Unjust Enrichment: What We Owe to Each Other

1. *Introduction*

For three decades, much of the law and theory of unjust enrichment has centred on mistaken payment of a non-existent debt, or mistaken overpayment of an extant debt. Take the following example:

> *Builder:* a builder has recently completed some repair work to the roof of my house, for which I owe her £500. In the course of making payment via my online banking app, I accidentally enter an extra digit. My bank executes the resulting payment instruction, and £5000 is transferred from my account to hers.

For Peter Birks, the appropriate legal response was self-evident: we will 'immediately see' that I should have a claim to recover £4500.[1] The restitutionary claim to money mistakenly paid was Birks' 'core case'[2] of unjust enrichment—the template for what he saw as a distinct domain of private law.

Accepting, *arguendo*, that *Builder* is a suitable archetype, how should we justify the restitutionary response to cases of this kind? Academic focus has recently shifted from material loss and gain towards the payee's role in the impugned transaction—what she has *done* to warrant liability.[3] The goal of this shift is to fit these cases within the 'doer-sufferer'[4] template of so-called 'corrective justice' theories of private law.[5] I argue in Part 2 of this article that, by treating the payee as someone who may properly be denied any meaningful opportunity to avoid the burden of repayment, this shift fails to reconcile unjust enrichment with the central commitment to equal freedom upon which these theories depend.

If we cannot construct a persuasive case from equal freedom for the restitutionary response to cases like *Builder*, we can nevertheless construct an argument that rests upon the Kantian ideal of respect for rational agency—which allows us to broaden our focus from mutual freedom to other concerns, but which does not override individual reasons in favour of exterior goals. In Part 3, I turn

[1] P Birks, *Unjust Enrichment* (2nd, OUP 2004) 6.
[2] ibid 5.
[3] R Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574; L Smith, 'Restitution: A New Start?' in P Devonshire and R Havelock, *The Impact of Equity and Restitution in Commerce* (2018) 115.
[4] EJ Weinrib, *The Idea of Private Law* (rev, OUP 2012) 65: 'Corrective justice embraces: a bipolar conception of interaction that relates the doer of harm to the sufferer of that harm'; EJ Weinrib, *Corrective Justice* (OUP 2012) 90.
[5] See e.g. Weinrib, *The Idea of Private Law* and *Corrective Justice* (n 4); A Ripstein, *Private Wrongs* (HUP 2016).

to moral contractualism.[6] Contractualism offers a particular sort of solution to problems of justice:[7] where a given action or inaction will alter the distribution of benefits and burdens amongst individuals, the morally right action conforms to a governing principle that everyone has reason to accept, or not to reject. The link between morality and law is direct, but methodological: a particular use of the State's coercive power is morally permissible if the principle licensing that use passes the contractualist test.[8]

In Part 3, I adopt the following formula: could everyone rationally choose this law, if we suppose that each person has the power to choose a law to govern situations of this kind?[9] I argue that a restitutionary rule for cases like *Builder* meets this threshold. We have reasons to value the ability to make and receive payments, which ability demands a rule that prevents a simple mistake from causing a significant loss. Everyone could rationally choose a rule placing the burden of risk for mistake with payees, provided that no such payee is made worse off than she was prior to the impugned transaction.

The success of the contractualist case for restitution comes at a price: the facts of *Builder* ground a restitutionary liability for the £4500 overpayment, but not as any sort of 'core case' from which to generalise a single 'law of unjust enrichment'.

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[6] Moral contractualism is now often associated with TM Scanlon, *What We Owe to Each Other* (HUP 1998), from which the title of this article is derived. In this article, I prefer a version of contractualism derived from Parfit: *On What Matters* (n 6) 355, which Parfit calls 'Kantian Contractualism'.

[7] I use the term to refer to questions that concern what each of us can be required to bear, for the sake of others, not more narrowly to refer to problems of competition over scarce goods. See further J Gardner, 'What is Tort Law for? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 6–7.

[8] TM Scanlon, 'Promises and Contracts' in P Benson (ed) *The Theory of Contract Law* (CUP 2009) 100.

[9] I argue that we should focus upon 'rational' rather than actual choice, or 'reasonable rejectability'.

2. *Corrective Justice*

A. *Mistaken Payment*

The common law tradition of unjust enrichment began as a transatlantic enterprise. Indeed, in *An Introduction to the Law of Restitution*,[10] Peter Birks attributed much of the momentum behind efforts to rationalise unjust enrichment to the American Law Institute's 1937 *Restatement of the Law of Restitution*.[11] Where enthusiasm for the field dimmed in the latter half of the twentieth century,[12] the baton was taken up by scholars across the rest of the common law world.[13] The first two editions of Goff and Jones' 'path-breaking'[14] *The Law of Restitution* were published in 1966 and 1978 respectively, and Birks' first book on the subject was 'preoccupied with the task of finding the simplest structure'[15] unifying much of the material therein. A wealth of scholarship followed in the wake of that project.

In each of Birks' two seminal texts,[16] his starting point and 'core case' of unjust enrichment endorsed a strict liability approach to the recovery of money paid under the mistaken assumption that it was owing. In *Kelly v Solari*,[17] Mr Solari had died before paying the final premium of a policy insuring his life, and the insurers had marked the policy as 'lapsed'. Unaware of this fact, Mr Solari's widow and executrix claimed, and the insurers paid, the sum that would have been owing if the policy had not lapsed. Subject to retrial on a question of fact,[18] the insurers were held to be entitled to recover the funds, even though Mrs Solari did not and could not have known about the insurers' mistake. For Birks, a simple example along the lines of *Builder* above was enough to show that the decision in *Kelly*

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[10] P Birks, *An Introduction to the Law of Restitution* (rev, OUP 1989).

[11] ibid 5.

[12] As Langbein put it, 'it is as though a neutron bomb has hit the field – the monuments have been left standing, but the people have been killed off' JH Langbein, 'The Later History of Restitution' in J O'Sullivan, R Nolan, WR Cornish and G Virgo (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (OUP 1998) 61. In 2005, Weinrib added his own colourful assessment that 'the corpse of restitution' had 'begun to twitch again in American law reviews' E Weinrib, 'Restoring Restitution' (2005) 91 Virginia L Rev 861, 861. This assessment was, perhaps, over-optimistic.

[13] Perhaps most numerous in the UK, Canada and Australia.

[14] Birks, *Unjust Enrichment* (n 1).

[15] Birks, *An Introduction to the Law of Restitution* (n 10) 1–6. 'Much' is crucial here, for Birks' first task was to reorganise focus around 'unjust enrichment', rather than the restitutionary response to which it may give rise.

[16] ibid 9; P Birks, *Unjust Enrichment* (n 1).

[17] *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24.

[18] Whether there was, in fact, a causative mistake.

v Solari must be correct: 'You go shopping with a friend. As you are leaving a department store an assistant comes running up to tell you that he has accidentally given you change for £50 when you had in fact paid with a £20 note'.[19] For Birks, restitution was the 'only acceptable' response.[20]

Birks traversed the gap between his 'core case' and a fully-fledged law of unjust enrichment by aggregating all cases with these features—the unjust transfer of some benefit from one party to another.[21] For Birks, the result was a distinct cause of action, a 'tertium quid' beyond consent and wrongs.[22] Though parts of *Unjust Enrichment* never attracted the status of orthodoxy,[23] this aggregative project had a powerful and lasting effect on the UK law of unjust enrichment.[24] On multiple occasions and on different fact patterns, courts have framed the relevant enquiry as a four-step formula:[25]

(i) Has the defendant been benefited, in the sense of being enriched?
(ii) Was the enrichment at the claimant's expense?
(iii) Was the enrichment unjust?
(iv) Are there any defences?

Let us call this the unified approach: the unified approach insists that there is one cause of action called 'unjust enrichment', the formula for which remains constant – from claims to recover mistaken payments, to the *quantum meruit* that remunerates an unpaid service-provider.[26]

If the prevailing judicial consensus supports this unified approach, no such consensus is discernible as to the *justification* for restitution. Academic focus has recently shifted from the three factors emphasised by the unified approach (loss, gain and injustice)[27] to some account of the defendant's 'involvement in the story':[28] she is liable, so it goes, because she participates in a 'bilateral'

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19 Birks, *Unjust Enrichment* (n 1) 7.
20 ibid.
21 ibid 12.
22 ibid 13.
23 In particular, academics and judges have not, by and large, been persuaded to discard multi-factor approach to injustice in favour of an enquiry into whether or not there was a 'basis' for the enrichment.
24 An effect to which Australian case law has largely been resistant. See recently *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [213]: 'in this country restitution arises in recognised categories of case and is not necessarily available whenever, and to the extent that, a defendant is enriched at the plaintiff's expense in circumstances that render the enrichment unjust' (Nettle, Gordon and Edelman JJ).
25 See e.g. *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn); *Benedetti v Sawiris & Ors* [2013] UKSC 50 [20] (Lord Clarke); *Investment Trust Companies v HMRC* [2017] UKSC 29 [2] (Lord Reed).
26 Albeit that (c) falls to be dealt with according to several distinct heads of injustice.
27 See e.g. L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Tex L Rev 2115, 2141.
28 Smith, 'Restitution: A New Start?' (n 3) 115.

payment,[29] for which there is 'no good reason'.[30] These arguments aim to reconcile the restitutionary response to mistaken payment with the 'doer-sufferer' template of so-called 'corrective justice' accounts of private law.[31] In what follows, I argue that these theories fail, and that they do so by divorcing the form of corrective justice from its normative basis in mutual freedom.

