

# Primary and Secondary Rights in Private Law

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## **Declaration**

I, Caspar Julius Ferdinand Bartscherer, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

## **Acknowledgments**

This thesis was borne out of initial reading suggested to me by my supervisor, Charles Mitchell, in the pursuit of an entirely different research proposal. For that and all other guidance, for his time, his patience and his invaluable and detailed feedback I owe an immense debt of gratitude to Charles. I am also thankful for the very helpful guidance I have received from my second supervisor, Prince Saprai, especially when developing the latter parts of my thesis.

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## **Abstract**

The thesis concerns the distinction between primary and secondary rights that is often drawn by theorists and practitioners of private law. The thesis examines what the theorists and practitioners who use these terms think that they are identifying, what consequences flow from classifying the law in this way, and whether doing this illuminates any of the problems in which they are interested.

Although their views of how to understand the law through the prism of the distinction differ, they all appear to build from a common conception of the distinction, which was introduced into English legal theory almost two hundred years ago by John Austin. However, their views are also based on other assumptions about The Distinction, some articulated and some implicit, that for a variety of reasons do not stand up to scrutiny.

So, while the distinction is helpful in some ways, it also contributes a great deal of confusion to our understanding of private law, and has less explanatory force than some of its adherents believe. The aim of the thesis is to clear up these misapprehensions and enable private law theorists and practitioners to use the distinction with greater precision.

## **Impact statement**

This thesis will enable practitioners and academics to better understand the distinction between primary and secondary rights and duties as applied in English private law. Furthermore, a clearer understanding of this distinction will prevent significant misunderstandings. Given the centrality of that distinction in this area, this is intrinsically worthwhile.

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## Chapter 1: Introduction

This thesis concerns the distinction between primary and secondary rights ('The Distinction'). The Distinction is often drawn by both theorists and practitioners in private law. In this thesis, I will consider what those theorists and practitioners who use these terms think they are identifying, what consequences flow from classifying the law in this way, and whether doing so can help us address any of the problems that private law practitioners and theorists are interested in. Although their views of how to understand the law through the prism of The Distinction differ widely, they do appear to be building from a common conception of The Distinction. That conception is the one which was introduced into English legal theory almost two hundred years ago by John Austin.

No discussion of the academic study of the distinction between primary and secondary rights in the common law can commence without reference to the groundwork laid by Austin. Although it is likely that the use of a similar distinction as an analytical tool predates Austin's *Lectures on Jurisprudence*, Austin is often credited with introducing The Distinction to English lawyers.<sup>1</sup> His definition or conception appears to be the shared starting point for both judges and academics throughout private law. In light of its status in the literature, Austin's definition bears setting out in full:

My main division, then, of [private law rights] is this: 1st. ... rights and duties which do not arise from injuries or wrongs, or do not arise from injuries or wrongs directly or immediately; 2ndly. ... rights and duties which arise directly and exclusively from injuries or wrongs.<sup>2</sup>

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<sup>1</sup> Charles Mitchell and those he cites at notes 13-16 suggest that Austin's intellectual lineage traces to continental theorists in this regard; 'Equitable Rights and Wrongs' (2006) 59 *Current Legal Problems* 267, 269; in particular, Mitchell singles out Pothier; see Robert Joseph Pothier, *A Treatise on the Law of Obligations, or Contracts* (William David Evans tr, Robert H Small 1826) para 341.

<sup>2</sup> John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law*, vol II (Robert Campbell ed, 5th ed. rev, Murray 1911) 764.

The distinction which Austin draws is thus between rights that ‘directly arise’ from breach of another legal right, and those which do not. Whereas the latter are termed ‘primary rights’, the former are termed ‘secondary rights’.<sup>3</sup> It is apparent on the face of this conception of The Distinction that the distinction being drawn is a simple one. There is a single criterion that allocates all rights to one category or the other. Further, that criterion is a technical criterion. Although there might be disagreement as to whether a particular right ‘directly arises’ from breach of another right in some instances, it is usually easy to determine whether or not a particular right arises from the breach of another right. This is because the criterion is one that can be applied without much consideration of the underlying substantive justice of a case. Whether a right has been breached or not can usually be determined simply by reference to the formal terms of that right. Thus, Austin’s conception of The Distinction is a formal distinction.<sup>4</sup>

However, their views are also based on other assumptions about The Distinction, some articulated and some implicit, that for a variety of reasons do not stand up to scrutiny. Thus, whereas The Distinction is helpful in some ways, it also contributes a great deal of confusion to our understanding of private law. It has less explanatory force than some of its adherents believe. The aim of this thesis is to clear up these misapprehensions and thereby enable readers to use The Distinction with greater precision.

In this introduction, I explain how I intend to accomplish these objectives. I have divided this introduction into (1) a general narrative overview of the themes of this thesis, followed by (2) a summary of the arguments made in each chapter.

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<sup>3</sup> John Austin, *The Province of Jurisprudence Determined* (Sarah Austin ed, J Murray 1861) 764.

<sup>4</sup> I do not wish to make too much of this, or to become embroiled in the substantial literature surrounding formalism. Rather, all I wish to express by calling this conception of The Distinction formal is that it relies on a very simple (and hopefully immutable) test to determine whether a particular right is primary or secondary. This can be contradistinguished with other distinctions in the law that might take into account polycentric considerations in determining what side of that distinction a particular right would fall. Consider, for instance the polycentric approach that might be taken to determining certain questions in tax law or public law; see Jeff King, ‘The Pervasiveness of Polycentricity’ [2008] Public Law 101.

These two parts of the discussion are intended to complement one another in setting out the aims and scope of this project.

## **1. Overview**

Many judges, practitioners and legal academics have a rosy view of the role played in private law by The Distinction. On that picture, the distinction between primary and secondary rights is the chief organising principle of private law: there are two kinds of rights – and two kinds of correlative duties – and every substantive legal right can be classified as either one or the other. As a consequence, on this view, The Distinction also helps us to analyse and thereby solve all sorts of problems that arise in the law; it is the most useful conceptual tool in our analytical toolbox.

Orderly and comprehensive classification is great. As Peter Birks argued, we need classification to structure our thinking.<sup>5</sup> One might add that we also need classification in order to understand which differences between our diverse rules are important, and which are less so. However, as Birks also recognised, taxonomical classification of the law comes with its own drawbacks. If our thinking hews too closely to the classifications, this can lead to silo thinking. For instance, silo thinking occurs when private lawyers fail to exchange ideas about private law concepts with public lawyers who use similar concepts in their work on public law. Worse, even, silo thinking might lead to contract lawyers failing to talk to tort lawyers about problems that occur in both areas of law. In order to avoid the downsides of having no taxonomy, we need to devise and use a classificatory taxonomy of private law. However, in order to avoid the risk of too rigid a taxonomy, we must, at the same time, bear in mind its limitations in our use of it. Moreover, as Birks argues, we need to pick a classification that is not only descriptively true – even an alphabetical classification can do that – but also helpful. In order to be helpful, a classification must not only fit the law it is classifying but assist our understanding of the underlying categories.<sup>6</sup>

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<sup>5</sup> Peter Birks (ed), *The Classification of Obligations* (Oxford University Press 1997) v.

<sup>6</sup> *ibid* vi.

The Distinction has the potential to do these things. Albeit not a panacea for all our taxonomical problems, it is a surprisingly versatile analytical concept that can, if properly understood, explain some things about how private law works in an illuminating way. However, at present, The Distinction does not always help our analysis, because it is ill-defined and misunderstood. This is the problem that this thesis seeks to set right. In this work, I analyse how The Distinction is used. I argue that there is a predominant conception of The Distinction, but that neither this nor any other conception of The Distinction is analytically necessary.<sup>7</sup> Lastly, I conclude that absent an argument from analytic necessity, there are nonetheless sufficient practical reasons to retain The Distinction as a classificatory tool in our analytical toolbox. Analysing private law in terms of primary and secondary rights provides us with a way to speak about and understand our substantive private law rights and obligations that we would sorely miss if we had to do without it.

In order to use it, however, we must first understand what The Distinction means. To some extent, the rosy view captures the structure of private law rights in a manner that is descriptively true. The Distinction exists in the law of torts, which differentiates between duties not to harm others, whether carelessly (in negligence) or otherwise, and duties to make good the loss suffered by others when we do tortiously harm them. Similarly, The Distinction exists in contract law, which draws a clear line between the obligations we incur through our contracts and the obligations to repair losses that result from breaching these contracts. In fact, The Distinction can even be observed in the law of trusts, to the extent that this recognises a difference between a trustee's primary duty to hold and produce trust funds when called upon to do so by the beneficiaries and

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<sup>7</sup> As a brief side-note, when I speak of something being an analytical truth, what I have in mind is something being a particular way as a matter of logic. It is analytically true, for instance, that a thing is itself. Similarly, it is analytically true that  $2+2=4$ . By contradistinction, conceptual claims are claims either about or derived from the concepts we hold. The claim that 'stars' are the bright lights we see in a clear night sky is a conceptual claim about the term 'sky'. It is a claim about what we collectively mean when we think or speak about 'stars'. However, as I examine in Chapter 4, some people refer to conceptual claims when what they intend to make are analytical claims. It is important to be aware of the difference.

his secondary duty to make good loss sustained by the beneficiaries caused by breaches of primary duties such as the duty of care. So far, so familiar.

However, strangely, given the almost axiomatic status that it occupies in our thinking about private law, The Distinction is relatively underexamined. It has certainly not been subjected to any internal examination of its limitations. This can be seen from the preceding paragraph. In it, I described secondary rights by reference to two common, but, at times, cross-cutting, criteria. I referred to duties to repair, and also to duties which arise from prior wrongdoing. These two aspects of secondary rights are often entwined in people's thinking about The Distinction. For instance, corrective justice theories are centred on duties to correct wrongdoing. In this, they implicitly assert that secondary rights arise from breach and that they are reparative. However, they do not assert these aspects separately, but rather simply bundle them together. Thus, by a sleight of hand, it appears as though there is no difference between responding to breach and being reparative. Yet we can envision legal rights that do one and not the other. A right may repair some loss without responding to the breach of an antecedent primary right. There are primary reparative rights.

Consider the following two examples:

*Insurance I: I agree with you to prevent the eventuation of an insured risk.*

*When the risk eventuates, the law will require me to make good the loss you have suffered as a consequence of the risk eventuating.<sup>8</sup>*

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<sup>8</sup> This is generally how the common law conceptualises insurance contracts: see the discussion of this issue by Lord Goff in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 AC 1, 35; see further the discussion of this in David Foxton, 'How Useful Is Lord Diplock's Distinction between Primary and Secondary Obligations in Contract?' (2019) 135 LQR 249, 258.

*Insurance II: I agree with you to make good the loss you have suffered as a consequence of the same risk eventuating.*<sup>9</sup>

The primary rights in *Insurance II* are no less compensatory or reparative than the secondary rights in *Insurance I*.

Conversely, a secondary right may spring up to respond to the breach of a primary right, not by repairing C's loss, but by requiring the wrongdoer to forfeit his gains, pay a penalty or do a handstand. Although requiring wrongdoers to perform a handstand may well be an unorthodox response to rights-violations, it is not an analytical necessity to respond to rights-violations through the creation of duties to repair.

It follows that we cannot create an exhaustive two-part classification of private law duties that places all duties which respond to breach and are reparative into one class and all duties which do not respond to breach and are not reparative into the second class. This will not work because some duties possess one of these features but not the other. Cross-cutting distinctions are fine, so long as we do not pretend that they create a simple dichotomy. The Distinction, however, is mostly understood as a simple dichotomy which sorts all substantive rights into either primary or secondary rights. As a result, a right which is part primary, because non-reparative, and part secondary, because arising from breach, makes using The Distinction much harder. Schrödinger's private law rights – both primary and secondary at the same time – would be a serious obstacle to successfully categorizing private law rights.

As we shall see, this cross-cutting conception of The Distinction is not the only alternative conception of The Distinction which exists in the literature. There are further divergent ways in which The Distinction is used by different people. Although I briefly entertain the notion that people might be mistaken about the

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<sup>9</sup> There are some cases in which insurance contracts have been interpreted like this: Foxton (n 8) 258–259; *Codemasters Software Co Ltd v Automobile Club de L'Ouest (No2)* [2009] EWHC (Ch) 3194, [32] (Warren J).

true meaning of the terms ‘primary rights’ and ‘secondary rights’, I conclude that these terms can legitimately be used to express more than one idea. People can and do use the expressions ‘primary rights’ and ‘secondary rights’ to refer to many things other than their Austinian sense, and they are using language intelligibly. For instance, we could intelligibly use The Distinction to refer to our substantive rights as primary and to the remedies the courts award us as secondary. There are several plausible candidate meanings for The Distinction drawn by the terminology of primary and secondary rights. Thus, there is no one conception that is analytically necessary. The best course of action, in light of that fact, is to pick one definition and stick with it. Given that there are several possible conceptions, we should choose the one that we have the most reason to use, normatively speaking. Ultimately, I argue for selecting John Austin’s conception of The Distinction which defines secondary rights as those which ‘arise directly from breach’ of primary rights, which in turn are defined as the rights which do not arise from such breaches.

Once we jettison the other candidate conceptions and settle on the Austinian conception, The Distinction, so defined, is stable. However, much like any single conception of it, The Distinction is not necessary in any meaningful sense. We could conceptualise the English law of obligations without referring to primary and secondary rights at all. The following example illustrates the point:

*Fence Painting: You and I make a contract. You agree to pay me £100; I agree to paint your fence before noon on Friday. The legal system provides that I have to pay you the price of obtaining the cost of a replacement painter, but that, ordinarily, you cannot use the legal system to force me to actually paint the fence.*

Using The Distinction, we would say that I have a primary obligation to paint, which is transformed into a secondary obligation to pay you a sum of money on Friday afternoon. However, we need not conceptualise *Fence Painting* in this way. Some would say that I merely have one composite obligation to either paint

or pay.<sup>10</sup> Others may say that I have an obligation to pay you a sum of money defeasible by painting before noon on Friday. And others, yet, may say that I am under no obligation to paint and no obligation to pay, but would be at risk of coercive sanctions if I neither painted nor paid.<sup>11</sup> I call all these other views ‘Flat Views’, since they accommodate merely one or no level of substantive rights.

What this illustrates is that it is impossible to talk about The Distinction without delineating substantive rights, on the one hand, from action rights and remedial rights, on the other hand. Without distinguishing these three different types of rights, people talking about the nature of legal rights in general, and The Distinction in particular, risk talking past one another. Building on the work done by Rafal Zakrzewski and Stephen A Smith, I define:

- a) substantive rights as the rights private citizens have against one another;
- b) action rights as the rights private individuals have to have their dispute adjudicated by a competent court; and
- c) remedial rights as the rights private citizens have against one another following the making of a final award by that competent court.

On the view that I propose, The Distinction resides firmly in the first of these categories.

As shall become apparent, not all of the Flat Views would allow for these distinctions. Thus, a significant part of this thesis is spent canvassing the differences as to these distinctions between different views and how that impacts on the compatibility of these views with The Distinction. At least some of these views are perfectly intelligible and fit the existing case law reasonably well, albeit, I argue, less well than the view which I propose. Although a view

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<sup>10</sup> Daniel Markovits and Alan Schwartz, ‘The Myth of Efficient Breach: New Defenses of the Expectation Interest’ (2011) 97 Virginia Law Review 1939.

<sup>11</sup> Oliver Wendell Holmes, ‘The Path of the Law’ (1998) 78 Boston University Law Review 699.

utilising The Distinction is not the only fitting and intelligible view of the structure of private law obligations, it is the most nuanced and sophisticated.

For instance, one advantage of having this more nuanced view of private law rights is that it enables us to distinguish between *Insurance I* and *Insurance II* as representing distinct jural relationships. If all contractual promises are conceptualised as perform or pay, *Insurance I* is simply reduced to *Insurance II*.<sup>12</sup> On Flat Views, it would thus not be possible to say that there is any difference in the jural relations created in *Insurance I* and *Insurance II*. As a consequence, it is impossible, on the Flat Views, to take parties to mean what they are saying, when they purport create these different jural relations. *Mutatis mutandis*, it is impossible to take judges seriously when they say that the parties in *Insurance I* have created different jural relations to those in *Insurance II*.

This is even worse on views that fail to recognise substantive legal rights at all, asserting that we have legal obligations only insofar as we have a right that a court take a particular action (ie what I have classified as action rights above). Those views cannot account for the possibility that A might owe B legal obligations, where, for instance, A is a diplomat that enjoys immunity. Ultimately, although it is not conceptually or analytically necessary, making a distinction between primary and secondary rights within the larger category of substantive rights structures our thinking and recognises more nuance than any more reductive system.

## **2. Outline**

The central thesis of this work is that although we need not conceptualise private law in terms of substantive primary and secondary rights, doing so can yield important benefits. However, in order to obtain these benefits, we must make the conception of The Distinction that we are using explicit, and we must acknowledge that The Distinction is not analytically required. Deep down, The

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<sup>12</sup> Shiffrin marshals a very similar argument against the view advocated by Schwartz and Markovitz; Seana Shiffrin, 'Must I Mean What You Think I Should Have Said?' [2012] Virginia Law Review 159.

Distinction is merely a way of thinking about private law that can render that thinking more elegant, clear, consistent, concise, and structured.

To begin, in Chapter 2, I will set out the quotidian ways in which The Distinction, defined according to the Austinian conception, is routinely used by judges, practitioners and academics when they think about problems in English private law. The fact that The Distinction provides a useful framework in this way is usually taken as read by these judges, practitioners and academics, who accordingly do not explicitly refer to it in their writing. However, it forms the essential conceptual underpinning for a central organising feature of many different areas of private law, which turn on the identification of a breach of duty as the starting point when determining the existence and content of many private law rights. Chapter 2 will briefly state and illustrate this, and thus provide a counterpoint to the discussion, which follows in Chapter 3, of the ways in which uses of The Distinction can go awry.

In Chapter 3, I will examine three cases in order to show that the distinction between primary and secondary rights is current in judicial and doctrinal academic discussion in various areas of private law. What unites these cases is the use made of The Distinction in the analysis undertaken by the judges in the case itself and/or by academics in the subsequent discussion of the case. Further, each of these cases illustrates that The Distinction is not used consistently at present.

Using the example of the *Photo Production* case,<sup>13</sup> I will show that the judicial definition of The Distinction is unfortunately confused and cross-cutting at present. Famous though it is, Lord Diplock's analysis in that case alights upon at least four criteria in order to delineate primary from secondary rights. Only one of these is based, like Austin's, on breach. This use of cross-cutting definitions has the effect that Lord Diplock's definition is unsuitable for distinguishing primary rights from secondary rights with any certainty. In fact, the various

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<sup>13</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

strands of his Lordship's reasoning are only possible using different senses of The Distinction. Once this equivocation between different definitions of The Distinction becomes apparent, it becomes impossible to maintain the different arguments Lord Diplock makes without some element of self-contradiction.

Similarly, The Distinction was put to supposedly clever use in order to determine whether or not a clause was penal in the *Cavendish* case.<sup>14</sup> *Cavendish* illustrates the twin pitfalls of insufficient definition of, and excessive reliance on, The Distinction. In *Cavendish*, Lords Neuberger and Sumption purported to rely on The Distinction to determine whether a given contractual clause was within the remit of the penalty doctrine. On their Lordships' reasoning, clauses that gave rise to primary rights structured the parties' principal bargain and are thus beyond the remit of the penalty doctrine. By contrast, clauses which gave rise to secondary rights did not determine the parties' principal bargain and are thus within the remit of the doctrine.

Although this has some initial appeal due to its simplicity and elegance, it does not work, for two reasons. First, it is not entirely clear which sense of The Distinction is used. It is hard to see how a test that appears to classify some rights as both primary and secondary would help us determine what clauses are within the remit of the penalties doctrine. Secondly, I conclude that, in this case, The Distinction is really just used as a proxy for determining whether a particular clause contains the parties' essential or principal bargain.

The trouble with this is that it reduces to asking the same question that was thought to be determinative in the other Justices' judgments in *Cavendish*. The other judges in the case held that a particular right was outwith the remit of the penalty doctrine where the right in question was concerned with determining the essential bargain under the contract. I argue that interposing a formal criterion, such as The Distinction, as a proxy in one's reasoning is a pointless thing to do when it adds nothing to that reasoning which is not already present in it.

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<sup>14</sup> *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67.

Furthermore, expressing policy calculations in the language of formal criteria destabilises those criteria and makes it harder to use them in future cases.

Lastly, the academic discussion of the *AIB* case<sup>15</sup> helps to drive home the point that judges are not alone in talking past one another when using The Distinction. In recent years, a lively academic debate has sprung up around the decisions in *AIB* and *Target*.<sup>16</sup> I discuss how The Distinction forms a central plank in one of the arguments against the move made in these cases away from awarding an equitable remedy, common account, on the basis of a trustee's primary duty to hold and produce trust funds when called upon to do so by the beneficiaries, and towards equitable compensation. One reply to this argument is an argument about the kind of rights which are capable of being primary rights. I argue that this reply fails because it is based on a different conception of The Distinction. Whereas the former argument is based on a conception of The Distinction that is built around breach, the reply is based on a conception of The Distinction that is built around whether a particular right arises from the parties' agreement or from the general law. Since neither make it explicit how they are defining The Distinction, they end up talking past one another. This illustrates a broader problem facing The Distinction. Just as in *Cavendish*, the use of The Distinction in argument cannot succeed absent careful definition of the conception we are relying on.

All three examples illustrate that The Distinction is in use among both judges and academics in private law. However, they also show that those using The Distinction do not consistently use the same conception of The Distinction. This, in turn, makes the use of The Distinction in these cases problematic. In fact, once the ambiguity in the use of The Distinction in these cases is exposed, much of the appeal of the arguments made using The Distinction disappears.

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<sup>15</sup> *AIB Group (UK) plc v Mark Redler (a firm)* [2014] UKSC 58.

<sup>16</sup> *Target Holdings Ltd v Redferns* [1995] UKHL 10.

Is it possible to reduce The Distinction to an essence that, if followed, would have saved those judges and scholars discussed in Chapter 3 from the errors they fall into? Perhaps, if only we were rigorous enough in our analytical or conceptual examination of The Distinction, we might derive such an essence? This is the question addressed in Chapter 4. After examining attempts at analytically and conceptually defining primary and secondary rights, I conclude that ultimately these are unsuccessful. Further, I argue that it is not analytically or conceptually necessary to analyse substantive rights in private law in terms of The Distinction. Whilst, as I shall explore in later chapters, using The Distinction comes with several advantages over Flat Views, other views are conceptually possible and analytically coherent.

To begin, it is important to notice that there are two analytically distinct analytical or conceptual questions that we are dealing with here. First: Is there one particular conception that we can analytically or conceptually conclude is the correct definition of The Distinction? Secondly: Is The Distinction analytically or conceptually necessary in our or any other system of private law?

In Chapter 4, I attempt to answer these questions. First, I examine the locus classicus of The Distinction in more detail: the discussion in ‘Lecture XLV’ of John Austin’s *Lectures on Jurisprudence*.<sup>17</sup> I then contrast Austin’s conception with other possible conceptions. Some concepts are ‘thin’, in the sense that they only include relatively sparse descriptive details. Conversely, other concepts are ‘thick’, in the sense that they include comprehensive or significant descriptive detail about the subject matter referred to.

What appears from my examination in Chapter 4 is that Austin’s conception of The Distinction is relatively ‘thin’. Ultimately, all that determines whether something is a primary or a secondary right according to Austin is whether that right arises from breach. Given that there are many other angles of description

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<sup>17</sup> Austin (n 2).

that we can attach to a right, this is a very ‘thin’ conception of primary and secondary rights.

Other conceptions, however, can be ‘thicker’. As we have observed at the outset, it is tempting to attach many other features to the fact of something being a secondary right, such as the fact that it not only has to arise from breach but also be reparatory. This can be appealing. After all, if our conception of The Distinction were thicker, we could make correspondingly more significant claims about a right in sheer virtue of it being primary or secondary.

However, I conclude that, as foreshadowed above, and in Chapter 3, these ‘thicker’ conceptions don’t stand up to scrutiny, because they lead to cross-cutting definitions. Although cross-cutting distinctions in themselves can be unproblematic, they do not work where, as with The Distinction, we seek to draw a clear and exhaustive dichotomy. This leaves us with Austin’s conception and some other conceptions as plausible candidate conceptions for The Distinction. I argue that although all of these conceptions are intelligible, none is conceptually or analytically any more correct than any other.

However, I argue, Austin’s conception ought to be the conception of The Distinction that we adopt for several reasons. First, it is the most widely used conception. Thus, if any conception has a claim to conceptual truth, it is Austin’s. On a normative level, this fact also supports the argument that its wide usage makes Austin’s conception most likely to be universally adopted, leading to greater clarity in conversations about primary and secondary rights. Moreover, unlike some other candidate conceptions, we do not have any other terminology to address the distinction captured by the Austinian conception of The Distinction. Lastly, the Austinian conception is the sense in which The Distinction is used in Chapter 2. Thus, analysis of our private law rights through the prism of the Austinian conception of The Distinction has the advantages enumerated in that chapter. Going forward from this point in the thesis, I adopt the Austinian conception of The Distinction as standard, context permitting.

Turning to the second question I address in Chapter 4, I explore what arguments (if any) there are to conclude that the existence of The Distinction is analytically or conceptually necessary. I examine Rob Stevens's claim that it is a conceptual truth that The Distinction exists in all systems of private law. Although this would be a convenient conclusion for our purposes, I argue that this claim is not made out. In fact, I conclude, after some methodological discussion, that it is not possible to use conceptual analysis to make any claims of necessity about The Distinction. Truth about our use of words and concepts does not easily translate into truth about the things which they describe – in this case, primary and secondary rights.

Similarly, an analytical claim that it is logically impossible to understand or organise our substantive rights other than through the lens of primary and secondary rights cannot be maintained. I do not find any arguments that would support such an analytical claim, and I thus tentatively conclude that it is impossible to demonstrate that The Distinction is analytically necessary. In fact, as the discussion of the Flat Views later in the thesis will show, there are plenty of counter-examples that would disprove any such claim.

Given that it is not analytically or conceptually required, what evidence might we have that The Distinction exists as a matter of descriptive truth? Apart from the examples of its use by practitioners canvassed in Chapter 3, we have not yet considered any evidence. This is a question about what reasons *for belief* we have to accept the existence of The Distinction. Albeit a question about reasons, this is non-normative. The enquiry is about what reasons we have to believe the world *is* a particular way, not whether it *should be* a particular way.

Concomitantly, we should ask a normative question, a question about whether the world should be a particular way. Irrespective of whether The Distinction is descriptively accurate, do we have any reasons to use The Distinction? This is a normative question; it is a question about how we *should* understand, or

structure, our legal system, if indeed we have a choice. This may take two particular modalities, only one of which is the subject matter of this thesis. First: if the positive law cannot be described accurately in terms of The Distinction, should we change the positive law so that it conforms to The Distinction. Secondly, supposing, instead, that The Distinction is one of several possibly descriptively accurate ways of conceptualising our substantive law of obligations, what reasons do we have to think about the law in terms of The Distinction?

I conclude that the English law of obligations can accurately be described in terms of The Distinction, but that it is equally possible to describe (at least parts of) it without resort to The Distinction. Thus, the second of these questions is naturally more pressing. Moreover, in answering it we will necessarily touch upon the question of whether it is preferable to organise one's system of private law in terms of a system of primary and secondary rights when creating it from scratch. I argue that, as will become apparent from the discussion of the Flat Views in Chapters 6 and 7, including primary rights is strongly preferable. Moreover, there are some, albeit weaker, arguments to be made in favour of also creating secondary rights.

The remaining chapters of the thesis are, hence, devoted to the following three questions:

- a) what reasons do we have to believe The Distinction is descriptively accurate;
- b) what reasons do we have to use The Distinction to structure our thinking if it is one among several descriptively accurate conceptualisations; and
- c) what reasons do we have to structure a system of private law in terms of primary and secondary rights?

In Chapter 5, I investigate how the relationship, briefly explored above, between substantive, action and remedial rights affects The Distinction. I start by building on the scholarship of Rafal Zakrzewski about the distinction between substantive and remedial rights. As per the definitions in 'Outline' above, Zakrzewski defines substantive rights as the rights we have against one another, prior to the commencement of any judicial process. He contradistinguishes remedial rights, which are the rights we have against one another after the conclusion of the judicial process.

For present purposes, Zakrzewski's key insight is that the shape or content of a remedial right can, but need not, resemble the content of the substantive right on which it is based. Thus, he distinguishes between replicative enforcement, where the content of the remedial right resembles the content of the substantive right, and transformative enforcement, where the content of the remedial right does not resemble the content of the substantive right. There is no necessary connection between the content of the remedial right and the content of the substantive right. Once we acknowledge this, it enables us to see that the fact of a particular remedy being awarded is not, without more, a reason to believe anything in particular about the content of the substantive rights that the claimant held prior to the commencement of the judicial process.

Building on this insight, I develop my own conceptual scheme for understanding the relationship between primary rights, secondary rights and remedies. I define three different modes in which a substantive right, whether primary or secondary, can be enforced. Direct enforcement is what Zakrzewski calls replication. Zakrzewski's transformative enforcement, however, must be further disambiguated into what I call type-I and type-II indirect enforcement. Any substantive right is type-I indirectly enforced where the remedy is based on that right, but does not mirror that right in content. By contrast, a primary right is type-II indirectly enforced where the remedy is based on the secondary right that arose from its breach. This third category, type-II indirect enforcement, allows

us to recognise that it is meaningful to speak of a right being enforced even where it is neither contained in the cause of action nor reflected in the content of the remedy.

In Chapter 5, I also discuss the classificatory work done by Stephen A Smith through the introduction of what he calls cause of action rights ('action rights'). These are, as described above, the entitlements which individuals have against the relevant parts of the state's judicial apparatus to have their rights recognised and eventually enforced. Thus, action rights are distinct from both substantive and remedial rights simply in virtue of their direction.

Building on the work done by Zakrzewski and Smith, I consider some arguments for and against regarding The Distinction as descriptively accurate, which are based on the remedies we can obtain. If we accept that forms of indirect enforcement are possible, it follows that we cannot infer much (if anything) about the content of substantive rights from the content of the remedies that are awarded to people holding those rights. Furthermore, the fact that action rights are different from substantive rights further makes it the case that we cannot logically infer an absence of substantive rights from the absence of a remedy. There may simply be reasons why our legal system has created substantive rights but is not making them enforceable through the creation of cause of action rights.<sup>18</sup>

In this way, Chapter 5 lays important groundwork for the chapters that follow it. If we accept that substantive rights, action rights and remedial rights are distinct and can come apart, most of the arguments based on the shape of remedies are exposed as non-sequiturs. For instance, consider the argument, canvassed in Chapter 7, that we can surmise that there are no primary duties in negligence because those duties are never directly enforced. Once we have realised that

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<sup>18</sup> Much of Chapter 5, Chapter 6, and Chapter 7 is occupied with the discussion of theories that deny that this is the case.

there is enforcement other than direct enforcement, that argument no longer holds much appeal.

Furthermore, I consider, in Chapter 5, whether we can make any arguments about remedies on the basis of the substantive rights that they are based on. For instance, could we claim that whereas a primary right can only ever be enforced directly, we have a greater variety of responses available where secondary rights are concerned? As the reader may suspect in the light of the foregoing, the answer is no, not without more. Just as the content of a particular remedy does not tell us much about the content of the underlying substantive right, the content of the substantive right does not tell us much about the content of the remedy awarded. Whether a remedy is based on a primary or a secondary right cannot predict or determine the content of that remedy.

Of course, it may well be possible to make a descriptive argument saying that as a matter of fact primary rights, or secondary rights, are only ever enforced through the award of remedies that have a particular content. However, that only establishes a contingent truth about the remedies available at a particular place and time. It does not show us some universal analytical truth about The Distinction. And it does not establish, in one way or another, whether we should continue to only award that particular remedy when enforcing primary, or secondary, rights.

Similarly, I do not wish to claim that it is impossible to make a normative argument for only enforcing primary, or secondary, rights through the award of remedies that have a particular content. In fact, there are arguments to this effect that I consider to be compelling. One such argument is the argument that it is undesirable to introduce considerations of loss when enforcing a non-loss-based primary right, which will be canvassed in Chapter 3. Other things being equal, the causation of loss from a breach is normatively irrelevant to a remedy based on a primary right which is *ex hypothesi* not connected with any breach, *viz* the right to an account. Thus, it would be better, other things being equal, if

any remedy based on such a right was in no part determined by reference to the causation of loss from a breach. Naturally, this is merely a *pro tanto* normative argument; I do not wish to suggest that there may not be sufficient countervailing reasons to enforce a non-loss-based right through the award of a loss-based remedy.

By contrast, merely asserting that X is a secondary right and that, therefore, any remedy based on it should be calculated by reference to loss is a *non sequitur*. First, non-loss-based secondary rights exist and there is no reason why they should be enforced through loss-based remedies. Secondly, although the enforcement of loss-based rights in itself *pro tanto* mandates loss-based remedies, it does so because the right is *loss-based* not because it is *secondary*. That is to say that there is an argument that other things being equal a loss-based right should be enforced through a loss-based remedy. However, that argument is based on the particular secondary right in question being loss-based, not on it being secondary. The right being secondary does not in itself make it the case that it should be enforced in any particular way. The contrast between these arguments illustrates why The Distinction does not yield any other insights about what remedies courts ought to award. This argument latches onto the one criterion of The Distinction – breach. Any argument that seeks to derive a normative argument supposedly from The Distinction but bases it on a different supposed attribute of it is not using it in the simple Austinian sense.

In summary, Chapter 5 establishes a framework and terminology for talking about the relationship between substantive rights, action rights, and remedial rights. That framework and terminology is necessary in order to disentangle (1) what remedies tell us about The Distinction and (2) what The Distinction tells us about remedies. I argue that, once the framework is applied, it becomes apparent that the question of what C's substantive right consists of is separate from the question of what remedy C is entitled to (a question of action rights). As a consequence, we cannot infer much about the content of C's rights from

the content of the remedial rights she obtains following court proceedings. This finding in turn will influence my conclusion that many of the arguments in favour of Flat Views that I will discuss in Chapter 6 and Chapter 7 are inconclusive. As I will show in those chapters, many of the arguments for Flat Views proceed from particular remedies being unavailable.

Furthermore, in the opposite direction of argument, the fact of a particular right falling on one side of The Distinction or the other does not, without further argument, tell us much about what remedies C may be entitled to on the basis of that right. First, descriptively speaking, the content of any given remedy need not, and often does not, mirror the content of the underlying substantive right. Secondly, with one exception it does not follow from a right being primary, or secondary (as the case may be), that the resulting remedy ought to have any particular attributes. Given that The Distinction is a thin concept, this is not surprising. Any normative argument about what remedy C should be awarded must thus be based on a normatively more salient aspect of the right being enforced. The one exception is any normative argument derived from the responsiveness of particular remedies to breach.

Lastly, I consider briefly what if anything the award of a particular remedy can tell us about the existence or nature of the claimant's substantive rights. In light of the foregoing conclusions, I argue that we can at most draw *prima facie* inferences. Given that there can be remedies that are not based on any substantive rights, the award of a remedy does not tell us anything conclusive about the existence of a substantive right. Given that substantive rights are sometimes not enforced in any way, the absence of a remedy does not allow us to conclusively infer the non-existence of a remedy, either. Given that remedies can be based on the transformative enforcement of substantive rights, the content of the remedy does not allow us to conclusively infer anything about the content of the claimant's substantive rights.

Having set up this framework of how to understand the relationship between substantive rights, action rights and remedial rights, I use it, in Chapters 6 and 7, to analyse the challenges to The Distinction posed by Flat Views. I distinguish between Flat Views that arise from theories concerning the nature of law generally, and Flat Views that arise from specific claims about a particular part of private law. I will term those who espouse views of the former sort Global Sceptics. Those who espouse views of the latter sort I will call Local Sceptics.

In Chapter 6, I analyse the challenges posed to The Distinction by Global Scepticism. Global Scepticism poses a serious challenge to The Distinction. If any of the views I have termed Global Scepticism is true, The Distinction cannot describe private law accurately. This is because Global Scepticism forces us to accept either that there is only one tier of substantive rights, or that there are no substantive rights beyond what I have described as action rights.

The claim that there is merely one tier of substantive rights entails denying the existence of merely type-II indirectly enforced primary rights. Recall the *Fence Painting* example from above. Once we deny that there are two tiers of substantive rights, we must accept one of two conceptualisations of *Fence Painting*:

- a) there is no primary duty to paint your fence painted, and only a simple duty to paint or pay; or
- b) there is a primary obligation to paint, but no secondary obligation to pay, and that primary obligation is type-I indirectly enforced.

Crucially, the existence of a primary duty to paint, a secondary duty to pay and the direct enforcement of that secondary duty – which together amounts to the type-II indirect enforcement of the primary right – cannot be conceptualised. Of course, in itself, that is not an argument against those views of Global Scepticism.

Alternatively, we may parse Global Scepticism as denying the existence of substantive rights separate from action rights. In that case, there would be no space for drawing The Distinction at all. As we have defined it, The Distinction exists in the broader category of substantive rights, the existence of which is being denied. The purpose of examining Global Scepticism is to determine whether any of the theories I have so termed present a good argument for jettisoning The Distinction. To do this, I will have to assess not only whether the theories in question in fact force us to abandon The Distinction along the lines of the argument just mooted, but also whether these theories are successful accounts of the nature of law. If they are not convincing accounts of the nature of law, they do not pose a credible threat to The Distinction.

In the first half of Chapter 6, I begin the discussion of Global Scepticism by setting out the family of views known as command theory. The basic idea behind these theories is that laws are commands backed by sanctions. These theories create problems for rights that can only exist if we accept that they are not always directly enforced. Since many primary rights are merely type-II indirectly enforced, this presents a significant problem for The Distinction.

In particular, I shall be discussing the versions of command theory advanced by Holmes and Kelsen. I have chosen Holmes because his theory is the crudest version of command theory. This leads to it presenting the purest version of the problem Global Scepticism poses for The Distinction. On Holmes' view, legal obligations are nothing more than predictions that a sanction will follow. I conclude that there is not much appeal in the crude picture of the law promoted by Holmes' view, and that consequently there is no serious challenge to The Distinction here.

Kelsen's version of command theory is somewhat more sophisticated. On Kelsen's view, all legal obligations are merely the antecedents for conditional judgments justifying sanctions. Albeit more than merely predictive, this view may be interpreted as similarly creating difficulties for The Distinction. However,

unlike Holmes' crude view, Kelsen's account can accommodate indirect enforcement (and hence The Distinction) depending on how broadly we define 'antecedent'. I argue that the inclusion of type-II indirectly enforced primary rights in any definition of antecedent risks undermining the Kelsenian project. Their inclusion opens the door to the challenge that there is no principled line as to what ought to count as an antecedent and hence a legal right, and what is simply background. Thus, I conclude that far from command theories presenting a challenge to The Distinction, The Distinction can help to illustrate the faults of command theories.

However, command theories are not the only versions of Global Scepticism that may represent a challenge to the existence of The Distinction. In the second half of Chapter 6, I discuss how the family of views known as interpretivism might also present a potential challenge. Interpretivism describes a family of theories that view legal obligations as a subset of our moral obligations. One particular strand of interpretivism defines legal rights as (some of) the moral rights that arise as a consequence of the actions of legal institutions – courts, parliament, etc. Albeit a promising theory of the nature of law, this strand faces difficulties delineating legal obligations from other moral obligations. These difficulties motivate some versions of interpretivism to define legal rights as those moral rights which are enforceable in the courts.

I argue that if these views are accepted, they can result in a Flat View. Just as with Kelsen's account, they create a risk that merely type-II indirectly enforced primary rights are insufficiently enforceable to count as legal rights. And just as with Kelsen, defining enforcement sufficiently broadly in order to include merely type-II indirectly enforced rights risks re-importing too many extra-legal moral obligations into our definition of what is a legal obligation.

There is something of a dilemma here. Either we retain enforceability as a criterion for determining the borders of what is a legal right, and risk jettisoning some of the primary rights we would otherwise regard as legal, or we retain those

rights *qua* legal rights at the price of potentially too wide a definition of legal rights. Given that Interpretivism is an attractive view, some might be tempted to go down the former route. This would turn Interpretivism into a Flat View, which could not account for the existence of both a merely type-II indirectly enforced primary right and the directly enforced secondary right that is based on its breach.

That, in turn, would have the consequence that for Interpretivists The Distinction would lose much of its utility. Of course, some of what we would term primary rights, the directly and type-I indirectly enforced primary rights, would persist. And most of what we now term secondary rights would equally persist. However, since many of the primary rights on the breach of which these secondary rights arise are no longer considered to be legal rights, those secondary rights would not in fact be secondary. Perhaps, some secondary rights, where both the primary right and the resulting secondary right are enforceable, would persist. However, the reach of The Distinction, and hence its utility as a way of thinking about the law, would be greatly diminished.

Fortunately, however, Interpretivism's status as a Flat View is merely apparent. Thus, I argue that, on closer inspection, the enforceability criterion is not necessary in order to delineate legal from other moral obligations. Rather, the solution lies in defining legal obligations as only those moral obligations that arise from institutional action triggering the relevant political morality. On the revision of interpretivism suggested here, duties that arise through the combination of institutional action with the political obligations we owe one another *qua* citizens of the same polity are legal duties. Moral duties that arise from institutional action's interaction with other antecedent reasons are not; similarly, moral duties that arise from political obligations without any institutional action are not.

In summary, I conclude that neither of the versions of Global Scepticism considered in Chapter 6 create reasons to doubt the existence of The

Distinction. As to the command theories: these are either too crude to be taken seriously as accounts of the nature of law (Holmes), or they do not in fact draw into question the existence of The Distinction (Kelsen). Although some versions of Interpretivism do make it hard to accommodate The Distinction, I argue that they could still do so on an admittedly *ad hoc* basis. More importantly, there is a version of Interpretivism that does not result in the creation of a Flat View and still manages to meet the challenge of delineating legal rights from the broader category of moral rights. Global Scepticism thus presents less of a challenge to the existence of The Distinction than appeared to be the case initially.

So, we do not have any reason to believe that The Distinction cannot exist as a matter of general theories of the nature of law. Of course, it is important to remember that this does not make it the case that we have reasons to believe in its existence. Moreover, as already mentioned, a further challenge to The Distinction comes from those who doubt the existence of individual primary or secondary rights in distinct areas of obligations. Since their views only commit them to a more localised criticism of The Distinction, I have termed these accounts Local Scepticism.

