1-1-2003

The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy

Stephen A. Smith

THE STRUCTURE OF UNJUST ENRICHMENT LAW: IS RESTITUTION A RIGHT OR A REMEDY?

*Stephen A. Smith**

One difficulty facing anyone trying to understand the law of unjust enrichment is that the relationship between two basic categories of unjust enrichment rules is unclear. The first category is comprised of rules that are directed at citizens and that set out the circumstances in which the recipient of a benefit is under a legal duty to return that benefit.[1] Rules describing when the recipient of a mistaken payment is under a duty to return that payment fall into this first category. The second category is comprised of rules that are directed at courts and that set out the circumstances in which a court may order that the recipient of a benefit do something for the transferor of the benefit. Rules describing when a court may order the recipient of a mistaken payment to pay a sum of money to the payor fall into this second category. What is unclear about the relationship between these two categories is whether the second category adds anything substantive to the first category. According to one view, dominant in England, the two categories of rules collapse into one—at least in cases involving mistaken payments and other defective transfers.[2] This "direct enforcement" view regards

---

* Professor of Law, McGill University. Work on this Article was supported by a grant from the Social Science and Humanities Research Council of Canada. I am grateful also for research assistance provided by Finn Makela.

1. "Unjust enrichment law" is understood in this Article as concerned exclusively with cases involving defective transfers. The reason for adopting this definition is explained below.

2. *See* Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 28 (2000); *see also* Peter Birks, *The Concept of a Civil Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 48–49 (David G. Owen ed., 1995) (arguing that the second category analysis is "superfluous"). *But see* Kit Barker, *Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right*, 57 CAMBRIDGE L.J. 301, 320–22 (1998) (arguing that "[t]he order

court orders to make restitution ("restitutionary orders") in such cases as orders that a defendant perform her primary obligation.[3] Restitutionary orders in this view merely replicate the defendant's original obligation to return the benefit.[4] A second view, which finds more support in American jurisprudence,[5] regards the two categories as distinct. This "remedial" view regards restitutionary orders as orders that a defendant repair the harm caused by her wrongly failing to perform her primary obligation.[6] This Article asks which, if either, of these views is correct. Is restitution a right or a remedy?

The answer to this question forms one part—a crucial one—of any general explanation of unjust enrichment law. Let me explain. A complete explanation of any legal rule or group of legal rules must address both normative questions about the justification, if any, for the rule(s) and analytic questions about the characteristic features of the rule(s). Analytic questions can be further divided, at least in respect of private law, according to whether they focus on rules that set out citizens' primary legal obligations (e.g., the obligation to perform a contract) or on rules that set out courts' responses to claims based on those primary obligations (e.g., an order to pay a sum of money). With respect to both primary obligations and judicial responses, the relevant analytic questions are similar: (1) what is the nature of the events that give rise to the obligation/response? and (2) what is the content of the

---

replicates the content of the primary right, but this does not make it the same thing.").

3. *See* Birks, *Rights, Wrongs, and Remedies*, *supra* note 2, at 30.

4. *See id.* at 28.

5. The *Restatement of the Law of Restitution* distinguishes between "The Right to Restitution" in part I and "Constructive Trusts and Analogous Equitable Remedies" in part II, and within part I a distinction is drawn between "Unjust Enrichment" in section 4 and "Remedies" in section 1. *See* RESTATEMENT OF THE LAW OF RESTITUTION pt. I §§ 1, 4, pt. II (1937). In the *Restatement (Second) of Restitution* remedies are given a separate chapter. *See* RESTATEMENT (SECOND) OF RESTITUTION ch. 2 (Tentative Draft No. 1, 1983). A particularly strong endorsement of the remedial view is seen in Justice Scalia's opinion in *Great-West Life v. Knudson*, 534 U.S. 204, 213–14 (2002), which is the subject of Tracy Thomas's article for this Symposium. *See* Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003).

6. *See Great-West Life*, 534 U.S. at 213 (discussing that restitution at law was viewed as reparation for breach rather than return of lost amounts).

obligation/response?[7] The answers to the first set of analytic questions establish whether the relevant primary obligation counts as a contractual obligation, a tort law obligation, and so on. The answers to the second set of analytic questions determine whether a legal response counts as remedial, punitive, direct enforcement of a primary obligation, and so on.

The question addressed in this Article—how should restitutionary orders be classified—is an analytic question about one category of judicial orders. That analytic questions generally are important is, I trust, uncontroversial. Even scholars who might purport to be interested solely in normative questions about law cannot avoid taking a position on analytic questions of the sort described above. To understand, from a normative perspective, why rules of *this* kind and of *that* kind are needed, and then to determine how to apply those rules effectively to the appropriate factual scenarios, it is necessary to draw analytic distinctions between rules, as well as between the kinds of events they are meant to deal with. Normative thinking, like any other kind of thinking, involves analytic categories: like cases should be decided alike. (And of course the reverse is also true—analytic thinking involves normative categories—as illustrated in this Article.)

Analytic work on judicial orders is particularly needed. Legal scholars have long theorized about the classification of primary obligations into contractual, tortious, and so on. Moreover, there is significant consensus, as illustrated by the similar approaches taken in leading textbooks in these fields, about what belongs in each of these categories. With respect to judicial orders, the picture is quite different. There is little consensus as to whether judicial orders are

7. Someone asking these questions with respect to primary contractual obligations, for example, would consider first whether contracts are created by promises, reliance-inducing statements, transfers of existing rights, or some other event; and, second, whether contractual obligations are promissory obligations, obligations to compensate for induced reliance, obligations to respect property, or some other category of obligation. By contrast, someone asking these questions with respect to a judicial response, say an order that a defendant pay a sum of money, would consider first whether the response was triggered by a wrong, a non-wrongful breach of duty, a threatened breach of duty, or some other event; and, second, whether the legal response was an order to pay a sum equal to the plaintiff's loss, pay a sum equal to the defendant's gain, perform the relevant primary obligation, or perform some other action.

best studied separately from primary obligations. And when they are studied separately, there is little consensus as to what are the appropriate categories, let alone what should go into each of these categories.[8] This lack of consensus is particularly evident, as I have already indicated, with respect to restitutionary orders. It is part of the reason lawyers are unsure even what to call this body of law: "unjust enrichment" or "restitution."

