used in the context of a frustrated contract and its application to frustration facts on the basis of the unjust

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[118] The central cases of tfc historically were cases where money was advanced for a negotiable instrument or other fungible and readily convertible form of value, that was for some reason, defective. In those cases, the basis of recovery from the modern perspective would be contract. The damages for breach of the promise that the defective negotiable instrument is good, are equal exactly to the money paid since in this instance the money paid is equal to the value of the defendant's promise which, in turn, is equal to the amount mentioned in the negotiable instrument.

[119] [1943] A.C. 32, [1942] 2 All E.R. 122 (A.C.) [hereinafter *Fibrosa* cited to A.C.].

[120] *Ibid.* at 61.

enrichment rationale was, and still is, generally praised by the academic writers on the law of restitution.[121]

That something was done to redress the unacceptable treatment of frustration in *Chandler* v. *Webster*[122] was certainly laudable. Our suggestion here is that the ground of the intervention could not have been unjust enrichment, since at the date of transfer the prestation was given consensually, just as certainly as it could not have been contract as the common law aptly says, the contract was frustrated. The case of frustration is generally recognized as presenting difficult problems of justice, but these are problems of distributive justice not corrective justice. This is evident from the facts and resolution of the *Fibrosa* case itself: the *Fibrosa* solution, as has been observed by most commentators, was unfair to the seller in *Fibrosa* who had made expenditures in preparation for its performance.[123] The clear injustice of imposing these entirely on the seller is not addressed at all in the *Fibrosa* doctrine. What is required in a case of a frustration is a localized distributive solution, whether imposed by statute or otherwise, on the model of the "just and equitable" winding up of a corporation or partnership.[124] In designing the rules to govern the distribution, benefits received under the contract would certainly have to be taken into account, but the fact they should be taken into account, by itself, does not make the cause of action of unjust enrichment relevant to the discussion. Similarly, the mere fact that a restitution is called for does not entail that the source of the obligation is unjust enrichment. Subsequent to the *Fibrosa* decision, legislation reformed the generally inadequate common law treatment of frustration.[125] Unfortunately, the "vitiated" doctrine — tfc as an unjust factor — survives to this day.

The continuation of the unjust enrichment construal of tfc has led to a number of what we would submit are false problems in the current writing. In what follows, we provide several illustrations and examples.

a. Tfc and the Issue of "Total" Failure

First, consider what was above called the usual case, the case where the plaintiff gives a prior non-conditional performance and the defendant breaches. Consider further its standard instance, where the plaintiff's prior performance is the payment of a price. If the plaintiff's performance was the payment of a price, and the defendant has given nothing under the contract to the plaintiff, then the plaintiff's loss measured by the

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121 See, *e.g.*, Goff & Jones, 4th ed., *supra* note 25 at 418-19.

122 [1904], 1 K.B. 493, 73 L.J.K.B. 401 (C.A.).

123 See, *e.g.*, Goff & Jones, 4th ed., *supra* note 25 at 418 ff.

124 See, *e.g.*, *Winding-up and Restructuring Act*, R.S.C. 1996, c. 6.

125 See *Law Reform (Frustrated Contracts) Act 1943* (U.K.), 6 & 7 Geo. 6, c. 40. All Canadian provinces, except British Columbia, Nova Scotia, and Saskatchewan ultimately adopted uniform legislation substantially similar to the U.K. act based upon the Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Thirtieth Annual Meeting* (1948), see Maddaugh & McCamus, *supra* note 25 at 404. See, *e.g.*, *Frustrated Contracts Act*, R.S.O. 1980, c. 179. In British Columbia a new and substantially improved version that modified the U.K. Act was passed, see *Frustrated Contract Act*, R.S.B.C. 1979, c. 144.

contract damage rule is at least as much as the payment, since his valuation of the defendant's performance on the date for performance in most situations is at least equal to the price he agreed to pay. These are, essentially, the facts and outcome in the famous case of *Rowland* v. *Divall*,[126] where the seller breached his obligation to convey title. In most situations like this, as already suggested, the plaintiff is entitled, at the least, to "his" money "back."