In Chapter 7, I examine various strands of Local Scepticism. I commence the chapter by discussing the large literature regarding the existence of primary duties in the law of negligence. It should be said that I exclude *Hedley Byrne*-type negligence<sup>19</sup> from this discussion, as it is not the target of Local Scepticism. Since the initial candidate duty, the duty of care, is never in itself enforced, whether directly or indirectly, I argue that the correct primary duty that should be discussed is a composite duty to not carelessly cause damage. Although this has an impact on some of the cruder arguments against the existence of a primary duty in negligence, the majority of the disagreement is about the existence of a duty of care. Thus, unsurprisingly, there is some inevitable slippage in the literature between the component duty not to be careless and

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<sup>19</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

the composite duty to not carelessly cause damage. So long as the argument being made is not reliant on that difference, nothing much turns on this.

Next, I consider a variety of arguments in favour of a liability view of negligence. None turns out to be particularly convincing. Many arguments in favour of Local Scepticism fall into the trap of simply recycling some of the cruder arguments in favour of Global Scepticism and applying them to a particular context. As we have already rejected those cruder arguments in chapter 6, they cannot succeed in Chapter 7. For instance, I dismiss the argument that there cannot be a duty in negligence because that duty is not injunctively enforced. Given the possibility of type-II indirect enforcement established in Chapter 5, this argument cannot succeed.

Similarly, I reject as fallacious the argument that there cannot be a primary duty in negligence on the basis that the considerations that apply to determine liability in negligence do not solely take into account the claimant's interests. Lastly, I consider the argument that a sceptical view is a more honest communicative choice, since the law cannot possibly mean what it communicates through the existence of a primary duty. Honest communication through legal norms is an important consideration. However, I argue, agreeing with Nicholas McBride, that in fact far from establishing the Local Sceptics' case, that consideration militates in favour of adopting a duty view.

Many of the arguments in favour of the duty view are not much more convincing. All the arguments that seek to establish that the duty view is the only possible conception of the law of negligence fail. Thus, for instance, the arguments based on corrective justice views of private law are overly ambitious in their claims and amount to little beyond repeated assertions that tort law just *is* a matter for corrective justice. It is, I argue, plainly possible to explain the law of negligence in the terminology of the sceptics, and the analytical necessity of the duty view can thus not be established.

However, arguments that argue that it is more descriptively accurate succeed. The language used by participants in the English legal system would be nonsensical without the existence of a primary duty. Other things being equal, a theoretical framework that fits what the users of the matter analysed say provides a better fit, notwithstanding that the alternative framework equally fits the outcomes from the framework.

Moreover, the duty view provides a more sophisticated and clearer framework, and should thus be adopted. Building on Raz's arguments for rights as intermediate stages of reasoning, I argue that thinking of the law of negligence in terms of The Distinction structures and clarifies our thinking. In this way, adopting the duty view results in more elegant and less complex ways of stating the same conclusions.

In summary, there is no reason to believe that either view is analytically necessary. However, the duty view is descriptively more accurate, as it has to explain away less of what judges adjudicating English private law say they are doing. Moreover, normatively, the duty view of the law of negligence is far more appealing, since it provides us with a clearer way to conceptualise the distinct stages of consideration applicable, and creates a more elegant structure to explain the different outcomes in the law of negligence.

Next, I consider whether there is reason to believe that there is no primary duty in strict liability torts. The argument goes that the law cannot really mean to create a duty, and must really just be creating a liability. Thus, it would be more honest if strict duties were just called strict liabilities. As in the negligence context, this would inconveniently have the effect of obliterating all strict primary duties, since, I argue, the effect is not merely to replace primary rights with primary powers. However, I argue that the argument fails because it is mistaken about both the nature of legal obligations and the nature of moral obligations.

Lastly, at the end of this chapter, I consider an argument that there is merely a liability to pay damages, and not a secondary duty. As with the argument regarding strict duties conceptualised as strict liabilities, conceptualising secondary duties as liabilities has the effect of crowding out The Distinction. That argument, when followed through, would reduce to an argument for not making the conceptual space for secondary duties as distinct from action rights. Ultimately, what it boils down to is asserting that primary rights are type-I and not type-II indirectly enforced when an award of damages is made by a court. Since secondary rights are no longer required to explain the award of damages, there is no need for The Distinction on this account. I reject this as unconvincing, and I argue that in fact we have reasons to stick with The Distinction because it provides a clearer and more elegant conceptualisation of private law.

Again, as in the earlier parts of the chapter, this Local Sceptic's argument does not succeed in establishing the absence of The Distinction in the chosen arena. We can thus say with confidence that The Distinction is accurately descriptive of all of the areas we have considered. However, in turn, albeit the best conceptualisation of the English law of obligations, it is not the only possible such conceptualisation as the ambitious Global and Local Sceptics' projects show.

As an overall conclusion, the project has shown multiple things. The Distinction is of current interest in both practice and in the literature. However, it is insufficiently well defined and consequently there are several inconsistent conceptions of The Distinction in use. This has the deleterious effect that people frequently argue past one another when using The Distinction. As a solution to this problem I suggest an explicit adoption of Austin's conception of The Distinction as this is in fact the most common and most useful definition.

However, adopting Austin's conception forces us to confront the fact that The Distinction is ultimately a thin analytical concept. A right being primary or secondary does not, in itself, imply anything beyond whether that right did or did

not arise from the breach of another substantive right. Whilst that greatly reduces the scope of arguments that can be made using The Distinction, it does not eliminate them completely. Furthermore, many arguments made using different conceptions of The Distinction could, of course, easily be recast to incorporate the different premises that they already implicitly contain. Confusion currently resulting from people using different cross-cutting conceptions of The Distinction would thus be avoided, and debate could be had openly and clearly.

I also establish that in order to understand The Distinction, it must be properly situated in the broader category of substantive rights, which is contradistinguished from both action rights and remedial rights. Using this insight, I analyse various theories of the nature of law that would result in a reduction of the scope of The Distinction. Ultimately, I reject these conceptualisations as unconvincing. Thus, we have no reasons to suspect that The Distinction is not descriptive, or to think that it is analytically impossible.

Lastly, I analyse various challenges to The Distinction local to particular areas of the law of torts and contract. I conclude that none of these challenges succeeds in establishing that The Distinction is inappropriate to describe the legal doctrine in these areas. In fact, I argue, The Distinction has the advantage of being clearer and more elegant than these rival conceptualisations.

The Distinction is a way of thinking about private law that can help make that thinking more structured, elegant, clear, consistent, and concise. I will, I hope, substantiate this argument. It might be objected that this argument for retaining The Distinction as one tool in our arsenal of analysis is a purely aesthetic argument, and as such should not have much normative force. However, this objection can be rebutted in two ways. First, other things being equal, elegance and other aesthetic criteria should be valued in everything, even in legal theory. As in mathematics, so in legal theory, an elegant explanation that arrives at the same solution as a clunky one is always preferable. Secondly, and more

fundamentally, elegance often comes hand in hand with other values that are of more than merely aesthetic value.

Albeit neither analytically necessary nor a thick concept, The Distinction is descriptively accurate and normatively preferable to alternative accounts. The distinction between primary and secondary rights and duties can help us structure our analysis of all the disparate areas of private law. It deserves its status as a fundamental distinction in private law theory.



## **Chapter 2: The Distinction at work**

Although there is much that is wrong in the current state of discussion regarding The Distinction, it should be emphasised at the outset that The Distinction forms the conceptual starting point for many successful and unproblematic analyses of different areas in private law. The Austinian conception of The Distinction accurately captures a real and extant difference between certain types of rights in private law. Furthermore, it is routinely used by practitioners and academics as a tool to solve legal problems, and many judicial decision and academic discussions simply take it as read. Because its truth is thought by many English lawyers to be too obvious to require any formal statement, examples of cases or academic work in which The Distinction has been expressly stated and then used in a straightforward and unproblematic manner are hard to find. As will be seen in the next chapter, however, there have unfortunately been some difficult and high-profile cases in which The Distinction has been used wrongly and incoherently. In order to show that this is not true of all uses of The Distinction, it will be beneficial to set out briefly that which is often taken as read, and this chapter will do so.

Albeit formal, the Austinian conception of The Distinction is a worthwhile distinction. Austin establishes a positive case for using The Distinction as the overarching classificatory structure of private law. In this regard, Austin makes the modest and sensible claim that organising one's description of a body of rules that establishes a set of private law rights into primary and secondary rights has advantages in terms of clarity of expression. Separating primary and secondary rights achieves a more compact exposition. Austin's proposed textbook structure is compact because, as he points out, the available secondary rights are standardised for a wide range of primary rights. As compact material is more manageable, this increases clarity of expression.

This can work for some areas of the law, such as the law of contract – after all, breach of both a contract for sale and a contract for services will occasion the same type of damages. However, this simplification will not necessarily work

across the whole law. For instance, even if we accept that both contract and tort recognise a secondary right to damages in the event of breaches of primary rights, the content of that secondary right differs between those two areas of the law. To give a trite example: in tort, the purpose of compensation (and thus the reference point for calculating that compensation) is restoration of the claimant to the position that she occupied before she was subjected to the tort; in contract, the purpose of compensation is to put the claimant into the position that she would have occupied if the contract had been performed. Clearly, the expository savings of separating primary and secondary rights are substantial, but it is insufficient to state the content of secondary rights once since different secondary rights arise in different contexts.

Moreover, in its focus on *breach*, the Austinian conception of The Distinction latches onto a significant feature of English private law. There are several well-known rules in English private law that are generally explained in terms of breach. What constitutes a breach of duty, how to quantify the loss that is triggered by that breach, and whether that loss is caused by the breach are all questions that arise in several areas of the law. Being focussed on breach, the Austinian conception of The Distinction can play a useful role in analysing and explaining these phenomena.

Considering the way in which many participants in the legal system understand private law, it can be taken as read that there are secondary rights which arise from the breach of other rights. For instance, the obligation to pay damages in contract is mostly understood in this way as a matter of course. This obligation only arises where another obligation, the primary obligation to perform under the contract, has not been complied with. This is mostly uncontroversial. It is nonetheless instructive.

Of course, even accepting that this is how contractual damages work, one might question why one ought to focus on breach as the dividing factor even on that picture. Take *Fence Painting* from the last chapter.

*Fence Painting: You and I make a contract. You agree to pay me £100; I agree to paint your fence before noon on Friday. I do not paint your fence. It is now Friday afternoon. The legal system provides that I have to pay you the losses you have suffered from that breach, but that, ordinarily, you cannot use the legal system to force me to paint the fence myself.*

On this example, there are many differences between your right to have your fence painted and your right to receive the cost of obtaining substitute performance elsewhere. For instance, if you could force me to do the painting myself, your eventual enforcement remedies might include the ability to ask the court to imprison me for contempt – provided always that the court order ordering me to paint your fence carried a penal notice, of course. Conversely, where I am ordered to pay you the cost of having your fence painted by someone else, the more usual enforcement mechanism would be to execute against my property. The need to establish breach is merely one of those differences.

Nonetheless, focussing on breach is instructive. Due to the way that our law has developed, many features that are connected to breach are important to the way in which a claimant's entitlement to damages is delineated and quantified. For instance, in the law of contract, the requirement of causation is intricately connected to breach. The causation-related question the law asks in determining whether your loss is compensable is whether loss was caused by my *breach*. Thus, in *Fence Painting*, any loss you would have suffered anyway because your neighbour drunkenly drove his car into the fence would not be compensable. It is not connected to breach in a way that is legally relevant.

Moreover, breach explains the different rules which govern an award of damages and a court order to pay a debt. In determining the contours of your secondary right to damages, questions of consequential loss and mitigation loom large. By

contrast, these are simply irrelevant in determining your payment obligation in debt. This distinction will most obviously crop up in comparing the difference in enforcement between payment obligations and other contractual obligations. However, as will be apparent in the next chapter, it is also highly pertinent in the arguments that have been made concerning equitable remedies against trustees.

More importantly, The Distinction also allows us the conceptual space to recognise that the primary payment obligation could be transformed into a secondary obligation upon breach. The focus on breach and causation illustrates the difference between a primary right to be repaid, that can be directly enforced in debt, and a distinct secondary right to be compensated for the losses springing from non-payment. If we designed a legal system from scratch, it would be possible to recognise both of these, and to choose to enforce either. As it is, contractual payment obligations are a rare example of primary rights being enforced directly. The breach of other contractual obligations tends to give rise to secondary rights to be paid damages, which are in turn enforced.

The Distinction allows us to explain this difference between the enforcement of debts – contractual payment obligations – and the enforcement of other contractual obligations in simple and straightforward terms. Whereas primary contractual rights to be paid money persist, other primary contractual rights tend not to. In contract, primary rights other than rights to the payment of money tend to give rise to secondary rights to compensation that can be quantified more easily in monetary terms. Of course, this distinction is a rough and ready one, since some primary contractual rights that are not entitlements to be paid sums of money are nonetheless directly enforceable. For instance, a court may award a claimant specific performance of her right to be delivered unique property or to be registered as the legal owner of a parcel of land.

Similarly, in tort, The Distinction can allow us to distinguish between a landowner's persistent primary right to be free from trespass and her secondary right to compensation for past trespasses that arise from breach of her primary right. The Distinction provides the conceptual apparatus for contradistinguishing the two rights whilst simultaneously highlighting their connection. Moreover, the connection between secondary rights and breach applies equally to this example. Although trespass is actionable *per se*, a landowner must show losses caused by the *breach* in order to recover more than merely nominal damages.

Lastly, consider *Insurance I* and *Insurance II* from the last chapter.

*Insurance I: I agree with you to prevent the eventuation of an insured risk. When the risk eventuates, the law will require me to make good the loss you have suffered as a consequence of the risk eventuating.*

*Insurance II: I agree with you to make good the loss you have suffered as a consequence of the same risk eventuating.*<sup>20</sup>

The Austinian conception of The Distinction allows us to recognise these two examples as creating different jural relations. Although *Insurance I* can seem a little artificial, it is easy to understand what is intended by parties who contracted on that basis.

There are two reasons it is easy to understand insurance contracts that create rights that fit the scheme of *Insurance I*. First, due to familiarity with The Distinction, we are used to dealing with the breach of primary rights. Secondly, the general law of contract provides robust default rules regarding the shape of its secondary rights. Albeit not necessitated by The Distinction, these default rules make it easy to deal with breach. We know that a breach of a primary contractual right is usually addressed by our legal system through the automatic

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<sup>20</sup> See the notes to these examples in Chapter 1 at nn 8 to 9 above.

creation of a secondary right to receive damages for the loss caused by the breach.

Further, we know that the measure of those damages is similarly set by default rules. These default rules, while expressed as addressed to breach, are of course not, strictly speaking, necessitated by the Austinian conception. The different measures of loss in contract and tort discussed above show that a range of different default responses is possible. Nonetheless, these default rules are well-known among practising and academic lawyers. Moreover, they are usually expressed by reference to breach. To reiterate, the default rules include rules about breach, loss and causation, all of which make reference to the breach of the primary right.

As Austin identified, having unitary default rules dealing with breach in (a particular area of) private law, greatly simplifies understanding. And it also unifies understanding of what any particular parties in contract may have agreed. In *Insurance I* the parties simply agree that X event will not happen. In the event that X does happen, the default rules kick in to specify what losses will be recoverable, and what losses will not be – either because they are not caused by the breach or because they are too remote. By contrast, in *Insurance II*, the parties will have to make specification for all of these contingencies because, as there is no breach, these default rules do not apply. Thus, the parties would have to agree in advance how to quantify the insurer's obligation, what losses would be too remote, and so on.

Although there are many problems with, and challenges to, The Distinction that we shall explore in the following chapters, it is important to emphasise the extent to which it is very frequently and successfully used in practice to solve legal problems in a clear, easily comprehensible and flexible way. The Austinian conception of The Distinction underpins our thinking about how we deal with the infringement of rights in private law. Indeed, it would be difficult to imagine

private law that we have today without the conceptual framework of The Distinction so understood.



## Chapter 3: Some case studies

### Introduction

In this Chapter, I will consider how the distinction between primary and secondary rights and obligations ('The Distinction') is used in some prominent case law. This consideration will not only paint a useful background picture for the questions being considered in the later chapters, but it will also establish some important insights about the nature of The Distinction and the problems that can crop up in its use. To this end, I will examine the House of Lords' decision in *Photo Production Ltd v Securicor Ltd*<sup>21</sup> and the Supreme Court's recent judgments in *Cavendish Square Holding BV v Talal El Makdessi*<sup>22</sup> and *AIB Group UK plc v Mark Redler (a firm)*.<sup>23</sup> I have chosen these three cases because they share two characteristics. First, they are landmark cases in their respective doctrinal areas. Secondly, they all provide a useful microcosm for one or more of the issues arising in connection with people's use of The Distinction.

The chapter will demonstrate that The Distinction is regularly being used by participants in, and commentators on, private law. It will also show a number of other things. First, *Photo Production* and *Cavendish* illustrate that far from having a settled definition, The Distinction is often vaguely defined. For instance, in *Photo Production*, Lord Diplock uses not one but four different attributes to describe what he takes to be the differences between primary and secondary rights. Although defining a distinction in detailed and rich terms is not objectionable in itself, this chapter will show that when it comes to The Distinction such a detailed and rich definition is unworkable. Indeed, we need look no further than *Photo Production* itself for the proof of this observation, since the legal question that arose in the case would be answered differently depending on which of Lord Diplock's four definitions was applied. And again, although Lord Neuberger and Lord Sumption in *Cavendish* did not explain which

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<sup>21</sup> *Photo Production* (n 13).

<sup>22</sup> *Cavendish* (n 14).

<sup>23</sup> *AIB* (n 15).

definition of The Distinction they thought they were using, the legal problem facing them in that case was also susceptible to different resolutions depending on the definition that they used.

Secondly, The Distinction is often used in an attempt to settle or explain disagreements regarding the substantive law, but unfortunately it is not always used very successfully to elucidate the technical points and policies at issue. This is brought out in the discussion of both *Cavendish* and *AIB*. In *Cavendish*, Lord Neuberger and Lord Sumption relied on The Distinction to draw the jurisdictional boundaries for the penalties doctrine. At first sight, this appears to be an appealingly elegant solution, but on closer study it turns out merely to have hidden the fact that the test applied by their Lordships was substantively identical with the test applied by the rest of the Supreme Court in the case. Thus, the use of The Distinction added nothing to the discussion.

Thirdly, people can end up talking past each other when they use The Distinction differently from one another in one and the same debate. For instance, in the debate surrounding *AIB* and *Target Holdings Ltd v Redfern*,<sup>24</sup> both sides rely on their conceptions of The Distinction to argue their point. However, as I show below, they pick up on different aspects of the debate surrounding The Distinction, and consequently fail to engage with one another. If they had defined their conception of The Distinction in advance, this miscommunication could have been avoided.

## **Photo Production**

Austin was writing about The Distinction in the first half of the 19<sup>th</sup> century, but it only entered the wider legal consciousness with the speech of Lord Diplock in *Photo Production*. Although Lord Diplock had already relied on The Distinction in a different context in *LEP Air Services Ltd v Rolloswin Investments Ltd*,<sup>25</sup> we

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<sup>24</sup> *Target Holdings Ltd v Redfern* (n 16).

<sup>25</sup> *LEP Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 (HL).

will focus on *Photo Production* as Lord Diplock developed a more detailed analysis of the terms 'primary' and 'secondary rights' in the latter case.<sup>26</sup> Lord Diplock's speech is interesting in two regards: first, his Lordship's reasoning shows how easy it is to slip from classifying a particular right as 'primary' to classifying it as 'secondary'. Secondly, the multiple cross-cutting attributes which Lord Diplock ascribed to primary and secondary rights respectively can lead to judges and academics talking past each other.

### Facts and background

The case concerned a clause limiting liability in a contract for services. Photo Production had contracted Securicor to provide night patrol services at their factory. One night, one of Securicor's employees intentionally started a fire when on his patrol. The fire destroyed the factory, causing £616k in damages. Photo Production sought to make Securicor liable for this loss, on the basis of either breach of contract or negligence. Whilst it was not disputed that Securicor would have ordinarily been liable for their employee's actions, they sought to rely on an exclusion clause in the parties' contract, which excluded any liability for the actions of employees 'unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of [Securicor]'. There was no suggestion that the actions of Securicor's employee could have been foreseen or avoided.<sup>27</sup> Photo Production argued that the so-called doctrine of fundamental breach made it impossible for Securicor to rely on the exclusion clause.

### The decision

Two approaches were taken to that argument in the House of Lords: whereas Lord Wilberforce (who gave the leading judgment with the concurrence of Lords

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<sup>26</sup> Robert Stevens cites *Photo Production* as authority for The Distinction in contract law: see his *Torts and Rights* (Oxford University Press 2007) 287 at FN 6; similarly, Peter Birks credits Lord Diplock's speeches in these two cases with having 'brought the two-tier analysis back into the law of contract' Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, n 18; Mitchell also credits Lord Diplock's judgments in both cases for introducing us to the primary/secondary distinction Mitchell (n 1) 270.

<sup>27</sup> *Photo Production* (n 13) 839G-840G.

Salmon, Keith and Scarman)<sup>28</sup> resolved the case purely on the basis of authority, Lord Diplock proposed an argument against the doctrine of fundamental breach that was based on The Distinction. The doctrine of fundamental breach was an approach to exclusion clauses which had been developed by Lord Denning MR in his judgment in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*, ten years earlier.<sup>29</sup> In that case, Lord Denning MR held that, where the injured party brought the contract to an end following a 'fundamental breach' by the other party, 'the guilty party cannot rely on an exception clause' because any exclusion clauses were part of the contract and could thus no longer have the effect of limiting any liability arising *after* the contract had been terminated.<sup>30</sup> Lord Denning MR sought to shore up that reasoning by quoting certain passages from Lord Reid's speech in *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale*.<sup>31</sup> Ultimately, however, this proved to be the downfall of the doctrine of fundamental breach when it came before the House of Lords in *Photo Production*. Lord Wilberforce correctly rejected Lord Denning's analysis as having been founded upon a selective misreading of *Suisse Atlantique*, and held that, instead, the question whether an exclusion clause continued to apply after the termination of a contract for repudiatory breach should be resolved depending on the ordinary contractual interpretation of the parties' contract.<sup>32</sup>

In addition, Lord Wilberforce explicitly endorsed Lord Diplock's method of reaching the same result.<sup>33</sup> Resting his analysis on The Distinction, Lord Diplock held that the exclusion clause modified Securicor's primary obligation to provide the night patrol services. Without the exclusion clause, that obligation would have been 'an absolute obligation to procure that the visits by the night patrol

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<sup>28</sup> Lord Salmon gave a brief judgment concurring with Lord Wilberforce *ibid* 852A-853D; Lord Keith simply stated his agreement 853E; Lord Scarman added two sentences of his own beyond stating his concurrence 853F-G.

<sup>29</sup> *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (CA).

<sup>30</sup> *ibid* 467.

<sup>31</sup> *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL).

<sup>32</sup> *Photo Production* (n 13) 841D-843B.

<sup>33</sup> *ibid* 845A-C.

... were conducted by natural persons who would exercise reasonable skill and care for the safety of the factory.<sup>34</sup> Through the inclusion of the exclusion clause in the parties' contract, however, Securicor's obligation had been 'limited to exercising due diligence ... to procure that those persons shall exercise reasonable skill and care for the safety of the factory.'<sup>35</sup> It followed that the termination of the contractual obligations following repudiation would make no difference to the effect which the exclusion clause had already had on the contract. Lord Denning MR's reasoning therefore failed as well. No claim could lie for damages based on a breach of Securicor's primary obligations because, on Lord Diplock's reading of the clause, Securicor had not breached its primary obligations. Even if the exclusion clause had ceased to apply at the moment when the contract was repudiated, there was no actionable loss because Securicor had not failed to fulfil its promise.

This interpretation of Lord Diplock's reasoning finds support in his Lordship's assertion that '[t]his makes it unnecessary to consider whether a later exclusion clause ... which modifies the general secondary obligation ... would have applied in the present case.'<sup>36</sup> There is a difference between the way in which his Lordship understood the exclusion clause on the facts of *Photo Production* (*viz* as modifying the parties' primary obligations) and a reading on which an exclusion clause does not affect the primary obligation but the extent of the parties' secondary liability in the event of a breach of those primary obligations.

Making this distinction is to be welcomed. These two ways in which an exclusion clause can operate *are* analytically distinct, notwithstanding the fact that in most cases the effect of a clause will be the same either way. Let us imagine that D and C make a contract where, in exchange for C paying £100, D's principal obligation is to carry out certain actions – to *phi* and to *chi*. Now, this contract also contains a clause excluding any liability for not *chi*-ing. We can see that the law claims different things depending on whether D's primary obligation is

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<sup>34</sup> *ibid* 851D.

<sup>35</sup> *ibid* 851E.

<sup>36</sup> *ibid* 851H.

limited or whether his secondary obligations are limited. When D's primary obligation is limited, the law claims that 'D should *phi*'. On the other hand, when D's secondary obligations are limited, the law says 'D should *phi* and *chi* (his primary obligation) but D does not have to compensate C for his not-*chi*-ing'.

Reading an exclusion clause as modifying a party's primary contractual obligations has one significant disadvantage, however. The argument built on that reading does not explain how the exclusion clause barred Photo Production from claiming against Securicor in the tort of negligence on the basis of their vicarious liability for the actions of their employee.<sup>37</sup> Although there would simply be no breach of the primary contractual obligation if the exclusion clause operated this way, Securicor's tortious liability would be unaffected. Only its primary contractual liability would have been modified, and it would still have been vicariously liable in tort for the setting of the fire. Fortunately, however, there is a different, more generous reading of Lord Diplock's speech that would allow contracting parties to use exclusion clauses to exclude not only contractual but also tortious liability post-repudiation.

To understand how, we must look to another passage of Lord Diplock's judgment, where his Lordship held that it is misleading to speak without any qualification of the determination or rescission of the contract upon the innocent party's election to accept repudiation. Rather, his Lordship reasoned, what happens in such cases is that the parties are released from further performance of their still inchoate primary obligations while their secondary obligations continue.<sup>38</sup> This is an elegant explanation, in that it provides a simple and straightforward explanation of which rights persist and which come to an end upon termination of the contract for breach. Further, it might help us to fashion a response to any argument stemming from the fact that rights cease upon

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<sup>37</sup> Lord Wilberforce seems attuned to the fact that Photo Production were asserting two alternative claims, but seems to have held that the exclusion clause applied to both, *ibid* 846D; Lord Diplock, on the other hand, seems to have had no interest in discussing Securicor's vicarious liability for its employee's negligence, 848D.

<sup>38</sup> *ibid* 849D-G, 850B.

termination whilst simultaneously giving defendants a shield against tortious claims that they thought they had contractually excluded.

Unlike the above primary-rights-based argument, however, Lord Diplock does not in fact assert that the persistence of the parties' secondary rights undermines Lord Denning MR's reasoning anywhere in his judgment. However, reading this argument into his Lordship's speech could explain why the doctrine of fundamental breach would fail to cancel out the effect of exclusion clauses regarding claims not based on the parties' contract. If the exclusion clause is itself a secondary obligation, the party in default could still rely on it because unlike their unperformed primary obligations it has not come to an end, since the parties are only released from their future primary obligations. Albeit not explicit, such a reading of exclusion clauses as *themselves* being secondary is supported, by way of contradistinction, by Lord Diplock's description of the parties' primary obligations as relating to their promises 'that some thing will be done' (ie that they will perform the main obligation bargained for).<sup>39</sup>

The problem with all this argument, however, is that it rests on two competing and mutually incompatible explanations of how the distinction between primary and secondary rights undercuts the argument in support of the doctrine of fundamental breach. For the first argument, the exclusion clause must *modify* the parties' primary rights and obligations. Otherwise it could not have modified Securicor's primary right prior to repudiation. But, conversely, for an argument based on the survival of secondary rights post-termination to succeed, the exclusion must be conceived as *being itself* a secondary jural relation.<sup>40</sup> Otherwise it would not persist, since the only rights that survive post-termination on this reasoning are secondary rights.

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<sup>39</sup> *ibid* 848C.

<sup>40</sup> In Hohfeldian terms, it might be more accurate to speak of Securicor as having a secondary privilege and Photo Production having a correlative secondary no-right to compensation for anything within the scope of the exclusion clause, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays* (Yale University Press 1920) 65ff.

Whilst we should distinguish between a right *modifying* a primary (or secondary) right and a right *being* a primary (or secondary) right, there are some problems with the idea that a clause which modifies a primary right itself generates a secondary obligation. This argument relies on the primary right having already been modified prior to breach, since breach triggers the ability to repudiate and the argument is explicitly committed to the obligation to take care being modified prior to repudiation. Hence, any right modifying a primary right would have to exist and carry out the modification prior to that primary right being breached. By contrast, assuming the Austinian conception of The Distinction, if a modifying right were to be secondary, it could not arise until after the breach of the primary right from which it arises. The right modifying Securicor's primary obligation must thus be primary on that conception.

What this shows is that perhaps Lord Diplock, albeit aware of the Austinian definition, had a different conception of The Distinction in mind. In a way, the multiple strands of argument that can be found in Lord Diplock's speech – whether explicit or merely implied – illustrate a broader problem: as the above analysis shows, it may be easy to conceive of a right as being either primary or secondary, but it can be harder to be sure which interpretation is correct, even when one has a clear definition between primary and secondary rights in mind – Austin's definition, in this instance. The reason on the facts of the case is that the exclusion clause simply does not contain enough information to tell us whether we should regard it as only coming into play after breach to affect the parties' secondary obligations or whether it operates from the moment the contract comes into force to limit the extent of the parties' primary obligations. Further, our discussion shows that it can be tempting to classify a right as either primary or secondary depending on how doing so serves one's argument: Lord Diplock's argument that Securicor never breached its primary contractual obligation necessitated classifying the exclusion clause as modifying the parties' primary rights and obligations and thus, as explained, ultimately required classifying the right itself as primary. Conversely, our second argument required

classifying the exclusion clause as secondary in order for it to persist and defeat Photo Production's tortious claim.

These problems arise even assuming one is using a clear conception of what makes a right primary or secondary, but matters are exacerbated by the surprising lack of clarity as to what conception of The Distinction forms the basis of Lord Diplock's argument. His Lordship's speech describes primary and secondary rights in a manner that allows us to draw at least four separate distinctions. First, in a nod to Austin, his Lordship asserts that 'breaches of primary rights give rise to substituted or secondary obligations[.]'<sup>41</sup> Secondly, Lord Diplock states that the parties are 'fully at liberty' to 'reject or modify' primary obligations,<sup>42</sup> but in apparent contrast, he says that secondary obligations cannot 'be totally excluded.'<sup>43</sup> Thirdly, Lord Diplock asserts that, being free to determine their primary obligations themselves, the parties may 'state these in express words in the contract', albeit that 'in practice' many of them 'are left to be incorporated by implication of law'. By contrast, Lord Diplock seems to envision secondary obligations exclusively 'aris[ing] by implication of law'.<sup>44</sup> Lastly, as alluded to above in the description of Lord Diplock's explicit argument about the modification of primary rights, there is a suggestion that primary rights are the parties' *principal* obligations or promises – the 'obligations upon each party ... to procure that whatever he has promised will be done is done.'<sup>45</sup> In contrast, we can surmise, secondary obligations are best seen as ancillary.

The ascription of multiple attributes to primary and secondary rights, respectively, is not a bad thing *per se*. After all, if The Distinction is to serve a useful purpose, it stands to reason that it may be a good thing for its content to be fleshed-out. However, problems quickly start to pile up if these attributes are also used to determine whether a given right is primary or secondary, ie if they

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<sup>41</sup> *Photo Production* (n 13) 848H.

<sup>42</sup> *ibid* 848G.

<sup>43</sup> *ibid* 849B.

<sup>44</sup> *ibid* 848H-849A.

<sup>45</sup> *ibid* 848C.

are conceived to be definitional rather than consequential. In this case, unless all these descriptions align in every instance, the presence of multiple factors risks creating confusion in drawing The Distinction. For instance, a right could be independent of breach (and thus primary according to the first attribute), whilst concerning an ancillary matter (and thus secondary according to the last attribute). Take an interpretation clause: such a clause clearly operates from the get-go and is not dependent on any putative breach whilst simultaneously being merely ancillary. Or, as discussed with regards to *Cavendish* below, a right could be created by the parties' express words (and thus be primary according to the third attribute), and yet it could additionally be conditional upon breach (and thus secondary according to the first attribute). What these examples show is that there are instances of overlap. And as will be explored below (with regard to *Cavendish* and *AIB*), this can create bad outcomes because it can lead to people talking past each other by drawing on different attributes to draw The Distinction.

## **Cavendish**

### Facts and background

The distinction between primary and secondary rights is treated as yielding significant insights by some of the Justices in the Supreme Court's recent decision on the penalties rule in *Cavendish*.<sup>46</sup> However, their Lordships' judgment unfortunately fails to substantiate how The Distinction can help the resolution of the issues facing the Court in that case. It is trite that damages for breach of contract in English law 'exist ... to reflect the [claimant's] interest ... and not to punish the defendant for not performing.'<sup>47</sup> In fact, the penalties rule holds that any contractual provision which seeks to impose a penalty for breach – in order to deter the defaulting party from breaching his obligation – is unenforceable.<sup>48</sup> *Cavendish* was a conjoined appeal from two decisions concerning that rule. Whereas the appeal from *ParkingEye Ltd v Beavis*<sup>49</sup> also

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<sup>46</sup> *Cavendish* (n 14).

<sup>47</sup> AM Tettenborn, *An Introduction to the Law of Obligations* (Butterworths 1984) 215.

<sup>48</sup> Professor Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) ss 26–178.

<sup>49</sup> *ParkingEye Ltd v Beavis* [2015] EWCA Civ 402.

raised issues of consumer protection, the *Cavendish* appeal<sup>50</sup> was straightforwardly concerned with contractual construction and interpretation, and the remit of the penalty rule.

The claimants, Cavendish, had entered into a contract with the defendant, Makdessi, and another party, Ghossoub, to acquire a controlling stake in the advertising agency built and heretofore owned by Makdessi and Ghossoub ('the Agency'). In consideration, a large sum was to be paid in instalments, depending upon profits and continuing goodwill. A central clause of the contract (11.2) provided for various ways in which Makdessi and Ghossoub ('the Sellers') were not to compete with the Agency for a number of years. The contract, which had been negotiated at arm's length and after both parties had taken sophisticated legal advice, contained clauses which provided that, if either of the Sellers competed with the Agency following the sale in any of the ways specified in clause 11.2, that seller would forfeit any further instalments (5.1) due to him, and the claimants would also acquire the right to purchase the remainder of that seller's shares at a discount (expressed as a price not containing any consideration for goodwill) (5.6). It was accepted between the parties that Makdessi was in breach of clause 11.2. The proceedings had arisen out of an attempt by the claimants to enforce clauses 5.1 and 5.6, which Makdessi sought to resist by arguing that the clauses were penal and thus unenforceable.

### *The decision*

Reversing the Court of Appeal, a seven-member panel of the Supreme Court allowed the claimants' appeal, holding that neither clause 5.1 nor clause 5.6 were penalties. Their Lordships' judgments can essentially be divided into two camps: Lord Mance and Lord Hodge, in separate judgments, with the concurrence of Lord Toulson, primarily based their conclusions on the fact that the clauses were protecting a genuine interest, whereas Lord Neuberger and Lord Sumption, in a joint judgment with which Lord Carnwath concurred, based their decision on the more formal argument that the clauses, as primary rights,

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<sup>50</sup> *Makdessi v Cavendish Square Holding BV* [2013] EWCA Civ 1539.

structured the consideration provided by the claimants and were thus outside the scope of the penalties rule altogether. Lord Clarke, rather inconveniently from the point of view of extracting a *ratio*, concurred with the reasoning of all the other Justices. For present purposes, our interest lies in the use their Lordships made of The Distinction in deciding this case.

In the first camp, Lord Mance decided the case on the basis that the clauses were genuine pre-estimates of the approximate value of the goodwill that would be lost if Makdessi competed with Cavendish, and were not designed to be a deterrent. It is important to note that his Lordship, following his own earlier judgment in the Court of Appeal in *Cine Bes Filmcilik ve Yapimcilik AS v United International Pictures*,<sup>51</sup> rightly recognised that the dichotomy between compensation for loss measured on a conventional basis and deterrence is not exhaustive of all the possibilities, since one contracting party might wish to assure itself of more than compensatory damages in the event of breach without necessarily wishing to deter the other party from committing a breach. The present case illustrates this: Cavendish were anxious to ensure that they should not be out of pocket in the event that they lost the value of the Agency's goodwill, but difficulties of quantification might have made it impossible for a court to make a compensatory award that would achieve this result.<sup>52</sup>

After acknowledging the appeal of the primary rights-based jurisdictional analysis proposed by Lord Neuberger and Lord Sumption (to which we shall come in a moment), Lord Hodge reasoned that, 'even if it were correct to analyse [the clauses] as ... secondary provision[s] operating on breach of the seller's primary obligation,' they would not fall foul of the penalties rule. Much like Lord Mance, Lord Hodge based this conclusion on the fact that the impugned clauses were measures designed to price the Agency's remaining goodwill. Ultimately, his decision rested on the buyers being entitled to protect their 'substantial

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<sup>51</sup> *Cine Bes Filmcilik ve Yapimcilik AS v United International Pictures* [2004] 1 CLC 401.

<sup>52</sup> See eg the wildly differing estimates of such loss commented upon by Lord Reed in *One Step (Support) Ltd v Morris-Garner and another* [2018] UKSC 20, at [12]-[15]; I wrote about this decision in Caspar Bartscherer, 'Two Steps Forward, One Step Back: One Step (Support) LTD v Morris-Garner and Another' (2019) 82 *The Modern Law Review* 367.

legitimate interest' through the clauses, which protection he contradistinguished from the deterrence prohibited by the penalties rule.<sup>53</sup> (As an aside, it is unclear where exactly the line should be drawn between the two categories of protection and deterrence that this creates. They might well overlap, and, whereas pricing a legitimate interest would likely be construed to be a narrower category, protecting a legitimate interest might well entail protecting it through deterrence. This would only leave deterrence in order to protect an illegitimate interest within the mischief that the doctrine is aimed at. One cannot but wonder whether avoidance of breach will ever be considered an illegitimate interest.) Lord Clarke wrote a short concurring speech, affirming the reasoning of all their Lordships. Lord Toulson agreed with the reasoning of Lord Mance and Lord Hodge but dissented on the conclusion in *Parking Eye*.

For our purposes, it is notable that Lord Hodge chose to 'construe [clause 5.6] as a secondary obligation' to counteract the danger that parties in future cases might otherwise be encouraged to frame all penalties as primary obligations. Discouraging parties from abusing formal criteria is something that is generally to be welcomed, but changing these criteria solely in order to achieve that aim is to be discouraged. The distinction between primary and secondary rights would no longer delineate a formal aspect of private law if a particular clause could be construed as falling within one category or the other according to the policy aims that the Supreme Court decides are best served by that change. As a taxonomical distinction, whether an obligation is primary or secondary should depend on fixed criteria.<sup>54</sup> We can see how unintuitive Lord Hodge's approach is by considering, by way of example, the Austinian conception of The Distinction. As the reader will recall, according to Austin, secondary rights are those rights that follow or arise directly from the violation of a primary right; primary rights are all other rights.<sup>55</sup> Either something arises directly from breach, or it does not; what event gives rise to a particular obligation does not change

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<sup>53</sup> *Cavendish* (n 14) para 278.

<sup>54</sup> On why it might be sometimes be advantageous to have certain, easily ascertainable rules (of classification, or otherwise) see text to n 71 below.

<sup>55</sup> Austin (n 2).

depending on whether or not the parties intended to create a disincentive against breach.

By contrast, Lord Neuberger and Lord Sumption, with whose joint judgment Lord Carnwath agreed, based their decision on the fact that clauses 5.1 and 5.6 gave rise to obligations that were not secondary but primary, in spite of the fact that those clauses only took effect on breach.<sup>56</sup> Their Lordships determined that the purpose of clauses 5.1 and 5.6 was to ‘fix the price’ to be paid by the claimants – which they found to be the claimants’ principal primary obligation. Since the penalties doctrine does not give the courts the authority to ‘review the fairness of the parties’ primary obligations’, the impugned clauses were beyond the remit of the penalties doctrine.<sup>57</sup>

As an aside, it is interesting how clearly Lord Neuberger and Lord Sumption drew the distinction between a right that arises from a breach (*viz* a secondary right) and the wider category of rights that arises on the occasion of breach (which, they suggest, can encompass primary rights).<sup>58</sup> Their clarity on this point can be contrasted with the seeming unwillingness of many judges to entertain the existence of a non-reparative primary right to account for misapplied trust property in the context of a trustee’s personal liability.<sup>59</sup>

Although we should hope for more of this clarity, this is nothing revolutionary in terms of analysis; on one understanding of the primary/secondary rights dichotomy, all rights which parties stipulate in their contract, are analytically primary.<sup>60</sup> However, more importantly, this is not as clean and neat a solution as it might initially seem. Whilst it eschews the issues faced by Lord Mance’s analysis, it raises the issue that on this definition every contractual clause,

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<sup>56</sup> *Cavendish* (n 14) [74].

<sup>57</sup> *ibid* [73].

<sup>58</sup> *ibid* [73].

<sup>59</sup> As most recently evidenced in the Supreme Court’s decision in *A/B* (n 15) to be discussed in more detail below.

<sup>60</sup> Pothier, whose distinction between ‘principal’ and ‘penal’ obligations can be seen as the predecessor to Austin’s primary and secondary obligations, advocates regarding all contractually stipulated obligations as ‘principal’; Pothier (n 1) 183, [341].

whether it would fall foul of the penalties rule or not, is technically a primary obligation.

If we follow their Lordships' analysis all the way through, we can see that it strikes upon the fact that the parties' contract contained a *conditional* primary right, ie a primary right that only imposes legal obligations once a future event – in this case, the breach – occurs. However, a more stringent analysis of secondary rights reveals them to have the very same conditional structure. A secondary right to reparative compensation only arises from the breach of a primary right if the general law of contract specifies that a *conditional* right to reparative compensation will be triggered in the event of a particular event, namely breach of one's primary obligations.

This reveals a fundamental problem with the reasoning of their Lordships. If primary and secondary rights are defined according to the received Austinian account, secondary rights are only those conditional rights which arise from breach and primary rights are the remaining rights which arise from some other event. However, clauses 5.1 and 5.6 were clearly triggered by breach in some way. It is unlikely that their Lordships had the Austinian conception of The Distinction in mind, given that clauses 5.1 and 5.6 could only be secondary on that conception.

