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## JUST AND UNJUST ENRICHMENTS

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# JUST AND UNJUST ENRICHMENTS

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## **Abstract**

In exploring the most fundamental question in restitution theory of what separates just from unjust enrichments, this essay undertakes three interconnected missions. The first is to situate the types of cases that prompt liability in restitution within a wider universe of enrichments, including those that trigger taxation as well as those deemed benevolent. My second mission is to defend the view that the concept of property cannot serve as the baseline for distinguishing just from unjust enrichments, and we should instead resort to the normative guidance of the foundational liberal values of autonomy, utility, and community. My third task is to show that this orientation need not generate legal indeterminacy or strip the law of restitution from its constitutive characteristics as one part of our private law. Rather, I argue that my approach to restitution theory can yield a happy doctrine, composed of sharp rules and not vague standards, and responsive to the properly interpreted injunction of correlativity that underlies the legitimacy of private law.

JUST AND UNJUST ENRICHMENTS

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### ABSTRACT

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## INTRODUCTION

Notwithstanding (or perhaps due to) the impressive blossoming of the law of restitution and unjust enrichment, its most fundamental question – what distinguishes just from unjust enrichments– is still being hotly debated. This essay is an attempt to contribute to this question.

My entry into this inquiry is idiosyncratic. I start with two observations. The first is that, at least in modern law, the law of restitution does not address most of the enrichments we deem to be unjust. Tax and redistribution schemes actually deal with most of these unjust enrichments, when “unjust” stands for a sequence of enrichments yielding a distribution we find unacceptable. The second observation is that, beyond this realm of correcting distributive injustices, most enrichments are not perceived as problematic. Indeed, although the title of this essay piggybacks on Michael Walzer’s celebrated *Just and Unjust Wars*, a stark distinction prevails between the way we treat wars as a priori bad (so that good justifications are needed to render a war into a just war) and enrichments, which we justifiably perceive (once we set aside distributive concerns) as a priori just. This privileged status of enrichments is clear not only from the



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admittedly awkward comparison to wars. The significantly differential treatment of harms and benefits in private law brings home this very same point.

I argue that unpacking these two rather obvious and uncontroversial observations can help to identify both the types of reasons that cannot and, even more significantly, the types of reasons that can justify restitution. In other words, it can help us identify the proper goals of the law of restitution.

## I. A UNIVERSE OF ENRICHMENTS

Restitution lawyers are preoccupied with paradigmatic private law cases of mistaken payments, self-interested conferrals of benefits, wrongful enrichments, and the like. The academic attention focused on these cases is of course commendable, and largely responsible for our enhanced understanding of the law of restitution. But the inward-looking and in-depth research of these types of cases has also had its costs. It may have obscured a wide range of enrichments that are either reversed outside the law of restitution or happily accepted as no cause for legal intervention. My first task in this essay is to situate the types of cases that prompt liability in restitution within this much wider universe of enrichments.

### *A. Taxable Enrichments*

Consider first the truism – albeit one hardly mentioned as such – that most of the legal regulation of enrichments occurs beyond the boundaries of the law of restitution, however these boundaries are defined. Both in terms of intensity and in terms of magnitude, tax law rather than restitution law is the primary legal mechanism for handling enrichments. To be sure, not only enrichments are taxed; tax law, at least in some jurisdictions, also targets consumption (as in value added tax) as well as the sheer holding of valuable assets (as in property tax). Still, the taxation of enrichments is quite a significant subset of contemporary tax law. Some of the enrichment events that prompt or said to justify prompting taxation are windfalls; Henry George's famous scheme of taxing land

improvements is a prime example.<sup>1</sup> But most of the enrichments subject to taxation are not the result of a transfer deemed to be in any way dubious. In many jurisdictions, bequests as well as gifts are taxed even though no one doubts the validity of these gratuitous transfers. Furthermore, the primary tax in modern times, the taxation of income, targets enrichments resulting from people's labor.

Tax law is complex, and the justifications of taxation are an important corpus within political philosophy. For the purposes of this essay, however, a few straightforward propositions will suffice. Some taxation of people's enrichments can be justified by reference to the *quid pro quo* they receive by way of certain public goods, such as security;<sup>2</sup> and some may be justified by the fact that their production of income relies on and utilizes existing societal goods for which it is just to make them pay.<sup>3</sup> And yet, as libertarian authors constantly remind us, the reality of modern-day taxation in liberal democracies can hardly be justified solely in these terms.<sup>4</sup> Currently, tax law is very much in the business of addressing distributive concerns. No wonder, then, that along with efficiency, distributive justice (or equity) is canonically presented as a prime goal of tax law and policy.<sup>5</sup>

Let us consider the meaning of these simple propositions. The bulk of our law serving to regulate enrichments is justified not by reference to any deficiencies in the transfer of resources from one individual to another, but rather by the injustice of the resulting distribution of resources in society. This justification, as Robert Nozick forcefully demonstrated, is analytically incompatible with the absolutist conception of

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<sup>1</sup> HENRY GEORGE, *PROGRESS AND POVERTY* (1879). See also, e.g., Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001).

<sup>2</sup> See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 145 (1993).

<sup>3</sup> See Reuven S. Avi-Yonah, *Why Tax The Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1404 (2002) (Book Review).

<sup>4</sup> See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 295-303 (1985).

<sup>5</sup> See, e.g., ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, vol. V, ch.2, pp. 310-11 (E. Camman ed., 4<sup>th</sup> ed., 1925). The text skirts over quite divergent views on the matter, ranging from notions of equal sacrifice to various ideas of redistribution. But these differences, notwithstanding their importance for tax theory, are unimportant for the modest purposes of this section.

property. If we assume with Nozick that property rights are necessarily absolute, any distribution we deem just will quickly become unstable due to unobjectionable voluntary exchanges.<sup>6</sup> This means that most of our legal regulation of enrichments is justified only after we are reminded that just distributions do not, in all likelihood, follow Blackstone's infamous model of "sole and despotic dominion,"<sup>7</sup> but include much more refined definitions of ownership.<sup>8</sup>

Realizing that the public side of the law of enrichment (tax law), actually rejects Blackstone's conception of ownership is significant for our purpose because this conception is frequently said to supply the private side of this law (the law of restitution) the baseline purportedly separating just from unjust enrichments.<sup>9</sup> To be sure, ruling out the absolutist understanding of ownership from public law does not necessarily dismiss the possibility of a division of labor between a private law that relies on a strictly libertarian conception of ownership and a public law that remedies the entailed deficiencies in terms of distributive justice.<sup>10</sup> And yet, this lesson of the public law of enrichment is nonetheless valuable. It releases us from the formalist-essentialist claim concerning the allegedly absolutist meaning of ownership, which still prevails despite the

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<sup>6</sup> See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 160-64 (1974).

<sup>7</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES \*2.

<sup>8</sup> See WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 102-03 (1990) (Rawlsians are likely to endorse a property regime that anticipates the need "to mitigate the effects of undeserved natural advantages after the initial distribution"). See also Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007).

