What Right Does Unjust Enrichment Law Protect?

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Abstract—This article offers an understanding of the normative basis of unjust enrichment. It begins by considering whether the right at stake in cases of unjust enrichment fits within a Kantian conception of right that treats free agency as the sole aspect of the person commanding respect. It argues that it does not because, in cases of unjust enrichment, recovery does not depend on finding a violation of the plaintiff’s bare freedom to choose. The article then argues that unjust enrichment vindicates the plaintiff’s right of self-determination—the realization of the capacity to live from self-chosen ends—when the laws of property and contract threaten to undermine it. This resolves the puzzles of unjust enrichment law that remain mysterious on other accounts, such as how the plaintiff can have a right to recovery even though property has been effectively transferred to the defendant, why the plaintiff may recover even though the defendant has been purely passive and has committed no wrong, and why unjust enrichment fails to exhibit the structure of corrective justice.

1. Introduction

Although unjust enrichment as a category of liability distinct from tort and breach of contract is now widely recognized, the nature of the right underlying it has remained a mystery. The first American Restatement of Restitution describes the principle against unjust enrichment in the following terms: ‘A person who has been unjustly enriched at the expense of another is required to make restitution to the other.’

Seavey and Scott, the authors of the Restatement, describe unjust enrichment as the postulate underlying the law of restitution analogous to the postulate of a right against harm that underlies tort law and to the right against breach of promise underlying contract law. But when they come to describing...
the postulate in right-terms, they lapse into circularity. Unjust enrichment, they argue, expresses the idea that 'a person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust.' This, of course, states no underlying principle of right; rather, the term ‘unjust’ seems to function as a stand-in for some yet unnamed principle. Similarly, Canadian, British and Australian courts have begun to articulate the conditions of the defendant’s liability in unjust enrichment, but without specifying the right whose infringement constitutes the injustice. And yet the question of the plaintiff’s right must surely be prior to that of the defendant’s liability, for the plaintiff’s entitlement is what justifies the defendant’s liability, and the conditions of liability must derive from a conception of what the plaintiff is owed. Otherwise, restitution for unjust enrichment could not be understood as giving something back to the plaintiff; rather, it would have to be understood as conferring upon the plaintiff something new. Moreover, without an understanding of the right that the law of unjust enrichment vindicates, we can have no coherent theory of what makes a particular enrichment unjust or any theory of what unifies the various circumstances under which enrichments are deemed unjust. Hence the quandary of the Supreme Court of Canada, which has stated that the test for unjust enrichment must be ‘flexible’, allowing the relevant ‘factors’ to vary from case to case, and which vaguely appeals sometimes to morality and sometimes to policy, giving many the impression that the court is simply doing what it likes.

In sum, there is a serious lacuna in the common-law jurisprudence of unjust enrichment; we are missing an account of what the plaintiff is owed and why.

Theorists of unjust enrichment have so far failed to fill the gap. Recent academic literature on the normative foundation of unjust enrichment has focused on the question of whether or not unjust enrichment can be understood as an instance of what Aristotle called corrective justice. But this

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3 Seavey and Scott, ‘Restitution’ (1938) 54 LQR 29–45, 31–32.
4 The Canadian court uses a three-stage test for a finding of unjust enrichment: (1) enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; (3) an absence of juristic reason for the enrichment. This test fails to state the principle underlying unjust enrichment; it simply articulates the conditions of liability without reference to an underlying principle. In P Jaffey, ‘Two ‘Theories of Unjust Enrichment’ in J Neyers, M McInnes, and S Pitel (eds) Understanding Unjust Enrichment (Hart Publishing, Oxford 2004) 139–164, 139, Peter Jaffey makes the same point about the unjust enrichment jurisprudence of the House of Lords. In Pavey & Matthews Proprietary Ltd. v. Paul (1987) 162 CLR 221 (HCA) at 263, the High Court of Australia held that ‘the requirements of good conscience and justice... inspire the concept or principle of restitution or unjust enrichment.’ Here too we are missing a normative argument to account for the plaintiff’s recovery.
5 Although the Canadian court has adopted the ‘absence of juristic reason’ approach rather than the ‘unjust factors’ approach, it has nevertheless held that in determining whether there is an absence of juristic reason for the enrichment, ‘the test is flexible, and the factors to be considered may vary with the situation before the court.’ See Peter v. Beblow (1993) 101 DLR (4th) 621 at 645.
6 GHL Fridman, ‘Unjust Enrichment (Dis)Contented’ in Neyers, McInnes and Pitel (n 4) 35–45, 43.
inquiry does not even begin to answer the question as to what right this category of liability vindicates. Corrective justice is, in Aristotle’s presentation, a *form* of justice to be contrasted with the form of distributive justice. While distributive justice is concerned with the distribution of benefits and burdens among the members of a political community, corrective justice is concerned with the rectification of transactional wrongs between members of the community. Aristotle explains the idea of corrective justice by comparing the parties’ pre-transactional condition to two equal lines. The injustice disturbs this equality by adding to the defendant’s line a segment that is subtracted from the plaintiff’s. Corrective justice operates by subtracting the segment from the longer line and adding it to the shorter so that the pre-transactional equality of the lines is restored.\(^8\) When corrective justice is taken to be the animating form of private law, the central insight it provides is structural. In that corrective justice makes explicit the link between defendant and plaintiff as the doer and sufferer of the same injustice, we understand why private law claims are between a particular plaintiff and a particular defendant and not between any needy person and any wealthy person. Corrective justice also illuminates the structure of private law remedies, for it explains why it is not enough for the court merely to remove the defendant’s gain or to make good the plaintiff’s loss—why it must force this particular defendant to compensate this particular plaintiff in an amount corresponding to the plaintiff’s actual loss.\(^9\)

However, while corrective justice gives us insight into private law’s structure, it tells us little about private law’s normative foundation. Corrective justice does not state a conception of what human beings owe each other. It does not give us a theory of the pre-transactional equality it presupposes or a theory of the kinds of losses that count as deviations from this equality. Because corrective justice does not state a theory of right, the inquiry into whether or not unjust enrichment exhibits the structure of corrective justice does not help us answer the question as to what right of the plaintiff unjust enrichment vindicates. Indeed, the focus on corrective justice may be said to hinder that inquiry in the way that putting the cart before the horse hinders the search for the best possible horse. For it is only once we identify the plaintiff’s right that we can say whether or not the correlative duty-bearer is the defendant or some other agency—for example, the court as a public institution. In other words, we must grasp the substance of the action before we can identify the form of justice suitable to its vindication. The question for a theory of unjust enrichment’s normative foundation is not whether we can fit unjust enrichment within the structure of corrective justice, but whether we can fit it into a theory of right.

In this article, I offer an understanding of the normative basis of unjust enrichment. I begin by considering whether unjust enrichment fits within

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\(^9\) Weinrib (n 7) 63–65.
a Kantian conception of right that treats free agency—the abstract capacity for choice—as the sole aspect of the person commanding respect. I argue that it does not, because recovery in unjust enrichment does not depend upon finding a violation of the plaintiff’s bare freedom to choose. I argue that in order to understand why the plaintiff recovers in these cases, we need a more robust conception of freedom as well as a theory of right adequate to such a conception. We can make sense of the courts’ interest in the fulfillment of the plaintiff’s legitimate expectations and in the ways the plaintiff’s concrete purpose has been frustrated in action only if we understand freedom as the actualization of the capacity for acting from self-chosen ends and law as a system that includes duties of supportive concern for this actualization in addition to duties of respectful non-interference. I thus argue that the law of unjust enrichment vindicates, not the plaintiff’s abstract agency, but the plaintiff’s right of self-determination, and that it does so by giving effect to the plaintiff’s purpose when the laws of property and contract would frustrate it.

2. Unjust Enrichment as Respect for Free Agency

The prevailing theoretical accounts of unjust enrichment assume, either explicitly or implicitly, that the normative foundation of unjust enrichment is a Kantian conception of right.10 According to this conception, human beings appear before courts of law, not as individual characters with subjective values and life-goals, but as abstract agents stripped of everything but their capacity to act from freely chosen ends. Because this capacity is necessarily presupposed in the choice of all ends valuable to the agent, it itself is the locus of absolute value commanding respect from all. As bearers of absolute worth, moreover, agents have equal rights to act from self-chosen ends and coercive duties not to interfere with the capacity for free action of others. They have no coercive duties to benefit others, for their equal worth means that none may be compelled to serve the particular ends of another—that each is entitled to act only from self-interest provided she does not interfere with a like entitlement of others. Hence it is a matter of indifference to law whether the free choice of one agent is compatible with the attainment of another’s goals; rather, the law is concerned only with whether the free choice of one agent is compatible with the free choice of another. If it is, the choice is permitted; otherwise, it is not. Kant expresses this idea in the following way:11

The concept of Right, insofar as it is related to an obligation corresponding to it…has to do, first, only with the external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on

10 See Weinrib (n 7); Smith (n 7); M McInnes, ‘The Measure of Restitution’ (2002) 52 U Toronto L J 163–219; A Drassinower (n 7); Klimchuk (n 7).
each other. But second, it does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other’s choice. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law.

