We all make mistakes: a ‘duty of virtue’ theory of restitutionary liability for mistaken payments

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I Introduction

Here I raise for consideration a particular perspective on the moral foundation of liability to make restitution of mistaken payments. At the outset I want to make clear that I am not, to begin with, interested in finding a justification which underlies the whole of the law of restitution or the law of unjust enrichment. In my view, there are sufficient differences between different claims for restitution (between, eg, claims for restitution of payments by mistake, where a change of position defence seems warranted, and claims for restitution of a payment made on a qualified basis which fails, where it is not)\(^1\) to make it doubtful that there is an underlying single principle of unjust enrichment which accounts for all the law in books with that name.\(^2\) This is an issue to which I shall return below.

The particular perspective on restitutionary liability to be considered is, to put it in quasi-Kantian terms, that in contrast to the moral foundations of contract, tort, and the law of property, which are generally regarded as being aspects or elements of ‘right’, liability to return the value of mistaken payments is an example of the law’s enforcing a duty of virtue. Thus I want to suggest that, in a way similar (though not identical) to the way the law might instantitate a duty of easy rescue as the ‘crystallisation’ in a

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\(^2\) In this sense the law of unjust enrichment is nearer to tort than to contract; See Smith, SA, ‘Unjust Enrichment: Nearer to Tort than Contract’, in Robert Chambers, Charles Mitchell, and James Penner (eds) Philosophical Foundations of the Law of Unjust Enrichment (Oxford: OUP, 2009), 181.
particular case of the general duty of beneficence, or the replacement of that duty with a different duty of ‘right’ (a distinction to which I must return below), liability for mistaken payments counts as a similar instantiation of the same duty of beneficence in a different fact situation. To bolster this perspective I will look in some detail at the conflicting intuitions (I suggest) we have in regard to this sort of legal liability – the claim will be that the sorts of intuitions that operate in this neck of the normative woods seem better explained when understood as groping towards an understanding of an agent’s virtue, rather than towards an understanding of duties of justice or right which the law might coercively enforce, duties called for because they correlate with the basic rights of autonomy that we all have.

If this is right, then one of Birks’s most cherished theses – that the law of unjust enrichment is a distinctive aspect of private law, not to be assimilated to contract, tort, or the law of property – can be made out: it is distinctive in having an entirely different normative source: to understand its fundamental normative foundations one has to look to Part Two of the *Metaphysics of Morals*, not Part One.³ But it is made out at a price – in the same way that a legal system can function more or less justly without a duty of easy rescue, a legal system could function more or less justly without a liability to return the value of mistaken payments. Moreover, if other liabilities normally held to fall under the rubric of ‘unjust enrichment’, such as the liability to return a pre-payment made under a contract which is later frustrated, are more plausibly cast as liabilities of ‘right’ as opposed to liabilities of ‘virtue’, then it would seem these other liabilities are more central aspects of the private law than the liability to return the value of a mistaken payment because private law just is more obviously in the business of instantiating private *right*, not private virtue. And if this is on the mark then another of Birks’s cherished theses would have to be abandoned: that is, of course, his thesis that liability to make restitution of a mistaken payment is the archetype or paradigmatic case of liability for unjust enrichment, viz. ‘[t]he law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.’⁴ On the duty of virtue explanation of liability for mistaken


payments, this liability is contingently instantiated in the system, a normative outlier, very much not a paradigm.

One further word of introduction, about what might be said to ‘motivate’ this paper. In one sense this paper is a meditation on two features of the law of restitution for mistaken payments first discussed, as far as I know, by Stephen Smith and Dennis Klimchuk, and Dennis Klimchuk respectively. In the first place, as they have both pointed out, a distinctive feature about the duty to make restitution is that it is both primary and remedial at the same time. In the second place, as pointed out by Klimchuk, there does not seem to be good normative support for this duty on traditional notions of corrective justice; that is, the claimant and the defendant are not linked as the doer and the sufferer of some wrong (the same wrong) that must be repaired, but neither is the defendant in possession of some asset of the claimant’s of which the claimant can make a claim for its return. There is, in consequence, something of a mystery about explaining liability to make restitution of a mistaken payment where there is no such mystery in explaining the liability to compensate in the standard tort or breach of contract case. Let me be clear about where the mystery lies – it is not in the causal relation between the claimant and the defendant; in the same way that a tortious act links the defendant and claimant as the doer and sufferer of the same wrong, the effective transfer of the money links the claimant and defendant as the transferor and recipient of the same transfer. The problem is that, without more, the effective exercise of one’s power to transfer property is a perfectly good expression of one’s autonomy under the law, and effective transfers themselves, without more, do not give rise to any injustice on which one’s ideas of corrective or remedial justice would normally be brought to bear. What draws our attention is the claimant’s mistake; but this deficiency in his act, or in the formation of the intention

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7 For a recent review of the arguments, finding that there still seems to be no basis in corrective justice for the claim for liability to make restitution of a mistaken payment, see Frederick Wilmot-Smith, ‘Should the Payee Pay?’, presented at Hong Kong, Obligations VII conference, July 2014.
8 This connection seems, for Lionel Smith, (‘Restitution: The Heart of Corrective Justice’” (2001) 79 Texas LR 2115) to be sufficient to bring the law within the realm of corrective justice, and therefore, private law. See infra text to note 40.
to act as he did, does not, like a wrong does, marry him to the defendant in any way, for it was his mistake and his alone. The defendant in the mistake case (unlike, for example, in the case of duress, or in the case of a mistake induced by the recipient’s fraud) did not participate in the claimant’s cognitive preliminaries to the act; to put this another way, the defendant’s receipt is merely *occasioned* by the claimant’s mistaken payment. It would be a different case if the mistake in some way undermined the actual transfer,\(^9\) for in that case the defendant’s receipt itself would be undermined – he would be in possession of something that was not rightfully his, but this is precisely not what happens in the case of a mistaken payment. The transfer itself is unmarred by the mistake, and is fully effective to give the defendant recipient good title to the money. So the question must be something like this: “Why is the defendant owner of the mistakenly paid money required to fix up a situation which was caused by the claimant, a situation which the law itself does nothing to prevent occurring given the rules governing the effective exercise of the claimant’s power to transfer title? What call of justice binds him, when he has done no wrong and the claimant has acted fully within his legal powers?”

**II Three fact situations**

Now for a (true) story: on the evening in London before a conference entitled ‘The Philosophical Foundations of Unjust Enrichment’, I was out for drinks with some of the presenters, and afterwards I took a taxi home. When I’d got to the Elephant and Castle (yes, yes, I then lived south of the river), I noticed that the driver had forgotten to start the meter. I pointed this out to him and he started it then, but I also assured him that having taken a cab this way home many times before I knew pretty accurately what the correct fare should have been, and when we got to my place that is what I paid him, about double what was on the meter. Now, of course, I could have insisted on my right to pay only the fare on the meter, but we have a word for the sort of person who would act like that: such a one is a “jerk”.

