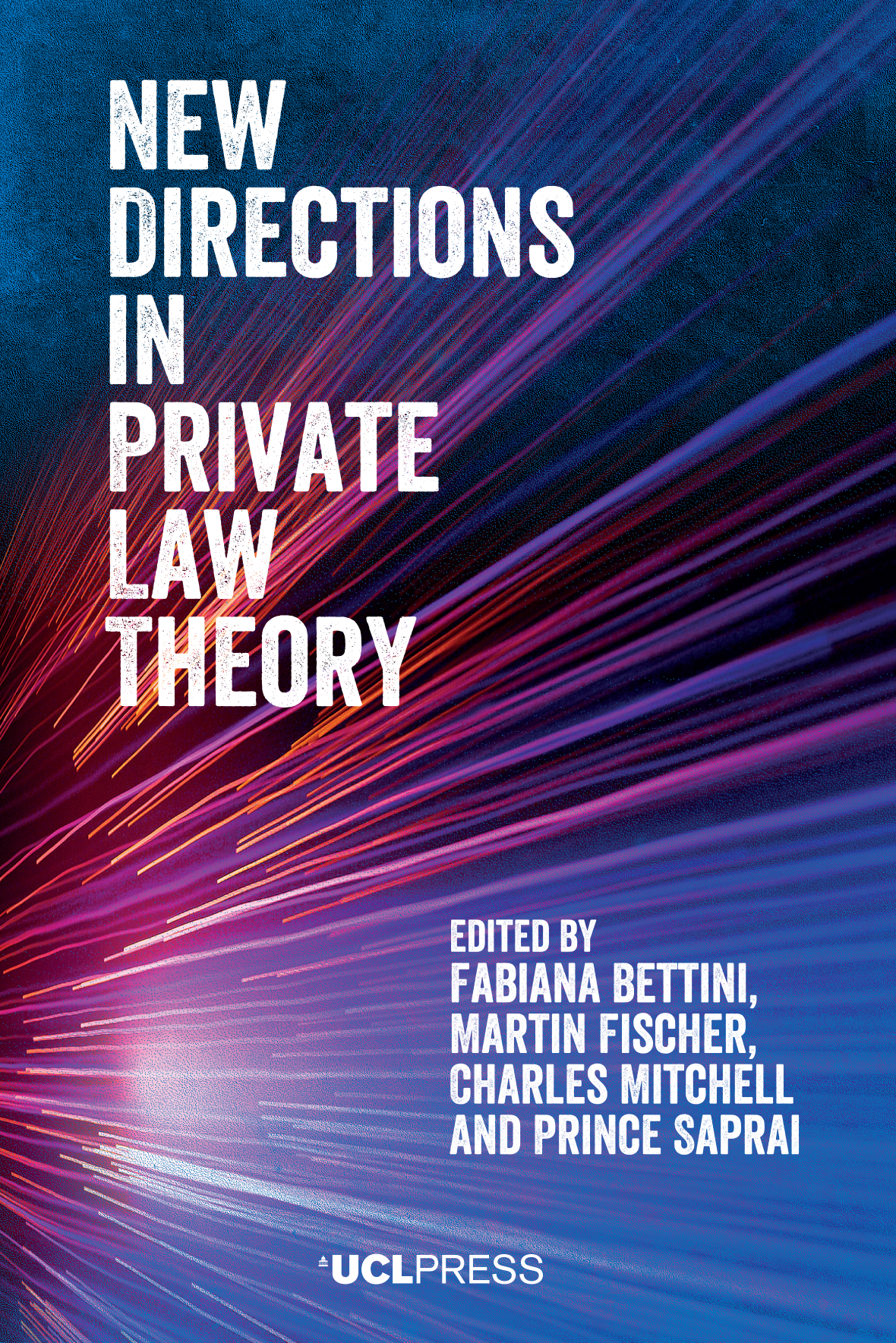
NEW
DIRECTIONS
IN
PRIVATE
LAW
THEORY
EDITED BY
FABIANA BETTINI,
MARTIN FISCHER,
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AND PRINCE SAPRAI
UCLPRESS

# New Directions in Private Law Theory

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Edited by

Fabiana Bettini, Martin Fischer,
Charles Mitchell and Prince Saprai

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This volume is dedicated to the memory of the late Professor John Gardner FBA who died in 2019. We are grateful to Sandy Steel and Nick McBride who at a special session at the conference for this volume gave presentations on the legacy of John's work in private law theory. John's own contribution to this field was enormous. In addition, he mentored and inspired a generation of young scholars to pursue research in private law theory and he was absolutely committed to promoting a diversity of voices and inclusion in academic life. For these reasons, it seemed fitting to dedicate this volume to John's memory and we are very grateful to his wife, Jenny, for allowing us to remember him in this way.

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# 1
# Introduction

Fabiana Bettini, Martin Fischer,
Charles Mitchell and Prince Saprai

The description, explanation and justification of legal doctrine from a theoretical perspective has recently come to play an increasingly important role in private law scholarship and judicial reasoning. Although the commonality of approach which identifies scholarship of this kind – scholarship which brings a philosophical method to the study of private law – means that it responds to the label of private law theory, what this label picks out is not enough to generate a well-bounded area of study. Rather the research area is composed of, and more easily identifiable, as the collection of a number of different sub-fields of research: contract theory, tort theory, and so forth, typically consisting in philosophical enquiry related to or arising out of a particular area of private law doctrinal scholarship but even still relatively vaguely defined.

While these sub-fields of private law theory might share a common concern with the relationship between social or moral practices and the law, legal ordering and categorisation, and with the philosophical puzzles that arise out of the concepts employed within private law (including for example causation, moral luck, normative powers and harm), they also differ from each other in many respects. Each is informed by the body of rules which its related field of doctrinal research takes as its object of study and, as such, on top of the variety of scholarship within each sub-field, there is additionally a great deal of variation between the various research areas collected under the label of private law theory. This means that the broadly framed commonality which gives private law theory its identity is only a relatively loose association, one which accommodates significant variation in both approach and subject matter.

The contributions to this volume reflect this breadth and interrogate a wide range of topics including aspects of private law doctrine, its ordering and also phenomena emerging from its application. The authors adopt a variety of different approaches, some focusing on the development of the law (both historical and contemporary), others on the justification of the legal rules, and still others focus instead on the categorisation of private law or the outcomes of its application.

That diversity is however an asset; collecting together these very different essays (from an equally diverse group of scholars) allows some of the subtle themes which run across private law theory to surface. Setting the chapters alongside one another helps to illustrate that, although this area of scholarship is broadly defined, there are ideas that repeat themselves and there is ample opportunity for contributions from across the range of this burgeoning area of scholarship to speak to each other and add to the field not just individually but also collectively.

Fittingly, this is well illustrated with reference to two of the themes which John Gardner explored in his last two books, *From Personal Life to Private Law* (where Gardner's focus is on the interpersonal relationships which private law helps constitute and regulate) and *Torts and other Wrongs* (which focuses more on the division and ordering of the categories within private law). Questions emerging from one or both of these themes are interrogated in each of the chapters in this volume.

Some of what can be found spread across the chapters in this volume are careful reflections on the everyday events that throw up challenges for private law, its conceptualisation and its justification. How should cricket players respond when a well-struck shot means a passer-by gets hit on the head by the ball? Should it make a difference if she was instead a spectator and could be understood to have consented to this risk? Why is it that the injured passer-by or spectator (and not someone else) is the one who can implicate a court in her demands for compensation? Why should innocent recipients be under a legal duty to return mistaken payments? Each of these questions is considered in a different chapter and each of the authors takes their question in a very different direction. What they share is a common starting point for some basic interaction between individuals and a concern with how, if at all, the law might respond to it.

Sitting alongside questions arising out of people's interactions with each other are questions about how we should understand private law and its various divisions and categories. Does the diversity identified amongst claims in unjust enrichment mean that the category is incoherent? Are claims in tort law always about compensating for wrongs? How should we understand parties' agreement in contract? Setting these more abstract

questions alongside questions about people's interactions, as occurs within and across the chapters of this volume, illustrates how the questions about legal ordering both derive from and inform more basic questions about how to respond to each other as our lives intersect, thus raising the question whether legal intervention changes in important ways the nature of our social and moral practices and indeed the nature of the relationships that we have with others?

There are benefits which can be derived from exploring a tightly circumscribed area of scholarship. Those are not what this volume is seeking. Rather we have sought to collect fresh and exciting writing that brings to light the complexity present within concepts employed in private law doctrine from a variety of different perspectives. What this volume also illustrates is how, when pursued within a broadly defined field, these different avenues of research might nonetheless intersect with each other in novel, interesting and potentially illuminating ways.

Turning to those contributions, the first, by Tim Liau, discusses standing, which – as he points out – has received little attention from private lawyers. Civil litigation ticks along, apparently without any serious upset, despite having few (some would say, 'any') explicit rules on standing. However, this complacency has been threatened by work in private law theory which has focused on the legal relationships that exist both between litigants among themselves and between litigants and the court during the course of litigation. Recent scholarship has brought a renewed focus on this complex web of relations and laid bare the need for us to be more serious in our thinking about standing in private law and what this means.

The main project of Liau's chapter is distinguishing standing from related concepts. He aims to draw a clear distinction between standing, which he understands as a power held by the claimant, and the separate power which a court has to issue orders. The 'two-power' model which Liau then elaborates itself raises some questions about the account of the remedial structure of private law which has been advocated by Stephen Smith, which places a defendant's liability to a court order at the centre of the story. The court's power to make such an order, argues Liau, is only one of the powers which deserves attention. Neglecting the claimant's distinct power of standing means that Smith's model cannot adequately accommodate the significant role which the claimant plays in civil litigation and particularly her power to initiate proceedings.

Other theorists have done more than Smith to consider the claimant's role but, suggests Liau, they have also failed to appreciate the importance of the distinction which he draws. To the influential body of work on civil recourse theory developed by John Goldberg and Benjamin

Zipursky, Liau offers a challenge by way of refinement. The triangular legal relationship between claimant, defendant and the court, which Goldberg and Zipursky identify in their account of a claimant's right of action, emphasises the previously neglected role of the court in civil litigation. However, the three-party relationship which they describe is, as Liau points out, difficult to reconcile with the two-party structure of the Hohfeldian scheme of rights and powers which Goldberg and Zipursky also endorse and apply. Resolving their triangular relationship into several distinct two-party relationships allows Liau to offer an explanation of the distinctive roles of the claimant and the court in the litigation process and how these are manifested in various features of civil litigation.

In private law, in contrast to public law, the question of who has standing to sue is typically answered so easily that the question is not even acknowledged. However, the ease with which the typical case can be understood creates a misleading impression of the complexity, which is revealed when the relationships between the parties involved in civil litigation are analysed more carefully. What emerges most strongly from Liau's work is that the scant attention which has previously been paid to questions of private law standing is to be regretted because their study can yield important theoretical insights into the role played by standing within the remedial structure of private law.

The next three chapters engage in different ways with the role of the will in private law. It is well known that private law, as well as being a source of imposed obligations, such as for example the duty not to negligently injure others or the duty to return mistaken payments, also allows parties through the exercise of normative powers to create new obligations, using for example the device of contract or trust, or to cancel or amend pre-existing duties, such as when we exercise the power of consent to permit conduct that would otherwise amount to a tort, as for example we do when we invite others onto our property. The will and the exercise of these normative powers of promise, agreement and consent play a central role in private law, and indeed in our daily lives, by enabling us to shape the normative framework that governs the relationships we have with other people. This facilitates the pursuit of a variety of fundamentally important goods, such as trust, intimacy, planning, cooperation and efficiency to name but a few.

In his chapter Joaquín Reyes explores the possibility that the out-of-fashion Scholastic doctrine of the just price, which according to Reyes still has traces in modern-day contract doctrines such as unconscionability, may impose substantive limits on the exercise of the normative power to contract. According to just price theory, the enforceability of a contract depends on whether the contract complies with the norms of commutative

justice, that is, whether it amounts to an equal exchange of values between the parties. As a matter of English law, such a doctrine seems completely at odds with the fundamental principle of freedom of contract. Reyes does not attempt to positively defend just price theory in his chapter, but rather in a more defensive vein attempts to show that some of the main objections that have been made to it are either inadequate or actually lend support to alternative conceptions of just price theory based on values aside from commutative justice. So, for example, Reyes argues that the claim that just price theory is based on very implausible metaphysical views about the *ontological* value of things exchanged is fallacious and that just price theory is compatible with the view that economic values attach to the *relational* value of things, or, put differently, on how *useful* the thing is to the purposes being pursued by a contracting party.

Reyes also considers the objection that the notion of just prices, which involves a normative inquiry, makes no sense when the prices of things are fixed in a value-neutral way by the laws of supply and demand. Reyes argues that the assumption that prices are fixed in a value-neutral way is too quick, and that in fact prices depend on background normative commitments, in other words, on choices about how to fix prices, for example, according to the laws of supply and demand in capitalist societies, which make them ripe for normative evaluation and criticism. Far from closing the door on just price theory, Reyes argues that this type of objection brings to light the inescapable nature of an account of the just price for any theory of contract and that commutative justice is but one conception of the just price among others.

Reyes suggests, then, that there may be a plurality of values or concerns which underpin the theory of the just price and hence set substantive limits on the exercise of the normative power to contract. Ohad Somech, in his chapter, continues the discussion of pluralism in contract law (which has in recent times become an increasingly important issue in contract theory), but in the context of determining the content of (rather than external limits to) the exercise of the power to contract. Somech makes use of a distinction drawn by Aquinas between 'consent' and 'assent' to distinguish how different theories of contract approach issues of contract interpretation where there is a gap in the contract or ambiguity about what the parties have agreed.

Somech argues that in the face of contractual uncertainty, a theory of contract will either attempt to discover the assent of the contracting parties or alternatively the consent of the contracting parties. Assent exists where between the various interpretations that might be given, there is a dominant alternative. In such cases, the courts use the

interpretive device of determining what the parties *would* have agreed to at the time of contract formation to fill the gap or resolve the ambiguity. In cases where there is no such dominant alternative, the courts will instead have to discover the consent of the parties, which amounts to determining what the parties actually *did* agree to, if anything, at the time of contract formation. The reason being that in such cases (where there is an absence of a dominant alternative), only an act of will of the parties can break the interpretive deadlock.

The issue of whether there is a dominant alternative in a particular case depends on the underlying theory of contract to which a court is committed. So, for example, theories that link contract to an external goal such as efficiency or relational justice will resolve uncertainty using the interpretive technique of assent, because they will interpret the contract in the manner that maximally advances the pursuit of that goal. On the other hand, theories of contract that attach greater value to the exercise of the will or the choice of the parties are more likely to adopt the interpretive technique of consent, because they do not presuppose that there is one goal or end above others that contract law should pursue. It may be that courts adopt different standards depending on the context, so for example courts may rely on the interpretive technique of assent when the contract is between commercial parties seeking to maximise profit, or they might rely on the technique of consent in the case of, say, a consumer or employment contract where a multiplicity of values, such as fairness, distributive justice or preventing exploitation are in play.

Somech suggests here that there is no value-neutral way of resolving interpretative disputes in contract, but rather a plurality of approaches depending on the underlying normative commitments of a court about the functions or purposes of contract law.

The values that underpin normative powers in private law is also a key theme in Beth Valentine's chapter. Valentine's subject is the much-maligned assumption of risk doctrine which provides a defence to non-intentional torts, such as negligence, on the ground that the claimant assumed the risk of the harm caused by the tort. The law concerning this doctrine has become increasingly muddled and there has been much confusion over its normative basis with courts increasingly taking the view that it is best understood in terms of a more general comparative fault standard, which reduces damages on the grounds of the unreasonable conduct of the claimant contributing to the harm caused by the tort.

Valentine argues that this movement in the law is a mistake and that it is important to disentangle a strand of the doctrine which is based not on comparative fault but on the exercise of the normative power of

consent. Valentine argues that consent plays an important role in private law in enabling private parties to cancel or vary the obligations that others owe to them. Valentine grounds the normative significance of the power in the value of personal autonomy, arguing that it respects and enables the claimant's capacity to shape her interactions with others and to participate in valuable forms of life that might otherwise be closed to her.

So, for example, my autonomy is arguably enhanced by being able to participate through the device of consent in forms of sport, such as boxing or ice hockey, which carry a high risk of negligent injury. Valentine argues that the application of the assumption of risk doctrine to such cases reflects the fact that the claimant has either expressly or impliedly exercised the normative power of consent to authorise or permit other players to engage or refrain from conduct that would otherwise amount to exposing me to a wrongful risk of harm. Valentine insists on the difference between such cases and others which are often lumped together with them under the rubric of assumption of risk, such as cases where there is no *pro tanto* duty on the defendant not to impose a risk on the claimant (for example, a hockey player has no *pro tanto* duty not to hit the ball too hard in trying to score in case it causes injury to a spectator). She also emphasises the difference between 'assumption of risk' cases and cases where the courts take account, on fairness-based grounds, of the comparative fault of the parties when they come to assess damages.

These three chapters provide important insights into the nature, scope and limits to the normative powers of contract and consent in private law, but also in a novel and interesting way bring to light the potential plurality of values that might underpin key private law doctrines such as unconscionability, contract interpretation and assumption of risk in tort law.

Sally Zhu's contribution, although speaking equally to the significance of the power to contract, is not directed at considering the power itself but instead considers a phenomenon that emerges from the exercise of this and other similar powers to transact. More specifically, what attracts Zhu's interest are peer-to-peer sharing transactions facilitated by intermediaries, and more specifically still, sharing transactions which provide parties with access to privately owned tangible goods and accommodation. Zhu argues that the collaboration which parties exhibit by engaging in discrete one-off transactions facilitated by these intermediaries gives rise to a further market or community level of collaboration.

This market or community level of collaboration is, argues Zhu, created by the parties' activities on the platform. Here, among other things, the participants offer to transact, negotiate with potential counterparties

and engage in further signalling behaviours. Participants, explains Zhu, are then collaborating with each other at both an individual transactional level and at a broader market or community level. Zhu argues that this process of collaboration changes the character of the resource system in which they are participating and which she argues can be understood as a distinct system of production, distribution and governance of economic resources, leading her to conclude that it operates as a property system and which she labels 'collaborative property'.

Zhu draws an analogy between the transactional sharing of private property which is the focus of her analysis and the shared use of commonly owned property. Off the back of this analogy, Zhu then develops a contrast, arguing that intermediating organisations play a distinctive role in collaborative property. These intermediaries are important not only in creating the marketplace, but also, at the second level of collaboration which she identifies, through their provision of information and risk sharing mechanisms. Zhu argues that sharing information and risks in this way is vital to the governance of the transactions and, using these mechanisms, collaborative property is able to avoid or mitigate some of the difficulties associated with the commoning of land and goods.

Broader points which we might draw out of Zhu's work are the potential for the complex transactional structures made possible by technological innovation to allow for the more efficient and effective use of property and also the flexibility of the legal power to contract reflected in its capacity to accommodate these developments.

In the chapters which follow, the authors move away from consensual transactions and consider interactions between people which are typified by one of them having committed a wrong. The strength of that association is the subject of Leo Boonzaier's chapter. He notes that for many theories of tort law, particularly those set up in opposition to the instrumental justification of tort law favoured by law and economics scholars, the claim that all torts are wrongs is essential to the correct explanation of tort law. As a counterpoint to this view there is, however, a plausible argument that even if many torts are wrongs, some torts are not. Boonzaier argues, using nuisance and cases of necessity as his leading examples, that some torts do not necessarily involve the tortfeasor acting as she ought not to have done.

Significantly, claims Boonzaier, these examples are not convincingly susceptible to the marginalisation or re-explanation to which they have traditionally been subjected by tort theorists who insist that torts are wrongs. The 'simpler' explanation of these cases which Boonzaier proposes is that they are instead consistent with the 'ordinary logic of tort

liability' found in negligence and elsewhere. They are, in this sense, unexceptional examples of tort liability. It follows that the ordinary logic of tort law, to which Boonzaier appeals, does not depend on the tortfeasor failing to do what she ought to have done, but rather on a tortfeasor being held responsible for the outcomes which she has brought about by her conduct.

At a deeper level Boonzaier raises questions about the ambition of theories of tort law and how comfortable we should be with attempts to explain away features of the law which fail to fit a general theory. A normative principle with which all tort liability might be justified has some appeal, but we can doubt the explanatory value of such a principle if, in order to maintain its truth, we are forced to clumsily exclude uncontroversial examples from tort law's ambit. On the other hand, accommodating more of the messy data that tort law practice generates comes with more costs than surrendering some perceived theoretical elegance. Explaining why tort liability does often, but does not always, depend on the tortfeasor acting wrongly is a demanding enterprise especially in comparison to the easy answer that all torts are wrongs, which becomes available if one is willing to exclude from tort law those troublesome counter-examples where there has been no wrongdoing. Boonzaier's challenge is then to ask why we should settle for this easier but, he argues, altogether less satisfying answer.

Although his specific concerns differ, Nicholas Sinanis shares Boonzaier's scepticism about the extent to which certain corrective justice theories, exemplified by the work of Ernest Weinrib and Arthur Ripstein, can adequately explain tort law. As the moniker would suggest, these theories have largely focused on the remedial aspects of damages awards in tort law. That focus has in turn shaped their theories not only about tort law's functioning but also about its legitimate ends. It has led Weinrib, for example, to claim that the correlative structure which he identifies in tort law is not simply typical of its operation but is essential to the very idea of tort law (and for that matter private law more generally). That focus on tort law's remedial function has, though, seemingly come at the expense of considering other aspects of tort law's operation which do not appear to exhibit this correlative structure including, as Sinanis draws out, at least some of the expressive effects of tort remedies.

While awards of damages are, at least typically, directed at compensating claimants for the losses caused by a defendant's conduct this does not prevent them from having further effects. Perhaps all torts are wrongs or perhaps, as Boonzaier argues in this volume, only most (but not all) torts are wrongs. On either understanding, a tort will typically be

a wrong and an award of damages will then often serve to mark out the defendant's wrongdoing. Courts are not oblivious to this feature of tort law and can, in some instances, use nominal damages to send a signal about the wrongfulness of the defendant's conduct even in the absence of any loss remediable by way of an award of damages.

That this is the case need not necessarily trouble theorists of Weinrib's ilk too deeply. The expressive effects of such an award, marking out the defendant's wrongdoing, are at least consistent with the same effect which can arise where a substantial award of damages is made. Attempts can be made – and, indeed, have been made – to accommodate them within the correlative structure on which Weinrib insists. More troubling are those cases where the message which the award is intended to express is entirely at odds with what is typically communicated by a substantial award of damages. This must surely be the case where the message which is intended to be conveyed by the award of a derisible sum relates not to the defendant but instead the claimant.

This inversion of the typical expressive content of a damages award was, as Sinanis demonstrates, sometimes deliberately employed by nineteenth-century English juries deciding tort cases. He shows that juries sometimes used the smallest award of damages available to them, a single farthing, not to mark out the defendant's wrongdoing in the absence of loss but instead to express contempt for the claimant. Sinanis picks out occasions on which juries did this because they believed that the claimant, even though wronged, should nonetheless not have brought the suit to court and other occasions where the juries believed that the claimant was otherwise not deserving of a remedy, being morally tarnished by his contribution to the wrong or by reason of other shabby behaviour. In these circumstances the award of damages and its expressive effects was seemingly not justified by a reason which applied to both parties, in the sense in which Weinrib develops this idea, but solely with reference to the claimant's conduct.

In stark contrast to the view that Weinrib espouses, the expressive aspects of these awards were understood, at least by the juries, to be an important part of how to do justice in the case at hand. Quite aside from the fascinating portrait of nineteenth-century court practice which Sinanis paints, his enquiry reiterates the question that Boonzaier's contribution to this volume raises: should we be satisfied with explanations of tort law which necessarily exile parts of the practice of tort law from consideration simply on the grounds that they fail to fit the justificatory theory being offered?

Where Sinanis's focus is historical, Jeevan Hariharan's is thoroughly modern, the object of his interest being the tort of misuse of private

information and the protection of individual privacy which has motivated its recent development. That tort, as its name would suggest, takes as its central concern information about a person and its dissemination and disclosure. As Haraiharan explains, though, informational privacy does not exhaust an individual's privacy interests and it can be questioned whether English law provides sufficient protection for a person's physical privacy.

Hariharan argues that a person's interest in physical privacy cannot be reduced into purely informational terms. The key insight which Hariharan works to develop is that physical privacy, unlike informational privacy, can be understood as deriving from the value of bodily integrity, a value which he argues is best understood broadly so as to extend beyond physical touching and to include sensory apprehension. This, he argues, is key to developing a framework for the proper protection of privacy because it demonstrates that the tort of misuse of private information not only fails to sufficiently protect individual privacy but, in a range of circumstances, is entirely inapt. Some breaches of privacy have little or nothing to do with private information and an action in tort which takes the disclosure of private information as its defining feature will inevitably fail to properly address these cases.

What Hariharan's argument suggests is that the issue in cases of invasion of privacy by sensing is instead a person's interest in the use to which her body is being put. The tort of breach of confidence was a good starting point for the development of a tort directed at protecting informational privacy. However, Hariharan argues, the same is not true for physical privacy and in developing the protection for bodily privacy we should instead start by looking at trespass to the person, a tort acutely concerned with the protection of a person's bodily integrity.

Quite apart from his suggestions for legal development, Hariharan's argument gives us reason to think about the relationship between tort claims and the underlying values they serve. It forces us to consider the possibility that the justification for claims for trespass to the person extends beyond the protection from physical harm with which it is typically associated and encompasses further values and interests. Putting aside the question of whether the value we find there can be bundled together and labelled bodily integrity, Hariharan's analysis provides a challenge to any attempt to reduce the complex of values lying behind this tort to simple statements about its motivation. That challenge, one might easily think, is unlikely to be restricted to just trespass to the person.

In her chapter, Edit Deutch proposes a new way of thinking about the illegality defence to private law claims. The question of when this

should be available has troubled courts for many years, and it is not one to which a convincing answer can be given without engaging with the underlying normative question of when allowing – or refusing – the defence can be justified. A broad judicial consensus has emerged that certain ways of approaching the practical question should be rejected – there are now few supporters of the view, espoused by some members of the UK Supreme Court but decisively rejected by the majority in *Patel v Mirza*, that the defence should be allowed or denied according to whether a claimant can only establish her claim by relying on evidence of her own illegal conduct. The best argument that judicial proponents of this approach had to offer was instrumentalist: one could usually determine without much time and effort whether the defence would be allowed in different situations and this outweighed the consideration that it produced results that everyone agreed were arbitrary and inconsistent. The *Patel* majority thought that wasn't good enough.

Scholars generally agree with them, and most also agree that the defence should sometimes be available, although some argue that it should never be. At this point, however, the scholarly consensus starts to run out. Various writers have elaborated reasons for liking or disliking the factors identified by the *Patel* majority as being relevant to the exercise of a judicial discretion in illegality cases. Many are attracted by the argument that the point of the defence is to prevent the legal system from 'stultifying' itself by allowing one body of rules to contradict another, but most accept that it is easier to express this thought in a general way than it is to explain how it should play out on the facts of cases.

In Deutch's chapter she offers a new perspective, proposing a model of the illegality rules which characterises their application as a deprivation of property by the state in order to promote the public good, triggering the same set of concerns as are triggered by state expropriation of private property. She argues, further, that a well-structured and coherent set of concepts has evolved to guide decision-makers charged with determining when state expropriation of property is justified, and that courts would do well to use the same concepts when analysing illegality cases because these are essentially concerned with the same set of issues. According to Deutch's model, the application of the illegality defence entails a deprivation of property because the claimant's cause of action against the defendant is akin to a valuable asset that is taken away when the court, as an agent of the state, denies the claim in order to promote the public interests of deterring wrongful conduct, furthering moral values and maintaining the integrity of the legal system.

Deutch's discussion gives us much to think about. Among other matters, readers may wish to reflect on her characterisation of a 'cause of action' as 'property' and on her further characterisation of an application of the illegality defence as 'expropriation'. Obviously, the question whether a remedy will be granted to a private law claimant turns on the application of legal rules, but as James Goudkamp has observed, some rules are designed to answer the question whether a *prima facie* claim arises on a set of facts while others aim to determine whether a remedy should be denied despite the fact that the application of the first set of rules gives a positive answer. Deutch's analysis, as she makes clear, depends on the premise that rules governing the effect of illegality on a claimant's right to a remedy are rules of the second kind: putting this in Goudkamp's language, they supply the defendant with a 'defence' to a claim rather than a 'denial', meaning a way of arguing that there is no claim to start off with. That is a plausible view of the rules on illegality, but it is not the only possible view, and if one were to say instead that these rules preclude a claimant from getting a claim off the ground in the first place, then the structure of Deutch's analysis would fall down.

Two last two chapters in this collection concern unjust enrichment. The first, by Pablo Letelier, critiques an argument by Robert Stevens, that courts and scholars have taken too wide a view of the claims that belong to this category of the law of obligations. Stevens maintains that the English judiciary's current thinking on this classificatory question has created problems because different types of claim have been included within the category of unjust enrichment, although they are normatively diverse, meaning that the reasons why the law gives the claimants restitutionary rights in the relevant cases are not all the same. Stevens claims that this has led courts to engage in over-generalised thinking when they are asked to determine liability questions in new cases and to conclude that restitutionary recovery is justified in cases where in fact no justification exists. His solution is to reduce the size of the category by identifying a core group of cases which possess a common feature, namely that a deliberate 'performance' is rendered by the claimant to the defendant, who accepts it. Restitutionary awards can be justified in such cases for reasons that do not also justify recovery in other cases where no 'performance' has taken place, and so a better understanding of the justifications for liability in these 'core' cases can be achieved if they are separated from the others and regarded as the only cases which make up the substantive doctrinal content of unjust enrichment law.

As Letelier observes, a corollary to this argument is that non-qualifying cases must be treated as belonging to some other category,

unspecified by Stevens, prompting the objection that even if one accepts that his approach will result in a better understanding of his 'core' cases (which some scholars would deny) it may still leave us worse off overall because it will weaken our understanding of the larger body of cases with which Stevens is concerned. The reason, says Letelier, is that Stevens ignores the possibility, embraced by more pluralist accounts of legal categorisation, that identifying commonalities between groups of rules that are dissimilar in some ways may still be illuminating if they are similar in other ways. Pinning his colours to the pluralist mast, Letelier favours an understanding of unjust enrichment as a category of obligations law that not only includes what he describes as cases where a 'deliberate conferral' has taken place (including the 'accepted performance' cases identified by Stevens) but also cases where there have been 'takings', 'discharges of debt' and 'coordinated transactions'. As Letelier concedes, this still leaves us with the task of justifying liability in all these cases, and, it would follow, providing an explanation of not only how these cases differ from each other but also what, other than the label of 'unjust enrichment', they have in common. What Letelier does not do, in contrast to Stevens, is subject that endeavour to further constraints as to how legal claims might helpfully and meaningfully be grouped.

While the focus of Letelier's chapter is on a conceptual question – how many claims belong inside the unjust enrichment category? – and is only indirectly concerned with the justifications for liability, Martin Fischer's chapter examines an explicitly justificatory question – what is the justification for imposing restitutionary liability in cases where a claimant has paid money to a defendant in the mistaken belief that the money is owed? For the immediate purposes of Fischer's project, it does not matter much whether claims of this sort should be classified as claims in unjust enrichment (although he, Letelier and Stevens all agree that they should, as indeed does everyone else). Would the answer to the classificatory question matter more if one wished to ask a follow-up question falling out of Fischer's project, namely whether the justifications he identifies for the recovery of mistaken debt payments also hold good for the making of restitutionary awards in other cases? On Stevens' view, knowing that the other cases being considered counted as 'unjust enrichment cases' would make it easy to answer this follow-up question because the answer would always be yes – reflecting his view that a body of rules can count as a 'category' of the law of obligations, such as the category of unjust enrichment, only if these rules are all justified by a single justificatory principle. On Letelier's view, however, this conclusion would not follow because he thinks that a body of rules which are not all justifiable in the

same way can still count as a 'category', an issue which – as was noted earlier – he leaves open for further consideration.

The central argument of Fischer's chapter is that existing accounts of the justifications for recovery in cases of liability mistake, which take autonomy to be the principal value served by allowing such claims, do not take us very far because they start in the wrong place. Typically, their point of departure is the claimant's mistaken belief that the money is owed, and it is this which they take to be the 'mistake' which results in the payor's autonomy being compromised and to which the law justifiably responds by awarding restitution. Fischer agrees that the claimant's mistaken belief is important but argues that such accounts neglect another important feature of the circumstances, namely that the claimant makes a payment intending to discharge a debt that in fact does not exist. For Fischer, it is not the claimant's mistaken belief that is the 'mistake' on which one should focus when asking why restitution is justified, but her mistaken payment, which Fischer terms a 'mistake in action'. The problem to which the law justifiably responds by ordering restitution is not only that the claimant misunderstood her situation, but also that she acted for a reason which did not actually count in favour of her action. Fischer goes on to show that this is a 'mistake' which gives the payor a reason to reverse her payment, because this is the closest she can come to undoing her mistake, and, further, that this reason for reversing the payment is one that necessarily implicates the recipient. By this latter argument, Fischer seeks to meet the challenge laid down by Frederick Wilmot-Smith, to find an explanation for the restitution of mistaken payments that is not wholly payor-focused – something which Fischer argues previous efforts have failed to do because they have been too tightly focused on the payor's mistaken belief as the 'mistake' which really matters.

In these introductory remarks we have sought to give a sense of the topics covered and arguments made in the following chapters of the book, to situate them in the field and identify some common themes which emerge from the discussion. Of course, each chapter must be read and considered in full to gain the benefit of the contributors' work, and we hope that readers will enjoy this and profit from it as much as we have ourselves. We commend them all to you.

2

# Private law's remedial structure: claimant standing, defendant liabilities and court orders

Timothy Liau*

GLENDOWER: I can call spirits from the vasty deep.
HOTSPUR: Why, so can I, or so can any man,
But will they come when you do call for them?
*HENRY IV Part 1* Act 3 Scene 1.

## 1. Introduction

Standing is a well-recognised idea in public law. Yet, to the private lawyer working within the law of obligations, it remains a relatively neglected concept.[1] Standing seems to have gone missing. It even appears to be the conventional wisdom that private law does not have or need rules about standing.[2] Peter Cane has for example observed that '[t]he requirement of standing only applies to actions in respect of public law wrongs. The reason for this is not entirely clear'.[3] Part of the reason why, as I have argued elsewhere,[4] is that as obligations lawyers our view of standing has been obscured by the usage of a variety of ambiguous and potentially misleading labels. In a wide range of contexts, what we might think of as

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'standing' has been referred as a 'right to sue',[5] 'right to enforce',[6] or 'right of action'.[7] Here I focus on this last label: on how standing has been buried within 'right of action'.

To rehabilitate standing from relative obscurity it first needs to be distinguished from neighbouring related concepts that could occlude it from view. The aim of this chapter is to deal with just one such concept. Its central claim is that standing – a power of the claimant – needs to be better differentiated from the court's powers to issue orders. Both powers are significant, and neither should be collapsed into the other. This is crucial to carving out the necessary conceptual space for a deeper understanding of standing's place and significance within the remedial structure of private law.

Doing so matters. A recent series of important developments in private law theory threatens to blur the line between these two powers. This chapter is thus in part clarificatory, and in part cautionary, warning against that potential danger.

To contextualise these claims, consider first a simple tort scenario:

> *Punch*: Dylan (D) punches Corey (C) on the nose, committing battery against her.

Corey might wish to get compensation from Dylan. To do so, Corey may need the assistance of the *courts* to compel Dylan's payment through a damages award, enforceable via its coercive machinery post-judgment. It is this point that has led civil recourse theorists to part ways with corrective justice theorists. Against legal economists' vision of 'liability rules' unilaterally imposed on defendants,[8] a key insight of corrective justice theorists was to stress as a core feature of private law relations the interpersonal nexus between duty-bearer and right-holder – their 'bilateral',[9] 'relational'[10] or 'bipolar'[11] structure.

In an important and expansive body of work spanning two decades,[12] John Goldberg and Benjamin Zipursky have emphasised how this, being only part of the story, misclassifies what they see as the basic phenomena to be explained.[13] For them what needs to be grappled with instead is how, post-wrong, there arises a 'triangle of legal relations'[14] – C, D and the *court* are all involved as participants in the remedial process leading up to an award of damages. This tripartite involvement, it is assumed, warrants a trilateral relation by way of explanation. Thus they have argued that wrongs generate 'private rights of action',[15] which should be thought of as 'triangular'[16] or 'trilateral',[17] as a 'power to have the state alter the legal relations between the parties'.[18]

Fleshing out their theory, Goldberg and Zipursky have at various points emphasised that a 'right of action' is, on their account, a Hohfeldian power.[19] This move however poses a conceptual challenge: a triangular 'right of action' appears disconcertingly non-Hohfeldian. Foundationally, Hohfeld's scheme is bilateral; he famously thought that only duties owed to someone else could be rights 'most properly called',[20] labelling them the technical term 'claim-rights'.[21] This feature, I believe, explains why Hohfeldian analysis has enjoyed a recent revival in private law scholarship, especially amongst those who wish to engage with, or work within, a 'rights-based' account of private law.[22] Can Hohfeld's bilateral scheme accommodate this triangular phenomenon? In this chapter I suggest that it can, but without requiring resort to a compound, triangular 'right of action'.

To advance my claims, sections 2 and 3 identify an ambiguity in the popular use of the word 'liability' to refer to a private law defendant's post-wrong normative position, showing why it matters that we more clearly separate out two distinct Hohfeldian liabilities. Doing so reveals how it is a dangerous but understandable ellipsis to simply say that post-wrong, a defendant falls under a 'liability', full stop. Sections 4 and 5 then advance what may for convenience be hereafter referred to as a *two-power model*, clarifying the relationship between a defendant's 'liabilities', a claimant's standing and the court's power to issue a judgment order – all three of which are implicated in the run-up to a private law remedy. It is shown how the model captures several salient features of C's standing within private law, explaining (a) why the court (or any arm of the state) is not a roving commission, (b) right-holder control – a hallmark feature of private law litigation, (c) the practice of settlements, (d) why our 'liabilities' are time-delimited, and allowing us to account for the difference between (e) successful suits and (f) unsuccessful suits. Section 6 explores some further implications on the role of wrongs, suggesting that a defendant's wrong does not create his liability to a court's coercive powers, nor his liability to be sued by the person wronged, more tentatively suggesting also that what wrongs (and other right-creating events) do is to provide the court with a good or justifiable basis for exercising its coercive powers over a defendant. Section 7 concludes with a summary of differences from Goldberg and Zipursky's influential 'private right of action' framework.

Before proceeding, a caveat. In truth, private law adjudication involves a network of legal relations, changing over time as the litigants' and the courts' powers are exercised pre-trial, during trial and post-trial, in execution of judgment. The point of this chapter is not to map out exhaustively all relations, demonstrating how they change over time as

each event occurs. The aim is rather less ambitious: to distinguish the two identified powers and explain their relationship, so as to better demarcate what I call a claimant's standing within private law for further interrogation, a necessary preliminary to any larger project on the topic.[23]

## 2. Defendant liabilities: the ambiguity

Focussing on D's position, the term 'liability' has been employed in an attempt to more accurately depict what happens within private law's remedial context. In fleshing out their theory of civil recourse and their companion account of triangular 'private rights of action', Goldberg and Zipursky have been chief proponents of a 'liability-only' view.

This spawned a 'duty versus liability' debate, occupying the attention of many academics.[24] As they acknowledge,[25] the 'liability-only' view has been defended most extensively by Stephen Smith, in a decade of insightful work on the remedial structure of private law.[26] While the debate has principally revolved around the legal effect of a civil wrong, the 'liability-only' view has also been generalised to other areas of private law, applying beyond torts and breaches of contracts to unjust enrichments.

The essence of the debate is over the plausibility of replacing post-breach secondary duties to pay damages with a substitute concept – a 'liability'. Advocates of a 'liability-only' view argue that wrongs generate only 'liabilities', rather than (secondary) duties to pay damages. In doing so, doubt is cast on the traditional understanding that such duties exist, while simultaneously asserting a relationship between these 'liabilities' and the civil wrongs which purportedly generate them.

The more traditional view, that *both* duty and liability co-exist, has been defended most prominently by John Gardner,[27] and more recently by Sandy Steel and Robert Stevens.[28] Hohfeld himself appears to have thought that both duty and liability co-existed complementarily:[29] 'If X fails to act under his remedial duty, A has *ab initio* the power, by action in the courts, to institute a process of compulsion against X. At this point, we reach, as the correlative of the power of A, the liability of X . . .'

The point here is that 'liability' is not an easy substitute, free from its own difficulties. 'Liability' is an ambiguous word in ordinary language. It is easy to slip inadvertently between liability's different senses, Hohfeldian or non-Hohfeldian. Rather than the technical Hohfeldian sense of a potential to have one's legal position voluntarily changed by another, for better or worse, it is used in a non-Hohfeldian

sense all the time in daily life, to denote a potential to experience some form of suffering.[30]

So a mother might say to her child during a frosty winter: 'you're liable to catch a cold if you go out in this weather without a coat',[31] or 'you're liable to trip and fall if you don't tie on those loose shoelaces'. A teacher might say to a student: 'you'd better buck up and study harder, or you're liable to fail your exams', or a meteorologist might say: 'given the weather patterns this season, we think this region is liable to earthquakes and tsunamis, so it's best to start preparing for that eventuality.' 'Liability' is commonly used to denote some prospect of imminent suffering on the horizon which need not be brought about by another person. It could very well be the product of natural events.

Adding on yet another layer of complexity, 'the term "liability" is often loosely used as a synonym for "duty" or "obligation" . . .', a point Hohfeld was keenly aware of and warned against.[32] So in accounting lingo, 'liabilities' are opposed to 'assets' in a balance sheet. Here a 'liability' is used to mean an enforceable debt or monetary sum owed to a creditor.

At this stage a quick primer may be useful. Hohfeld's analytic scheme accounts for all assertions of 'rights' as bilateral legal relations between two persons, allowing us to disambiguate between four different senses of 'right' in terms of four more basic entities and their correlatives.[33] Each entity has a correlative, hence the bilateral form of each legal relation:

**Table 2.1** The Hohfeldian scheme. Created by Timothy Liau.

| **First-order relations** | | **Second-order relations** | |
|---|---|---|---|
| Right [claim] | Liberty [privilege] | Power | Immunity |
| ↓ | ↓ | ↓ | ↓ |
| Duty | No-right [no-claim] | Liability | Disability |

Duties, rights, liberties and no-rights are first-order relations. They govern what we do to one another: acts, omissions and their results. They are three-place relations that relate two persons to an act-description or state of affairs.[34]

By contrast, a Hohfeldian power is a *second-order* relation. Unlike 'right', 'duty', or 'liberty', it is a meta-relation, governing how

other relations may be *changed* through the voluntary control of another.[35] So:

| | |
|---|---|
| C has a power if and only if C has the ability to change her own (C's) or another's (D's) Hohfeldian relations. Equivalently, D has a correlative liability to have her relations changed. | *Hohfeldian correlativity of power & #liability* |

Hohfeld thought that the nearest synonym for 'power' was an 'ability' to change legal relations, and the nearest synonym for 'liability' a 'subjection' to such change.[36] As a quick check, it may be helpful to substitute for 'liability' other synonyms, such as 'subjection' or 'vulnerability' to change, as a convenient heuristic.

A brief sampling of 'liability'-talk by various participants in the 'duty versus liability' debate reveals a variety of different formulations at play. For example, Goldberg and Zipursky have argued that:

> The tort defendant does not have a legal duty to pay . . . Instead, what the defendant has, under the law, is a liability to pay . . . injuring someone through medical malpractice does not generate a duty to pay the injured plaintiff. Instead, it creates a liability to have a damages judgment entered against one, assuming that the plaintiff can make her case.[37]
>
> The commission of a tort does not therefore create an affirmative legal duty to pay; instead, it creates a legal liability to the plaintiff. The concept of liability describes one who is legally vulnerable to certain actions by another. A liability, as Hohfeld explained, is correlative to a power in another. In torts, the liability of a defendant to a plaintiff is correlative to a power of the plaintiff against the defendant.[38]
>
> As an account of tort damages, corrective justice theories . . . mistake a liability/power relation for a duty/right relation . . . To be sure, the commission of a tort has a legal consequence. But it is not the creation of a legal duty owed by tortfeasor to victim. It is instead the creation of a legal power, and with it, a corresponding liability. To commit a tort is to render oneself *vulnerable* to being sued and to having a court authenticate the suit's demand for payment of compensation.[39]

In similar vein, Stephen Smith has claimed that:

> Rather than imposing ordinary or even inchoate duties to pay damages, the common law merely imposes liabilities to pay damages

> . . . The most important feature of damage awards is that they are awards – that is, that courts issue them.[40]
>
> Authors regularly referred to 'liabilities' to pay damages, but it was almost never made clear whether the liability in question was a liability to fall under a substantive duty to pay damages, or a liability to being ordered by a court to pay damages. The same observations apply to restitutionary orders, also discussed by most remedies textbooks.[41]
>
> I defend a view that I had once thought heretical – namely, that there is no duty to pay damages or make restitution prior to being ordered by a court to do so.[42]

For convenience of illustration, our initial example *Punch* concerned a tort. But, as noted earlier, the 'liability-only' view has been applied and generalised, *mutatis mutandis*, to other areas of private law, including the law of restitution for unjust enrichments:

> the liability model . . . supposes that the only legal consequence of a mistaken payment is that the recipient falls under a liability, in particular a liability to a court order.[43]

Contrast John Gardner, responding on separate occasions to Goldberg and Zipursky and Stephen Smith:

> Strictly, there is no such thing as a liability to pay damages. That is an elliptical expression. It is a liability to be required to pay (a specified sum in) damages.[44]
>
> The primary liability of tortfeasors is none other than a liability to be placed under a duty by the court to pay a liquidated sum in reparative damages.[45]

## 3. Two Hohfeldian liabilities

There is a risk that the 'duty versus liability' debate may have skewed our focus, obscuring our vision.

By advocating 'liability' as a replacement concept for a post-breach secondary duty to pay damages, the spotlight is cast upon D's normative position. This unilateral focus on D may cause a false appearance: that D's supposed 'liability', post-wrong, is singular and continuous throughout the whole remedial process leading up to a successful award of damages.

The true position however, as I shall argue, is that D is under (at least) two separate and distinct liabilities, each correlative to two different power-holders. Hence my coining it, for convenience of reference, a *two-power model*.

Recall how Hohfeld's scheme teaches us that we cannot think of liabilities as free-floating unilateral entities. We need always to ask: 'liable to whom'? Doing so helps us to identify the relevant correlative power-holder, in whose hands D's normative position may be changed.

The model draws support from Hohfeld himself, who hinted that his term 'indicates that specific form of liability (or complex of liabilities) that is correlative to a power (or complex of powers) vested in a party litigant *and* the various court officers'.[46]

To bring this point out more clearly, consider hypothetically a troubling implication of a one-liability model which focusses solely upon D's 'liability to a court order', after she has, say, committed a wrong, or assumed some obligation. Some formulations and instances of 'liability'-talk from the debate, examples of which have been extracted above, might suggest the following view to an unwary reader:

> *Court-focussed one-liability model*: that as in *Punch*, immediately after Dylan punches Corey on the nose, Dylan is 'liable' only to be ordered *by the court* to pay damages. This would entail that, post-wrong, D would be immediately subject to the court's (correlative) coercive power to order her to pay damages.

While this is certainly a possible configuration for a legal system to take, it should strike a private lawyer as surprising, if not highly problematic. Such a model is overly defendant-sided. It leaves little room for Corey's participation.

Indeed the claimant's role appears to have been entirely effaced. Call this the *puzzle of the missing claimant*.

## 4. Claimant standing and the court's power to issue orders: two powers, not one

Key to resolving this puzzle, I argue, is in making a clearer conceptual distinction between two different Hohfeldian senses in which D is 'liable', a distinction which may be prone to being overlooked. Private lawyers and theorists can be equivocal about the 'liability' to which they are appealing.

Each sense of 'liability' identifies a different power, vested in a different power-holder, to whose exercise Dylan is liable. One power is vested in the court. The other power is vested in the claimant, Corey. Distinguishing between these two powers, we have:

(1) D's liability to be sued by C at $t_1$, before suit is commenced. Translated in terms of correlative powers, Dylan is subject, at $t_1$, to the exercise of Corey's power (standing)[47] to sue her.
(2) D's liability to a court order at $t_2$, after suit is commenced. It is only after C decides to sue D, that Dylan's liability to be ordered by the Court to pay damages to Corey, at $t_2$, can begin. Translated in terms of correlative powers, Dylan is then subject to the exercise of the Court's power (jurisdiction) to enter judgment against her, thereby converting Dylan into a judgment debtor.

The two powers, each correlative to a different sense in which Dylan is 'liable', are conceptually distinct. But this does not mean they are unrelated. What is their relation?

Under this model of two powers, Corey's power (i.e. standing) to sue is both logically prior, and temporally prior, to the court's power (jurisdiction) to make an order against Dylan. Dylan is liable to a court order to pay damages or specifically perform her contractual obligations et cetera, only if, and only when, Corey decides to exercise her power to initiate suit. Put pithily, C's exercise of her power to sue is what triggers, or activates, D's liability to the court's power (jurisdiction). See Figure 2.1.

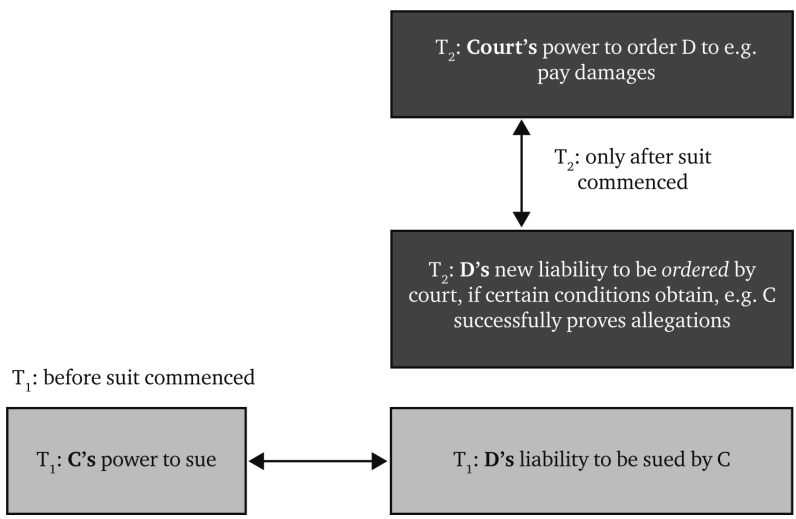


**Figure 2.1** The two-power model. Created by the author.

Recall that Hohfeldian powers, when exercised, *change* the normative positions (i.e. legal relations) of the persons subject to their exercise. One distinctive feature of Corey's power to sue – a Hohfeldian power – is that it changes Dylan's position by now exposing Dylan to the power of the court, where prior to that, she was not so exposed.[48] In other words, she is now 'liable' to the court in a way she was not before.

Before Corey's suit, a court would have had no jurisdiction over Dylan. Even if anxious to rectify the wrong done, it could not order Dylan to pay damages of its own accord.[49] As illustration, consider now a variation on our initial example, *Punch*:

> *Neighbour Judge*: Dylan (D) punches Corey (C) on the nose, committing battery against her. It so happens that their neighbour, who is a judge, witnesses this. Corey has not yet decided what to do. The next day, Dylan discovers a court order to pay Corey damages in her mailbox. Dylan need not comply.

The analysis above explains and clarifies how, post-punch, it is true that Dylan is indeed 'liable' in some sense. The point to be stressed here is that the only liability she is immediately under is a liability to be sued by *Corey*. She is not yet liable to a court order. That would be entirely contingent upon Corey's decision to sue, and is triggered or activated only after initiation of suit.

Why, then, might we be prone to thinking that defendants are only under one single continuous liability throughout the remedial process? Because in a successful civil suit, although the defendant falls under two distinct liabilities, these liabilities are temporally successive, proceeding one after the other. But at any given time, D is only under one of these liabilities, i.e. subject to the exercise of one other person's power. First it is the claimant's. And only after that, the court's. For C to successfully obtain a damages award, both C and the court must decide, in succession, to exercise their powers against D.

The relationship between these two distinct liabilities creates an understandable illusion: that D's supposed 'liability' post-wrong is a singular one. Clarifying the relationship between the claimant's power to sue (standing) and the court's distinct power (jurisdiction) over the defendant, reveals and exposes that illusion as false.

## 5. Standing's priority and significance

The two-power model hence carves out the necessary conceptual space to accommodate standing's significance within the remedial structure of

private law. It emphasises that in private law, D's 'liability' is never to the court, unless and until the claimant says so. Interposed between D and the court's coercive powers lies someone: a person legally empowered with standing.

This claimant power captures an important sense of the way we use the word 'standing' in legal discourse. We may define it as:

> A power against another to hold her accountable before an adjudicative body (e.g. a court or tribunal), thereby subjecting her to its power (jurisdiction) to make an order against her.

Recognising standing's distinctiveness as a claimant power, which has logical and temporal priority to the court's public power, helps explain several important features about private law's remedial structure:

## 5.1 The court is not a roving commission

It explains why in private law, the court is not a roving commission,[50] with the unilateral initiative to investigate wrongs, enforce rights and order damages awards. As the UK Supreme Court in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* recently recognised, 'In the first place, the courts do not act on their own initiative, but only when their jurisdiction is invoked: normally, by the issuing of a claim'.[51]

In private law the state stands by the side. The court conceives of its role as passive. It must be convinced to do something, and it takes no position on matters not before it. It will not step in to resolve a private dispute or undo a wrong or injustice unless and until a private individual with the requisite power – standing – initiates it.[52]

In private law it is not the courts – or any arm of the state[53] – who has standing. The courts cannot unilaterally issue damages awards, ordering Dylan to pay Corey in disregard of Corey's choice. To the extent that a court can bypass C's discretion over whether to exercise her standing, this would diminish from C her control over the duties owed to her by D. In the extreme case where the court or a state body were simply a roving commission, roaming around and unilaterally ordering defendants to pay damages at its own initiative, whether on the basis of its own investigations or at the behest of whistle-blowers, C could no longer be said to have control over the enforcement of the duty. The two powers would collapse into one; post-breach, D would be immediately liable to the courts. We would then be left, again, with the *puzzle of the missing claimant*.

Contrast criminal law, where victims play a much less central role. H.L.A. Hart once pointed out that in criminal law it is an arm of the state – the prosecutor, with prosecutorial discretion – which has the standing to charge alleged offenders:

> [t]he crucial distinction . . . is the special manner in which the civil law as distinct from the criminal law provides for individuals: it recognizes or gives them a place or *locus standi* in relation to the law quite different from that given by the criminal law.[54]

Indeed, unlike prosecutors who are duty-bound public officials,[55] John Gardner has recently argued that a private law right-holder typically has 'radical discretion':

> The special feature of private law, procedurally speaking, is that the most extensive legal powers to determine the powers of the court, those most akin to those of a criminal prosecutor, lie with the very person who claims to have been wronged. She is the plaintiff, a non-official who stands to profit personally, whether financially or otherwise, from the outcome of the proceedings. Indeed she is *meant* to profit personally if her claim succeeds.[56]

## 5.2 Right-holder control

Relatedly, the two-power model captures a hallmark feature of private law litigation: exclusive right-holder control.[57] Here Hohfeld's analytic scheme is particularly illuminating, explaining it as the effect of conferring exclusive standing to right-holders, and how that standing relates to the court's power (jurisdiction) over the defendant.

I have elsewhere argued that an implicit general standing rule applies across the whole law of obligations, so that only right-holders have standing.[58] So, under this rule, only Corey is vested with the power to initiate legal proceedings, with the goal of enlisting the court's aid to coerce Dylan into paying her damages by converting her into a judgment debtor. This power is capable of being exercised by the claimant without the need for permission from the court.

Having exclusive standing grants Corey exclusive control over the enforcement of the duty. Only she can set in motion the remedial processes of private law. She is the gateway to Dylan's liability to the court's power (jurisdiction). She may choose to forgo enforcement, or agree a settlement with Dylan, with threat of enforcement hovering in

the background. It is all up to Corey. Therein lies the truth in the proposition that '[t]he authority of the court to tackle and resolve the dispute, in private law cases, is subject to the authority of the plaintiff'.[59]

By contrast, though in public law standing is also concerned with whether a particular person can invoke the jurisdiction of the court to obtain a variety of orders (e.g. quashing, mandatory, or prohibitory), exhibiting a similar logical and temporal priority between the two powers, an important difference exists. Judicial review requires leave or permission from the High Court to proceed.[60] Furthermore, the precise test differs, reflecting a public interest model aimed more at controlling the misuse of public powers.[61]

## 5.3 Settlements

Realising that Dylan's immediate 'liability' post-punch is to be sued by Corey, and not to be ordered by a court, better explains the practice of settlement agreements.[62] To prevent or terminate a suit in private law, Dylan must bargain with Corey for a settlement, and not with the court.

In a similar vein, those accused of crimes make plea bargains with prosecutors who have prosecutorial discretion, and not bargains with the court. The prosecutor gets to decide which charges to pursue, and which not to. The court cannot disregard that without usurping the prosecutor's standing and public functions.

## 5.4 Timing

Another implication of the model is that exclusively empowering C with standing means C gets to control when D's liability to the court begins. In private law our 'liabilities' to suit do not, like a Sword of Damocles, always and forever hang over our heads. They have start dates and end dates.

A claimant must bring suit within time for it to be effective. Our liabilities to suit by particular claimants are extinguished after the expiry of the applicable limitation period, which renders a previously enforceable duty no longer enforceable.[63] D starts becoming subject to the court's power (jurisdiction) to order her to pay damages only when and if C sues in time.[64] If undefended by deadline, default judgment is entered against D.[65]

## 5.5 Successful suits

For a claimant to successfully obtain a damages award, two distinct powers must be exercised, not just one. The court's power, held by someone in a public judicial office, ought to be better differentiated from

the claimant's standing. When exercised, each power alters D's position. But in different ways.

Suppose the civil suit is successful, i.e. the court decides in C's favour. In issuing a judgment order against D, the court is exercising its own power (and not the claimant's), thereby changing D's normative position. Entering judgment against Dylan converts Dylan into a judgment debtor,[66] merging or modifying any pre-existing duty to pay damages into a new judgment duty.[67] The new, court-ordered duty is a different duty as wholly new consequences are attached to non-compliance,[68] and it may be directly enforced by the judgment creditor in execution via a whole host of coercive machinery provided by the state for the enforcement of judgment debts, for example third-party debt orders, charging orders, stop orders, or the seizure of goods.[69]

This account is compatible with what Hohfeld himself thought: '[i]f A brings an action for damages, and the tribunal pronounces in his favour, the remedial obligation between A and X is discharged by, or, in legal terms, "merged in," the new legal relation or *vinculum juris* that results, – a judgment obligation. X is now under a judgment duty, and his liability, – "the ultimatum of the law" – now becomes even more threatening.'[70]

### 5.6 Unsuccessful suits

It is an empirical fact that unsuccessful civil suits occur. It is commonplace for claimants to lose despite their best efforts, and contrary to their utmost desires. At civil trial, the court as fact-finder and law-applier ought to exercise its power to order damages or any other relevant award in C's favour only if C has satisfactorily established her legal rights, through proof of her allegations. C may fail at any one of these hurdles.

On a two-power model, unsuccessful suits are easily explained. The *court* has decided not to exercise its power to order judgment against D, *despite* C having exercised her power to sue D. So, it is sensible to say that a claimant has exercised her 'right of action' (standing), but without 'liability' ultimately imposed on the defendant. By contrast, a single-power model – relying upon a singular triangular relation – must struggle to accommodate unsuccessful suits.

## 6. Some further implications: the role of wrongs

Having set out the two-power model, it may be helpful to emphasise at this juncture that accepting it does not require staking out a firm stance

on the 'duty versus liability' debate. The model itself does not presuppose secondary duties. It remains agnostic as to their existence and is therefore compatible with either view.

There is however a pay-off on the debate from the preceding analysis, which can now be explored. Recall how advocates of a 'liability-only' view like Goldberg and Zipursky, and Stephen Smith, are in essence arguing for two connected propositions. First, that post-breach secondary duties to pay damages ought to be replaced with a substitute concept – a 'liability'. Second, the assertion of a relationship between these supposed 'liabilities', and the wrongs that generate them.

The two-power model equips us with the conceptual tools to view the debate from a different angle, and to further interrogate the second point of contention. It forces a more precise clarification of the nature of these supposed 'liabilities', and their putative relationship to an underlying civil wrong (i.e. a rights-infringement), or any other right-creating event (for example an unjust enrichment or a contract).

Advocates of the 'liability-only' view have said that they are employing it in a Hohfeldian sense.[71] Yet, having clarified and distinguished between the two conceptually distinct senses of liability at stake, a closer look reveals that D's wrong against C generates neither.

(1) D's wrong does not create in D a liability in the first sense, ie to the *court's* power (jurisdiction) to order her to pay damages.
(2) Neither does it create in D a liability in the second sense, ie to the *claimant's* power (standing) to sue.

This may cause us to doubt whether any *new* 'liability' – or correlatively, a power – is truly created by the very wrong itself, a relationship most strongly defended in recent times by civil recourse theorists, who have traced it back to William Blackstone's *Commentaries on the Laws of England*.[72]

## 6.1 D's liability to the court's coercive powers does not vary according to D's wrong

D's wrong does not by itself create in D any liability to the court's coercive powers (jurisdiction), to order damages against her.

Recall *Punch*. Dylan's liability to the court's powers does not turn upon whether Dylan has punched Corey on the nose. Instead, it turns upon whether Corey decides to sue. This is what it means for C to have (exclusive) standing. This is what the two-power model shows.

If the two were friends and Dylan were to apologise, Corey might well forgive her, in which case Dylan's liability to the court never arises at all. To think otherwise would be to ignore the priority and significance of a claimant's standing, collapsing two distinct powers into one. It would be to bring us back to the *puzzle of the missing claimant*, in which the claimant's role is effaced.

Is there a real danger of this view? We cannot discount the possibility that it may be adopted, especially by the unwary. The point here is to caution against it. The risk of potential error here finds its source in the 'duty versus liability' debate, from a series of misleading analogies made to criminal law convictions where the *state*, rather than the victim, is in the driving seat.

The analogy has been advanced most forcefully by Stephen Smith,[73] though it seems also to have been picked up by Goldberg and Zipursky at various points in different places:[74]

> . . . to say that we have liabilities to X, means that X may be done or imposed upon us by another person or institution. Lawyers say that criminals are liable to be punished – not that they have duties to punish themselves – because punishment is imposed by the courts. Thus, to describe wrongdoers as liable to pay damages suggests that they do not have duties to make these payments, but only that they are liable to be ordered to pay them.[75]
>
> As understood here, 'wrong-based damages' are roughly the private law equivalent of criminal punishment. To be clear, I am not suggesting that wrong-based damages are a form of criminal punishment or that they have the same aim as criminal punishment. The suggestion is only – though importantly – that wrong-based damages are structurally similar to criminal punishment. Specifically, wrong-based damages and criminal punishment share four structural similarities…[76]

It must be stressed that private law damages and criminal punishment also share important structural dissimilarities, which should not be forgotten. Aside from claimant standing, it might be said on a brief aside that, unlike fines which are payable to the state, private law damages are generally due only *to the claimant*. The language here of 'no duty to punish oneself' is misleadingly unilateral, meant to resemble a vow made to oneself, as opposed to a promise made to another. Once clarified the objection loses much force. As a matter of formal structure, punitive damages could take the form of a duty owed to the correlative

right-holder to pay him an unliquidated monetary sum, even if said sum is not quantified by reference to his consequential losses, as with compensatory damages.[77]

Moreover, one may also doubt whether fines (for example for traffic offences) really carry the expressive, condemnatory function Smith suggests. It has been claimed, most famously by Joel Feinberg, that lacking this feature, these are not punishments but mere 'penalties'.[78]

## 6.2 D's liability to be sued by C is not a new liability, created by D's wrong

It might be suggested that, even if no new liability to the court's powers is generated by Dylan's punch, it does generate some other new liability – her wrong is what creates in Dylan a new liability to *Corey's* powers to sue.

Goldberg and Zipursky appear to take this view, though preferring the language of 'rights of action'. For them, torts are wrongs which 'generate(s) for its victim a private right of action: a right to seek recourse through official channels against the wrongdoer.'[79]

The problem with stipulating such a tight relation between wrongs and 'liabilities' is that Dylan's liability to be sued by Corey is not a *new* liability, created by the very wrong itself. Indeed, Corey's power to sue Dylan pre-exists the wrong. So, its existence cannot be explained by it.

As illustration, consider yet another example:

> *Quarrel*: Corey and Dylan quarrel on Twitter. Dylan threatens Corey via private text that she will punch Corey on the nose tomorrow.

Even before the wrong occurs, if the threat of the wrong is imminent and highly probable,[80] Corey has the power to sue to enforce her primary right not to be punched in the nose, obtaining a *quia timet* prohibitory injunction from the court to restrain the wrong from occurring, in anticipation of the wrong. In fact, the court might even decide to grant Corey damages *in lieu* of an injunction,[81] even though no wrong has been committed.[82]

Does this mean that wrongs are normatively inert? What might their role be, if not to generate liabilities (or correlative powers) where none existed prior, or for that matter the role of any right-creating event (for example a contract, or an unjust enrichment at the expense of another)?

More tentatively, an alternative view might be ventured here: the existence of a genuine wrong by D, (which for some generates a secondary duty to pay damages),[83] is what provides the court with a good or

justifiable basis for exercising its coercive powers over a defendant. This follows from the court's role-based duty to apply the law to the true facts as between the litigants before it so that as far as possible only meritorious claims succeed.[84]

A court is a public body. It does not have free-wheeling discretion to exercise its powers however it likes.[85] It must exercise them by reference to legal rights and duties, which it is tasked to determine and enforce. These powers have coercive effect, and the application of coercive force on private individuals must be justified; even more so where its application is not by private individuals but rather by a public body, an arm of the state.[86]

## 7. Conclusion: points of departure, and a new direction?

This chapter has made a start towards a deeper understanding of standing's place and significance within private law's remedial structure. In developing my analysis, I have built upon and engaged with Goldberg and Zipursky's pioneering work on 'private rights of action'. It may therefore be useful to the reader to summarise, in brief conclusion, just how and why we depart. These might be read as a series of friendly suggestions, by way of further refinement.

### 7.1 The court is not an 'agent' of C

I have identified at least two distinct defendant liabilities at play, specifying how even though the court's public power may be related to the claimant's private power, so that the former is triggered or activated by the latter, the two remain analytically distinct. In doing so I have resisted the need for a composite triangular or trilateral relation to capture what they conceive of as the basic phenomenon to be explained.

By contrast, while C's standing is given a key role in Goldberg and Zipursky's analysis, they account for the engagement of three distinct parties with a singular triangular legal relation: C's 'private right of action' against D. Under their account of a 'right of action', it is C who, acting *through the state*, imposes upon D a court-ordered duty to pay damages:

> The commission of a tort confers on the victim a particular legal power; namely, a power to demand and (if certain conditions are met) to obtain responsive action from the tortfeasor. A legal liability is the Hohfeldian flipside of this kind of legal power. The commission

> of a tort leaves a tortfeasor vulnerable to a claim initiated by the victim and backed by the power of the state. Because the vulnerability is to the victim, the wrongdoer's fate is, to a substantial degree, in the victim's hands. The victim, not a government official, decides whether to press her claim or not, and the victim, in principle, also decides whether to accept a resolution of the claim short of judgment. If the claim is successful, of course, the victim can enlist the state's aid in her effort to enjoin ongoing wrongful conduct or to demand responsive action from the wrongdoer in recognition of the wrong done to her.[87]

On this view of a 'right of action', even though two powers are at play, D is only ever under one liability, said to be correlative to C's power. In contrast to the *court-focussed one-liability model* discussed above,[88] this might be said to constitute a *claimant-focussed one-liability model*.

An analogy to agency law has been invoked to accommodate the state's (to be precise, really the court's) power. So, they have said that C's power is 'mediated, rather than direct', as:

> it is only by virtue of the acts of a third party – the state – that the legal relations are altered. However, the plaintiff with a right of action has the legal power to have the state change these legal relations. It is almost as if the state acts as an agent of the plaintiff, once the plaintiff is determined to have satisfied the requisite conditions.[89]

As Ori Herstein has pointed out, the idea of a 'mediated power', invoking an agency metaphor, is 'highly mechanistic' and risks relegating courts to mere 'vending machines'.[90] This, I fear, collapses the court's power into C's standing, hence my resistance to the move. Moreover, compounding the two powers into a singular composite relation leads to some follow-on difficulties, causing me further hesitation.

## 7.2 Timing

The first point can be illustrated using one of their own recent examples applying Hohfeldian analysis to a contract for the sale of goods:

> The contract between seller and buyer, for example, generates in seller and buyer not only claim rights but also certain powers, including the power of each to file a complaint in a court for breach

> of the contract that, if its allegations are proven, entitles the complainant to a remedy for the breach. There is no legal duty correlative to this legal power: that seller or buyer can sue and potentially prevail on a breach of contract claim does not mean that merely by virtue of a breach, seller or buyer has a legal duty to bring suit or compensate the other for the breach. Instead, the correlate to this power is a legal liability. Thus, to say that contract law gives buyer a (conditional) power to pursue and obtain a remedy against seller for seller's breach of their contract is to say that, were seller to breach the contract, seller would face a liability to buyer.[91]

If C's 'right of action' is a 'mediated' or 'indirect' power, it might be asked when exactly that power is exercised. Is it (i) pre-trial, at time of initiating suit ('filing a complaint'), or (ii) at trial, only at time of judgment?

These two events could be separated by what is possibly a very time-consuming civil trial. Years may have elapsed since the buyer filed a complaint. If the relevant liability in a 'right of action' is to have one's legal relations *altered by the state*, then that correlative power can only be successfully exercised at time of judgment, when the *judge* actually makes a decision, in light of his findings of fact and the applicable law, to issue an order against the defendant-seller.

It seems less plausible to claim that at time of judgment, the relevant correlative power being exercised is the claimant-buyer's 'right of action', rather than the court's own (public) power.

## 7.3 Unsuccessful suits

As mentioned above, a singular trilateral relation struggles to accommodate unsuccessful suits – where a claimant sues but fails to achieve his goal: obtaining judgment order against the defendant. This could happen for a whole host of reasons; it may be that C could not prove the alleged facts on a balance of probabilities, or the applicable law was not in C's favour, or D might have had a complete defence, et cetera.

It has been said that C's 'right of action' is a 'conditioned power',[92] so there are conditions precedent attached to the successful exercise of the power. The power is unsuccessfully exercised if these conditions, or hurdles, fail to be satisfied, so: 'the changing of the legal relation is something one can do only if one is able to satisfy certain conditions; typically, crossing certain procedural thresholds and meeting certain evidentiary standards to the satisfaction of a factfinder.'[93]

The idea of conditions imposed upon a power's exercise is not at all troublesome. The difficulty is that the conditions identified appear to be attached to the exercise of the *court*'s power, rather than a claimant's power. The burden of producing evidence to prove one's pleadings are conditions or hurdles that C must jump only *after* suit has commenced, i.e. after C has successfully exercised her power to sue D (by 'filing a complaint in court for the breach of contract' and service on D). They therefore cannot be conditions attaching to this power, as the power's successful exercise presupposes that all its conditions were satisfied.

By comparison, on a two-power model any change of C and D's status to judgment-creditor and judgment-debtor is due to the *court's* power. Unsuccessful civil suits occur because the court remains unmoved despite the claimant's efforts and pleas, ultimately refusing to exercise its powers over the defendant, in C's favour. Not because C has failed to exercise her own 'right of action'. C loses, despite having successfully subjected D to the court's public power.

To me it is counter-intuitive to explain unsuccessful civil suits as the product of a claimant's failed exercise of his or her 'rights of action'. If an analogy is needed, those accused of crimes can be ultimately acquitted if the prosecutor fails to discharge its burden to prove its case beyond a reasonable doubt. But the better explanation is that the acquittal happens because the court refuses to exercise its separate power to convict the accused, despite the prosecutor's successful exercise of its own power to charge the accused before the courts. The prosecutor has not failed to exercise its 'right of action'.

## 7.4 Judicial mistakes of law

As a subset of the point above, and compounding the difficulty identified, a court may not always get the applicable law correct. For example, because a binding precedent on a point of settled law was not cited to the court, so the decision is *per incuriam*.

It is a 'truism about law' that 'legal authorities have the power to obligate even when their judgments are wrong', and that 'courts sometimes make mistakes when interpreting the law'.[94] Judicial fallibility, however rare, may entail that even a meritorious claimant (for example the buyer) who was genuinely wronged might still fail to get a favourable ruling against the defendant (for example the seller).

A mistaken court that misapplies the law can stall a claimant's attempt at vindicating her contractual rights despite the claimant's best efforts, and *even if* the claimant has done all that she could, satisfying the necessary conditions of evidence and procedure.

This conceptual possibility, of a mistaken court ruling against the genuine rights of claimants, can only be catered for if we start recognising that a court's power is analytically distinct from the claimant's power.[95]

## 7.5 Remedial discretion

Why the heavy focus on C's power? The motivation seems one of capturing how tort victims have something quite robust when seeking damages, without resorting to a secondary right to damages,[96] which Goldberg and Zipursky reject. In some sense 'the plaintiff is *entitled* to have a judgment against the defendant',[97] which for them consists (in part):

> . . . of a Hohfeldian *power* that correlates to a *liability* in the defendant. This power—the plaintiff's capacity to alter legal relations by commencing and proving a lawsuit—is often called 'a right of action'.[98]

This move attributes to C a larger degree of agency in bringing about the ultimate change in D's status to judgment-debtor, after a successful civil suit. But it comes at a conceptual cost, correspondingly diminishing the court's agency.

This creates a difficulty – should a claimant seek a court order which involves any degree of judicial discretion, say specific performance of a contractual obligation, delivery up of goods in the possession of a converter,[99] or an injunction to which damages in lieu might be given,[100] a sharp conceptual line must be drawn, denying entirely that the claimant has any 'right of action' in respect of that order, *tout court*.[101] Yet in these cases, we might still want to say that claimants possess a power (standing) to subject defendants to the court's power to issue orders. It is just that, perhaps, the court owes no duty to issue that specific order.

Goldberg and Zipursky have thus needed to concede that 'Actions that sound in equity are fundamentally different from tort actions',[102] because 'individuals who bring claims in equity do not, strictly speaking, possess rights of action. In other words, they do not come to court claiming an *entitlement* to relief. Rather, in the manner of a petitioner, they *request* it. Instead of asserting a legal power over the defendant that the court is bound to authenticate, equity claimants ask the court to act for their benefit'.[103]

This concession, I fear, goes a step too far in the other direction. The equity/common law divide is not a clean one. There may be no such 'fundamental difference' today. While some remedies, equitable in origin,

are typically described as 'discretionary', it is now well-accepted that (at least in English law) the 'principles upon which English judges exercise the discretion . . . are reasonably well settled and depend upon a number of considerations . . . which are of very general application'.[104]

Moreover, it would not be far-fetched to say that some equitable remedies are available as of right. For example, though equitable in origin, the victim of an innocent misrepresentation, induced to contract with his misrepresentor, has a power to rescind the contract.[105] Where a court order is necessary to effect rescission, C may more than 'request' or 'petition' it. It would be appropriate to describe what C has as a 'right to rescind'. Were that not the case, there would be no need for a statute cutting back C's strong 'entitlement', granting courts the discretion to substitute damages in lieu of rescission.[106]

## Notes

1 A notable exception is Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1; Benjamin C Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Florida State University Law Review 299, 340: though coining a novel idea of 'substantive standing' to distinguish it from the 'technical legal meaning of "standing" as ordinarily used by lawyers'. NB in their later work 'substantive standing' seems to have been supplanted by their preferred concept of a 'right of action'. Most recently, John CP Goldberg and Benjamin C Zipursky *Recognizing Wrongs* (Harvard University Press 2020) 198–201, especially 201.

2 e.g. Peter Cane, *An Introduction to Administrative Law* (2nd edn, OUP 1992) 44–45; James Goudkamp, *Tort Law Defences* (Hart 2013) 30–31; James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment', in Charles Mitchell and William Swadling (eds) *Restatement Third: Restitution and Unjust Enrichment* (Hart 2013) 140–41.

3 Cane (n 2) 44–45.

4 Timothy Liau, 'Standing in Private Law' (DPhil thesis, University of Oxford 2020); on a related point focussing on the privity doctrine, see also Timothy Liau, 'Privity: Rights, Standing, and the Road Not Taken' (2021) 41 OJLS 803.

5 e.g. *Do Carmo v Ford Excavations Pty Ltd* [1984] HCA 17; (1984) 154 CLR 234 (HCA) [13] (Wilson J); *Beswick v Beswick* [1968] AC 58 (HL) 73, 75 (Lord Reid), 80 (Lord Hodson), 87 (Lord Guest), 92–93 (Lord Pearce); *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] AC 774 (HL); Carriage of Goods by Sea Act 1992 s 2(1); Peter Kincaid, 'Third Parties: Rationalising a Right to Sue' (1989) 48 CLJ 243; Michael Tilbury, 'Remedy as Right', *Structure and Justification in Private Law* (Hart 2008) 425.

6 e.g. Contracts (Rights of Third Parties) Act 1999; Law Commission, *Privity of Contract* (Report No 242, 1996) paras 3.30–32; Robert Nozick, *Anarchy, State and Utopia* (Basic Books 2013), Ch 5 80–81.

7 e.g. *Blake v Midland Railway* (1852) 18 QB 93, 110 (Coleridge J); *Seward v Vera Cruz* (1884) 10 App Cas 59 (HL), 67 and 70 (Lord Selborne LC); *Lord Sudeley v Attorney General* [1896] 1 QB 354 (CA) (Esher MR), 359–60; *Donoghue v Stevenson* [1932] 1 AC 562 (HL), 609–10 (Lord Macmillan); *Davies v Powell Duffryn Associated Collieries* [1942] AC 601 (HL) 610 (Lord MacMillan), 614 (Lord Wright); s 1 Fatal Accidents Act 1976.

8 Most famously Guido Calabresi and Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 1089 Harvard Law Review 85.

9 Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 36; Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64, 75:

'bilateral structure'; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 581: 'bilateral nature of the necessary relation'.

10 Ripstein, 'Private Authority' (n 9) 75: 'irreducibly relational'; John Gardner, *From Personal Life to Private Law* (OUP 2018) 20: 'relations of duty'.

11 Ernest J Weinrib, *The Idea of Private* Law (OUP 1995) 2: 'bipolar relationship of liability'; Ripstein, *Private Wrongs* (n 9) 5: 'Both the dispute and its resolution are bipolar'.

12 Including Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (n 1); Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Georgetown Law Journal 695; Benjamin C Zipursky, 'Philosophy of Private Law' in Coleman, Kenneth and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004); John CP Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale LJ 524; John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917; Benjamin C Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (n 1); John CP Goldberg and Benjamin C Zipursky, 'Civil Recourse Revisited' (2011) 39 Florida State University Law Review 341; John CP Goldberg and Benjamin C Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 Indiana Law Journal 569; John CP Goldberg and Benjamin C Zipursky, 'From Riggs v Palmer to Shelley v Kraemer: Judicial Power and the Law–Equity Distinction' in Klimchuk Dennis, Irit Samet and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020); Goldberg and Zipursky, *Recognizing Wrongs* (n 1); Benjamin C Zipursky, 'Civil Recourse Theory' in Andrew Gold, John CP Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (OUP 2020); John CP Goldberg and Benjamin C Zipursky, 'Hohfeldian Analysis and the Separation of Rights and Powers' in Shyam Balganesh, Ted Sichelman and Henry Smith (eds), *Wesley Hohfeld A Century Later* (CUP 2022).

13 Zipursky, 'Civil Recourse Theory' (n 12) 55–58; *Recognizing Wrongs* (n 12) 154.

14 Zipursky, 'Philosophy of Private Law' (n 12) 636–37.

15 Goldberg and Zipursky, 'Torts as Wrongs' (n 12) 918; Goldberg and Zipurksy, 'Civil Recourse Revisited' (n 12) 363.

16 On 'The Triangularity of Private Rights of Action' see Zipursky, 'Philosophy of Private Law' (n 12) 636–37; Zipursky, 'Civil Recourse, Not Corrective Justice' (n 12) 733: 'It is critical to understand the triangular structure of this set of statements . . .'; cf Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 124: 'the 'right to civil recourse' refers to a particular kind of triangular right . . .

17 Discussing the move towards 'trilaterality', see Kit Barker, 'Private law, analytical philosophy and the modern value of Wesley Newcomb Hohfeld' (2018) 38 OJLS 585, 607–9.

18 Zipursky, 'Philosophy of Private Law' (n 12) 633–37.

19 Zipursky, 'Philosophy of Private Law' (n 12) 633; Goldberg and Zipursky 'Hohfeldian Analysis' (n 12); Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 98: 'Though familiar in legal discourse, the phrase 'right of action' is hard to pin down . . . It is a Hohfeldian power: a power to file a claim and, upon proof of claim, to obtain judicially ordered relief that corresponds to a liability in the person(s) against whom suit has been brought'.

20 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 33.

21 Hohfeld (n 20) 30–32.

22 See generally, Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011); Kit Barker (n 17) (2018) 38 OJLS 585. Specific examples include Robert Stevens, *Torts and Rights* (OUP 2007); Ben McFarlane, *The Structure of Property Law* (Hart 2008); Robert Stevens and Ben McFarlane, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1.

23 Timothy Liau, *Standing in Private Law* (OUP 2023) (forthcoming)

24 In addition to the examples at (nn 38–45), Nathan Oman, 'Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law' (2011) 39 Florida State University Law Review 138; Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283; Kit Barker (n 17); Nick McBride, *Humanity of Private Law* (Hart 2019) 54–63; James Penner and Karluis Quek, 'The Law's Remedial Norms' (2016) 28 Singapore Academy of Law Journal 768.

25 Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 162 footnote 18; Zipursky, 'Civil Recourse Theory' (n 12) 56.

26 Stephen A Smith, 'Why Courts Make Orders (And What This Tells Us about Damages)' (2011) 64 Current Legal Problems 51; Stephen A Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 1727; Stephen A Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law and Jurisprudence 157; Stephen A Smith, *Rights, Wrongs, and Injustices* (OUP 2019).
27 John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University Law Review 43; John Gardner, 'Damages without Duty' (2019) 69 University of Toronto Law Journal 412.
28 Steel and Stevens, 'The Secondary Legal Duty to Pay Damages' (n 24).
29 Wesley Newcomb Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) IX Columbia Law Review 285, 293–94.
30 Andrew Halpin, 'Rights, Duties, Liabilities, and Hohfeld' (2007) 13 Legal Theory 23.
31 Halpin (n 30) 26.
32 Hohfeld (n 20) 53.
33 Hohfeld (n 20) 30.
34 John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 199; John Finnis, 'Some Professorial Fallacies about Rights' (1972) 4 Adelaide Law Review 377, 379–80.
35 Hohfeld (n 20) 44. NB others have added more parameters to Hohfeld's definition, on grounds that his definition is too wide, possibly including some voluntary acts effecting legal changes not properly attributable to the exercise of a power (e.g. a crime, civil wrong, changing residence to a different jurisdiction). See e.g. Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 79; Joseph Raz, 'Normative Powers (Revised)' (2019) Oxford Legal Studies Research Paper No. 36/2019 <https://ssrn.com/abstract=3379368>; Andrew Halpin, 'The Concept of a Legal Power' (1996) 16 OJLS 129. These refinements could be incorporated. However for our limited purposes such level of detail would be an unnecessary distraction, hence its relegation to a footnote.
36 Hohfeld (n 20) 45, 54.
37 Goldberg and Zipursky 'Civil Recourse Revisited' (n 12) 363.
38 Zipursky, 'Civil Recourse, Not Corrective Justice' (n 12) 720–21.
39 Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 163.
40 Smith, 'Duties, Liabilities, and Damages' (n 26) 1727–78.
41 Smith, *Rights, Wrongs, and Injustices* (n 26) *vii.*
42 Smith (n 41) *x*.
43 Smith, 'A Duty to Make Restitution' (n 26) 161. For breach of contract: Stephen A Smith, 'Remedies for Breach of Contract: One Principle or Two?' in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014). More generally: Smith, *Rights, Wrongs, and Injustices* (n 26).
44 To Steve Smith: John Gardner, 'Damages without Duty' (n 27), 419–20.
45 To Goldberg and Zipursky: John Gardner, 'Torts and Other Wrongs' (n 27) 43, 57.
46 Hohfeld (n 20) 54.
47 See Section 5.
48 A similar analysis has been advanced by Ori Herstein, 'How Tort Law Empowers' (2015) 65 University of Toronto Law Journal 99, 109.
49 An order made without the jurisdiction to make it has no effect, or at the very least may be set aside. Support may be drawn from *Sir Richard Newdigate v Davy* (1701) 1 Lord Raymond 742; 91 ER 1397 (money paid under a judgment could be recovered; judgment was void because the court had no jurisdiction). See also *Farrow v Mayes* (1852) 18 QB 516, 118 ER 195; *In Re Smith* (1888) 20 QBD 321 (CA); cf *O'Connor v Isaacs* [1956] 2 QB 288 (CA). Cf *Isaacs v Robertson* [1985] AC 97 (PC) (discussing an order made by a court of 'unlimited jurisdiction').
50 For a recent judicial dictum to this effect in relation to trusts, see *Carroll v Toronto-Dominion Bank* 2021 ONCA 38 [18] (Paciocco JA): 'The enforcement of trusts was not achieved by empowering courts to act as roving commissions of inquiry into their proper performance, but by empowering courts to assist those with an interest in trusts in enforcing and compelling the performance of those trusts.' Compare *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707 (Ch), 734; *Re Stevens* [1897] 1 Ch 422; *In Re Wrightson* [1908] 1 Ch 789, 799; *Bartlett v Barclays Bank (No 2)* [1980] 2 WLR 430 (Ch) 452. See generally Daniel Clarry, *The Supervisory Jurisdiction Over Trust Administration* (OUP 2019). Trusts raise especially interesting questions and puzzles, deserving separate treatment. A fuller discussion is best left for a separate occasion.