We can see that the conception of freedom underlying this account of right is extremely thin. Here freedom consists simply in the capacity to act from self-chosen ends as opposed to being determined in one’s behaviour by external causes. Whether this capacity is actualized in its expression or frustrated is of no account; all that matters is whether the capacity for free choice was expressed in a way that was compatible with the like expression of another’s capacity. As others have shown, the idea that human beings are free agents who owe one another duties of respect for free agency but no duties of concern for the attainment of their goals illuminates much of private law. I now consider whether this idea can also explain the law of unjust enrichment.

A. The Plaintiff’s Right to Consent

Many scholars have thought that the law of unjust enrichment is concerned, at bottom, with protecting the plaintiff’s freedom of choice. If this is correct, unjust enrichment falls neatly within the concept of right articulated above. In ‘Restitution: The Heart of Corrective Justice’, Lionel Smith argues that, just like tort and breach of contract, unjust enrichment entails liability for interference with Kantian right. He argues that the plaintiff’s normative loss in a case of unjust enrichment is constituted by the fact that ‘the plaintiff


13 For example, Birks groups mistakes giving rise to claims in unjust enrichment under the heading ‘non-voluntary’ transfer in P Birks, An Introduction to the Law of Restitution (Clarendon Press, Oxford 1985) 140. In McInnes, ‘Enrichments and Reasons for Restitution: Protecting Freedom of Choice’ (2003) 48 McGill L J 419–475, 424, McInnes argues that unjust enrichment responds to the plaintiff’s ‘lack of free will.’ In H Dagan, The Law and Ethics of Restitution (CUP, Cambridge 2004) 38–42, Dagan argues that mistaken payments are ‘most conspicuously cases of involuntary transfers’ that subvert the agent’s control over her own resources. Drassinower argues that the principle underlying unjust enrichment is ‘a person is entitled to what is his until he freely parts with it’; Drassinower (n 7) 467. In ‘The Nature of Restitution’ (1995) 15 OJLS 33–49, McBride and McGrath argue that an enrichment is unjust ‘where it resulted from the disposition of my property in a way which I did not consent to,’ at 37. In ‘Free Acceptance and the Law of Restitution’ (1988) 104 LQR 576–599, 581 Burrows writes that the factors which make an enrichment unjust are those that establish the involuntariness of the transfer from plaintiff to defendant.

14 Smith (n 7) 2139.
did not fully consent to the transfer.\textsuperscript{15} For example, in the case of a mistaken payment, Smith says that the plaintiff’s consent is vitiated because it was given on the basis of bad information. Likewise, in the case of a frustrated contract, he argues that the plaintiff’s consent was conditional and, when the contract is frustrated, the condition fails and consent is vitiated.\textsuperscript{16} Similarly, McInnes argues that the plaintiff is not bound by a mistaken payment because her error vitiated her intention; this, he suggests, follows from the fact that ‘Kantian responsibility is premised upon free choice’.\textsuperscript{17} The argument is thus that, because the plaintiff did not consent to the transfer of property that is now in the defendant’s possession, the plaintiff’s right to choose the allocation of her resources has been disturbed in cases of unjust enrichment.

It is not clear, however, why we should think that a mistake that frustrates the plaintiff’s intended goal vitiates consent, that is, why we should think that an erroneous choice given her particular goals undermines her freedom to choose.\textsuperscript{18} A theory of consent is a theory of what makes my action attributable to my agency, of how I can be held responsible for action in a way that is consistent with my freedom. Accordingly, a theory of consent must follow from a conception of human freedom. We have already seen the conception of human freedom that underlies Kant’s theory of right. The understanding of consent suitable to that conception of freedom is thin. Where freedom is understood as the bare capacity for purposive action, consent must mean that the choice the individual made was the product of her free will. A requirement of consent cannot, on this understanding of freedom, mean that the individual’s choice must be actualized as planned. What alone matters for this conception of right is that action reflect the agent’s capacity for choice. The content of the choice—the particular end or project the free will is trying to realize—is here a matter of indifference.

In cases of unjust enrichment, the plaintiff was not forced or induced by fraud to act; in fact, in two standard cases of unjust enrichment, she intended to part with her property in the thing transferred. Consider a mistaken payment. A gives money to B mistakenly thinking she owes B this money. Despite the mistake, we can say that A voluntarily gave that money to B. In another case, A performs services for B under a contract that turns out to be unenforceable. The unenforceability of the contract does not change the fact that the services were freely performed. The transfer of property or services in these cases appears defective only from the perspective of the plaintiff’s particular purposes. The mistake frustrates the realization of the intended goal, but it does not implicate the plaintiff’s capacity for goal-setting. Mistake and defeated expectations are relevant only if we are interested in the concrete

\textsuperscript{15} Ibid 2140.
\textsuperscript{16} Ibid 2134.
\textsuperscript{17} McInnes (n 7) 189.
\textsuperscript{18} This point is also made by Klimchuk and Botterell. See Klimchuk (n 7) 127 and Botterell (n 7) 286.
choice and particular purpose the individual actually settled upon rather than in the bare capacity to make choices and formulate purposes. So if by the right to consent consent-theorists mean something like a right that action be freely willed or voluntary, it seems clear that a right of consent in the allocation of one’s resources is not at stake in these standard cases of unjust enrichment.

There is a further problem with focusing on the plaintiff’s freedom of choice. Not only does the plaintiff’s freedom to choose seem undiminished in these cases of unjust enrichment, but thinking of the plaintiff’s right as the right to determine her own actions leaves us at an impasse when recovering in unjust enrichment would amount to allowing the plaintiff to determine the defendant’s actions. Suppose A mistakenly paints B’s house and B refuses to pay for the improvement. If it is true that A’s mistake vitiates her consent to confer this benefit on B, then A’s freedom of choice in the expenditure of her resources has been compromised here. But of course it would also compromise B’s freedom of choice if B were forced to pay for the unrequested improvement. If A’s right to determine her own projects has really been undermined by her mistake, there seems to be no fair solution to this problem. The courts, however, are clear that, under these circumstances, B need not pay A for the unrequested improvement. Yet the theory that treats unjust enrichment as a vindication of the plaintiff’s freedom of choice can only view this decision as unfairly privileging B’s freedom over A’s; and, of course, the reverse decision would unfairly privilege A’s freedom over B’s. Far from illuminating the law of unjust enrichment, focusing on the plaintiff’s right to choose makes unjust enrichment appear as an unprincipled doctrine, one inconsistent with the equal freedom of plaintiff and defendant.

Finally, my argument that the focus on the plaintiff’s freedom of choice in the alienation of her own resources is misplaced finds support in the decision of the House of Lords in *Foskett v. McKeown*.¹⁹ In that case, the court pointed out that, when the plaintiff retains title to the property that is in the defendant’s possession, the plaintiff need not make out a claim in unjust enrichment but can recover on the basis of her ‘hard-nosed property rights’.²⁰ Moreover, the court explicitly accepted the proposition that follows from this: a claim in unjust enrichment will lie even if, as a matter of property law, property has passed from plaintiff to defendant. In cases of unjust enrichment, Lord Millett held, ‘the plaintiff is not concerned to show that the defendant is in receipt of property belonging beneficially to the plaintiff or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the

¹⁹ *Foskett v. McKeown* [2000] 2 WLR 1299 (HL).
defendant provides no defence; indeed it is usually the very fact which founds the claim'. This seems right. If the plaintiff retained title to the property in the defendant's possession, she should be able simply to claim: 'that's my property. Give it back'. The victim of theft need not show that the person in possession of her property has been enriched at her expense. It is enough to show that the property is hers. As Lord Millett continued, 'a plaintiff who brings an action [based on ownership of property] like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. [The defendant] may, for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff's interest'.

Lord Millett might also have pointed out that the terms of analysis for liability in unjust enrichment—terms such as 'enrichment' and 'deprivation'—can only be understood as legal rather than factual terms if there has been a transfer of title from plaintiff to defendant. If the wind blows my lawn furniture onto my neighbour's property, I have not suffered a legal deprivation, nor has my neighbour enjoyed a legal enrichment: as a matter of law, the furniture is still mine. Most importantly, the defendant's 'good title' to the property in question is not a defence to claims in unjust enrichment—a fact explicable only if unjust enrichment operates notwithstanding a valid transfer of property. But if it is true that liability for unjust enrichment in no way depends on the plaintiff's continuing title, the consent theory of unjust enrichment runs into trouble. Property law requires a choice to make a transfer before it will find a valid transfer of title. Thus, if there has been a valid transfer of property from plaintiff to defendant in cases of unjust enrichment, then there must also have been a choice to make a transfer. Therefore, the plaintiff's right to choose freely