Of course, they might rely on the 'directly' in the Austinian conception to narrow the category of secondary rights; if 'directly' is more narrowly defined, the category of secondary rights will be resultingly narrower. Perhaps we could narrow our definition of secondary rights by stipulating that only those rights which arise from breach as a *matter of the general law* of contract arise 'directly' from breach. As Bowen LJ recognised in *Birmingham and District Land Co v London and Northwestern Railway Co (No 1)*, the right to damages is given by the general law as a reaction to the breach, whereas any contractually agreed

indemnity arises out of the relevant terms of the contract.<sup>61</sup> Although this serves to move the line between primary and secondary rights to a point where clauses 5.1. and 5.6 are clearly primary, it raises a new problem. On this reading, contractual stipulations specifying liquidated damages, outright penalties etc would equally not arise as a consequence of the general law, either. Thus, no contractual clause could ever be within the remit of the penalties rule, according to the primary/secondary rights aspect of their Lordships reasoning, even if they are conditional upon breach.<sup>62</sup> However, since their Lordships explicitly stated that they did not wish to abolish the penalties doctrine and also contradistinguished clause 5.1 against contractual clauses seeking to specify a ‘measure of compensation for breach’, it is likely that their Lordships had a different conception of The Distinction in mind.<sup>63</sup>

It stands to reason that, in light of the reasoning their Lordships employed with respect to clause 5.1<sup>64</sup> and which they explicitly adopted for clause 5.6,<sup>65</sup> in fact a distinction between principal and ancillary rights is the best candidate conception for our purposes. This is the same as the fourth of Lord Diplock’s different conceptions of The Distinction. In order to make this apparent, it will be helpful to set out the relevant passage at length:

Where ... does clause 5.1 stand? It is plainly not a liquidated damages clause. It is not concerned with regulating the measure of compensation for breach of the restrictive covenants. It is not a contractual alternative to damages at law. Indeed in principle a claim for common law damages remains open in addition, if any could be proved. The clause is in reality

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<sup>61</sup> *Birmingham and District Land Co v London and Northwestern Railway Co (No1)* (1886) 34 Ch D 261, 274–275.

<sup>62</sup> Of course, the reason was not solely that the clause was a primary obligation but that, in effect, it fixed a price for the defendant’s performance (and the judges could not consider the fairness of said price). In reality, there is very little between the two different approaches; even if their analysis was different, both seem to focus on the fact of ‘pricing’, and just come at it from different angles.

<sup>63</sup> *Cavendish* (n 14) [74]; this was a contradistinction that their Lordships seem to have placed great stock in; NB the almost identical ‘measure of compensation for the breach’ at [76].

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid* [81].

a price adjustment clause. *Although the occasion for its operation is a breach of contract*, it is in no sense a secondary provision. ... Clause 5.1 belongs with clauses 3 and 6, among the provisions which determine Cavendish's primary obligations, ie those which fix the price, the manner in which the price is calculated and the conditions on which different parts of the price are payable. Its effect is that the Sellers earn the consideration for their shares not only by transferring them to Cavendish, but by observing the restrictive covenants.<sup>66</sup>

Of course, the italicised passage appears to be a nod to the Austinian Definition. However, the underlined passages set up a dichotomy between earning the counterparty's consideration, on the one hand, and modifying compensation for breach, on the other, which is strongly redolent of the distinction between principal and ancillary terms.

It could be said that recognising that their Lordships' conception of The Distinction contains elements of Lord Diplock's fourth definition should not necessarily rule out that the Austinian Definition might have also influenced that conception. In light of the passage cited above, such a hybrid definition of The Distinction might even be the most exegetically faithful interpretation of their Lordships' judgment. However, as observed regarding *Photo Production* above, the two definitions can lead to the same clause in a contract being classified differently – they are cross-cutting definitions. Whereas it was observed above that the same right can be primary on the Austinian definition and secondary on Lord Diplock's fourth definition, the impugned clauses in *Cavendish* illustrate that the opposite divergence can also be observed. Albeit arising on breach and thus secondary on the Austinian Definition, clauses 5.1 and 5.6 – and this is the crux of their Lordships' argument – concern the price to be paid for performance and are thus primary on Lord Diplock's fourth definition.

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<sup>66</sup> *ibid* [74] (both italics and underlining, my emphasis).

This creates some difficulties for crafting a hybrid definition, in turn. Since the definitions are cross-cutting, we cannot keep the entirety of both definitions to create a new definition. Suppose one were to start with the Austinian definition and add on elements of Lord Diplock's fourth definition<sup>67</sup> The Diplockian elements could be used to enlarge either the clauses that would be categorised as primary or those that would be categorised as secondary. That is, we could enlarge the category of secondary rights (and hence narrow the category of primary rights) by saying that a right would be primary if and only if it is both causally independent of breach and part of the parties' principal bargain. That would make the definition of primary rights conjunctive: it would need to meet the criteria of both the Austinian definition and Lord Diplock's fourth definition. If we want The Distinction to remain exhaustive, the definition of secondary rights would then be disjunctive: a right would be secondary if it was either causally dependent on breach or in some way ancillary to the parties' main bargain. Of course, once The Distinction was so defined, the impugned clauses would be secondary and thus within the remit of the penalties doctrine. This is clearly not an outcome their Lordships intended, and hence it cannot be the definition that they had in mind.

Perhaps, then, their Lordships had the opposite hybrid definition in mind. On that definition, a right would be primary if it were *either* causally independent of breach *or* part of the parties' principal bargain. Consequently, a right would be secondary and thus within the remit of the penalties doctrine if and only if it were *both* causally dependent of breach *and* in some way ancillary to the parties' main bargain. By contrast to the other hybrid definition considered above, this would have the consequence that the category of primary rights would be enlarged at the expense of secondary rights.

Recalling the extracted passage, it does indeed seem plausible that this is the definition their Lordships intended to use. This impression is strengthened once

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<sup>67</sup> Of course, the result would be the same if we started the other way around. Much like in arithmetic, the addition of criteria is transitive.

the fact that their Lordships considered wholly breach-independent obligations to be outside of the penalties doctrine's jurisdiction is taken into account.<sup>68</sup> Although there might be some ancillary rights that are causally dependent on breach that would be secondary on this conception, the majority of contractual clauses would presumably be in the broadened category of primary rights on this definition. Thus, the majority of contractual clauses would be outwith the remit of the penalties doctrine. It should however be said that their Lordships never explicitly stated that they considered this to be the conception of The Distinction that they were using.

The difficulties that would result from adoption of the approach of Lord Neuberger and Lord Sumption was illustrated by the recent first instance decision in *Vivienne Westwood Ltd v Conduit Street Development Ltd*.<sup>69</sup> The case concerned a lease of a commercial property. The rent payable had been significantly curtailed by a side letter. By a further term of that side letter, the rent would revert to that agreed on the face of the lease in the event of any breach of the terms of the lease or the side letter. Following a number of assignments of the landlord's interest, the tenant failed to pay the rent on time once. The landlord then sought to enforce the more onerous rental obligations contained in the lease, and the tenant argued that the term by which the rental obligation reverted to that contained in the lease was a penalty. Interestingly, Timothy Fancourt QC, sitting as a Deputy High Court Judge, recognised that the approach of Lord Neuberger and Lord Sumption might have the effect that that term would be entirely outwith the remit of the penalties doctrine. However, relying on the approach of the other Justices, Timothy Fancourt QC distinguished *Cavendish* on the basis that the impugned clauses in *Cavendish* were only triggered in the event of non-compliance with a central term, whereas in *Vivienne Westwood* they would be triggered by any breach.<sup>70</sup>

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<sup>68</sup> *Cavendish* (n 14) para 14.

<sup>69</sup> *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch).

<sup>70</sup> *ibid* [45]-[46].

*Vivienne Westwood* illustrates the difficulty created by the approach championed by Lord Neuberger and Lord Sumption. Without clarity as to what definition of The Distinction their Lordships had in mind, the proposed test is difficult to apply. Fortunately, that problem could be side-stepped by relying on the approach of the other justices, in this case. However, future courts in cases involving more-carefully-tailored, potentially-penal terms will not be able to rely on that lifeline.

However, the difficulties of (partially) utilising Lord Diplock's fourth definition in this context do not end at this juncture. In fact, using Lord Diplock's fourth definition would undermine the very advantages that using a formal criterion like The Distinction to determine the substantive question of the scope of the penalties doctrine's jurisdiction carries in the first place. A formal criterion can, in the right circumstances, furnish a more straightforward proxy for determining the underlying substantive question. As Raz argues, a rule of thumb or formal proxy can be useful where the decision-maker has limited information or where investigating the true reasons applicable to a decision would be time-intensive or otherwise costly.<sup>71</sup> For instance, such a rule of thumb can be designed with less ambiguity than the true underlying considerations. Suppose, for instance, that contractually created secondary rights, according to whichever definition, mapped reasonably well onto rights that could be prohibited penalties. If it were otherwise difficult or costly to determine whether a particular clause was within the remit of the penalties doctrine, that correlation between penalties and secondary rights could be used as a heuristic in order to more efficiently determine jurisdiction.

Suppose for a minute that the test suggested by Lord Hodge and Lord Mance – whether a particular clause is designed to structure the price for the counterparty's performance – represents the true, substantive reasons applicable to the determination not of whether a particular clause is a penalty

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<sup>71</sup> Joseph Raz, *Practical Reason and Norms* (OUP 1999) 58–84; I do not endorse the use of this reasoning to justify Raz' account of authority; as Scott Hershovitz shows, it fails on its own terms: see Scott Hershovitz, 'The Role of Authority' (2011) 11 *Philosophers' Imprint* 1.

but of whether that clause is within the remit of the penalties doctrine at all. Suppose further, quite reasonably, that that test is also rather vague and fact-sensitive. That would make it hard for parties to predict whether a clause would be within the remit of the penalties doctrine's jurisdiction when drafting their contracts. Such a substantive test would also be cumbersome for courts to apply. The elegance of the solution to this quandary proposed by Lord Neuberger and Lord Sumption surely ought to be admired.

Not so, however. If Lord Diplock's fourth definition is indeed (part of) the definition their Lordships intended, the Razian justification of a rule of thumb cannot work. Recall that on Lord Diplock's fourth definition a right is primary if it forms part of the parties' principal bargain and secondary if it regulates an ancillary matter. Applying that, the question of whether a clause is principal, appears to be just as substantive as the question whether a particular clause is designed to structure the price for the counterparty's performance. If the proposed proxy is just as substantive as the underlying reasons, however, it would likely require just as much careful consideration as the underlying reasons, thereby vitiating the very reason for adopting a formalistic proxy.

Furthermore, it stands to reason that on Lord Diplock's fourth definition the test proposed by Lord Neuberger and Lord Sumption just dissolves into the test proposed by Lord Hodge and Lord Mance. Put simply, in answering whether a particular right is a principal bargain we are looking for the contractual clauses that contain those elements of the parties' bargain that would be contained in a two sentence summary of their contract. Arguably, those very same clauses would be the clauses setting the price, in a broad non-monetary sense, for the counterparty's contractual performance. That may well have been the result intended by Lord Neuberger and Lord Sumption, since their Lordships explicitly aver to the considerations animating the other judgments in that case.<sup>72</sup> Whether it exactly matches that test or not, however, the test proposed by Lord

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<sup>72</sup> 'The clause is in reality a price adjustment clause.' *Cavendish* (n 14) per Lord Neuberger and Lord Sumption at [74].

Neuberger and Lord Sumption would still not have the ‘rule of thumb’-advantages of a formalistic test.

### Reasons

Quite apart from whether their Lordships have successfully managed to create a formal criterion as a proxy for the substantive considerations that stake out the extent of the penalties jurisdiction, the criterion that their Lordships propose to use as a proxy should also map onto those underlying substantive considerations. However, unless explicitly seen as such a proxy, the fact of a right being primary or secondary does not of itself tell us whether it should fall within the remit of the penalties doctrine. As a normative question, whether The Distinction is a useful proxy to determine the remit of the penalties doctrine depends on the justification given for that doctrine.

Does the distinction drawn by their Lordships map onto any underlying considerations? Perhaps. The penalties doctrine could function as one of English law’s ‘piecemeal solutions in response to demonstrated problems of unfairness’ recognised by Bingham LJ.<sup>73</sup> In the absence of any general principle of good faith, the use of The Distinction as part of a rule dividing illegitimate penalty clauses from permissible bargains might be sensible. Their Lordships’ analysis correctly seizes upon the fact that, as Bingham LJ recognises, one of the things that is objectionable about penalty clauses is that, while they ‘purport’ to be agreed damages clauses, they are in fact punitive and intended to discourage defendants from breaching their obligations.<sup>74</sup> The courts’ disapproval, or so one could argue, is focussed on the pretence. Other obligations would be perfectly harmless, even if they were more onerous, provided that they were not smuggled into the contract in bad faith. If the penalties doctrine were only motivated by this rationale, it is easy to see how a clause that was not smuggled in as part of the parties’ ancillary obligations would be beyond the remit of the doctrine.

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<sup>73</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439; Beale (n 48) ss 1–039 cites the same expression from Bingham LJ’s judgment in that case.

<sup>74</sup> *Interfoto* (n 73) 439.

Of course, it might be queried whether this is the only mischief that the penalties doctrine is designed to remedy. For example, one might think that if the purpose of the doctrine were to encourage fairer bargains, the *prima facie* appearances given by the legal shape of the rights in question would matter less, ie it would make no real difference whether a contractual stipulation were structured as a particular primary right or characterised as a secondary obligation. If substance is the concern, the taxonomical classification of the parties' rights should be irrelevant, provided that the burden on the affected party is neither increased nor decreased by structuring her obligations one way or another. Of course, this concern seems to have been assuaged in the present case, given the Justices' agreement that the impugned clauses were legitimately pricing the remaining goodwill of Makdessi and Ghossoub. However, that may not always be the case in situations where parties have inserted substantially detrimental primary rights into their contracts. There is nothing to prevent C pricing not having her fence painted on Friday at noon at several million pounds, even when that is several orders of magnitude more than any consideration due to D under the contract.

This is especially concerning if their Lordships did indeed mean to utilise the second of the hybrid definitions identified above. Due to the formalistic nature of the Austinian Definition, that hybrid definition is vulnerable to parties defining terms that are not triggered by breach and thereby automatically putting those clauses beyond the remit of the penalties doctrine. Indeed, Lord Neuberger and Lord Sumption explicitly acknowledged this problem with a test that turns on breach.<sup>75</sup>

A stronger possible rationale for the penalties doctrine, and one that takes its cue from the emphasis placed by earlier cases on the prohibition of clauses designed to deter breach, is that it seeks to promote coherence in the law by prohibiting parties from obtaining specific performance through the back door. This reasoning could rely either on the desirability of not allowing parties to force

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<sup>75</sup> *Cavendish* (n 14) para 14.

other parties to perform their contracts or on promoting coherence in the law. Given that there is a rule against awarding specific performance as a matter of right, it would be incoherent to let parties use other parts of the law to circumvent that rule, whether or not that rule is a good one. Regardless of which of these two justifications is used, the distinction between stipulations that create primary obligations, on the one hand, and stipulations that create ancillary rights, on the other, does not seem to map onto those underlying policy reasons for the rule against penalties. A stronger contractual party can deter its counterparty from breach through either primary or secondary obligations. In fact, as Lord Hodge recognised, clauses 5.1 and 5.6 provided ‘a strong incentive’ against breach.<sup>76</sup> Although there is a distinction worth making between deterring D from *phi*-ing and providing D with an incentive for not *phi*-ing, avoiding a disincentive is usually a strong incentive.<sup>77</sup> This is so, *a fortiori*, on the facts of *Cavendish*: the incentive Lord Hodge was speaking of can just as well be characterised as avoiding the disincentive of having to forego part of the consideration otherwise due.

What the above shows is that our observation that The Distinction is poorly defined is not limited to *Photo Production*. In fact it is even less clear which conception of The Distinction is relied on in *Cavendish* than in *Photo Production*, because Lord Neuberger and Lord Sumption never attempt to define The Distinction. Moreover, our discussion shows that the *prima facie* clever use of The Distinction to resolve the tricky issue confronting the court in *Cavendish* only serves to displace the underlying policy considerations. Rather than hiding their considerations behind a formalistic argument, Lord Neuberger and Lord Sumption would have been better advised to address the policy considerations underlying the question of enforcing the impugned clauses head on, following the lead of Lord Hodge and Lord Mance.

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<sup>76</sup> *ibid* 274.

<sup>77</sup> In the sphere of genuine reasons for action, we have reasons for avoiding something we have reasons not to do. However, since incentivising seems to be concerned with making people behave one way or another and not about giving them genuine reasons, they could come apart in instances where people are not inclined to do what they have reason to do such as when they are illogically indifferent to disincentives.

## **AIB**

Prima facie, the decision of the Supreme Court in *AIB*<sup>78</sup> is a decision about personal remedies against trustees in the event of breach of trust. However, beneath the surface, questions regarding the remedial implications and the shape and content of primary and secondary rights played a major role. In fact, those questions have been the real locus of debate in this area since the House of Lords' decision on the issue in *Target Holdings Ltd v Redfern*.<sup>79</sup> Thus, *AIB* illustrates how remedial discussions in private law are frequently reliant on a particular conception of primary and secondary rights. These debates shine some light on (a) whether these arguments regarding primary and secondary rights are being used in a consistent manner, and (b) whether the use of The Distinction in argument provides for greater expositional clarity. Furthermore, my analysis showcases a clear parallel, in one respect, between *AIB* and *Cavendish*, raising the hope that a consistent use of The Distinction might yet prove useful.

### Facts and backgrounds

The case concerned a £3.3m loan made by the appellant bank to a third party, the Sondhis, to be secured by a first charge over the Sondhis' house. In order to carry out this transaction the appellants engaged the services of the respondent firm of solicitors, transferring the loan amount to the respondents to be held on trust until completion. Contrary to their explicit instructions, the respondents paid out the loan moneys without obtaining a first charge over the house and leaving an outstanding first charge over the property of circa £300k in favour of Barclays Bank plc. Barclays repossessed and sold the property upon the Sondhis' default, obtaining only £867,679 for the appellants. The appellants sought to ameliorate the position in which they now found themselves, more than £2.4m short, by seeking to capitalise on the defendants' personal liability

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<sup>78</sup> *AIB* (n 15).

<sup>79</sup> *Target Holdings Ltd v Redfern* (n 16).

as trustees for the paying out of the trust fund (making an allowance for the roughly £867k they had already recovered from Barclays).

### The decision

Affirming the Court of Appeal's decision, the Supreme Court awarded the appellants circa £300k in equitable compensation for breach of trust, but denied their claim to have an order for common account, which, upon falsification of the unauthorised transaction, would have ultimately entitled them to an order of some £2.4m. Lord Toulson and Lord Reed, who gave the only substantive speeches, dismissed the appeal for essentially the same reasons. Whilst their Lordships would have preferred to find that only the £300k had been misapplied, the Court of Appeal's finding that the entire £3.3m had been misapplied had not been appealed.<sup>80</sup> Thus, their Lordships based their decision on a finding that beneficiaries must establish a causal link between a breach of trust and their loss;<sup>81</sup> the order for common account was dismissed as merely archaic language used to dress up an award of equitable compensation for breach of trust. At least in the commercial context, it seems that an order for equitable compensation is now the only order that can be made in favour of a beneficiary who successfully establishes that trust money has been disbursed by her trustee in an unauthorised transaction.<sup>82</sup>

This approach is in stark contrast with an older conception of trustee liability that draws support from a line of nineteenth century cases<sup>83</sup> and was regarded as standard Chancery practice for most of the twentieth century.<sup>84</sup> On that conception, a beneficiary would not have to prove breach – much less prove a causal connection between that breach and any loss. Rather, a beneficiary would only have to show that the trustee owes a duty to hold the requisite assets

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<sup>80</sup> *AIB* (n 15) per Lord Toulson at [24] and Lord Reed at [140]].

<sup>81</sup> *ibid* Per Lord Toulson at [73] and Lord Reed at [140].

<sup>82</sup> James Edelman, 'An English Misturning with Equitable Compensation' in Simone Degeling and Jason NE Varuhas, *Equitable Compensation and Disgorgement of Profit* (Hart 2017) ch 5.

<sup>83</sup> *Bacon v Clarke* (1837) 40 ER 938; *Knott v Cottee* (1852) 16 Beav 77; *Re Salmon* (1889) 42 ChD 351 (CA); *Re Stevens* [1898] 1 Ch 162; see also the discussion in Steven Elliott, 'Compensation Claims against Trustees' (DPhil, University of Oxford 2002) 94–98.

<sup>84</sup> Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214.

on trust in line with the trust instrument, and, if the trustee is unable to produce the assets when asked to do so, he must make up the shortfall from his own money. As Steven Elliot has argued, an order for account is a performance remedy in that it requires the defendant to perform their primary obligation.<sup>85</sup> Even those academics who disagree with this approach describe the older conception of trustee liability argument as being based on the enforcement of primary rights.<sup>86</sup>

To complete the exposition, performance remedies can be contradistinguished from reparative remedies, such as eg a common law award of damages or equitable compensation, that give effect to the defendant's secondary obligation to repair the loss caused by a breach of her primary obligations.<sup>87</sup> As will be discussed in the next chapter, there can be secondary obligations that are not obligations to repair, and there can be primary obligations to repair. Consider again the following example from the introduction.

*Insurance II: I agree with you to make good the loss you have suffered as a consequence of the same risk eventuating.*<sup>88</sup>

*Insurance II* clearly demonstrates that primary obligations to repair can and do exist. However, let us suppose for present purposes that secondary obligations are commonly reparative, whereas primary obligations are not.

Four arguments have been made against the older conception of the beneficiary's account remedy and its conceptualisation as an enforcement of a primary right. First, whether we call it substitutive or reparative, the courts are

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<sup>85</sup> Elliott (n 83) 61; 'The category of performance claims is defined according to the nature of the claim, these claims being claims that the defendant perform a primary duty.'

<sup>86</sup> Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press 2004) 604; Charlie Webb and Tim Akkouch, *Trusts Law* (Palgrave Macmillan 2015) 306.

<sup>87</sup> These categories were originally developed in Elliott (n 83) 94–97; they were subsequently published as James Edelman and Steven Elliott, 'Money Remedies against Trustees' (2004) 18 *Trust Law International* 116.

<sup>88</sup> As Foxton points out, there are some cases in which insurance contracts have been interpreted like this Foxton (n 8) 258–259; *Codemasters Software Co Ltd v Automobile Club de L'Ouest (No.2)* (n 9) per Warren J at [32].

always ultimately asking a trustee to pay a sum of money to make up for the loss to the trust fund.<sup>89</sup> Secondly, the beneficiaries' primary right is a right that the trustee hold the trust property and, once the trustee breaches his correlative duty, it can no longer be enforced because it ceases to exist. Thirdly, even if the right to account were a primary right, it is not the same primary right as the right that the trustee hold the original asset on trust; paying a monetary substitute is not the same as holding the original asset.<sup>90</sup> Lastly, even if there were a duty to account in the manner suggested by the old account of trustee liability, that duty could not be primary because '[a] trustee does not contract to pay a particular sum to the beneficiaries[.]'<sup>91</sup> All of these criticisms can be addressed, and the way in which this can be done holds important lessons about the primary/secondary right distinction.

There is a *prima facie* appealing argument against not drawing the distinction between primary rights-based performative and secondary-rights-based reparative remedies. It can seem like courts are ultimately always asking a trustee to pay a sum of money to make up for the loss to the trust fund irrespective of the basis of the underlying claim. Thus, it can sometimes be ambiguous on the face of things whether a given remedy does one or the other. For example, it is possible, in principle, to sue for damages for breach of a contractual obligation to pay a debt. Let us suppose the amount of the debt is £100. The remedy awarded (provided there are no complications in proving loss and no consequential losses) on such a suit - ie an order that the defendant should pay the claimant £100 - would *prima facie* look exactly the same as a remedy ordering the defendant to perform his primary obligation - ie an order that the defendant should pay the claimant £100.

However, the fact that superficially both orders seek to bring the claimant to the position where she has an additional £100 obscures important differences

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<sup>89</sup> *AIB* (n 15) per Lord Reid at [105].

<sup>90</sup> Webb and Akkouch make an argument that could be interpreted as either the second or third of these arguments; Webb and Akkouch (n 86) 306.

<sup>91</sup> Burrows (n 86) 605.

between them. The outcome is only alike because, entirely coincidentally, the claimant neither mitigated her loss nor suffered any consequential losses. When things get more complicated, enforcement and reparation diverge. In the event of mitigation, and in the event of losses that would have occurred either way, reparation will be less than the value of the primary obligation; but when asked to repay a debt, it is no defence to say that the creditor was a spendthrift and would have spent the money immediately anyway. In these circumstances, and as indeed was the case in *AIB*, enforcing one's primary obligation is more valuable. Conversely, however, in the event of consequential loss, compensation would be more valuable to the claimant. Again, when demanding repayment of a debt, it is incoherent to claim consequential losses; when asking for damages for the non-payment of a debt, however, consequential losses might well be available.<sup>92</sup> These differing practical outcomes show that it matters greatly whether a remedy is concerned with remedying losses *consequent upon* breach or enforcing an obligation *independent* of breach.

Let us now consider the argument that the beneficiaries' primary right is a right that the trustee hold the trust property and, once the trustee breaches that duty, it can no longer be enforced. Put differently, the criticism runs something like this: enforcing the beneficiary's primary right that the trustee hold the trust assets on trust involves a fiction once the breach has occurred since the trustee manifestly no longer holds the property on trust following a breach. Once the right to have the property held on trust becomes impossible to fulfil, it is extinguished.

Generally, it is correct to say that in our legal system and legal systems like it *some* primary rights can only be extinguished and replaced by secondary rights to repair, in the event of their breach.<sup>93</sup> For instance, a contractual right to the performance of a personal service might be said to cease existing upon breach,

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<sup>92</sup> Indeed that is what default interest can be seen as – damages for the loss of use value of the money.

<sup>93</sup> Albert Kocourek, *Jural Relations* (2nd ed, Bobbs Merrill 1928) 348.

and is transformed into a secondary right to compensation.<sup>94</sup> However, this is not the case for *all* primary rights. Consider the landowner's right to freedom from trespass. Whilst trespassing during the period *p* does irreversibly put the landowner in the position of never being free from trespass in the period *p*, the 'main right' to be free from trespass for the rest of the time subsists, and can be enforced by the landowner by asking for the ejection of trespassers continuing in occupation and an injunction against repeat trespassers. Similarly, it might be argued that a right to the stewardship of the trust is akin to trespass in that the main right persists in the face of individual violations and can continue to be enforced.

However, this argument is *prima facie* vulnerable to the objection that, whereas the main right may persist, the right to the faithful stewardship of the individual asset that has been misapplied is itself extinguished due to impossibility. The argument could be made that the correct analogy is not with the forward-looking right to be free from trespass henceforth, but rather with the past period in which that right has been violated. Just as a landowner can no longer enforce his right to be free from past violations because to do so is patently impossible, a beneficiary cannot enforce his right that the trustee hold asset X on trust, since by definition the trustee has unauthorisedly disposed of asset X.

Although it is true that the trustee can no longer hold asset X on trust,<sup>95</sup> that truth fails to dispose of the argument that the right to account can be enforced as a primary right, because the persuasiveness of this analogy (a) relies on eliding the differences between the proprietary and personal rights of the beneficiary, and (b) thus disappears if the personal rights of the beneficiary are more precisely defined. Addressing (a), it seems correct that certain actions of the trustee irreversibly extinguish the beneficiary's right to a particular asset. Both authorised substitutions and unauthorised dispositions to *bona fide* purchasers

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<sup>94</sup> The example is that used by Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press 2005) 54; one might query whether it would not be better to regard the right as merely unenforceable rather than extinguished, but that is an exploration best left for another time.

<sup>95</sup> This is a central contention of the admittedly very brief argument Webb and Akkouh make; Webb and Akkouh (n 86).

extinguish the beneficiary's right of 'beneficial ownership' in the asset being disposed of. And similarly, they make impossible and thus extinguish any *in personam* right that the beneficiary might have against the trustee putting the latter under a duty to hold asset X for the beneficiary. However, it would be too simple to assume that the *in personam* duty of stewardship – the basis of an action for account according to the old account of trustee liability<sup>96</sup> – is necessarily composed of distinct duties to hold asset X, asset Z etc, since such a presumption seems to make the explanation of authorised substitutions more difficult. Of course, it is possible that these duties are distinct and that, when the trustee makes an authorised substitution, her duty to hold asset X comes to an end and she comes under a new duty to hold asset Y. However, it seems just as plausible (and more elegant, to boot) that the trustee instead owes an *in personam* duty to hold whatever assets authorisedly comprise the fund from time to time.<sup>97</sup> On the latter model, no old personal stewardship rights are extinguished and no new personal stewardship rights are created every time a trustee makes a new investment or sells an old one; rather, the trustee is all throughout fulfilling their duty of stewardship of such property as may from time to time constitute the assets subject to the trust.

Once we see that we can classify the trustee's duty as a duty that can be complied with through multiple different courses of action – she may hold asset X or she may hold asset Y – it is only a small step to realising that we could imagine a world in which a trustee could also comply with her stewardship duty by paying a monetary substitute into the trust account in the event of her failure to acquire substitute property following an unauthorised substitution. On this

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<sup>96</sup> Charles Mitchell, 'Stewardship of Property and Liability to Account' [2014] *Conveyancer and Property Lawyer* 215.

<sup>97</sup> On the idea of conceptualising trust obligations as related to a fund rather than individual things see Joshua Getzler, 'Plural Ownership, Funds, and the Aggregation of Wills' (2009) 10 *Theoretical Inquiries in Law* 241, 249–256; for a very similar argument, see also James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice: Essays in Celebration of the 25th Anniversary of the Founding of the Centre for Commercial Law Studies, Queen Mary, University of London* by Professor Sir Roy Goode QC CBE FBA (LexisNexis Butterworths 2006) 211; for a fund analysis of legal obligations beyond the trust context, see Richard Nolan, 'Property in a Fund' [2003] *Law Quarterly Review* 108.

conceptualisation, the correlative position is that the beneficiary has a primary right that the trustee at all times holds either asset X, asset Y, any other authorised substitute asset, or the monetary equivalent of whatever asset was first dissipated.

The duty to pay a monetary substitute to one's beneficiary is not the same as the duty to hold asset X. However, the duty to hold substitute asset Y is also not the same as the duty to hold asset X. Since, on this level of granularity, we would not object to the enforcement of the personal duty to hold asset Y on the basis that it is not the original duty to hold asset X that the trustee originally was under, why should we object to the substitute personal duty to pay over a monetary equivalent of asset X on that basis?

In any event, if we chose to be less granular, there is no obvious reason why there could not be one duty to hold either asset X, asset Y, any other authorised substitute asset, or the monetary equivalent of whatever asset was first dissipated. This puts the onus on those who want to use the 'not the same duty' argument to argue that there is one modular duty to hold either asset X, asset Y, or any other authorised substitute asset, and another distinct duty to hold the monetary equivalent of whatever asset was first dissipated. Further, even if these duties were distinct, critics of the old account of trustee liability would then have to mount an argument that the latter duty possesses properties that give rise to convincing reasons as to why that duty cannot be conceived of as a primary duty. Without a further argument, a mere assertion that two duties are not the same duty – in some unspecified manner – is not an argument against the primary enforcement of either of those duties, and thus not an argument against the enforcement of a primary duty to pay a substitutive monetary equivalent of an asset.

Going beyond the context of *AIB*, enforcing alternative primary rights underlies the judgment of Lord Neuberger and Lord Sumption in *Cavendish*. Recall that in that case their Lordships held that two particular clauses were not a penalty

clause on the basis that they really created primary rights that were capable of enforcement without falling foul of the penalties doctrine. In that case, the buyers essentially had an either/or-type right of the same kind as the beneficiary's personal right to the trustee's stewardship; viz the buyers were entitled to either the sellers' loyalty or to no longer be under any obligation to confer the goodwill portion of the price unto the sellers. On the old account of trustee liability, the beneficiary is entitled to either the trustee's stewardship of assets according to the trust instrument or to receive substitutive performance of that duty in the form of a monetary payment. If we accept the former as either one modular primary right or as two primary rights stemming from the same source, we are committed to at least the possibility of recognising primary rights taking this shape. If there is a reason why the beneficiaries' right to an accounting remedy cannot be a primary right, it is not a reason based on the nature of primary rights.

Lastly, we must contend with Burrows' criticism that, even if there were a duty to account in the manner suggested by the old account of trustee liability, it would not be justified to directly enforce that primary duty because '[a] trustee does not contract to pay a particular sum to the beneficiaries'.<sup>98</sup> There is some doubt as to whether this is true as a matter of empirical fact. Surely, at least prior to the decisions in *Target* and *AIB*, many trustees – and particularly solicitor-trustees – knew that they would be liable to an action of account in the event that they misapplied the trust funds. Thus, by accepting their office they may fairly be taken to have agreed to pay a particular sum to the beneficiaries. But even granting, for the sake of argument, that trustees had not explicitly agreed to substitutively perform, the argument that this would make it the case that substitutive performance would thus not be justified is unconvincing.

There are two ways to parse Burrows' argument, neither of which is particularly convincing. First, and perhaps exegetically more likely, it could be that Burrows

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<sup>98</sup> The best exegesis of Burrows' argument is reading it as a normative argument rather than as a descriptive one about primary and secondary rights since he argues that 'it is hard to see why in terms of policy one would wish to retain a distinctive remedy' of account; Burrows (n 86) 605–606.

is asserting that direct enforcement of primary rights would only be justifiable where the corresponding primary duties have been explicitly accepted by the person who is subject to their enforcement. The defenders of retaining a distinct remedy of account have often conceptualised that remedy as similar to the direct enforcement of a right to be repaid a sum due under a contract – a debt claim. It is true that duties to repay sums of money arising from contracts are directly assumed. The direct enforcement of a duty which is not directly assumed is thus in some ways disanalogous to a debt claim.

However, there is no reason to think that the explicit assumption of the primary duty is what makes primary contractual obligations to pay a sum due under a contract directly enforceable. Other primary obligations that do not arise from directly expressed consent are also directly enforceable. For instance, primary restitutionary obligations, which arise irrespective of D's consent, can be directly enforced.

In fact, most theories as to why primary contractual obligations to repay sums due are directly enforceable whereas other primary contractual obligations are not directly enforceable rely on arguments that latch onto the fact that the obligation is a simple obligation to hand over a sum of money. This is the feature of such primary obligations that arguments about the relative cost of supervising enforcement latch onto. It is much easier to check whether D has paid C the correct amount than to check whether D has correctly painted D's fence.<sup>99</sup> This is also the feature that is emphasised in arguments about infringements of D's autonomy. The relatively non-invasive nature of an order that D should hand over a sum of money explains why D is ordered to perform her primary obligation in a debt claim, but why instead of being ordered to paint C's fence D is instead ordered to pay damages in a case where D breaches a contractual fence-painting obligation. Thus, the fact that the trustee did not agree to perform a primary duty to account does not go to the question of whether such a primary

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<sup>99</sup> See, for instance, the summary of the judicial reasoning for refusing to order specific performance in cases requiring 'constant supervision': *Co-op Insurance Society Ltd v Argyll Stores Holdings Ltd* [1997] UKHL 17, 12C-15B.

duty should be directly enforced. In fact, once the account has been prepared, the remedy sought in an action for account is the payment of money. The remedy of account is thus analogous to a debt claim in the way that most matters.

An alternative reconstruction of what Burrows might wish to argue instead could be that the remedy of account cannot be the direct enforcement of a primary right because the right in question – the right to receive an account – cannot be a primary right. On this reconstructed version of the argument, it would be part of the definition of what a primary right is that that right has to arise directly from the obligated party's consent. However, if we take Burrows to be saying that the trustee's duty cannot be a primary duty, then it is only possible for him to make this argument because he is using a different conception of the distinction between primary and secondary rights from the conception of this distinction that is used by proponents of the old account of trustee liability. In other words, in order to render Burrows' criticism intelligible, it must be a necessary attribute of primary obligations that they must be explicitly agreed to by the parties. Now, as Lord Diplock noted with regards to the law of contract in *Photo Production*, 'in practice a commercial contract never states all of the primary obligations of the parties in full'.<sup>100</sup> In light of that fact, we might read the argument as relying on a less literal conception of 'explicit agreement', which counts any liability the parts would have been free to modify as 'explicitly agreed.' Using that reading, we can ascribe a conception derived from the second and third attributes of primary and secondary rights highlighted by Lord Diplock in *Photo Production*<sup>101</sup> to Burrows' argument. It should be emphasised that Burrows neither explicitly states that this is the conception he operates on nor asserts that this is his reading of *Photo Production*.

However, this conception is a plausible candidate because adopting it would render Burrows' criticism of the older conception intelligible. If primary rights are those which the parties are free to modify and secondary rights are those which

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<sup>100</sup> *Photo Production* (n 13) 848F-G.

<sup>101</sup> See text to notes 41 through 45 above.

are implied by the general law, then it makes sense to say that the fact that a ‘trustee does not agree’ to take on a duty to substitutively perform undermines the case for primary enforcement of that duty.<sup>102</sup> After all, both sides to this debate maintain that whatever personal claims beneficiaries may have against their trustees are implied by the general law of trust. By contrast, the *in personam* duty to hold asset X might be more readily characterised as having been freely determined by trustee and settlor. Thus, we could argue that because there was no explicit contractual agreement, the accounting duty cannot be a primary duty and thus cannot be justified as such.

However, that argument disintegrates once we investigate the reason why the defenders of the older conception of trustee liability cast their defence in terms of enforcing primary rights. The contrast they are seeking to draw is between a different conception of primary and secondary rights than that elucidated above. More specifically, their arguments emphasise that an order for common account is the enforcement of a primary right because, unlike say a claim for damages, ‘it is not founded on an assertion that the steward has committed a breach of duty.’<sup>103</sup> Thus, the conception of The Distinction that they rely on is that propounded by Austin, according to which The Distinction ‘rests exclusively’ on the ‘events from which the rights... arise’: secondary rights ‘directly arise’ from delict or injury (*viz* the violation of other rights); primary rights are those that arise from any other event.<sup>104</sup> As a side note, I described the contrasting conception as arising from *parts* of Lord Diplock’s in *Photo Production* since, as the reader will be aware from the discussion of that case, his Lordship also avers to the Austinian conception.<sup>105</sup>

Bearing that conception of The Distinction in mind, the appeal of asserting that a remedy for account is based on the enforcement of primary rights is evident. If the trustee’s liability was based on secondary rights that arose from breach, it

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<sup>102</sup> Burrows (n 86) 605.

<sup>103</sup> Mitchell (n 96) 223; citing *Bacon v Clarke* (n 83) 940; *Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624 (PC(Sing)).

<sup>104</sup> Austin (n 2) Lecture XLV.

<sup>105</sup> *Photo Production* (n 13) 848.

would make sense to think of it in terms of repairing that breach by paying reparative compensation for loss caused by the breach. If, however, no breach needs to be alleged because the beneficiary is simply enforcing a primary right, it makes no sense to think of the trustee's liability as determined in any way by the consequences flowing from that breach.<sup>106</sup>

Whether or not one accepts this particular conception of The Distinction is ultimately irrelevant for present purposes. What it is crucial to recognise is that the argument made by Elliott, Mitchell et al does not rely on primary rights arising from the contract or trust instrument (and thus the parties' private arrangements) in a more meaningful sense; rather, it relies on the distinction between primary and secondary rights with regards to breach to explain why, on their account, causation is neither here nor there. Whether the duty to pay a money sum equivalent to the value of a dissipated asset arises from the trust instrument (and thus the parties' private arrangements) in a more meaningful sense or whether it is a rule derived from the general law of trusts, we can, although of course we need not, still conceptualise it as arising independently of breach and thus not involving questions of breach, causation, and loss. Unless there is a further – perhaps normative – argument that only rights which the parties explicitly agreed can be directly enforced, the fact that the trustee did 'not contract to pay a particular sum' does not affect this in the slightest.

## **Conclusion**

There are a number of general conclusions about the use of The Distinction in private law jurisprudence that we can draw from the debates which have been triggered by the decision in *AIB*. First, as shown by the comparisons which have been drawn here between the different approaches in *Photo Production*, *AIB*, and *Cavendish*, not everyone who uses The Distinction uses it in the same way. Secondly, as a consequence, it is not always elucidating to frame one's discussion of private law problems in these terms. The absence of a common

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<sup>106</sup> Elliott (n 83) 39–43; see also Mitchell (n 96) 222–223.

conception of The Distinction can lead to the appearance of disagreement about things about which there is none. Equally, it can lead to the appearance that certain disagreements are intractable when in fact each disagreement could easily be resolved once it is appreciated what it is really about. The debate about primary enforcement that arises in connection with *A/B* is an example of the latter phenomenon.

Ultimately, without a more fully fleshed out conception of The Distinction, any analysis purely in terms of The Distinction will end up obscuring the true underlying considerations. As a consequence, the underlying considerations end up only being present in the form of unstated assumptions about what is and is not entailed by something being, say, a primary right.

Lastly, the emphasis on the direct enforcement of primary rights by Lord Sumption and Lord Neuberger in *Cavendish*, on the one hand, and the proponents of the older conception of trustee liability of account, on the other hand, suggests some shared beliefs across those disparate areas of private law that certain remedies are appropriate when enforcing primary rights that are not necessarily appropriate when enforcing secondary rights.

## Chapter 4: The Distinction analysed

### Introduction

The last chapter showed us that participants in the legal system, judges and commentators in particular, do not use one common and certain conception or definition of The Distinction. Further, it showed that this causes difficulties in the doctrinal debate. In order to address this problem, it will be necessary to determine what is at the root of this cacophony of conceptions. Two possibilities present themselves. It could be that there is no common conception of The Distinction, or it could be that some of the judges and academics whose work we surveyed in the last chapter simply got it wrong. Thus, the purpose of this chapter is to examine two questions: first, what is the correct definition or conception of The Distinction; and, secondly, does The Distinction exist and should we use it in describing private law?

The first part of this chapter examines what the correct definition of The Distinction is. I will review several candidate conceptions of The Distinction and assess whether these candidate conceptions (a) are an accurate description of private law rights, (b) are analytically coherent, and (c) can be ranked on a normative basis. I first examine Austin's definition of secondary rights as those which arise from breaches of primary rights. As set out in Chapter 2, this conception of The Distinction appears to be the shared starting point for both judges and academics. However, I will also identify several alternative and divergent conceptions of the terms 'primary and secondary rights' which are in common use. Some of these describe private law rights accurately and others do not.

It is thus not possible to arrive at a single definition of The Distinction on that basis. Moreover, although some of the alternative conceptions can be excluded for being internally inconsistent or unstable, there are no conceptual or analytical arguments which are capable of proving that these rival conceptions must necessarily be narrowed down to a single established conception. In assessing

these conceptions, I deal with the descriptive and analytical arguments for and against each conception, in turn, since that is the most economical approach. I also first deal with the Austinian conception in a separate sub-section, given its centrality to the thesis overall.

