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Thinking in Terms of Contract Defences?

Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith

1. INTRODUCTION

While the terminology of defences is commonplace in other fields of private law, contract lawyers seem relatively unaccustomed to thinking in terms of defences. For example, although the leading texts in other areas of private law reserve a prominent place for defences,¹ the present edition of *Chitty on Contracts* does not.² Similarly, although Andrew Burrows dedicates Part 4 of his *Restatement of the English Law of Unjust Enrichment* to defences,³ he includes no equivalent section in his *Restatement of the English Law of Contract*. Indeed, references to ‘defences’ in that work are few and far between.⁴

Although it is true that the word ‘defence’ is used periodically in writing on contract law,⁵ contract law scholars tend not to employ the concept of a defence in structuring their analyses, and they do not seem to attach particular significance to the term. They may even struggle to point with confidence to rules that count as defences. In his chapter in this volume, Kit Barker sums up the situation as follows:⁶

Ask most lawyers to name defences in the criminal law, law of torts, or the law of unjust enrichments and they will readily be able to reel off a list with some confidence. Request from them instead a list of contractual defences and they will probably pause longer for thought.

The overarching aim of this chapter is to explore the reluctance of contract lawyers to think in terms of defences. The opposition to terminology that is ubiquitous elsewhere in private law is a striking feature of contract law scholarship that merits attention. The analysis is in three parts. In Section 2, we ask whether contract law has defences. We argue that, on three popular definitions of that term, there are defences to contract claims. This, combined with three further features, which we canvass in Section 3, explains specifically what is puzzling about the fact that contract lawyers do not think in terms of defences. Finally, in Section 4 we address the question whether contract lawyers ought to speak in terms of defences. As a precursor to this analysis, we isolate a range of related questions that can be asked about defences. Considerable confusion, we believe, has been nourished by a failure on the part of many theorists to be clear about the questions that they are asking. Having explained through a process of distinction the question with which we are concerned, we offer reasons for and against using the language of defences in the contractual context.

¹ Eg, A Dugdale (ed), *Clerk & Lindsell on Torts*, 21st edn (London, Sweet & Maxwell, 2014) ch 3 (entitled ‘General Defences’); C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones on Unjust Enrichment* 8th edn (London, Sweet & Maxwell, 2011) Pt 6 (entitled ‘Defences’).

² H Beale (ed), *Chitty on Contracts*, 32nd edn (London, Sweet & Maxwell, 2015).

³ A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, Oxford University Press, 2012).

⁴ A Burrows, *A Restatement of the English Law of Contract* (Oxford, Oxford University Press, 2016). The index does not even contain the term ‘defence’ as a main entry.

⁵ See, eg, *Contributory Negligence as a Defence in Contract* (Law Com No 219, 1993); Law Commission, *The Illegality Defence* (Law Com 320, 2010); Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com 242, 1996) para 10.2.

⁶ See ch 2 at p [xxx] [P.1].

2. ARE THERE DEFENCES IN CONTRACT?

One possible explanation for the dearth of references to defences in writings on contract law is simply that there *are* no defences to contract law claims. While this suggestion might seem surprising, it should not be dismissed out of hand. For example, in her chapter in an earlier volume in this series, Helen Scott ventures that the South African law of unjust enrichment may leave no room for defences because of the way in which the elements of the cause of action in unjust enrichment are defined.⁷ Whether contract law recognises defences depends on how the concept of a defence is understood.⁸ In this section we argue that, on three popular definitions of ‘defence’, there are several examples of contract law doctrines that answer to the description of a defence.⁹ The upshot is that the failure of contract law scholars to employ the concept of defences cannot be explained on the ground that there are no defences in the law of contract.

2.1. *Defences as rules that are external to the elements of the cause of action*

In his chapter in *Defences in Tort*, Graham Virgo wrote that ‘[a] denial negates an element of the [claim], whereas a defence is a rule that relieves the defendant of liability where all the elements of the [claim] for which the claimant sues are present’.¹⁰ This analysis, which Kit Barker describes as ‘probably the most popular of modern academic conceptualisations of the idea of a “defence”’, offers a contrast with the concept of a denial.¹¹ It explains defences in terms of a distinction between the ‘elements of the claim’ and those doctrines that are external to the claim, but which relieve the defendant, wholly or partly, of liability.¹² Proponents of this definition need to offer a full account of it. However, in this chapter, we assume that such an explanation can be given, and will adopt an intuitive, pre-theoretical notion to develop our own claims.

Many contract law doctrines seem to operate as denials. Barker writes:¹³

If one understands a contractual cause of action as the set of facts both sufficient and necessary to meet the requirements of contractual inception doctrines (the ‘elements’ of a binding contract) then ... it is pretty clear that no argument

⁷ H Scott, ‘Defence, Denial or Cause of Action: “Enrichment Owed” and the Absence of a Legal Ground’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Oxford, Hart Publishing, 2016) 64.

⁸ Without clarifying the definition of the concept, there is a risk of a ‘merely verbal’ dispute: see generally D Chalmers, ‘Verbal Disputes’ (2011) 120(4) *Philosophical Review* 515.

⁹ We discuss the definition of defences at greater length in A Dyson, J Goudkamp and F Wilmot-Smith, ‘Central Issues in the Law of Tort Defences’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) 5–11; A Dyson, J Goudkamp and F Wilmot-Smith, ‘Defences in Unjust Enrichment: Questions and Themes’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Oxford, Hart Publishing, 2016) 2–7.

¹⁰ G Virgo, ‘Justifying Necessity as a Defence in Tort Law’ A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) 139.