The Article has three parts. Part I explains how I employ the terms "direct enforcement orders," "remedial orders," and "restitutionary orders" in this Article. The definitional inquiry is necessary because the first term may not be familiar and because the others terms, though familiar, are understood in a narrow sense in this Article. Part II explains the preconditions for making direct enforcement orders and remedial orders. This explanation, which applies to judicial orders generally and not just to restitutionary orders, turns on the conclusions of an essentially normative account about why and when courts should directly enforce primary obligations and why and when they should grant remedial orders. Finally, in Part III, the question of whether restitutionary orders are properly considered direct enforcement orders or remedial orders is addressed in light of the conclusions from Part II and of the judicial practices regarding such orders. My conclusion, which will displease both those who think restitutionary orders are direct enforcement orders and those who think they are remedial orders, is that restitutionary orders can rightly be regarded as either remedial orders or as direct enforcement orders. Sometimes they are the former, sometimes the latter.

I. DEFINITIONAL ISSUES

A. Direct Enforcement Orders and Remedial Orders

Both direct enforcement orders and remedial orders are judicial orders that a defendant do or not do some action. With respect to direct enforcement, that action is the performance of a primary legal obligation or duty.[9] Examples of primary legal obligations include

8. *See* Birks, *Rights, Wrongs, and Remedies*, *supra* note 2, at 25–36.

9. I will use the terms "duty" and "obligation" interchangeably. The distinction between "primary" rights and "remedial" or "secondary" rights goes back, in the common law, to Austin. *See* John Austin, *Lecture XLV: Law*

duties not to injure others, duties to perform contracts, parents' duties to support their children, and duties to pay taxes. These duties are *legal* duties because they are articulated as such by law-making bodies and because their actual or likely non-performance can give rise to legal consequences. They are *primary* duties because they arise not from breaching another duty, but from a "non-wrong" such as entering the jurisdiction (in the case of the above tort duty), doing a non-wrongful act (in the case of contractual duties and most duties to pay tax), or attaining a certain status (in the case of duties to support one's children).[10] Orders that a defendant refrain from trespassing on a plaintiff's property or that a defendant respect a contractual non-competition covenant are conventionally understood as direct enforcement orders in the sense intended here.

The term "remedy" has a wide variety of meanings in legal discourse, and the same is true of "remedial orders."[11] In most law schools, what I have defined as a "direct enforcement order" would be taught in a course on Remedies. In this Article, I use "remedial order" in a specific and narrow sense. Specifically, I mean a judicial order designed to ensure that the defendant repair a harm or loss caused to the plaintiff by the defendant's failure to perform a primary obligation. Remedial orders are therefore compensatory orders. An example of an order that would conventionally be understood as remedial in this sense is an order that a defendant who was found to have wrongfully caused the plaintiff a personal injury pay to the plaintiff a monetary sum equivalent to the loss. Orders that cannot be classified as remedial in this sense include punitive damages, nominal damages, declarations, and injunctions to prohibit continuing or anticipated torts.

The substantive reason for adopting this narrow definition of remedial orders is that it matters whether judicial orders, including orders to make restitution, are remedial in this sense. A distinct set of principles (discussed below) governs the making of remedial orders. Linguistically too, there is a reason for using the word

---

of Things—Its Main Divisions, *in* 2 LECTURES ON JURISPRUDENCE 760, 761–62 (Verlag Detlev Auvermann KG, 5th ed.1972) (1885).

10. *See id.*

11. *See* DAN B. DOBBS, DOBBS LAW OF REMEDIES 21 (2d ed. 1993); Birks, *Rights, Wrongs, and Remedies*, *supra* note 2, at 9–19.

"remedy" in this narrow sense: this is the sense that corresponds to the core of its ordinary, etymological, and legal meaning.[12]

B. Restitutionary Orders

The term "restitutionary order" is also used in a relatively narrow sense in this Article.[13] A restitutionary order, as understood here, is a judicial order that is made in response to a claim of *subtractive* unjust enrichment and that requires the defendant to pay to the plaintiff the value of the property that the defendant received from the plaintiff.[14] The standard example of subtractive unjust enrichment is a mistaken transfer. Other examples include transfers made under duress, under legal compulsion, by reason of necessity, by persons lacking capacity, or on the basis of a failed consideration.[15] These are cases of "subtractive" unjust enrichment because the defendant's enrichment is subtracted from the plaintiff's assets. Judicial orders that do not here qualify as restitutionary orders thus include, inter alia, an order that a defendant disgorge profits made as a result of breaching a duty owed to the plaintiff (restitution for wrongs) and orders requiring a defendant to pay a fair sum for services performed by the defendant (quantum meruit).

My reasons for adopting a narrow definition of restitutionary order are, again, substantive and linguistic. The substantive reason is that it is far from clear that the same principles that apply to instances of restitutionary orders in the narrow sense should apply to restitution for wrongs, quantum meruit, and a variety of other situations that are sometimes described as giving rise to restitutionary orders. I share the view of many that, at a minimum,

---

12. *See* 13 OXFORD ENGLISH DICTIONARY 584 (2d ed. 1989) ("remedy" derived from Latin "to heal").

13. I note here that the conclusion to this Article—that restitutionary orders are sometimes direct enforcement and sometimes remedial—suggests that the term "restitutionary order" is sometimes a misnomer. When a (so-called) restitutionary order is the direct enforcement of a primary duty (to make restitution) the term is appropriate. But when a restitutionary order is a remedy then it should be labeled as such or simply as "damages."

14. The defendant in such cases is also typically required to pay an award or interest. I discuss the significance of interest awards in Part III. I also discuss in Part III the significance of courts making proprietary awards, as they sometimes do, in cases involving subtractive unjust enrichment.

