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Defences in Unjust Enrichment: Questions and Themes

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Abstract

This book is the second in a series of four that is concerned with defences to liability arising in private law. We felt, and still feel, that the topic has not received the attention that it deserves. 1 We are not alone in holding this view. 2 By contrast, defences have dominated the research agendas of many scholars of the criminal law.³ The asymmetry in attention to defences in these different fields is striking in part because of the apparent parallels between the two domains. For instance, the distinction in private law between causes of action and defences arguably mirrors that between offences and defences in the criminal law.

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Defences in Unjust Enrichment: Questions and Themes

Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith

I. Introduction

This book is the second in a series of four that is concerned with defences to liability arising in private law. We felt, and still feel, that the topic has not received the attention that it deserves.¹ We are not alone in holding this view.² By contrast, defences have dominated the research agendas of many scholars of the criminal law.³ The asymmetry in attention to defences in these different fields is striking in part because of the apparent parallels between the two domains. For instance, the distinction in private law between causes of action and defences arguably mirrors that between offences and defences in the criminal law.⁴

Our first book examined defences to tort claims.⁵ The present volume deals with defences to claims in unjust enrichment. The next two books will concern defences to contractual claims and claims in equity respectively. Part of the reason why we undertook to produce a series of books was that we believe there is merit in thinking about private law defences as a whole.⁶ The workshop at which the papers published here were presented, and the book itself, confirms that that belief was, and remains, justified. The same questions that had arisen in our exploration of tort law defences frequently recurred in the unjust enrichment defences workshop. In this introductory chapter, we review several of these questions. We also set out how our contributors seek to answer them.

¹ In our first collection, on tort law defences, we observed that defences are rarely discussed in the theoretical literature, citing J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford, Oxford University Press, 2014) as an illustration. In a similar vein, there are no chapters on defences in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009).

² Eg, Ross Grantham and Charles Rickett write: ‘The integration of defences into the normative justification for liability is something that has been overlooked in most areas of the private law’: R Grantham and C Rickett, ‘A Normative Account of Defences to Restitutionary Liability’ (2008) 67 *Cambridge Law Journal* 92, 103 n 57. Similarly, Graham Virgo observes: ‘In the field of private law, much work has been done to describe, explain and rationalise different causes of action. Whilst some excellent work has also been done as regards the analysis of specific defences, notably change of position and passing on as defences to claims in unjust enrichment, surprisingly little work has been done to analyse defences in private law more generally’: G Virgo, ‘Book Review’ (2015) 74 *Cambridge Law Journal* 160, 160.

³ See, eg, HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Oxford University Press, 1968) chs 2, 4 and 8; GP Fletcher, *Rethinking Criminal Law* (Boston, Little, Brown & Co, 1978) chs 7, 9–10; J Gardner, *Offences and Defences: Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) chs 4–9.

⁴ Nevertheless, few theorists with expertise in both criminal law and private law have considered the possibility of cross-fertilisation. There are, of course, exceptions. The influence of Hart’s work on criminal law defences is visible in his seminal account of the concept of defeasibility, in which he considered defences in private law: HLA Hart, ‘The Ascription of Responsibility and Rights’ (1949) 49 *Proceedings of the Aristotelian Society* 171.

⁵ A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015).

⁶ For more details regarding the project generally, see A Dyson, J Goudkamp and F Wilmot-Smith, ‘Central Issues in the Law of Tort Defences’ in Dyson, Goudkamp and Wilmot-Smith (n 5) 3–5.

II. Two Questions about Defences

In this section we discuss two important controversies about defences. The first is what a defence actually is; the second is the justification for a legal system recognising defences. We discuss the first of these questions by reference to the distinction between denials and defences.

A. Distinguishing Denials and Defences

i. Preliminaries

At the first workshop, on tort law defences, it was clear that there was no consensus as to the meaning of the term ‘defence’. Indeed, one of the essays in the subsequent collection concerned itself exclusively with the definition of the concept.⁷ It reveals that scholars understand the term in numerous different ways, and that disagreements between scholars in this regard are vigorous and multi-faceted, with several orthogonal debates breaking out. There seemed to be fewer disagreements at the unjust enrichment workshop on this particular point. However, this harmony may be illusory: when the question wapproached in terms of denials and defences (i.e., how are defences distinct from denials?), alliances seemed to be much shakier.

In our chapter in the first book, on tort law defences, we considered the distinction between denials and defences at some length.⁸ The distinction aims to separate two kinds of response that a defendant might make to a claim: a denial is an assertion that the cause of action is incomplete;⁹ a defence accepts that the cause of action is complete, but argues that liability should be reduced or eliminated on account of some other consideration (although some scholars consider rules that merely reduce liability not to be defences but a *tertium quid*).¹⁰ Difficult issues regarding this distinction that we identified included: whether there is indeed a conceptual distinction between denials and defences; and, if there is a distinction, the identification of the different characteristics of denials and defences.

Several contributors endorse the distinction between denials and defences in this volume.¹¹ For instance, Klimchuk says:¹²

‘We can ask, first, whether change of position works to deny that an element of the cause of action in unjust enrichment has been made out, or whether instead it

⁷ L Duarte d’Almeida, ‘Defining “Defences”’ in Dyson, Goudkamp and Wilmot-Smith (n 5).

⁸ Dyson, Goudkamp and Wilmot-Smith (n 6) 6–8.

⁹ This is perhaps insufficiently nuanced. A defendant might raise a *partial* denial. For instance, a defendant might accept that she has been unjustly enriched at the claimant’s expense, but deny that she has been enriched to the extent of the objective measure. We observe that debate exists as to whether such a contention should be characterised as a partial denial (‘subjective devaluation’) or a defence (‘change of position’). See, in particular, *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561, 606 [119] (Lord Nicholls); *Benedetti v Saimiris* [2013] UKSC 50; [2014] AC 938, 987–88 [118] (Lord Reed JSC).

¹⁰ See, eg, J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing, 2013) 6.

¹¹ Mitchell p.3 (‘either as a denial that the claimant has...’); Scott p.1; Virgo p.8 (‘If a claimant seeks restitution’). Cf Häcker p. 000, footnote 7.

¹² Klimchuk, p.3. See, further, Meier’s definition of a defence as ‘a fact that is able to extinguish an otherwise given cause of action’. p 4-5.

serves to reduce the defendant's liability notwithstanding that the elements of the cause of action have been made out.'

However, although the distinction is evidently seen to be of vital import by contributors who recognise it—for example, both Helen Scott and Dennis Klimchuk dedicate substantial parts of their chapters to the proper classification of two doctrinal rules by reference to it—our contributors seem as a whole to assume the distinction is unproblematic. In our earlier work, we suggested some reasons to doubt whether the distinction is indeed trouble-free.¹³ We want to highlight three problems with which scholars who endorse the distinction must, in our view, grapple. First, we discuss some disagreement about the nature of the distinction between denials and defences; next, we ask whether the law of unjust enrichment recognises the distinction; and finally we consider whether the distinction is exhaustive of the rules that comprise the law of unjust enrichment.

ii. What Kind of Distinction is it?

There appeared to be some disagreement amongst our contributors about the nature of the distinction between denials and defences. In her contribution Elise Bant argues that understanding the defence of change of position 'as an aspect of the general enrichment enquiry' (i.e., as part of the cause of action) would be 'contrary to the vast preponderance of authority that conceives of and treats the defence as having a role independent of the elements of the primary claim'.¹⁴ Although Bant is here concerned with the possible changes to the substantive rules of change of position which might have to be made if change of position were thought of as a denial, the passage suggests one way in which the distinction between denials and defences can be understood: as one that the law itself draws. On this analysis, in other words, the boundary of the distinction between denials and defences is to be settled by legal authorities.

