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**TAKING IT BACK: AN ANGLO-AMERICAN COMPARATIVE STUDY ON
RESTITUTION FOR MISTAKEN GIFTS**

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The research question of this article is: under Anglo-American law when is a donor entitled to take back the value of an executed inter vivos gift made pursuant to a mistake? Although gift giving is a ubiquitous ritual that transcends national and cultural boundaries, legal analysis on gifts is remarkably rare. So far legal literature both in Anglo-American law on gifts have tended to concentrate on promises to make gifts rather than the issue of mistaken gifts. This paper attempts to address the lacuna in this area. On a more general level, by embarking on the research question the following important questions are raised from an Anglo American perspective: Why is a mistaken transfer of wealth reversed by the law? How does a mistaken gift affect the donor’s personal autonomy? What is the function of gift giving in our society? What are the motivations behind gift giving apart from altruism? How do gift exchanges form communities? How do human beings interact with each other outside the commercial world? The project of this article is to construct a normative framework to deal with the research question which draws upon works by feminist legal scholars, sociologists and anthropologists which recognizes that a gift is an important transaction which engenders social bonds such as love, affection, intimacy, friendship, trust and gratitude which forms the basis of influencing parties' future conduct in the social sphere.

I. INTRODUCTION

In March 2001, the acclaimed actress Jane Fonda pledged to donate \$ 12.5 million to the Harvard School of Graduate Education¹ making it the largest individual donation in Harvard’s history. At the time the gift was announced, Fonda was reported to have said the donation was inspired after reading Carol Gilligan’s book *In a Different Voice: Psychological Theory and Women's Development*;² she was so moved that she

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¹ Patrick Healey, *Making Over an Image[:] Fonda's \$12.5m Funds Harvard Gender Studies*, BOSTON GLOBE, Mar. 3, 2001, at 1, available at LEXIS, News Library; Ed Hayward, *Harvard's Fonda Jane's (sic) \$ 12.5M*, BOSTON HERALD, Mar. 3 2001, at 1, available at Lexis, News Library.

² CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Rather surprisingly, a day before Fonda’s largesse was made public it was announced that Carol Gilligan was leaving Harvard to join New York University’s Law School. See Patrick Healey, *Harvard Educator Seeks Renewal at NYU*, BOSTON GLOBE, Mar. 8, 2001, at 1, available at LEXIS, News Library.

cried much of the way while reading through the book because she identified closely with the issues raised.³ Fonda's donation was meant to launch the Harvard Center of Gender and Education. This sum included the setting up of a Chair in honor of Professor Gilligan. Unfortunately, this story did not have a happy ending. In early 2003 it was reported that Harvard was returning to Fonda the unused portion of \$ 6.5 million that was disbursed.⁴ The remaining sum initially pledged would also be scaled back. Although it remains unclear what were the factors which contributed to Fonda's decision to withdraw the gift, the press speculated three reasons behind this. First, Fonda was said to be increasingly frustrated with Harvard's failure to find a suitable leader for the Center.⁵ Second, Harvard recently adopted more restrictive policies which impeded the establishment of the center. Finally, reports suggested that Fonda was reluctant to give the remainder of the money because the value of her stock portfolio, which included AOL Time Warner stocks, had plunged drastically.

It was fortunate that matters did not turn acrimonious and both parties were able to resolve their differences amicably. However, it is interesting to speculate what would be the position in law if Harvard had refused to give Fonda back the \$ 6.5 million dollars which was disbursed? Would Fonda be legally entitled to demand restitution of the money already disbursed on the ground of a mistake? Essentially, this is the research question that this paper investigates: when is a donor entitled to take back the value of an executed *inter vivos* gift on the basis of a unilateral mistake in the absence of misrepresentation, fraud, duress, undue influence or any wrongdoing by the donee? This writer will consider the problem from a comparative Anglo-American perspective.⁶

There are several qualifications which ought to be made in order to set out the proper parameters of this article. First, as mentioned above, the inquiry pursued in this paper presupposes the absence of misrepresentation, fraud, duress, undue influence or any other wrongdoing by the donee. If the donee was guilty of wrongdoing, then

³ See Healey, *supra* note 1.

⁴ Jenna Russell, *Fonda Curtails \$12.5m Harvard Grant*, BOSTON HERALD, Feb. 1 2003, at 1, available at Lexis, News Library; *Actress withdraws most of \$12.5 million pledge to Harvard*, THE ASSOCIATED PRESS, Feb. 1, 2003, available at LEXIS, News Library; Jennifer L. Steinhardt, *Actress Fonda Withholds Harvard Gift*, HARVARD CRIMSON, Feb. 3, 2003, available at LEXIS, News Library; *Harvard University Returns Jane Fonda Sex Center Donation*, AGENCE FRANCE PRESSE, Feb. 4, 2003, available at LEXIS, News Library.

⁵ Mary Leonard, *College Endowments Lose Billions in Market Squeeze*, BOSTON GLOBE, Oct. 13, 2002, at 1, available at Lexis, News Library.

⁶ There has been an extraordinary amount of comparative work done in the law of restitution in recent times especially between English and civil law. See e.g., Reinhard Zimmermann & Jacques du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, 2 RESTITUTION L. REV. 14 (1994); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403 (1995); Sonja Meier, *Mistaken Payments in Three Party Situations: A German View of English Law* 58 CAMBRIDGE L.J. 567 (1999); UNJUST ENRICHMENT AND THE LAW OF CONTRACT (E.J.H. Schrage ed., 2001); THOMAS KREBS, RESTITUTION AT CROSSROADS (2001); Gerhard Danneman, *Unjust Enrichment by Transfer: Some Comparative Remarks*, 79 TEX. L. REV. 1837 (2001); UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE LAW (David Johnston & Reinhard Zimmerman eds., 2002); Peter Birks, *Comparative Unjust Enrichment* in THEMES IN COMPARATIVE LAW 137 (Peter Birks & Arianna Pretto eds., 2002). For an older work see JOHN P. DAWSON, GIFTS AND PROMISES (1980).

obviously the donee's wrong would be the source of restitutionary liability. Second, what is being considered here is not a mere change of mind by the donor. In other words, we are not looking at the law of 'regretted decisions'⁷ but a genuine mistake on the donor's part with regard to some underlying assumption of the gift. Gifts cannot be revoked simply because the donors wish they had not made them and would like to have back the property given. Third, it is beyond the scope of this article to look at engagement gifts e.g. the issue of the donee's entitlement to keep an engagement ring when the marriage is called off. There is already an excellent article dealing with this subject.⁸ Fourth, this article does not deal with the issue of when a settlor can revoke a properly constituted trust. Fifth, conditional gifts (gifts subject to a condition subsequent or condition precedent) are not the subject of this article. Finally, the question of when an intended donee can obtain restitution from a third party when a gift goes awry and ends up in the hands of an unintended recipient will not be considered.⁹

The question remains: why write a paper on the law of restitution for mistaken gifts from an Anglo-American perspective? A short answer would be that this is a common problem¹⁰ and there does not seem to be any recent legal literature that deals with this specific issue adequately. Although gift giving is a ubiquitous ritual that transcends national and cultural boundaries, legal analysis on gifts per se is remarkably rare. So far Anglo-American law review articles on gifts have tended to concentrate on the enforceability of promises to make gifts rather than the issue of restitution for mistaken gifts. This article attempts to address the lacuna in this area. On a more general level, a project comparing Anglo-American law on restitution for mistaken gifts is valuable because it raises a multitude of fascinating issues: Why is a mistaken transfer of wealth reversed by the law? When can a gift be properly characterized as 'mistaken'? How does a mistaken gift affect the donor's personal autonomy? What is the function of gift giving in our society? What are the motivations behind gift giving apart from altruism? What is the connection between gift giving and inter-personal relationships? Ultimately, behind the technicalities of legal doctrine, the law in this area reveals compelling and rich stories about property, personhood and relationships outside the commercial world. It seems ironic that although Anglo-American law has a reasonably advanced and theoretically sophisticated framework to analyze commercial relationships, there is a real poverty in legal scholarship on how the law should deal with relationships outside a business setting. Lawyers rely on their basic intuitions and archaic and quaint maxims when dealing with gifts, e.g. "equity will not assist a volunteer", "equity will not perfect an

⁷ See e.g. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS (1998).

⁸ Rebecca Tushnet, *Rules of Engagement*, 107 YALE L.J. 2583 (1998).

⁹ 4 GEORGE PALMER, LAW OF RESTITUTION §18.8 (1978); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11(3) (Tentative Draft No. 1. April 6, 2001).

¹⁰ For example, at the time this paper was written, there is the controversy on donations to a foundation to re-open the Statue of Liberty to the public after September 11, 2001. See Mike McIntire, *U.S. is Investigating Use of Donors' Gift to Statue of Liberty*, NEW YORK TIMES, Apr. 5, 2004, at 1, available at Lexis, News Library. Donors were angry because the foundation solicited for funds when it had over \$ 30 million in reserve. An interesting question would be whether the donors were entitled to restitution of their gift to the foundation.

imperfect gift" etc. It is part of this writer's project, to correct this and present a defensible normative framework in dealing with the issue of when a donor is able to take back the value of a completed gift from the donee.

The organization of this article is as follows: Part II describes the comparative law methodology adopted in this article i.e. Zweigert and Kötz's *functionality* approach.¹¹ Part III is a brief overview of the jurisprudential basis of the reasons why a person is allowed restitution for a mistaken transfer of wealth. In this paper, this writer will assume that restitution for mistaken transfers is necessary to restore the plaintiff's Kantian autonomy as a free-willed agent. Part IV attempts to unpack what is meant by a mistaken gift and the causative link between a mistake and the making of a gift. Part V and VI is a review of the law on restitution for mistaken gifts in the United States and England respectively. Part VII involves a comparison and a critical evaluation of the law of the United States and England. It will be shown that the implicit normative basis of the law in this area is deeply flawed. And, finally, Part VIII is the prescriptive project of this article i.e. this writer constructs an alternative normative framework to govern restitution for mistaken gifts.

II. THE COMPARATIVE METHODOLOGY USED IN THIS PAPER

One of the most difficult things about writing a comparative piece is to find an appropriate methodology to compare two different legal systems.¹² The methodology adopted in this paper is that of *functionality*.¹³ As Zweigert and Kötz explain there are several steps in this approach. First, the question to be studied must be posed in purely functional terms without reference to the concepts of one's own legal system. Second, an objective report free from any critical evaluation of each legal system should be presented. Third, an inclusive syntax and vocabulary capable of embracing heterogeneous legal systems needs to be developed. Finally, the comparative legal scholar must engage in a critical evaluation of the systems compared.

In comparing the modern law of restitution of England and the United States we do not need to engage with step three; the syntax and vocabulary between both jurisdictions are quite similar due to extensive cross fertilization. The development of the modern¹⁴ law of restitution in both countries can be traced back to the *Restatement*

¹¹ KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 – 36 (3rd ed. 1998).

¹² See e.g., Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025; James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607 (1998); John C. Reitz, *How to Do Comparative Law?*, 46 AM. J. COMP. L. 617 (1998).

¹³ KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 – 36 (3rd ed. 1998). Cf. Pierre Legrand, *Alterity: About Rules, For Example*, in THEMES IN COMPARATIVE LAW, 21, 21, (Peter Birks & Arianna Pretto eds., 2002) (Legrand argues a functionalist project is doomed to fail. In his view the 'main objectives of the comparatist, then, must be to understand why a particular legal culture has been attracted to a particular genre of cultural product and to capture the trajectory of epistemological justification that has been followed by that culture.')

¹⁴ This article will not examine the historical literature before the RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1937). See e.g. Sir

of *Restitution* (1937) drafted under the umbrage of the American Law Institute;¹⁵ the *Restatement* influenced Robert Goff and Gareth Jones to write their ground breaking book on the law of restitution in England.¹⁶ However, in this writer's view there are still significant differences in both jurisdictions that make a comparative project worthwhile. Atiyah and Summers have noted that there are some profound distinctions that exist in the law of England and the United States despite both of them belonging to the same legal family.¹⁷ What is especially fascinating is that while the study of the subject of restitution has flourished in England, interest in the law of restitution seemed to have waned¹⁸ in the United States until very recently.¹⁹ Such a comparative study is also timely as Professor Andrew Kull is currently preparing a new *Restatement*.

Quite apart from methodology, there is also a question of the sources of law to be studied. The difficulty in undertaking a comparative project involving the United States is that there is technically no 'common law' of the United States but rather the law of fifty states, the District of Columbia and federal law. As a matter of strategy, the principal sources of the law that will be looked at would be the *Restatements*, major treatises and influential law review articles.²⁰ The *Restatements* are as close as one can get to a common law. Dean Goodrich, a former director of the American Law Institute, described the *Restatement* as "common law "persuasive" authority" with a high degree of persuasion'.²¹ According to Goodrich, a court would be slow to depart

William D Evans, *The Action for Money Had and Received*, in ESSAYS (1802) available at 6 RESTITUTION L. REV 3 (1998).

¹⁵ For a historical review of the American Law Institute see John P. Frank, *The American Law Institute 1923 - 1998*, 26 HOFSTRA L. REV. 615 (1998).

¹⁶ ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* (1st ed. 1966).

¹⁷ See PATRICK ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS* (1981). [to read **Law and legal theory in England and America / Richard A. Posner**]

¹⁸ See John H. Langbein, *The Later History of Restitution*, in RESTITUTION[:] PAST PRESENT AND FUTURE 57 (William Cornish et. al. eds., 1998); AMERICAN LAW INSTITUTE, PROCEEDINGS 235 – 236 (2000); Peter B.H. Birks, *A Letter to America: The New Restatement of Restitution*, 3 GLOBAL JURIST FRONTIERS (Mar. 11, 2004) at <http://www.bepress.com/gj/frontiers/vol3/iss2/art2>. See also Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995); David F. Partlett & Russell L. Weaver, *Restitution: Ancient Wisdom*, 36 LOY. L.A. L. REV. 975 (2003) who say restitution has been lost in American jurisprudence.

¹⁹ Several conferences and symposiums have been dedicated to the subject in recent times. See e.g. Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001); Symposia, *Second Remedies Discussion Forum: Restitution*, 36 LOY. L.A. L. REV. 777 (2003).

²⁰ See e.g. John W. Wade, *The Literature of the Law of Restitution* 19 HASTINGS L.J. 1087 (1968) for a comprehensive review of the important literature.

²¹ Herbert F. Goodrich, *Restatement and Codification* in DAVID DUDLEY FIELD CENTERNARY ESSAYS 241, 244 (Alison Reppy ed., 1949). See also Nathan M. Crystal, *Codification and the Rise of the Restatement Movement* 54 WASH. L. REV. 239 (1979); John W. Wade, *The Restatement (Second): A Tribute to its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend*, 13 PEPP. L. REV. 59 (1985). Cf. Charles E. Clark, *The Restatement of the Law of Contracts* 42 YALE L.J. 643 (1933); W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for*

from the *Restatement* as ‘it will do so with the knowledge that the rule which it rejects has been written by the people who by training and reputation are supposed to be eminently learned in a particular subject and that the specialists’ conclusion have been discussed and defended before a body of very able critics.’²² With regard to the Restatements, two Restatements will be looked at in detail: *Restatement of Restitution* (1937)²³ and the draft *Restatement (Third) on Restitution and Unjust Enrichment*.²⁴ The draft *Restatement (Second) on Restitution*²⁵ will not be examined since it was abandoned. With regard to English law, the case law, would of course, feature prominently. In addition to this academic commentary would also be considered in detail. It is interesting to note that two of Atiyah and Summers’²⁶ observations on the difference between the Anglo-American legal system: first, the English legal system is highly formal while the American counterpart is highly substantive and second, the lack of status of the English academic as compared to her American colleague may no longer be true at least with regard to the law of restitution. In recent times, the courts in England frequently cite academic work in their judgments.²⁷ As Professor Burrows observed English academics now ‘seek to influence the judiciary and aspire to, and can expect to, be cited in judgments; ... they regard the primary purpose of their work as being to ensure consistency and rationality in decision making, based on shared political and moral values in society, rather than the introduction of new social policies; and that they tend to have close contact with practitioners, especially at the Bar.’²⁸

its Amelioration, 13 PEPP. L. REV. 23 (1985); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures* 143 U. PA. L. REV. 595 (1995) (for less flattering views of the Restatement project).

²² Herbert F. Goodrich, *Restatement and Codification* in DAVID DUDLEY FIELD CENTERNARY ESSAYS 241, 244 - 245 (Alison Reppy ed., 1949).

²³ See Warren A. Seavey & Austin W. Scott, *Restitution* 54 L.Q. REV. 29 (1938) for a background on the aims of the restatement; RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS xi – xii (1937).

²⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 1. April 6, 2001).

²⁵ RESTATEMENT OF RESTITUTION (Tentative Draft No. 1. April 5, 1983).

²⁶ PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS [page numbers??] (1981).

²⁷ Two Lexis-Nexis searches conducted on April 20, 2004 using the key words “Birks w/5 restitution” and “Burrows w/5 restitution” in the Reported and Unreported database of judgments from England and Wales revealed 40 and 25 decisions respectively containing these key words. These key words are a reference to Peter B.H. Birks and Andrew Burrows of Oxford University who are the leading academics on the law of unjust enrichment.

²⁸ Andrew Burrows, *Restitution: Where Do We Go From Here*, 50 CURRENT LEGAL PROBS. 95 at 109 (1997). Cf. For a less flattering view of the impact of academic influence see Margaret Halliwell, *Academics, Equity and Unjust Enrichment*, 34 CAN. BUS. L.J. (2001) 391; Steve Hedley, *Unjust Enrichment: A Middle Course?*, 2 OXFORD U. COMMONWEALTH L.J. 181 (2002); Margaret Halliwell, *Treatises as Precedents of English Law: Unjust Enrichment Marches On*, 62 CAMBRIDGE L.J. 561 (2003) David Campbell and Philip Wylie, *Ain’t No Telling (Which Circumstances are Exceptional)*, 62 CAMBRIDGE L.J. 605 (2003).

