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## THE STRUCTURE OF UNJUSTNESS

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### INTRODUCTION

What renders an enrichment unjust?<sup>1</sup> This is the most fundamental and perplexing issue in the law of unjust enrichment – fundamental because in the absence of unjustness, one is not liable for being enriched at another’s expense and perplexing because the reference to “unjust” (or “unjustified”) enrichment provides little indication of the source of one’s liability. In the past, perplexity about this fundamental issue fueled the suspicion that unjust enrichment, if recognized as a discrete basis of liability, would be incompatible with disciplined legal reasoning.<sup>2</sup> Even today, as we celebrate a new *Restatement (Third) of Restitution and Unjust Enrichment*, uncertainty concerning what makes a particular enrichment unjust continues to spawn both doctrinal and theoretical controversy.

This Article examines the issue from the perspective of corrective justice. Corrective justice is the theoretical notion that sets out what it means for private law to be fair and coherent.<sup>3</sup> It does so by insisting that liability be based on normative considerations that embrace both parties in relation to each

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<sup>1</sup> The unjust enrichment dealt with in this Article is the kind that operates, in Professor Peter Birks’s words, “by subtraction,” that is, where “value has passed to the defendant from the plaintiff.” PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 23 (1989).

<sup>2</sup> See, e.g., *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 859 (Can.) (Martland, J., dissenting) (“[T]he adoption of this concept . . . would clothe judges with a very wide power to apply what has been described as ‘palm tree justice’ without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test [is] his individual perception of what he considered to be unjust.”). A similar note was sounded decades earlier in W.S. Holdsworth, *Unjustifiable Enrichment*, 55 L.Q.R. 37, 49 (1939).

<sup>3</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56-83 (1995).

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other. The requirement of applicability to both parties in their interrelationship is a general structural idea to which particular substantive elements of liability, whatever they are, have to conform if they are to be fair to both parties and coherent with one another. My goal is to show how this structural idea illuminates the unjustness that figures into unjust enrichment.

#### I. CORRECTIVE JUSTICE

Corrective justice understands civil liability as an entirely interactional phenomenon. It treats the parties as being each related to the other, and it treats the law as constructing categories expressive of the reciprocity of this relationship. From the standpoint of corrective justice, the plaintiff and defendant participate in a juridical process in which what matters is not either party's action considered on its own, but the norms and imputations appropriate to their interaction with each other.

The juridical character of this interaction is reflected in the most pervasive feature of liability: the liability of a particular defendant is always a liability to a particular plaintiff. In holding the defendant liable to the plaintiff, the court is not making two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same thing from the defendant), but a single judgment that embraces both parties in their interrelationship. Each party's position is intelligible only in the light of the position of the other. The defendant cannot be liable without reference to a plaintiff in whose favor such liability runs. Similarly, the plaintiff's entitlement exists only in and through the defendant's subjection to liability. Liability thus treats the plaintiff and defendant as correlatively situated.

Corrective justice draws out this correlativity's normative implications. For corrective justice, the point of liability is to correct an injustice between the parties. This correction can occur only if the structure of the injustice matches the correlative structure of liability. As is evidenced by the judgment's simultaneous correction of both sides of the injustice, the injustice done by the defendant and the injustice suffered by the plaintiff are not independent items. Rather, they are the active and passive poles of the same injustice, so that what the defendant unjustly has (or has done) is the basis of liability only because of what the defendant has unjustly suffered, and vice versa. Because the determination of the injustice is not a matter of mere assertion but is a normative ascription that must be justified by an appropriate set of reasons, the correlativity of the injustice means that the reasons for concluding that something is an injustice also have a correlative structure. Accordingly, the only considerations that matter for elucidating the injustice as between the parties are those that apply correlatively to both of them. Then the reasons that support liability render the injustice for which the defendant is held liable the same as the injustice that the plaintiff has suffered.

