held values – a point developed by Saunders. However, as Feldman warns, common linguistic expressions may conceal a degree of conceptual variation.

The underlying theme of the book, reflected in the unsatisfactory distinction between process and substance, is the tendency through much of the common law world for the scope of judicial review to expand from a constrained focus on procedural error and policing the boundaries of legality into the substance or qualitative assessment of the actual decision. The value of the essays, primarily focusing on the UK, Canada and Australia, is not so much the recognition of that development, as the analysis of scholars with deep experience of the various jurisdictions as to why the trend is occurring and in what sense the incentives are common.

There are, inevitably, omissions and topics lightly touched, including financial and commercial regulation. The regulation of collective action depends on values that differ from those affecting individual autonomy. Daly makes a similar point in seeking to distinguish between "rule of law" values and the principle of good administration. Passing references to "*Chevron* deference" are dismissive, although Mashaw's paper, which deals with reasoning under the US Administrative Procedure Act and from a European perspective, is a valuable counterbalance. Further, it would have been useful to have had a comparative review of the effects of the Canadian Charter and the UK's Human Rights Act 1998 on judicial review of administrative decision-making. The values underlying judicial review and human rights protection are closely related; the relationship is arguably important to understanding the proper scope (and limits) of judicial review – a topic addressed in the Canadian context by Mary Liston. In Australia, without a bill of rights, similar results have been achieved by applying the "principle of legality" as a principle of statutory interpretation. As the bulk of judicial review occurs in the context of powers conferred by statute, there is also room for closer analysis of principles of statutory interpretation, which are themselves an integral part of public law. Cheryl Saunders gives a list of other areas for exploration.

In an age that has seen the publication of a number of books of essays on administrative law, this publication stands above the crowd, by reason of its coherent development of themes and the uniformly high quality of the essays. The authors and the publisher are to be congratulated.

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Defences in Unjust Enrichment. By ANDREW DYSON, JAMES GOUDKAMP and FREDERICK WILMOT-SMITH (eds.) [Oxford: Hart Publishing, 2016. xxxi + 328 pp. Hardback £75. ISBN 978-1-84946-725-4.]

One puzzle about the law of unjust enrichment is that we know many things about the law of unjust enrichment, but find it hard to explain *why* we know them. For example, we know that, if I pay you £100 by mistake, not only *will* you be liable to pay me £100, but you *should* be held liable to pay me £100. But if we are pressed to explain *why* you should be held liable to me in this case, we start to flounder. Similarly, if – having received my mistaken payment of £100 – you make a donation that you would not otherwise have made of £20 to a charity, we all know that your liability to me *should* go down to £80; in other words, you should have a defence of change of position. But if we are asked to explain *why* you should have a defence of change of position in this case although (for example) no such defence will be given

to you where someone gives you £100 that they have stolen from me and, in reliance on this receipt, you make a donation of £20 to charity, we again struggle to explain why we believe what we strongly believe to be true.

These two problems of explanation seem to be linked. If we do not know why you should be held liable to pay me £100 in the first case, it is almost inevitable that we will struggle to explain why your liability to pay me £100 should go down to £80 in the second case. We can only work out what defences should be recognised in unjust enrichment once we know why the law of unjust enrichment exists in the first place. This is not at all to deny the now standard distinction between *denials* – where a defendant relies on certain facts to deny that there is any basis for making him liable to the claimant – and *defences* – where a defendant is prima facie liable to the claimant but relies on certain other facts to assert that he should not ultimately be held liable. It is simply to say that we cannot understand why the facts that defeat a prima facie liability are sufficiently important or significant to defeat that liability unless we first understand what is so important or significant about the facts making the defendant prima facie liable that they provide us with reason to recognise that liability.