What function does the tfc condition serve in this simple and central case? Quite simply, it establishes that this very straightforward solution to the damage calculation problem — giving the plaintiff "back" "his" money — is available on the facts of the case. Some modern writers who conceive of this intervention as based on unjust enrichment, argue that requiring the failure be "total" is arbitrary, and that the unjust enrichment claim should extend to cases where the failure is only partial.[127] Others argue over what should count as a consideration sufficient to preclude the use of the doctrine. These questions when posed as questions in the law of unjust enrichment are unanswerable. Ask those same questions while conceiving of tfc as an contract damage rule, they are easily answered. Of course the plaintiff can also argue that he is entitled to at least his cost (the price) less the extent to which receipts from the defendant have reduced this loss. In appropriate circumstances this would be the obvious, most effective way to measure the loss caused by the breach.

A recent decision of the High Court of Australia, *Baltic Shipping Co.* v. *Dillon*[128] illustrates some of the difficulties that can arise if the tfc rule is construed as based in unjust enrichment. In that case, the plaintiff was a passenger on a cruise ship. The cruise was to last for fourteen days but on the tenth day, the ship sank. The plaintiff sued for the price back, arguing in part that the failure need not be total in order for the plaintiff to be able to sue in unjust enrichment. The Court rejected the tfc argument and allowed the plaintiff to recover damages "in contract" for distress. The Court mistakenly categorized the tfc argument as an instance of an action in unjust enrichment and in part conceived of the issue as a competition between mutually exclusive causes of action, one in unjust enrichment for restitution and the other in contract for damages for breach of contract. The fact that the failure of consideration was not total was selected by the court as the determinative criterion in making the choice of contract over unjust enrichment. The suggestion here is that this debate — whether the failure has to be total in order to sue in unjust enrichment — is based on a fundamental misconception as to the nature of the tfc rule. What is misunderstood is that the discussion is really about two methods of calculating the damages flowing from a breach of contract, and not about mutually exclusive rights or even mutually exclusive remedies. On the facts like *Baltic Shipping*, the use of the tfc method of calculation is not convenient or helpful, since the principal element of the plaintiff's loss was the disappointment and distress arising from the breach, which in part is a consequential reliance loss and in part an expectation interest loss. If that loss is fully compensated, then the defendant's breach is remedied and it can keep the price.

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126 [1923] 2 K.B. 500, 92 L.J.K.B. 1041 (C.A.) [hereinafter *Rowland* v. *Divall*].

127 See, *e.g.*, *Burrows*, *supra* note 25 at 255 ff.

128 *(The Mikhail Lermontov)* (1993), 67 A.L.J.R. 228 (H.C.).

b. Tfc and Services

The construal of the tfc doctrine as a contract damage calculation rule is often overlooked due to the influence of the misleading metaphor that contract damages are about going ahead, and that recovery in civil responsibility and unjust enrichment are about going back. Tfc looks like "going back" not "going forward." This error is aided and abetted by the fiction of rescission — the retroactive removal of the contract — since it is sometimes said that where there is tfc, the contract is rescinded *ab initio* and restitution is ordered. Rescission is a fiction: nothing anybody does today can change what happened yesterday, even if they are an academic lawyer, judge or legislator; it is impossible to get rid of the contract *ab initio*. The most we can say is that the case should be solved as though there were no contract, but if that is the meaning of the conclusion, some reason must be given for adopting it. Breach of contract cannot be the reason because all the fact of breach justifies is reversal of the harm caused by the breach. To date, no one has provided a satisfactory reason for solving the case of breach of contract as though the contract was never made. No one ever will since the argument is incoherent. What does it mean to solve a case of breach of contract as though there never was a contract? It does not compute. Putting the metaphor and fiction aside, it is simpler if we say that all recovery in private law, no matter what the cause of action, is intended to compensate for loss caused by the breach, the wrong, or the non-consensual receipt and retention. This applies to all recovery unless what we are talking about is part of the private law of punitive interventions, but if that is what is happening here, then the common law should say so.