21 Ibid 1324.
22 Ibid 1324–1325.
23 As Grantham and Rickett put this point, where the plaintiff retains title to the thing transferred, there is no enrichment because the defendant's receipt was always encumbered by an obligation to return the property. See Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical 'Truth' (2000) 63 MLR 905–911, 909.
24 In P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 CLP 231–254, Birks argues that the House of Lords in Foskett was wrong to insist upon a distinction between proprietary right and unjust enrichment. His argument may be summarized as follows. Unjust enrichment is a causative event that gives rise to rights. A proprietary right is a right to a particular thing valid against the world. When the causative event of unjust enrichment gives rise to a right good against the world, we have the coincidence of property and unjust enrichment. Putting aside the question of whether unjust enrichment is an event giving rise to rights or whether it is rather a cause of action to protect already existing rights, I think Birks' argument relies upon an overly narrow view of property law. Property law does more than describe which rights are good against the world. Property law embodies a conception of ownership as the right of exclusive use and alienation and a conception of how ownership is violated, for example, by trespass, use without permission, or theft. Property law responds to rights violations through doctrines derived from its conception of ownership, such as tracing and the remedies of restitution or disgorgement. The point of Foskett was that property law itself fully protects violations of proprietary right and that unjust enrichment must therefore be about the protection of a different kind of right. For a similar response to Birks' argument see Grantham and Rickett (n 23).
what to do with her resources cannot be the normative idea unifying unjust enrichment as a category of liability. Lionel Smith accepts that ‘it is absolutely clear that the claim [in unjust enrichment] lies even if property passes’, yet he nevertheless describes unjust enrichment as a transfer to which the plaintiff has not ‘fully’ consented. But, as I have tried to show, the assertion that cases of unjust enrichment obtain where there has been an effective transfer of property but where the plaintiff did not consent to the transfer is incoherent: it simultaneously assumes and denies the plaintiff’s consent. Smith tries, I think, to avoid this contradiction by vaguely describing the transfer in unjust enrichment as one to which the plaintiff did not ‘fully’ consent. But what does ‘fully consent’ mean here? Perhaps Smith means that the plaintiff has a right of consent more robust than the consent required for valid transfers of property. Perhaps he means that the plaintiff has a right, not only that her choices be free, but that her action reflect her goals as chosen. This might explain why the plaintiff may make a claim in unjust enrichment even where property has passed. I will return to this possibility. For now, I want to point out that the use of the term ‘fully consent’ masks a confusion about unjust enrichment’s normative foundation. Smith argues that unjust enrichment is about transfers that are ‘not valid under Kantian right’, that is, transfers that are inconsistent with ‘our ability to make choices in our lives and our corresponding duty to allow others to do the same’. But if by a right of full consent Smith means a right of free choice in the allocation of one’s resources, then, as I have tried to show, he has failed to explain the law of unjust enrichment. If, on the other hand, by a right of full consent Smith means a right that one’s end be realized in action, he has abandoned the Kantian theory of right because this understanding of consent does not follow from the thin conception of freedom that theory of right presupposes.

25 Botterell suggests a different way of construing the plaintiff’s claim in unjust enrichment as proprietary in the sense that the reason for the plaintiff’s claim is based on the plaintiff’s rights of ownership. ‘...[I]t is clear,’ he argues, ‘that the reason the plaintiff is demanding the return of the mistaken payment from the defendant is that the money was once the plaintiff’s’: Botterell (n 7) 290 (emphasis added). So the basis for recovery ‘resides in a past proprietary claim’: Ibid 294. The difficulty here is that it is not clear why the fact that the plaintiff was once the owner of the property now alienated should ground any continuing rights in that property. A person who gave a gift, or made an exchange, was also once the owner of the property now alienated. It is clear, however, that this fact does not ground any continuing proprietary rights in these cases. The idea of a past proprietary claim thus cannot do the work Botterell wants it to do.

26 Smith (n 7) 2141 n 106 and 2142.
27 Ibid 2140.
28 McInnes, I think, tries to do the same by describing the plaintiff as entitled to retrieve the value of ‘something she did not truly choose to give up’ in McInnes, ‘Enrichment Revisited’ in Neyers, McInnes and Pitel (n 4) 165–220, 169 and 208 (emphasis added). Botterell also seems to do this by stating that in unjust enrichment, the object in question ‘more properly’ belongs to the plaintiff than to the defendant: Botterell (n 7) 291.
29 Smith (n 7) 2139.
30 Ibid 2117.
B. The Defendant’s Wrongdoing

Another way of interpreting unjust enrichment as a vindication of the plaintiff’s free agency is to find the defendant guilty of some wrongdoing in retaining the benefit conferred by the plaintiff, that is, to find in the defendant’s retention of the benefit some failure to interact on terms appropriate to mutual respect for free agency. One such interpretation is suggested by McInnes and by McBride and McGrath. They argue that, when the defendant refuses to return the benefit to the plaintiff, he does so on the basis of a claim to retain his property until he freely parts with it. But in retaining property the plaintiff did not freely give up, the defendant fails to acknowledge the plaintiff’s identical right to keep her property until she freely parts with it. The defendant therefore seems to be making an exception of himself and, in doing so, fails to treat the plaintiff as an equal.\(^3\) The flaw in this argument is plain. Once we accept the distinction between a claim in unjust enrichment and a claim in property, there is no reason to think that the defendant is asserting a right he fails to acknowledge in the plaintiff. The defendant asserts a right on the basis of title and, as I have argued above, the plaintiff, having voluntarily parted with the property, can no longer make such a title-based claim.

We find a more promising possibility in Abraham Drassinower’s analysis of unjust enrichment. Drassinower tries to show that the plaintiff and defendant in an action for unjust enrichment are correlative links as the doer and sufferer of the same injustice just as they are in cases of tort and in cases where there has been a breach of contract.\(^3\) The argument for the injustice of the defendant’s retention of the benefit runs as follows. One consequence of mutual respect for free agency must be that no person can be compelled to serve another’s ends. Accordingly, the plaintiff cannot be held to have acted for the benefit of the defendant unless she intended to do so. In cases of unjust enrichment, the plaintiff had no such intention. This is why, in Pettkus v. Becker, for example, the Canadian Supreme Court held that an absence of donative intent on the part of the plaintiff is necessary in order to make out a case of unjust enrichment.\(^3\) Absent this intention on the part of the plaintiff’s part, the defendant must return the value of what was transferred; otherwise, the defendant is claiming a right to the plaintiff’s unilateral service, a right incompatible with their equal status as free agents. On this account, unjust enrichment falls squarely within the Kantian conception of right grounded in abstract agency. The basis for the right to the value of the thing transferred is the plaintiff’s right to be treated as an absolute end—as a being with the capacity to set ends—and not merely as a means for the ends of others.

\(^3\) McInnes (n 10) 188; McBride and McGrath (n 13) 39.

\(^3\) Drassinower (n 7).

The difficulty with this account is that it seems implausible to interpret the defendant’s refusal to set things right for the plaintiff as a claim of entitlement to the plaintiff’s service. The transfer of value from plaintiff to defendant was a product of the plaintiff’s voluntary choice. The defendant asserts no right to determine the plaintiff’s actions. In making the transfer, the plaintiff acted according to her own plan, pursuing her own projects and not those of the defendant. As it turned out, the plaintiff’s plans were frustrated due to a reasonable but mistaken apprehension of the circumstances and the defendant is now the beneficiary of the plaintiff’s error. For example, the plaintiff acted pursuant to a contract that turned out to be void, or made a mistake about the nature of her liability, or made improvements to the wrong house, or repaired a car thinking it was her own. The defendant turns out to be the beneficiary of the plaintiff’s frustrated plans, but the defendant may be a purely passive beneficiary. When the plaintiff alerts the defendant to what has happened, the defendant merely says, with full Kantian right, ‘why should I help you correct your mistakes?’ The suggestion that the defendant is claiming a right to the plaintiff’s service and thus failing to act on terms appropriate to mutual respect therefore seems implausible. On the contrary, in cases of unjust enrichment, it is the defendant rather than the plaintiff who appears to be placed under a positive duty to benefit another.

Things do seem otherwise, however, where the defendant freely accepts the benefit conferred. Consider the case of Pettkus v. Becker. Mr Pettkus and Ms Becker lived in a common-law relationship for almost twenty years. Over the course of these years, Pettkus developed a successful bee-keeping business with considerable help from Becker. The farms at which the bee-keeping businesses were run were placed in Pettkus’s name alone. The money to buy the bee hives and the equipment came from Pettkus’s account, while Becker’s money went towards household expenses. When their relationship ended, the trial judge awarded Becker forty bee hives without bees and fifteen hundred dollars. But what Becker wanted, of course, was an interest in the land owned by Pettkus and in the bee-keeping business and this is what she was awarded by the Supreme Court of Canada. The basis for the award can be found in the following passage from the judgment of Dickson J: ‘...where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it’.