51 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2020] 3 WLR 1369 [178] (Lord Reed and Lord Hodge, Lord Lloyd-Jones and Lord Hamblen agreeing).
52 Ripstein *Private Wrongs* (n 9) 272.
53 Hence why, for example, in the case of charitable trusts enforced by the Attorney-General, a public official, things start taking on a more public flavour, moving one step from private law towards becoming public or regulatory law. See e.g. Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart 2016), arguing that charity law is a public law–private law 'hybrid'.
54 HLA Hart, 'Legal Rights', *Essays on Bentham* (Oxford: Clarendon Press 1982) 183. Compare Gardner *Personal Life* (n 10) 199–201. Though note s 6 Prosecution of Offences Act 1985 (private prosecutions, subject to various limits).
55 And whose decisions may potentially be subject to judicial review.
56 Gardner, *Personal Life* (n 10) 200. For further discussion see Larissa Katz and Matthew Shapiro, 'The Role of Plaintiffs in Private Law Institutions' in Harris Psarras and Sandy Steel (eds) *Private Law and Practical Reason: John Gardner's Private Law Theory* (forthcoming 2023). Thanks to Larissa and Matt for permission to cite their draft.
57 Zipursky, 'Philosophy of Private Law' (n 12) 655.
58 Timothy Liau, 'Standing in Private Law' (n 4); Timothy Liau, 'Privity: Rights, Standing, and the Road Not Taken' (n 4) 809–11. Just to be a bit more precise: only those who *hold themselves out* to be right-holders, have standing. A claim form must state the nature of the claim, specify the remedy sought, and be verified by a statement of truth: CPR 16.2(1), CPR 22.1(4). A necessary epistemic qualification since it cannot be known before trial what is to be proven only during trial, and to accommodate the possibility of judicial mistakes.
59 Gardner, *Personal Life* (n 10) 199. On 'authority', contrast Ripstein, 'Private Authority and the Role of Rights: A Reply' (n 9) and John Gardner, 'Private Authority in Ripstein's Private Wrongs' (2016) 14 Jerusalem Review of Legal Studies 52.
60 CPR 54.4' s. 31(3) Senior Courts Act 1981; Before that: *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) 643–44 (Lord Diplock). On which see further Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) [25–001]; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) [4.69]–[4.80].
61 The test being one of 'sufficient interest': s. 31(3) of the Senior Courts Act 1981. Though what is 'sufficient' may vary depending on the order sought. Craig, *Administrative Law* (n 60) [25–034]; Joanna Miles, 'Standing in a multi-layered constitution' in Bamford and Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart 2003). See e.g. *R v Somerset County Council and ARC Southern Limited* [1998] Env LR 111, 121 (Sedley J): 'Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.'
62 CPR 1.4(f), CPR 26.4.
63 Limitation Act 1980. Similarly, laches in equity: cf s. 36 Limitation Act. See e.g. *Letang v Cooper* [1965] 1 QB 232 (CA) 245–46 (Diplock LJ): 'The Act is a limitation Act; it relates only to procedure. It does not divest any person of rights recognised by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them.'; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 (CA), 404: 'it is trite law that the English Limitation Acts bar the remedy and not the right' (Donaldson LJ); *Iraqi Civilian Litigation v Ministry of Defence* [2016] UKSC 25; [2016] 1 WLR 2001 (Lord Sumption) [1]: 'Limitation, which deprives the litigant of a forensic remedy but does not extinguish his right, is for that reason classified by the English courts as procedural…the distinction on which it was based between barring the remedy and extinguishing the right.'; *Moses v Macferlan* (1760) 2 Burrow 1005; 97 ER 676 (Lord Mansfield): 'This kind of equitable action, to recover back money . . . does not lie for money paid by the plaintiff . . . as in payment of a debt barred by the Statute of Limitations . . . because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering'.
64 NB it ends once judgment has been entered, i.e. 'perfected' (CPR 40.2, 40.3). See generally, Zuckerman, *Civil Procedure* (n 60) 1066–77. Justice requires limits to the uncertainty created by legal disputes. Finality of litigation demands that once judgment is given, the matter in

controversy is concluded, subject only to appeal. Once perfected the court's jurisdiction is exhausted and the court no longer possess power to vary or set side judgment, subject to certain exceptions (e.g. slips): *Taylor v Lawrence* [2002] EWCA Civ 90 [9]. The proper recourse for a dissatisfied party is to appeal, otherwise there would be no finality.

65 CPR, Part 12.

66 CPR 70.1.

67 Wesley Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (n 29) 294. Compare Rafal Zakrzewski, *Remedies Reclassified* (OUP 2005) Ch 5 Smith, *Rights, Wrongs, and Injustices* (n 26) 9–10, 96–104.

68 CPR 70.2A(4), s. 39 Senior Courts Act 1981. Possibly contempt of court: CPR 81.4. Though failure to pay a judgment debt (cf orders for specific performance or injunctions) may not normally result in contempt proceedings: ss. 4–5 Debtors Act 1869.

69 CPR 69, 72, 73.

70 Hohfeld, 'Nature' (n 67) 285, 294.

71 And so correlative to a power: see e.g. Zipursky, 'Philosophy of Private law' (n 12) 632; Zipursky, 'Civil Recourse, Not Corrective Justice' (n 12) 720–21, Goldberg and Zipursky, 'Hohfeldian Analysis' (n 12).

72 Henry Winthrop Ballantine, *Blackstone's Commentaries (Revised and Abridged)* (Blackstone Institute: Chicago 1915). See Goldberg, 'The Constitutional Status of Tort Law' (n 12) 545–59; Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 54–55; Smith, *Rights, Wrongs, and Injustices* (n 26) 177.

73 Discussing see e.g. Ripstein *Private Wrongs* (n 9) 276–85.

74 Goldberg and Zipursky, 'Civil Recourse Revisited' (n 12) 363: 'A tort liability is in some ways like a criminal liability. The commission of an armed robbery does not generate a duty to go to jail; it creates a liability to be sent to jail, assuming the prosecution can make its case.'; Zipursky, 'Civil recourse, not corrective justice' (n 12) 722: '. . . this view leads us to recognize a similarity between tort law and criminal law, which is an area where legal norms contain serious normative force. The imposition of liability is in some ways like the imposition of a punishment.'

75 Smith, *Rights, Wrongs, and Injustices* (n 26) 192, elaborating on an earlier argument in Smith, 'Duties, Liabilities, Damages' (n 40) 1754: '. . . as criminal punishment illustrates – it is important, in order for the law's message to be brought home to specific victims and wrongdoers . . . In private law, damages can serve a similar role, or at least they can serve this role if they are imposed as liabilities, not duties.'

76 Smith, *Rights, Wrongs, and Injustices* (n 26) 202. See his arguments from 202–6.

77 That certainly seems the formal structure of the duty to pay punitive damages post-judgment, after liquidation at trial. On punitive damages see *Rookes v Barnard* [1964] AC 1129 (HL); *Cassell v Broome* [1972] AC 1027 (HL); *Kuddus v Chief Constable of Leicesterchire Constabulary* [2001] UKHL 29, [2002] 2 AC 122; *Whiten v Pilot Insurance* [2002] 1 SCR 595 (Supreme Court of Canada); cf *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 197 ALR 626.

78 J Feinberg, 'The expressive function of punishment' (1965) 49 The Monist 397.

79 Goldberg and Zipursky, 'Torts as Wrongs' (n 12) 918.

80 S50 Senior Courts Act 1981. *Canada v Ritchie Contracting and Supply* [1919] AC 999 at 1005 (Lord Dunedin); *Redland Bricks v Morris* [1970] AC 652 (Lord Upjohn).

81 S50 Senior Courts Act. More generally, see *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287; *Coventry v Lawrence* [2014] UKSC 13; *Morris-Garner v One Step* [2018] UKSC 20.

82 *Slack v Leeds Industrial Cooperative Society Ltd* [1924] AC 851 (HL); *Hasham v Zenab* [1960] AC 316 (PC); *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197.

83 Gardner (n 27); Steel and Stevens (n 28).

84 See e.g. Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law: Essays on Law and Morality* (OUP 1979): 'litigants can be guided by the law only if the judges apply the law correctly; it is futile to guide one's action on the basis of law if when the matter comes for adjudication the courts will not apply the law and will act for some other reasons. People will be left guessing what the courts are likely to do – but these guesses will not be based on the law but on other considerations'.

85 e.g. Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1.

86 Hence the need for constraints on state power, like a 'harm principle' and its variants: see e.g. John Stuart Mill, *On Liberty* (Routledge 1991); Joseph Raz, *Morality of Freedom* (OUP 1986) 420–24; Ripstein, *Private Wrongs* (n 9) 288–95. But to delve any further into political philosophy here would be to wade too far off afield.

87 Goldberg and Zipursky, 'Civil Recourse Defended' (n 12) 572.
88 Section 3: Two Hohfeldian liabilities
89 Zipursky, 'Philosophy of Private Law' (n 12) 633.
90 Herstein (n 48) 115–17.
91 Goldberg and Zipursky, 'Hohfeldian Analysis' (n 12).
92 Zipursky, 'Philosophy of Private Law' (n 12) 633; Goldberg and Zipursky, 'Hohfeldian Analysis' (n 12); Goldberg and Zipursky *Recognizing Wrongs* (n 12) 29, 98
93 Zipursky, 'Philosophy of Private Law' (n 12) 633; this point is reiterated in Goldberg and Zipursky *Recognizing Wrongs* (n 12) 29, 98.
94 Scott Shapiro, *Legality* (Harvard University Press 2011) 15. See also HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 141–7, distinguishing finality from fallibility; Joseph Raz, *Practical Reasons and Norms* (OUP 1999) 134–6: 'Courts have power to make an *authoritative* determination of people's legal situation . . . The fact that a court can make a binding decision does not mean that it cannot err. It means that its decision is binding even if it is mistaken. To be a binding application of a norm means to be binding even if wrong, even if it is in fact a misapplication of the norm'. Consistently, it is the general rule that money paid pursuant to a court order cannot be recovered as long as that order subsists. A mistaken judgment is conclusive between the parties until corrected by an appellate court: *Philips v Bury* (1694) Skin 447 at 485; 90 ER 198 at 215, *Marriot v Hampton* (1797) 7 TR 269, 101 ER 969; cf *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676 (distinguished); *Wilson v Ray* (1839) 10 Ad & El 82, 113 ER 32 (possible exception for fraud). Discussing, see Charles Mitchell, Stephen Watterson and Paul Mitchell (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2017) [2–31]–[2–40].
95 Herstein (n 48) 112–13.
96 Compare John Gardner, 'Torts and Other Wrongs' (n 45) 58: 'the court has a legal duty to award a liquidated sum in reparative damages against her if the tort is proved. This legal duty exists because the successful plaintiff has a legal right to reparative (not taken to include nominally reparative) damages. The plaintiff's right grounds a legal duty on the court to impose a new legal duty on the tortfeasor, a legal duty that is also grounded (by the court and by the law) in the plaintiff's right'.
97 Goldberg and Zipursky, 'Judicial Power and the Law-Equity Distinction' (n 12) 293.
98 Goldberg and Zipursky, 'Judicial Power and the Law-Equity Distinction' (n 12) 293.
99 S3(2) Torts (Interference with Goods) Act 1977 lays out three disjunctive options for 'relief', damages alone being one.
100 S50 Senior Courts Act (n 81). See e.g. *Coventry v Lawrence* (Neuberger MR) [120]: '120 The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered . . .'
101 Goldberg and Zipursky, 'Judicial Power and the Law-Equity Distinction' (n 12) 303: 'When a court orders specific performance of a contract for the sale of land, or enjoins a nuisance, it is not, strictly speaking, fulfilling its obligation to provide the plaintiff with an avenue of civil recourse. It is doing equity.'
102 Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 59.
103 Goldberg and Zipursky, 'Judicial Power and the Law-Equity Distinction' (n 12) 296. *Recognizing Wrongs* (n 12) 58–60.
104 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 9, 11 (Lord Hoffmann), discussing specific performance.
105 *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).
106 Section 2(2) Misrepresentation Act 1967. For non-fraudulent misrepresentations, if 'equitable to do so' having regard to a series of factors.

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3

# Just price theory: addressing scepticism

Joaquín Reyes*

## 1. Introduction

The term 'just price' is as old as commercial exchange. It was already in common usage in the times of Hammurabi, the Babylonian King.[1] It later passed on to Roman Law and it has been used by lawyers and market agents ever since. It is, of course, still in use today. In effect, not only do we encounter many situations in which the price of a certain good seems 'wrong', either because it is exorbitant – a 'rip-off' – or too small – 'a bargain'. Moreover, deep-seated legal rules and institutions still make explicit reference to just prices – civil law remedies against *laesio enormis,* the doctrine of unconscionability, prohibitions on price gouging, 'fair rent' laws provide examples – and notions of 'fair pricing' are still at the

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(1) *denying* the full-blown rejection of price normativity that has become a pervasive feature of contemporary contract theory and economic price analysis,
(2) *denying* the value monism implicit in the standard account of the Scholastic doctrine of the just price in which commutative justice is the sole normative standard of fair pricing, and
(3) *endorsing* value pluralism in price justification.

In a nutshell, the proposed reassessment of just price theory involves a three-stage movement from *just pricing* (the Scholastic theory of the just price) to just *pricing* (our current state of theory) to *justified* pricing (the proposed theory). This paper deals mainly with claim (1), but it does not provide a full defence of claims (2) and (3). Nevertheless, I think that it also provides at least *pro tanto* reasons in support of (2) and (3).

core of many discussions over the price of medicines and vaccines. The 2021 'Fair Pricing Forum' hosted by the WHO with the objective of 'improving access to medicines and health products through fair pricing'[2] is a case in point.

Despite its pervasiveness, the idea that there is a 'just' price of things has fallen into disrepute in contemporary scholarship. Indeed, talk of just prices has a 'distinctly unfashionable'[3] ring to it. This is because the concept of the just price is historically linked to the 'Scholastic doctrine' of the just price, according to which the just price is the price required by commutative justice, i.e., the price that keeps equality of value between things exchanged. Once at the core of economic thought, the Scholastic doctrine of the just price – and just price theory with it – is now regarded almost universally as 'a frozen and lifeless relic of an earlier age'.[4] Indeed, some scholars have argued that the doctrine of the just price is grounded upon the 'inveterate fallacy'[5] of thinking that value is an objective quality of things, a claim that would rest on discredited metaphysical assumptions. Others have argued that the very idea of a just price is a 'contradiction in terms',[6] and that the question of what a person *ought* to get in return for her goods is a question 'absolutely devoid of meaning'.[7] Moreover, the dominant opinion in economic theory is that it is impossible, by definition, to sell something for more than it is worth, because the value of a thing is determined by the price at which the parties have agreed to transact.[8] But if this is the case, how can we make sense of legal rules that forbid buying or selling something for more than it is worth? Should we discard these legal schemes as medieval relics and abandon just price theory altogether? How strong are these and other objections against the concept of the just price really?

In this chapter, I evaluate some of the reasons behind this scepticism about the very possibility of just prices. Addressing these objections is the first step to get just price theory off the ground. If these objections against the just price are sound, then legal institutions and day-to-day practices whose intelligibility depends upon establishing a normative standard that allows us to distinguish between just and unjust prices, however pervasive across jurisdictions and however enduring throughout the centuries, are indeed unintelligible. In this chapter, I argue that this is not the case and that, despite these objections, there are reasons to take just price theory – and, by implication, institutional arrangements relying upon or contributing to establish standards of fair pricing – seriously.

This chapter considers and rejects some arguments against the idea that there is a just price of things, which I take to be those most likely to

raise scepticism over the very idea of a just price. In dealing with these objections, I intend to give support to two different but related claims: First, that these objections fail to provide good reasons to dismiss price normativity altogether. Second, that some of these objections are best understood as providing alternative *conceptions* of the just price – alternative, that is, to the Scholastic conception of the just price based on commutative justice – rather than full-blown rejections of it. To claim that some of these objections are, in reality, alternative conceptions of the just price entails a vindication of the kind of inquiry that the Scholastic doctrine of the just price represents, but also a partial restatement and revision of that same tradition in more pluralistic terms. In other words, I would like to suggest that there is more to just price theory than a concern for commutative justice, and that other justificatory values apart from commutative justice, such as efficiency, autonomy or distributive justice, can play a role in justifying prices, as well as in deciding which normative standard contract law should adopt as a remedy to price disparity.

The chapter is structured into four sections. The first three sections deal with different kinds of objections to just price theory. Thus, section 2 deals with an objection that I have termed as the 'argument from bad metaphysics'. According to this objection, the idea of the just price only makes sense if one assumes certain metaphysical beliefs about value that are now universally discredited. I argue that this is a fallacious argument.

Section 3 deals with an objection that I have called the 'argument from value-free economics'. According to this argument, the recognition of economics as a value-neutral science entails a rejection of the value-laden approach to prices that just price theory represents. My specific target in this section is the claim – famously made by RG Collingwood – that the very idea of the just price is a 'contradiction in terms'.[9] Following the current consensus among philosophers of science about the value-laden nature of economic discourse – i.e., that the normative assumptions that unite positive and normative economics imply that price discourse in economics is normatively biased towards efficiency and higher outputs – I propose a reinterpretation of Collingwood's scepticism. I suggest that Collingwood's position is best described as an argument for an alternative conception of the just price based on the justness of underlying institutional arrangements – the just price, according to this conception, would be the price that can be fetched under just institutional arrangements regarding exchange – and against the identification of the just price with the market price.

Section 4 engages briefly with what I term the 'argument from consent'. According to this argument – famously made by Hobbes – 'the value of all things contracted for is measured by the appetite of the

contractors, and therefore the just value is that which they be contented to give'.[10] Here I argue that this objection is, again, best understood as an alternative version of price justification, one linking consent to justice.

Section 5 summarises the main conclusions from the preceding sections and concludes by briefly discussing the passage in which Hayek claims that we should abandon 'the futile medieval search for the just price'.[11]

## 2. The argument from bad metaphysics

I shall start with the 'argument from bad metaphysics'. Enlightenment thinkers such as Thomasius[12] and Barbeyrac[13] held that just price theory is committed to the claim that economic value is an 'intrinsic quality' of things. Thomasius, for instance, claimed that for Scholastics 'the prices of things originate from a natural comparison between them and are nearly an intrinsic quality thereof'.[14]

The idea that just price theory entails a highly implausible metaphysical belief on economic value as an intrinsic property of things underlies many contemporary rejections of it among economists. Perhaps the best illustration of this view is in the works of the Austrian economist Ludwig von Mises. In his influential *Human Action: A Treatise on Economics*, Mises claims that, for Aristotle, 'value was considered as objective, as an intrinsic quality inherent in things'.[15] He further adds that 'this fallacy frustrated Aristotle's approach to economic problems and, for almost two thousand years, the reasoning of all those for whom Aristotle's opinions were authoritative'.[16]

What does it mean to claim that the just price would be an 'objective' or 'intrinsic quality' which inheres in things, and why would that sole fact entail that the search for just prices is doomed to failure? One possible interpretation is that having 'intrinsic value' would mean that a thing's economic value ought to reflect its *ontological* value, quite apart from its usefulness to satisfying human needs or wants or to any other consideration besides its ontological dignity. Thus, for instance, just price theorists would be committed to the idea that the economic value of living creatures ought to be higher than the value of inanimate objects because living creatures are ontologically superior to inanimate objects. It would follow from this that, in a just exchange involving mice and diamonds, the price of mice ought to be set higher than the price of diamonds.

While it is certainly true that Scholastics believed in ontological hierarchies and degrees of ontological perfection, and that a theory of

just prices grounded upon such metaphysical beliefs seems highly implausible, the truth is that nobody in the history of economic thought has ever defended such a claim, and it is very unlikely that someone will in the future. In other words, this version of the objection commits the *straw man fallacy*: the informal fallacy based on giving the appearance of refuting the opponent's argument by refuting a different argument, or a weaker version of the same argument. In this case, the fallacy consists in attempting to refute just price theory by refuting the claim that economic value reflects ontological value. While that claim is certainly false, it is one that no just price theorist has ever defended. The distinction between a thing's ontological value and its economic value is old and it has been present in philosophical discourse at least since Plato's *Euthydemus*, in which Socrates asserts that 'it is the rare thing, Euthydemus, which is the precious one, and water is cheapest, even though, as Pindar said, it is the best'.[17] The same distinction was made by Augustine, Thomas Aquinas, Scotus, Covarrubias, Molina, Soto, Lugo, Antoninus of Florence, Bernardine of Siena, and, in fact, 'by everyone'[18] that dealt with the just price within the Scholastic tradition. It has even been said that late Scholastics 'seem to have enjoyed pointing out that the just price of goods did not correspond to their intrinsic worth or usefulness'.[19]

Here is another possible interpretation of the same objection. For just price theory, what accounts for a thing's price is an attribute inherent to a thing's substance. This might be an 'accident' in Aristotelian terminology, for example a thing's colour, weight or other similar characteristic. Alternatively it might be its 'essence', the kind of thing it is. For example if it is a cat, its 'catness', if it is a dog, its 'dogness'. Or, if not its essence, then at least an essential quality of that same thing – a 'necessary accident' or 'property' in Aristotelian terms, such as its being 'rational', or 'sentient' as examples. But since the metaphysical categories of substance, attributes, essence, and other similar things are grounded upon discredited Aristotelian metaphysics, then just price theory must be false. Although some version of this argument is very likely to be at the core of the sceptical attitude towards just price theory, it is difficult to find an explicit statement of it. The fact that Aristotelian essentialism was wrong is nowadays taken to be uncontroversial and it is usually left implicit in much that is written about legal philosophy.[20] However, it has also been explicitly taken as a reason to reject explanations of modern contract law grounded upon Aristotelian categories. A good case in point is Dennis Patterson's reply to James Gordley's claim that we need to return to Aristotle to make sense of modern contract doctrine.

Patterson objects to Gordley's overall approach to contract theory in these terms:

> You seem to regret the fact that contemporary contract theorists have failed to generate a metaphysical theory like Aristotle's; one that will provide an answer to the philosopher's demand for 'a new and correct theory of contracts.' ([James Gordley, *The Philosophical Origins of Modern Contract Doctrine*] p. 222) If nostalgia is indeed the sentiment, then the nostalgia is problematic, if not misplaced. *Aristotle was wrong about essences: you do not deny that.* But *if Aristotle was wrong about essences, then he never had a correct theory of contract*. If he never had a correct theory of contract, *then our nostalgia is for an illusory object*. If the object (a metaphysically correct theory of contract) of our nostalgia is illusory, that suggests our nostalgia itself might be equally devoid of content.[21] [emphasis added]

Is nostalgia over just prices equally misplaced? Can we apply the same argument to just price theory and claim that *if Aristotle was wrong about essences, then the search for a correct theory of just prices is illusory*? The answer is clearly no. First, because, as a point of logic, it is simply not the case that if a certain philosophy *x* entails a certain theory *y*, then the rejection of *x* entails the rejection of *y*. Indeed, one way to reconstruct the argument would be this:

(1) If Aristotle was right about essences, then it is possible to have a correct theory of the just price.
(2) It is not the case that Aristotle was right about essences.

Therefore:

(3) It is impossible to have a correct theory of the just price.

As stated, the argument commits the fallacy of *denying the antecedent* (the formal fallacy according to which the consequent of a conditional must be false because the antecedent of that same conditional is false). Since denying the antecedent is a formal fallacy, it would be uncharitable to reconstruct the argument in this way if there is another plausible version of the argument that is not formally invalid. Patterson (or someone else trying to apply his original argument about contract to the doctrine of the just price) could reply that this is not the most charitable reconstruction of his argument.

Perhaps the following would be a better reconstruction:

(1) If Aristotle was wrong about essences, then a correct theory of the just price is impossible.
(2) Aristotle was wrong about essences.

Therefore:

(3) A correct theory of the just price is impossible.

This argument is formally valid, but premise (1) is false. It is not the case that a correct theory of the just price is possible only if Aristotelian essentialism obtains, not even for the Scholastic doctrine of the just price. Indeed, at least according to Aquinas' view – which I take to be the most representative author of the Scholastic tradition[22] – it is not the essence or substance of a thing that accounts for its price, but rather its usefulness to the purpose for which it has been bought or sold.[23] A defect in a thing's substance, quantity, or quality does mean lowering its price,[24] but only inasmuch as that defect is connected with the specific use for which the thing is being sold, giving occasion, therefore, of loss to the buyer.[25] So if the buyer wants a horse, then she cannot blame the seller for giving her a lame horse and not a fleet one, unless she specifically asked for a racing horse.[26] But if she bought a racehorse and received a lame one, then the seller must compensate for the defect by modifying the price, because the lacking quality is significant for the purposes of the buyer. Thus, the individual characteristics of things exchanged – their substance, quantity, and quality – are considered in the price but only as means to achieve the particular ends of the parties, not in themselves.

The remarks above concerning economic value being grounded upon a thing's *usefulness* to the particular ends of the parties allow us to distinguish *economic* value from *intrinsic* value. Indeed, they show that the economic value of a thing can depend on *non-intrinsic* (relational) properties of the thing, while still being properties *of* that thing. To illustrate this point further, let me borrow an example from Rabinowicz and Rønnow-Rasmussen: Princess Diana's dress.[27] This dress is valuable because it belonged to Princess Diana: the value of the dress comes from the importance of something other than the dress' intrinsic properties. Indeed, the same dress would have the same intrinsic features regardless of who wore it, and yet it would have little value if worn by someone else. The value of Princess Diana's dress depends on the *non-intrinsic* (relational) property of it having belonged

to Princess Diana. However, having belonged to Princess Diana is still a property *of* that dress.

Now, someone might want to take the 'argument from bad metaphysics' one step further. A just-price sceptic might want to claim that, regardless of whether Aristotelian essentialism is true or not, it is likely that just price theory *cannot avoid* a commitment to highly implausible metaphysical beliefs about value.[28] Indeed, if there is such a thing as a just price, then the just price theorist must account for the kind of entity that just prices are, and once he or she has done so, then he or she must establish an account of just prices that does not presuppose any implausible metaphysical beliefs about value. The relationship between economic and moral value is one of the major problems in value theory, and the excessively modest metaphysical approach to value suggested here seems to dodge this important philosophical issue entirely.

I concede that this objection is quite right. How to relate moral and economic value is an incredibly difficult problem, and unless we can settle this issue, any theory of the just price will be incomplete.[29] However, I believe that it is not the case that we cannot advance theories of the just price unless we settle meta-ethical debates about value, and I see no problem, therefore, in simply bracketing out the metaphysical debate about economic value. In fact, we do this regarding other notions all the time. We discuss, for instance, ideas of responsibility, justice, rights and related concepts without first having to settle the longstanding debate over the existence of free will or the truth of determinism. To my view, there is nothing wrong with this bracketing strategy. As P. F. Strawson famously – albeit controversially – argued, the rationality of our moral practices does not depend on the truth or falsity of determinism.[30] For the same reasons, the rationality of just price theory does not depend on the truth or falsity of moral realism, Aristotelian essentialism, or any other meta-ethical view.

Moreover, the point of replying to the 'argument from bad metaphysics' is *not* to show that just price theory makes no assumptions regarding moral values (it is, after all, *just* price theory), but rather that *it does not presuppose a metaphysical account of economic value*. I admit that grounding economic value on the intrinsic properties of a thing is a rather implausible account of economic value, one that leads to absurd consequences (such as the one pointed out above concerning the possibility that mice would be worth more than diamonds), but I deny that this account of economic value is necessary for just price theory. Instead, I have suggested that a relational account of value – one based on a thing's usefulness – would suffice.

To be sure, the just-price sceptic might find that a relational account of economic value – as opposed to an intrinsic or ontological

account – also entails highly implausible metaphysical assumptions. However, I fail to see why this would be the case. The burden of proof lies, I think, on the side of the sceptic.

In sum: the 'argument from bad metaphysics' is fallacious. Although responding to it allows us to see that just price theory need not be grounded in Aristotelian essentialism in order to be successful, if we want to move the discussion over price normativity forward, we must move beyond this argument and start looking elsewhere.

## 3. Argument from value-free economics[31]

One of the most influential and explicit rejections of just price theory comes from what can be termed as the 'argument from value-free economics'. According to this argument, the problem with the idea of the just price would not be its dubious metaphysical commitments, but rather the kind of inquiry that just price theory represents: a *normative* inquiry into *economic* activity. Just price theory would be a theoretical endeavour that fails to distinguish between the descriptive and the normative, between propositions of *fact* about prices, on the one hand, and our *value* judgements or normative attitudes towards those prices, on the other.

British philosopher R. G. Collingwood dismissed the very idea of a just price precisely on these grounds. He believed that the scientific nature of economics logically entails a rejection of price normativity. From this the conclusion would follow:

> It is, therefore, impossible for prices to be fixed by any reference to the idea of justice or any other moral conception. A just price, a just wage, a just rate of interest, is a contradiction in terms. The question what a person ought to get in return for his goods and labor is a question absolutely devoid of meaning. The only valid questions are what he can get in return for his goods or labor, and whether he ought to sell them at all.[32]

Surprisingly, he also believed that the demand for just prices or just wages was a *rational demand*, worthy of careful consideration:

> As soon as any moral motive is imported into an economic question the question *ceases to be an economic one*, and the price, or wage, or interest becomes a gift. But *the demand for a just price or a just wage is not a mere confusion of thought* . . .

> The demand for a just wage, a wage *fixed by legal or moral, rather than by economic, standards, is a rational demand and deserving of respectful attention* if it is based on the belief that special circumstances, which *ought not to exist*, induce certain wage-earners to accept a lower wage than that which they would accept if these circumstances were removed. If such circumstances exist, *they ought to be removed*, for instance by legislation; and since this legislation would raise some people's wages, the wages as so raised might be loosely described as wages fixed by law. But they would really be fixed not by law but by supply and demand in a market where law insured fair bargaining. In a word, the demand is reasonable so far as it is a demand, not for legislation directly controlling wages – that is an impossibility, since *a wage fixed by any but economic considerations ceases to be a wage* – but for legislation amending the condition of society.[33]

How can Collingwood believe that the very idea of a just price is a 'contradiction in terms'[34] and, *at the same time*, claim that the demand for a just price is a 'rational demand'[35]? How can the demand for something 'absolutely devoid of meaning'[36] also deserve 'respectful attention'?[37] If Collingwood's claim that prices fixed by any normative standard is contradictory or otherwise meaningless is to be taken literally – as Hayek did[38] – then the claim seems to be unsupported by Collingwood's own arguments.

The truth seems to be that Collingwood did not really believe that the idea of the just price was contradictory, although he *believed* that he did. Paraphrasing G. A. Cohen on Marx, one could say that *Collingwood mistakenly thought that Collingwood believed that prices cannot be unjust*, because he was confused about the nature of economics – and hence of prices.[39]

The reason for this confusion is that Collingwood was unclear as to whether economic facts (prices, wages and rates of interest, amongst other things) can be partially fixed by normative considerations. Indeed, Collingwood's argument is ambiguous regarding these two claims:

(1) Economic facts are *necessarily* fixed by economic reasons, and
(2) Economic facts are *exclusively* fixed by economic reasons.[40]

This ambiguity is what allows him to claim that a *just* price is a contradiction in terms (because prices are fixed *exclusively* by economic reasons), but, at the same time, concede that a demand for prices fixed 'by supply and demand in a market where law insured fair bargaining'[41] is

nonetheless a rational demand (because prices are *necessarily* fixed by economic reasons, but not *exclusively*: prices partially fixed by normative reasons would still be prices so long as they are *also* fixed by economic reasons). The only thing that Collingwood categorically denies – because it is entailed by both (1) and (2) – is the idea of a price fixed exclusively by non-economic reasons.

While both claims are arguably false, only (2) is incompatible with the introduction of normative standards allowing legal officials to distinguish between just and unjust prices. Indeed, the law cannot ensure *fair* bargaining without introducing moral considerations into the determination of economic facts. Laws protecting fair bargaining regulate the market according to moral and justice-based reasons, making it the case that the prices in those markets are fixed, at least in part, by legal and moral considerations.

If Collingwood admits – as he explicitly does – that prices are sensitive to normative considerations introduced by the rules and institutions that regulate market transactions, and therefore recognises that economic facts are not entirely devoid of normative elements – in other words: if we take Collingwood's claim to be that prices are *necessarily* but *not exclusively* fixed by economic reasons -– then a less polemic and, I think, more charitable reading of Collingwood's argument comes to surface, one that shows that his views on just prices are more sensible than what his now famous remarks would make it appear (and indeed more consistent with his final thoughts on the matter, as expressed in his *The New Leviathan*, published a year before his death).[42] In what follows, I would like to suggest that Collingwood's rejection of the very idea of a just price is best understood as a rejection of one particular *conception* of the just price – namely, one according to which the just price is the price fixed by supply and demand – and an endorsement of a different conception of the just price according to which the just-making features embedded in prices are not grounded upon the laws of the market, but on the *background conditions of exchange*.

What reasons does Collingwood have to believe claim (2), i.e., that prices are fixed *exclusively* by economic considerations? As many of his contemporaries, Collingwood believed that prices cannot be unjust because he believed this to be logically entailed by the value-free nature of economic discourse.[43] According to this view, the entanglement of the descriptive and the normative that would be at the core of the idea of a just price would distort our understanding of prices. Prices would be *facts* about the world, facts fixed by the laws of supply and demand, and price analysis would be, therefore, the study of those economic facts. If this is correct, then prices are neither just nor unjust, because *facts* are neither just nor unjust.

The picture of economics as a value-neutral discipline, however, is not accurate.[44] The current consensus among philosophers of social science is that a purely descriptive economic theory of human action without value assumptions is impossible. Amartya Sen has dedicated a life's work to this idea, and Hilary Putman's *The Collapse of the Fact/Value Dichotomy* has given further analytical support to the idea that when it comes to propositional discourse in economics, facts and values cannot be sharply separated.[45] As Russel Hardin has stated, there is no such thing as a 'rational choice without substantive values'.[46] Not even in economics.[47]

Be that as it may, the main point is that claim (2) does not follow from pointing out that prices are economic facts. For even if prices are economic facts – facts fixed by economic considerations – economic facts are facts of the wrong kind for the purposes of claim (2). For (2) to obtain, economic facts should be similar to brute or *natural* facts, since these are the kind of facts that cannot be fixed by moral considerations. However, it seems odd to think of economic facts – and hence of prices – in this way. In what follows, I elaborate on this claim by suggesting that prices – quantities representing the exchange value of a good – are best conceived as a kind of social fact, namely: *institutional* facts.

The price of a good is not simply something that just so happens to be the case regardless of the will of any individual. In this sense, prices are different from purely natural facts such as storms or floods in that their existence does not depend on our having any beliefs or other propositional attitudes towards them. *Social* kinds, on the contrary, are partially constituted by the beliefs and propositional attitudes of those who engage with them. Let me illustrate this point with the following examples borrowed from MacIntyre:[48]

> *Brain Lesion and Particle Theory*. Suppose that there is a widespread disease that causes localised brain lesions resulting in the loss of all our beliefs and concepts about atoms and molecules, thus leaving no trace of such concepts and beliefs in our language or practices.

In this case, there is no doubt that atoms and molecules would still exist after the loss of our concepts and beliefs. As MacIntyre notes, 'nothing that is now true in particle theory would then be false'.[49] But now consider the following situation:

> *Brain Lesion and Prices*. Suppose that there is a widespread disease that causes localised brain lesions resulting in the loss of all our beliefs and concepts about money and prices,[50] thus leaving no trace of such concepts and beliefs in our language or practices.

In this case, the outcome is clear: there would be no such thing as prices and money after the loss of our beliefs about them. The reason is that prices are not brute or natural facts. They do not belong to the same category as atoms and molecules. The reason for this is also clear: the existence of money and prices depends upon our beliefs and attitudes towards them.[51]

But there is something else. At least in complex and civilised societies such as ours, prices are not simply fixed by isolated individuals, not even by groups of individuals, according to their own purposes and whims.[52] Prices are the product of *institutional arrangements concerning prices*. The complex web of legal rules and institutions that regulate prices is what we call the *price system*. Without the price system, there would be no such thing as quantities of money representing exchange value. Indeed, the existence of prices in a society requires a common medium of exchange (money), private ownership, contracts, and other facts generated by social and legal contexts. Like money,[53] taxes, and private ownership,[54] prices are creatures of the law. Indeed, prices are one of the most – if not *the* most[55] – paradigmatic case of *institutional* facts, i.e., facts generated by institutional contexts.

In Searle's terminology, prices are facts regulated by *constitutive* rules, rather than merely *regulative* rules. Regulative rules regulate pre-existing forms of behaviour, whereas constitutive rules do not merely regulate, 'they create or define new forms of behavior'.[56] They have the form 'X counts as Y in context C'.[57] Searle explains:

> Where the rule is purely regulative, behavior which is in accordance with the rule could be given the same description or specification (the same answer to the question 'What did he do?') whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist.[58]

The rules of exchange are constitutive rules. They do not simply acknowledge and regulate pre-existing prices. Quite the opposite: they provide pre-institutional facts about exchange with a new meaning. Thus, it is only when we consider the background social and legal context provided by rules regulating exchange that the brute fact of 'A giving two metal coins to B' transforms into (i.e., can be understood as) 'A *buying* a quarter of potatoes from B' or, to use a slightly different terminology, 'A *paying the price* of a quarter of potatoes to B'.[59]

If constitutive rules define what counts as the price of *x*, then the identification of certain facts and not others as the price of *x* depends upon the institutionally embedded normative commitments that shape the market system. Institutions are themselves shaped by the normative commitments of a given political community. Thus, a market system exclusively biased towards higher outputs will tend to identify the fact that people want *x*, whatever *x* is, as a reason to put a price on *x*, and the fact that people are willing to pay as much as £100 for *x* as a reason to count £100 as the price of *x*. By contrast, a market not exclusively concerned with higher outputs will count facts other than a buyer's willingness or ability to pay as relevant to identify the price of a good. For instance, a normative commitment to satisfying basic needs would make it the case that the price of prescription drugs will not be so affected by how much people are willing to pay for them. Therefore, the identification of the price of drug *x* as £10 will be insensitive to the fact that some people are willing to pay £100 for *x*.

Once the institutional nature of prices is recognised and Collingwood's mistake about the purely descriptive nature of price discourse is therefore corrected, we can now safely discard claim (2) – namely, that economic facts are fixed *exclusively* by economic reasons – and reformulate Collingwood's original rejection of the very idea of the just price in terms that fit this recognition. *Pace* his own rhetoric, it is now clear that the point of Collingwood's claim cannot be that the idea of a just price is unintelligible. His point is that prices fixed *exclusively* by supply and demand are neither just nor unjust because supply and demand cannot function as a proxy for justice.[60]

Collingwood is of course correct about this. Prices fixed *exclusively* by supply and demand consist in an aggregate of prices over an arbitrary timespan that lacks any normative pull. Indeed, these prices can be – and usually are – *the final result of an extended series of unjust prices*. To illustrate this, consider the following example:

> *Housing Prices.* I buy a house in Edinburgh and am forced to pay double the ongoing market price. The circumstances that forced me to pay that price replicate all over Edinburgh for six months. By the end of the period the market price for my house is equivalent to the price I paid for it.[61]

*Housing Prices* illustrates a familiar experience that also reveals the problematic nature of taking the law of supply and demand as a normative standard. If the price I paid for my house was unjust, then it must be the

case that all prices that led to the new market price in *Housing Prices* were also unjust. But if the law of supply and demand accounts for justice, then the new market price, the sum of a series of unjust prices, would be nonetheless just. This is a very peculiar result that leaves too many questions unanswered. The most important, as Walsh and Lynch rightly point out, is this: 'how can a series of unjust pricing practices, when summed, give rise to a just price?'[62]

Another problem for taking ongoing market prices as a standard of justice lies in the indeterminate and malleable nature of market prices. Now, one may think that the laws of supply and demand are sufficient to determine what counts as the market price of a given commodity. But this is not the case. Consider, for instance, the appropriate timespan to determine the market price. How far back in time should we go to calculate the market price of a given commodity? One month, six months, one year, a decade? The choice of timespan is a decision that will considerably affect what counts as the market price (and therefore as the just price), and yet the laws of supply and demand do not provide any normative guidance to choose between different periods of time.[63] The same applies to the identification of the *relevant market* for a given commodity. Economic goods can receive many different and even incompatible descriptions. A house, for instance, can be both a consumption good and a financial asset. This makes it the case that goods can belong to more than one market at the same time. Moreover, they can even belong to different markets depending on the level of generality of a given description (a bottle of Laphroaig can belong to the market of 'whiskies', or to the market of 'single malt whiskies', or 'Islay single malt whiskies', or 'Islay single malt whiskies sold in Scotland' for example). Our preferred description will considerably affect what the relevant market for an item should be. The specification of the relevant market is a decision that precedes what counts as supply and demand and for which the laws of supply and demand provide no guidance.

Finally, there are problems associated with the very idea of *demand*.[64] 'Demand' is an umbrella term that implies the conceptual identity between two quite different notions: wants ('preferences') and needs. As David Wiggins has noted, professional economists typically conceptualise needs as a special kind of wants, namely, a want for which one is unwilling to pay.[65] However, needs are not a type of want. The difference lies in the fact that wants, like preferences or desires, depend exclusively on subjective states, whereas needs also depend on an objective state in the world, namely, whatever it

is necessary for someone or something to flourish. Wiggins explains it thus:

> If I want to have $x$ and $x = y$, then I do not necessarily want to have $y$. If I want to eat an oyster, and that oyster is the oyster that will consign me to oblivion, it doesn't follow that I want to eat the oyster that will consign me to oblivion. But with needs it is different. I can only need to have $x$ if anything identical with $x$ is something that I need. Unlike 'desire' or 'want' then, 'need' is not evidently an intentional verb. What I need depends not on thought or the workings of my mind (or not only on these) but on the way the world is. Again, if one wants something because it is F, one believes or suspects that it is F. But if one needs something because it is F, it must really be F, whether or not one believes that it is.[66]

Unlike wants, then, needs depend on an objective state in the world. That objective state consists in whatever it is necessary for someone or something to flourish.[67] The concept of demand does not have this necessary connection with flourishing.

Moreover, 'demand' – as the term is used in the expression 'the laws of supply and demand' – means demand which registers in the market: *effective* demand. Effective demand means demand backed by money: needs and want that are not backed by money do not count as demand. This is yet another reason not to take the idea of a price fixed exclusively by supply and demand as a normatively adequate standard of just prices. Thus understood, the market price 'exclude[s] marginalized community members whose resources are insufficient to afford them a place on the demand curve, thus preventing them from having a say in what the prevailing price [i.e., the market price] should be'.[68]

It should also be clear by now that there is also something to be said for Collingwood's claim that the demand for a just price is a demand for the removal of unjust background conditions of exchange. For it is, among other things, a demand for *just institutional arrangements regarding prices*.[69] The adequate functioning of the price system is of great importance to society as a whole. If prices are too high or too low for certain goods, the whole society is affected. Price calculation, therefore, is not something that can be left entirely to one individual. I cannot do as I please with prices, because prices also 'belong' to the community, as it were, and the community will make certain decisions about what is the right price to pay for a certain item. To some extent, I buy and sell as a representative of the community, and not as an isolated individual. This is why the law of

contracts exists in the first place. Thus, for example, under what conditions, if any, *accesio*, *traditio*, or *usucapio* count as a valid form of acquisition of property rights, whether certain kind of goods are susceptible of private ownership at all, or what a property right actually entails, all define in a very specific manner the underlying conditions under which goods *ought* to be exchanged.[70]

This is not the place to develop the idea that the just price is the price that can be fetched under just institutional arrangements. What I would like to note here is that the recognition that Collingwood is correct in understanding the just price as the price that stems from just background conditions of exchange entails another parallel recognition on the side of just price theory. For it is a recognition that it is at least conceptually *possible* to talk of just prices *without* invoking equality in exchange or commutative justice as a moral standard. In other words: if there are no pre-institutional prices, it follows that there are no *pre-institutionally just* prices either.[71] As the Scholastic theologian Domingo Bañez (1654) would put it, 'there is no just price by natural law, only by positive law'.[72]

The upshot of this recognition is that, in order to move just price theory forward, the original Scholastic doctrine of the just price needs to be partially modified and complemented by a more pluralistic approach to price justification, one that can accommodate the fact that some prices can be normatively justified by criteria other than commutative justice. In sum: although Collingwood's objection fails as an objection against just price theory, it succeeds in illustrating one way in which price justification can be separated from concerns over equality in exchange (i.e., over commutative justice).

One final thought: the institutional nature of prices also has implications for claim (1) – namely, that economic facts are *necessarily* fixed by economic reasons. The implication is that this claim seems to hold true only if we stipulate an *ad-hoc* definition of wages and prices, one that does not track the way in which we use these concepts in ordinary language. Let me illustrate this point with an example:

> *Fixed Prices*. P lives in a country where prices are fixed by Wise Communist, one of the elders of the country who is thought to have a divine gift that gives him epistemic access to the value of everything. Wise Communist fixed the price of a quarter of potatoes at £2. P goes to a shop to buy a quarter of potatoes. The grocer tells P that the price for a quarter of potatoes is £2. P pays £2 for the quarter of potatoes.

Collingwood must claim that Wise Communist did not fix the price of a quarter of potatoes, that the grocer did not tell P the price for a quarter of potatoes, and that P did not pay a price for those potatoes. This seems counterintuitive. There is nothing that contradicts our common usage of the word 'price' in saying that P paid a *price* for those potatoes. To be sure, Collingwood could simply bite the bullet and go against our linguistic conventions about the way we use the word 'price'. However, I find this too big a bullet to bite. I see no other motivation to deny that P paid the price of those potatoes other than clinging on to a definitional point about prices being necessarily fixed by supply and demand. It seems to me that Collingwood's position would be like the position of someone who believes that all swans are white and that, after being shown a black swan, denies that black swans are proper swans.

Note that this objection collapses if one affirms that a price fixed exclusively by non-economic considerations is the *wrong* price to pay, or that the price that P paid was *unjust*. But that is not Collingwood's claim. His claim is that such a price *ceases to be a price.* However, if we reinterpret his position regarding just prices in the way suggested above – namely, as endorsing the claim that the just price is the price fetched under just background conditions of exchange – then the problem with the *Fixed Price* example is that those prices would be unjust – at least according to Collingwood – because they are generated by unjust institutional arrangements (arrangements that, in Collingwood's terms, do not ensure fair bargaining).

## 4. Argument from consent

The most influential consent-based account of contractual obligations, with its consequent rejection of the Scholastic doctrine of the just price, is Hobbes' account of justice as consent. According to Hobbes, 'the definition of INJUSTICE is no other than *the not performance of covenant*. And whatsoever is not unjust, is *just*.'[73] Further, Hobbes claimed that 'the value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give'.[74]

Hobbes's idea of the just value is a paradigmatic example of the liberal rejection of non-elective obligations, which would crystallise in private law during the nineteenth century with the so-called 'will theories' of contract.[75] Samuel Williston suggested that a similar phenomenon arose in economic theory, where Smith, Ricardo, Bentham, and

John Stuart Mill 'successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress'.[76]

Consent theory is a reductionist theory. It downplays the role that most legal systems give to private law remedies against inequality in exchange and explains price disparity as *nothing more than* an indication of an underlying defect in consent – a defect that would explain, in turn, the need for a remedy. In other words, consent theory tends to dismiss the *explananda* of just price theory – the legal rules and institutions shaped by a concern for just prices – as irrelevant. It tends to explain the *explananda* away.

However, the motivations for explaining the *explananda* as nothing more than an indication of consent are, at least *prima facie*, unclear. There are at least *pro tanto* reasons to take these legal rules and institutions in their own terms, i.e., as rules and institutions that introduced a substantive standard of justice into the law of contracts. Moreover, mere consent does not seem to explain neither the way in which courts deal with cases of gross disparity – judges do not seem to decide cases based on whether the parties have *really* agreed to the price in the contract, but rather on whether the price agreed to in the contract is justified according to some normative standard[77] – nor does it explain the reason for having a specific remedy against price disparity apart from the traditional remedies against defects in contractual consent, such as error, misrepresentation, fraud (*dolus*), force, or fear (*metus*). The very fact that remedies against inequality in exchange are so pervasive in most legal systems is a reason to believe that our legal institutions are trying to capture a specific kind of injustice that is not sufficiently captured by framing disparity in exchange as a mere problem of consent. Framing price disparity as a problem of consent seems to be an attempt to reduce every contractual injustice to one single pattern – lack of consent. But this is done at the price of effectively distorting both the meaning of remedies against price disparity in the law, and the traditional remedies against defect in contractual consent, which are now expanded to cope with new situations beyond their original scope of application.[78]

Nevertheless, if what consent theorists claim is true, then we have reasons to explain the *explananda* in terms of consent, and to dismiss the idea that institutions concerned with just pricing are trying to incorporate a substantive standard of justice to the law of contracts different from consent. The relevant question, therefore, is this: is it possible to establish a connection between just prices and consented prices? What arguments can we give to think that *consented* prices are also *just*?

Alan Wertheimer provides a plausible reconstruction of the argument from consent. His reconstruction is helpful to our purposes,

since it allows us to explain the relationship between consent, the economic debate over the sources of value, and the role of autonomy in price justification. Wertheimer's reconstruction of the argument from consent goes like this:

(1) A transaction is unfair only when B receives less value from the transaction than B ought to receive by some benchmark.
(2) The same good can have different values to different persons or at different times.
(3) A good's value to the parties of the transaction is indicated by the price at which they are prepared to transact.
(4) If B voluntarily consents to pay (or give) X for a good, this indicates that B is receiving adequate compensation for what she gives up.[79]

In his own assessment of this argument, Wertheimer accepts claim (1), and sees claim (2) as 'obviously true'.[80] I would not want to deny that each of these claims seems unproblematic taken on its own nor that they can both be true at the same time. However, since (2) touches upon the idea that value is subjective and variable and (1) appeals to an objective benchmark against which to judge whether someone has received more or less than she ought to receive, one may wonder how the two claims can possibly hang together. If the same good can have different values to different persons, it may seem impossible, by definition, to provide an objective benchmark against which to judge whether that good is being bought or sold for more or less than its just price. If this is the case, then the very idea of a just price would make little sense. But is this true? Is the *subjectivity* of value incompatible with affirming an *objective* normative standard for prices?

The answer is no. Affirming that value is subjective only entails taking a position on the debate about the *sources* of value. It is a plausible answer to the question 'Where does economic value come from?' Affirming the possibility of an objective standard of fair pricing is a *normative* claim, one that affirms that prices can be subject to normative standards that do not depend on the subjective valuations of the parties. It is not a response to the question about the sources of value, but rather to the question 'What justifies prices?' It is perfectly possible, for instance, to claim both (1) that the economic value of a certain prescription drug is represented by the price of £20 because that price best represents the relative scarcity of a product at a given time, and (2) that the price of £20 is *unjustified* from a normative perspective because it is a price that takes advantage of the needs of the buyer, thus violating the requirements of commutative justice. To be sure, if the rules regulating exchange were

meant to identify, say, labour and costs of production instead of relative scarcity then certainly some prices would be very different from what they are now. But the question about price justification would still need to be answered. Indeed, there is nothing preventing the price that reflects the costs of production of prescription drugs from being exploitative or otherwise unjust.

Moreover, it is impossible to talk of an unjust price without *first* identifying that very price which is taken to be unjust by some normative standard. The sources-of-value debate in economics is a debate over the criteria for identifying *what* is the price of a thing. The just-price debate is a debate over the possibility of evaluating those prices thus identified according to a normative standard. Claiming that the sources of economic value are subjective does not entail claiming that the normative standard to evaluate economic value should also be subjective.

Claim (3) also seems true as a description of the outcome of the parties' bargaining process. As Wertheimer notes, this premise, as it stands, 'simply establishes that the parties have their reservation prices for the good in question'.[81] The reservation price for the buyer is the highest price that she is willing to pay for the good. For the seller, it is the lowest price that she is willing to receive. The value of the good for the parties, therefore, will be represented by the price at which they have consented to. The problem with the argument, however, lies in (4), which does not seem to follow from (3). Wertheimer hits the nail on the head: '[Claim (3)] does not show that any price *within* the bargaining range established by their reservation prices is fair. So even if (3) is true, it hardly follows that (4) is true.'[82] In other words: (4) obtains only if there is a necessary connection between the range of prices which the parties can *consent* to (each party's bargaining range) and *justice* in pricing (adequate compensation for what each party gives up). The challenge that lies at the core of any consent theory of justice is to find a necessary link between justice and consent. How can we move from consent to justice?

A strong candidate for ascertaining a connection between justice and consent is the value of *autonomy*. I shall not analyse here whether autonomy can indeed provide the necessary link between justice and consent. What I would like to note for present purposes is that, far from being a rejection of the concept of the just price, the argument from consent involves an alternative *conception* of justice in pricing, one based on the link between justice and consent. Indeed, Hobbes did *not* say that there is no such thing as a just price. Rather, he claimed that the just price was the price the contracting parties are willing to consent to, 'that which they be contented to give'.[83] Consent theory is a theory of *justice*, and the

conception of prices stemming from it is a conception of what a price *ought* to be. According to this conception of the just price, the just price consists in whatever price the parties have agreed upon in exchange.

Now, one might try to resist this conclusion and state a version of this argument that is immune to my claim that consent theorists are really offering their own conception of just price.[84] For indeed there is a difference between (1) having a conception of contractual justice and (2) having a conception of the just price (or even having a conception of a price), and it does not follow that by affirming (1) you are also and necessarily affirming (2). You can have (1) without (2). Consent theory is a theory of contractual justice, but it is not necessarily a theory of the just price.

I would certainly agree to this. My point here is very modest, and it only applies to conceptions of contractual justice that are also conceptions of a 'price', but that might want to deny that they are also conceptions of a just price. That is, it only applies to conceptions of contractual justice that would claim that, because they are conceptions of contractual justice based on consent, that makes it the case that there is no such thing as a 'just price' because prices are also determined by consent. I argue that it is better to say that there is a theory of the just price embedded within such a conception of contractual justice, namely, that the just price is the price consented by the parties.

This might seem like a purely terminological issue, but I think it matters because, as I have stressed throughout this paper, it allows us to see that there is more to just price theory than an exclusive commitment to commutative justice as the sole value able to justify prices. That is, that there are conceptions or theories of the just price other than the 'Scholastic doctrine of the just price'.

## 5. Hayekian just pricing (and concluding remarks)

Section 2 of this paper focused on the 'argument from bad metaphysics' (the idea that just price theory is inseparably linked to a discredited Aristotelian essentialism) and showed that, however reconstructed, the argument is fallacious and provides no ground to dismiss the possibility of price normativity.

Section 3 addressed Collingwood's famous objection against the very idea of a just price. I termed his argument the 'argument from value-free economics'. After observing that Collingwood's objection rests on a misconception about the purely descriptive nature of economic discourse,

I attempted to reconstruct his argument against the very idea of a just price as an argument against the identification of justice in pricing with supply and demand and in favour of an institutional approach to justice in pricing, according to which the just price is the price that stems from just institutional arrangements. Since institutions can be shaped by different normative commitments, an institutional approach allows us to adopt a more pluralistic approach to price justification, one that entails a partial reform to the Scholastic approach to just price theory and its commitment to commutative justice as the sole source of price justification.

Section 4 dealt with the 'argument from consent' (the argument according to which the just price is nothing but the price at which the parties decide to transact) and with the structurally similar version of this argument in economics, i.e., the 'marginalist objection' to just prices. As with the previous argument, I attempted to show that the argument from consent does not give us reasons to dismiss the idea of just prices altogether. Quite the opposite: it provides us with an alternative conception of justice in pricing, one that links justice and consent. I also argued, however, that the link between justice and consent is problematic, and that we need a further premise linking consent to justice. I suggested the possibility that the value of autonomy may serve as the missing premise linking consent to justice.

I would like to end this article with a brief note on Friedrich Hayek, another author who has famously rejected the idea of a just price.

Hayek famously claimed that the abandonment of 'the futile medieval search for the just price'[85] was a necessary condition for economic growth. For Hayek, the market order could only develop

> when a thousand years of vain efforts to discover substantively just prices or wages were abandoned and the late schoolmen recognized them to be empty formulae and taught instead that the prices determined by just conduct of the parties in the market, i. e., the competitive prices arrived at without fraud, monopoly and violence, were all that justice required.[86]

Hayek thought of his own argument as a rejection of the concept of the just price, but he was actually proposing – and conflating – not one nor two, but three alternative conceptions of the just price. The first is the conception of the just price based on consent (prices arrived at without fraud or violence). The second is the just price as the price obtained by the just conduct of the parties (prices determined by the just conduct of the parties is all that justice requires). The third is the just price as the competitive market price (competitive prices arrived at without monopoly).

To be sure, Hayek identifies the competitive market price with the price obtained by the just conduct of the parties, and the requisites for a 'just conduct' in Hayek's account are both minimal (absence of fraud and violence) and related to consent, so there is a sense in which he can still claim to be endorsing only this version of the consent theory. However, there is no necessary connection between competitive prices and the just conduct of the parties, nor for that matter between any of those two criteria and consent. In fact, it is possible to think of consented prices which are not competitive, and of competitive prices which are not consented by the parties.

Hayek's inconsistent views on just pricing – claiming to endorse an outright rejection of the very idea of a just price, on the one hand, while in reality affirming three possible versions of just price theory, on the other – are symptomatic of the status of just price theory in contemporary scholarship. One of the aims of this paper has been to show this inconsistency. If the preceding considerations have shown anything it is that, despite the harsh rhetoric against the idea of a just price – 'a contradiction in terms',[87] 'a question absolutely devoid of meaning',[88] based on an 'inveterate fallacy',[89] a 'futile medieval search',[90] 'a frozen and lifeless relic of an earlier age',[91] 'a nebulous concept invented by pious monks who knew nothing of business or economics and were blissfully unaware of market mechanisms'[92] – many modern objections to just price theory can be understood as offering alternative *conceptions* of the just price rather than providing grounds for rejecting the very *concept* of just prices altogether. Framing the debate over just prices in this way, avoiding the temptation of taking contemporary anti-scholastic rhetoric too seriously, might contribute to addressing the strengths and limitations of the different sides in the debate within a common framework of meaning, in which each side might have something to contribute to our understanding of what a just price is.

## Notes

1 John W Baldwin, 'The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries' (1959) 49 Transactions of the American Philosophical Society 1, 8.
2 World Health Organization 'Fair Pricing Forum 2021' <www.who.int/news-room/events/detail/2021/04/13/default-calendar/fair-pricing-forum-2021> accessed 23 September 2022.
3 Robert C Hockett and Roy Kreitner, 'Just Prices' (2018) 27 Cornell Journal of Law and Public Policy 771.
4 Jacob Viner, *Religious Thought and Economic Society: Four Chapters of an Unfinished Work* (Jacques Melitz and Donald Winch eds, Duke University Press 1978) 12.
5 Ludwig Von Mises, *Human Action: A Treatise on Economics* (3rd revised edn, 1966) 203.

6 RG Collingwood, 'Economics as a Philosophical Science' (1926) 36 International Journal of Ethics 162, 174.
7 Collingwood (n 6) 174; quoted with approval in Friedrich A von (Friedrich August) Hayek, *The Constitution of Liberty* (Routledge 1990) 442.
8 This account of economic value is shared even by scholars working on theories of exploitation. See Alan Wertheimer, *Exploitation* (Princeton University Press 1996); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol 4 (New York 1988); Hillel Steiner, 'A Liberal Theory of Exploitation' (1984) 94 Ethics 225; Hillel Steiner, 'Exploitation, Intentionality and Injustice' (2018) 34 Economics & Philosophy 369.
9 Collingwood (n 6) 174.
10 Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1688* (Edwin Curley ed, Hackett Publishing Company 1994) Part I, Chapter XV [14] [74–76] 94.
11 Friedrich A (Friedrich August) von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge 1993) 237.
12 C Thomasius, *De aequitate cerebrina* II § 14, printed as Dissertatio LXXIII in his *Dissertationum Academicorum varii imprimis iuridici argumenti* III 43.
13 J Barbeyrac, *Le Droit de la nature et des gens, ou système general des principles le plus importants de la morale, de la jurisprudence, et de la politique par le baron de Pufendorf, traduit du latin par Jean Barbeyrac, . . . avec des notes du traducteur; et une préface, qui sert d'introduction à tout l'ouvrage* (1734) notes 1 and 2 to III v 9.
14 *De aequitate cerebrina*, II § 14. As translated in Andrea Perrone, 'The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks' (2014) 122 Rivista Internazionale di Scienze Sociali 217, 6.
15 Mises (n 5) 203.
16 Mises (n 5) 203–4.
17 Plato, Euthydemus, 304b, in Plato, *Complete Works* (Hackett Publishing 1997) 743.
18 Bernard W Dempsey, 'Just Price in a Functional Economy' (1935) 25 The American Economic Review 471, 475.
19 James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 95.
20 Even those who think that private law theory should return to Aristotle (such as James Gordley) are hesitant to defend Aristotelian essentialism. To what extent Aristotelian metaphysics needs to be defended from its critics does not concern us here. For a contemporary defence of essentialism, see David S Oderberg, *Real Essentialism* (Routledge 2007).
21 Dennis Patterson, 'The Philosophical Origins of Modern Contract Doctrine: An Open Letter to Professor James Gordley' (1991) 1991 Wisconsin Law Review 1432, 1435.
22 In his *Price and Value in the Aristotelian Tradition*, Odd Langholm identifies five main theories of value within the Scholastic tradition, all stemming from the context given by Robert Grosseteste's *Translatio Lincolniensis*, the first complete Latin translation of Aristotle's *Nichomachean Ethics*. However, Aquinas' treatment of value, though it formed a branch in itself, influenced everyone within the scholastic tradition, including those who took a different approach to value. See Odd Langholm, *Price and Value in the Aristotelian Tradition: A Study in Scholastic Economic Sources* (Universitetsforlaget 1979) 18 and passim.
23 Aquinas, *Summa Theologiae*, II-II q 7 a. 2 *ad tertium*.
24 Aquinas (n 23) in c.
25 Aquinas (n 23) *ad tertium*.
26 Aquinas (n 23) q 77 a 3 in c.
27 Wlodek Rabinowicz and Toni Rønnow-Rasmussen, 'A Distinction in Value: Intrinsic and for Its Own Sake' (2000) 100 Proceedings of the Aristotelian Society 33, 41.
28 I am grateful to Ismael Martínez-Torres for pressing me on this point.
29 On the relationship between economic and moral value, see generally Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1995).
30 PF Strawson, *Freedom and Resentment and Other Essays* (Routledge 2008) 19.
31 This section reproduces, with some modifications, some of the arguments in Joaquín Reyes, 'Beyond Commutative Justice: Contract Law, Justice, and Just Prices' (2021) 7 Latin American Legal Studies 143.
32 Collingwood (n 6) 174.
33 Collingwood (n 6) 175–76 [my emphasis].
34 Collingwood (n 6) 174.

35 Collingwood (n 6) 175.
36 Collingwood (n 6) 174.
37 Collingwood (n 6) 175.
38 Hayek (n 11) 243 'The prices which must be paid in a market economy for different kinds of labour and other factors of production if individual efforts are to match, although they will be affected by effort, diligence, skill, need, etc., cannot conform to any one of these magnitudes; and considerations of justice just *do not make sense* with respect to the determination of a magnitude which does not depend on anyone's will or desire, but on circumstances which nobody knows in their totality.' [emphasis added] 'One of the few modern philosophers to see this clearly and speak out plainly was RG Collingwood.' Hayek (n 11) 332–33 footnote 29.
39 GA Cohen, 'Review of Karl Marx' (1983) 92 Mind 440, 444: '*Marx mistakenly thought that Marx did not believe that capitalism was unjust*, because he was confused about justice.'
40 Collingwood (n 6) 174: 'It is, therefore, impossible for prices to be fixed by any reference to the idea of justice or any other moral conception'; and at 176: 'as soon as any moral motive is imported into an economic question the question ceases to be an economic one.'
41 Collingwood (n 6) 176.
42 RG Collingwood, *The New Leviathan or Man, Society, Civilization and Barbarism* (Clarendon Press 1942) 323 (38.65): 'The conception of a just price is logically dependent upon the conception of free will as exercised in economic transaction or exchanges'; and at 324 (38.74): 'The existence of the contrast between rich and poor is an offence against the ideal of civility; for it involves the constant use of one kind of force by the rich in all their dealings with the poor; economic force; the force whose essence it is to compel the poor to accept or give unjust prices in all their dealings with the rich.'
43 See Mises (n 5) 203: '[Economics] is a theoretical science and as such abstains from any judgment of value'; Hayek (n 11) 231 (claiming that the concept of justice is inapplicable to the spontaneous order of the market) at 237–38; Lionel Robbins, *An Essay on the Nature & Significance of Economic Science.* (2nd edn, revised and extended, 1949) vii: '[judgements of value] are beyond the scope of positive science'; and at 148: 'Economics deals with ascertainable facts; ethics with valuations and obligations. The two fields of enquiry are not on the same plane of discourse. Between the generalisations of positive and normative studies there is a logical gulf fixed which no ingenuity can disguise and no juxtaposition in space or time bridge over.'
44 On the connections between the descriptive and the normative in economics, see Daniel M Hausman, 'The Bond between Positive and Normative Economics' (2018) 128 Revue d'economie politique 191; Daniel Hausman, *The Inexact and Separate Science of Economics* (CUP 1992); Daniel M Hausman, Michael S McPherson and Debra Satz, *Economic Analysis, Moral Philosophy, and Public Policy* (3rd edn, CUP 2016); Russell Hardin, 'The Normative Core of Rational Choice Theory' in Uskali Mäki (ed), *The Economic World View: Studies in the Ontology of Economics* (CUP).
45 Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press 2002).
46 Hardin (n 44) 57.
47 These authors have further developed an insight first articulated by ordinary language philosophers such as JL Austin in the 1950s and 1960s, and then taken one step further by Quine. Ordinary language philosophers had pointed out hybrid cases in which the terms we use in ordinary language are not straightforwardly factual nor evaluative (e.g. 'dainty', 'dumpy', or 'cruel'). Quine's defence of belief holism – the idea that our beliefs constitute a web where every belief is tied to all others – allowed him to break the sharp analytic/synthetic distinction and the fact/value distinction with it. The upshot of Quine's approach is that there is simply no way to distinguish accurately between evaluative and descriptive claims. This idea deepens the significance of Austin's findings, for terms like 'dainty', 'dumpy', or 'cruel' would not be simply exceptional cases of terms with hybrid meaning. Since terms are holistically linked to both evaluative and factual components, then it should not be so difficult to find more cases in which the descriptive and the normative are constitutively entangled. Analyses of categories of race and gender in the social and biomedical sciences are important examples of this kind of entanglement. From this perspective, the response to the critics of just price theory would be, therefore, that economic analysis of prices should also be added to the list of hybrid categories such as race and gender.
48 Alasdair MacIntyre, 'Social Science Methodology as the Ideology of Bureaucratic Authority' in MJ Falco (ed), *Through the Looking Glass: Epistemology and the Conduct of Enquiry* (University

Press of America 1979); Alasdair MacIntyre, *The MacIntyre Reader* (Kelvin Knight ed, Notre Dame Press 1998) 57.

49 MacIntyre (n 48) 57.

50 Without prices there would be no money, but the opposite is not necessarily true. Without money there would be barter, and, arguably, prices.

51 This holds true for the kind, but not necessarily for each individual token. See John R Searle, *The Construction of Social Reality* (Penguin Books 1995) 32: 'a single dollar bill might fall from the printing presses into the cracks of the floor and never be used or thought of as money at all, but it would still be money. In such a case a particular token instance would be money, even though no one ever thought it was money or thought about it or used it at all. Similarly, there might be a counterfeit dollar bill in circulation even if no one ever knew that it was counterfeit, not even the counterfeiter. In such a case everyone who used that particular token would think it was money even though it was not in fact money. About particular tokens it is possible for people to be systematically mistaken'; Muhammad Ali Khalidi, 'Three Kinds of Social Kinds' (2015) 90 Philosophy and Phenomenological Research 96, 98.

52 Hayek believed that this fact alone makes it the case that justice is not applicable to market prices, because there is nobody that can be made responsible for them. See Hayek (n 14) 231ff; However, this is a clear non-sequitur. On the compatibility between Hayek's insights about market prices and substantive conceptions of justice, see especially Theodore A Burczak, *Socialism After Hayek* (The University of Michigan Press 2006); See also Fernando Atria, 'Socialismo Hayekiano' [2010] Estudios Públicos 49.

53 Christine Desan, 'Money as a Legal Institution' in David Fox and Wolfgang Ernst (eds), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* (OUP 2016); Andreas Rahmatian, 'Money as a Legally Enforceable Debt' (2018) 29 European Business Law Review 205.

54 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (OUP 2002).

55 When Elizabeth Anscombe introduced the distinction between brute facts and institutional facts, she used the price of potatoes in a contract sale to illustrate the point. GEM Anscombe, 'On Brute Facts' (1958) 18 Analysis 69, 69.

56 John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969) 33.

57 Searle (n 56) 35.

58 Searle (n 56) 35.

59 On institutional facts, see especially Anscombe (n 55) 69; See also Searle (n 56); Neil MacCormick, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Reidel 1986) 49–76; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 11–74.

60 Cf Joseph Heath, 'On the Very Idea of a Just Wage' (2018) 11 Erasmus Journal for Philosophy and Economics 1, 31: 'The market has one job to do, and it does that job very well. Producing "just" wages, however, is not that job.'

61 With slight modifications, the example is taken from Adrian Walsh and Tony Lynch, *The Morality of Money: An Exploration in Analytic Philosophy* (Palgrave Macmillan 2008) 135.

62 Walsh and Lynch (n 61) 135.

63 Walsh and Lynch (n 61) 135.

64 For this paragraph, see David Wiggins, 'Claims of Need', *Needs, Values, Truth* (3rd edn, OUP 1987) passim, but especially 5–9, 25–26; Scott Meikle, *Aristotle's Economic Thought* (OUP 1995) 119–21. See also Daryl Koehn and Barry Wilbratte, 'A Defense of a Thomistic Concept of the Just Price' (2012) 22 Business Ethics Quarterly 501, 506.

65 Wiggins (n 64) 5.

66 Wiggins (n 64) 6.

67 GEM Anscombe, 'Modern Moral Philosophy' (1958) 33 Philosophy 1, 7: 'To say that an organism needs that environment is not to say, e.g. that you want it to have that environment, but that it won't flourish unless it has it.'

68 Koehn and Wilbratte (n 64) 506.

69 Nick Sage has kindly suggested to me that one could formulate a version of the Collingwood-type argument that resists my claim that it really amounts to a particular conception of just price. For instance, one could claim (1) that there is an economic conception of 'price', according to which it is an amount of money an instrumentally rational self-interested agent can in fact obtain from another such agent, in return for doing or providing something, and (2) that 'justice' is a matter of moral standards concerning how members of a community ought to treat each other (standards that have nothing to do with instrumental rationality). On this

view, I might accept or even demand that we use considerations of 'justice' to determine certain background conditions or institutional arrangements, which establish the context in which, and constraints under which, two instrumentally rational parties can haggle out a 'price'. However, if we purport to set the 'price' itself by invoking considerations of 'justice' – and thus do not leave any room for instrumental haggling to operate – then we no longer have a 'price' (given the way I have previously defined 'price'). Here I would not be claiming that the just price is the price that stems from just background conditions of exchange, but merely advocating for just institutional arrangements. All the while maintaining that, only to the extent we allow instrumental haggling within those arrangements do we still have something I call a 'price'.

I would argue against the idea that the conception of price as the outcome of instrumental haggling does not involve a conception of the just price. That is, I would argue against the fact that it is possible to have a value-neutral account of prices. To the extent that one needs to provide a normative justification for a system in which two instrumentally rational parties can haggle out a price within those just arrangements – say, for instance, that one believes that there is value in having such a system of instrumental haggling because it promotes a formally egalitarian vision of justice (formally egalitarian because it is not concerned with substantive equality between the parties, but also because it treats all of our preferences equally regardless of their content) – and that one conceptualises prices as the economic outcome of such a system, then I would claim that one is also providing a theory of the just price. Why? Because then one would identify something as 'the price' of a certain good only to the extent that it reflects the values embedded in the institution (in this case, the formally egalitarian values of allowing instrumental haggling).

Now, one might want to resist the claim that one *needs* to provide a normative justification for a system of instrumental haggling. By merely describing a certain institutional arrangement – so the objection would go – I'm not advocating for or defending it. In fact, I might be completely indifferent to the existence of a price system. But given that we have such a system of instrumental haggling, then that's what prices look like.

I concede that without providing a normative justification for prices one is not committed to any version of the just price. However, it does not follow from this that the idea of a just price is nonsense. Although you might not want to provide a normative justification for prices, that does not mean that such a theory is not possible, and that's the claim that I defend in the paper. I am grateful to Nick Sage for pushing me on this point.

70 Cf Claudio Michelon, 'Virtuous Circularity: Positive Law and Particular Justice' (2014) 27 Ratio Juris 271; Claudio Michelon, 'What Has Private Law Ever Done for Justice?' (2018) 22 Edinburgh Law Review 329.

71 In a similar vein, Andrew Lang, 'Market Anti-Naturalisms' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (CUP 2017) 326: 'To the extent that the market values of assets are a function of the legal order constituting the market . . . the question whether the market value is the "right" one . . . becomes indistinguishable from the question of whether the legal order on which the market rests is normatively justifiable.'

72 D Bañez, *Decisiones de Iustitia et Iure, tomus quartus* (1654) II-II 77 1 272: 'Nullum est pretium iustum lege naturali, sed solum lege positiva'.

73 Hobbes (n 10) Part I, Chapter XV [2] [129–131] 89.

74 Hobbes (n 10) Part I, Chapter XV [14] [74–76] 94.

75 See PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) passim; Gordley (n 19) 161.

76 Samuel Williston, 'Freedom of Contract' (1921) 6 Cornell Law Review 365, 366; See also Gordley (n 19) 161 ff.

77 On this, see James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1645.

78 Hart makes a similar point to explain the recasting of different legal rules in order to make them fit with the 'command' theory of law. HLA Hart, *The Concept of Law* (3rd edn, OUP 2012): 'the uniformity imposed on the rules by this transformation of them conceals the way in which the rules operate, and the manner in which the players use them in guiding purposive activities, and so obscures the function in the co-operative, though competitive, social enterprise which is the game.'

79 Wertheimer (n 8) 250.

80 Wertheimer (n 8) 250.

81 Wertheimer (n 8) 250.

82 Wertheimer (n 8) 250.

83 Wertheimer (n 8) 250.

84 I am grateful to Nick Sage for pressing me on this point.
85 Hayek (n 11) 237.
86 Hayek (n 11) 237.
87 Collingwood (n 6) 174; Hayek (n 7) 442.
88 Collingwood (n 6) 174.
89 Mises (n 5) 203–204.
90 Hayek (n 11) 238.
91 Viner (n 4) 12. The phrase is directed to Scholastic economic thought as a whole.
92 Raymond de Roover, 'The Concept of the Just Price: Theory and Economic Policy' (1958) 18 The Journal of Economic History 418, 418. The author thus characterises the view of modern economists regarding the doctrine of the just price.

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4

# Theories of assent and consent in contract interpretation

Ohad Somech*

## 1. Introduction

Consent has unique normative significance. At times described as 'moral magic', consent can transform illicit acts into morally (and legally) permissible ones, turning assault into medical treatment and trespass into a social visit.[1] In contracts, consent plays two major roles. One is as a prerequisite for the formation of legally binding contract, with legal inquiry pertaining to consent's validity – whether it was informed, voluntary and given by a mentally capable person.[2]

The second role of consent, and the focus of this chapter, is in the interpretation and supplementation of contracts. Interpretation often hinges on the parties' consent, with courts seeking to enforce the interpretation intended by them.[3] Grounding interpretation on intentions has multiple justifications. For corrective justice, it safeguards against contractual obligations exceeding those voluntarily undertaken by the parties. Legal economists view consent as a mechanism to ensure the transaction's efficiency, suggesting that courts should enforce parties' intended terms because the latter are better positioned to design the contractual arrangement to accommodate their circumstances and needs. Last, upholding the parties' intentions is conducive to personal autonomy, as it provides parties with the ability to self-determine how to advance their chosen project.[4]

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Though the two may be intertwined, the interpretation of contracts usually comes after the question of formation has been settled, and is directed at the content of the parties' intentions (that is, what they consent to) rather than its validity. Accordingly, scholarship pertaining to interpretation debates the best method to reveal the parties' intention and whether the parties should be allowed to choose the interpretive style the courts would later apply.[5]

In this chapter, I discuss contract interpretation through a different prism, one that can be traced back to Thomas Aquinas's distinction between consent (or choice) and assent. The distinction, I argue, allows for the categorisation of theories of interpretation as either theories of assent or of consent, fleshes out the theorists' views on how parties form their intentions, and challenges the reliance which they place on the parties' intentions when interpreting agreements.

Both assent and consent may be valid ways to form a contract. As section 3 explains, however, the two differ in how a person comes to make their choice. Assent is a response to the existence of a dominant alternative, one that is equal or superior to all other alternatives. Consent, conversely, is a response to the absence of a dominant alternative. When we consent, Aquinas suggests, 'our deliberating (reasoning) is brought to an end only by will, by the act of choosing'.[6] Thus, for a person to consent, they must be offered alternatives that cannot be easily compared, meaning they cannot place the benefits of each alternative on a single scale (such as their money value), determine their absolute value and choose the most valuable one.

Consider a person contemplating two employment offers which differ only in their hourly pay and the number of paid vacation days. A person would *assent* to an offer if it includes both a higher pay and more vacation days. They would also assent to an offer if they can easily assign a (subjective) money value to each vacation day. For instance, if they consider every vacation day to equal $1 in hourly pay, then an offer of $20 an hour and ten vacation days would equal an offer of $30 an hour and no vacation days, and both would dominate an offer of $10 an hour and 15 vacation days, despite the latter offering more vacation days than either alternative. For a person to consent, then, it must be that hourly pay and vacation days are non-commensurable and that the different alternatives offer more of one benefit and less of the other, requiring choice based on a judgement that goes beyond deliberative reasoning.

The distinction between assent and consent sheds new light on the ongoing debate surrounding contract interpretation. In particular, while most theories place a premium on honouring the parties' intentions, they are, I argue, divided on whether parties' intent comes in the form of their

consent or assent to the proposed interpretation – that is, on whether interpretive disputes have a dominant solution.

Assent theories of interpretation, as I call them, suggest that any (or almost any) interpretive dispute yields an interpretative solution that, from the theory's internal perspective, dominates all others. An approach that believes in the existence of a dominant interpretation is a theory of assent if it also claims that the parties intended to be bound by it.[7] Consent theories of interpretation also view honouring the parties' intentions as the primary purpose of the interpretive process. But, unlike theories of assent, they accept that in some disputes no dominant interpretation exists.

Applying the assent/consent distinction to contemporary theories has important implications. I focus on two of these here, one for each type of theory. For theories of assent, the distinction reveals the tension between their approach to how parties form their intentions and their freedom of contract. It further suggests a particular conceptualisation of how contracts emerge.

In contemporary contract law, parties need to agree on relatively little to create a valid contract. To meet the consideration requirement, parties need only share intentions on the *type* of consideration to be exchanged (such as labour for money). Parties often share intentions on consideration type before concluding the process of offer and acceptance. This implies the emergence of a non-binding but complete agreement. The agreement is non-binding because the parties never offered (or accepted) its terms. It is complete because, were the parties to complete the process of offer and acceptance, they would usually succeed in forming a binding contract for which – theories of assent suggest – every interpretive question would have a dominant solution which the parties intended and to which they have assented.

The hypothetical agreement is not only complete but also ideal. As section 3 explains, the dominant solution to interpretive questions is also the normatively desirable one (for example, efficient or reasonable) and the hypothetical agreement that emerges is composed (almost) entirely of ideal terms. For theories of assent, then, contract begins as a non-binding, but complete and ideal agreement. Parties, however, usually expressly agree on more than the *type* of consideration to be exchanged. When they do, their express terms might deviate from those of the ideal agreement. This in itself does not pose a challenge to theories of assent, as they would enforce the (explicitly) agreed upon terms.

The difficulty arises when, as is often the case, parties expressly agree on some terms but leave other (related) terms vague or unaddressed. Here, theories of assent may follow one of two avenues. The first is to treat

each term independently – that is, to insert the terms of the ideal agreement whenever the parties did not expressly agree otherwise. The other is to consider the agreement as a whole and restore the balance achieved in the ideal agreement by adjusting the ideal terms to the changes expressly made by the parties. Both solutions are problematic. Treating each term separately puts into question what made the terms ideal in the first place, undermining the claim that a dominant solution ever existed, and suggesting that the theory is actually one of consent. Considering the agreement as a whole and restoring the contractual ideal undermines the parties' freedom of contract by frustrating their attempts to deviate from it. That is, if it reflects the parties' intentions, it does so by severely restricting what these intentions may be.

The assent/consent distinction poses a different challenge to theories of consent. Like theories of assent, theories of consent begin the interpretive process by seeking a dominant interpretation. But, because they admit such an interpretation does not necessarily exist, theories of consent must formulate ways to resolve disputes when it does not. The challenge, then, comes from the nature of consent as a choice based on non-deliberative reasoning. This makes it harder, if not impossible, for adjudicators to determine the parties' intentions when resolving interpretive disputes.

Where courts are unable to determine the content of the parties' intentions they cannot rely on them to interpret their agreement. Consent theorists' attempts to meet this challenge explain much of their interpretive approach. In particular, theories of consent can avail themselves of one (or more) of four possible responses: *first*, to refuse enforcement on indefiniteness grounds; *second*, to enforce obligations based on external (non-contractual) values; *third* to apply a solution based on contractual values other than honouring the parties' intentions; and *fourth* to design contract rules that reduce the number of instances in which no dominant interpretation exist.

In section 4 I argue that the first three solutions apply principles other than their intentions to interpret the parties' agreement. The fourth solution seeks to identify the parties' intentions via the proxy of their chosen contract type. This maintains some allegiance to their intentions, but only when and to the extent the proxy successfully serves its purpose.

The reminder of this chapter is structured as follows: section 2 offers an overview of the normative significance of assent and consent in contract theory; section 3 discusses the assent/consent distinction and applies it to the theories discussed in section 2; section 4 sets forth the two implications of the distinction; and section 5 concludes by offering some thoughts on the future of contract interpretation theory.

## 2. Three theories of contract interpretation

Before turning to the main theme of this chapter – the assent/consent distinction – a brief overview of the theories to be discussed is in order. In this chapter, I focus on three distinct theories: *first*, a corrective justice (or public justification) theory recently offered by Peter Benson; *second*, the economic analysis of contracts as articulated by Richard Posner and by Allan Schwartz and Robert Scott; and *third*, Hanoch Dagan and Michael Heller's choice theory of contract. Because the purpose of this section is to allow for the categorisation of the theories based on their internal perspective, I seek to present each theory in its best light and in its own terms, without defending (or contesting) the validity of the claims.[8]

### 2.1 Corrective justice (public justification)

The corrective justice (or public justification) theory of contracts, recently presented by Peter Benson, offers a justification of contract law 'that is acceptable as such to everyone who participates in or can be affected by the system of contract law'.[9] Two tenets of the theory are relevant to our discussion. First, that once interpreted, enforceable agreements have no gaps. Second, that the parties can only be liable for what they did. '[A] public basis of justification', Benson argues, 'begins with the organizing principle of no liability for nonfeasance', and liability cannot be imposed 'to achieve a favoured end, whether it be the parties' joint welfare, general welfare, efficiency, distributive fairness, or something else.' Instead, 'the public justification roots the allocation of risks in the parties' actual consent', which 'may be express or implied'.[10]

Taken together, the two tenets suggest that, at the moment of formation, the parties have – explicitly or implicitly, but actually – agreed to the allocation of all contractual rights and obligations for every (or almost every) possible contingency.[11] This, Brian Langille and Arthur Ripstein recognise, means that much of what the parties intended and agreed upon 'went without saying', with the parties themselves often unaware of many of the details. How, one might ask, could that be? Langille and Ripstein's answer is that communication is grounded in its objective (public) meaning and is independent of the parties' private intentions. Because it is the public meaning that governs the parties' agreement, they need not be consciously aware of the contract's terms to have intended them.[12]

To keep with the principle of no liability for nonfeasance, then, it is necessary to link the public meaning of the agreement with the parties'

(actual) intentions. Meeting this challenge Benson turns to the idea of reasonableness:

> Both parties, as reasonable persons, *must* accept the fair and reasonable meaning of their interaction as a transaction between two. At the center, therefore, is the idea of the reasonable. Next, the law can coherently construe the fair and reasonable meaning of their interaction as involving a form of transactional rightful acquisition between the parties . . . All of these aspects are readily understandable by both parties and can be imputed to them as part of their reasonable intention without requiring that they must want or intend to produce contractual effects.[13]

Benson suggests that, by entering into the contractual relation, the parties intend and are bound by the reasonable meaning of their particular transaction. The reasonable, Benson explains, is a normative concept that 'embodies an idea of reciprocity' and requires viewing the parties as equal and independent people willing 'to limit the pursuit of their interests as required by fair principles'.[14] Treating the parties as equal and independent entities implies that contract law should be oblivious to the 'parties' wishes, needs, or purposes, whether individual or shared',[15] and instead focus solely on the actual transaction as 'the first subject of contractual interpretation and implication . . . [t]he irreducibly basic unit of analysis'.[16]

The appeal to the reasonable, Benson argues, does not undermine the significance of the parties' intention. On the contrary, the parties 'can be bound only by what they have done; and what they have done is, and must be, the basis of any further implication or inference that has these juridical consequences'. Thus, the 'whole law of implication' rests on the 'identity between presumed intent and the reasonable'. Presumed intentions, Benson further explains, are not probable or hypothetical intentions. 'Nor is presumed intent a second-best stand-in for or approximation of the parties' unknown subjective consents . . . Rather, presumed intent refers to what the parties to a given contract *must* reasonably have intended'.[17]

To sum up, entering into the contractual framework the parties intend to and are bound by the reasonable meaning of the (express and implied) terms of their agreement, that together form a complete contract. The reasonable meaning of the parties' agreement, in turn, reflects their (shared) intentions and is derived from an analysis of the transaction alone, without reference to their purposes, desires or wishes, or to 'external' values such as efficiency or distributive justice.

## 2.2 Economic analysis

For legal economists, contract law serves two related functions: *first*, it provides an enforcement mechanism that expands the possibilities of trade; and *second*, it reduces transaction costs and increases contractual surplus.[18] The first goal pertains to doctrines that police the bargaining process, such as duress, mistake and unconscionability.

Contract interpretation is usually discussed in the context of the second goal.[19] To achieve this goal, economists argue, contract interpretation should, whenever possible, honour the parties' intentions, 'because it would be rare that a judge or jury had a better sense of what would be an efficient transaction than the parties themselves had'. The agreement *actually intended* by the parties is therefore assumed to be efficient or, at the very least, as more likely to be efficient than the one proposed by courts or legislators.[20]

Economists recognise that the intentions of the parties are not always easily ascertained. The text itself may be vague or ambiguous and the parties might not have addressed the relevant contingency, leaving a gap in the contract. In these instances, courts need to go beyond the explicitly (and clearly) expressed intentions of the parties. On this point economists are divided. Some suggest that, when interpreting and supplementing contracts, courts should apply the parties' first order intentions – that is, the parties' intended resolution of the particular dispute. Others argue that courts should follow the parties' second order intentions and apply the interpretive *mechanism* chosen by the parties, irrespective of whether the outcome in the particular case is or appears to be (in)efficient.

Richard Posner, advocating for the first approach, suggests that '[g]ap filling and disambiguating are both . . . efforts to determine how the parties would have resolved the issue that has arisen had they foreseen it when they negotiated their contract'. Courts, Posner claims, have five ways to resolve interpretive disputes. The first three are: '(1) to determine what the parties really meant . . . (2) to determine what resolution the parties would have agreed to . . . [and] (3) [to p]ick the economically efficient solution on the assumption that that is probably what the parties intended'. The remaining two solutions are applying a legal tie-breaking rule and to '[c]ombine [solutions] 1 and 4 by pretending that a written contract always embodies the complete agreement of the parties'. Apart from solution 4, which Posner largely dismisses, all solutions 'tend to merge in practice'.[21]

Deciding between the different solutions, Posner, like most other legal economists, argues that courts should not override the parties'

intentions. But, 'when the parties' intentions are not readily inferable', courts should 'use commercial or economic common sense to figure out how, in all likelihood, the parties would have provided for the contingency that has arisen had they foreseen it.' In particular, courts should apply the efficient interpretation of the disputed term, because 'even if for philosophical, political, or other reasons the goal of contract law is taken to be the enforcement of the parties' intended transaction . . . the norm of economic efficiency provides a guide to deciding what transaction was, in all likelihood, intended'.[22]

Posner is optimistic about courts' ability to determine the efficient solution, suggesting that if 'judges have some minimum competence in understanding commercial dealings' they should be able to determine and apply the efficient solution.[23] Others are less optimistic.[24] Instead, and at least when it comes to sophisticated commercial entities,[25] the rule of interpretation should mimic the parties' majoritarian preference and allow parties to opt-out by expressly stating their choice.[26] Important for our discussion is that, following Schwartz and Scott, courts should not aspire to find the efficient solution to the interpretive problem and instead apply the interpretive mechanism chosen by the parties regardless of its (apparent) efficiency in resolving the concrete problem at hand.