Compare Bant's analysis with that offered by Helen Scott. Scott writes that 'the distinction between actions and defences, and more specifically denials and defences, turns on substantive arguments about the definition of torts'.¹⁵ Although Scott is talking about the law of torts here, the context makes it clear that her claim in this regard is not confined to that branch of private law. Scott adds that the task of deciding whether some doctrine is 'extrinsic to the claimant's action' is 'an exercise informed by doctrinal and moral arguments specific to the unjust enrichment context, not instrumental arguments of relatively general application'.¹⁶ All this suggests that the classification of a doctrine as a defence or a denial is not a *mere* function of authority; instead, it depends in part on normative arguments extrinsic to the law (even if these arguments must, for whatever reason, be local 'to the unjust enrichment context'). Scott does not, we take it, mean to suggest that the question is whether there are good normative reasons to employ the distinction—we are here concerned with definition, not justification.¹⁷ Instead, she

¹³ Dyson, Goudkamp and Wilmot-Smith (n 6) 7.

¹⁴ Bant, p.7.

¹⁵ Scott, p.1.

¹⁶ *ibid* p.2.

¹⁷ We address the issue of justification in Section IIB.

suggests that normative arguments cannot be avoided in the description of the distinction between denials and defences.¹⁸

iii. Does the Law of Unjust Enrichment Recognise the Distinction?

The next problem concerns whether the distinction between denials and defences, howsoever understood, is recognised in the law of unjust enrichment. It is salutary here to recall certain statements defining the cause of action in unjust enrichment. In a widely endorsed passage, Lightman J stated:¹⁹

‘It is now authoritatively established that there are four essential ingredients to a claim in restitution:

- i) a benefit must have been gained by the defendant;
- ii) the benefit must have been obtained at the claimant’s expense;
- iii) it must be legally unjust, that is to say there must exist a factor (referred to as an unjust factor) rendering it unjust, for the defendant to retain the benefit;
- iv) there must be no defence available to extinguish or reduce the defendant’s liability to make restitution.’

Taken literally, this would show that the law of unjust enrichment does not distinguish denials and defences. The fourth ingredient that Lightman J mentions brings defences within his definition of an action in unjust enrichment in negative form.²⁰ The absence of defences is, in other words, one of the elements of the action.²¹

Attempts to fold defences into the cause of action have been made not only in relation to definitions of a cause of action in unjust enrichment but also in connection with individual ‘defences’. Consider, for example, the fact that one prominent way of understanding the change of position ‘defence’ is to see it as concerned with ‘disenrichment’ and hence with the enrichment element of the action. Peter Birks argued that this ‘defence’ ‘[attacks the element of] “enrichment at the expense of the claimant.”’²² So conceived, the change of position ‘defence’ is not, it would seem, ‘external’ to the cause of action. Given the prominence of the change of position ‘defence’, this logic might lead one to think that the law of unjust enrichment does not recognise any defences. Perhaps some legal systems have reached that position already.

¹⁸ There are interesting parallels here with well-known debates in general jurisprudence concerning the nature of conceptual analysis. See, eg, HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994) 244; JM Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1980) ch 1. Cf Dworkin’s claim that ‘the flat distinction between distinction and evaluation’ has ‘enfeebled legal theory’: R Dworkin, *A Matter of Principle* (Cambridge MA, Harvard University Press, 1985) 148.

¹⁹ *R (Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin); [2003] 1 Lloyd’s Rep 418, 421 [11].

²⁰ Cf the more circumspect remarks of Lord Clarke JSC in *Benedetti v Saviris* [2013] UKSC 50; [2014] AC 938, 955 [10]: ‘a court must first ask itself four questions’.

²¹ For a thorough theoretical consideration (and rejection) of the thesis that there is no distinction between defences and denials see L Duarte d’Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford, Oxford University Press, 2015).

²² P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Oxford University Press, 2005) 208. Birks’s commitment to this view is unclear. Elsewhere he made remarks that are inconsistent with viewing the change of position doctrine as striking at the enrichment element of an action in unjust enrichment. See *ibid* 207, where Birks spoke of defences as ‘trumping the injustice of the defendant’s enrichment’. For elaboration of Birks’ position in this regard, see J Goudkamp and C Mitchell, ‘Denials and Defences in the Law of Unjust Enrichment’ in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford, Hart Publishing, 2013) 144.

For instance, Helen Scott, in her contribution in this volume, suggests that ‘South African law may embody that mythical system ... in which all liability rules have been assimilated into the elements of the action, rendering defences (or at least defences specific to the law of enrichment) superfluous’.²³

These remarks raise many important questions. Is the law of unjust enrichment best understood without considering defences? Or is there some reason why the concept of defences—howsoever understood—is important to our understanding of the terrain? More generally, should such an approach—whereby defences are folded into the cause of action—be applied to the legal system as a whole? Or is there something wrong with such a system? We will return to this last question later, when we consider the point of formulating legal rules as defences.²⁴ For now, however, we want to highlight another reason to examine the law of unjust enrichment through the prism of this distinction, between defences and denials: it casts light on a well-known debate concerning the basis of the law of unjust enrichment. Unjust enrichment lawyers customarily distinguish ‘unjust factors’ systems from ‘absence of basis’ systems.²⁵ Under the former system, a claimant’s success depends upon her showing that an enrichment was transferred under the influence of an ‘unjust factor’, such as a mistake. In the latter, a claimant’s success depends upon her demonstrating that the enrichment was transferred without legal basis. These systems may view particular doctrines, in terms of the divide between denials and defences, differently. Consider, for example, the well-recognised rule that ‘to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered’.²⁶ Lawyers who endorse the ‘unjust factors’ approach sometimes interpret this ‘enrichment owed’ doctrine as a defence.²⁷ This seems to have been how Robert Goff J understood the doctrine. In *Barclays Bank Ltd v WJ Simms* his Lordship wrote:²⁸

‘If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact ... His claim may however fail if ... the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt.’

²³ Scott, p.10.

²⁴ See Section IIB(ii).

²⁵ The literature on these different approaches is voluminous. See, eg, A Burrows ‘Absence of Basis: The New Birksian Scheme’ in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, Hart Publishing, 2006) 33; S Meier, ‘No Basis: A Comparative View’ in A Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006) 343; R Stevens ‘Is there a Law of Unjust Enrichment?’ in J Edelman and S Degeling (eds), *Unjust Enrichment in Commercial Law* (Sydney, Law Book Co, 2008) 11.

²⁶ *Fairfield Sentry Ltd v Migani* [2014] UKPC 9; [2014] 1 CLC 611, 619 [18] (Lord Sumption JSC). In his contribution to the present volume, Andrew Kull examines restitution between successive fraud victims, which gives rise to similar issues.

²⁷ C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell, 2011) ch 29.

²⁸ *Barclays Bank Ltd v WJ Simms* [1980] QB 677 (QBD) 695.

If one endorses the view that any payment ‘under a mistake of fact’, *regardless of whether it discharges a liability*, is prima facie sufficient for restitution, enrichment owed—or the ‘good consideration’ doctrine—naturally falls to be considered at a later stage.

By way of contrast in her chapter in the present volume, Helen Scott suggests that under an absence of basis system:²⁹

‘The claimant cannot make out even a prima facie case without pleading the absence of liability ... and, at least in cases involving an apparent contractual or other obligation, without proving the non-existence or invalidity of that obligation.’

In this way, the proper classification of the enrichment owed doctrine feeds into one of the most heated questions in the academic debate on the law of unjust enrichment. Indeed, the proper classification of the doctrine may turn on the following question: does the fact the enrichment was owed defeat a prima facie injustice, as the unjust factors view might hold?³⁰ Or does it, instead, demonstrate that there was no injustice at all, as the absence of legal ground view might hold? We hope that this shows that examining the distinction between denials and defences, and seeing whether it is instantiated in the law of unjust enrichment, is vitally important if we are to understand the law as a whole.

iv. Is the Distinction Exhaustive?