In light of the fact that we cannot narrow down the possible conceptions on a descriptive or analytical basis alone, we must examine whether there are any normative arguments for preferring any one of the available conceptions of The Distinction over the others. When I say that we are considering a normative argument what I mean is an argument about what we should do. This can be distinguished from descriptive arguments, which are arguments about what the law is. It can further be distinguished from conceptual arguments, which are arguments about the meaning of the terms being used, and from analytical arguments, which are (roughly speaking) arguments about the logical limitations of the nature of the thing being analysed. As I shall argue below, there is frequent confusion around what type of argument private law theorists are making, and that confusion can make it hard to engage with those arguments.

Having determined, that no analytical argument can establish conclusive reasons for preferring it over alternative conceptions, I argue that the Austinian conception is normatively preferable. First, some of the other conceptions describe phenomena for which we already have sufficient language. Moreover, the Austinian conception is the most frequently used conception of The Distinction, and there is thus a 'small-c conservative' argument for retaining it. Lastly, the fact that the Austinian conception has the benefits illustrated in Chapter 2 further militates in favour of retaining it.

Having concluded that the Austinian conception is normatively preferable to the other possible conceptions of The Distinction, I consider whether we have any reasons to believe in the existence of The Distinction so conceived in the second half of this chapter. Chapter 2 showed that it is possible to describe substantive

rights and obligations in English private law in terms of The Distinction as conceived by Austin. That makes it the case that descriptively the rights possessing the features of primary and secondary rights as conceived by Austin exist. However, that does not make it the case that we have to focus on those features in our analysis; it does not make it the case that we have to use The Distinction to describe the law in those terms. In fact, I conclude that we cannot make any analytical or conceptual claims that make it necessary that we use The Distinction in order to analyse rights in private law. I consider some arguments to the contrary but conclude that they do not establish that using The Distinction is inescapable.

Nonetheless, I argue that, normatively, we have good reasons to use The Distinction in our description of our private law rights. Using The Distinction allows us to highlight important features in that law and to conceptualise real differences between different but otherwise closely connected rights and obligations. Moreover, the arguments for the use of the Austinian conception over other conceptions derived from Chapter 2 equally apply as arguments in favour of using The Distinction so conceived. Thus, we should continue using The Distinction, understood in the Austinian sense, in our analysis of rights and obligations in private law.

In fact, some of the reasons in favour of so using The Distinction translate, *mutatis mutandis*, into reasons for adopting rights capable of description in terms of The Distinction when creating or reorganising a system of private law. Thus, there are two different kinds of normative arguments in favour of the use of The Distinction. First, doing so helps us describe English private law. Secondly, adopting a system of private law rights that is capable of description in terms of The Distinction are *pro tanto* preferable to adopting one that is not.

## **The different conceptions**

### *The Austinian conception*

The conception of The Distinction that the reader should be most familiar with at this stage is that advanced by John Austin in ‘Lecture XLV’ of his *Lectures on Jurisprudence*.<sup>107</sup> As set out in Chapter 2, Austin stipulates that substantive legal rights can be categorised as either (a) those which arise from breaches of primary rights, which he calls secondary rights, or (b) as rights which do not arise from breach of another rights, which he classifies as primary rights.<sup>108</sup> As was noted in Chapter 2, this conception of The Distinction picks out a real feature of private law – it is descriptively accurate. This is unsurprising, given that the central claim – that there is a distinction between rights that arise from breach of other rights and rights that do not – is a fairly modest claim.

### *The exhaustiveness of The Distinction on the Austinian conception*

There is a slightly more ambitious element to Austin’s conception of The Distinction, however. Austin explicitly claims that The Distinction is exhaustive of all substantive legal rights.<sup>109</sup> Of course, analytically speaking the dichotomy between primary rights and those rights that arise from the breach of primary rights is not exhaustive. It is, after all, a theoretical possibility that there might be substantive rights that arise neither from non-breach events nor from breach of primary rights. This is because we can conceive of substantive rights which arise from the breach of non-primary rights, such as secondary rights. Let us call these tertiary rights. Further, we could similarly imagine quaternary rights arising from the breach of these tertiary rights, etc etc *ad infinitum*. Since these tertiary, quaternary etc rights do not arise from breach of primary rights, they would not be secondary according to Austin’s distinction. Thus, at least logically or conceptually speaking, Austin’s claim that The Distinction as defined by him is exhaustive is false.

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<sup>107</sup> Austin (n 2) ch XLV.

<sup>108</sup> *ibid* 764.

<sup>109</sup> *ibid* 761.

It is, nonetheless, descriptively true. Although this might change as the law changes, there are currently no tertiary rights recognised in English private law. It might be suggested that the duty to pay interest on damages can be conceptualised as a tertiary duty arising from the breach of the secondary duty to pay the damages. Indeed, Andrew Burrows has argued that if interest awards are compensatory then they are best conceptualised as damages for the wrong of failing to pay sums that are due, whether those sums are due as primary rights (in restitution or under a contract) or as secondary rights (damages for breach of contract and damages for torts).<sup>110</sup> Now, if interest arises from the breach of a primary duty, interest would simply be conceptualised a secondary right. However, where interest is due for the non-payment of a sum due under a secondary right, it stands to reason that the duty to pay interest would be best described as a tertiary right.

The challenge to the descriptive validity of Austin's claim of exhaustiveness comes from applying Burrows' reasoning to awards of interest available as of right under general common law principles. Indeed, on the face of it, various dicta by the majority of the House of Lords in its decision in *Sempra Metals v IRC* suggest that interest could be available at common law for the late payment of sums due as damages for breach of contractual or tortious duties.<sup>111</sup> *Sempra* has now been overruled by the Supreme Court in *Prudential Assurance v HMRC* insofar as the availability of interest on restitutionary awards is concerned.<sup>112</sup> However, that is irrelevant for present purposes, since the question of interest on damages awards did not arise and was not addressed in *Prudential*, leaving *Sempra*, where that question did arise and was addressed, standing as the relevant authority on the matter.

Interest awards calculated by reference to damages awards do not have to be conceptualised as arising from the breach of the secondary duties requiring the

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<sup>110</sup> Andrew Burrows, 'Interest' in Sarah Worthington and Graham Virgo, *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) 258.

<sup>111</sup> *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34.

<sup>112</sup> *Prudential Assurance Company Ltd v Commissioners for HMRC* [2018] UKSC 39.

payment of those sums. Indeed, Burrows in no way suggests that they should be so conceptualised. In fact, the interest available for the late payment of damages that is suggested to be available where a damages award is made in *obiter* comments from their Lordships in *Sempre* could be conceptualised either as part and parcel of the loss that my secondary rights would entitle me to recoup and hence also secondary, or as representing a tertiary right arising from the breach of my secondary rights to recover my losses.

Thus, there is nothing to suggest that we would be forced to use the conceptual apparatus of tertiary rights to accommodate interest awards. In fact, the precise wording of the dicta that might have tempted us to introduce that conceptual framework – *viz* tertiary rights – expressly militates against doing so, since all of their Lordships appear to be committed to conceptualising interest on sums due as secondary rights as likewise secondary. In particular, Lord Nicholls, speaks of ‘interest losses [being] recovered as *damages*’.<sup>113</sup> Similarly, Lord Scott says that ‘interest ... can represent an item of contractual damages or tortious damages’.<sup>114</sup> Lord Walker is perhaps the most explicit; his Lordship quotes from the judgment of Ward LJ in *Hartle v Laceys* to the effect that “[t]he issue here is not about interest *on* damages but about interest as damages”.<sup>115</sup> Similarly, Lord Mance refers to ‘damage consisting of loss of interest’,<sup>116</sup> and uses that very same phrasing again when describing *Sempre*’s alternative tortious claim for breach of statutory duty.<sup>117</sup> It is made even clearer that interest is seen as the measure of the loss recoverable as part of C’s secondary right by the fact that Lord Mance describes the claim in damages as ‘a claim for damages composed of both the lost principal and the lost interest.’<sup>118</sup>

In light of all of those dicta, it seems that what their Lordships had in mind is a conceptualisation according to which the lost interest is conceptualised not as

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<sup>113</sup> *Sempre Metals Ltd v Inland Revenue Commissioners* (n 111) at [99] (my emphasis).

<sup>114</sup> *ibid* at [151].

<sup>115</sup> *ibid* at [164] (his Lordship’s emphasis).

<sup>116</sup> *ibid* at [217].

<sup>117</sup> *ibid* at [225].

<sup>118</sup> *ibid*.

arising from breach of the secondary duty to pay damages but as being part and parcel of that secondary duty to pay damages. And even if one were to read some of the above dicta as going the other way, which it might be possible to do with some strain, there is one dictum that clearly speaks against any conceptualisation in terms of tertiary rights. Namely, Lord Mance speaks of ‘damages ... being claimed for non-payment of damages’ in *La Pintada*, and the way that last sentence in that paragraph is juxtaposed to the rest of the paragraph, which his Lordship commences with ‘[b]ut equally there is a point...’, suggests to me that his Lordship would actually explicitly disprove of tertiary rights.<sup>119</sup>

Of course, none of this makes it the case that tertiary rights would not better conceptualise the loss that that interest is designed to compensate, if indeed that interest is best understood as being awarded as compensation for loss. As an aside, it appears awkward to me to conceptualise interest on damages as compensating for the original loss. This is especially so in the law of tort. In a low-inflation world, it is a stretch to conceptualise interest on tortious damages as representing the inflation-adjustment of loss from the tortious event. An interest rate appears to more easily capture the use value of investing money C should have had. Thus, the interest received on tortious damages more accurately represents the loss from the non-prompt payment of those damages.

However, this aside is somewhat beside the point. In light of their Lordships’ emphasis on the secondary nature of interest as damages, Austin’s claim of exhaustiveness is descriptively sound. English law does not recognise tertiary rights. In fact, I am not aware of any common law legal system that recognises such ‘tertiary’ rights *qua substantive* right. There is an argument that our legal system recognises rights of this kind as *remedial* rights.<sup>120</sup> However, as I shall argue in the next chapter, remedial rights are significantly different from the substantive rights to which The Distinction applies. They should thus not be

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<sup>119</sup> *ibid* at [228].

<sup>120</sup> Zakrzewski (n 94) chs 3–4.

classified as tertiary rights on the same plane as primary and secondary rights. Hence, Austin's claim remains descriptively true irrespective of whether or not we conceptualise remedial rights as arising from the breach of secondary rights.

### Other conceptions

Albeit descriptively true, Austin's conception of The Distinction is not the only possible conception. As became apparent in Chapter 3, there are different possible conceptions based on various elements of Lord Diplock's speech in *Photo Production*.<sup>121</sup> Specifically, the distinction between the parties' principal and ancillary obligations based on his Lordship's fourth distinction appears to have emerged as a strong candidate conception.<sup>122</sup> Thus, as established in the last chapter,<sup>123</sup> that candidate conception can be said to track the sense in which The Distinction was used by Lord Neuberger and Lord Sumption in *Cavendish*.<sup>124</sup>

Moreover, academics have also used the terminology of The Distinction to describe phenomena that are very different from the Austinian conception of it. For instance, Andrew Tettenborn uses the terminology of The Distinction to describe a distinction in the law that is far removed from any of the other conceptions discussed. In the introductory sections of his *An Introduction to the Law of Obligations*, Tettenborn uses the term 'primary rights' to describe substantive legal obligations (and in particular primary rights on the Austinian conception), but uses 'secondary rights' interchangeably with the term remedies.<sup>125</sup> It should be noted that this is merely a short observation connected to a larger argument; thus, I would be slow to ascribe an attempt to generate a particular conception of The Distinction to Tettenborn here. Rather, what is interesting is that the terminology of The Distinction is used to refer to a phenomenon that may be quite different to the one picked out by the Austinian conception.

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<sup>121</sup> These observations can be found in *Photo Production* (n 13) at 848-849.

<sup>122</sup> *ibid* at 848C.

<sup>123</sup> See the discussion in the section on *Cavendish* above.

<sup>124</sup> *Cavendish* (n 14).

<sup>125</sup> Tettenborn (n 47) 3.

Further to the above two alternative conceptions of The Distinction, there are of course also the other rival conceptions of The Distinction that I have described as hybrid conceptions in Chapter 3. What unites these other conceptions is that unlike the above conceptions of The Distinction, they ascribe more than one attribute to either primary or secondary rights as a consequence of being so described. These concepts are therefore ‘thick’ concepts that provide a rich amount of evaluative information.<sup>126</sup>

By contrast, take the Austinian conception. That conception is a thin conception of The Distinction. On the Austinian conception, there is just one thing that we know about a particular right from it being classified as primary or secondary – whether or not it arose from the breach of another right. On the accounts that I discuss in what follows, however, a particular right being primary or secondary will tell us more. For instance, on the simple hybrid account considered in Chapter 3, a right being primary tells us that that right is both principal and does not arise from breach. A right being secondary entails that that right arose from breach and is ancillary.<sup>127</sup> Similarly, on the account discussed below, a right being secondary tells us that it both arises from breach and is compensatory. Thus, whereas, on the conceptions considered in the last section, The Distinction is a ‘thin’ concept, on the conceptions considered in this section, it is a ‘thick’ concept.

### *Compensatory secondary rights*

Apart from the features already raised by the hybrid accounts of The Distinction discussed in Chapter 3, there are further features sometimes ascribed to primary rights, secondary rights or both turning an augmented Austinian conception into

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<sup>126</sup> Pekka Väyrynen, ‘Thick Ethical Concepts’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2019, Metaphysics Research Lab, Stanford University 2019) <<https://plato.stanford.edu/archives/sum2019/entries/thick-ethical-concepts/>>.

<sup>127</sup> Of course, as discussed in the section on *Cavendish* in Chapter 3 above, that particular way of drawing The Distinction does not work because a right can be both ancillary and arise prior to breach. However, that is besides the point for present purposes, as I am only seeking to illustrate that there are conceptions of The Distinction on which ‘primary rights’ and ‘secondary rights’ are ‘thick’ concepts.

a 'thick' concept. Of these, perhaps the most common is the assumption that secondary rights must necessarily be compensatory. Peter Birks suggests that an example of this widespread assumption can be found in the speech of Lord Reid in *Cassell & Co Ltd v Broome*.<sup>128</sup> In the context of considering punitive damages, Lord Reid treats 'compensatory' damages as all that the claimant 'was fairly entitled to receive'.<sup>129</sup> As Birks argues, this reasoning can be interpreted as emblematic of an inability to conceive of non-compensatory secondary rights. Such an inability is not uncommon.

Now, it might be true in some legal systems that, when D breaches any primary duty owed to C, the only secondary duty that D can ever owe C is compensatory. However, this is not the case in English law. Nor, I argue, is it the case as a matter of abstract universal truth<sup>130</sup> about secondary rights. Lastly, I argue that the normative argument in favour of so limiting secondary rights and obligations fails to withstand scrutiny.

First, as a matter of descriptive truth, non-compensatory secondary rights exist in English law. Their existence becomes apparent when examining the rights that a claimant has in the case of tortious interference with goods. C has a primary right to possession and non-interference with that possession, once that right is violated, the remedies available under the Torts (Interference with Goods) Act 1977, s 3(2) suggest that C has two possible rights which she could enforce, both of which can be seen as restitutionary secondary rights. The order for the return of the chattel in section 3(2)(a) is a secondary right that arises from the violation of C's primary right to possession, and the order for a monetary equivalent of the value of the chattel in section 3(2)(b) can be seen as a different expression of that same secondary right to restitution. Although both orders can also be described as involving a compensatory element dealing with the loss occasioned as a consequence of D's breach of duty, they should nonetheless

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<sup>128</sup> *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL); Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (1997) 31.

<sup>129</sup> *Cassell & Co Ltd v Broome* (n 128) 1086A-C.

<sup>130</sup> Birks, 'Definition and Division: A Meditation on Institutes 3.13' (n 128) 31.

be properly be classified as restitutionary, given that they involve returning something to C. Even if the alternative duty to pay ‘damages by reference to the value of the goods’ in subsection (2)(b) were to be seen as compensatory, the duty to return the chattel in subsection (2)(a) clearly is not.

Similarly, it is not logically necessary that all secondary rights be compensatory. We can, for instance, easily enough envision a secondary right that instead of compensation offers an account of all profits made as a consequence of that breach. Although there is an argument that in the context of fiduciaries such a right is a primary right of ascription rather than a secondary right arising from breach, there is no reason why that argument should apply to all conceivable substantive rights to profits.<sup>131</sup> Of course, there might be a normative argument that whereas analytically non-compensatory secondary rights are possible, only compensatory/reparative claims are actually ever justified in response to breaches of primary duties. Of course, such an argument would not suffice to prove that all secondary rights *are* compensatory.

For instance, corrective justice accounts claim that the very structure of the law of torts is such that the law responds to all breaches of primary duties through ‘a duty to repair the losses.’<sup>132</sup> In this, the law of tort embodies a legal norm of corrective justice which in turn reflects an underlying moral norm of corrective justice that requires those who cause losses to repair those losses.<sup>133</sup> The claim appears to be that this is simply what tort law is. Nonetheless, it can be treated as grounding a normative argument about secondary duties in tort law as well: since this is what tort law is, anything purporting to be tort law that creates different rules ought to be adjusted to reflect the true nature of tort law better. As true tort law only creates reparative rights, all secondary rights in tort law should be reparative.

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<sup>131</sup> Lionel Smith, ‘The Motive Not the Deed’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Oxford University Press 2003).

<sup>132</sup> Jules L Coleman and others, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, vol 68 (Oxford University Press Oxford 2001) 15; see also Ernest J Weinrib, *The Idea of Private Law* (OUP Oxford 2012) chs 5–6 for a very similar account.

<sup>133</sup> Coleman and others (n 132) 15.

Similarly, there is, as I will discuss in Chapter 7, some advantage to be gained from limiting the secondary rights available from the breach of contractual terms to a limited category of monetary remedies. The argument that I shall develop in full below can be summarised as follows. The enforcement of primary contractual obligations primarily through the enforcement of secondary reparative obligations arising from their breach permits the existence of a system where there is no limitation on the scope and content of those primary contractual obligations. Where the varied primary rights created by contracting parties are not directly enforced, the potentially autonomy-limiting effects of those primary rights are curtailed. If the worst that can happen to me when I pledge to clean your house every day for the next 40 years is the award of damages in your favour, the law has less reason to prevent me from incurring that obligation.

In this way, the secondary rights that arise that arise from the breach of primary contractual obligations (and the direct enforcement of those primary contractual obligations) should be limited so that we can continue to have freedom of contract regarding the creation of those primary obligations. In order to achieve the least infringement of D's autonomy, secondary obligations in contract should continue to be mostly limited to being monetary obligations. It is tempting to stretch this argument into an argument that we should only have reparative secondary obligations in the law of contract.

However, stretching the argument in that way would be misguided. Some other modest secondary right could perform the same role. First, there are other possible monetary awards that would yield the same benefits. For instance, we could have a default rule giving C a secondary right to receive any profits D made from his breach and mandating that she could only enforce that secondary right and could not enforce her primary contractual rights. Such a rule would similarly protect D's autonomy from the enforcement of overly onerous primary contractual rights. Secondly, even non-monetary secondary rights could be

crafted so as to not interfere overly with D's autonomy. For instance, a rule requiring contract breakers to perform some limited amount of community service would not be too onerous an interference with D's autonomy. Of course, there are other arguments that can be made against these alternative remedies. The point is simply that the benefits of not directly enforcing C's contractual rights can be obtained without the restriction of all secondary rights to compensatory or reparative secondary rights.<sup>134</sup>

Moreover, even if we grant the applicability of the corrective justice argument or the indirect enforcement argument, these arguments would give merely some of the total applicable reasons. There are many reasons that apply to determining what our rights should be. For instance, apart from not interfering overly with D's autonomy and enabling the parties' freedom of contract, many other reasons apply to determining what our contractual secondary rights should be. For instance, it stands to reason that protecting C's interest in receiving the performance bargained for generates some *pro tanto* reasons in favour of secondary rights that protect that interest.<sup>135</sup> Similarly, systemic considerations in favour of the efficient administration of justice give rise to *pro tanto* reasons in favour of creating secondary rights that make achieving that aim easier.

As a separate point, even if the reasons applicable to any one area of private law, say tort law, are such that they favour the creation of compensatory secondary rights only, it is inherently unlikely that the reasons applicable to the entirety of private law would be exactly the same. Thus, even if we accepted *arguendo* that corrective justice applies to make it the case that we should only have compensatory secondary rights in the law of torts, that would not be an argument for only having compensatory secondary rights in all parts of private

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<sup>134</sup> In fact, as we will discuss in the next chapter, restrictions on the direct enforcement of primary contractual rights can easily be achieved without secondary rights. We could simply have what I call type-I indirect enforcement of contractual rights as a standard to achieve the same autonomy-enhancing benefits.

<sup>135</sup> I use the term '*pro tanto*' in the sense in which people frequently (and erroneously) use '*prima facie*', that is to refer to reasons or considerations that apply other things being equal but are not all things considered determinative: see Shelly Kagan, *The Limits of Morality* (Clarendon Press 2007) 17.

law. A fuller consideration of all the reasons applicable to every situation in which secondary rights arise in private law would, I suspect, yield enough material for another thesis. For the time being, however, it appears unlikely that all the applicable reasons are exactly the same in every part of private law.

Thus, this thicker view, according to which secondary rights arise from breach and are always compensatory, must be rejected. It is patently not descriptive of English private law. Further, there is no reason to suppose that it is analytically or conceptually necessary that rights which arise from breach compensate for that breach. Lastly, the normative arguments in favour of making all secondary rights compensatory remain unconvincing.

#### *Primary rights as principal rights*

Another thicker conception of The Distinction is the one discussed in the last chapter as based around Lord Diplock's fourth definition. According to that conception primary rights are those rights that express the principal bargain between the parties, and secondary rights are rights that are ancillary to that principal bargain. As already discussed in the last chapter, various hybrid definitions that rely on both this sense of The Distinction and the Austinian conception generally fail because they create cross-cutting definitions. However, it is possible to create a stable conception of The Distinction that relies on the sense in which it is used in Lord Diplock's fourth definition. In a sense, the resulting conception is thicker than the Austinian one. Whereas the Austinian conception relies on the binary consideration of breach alone, this conception revolves around a consideration that, as its use in *Cavendish* illustrates, tracks the quite layered intuitions we have around the relative centrality of different facets of a contractual bargain. Thus, this conception tracks a distinction that is quite illuminating in the law of contract where the parties' agreement governs a wide variety of eventualities, some of which are clearly more 'primary' to the parties' commercial arrangement than others.

However, the strength of the conception in this respect also makes it uniquely unsuited to be a general conception of The Distinction. What makes the conception analytically useful in contract makes it inapplicable in other areas. For strangers thrust together in the context of say, a road traffic accident, it is much less insightful to consider which is the 'principal' right out of the rights governing their respective liabilities for the harm suffered by the other. Similarly, for a man who is unjustly enriched by another it will unlikely make much sense to ask which obligations are principal and which are subsidiary. His jural relationship with the claimant is insufficiently complex to be meaningfully analysed in these terms.

*Normative considerations favour preferring Austin's conception*

As demonstrated in the last section, a thicker version according to which secondary rights are compensatory is neither accurate nor desirable. Similarly, the thicker conception of The Distinction that tracks Lord Diplock's fourth definition, albeit useful in the law of contract, is not a viable candidate conception of The Distinction because it is inapplicable to other areas. However, that still leaves us with the alternative conceptions used by Tettenborn noted above. These alternative conceptions do descriptively exist and are not logically incoherent. On what basis, then, should we choose between these two alternatives and the Austinian conception? In answer to that question, I argue that we have three good reasons to choose the Austinian conception.

First, one alternative conception describes a phenomenon that we can already describe using other more established terminology. There is an established distinction between substantive rights and remedies that tracks the conception of The Distinction that Tettenborn appears to be using. In fact, as I shall discuss in the next chapter, that distinction is closely linked and complementary to The Distinction, understood in the Austinian sense. Therefore, we do not need to use the terminology of primary and secondary rights in order to describe the distinction apparently singled out by Tettenborn. By contrast, I am not aware of any other terminology that is used to draw the distinction that is captured by the

Austinian conception. Thus, using the terminology of primary and secondary rights to describe the Austinian conception will be a more useful use of that terminology.

Secondly, the Austinian conception of The Distinction is widely used by practitioners and theorists in private law. As detailed in Chapter 2, the fact that breach has significant explanatory power in the English law of obligations makes it the case that it is convenient to use the Austinian conception. This leads to frequent and unquestioning use of that conception. Moreover, even where definitions of The Distinction deviate from Austin's conception, there is reference back to that conception. For instance, as observed in Chapter 3 above, Lord Diplock makes reference to the Austinian conception when discussing The Distinction in *Photo Production*.<sup>136</sup>

Naturally, the utility of the Austinian conception is boosted by this frequent usage. The conception already having widespread currency greatly increases the likelihood that practitioners and theorists in private law will continue using The Distinction in this sense. This is essentially a small-c conservative argument. Absent convincing reasons to the contrary, there are many transaction costs to changing a definition that can be avoided if an already popular conception of a particular term is adapted.

Further, given that the Austinian conception is a useful analytical tool, there is a separate type of small-c conservative argument to be made here. The preservation of the Austinian conception would be the preservation of a thing of value. It might thus be justifiable even if there were an alternative better conception.<sup>137</sup>

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<sup>136</sup> *Photo Production* (n 13) 848H.

<sup>137</sup> For an argument in favour of this type of small-c conservatism, see, for instance: GA Cohen, 'Rescuing Conservatism: A Defense of Existing Value' in R Jay Wallace, Rahul Kumar and Samuel Freeman (eds), *Reasons and Recognition* (Oxford University Press 2011).

Lastly, the Austinian conception has the explanatory benefits already demonstrated in Chapter 2. In brief, it accurately captures a real distinction in the law. It highlights the centrality of breach across some doctrinal areas of private law, and illustrates the contrast with those areas in which breach is irrelevant. For instance, the Austinian conception of The Distinction gives us the terminology to talk about the similar albeit slightly different roles played by breach, causation, and loss in both contract and tort. It also gives us the terminology to distinguish between *Insurance I* and *Insurance II*.<sup>138</sup> Thus, when defined according to its Austinian conception, The Distinction can be a useful tool in a private lawyer's analytical toolbox.

Unlike the thicker rival conceptions, the Austinian conception works. Unlike some other rival conceptions, the Austinian captures a distinction for which there is no other terminology. Moreover, the Austinian conception is widely accepted and used, and provides a number of distinct benefits. Although we need not necessarily adopt this conception of The Distinction, we should do so in light of these benefits.

### **Reasons for using The Distinction**

Having arrived at a definition of The Distinction with the Austinian conception, we must now ask whether we have any reason to use The Distinction so defined. This is no longer a comparison with other alternative conceptions. Rather, in this section, we will investigate what evidence we have of The Distinction and whether we should use it.

#### *Descriptively, it exists*

Descriptively, the rights distinguished by The Distinction exist in English private law. Although we will consider some arguments to the contrary in Chapters 5, 6 and 7, at a doctrinal level, there is no dispute that there are some primary rights and secondary rights. There is much less agreement as to the existence of

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<sup>138</sup> See the discussion in Chapter 1 at nn 8 to 9 and Chapter 2 at n. 20 above.

certain individual rights, but that does not negate the essential point that some primary rights exist, and some secondary rights exist. As discussed in Chapter 2, this fact is almost always taken for granted, and there is thus a surprising dearth of literature on this question. Because the existence of some rights capable of categorisation according to The Distinction is such a given, however, we need not spend too much time considering the point. Descriptively, primary and secondary rights exist in English private law.

However, there are many different descriptively true statements about the rights we have in private law. There are many phenomena with varied aspects that are capable of description in terms of a variety of distinctions.

*Analytically, it is not necessary to use it*

One reason The Distinction might be important is if it did not just exist in English private law as a matter of chance, but was in fact analytically necessary in any system of private law. In this sub-section, I argue that albeit descriptively true, The Distinction is not analytically necessary. The fact that it sometimes is treated as such can be explained by a common confusion about what is sufficient to analytical necessity. This common confusion is based on a conflation of conceptual and ontological truth or a confusion about what kind of evidence establishes these two kinds of truth. This confusion ought to be discouraged. Although The Distinction truly describes English private law and is important, it is not necessary for a system of private law to have both primary and secondary rights.

As Austin observed, Roman Law did not contain a system of substantive rights that could be classified as either primary or secondary.<sup>139</sup> Rather it contained a flat system of action rights – more on which in the next chapter – that did not admit of analysis in terms of whether a right arose from breach or not. In light of this counter-example, why would we ever be tempted to think that The Distinction is analytically necessary?

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<sup>139</sup> Austin (n 2) 768–769.

A clue might be found in the way in which the evidence for the necessity of The Distinction is sometimes described. Robert Stevens's attack on Peter Birks's event-based classification of private law illustrates this. We will discuss the merit of that attack itself in the next sub-section of this chapter. For present purposes, let us focus on the evidence for the existence of The Distinction which Stevens relies on. In order to establish that The Distinction exists and presents a problem for Birks, Stevens appears to rely on an abstract, universal truth about the relationship between primary and secondary rights.

Let us have a look at his epistemology. First, Stevens advances an argument based on the remedies available that we will consider in the next chapter. The argument that we are interested in here, is one that Stevens does not strictly make but that is in the neighbourhood of what he says. Earlier on in *Torts and Rights*, Stevens asserts that he is seeking a conceptual classificatory system.<sup>140</sup> This suggests that he is relying on some feature of how we think about rights in order to devise his classificatory system. Given the centrality of The Distinction in Stevens's criticism of other classificatory systems, it is not a stretch to assume that Stevens similarly believes that conceptual analysis can aid in establishing The Distinction. Conceptual analysis presents interesting problems regarding both descriptive and analytical claims.<sup>141</sup> Furthermore, Stevens is by no means the only one to make these sorts of arguments, and other examples can be found in the writings of, *inter alia*, Peter Birks and James Penner.<sup>142</sup> Thus, it might be helpful to conduct a brief inquiry into the legitimacy of this type of argument.

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<sup>140</sup> Stevens (n 26) 284.

<sup>141</sup> I am not aware of it being used with regard to normative claims and cannot see any obvious advantage to doing so.

<sup>142</sup> Birks uses the language of concepts in the title to an article that appears to be about the nature of civil wrongs, see 'The Concept of a Civil Wrong' in David Owens (ed), *Philosophical Foundations of Tort Law* (1995); Similarly, James Penner describes judicial arguments about what certain rights are as regarding the 'conceptual features' of those rights, when in fact he is discussing the nature of those rights James Penner, 'The Bundle of Rights Picture of Property' (1995) 43 *UCLA Law Review* 711.

Stevens appears to be arguing that the concepts we use to understand particular rights can be used to test the truth of claims about those rights. He argues that we should use a classification that is conceptual and takes into account that primary rights are distinct from secondary rights (whether as a matter of concepts or the underlying reality is unclear) and then uses both of those arguments to criticise Peter Birks's taxonomy as not reflecting the actual existing rights.<sup>143</sup> I have left this claim intentionally vague to illustrate that there are many different varieties of this type of claim.

First, some scholars make arguments which are either descriptive of positive law, or some metaphysical or ontological features of law generally *without actually relying on any arguments about concepts*. These arguments are then labelled conceptual, when in truth they are not. Instances of this practice can be found in the work of many leading private law theorists.<sup>144</sup> This is simple mislabelling: the label 'conceptual' suggests that what we are interested in are arguments regarding *our use of notions or words*, such as PRIMARY RIGHTS, whereas some of the arguments being made are rather arguments about *the nature of the things these notions or words refer to*, viz the jural relationships that arise from something other than breach. Borrowing terminology from the philosophy of mind, these academics are eliding the difference between *concepts* and their *referents*.<sup>145</sup> In these instances the elision does not seem to be intentional.

That there is a difference that can be elided between a concept and its referent is evident when we are concerned with concepts that describe physical objects.<sup>146</sup> Thus, most would agree that there is a difference between the concept PHILOSOPHER and philosophers. I can grasp the concept

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<sup>143</sup> Stevens (n 26) 284–303.

<sup>144</sup> The papers cited at n. 142 above both fall into this category.

<sup>145</sup> Marga Reimer and Eliot Michaelson, 'Reference' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2018, Metaphysics Research Lab, Stanford University 2018) <<https://plato.stanford.edu/archives/win2018/entries/reference/>>.

<sup>146</sup> Nicos Stavropoulos, 'Words and Obligations' in Andrea Dolcetti and et al (eds), *Reading HLA Hart's 'The Concept of Law'* (2013).

PHILOSOPHER without knowing what a philosopher is. Let us stipulate for a moment that all philosophers are human.<sup>147</sup> Suppose, however, that John is convinced that humans don't exist and that he is an alien being manipulated by other aliens who behave exactly like what we believe (and for the purpose of this example we may assume, believe correctly) are humans. He would correctly identify all instances designated by PHILOSOPHER, but would (we assume, wrongly) think that Plato is in fact Plato-alien. He grasps PHILOSOPHER and can correctly identify philosophers, but he does not know that philosophers are humans with certain attributes. John is not conceptually confused, he is just (we assume) wrong about the attributes that the referents for the concept PHILOSOPHERS possess.<sup>148</sup> He is conceptually competent: his understanding of the concept correctly picks out its referents. However, he is ontologically confused: he does not know that philosophers are human beings. His conceptual competence does not help him here, the concept does not tell us anything about the nature of its referents.

Secondly, private law theorists could be intentionally treating concepts and referents as the same. It could be that the argument is that whilst concepts and referents could come apart in the case of physical objects, this is not so for private law rights. Their claim might be that there is no meaningful difference to be elided, in the case of primary rights/PRIMARY RIGHTS. The argument for this is something roughly in the neighbourhood of 'whilst there is an objective reality regarding the physical make-up of philosophers, this is simply not the case for law; law is just the sort of thing that changes depending on what we think it is.'

Whilst I have not come across this claim being explicitly advanced in private law theory, it has been made in general jurisprudence.<sup>149</sup> And, although there are no

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<sup>147</sup> Leaving unresolved, for the time being, what other properties philosophers may have.

<sup>148</sup> Timothy Williamson, *The Philosophy of Philosophy* (Wiley 2008) chs 2–3.

<sup>149</sup> A more subtle version of this claim is advanced in David Plunkett, 'A Positivist Route for Explaining How Facts Make Law' (2012) 18 *Legal Theory* 139; Plunkett relies on David Chalmers, 'Revelation, Humility, and the Structure of the World' <<http://consc.net/papers/revelation.ppt>>; ultimately, these arguments might be said to trace their roots to Saul A Kripke, *Naming and Necessity* (Harvard University Press 1980) Lecture III.

private law scholars who explicitly make this argument, there are plenty who seem to rely on some such argument somewhere in the background. For instance, Rafal Zakrzewski spends an entire chapter discussing how various authors have used the word remedy, transitioning from that to a discussion of the actual features and normative discussions surrounding what a remedy is.<sup>150</sup> Stevens's argument appears to be very similar. He urges us to use a classification that is conceptual and takes into account that primary rights are distinct from secondary rights and then uses both those arguments to criticise Peter Birks's taxonomy as not reflecting the actual existing rights.<sup>151</sup> This might of course also be interpreted as the inverse of a conceptual argument. Stevens might be advancing an argument as to the correct use of words that relies on facts about the underlying reality as premises. Such an argument would be legitimate but ultimately does not tell us anything about what rights and obligations actually are because it wouldn't allow us to draw any conclusions about actual rights from our conceptual analysis. It would thus not help in criticising Birks's classificatory system.

Ignoring the inverse possibility, there are two flavours, so to speak, of the second type of conceptual argument. The first asserts that rights are just what we think they are; this entails that rights do not have any existence distinct from our imagining them. The second, less radical interpretation makes the more modest claim that the concepts we (together) hold tell us something about the nature of the rights they refer to. Since the second claim is more modest and would be sufficient to substantiate some assertions about the nature of primary and secondary rights for Stevens's purposes, I shall proceed on the assumption that this latter flavour is the one Stevens would seek to rely on.

Both of these flavours run into three challenges: first, there might not be a sufficiently precise community definition of the primary-secondary relationship to inform any interesting claims about the nature of that relationship. This

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<sup>150</sup> Zakrzewski (n 94) ch 3, discussion of actual features in particular at p.50.

<sup>151</sup> Stevens (n 26) 284–303.

problem was brought out by the dissection of *Cavendish* in the last chapter. Even assuming that Austin's definition correctly maps onto our shared concept of the relationship between primary and secondary rights, the disputed clauses could, as I have argued above, conceivably be either under that definition. Our concept could not pick out whether those rights were primary or secondary. Secondly, the assumption that everyone has Austin's exact definition in mind when talking or thinking about primary and secondary rights seems unduly generous.<sup>152</sup>

Lastly, proponents of conceptual analysis might plausibly be wrong in arguing that law is different from philosophy. Should that be the case, the way we think about the relationship between primary and secondary rights could be entirely mistaken. Our shared concept might just pick out the wrong features; we could all be John. Thus, conceptual analysis does not allow us to make any abstract analytical claims about the nature of rights in private law generally speaking. Clearly, it is logically possible to have a legal system in which it is not possible to draw The Distinction.

*Normatively, it should be used*

Although it is not necessary to organise one's understanding of private law in terms of The Distinction, I argue that there are several arguments in favour of so understanding English private law. Some, albeit not all, of these arguments also lend support to the more ambitious argument that it is desirable to structure one's system of private law as containing both primary and secondary rights when designing a legal system from scratch or otherwise creating new rights. Lastly, there are arguments in favour of the latter which do not establish the former. Going along, I will flag up which arguments do which.

It is important to keep in mind that these two types of arguments are not only distinct but also quite different. The first argument concerns how we should think

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<sup>152</sup> Both of these challenges are due to Stavropoulos, 'Words and Obligations' (n 146); see also his 'Obligations, Interpretivism, and the Legal Point of View' in Andrei Marmor (ed), *Routledge Companion to Philosophy of Law* (2012).

about rights in English private law as they currently exist. The second argument concerns what rights we would give to people if we were reorganising or creating a legal system. Nonetheless, there are some considerations that count in favour of both. *Mutatis mutandis*, any argument in favour of thinking about private law rights in terms of The Distinction that is not reliant on specific features of English private law will also support a *pro tanto* argument in favour of introducing rights that are capable of being thought about that way. Whereas the first and third argument considered below are applicable to both questions, the second argument we shall consider is specific to English law. Finally, the last argument I will consider in this section is an argument in favour of organising one's system of private law rights in terms of primary and secondary rights.

In brief, there are three arguments in favour of analysing English private law through the prism of The Distinction. First, as we have considered in Chapter 2, using The Distinction allows us to state our private law rights and obligations more concisely. Secondly, The Distinction, with its focus on breach, captures a normatively salient feature of much of English private law as it currently exists. Lastly, using The Distinction to understand private law allows us to capture more complexity and nuance than the alternative conceptualisations that we shall consider in Chapters 6 and 7. The nuances so captured are drawn by participants in the English legal system and, further, track normatively salient differences that might well be applicable in any other system of private law.

Returning to the first of these arguments and as stated in Chapter 2, Austin makes the modest and sensible claim that organising one's description of private law into primary and secondary rights has advantages in terms of clarity of expression. Thus, separating primary and secondary rights achieves a more compact exposition. As compact material is more manageable, this increases clarity of expression. As observed, this is certainly true within individual doctrinal categories, but it might be quibbled with when applied to the entirety of private law. There are important differences between the secondary rights recognised in, for instance, torts and contract. This makes it the case that we cannot simply

state the content of secondary obligations once and for all for the entirety of private law. However, there are many commonalities and The Distinction allows us to express them. Although there is not just one type of secondary rights, the existence of different secondary rights nonetheless allows substantial expositional savings.

Thus, even if it is possible to describe English private law without resort to the terminology of The Distinction, doing so comes at the price of sacrificing those expositional savings. *Mutatis mutandis*, the same assessment applies at the stage of reorganising or creating a system of private law. Merely having one plane of rights makes it more difficult to specify, for instance, the consequences of breaches of contracts for goods and contracts for services once and for all.

Secondly, The Distinction captures something important about the nature of rights in English private law. As discussed in Chapter 2, considerations relating to breach play an important role in defining what rights we have and what rights are enforceable. For instance, in the law of negligence the requirements of causation, loss and remoteness are all in one way or another determined by breach. Moreover, breach itself, is of course a requirement too. The doctrinal importance of breach can, at times, be said to track the normative significance of breach.

Consider Birks's event-based classification of English private law. As Stevens argues, that classification cuts across categories because some of the rights in it are primary and some are secondary. The reader will no doubt be familiar with the classification of obligations proposed by Birks. In brief, Birks proposes classifying private law rights according to whether they arise from (1) consent, (2) wrongs, (3) unjust enrichment, or (4) some other event. Stevens's objection to this classification is based on the fact that some of these events give rise to primary rights – consent, unjust enrichment, other events – whereas others give

rise to secondary rights – wrongs.<sup>153</sup> Of course, Birks himself knew that his classification so straddled The Distinction.<sup>154</sup>

Stevens is right that Birks's classification straddles The Distinction, yet the accusation that this leads to a misunderstanding of the common law of torts seems a tad dramatic. It is true that the law of torts is grouped according to the fact that almost all tortious causes of actions are based on the enforcement of secondary rights, and it is further true that the category of torts also somewhat artificially excludes rights which arise from breaches of primary rights that in turn have arisen from consent (breaches of contract, primarily). Further, there is truth to the claim that, by focussing on the fact that causes of action in tort almost always<sup>155</sup> enforce secondary rights, we lose sight of the true, normative justifications for rights in tort. Worse even, focussing on the wrong, we lose sight of the justificatory inadequacy of whatever event gave rise to the primary right that was breached.

In some ways, making The Distinction explicit carries the argument here. Without the crutch of 'wrongs' in our classificatory scheme, we are forced to categorise the law of torts according to the source of its primary rights and that source, once scrutinised, is found wanting – the varied events that give rise to primary rights in torts do not properly delineate a coherent category. However, that argument rather misses the point. 'Wrongs' tells as cogent a justificatory story as consent or any of the other categories. The events-based classification does not hold within it a complete explanation of the normative justification of any of its categories. For instance, the fact that contractual rights arise from consent does not without more justify those rights; rather, in order to tell the complete story of the normative justification of contractual rights one ought to also adduce

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<sup>153</sup> Stevens (n 26) 285–288.

<sup>154</sup> Peter Birks was alive to the fact that his proposed classificatory system straddled The Distinction: see his acknowledgement of that fact in his Birks, 'Definition and Division: A Meditation on Institutes 3.13' (n 128) 23–26.