Now, as is well known to all lawyers, there are many circumstances in which the law allows one perfectly well to act like a jerk. The cab fare circumstance is one, in which for fairly obvious reasons a cabbie is entitled to demand only the amount on the

\(^9\) A point to which we shall return below at text to n.--
meter. But here’s another example, provided by Lord Denning, from *Miller v Jackson*:

[E]very time that a batsman hit a ball over the fence so that it landed in the garden, he would be guilty of a trespass. If he hit it so that it went under the fence and down the bank, he would be guilty of a trespass. So would the committee of the cricket club, because they would have impliedly authorised it. They cheered the batsman on. If one or two of the players went round and asked the householder if they could go into the garden to find it, the householder could deny them access: "You are not to come in here," he could say, "to get your ball. I am not going to get it for you. Nor will I let you. It is going to stay there." If the cricketers said: "It's a new ball. It cost us over £6," the householder could say: "That is your lookout. You ought not to have put it there." Of course, if the householder picked up the ball himself and gave it to his son to play with, he would be liable in conversion. But otherwise he would not be liable at all.

So the householder can effectively deny the trespasser owner of the cricket ball his possession of it, however unreasonable this might be. If you make, however innocent, the mistake of placing your property where exercising your right to regain possession of it would also constitute a trespass, you have effectively placed yourself at the mercy of another.

Let me give one more example, which I think is much more dubious in terms of the moral rights and wrongs of the situation, an example borrowed from an essay I wrote some years ago, the point of which at the time was to reveal a basic difference in the way that the law of restitution looks upon ‘services’ cases, as opposed to property transfer cases.

[A]s a professional tennis player, I am paid, for a time, to wear Ace brand equipment when I play because of the publicity it generates for Ace. I have had a very successful year and my agent has been renegotiating so many of my sponsorship deals that I can barely remember who I am bound to publicise. On the day of the Wimbledon final, which I win, I mistakenly put on the Ace kit and use the Ace racket thinking I am obliged to do so, though in fact I am contractually bound to use GrandSlam gear. Even though it turns out that the resultant publicity for Ace is such that it feels able to

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10 [1977] 1 QB 966 at 978.
11 See also *Jacque v. Steenberg Homes, Inc.* (Wisc. 1997)
12 Joe Campbell raises a doubt about Lord Denning’s view. Relying on the holdings in *Chairman, National Crime Authority v Flack* ((1998) 156 ALR 16) and *Parker v. British Airways Board* ([1982] QB 1004), Campbell argues that a householder will be presumed at law to have the intention to assume possession of, i.e. control over, all chattels on her property. Thus the householder takes possession of the property, here the cricket ball, and would thus be liable to an action for its return or its value. However, in *Flack* the presumption was by Tamberlin J held to be rebuttable, and so if this is correct then the landholder can refuse to take possession of the cricket ball even though it is on her property. This must surely be correct, for otherwise the tortfeasor who launches the cricket ball onto one’s property would effectively have a legal power to make one a finder of a chattel against one’s will.
cancel £10m worth of advertising – so there is no doubt that it is enriched by a service which is commonly traded in the market\textsuperscript{14} – and even though I am being sued for all I am worth by GrandSlam, there is no chance that I have a claim in restitution against Ace. The reason is that there is no longer an obligation on it to pay for the enrichment I have rendered. Ace receives an unexpected enrichment by my actions, and gets to laugh all the way to the bank.\textsuperscript{15} Thus in structurally identical situations [where a benefit is conferred by a liability mistake], identical ‘unjust’ factors operate to protect the plaintiff’s interest in the value of his property, but do nothing to protect his interest in the value of his services.

Now if I had to line up these three cases, I should say that most people’s intuitions are that the householder who won’t hand back the cricket ball or even let the owner come and collect it is the greatest jerk, morally speaking, the person who takes advantage of the cabbie’s mistake the second greatest,\textsuperscript{16} while for some the intuition that Ace should pay anyone anything for its unexpected publicity windfall is actually counterintuitive. One thing I think that tells us is that we regard property mistakes as somehow more significant than ‘services’ mistakes.\textsuperscript{17} The first case is a straightforward case of someone being effectively denied their right to property; the second case is someone being denied what would otherwise be a perfectly valid claim for payment, though there is no interference with any property the person actually has.

\textsuperscript{14} This detail is to show that Ace is unable to ‘subjectively’ devalue its enrichment; by cancelling £10m worth of projected advertising, we can put a money value on the enrichment Ace receives. The benefit may, in fact, be greater, but Ace could not claim, given the ‘but for’ causation of the example, that the benefit was not worth at least this much to it.

\textsuperscript{15} I still think it is right that I should have no claim against Ace (I think, for example, that \textit{Benedetti v Sawiris} [2010] EWCA Civ 1427 is on my side), but others disagree, in particular the authors of the most recent edition of \textit{Goff and Jones}. (See Charles Mitchell, Paul Mitchell, and Stephen Waterson, \textit{Goff and Jones: The Law of Unjust Enrichment} 8th Ed (London: Sweet & Maxwell, 2011), at 9-02, 9-04. The case law in this area is exiguous and does not, to my mind, support the view that ‘services’ cases align with payment of money cases. There is obviously no claim on the basis of free acceptance. See id at 17-09, 17-13.) I assume that on their application of a ‘but for’ causal test for enrichment at the claimant’s expense, Ace is enriched by my mistake. It is not clear to me what ‘at my expense’ is in such a case, because my wealth has not declined in virtue of wearing Ace’s kit, though my \textit{failing to wear} the GrandSlam kit has made me liable to GrandSlam for significant damages. My main difficulty with Ace’s liability, though, is that there does not seem to be anything equivalent to a ‘transfer of value’ from me to Ace, since conferring a benefit on someone by one’s actions is not a ‘transfer’ of any kind (Penner, supra note 6 at --), and in any case I think the idea of a ‘transfer of value’ incoherent; see Penner, James ‘Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds’ in Robert Chambers, Charles Mitchell, and James Penner (eds) \textit{Philosophical Foundations of the Law of Unjust Enrichment} (Oxford: OUP, 2009), 306.

\textsuperscript{16} From his question to me at King’s in June, 2013, I got the impression that for Raz the cabbie’s claim was the strongest because in that case there was the clearest expectation that I, the defendant, would make over a particular sum to the defendant, in which case the ‘jerk order’ of these first two cases would be reversed. To the extent I hesitate to adopt the same view, it lies in the intuition that commercial parties are expected to look after their own interests, which is why I think the law is the way it is in this case; but this is a point about commercial morality to which we must return below: see text to n. xx below. But I take it that Raz and I agree that, however we order the first two cases, they are much more compelling cases than the third.