The final question that we will discuss regarding the distinction between denials and defences is whether it is exhaustive (that is, does it encompass every plea a defendant might make to resist a claim in unjust enrichment?). One might conclude that there are doctrines in the law of unjust enrichment that cannot properly be categorised as pertaining to either the denials or defences categories. The doctrine of illegality is arguably such a rule.³¹ Although many—including Graham Virgo, in his contribution to this volume³²—regard the doctrine of illegality as a defence, consider Lord Sumption JSC’s claim that³³

‘although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act (for example by restoring the parties to the status quo ante, in the same way as on the rescission of

²⁹ Scott, p.11.

³⁰ Cf, however, A Burrows, ‘Good consideration in the law of unjust enrichment’ (2013) 129 *Law Quarterly Review* 329, 331: ‘The importance of a mistaken payment being made for good consideration is not that this constitutes a defence but that this means that the payment is being made under a contract so that, unless the contract is invalid, there is no prima facie right to restitution’. If this is correct, the distinction between the supposedly rival systems arguably becomes very difficult to make out.

³¹ We do not here consider the possibility of illegality as a cause of action in unjust enrichment. For discussion, see W Swadling, ‘The Role of Illegality in the English Law of Unjust Enrichment’ in D Johnston and R Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002).

³² Virgo, p.9: ‘If a claimant seeks restitution for unjust enrichment, the fact that the claim is tainted by illegality will operate as a defence’.

³³ *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430, 445 [23]. Cf *Jetivia SA v Bilta (UK) Limited (in liquidation)* [2015] UKSC 23; [2015] 2 WLR 1168 where Lord Sumption at 1187 [60] calls judicial abstention the ‘policy’ (rather than the rule?) and, at 1187 [55], where he says: ‘It is convenient to call this the illegality defence, although the label is not entirely accurate for it also applies to a very limited category of acts which are immoral without being illegal.’

a contract) the courts withhold judicial remedies, leaving the loss to lie where it falls.’

This passage suggests that Lord Sumption would not regard the distinction between denials and defences as being exhaustive. His Lordship explicitly states that illegality is not a defence, but neither does he appear to understand it as a denial. In similar fashion, Ross Grantham and Charles Rickett argue that:³⁴

‘The need to incorporate the defences into the overall normative justification of unjust enrichment does not, of course, rule out the existence of defences that reflect policy considerations external to the law of unjust enrichment or even the private law as a whole. As is the case with contractual and tortious liabilities, issues such as illegality and excessive delay in bringing proceedings offer reasons to deny liability, but these factors are not central to the logic or extent of liability.’

If there are indeed such doctrines, how should they be classified? Is illegality the sole example, or are there other similar doctrines, as Grantham and Rickett seem to suggest?

v. Conclusion

Attempts to distinguish denials from defences are regarded by some as arid conceptualism. We hope that we have shown this not to be the case. There are important theoretical questions at the heart of the distinction, and a proper understanding of the distinction and its application in the law is vital to questions as basic as the foundation of the law of unjust enrichment. Our remarks have perhaps raised more questions than they have answered, but this only goes to show the amount of work that remains to be done in this field.

B. The Rationale of Defences

There may, of course, be numerous reasons why a legal system might employ defences.³⁵ In this subsection we will examine the rationale of defences from two angles. First, we will consider two reasons why the law of unjust enrichment might limit the circumstances in which claimants can recover and note that the difference between these reasons may have practical consequences. In this discussion, we want to remain agnostic as to whether recovery is limited by way of a defence or by modification of the elements of the cause of action. Accordingly, we will refer to such control devices as ‘exceptions’. Secondly, we will ask whether the law should formulate exceptions as *defences* (rather than through more precise definition of the cause of action).

i. Two Reasons for Recognising Exceptions

In his contribution to this volume, Graham Virgo writes that:³⁶

‘Most of the defences to claims in unjust enrichment focus on the relationship between the claimant and the defendant, and are normatively related to the principle of corrective justice. That is not the case with the defence of illegality,

³⁴ Grantham and Rickett (n 2) 94.

³⁵ For a list of possible rationales, see Goudkamp and Mitchell (n 22) 146–50.

³⁶ Virgo, p.1 (footnotes omitted).

which is influenced by external considerations of public policy rather than securing justice between the parties.’

Many judges and scholars would accept Virgo’s claim that the illegality doctrine is unconcerned with justice between the parties.³⁷ For example, Lord Mansfield said in *Holman v Johnson* that the doctrine ‘is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff.’³⁸ Lord Sumption JSC endorsed Lord Mansfield’s understanding in *Les Laboratoires Servier v Apotex Inc.* His Lordship remarked that the illegality doctrine ‘is in the nature of things bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits, legal or otherwise’.³⁹ We have already noted⁴⁰ Lord Sumption’s view that the illegality doctrine is ‘in reality a rule of judicial abstention’.⁴¹ This view is related to the proposition that the doctrine is unconcerned with realising inter-personal justice. The justification for the illegality doctrine is instead, for Lord Sumption, a ‘principle of consistency’.⁴² When achieving inter-personal justice would undermine the consistency (or ‘integrity’, in the language of McLachlin J in *Hall v Hebert*⁴³) of the legal system, the interest in consistency is prioritised. Consistency is achieved by judicial abstention.

It is not our purpose to engage with the merits of these rival accounts of the doctrine of illegality. Instead, we want to draw attention to the fact that the passages in the previous paragraph suggest that there are at least two general reasons why a legal system might recognise an exception to a liability rule: first, in order to take account of the concerns of justice between the parties; second, to uphold the integrity of the legal process itself. We believe that these reasons may have consequences for the rules of pleading. Virgo claims that the doctrine of illegality’s ‘public policy foundations’ explains why ‘illegality may defeat a claim even though it has not been pleaded’.⁴⁴ This implies that rules concerned with upholding the integrity of the legal system can be considered by the court on the court’s own motion.

Another potential consequence of the distinction between inter-party justice exceptions and integrity-based exceptions relates to the breadth of application of the exception in question. As Lionel Smith observes in his essay in this collection, ‘[s]ome

³⁷ Cf, in this respect, Chief Justice McLachlin’s contribution to the previous collection on tort law defences, in which she argued that the doctrine of illegality is founded on corrective justice: B McLachlin, ‘Weaving the Law’s Seamless Web: Reflections on the Illegality Defence in Tort Law’ in Dyson, Goudkamp and Wilmot-Smith (n 5). This claim arguably commits her to the proposition that the doctrine of illegality is concerned with inter-personal justice rather than with broader societal concerns.

³⁸ *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121.

³⁹ Above n 33, 440 [13]. Cf his Lordship’s remark that ‘the defence [ought not to be extended] far more widely than anything warranted by the demands of justice’: *Jetivia S.A v Biltta (UK) Ltd (in liquidation)* (n 33) 1192 [70]. It is unclear whether ‘justice’ here refers to inter-personal justice or to some other concept.

⁴⁰ See the text accompanying n 43 above.

⁴¹ Above n 33, 445 [23].

⁴² Above n 33, 446 [24].

⁴³ *Hall v Hebert* [1993] 2 SCR 159 (SCC) 176.