<sup>155</sup> I say almost always because, contrary to the paradigm of our thoughts which I suspect is shaped by the dominance of negligence on undergraduate courses, primary rights in tort can occasionally be enforced directly as can be seen, eg, from the availability of *quia timet* injunctive relief for trespasses.

facts about whatever complex theory might justify the state enforcing duties assumed consensually. When we refer to consent as an explanation, the most we are doing is referring to that complex theory through a sort of shorthand. We might suppose that, in Birks's fourfold classification, 'wrongs' assumes a similar function as shorthand for the complex normative story we tell normatively justifying tortious secondary rights. Regarding secondary rights, this complex normative story might turn out to be a corrective justice account, or it might turn out to be a consequentialist account.

There is a further benefit to referring to intermediate steps in the normative explanation that might explain why Birks wishes to focus on events such as wrongs or consent. Oftentimes, these intermediate explanatory steps have strong normative force for many people – the mere mention of consent, for instance, is perceived as sufficient justification for contractual rights by many people in spite of the fact that those people would not point to the same, or indeed any, more complete normative justification for contractual rights if pressed on the issue. Whilst this can contribute to an insufficiently scholarly enquiry into the normative justifications of private law rights, these shorthand factors provide a valuable service in virtue of their general acceptance: they forestall arguments and thus enable the smooth functioning of private law.

The function fulfilled here by powerful notions such as property, consent, wrong etc is akin to one of the functions of rights in Joseph Raz' theory of rights. On that theory, the rightsholder's interests ground her rights, which in turn ground duties incumbent upon others. The full normative explanation acknowledges that the duties incumbent upon those around her are ultimately grounded in her interests. One of the benefits of her having rights, however, is that we do not have to refer to her interests at every juncture. This enables people who have divergent ideas about first principles to nonetheless come to agreements about practical reasons. Thus, the fact that we can refer to these 'intermediate conclusions' in a normative argument 'mak[es] social life possible'.<sup>156</sup>

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<sup>156</sup> Joseph Raz, *The Morality of Freedom* (New Ed, Clarendon Press 1988) 180–181.

In fact, we could go further than simply defending wrongs as a category. The splitting off of breaches of contract from other wrongs, to create the category of torts, could also be defended on the basis of a similar argument. The exclusion of breach of contract from the subcategory of tort could be defended on the basis that, whereas we wish to foreground the explanatory power of the wrong with respect to torts, in cases of breach of contract we wish to foreground the explanatory work being done by the consent grounding the primary rights being violated. One could mount an argument that with respect to the normative justification of torts, the only shorthand we need is the fact that pre-existing rights have been violated, whereas the strong force of the consent-related shorthand justifies referring to this instead, and thus putting less emphasis on the fact that we are also relying on a wrong.

This differential treatment of breach of contract and torts would not be possible if we were to not use The Distinction in order to create more than one plane of substantive rights. It would not be possible to create wrongs as a category. Without primary rights to breach, there cannot be any rights that arise from the wrong of breach.

Of course, Birks's classification is merely one way of categorising English private law. I have not attempted to establish that we should retain Birks's scheme instead of another. Rather, I have sought to show that a categorisation of something on the basis of the rights in question stemming from the breach of primary rights is not possible without understanding English private law through the prism of The Distinction. Losing sight of The Distinction would obscure the fact that, as Birks points out, some of the rights on which causes of action are based are primary and some are secondary.<sup>157</sup>

Lastly, without The Distinction, we would necessarily have a flat structure of substantive rights. In fact, as the next three chapters will show, some such Flat Views end up excluding all substantive rights in favour of merely recognising

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<sup>157</sup> Birks, 'Definition and Division: A Meditation on Institutes 3.13' (n 128) 23–26.

action rights. Irrespective of whether such a conceptualisation of English private law is descriptively accurate (which we will consider in detail in the next three chapters), such a Flat View of English law has one significant disadvantage. It does not recognise some of the nuances that we can recognise using The Distinction.

Austin was alive to this problem. Almost 200 years ago, he argued that a legal system that only recognises one plane of rights prior to judicial enforcement cannot accurately render the subtle nuances of the rights that actually exist. Austin observes that many legal systems, such as eg the Roman one, appear not to contain primary rights because they only describe causes of action.<sup>158</sup> However, as Austin points out, such legal systems nonetheless contain primary rights: whilst they are not explicitly stated, primary rights appear to be described through the lens of a cause of action for a set of facts that could well be described as the breach of a primary right.<sup>159</sup> Reorganising such an account – of primary rights through the lens of secondary rights – into one where primary and secondary rights are dealt with distinctly would, as Austin argues, not only result in the benefit of brevity but would also help in bringing out the difference between those primary rights which are prescriptive and those which are proscriptive. Since, per Austin, all secondary rights prescribe consequences, proscriptive primary rights are in danger of not being recognised within such a system. Of course, the loss of nuance would be greater than merely being unable to distinguish between prescriptive and proscriptive rights. For instance, we could not distinguish between *Insurance I* and *Insurance II*.

Finally, if we were designing a system of private law rights from scratch, there is good reason to include both primary and secondary rights because doing so would best reflect the structure of the moral obligations that pre-exist in the

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<sup>158</sup> Austin (n 2) 767–769.

<sup>159</sup> *ibid* 768; It is interesting at this juncture to observe that there is a parallel between these observations and the so-called paradox of the just law as found in eg Raz' work: whilst a law prohibiting murder might not have any normative force, a law prescribing consequences to be suffered by perpetrators of murder would not run into that problem: see Joseph Raz, *Ethics in the Public Domain* (Clarendon 1994) 342ff.

space regulated by private law rights. As I will expand in the following chapters, a large part of what makes Flat Views as unattractive as they are as conceptualisations of private law rights is that they fail to recognise the normative relationships between, for instance, contracting parties that are encapsulated in primary rights. Although that particular insight establishes the desirability of having substantive primary rights, it fails to make an argument for the existence of secondary rights and duties.

However, a system of private law rights that includes both primary and secondary substantive rights better reflects the fact that we do incur distinct moral obligations from the breach of our other moral obligations.<sup>160</sup> For instance, consider the following example:

*Parental Justice: A little boy has a moral obligation not to hit his sister. If he nonetheless does so, he ought to apologise.*<sup>161</sup>

The fact that the little boy should apologise to his sister is intuitively appealing. Irrespective of whether we subscribe to a corrective justice account of interpersonal moral obligation<sup>162</sup> or whether we think a continuity thesis of reasons better explains the duty to apologise,<sup>163</sup> it ought to be uncontroversial that an apology or some other form of repair is due.

Other thing being equal, and when afforded the luxury of designing a system of private law rights from scratch, it is preferable if those rights are morally intelligible. One easy way for them to be morally intelligible is for the legal rights to reflect the underlying moral obligations. Of course, this argument in favour of including secondary obligations of repair (albeit not necessarily of compensation) is merely a *pro tanto* argument. There are several reasons why legal rights could deviate from the underlying moral rights and still be morally

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<sup>160</sup> On the role of apologies: see John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) ch 4.

<sup>161</sup> This argument and this example were suggested to me by Prince Saprai.

<sup>162</sup> Weinrib (n 132) ch 5.

<sup>163</sup> Gardner, *From Personal Life to Private Law* (n 160) 98–102.

intelligible. For instance, there could be normative arguments for the creation of new rights. Nonetheless, other things being equal, it is desirable for our system of private law rights to reflect our underlying moral obligations. Thus, it is desirable to include both primary and secondary substantive right in one's system of private law.



## **Chapter 5: Substantive rights, action rights, and remedies**

### **Introduction**

The Distinction, as defined in the last chapter, exists in some relationship to the distinction between rights and remedies. In this chapter, I will explore that relationship. First, I will show how there can sometimes be a temptation to conflate The Distinction and the distinction between rights and remedies.

Next, I will consider whether a particular right's status as either primary or secondary has any impact on the remedies that are available in reliance on that right. I consider that it is not possible to substantiate any determinative claims about any differences between primary and secondary rights, whether descriptively, abstractly or normatively. I consider and reject two theorists' arguments in this context. First, I reject Austin's rigid scheme of enforcement according to which primary rights are never directly enforced by the courts but are only ever enforced indirectly through the enforcement of secondary rights that arise from their breach. Secondly, I reject Peter Birks's argument that the courts are more constrained in enforcing primary rights than in the creation of secondary rights.

In response to this, I will define terminology to give a clear shape to the distinct rights, powers etc that can be found as rights and remedies and everything in-between in English private law. In essence, I argue that The Distinction exists within the space of what I have termed substantive rights – ie the rights that private law's subjects hold against one another. Substantive rights are distinct from and must be contrasted with remedies and action rights. I define the former as the rights that private law's subjects hold as a consequence of adjudicative determinations, and the latter as the entitlements to such determination that private law's subjects have against the state's machinery of enforcement (courts etc).

Lastly, I consider whether we can infer anything about the existence, non-existence or content of substantive rights from the award or non-award of remedies. The direction of the arguments considered in this context is the inverse from arguments about what rights lead to what remedies. For instance, Stevens argues that we can deduce the existence of The Distinction from the existence of certain remedies. Similarly, Smith advances the more modest claim that some non-enforcement is in fact evidence of the non-existence of substantive rights. I argue that, *pace* Stevens and Smith, the award and content of remedies does not allow us to make more than a preliminary, *prima facie* inference about the existence of remedies. Foreshadowing my engagement with sceptical views in Chapters 6 and 7, I argue that we ought to look at the courts' reasoning about the parties' rights rather than examining the awards that result from that reasoning. There are simply too many considerations that apply at the point of adjudication to enable us to draw any robust conclusions from the award or non-award of remedies.

### **The temptation to conflate**

It is tempting to use the terms secondary rights and remedies interchangeably. As we saw in the last chapter, some academics do this. I suspect that there are a number of ways in which this can come about. As Birks established, the word remedy is capable of having a multitude of distinct meanings. Thus, on one definition, remedy refers to any legal 'cure' or recourse for the violation of a legal right. On this interpretation, secondary rights would fall within the category of remedy.<sup>164</sup> This is not the meaning of remedy we are interested in here. Rather, in order to illuminate the meaning of The Distinction, we must adopt what Rafal Zakrzewski dubs the 'core meaning' of remedy: this is the definition of 'remedy' as the rights comprising the jural relationship arising from the making of a court order, to be contradistinguished from substantive (meaning pre-judgment) rights.<sup>165</sup>

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<sup>164</sup> Birks, 'Rights, Wrongs, and Remedies' (n 26).

<sup>165</sup> Zakrzewski (n 94) ch 1.

Whilst both meanings of remedy are consistent with some of the cases and some of the literature, and there are no conclusive reasons for drawing the distinction between substantive and remedial law one way or another, adopting Zakrzewski's definition has the advantage of preventing the equivocation between the narrow and broad meanings of remedy that might occur if we include secondary (otherwise substantive) rights in our meaning of remedy. As discussed previously, equivocation can lead to confusion if the fact of equivocation is not made explicit.

<b>Substantive Law</b>		<b>Remedial Law</b>
<i>Primary Rights</i>	<i>Secondary Rights</i>	<i>Remedies (core sense)</i>
Right to be free from battery	Right to reparation of the breach of primary right	Order enforcing/ concretising the secondary right
Contractual right to money payment		Order for performance of primary right

Table I - Zakrzewski's scheme

<b>Substantive Law</b>	<b>Remedial Law</b>	
<i>Primary Rights</i>	<i>Secondary Rights</i>	<i>Remedies (core sense)</i>
Right to be free from battery	Right to reparation of the breach of primary right	Order enforcing/ concretising the secondary right
Contractual right to money payment		Order for performance of primary right

Table II - Secondary rights as remedies

As can be seen from *Table II*, this equivocation follows from the term ‘remedy’ being used to refer to the rights arising from court orders (*‘Remedies’*, second row) when it is also used as an umbrella term for both remedies in that sense and secondary rights (*‘Remedial Law’*, first column).<sup>166</sup> This equivocation is clearly avoided by using remedy in accordance with Zakrzewski’s core sense. As *Table I* illustrates, so used, ‘remedy’ refers to the same category, whether contradistinguished from substantive rights generally or as part of the three-way distinction between primary rights, secondary rights, and remedies.

To create the conceptual apparatus needed to discuss the issues thrown up by this and the following two chapters, we must define substantive rights as containing both primary and secondary rights, and remedies according to Zakrzewski’s core sense. This does not, of course, preclude us from drawing into question the existence of any part of that scheme as a matter of positive law or the desirability of retaining all of those rights. However, if we do not delineate sufficiently the distinction between substantive rights and remedies, it will be impossible to discuss the various challenges to The Distinction that arise in the following chapters.

## **From rights to remedies**

### *Austin*

Having so defined substantive rights and remedies, there is a temptation to deduce some sort of general rule about the relationship between rights and remedies. One candidate for such a rule is that proposed by John Austin. He argues that ‘every right of action arises from an injury’.<sup>167</sup> This rule entails a fixed relationship between primary rights and secondary rights, and secondary rights and remedies. When we recall that according to Austin every breach of a primary right gives rise to a secondary right, it follows as a corollary that courts cannot directly enforce primary rights. On Austin’s scheme, primary rights give rise to

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<sup>166</sup> *ibid* 42ff.

<sup>167</sup> Austin (n 2) 764.

secondary rights and those secondary rights can then be enforced in court eventually giving rise to remedies.

To substantiate this scheme, Austin attempts to disprove counterexamples by creating a dichotomy between merely advising upon a speculative right and adjudicating upon a wrong.<sup>168</sup> He continues to claim that, when doing the former, courts may sometimes be pretending to be doing the latter, but that in the absence of a wrong it is merely the former. Thus, when courts declare primary contractual entitlements to be one way or another, they are not adjudicating upon them as ‘courts of justice’ but merely acting as ‘registration offices’. Austin attempts to support this argument by the assertion that even where there is an amicable pursuit of a claim in, eg money had and received, the purpose of going to court is to establish whether or not a wrong has been committed.

This whole argument is fallacious and badly substantiated. First, the dichotomy introduced is false; the fact alone that one can speculatively advise upon a wrong shows this to be so. Many appellate judgments regarding preliminary issues operate like this, with the judicial order taking the following form: if the facts are such, there is a wrong and the consequences are such, but if the facts are such-and-such there is no wrong and the consequences are such-and-such.

Moreover, just as there is the possibility of speculatively advising upon a wrong, it is possible, as Mitchell argues, to judicially enforce – parking, for the time being, what might be entailed by enforcement – a primary right.<sup>169</sup> A court order to specifically enforce a primary obligation in debt is an example often given.<sup>170</sup> *Insurance II* is a further instructive example. There can be no suggestion that the eventuation of the insured event is a breach in such a situation, given that *Insurance II* is explicitly distinguished from *Insurance I* on the basis that the eventuation of the insured event is not a breach.<sup>171</sup> Similarly, non-return of an

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<sup>168</sup> *ibid* 764–766.

<sup>169</sup> Mitchell (n 1).

<sup>170</sup> C.f. the arguments regarding the enforcement of primary rights that arose in the context of the discussion of *A/B* (n 15) in Chapter 3.

<sup>171</sup> See the discussion of this difference at n. 20 above.

unjust enrichment prior to a court order is not a wrong, but would have to be one if only secondary rights can be enforced in court.<sup>172</sup> One aspect of the problem is that Austin really introduces two distinctions – one between speculative advising and adjudicating, and the other between claims based on primary rights as opposed to those based on a wrong – which do not align.

Even when there has been a wrong, it is not necessary to rely on the fact of that wrong when seeking a remedy in court. It is possible to enforce a primary right without determining whether there has been a wrong or not; all it is necessary to establish in that scenario is that there is a primary right owed by D to C.<sup>173</sup> As discussed in Chapter 3, in the context of the discussion regarding *AIB v Mark Redler*,<sup>174</sup> this is the approach advocated by those espousing the classical view of the action for an account: a claim in account requires asserting a primary right to account quite irrespective of whether there has been a breach of the defendant's stewardship duties. Thus, it is clear that Austin's proposed scheme does not describe the law accurately.

### Birks

Having concluded that both primary and secondary rights can form the basis of a remedy being awarded, a natural further question would be whether the fact that a remedy is based on, say, a primary right rather than a secondary one makes any difference. Peter Birks advances an argument that goes to this question. He argues that whilst primary rights can only ever be directly enforced – that is, the content of the remedy must mirror the content of the primary right – a judicial system has a much wider choice as to the shape of the remedies it awards in response to a wrong.<sup>175</sup>

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<sup>172</sup> Mitchell (n 1).

<sup>173</sup> Even if Smith were right that C must also allege a past or imminent wrong in order to establish a cause of action, C would merely be relying on the wrong as a fulfilling a further condition of the cause of action and not qua causative event giving rise to a secondary right; c.f. Stephen A Smith, 'Rights, Remedies, and Causes of Action' in Charles EF Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008).

<sup>174</sup> *AIB* (n 15).

<sup>175</sup> Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 12–14.

This can be parsed as either: (a) an argument that a judicial order must always enforce the underlying substantive right directly, but that a legal system has a wide choice in the creation of secondary rights; or as (b) an argument that the remedial response to relatively fixed secondary rights can nonetheless be varied. In light of Birks's broad aversion to discretionary remedialism,<sup>176</sup> it might be supposed that Birks would be more in favour of enforcing all rights directly. Thus, argument (a) is more likely to be what he had in mind. Birks's primary claim is thus that, as a matter of principle, the contents of primary rights are narrowly confined by their causative events, whereas secondary rights can have all sorts of content as a consequence of being caused by a wrong. This claim might be doubted: it does not seem to be the case that, as a matter of logic, as Birks contends,<sup>177</sup> there is any difference between the spectrum of rights that can arise from the categories of events that give rise to primary rights (consent, unjust enrichment, other events), on the one hand, and wrongs, on the other hand. It is logically possible, albeit perhaps counterintuitive and possibly normatively undesirable, for the legal system to ascribe entirely different rights to the parties' consent than those which are usually thought to arise from that consent. So, for example, it is not impossible that A could promise to paint B's fence and that instead of an obligation to paint the fence he would in fact incur an obligation to wash B's car. Of course, such a legal system would be quite confusing and thus, other things being equal, undesirable, but it is nonetheless very much a possibility.

Quite apart from the persuasiveness of Birks's main argument, it is his subsidiary argument regarding the relationship between substantive rights and remedies that should be the focus of our discussion in the context of the present chapter. Birks asserts that the 'remedial logic' of primary rights will not support any remedy that imposes any burden upon that defendant which is different from the duty he is already under.<sup>178</sup> If we read his main argument as being one about the

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<sup>176</sup> See Birks, 'Rights, Wrongs, and Remedies' (n 26) 22–25.

<sup>177</sup> Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (n 175) 12–13.

<sup>178</sup> *ibid* 13.

shape of our substantive secondary rights, then *mutatis mutandis* the same will presumably be true for the remedies that secondary rights can support. Again, however, this claim is plainly unsustainable as a matter of ordinary logic – we can conceive of a legal system in which judges recognise C’s primary rights and nonetheless do not enforce them. Consider this example:

*Blackacre: I own Blackacre. I have a primary right to exclusive possession.*

*The department of defence uses Blackacre to quarter its soldiers as part of a war effort. A court might recognise my primary right-based vindicatio of my ownership of Blackacre, but nonetheless refuse to make an order enforcing that primary right against the Department of Defence for the duration of a war, on the ground that the importance of the war effort makes my right unenforceable for the duration of the war.*

This example illustrates that non-enforcement of substantive rights is logically possible.

In fact, our own legal system provides far more mundane examples than *Blackacre*. Stephen A Smith has argued that limitation periods are such an example of non-enforcement of subsisting (primary) rights.<sup>179</sup> Suppose that D contracts to repay a sum to C, D fails to pay C and C does not bring an action for more than six years after the debt’s due date. C cannot obtain a remedy based on D’s duty to repay the debt. Now, of course, we might simply assert that C’s right is extinguished after six years, but at least doctrinally this does not appear to be the case. We have reasons to believe that C’s right persists even when it becomes unenforceable, since that is the best explanation for the fact that D cannot get restitution after he mistakenly pays D the sum due. C’s unenforceable right to the repayment of the debt constitutes a bar to restitution

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<sup>179</sup> Stephen A Smith, ‘Rights and Remedies: A Complex Relationship’, *Taking Remedies Seriously* - Canadian Institute for the Administration of Justice Annual Conference (2009) 55 <<https://papers.ssrn.com/abstract=2006626>> accessed 25 October 2017.

notwithstanding that C could not obtain an order that D repay that debt.<sup>180</sup> Although D's contractual right is no longer enforceable, it persists and continues to have some force between C and D.

The decision of the Court of Appeal in *Independent Trustee Services Ltd v GP Noble Trustees* provides a further example of substantive rights persisting even where they are not enforceable.<sup>181</sup> *Independent Trustee Services* concerned the bona fide purchaser defence. A rogue, in breach of trust, had defrauded various pension schemes of some £50m. The appellant had been appointed as the new trustee under the pension schemes and now sought, *inter alia*, to obtain a tracing remedy to recover a sum of roughly £1.48m that had been transferred to the respondent, the rogue's ex-wife, in settlement of a matrimonial proceedings award. Had time stopped there, the claimant would not have been able to recover the £1.48m since the respondent would have been able to raise a valid bona fide purchaser defence. Satisfaction of a court order would have provided sufficient consideration for the purposes of the defence.<sup>182</sup>

However, the respondent found out that her ex-husband, in a most roguish manner, had substantially concealed the extent of his assets from her; consequently, she had the previous award set aside *ab initio*. The appellant now maintained that since the award had been set aside, the bona fide purchaser defence was no longer made out. The Court of Appeal accepted this argument, rejecting the respondent's argument that the effect of the defence was to extinguish the appellant's underlying right to have the £1.48m returned.<sup>183</sup> As Lloyd LJ put the point, the beneficiaries' right 'has continued to subsist in the

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<sup>180</sup> The action 'to recover back money, which ought not in justice to be kept ... lies only for money which, 11 ex æquo ot bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor [sic!] and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations... because ... the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.' *Moses v Macferlan* (1760) 97 ER 676, 680–81 (Lord Mansfield).

<sup>181</sup> *Independent Trustee Services Ltd v GP Noble Trustees* [2013] Ch 91 (CA).

<sup>182</sup> *ibid* [26].

<sup>183</sup> *ibid* per Patten LJ at [49].

meantime and it is no longer capable of being defeated by the bona fide purchaser defence'.<sup>184</sup>

Although it might be possible to conceptualise the beneficiaries' rights as simultaneously existing and not existing during the duration that the bona fide purchaser defence operated, that would directly contradict the reasoning of the Court of Appeal quoted above. Moreover, it would be a much less elegant solution than conceptualising the beneficiaries' rights as persisting but merely unenforceable. The beneficiaries' rights simply become enforceable again when the consideration for the defence is rescinded.

Furthermore, sometimes rights are enforced but they are enforced through the award of what Zakrzewski terms a 'transformative remedy'.<sup>185</sup> Consider the power to award damages *in lieu* under Lord Cairns' Act.<sup>186</sup> Under that power, a court may determine that a claimant has a primary right, the direct enforcement of which would entitle her to the award of an injunction, but may refuse to directly enforce that primary right, and choose to make an award of damages instead. For instance, an injunction requiring the defendant to tear down a number of houses built in breach of a negative covenant was refused in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.<sup>187</sup> Instead, Brightman J awarded damages *in lieu*.

One way to conceptualise such an award is as simply enforcing a secondary right to the payment of damages that arose at the time of breach. However, that conceptualisation is somewhat awkward, given that the claimant explicitly based its cause of action on its primary right arising under the covenant, and that the making of the damages award was conceptualised as a mechanism for the enforcement of that primary right. Considerable mental gymnastics would be required in order to treat something as the enforcement of a right that was not

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<sup>184</sup> *ibid* at [113].

<sup>185</sup> Zakrzewski (n 94) ch 4.

<sup>186</sup> Originally contained in s.2 of the Chancery Amendment Act 1858 (Lord Cairns' Act), the power to award damages *in lieu* of an injunction is now contained in s.50 of the Senior Courts Act 1981.

<sup>187</sup> *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

relied on by the claimant. In contrast, conceptualising the damages as the transformative enforcement of the primary right neatly avoids these mental gymnastics.

Moreover, remedies can be awarded that are not based on any substantive rights. As Smith argues elsewhere, where the considerations at hand are so fact-sensitive that no general rule can be formulated, the legal system awards remedies which are not based on any substantive pre-judgment rights.<sup>188</sup> The example cited by Smith, namely the making of a property adjustment order under the Canadian matrimonial causes legislation, is mirrored in the UK under Part II of the Matrimonial Causes Act 1973. Under that regime there is, as Lord Denning put it, ‘no right to maintenance, or to costs, or to a secured provision, or the like, until the court makes an order directing it.’<sup>189</sup> In fact, claims under the Inheritance (Provision for Family and Dependants) Act 1975 are similarly conceptualised as not being based on definite substantive and action rights.<sup>190</sup> Sometimes, courts are given the power to award remedies without D owing C any pre-judgment duty.

Of course, a legal system in which every remedy is exactly based on the enforcement of a corresponding substantive right is possible, but our legal system is not such a system. The fact that our legal system works in the way that it does logically entails that a system of private law rights and remedies such as ours is possible. Thus, it cannot be an analytical truth concerning such a system that every remedy must be based on the enforcement of a corresponding substantive right. Any counter-example disproves a claim of analytical necessity. Birks’s argument thus fails both descriptively and analytically.

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<sup>188</sup> Smith, ‘Rights and Remedies’ (n 179) 60–61; for further discussion see also Stephen A Smith, ‘Rule-Based Rights and Court-Ordered Rights’ in Donal Nolan and Andrew Robertson, *Rights and Private Law* (Hart Publishing 2011).

<sup>189</sup> *Sugden v Sugden* [1957] P 120 (CA) 135.

<sup>190</sup> *Roberts v Fresco* [2017] EWHC 283 (Ch), [2017] Ch 433, [42].

### *A normative argument*

On a more generous reading of Birks's argument,<sup>191</sup> we could conceive of it as an argument about the *normative* internal logic of our legal system and those like it. There is, as Smith points out, some intuitive appeal to normative variation of this argument: other things being equal, our rights should be enforced.<sup>192</sup> If they are not enforceable, they lose a great deal of their beneficial attributes. They no longer create certainty, give people confidence, enable efficient commerce, etc.

Other things, however, are seldom equal. There are usually good reasons why some rights should no longer be enforced. For instance, limitation periods make plenty of normative sense: not allowing parties to revive old disputes contributes to legal certainty and incentivises parties to resolve their disputes within a reasonable timeframe.<sup>193</sup> The non-enforcement in *Blackacre* is also normatively defensible – the policy reasons provided by the importance of the war effort simply override the reasons for the enforcement of private law rights. Lastly, the policy reasons in favour of the bona fide purchaser defence simply do not apply where no consideration is provided. Thus, sometimes, there are good normative reasons for non-enforcement.

Similarly, sometimes there may be good reasons for awarding remedies that are different from the substantive rights on which they are based. The facts of *Wrotham Park* illustrate this perfectly. As Brightman J recognised, directly enforcing C's rights would be an 'unpardonable waste of much needed houses'.<sup>194</sup> Nonetheless, it is normatively desirable that a remedy is awarded that comes close to enforcing C's primary right without causing such social harm.

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<sup>191</sup> In light of the fact that Birks' argument includes the example of cutting of a wrongdoers' ear as a 'logical possibility', any reading of his claim as all things considered normative must be rejected; however, a more limited pro tanto claim is possible; c.f. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (n 175) 12.

<sup>192</sup> Smith, 'Rights and Remedies' (n 179) 43–44.

<sup>193</sup> Richard Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' [1986] *Washington University Law Review* 667, 667–668; see also Richard Epstein, 'The Temporal Dimension in Tort Law' [1986] *The University of Chicago Law Review* 1175, 1183.

<sup>194</sup> *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* (n 187) 811B.

Lastly, there are good reasons in favour of a legal system sometimes awarding remedies without those reasons necessarily constituting sufficient reasons to create rights. For instance, in the case of matrimonial causes, as Smith has recognised, the applicable considerations vary so widely from one case to the next that it may be difficult to express them with sufficient particularity as a substantive right.<sup>195</sup> Nonetheless, the desirability of providing the courts with the power to make such awards is not in doubt. In those circumstances, it is sensible to give the courts a power to award remedies without requiring claimants to rely on any substantive rights in order to establish a cause of action.

The desirability of sometimes empowering courts to award remedies without the existence of substantive and action rights can further be illustrated considering the differences in how New Zealand and England deal with the family home of cohabiting couples. In New Zealand there is a statutory scheme, the Property (Relationships) Act 1976, under which courts may take a wide variety of factors into account when deciding how to divide the family home of a cohabiting couple upon separation. By contrast, in England, the courts have been forced to improvise a similar scheme. Following *Stack v Dowden*, the shares in which cohabiting partners are entitled to their family home upon the dissolution of the relationship is determined by their substantive rights arising from a common intention constructive trust.<sup>196</sup>

That approach has rightly been criticised for forcing a fact and context-sensitive approach of imputation into the rigid structures of equitable property rights, thereby doing harm to the clarity of those rights.<sup>197</sup> That difficulty and harm could have been avoided, had Parliament acted and created a scheme similar to that in force in New Zealand. Legislation would have freed the English courts from the responsibility of having to address the issue by using a scheme of

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<sup>195</sup> Smith, 'Rights and Remedies' (n 179) 61.

<sup>196</sup> *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

<sup>197</sup> William Swadling, 'The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed' [2007] *Law Quarterly Review* 511, 516–518.

substantive rights, the only approach available to them, to address an issue to which they are ill-suited.

### **My scheme**

Having established that it would be neither descriptively, analytically or normatively accurate to say that rights must be enforced, or that remedies must enforce rights, we must now develop a framework that will enable us to apply that insight. We need to do this in order to discuss the Flat Views canvassed in Chapters 6 and 7 more economically. In a book that is a rare exception to the dearth of literature on the relationship between rights and remedies, Rafal Zakrzewski has developed terminology that provides a helpful starting point.

As discussed above, Zakrzewski distinguishes between substantive rights, which encompass both primary and secondary rights, and remedies. He then points out what we have already observed in the last section, that there can be different relationships between rights and resulting remedies. Specifically, Zakrzewski draws a distinction between replicative and transformative enforcement.<sup>198</sup> According to this dichotomy, a substantive right is replicated in a remedy if and only if the remedy is based on and has substantially the same content as the substantive right.<sup>199</sup> For instance, my secondary right to be awarded damages will be replicated in a court order creating a new, separate entitlement to damages. By contrast, a substantive right is merely transformatively enforced where the remedy, albeit based on the substantive right, does not have the same content as the right on which it is based. The award of damages *in lieu* of direct enforcement of the claimant's primary right in *Wrotham Park* is an example of a transformative remedy.

The core insight of this analysis – that substantive rights can be enforced in different ways – is crucial for our purposes. Not only does it show that Birks's subsidiary argument above is hopeless, it also enables us to fruitfully engage

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<sup>198</sup> Zakrzewski (n 94) 55–61.

<sup>199</sup> The content of a right is the conduct regulated by the correlative duty. Rights which have the same content as other rights correlate to duties that impose the same obligation.

with the sceptics in the next two chapters. Nonetheless, we will have to expand upon it, and coin slightly different terminology. Specifically, my scheme of enforcement will distinguish between two different types of what I call indirect enforcement, only one of which is covered by Zakrzewski' transformative enforcement. To illustrate the point, it will now be necessary to revise the tables at the beginning of this chapter.

Substantive rights		Action Rights		Remedies
<i>Primary</i>	<i>Secondary</i>	<i>The substantive rights that are part of the...</i>	<i>...formula entitling C to the following...</i>	<i>...remedial right</i>
Right to an account		→	If C has the necessary rights, C is entitled to an order creating a replicative remedial...	...right to an account
Right to have fence painted (duty view)	Right to damages	→	If C has the necessary rights, C is entitled to an order creating a replicative remedial...	...right to be paid damages
Right to have fence painted (Smith's liability view)		→	If C has the necessary rights, C is entitled to and order creating a transformative remedial...	...right to be paid damages
Right to have fence painted or be paid (alternative promise view)		→	If C has the necessary rights, C is entitled to and order creating a replicative remedial...	...right to be paid damages
		Not necessary	If the justice of the situation so demands, C is entitled to an order ...	...a right arising from a property adjustment order

Table III - My scheme

In line with this table, I shall define the enforcement of a substantive legal right as follows. A substantive legal right, X, is directly enforced if and only if X forms the basis of a cause of action yielding a remedy that is (a) (at least, partially)

centred around or justified by reference to the existence of that right X, and (b) the content of that remedy resembles the content of X. *Example 1* is an example of direct enforcement.

*Example 1: I have a substantive legal right, A, correlative to your duty to paint my fence white on 5 March 2019. I have a cause of action right against the court that they order you to do that, all other things being equal. My right A is directly enforceable.*

Direct enforcement roughly mirrors what Zakrzewski calls replication. By way of contrast, a right is merely *indirectly* enforced where (a) and/or (b) are not given. *Example 2* is an example of indirect enforcement.

*Example 2: I have a substantive legal right, alpha, correlative to your duty to paint my fence white on 5 March 2019. I have a cause of action right against the court that they order you to pay me damages for not painting my fence, all other things being equal. My right alpha is indirectly enforceable.*

Further, we can distinguish between two types of indirect enforcement. Type I indirect enforcement describes what happens where C brings her substantive right into court and is awarded a remedy that is justified by reference to that right but is so different in content as not to resemble that right any longer. An instance of this type would be where C applies to obtain injunctive enforcement of her primary right to restrain D from competing with her but is instead awarded damages under Lord Cairns' Act; another is *Example 2A*.

*Example 2A: I have a substantive primary right, alpha, correlative to your duty to paint my fence white on 5 March 2019. I have a cause of action right against the court based on my right alpha that they order you to pay me damages for not painting my fence. My right alpha is type-I indirectly enforceable.*

Type I indirect enforcement mirrors what Zakrzewski calls transformative enforcement. Both primary and secondary rights can be enforced directly and type I indirectly, although the latter is a more common response to causes of action based upon primary rights.

In contradistinction, type-II indirect enforcement describes the different scenario where C's cause of action is not based on her original primary right but rather relies on the secondary right that has arisen in response to the violation of her primary right. The difference between this and type-I indirect enforcement can be seen by contrasting *Example 2B* (type-II) with *Example 2A* (type-I).

*Example 2B: I have a substantive primary right, alpha, correlative to your duty to paint my fence white on 5 March 2019. At midnight on 5 March 2019, my secondary right beta correlative to your duty to compensate me for not painting my fence arises. I have a cause of action right against the court based on my right beta that they order you to pay me damages for not painting my fence. My right beta is directly enforceable; my right alpha is type-II indirectly enforceable.*

Although some might say that the primary right that is only type-II indirectly enforced is not enforced at all, its existence continues to justify the remedy awarded. Since type-II indirect enforcement is based on another right arising from the right so enforced, and since as we have observed in Chapter 3 there are no tertiary rights, it follows that only primary rights can be type-II indirectly enforced.

#### *Action rights*

Lastly, we need some terminology to describe the entitlements that individual private law subjects have against the enforcement machinery of the state to have

their substantive rights enforced.<sup>200</sup> Zakrzewski comes close to describing these entitlements when he defines ‘causes of action’ as ‘the set of facts that empower the court to grant relief.’<sup>201</sup> Diplock LJ in *Letang v Cooper* comes even closer to the sense that I have in mind by describing a cause of action as ‘simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.’<sup>202</sup> The fact that a cause of action is an entitlement, good against the court, comes through clearly. In order to highlight this, and to distinguish the sense that I have in mind from the sense in which Zakrzewski uses the expression ‘causes of action’, I will label these entitlements ‘action rights’.

One way of conceptualising the way in which action rights work is as a formula. Looking at it in this way, substantive primary and secondary rights are premises in a complex argument yielding the award of a remedy by the court. There are many further premises in that complex argument, however: the absence of limitations, the claimant’s clean hands, any number of empirical facts about the claimant and defendant, etc. Similarly, in light of the foregoing discussion, we should recognise that in the case of some action rights the substantive rights element may remain empty; some remedies require no substantive rights. Put differently, asserting a substantive right (whether primary or secondary) is not necessary for all action rights: it is merely a necessary element in some sufficient sets.

Lastly, it is important that what distinguishes substantive rights from action rights is not just their content. Of course, the content of these different rights is very different. C’s substantive right in *Fence Painting* entitles her to the painting of her fence by D. Her action right entitles her to the making an order against D by the court. The content or shape of C’s action right is a right to demand that the court exercise its power to alter C’s and D’s jural relations (by the creation

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<sup>200</sup> The writing of Stephen A Smith on this topic is very instructive. Although I arrive at quite different conclusions from Smith, I could not have developed and crystallised my thoughts on the topic without his writings; see Smith, ‘Rights, Remedies, and Causes of Action’ (n 173).

<sup>201</sup> Zakrzewski (n 94) 50.

<sup>202</sup> *Letang v Cooper* [1965] 1 QB 232, 242G-243A.

of the remedy). By contrast, in Hohfeldian terms, C's substantive right is usually a claim right.

Hohfeldian terminology will help drive home the point I am making here, by helping to illuminate the structural contrasts between the different legal rights at play. By way of a quick explainer, WN Hohfeld criticised the insufficiently precise language of 'rights' and 'duties' used to refer to all jural relations between private citizens.<sup>203</sup> In their stead, he proposed more precise language in 'a scheme of 'opposites' and 'correlatives''.<sup>204</sup> The word 'right' would be confined to C's 'claim right' defined as an entitlement to demand that D perform or refrain from an action and correlated to a corresponding duty upon D to do so.<sup>205</sup> By contrast, C's 'power' is an entitlement to bring about a change in D's jural relations, and is correlated to a corresponding liability in D.<sup>206</sup> Hohfeld defines two further such relations, but these two pairs of correlatives suffice for our purposes.

However, the contrast between the Hohfeldian structure of substantive rights and action rights is merely apparent. The content of a substantive right can also be a right to demand that D exercise a Hohfeldian power to change rights and obligations. Consider a further example:

*Whiteacre: D owns Whiteacre. C has a right of pre-emption over Whiteacre, entitling her to demand that D exercise his powers of sale over Whiteacre in a particular way.*

The content and structure of C's right of pre-emption look very similar to that of an action right. Thus, more importantly, what distinguishes substantive rights from action rights is the direction in which they operate. Whereas substantive rights and obligations are a jural relation between C and D, individual subjects of private law, an action right is a jural relation between C and the competent

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<sup>203</sup> Hohfeld (n 40) 35.

<sup>204</sup> *ibid* 36.

<sup>205</sup> *ibid* 38.

<sup>206</sup> *ibid* 50.

court. This is perhaps *the* distinguishing criterion; as Austin rightly recognised, action rights are ‘rights which avail against the ministers of justice rather than against the defendant.’<sup>207</sup> To complete the picture, remedies are, again, jural relationships between C and D. However, what distinguishes them from substantive rights is that remedies arise from the fact of a judicial award having been made.

Of course, it might also be possible to conceptualise a right as the combination of substantive right and action right that entitles C to her remedy. For instance, using *Fence Painting*, C would have a composite right that D paint her fence if and only if C has standing to expect D to paint her fence, and if she can demand of the court that they order D to do so if he does not. However, as the above shows, descriptively, there are sometimes instances where C has the standing to expect D to paint her fence but where C cannot demand that the courts force D to paint her fence. In fact, the default rule is such that C can only enforce her secondary right to be paid damages for the non-painting.

#### *The case for using this terminology in our discussion*

There are several reasons to distinguish (a) between substantive rights, action rights and remedies and (b) between direct, type-I indirect and type-II indirect enforcement of substantive rights. First, that terminology is required in order to express all the moving parts in the enforcement of substantive rights. As we observed in the last section, substantive rights and remedies can come apart in some situations, and it is helpful to have terminology to describe those situations accurately. This separate terminology, unlike the terminology employing composite rights considered in the last paragraph, recognises the analytical possibility that these rights are distinct.

Secondly, The Distinction exists in the space of substantive rights, as contradistinguished from action rights and remedies. It would not be possible to draw it in the way that the Austinian conception demands without delineating

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<sup>207</sup> Austin (n 3) 765.

substantive rights from these other rights. As we shall see in the next chapter, it is a corollary of this that theories that deny the separate existence of substantive and action rights cannot properly accommodate The Distinction. Any theory that denies these variable enforcement relationships thus poses a challenge to the existence of The Distinction, since it deprives The Distinction of the space in which it exists.

Lastly, distinguishing between these different rights gives us the nuance to understand the differences that the courts themselves make. For instance, the courts themselves distinguish between the type-I indirect enforcement and the type-II indirect enforcement of primary rights. Whereas damages *in lieu* of an injunction are explicitly based on C's substantive primary right, contractual damage awards are based on C's secondary right to receive damages and thus more remotely on C's primary right to receive the performance bargained for.

### **From remedies to rights**

Lastly, we must consider the extent to which the award of a remedy allows us to infer the existence of a substantive right. The award of remedies is, as Smith recognises, one of the most noticeable outcomes of litigation and since many private law rights are created by and evidenced in precedent, there must be some connection between the award of remedies and the existence of substantive rights.<sup>208</sup> Some of the sceptical views that will be considered in Chapters 6 and 7 rely in part on such inferences. For now, suffice it to say that our conclusions from the last two sections should make us immediately suspicious of such attempts. After all, we concluded that there can be remedies that are not based on any substantive rights; looked at from a different angle, there can be action rights among the premises of which there are no substantive rights. If a remedy can be based on something other than the existence of a substantive right, then we cannot infer the existence of such a right from the

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<sup>208</sup> Smith, 'Rule-Based Rights' (n 188) 221.

award of the remedy alone.<sup>209</sup> When a matrimonial property adjustment order is made, that is not evidence that the claimant has any substantive rights.

Even if the availability of a remedy does not necessarily indicate the existence of a substantive right, it can be tempting to infer certain things about the nature of rights from the award of remedies. For instance, in support of his arguments canvassed in the last chapter, Robert Stevens infers facts about the nature of our private law rights from the availability of certain remedies. Stevens argues that the availability of ‘a variety of remedial responses ... for the commission of a wrong ... obviously [reveals] ... “the distinction between primary and secondary rights”’.<sup>210</sup> Even confining the remit of the argument by making the reasonable assumption that the remedial responses Stevens has in mind are remedies based at least in part on a substantive right, there are multiple ways of parsing this argument. This assumption excludes, for the time being, remedies not based on substantive rights.

First, it could be that Stevens is asserting that the existence of secondary rights is implied by the availability of certain remedial responses because these remedial responses resemble secondary rights and remedial responses always resemble the rights they are based on.<sup>211</sup> This could be read as a descriptive local claim, an analytical claim or a normative claim. As a descriptive local claim this seems patently false: there are, as observed above, sometimes remedies the content of which might seem to be based on a secondary right but which are in fact the type-I indirect enforcement of an underlying primary right. An example of this is the award of damages *in lieu* under Lord Cairns’ Act.