15. *See* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION chs. VI–VIII (1985).

cases of disgorgement and quantum meruit are neither about unjust enrichment nor give rise to restitutionary orders.[16] But even if I am wrong in this view, it seems prudent to begin our inquiry by focusing on what is widely agreed to be the core case of a restitutionary order in response to an unjust enrichment. Linguistically, confining restitution to cases of subtractive unjust enrichment is consistent with the etymology of "restitution," which lies in the idea of "restoration" (rather than any notion of "handing over"), and with the ordinary understanding of restitution as a "giving back."[17]

II. THE PRECONDITIONS FOR MAKING DIRECT ENFORCEMENT ORDERS AND REMEDIAL ORDERS.

To determine whether a particular judicial order is a direct enforcement order or a remedial order we need to know, inter alia, the preconditions for making each order. If the preconditions for a remedial order are not satisfied in cases in which restitutionary orders are made, then restitutionary orders are not remedial. The same is true for direct enforcement orders.

To determine the preconditions for direct enforcement orders and remedial orders we need to know, in turn, *why* a court would consider it appropriate to make either order. In other words, we need a theory of the normative foundations of judicial orders, or at least of the normative foundations of two kinds of judicial orders. A theory of the normative foundations of judicial orders is one part of a theory of the normative foundations of private law. Of course, it is not possible to speak of "the" theory of the normative foundations of private law—there is no single normative theory accepted by all, or even a clear majority of, lawyers or scholars. But broadly speaking, and leaving aside skeptical normative theories,[18] normative theories of private law generally regard private law as grounded in either consequentialist or deontological moral foundations. I shall not argue in favor of either of these views here. Instead, I will discuss

16. *See, e.g.*, JACK BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION 21–44 (1991); J. E. Penner, *Basic Obligations*, *in* THE CLASSIFICATION OF OBLIGATIONS 91–122 (Peter Birks ed., 1997); Samuel Stoljar, *Unjust Enrichment and Unjust Sacrifice*, 50 MOD. L. REV. 603 (1987).

17. OXFORD ENGLISH DICTIONARY, *supra* note 12, at 753.

18. Skeptical theories are theories that regard the law as having no normative justification.

the implications of each in respect of the preconditions for direct enforcement and remedies.

A. Consequentialist Accounts of Direct Enforcement and Remedial Orders

Consequentialist theories of private law, in the sense intended here, explain private law on the ground that it encourages or requires behaviour that has "good" consequences. Different consequentialist theories define those consequences in different ways, but most explain them in terms of some conception or aspect of human well-being. The best known contemporary group of consequentialist theories, "efficiency" theories, regard private law as promoting the welfare, understood subjectively, of all members of society.[19] For the sake of convenience, I will adopt this model in the discussion that follows, but my arguments apply equally to other instances of consequentialist theories.

There are three main ways that a judicial order could be used to promote welfare, and thus three possible roles for judicial orders in efficiency-based normative theories. First, a court order could directly require a person to behave in a way that increases societal welfare. To take a simplified example, suppose that Ann comes to a court complaining that John has in his possession a painting that he took from her. Suppose further that Ann will obtain more welfare from possessing the painting than John will. A court following this first approach might simply order John to do the "welfare-maximizing thing" and give Ann the painting.

The second way in which a court order might promote welfare is by creating incentives that encourage people to act in future welfare-maximizing ways. For example, an order to pay a sum of money to the complainant might be regarded—and typically is regarded in efficiency theories—as an incentive to encourage the defendant and other citizens to act appropriately in the future. The possibility of a similar order being made again operates as a stick for persons who, in the future, are in the defendant's position, and as a carrot for persons who, in the future, are in the plaintiff's position.

---

19. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 101–54 (5th ed. 1998).

Finally, and less studied, a court order might promote welfare by establishing initial entitlements to property rights, to make it easier for parties to act in welfare-maximizing ways in the future.[20] The setting of boundaries around intellectual property rights for example, will make it easier for persons to engage in welfare-enhancing exchanges of such rights in the future.

For our purposes, what is important about these three ways of promoting welfare is that none is plausibly understood as a remedy—i.e., none of them aim to *repair* a loss caused by the party subject to the order. The first way—an order that a person behave in a certain welfare-maximizing way—might be triggered by that person's failure to behave appropriately in the past, but it cannot be regarded as an attempt to repair the effects of that past behavior. The point of the order is to require the defendant to perform an efficient action. As such, it is probably best regarded as the direct enforcement of a primary obligation.[21]

Setting incentives for welfare-maximizing behavior (i.e., the second way judicial orders can promote welfare identified above), might support judicial orders that *look like remedies* to those who think the law should provide remedies, but from the perspective of a consequentialist theory, they are not remedies. Remedies are retrospective; their purpose is to repair a loss that happened in the past. Incentives, by contrast, are prospective; their purpose is to encourage all citizens (and not just the plaintiff and defendant) to behave in certain ways in the future. Incentives are neither remedial nor direct enforcement.

The third way of promoting welfare, establishing initial entitlements, is self-evidently neither remedial nor direct enforcement.

The conclusion that consequentialist theories of law cannot explain why courts acting on consequentialist grounds might make a remedial order does not deny that such theories may explain the *content* of the orders that non-consequentialists call "remedial" orders. The usual consequentialist explanation is that such orders set

20. *See id.* at ch. 3.

21. I say "probably" because we cannot be sure without a consequentialist account of direct enforcement on the table—which I do not provide.

useful incentives.[22] Consequentialist theories may also be able to explain why it might be useful for lawyers and courts *to think* that what courts are doing is making remedial orders. The explanation here would be to the effect that, in practice, courts will better achieve the consequentialist aims of setting appropriate incentives if they think they are ordering remedies than if they think they are trying to set incentives.[23] Nothing said here is meant to prove or disprove these explanations. So far as this Article is concerned, the only claim I make concerning consequentialist theories is that such theories provide no reasons for remedial orders in the sense understood here.