Such correlatively structured reasons achieve both coherence and fairness. By positioning the parties as the doer and sufferer of the same injustice, the reasons for liability reflect the unity of the parties' relationship. The

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determination of liability then functions as a coherent enterprise in justification applicable to the relationship as a whole rather than as the enumeration of a hodgepodge of factors separately relevant only to one or the other of the parties. With justificatory coherence comes fairness as between the parties. Justifications for liability that do not match the correlative structure of the parties' relationship necessarily favor one of the parties at the expense of the other, thereby failing to be fair from the standpoint of both. In contrast, reasons for liability that reflect the parties' correlative situation set terms for the parties' interaction that take account of their mutual relationship and are thus fair to both of them.

To the extent that it is fair and coherent, the law works out these correlatively structured reasons for liability through concepts that treat a particular basis of liability as a thematic unity. Each basis of liability has a theme that summarily describes its specific subject matter (consensual agreement in the case of contract, wrongful risk creation in the case of negligence, and so on). The law's task is to construct the ensemble of concepts appropriate to that theme in a way that expresses a correlatively structured justification for liability. Such a justification treats the parties' relationship as a unity that is articulated through the concepts that govern it. The interactions to which liability responds link two different parties through events that may occur at different times (for example, offer and acceptance in contract law, and the defendant's risk creation and the plaintiff's injury in negligence law). The law overcomes this difference in parties and events by formulating concepts that, taken together, constitute an integrated sequence. The set of concepts thereby assembles the liability-producing events into the single injustice that is the same for both parties.

Consider the treatment of unreasonable risk creation in negligence.<sup>4</sup> Negligence law translates into a series of legal concepts the progression from the defendant's creation of an unreasonable risk to the materialization of that risk in injury to the plaintiff. The termini of this progression are the concepts of breach of the standard of reasonable care and factual causation. These two termini, however, do not operate as atomistic elements, one applying to the defendant and the other to the plaintiff, that the law simply adds together. Rather, the law insists that the termini be coherently linked through the concepts of duty and proximate cause. These concepts, in turn, connect wrongdoing and injury by describing the wrongful risk in terms of the range of the potential victims and consequences through which the risk is to be understood as wrongful. Thus, the risk that materializes into injury to the plaintiff is the same as the risk that the defendant unreasonably created, and the wrong done in its creation is the same as the wrong suffered in its materialization. Through this ensemble of concepts, all of which are necessary for liability, the law treats the defendant's act and its effect on the plaintiff as

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<sup>4</sup> For a more exhaustive discussion of this topic, see *id.* at 145-70.

an integrated sequence in which there is a single injustice that is the same for both parties.

Our concern here is with the ensemble of concepts that correlatively situates the parties when liability exists for unjust enrichment. How do the components of unjust enrichment come together to form a similarly unified framework for liability?

## II. UNJUST ENRICHMENT

Liability for unjust enrichment is composed of two strands, the first dealing with beneficial transfer and the second with the unjustness of retaining the benefit transferred. The transfer strand, formulated as the enrichment of one person at the expense of the other, states the theme for this basis of liability: the plaintiff has done or given something for nothing. The phrase “enrichment at the expense of” identifies the two parties to the relationship, situating them correlatively as transferor and transferee of the same gratuitous benefit. This correlativity signifies the full conformity of the transfer strand to corrective justice.

The fact that unjust enrichment takes the transfer of something for nothing as its theme reveals what the unjustness strand is about. While not proscribing beneficial transfers – gifts, after all, are not against public policy – the law insists that they be expressive of the parties’ free will. Accordingly, the threshold issue concerning the justness of the enrichment is to determine whether the transferor intended to transfer the benefit without receiving something in return. The inquiry into the unjustness of the enrichment, in other words, does not range at large over what is just or fair. Rather, it deals with the transferor’s donative nature – that is, the issue of justness specifically pertinent to one person’s giving another something for nothing.

This focus on the plaintiff’s donative intent is manifest in the positive law. In Canada, where the unjustness aspect is formulated as an “absence of juristic reason,” a conspicuous form of juristic reason is that the plaintiff conferred the benefit as a valid gift.<sup>5</sup> Similarly, in common-law jurisdictions that adhere to the unjust-factors approach, many of those factors refer to the circumstances under which the plaintiff’s donative intent can be regarded as vitiated (e.g., mistake) or qualified (e.g., failure of consideration).<sup>6</sup>

The absence of donative intent on the plaintiff’s side, although important, is not the whole story. This is evident both doctrinally and theoretically. From a doctrinal standpoint, one can readily posit instances where the plaintiff, although not intending to make a gratuitous transfer, is nonetheless unable to recover from the transferee. Imagine that the plaintiff is hired to clean X’s

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<sup>5</sup> See, e.g., *Peter v. Beblow*, [1993] 1 S.C.R. 980, 990-91 (Can.). Another form of juristic reason that the court mentions is whether the benefit was conferred in pursuance of an obligation owed to the defendant. *Id.* This juristic reason is beyond the scope of this Article and thus will not be discussed.