\textsuperscript{17} This is an issue to which I shall return below, text to fn – infra.
And the final case is not really about property rights at all – rather, it concerns a claim against someone for conferring an intangible benefit, albeit one with a market value to the beneficiary which can be determined with some precision in this particular fact situation. But what I also thinks it tells us, and this is what I want to concentrate on here, is that there is no simple moral intuition that we have such that people who benefit from the mistakes of others are ipso facto under a duty to those others to help those others remedy those mistakes, nor that they are ipso facto under some other kind of duty not to benefit from the mistakes of others. If I have ranked the intuitions about behaving like a jerk correctly, then the one case where we think the recipient ought to do something is the case where he does not, and cannot without committing the wrong of conversion, benefit at all, thus being a jerk by taking a ‘dog in the manger’ attitude. If all this is right, it suggests that, morally speaking, the duty not to be a jerk is akin to the Kantian duty of beneficence toward others, an imperfect duty in other words.

III Imperfect duties

Let me first set out the features which are commonly regarded as distinguishing imperfect duties from perfect ones, and then propose a ‘thin’ and ‘robust’ version of the distinction.

Perhaps the most important feature of the distinction is the idea that imperfect duties do not correlate with rights held by others. The classic example is the Kantian duty of ‘beneficence’. This duty can be variously described, but for our purposes here I think we can, to advantage, contrast two conceptions of it. The first, broader conception, is that to ‘act beneficently’ is advance the happiness of others, with their happiness in

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18 In contrast to the common law: as Dennis Klimchuk reminds me, according to childhood moral lore: ‘Finders keepers, losers weepers’.
19 See also Penner, Basic Obligations, pp 114 for the example of Jones taking pleasure in Smith’s pruning Jones’s hedges, having unbeknownst to Smith cancelled the gardening contract, where Jones intends to rip out the hedges so acquiring no benefit from the pruning.
20 I am going to deal only with imperfect duties to others, not to oneself.
21 The literature on imperfect duties is extensive; in what follows I have relied in particular on O. O’Neill, Constructions of Reason: Explorations of Kant’s Practical Philosophy (Cambridge: CUP, 1989), especially chapter 12, ‘The great maxims of justice and charity’, and EJ Weinrib, ‘The Case for a Duty of Rescue’ (1980) 90 Yale LJ 247, Arthur Ripstein, ‘Three Duties to Rescue: Moral, Civil, and Criminal’ (2000) 19 Law and Philosophy 751-79; A. Buchanan, ‘Justice and Charity’ (1987) 97 Ethics 558. Buchanan’s paper is more or less devoted to showing that the duty of virtue/duty of right distinction is not robust, at least in so far as the distinction is supposed to illuminate a distinction between duties of charity or beneficence and duties of justice.
mind, or their happiness being the motivation for the act, or with the pursuit of their happiness serving as the principle underlying the act. On a narrower formulation, which I borrow from O’Neill, the agent’s concern is for the needs of others rather than their flourishing: ‘Among rational and needy beings, charity, in the old sense of concern for the needs of others, is an obligation.’ In either case, in Kantian terms to discharge a duty of virtue is to adopt an end, viz the flourishing or the meeting of the needs of another.

Whether the duty is related to the needs or to the flourishing of others, a further analytic distinction needs to be made. On one view, which I shall call ‘thin’ understanding of imperfect duties, the imperfect/perfect distinction turns on the fact that imperfect duties are ‘wide’ or ‘unallocated’ or ‘indeterminate’. On a second view, what I shall call a ‘robust’ understanding, it is essential to the ‘meaning’ or significance of imperfect duties that they (1) are not correlated with rights, and (relatedly) (2) that their discharge cannot be enforced. On the former, thin, understanding, imperfect duties are in fact only contingently so. Correlativity is a problem because imperfect duties are ‘wide’ in the sense that the duty-ower has a range of different paths she might follow in fulfilling the duty; one particular act of beneficence is not usually presented to her as the best way to fulfil such a duty so, in consequence, there is not, usually, a particular way of fulfilling such a duty that would be correlative to a right another might have. Thus, there is usually no correlative right that any individual holds that I fulfil my duty of beneficence in their particular favour: I can discharge this duty by attending to the needs of any person, not specific persons, and it is not my duty to attend to the needs or flourishing of every individual. So there is a problem of allocation here, as O’Neill puts it.

But this allocation problem is contingent, not principled. If an allocation takes place, then an imperfect duty ‘crystallises’ into a genuine, perfect, duty with a correlative right. True it is that, given the ‘wide’ scope of the duty (to be concerned with the fortunes of others generally), no individual can himself allocate his duty of beneficence to specific others so that these others and only these others have

22 On the difference between the specific reasons or motivations of an agent and the principles upon which they act, see O’Neill, supra n., chapter 8.
23 O’Neill, supra n --, 230.
correlative rights. But whilst this is the general case, in certain contexts a particular allocation can become ‘salient’, giving rise to a correlative right. As Weinrib argued in claiming that the law should adopt a duty of easy rescue, circumstances alone may perform this task of allocation. He put the point this way:

[W]hen there is an emergency that the rescuer can alleviate with no inconvenience to himself, the general duty of beneficence that is suspended over society like a floating charge is temporarily revealed to identify a particular obligor and obligee, and to define obligations that are specific enough for judicial enforcement.

More controversially, imperfect duties might be crystallised by an institution which serves the function of allocation. For example, it might be said that a system of taxation and social welfare can, in principle, do so, such that (1) a person may discharge their duty of beneficence by discharging a duty to pay tax which correlates with the right of the state to receive that payment, and (2) a person may have a right of support which correlates with a duty on the state that that support is provided by expending the collected taxes in their favour. The underlying idea is that the institution provides a procedure whereby the imperfect duty is crystallised ‘indirectly’, so to speak, into an obligation to benefit others via paying a tax which is distributed to the recipients, those recipients having rights to demand such distributions.

On the robust understanding of imperfect duties, the idea lying behind the non-correlativity of imperfect duties to rights has a different grounding. That grounding is conceptual, and goes to the explanation why some duties are imperfect and others perfect. Duties of virtue are imperfect duties as a matter of their nature, and duties of right are perfect duties as a matter of theirs. It is not just a contingent matter of allocation so as to identify correlative duty-owners and right-bearers. Duties of virtue, it is said, are ‘agent-centred’ whilst duties of right are ‘action-centred’. Both sorts of duties are, as O’Neill emphasises, duties concerned with the agency of others, but these duties address different aspects of our agency in distinct ways. To the extent you are needy, your agency is diminished or imperilled, and this evokes my moral concern. Imperfect duties of virtue capture our moral obligation to concern ourselves with how the lives of others go – they reflect how we act as agents properly attuned to