¹¹ Barker, ch 2, p ... For an assessment of this conception of a defence, see L Duarte d’Almeida, ‘Defining “Defences”’ in A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Tort* (Oxford, Hart Publishing, 2015). Daniel Markovits uses this definition of the term defence in his contribution to this volume. He writes that ‘a party that seeks to avoid enforcement of boilerplate does not offer a defence against contractual obligation so much as directly deny that the boilerplate belongs in the contract to begin with’: **Markovits, ch 3, p ... [p.23]**.

¹² On some accounts, not every doctrine relieving the defendant of liability is a defence: this shows the possibility of further distinctions within the defence/denial group.

¹³ Barker, ch 2, p ...

concerning agreement, consideration, intention to create legal relations or uncertainty of terms is really a defence argument.

All of these arguments assert that the preconditions of contractual validity are absent, and without a contract, an action for breach of contract cannot be established.

Nevertheless, at least some contract law doctrines seem to amount to defences in the sense currently under consideration. Consider, for example, limitation.¹⁴ It is not an element of the cause of action in breach of contract that no limitation bar applies. As Burrows observed in the context of tort defences, ‘no one has ever suggested that limitation should instead be viewed as specifying an element of the cause of action’.¹⁵ A plea that a limitation bar applies cannot, it follows, be a denial. Instead, a limitation bar prevents a claim from succeeding if the cause of action of action for breach of contract is fully constituted. Scholars analysing other compartments of the law of obligations routinely refer to limitation as a ‘defence’;¹⁶ there is no reason to distinguish contract law in this respect.

Limitation is certainly not the only example of a contractual defence in the relevant sense of the word. The action for breach of contract is actionable per se; a claimant need not prove any loss for the claim to succeed. However, the defendant can seek to limit her liability for any loss that the claimant shows was caused by the defendant’s breach. Any such limiting doctrines can be thought of as defences, and arguably should be understood in this way.¹⁷ The doctrine of remoteness of damage is, for example, such a limiting rule,¹⁸ and in his chapter, V Niranjan claims that ‘remoteness ... is an answer or defence to what is in any case a complete cause of action.’¹⁹ Much the same could be said about the contributory negligence doctrine.²⁰ That rule is a damages-limiting device and, as such, can be understood as a defence on the defence/denial framework. It is no part of the cause of action in breach of contract that the claimant took reasonable care of her own interests.²¹

Many other doctrines, including rules that are typically thought of as being central to the law of contract, are arguably defences too on the meaning of that term that is presently in issue. Consider the doctrine of undue influence, which is discussed by Stephen Waddams in

¹⁴ Limitation Act 1980 (UK) ss 5–7. Compare Duarte d’Almeida (n 11) 51–2 (arguing that limitation is a procedural bar, not a defence).

¹⁵ A Burrows, ‘Some Recurring Issues in relation to Limitation of Actions’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) 310.

¹⁶ See, eg, N McBride and R Bagshaw, *Tort Law* 5th edn (2015, Harlow, Pearson Education) (treating limitation within ch 26, which is entitled ‘Defences’); Mitchell, Mitchell and Watterson (n 1) (addressing limitation within a part of the book that is headed ‘Defences’).

¹⁷ Some writers deny that rules that affect only the remedy are defences: see, eg, J Goudkamp, *Tort Law Defences* (rev ed, Oxford, Hart Publishing, 2016) 2. An intermediate position was adopted by the Law Commission in its report *Privity of Contract: Contracts for the Benefits of Third Parties*: Law Commission (n 5) para 10.2. The Commission wrote that: ‘we do not include as defences matters which bar a particular remedy such as that specific performance is not available of a contract for personal service.’

¹⁸ *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2009] 1 AC 61.

¹⁹ Niranjan ch 10, p ...

²⁰ Law Reform (Contributory Negligence) Act 1945 (UK) s 1.

²¹ It has periodically been suggested (or held) that the contributory negligence doctrine can reduce damages to nil: see, eg, *McMullen v National Coal Board* [1982] ICR 148 (QBD); *Jayes v IMI (Kynoch) Ltd* [1984] EWCA Civ 4; [1985] ICR 155, 159; *McEwan v Lothian Buses plc* 2006 CSOH 56; 2006 SCLR 592, [32]–[35]; *Byron Avenue* [2010] NZCA 65; [2010] 3 NZLR 445, [63]; cf *Wynbergen v Hoyts Corp Pty Ltd* (1997) 72 ALJR 65 (HCA); *Anderson v Newham College of Further Education* [2002] EWCA Civ 505; [2003] ICR 212; *Buyukardicli v Hammerson UK Properties plc* [2002] EWCA Civ 683 [7]. Where the doctrine has his consequence, it is difficult to see it other than as a defence: it completely eliminates the obligation to pay damages, but on no view does it suggest that there was no wrong.

his chapter.²² The absence of undue influence does not seem to be a part of the cause of action in breach of contract, yet the doctrine can be used to avoid a contract—and, so, to resist an action for breach of contract.²³ As such, it is arguably a defence. Waddams writes: ‘From one point of view the use of such a power may be regarded as a defence to contractual obligation’.²⁴ The doctrines of duress and misrepresentation might be similarly understood: the absence of duress and misrepresentation do not seem to be part of the cause of action in breach of contract; yet the doctrines can be raised to resist an action for breach. Substantially the same points can be made in relation to the illegality doctrine.²⁵ The absence of illegality is not usually cited as part of the cause of action in breach of contract. To this extent, the doctrine appears to be a defence.