## 2.3 Choice theory

The third and last theory I will discuss is Hanoch Dagan and Michael Heller's choice theory of contracts.[27] For choice theory, the ultimate goal of contract law is to foster individuals' self-determination (or personal autonomy).[28] Thus, while parties usually have more immediate goals in mind – namely, enhancing their personal wealth (*utility*) and forming interpersonal relations (*community*) – contract *law* should support their endeavours only if and to the extent they advance personal autonomy.[29]

For 'autonomy to be meaningful', Dagan and Heller suggest, 'there must be (other things being equal) "more valuable options than can be chosen, and they must be significantly different," so that choices involve "tradeoffs, which require relinquishing one good for the sake of another"'. Thus, a primary goal of contract law is to provide individuals with an 'adequate availability of choice among [contract] types', each offering a different mixture of the immediate goals of contracting.[30] A commitment to self-determination, Dagan and Heller argue, also yields 'three guiding principles: (1) [l]aw should *proactively facilitate* contracts[;] (2) [l]aw should take seriously *the autonomy of the parties' future selves*[; and]

(3) [r]*elational justice* must serve as the floor of legitimate contractual interactions eligible for law's support'.[31]

Choice theory and subsequent and related writings have yet to offer a comprehensive theory of interpretation or detail its relation to the parties' intention.[32] In this section, I build on the work already done to suggest what such a relation might look like and show that a contract law dedicated to self-determination leads to seemingly contradictory conclusions. In section 4, I argue that attempts to meet this contradiction explain much of consent theories' approach to contract interpretation. For now, I focus on describing the puzzle and, in the process, offering a preliminary outlook of choice theory's interpretive approach, which will require a somewhat lengthier discussion of the theory.

To begin with, choice theory exhibits a commitment to parties' intention:

> [B]ecause autonomy is emphatically 'incompatible with any vision of morality being thrust down people's throats,' it must stop there and 'leave individuals free to make their lives what they will.' This premise implies that contract is – and should remain – a voluntary obligation. People may not be forcibly pushed to seek contract's potential utility or community goods. ... It means, for example, that party sovereignty is not simply an instrument for securing the efficient allocation of resources in society.[33]

From this perspective and for enforceable agreements, it seems that contract law should seek to solely determine and enforce the parties' intentions. But choice theory's first and third guiding principles, proactive facilitation and relational justice, suggest otherwise. Proactive facilitation means that, whenever the parties have not expressly agreed otherwise, contract law should (and does) 'go . . . out of its way to facilitate transactions by offering defaults that can fill gaps, even regarding crucial aspects of a transaction, such as price'.[34]

Proactive facilitation alone does not yet say how vague, ambiguous, or incomplete contracts are to be interpreted (or supplemented). In principle, choice theory could have opted for a highly contextualist approach that seeks to determine the parties' actual intentions. Instead, choice theory follows two different interpretive strategies. The first is to treat interpretation and supplementation as an extension of contract type. In particular, Dagan and Heller suggest that '[p]ositioning gap-filling as a core function of contract law quickly necessitates a significant degree of variation among contract types'.[35] Thus, for example, 'the parol

evidence rule should be relaxed in more interpersonal contexts, while it should be imposed strictly in high-value corporate transactions'.[36]

A second interpretive strategy, offered by Dagan and Avihai Dorfman, looks at relational justice as the source of contract interpretation and supplementation. Relational justice, Dagan and Dorfman suggest, serves two functions: 'a prerequisite of the legitimate employment of contract law and an aspirational idea'. The first function of relational justice – creating 'the floor of relational justice' – pertains to doctrines such as duress and unconscionability, and is therefore less relevant to our discussion.[37]

Relational justice's aspirational function directly applies to contract interpretation and supplementation and prescribes the creation of *normative defaults* that 'go beyond the floor of relational justice'.[38] The parties, Dagan and Dorfman suggest, may opt out of normative defaults without it being 'tantamount to an authorization to disregard self-determination', but 'such repudiation [of normative defaults] would not be . . . lightly concluded'.[39]

Dagan and Dorfman do suggest that 'when parties enter the *contractual domain*, they are presumed to accept [normative default's] jurisdiction'.[40] Ultimately, however, Dagan and Dorfman contend that: 'Normative defaults do not depend on their responsiveness to majoritarian preferences, but rather derive directly from the normative commitments indigenous to liberal contract'.[41]

Normative defaults reflect a concern to self-determination, but are not about – and may well conflict with – a commitment to parties' intentions and sovereignty. Thus, the puzzle is not that choice theory is incoherent vis-à-vis self-determination, but that it offers a (seemingly) contradictory conclusion to the extent that a contract law dedicated to advancing parties' self-determination should honour the parties' intentions when interpreting and supplementing their agreement.

Dagan and Dorfman seem aware of this tension when they tentatively accept Seana Shiffrin's claim that the expectations posed by relational justice in general and normative defaults in particular 'may seem out of place for relationships of reciprocal respect for independence – it may be, on this view, even "morally distasteful."'[42] But, they argue, such rules follow 'quite naturally if the parties' relationships are to be governed by relational justice'.[43]

Dagan and Dorfman's argument pertains to relational justice as a mandatory floor, but not to its aspirational function. In particular, if opting-out of normative defaults is not an 'authorization to disregard self-determination', then normative defaults are not necessary for contract to be legitimate even from the perspective of relational justice. Why, then, should normative default – from which the parties can opt out

'only if they use "apt and certain words"'[44] – be able to overrule the parties' legitimate intentions and undermine their (acceptable) choice of how to advance their life-story?

To illustrate, consider Dagan and Dorfman's discussion of good-faith. From relational justice's view, they argue, the requirements of good faith 'do not necessarily follow only from the particular parties' intentions'.[45] Instead, they claim '[t]he doctrine's underpinnings are normative, which explains [courts'] references to "ethical norms" or to "standards of decency, fairness, and reasonableness,"' as well as why (some) courts '[i]nsist that such an opt-out [of the normative default rule of good faith] requires explicit language and that the rigidity of this requirement depends upon the nature of the contractual power at issue.'[46] The puzzle, then, is in justifying the imposition of ethical norms, irrespective of the parties' intentions and with limited ability to opt-out, despite the fact that the parties' intended agreement is legitimate.[47] Stated differently, if normative defaults are desirable but unnecessary for the agreement's legitimacy, then fostering *self*-determination seems to imply honouring the parties' intentions and rejecting attempts to overrule (or curtail) their intention as inserting the will of another and disregarding the parties' capacities and powers of as autonomous agents.[48] In section 4, I show the implications of this puzzle on the approach of theories of consent to contract interpretation.

## 3. Assent and consent and theories of interpretation

### 3.1 The assent/consent distinction

#### *3.1.1 Assent and consent in the works of Aquinas*

It is now time to turn to the assent/consent distinction. The distinction offered here loosely follows Aquinas's discussion on reason, will, deliberation, and choice,[49] and though one need not adopt Aquinas's view in its entirety, it is helpful to understand that Aquinas's goal is to offer 'an explanatory description . . . of the way in which reasons *motivate*' behaviour, without asserting that 'one acts only for reasons, or that one can act without the support of one's emotions'.[50]

For Aquinas, reason motivates by informing one of the benefits of each proposed course of action. To illustrate, consider the following example offered by John Finnis:

> Here is a group of eight students, occupying a corridor of eight rooms and a small kitchen in the college hostel. They are deciding whether or not to establish for themselves, by agreement, a curfew

> on cooking and kitchen conversation after 9.00 p.m. The walls are thin, the doors are even thinner, voices and kitchen noises travel, some of the students find it hard to study at nights with these distractions.[51]

The students, Finnis adds, all want to succeed in their education and gain the benefits of employment, understand the desirability of getting along with others and enjoy company and night-time talking. How, then, is each student to choose the optimal arrangement? Aquinas's answer begins with reason. The students, he suggests, need not choose among all proposals that may come to one's mind. Instead, choice is required only 'between proposals that interest one'.[52]

Choice, then, starts with a process of deliberation that engages one's reason. In the example, this process of deliberation might leave the students with three *real* alternatives: '(i) a 9.00 p.m. curfew; (ii) a 10.00 p.m. curfew; and (iii) leave things *laissez faire*'. These proposals are of interest to the students because each 'has its attractions . . . none has all the merits of the others . . . [and] they are mutually incompatible'. Conversely, a proposal to impose a 4 a.m. curfew would likely not be of interest to the students and would be eliminated by reason.[53]

Understanding the benefits of each proposal and discarding of proposals dominated by one (or more) available alternatives is the purview of reason and its way to motivate behaviour. If, following this deliberative process, only one proposal remains of interest – that is, when reason determines that a proposal is dominant – one assents to that proposal. Assent, then, is the response to the judgement of reason that a particular proposal offers all the benefits of other proposals and more.

As just described, assent bears some resemblance to the idea of preference maximisation. The two, however, may differ substantially. Recall that Aquinas's discussion pertains to the role of reason in motivating human decision making. Accordingly, whether assent is merely a maximisation strategy depends on whether 'preferences' offer a satisfactory description of human motivation – for example, if one considers the term 'preference' to capture motivating factors such as habits, whims, social norms and roles, aspirations, moral duties and emotions.[54] If it does not, then assent and preference maximising describe different decision-making strategies. Consider a person only willing to accept offers that conform to her (actual or perceived) moral duties and social roles, namely: reasonable offers. Confronted with two alternatives, one preference maximising but unreasonable one and the other reasonable but less favourable, such a person will *assent* to the latter, as it is the only alternative that can be 'of

interest' to them and despite the fact that it does not maximise their preferences.

Assent, then, is the outcome of a deliberative process of elimination. Consent, on the other hand, 'is more than a matter of forming judgement', and is required when no 'one proposal is "dominant"'. Here, 'our deliberating (reasoning) is brought to an end only by will, by the act of choosing'. Thus, while reason still has a role, consent goes beyond 'the intelligible benefits' of the various proposals, and is a 'judgement of preferences . . . the very choosing'.[55] In the hostel example, then, the students are faced with a need to consent to one of the proposals and, though all students share the same purposes, they must each form their own judgement on preferences to bring the deliberation to an end.

What differentiates assent and consent is that only consent requires a judgement that goes beyond reason's reflective process, engaging one's cognitive, emotional and somatic abilities, and requires one to form a judgement which is 'the very choosing'. In contemporary terms, therefore the prerequisite of consent is the existence of proposals offering a plurality of non-commensurable benefits, with none offering all the benefits – in type or quantity – of the others.[56] Faced with these alternatives, consent – a judgement that goes beyond the reflective process – is required. This does not imply that consent is mere arbitrary judgement. Rather, consent may be better understood as an intuitive and emotion-laden decision-making process, which lacks the explainability that characterises deliberative reasoning.

### *3.1.2 Assent and consent in contract interpretation*

With the consent/assent distinction at hand, we can now apply it to the contractual context. Common to assent and consent theories of interpretation is an affinity to the parties' intentions. Thus, when the parties unambiguously express their intentions, both approaches would (usually) honour them. Where the two approaches diverge is when the express terms are vague or ambiguous or when the agreement is silent on the matter at hand.

Theories of assent, as the name suggests, maintain three interrelated propositions: *first*, that (almost) any interpretive problem has a dominant solution – an interpretation that is superior to all others; *second,* that, by definition, the parties' assent to the dominant solution; and *third*, that holding the parties to the dominant interpretation is holding them to their intended agreement.

The three propositions imply that, because parties *necessarily* assent to the dominant proposal, it is unnecessary for them to be aware of it or,

for that matter, of the problem it resolves. They further suggest a belief in the courts' competence to determine the dominant solution, as its mere theoretical existence would be of no help to resolve actual disputes. This does not mean assent theorists deny that reasonable people may disagree or that courts may err, as long as courts are able to determine and apply the dominant solution in the vast majority of cases.

Lastly, theories of assent can also accept that, in some instances, no dominant solution exists. Consider, for example, the well-known *Raffles v Wichelhaus* in which each party argued that the agreement referred to a different ship named *Peerless*.[57] Here, theories of assent can concede that none of the interpretations is dominant. But, not only is *Raffles* an outlier, its outcome was a refusal to enforce the agreement. Thus, theories of assent can still maintain that a dominant interpretive solution can be found for any problem arising out of an enforceable contract, and that when (and because) no dominant interpretation exists the legal conclusion is (and should be) that the parties failed to form a binding contract.

Theories of consent also begin the interpretive process by seeking a dominant solution to the problem. That is, they accept that some things may go without saying and suggest that, when this is the case, courts should honour the parties' intentions. But, unlike theories of assent, theories of consent deny that this is always the case and instead claim that, in a significant portion of disputes, more than one interpretive solution may be 'of interest' to the parties.

The assent–consent distinction categorises theories of interpretation based on their answer to this very question of whether parties consent or assent to agreements. Still, it may be important to show that consent is not foreign to contracting practices, even when considering commercial agreements among sophisticated parties. Sophisticated parties may be assumed to reduce all costs and benefits to their money value and *assent* to the alternative that maximises their (expected) profits. This view was challenged by the literature on relational contracts, suggesting that such parties advance a host of other goals – including, fostering trust and cooperation and enhancing their reputation and status within the relevant commercial society – which are only loosely linked to profit maximising.[58] If the benefits of trust, reputation, and cooperation cannot be easily reduced to their money value, then even commercial parties must trade-off not easily commensurable costs and benefits, and will sometimes *consent* to an agreement and its terms.

The role of consent may be clearer in agreements involving individuals, such as consumer, employment and marriage contracts. For example, in the employment context, prospective employees may need to

trade-off benefits such as: job title and description, wage, benefits, flexible hours, and remote work and organisation type and culture. At least some of these, it seems plausible, are non-commensurable benefits requiring individuals' consent (as opposed to assent) to the agreement.

When the parties consent to agreements, their unexpressed (or vague) intentions are of no avail to the court, because to determine these intentions courts need to reconstruct the parties' non-deliberative judgement – that is, their intuitive, emotional and somatic response to the various proposals. Often, this task cannot be accomplished by the courts or, for that matter, by any other third party.[59] Indeed, because consent goes beyond deliberative reasoning, the parties themselves may struggle to articulate their rationale(s) for choosing one alternative over the others. For theories of consent, then, the problem is not that reasonable people may disagree or that courts may err, but that, when parties' consent to an agreement and no direct evidence of their intentions exists, there is little to rely on in determining their intent.

## 3.2 The distinction applied

We can now apply the assent/consent distinction to the theories discussed in section 2. In what follows, I argue that both Benson's corrective justice approaches and Posner's economic analysis are best understood as theories of assent. Choice theory, on the other hand, is a theory of consent, while for reasons explained below Schwartz and Scott's analysis cannot be precisely fitted into either account and can be understood as one or the other.

### *3.2.1 Corrective justice*

Theories of assent view the interpretation of contracts as yielding a single solution that is 'of interest' to the parties – a dominant interpretation to which the parties (necessarily) assent. For Benson, as we shall see, this dominant solution is the reasonable interpretation of the agreement.

Recall that, following Benson: (i) contracts have no gaps; (ii) parties can only be liable for what they have done; and (iii) parties are bound to the reasonable interpretation of their contract. The two latter principles mean that, within the contractual framework, the parties *must* intend the reasonable interpretation of their agreement and that, in fact, there is an 'identity between [the parties'] presumed intent and the reasonable'.[60] Put in Aquinas's terms, this implies that the reasonable interpretation is the only interpretation that is (or can be) 'of interest' to the parties. Otherwise – that is, if the parties could choose among different

(non-dominated) alternatives with the reasonable being only one of them – the claim of identity could not be sustained.

The second and third principles suggest that the parties assent to the reasonable interpretation of the contract. The first principle means that a reasonable interpretation is (almost) always available. For Benson, a 'contract would be incomplete only if it turns out that this reasonable transactional framework, though fully worked through, cannot settle issues that arise in transactions and that must be addressed if the parties' rights and obligations are to be adequately specified'.[61] But, because contracts have no gaps, the reasonable *is* able to settle all (or almost all) issues required to specify the parties' rights and obligations. That is, a reasonable interpretive solution always exists and is applicable by courts.

One last conclusion that can be drawn is that the reasonable interpretation is also the normatively desirable one. In its transactional dimension, Benson argues, the reasonable is 'the fundamental normative nature of contractual rights and obligations', which 'bound [the parties] only by what they have done' and 'do not raise a question of legitimacy which . . . seems unavoidable for the default rule paradigm'.[62] Indeed, 'contract law', Benson claims, 'supposes a division of labor between, on the one hand, a definite reasonable framework . . . and, on the other hand, the parties' substantive choices of what they want to give and receive via transacting'.[63] Thus, while the parties may use the express terms of the contract to advance other values, such as efficiency, the reasonable is the only value that contract *law* can and should advance.

But the reasonable is not only the normative ideal for contract law. Because reasonableness captures the parties' intent it also serves as an ideal to the parties themselves. Indeed, it is the only value the parties can (and should) pursue outside the express terms of the agreement. The reasonable agreement therefore *is* the contractual ideal, which again explains why Benson's is a theory of assent and why contract law is unconcerned with the parties' purposes or desires.

### *3.2.2 Economic analysis*

Posner's economic analysis of contract interpretation, we saw, assumes both that the parties' actual agreement *is* efficient, and that the parties *intend to form* an efficient agreement.[64] Thus, as long as there is a single efficient solution to the interpretive issue, such solution is also the dominant solution and the one that the parties have intend.[65]

Another way to reach the same conclusion is to understand Posner's argument as suggesting that all desires, purposes and ends advanced via agreements are commensurable.[66] If parties can place the different

contractual benefits on a single scale (such as their money value), reason would eliminate all but the proposal that one should maximise one's profits, and would do so regardless of the particular mixture of contractual benefits the proposal entails.[67] Thus, a dominant solution can be expected in most, if not all, interpretive disputes.

To complete the analysis, Posner suggests courts are (usually) capable of determining and applying the efficient interpretive solution. Thus, the efficient (dominant) solution of interpretive disputes is available for courts to determine and apply and allows for the resolution of contractual disputes. Last, Posner views the efficient interpretive solution to not only be the intended interpretation but also, and perhaps primarily, the normatively desirable one. Thus, like the reasonable agreement is for Benson, the efficient contract is the ideal contract from Posner's perspective.[68]

Schwartz and Scott share Posner's assumption that the parties' actual agreement is and is intended to be efficient. However, they differ on two issues of importance to our discussion: *first*, they limit their analysis to commercial agreements between sophisticated entities; and *second,* they are less optimistic of courts' competence. Thus, they argue that courts should limit themselves to applying the interpretive *method* chosen by the parties or, if they made no such choice, the method preferred by most parties (the majoritarian default).

Schwartz and Scott's emphasis on institutional competence makes it difficult to directly apply the assent–consent distinction. In what follows, I offer two readings of their argument, each conforming to one of the categories, but only in the second order – that is, Schwartz and Scott's approach can be understood as a (second order) theory of assent or a (second order) theory of consent.

The first and straightforward reading of Schwartz and Scott suggests they are primarily concerned with efficiency not intentions. This suggests parties seek to maximise their surplus through the substantive contractual arrangement, as well as their choice of how their contract will be interpreted. Accordingly, Schwartz and Scott can be seen as advocating a theory of assent in the second order. That is, parties assent not to the efficient interpretation of the disputed term, but to the efficient (ideal) style of interpretation and, by extension, to whatever outcomes such an interpretive style produces, whether efficient or not.

But Schwartz and Scott might also be read as dealing primarily with party sovereignty.[69] From this perspective, it is only sophisticated parties who share the single concern of efficiency.[70] Accordingly, if the same is not (necessarily) true in other contract types, and if – contra Schwartz and Scott – contract law is also the law of agreements other than commercial

agreements,[71] then parties to such contracts *consent* to their chosen interpretive style. When parties' preferences include goals other than efficiency, the interpretive styles they may choose from may include a plurality of non-commensurable benefits. For example, a textualist style of interpretation may promote efficiency and a contextualist style may have the benefit of facilitating trust and cooperation. If these benefits are non-commensurable and similar in magnitude, parties would need to *consent* to one of these alternatives. And, if they did not unambiguously express their choice, the nature of consent suggests that courts would find it difficult to determine which of the two alternatives the parties – or most similar parties in their position – would have chosen.

This alternative reading suggests that, by dividing contracts into types, Schwartz and Scott identify certain contract type(s), such as commercial agreements, in which a dominant interpretive style exist and argue that courts should apply it. But this allows for the possibility that, in other contract types, a dominant interpretation cannot always be found, meaning that the theory is, at least potentially, one of consent, though of a second order.

### *3.3.3 Choice theory*

Choice theory's commitment to meaningful choice and its treatment of the immediate goals of contracting imply that it is a theory of consent. Choice theory seeks to advance personal autonomy by offering parties a choice between valuable alternatives, 'so that choices involve "trade-offs, which require relinquishing one good for the sake of another".'[72] In the contractual context, Dagan and Heller suggest, the goods to be traded-off are utility and community, which 'are components of distinct contract types that support people's diverse pursuits and interests'. Choice theory therefore advances personal autonomy by offering parties a choice between different mixtures of contractual goals and ends.[73]

Key to our discussion is that the understanding of meaningful choice as requiring a trade-off between goods suggests that these goods are incommensurable. Otherwise, one would maximise overall benefit rather than trading-off the different benefits. Thus, when contract law lives up to its ultimate goal, parties would often consent to one of several (non-dominant) alternatives, each offering different mixtures of benefits in terms of utility and community, with none offering the same (or greater) amount of utility and of community as all other alternatives.

Put differently, consent follows from choice theory's normative commitments, as opposed to contingent factors such as institutional (in)competence, because consent to a particular mixture of contractual

goods – as opposed to assent to such mixture – is the likely outcome of a contract law dedicated to enhancing personal autonomy.

## 4. Implications

Thus far, we have explained the consent–assent distinction and applied it to contract theory. This section addresses two of its implications. The first pertains to theories of assent, and suggests a conceptualising of contract beginning as an ideal arrangement from which the parties may diverge, requiring theories of assent to strike an uneasy balance between freedom of contract and the 'ideal'. The second applies to theories of consent and shows that, perhaps paradoxically, their understanding of intent as an expression of a 'judgement of preferences' makes them less able to rely on these intentions when interpreting agreements. It then considers the different strategies theories of consent may, and in fact do, undertake to confront this challenge.

### 4.1 Ideal contract and freedom of contract

Theories of assent suggest that every interpretive dispute is resolved by applying the dominant interpretation to which the parties (by definition) assent. They also view the dominant interpretation as ideal. Thus, when the parties agree on the bare minimum needed for formation – that is, on the type of consideration to be exchanged – they form an ideal arrangement: a contract composed solely of dominant, and therefore ideal, terms.

Consider, for example, the employment context. In modern contract law it is enough for parties to agree on the type of job to be performed by the employee (such as CEO, school teacher, or cashier) and the type of considerations they will receive (money, social benefits) for a contract to be formed.[74] Such an agreement – theories of assent suggest – would be comprised solely of dominant terms and would therefore be an ideal arrangement.

The idea of an ideal arrangement should not be overstressed. In particular, it does not suggest that theories of assent strive for every particular contract to conform to the ideal. On the contrary, commitment to freedom of contract in theories of assent and party sovereignty imply that, where parties explicitly and unambiguously agree to a non-ideal arrangement, their intentions should be enforced. The problem arises, however, when parties expressly agree on some (non-ideal) terms, but leave other (related) terms vague or unaddressed.

Parties rarely agree merely on the types of consideration exchanged. When they explicitly agree on certain terms, these may not conform to the ideal. The reasons parties diverge from the ideal agreement differ among the theories. For Benson, parties use express terms to advance goals other than reasonableness (such as efficiency and distributive justice). Legal economists claim that parties diverge from the ideal contract because, though they are better able than courts (or legislators) to determine the efficient arrangement, they are not all-knowing. Irrespective of the reason, when parties use express terms to diverge from the ideal, theories of assent face a dilemma: interpret and supplement the agreement to restore the agreement's ideal nature or apply the same terms considered ideal before the changes made by the parties. Neither alternative is normatively desirable.

To illustrate, consider the employment context once more and assume that, if the parties agree only on the bare minimum needed to form a contract, the ideal agreement for a cashier's job is comprised of an hourly pay of $12, at-will employment and no social benefits. But what if the parties expressly agreed on an hourly pay of $8, leaving all other terms vague or unaddressed? How are courts to supplement the terms relating to termination and benefits?

One alternative is to keep these terms as they are, regardless of the substantially lower pay agreed upon by the parties. That is, to treat the reasonableness or efficiency of each term on its own. Following this path implies that the parties would assent to these terms regardless of the changes in the hourly pay and that termination at-will and no benefits are the dominant terms irrespective of pay. But, if employment at-will and no benefits are reasonable (or efficient) when pay is $8 an hour, then $8 an hour should be reasonable (or efficient) when the agreement is silent about pay. Put differently, if choosing a (seemingly) non-ideal term does not affect the reasonableness (or efficiency) of related terms, it is implausible that it was, in fact, a dominant term, the *only* reasonable (or efficient) term that was 'of interest' to the parties.

Three possible responses should be considered and rejected. First, that the dominant interpretive solution is imprecise. For example, that any pay between, say, $5 and $15 is reasonable (or efficient). This response misses the mark because, for theories of assent to work, they must show that (almost) all interpretive solutions have a specific dominant interpretation the parties assent to. Otherwise, courts could not resolve interpretive disputes. Thus, in the example, if both $12 and $8 an hour are both reasonable, then courts could not supplement agreements that are silent about pay. Stated otherwise, if both terms are

reasonable, then neither is dominant, and the parties must *consent* (rather than assent) to one of them.

A second response is that the dominant interpretation varies with circumstances. In our example, the lower salary may be reasonable because the particular employee lacks experience. But this response merely suggests that the ideal terms should be context specific. Even then the problem remains. In particular, let us assume that $12 an hour is the dominant pay term for *the particular cashier and employer* at hand, but that the parties nevertheless expressly agree to a pay of $8 an hour. Here, it appears implausible for the terms not expressly addressed by the parties – that is, for terms implied-in-fact – to be both unaffected by the fact that the parties have (expressly) agreed on a lower hourly pay than is considered reasonable and, at the same time, to suggest that such (implied-in-fact) terms remain the dominant interpretation of the agreement.

Legal economists may also offer a third response, suggesting that: just as the parties use express terms to diverge from the ideal terms whenever a different term is deemed more efficient for their particular situation, they would also change all other 'ideal' terms that were subsequently made inefficient by their choice. Thus, if the parties found $8 an hour to be the efficient term, they would expressly address any other 'ideal' terms made inefficient by their choice. But, this assumes parties are aware of the content of all ideal terms; able to determine how changing one term affects the efficiency of related terms; know how to opt-out from the ideal terms in a legally valid way; and are able to identify and clearly draft the now efficient terms. Even if this may be plausible for contracts between two sophisticated parties, it seems unlikely in most other agreements.

It is important to see what is at stake here. Keeping the ideal terms as they are irrespective of the parties' chosen express terms means that $12 hourly pay is no longer a dominant alternative, that the question of pay does not have a dominant answer and the interpretive solution cannot be safely grounded on the parties' intent. For example, and for the reasons just discussed, if the parties expressly agree that termination would be for cause, but leave all other terms unaddressed, it is implausible that $12 an hour and no benefits are still dominant terms, the parties cannot be said to assent to any particular interpretive solution and that interpretation of their contract must be grounded on something other than their intentions. For corrective justice, this violates the fundamental principle of no-liability for nonfeasance. For legal economists, it means that maintaining an allegiance to parties' intentions requires either an unrealistic view of how most parties form their intentions or a substantial narrowing of the purview of contract law.

Assent theories may therefore prefer to opt for the alternative solution. Here, if the parties' express terms diverge from the ideal, terms not (clearly) addressed by the parties should be interpreted (or supplemented) to restore that 'ideal'. This solution has the advantage of viewing the 'ideal' as referring to the arrangement as a whole, rather than to each term in isolation, and is therefore more compatible with accepted principles of contract interpretation.[75] Nevertheless, it too comes with a normative downside in the form of curtailing the parties' freedom of contract.

Freedom of contract is important to both economic and corrective justice theories, though for different reasons. For corrective justice, freedom of contract is part of the division of labour between contract law's 'reasonable framework' and 'the parties' substantive choices of what they want to give and receive via transacting'. With the exception of 'gross inadequacy of consideration', 'the freedom of contract that parties have . . . [is] the freedom to make promises that can be part of this two-sided relation, leaving the decision as to what and how much each of the sides are to the parties' themselves'.[76]

The agreed express terms of the contract, then, are the only way for the parties to pursue ends other than the reasonable and give effect to their shared wishes, needs and purposes. But, if whenever the parties use express terms to diverge from the 'ideal' courts interpret and supplement their contract to restore it, then the parties' freedom of contract would be greatly curtailed. That is, because restoring the ideal requires courts to undermine the parties' attempt to pursue goals other than the reasonable. In the employment example, for instance, the parties may seek to advance distributive justice by agreeing on termination for cause, leaving all other terms unaffected. But, if the reasonable is to be restored, courts would have to supplement the pay term with a lower than $12 an hour pay, undoing what the parties sought to accomplish. The parties, one may argue, may respond by expressly agreeing on all other related terms. That is, given that the courts would not contradict the parties' express intentions, parties may curtail the courts' attempt to restore the reasonable (ideal) agreement by expressly agreeing on the content of all relevant terms. But this, as mentioned, seems implausible.

The same is true from an economic perspective. Economists view freedom of contract as instrumentally valuable, allowing the parties to use their superior knowledge to efficiently structure their transaction. Applying the proposed solution means that, to interpret an agreement in which parties diverged from the ideal in some terms, courts should view the agreement as a whole and determine which terms became inefficient

due to the parties' explicit divergence from the ideal and determine what would be the efficient arrangement given this divergence. But, it seems, to achieve this courts would need to hold the competence and information assumed to only be held by the parties themselves. Indeed, were courts able to achieve this goal there would be little (economic) reason to honour the parties' intentions in the first place. From the economic perspective, therefore, requiring courts to examine how the express terms of the agreement affect the efficiency of terms not (clearly) addressed by the parties is likely to result in great uncertainty for the parties, discouraging them from attempts to increase efficiency by expressly changing the 'ideal' terms to ones that meet their particular needs and circumstances.

Theories of assent face a dilemma. Keeping to the ideal terms when the parties expressly change some of them undermines the claim that the terms are dominant and that the parties assented to any of them. Changing the ideal terms in response to the parties' express terms curtails their freedom of contract.

## 4.2 The limits of (honouring) the parties' intentions

Theories of consent are met with a different challenge: when a dominant interpretation cannot be found and no direct evidence of the parties' intention exists, courts have little to rely on in determining the parties' intended meaning of the disputed term.

When parties consent they rely on their non-deliberative capacities – their intuitive, emotional and somatic judgement – to form their decision. Because third parties find it difficult to access the rationale(s) of non-deliberative decision, determining what the parties have actually intended may prove impossible. Thus, though there may be some easy cases, in others courts are left with little or no way to determine the parties' intentions.[77]

To illustrate, consider the theory of consent already discussed, namely: choice theory. Here, parties are assumed to consent to a particular mixture of utility and community. Because such choice represents the parties' consent – their 'judgement of preferences' – courts only learn of the parties' choice from the agreement itself. Thus, when the courts are required to interpret the agreement, they have little to rely upon. Consider parties who chose to advance a relatively balanced utility-to-community ratio by adopting a high utility-to-community ratio in the 'business as usual' part of the contract – with each party bearing its own risks – and a high community-to-utility ratio when (relatively) extreme circumstances arise,

in which case benefits and costs are to be shared. Here, for example, if the parties used vague or incomplete language when drafting the term pertaining to extreme circumstances, courts may only have the term dealing with 'business as usual' to learn of the parties' intentions. This, however, would suggest that the parties' intended for each party to bear its own risks even in extreme circumstances. A conclusion opposite to their genuine intentions.

In more general terms, barring direct evidence of the parties' intentions, courts may often be unable to determine the parties' intentions, as they cannot access their unreflective decision-making process. And, as we have seen, though circumstantial evidence – such as past dealing and performance – may offer some indication, it may also be misleading. Importantly, then, the difficulty courts face is, for the most part, irrespective of the amount of evidence allowed or courts' competence, because, with the exception of direct evidence of the parties' intentions, no evidence of expertise provide access to the parties' non-deliberative judgement and choices.[78]

When no dominant solution can be found, theories of consent may avail themselves with one (or more) of four interpretive strategies. *First*, they may refuse to enforce the agreement on indefiniteness grounds, as in the *Peerless* case. Modern contract law, however, largely rejects this and courts are willing to supplement the parties' agreement even when material terms, such as price, are missing. Contract theory also supports extensive supplementation, either because it finds parties subject to the public meaning of their agreement, or to facilitate them to reduce transacting costs and foster their self-determination.

*Second*, theories of consent may advocate interpreting and enforcing contractual obligations based on external (non-contractual) values, as suggested in Charles Fried's analysis of mistake, implacability and frustration. In these cases, Fried argues, 'there just is no agreement as to what is or turns out to be an important aspect of the arrangement'. Thus, contract law must resort to non-contractual values to resolve the dispute, with Fried offering the principles of fault and sharing.[79] Though Fried applies this solution only when a basic assumption of the parties failed, theories of consent can apply it whenever courts cannot find a dominant solution to the interpretive dispute and are unable to reconstruct the parties' shared intent.

*Third*, theories of consent may apply contractual values other than honouring the parties' intentions. This strategy accepts that the parties' shared intentions either do not exist or cannot be determined, and suggests applying contract law's internal values to interpret their

agreement. For example, following choice theory, this implies an interpretive approach committed to the theory's three principles: proactive facilitation; a concern with the autonomy of the parties' future selves; and relational justice.[80]

The first three solutions suggest an interpretive approach that no longer considers the parties' intentions as a necessary (or even primary) source for contract interpretation. The *fourth* suggests designing contract rules ex-ante to reduce the number of instances in which no dominant interpretation exists or in which the parties' intentions cannot be ascertained, by channelling the parties' choices. One example, already mentioned, is dividing contracts into types and channelling the parties to choose the contract type that is indicative of their intentions. This strategy may create contract types in which assent is the typical form in which parties form their intentions. And, by offering parties a plethora of contract types, may allow parties to signal their intention, even when it comes in the form of consent.

Though seemingly promising, much work is needed to link the parties' choice of contract type with a particular interpretive approach. In principle, however, courts may differentiate among three archetypes. In the first two, both parties are interested in only one of the two immediate goals of contract. For example, sophisticated parties to commercial agreement may only be interested in utility, suggesting courts should enforce the efficient interpretation, while parties to marriage agreements may find community to be their only goal and that therefore courts should place greater emphasis on values of fairness and sharing. Naturally, most contract types would offer a certain mixture of the two, and the choice of type would indicate which value should be given greater emphasis when interpreting the agreement.

The above also helps us understand choice theory's interpretive approach. Recall that the commitment to parties' self-determination found in choice theory suggests that a premium is being placed on parties' intentions. However, choice theory being a theory of consent means that where no dominant interpretation exists it will be impossible to determine those intentions. Choice theory's response addresses this concern by applying the fourth strategy: providing parties with ample choice among contract type and requiring the parties to express their desired mixture of utility and community through their choice.

The puzzle, however, does not end here. Another challenge to choice theory, as you may recall, is justifying the use of 'normative defaults' – that is, of contractual default rules that do not (necessarily) reflect the preferences of most parties and serve an aspirational function

that goes beyond the minimum required by relational justice. Such normative defaults too may be (partially) explained as a product of the parties' choice of contract too. Like sharing and fairness, the parties can be said to (actually) intend relational justice's aspirational function when they choose a contract type that places greater emphasis on community, assuming it implies a concern to the autonomy and well-being of the other party that exceeds the bare minimum required by relational justice to form a binding contract. Indeed, it may be for this reason that Dagan and Dorfman largely exclude commercial agreement from the purview of normative defaults, suggesting that, in this type of agreement, normative defaults would 'only add up the costs of opting out without significantly affecting the parties' agreement'.

## 5. Concluding remarks: where to next in contract interpretation

This chapter offers the assent–consent distinction as an organising idea for theories of contract interpretation. The distinction fleshes out the difference in views on what motivates parties and how they form their intentions; on whether contract begins as an ideal arrangement or an open-ended endeavour; and on the implications and challenges that each type of theory faces. Thus, though the chapter remains neutral between the two types of theories, it provides a framework for comparing among them.

Given the challenges each type of theory faces, there remains the question of where can contract interpretation advance from here. Offering a comprehensive theory of interpretation is well beyond the scope of this chapter. Instead, in this concluding section, I succinctly sketch three possible ways of moving forward.

First, one may accept that parties' intentions have only a limited role in contract interpretation. To a large extent, this may be what theories of assent actually propose. Theories of assent suggest that courts resolve interpretive dispute by identifying the dominant alternative to which the parties have assented. This implies a view of the parties as sufficiently abstract and idealised to allow for their objectives, purposes, and eventually intentions to be knowable. But, theories of assent argue, these (idealised) intentions also correspond and reflect the particular parties' actual intentions.

To bridge this gap, theories of assent adopt normatively infused beliefs about the world. In particular, a belief about how parties (actually) form their intentions, which is based on a normative perspective of how

parties should do so. In economic theory, these 'normative beliefs' are embodied in the concept of the rational agent (or *homo economicus)*. The rational agent is descriptive of how parties, at least when sophisticated and commercial, form their intention. It is normative, because legal economists suggest that this is also how parties should conduct their affairs.[81] Corrective justice offers a similar idea in the form of the "juridical conception of the person". For Benson, the juridical person is a normative concept that embodies our everyday moral experience. But, Benson suggests, the juridical person also describes what all parties can recognise in themselves via introspection. That is, the juridical person is how people (actually) believe they ought to behave and, therefore, it captures, if not the parties' actual intentions, then the intention they believe they ought to have.[82]

Normative beliefs may be desirable if and to the extent they inform the parties' aspirations. But, by imposing such constructs when determining the parties' intentions, theories of assent seem to accept that contract interpretation is not solely, or even primarily, concerned with enforcing the parties' intentions.

A second approach is to determine the parties' intentions via proxies. Arguably, this is what choice theory advocates when it uses the parties' choice of contract type to determine their intentions. Proxies, however, do not always accurately depict what they are meant to signify. Thus, though they may currently be the best available way to determine the parties' actual intentions, they are an imperfect one.

The third and final alternative is for contract law to take intentions more seriously. That is, to engage with parties' non-deliberative motivation and decision making. Consider emotions. Emotions take part in the entire life cycle of contracts, from the negotiations to the reaction to performance or breach.[83] Yet, contract law rarely (if ever) takes emotions into account when interpreting agreement, perhaps because they are thought of as too unstable to enter legal analysis. Psychological research suggests otherwise.[84] Indeed, were we unable to reliably predict the emotional response of others, we would find it difficult to function in a complex human society. Thus, if contract law truly cares about parties' intentions, it can and should consider emotions – as well as other non-reflective motivating factors – when determining what these intentions are.

This approach too faces challenges. First, courts may not hold the required competence to determine how emotions affect the parties' intentions. For this to be possible, legal research would need to place greater emphasis on the study of emotions in their contractual context, a process not dissimilar to the incorporation of philosophical and economic

perspectives in legal discourse. A second challenge is that, once emotions become part of legal analysis, they would be subject to the law's disciplinary powers. For example, courts may seek to distinguish appropriate and inappropriate emotional responses, only providing legal recourse to the former. Though such distinction may already exist in other legal areas, such as criminal law, applying it to everyday normative behaviour may greatly extend the expressive powers of the law in the regulation of emotional responses.[85]

## Notes

1 Lawrence B Solum, 'Consent', (19 January 2020) <https://lsolum.typepad.com/legal_theory_lexicon/2004/11/legal_theory_le.html> accessed 18 January 2022.
2 Brian H Bix, 'Consent and Contracts' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018).
3 Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale Law Journal 541, 568–69.
4 See section 2.
5 Joshua M Silverstein, 'The Contract Interpretation Policy Debate: A Primer' (2021) 26 Stanford Journal of Law, Business and Finance 222; Alan Schwartz and Robert E Scott, 'Contract Interpretation Redux' (2009) 119 Yale Law Journal 926; Schwartz and Scott, 'Contract Theory' (n 3).
6 John Finnis, *Aquinas: Moral Political and Legal Theory* (OUP 1998) 67.
7 Theories of interpretation can also reject parties' intent and be divided on the existence of a dominant solution. These two remaining categories of interpretation have increasing practical and theoretical significance (Eyal Zamir, 'The Inverted Hierarchy of Contract Interpretation and Supplementation' (1997) 97(6) Columbia Law Review 1710; Roy Kreitner, 'Fear of Contract' (2004) 14(2) Wisconsin Law Review 429). In this chapter, I do not address these approaches directly, but some of the conclusions are transferable.
8 For discussion: Hanoch Dagan and Ohad Somech, 'When Contract's Basic Assumptions Fail' (2021) 34 Canadian Journal of Law and Jurisprudence 297.
9 Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press 2019) 13, 23. Benson also rejects reliance as a justification of contractual liability at 69–75.
10 Peter Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33(2) Osgoode Hall Law Journal 273, 328–29.
11 This, as Stephen Smith argued, is the case for both express and implied terms, with the latter being 'implied by a court on the basis that they were implicitly agreed upon by the parties; they are terms that 'go without saying' in an agreement', Stephen A Smith, *Contract Theory* (OUP 2004) 280–81, 300–01.
12 See Brian Langille and Arthur Ripstein, 'Strictly Speaking: It Went Without Saying' (1996) 2(1) Legal Theory 63, 70–72.
13 Benson, *Justice in Transactions* (n 9) 68.
14 Benson, *Justice in Transactions* (n 9) 15.
15 Benson, 'The Idea of a Public Basis' (n 10) 317.
16 Benson, *Justice in Transactions* (n 9) 133.
17 Benson, *Justice in Transactions* (n 9) 134.
18 Richard A Posner, 'The Law and Economics of Contract Interpretation' (2004) 83 Texas Law Review 1581, 1582.
19 Posner, 'Contract Interpretation' (n 18) 1583.
20 Posner, 'Contract Interpretation' (n 18) 1605.
21 Posner, 'Contract Interpretation' (n 18) 1586, 1590, 1605.
22 Posner, 'Contract Interpretation' (n 18) 1588, 1605. The reason, Posner explains, is that '[e]ach party wants to maximize his gain from the transaction, and that is usually best done by agreeing to terms that maximize the surplus created by the transaction' at 1588.

23 Posner, 'Contract Interpretation' (n 18) 1606. When judges are commercially incompetent, however, 'literalism may be the superior approach after all' Posner, 'Contract Interpretation' (n 18) 1606.
24 Schwartz and Scott, 'Contract Theory' (n 3); Schwartz and Scott, 'Contract Interpretation Redux' (n 5).
25 Defined as: '(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm', Schwartz and Scott, 'Contract Theory' (n 3) 545.
26 Schwartz and Scott, 'Contract Theory' (n 3) 569.
27 Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (CUP 2017).
28 I will use the two terms interchangeably throughout this chapter.
29 Dagan and Heller, *The Choice Theory of Contracts* (n 27) 79–80.
30 Dagan and Heller, *The Choice Theory of Contracts* (n 27) 68–69.
31 Hanoch Dagan and Michael Heller, 'Freedom, Choice, and Contracts' (2019) 20(2) Theoretical Enquiries in Law 595, 629.
32 Dagan and Heller 'Freedom, Choice, and Contracts' (n 31); Hanoch Dagan and Michael Heller, 'Autonomy for Contract, Refined' (2021) 40(2) Law and Philosophy 213; Hanoch Dagan and Michael Heller, 'Why Autonomy Must be Contract's Ultimate Value' (2019) 20(1) Jerusalem Review of Legal Studies 148; Hanoch Dagan, 'The Value of Choice and the Justice of Contract' (2019) 10(3) Jurisprudence 422; Dagan and Somech, 'When Contract's Basic Assumptions Fail' (n 8).
33 Dagan and Heller, *The Choice Theory of Contracts* (n 27) 82.
34 Dagan and Heller 'Freedom, Choice, and Contracts' (n 31) 631.
35 Dagan and Heller 'Freedom, Choice, and Contracts' (n 31) 631.
36 Dagan and Heller, *The Choice Theory of Contracts* (n 27) 83.
37 Hanoch Dagan and Avihay Dorfman, 'Justice in Contracts' (2022) 67(1) American Journal of Jurisprudence 1, 14.
38 Dagan and Dorfman 'Justice in Contracts' (n 37) 14.
39 Dagan and Dorfman 'Justice in Contracts' (n 37) 14. Though Dagan and Dorfman discuss normative defaults in terms of gap-filling alone, by suggesting that good-faith in performance is a normative default their argument has bearings on the interpretation of the parties' express terms as well.
40 Dagan and Dorfman 'Justice in Contracts' (n 37) 16.
41 Dagan and Dorfman 'Justice in Contracts' (n 37) 13.
42 Dagan and Dorfman 'Justice in Contracts' (n 37) 28.
43 Dagan and Dorfman 'Justice in Contracts' (n 37) 29.
44 Dagan and Dorfman 'Justice in Contracts' (n 37) 5.
45 Dagan and Dorfman 'Justice in Contracts' (n 37) 27.
46 Dagan and Dorfman 'Justice in Contracts' (n 37) 27–28 do suggest that normative defaults are 'much less intrusive on the parties' contractual freedom' because 'they only add up the costs of opting out without significantly affecting the parties' agreement' (at 19–20). This seems overly optimistic. When the parties are not sophisticated and legally educated they are unlikely to be aware of the normative defaults or successfully opt-out of them. When both parties are sophisticated and legally educated – that is, mostly, when they are large firms – relational justice is likely to reach similar conclusions as theories based on reciprocal respect to independence because the substantive equality between the parties suggests that it would not be relationally unjust for contract law to treat them as formally equal. Conversely, if we accept that an ability to opt-out removes concerns of paternalism, why should *normative* defaults be restricted to relational justice, and not *directly* advance other contractual value(s), such as utility and community, at least when doing so is in the service of personal autonomy?
47 Otherwise, as we have seen, good faith would have been a mandatory floor not a normative default.
48 See Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 Philosophy & Public Affairs 205, 220. One may suggest that an easy solution to this problem would be to make normative default salient and easily changeable. This, however, may turn non-majoritarian normative defaults to a mere cost imposing apparatus – with most parties paying to opt out (though, some behavioural effects, such as the endowment effect, may suggest a more lasting effect). Thus, stickiness seems necessary to differentiate normative and majoritarian defaults, in practice if not in principle.
49 In particular, I follow Finnis, *Aquinas* (n 6).

50 Finnis, *Aquinas* (n 6) 62 (emphasis in original).
51 Finnis, *Aquinas* (n 6) 63.
52 Finnis, *Aquinas* (n 6) 63.
53 Finnis, *Aquinas* (n 6) 63.
54 Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96(4) Columbia Law Review 903, 936–37.
55 Finnis, *Aquinas* (n 6) 67.
56 Finnis, *Aquinas* (n 6) 67 endnote b.
57 *Raffles v Wichelhaus* [1864] EWHC Exch J19.
58 Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) American Sociological Review 55; Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 Southern California Law Review 691.
59 One way to explain this conclusion is that requiring courts to perform this task is requiring them to rank the parties' preferences and desires - a task that, when applied to non-commensurable benefits, is not subject to any objective criteria and therefore cannot be performed (or verified) by courts.
60 Benson, *Justice in Transactions* (n 9) 143
61 Benson, *Justice in Transactions* (n 9) 131.
62 Benson, *Justice in Transactions* (n 9) 132.
63 Benson, *Justice in Transactions* (n 9) 131.
64 The two assumptions are similar, but distinct. That the parties' agreement is efficient does not necessarily capture their (entire) intentions; and the parties may intend, but fail, to form an efficient contract.
65 Omri Ben-Shahar, 'A Bargaining Power Theory of Default Rules' (2009) 109(2) Columbia Law Review 396, 397. Ben-Shahar argues that, to use the terminology of this chapter, because the economic analysis is an assent theory built around the criteria of efficiency, there is no dominant alternative for purely distributive terms. Though this is a challenge to the economic analysis, it does not hold for all theories of assent, and I will not address it here.
66 On the significance of this assumption to economic analysis see Alon Harel and Ariel Porat, 'Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics' (2001) 96(4) Cornell Law Review 749.
67 Such scale would also reflect effects such as diminishing subjective value.
68 Posner, 'Contract Interpretation' (n 18) 1606.
69 Schwartz and Scott, 'Contract Theory' (n 3) 618–19.
70 Schwartz and Scott, 'Contract Theory' (n 3) 551 argue that, in this particular context, the assumption holds not only for common sense, but also because of the disciplinary powers of the market, and because corporate officers who do otherwise appropriate shareholders' resources.
71 Schwartz and Scott, 'Contract Theory' (n 3) 544–45.
72 Dagan and Heller, *The Choice Theory of Contracts* (n 27) 69.
73 Dagan and Heller, *The Choice Theory of Contracts* (n 27) 80.
74 See Uniform Law Commission, *Uniform Commercial Code* (2002) s 2–204(3), 2–305; American Law Institute, *Restatement (Second) of Contracts* (1981) s 33.
75 Uniform Commercial Code (n 71) s 202(2).
76 Benson, *Justice in Transactions* (n 9) 58, 131, 187.
77 The frequency of such cases is an empirical question I would not attempt to fully answer here, except to suggest that one crucial aspect in answering it is our understanding of parties' attitude to risk and ambiguity (meaning, uncertainty). If people are sufficiently aware of their own risk (or ambiguity) aversion in a way that allows them to insert it into their deliberative process (such as when one has a specific (subjective) discount factor known to her), then parties can assent to alternatives that combine certain and risky (or ambiguous) outcomes. But, if facing risk (or ambiguity) form their decision in a more intuitive (or affect laden) way, then the existence of these factors alone may turn their choice to one of consent. Given the commonality of risk and ambiguity in contracts, it is probably enough for the latter to be true for consent to be the common way of forming intentions in contractual decision making.
78 In Aquinas's terms, circumstantial evidence is usually used to show that one alternative dominates the other, and therefore cannot be of help when a genuine matter of consent is at hand.
79 Charles Fried, *Contract as Promise: A Theory of Contractual Obligations* (Harvard University Press 1981) 13, 16, 59, 63.

80 For a discussion of this approach to the doctrines of mutual mistake, impossibility, impracticability and frustration, see Dagan and Somech, 'When Contract's Basic Assumptions Fail' (n 8).
81 Schwartz and Scott, 'Contract Theory' (n 3).
82 Benson, *Justice in Transactions* (n 9) 369.
83 Tess Wilkinson-Ryan and David A Hoffman. 'Breach is for Suckers' (2010) 63(4) Vanderbilt Law Review 1003.
84 Nico H Frijda, 'The Laws of Emotion' (1988) 43(5) American Psychologists 349; John Tooby and Led Cosmides, 'The Evolutionary Psychology of the Emotions and their Relationship to the Internal Regulatory Variables' in Michael Lewis and others (eds), *Handbook of Emotions* (Guilford Press 2008); Marcel Zeelenberg and Rik Pieters, 'Feeling is for Doing: A Pragmatic Approach to the Study of Emotions in Economic Behavior' in David De Cremer, Marcel Zeelenberg and J Keith Muringhan (eds), *Social Psychology and Economics* (Psychology Press 2006); Roy F Baumeister, C Nathan DeWall and Liqing Zhang, 'Do Emotions Improve or Hinder the Decision Making Process?' in Kathleen D Vohs, Roy F Baumeister and George Loewenstein (eds), *Do Emotions Help or Hurt Decision Making* (Russel Sage Foundation 2007).
85 John Gardner, 'The Logic of Excuse and the Rationality of Emotions' (2009) 43 Journal of Value Enquiry 315.

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## Case law

*Raffles v Wichelhaus* [1864] EWHC Exch J19

5

# Why we should assume the risk: an argument for consent-based assumption of risk

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Assumption of risk is a common law doctrine that acts as a defence to negligence and other non-intentional torts in which the plaintiff 'assumes the risk' of the harm for which they are seeking damages. It is often viewed as 'the doctrine of consent applied to non-intentional tort'[1] despite being, to put it mildly, a bit of a conceptual mess. However, despite its muddled state – and its current decline in favour when compared to frameworks of comparative fault/responsibility – I argue that a version of the doctrine should be retained due to its relation to consent. In at least one sense, assumption of risk respects and enhances autonomy and can therefore be justified via reference to the normative value of consent. Because of this, the doctrine (or perhaps I should say *a* doctrine) of assumption of risk should be retained instead of being replaced with rules that focus on the plaintiff's negligent contribution to the harm they suffer.

Section 1 explains the doctrine and why it is worth consideration. While some courts have adopted a similar position and retained a narrower version of assumption of risk, the trend is moving towards replacing this doctrine in its entirety on both sides of the Atlantic.

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A thorough examination of this defence can thus shed light on which way the doctrine should evolve. Because consent plays an important role in my argument for retaining some versions of assumption of risk, and because of some conceptual mistakes surrounding consent in the context of risks, Section 2 takes a bit of a detour from legal doctrine and addresses consent, risks and autonomy directly. Sections 3–5 then discuss distinct types of assumption of risk found in the legal system. Some versions are worth retaining for consent-based reasons, some have strayed too far from its original consensual foundation and cannot rely on a consent-based justification, and others are just a mixed bag that need to be sorted into finer-grained categories. While these sections may be viewed as little more than conceptual re-categorising, such a step is necessary if we are to avoid throwing the proverbial baby out with the bath water.

## 1. Introduction to assumption of risk

The consensual nature of assumption of risk, as a general doctrine, is often declared; the *Restatement (Second) of Torts* [*Second Restatement*] uses 'consent' or variations of the word nineteen times in §496 A–C. Stemming from the *volenti* maxim (to one who consents no wrong is done), the doctrine historically was 'developed under a theory of "consent to injury"'.[2] The *Second Restatement* makes perhaps a stronger claim by asserting that 'the distinction [between general assumption of risk and the *volenti* maxim] . . . is one without a difference, of terminology only'.[3] Signalling the survival of assumption of risk from its previous rulings, the California Supreme Court notes in *Knight v Jewett* that both express and implied assumption of risk is 'based on consent' and rely on the *volenti* maxim.[4] Simons echoes these statements, asserting that 'a consensual rationale underlies many cases conventionally categorized as assumption of risk'.[5]

How accurate this characterisation is, I argue, depends on the type of assumption of risk under consideration. Having a rather confusing history and application, assumption of risk comes in a variety of forms. The *Second Restatement* defines it in section 496 as follows:

> § 496 A. General Principle: A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.
>
> § 496B: Express Assumption of Risk: A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from

> the defendant's negligent or reckless conduct cannot recover for such harm unless the agreement is invalid as contrary to public policy.
>
> § 496C: Implied Assumption of Risk: [A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

In both express and implied assumption of risk, the plaintiff is ineligible to recover damages because they 'assumed' the risk of the harm they suffered. The differences between the two types emerge largely in how we determine whether an assumption occurred. In express assumption of risk, the plaintiff expressly agrees to accept the risk. When they do this and the defendant acts, the latter does not breach a duty owed to the former. In implied assumption of risk, which is also called secondary assumption of risk, the plaintiff knowingly chooses to enter or remain in situations that expose themselves or their belongings to a risk of harm arising from the defendant's conduct.

Adding to the 'doctrinal muddle',[6] some US courts further divide implied assumption of risk into three categories, leading to a total of four types of assumption of risk: express, implied primary, implied secondary (reasonable) and implied secondary (unreasonable). Speaking about the doctrine generally, the Nevada court in *Auckenthaler v Grundmeyer* articulates such a categorisation.[7] In this schema, express assumption of risk is the same as the *Second Restatement*'s, requiring express agreement or contract. Closely related to this type, primary implied assumption of risk 'occurs when the plaintiff voluntarily accepts known risks involved in a particular situation',[8] often by 'enter[ing] voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility'.[9] This assumption of risk arises, for example, when a spectator enters a baseball stadium; by doing so, they assume the risk that players may hit balls into the stands.[10] In these cases, there is no breach of duty on the part of the defendant because the plaintiff is held to have (impliedly) relieved them of any such duty. In secondary implied assumption of risk, the plaintiff 'voluntarily encounter[s] a known risk created by the defendant's negligence'.[11] Unlike in implied primary assumption of risk,

the defendant is negligent and so breaches a duty owed to the plaintiff. The plaintiff then voluntarily exposes themself to this negligence, and their exposure is judged to be reasonable. For example, a contractor notices a defective machine, alerts their employer to its disrepair, and continues to reasonably use it when the employer doesn't fix it. (The use is reasonable because the risk is slight in comparison to the utility of continuing to use the machine.)[12] The last sense of assumption of risk is also called secondary implied assumption of risk.[13] Whereas the previous plaintiff was reasonable in accepting the risk, the plaintiff who assumes the risk in this type of secondary implied assumption of risk is unreasonable. Their conduct, then, is negligent, and this negligence may itself be grounds for reduction or denial of recovery.

There is yet another type of assumption of risk called primary assumption of risk whose language does not cleanly map onto the existing distinctions. It gained prominence in *Knight v Jewett*, where the California Supreme Court described it in terms of a no-duty analysis. In the no-duty analysis of primary assumption of risk, the court can hold, as a matter of law, that the defendant does not owe the plaintiff a duty. While there is no duty violated in express assumption of risk or implied secondary assumption of risk, the lack of a duty violation in such assumption of risks is because the plaintiff releases the defendant from a duty. In primary assumption of risk, the no-duty analysis explicitly lacks a consent-basis. For example, the court in *Morgan v Ohio Conference of the United Church* held that 'with the doctrine of primary assumption of the risk, *the injured plaintiff's subjective consent* to and appreciation for the inherent risks of the recreational activity *are immaterial to the analysis*'.[14] This type of assumption of risk thus shifts focus from the plaintiff to the defendant and whether they had a duty of due care.[15] The duty of care in turn relies on whether the harm emerged from 'an inherent and ordinary risk'[16] of the conduct engaged in: 'A defendant owes no duty to protect a plaintiff against certain risks that are so inherent in an activity that they cannot be eliminated.'[17] These risks include things like 'a carelessly extended elbow' in basketball, moguls in a ski run, and foul balls that fly into the stadium's seating.[18] As the examples indicate, courts initially limited this approach to sports, but it now includes a broader array of recreational activities. Secondary assumption of risk, in this framework, is any assumption of risk in which the defendant is negligent but the plaintiff encounters the risk or consents to it. This type of secondary assumption of risk is, at least in California, merged with comparative fault principles.

To summarise the terminology found in the US system, see Figure 5.1.

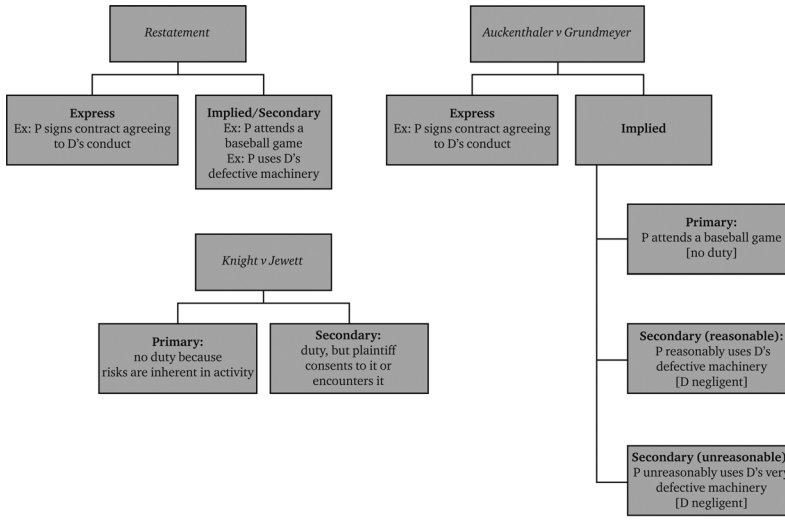


**Figure 5.1** Three hierarchical lists of the types of assumption of risk found in the *Second Restatement*, *Auckenthaler v Grundmeyer* and *Knight v Jewett* with examples listed for each. Created by the author.

To generalise this terminology for non-US systems – and to hopefully make things a little less confusing by avoiding multiple names with 'primary' and 'secondary' – I will primarily use the following terms in lieu of the above overlapping labels:

- Express assumption of risk: assumption of risk which relies on the express agreement of the would-be-plaintiff to the 'risky' conduct. (Restatement and *Auckenthaler* express; some *Knight* secondary)
- *Knight* no-duty assumption of risk: assumption of risk in which the defendant owes no duty to the plaintiff because the risk is inherent in an activity the plaintiff enters into; 'the injured plaintiff's subjective consent to and appreciation for the inherent risks of the recreational activity are immaterial to the analysis.' (*Knight* primary)
- Implied no-duty assumption of risk: assumption of risk in which the defendant owes no duty to the plaintiff because the plaintiff voluntarily accepts a known risk of an activity. (*Auckenthaler* implied primary; some *Restatement* implied/secondary)
- Negligent assumption of risk: assumption of risk in which the defendant is negligent and the plaintiff voluntarily – either reasonably or unreasonably – exposes themselves to the risk. (*Auckenthaler* implied secondary, both reasonable and unreasonable; some *Restatement* implied/secondary; some *Knight* secondary)

Perhaps unsurprisingly, the use of assumption of risk has fallen out of favour. This has occurred for two main reasons. First, the doctrine acquired a bit of a bad reputation from its start in nineteenth-century employment cases. The common criticism with its use was that it relieved employers from tortious liability for workplace accidents in such a way that reflected current (and arguably unjust) economic and socioeconomic norms or theories. Second, the doctrine may be thought to be rendered obsolete due to comparative negligence. Even as early as 1987, commentators and courts were calling for its eradication.[19] Writing in 2014, Simons notes that '[m]ost American jurisdictions . . . abolished assumption of risk, "merging" it into the new comparative responsibility rules'.[20] Those that retain assumption of risk often interpret it very narrowly, giving legitimacy only to express and implied no-duty assumption of risk. The remaining types of assumption of risk are often treated as 'a phase of contributory negligence'.[21] When treated as a part of the contributory negligence analysis, assumption of risk is used to support the claim that the plaintiff contributed to their own injury in such a way that their damages should be reduced.

In light of this decline and merger, it is reasonable to ask why we should be concerned about assumption of risk at all. However, there are two compelling reasons why we should still theorise about this doctrine. First, assumption of risk might come back into fashion,[22] and, even if it does not, some courts may still use the doctrine. If/when the doctrine does (re)appear in legal reasoning, it would be helpful for it to leave the confusion surrounding it behind.

Second, and more importantly, there are some uses of assumption of risk which should still have legal force for consent-based reasons; while part of the doctrine can be jettisoned or merged with other legal norms, not all of it should. As I hope is clear, there are different justifications for the different versions of assumption of risk. Some of these reasons would count against the merger of assumption of risk into a contributory fault scheme or a complete elimination of it on other grounds.[23] As an added bonus, examining why some forms of assumption of risk should be retained for consent-based reasons might also offer insight into our other consent-based or consent-adjacent practices.

## 2. Consent, risks, and autonomy[24]

Given the role that consent and risk plays in this discussion, I find it prudent to start by arguing for conceptual clarity about how consent applies to risks, which involves clarity about the structure of consent itself

as well as the normative foundation of consent. This groundwork should be helpful in determining which versions of assumption of risk can stay and which should be removed or re-examined.

Following many others, I assume both that consent has a 'moral magic'[25] that permits it to alter the obligations we owe each other and that it gains this normative force from its relationship to autonomy. For example, Heidi Hurd views consent as a 'power of personhood' and argues that this power's source is our commitment to autonomy.[26] Larry Alexander endorses Hurd's view and, perhaps, goes even further in claiming that 'one who cannot alter others' obligations through consent is not fully autonomous.'[27] Joan McGregor argues that '[f]rom the moral point of view, concern about personal autonomy and self-determination is represented by guaranteeing agents control over their domain through their power of consent'.[28] Along similar lines, Emily Sherwin describes consent as 'the practical means for exercising autonomy in one's relations with others' and views its mechanism as connected to the value of self-governance.[29] Echoing the theme of autonomy and self-determination, Donald VanDeVeer holds that the importance of consent derives from 'a right or legitimate claim of competent persons to direct their own lives within the domain of acts not wrongful to others'.[30] John Davis[31] and Vera Bergelson[32] also claim the normative basis of consent's transformative power is autonomy.[33]

I present the above, non-exhaustive list as a way to motivate the plausibility of my assumption that consent derives its normative power from the value of autonomy (an assumption which is compatible with consent being valuable for other derivative reasons too). While there are other accounts of the grounding of consent, to fully – or even partially – engage in this debate would leave us very little room for assumption of risk. I thus explicitly note this assumption as a limiting factor of the analysis.

In establishing what is meant by 'autonomy', I follow most authors in relying heavily on my reader's pre-existing sense of the term and present self-legislation or self-governance as synonyms for autonomy. To further flesh-out the account, I use Feinberg's framework in which autonomy can be a capacity, a condition, an ideal, or a right.[34] In the context of consent, I argue that we should view autonomy as a capacity and as the successful exercise of that ability, which is a condition. Consent's relationship to autonomy is then this: consent respects autonomy qua capacity and enhances it qua condition.[35] When we give another person's consent normative force, we recognise their status as a special type of normative agent – the type of agent who has the capacity to self-govern and thus release others from obligations owed to them. Consent then becomes a

tool for them to use in more effectively governing their life. If assumption of risk is a type of consent, then, it will have these same positive upshots of acknowledging the plaintiff as a person who has the capacity to self-govern and then providing them with a legal tool to more effectively do so.

If assumption of risk is a type of consent, it should also share important structural aspects of consent. Consent is autonomy-respecting and enhancing in a relational way; it is something given, and so it must have a giver, a receiver, and a thing given. A bit more formally, consent in its most basic structure is a three-place relationship among a consent-giver, G, a consent-receiver, R, and the thing consented to, Φ. The first component is (hopefully) uncontroversial. Consent, 'as a power of personhood',[36] requires a person (or, at least a pseudo-person, such as a corporation). To determine what the other pieces of this relation are, we should look to what consent is about. Relying once again on 'common understandings' of consent, we can think of consent as the exercise of autonomy through '"authoriz[ing]" another to act in an area that is part of one's domain' or 'giving "permission" to another to cross over a boundary of one's own'.[37] These authorisations or permissions affect rights and obligations. R, then, must be a person (or pseudo-person) who owes something to G, and the object of consent must be something that would, absent consent, violate rights and obligations.

What, then, can violate rights and obligations owed to another? If to violate a right or obligation is *prima facie* wrong and if the 'ought implies can' principle – or at least something similar to it – is correct, then Φ should be something R can do or can exercise some control over. Actions and omissions meet this criterion. Perhaps even emotional responses, beliefs, and other similar mental states do.[38] I violate my obligations to you by acting, failing to act, acting negligently, or acting recklessly. To remove this act component from the equation means that consent is no longer about what R would otherwise owe to G and so transforms the transaction into something that is no longer about altering the normative relationship between G and R through an exercise of G's autonomy.

However, a common misconception surrounding consent, especially consent as is found in assumption of risk doctrine, is that consent can be given to risks.[39] By risk, I mean the possibility that an event whose subjective probability of occurring is greater than zero but less than one may occur. Defined as such, risks may be 'pure risks' that never materialise and never cause a negative reaction in others, but they may also materialise and impose harm or induce fear and cause disruption even when the objective probability of occurring is zero. Speaking of consenting to risks is thus speaking of consenting to a subjective probability. In this way, it makes little sense for G to give consent to R for

a risk. The subjective probability of an event – in and of itself – is not something that could violate R's obligation to G. R performing an action that results in the creation or modification of a risk could; risky actions are often negligent or reckless actions after all. However, the difference is that G consents to R *doing* something that has a subjective probability between zero and one of giving rise to some result instead of G consenting to a risk of the result. Consent is given for an action or omission done by another and not to a subjective probability. This shift is both subtle and allegedly too descriptively plausible to be of note.

Why does this pedantic point matter then? I admit that it might not be helpful at all in determining why *imposing* a risk might be morally or legally impermissible in the first place. I am starting from the assumption that imposing a risk – perhaps even a pure risk – is normatively wrong in some circumstances and that this normative wrongness thus gives rise to obligations to avoid actions which impose that risk. What the distinction does instead, then, is prevent us from placing importance on risk when determining if a tort has occurred. The importance instead is placed firmly on the existence of a duty to do or not do certain actions. The reason some actions are prohibited or required may refer to the subjective probability of certain results occurring as a result of those actions, but the associated risk makes an appearance only at this stage of determining prohibited actions. In determining if a tort has occurred, the shift thus requires us to trace back the harm experienced by the plaintiff to an action or omission of the defendant – not the presence or absence of risk. If the harm arose from an action which did not violate a duty, then no tort has occurred regardless of whether the plaintiff assumed a risk or consented.

To make the theoretical importance of this distinction clear, consider the following cases, taken from Westen:

> *Inflammation*: A patient Joan has 20–30 vision in one eye but only 20–100 vision in the other. In order to correct her vision, Joan seeks out a laser surgeon, *A,* who informs her that, in order to correct vision in the one eye, he must operate on both. *A* also informs Joan that while there is only a small risk that she will go blind in both eyes, there is a larger, but still less than 15%, risk that she will suffer inflammation in one or both eyes for as much as a week. Joan hopes to escape inflammation, but she would prefer even the certainty of a week of eye inflammation to the alternative of forgoing an opportunity for improved vision and submits to the surgery. To her disappointment, Joan develops a week of inflammation in both eyes.

> *Blindness*: A patient, Helen, has the same eye conditions as Joan, and she goes to the same doctor for the same treatment. Unfortunately, the worst risks materialize in Helen's case, and to her horror she goes blind in both eyes . . . [Helen] obviously did not prefer the certainty of total blindness to the alternative of forgoing a laser procedure on eyes that were still healthy![40]

Westen argues that these two cases are normatively distinct. He views what occurs in *Inflammation* as nothing more than normal, run-of-the mill, prescriptive consent. Assuming a preference-based account of consent, Westen points to Joan's preference for even the certainty of temporary inflammation over forgoing the surgery when asserting she consented. In contrast, he argues that *Blindness* involves a type of 'imputed consent', meaning that we attribute prescriptive consent in this case even though none is present. He claims Helen did not prescriptively consent because she did not prefer the certainty of blindness to the surgery. She may have consented to a risk of blindness, but a risk of blindness is very different from the certainty of it. Westen claims this distinction between the two patients is important because justifications denying recovery for damages in both cases 'rest on different factual and normative premises'.[41] In *Inflammation*, Westen holds the normative basis for denying recovery is that the patient 'choos[es] [the harm] as that which she prefers for herself under the circumstances'.[42] In contrast, the patient is treated *as if* she consents in *Blindness* because the risk was reasonable to take and she was sufficiently informed.

Placing aside other issues that may arise with his account, Westen errs in drawing a distinction between these cases for the reasons discussed above. As a result, he creates an unnecessary problem of justifying the imputation of consent when consent is not actually present and attempts to provide different justifications for lack of liability on the part of the surgeon. The problem easily disappears when we look at the action which caused harm to Helen and ask, 'did she consent to that action?' instead of looking at what risks she consented to. In both cases, the patients consented to the surgeon's action, and thus liability should not be imposed for that same reason.

Even when we avoid Westen's mistake and merely use 'consenting to a risk' as shorthand for 'consenting to a risky action', there is still a concern that our analysis will lead us into muddy waters. For example, consider a fly puck in a hockey game. I know (and you now know) there is a risk that a puck may hit people in the stands at a hockey game. Deflections happen, physics exist, and sometimes a fly puck escapes the

rink. If I get hit with an errant puck at a well-maintained rink and try to sue, my case would – and should – get nowhere; the court would conclude that I have assumed the risk and/or consented to the risk of being hit with a puck. The end result is correct, but the means by which the court gets here is wrong. Consider now a case in which the stands are filled with people who know nothing about hockey. They, therefore, cannot consent to any risk associated with hockey. Yet, if they get hit, no tort has occurred. Neither consent to a risk nor liability are present. If we trace the harm back to the defendant, we will see why: the harm of being hit with a puck arose from, let us stipulate, a player hitting a wobbly puck very hard. A player has no duty to spectators to not hit a wobbly puck very hard in the normal course of game play. Our analysis has thus gone from establishing consent to a manifested risk to establishing whether a duty existed in the first place, and we no longer have to figure out what to say about the naïve attendees at the hockey game.

While this point may once again seem obvious,[43] I ask the reader to recall *Lawson by and through Lawson v Salt Lake Trappers, Inc*. where the court, in applying the assumption of risk doctrine, stated that 'being struck by a foul ball is "one of the natural risks assumed by spectators attending professional games"' and that the respondent did not breach a duty owed to the plaintiffs.[44] Though perhaps obvious, this point is important when addressing *Auckenthaler* implied primary assumption of risk (which is addressed in section 4). Given that the normative reasons we have for allowing consent to alter obligations are different from the reasons we have to establish (or not to establish) an obligation in the first place, it will be important in evaluating that type of assumption of risk to be clear on what is actually occurring.

Other than the structure and the normative grounding of consent, I want to remain neutral about most other debates that surround consent, such as how much information one needs in order for consent to be transformative (including which act-descriptions of the action are relevant) or what constitutes coercion. Whatever answer one fancies to those questions can be incorporated into conditions on when assumption of risk should be transformative. The two exceptions to this neutrality are whether consent can be irrational and whether consent involves a communicative act. At risk of offending Kant, I will assume that being an autonomous, sovereign entity means that one can choose to be irrational. One's ability to author one's own story is, after all, expanded when grammar can be thrown out the window. (See James Joyce.[45]) Furthermore, one's control is enhanced when it is up to them whether they have released another from duties owed to them. Both of these

assumptions, though merely assumptions, do play a role in delineating which versions of assumption of risk should be retained. My hope is that the reader is charitable enough to rely on the work others have done arguing in favor of these attributes of consent that they grant me these assumptions, even if only for the sake of the following argument.

## 3. Express assumption of risk – consent for non-intentional torts

Express assumption of risk is described as 'consent applied to non-intentional torts'.[46] Because this description is accurate, I advocate for retaining this version of assumption of risk. Taking the consensual nature of the practice seriously thus speaks against its merger into a comparative fault schema or consolidating it into contributary negligence, per some courts.

In express assumption of risk, an agent 'expressly agrees to accept a risk of harm'[47] arising from another's conduct. (For reasons discussed earlier a more accurate articulation would be that an agent expressly agrees to another's risky conduct, as opposed to the risk itself.) In this type of assumption of risk, the defendant owes certain duties to the plaintiff – duties which the action would otherwise violate. The plaintiff's agreement then alters this duty. Agreement, I take it, involves the intentional releasing of another from a duty; it is a form of permission for the other to do the agreed upon act. Furthermore, the agreement impacts the normative relationship between the plaintiff and the defendant in such a way that the latter's actions are now no longer impermissible vis-à-vis the former. The agreement, then, is consent. The *Second Restatement* reaffirms this connection in comment c of § 496A, describing what occurs in express assumption of risk (§ 496B) as the plaintiff giving their express consent.

Like recognition of consent as a criminal defence or a defence to intentional torts, recognition of express assumption of risk as a defence to non-intentional torts respects and enhances the consent-giver's autonomy. Giving express assumption of risk legal force recognises that the plaintiff is the type of agent who can alter the rights and obligations of others in relation to them. This principle holds true even in cases where the consenter regrets their consent and sues the consent-receiver. Furthermore, the doctrine avoids a chilling effect on those cases of assumption of risk which do not end up in court, thereby enhancing the consenter's autonomy. Absent the doctrine, consenters might worry that their consent will not legally alter the consent-receiver's obligations, both making the receiver

more reluctant to perform the consented-to action and raising the concern for both parties that, should the consenter die, their estate would not honour their consent and instead seek to hold the consent-receiver liable. These worries would dampen the consenter's ability to 'rearrange her moral furniture',[48] by severely limiting the usefulness of one of their most important autonomy-enhancing tools. For example, many jurisdictions use assumption of risk in preventing recovery for sports injuries arising in the normal course of the game. Absent such a bar on liability, athletic consenters would be unable (absent perhaps a contract) to relieve others of the duty to not negligently injure them in the course of standard play, thereby hindering their ability to engage in certain activities and relations with others.[49]

Due to the importance of autonomy-enhancing tools in our legal system, express assumption of risk should thus be retained as a legitimate defence. Furthermore, the consensual nature of assumption of risk also warrants continuing to recognise its traditional role as a defence to reckless conduct and strict liability, contra some courts.[50] So long as the plaintiff has given consent – reasonably or not – the duty is waived. The defendant's conduct is thus neither negligent nor reckless, even if it was prima facie so or even if strict liability is imposed.

This consensual nature of express assumption of risk speaks against two shifts in tort law which seek to further distance the doctrine from consent. The first is the shift to a comparative negligence framework. Under these rules, a plaintiff's unreasonable actions can reduce their recovery; reasonable actions, in contrast, do not reduce or prevent recovery. Yet, as Simons notes, 'consent and unreasonable conduct are distinct concepts . . . some fact patterns instantiate both, but others instantiate only one or the other'.[51] Replacing consent with comparative fault would negate reasonable consent's 'moral magic'. Yet, surely respect for autonomy should extend to both unreasonable and reasonable consent acts, especially when reasonableness and unreasonableness is determined by a court or jury. Because of this lack of overlap between the two doctrines, express assumption of risk should not be subsumed into a comparative fault framework.[52] Furthermore, most courts are reluctant to extend comparative fault to strict liability. Replacing assumption of risk with comparative fault would thus limit the doctrine's scope.

The second shift is the move from express assumption of risk in the *Second Restatement* to contractual limitations on liability in the *Third Restatement*. In the *Third Restatement*, §2 'replaces the rule for express assumption of risk in *Restatement Second, Torts* § 496B'.[53] This new section holds that a contractual limit on liability, when valid, completely bars a

plaintiff's recovery. While it admits that the agreement may 'occur by written agreement, express oral agreement, or conduct that creates an implied-in-fact contract', it excludes all consents which do not meet the requirements of contracts.[54] In this way, it narrows the scope of the *Second Restatement*'s express assumption of risk.

This narrowing, however, is a mistake. Whereas contracts – and thus contractual limitations on liability – are necessarily bilateral, consent is unilateral, in the sense that the consent-receiver is not involved in consent beyond their role as a receiver of it. As Tadros notes, we have a strong interest in it being up to us whether we release others from duties they owe us.[55] To require consent to be bilateral would mean that even 'with all the will in the world, [the consenter] may not be able to determine whether [the consent-receiver] wrongs her by *v*ing'.[56] Given this and the standard requirement of a 'meeting of minds' for contracts, I suspect that a non-insignificant number of cases will not be covered under the new rule. A plaintiff can give consent to another without that consent constituting a contract or the other even being fully aware of the consent. Replacing express assumption of risk with contractual limits on liability would thus hinder the consenter's exercise of their autonomy by preventing any consent to a non-intentional tort which occurs outside of a contract from having legal effect. While the law may not need to recognise all valid consent acts as transformative, we should be aware that the *Third Statement's* replacement excludes some autonomous consent authorisations and is more restrictive than the standard nullifications of consent for public policy reasons.

In positing this relationship between express assumption of risk and consent, I wish to remind my reader of the point made earlier about consent to risk which distinguishes my point from the conclusion of others who have endorsed a link between assumption of risk and consent. As Simons notes, 'few have examined this relationship between assumption of risk and consent carefully'.[57] However, two of those who have – Simons and Mansfield – conclude assumption of risk and consent apply to different sets of cases. Both hold that the difference between the two is the 'certainty or uncertainty of the invasion of [the plaintiff's] interest'.[58] In their views, consent should be used when there is 'relative certainty that the risk will materialize' while assumption of risk 'should refer to acceptance of a risk of harm (or of some other invasion of a legal interest) that the plaintiff does not believe is substantially certain to materialize'.[59]

However, this distinction between consent and assumption of risk is artificial and only weakens the perceived normative importance of assumption of risk. Consent is to conduct, and, in both express assumption

of risk and standard consent, the plaintiff has given their permission for the consent-receiver to engage in certain acts or omissions. The subjective probability of the conduct resulting in certain actions is only relevant, if at all, in determining if any information requirement is met for consent's validity. As long as they have sufficient information for the consent to be valid, the consent-giver's belief about whether certain results are likely or unlikely to follow from this conduct is irrelevant. This lack of distinction gives us prima facie reasons to transfer rules surrounding consent in intentional torts to unintentional torts, such as those regarding apparent consent and voluntariness requirements.

## 4. No-duty – a mixed bag

No-duty assumption of risk cases cover many different types of cases, even when we separate the *Knight* analysis from the rest. This is because (1) courts do not distinguish between cases which involve tacit but still valid, normal consent and those that involve a more fictitious imputation of consent, and (2) some courts commit the conceptual mistake that consent can be to risks. Once we address these inaccuracies, we can better distinguish between types of assumption of risk that should not or should be retained and better articulate their normative justification.

The first inaccuracy occurs in implied no-duty assumption of risk. In this type, the plaintiff 'is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility'.[60] If 'regarded as' means simply that the plaintiff did tacitly or impliedly agree, then we should say the same for this type of assumption of risk as we did for express assumption of risk. Tacit consent is still consent. Therefore, in the set of cases which do involve consent, implied primary assumption of risk (to use *Auckenthaler* terminology) should not be merged with comparative fault. Given that implied primary assumption of risk is subsumed by the newer rules more often than its express cousin, a larger change in doctrine would be warranted. This change would also render *Auckenthaler*'s scathing review of all implied assumption of risk (which includes what I call implied no-duty assumption of risk) as overly broad.

However, the 'regarded as' does give pause. Its inclusion may indicate that in at least some cases agreement is not actually present but instead is merely imputed. The court in *Bundschu v Naffah* recognises (or at least writes of) both possibilities as falling under implied assumption of risk, stating that implied assumption of risk 'refers to those instances where a defendant owes some duty of care, but the plaintiff *voluntarily*

*consents or acquiesces* in an appreciated, known, or obvious risk created by the breach of the defendant's duty of care'.[61] The inclusion of 'acquiesces' in addition to consent seems to indicate that the former is something other than consent and is nevertheless sufficient for implied primary assumption of risk. *Auckenthaler* also contains some of this duality, holding that the plaintiff, whose conduct was characterised as implied primary assumption of risk, 'impliedly consent[ed]' 'by choosing to participate'.[62] Though using the language of consent, the court seems to indicate that it was the choice to participate in an activity upon which consent is predicated. This pattern of predication of consent upon another action calls to mind constructive consent. These cases of no-duty assumption of risk, which I will call acquiescence assumption of risk, are normatively similar to negligent assumption of risk and will be addressed in section 5.

The second inaccuracy can be seen most clearly in the *Knight* no-duty assumption of risk. Here, there is no grounds for recovery because the risk is inherent in the activity the plaintiff enters into. Applying this standard, the court in *Morgan* held that 'the injured plaintiff's subjective consent to and appreciation for the inherent risks of the recreational activity are immaterial.'[63] As was mentioned earlier, this has led to a shift in focus from the plaintiff's actions to whether the defendant had a duty of care and an emphasis on whether the risks were 'so inherent in an activity that they cannot be eliminated'.[64] This way of categorising scenarios includes both cases in which there is no duty owed because the defendant never owed a duty to the plaintiff and cases in which there was a duty owed but the duty was removed because of the plaintiff's actions. Lumping these cases together is a mistake.

Consider the fact pattern of *Knight*. Here, the plaintiff was playing touch football with the defendant when the defendant stepped on his finger, eventually leading to its amputation. While we might say that the plaintiff never consented to the risk of having his finger amputated, he did consent to play football with the defendant, and thereby relieved the defendant of a host of obligations relating to contact and due care. The risk of injury and the injury itself materialised from a consented to action. Thus, there is no breach of duty even though a prior duty existed. This subcategory of no-duty assumption of risk should be retained for the same reason express assumption of risk is retained.

This subtype is different from the other subtype of *Knight* assumption of risk. In this type, there is no duty because the plaintiffs 'impliedly understand' that 'players have no duty to refrain from hitting a ball into the stands'.[65] The key part here is that the plaintiff understands that

others have no duty to them regarding the action and not that others have no duty to the plaintiff because of the plaintiff's understanding. The difference is important: in the latter, a prior duty exists but is negated in some way; in the former, no prior duty exists at all. At this point, recall the structural relationship of consent. If no duty exists between R and G, then consent is not relevant. Even if an individual attendee did not 'impliedly understand' what a fly ball was, a player who was responsible for a ball going into the stands and causing injury would not be liable. A baseball player has an obligation not to intentionally throw or hit a ball towards a spectator outside of the norms of the game, but they simply have no duty to avoid hitting or throwing a ball into the stands in the normal course of play. The same risk of being hit is present, but absent the duty the consensual nature of assumption of risk is irrelevant. With this subtype, the only error is claiming that such cases bear close enough resemblance with the others to warrant the same name. Risk is there, yes, but not duty and thus no consent.

Removing this type of assumption of risk from the doctrinal umbrella is important because determining whether a duty exists at all is a very different process involving different normative values from determining if the defendant has somehow been released from that duty. The reasons we have for allowing consent to work its 'magic' will not necessarily be the same reasons we use in determining the existence of a duty. Thus, we should not treat all no-duty assumption of risk cases as the same.

## 5. Negligent assumption of risk – where is the consent?

While I have argued for the retention of express assumption of risk and some versions of no-duty assumption of risk, my endorsement of negligent assumption of risk and the acquiescence type of implied no-duty assumption of risk is more hesitant and partial. My hesitancy stems from concerns about whether consent is present in these cases or whether the doctrine is motivated by normative values distinct from consent's autonomy-enhancing justification. Almost all versions of assumption of risk involve an awareness of a risk[66] followed by some conduct on the part of the plaintiff which leaves them in the 'danger zone' created by the defendant. Courts and scholars have often inferred consent from this. Speaking of all implied assumption of risk cases (implied no-duty and negligent assumption of risk), the *Second Restatement* asserts that such behaviour manifests a 'willingness to accept [the risk of harm]'.[67]

Keeton, et al. also attribute consent in these assumption of risk cases: '[b]y entering freely and voluntarily into any relation or situation where the negligence of the defendant is obvious, the plaintiff may be found to accept and consent to it'.[68] In implied no-duty assumption of risk, the defendant is 'regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility'.[69] The language for negligent assumption of risk is slightly different; here, the plaintiff 'voluntarily encounter[s] a known risk' instead of 'tacitly or impliedly agreeing' to the defendant's conduct.[70]

While I readily grant that not all consent needs to be expressed explicitly in language, these characterisations of assumption of risk are concerning, and we should be careful not to assert too quickly that valid consent is present. What is missing from all the descriptions of what occurs in implied assumption of risk is a clarity that mere awareness of a risk and voluntary continued exposure to it does not constitute consent. Absent this, my concern – shared by Simons – is that 'courts [will] characterize the behavior as consensual because they conclude that such a plaintiff is not entitled to relief' instead of vice versa.[71] Courts will then point to the encounter of the risk as proof that the plaintiff assumed the risk or consented to the defendant's conduct. There are two ways in which 'encountering the risk' can be connected to 'consenting to the conduct'. The first way is not problematic; however, I suspect the second way at least partially contributes to assumption of risk's bad reputation amongst some scholars.