B. *Corrective Justice and Kantian Right*

In *The Idea of Private Law*, Ernest Weinrib set out to reveal private law's 'immanent intelligibility'.[32] For Weinrib, this meant devising a theory that could reflect the 'bipolarity'[33] of adjudication—an umbrella theory for the law of contracts, torts and unjust enrichment that was rooted firmly in the interests of, and connection between, both parties to a civil suit.[34] For present purposes, there are two critical steps to this account. The first, formal step follows the path of Aristotelian corrective justice—justice as the restoration of 'equality between the two parties to a bipolar transaction', rather than 'a proportion in which each participant's share is relative to whatever criterion governs the distribution'.[35] For Weinrib, private law rights and duties represent a quantitative baseline—an 'equality' between right-holder and duty-ower.[36] The party who breaches a duty owing to another disrupts this equality, which compensation (by taking something from the defendant and giving it to the claimant) restores at one stroke. In this way, corrective justice 'treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other'.[37]

But Weinrib identifies a 'troubling lacuna'[38] in this 'sparse and formal' account of corrective justice.[39] If corrective justice presupposes an equal baseline, 'the problem is: in what respect are the

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[29] Stevens, 'The Unjust Enrichment Disaster' (n 3) 581.
[30] ibid.
[31] Weinrib, *The Idea of Private Law* (n 4) 65.
[32] ibid 18–19.
[33] ibid 74.
[34] ibid 2, 19, 122. See also S Steel, 'Private Law and Justice' (2013) 33 OJLS 607, 609.
[35] Weinrib, *The Idea of Private Law* (n 4) 56.
[36] ibid 62ff.
[37] ibid 56 and 74: this reveals the 'unity of the plaintiff-defendant relationship' through the 'very correlativity of doing and suffering harm'.
[38] ibid 76.
[39] ibid 57.

parties equal?'.[40] Weinrib answers this question by adopting the commitment to each party's 'external freedom' (freedom from constraint in action)[41] made by Kantian Right. Kant's Universal Principle of Right ('UPR') states that 'an action is right if it can coexist with everyone's freedom in accordance with a universal law'.[42] From the UPR, Kant derived each person's 'innate right' to freedom 'insofar as it can coexist with the freedom of every other in accordance with a universal law',[43] and a series of downstream rights enforceable by private action. For Kant, this framework of rights, duties and remedies was necessary to establish the conditions of Right (the ability to reconcile the choices of everyone in accordance with the UPR), operating to negate the kinds of constraints or 'hindrances'[44] to freedom that arise unavoidably from interaction with others.[45] This provides the 'normative grounding' for private law as corrective justice:[46] for Weinrib, the 'equality' from which breach departs, and which compensation restores, is an 'equality of free wills in their impingements on one another'.[47]

Yet, the 'lacuna' Weinrib identifies is larger than that which he identifies: justifying remediation is not merely a matter of specifying the relevant 'baseline'; we must also explain how departure from that baseline constitutes a reason for compensation. Compensatory reasons are not implicit in relational wrongs, and 'equality' does not presuppose a duty to rebalance.[48] For Kant, the answer was that those rights and duties which flow from the UPR entail compensation; compensatory reasons *are* (for Kant) implicit in rights and duties, and merely act to 'preserve what is [the right-holder's] undiminished'.[49] Weinrib endorses a version of this claim from 'continuity', which now attracts that

[40] ibid 76.
[41] I Kant, *Metaphysics of Morals* M Gregor ed (rev, tr, CUP 2017) 6:315, 6:316.
[42] ibid 6:231.
[43] ibid.
[44] ibid.
[45] A Ripstein, *Force and Freedom* (HUP 2009) 14: 'Kant argues that these norms and institutions do more than enhance the prospects for independence: they provide the only possible way in which a plurality of persons can interact on terms of equal freedom'.
[46] Weinrib, *The Idea of Private Law* (n 4) 2.
[47] ibid 84.
[48] E Voyaikis, 'The significance of choice in private law: a reply to Priel, Thomas and Dagan' 2019 10 Jurisprudence 434, 437: 'wrongfulness-based accounts owe us an explanation as to why the fact that a wrong has occurred is so important for the justification of the repair'.
[49] Kant, *Metaphysics of Morals* (n 41) 6:271: if another 'has wronged me and I have a right to demand compensation from him, by this I will still only preserve what is mine undiminished but will not acquire more than what I previously had'. For Kant, 'wrongdoing never changes rights. If I injure you wrongfully, your entitlement to compensation is not an entitlement to anything more than your entitlement that I not injure you': Ripstein, *Force and Freedom* (n 45) 39.

general label.[50] For Weinrib, rights and duties 'continue to be the normative market of the parties' relationship' post-breach, albeit 'transformed'[51] into a 'judicially crystallized post-injustice shape'.[52]

Weinrib frames this claim as a necessary corollary to the conclusion that claimant and defendant sit of either side of a right-duty relationship: if rights and duties did not continue through breach, 'the duty—absurdly—would have been discharged by its breach'.[53] Yet, this phrasing stacks the deck: swap the verb for 'destroyed', and we have the following, wholly tenable claim: breach causes a duty to cease to exist, and a compensatory liability to arise in its place.[54] Indeed, that liability cannot *be* the original duty, without more: the cause of action for tortious or contractual breach accrues at breach, and it is a duty to do something different from the action specified by the original duty.[55] To understand the idea that duties 'continue', we must instead look to the facts which are reasons for action taken to conform with duties or compensate for breach. I turn to this task in what follows.

C. *Corrective Justice and Continuity*

Reasons are features of the world that count in favour of a particular response.[56] Our focus is upon reasons for action, or 'practical' reasons.[57] Without endorsing any more precise claims about how features of the world render particular actions appropriate, let us accept that reasons have this sort of connection with value: to identify a practical reason is to identify some good-making property of the

[50] See e.g. J Raz, From Normativity to Responsibility (OUP 2011) 261; Gardner, 'What is Tort Law for? Part 1. The Place of Corrective Justice' (n 7); Weinrib, *The Idea of Private Law* (n 4) 143; A Ripstein, *Private Wrongs* (HUP 2016) 248. See generally S Steel, 'Compensation and Continuity' Oxford Legal Studies Research Paper No. 49/2019 (unpub).
[51] Weinrib, *Corrective Justice* (n 4) 90. Weinrib uses language very similar that to that employed by Kant: 'Because the right continues to exist, plaintiffs can justly apply to courts for the restoration of what remains rightfully theirs' 92.
[52] ibid 87.
[53] ibid 92.
[54] See e.g. S Steel, 'Compensation and Continuity' Oxford Legal Studies Research Paper No. 49/2019 (unpub) 7: 'this objection gains intuitive purchase by using the word 'discharge' rather than 'cause not to exist'. Discharge means 'fulfil'; clearly, to breach is not to fulfil a duty'. Of course, breach will not *always* destroy the original duty: a repudiatory breach by one contracting party gives the other a choice – to terminate a contract, or to insist upon performance *Heyman v Darwins Ltd* [1942] AC 356. But Weinrib's focus and ours is not upon cases in which some ongoing contracted-for performance is still possible and preferable. Rather, we are interested in liability pursuant to breach.
[55] The duty is not a duty to perform or pay; it is simply a duty to perform.
[56] Whether of belief, emotion, or action See e.g. J Raz, *Practical Reason and Norms* (2nd ed, OUP 1999) 15; Parfit: *On What Matters* (n 6) 31; Raz, *From Normativity to Responsibility* (n 50) 85 'The facts that are reasons are reasons because they are part of the case for a certain response, for a belief or an action or an emotion'; TM Scanlon, *Being Realistic about Reasons* (OUP 2013) 7.
[57] M Alvarez: 'a reason can favour φ-ing, that is, it can make φ-ing right or appropriate'.

act to which that reason refers.[58] To act in the manner specified by one's reasons (with or without that good-making feature in mind) is to 'conform' with those reasons.[59]

Let us begin with an example that involves non-relational reasons—those circumstances which make the case for me to perform some act, which reasons do not directly concern other people. Imagine that I decide to go swimming. My reason (and that which I would offer, if asked) is that swimming is a form of aerobic exercise, which is good for my health. Indeed, swimming might be *best* for my health: perhaps it is the means of aerobic exercise that will supply the best overall workout. Three observations are pertinent here. The first is that those features of the world which are reasons can be reasons for multiple actions, each of which would fall short of conformity when taken alone: if I have reason to go swimming, I also have reason to pack my swimming kit, travel to the swimming pool and present my membership card for admission.[60]

Second, conformity is rarely an all or nothing affair. Suppose that I borrow some money from my friend, promising to repay it in full the following day. My promise, and the expectation it engenders, generates a reason to repay, with which I conform perfectly by paying. But I also have other reasons to repay (e.g. to be a 'good friend') which do not admit perfect conformity;[61] no precise criteria for success are prescribed by the reason to be a good friend, and the good-making property of friendship may be realised in multiple ways. The reason that I have to go swimming (to look after my health) is of the latter kind. So, the features which are reasons are reasons to come as close to conformity *as is possible*.[62] Sometimes perfect conformity is possible; often it is not.