2.2. Rules external to the cause of action that must be pleaded by the defendant

Robert Stevens claims that the first definition of a defence is satisfactory only when coupled with a rider. He writes: ‘Anything that the defendant pleads which can resist the claimant’s action, that does not merely constitute a denial of an element of the claim, is a defence.’²⁶ Applying this definition, Stevens argues that the doctrine of waiver is a defence.²⁷ Limitation is also a defence in this sense of the word. The rules governing limitation are external to those that specify the scope of the action in breach of contract, and the defendant carries the onus of pleading limitation (although once put in issue, it falls to the claimant to prove that the bar does not apply.²⁸) Another defence on this definition is contributory negligence.²⁹ We have already noted that the contributory negligence doctrine is not part of the cause of action in breach of contract,³⁰ and it is well-established that the defendant must plead it.³¹ A final illustration is the mitigation doctrine. It is an external rule in respect of which the defendant bears the onus of pleading.³²

While all rules that are defences on the first definition of that term that we have canvassed are also defences on Stevens’s definition, the converse is not true. Illegality would seem to be a defence on the first definition,³³ but it cannot be on Stevens’s meaning of that word: it is unnecessary for the defendant to plead it.³⁴ The court is permitted, perhaps required, to consider the doctrine provided that it emerges on the evidence that the preconditions for its application are satisfied.³⁵

²² Waddams, ch 4.

²³ For discussion of whether undue influence is a defence, see S Waddams p 000 [‘From one point of view the use of such a power may be regarded as a defence to contractual obligation’]

²⁴ Waddams, ch 4.

²⁵ The illegality doctrine is addressed by Lord Toulson in his chapter: see ch ...

²⁶ R Stevens, ‘Should Contributory Fault be Analogue or Digital?’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) 246. See also Stevens’s chapter in this volume: ch 7, p ... (‘In private law, a defence is a reason that the defendant must assert in his pleadings that will defeat an otherwise good claim’).

²⁷ ‘Generally therefore, waiver operates as a defence to a claim that would otherwise succeed’: Stevens, ch 7, p ...

²⁸ See Burrows (n 16) 310.

²⁹ Expressly stated in Stevens (n 26) 244–48.

³⁰ See the text accompanying n 20.

³¹ *Fookes v Slaytor* [1978] 1 WLR 1293 (CA).

³² *Anselm v Buckle* [2014] EWCA Civ 311 [24] (Briggs LJ).

³³ See the text accompanying n 25.

³⁴ *Lipton v Powell* [1921] 2 KB 51 (Div Ct); *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817, 821; [1976] 1 WLR 1213 (CA) 1218; *Pickering v Deacon* [2003] EWCA Civ 554; *The Times*, 19 April 2003.

³⁵ As to these preconditions, see, now, *Patel v Mirza* [2016] UKSC 42.

2.3. *Pleading and proof definition*

Other writers understand the way in which the onus of proof has been allocated in respect of a given rule to indicate whether the rule concerned is a defence. This yields a third popular definition of the term ‘defence’. This definition does not incorporate within it the distinction between a denial of the element so the action in which the claimant sues and rules that are external to those elements.³⁶ It is hence quite separate from the definitions considered thus far. Tony Weir embraced this third definition of the term ‘defence’ when he asserted that the contributory negligence doctrine is ‘unquestionably a defence ... [since] it is for the defendant to plead and prove it’.³⁷ There are many other contract law doctrines that are defences on this definition. Because the onuses of pleading and proof usually go hand in hand,³⁸ and rules in respect of which the defendant carries an onus of pleading must usually also be proved by the defendant.³⁹ It follows that most rules that are defences on Stevens’s definition are also defences on this third definition.

2.4. *Summary*

In this section, we have canvassed three popular definitions of defences in private law. We have also shown that on all of these definitions, there are defences in contract law.

3. THE PUZZLE OF CONTRACT DEFENCES

The preceding section demonstrated that there are doctrines in contract law which *could* be analysed as defences, regardless of how that word is understood. In view of this, coupled with the fact that the language of defences is ubiquitous in other branches of private law, it is curious that contract law scholars shun the term. In this section, we give three additional reasons why the relative absence of the concept of a defence in contract law scholarship is puzzling.

3.1. *Similar terminology for similar doctrines*

It has forcefully been argued that we should discuss rules that share the same or a similar logical form in a unitary lexicon, regardless of the historical or jurisdictional pedigree of those rules. This proposition is particularly prominent in debates over the distinction between legal and equitable rules. For example, Andrew Burrows, a leading exponent of this way of thinking, argues that ‘lawyers are not doing enough to eradicate the needless differences in terminology used, and the substantive inconsistencies, between common law and equity.’⁴⁰ Burrows’ argument typifies the view, widely held, that rules of the same form should be discussed in a common language, regardless of their origin in the law of obligations. This deepens the puzzle with which we are concerned. As we have shown, contract law has various doctrines which *could* be called defences. Furthermore, some of these doctrines, like

³⁶ Compare Duarte d’Almeida (n 11), who explains the distinction between defences and denials in terms of probative burdens.

³⁷ T Weir, *Introduction to Tort Law*, 2nd ed (Oxford, Clarendon Press, 2006) 129. It should be noted that Weir seems to think that the burden of proof is important when it comes to ascertaining whether a rule is a defence. This view is not shared by Stevens, who focuses on the burden of pleading.

³⁸ *Semper necessitas probandi incumbit ei qui agit* (he who asserts must prove).