First, 'encountering the risk' could be a non-verbal way of *expressing* consent to the conduct which gives rise to the risk. Note that this does not contradict a unilateral view of consent. Whether consent is actually present is a different question from (1) whether the court has sufficient reason to conclude consent is present, (2) whether a potential consent-receiver has reason to conclude they have consent, and (3) how we should respond to a potential consent-receiver's action based on their understanding of whether they have consent. Uptake, in my view, is not required for consent to be present. Without the uptake requirement on consent's validity, there is no requirement for an attempt to communicate either.[72] However, a good piece of evidence that consent is present is that the consenter made some attempt to communicate consent. Because of our epistemic limitations, both we and the courts can and should look to our communicative acts for an indication of whether another consents. This sense of 'encountering the risk' would thus be evidence of the existence of consent, and not necessarily a component of consent itself.

In some instances, I believe this is an accurate description of events. For example, if a partner discloses that they have an STI and I respond

by non-verbally initiating sexual intercourse, it would be reasonable to assume that I have consented to the relevant conduct which gives rise to the risk of me contracting an STI and that I am expressing this consent via my non-verbal acts. However, as with any communicative act, my actions occurred in a context which influenced their meaning and interpretation. It would be a mistake to assume that every action which fits such a general description as 'awareness of risk plus presence in the "danger zone"'[73] should be interpreted as expressing consent. For example, it would be a grave moral error to assume that a person who voluntarily attended a party and left their drink unattended at a fraternity house known by that person to spike drinks thereby is expressing consent to being roofied. Yet, such a scenario involves both an awareness of risk and a willing exposure to the risk. However, in this context such a behaviour should not be construed as communicating consent due to linguistic norms. No competent speaker in this linguistic community – assuming such a community is relevantly similar to our current community – would interpret such actions as communicating consent to being drugged.

Second, we could view plaintiffs who encounter known risks as constructively 'consenting' to the alleged tortious conduct. In constructive 'consent,' we treat an agent if they consent to $\Phi$ because they did $\Psi$. For example, it is because of their decision to enter public spaces that we treat movie-goers as if they consent to incidental contact by others. Similarly, we might argue that it is because of an employee's use of machinery with the knowledge of the risks involved that we can permissibly treat them *as if* they consented to their employer not providing them with safe working conditions. In such cases no consent is actually present; we merely treat the agent as if they consented. Negligent assumption of risk and acquiescent assumption of risk are, under this reading, an example of constructive consent: the knowledge of a risk and some action resulting in exposure to this risk is treated as consent to the defendant's action that gives rise to the risk. I have elsewhere argued against this practice as bearing any normative resemblance to consent and so will not repeat those arguments here.[74] Instead, I will simply highlight one of the main conclusions of that work: whether constructive consent – including constructive consent in assumption of risk cases – results in a permissible alteration of the moral landscape will depend on case specific factors. Why, specifically, do we treat a defendant's conduct in this type of case as not constituting a tortious claim? As my roofied drink example above hopefully illustrates, simply stating that the plaintiff knew the risk is insufficient.

To see how constructive consent – under the guise of assumption of risk – can lead to arguably incorrect decisions, consider the classic case of *Lamson v American Axe & Tool Co*. In this case, the plaintiff painted hatchets, which he then placed on a rack for drying. The racks had been replaced about a year prior to the plaintiff's injury, and he had alerted his boss to the fact that the hatchets were now likely to fall on him. (The hatchets did not fall off the old rack at all.) The boss then told the defendant, essentially, to get back to work or quit. The plaintiff stayed and was later injured by a falling axe. Holmes, who was at that time the Chief Justice of the Supreme Judicial Court of Massachusetts, held that the plaintiff could not recover because '[h]e stayed, and took the risk'.[75] In this very short opinion,[76] the court looked no further than the plaintiff's awareness of the risk and his decision to remain at his job. Yet, a decision not to quit your job is not, without much more built into the story, the same as consent to an employer's otherwise negligent conduct. The Holmes Court thus treated the plaintiff as if he consented (when he really had not) due to some undisclosed underlying normative reason.

To be clear, I am not denying that there is never an underlying normative reason that can justify a conclusion of not liable. Instead, what I draw attention to is the fact that the court does here what future courts would do in constructive consent cases related to monitoring inmate phone calls or testing blood alcohol content levels [BAC]. As with those cases, there may be weighty reasons to view the conduct in question as permissible. For example, in the case of so-called implied consent laws for BAC, a concern for safety could very well justify the invasion of privacy. However, these concerns must be weighed against autonomy-based concerns which the name of 'consent' hides.

The same is true in *Lamson*. Typically, we would think an employer owes a duty of care to their employees. We would then consider if there were reasons why the employer lacks a duty in this specific case. Possible reasons include societal benefit, fairness to the defendant, or respect for an exercise of the plaintiff's autonomy. To conclude that there is no obligation owed because of, for example, the resulting benefit to society (where 'benefit' is viewed from the standpoint of an arguably misguided market/economic theory), we would have to weigh this benefit against the violation of the plaintiff's autonomy. If we claim that consent is present, then this autonomy-based concern is significantly diminished though, if not entirely eliminated. Imputing constructive consent thus attempts to remove a normative weight from the deliberative scales prematurely. Other than tipping the scales, this move does nothing more than kick the can down the road: we still must ask why we are justified in

removing the weight. Retaining an association to consent or even simply relying on the awareness + voluntary encounter = no liability framework seeks to hide this question. I doubt even the Holmes court would adopt the framework for all cases. There thus must be some relevant difference between these cases which justifies the differential treatment and label of 'assumption of risk'. Given this relevant difference – whatever it may be – it would be much clearer to remove the middleperson (middle-concept?) and simply refer to whatever this reason is instead of misleadingly describing what occurs by reference to consent. For these types of assumption of risk, then, I have little objection to treating assumption of risk the same as contributory negligence, since the latter has its grounds not in the autonomy of the plaintiff but in fairness towards the defendant.

It is important to note concerns about the presence of consent arise even when courts claim to be using express assumption of risk. Consider here *Arbegast v Board of Education*. In this case, the plaintiff was a student teacher, and the defendant rented out donkeys, helmets, and other supplies to her school for a game of 'donkey basketball'. Arbegast, the plaintiff, fell off her donkey when he lowered his head. The key legal question was asked against the backdrop of CPLR article 14-A, which established a system of comparative causation that included implied assumption of risk but did not cover express assumption of risk.[77] Therefore, the appeal focused on whether the plaintiff was entitled to a jury instruction on comparative causation based on implied assumption of risk. The Court of Appeals ruled that she was not entitled to such an instruction because of her own testimony that the company informed her of the risks associated with the sport; it explicitly held that express assumption of risk was present. Specifically, the court cited the plaintiff's 'admission that she had been informed both of the risk of injury and that "the participants were at their own risk"' in concluding that express assumption of risk applied.[78]

As with implied no-duty assumption of risk, there is no attempt to determine whether the plaintiff had the *mens rea* or *actus reus* necessary for consent, such as an intention to release the defendant from the duties it owed to her, for example, not to be harmed by their stubborn donkey. Instead, the court points to her voluntary use of the donkey and her knowledge of risks as a basis for treating her as if she consented to the defendant's conduct. The template invoked here – one of awareness of risk plus use – echoes that of constructive consent. As there, there may be legitimate reasons to deny wrongdoing or recovery for the 'consenter', but this will be a separate issue from whether the agent consents.

While it might seem odd to insist that the court moved too quickly in assuming express consent is present when a person voluntarily rides a donkey *to play donkey basketball* after being informed that (1) donkeys will act like, well, donkeys,[79] and (2) 'participants were at their own risk', the quick conclusion here is just as much a part of what led to assumption of risk's bad reputation as *Lamson*. If we can assume consent or agreement in this case, why should we not be able to assume the same when the donkey is replaced by defective machinery used in the course of a plaintiff's employment? The structure is the same, but yet many of us seem to want these cases to be decidedly differently. The difference, then, cannot be because one is 'express' and another is not. The difference instead has to do with social policy, and this difference should be made explicit. The normative reasons we have for promoting autonomy directly through consent (and express assumption of risk) are distinct from those reasons we have for promoting other values through other laws that also govern tort liability. If we are unclear about which reasons apply where, it will be unclear which resulting practices are worth the cost.

## 6. Conclusion

Assumption of risk, though down, should not be counted out. Once we narrow its scope, it still has a significant role to play as an extension of consent's magic. However, talk of consenting to risks and assuming risks has unnecessarily muddied the waters and may have led courts to being too quick to attribute consent when there is none. These doctrinal 'bad apples' should therefore be removed to avoid fully spoiling the bunch. Yet, we should be careful not to remove all versions of assumption of risk from our legal lexicon. To do so, as is advocated by the *Third Restatement*, would limit the scope of consent's 'moral magic' and ignore its unique, unilateral, and autonomy-enhancing nature.

## Notes

1 Kenneth Simons, 'Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference' (1987) 67 Boston University Law Review 213, 248.
2 Danielle Clout, 'Assumption of Risk in New York: The Time Has Come to Pull the Plug on This Vexatious Doctrine' (2012) 86 St John's Law Review 1051, 1053.
3 American Law Institute, *Restatment (Second) of Torts* (American Law Institute Publishers 1965) § 496 A comment *b*.
4 *Knight v Jewett*, 3 Cal. 4th at 325 (Cal 1992).
5 Kenneth Simons, 'Exploring the Relationship Between Consent, Assumption of Risk, and Victim Negligence,' in John Oberdiek (ed), *Philosophical Foundation of The Law of Torts* (OUP 2014) 287.

6 Stephen Sugarman, 'Assumption of Risk,' (1997) 31 Valparaiso University Law Review 833, 834.
7 This division is also found, though not necessarily endorsed, in the *Second Restatement*: '"Assumption of risk" is a term which has been surrounded by much confusion, because it has been used by the courts in at least four different senses, and the distinctions seldom have been made clear' (n 3 § 496 A comment *c*). It then proceeds to list the four types in comment c of § 496 A. Other cases from different jurisdictions include the same summary. See, for example, *Mizushima v Sunset Ranch, Inc,* 103 Nev at 262 (Nev 1987).
8 *Auckenthaler v Grundmeyer*, 877 P 2d at 1041 (Nev 1994).
9 *Restatement (Second) of Torts* (n 3) 561.
10 See *Lawson by and through Lawson v Salt Lake Trappers, Inc*. 901 P 2d at 1016 (Utah 1995) Here, the court reaffirmed its position on being struck by foul balls in a baseball stadium, stating that 'being struck by a foul ball is "one of the natural risks assumed by spectators attending professional games"', and that the respondent did not breach a duty owed to the plaintiffs.
11 *Auckenthaler* (n 8) 1041.
12 This example is taken from the *Second Restatement* (n 3) §496 A comment *a*.
13 When needed, I will distinguish between them as 'secondary implied assumption of risk (reasonable)' and 'secondary implied assumption of risk (unreasonable)'.
14 *Morgan v Ohio Conference of the United Church* 2012-Ohio-453 at para. 15 (Ohio Ct App 2012). Italics added.
15 For a review of this shift, see Christopher Boatman, 'A Knight/Li News Update: A Detailed Analysis of the Case Law Suggests that We Should Return to a Consent-Based Assumption of Risk Defense' (2013) 41 Western State University Law Review 57.
16 *Bundschu v Naffah*, 768 NE 2d at 1219 (Ohio Ct App 2002).
17 *Bundschu* (n 16) 1221. See also *Knight*: "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself" (n 4) 708.
18 *Knight* (n 4) 708.
19 Simons, 'Assumption of Risk' (n 1) 213.
20 Simons, 'Exploring the Relationship,' (n 5) 275; the new rules referenced in the quotation are, roughly, that a plaintiff's conduct should reduce damages if they contributed to the harm and that contribution was unreasonable.
21 *Lawson* (n 10) 1016.
22 Boatman's 'Knight/Li News Update' and Dorfman's 'Assumption of Risk, After All' – both writing in the 2010s – have argued for its return. Boatman (n 15); Avihay Dorfman, 'Assumption of Risk, After All' (2014) 15 Theoretical Inquiries in Law 293.
23 As advocated by, for example, Sugarman, Clout, and the California Supreme Court in *Li v Yellow Cab. Co*. Sugarman (n 6); Clout (n 2); *Li v Yellow Cab Co* 532 P2d at 1241 (Cal 1975) (note that *Knight v Jewett* later clarified that *Li* applied to only secondary assumption of risk. However, before this clarification, occurring almost twenty years after *Li*, there was disagreement about how to interpret the decision.)
24 My thanks to Chris Mills and others at UCL's New Directions in Private Law Theory Conference for pushing me to clarify the relationship between consent and risk, consent and autonomy, and the importance of these relationships.
25 The phrase 'moral magic' comes from Hurd: Heidi Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121, 121.
26 Hurd (n 25) 121.
27 Larry Alexander, 'Moral Magic of Consent (II)' (1996) 2 Legal Theory 165, 165.
28 Joan McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and The Law' (1996) 2 Legal Theory 175, 192.
29 Emily Sherwin, 'Infelicitous Sex' (1996) 2 Legal Theory 209, 212.
30 Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds on Benevolence* (Princeton 1986), 62.
31 John Davis, 'Precedent Autonomy and Subsequent Consent' (2004) 7 Ethical Theory and Moral Practice 267.
32 Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer (eds) *The Ethics of Consent: Theory and Practice* (OUP 2010).
33 Some, such as Victor Tadros and Meir Dan-Cohen, accept a strong relation between autonomy and consent but argue that dignity serves as a limiting factor on this power, rendering consent to actions which violate dignity to be non-transformative. However, even in these views

autonomy still does the heavy moral lifting – albeit slightly more limited work. Victor Tadros, 'Consent to Harms' (2011) 64 Current Legal Problems 23; Meir Dan-Cohen, 'Basic Values and the Victim's State of Mind' (2000) 88 California Law Review 759.

34 See Joel Feinberg, *Harm to Self* (OUP 1986) Chapter 18.

35 This view of autonomy also aligns with David Enoch's sovereignty-based view and what Jeremy Waldron calls will-based theories of consent. David Enoch, 'Hypothetical Consent and the Value[s] of Autonomy' (2017) 128 Ethics 6; Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 Philosophical Quarterly 127.

36 Hurd (n 25) 121.

37 McGregor (n 28) 192.

38 For ease as of writing I will use "actions" as shorthand for this list. See also McGregor (n 28) for a similar view.

39 Both Shuck and Feinberg speak of 'consent to risk' when discussing consent that is informed. Tadros also speaks as if consent can be to risks and then is merely extended to the manifestation of the risk if such a manifestation occurs, and Westen holds that consent to risk is separate from consent to the resulting harm (which causes him to erroneously view informed consent as fictitious). Peter Schuck, 'Rethinking Informed Consent' (1994) 103 Yale Law Journal 899, 902; Feinberg (n 34) 278; Victor Tadros, *Wrongs and Crimes* (OUP 2016) 242–43; Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate Publishing Company 2004) Chapter 7.

40 Westen (n 39) 280–81.

41 Westen (n 39) 282.

42 Westen (n 39) 282.

43 As an anonymous reviewer noted, 'A person who speaks of consenting to risks as a shorthand for consenting to risky actions can accept that in some situations there is no duty to begin with . . . I don't see how someone who speaks of consent to risk as a shorthand for consent to risky action would somehow be blind to this rationale [that there is no duty in the hockey example].' While I agree with the first comment, I am afraid that the second is too charitable given the legal history of flyballs in US baseball stadiums.

44 *Lawson* (n 10) 1016.

45 For those unfamiliar with his unique approach to grammar and punctuation, I present the following excerpt from *Ulysses*, Episode 11:

> —*Co-ome, thou lost one!*
> *Co-ome, thou dear one*!
> Alone. One love. One hope. One comfort me. Martha, chestnote, return!
> —*Come*!
>
> It soared, a bird, it held its flight, a swift pure cry, soar silver orb it leaped serene, speeding, sustained, to come, don't spin it out too long long breath he breath long life, soaring high, high resplendent, aflame, crowned, high in the effulgence symbolistic, high, of the ethereal bosom, high, of the high vast irradiation everywhere all soaring all around about the all, the endlessnessnessness. . .
>
> —*To me!*
> Siopold!
> Consumed.
> Come. Well sung. All clapped. She ought to. Come. To me, to him, to her, you too, me, us.

James Joyce, Ulysses (first published 1922, Project Gutenberg 2001) Retrieved from <www.gutenberg.org/ebooks/4300> on 29 September 2022.

46 Simons, 'Assumption of Risk' (n 1) 248.

47 *Second Restatement*, (n 3) § 496 B.

48 Hurd (n 25) 124.

49 See *Pfenning v Lineman*, 947 NE 2d at 402 (Ind 2011) for a list of cases which rely on assumption of risk in addressing sports injury cases.

50 See the following for an explanation and list of some of these cases: Schuck (n 39) 907; Simons, 'Assumption' (n 1) 276. See also for articulations of 'traditional' assumption of risk extending to strict liability and recklessness: *Second Restatement* (n 3) § 496 A, comment d; Simons, 'Assumption' (n 1) 214–15.

51 Simons, 'Exploring the Relationship' (n 5) 276.
52 Some courts already explicitly preclude express assumption of risk from comparative fault frameworks. For example, see *Mizushima* (n 7) and *Knight* (n 4).
53 American Law Institute, *Restatment (Third) of Torts* (American Law Institute Publishers 2000) 20.
54 *Third Restatement* (n 53) 20.
55 Tadros, *Wrongs* (n 39) 206–7.
56 Tadros, *Wrongs* (n 39) 207.
57 Simons, 'Assumption of Risk' (n 1) 248.
58 John Mansfield, 'Informed Choice in the Law of Torts' (1961) 22 Louisiana Law Review 17, 32.
59 Simons, 'Assumption of Risk' (n 1) 248. Simons moves away from this view in 'Exploring the Relationship' (n 5).
60 *Second Restatement,* (n 3) § 496 A comment c2.
61 *Bundschu* (n 16) 1222, italics added.
62 *Auckenthaler* (n 8) 1041.
63 *Morgan* (n 14) para 15.
64 *Bundschu* (n 16) 1221.
65 *Auckenthaler* (n 8) 1042.
66 In some courts, awareness of the risk is not even required. The standard instead is that a reasonable person would have been aware. See *Meistrich v Casino Arena Attractions Inc* 31 NJ at 52 (NJ 1959).
67 *Second Restatement* (n 3) § 496 C comment *b.*
68 W Page Keeton, Dan Dobbs and Robert Keeton, *Prosser and Keeton on the Law of Torts* (5th edn, West Publishing Co 1984) 487.
69 Clout (n 2) 1055.
70 *Auckenthaler* (n 8) 1041.
71 Simons, "Assumption" (n 1) 225.
72 At least there is no requirement internal to the structure of consent. We could hold that out of respect for R, G should attempt to communicate to R. However, at most a lack of attempted communication would be wrong by G against R and not grounds for invalidating the consent G gives R.
73 Lord Watson expressed a similar concern in *Smith v Baker & Sons*: 'When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance.' It is unfortunate that more judges did not share his concern. *Smith v Baker & Sons* [1891] UKHL 2, [1891] AC 325 (Watson LJ).
74 See M Beth Valentine, 'Constructive Consent: A Problematic Fiction' (2018) 37 Law and Philosophy 499.
75 *Lamson v American Axe & Tool Co*, 177 Mass at 145 (Mass 1900).
76 Including the standard West headnotes, the opinion is only one standard pdf page.
77 The court assumed that the legislature intended the common law meanings of express and implied. It offered the following definitions: 'Express assumption . . . resulted from agreement in advance that defendant need not use reasonable care for the benefit of plaintiff and would not be liable for the consequence of conduct that would otherwise be negligent . . . Implied assumption was founded . . . on plaintiff's voluntarily encountering the risk of harm from defendant's conduct with full understanding of the possible harm to himself or herself.' *Arbegast v Board of Education*, 480 NE 2d at 371 (NY 1985).
78 *Arbegast* 480 (n 77) 368.
79 For the record, I would like to say that, in my experience, some donkeys can be very lovely creatures. I would also like to place an emphasis on 'some'.

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# 6
# Collaborative property: P2P sharing as property system

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## 1. Introduction

The sharing economy has drawn increasing attention from academic commentators in the last decade.[1] The definition I will use is peer-to-peer (P2P) sharing of access to tangible goods, including accommodation, for which the closest neologism is 'collaborative consumption'.[2] There have been many claims of the potential efficiency and equity gains from sharing resources rather than owning them outright, most notably the reduction in waste and under-utilisation of existing resources, and the opportunity for consumers to access the utility of resources without the expense of ownership.[3] For example, it is more efficient for some people to own cars and others to own lawnmowers, and to share the use of these assets when they are needed, rather than for everyone to own both a car and a lawnmower. Aside from the arguments from economic efficiency there are also considerations from sustainability, anti-capitalist sentiment and a suite of pro-social motivations.[4] Yet there have been few attempts to analyse the sharing economy's value system, namely how it creates and distributes economic resources, and how this compares with existing forms of resource production and distribution. In particular, the various forms of mixed commons, which are property systems characterised by co-extensive private and common rights and uses over resources, which sharing resembles in many ways.[5] Explicating the value structure of sharing is important for evaluating how well it can achieve the merits and gains ascribed to it by its proponents.

I will advance the argument that sharing constitutes the archetype of a new property system, which I term 'collaborative property'

(hereafter CP) after the recognition of the collaborative nature of sharing.[6] I will address primarily the case of peer-to-peer exchange of tangible resources, including both personal and real property, without the transfer of ownership.[7] I am agnostic on the organisational form, which can be online platforms, community libraries, social media groups and other similar forms, and whether the exchange involves money, in-kind benefits, or is simply gratuitous.[8] CP has a set of distinctive features embodied in its archetype which enables it to retain the advantages of private property while simultaneously partaking in some of the advantages of common property.

In section 1, I discuss how sharing can be understood as an entire property system consisting of production, distribution and governance, and how the CP it engenders compares with other models of mixed commons and peer-production systems. Section 2 delineates the essential features of CP, in particular the transactional structure used for CP which I argue is its most distinctive aspect. In section 3, I explore how these features of CP enable it to emulate the benefits of a commons while managing the collective governance problems that arise from commoning.[9] Finally, section 4 briefly discusses the trade-offs and limitations of CP.

## 2. Sharing as a property system

I will briefly expand on how P2P sharing can constitute a distinctive property system, by which I mean a system for producing, distributing and managing economic value.[10] I use the term 'sharing' here to denote the suite of actual economic practices that constitute P2P access to tangible goods, and CP to denote the property and value dynamics which constitute the essential features of the practice. It might seem that P2P sharing, whereby the use of a tangible resource is transferred to or accessed by a party who is not the owner, constitutes a simple exchange of existing utility of the shared good between owner and user. Nothing new is produced, the transfer of value is limited to the transacting parties and does not benefit anyone else, and sharing is simply another extension of private ownership and market exchange, like buying and selling, or renting. However, commentators have argued that sharing creates benefits which these more familiar forms of exchange do not.[11] I argue that while sharing is not a novel or unique economic activity, it does present distinct characteristics which enable it to produce, distribute and manage resources in a way that is different from other property paradigms.

Sharing enables new ways of distributing and consuming resources. Instead of having to purchase and own an asset to access its function, a consumer now has the option of renting it through a sharing platform. The distribution and consumption of resources no longer depends on the user owning it, which effectively separates the utility provided by a resource from its costs of ownership. Kreiczer-Levy has argued that sharing also presents a different form of property use compared with renting and leasing, since instead of being tied to any specific object of property, even temporarily, access connotes a stream of services delivered by a revolving suite of objects.[12] This means consumption of goods no longer necessitates the geographical and relational stability conventionally associated with owning tangible goods.[13] Furthermore the advent of widespread P2P sharing also changes the economic possibilities of private ownership, which need not entail exclusive possession and consumption of goods, but is inflected by the possibility of using goods for other purposes.[14]

Sharing also implicates a way of producing resources, specifically producing the under-utilised portion of existing resources.[15] This can be analysed through Ostrom's matrix of resource system and resource unit,[16] coupled with Benkler's notion of granularity.[17] Ostrom defines a resource system as a system which supports a stream of resource units, it being the units which are appropriated for consumption. Most P2P sharing involves resources which are typically owned for the purposes of personal consumption. This means they are usually taken out of circulation in the marketplace and their utility is reserved for the sole use of the owner to the exclusion of other potential users. If these resources are not shared, they will not generally be made available for other people's consumption through another method, such as through a long-term lease.[18] For example, a personal car when it is unused is simply unused; its downtime denotes utility which might have been realised but was not. And for tangible goods which can only support a limited number of users at any time, and have a limited lifetime utility, the resource units which remain unconsumed are lost. So, an owner by opening access to assets which would otherwise be for their exclusive use, 'produces' the utility which would otherwise have been wasted.[19] The utility of a car can also be produced in a different way. Whenever a car owner makes a journey, the empty seats are potential utility for anyone travelling in the same direction, and which are not made available for consumption because the owner is not running a bus service.[20] Like downtime or unused mileage, empty seats are a resource unit which can be produced for sharing. Thus, sharing differentiates the different resource units that are produced by a resource system and enables these to be consumed separately.[21]

This potentially increases the amount and variety of consumption a resource system can support, and improves on the allocative efficiency of existing resource systems, particularly for those composed of resource units with fast rates of decay.[22]

Finally, sharing represents a new way of contributing to and maintaining resources. Widening access to resources which would otherwise be ring-fenced by private ownership enables greater distribution of labour through the shared objects. As owners provide their private property for others to use, they produce not only its inherent use value, but also the labour they have hitherto invested in the property, such as purchasing, storing, and otherwise maintaining it. This value accrues to subsequent users of shared property, who during their use and possession also have the opportunity to invest similar labour which accrues to the owner and to subsequent users after them.[23] In other words, opening up access to goods not only gives non-owners the opportunity to share in their benefit, but also gives them the opportunity to share in their maintenance. Keeping goods clean and functional, storing them, or potentially even improving them, may seem to be mundane and negligible actions, but together they constitute a necessary and not inconsiderable flow of labour. Sharing enables this labour to flow to others, creating a mesh of value transmitted through tangible resources across the boundaries of private ownership.

## 2.1 Sharing as commons

This shows that sharing is much more than a method of consumption, but encompasses all the central elements of a property system: production, distribution, and governance. It also shows how sharing enables the realisation of benefits beyond those possible in straightforward private ownership: more flexible property use, less wasted utility and the chance to benefit from another's labour. Doing so requires the cooperation of multiple peer participants, leading some to observe that sharing resembles a commons where resources are pooled and accessed by a community.[24] Here I delineate how CP resembles two approaches to commons, mixed commons and peer-production, and how it can address some of the gaps in this area.

The central aim of CP is to construct a system of property which can realise some advantages from both private property and commons and also overcome their respective drawbacks. It shares this aim with many theories of mixed commons, most pertinently Smith's 'semicommons' and Dagan and Heller's 'liberal commons', which use similar strategies of using coextensive private and collective incentives to manage common

property.[25] However most mixed commons involve either legal co-ownership or situations of physical or relational proximity. Land and housing are the single most used examples of common resources,[26] while often cited forms of collectivity include marriage, close corporations and trusts, all of which involve either legal or equitable joint ownership. All of these evince a sense of participants being bound together, whether by ties of legal rights as in the case of trusts, or by relational proximity as in the case of marriage or inheritors, or in the case of neighbouring landowners, enforced physical proximity which makes each vulnerable to the actions of their neighbours.[27]

In contrast, the urgency to cooperate through sharing is much lower. Sharers have little opportunity to affect the interests and rights of others, and they are not dependent on cooperating to realise a necessary benefit, unlike owners in semicommons or housing complexes. Indeed the allure of sharing is how it enables participants to choose their level of commitment to the common project on a flexible basis. Owners can choose how little or often to share their property, their conditions of allowing access, and how to use their property when it is not being shared. For example, hosts on Airbnb can freely set their availability and are not obliged to accept all booking requests.[28] Airbnb hosts, for all intents and purposes, retain full control over their property while accessing the common benefits of being part of an online sharing platform, such as economies of scale in marketing and insurance. Like mixed commons the level of commitment to the commons is a sliding scale, and sharing, and by extension CP, offers a more flexible and granular basis for fixing the level of commitment. But unlike mixed commons, where participants begin from a position of interdependence and must cooperate to solve collective problems, CP begins from the opposite position, of creating interdependence between private owners in order to solve problems pertaining to private ownership, such as wastage, under-utilisation and high costs.

## 2.2 Sharing as peer-production

Another important feature of CP is its continual process of production. Unlike land and housing, there is no identifiable object of CP outside of the sharing process itself. There is no common pool of objects except that participants continue to contribute resources and exchange with each other, and once the process stops the structure reverts to one of discrete private ownership. Insofar as CP denotes a method of organising labour and resources to achieve beneficial outcomes, it can be seen as a

production system comparable to peer-based production and urban commons.[29] The similarities between these models are that they diverge from the traditional categories of market and firm, and their participants are 'peers' or self-selecting non-professionals. Peer-based production and urban commons claim to realise benefits and efficiencies which escape markets and firms, and some have argued the same for the sharing economy.[30] Some have analysed the conditions which are conducive to the emergence of peer-to-peer sharing markets,[31] and I agree that while sharing offers efficiency gains over outright ownership, these do not materialise in all situations. It makes sense to share assets with high value and low use frequency, such as cars and spare rooms, but not smartphones which are frequently used, or clothes which are sufficiently inexpensive that the costs of owning them are not offset by the benefits of sharing.

Like peer-based production, sharing depends on the contribution of spare time and resources by parties who are highly dispersed and loosely connected. Both models are examples of what Benkler calls 'barn raising'.[32] They integrate granular inputs of labour to produce an output with considerable commercial or economic value, labour which would otherwise have a relatively low opportunity cost. Benkler gives the example of the NASA Clickworkers project, in which laypersons can visit a website and search for craters on Mars. Most contributions came from one-time visitors who spent a few minutes on the task, time which they would likely otherwise have spent on leisure. Yet the agglomeration of these few minutes achieved a task which would have required the full-time employment of a specialist.[33] A similar logic applies to goods-sharing; the car which is not used would be parked on the driveway, and the spare room would be left unused. However the analogy is inexact, as while Benkler's examples of NASA Clickworkers and Wikipedia face the difficulty that they require gratuitous labour, they also benefit from being public goods which can only be added to but cannot be exhausted.[34] In contrast, sharing can harness the incentives of private property and profit making,[35] but its resources are private goods which are rival and subtractable.[36] If contributions and appropriations are not carefully managed, CP will be susceptible to tragedy.

This sets up the challenge for CP. Its distributed and ad hoc mode of production enables it to realise value that is not realisable in other ways and gives it greater flexibility compared to traditional or mixed commons. CP realises value through incentivising owners to open their property for common use, but because it involves tangible resources, it faces the problems of over-use and free-riding which plagues any commoning of private goods. Moreover, the usual solutions of privatising costs and

benefits,[37] or binding participants to common interests and governing through strong norms[38] potentially undermine the first condition of preserving the distributed base of cooperation. How can CP enable property-based cooperation without binding participants together, while also managing the risks of over-use, will be the subject of my analysis. And I aim to show that it is the transactional structure of CP which makes this possible.

## 3. Features of collaborative property

Here I delineate the distinctive features of CP as a value structure, by looking at how resources are owned and controlled, how these are distributed and exchanged, and what form of economy this produces. These three aspects of CP are deeply intertwined, but I will analyse them separately for clarity.

### 3.1 Privately owned private goods

I have stated frequently that the underlying ownership structure of CP is private ownership, so here I will be brief. Private ownership denotes the paradigm of legal rights which gives individuals exclusive control over and entitlement to the benefits of resources they own.[39] Sharing a resource presumes that the sharer has both the ability and authority to allow access to the resource, which requires having a legal interest that enables them to shift possession temporarily to the user. The immediate sharer need not be the owner of the resource, such as if they are a lessee of the owner and have the latter's permission to allow others to use the resource. So, while the host on Airbnb need not own the accommodation, such as if they are a tenant or a property management company, I will presume that they have the same authority to share as if they were the owner.[40]

### 3.2 Transactional collaboration

The second and most distinctive feature of CP is the transactional structure of its cooperation. Reasoning forward from the first feature, that CP is based on private ownership, means that any transaction cannot entail transfer or exchange of ownership. This is not simply a matter of form. Preserving the initial structure and distribution of ownership means cooperation depends on the continuing willingness of participants to engage in the collaborative transaction. This process of contribution both

constitutes and sets the limits of CP. I have stated that CP is more akin to a process of commoning, and there is no enduring or identifiable object of property outside of the value that is produced through the sharing process. Without ongoing cooperation, CP reverts to straightforward private ownership. This leads to three important observations.

First, collaboration which is grounded in private ownership facilitates the flow of labour-service. I have argued elsewhere how labour and its fruits are transferred through physical objects to accrue to subsequent users of those objects.[41] The labour that an owner has invested in a resource, obtaining, maintaining and otherwise ensuring its ongoing functionality accrues to users of that resource. For the duration of sharing the owner is relieved of some of these labours, such as storing, keeping safe and cleaning, which passes to the user with physical possession of the resource. However, those labours which remain with the owner, such as the responsibility to repair any damage and to bear risks for malfunction and loss, represent their ongoing labour in the resource and hence their ongoing contribution to the collaborative transaction. This is grounded in their ownership rights and duties and is what makes sharing, constituted by the flow of labour-service between a revolving set of individuals through myriad objects, different from the labour flows of selling or donating.[42]

Secondly, that collaboration is constituted by the transaction and limited by its terms and boundaries means participants can choose the level of commitment they are willing to bring to the collaborative exchange. Unlike mixed commons or co-ownership where commitment tends to be either the default position or a long-term proposition, participants can choose how long and how much to commit by changing the terms of the transaction itself. In other words, the transaction can be seen as the most basic unit of commitment. The extent of commitment can be as limited as a one-off transaction, wherein all anticipated benefits and costs are priced into the exchange and participants owe no obligations beyond the terms of the transaction. Most P2P rentals on digital platforms such as Airbnb or Turo are examples of this type. Or it can be a more extensive and prolonged transaction, such as banking contributions in a community to spend later or committing resources on a long-term basis, in other words whenever there is a lag between contribution and appropriation. Time-banks, memberships, token systems and libraries are all examples of such transactions. There is infinite gradation and possible configurations of collaborative transactions, sometimes even within one organisation. For example, it used to be that Homeaway, a P2P accommodation sharing platform, offered users the option of transacting either in

money or in tokens.[43] Users who chose the former option would conform to a one-off transaction structure, whereas those who chose the latter would have committed themselves to making some future contribution to the platform by virtue of being locked-in through the token system.

Using transactions as the base unit for commoning enables different possibilities of configuring contribution beyond the conventional methods of either committing in units of time, or labour, or amount of resources. It allows CP to be much more flexible than other forms of commons, as participants can choose what they are willing to stake every time they participate in sharing. This preserves the range of activities a resource can support, as in-between sharing the owner has discretion on how to use his property and can commit it to other uses or even other sharing communities. It also protects the owner's positive ongoing choice and autonomy; rather than a mere 'right to exit',[44] the owner exercises a right to share by engaging in transactions.[45] His obligations cease as soon as the transaction ends, and the owner is restored in his ability to choose his next transaction.

That owners retain their full ownership rights and can configure the extent of their commitment does not mean they retain full control over the terms of transactions. Instead, the level of control is inflected through the extent rules of the organisation sharing is intermediated through. The transactions are usually one-offs, as participants agree to commit to the duration, terms and responsibilities necessary to the immediate exchange but no more, such as if a homeowner agrees to host a guest for two nights' stay on Airbnb in exchange for a sum of money. But a multitude of similar and repeated transactions can aggregate into something more cohesive.

This leads to the third important aspect of transactional collaboration, which is the change in character of the resource system. For one-off transactions at the discretion of the owner the resource system is the asset being shared, and the resource unit is the use and general utility the asset can support. But for a multitude of similar and repeating transactions, the resource system is no longer limited to the discrete assets being shared, but the pool of resources that are committed to being shared, and the unit is the utility the pool of assets can support. This shift from discrete resources to a pool of resources is not an empirical transition, but an emergent one. The common pool emerges from the ongoing and future transactions between participants, regardless of their identities or the substance of their exchanges.[46] This is what differentiates CP from other forms of commons or co-owned property. Commons are concerned mostly with how to govern property so as to maximise its efficiency or longevity. In contrast for CP the governance of property is in service of the

promotion of transactions, meaning to increase the likelihood and incidence of transactions in the future. Examples of ways CP governance might achieve this is to ensure faster and safer transactions between parties, to alleviate their fears, promote mutual trust and thereby increase the chance that the parties will engage in more sharing in the future. More transactions signal more commitment and more property being made available for sharing.[47]

## 3.3 Dual level of cooperation

The assertion that a multitude of discrete one-off transactions can create an emergent commons dovetails with the third feature of CP, which is how it operates on two scales of cooperation. There is the transaction level where the actual exchange of value occurs, and the market or community level where pooling of resources and collectivisation of costs and benefits occurs. This dual level of operation explains how CP can emulate the dynamics of a commons from a base of private ownership and transactional exchange.

When participants contribute assets or money to sharing transactions, they effectively create a market.[48] By engaging in actions such as listing their property on a platform, communicating with potential counterparties, maintaining their property in anticipation of further sharing, or simply maintaining an account on a platform, participants are signalling their commitment and availability to engage in sharing. Their market-making actions consist of the labours of ownership discussed previously, plus the additional labour involved in bringing goods to market.[49] In short it consists of the same flow of labour-service through resources prepared and offered for sharing. As noted by economists, having a deep and active market can significantly reduce transactions costs such as searching for and negotiating trades.[50] Indeed it is only with the advent of advanced information communication technology that P2P sharing markets are viable at all, where before sharing private possessions was limited to a close circle of friends and family.[51] While the role of the platform or intermediary is important in coordinating market-making, it must also be recognised that much of the costs and labours fall onto owners who effectively act as suppliers and managers of the inventory of goods available on a platform. Insofar as the market may be constituted as a network of labour-service supplied by owners of assets through contributing their private property, and this very act of market making brings tangible benefits to all participants, we may view this as an act of commoning, and the market as a pool of resources.

The distinction between transactions and the market should not be overstated. Although signalling availability may be enough to create the semblance of a market, actual transactions are necessary to constitute and maintain the market pool of resources. Goods which are signalled as being available for sharing will presumably be shared so long as the conditions for access, such as price, duration and other terms, are satisfied. If there are too few choices and transactions occurring, then the market is illiquid and shallow which undermines the valuable network effects that keep contributions growing.[52] Moreover the benefits of market making can only be captured through making transactions. While it is convenient to have a pool of resources to choose from, neither the owner nor the consumer will gain access to the benefit of sharing unless and until they engage in an exchange, at which point the utility and labour-service flows through the shared object. Thus, the market which emerges through transactions also realises its benefits through facilitating more transactions.

This does not mean that the tangible benefit of having a market or sharing community is limited to coordinating supply and reducing transaction costs. It also presents opportunities for economies of scale not realisable at the transaction level (economies of scale being defined as falling average fixed costs per-unit at the margin). Smith has argued that by putting neighbouring lands to the common use of grazing while keeping the parcels private for farming, semicommons is able to operate on two economies of scale. Commoning for grazing enables the commoners to achieve something which their parcels individually could not, namely rearing animals which requires large land tracts. But for the activity of farming, each commoner can farm his own parcel productively. By proceeding on different property systems for different activities, semicommons captures the economies of scale for both. Farming benefits from the productivity and investment incentives of private property, while grazing benefits from the distribution of risk of common property.[53]

CP exhibits a similar dynamic. Private ownership gives owners incentives to use and maintain their property productively, while sharing gives them the option of more efficient use as owners trade their otherwise unused resources for those they have need of. CP also presents more opportunities for benefits to flow between the different activities. The care and investment owners put into their property, typically for their own benefit, flows directly to users in the form of labour-service and increases the utility for both parties. These are benefits realised at the transaction level which are made possible by the underlying structure of

private ownership in sharing. More important are the benefits which can only be realised at the market level, which I will discuss in the next section.

## 4. Harnessing the benefits of private property and common use

Here I outline how the essential features of CP, namely private ownership, transactional structure and dual level cooperation, allow it to successfully realise benefits of collectivity and also to ameliorate the intractable problems of common property systems.

### 4.1 Rational decision making

Private ownership structure coupled with the transactional structure of CP enable it to build a resilient and distributed value system in which each unit transaction maintains a minimum level of economic net utility. The costs and benefits of resource control and management are internalised through the mechanism of private ownership.[54] Private owners bear the full costs of purchasing and maintaining the property and its relevant risks, in return for accessing the full benefits of using and exchanging the good. Whatever use the property is put to, the outcome, whether beneficial or adverse, may be attributed wholly to the owner. Thus, assuming that owners act as economically rational agents, there is minimal level of guaranteed utility as owners may be presumed to take actions which they think are of net benefit to them. And the relatively discrete yet distributed structure of costs and benefits mean the market itself is potentially more resilient, as there is less room for systemic risk and no single point of failure. So, barring an earthquake that affects an entire city, it is safe to assume there will always be a supply of Airbnb accommodation, or Turo cars, or Uber rides in an area.

Likewise the power of decision making is also structured by private ownership, which reduces the number of decision makers for each resource while increasing the number of decision makers overall and potentially making the entire structure more distributed.[55] Concentrating the rights of control in one entity has been argued to reduce transaction costs, as it obviates the need for collective bargaining and agreement.[56] While this is largely a matter a degree, in the case of most tangible goods used for sharing the owner will have unilateral and exclusive decisional power over the good.[57] Owners can unilaterally decide whether or not to share their property and the conditions of access, which leads to more

flexible supply as owners can decide whether or not to contribute depending on their own utility calculations, and more resilient supply as there will always be some owners willing to share their property given a set of conditions. It also means greater choice and opportunity for consumers; even if a consumer cannot accept one owner's terms, chances are there will be other options which are acceptable.[58] Furthermore both the provider and the consumer have unilateral power to commit themselves to the sharing arrangement, there is no need to consult other providers or consumers in the sharing platform or community as to the permissibility or desirability of their transaction.

## 4.2 Over-use, under-investment and free-riding

Over-use, under-investment and free-riding are specific behaviours which often arise in situations involving common tangible resources. Briefly, if a resource is open-access, there is no incentive for any user to invest in maintaining or protecting the resource, as they cannot ensure their investment will not be exploited, or free-ridden upon, by another user. It also means users do not need to bear the whole cost of their use, because they cannot be prevented from taking as much as they wish from the resource, whether by paying a fee or having to bear the cost of replenishing it.[59] These behaviours collectively result in a tragedy of the commons.[60]

CP's two economies of scale allows it to mitigate the problems of over-use and under-investment and the risk of free-riding behaviour without jeopardising its distributed contribution structure described above. Most commons systems solve these problems by tying in commitment from members and communally monitoring and sanctioning defection.[61] These measures have been shown to be costly and often precarious, as perpetrators are difficult to identify and there is always the temptation to free-ride on others' labour.[62] In contrast CP is able to utilise its two economies of scale to internalise the cost and benefits of monitoring and sanctioning at the transactional level, while integrating information about defectors at the commons level. I will proceed to explain how this is achieved.

CP *prima facie* does not suffer from the problem of under-investment because resources are privately owned and the decision of how much to invest and transact is the sole discretion of the owner. Investing in CP means improving and maintaining a resource which is subsequently made available for others to use. If the owner is only sharing ad hoc, then the incentive to invest comes mainly from 'self-service' to improve property for their own use, a boon which is then infrequently accessed by others.[63]

The infrequency of sharing means the disincentive to invest which arises from the possibility of free-riding behaviour is low, as the owner is unlikely to refrain from improving their property which they mainly use for personal consumption on the off-chance that their labour could be exploited by another use. In contrast if the owner is sharing regularly, then their motivations for sharing will likely factor into their investment calculation. Someone who shares with a view to profit would likely be incentivised to increase the value of their property by the higher payout on the market.[64] Someone who shares gratuitously would likely be motivated by pro-social incentives, which suggests they are willing to take some economic loss in return for social gains, so will not be put-off from investing in sharing by the possibility of free-riding behaviour.[65] Private ownership enables owners to calibrate their investment according to their expected payoff, so each transaction is presumably efficient. In short, CP does not suffer from the problem of under-investment because owners can be relied upon to invest up to a level they find utility maximising.

CP is however susceptible to problems similar to over-use and free-riding behaviour. The labour and value invested in shared property is made available to parties who do not have the same incentives to maintain it. A consumer who uses shared property without care, causing damage or otherwise diminishing its utility, has free-ridden on the owner's labour-service provided through the resource, by exploiting the benefit provided without bearing the cost which accrues to the owner. They have also free-ridden on the common labour of other participants in sustaining the pool of resources, by benefiting from the willingness of others to share without observing the norms of commoning. In other words such a user has defected from the norms which incentivise sharing, and in doing so has potentially diminished others' incentive to participate and by extension the amount of contribution and transactions occurring in the future.[66]

Monitoring and sanctioning of these dangers in CP proceeds on its two levels of scale, the transactional level and market, or commons, level. At the transactional level participants police the behaviour of their counter-party, which is both feasible given the discrete and bounded nature of transactions, and self-sustaining as both parties have strong incentives to ensure the other is not defecting on their agreement. Monitoring is performed by parties who have the most intimate knowledge of the transaction, who are invested in the behaviour of the counter-party to the extent they have staked money, time and resources in the transaction, and who reap the full benefit of property performance and bear the whole cost of defection. In other words, both the incentive and the ability to monitor

is internalised. Sanctioning is slightly different, with the intermediary (platform or community) playing a larger role as in prototypical commons.[67] The rules enforced on many sharing platforms are similar and roughly track the balance of obligations imposed at common law; generally a consumer is strictly liable for damage to shared goods.[68] Most platforms operate dispute resolution processes to settle disputes and facilitate compensation, but the scope of relevant information and interested parties is generally limited to a particular transaction. This reduces the costs of sanctioning by reducing the amount of information processed and the number of parties involved, so can be seen as an economy gain from operating on a small scale.

At the commons level, I have already mentioned rule-setting as one major component of monitoring and sanctioning.[69] The other component is integrating the information gained through past disputes to moderate future transactions and prevent free-riding at the commons level. This is necessary because the discrete nature of transactions means defection which is sanctioned within one exchange is not readily apparent to other participants in the group, so the defector can avoid bearing the adverse effects of his action by simply engaging with different counter-parties. The most common method for monitoring behaviour in the commons is a transparent peer rating system, whereby bad past behaviour is reflected in a rating which is publicly accessible. This ensures that a party who defects in one transaction will find their ability to engage in future transactions curtailed, and so cannot escape the costs of their actions at the commons level.[70] The system also gains in credibility with more reviews which means its value increases with scale. Moreover, the additional cost of coordinating this system is minimal, as the labour of monitoring and reviewing participants has already been expended at the transaction level, and information communication technology advancements enables the storing and communication of information at very low marginal cost. Sanctioning is also straightforward; as participants are not bound by co-ownership or physical or relational proximity, it is easy to exclude defectors from some or all future sharing without disrupting future contributions. This may be achieved through de-prioritising listings or forced delisting by the platform, or social exclusion by other sharers on the basis of bad reviews.

This is not to say that peer reviews are always fair or accurate; indeed studies show that inflating ratings, malicious reviews and other defecting behaviour are common.[71] There is also the pressing concern of discriminatory reviews which prejudice certain users based on their race or socio-economic position.[72] In response platforms have introduced

countermeasures to build trust among users, such as verifying users' identities to ensure their veracity and guard against false accounts,[73] and discouraging providers from choosing their consumers to guard against discrimination.[74] So while the review system is not perfect, it serves a valuable function and has a real effect on users' choices.

This process not only takes advantage of two economies of scale, but also separates the two types of resources and subjects them to the property system which best maximises their net utility. Like semicommons, CP allows resources to be utilised for one purpose, namely owning and up-keeping, in a way that incentivises its productive use, which is how CP avoids the problem of under-investment. It simultaneously allows resources to be commoned for a different purpose which the units cannot individually achieve efficiently. But whereas semicommons runs into the problems of provisioning and free-riding in common-use, CP avoids this because a major feature of its common-use is the market and the information it coordinates. Markets and information are by nature public goods and therefore not subject to the same dynamics as private goods. Rather they are closer to information or cultural goods which, as Benkler analysed, have a positive correlation between number of units and total utility, and no upper limit on scale.[75]

This means a CP system does not face the same constraint as other forms of commons which must balance the number of participants and amount of resources it can support with the costs of coordinating, monitoring and sanctioning.[76] In CP coordination operates at the market level, which Benkler, Evans and Schmalensee and others have asserted benefits from very large scales (although they disagree on the upper limit). I have shown how monitoring and sanctioning conform to the same dynamic, whereby the 'goods' being provided are information which are then used to allocate tangible private goods more efficiently.[77] In other words the provisioning and use of the common good is subjected to an open-access system which maximises its utility, while the benefits of the common good are captured through private goods. This is made possible by parcelling participants and resources into transactions rather than agglomerating them. While this might mean frequent transactors may miss out on opportunities to scale down costs or scale up production, it also ensures that each transaction is at least net positive utility irrespective of the other transactions on the market. CP as a property system can capture some of the benefits Benkler observes in information goods, because it consists of modular units (transactions) which can be cheaply and easily integrated into a whole (market) that produces real benefits (transparency in monitoring and sanctions).

## 4.3 Managing risk

Finally, a salient problem facing any commons is how to manage adverse events and their subsequent effects. Many adopt some form of egalitarian distribution and share the burden of loss across all participants, particularly when the resources are communally owned or at least are not clearly divided into individual lots.[78] In doing so they are operating a system akin to insurance, by spreading a loss that would be catastrophic for a participant to bear individually across the community. Risk spreading presents certain economic and social gains,[79] and in common ownership systems risk sharing is arguably the default position, which means they avoid the further costs of risk shifting incurred in private ownership systems. But in return it requires measures to prevent participants from withdrawing, and to compel them to continue contributing when things are difficult. This is often achieved through formal ties of ownership or dependence through physical or relational proximity, and at the expense of choice and flexibility. Here I will discuss how CP, a fundamentally private ownership system, can collectivise and spread risk while retaining the flexibility to exit.

Risk, understood as the measure of uncertainty through probabilistic functions, is an integral aspect of any property system which generally determines how the costs of adverse events are assigned. The private ownership structure of CP means the risks associated with sharing, namely property damage and liability, are the sole responsibility of the owner by default. This entails owners either self-insuring or purchasing insurance cover for their sharing activities, both of which can be prohibitively costly and inefficient.[80] They can pass some risks to the user by simply transferring possession, thereby achieving a measure of risk sharing at the transaction level. But the bilateral scope of the transaction and the relatively similar financial position of the parties means there is little scope for economies of scale. In response, sharing platforms have engineered their own risk management schemes, either by negotiating new insurance policies with external partners on behalf of their users,[81] or insuring some risks themselves by acting as guarantor or operating an internal insurance scheme.[82] These schemes provide participants with insurance cover they could not procure individually, or at potentially lower cost, by using the platform's greater economic clout and centralised coordinating role to organise what is effectively a group insurance cover.

Although formally participants are shifting risk to insurance companies through platform as agent, the dynamic can also be seen as

risk collectivisation. Participants contribute to the insurance pool by paying fees, and appropriate from the pool when they suffer an insured loss. This achieves economies of scale by taking advantage of the law of large numbers and spreading risk across a large number of transactions.[83] The 'insurance pool' is an artifice to designate the dynamic (platform providers will not realistically set aside funds specifically to indemnify users), but it shows clearly how participants share common risk management by indirectly contributing to insure each other. Furthermore this need not be facilitated through money. A token system which replaces money on the platform, or an in-kind exchange whereby participants receive access to others' property in return for providing their own can also achieve a similar effect.[84] If by contributing resources the owner is 'paid' in tokens or in entitlement to access others' resources, then in the event their own property is damaged and can no longer support utility, the owner can still spend their token or entitlement to access the utility of other resources. Basically, the owner contributes to the common pool, whether that be a fund or a pool of fluctuating resources, and appropriates from the common pool when they suffer a loss.

Managing risk by tying together contribution with appropriation is characteristic of prototypical commons, wherein risk is by default collectivised and apportioned in the same way as benefits, by a reduction in the amount of units appropriated and a share of the responsibility in remedying the loss, usually according to communally determined proportions. The difference lies in the flexibility offered by CP by virtue of its transactional structure. There is no need to determine commitments, instead they are automatically included through each transaction. There is also the option to separate risk from benefit, such as platforms which use insurance mechanisms allowing participants to privatise the benefits accruing to their property while collectivising their risks. Thus, the transactional structure of CP offers an alternative method for addressing one of the most intractable problems of any common property system, by firstly internalising risk through private ownership, then collectivising risk using the principles of insurance, to achieve considerable economies in risk management.

## 5. Tradeoffs and limitations

The above discussion on risk collectivisation reveals an inherent tradeoff between the different advantages of CP, namely the features associated with flexibility, choice and control and the ability to realise economies of

scale. To realise economies of scale a certain function or control must be ceded to the market or community and away from the individual. For example, collectivising risk can reduce a participant's costs of risk management, but it also implies the participant will be subsidising other people's losses and risky behaviours. Or owners can lower storage and maintenance costs by giving possession of their property over to be managed by an external party, like in a library or By Rotation's wardrobe management service, but that necessitates losing on-demand access to their property.

This is related more generally to the transactional structure of CP, and the limitations associated with it. Internalising certain costs and benefits within transactions presents benefits, but it also prevents greater economies from being gained. As long as transactions remain discrete there will likely be duplication of effort and cost somewhere. This is the difference between lending books P2P and going to a library, where the former requires the labour of multiple parties to coordinate sending and returning books, and the latter requires the labour of maintaining a library. Which model is more efficient depends on context, but it is clear to see how a library system will have scale advantages in the areas of purchasing power, storage and supporting a high frequency of lending. I have stated the advantage of transactions is it allows participants to choose their level of tradeoff by altering the boundaries of their transactions, but the tradeoff remains as an inherent limitation of CP. The advantages I have argued for CP depends on transactions being discrete events, as participants' ability to unilaterally choose and manage their sharing requires clearly demarcating relevant information and limiting decision-makers. In short, it seems inevitable that CP must accept some level of inefficiency in transactions in return for the advantages discussed above.

Another limitation is the lack of analysis of the organisational form of CP in this paper. As the discussion has shown, the intermediating organisation plays a crucial role in facilitating the transactions which constitute CP. Transactions are not spontaneous events but require very specific conditions in place before they become viable. That the very P2P sharing transactions which form the archetype for CP have not been widely possible until the late 2000s is a strong testament to the precariousness and fragility of sharing as an economic phenomenon. Therefore, the specific terms of a sharing organisation, whether that be a commercial platform like Airbnb or a community Facebook page like Hoffice, are central to the value structure of that CP system. I have referred frequently to how participants benefit from economies of scale through commoning. What was not mentioned is how these economies of scale are made possible through organisation. As an empirical matter,

it is platforms who provide the ICT tools, guarantee payments and negotiate everything from insurance cover to logistics on behalf of their users.[85] The savings made by participants have not disappeared, they were merely shifted onto the platform which used its size and central authority to scale necessary functions. As an analytical matter, this dynamic is arguably the same in all property systems, with markets, firms and communities taking the place of platforms as organising intermediaries.

However, this limitation does not change what I perceive to be the features of CP as a property system, and which differentiate it from other forms of private and common property. The element of labour-service, and the fundamentally transactional structure of exchanging private value, producing common value and appropriating common value, are all distinctive of CP. Particular organisational forms will change the terms of and extent to which these features are present; for example Airbnb seeks to maximise the exchange of private value and limits commoning mainly to activities of market-making, whereas Couchsurfing seeks to maximise commoning by building a community of gratuitous sharers. But the dynamics I have analysed remain present in all instances.

## 6. Conclusion

I have presented how P2P sharing constitutes a new property paradigm called collaborative property that is based on transactional collaboration and labour-service. I have detailed how these features enable CP to combine the benefits of private ownership with the economies of scale of common property, in a way that addresses the challenges which mixed commons and peer-based production systems cannot. In particular I have raised risk management as a matter for which CP can offer a unique solution to, by internalising the benefits of managing risk at the transaction level to and taking advantage of parties' incentives and ability to mitigate, while spreading the costs at the commons level to achieve a measure of risk sharing which is potentially more equitable and less expensive.

An important concern that remains unaddressed is the potential for sharing to exacerbate existing inequalities in property ownership, particularly for high value resources such as real property, by enabling owners greater opportunity to monetise their assets at the expense of non-owners.[86] A related concern is that sharing may exacerbate erosion of private ownership, and in the long-run transfer greater economic power to property owners, particularly if those owners are ultimately corporate entities. These are legitimate societal concerns which should be considered when designing regulatory measures for the sharing economy.

I will only state that in relation to my conception of CP, the base of private and distributed ownership is posited as a necessary feature in order for the other benefits, such as wider distribution of labour-service, to materialise. As such, the features of CP which I have enumerated do not *prima facie* apply to a situation involving business to peer rentals. It is also important to recognise that these concerns do not detract from the potential for new forms of cooperation which sharing has showed us is possible. The sharing economy is still nascent, and its long-term economic viability remains uncertain, but one potential path of development is towards greater collaboration in producing and distributing resources in a community.

## Notes

1 In spite of this the very definition of 'sharing economy' remains highly contested, with different aspects emphasised by different commentators. For an overview of the concept, see K Frenken and J Schor, 'Putting the Sharing Economy into Perspective' (2017) 23 Environmental Innovation and Societal Transitions 3.

2 Rachel Botsman and Roo Rogers, *What's Mine Is Yours: How Collaborative Consumption Is Changing the Way We Live* (Collins 2011).

3 Botsman and Rogers, *What's mine is yours* (n 2); Liron Einav, Chiara Farronato and Jonathan D Levin, 'Peer-to-Peer Markets' (2016) 8 Annual Review of Economics 615; A Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (MIT Press 2016); T Schaefers, SJ Lawson and M Kukar-Kinney, 'How the Burdens of Ownership Promote Consumer Usage of Access-Based Service' (2016) 27 Marketing Letters 569; S Moeller and K Wittkowski, 'The Burdens of Ownership: Reasons for Preferring Renting' (2010) 20 Managing Service Quality: An International Journal 176.

4 See LK Ozanne and PW Ballantine, 'Sharing as a Form of Anti-consumption? An Examination of Toy Library Users' (2010) 9 Journal of Consumer Behaviour 485; E McArthur, 'Many-to-Many Exchange without Money: Why People Share Their Resources' (2015) 18 Consumption Markets & Culture 239; H Guyader, 'No One Rides for Free! Three Styles of Collaborative Consumption' (2018) 32 Journal of Services Marketing 692.

5 For an historical overview of the trends in commons literature in the context of law and economics, see Carol M Rose, 'Left Brain, Right Brain and History in the New Law and Economics of Property' (2000) 79 Oregon Law Review 479.

6 Botsman and Rogers, *What's Mine is Yours* (n 2). Cf A Huber, 'Theorising the Dynamics of Collaborative Consumption Practices: A Comparison of Peer-to-Peer Accommodation and Cohousing' (2017) 23 Environmental Innovation and Societal Transitions 53.

7 I am only addressing P2P transfers here because this model best reflects the 'collaborative' nature of the sharing economy, compared with other models such as business-to-consumer, hybrid private–public ventures, and community-based projects, all of which involve greater centralisation of ownership and other economic functions related to sharing. These categories are taken from Shelly Kreiczer-Levy, *Destabilized Property: Property Law in the Sharing Economy* (CUP 2019), who provides a comparison between the legal and economic dynamics of these various models. I also confine my inquiry to tangible as opposed to intangible property, such as information goods or money, because of the differing economic dynamics affecting tangible goods. Briefly, tangibles are susceptible to 'tragedy', hence their organisation into common forms of governance is much more controversial and problematic compared to intangibles. I will address these issues in more detail in section 3.

8 The organisational form is highly significant in structuring the terms of P2P sharing: Steven Vallas and Juliet B Schor, 'What Do Platforms Do? Understanding the Gig Economy' (2020) 46 Annual Review of Sociology 273. However the aim of this paper is to explore the basic value

and economic dynamics of P2P sharing, and space precludes me from exploring the organisational aspect in any greater detail.

9 It has been increasingly recognised that 'commons' need not denote a discrete resource to which multiple parties have access to, but is a process by which parties contribute resources for common use. See the literature on urban commons, K Bradley, 'Open-Source Urbanism: Creating, Multiplying and Managing Urban Commons' (2015) *Footprint* 9(1); SR Foster and C Iaione, 'The city as a commons' (2016) Yale Law & Policy Review 34(2) 281. More generally, see J Euler, 'Conceptualizing the Commons: Moving Beyond the Goods-based Definition by Introducing the Social Practices of Commoning as Vital Determinant' (2018) Ecological Economics 143, 10–16.

10 'System' is used to denote the complete suite of both norms and economic practices which constitute the process for producing, distributing, and otherwise managing a resource. Penner describes property law as a 'normative system' by which he means a suite of legal rules which have internal coherence and serves a particular purpose: James E Penner, *The Idea of Property in Law* (OUP 2000) Ch 2. Due to the nascent nature of sharing, there are very few legal rules which explicitly govern it, so my discussion will primarily focus on actual economic practices and their effects.

11 Y Benkler, 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production' (2004) 114 Yale Law Journal 273; Sundararajan, 'Crowd-based Capitalism' (n 3).

12 Kreiczer-Levy, *Destabilized Property* (n 7).

13 Kreiczer-Levy *Destabilized Property* (n 7) is concerned with showing how instead of being tied down to a place or identity through physical possessions, sharing enables people to flexibly explore different forms of interaction with the world and other people, using an inconstant revolving suite of property as the platform for interaction. Cf J Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life Is a Paid-for Experience* (JP Tarcher/Putnam 2001).

14 I am making the argument from actual use, rather than property rights. The owner retains the right to exclude others, but the point is that the owner chooses not to when they share, and with the advent of the sharing economy this choice becomes more feasible and frequent. One possible effect has been to increase consumption on the expectation that costs can be recouped through rental: B Parguel, R Lunardo and F Benoit-Moreau, 'Sustainability of the Sharing Economy in Question: When Second-Hand Peer-to-Peer Platforms Stimulate Indulgent Consumption' (2017) 125 Technological Forecasting & Social Change 48. The power to share and allow access has always been open to legal owners, and indeed sharing depends on this legal power: Daniel B Kelly, 'The Right to Include' (2014) 63 Emory Law Journal 857. While this has traditionally been possible in the context of land, it has not always been feasible to do so on a large scale and with net economic benefit outside of real property, as the transaction costs of doing so were prohibitively high: Farronato, Einav and Levin, 'Peer-to-Peer Markets' (n 3).

15 This aspect, which relates to the sharing economy's claim to sustainability, is highly contested in the literature: Andrea Geissinger and others, 'How Sustainable Is the Sharing Economy? On the Sustainability Connotations of Sharing Economy Platforms' (2019) 206 Journal of Cleaner Production 419. Some argue that sharing exacerbates over-consumption and existing shortages, particularly in the housing market: Chris J Martin, 'The Sharing Economy: A Pathway to Sustainability or a Nightmarish Form of Neoliberal Capitalism?' (2016) 121 Ecological Economics 149. Others contend that sharing does enable more sustainable use of existing resources: Botsman, *What's Mine is Yours* (n 2). While the jury is still out on the empirics, the potential for a sustainable system of CP is possible for the reasons I will set out in the succeeding pages.

16 E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990) 30–31.

17 Benkler, 'Sharing Nicely' (n 11).

18 This presumption holds better for resources that are not housing, as the swathe of literature on how Airbnb diverts housing stock from the long-term rental market to the short-term rental market, and the considerable incidence of illegal sub-letting indicates. It is feasible to buy or lease real estate for the purpose of short-term rental, but not as feasible to buy or lease a car in the hopes of earning arbitrage.

19 Hence the concepts of 'prosumption' and 'co-production'. Botsman and Rogers, *What's Mine is Yours* (n 2).

20 Benkler, 'Sharing Nicely' (n 11).
21 Car-sharing produces the entire asset, as the users access both mileage and seating capacity. Ride-sharing such as Uber produces mileage, as the consumer determines the journey and pays for it accordingly regardless of how many seats are taken up. And car-pooling such as Blablacar produces empty seats. Many other assets such as real estate and tools can also be analysed in similar fashion; Hoffice allows real estate owners to share their space on a flexible hourly basis, Airbnb and Vrbo allows sharing of spare rooms or entire properties, Shareshed offers the use of tools while Taskrabbit also includes the service.
22 Benkler, 'Sharing Nicely' (n 11).
23 Sally Zhu, 'Sharing Property Sharing Labour: The Co-Production of Value in Platform Economies' (2020) Laws 9(4) 24.
24 K Bradley and D Pargman, 'The Sharing Economy as the Commons of the 21st Century' (2017) 10 Cambridge Journal of Regions Economy and Society 231.
25 Henry E Smith, 'Semicommon Property Rights and Scattering in the Open Fields' (2009) 29 Journal of Legal Studies 131; Hanoch Dagan and Michael A Heller, 'The Liberal Commons' (2001) 110 Yale Law Journal 549.
26 Smith, 'Semicommon' (n 25) 134–37 talks about farming land; GS Alexander, Governance Property (2012) 160 University of Pennsylvania Law Review 1853, discusses housing, as do Dagan and Heller, 'Liberal Commons' (n 25). This focus on land and housing as the subject of commons also holds in other literature, such as urban commons: see SR Foster and C Iaione, 'The City as a Commons' (2016) 34 Yale Law & Policy Review 281. And property law: see C Geisler and G Daneker, *Property and Values: Alternatives To Public And Private Ownership* (Island Press 2000).
27 Smith 'Semicommons' (n 26) expanded his concept of the semicommons to other forms of property such as water: Henry E Smith, 'Semicommons in Fluid Resources' (2016) 20 Marquette Intellectual Property Law Review 195, and telecommunications: Henry E Smith, 'Governing the Tele-Semicommons' (2005) 22 Yale Journal on Regulation 289. But water is physically bounded like land, so it is physical proximity which makes each user or owner vulnerable to the actions of their neighbours. Telecommunications are intangible, and while they are rival they are not subtractable, so not subject to the same dynamics as the tangible resources I am concerned with. The model of semicommons, while enlightening, does not provide a full explanation of sharing.
28 Although there are strong pressures to do so, and hosts must comply with non-discrimination policies. See U Gunter, 'What Makes an Airbnb Host a Superhost? Empirical Evidence from San Francisco and the Bay Area' (2018) 66 Tourism Management 26. See also D Das Acevedo, 'Unbundling Freedom in the Sharing Economy' (2018) 91 Southern California Law Review 793 on algorithmic management.
29 Benkler, 'Sharing Nicely' (n 11); E Katrini, 'Sharing Culture: On Definitions, Values, and Emergence' (2018) 66 Sociological Review 425; K Bradley, 'Open-Source Urbanism: Creating, Multiplying and Managing Urban Commons' (2015) 9 Footprint 91.
30 Sundararajan has argued that platforms may be seen as a new hybrid organisational form in-between market and firm in Sundararajan *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (n 3) 77–84. Cf R Dyal-Chand, 'Regulating Sharing: The Sharing Economy as an Alternative Capitalist System' (2015) 90 Tulane Law Review 241, who argues that platforms are closer to coordinated market economies. Both authors agree that platforms are a species of market-based exchange.
31 Y Benkler, 'Coase's Penguin, or, Linux and "The Nature of the Firm"' (2002) 112 Yale Law Journal 369; Sundararajan, *The Sharing Economy* (n 2) 65; L Gansky, *The Mesh: Why the Future of Business Is Sharing* (Portfolio 2010); Jeremiah Owang, 'Quick Guide: The Collaborative Economy Body of Work for Corporations', <www.web-strategist.com/blog/2013/08/22/table-of-contents-the-collaborative-economy> accessed 5 September 2022.
32 Benkler, 'Sharing Nicely' (n 11).
33 Benkler, 'Coase's Penguin' (n 31).
34 Benkler, 'Coase's Penguin' (n 31).
35 Zhu, 'Sharing Property' (n 23).
36 Ostrom, *Governing the Commons* (n 16) 30–31.
37 H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 American Economic Review 347.
38 Ostrom, *Governing the Commons* (n 16) 88–100.
39 James E Penner, 'The "'Bundle of Rights'" Picture of Property' (1996) 43 UCLA Law Review 711; Jeremy Waldron, *The Right to Private Property* (Clarendon 1988).

40 This condition of legal authority and title is required both by statute regulating the supply of goods (Sale and Supply of Goods Act 1982 s 2) and by user agreement contracts on various platforms (see Turo's Terms which state 'You will not offer any vehicle or optional Extra that you do not yourself own or have authority to share . . .', <https://turo.com/gb/en/policies/terms> accessed 7 September 2022).
41 Zhu, 'Sharing Property' (n 23).
42 Zhu, 'Sharing Property' (n 23).
43 The platform has since been rebranded as VRBO and operates an almost identical system to Airbnb.
44 Dagan and Heller, 'Liberal Commons' (n 26).
45 DJ Kochan, 'I Share, Therefore It's Mine' (2017) 51 University of Richmond Law Review 909. Cf Kelly, 'The Right to Include' (n 13); EM Penalver, 'Property as Entrance' (2005) 91 Virginia Law Review 1889.
46 Similar to how Kreiczer-Levy *Destabilized Property* (n 7) envisions 'access'.
47 Such is the nature of multi-sided businesses which are sustained by market depth and network effects; see DS Evans and R Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press 2016).
48 Sundararajan, *The Sharing Economy* (n 30) 77–78. Similar to Benkler's idea of networks; Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006).
49 Zhu, 'Sharing Property' (n 23).
50 Evans and Schmalensee, *Multisided Platforms* (n 47).
51 R Belk, 'Sharing Versus Pseudo-Sharing in Web 2.0' (2014) 18 Anthropologist 7.
52 Evans and Schmalensee, *Multisided Platforms* (n 47).
53 Smith, 'Semicommon' (n 25).
54 Demsetz, 'Property Rights' (n 37).
55 RH Coase, 'The Problem of Social Cost' (2013) 56 Journal of Law & Economics 837; Waldron, *Private Property* (n 39).
56 Coase, 'The Problem of Social Cost' (n 55); Demsetz, 'Property Rights' (n 37).
57 A Perzanowski and JM Schultz, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2017).
58 But see the empirical studies suggesting market uniformity and systemic discrimination against certain classes; J McCloskey, 'Discriminatorybnb: A Discussion of Airbnb's Race Problem, Its New Anti-Discrimination Policies, and the Need for External Regulation' (2018) 57 Washington University Journal of Law & Policy 203; JB Schor and W Attwood-Charles, 'The "Sharing" Economy: Labor, Inequality, and Social Connection on for-Profit Platforms' (2017) 11 Sociology Compass. While discrimination does exist on platforms, it must be remembered that they also exist in non-platform exchanges, possibly with much greater frequency and less transparency.
59 Dagan and Heller, 'Liberal Commons' (n 25) discuss these factors in the context of liberal commons.
60 G Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.
61 Ostrom, *Governing the Commons* (n 16) 94–102; Dagan and Heller, 'Liberal Commons' (n 25).
62 Often construed as a prisoners' dilemma situation.
63 Zhu, 'Sharing Property' (n 23).
64 E Bucher, C Fieseler and C Lutz, 'What's Mine is Yours (for a Nominal Fee) – Exploring the Spectrum of Utilitarian to Altruistic Motives for Internet-Mediated Sharing' (2016) 62 Computers in Human Behavior 316. The same considerations apply for in-kind exchanges.
65 JB Schor and others, 'Paradoxes of Openness and Distinction in the Sharing Economy' (2016) 54 Poetics 66; M-P Wilhelms, S Henkel and T Falk, 'To Earn Is Not Enough: A Means-End Analysis to Uncover Peer-Providers' Participation Motives in Peer-to-Peer Carsharing' (2017) 125 Technological Forecasting & Social Change 38.
66 CP Lamberton and RL Rose, 'When Is Ours Better Than Mine? A Framework for Understanding and Altering Participation in Commercial Sharing Systems' (2012) 76 Journal of Marketing 109; Ostrom, *Governing the Commons* (n 16) 42–45.
67 Vallas and Schor, 'What Do Platforms Do?' (n 8).
68 Sally Zhu, "Risk Management in Peer-to-Peer Sharing", unpublished, on file with author.
69 This corresponds to the dual-level of cooperation, namely transactional and commons, which I refer to in section 3.3 above.

70 T Teubner, F Hawlitschek and D Dann, 'Price Determinants on Airbnb: How Reputation Pays Off in the Sharing Economy' (2017) 5 Journal of Self-Governance and Management Economics 53; G Abrate and G Viglia, 'Personal or Product Reputation? Optimizing Revenues in the Sharing Economy' (2019) 58 Journal of Travel Research 136; AG Mauri and others, 'Humanize Your Business. The Role of Personal Reputation in the Sharing Economy' (2018) 73 International Journal of Hospitality Management 36.
71 J Bridges and C Vásquez, 'If Nearly All Airbnb Reviews Are Positive, Does That Make Them Meaningless?' (2018) 21 Current Issues in Tourism 2057.
72 R Dyal-Chand, 'Sharing Whiteness' (unpublished); McCloskey, 'Discriminatorybnb' (n 58).
73 Airbnb, 'Verifying Your Identity' <www.airbnb.co.uk/help/topic/1389/id-and-verification> accessed 7 September 2022.
74 Uber has a policy that drivers are downgraded if they refuse more than a certain amount of requests per day; AJ Ravenelle, 'Sharing Economy Workers: Selling, Not Sharing' (2017) 10 Cambridge Journal of Regions Economy and Society 281.
75 Benkler, 'Coase's Penguin' (n 31).
76 Ostrom, *Governing the Commons* (n 16).
77 That is prices, supply, reputation. See, DE Rauch and D Schleicher, 'Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy' (2015) 76 Ohio State Law Journal 901.
78 Ostrom, *Governing the Commons* (n 16); Dagan and Heller, 'Liberal Commons' (n 25); cf Smith, 'Semicommon' (n 25).
79 V Barbet, R Bourlès and J Rouchier, 'Informal Risk-Sharing Cooperatives: The Effect of Learning and Other-Regarding Preferences' (2020) 30 Journal of Evolutionary Economics 451; CA Heimer, 'Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation Through Insurance', in T Baker and J Simon (eds), *Embracing Risk* (University of Chicago Press 2002); T Baker, 'Risk, Insurance, and the Social Construction of Responsibility' in Baker and Simon, *Embracing Risk* (n 79).
80 Zhu, 'Risk Management' (n 68).
81 Airbnb, Host Protection Insurance (<www.airbnb.co.uk/d/host-protection-insurance> accessed 7 September 2022); Turo, Insurance (<https://turo.com/gb/en/insurance> accessed 7 September 2022); Libraryofthings, Public Liability Insurance, (<www.libraryofthings.co.uk/terms-of-borrowing> accessed 7 September 2022).
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7

# Is a tort a failure to do what one ought?

Leo Boonzaier

## 1. Introduction

Is a tort a failure to do what one ought? Many theoretical accounts of tort liability suppose that it is. These accounts suppose, in other words, that a defendant who commits a tort has done something that he should not have done, and justify the imposition of liability upon him on that basis. For Goldberg and Zipursky, for example, tort liability is imposed for acts that are 'not to be done' or 'unacceptable'; they reject theories that cannot account for tort law's genuine 'ought-ness'.[1] For McBride, tort law is in the business of telling me 'what I am supposed to do', and imposes liability upon me when I fail to do it.[2] These theoretical accounts are therefore bound up with that prior question: Is committing a tort a failure to do what one ought? Is it the kind of thing one should not do?

There is much to be said in favour of an affirmative answer. Nevertheless, I will defend the view that, although some torts are failures to do what one ought, not all are; and that, more importantly, those in the latter category are not anomalous or exceptional. They fall to be explained on the same basis as the others. This approach is, in some respects, unorthodox. It is in tension with the prevailing view, at least among so-called 'moralists'[3] or 'non-instrumentalists'.[4] But by the argument that follows, the prevailing view is mistaken. In section 2, I clarify the claim that torts are failures to do what one ought, and explain some concepts that surround it. Section 3 discusses the claim's appeal. Then the attack on it begins. Section 4 raises apparent counterexamples, namely nuisance and necessity cases, in which liability is imposed despite the defendant's having behaved quite correctly. These counterexamples

tend to be marginalised by proponents of the prevailing view, whose arguments are considered in section 5. I suggest that, in reflecting on their responses, one discerns a central weakness in their position. It obscures a fundamental commonality between the counterexamples and those cases that lie at the undisputed core of tort liability. Section 6 then seeks to confirm, by a different route, that the attempt to marginalise the counterexamples is unconvincing. I conclude we should abandon the claim, and accept that torts are not (necessarily) failures to do what one ought. Finally, in part 6, I indicate why this does not have the perilous consequences sometimes thought.

## 2. Preliminaries

### 2.1 The claim

The claim that torts are failures to do what one ought is slippery, and we need to pin it down before we can test it. We might try to capture the general idea like this:

> **OG:** Tort liability is grounded upon a failure by the tortfeasor to do what he ought to do.

This is the sort of claim that is integral to many accounts of tort liability, and which I intend to argue against. But the 'grounding' relation mentioned in OG is tricky. To make life easier, one might assess this claim by replacing it with another:

> **OC:** Tort liability is conditional upon a failure by the tortfeasor to do what he ought to do.

If OC is false, then OG is false – since *A* cannot ground *B* unless *B* exists only if *A* exists. Arguing against OC is therefore a fully effective way of falsifying OG. And the advantage of proceeding in this way, rather than tackling OG directly, is that it allows us to preserve, for later consideration, the kind of justificatory connection that OG identifies between the tortfeasor's conduct and his liability.

The difficulty with OC is that it obscures the fact that the act for which liability is imposed and the act that constitutes a failure to do what one ought are one and the same. This formulation causes us to lose sight, in other words, of the fact that tort liability is (or is thought to be) a

liability *for* the failure to do what one ought. It is that very failure that one is required, by the imposition of liability, to repair. The mere statement of a condition for the imposition of liability therefore misses something important, or is at risk of doing so. The simplest solution may be to turn our attention to the following claim:

> **TO:** The commission of a tort is a failure by the tortfeasor to do what he ought to do.

And this is indeed the claim that I will focus on, and argue against, for the remainder of this chapter. But we will need to bear in mind that TO does not stand alone: its truth is meant to contribute to the justification of the liability, in the way that OC, and especially OG, made plain.

TO needs further refinement. For one thing, we must allow for the possibility that law and morality diverge. Suppose that, according to the tort law of some theocracy, describing another person as 'an atheist' attracts liability in defamation, for example. Or suppose that it is tortious for a worker to foment a strike that he foresees will harm the economic interests of his employer (as was once the law in England). Plausibly the defendant in these examples has not done anything he should not have done. Yet he will be held liable in tort for doing it. In other words, these seem to be counterexamples to TO. But they are unsatisfying ones. The fact remains that the liability is being imposed because *the law takes the view* that the defendant has done what he should not have. And that is sufficient, or should be sufficient, to preserve the truth of the claim that is properly at issue.[5] Hence we should read TO (and OC and OG, *mutatis mutandis*) in the following way:

> **$TO_L$:** The commission of a tort is a failure by the tortfeasor to do what, in the law's view, he ought to do.

There is a final point of clarification. Vicarious liability is conventionally considered to be a form of tort liability, but it is imposed even on those who have not done anything they should not have. Indeed it is imposed for conduct in which the defendant might not have participated at all. That, however, is because vicarious liability is the imposition of liability *for the tort of another*. And the tortfeasor himself, whose liability is vicariously imputed to the defendant, usually will have acted as he ought not to – or so it may plausibly be argued. Hence the imposition of vicarious liability poses no challenge to TO; it is simply outside the claim's scope. For similar reasons, no difficulty is posed to TO by the award of an

injunction, which is a response to a *threatened*, not actual, commission of a tort. TO's formulation is therefore unaffected.

## 2.2 Oughts and duties

Many writers arrive at TO via a claim about duties. TO is the claim that results from the conjunction of two others that tend to be widely endorsed. The first identifies a connection between torts and wrongs, in other words the breach of a duty:

> **TW**: The commission of a tort is a wrong (= breach of duty).

And the second claim cashes out what that means – what it means to have, and to breach, a duty. One might call this claim the 'ought-entailment lemma':

> **Lemma**: '*A* has a duty to *x*' entails that '*A* ought to *x*'.[6]

The two claims, when conjoined, lead inexorably to TO. If torts are wrongs, and wrongs entail acting as one ought not to, then TO must be true. And thus it follows that, if TO is in fact false – as I intend to argue – then at least one of the claims that leads to it is also false. For this reason, my argument in this chapter has potentially important implications for the very common view that torts are wrongs. It means we would need to either abandon TW, or abandon the appealing understanding, embodied in the ought-entailment lemma, of what having and breaching a duty consist in.

Yet these implications should not be overstated. There are many ways to understand duties, and not all of TW's proponents will arrive at TO.[7] One might endorse TW while rejecting the lemma, and understand having a duty to *x* to entail something more modest for what the duty-bearer has reason to do. It may be that duties are reasons of special stringency but are not necessarily conclusive, for example, and hence it does not always follow that one ought to perform them. Or one may give up altogether on the attempt to understand duties in terms of what the duty-bearer has reason to do. Perhaps duties are better understood in terms of what they justify others in doing to the duty-bearer: coercing him, holding him accountable for their breach, and so on. On the one hand, then, it is very common that writers end up endorsing TO because of the way they cash out their view that torts are breaches of duty. Specifically, they endorse the ought-entailment lemma. On the other

hand, there is no need to insist that their understanding of duties is the best one, still less that it is the only one. Even so, it is the understanding that is implicated by the argument of this chapter. As mentioned, however, the challenge is indirect: my target is not the claim that torts are wrongs, but the claim that torts are (therefore) failures to do what one ought.

To be clear, when I say 'ought' here I mean 'all-things-considered ought'. The other variety of 'ought' statements, in which the 'ought' is merely *pro tanto*, are relatively modest. '*A* ought *pro tanto* to *x*' entails only that there is a case in favour of that action. It does not entail that *x* is the correct action for *A* to perform: the case in favour could be outweighed, or otherwise defeated, by other considerations. To say that there is a *pro tanto* case against committing torts is innocuous. My interest is in the stronger and more significant claim that torts embody all-things-considered oughts, which do not merely identify a case in favour of *x*-ing; they settle, or purport to settle, that *x* must not be done.[8] 'Ought' statements of this kind can be rendered in the language of reasons, which I will sometimes prefer in what follows. I take it, following Raz,[9] that '*A* ought (all-things-considered) to *x*' is equivalent to '*A* has a conclusive reason to *x*'. The action, *x*, is 'unreasonable' if *A* has a conclusive reason to not-*x*. And *x*-ing is 'reasonable', finally, if *A* had either a conclusive reason to *x* or, at any rate, an undefeated one.[10] The claim that I am assessing in this chapter may then be fully stated thus:

> **$TO_{L, ATC}$:** The commission of a tort is a failure by the tortfeasor to do what, in the law's view, he ought to do, all things considered.

Or, equivalently, a tort is a failure by the defendant to conform to what the law takes to be a conclusive reason. This is a claim endorsed explicitly by some important writers,[11] and is employed, at least implicitly, in the accounts of several others.[12]

Let me enter a final terminological stipulation. In what remains of this chapter I will use the adjective 'wrong', and the adverb 'wrongly', to mean 'contrary to what one ought to do' (and I will use 'right' and 'rightly' to mean the opposites). The reason for the stipulation is brevity. Its danger is that 'doing the wrong thing' might be conflated with 'committing a wrong' (or 'acting wrongfully'), in other words breaching a duty. Up to a point, the similarity between the two is useful. It reminds us of the commonly perceived connection between acting wrongly (= contrary to what one ought to do) and committing a wrong (= breaching a duty) that I have just outlined. As I have also insisted, however, the two are not the same, and some writers do not even accept the connection. But since the

difference between 'acting wrongly' and 'committing a wrong' is recognised elsewhere,[13] and since I have just made clear what I mean, any pitfalls should be avoidable.

## 2.3 Oughts and culpability

'*A* ought to *x*' is not equivalent to '*A* is culpable if she does not *x*'. This is for a number of reasons. The most basic is that one may blamelessly fail to do what one ought. One might park one's car in a prohibited zone only because the 'No parking' sign had been made illegible by vandals the night before. Or one might assault a person believing reasonably, but mistakenly, that she was a dangerous intruder into one's home. And so on. Plausibly these actions were unreasonable given the true facts of the matter. It would be better if one had not performed them. Yet one acted blamelessly, given that one reasonably believed the facts to be otherwise. I am using 'ought' (and its equivalents), then, in what is sometimes called the 'fact-relative' sense, rather than in the 'belief-relative' or 'evidence-relative' senses.[14] Hence we might say that 'one ought not to assault people', even if there are times, as my example shows, when one is not culpable in doing so. The point may be expressed in other ways. One way is to distinguish justifications from excuses.[15] To act culpably is to act without a justification *and* without an excuse. But to act as one ought not to entails only that one acted without justification (which, at least for our purposes, can be treated as synonymous with 'acting unreasonably'). My examples may be analysed, then, as cases in which the defendant has acted unjustifiably, albeit that he was excused in doing so. Crucially, therefore, they pose no problem for TO, which says only that tortious conduct is unjustifiable, not that it was blameworthy or unexcused.

It is important that we consider the more limited claim, because the stronger one would be a non-starter. It is not plausible that tort liability always or even mostly requires culpable conduct by the defendant (though culpability may well play some subtler roles).[16] In fact it is tort law's relative indifference to excuses that is conspicuous.[17] Yet, despite this, many continue to say that tort liability is imposed only for doing the wrong thing – never mind whether, in doing so, the defendant was blameworthy. That is the relatively plausible thought that TO tries to capture, and which requires proper testing.

## 2.4 Oughts and anti-instrumentalism

The impression is sometimes given that, if we do not hang onto the thought that committing torts is wrong, and perhaps wrongful, we are

doomed to become 'instrumentalists' about tort law. We will lose our grip on the sense that tort liability is a system of 'personal responsibility' – a fitting response by the law to the objectionable thing that the defendant has done – and start to think of the liability as a mere 'tax on a course of conduct', an incentive applied to defendants in order to bring about beneficent social outcomes, such as the deterrence of accidents or the optimisation of insurance arrangements. For the 'anti-instrumentalists', then, it becomes crucial to preserve the focus on what the defendant did in the past, on the fact that this conduct was deficient or objectionable, and on the fact that imposing liability upon him is appropriate just for that reason – that is, regardless of the consequences for accident-reduction or insurance arrangements. Tort law is not merely a useful instrument to the production of aggregate welfare; it is about reacting justly to what this defendant has done wrong in the past. In this way, TO comes to seem integral to any successful non-instrumental account of tort law. And TO's rejection, correspondingly, comes to seem the preserve of the instrumentalists: it is only they, so the thought runs, who let the defendant's bad behaviour drop out of the analysis.

If that sketch seems a little crude, it can be buttressed with views of greater theoretical sophistication. For example, HLA Hart established that legal liabilities may be, and usually are, imposed for breaches of legal duties, properly speaking.[18] His arguments are widely celebrated, of course, and allowing the duty to drop out of the analysis is thought to defy them – and this heresy is usually associated, again, with the instrumentalists.[19] Second, and relatedly, the function of the law is to guide.[20] And its primary duties cannot do that properly, it is widely supposed, unless they settle what the law's subjects ought to do.[21] Third, Peter Birks applied this Hartian model – a 'primary' duty, the breach of which grounds a 'secondary' or 'remedial' duty – to tort law as a whole; indeed the breach of duty is, for Birks, the defining feature.[22] In these ways, the truth of TO (and of TW) comes to seem fundamental. It stands at the intersection, so it is thought, of a number of well-established theoretical precepts. What's more – and this is the crucial point for the moment – TO is taken to be bound up with non-instrumental jurisprudence. It is thought to be the very thing that the instrumentalists miss.

