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Private Law's Remedial Structure: Claimant Standing, Defendant Liabilities, and Court Orders

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Timothy Liao*

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.

I. 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 usage of a variety of ambiguous and potentially misleading labels. In a wide range of contexts, what we might think of as '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. This article deals with one such concept. Its central claim is that standing, a power of the claimant, needs to be better differentiated from the court's powers

* This paper draws on one section in Chapter 2 of T Liao, 'Standing in Private Law' (DPhil thesis, University of Oxford 2020), an unrevised version of which was presented online at the *Global Seminar for Private Law Theory* organized by Lionel Smith, 12th June 2020. I am grateful to participants for helpful discussion, and for written comments, to XX, XX....

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

² Eg 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', *Restatement Third: Restitution and Unjust Enrichment* (Hart 2013) 140-41.

³ Cane (n 2) 44-45.

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

⁵ eg *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 1924 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 eg 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 eg *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); s1 Fatal Accidents Act 1976.

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to issue orders. Both are significant, and neither power 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 threaten to blur these two powers together. This article is thus in part clarificatory, and in part cautionary, warning against that potential danger. To briefly sketch out the background context, 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-judgement. This point has led Civil Recourse theorists to part ways with Corrective Justice theorists. A key insight of Corrective Justice theorists, against legal economists' vision of 'liability rules' unilaterally imposed on defendants,⁸ was to stress as a core feature of private law relations the interpersonal nexus between duty-bearer and right-holder, establishing 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, which is tripartite.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, wrongs

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

⁹ Arthur Ripstein, *Private Wrongs* (HUP 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 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 Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1; Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Georgetown Law Journal 695; Benjamin Zipursky, 'Philosophy of Private Law' in Coleman, Kenneth and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004); John 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; Goldberg and Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917; Benjamin Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Florida State University Law Review 299; Goldberg and Zipursky, 'Civil Recourse Revisited' (2011) 39 Florida State University Law Review 341; Goldberg and Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 Indiana Law Journal 569; Goldberg and Zipursky, 'Hohfeldian Analysis and the Separation of Rights and Powers' in Shyam Baganesh, Ted Sichelman and Henry Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (CUP 2017); John Goldberg and Benjamin 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 & Zipursky, *Recognizing Wrongs* (HUP 2020); Benjamin Zipursky, 'Civil Recourse Theory' in Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (OUP 2020).

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

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

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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

In the course of fleshing out their theory, Goldberg and Zipursky have argued at various points that a ‘right of action’, on their account, is 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 work within a ‘rights-based’ account of private law, or who wish to engage with it.²² Can Hohfeld’s bilateral scheme accommodate this triangular phenomenon? I suggest here that it can, but without requiring resort to a compound, triangular ‘right of action’.

To advance my claims, sections II and III identify an ambiguity in 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 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 IV and V 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 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 VI explores some further implications on the role of wrongs, while Section VII concludes with a summary of differences from a ‘private right of action’ framework.

Being going into the paper proper, a caveat is due. 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 the civil trial, and post-trial execution of judgment. The point of this paper is not an attempt to map out exhaustively all relevant relations, demonstrating how they change over time as each event occurs. The aim is less ambitious; to distinguish and explain the relationship between the two identified

¹⁵ Goldberg and Zipursky, ‘Torts as Wrongs’ (n 12) 918; Goldberg and Zipursky, ‘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) OJLS 585, 607-09.

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 Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 33.

²¹ Hohfeld (n 20) 30-32.

²² See generally, Donal Nolan and Andrew Robertson, ‘Rights and Private Law’ in Nolan and 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.

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powers, in order to better isolate out what I call a claimant's standing within private law for further interrogation, a necessary preliminary to any larger project on the topic.

II. 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.²³ As they acknowledge,²⁴ 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.²⁵ 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,²⁶ and more recently by Sandy Steel and Robert Stevens.²⁷ Hohfeld himself appears to have thought that both duty and liability co-existed complementarily:²⁸ '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 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.²⁹

²³ In addition to the examples at (nn 37-44), 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.

²⁴ Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 162 footnote 18; Zipursky, 'Civil Recourse Theory' (n 12) 56.