³⁹ As Weir observes, the defendant carries the onus of proof in relation to contributory negligence: *Wakelin v L & SW Rly* (1886) 12 App Cas 41 (HL) 47 (Lord Watson); *SS Heranger (Owners) v SS Diamond (Owners)* [1939] AC 94 (HL) 104 (Lord Wright).

⁴⁰ A Burrows ‘We Do This At Common Law But That In Equity’ (2002) 22 *OJLS* 1, 1.

limitation, Burrows himself even calls defences in writing about other areas of the law.⁴¹ Nevertheless, scholars, often seem to resist linguistic assimilation of these doctrines in their writing on contract law.⁴² In the absence of explanation, this resistance to invoking in the law of contract language that is used freely elsewhere in the law of obligations is puzzling.

3.2. *Statutory recognition of defences*

Another reason why it is surprising that lawyers do not think about contract doctrine with the concept of a defence is that certain features of the law *require* them to do so. When a third-party beneficiary brings proceedings to enforce a contract, a promisor has a statutory entitlement to certain defences she would have had against the promisee.⁴³ For example, section 3(3)(b) of the Contracts (Rights of Third Parties) Act 1999 (UK) provides that

[t]he promisor shall also have available to him by way of defence or set-off any matter if ... it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

This provision mandates the use of the terminology of defences, and requires the parameters of the term ‘defence’ to be identified. The Contracts (Rights of Third Parties) Act 1999 is not the only piece of legislation that is concerned with contract law that utilises the concept of defences.⁴⁴

3.3. *Use of concept of defence in theoretical discussions*

The final reason that contract law scholars’ failure to invoke the language of defences is surprising is that legal theorists use the concept in thinking about the law of contract.⁴⁵ In *Contract Theory*, Stephen Smith invokes the terminology of defences. He applies it to a variety of doctrines including duress, unconscionability, mistake, frustration and estoppel.⁴⁶ Further, although HLA Hart’s most famous writing in special jurisprudence is perhaps his treatment of the criminal law,⁴⁷ his earliest published essay, which introduced legal philosophers to the concept of defeasibility, concerned defences in contract.⁴⁸ Borrowing from the law of real property, Hart illustrated the ‘defeasible character of legal concepts’ in the contractual context.⁴⁹ He explained:⁵⁰

When the student has learnt that in English law there are positive conditions required for the existence of a valid contract, i.e., at least two parties, an offer by one, acceptance by the other, [etc.] his understanding of the legal concept of a contract is still incomplete ... For these conditions, although necessary, are not

⁴¹ See the sources mentioned in n 16.

⁴² See the text accompanying nn 3–4.

⁴³ Contracts (Rights of Third Parties) Act 1999 (UK) s 3.

⁴⁴ See, eg, Third Parties (Rights against Insurers) Act 2010 (UK) s 2(3)–(4).

⁴⁵ See, further, PS Atiyah, ‘Contract and Fair Exchange’ in his *Essays on Contract* (Oxford, Oxford University Press 1986) 329

⁴⁶ S Smith, *Contract Theory* (Oxford, Oxford University Press, 2004), esp ch 9.

⁴⁷ Especially on account of his *Punishment and Responsibility* 2nd edn, (Oxford, Clarendon Press, 1968).

⁴⁸ HLA Hart, ‘The Ascription of Responsibility and Rights’ (1948–9) 49 *Proceedings of the Aristotelian Society* 171, also in AGN Flew (ed), *Logic and Language* (first series, Oxford, Blackwell, 1951). Hart later disowned the paper: Hart (n 47) v.

⁴⁹ Hart (1948–9) (n 48) 181.

⁵⁰ *ibid*, 174–75 (emphasis in original)

always sufficient and he has still to learn what can *defeat* a claim that there is a valid contract, even though all these conditions are satisfied.

These defeating factors are, Hart says, defences to claims in contract. He went on to list a number of defences in contract law, including duress, insanity, intoxication and frustration, which he classified into seven distinct categories.⁵¹ The essay has spawned a vast philosophical literature on ‘defeasibility’.⁵²

The reluctance of the authors of leading treatises on the law of contract to organise and discuss contract law in terms of defences thus appears out-of-step with some of theoretical literature on contract. This is not attributable simply to a lack of awareness of this philosophical literature: both Hart’s paper and Smith’s book are very well known and widely discussed. Not only does mainstream writing regarding contract law depart from the theoretical literature to which we have referred, but the difference in approach is unexplained.

4. SHOULD CONTRACT LAWYERS THINK IN TERMS OF DEFENCES?

We have suggested that the absence of the concept of defences from doctrinal scholarship on contract law is, at least at first glance, puzzling. In this section we ask, first, whether the asymmetry with other areas of the law of obligations is justifiable; we ask, next, what advantages there might be in thinking of contract law using the concept of a defence. Before we turn to this, we attempt to clarify the precise question we are asking. It is important that we do so, for much of the literature regarding the defences, in private law and beyond, fails to isolate the exact question that is being addressed.

4.1. Clarifying the question

To create a contract, it is usually sufficient that there be offer and acceptance, consideration and an intention to create legal relations. If, however, there is a fundamental change in circumstances such as to render performance ‘radically different from that which was undertaken by the contract’, the contract is frustrated.⁵³ Let us, for now, prescind from whether the doctrine of frustration is a ‘defence’; we can, instead, call it an ‘exception’ to a more general rule. Very many legal doctrines seem to take the form of exceptions in this sense. We should distinguish at least six questions that arise; our question in this section is the sixth.