Though there is some truth in this association, there is a danger of overstating it. For one thing, an instrumentalist justification of tort liability is surely compatible with the view that torts are failures to do what one ought. Indeed the natural answer to the question, 'Why should torts be deterred?', would be, 'Because they are things that should not be done.' That they are things that should not be done is the very reason why it is good to reduce their occurrence. Accordingly, even

arch-instrumentalists like Richard Posner could readily accept, in the course of developing his theory of 'optimal deterrence', that tort liability (or, at any rate, negligence liability) requires the defendant to have behaved wrongly.[23] Admittedly it might be said, against Posner, that his wider consequentialist commitments lead him to give a distorted and denuded picture of what the defendant's wrongdoing consists in.[24] But that *ad hominem* point need not detain us. The fact remains that the truth or falsity of TO (and of TW) has few implications for the kind of justificatory connection that one identifies between the defendant's tortious conduct and his liability for it. Even granting that committing torts is necessarily wrong, in other words, it remains up for grabs whether the reason to impose liability for them is instrumental (= justified by the beneficent social consequences to which that liability is an instrument) or non-instrumental (= justified independently of any such consequences).

The truth of TO would not be sufficient, then, to refute instrumentalism. But is it at least necessary? If TO is false, would anti-instrumentalism not be doomed to fail? After all, anti-instrumental accounts would be left unable to trade upon the thought that a tortfeasor has done something that he ought not to, which would seem to make it much more difficult to argue that tort law is a system of personal responsibility, a system according to which the burden of liability is fittingly imposed upon a defendant just in virtue of what he has done. Moreover, TO helps to show that tort liability is a *remedial* response, properly speaking: the defendant's liability for *x*-ing is to be explained as second best to *x*'s non-performance, something the law does because the defendant contravened its guidance the first time around. And so, even if securing the truth of TO does not guarantee anti-instrumentalism's success, it does, at least, seem very helpful to it.

In a way, this is quite right. TO is highly congenial to anti-instrumentalists of a certain stripe – perhaps the main stripe. It forms an important premise in their wider accounts, and so it is not surprising that they tend to insist upon it. Yet other kinds of non-instrumental account are available. They descend from Tony Honoré's now-classic 1988 essay on 'outcome responsibility',[25] and do not rely upon a negative assessment of the defendant's conduct to justify liability.[26] They rely upon the fact that the defendant has injured the plaintiff – never mind whether, in doing so, he behaved wrongly. They point out that, just in virtue of causing the harm, the defendant's 'agency' is (usually) implicated, and that accordingly he is (usually) 'responsible' for it. I am speaking vaguely here; these are famously difficult concepts. The point is only this: these accounts displace acting wrongly from the central role that other non-instrumentalists ascribe to it.

They are built, instead, around the sparer notion of being responsible for an outcome. True, tort law often adds further conditions before it will impose liability upon a defendant, and they may indeed include the fact that he has behaved wrongly. But these are optional additions. What is necessary, rather than optional – that which states the 'moral essence' of the tort[27] – is simply that the defendant injured the claimant. For writers who take this view, there is no need to cling to TO, since their purported justification of tort liability does not rely upon it. And it raises the stakes unduly to think that losing our grip on TO will send us straight to instrumentalism's abyss.

## 3. The case in favour

The question, then, is whether we have good reason to think that all torts are failures by the defendant to do what, in the law's view, he ought to have done. But is there not ready evidence available? McBride, in an influential 2004 article, argues that there is.[28] Exhibit A is the fact that the law not only orders compensation when torts are committed, but awards injunctions to prevent their commission. Plainly the law would not do this unless it took the view that the conduct ought not to be performed.[29] Exhibit B is the fact that the law awards not only compensatory but also punitive damages, which shows that the law does not merely want to 'tax' the action that constitutes the commission of the tort, but disapproves of it.[30]

These exhibits are not conclusive, as McBride's critics such as Dan Priel have pointed out.[31] The problem is that neither establishes that it is *always* a precondition for tort liability that the defendant failed to act as he ought. Punitive damages are very exceptional. They are available only for conduct that is 'so outrageous as to warrant a punitive response'.[32] This is a deliberately high bar, which few tortious acts will meet.[33] Injunctions, though perhaps less rare, are plainly not awarded standardly, as McBride does not deny.[34] In the tort of negligence, certainly, injunctions are almost never awarded.[35] It is true, as McBride notes, that the rarity of injunctions does not show that TO is *false*: there are many reasons why, even supposing the law takes an action to be required, the law would baulk at compelling its performance.[36] But that is not in dispute. What is in dispute is whether this slender evidentiary basis establishes that TO is always and everywhere true. And the answer to that must be 'no'. These exhibits may well establish that *some* torts are failures to do what one ought, but that is not sufficient to establish TO's general truth.

Notice that the source of the disagreement here between McBride and his opponents is not about what the legal materials say. All

participants in the debate agree that injunctions and punitive damages are awarded only on satisfaction of criteria additional to the mere existence (or threat) of a tort, that these criteria are not negligible, and that they ensure that these awards are made only in a limited number of cases. The disagreement is about what ought to be inferred from that limited number of cases – which depends on certain other assumptions. Perhaps the most pertinent is how one understands the argumentative burden under which one is labouring. McBride's exhibits may well suffice to refute the opponent whom he seems to have in mind: the person who insists that torts are *never* failures to do what one ought.[37] That extreme view does indeed run into trouble with these two exhibits, which seem to show that the law regards many tortious acts to be unreasonable and in need of prevention. But refuting the extremists does not suffice to justify TO. We want some positive case for believing it states a general truth.

To make a positive case, the natural place to start is the tort of negligence. That is the area within which TO seems most plausible. It is built into the tort's headline element, after all, that the defendant acted unreasonably (which is equivalent, on the schema I mentioned in section 2.2, to acting as one ought not to).[38] And it is clearly true that this now represents the majority of tort cases, as a result of 'the staggering march of negligence' over the course of the twentieth century.[39] To be sure, acting negligently is not *equivalent* to acting as one ought not to. If the defendant acted as he should not have, but did so only because of his reasonable ignorance of the facts, he might escape liability.[40] Conduct is negligent, in other words, only if it was unjustified *and* in certain respects unexcused. Nevertheless, acting as one ought not to have acted is a necessary condition for acting negligently (albeit not a sufficient one), which is the important point here. For it ensures that instances of negligence liability are consistent with TO. Given negligence liability's preponderance in legal practice, then, it provides a powerful source of support to the claim at issue, whose proponents accordingly present it as the paradigm.[41]

The intentional torts are more contestable. Yet it seems at least plausible, perhaps obvious, that assault, theft, defamation, etc, are things one ought not to do. True, the elements of these torts do not require direct establishment of the unreasonableness of the defendant's conduct, in the way that negligence does. But plausibly the unreasonableness has been, as it were, predetermined: the fixed rules of law that give content to these torts have already settled things for us.[42] It is always unreasonable, so the thinking goes, to perform acts that meet the conduct requirements of these torts – to assault, to defame, to steal. And so no direct proof of

unreasonableness is required, because none is needed. Second, we must allow for the role of defences. Some of them are established by showing the defendant's conduct was not unreasonable.[43] Their effect is thus to condition liability upon unreasonable conduct, even if the torts' positive elements, standing alone, do not.

Now, it is sometimes said that trespass and defamation are torts of 'strict liability', providing a contrast with the tort of negligence. But we should not be misled into thinking they are at odds with TO. That phrase, 'strict liability', is famously ambiguous.[44] And we are not concerned here with torts that are 'strict' only in the sense that they may be committed blamelessly, nor in those that merely dispense with express proof of fault. Our question is whether there are some torts that are 'strict' in the stronger sense that they may be committed, and liability imposed, even when one acts rightly. And we have no reason – so far – to think that torts like trespass and defamation fit that description.[45] Put differently, the truism that it is possible to commit trespass 'innocently', in the sense that one might trespass in reasonable ignorance of the fact that one was upon another's land, is beside the point. It does not unsettle the fact that, had one known the facts, one should not have done it. The upshot is that TO is unaffected.[46]

In sum, the case in favour of TO rests on three main pillars. First, it seems clear that the law evinces an attitude of disapproval towards the commission of torts in some cases: it seeks to prevent their occurrence by awarding injunctions, and sometimes responds punitively. Second, the tort of negligence, which has risen to supremacy over the course of the last 150 years, seems to embody TO virtually explicitly (and, though the intentional torts are not beyond doubt, they do not create any problems). Third, and perhaps most importantly – since it allows us to fit the first two points into a broader explanatory framework – TO seems to contribute to our understanding of tort liability's (non-instrumental) justification. Tort liability is a burden whose imposition on defendants is justified because the defendant behaved as he should not have. The liability is a remedial response, properly speaking: the defendant's liability for *x*-ing is to be explained as second best to *x*'s non-performance, something the law does because the defendant has contravened its instructions. TO seems a natural way to bear out both thoughts, hence the powerful case in its favour.

## 4. The cases against

In the previous section, I said that the negligence standard ensures (where it applies) that TO is satisfied. Predictably, therefore, the cases usually thought to cause trouble for TO are those that dispense with this

kind of fault condition. The most famous is *Rylands v Fletcher*,[47] whose facts hardly bear repeating. The defendant was held liable when the reservoir on his land burst and flooded his neighbour's. This was despite the fact that negligence on the part of the defendant was not proved. It seems most implausible, moreover, to think that building a reservoir on one's land is *ipso facto* to act wrongly.[48] Indeed the speech given by Blackburn J in the Exchequer Chamber, and approved by the Lords, expressly endorsed a principle according to which the defendant was held liable 'without any fault of his own'.[49] So understood, the case seems to pose a serious challenge to TO. Yet not everyone accepts this reading of it, which means the surrounding debate has not been especially productive. The result of *Rylands* itself is sometimes dismissed as anomalous, a peculiar policy response to a number of tragic incidents in the immediate run-up to the decision.[50] And the facts of the cases that apply it are 'often within a hair's breadth' of sustaining fault-based liability.[51] After all, the defendant's activities are unusually dangerous; the defendant has (inevitably, since litigation has resulted) failed to prevent the resulting harm; and there tend to be few available explanations for this other than defendant negligence. How else did the dam wall, which the defendant constructed and maintained, break? How else did the product manufactured in the defendant's factory become defective? And so on. Accordingly, there is no way to break the impasse between those who think these are cases of 'true' strict liability, in other words cases in which the law is genuinely unconcerned with the reasonableness or otherwise of the defendant's conduct, and those who think the law is concerned with it but, for sound reasons of policy, does not make direct proof of it a precondition for liability. The latter, deprecatory readings are helped along by the diminution of these pockets of strict liability over recent decades. The rule in *Rylands* has been whittled down in England and Wales,[52] in particular, and abandoned in Australia.[53] As a result, the debate about *Rylands* and its ilk has gone a bit stale. A more satisfying debate requires cases which, unlike *Rylands*, are relatively recent and practically significant, and which impose liability in circumstances where unreasonable conduct by the defendant was not merely unproved, but undoubtedly absent.

### 4.1 Nuisance

Fortunately, there are cases of this sort in modern English law, which provide the robust counterexamples needed to test the truth of TO.[54] The point is nicely illustrated, in fact, by returning to McBride's Exhibit A.

I said earlier that there is a lack of evidence that courts would injunct all torts. In fact there is clear evidence they would not. The English courts have decided, in several carefully considered cases, that an injunction should not be awarded, because the defendant's activity ought to continue; but that compensation must be paid to those harmed by it. In other words, they have decided that a tort can be committed even when the defendant's conduct is palpably reasonable. The tort in each case was nuisance.

In *Miller v Jackson*, the claimants' house had been peppered with balls struck from the neighbouring village cricket field.[55] This was held to be an actionable nuisance entitling the claimants to compensation. However, the recreational value of cricket was so great, the Court of Appeal held, that it should be allowed to continue. The Court therefore refused, despite the ordinary rule in nuisance cases, to award an injunction. The authority is admittedly a peculiar one, since only a minority of the judges agreed with the result attributable to the court aggregatively.[56] But through that fortuity a precedent was established, which later courts have embraced.

In *Dennis v Ministry of Defence*, Buckley J held that the Royal Air Force was justified in using its airfield to train its pilots, and should be allowed to continue, but that doing so constituted a tort against the claimant, who owned neighbouring land.[57] After all, the noise from the airfield was a serious disturbance, and it was no consolation to him that the operation of the airfield was on balance justified. Thus, on the one hand, no injunction was awarded, since 'the public interest clearly demand[ed]' that pilot-training should continue; but that was irrelevant, in Buckley J's view, to the question of whether there was an actionable nuisance entitling the claimant to damages.[58] That question turns on the degree to which the defendant's activity has set back the claimant's interests, and the fact that the activity was reasonable on balance is beside the point. Buckley J therefore applied the approach of *Miller v Jackson*, which he thought rooted in sound principle. Not all courts took the same view,[59] however, producing a conflict of authorities which the Supreme Court resolved in 2014 in *Coventry v Lawrence*.[60] It held unanimously, affirming both *Miller* and *Dennis*, that judges should be free to decline an injunction because of the public interest in the continuance of the defendant's activities, even to a claimant who has established a tortious nuisance.[61]

It is true, as I mentioned earlier, that there are reasons for a court to refuse an injunction quite apart from the reasonableness of the defendant's conduct. It might be unduly heavy-handed to deploy the legal machinery to prevent even conduct that ought not to occur.[62] But that is not what motivated these decisions. What motivated them was that the

activity ought to continue. In *Miller* this was because of the value to the community of the 'manly' sport of cricket.[63] In *Dennis* it was the patent public interest in the Royal Air Force's work.[64] And the basis of the Supreme Court's decision in *Coventry* was that, although concerns about the law's heavy-handedness had long been recognised as reasons for refusing an injunction,[65] these were not the only reasons;[66] courts should readily refuse an injunction on the quite different basis that, because the defendant's activity is of benefit to the public, it ought to go ahead.[67]

These judgments were, in fact, spelling out the implications of a principle of 150 years' standing: that an activity is all-things-considered reasonable does not mean it is not a tortious nuisance. Overwhelming though the benefits of the activity may be, 'that law . . . is a bad one which, for the public benefit, inflicts loss on an individual without compensation'.[68] This celebrated principle, from Bramwell B's speech in *Bamford v Turnley*, came shortly to be applied in other judgments of equally high authority to deny that nuisance liability depended on unreasonable or negligent conduct by the defendant.[69] True, the point is complicated by the fact that liability in nuisance depends on the so-called 'reasonable use' enquiry, but the complexity is only superficial: that enquiry relates not to the reasonableness of the defendant's conduct but to the reasonableness of the claimant's having to put up with the interference without remedy.[70] That there is logical space between the two – with the effect that the claimant is sometimes entitled to damages even though the defendant's conduct is reasonable – is amply demonstrated by the cases under discussion. *Coventry* affirms the corollary that, in cases of this kind, the court should not issue an injunction. It thus reached the same conclusion that American law had reached a half-century ago, to great intrigue, in *Boomer v Atlantic Cement Co*.[71]

Admittedly *Coventry*, like *Boomer*, has divided opinion. For some, its sharp end is the court's willingness to deny an injunction even when it has found an actionable nuisance. Hence the court 'is, in effect, licensing a continuing wrong'.[72] For my part, I doubt this alarmism is justified. But here I want to view the case from its other end. From that perspective, what is striking about the court's approach is not the denial of an injunction as such, but its ready acceptance that damages should be paid even for conduct it regards as obviously reasonable. That may sound strange to those accustomed to the practical preponderance of negligence and the intellectual architecture that has been built around it. But these nuisance cases are all the more important for that: they breathe new life into the tort of negligence's competitor, according to which the defendant may have a duty to compensate even when he has acted reasonably.

### 4.2 Necessity

The classic case to instantiate that thought is, of course, the Minnesota Supreme Court's 1910 decision in *Vincent v Lake Erie Transportation Co*.[73] The defendant ship's captain had overstayed his contractual permission to moor at the plaintiff's dock in order to keep his ship safe in a sudden storm. The ship, pitched back and forth by the rough weather, caused damage to the dock, resulting in a claim by the plaintiff for the cost of repair. The court made plain that the ship's captain had behaved reasonably in staying moored to the dock. Yet it held him liable to compensate the plaintiff. '[T]he dock owner may recover from the shipmaster for the injury sustained', the court held, 'although prudent seamanship required the master to follow the course pursued.'

The court did not think the principle on which it relied was an adventitious one. It said the principle would have applied in other reported cases, and that it was supported by 'theologians': in cases of necessity, one may take the property of another 'without moral guilt', yet an obligation to pay compensation remains. Others have since mounted famous defences of the same thought. A stranded hiker breaks into your mountain cabin to avoid freezing to death, in Joel Feinberg's famous example; he is justified in doing so, but should pay for the damage.[74] A diabetic takes your insulin to avoid life-threatening hyperglycaemia; the non-consensual taking is justified, concludes Jules Coleman, but he ought to replace the insulin.[75] These kinds of examples can be multiplied, and often are in the moral-philosophical literature.[76] If they are taken seriously, they would seem to undermine any general claim that tort liability requires a failure to act as one ought to. In the legal examples I have mentioned, and which have enduring non-legal analogues, there is a duty to compensate for conduct that the court, fully mindful of what it is doing, says ought to have been performed.

## 5. Responses

Usually, however, these cases are not taken very seriously. Some say *Vincent* and its ilk were wrongly decided.[77] The more common move, however, is to accept that they were rightly decided, and then marginalise them as exceptions, leaving intact the general truth of TO. But what is the argument for doing so? Plainly *Vincent* and the nuisance cases that I mentioned are statistical exceptions. They occupy a much smaller part of modern tort law than does negligence liability. On what basis, however,

does one deny that even a statistical exception reveals something of importance about the connection between tort liability and acting wrongly? It is true that a theory of tort law need not, and probably should not, seek a unified explanation of every single instance of liability that is conventionally classified in the law of tort.[78] But the challenge is to show that one's choice of outcasts is not *ad hoc*.

The view that these cases are marginal is sometimes helped along by the thought that they arise only in a discrete corner of tort law. For example, they are often presented as bearing on property rights only, or the necessity defence only.[79] But the nuisance cases cast much doubt on at least the latter limitation, and it also seems implausible, for reasons to be discussed later,[80] that the issue arises only in respect of property rights. For now, however, the key point is that confining the problem to property rights does not help. These cases may nevertheless tell us something very important about tort law – at least insofar as it protects property rights. In other words, one needs to show that, because these cases involve property rights, they are not tort law's problem. We await a deeper argument explaining why that is so.

In trying to discern that deeper argument, a source of difficulty is that many writers take for granted the assumptions I am trying to test. In section 2.4, I identified one assumption of this kind: it is widely thought that TO is integral to non-instrumental accounts of tort liability, and that TO's rejection, correspondingly, is thought to commit one to instrumentalism. The result is that law and economics have been allowed to 'monopolize' thinking about these cases.[81] Calabresi and Melamed famously used nuisance cases, including *Boomer*, to illustrate the susceptibility of tort law to economic analysis.[82] Theirs is now the standard way to explain the combination of features that I emphasised in section 4: the award of damages, but not an injunction.[83] The English judges who decided these cases have also been drawn into this way of speaking. Lord Sumption in *Coventry* described the strong tendency to award an injunction whenever the tort is established as 'unduly moralistic', for example, contrasting this with the more sensible approach of '[m]odern economic theory'.[84] He thereby aligned *Coventry*'s logic with that said to underlie the rule in *Rylands v Fletcher*, which the UK's highest court has likewise interpreted as 'an isolated victory' for the theory of cost-internalization.[85] One might indeed trace this understanding back to the founding Victorian-era judgments of Baron Bramwell, whose reasoning was patently indebted to the economic theory of the time.[86] These associations, in sum, encourage one to think of the nuisance cases as marginal. Rather than

providing counterexamples to the claim that torts are failures to do what one ought, they only show that judges and lawyers have sometimes been seduced by the economists, and lost touch with tort law's true logic altogether.

Yet it seems deeply implausible that economic analysis is *necessary* to the conviction that liability should be imposed in these cases. There is no hint of economic analysis in *Vincent*,[87] nor in the judgments that *Boomer* relied upon,[88] and Lord Sumption's reasoning was viewed with caution by his colleagues.[89] The best discussion of Bramwell B's views places him in 'the Blackstonian tradition'.[90] Rights-based thinking was integral to Buckley J's reasoning in *Dennis*.[91] And so on. The fact that others have tended to analyse the nuisance cases in economic terms is therefore best understood as a result of the association between TO and anti-instrumentalism, rather than evidence for it. Once TO is assumed to be integral to anti-instrumentalism, then these cases are seen to be incompatible with it; they thus call for a different rationalisation, which economic analysis has provided. But the whole point here is to see whether the premise is true – whether we really ought to think these cases call for a special explanation, different from the non-instrumental one that applies, so the non-instrumentalists would argue, to all other tort cases. We therefore return to the key question once again: what is it about the TO-defiant cases that justifies regarding them as so different?

## 5.1 Tort and insurance

We might be pointed in the direction of a deeper explanation by Martin B's statement in *Blyth v Birmingham Waterworks Co*,[92] often cited as the archetypal case of negligence liability in English law, decided at much the same time that Bramwell B's version of nuisance law was clicking into gear. The question was whether the Birmingham Waterworks Co could be liable to the plaintiff, whose house had been flooded when piping laid by the Waterworks had burst due to a frost of 'extreme severity'.[93] The case is best known for Alderson B's canonical formulation of the negligence standard (which allowed the Waterworks, having done all that was reasonable, to avoid liability). But our interest is in the dichotomy stated by Martin B in his terse concurring judgment:

> The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.[94]

Martin B had in fact said the same thing in *Rylands*, where in the Court of Exchequer he refused, over Bramwell B's dissent, to hold the defendant liable.[95] His point of view – that imposing liability in the absence of negligence would be to do something anomalous and inappropriate – did not prevail before the House of Lords in *Rylands* itself, but ultimately it would become dominant. And the tort of negligence's staggering march to victory was assisted, at some important junctures, by the invocation of Martin B's contrast between liability in tort and the liability of an insurer.[96] To fail to restrict liability to breaches of the negligence standard, these later courts have suggested, is to dispense with the logic of tort liability, and to replace it with something else altogether. Moreover, this contrast between tort liability and the liability of an insurer can be traced through to recent theoretical writing. Joseph Raz, for example, has argued that tort liability is generally 'responsibility-based', in other words grounded upon one's 'failure to conduct oneself as one should have done' (his focus is negligence liability), which he contrasts with the liability of an insurer.[97]

The contrast may seem helpful, then, to TO's proponents: it seems to allow the alleged counterexamples to be removed from tort law and rehoused. Yet the question is not whether a contrast between tort liability and the liability of an insurer exists – plainly it does – but whether it maps onto the sets of cases that Martin B, along with TO's proponents, might imagine. In other words, if an instance of liability is inconsistent with TO, does it for that reason become analogous to the liability of an insurer (and unlike paradigmatic liabilities in tort)? It does not. Reflecting on the contrast case in fact hinders, rather than advances, the argument in favour of TO. Martin B's dichotomy implies that a liability is analogous to that of an insurer merely because the conduct that incurred it was not unreasonable. But that misses the point. What characterises the liability of an insurer is that it is imposed *regardless of any harm-causing conduct by that person at all*. If my house burns down, I can claim under my insurance policy even though my insurer had nothing at all to do (one hopes) with the fire. The insurer's liability is conditional upon the incurrence of the fire damage, but in no way grounded upon the insurer's harm-causing conduct. In this respect it is plainly different, therefore, from *both* liability in negligence *and* the liability in *Vincent*, *Dennis*, and similar cases. For surely no one would deny that the results in these latter cases depend crucially on the fact that the defendants caused the harm for which they were held liable.[98]

Here, then, is a tabular representation of the three categories of case we need to consider:

**Table 7.1** Tort and insurance liability contrasted. Created by Leo Boonzaier.

| | **Liability type** | ***D* caused the harm?** | ***D* acted wrongly?** |
|---|---|---|---|
| 1. | Negligence liability | Yes | Yes |
| 2. | *Vincent*, *Dennis*, etc | Yes | No |
| 3. | Insurer's liability | No | No |

All participants in the debate agree on the clear difference between negligence liability and the liability of an insurer. The question is what we should make of the middle category of cases, which I discussed in part 3. Negligence liability requires *both* that the defendant, *D*, caused the harm for which the liability is being imposed *and* that this conduct was unreasonable (in other words, an instance of what I have been calling 'acting wrongly'). The liability of an insurer rests on neither. It requires no harm-causing conduct by him at all. The problem with Martin B's dichotomy, then, is that it forces the middle category of cases into the same mould as that of an insurer, despite the fundamental disanalogy between them. And it seeks to drive a wedge between these cases and liability in negligence, despite their clear commonality. The commonality is that the defendant's harm-causing conduct seems to be integral to the justification of his liability for it.

## 5.2 Tort and enrichment

Much the same points emerge when we take Ernest Weinrib's famous attempt to re-explain *Vincent* as an unjust enrichment case.[99] The ship's captain was benefited by his use of the dock, the argument runs, and unjustly so because he used it without the owner's consent. Hence, by familiar principles, he must restore the monetary value of the benefit to the owner. And that – not the logic of tort law – explains the liability result in *Vincent*. This switch from tort to enrichment may seem to many an attractive one. Birks established as orthodoxy that the defining difference between liability in tort and in enrichment is that the former depends upon a wrong by the defendant and the latter does not.[100] For those who believe the ought-entailment lemma,[101] it must follow that *Vincent* does not involve the commission of a wrong; and it is tempting to conclude, by application of the Birksian schema, that it should therefore be defended as an enrichment case.

Despite its superficial appeal, the law of enrichment provides no safe harbour. The sticking points in Weinrib's analysis of *Vincent* are not

hard to spot: the classic objection is that the measure of damages in the case was the plaintiff's loss, not the defendant's gain.[102] But there is also a more fundamental and far-reaching problem, which the discussion in section 5.1 has helped to highlight. Attempting to rehouse *Vincent* in unjustified enrichment goes too far too fast. Its immoderation is the same as that exhibited by Martin B's dichotomy. For notice that in enrichment, or at least the mistaken payment cases Birks thought were the subject's core,[103] the defendant's prior conduct plays no role in justifying his liability at all.[104] What matters is the fact of the defendant's enrichment at the claimant's expense, its being irrelevant if that occurs by (say) a payment into his bank account in which he was entirely uninvolved. To treat *Vincent* as susceptible to the same analysis therefore causes the defendant's role in damaging the dock to drop out. It is made irrelevant, in other words, that the defendant caused the harm for which he is being held liable. And that is surely going too far. While it is of course true that the defendant's conduct in *Vincent* was not unreasonable, it is a drastic move to eliminate that conduct from the justification of liability altogether. Seeing that *Vincent* may not be a good fit with tort law in one respect, then, Weinrib assimilates it to a model with which it is an even worse fit in another, no less important, respect.

## 5.3 Tort and the twin-track model

There is something puzzling, in sum, about both Martin B's and Weinrib's proposals. In order to deal with apparent counterexamples to the claim that torts are failures to do what one ought, they cast them out of tort law, and attempt to re-explain them on some different basis. Yet a fundamental feature of the apparent counterexamples is obscured by the re-explanation, namely that the liability is conditioned upon the defendant's harm-causing conduct. More strikingly still, this fundamental feature is shared by all other tort cases. So the attempted marginalisation of the apparent counterexamples does seem *ad hoc* after all, and indeed enormously theoretically costly. The better approach, rather than casting these cases out of tort law, is to accept they must shape our understanding of it. Both the TO-compliant and TO-defiant liabilities are part of a single genus.

It might be objected that the debate has, at this point, become merely semantic. Are we not squabbling over the meaning of the word 'tort'? Both sides agree that the imposition of liability in *Vincent* and the nuisance cases is justified; they merely differ, one might think, on whether we ought to use the term 'tort' to encompass it. But that impression is mistaken. We are not debating the definition of words; we are trying to

understand the things those words might pick out. We are interested, in particular, in the normative justifications for liability, and more particularly still on the set of cases for which a given justification must account. I have been developing an argument against what are sometimes called 'dualist' or 'twin-track' models of tort law.[105] Noticing that some cases contradict the orthodox, TO-compliant model, its adherents suppose that those cases are to be given a quite different normative justification. Hence what is conventionally called 'tort liability' has, it turns out, (at least) two distinct normative bases: there is one justification – seemingly the main one – that explains the TO-compliant instances of liability, and some other justification – still to be determined – that explains the rest.[106] Naturally that has the benefit, to these writers, of preserving the truth of TO (albeit within a narrowed domain of application). But the better response, I have argued, is to reject it. For both sets of cases share a fundamental feature, which the liability of an insurer and in enrichment lack, namely that the defendant's harm-causing conduct stands central. Hence there is a strong presumptive case that the justification for the two sets of cases is a unified one, built around that common feature.

## 6. The simple argument

This point can be approached from a different angle. I hope to do so by means of what I call 'the simple argument'. It is simple because it merely points out the phenomenological continuity between these TO-defiant cases and the undisputed cases of tort liability. This strongly suggests that no wedge can be driven between the two sets, so as to put one within the ordinary logic of tort liability and one without.

The germ of the argument is that the principle underlying the cases in section 4 might have been extended to others. *Miller v Jackson*'s personal-injury analogue is in fact well-known. In *Bolton v Stone*, the claimant was hit on the head by a cricket ball driven out of the defendant's cricket ground.[107] The facts in the two cases are strikingly similar: balls struck in the course of the defendant's cricket-playing caused harm to persons on neighbouring land. The difference was that in *Miller* the balls caused diminished amenity value, whereas in *Bolton* the ball caused personal injury to the claimant. To be sure, the result in *Bolton* was that the defendant was not liable, because it would not have been reasonable, given the small risk of injury, that cricket be stopped altogether. It is now regarded as a canonical judgment in the development of the English law of negligence, and thus strongly affirmative of TO. But that result was

not written into the moral firmament. In fact it was widely criticised at the time. It seemed puzzling to many observers that the reasonableness of the defendant's cricket-playing was thought to provide an answer to the claim. Indeed this was a view expressed by Lord Radcliffe in his speech. He wrote that he '[could] see nothing unfair in the [defendants] being required to compensate [the claimant, Ms Stone] for the serious injury that she has received as a result of the sport that they have organized'.[108] But that did not suffice to make out liability, he said 'with regret', under the contemporary law of negligence. And in closing he wrote portentously that, although the defendant need not have taken further safety precautions:

> Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say.[109]

Lord Radcliffe's implication that the club ought to have compensated Ms Stone was taken up with vigour by commentators, both popular and professional, whose reaction to the judgment was hostile.[110] Heft was added to the public outcry by Arthur Goodhart's note arguing that the case was wrongly decided.[111] As a result, the defendants decided to let Ms Stone keep the compensation she had been awarded by the Court of Appeal,[112] and anxiously conveyed their decision to the *Law Quarterly Review*.[113] Some distinguished tort scholars of the time took these events sufficiently seriously to develop the notion of 'ethical compensation':[114] the *Bolton* saga showed, they thought, that the defendant has a duty to compensate the claimant even in circumstances when the law of negligence fails to acknowledge it. Richard Epstein drew on these writings when he famously argued, in 1973, that the club ought to have been held liable strictly.[115]

Whatever the merits of Epstein's broader project,[116] it suggests an important truth about *Bolton*. The point is not that the case should necessarily have been decided differently. It is only that, *if* the Lords had decided the case differently, it does not seem plausible to insist they would have lost touch with the ordinary logic of tort law. True, the prevailing doctrine, to which the Lords ultimately acceded, coupled tort liability with unreasonable conduct. But if the Lords had uncoupled it, they would have made an equally viable choice, and quite possibly one that would have been less controversial. They might have supported it using the same points made by the courts in *Bamford v Turnley* or later in *Dennis*.[117] In short, what does it matter to the claimant that it was

reasonable, on balance, for the defendant club to keep playing cricket? The claimant was injured as a result of actions the club chose to undertake. The club is responsible, therefore, for the harm, and should have to compensate accordingly. True, it offers up the defence that its cricket-playing was in the public interest – but 'that law . . . is a bad one which, for the public benefit, inflicts loss on an individual without compensation';[118] that would be for her 'private rights [to] be subjugated to the public interest'.[119] Whether or not the defendant's cricket-playing was justified, the court might have said, is irrelevant to the claim at issue.

What point am I making? I am suggesting, for one thing, that if a court had decided *Bolton v Stone* in this way, it would at least be rationally intelligible (which is not to insist that this result would be all-things-considered the best one). And this rational intelligibility is something that, all else equal, an account of tort liability ought to be able to explain. Already this suggests a worry about attempting to cabin the lesson of *Miller v Jackson*, *Dennis*, and *Vincent* within property rights:[120] a court that saw the lesson as extending to *Bolton*, a case of personal injury, does not seem to be labouring under a misunderstanding. In any event, and more importantly, the defenders of TO would have to account for the rational intelligibility of my imagined variant of *Bolton* in a way that is implausible. As we know, they posit a radical disjunct between the justification of the actual result in *Bolton* and the justification of the result in cases like *Miller*, *Dennis*, and *Vincent*. That is the position to which one is driven if one adopts a two-track model in which the main track complies with TO, and thereby forces *Miller*, *Dennis*, and *Vincent* onto an entirely different second one. That is the point I already made in the previous section. The new point is that, in a sense, the two supposed tracks of liability run through *Bolton* itself. They provided the two options between which the judges in *Bolton* were choosing. TO's defenders imply that, had Lord Radcliffe found a way to impose liability on the defendant in *Bolton* despite the all-things-considered reasonableness of its cricket-playing, he would *ipso facto* have departed from the ordinary justification for tort liability applied by his colleagues and replaced it with some innominate other. But that view is seeming increasingly strange – as the close factual similarity between *Miller v Jackson* and *Bolton v Stone* underscores. Where would we locate the discontinuity? I hit my ball onto your property and smash your window; I hit my ball onto your property and impair the use of your garden; I hit my ball onto your property and onto your head. There seems to be only seamless continuity here, as we move from cases of property damage, through to nuisance cases like *Miller v Jackson*, and on into the heartland of what is now negligence liability for personal injury like

*Bolton v Stone*. The moral and legal phenomenology is the same. We are asking, in each of these very similar factual scenarios, whether the defendant, as a result of the legally recognised harm he has caused to the claimant, owes a duty to compensate her in the amount of the loss so caused. The courts have taken different views, to be sure, on the narrow question of whether the liability should be conditioned upon unreasonable conduct. But TO's defenders have to inflate that difference of views into an incomparably grander one: they have to say that, despite appearances, these were disagreements about whether to apply the ordinary logic of tort law or substitute it with another.

If one approaches the data without a strong preconception, that view seems hard to credit. Far more natural, it seems to me, to accept that the choice whether to condition tort liability upon unreasonable conduct – in *Vincent*, *Dennis*, *Miller*, and *Bolton* – is a local one. It is a choice, in other words, between two viable ways, grounded upon the defendant's role in causing a harm, to decide whether compensation for it should be paid.

## 7. What next?

For these reasons, I conclude we should reject the claim that torts are failures to act as one ought. Though many torts match that description, some do not. And whereas the orthodox approach is to marginalise the counterexamples as anomalies or exceptions, I have suggested this comes at an underappreciated theoretical cost. One has to posit a mysterious divide between the two categories of case, and leave the alleged exceptions high and dry, without any satisfying explanation. It does so despite the basic commonality they share with cases of negligence liability, which TO's proponents are happy to claim as their paradigm.

Some might feel, however, that I have moved too fast. TO may have its problems, but is the best solution really to reject it? Some would prefer to refine or moderate it. For example, one might say that committing a tort is necessarily to violate a 'standard of conduct', even if not always to act wrongly.[121] Perhaps the hope is that one will hang onto the appeal of TO that I tried to capture in section 3, while dulling the force of the counterexamples that I raised thereafter. My own sense, for what it's worth, is that these attempts to finesse one's concepts become mealy-mouthed, and lose touch with what was attractive about TO in the first place. But I cannot defend that view here. What I will do instead, in

closing, is to mention another sort of response, which casts doubt in a different way on the conclusion I urged. 'True', my opponent might say, 'there is a theoretical price to be paid for positing an inscrutable divide between the two sets of cases, and leaving one of them unexplained. But the theoretical price that you have to pay is even greater. If you abandon TO, and the powerful intuition that it helps to sustain, then you risk being unable to explain *any* tort cases – not even the seemingly easy cases in which the defendant has failed to do what he ought to. And what's more', so the objection might continue, 'you leave it mysterious why the easy cases are, as you granted at the outset, so statistically preponderant. Why, in other words, are there so many torts that consist in doing what one should not, and such a comparatively small number of torts that consist in doing what one may? That fact is, on your account, incapable of explanation. Better, then, to stick with the orthodox response after all: to hang onto the powerful intuition that (almost all) torts are failures to act as one ought to, use it to justify liability in those cases where it obtains, and tolerate the cases discussed in section 4 as discomforting – but mercifully rare – exceptions.'

This objection has a lot to be said for it. It rightly identifies the explanatory hurdles confronting those who take my view. But it is also, I think, overstated. It implies that the right course of action is to cling on to TO, so as not to confront these explanatory hurdles. A different and better approach, however, is to see how they might be overcome.

There is no doubt that one needs to explain why it is that tort liability is usually conditioned upon acting wrongly. The question is where. To endorse TO is to build it in at the earliest stage. It is to include acting wrongly in the set of (defeasibly) sufficient conditions that justify the imposition of tort liability. To be sure, those who take this view have to deal with the counterexamples discussed in part 3. This they do by supposing there are, in fact, two sets of (defeasibly) sufficient conditions that justify the imposition of tort liability. There is one set that includes acting wrongly and there is one set that does not. The former set explains the majority of tort cases (especially liability in negligence); the second explains the outliers (like *Vincent* and *Dennis*). In this way, the preponderance of fault-based liability can be readily explained. It follows from the fact that acting wrongly is built into the first set of conditions, which have a much wider range of application than the relatively quirky second one. Or so they would argue.

My proposal is different. For all the reasons given in this chapter, it rejects the introduction of a separate second track by which liability may be justified. Bound up with this, it denies that the (single) set of

(defeasibly) sufficient conditions that justify the imposition of tort liability includes acting wrongly: if it did, it would fall foul of section 4's counterexamples. It follows, to be sure, that one will have to make good on the fault-free accounts of tort liability, inspired by Tony Honoré, that I mentioned at the end of section 2. It also follows, moreover, that one cannot account for fault liability's statistical preponderance in the most popular way. But various other ways remain possible. For example, it may be that the set of otherwise sufficient conditions is, over a certain domain, indeterminate. It may be that the conditions are satisfied not only by the defendant's conduct in committing the tort, for example, but by the conduct of the claimant. For liability to be assigned to the defendant within that domain, then, the law cannot but add further conditions, such as defendant fault, if it is to be normatively justified.[122] Or one might make the simple point that, even when there is a (defeasibly) sufficient case for imposing liability on the defendant, that case is sometimes defeated by other values – most obviously, perhaps, the value of the defendant's liberty. Since conditioning liability upon wrongdoing is a way to respect these other values, it may often be justified.[123] In these (and perhaps other) ways, one might explain why tort liability so often requires defendants to have acted wrongly. One can also explain, much better than those accounts that build wrongdoing into their set of (defeasibly) sufficient conditions, why it does not *always* do so. Hence one can give a rational account of the choice made by the court in cases like *Vincent* and *Bolton*, rather than insisting the cases fall on opposite sides of a supposedly fundamental, but mysterious, divide. That choice is a function of competing values, which rub up against the unified general case in favour of liability, and of the different circumstances to which that single explanation is applied.

I am supposing, then, that a plausible account of tort liability's justification can be resolved into discrete steps. The first question is: What are the (defeasibly) sufficient conditions that justify the imposition of tort liability? The second question is: How do those (defeasibly) sufficient conditions play out in particular cases? In other words, when are those conditions satisfied, and when are they defeated? The argument of this chapter is that there is a constraint on an adequate answer to the first question: it must provide one and the same set of (defeasibly) sufficient conditions, both for torts that are failures to do what one ought, and for those that are not. Difficult further questions remain to be answered, while keeping that constraint satisfied. Answering those further questions indeed becomes pressing, if one takes the approach that I have suggested: otherwise, one will fail to meet the objection I sketched a moment ago.

But if one collapses the second question into the first, and treats the defendant's behaving wrongly as integral to the (defeasibly) sufficient case for liability, then one falls prey, at the very first step, to the objections I developed throughout this chapter.

## Notes

1 John CP Goldberg and Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham Law Review 1563; 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 945, 950.
2 Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart 2019) 38.
3 John Gardner, 'Tort Law and Its Theory' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (CUP 2020).
4 Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 49–55.
5 Compare Nicholas J McBride, 'Duties of Care—Do They Really Exist?' (2004) 24 Oxford Journal of Legal Studies 417, 417 fn 1; Goldberg and Zipursky, 'Torts as Wrongs' (n 1) 950.
6 To be clear, '*A* has a duty to *x*' is plainly not *reducible* to '*A* ought to *x*'. Indeed the importance of duties, many would say, is precisely that they are more stringent than run-of-the-mill 'oughts'. The lemma does not suggest otherwise.
7 Compare Leo Boonzaier, 'Gardner on Duties in Tort' in Haris Psarras and Sandy Steel (eds), *Private Law and Practical Reason* (OUP 2022) 21–25.
8 It is no part of this claim that, when the law takes the view that one ought (all things considered) to *x*, *x*-ing is indeed what one ought (all things considered) to do. The claim is about the law's point of view, and leaves aside the question whether the law's view on the matter entails genuine all-things-considered reasons for action.
9 Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 27.
10 In the latter case, *x*-ing is 'permitted', though not required.
11 McBride, *The Humanity of Private Law* (n 2) 36.
12 For examples Weinrib, *The Idea of Private Law* (n 4) 197; Peter Jaffey, 'Duties and Liabilities in Private Law' (2006) 12 Legal Theory 137, 139–43; Stephen A Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019) 259–61. Goldberg and Zipursky's view is more elusive, but seems to come to something very similar: see for example 'Torts as Wrongs' (n 1) 950–51 (arguing that torts are wrongs in the sense, inter alia, that in the law's view 'the act in question is not to be done', and hence impermissible).
13 For example John Gardner, 'Wrongs and Faults' in Andrew Simester (ed), *Appraising Strict Liability* (OUP 2005) 55.
14 Derek Parfit, *On What Matters: Volume One* (OUP 2011) 150–51. The distinction needs some modification, however, since we are concerned here with *the law's* view of the facts: see the discussion in section 2.1. The essential point, however, is that we are not concerned with *the defendant's* view of the facts.
15 The distinction is time-honoured, especially in the criminal law. See for example Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Columbia Law Review 199.
16 See for discussion Sandy Steel, 'Culpability and Compensation' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart Publishing 2021).
17 John CP Goldberg, 'Inexcusable Wrongs' (2015) 103 California Law Review 467.
18 HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1994) especially at 39.
19 See for example the treatment in Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 1).
20 This, too, is often thought to be central to Hart's legacy: Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 1).
21 For example Jaffey, 'Duties and Liabilities' (n 12) 138–39; Stephen A Smith, 'The Normativity of Private Law' (2011) 31 Oxford Journal of Legal Studies 215; McBride, *The Humanity of Private Law* (n 2) 37–39, 60–62.

22 Peter Birks, 'The Concept of a Civil Wrong' in David G Owen, *Philosophical Foundations of Tort Law* (Clarendon 1995) 47–9; 'Rights, Wrongs, and Remedies' (2000) 20 Oxford Journal of Legal Studies 1, 28. As Birks readily accepted, the model was not his own, but a revival of a view once widely held. It is usually traced to John Austin.
23 Richard A Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29, 32–33.
24 Compare for example Goldberg and Zipursky, 'Torts as Wrongs' (n 1) 927.
25 Tony Honoré, 'Responsibility and Luck' (1988) 104 Law Quarterly Review 530.
26 See prominently Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449; John Gardner, 'Obligations and Outcomes in the Law of Torts' in John Gardner and Peter Cane (eds), *Relating to Responsibility* (Hart 2001); Nils Jansen, *The Structure of Tort Law* (Sandy Steel tr, OUP 2022) 91–110.
27 Gardner, 'Obligations and Outcomes' (n 26) 125.
28 McBride, 'Duties of Care' (n 5). McBride's concern is with the claim that the commission of a tort (or, at any rate, the tort of negligence) is a breach of duty. For reasons explained in section 2.2, I focus instead upon the claim that the commission of a tort is a failure to do what one ought.
29 McBride, 'Duties of Care' (n 5) 427–30.
30 McBride, 'Duties of Care' (n 5) 426–27. I omit here McBride's argument that, if torts are not wrongs, then the liability that results from them becomes 'paradoxical' and hard to explain. I gave an implicit (and admittedly only partial) answer to this in section 2.4.
31 Dan Priel, 'Tort Law for Cynics' (2014) 77 Modern Law Review 703, 710–15.
32 *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 [131]; also [89].
33 Punitive damages are 'a remedy of last resort': *Kuddus* (n 32) [63].
34 For example McBride, *The Humanity of Private Law* (n 2) 56–58.
35 Both McBride and Priel agree that, so far as we know, injunctions are unavailable in the tort of negligence. They cite *Miller v Jackson* [1977] QB 966, 980, which I discuss later.
36 McBride, *The Humanity of Private Law* (n 2) 56–58.
37 It is usually attributed (contestably) to Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 458–62.
38 See for fuller analysis John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 Law Quarterly Review 563, 565–68.
39 Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon 1998).
40 *Roe v Minister of Health* [1954] 2 QB 66.
41 This basic architecture is traceable (ironically, in light of n 37 above) to Holmes: see *The Common Law* (Little, Brown 1881) lecture III. See more recently, for eg, David Owen, 'The Fault Pit' (1992) 26 Georgia Law Review 703.
42 This was Holmes's own proposal: *The Common Law* (n 41) lectures III–IV.
43 Compare Steel, 'Culpability and Compensation' (n 16) 60. For example, liability in defamation may be strict *prima facie*, but one may escape it by showing that one published the impugned statement in the reasonable belief that it was in the public interest: Defamation Act 2013, s 4.
44 See for helpful analysis Allan Beever, *A Theory of Tort Liability* (Hart 2016) 32.
45 In section 4.2, I consider specific instances of liability under these torts that do cause problems.
46 Notice that I have taken the strictness of these torts for granted. But see McBride, *The Humanity of Private Law* (n 2) 39, 242–45, who argues that instances of non-contractual strict liability are 'demonstrable historical excrescences' for which there is no sound justification. If that is right, it provides a further reason these torts do not helpfully test the truth of TO.
47 *Rylands v Fletcher* (1868) LR 3 HL 330.
48 The benign interpretation, mentioned at n 42 above in relation to the intentional torts, is therefore much less plausible in the case of *Rylands*.
49 *Fletcher v Rylands* (1866) LR 1 Exch 265, 280.
50 AWB Simpson, 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*' (1984) 13 Journal of Legal Studies 209.
51 John CP Goldberg and Benjamin C Zipursky, *Torts* (OUP 2010) 267.
52 See now *Transco plc v Stockport MBC* [2004] 2 AC 1.
53 *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13.
54 Gregory Keating has argued against a certain wrongs-based picture based on these cases' American equivalents: 'Nuisance as a Strict Liability Wrong' (2011) 4 Journal of Tort Law 1;

'Is There Really No Liability without Fault: A Critique of Goldberg & Zipursky' (2016) 85 Fordham Law Review Res Gestae 24, 35–37. So the freshness of my approach is only relative.

55 *Miller v Jackson* (n 35).

56 Lord Denning MR thought there was no nuisance and therefore no remedy; Geoffrey Lane LJ thought there was a nuisance entitling the claimant to both damages and an injunction. Only the speech of Cummings-Bruce LJ is aimed at justifying the order that issued: he thought that damages, but not an injunction, should be awarded, and each aspect of that award carried a (differently composed) majority.

57 *Dennis v Ministry of Defence* [2003] EWHC 793.

58 *Dennis* (n 57) [46]–[48].

59 See especially *Kennaway v Thompson* [1981] 1 QB 88.

60 *Coventry v Lawrence* [2014] UKSC 13.

61 Nominally the Supreme Court preserved the proposition that an injunction is the 'prima facie' remedy (at [121]), but it also held that the court's power to award damages rather than an injunction should be 'much more flexible' than usually suggested; it was 'simply wrong in principle' to do this only in exceptional circumstances (at [119]).

62 See again McBride, *The Humanity of Private Law* (n 2) 56–58.

63 *Miller v Jackson* (n 35) 988 (Cumming-Bruce LJ).

64 See again *Dennis* (n 57) [46]–[48].

65 This is according to *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

66 See for example *Coventry* (n 60) [119], [239].

67 *Coventry* (n 60) [124]–[125], [240].

68 *Bamford v Turnley* (1862) All ER 706, 713.

69 *St Helen's Smelting v Tipping* (1865) 11 HL Cas 642. See too *Brand v Hammersmith and City Railway Co* [1867] LR 2 QB 223, 231.

70 For example *Transco* (n 52) [26].

71 *Boomer v Atlantic Cement Co* 26 NY2d 219 (NY 1970).

72 The phrase originates in Jasen J's dissenting judgment in *Boomer* (n 71).

73 *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910).

74 Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 Philosophy & Public Affairs 93. See too Judith Jarvis Thomson, 'Rights and Compensation' (1980) 14 Noûs 3.

75 Jules L Coleman, *Risks and Wrongs* (OUP 2002) 282–83, 292ff.

76 See for example Justin A Capes, 'Strict Moral Liability' (2019) 36 Social Philosophy and Policy 52.

77 Stephen D Sugarman, 'The "Necessity" Defense and the Failure of Tort Theory' (2005) 5 Issues in Legal Scholarship.

78 Compare Goldberg and Zipursky, 'Torts as Wrongs' (n 1) 951–2; McBride, *The Humanity of Private Law* (n 2) 39.

79 See for example Weinrib, *The Idea of Private Law* (n 4) 190–203; Dennis Klimchuk, 'Property and Necessity' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013).

80 See section 6 below.

81 Weinrib, *The Idea of Private Law* (n 4) 190.

82 Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

83 See for example William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987) 42–48.

84 *Coventry* (n 60) [160]. Awarding damages instead of an injunction, he said, quoting Lord Millett in *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1996] Ch 286, 304, 'ensures a more efficient allocation of scarce economic resources'.

85 *Transco* (n 52) [29] (Lord Hoffmann). See too [55] (Lord Hobhouse).

86 *Bamford v Turnley* (n 68) 713. Bramwell B's views are illuminatingly discussed in AWB Simpson, *Leading Cases in the Common Law* (OUP 1996) 173–75.

87 See again section 4.2 above.

88 *Northern Indiana Public Service Co v Vesey* (1936) 210 Ind 338.

89 *Coventry* (n 60) [127], [168].

90 Simpson, *Leading Cases* (n 86) 175.

91 *Dennis* (n 57) [46]–[47].

92 *Blyth v Birmingham Waterworks Co* [1856] All ER 478.
93 *Blyth* (n 92) 480.
94 *Blyth* (n 92).
95 *Fletcher v Rylands* [1865] 3 H&C 737, 745.
96 For example *Hambrook v Stokes Brothers* [1925] 1 KB 141, 125; *Bourhill v Young* [1943] AC 92, 110; *Glasgow Corporation v Muir* [1943] AC 448, 455–56, 465.
97 Joseph Raz, 'Responsibility and the Negligence Standard' (2010) 30 Oxford Journal of Legal Studies 1, especially at 5–8. See too Jansen, *The Structure of Tort Law* (n 26) 101–2 (contrasting 'responsibility-based' and 'responsibility-independent' liabilities). Note that Raz's expression here is liable to mislead: plainly he does not think that one can be responsible only for conduct that one should not have performed all things considered.
98 To be sure, there is a plausible argument that the liability in *Rylands* itself is not responsibility-based in this sense, and is thus akin to that of an insurer. This is the position Raz himself takes: 'Responsibility and the Negligence Standard' (n 97) 7–8. But his arguments there do not carry over to cases like *Vincent*, and he would not claim they do. Jansen's position is in both respects similar: *The Structure of Tort Law* (n 26) 38.
99 Weinrib, *The Idea of Private Law* (n 4) 196–203.
100 See again n 22 above.
101 This was discussed in section 2.2 above.
102 For example Robert E Keeton, 'Conditional Fault in the Law of Torts' (1959) 72 Harvard Law Review 401, 410–18; Kenneth W Simons, 'Justification in Private Law' (1996) 81 Cornell Law Review 698, 722–27.
103 Peter Birks, *Unjust Enrichment* (OUP 2005) ch 1.
104 But see Martin Fischer, 'Mistakes in Unjust Enrichment', elsewhere in this volume. Fischer argues that the claimant's conduct, rather than the defendant's enrichment, is in fact crucial to the justification of liability in these cases – though not in a way that deflects the argument I make in the text.
105 Jansen, *The Structure of Tort Law* (n 26) 11. Note that Jansen, while also arguing against twin-track models, has in mind two subtly different tracks to those I am considering here, namely fault and strict liability rather than TO-compliant and TO-defiant ones.
106 McBride and Smith are especially clear about this in their recent books: see McBride, *The Humanity of Private Law* (n 2) 60–61, 68–70; Smith, *Rights, Wrongs, and Injustices* (n 12) 256–63. Though they seek to account for the cases I have discussed in this part, they do so on a basis quite different from cases of genuine 'wrongdoing'. The same approach is apparent in earlier texts like Weinrib, *The Idea of Private Law* (n 4) chs 6–7.
107 *Bolton v Stone* [1951] AC 850 (HL).
108 *Bolton* (n 107) 868.
109 *Bolton* (n 107) 869.
110 See further Mark Lunney, 'Six and Out: *Bolton v Stone* after 50 Years' (2003) 24 Journal of Legal History 1, 15–17.
111 AL Goodhart, 'Is It Cricket?' (1951) 67 Law Quarterly Review 461. See also Dennis Lloyd's case note which, while not saying the judgment was wrongly decided, presents it as exceptional: (1951) 14 Modern Law Review 499.
112 *Stone v Bolton* [1950] 1 KB 201 (CA).
113 AL Goodhart, 'Notes' (1952) 68 Law Quarterly Review 3.
114 John Salmond, *The Law of Torts* (13th edn, Sweet & Maxwell 1961) 30; also Glanville Williams, 'The Aims of the Law of Tort' (1951) 4 Current Legal Problems 137, 142.
115 Richard A Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151, 170.
116 Epstein's project was ambitious, since it suggested that a *general* regime of (defeasible) strict liability was morally justified. That is widely thought implausible, or indeed impossible: Stephen R Perry, 'The Impossibility of General Strict Liability' (1988) 1 Canadian Journal of Law and Jurisprudence 147. But it is no part of my argument that strict liability should be imposed generally, for the reasons mentioned in section 7 below.
117 A nuisance claim was brought in *Bolton* and disavowed before the House of Lords on the basis that, 'in the circumstances of this case' (i.e. an 'isolated escape' causing physical injury, rather than, as in *Miller v Jackson*, a continuing 'state of affairs'), 'nuisance cannot be established unless negligence is proved'. See *Bolton* (n 107) 860; also 868.
118 *Bamford v Turnley* (n 68) 713.
119 *Dennis* (n 57) [46].
120 See again n 79 above.

121 Compare John CP Goldberg and Benjamin C Zipursky, 'The Strict Liability in Fault and the Fault in Strict Liability' (2016) 85 Fordham Law Review 743.
122 This is the nub of Stephen Perry's account: see 'The Moral Foundations' (n 26).
123 See for example John Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (OUP 2014).

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# ‘Damages, one farthing’: under-compensation in nineteenth-century tort

Nicholas Sinanis

## 1. Introduction

Some modern private law scholars contend that, in basic theoretical terms, the law of tort is best understood as manifesting a principle of corrective justice. As a distinct principle of justice, corrective justice is centrally concerned with repairing the harmful consequences that one’s wrong causes another to suffer.[1] The success of corrective justice as a theory of tort law is said to lie in its ability to explain tort law’s central feature – its correlative structure: it is the notion of correlativity that captures the bilateral relationship between the parties to a tort action.[2] Yet, so central is the notion of correlativity that it is also said to determine the ways in which tortious wrongs may be legitimately remedied. For corrective justice theorists, legitimate tort remedies are limited to those whose ‘normative force applies simultaneously to both parties’.[3] Tort law’s paradigmatic ‘correlative’ remedy is the award of compensatory damages. As Weinrib explains, this is because it treats the defendant and plaintiff in a tort action, respectively, ‘as doer and sufferer of the same injustice’.[4]

But not all modern tort damages awards are compensatory. Indeed, some such awards are also ‘non-correlative’, which has seen corrective justice theorists question their legitimacy.[5] One modern damages award that has been described as ‘in no sense compensatory’,[6] but whose legitimacy corrective justice theorists have not questioned,[7] is the award of nominal damages. The correlative, and therefore legitimate, purpose of nominal damages is, as Burrows puts it, ‘merely to declare that the defendant has committed a wrong against the claimant and hence that

the claimant's rights have been infringed'.[8] In modern tort law, a plaintiff only stands to collect nominal damages for torts actionable *per se* – that is, where they need not prove that the defendant's tortious wrong caused them to suffer any harmful consequences at all.

Yet, like all modern tort awards, nominal damages have long been practised at English common law. In 1887, Oxford University's Corpus Professor of Jurisprudence, Frederick Pollock, separately (albeit briefly) discussed the practice of nominal recovery in his pioneering treatise on the law of tort. In chapter v, entitled 'Of Remedies of Torts', he observed that it could mean 'one of two things'.[9] 'According to the nature of the case', Pollock supposed that an award of nominal damages 'may be honourable or contumelious to the plaintiff'.[10] Nominal damages bearing Pollock's second 'contumelious' meaning have not entirely disappeared from the contemporary adjudication of tort actions, defamation actions in particular.[11] Although decidedly rarer in modern – overwhelmingly non-jury – tort trials,[12] private law scholars have rather neatly classified so-called 'contemptuous damages' as a 'sub-species'[13] of nominal recovery. Yet, unlike nominal damages, contemptuous damages awards do not mean to do the plaintiff the 'honour' of publicly declaring her infringed right. As Barker explains, their distinctive purpose is to publicly declare 'disapproval of the plaintiff's reasons for bringing an action in reliance upon it'.[14] In order to fulfil this 'non-correlative'[15] purpose, the amount of any such nominal award must be so conspicuously small as to make its contumelious meaning manifest. The smallest coin currently known to English law is the penny. In Pollock's time, it was the farthing – one-quarter of a (pre-decimal) penny.[16]

Contumelious nominal recovery in the historical practice of English tort law adjudication has escaped both historians and theorists of private law. Prompted by Pollock's brief treatment of the subject, this chapter purports to enter this neglected historical dimension. Temporally, it focusses on the nineteenth century. It was not until this period that a regular practice of reporting first instance – *nisi prius* – proceedings, in London and on circuit, arose. In turn, this chapter revisits both the standard printed and newspaper reports of nineteenth-century tort trials where the nominal awards fixed by English common law juries bore Pollock's second 'contumelious' meaning. In particular, it examines reports where juries returned verdicts of a single farthing. This chapter suggests that nineteenth-century contumelious farthing verdicts can be plausibly sorted into the following three broad – though not mutually exclusive – categories:

(1) In the first category, juries returned farthing verdicts where they judged that, although having been technically wronged, plaintiffs should not have brought an action for damages.

(2) In the second, they were returned where juries judged that, despite the harmful consequences caused by the defendant's tortious wrong, plaintiffs were also to blame for them.
(3) In the third, they were returned to effectively deprive plaintiffs of recovery on the basis of a jury's judgment that they were undeserving in a moral sense.

Ultimately, this chapter will illuminate the scope and potency of contumelious farthing verdicts in an earlier, less familiar, stage of the common law practice of adjudicating tort actions. In doing so, it will be shown that the normative considerations according to which nineteenth-century English juries rectified tortious injustices were varied. Across a surprising breadth of tort actions (not all of which have survived) these considerations encompassed emphatically non-correlative considerations that applied singularly to tort plaintiffs. By pervasively accommodating these considerations at the remedial stage of nineteenth-century tort actions, many plaintiffs were left under-compensated, if compensated at all. So much so, that the extent to which leading corrective justice accounts of tort law's remedial legitimacy can sensibly account for nineteenth-century adjudicative tort practice must be called into question.

## 2. The meanings of nominal tort awards

A contemporary description of the award of nominal damages appears in the 1846 decision of the central Court of Common Pleas in *Beaumont v Greathead*.[17] In his often-cited judgment, Maule J described it as 'a sum of money that may be spoken of, but that has no existence in point of quantity'.[18] In torts actionable *per se*, like those involving infringements with rights to land, chattels and persons, the essential ground of the plaintiff's claim was often that he had been, to use Holt CJ's memorable phrase in *Ashby v White*, 'hindered of his right'.[19] Where the plaintiff ultimately rested his case upon proof of 'merely technical, not substantial, damage',[20] he readily stood to recover a sum whose existence in point of some 'quantity' was altogether lacking.

### 2.1 Sums non-existent 'in point of quantity'

In such cases, John D Mayne, writing in his *Treatise on the Law Damages* in 1856, considered the difficult question to be 'the amount'[21] of nominal awards. In his view, the question of quantum essentially depended 'upon

the nature of the action and the evidence'.[22] *Bourne v Alcock* is illustrative.[23] Suing out of a writ of trespass, Mr Bourne alleged that the defendant unlawfully, but harmlessly, crossed his land with cattle, horses and carriages. At the trial of his claim, the jury found that Bourne's right to exclusive possession of his land had been infringed. They assessed the very small sum of 1s damages.[24] That the *Bourne* jury's award was entirely nominal in the sense that it bore no existence 'in point of quantity' is suggested by Denman CJ's in banc speech: 'If the plaintiff was entitled in respect of any damage, he was entitled to prove what it was'.[25] Significantly, however, the *Bourne* report further suggests the plaintiff had chosen to rest his case upon proof of merely 'technical' damage. Had he chosen to give evidence of circumstances 'beyond the acts necessary for asserting the right', it was supposed that 'the case would have been different'.[26]

In tort actions where the essential ground of the plaintiff's action was that his right had been infringed, evidence of the nature and circumstances of the right infringement were often given. The purpose of doing so was to induce the jury to increase the damages they might otherwise have given. In 1814, in *Merest v Harvey*,[27] a barrister and man of public service unlawfully entered Mr Merest's field in the sporting county of Norfolk with dogs and guns in search for game.[28] At trial, however, Merest was not content with resting his case upon mere proof of technical damage; beyond the trespassory act 'necessary for asserting his right', he also gave evidence in aggravation, which showed that, in the course of his unlawful entry, Mr Harvey had used 'very intemperate language' and behaved like a 'drunken and insane person'.[29] Ultimately, a local jury found that the plaintiff's right to possess his land to the exclusion of others had been infringed without justification. But, in this case, they gave very substantial (and allegedly excessive) damages in the sum of £500. Unlike the *Bourne* jury's 1s, however, the *Merest* jury's much larger award was not merely nominal. As the *en banc* judgments reveal, the aggravated nature of the right infringement seemingly induced the jury to increase their award, probably for the combined purpose of making a public example of the defendant and compensating the plaintiff for the insult done to him.[30]

## 2.2 'Honourable or contumelious'?

As Pollock observed in the final quarter of the nineteenth century, genuinely nominal tort awards were capable of bearing different meanings. Yet, in a practice of tort law adjudication where trial juries gave

no reasons for the sums they assessed, the question of meaning was seldom clear. To some extent, the meaning of nominal tort awards could be discerned by relating the jury's ultimate award back to the sum originally laid by the plaintiff in his pleadings. The sum a tort plaintiff originally pleaded communicated to the trial court something about 'the main object of his action'.[31] Where a plaintiff laid a modest sum, and went on to, at least primarily, rest his case upon proof of technical damage, this perhaps signalled to juries that the plaintiff's genuine object for suing was to assert a right. In such cases, it may be reasonably supposed that ultimately small, seemingly token, sums assessed by the jury did not mean to be other than 'honourable' to the plaintiff.[32]

Yet, not all nominal tort awards bore – or were intended to bear – honourable meanings. The greater the disparity between the plaintiff's originally pleaded sum and the jury's award, the more likely the meaning was a different one. In the Court of Exchequer Chamber in 1840, Parke B stated that 'a farthing damages is the lowest amount that is ever given, because it is the lowest coin which is known to the law'.[33] Equally, not every farthing tort award given by juries appears to have necessarily meant to be contumelious to plaintiffs. In *Weldon v Budd*,[34] a firm of solicitors dispatched a junior clerk to serve a writ upon an individual at a time when they were expected to be at the offices of one Mrs Weldon. Despite her resisting his entry, the clerk managed to get his foot inside her door. At the trial of the plaintiff's claim, the jury accepted that the clerk had infringed the plaintiff's right, awarding a single farthing. Yet, the brief newspaper report gives no indication that the *Weldon* jury had necessarily meant their award to be contumelious rather than honourable to the plaintiff.[35]

In many instances, the nineteenth-century reports of tort trials often dispel all ambiguity about what English juries intended their farthings to mean. A striking example is *Williams v Hall*,[36] an 1831 action for assault reported at some length in the daily London newspaper, *The Times*. Mr Williams alleged that, in the course of a heated argument about the propriety of duelling in a central London pub, the defendant assaulted him after angrily unscrewing his wooden hand from its iron plate.[37] In the course of counsel for the defendant's closing address, the jury foreman suddenly (and without the entire jury's consent[38]) told Lyndhurst CB that they had 'heard enough of the case to convince us that the plaintiff ought not to get more than a farthing damages'.[39] Giving the defendant's counsel the courtesy of concluding his remarks, Lyndhurst CB instructed the *Williams* jury that the defendant's assault, having been proved, entitled the plaintiff to a verdict. But as for the damages, he said 'it was for the jury to say what damages ought to be given'.[40] Clearly contemptuous of the

plaintiff's claim, the reporter noted: 'The jury, without observing any secrecy or reserve, instantly exclaimed together, and in a loud voice, "a farthing! a farthing!".'[41] Yet, it is the *Times* reporter's description of the public reaction at a seemingly crowded Guildhall that bears particular note. 'So extraordinary a method of delivering a verdict', it was further noted, 'excited a loud burst of laughter in the court'.[42] In cases of ambiguous meaning, it was often the trial judge who sought clarification about the meaning of the damages the jury had fixed. After a farthing was awarded in an 1874 libel action, the trial judge is reported to have told the jury, 'I presume, gentleman, from your verdict that you are of the opinion that this action should never have been brought', to which the foreman appreciatively replied, 'We are, my Lord'.[43]

The principal reason that trial judges sought clarification about the meaning of farthing awards was not to accentuate – either the honour or contumely – that the jury had sought to express. The essential reason was a practical one. In his 1845 *Beaumont* judgment, Maule J went on to characterise nominal tort awards as 'a mere peg on which to hang costs'.[44] Pursuant to chapter 24 of the 1840 statute 3 & 4 Vict, plaintiffs who recovered less than 40s damages in tort actions were to be deprived of their costs.[45] The only exception to this rule was if the judge who presided at trial could certify that 'the plaintiff's action was really brought to try a right'.[46] In turn, by asking foremen to clarify what they really meant by awards below 40s, judges were better placed to say whether the tort plaintiff, despite winning the jury's verdict, should be deprived of his costs. Significantly, in 1888, Huddleston B rejected the assertion that, for the purposes of denying a plaintiff his costs, 'a verdict of a farthing damages is conclusive in all cases'.[47] He nonetheless accepted that farthing verdicts 'went a long way . . . in showing "good cause"'[48] for doing so. Where trial judges sought clarification of farthing verdicts, they appear to have sought merely confirmation that the contumelious meaning that they presumed such verdicts bore was the meaning the jury intended. In some cases, judges even asked jurors whether they had deliberately given a farthing with a view to seeing the plaintiff deprived of his costs. Hence, in exercising his discretion on costs in *Man v Ward*,[49] Lord Coleridge CJ told a trial jury that he understood their farthing to mean that each party should pay their own costs; at once, 'several of the jurors thereupon assured the learned judge that he had rightly understood the true purport of their verdict'.[50]

That ultimately depriving a plaintiff of his costs was the unstated pretext of farthing tort verdicts is widely attested to in the contemporary reports. Trial judges were generally less tolerant of jurors who expressed views on costs that the judges had not solicited. After announcing a

farthing verdict in an 1891 action for malicious prosecution and libel, the foreman ventured to tell the judge, 'If we have anything to say in the matter we think each should party should pay their own costs'.[51] Courteously, but firmly, the trial judge replied, 'that is hardly within your province gentlemen'.[52]

## 3. Where plaintiffs should not have sued

The first broad category of tort action in which contumelious farthing verdicts were returned were where local jurors judged that, despite having been technically wronged, the plaintiff should not have brought an action for damages. The category is a broad one, though two tort actions provide continuous and compelling illustrations. The first action involved contested rights of way where plaintiffs either chose not to plead or ultimately rest their cases upon mere proof of technical damage. The second action involved defamatory statements where plaintiffs relied upon local juries for the clearing of their characters.

### 3.1 Legal rights of way

In his torts treatise, Pollock observed that nominal sums were readily viewed as operating 'as a simple declaration of rights . . . in actions of trespass brought to settle disputed claims to rights of way'.[53] A sharp illustration is the 1807 case of *Cobb v Selby*,[54] in which a rector from Kent brought an action for damages after a parish farmer obstructed him from using the farmer's private road to access the farmer's field of wheat. This was despite the parish's entitlement to the tithes of wheat from the field. Because of the farmer's unlawful obstruction, the plaintiff pleaded and ultimately proved that he could not collect a tithe of wheat valued at £14. At the trial of the plaintiff's claim at the Maidstone assizes, Macdonald CB instructed a special jury that, as long as the contested right of way continued to be used as a road by the parish farmer, the rector had a right to use it to collect tithes of wheat from the field in question.[55] In turn, 'The jury . . . found a verdict for the plaintiff, but gave only a farthing damages'.[56] The early *nisi prius* reporter Isaac Espinasse's trial report emphasises that the *Cobb* jury returned their farthing verdict despite the plaintiff having fully proved 'the tithe . . . to be worth £14, and to have been totally spoiled'.[57]

The ultimate decision of Mansfield CJ's central King's Bench may help illuminate the meaning of the jury's farthing verdict. As the

Chief Justice underscored, the plaintiff's claim had not only been 'treated at the trial as a matter of law', but that the particular issue 'had never been submitted to a jury'.[58] This strongly suggests that, in the jury's judgment, the rector's legitimate remedial entitlement was not damages for the spoiled wheat tithe, but a mere declaration that his legal right of way had been hindered. By agreeing to give the successful rector the absolute 'lowest coin', it is rather tempting to suppose that the special *Cobb* jury intended their verdict to be contumelious of a parish clerk who – instead of (honourably) seeking to 'try a right' – had sought to secure for himself substantial damages. Indeed, by discounting the actual loss that, by all accounts, the plaintiff had proved, their farthing verdict may be seen as reinforcing the eighteenth-century Scottish jurist, Lord Kames' observation that in England's courts of common law juries 'give such damages as in conscience they think sufficient'.[59]

## 3.2 The 'clearing' of defamed characters

Farthing verdicts were routinely returned in nineteenth-century defamation trials. According to Baker, tort plaintiffs in actions for slander and libel were not 'primarily interested in damages; winning the jury's verdict was enough to restore the reputation and satisfy the sense of grievance'.[60] Yet, in seeking the satisfaction of their grievances, it appears that defamation plaintiffs did not seek damages for the narrow purpose of compensating the harmful consequences that defamatory imputations caused their reputations to suffer.[61] Often they appear to have sought damages awards whose essential remedial purpose was simply to clear their characters of the imputations cast upon them. It was at local defamation trials, typically held out on assize circuits, that clearings of individual character were publicly undertaken. The notoriously large sums laid in defamation pleadings appear to have signalled to local jurymen what plaintiffs considered their individual characters to be worth. In 1852, in *Ford v Wilbraham*,[62] one Reverend Ford claimed libel damages in the very large sum of £500 against the proprietor of the conservative *Chester Courant*. Seemingly anxious about what the local jury might make of the plaintiff's pre-trial estimate, his counsel immediately assured them that 'the vindication of his character was his sole object'.[63] Indeed, despite the size of his originally pleaded sum, the *Ford* jurors were urged not to suppose that the suing cleric had any 'desire whatever to put money in his pocket in the shape of damages'.[64]

As such, one of the important adjudicative functions contemporary defamation juries often undertook involved using the medium of damages

to either credit or discredit a plaintiff's pre-trial estimate of his own character. In the columns of the daily *London Courier* in 1834, a Shropshire jury was publicly praised for giving the 'eccentric'[65] barrister and aspiring parliamentarian, Edmund L Charlton, 1s despite him having laid damages of £3,000.[66] That the jury discredited Mr Charlton's large character estimate is suggested by the vivid description of the process by which they arrived at their shilling: 'The jury . . . drew his 3000*l* estimate through an arithmetical purifier, which only handed to him the 60,000th part of his claim'.[67] At the trial of Charlton's claim six months earlier, the defendant's counsel had strongly rebuked him as a stickler whose libel action he described as 'contemptible and unnecessary'.[68] In his closing address, he told the jury that 'Charlton's character did not need vindication'[69] – indeed, that it would have rather benefitted had he, instead of suing, chosen not 'taken no notice of the paper'[70] in which the imputation was contained.

Stickler behaviour – and the meting-out of contemptuously low awards to combat it – appears to have been especially rife in nineteenth-century defamation actions. Indeed, the presentation of defamation claims often strikes one as an anxious attempt to persuade testy local jurymen not to estimate the plaintiff's character 'at so cheap a rate as the value of the coin suggested by the other side'.[71] Allegations of frivolity calculated to induce farthing verdicts appear to have been very common where plaintiffs sued upon words that, although technically actionable, were spoken in ordinary social settings and in the course of trade rivalries. In a Southampton pub in 1830, the defendant was alleged to have slandered the plaintiff for calling him a 'rogue and a villain'.[72] At the trial of his claim at the Hampshire assizes, counsel for the defendant disparaged the dispute as a 'pot-house squabble', suggesting that the plaintiff's 'action had been brought to indulge feelings of resentment'.[73] The jury's verdict strongly suggests that they adopted the same, very low, opinion of the plaintiff's action – 'Damages, one farthing'.[74] In 1834, a Gravel-Lane cotton trader sued his longstanding rival in nearby Houndsditch after slandering him as a thief.[75] In addition to having 'his character clear to the world',[76] the plaintiff sought to prove that, although actionable *per se*,[77] the defendant's words proved harmful, causing him to 'los[e] a considerable portion of his business'.[78] On that basis, he presented evidence of further 'special damage' for which he sought 'compensation'.[79] Employing a familiar 'contemptuous expression',[80] the defendant's counsel characterised the plaintiff's action a 'trumpery' one, reminding the jury that it 'had only arisen out of the animosity that "two of a trade" ever felt towards each other'.[81] The jury, in turn, gave a farthing. In such

cases, it cannot be conclusively said that farthings always bore contumelious meanings. They may be alternatively explained as rather more honourable attempts to, in the circumstances of the case, clear what the jury regarded as a trivial imputation upon the plaintiff's character. However, in cases, such as those above, where the defence reportedly centred on expressing contumely for an action that the plaintiff should have foregone, farthing slander verdicts may plausibly be read in terms of the jury giving full expression to that view.

Occasionally, the contemporary reports attest to the potency of a farthing's contumelious meaning in defamation actions. *Hesketh v Brindle*,[82] an 1887 libel action in which a Manchester stockbroker sued upon a libellous letter allegedly imputing fraud to him, provides an arresting example. After Day J submitted the plaintiff's case to the jury, a verdict for the plaintiff was returned, but with no damages. Rejecting it, Day J further instructed them 'that if they found for the plaintiff they must give some damages'.[83] Without a moment's pause, they added to their verdict the absolute lowest coin. Yet, before receiving it, Day J warned them of the scandalous implications of a plaintiff 'winning' such a verdict in a defamation action, describing it as 'equivalent to ruin . . . as it meant that the plaintiff had no character to lose'.[84] The jury, however, refused to change their verdict, which Day J grudgingly received.[85] Yet, in a striking attempt to soften the farthing's sting, he made a public point of declaring 'that in his opinion the plaintiff left the court without the slightest imputation on his character'.[86]

## 4. Where plaintiffs were partly to blame

The nineteenth-century trial reports also show that juries applied the tool of the farthing verdict where they formed the collective judgment that the plaintiff, as much as the defendant, was to blame for the harmful consequences that were suffered. The reported trials of two different tort actions clearly attest to this second application. The first were actions for trespass to the person where the injured plaintiff had behaved provocatively. The second were actions on the case for negligence where the plaintiff's own negligence also causally contributed to his injuries.

### 4.1 Provocation in trespass

Evidence of provocation was often given and admitted in actions of trespass to the person throughout the nineteenth century. Where the defendant's trespass happened to cause very serious injuries to the plaintiff's person, the reports suggest an inclination, at least on the part of some trial judges, to

instruct juries not to permit evidence of provocation 'to reduce the verdict below the amount of damage actually sustained'.[87] Yet, how nineteenth-century trial judges instructed juries appears to have varied considerably.[88] Where a plaintiff's own provocative behaviour founded no affirmative defence to tortious liability, in the ordinary case, it seems, the proper effect of provocation on trespass verdicts was entrusted entirely to the jury.

In 1827, in *M'William v Vickery*,[89] the defendant's wife collected goods from the plaintiff storekeeper on the promise that she would pay for them at a later date. In a suggestive letter, the plaintiff informed Mrs Vickery that, in the event she could not meet her debts, 'she might make a set-off in another way, for which purpose he would wait for at a certain evening, in the hopes of seeing her'.[90] After showing the letter to her husband, an outraged Mr Vickery set out to ensnare the storekeeper where he had hoped to see his wife. At the trial of the plaintiff's claim, a witness testified that – armed with a cudgel – the defendant, then and there, 'thrashed the plaintiff soundly'.[91] In his summing-up, Park J is reported to have been 'very sorry' that English common law entitled a plaintiff to a verdict whose own behaviour had been so 'calculated to provoke a man to assault another'.[92] Before submitting the plaintiff's case to the jury, he told them that although 'they must certainly give damages . . . he trusted that it would only be the amount of one farthing, for sixpence, or three-pence or two-pence would be far too much'.[93] Given the firmness of Park J's summing-up remarks, the jury's ultimate farthing verdict may suggest there was little scope for them to disagree.

The reduction of a trespass award to contemptuously low levels on the basis of evidence of provocation is further attested to in *Hayward v Bradford*.[94] In 1845, Mr Bradford was alleged to have attacked a Shropshire organist after learning that he had surreptitiously entered his fiancée's house during a night of heavy drinking.[95] One Sunday morning, the defendant accosted Mr Hayward on his way to mass. Armed with a horsewhip, he 'thrash[ed] away with all his might',[96] before leaving him at the steps of Newport church with lacerations to his face and eyes.[97] Interestingly, the *Times* report notes counsel for the defendant's candid trial admission that the plaintiff had, indeed, suffered 'a good horsewhipping'[98] at the defendant's hands. In mitigation, however, he urged the jury to consider whether, in all the peculiar circumstances, Hayward 'richly deserved the discipline he had undergone'.[99] Sensing that the jury's mind could not be swayed, Compton J asked them if it was worth him even commenting on the evidence.[100] After a short deliberation, the jury returned a verdict for the plaintiff – 'Damages, one farthing'.[101]

*Hunt v Burgess*[102] serves as a further illustration. Mr Hunt, a prying London photographer, attended St James' Hall to see Bertha Moore, the

star of the touring New York blackface group, Christy's Minstrels. The group's American manager, Mr Burgess, sent someone to ask Hunt to leave the hall. After Hunt directed a remark at Burgess 'couched in coarse terms',[103] he accosted Hunt, before 'nearly throttl[ing] him by violently seizing him by the throat'.[104] Hunt's doctor found him to be suffering from 'nervous excitement, pain in the throat, difficulty breathing, and pain on the shoulder, and that he was under his treatment for some time'.[105] In his pleadings, Hunt not only laid that 'he had been put to 4*l* 4s expenses for a doctor's bill', but had lost income 'which would have accrued to him from the performance of certain photographic work'.[106] At trial, his counsel told the jury that the 'outrage he had been obliged to submit to', coupled with the 'great pecuniary loss' he had proved, entitled the plaintiff to 'substantial damages'.[107] For the defendant, it was successfully argued that the 'plaintiff was alone to blame, as he had by his conduct brought all he complained of by himself'.[108] Kelly CB is reported to have 'very shortly' left the plaintiff's case to the jury. Clearly excluding the plaintiff's seemingly proven damage from their consideration, the *Hunt* jury found for the provocateur photographer, but in the contemptuous sum of a farthing (one that the presiding Chief Baron reportedly 'quite approved'[109]). In doing so, the *Hunt* report suggests that some judges informally assented to an informal practice of juries using evidence of a plaintiff's provocation to effectively enforce an exculpatory defence of provocation.

Of course, contemptuous farthing trespass verdicts were never unimpeachable. In his 1860 treatise on tort, the English barrister, Charles G Addison, stated as a general proposition that new tort trials would be granted 'for smallness of damages, when it appears that if the plaintiff is entitled to a verdict at all he is manifestly entitled to much greater damages than have been given by the jury'.[110] The more serious the plaintiff's personal injuries, it seems, the greater the likelihood of a farthing trespass verdict being set aside irrespective of the plaintiff's provocation. Hence in the 1870 action of *Torr v Wightman*, where the provoked defendant's trespass to the plaintiff's person was such that it caused her to become so 'alarmingly ill' that 'her life was fast ebbing from her', Kelly CB, sitting in the Exchequer Chamber, set aside the jury's farthing verdict on the ground that it was 'insufficient'.[111]

## 4.2 Contribution in negligence

Unlike in trespass actions, which were actionable *per se*, damage was the 'gist' in negligence actions. For present purposes, the key ramification of

the 'principle . . . that damage is the gist of the action',[112] was a plaintiff's entitlement to fully recover for his injuries, providing they could be causally linked to the defendant's negligent act. However, famously in *Butterfield v Forrester* in 1809, the King's Bench in banc upheld Bayley J's directed verdict for the defendant in a negligence action, providing the jury were satisfied that the plaintiff causally contributed to his injuries by riding his horse 'extremely hard, and without ordinary care'.[113] In doing so, Ellenborough CJ is believed to have first recognised the complete 'defence of contributory negligence'.[114] In its operation, the defence compelled a verdict for the defendant where the plaintiff's injuries could be shown to have been caused, either solely or in part, by his own imprudence. Yet, despite the all-or-nothing 'rule' in *Butterfield*,[115] the nineteenth-century trial reports attest to jurors mitigating negligence recovery – including to the lowest possible extent of a farthing – on the basis of conflicting evidence of the true proximate cause of the plaintiff's injuries.

In 1858, Mr Smith, the victim of a railway accident at Charlton station, brought an action on the case alleging negligence against a servant of the Great Northern Railway Company. At the trial of the plaintiff's claim, the defence contested whether the plaintiff's serious injuries were suffered 'in consequence' of the stationmaster's 'want of prudence' in failing to put up the signal of 'caution'.[116] The true proximate cause of Smith's injuries clearly divided the jury, a division no doubt reflected by the farthing verdict that over two hours of deliberation had produced. Upon its announcement, however, it elicited a defiant response from the presiding judge, Lord Campbell:

> I really cannot, in the discharge of my duty gentlemen, receive that verdict. It cannot be right. It is impossible that it can be right. It cannot stand. The Court of Queen's Bench would set it aside. If you find for the plaintiff, you are bound to give him reasonable damages. If he is not entitled to your verdict you must say so. I must beg you will return to your chamber.[117]

Such was the division in the jury that they remained locked up overnight, deprived of food and drink. After wearily resuming their seats in the jury-box the next morning, Lord Campbell reminded them, and to the court's amusement, that in times gone by divided juries not only risked being locked up, but getting 'carried in a cart to the borders of the next county, and there shot into a ditch'.[118] Lord Campbell, however, remained steadfast: in such an action as negligence, he insisted that one farthing damages 'was not a reasonable answer, and the law would not sanction it'.[119] If the

plaintiff's negligence had, in fact, severed the causal connection between the stationmaster's negligence and Mr Smith's injuries, the rule in *Butterfield* inflexibly compelled a total denial of liability, and thus a verdict for the railway. It is reasonable to assume that the *Smith* jury's farthing verdict was a compromise of their unresolved differences on this question.

It should not be supposed, however, that Lord Campbell's defiant stand in *Smith* exemplified the common law judiciary's handling of all, seemingly compromise, farthing negligence verdicts throughout the period under examination. Two years before *Smith* was decided, Mayne had suggested that a new trial would not necessarily be granted on the ground 'that from the smallness of the damages the jury must have come to a compromise'.[120] He cited Tindal CJ's 1845 in banc speech in the Common Pleas for the proposition that – even in cases where damage was the gist of the plaintiff's action (as in negligence) – 'a new trial ought not to be granted . . . unless the judge who tried the cause is dissatisfied with the smallness of the damages'.[121] Unlike Lord Campbell, whose reputation for 'unduly affecting verdicts'[122] was well-known, the disposition of other trial judges was to accede to, rather than defy, the jury's collective remedial judgment.

In *Watts v Bennett*, in 1878,[123] a child sued in negligence (through her father) after suffering injuries alleged to have been negligently caused by the defendant driving his cart against her. At the trial of her claim before Gove J, the defendant argued that he was not liable because of the contributory negligence of the victim's father 'in allowing so young a child to be alone in the street'.[124] The conflicting evidence of causation induced the jury to find a farthing for the plaintiff, though against which her counsel moved for a new trial 'on the ground that the [farthing] verdict was illogical and the damages totally inadequate'.[125] Reminiscent of Lord Campbell, Gove J described the jury's verdict as 'a little surprising' and, more significantly, 'not legally logical'.[126] He nonetheless received it, considering it not 'unnatural'.[127] Later, in banc, Gove J rationalised the impugned farthing on the basis that 'the jury thought both parties were to blame'.[128] If this had been the *Watts* jury's rationale, then it could not be said that they had been 'actuated by a corrupt motive'.[129] Deferring to the 'judge who tried the cause', the Chief Justice of the Common Pleas, Lord Coleridge, ultimately denied the plaintiff's motion – the legal illogicality of the negligence farthing notwithstanding, the reviewing court's unanimous view was that there had not been 'any substantial injustice'.[130]

In negligence actions, therefore, where plaintiffs were partly to blame for their suffering, English judges responded varyingly, and often inconsistently, to what a later American torts scholar aptly termed 'jury lawlessness in awarding an inadequate verdict'.[131] Not all

nineteenth-century English judges were equally insistent that juries 'carry out inflexibly and unflinchingly the rules of inexorable logic'.[132] In the case of farthing negligence verdicts, the propensity of at least some such verdicts to accomplish 'substantial justice between parties'[133] helped shield them from post-trial attack.

## 5. Where plaintiffs were otherwise morally underserving

The contemporary reports attest to the use of the tool of one farthing damages in other tort actions. In these cases, the principal reason for its use was to deprive plaintiffs of substantial damages on the basis of a jury's collective judgment that, at least some aspect, of their character was morally deficient. The remedial relevance of considerations of personal moral desert[134] is widely attested to in nineteenth-century tort actions broadly involving injuries to domestic relations, though other actions provide striking examples too.