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[58] This has been labelled the 'guise of the good'. See further GEM Anscombe, *Intention* (OUP 1957) §6; K Setiya, *Reasons without Rationalism* (PUP 2007) 24; S Tenenbaum, *Appearances of the Good: An Essay on the Nature of Practical Reason* (CUP, 2007) 33; Raz, *From Normativity to Responsibility* (n 50) 59ff; P Boswell, 'Intelligibility and the Guise of the Good' (2018) 13 Journal of Ethics and Social Philosophy 1.

[59] J Raz, *Practical Reason and Norms* (2nd ed, OUP 1999) 178.

[60] See e.g. Gardner, 'What is Tort Law for? Part 1. The Place of Corrective Justice' (n 7) 31: a reason to pay for a bus ticket 'is a reason to keep some loose change in my pocket, to hunt in my pocket for my loose change when I get to the bus stop' etc.

[61] Raz argues that reasons to look after children may also be of this kind: 'if perfect conformity means that nothing can be done that will improve compliance then perhaps there is no perfect compliance with the reasons parents have to care for their children': Raz, *From Normativity to Responsibility* (n 50) 197.

[62] In 'Reasons in Conflict' (ibid 173ff) Raz describes the 'conformity principle' differently as follows: 'one should conform to reason completely. If one cannot one should come as close to complete conformity as possible' 189. The latter part of the conformity principle entails the former.

These two points prompt a third: those features which are reasons can be reasons for multiple actions short of perfect conformity, where the action which once constituted best-possible conformity is no longer an option. If a thief steals my wallet on the way to repay my friend, my reason to pay (e.g. my promise, and the expectation it engenders) is a reason to pay as much as I can as soon as I am able. If the pool is closed, my reason to go swimming (e.g. to look after my health) is a reason to go running. The point is unaffected by culpability: if I empty my bank account or cancel my pool membership, I have precisely the same reasons to perform some 'next best' or 'compensatory' act. It is in the nature of reasons that they count in favour of whatever action will bring us as close as possible to conformity.

Legal duties are special kinds of reason: the *fact* of the duty gives me a reason to act as it specifies. Thus duty-given reasons are not of the kind 'there is some good-making property of action' (which may be realisable in multiple ways, and which may generate multiple options for conformity), but rather 'the law says so'—to which there is only one correct way of conforming. Thus, legal reasons are at once more powerful and narrower than other reasons. My legal duty is a reason to act without assessing the relative value of any given course of action.[63] But it is also a reason to do only whatever is necessary to comply with my legal duty, for so long as my duty exists.

This claim is entirely compatible with another, which follows from the general discussion of reasons above: whatever reasons supported the original duty (promise, reliance etc) can ground reparative liability. The difference is between duty-given reasons ('because the law says so'), and the reasons *for* that duty. Where duties specify particular acts, the facts which are reasons are reasons to come as close to conformity as is possible in the circumstances. So, a duty cannot itself support a legal mandate to repair, unless such action is also specified by the duty at the outset. But the justificatory basis of that original duty can.

The dual ideas implicit in reasons 'continuity'—that the facts which are reasons for duties do not lose their normative force by virtue of breach,[64] and may count in favour of compensation—are

[63] J Raz, *Practical Reason and Norms* (2nd ed, OUP 1999) 178ff, expanding on what he calls 'exclusionary reasons'.
[64] As Voyaikis puts it: 'the normative force of the considerations that justify the imposition of an original burden on a person is not exhausted or extinguished when that person has failed to discharge that burden': E Voyaikis, *Private Law and the Value of Choice* (Hart Pub, 2017) 19.

hardly startling claims. And they do not warrant the further conclusions that: (i) reasons for duties are always (*prima facie* or conclusive) reasons for taking or mandating some compensatory 'next best' action in cases of non-conformity, so that we need not weigh other facts that count for or against a remedial burden;[65] or (ii) reasons for duties ground *non*-compensatory damages.[66] These ideas simply underscore two points—first, that those facts which are reasons for duties 'will generally be an important part of the case for justifying the imposition of the burden of repair';[67] second, that 'wrongdoing' (culpable action or inaction) is not necessary to travel the distance between original and reparative duty.

This is no less true where the original duty is a duty e.g. not to cause harm by failing to take care: here, non-conformity involves a failure to take care, but compensation is justified by those considerations which supported the original duty—not new reasons derived from culpability.[68] This is not to deny that failure to conform may be a reason for regret, or a reason to share that regret with another.[69] It is simply to deny that responses of this sort—regret, blame, condemnation, disapprobation etc—are the *source* of norms of conformity. In this respect, it may be useful to distinguish between two senses of 'responsibility'—'attributive' (the basis for moral appraisal), and 'substantive' (the actions that people must take for one another).[70] The facts which are reasons are reasons to come as close as possible to conformity, and may ground substantive responsibility to that effect; they do not require independent compensatory norms, and they do not presuppose fault.[71]

We can now put Weinrib's account of corrective justice and Kantian Right, and his accompanying claims about how rights and duties 'continue' through breach, into proper context. The commitment to equal freedom grounds both particular rights and duties, and the compensatory 'next

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[65] Raz *From Normativity to Responsibility* (n 50) 190.

[66] Such as punitive or exemplary damages: ibid 191.

[67] E Voyaikis, *Private Law and the Value of Choice* (Hart Pub, 2017) 17–18.

[68] Raz *From Normativity to Responsibility* (n 50) 191–192: 'the reason to compensate... does not depend on the agent being at fault, for the failure to achieve full conformity with reason. If compensation is nothing but acting to get as close as possible to complete compliance then the reason one has to compensate is the reason one had in the first place. That reason does not (special cases apart) presuppose fault, and nor does the reason to compensate'.

[69] If the reason is relational: Raz *From Normativity to Responsibility* (n 50) 189.

[70] Scanlon, *What We Owe to Each Other* (n 6) 248–251. See also E Voyaikis, *Private Law and the Value of Choice* (Hart Pub, 2017) 41ff.

[71] Or any particular source of non-conformity. Of course, the manner of breach may well play a justificatory role in grounding a *non*-compensatory remedy.

best' response to breach; 'wrongdoing' plays no independent normative role.[72] For Weinrib, a defendant must comply with some (primary or compensatory) private law duty just when this will bring her in closest conformity with reasons from mutual freedom.[73]

D. *Unjust Enrichment: Corrective Justice and Kantian Right*

We are now in a position to consider existing arguments from corrective justice for the restitutionary response to mistaken payment. Let us return to *Builder*, the example with which I began.[74] Weinrib's language of quantitative equality seems a natural fit for the restitutionary response to cases like *Builder*; it is precisely the goal of restitution to restore the parties pre-transactional (material) holdings. Thus, Lionel Smith has argued that:

> Unjust enrichment includes both a material gain by the defendant and a material loss by the plaintiff. Moreover, the loss and gain do not come together by random chance. They are two sides of the same coin-that coin being a transfer of wealth from plaintiff to defendant. There is a nexus of exchange between the parties. This nexus gives an "articulated unity" to their bilateral relationship in a transaction which is paradigmatically within Aristotle's conception of corrective justice.[75]

It bears emphasis that the difficulty faced by this arithmetic account of the restitutionary response to mistaken payment is not that the payor is treated as both 'the doer and sufferer' of harm, so that 'there is no sense in which the defendant is the agent of the plaintiff's misfortune'.[76] The problem is more serious than these criticisms imply. We saw above that corrective justice 'acquires its normative force from Kantian right'; for Weinrib, the defendant must comply with some private law duty with respect to another if and because this will bring her into closely conformity with reasons from equal freedom.[77]

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[72] For Weinrib, as for Kant, 'wrongdoing never changes rights; If I injure you wrongfully, your entitlement to compensation is not an entitlement to anything more than your entitlement that I not injure you' Ripstein, *Force and Freedom* (n 45) 39.

[73] I use the term 'duty' here to encompass both duties and liabilities.

[74] *Builder:* a builder has recently completed some repair work to the roof of my house, for which I owe her £500. In the course of making payment via my online banking app, I accidentally enter an extra digit. My bank executes the resulting payment instruction, and £5000 is transferred from my account to hers.

[75] L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Tex L Rev 2115, 2141.

[76] D Klimchuk, 'The Structure and Content of the Right to Restitution for Unjust Enrichment' (2007) 57 University of Toronto Law Journal 661, 677, to which Weinrib refers in EJ Weinrib, 'Correctively Unjust Enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009). See also Stevens, 'The Unjust Enrichment Disaster' (n 3), 582.

[77] 'The equality of corrective justice acquires its normative force from Kantian right': EJ Weinrib, *The Idea of Private Law* (rev, OUP 2012) 82.