²⁵ Stephen Smith, 'Why Courts Make Orders (And What This Tells Us About Damages)' (2011) 64 Current Legal Problems 51; Stephen Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard LR 1727; Stephen Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law and Jurisprudence 157; Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

²⁶ 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.

²⁷ Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283.

²⁸ Wesley Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) IX Columbia Law Review 285, 293-94.

²⁹ Andrew Halpin, 'Rights, Duties, Liabilities, and Hohfeld' (2007) 13 Legal Theory 23.

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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’,³⁰ 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 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 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.³¹ 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.³² Each entity has a correlative, hence the bilateral form of each legal relation:

1 st order relations		2 nd 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.³³

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.³⁴ 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.³⁵ As a quick check, it may be helpful to

³⁰ ibid 26.

³¹ Hohfeld (n 20) 53.

³² Hohfeld (n 20) 30.

³³ John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 199.

³⁴ 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 (eg a crime, civil wrong, changing residence to a different jurisdiction). See eg 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) *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.

³⁵ Hohfeld (n 20) 45, 54.

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substitute for 'liability' other synonyms, like '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.'³⁶

'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.'³⁷

'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'³⁸

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.'³⁹

'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 textbook.'⁴⁰

'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'.⁴¹

For convenience of illustration our initial example *Punch* concerned a tort, but as noted earlier, the 'liability-only' view has been transplanted and generalised *mutatis mutandis* to other areas of private law:

'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'⁴²

³⁶ Goldberg & Zipursky 'Civil Recourse Revisited' (n 12) 363.

³⁷ Zipursky, 'Civil Recourse, Not Corrective Justice' (n 12) 720-21.

³⁸ Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 163.

³⁹ Stephen Smith, 'Duties, Liabilities, and Damages' (2012) 125 *Harvard LR* 1727, 1727-78.

⁴⁰ Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019) vii.

⁴¹ *Ibid* x.

⁴² Stephen Smith, 'A Duty to Make Restitution' (2013) 26 *Canadian Journal of Law and Jurisprudence* 157, 161. For breach of contract: Stephen Smith, 'Remedies for Breach of Contract: One Principle or Two?' in Klass, Letsas and Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014). More generally: Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

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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.’⁴³

‘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.’⁴⁴

III. 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’.⁴⁵

To bring this point out more clearly, consider hypothetically a troubling implication of a one-liability model, focussing solely upon D’s ‘liability to a court order’, after she has say committed a wrong, or assumed an obligation. Some formulations and instances of ‘liability’-talk from the debate, some 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 certainly is a possible configuration for a legal system to take, this should strike a private lawyer as surprising, if not highly problematic. Such a model is overly defendant-sided. It leaves no room for Corey’s participation. Indeed, the claimant’s role appears to have been entirely effaced. Call this the *puzzle of the missing claimant*.

IV. 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’ to C, a distinction which may be prone to being overlooked.

⁴³ To Steve Smith: John Gardner, ‘Damages Without Duty’ (n 26), 419-20.

⁴⁴ To Goldberg and Zipursky: John Gardner, ‘Torts and Other Wrongs’ (n 26) 43, 57.

⁴⁵ Hohfeld (n 20) 54.

