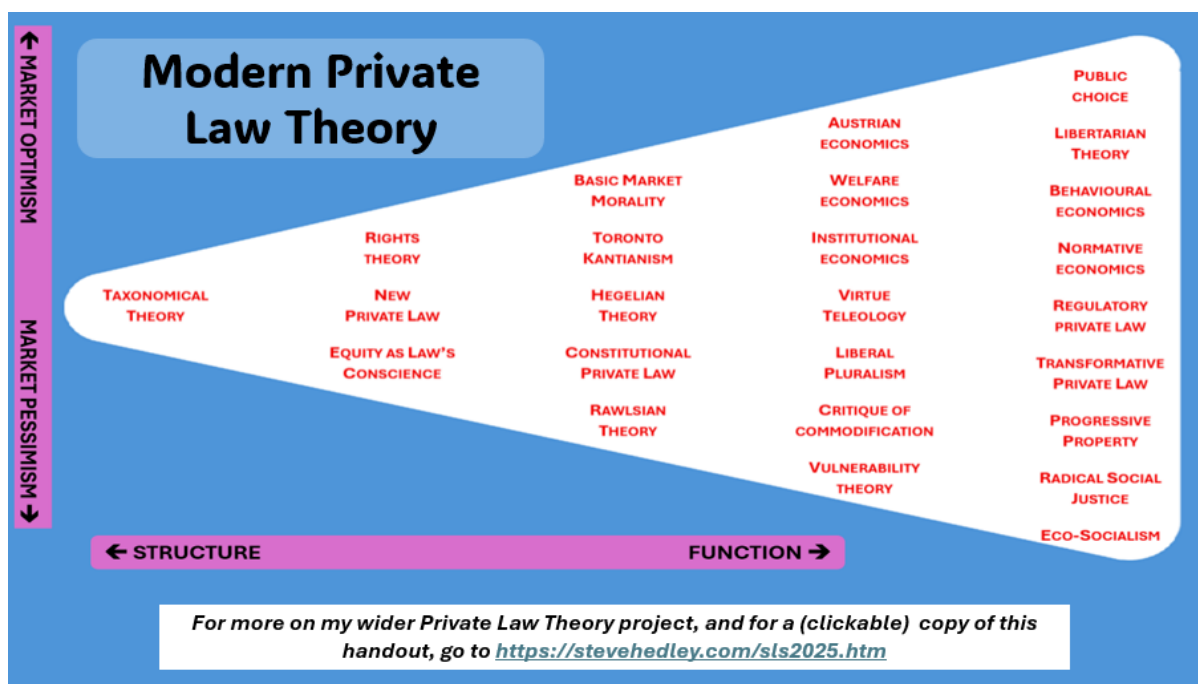


# ‘What is Unjust Enrichment for?’

(SLS Remedies and Restitution section, 4 September 2025)

‘Vous avez beau ne pas vous occuper de politique, la politique s'occupe de vous tout de même’



Yet while the literature on Tort, Property and Contract is richly present here (indeed, this map is extremely reductive, given the range of carefully nuanced views) – nonetheless it is *over-elaborate* for depicting views on unjust enrichment.

- Those at the more libertarian end (top right-hand corner) are highly resistant to ‘unjust enrichment’. For a rare positive take see L Dominiak, ‘[Unjust Enrichment and Libertarianism](#)’ (2022) 10 *Polish Political Science Review* 1. As a rule, libertarians (and similar) are unlikely to trust judges to say which enrichments are unjust.
- Those at the more progressive end (bottom right-hand corner), by contrast, are usually well-schooled in Romanist thought, and think of ‘unjust enrichment’ as an old-fashioned concept with little progressive potential – see M Bartl, ‘[Private Law and Political Economy](#)’ in Bartl Burger and Mak eds, *Uncovering European Private Law: A Student Handbook* (2025) 297.
- Centrists are more positive about ‘unjust enrichment’ liabilities, but their theories strongly suggest that it is a misleading label (see below, especially category (3)).
- Strong support for ‘unjust enrichment’ – and coherent ideas about what it is *for* – therefore come only from the more radical formalists (‘Structure the Law, Don’t let “Unjust” Float Off into the Clouds!’) and radical instrumentalists (‘Don’t Worry about How we Arrange the Deck-chairs, Ask Where the Ship is Headed!’).

## ‘Unjust enrichment’ in Private Law Theory?

**Competing residual views** – On some other planet, ‘unjust enrichment’ might be a primary notion – law might be organised primarily around which enrichments are just, and which not. On the planet we actually inhabit, that intellectual space is already taken (we answer these private law questions primarily by asking what counts as a legal wrong, who owns each piece of property, and when/how agreements are enforced).