So, the problem that we face here is: even *if* we could view the mistake payee as an 'agent of the plaintiff's misfortune', we have no case from equal freedom for requiring her to do anything about it.[78] The deliberate infliction of economic harm is entirely compatible with an 'equality of free wills',[79] and Smith gives us no reason to view the gain as anything other than means now at the payee's disposal.

Weinrib focuses more directly upon the defendant's role in the impugned transaction. For Weinrib, the case for restitution is 'established through a transaction in which both parties participate' whenever 'the wills of the two parties are so related to each other as to converge on the reason for not allowing the defendant to retain the benefit'.[80] This 'convergence' occurs when two conditions are satisfied: (i) 'the absence of an intention (or of an obligation) to give the defendant something for nothing'; and (ii) 'acceptance of the benefit as non-gratuitously given'.[81] Weinrib argues that these conditions have an 'analogous' function to that of offer and acceptance in contract law: they 'link the wills of the parties to each other through the subject matter of the transaction',[82] justifying the attribution of substantive remedial responsibility (in this context, liability to effect restitution).

Weinrib's convergence theory has recently entered broader unjust enrichment discourse. In 2019, Stevens proclaimed the arithmetic approach a 'disaster'[83] for unjust enrichment, advocating in its place a thesis very close to Weinrib's. For Stevens, unjust enrichment requires two key factors: performance by the claimant for the defendant (and accepted by the latter), rendered for 'no justifying reason'.[84] Stevens argues that in cases like *Builder*, the 'bilateral' nature of the impugned transaction establishes that the elements of the claim 'form a single normative sequence', so that 'the same justifying reason for restitution (the performance for which there is no reason) applies to both parties concurrently'.[85] In a case like *Builder*, for Stevens as for Weinrib, the requisite 'convergence' (proof that

78 No case for the 'substantive' responsibility discussed immediately above.
79 Weinrib, *The Idea of Private Law* (n 4) 2.
80 Weinrib, *Corrective Justice* (n 4) 189.
81 ibid 204.
82 ibid 206.
83 Stevens, 'The Unjust Enrichment Disaster' (n 3).
84 ibid 581. See also, R Stevens, 'Private Law and the Form of Reasons' in J Goudkamp and A Robertson (eds) *Form and Substance in the Law of Obligations* (Hart Pub 2019) 130–131.
85 ibid 582.

the reason for restitution is relevantly 'two-sided')[86] is established through the transaction in which both parties participate. Smith is now persuaded that this focus upon the defendant's 'involvement in the story'[87] is critical; according to Smith's revised account, 'participation' is established wherever the defendant requests performance, or accepts a transfer of rights 'with a genuine opportunity to reject'.[88]

The question in what follows is whether some version of this convergence thesis supplies the crucial missing step, which is an argument from equal freedom for requiring the payee to effect restitution of a mistaken payment. There are two focal points for constructing such an argument. The first concerns the claim that some performance is rendered, or transaction executed, 'for no reason'[89] (or no 'good',[90] 'justified',[91] or 'juristic'[92] reason). In Stevens' words:

> A defendant who receives a performance from a claimant does so either on the basis that it is made for some justified reason, or that it is not. If the recipient knows from the outset that there is no justifying reason for the performance (e.g. it is not a gift, payment of a debt owed etc.), then that recipient must make restitution. If the recipient initially believes that there is a good reason for the performance, or does not care, and the claimant can now show that there was not (e.g. shows that the payment was made under a mistake as to liability) then again the defendant must make restitution.[93]

It is not clear what 'on the basis that' in the first sentence of this passage adds. When I overpay my builder, her agent accepts and credits her account. She does not receive 'on the basis that' payment is made for any particular reason, or that it is made for *no* reason; she simply receives payment – via her agent who is authorised to that end. The binary framing works better if applied directly to those reasons which accompany performance: either I have a reason for payment (e.g. that payment was due, to make a gift, generate some obligation to effect counter-performance etc.), or I do not.

But how can the lack of a reason ground *any* response, let alone one that implicates my payee? We have seen that having a reason not to φ can justify doing whatever is next best to φ: the facts which

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86 See Weinrib, *The Idea of Private Law* (n 4) chapter 5 'Correlativity', and R Stevens, 'Private Law and the Form of Reasons' in J Goudkamp and A Robertson (eds) *Form and Substance in the Law of Obligations* (Hart Pub 2019) 130.
87 Smith, 'Restitution: A New Start?' (n 3) 115.
88 ibid.
89 Stevens, 'The Unjust Enrichment Disaster' (n 3) 582.
90 ibid 581.
91 ibid.
92 Weinrib, *The Idea of Private Law* (n 4) 198; Weinrib, *Corrective Justice* (n 4) 202.
93 Stevens, 'The Unjust Enrichment Disaster' (n 3) 581.

are reasons for me to go swimming may be reasons to go running if the pool is closed. But *not* having a reason to φ is just that—the absence of a reason. It cannot justify any action at all. So, let us rephrase 'performance for no reason' to 'reason not to perform': in *Builder*, I had a reason not to pay my builder more than I owed. That reason (e.g. to preserve my resources for future plans) may be a reason for me to seek repayment. But it is not a reason, without more, why my payee should have to comply with my request. A 'reason not to φ' is only a reason for someone other than the actor to perform reparative action if the original reason was a reason for *them* to act or abstain. So, we are back to square one: in *Builder*, we have a reason why I should seek £4500, but no a reason why my builder should pay it.

For those who endorse some version of the convergence thesis, the solution lies in isolating the payee's role in the impugned transaction—what she has *done* that justifies liability. In Smith's words, 'we should always be worried about the defendant's involvement in the story. People are responsible for things that they have done, not for things that have just happened to them'.[94] Thus, the focus shifts from loss and gain towards the payee's actions: she is no longer treated as a passive recipient of wealth,[95] but rather an active 'agent of the claimant's misfortune'.[96] Yet, we have already seen that the flaw in Smith's original thesis was not the lack of any story about what the payee had done (wrong); rather, it was the lack of any reason from equal freedom for requiring her to do something (effect restitution) *now*. That problem remains. Smith's revised argument is an inversion of the claim that there is a bilateral reason from mutual freedom for requiring the defendant to effect compensation: the claim is that the payee's involvement in the impugned transaction itself grounds a reason for restitution. But how? The mere fact that some intentional action affects another person (alters their legal or economic position, or both) hardly completes a justification for requiring the actor to pay the person affected.[97]

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[94] Smith, 'Restitution: A New Start?' (n 3) 115. See also Stevens, 'The Unjust Enrichment Disaster' (n 3) 581: 'Returning to the core case of the mistaken payment, the payment of a sum of money can be made only if accepted'. In personal correspondence, Rob has given me to believe that this emphasis on participation was crucial to his argument: 'If instead of focusing on the gains and losses, we focus on the payment, *that* is bilateral. C alone cannot make the payment to D, it requires D's co-operation. Similarly, D alone cannot extract a payment from C. C has to do it too. The payment is the doing of both of them. It is bilateral'.

[95] Weinrib, *Corrective Justice* (n 4) 9.

[96] To use to the language of D Klimchuk, 'The Structure and Content of the Right to Restitution for Unjust Enrichment' (2007) 57 University of Toronto Law Journal 661, 677.

[97] See e.g. P Watts, 'Unjust Enrichment' (2005) 121 LQR 163, 166: 'We frequently enrich one another in our daily interactions, just as we harm one another economically. There is no general duty to account for windfalls, just as there

For Smith and Stevens, it makes all the difference that the payee had 'an opportunity to refuse' (or 'choice to disclaim');[98] this provides a way of 'ensuring that the defendant's choices are consulted equally with the plaintiff's', and thus 'respecting [her] freedom'.[99] But it not at all obvious how such an opportunity, such as it is, demonstrates respect for freedom. That an individual chooses to *assume* (or gives it to be understood that she chooses to assume) a particular burden can justify imposing it upon her. Indeed, I argue in Part 3 that representations of this sort ground liability in certain cases of non-performance. But a mistaken payee clearly does nothing to make or manifest a choice of this kind. Nor can she: in most cases she lacks information material to the imposition of the burden to which such a choice refers. In these circumstances, restitution does not 'consult her choices equally'; to the contrary, it gives her no meaningful opportunity to accept or avoid the burden of repayment.

Weinrib's argument from acceptance deals with this idea head-on. For Weinrib, the defendant-sided condition for restitution 'consists in accepting the benefit *as non-gratuitously given*';[100] like Kant's second limb of private right (contract), this establishes 'the unity of the parties' wills with respect to the non-gratuitousness of the original transfer',[101] by demonstrating that the defendant assumed the burden of an interpersonal duty to pay. But this analogy bears closer consideration. For Kant, contracts entail coercion—an 'entitlement to have another person's action subject to your choice'.[102] That entitlement is permissible just when the contract can be viewed as a prior 'act of the united choice of two persons'.[103] Thus, choice can ground duties to pay—not 'by the *separate* will of either but only by

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is no general duty to compensate for economic harm'. See also P Watts, 'Unjust enrichment—The potion that induces well-meaning sloppiness of thought', [2016] *Current Legal Problems* 289, 292: 'mere preservation of our wealth against erosion by others has not been a protected interest'. To the contrary, this is precisely the sort of behaviour that the common law encourages. In *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1, at [142] Lord Nicholls explained that, 'Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition'._

[98] Smith 'Restitution: A New Start?' (n 3) 115.