<sup>6</sup> BIRKS, *supra* note 1, at 140-264.

shoes, but mistakes *Y*'s shoes for *X*'s and cleans them. Despite the plaintiff's mistake and his consequent absence of intent to clean *Y*'s shoes for nothing, the famous statement of Chief Baron Pollock would apply: "One cleans another's shoes; what can the other do but put them on?"<sup>7</sup>

From a theoretical standpoint, the absence of donative intent on the plaintiff's side, without more, cannot create a duty on the defendant to make restitution. If the plaintiff were reclaiming a benefit that she continued to own unless transferred according to her will, then the absence of donative intent might mean that the property in the benefit had not passed. Liability for unjust enrichment, however, does not work that way; it reverses beneficial transfers even where the property in the benefit has passed.<sup>8</sup> The consequent obligation is satisfied out of assets that are rightfully the defendant's. It would be odd if something about the plaintiff alone could force the defendant to part with what is rightfully his. Thus, because the defendant's obligation compels restitution to the plaintiff out of the defendant's resources, that obligation cannot be the unilateral consequence of the plaintiff's lack of donative intent. Rather, it must be relationally constituted.

Just as the transfer strand has aspects relating to the defendant and plaintiff respectively (stemming from the "enrichment at the expense of" requirement), so too must the unjustness strand. This bilaterality is not explicit in the standard formulation of unjust enrichment, which uses the single word "unjust" to cover both aspects. Nonetheless, if the plaintiff's lack of donative intent sufficed, liability for unjust enrichment would be exposed to the standard objection leveled by corrective justice against one-sided elements: a finding of liability would be untrue to liability's relational character. An action for unjust enrichment does not deal with a benefit in the air, but with the subjection of a particular defendant to the plaintiff's claim. The basis for requiring the defendant to make restitution to the plaintiff must therefore apply to both parties. That the plaintiff gave the gratuitous benefit without donative intent is not in itself a reason for holding the defendant liable. What the unjustness strand needs is a second aspect connecting the defendant to the basis of the plaintiff's claim.

Corrective justice indicates the structural role of this second aspect. The root idea of corrective justice is that the reasons for liability operate correlatively so that the injustice that liability corrects is the same from both sides.<sup>9</sup> Applied to unjust enrichment, this idea requires the parties to be correlatively situated with respect to the same conception of unjustness. As

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<sup>7</sup> Taylor v. Laird, (1856) 25 L.J. Ex. 329, 335 (Pollock C.B.) (Eng.). An example of the plaintiff's bestowing a benefit without donative intent and yet failing to recover is *Nicholson v. St. Denis*, 8 O.R.2d 315 (1975) (Can. Ont. C.A.).

<sup>8</sup> See *Foskett v. McKeown*, [2000] 2 W.L.R. 1299 (H.L.) (distinguishing proprietary claims from claims in unjust enrichment).

<sup>9</sup> Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350-51 (2002).

indicated, lying at the heart of this conception is the non-donative nature of plaintiff's beneficial transfer. From the defendant's perspective, the correlate of this is that the defendant accepted the beneficial transfer on the same basis the plaintiff made it – that is, as non-donative.

Acceptance connects the defendant's will to the plaintiff's intention in conferring the benefit. In this context acceptance is relevant to liability as a relational phenomenon. Accordingly, acceptance is itself a relational idea. What the defendant accepts is not the benefit on its own, but as it has arisen through the parties' interaction. Absence of donative intent in the plaintiff is crucial to that interaction. To accept the benefit, therefore, is to accept it as given. The relationship that acceptance establishes is not that of the defendant to the benefit, but that of the defendant to the plaintiff through the benefit. Consequently, the two aspects of the unjustness strand (absence of donative intent on the plaintiff's side and acceptance as non-donatively given on the defendant's side) mark the convergence of both parties' wills on the non-donative transfer. Liability results because the defendant cannot retain as a gift what was neither given nor accepted as a gift.