⁴⁴ **Virgo, p.16.** Virgo is correct that illegality can be raised by the court *proprio motu*. Law Commission, *The Illegality Defence: A Consultative Report* (Law Com Consultation Paper 189, 2009) 133 [7.22]; *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213 (CA) 1218.

defences are available to more than one cause of action. Illegality is an example'.⁴⁵ In *Vellino v Chief Constable of Greater Manchester* Sedley LJ said '[the illegality doctrine] applies across the board'.⁴⁶ If the illegality doctrine seeks to uphold the integrity of the legal system, the doctrine's application to numerous causes of action is unsurprising: such a doctrine should be available (if desired) whenever a cause of action is capable of undermining that integrity. Inter-personal defences do not appear to have such broad applicability. For example, the doctrine of contributory negligence is available to some actions in tort (such negligence) but not others (such as trespass⁴⁷ and deceit⁴⁸). Quite how important this apparent distinction is remains to be seen, but is certainly worthy of further inquiry.

ii. Why use Defences?

Would there be anything wrong with what Helen Scott terms the 'mythical system ... in which all liability rules have been assimilated into the elements of the action'?⁴⁹ Some scholars seem to think that there would be. For instance, in her contribution Elise Bant considers the change of position defence and warns of 'the danger—realised in some cases—that, by focussing on the extent to which a defendant's assets remain swollen by her receipt the defence will come to be treated simply as an aspect of the general enrichment enquiry'.⁵⁰ Bant here assumes that there would be something wrong with a system which assimilated change of position to an aspect of the cause of action. However, what, exactly, would be wrong with such a system?⁵¹ Why should not a legal system fold exceptions into the elements of the action in order to create Scott's postulated 'mythical system'? In other words, why should the law seek to respond to the reasons for exceptions to rules by way of *defences*?

To understand an interesting—but, we think, ultimately flawed—answer to this question, notice that the cause of action in unjust enrichment is very expansive. In most cases, it is complete on receipt of the enrichment—for instance, when money is paid to the defendant by mistake.⁵² The upshot of this is that the cause of action in unjust enrichment imposes not only strict liability (that is to say, liability that arises irrespective of whether the defendant was at fault) but also what might be called 'passive liability'.⁵³ By passive liability we mean liability that arises irrespective of the defendant's

⁴⁵ L Smith p.27.

⁴⁶ *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249; [2002] 1 WLR 218, 228 [44]. 'We do not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action': *Clunis v Camden and Islington Health Authority* [1998] QB 978 (CA) 987.

⁴⁷ *Co-Operative Group (CSW) Ltd v Pritchard* [2011] EWCA Civ 329; [2012] QB 320.

⁴⁸ *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43; [2003] 1 AC 959.

⁴⁹ Scott, p.10.

⁵⁰ Bant, p.6-7.

⁵¹ Bant's reason is that it would restrict the ambit of change of position to situations where the defendant is 'disenriched', ie, loses what the law would class as an enrichment at the cause of action stage: see text to n 14. We are unconvinced by this; the law *could* recognise a doctrine with the same ambit at the cause of action stage.

⁵² Cf subsequent failures of consideration: *Guardian Ocean Cargoes Ltd v Banco do Brasil* [1994] 2 Lloyd's Rep 152 (CA).

⁵³ S Smith, 'A Duty to Make Restitution' (2013) 26 *Canadian Journal of Law and Jurisprudence* 157, 170: 'the subject of the duty may be entirely innocent, even passive'.

participation in, or perhaps even irrespective of the defendant's awareness of, the facts on which the claim is based.⁵⁴ This 'unilaterality', i.e., the creation of 'a right against someone who had no hand in bringing about the matter she now bears a responsibility to set aright', gives rise to a puzzle: how can such a rule be justified?⁵⁵

It has been argued that defences can justify an expansive cause of action. For example, in *Lipkin Gorman v Karpnale Ltd* Lord Goff of Chieveley opined that⁵⁶

'the recognition of change of position as a defence should be ... beneficial [because it] ... will enable a more generous approach to be taken to the recognition of the right to restitution, in the knowledge that the defence is, in more appropriate cases, available.'

Several contributors to this volume endorse the view, as Dennis Klimchuk puts it, that 'restitution for unjust enrichment should never make defendants worse off'.⁵⁷ Meeting that promise is widely understood to be the purpose of the change of position defence. There is some debate in the essays about whether the appropriate baseline for being 'worse off' is historical, as Bant argues,⁵⁸ or counterfactual, as Ratan argues.⁵⁹ An historical baseline seeks to ensure that the defendant is not worse off than the position she *was in* before the defective transfer; a counterfactual baseline seeks to ensure that the defendant is not worse off than the position she *would have been* in some specified possible world.⁶⁰ But prior to this debate, these commentators all appear to agree with the claim that the existence of the change of position defence helps to justify the cause of action in unjust enrichment.⁶¹

This argument is difficult to assess as it has never been developed in detail. It may state no more than a conditional: if you have defences, they can justify causes of action.

⁵⁴ There is a debate in the literature about whether the defendant comes under a duty or merely a liability when the cause of action is complete: *ibid.* However, no one questions that the cause of action is complete on receipt; the debate concerns what the consequence of that conclusion is (or ought to be).

⁵⁵ D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 86.

⁵⁶ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 581. See also Birks (n 22) 40; Grantham and Rickett (n 2) 93.

⁵⁷ Klimchuk, p.5. See, further, Chambers p.000; Ratan, p.23-24.

⁵⁸ Bant, p.11: the defendant should 'not placed in a worse position she occupied prior to her receipt'. See, further, S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford, Hart Publishing, 2013) 231.

⁵⁹ Ratan, p.1: 'a counterfactual comparison is embedded at the core of the change of position doctrine'.

⁶⁰ Amongst counterfactualists, many have claimed that the appropriate possible world is the one where the defendant did not receive the enrichment; Ratan, in his essay, argues that it is the one where there was no defect in the claimant's intention.

⁶¹ On a counterfactual account, like Ratan's, the specification of the appropriate counterfactual may well be bound up with the question of what problem the cause of action in unjust enrichment seeks to remedy. He claims that to discover the appropriate counterfactual for the change of position defence, we would ideally

delve into the normative theory of unjust enrichment. The pertinent question would be: which counterfactual baseline figures in the most compelling moral justification for the imposition of unjust enrichment liability? The baseline adopted in that fundamental debate could then be doctrinally implemented by the change of position defence.

Ratan, p.24.

However, in relation to change of position Lord Goff does appear to commit to more than a conditional; his Lordship implies that the defence will allow the law to vindicate some good that it could not realise through manipulation of the cause of action alone. How can this be so? Why could the law not, for instance, develop causes of action which are capable of justification without the need for defences—or which distinguish between ‘appropriate cases’ at the cause-of-action stage? One thought, which has occurred to a number of scholars, is that defences may help to finesse legal rules in a manner which cannot be done by modifying the content of the cause of action, or which can be done only with great impracticality. For instance, Peter Birks opined:⁶²

‘It has become apparent in recent years that the fine tuning of the law of unjust enrichment will fall to the [defences stage]. Restrictive interpretations of the cause of action have been relaxed as defences have begun to take the strain ... [T]he new strategy will do more sensitive justice.’

Andrew Burrows appears to be attracted to this idea. He writes that ‘[r]ather than the courts placing arbitrary restrictions on liability, the scope of restitution is now more satisfactorily and openly controlled by the defences’.⁶³ Burrows’s suggestion appears to be that attempting to control the circumstances in which liability arises at the cause-of-action stage would be less ‘satisfactory’. However, what reason is there to accept that this is the case? In Birks’ terms, why does recognising defences permit the law of unjust enrichment ‘to ‘do more sensitive justice’? In Burrows’s language, why does the law of unjust enrichment dispose of cases ‘more satisfactorily and openly’ than it would if there were no defences and all relevant issues were treated as asking whether a cause of action exists?