<sup>9</sup> See e.g., ROSS B. GRANTHAM & CHARLES E.F. RICKETT, ENRICHMENT AND RESTITUTION IN NEW ZEALAND 18-20, 45-46, 53, 58-60 (2000); Nicholas J. McBride and Paul McGrath, *The Nature of Restitution*, 15 OX. J. LEGAL STUD. 33, 37-39, 43 (1995). Cf. Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1196-97, 1200, 1209 & n.54 (1995); John Carter, *Restitution and Contract Risk*, in RESTITUTION: DEVELOPMENTS IN UNJUST ENRICHMENT 137 (Mitchell McInnes ed. 1996).

<sup>10</sup> This legal architecture is forcefully suggested in Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2003). In addition to the critique mentioned in the text below, I also find Weinrib's account of why property rights at the stage of unilateral acquisition must be absolute and need not be tempered by something like the Lockean proviso quite perplexing. A thorough discussion of Weinrib's account of property is beyond the scope of this essay.

devastating critique it has endured.<sup>11</sup> It thus leaves private law libertarians, and particularly those who hold that the absolutist conception of property can neatly separate just from unjust enrichments, with a rather insurmountable burden. They must offer support for their claim that private law doctrines should be founded on this conception of property by showing that public law can and does supplement private law with rules that adequately remedy the injustices of the libertarian private law they advocate, both in terms of distribution and in terms of interpersonal dependence.<sup>12</sup>

### *B. Benevolent Enrichments*

My second point of departure is another truism also usually unnoticed. Injurers who affect other people's interests without their consent are commonly required to compensate their victims. While there are of course exceptions to this rule, the law of torts does recognize a general duty of compensation for harm. By contrast, people who benefit from other people's interests are required to make restitution only in certain carefully delineated categories; in other words, there is no general duty of restitution.<sup>13</sup>

Why does the law of restitution take this position? Why does it perceive enrichments as a priori unproblematic,<sup>14</sup> maybe even desirable<sup>15</sup>? This question is most clearly urgent for those common law jurisdictions that adhere to the traditional method of

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<sup>11</sup> See, e.g., LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

<sup>12</sup> Cf. Aditi Bagchi, *Imperfect Rights in Private Law*, U. of Penn. Law School, Public Law Research Paper No. 07-36 available at SSRN: <http://ssrn.com/abstract=1012954>.

<sup>13</sup> See Saul Levmore, *Explaining Restitution*, 71 VA. REV. 65 (1985) (supporting this difference); Ariel Porat, *Expanding Restitution: Liability for Unrequested Benefits* (unpublished manuscript) (challenging it).

<sup>14</sup> See Kit Barker, *Responsibility for Gain: Unjust Factors or Absence of Legal Grounds?* *Starting Points in Unjust Enrichment Law*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS* 47, 56 (Charles Rickett & Ross Grantham eds., 2008) ("gains require no moral or legal explanation").

<sup>15</sup> See PETER JAFFEY, *THE NATURE AND SCOPE OF RESTITUTION: VITIATED TRANSFERS, IMPUTED CONTRACTS AND DISGORGEMENT* 17 (2000) (gains are "a matter of celebration, not regret").

“unjust factors,” which highlights the need for providing reasons for restitution.<sup>16</sup> But it is also relevant within the civilian model, in which liability for restitution is triggered if the defendant’s grounds for retaining the disputed enrichment are denied. Even civilians do not find enrichments as such repugnant (contrast again with the a priori evil of harms), and only require *unjustified* enrichments to be reversed.<sup>17</sup>

This split between private law’s treatment of harms and its treatment of enrichments or benefits is in fact not that puzzling, at least not for those who appreciate the admittedly complex ways in which private law relies on our collective normative commitments.<sup>18</sup> More specifically, good reasons, rooted in some of the most fundamental commitments of liberal societies to autonomy, utility and community render harms *a priori* objectionable, while rendering many enrichments, even at the expense of another, innocuous or even laudable.<sup>19</sup> (This proposition is true only after we set aside concerns of distributive justice largely addressed by the public side of enrichment law, namely: tax law, and not by the law of restitution.<sup>20</sup>)

While harms derogate from people’s welfare and often undermine their autonomy, benefits add to their welfare and expand the various possible ways for them to write the story of their lives.<sup>21</sup> Barring reasons to the contrary, then, as is the case in the various categories of the law of restitution, the sheer receipt of benefits is conducive rather than detrimental to these two fundamental liberal values.

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<sup>16</sup> Cf. Barker, *supra* note 14, at 57-63, 73.

<sup>17</sup> On the distinction between the two systems’ orientations, see, e.g., Dennis Klimchuk, *Restitution and Realism*, 20 CAN. J.L. & JURISP. 225, 230-32 (2007).

<sup>18</sup> See generally Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809 (2008).

<sup>19</sup> This proposition seems to underlie Kit Barker’s recent attempt to reconceptualize every instance of responsibility for gain in terms of responsibility for harm. See Kit Barker, *The Nature of Responsibility for Gain: Gain, Harm and Keeping the Lid on Pandora’s Box*, in PHILOSOPHICAL FOUNDATIONS OF UNJUST ENRICHMENT \* (Robert Chambers et al. eds, forthcoming 2009).

<sup>20</sup> As the text implies, there is no inherent reason for excluding distributive justice from private law. See generally Daphna Lewinsohn-Zamir, *In Defense of Redistribution through Private Law*, 91 MINN. L. REV. 326 (2006).

<sup>21</sup> See Barker, *supra* note 14, at 56.

On its face, these observations as to the distinction between benefits and harms ignore the person at whose expense the recipient's benefit has been enriched. But this discrepancy is only troublesome when the recipient is responsible for some harm endured by that person, again indicating that what is problematic is the plaintiff's harm rather than the defendant's benefit.<sup>22</sup> Indeed, the a priori innocence of the receipt of benefits that concerns me here becomes clear precisely when no harm is inflicted, or when the defendant's benefit exceeds the plaintiff's harm. In such cases, if the plaintiff's insistence on restitution is backed merely by her disapproval of the defendant's enrichment, it ends up as a fanciful disguise for envy. Some indeed argue that in the larger context of the public law of enrichments, envy, in the sense of preferences regarding relative wealth or other primary goods, carries normative significance.<sup>23</sup> But even if we take this view as a given, it does not follow that "sentiments of envy or spite"<sup>24</sup> should inform private law and guide the resolution of disputes between a particular claimant and a particular defendant.<sup>25</sup>

What about the difficulty of free-riding on other people's efforts and investments? Were free-riding a socially repugnant behavior, its prohibition might indeed carry over to our question about the moral status of enrichments. But a blanket disapproval of free-riding is indefensible. As Wendy Gordon explains, "if deliberate uses of others' efforts always triggered an obligation of payment, it would cause paralysis." No culture could exist "if all free riding were prohibited within it" because culture "is interdependence, and requiring each act of deliberate dependency to render an accounting would destroy the synergy on which cultural life rests." Furthermore, no community could exist because

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<sup>22</sup> As the text implies, in these cases we should focus directly on the defendant's responsibility for the claimant's predicament, which is not always obvious. In many contexts, such responsibility would be inappropriate. Often, a profit we deem to be legitimate is, by definition, obtained at the expense of others, and that is indeed the very essence of competitive markets.