III. WHY DO YOU GET RESTITUTION FOR A MISTAKEN TRANSFER?

Writing in 1995, Andrew Kull lamented that: ‘American lawyers today (judges and law professors included) do not know what restitution is’.²⁹ Therefore, it is perhaps helpful at this stage for the benefit of beginners to the subject for this writer to outline briefly why a person gets restitution of a benefit which was mistakenly transferred.³⁰ I start with a simple example of mistaken payment, an illustration that is generally regarded as the core case of restitution³¹: X pays money to Y by mistake. X is entitled to restitution of the money paid subject to certain defenses like Y’s change of position in reliance of the payment. A person unfamiliar with the subject may be tempted to think that such a scenario is merely an unrealistic classroom hypothetical which happens only infrequently. But this view is wrong. The case law shows that mistaken payments happen all the time especially in the banking and commercial world. A leading English case will be used as an illustration of the practical significance of the subject. In *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd*,³² the plaintiff, a New York bank, mistakenly pays the defendant, a bank incorporated in England, a sum of U.S. \$2,000,687.50 twice on the same day. This error was due to a clerical oversight. Subsequently, the defendant became insolvent. The plaintiff sought a proprietary right over the money mistakenly paid in order to secure priority over the defendant’s creditors. This case demonstrates the complexity of reversing mistaken transfers of wealth in the face of trans-national insolvency regimes, third party expectations and the payee’s security of receipt. It seems almost

²⁹ Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195 (1995). See also AMERICAN LAW INSTITUTE, PROCEEDINGS 145 (2001) where Professor Douglas Laycock observed: ‘I get [consulting claims] every week about restitution. Lawyers panic when they see a restitution issue...’; John H. Langbein, *The Later History of Restitution*, in RESTITUTION[.] PAST PRESENT AND FUTURE 57, 61 (William Cornish et. al. eds., 1998) (‘The subject has all but vanished for the law reviews, and apart from Professors Kull and Laycock, it is hard to name a living American authority’); Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999) (reviewing HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1999)).

³⁰ This essay will not tackle the unresolved issue of the overall structure of the subject. See e.g. John P. Dawson, *Restitution without Enrichment*, 61 B.U. L. REV. 563 (1981); Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995); Peter B.H. Birks, *The Law of Unjust Enrichment: A Millennial Resolution*, SING. J. LEGAL STUD. 318 (1998); Peter B.H. Birks, *Unjust Enrichment and Wrongful Enrichment*, 71 TEX. L. REV. 1777 (2001); Mark P. Gergen, *What Renders Enrichment Unjust*, 71 TEX. L. REV. 1927 (2001); Steve Hedley, *Unjust Enrichment: A Middle Course?*, 2 OXFORD U. COMMONWEALTH L.J. 181 (2002).

³¹ RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 6, 15 – 28, 44 - 55 (1937); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 (Tentative Draft No. 1. April 6, 2001); PETER B.H. BIRKS, UNJUST ENRICHMENT 3 – 18 (2003). In *Guyana Telephone & Telegraph Co. v Melbourne International Communications*, 329 F.3d 1241, (Fla. Ct. App. 2003), Kravitch, Circuit Judge observed ‘[t]he paradigm examples of unjust enrichment are mistaken transfers.’

³² (1985) Ch. 105. The reasoning of this case has been doubted by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669.

like a paradox that as our world becomes more advanced and sophisticated that such errors occur with increasing frequency.

To fully comprehend restitution law, it is important to understand what it is not. In the example given above, the plaintiff's claim is not grounded in other more familiar categories of the law of obligations such as tort or contract.³³ Liability in the hypothetical between X and Y cannot be explained under orthodox tort theory because the defendant being a passive recipient has breached no independent duty of care to the plaintiff.³⁴ Unless, we take the view that there is a duty to return a mistaken payment. But this analysis begs the question: what is the basis for the duty to make restitution to the plaintiff? Likewise restitutionary liability cannot be premised on a contractual analysis because no agreement had ever been concluded between the parties. In the past, restitution had been rationalized as a form of implied contract or a quasi contract,³⁵ the courts as a matter of legal fiction imputed an implied contract on the parties. However, as with many legal fictions, there are serious conceptual problems with this theory especially in the context of mistaken payments. As a theory, it lacks the explanatory force to clarify the justification of the implication of a contract between the parties. Therefore, it is unsurprising that most restitution scholars do not favor the implied contract analysis. The draft *Restatement (Third) on Restitution and Unjust Enrichment* correctly points out another:³⁶ 'misconception is that restitution is essentially a remedy, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract.' Due to the fact that the cause of action for restitution for a mistaken payment arises independently from the law of torts and contracts, some restitution scholars have termed it as an instance of an autonomous unjust enrichment.³⁷

³³ See generally Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 67 (1985) ("Restitution occupies the crucial ground between its much studied neighbors, tort and contract. Restitution deals with nonbargained benefits; tort law with nonbargained harms; contracts with bargained benefits and harms.")

³⁴ Cf. Stephen A. Smith, *Justifying the Law of Unjust Enrichment* 79 TEX. L. REV. 2177, 2193 – 2197 (2001) (suggests that there is a duty not to interfere with another's attempt to retrieve defectively transferred property).

³⁵ For a historical account see e.g. J.B. Ames, *History of Assumpsit*, 2 HARV. L. REV. 53 (1888); John H. Baker, *The History of Quasi-Contract in English Law*, in RESTITUTION[.] PAST PRESENT AND FUTURE 37 (William Cornish et. al. eds., 1998); Yung Frank Chiang, *Payment By Mistake in English Law* 11 FLA. J. INT'L L. 91 (1996); D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS, 263 – 293 (1999).

³⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. h (Tentative Draft No. 1. April 6, 2001).

³⁷ PETER B.H. BIRKS & ROBERT CHAMBERS, THE RESTITUTION RESEARCH RESOURCE VI (1994). This proposition was accepted in *Flint v. ABB Inc.*, 337 F.3d 1326, (Fla. Ct. App. 2003). Kravitch, Circuit Justice wrote: '[t]he law of unjust enrichment is concerned solely with enrichments that are unjust *independently* of wrongs and contracts. Cf. Gerard McCormack, *Restitution, Policy and Insolvency* in RESTITUTION AND INSOLVENCY 261, 262 (Francis Rose ed., 2000) (who observed that restitution scholars have a propensity for 'using a new language, which by and large is known only to those specialized in the field, perhaps smacks of a degree of elitism and "other worldliness"').

Recognizing that the action is autonomous from torts and contracts is only the beginning of the story. We come back to the unresolved jurisprudential question which is central to this paper: why should the law reverse a mistaken payment? At the present moment, there are several competing accounts why there is restitutionary liability on a recipient of a mistaken payment. It must be noted that it is beyond the scope of this paper to assess in detail the merits of each theory. The first model is premised on the idea of respecting an individual's Kantian autonomy. Hanoch Dagan³⁸ explains the link between personal autonomy and mistakes as follows:

'Mistakes are frequently said to "destroy action" by preventing the action from being of its intended character.' Hence a mistaken transfer is not the result of the autonomous decision of the transferor. To validate 'a wealth transfer based on such vitiated judgment would offend the liberal commitment to individual free choice; it would violate the maxim that the exercise of (subjective) free will should be the prerequisite to any legitimate transfer of, or interference with, resources.'³⁹ The implicit rationale for reversing mistaken transfer is a commitment to liberalism: whereby 'each individual is [seen] as distinct and unique, [and] each should be able to choose personal goals (as well as the means of achieving these goals) voluntarily and should be held responsible for such choice'.⁴⁰ It follows that where the transfer of property is involuntary, the law does not hold the donor responsible. A moment's reflection would reveal that the stated rationale seems to be influenced by Kant's conception of right, which mandates that all persons be treated as reasonable and rational persons and as ends in themselves.⁴¹ In this paper, I will adopt this model of liability.

For the sake of completeness, it is also worth mentioning the other competing theories for restitutionary liability to return a mistaken payment. The second often-cited theory for allowing restitution for mistakes is based on the Aristotelian notion of corrective justice, which eliminates wrongful gains and their corrective losses.⁴² The argument goes like this: '[w]here a defendant unjustly makes a gain at the expense of a plaintiff by subtracting wealth from him, the restitutionary response which ensues can relatively straightforwardly be justified by reference to corrective justice.'⁴³ But this theory is not free from controversy especially with regard to mistaken payments; where the payment is caused by the plaintiff's unilateral error and the defendant is merely a passive recipient, it is difficult to identify a wrong done by the defendant.

³⁸ Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1798 – 1799 (2001). See also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) who analyzes contracts based on a consent theory. Cf. Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL L. REV. 1573, 1589 (2003) (argues 'that it would not be an invasion of the autonomy interest to hold an actor responsible for his own uncoerced mistakes' since such mistakes are made voluntarily').

³⁹ Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1798 – 1799 (2001).

⁴⁰ See Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1798 – 1799 (2001).

⁴¹ IMMANUEL KANT, *GROUNDWORK OF METAPHYSICS OF MORALS*, 38 (McGregor ed. & trans. 1998).

⁴² Kit Barker, *Unjust Enrichment: Containing the Beast* 15 OXFORD J. LEGAL STUD. 457, 468 (1995).

⁴³ See *id.*, at 468.

Kit Barker is acutely aware of this conceptual problem in the corrective justice theory and he attempts to resolve this by saying ‘corrective justice in its Aristotelian conception is a *form* of justice which does not necessarily entail any particular substantive *content*’⁴⁴ His argument is that the plaintiff’s mistake is a form of unjust factor which somehow makes the enrichment wrongful. With respect, Barker’s thesis is unsatisfactory for two reasons. First, it is quite circular. Our initial query is this: why is a person entitled to get restitution for a mistaken payment? Answer: Because of Aristotle’s notion of corrective justice to reverse one party’s wrongful gain at the expense of another. The next logical question is this: what is the wrongful gain that must be corrected? Answer: the gain was wrongful because it was transferred pursuant to a mistake.⁴⁵

The third account of liability is what I shall term the swollen assets theory. Professor Peter Birks, in his new book,⁴⁶ explains why a defendant is unjustly enriched when a plaintiff makes a mistaken payment. He gives this example:

‘You go shopping with a friend...[the shop assistant gives] you change for £ 50 when you had in fact paid with a £20 note. He gave you £ 30 more than he owed. You may be tempted to insist that you were entirely innocent...But you will see that a retort of that kind will not strengthen your case to keep the £ 30. Your innocence is irrelevant. Nor would it do you any good to make a show of anger at the shop-assistant’s want of care. He himself will admit to having been careless. The fact remains that, so long as you still have the mistaken money, there is no answer to the shop’s demand to have it back.’

While Birks’ example is intuitively persuasive, on reflection, in order to subscribe fully to his explanation of liability for mistaken payment, this would mean that the plaintiff ought to prove a mistaken payment *and* that the defendant’s asset remains swollen at the time of the claim. However, the courts have not insisted on the requirement on proof of that the defendant’s assets remain swollen as a pre-requisite to a restitutionary claim.

The final justification for restitutionary liability is an instrumentalist account. In the economist’s world, mistakes are potential accidents. Hence, the law should minimize ‘social costs by inducing appropriate avoidance behavior and properly allocating the

⁴⁴ See *id.*, at 469.

⁴⁵ For a more advanced articulation of restitution and corrective justice see Lionel Smith, *Restitution: The Heart of Corrective Justice* 79 TEX. L. REV. 2115, 2140 (2001) who incorporates Kant’s concept of right in considering the notion of corrective justice. Lionel Smith argues that ‘[i]f I own something, then it is an external manifestation of my ability to act as a self-determining agent. To be deprived of it when I still own it is therefore a violation of my Kantian right. On your side, your gain is normative because you are in possession of something that is an external manifestation of my own Kantian freedom. It is inconsistent with Kantian right for you, as a self-determining agent, to deny me the same status. The normative loss and gain are perfected without any wrongdoing.’ Cf. Stephen A. Smith, *Justifying the Law of Unjust Enrichment* 79 TEX. L. REV. 2177, 2193 – 2197 (2001) (who disputes that losing one’s property is a normative loss. Stephen Smith also argues that even if the loss is normative, it does not explain adequately why there is a strict liability duty to make restitution).

⁴⁶ PETER B. H. BIRKS, UNJUST ENRICHMENT 6 (2003).

costs of the mistakes'.⁴⁷ Hanoch Dagan⁴⁸ and Melvin Eisenberg⁴⁹ have written carefully analyzed works on this. This approach will not be pursued in this paper.

IV. WHAT IS A MISTAKEN GIFT?

What is a mistaken gift? For such a seemingly simple question, there is no easy answer. The difficulty lies in pinning down what is a mistake. The twin concepts of a gift and a mistake will be unpacked in the sub-sections below.

A. *The Definition of a Gift*

Anglo-American law has a very similar definition of a gift. An *inter vivos* gift is a gratuitous transfer of the ownership of property without consideration from the donor to the donee while the donor is alive and not in expectation of death.⁵⁰ This definition although technically accurate is rather hollow as the contextual significance of gift giving is not captured. It is also weak in that it is over inclusive. On a strict literal wording of the definition, a payment by a gambler to her bookie and vice versa and money paid pursuant to a void contract may also be construed as a gift. Obviously, this is beyond our conventional understanding of a gift.⁵¹ Perhaps, a better definition of a gift is a transfer of property without any *agreed upon recompense*.⁵² In the gambler/bookie example, there is an implicit, albeit unenforceable, agreement by way of gaming or wagering. Similarly, where a payment was made pursuant to a void contract, there was an agreed upon recompense. The presence of such an agreement (though null and void) takes it outside of what we would consider to be a gift.

Further in order to identify a gift, we must also understand the usual contextual motives *why* gifts are made. There are essentially three kinds of gifts: the *anonymous gift*, the *casual gift* and the *highly structured voluntary settlement*. In most cases, only the anonymous gift is motivated by pure altruism.⁵³ With regard to the casual gift,

⁴⁷ Hanoch Dagan, *Mistakes*, 71 TEX. L. REV. 1795, 1796 (2001).

⁴⁸ *Id.*

⁴⁹ Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL L. REV. 1573, 1589 (2003).

⁵⁰ See 20 HALSBURY'S LAWS OF ENGLAND paragraph 1 (1993) (for English law). For U.S. law see e.g. Noel v Parrott, 15 F. 2d 669 (Va. 1926); Smith v Shafer, 623 N.E. 2d 1261 (Ohio App. 3 Dist., 1993). See also RESTATEMENT OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS), § 6 (Tentative Draft No. 3. April 4, 2001).

⁵¹ Cf. Lipkin Gorman v Karpnale [1991] 2 A.C. 548, 562, 575 (where a gambling loss was described as a gift).

⁵² See JOHN P. DAWSON, GIFTS AND PROMISES 136–142 (1980).

⁵³ In fact, some gifts are motivated by ill will. See *In re Moore* 39 Ch. D. 116 (1888) ; Schultz v. Schultz 637 S.W. 2d. 1 (Mo. 1982).

Eric Posner suggests that people give ‘gifts to each other in order to (1) enhance the well-being of the donee, (2) increase the status of the donor, or (3) enter or enhance an exchange relationship’.⁵⁴ In addition, it is suggested that there is a fourth reason for gift giving i.e. to enhance the position of the donor. This is especially true of highly structured gifts. Although the donor may also hope to achieve the three reasons sketched out by Posner, the predominant motivation is usually to avoid or to pay less tax. Posner’s insightful observation (together with the suggested fourth reason) has a powerful explanatory force in illuminating and identifying most gift giving.

B. *The Definition of a Mistake*

While it is relatively easy to define a gift, the concept of a mistake is nebulous and elusive.⁵⁵ It is possible to have a complex metaphysical and epistemological debate on what constitutes a mistake. As the *Restatement (Third) of the Law of Restitution and Unjust Enrichment* concedes: ‘[t]he distinction between mistakes that are legally significant and those that are not is difficult to draw in analytical terms, because both kinds of mistake ultimately refer to the divergence between anticipation and realization that is the inevitable condition of all human affairs.’⁵⁶ A mistake in Anglo American law is one which: (a) involves a belief that a certain state of affairs exists,⁵⁷ and (b) in reality another state of facts exists. This definition is also consistent with the *Restatement (Second) of Contracts* which provided that a mistake is ‘a belief not in accord with the facts.’⁵⁸ English judges also define a mistake in a similar fashion. Lord Phillips MR in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*⁵⁹ said a ‘mistake can simply be defined as an erroneous belief’. Similarly, Buckley LJ in *Roles v Pascall & Sons*⁶⁰ opined that: ‘[a] mistake exists when a person erroneously thinks that one state exists when, in reality another state of facts exists.’

⁵⁴ Eric A. Posner, *Altruism, Status, And Trust in the Law of Gifts and Gratuitous Promises*, WIS. L. REV. 567 (1997).

⁵⁵ See e.g. Duncan Sheehan, *What is a Mistake?* 20 LEGAL STUD. 538 (2000); Richard Sutton, *Mistake: Symbol, Metaphor and Unfolding* 10 RESTITUTION L. REV. 9 (2002); Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL L. REV. 1573 (2003).

⁵⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 5 cmt. a. at 6 (Tentative Draft No. 1. April 6, 2001).

⁵⁷ The belief may be an explicit or tacit belief. See e.g. Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL L. REV. 1573 (2003); Tang Hang Wu, *Restitution for Mistaken Gifts*, (???) J. CONTRACT. L. ??? (2004).

⁵⁸ RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981). Cf. Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL L. REV. 1573 (2003) (divides mistakes in contract law into five types: evaluative mistakes, mechanical errors, mis-transcriptions, interpretive mistakes and shared mistaken factual assumptions).

⁵⁹ [2003] QB 679, 690.

⁶⁰ [1911] 1 KB 982, 987. Cf. Parke B in *Kelly v Solari* 9 M & W 54, 58 (Q.B. 1841) (defined a mistake as a ‘supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue’).