The idea that the acceptance of the non-donative transfer is a presupposition of liability finds echoes in the common law. For example, immediately following Chief Baron Pollock's statement about the cleaning of another's shoes, he remarked that "the benefit of the service could not be rejected without refusing the property itself."<sup>10</sup> This suggests that if the owner of the shoes had had the opportunity to reject the cleaning, then liability would be justified. Not rejecting the benefit would have amounted to acceptance of it. On the basis of this and similar statements, Peter Birks controversially proposed that free acceptance could serve as a defendant-oriented unjust factor.<sup>11</sup> Others have affirmed that free acceptance is a valid component of the unjust enrichment analysis but that it goes to establishing the enrichment rather than counting as an unjust factor.<sup>12</sup> Although I draw on the same legal material, my suggestion is more comprehensive. Acceptance has nothing to do with establishing the enrichment; enrichment belongs entirely to the transfer strand. While it is defendant-oriented and belongs to the unjustness strand, acceptance does not figure as the unjust factor applicable to a distinct set of situations. Rather, it makes the unjustness of the defendant's retention of the benefit correlative to the unjustness of the plaintiff's gratuitous but non-donative transfer. Acceptance is thus a general structural feature of liability for unjust enrichment.

From this, the following picture emerges. Transfer and unjustness form the two interwoven strands for unjust enrichment. The transfer strand deals with the movement of a gratuitous benefit from plaintiff to defendant. The unjustness strand relates the wills of the two parties through the non-donative

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<sup>10</sup> *Taylor*, 25 L.J. Ex. at 332.

<sup>11</sup> See BIRKS, *supra* note 1, at 265-93.

<sup>12</sup> See, e.g., GRAHAM VIRGO, PRINCIPLES OF THE LAW OF RESTITUTION 87 (2d ed. 2006).

making and accepting of the gratuitous transfer, thereby bringing out the normative implications of non-donative transfer for their relationship. Each strand is both correlatively structured and related to the other. Together the four components of liability – the defendant’s enrichment, the enrichment’s being at the plaintiff’s expense, the plaintiff’s lack of donative intent, and the defendant’s acceptance of the benefit as non-donatively given – form an integrated ensemble that, like the ensemble of negligence concepts mentioned above in Part I, states a coherent basis of liability. Within the unjust enrichment ensemble, the two aspects of unjustness provide a reason, normatively relevant to both parties in their interrelationship, to reverse the transfer of the non-donative benefit.

### III. SITUATIONS OF ACCEPTANCE

So far I have been tracing the structural role of acceptance. I now turn to the content that fulfills this structural role for the common law. How does acceptance manifest itself in the common law’s handling of unjust enrichment? As I will indicate in this Part, acceptance refers to the integration of the benefit into the defendant’s purposes. It is present when the beneficial transfer is consonant with the defendant’s projects. This consonance can arise in three ways: through action by the defendant with respect to the benefit, through a specific project of the defendant’s that the benefit forwards, or through a benefit – money – that fits with any project that the defendant might have. These different ways form the various situations in which acceptance can be imputed to the defendant.

In the first situation the defendant knows or takes the risk that the benefit is non-gratuitously given and yet requests it or acquiesces in it by foregoing the opportunity to refuse it. For example, the plaintiff performs a service for the defendant under an unenforceable contract, which serves as evidence both of the defendant’s request for the service and of the plaintiff’s non-donative intent in providing it;<sup>13</sup> or the owner “lies by” when he knows that another is expending money to improve the property on the mistaken supposition of his own title.<sup>14</sup> In such cases, the defendant’s behavior in the face of the non-

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<sup>13</sup> *Degelman v. Guarantee Trust Co.*, [1954] S.C.R. 725 (Can.) (awarding a nephew the value of services performed for his aunt under an unenforceable agreement); *Pavey & Matthews Pty. Ltd. v Paul* (1986) 162 CLR. 221 (Austl.) (allowing a builder to recover costs for improvements he made on another’s property based on an unenforceable oral contract). The example of services provided under an unenforceable contract shows that the first situation includes, but goes beyond, Birks’s notion of free acceptance. Over time, Birks came to accept the view that the unjust factor in this case is not free acceptance but failure of consideration. See PETER BIRKS, *In Defence of Free Acceptance*, in *ESSAYS IN THE LAW OF RESTITUTION* 109 (Andrew Burrows ed., 1991). The larger role assigned to acceptance here is a consequence of treating acceptance as a structural feature rather than as an unjust factor.