<sup>23</sup> For the competing views on this question, see Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 232 n.28 (1998).

<sup>24</sup> Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 181 (1996).

<sup>25</sup> *Contra* Mark Gergen, *What Renders Enrichment Unjust*, 79 TEX. L. REV. 1927, 1927, 1929, 1945, 1953-54 (2001) (discussing JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951)).

community is defined as interdependence: “persons learn from each other, sell complementary products, build on a common heritage.”<sup>26</sup> This value of interdependence, which is the defining feature of each human community, explains why law does not interfere in many cases where one person’s activity generates positive externalities others enjoy.<sup>27</sup>

Thus, three core humanistic values – autonomy, utility, and community – explain law’s a priori approval of enrichments. We may therefore plausibly expect that this presumption would be upset when at least one of these core values is actually undermined by allowing the recipient to retain her enrichment.

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My brief survey of the wide universe of enrichments that are not regulated by the law of restitution ends here with two main lessons that will guide me in the remainder of this essay, one negative and one positive. The first is the implausibility of relying on Blackstone’s absolutist conception of property as the baseline for deciding which enrichment is just and which is not. The second is the determinative role of the three core liberal values of autonomy, utility, and community in this formidable task.

## II. FROM NORMATIVE GOALS TO PRIVATE LAW RULES

The task of justifying restitutionary rules requires setting up baselines that determine the justice (or injustice) of the enrichments at stake. These baselines cannot rely on a

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<sup>26</sup> Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 468 (1992); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 167-68 (1992).

<sup>27</sup> Moreover, even in terms of the more individualistic desert for labor theory of property, the entitlement claimed by laborers vis-à-vis free riders is often exaggerated. Laborers, under this theory, merit a reward because by engaging in value-creating activities they contribute to the betterment of the human predicament. But this means that their prerogatives, even from the very perspective of desert theory, must be subject to three and rather demanding limitations: “Laborers deserve rewards if and only if they engage in the right kind of activity (useful and purposeful, rather than destructive, inconsequential, or simply inadvertent). They can make a claim to be rewarded if and only if they have actually added value. And, finally, the deserved reward must be proportional to the added value they indeed generated.” Hanoch Dagan, *Property and the Public Domain*, 17 YALE J.L. & HUMAN. 84, 90 (Supp 2006).

plaintiff's reference to the benefit at stake as "mine" or to the defendant's enrichment as being at her expense. These colloquial statements beg the question that needs to be decided, namely, whether to allocate the entitlement to the specific benefit at hand to one party or the other.<sup>28</sup> There are no shortcuts in answering this question, which requires us to employ the guidelines of autonomy, utility, and community in the various contexts traditionally covered by the law of restitution.

At its core, then, restitution theory – the theory that determines which enrichments are just and which unjust, and furthermore prescribes the appropriate remedial response for unjust enrichment – is distributive. Unlike the public side of the law of enrichments, this distribution is not between the better off and the worse off in society. And yet, the theory underlying the law of restitution still clearly constitutes a society-wide distribution of burdens and benefits regarding a diverse set of resources and of activities.<sup>29</sup>

Identifying the types of normative considerations that restitution theory invokes along these lines is likely to raise two important concerns. Some may worry about the predictability of the resulting doctrine. Others may inquire whether my analysis does not collapse restitution law into a garden variety form of regulation, thus obscuring its characteristic features as an important part of private law usually analyzed in terms of corrective rather than distributive justice. Addressing these concerns is important both for their own sake and to refine the ways in which autonomy, utility, and community should legitimately inform the law of restitution.

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<sup>28</sup> Recall that, on the one hand, we have no reason to presuppose that *any* gains derived from resources properly described as the plaintiff's property are *necessarily* within her entitlement and that, on the other, the entitlement to profit is at times an element of rights that we do not usually classify as proprietary. See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 21 (2004) (hereinafter: DAGAN, LER).

<sup>29</sup> For a more detailed account of the distributive dimension of one restitutionary doctrine, governing cases of wrongful enrichments, see HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* 22-33 (1997). See also PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 186-90, 282-83 (2002).

### A. Vague Values and Predictable Rules

My initial concern, predictability, takes two forms. One is that allowing judges to consult with the values of autonomy, utility, and community is likely to threaten the important benefits of “the rule of rules” in the authoritative settling of disputes that secures the moral benefits of coordination, expertise, and efficiency.<sup>30</sup> Rules, as Emily Sherwin explains, “are designed to translate the implications of normative values into concrete prescriptions for action or decision.” To do so effectively, rules “must be general, in the sense that they prescribe outcomes for classes of cases,” and they must be “sufficiently determinate that rule-appliers can understand what the rules prescribe without first resolving the very normative questions the rules are designed to settle.” In other words: for rules to function as rules they must be followed by those applying them “in all cases, without considering whether the local outcome of the rule conforms to the values the rule is supposed to advance.”<sup>31</sup>

Restitution theory should thus distance itself from the dubious nominalistic approach of case by case adjudication. Identifying autonomy, utility, and community as the underlying values of the law of restitution should not lead us to the unfortunate strategy of inviting judges to *routinely* make ad-hoc judgments based on these values.<sup>32</sup> By the same token, it should not imply the problematic approach of rule-sensitive particularism allowing judges to depart from rules whenever the outcome of the particular case at hand so requires, while taking into account both substantive values and the value of preserving the rule’s integrity.<sup>33</sup> Instead, it should advise *some* legal actors – notably, judges of appellate courts – to *occasionally* use new cases as triggers for an ongoing refinement of

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<sup>30</sup> See LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 12-15 (2001). See also, e.g., Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 224-34 (2004).

<sup>31</sup> Emily Sherwin, *Rule-Oriented Realism*, 103 MICH. L. REV. 1578, 1589, 1590, 1591 (2005).

<sup>32</sup> Similarly, pointing out the distributive dimension of the law of restitution should not be understood as a prescription to evaluate individual cases distributionally, but rather as an observation on the doctrine’s nature. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 501 (1980).

<sup>33</sup> See Sherwin, *supra* note 31, at 1591-94. See also Amy Goymour, *Book Review*, 65 CAMBRIDGE L.J. 456, 458 (2006).

rules, as opportunities to revisit the normative viability of existing rules *qua* rules, and to re-examine the adequacy of the legal categorization that organizes these rules.