[99] ibid. See also Stevens, 'The Unjust Enrichment Disaster' (n 3) 581 (using the language of Kant's Humanity Formula): 'a performance rendered by the claimant must have been accepted by the defendant... This meets the objection that the defendant is not responsible for the state of affairs that requires correction. It is not the case, and cannot be, that the justification for recovery is wholly 'claimant sided'. Such an approach would be immoral. We would be using the defendant as a means to an end, requiring them to correct an injustice that was not of their doing'.

[100] Weinrib, *Corrective Justice* (n 4) 205.

[101] ibid 225.

[102] Ripstein, *Force and Freedom* (n 45) 365.

[103] Kant, *Metaphysics of Morals* (n 41) 6:271; GP Fletcher, *Law and Morality: A Kantian Perspective* (1987)87 Colum L Rev 533, 547: 'a 'common will' is required for each to transfer his power of choice to the other'.

the *united will* of both'.[104] For Weinrib, 'acceptance' performs an equivalent role in unjust enrichment: it demonstrates that 'by compelling a retransfer of the value, the law is not acting inconsistently with the defendant's will'.[105] Yet, Weinrib is clear that 'acceptance here refers not to an express affirmation by the defendant but to the integration of the benefit into the defendant's purposes'.[106] We can, he says, 'impute' the mental element ('awareness that any benefit received from another was not intended to be given gratuitously')[107] and we can do so wherever 'the law can reasonably regard the beneficial transfer as something that forwards or accords with the defendant's projects'.[108] It bears emphasis that this is imputation writ large, not merely a presumption or inference from the facts; it applies where the payee neither knows, nor has any means of knowing, that the benefit was given 'non-gratuitously'. Imputation thus strips acceptance of the trappings of agreement, representation or actual knowledge of any condition attached to payment.[109] And once 'acceptance' is watered down in this way we cannot use it to derive obligational force from mistaken payment in a manner compatible with Kantian Right.

By undermining Kant's emphasis on mutuality—by insisting that 'acceptance' is relevant *even if* the payee does not and cannot choose whether to assume the burden of repayment—the convergence thesis fails to reconcile the restitutionary response to mistaken payment with the commitment to equal freedom embedded by the UPR. To the contrary, it treats the payee as someone whose choices may be subordinated to those of her payor.[110]

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[104] ibid, emphasis original.

[105] Weinrib, *Corrective Justice* (n 4) 211. See also Stevens, 'The Unjust Enrichment Disaster' (n 3) 581.

[106] ibid 204.

[107] ibid 208ff.

[108] ibid.

[109] Weinrib presents 'acceptance' variously as benefit (whatever 'forwards or accords with the defendant's projects'), or some participative act of taking ('integration of the benefit into the defendant's purposes'): Weinrib, *Corrective Justice* (n 4) 208; 204. For Stevens, too, it is relevant merely that the payee (or her agent) takes whatever steps are necessary to effect payment – absent knowledge of the transactional defect.

[110] Kantian freedom is freedom 'to use the means that you have to set and pursue whatever purposes you see fit, restricted only by the entitlement of others to do the same with their means' Ripstein, *Force and Freedom* (n 45) 63.

3. *Contractualism*

A. *Introduction*

The question at each stage of the private law enquiry, whether we are trying to justify duties to perform specific acts, or compensatory liabilities to remedy past failures, is: 'can we justify imposing this particular burden on would-be occupants of the position specified?' More precisely, for our purposes: 'can we justify imposing upon payees the burden of repayment, if it turns out that their payor was operating under some causative mistake?'. It is extremely difficult to source such a justification from equal freedom. Yet, there is, I argue, an account that centres the Kantian ideal of respect for rational agency—which allows us to broaden our focus from mutual freedom to other concerns, but which does not override individual reasons for action in favour of external ends. In what follows, I endorse a contractualist justification for restitution: a private law rule is just if and because it is one that everyone could rationally choose, if we suppose that each person has the power to choose a law to govern situations of this kind; everyone could rationally choose a rule placing the burden of risk for mistake with payees, provided that any such payee is not made worse off than she was prior to the impugned transaction.

B. *Contractualism and Consent*

The label 'contractualism' is most often associated with Scanlon's 1998 treatise *What We Owe to Each Other*,[111] which departs from an intuitive idea: we should be motivated and able to justify our actions to those whom they affect on grounds that we 'could expect them to accept'.[112] Contractualism shares a common root with theories of justice: it seeks to resolve questions that arise wherever a particular choice about how to act has implications for those other than the chooser, about what sort of distribution of benefits and burdens is acceptable.[113] And it aims to do so in a way that complies with

[111] Scanlon, *What We Owe to Each Other* (n 6).
[112] ibid 4.
[113] Without discriminating between instances of 'allocation back' and 'allocation *tout court*', unlike the Aristotelian distinction between corrective and distributive justice; see further Gardner, 'What is Tort Law for? Part 1. The Place

the Kantian prohibition on treating people 'as mere means', by specifying 'moral limits on the ways that individuals can be treated for the sake of benefits to others'.[114] Thus, the notion of each individual as a rational agent occupies centre stage: justifiable action is action allowed by justifiable principles; justifiable principles are those which those affected cannot reasonably reject.[115]

Of course, the fact that there are reasons to perform a particular action, or conclusive reasons to do so, is not on its own a justification for legal coercion.[116] For contractualism, the connection between morality and law is methodological: the moral framework is applied directly to matters of legal right and duty, but those rules which would deploy State coercion must also pass the contractualist test.[117] They must be rules that 'no one could reasonably reject as a basis for informed, unforced general agreement',[118] and the *form* of these rules (authoritative State mandates) must be one that no one could reasonably reject. Thus, a particular use of the coercive power of the State is morally permissible if 'a principle licensing this use is one that no one, suitably motivated, could reasonably reject'.[119] The 'suitable motivation' is just this—motivation to find principles for the general regulation of behaviour that others could not reasonably reject.[120] So, for Scanlon, a just private law is a law that could not reasonably be rejected by anyone with the commitment to identifying general laws to govern situations of the kind specified.[121] Scanlon applies this technique to justify contractual duties, and the expectation measure of damages for breach of contract; he highlights in so doing the additional steps necessary to justify legal intervention to support duties to perform actions that one might otherwise be morally bound to perform.[122] Our task is to consider whether contractualism justifies restitution in cases like *Builder*, and if so what the boundaries of such a principle might be.

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of Corrective Justice' (n 7). In 'Contractualism and Justification' (NYU working paper, unpub 1) Scanlon notes that his contractualist theory was influenced by Rawls' earlier attempts to develop a theory of justice as fairness: see e.g. J Rawls, *A Theory of Justice* (HUP 1971).

114 TM Scanlon, 'Contractualism and Justification' (NYU working paper, unpub 1) 4.

115 ibid 2: 'contractualism makes the rightness of an action or policy depend on whether it would be permitted by justifiable principles. And it makes the justifiability of principles depend on the reasons of certain kinds that individuals have to accept or reject them'.

116 Scanlon, 'Promises and Contracts' (n 8) 99.

117 ibid 100.

118 Scanlon, *What We Owe to Each Other* (n 6) 153.

119 Scanlon, 'Promises and Contracts' (n 8) 99.

120 Scanlon, *What We Owe to Each Other* (n 6) 5.

121 Scanlon, 'Promises and Contracts' (n 8) 100, 119.

122 See generally Scanlon, 'Promises and Contracts' (n 8).

Scanlon's contractualism does not suppose that people *have* actually chosen particular rules; nor does it make any claims about what people would do, if given the chance. This might seem counterintuitive: what use is the search for a 'general will' regarding principles of allocation if it does not reflect actual choice? Yet, it should be clear that choice is not *always* morally significant when we seek to determine how we ought to act: it cannot be that we must let others choose 'whether or not we give their student essays low grades… report their crimes, or vote against them in some election'.[123] Nor is choice a useful criterion for determining the moral validity of particular laws: the democratic ideal is not participation in all acts of State, but rather the exercise of choice with respect to those who would act on our behalf;[124] that citizens did or would vote for a law disenfranchising a sector of the population does not warrant the conclusion that that law is just. If contractualism is to help us justify rules of action, it must help us to come up with rules that protect consent just when consent matters.

One candidate lies in the notion of 'possible consent': perhaps a just law is a law to which all citizens *could* consent, where 'could' reflects some sort of limitation derived from one's reasons for action.[125] Kant runs an argument of this sort for the basis of State power—the social contract as an idea of reason specifying conditions for the legitimacy of a republican constitution that upholds equal freedom through law,[126] which binds 'every legislator to give his laws in such a way that they could have arisen from the united will of a whole people'.[127] Kant explicitly rejects the notion of *actual* consent as the relevant criterion,[128] and does not use hypothetical consent. He argues: 'If the law is such that a whole people could not *possibly* agree to it, it is unjust [nicht gerecht]; but if it is at least *possible* that a people could agree to it, it is our duty to consider the law as just [gerecht], even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were

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123 Parfit: *On What Matters* (n 6) 180; Scanlon, *What We Owe to Each Other* (n 6) 155.