34 Klimchuk also makes this point about the defendant’s passivity in Klimchuk (n 7).
35 So for Stephen Smith, it looks like unjust enrichment is enforcing ‘a pure duty to benefit another.’ He therefore argues for some radical changes to the law of unjust enrichment, including a fault requirement and a rejection of the idea that there is in principle a duty to return benefits conferred by mistake. See S Smith, ‘Justifying the Law of Unjust Enrichment’ (2001) 70 Texas L R 2177–2197, 2187 and 2194.
Pettkus was not a passive recipient of a benefit; he freely accepted Becker's services. How should we understand the significance of this? We might understand the defendant's free acceptance of a benefit and the subsequent refusal to pay for it as the defendant's failure to act on terms appropriate to mutual respect for free agency. Such an interpretation of the significance of free acceptance might run as follows. As individuals who are separate centres of self-determining activity, human beings have no obligations to serve another and (absent contract) are not entitled to the service of any other. They must therefore assume that other human beings are acting in their respective self-interest and not in the interest of another. Thus, when A accepts the benefit from B or sees that B is performing a service for him, it is unreasonable for A to assume that B intends a gift. If A accepts the benefit or has the opportunity to stop B and says nothing, the law imposes upon the defendant an obligation to pay for the benefit whether or not that obligation is voluntarily assumed. If the law did not do this, it would allow the defendant to subordinate the plaintiff to his own projects, for in accepting a benefit that he knows or ought to know is given non-gratuitously and then failing to pay for it, the defendant treats the plaintiff as a means to his own ends. Moreover, if the defendant accepts the benefit, paying for it would not count as serving the plaintiff, for paying for a benefit freely accepted is merely recognition of the parties' equal status as self-determining beings. Stated otherwise, Pettkus's free acceptance of Becker's services must be construed in one of the following ways. Either he is asserting an entitlement to Becker's unilateral service, or he is assuming that Becker was acting gratuitously, or he is, by accepting the benefit, also assuming the obligation to pay for it. Since both the claim to another's service and to the assumption of gift amount to an assertion of a right to treat another as a means to his own ends, the law construes the acceptance of the benefit as an acceptance of the non-gratuitous terms under which that benefit was offered.\footnote{The view that the law construes free acceptance as the assumption of the obligation to pay because the alternative construction asserts a right incompatible with mutual freedom is importantly different from the view that free acceptance means that the defendant is passively but voluntarily assuming financial responsibility for the benefit received. The latter view, adopted by McInnes (see McInnes (n 28) 181) threatens to conflate unjust enrichment, where the obligations are imposed by law, with contract, where the law enforces obligations voluntarily assumed. Moreover, the view that free acceptance is a passive but voluntary assumption of the obligation to pay cannot explain why the test for free acceptance is whether the defendant should have known that the services were not being bestowed gratuitously, see Peter v. Boblow (1993) 101 DLR (4th) 621 at 635. McInnes thus suggests that the objective test can only be defended on policy grounds. The interpretation I have suggested explains the objective test because free acceptance here turns on the question of what it is reasonable for the defendant to assume about the plaintiff's behaviour given that human beings must be understood as separate centres of self-determining activity.}

Accordingly, in cases like Pettkus v. Becker, where the defendant freely accepts the benefit received and then refuses to pay for it, the defendant appears to be more than a passive beneficiary and does seem to be asserting a right to the plaintiff's service contrary to Kantian right. Drassinower thus
places much emphasis on the importance of free acceptance for the law of unjust enrichment. However, the foregoing discussion of free acceptance could establish that unjust enrichment’s underlying idea is the enforcement of mutual respect for free agency only if the defendant’s free acceptance of the benefit were a requirement of liability. But it is not. There are cases where the plaintiff recovers even in the absence of the defendant’s free acceptance of the benefit conferred. Indeed, in some cases of defendant liability, there is no act of will whatsoever on the part of the defendant.

Mistaken payments are an example. Here, the plaintiff transfers money to the defendant under the mistaken impression that she owes the defendant this money. The defendant remains a purely passive recipient, yet there is no doubt that a court will order the defendant to pay back the plaintiff. There are other circumstances in which we find the courts indifferent to the defendant’s active involvement. For example, while the ordinary rule is that a plaintiff cannot recover for improvements made to the defendant’s property unless the defendant freely accepted these improvements, Greenwood v. Bennett suggests that the rule is otherwise if the defendant intended to sell the property in question. Here the court found the defendant liable for the value of the improvements to the property up for sale even though they were unrequested and made without his knowledge.38

It might be argued, however, that we can impute free acceptance in a case of mistaken payment because money is an ‘incontrovertible’ benefit, something anyone can be deemed to want. Similarly, we might say that, when property is up for sale, improvements are the equivalent of money because they will increase the property’s sale price and so are equally incontrovertible. However, these rejoinders misunderstand the significance of free acceptance in the argument for defendant wrongdoing in cases of unjust enrichment. If the claim is that free acceptance of the benefit makes the defendant guilty of wrongdoing in refusing to pay for it, it is because, absent express donative intent, the law must impute to free acceptance the assumption of an obligation to pay for the benefit. Accepting an obligation presupposes activity of some kind, and free acceptance fills this gap. However, we cannot fill the gap by deeming a benefit incontrovertible, because this simply bypasses what needs to be established: the defendant’s active involvement in the transaction on the basis of which acceptance of an obligation could be imputed. To say that the defendant could reasonably be deemed to want the benefit is hardly sufficient to show that she implicitly accepted an obligation to pay for it, and so it is also insufficient to show that her refusal to pay wrongfully subordinated the plaintiff to her ends. Cases of incontrovertible benefit—mistaken payments and improvements to property up for sale—show that an act of will on the defendant’s part is not essential to a finding of liability. As I will later argue, free acceptance is an

instance of a different requirement, one that can be fulfilled either by the defendant’s free acceptance or by the finding that the benefit conferred is incontrovertible. Here I want only to emphasize that, since the defendant’s free acceptance is not a requirement of liability in unjust enrichment (and since incontrovertible benefit cannot do the work of free acceptance in grounding an implied undertaking to pay for the benefit), the plaintiff’s right to be free from subordination to the defendant’s ends cannot be the right underlying unjust enrichment and unifying it as a category of liability.

McBride and McGrath, who also interpret liability in unjust enrichment as liability for a particular kind of wrongdoing, try to resolve the problem of the defendant’s passivity by arguing that the defendant’s knowledge of his unjust enrichment should be a requirement of liability: ‘the restitutionary duty... only arises when the unjustly enriched recognize that they are unjustly enriched’.39 There is some ambiguity here about how this requirement of the defendant’s knowledge is supposed to work. The requirement of knowledge may mean that the defendant’s knowledge of the enrichment is what makes the enrichment unjust. But if the enrichment is not unjust apart from knowledge, how can mere knowledge of the enrichment transform it into something unjust? Perhaps then the claim is that unjust enrichment is a fully constituted injustice regardless of the defendant’s knowledge. But the defendant’s knowledge of this unjust enrichment then constitutes an independent wrong and so fails to explain what is wrong about the enrichment itself. My view is that it is not possible to explain unjust enrichment as liability for wrongdoing because liability does not depend on the defendant doing anything wrong.

C. A Defective Transfer

In The Idea of Private Law, Ernest Weinrib offers the following account of the normative foundation of restitution for unjust enrichment:

The ultimate basis of this recovery [for unjust enrichment] is that corrective justice, being in Aristotle’s words, ‘towards another,’ assumes the mutual externality of the parties and the consequent separateness of their interests. Accordingly, corrective justice recognizes no obligation to enrich another. The conferral of a benefit is literally within the free gift of the donor as a self-determining agent. Consequently, only if the donor acts in execution of a donative intent is the transfer of the benefit an expression of right. Unilateral transfers, such as mistaken payments, that are not the product of a donative intent are juridically ineffective, regardless of the absence of wrongdoing by the donee. Their restitution can therefore be demanded as a matter of corrective justice.40

39 McBride and McGrath (n 13) 38.
40 Weinrib (n 7) 141.
Weinrib’s account suggests that the rule that no one can be forced to serve another does not, in cases of unjust enrichment, implicate the defendant’s conduct but rather impugns the transaction, rendering the latter itself defective. The transaction is defective because, being neither reciprocal nor the product of a donative intent, it reflects the plaintiff’s servility to the defendant rather than the equal free agency of plaintiff and defendant. The Kantian ground of right, however, is free agency. Accordingly, the transfer from plaintiff to defendant, because it is not a manifestation of equal free agency, cannot be an expression of right—that is, cannot give the defendant a right in the thing transferred. Thus, what we have in cases of unjust enrichment is an incomplete transfer. There has been a material transfer from plaintiff to defendant: the plaintiff has performed services for or given money to the defendant. But the transfer is not normative; it is not one capable of conferring rights. Thus, although the defendant has material possession, a ‘factual gain’, the plaintiff retains a right to the value of the thing transferred.

But now we again come up against the difficulties posed by the law of property. I have argued that we must accept the House of Lords’ judgment in Foskett v. McKeown if unjust enrichment is to be preserved as a separate category of liability. Only if property has passed in cases of unjust enrichment can we make sense of unjust enrichment as a cause of action distinct, not only from tort and breach of contract, but also from a claim of vindicatio, or ‘that thing is mine’. Most importantly, it is only if unjust enrichment operates notwithstanding the transfer of valid title can we make sense of the fact that ‘good title’ is not a defence available to the defendant. If, however, we take seriously the proposition that property has passed from plaintiff to defendant in cases of unjust enrichment, it will not do to say that in unjust enrichment there has been a material transfer of property but no transfer that the law can recognize as an expression of right. Property law is, as Weinrib recognizes, normative; human beings have rights to the exclusive control of their property because the capacity for purposive action manifests itself by subduing things to its agency. The laws of property thus recognize only those transfers of property that are consistent with the owner’s right of exclusive control over her property. Accordingly, the laws of property do not merely respond to factual happenings. Property law does not recognize a transfer whenever property passes as a matter of fact from one person to another. It gives legal effect only to those transfers that can be viewed as expressions of right. More specifically, property law requires an intention to transfer. The kind of intention with which property law is concerned is no doubt a thin kind of intention—one that simply marks a distinction between voluntariness and coercion—but it is the concern for intention appropriate to property law’s normative foundation, the abstract agency of the will. It is therefore not clear why we should think that the transfer

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41 Ibid.
from plaintiff to defendant in unjust enrichment, though effective as a matter of property law, is nevertheless juridically incomplete. To argue that the defendant in unjust enrichment has title as a matter of property law but nevertheless cannot retain the value of the benefit as a matter of right is either to deny the normativity of property law or to recognize that free agency is not the sole ground of right. Weinrib would endorse neither of these conclusions; but once we take seriously the distinction between a claim in property and a claim in unjust enrichment, one or the other must follow from his argument.