The point being made here – that it is difficult to discuss, or understand, the law of defences in unjust enrichment without first understanding the basis of the law of unjust enrichment – is unintentionally reinforced by the papers in this outstanding volume, which represents the state of the art in thinking on the law of defences in unjust enrichment. The focus of the book is overwhelmingly on the defence of change of position (with Dennis Klimchuk, Ajay Ratan, Robert Chambers and Elise Bant each contributing a chapter on that defence) and the "defence" – assuming it exists – of good consideration (on which there are three papers, by Helen Scott, Andrew Kull and Sonja Meier). Graham Virgo covers illegality. Birke Häcker looks at the case where one of the parties to a claim in unjust enrichment is a child, and sets out what effect that fact will have on the defendant's ability to raise a defence to the claimant's claim. Charles Mitchell provides readers with a comprehensive survey of the defences that might be raised in a case where a claimant seeks to recover taxes that were paid subject to an ultra vires demand for tax by a public body and the public body tries to defeat the claimant's claim on the basis that it could have made an intra vires demand for those taxes. Passing on (or "disimpoverishment", in Birks' terminology) is therefore not discussed at all. That may be because that "defence" is so outré as not to be worth considering. However, we cannot know that that is the case until we know why claims in unjust enrichment are allowed in the first place and can then see why establishing that the claimant passed on her loss to someone else cannot give us any reason to disregard the reasons that the defendant's unjust enrichment gives us to make him liable.

Lionel Smith's contribution to the volume discusses whether unjust enrichment amounts to a cause of action, and what the law of defences to claims in unjust enrichment has to tell us about this issue. Smith argues that "[t]he correct level of generality for the definition of causes of action is one that neither lumps together juridically distinct justifications for legal recourses, nor pointlessly distinguishes between different ways in which the same justification may be activated" (p. 39). He goes on to deny that "unjust enrichment" amounts to a cause of action as, "in terms of [the] normative reasons for allowing restitution", unjust enrichment exists both in cases where "the claimant's consent to an enrichment was somehow impaired" and "cases in which the claimant has a claim to recover a transfer *regardless of whether* the claimant consented to it" (p. 44, emphasis in original). The law of defences seems to support this position as the defence of change of position does not apply to all causes of action in unjust enrichment, such as where tax has been

paid pursuant to an ultra vires demand, or where there has been a failure of consideration.

These points again emphasise the need – in talking about the availability of defences in unjust enrichment – to understand what sort of claim in unjust enrichment one is talking about, and why that claim exists. If, as Smith contends, "we still do not understand the structure of the common law of unjust enrichment" (p. 46), our understanding of the law of defences in this area cannot be much beyond the age of infancy. Given this, it is not surprising that Lord Reed – in the final paper in the book – should discourage judges from relying unduly on academic opinions in deciding cases of unjust enrichment: "doctrinal scholarship is not a substitute for the analysis of the law by the judges themselves. It can influence that process, but it cannot replace it" (p. 310). He goes on: "the court should resist the temptation to lay down broad or inflexible rules [of the kind favoured by some academic scholars of unjust enrichment] at what is still an early stage in the evolution of this area of English law" (p. 316). Reed's point is underscored by the "Index of Authors" that faces the last page of his paper. Only 13 authors are mentioned: a surprisingly limited number, and one that emphasises just how dangerous a development it would be if the judges placed the future of the law of unjust enrichment in the hands of such a small coterie of academics.

None of this is to deny the importance and quality of this book, which contains a host of insights, suggestions and arguments that are sure to spawn the kind of new writing on unjust enrichment that is so essential if this area of law is to flourish on sound foundations. I will conclude this review by picking out just three highlights.

(1) Kull brilliantly discusses what the position is where a fraudster induces a man (call him Paul) to lend him some money and then repays Paul by fraudulently inducing another man (call him Peter) to lend money to him, with the result that Peter subsequently brings a claim in unjust enrichment against Paul. Kull's preferred solution (which he calls "Jessel's bag in reverse") is that Paul's gain be shared between Peter and Paul. However, Kull acknowledges that the law of defences is hostile to this solution (which, where it has been employed in unpicking Ponzi schemes in the US, amounted to a "product of sheer improvisation" (p. 252), is "impossible to square with previous authority" (p. 254)) and instead takes the "all or nothing" position that, if Peter can sue Paul at all, then Peter should be allowed to recover from Paul in full unless Paul can raise a defence ("good consideration" or "money due"), in which case Peter's claim will be completely defeated.