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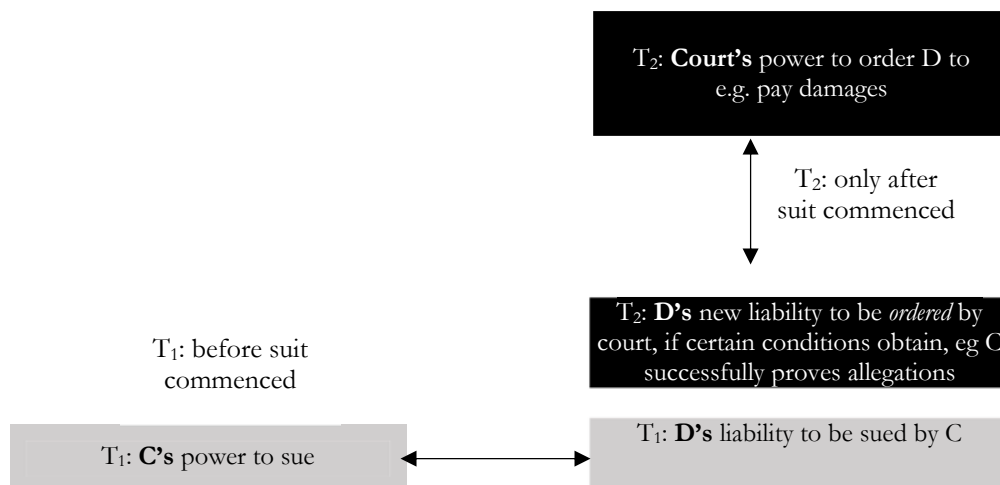
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Each sense of 'liability' identifies a different power, vested in a different power-holder, to whose exercise Dylan is liable. One power is vested in the court. The other power is vested in the claimant, Corey. Distinguishing between these two powers, 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)⁴⁶ 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 , begins. 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 (ie 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).



Recall that Hohfeldian powers, when exercised, *change* the normative positions (ie 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.⁴⁷ In other words, she is now 'liable' to the court in a way she was not before.

⁴⁶ See Section V.

⁴⁷ A similar analysis has been advanced by Ori Herstein, 'How Tort Law Empowers' (2015) 65 University of Toronto Law Journal 99, 109.

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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.⁴⁸ Consider, as illustration, a variation on our initial example:

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 stressed 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 a defendant is only under a 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, ie subject to the exercise of one other person's power. First it is the claimant's, and only after that, the court's. In order for C to successfully obtain a damages award, both C and the Court must decide to exercise their powers against D, in succession.

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.

V. 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 (eg a court or tribunal), thereby subjecting her to its power (jurisdiction) to make an order against her.

Recognising standing's distinctiveness as a power, and that it has logical and temporal priority, helps us to explain several important features about private law's remedial structure:

a. Court not roving commission

It explains why in private law the court is not a roving commission, with the unilateral initiative to investigate wrongs, enforce rights, and order damages awards. 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

⁴⁸ 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').

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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.⁴⁹

In private law it is not the courts – or any arm of the state – 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 strips C of 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, vested in the courts. Immediately post-breach, D would be liable only to the courts. We would then no longer be in the private law world. We would be left, again, with the puzzle of the missing claimant.

The point can be accentuated by simple contrast to criminal law, where victims play a minimal role. Suppose a law student walks into a shop prominently displaying a warning sign that says: 'shoplifters will be prosecuted'. If he learnt his lessons well, he would know that the shopkeeper could not really follow through on this warning. For in criminal law it is an arm of the state – the prosecutor – which has the standing to charge alleged shoplifters, not victims. And prosecutors have prosecutorial discretion.⁵⁰ Hart once put it thus:

'[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'.⁵¹

Indeed, unlike prosecutors who are duty-bound public officials, it has been argued that a private law right-holder typically has 'radical discretion'. Gardner argues that:

'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, lies 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.'⁵²

b. Right-holder control

Relatedly, the two-power model captures a hallmark feature of private law litigation: exclusive right-holder control.⁵³ Here Hohfeld's analytic scheme is particularly helpful, 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.⁵⁴ So, under this rule, only Corey is vested with

⁴⁹ Ripstein (n 9) *Private Wrongs* 272.

⁵⁰ Even if judicially reviewable.

⁵¹ HLA Hart, 'Legal Rights', *Essays on Bentham* (Oxford: Clarendon Press 1982) 183. Compare Gardner *Personal Life* (n 10) 199-201.

⁵² Gardner, *Personal Life* (n 10) 200. For further discussion see Larissa Katz and Matthew Shapiro, 'The Role of Plaintiffs in Private Law Institutions' in H Psarras and S Steel (eds) *Private Law and Practical Reason: John Gardner's Private Law Theory* (forthcoming 2022). Thanks to Larissa and Matt for permission to cite their draft.

⁵³ Zipursky, 'Philosophy of Private Law' (n 12) 655.