Two questions that can be asked about a specific exception, like frustration, are as follows. We might ask, first, what the law is on the matter. This requires an analysis of the relevant doctrinal materials. What does ‘radically different’ mean? Does frustration occur automatically?⁵⁴ And so on. Next, we might ask whether the relevant law, whatever it may be, is justified. Is it right that the law excuses the parties from further performance when there are radical changes in circumstances? Or should the parties bear the risk of prejudice from these shifts?

Particular exceptions can be categorised within a broader class of doctrines. A third question we can ask, then, is whether the exception in question is a token instance of some

⁵¹ Ibid, 175–76.

⁵² For an overview of some of the key debates, see JF Beltrán and GB Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford, Oxford University Press, 2012). For a book building a theory of defeasibility and defences out of Hart’s essay, L Duarte d’Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford, Oxford University Press, 2015).

⁵³ *Davis Contractors v Fareham Urban DC* [1956] AC 696 (HL) 728 (Lord Radcliffe).

⁵⁴ As to which, see Ewan McKendrick’s chapter: ch 8.

more abstract type. This is the sort of question which people address when they ask whether contract law has defences: a category of ‘defences’ is posited, and it is asked whether some particular doctrine (such as frustration) belongs within that category. There are numerous (mutually consistent) possible classifications that can be discussed. Frustration might be (along with duress and undue influence, for example) within the more abstract category of ‘doctrines which can cancel valid contracts’ and (along with common mistake, for instance) within the more abstract category of ‘doctrines which deal with circumstances being radically different from that expected.’ We can also discuss which of these arrangements is most enlightening; this might vary, depending on one’s purposes.

In proposing an answer to this third question, a more abstract category than the particular exception must be put forward. We can then ask, fourth, whether the law should recognise exceptions of the type gathered together by this category; most abstractly we can ask, as Richard Epstein does, ‘why it is necessary to think of exceptions to the general proposition at all’.⁵⁵ Scholars often ask what reasons there are to recognise *defences*.⁵⁶ This is another way of asking the fourth question. A danger of asking it in this way is that the term ‘defence’ is used in various ways by different authors.⁵⁷ However, if a clear answer is given to the third question, this will clarify the sense of ‘defence’ in question. The fourth question differs from the second question: the second question is about a particular doctrine, and so might point to quite particular features of that doctrine; the fourth question is about a more abstract category, so answers must draw on more general features shared by all members of the set.

The fifth question we can ask is what, if anything, we can learn from the fact that some doctrine is within a more general category. It might be thought, for instance, that the classification of some doctrine as a defence can have practical implications. For example, in his chapter Daniel Markovits writes that

the doctrinal distinction between a defence against and a direct denial of contract liability, although largely rhetorical when stated as a matter of general theory, can make a difference to outcomes when embedded in a particular sphere of commercial and legal practice.⁵⁸

Some have argued, more concretely, that quite general practical consequences can flow from the classification of some doctrine as a defence. A good illustration is found in Robert Stevens’s work. He writes that ‘[t]he most important practical effect of characterising an issue as being a defence is that it will usually determine who has to prove what as a matter of evidence’.⁵⁹

⁵⁵ RA Epstein, ‘Pleadings and Presumptions’ (1973) 40 *University of Chicago Law Review* 556, 558.

⁵⁶ See, eg, *ibid* (arguing that defences can be used to structure legal argument and clarify difficult issues of law); RA Epstein, ‘Nuisance Law: Corrective Justice and Its Utilitarian Constraints’ (1979) 8 *Journal of Legal Studies* 49 (arguing that defences can be used to limit the scope of utilitarian arguments in law); B Chapman, ‘Law, Incommensurability, and Conceptually Sequenced Argument’ (1998) 146 *University of Pennsylvania Law Review* 1487 (arguing that defences enable the law to cope rationally with incommensurable values); B Chapman, ‘Defeasible Rules and Interpersonal Accountability’ in JF Beltrán and GB Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford, Oxford University Press, 2012) 410 (arguing that defences ensure ‘a process that knits the parties together in a self-confirming exchange of mutual respect’); J Goudkamp and C Mitchell, ‘Denials and Defences in the Law of Unjust Enrichment’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Comparative and Critical Essays* (Oxford, Hart Publishing, 2013) (suggesting five possible reasons for recognising defences in the law of unjust enrichment and rejecting several others).

⁵⁷ We sketched three definitions above in Section 2. That list is not exhaustive.

⁵⁸ Markovits, ch 3, 000.

⁵⁹ Stevens (n 26) 250.

These arguments do not seem to be concerned with whether some particular category of exceptions should exist, or how we should categorise those exceptions; they are concerned with what follows *from* that categorisation. Arguments of this type, while popular, are controversial. For example, it might be thought that all of the ‘consequences’ of characterising a doctrine as a defence are in fact constituents of the definition.⁶⁰

The success of such practical arguments may also depend on whether concept of a defence is internal to the law or merely an analytic device for thinking about the law. On one view, the concept of a defence is part of the positive law.⁶¹ The idea here is that the law, rightly or wrongly, embraces the idea of a defence. For example, if defences are understood in contradistinction to denials,⁶² the claim is that the law itself classifies rules as either denials or defences based on an organisational divide found within the law. This may be John Gardner’s position. Of the distinction between offences and defences in criminal law, he asks ‘what line is it that ... legal systems ... are trying to draw?’⁶³ It might be argued that the law should not be arranged in this way. Perhaps the divide between denial and defences is incoherent; and, even if it is not, perhaps the law does not draw the line in the right place. However, on this first view, this would be irrelevant to a description of the law: there is a line, and it is drawn by the law itself.⁶⁴

Another view is that the concept of a defence is one that we use merely to think about the law (or, at least, about certain branches of the law). The law might be such that a claimant can establish liability only by proving a certain set of facts, and the defendant can resist that liability only by proving some other set of facts. However, this view claims, once we know all the facts about when liability arises, how it might be defeated, who bears the burden or pleading and proof, and so on, we know *everything* salient that there is to know about the law. There is, in other words, no further question about whether some of these rules are classified as a defence by the law.⁶⁵ Scholars and judges might refer to certain rules as defences but, on this alternative way of understanding things, such references are nothing more than an exegetical tool: perhaps the label ‘defence’ is a shorthand for rules in respect of which the defendant bears the burden of proof, for example.