Consequently, Stevens’s claim cannot be supported as an analytical claim, either. To elaborate, let us assume, in line with the foregoing, that Stevens’s

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<sup>209</sup> Smith, ‘Rights, Remedies, and Causes of Action’ (n 173) 237–238.

<sup>210</sup> Stevens (n 26) 286; citing Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (n 175) 10.

<sup>211</sup> For present purposes, let us pause what definition of resemblance we are using so that this is a relatively modest claim. I do not wish to spend much time arguing about what precisely resemblance would entail.

assumptions are not empirically sound. Let us further assume that the secondary rights that our systems purport to create are genuine rights.<sup>212</sup> Given those assumptions, it follows that Stevens's hypothesis cannot be correct as regards rights in general – a single negative instance disproves the general positive claim. Stevens's assertion is initially more plausible as a normative claim: there is a plausible case for saying that if prior to a court order I have a right that you *phi* the court should, other things being equal, make you *phi*. Furthermore, it might be reasoned that, again other things being equal, the court should not order you to *chi* instead. Of course, other things are seldom equal. Thus, even a normative claim is little more than a *pro tanto* argument and certainly insufficient for positing a necessary connection.

Another possibility would be that the argument is merely one of inference: because we can observe remedial responses whose content closely resembles the content of secondary rights we can infer that secondary rights exist. This is more plausible. Absent further evidence, and using Occam's razor, a substantive legal or moral duty to *phi* is the best explanation for the award of a remedial duty to *phi* upon demand. Of course, that would prove rather less than that the 'obvious' existence of the primary-secondary distinction.

Perhaps it would be enough for a *prima facie* inference to be drawn to that effect. However, there is better evidence available. In cases that look like *Fence Painting*,<sup>213</sup> for instance, we can take the courts at their word when they state that C had a secondary right to be paid damages. Similarly, in cases like *Wrotham Park Estate Ltd v Parkside Homes*<sup>214</sup> we should be able to take litigants to know what they are doing when they bring claims based on their primary rights.

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<sup>212</sup> For this premise not to be given would require a scepticism about the genuine nature of the substantive rights in *this* legal system paired with the denial of such scepticism with regard to rights in general; that seems to be an insufficiently motivated position.

<sup>213</sup> See the definition in Chapter 1 in the text preceding n. 10 above.

<sup>214</sup> *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* (n 187).

If this last section seems cursory, this is intentional. I will be addressing theories that are sceptical about the existence of certain types or categories of rights in the next two chapters. Unsurprisingly, scepticism about the existence of unenforced or unenforceable rights is central to all of these theories. Hence, there will be ample opportunity to engage with these theories. Hence, the present section is merely intended to make the connection between that discussion and the strands of discussion that run through this chapter.

## Chapter 6: Global Scepticism

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*But, say you, surely there is nothing easier than for me to imagine trees, for instance, in a park, or books existing in a closet, and nobody by to perceive them. I answer, you may so, there is no difficulty in it; but what is all this, I beseech you, more than framing in your mind certain ideas which you call books and trees, and the same time omitting to frame the idea of any one that may perceive them? But do not you yourself perceive or think of them all the while? This therefore is nothing to the purpose; it only shews you have the power of imagining or forming ideas in your mind: but it does not shew that you can conceive it possible the objects of your thought may exist without the mind.* <sup>215</sup>

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### Introduction

Just as the question of unobserved trees has been a mainstay in the philosophy of science since the publication of George Berkeley's *Principles of Human Knowledge*, so scepticism about the existence of unenforced or unenforceable legal duties has exercised legal theorists at least since the publication of Austin's *The Province of Jurisprudence Determined*.<sup>216</sup> This scepticism has, as the reader may have noticed, already been foreshadowed by the discussion in the last section of the previous chapter. For the purposes of this thesis what is significant is that forms of this scepticism might deny the existence of some of the rights that we have axiomatically assumed exist and form part of The Distinction. This poses a risk that ultimately, The Distinction might become meaningless. In order to properly consider how this challenge to The Distinction arises, it will be helpful to roughly divide those who subscribe to the many different varieties of this scepticism into two categories. Theorists in the first category, whom I shall call

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<sup>215</sup> George Berkeley, *Principles of Human Knowledge and Three Dialogues* (Jacob Tonson 1734) s 23.

<sup>216</sup> Austin (n 3).

Global Sceptics, make a variety of claims about the nature of law which, in different ways, make it the case that some rights that are regarded by others as primary rights are not regarded as legal rights. All of the theorists that I have labelled Global Sceptics are working in general jurisprudence; that is, they are concerned with the nature of law, in the abstract. By contrast, theorists in the second category, whom I shall label Local Sceptics, make claims about the non-existence of one or a range of particular primary rights. Local Sceptics are engaged in special jurisprudence; that is, they are concerned with questions about particular areas of law.<sup>217</sup>

In this chapter, I shall be looking at the relationship between the general theories of the nature of law which I call Global Scepticism and The Distinction. The chapter has two aims: first, to consider what, if any, implications the different versions of Global Scepticism have for The Distinction; and, secondly, to consider whether The Distinction can be a useful test case that might provide us with any insights about these theories. To answer these questions, I shall first examine the version of Global Scepticism that arises from the general jurisprudence of Oliver Wendell Holmes and Hans Kelsen, before considering whether the interpretivist project of Ronald Dworkin (and those whose work is based on his theory of the nature of law) also gives rise to Global Scepticism.

In the next chapter, I shall examine the work of those Local Sceptics who deny the existence of primary duties in tort law in instances where those primary duties are not, or are rarely, enforced directly and are enforced only, or primarily, indirectly, through the enforcement of the secondary rights arising from their breach. In particular, I shall focus on the work of those who doubt the existence of (i) duties of care in negligence, and of (ii) duties underlying strict liability.

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<sup>217</sup> Leo Boonzaier has recently written about this distinction between Global and Local Scepticism as it occurs within the work of Holmes, albeit that he uses different terminology: see his 'Wrongs and Reasonableness' (2018) draft thesis chapter (cited with permission and on file with the author) s 2.

Returning to the remit of this chapter, any theory of primary and secondary rights has to engage with Global Scepticism for two reasons: first, as we will see in this chapter, Global Scepticism directly challenges The Distinction. Secondly, Local Scepticism's challenge to The Distinction is often reliant on the arguments of Global Scepticism; if Global Scepticism fails, some Local Scepticism cannot get off the ground.

In order to engage with Global Scepticism, I first consider command theories. These are a family of theories that consider legal obligations to be nothing more than the prediction of (or preconditions to) some sort of officially sanctioning act – usually the award of a remedy. In this part of the chapter, I first consider the view, advanced by Holmes, that a legal obligation to *phi* is nothing other than a prediction that some unpleasant event will follow in the event that the defendant fails to *phi*. This view, apart from radically altering our understanding of what a legal obligation is, also poses a serious challenge to The Distinction. Given that it is hard to see how both the primary and secondary obligations in, say, *Fence Painting* could be seen as a prediction, it is impossible for this theory to countenance the existence of both the primary duty to paint the fence and the secondary duty to pay damages. Either one is the prediction, or the other is. However, I argue that the perceived threat that this poses to The Distinction is merely that – a perceived threat. The Holmesian view of legal obligations does not have much to recommend it. It fails as an account of the nature of law for the reasons famously enumerated by HLA Hart, which I shall set out below.

Next, I will consider the Kelsenian account. According to Kelsen's view, an obligation is a legal obligation if it forms the normative antecedent to judicial enforcement action. I argue that this view can easily accommodate both directly enforced primary and secondary rights and type-I indirectly enforced primary and secondary rights.<sup>218</sup> Thus, the Kelsenian account is more accommodating

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<sup>218</sup> Recall the definition of these terms in the section on 'My scheme' in Chapter 5, above. Direct enforcement is the award of a remedy that imposes the same obligation as the right the remedy is based on. Type-I indirect enforcement is the award of a remedy that imposes a different obligation from the right the remedy is based on. Lastly, type-II indirect enforcement of a primary

of The Distinction, since most primary and secondary rights would continue existing if Kelsen were right about the nature of law. However, this account nonetheless creates a problem for The Distinction, since it is unclear whether it can accommodate type-II indirect enforcement of primary rights. If type-II indirectly enforced primary rights are not primary rights, we would not have many of the primary rights we think we do have. I argue, however, that far from presenting a problem for The Distinction, this realisation reveals a weakness in the Kelsenian account. The notion of an antecedent can easily be stretched to include not only type-II indirectly enforced primary rights but much else besides. Thus, the Kelsenian account is not a reliable test of what counts as a legal obligation and what does not, and thus fails as a theory of the nature of law. If all command theories fail, they do not present a serious challenge to The Distinction.

In the second half of this chapter, I consider a different family of theories of the nature of law and legal obligation that can also potentially lend itself to Global Scepticism. Some strands of interpretivism, the family of theories influenced by the work of Dworkin, define our legal obligations as (some of) the moral obligations that arise as a consequence of the actions of legal institutions – the courts, parliament etc. However, since defining our legal obligations as the entirety of the moral obligations that arise from those actions would be overinclusive, these views need some delimiting criterion to appropriately constrain the scope of what they consider to be legal obligations.

Some attempts to constrain the scope of what counts as a legal obligation in this context use enforceability as a criterion. This, as with the command accounts considered in the first half of this chapter, leads to a Flat View of legal obligation that excludes primary rights that are only type-II indirectly enforced from the scope of what is considered a legal right. This recategorisation of many rights that would always exist in situations where both primary and secondary

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right is the award of a remedy that imposes the same obligation as the secondary right that arose from the breach of that primary right.

rights play an important role on the orthodox view of The Distinction removes much of the utility of The Distinction as a classificatory dichotomy. However, I argue that, there are other, similar, versions of interpretivism that can accommodate type-II indirectly enforced rights, and thus leave The Distinction intact. All that is needed is to find a different delimiting criterion that can keep out clearly non-legal moral obligations that arise from institutional action. Finally, I suggest one such criterion.

#### Command theories

The most obvious version of Global Scepticism is brought to us by so-called ‘command’ or ‘imperative’ theories of the nature of law. The writings of Austin, Bentham, Holmes and Kelsen on the nature of law all constitute prominent examples of such theories.<sup>219</sup> However, to illustrate the point for our purposes, it will suffice to focus on the writings of Holmes and Kelsen. I have chosen Holmes because his theory most starkly illustrates the scepticism in Global Scepticism,<sup>220</sup> and I have chosen Kelsen because his theory is the most recent and sophisticated version of command theory.<sup>221</sup> If any version of command theory is going to withstand scrutiny and survive to stir up trouble for The Distinction, it is likely to be Kelsen’s.

#### Holmes

In *‘The Path of the Law’*, Holmes suggests that substantive legal obligations are ‘nothing but ... prediction[s]’ of the sanctions that will result from their breach.<sup>222</sup> We will return to quite what these sanctions are on Holmes’ theory. Animated by a concern to emphasise that the content of the law is merely historically determined and accidental, Holmes sought to move away from a reliance on the

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<sup>219</sup> See the precis provided in Leslie Green, ‘Legal Positivism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2018, Metaphysics Research Lab, Stanford University 2018) s 2 <<https://plato.stanford.edu/archives/spr2018/entries/legal-positivism/>>; see also Austin (n 3); Holmes (n 11); Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press Oxford 1992); Hans Kelsen, *Pure Theory of Law* (Univ of California Press 1967).

<sup>220</sup> More on this below.

<sup>221</sup> Green, ‘Legal Positivism’ (n 219) s 2.

<sup>222</sup> Holmes (n 11) 700.

terminology of ‘rights’ and ‘duties’ which, due to its close connection to the language of morality, obscured the distinctness of legal and moral obligations.

<sup>223</sup> Although we will examine that argument briefly, what is important about Holmes’ account of the nature of law is that it might tempt us into thinking that primary rights and duties do not exist.<sup>224</sup>

Although this account of the nature of law can be read as creating a threat to merely type-II indirectly enforced primary rights as we understand them, it is better understood as leading to the erasure of the distinction between type-I and type-II indirect enforcement, and thereby to a jettisoning of many secondary rights. Holmes addresses primary rights directly, stating that ‘so-called primary rights and duties are invested with a mystic significance...’, and that the ‘duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else.’<sup>225</sup> Crucially, we are not told whether the predicted outcome – paying damages – refers to the eventuation of the secondary duty to pay damages or to the eventual judicial order to pay damages. Put differently, on the language used in the above quote, as well as in the rest of *The Path of the Law*, it is quite simply ambiguous whether ‘paying damages’ refers to, in the language of the last chapter, the eventuation of a substantive secondary right, or whether it refers to a judicially ordered remedy.<sup>226</sup>

If paying damages refers to the eventuation of a substantive (ie pre-court) secondary right to be paid money, then Holmes’ theory of substantive legal rights as mere predictions applies to primary rights whereas secondary rights are sanctions. On that reading, the problem for The Distinction would be that primary and secondary rights would be very different beasts, neither of which would be *normative* legal obligations between C and D in the sense that those

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<sup>223</sup> *ibid* 708.

<sup>224</sup> *ibid* 702.

<sup>225</sup> *ibid*.

<sup>226</sup> It is of note that this ambiguity follows the pattern, identified in the last chapter, of insufficiently disambiguating uses of The Distinction in the Austinian sense of two classes of substantive rights, on the one hand, or in the sense of the rights-remedies distinction, on the other hand. See the Discussion in the section titled ‘The temptation to conflate’ in Chapter 5.

terms are commonly understood; primary rights would be predictions and secondary rights would be sanctions.

However, substantive secondary rights do not really qualify as sanctions, since they do not involve being *ordered* to pay damages.<sup>227</sup> Consequently, in light of the overall argument in *The Path of the Law*, it is more likely that instead ‘pay damages’ refers to the imposition of a court-ordered remedy. On that reading, there will never be any occasion for the existence of secondary rights and obligations, since all substantive rights would be primary rights in the sense of predictions of remedial consequences. Consequently, type-I indirect enforcement would never exist, since in all cases of what we now regard as type-II indirect enforcement, what is being enforced – if we can use that term at all, on Holmes’ view – is the primary right, rather than an interposed secondary right.

Thus, the real challenge Holmes’ theory and other command theories pose for The Distinction is due not to its anomalous view of what it means to have a legal right, but rather to the resulting flattening of the structure of substantive legal rights. On this second reading, primary rights would still only be predictions rather than genuine normative rights, but that is not even the problem for The Distinction, since we cannot draw The Distinction where there is only one plane of substantive rights – however they may be understood.

However, this conclusion should not give proponents of The Distinction excessive cause for concern, since Holmes fails to make a convincing case for his conception of the nature of law. As mentioned above, although Holmes purports to make an argument about the nature of law, the only positive claims he advances to support that argument are his observations regarding the desirability of moving away from moral language. Whereas that argument might establish that the law *should* consist only of predictions, however, it fails to

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<sup>227</sup> In fact, Smith has argued that not even court-ordered remedies are really sanctions, as the true sanctions are the applications of the enforcement mechanisms - such as eg writs of control etc - that are available in order to ensure compliance with the court ordered remedies; see his ‘Rights and Remedies’ (n 179) 47–49.

establish one way or another what the law *consists of in fact*.<sup>228</sup> The point is obvious, but to spell it out: the fact that it would be preferable for me to have done all my Christmas shopping by 24 December does not make it the case that I have.<sup>229</sup> Furthermore, as Hart has famously shown, thinking of the law in terms of rights and obligations makes rather more sense. As Hart puts it, command accounts of the nature of law ‘obscure... the fact that ....rules...are not merely ... a prediction ....[of] sanctions[,] ... but also a reason or justification for such [sanctions]’.<sup>230</sup> Although there has been one prominent recent attempt to rehabilitate command theory,<sup>231</sup> this revision of command theory cannot overcome the hurdle that duties simply provide a better fit for our intuitions about at least parts of the law.

### Kelsen

Kelsen’s account of legal obligations (or norms) as ‘reconstructed legal norm[s]’, albeit considerably more sophisticated, raises a similar challenge to the existence of The Distinction. Kelsen, like Holmes, seeks to free legal norms from any conceptual connection to moral norms: in order to ‘secure the autonomy of the law ... vis-à-vis the moral law’, his theory dispenses with any understanding of legal norms as ‘oughts’ and in its place reconstructs each legal norm ‘as a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence’.<sup>232</sup> A legal obligation to *phi* is thus nothing more than the law specifying not-*phi*-ing ‘as the condition for a coercive act qualified as the consequence of an unlawful act’.<sup>233</sup>

Viewed through the prism of the last chapter, Kelsen’s theory essentially focusses on causes of action – ie our entitlements to remedies – and thereby

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<sup>228</sup> It has recently been suggested that Holmes is more convincing in his Local Scepticism than in his Global Scepticism: see Boonzaier (n 217) s 2.2 Whatever the merits of that claim, Holmes’ arguments in favour of Local Scepticism cannot, by hypothesis, establish any Global Scepticism.

<sup>229</sup> Shiffrin (n 12) 169.

<sup>230</sup> HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 82.

<sup>231</sup> Frederick Schauer, *The Force of Law* (Harvard University Press 2015); for a detailed critique, see: Leslie Green, ‘The Forces of Law: Duty, Coercion, and Power’ (2016) 29 *Ratio Juris* 164 <<https://doi.org/10.1111/raju.12122>> accessed 11 August 2019.

<sup>232</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 219) 23.

<sup>233</sup> *ibid* 43.

relegates substantive rights and obligations to the background. Kelsen's conceptualisation of legal norms creates problems for The Distinction depending on how we define what a 'condition' is. It seems to be clear that a substantive legal right would count as a condition of the ensuing remedy where that right is directly enforced and where it is type-II indirectly enforced. Where D has a (primary) contractual obligation to pay a sum of money, that debt is a necessary ingredient in C's cause of action – or a condition using Kelsen's terminology – entitling C to an order that D pay her that sum. Similarly, where D is under a (primary) contractual obligation not to compete with C, but the court awards damages in lieu of an injunction (type-I indirect enforcement), C's primary right is a necessary ingredient in her cause of action entitling her to that remedy.

However, D's primary duty not to assault C does not form part of the cause of action entitling C to the payment of damages. Rather, on the orthodox understanding of tort law, that role is reserved for D's secondary obligation to pay damages that arises from the breach of her primary obligation. Thus, depending on how 'condition' is used here, Kelsen's theory would not be able to accommodate merely type-II indirectly enforced primary rights, such as D's duty not to assault C.

It is possible, of course, to define 'condition' more widely so as to catch merely type-II indirectly enforced primary rights within Kelsen's reconstructed norm. After all, but for the existence of the type-II indirectly enforced primary right, the secondary right would not have come into existence, and, in that sense, the primary right is a condition of the remedy. However, that reasoning is not limited to primary rights and could be extended much further. As Leslie Green points out, Kelsen 'has no principled way to fix on the delict as the duty-defining condition of the sanction' to the exclusion of all the other 'antecedent conditions' such as the existence of the legal system, the presence of the parties in the realm, etc.<sup>234</sup>

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<sup>234</sup> Green, 'Legal Positivism' (n 219) s 2.

## Interpretivism

Another threat to The Distinction comes from a theory of the nature of law that has steadily been gaining in popularity over the past decade: interpretivism. Interpretivism describes the family of theories that views our legal obligations as being (partially) determined by the impact of institutional action upon our moral obligations. Some forms of interpretivism, sometimes styled *pure* interpretivism, view legal norms as a subset of political morality.<sup>235</sup> That interpretivism is in direct contrast with legal positivist views according to which morality does not figure among the sources of law. Whilst there are many important differences between different strands of interpretivist thought, I have sought to only highlight those nuances where they make a difference to the interaction of interpretivist theories and The Distinction.

One important *explanandum* for all theories of the nature of law and legal obligations is the question of how it is possible that a particular institution taking a particular action can change our legal obligations. For instance, how can the fact that the House of Lords decided *Donoghue v Stevenson*<sup>236</sup> the way it did make it the case that manufacturers of goods owe legal duties to take reasonable care to not injure those who will eventually use their products? The interpretivist theories that we shall focus on here explain this *explanandum* as follows: due to the moral principles mandating that laws be predictable and that like cases be decided alike etc, the decisions of the legislature and those of the (higher) courts can give rise to derivative moral obligations, which are our legal obligations. On this picture, our legal obligations are a subset of our moral obligations.

The mechanics of institutional action giving rise to derivative moral obligations are no different from the ordinary mechanics of any other action, such as agreeing to help a friend move house, for instance, that changes our moral profile, ie our moral entitlements and obligations. When A promises B that she

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<sup>235</sup> Nicos Stavropoulos, 'Legal Interpretivism' in Zalta (ed), *SEP* (Summer 2014) s 4 <<http://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/>>.

<sup>236</sup> *Donoghue v Stevenson* [1932] AC 562.

will help him move house on October 1<sup>st</sup>, the general moral principles, whatever they may be, that make it the case that we generally should keep our promises, together with the fact that A made that particular promise to B, make it the case that she comes under a new, or as I call it here, derivative moral obligation to help B move on October 1<sup>st</sup>. Similarly, the general moral principles underpinning our judicial system – the rule of law, stare decisis etc – make it the case that following the House of Lords’ decision in *Donoghue v Stevenson*, careless manufacturers came under a derivative obligation towards the ultimate consumers of their products.

There are two distinct ways in which interpretivism comes to interact with concerns of enforcement and enforceability, and consequently might lead us to conclude that those primary rights which are never directly enforced are not in fact legal rights. First, on one reading of interpretivism, enforceability is an important criterion of legality. Secondly, one of interpretivism’s attractions is that it can tell a convincing story about how law can help justify coercive enforcement, which in turn can highlight one of the most useful uses to which The Distinction is put in the English legal system.

As to the first, in order to understand why on some interpretivist theories enforceability becomes a criterion of legality, we have to engage with the most obvious problem created by regarding legal obligations as a subset of our broader political moral obligations, which is that this creates the need for criteria separating the legal from the wider domain of the moral. In fact, most pure interpretivist theories do address this concern, as we shall see in the following paragraphs. An initial line of defence for interpretivism is that interpretivists only call those moral obligations which arise as a consequence of institutional action (ie parliament or the courts doing certain things) law. However, as Ronald Dworkin, Mark Greenberg, Scott Hershovitz, and Alexandra Hearne have argued, defining legal obligations as the entirety of our moral obligations that arise from institutional action carries the danger of over-inclusivity; legal

institutions often take actions that change our moral profile in ways we would not consider legal.<sup>237</sup>

Thus, to use Hearne's example, when Camden council changes the speed limit signage on Gower Street from 30mph to 20mph this might alter my moral profile in ways that are both legal and non-legal. Let us assume that, other things being equal, I have a general moral obligation to drive within the speed limit – for instance, my *pro tanto* associative obligations to respect the democratic structures of the country I live in.<sup>238</sup> It is plausible to assume that, as a consequence of the change in signage, I now have a specific legal obligation to drive no more than 20mph on Gower Street, whereas before I had a legal obligation to not exceed 30mph on Gower Street.<sup>239</sup>

Suppose further, however, that I promised my grandmother that I shall visit her every Monday morning before my tutorial, and that I have to drive along Gower Street to do so. When the speed limit was 30mph, I could comply with my obligations to my grandmother by setting my alarm to 8AM, but as a consequence of the changed signage, I now have to set my alarm to 7:45AM. My moral profile has changed, but, if anyone were to suggest that my obligation to get up earlier than before was a legal obligation, then, in a fundamental way, we would no longer be talking about the same sense of legal obligation.<sup>240</sup>

I believe that one way to answer the challenge raised by the getting up earlier example is to refine our hitherto rough sketch of interpretivism by paying attention to *which* of the reasons that are triggered by the relevant institutional

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<sup>237</sup> Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 405–406; Scott Hershovitz, 'The End of Jurisprudence' (2014) 124 Yale LJ 1160, 1187–1188; Mark Greenberg, 'The Moral Impact Theory of Law' (2013) 123 Yale LJ 1288, 1321ff; Alexandra Hearne, 'Law as Morality: Reinterpreting the Dependence View' (2017) draft thesis chapter (cited with permission and on file with the author).

<sup>238</sup> The reason these particular reasons were chosen will become apparent in the following paragraphs.

<sup>239</sup> This example and the resulting argument is directly lifted from Hearne; Hearne (n 237); Scott Hershovitz also uses speed limits as his opening example: see Hershovitz (n 237).

<sup>240</sup> This example is lifted wholly from Hearne; Hearne (n 237).

action actually create legal obligations.<sup>241</sup> Considering the changed speed sign on Gower Street: rather than saying, simply, that the change in our legal obligation is the change in our moral profile that comes about as a consequence of the new sign being put up, as Greenberg would say,<sup>242</sup> a better conception would say that *only some* of the considerations that ground the change in my moral obligations brought about by the new sign are the kind of political reasons that lead to legal obligations. My moral obligation to drive no faster than 20MPH is most likely overdetermined in this situation. Many pre-existing obligations of the driver in that situation will interact with the presence of the new sign to bring about a change in our moral profile.

This refined conception recognises that many of these other underlying reasons are not political reasons. For instance, when the sign is changed, our underlying obligations not to hurt others are triggered, and because driving safely is to some extent a coordination problem, driving within the speed limit helps me to avoid endangering other road users more reliably than leaving it up to me to make an independent assessment of a safe speed. In this way, it gives me reasons to drive within the speed limit irrespective of whether it is the best possible speed limit. Since that reason would have arisen even if the changed sign had been put up by a prankster, it is independent of any institutional action *qua* institutional action.<sup>243</sup> Similarly, I might have prudential reasons to only drive the stated speed limit so as to avoid a ticket.

In addition to those background reasons, I also have political obligations, which are the only reasons that, through institutional action, lead to legal obligations on this refined view. The sort of political reasons that I have in mind here are those that arise from what Dworkin characterises as our associative obligations

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<sup>241</sup> I owe a great deal to Conor Crummey and Alexandra Hearne for helping me develop my thoughts on this particular aspect of the chapter, and to Margaret O'Brien, Nicos Stavropoulos, Harrison Tait, and Alexandra Whelan for many earlier fruitful discussions on interpretivism.

<sup>242</sup> Greenberg (n 237).

<sup>243</sup> On coordination problems and their ability to affect our normative situation see Leslie Green, 'Authority and Convention' (1985) 35 *Philosophical Quarterly* 329; on coordination problems more generally, see David Lewis, *Convention: A Philosophical Study* (HUP 1969).

to the other members of our political community *qua* members of that community.<sup>244</sup> In brief, these are reasons that we owe each other out of respect for our mutual self-governance, such as reasons to respect the democratic enactments of parliament, and the rule of law reasons that ground the rules of precedent. In this instance, these reasons make it the case that when a new sign is put up, our normative profile does not merely change because we should not run other people over and because prudence counsels avoiding the imposition of penalty points on our driving licences, but also because respect for our institutions of government demands taking these kinds of institutional actions seriously as exercises of our mutual self-government in a democracy.<sup>245</sup>

The reason I believe that only the interaction of institutional action and political reasons gives rise to legal obligations is that only where that interaction takes place do we actually have a changed legal profile. Nobody would say, after all, that we had a legal obligation to drive 20MPH if a prankster had changed the speed sign. Of course, it might appear that we have a legal reason, and we might well have real prudential and interpersonal reasons not to exceed that apparent speed limit, but that does not mean that we actually have a legal obligation. Hence, even when it is Camden council that puts up a new sign, those other reasons do not contribute to our legal obligations, and those legal obligations are determined only by the interaction of political reasons and institutional action.

However, even this refined version of interpretivism might still need some criterion, such as enforcement, to keep out other non-legal obligations from its definition. Thus, although Dworkin similarly argues that not all the moral obligations created by institutional action are legal obligations, the objects of his concern are not the moral knock-on effects of institutional action, but certain political or legislative rights which, in his view, are not legal. Thus, even though

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<sup>244</sup> Ronald Dworkin, *Law's Empire* (HUP 1986) 195ff.

<sup>245</sup> Compare the difference between the obligations we owe one another as citizens of the same polity when contrasted against the lesser obligations we owe those who are not members of that same polity argued for in Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113.

they are moral obligations that arise from institutional action, some legislative rights are not properly classified as legal obligations. For instance, Dworkin cites the example of an unparticularised legislative right to health care. Let us suppose that this right has arisen as a consequence of institutional action and is a moral right of citizens against their government; nonetheless, Dworkin suggests, we would not regard it as a legal right. This seems plausible, as an unparticularised right to be provided with some form of health care does not intuitively seem to be a legal right. Dworkin argues that this intuition maps onto the fact that the legislative right to health care is, absent specific institutional action particularising it (giving directions for implementation etc), unenforceable in court. In fact, this enforcement argument might be another way to get out of the dilemma presented by the getting up earlier example. *Mutatis mutandis*, enforcement, or the lack thereof, could be used to distinguish my legal obligation to drive no more than 20mph from my non-legal obligation to get up earlier. Whereas I might face a fine when I drive down Gower Street at 25mph after the changing of the signs, I would not face any legal consequences if I failed to get up at 7:45AM.

It is not clear from the above discussion what exactly enforcement entails in this context. Unsurprisingly, given that these are general theories as to the nature of law, neither Dworkin nor Hearne appear to commit to a position on whether or not indirectly enforced primary rights are legal rights. Enforcement could be confined to direct enforcement here, or it could encompass direct and (one or both types of) indirect enforcement. We could suppose that the concept of enforcement, used to buttress interpretivism in this context, is inclusive of indirect enforcement. Thus, we would be able to sidestep the challenge of accommodating our intuition that primary rights are legal rights with interpretivism.

However, whereas it is plausible that the sense of enforcement that is envisaged here encompasses type-I indirect enforcement, it is less likely that it would encompass type-II enforcement, due to the limiting work that enforcement is

required to do for this type of interpretivist argument. Insofar as type-I indirect enforcement is concerned, there is no reason that Dworkin's contrast between legal and merely political rights would disintegrate if legal rights were transformatively enforced. It is unlikely that the speeding violation in Hearne's example would be met with an order requiring the driver to forthwith drive within the speed limit. The fact that legal enforcement comprises only the paying of a fine in this example does not diminish the utility of using enforcement as a criterion for distinguishing the legal obligation to drive within the speed limit from the merely moral obligation to get up earlier, here. Rights that are type-I indirectly enforced would still be legal rights on both of these theories.

Accommodating type-II indirectly enforced rights within these theories would create some challenges, however. It would, I think, be possible to accommodate these types of rights by stretching the concept of enforcement used by these theories further. Yet, doing so would risk undermining our ability to use enforcement as a criterion for drawing the distinction between legal and other moral rights. Suppose, for example, that we included type-II indirect enforcement in our definition of enforcement for the purposes of drawing Dworkin's distinction between legal and other moral rights. It would work to exclude his putative unparticularised legislative right to healthcare from the legal domain; that right is not even type-II indirectly enforceable.

However, the concrete rights that come about through institutional action but are justified by those legislative rights are enforceable. Thus, when we drill down into how we would define enforcement so as to include type-II indirect enforcement, we would arrive at a definition that ultimately draws an arbitrary line. Why? When we ask what the relationship is between a purely type-II enforced primary right and the ultimately resulting remedy, the answer will be something along the lines of: the legal system awards you this remedy because you have a right, your secondary right, and you have that right because another right, the primary right in question, was violated. For example, a judge might say to a claimant, I am ordering the defendant to pay you £100 because you have a

right to be paid for the damage suffered as a consequence of the defendant's breach of his obligation to deliver 10 widgets to you by 1<sup>st</sup> August.

Absent some *ad hoc* qualification, it is hard to distinguish this justificatory relationship from that between the remedy and any other factor which explains the existence of the secondary right being enforced, such as, for instance, the constitutional provisions that direct judges to award remedies when causes of action disclose certain substantive rights (and when a variety of other conditions are also met). In terms of their relationship to the secondary rights being enforced, the purely type-II enforced primary rights strongly resemble Dworkin's merely legislative rights, once those legislative rights have been given a more concrete shape by legislative action. Once we allow type-II indirect enforcement, there is no separating our primary right being enforced through the enforcement of a resultant secondary right from our right to health care being enforced through the enforcement of, say, a statutory entitlement under the NHS created through statute.

We might be tempted to respond that what distinguishes purely-type-II enforced primary rights from the other factors that help justify the enforcement of secondary rights is that the primary rights are *legal* whereas the other factors are merely moral. However, that would be putting the cart before the horse; after all, the question we are attempting to answer is whether these primary rights are in fact legal rights. It might seem that by this logic, we could also doubt whether type-I indirect enforcement should count as enforcement. However, since the rights that are type-I indirectly enforced do form part of the cause of action that is necessary for the judicial reward of the remedy sought, it seems that they can be clearly delineated. Although it might be argued that using inclusion in the cause of action is a similarly *ad hoc* backstop, it does seem to align with most people's intuitive sense of enforcement.

The interpretivist dilemma faced vis-à-vis the existence of merely type-II enforced primary rights *qua* legal rights thus has two horns. On the one hand, if

we want to use enforcement to draw the line between legal rights and other moral rights, we need to adjust our understanding of legal rights to exclude primary rights which are only type-II indirectly enforced. If, on the other hand, we trust our intuition that these primary rights are legal rights, we cannot use enforcement as the distinguishing criterion. Some would be happy to take this dilemma by the first horn, and simply accept that not everything we would ordinarily consider a primary right is a legal right.

On my view, and as discussed in Chapter 4, what I have described as *substantive* legal rights are not themselves entitlements to a particular remedy. That role is left to action rights, of which substantive rights are only one constituent element. However, on an alternative view, our legal rights are simply what I have described as action rights, ie entitlements to remedies, and what I have described as *substantive* legal rights are simply part of the general normative background of those legal rights.<sup>246</sup> Whilst I find this intuitively implausible, others might not. At first sight, not much appears to turn on it: in some ways, this is simply a disagreement about labelling. However, it is only a disagreement about labelling if all participants in our discussion are aware of the fact that they have chosen to label things differently (or in the same way, as the case may be).

As I have shown in the previous chapter, losing sight of the distinction between substantive rights and cause of action rights can lead to confusion, and limiting our concept of substantive legal rights to those that are enforceable leads to us losing sight of that distinction. Moreover, in a case like *Example 1*,<sup>247</sup> this alternative view relegates my right to have you paint my fence to the non-legal, with my legal right to receive compensation only arising once performance becomes impossible or an anticipatory breach has been committed and accepted.

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<sup>246</sup> I am grateful to Conor Crummey for this suggestion.

<sup>247</sup> See the description of *Example 1* in the section entitled 'My scheme' in Chapter 5 above.

Ultimately, this seems intuitively implausible to me, and I would, instead, take the dilemma by the second horn. This seems more appealing to me because rights which are merely type-II indirectly enforceable are: (1) relevantly different from merely political rights, and (2) in fact classed as legal by most legal practitioners. Of course, the fact that particular rights are part of our concept of what is a legal right does not make it the case that they are. We could think that the stars are holes in the sky. Rather, the fact that we so think of them merely creates a *pro tanto* persuasive reason for belief; absent other information to the contrary, the simplest explanation for this being our concept of a legal right is that that concept maps onto the ontological truth. As Dworkin has argued elsewhere, whereas the very point of a discussion about the nature of law is that the participants may well be fundamentally at odds about the *nature* of law, they must be talking about the same things when they use the word ‘law’ for their discussion to be meaningful. We can have a fruitful disagreement about what ‘the best TS Elliot poem’ is seeking to convey, but our disagreement is pointless if one of us has *Prufrock* in mind and the other *The Waste Land*.<sup>248</sup>

Furthermore, if, like interpretivists, we think that normative considerations determine what our legal obligations are and what remedies courts should award, retaining that distinction is attractive. For it is more plausible that, at least sometimes, different normative considerations apply to the question of what we owe each other as a consequence of institutional action than apply to the question of what the courts should make us do as a consequence of what we owe each other.

Maintaining that our intuitions about the difference between substantive rights and causes of actions latch onto a real distinction does, as I have shown, lead to the conclusion that we cannot use enforceability as the criterion for drawing the line between legal and other moral rights. However, that does not make it the case that we have to abandon interpretivism, or, indeed, that we have to relinquish the insight that enforceability plays an important role. Rather, if we

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<sup>248</sup> Dworkin (n 244) 91–92.

want to remain interpretivists, we must find another criterion for distinguishing legal rights from other moral rights. Attempting that task is well beyond the confines of both this chapter and this thesis. We can, however, briefly, explore what other role might be played by enforcement in an alternative story about interpretivism that *is* compatible with our intuitions about rights which are merely type-II indirectly enforceable.

The state's enforcement of private law rights is, by its very nature, coercive. The threat of a conviction for contempt of court and the resulting imprisonment can be attached – by way of a penalty notice – to every court-ordered remedy. This is quite apart from the fact that the enforcement of civil judgments might include various other coercive courses of action by servants of the state – High Court Enforcement Officers etc. Consequently, the fact that legal rights are enforceable in this manner raises a high justificatory hurdle for any law. As Nicos Stavropoulos has suggested, it is the creation of this justificatory hurdle, rather than anything else, that renders enforcement such a crucial piece of the puzzle about the nature of law. Rather than providing the explanation of the nature of law, as Holmes or Kelsen might have contended, enforcement is a highly normatively salient feature of the background against which laws operate. Explaining that feature (*sc.* enforcement) in turn animates much of the debate surrounding the normativity of law. Whilst Stavropoulos' insight lends some support to the interpretivist project, the realisation that the fact of enforcement creates a justificatory hurdle for law is universal and can be applied irrespective of what one's theory of the nature of law happens to be.

There are many related observations in this neighbourhood. Once we realise that factual enforcement creates a normative hurdle for the laws that are enforced, other related insights become easily accessible. For instance, bearing this realisation in mind, we can see that law which does not clear the normative hurdle Stavropoulos has identified cannot legitimate its coercive enforcement. If laws clear the justificatory hurdle set by Stavropoulos, however, official coercion can be justified where it is prescribed by law. Thus, when Dworkin claims that

‘law provides a justification *in principle* for official coercion’,<sup>249</sup> he must have had a version of law in mind that can clear Stavropoulos’ hurdle. Indeed, the normative link between legality and enforcement is integral to the central normative claim made under the heading of ‘the rule of law’ – the claim that *only* law can justify coercive enforcement. In Dworkin’s words, again: ‘Law insists that force not be used ... except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.’<sup>250</sup>

Lastly, a related argument can be made for limiting what can count as law along these lines. In its simplest form, that argument can be stated as follows: in order to justify why citizens can call upon the state to coerce other citizens to comply with their legal obligations it would be tremendously helpful if citizens were already under obligations to do that which the state proposes to coerce them into doing.<sup>251</sup> Other things being equal, it is much easier justifying the fact of a judicial order (backed by the threat of coercive enforcement) that D pay C £1m if C was entitled, morally and legally, to be paid that sum by D, prior to the institution of proceedings. This argument might be thought to regard direct enforcement as morally preferable, as only direct enforcement can deliver the desired moral justification to coercive enforcement on this simplified argument.

Of course, other things are often not equal and, as I have detailed in Chapter 4, there are often reasons for awarding orders that do not mirror substantive rights or for refusing to make orders even where C is seeking the enforcement of her substantive rights. Stavropoulos recognises this when he acknowledges that the role played by enforcement as part of the morally salient background to the existence of our legal obligations does not make it the case that all, or even most rights, have to be enforced. As he puts it: ‘Not all obligations so affected need be enforced in actual practice. But because some are, the constitution of all is

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<sup>249</sup> *ibid* 110.

<sup>250</sup> *ibid* 93.

<sup>251</sup> I am grateful to Conor Crummey for suggesting this phrasing and pointing out that an earlier draft needed clarification in this regard.

affected.<sup>252</sup> Stavropoulos is indubitably right about the impact of enforcement on the kinds of justifications we have to offer for our substantive legal rights irrespective of their actual enforcement. If the eventual enforcement of rights makes it the case that we need to be especially careful when morally justifying them, it stands to reason that the possibility of their enforcement also gives us reasons, albeit weaker ones, to be careful when morally justifying them.

However, it is unclear from Stavropoulos' article whether he intended this argument to apply beyond enforcement to enforceability. An argument could be made that enforcement is part of the normatively salient background even of rights which are not directly enforceable in theory. On that reasoning, the prospect of any type of enforcement is part of the morally salient background of substantive rights; even type-II indirect enforcement would be sufficient to make it the case that we need to justify our primary rights more carefully.

However, it stands to reason that the justificatory hurdle created by both types of indirect enforcement (or theoretical enforceability) is lower, since the precise content of the substantive right is not mirrored in the remedy. Going back to the contrast between *Example 1* and *Example 2* from Chapter 5, we can see the difference between a remedy replicating the content of the right it is based on – *Example 1* – and a remedy not replicating that content – *Example 2*.<sup>253</sup> Thus, in the case of type-I indirect enforcement, there is the mediating filter of what Rafal Zakrzewski, as discussed in the last chapter, calls transformative enforcement – ie in *Example 2A* the content of a primary right is transformed into an obligation to pay damages in lieu; similarly, in the case of type-II indirect enforcement, such as in *Example 2B*, there is the mediating filter of the interposed secondary right.

Both of these filters make it the case that the content of our substantive rights never turns into a remedy. You will not be ordered to paint my fence in either *Example 2A* or *Example 2B*. Consequently, any objection to coercively enforcing

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<sup>252</sup> Nicos Stavropoulos, 'The Relevance of Coercion' (2009) 22 Ratio Juris 339, 353.

<sup>253</sup> See the definitions in the section on 'My scheme' in Chapter 5 above.

*Fence Painting* will be less strong on any variation of Example 2 than it would be on Example 1, where you will actually be ordered to paint my fence. Of course, in Example 2 your autonomy will still be affected by coercive enforcement of your substantive legal obligation to paint my fence through the imposition of a remedial obligation that you pay me damages. However, since the form that the damages order takes only requires you to part with a sum of money, rather than to perform an act, it stands to reason that it is a lesser intrusion on your autonomy. In fact, it is with reference to this argument that the court's general rule against awarding specific performance for personal service contracts is often justified.<sup>254</sup> If performance of the primary obligation is never coercively demanded, we have to subject the content of indirectly enforced rights to less stringent moral scrutiny, at least insofar as that scrutiny is motivated by any concerns about the justifiability of coercive enforcement.

Albeit creating a lower hurdle for indirectly enforced rights (which are more often than not primary rights), this alternative account of the importance of enforcement does not exclude primary rights from being legal rights. In fact, it might be repurposed to show an advantage of using The Distinction in conceptualising our private law. If what is going on in the version of Example 2 that is present in English Law is Example 2A, it could be said that one valuable benefit of using The Distinction is that, in the law of contract, the mediating interposition of standard secondary rights to compensation allows for the creation, by parties, of a wider range of primary rights. If the content of the primary rights does not end up being enforced directly, any autonomy impinging concerns about the content of those rights goes away. If, conversely, my contracting partners could use the coercive powers of the state to make me do that which I promised to do, the state would have much more reason to pay close attention to what it is I promise. However, because of the interposition of *standardised* secondary rights, there is no need for a *numerus clausus* of primary contractual rights.