⁵⁴ Timothy Liau, 'Standing in Private Law' (DPhil thesis, University of Oxford 2020); also Timothy Liau, 'Privity: Rights, Standing, and the Road Not Taken' (2020) OJLS XX.

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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 to accept 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'.⁵⁵

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 (eg 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.⁵⁶ Furthermore the precise tests differs, reflecting a public interest model aimed more at controlling the misuse of public powers.⁵⁷

c. 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 settlements.⁵⁸ To prevent or terminate a suit in private law, Dylan has to 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.

d. Timing

Another implication of the model is that exclusively empowering C with standing means that C gets to control when D's liability to the court begins. In private law, our 'liabilities' 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.⁵⁹ D starts becoming subject to the court's power (jurisdiction)

⁵⁵ Gardner, *Personal Life* (n 10) 199. On 'authority', contrast Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 *Jerusalem Review of Legal Studies* 64 and John Gardner, 'Private Authority in Ripstein's Private Wrongs' (2016) 14 *Jerusalem Review of Legal Studies* 52.

⁵⁶ CPR 54.4' s31(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].

⁵⁷ The test being one of "sufficient interest": s31(3) of the Senior Courts Act 1981. Though what is 'sufficient' may vary depending on the order sought. Craig, *Administrative Law* (n 56) [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 eg *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.'

⁵⁸ CPR 1.4(f), CPR 26.4.

⁵⁹ Limitation Act 1980. Similarly, laches in equity: cf s36 Limitation Act. See eg *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

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to order her to pay damages only if, and when C sues in time.⁶⁰ If undefended by deadline, default judgment is entered against D.⁶¹

e. Successful suits

To achieve the claimant's desired result of a damages award in its favour, two distinct powers must be exercised, and 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 of the two powers alters D's position, but in different ways.

Suppose the civil suit is successful, ie the court decides in C's favour against D. In issuing 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,⁶² merging or modifying any pre-existing duty to pay damages into a new judgment duty.⁶³ The new, court-ordered duty is a different duty as wholly new consequences are attached to its non-compliance,⁶⁴ 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, eg third-party debt orders, charging orders, stop orders, or the seizure of goods.⁶⁵

This account is compatible with what Hohfeld himself thought: '[i]f A brings an action for damages, and the tribunal pronounces in his favor, 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.'⁶⁶

f. Unsuccessful suits

It is an empirical fact that unsuccessful civil suits happen all the time. It is commonplace for claimants to lose, in spite of 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 in C's favour only if C has satisfactorily proved her allegations, establishing her legal rights. C may fail at any one of these hurdles.

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'.

⁶⁰ NB it ends once judgment has been entered ie "perfected" (CPR 40.2, 40.3). See generally, Zuckerman, *Civil Procedure* (n 56) 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 court's jurisdiction is exhausted and court no longer possess power to vary or set aside judgment, subject to certain exceptions (eg 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.

⁶¹ CPR, Part 12.

⁶² CPR 70.1.

⁶³ Wesley Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) IX Columbia Law Review 285, 294.

⁶⁴ CPR 70.2A(4), s39 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: ss4-5 Debtors Act 1869.

⁶⁵ CPR 69, 72,73.

⁶⁶ Hohfeld, 'Nature' (n 63) 285, 294.

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On a two-power model, this outcome is accounted for as the *court's* decision not to exercise its correlative power to order judgment in C's favour 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. A two-power model possesses the resources to easily explain unsuccessful suits, whereas a single-power model – relying only upon a singular triangular relation – would struggle.

VI. 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 which generate them.

The 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 (ie a rights-infringement), or any other right-creating event (eg an unjust enrichment or contract).

Advocates of the 'liability-only' view have said that they are employing it in a Hohfeldian sense.⁶⁷ 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*.⁶⁸

a. D's liability to the court's coercive powers doesn't vary according to D's wrong

D's wrong does not 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 or not *Corey decides to sue*. This is what it means for C to have (exclusive) standing. This is what the two-power model shows.

⁶⁷ And so correlative to a power: see eg 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).

⁶⁸ 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; Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019) 177.

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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.