There are three properties a relevant mistake in a restitutionary claim may be said to possess. First, a specific moment in time must be chosen in assessing whether a person was mistaken or not. The relevant instance with regard to a mistaken gift is the time when the gift was made; a donor is not regarded as mistaken if she merely changes her mind in the future or with the benefit of hindsight feels that the gift was too generous. An error of judgment is not regarded as a mistake.⁶¹ Second, the mistaken belief must ‘have an object, a point of reference, a content. They are, as it were directed towards something.’⁶² A general feeling is not a belief. For example, a gift motivated by a good feeling towards the donor e.g. love, affection and friendship can never be characterized as a mistaken gift. Third, the characterization of a mistake as a belief, which must be demonstrably false, suggests that one can only be mistaken about matters that are *conceptually certain*.⁶³ Where the alleged error pertains to a matter that is conceptually uncertain, i.e. if the truth and falsity of the belief cannot be ascertained; there can be no mistake.

C. *The Causative Link between the Mistake and the Gift*

Again, Anglo American law seems to suggest that the appropriate causative link between a mistake and a gift sufficient to trigger a restitutionary claim is the ‘but-for’ test.⁶⁴ In other words, the relevant causation question is: but for the mistake, would the gift have been made? If the donor, can show that the gift would not have been made but for the mistake, then prima facie the donor has a right of restitution from the donee.

V. THE LAW ON RESTITUTION FOR MISTAKEN GIFTS IN THE UNITED STATES

A. *The Position in the Restatement of Restitution*

The *Restatement of Restitution* (1937)⁶⁵ contemplates three situations when a person can take back the value of an *inter vivos* gift on the ground of a mistake. § 26 (1) of

⁶¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT , §5 cmt. c at 13 (Tentative Draft No. 1. April 6, 2001). See also Peter B.H. Birks, *Mistakes of Law*, 53 CURRENT LEGAL PROB. 205, 224 (2000) (who argues that a mis-prediction is not a mistake).

⁶² Stephen Shute, *Knowledge and Belief in the Criminal Law* in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 171, 183. (Stephen Shute & Andrew Simester eds. 2002).

⁶³ *Id. Cf.* Duncan Sheehan, *What is a Mistake?* 20 LEGAL STUD. 538 (2000) (argues that an opinion e.g. a belief as to purely subjective matters can never be shown to be wrong. However, according to Sheehan, an opinion which is statement of underlying fact may be shown to be false).

⁶⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT , §5(2) (Tentative Draft No. 1. April 6, 2001); ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 193 (6th ed. 2002).

⁶⁵ RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 26 (1937).

the Restatement provides that a donor is entitled to restitution where the gift was induced by a mistake of fact if the mistake was: (i) caused by fraud or material misrepresentation, or (ii) as to the identity or relationship of the donee or as to some *basic* fact, or (iii) as to the amount given or as to the basis upon which the amount was computed.

Categories (i) and (iii) of § 26 (1) are quite self explanatory and straightforward. Obviously, if a gift was induced by the donee's fraud or material misrepresentation, the donee should make restitution on the account of her wrongdoing. Also, it seems intuitive that a gift in excess of the donor's intent ought to be refunded. If an absent minded donor intended to hand the donee a \$ 20 dollar note but inadvertently hands over a \$ 50 note instead⁶⁶, it is quite logical that subject to the defense of change of position,⁶⁷ the donee should return the extra \$ 30 to the donor. However, the proposition in category (ii) is not so self evident; a donor is entitled to restitution where she was laboring under a mistake as to identity or relationship of the donee or as to some *basic* mistake. The last limb is especially ambiguous. What exactly are basic mistakes? The *Restatement* provide that a basic mistake is a mistake which 'entails the substantial frustration of the donor's purposes' and that '[n]o more definite general statement can profitably be made as to what constitutes a basic mistake in the making of a gift.'⁶⁸ The *Restatement* goes on to list down examples of such basic mistakes: mistakes as to the identity of the donee, or the identity or essential characteristic of the gift, or the existence of a relationship between the donor and the donee, or a mistaken belief in the existence of facts which would create a moral obligation upon the donor. Also, restitution is allowed where a town or public institution furnishes support in performance of a public duty to care for the poor and where the town or public institution was mistaken as to the financial condition of the recipient. § 49 of the Restatement re-iterates the rule enunciated in § 26 with regard to mistakes of law. Thus, no distinction is made between a mistake of fact and a mistake of law.

However, historical research shows that we must be careful about relying on this section as representing the 'common law' on mistaken gifts. It is worth looking at transcripts of the proceedings of the American Law Institute of the *Restatement of Restitution* (1937). Warren Seavey, one of the drafters of the Restatement commented on this section:

⁶⁶ See e.g. *Twyford v Huffaker*, 324 S.W.2d 403 (Ky. Ct. App. 1958).

⁶⁷ See e.g. Gordon K. Scott, *Restitution from an Innocent Transferee who is not a Purchaser for Value*, 62 HARV. L. REV. 1002 (1949); Richard Nolan, *Change of Position*, in LAUNDERING AND TRACING 135 (Peter B.H. Birks ed., 1995); Phillip Hellwege, *The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study*, 7 RESTITUTION L. REV. 92 (1999); Michael Jewell, *The Boundaries of Change of Position – A Comparative Study*, 8 RESTITUTION L. REV. 1 (2000); Andrew Burrows, *Change of Position: The View From England*, 36 LOY. L.A. L. REV. 803 (2003).

⁶⁸ RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 26 cmt. c. at 118 (1937).

‘This Section is very largely manufactured out of whole cloth. Some of my colleagues have suggested that in every case where law is manufactured, the group should so state, perhaps in red ink at the top. This is one of the cases where we would have to put at least purple ink because it is partly manufactured and partly rest on the cases...we have taken refuge in this very general statement that if the mistake was as to the identity or relationship of the donee or was some other basic mistake. Basic, of course, is an obscure word. Nobody knows quite what it means but it is a word which we hope will give room for the courts to undo transactions where they think there would be gross injustice otherwise.’⁶⁹

The *Restatement (Third) of the Law of Restitution and Unjust Enrichment*⁷⁰ (“hereinafter *R3RU*”) essentially preserves this rule with a slight change in terminology. § 11 of *R3RU* stipulate that a donor whose gift was induced by an *invalidating* mistake⁷¹ has a claim in restitution as necessary to prevent the unintended enrichment of the donee. As to what constitutes an invalidating mistake, *R3RU* gives two illustrations. The first category where a gift may be taken back is a gift of the wrong property. *R3RU*⁷² states that a donor may assert a claim in restitution where the gift consisted of a larger interest than the donor intended to give. This proposition is uncontroversial. *Mitchell v Mitchell*⁷³ is an excellent example of this. In this case, the donor owned two plots of land – lot No. 253 and 254. The donor thought his residence and outhouses were on Lot No. 254 and so being eighty years old, the donor conveyed Lot No. 253 to his son, Benjamin, for the use of Benjamin and the donor’s daughters. Subsequently, the donor’s children tried to claim the dwelling house and most of the out houses. The donor’s prayer for reformation of the deed was allowed because the court believed that the donor had made a gift of the wrong property.

The second illustration of when restitution ought to be allowed is less clear. *R3RU*⁷⁴ provides that a mistake that will invalidate a gift is ‘a misapprehension of existing circumstances that is the cause in fact of the resulting transfer. The donor’s mistake must have induced the gift; it is not sufficient that the donor was mistaken about

⁶⁹ AMERICAN LAW INSTITUTE, 12 PROCEEDINGS 295 – 296 (1934 – 1935).

⁷⁰ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 1. April 6, 2001).

⁷¹ The change in terminology appears to be a result of the reporter’s oversight. See AMERICAN LAW INSTITUTE, PROCEEDINGS 156 (2001).

⁷² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §11 cmt. d. at 138 – 140 (Tentative Draft No. 1. April 6, 2001).

⁷³ 1869 W.L. 1728 (Ga. 1869). See also *Crockett v. Crockett*, 1884 W.L. 2441 (Ga. 1884); *Andrews v. Andrews*, 1859 W.L. 4668 (Ind. 1859); *In re Estate of Clark*, 233 A.D. 487 (N.Y. 1931); *Tyler v. Larson*, 106 Cal. App. 2d 317 (1952); *Wescott v. Westcott*, 259 N.W. 2d 545; *Kemna v. Grave*, 630 S.W. 2d 160 (Mo. App. 1982); *Jones v. McNealy*, 35 So. 1022 (Ala. 1904); *Yano v. Yano*, 144 Ariz. 382 (Ariz. App. 1985).

⁷⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §11 cmt. e. at 140 – 14, 149 – 151(Tentative Draft No. 1. April 6, 2001).

relevant circumstances'. The precise ambit of this statement is somewhat obscure. Nevertheless, *R3RU* does provide us with some clues as to what is excluded from the concept of an 'invalidating mistake'. An 'error' which is apparent in hindsight may reveal an error of judgment on the donor's part. But this is not regarded as an invalidating mistake. *R3RU* makes it clear that neither improvidence nor disappointed expectations will serve as the basis of a claim in restitution.

B. *The Position in Leading Treatises*

1. *Palmer's Law of Restitution*

George Palmer's work,⁷⁵ widely regarded as the leading American treatise on restitution, begins the section on *inter vivos* gifts, by saying that gifts are irrevocable unless expressly made revocable.⁷⁶ According to Palmer, there are two types of mistakes in connection with gifts.⁷⁷ The first kind of mistakes is a mistake which induced the making of the gift. Such mistakes may relate to the donee, such as her identity, her relationship to the donor or her wealth or lack thereof. Also the mistake may relate to the property given, such as the extent of the donor's interest in it; or it may be a mistake as to some other matter that induced the donor to make the gift. In his analysis, Palmer makes an important distinction between a contract and a gift. For contracts, Palmer asserts, rescission is rarely granted for unilateral mistakes. However, Palmer argues that unilateral mistakes are sufficient to justify rescission of a gift.⁷⁸ Unlike contracts, there are no compelling reasons why a gift ought not to be rescinded on proof of a unilateral mistake. The only general policy in favor of a bar to restitution is the 'social interest in the security of acquisitions.'⁷⁹ However, in Palmer's view, this is not a policy which is overwhelming in allowing a donee to keep a gift which is a product of the donor's mistake. Unless the donee can prove that she has changed her circumstances in reliance of the gift, she should make restitution. The second general type of mistake connected with gifts is a mistake in expression. An example of such a mistake is a donor who intended to convey a life estate to the donee, but by mistake in the expression of the deed of transfer, granted a fee simple instead. It seems quite uncontroversial that reformation is always possible in such circumstances subject to proof.

2. *Farnsworth on Contracts*

⁷⁵ GEORGE PALMER, *LAW OF RESTITUTION* (1978).

⁷⁶ 4 GEORGE PALMER, *LAW OF RESTITUTION* §18.1 at 2 (1978).

⁷⁷ *Id.*, §18.2 at 7.

⁷⁸ See e.g. *Twyford v Huffaker* 324 S.W.2d 403 (Ky. Ct. App. 1958).

⁷⁹ Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 18 (1943).

Although this treatise is on contracts, it contains a short but interesting observation on gifts. Farnsworth⁸⁰ writes that a gift stands on a different footing from that of a promise to make a gift. He illustrates his argument with the example of an employer instead of merely making a promise to make a gift, actually delivers a watch to her employee as a present. Such an employer cannot subsequently reconsider the gift and seek the return of the watch. Farnsworth cites three reasons why this is so. First, the employee's assertion of the right to retain the gift does not involve the enforcement of a promise. The employee's right is rooted in the law of property and not contract. Second, denial of relief to the employer may reflect the law's policy in leaving parties of gratuitous transactions where they stand. Because litigation is costly to society as a whole, it is unjustified as a means to enforce or reverse gift transactions which are generally unproductive to society. Finally, the actual delivery of the gift performs an evidentiary and cautionary function in establishing that the donor intended to make the gift and that the significance of her act was brought home to the donor by the delivery of the gift.

C. *Leading Law Review Articles*

To this writer's knowledge, there is only one student written comment on restitution for mistaken gifts.⁸¹ This piece is important because it appears to have influenced Goff and Jones,⁸² the leading English work on restitution. Parker's basic thesis is that 'only the state of mind of the donor ... is germane'⁸³ in deciding whether to allow restitution for a mistaken gift. The writer gives two reasons for this view. First, in contrast to bargain transactions, the donee has sacrificed nothing to obtain the bounty she has received. Second, 'underlying considerations of certainty and finality which are entitled to full weight in business situations are not as significant in gift transactions.'⁸⁴ As long as the donee is afforded some protection for her reliance or change of position as a result of the gift, there is little to be said for allowing her to retain the gift.

Apart from this student note, the majority of the law review literature has so far concentrated on the issue of when a promise to make a gift is enforceable.⁸⁵

⁸⁰ 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 86 - 88 (2004).

⁸¹ George E. Parker, Comment 58 MICH. L. REV. 90 (1959).

⁸² See ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 78 - 79 (2nd ed. 1978). However, the note is not cited in the latest edition of this work.

⁸³ George E. Parker, Comment 58 MICH. L. REV. 90, 91 (1959).

⁸⁴ *Id.*, 91.

⁸⁵ See e.g. Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEG. STUD. 411 (1977); Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEG. STUD. 39 (1992); Jane B. Baron, *Do We Believe in Generosity?: Reflections on the Relationship between Gifts and Exchanges*, 44 U. FLA. L. REV. 355 (1992); E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. L. 359 (1995); James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 570 - 582 (1995); Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre For Nominal*

Nevertheless, the articles on the enforceability of gratuitous promises are valuable to our inquiry as it throws light on how leading academics conceive the status of a gift. There appears to be three schools of thought on the legal status of the gift. The first view is that a gift has an inferior social utility as compared to a contract. This is exemplified by Lon Fuller's classic article *Consideration and Form*⁸⁶ which contains an important observation on the nature of a gift. He contrasts a contract with a gift as follows: '[w]hile an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is in Bufnoir's⁸⁷ words, a "sterile transaction"' .⁸⁸

The second school of thought takes the opposite view. The gift is seen as an important ritual which has many social implications. Jane Baron's essay *Gifts, Bargains, and Form*⁸⁹ is representative of this view. Baron uses works from sociologists and anthropologists to suggest that the legal depiction of gifts as one-sided transactions is a false caricature. In particular, Baron relies on the iconic essay written by French sociologist/anthropologist Marcel Mauss⁹⁰ who studied 'archaic' societies and found that the ritual of gift giving form an important social role. Gift giving involves three independent obligations – to give, to receive and to repay. These social obligations form the relative power and status structure of groups in such societies. Baron culls two interesting observation on the study of gift giving from the non-legal literature. First, gifts are embedded with the norm of reciprocity. Although, the precise form of reciprocation is not bargained for⁹¹ nor stipulated it is left as a matter of trust between the parties. Second, because there is an absence of a

Consideration is not Binding, but Should Be, 97 NW. U. L. REV. 1809; Roy Kreitner, *The Gift Beyond the Grave: Revisiting The Question of Consideration*, 101 COLUM. L. REV. 1876 (2001).

⁸⁶ Lon L. Fuller, *Consideration and Form* , 41 COLUM. L. REV. 799 (1941). See also 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 71 (1990) who argue that '[g]ifts are generally unproductive'.

⁸⁷ PROPRIÉTÉ ET CONTRAT 487 (2nd ed.1924).

⁸⁸ However, it is interesting that Fuller immediately qualifies this statement in the footnote to this proposition by stating that a gift is a 'sterile transaction' cannot be taken literally as the element of exchange is variable and there are few human relationships which do not involve a degree of reciprocity.

⁸⁹ 64 IND. L.J. 155 (1989). See also Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How Gifts Become Exchanges and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992). Cf. Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gifts*, 46 UCLA L. REV. 815 (1999) (an essay looking at gifts using political philosophy and psychoanalytic theory and concludes that gifts are fundamentally ambiguous in character).

⁹⁰ MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES 1 (Ian Cunnison, trans. 1954).

⁹¹ Cf. *Simpson v U.S.*, 261 F.2d 497 (Ill. 1958) (A corporation paid a widow of a deceased executive in the corporation a sum equal to executive's salary for nine months. The payment was pursuant to established plan, the purpose of which was to encourage living executives to continue in their employment by corporation. Schnackenberg, Circuit Judge held that this was a gift).

commodity exchange for ‘feeling bonds’⁹² between members of society, a gift is important in establishing a connection between individuals by engendering emotional feelings such as personal obligation, gratitude and trust. More sophisticated law and economics scholar also recognize the social utility of gift-giving. For example, Eric Posner⁹³ also recognizes the social utility of gift-giving. Posner claims that the motive of gift giving may be either be ‘(1) enhance the well-being of the donee, (2) increase the status of the donor, or (3) enter or enhance an exchange relationship’.⁹⁴ Posner argues that gifts are used as a social ‘signal’ by donors to enter into a trust relationship.

Melvin Eisenberg⁹⁵ presents the third school of thought on gifts. He accepts Baron’s thesis that gifts function in the affective realm and engenders feelings such as love and friendship. However, Eisenberg makes a sharp distinction between the realm of contract and world of gift. The law, according to Eisenberg, ought not to impinge on the world of gift. He argues:

The principle that simple donative promises are unenforceable is justified not because simple donative promises are less important than bargain promises, but because they are more important. The world of gift is a world of our better selves, in which affective values like love, friendship, affection, gratitude, and comradeship are the prime motivating forces. These values are too important to be enforced by law and would be undermined if the enforcement of simple, affective donative promises were to be mandated by law. It is just because these values are usually missing from the more impoverished world of contract that the law must play a central role in that world.⁹⁶

VI. THE LAW ON RESTITUTION FOR MISTAKEN GIFTS IN ENGLAND

A. Case Law

In analyzing the English cases, we must bear in mind that orthodox English jurisprudence still insists on a strict demarcation between the rules of common law and the rules of equity. We start by looking at the cases in common law. At common

⁹² See e.g. Lewis Hyde, *Some Food We Could Not Eat: Gift Exchange and the Imagination*, KENYON REV. 32 (1979), reprinted in 2 PROPERTY LAW 569, 570 (Elizabeth Mensch & Alan Freeman eds., 1992).