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But even if we limit the role of autonomy, utility, and community to a circumscribed number of cases, the worry about unacceptable legal indeterminacy – the second version of the predictability concern – may still linger. Would not allowing restitutionary doctrines to rest on these three values without a predetermined formula for measuring and balancing them entail unbridled judicial discretion?<sup>34</sup>

I do not think so, even when disregarding that classical legal formalism, the main alternative to legal reasoning, is hopelessly manipulable and thus indeterminate.<sup>35</sup> To see why, we must first realize that a jurisprudence based on value pluralism such as the one I propose here for the law of restitution is very different from one that endorses the (philosophically suspect) positions of relativism, skepticism, or nihilism. These positions undermine any possibility of moral justification, evaluation, or for that matter criticism, and thus the idea of law itself.<sup>36</sup> By contrast, value-pluralist jurisprudence recognizes a broad menu of incommensurable human alternatives, but acknowledges a minimal core of moral truths.<sup>37</sup> In our case, the moral significance of autonomy, utility, and community.

The heterogeneity prescribed by value pluralism, meaning the idea that different values or different balances of the same values should guide different areas of law (and life), should not be equated with an invitation to apply subjective preferences. Context

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<sup>34</sup> See James Edelman, *Book Review*, 69 MODERN L. REV. 131, 134 (2006). See also, e.g., Prince Saprai, *Book Review*, 121 L.Q. REV. 521, 523 (2005).

<sup>35</sup> The main and inescapable reason for this doctrinal indeterminacy is the availability of multiple and potentially applicable doctrinal sources, rather than the indeterminacy of discrete rules. See Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 613-17 (2007).

<sup>36</sup> See STEVEN J. BURTON, JUDGING IN GOOD FAITH 19-21 (1992).

<sup>37</sup> See, e.g., JOHN KEKES, THE MORALITY OF PLURALISM 31-34, 118-38 (1993); MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 1-19 (1994); Isaiah Berlin, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS 1, 11 (Henry Hardy ed., 1991); William A. Galston, *The Legal and Political Implications of Value Pluralism*, 57 MD. L. REV. 236, 241 (1998).

matters. Our lives are divided into economically and socially differentiated segments.<sup>38</sup> Each “transaction of life” has some features of sufficient normative importance, features that gain significance from the perspective of our general normative commitments and justify distinct legal treatment.<sup>39</sup> Indeed, good lawyers cautious to look at each one of the (rather narrow) categories of restitution, benefit from an “alert sense of actuality [that] checks our reveries in theory,” as well as from “the illumination which only immediacy affords and the judiciousness which reality alone can induce.”<sup>40</sup> They thus realize that different types of human interactions, and therefore different categories of restitutionary doctrines, call for different balances of these broad normative commitments. Indeed, here, as elsewhere, the requirement to explicitly apply judgment, which needs to be normatively and contextually justified, is a real constraint.<sup>41</sup>

In some categories of cases this contextual normative inquiry might lead to a standoff, with reason unable to adjudicate between two (or more) competing accounts. But the relevant question is not whether such cases are possible, and the sheer existence of hard cases scarcely undermines the determinacy of the law. Rather, the question is whether these cases are prevalent enough so that they threaten a restitution theory premised on these guidelines. In many cases, a sufficiently robust contextual normative account can have quite sharp doctrinal teeth, and I attempt to demonstrate this in the last part of this essay. Although some of my accounts may obviously be controversial, they can hardly be challenged by the sheer difficulty of measuring or balancing autonomy,

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<sup>38</sup> See PETER BERGER ET. AL, *THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS* 63-82 (1973).

<sup>39</sup> See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); Elizabeth Anderson, *Pragmatism, Science, and Moral Inquiry*, in *IN THE FACE OF FACTS* 10, 17 (Richard Wightman Fox & Robert B. Westbrook eds. 1998).

<sup>40</sup> Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A.J.* 71, 73-74, 159 (1928). See also William W. Fisher III, *The Development of American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in *A CULTURE OF RIGHTS* 266, 272-73, 275 (Michael J. Lacey & Knud Haakonssen eds. 1993). Joseph Raz’s analysis of the distinguishing cases phenomenon brings home a similar point. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 183-97 (1979).

<sup>41</sup> See Joseph William Singer, *Property Norms: Reflections on the Externalities of Ownership* §§ 2.2.2-2.2.3 (unpublished manuscript).

utility, and community, or by the possibility that there are other pertinent values.<sup>42</sup> To challenge my approach to restitution, a detailed demonstration of the superiority of such a competing account is needed, rather than a blanket claim that a better account will always be available.<sup>43</sup>

### *B. Private Law and Public Values*

Restitution lawyers may nonetheless be reluctant to endorse an approach relying on a foundational distributive scheme informed by the trio of autonomy, utility, and community. Their position may be explicitly or implicitly informed by the orthodox association between restitution law, as part of private law, and corrective justice. More precisely, with Ernest Weinrib, they may worry that my approach fails to provide adequate justification for restitutionary liabilities because it may not explain “why the plaintiff’s unilateral transfer of the benefit creates an obligation in the defendant.” Reasons such as autonomy, utility, or community often refer to “the normative position of each of the parties separately rather than [to] the relationship between them.” Herein lays a fatal failure, says Weinrib: “Basing liability on such considerations exemplifies the fallacy that what is unilaterally applicable to the plaintiff can have bilateral significance for the relationship of plaintiff and defendant.”<sup>44</sup>

Indeed, in Weinrib’s view, no social purpose or social value, even if ostensibly desirable otherwise, can legitimately inform private law. Private law is an autonomous realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms. For Weinrib, this isolation derives from the bilateral logic of private law adjudication, understood as a unique forum for the vindication of infringed rights. As such, private law must comply with the injunction of correlativity, requiring both that the reasons underlying the plaintiff’s right be the same as the reasons that justify the defendant’s duty, and that these very reasons also explain the specific remedy inflicted on

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<sup>42</sup> Cf. James Gordley, *The State’s Private Law and Legal Academia*, 56 AM. J. COMP. L. \* (2008).

<sup>43</sup> Cf. RONALD DWORKIN, *LAW’S EMPIRE* 76-86 (1986) (responding to the challenge of “external critique”).

<sup>44</sup> Ernest A. Weinrib, *Reviving Restitution*, 91 VA. L. REV. 861, 868-72 (2005).

the defendant. The commands of correlativity, in this view, are so robust that they leave no space for any other (social) value.<sup>45</sup>

I agree that private law is not just a means for normative regulation, meaning that intrinsic features of private law constrain the types of rules it can legitimately promulgate. Brute instrumentalism, which perceives civil suits as one “mechanism whereby the state authorizes private parties to enforce the law,”<sup>46</sup> is misguided because, like any other aspect of state coercion implied by law, the bipolar structure of private law litigation also entails some justificatory burden.<sup>47</sup> Weinrib is thus correct in insisting that private law should be able to justify to defendants both the identity of the beneficiary of any liability imposed on them, and the exact type and degree (or magnitude) of that liability.