Furthermore, Weinrib’s insistence on the significance of the plaintiff’s donative intent or lack thereof is puzzling, not only from the perspective of property law, but also from the perspective of Weinrib’s own insistence on Kantian right as private law’s normative framework. So long as the plaintiff intended to part with her property in the thing transferred, that transfer is consistent with her right of exclusive control over her own resources and so with her status as a free agent. Whether she parted with that property because she wanted to make a gift or because she thought she was getting something in return is a question of the particular goal she was trying to accomplish in making the transfer, not a question of whether the transfer is attributable to her free agency. But, as Weinrib himself argues, ‘[w]hat matters for the concept of right is not the specific object that free choice is attempting to achieve, but only that it is a free choice that attempts to achieve it’. The difficulty is that if we treat free agency as unjust enrichment’s normative foundation, we cannot account for the way that body of law concerns itself with the plaintiff’s particular intentions and legitimate expectations and how they are realized in concrete action.

None of the interpretations we have so far studied offer a theory of unjust enrichment’s underlying right that is capable of unifying this body of law. The plaintiff’s right to choose how to allocate her resources may no doubt explain some circumstances under which the courts order a restitutionary remedy; it may, for example, explain the defendant’s liability in a case where he has made a profit by using the plaintiff’s property without her permission. But the plaintiff’s right to choose will not account for what has been called ‘autonomous unjust enrichment’ and what I have simply been calling unjust enrichment, that is, where the cause of action depends on no independent wrongdoing on the part of the defendant. The rule that no one can be under a duty to benefit another may explain why the plaintiff recovers when the defendant freely accepts the benefit conferred, but it will not explain why the plaintiff recovers in cases where the defendant is a passive beneficiary. Finally, the idea that the transfer from plaintiff to defendant is normatively incomplete because neither reciprocal nor the product of a donative intent may account for cases where the benefit conferred is a service (so that the laws governing effective transfers of assets are not in issue), but it cannot account for the cases
where the benefit conferred is title to an asset. For in those cases, the supposed normative deficiency of the transaction is contradicted by the property law that deems the transfer normatively effective. In other words, none of these interpretations of the normative foundation of unjust enrichment can explain why the plaintiff recovers in cases of mistaken payment. And mistaken payment is, on almost all accounts, the paradigmatic case of unjust enrichment because it brings into sharp relief the irrelevance to unjust enrichment of contract, fault, and continuing title, thereby showing its distinctiveness as a cause of action.

The law of unjust enrichment appears to transfer resources from the defendant to the plaintiff in circumstances where the defendant is not only blameless but perfectly passive and where the plaintiff seems to be complaining about the consequences of her own freely willed activity. The theory of right grounded in free agency, which requires respect for the agent’s capacity to set goals but indifference to the agent’s realization of her goals as set, cannot explain this. It thus seems that a right arising out of freedom conceived as the bare capacity for choice does not underlie the law of unjust enrichment, for a violation of that capacity is not a requirement of liability. To articulate the normative foundation of unjust enrichment we need a different theory of right based on a different conception of freedom. In the next section, I argue that we find the germ of such a conception implicit in the case law and in the academic writing we have already discussed.

3. Unjust Enrichment as Public Concern for Self-Determination

In the case law on unjust enrichment, the courts have failed to articulate the principle that underlies this body of law. Their judgments, however, hint at its nature. Judgments in unjust enrichment reflect a concern, not for the capacity for action, but for the consequences of action and for whether the consequences the plaintiff brought about were those she intended; the cases treat as fundamental the plaintiff’s particular aims, legitimate expectations and reasonable mistakes. For example, in both Deglman v. Guaranty Trust Co and Constantineau and Pavey v. Matthews Pty Ltd v. Paul, where the claim in unjust enrichment was based on services performed under contracts that turned out to be unenforceable, the finding of liability depended in large part on the contracts as evidence of the plaintiff’s frustrated intention. In both cases, the plaintiffs acted under the reasonable expectation that they would receive something in return for their services; in neither case did the plaintiff intend to make a gift. In Pettkus v. Becker, Becker laboured extensively in

43 [1954] SCR 725 (‘Deglman’)
44 (1987) 162 CLR 221 (‘Pavey’)
45 See Deglman at 728 (‘the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for’) and Pavey at 257 (‘In such an action, it will ordinarily be permissible for the plaintiff to refer to the unenforceable contract as evidence, but as evidence only, on the question whether what was done was done gratuitously’).
46 [1980] 2 SCR 834
the reasonable belief that she was contributing to a business of which she was a half-owner; she had no intention to contribute to a business she did not own and thus unilaterally to benefit her partner. The truth of the matter was that, as a matter of property law, she was entitled to nothing when the relationship fell apart. Dickson J found that ‘the compelling inference from the facts is that [Becker] believed she had some interest in the farm and that that expectation was reasonable in the circumstances’.\(^47\) In \textit{Peter v. Beblow},\(^48\) McLachlin J held that in cases of unjust enrichment, ‘the fundamental concern is the legitimate expectation of the parties’.\(^49\) In \textit{Regional Municipality of Peel},\(^50\) McLachlin J held again that the court must take account of ‘legitimate expectations and what, in the light of those expectations, is fair’.\(^51\) In \textit{Kelly v. Solari},\(^52\) where the plaintiff insurance company paid out proceeds on a policy that had lapsed, Baron Parke formulated his finding of liability in terms of the plaintiff’s defeated expectation: ‘I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which in fact is untrue, and the money would have not been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back.’\(^53\) Moreover, our discussion of the academic writing on unjust enrichment revealed that, although writers have insisted upon free agency as unjust enrichment’s foundational normative principle, when they try to account for unjust enrichment’s features, they cannot help but acknowledge the way this body of law attributes normative significance to concrete consequences as opposed to abstract choice, to particular intentions and goals as opposed to the abstract capacity to form intentions and set goals.

But what can be the normative significance of the plaintiff’s particular intentions, goals, and projects? How can the defendant be obligated to serve these goals consistently with the equality of plaintiff and defendant? The answer comes to light once we move from a conception of freedom as the bare capacity for choice—the conception for which particular intentions and goals are a matter of indifference—to a conception of freedom as the actualization of that capacity.\(^54\) On this view of freedom, to be free is to act from purposes that are actually self-chosen and to be able to view one’s life as broadly expressive of one’s own projects and goals, as the unfolding of one’s self-determined ends.

\(^{47}\) Ibid 849.
\(^{48}\) (1993) 101 DLR (4th) 621
\(^{49}\) Ibid 645.
\(^{50}\) [1992] 3 SCR 762.
\(^{51}\) Ibid 786.
\(^{52}\) (1841) 9 M & W 54
\(^{53}\) Ibid 59.
\(^{54}\) In this article, I make no argument for why we should move from the negative conception of freedom to the positive one. My argument is just that we can only explain the principle of unjust enrichment from within the positive conception of freedom.
We may call this conception of freedom self-determination. The conception of freedom as self-determination has implications for law, for it means that law cannot, consistently with individual freedom, be a coercive system imposed on the individual from without; rather, it must be capable of self-imposition by those subject to it. Moreover, the conception of freedom as authoring one’s life gives content to the idea that law must be capable of self-imposition. Once we think of freedom as the actualized capacity for living according to self-chosen ends, law’s concern for individual freedom requires, not only respect for the formal capacity for choice, but also support in the realization of that capacity. This is because the individual’s need to see her goals reflected in her action now appears as a need of freedom itself rather than her particular desire. It is thus a public need, one qualified for legal recognition because capable of grounding equal rights. We arrive at the idea that the individual is entitled to a system of law supportive of self-determination, of the individual’s ability to shape a life she can view as her own. And the idea of self-determination makes normatively significant the relationship between intention and action, for to see one’s life as one’s own is to see in one’s action and its consequences the reflection of self-chosen plans.

Public law often seems to be ordered explicitly to this principle of self-determination. There we have the idea that citizens have the right to insist that their government provide the material conditions that make freedom of choice meaningful, such as food, shelter, education and health care. This principle also seems to explain why the law generally limits criminal responsibility to the consequences of one’s action that were intended or reasonably foreseeable. But socio-economic rights and laws governing criminal responsibility concern the legal relationship between citizens and the state, not between one citizen and another. And how can the relationship between private citizens be ordered to a principle that imposes duties of positive concern for another’s self-determination? Forcing one citizen to care for the self-determination of another would violate the equality of the parties considered as free agents, since some need more support than others, and some would therefore have to act unilaterally for the benefit of others. Moreover, the idea that freedom is the actualized capacity for free choice presupposes that free choice is something worthy of respect, or else its actualization could not be worthy of our concern. So it seems that compelling concern for self-determination cannot be part of private law without violating free agency, the dignity of which is presupposed by the very idea of self-determination.