124 As O'Neill has put it, 'If we had to consent to every particular act of state for it to be legitimate, the central purpose of the social contract tradition – the justification of government – would be undermined'. Thus, 'Clearly, actual consent is not always needed: it is no more necessary than it is sufficient for justification or just action' O O'Neill, 'Kant and the Social Contract Tradition' in E Ellis (ed) *Kant's Political Theory: Interpretations and Applications* (Penn State University Press 2012) 28.

125 ibid.

126 ibid 31 and I Kant, *Theory and Practice* – the short title for 'On the Common Saying: "That May be Correct in Theory, but It Is of No Use in Practice" (1793). In MJ Gregor (ed tr) *Practical Philosophy* (CUP 1996) 8:297.

127 I Kant, *Theory and Practice* in MJ Gregor (ed tr) *Practical Philosophy* (CUP 1996) 8:297.

128 ibid 8:297.

consulted.'[129] Public right obtains, and entitles officials to make arrangements for citizens, when the arrangements that officials make are arrangements that citizens could have consented to.[130]

O'Neill interprets these claims as another way of specifying the conditions set out by the UPR: the UPR 'requires the rejection of any basic maxims for structuring the domain of the external use of freedom that *could not* be consented to or adopted by all'.[131] Thus, a given framework must 'require the freedom of individuals, without which the possibility of genuine consent or dissent is undermined'.[132] Presented thus, it is not at all clear what 'consent' adds: securing freedom *itself* might be a worthwhile aim for a particular public arrangement; it is less clear why that arrangement should aim to secure the freedom necessary to consent to the mandates by which that freedom is secured (irrespective of whether anyone or everyone *would* consent, given certain actual or idealised conditions).

But there is another way of interpreting Kant's remarks about possible consent. Immediately following the passage quoted above, Kant gives the following example:

> If, for example, a war tax were proportionately imposed on all subjects, they could not claim... that it is unjust because the war is in their opinion unnecessary.... But if certain estate owners were oppressed with levies for such a war, while others of the same class were exempted, it is easily seen that a whole people could never agree to a law of this kind, and is entitled to make representations against it, since an unequal distribution of burdens can never be considered just.[133]

Consent, here, performs a sifting role: certain objections are admissible (those informed by reasons which go to the unevenness of a given distribution of burdens) whilst others are not (those informed by reasons which concern the rightness of some executive disbursement, equally borne). On this view, Kant's argument offers something beyond baseline (negative) conditions for consent: it asks us to consider the *reasons that people have* to accept or reject particular rules; people have reasons to reject rules that impose a special burden upon (or give a special privilege to) a certain sector of the population; people do not have reasons to reject rules that distribute burdens and privileges evenly. The possibility

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[129] ibid. Thus, the test is 'whether the law *could* have arisen from the agreement of all' ibid 3:302. In the Naturrecht Feyerabend lectures, Kant argues that 'one must examine whether the law could have arisen from the agreement of all: if so, then the law is right' (27:1382).

[130] Ripstein, *Force and Freedom* (n 45) 203; 214.

[131] O O'Neill, 'Kant and the Social Contract Tradition' in E Ellis (ed) *Kant's Political Theory: Interpretations and Applications* (Penn State University Press 2012) 38.

[132] ibid 33.

[133] I Kant, *Theory and Practice* in MJ Gregor (ed tr) *Practical Philosophy* (CUP 1996) 8:297.

of consent becomes the possibility of rational consent, where 'rational' means 'the reasons that people have'; the reasons that people have are derived from the distribution of benefits and burdens.

This is the central thrust of Scanlonian contractualism: Scanlon does not focus on what people have actually agreed to, what they would agree to (given certain actual or idealised conditions), or what (being free) they are not disabled from agreeing to. Rather, the goal is to identify laws that citizens do not have (particular kinds of) reasons to reject—which reasons are derived from the distribution of benefits and burdens associated with that law. In this way, contractualism fulfils the Kantian mandate to treat individuals as rational agents, and it does so directly: rather than treating individuals as beings who must be afforded certain *conditions* for rational agency (freedom from interference), it treats individuals as rational agents immediately engaged in the process of shaping their actions in line with the moral significance of features of the world around them.

I refine the contractualist formula below. First, I shall deal with one possible objection. I argued at the outset to this section that, if the contractualist technique is to work, it must help us to come up with rules that protect consent where consent matters. It might seem that the notion of 'rational consent' or reasonable non-rejectability fails to do this: a rapist might claim that her victim *could rationally have* consented to intercourse. But even if the victim could rationally have consented to intercourse, she could not rationally consent to her actual consent being ignored—so that the lack of her actual consent remains an impediment to the conclusion that the relevant act was just.[134] Thus, the rational consent principle does not ignore the moral importance of actual consent.

Yet, this notion of rational consent or reasonable non-rejectability requires more work, if it is to suffice as a master argument for establishing the moral permissibility of particular laws. The goal of what follows is to make the case for a particular contractualist test, which is this: is this law one that everyone could rationally choose, if we suppose that each person has the power to choose a law to govern situations of this kind?

[134] Parfit: *On What Matters* (n 6) 191. Nor could she rationally consent to a rule that ignored her consent on a systemic basis.

C. *Refining the Formula: Reasonable Non-Rejectability and Rational Choice*

For Scanlon, an act is wrong 'if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced general agreement',[135] if he or she had the proper motivation.[136] The enquiry into whether someone *could* reasonably reject a principle has the following features: (a) it is agent relative,[137] in that the only permissible objections are those based on the principle's impact on one's *own* interests, and the only relevant addressees are those whom the principle would affect);[138] (b) it is limited to information actually available to that individual;[139] and (c) it has 'moral content', so that certain rational objections are not Scanlonian-reasonable.[140] In particular, if a principle imposes a burden (*b*1) on me, but every alternative imposes a greater burden (*b*2) on someone else, then *b*1 does not give me a reason to reject the principle.[141]

Parfit proposes a different version of the formula, which he calls 'Kantian Contractualism'.[142] The relevant question is whether the principle permitting or prohibiting the act in question is one that everyone could rationally (has sufficient reason to) choose, if we suppose that each person has the power to choose which principles will be accepted by everyone. The enquiry into whether someone has sufficient reason to choose a principle has the following features: (a) it includes reasons that the chooser has to want someone else's interests to be promoted, which do not stem from the chooser's

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135 Scanlon, *What We Owe to Each Other* (n 6) 153.

136 To come up with principles for the general regulation of behaviour that no one could reasonably reject: ibid 4.

137 Here, I use the term in a broader sense than Raz in Raz, *From Normativity to Responsibility* (n 50) 203, specifically to refer to considerations that impact the individual concerned.

138 See further TM Scanlon 'How I am not a Kantian' in D Parfit and S Scheffler (eds), *On What Matters: Volume Two* (OUP 2011).

139 Not necessarily to that individual's beliefs: the relevant thought-experiment may also be 'urging him to take into account facts or reasons that he is presently ignoring' Scanlon, *What We Owe to Each Other* (n 6). But it must be information actually available to that person, which may be 'less than perfect' 32.

140 Scanlon, *What We Owe to Each Other* (n 6) 194–195. See also See T Nagel, 'One-to-One', 20 London Review of Books 4 February 1999.

141 E Ashford and T Mulgan, 'Contractualism', *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition),

142 Parfit: *On What Matters* (n 6) 355: 'According to the Kantian Contractualist Formula: Everyone ought to follow the principles whose universal acceptance everyone could rationally will, or choose'.

own interests (which Parfit calls 'impartial reasons');[143] and (b) it includes facts of which one may not actually be aware.[144] It introduces no additional threshold criteria for the eligibility of practical reasons.

Let us see how these differences work in practice. Take the following example, which I adapt from Volume One of Parfit's *On What Matters*:[145]

> *Lifeboat*: I am stranded on one rock, and five people are stranded on another. Before the rising tide covers both rocks, you could use a lifeboat to save either me or the five, but not both. My rock is nearer, though you could reach either. All stranded persons are strangers (to you and to each other), and are similar in all relevant ways.

Let us compare two principles which might govern your behaviour:

> *Numbers Principle*: when we could save either of two groups of strangers, who are in all relevant ways similar, we ought to save the group that contains more people.
>
> *Nearness Principle*: when we could save either of two groups of strangers, who are in all relevant ways similar, we ought to save the group that is nearer to us.