Since an account of direct enforcement, which I assume consequentialist theories can provide,[24] is not of much help by itself if we are trying to compare direct enforcement with remedial orders, consequentialist theories are of little help in answering the question I have posed. Whether this conclusion should be regarded as an illuminating argument for consequentialist theories or as one reason for rejecting consequentialist theories is a question for another article.

B. Deontological Theories: Introduction

Deontological theories of private law, in the sense intended here, explain private law in terms of the intrinsic value—the intrinsic rightness or wrongness—of actions rather than the consequences of those actions.[25] So far as primary obligations are concerned, a deontological explanation is typically framed in terms of individual rights and duties. According to this "rights-based" view of private law, which I will use as my model of a deontological theory, citizens' primary obligations—to perform contracts, not to harm the property or person of others, and so on—are grounded in the intrinsic wrongness of harming a specified aspect of another's interests.[26]

---

22. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 967, 1032 (2001).

23. *See, e.g., id.* at 1028–38.

24. That account, however, is likely to suggest that direct enforcement should play an extremely limited role. *See, e.g.*, Richard Craswell, *Two Economic Theories of Enforcing Promises*, *in* THE THEORY OF CONTRACT LAW 19 (Peter Benson ed., 2001).

25. Two important examples are CHARLES FRIED, CONTRACT AS PROMISE (1981) and ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

26. *See, e.g.*, WEINRIB, *supra* note 25, at 4.

Thus, to commit the tort of trespass is wrong in this view because the tortfeasor has unjustifiably infringed the victims' right to exclusive use of her property, and it is wrong regardless of the consequences of that action for social welfare or any other concept of social good.

The implications of adopting a deontological theory for understanding judicial orders, and in particular for understanding direct enforcement and remedial orders, are complex. If rights are important then courts should not do anything that would infringe on individuals' rights. Courts must respect the same primary obligations that citizens must respect. But the importance of respecting individual rights does not tell us what, if anything, courts should do when individuals come to them with a "rights-based" complaint. It is perfectly consistent with respecting rights, at least when rights are understood in the individualist sense of this tradition, for courts to do nothing in the face of actual or threatened rights-infringements. The thief infringes his victim's rights, but a person who fails to prevent a potential thief from stealing or who fails to apprehend a successful thief does not infringe anyone's rights.

The concept of individual rights and duties used to explain primary obligations in nearly all deontological theories is insufficient, then, to explain judicial orders. A further normative concept must be introduced. This is not a defect in deontological theories. In contrast to consequentialist theories, which suppose that the relevant concept of the good (e.g., welfare) can and should provide a guide for all actions, it has never been supposed in deontological theories that the concept of rights (or whatever else accounts for primary legal obligations) provides a complete guide for individual behavior, much less a complete guide for the state's behavior.

The main limitation on the kind of account of judicial orders that may be added to a deontological theory of private law is that such an account must be consistent with the theory's explanation of primary obligations (which I assume here is rights-based). The main significance of this limitation, in turn, is that it precludes adopting a consequentialist account of judicial orders. According to a consequentialist account, courts may require that a defendant do something, say pay a sum of money, in order to encourage other persons to behave properly in the future. In principle, it may be appropriate to make such an order regardless of whether the

defendant has done anything wrong, even by consequentialist standards. An order that an "efficient breacher" of a contract pay damages is arguably just such an order: The defendant must pay a sum of money even though his behavior is regarded as praiseworthy by efficiency theories.[27] The defendant may, therefore, be used as an instrument for furthering the general good. Whatever consequentialist justification exists for this approach, it is clearly inconsistent with a rights-based deontological theory.[28]

I will limit my inquiries, then, to deontological explanations for direct enforcement orders and remedial orders.

C. Deontological Accounts of Direct Enforcement Orders

From a deontological perspective, the puzzle posed by direct enforcement is not so much why courts make such orders but why they do not make more of them. After all, the *content* of what a defendant is required to do by virtue of an order of direct enforcement is the same as the content of his primary obligation. Assuming that the state has an interest in primary obligations being performed, why is it not appropriate for courts to encourage performance by directly enforcing primary obligations whenever they are requested to do so? That accommodating such requests may be costly is not a particularly strong objection in a deontological account of the law.

The solution to this puzzle turns on the different roles that legal statements about our primary obligations, and legal orders that directly enforce primary obligations, are meant to play in citizens' practical reasoning. From the legal or internal perspective, when courts or legislatures articulate primary legal obligations they are articulating legal *rules*.[29] By this is meant not just that primary legal obligations are of general application, directed at all persons living within a jurisdiction (or at least to all persons of a certain class—parents, for example—within a jurisdiction). More importantly, it

---

27. Unless of course the original promise was a disjunctive promise to perform or pay damages—an implausible interpretation in most cases. I note also that not all consequentialist accounts support the idea of efficient breach. *See, e.g.*, Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

28. *See* IMMANUAL KANT, *Introduction to the Metaphysics of Morals*, *in* THE METAPHYSICS OF MORALS 40–54 (M. Gregor trans., 1991).

29. *See* H.L.A. HART, THE CONCEPT OF LAW 85–91 (1961).

means that primary legal obligations are presented as statements of what citizens *ought*, morally, do as opposed to statements of what it might be in citizens' self-interest to do. The norms set out in the primary obligations are meant to be followed, not because of any sanction that might or might not be attached to them, but because they describe what citizens morally ought to do. From the legal perspective, then, the articulation of primary obligations is the articulation of *guidelines* for behavior. It is of course understood that if citizens fail to perform their primary obligations they may be subject to an order by the courts. But such orders (in whatever form they may take) are not meant to be the reason that the primary obligation should be performed. From the law's perspective, it is intended that the citizen should (if he has not already done so) internalize these rules, accepting them as not just legally valid but as normatively valid—as the pronouncements of a valid authority. This is not to make the implausible claim that all primary obligations are normatively valid; nor is it to claim that citizens always internalize primary obligations in the way that the law aspires. The point is simply that this is how statements about primary obligations are meant to be regarded.