<sup>14</sup> *Ramsden v. Dyson*, (1866) L.R. 1 H.L. 129 at 140 (Eng.) (Lord Cranworth L.C.) (“If a stranger begins to build on my land supposing it to be his own, and I, perceiving his

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gratuitous conferral can be regarded as an acceptance of those benefits as given without donative intent. The failure to reject is both the expression of one's free will with respect to the beneficial transfer and the assumption of responsibility for the implications of its non-gratuitous nature.

The idea that non-rejection can count as an acceptance of the benefit is subject to an important qualification. The non-rejected benefit has to be identifiable as an object of choice independent of what the defendant otherwise owns. This is the point of Chief Baron Pollock's remark in the hypothetical about the cleaned shoes: "the benefit of the shoes could not be rejected without refusing the property itself."<sup>15</sup> Once the benefit is inextricably entangled in what the defendant otherwise owns, no expression of will with respect to the benefit itself can be isolated. In using the improved object, the defendant is simply using what she owns, as she is entitled to do regardless of the improvement.

In the second situation, known to the common law as "incontrovertible benefit," the law treats the defendant as having accepted the beneficial transfer because, given the nature of the defendant's activities and projects, the defendant has no reason not to accept it. For example, the defendant holds property destined for a particular use or disposition that is furthered by the benefit that the plaintiff non-gratuitously conferred;<sup>16</sup> or the plaintiff discharges an obligation owed by the defendant.<sup>17</sup> In such instances, the benefit furthers the specific purposes implicit in the defendant's activities. The law therefore regards the defendant as having accepted the beneficial transfer.

In contrast to the first situation, here the entanglement of the benefit with the defendant's entitlements is no barrier to recovery. The reason for this difference is that the two situations relate the defendant's will to the benefit received in different ways. In the first situation, evidenced by request or acquiescence, the defendant's acceptance has to be referable to the benefit as such without limiting the use that the defendant is otherwise entitled to make of what she owns. Therefore, the defendant's will must be specifically directed to the benefit independent of the defendant's use of the owned thing. Once the benefit becomes entangled in the defendant's entitlements without indication of the defendant's acceptance, the defendant is not liable for

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mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he expended money on the supposition that it was his own.").

<sup>15</sup> Taylor v. Laird, (1856) 25 L.J. Ex. 329, 335 (Pollock C.B.) (Eng.).

<sup>16</sup> Lac Minerals v. Int'l Corona Res. (1989) 64 D.L.R. 14 (Can.) (ordering restitution for a plaintiff who developed a mine and constructed a mill on the defendant's mining property); Greenwood v. Bennett, [1973] 1 Q.B. 195 (Can.) (ordering restitution for improvements to a car that was to be sold).

<sup>17</sup> Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros., [1936] 3 All E.R. 696 (Eng.) (ordering a fur supplier to repay a warehouse for the customs duty that the warehouse had to pay on a shipment of the supplier's furs briefly stored in the warehouse that were subsequently stolen).



enjoying the benefit through the use of what belongs to her. In the second situation, in which the benefit is incontrovertible, the acceptance is imputed because the benefit forwards the use that the defendant would otherwise have made. Unlike the first situation, here the actual or prospective use shows the consonance of the benefit with the defendant's projects and is therefore the reason for regarding the benefit as accepted. Because the will is not directed to the benefit independently of the use, the benefit's inextricable entanglement with what the defendant is otherwise entitled to use poses no barrier to liability. Thus, the distinction between the two situations is that in the first, acceptance is independent of use and, accordingly, cannot operate on an entangled benefit; in the second, acceptance occurs through use, thereby rendering entanglement irrelevant.