⁹³ Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, WIS. L. REV. 567 (1997). See also ERIC A. POSNER, LAW AND SOCIAL NORMS, 49 – 67 (2000).

⁹⁴ *Id.*, 567.

⁹⁵ Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997).

⁹⁶ *Id.*, 849. Joseph Perillo, one of the leading contract scholars in the United States, accepts this thesis. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 172 (2003).

law there are not many cases on mistaken gifts. Perhaps an explanation for the paucity of cases in this area is that in the past many potential litigants must have been advised that the probability of recovery was slim due to *Aiken v Short*.⁹⁷ In this case, Bramwell B said that a claimant may only recover a mistaken payment if the mistake pertains to her liability to pay. Therefore, restitution is only available if a plaintiff paid money while laboring under the mistaken belief that she was under a *legal liability* to pay the defendant. In contrast, a mistaken gift, albeit one made under erroneous assumptions, is still a gratuitous transfer. But nobody has come up with a convincing rationale for this limitation. Hence, it is unsurprising that the rule was gradually eroded over time.⁹⁸ *Morgan v Ashcroft*⁹⁹ is also a formidable authority against restitutionary liability for mistaken gifts. Although this case was concerned with an alleged overpayment of gambling debts, some comments were made on mistaken gifts. Sir Wilfred Greene MR opined that only fundamental mistakes such as mistakes as to the identity of the recipient would attract a restitutionary claim for gratuitous transfers. The other judge in the case, Scott LJ, was less categorical in denying restitutionary recovery. He left the possibility that there may be cases where a donor who makes a gift ‘under a definite mistake of person to be benefited, or of the substantial nature of the transaction’¹⁰⁰ might be held to recover. Unfortunately, there is no guidance in his judgment as to what is considered to be an error ‘of the substantial nature of the transaction’.

In contrast, two later authorities appear less adverse to restitutionary recovery for mistaken gifts. The first case is *Larner v London County Council*.¹⁰¹ The local authority promised to pay all their employees who entered the Services, during the war, the difference between their war service pay and their wage in civil employment. Employees were required to advise the local authority immediately of any change in the amount of their war service pay. The defendant did not do so and consequently the local authority overpaid him. Counsel for the defendant relied on *Aiken v Short*¹⁰² and contended that the overpayment was not recoverable as the payment was voluntary. Denning LJ rejected this submission. Although the payments were voluntary in nature, the local county council had for good reasons of national policy made a promise to the men, which they were in honor bound to fulfill. This was not a question of enforcing a gratuitous promise but of recovering overpayments made in the belief that they were due under the promise, but were in fact not due. Therefore, he found for the local council. However, this case does not really concern restitutionary recovery for mistaken gifts. The Court of Appeal took great pains to

⁹⁷ 1 H & N 210, 215 (Ex. Ch. 1856).

⁹⁸ *Kerrison v Glyn Mills, Currie & Co* (1911) 81 LJKB 465 ; *Larner v London County Council* [1949] 2 KB 683; *Barclays Bank Ltd v WJ Simms (Southern) Ltd* [1980] QB 677; *Sybron Corporation v Rochem Ltd* [1984] Ch 112.

⁹⁹ [1938] 1 KB 49.

¹⁰⁰ *Id.*, 74.

¹⁰¹ [1949] 2 KB 683.

¹⁰² 1 H & N 210, 215 (Ex. Ch. 1856).

emphasize that it did not regard the payment by the London County Council as a gift. 'The payments made under that promise were not mere gratuities.'¹⁰³

The second case, albeit in a banking context, is *Barclays Bank Ltd v WJ Simms (Southern) Ltd*.¹⁰⁴ A bank overlooked a customer's stop payment order, and consequently paid a check. The bank tried to recover the money from the payee of the check. Goff J (as he then was) said that subject to certain defenses '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'.¹⁰⁵ What is unclear is whether this statement applied to mistaken gifts as well. It is therefore important to examine how Robert Goff J dealt with *Morgan v Ashcroft*.¹⁰⁶ Counsel for the payee relied heavily on this case, in particular the judgment of Sir Wilfred Greene MR. It was argued that a person who makes a payment without the intention of discharging a legal obligation cannot recover the money from the payee, although it had been paid under a mistake of fact, except where the mistake can be described as fundamental e.g. where the error pertains to the identity of the payee. Goff J rejected this submission. He said:

'If [this submission] is right, money would be irrecoverable in the following, by no means far-fetched, situations. (1) A man, forgetting that he has already paid his subscription to the National Trust, pays it a second time. (2) A substantial charity uses a computer for the purpose of distributing small benefactions. The computer runs mad, and pays one beneficiary the same gift one hundred times over. (3) A shipowner and a charterer enter into a sterling charterparty for a period of years. Sterling depreciates against other currencies; and the charterer decides, to maintain the goodwill of the shipowner but without obligation, to increase the monthly hire payments. Owing to a mistake in his office, the increase in one monthly hire payment is paid twice over. (4) A Lloyd's syndicate gets into financial difficulties. To maintain the reputation of Lloyd's, other underwriting syndicates decide to make gifts of money to assist the syndicate in difficulties. Due to a mistake, one syndicate makes its gift twice over. It would not be difficult to construct other examples.'

Goff J confined the effect of *Morgan v Ashcroft*¹⁰⁷ to the narrow proposition that an overpayment of gambling debts by a bookmaker is not considered to be made under a mistake of fact sufficiently fundamental to ground recovery because the law prevents the bookmaker from saying that he intended anything but a present. It is worth noting

¹⁰³ [1949] 2 KB 683, 689.

¹⁰⁴ [1980] QB 677.

¹⁰⁵ *Id.*, 695.

¹⁰⁶ [1938] 1 KB 49.

¹⁰⁷ *Id.*

that the analysis in *Barclays Bank Ltd v WJ Simms (Southern) Ltd*¹⁰⁸ has been approved by a number of subsequent cases.¹⁰⁹

So does *Morgan v Ashcroft*¹¹⁰ survive Goff J's searching critique? Would it be accurate to say that the current focus has shifted away from limiting recovery of mistaken gifts to situations where the mistake can be described as fundamental to permitting a restitutionary claim simply on proof of a mistake which induced the gratuitous transfer? In the final analysis, it is suggested *Barclays Bank Ltd v WJ Simms (Southern) Ltd*¹¹¹ does not provide cogent support for such wide paradigm shift. First, *Barclays Bank Ltd v WJ Simms (Southern) Ltd*¹¹² was not a case involving a mistaken gift. It is a fallacy to treat a mistaken payment in the commercial world in the same manner as a completed gift. Second, although Robert Goff J purported to disavow Sir Wilfred Greene MR's analysis of allowing recovery only for fundamental mistakes, it is telling that all the examples, which Goff J provided, where he thought that recovery should be possible, was an instance of a double payment where the payer mistakenly pays a second time overlooking a previous payment.¹¹³ Consequently, at the very most *Barclays Bank Ltd v WJ Simms (Southern) Ltd*¹¹⁴ merely suggests that a personal restitutionary claim would be allowed for gifts where the donor makes a double payment.

We turn our attention to the cases in equity. The first case is *Ogilvie v Littleboy*.¹¹⁵ Lindley LJ said in absence of circumstances of suspicion: 'a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious character as to render it unjust on the part of the donee to retain the property given to him.' Unfortunately, no more assistance can be gleaned from this case as the learned judge did not go on to elaborate what he meant by a serious mistake. Another important case that is often referred to is *Lady Hood of Avalon v MacKinnon*.¹¹⁶ The claimant made a settlement to her elder daughter to place the elder daughter in a similar financial position as her younger daughter. At the time of the settlement in question, the claimant forgot about a similar settlement six years ago to her elder daughter. When her solicitors reminded her about the earlier settlement, the claimant applied to set aside the later settlement. The application was allowed.

¹⁰⁸ [1980] QB 677.

¹⁰⁹ *Lloyds Bank plc v Independent Insurance Co Ltd* [1999] 2 WLR 986 (Eng. C.A.); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 372, 399, 407 – 408; *Nurdin & Peacock plc v DB Ramsden & Co* [1999] 1 WLR 1249.

¹¹⁰ [1938] 1 KB 49.

¹¹¹ [1980] QB 677.

¹¹² *Id.*

¹¹³ *Id.*, 697.

¹¹⁴ *Id.*

¹¹⁵ 13 TLR 399, 400 (????, 1897).

¹¹⁶ [1909] 1 Ch 476.

A more recent authority in equity is *Gibbon v Mitchell*.¹¹⁷ In order to reduce inheritance tax on his death, the claimant planned to give certain funds in a marriage settlement to his two children, David and Jane. The claimant was advised to execute a deed of surrender of his life interest in the fund, which he did. Unfortunately, the deed did not have the intended effect. Instead, it vested an interest in possession of the fund's income in a discretionary class for the remainder of the claimant's life and after his death it vested the capital in all his children including any future children. The claimant applied to set the deed aside. Millett LJ (as he then was) allowed the claim. Millett LJ said that the authorities showed that a voluntary disposition will be set aside if the court is satisfied that the donor did not intend the transaction to have the effect which it did. Most of the authorities referred to in *Gibbon v Mitchell*¹¹⁸ were instances of reformation because the instrument of settlement went beyond the donor's intention or where the deed was not properly explained to the donor.¹¹⁹ In another case, the settlement was set aside as the gift did not vest in the donee absolutely as envisaged by the donor. Due to a marriage covenant the gift vested in the donee for life, thereafter the donor for life and then to their children.¹²⁰

B. *Leading English Academic Work*

The leading academic writings in England subscribe to an approach which will be termed the 'causal mistake thesis'. This analysis is exemplified by Goff and Jones' position in *The Law of Restitution*, widely regarded as the most influential English work on restitution law; Goff and Jones assert '[i]n our view, it is open to the courts to grant restitution if the donor is mistaken as to some assumption which proves false and which caused him to make the payments.'¹²¹ As mentioned above, Goff and Jones¹²² appear to have taken this position because they were influenced by a student note in the *Michigan Law Review*.¹²³ Within the adherents of the causal mistake thesis, there is a strong version and weaker version of this theory. Andrew Burrows,

¹¹⁷ [1990] 1 WLR 1304 (Ch.D. 1990).

¹¹⁸ *Ibid.*

¹¹⁹ *Meadows v Meadows*, 16 Beav 401 (1853) (reformation on the ground that the claimant did not know the contents of the deed); *Walker v Armstrong*, 8 De GM & G 531 (1856) (the deed was reformed because it went beyond the donor's instructions to his solicitor); *Phillipson v Kerry*, 11 WR 1034 (1863) (the deed was set aside because it did not fully express the claimant's intention nor was it fully explained to her); *In re Walton's Settlement* [1922] 2 Ch 509 (there was a trust fund in favor of donor subject to an obligation that she should use the fund to purchase annuities for her own benefit. The donor wanted to avoid purchasing annuities. She was wrongly advised to revoke the trust of settlement. This caused the trust fund to be held on resulting trust for the settlors. The deed was set aside because it went beyond the claimant's instructions).

¹²⁰ *Ellis v Ellis* 26 TLR 166 (1909).

¹²¹ ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 194 (6th ed. 2002).

¹²² See ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 78 – 79 (2nd ed. 1978). However, the note is not cited in the latest edition of this work.

¹²³ George E. Parker, Comment 58 MICH. L. REV. 90 (1959).

in the latest edition of his book,¹²⁴ describes a strong version of the causal mistake thesis. He considers the following example: an uncle gives a birthday present of £ 1,000 to his niece, not knowing she married X a man the uncle dislikes.¹²⁵ Burrows argues that in this example if the donor, can establish that had the uncle ‘known that the niece had married X, he would not have made the payment, there seems no good reason to deny restitution of the £ 1,000. In practice, of course, the payer would have a difficult burden in proving ‘but for’ causation on such facts.’¹²⁶ This analysis puts primacy on the causation element of the gift. Thomas Krebs is also another adherent of the strong version of the causal mistake thesis. Krebs argues: ‘had the transferor been in possession of all the relevant facts, would he have made the transfer? If not, he clearly did not really mean the transferee to have the benefit. His consent to the transfer, and thereby the basis of the transfer, is vitiated. Restitution is justified.’¹²⁷ On the other hand, Peter Birks,¹²⁸ generally regarded as the leading academic on unjust enrichment, provides a weaker version of the causal mistake thesis.¹²⁹ Although, Professor Birks thinks that ‘gifts are relatively easily invalidated on the ground of mistake’, he gives an example in his new book where restitution ought not be allowed which suggests that he believes in a weaker version of the causal mistake thesis. Birks says:

‘If an uncle gives £ 1,000 each to all his nephews and nieces and then finds that one of them is gay, the fact that he is a notorious homophobe will not in itself show that he made a mistake which caused that gift. At the very least the uncle would have to show that his belief as to sexual orientation was actively in his mind when the gift was made.’

It is interesting to see why advocates of the causal mistake thesis think that gifts are relatively easy invalidated on the ground of mistake. Two reasons can be gleaned from the literature. First, a gift is viewed as an inferior transaction as compared to a contract. Some restitution scholars steadfastly assert that since gifts and other gratuitous transfers do not allocate risks between the parties, it is difficult to see why a restitutionary claim should not be allowed whenever a donor can prove that the gift was induced by a mistake.¹³⁰ The second reason also relates to risk allocation. Birks distinguishes bargains from gifts as follows: the former ‘are rarely invalidated for mistake because the ground rule is that each party to a bargain bears all those risks of

¹²⁴ ANDREW BURROWS, *THE LAW OF RESTITUTION* 144 – 145 (2nd ed. 2002).

¹²⁵ This example was initially posed by ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 76 (2002). Tettenborn thought that this was a clear case where the uncle should not be allowed restitution of the gift.

¹²⁶ *Id.*, 145. *See also* THOMAS KREBS, *RESTITUTION AT THE CROSSROADS* 76 – 81 (2001).

¹²⁷ THOMAS KREBS, *RESTITUTION AT THE CROSSROADS* ???? (2001).

¹²⁸ PETER B.H. BIRKS, *UNJUST ENRICHMENT* 134 - 137 (2003).

¹²⁹ *Id.*, 134 – 135. Birks terms this as an invalidation of a gift from impaired intent.

¹³⁰ THOMAS KREBS, *RESTITUTION AT THE CROSSROADS* 76 – 81 (2001); ANDREW BURROWS, *THE LAW OF RESTITUTION* 144 – 145 (2nd ed. 2002); ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 193 (6th ed. 2002).

disappointment which the contract does not place upon the other. Gifts are not bargains, and gift givers are therefore not risk-takers'.¹³¹

Apart from the causal mistake thesis, there are two other theories on when restitution for a gift ought to be allowed – a proprietary theory and an objective intent test. Steve Hedley postulates a proprietary theory.¹³² He argues that the real question is to what extent a donor has to realize what she is doing before a donor is treated as having formed an effective intention to pass property. Only extreme misperceptions on the donor's part should have the effect of failing to pass property. Two instances of such misperceptions are mistake as to the amount transferred and mistake of the identity of the donee. Hedley does not think that it is helpful to analyze the law with reference to mistake. Andrew Tettenborn is another commentator who is uneasy about the causal mistake approach based purely on the claimant's subjective intent. In its place, he proposes an objective analysis which uses an objective third person to view the transaction. Tettenborn argues that: '[i]f such a person, knowing the facts behind the rendering of the benefit, but not the individual characteristics of the parties, would have regarded the mistake as immaterial then restitution is not available: otherwise, prima facie, it ought to be.'¹³³

VII. COMPARING AND EVALUATING THE LAW OF ENGLAND AND THE UNITED STATES ON RESTITUTION FOR MISTAKEN GIFTS

In this part, I shall compare and offer a critical evaluation of the law of England and the United States on restitution for mistaken gifts.

A. *The Ascendancy of the Causal Mistake Thesis in Anglo-American Law*

The comparison of the law of restitution for mistaken gifts reveal that the causal mistake thesis may emerge as the dominant test on both sides of the Atlantic as the determining factor on whether a donor is entitled to restitution for a mistaken gift. In England, leading restitution theorists such as Goff and Jones,¹³⁴ Burrows¹³⁵ and Birks¹³⁶ have endorsed this approach although as shown above there is a strong and weaker version of this thesis. This is significant as academics in England do exert an

¹³¹ PETER B.H. BIRKS, UNJUST ENRICHMENT 134 - 135 (2003).

¹³² STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERINGS 13 (2001). *See also* SAMUEL STOLJAR, THE LAW OF QUASI CONTRACT 2 – 10 (1989); JOACHIM DIETRICH, RESTITUTION [:] A NEW PERSPECTIVE 209 – 213 (1998).

¹³³ ANDREW TETTENBORN, THE LAW OF RESTITUTION IN ENGLAND AND IRELAND 76 (2002). Cf. GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 160 – 161 (1999); ANDREW BURROWS, THE LAW OF RESTITUTION 144 – 145 (2nd ed. 2002) (who criticize Tettenborn's analysis).

¹³⁴ ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 193 (6th ed. 2002).

¹³⁵ ANDREW BURROWS, THE LAW OF RESTITUTION 144 – 145 (2nd ed. 2002). *See also* THOMAS KREBS, RESTITUTION AT THE CROSSROADS 76 – 81 (2001).

¹³⁶ PETER B.H. BIRKS, UNJUST ENRICHMENT 134 - 137 (2003).

enormous influence on restitution law. There is evidence of the causal mistake thesis making inroads in other parts of English restitution law. For instance, in the recent English case of *Papamichael v National Westminster Bank*,¹³⁷ Judge Chambers expressly cites with approval Goff and Jones' causal mistake thesis albeit in a case involving a mistaken payment made in a banking context. Similarly, the survey of the American law of restitution suggests a similar trend. George Palmer adopts a comparable approach to Goff and Jones; a mistake which induces the making of the gift suffices to trigger the donee's liability to make restitution. *R3RU*¹³⁸ also seems to affirm the causal mistake thesis. *R3RU* provides that restitution is available where 'a misapprehension of existing circumstances that is the cause in fact of the resulting transfer... The donor's mistake must have induced the gift'.¹³⁹

One of the main attractions of the causal mistake thesis is its beguiling elegance and simplicity. Its normative premise is simple yet *prima facie* persuasive. If gifts are indeed non-risk allocating transactions and presumably a windfall to the donee, why should they not be reversed on proof of the donor's unilateral mistake? There is also no prejudice to the donee; a donee who had acted in reliance of the gift is protected by the change of position defense. In contrast, Hedley's proprietary theory¹⁴⁰ and Tettenborn objective intent theory¹⁴¹ suffers from the fact that they do not seem to benefit from a persuasive normative framework. For example, Hedley says only extreme misperceptions on the part of the donor justifies restitution of the gift. But Professor Hedley does not tell us *why* this is so. Likewise, Tettenborn does not elaborate on the normative basis of his objective theory.