An order of direct enforcement is quite different. From the law's perspective it is essentially a *command*.[30] By this I mean not just that direct enforcement is aimed at a particular individual and requires that the individual do a specific thing. More fundamentally, it is a command because the sanction that is necessarily attached to the order (for example, a charge of contempt of court or the possibility of goods or money being seized by the sheriff[31]) is an integral part of the order. Insofar as a judicial "order" specifying what the parties ought to do is not accompanied by a sanction for non-performance, that order is merely declaratory. The difference is critical. A declaratory order presumes that the parties are willing to internalize the primary obligations it sets out; the order is required only because those obligations are unclear. A declaratory order is effectively a "fine-tuned" articulation of a primary obligation. By contrast, an order of direct enforcement, which is aimed at a particular individual and which places the sanction front and center,

30. *See id.* at 19–20.

31. *See* ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 2 (2d ed. 1994).

presumes that the defendant is not willing to internalize the relevant obligation. The sanction is presumed to be the reason for performance.[32] Save in cases where a declaration is sought, why else would anyone go to court?

From a deontological perspective, this difference between the messages conveyed by statements of primary obligations and by the direct enforcement of such obligations suggests the following test for determining when it is appropriate to directly enforce a primary obligation. Direct enforcement is appropriate when, but only when, a citizen is unwilling to accept or internalize a primary obligation. Aside from whatever general or social value may arise from living in a community in which those in power attempt to guide behavior primarily by rules rather than commands, there is a value, from a deontological aspect, in rule-based over command-driven behavior. It is important that people act in external conformity with their primary obligations, but it is also important—intrinsically important—that they do so for the right reasons. From a deontological perspective, which focuses on the intrinsic value of actions, it is important that people honor contracts not just because they are afraid of what courts will do to them if they do not honor contracts, but because they think they *ought*, morally, to honor contracts. Insofar as courts order direct enforcement, they assume that citizens are unwilling or incapable of internalizing the relevant norm, and that they will conform only because of an external threat. The threat does not, of course, eliminate the possibility of internalizing the norm, but it sends the wrong message. It tells the citizen that he is not expected to internalize the norm.

Orders of direct enforcement are thus inconsistent with the law's desire—a legitimate desire from a deontological perspective—that the law be treated as a legitimate authority rather than a gunman writ large. Nonetheless, there remains a role for direct enforcement. Although there is a value in citizens conforming to their primary obligations for the right reasons, there is also a value in citizens outwardly conforming to those obligations. Rights-infringements are wrong no matter why they happen. This latter value can appropriately be pursued in those cases in which it is clear that the former value is of no concern. In practice, this leads to the

32. Of course the granting of direct enforcement orders is itself governed by rules directed at the judiciary. *See* HART, *supra* note 29, at 95–96.

common-sense conclusion that commanding citizens to perform their primary obligations by direct enforcement orders is prima facie appropriate where citizens are unwilling to internalize the relevant primary obligation.[33] Stated differently, direct enforcement is in principle appropriate precisely in those cases in which it is clear that it is needed in order to ensure that the relevant primary obligation is performed.

D. Deontological Accounts of Remedial Orders

An initial observation is that any explanation of remedial orders, deontological or not, must piggyback onto an explanation of direct enforcement. A remedial order is not the direct enforcement of a primary obligation, but it is a sanction-backed order directed to a specific individual to do a specific thing. A remedial order might usefully be described as the direct enforcement of a secondary obligation (the obligation to repair). It follows from what was said above concerning the prerequisites for direct enforcement that a prerequisite to granting a remedial order is that the defendant is unwilling to perform his secondary obligation to repair (assuming that performance was desired by the plaintiff). I will not say anything further about this aspect of remedial orders. Although it may be queried whether this requirement is always properly taken into account by courts (especially in cases in which the parties disagree in good faith as to their rights) my interest here is with the logically prior, and substantively more important issue of when, if ever, the content of a remedial order—to repair a loss—is something the defendant ought to do. I will assume that if the parties are in court then the "unwillingness" requirement is satisfied.

From a deontological perspective, the justification of a duty to repair (a secondary obligation), must be of a similar kind to the explanation of primary obligations. It must be grounded in the intrinsic value of the reparative acts. So far as I am aware, the only plausible explanation of this kind is a justice-based explanation, more specifically a corrective justice-based explanation. I will not

33. The qualifier "prima facie" is added to make clear that in certain cases other considerations, for example personal liberty or difficulties of supervision, may justify defeating an otherwise valid claim for direct enforcement. I note that it is not clear, however, that "adequacy of damages" is a relevant factor. I discuss such considerations briefly in Part III. *See infra* Part III.

offer a moral justification for corrective justice,[34] but will assume that, like the concepts of "rights" and "welfare" used earlier, it expresses a prima facie morally plausible value. I will therefore limit myself to explaining what corrective justice means, why it can be adopted by a deontological theory, and its implications for when remedial orders should be given.

The concept of "justice" is conventionally understood to provide, inter alia, a particular type of standard for assessing acts or omissions.[35] To say that an act is "just" is to say, first, that it is intrinsically valuable (or intrinsically "right" or "good") rather than merely instrumentally valuable (valuable because of its valuable consequences). Justice is its own end. This is one reason that efficiency theories and, more generally, consequentialist moral theories are not thought to provide theories of justice.[36] Second, to say that an act is just is to say that it is intrinsically valuable because, in broad terms, one person has rendered to another person what is fitting or appropriate or "due" to that person. A contrast can again be drawn with efficiency-based standards, which evaluate actions not in terms of their rightness vis-à-vis particular individuals but in terms of their rightness vis-à-vis the amount of welfare they produce in society generally. In efficiency terms, an award of damages is valuable if it leads to an increase in overall welfare. By contrast, the award is just only if the plaintiff was due the sum paid and was due that sum from the defendant.