Perhaps the idea is that it would be too cumbersome to define a cause of action with sufficient specificity to account for all exceptions. In his chapter in this collection, Lionel Smith highlights Joseph Raz’s analysis on the individuation of norms.⁶⁴ Raz writes that ‘[i]t is possible to devise principles of individuation which guarantee that every rule includes all its qualifications and that no rules ever conflict with each other’.⁶⁵ For example:⁶⁶

‘The criminal law includes a rule prohibiting assault. This rule is qualified by various other laws. Assault is permitted in self-defense, in carrying out lawful orders, in cases of necessity ... One might wish to claim ... that no statement of the law against assault is a complete description of that law unless it enumerates all these qualifications. One may claim that the qualifying laws are not separate laws but only parts of the law prohibiting assault.’

However, Raz asserts, ‘[t]o do so would be to accept a very misguided doctrine of the individuation of laws’.⁶⁷ The laws we would have, on such a system, would be ‘enormously complex. They [would] also be very repetitive, having much of their content in common (the doctrine of self-defense, for example, will be a part of each of the

⁶² Birks (n 22) 40.

⁶³ A Burrows, *The Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2011) 523.

⁶⁴ J Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale Law Journal* 823, 825–34.

⁶⁵ *ibid* 831.

⁶⁶ *ibid*.

⁶⁷ *ibid*.

criminal laws)'.⁶⁸ Instead, therefore, 'we should adopt a doctrine of individuation which keeps laws to a manageable size, avoids repetition, minimizes the need to refer to a great variety of statutes and cases as the sources of a single law...'.⁶⁹

Smith suggests that these passages 'may also go a long way in helping us to understand why some elements should be classified as defences, rather than as parts of a cause of action'.⁷⁰ He does not develop this idea. There are perhaps two distinct reasons to reduce complexity in the legal system. First, a pragmatic reason: less complexity makes the legal system easier for officials to manage. Second, a rule of law reason: by reducing complexity in this way, the law may be more intelligible and accessible. Both of these reasons may have intriguing implications for defences as a whole: they suggest that, where possible, the law should favour general defences, applicable to multiple causes of action, rather than a plethora of specific defences.

A related argument in support of recognising defences, which is particularly relevant to the law of unjust enrichment, concerns burdens of proof.⁷¹ It might be contended that defences allow the law to allocate burdens efficiently and/or fairly.⁷² For example, imagine a system which required claimants to prove the surviving enrichment in an unjustly enriched defendant's hands in order to recover. The defendant is likely to have all of the evidence relevant to the claim (certainly, it is plausible to think that defendants will be much more likely to have access to the relevant evidence than claimants); if a claimant were required to prove the ultimate enrichment in the defendant's hands, she would have to make invasive and possibly wasteful inquiries into the defendant's actions.⁷³ These considerations perhaps explain why most legal systems require the defendant to produce evidence of expenditure. We doubt whether this point about access to evidence is a compelling reason for recognising defences. Instead of a change of position defence, could the law not, in a system which incorporated all defences as negative elements of the cause of action, avoid the difficulty involved in requiring the claimant to make invasive/wasteful inquiries into the defendant's actions by putting the defendant to proof in respect of the enrichment element of the cause of action?

⁶⁸ *ibid.*

⁶⁹ *ibid* 832.

⁷⁰ L Smith p.16, footnote 50.

⁷¹ There is also a debate about the role of proof in constituting what *is* a defence. For example, Helen Scott, in her essay in this collection writes: Scott p.1 'there remains a close correspondence between defences and the burden of proof'. We have previously contended that questions of definition must be kept distinct from the consequence of a definition: Dyson, Goudkamp and Wilmot-Smith (n 6) 5–6. See, further, L Duarte d'Almeida (n 21) 133.

⁷² Some scholars define defences as rules in respect of which the defendant carries the onus of proof. We have set this definition to one side for the purposes of these remarks.

⁷³ Cf R Epstein, 'Pleadings and Presumptions' (1973) 40 *University of Chicago Law Review* 556, 580. Epstein doubts the strength of this point. He contends, *inter alia*,

'whenever the question of access is crucial, there are better techniques available for handling it [than by way of the allocation of the burden of proof]. ... [D]iscovery procedures can largely eliminate the problem of unequal access. Under most modern systems, pre-trial discovery rules enable each party to obtain from his adversary all relevant evidence, regardless of whether it is admissible at trial.

III. Themes Across Private Law

A. The Unity of a Defence

John Gardner has argued that self-defence to criminal liability might be both justificatory and excusatory. For Gardner, a defendant is justified in acting in self-defence if the defendant had an undefeated reason to exercise defensive force and the defendant acted for that reason. By contrast, in Gardner's view, a defendant is excused in exercising defensive force where she mistakenly believed that there was an undefeated reason to use defensive force.⁷⁴ Since (at least in England) the defence of self-defence is granted both to defendants who were justified and to defendants who were excused, in Gardner's terms,⁷⁵ Gardner is committed, we believe, to the proposition that there are justificatory and excusatory versions of the defence of self-defence.⁷⁶ In a similar vein, Paul Robinson suggests that in some jurisdictions in the United States there may be two separate criminal law defences conflated under the heading of self-defence, one justificatory and the other excusatory.⁷⁷ Within the law of unjust enrichment, illegality can operate as a defence and to disable a defence. In the first context, a claimant might be barred from raising the fact of an illegal agreement, and so may not be able to make good her claim (for example, for a failure of condition);⁷⁸ in the second context, a defendant's putative change of position defence can be barred if the act relied upon is itself illegal.⁷⁹ One might, therefore, argue that there is more than one illegality defence within the law of unjust enrichment.⁸⁰

In his chapter in the present volume, Ajay Ratan resists a possible splintering of the change of position defence, arguing that the doctrine encompasses both pre- and post-receipt detriment.⁸¹ Conversely, Dennis Klimchuk suggests that a unitary defence cannot be found. He considers change of position in the context of both reliance and non-reliance based expenditures, and concludes that the doctrine 'collects two defences'.⁸² Klimchuk's reason for saying there are two defences is that he believes one to be a denial

⁷⁴ For more detail in this regard see Gardner (n 3) ch 5.

⁷⁵ See Criminal Justice and Immigration Act 2008, s 76

⁷⁶ Incidentally, Gardner does not adopt this position about only self-defence. We understand him as extending this view to the criminal law's network of defences generally. He writes: 'in general no excuse is accepted into the criminal law which is not also a partial justification, and no justification is accepted which is not also a partial excuse' (Gardner (n 3) 113).

⁷⁷ PH Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199, 240 ('A jurisdiction may properly provide a "self-defense" justification and a "self-defense" excuse') (footnote omitted).

⁷⁸ *Berg v Sadler and Moore* [1937] 2 KB 158 (CA).

⁷⁹ *Barros Mattos Junior v MacDaniels Ltd* [2004] EWHC 1188 (Ch); [2005] 1 WLR 247. For a comment, sensitive to the distinctions defences require, see A Tettenborn, 'Bank Fraud, Change of Position and Illegality: The Case of the Innocent Money-Launderer' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 6, 8.

⁸⁰ For a similar argument in the tort context, see Goudkamp (n 10) 61–62. It should be noted that whether or not there is more than one illegality defence in the law of unjust enrichment depends on whether an exception to a defence properly can be characterised as a defence: in the second context, the doctrine of illegality operates not as a defence to an action but by preventing a defence from biting.

⁸¹ XREF.

⁸² Klimchuk p.25.