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25 As I understand it, Weinrib no longer endorses the argument in Weinrib, supra n that a legal duty of easy rescue is justified.
26 Weinrib, supra n --, 287-92.
27 Weinrib, supra n--., 292.
the moral law so as to reflect this concern for others who are also agents, but whose agency may be imperilled or diminished by their circumstances. Perfect duties, by contrast, relate us to each other in so far as we are rational, not needy. To the extent we are rational, we can exercise freedom, pursue meaningful projects and so on. Perfect duties are action-centred in that they prohibit *interference* with the agency of others irrespective of our moral motivation. The very raison d’etre of perfect duties of right is that their observation prevents hindrances to freedom, and their coercive enforcement can be justified as the hindrance of hindrances to freedom, whereas to fail to fulfil an imperfect duty does not *interfere* with the freedom (agency) of others in any sense. According to the thick understanding of imperfect duties of virtue, it is because they are agent-centred that it can be argued that coercing their discharge is conceptually impossible, for if the act is coerced then it is no longer the discharge of a duty of virtue, for it does not involve, much less require, my ‘adopting an end’: if I am forced to give money as charity, it is no longer really an act of charity by me: because I do not give it freely it no longer manifests my virtue, or expresses my benevolence toward the recipient, any more than an obligatory ‘gift’ really counts as a gift.\(^{28}\) The robust view seems right to me, though I don’t have the space here to defend that position. Very briefly,\(^{29}\) the thin view seems to obliterate any genuine distinction between acts which discharge duties, and acts which are merely morally praiseworthy things to do. To my mind that is not a distinction we should lightly abandon.

But if we adopt the robust view of imperfect duties, then *replacing* an imperfect duty of rescue with an enforceable duty of right to rescue is not justified just because some salient allocation arises. That is, this is not just a matter of (on the thin view) an unspecified duty of right becoming specified, in the way an unspecified duty of care might generate specific duties to take care in particular ways in particular circumstances. One needs an argument which would allow us to hold that an

\(^{28}\) It is the ‘expressive’ aspect of this which Kant might find problematic. The province of imperfect duties, of duties of virtue, as Kant tells us again and again, is the inner self, the rational agency which fixes its eyes on the moral law, unconcerned with outer appearance to others. But Kant might agree that such a duty cannot be coerced, since if an action fulfils an imperfect duty of virtue, the agent’s eyes are necessarily on the moral law, not on any consideration such as that of avoiding punishment, so such an act, if carried out virtuously, would not be in response to coercion even if in fact non-compliance was met with coercive sanctions.

\(^{29}\) Buchanan supra n. takes a similar line, 570-71
individual in such a circumstance is under an obligation of a different kind, a duty of right. It is not at all clear what that argument could be.

Consider this for an argument. Nagel has said\(^{30}\) that it can be less irksome to be under an enforceable obligation to pay taxes in order to look after the less well off in one’s society than to have a constant duty of virtue to decide from time to time how much one should devote of one’s resources to others on a case by case basis. The idea here is that the duty to pay taxes replaces the duty of charity; it doesn’t, that is, crystallise it. It is justifiable to do so because, raised and spent systematically, the state provision for the poor is more systematic and effective, but secondly, as Nagel points out (though to put it in my words), it is often less burdensome in real terms to have a narrow duty of right than a wide duty of virtue.\(^{31}\) The case might be extended beyond need to cases where the imperfect duty is to advance the welfare of others by helping them to flourish, eg by supporting the British Museum. It might be less irksome to pay tax once a year to the state, which will then more or less adequately distribute the fund in ways which work for the general good, than to be faced with a demanding duty of virtue.

On this account, one of the functions of the law is to replace imperfect duties of virtue with perfect legal duties of right; the law thus allows us to flourish better by allowing us to act less virtuously. I find this thought immensely appealing,\(^{32}\) but appealing or

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\(^{31}\) I am not concerned here about duties which a community per se might actually have, for instance the duty to punish criminals, which is only effectively fulfilled through institutional, community action. On this version of the law’s authority, the law solves a co-ordination problem by allowing individuals to act together to achieve a perfect duty they have but which cannot be met in the absence of their creating a community institution which ‘speaks’ for them collectively. In such a situation it might be said, on Kantian terms, that individuals have a perfect duty to ‘enter a civil condition’, ie create an institution of criminal law, which in turn allows them to meet their prior collective perfect duty to deal appropriately with instances of crime. By the way, this duty to deal with crime need not strictly entail a duty to punish, but rather a duty to provide the normative means for a criminal to expunge his guilt, whether by punishment or otherwise, even in the fact of a vengeful or unreasonable victim or community (cf Hegel’s right of a criminal to be punished). (In the same way the tort system’s most fundamental normative justification is its provision of a means for the defendant of good will to do corrective justice, however unreasonable or vindictive his victim might be. On this view the tort system is just as much there to serve defendants as it is to serve claimants.)

\(^{32}\) On one reading of their work, Alasdair McIntyre (After Virtue – cite) and Onora O’Neill (supra n --, chapter 8) would find this appalling, not appealing. But the intuition I am pursuing here is not one which would have us favour conceiving of our moral relations to others as being merely a matter of justice, disregarding or minimising the importance of the personal instantiation of virtue. Rather it shifts our focus from one sort of virtue to another; rather than the virtue of beneficence being the
not, it doesn’t to my mind work as a very good justification. Being relieved of an irksome duty of virtue is a reason, but not the right kind of reason, for imposing upon a person a duty of right. Imposing a duty of right to be good to others is requiring a person to use their means (their property or whatever) for the benefit of others. Such a duty is not imposed as a hindrance to a hindrance of freedom. It therefore lacks the moral character of a moral duty though by law it is made a duty of right by being enforceable at the behest of a correlative rightholder. Now of course it may be the case that we should not observe a robust distinction between duties of right and duties of virtue; this seems to be the thought underlying what Nagel says, and it is explicitly the position of Buchanan. But for the reasons already canvassed, that is not the option I intend to pursue here.

In the next section I will argue that if we adopt a robust understanding of imperfect duties, then if the law enforces a duty (or imposes a liability) to make restitution of a mistaken payment, it replaces a prior duty of virtue to do so with an enforceable duty or liability of right. I will argue that this is so even if I cannot argue that this replacement of the one with the other is justified. But I shall make a suggestion along those lines, drawing upon Ripstein’s discussion of a legal duty to undertake easy rescues. First however, I want to mention one further Kantian take on the ‘crystallisation/replacement’ problem, that of Klimchuk.33

On Kant’s account, an imperfect duty is a duty to adopt a particular end. In contrast, perfect duties require that one act or forbear from acting in particular ways. It is a perfect duty to pay one’s taxes, for example, but an imperfect one to be beneficent. One discharges the imperfect duty of beneficence by adopting among one’s ends the happiness of others. Doing so entails no action in particular, but—and this is key—if one does nothing then one has not, in fact, made others’ happiness one’s end. Put another way, one does not make others’ happiness one’s end merely by wishing them well (that is mere benevolence) or even just by planning to help them.

[We can then take a further step] (which is not explicitly in Kant, but I think he would accept): circumstances sometimes make it that there is an action that no one who has made others’ happiness her end could refrain from doing. Put another way: there are circumstances in which I could not refrain from helping a particular person in a particular way and it be true that I have made others’ happiness my end. This is not to say that in those circumstances

33 Klimchuk, check publication
the duty to which I am subject has been perfected, because neither its foundation nor basic structure have been altered. Rather it has been made determinate.