55 Hegel explains this idea, which he calls the right of intention, in the addition to paragraph 110 of the Philosophy of Right: ‘my act is to count as mine only if on its inward side it has been determined by me, if it was my purpose, my intention. Beyond what lay in my subjective will I recognize nothing in its expression as mine. What I wish to see in my deed is my subjective consciousness over again.’ See Philosophy of Right trans. TM Knox (OUP, Oxford 1967).
This argument assumes, however, that, if concern for self-determination is a part of private law, it must be the source of positive duties of care directly binding one citizen to another—duties that would violate their freedom of choice. But this is not the case. As I argued, the idea that freedom is the actualized capacity for free choice presupposes the dignity of that capacity and so must acknowledge a sphere in which that capacity is inviolable, one in which the law leaves people free to set and pursue their own goals so long as they allow others to do the same. So there can be no duties upon private citizens to shape their own activity with reference to this robust conception of self-determination; they have only to obey the laws of non-interference with the capacity for free choice of others. However, when these laws of non-interference with the free choice of others—the laws of property, contract, and tort—operate in the concrete circumstance to undermine the individual’s self-determination, the individual can complain, not to any private individual or about any private individual, but to the court as a public institution of justice about the law as an embodiment of justice. The conflict between legal doctrine and the right of self-determination raises a question about what courts, as institutions of justice, ought to do, not a question of what private citizens ought to do. As institutions of justice, courts must ensure that the law protects the freedom of the individual not only in its form, but also in its substance; for when it fails to protect the substance, and so becomes hostile to individual self-determination, it becomes a law incapable of being self-imposed.56 Thus, when the logic of respect for abstract agency leads to an application of the law that subverts the self-determination of the individual, the court refuses that application in order to do justice, where justice is understood as the set of laws ordered to the self-determination of all.57

This is what we find in cases of unjust enrichment. The plaintiff has acted with the intention of realizing her own goals; instead, she ended up unilaterally benefiting the defendant. The plaintiff, claiming that the result is not what she intended, asserts an entitlement to the return of the benefit conferred or its value. But against this assertion of the plaintiff’s, the defendant has some

56 Klimchuk suggests that unjust enrichment may be viewed as correcting the application of law when, because of its universality, it would work an injustice. He argues that the transaction should be reversed when ‘as between the mistaken payer and the payee, the former has the superior claim to the thing transferred.’: Klimchuk (n 7) 136. Although I think Klimchuk is right to suggest that unjust enrichment responds to injustice in the application of legal doctrine, his formulation doesn’t explain what is unjust about the application of the legal doctrine or why the payer has the superior claim in the particular case. Once we see that the important contrast is not between the legal doctrine’s universality and unjust enrichment’s interest in the particular case, but between the abstract conception of freedom underlying the legal doctrine and the richer conception of freedom underlying unjust enrichment, we can articulate the nature of the injustice to which unjust enrichment responds and say why the payer has the superior claim.

57 For this understanding of the way the right of individual self-determination manifests itself in private law, see Alan Brudner, The Unity of the Common Law (University of California Press, Berkeley 1995). Brudner, however, does not treat unjust enrichment as a vindication of the right of self-determination; rather, he thinks that unjust enrichment can be explained by reference to the conception of right grounded in the bare capacity for choice, 113–114.
proprietary right. The plaintiff may have effectively transferred title to the
defendant, or may have attached materials to the defendant’s property, or may
have performed services under an unenforceable contract so that the defendant
retains title to what she promised under the agreement. But property, because
respected only as an embodiment of freedom, cannot coherently serve as the
basis for a claim that would compromise the freedom of another. Otherwise,
property law becomes, in the particular case, incapable of self-imposition by
the plaintiff. To prevent the law from becoming mere external coercion, the
court suspends the application of the rules governing the transfer of title by
requiring the defendant to return the value of what was transferred.58 In doing
so, the court fulfils its duty to protect the plaintiff’s right of self-determination,
vindicating her right that a court not enforce the law in a way that frustrates
her self-chosen plans.59

In cases of unjust enrichment, the court is therefore not requiring the
defendant to compensate the plaintiff for any kind of wrongdoing, but is rather
refusing the application of the law of property in the particular case by ordering
restitution. The relevant normative relationship is thus between the plaintiff
and the court. The defendant is singled out, not as a wrongdoer who must
compensate for inflicting a loss, but as the factual beneficiary of the plaintiff’s
mistake who must return the benefit received. It follows that unjust enrichment
does not exhibit the structure of corrective justice. But this should not be
surprising. As Weinrib’s interpretation of Aristotle’s model of corrective justice

58 Lipkin Gorman v Karpnale [1991] 2 AC 548 is a difficult case. Here, the plaintiff law firm sought restitution
of money stolen from it by Cass and then used for gambling by Cass in the defendant casino. The difficulty lies in
trying to determine whether the plaintiffs succeed on the basis of their continuing proprietary claim to the money
or on the basis of unjust enrichment. The judgments give some reason for thinking that the law firm is simply
making a claim on the basis of ownership, that it is tracing its assets into its direct product—the money drawn by
Cass from the bank—and following it into the hands of the club. If this is the right analysis, Lipkin is a case of
vindicatio, not unjust enrichment. There is, however, reason to think that the proprietary analysis may be wrong
because the House of Lords also found that title to the money passed to Cass when he withdrew it from the bank
and because of the common law rule that money cannot be traced into a mixed fund. See Ewan McKendrick,
If it is true that title to property has passed in these circumstances—because the law firm should be understood,
not as the owner of the deposited money but as a debtor of the bank and because the bank then voluntarily
transferred money to Cass—then the law firm has a claim in unjust enrichment. And although the firm is not
claiming that the consequences of its action are not what it intended, we nevertheless see the same general theme
that we find in other cases of unjust enrichment. In Lipkin, we can understand the solicitors to be complaining
that the operation of property rules governing the transfer of currency validate a transaction that expresses, not
the plaintiffs’ self-determination, but their subordination to another, making the property rules incapable of self-
imposition in the particular case.

59 It might be objected that the court cannot be said to have a duty to order restitution for unjust enrichment
because if the plaintiff chose not to seek a remedy, the court would not be under a duty to do anything. So
perhaps it can only be said that the court has a power to order restitution. Yet, while it is true that the court would
be under no duty if the plaintiff did not seek a remedy, the court nevertheless is under a duty to order restitution
if the plaintiff does establish the defendant’s unjust enrichment. This is so because the general assumption is that
property law, as a body of law evincing respect for human agency, ought to be enforced by the courts. I am
suggesting that the court has a duty to suspend the operation of the laws of property where their application
would undermine self-determination in the particular circumstances of the plaintiff. Thus, the duty to order
restitution can only arise if the plaintiff demonstrates that, under the circumstances, the laws of property
undermine her ability to see her intention reflected in action, for it is only then that the right of self-determination
requires a suspension of the laws of property.
suggests, corrective justice is the form of justice suitable to vindicating wrongs committed by the defendant and suffered by the plaintiff. Corrective justice makes salient the unity of the plaintiff and defendant as the doer and sufferer of the same injustice. This nexus between the defendant’s wrongful act and the plaintiff’s wrongful injury gives us corrective justice’s bipolar structure and justifies singling out this particular plaintiff for compensation and this particular defendant for liability. As I have tried to show, however, unjust enrichment is a category of liability that is independent of defendant wrongdoing, that does not depend on our finding the normative nexus between wrongful injury and wrongful act, and so we should not be surprised if its structure differs from those categories of liability that do depend on defendant wrongdoing. While the compensation of wrongs committed by the defendant and suffered by the plaintiff is no doubt private law’s dominant theme, and while corrective justice is its primary structure, unjust enrichment, as a category of liability independent of defendant wrongdoing, indicates that this is not private law’s only theme and that corrective justice is not its only structure. Let us now consider more closely whether the account I have offered of the right at stake in unjust enrichment can explain the circumstances under which courts have held enrichments to be unjust.60

A. No Donative Intent: The Plaintiff’s Right of Self-determination
An essential element of unjust enrichment is an absence of donative intent on the part of the plaintiff, a finding that the plaintiff made a transfer to the defendant that was not intended as a gift. If we understand unjust enrichment law as protecting the plaintiff’s interest in seeing her intention reflected in the outcomes of her action, the inquiry into the plaintiff’s donative intent is an inquiry into whether the outcome of the plaintiff’s action can reasonably be viewed as expressive of her reason for acting. If the plaintiff intended to make a gift to the defendant and now wants to change her mind, there is no injustice in denying recovery. This is because both parting with the object of the gift and the fact of getting nothing in return were part of the plaintiff’s intention at the time of the transaction. A similar argument might be made with respect to the plaintiff who can be seen as taking a risk as to whether or not she will receive anything in return for the transfer. For example, if the plaintiff washes the defendant’s car without giving the defendant a chance to refuse, the plaintiff must be taking a risk as to whether or not she will receive compensation

60 It might be thought that the question of what right justifies the law of unjust enrichment could be answered much more simply if we say with Raz that individuals have rights that reflect duties in others to respect those interests that are aspects of well-being and that seeing one’s reason for action in the consequences of action is an aspect of individual well-being. See J Raz, The Morality of Freedom (Clarendon Press, Oxford 1988) 166. But if we accept that there are property rights, this means that property rights are themselves supported by interests central to well-being and so we need an account of how, in unjust enrichment, the defendant’s right to property can co-exist with the plaintiff’s right to recover based on self-determination.
for her work. Because she takes a risk, it can be said that both receiving compensation and not receiving compensation are consistent with her intentions; this is just what it means to take a risk.\textsuperscript{61} However, when the plaintiff acts on the basis of some reasonable expectation of receiving something in return for her transfer, she neither intends to give gratuitously nor to take a risk. She transfers property or provides services on the reasonable expectation that it is not a unilateral transaction. The one-sidedness of the transaction in a case of unjust enrichment defeats the plaintiff's intentions. In each case the plaintiff might say, 'That is not what I meant to do. This outcome does not reflect my intention'.