There is no need in the law of contract damages for the going ahead metaphor or the retroactive removal fiction. However, if the metaphor and the fiction are in control, then it may seem natural to ask whether a tfc-type argument is also available where the plaintiff's prior performance is in the form of services. Can the plaintiff rescind the contract and sue in *quantum meruit* to get the value of her services back? If we say yes, then it would seem natural to conclude as well that the plaintiff gets the value of the services back even when this value, measured from her point of view, exceeds the contract price. If we allow that, then we allow the plaintiff to recover from the defendant a loss caused by her bad bargaining, not by the breach. This would be absurd. An American case, *Boomer* v. *Muir*[129] is often cited as authority for a positive answer to this question, since the court in that case allowed the plaintiff to recover an amount greater than the amount owing under the contract on the basis of a "rescission-then-restitution" argument. On the facts of that case, the recovery could as easily have been justified as compensation for consequential losses. In principle, if the forgoing arguments concerning the true nature of the tfc argument are accepted, the question "restitution for breach?" is a non-starter, since a plaintiff in contract is restricted to contract damages.

Recall that the argument which gives the restitution-for-breach some initial plausibility arises in the case where the prior performance is the payment of a price. We can use metaphors and fictions with impunity and without harm in the case of prices

[129] 24 P. 2d 570 (Cal. D.C.A. 1933).

since talking about giving "the" money "back" or giving "back" the price is always exactly the same thing, in terms of outcomes, as talking about compensating the plaintiff for the loss caused by the breach. Services, unlike money, however, cannot be returned. To do justice between the parties we have to move from the services to their money value. How much money? Not, it is submitted, the value of the services. It has to be the value of the defendant's performance since the objective is to compensate the plaintiff for the loss caused by the defendant's breach of the defendant's performance.

It was argued above that it is a mistake to construe a prior performance in the usual case as conditional, as opposed to being a further extension of the plaintiff's investment in the creditworthiness of the defendant. It was also suggested that even where the prior performance is truly conditional, the most the plaintiff gets, in the absence of some trust or similar relationship, is a promise to return "it" should the condition obtain. As it will be argued in the next sub-section, it makes sense sometimes to find such a promise in the case of a price. But it is difficult to see how a defendant could actually make such a promise where the prior performance is a service. There is no "it" to return.

c. Tfc and the Profit from Breach

Bush v. *Canfield*[130] is an intriguing once-in-a-century American case which posed the following problem: what if the plaintiff pays a price in advance and the defendant breaches, in the circumstance where the defendant had a profitable contract? Can such a defendant argue that the plaintiff's recovery must be adjusted to take account of the plaintiff's expected loss on the contract? There are several possible ways to answer "no" to this question — which is, it is suggested, the correct response. Only two need be mentioned. One is to say that this is a case of tfc and the plaintiff is entitled to "rescind" the contract and sue in unjust enrichment to recover the price paid to the defendant. This argument comes to the right response, and because of that it has added to the general appeal of the unjust enrichment construal of the tfc argument. The second approach is to analyze the prior payment as conditional, and as such, accompanied by an implicit promise from the defendant to return it if the defendant does not perform the explicit promise to sell. Do sellers actually make such implicit promises? It seems that, quite obviously, they do. If this is in fact the case, then the justice of the buyer's argument to get "the price" or "deposit" back is clear. The right to have "the" money "back" is a contract damage argument based on the breach of the promise to return "the" money if the seller fails to perform the promise to transfer title.

Those who take the opposite view use it as a springboard to establish a more general form of the argument which says that plaintiffs may rescind on breach and recover in restitution for any type of prior performance, services included, unlimited by contract values. This can be seen to be erroneous for the reasons already expressed, namely, that for there to be a truly conditional prior performance, it is essential that there be the possibility of returning that performance and services, of course, cannot be returned.

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[130] 2 Conn. 485 (S.C.E. 1818).

d. Tfc and Proprietary Protection

There is a proprietary element to the unjust enrichment claim that has been articulated in various ways over the past 100 years. Some aspects of "tracing" doctrines and constructive trusts demonstrate this. For some who construe the tfc argument as based in unjust enrichment, there is, then, naturally, a proprietary dimension to that claim. This is a simple case of error compounding error. That the argument in favour of proprietary protection is obviously suspect, flows from the fact that it seems to permit a simple contract creditor to be transformed into secured creditor. One way, perhaps, to enhance the plausibility of this proprietary element of the tfc claim is for the plaintiff to argue that the plaintiff's prior performance was actually conditional, and that on breach, the property in the plaintiff's prior performance somehow reverts to or is "retroactively" vested in the plaintiff. The plausibility of this line of argument is enhanced if the rescission fiction is applied uncritically. Construing the plaintiff's prior performance as truly conditional by itself does not help bring about this odd result since, even a conditional transfer, without more, entails only a promise to return the performance when the relevant condition obtains. Two recent cases illustrate some of the confusion that can arise on this score if the tfc doctrine is understood as an unjust enrichment doctrine.