It is this present writer's contention that despite its eminent supporters, the causal mistake thesis is fundamentally flawed. First, this approach is built on the false premise that gifts are unimportant transactions that have little social utility. Hence, restitution scholars who subscribe to this view take the position that it is relatively easy to take back the value of completed gifts; so long as the donor can establish that she made the gift while she was influenced by a unilateral subjective mistake, the donee is under an obligation to make restitution. Second, the causal mistake thesis is also conceptually unsound as it wrongly assumes that the correct causal test to use in determining human conduct is the 'but-for' test. Both these ideas will be developed in the sections below.

B. *Re-conceiving the Status of a Completed Gift – The Creation of a Moral Economy and Gifts as Social Signals*

¹³⁷ [2003] 1 Lloyd's Rep 341 (Q.B.)

¹³⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §11 (Tentative Draft No. 1. April 6, 2001).

¹³⁹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT , §11 e at 140 - 141 (Tentative Draft No. 1. April 6, 2001).

¹⁴⁰ STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERINGS 13 (2001).

¹⁴¹ ANDREW TETTENBORN, THE LAW OF RESTITUTION IN ENGLAND AND IRELAND 76 (2002).

While most restitution scholars agree¹⁴² that where there is a valid contract, the law of unjust enrichment will not operate unless the contract is set aside, they do not share the same view where there is a completed gift. A gift is seen almost disdainfully as a one-sided transaction where the donee is only deserving of protection to the extent of her change of position. This view is especially prevalent among English scholars¹⁴³ and the early American literature on gifts.¹⁴⁴ Recall Palmer¹⁴⁵ who said that apart from the social interest of security of acquisition (which, in his view, is not a very strong reason to begin with), there are no reasons why a gift ought not to be set aside on proof of a mistake. Influential English scholars also take a similar position; for instance Burrows¹⁴⁶ implicit assumption is that gifts are not worthy of protection because they do not allocate risk and Birks¹⁴⁷ who thinks that gift givers are not risk takers and hence ought to be able to recover back the value of the gift if they made a mistake.

But is this portrayal of gifts accurate? It is suggested that it is not. The existence of a completed gift like the presence of a valid contract should prevent the law of unjust enrichment from operating. The root of the problem of why a gift is said to be unworthy of protection stems from a serious disjunction between the legal view and the sociological perspective of the gift. The view that gifts are redundant transactions is a crude caricature which is completely incompatible with non-legal scholarship on gifts. As a sociologist asks pointedly: ‘[i]f gifts are redundant, what social value could they possibly have which would account for the great importance which most people attach to them?’¹⁴⁸ The approach the English academics advocate and the position *R3RU* adopts i.e. the restitution is available on proof of a causal mistake is also inconsistent with the modern American academic literature on promises to make gifts. As shown in part V(C), two distinct attitudes towards gifts may be discerned from modern American literature on donative promises. Both accounts do not support the causal mistake thesis in relation to restitution for mistaken gifts.

¹⁴² See e.g. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §2(2) (Tentative Draft No. 1, April 6, 2001); ANDREW BURROWS, *THE LAW OF RESTITUTION* 323 - 324 (2nd ed. 2002); 2 ENGLISH PRIVATE LAW 552 (Peter B.H. Birks ed., 2000); GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 40 - 42, 150 (1999). Cf. Andrew Tettenborn, *Subsisting Contracts and Failure of Consideration – A Little Skepticism*, 10 RESTITUTION L. REV. 1 (2002).

¹⁴³ ANDREW BURROWS, *THE LAW OF RESTITUTION* 144 - 145 (2nd ed. 2002); THOMAS KREBS, *RESTITUTION AT THE CROSSROADS* 76 - 81 (2001); ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 193 (6th ed. 2002).

¹⁴⁴ See e.g. George E. Parker, Comment 58 MICH. L. REV. 90 (1959).

¹⁴⁵ 4 GEORGE PALMER, *LAW OF RESTITUTION* §18.2 at 7 - 10 (1978).

¹⁴⁶ ANDREW BURROWS, *THE LAW OF RESTITUTION* 144 - 145 (2nd ed. 2002).

¹⁴⁷ PETER B.H. BIRKS, *UNJUST ENRICHMENT* 134 - 135 (2003).

¹⁴⁸ David Cheal, *Moral Economy* in *THE GIFT* [:] AN INTERDISCIPLINARY PERSPECTIVE 90 (Aaron Komter ed. 1996).

The first approach towards gift transactions emerges from Jane Baron's work¹⁴⁹ on promises to make gifts. Baron presents a more balanced and thoughtful picture about gifts. In a carefully analyzed essay Baron insightfully uses works from other non-legal disciplines to show that the stereotypical legal perception of gifts as being voluntary, disinterested and spontaneous is inaccurate.¹⁵⁰ These social studies reveal the reality that we know: gifts are in fact social exchanges.¹⁵¹ 'Gifts and social relations are fundamentally tied to each other'.¹⁵² Although the *quid pro quo* is not explicitly bargained for, they are nonetheless exchanges. Two important implications flow from this. First, gifts act as an informal method of influencing parties' future conduct in the social sphere. Hence the argument about the redundancy of gifts falls away. Second, a gift is almost always followed up by acts of reciprocity from the donee. The causal mistake thesis ought to recognize this and protect the donee sufficiently. It is suggested that the defense of change of position is not sensitive enough to deal with such acts of reciprocity which may be subtle but at the same time very real. These two points will be developed below.

While contracts are said to be important because they operate in the markets as a bargained for means of regulating parties' future conduct, it can be argued that gifts are also vital because they function in a similar fashion in the non-commercial world. Although a gift is not a legally recognized method of binding parties' future conduct, most gift giving is calculated (whether consciously or subconsciously) to influence the donee to behave in a benevolent way towards the donor in future by fostering and engendering social bonds such as love, affection, intimacy, friendship, trust and gratitude. Thus 'gift-exchange can be characterized as a non-commodity market which functions in the affective realm in much the same way as commodity markets function in the conventional economic realm.'¹⁵³ David Cheal, a sociologist, describes gift exchanges as creating a *moral economy*.¹⁵⁴ He explains that such a moral economy generates individual commitments to fulfill their customary obligations to each other which makes actions somewhat predictable and keeps social uncertainty at a lower level.¹⁵⁵ Therefore, just as it is important to protect the market economy from being subverted by the law of restitution by recognizing the sanctity of

¹⁴⁹ Jane Baron, *Gifts, Bargains and Form* 64 IND. L.J. 155 (1989).

¹⁵⁰ The leading work is by MARCEL MAUSS, THE GIFT [:] FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (Ian Cunnison trans. 1966). Some of the other studies are usefully summarized in Jane Baron, *Gifts, Bargains and Form* 64 IND. L.J. 155, 189 (1989). See also THE QUESTION OF THE GIFT [:] ESSAYS ACROSS DISCIPLINES (M. Osteen ed. 2002); Tang Hang Wu, Book Review, SING. J. LEGAL STUD. 642 (2003)

¹⁵¹ Some gifts of course do not envisage any element of exchange e.g. anonymous donations to charity. However, it can be argued that some large donations to charity are to a certain extent motivated by social factors e.g. to increase the status of the donor in the community.

¹⁵² THE GIFT [:] AN INTERDISCIPLINARY PERSPECTIVE 3 (Aaron Komter ed.1996).

¹⁵³ Jane Baron, *Gifts, Bargains and Form* 64 IND. L.J. 155, 189, 197 (1989).

¹⁵⁴ David Cheal, *Moral Economy* in THE GIFT [:] AN INTERDISCIPLINARY PERSPECTIVE 90 (Aaron Komter ed.1996).

¹⁵⁵ *Id.*, 91. See also John F. Sherry, Jr., *Gift Giving in Anthropological Perspective*, 10 J. CONSUMER RES. 157 (1983).

contracts, it is equally essential to protect the moral economy by defending the completed gift from an overzealous application of the law of restitution.

Eric Posner also reaches the same conclusion about the importance of gifts in his recent book.¹⁵⁶ He rightly points out that the ideology of altruism in gift giving has blinded law professors to the social function of gifts.¹⁵⁷ In considering a model of cooperation between individuals, Posner assumes that there are two kinds of people – good (or co-operative) types and bad (or opportunistic) types. The good types engage in actions that are called ‘signals’ to distinguish themselves from bad types. Posner’s thesis is that much of our social, family, political and business behavior can be understood in terms of *signals*.¹⁵⁸ As Posner explains ‘a good type is a person who values future returns more than a bad type does, one signal is to incur large, observable costs prior to entering a relationship.’¹⁵⁹ According to Posner, some gifts act as such social signals because they are costly – ‘either in terms of money or in terms of the time necessary to choose a gift that suits the taste of the recipient.’¹⁶⁰

The case for protecting a completed gift from the law of restitution is also fortified by the fact that the defense of change of position appears ill equipped to deal with the norm of reciprocity implicit in gift giving. According to the proponents of the causal mistake approach, restitution for a mistaken gift would never act to the detriment of the donee as the defense of change of position adequately protects her. A simple illustration will show why this assumption is doubtful. A man gives a woman a pair of expensive earrings over dinner not knowing that she is a fervent pro-abortion activist. He is very much in the opposite camp. The lady is very touched by the gift and they make love that night. Subsequently, her beliefs come to his attention. He asks for the gift or the value back claiming he had made a mistake. She flatly refuses. How would we analyze these facts? There is of course the debate as to whether there is a mistake in the first place. If we adopt a strong version of the causal mistake thesis to this hypothetical we would come to the conclusion that the man was mistaken and he is entitled to restitution subject to the woman’s change of position. It is here that the analysis becomes tricky. Do we say that she has relied on the receipt of the gift and changed her position? One could say that she had not changed her position – *de minimis non curat lex*. But is it satisfactory for the law to regard acts of extreme intimacy as a mere trifle? A better view would be to say that she had changed her position. How then do we restore her to her original position? The problem then becomes one of valuation – how do we assess her change of position? Do we peg a monetary value to the change of position? Could the man then subjectively devalue the change of position? This illustration starkly demonstrates the inadequacy of the

¹⁵⁶ ERIC A. POSNER, LAW AND SOCIAL NORMS, 18 – 27, 49 – 67 (2000).

¹⁵⁷ *Id.*, 50.

¹⁵⁸ See also Colin Camerer, *Gifts as Economic Signals and Social Symbols* 94 AM. J. SOC. S 180 (1988).

¹⁵⁹ ERIC A. POSNER, LAW AND SOCIAL NORMS, 19 (2000).

¹⁶⁰ *Id.*, 22.

approach of allowing restitutionary recovery for a mistaken gift as long as there is a causative mistake and addressing any prejudice to the donee by the change of position defense. The defense does not sufficiently protect the donee as the donee's change of position is often social, emotional and in most cases unquantifiable in monetary terms. Overall the effect of analyzing gift giving in terms of the current restitutionary discourse is undignified, leads to a commodification¹⁶¹ of relationships and is an anathema to the promotion of good social relations. It is therefore suggested that such an analysis be rejected.

Before moving on to the next section, it is worth quickly mentioning that the second American modern perspective on promises to make gifts also do not support restitution of a gift simply on proof of a causal mistake. In contrast to Jane Baron, Melvin Eisenberg¹⁶² justifies the unenforceability of donative promises on the ground that we must make a sharp distinction between the world of gift and the world of contract. Eisenberg's theory is that the world of gift deals with affective values such as love, friendship, affection, gratitude and comradeship which are far too important to be enforced by law; these important sentiments are missing in the world of contracts which is why the law must play a central role in that world. If we accept Eisenberg's thesis that the law ought not to interfere in the world of gifts by enforcing promises to make gifts, a similar argument could be made that the law ought not to *reverse* an allegedly mistaken gift because this would constitute interference into the world of affective values.

C. *The Incompatibility of the But-For Theory of Causation and Gift Giving – The Problem of Indeterminacy of Human Actions*

Most restitution scholars argue that the appropriate causation test that a claimant must satisfy in order to recover a mistaken payment is the but-for test.¹⁶³ It is said that English courts have recognized the but-for test for mistaken payments in a commercial context.¹⁶⁴ Hence some restitution scholars conclude that a counterfactual theory is applicable to *all* mistaken payments including mistaken gifts. But this represents an unjustified leap in reasoning. It is worth noting that all the English cases relied on in support of the but-for theory are mistaken payments in the

¹⁶¹ On commodification *see generally* Margaret Jane Radin, *Market-Inalienability* 100 HARV. L. REV. 1849, 1904 (1987).

¹⁶² Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997).

¹⁶³ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §5(2) (Tentative Draft No. 1, April 6, 2001); ANDREW BURROWS, *THE LAW OF RESTITUTION* 135 - 141 (2nd ed. 2002); 2 ENGLISH PRIVATE LAW 552 (Peter B.H. Birks ed., 2000); GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 151 - 159 (1999). *Cf.* PETER JAFFEY, *THE NATURE AND SCOPE OF RESTITUTION*, 167 - 168 (2000) (who is more ambivalent with regard to the but-for causation test in relation to gift giving).

¹⁶⁴ *Kelly v Solari* 9 M & W 54, 58 - 59 (Q.B. 1841); *Barclays Bank Ltd v WJ Simms (Southern) Ltd* [1980] QB 677; *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] Q.B. 110; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 372, 399, 407 - 408; *Nurdin & Peacock plc v DB Ramsden & Co* [1999] 1 WLR 1249 (Ch.D.).

commercial world. In the business world, banks and other large corporations are not in the habit of making gratuitous payments out of the blue; perhaps in this context, it may be quite reasonable to use a but-for causation test. For example, one can confidently say in the English case of *Barclays Bank Ltd v WJ Simms (Southern) Ltd*¹⁶⁵ that the bank would not have honored the check but-for the fact the bank had overlooked the stop payment order. But is this analysis valid with regard to gift giving? The argument that will be developed below is that it is not; the reasons and motivations behind gift giving are far too complex to be dealt with using the but-for theory.

Most of the literature on causation has concentrated mainly on dealing with the problem of causation in tort law.¹⁶⁶ The work on causation in tort law is not very helpful to our inquiry because the causation analysis in restitution for a mistaken gift is different. First, the causation inquiry in a restitution claim is not directed at finding out the cause of a physical event. For example, in a case where a person sues her electrician for short circuiting her fuse box which led to a fire in her house, the court is interested in answering the question: did the electrician's action *cause* the fire? Perhaps, the fire would have started anyway because the fuse box was defectively manufactured and there was nothing the electrician could have done. Or the defective fuse box and the electrician's action were concurrently the cause of the fire. The crucial difference between the tort hypothetical posed and restitution for mistaken gifts is this: in the latter we are looking for *the cause of a human action* i.e. the gift whereas in the former situation we are trying to determine the cause of a physical event. The idea that human actions are different will be developed below.

Apart from the but-for theory, the other causation tests frequently used in tort law is also not helpful. The substantial-factor test of causation is inapplicable to determine whether a gift was mistakenly made. This test is usually used in tort law when two independent causative elements come together to produce a result that either element alone could have produced.¹⁶⁷ The courts¹⁶⁸ have used such a causative test in tort law because if the law insists on a stricter causation rule many plaintiffs would be uncompensated and defendants could escape liability simply by proving a concurrent cause.¹⁶⁹ Obviously, the adoption of a more lenient test of causation in these tort

¹⁶⁵ [1980] QB 677.

¹⁶⁶ See e.g. Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181 (2003); Richard Fumerton, *Moore, Causation, Counterfactuals and Responsibility*, 40 SAN DIEGO L. REV. 1273 (2003); Stephen Perry, *Harm, History and Counterfactuals*, 40 SAN DIEGO L. REV. 1283 (2003); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333 (2002); Richard W. Wright, *Causation in Tort Law*, CAL. L. REV. 1735 (1985).

¹⁶⁷ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, 263 - 269 (5th ed. 1984).

¹⁶⁸ See e.g. *Corey v Havener* 65 N.E. 69 (Mass. 1902). In England, the House of Lords recently adopted the conception of causation in law as a normative phenomenon in *Fairchild v Glenhaven Funeral Services* [2003] 1 A.C. 32. See also Jonathan Morgan, *Lost Causes in the House of Lords: Fairchild v Glenhaven Funeral Services*, 66 MOD. L. REV. 277 (2003).

¹⁶⁹ See e.g. Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. Rev. 941 (1935).

cases is motivated by the sense that the defendant had committed a wrong vis-à-vis the plaintiff. But this policy reason is absent in a case where a gift is given under a mistaken assumption where there is no fraud, coercion or misrepresentation. The defendant is merely a passive recipient. And the plaintiff is the one who is attempting to use her own unilateral mistake as the source of taking back the value of the gift. Therefore, there is no reason why the law should be more indulgent to the plaintiff in analyzing the causation issue through a normative lens. The ‘NESS’ (Necessary Element of a Sufficient Set) test¹⁷⁰ is also not relevant in analyzing human conduct. Under this test ‘a particular condition was a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result.’¹⁷¹ However, as Tony Honoré¹⁷² have shown it is impossible to suppose a set of NESS conditions that would be sufficient to explain human conduct because human actions are simply not predictable.