This might be called the ‘robust’ crystallisation view, that is, though an imperfect duty of virtue may become determinate, the very fact that I must discharge the duty in a particular way, reflecting as it still does my duty to adopt the welfare of others as my end, does not alter its character. If this is right, and I think it is, then no argument arises here for imposing a like duty of right; indeed it argues against such an imposition.

IV The liability to make restitution of mistaken payments conceived of as the legal ‘replacement’ of an imperfect duty of virtue

At first glance, the legal liability to make restitution of a mistaken payment does not look much like the legalisation of a pre-existing imperfect moral duty, but rather the legalisation of a pre-existing perfect moral duty. If we were to ask the moral basis for the right to restitution of a mistaken payment, we would quite naturally think of this as a perfect moral duty: the duty is one which seems to correlate perfectly well with a right to restitution, and it is also narrow in the sense that there is a specific act required to discharge it, that is to transfer the equivalent in value to what was received. We have already seen, however, in considering Weinrib’s claim for a duty of easy rescue, that appearances here can be deceiving. If on the thin theory of imperfect duties such duties can be made perfect by circumstances serving to identify with some certainty an obligor and an obligee, then this looks like just such a case.

But deploying the robust understanding of imperfect duties, the case for conceiving the liability to make restitution of a mistaken payment as the replacement of an imperfect duty of virtue is more compelling. Consider the equation of perfect rights of duty as being ‘action-centred’ and concerned to ‘hinder hindrances to freedom’. In what sense is requiring you to make restitution of a mistaken payment I made a hindrance to a hindrance of my freedom by you? To erase the outcomes of my mistakes is not plausibly seen as a hindrance to a hindrance to freedom, for two reasons; first, if making a mistake is a hindrance to freedom, it is one which I

34 I am being intentionally ambiguous here between ‘result’ and ‘consequence’. See Gardner get cite
committed against myself by making the mistaken payment; you did not hinder me in any way. Secondly, and more basically, the ability to make mistakes and suffer the consequences is an aspect of being genuinely free, i.e. truly autonomous. On this view, to require you to make restitution would positively hinder my freedom, not hinder a hindrance to it. Now of course some attempts of mine in which I purport to exercise the powers I have as a free, autonomous individual are, under the law, so flawed that I am not really regarded as having acted at all. Thus in the case of a transfer, a ‘fundamental’ mistake, ie as to the identity of the recipient, prevents title from passing – I have not in truth exercised the power to transfer property at all; similarly a plea of non est factum, if successful, shows that there never was an act of mine which counts as the voluntary undertaking of an obligation or the exercise of a power. The same sort of reasoning applies to other cases such as the rectification of documents, the automatic resulting trust, and so on. But the law cannot give and take conceptually at the same time; a mistaken payment does validly, i.e. effectively, transfer title to the property to the recipient. That is what causes the problem; the claimant really did accomplish something, though mistakenly. And that immediately raises the question why the claimant, as a free autonomous being, should not have to live with the outcomes of her effectively executed choices, the effectively executed deployment of her means. Thus any imposition of legal liability to make restitution in such a case does look like replacing a pure duty of beneficence which might or might not be crystallised in favour of the mistaken payor with a general liability to make restitution as a matter of right.

Furthermore, the thick understanding of imperfect duties raises the issue of whether such duties, having been replaced by any legal liability put in their place, change their quality because now subject to coercive enforcement. In order to address this we have to consider the way such a duty might be justified. In terms of the moral justifications posed for the law of restitution of an unjust enrichment caused by a mistaken payment, theorists tend to fluctuate between focussing upon (1) the plight of the claimant and (2) the injustice of the defendant if he were able to retain the enrichment. Thus on one hand we have the ‘vitiated intention’, ‘autonomy of the claimant’-focussed justifications, and on the other those that emphasise the injustice of the defendant’s gain, of which he should be stripped. In the preceding paragraphs I have argued that to the extent we take someone’s freedom and autonomy seriously we
cannot simply assume that the mistaken payor has any right to demand, or his recipient any duty to provide, the correction of the payor’s mistake. Indeed, the ball is very clearly in the autonomy theorist’s court. Trying to frame the claimant’s autonomy claim by focussing on the diminution to their resources resulting from the mistaken payment is, from this perspective, misguided, for the diminution of the claimant’s resources is precisely the outcome of the very mistaken transaction which the claimant chose effectively to execute; if he owns the mistake, he also owns its outcome. But there is also a problem with a focus on the injustice of the defendant’s unjust enrichment. If our concern is to strip the defendant of a gain because it would be unjust for him to keep it, then there is no particular reason why the claimant should have a claim to it. In certain cases one would do better to teach the mistaken payor a lesson and not return it, devoting the money elsewhere. (Indeed, in some circumstances teaching the payor a lesson in this way would amount to a discharge of my duty of virtue – being taught a lesson is a good thing.) Any means of stripping the defendant of the gain would be equally effective in addressing his unjust enrichment per se. Perhaps the best result would be to give it to charity; in some cases, all things considered, it would be best for the defendant to keep it, as happens in at least some cases of the defence of change of position. From this point of view, the duty to strip oneself of an unjust enrichment would appear to be a wide duty, reflecting an imperfect duty, since there would seem to be no one best way of doing so; it would not be best, thinking beneficently, in all cases to return the money to the payor; the payor might be rich, and others in greater want, etc, etc. But if this is right, then returning the money to the payor himself might be best explained as being, to some

35 Hanoch Dagon argues that institutions such as banks who make mistaken payments should be limited to a capped return from recipients, on the basis that banks are better cost-avoiders of mistakes. See Hanoch Dagan, The Law and Ethics of Restitution, (Cambridge, CUP, 2004), 60-63.
36 A similar, though not identical problem arises when one is faced with stripping a defendant of a gain acquired through wrongdoing, where the gain is not acquired at the expense of the wronged claimant. 37 The recent, widely accepted, ‘no longer enriched’ version of the defence strictly requires the law to distinguish between saved expenses the defendant would otherwise have had to meet, such as paying his rent, from extraordinary expenses which, but for the mistaken payment, he would not have been able to afford. Where the latter kind of expenditure is made, the ‘no longer enriched’ version of the defence claims that the defendant is no longer enriched, because he was saved no ‘necessary’ expense. But this is smoke and mirrors; even though the defendant benefitted incontrovertibly from being able to invite 6 more guests to his daughter’s wedding – he invited them after all and spent money in order to do so – none of this realisation of his enrichment at the claimant’s expense is taken into account to reduce the extent of his change of position; the claimant just has to shrug and accept that he is required to ‘pay for’ those guests. (This again seems to suggest that services (providing for wedding guests, a world cruise, etc) are regarded differently in the law than property enrichments. If the defendant still had a chattel he purchased on the strength of the receipt of the mistaken payment, then it would count as an enrichment and be valued at its market price at resale value.)
significant extent, expressive. That is, it might to some significant extent express a solicitude to the mistaken payor, expressing an interest in his affairs above and beyond the call of perfect duty; whilst to be a person of virtue, an honourable person, might require one not to take advantage of the mistakes of others, it may not require one to help others fix up their mistakes. When I choose to do so, however, it expresses a kind of relationship between us the meaning of which is lost if I am coerced into doing so.