### 5.1 Injuries to domestic relations

Remedial consideration of a tort plaintiff's moral desert is especially pronounced in nineteenth-century actions on the case brought by aggrieved husbands against the man with whom their wife had criminally conversed. In 1827, in *Mason v Wakefield*, a Staffordshire innkeeper brought an action for criminal conversation after his 'virtuously educated' wife committed adulterous intercourse with a 'respectable and opulent cabinet-maker'.[135] For the loss of his wife's consortium, Mr Mason sought 'reparation'[136] in the very large sum of £6,000. His case was constituted of a parade of local witnesses, each testifying to the 'improper acquaintance'.[137] Though the defendant called no witnesses, the plaintiff's case was fatally punctured in cross-examination, it being revealed the plaintiff's profligate drinking meant he had been 'unable to watch over her conduct and morals',[138] and which gradually 'exposed her to the designs of any intriguing individual'.[139] Moreover, by choosing to live with her despite him learning of her infidelity the defendant's counsel regarded it plain that, despite the injury he had declared, he did not really estimate the loss of Mrs Mason's consortium 'at a single straw'.[140] Fastening on the morality of the plaintiff's cause, Garrow B told the jury:

> If we had the power, we should all say we very much disapprove of the conduct of the defendant. But we cannot settle what sum we

> would make him contribute to a public charity. We have no power for that purpose. We are to say what compensation the plaintiff deserves.[141]

In a more extraordinary appeal to the jury's moral compass, Garrow B asked them to imagine what Mr Mason might do with the proceeds of any substantial recovery. With rhetorical scorn, he asked: 'Is it a case in which he would deserve as much as would pay for a dinner upon his victory? If so, he would probably sit at the top, and his wife at the bottom of the table, and they would all get drunk together'.[142] The *Times* reporter notes the immediacy with which the *Mason* jury returned their farthing verdict, and for which the presiding baron assured them 'the public are much indebted'.[143]

The tort plaintiff's moral virtue was a decisive remedial consideration in actions *per quod servitium amisit*. The 1837 case of *Maddox v Dawson*[144] provides a neat illustration. Mr Maddox, a carpenter at the Shropshire Bog Mine, brought an action for seduction against the son of a local publican. The plaintiff claimed that the services of his nineteen-year-old daughter, Hannah, who testified to 'attending to the cows and the dairy',[145] were lost by the defendant's sexual mischief. The report does not identify the component of the plaintiff's originally pleaded sum representing the value of the services actually lost. By the 1830s, however, the proposition that a plaintiff's entitlement to substantial damages only required him to show that his daughter lived with the family 'under such circumstances that he had a right to her services',[146] was seemingly well-settled. Hannah lived with her father.

At the trial of Mr Maddox's claim at the Exchequer's Oxford circuit, the defence strategy centred on portraying the plaintiff as a morally lax father who had neglected his daughter's chastity. In cross-examination, for example, it was elicited that two of the plaintiff's other daughters had given birth suspiciously soon after their marriages.[147] One evening, Mr Maddox had even fallen asleep knowing that Hannah was with the defendant. In turn, the defendant's counsel called on the jury to diminish the plaintiff's award to a seemingly contemptuous level on the basis of evidence that he 'had shown so great a want of care in bringing up his own children'.[148] In a more sober summing-up, Parke B's admitted inclination was that the plaintiff's case did not 'demand high damages',[149] but he entrusted it to the jury to say what damages the plaintiff deserved. Seemingly swayed by the defence, the jury reduced their award below the value of the services actually (or inferred to be) lost, giving a mere farthing.

Considerations of a plaintiff's moral desert also regularly appear in reports of the action for breach of promise to marry. For Pollock, the (formally) contractual action's strongest connection to tort lay in the 'large discretion . . . given to the jury as to damages'.[150] In 1838, in *Wilde v Atherton*,[151] the daughter of a family in 'reduced circumstances' sought 'reasonable compensation' of £200 after her fiancée disappeared on the day of their wedding. At the trial of the jilted bride's claim, evidence was adduced of a conversation between the plaintiff's father, Mr Wilde, and the defendant about the prospective groom's financial prospects. According to it, an inquiring Wilde:

> asked as to his prospects; he [Mr Atherton] said he could allow his wife 30s a-week for housekeeping, and on the objection of that that was but a small sum to maintain a family upon, replied that he had 500*l* he could procure at any time, and plenty more if that was not sufficient.[152]

Counsel for the defendant exploited the evidence. Indeed, the defence case strikes as a relentless attempt to morally 'stigmatise' the plaintiff as, at bottom, money-grubbing. In a 'long and humorous speech',[153] Mr Atherton's counsel asked the jury if the whole controversy had not struck them 'as a gross attempt on the part of the plaintiff's parents to entrap into matrimony, by way of speculation, a weak and silly young man'.[154] The evidence, it was finally submitted for the defendant, was 'sufficient to reduce their damages to the smallest possible sum'.[155] After a gentle rebuff by the trial judge for daring to ask 'what sum would carry costs?',[156] the foreman brought in a verdict in the contemptuous sum of a farthing.

Attempts to induce breach of promise juries to reduce their awards to contemptuous levels were also made where the defence adduced evidence of conduct that nineteenth-century jurors were apt to view as 'unfeminine' or 'unmaidenly'. In an 1845 action reported in the *Lancashire Gazzette*, the defendant's counsel highlighted the fact that 'all the courting was done by the plaintiff and her mother'.[157] As Lettmaier compellingly suggests, the case illustrates the mitigating effect of 'female initiative'[158] in a sphere of contemporary English social life that exposed young women to moral judgment. In the instant case, it was the plaintiff's 'unmaidenly forwardness'[159] that seems to have induced the jury to give her a farthing.

By contrast, in the trickle of nineteenth-century breach of promise cases brought by male plaintiffs, farthing verdicts seem to reflect negative contemporary attitudes towards 'unmasculine' displays of heartbreak. In an 1882 letter sent to a young woman by an Exeter farmer's solicitor, it

was explained that his client '"feels bound to take proceedings for his own vindication, and to show his neighbours and friends that he has done nothing dishonourable, and also to let other ladies know that they must not trifle with gentlemen's feelings more than gentlemen are permitted to trifle with ladies".'[160] The jilted farmer's melancholy letter was seized upon by the defendant's counsel at trial. His derisive cross-examination is reported to have provided the local assize court 'a great deal of amusement'.[161] And in giving a farthing, the jury appear to have shared in it.

## 5.2 Other moral impeachments of character

Outside of tort actions involving injuries to domestic relations, jurors also returned farthing verdicts where the evidence at trial showed the plaintiff to be of otherwise contemptible character. In defamation actions in particular, trial judges routinely framed the question of damages for the jury in terms of an inquisition into his moral character. In *Macmillan v Labouchère*,[162] a persecuted cleric sued upon a libel imputing that he had applied to his own use funds intended for the church mission. The defendant's case aimed to prove the truth of the imputation. After summing-up the evidence, the presiding Lord Chief Justice asked the jury:

> If they thought it [the plea of truth] wholly failed and that the plaintiff acted unselfishly, and for the love of God and the poor and devoted his life to this work, they would give reasonable damages. If, on the other hand, they thought he was a self-seeking man desiring only his own glorification, and one who cloaked in the garb of religion his own selfish ends – then they would probably think the smallest damages sufficient.[163]

Lord Russell CJ's summing-up suggests that the failure of a truth defence did not – for the purposes of determining the plaintiff's full recovery – mean that juries proceeded as if the defamatory imputation was utterly unfounded. As barristers John F Clerk and William HB Lindsell noted in their 1888 torts treatise, within proper limits, the rules of evidence permitted a defamer to mitigate his full financial liability 'by impeaching the general reputation of the plaintiff'.[164] In *Macmillan*, the jury's one farthing award reflected a collective judgment that, despite having been technically defamed, the imputation sued upon got very close to the truth: that he was a morally dubious man of the cloth.[165]

It should not be supposed that the nineteenth-century jury's instrumental use of the farthing verdict for the purpose of moral character impeachment was exclusive to defamation actions. It is also attested to in other tort actions. A powerful example occurs in 1861, in the 'Atheist martyr'[166] Charles Bradlaugh's trespass action against a Devonshire superintendent.[167] Having gained public notoriety as a leading antireligious thinker, Bradlaugh hired a private field by the River Tamar in Devonport where he intended to lecture on an undisclosed subject. Averse to Bradlaugh's 'extreme latitude of opinion on theological subjects',[168] Bradlaugh's lecture was attended by a cadre of Devonshire constables led by the superintendent Mr Edwards. Just as Bradlaugh began his speech, the policemen 'burst through'[169] the large crowd: he was forcibly deplatformed and then detained at the local station on charge of assaulting the superintendent. Bail was denied. After two full days of investigation, a panel of magistrates found the charge 'to be altogether groundless'.[170] Bradlaugh was put to £7 and 14s in procuring bail, as well as gathering evidence to establish his innocence. It ultimately formed the special component of the substantial damages he sought from the superintendent in an action for assault and false imprisonment.

At the trial of Bradlaugh's claim at the Exeter assizes, the defence strategy centred upon a high-handed cross-examination designed 'to elicit from him that he entertained and had in various writings promulgated doctrines at variance with the opinions commonly received amongst Christians'.[171] With the aim of exciting 'prejudice against him in the minds of the jury',[172] the defendant's counsel repeatedly asked Bradlaugh if he was the notorious 'iconoclast' – the *nom de plume* under which the young Bradlaugh had been writing antireligious essays. Despite Bradlaugh's refusal to answer the question, Bramwell B – and despite the strong protestations of Bradlaugh's counsel – 'did not interfere to prevent this repetition of the question'.[173] Bramwell B's ultimate summing-up surely offers insight into his own moral predilections:

> The learned Baron, in leaving the case to the jury, began by observing that the doctrines entertained by the plaintiff and those who thought with him were much to be deplored: for that, although in strictness there was no evidence before them upon the subject, there could be no doubt as to the tendency and character of the lecture about to be delivered. He further told them that the defendant in his character of constable had a right to be in the field.[174]

With their pious prejudices excited, a special jury of landed Devonshire gentry returned a farthing verdict. Indignant, Bradlaugh's counsel moved to have it quashed on various grounds. 'As to the damages', the central contention in banc was that a single farthing was 'manifestly perverse, the plaintiff having proved that he necessarily expended 7*l* 14s, and the jury having awarded him by way of compensation for that loss, as well as for the inconvenience and indignity to which he was unlawfully subjected, only one farthing'.[175]

The central Common Pleas' attempts to explain why the jury's 'very small'[176] verdict had done Bradlaugh no 'substantial injustice' are striking. In denying his new trial motion, Erle CJ did not seem to think that the jury's farthing necessarily bore a contumelious meaning. Rather, he supposed that it may have been intended as paternalist advice: 'it may be that the jury considered that a very small compensation was due to him for preventing him from doing that which he himself might afterwards have deeply regretted'.[177]

The only other reviewing judge who specifically addressed the issue of the insufficiency of the jury's verdict was Williams J. He was rather less inclined to conjecture over what the impeached farthing truly meant. Instead, he addressed Bradlaugh's asserted 'right' to recover even the most objectively ascertainable component of his proven damage. In a resounding endorsement of the *Bradlaugh* jury's collective remedial judgment, Williams J explained that Bradlaugh had 'no more right to recover those expenses than a plaintiff in an action for an assault has to recover the amount of the surgeon's bill for the dressing of his wounds. It is a matter which the jury may take into their consideration, but that is all'.[178] Ultimately, it may have been Bradlaugh's biographer who came closest to discerning the 'true purport' of the jury's farthing. 'Probably the jury thought the plaintiff was legally right in bringing his case, but, being an Atheist', he supposed, 'must be morally wrong'.[179]

## 6. Conclusion

This chapter has subjected the English common law practice of what Pollock termed 'contumelious' nominal recovery to closer historical examination. It has sought to do so by presenting a threefold categorisation of nineteenth-century tort trials where English juries awarded plaintiffs damages of one farthing. In doing so, it has set out to illuminate the full, yet often unheeded, scope of historical tort actions in which juries returned farthing verdicts, and where judges sitting centrally in review routinely refused to disturb them.

As a result, this chapter has drawn attention to a critical aspect of the historical practice of adjudicating tort actions – that is, the normative-adjudicative authority that local lay jurors exercised at the remedial stage of such actions across the nineteenth century. In the exercise of this remedial authority, the normative considerations according to which the relationships between nineteenth-century tort plaintiffs and defendants were rebalanced were highly varied. As part of their collective judgment about what damages 'would fully meet the justice of the case',[180] this chapter has aimed to show that juries frequently used the weapon of farthing verdicts for the broad purpose of publicly holding out tort plaintiffs as objects of contumely. As the contemporary sources indicate, juries were often induced to do so, even when plaintiffs seemingly satisfactorily proved that the defendant's tortious wrong had caused them to suffer harmful consequences.

During the period under examination, contemptuous farthing awards showed scarce respect for the bilateral substance required by most corrective justice accounts of tort law, and by reference to which the legitimacy of modern tort remedies is judged. Indeed, the contemporary legitimacy of such awards was judged in terms of a fundamental commitment to the jury's role in legitimate conceptions of the adjudication of actions at common law. Under this conception, the question of the 'normative force' of individual tort awards was, in each case, entrusted to the jury. In select cases, of course, trial judges occasionally deployed the summing-up device to elicit jury verdicts that would conform with their own normative predilections. These included farthing verdicts. Importantly, however, the normative force of nineteenth-century farthing verdicts singularly applied to tort plaintiffs was not often seen to undermine their legitimacy. By fundamentally entrusting the rectification of tortious injustices to each jury's collective normative judgment, the principles of justice manifested at the remedial stage of many nineteenth-century tort actions were manifold. They were certainly not limited to, or confined by, a principle of corrective justice. In many cases, English juries sought to do what might be more aptly described as *localised* justice – with all the wide normative considerations that such an open-ended form of civil justice entailed. A consequence of this, however, was that many nineteenth-century tort plaintiffs, if they were compensated at all, were left under-compensated.

## Notes

1 See Jules L Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Industrial Law Journal 349, 370.
2 Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471.

3 Ernest J Weinrib, *Corrective Justice* (OUP 2012) 11.
4 Ernest J Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 Theoretical Inquiries in Law 1, 1.
5 Perhaps the best example are extra-compensatory exemplary (or punitive) damages, see Ernest J Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273, 290, arguing that punitive damages awards illegitimately 'refer to one of the parties [the defendant] without encompassing the correlative situation of the other'.
6 Andrew Burrows, *Remedies for Torts, Breaches of Contract and Equitable Wrongs* (4th edn, OUP 2019) 503.
7 Despite their non-compensatory purpose, corrective justice theorists contend that nominal damages are correlative, and thus corrective justice-conforming, see Weinrib, 'Civil Recourse and Corrective Justice' (n 5) 286–89. It has been recently argued that nominal damages have a public, and therefore partially *non*-correlative purpose, see Václav Janeček, 'Public Interest Damages' (2020) 40 Legal Studies 589, 600.
8 Burrows (n 6) 503.
9 Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens & Sons 1887) 121.
10 Pollock (n 9) 121.
11 *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 (HL) [36] (Lord Steyn), [69] (Lord Millet). See also Anthony I Ogus, *The Law of Damages* (Butterworths 1973) 151.
12 David Wright, 'Discretion with Common Law Remedies' (2002) 23 Adelaide Law Review 243, 269.
13 Burrows (n 6) 503.
14 Kit Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in SGA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Bloomsbury 2013) 71.
15 Janeček (n 7) 600, describing contemptuous awards as punitive towards tort plaintiffs 'whose conduct has adverse effects on non-correlative public interests'.
16 See W Stewart Thorburn, *A Guide to the Coins of Great Britain and Ireland* (L Upcott Gill 1884) 54–56.
17 (1846) 2 CB 494, 135 ER 1039.
18 *Beaumont* (n 17) 1041.
19 (1703) 2 Ld Raym 938, 955; 92 ER 126, 137.
20 *Pooley v Stevenson* The Times, 4 June 1897 (QB) 6.
21 John D Mayne, *A Treatise on the Law of Damages* (T & JW Johnson 1856) vii.
22 Mayne (n 21) vii.
23 (1842) 4 QB 621, 114 ER 1032.
24 *Bourne* (n 23) 1034. In *Ashby*, Mr Ashby's infringed right to vote at a 1702 parliamentary election saw him recover the rather larger sum of £5, see *Ashby v White* (1703) 1 Bro PC 62, 63; 1 ER 417, 417–18.
25 *Bourne* (n 23) 1034.
26 Counsel for the plaintiff suggested in banc that 'wanton damage' might have been originally 'complained of', see *Bourne* (n 23) 1034.
27 *Merest v Harvey* (1814) 5 Taunt 442, 444; 128 ER 761, 761.
28 *Merest* (n 27) 761.
29 *Merest* (n 27) 761. For *un*-aggravated 'sporting' trespasses to land where juries gave very small nominal awards, see *Holroyd v Pamphillon* The Times, 7 May 1827, 3; *Read v Waddelow* The Times, 14 March 1831, 6.
30 The combination of punitive and compensatory purposes is implicit in Heath J and Gibbs CJ's speeches, see *Merest* (n 27) 761.
31 *Lane v The Free Press Newspaper & Printing Co* The Times, 30 June 1861, 11 (Erle CJ).
32 Counsel often promptly assured jurors that the plaintiff was not presenting an aggravated case, and therefore not seeking very large damages, see *Cullaby v Lascelles* The Times, 5 December 1874 (QB) 14.
33 *R v Morris* (1840) 9 Car & P 349, 351; 173 ER 864, 865.
34 The Times, 22 April 1887 (QB) 3.
35 In some cases, farthing damages were understood as representing minuscule compensatory sums, see *Wood v Manchester, Sheffield & Lincolnshire Railway Co* The Times, 2 April 1859, 11:

'damages one farthing; which they did not mean as contemptuous . . . because some amount of injury had been done'.

36 *Williams v Hall* The Times, 16 June 1831, 3.

37 *Williams* (n 36) 3.

38 *Williams* (n 36) 3: 'a dry old gentleman who . . . wore a pair of very large spectacles, very quietly observed, "I beg your pardon, Mr Foreman, you have not got my consent to that verdict".'

39 *Williams* (n 36) 3. For other disruptive announcements of farthing verdicts, and with mixed judicial reactions, see *Hunt v Varley* The Times, 31 March 1865, 13; *Klamborowski v Cooke* The Times, 2 December 1897 (QB) 7.

40 *Williams* (n 36) 3.

41 *Williams* (n 36) 3. Farthing verdicts were not always impulsively returned, see *Nicholas v Abraham* The Times, 10 August 1863, 9.

42 *Williams* (n 36) 3. For the public emotion generated by farthing verdicts see, *Cooke v Cooke* The Times, 4 August 1827, 3; *Anon* The Times, 9 March 1838, 5; *Hulse v Tollemache* The Times, 19 August 1851, 7.

43 *Cullaby* (n 32) 14. Where trial judges directed juries to give 'reasonable [and] moderate damages' but defiantly gave a farthing, costs may have been more contested, see *Downing v D Owen & Co Ltd* The Times, 2 June 1888 (QB) 6.

44 *Beaumont* (n 17) 499.

45 Statute 1840 (3 & 4 Vict c 24).

46 *Beaumont* (n 17) 499.

47 *MacGregor v Clay* The Times, 16 June 1888 (QB) 5.

48 *Truscott v Gutmann* The Times, 16 April 1888 (QB) 12. For an appellate exposition of 'good cause' where a farthing libel verdict was returned, see *Wood v Cox* The Times, 13 February 1889 (CA) 3 (Lord Lindley).

49 *Man v Ward* The Times, 13 January 1887 (QB) 3. After 1883, the matter of costs was governed by the Rules of the Supreme Court 1883 Order 65, r 1: 'the costs of and incident to all proceedings . . . shall be in the discretion of the court or judge'.

50 *Man* (n 49). See also *Gamgee v Ward* The Times, 8 December 1892 (QB) 14 (Lord Coleridge CJ): 'I am extremely happy, as I always am happy, to be able to give effect to the feeling of the jury'; *Moore v Jerome* The Times, 9 February 1895 (QB) 4; *Day v Gibson* The Times, 31 October 1895 (QB) 14.

51 *Casby v Lazarus* The Times, 9 November 1891 (QB) 3. See also *Newcomb v Drakard* The Times, 10 March 1830, 4.

52 *Casby* (n 51). Other judges were less 'happy' about giving effect to the jury's 'feeling' about costs, see *Kain v Mahood* The Times, 22 December 1860, 10 (Crompton J): 'it is very wrong for juries to think of costs at all'.

53 Pollock (n 9) 122. See *Bourne* (n 23) 625.

54 *Cobb v Selby* (1807) 6 Esp 103, 170 ER 843.

55 *Cobb* (n 54) 844.

56 *Cobb* (n 54) 844.

57 *Cobb* (n 54) 844.

58 *Cobb v Selby* (1807) 2 Bos & Pul (NR) 467, 469; 127 ER 711, 712.

59 Henry Home of Kames, *Principles of Equity* (first published 1760, new edn, Bell & Bradfute 1825) 64.

60 John H Baker, *Introduction to English Legal History* (5th edn, OUP 2019) 472.

61 See Chris Dent, 'Locus of Defamation Law Since the Constitution of Oxford' (2018) 44 Monash University Law Review 491, 514–19: 'it is clear that the [reputational] concept was not the only prism through which the action was seen in that [the nineteenth] century'.

62 *Ford v Wilbraham* The Times, 11 August 1852, 8.

63 *Ford* (n 62).

64 *Ford* (n 62). See, by contrast, *Stringer v Firmadge* The Times, 24 March 1826, 3, where it was argued that 'vindication of her [the plaintiff's] character . . . could only be obtained by large damages'.

65 Stanley Leighton, *Shropshire House: Past and Present* (Bell 1901) 38.

66 *Charlton v Hutton* The Times, 25 March 1834, 4. Shillings as much as farthings were apt to be considered contemptuous of the plaintiff, see *Hindley v Thorn* The Times, 28 April 1888 (QB) 6 (Huddlestone B).

67 *Charlton v Hutton*, London Courier, 4 August 1834, 4.

68 *Charlton* (n 67) 4. *Moore v Gill* The Times, 9 June 1888 (QB) 6 (Lord Coleridge CJ). Judicial condemnation of frivolous defamation actions seems to have been stronger at trials involving 'all the farce and solemnity of a special jury', see *Hardy v Dewsnap* The Times, 17 August 1824, 3.
69 *Charlton* (n 67) 4.
70 *Charlton* (n 67) 4.
71 *Jeffrey v Phillips* The Times, 23 August 1869 (QB) 9.
72 *Vain v Wear* The Times, 22 July 1830, 3.
73 *Vain* (n 72). In *Edwards v Thomas* The Times, 15 August 1827, 13, the phrase 'public-house squabble' was used.
74 *Vain* (n 72).
75 *Defries v Davis* The Times, 16 May 1835, 7.
76 *Defries* (n 75).
77 For the contemporary categories of slanders actionable *per se*, see Thomas Starkie, *A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecution*, vol 1 (first published 1812, 2nd edn, J & WT Clarke 1830) 10.
78 *Defries* (n 75) 7.
79 *Defries* (n 75) 7. Mockery of strained attempts to prove 'special damage' is often encountered, see *Jones v Neyler* The Times, 29 August 1827, 3: 'It reminded him [Lord Tenterden] of a man's claiming special damages once at Nottingham, for not being invited to a dinner-party'.
80 *In re Syme*; *ex parte The Daily Telegraph News Paper Co* (1879) 5 VLR 291, 297 (Barry J).
81 *Defries* (n 75) 7.
82 *Hesketh v Brindle* The Times, 21 July 1887 (QB) 6.
83 *Hesketh* (n 82). See also *Hill v Finney* (1865) 4 F & F 615, 655; 176 ER 716, 734 (Cockburn CJ).
84 *Hesketh* (n 82). In other cases, it was suggested that the plaintiff 'appearing before the public in such a case' would do more to sully his character than the imputation itself, see *Walrond v Long* The Times, 5 April 1862, 12.
85 *Hesketh* (n 82).
86 *Hesketh* (n 82).
87 *Watson v Christie* (1800) 2 Bos & Pul 224, 224; 126 ER 1248, 1248 (Eldon CJ), where the defendant's assault left the plaintiff in a 'state of extreme ill-health, and was likely to continue so during the rest of his life'.
88 Where less serious harm was inflicted, some judges told juries that a plaintiff's provocative behaviour was not to be 'put out' in calculating a 'reasonable compensation', see *Bray v Wall* The Times, 31 July 1854, 11 (Alderson B).
89 *M'William v Vickery* The Times, 12 March 1827, 7.
90 *M'William* (n 89).
91 *M'William* (n 89).
92 *M'William* (n 89). In similar cases, impatient trial judges urged the contending parties to agree to a juror's withdrawal so 'that neither party should have the victory', see *Farrell v Schoolbred* The Times, 13 May 1861, 11 (Wightman J).
93 *M'William* (n 89). Some judges voiced concern about the policy implications of very small nominal verdicts, see *Bray* (n 88) 11 (Alderson B): 'merely nominal damages would not conduce to the administration of justice. It would be a bad principle to say that some people are the scum of society, and then that anybody had a right to beat them'.
94 *Hayward v Bradford* The Times, 1 August 1854, 12.
95 *Hayward* (n 94).
96 *Hayward* (n 94).
97 *Hayward* (n 94).
98 *Hayward* (n 94).
99 *Hayward* (n 94). See also *Hulse* (n 42) 7: 'I am not here to deny that [the defendant] did give this man a horsewhipping, but I'm here to say he richly deserved it . . . Mr Tollemache only did as any of you [the jurors] would have done in the same case'.
100 Farthing trespass verdicts are also reported to have been excitedly announced in the course of a judge's summing-up, see *Edwards v Braine* The Times, 5 November 1835, 4.
101 *Hayward* (n 94) 11.
102 *Hunt v Burgess* The Times, 8 December 1869, 11.
103 *Hunt* (n 102).

104 *Hunt* (n 102).
105 *Hunt* (n 102). Counsel mocking the testimony of 'medical men' was a tactic designed to induce farthings at assault trials, see *Hulse* (n 42) 7: 'They pretend that they put 18 leeches upon him [the plaintiff] and gave him medicine for a fortnight'.
106 *Hunt* (n 102).
107 *Hunt* (n 102).
108 *Hunt* (n 102).
109 *Hunt* (n 102). Although receiving them, some judges openly disapproved of farthing verdicts that they considered unwarranted, see *Warner v Bourne* The Times, 2 April 1844, 8 (Tindal CJ): 'His Lordship appeared to be, however, by no means satisfied with the [farthing]'.
110 Charles G Addison, *Wrongs and their Remedies: Being a Treatise on the Law of Torts* (V & R Stevens Sons 1860) 795.
111 *Torr v Wightman* The Times, 7 November 1870, 11. In tort cases where 'there is not standard for estimating the damages', Addison conceded that a court would more reluctantly set aside even a farthing verdict, see Addison (n 110) 795; *Apps v Day* (1853) 13 CB 112, 112; 139 ER 47, 47 (Maule J): 'It was for them [the jury] to say what damage the plaintiff had sustained; and we have no means of knowing that their estimate was an improper one'.
112 *Clifton v Hooper* (1844) 6 QB 468, 472; 115 ER 175, 176.
113 *Butterfield v Forrester* (1809) 11 East 60, 60; 103 ER 926, 927.
114 Thomas Beven, *Principles of the Law of Negligence* (Stevens & Hayes 1889) 337; for a summary of the nineteenth-century cases expounding the defence, see 138–61.
115 For the rule's appearance in a judge's summing-up, see *Chadwick v The Marchioness of Hastings* The Times, 5 December 1835, 6 (Lord Abinger).
116 *Smith v Great Northern Railway Co* The Times, 18 December 1858, 8.
117 *Smith* (n 116). The Queen's Bench had previously set aside a farthing negligence verdict where the plaintiff's evidence showed that 'it was doubtful whether plaintiff would not be always lame', see *Armytage v Haley* (1843) 4 QB 917, 917; 114 ER 1143, 1143; *Torr* (n 111) 11. Farthing negligence verdicts appear to have been less likely set aside where plaintiffs causally contributed to non-debilitating injuries, see *Brown v Gaywith* The Times, 2 April 1873, 11.
118 *Smith* (n 116).
119 *Smith* (n 116).
120 Mayne (n 21) 306. In *Mostyn v Coles* (1862) 7 H & N 873, 874; 158 ER 723, 723 (Bramwell B), it was suggested that setting aside a compromise negligence verdict would depend on showing that the jury 'could not on any rational grounds have arrived at it'.
121 *Gibbs v Tunaley* (1845) 1 CB 640, 642; 135 ER 692, 693.
122 Anon, 'The Personal and Parliamentary Life of Lord Campbell' (1862) 24 Mont L Rep 389, 399.
123 *Watts v Bennett* The Times, 28 November 1878, 11.
124 *Watts* (n 123).
125 *Watts* (n 123).
126 *Watts* (n 123).
127 *Watts* (n 123). See also *Lawley v Great Eastern Railway Co* The Times, 29 July 1880 (QB) 11, where Kelly CB received a farthing negligence verdict after the jury 'consider[ed] that there was negligence on both sides'.
128 *Watts* (n 123).
129 *Watts* (n 123). 'Corrupt motive' may have been enough to show a jury's 'total refusal . . . to discharge their duty', and which may have warranted a new trial on ground of insufficiency, see Mayne (n 21) 306.
130 *Watts* (n 123). The Exchequer Chamber had taken a similar view in *Mostyn* (n 120) 875 (Pollock CB), ruling that a negligence verdict for 'nominal damages' (including a farthing) may be upheld 'as the result of an opinion, that although the negligence or misconduct of the plaintiff had not occasioned the injury, it had in some way contributed to it'.
131 James Fleming Jr, 'Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur' (1963) 1 Duquesne University Law Review 143, 154.
132 Dwight Foster, 'Advantages of the Jury System' (1882) 135 North American Law Review 447, 457.
133 Foster (n 132). Responding to the criticism that the jury's farthing verdict was 'perverse . . . and amounted in a legal sense to misconduct,' Lord Coleridge CJ opined, 'All verdicts for a

farthing are in a strict sense illogical . . . But the real meaning of such a verdict is this – the jury say to the parties, 'Go your way', thinking that a fit end to the case', see *Coomb v Moore* The Times, 13 May 1881 (QB) 4.

134 Pollock had loosely referred to an injured plaintiff's moral desert as a reason for a jury responding contemptuously, see Pollock (n 9) 121: 'whatever he [the plaintiff] did suffer at the defendant's hands was morally deserved'.

135 *Mason v Wakefield* The Times, 19 March 1827, 3.

136 *Mason* (n 135).

137 *Mason* (n 135).

138 *Mason* (n 135).

139 *Mason* (n 135).

140 *Mason* (n 135). This mitigating evidence seems to have fallen short of the plaintiff's affirmative consent to, or condonation of, his wife's infidelity, which would have provided the defendant an exculpatory defence, see *Duberley v Gunning* (1792) 4 TR 651, 652–53; 100 ER 1226, 1226 (Lord Kenyon); 'if they [the jury] were of the opinion that husband had consented to the infidelity of his wife, it took away altogether the ground of the action, and they should find a verdict for the defendant'; the consent defence was later rationalised in terms of the husband being an 'accessory to his own dishonour', see *Bromley v Wallace* (1803) 4 Esp 237, 238; 170 ER 704, 704 (Lord Alvanley).

141 *Mason* (n 135).

142 *Mason* (n 135).

143 *Mason* (n 135). Criminal conversation juries sometimes explained their farthing verdicts, see *Dundas v Hoey* The Times, 3 July 1840, 7, the foreman saying: 'We think he had morally deserted her' (the defendant's evidence showed that the plaintiff had allowed his wife to live freely before the 'criminal connexion').

144 The Times, 24 March 1837, 6.

145 *Maddox* (n 144).

146 See, most recently, *Maunder v Venn* (1829) M & M 322, 322; 173 ER 1175, 1175 (Littledale J).

147 *Maunder* (n 146).

148 *Maunder* (n 146). For paternal moral ill-example inducing farthing seduction verdicts, see *Bristow v Harford* The Times, 13 July 1850, 7. Again, such evidence of a father's morally defective character fell short of exculpatory evidence of his consent or connivance to his daughter's seduction, see *Reddie v Scoolt* (1794) Peake 315, 316; 170 ER 169–70 (Lord Kenyon).

149 *Maunder* (n 146).

150 see Pollock (n 9) 127. See also *Finlay v Chirney* (1888) 20 QBD 494, 498 (Lord Esher MR).

151 *Wilde v Atherton* The Times, 12 April 1838, 7, and the jury being immediately assured by the plaintiff's counsel that 'vindictive damages' were not counted for.

152 *Wilde* (n 151).

153 *Wilde* (n 151).

154 Evidence in mitigation of damages included portraying the promisor as worthless, both financially and personally, see *Rooke v Conway* The Times, 20 August 1842, 7, where a farthing was secured after the jury were told that the defendant's being so much older than the plaintiff showed that her imagined 'loss was in truth a profit'.

155 *Wilde* (n 151). See also *Capron v Dening* The Times, 16 March 1868, 11.

156 *Wilde* (n 151).

157 *Burrows v Bagshaw* Lancashire Gazzette, 24 May 1845, 2.

158 Saskia Lettmaier, *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800–1940* (OUP 2010) 52; *White v Ferguson* News of the World, 8 March 1891, 4.

159 *White* (n 158).

160 *Hole v Harding* The Times, 30 January 1882 (QB) 7.

161 *Hole* (n 160).

162 *Macmillan v Labouchère* The Times, 27 November 1894 (QB) 14. Labouchère

163 *Macmillan* (n 162).

164 John F Clerk and William HB Lindsell, *The Law of Torts* (Sweet & Maxwell 1889) 488. For a similar case brought by a morally dubious cleric, see *Kelly v Sherlock* The Times, 14 August 1865, 11.

165 In such a practice of defamation recovery, a plaintiff benefitted his character by giving evidence, a procedural right granted in the Evidence Amendment Act 1843 (6 & 7 Vict c 85) and in the Evidence (Further) Amendment Act 1869 (32 & 33 Vict c 68). For the connection between defamation plaintiffs not entering the witness-box and contemptuous farthing verdicts being returned, see *Salmon v Riley* The Times, 16 January 1861, 11; *Maclaren v Davis* The Times, 17 June 1890 (QB) 3 (Cave J); *Wilson v Collison* The Times, 16 March 1896 (QB) 3 (Hawkins J).
166 Anon, *Report of the Two Nights Debate at Wigan between 'Iconoclast' and Mr W M Hutchings* (Baker & Co 1870) 52.
167 *Bradlaugh v Wards* (1861) 11 CB (NS) 377; 142 ER 843.
168 *Bradlaugh* (n 167) 843.
169 Adolphe Smith, *The Biography of Charles Bradlaugh* (Freethought Publishing Co 1883) 74.
170 *Bradlaugh* (n 167) 844.
171 *Bradlaugh* (n 167) 844.
172 See *Anon* (n 166).
173 *Bradlaugh* (n 167) 844.
174 *Bradlaugh* (n 167) 844.
175 *Bradlaugh* (n 167) 844.
176 *Bradlaugh* (n 167) 846. Consistent with Tindal CJ's speech in *Gibbs* (n 121), the central Common Pleas' decision whether to set aside the *Bradlaugh* jury's farthing verdict seems to have rested on how much it had 'dissatisfied' the trial judge: 'We will speak to my Brother Channell before we decide whether the rule should go or not', see 381.
177 *Bradlaugh* (n 167) 846. For similar appellate speculation over what juries really intended by farthing false imprisonment verdicts, see *Scarlett v Pond* The Times, 21 April 1875, 11 (Lord Coleridge): 'although there might be strong and cogent proof that the plaintiff had committed a felony, [in giving a farthing] the jury might think it felt short of the certainty required to justify them in fixing such a stigma upon him'.
178 *Bradlaugh* (n 167) 846; see *Hunt* (n 102), and *Cobb* (n 54).
179 Smith (n 169) 76.
180 *Else v Bevern* The Times, 27 April 1824, 3.

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9

# Physical privacy and bodily integrity

Jeevan Hariharan*

## 1. Introduction

Given how many Antipodean lawyers there are in the United Kingdom, it surely becomes tedious to hear yet another Australian regale stories of how the system works over there. Of course, this has never stopped me from giving my two cents. So it is that I begin this chapter at the University of Sydney, where undergraduate degrees were (and still are) structured somewhat differently to the UK. There, Tort is the first substantive law subject one studies, close to the beginning of what is often a five- or six-year combined degree. Just like the Tort course I now help teach to more jaded second years at UCL, students start by learning about trespass to the person before they spend the bulk of the course on negligence and other topics. However, for me at least, the overall effect of learning about trespass so early was that I never thought critically about battery, assault and false imprisonment until recently. These torts were like Shakespeare's *A Midsummer Night's Dream*; something studied early in one's education and certainly not forgotten, but also not subject to the same interrogation as the tragedies encountered later on.[1]

In this contribution, I want to correct this deficiency by pausing to think more about trespass to the person, and the tort of battery in

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particular. Battery, as we learn, protects one of our fundamental interests: bodily integrity.[2] Moreover, it supposedly does so in strong terms because even the slightest contact with a person's body can be enough to engage the tort.[3] In the words of Blackstone, quoted by Goff LJ in *Collins v Wilcock*, 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it'.[4] What almost never seems to be questioned, however, is why the 'first and lowest' stage of bodily interference must involve contact with someone's body.[5] We fail to ask this question, in my view, because we tend not to think deeply enough about the concept of 'bodily integrity'. When we do so properly, as I will explain below, bodily integrity emerges as a rich idea which goes beyond 'mere touching'. In fact, thinking about bodily integrity in a more considered way has important implications for a wider debate about the concept of privacy, and how certain aspects of our privacy should be legally protected.

Privacy, as readers will be aware, has been one of the most dynamic areas of English tort law in recent years. Courts in this jurisdiction famously developed breach of confidence under the influence of the Human Rights Act 1998 (HRA) into a new, standalone tort of misuse of private information (MOPI).[6] Taken alongside traditional breach of confidence and data protection legislation, English law in principle now protects an individual's control over their personal information; what is often described as 'informational privacy'.[7] One of the important issues which remains, however, is whether English law adequately protects other aspects of individual privacy as well – in particular 'physical privacy', which concerns intrusions into one's seclusion or personal space.[8] On one view, the MOPI framework is sufficiently capacious to protect both informational and physical privacy. But as I will demonstrate in this chapter, that view does not properly account for the conceptual difference between physical and informational privacy. An enhanced understanding of bodily integrity is the key to understanding this difference, and it also points us in the novel, but more sound direction that physical privacy should be protected through the trespass torts.

The rest of my discussion is divided into three parts. Section 2 explains in more detail the issue I am seeking to address in privacy law about the adequacy of the MOPI tort in protecting physical privacy. Discussion of that issue has been constrained because there has not been sufficient attention given to whether, or in what way, physical and informational privacy have a different normative foundation. Section 3 is the heart of the chapter. Here I unpack bodily integrity arguing that, properly understood, the concept is underpinned by the idea that we as individuals,

not anyone else, are in control of our bodies. That control can be compromised by unauthorised touching, of course. But it can be undermined by other activities as well, including watching, listening or sensing an individual without their consent. In section 4, I explain how this understanding of bodily integrity helps us appreciate how physical and informational privacy are conceptually different, and lay the groundwork for further work pursuing comprehensive physical privacy protection through trespass, rather than MOPI.

## 2. MOPI and the protection of physical privacy in English law

Ever since its inception as a new form of breach of confidence, it has been clear that MOPI is focused on information about the subject.[9] In *Campbell v MGN*, the seminal decision where MOPI was first recognised, all the judges in the House of Lords appeared to accept that the action requires the *dissemination* of private *information*.[10] In doing so, the court took no position on the extent to which English law protects privacy violations not entailing information disclosure. Lord Nicholls was the clearest on this point. In an important paragraph clarifying the extent to which MOPI protects privacy, he said:

> In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful *publication* by the 'Mirror' of private *information*.[11]

The central idea reflected in this passage that MOPI (at least in its initial formulation) only protects against 'one aspect' of individual privacy immediately invites further questions. What other aspects of individual privacy are there? And how, if at all, are those aspects of privacy protected? Lord Nicholls, perhaps understandably, was reluctant to go any further than providing an example of a privacy violation not involving

information disclosure, for example strip searches.[12] An answer to the broader issue of whether English law comprehensively protects privacy was not required to resolve Campbell's claim, and the difficulties with providing an exhaustive definition of privacy have been well documented.[13]

Academic commentators, however, have sought to engage with these more fundamental points, particularly in the years since *Campbell*. In the English context, the most influential account has come from Nicole Moreham.[14] Moreham offers a comprehensive theory of individual privacy, and then uses that theory to make claims about the gaps in privacy protection and how those gaps should be filled. Recently, some of the central tenets of Moreham's approach have been criticised by Paul Wragg who, in turn, offers his own view of the adequacy of the MOPI framework.[15] In what follows, I examine each of these approaches, and explain the need for deeper analysis into why different aspects of our privacy are important.

## 2.1 Moreham's account of privacy and the adequacy of English law

In a series of important works, Moreham has developed an account of privacy which (like many other privacy theories), has two interlinked dimensions: first, a definitional dimension setting out what privacy means; and second, a normative dimension, explaining why privacy is important.

On the definitional dimension, Moreham's overarching claim is that privacy is a state of 'desired "inaccess"'.[16] We have privacy, on this view, when access to ourselves accords with our wishes. For Moreham, there are two ways of 'accessing' someone, and accordingly two components of individual privacy.[17] First, there is informational access, which encompasses the *collection*, *storage* and *dissemination* of *information* about someone.[18] Where such access occurs against the subject's wishes, it is an invasion of their 'informational privacy'.[19] Second, there is physical access, which concerns sensory access to someone's *physical self*.[20] If someone is *watched*, *listened* to or *otherwise sensed* against their wishes, it is an invasion of their 'physical privacy'.[21] For Moreham, it is also a physical privacy invasion to *take photographs/recordings* of someone against their wishes, or to *disseminate* such *photographs/recordings* to others.[22]

As to the normative dimension, Moreham identifies various values which are served by an individual having 'desired inaccess'.[23] In particular, Moreham argues that privacy is grounded in respect for: (1) dignity – to violate someone's privacy is to treat that person as a means to another's

end;[24] and (2) autonomy – privacy allows an individual to determine someone else's access to them, giving them space to 'be themselves' and to act in accordance with their own principles and ideas.[25]

Adopting this theoretical framework, Moreham analyses the current privacy protections in English law. In her view, informational privacy is well-protected.[26] English law covers the unwanted *disclosure* of private information through the traditional breach of confidence action and MOPI. In addition, the *acquisition* and *storage* of such information is actionable through recent extensions to breach of confidence[27] (which are slowly starting to appear in the MOPI context as well).[28]

Physical privacy, by contrast, is only protected partially.[29] Moreham argues that breach of confidence and MOPI adequately protect against the unwanted *disclosure* of photographs or other recordings of someone. But there is a lacuna in the protection of *non-disclosure* based physical privacy invasions, that is watching, listening or otherwise sensing someone, or the act of photographing/recording someone without disseminating the image. For Moreham, this gap can be filled by common law development of MOPI.[30] All that needs to happen is for courts to recognise definitively that the acquisition and storage of private information is an actionable MOPI.[31] For Moreham, it is just one step further for courts to eventually 'drop the language of information altogether' and fashion a comprehensive physical privacy tort.[32]

As will be seen below, the account of physical privacy I ultimately adopt in this chapter is strongly influenced by Moreham's definition and bears key similarities to her approach. There are, however, important questions left open by her theory, particularly regarding the distinction between physical and informational privacy. When discussing the difference between these concepts, Moreham says that physical and informational privacy can sometimes overlap, but the key distinction between the two is that not all privacy invasions can be reduced to informational terms.[33] In certain situations, for example, a tenant being watched by a landlord *via* a secret camera while showering, Moreham's view is that the subject's objection to the perpetrator's conduct is 'primarily physical', rather than a concern about any information obtained.[34]

Moreham's claim that the subject's 'objection' differs in physical and informational privacy violations is striking because it suggests (rightly in my view) that there is something normatively significant which delineates the two concepts. However, when it comes to explaining the rationales for privacy protection, Moreham herself does not appear to distinguish between physical and informational privacy on this basis. Although it is contemplated that certain values emerge more strongly in particular

cases,[35] no claim is made about physical and informational privacy being important for different reasons, or that physical and informational interferences impact the subject in different ways. To the contrary, Moreham emphasises that the same values (particularly dignity and autonomy) are implicated in all breaches of privacy.[36]

This uncertainty about whether and why exactly the subject's concern in physical and informational cases is different has important consequences when it comes to Moreham's conclusions about physical privacy protection in English law. Moreham's argument that physical privacy is adequately protected by MOPI and breach of confidence so far as *disclosure* is concerned sits somewhat uneasily with the idea that informational and physical privacy are distinct concepts. If a physical privacy invasion involving the disclosure of an intimate image is conceptually different to the disclosure of an image where the subject's principal concern is informational, it is difficult to see how actions grounded in information directly protect both. Perhaps the better way of putting the point, more consistent with Moreham's theoretical framework, is to say that MOPI and breach of confidence provide a degree of 'residual' or 'incidental' protection for physical privacy invasions involving the disclosure of an image or recording. These actions are chiefly directed at remedying the unauthorised disclosure of information, but in doing so they protect an individual in certain cases where the subject's main concern is sensory.

The same point applies with force in relation to *non-disclosure* physical privacy invasions, where Moreham argues that the gap she has identified can be filled by developing MOPI. The fact that physical and informational privacy serve the same underlying values of dignity and autonomy is relied on by Moreham to support the adaptability of the MOPI framework.[37] Again, however, it is difficult to see how the argument here interacts with the key claim about physical and informational privacy being distinct. Unless MOPI is entirely gutted of its informational constraint, which is so central to the way the tort has developed that it is part of the name, the way in which it protects physical privacy will at best be incidental.

## 2.2 Wragg's critique of the physical/informational distinction and the constraints of the current debate

In a recent piece, Wragg develops a fascinating critique of Moreham's model, albeit along quite different lines.[38] Wragg takes broader aim at attempts to distinguish physical and informational privacy, not just in

Moreham's account, but in various other models which divide privacy in a similar way. This includes long-standing US jurisprudence, where separate privacy torts are recognised for the 'public disclosure of embarrassing private facts about the plaintiff' and 'intrusion upon the plaintiff's seclusion or solitude, or into his private affairs'.[39]

The crux of Wragg's criticism is that physical and informational privacy are not actually distinct. Rather, physical and informational privacy are said to be 'conceptually inseparable'[40] or 'occupy the same conceptual space'.[41] In his view, both physical and informational components are present in all privacy invasions, which means that it is wrong to think that 'in physical privacy claims informational privacy is not at stake'.[42] To illustrate this, Wragg returns to the example of the landlord watching a tenant showering through a secret camera, which Moreham identified as a paradigm physical privacy case because the privacy invasion cannot be reduced to informational terms.[43] In this situation, Wragg argues that there is a physical component to the privacy invasion, but that the 'attack on her informational privacy looms large in the background'.[44] This is because the intruder acquires 'sensory data' about the tenant, at least to the extent that information about her physical dimensions and behaviours is acquired during the invasion.[45]

Wragg supports this claim about the conceptual inseparability of physical and informational privacy by highlighting that the two serve the same values. In somewhat similar terms to the normative dimension of Moreham's account, Wragg identifies a range of values served by privacy generally, including personality, dignity, freedom, control, individuality and, in particular, autonomy.[46] Importantly, in Wragg's view, physical and informational privacy enable autonomy to emerge in the same way. In each case, privacy provides the individual control over what is 'known and knowable about their personality and physical appearance, especially as it relates to elements that are hidden from general view'.[47]

For Wragg, the practical upshot of physical and informational privacy being inseparable is that no significant legal development is required to realise comprehensive privacy protection in English law.[48] Instead, Wragg argues that the mature MOPI jurisprudence is sufficiently dynamic to cover physical privacy (what he calls 'intrusion-only') claims. English courts, as Wragg points out, have increasingly incorporated the concept of intrusion in MOPI cases.[49] While there is still an informational constraint to the action, judges take account of the intrusive nature of the defendant's conduct, particularly at the initial stage of the MOPI analysis which involves determining whether the claimant has a reasonable expectation of privacy in the information concerned.[50] All that is left to do, as Wragg sees it, is for

courts to recognise that the existing MOPI framework applies in an 'intrusion-dominated' claim i.e., where there is a strong physical, rather than informational, dimension to the privacy invasion.[51]

The end result, it can be observed, is that despite Wragg taking a different theoretical position to Moreham on the division between physical and informational privacy, both end up in a similar place so far as English law is concerned. For Wragg, just like Moreham, the MOPI framework (with incremental judicial developments) is sufficiently capacious to protect privacy comprehensively. If anything, Wragg's argument seems on its face to proceed on a more conceptually sound basis, because physical and informational privacy are not presented as analytically distinct ideas. For him, the adaptability of the MOPI framework to protect both follows from the fact that the entire distinction between physical and informational privacy is illusory.

Provocative and compelling as Wragg's account is, his central theoretical claim about the indivisibility of physical and informational privacy is ultimately unconvincing. For present purposes, the most important point to note is that there is a mismatch between Wragg's overarching claim that physical and informational privacy are 'conceptually inseparable'[52] and his actual discussion of these ideas.

Throughout his analysis, Wragg continues to use the terms physical privacy (or intrusion) and informational privacy. Thus, when analysing the shower camera example, Wragg says that intrusion is present but that informational privacy 'looms large'.[53] At another point, he says that both physical and informational privacy are present in all cases but: '[i]t is only the focus that changes'.[54] And when explicating the adaptability of the MOPI framework, Wragg clearly distinguishes between 'information-dominated', 'intrusion-dominated', and 'mixed intrusion and information' privacy claims.[55] Put together, Wragg seems to be acknowledging throughout his discussion that physical and informational privacy are in fact different things, albeit that he thinks all privacy interferences involve an interference with both. But if this is so, we should not take Wragg's argument to mean that physical and informational privacy are 'conceptually inseparable' in the sense that they refer to the *same concept*. He is instead making a different claim under the guise of a claim about conceptual inseparability; namely that physical and informational privacy are somehow different dimensions of *every* privacy interference which are at stake simultaneously, and that both serve precisely the same values.

Where this leaves us is that Moreham and Wragg in fact both understand physical and informational privacy to be different aspects of individual privacy, which are joined up in the sense that the two serve

the same values. What is significant, however, is that throughout their pieces, neither Moreham nor Wragg delve into the question of whether physical and informational privacy could be important for fundamentally different reasons. In my view, it is precisely because we lack a strong normative account of why physical and informational privacy are important that we run into difficulties articulating the boundary between them and are thereby fixed to the MOPI framework.

In what follows, I argue that the concept of bodily integrity is the missing piece of the puzzle in this analysis. A deeper understanding of that idea allows us to appreciate what physical privacy is, and how it differs from informational privacy. The analysis also points us in a new and fascinating direction so far as English law is concerned.

## 3. The concept of bodily integrity

### 3.1 A prominent yet under-analysed concept

Bodily integrity, sometimes also referred to as physical integrity, bodily security or bodily inviolability,[56] comes up throughout philosophical and legal discourse.[57] In moral and political philosophy, bodily integrity is deployed by influential theorists like Judith Jarvis Thomson when explaining why it would be unacceptable for a surgeon to kill a young man in good health without consent in order to transplant his organs into five patients. Thomson says that it is 'because the young man has interests—interests, in particular, in life and bodily integrity . . . that the surgeon must not operate'.[58] And for Martha Nussbaum, bodily integrity is one of the ten 'central capabilities' that a decent political system must secure in order for people to be 'able to pursue a dignified and minimally flourishing life'.[59] Nussbaum describes bodily integrity in this context as '[b]eing able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction'.[60]

As a legal concept, bodily integrity arises in a range of areas, including in human rights law,[61] criminal law,[62] and in some constitutional contexts.[63] In English law, however, bodily integrity arises most prominently in tort law,[64] and it is how the term is used in this area that I am most interested in here. As alluded to in the introduction above, the main usage of the term in tort is to describe the interest protected by battery. In *Parkinson v St James NHS Trust*, Hale LJ observed that: '[t]he right to bodily integrity is the first and most important of the interests protected

by the law of tort'.[65] For that proposition, she cited the textbook *Clerk & Lindsell on Torts*, which in its current edition reaffirms that the law affords mentally competent adults 'an absolute right of bodily integrity'.[66] Also referred to in support is the classic statement on battery in *Collins v Wilcock*, where Goff LJ said that: '[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate' and thus that even the 'least touching' of another person may amount to a battery.[67]

Despite this widespread deployment in philosophical and legal discussions, bodily integrity is remarkably under-theorised, and it is difficult to get a full sense of the concept.[68] Bodily integrity is not specifically defined in Thomson's work, and there is uncertainty about how it fits within her broader theory of rights.[69] Nussbaum also does not provide a definition of bodily integrity *per se*, but rather a list of examples where bodily integrity is respected and why it is valuable.[70]

In the legal context, and looking at tort law in particular, there are similar difficulties. In one of the few detailed legal discussions of bodily integrity, Jonathan Herring and Jesse Wall note that: '[c]ases where reference is made to the concept are contradictory, and it is very hard to find any definitive legal definition of the concept'.[71] One can clearly see this by reflecting on the oft-repeated propositions above that battery protects a person's fundamental interest in bodily integrity, and that even the slightest touching with a person's body *may* constitute a battery. Implicit in these statements is the idea that there is a widely understood concept of bodily integrity, and moreover, that touching or contact somehow defines the outer limits of interference with the interest. But this does not give us any sense of what the concept is, nor a justification for why touching is any more than an *example* of what can constitute an interference with someone's bodily integrity. Importantly, there is also an assumption that 'touching' the body is itself a clear-cut idea. Modern battery law paints a more complicated picture, given that there is still uncertainty about whether exposure to materials like light or smoke is sufficient to engage the tort.[72]

Approaching bodily integrity through the lens of ordinary language can help us to some extent when trying to get to grips with the underlying concept, but this strategy does not take us all that far either. Starting with the term 'body', it might be thought that this is an uncontroversial idea, and that our bodies are easily identifiable as physical, individuated entities with distinct boundaries.[73] The difficulty is that it is not clear that this is the way that the 'body' is being understood when bodily integrity is being referred to as a fundamental human interest. If a person's hearing aid or wheelchair is deliberately touched or tampered with, most would

conclude that there has been an interference with their bodily integrity.[74] But it is difficult to square this with the notion that 'body' is operating in the term 'bodily integrity' merely as a reference to what is enclosed by a person's skin and flesh.

The term 'integrity' adds a further layer of complexity. Etymologically, 'integrity' is derived from the Latin *integritās*, meaning wholeness, entireness, completeness, purity.[75] The *Oxford English Dictionary* defines 'integrity' as '[t]he condition of having no part or element taken away or wanting; undivided or unbroken state; material wholeness, completeness, entirety'.[76] Adopting this definition it would be possible to take a narrow, literal approach and argue that a person's bodily 'integrity' refers to the actual wholeness or unbrokenness of their body.[77] On this view, an individual's bodily integrity would be interfered with when part of the body is severed, broken, perforated or perhaps injured. But if this interpretation is accepted, it makes no sense to say that a person's bodily integrity can be interfered with by the 'slightest' touching. Instead, when people speak of bodily integrity being interfered with by touching, the term 'integrity' seems clearly to be used in a non-literal, metaphorical way, according to which a person's body can be less 'complete', 'whole' or 'integrated' by even the most minimal physical contact.

This short overview of how the concept of bodily integrity is commonly used leaves us in a rather unsatisfactory position, especially when trying to work out what bodily integrity means in tort law. On the one hand, we are told that bodily integrity is one of the most important interests we have, and that it is protected strongly by battery. And yet, it is difficult to locate what bodily integrity means, beyond coming up with examples of situations where it appears to be at stake. Unpacking the components which make up the term, it seems clear that both 'body' and 'integrity' are being referred to in a sophisticated, non-literal way. Ultimately, however, we lack a full sense of what bodily integrity means or a comprehensive account of the circumstances in which it is engaged.

## 3.2 Bodily integrity as bodily control

There is, I think, a way forward, and inspiration comes from an unlikely source. In recent years, there has been a wave of tort law scholarship in the Kantian tradition which rejects an important aspect of the conventional account of battery discussed above; namely, that the correct way to understand the tort is that it protects a person's interest in their bodily integrity. The clearest presentation of this position comes from Arthur Ripstein and Allan Beever who both, albeit in slightly different

ways, critique the idea that tort law is an instrument for achieving certain ends, instead conceptualising it as an outworking of Kant's moral philosophy.[78] I do not subscribe to the grand unifying picture of tort presented in either Ripstein or Beever's accounts.[79] It is, however, suggested that there is an important insight generated from their work which can help us articulate what bodily integrity means.

According to Ripstein, the organising principle underlying all of tort law is the basic 'moral idea that no person is in charge of another'.[80] It is up to an individual, not anyone else, to determine the purposes they pursue. For Ripstein '[y]our body and property are just what you use in deciding what purposes you pursue. You don't ever do anything except with your body; what you can do or accomplish depends on the other things that you are entitled to use.'[81] It follows that nobody else is in charge of your body or property – no one else but you can determine the purposes your body or property are used to pursue.[82] Intentional torts against the body or property are explained, on Ripstein's account, on the basis that they involve the defendant using the claimant's body or property without authorisation.[83] Thus, in the case of battery, D touching C without their authorisation involves using something (C's body) over which only C is in charge.[84]

Beever gets to a similar conclusion regarding battery *via* a slightly different route. He defines battery as 'an intentional and unconsented to touching of another' and argues that bodily integrity is clearly not the central concept which underlies this tort.[85] This is because mere touching can suffice for a battery, and in cases like this where there is no injury, Beever thinks it misleading to say that the *integrity* of someone's body is at stake.[86] Based on the discussion above, we can note that there is already a reason to be sceptical of Beever's argument here – his disavowal of bodily integrity is premised on a literal interpretation, without countenancing the idea that 'integrity' is operating in this context in a metaphorical way.[87] Nonetheless, having rejected bodily integrity on this basis, Beever says that a better way of understanding battery is that it protects 'one's entitlement to control the use of one's own body'.[88] Like Ripstein, the idea behind this is that each person's body is their own, such that it is only the individual who has 'the power to choose the purposes to which it is put'.[89]

Although attractive for their simplicity, these Kantian accounts do not adequately explain the battery tort. As Scott Hershovitz has persuasively argued, critiquing Ripstein's position in particular, the central difficulty is with the idea that tort law views *any* use of a person's body (or at least any touching), absent their authorisation, as wrongful.[90] There are, Hershovitz

points out, a variety of situations where somebody's body is touched without authorisation which are clearly not wrongful in tort law. This includes the range of contact we are subject to in our day-to-day lives (or at least pre-pandemic lives) e.g. jostling on a crowded bus.

It is tempting to argue that jostling and other cases can be accommodated within Ripstein and Beever's account by saying that we authorise this contact through our implied consent.[91] But consent, implicit or explicit, clearly does not tell the full story here. To use an example proffered by George Letsas, a passenger holding a sign on a crowded bus saying 'I do not consent to being touched' does not by this act render all jostling impermissible.[92] And indeed, courts have repeatedly emphasised that there are factors other than consent which make certain touching a battery – in some cases, courts have focused on the 'hostility' of the defendant's conduct;[93] in others, the key point is whether touching is not acceptable in the 'ordinary conduct of daily life'.[94]

As Hershovitz explains, the reason why Ripstein's approach cannot explain these basic features of battery (and the same point can be made of Beever's position as well) is the reliance on the notion that all of tort can be underwritten by one grand principle that no person is in charge of another. In taking this approach, 'Ripstein categorically rejects the idea that the rights tort law accords us are explained by the *interests* those rights serve. Indeed, he denies that the rules of tort reflect an effort to reconcile competing interests'.[95] Properly understood, interests precede the institutional rights that tort law recognises.[96] In recognising torts, judges are deciding what interests of ours are worth protecting, and they are engaging in a complex process of balancing those interests against the interests (private and public) of others.[97]

The principle that somebody else cannot use your body without authorisation is not, therefore, convincing as a singular encapsulation of the battery tort. At the same time, Ripstein and Beever's thinking around battery can assist us in an important way. What I want to suggest, even though it is something clearly incompatible with their broader accounts, is that Beever and Ripstein's approaches help to articulate an important interest we have as individuals – the interest which we commonly refer to as our 'bodily integrity'.

Bodily integrity, taking this view, is about us being in charge of our bodies; it is our interest as individuals in having an exclusive say over the purposes to which our bodies are put.[98] To have one's bodily integrity interfered with, in turn, is to have one's body put to somebody else's purposes. This idea does a remarkably good job of capturing the way we use the term bodily integrity throughout philosophical and legal

discourse. In particular, it strikes at the metaphorical way 'integrity' is operating in this context, identifying what is commonly at issue when a doctor non-consensually transplants someone's organs and when a person encounters slight unwanted contact. In these cases and others, the concern is that the person's control over their body is being compromised; their body is being put to the purposes of someone else.

### 3.3 Bodily integrity interferences beyond 'touching the body'

This approach to bodily integrity has the resources to capture more complicated scenarios as well. Earlier in the discussion, I noted that there are situations such as tampering with a wheelchair that most would consider an interference with bodily integrity even though the 'body', literally understood, is not being touched. These are not factual patterns which Ripstein or Beever consider in their dedicated discussions of tort law, but it is a point Ripstein contemplates within other work on Kant's *Doctrine of Right*.[99] There, Ripstein elaborates on his understanding of bodily rights, arguing that interferences with things outside your body can constitute an interference with the body when you are using or in physical possession of those things.[100] This, for Ripstein, explains why it is a bodily interference to touch someone's clothes when they are wearing them, but not when the clothes are not being worn. And he applies similar logic to interferences with prosthetic limbs or wheelchairs. When they are in use, to interfere with the limb or wheelchair is to interfere with the person themselves. These elaborations can be helpful when they are understood as articulating the nature of our interest in bodily integrity. In such situations, a person's body is the subject of the interference – it is being put to the purposes of someone else, even if there is no touching of the flesh itself.

Where matters really seem to get interesting for present purposes is when we think about situations not involving touching at all. Watching, listening or even sniffing someone against their wishes seem to me clearly to be cases which drive at the same interest. Though these types of interferences are not discussed by Ripstein or Beever, the objection in these scenarios ultimately comes down to the same point.[101] When someone is being spied on in the shower, the fundamental reason for their concern is that their body is being put to another person's purposes. To be sure, the means through which this interference is occurring is different to touching, because the perpetrator is using their eyes and ears. The important point to recognise, however, is that regardless of whether there is contact or not, the individual's body is the subject of the perpetrator's

interference. Control over the individual's body is being compromised because their body is being put to the purposes of someone else.

To be clear, the claim here is certainly not that all instances of watching or listening to someone against their wishes are necessarily wrongful. In the same way that a person can be jostled on a bus without this constituting a wrong which tort law recognises, there may be a whole host of situations, such as an artist sketching a portrait of a passerby,[102] where a person is non-consensually watched or listened to which are not *generally* wrongful.[103] The qualification 'generally' is important here because the precise context will matter. For instance, sketching a picture of an adult in public is permissible in most cases, but the same may not be true if a detailed sketch is taken of a young child (or perhaps even if the artist takes up their easel at a swimming pool). The key, when assessing various situations, is to note that not all interferences with a person's interests necessarily represent wrongs. Rather, as noted above, the recognition of wrongs in tort is a complex process, where courts engage in a nuanced process of working out which interests of ours to protect and balancing our interests against the interests of others.

## 4. Physical privacy as an aspect of bodily integrity: theoretical and legal implications

### 4.1 Revisiting the concepts of physical and informational privacy

Armed with this richer understanding of bodily integrity, and particularly the idea that a person's bodily integrity can be implicated by watching, listening to or otherwise sensing someone, we can return to the concepts of physical and informational privacy. Moreham, it will be recalled, defines physical privacy in terms of unwanted physical access.[104] She says that it is a physical privacy interference to watch, listen or otherwise sense someone against their wishes.[105] And it is also a physical privacy interference to take photographs/recordings of someone against their wishes, or to disseminate such photographs/recordings to others. Informational privacy, on the other hand, is about unwanted informational access.[106] For Moreham, this encompasses collecting, storing or disseminating information about someone when they do not want this to happen.[107]

Based on the above analysis, it is suggested that physical privacy should be conceptualised as a subset of one's interest in bodily integrity. Specifically, it refers to a person's interest in controlling the circumstances

in which their body is touched, watched, listened to, or otherwise sensed (including *via* technological aids). I will shortly say a little more about what I mean by 'subset' here. The key takeaway, however, is that if a person's body is touched, watched, listened to or otherwise sensed without authorisation, it interferes with this interest. When this happens, the person's control over their body is compromised – their body is being put to the purposes of someone else. Informational privacy, by contrast, is a person's interest in controlling the use of information about themselves. This interest can be interfered with through the unauthorised acquisition, storage, or dissemination of information about someone. In such cases, it is information about the person, not their body, which is being put to somebody else's purposes.

These definitions of physical and informational privacy, it will be noted, bear key similarities to Moreham's account. And, in practical terms, what counts as a physical and informational privacy interference will in most cases be the same both on Moreham's theory and the account endorsed here. There are, however, five important points which should be noted about my specific approach.

The first point is about the connection between bodily integrity and physical privacy. When I say that physical privacy is a 'subset' or 'aspect' of bodily integrity, what I mean is that part of what it is to have control over your body is having control over the circumstances in which your body is touched, watched, listened to or otherwise sensed. This means that any interference with your physical privacy is an interference with your bodily integrity. But the same is not necessarily true the other way around, i.e., not all bodily integrity interferences are interferences with physical privacy. The key in physical privacy cases is that the interference with the body is *sensory*. There are a variety of other ways in which a person's body can be put to the purposes of someone else. For example, if someone is forced against their will to do hard labour, their body is clearly being put to another person's purposes. But the interference is not occurring *via* the senses, so it is not an interference with the subject's physical privacy. Physical privacy as a result is not simply reducible to bodily integrity. Rather, physical privacy marks out an aspect of it.

The second point is about whether it is a physical privacy interference to touch someone, just as it is to watch, listen to or sense them using other means. Moreham's account, it should be noted, appears to have developed over time on this issue. In earlier writings, touching is included within Moreham's definition of physical privacy,[108] but her later work does not deal with touching explicitly.[109] Part of what the above analysis has sought to show is that touching in and of itself is not

significant in marking out the scope of our interests. If a stranger sitting next to you in a theatre runs their fingers through your hair without consent, that seems to me clearly to interfere with your physical privacy, in the same way as if they had sniffed your hair instead without touching it. Touching is therefore included within my account of physical privacy.

The third point concerns sensing objects closely associated with someone e.g. sniffing someone's bedsheets when they are out of the house. Again, Moreham's early work suggests that physical privacy intrusions can involve sensing 'things closely associated' with a person,[110] whereas her later work does not deal with this point expressly. Based on what I have said above, it should be clear that interferences with things associated with someone are generally not an interference with a person's physical privacy, because it is an object not the person's *body* which is being put to another's purposes.[111] An exception is where the object is in use or connected to the person's body, such as the example of tampering with someone's wheelchair explored above.

The fourth point is about cases where someone is sensed via *technological aids* and the *subsequent viewing* of photographs/recordings. Whether these activities count as interferences with an individual's physical privacy is a difficult issue. On one view, it might be argued that such conduct cannot be a physical privacy interference when the interest is conceptualised in terms of bodily integrity. The body *itself*, it could be said, is not at issue in these cases; rather, the interference concerns an image or representation of the body. Such an interpretation, it is suggested, is overly narrow. Especially in a digital age, there is no principled distinction between viewing someone through a peephole or through a webcam, nor does it make a difference that a recording is made so that the person is viewed later in time. Part of what it is to exercise meaningful control over the circumstances in which one is sensed is to determine the conditions in which one is viewed or listened to, regardless of *when* or *how* this happens.

As a final point on my theoretical account, I should say something about timing. Very often, physical and informational privacy interferences will occur at different times: watching someone without authorisation will precede the unauthorised dissemination of information about them. That said, on my account, just like Moreham's, it could be the case in certain situations that a person's interest in physical and informational privacy is interfered with at the same time.[112] In particular, the unauthorised acquisition of information about someone can occur at the same time as unauthorised sensing. Importantly, however, we should not be confused into thinking that the line between the two is blurred as

a result. In respect of physical privacy, what is at issue is the person's *body* and the circumstances in which it is sensed. Whether information is gained by sensing someone's body and the nature of that information is immaterial to the specific question of whether one's physical privacy has been invaded, in the same way that any information gained by an assailant when they punch a victim in the face is immaterial to our assessment of the interference with the victim's body. Regarding informational privacy, what is at issue is the use of *information* about a person. Whether the person is sensed in order to use the information is immaterial to the specific question of whether one's informational privacy has been interfered with.

The overall picture that emerges is a clear sense of why physical and informational privacy are distinct. In contrast to Wragg, who views physical and informational privacy as somehow conceptually inseparable, the key insight of the above discussion is that physical privacy is different from informational privacy because it rests on a different normative foundation: our interest in bodily integrity. The subject of the interference is someone's body, rather than information about them. And the reason we have an interest in our physical privacy stems from a broader interest we have in not having our bodies put to the purposes of someone else.

## 4.2 Protecting physical privacy in tort: the way forward

What are the implications of this discussion for tort law? Only some brief remarks are possible here. I leave it to future work to develop these doctrinal claims more comprehensively.

First and most importantly, understanding the conceptual difference between physical and informational privacy allows us to see clearly that MOPI is an inadequate vehicle through which to pursue the legal protection of physical privacy. That action, from its inception, has been concerned with the *dissemination* of private *information*. And over time, the tort has developed in a direction where it seems that the *acquisition* of information is also within scope.[113] Based on the discussion above, it makes sense for MOPI to continue to move in this direction. A person's interest in their informational privacy concerns control over the use of information about them, which goes further than just the publication of that information.[114]

What we should move away from, however, is the idea that a cause of action focused on information is the right avenue for protecting non-informational interests. Of course, it may be true that an informational privacy action provides a degree of 'incidental' protection for physical

privacy. In particular, holding a defendant liable for the acquisition of private information will residually cover the physical privacy interference involved in any unauthorised sensing used to obtain that information. From a theoretical perspective, the difficulty is that any such incidental or 'back door' protection does not drive at the claimant's true objection. Indeed, it has the effect of reducing an interference with someone's body into an interference with information about them.

Perhaps more importantly, there will be a host of factual situations involving a physical privacy interference where no information is at stake at all, so there is not even the possibility of bringing a MOPI claim. One needs to look no further than Lord Nicholls' example in *Campbell* of a strip search to see that this is so.[115] Take a situation where a prisoner is subject to an unauthorised strip search, with the pure purpose of humiliating them and no justification on security grounds. In this type of case, it is very difficult to imagine the conduct ever being conceptualised as a use of private information.[116]

The better way of proceeding is to look to trespass to the person to protect our interest in physical privacy.[117] Here, there seem to be two ways litigants could look to fashion a claim in an appropriate case. The first, and to me most theoretically sound, way of proceeding would be to argue that the battery tort can be incrementally developed to encompass all forms of sensory interference, and not just situations where there is bodily contact.[118] The action, properly understood, is therefore available where there is an intentional interference with the claimant's physical privacy, subject of course to a qualification that there is no battery unless the defendant's conduct is 'hostile' or unacceptable in the 'ordinary conduct of everyday life'.

A second, alternative way of fashioning a claim would be to argue that a 'new' form of trespass to the person should be recognised where the means of interfering with bodily integrity occurs through senses other than touch. The overarching idea about tort law here would perhaps be that different forms of trespass to the person (battery, assault and false imprisonment) are all concerned with a claimant's interest in not having their body put to the purposes of someone else. The different torts simply represent different ways in which the claimant's body is 'directly' used by the defendant: battery is where the use occurs through actual bodily contact; false imprisonment concerns use through the prevention of movement; and assault is where the claimant is made to apprehend imminent bodily use through contact.[119] Adopting this position, the argument would be that using someone's body by watching or listening is a different method of bodily interference, and therefore requires the recognition of a new form of trespass.

Readers will naturally wonder about the place of Article 8 of the ECHR within this positive proposal. Since the enactment of the HRA, there has continued to be debate about the precise extent of the ECHR's impact on disputes *between private citizens* (the so-called 'indirect horizontal' effect).[120] On one commonly accepted view, the ECHR does not create any new causes of action, but if there is a relevant cause of action, courts are under a duty to interpret and apply the law compatibly with the ECHR.[121] In the case of physical privacy, this would certainly bolster an argument that the tort of battery covers different forms of sensory interference. The current approach to Article 8 incorporates a variety of activities involving unauthorised watching or listening.[122] This includes strip searches,[123] surreptitiously filming someone in a bathroom,[124] and bugging a prison cell or visiting area.[125]

As I see it, however, Article 8 is not necessarily required to see battery as encompassing cases where there is no touching. On the main argument I have presented, the claim is that battery protects all aspects of physical privacy and so, properly understood, can be engaged in factual situations involving unauthorised watching or listening. This logic bears similarities to the Supreme Court's reasoning in *R (Jalloh) v Home Secretary* where it was held that the tort of false imprisonment does not require physical barriers or restraint, so was available in circumstances where the claimant was subject to an unlawful curfew imposed by the Secretary of State, backed by electronic tagging.[126] Baroness Hale said: '[t]he essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various'.[127] Here, the court is appealing to the interest underlying the tort (i.e. 'its essence') and using it to explicate the proper scope of the action. No recourse to the ECHR was required.[128]

Finally, it should be noted that the pre-HRA case law contains hints that battery is a way of protecting unauthorised watching and listening, in certain circumstances. In the Court of Appeal's famous decision *Kaye v Robertson*, it was accepted that deliberate flash photography could be a battery if the effect of a camera's flashing light was to injure someone, cause them distress or otherwise damage them in some way.[129] On the facts, however, there was no battery as the necessary effects were not established.[130] There is, with respect, an obvious flaw in this reasoning: battery is actionable *per se*, which means that no proof of damage should have been required. Therefore, if a court were to revisit the matter, it could be argued that *Kaye*, understood correctly, is authority for the proposition that flashlight photography is sufficient to engage the tort regardless of effects. From that position, it would seem odd to then hold

that the law should treat flashlight photography differently from other forms of surveillance merely on the basis that the light shone on the claimant *via* the flash represents some form of bodily contact. To draw such an arbitrary distinction seems to misunderstand the nature of the interest which underlies the tort.

## 5. Conclusion

Given where I started this chapter, it would be remiss of me not to end without mentioning that the avenue suggested for the protection of physical privacy through battery is one that I think would also be available in Australia. Of course, unpacking this further is another task for another day, but there too the development of privacy law has been the subject of long-standing debate.[131] Indeed, progress has been even slower in Australia without the overlay of the HRA, and no standalone privacy tort has yet been developed. Seen through that lens, the development of MOPI in the UK is remarkable and welcome. But as this chapter has shown, we should not be lulled into thinking that informational actions are a panacea to all privacy problems. There is at least one aspect of individual privacy, our physical privacy, which is grounded in our bodily integrity and cannot be reduced to informational terms. Understanding the connection between physical privacy and bodily integrity is the key to unlocking this because it demonstrates that part of the answer to developing comprehensive protection of privacy has been staring at us from the common law all along. Or at least since our first few Tort classes anyway.

## Notes

1 My experience is not unique. As Peter Holland has observed, the play is 'so often the way children first encounter Shakespeare': William Shakespeare, *A Midsummer Night's Dream* (Peter Holland (ed), OUP 2008) 1.

2 Michael A Jones (ed), *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) para 1–26; Ken Oliphant, Donal Nolan and Mark Lunney, *Tort Law: Text and Materials* (6th edn, OUP 2017) 810; Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 135–36.

3 '[T]he least touching of another in anger is a battery': *Cole v Turner* (1704) 6 Mod 149 (Holt CJ). See also James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) para 4-009; Jones (n 2) para 14–09.

4 *Collins v Wilcock* [1984] 1 WLR 1172, 1177.

5 Assault is a form of trespass to the person not requiring bodily contact. As is well known, however, assault is parasitic on battery – the tort will only be made out where the claimant apprehends actual physical contact: see e.g. Christian Witting, *Street on Torts* (16th edn, OUP 2021) 266–67. I return to assault briefly below – see footnote 119 and accompanying text.

6 The tort is available where: (1) the claimant has a reasonable expectation of privacy in the information concerned; and (2) on a proportionality analysis, that expectation outweighs

a defendant's competing rights related to free expression: *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] 2 WLR 424 [47]. MOPI was recognised as a standalone tort in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003.

7 See NA Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73 CLJ 350, 361. Moreham's position is unpacked in section 2.

8 Moreham, 'Beyond Information' (n 7); Thomas DC Bennett, 'Triangulating Intrusion in Privacy Law' (2019) 39 OJLS 751, 752.

9 The fundamental link between MOPI and information is derived from the way the tort developed, not as a standalone privacy tort, but rather as an extension of breach of confidence to cover situations where there was no initial confidential relationship between the parties. Although MOPI has now been recognised as an independent tort and has developed a sophisticated jurisprudence in its own right, information remains at the heart of the action. This can be observed, for example, in the way the tort is expressed in the latest MOPI case to reach the Supreme Court: *ZXC* (n 6) [47]. There, the first stage of the two-stage test for MOPI is articulated as an enquiry into 'whether the claimant has a reasonable expectation of privacy in the relevant *information*' (emphasis added). And in later paragraphs (see e.g. [52]–[53]), the court refers repeatedly to the types of information which normally are and normally are not regarded as private.

10 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 [15], [21] (Lord Nicholls), [51] (Lord Hoffmann), [92] (Lord Hope), [134] (Baroness Hale), and [166] (Lord Carswell). See also Moreham, 'Beyond Information' (n 7) 359. In subsequent cases, particularly *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [2016] FSR 12 discussed below, there have been indications that MOPI no longer requires *dissemination*, and can be established by the *acquisition* of information alone. Importantly, though, there is no suggestion here that MOPI has transcended beyond cases involving information. On this point, see Bennett (n 8) 752–53, who persuasively argues that MOPI remains tethered to informational cases.

11 *Campbell* (n 10) [15] (emphasis in original).

12 Strip-searches would have been at the forefront of the judges' minds in *Campbell* given that only seven months earlier, the court had delivered judgment in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406. In *Wainwright*, the claimants (Mr and Mrs Wainwright) had been required to remove their clothes and were subject to a search when entering a prison. While one of the claimants, Mr Wainwright, had been touched and so could bring an action in battery, the House of Lords unanimously held that English law recognised no general tort of invasion of privacy. As such, there was no cause of action available to Mrs Wainwright.

13 An influential report at the time was the Calcutt Committee's review of English privacy law in 1990. There, the Committee referred to the significant issues with defining privacy when considering a statutory privacy tort. It said that those definitional difficulties were not insuperable, but only if the tort related specifically to the publication of personal information. In the end, however, the Committee decided against recommending a new tort: Home Office, *Report of the Committee on Privacy and Related Matters* (Chairman: David Calcutt, Cm 1102, 1990) paras 12.5, 12.9–12.18.

14 See particularly NA Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628; Moreham, 'Beyond Information' (n 7); NA Moreham, 'The Nature of the Privacy Interest' in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and The Media* (3rd edn, OUP 2016); NA Moreham, 'Compensating for Loss of Dignity and Autonomy' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing 2018). A central aspect of Moreham's approach was endorsed by Tugendhat J in *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB), [2011] EMLR 27 [85] which, in turn, was cited by the Supreme Court in *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081 [58].

15 Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' (2019) 78 CLJ 409.

16 Moreham, 'Privacy in the Common Law' (n 14) 636.

17 Moreham, 'Privacy in the Common Law' (n 14) 639–41; Moreham, 'The Nature of the Privacy Interest' (n 14) para 2.10.

18 Moreham, 'Privacy in the Common Law' (n 14) 640–43.

19 Moreham, 'Privacy in the Common Law' (n 14) 641–43; Moreham, 'Beyond Information' (n 7) 354.

20 Moreham, 'Privacy in the Common Law' (n 14) 640; Moreham, 'The Nature of the Privacy Interest' (n 14) paras 2.10, 2.29.

21 Moreham, 'Beyond Information' (n 7) 354.
22 Moreham, 'Beyond Information' (n 7) 354–55.
23 Moreham, 'The Nature of the Privacy Interest' (n 14) paras 2.53–2.87.
24 Moreham, 'The Nature of the Privacy Interest' (n 14) paras 2.55–2.64; Moreham, 'Compensating for Loss of Dignity and Autonomy' (n 14) 134–36.
25 Moreham, 'The Nature of the Privacy Interest' (n 14) paras 2.65–2.69; Moreham, 'Compensating for Loss of Dignity and Autonomy' (n 14) 136–40.
26 Moreham, 'Beyond Information' (n 7) 359–61.
27 The main development to traditional breach of confidence which Moreham relies on arises from the Court of Appeal's 2010 decision *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] 2 WLR 592. There, the Court held that information could be 'misused' for the purposes of breach of confidence without disclosure, through acquisition alone.
28 The most prominent MOPI case in this regard is *Gulati* (n 10), which was handed down after Moreham's main article on this issue: Moreham, 'Beyond Information' (n 7). In *Gulati*, a case concerning phone-hacking, it was common ground between the parties that MOPI does not require disclosure and could be established merely by obtaining private information. Given that the point was not in dispute, a further decision is likely required to clarify this issue.
29 Moreham, 'Beyond Information' (n 7) 361–62.
30 Moreham, 'Beyond Information' (n 7) 373–77.
31 As alluded to above (note 28 and accompanying text), *Gulati* was handed down after Moreham's main article, and proceeds on the basis that the acquisition of private information can be actionable under MOPI. There is no suggestion in this case, however, that MOPI has transcended beyond information: see note 10 above, citing the important analysis on this point in Bennett (n 8) 752–53.
32 Moreham, 'Beyond Information' (n 7) 374–75.
33 Moreham, 'Beyond Information' (n 7) 355.
34 Moreham, 'Beyond Information' (n 7) 355; Moreham, 'Privacy in the Common Law' (n 14) 649–51.
35 See e.g. Moreham, 'The Nature of the Privacy Interest' (n 14) para 2.64.
36 Moreham, 'Beyond Information' (n 7) 373–74; Moreham, 'Compensating for Loss of Dignity and Autonomy' (n 14) 131.
37 Moreham, 'Beyond Information' (n 7) 373–74.
38 Wragg (n 15).
39 These are the first two of the four privacy torts formulated by William Prosser: see William L Prosser, 'Privacy' (1960) 48 California Law Review 383, 389. The torts were effectively codified into US law *via* their incorporation in the American Law Institute's *Restatement (Second) of Torts*.
40 Wragg (n 15) 420.
41 Wragg (n 15) 409.
42 Wragg (n 15) 421.
43 Moreham, 'Beyond Information' (n 7) 355.
44 Wragg (n 15) 422.
45 Wragg (n 15) 421–22.
46 Wragg (n 15) 423–26.
47 Wragg (n 15) 425.
48 Wragg (n 15) 426–37.
49 Wragg (n 15) 427–29.
50 Wragg (n 15) 429, citing in particular the test laid down in *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 [36].
51 Wragg (n 15) 434–36.
52 Wragg (n 15) 420.
53 Wragg (n 15) 422.
54 Wragg (n 15) 411.
55 Wragg (n 15) 434–35.
56 Another term arguably used equivalently is 'bodily autonomy'. As discussed below (see note 98), this chapter does not address whether 'bodily integrity' and 'bodily autonomy' refer to the same concept.
57 See AM Viens, 'Introduction' in AM Viens (ed), *The Right to Bodily Integrity* (Routledge 2016).
58 Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990) 222 (emphasis omitted).

59 Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) 33.
60 Nussbaum (n 59) 33.
61 There are various international instruments which enshrine bodily or physical integrity as a fundamental right; e.g. Article 3(1) of the EU Charter of Fundamental Rights declares that '[e]veryone has the right to respect for his or her physical and mental integrity'.
62 Battery, as is well-known, is a crime as well as a tort. While the relevant principles are largely similar, the focus of this chapter is squarely on tort law.
63 In jurisdictions like the USA, this is primarily in the context of debates about refusing medical treatment and the right to die. See Jeffrey M Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* (OUP 2008) ch 8.
64 David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002) 241.
65 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266 [56].
66 Jones (n 2) paras 1–26.
67 *Collins* (n 4) 1177.
68 See Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76 CLJ 566, 566.
69 Richard J Mooney, 'Review of The Realm of Rights by Judith Jarvis Thomson' (1992) 90 Michigan Law Review 1569, 1574.
70 See AM Viens, 'The Right to Bodily Integrity: Cutting Away Rhetoric in Favour of Substance' in Andreas Von Arnauld, Kerstin Von Der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020) 368.
71 Herring and Wall (n 68) 566. This discussion focuses on bodily integrity in the medical context.
72 See Goudkamp and Nolan (n 3) para 4-009. The authors express the view that exposure to such materials is probably not sufficient, but note that the position is unclear. I return to the uncertainties around whether exposure to light in the context of flashlight photography is sufficient for battery in Section IV when discussing *Kaye v Robertson* [1991] FSR 62.
73 This is sometimes referred to as the 'liberal conception' of the body: see Viens (n 70) 367.
74 The European Court of Human Rights has had to consider at least one case dealing with a similar fact pattern, which in fact involved no touching at all. In *Price v UK* (2002) 34 EHRR 53, Judge Greve (in a separate opinion) said that '. . . to prevent the applicant, who lacks both ordinary legs and arms, from bringing with her the battery charger to her wheelchair when she is sent to prison for one week…is in my opinion a violation of the applicant's right to physical integrity'. This case is discussed at Herring and Wall (n 68) 574–75, 587.
75 'Integrity, n.', *OED Online* (OUP 2021) <https://www.oed.com/view/Entry/97366> accessed 23 August 2022.
76 'Integrity, n.' (n 75).
77 As discussed below, this appears to be the position adopted by Allan Beever.
78 See Nicholas J McBride, 'Review of Private Wrongs by Arthur Ripstein and A Theory of Tort Liability by Allan Beever' (2017) 76 CLJ 464, 464–65. As McBride notes, Ripstein and Beever are not the first to conceptualise tort this way, but their accounts represent the clearest presentation of the Kantian position.
79 In this chapter, I make no claim about whether there is *any* grand or universal picture which explains the whole of tort. Broadly, however, I am sceptical of attempts to explain all of tort by reference to a single idea. On the difficulties with grand unified theories of tort, see Scott Hershovitz, 'The Search for a Grand Unified Theory of Tort Law (Review of Private Wrongs by Arthur Ripstein)' (2017) 130 Harvard Law Review 942; James Goudkamp and John Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21 Legal Theory 47.
80 Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 6.
81 Ripstein (n 80) 30.
82 Ripstein (n 80) 30, 39.
83 Ripstein (n 80) 46.
84 Ripstein (n 80) 46–47.
85 Allan Beever, *A Theory of Tort Liability* (Hart Publishing 2016) 49.
86 Beever (n 85) 49.