Insofar as the correlativity requirement insists that the defendant’s liability and remedy correspond to the plaintiff’s entitlement, it is indeed essential to the integrity of private law and thus to any credible restitution theory. But the correlativity between plaintiff’s entitlement and defendant’s liability should not obscure the rich social fabric that serves as the inevitable context for the parties’ relationship. *Pace* Weinrib, correlativity need not mean that private law has, or should have, an inner intelligibility decipherable without recourse to social values. Quite the contrary: the pivotal role of private law in defining our mutual legitimate claims and expectations in our daily interactions<sup>48</sup> undermines the legitimacy of a private law regime that ignores these values.

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<sup>45</sup> See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 3-14, 212, 214 (1995); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 *THEORETICAL INQUIRIES IN LAW* 1, 3-5, 37 (1999). See also Dennis Klimchuk, *Restitution and Realism*, 20 *CAN. J.L. & JURISP.* 225, 240 (2007).

<sup>46</sup> Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 *WIS. L. REV.* 131, 154. The distinction between private law adjudication and public law regulation is particularly blurred in some law and economics accounts of the common law. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 383-85 (6th ed. 2003).

<sup>47</sup> On the dialectical relation between law’s coercion and its nature as a justificatory practice, see Dagan, *supra* note 35, at 622-37.

<sup>48</sup> See Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 *MICH. L. REV.* 134, 148-52 (2000).

For this reason, the parties' *ex ante* entitlements, from which this correlativity must be measured, are best analyzed by reference to our social values.<sup>49</sup>

Refusing to isolate private law from social values does not render correlativity vacuous; it does not, in other words, collapse private law into just another form of regulation. After all, as Weinrib correctly insists, taking correlativity seriously precludes assertions that the plaintiff's right is simply the "analytic reflex" of the defendant's duty (or vice versa).<sup>50</sup> Yet, understanding that correlativity is situated within a thick layer of social values does require a more modest formulation of the correlativity injunction.

In this formulation, correlativity prescribes that it is not enough for a plaintiff to demonstrate the desirability of the state of affairs that would result if the type of complaint she raises were to generate the remedy sought. Rather, a private law plaintiff has an additional justificatory burden: to give reasons why people in her predicament should be entitled to extract from people in the defendant's category the kind of remedy she now requires. One can easily overcome this additional hurdle in some cases, as in the paradigmatic case of an injured plaintiff seeking remedy from a defendant who negligently caused her harm. But some cases are more challenging as, for instance, when the defendant can plausibly ask "why me?" (Why should she be forced to be the agent of remedying the plaintiff's unjustified harsh predicament), or "why you?" (Why should the plaintiff be allowed to invoke the state's machinery to remove an unjust privilege that the defendant currently holds). And even if the plaintiff has good answers to both questions, she still needs to justify her entitlement to the specific measure of recovery she seeks to impose on the defendant.

Weinrib goes even further by requiring that the reasons for the parties' entitlements (and not only the entitlements as such) should be correlative, namely, that the reasons themselves be wholly internal to the parties' relationship. "Because the justifications that ground liability are constitutive of the normative relationship between the parties," he

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<sup>49</sup> Cf. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 11 (2006); Peter Cane, *Distributive Justice and Tort Law*, 2001 N.Z.L. REV. 401.

<sup>50</sup> WEINRIB, *supra* note 45, at 124.

says, “those justifications must themselves have a relational structure.”<sup>51</sup> But this additional requirement of relational reasons is excessively demanding and unwarranted. The bipolar form of private law is only one object, albeit important, of the justificatory burden prompted by the application of state coercion invoked by private law adjudication. Therefore, it should not be entitled to exclusivity in determining the types of normative considerations we must take into account; it should not, in other words, be allowed to overwhelm our justificatory inquiry. Cases in which the reasons for the parties’ entitlements are correlative may well be easier insofar as the integrity of private law is concerned. But this does not and should not imply that they are the only cases, or that we should a priori assume that even if the reasons are not correlative, their implications with respect to the parties’ entitlements will not be sufficiently convergent. Quite the contrary, the sheer fact that the reasons supporting the plaintiff’s entitlement are not the same as those supporting the defendant’s liability should not *necessarily* prevent the complaint from proceeding if the convergence between these two sides of the coin is sufficiently wide, and the justificatory burden of showing the desirability of allowing it in its private law form is, on balance, properly met. Not only should private law allow cases of substantial convergence between prescriptions entailed by reasons pertaining to the plaintiff and defendant as a matter of course. There may even be categories of cases wherein the “justificatory deficit” of considering reasons relating to the interests of third parties is actually outweighed by the significant normative superiority of allowing such cases in private law. Each type of case thus requires a careful account of the reasons for and against recognizing the plaintiff’s entitlement vis-à-vis the defendant, reasons of the kind that Weinrib indeed tries to exclude from private law. These reasons relate to whether law’s endorsement of such claims supports or distorts the ideal construction of the type of relationship under consideration, and whether using private law in this way is necessary, and overall conducive, to the public purpose at hand.<sup>52</sup>

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<sup>51</sup> Weinrib, *supra* note 44, at 874.

<sup>52</sup> Note again that this does not collapse my view into brute instrumentalism because, unlike most instrumentalists, I take seriously the requirement that the plaintiff give reasons for why someone in her predicament should be entitled to extract from someone like the defendant the kind of remedy she now requires. Indeed, the practical implications of this additional justificatory burden are limited, but by no means trivial. In some cases, allowing a private law claim of the sort

### III. EXAMPLES

Thus far, I have presented several abstract arguments on the substance and form of restitution theory, which separates just from unjust enrichments. I argued that the concept of property cannot serve as the baseline for this cardinal question, which should instead refer to the foundational liberal values of autonomy, utility, and community. I further claimed that this orientation need not generate legal indeterminacy or strip the law of restitution from its constitutive characteristics as part of our private law, but can yield a happy doctrine composed of sharp rules instead of vague standards, and responsive to the refined prescription of correlativity as identified above.

The time has come to see these broad propositions in action, examining their validity and power in the specific contexts governed by the law of restitution. This is an important component of my task in this essay because, like any theory of the law, part of the assessment of my theory must lie in the appeal of its specific results as well as in its ability to perform across a range of questions, to help in solving problems, and to confront possible criticisms.<sup>53</sup> A detailed account of even one paradigm category in the law of restitution exceeds the scope of this essay. Fortunately, it is also unnecessary. For our purposes, brief sketches of two case studies – which I discuss at some length elsewhere<sup>54</sup> – can (I hope) do the job.

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required would be unjust, even when likely to bring about a desirable state of affairs. This is why, for instance, I agree with Weinrib that, in most cases, the law of restitution should not allow recovery in excess to both the plaintiff's harm and the defendant's net profits. *See* Hanoch Dagan, *Restitution's Realism*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 19, at \*, \*.

<sup>53</sup> In other words, as a lawyer and a pragmatist, I am committed to pay attention to both the particular contexts of specific doctrinal questions and to the motivating principles and policies underlying their resolution. *Cf.* DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* 223, 232-33 (1985). The top-down structure of this essay is purely expositional, and any valuable legal analysis needs to include both the "top" and the "down" sides.