The American courts have had experience of applying the but-for causation test in cases of mixed motives in employment discrimination suits brought under title VII of the Civil Rights Act of 1964.¹⁷³ In title VII actions, the complainant must prove that the termination of her employment happened ‘because of’ race, color, religion, national origin, or sex’. The Supreme Court considered this section in detail in *Price Waterhouse v. Hopkins*.¹⁷⁴ It must be noted that this causation test has been superseded by the Civil Rights Act of 1991. Section 107 of the Civil Rights Act of 1991 provides that “an unlawful employment law practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”.¹⁷⁵ Nevertheless the question remains: is the jurisprudence in *Price Waterhouse v. Hopkins*¹⁷⁶ helpful in our causation inquiry? It is suggested that it is not. Like the tort cases, the causation analysis is greatly influenced by policy factors. In discrimination cases the underlying factor is not to insist on a causative test which is so stringent so as to defeat a legitimate complaint. However, as explained above this policy reason is missing in a restitutionary claim for a mistaken gift because the defendant is usually innocent of any wrong doing.

¹⁷⁰ Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988).

¹⁷¹ Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019 (1988).

¹⁷² Tony Honoré, *Necessary and Sufficient Conditions in Tort Law* in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 363, 382 - 383 (David.G. Owen ed. 1995).

¹⁷³ 42 U.S.C §§2000e – 2000e-17 et seq. (1976). See generally Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

¹⁷⁴ 109 S. Ct 1775 (1989).

¹⁷⁵ 42 U.S.C § 2000e-2(m). See generally Michael A. Zubrensky, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law after Price Waterhouse v Hopkins*, 46 STAN. L. REV. 959 (1994).

¹⁷⁶ 109 S. Ct 1775 (1989).

The but-for theory is unworkable to apply in relation to gift giving for two reasons. First, there is a serious conceptual problem in using the but-for theory in analyzing complex human actions like gift giving because human actions are indeterminate. Tony Honoré illustrates this point brilliantly.¹⁷⁷ Suppose Alec tells Bill that Charles was having an affair with Bill's girlfriend. After hearing this, Bill assaults Charles. While Alec's action may have had something to do with Bill hitting Charles, Honoré argues quite sensibly that: '[i]t does not follow from Bill's reaction on this occasion that he would react similarly if told the same thing again. Nor does it follow that David would react in the same way if Alec told him the same thing about *his* (David's) girlfriend. Even with a great deal of information about people's characters and background, their reactions simply are not totally predictable.'¹⁷⁸ Honoré is surely right to say that '[a]n indeterminate world ... presents a difficulty for the but-for theory, since in an indeterminate world we cannot calculate what would have happened in the absence of a particular...act'.¹⁷⁹ Applying this analysis to Tettenborn's example¹⁸⁰ of the uncle making the birthday gift to his niece in ignorance of the fact that she married a man he detests. Who is to say but-for his ignorance he would not have made the gift? It may very well be that after a period of reflection, the uncle would still have made the gift in spite of the niece's husband. At the very most, we can only come to a conclusion that he *might* have not made the gift. But we will never really know the answer since human actions are indeterminate; we cannot realistically isolate one particular fact and say with much conviction that absent this fact the gift would not have been made.

Second, when a gift is motivated by two or more reasons (which is usually the case), it is extremely difficult to apply the but-for theory. Again Honoré¹⁸¹ provides a vivid example. Sam is offered a job in Middletown. Sam has two reasons which motivate him to accept the job: (a) an increase in salary; and (b) Middletown is his wife's hometown and she wishes to return there. There are other *conditions*, had they not existed, which would have persuaded him not to take the job: (i) there are good schools in the town for his children; and (ii) the town has a lively choral society. Since Sam acted on reasons (a) and (b) singly or jointly, it is quite impossible to say which was the but-for reason for making the decision to move to Middletown. With regard to conditions (i) and (ii), while they were not the primary inducement for Sam's move to Middletown, had they not existed Sam would have refused the offer. This leads Honoré to the conclusion that: '[b]ut-for reasons are often not reasons *for* making a decision or action on it, but are reasons *against not* making it.'¹⁸²

¹⁷⁷ Tony Honoré, *Necessary and Sufficient Conditions in Tort Law* in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 363 (David.G. Owen ed. 1995).

¹⁷⁸ *Id.*, 381.

¹⁷⁹ *Id.*, 381.

¹⁸⁰ ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 76 (2002).

¹⁸¹ Tony Honoré, *Necessary and Sufficient Conditions in Tort Law* in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 363, 383 - 384 (David.G. Owen ed. 1995).

¹⁸² *Id.*, 384.

Honoré¹⁸³ proposes the following test of causation for human action. He says:

‘...we know enough about the sorts of reasons that motivate us to be able often to conclude that certain factors were singly or together sufficient for the decision. All that is meant by ‘sufficient’ in this context is that they provide an adequate explanation of the decision that the person who makes the decision would acknowledge, if truthful, that these were his reasons. They were sufficient for this individual in this situation, though there is no implication that they would be sufficient for him or anyone else in a similar situation on another occasion.’

Honoré’s analysis poses a serious challenge to validity of the causal mistake thesis; the assumption that the but-for theory is appropriate in analyzing indeterminate human behavior such as gift giving appears to be incorrect. Can we salvage the causative mistake thesis by simply adopting the Honoré test of sufficiency as the causation test? It is doubtful if this can be done. Honoré distinguishes between: (a) reasons which are sufficient to induce an action; and (b) but-for reasons *against not* making a decision. For example in the illustration about the uncle making a birthday gift to his niece in ignorance of her niece’s marriage to a man he detests the reasons *sufficient* to induce the uncle to make the gift could include the following: (i) the niece’s birthday; (ii) the uncle’s love and affection for his niece; and (iii) the uncle’s desire to deepen their relationship. The *but-for* reason for not making the gift would of course be the identity of the niece’s partner. What is unclear is the relationship between these two sets of reasons. Do we still insist that the donor is entitled to restitution if the donor can establish a but-for reason against not making the gift when the reasons sufficient in inducement of the gift are still intact? Is the donor’s autonomy compromised in such a situation? What if the donor was mistaken with regard to only one of the sufficient reasons? Is the donor entitled to restitution in such circumstances? Restitution scholars who support the causal mistake thesis have so far ignored these difficult issues of causation.

D. *A Flawed Construct of Autonomy Based on the Anti-social Man – Reconciling the Idea of Autonomy with Relationships*

The causal mistake thesis also reveals a deeply flawed model of personal autonomy and personhood; it concentrates solely on the subjective intent of the donor in constructing the concept of personal autonomy. The law is seen simply as an exercise of facilitating the maximum recognition of the donor’s subjective intent. But is this conception of autonomy accurate? This conception appears to be built around the ‘antisocial man in the state of nature’¹⁸⁴ – a person who just wants to be left alone, does not form relationships and is never a parent, a spouse or a friend. It would seem that this model of personal autonomy is a form of a separation thesis about what it means to be a human being.¹⁸⁵ As Robin West explains the separation thesis assumes:

¹⁸³ *Id.*, 384.

¹⁸⁴ Ngaire Naffine, *In Praise of Legal Feminism* 22 LEGAL STUD. 71, 83 (2002).

¹⁸⁵ Robin West, *Jurisprudence and Gender* 55 U. CHI. L. REV. 1 (1988).

‘I am one human being and you are another, and that distinction between you and me is central to the meaning of the phrase “human being”. Individuals are...“distinct and not essentially connected with one another”’.¹⁸⁶

But this view of the legal person is too simplistic.¹⁸⁷ The analysis fails to recognize that gifts are primarily about relationships. Further, gifts are usually motivated by multifarious reasons described in Part IV (A) namely: (a) to enter or enhance a social relationship with the recipient; or (b) to enhance the well being of the recipient; or (c) to increase the status of the donor,¹⁸⁸ and (d) to enhance the position of the donor e.g. for tax purposes. If a gift is given for a wide variety of reasons, the donor usually cannot establish a particular fact as *the* causative factor which inspired the gift. Hence, the donor cannot claim that her right of subjective self-determination had been compromised even if one of the underlying assumptions why she made the gift turned out to be untrue. In most cases, the other reasons for making the gift will still subsist e.g. the gift was inspired by sentiments such as love, affection, friendship or a desire to increase the status of the donor. So, again using Tettenborn’s example¹⁸⁹ about the birthday gift from the uncle to the niece in ignorance of the niece’s husband, it would seem that the uncle’s primary motivation for making the gift is still valid; the gift was motivated by the uncle’s love and affection for the niece and was probably meant to enhance his relationship with her. Therefore, it would be a stretch to say the uncle’s autonomy is compromised simply because he was ignorant of the identity of the niece’s husband.

The problem is, in most restitution scholars’ world, the legal protagonist is characterized as an alienated and atomistic individual who values her right of subjective self-determination over intimacy, relationships or status in society. The concept of self is conceived as pure subjectivity wholly separate from everyone else. Feminist legal scholars have always known that the very idea of the free legal actor as an antisocial person is a fiction.¹⁹⁰ A better theory of autonomy and personhood is required. Margaret Jane Radin develops a more plausible hypothesis. She argues that there are three ‘overlapping aspects of personhood: freedom, identity, and contextuality.’¹⁹¹ The first aspect focuses on free will; the second on the integrity and continuity of the self required for individuation. ‘The contextuality aspect of personhood focuses on the necessity of self-constitution in relation to the environment of things and other people. In order to be differentiated human persons, unique

¹⁸⁶ *Id.*, 1.

¹⁸⁷ See e.g. *Notes: What We Talk about When We Talk about Persons: the Language of Legal Fiction* 114 HARV. L. REV. 1745 (2001); Ngaire Naffine, *Who Are Law’s Persons? From Cheshire Cats to Responsible Subjects* 66 MOD. L. REV. 346 (2003).

¹⁸⁸ Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, WIS. L. REV. 567 (1997).

¹⁸⁹ ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 76 (2002).

¹⁹⁰ Ngaire Naffine, *In Praise of Legal Feminism* 22 LEGAL STUD. 71, 83 - 84 (2002); Robin West, *Jurisprudence and Gender* 55 U. CHI. L. REV. 1 (1988).

¹⁹¹ Margaret Jane Radin, *Market-Inalienability* 100 HARV. L. REV. 1849, 1904 (1987).

individuals, we must have relationships with the social and natural world.’¹⁹² This is an important insight. Relationships are not necessarily antithetical when thinking about autonomy. Some relationships are ‘utterly essential and positively enabling’.¹⁹³ As Jennifer Nedelsky¹⁹⁴ persuasively argued:

‘If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships – with parents, teachers, friends, loved ones – that provide the support and guidance necessary for the development and experience of autonomy.’

In adopting Nedelsky’s model of autonomy, I am not saying that all relationships have a positive effect and make us an autonomous individual. Human beings, as Professor Robin West has argued, live in a fundamental contradiction between our fear of invasion and our need for intimacy.¹⁹⁵ We are people who at various times “value intimacy, fear separation, dread invasion, and crave individuation.”¹⁹⁶ But gift giving represents a time when we seek and value intimacy and connectedness with another entity. The gift is the donor’s way in connecting with the donee. Most gifts are by nature concerned with relationships and a legal framework that overlooks its social context is intrinsically deficient. A new conception of autonomy, which reconciles the value of self-determination and ‘the centrality of relationships in constituting the self’,¹⁹⁷ is necessary in dealing with the issue of mistaken gifts. In re-thinking the conception of gifts and the idea of autonomy, we should move away from the current obsession of restitution scholars with the individual’s subjective right of self determination. Instead, we should re-conceive autonomy of the donor in terms of the relationship forged by the gift giving or the status gained by the donor. Lewis Hyde¹⁹⁸ observed:

¹⁹² *Id.*, 1904.

¹⁹³ Ngairé Naffine, *In Praise of Legal Feminism* 22 *LEGAL STUD.* 71, 84 (2002).

¹⁹⁴ Jennifer Nedelsky, *Reconceiving Autonomy: Sources Thoughts and Possibilities* 1 *YALE J.L. & FEMINISM* 7, 9 (1989). See also Margaret Jane Radin, *Market-Inalienability* 100 *HARV. L. REV.* 1849, 1904 - 1906 (1987); JOSEPH WILLIAM SINGER, ENTITLEMENT [:] THE PARADOXES OF PROPERTY 130 -131 (2000).

¹⁹⁵ Robin West, *Jurisprudence and Gender* 55 *U. CHI. L. REV.* 54 - 58 (1988).

¹⁹⁶ *Id.*, 61.

¹⁹⁷ Jennifer Nedelsky, *Reconceiving Autonomy: Sources Thoughts and Possibilities* 1 *YALE J.L. & FEMINISM* 7, 12 (1989).

¹⁹⁸ Lewis Hyde, *Some Food We Could Not Eat: Gift Exchange and the Imagination* , *KENYON REV.* 32 (1979), reprinted in 2 *PROPERTY LAW* 569, 570 (Elizabeth Mensch & Alan Freeman eds., 1992).

‘...when you give someone a gift, a feeling-bond is set up between the two of you. The sale of commodities leaves no necessary link. Walking into a hardware store and buying a pound of nails doesn’t connect you to the clerk in any way – you don’t even need to talk to him if you don’t want to (which is why commodities are associated with both freedom and alienation). But a gift makes a connection. With many gift exchange situations, *the bond is clearly the point* – with marriage gifts and with gifts used as peace overtures, for example.’ (Emphasis added)

Hyde’s observation reveals that in most cases the primary purpose of a gift is to establish an emotional bond and a sense of connectedness with the recipient. It is this sense of connectedness that makes the donor autonomous. Therefore, a donor’s autonomy is *not* compromised if she was mistaken as to only *one* of the underlying assumption which led to the gift if the gift was also motivated by other reasons such as love and affection and a desire to forge an emotional bond or to increase her status. In this case, in spite of the mistake, the donor’s primary purpose had been achieved.

E. A One-Sided View of Personal Autonomy

The final objection to the causal mistake thesis is it fails to balance the autonomy of the donor with the autonomy of the donee. By interpreting mistakes so widely and allowing restitution subject to the defense of change of position, the donor is given an indirect power to interfere with the donee’s autonomy. Consider again Tettenborn’s example¹⁹⁹ whereby I give a birthday present of £ 1,000 to my niece, not knowing she married a man I dislike. Hard line causal mistake theorists²⁰⁰ would have no problems with allowing restitution in this context. But this contention is wrong because if restitution is allowed, the donor is given the power to indirectly interfere with the donee’s autonomy. Let us increase the hypothetical gift to £ 1,000,000. It is not difficult to imagine a situation whereby the uncle, after discovering the identity of the niece’s spouse, is in a position to threaten the niece with the invidious choice of keeping the gift or her husband. While it may be unobjectionable for a donor to subtly attempt to influence the donee’s lifestyle with the *promise* of a gift or bequest, it is quite another thing to allow the donor to do so with a *completed* gift. In the latter situation, the donee did not know of the unspoken assumptions which came with the gift.

The causal mistake thesis contains an inherent contradiction in its internal structure. It is said that the reason for restitution for mistakes is premised on correcting the donor’s involuntariness.²⁰¹ Where the transfer of property is involuntary, the law does not hold the donor responsible. In fact, the theory goes, that the law would insist on

¹⁹⁹ ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 76 (2002).

²⁰⁰ ANDREW BURROWS, *THE LAW OF RESTITUTION* 144 (2nd ed. 2002); THOMAS KREBS, *RESTITUTION AT CROSSROADS* 78 – 79 (2001).

²⁰¹ Hanoch Dagan, *Mistakes*, 79 *TEX. L. REV.* 1795 (2001); THOMAS KREBS, *RESTITUTION AT CROSSROADS* 31 (2001); ANDREW BURROWS, *THE LAW OF RESTITUTION* 130 (2nd ed. 2002).

the reversal of the transaction by mandating the transferee to make restitution to the transferor. Otherwise, the transferor's right as an autonomous agent is infringed. A moment's reflection would reveal that the stated rationale seems to be influenced by Kant's conception of right, which mandates that all persons be treated as reasonable and rational persons and as ends in themselves.²⁰² Mistakes are corrected because it is not the result of an autonomous decision. However, the causal mistake thesis as articulated by the hard line causal theorists in relation to gifts is indefensible because it ignores the *donee's* Kantian right to be treated as an autonomous individual. If we use Kant's famous command of treating *all* individuals as ends, there is no reason in Tettenborn's example why the donor's project should triumph over the donee's project. A restitutionary right in favor of the donor would certainly breach the donee's Kantian right by indirectly impinging on the donee's status as an autonomous free-willed agent who is free to pursue her own happiness and projects (including her choice of life partner). Thus, the question is commonly thought of as one where the donor makes a mistake as to an underlying assumption and what has to be decided is how we should restore the donor's Kantian right as a rational and free willed agent. But this is incorrect as the problem is reciprocal. To restore the donor's autonomy by recalling the gift would be to infringe indirectly on the donee's autonomy.

Of course, the counter argument is that the donor is not really infringing on the donee's autonomy; the donee could very well renounce the gift. It follows that the donee would not be put in a worse position, as the gift was to begin with an unexpected windfall. This argument is unpersuasive. If we reflect on conditional gifts, the same argument could be made. But Anglo-American law has always imposed a limit on a donor's ability to influence the lives of donees through conditional gifts.²⁰³ Courts have systematically struck down condition subsequent in gifts that affect the beneficiary's choice of marriage or encouraged the break up of marriages.²⁰⁴ Evershed MR summarized the English court's attitude succinctly in *Re Gape's Will Trust*.²⁰⁵ He said: '[i]t is well established that the courts are always adverse to conditions which may affect the free choice of anyone in matters relating to marriage or to conscience'.²⁰⁶ Similarly, in American law a legacy which is conditional on some form of restraint on the marriage choice of the legatee is not tolerated.²⁰⁷ The causal mistake thesis, if applied to gifts, is equally if not more odious than such conditional gifts. At least the donee at the time a conditional gift was made knew the gift came with strings attached. Under the causal mistake thesis, the donor is entitled to recall a gift based on unarticulated assumptions. Thus, seeing how hostile the courts are towards conditional gifts affecting the donee's decision to marry, it is quite unlikely that the courts will order restitution in Tettenborn's example

²⁰² I. Kant, *Groundwork of Metaphysics of Morals*, (McGregor, ed and trans), (Cambridge, 1998), 38.