87 Elsewhere, Beever makes it explicit that this is the understanding of bodily integrity he is adopting: Allan Beever, 'What Does Tort Law Protect?' (2015) 27 Singapore Academy of Law Journal 626, 632–34. It should be noted that Beever (at 634) briefly considers that he has taken too narrow an interpretation of bodily integrity. Even then, however, the alternative he considers is bodily integrity as freedom from moral corruption, not that the word 'integrity' means 'whole' or 'complete' in a metaphorical sense.
88 Beever (n 85) 50.
89 Beever (n 85) 50.
90 Hershovitz (n 79) 949–52.
91 While Ripstein does not consider such examples in *Private Wrongs*, this is the approach adopted by Beever: see Beever (n 85) 75–76.
92 George Letsas, 'Reclaiming Proportionality: A Reply to Arthur Ripstein' (2017) 34 Journal of Applied Philosophy 24, 26. See also Hershovitz (n 79) 950–52.
93 *Wilson v Pringle* [1987] QB 237, 252–53. See also Goudkamp and Nolan (n 3) para 4-011.
94 See *Collins* (n 4) 1177–78.
95 Hershovitz (n 79) 948 (emphasis added). For a critique along similar lines, see Gregory C Keating, 'Form and Substance in the "Private Law" of Torts' (2021) 14 Journal of Tort Law 45, 60–69.
96 Hershovitz (n 79) 957–63.
97 Hershovitz (n 79) 960–61.
98 An issue which is not addressed in this chapter is whether 'bodily integrity' understood in this way relates to or is different from 'bodily autonomy'. Stated shortly, my view is that bodily integrity and bodily autonomy are essentially equivalent. Bodily integrity, however, is a better label in part because of the varying senses in which the term autonomy is used.
99 See Arthur Ripstein, 'Embodied Free Beings under Public Law: A Reply' in Sari Kisilevsky and Martin J Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017), replying to a criticism advanced by Japa Pallikkathayil, 'Persons and Bodies' in Sari Kisilevsky and Martin J Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017).
100 Ripstein (n 99) 189–90.
101 In his critique, Hershovitz applies Ripstein's theory to the US tort of intrusion upon seclusion and contemplates that watching someone can clearly be a use of the body: see Hershovitz (n 79) 953–54. He thinks that position would be subject to the same criticism which I outlined and endorsed above.
102 I am grateful to Nick McBride for raising this example. For related discussion of a similar case see Andrea Sangiovanni, 'Rights and Interests in Ripstein's Kant' in Sari Kisilevsky and Martin J Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017) 84ff. According to Sangiovanni (who argues that Ripstein's Kantian view is lacking because it does not appeal to interests), the reason why a portrait artist commits no wrong is because we do not have a sufficiently strong interest in controlling who draws us in public.
103 It might be objected that jostling on a bus and an artist sketching a portrait are not comparable cases because jostling is *prima facie* wrongful (but permissible because touching 'in the ordinary conduct of daily life' is a defence) whereas the artist's conduct does not rise to this level. As should hopefully be clear from the above, I reject such a distinction (and the idea that the 'ordinary conduct of daily life' qualification is a defence to action which is *prima facie* wrongful). As I see it, the jostling and portrait case are structurally identical. In each case, there may be an interference with an individual's interest, but the relevant conduct is not wrongful in the first place.
104 Moreham, 'Privacy in the Common Law' (n 14) 640–41, 649; Moreham, 'Beyond Information' (n 7) 354.
105 Moreham, 'Beyond Information' (n 7) 354–55.
106 Moreham, 'Privacy in the Common Law' (n 14) 640–41.
107 Moreham, 'Privacy in the Common Law' (n 14) 640; Moreham, 'Beyond Information' (n 7) 354.
108 Moreham, 'Privacy in the Common Law' (n 14) 640.
109 See e.g. Moreham, 'Beyond Information' (n 7) 354.
110 Moreham, 'Privacy in the Common Law' (n 14) 640, 649.
111 To be clear, the claim here is not that sensing things closely associated with someone can never be considered a privacy invasion. The point is simply that these activities do not generally represent an interference with the individual's physical privacy. Moreover, unlike Moreham,

I do not subscribe to the view that physical and informational privacy are together necessarily exhaustive of individual privacy. Indeed, in this chapter at least, I do not seek to offer any grand or overarching theory of privacy generally.

112 Moreham, 'Beyond Information' (n 7) 355.

113 As noted at n 28 above, the main decision to this effect is *Gulati* (n 10).

114 This is consistent with the position taken by the Australian Law Reform Commission: see Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era: Final Report' (2014) paras 5.37–5.39, 5.43–5.45.

115 *Campbell* (n 10) [15].

116 A further group of cases where it is difficult to envisage a MOPI claim is where there is a serious physical privacy interference but no 'new' information is acquired by the defendant. These types of scenarios are contemplated in Moreham, 'Privacy in the Common Law' (n 14) 649. Here, Moreham considers examples like a perpetrator training a telescope on his ex-partner's bedroom so he can watch her getting changed. As Moreham points out, the perpetrator obtains little 'information' in this type of situation – he knows exactly what his ex-partner looks like naked, what clothes she has and so on. Yet, there is still a serious interference with the claimant's physical privacy.

117 This is also better than alternatives of pursing physical privacy protection through property torts such as nuisance. The Court of Appeal recently rejected such an approach in a case involving overlooking: see *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104, [2020] Ch 621. At the time of writing, that decision is subject to a Supreme Court appeal.

118 Such a development, it should be noted, would arguably be no more radical than dropping the informational constraint in MOPI. As noted above, information is central to the way MOPI has developed and operates in practice. Battery, moreover, is the preferable vehicle for protecting physical privacy given that it has always been specifically concerned with protecting against *bodily* interferences.

119 At first glance, it is difficult to see assault as a method of 'using' of the body in the relevant sense. Perhaps one way of rationalising the tort within this structure is that the law is not only concerned with protecting our interest in not having our bodies actually interfered with – it also seeks to protect a parallel interest in being 'assured' that we will not be subject to bodily interference. That we have interests of this kind is discussed by TM Scanlon, attributing this idea to John Stuart Mill: see TM Scanlon, 'Rights and Interests' in Kaushik Basu and Ravi Kanbur (eds), *Arguments for a Better World: Essays in Honor of Amartya Sen: Volume I: Ethics, Welfare, and Measurement* (OUP 2008) 74.

120 NA Moreham and Tanya Aplin, 'Privacy in European, Civil and Common Law' in NA Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and The Media* (3rd edn, OUP 2016) paras 3.37–3.39.

121 This was the position taken by Baroness Hale in *Campbell* (n 10) [132], and apparently common ground between the parties in that case.

122 See Moreham, 'Beyond Information' (n 7) 355–58; NA Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination' [2008] European Human Rights Law Review 44, 49–62.

123 e.g. *Wainwright v United Kingdom* (2007) 44 EHRR 40.

124 e.g. *Söderman v Sweden* (2014) 58 EHRR 36.

125 e.g. *Allan v United Kingdom* (2003) 36 EHRR 12.

126 *R (Jalloh) v Home Secretary* [2020] UKSC 4, [2021] AC 262.

127 *Jalloh* (n 126) [24] (Lord Kerr, Lord Carnwath, Lord Briggs and Lord Sales agreeing).

128 In *Jalloh*, the Secretary of State had argued that the scope of common law imprisonment should be limited by reference to the Article 5 jurisprudence on deprivation of liberty. Baroness Hale rejected that argument, saying that the 'common law is capable of being developed to meet the changing needs of society': *Jalloh* (n 126) [33]. She went on to quote Lord Toulson in *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [133] who said that 'it was not the purpose of the Human Rights Act that the common law should become an ossuary'.

129 *Kaye* (n 72), 68 (Glidewell LJ (Bingham LJ and Leggatt LJ agreeing))

130 *Kaye* (n 72) 69.

131 For a recent discussion explaining the Australian position and arguing that the High Court has left the door open for the development of a privacy tort, see Jelena Gligorijevic, 'A Common Law Tort of Interference with Privacy for Australia: Reaffirming ABC v Lenah Game Meats' (2021) 44 UNSW Law Journal 673.

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10

# A human rights perspective on the illegality defence

Edit Deutch*

## 1. Introduction

The 'illegality defence' (or 'illegality principle'), which can relieve a defendant of liability in cases where a cause of action arises out of a claimant's wrongful conduct, has been the topic of much debate and controversy over the past two centuries.[1] Doctrinal and theoretical disagreement have led to significant uncertainty as to the scope and application of the defence,[2] but the Supreme Court's decision in *Patel v Mirza*[3] has marked a turning point. *Patel* introduced a discretionary 'judgment based' approach,[4] moving away from the 'reliance' rule-based model applied in the earlier House of Lords' decision in *Tinsley v Milligan*.[5] Nonetheless, the new approach in *Patel* leaves significant room for further development. The 'range of factors' rule established by *Patel* is partial and vague,[6] and leaves many questions unanswered;[7] nor have subsequent decisions[8] provided clear guidance as to how this test should be applied.

This chapter presents a new perspective on the illegality defence and its application, which draws on human rights laws that protect people from being unjustifiably deprived of their property by the state. The cornerstone of the proposed model is that the application of the illegality defence by a court should be understood as the state depriving a claimant of her property (the claimant's cause of action) for a public purpose. This human rights perspective, if adopted, would constrain the scope of the

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application of the defence, requiring its adaptation to the contours of a legitimate intrusion into the human right to property. This approach could be integrated into the discretionary framework adopted by *Patel*, and the judicial discretion which the defence incorporates made subject to this constraint on the exercise of state power.

Section 2 provides a general outline of this model. Section 3 discusses several doctrinal complexities of the illegality defence and the benefits of applying the proposed human rights-based model. Lastly, section 4 discusses the application of the model to the turpitude factor.

## 2. The general outlines of a human rights perspective on illegality

The illegality defence is founded on public policy considerations rather than corrective justice. Where a claim is barred by illegality this is inconsistent with the requirements of corrective justice, as the defendant is released from liability despite the fact that the claimant would otherwise have been entitled to a remedy.[9] The defendant, by escaping liability, benefits from an incidental windfall.

As explained in *Holman*:

> If, from the plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.[10]

What I argue in this chapter is that the illegality defence functions to (entirely or partially) deprive a claimant of property (the claimant's cause of action) and this deprivation is brought about by the state (via the judiciary) for a public purpose (the public goals which this defence furthers). My argument is based on the view that the illegality defence functions as a legal rule 'external' to a cause of action, which relieves the defendant of liability. As the right to property is a legally protected human right, understanding the defence in this way opens the door for the consideration of legal rules which protect the right to property by restricting the state's power to deprive people of their property.

Labelling the illegality defence an 'external' factor is not self-explanatory and so requires clarification. The label relies on the

distinction between 'defences' (rules relieving a defendant of liability where all the elements of a cause of action are present) and 'denials' (negations of an element of a cause of action), which has been developed in academic literature.[11] Illegality is best understood as a 'defence', rather than a 'denial'.[12]

Scholars have argued that rather than characterising the illegality defence as either a 'defence' or 'denial' it should be understood as an 'exception'.[13] Characterising the illegality defence in this way is not necessarily inconsistent with understanding it as an 'external' mechanism.[14] However, it should be noted that understanding the illegality defence as instead operating as a 'standing rule'[15] has been rejected in the legal literature.[16]

Characterising the illegality defence as a defence, and not a denial, from which it follows that it is best understood as being 'external' to the claimant's cause of action, is well supported.[17] The illegality defence is available as a defence to all private law causes of action and serves as a general unified principle which applies to all causes of action. While the specific *application* of this general defence is influenced by the cause of action which is barred, the basic rules of the defence are universal to every private law cause of action, consistent with the view that illegality is not an 'internal' element of any specific cause of action. In this respect illegality can be compared to estoppel, another generally available defence to causes of action in private law.

There are circumstances in which the claimant's unlawful conduct prevents a cause of action from arising. In these circumstances nothing that can be characterised as 'property' emerges and so no question arises of the claimant losing such 'property'. To illustrate, a claimant's illegal conduct may lead a court to conclude that the defendant owed the claimant no duty of care with the result that no claim in the tort of negligence will arise.[18] What functions as a denial of the claimant's cause of action in these circumstances is not the 'illegality *defence*'. Rather the claimant's unlawful conduct is just *a fact* to be considered when examining whether one of the elements of the relevant cause of action has been established by the claimant, and so it is 'internal' to the cause of action. The illegality defence, by contrast, functions to relieve the defendant of liability despite the claimant having established the elements of her cause of action and, as such, is best understood as 'external' to the cause of action.

In any event, even if circumstances in which the claimant's illegal conduct functions as a denial are understood as forming part of the illegality defence, this chapter restricts its analysis to circumstances in

which the claimant's unlawful conduct relieves the defendant of liability despite the claimant having made out a cause of action.

A cause of action may serve as protected property under the Human Rights Act 1998, in light of section 1 to the first Protocol of the European Convention on Human Rights.[19] Contractual rights and causes of action in private law, having an economic value, can, in principle, be classified as 'possessions', according to English case law.[20]

Defining a cause of action which has not yet been successfully pursued through the court system as 'property', however, raises issues. Success in court is not guaranteed and the classification of a mere expectation as a 'possession' is problematic.[21] Nonetheless, courts have held that a cause of action can be understood to be a 'legitimate expectation' and can be defined as a 'possession' even prior to a judicial decision that the claim should succeed,[22] although a definitive position on this issue has not yet developed.[23] Some decisions of the European Court of Human Rights and the European Commission on Human Rights[24] indicate that undecided claims can usually be viewed as protected 'legitimate expectations' as long as there is 'sufficient basis' for the claim[25] or the claim has a high chance of success.[26] But, in any event, in the illegality context there is no need to decide this issue. If no cause of action has emerged, the illegality defence will be irrelevant as there will be no cause of action to be barred by it.

Several objections may be raised to the human rights-based perspective on the illegality defence put forward here. The first objection relates to the accurate definition of the object of which the claimant is deprived by the application of this defence. In other words, does the claimant lose her cause of action or her remedy? A cause of action is defined as 'a group or aggregate of operative facts giving ground or occasion for judicial act'[27] and as 'the instrument or vehicle for getting to the remedy'.[28] The illegality defence refers to the claimant's entitlement to be assisted by the court in realising her rights and thus it should be conceived as depriving the claimant of her cause of action, namely the right to be assisted by the court in obtaining the remedy in issue.[29]

A second objection is based on the fact that when the state takes an asset for a public purpose, this purpose is commonly pursued through the subsequent use of the asset by the state. In the illegality context, the asset (the cause of action) is 'destroyed', or, alternatively should be conceived as transferred to the defendant, as the defence relieves her from liability. Against this, however, it can be observed that the courts have found that a legitimate state deprivation can be performed through the destruction of an asset[30] or the transfer of the deprived asset to private parties if this step is directed at promoting the public interests in play.[31]

A third objection which merits consideration comes from the thought that if the illegality defence is best conceived as an act of state deprivation for a public purpose, then it would seem to follow that other defences, such as limitation or acquiescence, should be similarly construed. Illegality is however distinguishable from these defences as it is a defence based entirely on the public interest and is inconsistent with considerations of corrective justice (as noted above). By contrast, these other defences aim to promote solely (or at least, mainly) corrective justice. For example, the defence of limitation is granted primarily due to the difficulties a defendant (or a potential defendant) would face if she were to be required to produce evidence after the elapse of a long period of time and the need to protect the defendant's reliance interest. Where the claimant delays the submission of a claim for an extended period, the debtor is likely to assume that she is no longer exposed to the risk of incurring liability and her reliance on this assumption should be protected. The potential implications of the human rights perspective on other defences besides illegality, which are based on public interests rather than on corrective justice, require separate analysis.

The application of the illegality defence deprives the claimant of her property for a public purpose. The deprivation is made by the state via the judiciary. All public authorities are bound by the Human Rights Act 1998 and section 6(1) of this Act provides that: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Section 6(3)(a) of this Act includes courts within the definition of a 'public authority' and so the judiciary is bound by these human-rights obligations and limitations.[32]

Defining the rationale for the illegality defence plays a crucial role in the implementation of the relevant tests. When considering the application of the illegality defence, this rationale reflects the public interest, the fulfilment of which has to be considered and weighed against the infringement of the claimant's right to her property. A number of sources[33] including *Patel*[34] and later decisions[35] define the purpose of the illegality defence as being to maintain the integrity of the legal system (referring mainly to the consistency of legal norms). I will return to this rationale when discussing criminal turpitude below.

The 'integrity of the system' rationale is a general goal which does not, on its own, supply clear criteria for consideration in the application of the defence. Obviously, the very fact that a claimant's unlawful act contributed to the accruing of her cause of action cannot suffice to produce the conclusion that the claim contradicts the criminal law. Such a view would be considered as advocating an approach quite similar to the 'outlawry' concept, strange to any liberal society.[36] Where a civil action

would have the effect of shifting a sanction imposed on the claimant by a criminal court onto the defendant this is clearly inconsistent with criminal law. However, this is a feature of only a minority of cases.[37] In most circumstances, the criminal law does not refer to the implications of the offence on a civil claim which had accrued in favour of the offender. Unless the purpose of the illegality defence is more clearly defined than simply as maintaining the integrity of the legal system its application will remain intuitive and vague.

The 'integrity of the system' concept relies in fact on three distinct rationales. These rationales are the following: deterring wrongdoing, preventing people profiting from their own wrongdoing, and maintaining the integrity of the courts and the public confidence in them. These are the main 'building blocks' of the 'integrity of the legal system' explanation of illegality.[38] Granting a civil remedy may undermine criminal norms if it diminishes their deterrent effect, enables the offender to profit from her own offence or harms the public trust in the judiciary.

Needless to say, if the criminal norm which had been infringed explicitly or implicitly aims to deny a civil claim, such a directive should be followed. This is also the case with circumstances in which a civil claim would have the effect of shifting of a criminal sanction imposed on the claimant onto another person.

The human rights perspective is justified on its merits, given the need to provide appropriate safeguards to the right to property in a liberal democracy. It also includes important 'working tools', which include the three sub-tests of proportionality: appropriateness,[39] necessity[40] and the cost–benefit balance.[41] The cost–benefit test compares the harm inflicted by the specific norm to the human right (the 'cost') to the public benefit which the norm generates. The values, rights and interests in question are incommensurable, as there is no common metric by reference to which they can be compared[42] and this leads to practical difficulties in its application. Notwithstanding the practical difficulties, however, the cost–benefit test serves as a central device for judicial review of state interference with human rights, including the right to property, and courts have developed criteria for its application.[43]

It should be emphasised that in the context of the illegality defence, a court is not restricted to applying the normal safeguards which can be found in human rights law but may optimise the features of these safeguards. The illegality defence is a non-statutory open-ended legal principle, developed by the judiciary itself, rather than by a separate state authority. This being the case, the restraints usually imposed on the court while reviewing the constitutionality of governmental acts, due to the

principle of the separation of powers, do not apply in the context of this defence. The court may thus adopt a policy that promotes the protection of the right to property that goes beyond the regular limitations of human rights review.

## 3. Deficiencies of the current model and the possible contribution of a human rights perspective

In this section, I will focus on the challenges related to the illegality defence which I identify below. I will explain how the human rights-based approach which I have developed can contribute to their resolution. The challenges which I will discuss are:

(a) Present case law is not sensitive to the human rights framework and does not take into consideration how the illegality defence can infringe the human right to property.
(b) Where the defendant is released from liability by the illegality defence this provides her with an unjust windfall; this aspect should be given a proper weight in the development of the doctrine.
(c) Barring the claimant's cause of action may in certain circumstances result in a type of 'double punishment' or 'double sanction', amounting to an 'overkill' response of the law to the claimant's actions.
(d) Illegality is applied by the courts to tortious claims when the justifications for such application are doubtful.
(e) The present case law does not provide a consistent and systematic model for the application of the illegality defence, which contributes to the legal uncertainty in this area.

### 3.1 Lack of sensitivity to the human rights perspective

Barring a cause of action through the illegality defence amounts to a state deprivation of property for a public purpose. Although *Patel* established a wide discretionary framework based on a 'range of factors', the human rights perspective and its implications were not considered there. This is unfortunate both because it entailed a failure to respect the claimant's right to property and because it failed to make use of the relevant concepts which can be found in human rights law.

Where the claimant has engaged in criminal conduct, the fact that the claimant had committed an offence, even if it was a grave one, should not expose her property to deprivation by the state without any

restrictions. As mentioned, outlawry is not an acceptable approach to illegality in a liberal democratic society.[44] While the fact that the claimant committed an offence may justify, in appropriate circumstances, the barring of a claim, the identification of such 'appropriate' circumstances should be made in a manner compatible with the human rights protection of the right to property and, in particular, the need to strike a balance between the claimant's right to her property and the opposing public interest.

It should be noted that although *Patel*[45] referred to proportionality as one of the factors which should be examined, the Supreme Court attributed to this factor a different and much more limited role than its role under the human rights perspective on illegality outlined here. *Patel* did not consider human rights jurisprudence on the right to property. As clarified in *Henderson*,[46] the role of the proportionality factor according to *Patel* is simply to avoid an 'overkill' of sanctions against the claimant.

The Supreme Court in *Henderson* found that the proportionality factor would be relevant only in cases in which the other factors lead to the application of the illegality defence. Accordingly, the Court explained that in many cases it would not be necessary to examine this factor at all.[47] In contrast to this approach, the human rights perspective on illegality outlined here uses the proportionality concept as the central pillar of the proposed model and incorporates its three sub tests. All the factors which may influence the result are examined through the prism of this concept.

In addition, the contents of the proportionality notion have been developed in a systematic manner through a rich stream of authority in human rights jurisprudence. Since the Supreme Court in *Patel* did not consider human rights law to be relevant, it did not refer to this line of authority; nor has it been considered in the subsequent case law.

### 3.2 A windfall for the defendant

Barring a claim on the grounds of illegality releases the defendant from her obligations, regardless of any demands for corrective justice between the litigating parties. Although it may seem that this is simply a price to be paid by the legal system in exchange for the advancement of public interests, so that there is nothing more to be said about the matter, the paying of this price can (and should) in fact be regulated by applying the legal rules which govern state deprivations of property.

First, as mentioned above, the third sub-test of proportionality examines the cost–benefit balance (comparing the cost incurred by the

person whose human right has been infringed and the benefit to the public produced by application of the illegality defence). While assessing the public benefit deriving from the application of the illegality defence, a court should consider the *aggregate* benefit. Releasing the defendant from her liability, through the application of the illegality defence, creates incentives to breach obligations and has a negative impact on the public interest. Promoting the fulfilment of obligations is essential to promote trade and economic efficiency. Releasing the defendant from liability is especially problematic where the defendant cooperated in the claimant's wrongdoing. The negative impact on the public interest in people performing obligations enforceable through civil actions should be taken into account when determining the public benefit which is to be balanced against the cost (the infringement of the claimant's right to her property). Thus, the relevant public benefit, where the deterrence aspect is being assessed, should be understood as the benefit to the deterrence factor deriving from barring the claim due to the claimant's wrongdoing minus the deficit to deterrence, stemming from releasing the defendant from the obligations she owes to the claimant.[48] This mode of 'calculation' is likely to lead in many cases to a relatively lower aggregate deterrence, thus militating against the application of the illegality defence.

Secondly, in the criminal context, the alternative means of civil forfeiture of the cause of action may also be available.[49] Applying this measure will prevent the deficit to the public interest (of failing to promote the enforcement of civil obligations), as the state will be able to enforce the forfeited cause of action against the defendant. The forfeiture order will serve as an assignment by operation of law of the cause of action from the creditor to the state, and the state (rather than the original claimant) will be entitled to enforce the claim against the defendant. Despite this, the 'necessity' sub-test of proportionality does not prefer forfeiture over the application of the illegality defence. This test requires the state to refrain from adopting a measure infringing a human right, if less harmful means, providing a similar benefit, can be found. In the present context, the harm to the claimant arising from the application of each of these mechanisms is likely to be of similar magnitude. As noted above, courts would be free to adapt the test and 'optimise' it for application within the context of the illegality defence.[50] This would mean not only that the benefit to the public interest should exceed the cost but also that the solution should be preferred that provides the best possible surplus between the benefit and the cost. The forfeiture mechanism obviously provides a higher surplus than the surplus which the illegality defence is likely to generate, as the costs are equal, but the benefit is greater under the forfeiture mechanism.

A human rights perspective supports the conclusion that forfeiture should be preferred, in principle, over the application of the illegality defence. Yet, for practical reasons, the enforcement authorities initiate forfeiture proceedings only in some of the relevant cases. Where a forfeiture order has already been issued, the application of the illegality defence becomes irrelevant as the cause of action will be possessed by the state. In other cases, where submitting a petition for a forfeiture order is considered by the relevant authorities, a court should act in order to facilitate forfeiture by, for example, delaying proceedings.

### 3.3 The need to prevent 'double sanction'

The application of the illegality defence may impose a problematic double sanction on the claimant by exposing her to a criminal or private law liability as well as deprivation of her cause of action against the defendant. As detailed below, the human rights framework advocated here, which examines the '*marginal* benefit' to the public interest stemming from the illegality defence (rather than the absolute benefit), may provide an appropriate mechanism for avoiding such unjust results.

The human rights jurisprudence prescribes that the 'cost' of a norm (in terms of the harm inflicted) should not be balanced against its 'benefit' in absolute terms. Rather, what matters is the balance between the 'marginal' cost imposed by the infringement of the human right and the 'marginal' benefit derived from promotion of the public interest by the given norm.[51] As detailed below, this insight enables (and dictates) that a court should take into consideration the other existing sanctions, when determining the relevant 'marginal benefit' of a norm which imposes a sanction.

In order to determine the 'marginal' public benefit which derives from an application of the illegality defence, we have to first identify the relevant 'intensity' of the public benefit on the facts of the case. It may be argued that the intensity of the public goals of illegality should never be limited. Ostensibly, any legal system endeavours to maximise the level of the integrity of courts, maximise respect to moral values and maximise the deterrence of wrongful behaviour. However, these considerations do not operate in a social vacuum. They are part of a general set of social policies and values. The need to consider the entire matrix of social goals dictates a more balanced determination of the goals of the illegality defence, so that the law should aspire to achieve the 'optimal' (rather than the 'maximal') level of compliance with its demands.

Take, for instance, the public interest in deterring persons from engaging in criminal behaviour. While considering the proper penalty

for theft of an item worth a minor sum, a sentence of imprisonment for life is likely to have a greater deterrent effect than the deterrence which sentences consistent with the present law achieve. Despite this, no modern democratic liberal legal society would consider a life sentence to be an appropriate penalty for theft in these circumstances. Not only would this constitute a grave infringement of the thief's human rights, but it would also undermine the system of applying criminal punishments, the severity of which is rationally related to the gravity of the offence committed. Maintaining this rational relationship creates proper incentives for abstaining from the performance of more severe offences. In addition, over-deterrence might encourage passivity, reduce positive initiatives and bring about public mistrust in the authorities. Achieving *maximal* deterrence is not a desired goal in criminal law and neither is it a desired goal in the context of the illegality defence.[52] The exact definition of the 'public purpose' of the illegality defence, in the context of deterrence, should therefore be the achievement of an *optimal* level of aggregate deterrence.[53]

The relevant public benefit, in terms of deterrence, has a cap (the 'optimal level' of deterrence). Therefore, if other sanctions have already been imposed on the claimant this will reduce the relevant marginal benefit stemming from the further application of the illegality defence. To illustrate the point, if the existing level of deterrence that results from imposing criminal liability is 70, the optimal level is at the value of 100 and the expected deterrence value stemming from the application of the illegality defence is 50, the actual benefit only amounts to 10 (meaning 30 less the negative impact of 20). It is the benefit of 10 which should be balanced against the 'cost' attributable to the infringement of the claimant's property rights.

The result of applying this approach would in many cases be that the cost will exceed this reduced benefit, meaning that in terms of the cost–benefit test of proportionality, the illegality defence should not be applied. In such cases a double sanction would not be justified, and the illegality defence should not be available. In other cases, the court may find a satisfactory solution by lowering the cost of applying the illegality defence, so that its weight will be lower than the benefit. For example, a court could bar the contractual claim of an aggrieved party for damages but allow restitution following rescission.

### 3.4 The problematic applicability of the illegality defence to tortious claims

Case law allows for the possibility of applying the illegality defence to tortious claims, with the application of the defence in each case examined on its merits.[54]

This approach is problematic. As mentioned above, a preliminary question would be whether the criminal law explicitly or implicitly purports to deny a civil claim.[55] Such is the case with respect to the 'narrow claim' in *Gray*.[56] Where this is the case, illegality bars a tortious claim. Where there is no such guidance from the criminal law, the court has to apply its general discretion in a way which is consistent with the human rights-based model I have proposed. What I will discuss below is how the human rights-based proportionality test I have proposed could be applied to tortious claims.

It is unlikely that a person will turn to a legal advisor, prior to committing an unlawful act, for advice on the impact of her actions on potential tortious claims arising *in her favour* out of her wrongful conduct. While a person considering whether to engage in an unlawful act might be expected to consider possible criminal exposure, it seems unlikely that she would consider possible tortious claims against the victim of the offence she is considering committing. Thus, at least in the vast majority of cases, the potential application of the illegality defence to a future tortious claim will not have a deterrent effect.[57]

When considering deterrence, different branches of law should be clearly differentiated. The deterrent effect of the illegality defence in contract is different from the effect in tort. A contractual right arises as a result of the parties' agreement. A person who is considering entering into a contract can be expected to consider the potential of the contract to be unenforceable. Just as parties base their decisions, amongst other things, on the risk that the contract will be breached, they are likely to be influenced by the potential risks of unenforceability in the event that the illegality defence will be applied.

For example, a party may refrain from engaging in a scheme that would involve submitting false reports to the tax authorities if this conduct could bar a future claim for breach of contract against their counterparty. Contracting parties often consult legal advisors, who would be able to inform them of this risk.

Part of the rationale that underlines the illegality defence derives from the principle that a person should not profit from her own wrong.[58] Tortious claims, however, do not commonly generate a *profit* for the claimant, but rather protect her *reliance* interest by granting *restitutio in integrum*.[59] This would suggest that the application of the illegality defence to tort claims is not as well justified as in circumstances where it prevents the claimant profiting from her illegal action.

As mentioned above, the 'appropriateness' sub-test of proportionality requires that a human right not be infringed unless the infringing norm is an appropriate measure for achieving the public interest. Blocking tortious

claims would, in light of this, generally not be an 'appropriate' measure for realising either the deterrence or the principle against profiting from one's own wrongdoing. This leaves only the rationale of maintaining the integrity of courts as a possible justification for applying the illegality defence in many cases. However, in general, the strength of this rationale on its own seems to be relatively limited. The result would be that applying the illegality defence is likely to produce a fairly modest benefit to the public interest, which may, in many cases, be lower than the expected cost. The cost–benefit analysis, following the third sub-test of proportionality, will then usually militate against the application of the defence.

### 3.5 Legal uncertainty in the present law

The wide discretionary model adopted by *Patel* removes some of the arbitrary effects of the rule-based reliance test,[60] but the unpredictability that arises from the discretion afforded to courts creates other difficult challenges. In human rights terms, a question arises, whether the deprivation of the cause of action, through the application of the illegality defence, is a deprivation of the claimant's property which is 'provided for by law'.[61] The answer to this question is yes. The illegality defence is essential for promoting the public interest and if a court wishes to avoid arbitrary results, given the wide spectrum of possible scenarios, applying a wide judicial discretion is inevitable. A partial solution to the problem inherent in this may be found in the elaboration of a systematic and coherent model. The well-examined concepts found in human rights law which protect the right to property should be applied in this context. Obviously, these concepts involve a considerable measure of judicial discretion as well, but they will still provide more systematic guidance and increase the predictability of outcomes.

I have so far presented the proposed model and some of its potential contributions to the development of the illegality defence. In the next section of this chapter, I will focus on one element of the defence which requires fresh consideration in light of the human rights-based approach which I have advocated, namely the 'turpitude' required for application of the defence.

## 4. Turpitude

Application of the illegality defence is founded on the claimant's misconduct – on the existence of 'turpitude'. It is generally accepted that

the relevant turpitude required for the application of the illegality defence includes criminal offences.[62] The cases that have come before the courts have mainly dealt with turpitude of this kind.[63] Application of this defence to other kinds of wrongdoing is contested. The defence has been allowed against claimants who have engaged in tortious conduct only in very limited circumstances, although conversely it has been allowed in some cases where the claimant's conduct has been lawful but contrary to morals or public policy.[64]

In this section, I will focus on several different types of turpitude – criminal offences, torts, and breaches of contract, and consider the implications of adopting my proposed model in these circumstances.

## 4.1 Criminal turpitude

### *4.1.1 Grave offences*

One might expect that where the claimant's conduct which satisfies the turpitude requirement of the defence is a grave offence, the illegality defence is likely to apply in an intensified manner. However, the human rights perspective challenges this expectation.

As noted above, the public interest which should be balanced against the 'cost' arising from the infringement of the claimant's right to property is the *marginal* deterrence promoted by the illegality defence (rather than the isolated and absolute deterrence value deriving from its application).[65] Where severe offences are concerned, deterrence will be achieved by the enforcement of criminal sanctions, so that the marginal contributory value of barring a civil claim may be negligible. To illustrate, suppose a murderer has a claim in tort against a third party arising out of her criminal conduct. The murderer, if convicted, will likely be severely punished by the criminal justice system and so the marginal contribution of additionally barring a civil claim will be small.

However, two objections should be considered. First, in this type of case, the 'optimal' value of the required deterrence will be high, so that there would be considerable scope for additional marginal deterrence. Secondly, in such cases the public interest in preserving the integrity of courts may be gravely harmed if a claim deriving from a severe offence is not barred. As mentioned above, the relative weight of this consideration is not particularly high in the context of the application of the illegality defence. However, the *extent* of the harm to this value would be substantial in such cases. These considerations may mean that it is justifiable to apply the illegality defence where the claimant has committed a grave offence.[66]

### 4.1.2 Administrative and other minor offences

The first sub-test of proportionality requires the measure chosen to be 'appropriate' for achieving the public purpose. Some criminal prohibitions, such as minor traffic violations, do not reflect any basic moral values, but rather aim to promote social order and coordination.

Blocking a civil claim that derives from this type of offence is not likely to further a moral goal and is not an 'appropriate' norm for such purpose. Additionally, court orders arising out of a cause of action deriving from such a minor offence are unlikely to affect the integrity of the court. The illegality defence is not an appropriate legal device in this context.

Finally, since according to the model proposed here, only the *marginal* deterrent effect of applying the illegality defence should be considered, when minor administrative offences have been committed, the social value of deterrence is relatively low. Therefore, it seems highly improbable that there would be any relevant marginal benefit in applying the illegality defence, and this is unlikely to exceed the cost of applying the defence. It will be preferable then to reject *ab initio* consideration of the illegality defence where these types of minor administrative offences are concerned. Of course, defining 'minor administrative offences' is not an easy task, but it is still worthwhile to adopt the position that this type of turpitude should be excluded without the need to engage with the human rights-based balancing exercise.[67] Efficiency considerations would support this position. The possibility that a claim will be barred by the illegality defence might encourage a debtor to refuse to perform her obligations, thereby increasing the likelihood that litigation will follow. Economic efficiency is one of the public interests which can be considered within the factor of the 'aggregate public interest'. Where the typical deterrence weight in applying the illegality defence is low, while the typical harm to efficiency caused by such application is high, the illegality defence should not be considered at all.

### 4.1.3 Strict liability offences

The scope of strict liability offences generally overlaps with the scope of minor offences, which do not reflect immoral behaviour, as in cases of strict liability *mens rea* is not required to be proven in order to impose criminal liability.[68]

The English authorities reject the application of the illegality defence in cases where the claimant has committed a strict liability offence, unless the claimant was aware of the facts comprising the offence.[69]

From the human rights perspective, the lack of a *mens rea* element to the offence has a decisive impact on the question whether a strict liability offence should satisfy the turpitude requirement of the illegality defence. Applying the defence where the claimant has committed a strict liability offence is not an appropriate measure for promoting morals, since no moral blame is involved in these cases (unless a *mens rea* actually accompanied the commission of the offence). The integrity of courts is also not likely to be harmed if a court makes an order in these circumstances. With regard to the deterrent effect, strict liability is imposed even if the offender has taken all the necessary precautions in order to avoid the offence. It is doubtful whether there will be any significant deterrent benefit if an additional sanction is imposed by private law. Denying a civil law remedy to the claimant is likely to cause the over-deterrence of activities that might be beneficial. Strict liability offences will not generally satisfy the sub-test of appropriateness required under the human rights model and the illegality defence should not be available where the claimant has committed a strict liability offence.

## 4.2 Tortious turpitude

I will now address the question of whether tortious conduct may justify the application of the illegality defence. It should be noted that this discussion does not relate to a tortious *cause of action*, but rather to tortious conduct.

### *4.2.1 The case law*

According to the present case law, the illegality defence does not apply to conduct which is merely tortious and does not have a criminal or quasi-criminal character. Examples include dishonesty and conduct which infringes an obligation owed to the public, such those arising out of competition law.[70]

The view expressed by Lord Sumption in *Apotex* is that torts:

> offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.[71]

Although it has been argued that *Patel* should be interpreted as finding that the claimant's conduct must be criminal or quasi-criminal in order to 'trigger' the application of the illegality defence,[72] this seems to be too

far-reaching an observation.[73] The opposite conclusion cannot be drawn from *Patel* either.[74]

### *4.2.2 The effect of the human rights model*

Under my model the question whether merely tortious conduct should satisfy the turpitude requirement needs to be analysed in light of two sub-tests of proportionality – the appropriateness and the cost–benefit tests.[75]

It should be emphasised that the proportionality factor referred to in *Patel* was not designed to be used in order to define the relevant turpitude required for the illegality defence to be applicable. As mentioned above, its purpose is just to avoid 'overkill', when the other factors mentioned in *Patel* point to the applicability of the illegality defence.[76] It cannot be inferred that *Patel* necessarily opened the door for a flexible consideration of the adequate type of turpitude, expanding its ambit beyond criminal and quasi-criminal conduct.

### *4.2.3 The appropriateness test and tortious turpitude*

The first issue to be considered is the appropriateness test (the first sub-test of proportionality). Is the application of the illegality defence appropriate in cases in which the claimant's turpitude is established by a tortious act? The question which must be asked is whether such application is likely to promote the goals of the illegality defence.

Take the deterrence factor. As mentioned earlier, providing negative incentives for wrongful conduct is one of the purposes of the illegality defence. The place of deterrence considerations in private law in general, and in tort law in particular, is, however, subject to an ongoing and intense debate. Nonetheless, there is substantial support for applying such considerations.[77] Applying the illegality defence in circumstances in which the claimant has engaged in tortious conduct is in principle consistent with both the purposes of tort law and of the illegality defence.

The claimant could also engage in tortious conduct in circumstances where her claim is a contractual one. The risk of losing a contractual claim may influence the decision of the claimant as to whether to commit the wrong.[78] This risk would include the possibility of being barred from enforcing a contractual remedy by the illegality defence due to the claimant's tortious conduct. The application of the illegality defence is, in principle, appropriate where a claim is to enforce a contractual right which has originated from the claimant's tortious conduct in much the same way as was the case for criminal conduct.

A distinction needs to be drawn between torts requiring fault (such as fraud) and strict liability torts. In criminal law the general rule is that

*mens rea* is required. As mentioned above, cases of strict criminal liability should not satisfy the turpitude requirement of the illegality defence, unless *mens rea* actually accompanied, in the case at stake, the commission of the offence.[79] However, the analogy between the criminal law and tort is, in this respect, not self-evident. The ambit of strict liability in tort is wider than strict liability in criminal law[80] and therefore it should not be assumed that public policy considerations relevant to the illegality defence in these two areas are necessarily the same.

Turning to the human rights 'appropriateness' test, application of the illegality defence is likely to be appropriate where subjective blame can be established and, possibly, also in certain cases of negligence.[81] Torts based on a strict liability rule do not necessarily involve any moral failure[82] and thus, the rationale of the illegality defence does not apply to such conduct. It should be re-emphasised, in this respect, that when, on the facts, the strict liability tort was performed maliciously or negligently, the claimant's conduct should be treated, for the purposes of the 'appropriateness' test and the other proportionality tests, in the same manner as tortious conduct which requires fault.

As far as the deterrence rationale of illegality is concerned, this rationale may justify barring claims arising from negligent conduct in addition to those arising from the commission of an intentional tort. There is a public interest in deterring negligent conduct. However, whether there is any role for the deterrence rationale with respect to strict liability torts is questionable. Although the legal system has an interest in encouraging people to take efforts to prevent the occurrence of the result prohibited by a strict liability tort, it is not clear that it is appropriate to use the illegality defence for achieving this result.

Regarding the rationale of maintaining the integrity of courts, hearing a claim arising out of the claimant's tortious conduct would not usually endanger the court's integrity, unlike circumstances where the claimant has engaged in criminal conduct. Criminal acts are usually conceived as being contrary to basic public order, so that where the court assists a criminal in realising rights associated with criminality the public confidence in courts may be affected. Tortious conduct is usually conceived by the public as problematic in nature but less severely so than a criminal offence. Such is certainly the case with relation to strict liability torts.

To sum up, the application of the illegality defence in circumstances where a tortious conduct had occurred may, in principle, fulfil the appropriateness sub-test of proportionality except in cases of strict liability torts.

### *4.2.4 The cost–benefit sub-test and tortious turpitude*

I established above that the appropriateness sub-test of proportionality generally justifies the application of the illegality defence in circumstances where a tortious conduct had occurred. Actually, barring a claim will still require consideration of the other sub-tests of proportionality. As a result, it is worthwhile considering some general implications of the third sub-test of proportionality (the cost–benefit test) in these circumstances.

The application of the cost–benefit proportionality test to tortious conduct is influenced by considerations similar to these referred to above. The public benefit derived from applying the illegality defence is more significant if the tort was committed with a malicious intent or at least negligently. The more wrongful the claimant's behaviour, the more the legal system should aim to deter persons from engaging in such behaviour and, accordingly, the public benefit deriving from deterring such behaviour will be greater where such behaviour is more wrongful.

As detailed above, the deterrent effect of the illegality defence is evaluated in aggregate. That is, the loss of deterrence deriving from the release of the defendant from her obligations should be deducted from the public's gain in deterring turpitude through the illegality defence. While assessing the question of whether the application of the illegality defence may have an aggregate deterrence surplus, the court will have to consider not only the gravity of the claimant's wrongful conduct, but also the severity of the defendant's breach of her obligations. Thus, for instance, where a defendant has breached a contract maliciously and the claimant has acted negligently, the aggregate benefit of barring the contractual claim is likely to be negative and the illegality defence should not be available.

It does not follow that simply because a deterrence surplus exists that the illegality defence should be available. Once a public benefit is found, the door will be open to consider the third sub-test of proportionality (the cost–benefit sub-test). The public benefit will have to be balanced against the harm caused by the application of the defence (the cost, in terms of the harm to the human right to property). Only if the benefit exceeds the cost should the claim be barred.

As being the case with criminal conduct by the claimant, the cost–benefit balance is to be assessed in terms of the *marginal* values. This means that the actual or potential submission of a civil suit against the tortious claimant, by the injured party – the defendant or a third party – will lessen the marginal benefit that may accrue from the application of the illegality defence.

One of the public benefits deriving from applying the illegality defence in the context of criminal turpitude is that it provides an incentive

to the defendant to reveal to the law enforcement authorities, either directly or through the court (within the civil proceedings), the commission of the crime. If a defendant is not likely to gain anything from coming forward, the claimant's crime might not be reported to the relevant authorities. Tortious conduct is different. There is unlikely to be any public interest in a claimant's tortious conduct being reported. The state does not typically have standing to intervene in the tort proceedings between two private parties and cannot implement any enforcement measures against the tortfeasor. The benefit to the public interest, which is likely to derive from motivating defendants to reveal wrongful conduct to the authorities through the illegality defence, may thus produce a public benefit in cases of criminal conduct, but only remotely so where tortious conduct is concerned.[83] This weakens the public interest in the illegality defence being available where the claimant has engaged in tortious conduct.

Contrary to the current case law, which restricts the kind of tortious conduct which can satisfy the turpitude requirement to a narrow range of cases, the application of a human-rights perspective leads to the conclusion that tortious conduct should, in general, be sufficient to satisfy the turpitude requirement for the illegality defence. An exception to this is where the claimant has committed a strict liability tort.

### 4.3 Breach of contract as turpitude

Should a breach of contract by the claimant be sufficient to meet the turpitude requirement of the illegality defence? The approach found in the case law, which generally denies that the requirement can be satisfied by tortious conduct (unless it is quasi-criminal or involves a breach of obligations owed to the public),[84] would suggest not.

Where a contracting party has brought a claim for breach of the contract which she herself breached, the defendant would normally not have to address the issue of illegality. The defendant might avoid liability by relying on the claimant's breach according to the ordinary legal institutions of contract law. For instance, the defendant will sometimes be able to rescind the contract due to the claimant's breach or be entitled to rely on this breach to set off damages awarded to the claimant.

However, these contractual defences and arguments will not always be available to the defendant. In addition, the defendant might be interested in raising the illegality defence on the basis that the claimant breached another contract between the parties, or where the claimant breached a contract between the claimant and a third party. The question

is whether the public interest in deterring breach of contracts might justify the application of the illegality defence to such conduct.

The assumption behind such discussion is that a sufficient nexus exists between the relevant conduct (the breach of contract by the claimant) and the cause of action. To illustrate, consider a case in which a seller breaches the contract in order to sell the same asset to a third party at a better price. If the contract is breached by the third party and the seller brings a claim against her, the question will arise whether the claim against the third party should be barred by the illegality defence.

It should also be noted that the claim in question, which the illegality defence could bar, is not necessarily a contractual claim. It could for example be a tortious claim or a claim for the restitution of unjust enrichment.

From the human rights perspective I have developed, the answer to the question whether a breach of contract may satisfy the turpitude requirement is, in principle, similar to that given with respect to tortious conduct. There is a clear public interest in promoting compliance with contracts and deterring breaches of contract. It is not only a matter of corrective justice between the parties. Contractual stability and reliability are essential factors in a modern society, vital to economic efficiency.[85] These provide an undisputed justification for the imposition of contractual liability alongside the moral value of keeping promises.[86] In human rights terms, barring a claim in cases of breach of contract, in principle, fulfils the 'appropriateness' test as this could promote the public interest in deterring breach of contract.

However, the appropriateness of applying the illegality defence to breaches of contract in order to promote public goals other than deterrence is not so obvious. It seems unlikely that barring a claim because of the claimant's breach of contract will promote the integrity of courts and the public trust in their function. The public does not conceive of a breach of a contract as a wrong so grave that courts should refuse the claimant a remedy because her claim is derived from her breach of contract.

As for the goal of promoting morals, contractual liability does not depend on fault. Contract law generally imposes strict liability.[87] This means that not every case of breach of contract involves a moral wrong. In some of the cases the breach will be a result of negligent or malicious behaviour, while in others the breaching party will, although failing to perform the obligation, have made reasonable efforts to comply with her obligations. The appropriateness of the illegality defence for promoting this moral goal then requires close attention to the circumstances of the case.

The approach I have advocated here also has an impact on the cost–benefit analysis within the third proportionality test. The moral rationale will be promoted only when the claimant's breach was deliberate or at least negligent. The application of the illegality defence may provide an important public benefit in terms of deterrence, the level of which will depend upon the seriousness of the claimant's breach and the overall circumstances. But the claimant's breach has to be compared with the seriousness of the defendant's breach of her obligations. The question whether the defendant's breach was accompanied by an element of fault will then be especially important in this respect, as the relevant benefit to the public interest is expressed by the 'aggregate benefit' value.[88]

Finally, as previously mentioned with respect to other types of wrongful conduct, if the breach of the contract has already resulted in (or will result in) sanctions being imposed upon the claimant in other proceedings, this will also affect the assessment of the marginal cost–benefit balancing.

## 5. Conclusion

The human rights perspective on the illegality defence which I develop in this chapter opens the door to the elaboration of a new approach to the illegality defence, one that is sensitive to the need to protect the human right to property. The model proposed here would assist in removing general difficulties in the application of the current approach to the illegality defence. In addition, the implementation of the structured concepts developed in the human rights jurisprudence may improve the predictability of judicial decisions and provide new legal tools for the application of the wide judicial discretion found in the illegality defence. I have also elaborated the possible contribution of this approach to the understanding of the turpitude requirement, suggesting a more consistent and cohesive manner of examining this element.

## Notes

1 Since its first prominent appearance in *Holman v Johnson* (1775) 1 Cowp 341.
2 For a description of the development of the case law, see for example James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 Law Quarterly Review 14, 14–15; James Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, vol 6: 2014–2015* (Appellate Press Ltd 2018) and authorities cited there.
3 *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

4 This approach establishes a trio of considerations, namely: the purpose of the norm that was transgressed, public policies which might be affected by the denial of the claim and proportionality.
5 *Tinsley v Milligan* [1994] 1 AC 340.
6 See, for instance, Goudkamp, 'The End of an Era?' (n 2); Graham Virgo, 'The State of Illegality' (2019) 31 Singapore Academy of Law Journal 747; Liron Shmilovits, 'When is Illegality a Defence to a Tort?' (2021) 41 Legal Studies 1, 4.
7 See James Goudkamp, 'The Law of Illegality: Identifying the Issues' in Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart Publishing 2018) 40, 45–52; James Lee, 'Illegality, Familiarity and the Law Commission' in Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart Publishing 2018) 157. Amongst other things, the relative weight of each factor has not been decided: see Goudkamp, 'The End of an Era?' (n 2) 16.
8 *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [2021] AC 563; *Stoffel v Grondona* [2020] UKSC 42, [2021] AC 540 [46].
9 In some cases, the claimant's illegal behaviour may entirely prevent the cause of action from accruing. These circumstances should be distinguished from circumstances in which the illegality defence is applied to an existing cause of action as an 'external' principle, which are the focus of my discussion. See text accompanying nn 11–18.
10 *Holman* (n 1) 343. See also *Patel* (n 3) [91], [99], [101], [120] (Lord Toulson). See also Shmilovits (n 6) 11–12.
11 See, amongst others, Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Central Issues in the Law of Tort Defences' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart 2015) 5–11; Graham Virgo, 'Justifying Necessity as a Defence in Tort Law', in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart 2015) 139; James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment', in Charles Mitchell and William Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment, Critical and Comparative Analyses* (Hart 2013) 133–64; Paul S Davies, Simon Douglas and James Goudkamp, 'Introduction' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart 2018) 1, 2–3 ('Davies et al.'); Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith 'Defences in Unjust Enrichment: Questions and Themes', in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith, (eds), *Defences in Unjust Enrichment* (Hart 2016) 1 (Dyson et al. 'Questions and Themes'); Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Thinking in Terms of Contract Defences' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds) *Defences in Contract* (Hart 2017) 1–4.
12 For sources supporting this conclusion, see Dyson et al., 'Questions and Themes' (n 11) text accompanying note 32; Dyson et al., 'Contract Defences' (n 11) 4; Davies et al. (n 11) 2; Goudkamp, 'Identifying the Issues' (n 7) 49–52. James Goudkamp, *Tort Law Defences* (Hart 2013) 135; Eric Descheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77 Modern Law Review 493. Illegality is regarded as a defence in the Andrew Kull, *Restatement Third: Restitution and Unjust Enrichment* (American Law Institute 2010), art. 32; Goudkamp and Mitchell (n 11) 153, 163. See also *Hall v Herbert* [1993] 2 SCR 159.
13 See Dyson et al., 'Questions and Themes' (n 11) text accompanying notes 37–48.
14 This can be deduced from the fact that the authors mentioned that the illegality defence is a general legal rule unconcerned with inter-personal considerations relating to any specific cause of action (Dyson et al. 'Questions and Themes' (n 11) text accompanying notes 36–48).
15 Namely, a rule which defines the parties who may bring judicial proceedings.
16 See Goudkamp and Mitchell (n 11) 141–42. The authors base their position on the rejection of an 'outlawry' approach.
17 See in detail Edit Deutch, *The Illegality Principle – A Constitutional Perspective* (PhD Thesis Dickson Poon School of Law at King's College London 2022) chapter 2.
18 The duty of care was denied due to the claimant's illegality in *Pitts v Hunt* [1991] 1 QB 24; for a critical review of *Pitts*, see James Goudkamp, 'The Defence of Illegality in Tort Law: Wither the Rule in Pitts v Hunt?' (2012) 71 Cambridge Law Journal 481. See also James Goudkamp, 'The Defence of Illegality: *Gray v Thames Trains Ltd*' (2009) 17 Torts Law Journal 205, 212. The Supreme Court of Canada found that the unlawful conduct of the claimant does not deny the duty of care towards the claimant, but rather serves as a defence: *Hall* (n 12). See, concerning this decision, Goudkamp, 'Identifying the Issues' (n 7). For denial of the duty of care due to the claimant's illegal behaviour in the Australian law see *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446.

19 Declaring that: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. This is one of the 'convention rights' protected under section 1 of the Human Rights Act 1998.
20 Although the status of future earnings and mere expectations is problematic, as detailed below, yet there are no doubts that 'enforceable claims' are defined as possessions. See for example *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092 [26] (Auld LJ); *Department of Energy and Climate Change v Breyer Group Plc* [2015] EWCA Civ 408, [2015] 1 WLR 4559.
21 See the judicial decisions cited in n 20 and Deborah Rook, *Property Law and Human Rights* (Blackstone Press 2001) 103–4 ('Rook'); John Wadham et al., *Blackstone's Guide to the Human Rights Act 1998* (7th edn, OUP 2015) 337. For the distinction between vested interests and mere expectations, see also Tom Allen, *Property and the Human Rights Act 1998* (Hart 2005) 40–42.
22 See, for example, *Pressos Compania Naviera SA and Others v Belgium* [1996] 21 EHRR 301.
23 Allen (n 21) 46–57.
24 See Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention of Human Rights* (7th edn, OUP 2017) 556–60.
25 See for instance, *Di Stefano v Italy* App no 38433/09 (ECHR, 7 June 2012).
26 See Allen (n 21) 46–57.
27 Charles E Clark 'The Cause of Action' (1934) 82 University of Pennsylvania Law Review and American Law Register 354, 354.
28 See the discussion at Peter Birks 'Rights, Wrongs, and Remedies' (2000) 20 Oxford Journal of Legal Studies 1, 12.
29 See in detail Edit Deutch, '*A Constitutional Perspective*' (n 17) chapter 2.
30 See, for instance, *Handyside v UK* [1976] 1 EHRR 737; *Adkivar v Turkey* [1997] 23 EHRR 143; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention of Human Rights* (7th edn, OUP 2017) 561.
31 Wadham et al. (n 21) 345; Rook (n 21) 66 and sources referred there.
32 Amy Goymour, 'Property and Housing' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 270–73; Alison L Young, 'Mapping Horizontal Effect' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 16–22.
33 See, for example, the Law Commission, *The Illegality Defence: A Consultative Report* (Law Com No 189, 2009) paras 2.13–2.15. See also Andrew Burrows, *Restatement of the English Law of Contract* (OUP 2016) 229–30.
34 *Patel* (n 3) [99]–[101].
35 See *Henderson* (n 8) [119], [124]–[125] and *Stoffel* (n 8).
36 See, for instance, Andrew Burrows, 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart 2018) 23, 29.
37 Such as the 'narrow claim' in *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] AC 1339. See also *Henderson* (n 8).
38 See Edit Deutch, *A Constitutional Perspective* (n 17) chapter 1.
39 This sub-test demands the chosen norm to be an appropriate legal mechanism for achieving the desired public purpose.
40 The necessity sub-test examines whether an alternative norm may achieve the public purpose of the chosen norm by causing less harm to the human right.
41 This sub-test requires that the weight of the public benefit which derives from the chosen norm will exceed the weight of the 'cost' – the harm to the human right. For an exhaustive jurisprudential discussion of these sub-tests see, for instance, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012). See in detail the discussion at Edit Deutch, '*A Constitutional Perspective*' (n 17) chapters 6–8.
42 Richard Stacey, 'The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication' (2019) 67 American Journal of Comparative Law 435, 448, 463.
43 See, for instance, *Sporrong and Lonnroth v Sweden* [1982] ECHR 5 [69]; *Brumărescu v Romania* [1999] ECHR 105 [78]; *Case of Gladisheva v Russia* [2011] ECHR 2021 [77]–[82]; *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 [130]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [19]; *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 [17]–[20]; *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] 1 AC 700 [73]-[74]; *R (Aguilar Quila) v Secretary of State for*

*the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [45]; *Samaroo v Secretary of State for the Home Department* [2001] 1 EWCA Civ 1139, [2001] UKHRR 1150; Rook (n 21) 80–81 and references there.

44 See n 36. Although the state enjoys the power to confiscate proceeds of crimes, this measure is subject to the proportionality demand. See the Proceeds of Crime Act 2002 s 6(5)(b); *R v Waya* [2012] UKSC 51, [2013] 1 AC 294. See also *GIEM SRL v Italy* (App no 1828/06 ECHR, 28 June 2018) [293]. In the context of civil forfeiture, the Proceeds of Crime Act 2002 does not explicitly adopt a general test of proportionality. However, it has been rightly argued that the constitutional protection of property should apply in this context (see for example Allen (n 21) 280).

45 *Patel* (n 3) [101] (Lord Toulson).

46 See n 8.

47 *Henderson* (n 8) [123]. For the view that it would not always be necessary to examine all the three factors, see also *Stoffel* (n 8) [26].

48 It should be noted that although the place of deterrence considerations in private law is subject to debate, such considerations are relevant at least to some extent (n 77). In the field of tortious claims, the deterring effect of the illegality defence on the behaviour of the claimant is minimal in the first place (n 57), so that there will not be any need to consider the deficit in deterrence deriving from the release of the defendant from her liability.

49 For the forfeiture mechanism see the Proceeds of Crime Act 2002, Part 5; Simon Young, *Civil Forfeiture of Criminal Property, Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing 2009) 207–10.

50 See text following n 43.

51 See Barak, *Proportionality: Constitutional Rights and their Limitations* (n 11) 350–52.

52 It should be noted that any 'contribution' to the public interest exceeding the optimal level is not to be conceived as a 'benefit' at all and has to be reduced from the overall benefit value. Over-deterrence involves in part a negative impact on the public interest.

53 As previously noted, 'aggregate' value is the gain resulting from deterring a behaviour such as this of the claimant, minus the loss of deterrence caused by the exemption of the defendant from liability for her breach.

54 For instance, in claims for damages for a breach of duty or causing bodily harm. See *Tchenguiz v Grant Thornton UK LLP* [2016] EWHC 3727 (Comm); *Singularis Holdings Ltd v Daiwa Capital Markets Europe* [2019] UKSC 50, [2020] AC 1189; *McHugh v Okai-Koi* [2017] EWHC 1346 (QB). See also Goudkamp, 'Identifying the Issues' (n 7) 41–42.

55 See text accompanying and following n 37 above.

56 See the discussion in the text accompanying n 37 above.

57 See Goudkamp, Identifying the Issues (n 7) 55; Goudkamp, '*Gray v Thames Ltd*' (n 18); James Goudkamp, 'Self-Defence and Illegality under the Civil Liability Act 2002 (NSW)' (2010) 18 Torts Law Journal 61, 69. See also James Goudkamp and Lorenz Mayr, 'The Doctrine of Illegality and Interference with Chattels' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing 2015) 223, 240. Herstein argues that people are often unaware of the possible civil law ramifications of illegal actions and rarely base their decisions on these considerations. By contrast, companies are more likely to have continuous consultations with their legal advisors about such ramifications (Ori Herstein, 'A Normative Theory of the Clean Hands Defence' (2011) 17 Legal Theory 171, 203–4). See also Frederick Wilmot-Smith, 'Illegality as a Rationing Rule' in Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart Publishing 2018) 121–2, 125–26

58 See *Henderson* (n 8) [119], [121]–[122]. See also, for example, Goudkamp, 'Identifying the Issues' (n 7) 40, 45–47; In *Stoffel* (n 8) the Court found that the focus should not be put on this consideration, but rather on the rationale of maintaining the integrity of the system. Yet, as the Supreme Court found in *Henderson* (n 8), the principle that a person should not profit from her own wrong has an important weight within the 'public policies' composing the 'integrity of the system' rationale.

59 See for this aspect Goudkamp, '*Gray v Thames Trains Ltd*' (n 18) 212–13; Goudkamp and Mayr, 'Interference with Chattels' (n 57) 223, 241.

60 For the reliance test see n 5 and accompanying text.

61 As dictated by Section 1 of the First Protocol of the European Convention on Human Rights.

62 See, for instance, *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] 1 AC 430 [23] (Lord Sumption). Sharon Erbacher, *Negligence and Illegality* (Hart 2017) 32.

63 Erbacher (n 62) 32.

64 See, for instance, *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB), [2010] PNLR 15.
65 See above under: 'The Need to Prevent 'Double Sanction'.
66 The application of the illegality defence to tortious claims is generally problematic, but the possible substantial impact of allowing such a claim on the value of maintaining the integrity of courts may, nevertheless, justify the application of this defence.
67 For a rejection of the illegality defence in cases of minor traffic offences, see, for instance, *Magill v Donnelly* [2019] NICty 2.
68 See for instance David Ormerod and Karl Laird, *Smith, Hogan & Ormerod's Text, Cases & Materials on Criminal Law* (13th edn, OUP 2020) 136–37.
69 *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391; *Apotex* (n 62) [29] (Lord Sumption). For the rejection of such application, see also Shmilovits (n 6) 7–8.
70 See *Apotex* (n 62). In this case, a right according to a foreign law had been infringed by the claimant. It should be noted that the Court did not find it necessary to elaborate on the general issue whether a breach of a foreign law may trigger the application of the illegality defence.
71 *Apotex* (n 62) [28]. For criticism of this position, see Edit Deutch, '*A Constitutional Perspective*' (n 17) chapter 10.
72 Nicholas McBride, 'The Future of Clean Hands Defences' in Paul Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart 2018) 267, 272, note 29 ('McBride'). The author infers this from paragraphs 99 and 101 of Lord Toulson's opinion, who referred in paragraph 101 to a: '. . . *prohibition which had been transgressed*'.
73 Lord Toulson did not explicitly discuss in *Patel* the categorisation of the required turpitude and the question whether the relevant prohibition should be a criminal one or whether any private law prohibition could, in principle, suffice. It can be expected that if the Supreme Court had intended to establish a binding precedent on this issue it would have done so explicitly.
74 See notes 62–70 above.
75 As for the second sub-test of proportionality (the 'necessity' test), this sub-test aims to assure that if the other sub-tests justify barring the cause of action, this will be limited to the minimum extent required in order to satisfy the public interest. This aspect does not require a special analysis in the context of the definition of the relevant turpitude.
76 See text accompanying notes 45–47.
77 For deterrence considerations in the field of tort, see, for instance, Gary T Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1997) 75 Texas Law Review 1801; Donal Nolan 'Causation and the Goals of Tort Law' in *The Goals of Private Law* (Hart 2009) 165, 187–90; Jennifer H Arlen, 'Compensation Systems and Efficient Deterrence' (1993) 52 Modern Law Review 1053; Daniel W Shuman, 'The Psychology of Deterrence in Tort Law' (1993) 42 University of Kansas Law Review 115.
78 See text following n 57 above.
79 See above, under 'Strict Liability Offences'.
80 It has even been argued that the boundary between strict liability rules and fault-based rules within tort law is often blurred and that most torts can be described as possessing qualities of strict liability. See John CP Goldberg and Benjamin C Zipursky, 'The Strict Liability in Fault and the Fault in Strict Liability' (2016) 85 Fordham L Rev 743, 745. Discussion of this proposition extends beyond the scope of this chapter.
81 It seems that at least when the negligent act includes indifference to the possible occurrence of a damage, such behaviour should be classified as immoral. This issue extends beyond the scope of my chapter and so I do not discuss it here.
82 Another issue is whether the very imposing of strict liability fits moral values. For a debate on this issue see Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530, 539–52. In his work, Honoré argues that the rule of strict liability can be justified from a moral perspective, since such liability sets not only an efficient allocation of responsibility, but also a fair one, based on the risk created by the tortfeasor.
83 A benefit to the public interest may accrue in exceptional cases, for instance where the tort relates to the mass production of unsafe products.
84 See above under: 'Tortious turpitude', subsection 'The case law', and specifically n 70.
85 It should nonetheless be noted that in this context the 'efficient breach' doctrine, applying in American law, denies the remedy of specific performance where this is justified by considerations of economic efficiency. For this doctrine and its criticism due to the negative impact of the doctrine on the public interest of maintaining contractual stability and promoting

the role of contracts, see for example Daniel Friedmann, 'The Efficient Breach Fallacy' (1989) 18 The Journal of Legal Studies 1.

86 See, for instance Robert Merkin and Severine Saintier, *Poole's Textbook on Contract Law* (14th edn, OUP 2019) 2–3.

87 Except for types of contracts in which the debtor does not promise to achieve a certain result, such as contracts to provide services. In these cases, liability is based on fault. See, for instance, Andrew Burrows (ed), *Principles of the English Law of Obligations* (OUP 2015) 116; Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (31st edn, OUP 2020) 437.

88 See above under: 'A windfall for the defendant'

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11

# Attribution in unjust enrichment: single or multiple connections?

Pablo Letelier*

## 1. Introduction

The language of 'attribution' has been used to describe the circumstances in which a claimant and a defendant are sufficiently connected for the purposes of recognising a claim for restitution in unjust enrichment.[1] Mainstream common law scholarship frames discussion of these circumstances in terms of the question whether a defendant's enrichment has been gained 'at the claimant's expense'. Until recently, this scholarship assumed that establishing the relevant connection between claimant and defendant is a rather uncontroversial issue.[2] This is no longer the case. The question about attribution in unjust enrichment has been the subject of a good deal of judicial and scholarly attention in recent years. Contemporary writers are increasingly aware that the connection between the parties to unjust enrichment claims and the division and ordering of the law of unjust enrichment are intimately related problems.[3]

A prominent example is Robert Stevens, who argues that a certain type of connection exists between claimant and defendant in 'core' instances of unjust enrichment liability, namely that a deliberate 'performance' is rendered by the claimant to the defendant, which is subsequently accepted by the defendant. Stevens further argues that cases in which restitution has been ordered, but which do not possess this feature, should not be regarded as forming part of the law of unjust enrichment. The connection that exists between the parties in 'accepted

* I would like to thank Robert Stevens, Charles Mitchell, Martin Fischer, Charlie Webb and an anonymous reviewer for their insightful comments to earlier versions of this chapter. All remaining errors are mine alone.

performance' cases makes it possible to justify the making of restitutionary awards for reasons which are bilateral in nature, something that cannot also be said of other claims which are seen by other scholars as forming part of the law of unjust enrichment, but which do not possess the same key feature.[4]

There is a lot to be said about Stevens' attribution theory. Unlike other accounts of the link that must be established between claimant and defendant for the purposes of unjust enrichment claims, his analysis reveals a deep concern for the normative underpinnings of unjust enrichment liability. However, an unqualified endorsement of his 'accepted performance' theory of attribution would have some problematic implications. Chief among them is the conclusion that many of the situations which courts and commentators currently regard as generating liability in unjust enrichment should be assigned to separate and unidentified categories of law, where they may be harder to rationalise and explain.

This chapter explores a way in which Stevens' attribution theory could be reconciled with an unjust enrichment analysis of cases which do not fit his 'accepted performance' model. To do so, it evaluates a widespread assumption in common law scholarship, according to which the 'at the expense of' question should receive the same answer in every possible unjust enrichment case. Relying on the experience of other jurisdictions, the chapter suggests that a bifurcated inquiry about the link between the parties distinguishing 'accepted performance' cases and other cases involving enrichments obtained in other modes may promote a deeper understanding of the normative underpinnings of different claims without renouncing the kind of overall analysis which plays an important part in enhancing our understanding of unjust enrichment as a distinct area of the law.

The rest of this chapter is divided as follows. Section 2 reviews Stevens' 'acceptance of performance' theory, emphasising some difficulties which may follow from its unqualified adoption. Section 3 explores a way of answering the question about attribution which does not require accepting that the same kind of link between the parties applies to every possible unjust enrichment scenario. Section 4 describes some of the advantages of this kind of differentiated inquiry. Section 5 summarises the main conclusions and identifies some pending questions.

## 2. Accepted performance

Stevens seems to share a concern articulated by other commentators about the need to find a stronger normative unity for the law of unjust

enrichment.[5] While the importance of this task is indisputable, there are good reasons to be on guard against views that may oversimplify our understanding of the law. This section argues that Stevens' attribution theory may lead us to turn our backs on cases not fitting a tightly defined model of connection between the parties, and thus hinder our chances of getting to grips with many unjust enrichment claims.

## 2.1 Forms and reasons

Stevens' theory about the connection between the parties in unjust enrichment claims stems from a broader effort to explain private law in terms of the structure of the relations between individuals underlying the rights that make it up. According to Stevens, private law can be distinguished by the fact that it imposes duties over which other individuals have control. Unlike, for instance, criminal law, private law recognises duties towards persons who may consent to the duty's non-performance and even release the obligor altogether.[6] This specific form of relation between right-holder and duty-bearer imposes constraints on the kind of reasons that can justify the recognition of a private law claim: they must be bilateral in form and tie the particular right-holder to the particular duty-bearer.[7] In the law of torts, for example, this would explain why reasons like compensation or deterrence cannot by themselves justify claims in negligence. As they do not relate a particular claimant to a particular defendant, these reasons, if taken seriously, would justify replacing the tort of negligence by a clearing house system where all negligent tortfeasors pay a fine to a central fund which compensates all victims.[8]

What is true of torts is also true of unjust enrichment. Not every relation between claimant and defendant may support the kind of reasons justifying the recognition of an unjust enrichment claim. In what is usually described as the 'core' instance of unjust enrichment, where the claimant mistakenly pays a sum of money in cash to the defendant and upon discovering the error seeks restitution, this means that the restitutionary claim cannot be justified only by reference to a defect in the claimant's consent to the defendant's enrichment.[9] Such a claimant-sided account cannot by itself explain why the defendant should incur a liability. Just as compensation and deterrence cannot by themselves justify a claim in negligence, a mistake on the claimant's side and an enrichment on the defendant's side cannot justify a claim in unjust enrichment, or at least not if they are considered in isolation from one another.[10]

To be coherent, reasons for liability in unjust enrichment must be bilateral in form and tie a particular right-holder to a particular

duty-bearer. In terms of the kind of connection between the parties that may support an unjust enrichment claim, this means that restitution of unjust enrichment will preferably be available where the parties are linked through a performance rendered by the claimant and accepted by the defendant.[11] This kind of link requires not only an intentional or deliberate action of the claimant to benefit the defendant, but also the acceptance by the specific defendant of this benefit, which is a necessary condition of the defendant's liability. Only if this link exists can the making of a restitutionary award on the ground of unjust enrichment be justified through the kind of bilateral-shaped reasons which are distinctive of private law.[12]

Stevens acknowledges that his theory does not fit with many decided cases where restitution on the ground of unjust enrichment has been granted.[13] For example, where the claimant discharges an obligation properly borne by the defendant, some cases expressly state that a claim in unjust enrichment lies to reverse the gain obtained by the defendant who has been saved the expense of paying his creditor. Here, the claim is not premised on the claimant's deliberate conferral of a benefit to the defendant, nor on the defendant's acceptance of this benefit. According to Stevens, however, these and other cases where the link between the parties does not follow his 'accepted performance' model should be distinguished from the 'core' unjust enrichment cases. Modern textbooks on restitution and unjust enrichment are wrong in gathering and explaining these cases together, as they should be treated as freestanding claims pertaining to an entirely different – and presumably anomalous – area of private law.[14]

## 2.2 A conceptualist approach?

The notion of conceptualism describes a particular way of thinking about the law which is helpful to understanding some aspects of Stevens' theory. Though there are several different meanings that one may attach to this way of thinking, a salient theme seems to be the importance of identifying ideal types of relations among individuals as the basis for the analysis of legal materials.[15] The work of Ernest Weinrib provides an important example. He begins with the assumption that private law rights and duties have a unifying structure indicated by the bipolar nature of the relation between a particular claimant and a particular defendant.[16] He argues that corrective justice explains all private law relationships, because it provides a single and coherent justificatory structure for the rights and duties between two parties.[17] This enables him to draw

specific conclusions about, among other areas of the law, the law of unjust enrichment:

> [A]s an instantiation of corrective justice, liability for unjust enrichment should exhibit the correlative structure of the parties' relationship, vindicate the plaintiff's right as against the defendant, and affirm the parties' freedom and equality.[18]

Two features frequently related to conceptualist thinking derive from its interest in ideal types of relations. First, conceptualist approaches typically propose models based on single organising ideas as the benchmark against which the solutions governing a multitude of very different situations should be evaluated.[19] For example, the bipolar justificatory structure provided by corrective justice enables Weinrib to explain what defines the rules making up the entire domain of private law liability, including the law of contracts, torts and unjust enrichment.[20] Secondly, conceptualist approaches tend to rely on ideas about the law whose pertinence is judged independently from the position taken in cases decided at any particular time and place.[21] Thus, Weinrib argues that corrective justice reflects an immanent rationality of the law which transcends society and historicity.[22]

Hints of both features can be recognised in Stevens' theory. His 'accepted performance' model is underpinned by the broader assumption that every private law duty corresponds to a specific kind of right, the recognition of which is premised on reasons bilateral in form.[23] Based on this assumption, Stevens considers the claim arising from mistaken payments and extracts the criteria for identifying the ideal relation behind 'core' unjust enrichment scenarios. He acknowledges that such criteria are not satisfied in many other scenarios understood to give rise to unjust enrichment claims,[24] and even that the account he proposes does not fit with the position taken by English courts in a number of important cases.[25] But this does not prevent him from concluding that his account 'not only should be the law, but always has been'.[26]

## 2.3 Doubtful implications

It thus seems that the main thrust of Stevens' 'accepted performance' theory of attribution is to promote a stronger normative unity for the claims grouped together as part of the law of unjust enrichment. This is certainly a commendable objective. Looking for consistency and boiling down into intelligible statements what would otherwise be a disorganised mass of isolated decisions are critical tasks, particularly in common law

jurisdictions, where the conceptual system the courts apply to resolve disputes acts as an important constraint on judicial discretion.[27]

Yet the search for a tighter normative unity among the claims we explain as part of the same area of the law cannot be the only aim of legal analysis. Common law judges tend to distrust conceptualist theories for a reason: abstract propositions rarely capture the detailed reasons for the practical solutions which have been adopted in individual cases.[28] In this, the 'accepted performance' model is not different from other conceptualist models. By downplaying the fact that restitutionary claims have been awarded as a response to unjust enrichment in different types of case, it marginalises a significant aspect of the decisions which collectively make up the law. This is undesirable for several reasons.

First, and most obviously, there are problems of fit. Proceeding in this way would contradict many leading cases which hold that a variety of situations beyond mistaken payments may support unjust enrichment claims, and thus the position of English law as it currently stands.[29] This exposes Stevens' analysis to the same kind of objection as the one which led the High Court of Australia to reject unjust enrichment analysis as a 'top-down' and therefore illegitimate approach to interpreting the law.[30] Distinguishing 'bottom-up' and 'top-down' reasoning is not a particularly compelling way to condemn certain modes of interpreting common law materials as illegitimate,[31] but even so, an account of the law which plainly contradicts the position taken in many decided cases can hardly be expected to provide a good, let alone the best, explanation for them.

Secondly, by forcing us to focus exclusively on a relatively narrow category of cases, the 'accepted performance' model hinders our chances of understanding the whole range of reasons behind the recognition of unjust enrichment claims. Conceptualist explanations of the law of negligence provide a familiar illustration of this problem. Take the case of Weinrib, who has advocated disregarding reasoning based on what he describes as 'desirable goals independent of tort law' to preserve the duty of care as a systematic and coherent concept.[32] While this view may appear sensible in theory, there seems to be little doubt that this kind of policy-based reasoning is a central feature, perhaps *the* central feature, of the judicial development of the law of negligence.[33] An account focusing exclusively on the conceptual issues posed by the notion of duty of care will be incomplete and to a certain extent clearly incomplete.[34] The same can be said about the law of unjust enrichment: focusing on the cases which happen to fit an idealised model of relation between the parties

and hiving off the rest into unspecified parts of the law is a poor way to understand the subject as it has developed in practice.[35]

Thirdly, unconditional acceptance of Stevens' theory would require a radical reconsideration of the position adopted in recent decisions, which include cases not fitting the 'accepted performance' model within the fold of the law of unjust enrichment. It has been noted many times that the common law evolves by incremental steps which tend to be anticipated in previous case law.[36] There is a strong presumption that earlier decisions should be followed.[37] While the range of situations where unjust enrichment claims may be available is still a much debated issue, English courts undoubtedly recognise that unjust enrichment claims may lie in situations which fall outside the scope of the 'accepted performance' model. Stevens suggests that some judicial decisions would mark a tipping point in the development of the law of unjust enrichment, as they seem to have stopped the progress of an expansionist approach to the subject.[38] But even if this is correct, accepting his theory amounts to endorsing a drastic departure from recent cases and thus may disturb the incremental development of the law.

Certainly, there is nothing wrong with developing conceptual schemes intended to explain groups of cases. On the contrary, developing such schemes can significantly enhance our understanding of the law and promote predictable and transparent decision-making. To be helpful as an interpretative device, however, they must be sufficiently flexible to account for the untidy complexity that flows from factual variations between cases.[39] And in the present context, this means that a scheme which purports to explain the link that must exist between claimants and defendants in unjust enrichment cases should be able to account for the variety of situations where unjust enrichment claims have been recognised by the courts. The next section will explore a way in which this objective may be achieved.

## 3. Accommodating differences

While some of the implications of Stevens' analysis may be questioned, he is right to draw a line between cases of unjust enrichment falling within the 'accepted performance' model and other cases. However, this makes it difficult to rationalise all the authorities where unjust enrichment claims have been held to lie. This section suggests that this difficulty follows from the premise that the link between the parties in unjust enrichment claims should be the same in every possible case.

### 3.1 Difficulties with recent judicial analysis of attribution

The decision of the UK Supreme Court in *Investment Trust Companies v HMRC* offers the most comprehensive judicial analysis of the link between the parties in unjust enrichment claims in English law.[40] The main issue addressed by the court was whether HMRC, which unlawfully levied VAT on financial services supplied by a third party to the claimant, was enriched at the claimant's expense as a consequence of receiving the corresponding VAT payments from the third-party supplier, as opposed to receiving these directly from the claimant.[41] In a unanimous decision given by Lord Reed, the court concluded that the necessary connection was not established, as the payments by the claimants to the supplier and the receipt of unlawfully levied tax by HMRC were independent of one another, and thus the situation involved no 'loss through gain'.[42]

At least in part, *ITC* seems to adopt an analysis of the link between the parties which shares important features with Stevens' theory. Unlike previous judicial decisions concerning this topic, *ITC* underlines the importance of the essential purpose of unjust enrichment claims and the normative underpinning of such cases in corrective justice. Lord Reed said that the point of 'at the expense of' requirement is to ensure that only normatively defective 'transfers of value' are reversed.[43] And his particular conception of 'transfer of value', as something which generally takes the form of a direct provision of a benefit from the claimant to the defendant, chimes with Stevens' notion of deliberate performance.[44] As noted above, this notion also stems from a concern about the normative underpinnings of unjust enrichment liability.

On the other hand, *ITC* explicitly rejects theories about the law of unjust enrichment which disregard the position adopted in previous cases. The 'at the expense of' element of the standard unjust enrichment analysis eschewed by the courts should not be interpreted as a statutory provision, but as a pointer guiding the 'careful legal analysis of individual cases'.[45] Lord Reed did not hold that situations falling outside the scope of an 'accepted performance' (or any other rigidly conceived) model should be regarded as falling outside the scope of the law of unjust enrichment. On the contrary, he went to great lengths to identify and distinguish a variety of situations where different types of connection between the parties were held to support claims in unjust enrichment. These included cases of 'direct transfer', but also cases where no 'direct transfer' had occurred but where restitution could be awarded nevertheless, because there was 'no substantial or real difference' between the links that existed between the parties and the link created by 'direct transfers'.[46]

These include (i) cases where the defendant receives an asset from a third party to which the claimant can establish an interest, (ii) cases where the claimant pays the defendant's creditor and discharges the defendant's liability, and (iii) cases where a set of coordinated transactions may be treated as forming a single transaction between claimant and defendant.[47]

It therefore seems that there are at least two competing ways of understanding the decision. One is to say that a claim in unjust enrichment can lie only where the link between the parties falls within the scope of the 'accepted performance' model. If this were the correct reading of Lord Reed's analysis in *ITC*, then his analysis would be incoherent, given that other situations which do not fit this model were also regarded by Lord Reed as forming part of unjust enrichment law. Another way is to accept that the 'accepted performance' model explains why unjust enrichment claims lie in some situations but that this does not exhaust the field because other types of link may also support unjust enrichment claims. While this understanding of the *ITC* judgment may help us to avoid some of the doubtful implications of Stevens' theory, however, it requires reconsideration of an important assumption that lies behind much common law scholarship on the 'at the expense of' inquiry.

From a comparative perspective, one of the peculiarities of the English judicial and academic discussion of the link between the parties in unjust enrichment claims is that it proceeds on the basis that the 'at the expense of' question should receive the same answer in every possible type of case.[48] This assumption can be perceived in the work of Peter Birks, who concluded that the 'at the expense of' question was designed to identify a range of permissible variations upon the connection existing between the parties in the core case of a mistaken payment.[49] On this point, Birks' views are consistent with orthodox approaches to the question for the link between the parties in English law.[50] These approaches differ in the way they define the qualifying link, but all agree that this link may be identified through a general test applicable across different unjust enrichment scenarios.

Spelling out this assumption helps to explain the seeming incoherence in the *ITC* judgment, Lord Reed emphasises that the application of the unjust enrichment analysis to 'a number of different types of claim' should not entitle courts to disregard the details of the reasoning developed by the relevant authorities.[51] Therefore, unlike previous unjust enrichment cases, it avoids engaging with general tests and instead grounds the discussion on specific situations. Like Birks, however, he assumes that the question whether the necessary link exists between the parties should receive a single answer in each of these

specific situations. So instead of isolating the features of the different kinds of connections revealed by the authorities, the judgment uses the identified situations to illustrate the full range of situations comprised by the *single connection* supporting unjust enrichment claims. Unsurprisingly, it is forced to express this single connection in very general terms to cover the variety of situations identified.

The judgment's conclusion that the differences between the identified situations would be 'more apparent than real' is therefore misleading. It rests on the assumption that there is only one type of link that will do. Yet this assumption contradicts the judgment's own premise that the features explaining the decision of individual cases are important and should not be disregarded in the name of modern theories of unjust enrichment. The emphasis on distinct situations is precisely what sets *ITC* apart from previous judicial analyses of the question and renders the decision a particularly useful template for considering other cases. This suggests that a reconsideration of the single connection assumption would be consistent with the judgment's rationale and conducive to amplifying its main advantages. In considering this possibility, the experience of other jurisdictions may provide useful insights.

## 3.2 Multiple types of connection

The recent history of the Scots law of unjustified enrichment can be told as a story of challenging received assumptions. Not long ago, the law was arranged in a way which might appear unrecognisable to a contemporary observer. The old law of quasi-contract, as the subject was previously known, was formed by three distinct actions oriented to the reversal of specific benefits: *repetition*, aimed at the return of a sum of money; *restitution*, aimed at the return of property other than money; and *recompense*, aimed at the reversal of gains obtained at the expense of another in a variety of circumstances outside those covered by other claims.[52] Each of these actions was subject to its own set of idiosyncratic rules, so that a fragmented body of law existed which in this respect resembled the French law governing restitutionary claims.[53] No overarching set of principles explained how the rules of Scots law might operate as a single system.[54]

This situation changed dramatically in the space of a few decades. In two influential articles, Birks forcefully argued that the lack of commitment to an organising principle displayed by Scots lawyers had led to incoherence and uncertainty.[55] Moreover, the decision of the House of Lords in *Woolwich Equitable Building Society v IRC*[56] forced

Scots lawyers to ask themselves where they would fit a claim for the return of payments made to a public body after an *ultra vires* demand.[57] Academic interest in the subject grew hand in hand with an increasing awareness in the Scottish Law Commission that the old law of quasi-contract had to be reformed.[58] Three major cases set out the basis for the future development of the Scots law of unjustified enrichment.[59] In one of them, Lord Rodger said:

> As the law has developed, it has identified various situations where persons are to be regarded as having been unjustly enriched at another's expense and where the other person may accordingly seek to have the enrichment reversed. The authorities show that some of these situations fall into recognisable groups or categories.[60]

By the turn of the century, a judicial and scholarly consensus had emerged that a single principle unified the old actions of repetition, restitution and recompense, which were re-characterised as unjustified enrichment remedies available in different fact situations exemplified by the Roman *condictiones*.[61] But acknowledging that an area of the law is underpinned by a general principle is one thing, and deciding how its different parts should be arranged is another. Birks had argued that Scots law could be structured according to the plan he initially envisioned for English law.[62] While this proposal found some initial support, Scots lawyers were all too aware of the importance of understanding native sources before adopting a framework conceived in such general terms.[63] Instead of focusing on abstract criteria, it was suggested that the way forward required further investigating the recognisable groups or categories of situations referred to by Lord Rodger as making concrete the general principle against unjustified enrichment in Scots law.[64] A more appropriate tool for this purpose was found in the Wilburg-von Caemmerer typology generally accepted among German lawyers.

The Wilburg-von Caemmerer typology distinguishes different situations where the general unjustified enrichment clause of the German Civil Code may support the recognition of specific claims. Four situations are recognised, depending on the manner in which the defendant's enrichment is brought about: performance by the claimant (where a claim known as the *Leistungskondiktion* may be available); unauthorised interference by the defendant with the claimant's rights (where a claim known as the *Eingriffskondiktion* may be available); unauthorised expenditure by the claimant on the defendant's property (where a claim known as the *Verwendungskondiktion* may be available); and discharge

by the claimant of the defendant's debt (where a claim known as the *Rückgriffskondiktion* may be available).[65] Similarly, a consensus emerged among Scots academic lawyers that the law of unjustified enrichment should be divided according to the manner in which the enrichment is acquired.[66] Robin Evans-Jones, for example, distinguishes situations where the enrichment is acquired as the result of a deliberate conferral of a benefit by the claimant upon the defendant; where it follows from an interference by the defendant with the claimant's property or analogous rights; where it is imposed by the claimant upon the defendant; and where it results from the claimant's discharge of the defendant's debt to a third party.[67]

The assumption underlying this division is that the common foundation in a general principle does not mean that the requirements of the claims recognised in each of these situations ought to be identical. In sharp contrast with Birks' approach to the 'at the expense of' question, a differentiated approach like the one adopted by German and Scots lawyers allows the link between the parties to be determined according to criteria specific to different categories of case, which is particularly helpful while dealing with difficult scenarios.[68] Critically, this tolerance of difference is not regarded as a problematic source of conceptual incoherence but as a strength: it is considered that accommodating the diversity of situations in which an unjustified enrichment claim may be recognised makes it possible to undertake the kind of nuanced analysis that is needed to make sense of a complex area of the law.[69]

### 3.3 A qualified answer

The differentiated approach adopted by German and Scots law is not new to English scholars. For example, Birks considered the possibility of adopting a bifurcated analysis of the link between the parties distinguishing 'performance' scenarios and scenarios involving enrichments obtained 'in other modes'. He recognised the potential for such an approach to tidy up the English thinking on the matter, but ultimately rejected it as based on what he considered to be a structurally alien language. He said:

> It is a difficult question, and one of great importance to the common law, whether rationality ultimately requires this distinction between enrichment by performance and enrichment in other modes. Suffice it to say here that, without any equivalent text on which to hang it, English law has not so far found it necessary to draw any such line. If and so long as it is not insisted upon, the discussion of the essential

link between the claimant and the defendant must focus immediately on 'at the expense of'.[70]

What is interesting about the Scottish experience, however, is that it shows how a differentiated approach to the question concerning the link between the parties can be adopted without upsetting native sources. While discussing the convenience of adopting a division inspired in the German typology, Scottish authors were wary of disturbing the historical foundations and structure of Scots law of unjustified enrichment.[71] It is true that Lord Rodger's dictum in *Shilliday* noted earlier provided an authoritative argument for distinguishing categories of situations where unjustified enrichment claims may be subject to different requirements. But his opinion could also be interpreted as committing Scots law to an 'unjust factors' approach similar to the one advocated by Birks for English law.[72] Much of the success of the typological scheme now favoured in Scotland is due to the work of academics showing that the decisions of courts and authoritative writings of institutional authors can be made to fit this scheme without being distorted.[73]

This kind of work is by no means impracticable in English law. In fact, it seems to have already started. For example, Andrew Burrows, writing extra-judicially, has argued that the German typology is helpful to distinguish concrete factual ways in which the connection supporting unjust enrichment may occur.[74] Similarly, Lionel Smith's recent criticism of English unjust enrichment analysis seems to rest on the insight that 'the link between claimant and defendant is different in different kinds of case'.[75] Like *Shilliday* in the context of Scots law, *ITC* may provide an authoritative basis on which the English materials could be reanalysed by distinguishing categories of situation in which different types of link exist between the parties to unjust enrichment claims.