For our purposes, the relevance of this distinction is this. If the classification of some doctrine as a defence is internal to the law, it may be that the law attaches consequences to that classification. If, however, the concept is merely an analytical device for thinking about the law, it is less clear that inferences can be drawn from the classification of a doctrine as a defence.⁶⁶

It is possible to ask and answer any of these five questions without employing the language of defences; indeed, contract lawyers seem to do so already. The puzzle we have

⁶⁰ For development of this analysis, see Dyson, Goudkamp and Wilmot-Smith (n 9) 5–6.

⁶¹ Goudkamp (n 17) xvii.

⁶² See section 2.1.

⁶³ J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) 143–44. Whether Gardner is in this first camp depends on what he means by the concept of an offence.

⁶⁴ On the idea of law claiming, see J Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford, Oxford University Press, 2012) ch 5.

⁶⁵ Consider our example of the legal rule, ‘ $P \rightarrow Q$ unless r ’, and the category of which r is a token, C . On both views under consideration, r is a part of C in virtue of r ’s features, C ’s features, and these features being sufficiently related. Yet, on the first view, one of those features is the law’s classification ‘ r is part of C ’; on the second view, such a classification is either not possible or not required.

⁶⁶ It is important to be quite precise here about what we mean. On this view, the classification of some doctrine as a defence is a conclusion we draw from various characteristics of legal doctrine—for example, from the rules of pleading and proof. We do not suggest that no further consequences should follow from the nature of legal rules on pleading and proof, only that the classification of those rules as a defence adds nothing to such an argument.

isolated does not, therefore, seem to concern any of these questions. Instead, it seems to concern a sixth question: what value is there in thinking about some abstract category of exceptions using the *language* or *terminology* of ‘defences’? This question is not about whether some particular exception, like frustration, or class of exceptions, such as those often designated with the label of ‘defences’, should be recognised. The question, instead, is about the way we talk about those rules and categories. As we have illustrated, we might discuss these areas of law using the language of ‘exceptions’; we could discuss them, instead, using a foreign language or even an idealised, formal language;⁶⁷ why, then, discuss the law using the language of ‘defences’?

4.2. *The value of the language of ‘defences’*

The concepts we use are sometimes thought to be important if we are to describe reality correctly. For example, Theodore Sider writes that ‘[f]or a representation to be fully successful, truth is not enough; the representation must also use the right concepts, so that its conceptual structure matches reality’s structure.’⁶⁸ Similarly, in the legal context, Ernest Weinrib writes that a theoretical account of the law should ‘orient itself to the features salient in legal experience’ and seeks to ‘understand those (and other) features as they are understood from within the law.’⁶⁹ These claims suggest that legal scholars who are concerned to describe the law should use the law’s concepts.

Even if what Weinrib claims here is true, it would not follow that contract lawyers need to invoke the *terminology* of defences. It is entirely possible to grasp the *concept* of a defence (regardless of the definition that one embraces) without using the word ‘defence’. The question here is: What would be wrong, for example, with an account of contract law, including defences, expressed in (say) a formalised language? One possible answer to this question is that, although nothing is intrinsically wrong with such an account, it may be harder for some people to understand than an account in natural language. A key concern for most people writing about the law is how best to articulate the claims about the law. For example, a textbook writer must be alive to her audience: construction lawyers might find it helpful to place certain rules front and centre which shipping lawyers can relegate to a footnote. In the context of the present volume, one might hypothesise, therefore, that contract lawyers are disinclined to use the language of defences because they consider that it does not help people understand the content of contract law.⁷⁰

This analysis pushes the question back one level: why do contract lawyers find the language of defences less useful than scholars of other areas of law? As we have shown, the language of defences could be applied to large swathes of contract law.⁷¹ Why is it harder (if, indeed, it is) to describe contract law using the terminology of defences than, for example, tort law and unjust enrichment law? One possible answer to this question is that contract law, unlike many other fields, does not make use of certain distinctions within the concept of a defence, such that that between justifications and excuses. Thus, these latter concepts are

⁶⁷ We could, for example, discuss some rule as ‘ $P \rightarrow Q$ unless r ’, where ‘ P ’ is the set of circumstances defeasibly sufficient to yield a legal conclusion (‘ Q ’), and ‘ r ’ is the exception to that rule; we could then ask in virtue of what r is a member of some broader set of exceptions, C . And so on.

⁶⁸ T Sider, *Writing the Book of the World* (Oxford, Oxford University Press, 2012) vii.

⁶⁹ EJ Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995) 11.

⁷⁰ We consider below whether the concept of a defence is internal to the law, such that a perfect presentation of the law would require the use of the concept.