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<sup>254</sup> See eg Prince Saprai, 'The Principle against Self-Enslavement in Contract Law' (2010) 26 *Journal of Contract Law* 25, 34–41.

On the flip side, if that is the useful role performed by standard secondary rights, there might, going back to the discussion of *Cavendish* in Chapter 3, be an argument that allowing penalty clauses to circumvent those standardised secondary rights would prevent those secondary rights from playing that useful autonomy enhancing role. Of course, *pace* Lord Neuberger and Lord Sumption, this is irrespective of whether the penalty clauses themselves are expressed as primary or secondary rights.

#### Conclusion

The problem all of the above forms of Global Scepticism pose to The Distinction, is, ultimately the same. It can be represented by the following argument:

P1: For The Distinction to be analytically useful it needs to pick out legal rights at different levels in the chain of enforcement;

P2: Many primary rights are only ever enforced indirectly through the secondary rights that arise from their breach; but

P3: As established in the last chapter, *pace* Austin, some primary rights are directly enforced; and

P4: Only enforceable rights are legal; thus

C: The Distinction is analytically useless.

The challenge posed by Global Scepticism would be significantly more straightforward if, contrary to what we established in the last chapter, it were descriptively or analytically true that only secondary rights were ever directly or type-I indirectly enforced. In that case, those who subscribe to Global Scepticism would be denying the existence of any rights which others would label primary rights *qua* legal rights. If we could only ever bring a claim in damages, the Global Sceptic might legitimately deny the existence of a primary right to contractual performance. Since we can, however, bring claims in debt and (in certain circumstances) obtain orders for specific performance of other contractual obligations and *mutatis mutandis* in other areas of private law, some primary rights clearly exist even on the sceptical accounts.

The next argument the Global Sceptic opponent of The Distinction might be tempted to make is that the primary and secondary rights that are being enforced are both on the same level vis-à-vis enforcement, and that it follows from this that there is no point making The Distinction. This claim would be more persuasive, if the kind of situations in which we enforce primary rights never overlapped with the kinds of situations in which we enforce secondary rights. If we only ever awarded damages for breaches of non-monetary contractual duties and only ever directly enforced monetary contractual duties through claim in debt (in other words if damage awards for non-payment of a debt and actions for specific performance did not exist), Global Scepticism's claim that all the unenforced/unenforceable primary rights are not really legal rights<sup>255</sup> would make it the case that all contractual rights exist on the same plane: they would arise from non-legal events and would be enforced without first being transformed into other, different legal rights. Thus, the Global Sceptic would, by way of discounting rights that are only indirectly enforced, have proven that The Distinction is not useful.

However, as we saw in the last chapter, sometimes a claimant will have a choice between enforcing her primary rights and enforcing her secondary rights arising from the breach of those very primary rights. Hence, even if we acceded to the Global Sceptics' claims, there would still be instances in which we could intelligibly distinguish between primary legal rights, arising from non-legal events, and secondary rights, arising from the breach of those primary rights. For instance, I might have a primary right that you deliver me the Egon Schiele drawing I bought from you, while simultaneously having the option to sue you for damages on the basis of the secondary right that I have as a consequence of your continuing breach of that primary obligation.

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<sup>255</sup> Of course, for the reasons that made us doubt the various forms of Global Scepticism above, the Global Sceptic's claim here is still deeply unappealing.

As a consequence, the strongest assault on The Distinction that can be made using Global Scepticism is that it does not exist outside the context described in the previous chapter. The attack on The Distinction is thus not as wide-reaching as we had feared, but merely an attack against the applicability of The Distinction in some contexts.

## Chapter 7: Local Scepticism

### Introduction

In the last chapter, Chapter 6, I examined the implications of Global Scepticism for the existence and usefulness of The Distinction. I established that there are two strands of Global Scepticism, those based on command theories and those based on interpretivism, that could potentially pose a challenge to either the use or usefulness of The Distinction. I concluded that, although these challenges are *prima facie* appealing, they fail to establish a positive case for completely jettisoning The Distinction. Having concluded that wholesale challenges to The Distinction fail, it makes sense to investigate whether there are any more modest challenges that might succeed. In investigating Local Scepticism, I shall be doing just that. This chapter is divided into three sections, reflecting the three areas in which there have been challenges to the existence of duties.

First, I consider those Local Sceptic accounts that deny the existence of what would otherwise be primary duties in the tort of negligence. Before it is possible to do so, I must first define what the correct candidate primary duty is. Although it is tempting to consider this to be the duty of care, I argue that it is actually a duty to not carelessly cause harm. Having recognised that this is the relevant duty, we consider the Local Sceptics' accounts. According to these views, there is simply no duty not to negligently cause foreseeable harm in cases where such a duty is commonly supposed to exist. If these theories correctly describe the law of negligence, the perceived universality of The Distinction would be under threat, considering the large part of the legal landscape that negligence occupies in practice.

However, I argue that the understanding of our rights and duties in the law of negligence advocated by so called 'rights theorists' is descriptively more accurate and normatively more appealing. Descriptively, there are several flaws in the arguments of the sceptics, chief among which is the reliance on the most simplistic of the Global Sceptics' arguments that we rejected in Chapter 6.

Although the rights theorists' arguments also fall short of establishing what they set out to show, I argue that their view is nonetheless descriptively more accurate. Furthermore, the rights theorists' view of the law of negligence is a more attractive picture of the law as it (a) more clearly captures the distinct stages in legal reasoning in this area and (b) is able to explain the outcomes in the law of negligence with greater ease and elegance. Thus, I argue that it would still be normatively preferable to conceptualise the law of negligence in this way, even if it were not the case that it is descriptively more accurate to do so. In light of the failure of the sceptics' view of negligence, the challenge to The Distinction is merely apparent.

Secondly, I consider an argument that denies the existence of strict primary duties in the case of the strict liability torts, such as nuisance. In denying the existence of a subset of our primary obligations, this argument parallels the last challenge to The Distinction. Advancing this challenge, Stephen A Smith argues that the purported strict duties in tort cannot in fact be duties because they would require us to try unreasonably hard. I argue that this does not, as one might think, simply lead to thinking of primary duties as primary liabilities and of primary rights as primary powers. Rather, due to the structure of how substantive rights arise, it would lead to there not being any jural relations instead of the primary duties, and strict liability would simply have one plane of formerly secondary and now primary rights and obligations.

However, I argue that such a radical rethinking of strict liability torts is not necessary because Smith's argument fails for two reasons. First, legal and moral obligations can come apart; even if the duty to try unreasonably hard were incapable of being a moral obligation, that would not preclude it from being a legal obligation. Secondly, I argue that Smith's argument fails as a moral argument, in any event, since we do sometimes have moral duties that we cannot comply with.

In the last section, I consider Smith's argument that, across private law, we do not in fact have a secondary duty to pay damages, but only have a liability to pay damages. Since the suggested secondary power-liability relationships are nothing other than our action rights viewed through a slightly different prism, the effect would be to deny the existence of secondary rights to receive damages altogether. Given the dominance of rights to receive damages among our secondary rights, this argument, if successful, is the most serious of the Local Sceptic challenges to The Distinction.

Fortunately, however, this argument also fails. The first plank of the argument is that we cannot have such a right in light of the unavailability of a tertiary right to receive damages for non-performance of the secondary right to payment. The second plank of the argument is that the secondary duty to pay damages cannot be conformed with prior to trial. I argue that the former is explained by the fact that albeit in existence prior to judgment, the secondary right to receive damages is not due until the judicial determination of quantum. The latter, in turn, is belied by the availability of the defence that successful settlement provides.

## **Negligence**

There has been an ongoing debate in tort scholarship regarding the best conceptualisation of the law of negligence. Essentially (if I may be forgiven for adopting a broad-brush approach), there are two schools of thought. There are rights theorists and sceptics. Rights theorists believe that the law of torts, and more particularly, the law of negligence, is based on rights that C has against D, whereas sceptics deny the existence of such rights. I do not mean to suggest that the views of the sceptics are exclusively defined negatively; indeed, many of them offer coherent loss-based accounts of the law. However, I have termed them sceptics here, since we are interested in the impact of their views on The Distinction. They can properly be described as sceptics regarding the applicability of The Distinction in analysing the law of negligence, since their

views necessarily entail denying that The Distinction is applicable in this context.<sup>256</sup>

It is important to note at the outset that we are here only concerned with the ordinary genus of negligence. Most sceptics are content to concede that there are indeed primary rights and duties in respect of *Hedley Byrne*<sup>257</sup> negligence liability based on voluntary undertakings.<sup>258</sup> The best conceptualisation of *Hedley Byrne* liability is irrelevant for our purposes here, since the Local Sceptics' criticism is not directed towards it, no matter how it is conceptualised.

#### A preliminary clarification

Before we can address the question of whether there are primary rights and duties in negligence, it is necessary, as a preliminary matter, to clarify the nature of the candidate duties and rights we are talking about, that is, which rights and duties might be said to arise in the law of negligence about the existence of which we can have a meaningful discussion. At the most basic level, in order to have a cause of action in the law of negligence, a claimant must establish four things: (1) that the defendant owed her a duty of care in law; (2) breach of that duty by the defendant; (3) a causal connection between that breach and damage that the claimant has suffered, and (4) that that damage was not so unforeseeable as to be too remote in law.<sup>259</sup>

Superficially, the duty of care would be the most natural candidate primary duty owed by D to C under the law of negligence. After all, the existence of a duty of care is the most obviously correlative element of the ingredients in the establishment of a cause of action in negligence. In order to establish it, we must establish that D owes C a duty not be careless in the specified manner in the

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<sup>256</sup> I am indebted to Orestis Sherman for pushing me to include this and the following clarification. I hope it makes my argument more even and charitable towards the sceptics' views.

<sup>257</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (n 19).

<sup>258</sup> Joseph H Beale Jr, 'Gratuitous Undertakings' (1891) 5 *Harvard Law Review* 222.

<sup>259</sup> Michael A Jones and Anthony M Dugdale, *Clerk & Lindsell on Torts* (Sweet & Maxwell 2018) ss 8–04.

specified situation. Additionally, there are many Local Sceptics who have argued that there are no duties of care.

The appeal of doubting the existence of the duty of care is easily explained. The situation-specific content of the duty of care means that it would be a Danaidean task<sup>260</sup> to list exhaustively all the ways in which D could be acting unreasonably. Furthermore, the standard of reasonableness makes it the case that, even at a greater level of granularity, it is very hard to state the precise contours of the duty in advance.<sup>261</sup> Thus, the duty of care naturally makes for fruitful ground for sceptical theories: it is easy and tempting to doubt the existence of a right or duty that it is difficult to state succinctly.

Moreover, the duty of care is never enforced, whether directly or indirectly. Direct enforcement of the duty of care would consist in D being enjoined to take reasonable care. Yet ‘the preponderance of opinion seems to make a very high probability of harm a necessary precondition of availability’ of a *quia timet* injunction for negligence,<sup>262</sup> and it follows that such an injunction would never be granted in a situation in which there was just a violation of the duty of care *simpliciter*, ie without there also being actionable damage that has already happened or is imminent. If C’s primary right corresponded to D’s duty of care, it would never be directly enforceable. Moving away from direct enforcement, the duty of care is not enforced indirectly, either. Actionable damage is also a necessary condition of ordinary non-injunctive negligence liability. There are, to my knowledge, no cases of pure carelessness that have led to type-I indirect

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<sup>260</sup> I hope that I may be forgiven the archaic terminology. It has been pointed out to me, quite rightly, that it is not really a Sisyphean task since Sisyphus only ever had one rock to roll up the hill. I hope that the fate of the Daughters of Danaus provides a more apt metaphor; their eternally futile struggle involves plenty of fresh water and hence is a more accurate metaphor for the futility of attempting to list exhaustively all the ways in which D could be acting unreasonably. We may pour as many glasses of specific instances into the vat of reasonableness, and yet it shall never be filled.

<sup>261</sup> This fear may be overblown, in any event, as a certain level of generality has its advantages. As Nolan has argued in a slightly different context, there is something to be gained from stating a duty generally so long as it is acknowledged that that is what one is doing: see Donal Nolan, ‘Assumption of Responsibility: Four Questions’ [2019] *Current Legal Problems* 35–36 <<https://doi.org/10.1093/clp/cuz002>> accessed 8 November 2019.

<sup>262</sup> John Murphy, ‘Rethinking Injunctions in Tort Law’ (2007) 27 *Oxford Journal of Legal Studies* 509, 510.

enforcement.<sup>263</sup> Similarly, the duty of care is not type-II indirectly enforced; to wit, the natural candidate for a secondary right in negligence would be C's entitlement to damages, but such a right *ex hypothesi* only arises once C has made out *all* the elements of her claim in negligence, including loss. Thus, the duty of care element is never by itself enforced.

This might lead us to think that there are no primary rights or duties in tort law. The argument might go that the only candidate duty – the duty of care – is neither enforced directly nor is its breach sufficient by itself to give rise to a secondary right which would in turn be capable of enforcement. This analysis, is however, misconceived. We can see it to be misconceived when we distinguish the duty component – duty of care – in the doctrinal analysis of the law of negligence and the primary duty D would actually owe any particular C upon a more plausible analysis of the law of negligence. Since, as we just observed, the mere breach of a duty of care does not ground liability, it is likely that the primary duty that D owes to C is not one of mere non-risk-creation (*viz* what the duty of care in negligence requires); rather, the duty that D owes to C is a composite duty not to cause damage through risky conduct (ie a duty not to fall foul of all the requirements of negligence). It is trite that all the elements of the tort of negligence are required to establish liability: D does not legally wrong C by causing him damage without D's conduct having been unreasonably risky. Similarly, risky conduct without damage is insufficient. As the editors of *Clerk & Lindsell*, the leading text on the English law of torts, put it:

‘Damage is the gist of the tort of negligence. Without damage there is no tort. Negligence does not impose a duty to act carefully; it is a duty not to inflict damage carelessly.’<sup>264</sup>

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<sup>263</sup> Recall the definition of these terms in the section on ‘My scheme’ in Chapter 5, above. Direct enforcement is the award of a remedy that imposes the same obligation as the right the remedy is based on. Type-I indirect enforcement is the award of a remedy that imposes a different obligation from the right the remedy is based on. Lastly, type-II indirect enforcement of a primary right is the award of a remedy that imposes the same obligation as the secondary right that arose from the breach of that primary right.

<sup>264</sup> Jones and Dugdale (n 259) ss 8–05.

It might be thought that the strictness of these requirements has been relaxed by the case law that has developed in light of the uncertain aetiology of fibromyalgia;<sup>265</sup> however, those cases merely modify the causation requirements, rather than exempting claimants from the need to show damage, and so my point still stands.<sup>266</sup> Simply put, the duty D owes C is not a duty of mere non-injuriousness, but a duty not to cause injury through injurious conduct.<sup>267</sup>

This clarification, albeit crucial to a clear discussion of the subject matter of this chapter, should not tempt us into thinking that none of the following arguments take the form of arguments about the duty of care *simpliciter* and that they are all arguments about the composite primary duty. Liability views often deny the existence of the duty of care. Given that the duty of care is a necessary element for the existence of a primary duty in negligence, this would, if successful, be a convincing move. Thus, this clarification should not detract from the fact that debate as to the existence of the duty of care *simpliciter* is an important locus of disagreement between those who adhere to a duty view and local sceptics. As Stephen Perry has put it, the duty of care has turned out to be the ‘main doctrinal battleground ... between [local sceptics] and rights theorists.’<sup>268</sup>

However, this clarification should help us understand the fallacy of any arguments in favour of duty scepticism based on the fact that the duty of care *simpliciter* is not *enforced* in one manner or another. On a duty view, the duty of care is a necessary condition for the existence of a primary duty, and equally for

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<sup>265</sup> I am grateful to Harrison Tait for suggesting this objection.

<sup>266</sup> The Principle in *McGhee v National Coal Board* [1973] 1 WLR 1 (HL) was expanded in the mesothelioma cases, in particular see; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10.

<sup>267</sup> In contrast to this, Nick McBride argues that the fact that the courts sometimes try to distort the ordinary rules of causation in cases of breach of the duty of care *simpliciter* can only be explained by the courts regarding these breaches as wrongs in themselves even without the occurrence of harm and do not want D to get away with those wrongs; see his ‘Duties of Care: Do They Really Exist?’ [2004] *Oxford Journal of Legal Studies* 417, 430–432.

<sup>268</sup> Stephen Perry, ‘The Role of Duty of Care in a Rights-Based Theory of Negligence Law’ in Andrew Robertson and Hang Wu Tang, *The Goals of Private Law* (Bloomsbury Publishing 2009) 90.

the enforcement of that duty, whether directly or indirectly. However, it is also insufficient for the existence of the duty of care, and its enforcement. Thus, the non-enforcement of the duty of care *simpliciter* cannot establish that the duty view is false, because the duty view does not claim that the duty of care *simpliciter* is enforceable, but rather claims that the composite duty exists.

### Duty-scepticism

Nicholas McBride has noted that many legal scholars have rejected Global Scepticism, and consequently believe that in a contractual context, D owes C a primary duty to perform even where that duty is never or only seldom enforced. However, this rejection of Global Scepticism in the contractual context frequently does not extend to people's understanding of the law of negligence.<sup>269</sup> Thus, as regards the law of negligence, there is a split between rights theorists<sup>270</sup> who believe in the existence of both primary and secondary rights in the law of negligence, and sceptics who deny that the rights and duties the rights theorists would describe as the primary rights and duties in negligence exist *qua* legal duties.<sup>271</sup>

Somewhat counterintuitively, given the order in which the foregoing arguments have been made, I will first consider some arguments for a sceptical conceptualisation of the law of negligence. After concluding that these are insufficient to establish that there only exists a power-liability relationship, I will explore whether we conversely have sufficient reason to believe that only the right-duty conceptualisation accurately describes the English law of negligence. Concluding that the arguments do not establish this either, I will then argue that we nonetheless have reasons to choose the latter conceptualisation. I have chosen this order of discussion to reflect the fact that the challenge to the use and usefulness of The Distinction is posed by the sceptic accounts. Strictly speaking, however, dismissing them as descriptively inaccurate is all that is required to show that The Distinction *can* be used to conceptualise the law of

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<sup>269</sup> McBride (n 267) 418–420.

<sup>270</sup> McBride calls rights theorists 'idealists'.

<sup>271</sup> McBride (n 267) 418–420.

negligence without actively misdescribing the law. For our purposes, establishing the advantages of the rights-based view merely provides the additional benefit of showing that The Distinction provides a desirable conceptualisation, and not merely a possible one.

Systematic defences of duty scepticism in tort are rare. However, one exception to this rule is a paper by Dan Priel, published in response to work by Nicholas McBride, arguing that the modern law of negligence better fits what I term a liability view. A liability view can be contrasted with the standard duty view. On the standard duty view, D owes X a primary duty to *phi*; if D does not *phi*, that breach of his primary duty gives rise to a secondary duty to *chi*. For instance, D could owe a duty to drive carefully; if D carelessly injured C, C would be entitled to be compensated. By contrast, on a liability view D does not owe C any primary duty to *phi*. Rather, D is under a primary liability to *chi* if he fails to *phi*. On a liability view, the law does not care whether you drive carefully or not; it merely imposes a duty to compensate should you carelessly injure someone. The contrast between a right-duty correlative and a power-liability correlative which I draw here is the familiar Hohfeldian contrast that I have already explained in Chapter 1.<sup>272</sup> The assertion is that what the duty view would regard as the primary duty is in reality a liability. The duties the duty view would regard as secondary duties remain duties, on the liability view. However, since they arise from the triggering of a liability and no longer from the breach of other duties, they would no longer be secondary.

Relying on Lord Denning's *dictum* to this effect in *Miller v Jackson*,<sup>273</sup> Priel asserts that there are no cases of any form of duty in negligence being enforced through an injunction in English Law.<sup>274</sup> Priel argues that it follows from this that there is no duty in negligence. It may be the case that duties in negligence are not directly enforced, although as John Murphy points out, Lord Denning's

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<sup>272</sup> See the explanation in the text to nn 203 to 206 above.

<sup>273</sup> 'The books are full of cases where an injunction has been granted to restrain the continuance of a nuisance. But there is no case, so far as I know, where it has been granted so as to stop a man being negligent'; *Miller v Jackson* [1977] QB 966 (CA) 980.

<sup>274</sup> Dan Priel, 'Tort Law for Cynics' (2014) 77 *The Modern Law Review* 703, 714–715.

dictum only establishes that Lord Denning was not aware of any such cases, not that none in fact exist.<sup>275</sup> However, neither Murphy nor I have been able to find any cases where negligence *simpliciter* was sufficient for the award of injunctive relief. Murphy rightly points out that many of the cases in which injunctions were awarded on the basis of, eg, nuisance would also have given rise to a claim in negligence. Of course, as Murphy acknowledges, that observation does not go towards establishing that the primary right in negligence is ever directly enforced and is thus ultimately irrelevant for our purposes.

In any event, even if primary rights in negligence were never injunctively enforced, that fact alone neither establishes the existence of a primary right nor its opposite. Non-enforcement is only an issue if we were convinced by the Global Sceptics' argument that legal rights must necessarily be directly enforceable. However, all that the non-availability of injunctions for any primary rights shows is that those primary rights are not directly enforced. Unless, contrary to what I have argued in Chapter 6, Global Scepticism is successful in establishing an argument for inferring the non-existence of a substantive right from its non-enforcement, non-enforcement is neither here nor there. The argument that no injunctions are available thus adds nothing to the general argument from Global Scepticism.

Further, Priel argues that a liability view can better explain why the law has decided to allow some risk-creating activities to take place where the cost of prevention would be too high.<sup>276</sup> The argument focusses on the high number of accidents that take place every year from the use of private motor vehicles. Priel argues that if one is committed to viewing negligence as occurring every time a duty of care would have been breached (ie irrespective of whether harm has in fact occurred), the duty view should surely commit one to outlawing driving altogether to prevent these wrongs. Since the law of negligence has, however, not outlawed driving altogether, we must be comfortable with a certain amount

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<sup>275</sup> Murphy (n 262) 520.

<sup>276</sup> Priel (n 274) 720–724.

of would-be wrongdoing occurring; hence, we cannot seriously be wedded to the idea that the law of negligence is really concerned with duties the breach of which constitutes a wrong. There would simply be too many wrongs.<sup>277</sup> Or so the argument goes.

This argument does present a serious challenge for those seeking to assert the existence of a primary duty in the law of negligence. First, as established above, one can assert the existence of a primary duty in negligence law without committing to the view that damage is unnecessary to the breach of that duty.<sup>278</sup> On this view of the primary duty in negligence, careless driving that fortuitously avoids injuring anyone simply does not amount to a breach of that duty. Thus, there are not that many wrongs committed on our roads every day, after all.

Perhaps a more accurate reconstruction of Priel's argument is that by allowing driving and only prohibiting careless driving the law fails to prevent some careless driving, which could only successfully be prevented by outlawing driving altogether, and that that position is inconsistent with the law recognising a right to be free from careless driving. However, without more, that argument is unpersuasive. Absent a peculiarly austere conception of rights, there is nothing inconsistent about recognising that a right exists without necessarily doing everything in one's power to prevent any and all infringements of that right. Human rights law helps to illustrate the point, since it frequently recognises certain rights while simultaneously recognising that the majority of those rights can, in the appropriate circumstances, legitimately be curtailed. There is no reason to think that the threshold at which a right can be a negligence right should be higher than the threshold at which something can be a human right; if anything, given the special protections enjoyed by human rights, the opposite should be the case.

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<sup>277</sup> *ibid* 723–724.

<sup>278</sup> See the subsection titled 'A preliminary clarification' at the beginning of this section above.

Moreover, Priel's argument that the attention paid in judgments to the question of the cost to D of preventing certain harms establishes that the law of negligence is inconsistent with the existence of a primary duty similarly fails. The argument here appears to be that since in setting standards of care courts sometime pay attention to the cost to D those standards cannot be rights-based. The example cited by Goudkamp and Murphy in advancing a similar version of this argument is Lord Reid's consideration of excessively expensive prevention measures in *Bolton v Stone* and *The Wagon Mound (No 2)*.<sup>279</sup> It would be inconsistent with the law caring about C's rights (and D's duties), the argument continues, if the law took into account purely defendant-sided considerations such as the cost of prevention. As the law does take these considerations into account in setting standards of care in negligence, it cannot be concerned with the claimant's rights.

Of course, that argument has some purchase in showing that a crude rights view, which explicitly commits itself to the claim that utilitarian considerations should have no role in setting the scope of our rights and duties in negligence, cannot explain this feature of the law of negligence. Goudkamp and Murphy ascribe this view to Robert Stevens, and criticise him for failing to explain how his 'rights view' can accommodate other-regarding considerations, such as the cost of prevention to the defendant.<sup>280</sup> However, fortunately, Stevens is not – and *our* account of primary rights need not be – wedded to such restrictive ideas about the nature of the reasons that can ground the parties' rights. Thus, the primary rights recognised by the law of negligence can be and are tailored to generate no primary right where that right would require D to undertake particularly onerous precautions – such as not driving at all, for instance. As Botterell rightly argues, a rights-based conceptualisation need not wed us to the idea that C has an absolute right to be free from harm to her person. Rather, the boundaries of

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<sup>279</sup> James Goudkamp and John Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21 *Legal Theory* 47, n 58.

<sup>280</sup> *ibid* 59.

C's rights and D's duties can be drawn in such a way that they are both left with mutually consistent spheres of freedom.<sup>281</sup>

Similarly, Stevens recognises this early on in *Torts and Rights* when he writes that whether D is entitled to engage in an action *prima facie* adverse to C's interests 'is in part determined by whether his actions were of social value'.<sup>282</sup> Thus, D can drive his car, so long as he does not injure C through failing to take proper care while doing so. What constitutes proper care in this context, in turn, is in general the outcome of a balancing exercise that takes into account *inter alia* C's interest in bodily integrity, D's interest in getting around in the conditions of modern society, and other considerations of the social utility of structuring our society along certain lines. After all, it would be odd if morality, in giving due regard to C's interest in bodily integrity, gave her rights which confined D to only leaving the house on foot. One can recognise primary rights and duties without committing oneself to a wholly deontological view. Non-deontological defences of entitlements are possible, after all.<sup>283</sup> A way of putting such a duty view is that there are two stages to the process: (1) the stage at which primary rights and duties are set; and (2) the stage at which they are applied. Whereas there is some force to the argument that excessive focus on consequentialist concerns at the second stage would be inconsistent with a duty view, there is no inconsistency in these applying at the first stage.<sup>284</sup>

Of course, the balancing that has been carried out might favour C's interests over D's interests in some contexts, and *vice-versa*. That might be because the reasons that favour C's interests outweigh those that favour D's, or *vice-versa*, as the case may be. For instance, it stands to reason that the applicable reasons will require those operating nuclear power plants to take much greater care than those who operate, say, coffee shops. As a result of that fact, the freedom to

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<sup>281</sup> A Botterell, 'Rights, Loss and Compensation in the Law of Torts' (2015) 69 *Supreme Court Law Review* 135, 142–144.

<sup>282</sup> Stevens (n 26) 23–24.

<sup>283</sup> John Rawls, 'Two Concepts of Rules' (1955) 64 *The Philosophical Review* 3.

<sup>284</sup> I am indebted to Orestis Sherman for suggesting an explanation in terms of different stages of consideration.

choose in which manner to run their business of those who operate nuclear power plants will naturally be quite curtailed in order to adequately reflect the reasons to protect the surrounding population from harm.

Furthermore, even if this were not such an implausible view of the kinds of reasons which can inform moral rights, C's legal primary rights need not, without more, be explicable by a coherent theory of moral rights. The legal system could, simply, have made a choice to give C a limited right to be free from most but not all harm caused by D's driving even if she had a moral right to be free from *all* such harm. The sceptical arguments thus fail to establish that a right-duty correlative account of primary rights in negligence is untenable. Put differently, a rights view need not make any claims as to how entitlements at the first stage are determined, although in fact many rights views do this.

It might be objected that since my argument relies on the law of negligence and morality coming apart, the argument only works if one is committed to a legal positivist view of the nature of law. According to positivist views of law, such as Hart's, the content of the law is determined by those institutional actions that are picked out by the rule of recognition, and the content of our moral duties does not come into it.<sup>285</sup> Consequently, on such a view, the positive law of negligence and the moral considerations that govern the same area of conduct as a matter of interpersonal morality can and do come apart. On the other hand, the objection might run, this route out of the challenge posed by the Local Sceptics is not available to those who subscribe to interpretivism. After all, (some) interpretivists, so the objection might go, believe that legal obligations simply are (a subsection of) our moral obligations, and consequently, interpersonal morality and the content of the law of negligence can never come apart.

However, this objection would be based on a misunderstanding of the claims of the interpretivist views considered in the last chapter. On those views, legal

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<sup>285</sup> Hart (n 230) ch 5.

obligations are moral obligations, but our legal obligations can nonetheless differ from what our moral obligations would be, but for the consequences of the institutional actions that give rise to our *legal* moral obligations.<sup>286</sup> As discussed in the last chapter, according to interpretivism, our legal obligations come about through the moral consequences of institutional actions (such as judicial decisions). Consequently, institutional actions could make it the case that, for instance, C no longer has a *legal* moral right to be free from all harm caused by D's driving even though absent that institutional action she would have a moral right to be free from all of it.

Are there nonetheless reasons for favouring a power-liability model? One argument that the cynic might advance is that such a model is a more honest choice where, as Priel suggests might be the case for the law of negligence at large, the law merely seeks to shift the cost of an otherwise desirable activity from C to D.<sup>287</sup> On this conceptualisation, the award of negligence damages could be understood as a sort of tax on some activity which we shall call *phi*-ing. If we take the claim that the law seeks to provide guidance to D as to how he should conduct himself (as Hart convincingly urges us to do<sup>288</sup>), the law would provide incorrect guidance where *phi*-ing is in fact desirable. For instance, on a right-duty account, D would receive incorrect guidance since the law would advise him that *phi*-ing was wrong, when in fact all that the law set out to do is to provide that D should bear any costs caused to C as a consequence of D's *phi*-ing. By contrast, on the liability model, the law does not take a view as to the desirability of *phi*-ing – and thus does not give D incorrect guidance with regards to whether he should *phi* or not – but merely allocates the cost of *phi*-ing to D.<sup>289</sup>

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<sup>286</sup> See the discussion in Chapter 5, as well as Stavropoulos, 'Legal Interpretivism' (n 235) for a general overview.

<sup>287</sup> Priel (n 274) 715–716.

<sup>288</sup> Hart (n 230) 40.

<sup>289</sup> Orestis Sherman has suggested to me that, in light of the fact that the alternative is letting the loss lie where it falls, the mere fact of loss-shifting already expresses that something is wrong. I think that this probably right. However, not much turns on it because the point that a duty to refrain from *phi*-ing expresses more censure than a liability for *phi*-ing still stands

Thus, Priel's argument goes, when the law merely wants to allocate a cost, the liability model is the more honest way to do so.

The strength of this argument ultimately depends on whether the function of negligence is, or perhaps more interestingly *ought* to be, the prevention of *phi*-ing or the allocation of the costs of *phi*-ing, which in turn depends on whether *phi*-ing is desirable or ought to be constrained. This determination might well be at the root of the disagreement between sceptics and their opponents. Now it might be suggested that this is a substantive moral question which seems unlikely to be capable of resolution at the unparticularised level of the generic activity of *phi*-ing. It is true, in any event, that a comprehensive resolution of the moral merits of all the conduct regulated by the law of negligence is beyond the scope of this thesis. However, it does seem unlikely that everything that the law of negligence regulates is in fact permissible activity so long as the externalities are borne. Therefore, this argument proves somewhat less than Priel sets out to prove.

Now, this argument may offer a reason to regard some discrete areas in which the law of negligence applies as open to reconceptualisation in terms of a liability view. However, given that it is Priel advocating an argument for reconceptualisation, the empirical burden of proof in this regard should lie with him. As he does not offer any concrete examples (beyond those we consider and reject here), this argument remains to be made. In any event, offering a reason to reconceptualise will only sustain an argument in favour of doing so if all other things are equal.

Lastly, a related argument is that the vagueness of the 'reasonableness' standard for D's liability in negligence is too imprecise to give much guidance in advance. By contrast, such a lack of guidance is less relevant where a liability-

imposing standard is concerned. Hence, a sceptical account of the law of negligence is less problematic in rule of law terms. Priel asserts that the guidance provided by the law of negligence is not particularly good guidance. Thus, it is often very hard to work out whether conduct will be reasonable *ex ante*.<sup>290</sup> An unstated corollary of this argument is that it is much easier to determine whether conduct was reasonable *ex post*. This seems plausible, at least insofar as the precise contours of the standard of reasonableness are concerned. Moreover, the rule of law concerns surrounding imprecise legal duties are familiar and convincing: clear and easy to follow legal standards are important in order to allow citizens to be able to plan their lives.<sup>291</sup> If this is so, that provides a good argument for preferring a liability view to a duty view: on a liability view, courts will determine whether conduct was unreasonable – and hence whether liability was incurred – *ex post*; by contrast, on a duty view, citizens have to figure out what conduct is unreasonable and seek to avoid it *ex ante*.

However, albeit familiar and generally sound, these rule of law concerns are less serious in the context of the reasonableness standard in negligence than this argument would suggest. First, to the extent that ‘reasonable’ is vague, it is not hopelessly so. This is to say that, although there might be some conduct of which it is hard to say in advance whether it is in fact reasonable, there are large areas of conduct that are clearly reasonable and equally large areas of conduct that are clearly unreasonable. This can be illustrated by reference to Priel’s example of unreasonably careless driving. Although it might be hard to determine in advance whether looking briefly at your car’s navigation system was reasonable behaviour, it is clear that watching TV on your phone while driving is unreasonable and that keeping your eyes on the road at all times is eminently reasonable in this regard.

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<sup>290</sup> Priel (n 274) 728–729.

<sup>291</sup> See eg Joseph Raz, *The Authority of Law* (OUP 1979) ch 11.

Moreover, as John Gardner has argued, somewhat vaguely formulated legal standards can perform a valuable service in encouraging laws' subjects to err on the side of caution and thus avoid the exploitation of loopholes or the inclusion in legal standards of textual distinctions which do not exist in the moral properties of the conduct regulated.<sup>292</sup> To counter this, it might be argued that such an overly vague standard would have a chilling effect on otherwise reasonable drivers. The phrase 'chilling effect' is used to describe the inhibitory effect a rule prohibiting activity X can have on activity Y, where activity Y is an activity that is sufficiently similar to X for people to worry that Y might be caught by the rule; arguments of this nature are made with particular frequency in the context of freedom of expression.<sup>293</sup> However, unlike in free speech doctrine,<sup>294</sup> preventing driving with just enough care is not a greater evil than permitting driving with slightly too little care. Careless driving can have serious consequences. By contrast, overly careful driving is merely an inconvenience. In any event, since any chilling effect on reasonable drivers would be most likely to affect unreasonable-adjacent drivers, ie those who are skirting the rules of reasonable driving, it would not necessarily be a bad thing. Pushing drivers into slightly more careful than absolutely necessary driving does not seem like a high price to pay to ensure consistently reasonable driving.

### Pro-duties

Not only are the arguments in favour of a liability view all unconvincing, there are a variety of arguments that can be marshalled to support a duty view. The most obvious argument in favour of a (composite) duty view is that that view best fits and explains the legal rules we have in the law of tort. Thus, for instance, McBride has argued that a liability view has a harder time coherently explaining all the instances where secondary obligations arise because it cannot make use

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<sup>292</sup> Gardner makes this argument regarding the descriptive quality of words such as 'wounding' in the context of the Offences Against the Person Act 1861, but the part of the argument that I cite applies equally to the reasonableness standard in negligence; John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) ch 2.

<sup>293</sup> See eg Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 Boston University Law Review 685.

<sup>294</sup> *ibid* 688.

of the conceptual apparatus of duty to do so. To wit, on a duty view, the answer to the question ‘when will I be liable to pay compensation?’ is simply ‘when you have breached your (composite) duty.’ By contrast, on a liability view, one will be forced to enumerate all the instances in which a duty to compensate arises. McBride suggests that the advantage of a duty view is that it provides a more coherent story of the tort rules that are actually applied by judges. By contrast, he argues, a liability view is at risk of being misleading by making it appear as though the law merely predicts what consequences will follow upon specified actions.

Now, having to enumerate all the situations in which a duty to compensate arises may be time-consuming and expositionally inconvenient; that, however, has no bearing on what rights C actually has. As discussed before, we cannot, without further argument, infer a primary duty from the mere existence of a (putatively) secondary one. McBride’s argument thus fails as a descriptive claim. Might it succeed if we read it instead as an argument that a duty view provides the better explanation of the existence of the putative primary duties? Instead of making the ambitious claim that the existence of primary duties is logically necessary for the existence of (putatively) secondary duties, we could simply confine ourselves to the more modest claim that primary duties are the best explanation for those duties. Whereas the duty view thus has an answer to the question ‘why do I have a duty to repair’, the liability view is merely left reasserting saying that one is liable to incur such a duty in all the situations enumerated. There is no convenient shorthand on the liability view.<sup>295</sup>

Although this seems like a promising advantage of the duty view at first, it could be countered that having a convenient shorthand only pushes the question one step back. Instead of asking ‘when do I owe a duty to repair’ a putative wrongdoer must instead ask ‘when do I owe duties the breach of which would make it the case that I owe a duty of repair’. Hence, whether this refashioned

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<sup>295</sup> See also the discussion in Chapter 3 in the text to n 71 above.

argument succeeds depends on whether one thinks that being able to push a question one step back is preferable to not being able to do so.

It stands to reason that is. Thus, John Goldberg and Benjamin Zipursky have argued that the inclusion of duty of care language can structure judicial discussion in a way that is not possible where it is denied that there is a subject of discussion at all.<sup>296</sup> If we accept that some of the relevant considerations in determining the question ‘when will I be held liable in law?’ depend on the questions ‘what care should I take?’, ‘has anyone lost out through my lack of care?’, and ‘how is my lack of care connected to their loss?’, then a framework that gives us the language to address those questions has advantages over one which fails to do so. As Goldberg and Zipursky recognise, there is a developed framework of reasoning with respect to duties of care and participants in the legal system can consequently extrapolate from existing case law more easily when they fall back upon that language.<sup>297</sup>

Lastly, McBride makes the normative argument that it would be paradoxical should the law care about sanctioning certain conduct but be indifferent as to the conduct occurring in the first place. It would be odd if the law did not care one way or another about D hitting C with his car but then required D to pay for the consequences of having hit her. However, as Priel points out, this argument loses much of its force if the particular activity in question – say hitting pedestrians with cars, for the sake of maintaining the same example – is not thought undesirable *per se*. Although Priel’s assertion that driving cars should not be avoided even though it is inherently risky is something of a straw man, his basic point is valid once it has been refined somewhat. Hitting pedestrians with cars is (uncontroversially) undesirable, but many areas of conduct regulated by the law of tort – say, accidentally denting another car when pulling into a parking spot – are not necessarily to be discouraged.

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<sup>296</sup> John CP Goldberg and Benjamin C Zipursky, ‘The Restatement (Third) and the Place of Duty in Negligence Law’ (2001) 54 Vanderbilt Law Review 657, 727.

<sup>297</sup> *ibid* 726ff.

To use this example, it might be the case that the costs of trying to not accidentally dent other vehicles greatly exceeds the costs of fixing accidental dents. (Let us suppose further that there are no transaction costs involved in obtaining compensation through the law of torts and that other things are equal). We might think that, as a consequence of these costs being what they are (on this hypothetical example), it would make more sense not to create a duty against dentings. Let us assume further that due to principles of resource allocation or considerations around responsibility, D, rather than C, should bear the cost of the dentings he causes. If all we were concerned with would be that resource allocation, then it would make more sense to give C a free-standing right to receive the cost of remedying the dent from D than to put D under a duty to not dent C's car accidentally.

Of course, this example rests on the premise that the care required to avoid dentings is more expensive than remedying the dentings *ex post*. That premise might appear somewhat unreasonable if we consider that the actual standard of care required in negligence is reasonable care. Purely from anecdotal evidence, the cost, in terms of extra attention required etc, of having to park reasonably carefully is negligible whereas the cost of beating out and repainting a dented bumper is all too often exorbitant.<sup>298</sup>

Returning to the argument that the law might care to sanction certain conduct, if not irrespective of cost, at least in spite of the cost of doing so, it might be that our only objective is reducing the incidence of dentings overall. That would still not necessarily establish that we should create a duty not to create dents carelessly. Should we desire to reduce dentings, the best set of legal duties or liabilities to enact will be entirely empirically dependent on whether prohibitory duties are effective at decreasing instances of the prohibited conduct. Thus,

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<sup>298</sup> Although it may be tempting to blame car mechanics' taking advantage of consumers relative lack of knowledge about cars nowadays for the steadily rising cost of having a dent removed, some blame should probably rest with car manufacturers making hard to repair cars: see eg 'Here's What \$7,000 Of Damage Looks Like On A Tesla Model 3 | CleanTechnica' <<https://cleantechnica.com/2018/05/20/heres-what-7000-of-damage-looks-like-on-a-tesla-model-3/>> accessed 13 August 2019.

there might be an equally compelling consequentialist counterargument. Suppose that it is desirable all things considered to attempt to decrease the number of accidental dentings.<sup>299</sup> However, suppose further that as a matter of human psychology it turns out that nudging in the form of increasing the cost of that behaviour actually is a much more effective tool of preventing denting than prohibiting denting outright.<sup>300</sup> If this is so, then a liability model of tort law would be the better way to arrive at that desired outcome (fewer dentings) and should thus be preferred. Without empirical evidence to support the claim that prohibiting denting is the best way to decrease denting, the undesirability of denting does not establish that it should be prohibited. There are, then, a number of scenarios in which we might want to shift the costs of dentings without wanting to prohibit denting.

More ambitiously, and somewhat less convincingly, there is an argument that a duty view is necessitated by the very nature of tort. The argument that the nature of tort law is inherently correlative will be familiar from the comprehensive theory of tort law put forward by Ernest Weinrib in *The Idea of Private Law*. According to Weinrib, we all owe each other duties to respect each other's equal freedom as a matter of Kantian morality. Furthermore, on this theory, how we should treat one another is entirely governed by deontological duties, excluding any and all consequentialist considerations from the scope of our moral reasoning. English tort law reflects this approach, the argument continues, since, if we were to subscribe to Weinrib's model, it gives expression to these moral duties based on Kantian morality. As a corollary, Kantian morality can explain all aspects of tort law as it is. For instance, the causation element in negligence is required by the deontological nature of Kantian morality, since making a wrongdoer responsible for harm not caused by them would make them responsible for something that they have not done to the victim of that harm.<sup>301</sup>

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<sup>299</sup> I take it for granted that, other things being equal, accidental (and any other) dentings are bad, I am less sure, however, that it is a particularly urgent priority to decrease accidental dentings, all things considered.