V A digression on imperfect duties: the ‘thank you’ test

The last point leads to an issue of gratitude. The recipient of the execution of a duty of charity or beneficence is normally expected to express gratitude. We normally say ‘thank you’ when someone fulfils an imperfect duty in our favour. I am not sure how robust this intuition is, but I can tell you that the taxi driver did thank me for paying the right fare, expressed more gratitude than the simple polite ‘thank you’ I would have received in paying my fare in the normal case. Conversely, I do not think we normally are expected to respond with gratitude (though we should always respond with politeness) when we are compensated for a wrong, or our fiduciary has to account for an unauthorised profit, which I take to be the fulfilment of perfect duties. Thus, to the extent that a mistaken payor is moved to express gratitude when the recipient returns the money, then I think this too is an indication that, in the absence of the law, any moral obligation to make restitution is imperfect in this case.

One final suggestion, which I owe to Joe Campbell. Campbell points out that in the classic case of Moses v MacFerlan\textsuperscript{38} the court’s reasoning is replete with references to the ‘ties of natural justice’ ‘founded in the equity of the plaintiff’s case’, money which ‘ex aequo et bono’ the defendant ought to refund, money retained against ‘conscience’. This sounds very much like the language of equity, not law. It would go beyond the scope of this paper to say that, historically, courts of equity were willing to enforce what would otherwise be regarded as duties of virtue. I shall only say this. When the chancellor started enforcing uses against the feoffee to uses, it was understood by the parties involved that the use bound in conscience, not in law; had it

\textsuperscript{38}[1760] 2 Burr. 1005
bound in law then the whole purpose of the device, to escape legal incidents of landholding, would have been obviated. As a matter of right, then, the feoffor to uses really did undertake a risk in transferring title to the feoffee. Query whether, under this early understanding of the use, the feoffee’s duty, though clearly specified or determinate, is best characterised as an imperfect duty of virtue, of beneficence towards the cestuis que use, not a duty of right.

VI Two alternatives: Weinrib’s ‘unjust retention theory’ and ‘property-based’ explanations of liability to make restitution of mistaken payments

At this point I must address two alternative theories for the restitutionary liability of recipients of mistaken payments, Weinrib’s ‘unjust retention theory’ and the so-called ‘property-based’ theories of restitutionary liability for mistaken payments.

Weinrib’s unjust retention theory has a simple, and at first glance compelling, unifying idea: that recipients of transfers are not entitled to treat them as gifts unless the transferor makes them with that intention. The ‘default’ then, is that a payor transfers money with the intention that it discharges a contractual obligation. Where it does not, because no such obligation exists, it is unjust for the recipient to retain it. ‘Liability results because the defendant cannot retain as a gift what was neither given nor accepted as a gift’. The crucial move is in the latter part of this sentence: ‘what was [not] accepted as a gift’. As far as I can tell, Weinrib does not explicitly argue that the non-intention of the recipient – he doesn’t have to do or think anything to become legally entitled to money mistakenly deposited in his bank account -- must be characterised as an intention that any receipt is received non-gratuitously. This would be to impose upon him an intention which he does not in fact actually have. To require recipients to have this intention is just for a legal system to adopt a rule which would, as a default, treat all transfers as made upon a contractual basis, and which fails in the case of a mistaken payment. The law would therefore regard all gifts as prima facie recoverable. To my mind this seems suspiciously like a formulation (perhaps as a matter of commercial morality, to which I shall return) of a perfect duty giving effect to an imperfect duty of beneficence, that is, to value the interest of

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40 Which the equitable doctrine of presumed resulting trusts actually does.
another with respect to one’s certifiably own means (the money is now one’s own, after all) above one’s own interests.

So my critique of this view is that I do not see an argument of justice that would require any legal system to adopt this general default rule, imposing an artificial intention upon all recipients.

Moreover, this formulation does not seem to cover all cases. *Lady Hood of Avalon*\(^{41}\) tells us that a person can recover a mistaken gift. Both transferor and transferee had the genuine intention to give on the one hand and to receive the payment as a gift on the other. The donative intent was on both sides. What was wrong about the transaction, and which justified the recovery, was that the gift was not the one Lady Hood intended to make. So the notion of mistake that operates in the legal doctrine extends beyond, or has nothing in particular to do with, gratuitousness.

Turning to ‘property-based’ theories, one idea underlying such theories is that, whilst title does pass when property is transferred by mistake, *morally speaking*, it really has not. As Weinrib has put it, at the ‘noumenal’ level (or at the level of moral ‘intelligibility’) the ‘title to the enrichment’ never passed.\(^{42}\) This way of seeing the matter seems to me, however, merely to be a specification or alternative characterisation of the unjust retention theory: morally speaking, the payor still owns the transferred money, because the defendant cannot retain it. To my mind Stephen Smith makes the best argument for such an alternative property-based theory. In arguing that there is a liability, not a duty, to make restitution of mistaken payments,\(^{43}\) he says:  

"[P]roperty-based explanations" suppose that the reason for reversing defective transfers is to support property-owners' interests in determining how their property is used, transferred, or otherwise disposed of. In the words of Charlie Webb, "these claims [to reverse defective transfers] arise as a means of protecting and effectuating the plaintiff's interest in exclusively determining the disposition of his assets." … [W]hen property-based explanations are presented as explanations of duties to make restitution, they are vulnerable to two objections. The first is that, even if it is

\(^{41}\) [1909] 1 Ch 476; See also *Pitt v Holt* [2013] UKSC 26; in line with Stephen Smith’s claim that the mistaken payee has a liability, not a duty to return the value of a mistaken payment, in *Pitt* the court held that the mistake would be reversed if its consequences were so grave that it would be unconscionable for the court to refuse relief.

\(^{42}\) See ‘Correctively Unjust Enrichment’, in Chambers et al. (And cf Webb, Jaffey, who, as far as I understand them, take similar sorts of lines.)

\(^{43}\) The argument he makes for which, I should say, is to my mind entirely convincing.

accepted that the transferor retains a property right, such a right does not explain why the recipient -- who has done nothing -- comes under a duty to return the property. The transferor's alleged property right seems incapable of supporting anything more than a duty not to use the property and, perhaps, a duty to permit the transferor access to recover the property. The second, more serious difficulty is that the kinds of transfers that -- according to the duty model -- give rise to duties to make restitution also pass legal title to the recipient. The fact that title passes strengthens the first objection. But it also supports a further objection, which is that property-based explanations must suppose, implausibly, that the law imposes duties on recipients to give up things (or their value) that the law has already said they own. These objections are persuasive insofar as they are directed at explaining duties to make restitution. … Property-based explanations can avoid these objections, however, if they are presented as explanations of liabilities, rather than duties, to make restitution. Property-based explanations suppose that the rules governing defective transfers provide a means to fix a problem that is largely the law's own creation: it is the rules governing the passing of property that dictate that defective transfers succeed (at least in some cases) in passing good title. Property-based explanations thus suppose that the law governing defective transfers helps to cure or mitigate the effects of other legal rules. It further follows that the root objection to duty model interpretations of property-based explanations is that they suppose the law puts the responsibility for bringing about such cures on citizens. The liability model, by contrast, supposes that the law governing defective transfers provides a means by which citizens can ask courts to fix the problem.