⁷¹ See section 2.

widely thought by criminal law scholars to be of profound significance for their subject.⁷² Similarly, torts scholars have also suggested that the difference between the ideas of justification and excuse is important for their discipline.⁷³ Conversely, few contract scholars have made much of them when discussing contract law.⁷⁴ There are, it is true, innumerable references in the case law and literature to contracting parties being ‘excused’ from their obligations, for example subsequent to the contract becoming impossible to perform.⁷⁵ In these cases, however, the term ‘excuse’ is not being used in contrast with that of ‘justification’; it is being used to denote the parties’ *release* from their obligations. If the language of defences is useful as a tool for making this further distinction, and if contract law has no use for the distinction, that would show why the term is less valuable to contract lawyers. Notably, however, unjust enrichment lawyers make use of the language of ‘defences’ and few have thought about those doctrines in terms of justifications and excuses.⁷⁶

A second answer to the question ‘why do contract lawyers find the language of defences less useful than scholars of other areas of law?’ may rest on convention: because judges do not use the language of defences in deciding contractual claims, it may not be illuminating to introduce what is essentially a foreign term into the discourse.⁷⁷ Now this does not, of course, explain why judges do not employ the terminology of defences. But that is not to the point; the mere fact that, for whatever reason, judges eschew the language of defences in the contractual context may provide some reason not to use the term ‘defence’ in expositions of contract law.

We have, so far, suggested reasons that contract lawyers might have to avoid the term ‘defence’. Would there be any value in their using the language of defences? We here suggest two considerations: first, to illuminate links with doctrines both within contract law and between contract law and other parts of private law; second, to express moral features of the law. We have already considered the first reason.⁷⁸ The idea we addressed is that rules that share the same or a similar logical form should be treated in a unitary lexicon, regardless of their historical or jurisdictional pedigree. It might be argued that the language of defences will enable similar links to be drawn within contract law and between contract law and other areas of law.

This virtue, if it is a virtue, must be balanced against a possible disadvantage to employing the language of defences. While the language may make it easier for certain distinctions to be

⁷² For instance, HLA Hart asserted that ‘the distinction between [justification and excuse] is . . . of great moral importance’: Hart (n 47) 13. Kent Greenawalt believes that ‘the basic distinction between justification and excuse is very important for moral and legal thought’: K Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ (1984) 84 *Columbia Law Review* 1897, 1927. George Fletcher writes that ‘[t]he distinction between justification and excuse is of fundamental theoretical and practical value’: GP Fletcher, ‘The Right and the Reasonable’ (1985) 98 *Harvard Law Review* 949, 955.

⁷³ See, eg, JL Coleman, *Risks and Wrongs* (Oxford, Oxford University Press, 1992) ch 11; GP Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85 *Harvard Law Review* 537, esp 556–64; JCP Goldberg, ‘Inexcusable Wrongs’ (2015) 103 *California Law Review* 467; JCP Goldberg, ‘Tort Law’s Missing Excuses’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015); Goudkamp (n 17) 82–101.

⁷⁴ Compare, however, AJ Morris, ‘Practical Reasoning and Contract as Promise—Extending Contract-Based Criteria to Decide Excuse Cases’ (1997) 56 *CLJ* 147.

⁷⁵ See, eg, *Taylor v Caldwell* (1865) 3 B & S 826, 840; 122 ER 309, 315 (Lord Blackburn); *Poussard v Spiers & Pond* (1876) 1 QBD 410 (QBD) 414 (Blackburn J); *Howell v Coupland* (1876) 1 QBD 258 (CA) 262 (James LJ); *Robinson v Davison* (1871) LR 6 Ex 269 (Exch) 275 (Kelly CB).

⁷⁶ Compare D Klimchuk, ‘What Kind of Defence is Change of Position?’ in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Oxford, Hart Publishing, 2016).

⁷⁷ Another hypothesis could be drawn from Barker, ch 2 p . . . [‘when the idea that a contractual cause of action . . .’].

⁷⁸ See section 3.1.

grasped, it might occlude others. To see what we have in mind, consider the doctrines of common mistake and frustration. Common mistake operates where the requirements of offer and acceptance are satisfied, but the parties have dealt with one another on the basis of a shared false assumption. If the mistake is sufficiently important, no contractual rights arise.⁷⁹ Frustration is distinguished from common mistake only by the moment in time when the assumption is falsified.⁸⁰ Frustration deals with cases where the event arises *after* the contract has been formed. The parties' contract is cancelled.⁸¹ Given that the only distinction between these doctrines is the time when the frustrating event occurs, contract scholars ought to treat their rules together.

However, it could be difficult to treat these rules together if the law is presented using the language of defences. Consider the denials/defences model of defences.⁸² Common mistake prevents a contract from ever having existed, and as such might be more amenable to being analysed as a denial: if there is no contract, there can be no breach. This may explain why *Chitty* deals with common mistake in its section on 'Formation of the Contract.'⁸³ Conversely, the doctrine of frustration is easier to analyse as external to the elements of the action in breach of contract: it does not deny that there was a contract, but asserts that the contract has been cancelled. We are not, of course, suggesting that common mistake should be understood as a denial and frustration as a defence. Neither are we contending that the association between frustration and common mistake cannot be captured on certain views of defences. Our point is that invoking the language of defences might result in two rules that are related in some fundamental way being discussed, and perhaps even classified, separately, to the detriment of understanding regarding them.⁸⁴

The second consideration we want to propose is that some moral features of the law might be missed if the language of defences is eschewed. In particular, the law's assessment of the moral character of certain acts might be overlooked. To understand what we have in mind here, it is important to distinguish the content of a legal rule from its moral implications. The precise same legal rule, or set of legal rules, can be more or less defensible depending on the language with which they are expressed. Consider, for example, the movement to recognise same-sex marriage: for many, an equivalent set of legal rules under the label of a 'civil partnership' would fail to treat same-sex partners in the same way as heterosexual partners. This suggests that the language used to create or discuss some legal rule can have moral implications: the implication of 'civil partnership' was widely thought to be an assessment that same-sex relations were qualitatively different from heterosexual relations even though they were accorded the same substantive legal rights.