Finally, the third situation is the non-donative payment of money. The peculiarity of money is that, as the universal medium of exchange,<sup>18</sup> it forwards any and every specific purpose that the defendant might have. The payment of money, therefore, is an incontrovertible benefit.<sup>19</sup> However, it differs in two ways from the non-monetary instances of incontrovertible benefit. First, acceptance is imputable for a non-monetary benefit only if, given the benefit's particular qualities, it forwards some particular project that the recipient has. In contrast, money forwards the recipient's projects, whatever they are. Second, whereas in the case of non-monetary benefit the imputed acceptance arising from the benefit's incontrovertibility operates despite being entangled in the defendant's other entitlements, money has no such entanglement. The receipt of the money, however, may lead the recipient to spend it on projects that she would not otherwise have undertaken – that is, to make the extraordinary expenditure that constitutes a change of position.<sup>20</sup> Accordingly, a benefit that subjects the defendant to liability while in the form of money may, when spent, become entangled in the defendant's entitlements. The imputation based on money's being the universal medium of exchange is

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<sup>18</sup> See *B.P. Exploration Co. v. Hunt*, [1979] 1 W.L.R. 783 (Q.B.) at 799 (Goff J.) (Eng.) (“[I]t is always necessary to bear in mind the difference between awards of restitution in respect of money payments and awards where the benefit conferred by the plaintiff does not consist of a payment of money. Money has the peculiar character of a universal medium of exchange.”).

<sup>19</sup> *VIRGO*, *supra* note 12, at 75. In unusual circumstances a defendant might reject such a benefit, for example, if the mistaken payment makes the defendant ineligible for means-based government services. For a situation in which this might occur, see *Director of Income Maintenance v. Henson*, [1987] 26 O.A.C. 332 (Can.). (I am grateful to Jason Neyers for pointing this out.) But until spent, money is not entangled in the defendant's other entitlements and so can be returned even if rejected. Thus whether it is accepted or rejected, the defendant is under an obligation to make restitution.

<sup>20</sup> *Rural Mun. of Storthoaks v. Mobil Oil Canada Ltd.*, [1975] 55 D.L.R. 3d 1 (Can.) (stating that, had a municipality that was erroneously receiving royalty payments from an oil company that was no longer leasing municipal land shown that they substantially altered their position as a result of the payments, they would not have had to repay the money).

then no longer be appropriate. As long as the money is unspent, the defendant's position is not different from what it would be in the second situation. Once the defendant changes position by making an extraordinary expenditure that entangles the benefit in the defendant's entitlements, the defendant's position is not different from that of the person with the cleaned shoes in the first situation.

These three situations correspond to the three ways of aligning the defendant's projects with the benefit bestowed by the plaintiff. The first aligns the project with a specific benefit that the defendant wishes to attain either by request or by non-rejection. The prospect of the benefit is what causes it to be incorporated into the defendant's purposes. The second is the converse of this; it aligns the benefit with a specific project that is otherwise evident in the defendant's activities. Because of the defendant's particular purposes, the benefit that forwards them is regarded as accepted. The third deals with money as the all-purpose means for forwarding any project and with the consequences of transforming the money received through expenditure on a specific project.<sup>21</sup> In all of these situations, the benefit that the plaintiff non-donatively gives fits the purposes that the defendant pursues. This fit is the basis for imputing acceptance to the defendant.

#### IV. SOME OBJECTIONS

I have suggested that the defendant's acceptance of the benefit as given is the structural correlate of the plaintiff's non-donative intent and that both aspects of unjustness are necessary for liability. The unfamiliar role assigned to acceptance gives rise to some possible objections,<sup>22</sup> which I will consider in this Part.

The first objection is that, because acceptance can be subsequent to the defendant's receipt of the benefit,<sup>23</sup> ascribing a structural role to acceptance is inconsistent with the idea that the cause of action in unjust enrichment is complete upon receipt of the benefit. This, however, misapprehends the effect of acceptance. What the recipient accepts is not the benefit conceived

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<sup>21</sup> These different ways of aligning the benefit bestowed by the plaintiff and the projects pursued by the defendant seem to constitute a more or less exhaustive taxonomy. The only addition necessary for completeness is the converse of the third situation. The third situation features a possible movement from the universality of money to the specificity of change of position through expenditure. The converse is a movement from the specificity of the benefit to a transformation of the benefit into money. This last possibility corresponds to Birks's view that a benefit becomes incontrovertible when realized in money. BIRKS, *supra* note 1, at 221.