In *Pan Ocean Shipping Ltd.* v. *Creditcorp*,[131] a charterer had paid charter payments in advance to the defendant. The defendant was the assignee of the receivables of the owner of the vessel. The vessel was off hire for a period of time due to the owner's inability to pay for the required repairs. The charterers argued that they were entitled to repudiate the contract and recover back the money paid in advance from the defendant, as their money. The House of Lords properly held that the charterers' only remedy was against the owner of the ship pursuant to the charterparty contract. Here is a case, then, where plaintiff's counsel was led astray by the analysis that tfc is about conditional payments that are recoverable in unjust enrichment. The plaintiff's counsel argued, in effect, that it could avoid the downside of the risk it took in its contract with the owner by paying in advance, by saying it still owned its performance.

Similarly, in *Kensington* v. *Unrepresented Non-allocated Claimants*[132] the defendant bank, which was insolvent and in receivership, had promised to sell gold bullion to the plaintiffs. The plaintiffs paid the price in advance. Because of the insolvency, there was not enough gold for everyone, so the plaintiffs naturally sought proprietary protection for their claims. One of many arguments they made was the tfc argument. They said they still owned their prior performance on the basis of a rescission-for-breach analysis. The argument was rejected summarily, but it is interesting that it was rejected not because tfc is a contract damage rule and therefore has no proprietary implications whatsoever; rather Lord Mustill appears to have assumed that the tfc argument has something to do with unjust enrichment and held that it was not applicable on the facts because there had not been a tfc.[133] Interestingly,

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[131] [1994] 11.L.J. No. 5, online: QL (HLJ).

[132] *Supra* note 117.

[133] The word "appears" is used because there is no explicit statement to confirm this analysis.

he said that there was no tfc because the plaintiffs had received what they had bargained for — a promise to sell unascertained future goods. This holding will, no doubt, get him in trouble with those who argue that tfc is about unjust enrichment, since it completely undermines their argument. Tfc will never be available if the "consideration" in tfc is construed to mean the defendant's promise and not her performance.

e. Tfc and Mistake

The last area of the tfc problem concerns situations where a contract is void. One party, thinking he is bound, performs and the other does not reciprocate. Recovery of the performance in this instance, because of the mistake, is properly based in unjust enrichment. Tfc is redundant. Many instances of recovery that are rationalized as tfc are in fact cases where mistake provides the sole rationale.

In *Rover International Ltd.* v. *Cannon Film Sales Ltd.*,[134] a contract between the plaintiff, Rover Ltd. and the defendant, Canon Films Sales Ltd., was declared void on the basis that Rover Ltd. had not been incorporated at the date the contract was entered into. For the sake of argument, assume this finding is valid and that this case, therefore, is not susceptible to the kind of analysis applied to *Deglman*. The fact that the contract was void was not known to either party. Over the course of the next several months, the plaintiff paid a total of £312,500 to the defendant. It was held on the authority of such cases as *Rowland* v. *Divall*[135] and *Warman* v. *Southern Counties Car Finance Corporation Ltd.*[136] that the plaintiff was entitled to the return of those payments on the basis of a tfc. The plaintiff also recovered those payments on the basis that they had been paid under a mistake of fact, the mistake being their belief in the valid incorporation of the defendant company and therefore the existence of the contract. Assuming the Court was correct to conclude that the contract was void, then the basis of recovery could not have been contract because there was none. It had to be unjust enrichment. Tfc, however, was not needed as an unjust factor, presuming that it could intelligibly play that role, since without a contract, there was no juristic reason supporting the transfer. The transfer had been made by mistake. Tfc does no normative work.

f. Tfc Is a Mistake

The forgoing argument is intended to show three main points. The first is that in most cases the tfc claim is a contract argument. The second point is that even when the proper cause of action is unjust enrichment, the proper unjust factor is not tfc but mistake. The third and larger intention of the forgoing is to show the impossibility of sorting through the old doctrines without both a coherent structure and properly formulated causes of action.