One point to note here is that this sort of explanation would only work for ‘title transfer’ unjust enrichments, not enrichments by way of the mistaken conferral of benefits through the performance of services, for such enrichments could not be avoided by any perfect rules of title or transfer. But leaving that issue to one side, it seems to me that if we correct one misconception in Smith’s account, we find that such a property-based explanation of liability to make restitution of mistaken payments just is a duty of virtue account of this liability. That misconception is found in the sentence I have italicised, viz: ‘Property-based explanations suppose that the rules governing defective transfers provide a means to fix a problem that is largely the law's own creation: it is the rules governing the passing of property that dictate that defective transfers succeed (at least in some cases) in passing good title.’ There could be no perfect laws of title which could possibly prevent any mistaken transfer. The rules of title transfer, being facilitative, make it the case that they can be used for good purposes or ill, for wise purposes or foolish ones, and by ‘mistake’ in the relevant sense. It is not the law, but the claimant, who is mistaken, and it is simply not the role of the law, even a perfect law, to make it the case that people cannot effectively make mistakes, for that would undermine, not enhance, their autonomy.
Furthermore, as Smith points out, on the liability model, we see why in ‘fixing’ the problem, the court’s assistance in these cases is necessary in a way that it is not in the case of, for example, a fiduciary’s liability to bring an unauthorised receipt of property into account. The liability cannot simply be framed as a duty to ‘undo’ the mistaken transaction. As Smith puts it: 45

Regardless of when the duty arises, even the most careful and best-intentioned recipient of a mistaken payment cannot be certain, prior to a court order, that the duty exists, or to whom it is owed. Suppose that you transfer money into my bank account by mistake and that shortly afterwards I become aware of the (unanticipated) payment. In these circumstances, I cannot reasonably be expected to know that I am under a duty to return the money to you until I know two additional things: first, I must know that it is you who made the payment and, second, I must know that you made the payment because of a mistake. Yet I cannot determine either of these facts on my own. Even if I happened to witness you making the transfer or am informed by my bank of your identity (which may not happen), I cannot be certain that I must make restitution to you because I cannot be certain that you were not a mere conduit for the ultimate payor. "Three-party" restitution cases are common. Further -- and often more important -- I cannot be certain that the transfer was impaired. How am I supposed to know that the payment was made by mistake (or because of a third party's threat, or other similar problem) as opposed to being a gift? Your reason for making the transfer is entirely within your knowledge. Of course, you may tell me that you were the transferor and that the transfer was made by mistake, but how do I know that you are telling the truth? It cannot be enough that your demand or explanation appears reasonable, because even information that appears eminently reasonable may be false. If you were to bring the dispute to a court, the court would require you to present evidence, witnesses, and so on before agreeing to order restitution. Why should I demand anything less? And even if such evidence were presented to me, there is something very odd about assuming that, like a court, I should assess your veracity, the plausibility of your demand, and so on. If nothing else, I might reasonably wonder at my ability to be impartial. And what happens if, with the best intentions in the world, I make a mistake? Is it supposed that, to be certain, I should require you to present your evidence to an impartial arbitrator?

It is submitted, then, that the best explanation for the law’s role in such cases is that it replaces an imperfect duty of virtue, a duty of beneficence, with a regime of rules whereby a liability is imposed, and which is implemented by a (coercive) court order as a matter of right.

VII Consequences of conceiving of liability for restitution of mistaken payments as the replacement of an imperfect duty of beneficence

I have argued that the legal duty to repay a mistaken payment is best seen as the replacement of an imperfect duty of beneficence. The law is not, strictly speaking, morally required to instantiate such a duty, but if doing so appears to be the obvious

45 Ibid at --
intuitive choice for the law to make when someone makes a mistaken payment, that is so, I suggest, because of the sorts of considerations Ripstein raises in discussing the duty of easy rescue. Ripstein endorses the private law distinction between nonfeasance and misfeasance: ‘When persons pursue their ends separately, private law only requires that they avoid interfering with each other. When they pursue them jointly, private law requires that they honour the terms of their arrangements.’\textsuperscript{46} Put more elaborately:\textsuperscript{47}

Thus within the realm in which parties bear a special responsibility for their own lives, parties are entitled to equal freedom, each allowed to pursue his or her own ends as he or she sees fit, secure against interference by others, provided that others are also entitled to a like liberty and security. \textit{Equal freedom can also be described as the idea that one person’s liberty will not be limited unilaterally by another’s vulnerability, nor one person’s security limited by another’s choices.}

To my mind, this notion of freedom under private law could not encompass any person’s duty of right to return a mistaken payment, for that would allow their freedom to use their means to be unilaterally limited (or directed) by another’s vulnerability of choices (even if those choices might be mistaken). But that is not the end of the story. Ripstein also argues that one may have duties to contribute to important institutions that underpin the freedom of all, like a legal system or a system ensuring that people have sufficient material resources to live as free agents. In general such an institution doesn’t single any one person out to perform a specific duty in favour of a specific other. One would normally contribute by transferring resources to the institution itself. But, as with a duty of rescue, a person may be singled out on the basis of their availability, or ‘salience’ to put it another way. Thus conceived, the duty is not a private law duty that the available rescuer owes to the person in need, who has a correlative right to aid, rather the duty of rescue is a public law duty which is just a specification of a duty to contribute to just institutions that support the freedom of all. Being a public law duty, an available rescuer who failed to act would not be liable to the person in need in private law damages, but could justifiably be criminally sanctioned.

Translating this sort of thought to the case of mistaken payments, one would argue that the institution which allows us collectively to evince a concern for the welfare of

\textsuperscript{46} Ripstein, supra, 758-59
\textsuperscript{47} Ibid, 759, my italics
others might, in the right circumstances, be embodied in private law – not as a reflection of fundamental perfect duties of right, but as the creation of ‘conventional’, i.e. legislated duties of right evincing the same sort of concern. Following Smith, the law provides to mistaken payors a means of correcting their mistakes; it does not impose duties upon payees which might sound in an action for damages. Liability for mistaken payments would fall into the same conceptual ball park as doctrines such as ‘good faith’ in contract, or ‘abuse of rights’, which prevent people from taking advantage of others even when the available advantage does not result from any illicit interferences with those others’ means. It is a social, institutional choice we make about the rigour with which we treat ourselves as responsible and autonomous. It is perfectly justifiable to do this, because it falls within the range of reasonable options we can pursue under this collective, social, motivation. It is thus not really a kind of corrective justice, in so far as that is understood to be the law’s response to breaches of duties of right. It is a kind of justice nonetheless. It is only mistakenly conceived as corrective in the conventional, duty of right sense, because we focus on the claimant and defendant’s causal connection as payor and recipient in the transfer. It is rather the justice reflecting a certain kind of humanity, in which we acknowledge that we all make mistakes, and being generally responsible and attentive to our own interests and concerns, it rarely does us real harm to be relieved of our errors in particular cases defined by law, despite those errors being products of our free and autonomous action. It is certainly not an underlying principle of corrective justice that requires of us to pay for any benefit whatsoever mistakenly bestowed upon us by others, which is why there is no reason to think transfers of property and benefits bestowed as ‘services’ need follow the same abstract rules of ‘unjust’ ‘enrichment’.