<sup>22</sup> Some of these objections appear in Dennis Klimchuk, *The Normative Foundations of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 81, 86-93 (Chambers et al. eds., 2009).

<sup>23</sup> See, e.g., *Cressman v. Coys of Kensington Ltd.*, [2004] 1 W.L.R. 2775 (A.C.) (Eng.) (upholding payment for a valuable and much sought-after vehicle registration number that was mistakenly transferred with a car already sold via auction).

statically at the time that the acceptance becomes operative, but rather the benefit *as transferred*. This includes not only the transfer's non-donative nature but also its occurrence at a particular point of time. The acceptance, in other words, is of the transfer whose subject matter is the benefit, not of the benefit standing alone, for it is the transfer that links the parties to each other. Thus, even when the acceptance comes after the receipt of the benefit, its effect is retrospective to the time of the receipt. This is why the moment of enrichment can reasonably be regarded as the time from which judgment interest<sup>24</sup> and the statute of limitations<sup>25</sup> run.

The second objection is that this account of unjustness misappropriates the notion of incontrovertible benefit. Incontrovertible benefit is conventionally treated as establishing the enrichment rather than the unjustness of retaining it. To this I reply that the account does indeed make incontrovertible benefit a matter of unjustness rather than enrichment, but this is its strength and not its weakness. The point of invoking the incontrovertibility of the benefit is to show that an obligation to make restitution is not inconsistent with the defendant's freedom of choice: "[t]he principle of incontrovertible benefit . . . exists when freedom of choice as a problem is absent."<sup>26</sup> If this is the case, it should be situated where it structurally belongs – as establishing the unjustness of the defendant's retaining the benefit.

The third objection is that acceptance is genuinely present only in the first situation, and not in situations of incontrovertible benefit. If so, acceptance cannot be a general feature of liability for unjust enrichment. Acceptance (so the objection would go) involves awareness of the existence or potential existence of the benefit and a decision to act with reference to it. This is how acceptance operates in cases of request or acquiescence. In situations of incontrovertible benefit, in contrast, the defendant can be held liable even if unaware of the benefit. If the point of acceptance is to implicate the defendant's will so that, in the words of Lord Justice Bowen's famous dictum, "[l]iabilities are not to be forced upon people behind their backs,"<sup>27</sup> the defendant's ability to choose whether or not to take the benefit cannot be dispensed with. Acceptances that are constructed or imputed on the basis of the consonance of the benefit with the defendant's projects will not do.

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<sup>24</sup> *Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs*, [1993] A.C. 70 (H.L.) (appeal taken from Eng.) (holding that enrichment occurs when an unlawful tax is paid to the state, not when that tax is deemed unlawful).

<sup>25</sup> LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* § 43-004-006 (7th ed. 2009) ("At common law, if money was paid under mistake time ran from the date when the payment was made and not from the date when the mistake was, or ought reasonably to have been, discovered.").

<sup>26</sup> *Regional Mun. of Peel v. Canada*, [1992] 98 D.L.R. 140 (Can.) (quoting J.R. Maurice Gautreau, *When Are Enrichments Unjust?*, 10 *ADVOC. Q.* 258, 271 (1988)).

<sup>27</sup> *Falcke v. Scottish Imperial Ins. Co.*, (1886) 34 Ch.D. 234 at 248 (Eng.).

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The answer is that in this context the will has a relational, and not merely an interior, significance. Only on this basis is it appropriate to corrective justice, which conceives of liability's norms as interactional rather than as unilaterally applicable to one or the other of the two parties. Accordingly, the role of the benefit in motivating the defendant's conduct is not the sole relevant factor. What matters is the connection between the defendant's will and the benefit bestowed by the plaintiff. This connection can take different forms. There is no reason why the difference between aligning purpose with benefit (situation one) and aligning benefit with purpose (situations two and three) should matter to the plaintiff's liability. What is relationally significant is the idea that includes all three situations: the benefit non-donatively given by the plaintiff fits the purposes that the defendant pursues. The imputation of acceptance merely expresses the relational significance that all the situations share.