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[134] [1989] 1 W.L.R. 912, 3 All E.R. 423 (C.A.).

[135] *Supra* note 126.

[136] [1949] 2 K.B. 576, 1 All E.R. 711.

2. FIDUCIARY OBLIGATION

The concept of "special" or "nominate" contract is merely the idea that there are standard instances of standard contractual relations whose terms can be expressed and fixed with considerable certainty at a certain level of abstraction. One can speak intelligently and accurately of their essence, nature or form.[137] With this notion comes the idea that the legislator or court participates in the articulation of the form by identifying its essence, by providing relevant and helpful suppletive terms, and by regulating its use. Often, in the common law tradition, the first two ideas — essential and suppletive terms — are conflated with a third and fourth, in the expression "implied contract." The third idea is the notion that in certain circumstances a court may infer that an actual agreement was reached by the parties, even though no words were used to express it, (contracts implied in fact), and the fourth is the "unjust enrichment" sense of quasi or implied contract. The historic conflation of all these ideas in the term "implied contract" obstructs, among other things, the emergence of the more coherent notion of special or nominate contract.[138] This is, in sum, one of the problems at the bottom of the suretyship and subrogation fiasco described above. A second deeply entrenched mechanism contributes to the obstruction. Much of the law of contract is over in Equity. The concepts of essential, suppletive and public order term are frequently submerged over there in the word "equity." The leading example of the harm caused by this failure to see the legal reality is common law's analysis of the fiduciary obligation.[139] The decision of Madam Justice McLachlin in *Canson* exemplifies this type of analysis.[140]

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[137] As von Mehren & Gordley explain: "Since each 'natural' kind of contract served a distinct purpose, each had its own set of rules, rules which must be followed for the purpose of that particular kind of contract to be achieved, and which, accordingly, are intended by the parties in the sense that they must intend what is necessary to achieve their purpose." A.T. von Mehren & J.R. Gordley, *The Civil Law System*, 2d ed. (Boston: Little, Brown & Co., 1977) at 42.

[138] For judicial recognition of some aspects this confusion, see *e.g.*, *Stanley Smith & Sons* v. *Limestone College*, 283 S.C. 430 (C.A. 1984) at 435, Bell J., where the court states: "Historically the form of action for this remedy was assumpsit, although no contract, express or implied, existed between the plaintiff and defendant. Because of this quirk of common law pleading, the term "contract implied in law" has been used to describe the circumstances under which the law imposes an obligation to make restitution for a benefit received, notwithstanding the absence of agreement between the parties. The unfortunate use of "implied contract" to connote both true ("implied in fact") and quasi ("implied in law") contracts has led to much confusion. The distinction, however, is clear. A contract "implied in fact" arises when the assent of the parties is manifested by conduct not words. A quasi contract, or one implied in law, is no contract at all..." See also the *Restatement of the Law of Contracts*, *supra* note 21, § 5 comment (a): "Implied contracts must be distinguished from quasi-contracts.... Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. ... Such obligations were ordinarily enforced at common law in the same form of action (assumpsit) that was appropriate to true contract, and some confusion with reference to the nature of quasi-contracts has been caused thereby."

[139] See, *e.g.*, *Canson Enterprises Ltd.* v. *Boughton & Co.*, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 [hereinafter *Canson*].

[140] *Ibid.*

In that case, the court dealt with the extent of the liability of a fiduciary for losses that would not have arisen but for his breach. These losses, however, were not reasonably foreseeable by him at the date of breach. The specific question was whether his liability in Equity for compensation was subject to some remoteness criterion. McLachlin J. reasoned that the tort foreseeability criterion did not apply, but that liability would extend only as far as permitted by a common sense appreciation of causation. She wrote:

> My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence in contract. ... In short equity is concerned not only to compensate the plaintiff but to enforce the trust which is at its heart.[141]