²⁰³ See e.g. Robert Chambers, *Conditional Gifts* in *INTEREST IN GOODS* 429, 441. (Norman Palmer & Ewan McKendrick eds. 1998).

²⁰⁴ See e.g. *Clayton v. Ramsden* [1943] AC 320.

²⁰⁵ [1952] Ch 743.

²⁰⁶ *Ibid*, 745.

²⁰⁷ *RESTATEMENT (SECOND) OF PROPERTY* §§ 6, 7 (1983).

because to do so would be to provide the niece with the incentive to break up her marriage.

The final objection is this: if the causal mistake approach is taken to its logical conclusion, it would allow restitution even if the donor's 'mistake' pertains to racist and other prejudicial matters. So using the strong version of the causative mistake thesis, we are driven to accept the distasteful conclusion that a donor is entitled to restitution in the following circumstances: (a) a racist donor who makes a gift to a donee not knowing the donee has married a person of an ethnic origin which the donor harbors prejudice against; (b) a donor who makes a gift not knowing the donee has converted to Islam, a religion which the donor disapproves of; (c) a homophobic donee who makes a gift to a donee not knowing that the donee is homosexual; and (d) a donor gives a present to a donee not knowing that the donee is fervent pro-abortion activist. The donor is a devout Catholic and very much opposed to abortion. Needless to say such a conclusion is highly undesirable. The only way in which the causative mistake approach may be salvaged would be to introduce a policy consideration to disallow restitution in the circumstances just described. But what would be the justification of such a policy? The policy cannot be based on illegality as it is not illegal to dislike people of color, Muslims, homosexuals and pro-lifers although most liberal minded people would not condone such an attitude. Any policy restricting recovery must necessarily be premised on recognizing that the donor's right to restitution is limited by the countervailing consideration that restitution should not interfere with the donee's life choices. If this concession is made, then the entire basis of the causative mistake thesis collapses i.e. that the donor is entitled to restitution solely on proof of a mistaken subjective intent subject only to the donee's change of position.

VIII. CONSTRUCTING A NORMATIVE FRAMEWORK TO GOVERN RESTITUTION FOR MISTAKEN GIFTS

As demonstrated in the preceding sections, the causal mistake thesis is flawed in many respects to govern when restitution ought to be made for a mistaken gift. But we know from Anglo American case law that the courts have allowed some donors to obtain restitution for a mistaken gift. What then are the norms that ought to guide our inquiry in when a donor is allowed to take back the value of a gift in absence of any wrongdoing on the donee's part? In this part of the article, I shall be concerned with a prescriptive project of constructing an alternative framework that is descriptively accurate in explaining the case law that have allowed restitution and at the same time normatively satisfactory in balancing the donor and the donee's rights.

A. The Myth of the Perfectly Voluntary Choice

Before we can begin to construct our normative framework, we need to re-consider carefully our understanding of the concept of voluntariness used in restitution law. Voluntariness or the lack thereof has often been invoked as the touchstone for restitutionary liability. But as Bryan and Ellinghaus have noticed the "adjective 'voluntary' is among the most treacherous and conclusory in the vocabulary of

restitution.²⁰⁸ English scholars are particularly prone to using voluntariness in such a conclusory manner. An example of such an analysis is found in Burrows' book. He argues: '[m]istaken payments are easy to analyse according to the unjust enrichment principle. The unjust factor is the mistake of the payor; more specifically, the mistake negatives the voluntariness with which the claimant paid the money'.²⁰⁹ Thomas Krebs²¹⁰ also argues in a similar fashion. In considering the question whether ignorance of a particular fact constitutes a mistake, he argues: '... had the transferor been in possession of all the relevant facts, would he have made the transfer? If not, he clearly did not really mean the transferee to have the benefit. His consent to the transfer, and thereby the basis of the transfer, is vitiated. Restitution is justified.'

With respect to Burrows and Krebs, it is suggested that matters are not as simple as they imply. The concept of voluntariness in itself is a very complex and nuanced idea.²¹¹ Burrows and Krebs' implicit assumption is that only gifts that are completely voluntary and made with perfect information ought to be respected. So in Tettenborn's example²¹² of the uncle making a gift to his niece not knowing that she married a man the uncle detests, Burrows and Krebs argue that the uncle should be able to demand the value of the gift back from the niece because the uncle's decision is involuntary. But is this conception of autonomy sound? It is suggested that it is not. Burrows and Krebs' argument is unrealistic because it does not recognize the limits of human cognition. Everyday decisions are made in circumstances of limited information; it is simply not possible or practical in terms of time, energy and money to collect all information before making a gift. The decision to acquire more information is itself a matter of choice. Most people, as Eisenberg observed, do not 'want to expend the resources required for [a] comprehensive search ... or recognize that [a] comprehensive search and processing would not be achievable at any realistic cost.'²¹³ If this is true of most decisions that we make in our everyday life, it is hard to see why a donor should be put in a position of privilege where she is conferred omnipotent knowledge. Also, it must be noted in the example that the niece is under no duty to disclose details of her personal life to her uncle; who she chooses as her partner is entirely her own business.

Burrows and Krebs fail to realize that completely voluntary choices are unattainable in reality. Everyday decisions are made under the condition of complex pressures and imperfect information. Therefore, the real question is when is a donor's choice considered *voluntary enough* to say that she has made an irrevocable gift. As Joel Feinberg puts it (in the context of criminal law):

²⁰⁸ Michael Bryan & M.P. Ellinghaus, *Fault Lines in the Law of Obligations: Roxborough v Rothmans of Pall Mall Australia Ltd* (2000) 22 SYDNEY L. REV. 636, 657 – 658 (2000).

²⁰⁹ ANDREW BURROWS, *THE LAW OF RESTITUTION* 130 (2nd ed. 2002).

²¹⁰ THOMAS KREBS, *RESTITUTION AT CROSSROADS* ???? (2001).

²¹¹ See e.g. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

²¹² ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 76 (2002).

²¹³ Melvin Eisenberg, *The Limits of Cognition and the Limits of Contract* 47 STAN. L. REV. 211, 214 (1995).

‘[T]he validity of an expression of assent cannot simply be read off the facts or derived from an analysis of the concepts of voluntariness and coercion. How much voluntariness is required for a valid (legally effective) act of consent is at least partly a matter of policy, to be decided by reference to a rule itself justified by the usual legislative reasons of utility and social justice.’²¹⁴

Feinberg’s insight is invaluable. The issue that we face is just how much voluntariness is required for there to be a valid act of consent when we deal with gifts.²¹⁵ In considering when a donor’s decision to make a gift was voluntary enough, we should realize that this inquiry is to a certain extent colored by policy considerations.²¹⁶ If gifts are redundant transactions and the change of position defense is capable of addressing any prejudice that may be faced by the donee in making restitution, then a wide interpretation of the causal mistake thesis may be defensible. But as argued in part VII(B) this assumption is unsustainable. There are good policy reasons why a completed gift should be protected; therefore the law should insist on a stricter standard than that envisaged by causal mistake thesis before a donor may assert that the gift was not voluntary enough.

B. Recognizing the Importance of Gift Giving, the Multi-causality of Motivation Behind Gifts and Balancing the Personal Autonomy of the Donor and Donee

Three important factors are crucial in the normative framework proposed in this essay. First, we must re-conceptualize the status of a completed gift. As demonstrated above in part VII(B), gifts are important transactions that function in the affective realm by engendering positive feelings between individuals and thereby creating a moral economy. Therefore, the courts should recognize the importance and social utility of gift giving and not order restitution for a completed gift lightly. Just as judges are hesitant in avoiding a contract based purely on the unilateral mistake of a contracting party, it is suggested that a stricter test other than the causal mistake thesis be adopted in ordering restitution for a mistaken gift.

Second, the multi-causality of motives behind gift-giving ought to be recognized.²¹⁷ A mono-causalist view of gift giving based on pure altruism is a false and unrealistic caricature of gift giving. Several points flow from this. Most adherents to the causal mistake thesis wrongly assume the ‘but-for’ causation test is suitable in analyzing gift-giving. But in part VII(C), this has been shown to be false. If gifts are motivated by multiple causes then the ‘but-for’ causation test is conceptually wrong to analyze gift-giving. Another important point that ought to be made is the relationship between multi-causality of motives behind gift-giving and the concept of personal autonomy.

²¹⁴ JOEL FEINBERG, HARM TO SELF 261 (1986).

²¹⁵ RESTATEMENT (SECOND) OF PROPERTY §§ 34.7 cmt d at 304 (1983).

²¹⁶ GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 120 (1999).

²¹⁷ RESTATEMENT OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS, § 6 cmt b at 4, (Tentative Draft No. 3. April 4, 2001).

The intention to make a gift is *not* vitiated if only one of the reasons, which inspired the gift, turned out to be false. In most gift giving, the gift is made primarily due to affective reasons e.g. to forge or enhance an emotional bond with the donee. For such gifts, restitution should not be ordered as the primary purpose of the gift is not vitiated. Joseph Singer²¹⁸ (building on Nedelsky's work²¹⁹) argues: '[w]e respect individuals, not by assuming them to be islands unto themselves, but by acknowledging that they best function and achieve their own ends in the context of social relations that support using their own abilities to flourish.' So using Tettenborn's example²²⁰ of the uncle's gift to his niece not knowing she married an enemy of his; the uncle's autonomy is not compromised in such a situation. The affective reasons e.g. the uncle's love and affection for his niece which motivated the gift is the prima facie reason why the gift was made and it is hard to see how these affective considerations are compromised by the uncle's ignorance of the niece's husband.

Finally, in deliberating on whether to order restitution, the courts should be sensitive in balancing the autonomy of the donor with the autonomy of the donee. The courts should not unwittingly confer on the donor an indirect power to interfere with the donee's life choices by allowing the donor to recall a gift. A strong version of the causal mistake thesis is simply unacceptable because it has the potential to prefer the donor's project over the donee's right as an autonomous free-willed agent. This offends against the Kantian idea of treating *all* individuals as ends in themselves. Therefore, a donor cannot ask for a gift back on the account that the donor was mistaken as to matters that are fundamental to the donee's autonomy such as race, life partner, political beliefs, sexual orientation etc.

C. *A Three Stage Test – Mis-transcription, Failure of Stated Basis and Serious Mistake Test*

In this part, I attempt to construct a test which takes into account the considerations described above. My suggestion is that the most descriptively accurate and normatively satisfactory test is a three stage test. Essentially, we ask three questions. First, is this a case of mis-transcription? Second, did the donor make the basis of the gift known from the outset? If so, and the basis fails to the donor is entitled to restitution. Finally, if the basis of the gift was not articulated, then we ask the third question: Was the donor in making the gift laboring under a serious mistake which goes to the root of the gift? Only such serious mistakes will trigger restitutionary liability.

²¹⁸ JOSEPH WILLIAM SINGER, ENTITLEMENT [:] THE PARADOXES OF PROPERTY 130 -131 (2000).

²¹⁹ Jennifer Nedelsky, *Reconceiving Autonomy: Sources Thoughts and Possibilities* 1 YALE J.L. & FEMINISM 7, 9 (1989).

²²⁰ ANDREW TETTENBORN, THE LAW OF RESTITUTION IN ENGLAND AND IRELAND 76 (2002).

1. The First Stage – Mis-transcription

This is the simplest category of mistaken gifts.²²¹ Essentially, the donor made a gift of the wrong property to the donee. If X intended to give Y Blackacre but X or X's lawyers erroneously wrote Greenacre instead in the deed of conveyance, X is entitled to have the deed reformed in accordance to X's original intentions. Thus, the deed would be rectified by substituting the word Greenacre with Blackacre. This is a very clear cut case where restitution is allowed because there is no danger of X impinging on Y's autonomy. The concerns listed in the preceding section is simply not present in this case: X's conveyance of Greenacre was not meant to establish or enhance X's relationship with Y; the causal link of the conveyance is mono causal in this case *e.g.* the mis-transcription; X is trying to take back Greenacre not because X is attempting to influence directly or indirectly Y's life choices. Cases involving mis-transcription poses evidentiary problems rather than the question of balancing between the competing autonomy of the donor and the donee. The fear of course is that the donor may concoct a false allegation of mis-transcription *ex post facto*. Anglo-American courts have responded to this concern by insisting that reformation of a deed is granted only if the applicant asking for such a remedy can prove her case by clear and convincing evidence rather than simply by a preponderance of evidence.²²²

2. The Second Stage - A Failure of Basis Test

Assuming there was no mis-transcription, we move on to the second stage. If a donor can show that the basis of the gift was made clear either to the donee or to the donor's attorney from the outset and the basis failed, then the donor is entitled to restitution of the gift. This category explains many of the cases where the courts have allowed reformation of a voluntary deed of conveyance. Usually, the stated basis is conveyed to the donor's attorney and the deed did not have the intended effect. *Manfredo v Manfredo*²²³ is representative of this situation. Mrs. Manfredo conveyed her share in a piece of land to her husband while 'her hold on life was precarious.' Mrs. Manfredo's husband died before she did. The brother and sister of Mr. Manfredo attempted to stake a claim in the land through Mr. Manfredo's estate. Mrs. Manfredo asked the court to avoid the conveyance. Mrs. Manfredo's attorney testified that he had in good faith advised Mrs. Manfredo that in the event she survived her husband the property would revert entirely to her. This advice was not true. In the circumstances, the court decreed that the deed was vacated and annulled as it was proven that the deed did not conform to Mrs. Manfredo's intention. Another excellent example is the case of *Tuttle v. Doty*.²²⁴ The donor mistakenly thought that her

²²¹ 4 GEORGE PALMER, LAW OF RESTITUTION §18.5 (1978); RESTATEMENT (SECOND) OF PROPERTY §§ 34.7 cmt d at 304 (1983); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 cmt. h at 138 (Tentative Draft No. 1. April 6, 2001).

²²² See *e.g.* *Joscelyne v. Nissen* [1970] 2 Q.B. 86; *Patton v. Mid-Continent Sys., Inc.*, 841 F. 2d 742,746. See also 4 GEORGE PALMER, LAW OF RESTITUTION §18.5 at 20 -24 (1978); Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL L. REV. 1573, 1610 -1611 (2003); 1 CHITTY ON CONTRACTS 326 – 327 (H.G. Beale et. al. 1999).

²²³ 68 So. 157 (Ala. 1915). See also *Stone v. Stone* 319 Mich. 194 (1947).

²²⁴ 203 Mich. 1 (1918).

grandson had stolen some of the donor's share certificates in a bank and telephone company. The donor had originally wanted to give those shares to her grandson. Being deeply disappointed with his behavior, the donor decided to make a gift of the shares to her daughter. Notices were duly given to the telephone company and the bank that the certificates had been stolen. As matter of fact, the certificates were not stolen but were delivered by the donor to her daughter for sake-keeping in a private box in a bank. Both the donor and her daughter had forgotten about this and genuinely thought that the shares were missing due to the theft. The gift of the share certificates were set aside. *Lady Hood of Avalon v MacKinnon* is the English equivalent.²²⁵ The plaintiff made a settlement to her elder daughter to place the elder daughter in a similar financial position as her younger daughter. At the time of the settlement in question, the claimant forgot about a similar settlement six years ago to her elder daughter. When her solicitors reminded the plaintiff about the earlier settlement, the plaintiff applied to set aside the later settlement. The application was allowed.

Although this article is a comparative study on Anglo-American law, it is worth mentioning the New Zealand decision *University of Canterbury v Attorney General*²²⁶ since this case is often cited by major English treatises.²²⁷ This case concerned a donor who made a gift of shares to a trust held by the university to disburse scholarships. The donation was made in the belief that there was a need to supplement the trust fund in order to increase the scholarships given out. In actual fact the trust fund had a healthy balance; scholarships were not disbursed due to the restrictive conditions of eligibility contained in the original trust deed. When the donor found out the real reason why scholarships had not been disbursed, he asked for the shares back. It is this present author's view that key issue which swayed the learned judge to order the return of the donation was the fact that the 'foundation upon which the gift was made did not exist'.²²⁸ There was evidence that the donor had pointedly asked the university when transferring the shares: 'would this [the donation of shares] be an acceptable way for you to increase the scholarship?'²²⁹ But the university had neglected to inform the donor of the real reason why scholarships had not been given out. This case is therefore better rationalized as standing for the proposition that a gift may be rescinded where the basis of the gift was made clear to the donee from the outset and that the basis turned out to be untrue.

Of course, the failure of basis test is only suitable as a framework to analyze *some* gifts. These usually involve highly structured voluntary settlements where the donor was quite single minded about the basis of the gift. In such cases, the basis of the voluntary settlement is well documented e.g. by contemporaneous instructions to the

²²⁵ [1909] 1 Ch 476. *See also* Alexander v. Alexander 1988 WL 28562 (Tenn. App.).

²²⁶ [1995] NZLR 78.

²²⁷ *See e.g.* ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 194 (6th ed. 2002).

²²⁸ *Ibid*, 85.

²²⁹ *Ibid*, 85.

donor's solicitors or is reflected in the deed of transfer.²³⁰ Rectification of the deed of settlement will be granted if the deed fails to achieve the donor's purpose.²³¹ In this case, like the previous category of mis-transcriptions, there is no problem of balancing the donor's autonomy with the donee's autonomy. Save for such highly structured voluntary settlements, the failure of basis test is not applicable in analyzing when restitution should be made by a donee. While it is true that most donors *hope* to get something from donees e.g. a deepening of the relationship,²³² to earn the donees' goodwill etc., it is artificial to construe the donors' hope as forming the basis of the gift. A father may make gifts to his children in the hope that they will take care of him in his old age. Likewise a young man may lavish the person of his affection with the hope that his feelings will be reciprocated. But in both cases if the children do not take care of their father in his old age²³³ and the recipient of the gift spurns the young man's advances, one cannot say that the basis of the gift has failed. The risk of non-reciprocation is just an inherent part of the gift exchange process. As Rugg CJ said in *Silano v. Carosella*:²³⁴ [s]ubsequent conditions which cast an appearance of injustice over the transaction as a gift do not afford ground for legal liability. A gift flowing from unalloyed good will commonly promotes friendship and stimulates thankfulness, but ingratitude cannot transmute a gift into an obligation enforceable at law.²³⁵ Otherwise, many disappointed donees will be vulnerable to make restitution to donors. For such gifts, it is impossible to say the basis of the gift has failed if it did not achieve what the donor hoped for. We then proceed to the final stage to ask whether the donor was laboring under a serious mistake.