Justice takes various forms (e.g., distributive, retributive, corrective). The particular form of justice that is appropriate to explaining judicial orders will depend on the nature of the orders being explained. In respect of private law orders to repair, the relevant form is corrective justice. Corrective justice is concerned

34. *See, e.g.*, WEINRIB, *supra* note 25, at 56–83.

35. *See id.* at 61–63.

36. Insofar as efficiency theories have a theory of "justice" it is that justice is synonymous with the maximization of welfare. This of course denies any real content to justice. To say that an act is just, in this view, says nothing more than that it promotes welfare. The concept of justice has no independent value. Efficiency theorists might also argue that individuals promote welfare best when acting out of a sense of (non-consequentialist) justice, and, thus, that a belief in "justice" is efficient even if it is mistaken. This argument, which is analogous to one made in respect of "remedies" (described in Part II B above; see also text accompanying note 15), again denies any real content to justice. *See id.* at 66–68.

with the justice of duties to repair or to rectify harms, and in particular with duties to repair harms caused by one's wrongful actions.[37] Corrective justice might thus be described as individual or personal justice.[38] It can be contrasted with both distributive justice—the justice of schemes for distributing goods, income, and other resources—and retributive justice—the justice of punishment.

The general idea underlying the concept of corrective justice is that we have a duty to repair or "correct" wrongful losses that we have caused. The losses must be wrongful or else there is nothing to "correct"—merely a situation that might be improved.[39] What qualifies as "wrongful" is not specified by the concept of corrective justice itself. Corrective justice is meant to explain duties to repair (secondary duties) and not duties not to cause wrongful losses (primary duties). Primary duties must be explained on other grounds. In a rights-based deontological theory of private law, those grounds are individual rights; a wrongful loss is a loss that arises from infringing another's individual rights.

The concept of corrective justice, then, provides an account—compatible with deontological theories of private law—for when remedial orders should be made. For the purposes of the question addressed in this Article, the most significant precondition to the making of such orders is that a wrong has been committed. Corrective justice duties are duties to repair losses caused by wrongs. Although the point is less important for our purposes, it should be noted that there is nothing in the concept of corrective justice that determines the form that a remedy should take. There are different ways of repairing losses. In particular, both orders to do or not do something and orders to pay a sum of money can in principle satisfy the requirements of corrective justice. Repair is, in practice, compensation, and compensation can be in kind or in money.

---

37. *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS, Book V (Richard McKeon ed., 1941); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 177–84 (1980); WEINRIB, *supra* note 25, at 56–83; Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE, 237 (Jeremy Horder ed., Oxford University Press, 4th Series 2000) (all discussing the nature of corrective justice).

38. *See* WEINRIB, *supra* note 25, at 60.

39. *See* Perry, *supra* note 37, at 239 ("Corrective justice gives rise to a duty to repair when persons have harmed one another.").

To summarize: From a deontological perspective, an order of direct enforcement is prima facie appropriate in cases in which it is clear that the defendant is unwilling to accept or internalize the relevant primary obligation. A remedial order, by contrast, is appropriately ordered in cases in which the defendant has wrongfully caused the plaintiff to suffer a loss (and failed to repair that loss). The only point to add—an important one as it turns out—is that it is of course possible that some plaintiff's claims may satisfy both of these criteria.

III. ARE RESTITUTIONARY ORDERS REMEDIAL ORDERS?

I turn now to consider the question posed in the introduction, that of whether restitutionary orders should be regarded as remedial orders or as the direct enforcement of primary duties. Three kinds of evidence will be examined: (1) the judicial explanation of restitutionary orders; (2) the content of restitutionary orders; (3) the preconditions for restitutionary orders.

A. The Judicial Explanation of Restitutionary Orders

In describing the plaintiff's argument in a case of subtractive unjust enrichment courts rarely make a clear distinction between the plaintiff's complaint against the defendant and what the plaintiff is asking the court to do.[40] The discussion tends to focus exclusively on the question of whether the defendant was unjustly enriched. That said, the language used and the explanations provided by courts when they make restitutionary orders are undoubtedly more consistent with the direct enforcement view.[41] Although references to restitutionary damages are sometimes still heard, the more usual terminology, especially in cases involving subtractive unjust enrichment, is restitutionary *awards*. More to the point, the very word restitution means a "giving back" rather than "compensation for loss" or anything similar. Consistent with this meaning, when courts do describe a plaintiff's claim in a case of subtractive unjust enrichment, it is styled not as a claim for damages or compensation or repair for any kind of wrong, but rather as a claim for the *return* or

40. *See* Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, 560 (H.L.) (Eng.) (Lord Templeman primarily focuses on the plaintiff's unjust enrichment claim.).

41. *See id.* at 578.

the *recovery* of benefits that the plaintiff transferred to the defendant.[42] Indeed, the direct enforcement view seems to neatly explain why courts fail to distinguish between the plaintiff's complaint about the defendant and the plaintiff's request to the court: on the direct enforcement view they are two sides of the same coin.

Judicial language and judicial explanations must be given significant weight in any explanation of the law.[43] In the case of restitutionary orders, they are in my view the strongest reason for supporting the direct enforcement view. But it would go too far, particularly in an area of law like restitution, to regard such language and statements as determinative. The history of restitution, littered as it is with false understandings, tells us this much. If the judicial view of restitution were considered the final word, we would still regard restitutionary orders as founded on implied contracts. One might add that even defenders of the direct enforcement view acknowledge that the word "restitution" has been frequently misused by lawyers and judges.[44]

B. The Content of Restitutionary Orders

In many cases, the status of a judicial order as remedial or direct enforcement can be established by the content of the order. For example, if the primary duty on which the plaintiff's claim is based is a tort duty not to injure the plaintiff, then an order that the defendant pay a sum of money to the plaintiff cannot be direct enforcement. The two duties are transparently different in content.

Where, however, the relevant primary obligation is a monetary obligation, the content of a judicial order may provide few clues as to how it should be classified. On such occasions, the content of a direct enforcement order will be the same as the content of remedial order—to pay a sum of money to the defendant. This is the case in respect of most restitutionary orders. The primary obligation in most cases of subtractive unjust enrichment is an obligation to return money. Mistaken transfers typically involve mistaken payments.