<sup>54</sup> *See* DAGAN, *LER*, *supra* note 28, at Chs. 3 & 5.

### A. Mistakes

The mistakes that typically concern the law of restitution, touching on the unilateral conferral of benefits that bring into play the recipient party's detrimental reliance, or at least frustrated expectations, invoke the values of autonomy and of utility.<sup>55</sup>

Autonomy is relevant from the perspective of the mistaken party because, as involuntary transfers, mistakes "invite the law's corrective measures to reinstate the commands of a mistaken party's will, thus expanding her freedom of action and securing her integrity of self." In such cases, however, the recipient's autonomy is at stake also because, "[i]f recipients were required to hold themselves always ready to give back any benefits they received, the security and stability of their affairs would be severely threatened." Therefore, an autonomy-based law of mistakes must assign entitlements and liabilities based on a careful attempt to "reconcile our liberty to make mistakes with our aspiration for security and stability."<sup>56</sup>

Utility is also relevant to the way law should (*ex ante!*) assign the entitlements to parties who find themselves in these types of cases. The law of mistakes is likely to affect (at least at the margins) the efforts of both transferors and transferees of benefits in trying to avoid mistakes. Given that both these efforts and the administration of the pertinent legal rule are costly (and borne by the parties), the humanistic injunction of utility calls for a careful application of a cost-benefit analysis of the possible legal rules.<sup>57</sup>

Putting these two perspectives to work in the most prevalent context of mistaken payments can help to demonstrate the doctrinal teeth of these seemingly abstract propositions. It can also vindicate my claim as to the potential determinacy of

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<sup>55</sup> One may argue that community is also relevant. Minimal notions of social responsibility require that owners (or owners-to-be), who can avoid legal accidents such as mistakes at relatively low cost, do so in order to prevent the severe harm another person is likely to incur if the accident does take place. In other words, the prescription embedded in the comparative avoidance ability test, discussed below, may be restated in terms of our moral obligations to other members of our community. Cf. Hanoch Dagan, *Codification, Coherence, and Priority Conflicts*, in *THE DRAFT CIVIL CODE FOR ISRAEL IN COMPARATIVE PERSPECTIVE* 149, 163-64 (Kurt Siehr & Reinhard Zimmermann eds., 2008).

<sup>56</sup> DAGAN, LER, *supra* note 28, at 38-39, 45-46.

<sup>57</sup> *Id.*, at 52-63.

restitutionary rules informed by my suggested normative infrastructure, and support my insistence as to the type of correlativity vital to the integrity of private law.

Both autonomy and utility point to two considerations that must be taken into account when assigning the risk of mistaken payments between payors and recipients. More specifically, both values require that we compare the parties' mistake-avoidance capacities, as well as their ability to insure or self-insure against this unfortunate contingency.<sup>58</sup>

A detailed analysis along these lines shows that the best rule often leaves both sides to the legal drama with some risk of harm. Particularly in the traditional cases of what I will refer to as "private contexts," where the parties are more or less equal in terms of their avoidance capabilities and their ability to spread the risks of mistakes, the law of mistakes should allocate the recipient's detrimental reliance according to a fault-based test. Two points bear emphasis here. *First*, in these types of cases, both values at hand are likely to caution us against imposing "superfluous burdens on potentially mistaken parties by unnecessarily limiting their liberty and by inefficiently inducing redundant precautions." For this reason, "both analyses recommend looking carefully at whether a mistaken payment actually generates an irrevocable harm before any liability is assigned to the mistaken party – that is, before limiting her entitlement to restitution."<sup>59</sup> *Second*, a careful analysis of the injunctions of both autonomy and utility in our context recommends that we follow in the footsteps of tort law, which basically faces a similar challenge: rather than using the outdated test of relative fault adopted by the first Restatement of Restitution,<sup>60</sup> we should look at the parties' comparative negligence. Hence, although my analysis largely confirms the desirability of the existing rules as regards to this type of cases, it also helps to refine the current state of (American) law.

Other types of cases call for very different conclusions. There are (increasingly important) categories of cases that fall under the rubric of what I call "institutional contexts" – mistaken payments by banks, brokers, or insurance companies, or improper

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<sup>58</sup> This paragraph, and the two that follow, summarize DAGAN, LER, *id.*, at 49-65, 77-80.

<sup>59</sup> *Id.*, at 65.

<sup>60</sup> See RESTATEMENT OF RESTITUTION §§ 69(2), 142(2) (1937).

tax payments. In these cases, the significant disparity in the parties' avoidance capacities and abilities to spread the costs of mistakes among the beneficiaries of the activity that generated those mistakes (e.g., the banking system), justifies a unilateral allocation of that risk. Insofar as this analysis applies to improper tax payments, and at least insofar as American law is concerned, it implies quite a radical reform: not only are there no good reasons for the prevailing restrictive approach to the restitution claims of mistaken taxpayers compared to other cases of mistaken payers, but this category's unique characteristics indeed require the adoption of a rule more liberal than the one governing other cases of mistaken payments, which grants unlimited restitution for improper tax payments. The case of other institutional contexts (mistaken payments by banks, brokers, or insurance companies) is more nuanced. On its face, my suggestion is quite radical there as well. But a careful reading of some American cases shows that current law already reflects, albeit implicitly and imperfectly, the need to apply a different legal regime to mistaken payments in these institutional contexts. A new reading of the existing defense of good faith creditor jurisprudence shows it oftentimes serves (in an admittedly tormented fashion) as the doctrinal home for a rule denying restitution of mistaken payments in institutional contexts where, by and large, the mistaken party is both the cheapest cost-avoider and superior risk bearer.

Be it as it may, this brief summary of my analysis of mistaken payments shows that, although the values of autonomy and utility may at first seem too abstract to be of any assistance to the particular doctrinal questions at hand, they are actually quite informative once situated in the robust context that the law of restitution typically faces. Indeed, their analysis can yield quite clear and determinate rules. Furthermore, as noted, we should not a priori assume that reasons supporting a plaintiff's entitlement will not sufficiently converge with other reasons supporting the defendant's liability. The category of mistaken payments provides a good example of such convergence. Because the rules governing such payments affect every payer and every recipient, the *ex ante* entitlements for these cases must be set up so that they properly address the autonomy and welfare concerns of both.<sup>61</sup> These considerations, as noted, by and large coincide.<sup>62</sup> Thus, for

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<sup>61</sup> As Dennis Klimchuk puts it, "liability vindicates not (or at least not only) the particular interest this particular plaintiff has in her autonomy. Instead (or as well) it vindicates the value of

instance, in private contexts, the plaintiff's autonomy justifications for restitution are strongest when the defendant's autonomy justifications for retention are weakest, that is, when there is no detrimental reliance, and vice-versa. Therefore, although the parties' autonomy concerns are indeed different, a private law doctrine can promote both simultaneously by imposing a rather trivial burden (to make restitution) on a defendant who has not relied, and limiting the restitution of a payer who negligently caused detrimental reliance. A legal system adopting such a doctrine should have no real difficulty explaining to the recipient why she, rather than ... (who?), should be responsible (in the cases and insofar as she is) for remedying the payer's harsh predicament,<sup>63</sup> and why the payer, of all people, is the one she should reimburse for the payment she mistakenly received.