At this point it is worth emphasising a few comparisons between the duty of easy rescue and the duty to make restitution of mistaken payments. The first is that they are clearly similar in that they form part of an expanded view of private law. As Weinrib points out, in the case of the duty to rescue we can perceive a ‘wrong’, i.e. the failure to do what’s ‘right’, without at the same time being able to cognise a harm. Whatever is wrong about the person who fails to make the easy rescue, it is impossible to treat them in any plausible way as being a causal source of the harm that the unrescued person suffers. Similarly with the mistaken payor: in the absence of duress or fraud on the part of the defendant, it is impossible to conceive of the defendant as being a
causal factor in the claimant’s diminution of his means occasioned by his mistaken payment. In one respect, the mistaken payor is in an even less attractive moral predicament. Contingently, the party requiring rescue may be the author of her own predicament, but in the case of the mistaken payor she always is. This does engage the considerations relevant to exercising our wide duty of beneficence in one way rather than another. It is a reason, though not a conclusive one, to decide to exercise an imperfect duty of beneficence in favour of Smith rather than Jones, that Smith is in need through no fault of her own, whereas Jones is in need because he gambled away his fortune or lost his fortune because made to pay compensation for a tort he committed. Desert, it seems, does figure in our exercise of an imperfect duty one way rather than another, though considerations of desert are not conclusive. One final point – I spoke above about two ways of characterising the imperfect duty of beneficence: one directed to concern for the needs of our fellows, one concerned with their flourishing. Needs are more urgent, so if the duty of beneficence is framed in this way, then the duty of easy rescue is clearly a case where this duty is engaged. But it is much harder to frame a duty to repay a mistake payor as the discharge of a duty of beneficence where beneficence looks (or looks first) to need. There may be very few cases where any claim by a mistaken payor for repayment could be framed as a way of addressing a need. On the other hand, helping another to repair their mistakes irrespective of their need would, I suggest, be a way of taking an interest in their flourishing.

In consideration of all this, it seems to me that even if the duty of easy rescue or the duty to make restitution of a mistaken payment both fall within the scope of private law, it is not at all clear where within that category they would fall. As regards the latter, where does liability to make restitution of a mistaken payment lie within the law of ‘unjust enrichment’, or better – as it may not be clear that this is a conceptually unified legal department – how does liability to make restitution of a mistaken payment relate to other claims in the same vicinity?

Outside of policy-based ‘unjust’ factors, it is orthodox to distinguish between those unjust factors which ‘vitiate’, or render deficient,\(^{49}\) intent, and those in which intent is ‘qualified’ from the outset. But it is worth remarking that outside the mistaken payment case, in which the mistake typically is ‘unilateral’, not ‘bilateral’, in the sense that the mistake does not have to be shared by the defendant, and moreover only needs to be unilateral, not bilateral, for the plaintiff to maintain a claim, all the other unjust factors are ‘relational’. In the vitiated intent cases, the defendant’s liability depends upon a relation between him and the claimant of duress or undue influence or some other transactional advantage/disadvantage. And in the qualified intent cases, typically cases of contracts, the basis is the mutual understanding of the parties as to the nature of the transaction. Thus in all cases but that of the ‘paradigmatic’ mistaken payment case, the ground for restitution much more easily sits within what Lionel Smith has called the ‘law of consent’.\(^{50}\) As Smith makes clear, to point this out is not to remove all these cases from the law of unjust enrichment, but it does point out that is natural to think that all of these cases are not contingently adopted into private law as the replacement of an imperfect duty of virtue in the way that I have tried to show that the law governing mistaken payments is. For unlike the mistaken payment case, these cases reveal a basis for restitution in the flawed or qualified transaction itself. Thus, it is not crazy to think that one might, as an officious bystander, imply a term into a contract with a builder that payments in advance ought to be returned if the contract is frustrated, for example by the builder’s death. Who would ever enter into such a contract on any other (implicit) footing? This, to my mind, whilst not reviving any quasi-contractual theory of unjust enrichment, does show that to the extent the law of contract is not conventional, i.e. the idea that pactum sunt servanda is a universal principle of justice (which, by the way, it is)\(^ {51}\) that reflects duties of right, the law of restitution of payments made on a basis which fails is also a matter of universal principles of justice reflecting duties of right. (Indeed, as I have already suggested, Weinrib’s unjust retention theory is arguably best seen as an attempt to show that mistaken payment cases fall within the ‘qualified’ consent cases, i.e. that all payments are made on the (default) basis that they are not gratuitous.) Much the same,


\(^{50}\) Lionel Smith, ‘Unjust Enrichment: Big or Small?’ in Simone Degeling and James Edelman (eds.) Unjust Enrichment in Commercial Law (Pyrmont, NSW: Thomson Reuters – The Lawbook Co., 2008), 35.

\(^{51}\) See Schiffrin cite, Penner cite
I think, could be said about vitiations of consent turning on duress, undue influence, and so on. It goes without saying that in almost all of these cases a change of position defence is never even considered, which also speaks volumes.

If that is right, then far from being the paradigmatic case of restitution, liability to make restitution of mistaken payments is the outlier.\textsuperscript{53}

Having this outlier status is, I suggest, what makes the justification of the claim so unusual in private law, but also so interesting. Being an outlier, it is rightly draws our attention, for in the case of mistaken payments, the law of consent, however broadly construed, does not hold within it a claim for restitution of a mistaken payment, for as I have rather dwelt upon above, in these cases the law does not regard the payment itself as undermined in any way. And if that is right, then the contingent nature of the justification for liability to restore mistaken payments brings this liability into line not with the other ‘consent’ bases for liability, but rather into line with policy-based justifications for restitution.

Heavens.

\textsuperscript{52}The exception is the case of ‘innocent’ undue influence; \textit{Alcard v Skinner}. I thank Mindy Chen-Wishart for drawing this exception to my notice; see also Mitchell, Goff & Jones, supra n [27-47].

\textsuperscript{53}I therefore disagree with Smith, supra n. 20 at 43, when he says that where a contract is avoided, the claim for the return of a payment rendered is just like a case of restitution for a mistaken payment.