Stephen Smith has advanced this analogy most forcefully,⁶⁹ though it seems also to have been picked up by Goldberg and Zipursky at various points in different places:⁷⁰

'...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'.⁷¹

'As understood here, 'wrong-based damages' are roughly the private law equivalent of criminal punishment. To be clear, I am not suggested 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...'⁷²

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*. As a matter of formal structure, even punitive damages could take the form of a duty to pay the correlative right-holder an unliquidated monetary sum, even if its quantum is not calculated by reference to his consequential losses as with compensatory damages.⁷³ 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, this objection loses much force.

⁶⁹ Discussing see eg Ripstein *Private Wrongs* (n 9) 276-285.

⁷⁰ 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 XX) 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.'

⁷¹ Smith, *Rights, Wrongs and Injustices* (OUP 2019) 192, elaborating on an earlier argument in Smith, 'Duties, Liabilities, Damages' (n 39) 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.'

⁷² Smith, *Rights, Wrongs and Injustices* (OUP 2019) 202. See his arguments from 202-06.

⁷³ eg *Rookes v Barnard* [1964] AC 1129 (HL); *Cassell v Broome* [1972] AC 1027 (HL); *Kuddus v Chief Constable of Leicestershire 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.

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Moreover, one may also doubt whether fines (eg for traffic offences) really carry the expressive, condemnatory function Smith suggests. It has been claimed, mostly famously by Feinberg, that lacking this feature, these are not punishments but mere ‘penalties’.⁷⁴

b. D’s liability to be sued by C is not a new liability, created by D’s wrong

It may be suggested that, even if no new liability to the court’s powers is created by the wrong, there is indeed a new liability generated by Dylan’s punch – 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.’⁷⁵

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. Consider another example by way of illustration:

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,⁷⁶ 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. The court might even grant damages *in lieu* of an injunction.⁷⁷

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 (eg a contract, or an unjust enrichment at the expense of another)?

An alternative might be ventured here: the existence of a genuine wrong by D, (which for some generates a secondary duty to pay damages),⁷⁸ is what provides the court 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.⁷⁹ A court is a public body. It does not have free-wheeling discretion to exercise its powers however it likes.⁸⁰ 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

⁷⁴ J Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 *The Monist* 397.

⁷⁵ Goldberg and Zipursky, ‘Torts as Wrongs’ (n 12) 918.

⁷⁶ *Canada v Ritchie Contracting and Supply* [1919] AC 999 at 1005 (Lord Dunedin); *Redland Bricks v Morris* [1970] AC 652 (Lord Upjohn).

⁷⁷ S50 Senior Courts Act. *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.

⁷⁸ Gardner (n 26); Steel and Stevens (n 27)

⁷⁹ See eg 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’.

⁸⁰ eg Peter Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 *Oxford Journal of Legal Studies* 1.

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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.⁸¹

VII. Conclusion: Points of Departure

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

a. Court not just an 'agent' of C

I have identified at least two distinct liabilities at play, specifying how even though the court's public power may be related to the claimant's private power, so that the latter is triggered or activated by the former, 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.'⁸²

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, 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.'⁸³

⁸¹ Hence the need for constraints on state power, like a 'harm principle' and its variants: see eg 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.

⁸² Goldberg and Zipursky, 'Civil Recourse Defended' (n 12) 572.

⁸³ Zipursky, 'Philosophy of Private Law' (n 12) 633.

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As 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’.⁸⁴ 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.

b. 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.’⁸⁵

If C’s ‘right of action’ is a ‘mediated’ or ‘indirect’ power, it might be asked when exactly it is exercised. Is it (i) at time of initiation of suit (‘filing a complaint’) pre-trial, 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. A year, maybe even two, 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.

c. Unsuccessful suits

As mentioned above, a singular trilateral relation struggles to accommodate unsuccessful suits, where a claimant sues but ultimately fails to achieve his goal of obtaining judgment order against the defendant. (It may be that C could not prove the alleged facts on a balance of probabilities, or because the applicable law was not in her favour eg D might have had a complete defence).

It has been said that C’s ‘right of action’ is a ‘conditioned power’,⁸⁶ 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.’⁸⁷

The idea of conditions on a powers’ exercise is not at all troublesome. The difficulty here is that the conditions identified appear to be attached to the exercise of the *court’s* power, rather than a claimant’s

⁸⁴ Herstein (n 47) 115-17.