In this passage, which is characteristic of the analysis of fiduciary obligations in the common law tradition, the court is overlooking the fact that in most cases involving an express fiduciary relation, the source of the obligation is a contract: the fiduciary's obligation arises out of a promise that the fiduciary makes to the settlor or the beneficiary. The nature and content of the promise, of course, are distinctive. The trustee or fiduciary, in general, promises to act with loyalty and in the best interests of the beneficiary. All that this establishes is that the content of the promise is different from, for example, the content of the promise in the contract of sale. Yet clearly, the fiduciary's contract is just another "special" contract and clearly its breach logically results in the same categories of damages to the defendant — the loss of the expectation and the loss due to essential and incidental reliance — that may arise in any breach of any contract.[142] The content of the expectation interest is different than in the case of a contract of sale, but that is to be expected because this is a different special contract. Likewise, the manner in which the reliance interest is injured and the nature of the reliance interest injury will also be different than in the case of a contract of sale. But again, this is to be expected. It does not follow from these important differences however that, as McLachlin J. says, the "basis of the fiduciary obligation and the rationale for equitable compensation are distinct...."[143] It is, with respect, not true to say of (negligence or) contract "that the parties are taken to be independent and equal actors concerned primarily with their own self-interest"[144] unless all that is meant to signify, is that the content of the promise of the fiduciary is different from the content of the promise of a seller or the content of the duty we owe our neighbours.

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141 *Ibid.* at 543.

142 Canadian courts have increasingly come to perceive the contractual origin of many fiduciary duties. For example, in *Hodgkinson*, *supra* note 54 at 379, La Forest J. recognizes that "The existence of a contract does not necessarily preclude the existence of fiduciary obligations between parties. Indeed, the legal incidents of many contracts give rise to a fiduciary duty." This recognition has not stopped the courts from letting this area turn into a largely discretional and policy-based area of the law. Later on La Forest J. adds: "Policy considerations support fiduciary relationships in the case of financial advisors. These are occupations where advisors to whom a person gives trust has power over vast sums of money, yet the nature of their position is such that specific regulation might frustrate the very function they have to perform." *Hodgkinson*, *supra* note 54 at 381.

143 *Canson*, *supra* note 139 at 543.

144 *Ibid.*

F. PROBLEMS IN THE DEFINITION OF TORT

While the law of restitution has created fictional doctrines that obscure the contract cause of action, it has also spawned doctrines that are really instances of fault. If a contest were held to choose the common law concept that has caused the most confusion or generated the most useless case law, "rescission" would probably win, followed closely, no doubt, by "condition" and "consideration." "Restitution," if it continues on its present path, shows great promise. The term "rescission" has at least four distinct meanings: (1) rescission in the context of breach; (2) rescission in the context of innocent misrepresentation; (3) rescission for mistake; and (4) rescission for duress and misrepresentation. Like the "restitution" remedy, reference to it identifies a number of different things while falsely conveying the impression of a unitary concept. In recent years, writers have seized on the idea of rescission *ab initio* to facilitate the jump from contract to restitution where there has been a contract induced by fraud or duress, just as they have done, as illustrated above, where there has been a breach resulting in tfc. Rescission, then, is another example of a law of remedies out of control.

We raise the issue of rescission in the present context to make two brief points. The first point, already suggested above, is that rescission *ab initio* is a fiction — nothing the law does today can affect past events. It may be that the law wants to speak of a solution to a case being "as though" the contract never existed, but if it does, it has a duty to explain why and how this treatment is justified. That raises the second point. The only instances where the "as though it had never existed" treatment is defensible and useful as a metaphor is where the contract is induced by some wrong committed by the defendant and is therefore itself the locus of the injury. In cases of fraud, negligent misrepresentation and duress, the rescission *ab initio* intervention is justified as a technique for reversing the harm caused by the wrong: since the harm is in, or just is the contract caused by the wrong, the removal of the contract by the court exactly compensates the plaintiff. Rescission *ab initio* in these cases, then, is justified as a tort remedy, not as a restitution remedy.[145] Some, ultimately false, plausibility is given to a restitution construal of these interventions through the notion that fraud, negligent misrepresentation and duress, and associated concepts, are "vitiating" factors and therefore "undermine" the contract. No one has yet provided a coherent account of what a vitiated will is or looks like that does not also identify a civil wrong. Relying on that very simple logic, there is no reason why the court should not remove the plaintiff's promise from the defendant's patrimony (as well as the counter promise from the plaintiffs) if that is the most effective way to do justice under the circumstances. Since the civil wrong of the defendant caused the harmful contract (by making the plaintiff take into account irrelevant considerations he was entitled to be free of), ridding the world of the contract is a just exercise of state power.