(2) Ratan argues that the defence of change of position should cover cases where a person, *D*, has expended money in the *expectation* of receiving money from another person, *C*, which money *D* does then receive but which then becomes the subject of a claim in unjust enrichment. Approaches to the defence that see it working to prevent *D* being made worse off than *D* would have been had *D* never *received* *C*'s money stop the defence taking account of any expenditure by *D* before *D* received the money. Instead, Ratan suggests, we should see the defence as working to prevent *D* being made worse off than *D* would have been had *C*'s decision-making not been defective. Ratan contends that such a principle makes more sense as we can imagine a world where *C*'s decision-making was not defective, but we cannot imagine a world where *C*'s decision-making was defective but *D* still did not (somehow) receive *C*'s money.

(3) Both Chambers and Meier look at the operation of defences in unjust enrichment at the border between the law of unjust enrichment and the law of property. Chambers argues that the availability of a defence of change of position should not be affected by whether the object of a claimant's claim is the

restitution of value that the claimant has transferred to the defendant or the restitution of rights that the claimant has transferred to the defendant: "Claims for restitution from an innocent defendant should not impose the cost of rescue on that defendant regardless of whether the claim is for value or rights" (p. 121). In a very careful discussion, Meier suggests that the best justification for recognising a defence of bona fide purchase to a claim in unjust enrichment is that such a defence has to exist if the rules protecting a defendant from having a proprietary claim made against him in a case where he has in good faith purchased property belonging to the claimant are not to be stultified. If, in such a case, the claimant could sue the defendant for the value of her property, there would be little point in a bona fide purchase rule giving the defendant a good title to the claimant's property. If this is right, then the defence of bona fide purchase in unjust enrichment "will have to be restricted to cases where the defendant acquired title in a property received from a third party by way of bona fide purchase" (p. 267). Against this, it could be objected that, in the case where I have paid you £100 by mistake, no one objects to your being held liable to me on the basis that doing so stultifies the effect of the rule that passes good title to the £100 from me to you despite my mistake. However, it might be the case that different purposes are served by (1) the rule giving you good title to the £100 that I paid you by mistake and (2) a rule giving good title to the good-faith purchaser of property to which the seller had no title. It might be argued that rule (1) exists for the benefit of people who receive the £100 from you and is, therefore, not undermined if your receipt of the £100 that I paid to you results in your being held liable to me. In contrast, rule (2) exists for the benefit of the good-faith purchaser, and would therefore be undermined if that same purchaser ended up being held liable to the person whose property he purchased. If this is right, then it seems that a proper understanding of the law of defences in unjust enrichment depends on one's understanding not only of the basis of claims in unjust enrichment, but also the basis of the rules on when someone will acquire good title to property.

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Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation. By Brian G. Slocum [Chicago: The University of Chicago Press, 2015. x + 355 pp. Hardback US$70. ISBN 978-0-226-30485-4.]

The concept of ordinary meaning plays a pivotal role in the interpretation of legal texts in jurisdictions throughout the world. Where else could interpretation begin, one might ask? Over the years, arguments have been adduced to demonstrate that attributing the ordinary meaning to a legal text is not just common sense, but is also desirable: in the case of legislation, it gives citizens fair notice of the legal consequences of their actions, it protects the separation of powers by giving force to the legislatively enacted text and it provides the surest indication of the intentions of the author. Yet, whilst the ordinary meaning of a text plays an important role in the reasoning of courts, there remain fundamental questions about both what exactly the ordinary meaning of a text is and how it might be evidenced.