The wrongs/property/contracts schema dominates the private lawyer’s universe. In a few instances, that leads to clearly unsatisfactory results, but (historically) there have been various contenders to fill the resulting intellectual space – all of them rather vague. *Condictio*, quasi-contract, equity, unjust enrichment – these framings go in and out of fashion, as do arguments over whether some of them are ‘really’ just masks for others. And all of them suffer from the ‘shopping list’ problem – in practical exposition, they are merely *ad hoc* lists of instances where private law departs from the mainstream – the chaotic doctrines of equity, the *Kondiktionsarten*, the ‘unjust factors’. Practical application is easy – just go through the list – but such lists are standing challenges to those who think of private law as a rationally ordered system. As some do.

**Unity of ‘unjust enrichment’?** There is no universal conceptual form of ‘unjust enrichment’ – ‘neither a single conception of unjust enrichment nor a uniform regulation for it’ (D Vicente, *Comparative Law of Obligations* (2021) 398; and for an interesting comparative study see S Lin, *The Law of Unjust Enrichment in China: Necessary or Not?* (2022)). What of modern attempts to eliminate the ‘unjust factors’ in favour of a unified criterion for ‘injustice’? Various schemes have been proposed, but none have to date attracted much support in common law thought:

- Birks’s ‘pyramid’, and his related argument for ‘unjustified enrichment’ (P Birks, *Unjust Enrichment* (2<sup>nd</sup> ed 2005) ch 5). All at this seminar know the arguments for/against this.
- Cutts invokes Scanlonian contractualism – an enrichment is unjust if the enriched party cannot rationally defend retaining it (T Cutts, ‘*Unjust Enrichment: What We Owe to Each Other*’ (2021) 41 OJLS 114). This is neat, but merely defers the problem: Which defences are the rational ones?
- A consumer-welfarist approach – enrichments are recoverable if they are of a general type that claimants could have secured for themselves through a relatively modest investment (M Gilboa and Y Kaplan, ‘*The other Hand formula*’ (2022) 26 *Lewis and Clark Law Review* 883). Interesting, but needs further elaboration.

A related problem is this: While few dispute the justice of Birks’s ‘core case’ (mistaken payment), there is no consensus on *why* it is just (for discussion see F Wilmot-Smith, ‘*Should The Payee Pay?*’ (2017) 37 OJLS 844). Whether this (extremely problematical) instance should be the ‘core’ of unjust enrichment, is perhaps a question we are not yet ready to answer definitively. It seems a poor example to organise our thought around. But what would be better?

As things stand, then, we are stuck with a normatively diverse vision of unjust enrichment. If there is a coherent concept of the ‘injustice’ in unjust enrichment, we have yet to identify it in ways that command general support. Is ‘unjust’ merely a conclusory label?

## Where are we now?

Five broad groups of those taking similar approaches, though of course differing on many other points. The grouping goes from the highly structural (group 1) to the highly instrumental (group 5). Sample writers within each group are given below.

(1) **Strong taxonomists** – argue that analysing these cases in accordance with a rigorous taxonomical structure is the most promising way of making rational sense of the law.

B Häcker, '[Mistaken Gifts after Pitt v Holt](#)' (2014) 67 CLP 333

A Burrows, '[In Defence of Unjust Enrichment](#)' [2019] CLJ 521

T Cooksley, '[The Role of Unjust Enrichment in New Zealand](#)' (SSRN, 9 October 2019)

J Costa-Neto, '[The Sad Future of Unjustified Enrichment in Brazil](#)' (2024) *Oxford University Comparative Law Forum* 3

(2) **Weak taxonomists** – argue that the Birksian taxonomy is useful, but at best it is a very general framework – 'unjust' and 'enrichment' have different meanings in different contexts – it is a mistake to expect a single normative basis in all the instances where the principle (if that is what it is) is applied. Yet legal structure has value even where there is (apparently) no normative structure informing it.