(of enrichment) and the other ‘is akin to but not quite a denial’.⁸³ This account is different again from Elise Bant’s contribution, which holds there to be common ground between reliance and non-reliance based cases.⁸⁴

The assumption that change of position is unitary may also underpin part of Lionel Smith’s analysis. Smith asks: ‘is unjust enrichment a single cause of action, or a principle that unifies many causes of action?’ Relevantly for present purposes, he considers whether thinking about defences can assist in answering that question. He argues that the fact the defence of change of position is unavailable to certain claims, such as *Woolwich* claims for restitution of unlawfully levied taxes,⁸⁵ ‘strongly suggest[s] that the claim being made is, in an important way, a *different claim* from the claims which are susceptible to the defence’.⁸⁶ He reasons that ‘If [two claims] were based on the same cause of action—in the sense of the same normative justification—then surely the defence, whatever it is, would be potentially available in both situations’.⁸⁷ Our only point is that this argument depends upon a proper individuation of the defence, such that it can be said that the same defence applies to different situations. Debates about the unity of causes of action are well known, as Smith describes in his chapter. Analogous questions arise at the defence stage: how unified must a doctrine be in order for it to count as *a* defence, rather than one among many?

How should scholars approach this question? In his chapter, Smith attempts to explain in virtue of what one cause of action is distinct from another. He claims that:

‘The correct level of generality for the definition of causes of action is one that neither lumps together juridically distinct justifications for legal recourses, nor pointlessly distinguishes between different ways in which the same justification may be activated’.⁸⁸

This is undoubtedly question begging—it depends, for example, upon our being able to identify which justifications are ‘juridically distinct’—but it is a start. Can it, however, serve as a template for thinking about defences? Do the same concerns that affect the unity of causes of action affect the unity of defences? These questions are not tackled in this volume—but they are undoubtedly important for future work in this field.

Why, specifically, are they important? Beyond their theoretical interest, they can have practical implications. For example, a perennial question in the law of unjust enrichment concerns the interrelation between estoppel and change of position,⁸⁹ and a number of lawyers—both scholars and judges—have tried to assimilate one doctrine into the other. Andrew Burrows has argued that ‘the injustice that estoppel is concerned to prevent is entirely, and more appropriately, achieved by another defence, namely change of

⁸³ Klimchuk p.25.

⁸⁴ Bant, p.000.

⁸⁵ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

⁸⁶ L Smith, p.28 (emphasis in original). Smith does not specify what he means by a defence being ‘unavailable’. Is a defence ‘unavailable’ if it is, for example, bound to fail on the facts? Surely not: there are mistaken payments where the defendant immediately becomes aware of the mistake; no change of position defence would then be possible. Instead, a defence is ‘unavailable’ if some aspect of the cause of action disqualifies the defence.

⁸⁷ L Smith, p.27. He adds: the ‘availability of the same defence to more than one kind of claim does not imply that they rest on the same cause of action’.

⁸⁸ L Smith p.18-9.

⁸⁹ For a detailed discussion, see E Bant, *The Change of Position Defence* (Oxford, Hart Publishing, 2009) 000.

position'.⁹⁰ The recognition of change of position, it follows, swallows up estoppel as a defence to claims in unjust enrichment. In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*, Gageler J took the opposite view.⁹¹ His Honour said that '[t]here is much to be said for treating the defence of change of position ... as a particular application of [estoppel] doctrine'.⁹² Burrows's argument depends upon an evaluation of the normative foundations of the two doctrines, and concludes that the purpose of the estoppel defence is achieved more sensitively by change of position; Gageler J's argument depends upon an ability to individuate defences (such that one defence can be said to be a class of another defence). These arguments, therefore, turn on prior question about how to identify the purposes of defences and how to distinguish defences on this basis.

B. Defences and Commensurability

Two things are commensurable if they can be measured by a common metric; they are incommensurable if they cannot.⁹³ Commensurability—or, rather, incommensurability—is important to several questions in the law of unjust enrichment (and, indeed, private law generally) and is hence a topic that deserves further attention.⁹⁴ Peter Birks argued that '[a]ll the defences [to claims in unjust enrichment] work by trumping the injustice of the defendant's enrichment'.⁹⁵ Birks's explanation of how defences operate seems here to invoke competing claims of justice, which are surely commensurable. Contrast this with Birks's claim that the change of position defence exists in order to⁹⁶

'reconcile the interest in obtaining restitution of unjust enrichment with the competing interest in the security of receipts. There is a general interest in our being free to dispose of wealth which appears to be at our disposition. The defence avoids the need to sterilize funds against the danger of unsuspected unjust enrichment claims.'

From this passage, it is clear that Birks did not see the interests in play regarding change of position as having a common currency; the interest in security of receipts is not one of justice. (Some scholars claim that even this position can be overridden by yet further concerns.⁹⁷)

These comments raise several important questions. One such question is whether it is logically possible for incommensurable considerations to be weighed. Another is whether concerns regarding incommensurability are more acute depending on where in the law of unjust enrichment they arise. In her contribution, Helen Scott seems to suggest that we should be less worried about incommensurability when it arises in connection with defences than where the incommensurable factors are confined to the cause of action

⁹⁰ Burrows (n 63) 558.

⁹¹ *AFSL v Hills Industries* [2014] HCA 14; (2014) 307 ALR 512. The case is discussed in detail in Elise Bant's chapter.

⁹² *ibid* 559 [155].

⁹³ For elaboration, see J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986) 342.

⁹⁴ The philosophical literature on incommensurability is vast, but it is surprisingly under-examined in the legal context.

⁹⁵ Birks (n 22) 207.

⁹⁶ *ibid* 209.

⁹⁷ See Bant's remarks on the illegality bar to change of position in Bant (n 89) 167.

stage. She rejects Andrew Burrows's claim that the good consideration doctrine overrides the injustice at the cause of action stage.⁹⁸ Scott argues: 'In order for the defendant's entitlement to the benefit to 'override' or 'outweigh' the claimant's mistake, these two considerations would have to be commensurable'.⁹⁹ From these remarks we might derive the following claim: the law cannot meaningfully weigh up two incommensurable goods when those goods are found within the cause of action stage. However, she does not doubt that the good consideration doctrine 'overrides' in this fashion and accepts it is rational for it to form part of the law. Her objection is to placing it within the cause of action stage. She suggests that it must instead come at a later stage. It follows that Scott does not appear to think that the incommensurability objection applies equally at the defences stage. We doubt that this is so, though the point deserves more attention.

Other scholars and judges appear to agree that the law can balance incommensurable goods at the defence stage. Within unjust enrichment, Elise Bant has argued that having a child can count as a relevant change of position, notwithstanding the fact it cannot (she says) be understood in terms commensurable with the concept of enrichment.¹⁰⁰ Beyond the law of unjust enrichment, consider a case where a court reduces a claimant's damages due to her contributory negligence. Lord Reed JSC has argued that '[t]he court is not comparing like with like'.¹⁰¹ His Lordship explains: the defendant 'has acted in breach of a duty (not necessarily a duty of care) which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests'.¹⁰² On this analysis, it follows that 'the blameworthiness of the pursuer and the [defendant] are incommensurable'.¹⁰³ Notice, however, that Lord Reed does not conclude that the apportionment exercise is impossible;¹⁰⁴ instead, it leads his Lordship to the view that appellate courts would rarely interfere with a finding concerning apportionment as 'a variety of possible answers can legitimately be given'.¹⁰⁵

This disagreement casts light on a prominent debate within the law of illegality. On one view, the law should aim to balance a number of competing policies—the need to deter, to do inter-party justice, to ensure that the integrity of the law is upheld, etc.—in a fact specific inquiry. For example, in *ParkingEye Ltd v Somerfield Stores Ltd* Toulson LJ said: 'in the area of illegality, experience has shown that it is better to recognise that there may be conflicting considerations and that the rules need to be developed and applied in a way which enables the court to balance them fairly'.¹⁰⁶ One objection that might be raised

⁹⁸ See A S Burrows, 'Good Consideration in the Law of Unjust Enrichment' (2013) 129 *Law Quarterly Review* 328; A Burrows, 'Is There a Defence of Good Consideration?' in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford, Hart Publishing, 2013) 174.