---

42. *See id.* ("The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors.").

43. *See* Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 248–49 (2000).

44. *See* Peter Birks, *Misnomer*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 1, 34 (W.R. Cornish et al. eds., 2000).

Of course, the amount of money specified by a remedial order should in principle be different, at least in some cases, from the amount specified by a direct enforcement order. In principle, a remedial order should, in at least some cases, include a sum intended to compensate for consequential losses. That such sums are not awarded as part of restitutionary orders[45] might seem, then, a strong objection to the remedial view. However, the objection is transparently weak. Courts add interest awards to restitutionary orders[46] and such awards can plausibly be regarded as compensation for consequential losses. The explanation is that, rather than engage in the administratively and evidentially difficult task of assessing consequential losses directly, courts have adopted a general rule that such losses are equivalent to the lost interest. To be sure, interest awards can also be regarded as a measure of (one aspect of) the defendant's unjust enrichment, and thus are also consistent with the direct enforcement view.[47] My point is that the amount of money a defendant must pay in restitutionary claims is consistent with both views of restitutionary orders. Furthermore, the common law's historical reticence to award consequential damages with respect to monetary obligations makes it generally unwise to place much weight on this feature of restitutionary awards.[48]

In any event, whatever support the direct enforcement view might derive from the rule against recovery of consequential losses is offset by the fact that courts grant monetary awards even in cases involving the transfer of chattels. Judicial practice here appears to support the remedial view. I noted earlier that there is no reason to suppose that a remedial order must always be in money rather than in kind, but direct enforcement ought to be in kind. In response to this point, Birks has argued that it is a mistake to assume that the primary obligation in such cases is to return the chattel.[49] But the only

45. "[H]e can be liable no further than the money he has received . . . ." Moses v. Macferlan, 97 Eng. Rep. 676, 679 (K.B. 1760) (Eng.).

46. *See* ANDREW BURROWS, THE LAW OF RESTITUTION 30–31 (1993). This is not always true (or the case). *See* Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669 (H.L.) (Eng.).

47. A third possibility is that a single interest award could also be regarded as a measure of benefit up to the point at which the primary duty was breached and thereafter as a measure of consequential loss.

48. *See* BURROWS, *supra* note 31, at 97–98.

49. Birks, *Rights, Wrongs, and Remedies*, *supra* note 2, at 29

evidence Birks offers in support of this view is that English law says that plaintiffs in such cases normally do not, in effect, have a right to the chattel.[50] That is an accurate statement of the plaintiff's rights at court, but there is no reason to assume it accurately describes the defendant's primary duty. More to the point, it is simply implausible as a matter of first principle to suppose that the recipient of a mistakenly transferred chattel is not under a primary duty to return that chattel. That is like saying our primary contractual obligation is to pay a sum of money equal to the value of our promised performance.

At the same time, just as it would be unwise to place significant weight on the rule against recovery of consequential losses, it would also be unwise to place significant weight on the rules that provide for monetary awards in cases involving chattels. The explanation for the latter rules regarding chattels seems likely to lie not in a principled distinction, but in historical limits on the ability of courts of law to award specific relief. Monetary restitutionary awards can thus plausibly be regarded as a second-best form of substitute direct enforcement.

The content of restitutionary orders, then, seems consistent with both the direct enforcement view and the remedial view. The direct enforcement view offers the more natural explanation of the rule against recovery of consequential losses; the remedial view offers the more natural explanation of the rule providing for monetary awards in cases involving chattels. In the end, however, both rules are explicable by both approaches.

C. The Preconditions for Restitutionary Orders

Earlier, in Part II, the preconditions for granting direct enforcement and remedial orders were described. The question I consider now is whether either—or both—of these sets of preconditions are satisfied in cases in which restitutionary orders are made.

Beginning with the preconditions for a remedial order, the only issue—an important one—is whether the requirement of a wrong is satisfied. The requirement of a loss is satisfied automatically if the

---

(responding to Barker, *supra* note 2).

50. *See id.* at 30 ("study of the common counts shows this to be incorrect for English law.").

wrong, which is failing to return a benefit, is established. Supporters of the direct enforcement view have argued that restitution cannot be a remedy since plaintiffs claiming restitution do not need to prove that the defendant has committed a wrong.[51] In particular, the plaintiff does not need to prove that the defendant wrongly failed to return the relevant benefit. The plaintiff needs only to establish facts that show the defendant was and is unjustly enriched. This is an accurate description of English law,[52] but it provides little support for the direct enforcement view. The facts that show that a defendant was and remains unjustly enriched also prove that a wrong has occurred. The primary obligation in a case of a mistaken transfer is an obligation to return what was transferred. If the mistaken transfer is proven and the defendant has not returned the benefit by the time of trial, then the necessary wrong is established. There is nothing left to prove when the breach of duty is shown.[53]

Moreover, an equivalent objection could in any event be made against the direct enforcement view. As explained in Part II, the main precondition for direct enforcement is that the defendant is unwilling to perform his primary obligation.[54] Yet a plaintiff claiming restitution is not required to prove that the defendant is unwilling to perform. If the "no wrong" objection is taken seriously, then the "no unwillingness to perform" objection must also be taken seriously—leading to the implausible conclusion that restitutionary orders are neither direct enforcement nor remedial. But of course the

---

51. *See id.* at 28.

52. *See* Kleinwort Benson Ltd. v. Lincoln City Council, [1998] 4 All E.R. 513, 542 (H.L.) (Eng.) ("[T]he cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment.").