3. The Third Stage - A Serious Mistake

If the donor does not satisfy stages one and two, it is suggested that the donor is entitled to restitution only if the donor makes a *serious mistake* in relation to the gift.²³⁶ The term 'serious mistake' is deliberately chosen in preference to the expression 'fundamental mistake'²³⁷ as the latter carries too much historical baggage

²³⁰ See e.g. *Gibbon v. Mitchell* [1990] 1 WLR 1304.

²³¹ See e.g. *University of Canterbury v. Attorney General* [1995] NZLR 78. Cf. *Hawes v. Emory University* 188 Ga. App. 803 (1988) (restitution denied because the basis of the gift was not stipulated clearly).

²³² See e.g. *Main v. Howard* 52 Or. App. 797 (1981) (reformation of a gift was denied although the relationship between the donor and donee had soured).

²³³ See e.g. *Moulton v. Moulton* 707 A. 2d 74 (1Me. 1998).

²³⁴ 272 Mass. 203 (1930).

²³⁵ Cf. The position is different in civil law. See JOHN P. DAWSON, *GIFTS AND PROMISES* 53 – 54, 140 – 141 (1980) (under German and French law a gift may be taken back due to 'gross ingratitude' of the donee).

²³⁶ *Ogilvie v. Littleboy* (1896 - 1897) 13 TLR 399 (???); (1899) 15 TLR 294 (????). See also 20 HALSBURY'S LAWS OF ENGLAND 38 – 39 (1993).

²³⁷ GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 148 -151 (1999).

in English law.²³⁸ The concept of a ‘fundamental mistake’ has been bandied about in English cases involving passing of legal title and the formation of contracts. The law with regard to fundamental mistakes has been described by Glanville Williams as in ‘semi chaos’;²³⁹ there does not appear to be any coherent principles to be gleaned from the cases. For these reasons and to avoid unnecessary confusion, it is suggested that the preferable term to use is ‘serious mistake’ instead of ‘fundamental mistake’. Also, the term serious mistake is descriptively more satisfactory than the term ‘basic mistake’²⁴⁰ or ‘invalidating mistake’²⁴¹ currently used in the *Restatement of Restitution* (1937) and *R3RU*; it conveys the message that not all mistakes pertaining to gifts will justify restitution of the gift. Only mistakes that are sufficiently grave will mandate the donee to make restitution to the donor.

As compared to the previous categories, it is much more difficult to articulate the precise ambit of a serious mistake.²⁴² Supporters of the causal mistake thesis may argue that a serious mistake test should be rejected for two reasons.²⁴³ It is said that the concept of a serious mistake is inherently vague and uncertain. And it is also argued that it is misconceived to require such a strict test since we are not dealing with contracts. As Friedmann says:

‘It is obvious that policy considerations underlying involuntariness in restitution are totally different from those relating to contract formation, which, as already indicated, are concerned with good faith acquisition of a legal right (the right to the other party’s performance). The crucial point for the purpose of restitution, namely that the payor was not legally obligated to make the payment, usually does not arise at the stage of contract formation, in which both parties are interested in creating new rights and obligations. On the other hand, questions relating to the creation and acquisition of new rights, which lie at the heart of contract formation and underlie the objective theory of contract, do not arise in the context of mistaken payment that was not due.’²⁴⁴

Friedmann concludes that ‘the seriousness of the mistake is only relevant for evidentiary purposes. The more serious was the mistake the better are the payor’s

²³⁸ See Glanville Williams, *Mistake in the Law of Theft* 36 CAMBRIDGE. L.J. 62 (1977); David Fox, *The Transfer of Legal Title to Money* 4 RESTITUTION L. REV. 60 (1996).

²³⁹ *Ibid*, 64.

²⁴⁰ RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 26 (1937)

²⁴¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 (Tentative Draft No. 1. April 6, 2001).

²⁴² GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 150 (1999).

²⁴³ See e.g. ANDREW BURROWS, *THE LAW OF RESTITUTION* 144 – 145 (2nd ed. 2002).

²⁴⁴ Daniel Friedmann, *The Objective Principle and Mistake and Involuntariness in Contract and Restitution* 119 L. Q. REV. 68, 85 (2003).

prospects of convincing the court that but for the mistake he would not have made the payment.²⁴⁵

Friedmann's critique is not insurmountable. It is conceded that the serious mistake test does envisage a degree of uncertainty. However, this is inevitable when dealing with a complex social phenomenon such as gift giving. The contention that the policy reasons underlying involuntariness in restitution and the formation of a contract are totally different is unconvincing. This argument may be true for mistaken payments in a *commercial context* but it is certainly unpersuasive in relation to gift giving. As demonstrated above, if the gift is re-conceived as a form of informal exchange which operates in the same way in the social sphere as a contract functions in the conventional economic realm, it becomes hard to justify why a completed gift should be treated as less important than a contract. Also, the distinction Friedmann draws between a mistaken payment and the formation of a contract i.e. that the former unlike the latter does not concern the creation and acquisition of new rights is not valid. This distinction is illusory when we talk about gifts. A gift like a contract *does* concern the creation and acquisition of new rights. Therefore, it is entirely logical to say that when a donor has delivered a gift to the donee and the donee has accepted it, only a serious mistake will afford the donor a restitutionary claim against the donee.

Since the proposed test is a fluid test courts may differ in their interpretation as to what is a serious mistake. Anglo-American law differs slightly on what constitutes a serious mistake. Under English law, there appears to be only two kinds of serious mistakes: (a) mistakes as to the amount transferred (e.g. double payments),²⁴⁶ or (b) mistakes as to the identity of the beneficiary.²⁴⁷ With regard to mistakes as to the amount transferred, it can be argued that a double payment negates the *factum* of the gift; obviously if a donor intended to give a donee £ 100 for her birthday, the fact that the donor had forgotten that the gift had already been made 10 days ago is a mistake which goes to the root of the subsequent gift. Another example would be to suppose the donor intended to give the donee £ 10; unfortunately the absent minded donor hands the donee a £ 20 note. With regard to mistakes as to the identity; if a donor wanted to make a gift to X but due to a mistake in the legal documentation the gift went to X and Y,²⁴⁸ surely there is no difficulty in saying that this is a mistake in the *factum* of the gift. In interpreting what are serious mistakes of identity, we must be careful not to read it too widely. Under English law mistakes relating to the character, attributes²⁴⁹ and social position should not be considered as a serious mistake of identity. American law also considers mistakes as to the amount transferred²⁵⁰ and

²⁴⁵ *Id*, 87.

²⁴⁶ *Lady Hood of Avalon v. MacKinnon* [1909] 1 Ch 476.

²⁴⁷ *Gibbon v. Mitchell* [1990] 1 WLR 1304 (???)

²⁴⁸ *Morgan v. Aschcroft* [1938] 1 KB 49, 66 -67; *Ellis v. Ellis* (1909) 26 TLR 166 (???) ; *Gibbon v Mitchell* [1990] 1 WLR 1304.

²⁴⁹ *Morgan v. Aschcroft* [1938] 1 KB 49, 66. *See also* *R v. Richardson* [1998] 2 Cr App R 200 (????).

²⁵⁰ *See e.g.* *Crippen v Adams*, 132 Mich. 31 (1902); *In the Matter of Clark's Estate* 233 App. Div. 487 (1931) *See also* 4 GEORGE PALMER, *LAW OF RESTITUTION* §18.5 at 25 (1978).

mistakes as to identity²⁵¹ of the beneficiary as mistakes which are significant enough to order restitution of a gift. It will be shown below that the American cases have taken a more liberal view as to what constitutes a mistake which is significant enough to order the donee to make restitution.

In considering when a donor's decision to make a gift was voluntary enough, we should be guided by the three factors elaborated in part VIII(B). First, what is a serious mistake is to a certain extent colored by policy considerations. It is suggested since a completed gift is inextricably bound up with the creation of a moral economy a court should not order restitution of a gift lightly. In order to illustrate the policy dimension of allowing restitution for mistaken gifts, it is instructive to note that American courts have sometimes allowed restitution in a case where a donor conferred a gratuitous benefit on a donee in the mistaken belief that the donee was destitute.²⁵² It is not entirely clear whether an English court will order restitution in such a situation.²⁵³ The decision to allow such donors to obtain restitution is obviously a policy motivated move in favor of good Samaritans and rescuers despite the fact that under orthodox Anglo-American law there is no duty to rescue.

Second, the motivation for gift-giving is often multi-causal and therefore it is not sufficient if the donor can only prove that she was mistaken about *one* of the motivating factors of the gift.²⁵⁴ If the other factors for the gift are still present, restitution ought to be denied. It is suggested that the multi-causality of motivation in gift giving is the reason why restitution is not allowed when the donor was mistaken with regard to the donor's legal relationship with the donee.²⁵⁵ *Mott v. Iossa*²⁵⁶ illustrates this perfectly. The defendant, Nicola Iossa 'married' Mrs. Mottemucci, and thereafter lived with her as husband and wife for 25 years until Mrs. Mottemucci's death. Unknown to Iossa, they were never legally married because Mrs. Mottemucci

²⁵¹ *Mitchell v Mitchell* 1869 W.L. 1728 (Ga. 1869). See also *Crockett v Crockett*, 1884 W.L. 2441 (Ga. 1884); *Andrews v Andrews*, 1859 W.L. 4668 (Ind. 1859); *In re Estate of Clark*, 233 A.D. 487 (N.Y. 1931); *Tyler v Larson*, 106 Cal. App. 2d 317 (1952); *Wescott v Westcott*, 259 N.W. 2d 545; *Kemna v. Grave*, 630 S.W. 2d 160 (Mo. App. 1982); *Jones v McNealy*, 35 So. 1022 (Ala. 1904); *Yano v Yano*, 144 Ariz. 382 (Ariz. App. 1985)

²⁵² See e.g. WARREN SEAVEY & AUSTIN SCOTT, NOTES TO THE RESTATEMENT OF RESTITUTION § 26 (1937); RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS §26 cmt c. at 118 - 119 (1937); James L. McCrystal, Comments 41 MICH. L. REV. 149 (1942); 4 GEORGE PALMER, LAW OF RESTITUTION §18.4 at 16 - 20 (1978); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §11 at 143, 151 (Tentative Draft No. 1. April 6, 2001).

²⁵³ *Cf. Re Rhodes* (1890) LR 44 Ch. D. 94.

²⁵⁴ See e.g. *Lowry v. Collector of Internal Revenue* 322 Mich. 532 (1948) (where the husband's principal purpose in making the gift of corporate shares to his wife was not to minimize income taxes but to enable the wife to have her own property. Gift could not be set aside because of subsequent changes in tax rates).

²⁵⁵ It is beyond the scope of this paper to consider in detail whether a 'putative wife' may obtain restitution for her services such as housework from her 'putative husband'. This writer is of the view that the unjust enrichment theory is unsuitable in dealing with the problem of regulating non-marital cohabitation. See e.g. JOHN MEE, THE PROPERTY RIGHT OF COHABITEES 184 - 226 (1999).

²⁵⁶ 119 NJ Eq 185 (1935).

had another living husband whom she never divorced. One of the issues in this case concerned a gift of a house from Iossa his putative stepson, Joseph. Iossa argued that this conveyance ought to be rescinded because it was founded in mistake; the gift was intended for the son of his 'wife'; Joseph does not fit that description. The court rejected this argument and held that there was no mistake in terms of the gift or the identity of the donee. It was held that considering that Iossa had stood in *loco parentis* to the boy for ten years and, the cause of the gift was Iossa's affection for the boy and not his belief that Mrs. Mottemucci was his lawful wife. Therefore, the court upheld Iossa's gift to Joseph. A better rationalization of this case is not to deny that there was a mistake. Iossa obviously thought he was the boy's stepfather when he made the gift. But since the motivation of the gift was multi-causal i.e. the gift was induced by the Joseph's legal identity (stepson of Iossa) *and* Iossa's love and affection for the boy, restitution is not allowed simply because *one* of the factors inducing the gift turned out to be false. It is important to note that there was no finding of fraud or misrepresentation in *Mott v Iossa*.²⁵⁷ If the donor had transferred property to the donee in circumstances where the donor falsely believed that the donor and donee were validly married and the donee was guilty of fraud or misrepresentation, restitution will usually be ordered.²⁵⁸ However, where the donee was not guilty of fraud or misrepresentation, the gift is valid.²⁵⁹

Third, in deciding whether to order restitution of a gift, the courts must be sensitive in not indirectly interfering with the donee's autonomy especially with fundamental matters which relates to ethnicity, choice of life partner, political beliefs, religion, sexual orientation etc. *Hawes v. Emory University*²⁶⁰ is a case that represents such a conflict of interests. In this case, the donor of a scholarship tried to get the university to return an endowment for the alleged failure to disburse a scholarship fund music majors or medical students. The court refused to order restitution because although there was some evidence that the parties had talked about how the funds would be used, it was held that the discussions were not concrete enough; the donor had not indicated in the record that the donation was to secure Emory's promise to use the gift in a certain way. This decision is eminently sensible. Otherwise, donors would be able to use a completed gift to wield considerable influence in dictating a university's direction. It is also not hard to see how the threat of taking back a large endowment

²⁵⁷ *Id.*

²⁵⁸ See e.g. *Schwarz v. U.S* 191 F. 2d 618 (4th Cir. 1951); *Dorsey v. Dorsey* 259 Ala 220 (1953); *Hutson v. Hutson* 168 Md. 182 (1935); *Morin v Kirkland* 226 Mass. 345 (1917); *Batty v. Greene* 206 Mass 561 (1910).

²⁵⁹ See *Donnelly v. Donnelly* 198 Md. 341 (1951); *McManus v Summers* 290 Md. 408 (1981). However, the conveyance is usually construed as a tenancy in common or joint tenancy instead of a tenancy in entirety since the latter may only exist between a husband and wife. See Donald Kepner, *The Effect of and Attempted Creation of an Estate By the Entirety in Unmarried Grantees* 6 RUTGERS L. REV. 550 (1952). Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §11 cmt. d at 141 (Tentative Draft No. 1. April 6, 2001); 4 GEORGE PALMER, LAW OF RESTITUTION §18.3 at 11 (1978) (who suggest that where the donor was mistaken as to the status of the donor's relationship with the donee, the donor is entitled to the gift. However, this analysis is probably inaccurate because the cases relied upon for this proposition all involved some fraud or misrepresentation on the donee's part).

²⁶⁰ 188 Ga. App. 803 (1988).

may affect an institution's ability to ensure that its faculty enjoys academic freedom. While it may be unobjectionable for a donor to state very clearly from the outset what the purpose of the gift was and record the aims and objectives of the gift clearly, it is quite another thing for a donor to ask for a donation back simply because the donor's hope of how the gift should be used was not fulfilled.

IX. CONCLUSION

This article will end with a re-consideration of Fonda's gift to Harvard described at the beginning of the essay. So is Ms. Fonda entitled to restitution of her gift to Harvard? Using the three stage test, first we have to consider whether this was a case of mis-transcription. Based on the reported facts, it is unlikely that this was so. Second, Fonda would have a better case in arguing that this was a failure of basis. Whether she would succeed is largely a question of fact. What was the basis of the gift and was it clearly stipulated to Harvard? If so, did the basis of the gift fail? For example, if the basis of the gift was to set up a center to study gender issues, the question would be whether Harvard's new policies precluded the setting up of such a center. The fact that the new policies may simply make it harder to start a center would not be sufficient. Ms. Fonda would have the onus to prove that the setting up of the center was impossible under Harvard's new guidelines. Finally, if the basis of the gift was not stated with sufficient clarity, did Fonda make a serious mistake? From the reports, it is unlikely that there was such a serious mistake as there was no mistake as to identity of the donee, amount transferred or the financial status of the donee. If the reason for wanting to take back the gift is due to the fact that the value of Fonda's stock portfolio had dropped, this would not constitute a serious mistake.

The central premise of this article has been that the causal mistake thesis which seems to be the dominant test in Anglo-American law is inappropriate to deal with the issue of mistaken gifts. There are a number of reasons for this. First, gifts are unraveled too easily under this model because they are wrongly perceived to be insignificant and unimportant. Second, the assumption that it is possible to identify *the* causative factor in the context of gift giving is incorrect. While causal mistakes may be identified with regard to mistaken payments in a commercial context, the reasons behind most gift giving is often much more nebulous and elusive. Most gifts are multi-causal in nature; this makes it impossible to identify the causative factor that inspired the gift. Third, the causal mistake thesis is justified on a narrow conception of autonomy, which concentrates solely on the subjective intent of the donor. This model of autonomy is deficient because it pays inadequate attention to the competing autonomy of the donee and the importance of relationships. In doing so, it allows the donor to infringe unfairly on the donee's autonomy by conferring on the donor an indirect power (the restitutionary right to recall the value of the gift) to influence and dictate the donee's life choices. Finally, there are serious conceptual difficulties, due to the indeterminate nature of human actions, in using the but-for theory to analyze gift giving.

Many of these difficulties have a common theme. Restitution scholars who support the causal mistake approach wrongly marginalize the gift as an unimportant one-sided transaction. Yet such a characterization is inconsistent with social reality. A completed gift is worth protecting because it fosters important affective bonds such as trust which is as important to our everyday social lives as contracts is to commerce.

Thus, if gifts are re-conceptualized as important exchanges functioning in the affective realm of a moral economy analogous to contracts functioning in the economic realm, then it is understandable why the law should insist that only serious mistakes, which nullify the intent of the donor to make the gift, would ground a restitutionary liability. The conclusion reached is that a more suitable framework of analysis is to use a three stage test i.e. restitution is only allowed if there was either a mis-transcription, or, a failure of basis test or, a serious mistake.