⁹⁹ Scott, p. 6 (footnotes omitted).

¹⁰⁰ Bant (n 89) 132–33.

¹⁰¹ *Jackson v Murray* [2015] UKSC 5; [2015] 2 All ER 805, 813 [27]. *Jackson* is discussed in J Goudkamp, 'Apportionment of Damages for Contributory Negligence: Appellate Review, Relative Blameworthiness and Causal Potency' (2015) 19 *Edinburgh Law Review* 367.

¹⁰² *Jackson v Murray* (n 101) 813 [27].

¹⁰³ *ibid.*

¹⁰⁴ Cf on this same point R Stevens, 'Contributory Fault—Analogue or Digital?' in Dyson, Goudkamp and Wilmot-Smith (n 6) 259. See, also, R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 310

¹⁰⁵ *Jackson v Murray* (n 101) 813 [28].

¹⁰⁶ *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338; [2013] QB 840, 853 [54]. See also his Lordship's remarks in *Jetivia SA v Biltal (UK) Limited (in liquidation)* [2015] UKSC 23; [2015] 2 WLR 1168, 1225 [173]. For discussion, see G Virgo, p. 10-15.

against balancing a range of factors is that it yields unpredictable outcomes. For instance, in *Apotex* Lord Sumption JSC said that the Court of Appeal’s approach ‘was a process, discretionary in all but name, whose outcome would have been exceptionally difficult for either party’s advisers to predict in advance’.¹⁰⁷ Is this a problem? One participant at the workshop suggested that, insofar as the illegality defence was designed in part to deter wrongdoing, *less* certainty about its application could be a virtue, not a vice!¹⁰⁸

Perhaps a more powerful objection is that a balancing approach is conceptually confused, like asking a judge to ‘gauge whether three metres or 16 gallons is greater’.¹⁰⁹ In *Saunders v Edwards* Bingham LJ seemed to suggest that it was relevant, in applying the doctrine of illegality, to consider the unlawfulness of the claimant’s act on the one hand and the quantum of the claimant’s loss on the other.¹¹⁰ The apparent purpose of this examination was to ensure that the denial of a claim for illegality did not result in the infliction of punishment on the claimant that was out of all proportion to the gravity of his wrongdoing. But if these two factors – unlawfulness and the magnitude of the loss that would be left uncompensated if the defence of illegality applied—are incommensurable, does it make sense to ask the court to reach a ‘proportionate’ conclusion about how they are to be balanced?¹¹¹ It was perhaps this concern that prompted Graham Virgo to suggest that there is a ‘danger that [an approach that requires the court to weigh a host of policy considerations] collapses from a principled exercise of judicial discretion into the exercise of arbitrary choice, potentially even returning to the old public conscience test’¹¹² espoused in *Tinsley v Milligan*.¹¹³ Whether this is indeed a problem depends upon what constitutes a ‘principled exercise of judicial discretion’. Virgo does not define that concept. The question is: can a discretion be exercised in a principled fashion when the goods in question are incommensurable? Virgo seems to think so. He advocates a ‘middle way’ between the two approaches canvassed. We should, he claims, recognise¹¹⁴

‘the public policy dimension of the illegality defence as a starting point for its application, but then moderate... this by reference both to how illegality is defined and to various recognised mechanisms which can be analysed as involving both countervailing policy considerations and the need to consider the justice of the case as between the parties. This involves the exercise of judicial discretion in a principled way.’

¹⁰⁷ Above n 33, 444 [21].

¹⁰⁸ We are reminded in this regard of a claim made in PH Robinson, ‘Criminal Law Defenses: A Systematic Analysis’ (1982) 82 *Columbia Law Review* 199, 272. Robinson argues that ‘vague and ambiguity in [certain defenses] may serve the useful purpose of deterring undesirable conduct by persons who in fact qualify for the defense’.

¹⁰⁹ R Stevens, ‘Contributory Fault—Analogue or Digital?’ (n 104) 259.

¹¹⁰ *Saunders v Edwards* [1987] 1 WLR 1116 (CA) 1133. See, further, *Cross v Kirkby* Times, 5 April, 2000 (CA) [53]; *Clarke v Clarke* [2012] EWHC 2118 (QB) [30].

¹¹¹ For the language of proportionality (and a position endangered by incommensurability objections), see A Burrows, *A Restatement of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2012) s 28(3)(c) Burrows proposes that the law of illegality should produce a result that is proportionate to myriad considerations.

¹¹² G Virgo, p.35.

¹¹³ *Tinsley v Milligan* [1994] 1 AC 340 (HL).

¹¹⁴ G Virgo, p.35-6.

This approach is only possible, it should be clear, if incommensurable goods can be balanced: it involves more factors, not fewer. We have not the space to reach a considered view on these various claims. Our concern here has been to highlight the issue, and we hope that private law scholars will in the future consider the topic in greater detail.

C. The Merits of a Comparative Perspective

Several contributions in this volume make use of comparative law. For instance, Sonja Meier examines bona fide purchase in the context of both English and German law; Helen Scott considers the distinction between unjust factor and absence of basis systems through the lens of ‘enrichment owed’; and Lionel Smith surveys not only a number of common law jurisdictions, but also a civilian perspective on his question.¹¹⁵ Even those contributors who do not adopt an overtly comparative analysis do analyse the law from numerous jurisdictions. Birke Häcker looks at German and United States law on minority as well as England and Wales; Elise Bant considers authorities from Australia and England and Wales on change of position; and Andrew Kull examines both US and English and Welsh authorities.

This approach has found favour in many common law courts. Judges often cite comparative material.¹¹⁶ Lord Neuberger of Abbotsbury PSC recently said:¹¹⁷

‘As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world’.

Comparative law has been vital to the development of the law of unjust enrichment, and its defences. In *Kleinwort Benson v Lincoln CC*, the House of Lords abolished the rule that mistakes of law would not ground a claim in unjust enrichment. Lord Goff said:¹¹⁸

‘I have referred to the fact that the mistake of law rule has already been abrogated in other common law jurisdictions, either by legislation or by judicial decision. This material is, of course, well known to lawyers in this country, and has, I know, been studied by all members of the appellate committee, not of course for the first time, and is regarded with great respect.’

And in *Lipkin Gorman v Karpnale Ltd*, as part of his argument in favour of the recognition of the change of position defence, his Lordship said ‘The principle is widely recognised throughout the common law world ... The time for its recognition in this country is, in my opinion, long overdue’.¹¹⁹

This harmony of academic and judicial approaches is striking for at least two reasons. First, academics rarely agree with each other, let alone with the judiciary, about the

¹¹⁵ L Smith, p9-15.

¹¹⁶ For a recent survey of the use of foreign decisions by the House of Lords and Supreme Court see A Burrows, ‘The Influence of Comparative Law on the English Law of Obligations’ in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Oxford, Hart Publishing, 2015).

¹¹⁷ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250.

¹¹⁸ *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (HL) 373.

¹¹⁹ Above n 56, 579.

proper role of history, philosophy and economics in legal reasoning; why is there such agreement on the use of comparative material? Second, not everyone *does* agree with this use of comparative material. The most famous disagreements on this point have been on the United States Supreme Court in the context of constitutional interpretation.¹²⁰ For instance, in *Roper v Simmons* Kennedy J's plurality opinion referred to the United Nations Convention on the Rights of the Child (a treaty the United States has not ratified).¹²¹ A number of Justices have argued that such citation is illicit. Thomas J has protested that: 'While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans'.¹²² On that basis, Scalia J has called the use of foreign law 'dangerous';¹²³ indeed, 'the basic premise of the [United States Supreme] Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand'.¹²⁴ The context of this debate is obviously quite far removed from the law of unjust enrichment, but we think that parallel issues arise.