On the Scanlonian formula, I cannot offer 'others will die' as a reason for rejecting *Nearness Principle*. But neither can I reject principles for the reason that they will have a negative effect on me, when every alternative will have a more serious effect on other people. So, I cannot offer 'I will die' as a reason for rejecting *Numbers Principle*. I cannot reasonably reject either principle. By contrast, the five others (using the same technique) can only reasonably reject *Nearness Principle*.[146]

Kantian Contractualism admits impartial reasons: I have reasons to care about whether others live or die, and am I not rationally required to give stronger priority to my own life.[147] So, I can offer 'others will be saved' as a reason for choosing *Numbers Principle*. Or, I can offer 'I will be saved' as a reason for choosing *Nearness Principle*. I could rationally choose either *Numbers Principle* or *Nearness Principle*. We then pick whichever principle that others could rationally choose; adopting the same technique, the five others could only rationally choose *Numbers Principle*.[148]

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[143] ibid 372. Impartial reasons are reasons apply to all of us whatever our position and inclination, and include reasons to want someone else's interests to be protected or promoted, which do not stem from my own interests.
[144] ibid 379.
[145] ibid 380ff.
[146] They can offer 'I and my companions will die' as a reason for rejecting *Nearness Principle*.
[147] ibid 382.
[148] If they are to accord due weight to each person's life. This, of course, raises questions of aggregation: see further Raz, *From Normativity to Responsibility* (n 50) 'Numbers: With and Without Contractualism' 193ff.

I will suggest three reasons for preferring the Kantian route. First, Scanlonian contractualism is neither sanguine nor collaborative: the goal is not to search for principles to which individuals could lend their enthusiastic support, but rather to identify those principles which do not prompt objections of the requisite kind. And though the formula invites a series of thought-experiments in which those affected are supposed to be motivated to devise general principles, those individuals are also supposed to be engaged in devising objections—which objections, to be reasonable, must be prudential.

This brings us to the second point, which concerns impartial reasons. On the Scanlonian test, I cannot reject a principle for the reason that it causes suffering or harm to others; it follows that my view is irrelevant, if I do not fall within the category of persons who could bear the burden assigned by that principle.[149] But why? Given everything that I know about the world around me, I could rationally reject *Nearness Principle*, and could do so for the reason 'many others will die'. That sort of objection is, in ordinary usage of the term, reasonable.[150] Moreover, we have reasons to care about the distribution of benefits and burdens entailed by principles that cannot affect our interests;[151] someone standing on dry land, to whom all those in peril are strangers, has reasons to reject *Nearness Principle*.

Finally, the enquiry is restricted to information actually available to the addressee. But this does not follow from the mode or motivation of enquiry: it is perfectly possible to justify principles in terms of information that the addressee does not presently have; if they are reasonable, they will not reject a robust and comprehensible justification constructed from facts of which they were not aware.

The search for principles that everyone has reasons to choose better reflects a shared commitment to each other's rational agency. It encompasses everyone, admits all rational choices and the information necessary to ground reasons of which the reason-giver may not presently be aware. In what follows, I deploy the following test: is this law one that everyone could rationally choose, if we imagine that each person has the power to choose which law will govern situations of this kind?

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[149] See further E Voyaikis, 'The significance of choice in private law: a reply to Priel, Thomas and Dagan' (2019) 10 Jurisprudence 434, 439: 'the case for imposition of substantive responsibilities must be addressed to those who get to bear them, or are otherwise adversely affected by their incidence, not to anyone else'.

[150] Indeed, it is the objection I *would* give, if asked.

[151] Because, for instance, we cannot engage in the activity regulated by the relevant principle.

D. *Contractualism and Mistaken Payment*

Let us compare two straightforward candidate principles for dealing with our hypothetical:

> *Builder:* a builder has recently completed some repair work to the roof of my house, for which I owe her £500. In the course of making payment via my online banking app, I accidentally enter an extra digit. My bank executes the resulting payment instruction, and £5000 is transferred from my account to hers.

Principle R insists that payees must refund money that is paid to them by mistake; *Principle NR*, by contrast, allows payees to keep money that is paid to them by mistake. Which is better?

We have reasons to value the ability to make and receive payments. Those activities involve risks, one of which *Builder* describes: I may accidentally overpay, or may enter the incorrect recipient in an online transfer. Those risks are commonplace, and may be serious. Everyone has reason to choose a rule that allows people to make payments without these risks, and the concerns that accompany them – what McBride calls a 'reassurance' argument.[152] And would-be payors have prudential reasons to choose a principle placing the burden of risk for mistaken payment with their counterparties. Thus, there is a prima facie case for *Principle R*, against *Principle NR*.

But any potential payor is *also* a potential payee. And at first glance, the costs that *Principle R* impose on my payee in *Builder* are identical to those which *Principle NR* impose on me – exactly £4500. Thus, it might seem that those who make and receive payments have no reason to choose any principle that disrupts the default risk-profile of transactions. But this is to view each payment apart from the context in which people hold and spend money. The amount of money at our disposal is one of several key assumptions that underpins the choices that we make—about our jobs, homes and relationships. If that assumption turns out to be false, the impact on our lives may be severe; certainly, it is greater

[152] McBride makes the argument that restitution of mistaken payments may perform a 'reassurance' function in the context of constituting a private law that rests on a commitment to human flourishing: see McBride *The Humanity of Private Law I* (Hart Pub, 2018) 191. As McBride puts it, 'by assuring the debtor that should he make a mistake in paying his debts he will be able (other things being equal) to get the value of his money back, the law encourages him to pay his debts'. He expressed it thus in a paper presented at the Obligations XIII Conference (2016) in Cambridge ('Restitution and Unjust Enrichment: The Coming Counter-Revolution'), and expands on this idea of 'confidence' or 'reassurance' in *The Humanity of Private Law I* (Hart Pub, 2018) 191. In his unpublished article, McBride argues that the confidence theory applies and justifies restitution where '(1) C was engaged in some valuable activity A, (2) as a result of which, D acquired from C something of value V, (3) but the circumstances in which D acquired V are such that if C were not able to recover the value of V from D, people would be discouraged from engaging in activity A'.

than the impact of giving up an unplanned-for ('windfall') gain.[153] Thus, everyone has reason to choose *Principle R*—which requires payees to assume the burden of risk of mistaken payment, and allows them to claim the upside of that protection for any transaction in which they are situated as payor.

But *Principle R* does not exhaust the possibilities for eligible principles, and the payee is not the only possible target for mechanisms that ameliorate risk associated with mistaken payment.[154] Let us compare an alternative suggestion, which 'socialises' the parties' loss, minimising risk in a different way:[155]

> *Principle NR-S*: payees need not refund money that is paid to them by mistake. The mistaken payor gets to claim compensation from a pot of public funds, maintained by contributions from everyone.

Principle NR-S doubles up as a public insurance scheme and an odd sort of lottery: we must all pay a small sum to protect ourselves from losing out in the event of our mistakenly paying money to another, and to purchase the chance of being allowed to keep any money that someone mistakenly pays to us. Even if we leave to one side the logistical problems of such a scheme, *Principle NR-S* does not seem to be the kind of principle to which *everyone* has reason to subscribe. 'Small sum' is a relative term; for many, the regular deprivation of an insurance premium will be particularly, perhaps intolerably, burdensome. An individual could not rationally choose a principle that would remove their ability to afford basic necessities, unless that principle was the only one available to protect them (or others) from some greater harm. We have seen that it is not.[156]

It also matters whether individuals can avoid the burden that any such principle entails. We have reason to take insurance for risky activities such as driving; indeed, there are justifications for mandating insurance, and doing so even if those who would drive are not financially well-situated to

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[153] This supposes that we view contractualism as (at least in part) committed to an *ex ante* enquiry. For an argument that this is the correct approach, see A James, 'Contractualism's (not so) slippery slope' (2012) 18 Legal Theory 263.

[154] A principle of this sort is eligible for contractualist consideration: both reasons-continuity and contractualism admit the sort of general risk-allocation questions that are supposedly the province of distributive justice.

[155] This argument appears in the earlier, unpublished version of F Wilmot-Smith, 'Should the Payee Pay? (2017) 37 OJLS 844, presented at the Obligations VII conference at Hong Kong University in July 2014, 13. If restitution were sought and paid from a State-run insurance pool, Wilmot-Smith argues, the parties would never have to give up a gain (small risk of a large harm) but would instead have to pay a 'minuscule insurance sum' (certainty of a very small harm).

[156] The same reason is a reason to reject a principle along the lines of *Principle R*, but which allows the payee to keep 'small' sums of money. Someone who was particularly poorly off could rationally object to a principle that either: (i) demanded their participation in an 'insurance scheme' for those who effect mistaken payments; or (ii) did not allow them to recover sums of money that most people (but not them) would regard as insignificant.

bear the burden of premiums. But that burden can be avoided by opting not to keep a car on the road. By contrast, even if the burden of 'mistaken payment insurance' is limited to those who do in fact make and receive payments, those activities are not of the sort that people can be expected to avoid. Thus, *Principle NR-S* is not a principle that everyone (whatever their means) has reason to choose.

But there are also reasons to doubt that *Principle R* passes the Kantian-Contractualist test. Above, I argued that the impact of losing money around which one has shaped one's plans is greater than the impact of losing a windfall gain; this was part of my case against *Principle NR*. And in (provisionally) endorsing *Principle R*, I assumed that the payee had *not* incorporated the money into her plans. But this assumption will often prove false: a mistake may only come to light years after it occurred,[157] by which time the payee (unless she is very wealthy, unaware that the funds are available to her, or otherwise doubts her security of receipt) usually *will* have adjusted her life in various ways to accommodate the payment. And, of course, this is precisely the sort of reliance that we encourage, so that currency can be free flowing;[158] this is the flipside of the argument from confidence in payment.