<sup>300</sup> An idea that has been popularised recently by Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions Using the Architecture of Choice* (Yale University Press 2008).

<sup>301</sup> Weinrib (n 132) ch 6.

If we accept that Weinrib's theory accurately describes what tort law is or should be, this gives us several reasons in favour of a duty view over a liability view. First, and perhaps most obviously, if tort law already expresses our moral duties to one another, the legal system would necessarily have to express those duties as duties rather than to label the conduct in question as permissible and merely impose a liability. Although moral duties do not, of course, generally have to be embodied in legal duties in order to exist *qua* moral duties, Weinrib's claim is that the law of tort simply *is* the expression of our genuine moral duties. Consequently, if morality is wholly determined by *rights and duties* and the law expresses morality, the law must be wholly determined by *rights and duties*. Any form of liability view is, naturally, ruled out.

Secondly, Stephen Perry has argued that the Weinribian account necessitates that any tortious duty D is under is owed to C, thus making it the case that the Weinribian account fits perfectly with the structure of the law of negligence that Perry posits – ie one based on a duty view.<sup>302</sup> Although this might be a good argument for excluding certain other explanatory accounts of negligence from consideration, if, indeed, negligence conformed to the duty view, it can only work as an argument for accepting the duty view of negligence if we accept that negligence is underpinned by the Weinribian account. On Perry's understanding, based on the classical four-stage test of negligence, D owes a primary duty of non-injury to C, and, should he breach that duty, he will owe a secondary duty to repair the consequences of that injury. A duty view would necessarily be correlative and would include acceptance of The Distinction.<sup>303</sup>

By contrast, what Perry terms a purely instrumentalist account – ie an account of negligence that is underpinned by considerations other than the Kantian interpersonal morality between C and D – would not necessitate D owing a duty to C. On an instrumentalist account, the law merely has to provide sanctions for

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<sup>302</sup> Perry (n 268) 85ff.

<sup>303</sup> *ibid* 86.

suboptimal behaviour. On an instrumentalist account, the argument continues, nothing much distinguishes the law of negligence from other regulatory regimes.<sup>304</sup> Although there would be a standard of behaviour and thus a duty in a wider sense, there is no need for a duty *owed to C*. Of course, supposing such a duty might, along rule-utilitarian lines, coincidentally be the best method of discouraging suboptimal behaviour. However, whereas a directional duty – ie a duty owed specifically from D to C – is *necessary* to the Weinribian account, it is not intrinsically necessary to the instrumentalist account. It is important to note that Perry considers it unimportant whether D is under a duty or merely a liability, as he merely seeks to emphasise the lack of directional jural relations. Since nothing turns on it for the purposes of Perry’s argument and since *liability-based* instrumentalist accounts are the accounts we are interested in for the purposes of this chapter, we will focus on the implications of Perry’s argument for liability-based instrumentalist accounts in what follows.

At first, one might read a lack of directional duties as requiring (some)<sup>305</sup> non-instrumentalists to be committed to a view on which duties or liabilities that have no correlative rights, and thus do not fit the Hohfeldian model. As will be familiar from the discussion at the outset, all Hohfeldian correlatives – be they right-duty, power-liability, etc – are strictly relational or correlative.<sup>306</sup> Put differently, on a Hohfeldian analysis, part of the definition of claim rights and duties is as follows: A’s duty is owed to B and is further always the mirror image of B’s claim right; conversely, B’s claim right entitles him to compel A to perform the specified act, that is the act that forms the content of A’s duty and B’s claim right. Thus, if C has a right that D pay her £100, it follows from that, on Hohfeld’s scheme, that D owes C a duty to pay her £100.<sup>307</sup> Similarly, if D is under a liability this entails that someone, let us suppose C, has the power to change D’s jural relations, ie

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<sup>304</sup> *ibid* 88.

<sup>305</sup> As mentioned above, the only instrumentalists that are affected by Perry’s distinction are those who do not, on rule-utilitarian grounds, suppose directional rights and duties between C and D. Rule-utilitarian instrumentalists or Local Sceptics that believe that some form of deontological *relational* considerations apply are not affected by Perry’s argument.

<sup>306</sup> See the explanation in the text to nn 203 to 206 above.

<sup>307</sup> Hohfeld (n 40) 38.

his rights, powers, liberties, immunities, duties, liabilities no-rights and disabilities.<sup>308</sup> Let us suppose that C and D have a contract that gives C an option to require D to buy her bike for £100; that option consists of two Hohfeldian powers. First, C has the power to change D's jural relations such that D comes under a duty to C to pay her £100; secondly, C has the power to change D's jural relations such that D now has a right that C transfer title and possession of the bike to him.

However, Perry's distinction could also be read as latching onto the fact that on an instrumentalist account D's duty or liability might be owed to someone other than C. Whereas The Distinction requires C's secondary right against D to arise from *her* primary right against D, this need not be the case with all duties and liabilities. Suppose that E executes separate contracts with both C and D that give E the power to make C sell her bike to D and to make D buy it for £100. In this scenario, the direction of the power-liability relationships does not correspond to the direction of the ensuing right-duty relationship. E has powers and C and D are under liabilities that could give C a duty to give her bike to D and a right to receive £100, and give D the correlative right and obligation. Whereas the power liability relationships exist between E and C, and E and D respectively, the ensuing right-duty relationship is between E only. The point Perry is seeking to make appears to be that on an instrumentalist view there is no need to presuppose any jural relationship *between C and D*, and that instead D's liability to be made to pay for his negligent conduct could correlate to a power which the state, or any other actor in the legal system, has.<sup>309</sup>

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<sup>308</sup> *ibid* 50.

<sup>309</sup> For the avoidance of doubt, I do not want to create the impression that one could only square The Distinction with an analysis solely in terms of claim rights and duties. As a matter of fact, a Hohfeldian would be likely to reason that what goes on in the case of a breach of primary duties is best explained through the superimposition of an additional power-liability analysis. In strictly Hohfeldian terms, D's breach of his primary duty can be analysed as simultaneously also being D's exercise of a power over C. To wit, on the Austinian conception of The Distinction, D gives C a new secondary right against him by his very breach of his primary duty D; obtaining a new secondary right, is a change of C's jural relations making D's breach the exercise of a power over C. It should be noted, that as D, through his breach, gives C a *new right*, this power-liability relationship is somewhat different from the situation that is usually thought of when a power-liability relationship is described – ie one where A, whether as C or D, has a power to negatively affect B's normative situation by creating an obligation upon B correlative to a right owed to her.

Lastly, there are arguments in favour of the duty view which, albeit not based on sweeping views about the structure of tort law, also maintain that adopting a duty view would yield normative benefits. In this vein, McBride argues that the existence of a primary duty would, or does, make justifying injunctions, and, it stands to reason *mutatis mutandis*, other forms of coercive enforcement easier.<sup>310</sup> It is, the argument runs, much easier to justify saying to a defendant ‘we are ordering you to do that which you ought to have done all along’ than to justify saying ‘we are making you do that which we never required you to do.’

However, a plausible rejoinder might be that the more generous interpretation of the latter would be ‘we are making you do that which we never required you to do but warned you we might make you do.’ In any event, this particular argument is not overly convincing since, as observed at the beginning of this chapter, duties in the law of negligence are not regularly directly enforced. In fact, the sceptic might turn this argument around on McBride and argue that there are rights that would be secondary on a duty view, but no primary rights. The secondary right to damages that arises on the duty view is frequently and easily directly enforced in the law of negligence. This shows, so the Sceptic might argue, that that plane of rights exists, but the plane of rights the Rights Theorist regards as primary rights does not.

More fundamentally, as discussed in Chapter 5,<sup>311</sup> there is no necessary connection between the content of a right and the content of the remedies available on the basis of that right. This is true descriptively, as McBride would surely agree, but also analytically. Furthermore, any normative link that may exist is not determinative. The range of reasons applicable to the granting of a remedy is broad and so is the range of reasons that make a remedy justifiable vis-à-vis D. And, depending on the circumstances, there are many factors that might

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<sup>310</sup> McBride (n 267) 421.

<sup>311</sup> See the discussion of this in the sections headed ‘From rights to remedies’ and ‘My scheme’ in Chapter 5, above.

justify the award of particular remedy that are not reducible to the content of the substantive right on which the remedy is based. Thus, for instance, the legal system might (truthfully) say to D ‘us making you do this is in your overall interest’ which, if D accepts the legal system’s theoretical authority,<sup>312</sup> is much more convincing than simply saying ‘you were under an obligation to do this’.

However, the practical arguments in favour of retaining the primary duty model that we canvassed in Chapters 2 and 4, above, ultimately persuade me that a duty-based conceptualisation ought to be adopted if one were designing a system of tort liability from scratch. For instance, a system in which liability is based on the violation of primary rights rather than on liability rules *simpliciter* has the advantage of being more structured, and therefore it can rely on the expositional advantages of that structure. This is essentially the same argument as that advanced by Austin regarding the expositional advantages of organising one’s understanding of the entirety private law on the basis of The Distinction applied to this context.

Simply put, it is easier to directly state the contours of C’s primary right(s) than it is to translate them into the conditional clauses that describe D’s liability. The point is a simple one. A textbook that describes our legal obligations in conditional terms will be longer; it will have to repeat the content of what would otherwise be our general secondary obligations for every instance of liability. By contrast, an approach relying on The Distinction can dispense with reiterating the content of the secondary duty every time it lists a primary duty and simply enumerate the content of the secondary obligations in a short section at the back. These advantages are analogous to the advantages to be gained from organising a piece of legislation into a multitude of sections rather than formulating the statute in a single section that contains a multitude of sub-sections separated by ‘provided that’, ‘or’, ‘unless’ and other similar conjunctive operators.

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<sup>312</sup> Consider the familiar Razian conception of theoretical authority based on superior knowledge. See Raz, *The Morality of Freedom* (n 156) ch 3.

A further argument is that structure can help us by simplifying our legal reasoning. The concept of a duty of care can provide an intermediate step in our reasoning. As Raz argues in the context of rights, sometimes using a concept as an intermediary step in our reasoning can help us reach our final conclusion without having to engage with the underlying reasons every single time.<sup>313</sup> Just like rights generally, primary rights and duties can serve as ‘points in the argument where many considerations intersect and where the results of their conflicts are summarised’.<sup>314</sup> Duties of care can, as argued by Goldberg and Zipursky and discussed above, serve as these intermediate conclusions in arguments about whether D ought to pay damages to C.<sup>315</sup> Where on a liability view we must consider whether we ought to impose liability every time, the argument has already been determined at the point at which duties were created on the duty view. Further, having already determined the settled situations, they can even simplify reasoning about novel situations.<sup>316</sup>

A further, related, strand of argument supporting the duty view is that, besides fitting the law and giving us useful conceptual tools, the duty view also fits the terminology which participants in (and commentators on) the legal system use to talk about the law of torts. The duty view simply provides a better descriptive fit for how participants in the legal system think about legal problems and express their reasoning. Thus, Goldberg and Zipursky argue that language of ‘breach’ does not make sense unless we presuppose a duty that can be broken.<sup>317</sup> Although Priel objects that many judges in the United States use language that is in fact explicitly inconsistent with a duty view, that should be of little concern for English readers, given that English judges do regularly speak of the duty of care. Of course, the fact that we speak about the law in a particular way does not conclusively establish that the structure of the law is that particular

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<sup>313</sup> See the discussion of this argument in the text to n 71 in Chapter 3 above.

<sup>314</sup> Raz, *The Morality of Freedom* (n 156) 181.

<sup>315</sup> Goldberg and Zipursky (n 296) 726–728.

<sup>316</sup> *ibid.*

<sup>317</sup> *ibid* 688, 710–713.

way – us talking about thing X having property P does not make it the case that thing X has property P, after all.<sup>318</sup> However, in the absence of other factors, applying Occam’s Razor, the simplest explanation of why we would talk about the law in terms of a duty of care, and why our textbooks would feature sections on duties of care, is that this is reflective of the law.

Whilst the iteration of this argument that has been discussed in this paragraph is expressed in terms of the duty of care, the argument can be extended to a law of negligence expressed in terms of our composite primary duty as defined above. The duty of care and breach elements that Goldberg and Zipursky find reflected in judicial language, in part constitute our composite duty. Insofar as judges regularly express themselves in those terms, and insofar as that establishes that the constituent parts are part of our law of torts, the composite duty described above is also accurately descriptive of our law of torts, since it does not go beyond its constituent elements expressed in the terms more familiar to tort lawyers.

Ultimately, there is a further small-c conservative argument for the use of duty views to be made. After all, at least in England, we have talked about the law of negligence in terms of duties for a long time. Hence, many people’s understanding of the law of negligence is dependent on this terminology. Retaining this terminology, other things being equal, is less likely to lead to confusion than jettisoning it. The cost of conceptual changes in legal terminology should not be underestimated: academics, students and practitioners would have to change the way they think about the law of negligence, new books would have to be written, etc. Of course, if there are convincing arguments for jettisoning an old concept, these concerns are unlikely to change the balance of reasons. However, where the applicable reasons are finely balanced,

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<sup>318</sup> An aphorism often attributed to Abraham Lincoln, albeit perhaps apocryphally, puts the point well. Lincoln supposedly asked how many legs a dog would have if you called its tail a leg, answering his own question with four ‘because calling a tail a leg doesn’t make it a leg.’ William Safire, ‘Opinion | Essay; Calling a Tail a Leg’ *The New York Times* (22 February 1993) <<https://www.nytimes.com/1993/02/22/opinion/essay-calling-a-tail-a-leg.html>> accessed 14 August 2019.

conservatism may well tip the balance. Of course, in this instance, the normative scales are already tilted in favour of retaining a conceptualisation of the law of negligence in terms of primary and secondary duties. Thus, this form of Local Scepticism fails to convince, *a fortiori*.

## **Strict liability**

The existence of primary duties in the law of tort has also been doubted in the context of strict liability torts. Strict primary duties are familiar from the intentional torts and from nuisance liability.<sup>319</sup> Stephen A Smith has argued that, since the law cannot possibly mean to provide the guidance that those strict duties would provide, such strict duties cannot exist. In this section, I will first set out this argument and how it affects The Distinction before considering some arguments which might lead us to reject this argument.

According to Smith, strict duties do not actually exist because the guidance they would provide is nonsensical. These duties provide the wrong guidance, the argument goes, because they are, using terminology coined by John Gardner, duties to succeed.<sup>320</sup> In the work to which Smith refers, Gardner distinguishes between reasons to try and reasons to succeed; whereas the former can be satisfied by trying irrespective of whether our attempt is successful, the latter can only be met by succeeding (albeit irrespective of whether we tried).<sup>321</sup> Often we have both reasons to succeed and reasons to try: for instance, I have reason to succeed in calling my mother on her birthday and that reason gives me a derivative reason to try since I greatly increase my chance of succeeding if I try. However, I can fulfil my reasons to succeed without trying by pocket-dialling her, and similarly I can meet my reasons to try by leaving her a number of voicemails without necessarily having met my reason to succeed. As an aside, I try to talk

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<sup>319</sup> Smith does not in fact use the term ‘nuisance’ but he does speak of a ‘a duty “not to allow water to escape from one’s property”’; Stephen A Smith, ‘Strict Duties and the Rule of Law’ in Lisa M Austin and Dennis Klimchuk, *Private Law and the Rule of Law* (OUP Oxford 2014) 189.

<sup>320</sup> *ibid* 193.

<sup>321</sup> John Gardner, ‘The Purity and Priority of Private Law’ (1996) 46 *The University of Toronto Law Journal* 459, 485–487 <<http://www.jstor.org/stable/825774>>.

about reasons rather than duties as much as I consistently can in this discussion, while faithfully representing Smith's argument, since the 'duty' concept can often be hotly contested in moral philosophy and nothing turns on the difference for our purpose. I take it to be axiomatic that a duty to *phi* is a smaller subset of reason to *phi*; where we have a duty to *phi* we also necessarily have reasons to *phi*, but the converse does not hold.

Building on this distinction, and on Gardner's work on strict liability torts,<sup>322</sup> Smith rightly recognises that a strict duty not to let a noxious substance escape onto your neighbour's land<sup>323</sup> and a duty not to trespass on her land are duties to succeed; put simply, the law does not care how hard you tried to not trespass, the law cares that you do not trespass. On Gardner's argument, duties to succeed generate reasons to try where trying would help in succeeding. As trying not to trespass reduces the number of trespasses we commit, the existence of a reason to succeed in not trespassing generates a *pro tanto* reason to try not to trespass. Since trespasses are undesirable, it is desirable that citizens take some care not to trespass on one another's land.<sup>324</sup> It might be thought that strict duties just imply reasons to take an adequate level of care to avoid most trespasses. However, Smith argues that, the best way to succeed in not trespassing is in taking the greatest possible care. Since, the argument goes, if the law wanted to give us reasons to take reasonable care, it would give us a duty to take reasonable care rather than a duty to succeed, the law must be providing the guidance to take more than reasonable care.

Yet, the argument continues, the law cannot possibly mean what it appears to say, here, since that would produce an absurd result. In accordance with rule of law principles, the law is meant to guide citizens in how to live their lives. However, the law cannot intend for citizens to stay in their homes for their entire

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<sup>322</sup> See eg John Gardner, 'Obligations and Outcomes in the Law of Torts' in John Gardner and Peter Cane (eds), *Relating to Responsibility: Essays for Tony Honore* (Hart Publishing 2001) <Available at SSRN: <https://ssrn.com/abstract=1397133>>.

<sup>323</sup> For the leading case on liability under the so-called principle in *Rylands v Fletcher*, see *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53.

<sup>324</sup> Smith, 'Strict Duties and the Rule of Law' (n 319) 193–195.

lives or to take other similarly drastic measure in order not to trespass.<sup>325</sup> Thus, it is more likely that the law merely wants to give citizens reasons to try reasonably hard. Accordingly, the better way to parse D's legal obligations in the intentional and other strict liability torts is as primary duties to try reasonably hard – which in their breach trigger ordinary secondary duties to pay compensation – and a further level of strict liability to incur non-secondary duties to pay compensation where we fail to not trespass despite taking reasonable care.

However, albeit *prima facie* appealing, this argument fails to establish that any instances of what we might think of strict primary duties are in fact merely liabilities. First, as Gardner points out in a chapter in the same volume, strict duties are not alone in potentially inviting duties to try unreasonably hard. Taking ridiculous measures can also be a more certain way of fulfilling one's duty to try, such as a duty of care. As Gardner poignantly illustrates, one sure-fire way for a local authority to avoid liability for not meeting its duty to take reasonable care that nobody gets injured in its public park is to ban all visitors from the park.<sup>326</sup>

Furthermore, as Gardner argues, Smith's argument appears to presuppose that every legal duty must be rule of law compliant. Were that the case, it would render the rule of law moot as a standard by which to assess legal duties since all legal duties would meet the standard simply in virtue of being legal duties.<sup>327</sup> This error seems to be prompted by the presupposition that all legal duties must be intelligible as moral duties. This is plainly not the case, sometimes lawmakers simply get it wrong.

Lastly, even if we were to grant that all legal duties have to be intelligible as moral duties, Smith's argument does not seem to contemplate the existence of moral duties that we tragically cannot help but fail to comply with.<sup>328</sup> For readers

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<sup>325</sup> *ibid* 193–195, 203.

<sup>326</sup> John Gardner, 'Some Rule-of-Law Anxieties About Strict Liability in Private Law' in Lisa M Austin and Dennis Klimchuk, *Private Law and the Rule of Law* (2014) 217.

<sup>327</sup> *ibid* 218.

<sup>328</sup> *ibid*.

acquainted with Gardner's writing, this will be a familiar area of consideration.<sup>329</sup> In short, morality is rife with luck and oftentimes we are responsible for bad outcomes that we could not, in the specific situation, have prevented no matter how hard we tried. In Bernard Williams' familiar example, we brake but nonetheless we hit the child darting out from behind the parked cars.<sup>330</sup> Even though we could not have prevented the accident, we are still responsible for it and we failed to meet some of the reasons that applied to us in the situation (I take it for granted that we do in fact have strong moral reasons not to kill children accidentally). As a consequence we have what you could term secondary moral reasons to apologise etc, if we fail to meet our reasons not to accidentally kill children no matter how hard we tried. Further, even if the reader were not to be convinced that this is true of moral duties and reasons, Smith's argument would still fail on the basis, canvassed in the last paragraph, that legal duties need not be the same as our moral duties.

### **Replacing rights with remedies**

An unlikely challenge to the existence of The Distinction comes from another argument made by Smith. He argues that certain secondary duties are in fact secondary liabilities in the Hohfeldian sense. In this section, I will examine whether Smith's argument withstands critical analysis. I will argue that, if Smith's argument holds up, this has consequences for secondary rights and duties that go far beyond merely recharacterising secondary duties as secondary liabilities (and secondary rights as powers). More specifically, I argue that if we follow Smith's analysis to its logical conclusion, there will be no substantive secondary juridical relationship between claimants and defendants of any kind left. After I briefly set out Smith's argument in the following paragraphs, I will elaborate on this below.

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<sup>329</sup> In the tort context, see eg Gardner, 'Obligations and Outcomes in the Law of Torts' (n 322); John Gardner, 'The Wrongdoing That Gets Results' (2004) 18 *Philosophical Perspectives* 53.

<sup>330</sup> Bernard Williams, 'Moral Luck', *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press 1981) 124.

In a series of articles,<sup>331</sup> but most importantly in ‘Duties, Liabilities, and Damages’,<sup>332</sup> Smith contends that there is no secondary *duty* to pay compensatory damages following breaches of primary rights in either contract or tort. Rather, he contends, contract-breakers and tortfeasors come under a liability to be ordered to pay compensation by a court. The claim appears to be essentially Hohfeldian:<sup>333</sup> although we might think that a defendant is under a duty to pay damages from the time of the breach of his primary duty, he is in fact only under a liability to come under such a duty post-judgment. Whereas D is under a duty where the legal position is that D should perform a particular action (here pay damages to C); D is (merely) under a liability where the legal position is such that another X has the power (ie is able through an act) to alter D’s legal position (and thus perhaps to bring it about that D is under a duty following X’s exercise of their power).

The argument made to support this contention is partially descriptive of the positive law in common law jurisdictions, and partially derived from a normative argument. Smith first argues that an attempted prepayment of damages prior to a claim being brought is not a defence to that claim,<sup>334</sup> and that this shows that there is no duty. If there were a duty, surely it could be discharged by performance; since it cannot, there cannot be a duty.<sup>335</sup> Secondly, Smith contends that there cannot be a secondary duty to pay damages since the common law does not recognise a cause of action for a breach of the putative secondary duty. Since the law’s normal response to the breach of a duty is the creation of an entitlement<sup>336</sup> to damages, the unavailability of damages suggests

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<sup>331</sup> Stephen A Smith, ‘Why Courts Make Orders (And What This Tells Us About Damages)’ (2011) 64 *Current Legal Problems* 51; Stephen A Smith, ‘The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy’ (2002) 36 *Loyola of Los Angeles Law Review* 1037.

<sup>332</sup> Stephen A Smith, ‘Duties, Liabilities, and Damages’ (2011) 125 *Harvard Law Review* 1727.

<sup>333</sup> Although Smith does not explicitly quote Hohfeld for the distinction between the duties and liabilities, Hohfeld is responsible for creating that distinction and his definitions have near-universal currency in present-day academic discussion; see the explanation in the text to nn 203 to 206 above.

<sup>334</sup> Citing *Edmunds v Lloyds Italico & l’Ancora Compagnia di Assicurazione e Riassicurazione S.pA and Another* [1986] 1 WLR 492 (CA); Smith, ‘Duties, Liabilities, and Damages’ (n 332) 1741–1742 at n 41.

<sup>335</sup> Smith, ‘Duties, Liabilities, and Damages’ (n 332) 1741–1742.

<sup>336</sup> NB the intentional ambiguity of this term.

the absence of a duty.<sup>337</sup> Briefly, the supposed secondary duty to pay damages does not display two of the crucial features of private law duties and thus, according to Smith, cannot be a duty.

The persuasive force of both of these arguments can be doubted, however. As to the first, the fact that a unilateral prepayment is insufficient to extinguish the duty does not necessarily make it the case that that no duty exists. Rather, it could simply be the case that performance of the duty in question requires the cooperation of the putative claimant. After all, successful settlement extinguishes the claimant's secondary rights and thus provides a complete defence<sup>338</sup> to a claim based on the relevant secondary rights.<sup>339</sup>

As to the second argument, we might contend that there can be genuine duties the breach of which does not automatically trigger a subsidiary right to be compensated for that breach. McBride suggests that there are no damages for the non-payment of a judgment debt either,<sup>340</sup> and yet we do not doubt that court orders create obligations on the defendant to pay their judgment debts.<sup>341</sup> The first half of that assertion might be doubted, given that interest on debts might best be conceptualised as damages for the non-payment of those debts following the *Sempra* case.<sup>342</sup> However, we should not discount the possibility of the existence of a secondary duty to pay damages simply because that duty cannot be breached by non-payment. It could simply be the case that, unlike a

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<sup>337</sup> Stephen A Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law & Jurisprudence 157, 169–170; NB that this argument is adapted to the secondary rights context from its original context in doubting the existence a primary duty to make restitution in unjust enrichment.

<sup>338</sup> Or, rather more accurately 'denial'; for an explanation of the difference between 'denials' and 'defences' albeit in a different context, see: 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 Essays* (Hart Publishing 2013) 137–138.

<sup>339</sup> Robert Stevens and Sandy Steel, 'Why There Is a Duty to Pay Damages' (2015) Draft Paper.

<sup>340</sup> *President of India v Lips Maritime Corp, The Lips* [1988] AC 395.

<sup>341</sup> Nicholas McBride, 'Stephen A Smith on Duties and Liabilities' [2015] University of Cambridge Faculty of Law Research Paper No. 62/2015.

<sup>342</sup> *Sempra Metals Ltd v Inland Revenue Commissioners* (n 111); see the discussion in the text to nn 109 to 117 above; note, however, that that approach has been deprecated in the restitutionary context by the recent decision of the Supreme Court in *Prudential Assurance Company Ltd v Commissioners for HMRC* (n 112).

primary duty to say pay a purchase price, the duty to pay damages does not have a due date.<sup>343</sup>

As flagged earlier, Smith further relies on two normative arguments to advance the liability view. The first is an argument regarding the nature of moral duties: since defendants cannot know the exact amount of loss suffered by claimants prior to an authoritative determination by a judge, a pre-judgment duty to pay damages would be a duty that it would be impossible to perform. Since legal duties ought to 'express moral duties' and since, relying on the maxim that 'ought' implies 'can', moral duties cannot be impossible to perform, the obligation to pay damages cannot be a duty. This is essentially the same argument that Smith levels against strict duties, and that we considered in the last section.

Secondly, Smith argues that if there were such a duty, courts would be merely enforcing pre-existing rights when ordering a defendant to pay damages. Since the enforcement of pre-existing secondary rights is not sufficiently different from the enforcement of primary rights, the adjudicative exercise (*viz* the award of damages) would not be sufficiently focussed on the wrong that gave rise to the secondary right. Consequently, the court would be missing an opportunity to reproach the defendant for the wrongfulness of her conduct.<sup>344</sup> Briefly, both of these arguments albeit valid are unsound.<sup>345</sup> As to the first argument, 'ought' implies 'can' is a controversial philosophical position.<sup>346</sup> On a rival account, the fact that sometimes we cannot help but fail to fulfil our moral duties is an integral

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<sup>343</sup> Stevens and Steel (n 339).

<sup>344</sup> Smith, 'Duties, Liabilities, and Damages' (n 332) 1752–1753.

<sup>345</sup> Although the arguments themselves are valid, not all of their premises are true. Therefore, they are unsound, albeit formally valid.

<sup>346</sup> Smith does not really elaborate the position c.f. 'Duties, Liabilities, and Damages' (n 332) 1744; rather, he simply relies on Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith tr, St Martin's Press 1965).

part of the tragic nature of human existence.<sup>347</sup> If we are content to accept duties that we cannot always perform, this argument falls away.<sup>348</sup>

As to the second argument, the idea that it might be desirable for a court to communicate an amount of community disapproval or censure where a defendant has committed a wrong is a familiar one in criminal law theory.<sup>349</sup> This argument is open to at least two challenges. First, we might doubt Smith's contention that damage awards do not adequately express censure. After all, the very thing that defines secondary rights is that they arise from the breach of primary rights. If the fact of breach is encoded in the DNA of secondary rights, then surely the creation and enforcement of secondary rights sufficiently communicates the law's concern with that breach. On the other hand, were we to grant, for the sake of argument, Smith's point that more censure is expressed on the liability view, we might be inclined to think that that level of censure, irrespective of whether it is apt in the criminal context, is misplaced for tortfeasors and contract-breakers where the torts and breaches of contract in question do not also constitute properly-criminalised conduct.

Community censure can have serious implications – consider Hawthorne's Hester Prynne.<sup>350</sup> Of course, being told that one is a right-breaker is rather less serious than being ostracised as an adulterer by puritans, but we might think the punishment of public shaming is nonetheless too harsh for tortfeasors. It stands to reason that it would be entirely inappropriate without the stricter requirements of the criminal process. Further, most criminal law theorists consider that conduct must clear some *de minimis* hurdle in order to be properly criminalised,

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<sup>347</sup> John Gardner gives the example of a non-swimmer rescuing a drowning person: we might not be able to do it, but we still should rescue them which is why we feel such agony at not being able to help them: see his 'The Wrongdoing That Gets Results' (n 329) 55–56; see also Stevens and Steel (n 339).

<sup>348</sup> As argued above, sometimes we cannot but help but fail to comply with our moral obligations. This is tragic, but it is simply part of what it is to be a moral agent. In particular, see the text to nn 329 to 330 in the section headed 'Strict liability' immediately preceding this section.

<sup>349</sup> See eg Grant Lamond, 'What Is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609; RA Duff, 'Perversions and Subversions of Criminal Law' in RA Duff and others (eds), *The Boundaries of the Criminal Law* (2010).

<sup>350</sup> Nathaniel Hawthorne, *The Scarlet Letter* (John Lane 1904).

and concern about the impact of censure is an important motivation for having such a *de minimis* requirement.<sup>351</sup> In this context, it is a legitimate concern that foregrounding the wrongfulness of the defendant's conduct might actually communicate the wrong thing altogether by side-lining the claimant's role and entitlement in favour of the aforementioned communication of censure.<sup>352</sup>

The foregoing discussion concludes that the liability view does not get off the ground. This is of the utmost importance for the survival of The Distinction, since serious implications for the primary/secondary dichotomy follow from the liability view when applied to secondary rights. We might think that all the liability view really does is transform secondary rights into secondary powers and secondary duties into liabilities.<sup>353</sup> As Hohfeld points out, those who do not differentiate in a Hohfeldian manner often use the expression 'rights' to encompass not only claim rights but also privileges, powers, and immunities.<sup>354</sup> *Mutatis mutandis*, Hohfeld argues that the term 'duties' is similarly used to encompass duties, no-rights, liabilities and disabilities.<sup>355</sup> Thus, whilst no longer being Hohfeldian rights and duties, secondary rights would intelligibly remain rights in a broader sense, and secondary duties would remain duties in a broader sense.

However, the mischief wrought by the liability view goes deeper – it extends beyond mere Hohfeldian distinctions. *Pace* McBride, the disturbance to our taxonomy goes beyond simply re-labelling secondary duties as secondary liabilities. Rather, this disturbance goes to the very nature of the bipolar jural relationship that exists between claimant and defendant post-breach. On the

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<sup>351</sup> For instance, Sandra Marshall and Antony Duff suggest that since censure is citizens collectively calling one another to account for their wrongs, we can only criminalise in instances where we as a body politic have been wronged through the wrong done to the victim of a crime: see their 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law & Jurisprudence* 7; similarly, Becker, whose approach is in many regards diametrically opposed to Marshall and Duff's, argues that the state's involvement in the business of censuring wrongdoers must be explicitly justified: see his 'Criminal Attempt and the Theory of the Law of Crimes' [1974] *Philosophy & Public Affairs* 262.

<sup>352</sup> For a detailed defence of the position that the civil process emphasises that the claimant is in control, see eg Marshall and Duff (n 351) 15.

<sup>353</sup> This is the conclusion McBride draws from Smith's arguments: see McBride (n 341).

<sup>354</sup> Hohfeld (n 40) 35.

<sup>355</sup> *ibid.*

duty model, D owes C a secondary duty once he breaches his primary duty and this secondary duty is reflected in C's correlative secondary right. On the liability model, matters are somewhat more complicated: when C's rights are infringed, she does not get a power that is a direct correlative of D's liability.

In order for C to have a power correlative to D's liability, she must be able to change his jural relations through an act of her will. However, due to the complications arising from the inclusion of the courts into the party's jural relationship, C's purported power more closely resembles her action right (recall the discussion in the previous section) than a Hohfeldian, bipolar power over D. If we look at D's liability, we notice that as a matter of fact, D is in fact under two distinct liabilities: the one Smith is chiefly concerned with, the liability to be brought under an obligation to pay damages, is a liability vis-à-vis the court corresponding to a correlative power in the court to bring D under that obligation to pay damages.

It is crucial to recognise that, on the most generous reading of the secondary liability view, C has no power to make D pay damages; rather, she merely has a power to bring him under an obligation – owed to the court – to appear before the court and enter a defence to C's claim. Thus, D's liability vis-à-vis C is merely a (procedural) liability to be brought under an obligation to appear before a court.<sup>356</sup> The contrast becomes apparent when we consider a genuinely correlative, bipolar power-liability relationship that could exist as a matter of substantive law between C and D: recall *Whiteacre* from Chapter 5.<sup>357</sup> Here, C can by an exercise of her will – by saying, I would like to buy Whiteacre at the price that we have agreed – change D's legal rights and obligations. *Ex ante* C's exercise of her power, D is under no duty to sell the land to C; *ex post*, he is.

Of course, as Sandy Steel and Robert Stevens point out, a commitment to the duty model does not require denying the existence of any of these power-liability

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<sup>356</sup> Smith briefly avers to this triadic relationship between C, D and the court: see Smith, 'Duties, Liabilities, and Damages' (n 332) 1750.

<sup>357</sup> See the definition of *Whiteacre* in the section title 'Action rights' in Chapter 5 above.

pairs of correlatives.<sup>358</sup> As our discussion of the importance of recognising the existence of action rights law above shows, the legal relationship between C and the courts – and D and the courts – will (almost)<sup>359</sup> always be present in the background of the substantive legal relationship between C and D. The contrast between the duty view and the liability view is thus one between a picture of the law in which C's substantive secondary rights and her action rights both exist, and a picture of the law in which she only has action rights. On the duty view, C's secondary rights are one of the necessary conditions in her exercise of her action rights. On the liability view, substantive secondary rights do not exist and the event of a breach of the primary right replaces the existence of the secondary right as one of the necessary conditions of C's action rights.

*Prima facie*, the premises required to make out the argument that C has an action right to be awarded a remedy are more complex on the liability view. Thus, C must show that she had a primary right and that that right was breached (and that there are no other factors making it the case that the infringement should not be remedied). By contrast, on the duty view, she must only show that she has a secondary right (and that there are no procedural factors making it the case that her right should not be enforced). The duty model thus seems to have the advantage of simplifying pleadings. Of course, the extent of that simplification depends on what is necessary to establish C's secondary rights. For instance, if we posit that D's breach of his primary duty *ipso facto* gives rise to C's secondary rights, we must show C's primary right and that it was breached – the very factors the liability view requires her to demonstrate – in order to establish her secondary right. Thus, the supposed simplification would turn out to be nothing more than a convenient shorthand in pleading.<sup>360</sup>

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<sup>358</sup> Stevens and Steel (n 339).

<sup>359</sup> On one understanding, C will not have any rights against the court once his claim is limitation-barred.

<sup>360</sup> Of course, there are, as discussed above, many differences between D being under a (secondary) duty and him being merely liable to have a remedy imposed upon him following a court order; however, the difference in what is required of C to establish her action rights does not appear to be one of them.

That is not to say, however, that there are no advantages to adapting the duty view. Since the duty model builds the additional step of the secondary right into the process, that model has more flexibility regarding where to incorporate considerations that would mandate not granting a remedy in spite of a breach having occurred. Whereas legal systems adopting the liability model must accommodate all policy considerations within the singular level of substantive rights or (worse even) the action rights, those adopting the duty model can predetermine some of the questions that might arise at the time of the court decision within the substantive law. It stands to reason that such accommodation would have the advantage of making the consequences of certain actions clearer to citizens in advance, since, as Smith argues, action law is primarily addressed to judges.<sup>361</sup>

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<sup>361</sup> Smith, 'Rule-Based Rights' (n 188) 17.



## Chapter 8: Conclusion

In this thesis, I have considered the use and utility of The Distinction in private law. I argue, first, that the most common conception of The Distinction is used almost reflexively in how we think about many disparate areas of English private law. That fact is explained by the reliance that these areas place on breach in order to structure the rights that we have against one another. That use is useful, as it allows us to highlight and understand commonalities and differences between different rights in private law.

Secondly, I have argued that we must, however, be careful in our use of The Distinction. Ill-defined or overly ambitious use of The Distinction can lead to serious confusion. This can be shown by the judgments in and discussion surrounding cases like *Photo Production*,<sup>362</sup> *Cavendish*<sup>363</sup> and *AIB*.<sup>364</sup> This realisation leads us to, thirdly, recognise that we need to better define what we mean when we use the terms ‘primary right’ and ‘secondary right’. There are several rival conceptions of The Distinction, and, for a number of reasons, we should use the Austinian one. This forces us to acknowledge that The Distinction, so defined, does not imply anything beyond its terms about the properties of a primary right, and it does not imply anything beyond its terms about the properties of a secondary right. To reiterate the point, not all secondary rights are compensatory.

Moreover, I assert that the substantive rights that we have in English private law can accurately and exhaustively be classified as either primary or secondary rights. Although it is not necessary to do so, it is preferable to make use of this analytical tool. Doing so enables us to explain things more efficiently, captures a normatively relevant feature of English private law, recognises more nuance than we could recognise without this analytical tool, and accurately gives expression to our underlying moral obligations.

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<sup>362</sup> *Photo Production* (n 13).

<sup>363</sup> *Cavendish* (n 14).

<sup>364</sup> *AIB* (n 15).

Our inability to draw further inferences from the classification of a substantive right extends to any possible impact that the classification of a right as, say, primary can have on what remedies ought to be awarded on the basis of that right. There is no necessary connection between a substantive right being primary and the type of remedy that is logically possible. (Of course, the type and content of a substantive right may still influence the type and content of available remedies.) Given that there is no necessary connection between a substantive rights status as primary or secondary, we cannot reliably infer the existence of these rights from the content and type of the remedies awarded. However, nonetheless, the remedies awarded combined with the judicial justification of those awards does provide good *prima facie* evidence of the existence of primary and secondary rights.

Lastly, I have considered the challenge to the use of The Distinction that emanates from what I have called Flat Views of the nature of legal obligation. The challenge posed by Global Scepticism is due to the fact that, on these general jurisprudential theories about the nature of law, there is no conceptual space for the simultaneous existence of both primary and secondary substantive rights. In fact, often, such view only see action rights. However, the challenge posed by Global Scepticism can ultimately be diffused. The first sub-category of Global Scepticism, command theories, are unconvincing as accounts of legal obligation. The second sub-category, interpretivism, presents a much more appealing account of the nature of legal obligation. However, interpretivism can be interpreted so as not to be a Flat View, which allows us to sidestep the challenge it poses to The Distinction.

Lastly, Local Scepticism poses a challenge to The Distinction by denying the existence of a variety of specific primary or secondary rights in concrete areas of private law. However, the Local Sceptics' views fail to convincingly portray the nature of primary obligations in negligence and strict liability. Equally, a duty-based view of damages is preferable to the view of damages advocated by Local

Sceptics. Thus, The Distinction survives the challenges from the Flat Views unscathed.

There are, naturally, a number of questions that this thesis has touched upon in passing that will be left to be investigated and answered another time. One part of the methodological approach of this thesis has been to investigate the impact that various areas of academic debate might have on our ability to use The Distinction. Thus, it has been necessary to dip into that debate. However, that purpose has also limited the scope of our engagement with that debate. Thus, for instance, there is much that remains to be said about the relationship between substantive rights and remedies. The discussion of these points in Chapter 5 is necessarily limited to an extent that is necessary in order to be able to properly consider the subject matter of this thesis. Fortunately, there is more literature developing in this area, and the important classificatory work that should be done here is sure to be done.<sup>365</sup>

Similarly, and entirely unsurprisingly, I have not been able to say much about the debate regarding the nature of law in general jurisprudence that was touched upon in Chapter 6. Insofar as anything has been said about this area in this thesis, my aim has been to explore the implications from these theories for The Distinction. *Mutatis mutandis*, the same holds true for the debate regarding the nature of liability in negligence that we touched upon in Chapter 7. Whilst I have considered a few arguments that have been made in this space, there is a wide-ranging and developing literature and much remains to be said about it.

I hope to have brought some clarity to one discrete area: the use of the distinction between primary and secondary rights in private law. Contrary to the challenges we have considered, The Distinction remains descriptively accurate, and it can be used fruitfully in our thinking about our obligations in private law. Of course, such use is only fruitful if everyone is on the same page about how

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<sup>365</sup> Unfortunately, the publication of Stephen A Smith's new book will be too late for inclusion in this thesis. However, it should make a good starting point for further discussion in this area: see Stephen A Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

we are using it. It is thus important that people use the same conception of The Distinction. In order to do so, we must, however, also be on the same page about how we are distinguishing substantive rights – the domain of The Distinction – from action rights and remedies. The Distinction will not be intelligible if we do not, for instance, distinguish between substantive rights and action rights.

I hope that whatever increase in clarity that this thesis has contributed to will help academics, judges and practitioners in their use of The Distinction. The Distinction understood in the way I advocated for can be a useful analytical skeleton through which to conceptualise our substantive rights. As such, it should be a useful part of our analytical toolbox in private law. If used properly, The Distinction can help us better understand many of the issues that we are trying to address in private law. Better understanding, in turn, can help us find better solutions. Moreover, if we are properly cognisant of the limitations of analysis in terms, we can avoid the pitfalls of the imprecise and misguided uses The Distinction is sometimes put to. If all this thesis does is prevent the sort of unnecessary analytical circumlocution using The Distinction found in the judgments of Lord Neuberger and Lord Sumption in *Cavendish*,<sup>366</sup> I would consider it to have succeeded in its task.

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<sup>366</sup> *Cavendish* (n 14).

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