This harmony—and discord—prompts a number of questions. Our interest here is to raise perhaps the most obvious, but also the most important, question: what is the merit of a comparative analysis? At one point in his essay Lionel Smith points out that '[n]either a claim in German law, nor a source of obligation in French or Quebec law, is defined entirely in terms of primary facts'.¹²⁵ One might respond: so what? Why is it that this discovery is an *important* discovery? More specifically, why should a court ever look to foreign law in formulating its own rules? We will consider three possible justifications.

The first possible justification of a comparative approach is the notion that it is not really comparative; a 'comparative approach' in reality involves looking to a common set of rules. For example, in the context of constitutional jurisprudence, Jeremy Waldron has argued that courts can draw on supranational legal norms, a *ius gentium*.¹²⁶ Closer to our topic, Lord Hailsham LC in *Broome v Cassell & Co Ltd (No 1)* (a case about the availability of exemplary damages in private law) said that he viewed 'with dismay the doctrine that the common law should differ in different parts of the Commonwealth'.¹²⁷ Why? One possible reason is that Lord Hailsham regarded divergence as a betrayal of the very nature of the common law—which was to unite the legal systems of numerous jurisdictions. A similar argument is put by Robert Stevens, who claims that:¹²⁸

¹²⁰ See generally RJ Delahunty and J Yoo, 'Against Foreign Law' (2005) 29 *Harvard Journal of Law & Public Policy* 291. Essentially the same debate broke out in the Australian High Court at around the same time. See M Kirby, 'The Citation of Foreign Decisions in Constitutional Adjudication: the Relevance of the Democratic Deficit' (2009) 43 *Suffolk University Law Review* 117.

¹²¹ 543 US 551 (2005) 571.

¹²² *Foster v Florida*, 537 US 990, 991 n 1 (2002) (Thomas J) (emphasis in original).

¹²³ *Lawrence v Texas* 539 US 558 (2003) 598.

¹²⁴ *Roper v Simmons* 543 US 551 (2005) 624.

¹²⁵ L Smith, p.13.

¹²⁶ J Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (New Haven, Yale University Press, 2012).

¹²⁷ *Broome v Cassell & Co Ltd (No 1)* [1972] AC 1027 (HL) 1067 (Lord Hailsham LC). Cf *Broome v Cassell & Co Ltd (No 1)* [1972] AC 1027 (HL) 1127 (Lord Diplock). For discussion, see J Harris, 'The Privy Council and the Common Law' (1990) 106 *Law Quarterly Review* 574.

¹²⁸ R Stevens, 'The Divergence of the Australian and English Law of Torts' in S Degeling, J Edelman and J Goudkamp (eds), *Torts in Commercial Law* (Sydney, Law Book Co, 2011) 62.

‘Our common law [of torts] is the embodiment of our rights one against another. At the margin these rights are, as a matter of morality, underdetermined, and one of the justifications for private law is that it provides the determinacy which individual reflection cannot provide. At the margin some divergence between different systems is understandable and not a source of concern. However, it should be and is a source of grave concern if the judges of one common law system embark on radical change based upon a novel conception of what the law of torts is.’

A second possible explanation is epistemic. The basic idea would be that foreign courts are a source of wisdom from which to draw. A caricature of this view would suppose that whatever rule is most widely endorsed has the prima facie case to being the best rule.¹²⁹ According to this caricature, the determination of the rule that should be adopted in any given context should be decided according to a popularity contest. Stevens endorses a moderate version of this thesis when he says:¹³⁰

‘Being inconsistent with other legal systems does not of course necessarily demonstrate that English law is wrong and other systems are right. However, being out of step with a large number of other systems should give pause for thought.’

A final reason why courts and academics might look to other jurisdictions is second-order.¹³¹ There may be incidental benefits of legal systems adopting the same rule on some matter. For example, the preamble to the Rome I Regulation asserts that:¹³²

‘The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.’

This is said to be ‘necessary for the proper functioning of the internal market’.¹³³ These propositions are taken to be self-evident; no empirical evidence is provided to support them. Whether this is justified is not a question we seek to answer here. Our only point is that this is a plausible form of argument in favour of studying comparative law: to discover what the law is in a different jurisdiction, and then to adopt a similar rule so as to achieve these incidental benefits.

There may be additional reasons why a comparative approach is appropriate. Whatever the reasons are, it is important that they be stated clearly as they will determine the nature of the comparative inquiry. It may be more appropriate for any given court to look to the jurisprudence of certain jurisdictions than of other jurisdictions. For example, Lionel Smith writes that he would be ‘doubtful of [a] scheme’ that would ‘threaten... to cut common law Canada off from the rest of the common law world’.¹³⁴ We take it that his doubt would be less acute if there was the threat of cutting common law Canada off

¹²⁹ Perhaps it is not *such* a caricature: the theory might be supported by something like Condorcet’s theorem, applied writ large.

¹³⁰ R Stevens, ‘The Contracts (Rights of Third Parties) Act 1999’ (2004) 120 *Law Quarterly Review* 292, 315.

¹³¹ For more of such arguments in the context of international trade, see Harris (n 127) 596–99.

¹³² Rome I, Recital (6).

¹³³ *ibid*, Recital (1).

¹³⁴ Smith, p.34.

from a civilian jurisdiction (assuming there were harmony between the systems at the start of the story). Why, though, should common law countries have any priority? This will depend on the reason for the comparative inquiry. If the rationale is that there is a common law, the reason is self-evident. If the rationale is epistemic, there is no a priori reason to give more weight to common law traditions. But if the rationale is the indirect benefits harmonisation brings, there may be more reason to harmonise with other common law jurisdictions insofar as (for example) those jurisdictions are ones with which England has most trading links. This picture has been complicated of late. Perhaps for this reason, Lord Reed says:¹³⁵

‘Nor is it only common law jurisdictions which should be considered. Particularly at a time when steps have begun to be taken towards some degree of harmonisation of private law across the European Union, it can sometimes be helpful also to consider civilian approaches.’

IV. The Structure of the Book

In *Defences in Tort*, we divided the essays into general and specific. We have not replicated this structure in this book. Part of the reason for this is that some of the most general chapters, such as Dennis Klimchuk’s inquiry into the nature of change of position, deal with specific defences. Nevertheless, we have attempted to group together those essays which we suggest should be read sequentially, such as the various contributions on the change of position defence. We close with an interesting and provocative essay by Lord Reed. Lord Reed gave an important opinion in *Benedetti v Sainiris*.¹³⁶ His Lordship was struck by the extent to which argument in the case revolved around academic interpretations of the law. His chapter here sets out his thoughts on the interrelation between academic work and practice—and thus casts light over the book, and project as a whole. What is the point of academic work?¹³⁷ Should it appeal to judges and practitioners?¹³⁸

¹³⁵ Reed, p.19.

¹³⁶ [2013] UKSC 50; [2014] AC 938. See G Virgo, ‘Evaluating Enrichment’ (2013) 72 *Cambridge Law Journal* 508.

¹³⁷ A famous cynical and entertaining reply to this question is given in F Rodell, ‘Goodbye to Law Reviews’ (1936) 23 *Virginia Law Review* 38.

¹³⁸ For different answers to this question, see M Kirby, ‘Welcome to Law Reviews’ (2002) 26 *Melbourne University Law Review* 1 and J Gava, ‘Law Reviews: Good For Judges, Bad for Law Schools’ (2002) 26 *Melbourne University Law Review* 560.