⁸⁵ Goldberg and Zipursky, ‘Hohfeldian Analysis’ (n 12) XX.

⁸⁶ Zipursky, ‘Philosophy of Private Law’ (n 12) 633; Goldberg and Zipursky, ‘Hohfeldian Analysis’ (n 12); Goldberg and Zipursky *Recognizing Wrongs* (n 12) 29, 98

⁸⁷ Zipursky, ‘Philosophy of Private Law’ (n 12) 633; This point is reiterated in Goldberg and Zipursky *Recognizing Wrongs* (n 12) 29, 98.

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power. The burden of producing evidence to prove one's pleadings are conditions or hurdles that C must jump only *after* suit has commenced, ie 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, refusing to exercise its powers over the defendant in C's favour. Not because C has tried to, but is unsuccessful at exercising her own 'right of action'. C loses *despite* having successfully subjected D to the court's public power.

It is quite counter-intuitive to explain failed civil suits as the product of an unsuccessful attempt by a claimant to exercise his or her 'rights of action'. If a further analogy is needed here, 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, *despite* the prosecutor's exercise of its own power to charge the accused before the courts. It is not because the prosecutor has failed to successfully exercise its 'right of action'.

d. 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'.⁸⁸ Judicial fallibility, however rare, may entail that even a meritorious claimant (eg the buyer) who was genuinely wronged might still fail to get a favourable ruling against the defendant (eg 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 do (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 recognise that a court's power is independent from the claimant's power.⁸⁹

e. 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,⁹⁰

⁸⁸ Scott Shapiro, *Legality* (HUP 2011) 15. See also HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 141-47, distinguishing finality from fallibility; Joseph Raz, *Practical Reasons and Norms* (OUP 1999) 134-36: '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'.⁸⁸ 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 T.R. 269, 101 E.R. 969; cf *Moses v Macferlan* (1760) 2 Burr.1005, 97 E.R. 676 (distinguished); *Wilson v Ray* (1839) 10 Ad. & El 82, 113 E.R. 32 (possible exception for fraud). Discussing, see *Goff and Jones: The Law of Unjust Enrichment* (n XX) [2-31]-[2-40].

⁸⁹ Herstein (n 47) 112-113.

⁹⁰ Compare John Gardner, 'Torts and Other Wrongs' (n 44) 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

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which they reject. In some sense ‘the plaintiff is *entitled* to have a judgment against the defendant’,⁹¹ 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’.’⁹²

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, diminishing equivalently the degree of the court’s agency.

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 possession of a converter,⁹³ or an injunction to which damages in lieu might be given,⁹⁴ a sharp conceptual line must be drawn, denying entirely that the claimant has any ‘right of action’ in respect of that order, *tout court*.⁹⁵ Yet in these cases, we might still want to say that claimants still possess a power to subject defendants to the court’s power to issue orders (standing). 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’,⁹⁶ 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’.⁹⁷

But this may go a step too far in the other direction. For example, though equitable in origin, the victim of an innocent misrepresentation, induced to contract with his misrepresenter, has a power to rescind the contract.⁹⁸ 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.⁹⁹

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’.

⁹¹ Goldberg and Zipursky, ‘Judicial Power and the Law-Equity Distinction’ (n 12) 293.

⁹² Ibid 293.

⁹³ S3(2) Torts (Interference with Goods) Act 1977 lays out three disjunctive options for ‘relief’, damages alone being one.

⁹⁴ (n 77). See eg *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...’

⁹⁵ 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.’

⁹⁶ Goldberg and Zipursky, *Recognizing Wrongs* (n 12) 59.

⁹⁷ Goldberg and Zipursky, ‘Judicial Power and the Law-Equity Distinction’ (n 12) 296. *Recognizing Wrongs* (n 12) 58-60.

⁹⁸ *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).

⁹⁹ S2(2) Misrepresentation Act 1967. For non-fraudulent misrepresentations, if ‘equitable to do so’ having regard to a series of factors.