E Sherwin, '[Legal Taxonomy](#)' (Cornell Legal Studies Research Paper, 18 August 2006)

H MacQueen, '[The Sophistication of Unjustified Enrichment: A Response to Nils Jansen](#)' (2016) 20 *Edinburgh Law Review* 312

R Reed, 'Theory and Practice' in Dyson Goudkamp and Wilmot-Smith eds, [Defences in Unjust Enrichment](#) (2016) ch 13

L Smith, '[Restitution: A New Start?](#)' in Devonshire and Havelock eds, [The Impact of Equity and Restitution in Commerce](#) (2018) ch 5

P Letelier, 'A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims' (2020) 136 LQR 121

D Visser, '[The Role of Reasons in the Law of Unjustified Enrichment](#)' (2022) 26 *Edinburgh Law Review* 397

D Sheehan, [The Scope and Structure of Unjust Enrichment](#) (2024)

With greater instrumentalism, 'unjust enrichment' increasingly resembles 'The Law of the Horse': the law may be principled, but not because of the 'unjust enrichment' label. (See F Easterbrook, '[Cyberspace and the Law of the Horse](#)' [1996] *University of Chicago Legal Forum* 207.)

(3) **Bilateral justice** – arguing that the results in classic 'unjust enrichment' cases are fair, but there is no 'principle against unjust enrichment' involved, or least not as hitherto described – the real question is one of interpersonal justice. '[C]lassifying a claim as within the law of unjust enrichment says nothing about the rules which should apply to it' (Gregson, below, at 87). These writers differ on what the real principles might be; several of them prioritise 'protecting autonomy', though perhaps they do not all mean the same thing by this.

J Nadler, '[What Right Does Unjust Enrichment Law Protect?](#)' (2008) 28 OJLS 245; see also her '[Unjust Enrichment in Law and Equity](#)' (forthcoming, *University of Toronto Law Journal*)

P Jaffey, [\*The Nature and Scope of Restitution\*](#) (2000)  
 C Webb, [\*Reason and Restitution: A Theory of Unjust Enrichment\*](#) (2016)  
 J Penner, 'We All Make Mistakes: A "Duty of Virtue" Theory of Restitutionary Liability for Mistaken Payments' (2018) 81 MLR 222  
 R Stevens, [\*The Laws of Restitution\*](#) (2023)  
 A Sebok, 'Corrective Justice, Unjust Enrichment, and Restitution' in Dagan and Zipursky eds, [\*Research Handbook on Private Law Theory\*](#) (2020) ch 23  
 R Gregson, 'Tort | Unjust Enrichment' in Day and Grower eds, [\*Borderlines in Private Law\*](#) (2024) ch 7

(4) **Societal justice** – arguing that the real question is one of justice in a wider social context, not merely as between the immediate parties; and private law principles should not be blindly applied in cases with a significant public element.

N Elkin-Koren and E Salzberger, 'Towards an Economic Theory of Unjust Enrichment Law' (2000) 20 *International Review of Law and Economics* 551  
 C Wonnell, 'A Law and Economics Perspective on Restitution' in Bant Barker and Degeling eds, [\*Research Handbook on Unjust Enrichment and Restitution\*](#) (2020) ch 11  
 M Gilboa and Y Kaplan, 'The Costs of Mistakes' (2022) 122 *Columbia Law Review Forum* 61  
 B Chao, 'Unjust Enrichment: Standing Up for Privacy Rights' (2023) 108 *Iowa Law Review Online* 49  
 H Dagan and A Dorfman, [\*Relational Justice: A Theory of Private Law\*](#) (2024) ch 11  
 S Peari and D Peari, 'Should Private Law Govern Public Issues?' *TTPI Blog* 19 August 2025

(5) **Problem solvers** – arguing that a 'principle against unjust enrichment' can usefully be invoked, instrumentally, to tackle particular problems, but foregrounding doctrinal consistency misses the point – where, indeed, it does not simply emphasise its own hypocrisy.

T Keren-Paz, 'Injuries from Unforeseeable Risks Which Advance Medical Knowledge: Restitution-Based Justification for Strict Liability' (2014) 5 *Journal of European Tort Law* 275  
 S Degeling and M San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 *Sydney Law Review* 69  
 A Bernstein, 'A Feminist Perspective: Private Law as Unjust Enrichment' in Gold Goldberg Kelly Sherwin and Smith eds, [\*The Oxford Handbook of the New Private Law\*](#) (2020) ch 12  
 A Davis, 'Corrective Justice and Reparations for Black Slavery' (2021) 34 *Canadian Journal of Law & Jurisprudence* 329  
 M Gilboa, Y Kaplan and R Sarel, 'Climate Change as Unjust Enrichment' (2024) 112 *Georgetown Law Journal* 1039  
 R Baharad, 'The Uneasy Case for Copyright Disgorgement', *Coase-Sandor Institute for Law & Economics Research Paper Series* 25-02 (2025)  
 C Roberts, 'Algorithmic Erasure in the Shadow of Statutes' (2025) 85 *Louisiana Law Review* 955