There are, of course, many ways in which an individual's plan may be frustrated due to circumstances beyond her control and, in most cases, she will have no one to whom she may legitimately complain. But where the force that frustrates the actualization of her goal is not simply her mistake but the \textit{legal effects} of that mistake, she can complain that the law is operating in a manner that fails to support her self-determination. This, I suggest, is what we find in cases of unjust enrichment. When I transfer money to another mistakenly thinking I owe a debt, my intention has been frustrated, not simply by my own mistake, but by the laws of property. Because the laws of property deem this an effective transfer and therefore confer rightful ownership on the beneficiary of my mistake, I cannot correct my error without becoming a thief. In the case of services performed under a contract that turns out to be unenforceable, my expectations of payment are frustrated, not only by the other party's refusal to pay, but by the law—usually the Statute of Frauds—which lends its support to that refusal. Similarly in the case of the partner in the quasi-spousal relationship who works and sacrifices for what she believes is a common enterprise but actually acquires no share of the family assets because property law gives rights of ownership to the title-holder alone. In each of these cases, the law lends its support to the subversion of the plaintiff's reasonable expectation. The court, as a public institution of justice, responds by preventing this effect of the law. It thus protects the plaintiff's right of self-determination where it is undermined in the circumstances by the laws of property or contract.

\textbf{B. Free Acceptance, Incontrovertible Benefit and Change of Position: Respecting the Defendant's Free Agency}

There are cases in the jurisprudence on unjust enrichment where the courts emphasize the fact of the defendant's free acceptance of the benefit received. However, there are also a number of cases—including those that are considered paradigmatic instances of unjust enrichment—where we find the courts

\textsuperscript{61} Peter Birks has made this argument as well. See Birks (n 13) 147.
indifferent to the defendant’s free acceptance. Is there a principle that can unify
the various ways in which the courts concern themselves with the defendant’s
conduct? I think that there is. The plaintiff’s right (\textit{vis-à-vis} the law) to see in
her deeds the reflection of her intentions must be limited by the defendant’s
right to determine her own projects, that is, by the defendant’s right of free
choice. Protecting the defendant’s right of free agency is the principle that
unifies the courts’ interest in free acceptance, incontrovertible benefits, and
change of position.\textsuperscript{62}

When discussing the theory that treats unjust enrichment as a vindication of
the plaintiff’s freedom of choice, I argued that this theory leaves us without a
justifiable result when vindicating the plaintiff’s freedom of choice requires
a violation of the defendant’s freedom of choice. But once we think of the
plaintiff’s right as a right before the law to the \textit{actualized} capacity for free
choice, we can overcome this difficulty. We can do so because the plaintiff’s
claim to actualized capacity and the defendant’s claim to respect for bare
capacity are not of equal weight. The defendant’s right is more fundamental;
indeed, it is the basis of the right claimed by the plaintiff. The right to see one’s
purposes reflected in the sum of one’s actions presupposes a right to determine
one’s own purposes. If the individual’s purposes are not self-chosen, then there
is nothing valuable, at least from the perspective of freedom, about their
actualization. The plaintiff must thus acknowledge the defendant’s right to
choose freely the allocation of her own resources, for although the plaintiff
asserts the insufficiency of this right as expressing the whole of freedom, she
must nevertheless acknowledge that respect for the capacity to choose is the
foundation of her claim to concern for actualized capacity. Thus, the courts will
not find the defendant liable in unjust enrichment if vindicating the plaintiff’s
right of self-determination would undermine the plaintiff’s freedom of choice.

The priority of capacity to actualized capacity explains the relevance of the
defendant’s acceptance of the benefit. The inquiry into whether the defendant
freely accepted the benefit conferred is an inquiry into whether the plaintiff’s
recovery in unjust enrichment would amount to allowing the plaintiff to
determine the projects of the defendant. When a plaintiff recovers in unjust
enrichment, it is frequently the case that the defendant must pay the plaintiff
the value of what the plaintiff transferred. There are, however, cases where
requiring the defendant to pay for the value of the property or services received
would allow the plaintiff to determine unilaterally how the defendant expends
her resources. \textit{Taylor v. Laird}\textsuperscript{63} is an example. In that case, Laird employed
Taylor to command a boat. Sometime during the voyage, Taylor relinquished
Taylor to command a boat. Sometime during the voyage, Taylor relinquished

\textsuperscript{62} McInnes has also argued that the idea that unifies the court’s interest in free acceptance, incontrovertible
benefit, and change of position is the defendant’s freedom of choice in \textit{McInnes} (n 28) and in \textit{McInnes} (n 13).

\textsuperscript{63} (1856) 25 LJ Ex 329.
ended, Taylor brought an action to recover additional salary. Chief Baron Pollock’s answer came in the form of a now famous question: ‘one cleans another’s shoes; what can the other do but put them on? . . . The benefit of the service could not be rejected without refusing the property itself’;64 In conferring an unrequested benefit and then demanding payment, the plaintiff claims a right to determine how the defendant will expend his resources. This the plaintiff cannot do, and so the usual rule is that there is no recovery for unrequested benefits.

Things are very different, however, if the benefit is freely accepted by the defendant who knows or ought to know that the benefit is not being conferred gratuitously. When the defendant freely accepts the benefit, she demonstrates that having the benefit is consistent with her own purposes.65 Moreover, accepting an obligation to pay for value freely accepted is just the necessary corollary of free acceptance in a body of law that treats the parties to the interaction as equals. That is to say, unless the defendant claims a right to the plaintiff’s unilateral service (which she cannot do), by demonstrating that having the benefit is part of her purposes, she demonstrates that paying for that benefit is part of her purposes as well. Thus, where the defendant freely accepts the benefit conferred, requiring the defendant to pay for that benefit in order to fulfill the plaintiff’s goals and expectations does not allow the plaintiff to determine unilaterally how the defendant expends her resources; here protecting the plaintiff’s interest in self-determination is consistent with respecting the defendant’s free agency.

Free acceptance by the defendant, however, is not the only way a plaintiff can demonstrate that the defendant’s paying for the benefit received is consistent with the defendant’s own plans. Let us return to the case of Greenwood v. Bennett, where the plaintiff improved the defendant’s car thinking it was his own. In that case, it turned out that the defendant’s car was up for sale. At first glance, this may appear to be just like Chief Baron Pollock’s hypothetical unrequested shoe shining. The problem in that case was that, if the plaintiff were to recover for the services performed, the plaintiff would be permitted to force a sale on the defendant. But things are different in the case of improvements to property up for sale. Because the property is for sale, the improvements to that property become the equivalent of a monetary payment. When, in accordance with the defendant’s own purposes, the property is sold, the defendant will realize the monetary value of those improvements. This is therefore not a case of a forced exchange of money for services but rather a straightforward return of the value received. Because the defendant intended

64 Ibid at 332.
65 She does so even when she freely accepts simply by refusing the opportunity to reject the benefit. For even if this indicates indifference to the benefit, the refusal of the opportunity to reject it implies that having the benefit and paying for it are consistent with her free agency.
to sell the property, the plaintiff’s recovery for the improvements leaves the
defendant’s own projects uncompromised.

The above analysis explains why a plaintiff can recover for a mistaken
payment even if the transfer of money takes place behind the back of a purely
passive defendant. Since money is fungible—since one dollar bill is the
equivalent of any other dollar bill—requiring the defendant to return the
mistaken payment does not amount to allowing the plaintiff to determine how
the defendant will expend her resources. Here too, returning the money is just
a straightforward return of value received, leaving the defendant’s own plans for
her resources undisturbed. In the usual circumstances of a mistaken payment,
the court can vindicate the plaintiff’s right of self-determination without
compromising the defendant’s freedom of choice. But this may not always
be the case. The defence of change of position applies where the plaintiff’s
recovery in a case of mistaken payment would in fact allow the plaintiff to
determine how the defendant expends her resources.66 A defendant can rely on
the change of position defence if she in good faith spent the money mistakenly
paid to her on a special project that would not have been undertaken but
for the discovery of the additional money. To allow the plaintiff to recover
the value of the mistaken payment in these circumstances would be to allow
the plaintiff to force an expenditure on the defendant inconsistent with the
defendant’s own plans for her money. It would thus protect the plaintiff’s
interest in self-determination at the expense of the defendant’s prior claim of
respect for free agency.

4. Explaining the Puzzles of Unjust Enrichment

Theories of the right at stake in cases of unjust enrichment must account for
three puzzling features of that category of liability. The first is that a successful
claim in unjust enrichment depends on no wrongdoing, or even any action,
on the part of the defendant. The second and related puzzle is that unjust
enrichment fails to exhibit the structure of corrective justice. And the third is
that an action in unjust enrichment will lie even though property has passed to
the defendant. We are now in a position to resolve these perplexities.