If the language of defences carries with it moral connotations, we might have moral reasons to use (or avoid) this language. Consider John Gardner's claim that the 'consequences [of the contrast between offences and defences] extend not only to the

⁷⁹ The leading case is *Bell v Lever Bros* [1932] AC 161 (HL). See, also, *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679.

⁸⁰ This is most clearly illustrated by *Amalgamated Investment & Property Co v John Walker & Sons* [1977] 1 WLR 164 (CA), where it was unclear whether the event took place before or after frustration.

⁸¹ *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 (PC (HK)) 505 (Lord Sumner); *Davis Contractors v Fareham Urban DC* [1956] AC 696 (HL) 728 (Lord Radcliffe); *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA) 8, 9, 14 (Bingham LJ).

⁸² See section 2.1.

⁸³ Beale (n 2) pt 2 ('Formation of the Contract'), ch 6.

⁸⁴ Our argument is subject to the caveat that the current method of presentation does not seem to have ensured rational thought about the law: common mistake and frustration are distinguished in the law in terms of their remedial consequences. See Law Reform (Frustrated Contracts) Act 1943 (UK).

organization of textbooks but also to the moral quality of the criminal law.’⁸⁵ He explains: ‘In classifying some action as criminal, the law asserts that there are prima facie reasons against its performance—indeed reasons sufficient to make its performance prima facie wrongful.’⁸⁶ A prima facie wrong, for Gardner, is ‘an actual wrong, not just an apparent or putative wrong.’⁸⁷ Defences are doctrines permitting the defendant, who has done something prima facie wrongful, to explain why she did it; she might, for example, be excused or justified in her wrongful act. The classification of some particular doctrine as an offence or defence, therefore, makes a moral claim about the character of the action-types in question. In that respect, Gardner’s claims might concern earlier questions, about the justification of certain exceptions or categories of law. However, if the language of ‘defences’ implicates that the defendant has something to answer for—that they have done something prima facie wrong—then there may be a further question about how we should talk about particular rules of law. If talking of certain doctrines as ‘defences’ to breach of contract accepts that a wrong was committed, but seeks to explain the wrongdoing, we might want to restrict the language of defences to those doctrines where that is, normatively, the fact of the matter; in particular, we would want to restrict the language to those situations where we wish to convey the sense that defendants invoking the doctrine have something to answer for.

These remarks bear on a prominent debate in the contract theory literature, in particular the extent to which any breach of contract is, in truth, a wrong. Oliver Wendell Holmes Jr famously pronounced that ‘[t]he 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.’⁸⁸ If this view is taken seriously, the language of defences should be avoided entirely in the contract context.⁸⁹ Even if we resist the extent of Holmes’s claim,⁹⁰ the justification of using the language of defences arises for individual doctrines. Consider frustration again. Suppose that an opera singer agrees to perform at an impresario’s house during the course of a new production. The singer becomes ill and is unable to perform; the impresario replaces her and claims damages from the singer.⁹¹ If the singer has a ‘defence’ of frustration, this might be thought to suggest that she has done something prima facie wrong, which requires justification. Whether she *has* done something prima facie wrong depends upon an independent theory of contractual obligation; our point here is that it might be thought important for the law to reflect the moral status of her action in its labelling of particular doctrines.⁹²

5. CONCLUSION

The aim of this chapter has been to probe the resistance of contract lawyers to using the language of defences. By demonstrating that contract law clearly admits of numerous rules that answer to at least one of three popular definitions of the concept of a defence, we have

⁸⁵ Gardner (n 63) 142. See also GP Fletcher, *Rethinking Criminal Law* (Boston, MA, Little, Brown & Co, 1978) 555. There are numerous instances in the law of this phenomenon, where the way a body of rules is understood affects is important: for many, for example, an equivalent set of legal rules under the label of a ‘civil partnership’ would fail to treat same-sex partners equally with different-sex couples who are able to enter ‘marriage.’

⁸⁶ Gardner (n 63) 96.

⁸⁷ *Ibid.*

⁸⁸ OW Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 462.

⁸⁹ We note that this would also make the language of defences inapposite in the unjust enrichment context.

⁹⁰ The claim has generated a vast literature, including as to what Holmes meant. For one treatment, see JM Perillo, ‘Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference’ (2000) 68 *Fordham Law Review* 1085.

⁹¹ This scenario is loosely based on *Poussard v Spiers & Pond* (1876) 1 QBD 410 (QBD).

⁹² For a development of similar ideas, see Barker ch 2, p ... [section on ‘The Eighteenth Century – Early Conceptions: Ballow, Blackstone and Powell’].

shown that the resistance is real rather than apparent. Contract law undoubtedly has myriad doctrines that qualify as defences. This raises a puzzle—why are contract lawyers disinclined to think in terms of defences?—to which we drew attention. We endeavoured to explain exactly why this puzzle arises. Finally, we identified reasons for and against using the language of defences. The ideas that we canvass in this last section are controversial. They are also far from fully developed, and intentionally so. This is because the puzzle with which this chapter engaged has gone unaddressed to date, and in these circumstances, we have sought merely to isolate some possible lines of reasoning for future development.