Certainly, these categories should include deliberate conferrals from claimants to defendants. In situations of this kind, establishing the link between the parties would typically require showing the existence of an intentional act of the claimant and its acceptance by the defendant. Cases falling within this category usually involve payments of money or provisions of goods and services taking place between claimant and defendant, but may also involve more complex relations including payments through or by agents, or services provided through third parties. The cases identified by Stevens through his 'accepted performance' theory may be accommodated in this category.

Importantly, however, other categories of case may also be accommodated alongside this central category. In line with *ITC* and other

leading unjust enrichment authorities, these should include at least: (i) situations involving takings by the defendant from the claimant, where establishing the link between the parties would typically require claimants to show that they had an entitlement which was interfered with by the defendant;[76] (ii) situations involving discharges of the defendant's debt, either because the claimant paid a creditor in respect of a debt which was also owed by the defendant, or because money traceably received from the claimant was used to pay a debt owed by the defendant to a third party; and (iii) situations involving coordinated transactions forming a single scheme, where establishing the link between the parties would typically require to show an arrangement between the claimant and a third party which results in an unintended benefit for the defendant.

To the extent that the claims recognised in these situations can be seen as the means by which the law pursues the abstract purpose of correcting normatively defective transfers of value, their differences may indeed be described as 'more apparent than real'. However, statements of this sort that are pitched at a high level of generality cannot provide a safe guide to identifying the details of what facts must be established to make out a claim in particular classes of case. To do this work, we would be well advised to distinguish groups of situations and focus on their specific features.[77] Though this differentiated approach to the link between the parties is not expressly recognised by *ITC*, it is inconsistent neither with the judgment's methodological premises,[78] nor with English law's preference for affording restitutionary claims in recognised categories of case.[79]

## 4. Advantages

The approach proposed above promotes a balance between two goals which are implicit in the reasoning in *ITC*. On the one hand, it entails the kind of overall analysis required by the modern unjust enrichment inquiry, which was itself endorsed by Lord Reed. On the other hand, it focuses attention on the features of the individual cases where unjust enrichment claims have been recognised, and therefore coheres with Lord Reed's analytical methodology. This balanced approach would allow future cases to be decided on an incremental basis, without committing English law to overgeneralised tests of liability.

### 4.1 Cohesion of thought

Integration of discrete rules into broader principles organised around categories plays a central role in civilian legal systems.[80] This is also true

of common law legal systems, at the heart of which we find the process of reasoning by analogy. It has been shown many times that this form of reasoning rests on general propositions by reference to which it can be assessed whether the facts of one case are relevantly similar to those of another.[81] These propositions help to distil the rules established by the cases to their essential components and express them through broader principles applicable to clusters of situations, a task which is critical in understanding how these rules relate to each other.[82]

The unjust enrichment analysis provides a framework that can be used to distil the rules established by a variety of seemingly disparate cases and focuses attention on systemic aspects of an area of the law which until recently was significantly under-examined. Indeed, a significant portion of the cases which today are understood to form the law of unjust enrichment were previously understood as giving rise to anomalous contract claims or isolated incidents of equitable doctrine. Approaching these cases through a single framework helped to understand the relationship between them and develop a common set of concepts to articulate the distinct issues they raise. Consideration of these issues resulted in reasoned answers to questions which previously received rather dogmatic answers – such as whether money paid under a mistake of law should be recoverable[83] – or no answer at all – such as whether payments of tax levied without Parliamentary authority should be recoverable.[84] Critically, it set in motion a process of reconsideration of the features of claims which until that point where widely seen as forming a 'backwater of the law'.[85]

If correct, the conclusion that unjust enrichment claims may be supported by different kinds of links between the parties would confirm, rather than deny, the utility of an analytical framework which enabled us to see that restitutionary claims did not originate in fictional contracts and prompted us to scrutinise the cases in search of answers. By accommodating the different links identified within the framework of common questions, an approach like the one suggested here would preserve the unity of the subject and avoid deporting some restitutionary claims to a miscellaneous category in a move that would make their features harder rather than easier to understand.[86]

### 4.2 Sensitivity to differences

While preserving the unity of the unjust enrichment analysis is useful, it should not lead us to ignore the features of individual cases. In line with the main thrust of Stevens' theory, the approach proposed here enables us to take into consideration the significant differences between the situations identified in *ITC* and in other unjust enrichment cases.

Distinguishing between categories of situations is useful to limit the range of situations between which analogies can be safely drawn. The fact that a particular circumstance is thought irrelevant for the purposes of deciding whether a claim should lie in one category of case does not mean that it is irrelevant for deciding the same question with respect to another category of case. For example, the fact that the recipient's fault makes no difference to the question whether a claim should lie in a mistaken payment case – which according to Stevens' theory belongs to the 'accepted performance' category – should not lead us to conclude that fault must also be irrelevant when deciding whether a personal claim should lie in a case concerning misdirected trust property – which, if considered an unjust enrichment claim, should probably be classified in the 'takings' category. Similarly, the fact that a defence of change of position has been recognised in a case such as *Lipkin Gorman* – which probably belongs to the 'takings' category – should not lead us to conclude that the same defence should be recognised in a case such as *Niru* – which is better explained as a case concerning the 'discharge of another's debt'.

This does not mean that analogies can never be drawn between the rules established by cases falling into different categories. There may be good reasons to conclude, for example, that a defence of change of position should be available in cases belonging to more than one of the categories proposed above.[87] The common set of concepts resulting from considering unjust enrichment cases alongside each other provide a useful starting point for the analysis of new situations, preventing the courts from reinventing the wheel every time.[88] The point is rather that analogies should not rest on the mere fact that, on a higher level of generality, cases falling within different categories can be seen as giving rise to claims based on unjust enrichment.

## 4.3 Incrementalism

The approach proposed here has the additional advantage of allowing an incremental refinement of the situations where unjust enrichment claims may be recognised. There is no need to attempt complete rationalisations of the law which may involve taking long jumps into deep waters.[89] Nor is there any need to conclude that all the cases which are dissimilar in some respect to a certain core class of case should be moved to the rubbish bin of the law.[90] In the preferred common law fashion, the features which describe the boundaries between different situations can be gradually adjusted to present a clearer overall picture.

Leaving this possibility open is particularly relevant as there are situations not considered by *ITC* which may give rise to unjust enrichment claims.[91] Take situations where it would have been legally or factually inevitable for the claimant to be enriched by a third party had it not been for the defendant receiving the enriching benefit. The principal example is provided by an old line of cases where a claim for money had and received was recognised against a defendant who had usurped the claimant's office and thereby received payments from a third party to which the claimant was entitled.[92] Birks argued that in this situation an 'interceptive subtraction' between claimant and defendant provided a sufficient connection for the purposes of recognising unjust enrichment claims.[93] This argument has been forcefully criticised,[94] and it is still controversial whether the idea of interceptive subtraction has a part to play in explaining various cases.[95] Should this interpretation find purchase among modern judges, however, it could be accommodated within the proposed framework without distorting our understanding of the features defining other situations.[96]

Consider further situations where the enrichment is imposed upon the defendant through the unrequested expenditure of the claimant in the defendant's property. An example can be found in *Greenwood v Bennett*,[97] where Harper repaired a car thinking he was its owner, when in fact the owner was Bennett, who sought to repossess the repaired car. Assuming an unjust enrichment claim is available to recover the value of the improvements made to the car in this kind of case, it seems that the link between the parties supporting this claim cannot be equated to the link revealed by any of the situations discussed above.[98] While this situation is not discussed in *ITC*, English law may eventually conclude that the link between the parties justifies the recognition of a distinct group of cases where the claimant in good faith imposes a benefit on the defendant without the latter's consent or knowledge.[99] Again, this addition to the proposed framework could help us to understand better the features of some rare cases which are difficult to reconcile with the features of more common unjust enrichment scenarios.[100]

Importantly, the task of identifying and refining categories of case where there exists a sufficient link between the parties to justify restitution is not likely to be an easy one, nor should it be. The law of negligence provides a useful illustration of the kind of challenges involved in identifying categories guiding the recognition of a duty of care.[101] While sensible in principle, this approach has been criticised for pre-judging the range of factors which may affect the outcome of particular cases.[102] Similarly, adopting the approach proposed here entails the risk

of attempting to pigeon-hole every possible unjust enrichment case into too narrowly defined categories of relationship between the parties.[103]

While this chapter does not attempt to present a solution to this potential problem, two points may be noted. First, similar challenges have not deterred courts from usefully approaching the question about the duty of care in the law of negligence by distinguishing distinct categories of situation.[104] Secondly, an approach that focuses on groups of situations is arguably better placed than an entirely abstract test to identify the variety of considerations explaining the decision of individual cases.[105] It would not be surprising if such an approach resulted in a richer understanding of the range of people, relationships and interests protected by the law through the recognition of unjust enrichment claims.

## 5. Conclusion

This chapter has attempted to show that Stevens' 'acceptance of performance' explanation of the kind of connection between the parties in unjust enrichment claims is not necessarily incompatible with other explanations of the qualifying link. It has questioned the widespread assumption that every unjust enrichment claim must reveal exactly the same kind of link, proposing instead that different forms of links may be accommodated in a nuanced answer to the question about the circumstances where the defendant's enrichment can be understood to have been 'at the claimant's expense'. This nuanced answer helps to preserve the kind of overall analysis promoted by the modern unjust enrichment inquiry without disregarding the important differences between situations giving rise to unjust enrichment claims.

However, this chapter carries an important risk of disappointment for the reader. Unlike Stevens' theory, the analysis proposed here stops short of identifying the different normative concerns which may lie behind the recognition of unjust enrichment claims in categories of case ranging next to those falling within the 'accepted performance' model. This raises an important question: why should we accept these different categories of unjust enrichment case if we still don't know the justificatory principles which may underpin restitution in each of them?

It is worth noting, however, that it is not uncommon for theoretical inquiries about the law's normative underpinnings to develop hand in hand with doctrinal distinctions like the one pointing to the categories

proposed here. If these categories are to be relied upon to provide appropriate guidance in the decision of future cases, more work is needed in understanding the justifications for recovery in each of them. In this sense, it seems clear that attribution in unjust enrichment has reached the point 'when debate must turn to questions of philosophical foundation; for reasons which are all too practical'.[106]

## Notes

1 For example, Eli Ball, *Enrichment at the Claimant's Expense* (Hart 2016) 1.
2 For example, Peter Birks, '"At the Expense of the Claimant": Direct and Indirect Enrichment in English Law' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 496.
3 Andrew Burrows, '"At the Expense of the Claimant": A Fresh Look' [2017] RLR 167, 171; Helen Scott, 'Comparative Taxonomy: An Introduction' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Elgar 2020) 165–66; Stephen Watterson, 'At the Claimant's Expense' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Elgar 2020) 271.
4 See especially Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 574.
5 See, for example, Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2139–40; Stephen Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law and Jurisprudence 157, 179; Charlie Webb, *Reason and Restitution* (OUP 2016) 17.
6 Robert Stevens, 'Private Law and the Form of Reasons' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 122. So, for example, the criminal law duty not to commit murder would be different from a private law duty in that it is not owed to an individual entitled to consent to the duty's non-performance. In a previous work, the author identifies the ability to waive private law rights as an indication of the premium placed by the law in protecting the autonomy of individuals. See Robert Stevens, *Torts and Rights* (OUP 2007) 339.
7 It is important to note that Stevens' endorsement of what may be described as the 'duty/right' explanation of private law's remedial structure is highly contentious. For an insightful summary of the main positions in this debate, see section 2 of Timothy Liau's Chapter 2 in this collection.
8 Stevens, 'Form of Reasons' (n 6) 124.
9 The conclusion that mistaken payment would be the 'core' unjust enrichment case was asserted, though not thoroughly justified, by Birks in Peter Birks, *Unjust Enrichment*, 2nd ed (OUP 2005) 3. This conclusion may be challenged. For example, it could be argued that in cases involving a 'failure of basis', including contracts discharged for breach or frustration, restitution is easier to justify on unjust enrichment grounds, as in these cases both claimant and defendant share a common understanding of the basis for the defendant's enrichment, a feature which is not present in mistaken payment cases. I am grateful to Charles Mitchell for helping me see this point.
10 Stevens, 'Form of Reasons' (n 6) 129.
11 Stevens, 'Form of Reasons' (n 6) 130.
12 There are other important implications of the 'accepted performance' theory for the unjust enrichment analysis, including redefining the reason for restitution in terms of a civilian 'absence of basis' approach, and limiting the measure of restitution to the objective value of the performance itself, as opposed to the ensuing enrichment for the defendant. These implications will not be considered in detail in this chapter.
13 Importantly, Stevens does not suggest that claims not fitting the 'accepted performance' model cannot be justified altogether and should be excised from private law. On the contrary, he identifies several kinds of restitutionary claims recognised by private law which do not fit his model.

14 Stevens, 'Form of Reasons' (n 6) 131, 133. Stevens admits that not all of private law can be explained in the kind of relations and reasons he proposes. This will be the case, for example, of the rules imposing limitation periods, and those recognising the defences of illegality and *volenti non fit iniuria*. It is not clear, however, whether he believes that unjust enrichment claims not fitting the 'accepted performance' model should be arranged next to these rules.
15 Dan Priel, 'Two Forms of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 166. See further Chaim Saiman, 'Restating Restitution: A Case of Contemporary Common Law Conceptualism' (2007) 52 Villanova Law Review 487, 488.
16 Ernest J Weinrib, *The Idea of Private Law* (rev edn, OUP 2012) 1–2.
17 Weinrib, *The Idea of Private Law* (n 16) 56–57.
18 Ernest J Weinrib, *Corrective Justice* (OUP 2012) 188.
19 Saiman, 'Restating Restitution' (n 15) 488.
20 Weinrib, *The Idea of Private Law* (n 16) 20.
21 Priel, 'Two Forms' (n 15) 167–68.
22 Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1987) 97 Yale Law Journal 949, 1000.
23 Stevens, 'Form of Reasons' (n 6) 122, 124.
24 Stevens, 'Form of Reasons' (n 6) 131.
25 Stevens, 'Disaster' (n 4) 574.
26 Stevens, 'Form of Reasons' (n 6) 146.
27 Philip Sales, 'The Common Law: Context and Method' (2019) 135 LQR 47, 48–49. See further Brian Simpson, 'The Common Law and Legal Theory' in Brian Simpson (ed), *Oxford Essays in Jurisprudence* (OUP 1973) 95.
28 Examples of this attitude can be found in *Lissenden v CAV Bosch Ltd* [1940] AC 412, 435 (Lord Wright); *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 286 (Lord Goff); and *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181, at [51] (Lord Rodger).
29 For example, *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 AC 548 ('*Lipkin Gorman*'); *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221; *Niru Battery Manufacturing Co v Milestone Trading Ltd. (No. 2)* [2004] EWCA Civ 487, [2004] 2 All ER (Comm) 289; *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176.
30 See especially *Roxborough v Rothmans of Pall Mall (Australia) Ltd* [2001] HCA 68, (2001) 208 CLR 516, at [72]–[74] (Gummow J); *Farah Constructions Pty Ltd. v Say-Dee Pty Ltd.* [2007] HCA 22, (2007) 230 CLR 89, at [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Bofinger v Kingsway Group Ltd.* [2009] HCA 44, (2009) 239 CLR 269, at [90] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).
31 Carmine Conte, 'From Only the "Bottom-up"? Legitimate Forms of Judicial Reasoning in Private Law' (2015) 35 OJLS 1, 10.
32 Ernest J Weinrib, 'The Disintegration of Duty' in Stuart Madden (ed), *Exploring Tort Law* (CUP 2005), 177. In a similar vein, Stevens has argued that considering policy factors to decide torts cases is unacceptable as judges lack the political and technical competence to weigh competing policy claims which are incommensurable. Stevens, *Torts and Rights*, (n 6) 308–10.
33 Jonathan Morgan, 'Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics' (2009) 125 LQR 215. See further Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Honour of John Fleming* (OUP 1998) 59; and Andrew Robertson, 'Rights, Pluralism and the Duty of Care' in Dolan Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 435.
34 This is, to the extent that the law is made up of decisions taken by judges exercising considerable discretion in a wide range of different contexts. Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) 205.
35 Kit Barker, 'Theorising Unjust Enrichment Law: Being Realist(ic)?' (2006) 26 OJLS 609, 625.
36 See, for example, *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 AC 349 ('*Kleinwort*'), 378 (Lord Goff).
37 *Willers v Joyce* [2016] UKSC 44, [2018] AC 843, at [4]–[9] (Lord Neuberger). See further Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 183.
38 Stevens, 'Form of Reasons' (n 6) 147.
39 Robert Goff, 'The Search for Principle' (1983) 69 Proceedings of the British Academy 169, 174.

40 *Investment Trust Companies v HMRC* [2017] UKSC 29, [2018] AC 275 (*'ITC'*).
41 As explained in the first instance decision, the applicable legislation was designed to place upon the claimant the burden of VAT payments made by the supplier of taxable services, as VAT is a tax on the consumer which is only collected by the supplier. See *ITC HC*, at [19]–[22] (Henderson J).
42 *ITC* (n 40) at [71] (Lord Reed).
43 *ITC* (n 40) at [43] (Lord Reed).
44 Watterson, 'At the Claimant's Expense' (n 3) 274.
45 *ITC* (n 40) at [42] (Lord Reed).
46 *ITC* (n 40) at [50] (Lord Reed).
47 *ITC* (n 40) at [46] (Lord Reed).
48 Sonja Meier, 'Enrichment "At the Expense of Another" and Incidental Benefits in German Law' in Helen Scott and Anton Fagan (eds), *Private Law in a Changing World: Essays for Danie Visser* (Juta 2019) 454.
49 Birks, *Unjust Enrichment* (n 9) 73.
50 For example, an entire monograph has been recently devoted to a demonstration that the different unjust enrichment cases reveal a connection between loss of the claimant and enrichment of the defendant, the essence of which was that one cannot arise but for the other. Eli Ball, *Enrichment at the Claimant's Expense* (n 1) 141, 212.
51 *ITC* (n 40) at [40] (Lord Reed).
52 Hector MacQueen, 'Peter Birks and Scots Enrichment Law' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 402–3.
53 Some of the parallels between the old Scots law of quasi-contracts and French law are explored in Hector MacQueen, 'Unjustified Enrichment, Subsidiarity and Contract', in Vernon Palmer and Elspeth Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press 2009) 324–26.
54 It is to be noted, however, that the actions of repetition, restitution and recompense were long held to effect obligations structurally different to the obligations arising from contracts. This led Birks to praise Scots Law as featuring a 'systematic and structured approach in which enrichment law, divided into two major sub-categories of "restitution" and "recompense", was long established and clearly distinguished from contract'. MacQueen, "Peter Birks and Scots Enrichment Law" (n 54) 403.
55 Peter Birks, 'Restitution: A View of the Scots Law' (1985) 38 CLP 57 and Peter Birks, 'Six Questions in Search of an Answer: Unjust Enrichment in a Crisis of Identity' [1985] JR 227.
56 *Woolwich Equitable Building Society v IRC* [1993] AC 70 (*'Woolwich'*).
57 MacQueen, 'Peter Birks and Scots Enrichment Law' (n 54) 408.
58 Martin Hogg, 'Unjustified Enrichment in Scots Law Twenty Years On: Where Now' [2006] RLR 1, 3.
59 *Morgan Guaranty Co of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725 (*'Shilliday'*); *Dollar Land (Cumbernauld) Ltd. v CIN Properties Ltd.* 1998 SC (HL) 90.
60 *Shilliday* (n 59) 727 (Lord Rodger).
61 Hogg, 'Twenty Years On' (n 58) 4; MacQueen, 'Unjust Enrichment, Subsidiarity and Contract' (n 53) 342.
62 Birks, 'Restitution: A View of the Scots Law' (n 55) 65 ff.
63 See, for example, Scottish Law Commission, *Recovery of Benefits Conferred under Error of Law* (Scot Law Com DP No 95, vol 1, 1993), [3.23].
64 Robin Evans-Jones, *Unjustified Enrichment Volume 2: Enrichment Acquired in Any Other Manner* (Thomson/WGreen 2003), [1.51] and [2.02].
65 Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 21–25; 87–88.
66 Evans-Jones, *Unjustified Enrichment Volume 2* (n 64) [2.06]. This position has been endorsed, for example, in Martin Hogg, *Obligations* (2nd edn, Edinburgh University Press 2006), ch. 4; Hector MacQueen, *Unjustified Enrichment* (3rd edn, Thomson/W. Green 2013), 16; and Hector MacQueen and Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (14th edn, W. Green 2017) [24.01] ff.
67 Evans-Jones, *Unjustified Enrichment Volume 2* (n 64) [2.02].
68 Niall Whitty, 'Rationality, Nationality and the Taxonomy of Unjustified Enrichment' in David Johnston and Reinhard Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 695; Meier, 'At the Expense' (n 48) 458–61.

69 Hector MacQueen, 'The Sophistication of Unjustified Enrichment: A Response to Nils Jansen' (2016) 20 Edinburgh Law Review 312, 321–22.
70 Birks, 'At the Expense of the Claimant' (n 2) 496. He went on to argue that critical division in English law was between ordinary and interceptive subtractions, but this distinction has proven controversial.
71 Whitty, 'Rationality, Nationality and the Taxonomy of Unjustified Enrichment' (n 68) 661; Evans-Jones, *Unjustified Enrichment Volume 2* (n 64) [2.35].
72 Hogg, 'Twenty Years On' (n 58) 7, 10.
73 Hector MacQueen, 'Review of Robin Evans-Jones, Unjustified Enrichment, Volume 2: Enrichment Acquired in any other Manner' (2015) 19 Edinburgh Law Review 147, 149.
74 Burrows, 'A Fresh Look' (n 3) 167, 170–71.
75 Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2019) 109–10. See also Lionel Smith, 'Defences and the Disunity of Unjust Enrichment' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016) 50–51; Birke Häcker, 'Fog on the Channel? Six Comparative Lessons in Unjust(ified) Enrichment' [2017] RLR 61, 70; and Stevens, 'Disaster' (n 4) 574, 576.
76 For example, cases where the defendant receives an asset, usually from a third party, where the claimant can trace an interest. It is worth noting that these situations do not necessarily amount to conversion or other wrongful interferences with goods. When they do, the claimant may choose to rely on either the wrong or the defendant's unjust enrichment as a ground for restitutionary liability. This possibility was labelled by Birks as 'alternative analysis'. Peter Birks, *An Introduction to the Law of Restitution* (rev edn, OUP 1989) 44, 314.
77 Evans-Jones, *Unjustified Enrichment Volume 2* (n 61) [2.02]–[2.03].
78 William Day, '"At the Expense of" in Unjust Enrichment: Casual, Direct or Intentional Transfers of Value?' [2017] LMCLQ 588, 605. The author argues that when the implications of *ITC* are worked through, the single connection assumption 'may start to be challenged'.
79 *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, at [21] (Lord Hoffmann); *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, at [246] (Lord Sumption).
80 The point is examined in Pablo Letelier, 'Another Civilian View of Unjust Enrichment's Structural Debate' (2020) 79(3) CLJ 527.
81 For example, Cass Sunstein, 'On Analogical Reasoning' (1993) 106 Harvard Law Review 741, 745; Duxbury, *The Nature and Authority of Precedent* (n 37) 175–76.
82 Julius Stone, *Legal System and Lawyers' Reasonings* (Stevens & Sons 1964), 185. Courts have repeatedly underlined the important implications of classifying specific rules into broader categories. See, for example, *Henderson v Merrett Syndicates Ltd.* [1995] 2 AC 145, 184–85 (Lord Goff); *Attorney General v Blake* [2001] 1 AC 268, 290–91 (Lord Steyn); *Foskett v McKeown* [2001] 1 AC 102, 129 (Lord Millett); *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649, at [77] (Lord Reed) and [109] (Lord Sumption). See further Henry Smith, 'Restating the Architecture of Property' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law Volume 10* (Hart 2019) 22, 27.
83 Goff, 'The Search for Principle' (n 39) 177. The mistake of law bar to restitution was removed in Kleinwort.
84 In *Woolwich*, p 177 Lord Goff concluded that 'money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right'.
85 Joachim Dietrich, 'What Is "Lawyering"? The Challenge of Taxonomy' [2006] CLJ 549, 549. It is worth noting that not so long ago the law of 'quasi-contract' was described as a 'territory which is more useful for the deportation of undesirable ideas than for colonization. See Paul Mitchell, *A History of Tort Law 1900–1950* (CUP 2015) 21.
86 A similar point is made in Andrew Burrows, 'In Defence of Unjust Enrichment' [2019] CLJ 521, 523–24; and Helen Scott, 'Change and Continuity in the Law of Unjust Enrichment' in Helen Scott and Anton Fagan (eds), *Private Law in a Changing World: Essays for Danie Visser* (Juta 2019) 488–89.
87 Elise Bant, *The Change of Position Defence* (Hart 2009) 198.
88 Charles Mitchell, 'Other Reasons for Restitution' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Elgar 2020) 383.

89 John Dawson, *Unjust Enrichment: A Comparative Analysis* (Little, Brown and Company 1951) 100, describes in these terms the recognition by the French Cour de cassation of the action *de in rem verso*.
90 See Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 228, describing the instances of liability grouped together by unjust enrichment scholars as making up 'the miscellaneous rubbish of the law'.
91 *ITC* (n 40) at [50] (Lord Reed). The judgment acknowledges that it would be unwise at this stage of the law's development to exclude other scenarios where the qualifying link may be present.
92 See, for example, *King v Alston* (1848) 12 QB 971, 116 ER 1134.
93 Birks, *Introduction* (n 76) 133–34; Birks, *Unjust Enrichment* (n 9) 75–78.
94 Lionel Smith, 'Three-party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 OJLS 481; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 81–82; Burrows, 'A Fresh Look' (n 3) 171.
95 Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff and Jones on the Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [6–101].
96 For example, it has been suggested that the link between the parties in these situations could be understood as a form of interference by the defendant with the claimant's right to obtain the benefit from the third party. Watterson, 'At the Claimant's Expense' (n 3) 288–98.
97 *Greenwood v Bennett* [1973] QB 195, ('*Greenwood*').
98 The key element linking the parties in the *Greenwood* situation seems to be that both claimant and defendant can justify some kind of right to the improved asset.
99 This is arguably the position adopted by modern Scots law. See Evans-Jones, *Unjustified Enrichment Volume 2* (n 64) [5.01], [5.22–5.23]. Cf Birke Häcker, 'Unjust Factors versus Absence of Juristic Reason (Causa)' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Elgar 2020) 301, suggesting that in German law a case like *Greenwood* would be dealt with through special rules governing the relationship between the owner of a thing and its illegitimate possessor.
100 Another example may be the mistaken payment cases involving bank transfers where the defendant is unaware that his account has been credited.
101 An approach adopted, for example, in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617–18 (Lord Bridge) and *Stovin v Wise* [1996] AC 923, 949 (Lord Hoffmann).
102 Jane Stapleton, 'In Restraint of Tort' in Peter Birks (ed), *The Frontiers of Liability Volume 2* (OUP 1994) 85–86.
103 For example, it may be argued that this approach risks disregarding the considerations of fiscal prudence which were factored in the assessment of the link between the parties in the scenario involved in *ITC*. On these considerations, see Scott, 'Change and Continuity' (n 87) 490.
104 Simon Deakin and Zoe Adams, *Markesinis and Deakin on Tort Law* (8th edn, OUP 2019) 102.
105 Danie Visser, *Unjustified Enrichment* (Juta 2008) 73–74.
106 With apologies to Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 OJLS 457, 475.

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*Shilliday v Smith* 1998 SC 725
*Willers v Joyce* [2016] UKSC 44, [2018] AC 843
*Woolwich Equitable Building Society v IRC* [1993] AC 70

# 12
# Mistakes in unjust enrichment

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## 1. Introduction

Although expressed in different ways, the general consensus amongst those who seek a non-instrumental justification for the restitution of payments caused by a liability mistake is that the principal value which the claim serves is the one we find expressed in choice-making, the value of autonomy.[1] If that is correct then it would suggest that the mistake that precipitates concern is a failure of the payor's choice-making. What went wrong, so to speak, is that the payor made a 'bad choice'.

This observation, though, offers little insight into why these particular circumstances could justify a claim for restitution and, perhaps more importantly, why this claim is typically made against the recipient of the payment. A person's choice-making can go wrong in many different ways, and a choice can be a 'bad' one with corresponding variety. In what sense then is a mistaken payor's choice a bad one?

Describing the payor as exhibiting an impaired intention or explaining that her decision-making was vitiated provides little assistance in this regard. These labels are often used to group several grounds for restitution together, including mistake, and this usage reinforces my broader point because this terminology tells us in a general way that the claimants have made a bad choice, but tells us little or nothing about what makes the choice a bad one. What is needed is a more specific account of how the payor's choice-making goes wrong in order to understand why

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this might motivate a claim for restitution against the recipient of the payment. What is it about a mistaken payment that makes it a bad choice?

A mistaken payment is typically characterised as consisting in a payment caused by a mistaken belief. This is true but neglects an important feature of these circumstances. Payments are the kinds of action which are performed in order to achieve some further goal.[2] In the case of a liability mistake, the payor is choosing not only to pay but also to pay in order to discharge a debt which she takes herself to owe.

It is this latter aspect of her choice which is the more significant one here. It is only in light of why she chose to act – in order to discharge her (supposed) liability – that one can see that this was a mistake. In order to understand her bad choice what we need to consider is not just the payor's beliefs but also what her actions were directed at achieving. We need to understand that hers was not just an intention to pay but also an intention to pay in order to discharge the debt which she took herself to owe.

Part of what makes such a mistaken payment a bad choice is that the payor is choosing to act in order to discharge a debt which she does not owe. The issue is not simply that, had she not held a mistaken belief, the payor would have chosen to act differently. It is also that her actions will fail to achieve what they are directed at bringing about. She will not discharge her debt because there is no such debt. Part of what matters is the reason which motivated the payor's actions and how this manifests in her intentional action. The beginnings of an explanation of the payor's bad choice can be found by contrasting the reasons which motivated the payor to act and what she actually had reason to do. Where a payor makes a mistaken payment, the reason for which she acted – the reason which explains what motivated her to act – was not a reason which counted in favour of that action. It was not a normative reason. This, I will explain, is what identifies the payor's bad choice.

A mistaken payment, explained in this way, is then a failure of the payor's practical reasoning.[3] The payor's mistake – at least the one which implicates the recipient – is in making a payment where she is mistaken about the reason which is motivating her to act. I will label this a 'mistake in action'. The relevant mistake is the action. It is the mistaken payment and not the payor's mistaken belief which the claim is addressing. Following this, as a terminological convention, where I refer to the payor's mistake or bad choice the mistake or choice which I am referencing is the one in part constituted by her actions.

Section 2 is dedicated to explaining this idea and the concepts which make it up. To do this I will first explain the two senses of reason which I rely on and then move on to the idea of 'acting for a reason'.

Having outlined the concept in this way I will then discuss two possible misconceptions which, if true, would have the potential to weaken its explanatory value. First, the concept of a mistake in action does not (as might be supposed) rely on the idea that an agent always acts for what she takes to be a good reason. The mistake which I outline does not, in other words, require that agents always act under the 'guise of the good'. Nor, as I will then go on to clarify, does this concept of mistake depend on agents always acting for what they take to be a conclusive reason.

Section 3 then applies this concept of a mistake in action to the action which is my focus: the action of making a payment. The action which a payor mistakenly engages in when making a mistaken payment is a transfer of money to the recipient. Understanding her mistake in this way then allows me to address the two questions on which I will focus: 'Why does the payor have reason to remedy her mistake?' and 'How is the recipient implicated in this remedy?'. These questions I will answer with reference to the continuing force of the reasons which apply to the mistaken payor. I will argue that this gives the payor a reason to get as close as possible to undoing her mistake. The closest it is possible to get to undoing the payor's mistake is to reverse the transfer of money. The most direct way in which this reversal can be achieved is for the recipient to pay the money back to the payor. It is because of this that the recipient has reason to transfer the money back to the mistaken payor.

The argument which I will develop here is limited. It does not provide a complete explanation of why a mistaken payor can justifiably hold the recipient to a legal obligation to pay restitution. It does not provide an explanation of the legal rule allowing a mistaken payor a claim in restitution. My ambitions are more modest. What I set out is instead an explanation of what reasons there are to reverse a mistaken payment. What one might characterise as being what counts in favour of the payor having such claim, and why – at least as a starting point – the claim is against the recipient.

This means I do not here address the possible (possibly obvious) objections which arise from the recipient's interest in retaining the payment and the (presumably) higher hurdles which must be met in order to justify a legal rule allowing for the enforcement of a legal claim in restitution. The argument is nonetheless significant. The questions which it addresses are central to the justification of the payor's claim for restitution against the recipient. This is because it is the answers to these questions which will form the basis of that fuller (non-instrumental) explanation of the legal rule allowing a claim and how it is justified.

## 2. A mistake in action

It is a significant feature of the circumstances in which a payor makes a payment caused by a liability mistake that her actions are directed at discharging the debt which she takes herself to owe. It is obviously also significant that she does not owe this debt. The combination of these two features – that the payor is acting in order to discharge a debt which she does not in fact owe – is what I have used to characterise a mistake in action. It is this mistake which I say is what gives the payor reason to respond and which explains why it is against the recipient that the payor will typically make her claim for restitution. I will return to these points in section 3.

What I will deal with now is my claim that these circumstances – this 'mistake in action' – can be best explained in terms of the payor's reasons for action. More particularly, mistaken payments can be explained by contrasting the reasons which motivated the payor's action and what she actually had reason to do. This contrast – and so too the idea of a mistake in action – relies on three concepts, the two senses of reason which I have used and the idea of 'acting for a reason'. I will start by explaining these concepts further and then address the two possible misconceptions I noted earlier.

### 2.1 Explanatory and normative reasons for action

The two senses of reason which I rely on arise from two different ways in which the word 'reason' is ordinarily used.[4] The first is the idea of 'reason' as an explanation. A reason (in this sense) is, as Joseph Raz puts it: 'Whatever provides a (correct) answer to questions about the reasons why things are as they are, become what they become, or to any other reason-why question'.[5] Why did he run? Because he was scared. Why is it dark? Because it is late. Why is the sea blue? Because it reflects the sky.

An explanatory reason is a fact[6] that provides an explanation and a fact is a reason why. In other words, it is a reason in as much as it provides (or figures non-redundantly) in an explanation.[7] This sense of 'reason' can be distinguished from a second sense, one in which reason is used for justification. A normative reason is a fact which counts in favour of some action, belief, or attitude. Why did she stop? Because she came to a red light. Why did the judge decide that case? Because she took an oath. Why did she pay him? Because she owed him the money.

Normative reasons are facts which have the potential to justify that for which they are a reason. Normative reasons are explanatory reasons

and so provide an explanation of why it is that what they favour is favoured. However, for normative reasons this explanatory role is secondary and 'depends on the fact that they favour what they favour'.[8] A justification (by giving normative reasons) is an explanation but not all explanations (by giving explanatory reasons) are justifications[9] and a justification explains why something is justified in virtue of it being justified by the reasons in its favour.

In the ordinary course we can explain a person's beliefs and purposeful action with reference to the facts which favour such belief or action. In the examples which I gave it was the fact that the light was red which both explains why the driver stopped and counts in favour of her stopping. The judge both did and should decide the case because of her oath and the payor's actions can be explained and justified similarly. This is part of what leads Raz to claim that: 'Normative reasons provide the standard explanations of beliefs and actions done with an intention or a purpose.'[10]

When explaining purposeful actions in this way, explanatory and normative reasons can come apart. If a driver mistakenly believes that there is a red light – perhaps what she sees is really a red balloon – her stopping cannot be explained by reference to the (putative) red light. The red light she believes to exist does not actually exist. It is not a fact that there is a red light and so this cannot be an explanatory reason. The putative red light cannot be a reason at all. What can provide an explanation of her actions is her belief that she had reason to stop. A belief which followed from her belief that there was a red light and her beliefs about traffic regulation. The fact that she believed that there was a red light and so believed that she therefore had reason to stop provides an explanation of her stopping. These beliefs are explanatory reasons.

However, as much as her stopping can be explained with reference to her false belief that she had come to a red light and so falsely believed that she had reason to stop, the mistaken driver's stopping cannot be justified in this way. Her false belief that there was a red light no more gives her a reason to stop than the putative red light itself. Neither her belief that there was a red light nor the putative red light to which it related are normative reasons for action. We might excuse her for her mistake – perhaps owing to the lighting and the red balloon's position most people would have been fooled – but we cannot justify her stopping for this reason.

That an agent acted because she believed that there was a reason for her action provides an explanation of her actions. That an agent acted because she *mistakenly* believed that there was a reason for her action

provides a better (or fuller) explanation of such action.[11] The first part of the explanation – that the action was done in the belief that there was a reason – need only rely on 'reason' used in its explanatory sense. An agent's actions can be explained with reference to the fact of her beliefs about what she has reason to do.

The latter part of the explanation – what makes it a better explanation of an agent's actions – relies on 'reason' in its normative sense. The explanation that an agent's belief that there is a normative reason for an action is false is based on a judgement that the putative reason, the reason which the agent mistakenly believes in, is not a normative reason for that action. In these circumstances an agent's beliefs about what she has reason to do fail to correspond with what she actually had reason to do. The further information that her beliefs are mistaken satisfies a wider range of interests about her conduct, and is a more comprehensive explanation.[12]

Let me return to the two different senses of reason I have outlined and their role in explaining a mistaken payor's conduct. Where a payor is caused to make a mistaken payment by a belief as to her liability, the most likely explanation for her action is that she believes herself to have reason to pay the recipient in order to discharge such debt.[13] This mistaken belief is the answer to the reason-why question: 'Why did she make the payment?' Her belief provides an explanation of why she acted. It is an explanatory reason for her action. Where a payor acts on her belief that she owes a debt and so has reason to pay the recipient her belief explains why she acted to make the payment.

More is explained when it is further noted that her belief was mistaken. She does not owe the debt. She does not have this reason to pay. By making reference to the payor's normative reasons we can explain that she does not have the reason to pay the recipient which she believes herself to have. The putative reason for which she is acting, her supposed debt, is not a normative reason for her to pay. It is by employing these two different senses of 'reason', by contrasting the reasons which the payor believed herself to be acting on and the reasons she had, that her mistake is identified. By acting on a reason about which she is mistaken the payor makes a mistake. She makes a mistake in action.

## 2.2 Acting for a reason

Lurking behind what I have said here is reliance upon the idea that the payor was acting in order to discharge her debt. Her reason for acting was in order to discharge the debt. She mistakenly believed that she owed a

debt to the recipient and it is this reason which motivated her to make the payment. The claim that I have made is that a payor makes a mistake in action when she is mistaken about the reason for which she acted. I have claimed that a payor makes such a mistake when the reason for which she acted is not a (normative) reason. What this obviously requires is that we identify the reason for which the payor acted. Note, however, that the claim is not that the payor did not have any reason to pay the recipient. It is a quite different thing to say that there are no normative reasons in favour of the payor acting as she did. That alternative claim would seem to be one way of establishing that the payor's actions lacked justification and does not necessarily depend on why the payor made her payment.[14]

The contrast that I am relying on is rather between what the payor had reason to do (her normative reasons for action) and which reason the payor acted for (the explanatory reason for which she acted). Why the concern with the reason for which the payor acted? Why this specific reason? Driving this interest is the premise from which this chapter started, that a mistaken payment reflects a failure of the payor's choice-making and that the value at stake here is the payor's autonomy. The explanatory reason that is significant is the reason which motivated the payor to act. This is the reason which the payor *chose* to act for.

Any particular action might have a number of different normative reasons which favour it. So, for example, I might have reason to go to the beach because it is a sunny day and also because I had promised to meet a friend there today. These are separate reasons but there is nothing stopping me from acting on both. These reasons taken together might form part of the explanation of what motivated me to act. Equally though I might only be acting on one or the other. It is up to me which reasons I act on. I get to decide – I choose – why I am going to the beach or for that matter whether I am going to respond to either of these reasons and go to the beach at all.[15]

Consider circumstances where I am renting a flat from a friend. After having paid my rent, my friend tells me that my rent for the month has increased as a result of a clause in our agreement. However I am not sure that she has construed the terms of the lease correctly. It is not clear to me that the increase takes effect this month. Pretend for a moment that I am wealthy and not overly concerned about paying a little more and that my friend is struggling and relies on this income. Assume for the moment that, at this stage, it is unclear which one of is correct and that I remain uncertain.

In these circumstances I could understand myself as having one of two different reasons to pay the extra amount. I might come to accept that

I owe the extra amount as a debt and act to discharge what I take myself to owe. Alternatively I might decide that I should pay the extra amount even if I do not owe the debt because this will support my friend.[16] I am in a position where I could choose to act on either of these reasons. Whatever my choice the action which I engage in is the same, I pay. What differentiates these two scenarios is the reason for which I am acting. In the first I choose to pay in order to discharge my debt. My debt is the reason which motivates me to act. In the second this is not the case. I am choosing to support my friend and this is the reason I choose to act on.

In both cases I make a payment but these circumstances are relevantly different from each other. This difference becomes particularly pertinent when – as it turns out – the increased rent is not owed. In the first scenario the reason for which I am acting (to discharge my debt) is not a normative reason. I am mistaken about the existence of this reason. By contrast, where I am acting to support my friend I have this reason whether or not I owe the debt. This is a normative reason for my action. These circumstances are different because in the first I am acting for a reason about which I am mistaken but in the latter I am not.

What then does it mean to act for a reason? When I say that the payor is motivated to act for a reason what do I mean? Donald Davidson's example of a nervous climber illustrates that a simple causal account is insufficient:

> A climber might want to rid himself of the weight and danger of holding another man on a rope, and he might know that by loosening his hold on the rope he could rid himself of the weight and danger. This belief and want might so unnerve him as to cause him to loosen his hold, and yet it might be the case that he never chose to loosen his hold, nor did he do it intentionally.[17]

Davidson – who argues that all intentional action is action for a reason – explains this in terms of acting intentionally but the example applies equally to action for a reason, action which will always be intentional action.[18]

To illustrate this, consider the situation again but this time stipulating that the nervous climber believes that he has reason to 'rid himself of the weight and danger' and desires this outcome. Again, if the climber's anxiety about whether to act on this reason causes him to loosen his grip on the rope – anxiety which is caused by his belief and desire – he is caused by his belief and desire to loosen his grip. However, his actions are still not intentional and so he is clearly not acting for this reason when

his grip loosens. Although caused to act by his belief in the reason and his desire to rid himself of weight and danger he is not caused to act in the right way. He is not acting for this reason.

Davidson's conclusion is that it is not possible to 'fully identify the causal conditions of intentional actions'.[19] Kieran Setiya, however, disagrees and explains that these examples of 'causal deviance' are explicable once the role such reason plays in the agent's reasoning is properly considered. As Setiya argues, what is critical in the explanation of action for a reason is that the agent is not simply caused to act by the reason but that her actions are guided by her awareness of the reason.[20] An agent is motivated to act for a reason where her actions are guided by her awareness of the reason as a reason for her to act.[21]

In order to φ for a reason an agent must believe that she has a reason to φ and must be caused to φ by this belief. But this is not enough. The agent must also believe that she is φ-ing for that reason and be guided in her φ-ing by that belief. Relying on Raz to sharpen up this notion of guidance:

> [T]he claim is that one's action is guided by a reason just in the case that one is motivated by the reason, through awareness of it, in a way that is manifested by the (normally unconscious) self-correcting process of tracking the success of the process of performing the action.[22]

Davidson's simple causal account fails to capture the way an agent employs a reason in her reasoning when she is acting for that reason. When acting for a reason, the reason does not just initiate the process but also forms part of what the agent understands herself to be doing and guides her action in this way.

Bringing this back to mistaken payments, imagine a scenario in which I believe that I owe a debt and so believe that I have reason to act in order to discharge such debt. Now imagine that this has triggered some latent anti-capitalist impulses. I am reminded of my youthful resolution to 'stick it to the man'. I refuse to participate in this capitalist hegemony. I believe that there is a reason to pay the debt (I am under a legal obligation) but I also believe this reason to be defeated by broader social concerns (capitalism is ruining the planet). I will not pay my debt.

Perhaps upon reflection I realise that my creditor is a struggling artist who needs the support and my resolve softens a little. I am still going to stick it to the man. I am not going to pay my debt. I will instead make a substantial donation to the artist, a donation in excess of what I owe him. I pay this amount as a donation and not in order to discharge my debt.

As it turns out I was mistaken in my original belief. I never owed the artist any money in the first place. But – and this is the key point for my purposes – if I had not held the mistaken belief that I had reason to pay him in order to discharge my liability it would never have triggered the line of thought which led to the donation. My mistaken belief that I had reason to pay the artist in order to discharge my debt was a 'but for' cause of my payment. At the same time the role that this belief played would seem to be a matter of chance. The belief happened to be what triggered my thinking but was not central to my reasoning about how to act.

That my reason to discharge my liability was not the reason which was guiding my action is made obvious by the fact that I was not paying the amount I believed I owed. I was paying in order to make a donation not settle a debt. This is not an example of the bad choice we find in circumstances in which a person pays in order to discharge her debt following a liability mistake. This is because I was not being motivated by a reason to discharge my debt. The reason which I took to motivate my actions was my reason to make a donation to the artist.

The explanatory reason which I rely on in setting up the contrast which establishes a payor's mistake in action is then a specific one. What I am looking for is the answer to the question of why the payor was motivated to make the payment. A payor makes a mistake in action when the reason for which she acted is not a normative reason for making the payment. It is the reason which she believed she was acting on and which guided her action in which we are interested. What must be established is whether she is mistaken about the reason for which she chose to act.

## 2.3 Acting under the 'guise of the good'

A further gloss on this analysis is required. There is a widely endorsed (and also much criticised) claim that in acting intentionally (and so also acting for a reason) an agent necessarily sees something good in her actions.[23] So it is often said that acting intentionally is to act under 'the guise of the good'.[24] Employing the terminology I have been relying upon, the claim can be understood as being that where an agent takes something as a reason for action, 'reason' features here in its normative sense. To act for a reason is to act for a reason which the agent believes is not just an explanatory reason for her action but also a normative reason for that action, one that might justify her actions. The idea of making a mistake in action relies on the agent acting for a reason which she takes to be a good one. This then invites the misconception that the idea relies on agents

always acting under the guise of the good. The explanation which I have offered would then only be true if this contested idea were also true.

Nothing I have said about acting for a reason relies on this proposition being true. On the contrary, I have placed much reliance on Kieran Setiya's account of acting for a reason which denies that acting for a reason involves acting under the guise of the good. Setiya instead insists that when acting for a reason an agent must only take that reason to explain her action.[25] He claims that reason is being used here in its explanatory sense. An agent must believe that the reason for which she is acting explains her action but need not (although obviously may) also believe that it could contribute to its justification. She can, on Setiya's view, choose to act for bad reasons.[26] This he takes to follow from (amongst other things) his view that agents can act intentionally for no reason at all.[27]

What I have said about acting for a reason does not depend on or conflict with Setiya's claims about the guise of the good. What my account does rely upon is that in order to make the kind of mistake which I have labelled a 'mistake in action' the payor must be acting for a reason which she takes to be a normative reason. Her mistake consists in taking the reason for which she is acting to be a normative reason for action when it is not. Absent her taking the reason for which she is acting to be a normative reason, the payor cannot be mistaken about the reason in the way in which I describe.

My account is entirely compatible with the claim that when acting for a reason an agent always acts for what she takes to be a normative reason. At the same time it does not depend on this claim being true. If Setiya is correct and an agent when acting for a reason need not necessarily take the reason for which she is acting to be a normative reason, then in those circumstances she simply cannot make the kind of mistake which I am seeking to explain.

Possibly this is a limitation of the analysis which I have offered and the utility of the concept of a mistake in action which I develop. Perhaps by limiting my concern to circumstances in this way I detract from the power of my explanation. I think not. Accepting Setiya's claims for the sake of argument, circumstances in which an agent chooses to act for a reason which she does not take to be a good reason (a normative reason) seem to be relevantly different from circumstances in which an agent takes a reason to be a normative reason.

Consider the example which Setiya uses to illustrate this point.[28] He imagines smoking a whole pack of cigarettes one night just before quitting at midnight. He posits a scenario in which he will derive no satisfaction

from his smoking and sees no good in this action and yet does it anyway. He is acting for a reason (a reason he takes to explain his action) but not for a reason he sees any value in (he does not take such reason to justify his action in any way). Setiya's claim is that: 'It is often easy to understand why people act in ways they do not see as good.'[29]

That might be true, but whatever the failure of his choice-making which this represents surely it is different from circumstances in which he mistakenly believes that he has good reason to act. Joseph Raz uses circumstances in which a person is under the influence of hypnotism or subject to a form of pathological compulsion like kleptomania as illustrations of such alternative failures.[30]

Although in these circumstances a person may be acting intentionally – when stealing an item from a store or quacking like a duck – there is a sense in which the intentionality[31] exhibited by these actions is diminished. When subject to such influences a person's 'normal powers of agency are temporarily reduced, and become partially ineffective.'[32] A person's choice to engage in such action is less her own than where it is not imposed upon by these kinds of pathology or suggestion.[33] The intentionality of her actions, when subject to such influence, is then lessened. Her intentions are – in this sense – defective.

These situations seem quite different from those in which a person makes a mistaken payment. Where a person holds a mistaken belief this does not seem to reduce her powers of agency in a manner that is analogous to such impairments. Where a person makes a decision based on a mistaken belief the choice is still very much her own. The intentionality of her actions is not reduced.

Rather, our beliefs function as inputs into our practical reasoning. We choose what to do in part on the basis of what we believe to be the case. Where a person acts on the basis of a false belief she responds to what she takes to be the case but not what is actually the case. Not only might this cause her to act differently from how she would have if her beliefs had been correct but her actions are also less likely to bring about the goals towards which they are directed. There is then a sense in which a person's powers of agency function effectively but are nonetheless thwarted by her mistaken belief rather than the intentionality of her actions being lessened or her intentions, in this sense, being defective.

It is not an accident that the example which Setiya relies upon is one in which we can understand his acting for a bad reason because we have some understanding of how nicotine addiction operates upon a person's choice-making. Setiya's smoking seems to involve the same kind of impairment of choice-making capacity (although perhaps to a lesser

degree) which Raz identifies in his examples of hypnosis and kleptomania. This is not what we would ordinarily expect of individual choice-making. It is then unsurprising that Setiya's example is not susceptible to the 'standard explanation' of purposeful action which Raz offers. That explanation, argues Raz, is an explanation with reference to the normative reasons which the agent took to favour such action.[34]

This view leads Raz to defend a more limited claim about the guise of the good than the claim which Setiya doubts.[35] Raz, like Setiya, argues that not all intentional action is undertaken for a reason and, again like Setiya, uses idle actions undertaken for no reason at all as an example.[36] Where Raz differs is that he argues that intentional action that is performed with an independent intention[37] is standardly performed for a normative reason as those are seen by the agent.[38]

What is important for my argument is that Raz limits this to being the 'standard explanation' of action performed with an independent intention because he allows for exceptions, for non-standard explanations. These non-standard cases include examples of the kind which Setiya relies upon. Raz's hypnotism and kleptomania and Setiya's nicotine addiction 'can be explained as deviations from the norm, either by being cases of less than complete intentionality or as anomic versions of the norm.'[39]

These exceptions are cases where we can point to an agent's actions being less intentional or anomic as an explanation for why they do not respond to the standard explanation of purposeful action. This also explains why – whatever failure might be present – they do not respond to the analysis of a mistake in action which I have offered. In these circumstances the agent is not choosing to act for a reason which she takes to be a good reason and so cannot be mistaken about this being a normative reason. These exceptions are instead explicable on the same terms as those Raz offers. That they are not captured by the analysis of mistakes in action which I offer is not a failure of such analysis. Rather, the explanation of these circumstances lies elsewhere.

To take stock, the explanation of mistaken payments I am offering is one of payments undertaken for what the payor takes to be a good (or normative) reason for paying but about which she is mistaken (it is not a normative reason for her to pay). Although this explanation is compatible with the view that an agent always acts for what she takes to be a good reason it does not rely upon it. Rather, if (and assuming this is possible) an agent acts for no reason or for what she takes to be a bad reason she simply cannot make the kind of mistake which I will be relying upon to explain the recipient's liability following a mistaken payment.

This is not an arbitrary exclusion. There is good reason to believe that these circumstances are relevantly different from the kind of mistakes which I am trying to explain. These are warranted exceptions. At the same time, clarifying this misconception invites a second potential confusion.

## 2.4 Conclusive reasons

The explanation of these non-standard examples could be taken to suggest that an agent can only make a mistake of action when she believes that her actions are justified. It might be taken to mean that such a mistake is only possible where she is acting for what she thinks she has 'all things considered' reason to do. If that were the case then the range of circumstances in which a mistake in action could occur would be limited. This limitation might invite an inference that the successful application of the idea is a matter of overly careful construction and this might suggest in turn that the concept lacks genuine explanatory power.

This is not the case. What I have said is that a mistake in action occurs where an agent takes herself to be acting for a normative reason but is mistaken about this. The agent need not take herself to have a conclusive or 'all things considered' reason. Rather, she simply needs to take herself to have some reason – a *pro tanto* reason as it is often labelled – for her actions. Her mistake likewise consists in the *pro tanto* reason for which she is acting not being a normative reason for action rather than her not having a conclusive reason for her actions.

This possibility arises because – even when not subject to the kind of influence or failing which Raz collects as requiring a non-standard explanation of an agent's purposeful action – people do not always choose to act correctly. A vivid depiction of this can be found in what is typically called *akrasia*, circumstances in which a person acts against her better judgement. Imagine a scenario in which I have just eaten a delicious piece of chocolate. Now I crave more. I know that I should stick to my diet, just one piece is enough. My own judgement is that all things considered I should not eat another piece but I nonetheless give in to temptation and satisfy my craving by finishing the bar.

Relying on the explanation of *akrasia* offered by David Owens, circumstances such as these can be understood as those where I am acting on a reason that I judge to be defeated by countervailing considerations.[40] The chocolate is delicious and I will enjoy eating it. I have reason to eat the chocolate. I also have reasons to stick to my diet, reasons which are stronger than my reason to satisfy my desire for chocolate. In light of

these considerations I should not eat the chocolate and my own judgement on the matter reflects this. Despite this I eat the chocolate. I take as my reason for acting – I am motivated by – the lesser reason. I knowingly act for a reason which I believe to be defeated.

As much as this demonstrates some failing in my choice-making – I am unable to resist temptation and show weakness of will – it still responds to Raz's standard explanation of purposeful action. I am acting for what I take to be a normative reason for action. The failure is also not an example of a mistake in action. I am acting for a reason which all things considered I should not act on but this is very much a real reason for me to act. The choice to act on a defeated reason is a 'bad choice' but it is not the same kind of bad choice as a mistake in action.[41] Choosing to eat the chocolate might be the wrong choice for me to make but it remains an effective exercise of my choice-making. I am choosing between real alternatives. I might be choosing badly but I am making a real choice in a sense which is lacking when I make a mistake in action.

A person makes a mistake in action when she is mistaken about the reason for which she is acting. These are circumstances in which a person is motivated to act and guided in her actions by a false belief that she has a (*pro tanto*) normative reason for her action. She is choosing to act for what she believes to be a normative reason for her action but that belief is mistaken. It is this failure of her choice-making which I have labelled a mistake in action and it is a mistake which a payor makes when paying in order to discharge a supposed liability.

In the introduction I identified the mistaken payor's autonomy as the value at stake in circumstances in which a payor makes a mistaken payment. I said that it was the value expressed in the payor's choice-making which the claim serves. However, as much as autonomy might be the value at stake this – on its own – tells us little about how the recipient of a mistaken payment's liability in restitution is justified. What is required is a far more specific account of what was flawed about this kind of choice and why this failure of choice-making implicates the recipient in a way which justifiably gives rise to his liability. The challenge which I said this presented was in identifying the particular flaw in the payor's choice-making which arises in this context.

That mistake, the mistake which I will now use to explain how the recipient is implicated by the payor's mistake, is her mistake in action. What I turn to next is explaining how, when making a mistaken payment, it is this particular flaw in the payor's choice-making which gives her reason to reverse her payment and how this in turn implicates the recipient.

## 3. Fixing the payor's mistake

If I pay you money by mistake the legal claim I will typically have is against you, the recipient.[42] According to Frederick Wilmot-Smith: 'It is not desperately hard to say why I, the payor, have an interest in such rule.'[43] Wilmot-Smith suggests that this is, at least in part, explained by the payor's impaired consent to make the transfer.[44] So there is apparently no puzzle here. Wilmot-Smith then suggests that the unanswered puzzle is a different one. It is not why the payor has an interest in being reconstituted but rather why it is the 'payee' (the recipient) who is singled out as the appropriate person to perform this task. As the title of his article 'Should the Payee Pay?' suggests, his focus is on the question of why the recipient comes under an obligation to 'fix the payor's problem'.[45]

Ultimately Wilmot-Smith's survey of the answers which have been proffered to this question leaves him unsatisfied,[46] and this is a sentiment I share. Where I differ from Wilmot-Smith is not only in thinking that impaired consent does little to explain the recipient's interest in being reconstituted but also in doubting the way in which he starts his enquiry.

While it is true that a mistaken payor has an interest in being 'reconstituted' as Wilmot-Smith suggests, more specifically what the payor has an interest in is remedying her mistake. How the recipient is implicated in the payor's mistake – why the payee should pay – can only properly be explained with reference to the payor's mistake. Why she has an interest in remedying her mistake and what that remedy involves are then what explain the recipient's involvement. Before getting to those points I must first complete the explanation of the payor's mistake which I started earlier. To return to a point I made at the outset, what is needed is a more specific account of the payor's bad choice.

### 3.1 Mistakenly transferring money to the recipient

What is it that the payor has an interest in remedying? This question might come across as obtuse but bear with me. We know what remedy the law allows. The recipient must pay restitution. He will come under an obligation to repay the amount that he received to the payor. What, though, does this fix? This seemingly obtuse question has an equally banal answer. He must fix the payor's mistake. If our concern is motivated by the failure of the payor's choice-making (her mistake) then this is what it must be fixing. It is fixing this mistake towards which the remedy is directed. Nothing interesting so far. However, this banal answer to my

obtuse question has the potential to become enlightening once it is appreciated that the mistake which the payor has reason to fix is a mistake in action.

To appreciate this point it is necessary to direct attention towards an aspect of the mistake in action on which I have not placed much emphasis so far. The focus of my earlier discussion was on distinguishing a mistake in action from other failures which an agent might make when choosing how to act. In order to isolate the specific failure which grounds the recipient's liability in restitution I devoted much of the discussion to the reasons motivating an agent to act and what she had reason to do. I paid comparatively little to what she was doing.

That the payor was mistaken about the reason which motivated her action tells us that her actions will not achieve the ends towards which they are directed. It also tells us that she presumably would not have acted in the way in which she did had she not been mistaken about the reason motivating her action. These features of the circumstances help explain that the payor is making a mistake but on their own they tell us little about why her mistaken payment calls for a response let alone how best to respond.

What has not attracted as much of my attention is that the mistake in action which I described consists in an agent *acting*. She is acting for a reason which she mistakenly takes to be a normative reason for such action. In the case of a mistaken payment this action is her paying. She makes her mistake in paying. That at least is true when she is successful in transferring money to the recipient. This is because a payment is an action which is in part constituted by its outcomes.[47] The actions comprising a payment are only a payment when the payor is successful in transferring money to the recipient. This allows a distinction to be drawn between the results and consequences of an action. A result is an outcome which is also a constituent of such action. A consequence, by contrast, is an outcome which is not a constituent of the action.[48]

It is not just the basic actions (the bodily movements involved) but also the results which such actions are directed at bringing about (the transfer of the money)[49] which make up the act of paying. The payor's mistake in action then, more fully, consists in the transfer of money by the payor to the recipient for a normative reason which she takes herself to have but about which she is mistaken. This is her mistake and this is what she has reason to fix. The observation that a payor has reason to fix her mistake is helpful because it forces an engagement with what the payor's mistake (more fully) consists in. It is significant not just that the payor is

acting for a reason about which she is mistaken but also that the action in which she is engaging is mistakenly transferring money to the recipient.

Here I must raise a note of caution. The claim that the payor has reason to fix her mistake in action is also potentially misleading. It creates the impression that what the payor has reason to interact with is her earlier action. It makes it seem as though it is her mistake in action that the payor must now 'fix'. This is not possible. It is – without relying upon metaphor – not possible to repair or reverse an action. Mistaken actions cannot be 'fixed' in this way. The payor made a mistaken payment. She cannot now undo what she did. She gets no 'do-over'. It is important that the obvious answer that the payor has reason to fix her mistake in action is helpful only as long as it is understood that in giving this answer one is speaking figuratively.

A person may not be able to undo her actions but she can interact with their outcomes. The effect a person's actions have on the world can often be at least partially reversed. Even where reversal is not possible other responses which address these effects – repair, replacement, compensation and apology as examples – are typically available.[50] Mistaken, wrongful and blameworthy actions can, in this metaphorical sense, be 'fixed'. Suppose in a moment of anger that I say something mean to a friend. The hurt that this causes is not something I can undo. I cannot literally take back my words and I cannot literally undo the harm that I inflicted. I can only apologise and explain that those words, coming out in the heat of the moment, do not reflect my true feelings. If I am lucky my friend might accept both my apology and explanation. Perhaps our friendship might continue as before. I might, in this way, 'fix' what I did even if I cannot go back and change what I said.

Mistaken payments – as I will explain below – have what will typically be a far more effective 'fix'. The outcomes which part constitute a payment, its results, are reversible. Money which is transferred can be transferred back. The action of making a payment cannot be undone but we can get close to this by reversing the transfer of the money. Transferring money back from the recipient to the payor is actually often so close to reversing the payor's mistake in making the payment that this point is perhaps easy to overlook.[51]

The distinction is nonetheless important. There is not a payment which can be interacted with which is separate from its outcomes. What it is possible to interact with, what it is possible to reverse, are the outcomes of the payor's actions.[52] As close as we can get to undoing a payment by reversing the transfer of the money, however, this is still not literally undoing the act of paying. But I am now getting ahead of myself

and I still need to explain why the recipient liability in restitution is best understood as remedying the payor's mistake by transferring the money back and why this is typically the closest we can get to undoing a mistaken payment.

## 3.2 The value in spending money

So, the payor has made a bad choice. That bad choice consists in her transferring money to the recipient for a reason about which she is mistaken. Realising her error will mean that she now knows she did not have a reason to act in the way she did but such revision of her beliefs does not do anything to change the fact that she transferred her money. Much like the other kinds of errors and failures I appealed to a moment ago a mistaken payment is one to which a payor has reason to respond. She has made a bad choice and having made this bad choice (I will argue) gives her a reason to take remedial action.

What I am claiming is that a mistaken payor has reason to respond to her mistaken transfer of money to the recipient. More specifically, I am claiming that she has reason to undertake remedial action in response to her mistake. It follows that I will here be speaking of the normative reasons for action which a mistaken payor has after having made a mistaken payment, that is the normative reasons she has to engage in actions which will remedy her mistake. When speaking about reasons or the reasons which a mistaken payor (and later the recipient) has, it is these normative reasons for action to which I am referring.

That explanation starts with Joseph Raz's conformity principle:

> *The conformity principle*. One should conform to reason completely. If one cannot one should come as close to complete conformity as possible. The first part of the principle is tautological. The interest in the principle is in its second part.[53]

Tort law theorists have drawn on an implication of the second part of this principle to explain why a tortfeasor has reason to respond to her tortious conduct.[54] What the conformity principle implies is that where a person fails to conform to a reason she will continue to have reason to come as close to conformity as possible. She will have reason to do 'the next-best thing' to complete conformity.[55]

John Gardner for example explains this idea – which he develops into his 'Continuity Thesis' – with reference to a promise to take his children to the beach that day, a promise which goes unfulfilled because

of an emergency that arises.[56] That (now broken) promise, argues Gardner, continues to exert a hold over him. The promise continues to shape what he has reason to do even if he can no longer conform to it completely. This is because what he can still do is something which gets him as close to conformity with his promise as is possible. So he might take his children to the beach the following day, or failing that the next closest option and so on.

Significantly, as Raz notes:

> The conformity principle is not 'an independent' principle. It is not as if one has a reason to do something, and because of the conformity principle one should conform to that reason. Rather that one should conform to it is what we say when we say that it is a reason.[57]

That one has reason to come as close to complete conformity as possible, where one cannot conform completely, adds nothing to the statement that one has a reason for action.[58] Having a reason for action is having a reason to conform completely and, where one cannot do that, having a reason to conform as completely as possible. What Raz is capturing with the conformity principle is simply a property of having a reason for action.

This is what leads Gardner to use his label of the Continuity Thesis.[59] The reason which he had to take his children to the beach – that he promised – is, after having been broken, also a reason to take his children to the beach the following day. Or perhaps instead, if he cannot do that, a reason to take them to the beach another day or a reason to do whatever else will get him as close as possible to complete conformity. The reason – his promise – continues to shape what he has reason to do even after his original failure to conform to it completely and continues to be a reason to come as close as possible to conformity to what the promise required of him.

What is true for broken promises is also true for tortious damage, or at least so argue Gardner and the other tort theorists who endorse this idea of continuity.[60] The reasons which a tortfeasor has to remedy the damage which she has caused is a continuation of the reasons which she had not to cause that damage in the first place. A tortfeasor, like a promise breaker, has reason to come as close as possible to conformity to the reasons with which she failed to completely conform. It is this continuity in what she has reason to do which isolates the promise breaker or tortfeasor as the person who typically has reason to remedy the promisee's or tort victim's remediable losses caused or occasioned by her failure.[61]

The same continuity of reasons – how an earlier non-conformity to reason continues to shape what a person has reason to do – is also critical

to understanding the reasons which a payor has to respond to her mistaken payment. With mistaken payments it is however a slightly different implication of the conformity principle which is significant. Tort law theorists who draw on this idea are interested in the specific reasons to which a tortfeasor fails to conform. What captures their attention is how she continues to have reason to come as close as possible to conformity with those specific reasons after she has initially failed to conform to them completely.

Rather than the failure to conform to a specific reason (or a number of specific reasons) as is the case for tort, a mistaken payor has failed to conform to a more general set of reasons. As part of making a mistaken payment a payor fails to conform to the various reasons which she has which require her to spend (or save) her money. Where she transfers money by mistake the reason she is acting on is not a reason for her to pay and she likely fails to respond to a reason which she has.[62] Not only was she making a bad choice – in the sense that she was mistaken about the reason for which she was acting – she probably did not have any other reason to transfer money to the recipient.

She presumably also leaves herself less able to conform to the set of reasons she has which require her to use money in other ways.[63] She now has less money. Less money to pay her debts, less money for spending, lending, gifting and all the various other things which she has reason to do. Fortunately for her the result of her payment, the transfer of money to the recipient, is reversible. Money which has been transferred can (at least typically) be transferred back and, practically speaking, the actions required to bring this about are usually trivially easy.

There are remedial actions available and so there is reason to take these actions. It is possible for a mistaken payor to bring her actions into closer conformity with the reasons which she has. She can in fact almost entirely ameliorate her earlier non-conformity and restore her capacity to choose amongst competing options and to respond to the reasons she has to use her money in other ways. She has reason to respond to her mistake by reversing the transfer because she made a bad choice[64] and reversing its results will allow her to better conform to the (continuing) reasons she has to use her money in other ways.

In an ideal world she would not have made the mistake which she did but in the world in which she finds herself she is still able to do something that is almost as good as avoiding the mistake in the first place. The next best thing is often going to bring her very close to the position she would have been had she not made her mistake. This is because she can reverse the results of her mistake and by doing so put herself back in

a position where she will be able to pay her debts, and otherwise choose amongst and act on the reasons she has to spend, lend and gift her money.

The rational appeal of correcting a prior non-conformity in the context of a mistaken payment again differs somewhat from what is found in tort. Both accounts trade on the idea that there is a distinctive case in favour of 'fixing' an error – that is undertaking actions which correct an earlier non-conformity – as opposed to engaging in some other action which might equally serve the reasons with which a person failed to conform (or the other reasons for action a person has).[65] Where they differ is that a tortfeasor will have typically failed to conform to a *reason to not act* in the way in which she did. A mistake in action by contrast typically involves acting in the *absence of reasons* to act in that way. All else being equal, the error is less substantial and there is then perhaps a less compelling case in favour of remedying mistaken payments relative to tort.[66] There is still however a non-conformity. There is still a distinctive reason to remedy such non-conformity. It is perhaps just a less pressing reason.

Here the mistaken payor runs into a different problem. She has reason to fix her mistake. She has reason to reverse her transfer of money to the recipient. The problem is that *she* cannot. *She* no longer has the authority to transfer the money the money. She cannot transfer the money back to herself. That was one of the outcomes of her mistake. The money and the authority to transfer it are now the recipient's. The outcome which the payor has reason to bring about is the reversal of her payment. The simplest and most direct way to achieve this outcome is not an action of hers but of the recipient's. He holds the authority to transfer the money back and he can act to bring this about. He can pay the money back to the payor.

However, this is not as much of a problem for the mistaken payor (in at least one respect) as it might at first seem.[67] To have reason for an action is for there to be value in that action. That the payor has reason to reverse her payment is because there is value in reversing such payment. This is what I have been arguing. The value which can be realised in the action is a reason for that action. That is as much true for the recipient as it is for the payor. It is out of this that we have reasons to act both to support others in their actions which hold value and also to act to realise value for others. That the payor has a reason to get her money back is a reason for anyone to give her that money back, or more particularly, a reason for whoever has the money and has the authority to give that money back to her. That person, the person who can most simply and directly reverse the transfer, is the recipient.

Wilmot-Smith is not wrong to say that a mistaken payor has an interest in being reconstituted. At the same time characterising her interest in this way is apt to mislead. A mistaken payor has reason to respond to her mistake by taking remedial action in response to her mistake. Labelling this as an interest in being reconstituted obscures how her mistake – and the reasons she has to use her money to which she failed to conform – shape what she has reason to do. The reason why a mistaken payor has an interest in being reconstituted is because she made a mistake. Reversing the transfer of money from the recipient appropriately reconstitutes her because it remedies her mistake. But even this fails to fully capture the significance of her mistake in the explanation of her interest in being reconstituted.

The closest it will ever be possible to get to not having made the mistake is to (immediately) reverse the transfer of the money to the recipient. In any given situation that might not be possible. At a minimum it is most likely going to take some time for the mistaken payor to realise and ask for her money back. Further complications might arise that mean that this reversal is not possible. There might also be countervailing reasons which count against reversal and mean that there is stronger reason to engage in an alternative remedial response or to not remedy the mistake at all.[68]

All that being said, where it is possible to reverse the transfer this will be the closest it will be possible for a mistaken payor to get to complete conformity with reason. What the payor has an interest in is not just in being reconstituted but rather (at least as a starting point) in being reconstituted by reversing the transfer of money. The recipient is necessarily implicated in this next-best thing because the transfer was to him and he now has authority over the transfer of that money. What was the payor's bad choice? What implicates the recipient? Both questions have the same answer. Her mistaken payment.

It is only with reference to the payor's transfer of money to the recipient that we can understand what her being reconstituted involves. Why is the claim not – as Wilmot-Smith colourfully hypothesises – against a 'Ministry of Mistaken Payments'?[69] Perhaps (all things considered) it should be. However, Wilmot-Smith's proposed option of socialising the cost of mistaken payments by allowing a claim against his Ministry of Mistaken Payments or for that matter allowing for a claim against some other party are both identifiable as alternatives because they resemble, in at least certain respects, the response which is the closest that it is possible to get to conformity. There might be good reasons to adopt these next-to-next-best options. But the explanation of why that or when this should be

the case will start from the explanation that the response which is the closest to conformity, the next-best option, is reversing the mistaken transfer. It is the recipient (because he is the one who now has authority to transfer the money) transferring the money back to the payor.

## 4. Conclusion

The point I have been making is not that allowing a claim against the recipient and not someone or something else will always or even ever be preferable. Many considerations will bear on that question not least of which is the impact on the recipient and how this might be justified. I am instead making two more limited points. Firstly, that what the payor has an interest in is remedying her mistake in action. Secondly, that the best remedy available is reversing her transfer of money to the recipient, something which can be most simply achieved by the recipient paying the money back to the payor. This may or may not be justifiable and there may or may not be a better alternative defendant. Those are however issues we must consider only after we have established what the payor has an interest in is reversing her transfer of money to the recipient.

In adopting his starting point, Wilmot-Smith makes a mystery of the question which he is trying to pursue. Once the payor is characterised as having an interest simply in being 'reconstituted' – glossing over her interest in reversing her mistake on which this relies – the recipient's involvement is a puzzle in the way in which Wilmot-Smith describes. However, this puzzle is one of his own making. The recipient's involvement in the circumstances is no mystery. Reversing the transfer of the money to the recipient necessarily involves the recipient because the recipient is the one who has the money and the recipient is the one who can act to pay the money back to the payor.

The liability which the recipient of a mistaken payments faces has served as the foundation on which the wider law of unjust enrichment has been built. At the same time the justification of the claim has itself faced little interrogation. The overwhelming focus has instead been on the coherency of the category constructed around this prosaic example. Before asking questions about this ambitious generalisation, however, one should ask a preliminary question. Why *does* a mistaken payor have a justifiable claim for restitution against the recipient of her payment?

If the answer to that question is the end towards which discussions of mistaken payments are working then what I have provided is instead a beginning. Mine is an explanation of what went wrong and why the payor

(and so the recipient) has reason to fix this. What I have done is to explain that the payor's mistake is in making the payment for a reason about which she is mistaken, and that it is this mistaken transfer of money to the recipient which she has reason to remedy. What the payor has an interest in is reversing her transfer of money to the recipient. What she has an interest in is getting her money back from the recipient. In order to explain why the recipient's liability in restitution is justified – why enforcing his cooperation in reversing the payor's mistake is justified – this is the place to start, with her mistake in action.

## Notes

1 See for example Jennifer Nadler, 'What Right does Unjust Enrichment Protect?' (2008) 28(2) OJLS 245 (who uses the label 'self-determination) and James Penner, 'We All Make Mistakes: A "Duty of Virtue" Theory of Restitutionary Liability for Mistaken Payments' (2018) 81(2) MLR 222.

2 It is a matter of controversy as to whether all intentional actions are done for a reason. However, even if one accepts that intentional action may be undertaken for no reason payments are almost invariably undertaken for a reason. Although it is plausible that one might engage in idle intentional action that amounts to a payment, this is a phenomenon which can be safely marginalised. On idle intentional action see Kieran Setiya, *Reasons without Rationalism* (Princeton University Press 2007) 52, Joseph Raz, *From Normativity to Responsibility* (OUP 2011) 70, and GEM Anscombe, *Intention* (2nd edn, Basil Blackwell 1963) 25 but contrast Donald Davidson, 'Actions, Reasons, and Causes' (1963) reprinted in *Essays on Actions and Events* (OUP 1980) 6 who claims that all intentional action is action for a reason.

3 I say failure 'of' rather than failure 'in' her practical reasoning because although she responds correctly to the reasons which she takes herself to have, she reasons correctly, her reasoning nonetheless leads her astray. The problem is not that her rational faculties are impaired but rather that they are misdirected by the incorrect or incomplete information on which she is relying. It is, to rely on the phrase used in computer science, an example of 'garbage in, garbage out'.

4 See for example Maria Alvarez, 'Reasons for Action: Justification, Motivation, Explanation' in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy (Winter 2017 Edition)* <https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/> (stable URL); Raz, *From Normativity* (n 2) 17–21; Setiya, *Reasons* (n 2) 42.

5 Raz, *From Normativity* (n 2) 16.

6 This assumption represents the prevailing consensus in the philosophy of action, see for example Alvarez (n 4) 'Reasons for Action'.

7 Raz, *From Normativity* (n 2) 16.

8 Raz, *From Normativity* (n 2) 19.

9 John Gardner, 'What Is Tort Law for? Part 1: the Place of Corrective Justice' (2011) 30(1) Law and Philosophy 1 2–3.

10 Raz, *From Normativity* (n 2) 26.

11 Raz, *From Normativity* (n 2) 31.

12 Raz, *From Normativity* (n 2) 31.

13 As discussed below a payor caused to make a payment by a mistaken belief as to her liability is not necessarily acting in order to discharge such debt and need not believe that she has reason to do so. Examples of such 'deviant causation' are though far from the norm.

14 I say one way of establishing this because an agent's actions might also lack justification in circumstances where there are reasons in favour of her actions but there are further reasons to not act as she did or to act in another way.

15 What I have reason to do – whether I have a particular normative reason for action – is by contrast not entirely up to me and in the case of categorical reasons (like legal debts) not up to

me in the same sense at all. One implication of this part of my analysis is that it follows that the claim does not protect the bare freedom to choose but rather a more value laden sense of autonomy (see for example Joseph Raz, *The Morality of Freedom* (Clarendon 1986) Ch 14). This is something that I will not explore here as it is most pertinent in circumstances in which a person is choosing to act for a non-categorical (or hypothetical) reason, a reason which depends on the person's prevailing goals and plans, circumstances which go beyond the scope of what this chapter is addressing.

16 Or both such reasons, with it following that I could also choose to act for both reasons.

17 Donald Davidson, 'Freedom to Act' (1963) reprinted in Davidson, *Essays* (n 2) 79.

18 Although there is some controversy as to whether all intentional action is action for a reason (contrast Anscombe, *Intention* (n 2) 24–25 and Donald Davidson 'Actions, Reasons, and Causes' (n 1) 6) it is uncontroversial that action for a reason is always intentional action see Setiya, *Reasons* (n 2) 24.

19 Davidson, 'Freedom to Act' (n 7) 79.

20 The explanation Setiya offers is of basic action (bodily movements for example) with non-basic action (action that an agent performs by doing something else intentionally with that end) being explained in terms of basic action. See Setiya, *Reasons* (n 2) 31–33 and 54–55; Raz, *From Normativity* (n 2) 30.

21 Setiya, *Reasons* (n 2) 32; Raz, *From Normativity* (n 2) 29–30.

22 Raz, *From Normativity* (n 2) 32.

23 Setiya, *Reasons* (n 2) 16 and sources cited at note 29 for a number of examples of those endorsing the claim.

24 J. David Velleman, 'The Guise of the Good' (1992) 26(1) Nous 3 established this as the modern label for an idea that is typically traced back to Socrates and is found in the work of Aristotle and Plato, see Raz, *From Normativity* (n 2) 12, 59.

25 Setiya, *Reasons* (n 2) 67.

26 Setiya, *Reasons* (n 2) 38.

27 Setiya, *Reasons* (n 2) 38.

28 Setiya, *Reasons* (n 2) 37.

29 Setiya, *Reasons* (n 2) 63.

30 Raz, *From Normativity* (n 2) 70–73.

31 My usage of 'intentionality' here follows Raz, *From Normativity* (n 2) 72 who notes that: 'Actions are characterized as intentional by a variety of criteria, several of which can be realized to various degrees, making it appropriate to speak of degrees of intentionality.'

32 Raz, *From Normativity* (n 2) 72.

33 Raz, *From Normativity* (n 2) 73.

34 Raz, *From Normativity* (n 2) 26.

35 Raz, *From Normativity* (n 2) 83.

36 Raz, *From Normativity* (n 2) 73.

37 Raz defines an independent intention as an intention 'one can have at a time one is not doing what the intention is an intention to do.' He contrasts these with embedded intentions: 'Embedded, the intentions present in all our intentional actions, are aspects of, manners of, acting, and thus distinct from independent intentions even when we act intentionally because we have an independent intention.' Raz, *From Normativity* (n 2) 65–66. Payments will, almost invariably, be actions performed with an independent intention.

38 Raz, *From Normativity* (n 2) 75, 83–84.

39 Raz, *From Normativity* (n 2) 84. As an example of an anomic inversion of the norm, Raz uses the example of a person who is acting in order to satisfy an urge to witness a gruesome sight that makes him sick. Although the agent sees no value in his actions Raz argues that there is nonetheless value in satisfying this urge. Setiya's example would appear to be susceptible to an explanation as being either anomic, or of less than complete intentionality, or both.

40 David Owens, 'Epistemic Akrasia' (2002) Monist 85(3); see also Donald Davidson, 'How Is Weakness of Will Possible' (1970) reprinted in Davidson, *Essays* (n 1) and Raz, *From Normativity* (n 2) 22. Owens perhaps does not capture all the examples which might amount to akratic action (see for example Setiya, *Reasons* (n 2) 37) but as I am relying only on the examples which are captured by Owens' explanation of the concept to the extent that his explanation fails to include some instances of the phenomenon this is not to relevant my argument.

41 Further illustrating this distinction is that a person might of course additionally be making a mistake in action if she is mistaken about the defeated reason which she takes to be a normative reason for her action. In these circumstances there would though be two different failures, behaving akratically and making a mistake in action. For an explanation of why this distinction is necessary see Raz, *From Normativity* (n 2) 22–23.
42 See for example *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24.
43 Frederick Wilmot-Smith 'Should the Payee Pay?' (2017) 37(4) OJLS 844.
44 Wilmot-Smith, 'Should the Payee Pay?' (n 43) qualifies his reliance on 'impaired consent' (see his note 2) with reference to earlier writing where he offers a brief argument that – with some similarity to the argument I offer here – relies on the reason a payor takes herself to have to make the payment as an explanation of 'a normal mistaken payment case' and suggests that the explanation of the payor's interest in cases arising from retrospective mistakes of law is different, see Frederick Wilmot-Smith, 'Retrospective Mistake of Law' in Paul S Davies and Justine Pila, *The Jurisprudence of Lord Hoffman* (Hart 2015).
45 Wilmot-Smith, 'Should the Payee Pay?' (n 43) 2.
46 Wilmot-Smith, 'Should the Payee Pay?' (n 43) 18.
47 For a defence of the view that actions can be part constituted by their outcomes see John Gardner, *From Personal Life to Private Law* (OUP 2018) 58–61 relying on Thomas Nagel, 'Moral Luck' Proceedings of the Aristotelian Society Supplementary Volume 50 (1976) 137.
48 Gardner, *From Personal Life to Private Law* (n 47) 59 following G H Von Wright, *Norm and Action* (Routledge & Keegan Paul 1963) 39–41.
49 The sense of transfer I am using here is intended to encompass both the transfer of physical cash and electronic funds transfers. The results which the payor intends to bring about in these two cases are clearly different in their specifics but both involve the transfer of money, that is the corresponding decrease and increase in the money to which the payor and recipient respectively are entitled.
50 See generally Gardner, *From Personal Life to Private Law* (n 47).
51 Robert Stevens, 'The unjust enrichment disaster' (2018) 134 LQR 574 579–80 'What needs to be reversed is not the consequence of the performance from C to D, but the performance rendered by C and accepted by D.' and 'That there has been a performance from C to D cannot justify reversal of anything other than the performance itself.'
52 Drawing a distinction between the results and consequences of a payor's actions makes space for different arguments to be offered in favour of the reversal of such results (the money transfer) and consequences (for example interest which has accrued on a deposit) and how these might differently implicate the recipient (or others). This makes space for what Stevens is perhaps trying to argue in favour of but for reasons of scope my focus here is on the payor's interest in reversing the results of her actions and I will not consider the case for the reversal of the consequences of the payor's actions or how this might differ from the case in favour of reversing the results.
53 Raz, *From Normativity* (n 2) 189.
54 See for example Gardner, 'What Is Tort Law for?' (n 8); Sandy Steel, 'Compensation and Continuity' (2020) 26(3) Legal Theory 250; Leo Boonzaier, *Duties in Tort Law and Its Theory* (2020) thesis submitted to the Faculty of Law at the University of Oxford for the degree of Doctor of Philosophy.
55 Gardner, 'What Is Tort Law for?' (n 9) 33.
56 Gardner, 'What Is Tort Law for?' (n 9) 28, who attributes the example to Neil MacCormick, 'The Obligation of Reparation' in MacCormick, *Legal Rights and Social Democracy* (Clarendon 1982) 212.
57 Raz, *From Normativity* (n 2) 189.
58 Raz, *From Normativity* (n 2) 189.
59 Gardner, 'What Is Tort Law for?' (n 9) 33.
60 The idea has been widely challenged and subsequently defended, see Steel, 'Compensation and Continuity' (n 54) and Boonzaier, *Duties in Tort Law* (n 54). The success or failure of Gardner's Continuity Thesis (and the more general idea of the continuity of reasons) in explaining tort doctrine is not however my concern here. Although I do think the general idea is successful.
61 Gardner, 'What Is Tort Law for?' (n 9) 33–34.
62 The qualification is necessary because a payor might coincidentally conform to a reason (different from the reason about which she was mistaken) which she had to make the payment. So for example, she might mistakenly act to discharge a non-existent debt A but

coincidentally discharge debt B (owed to the same person) which does exist and so is a reason for her to make the payment. She is still making a mistake but an implication of my argument is that it is less clear that she has any reason to respond to her mistake. This would appear to be consistent with the legal position which denies recovery where there is a 'justifying ground' for the mistaken payment. Unfortunately I do not have the space to pursue these thoughts any further here.

63 This further qualification is necessary because although a mistaken payment will often leave the payor less able to pursue valuable options this effect is contingent on the size of the payment relative to the payor's wealth. Where an extremely wealthy person makes a relatively small mistaken payment this might have no discernible effect on her capacity to conform to the reasons which she has to use her money.

64 That she made a bad choice (by acting for a reason about which she was mistaken) is important not just because it means that she is likely not conforming to reason and that the value which might otherwise be found in her choosing between valuable options is absent. That she is acting for a reason about which she is mistaken also means that her choice to act in this way is less significant than it would have been absent such mistake. Although the payor has acted intentionally her action were motivated by a reason about which she was mistaken. There is good reason to not attach the same significance to her choice-making (at least for certain purposes) as would be the case if she had not been mistaken. The importance of this aspect of her mistake is however not as part of the case in favour of reversing her mistaken transfer but rather as part of the explanation of why the fact that it was her choice to act in this way does not provide a ground against requiring the recipient to reverse the transfer. That explanation is not one I will pursue here focused as I am on the case in favour of the payor having a claim in these circumstances.

65 John Gardner offers an extended defence of this point over the course of *From Personal Life to Private Law* (n 47).

66 This would help explain why claims for the restitution of mistaken payments are (speaking quite generally) easier to defend than tort claims as illustrated by the availability of the defence of change of position to claims for the restitution of mistaken payments.

67 This leaves much to explain and most importantly why the burden of remedying the payor's mistake is not a sufficient objection to him having to act to reverse her payment such that he will generally have a conclusive reason to act in this way.

68 For reasons of scope I will not explore these possibilities here but will note that at least some of them are captured by the change of position defence to a claim in unjust enrichment.

69 Wilmot-Smith, 'Should the Payee Pay?' (n 43) 2.

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# Index

*New Directions in Private Law Theory* brings together some of the best new work on private law theory, reflecting the breadth of this increasingly important field. The contributions interrogate a wide range of topics including aspects of private law doctrine, its development, ordering and application.

The authors adopt a variety of different approaches and contribute to ongoing and important debates about the moral foundations of private law, the individuation of areas of private law and the connections between private law and everyday moral experience. Questions addressed include: Does the diversity identified amongst claims in unjust enrichment mean that the category is incoherent? Are claims in tort law always about compensating for wrongs? How should we understand parties' agreement in contract? The contributions shed new light on these and other topics, and the ways in which they intersect and open up new lines of scholarly enquiry.

The book will be of interest to researchers working in private law and legal theory, but it will also appeal to those outside of law, most notably researchers with an interest in moral and political philosophy, economics and history.

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