First, why is there a duty on the defendant to set things right for the plaintiff
where the defendant has done nothing wrong? Put another way, if there is a
legal duty to return the benefit received, why is the defendant’s failure to return
the benefit to the plaintiff not a legal wrong?67

66 This defence was recognized by the Supreme Court of Canada in Rural Municipality of Storthoaks v. Mobil
67 This is Stephen Smith’s question: ‘why, despite a legal obligation to return mistakenly transferred benefits,
[is] a failure to make restitution . . . not a legal wrong?’ See Smith (n 35) 2185.
We can now answer this question in the following way. If the normative foundation of unjust enrichment is the plaintiff’s right of self-determination, then the plaintiff’s right in cases of unjust enrichment is correlative to a duty, not in the defendant, but in the court as a public institution of justice. If the plaintiff’s right of self-determination created a positive duty of concern in the defendant, this would allow the richer right of self-determination to subsume the narrower right of non-interference with free agency. And while the conception of freedom as self-determination regards abstract agency as an incomplete conception of individual freedom, it must nevertheless acknowledge that capacity and its dignity as the foundation of its own richer conception. For how could the realization of the capacity for choice be worthy of concern if there were nothing about that capacity that was special and therefore worthy of protection? Freedom as self-determination acknowledges its own normative foundation by respecting a sphere ordered to free agency rather than effective autonomy, a sphere where individuals are free to pursue their own ends consistent with the like freedom of others and where they owe others no positive duties of concern. The defendant therefore need not shape his private life so as to support the plaintiff’s self-determination and does nothing wrong by asking the plaintiff who alerts him to her error, ‘why should I help you correct your mistakes?’

To understand why the plaintiff’s right in unjust enrichment is correlative to a duty in the court, we have to see that the right to an autonomous life, a life one can reasonably view as one’s own, has implications for law. It means that citizens have a right to be governed by laws that are not merely external impositions but that are rather capable of being self-imposed. The complaint in cases of unjust enrichment, I have argued, is a complaint that the law (usually of property) has, in the particular circumstance, become hostile to the agent’s self-determination because it will, if applied, undermine the agent’s ability to see her action as the reflection of her chosen ends. The complaint here is that the law is, in the circumstance, incapable of being self-imposed because it subverts rather than supports the agent’s freedom. But if the complaint is about the application of the law in the particular circumstance and not about anything the defendant has done, then it is a petition to the court about what it ought to do as a public institution of justice. It is thus the court that must set things right for the plaintiff and refuse the implication of the law of property by requiring the defendant to pay value for the benefit received. This explains why liability for unjust enrichment does not depend on wrongdoing on the part of the defendant and why the defendant commits no wrong by failing to return the benefit to the plaintiff before the court orders him to do so.

The idea that the plaintiff’s right in unjust enrichment is correlative to a duty in the court and not in the defendant also explains the second puzzling feature of unjust enrichment. Unjust enrichment, as Dennis Klimchuk has argued,
does not seem to exhibit the features of corrective justice. The plaintiff and the defendant are not correlative linked as the doer and sufferer of the same injustice because in the paradigmatic case of unjust enrichment, the defendant has done nothing that could count as an injustice. For those who think that corrective justice is the idea that animates private law, unjust enrichment must look like a counterexample that threatens to undermine the theory; for here we have, not simply isolated doctrines that can be dismissed as mistakes or as products of policy external to law, but an entire category of civil liability grouping together court decisions whose rightness few dispute. My account of unjust enrichment supports the view that this category of liability is not an instance of corrective justice but without disturbing the idea that corrective justice is the primary structure of private law. Corrective justice is the form of justice suitable to rectifying wrongs committed by one citizen against another. The right at stake in unjust enrichment, however, is a right that private law itself be capable of self-imposition in the particular case, a right that can be violated only by those who make and apply the law. Because this right is correlative to duties in public institutions, its vindication is not an instantiation of corrective justice. But this conclusion in no way threatens the thesis that corrective justice is the structure of the private law whose operation the law of unjust enrichment limits and qualifies.

The third puzzling feature of which a theory of unjust enrichment must take account is that a claim in unjust enrichment arises where, as a matter of property law, there has been an effective transfer of value from the plaintiff to the defendant. So, for example, in an article that casts doubt on the possibility of a coherent and unifying principle of unjust enrichment, Peter Jaffey wonders in the case of mistaken payment, ‘if the claimant validly disposed of the money, what justification for a claim can there be? And if the relevance of the mistake or other vitiating factor is not in vitiating the exercise of the power of transfer... then what exactly is its relevance, and how exactly does it relate to the supposed principle of unjust enrichment?’

We can now respond to this challenge as well. For once we understand unjust enrichment as a principle of self-determination giving the individual rights against the application of the rules of property when the abstract conception of agency underlying property threatens to subvert the realization of individual freedom, this feature of unjust enrichment no longer seems mysterious. We can say that while it is true that a mistake does not vitiate an effective transfer from the perspective of property law and its concern for freedom of choice, the mistake and its legal consequences nevertheless make the transfer something the plaintiff can no longer view as expressive of her own purposes. *This is

68 See Klimchuk (n 7).
69 Jaffey (n 4) 148.
the relevance of the mistake for unjust enrichment, because the principle underlying this category of liability is the plaintiff’s right to see her reason for acting reflected in the legal consequences of her action. That this is a right against the application of the laws of property accounts for the fact that, in cases of unjust enrichment, property has passed. As Lord Millett argued in Foskett, this is the very fact which grounds the claim.70

5. An Objection

I have argued that cases of unjust enrichment vindicate the plaintiff’s right to see her reason for action reflected in the legal consequences of her action. A consequence of this theory of unjust enrichment’s normative foundation is the exclusion of certain cases, ones often thought to be instances of unjust enrichment, from this category of liability on the ground that they don’t respond to the same underlying right. Most obviously, cases where the court awards the remedy of restitution or disgorgement for wrongdoing are not, on this view, cases of unjust enrichment. In those cases, the plaintiff’s claim follows from the defendant’s violation of her rights of ownership in her property or from the violation of what Weinrib has called rights that are property-like, such as the beneficiary’s entitlement to the fiduciary’s loyalty.71 The remedy is restitution, or disgorgement of any profits realized from use, of what remains rightfully the plaintiff’s own.

There are other cases that do not fit. Consider the case where the government taxes its citizens or forces a payment upon another level of government under a law that turns out to be ultra vires. Here, the plaintiffs do not complain that they did not intend to give the government this money; they complain that the government had no right to compel the payment. But then we should understand this as a claim that the tax was in fact an unlawful taking, that the money is, and always was, rightfully the plaintiffs’ and not the defendants’. The same is also true in a case where the plaintiff transfers an asset to the defendant but the plaintiff’s consent to the transfer was coerced or the plaintiff lacked the capacity to consent to the transfer. In either case, the transfer cannot even be viewed as an expression of the plaintiff’s free choice and the plaintiff must retain title to the asset as a matter of property law. These are cases where a court may order the defendant to make restitution for gains received at the plaintiff’s expense, but they are not, in my view, cases of unjust enrichment.

70 Foskett 1324.
71 Ernest Weinrib, ‘Restitution and Unjust Enrichment: Restitutionary Damages as Corrective Justice’ (2000) 1 Theoretical Inquiries in Law 1–37. In the category of property-like rights violations that may give rise to the remedy of restitution Weinrib also includes cases where the defendant treats the plaintiff’s right as an asset the defendant can appropriate, that is, as property.
It might now be objected that the fact that there are claims arising from the defendant’s receipt of a benefit that fall outside this theory of unjust enrichment is a problem for the theory. Peter Jaffey, for example, argues that a theory of unjust enrichment’s normative foundation must account for all claims arising from the defendant’s receipt of a benefit.\textsuperscript{72} But there is no reason why this should be true. The fact that there are all kinds of private gains toward which private law is indifferent suggests that the fact of private gain is not what is salient in these cases. Private gain describes a factual circumstance whose salience for law depends on the normative significance of that gain. Gains may be normatively significant for different reasons. In some cases, the law grants a gain-based remedy because the defendant realized the gain through wrongdoing. Here the justification for liability is not the fact of gain but the legal wrong. But this is precisely the sort of justification for liability that is missing in the case of a mistaken conferral of a benefit. That the two cases share the feature of private gain is no reason to lump them together under the category ‘unjust enrichment’, and we should not be surprised that a theory of unjust enrichment’s normative foundation—a theory of what justifies liability in unjust enrichment—would treat these cases differently. A theory of unjust enrichment’s foundational idea need not draw together all private gains; it need only draw together private gains that are normatively significant in the same way.

6. Conclusion

In this article, I have tried to identify the right at stake in cases of unjust enrichment. Others scholars who have sought to do this have assumed that the right must fit within a Kantian theory of right grounded in abstract agency. I have argued that unjust enrichment’s unifying principle cannot be the vindication of the plaintiff’s free agency, for liability in unjust enrichment does not depend on finding an interference with this abstract capacity for choice. I have argued that the right that unifies the law of unjust enrichment is rather a right of self-determination, a right held against public institutions (including courts) to see the outcomes of one’s action as the product of one’s self-determined purposes. Seeing unjust enrichment in this light helps solve puzzles that remain mysterious on the other accounts. Specifically, it explains how the plaintiff can have a right to recovery even though property has been transferred to the defendant; it explains why free acceptance matters in some cases but not in others; it explains why the plaintiff may recover even though the defendant has been purely passive and has committed no wrong; and it explains the way unjust

\textsuperscript{72} Jaffey (n 4).
enrichment is concerned with the plaintiff’s goals, legitimate expectations and reasonable mistakes. Finally, it explains how the law of unjust enrichment, in that it protects a right correlative to a duty on a court rather than on the defendant, can be a counterexample to the form of corrective justice without upsetting the thesis that corrective justice is the form of private law.