53. *See id.*

54. An additional "precondition" for a direct enforcement order is that it be possible to perform the primary obligation. It might be argued that it is not in fact possible for a defendant in a successful claim based on subtractive unjust enrichment to perform the primary obligation since by definition it is too late to perform. The benefit should have been returned earlier (on the controversial question of exactly when the benefit should be returned, see Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 TEX. L. REV. 2177, 2194–95 (1979)). This suggestion raises complex issues about the concept of an "obligation" that cannot be explored here. Briefly, however, the response is that with respect to subtractive unjust enrichment claims, the essence of the primary duty is the obligation to return the relevant benefit. The timing of the return is merely a non-essential feature of the obligation. Hence, "late return" is just that—late *return.*

"no unwillingness to perform" objection should be rejected for the same reason that the "no wrong" objection should be rejected. The defendant's unwillingness to perform is proven by the facts that establish that the defendant was and remains unjustly enriched. If the parties are in court, it goes without saying that the defendant is unwilling to perform his primary obligation.[55] Here again, there is nothing left to prove.

I conclude, then, that the preconditions for both direct enforcement orders and remedial orders are met in cases in which restitutionary orders are made. This conclusion rebuts the most important objections to the direct enforcement and the remedial view respectively. At the same time, it also provides a powerful argument *in support* of each view. Let me explain.

Insofar as the preconditions for an order of direct enforcement are met, then the law would be acting prima facie inconsistently (not to mention normatively badly) if it refused to grant such an order. There may, of course, be cases in which a prima facie good claim for direct enforcement can properly be refused for external reasons. Orders that involve personal service, raise special supervision problems, or that might have a chilling effect on freedom of expression arguably fall into this class. But none of these concerns, or any others that might be relevant,[56] arise in cases of subtractive unjust enrichment. The content of an order of direct enforcement in such cases is straightforward: to pay a sum of money.[57]

The same point can be made with respect to remedial orders. If a wrong has occurred, it is legally inconsistent (and normatively wrong) for the law to refuse a remedy to a plaintiff who seeks one. If corrective justice is important, then it is important in all cases of wrongfully caused losses. To be sure, a legal system might decide that certain wrongs are not serious enough to justify permitting

---

55. This may not be right since the parties may have a good faith dispute as to their rights.

56. If it were the case that a court should not order direct enforcement unless damages are "inadequate" then this might provide a good reason to refuse direct enforcement. However, it is not clear why adequacy of damages should be relevant, particularly in a case where the primary obligation is a simple duty to return a benefit.

57. I am assuming here that, for reasons discussed earlier, a direct enforcement order in a case involving transferred chattels can properly be expressed in monetary terms.

victims to ask courts for remedies. It might further be argued that the wrong of failing to return property is just such a wrong. As I have argued elsewhere, the relevant duty here—the duty to return property—is a positive duty to assist another person.[58] For good moral reasons, the law does not normally enforce duties to benefit others. Such a duty, though normally only a trivial burden, is prima facie inconsistent with the principle—the harm principle—that legal constraints on liberty are justifiable only to the extent they are required in order to prevent harm to others.[59] On these grounds, it might be argued that while one morally ought to return property that one has received by, say, mistake, a failure to do so should not give rise to legal liability. Supporters of the direct enforcement view appear to believe something along these lines.

The difficulty with this argument is that it cuts both ways. If a duty to return property is not capable of supporting a claim for reparation, then it is not clear why it is capable of supporting an order of direct enforcement. If anything, the opposite conclusion seems more plausible. It is usually assumed that remedial orders should be granted more easily than direct enforcement orders on the grounds that they are less intrusive.[60] It is possible, I suppose, that just as a prima facie good claim for direct enforcement can sometimes be defeated by "external" considerations that do not apply to a claim for a remedy, a prima facie good claim for a remedy can sometimes be defeated by external considerations that do not apply to a claim for direct enforcement. Yet, the law provides no clear examples of such circumstances, and it is difficult to imagine what they would be. In every case in which injunctive or specific relief—which I will assume are instances of direct enforcement—is available for the breach of a non-monetary obligation,[61] compensatory damages are also available if a loss has been caused by a breach of the relevant primary duty.[62] It is only where a breach has not yet happened that a remedy is unavailable.

---

58. *See* Smith, *supra* note 54, at 2181–82.

59. *See* JOHN STUART MILL, ON LIBERTY 13 (Henry Regnery Co. 1955) (1859).

60. Though with respect to monetary obligations, this is not a good argument.

61. I leave to the side cases involving monetary obligations because it is the status of such cases that is the issue.

62. *See* DOBBS, *supra* note 11, at 6.

Finally, the similar content of direct enforcement orders and remedial orders is not itself a reason for refusing a remedial order. Assuming that the preconditions for a remedial order are satisfied, a remedial order should be available. Of course, if an order of direct enforcement has already been made by a court, then it would be inappropriate to *also* order a remedy.[63] If the primary duty is performed, there is no loss to remedy. But this does not explain why a court should refuse a remedy in the first place. Moreover, insofar as this is an argument in favor of the direct enforcement view, it is also an argument in favor of the remedial view. It could equally be argued that courts should refuse direct enforcement orders because they give remedial orders, and, in practice, such orders give plaintiffs what they would get from direct enforcement.

IV. CONCLUSION: A DUAL ROLE FOR RESTITUTIONARY ORDERS

The above analysis establishes that restitutionary orders can plausibly be explained as either direct enforcement orders or remedial orders. It also establishes that courts would be acting inconsistently—and normatively wrongly—if they refused a request to make either kind of order in the types of cases in which restitutionary orders are made.

On the assumption that a single restitutionary order cannot be both remedy *and* direct enforcement, the conclusion to draw from the foregoing seems clear: Restitutionary orders can be direct enforcement orders *or* remedial orders. Sometimes they will be the former, sometimes the latter. The classification of any particular restitutionary order depends on whether the court is responding to a request for a remedy or a request for direct enforcement.

The language that courts have used in past cases involving subtractive unjust enrichment suggests that most of the orders made in past cases were direct enforcement orders. This finding is consistent with the "dual role view." This view allows for different mixtures of direct enforcement and remedial orders. It even allows for the possibility that every past restitutionary order was a direct enforcement order. The dual role view does not require that plaintiffs sometimes request remedies and sometimes request direct

63. *See id.* at 3.

enforcement. All it requires is that they be understood to have the option of making either request.