As for Lord Justice Bowen's dictum about not forcing liability behind a person's back, the objection proves too much. If the dictum is understood as applying only to situations in which the defendant was aware of the benefit, then incontrovertible benefit would not give rise to liability at all, regardless of whether incontrovertible benefit was seen as going to enrichment or unjustness. But although doubt is sometimes cast on the soundness of the doctrine of incontrovertible benefit on the grounds that it amounts to a forced exchange,<sup>28</sup> the doctrine is now solidly entrenched in the law. Consequently, unless one thinks that either the dictum or the doctrine of incontrovertible benefit is wrong, the two have to be brought into harmony. This harmony is achieved if one recognizes that, because liability for an incontrovertible benefit is based on the defendant's purposes, it does not operate behind the defendant's back.

Nor should the idea of a juridically-constructed will itself be objectionable. In the law of unjust enrichment one sees such a will in connection not only with the defendant's acceptance but also with the plaintiff's donative intent. One might think that donative intent is solely a matter of whether the plaintiff exercised his choice for the purpose of effecting a gift. Yet it also includes situations, often stigmatized as officious intermeddlings, in which, whatever the transferor's subjective intent, the background legal categories justify the imputation of an intention to bestow a gift. Thus, a plaintiff who makes an unrequested improvement to property that he knows belongs to another in the hope of being compensated for his labour may subjectively have no intention of giving a gift. Nonetheless, because his action takes place within a legal regime under which only the owner has the right to determine whether to improve one's property, the improver can be taken to know that his action cannot obligate the owner to pay for the improvement. Accordingly, the law

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<sup>28</sup> ANDREW TETTENBORN, *LAW OF RESTITUTION IN ENGLAND AND IRELAND* 20-22 (2nd ed. 1993) (outlining the argument that even if a defendant who received an incontrovertible benefit may not be prejudiced by having to repay the benefit, it is still an open question whether it is just to make him do so).

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treats his action as the bestowal of a gift. The background legal category of property, which recognizes in the owner the exclusive power to improve the condition of what is owned, justifies the law's viewing the improvement as the expression of a donative intent. In this example the imputation of donative intent is based not on what is subjectively within the plaintiff's mind, but on how the plaintiff's conduct is to be publicly understood and categorized in relation to the defendant's property.

#### CONCLUSION

In this Article I have explored the structure of unjustness from the standpoint of corrective justice. My argument has been that unjust enrichment is composed of a transfer strand and an unjustness strand, both of which have a correlative structure. The implication for the unjustness strand is that correlative to the plaintiff's lack of donative intent is the defendant's acceptance of the benefit as non-donatively transferred.

In this analysis of unjust enrichment corrective justice performs the theoretical role that Rawls termed "orientation."<sup>29</sup> The underlying idea is that a task of theory is to orient us within a certain conceptual space by showing how the elements in that space cohere within a unified framework. The metaphor of orientation is apt, because we orient ourselves within that unified framework by using one direction to find the others. When unjust enrichment is conceptualized as a unified framework of liability in accordance with corrective justice, the ideas of beneficial transfer and non-donative intent lead us to the significance of acceptance.

Despite the outstanding accomplishment of Andrew Kull and his colleagues in the American Law Institute in drawing up the *Restatement (Third) of Restitution and Unjust Enrichment*, unjust enrichment is still the least developed area of private law. Especially problematic is the nature of the unjustness. Further progress will require not only the grasp of extensive and complex legal doctrine, for which the new *Restatement (Third)* will be invaluable, but also an appreciation of the unified framework that informs the doctrine. Corrective justice is the theoretical notion implicit in whatever unity private law possesses. By recognizing that unjust enrichment deals with non-donative beneficial transfers within the conceptual space of correlatively structured legal reasoning, one can perhaps locate the structural components of unjustness. That at least has been the ambition of this Article.

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<sup>29</sup> JOHN RAWLS, JUSTICE AS FAIRNESS 3 (2001) (citing Immanuel Kant, *What is Orientation in Thinking?*, in KANT: POLITICAL WRITINGS 237 (2nd ed. 1991)).