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

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

1. Introduction

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

* This chapter fleshes out a section of my DPhil thesis, and complements *Standing in Private Law* (OUP 2023) (forthcoming). An early draft was presented at the *Global Seminar on Private Law Theory*, June 2020, and a more developed version at the *New Directions in Private Law Theory* conference, November 2021. For their engagement I am indebted to all participants. For written comments and helpful discussion I am especially grateful to Kit Barker, Nico Cornell, Martin Fischer, John Goldberg, Andrew Halpin, Paul MacMahon, Ben McFarlane, Charles Mitchell, Stephen Pitel, Irit Samet, Duncan Sheehan, Paul Stanley, Sandy Steel, Rob Stevens, Lionel Smith, Steve Smith, Bill Swadling, Ben Zipursky, and the anonymous reviewer. Apologies if I have inadvertently missed anyone out. Remaining errors are mine alone.

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

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

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

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

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

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

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

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

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

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

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

2. Defendant liabilities: the ambiguity

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

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

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

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

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

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

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

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

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

Table 2.1 The Hohfeldian scheme. Created by Timothy Liau.

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

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

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

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

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

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

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

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

In similar vein, Stephen Smith has claimed that:

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

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

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

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

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

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

3. Two Hohfeldian liabilities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

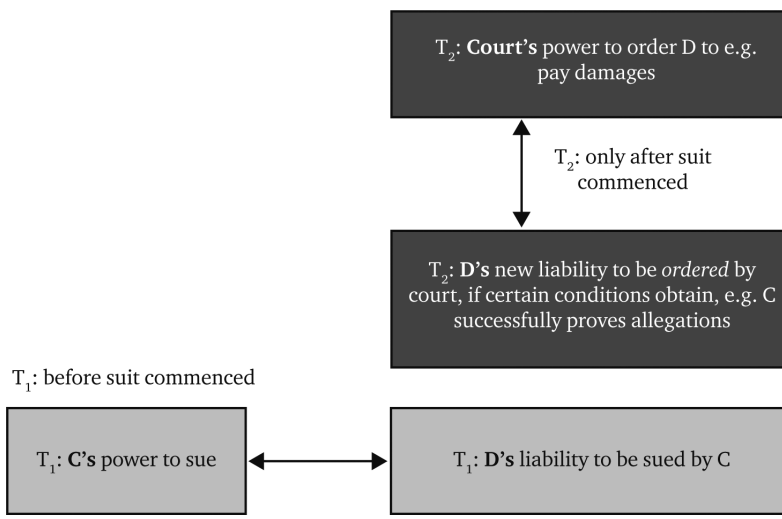

Figure 2.1 The two-power model. Created by the author.

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

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

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

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

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

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

5. Standing's priority and significance

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

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

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

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

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

5.1 The court is not a roving commission

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

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

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

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

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

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

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

5.2 Right-holder control

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

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

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

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

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

5.3 Settlements

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

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

5.4 Timing

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

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

5.5 Successful suits

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

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

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

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

5.6 Unsuccessful suits

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

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

6. Some further implications: the role of wrongs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As illustration, consider yet another example:

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

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

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

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

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

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

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

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

7.1 The court is not an 'agent' of C

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

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

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

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

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

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

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

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

7.2 Timing

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

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

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

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

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

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

7.3 Unsuccessful suits

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

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

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

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

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

7.4 Judicial mistakes of law

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

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

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

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

7.5 Remedial discretion

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

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

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

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

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

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

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

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

Notes

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

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

3 Cane (n 2) 44–45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Hohfeld (n 20) 30–32.

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

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

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

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

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

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

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

65 CPR, Part 12.

66 CPR 70.1.

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

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

69 CPR 69, 72, 73.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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