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[145] This understanding makes intelligible the traditional restrictions on rescission, which presume for the most part that the contract is not without effect pending the plaintiff's exercise of his right to rescind. See *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 51 L.J. Ch. 113 (C.A.).

G. NO AGENCY OF CHANGE

The last barrier to the emergence of a cause of action in unjust enrichment is that there is no ready agency in the tradition available to generate the transformation that is required: the theory of the common law forbids such structural reform. Perhaps, as with contract and civil responsibility, the reform can be achieved incrementally and asymptotically. But this will be difficult due to two features of the current circumstances. First, on the very best interpretation, common law private law is distributed over a series of incommensurable categories: contract, tort, restitution (unjust enrichment), property, and Equity. This mixed system of rule organization combines four types of legal rules: one based on traditions of argument — Equity,[146] another based upon cause of actions or basic logics of legal argument — contract and tort; a third based on a remedial response — restitution; and a fourth based on the regime of entitlements — property. The next step in the further transformation of the common law to a more rational organization is the integration of Equity into the law of obligations and restitution into unjust enrichment. Second, this mixed system results in layers and webs of rules which result, in turn, in overlapping rules, duplication, contradictions, and rules at cross-purposes. In disentangling this, there will be an understandable reluctance on the part of courts to discard doctrines for redundancy or inelegance for fear of unintended and unanticipated repercussions somewhere else in the web. Executing this task requires a confidence in the knowledge that the new paradigm or paradigms is right or at least better. The switch to contract and fault was relatively easy since the merits of the underlying principles are clear. This may or may not be the case with the next steps in this process.

IV. CONCLUSION

Sorting through the old law of quasi-contract and equitable remedies and modernizing it requires definitive principles of selection and organization. Modernizing the law will result in a transformation of the language of reasons and may result, no doubt will result, in deciding that many old doctrines and decisions were mistaken. It will not be enough, obviously, to take all the old outcomes as given, but it would also be mistaken to think that, because of defects in the justificatory language, there is not much wisdom in the old law either. This modernizing process has been readily underway for the last fifteen years. The mistake now being made, however, is to assume that any remedy in the common law that has a strong resemblance to restitution must be based on the principle against unjust enrichment. This understanding of the subject is leading to another generation of fictions all designed to tailor recalcitrant cases and doctrines into an inadequate paradigm. In light of this, the argument of this paper has been that the common law of restitution is in need of a reconceptualization starting from the ground up. In this process, resort can be had to a number of guides

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[146] For example, F.W. Maitland defines Equity as "that body of rules administered by our English [and Canadian] courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity": F. W. Maitland, *Equity, also The Forms of Action at Common Law: Two Courses of Lectures* (Cambridge: University Press, 1909) at 1.

and constraints. These include: civil law methodologies and structure, a determination to root out fictions,[147] and the proper use of the other causes of action, contract and civil responsibility. Using these techniques, we have defined what we believe to be the proper cause of action in unjust enrichment — non-consensual receipt and retention — and enumerated some of the most glaring problems in the present law.

Perhaps the main difference between a civilian and common law mentality is that the civilian puts greater faith in the idea that he is participating in an endeavour to identify and articulate something that is real — private law — and that he is doing this in a tradition that has for hundreds of years, more or less, believed this. The common lawyer, in contrast, looks on private law as largely serving social and economic purposes, external to itself, or, what is worse, as binding because the judge said so. Although this functional/postitvist premise has elements of truth, it should not be pursued to the near-exclusion of the realist point of view. The whig mentality of the common lawyer compounds the error for he adopts the conceit that the responsiveness and justness of the law evolves or progresses, over time, so that his current version is more effective and more intelligent than that which existed ten or 100 years ago. Why is "nineteenth century" (or "medieval") a derogatory term? In the law of restitution, this mentality is merely a gross self-deception of a complacent style of private law which refuses, just like Fuller and Purdue and Bullen and Leake, to take the reality of private law seriously.

[147] As P. Birks notes in Birks, *Introduction*, *supra* note 15 at 7: "No subject can ever be rationally organized or intelligibly applied so long as it is dominated by the language of fiction, of deeming, and of unexplained analogy."