### *B. Self-Regarding Conferral of Benefits*

I turn now to my second example: the law governing the self-regarding conferral of benefits. Like the law of mistakes, the analysis of this branch of the law of restitution will help demonstrate the viability of my proposed approach and will show that it generates predictable rules complying with the private law injunction of correlativity. Unlike the law of mistakes, however, it will also help us realize the limits of this last injunction and lead us to discuss a category of cases where taking third part effects into account is actually justifiable. Or, at least, this is what I will argue.

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autonomy more generally, a value in which the defendant can also be understood to have an interest." Dennis Klimchuk, *The Normative Foundations of Unjust Enrichment*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 19, at \*, \*. Klimchuk suggests that this raises the worry that "the defendant's duty to make restitution is [inappropriately] contingent... because it rests on the adoption by the legal order of a particular value." *Id.*, at \*. To this worry, he provides two possible and correct replies. "The first is that the Kantian standard of the modality adequate to the bindingness of legal obligation is too high. The second is that it is not satisfied in any event by the corrective justice account, because we wouldn't protect the abstract entitlements in which the corrective justice account is anchored unless they served a value in which we have an interest." *Id.*, at \*. There is a third response: as noted, the parties' *ex ante* entitlements are not even intelligible without resorting to such underlying normative commitments.

<sup>62</sup> Although there is some divergence. See DAGAN, LER, *supra* note 28, at 64-65.

<sup>63</sup> Her unique role as the proper defendant derives from the fact that, in this type of cases, her autonomy would be least jeopardized by carrying the (quite nominal) burden of remedying the plaintiff's justified grievance.

Conventional analysis suggests that restitutionary liability in this category arises when the defendant has been unjustly enriched, unless the plaintiff's conferral of the unrequested benefits is deemed officious.<sup>64</sup> The problem, of course, is to set the boundaries between these conclusionary epithets; to offer a principled distinction between unrequested benefits that justify granting restitution, when we would consider it unjust for the defendant to retain the benefit, and other unrequested benefits that would not be thus privileged, when we would label the benefactor a volunteer (and the payment officious) and refuse to grant restitution.

Autonomy and utility can again be recruited for the task.<sup>65</sup> The key point here is that restitution can help overcome free-riding problems that may hinder jointly beneficial actions. Restitution, more specifically, is necessary in categories of cases where the parties' interests are sufficiently locked in, but their cooperation in jointly serving these interests is unlikely. Typical situations of this category would be, for instance, cases wherein the parties are co-owners, or are both subject to a common liability, or cases of class actions, or of the maritime doctrine of general average. Although the promotion of the parties' self-interest requires cooperation in these cases, their jointly beneficial collective action might be frustrated absent legal intervention because the individual interest of each of them might supersede their collective good.<sup>66</sup> Under such circumstances, restitution becomes an attractive tool for forcing the parties to pay their proportionate share of the collective good, thus overcoming these free-rider difficulties.

Solving free-rider problems in the provision of collective goods serves not only the parties' utility interest. If carefully fine-tuned, it is also an important injunction of our commitment to autonomy. Autonomy stands for self-determination, and negative liberty

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<sup>64</sup> See, e.g., PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 95-96 (paperback ed. with revisions 1989); ANDREW BURROWS, THE LAW OF RESTITUTION 113 (2d ed. 2002); 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(4), at 604-05 (2d ed. 1993); CHARLES MITCHELL, THE LAW OF SUBROGATION 4, 9 (1994); 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.5(b), at 23-24 (1978 & supp. 1998).

<sup>65</sup> This paragraph, and the two that follow, summarize DAGAN, LER, *supra* note 28, at 130-36, 139-40.

<sup>66</sup> This contingency is the expected outcome if no single member of the group is likely to derive sufficient benefits from that good to justify paying the entire cost of supplying it alone, and no coalition of members can feasibly divide the costs among members.

(or “personal gatekeeping”) is but a means, albeit frequently quite an important one, for this ultimate value.<sup>67</sup> Therefore, where law’s abstention (rather than its intervention) is likely to frustrate goals and aspirations that require collective action, overriding the explicit disinterest of restitution defendants in participating and paying for collective action may indeed be justified from an autonomy perspective as well.

If the parties’ autonomy is to sanction law’s intervention, however, to identify a category of cases in which law’s intervention is necessary for the solution of collective action problems is not enough. It is not enough that the defendants’ proportionate benefit from law’s necessary intervention objectively exceeds their proportionate share in the costs of supplying the collective benefit. If autonomy is the name of the game, restitutionary obligation should only apply where potential restitution defendants are also *subjectively* better off receiving the collective benefits and paying than doing without the benefits entirely. This second condition points to the familiar doctrine of subjective devaluation, which essentially ensures that the divergence of the defendant’s explicit preferences (objection) from what we assume to be her self-interest (participation) derives from the payoff structure locking her and the other participants in a collective action and making defection the dominant strategy, rather than from her genuine subjective preferences.

Appreciating this justification for restitution underscores the need for regulating with precise rules, rather than vague standards, the restitutionary liability for the self-regarding conferral of benefits. As Gordon explains, individualized inquiries in this context tend to be particularly difficult. A litigated restitution case may imply that the free-riding at issue is not detrimental since, in these cases, a restitution claimant has “already engaged in the valuable activity.” As long as a restitution court is dealing with an isolated fact pattern, it is hard for the court to determine “if there exists a substantial class of people, like the claimant, who have not yet engaged in the valuable activity but would do so if restitution were assured.” This uncertainty justifies a refusal of restitution in such isolated fact-specific cases, making intervention justified only where a court identifies *classes* of

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<sup>67</sup> See H. L.A. HART, *Between Utility and Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 198, 206-07 (1983); WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 120, 123-25 (1990).

situations where free-riding is systemically detrimental and where subjective devaluation seems unlikely.<sup>68</sup>

Not only does the restitutionary category under consideration seem particularly hospitable to rules, but the specific rules it calls for are in fact derivative of our specific normative commitments.<sup>69</sup> This is most clearly evident when the recommendations of autonomy and utility differ in the specific rules they endorse for delineating the scope of subjective devaluation. Thus, a utility-enhancing perspective recommends denying restitution when the utility loss to the defendant, had she been forced to make restitution, outweighs the gain to the plaintiff from the action that restitution could have facilitated. The injunction of autonomy is quite sharper. Even when we are relatively certain that overall the action is indeed jointly beneficial, awarding restitution in cases of potentially subjective devaluation offends the liberal commitment to individual free choice and self-determination. This normative difference generates a doctrinal one. Utility would support a restrictive interpretation of subjective devaluation, which potential realizability in money should suffice to defeat because, even if the recipient lacks appreciation of the conferred benefit, the market's appreciation suffices to ensure that restitution does not generate a utility loss.<sup>70</sup> By contrast, autonomy is more demanding. Insisting on people's right to order their own priorities means that a benefit is deemed incontrovertible only if it has been actually converted into money or if "it is inevitable that the defendant will [in fact] exercise the benefit."<sup>71</sup> Indeed, the choice between these two alternative tests, offered respectively by the two great authorities of English law – Goff and Jones and the

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<sup>68</sup> See Gordon, *supra* note 26, at 474-75; Wendy Gordon, *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-by-Case Response to Market Failure*, 8 J.L. & INFO. SCI. 7, 11-12 (1997).