So, our principle of restitution must be revised to ensure that it does not frustrate the plans of those who receive mistaken payments, or undermine confidence in security of receipt:

> *Principle R2*: a mistaken payee must repay money paid to her, to the extent that so doing will not cause her to be worse off than she was prior to payment.[159]

These goals are incorporated within the positive law of unjust enrichment, by the so-called 'defence' of change of position. Change of position was openly recognised by the House of Lords in 1988 in *Lipkin Gorman v Karpnale*,[160] in which Lord Goff described its rationale as follows: 'where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution'.[161] There is a strong case for thinking that *Principle R2*, which encompasses change of position, exceeds the threshold set by Kantian-Contractualism: everyone could rationally choose a

[157] See e.g. *Prudential v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39.
[158] See e.g. *Miller v Race* (1758) 1 Burr 452; 97 ER 398.
[159] I take it as implicit, and do not have space to explore, the idea that this principle would need additional nuance if it were not to extend to those who make some deliberate disbursement, when aware of another's claim restitution.
[160] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.
[161] ibid 578.

principle that protects would-be payors from the (potentially-serious) consequences of easily-made mistakes, and would-be payees from the (potentially-serious) consequences of restitution.

Cases in which the relevant mistake comes to light at some point after payment raise a related question: should our principle require payees to hand over any interest gain actually or hypothetically accrued over the period between mistaken payment and restitution? I do not think that this question can be disposed of by characterising interest as the 'use' of money,[162] or payment as the impugned 'performance', to be distinguished from the 'opportunity to use' money paid.[163] Nor do I think it can be dealt with by considering whether duty to repay (a debt) arises at the moment of mistaken payment,[164] without considering the reason why any such duty might arise.[165] The argument for thinking that a principle capturing interest fails the Kantian-Contractualist test reflects the discussion of change of position, above: if the reason for choosing *Principle R2* depends on the greater harm associated with losing money upon which one has built plans, that reason militates against a principle mandating that those who invest mistaken payments must cough up their gain. This reasoning *also* extends to traceable gains of other forms.[166] So, in *Principle R2* 'the money' should be understood to refer to the capital sum alone:

> *Principle R2*: a mistaken payee must repay the capital sum paid to her, to the extent that so doing will not cause her to be worse off than she was prior to payment.[167]

Restitution should not encompass compound or simple interest, or traceable gains of other forms.[168]

Everyone could rationally choose a law requiring mistaken payees to effect restitution. Most of us have reasons to value the ability to make and receive payments; that ability demands some risk-allocating principle, which ensures that a simple mistake cannot result in a significant loss; everyone could rationally choose a law placing the burden of risk for mistake with would-be payees, if that law

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[162] See e.g. *Sempra Metals v IRC* [2007] UKHL 34.
[163] Stevens, 'The Unjust Enrichment Disaster' (n 3) 597. That reasoning was cited with approval by Lord Reed in *Prudential v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39 [70]–[71].
[164] *Prudential v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39 [77].
[165] See further T Cutts, 'Use Value and Interest in Unjust Enrichment' (2019) Lloyd's Maritime and Commercial Law Quarterly, 410.
[166] Such as equity investments (e.g. *Trustee of FC Jones v Jones* [1997] Ch 159) and gambling profits.
[167] Other questions arise, such as whether restitution should arise in the context of a payment made by mistake, where there was otherwise a duty to pay. Those questions are important, but I cannot consider them here.
[168] This claim is limited to the context of restitution for mistake; there may be different considerations which arise in the context of a demand for the recovery of unlawfully demanded tax, where the claim is not based on mistake.

builds in measures to ensure that restitution will not cause an innocent payee to be worse off than she was prior to payment, and allows her to keep any investment gains that she has made on the basis of a reasonable expectation of security of receipt.

E. *Contractualism and Representation*

The rationale for *Principle R2* does not encompass very many other cases that fall within the scope of unjust enrichment, as it is traditionally understood. Take the following two examples:

> *Gardener Unpaid*: Ben asks Andrea, a gardener, to remove some invasive knotweed from his garden. When she enquires about pay, he replies, 'I'm sure we can figure out the details—how many hours, pay etc'. Removing the weeds takes Andrea two weeks of full-time work. Ben observes the work being done, but refuses to pay.
>
> *Gardener Paid*: Ben asks Andrea, a gardener, to remove some invasive knotweed. When she enquires about pay, he gives her £1000, saying 'I'm sure we can figure out the details—how many hours, pay etc'. Andrea accepts the money, but refuses to make any effort toward removing the weeds.

The contractualist justification for providing monetary relief to Andrea in *Gardener Unpaid* and to Ben in *Gardener Paid* is of a different sort from the contractualist case for restitution of mistaken payments, and it concerns the effect of each representation on the party to whom the representation is made.

People have reasons to want to be able to make and rely upon assurances regarding future performance,[169] which include, but are not limited to, the reasons they have for wanting to avoid loss suffered in reliance.[170] And a promise can provide assurance to the extent that the promisee believes that the promisor will in fact be moved to perform.[171] Thus, there is value to a principle that requires a promisor to perform, or match that expectation monetarily. But because the burdens associated with such a principle are significant, particular steps must be made before those burdens can be triggered: *inter alia*, the parties must indicate that they understand themselves to be undertaking a legal responsibility; they must agree upon particular terms for performance.

[169] Scanlon, 'Promises and Contracts' (n 8) 95 and 108.
[170] ibid 103.
[171] ibid 104.

Our cases do not meet the threshold of contractual liability, and the case for recompense is a more straightforward one—which does not depend upon the value of particular social practices, and which can be made by direct reference to the burdens associated with reliance. When we decide how to use our resources, we have reasons not to want the plans co-opted by others.[172] Thus, we have reasons to choose a principle that will provide some protection against the impact of this sort of (overt or inadvertent) manipulation. So, let us formulate the following principle:

> *Principle E:* If one person (R) intentionally or negligently leads another person (R-ee) to form the expectation that R will φ, and R has reason to believe that R-ee will suffer loss in consequence of that expectation if R does not φ, then R must take reasonable steps to prevent or remedy R's loss.[173]

Principle E demands that the representor either perform the anticipated act, disabuse the service-provider of her expectation, or (adopting the next-best course of action) restore her to the *status quo ante*, which includes compensating her for any missed opportunity to bargain. If reliance has involved the transfer of specific rights, it may *also* involve a duty to retransfer those rights.

This line of argument is not intended to give an exhaustive account of the remedial response to cases other than mistaken payment which are typically dealt with under the rubric of unjust enrichment. It is merely intended to show that the contractualist case for restitution of mistaken payments does not support the unified approach to unjust enrichment, outlined at the outset to this article. The contractualist case for restitution of mistaken payments is a different case from the contractualist case for requiring an individual to remedy the loss suffered by another in reliance on one's expectation of future performance, in circumstances that do not meet the preconditions of contractual bargains. This is not to support calls for a distinction between the forms of enrichment (e.g 'property' versus 'services');[174] indeed, I do not think that this distinction can be sustained by

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[172] ibid 89.

[173] Based on ibid 91 *Principle M*.

[174] See e.g. SJ Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 Modern Law Review 603; P Jaffey, 'Two Theories of Unjust Enrichment' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart Pub 2004); A Botterell, 'Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 Canadian Journal of Law & Jurisprudence 275; J Nadler, 'What Right does Unjust Enrichment Protect?' (2008) 28 OJLS 245; B. McFarlane, 'Unjust Enrichment, Rights and Value' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Pub 2012); D Priel, 'The Justice in Unjust Enrichment' (2014) 51 Osgoode Hall Law Journal 813, 837–842; P Watts, 'Unjust enrichment—The potion that induces well-meaning sloppiness of thought', [2016] *Current Legal Problems* 289; C Webb, *Reasons and Restitution: A Theory of Unjust Enrichment* (OUP 2016).

reference to a differential impact on the claimant's ongoing freedom of action.[175] Rather it is to distinguish between reasons for restitution—on the one hand, protecting individuals against certain risks associated with payment, thereby facilitating a valuable practice; on the other, preventing individuals from co-opting one another's plans by reneging on representations that are calculated or likely to induce reliance.

4. *Conclusion*

The justification for restitution of mistaken payments for which I have argued is this: everyone has sufficient reason to choose a principle that requires any would-be payee to shoulder the risk of that the payor will be labouring under some causative mistake, which allows each person to claim its upside whenever they find themselves in the position of payor. This approach takes seriously the Kantian commitment to specifying rules that are properly responsive to each person's status as a rational agent, capable of identifying and weighing reasons and guiding action in conformity with that assessment. Kantian Contractualism does not merely specify baseline conditions for rational agency; it requires individual laws to align with rational choice. This is 'what we owe to each other': when our actions will affect others, we must act in a manner that accords proper status to their rational agency. General *laws* of action, backed by the coercive power of the State, should be ones that we can all rationally choose.

[175] C Webb, *Reasons and Restitution: A Theory of Unjust Enrichment* (OUP 2016) 104. See generally F Wilmot-Smith, 'Reasons? For Restitution' (2016) 79 MLR 1116, 1133–1134.