<sup>69</sup> This paragraph summarizes DAGAN, LER, *supra* note 28, at 139-45 and the sources therein.

<sup>70</sup> There may be hard cases such as, for example, a landowner subjectively estimating the value of her house as far higher than its market value, with or without the cooperative improvement (to which she attributes little or no value). Imposing an immediate restitutionary liability on such a defendant may cause a utility loss if it requires her to liquidate her property at its (lower) market value. But even in these (rare?) cases, potential realization seems to ensure the efficiency of a restitutionary liability as long as the plaintiff's remedy takes the form of an equitable lien to be realized at the moment of realization rather than immediate monetary payment.

<sup>71</sup> GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 79 (1999).

late Peter Birks<sup>72</sup> – requires a normative choice between the injunctions of utility and autonomy.<sup>73</sup> Clarifying this foundational normative question turns out to be a prerequisite rather than an enemy of doctrinal clarity.

Contemporary law largely follows Birks' position, as illustrated by the orthodox position that denies restitutionary liability for improvements of the defendant's existing interest, as opposed to its preservation. Although the line between improvements and preservation is often murky, a defendant's objection to invest in an improvement is more likely to express her genuine valuation rather than be a strategic holdout.<sup>74</sup>

While champions of utility may challenge this prevailing normative position,<sup>75</sup> neither existing law nor its more utilitarian alternative is indeterminate or arbitrary. Both positions make quite precise prescriptions. Moreover, given that both sets of prescriptions are morally acceptable (unlike many other possible legal regimes), a good faith choice between them by the legislature or the judiciary represents a legitimate application of authority rather than a whimsical usurpation of power.

Furthermore, nothing in the "publicness" of the values that inform the parties' entitlements infringes the injunction of correlativity, properly interpreted. To begin with, autonomy and utility (in whichever balance is ultimately decided) are not introduced in any particular dispute, but rather *ex ante*. These values, then, set the limits for the right of potential benefactors to confer and seek restitution and the correlative obligation of potential beneficiaries to pay for such unsolicited benefits. Moreover, as is true of mistakes, although the reasons for a particular beneficiary's liability in this account are not wholly internal to her relationship with the particular benefactor who seeks restitution, correlativity is *not* infringed. The pertinent rules affect both potential benefactors and potential beneficiaries. And the pertinent autonomy and utility of both of

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<sup>72</sup> Compare LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 25 (6th ed. 2002, Gareth Jones ed.) to BIRKS, *supra* note 64, at 121-24.

<sup>73</sup> My own take on this matter is that the autonomy analysis should prevail for individuals, but where the recipient is a profit-making enterprise, utility concerns should trump.

<sup>74</sup> See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 586-88 (2001); Daniel Friedmann, *Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free Riding*, 36 *LOY. L.A.L. REV.* 831, 850 (2003).

<sup>75</sup> See Porat, *supra* note 13.

these groups that, from an *ex ante* perspective, by and large converge in any event, are largely convergent. Finally, at least up to this point, no interest of a third party has been invoked.

Indeed, the garden variety restitution cases in our category that we have considered so far are quite easy. But this category also does (or, in my view, should) include a class of cases in which the interest of third parties *is* part of the justificatory premise for the parties' entitlements. As noted,<sup>76</sup> allowing such external reasons admittedly creates a justificatory deficit. But because the injunction to comply with the prescription of correlativity is only one, albeit important, component of private law's justificatory burden, it may at times be outweighed by stronger competing normative concerns.

The most important instance of this possibility in contemporary restitution law is the expansion of the doctrine governing self-regarding conferral of benefits. In its wake, the doctrine is made to include classes of cases in which, even though the parties' interests are not as clearly locked in, the interest of third-parties affected by the benefactor's decision concerning the benefit strongly support recognition of a restitutionary claim. This is the case when, for instance, one defendant settles with the plaintiff in a torts case and seeks subrogation from the other defendants after attaining full exoneration. Although between a payor and a tortfeasor, cases of payments to victims by a nonliable original defendant may not comply with the prescription of correlativity, the law justifiably allows subrogation in the name of the victims' interest to be compensated promptly.<sup>77</sup> A similar analysis applies to insurance payments for a loss that is generally within the basic scope of the policy coverage, but is beyond the insurer's liability.<sup>78</sup> This expansion of insurance subrogation is justified because, were insurers not allowed to recover colorable claims that were paid even if these claims were not ultimately covered, they would be more hesitant to accept claims altogether. An expansive approach to

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<sup>76</sup> See text accompanying note 52.

<sup>77</sup> See *In re Air Crash Disaster*, 86 F.3d 498, 511-13, 549-50, 552 (6th Cir. 1996). See also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 cmt. c (Tentative Draft No. 2, 2002).

<sup>78</sup> See *State Farm Fire & Cas. Co. v. East Bay Mun. Util. Dist.*, 62 Cal. Rptr. 2d 72, 75, 77 (Ct. App. 1997). See also, e.g., *Continental Ins. Co. v. Federal Ins. Co.*, 266 S.E.2d 351, 352 (Ga. Ct. App. 1981).

insurance subrogation helpfully encourages them “to err on the side of caution when rejecting claims.”<sup>79</sup> Finally, as I show in some detail elsewhere, a similar analysis applies to one of the most high-profile patterns of litigation in recent times, in which governments sue industries (the tobacco industry is a prominent example) for costs they incurred in ameliorating injuries suffered by their citizens and arguably inflicted by the defendants, and for the costs of preventing or reducing the risk of such injuries in the future.<sup>80</sup>

### CONCLUDING REMARKS

My main claim in this essay is quite straightforward. The goals of the law of restitution reflect our more general normative commitments, at least in liberal settings, to autonomy, utility, and community. This correspondence should not be surprising for a private law doctrine. Private law, more than any other part of our law, structures our daily interactions as individuals. No wonder, then, that the accumulated wisdom of its doctrines encapsulates the social vision that underlies these interactions.

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<sup>79</sup> Michael S. Quinn, *Subrogation, Restitution, and Indemnity*, 74 TEX. L. REV. 1361, 1380 (1996). *See also, e.g.*, *State Farm Fire & Cas. Co.*, 62 Cal. Rptr. 2d at 76-77.

<sup>80</sup> *See* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. Rev. 354, 358-405 (2000).