PROPERTY IN CRIMINAL LAW AND PRIVATE LAW

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Dedication

To the memory of:

John Gardner

John FitzGerald

Shahjehan Khan

Acknowledgments

There are many more people to whom I owe thanks, but I am grateful to be able to say them in person.

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ABSTRACT

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A proposition of law about the allocation of proprietary rights or about the objects of a proprietary right which is true at private law is, usually, also true at criminal law. In the ordinary course of things, whatever private law takes to be property owned by *X*, criminal law would take to be property owned by *X*. To illustrate, it is true to say that things like balloons, balustrades and ballparks count as the sort of object over which a person can have a proprietary interest, as a matter of both private law and criminal law. It is also true to say that if private law allocates to me a certain balloon, balustrade or ballpark then so will criminal law – on the whole. This is what we expect in the ordinary case.

However, there are a number of instances in English & Welsh law in which this expectation does not hold. The aim of the thesis is to explain why the ordinary case occurs most of the time. A derivative aim is to explain why the ordinary case does not obtain all of the time. Certain vivid occasions on which criminal and private law have come apart, cases such as *R v Hinks* [2001] 2 AC 241, have received attention. However, there has never yet been a sustained exploration of the influence that both criminal and private law, together, bring to bear on the reasoning and outcomes of cases that involve property and wrongdoing.

My proposal is that the ordinary case is explained by the influence which four features of the legal system exert over the reasoning and outcomes in case-law. The four features are: the laws which constitute ownership, the technical lexicon used to state property laws, concurrent civil and criminal jurisdiction over property, and the maxim that wrongdoers should not benefit from their wrongdoing. These are necessary conditions but they are not necessary and sufficient conditions – whether individually or jointly – because, as we have seen, there is case-law which bucks the trend. That latter case-law is, in turn, explained by two things. The first is value pluralism. The second is a contest between two of law's claims: law's claim to moral authority and law's claim to have comprehensive practical authority.

TABLE OF CONTENTS

Chapter 1 – Introduction 1
1. Property and wrongdoing 1
2. Breakages in the pattern 6
3. The puzzle 16
4. What explains the pattern of covariance? 24
   4.1 Four fixed features of the legal system 24
   4.2 Guarantees and constraints 27
   4.3 The claims defended 33
5. Terminology and assumptions 35
   5.1 The term ‘property’ 35
   5.2 ‘Private’ law, ‘criminal’ law, ‘property’ law 44
   5.3 Other assumptions 48
6. Conclusion 51

Chapter 2 – Some Responses to the Puzzle 53
1. Introduction 53
2. The ‘building block’ view 55
   2.1 Problems with the building block view 57
3. The ‘distinct domain’ view 58
   3.1 Problems with the distinct domain view 61
4. The ‘different functions’ view 65
   4.1 Problems with the different functions view 70
5. The ‘mutatis mutandis’ view 76
   5.1 Problems with the mutatis mutandis view 79
6. The ‘dependence’ view 80
   6.1 Problems with the dependence view 83
7. Conclusion 86

Chapter 3 – Language 90
1. Introduction 90
2. The feature under examination 92
3. Distinct domain theories must commit to homonymy 94
4. Why homonymy is implausible: a first pass 99

5. The homonymy objection renewed ... 110
6. Response ... 113
6.1 What is the function of terms of art? ... 114
6.2 What is the function of non-technical terms? ... 120
7. The linguistic commitments of other models of the legal system ... 125
8. Conclusion ... 128

Chapter 4 – Jurisdiction ... 131
1. Introduction ... 131
2. The feature under examination ... 134
2.1 What is 'jurisdiction'? ... 134
2.2 Civil and criminal courts make decisions on the basis of a shared set of norms ... 139
3. A constraint: avoiding norm conflict ... 146
3.1 A thought experiment ... 147
3.2 Risk of conflicting rulings on substantive law ... 148
3.3 Risk of conflict arising from jurisdictional rules ... 155
4. Complications arising from concurrent jurisdiction ... 158
4.1 Legal systems claim comprehensive practical authority ... 160
4.2 Claiming comprehensive practical authority ... 164
4.3 Departures from covariance due to the comprehensiveness claim ... 166
5. Problematising deviations from covariance ... 170
6. Conclusion ... 174

Chapter 5 – Ownership ... 176
1. Introduction ... 176
2. The property regime is a coordination scheme ... 180
3. Duties on non-owners guarantee the owner's right to security of property ... 185
3.1 Penner's theory of property in outline ... 188
3.1.1 Penner's 'exclusion thesis' ... 193
3.2 Honoré's necessity claims ... 200
3.2.1 Claim (7) – checking conversion ... 202
3.3 Duties inconsistent with rules of allocation ... 204
4. Duties on owners are a constraint on their freedom to use their things ... 207
4.1 What things can be owned? ... 210
4.2 Honoré's claim (3) – totality of incidents ... 215
5. Conclusion ... 216

Chapter 6 – Profiting from Wrongdoing 218
1. Introduction 218
2. Riggs v Palmer 223
2.1 The decision in outline 223
2.2 Dworkin on Riggs 226
3. A Dworkinian principle? 229
3.1 Dworkin's account of principles 229
3.2 Does the maxim state a true moral principle? 232
4. The slayer rule in the common law 237
4.1 Deliberate killing with no intention to acquire 238
4.1.1 Euthanasia and assisting suicide 239
4.1.2 Suicide pacts that fail 240
4.2 Manslaughter 243
4.3 Modes of acquisition 247
5. What explains legal practice in slayer rule cases? 248
5.1 Analysing 'ought' statements 248
5.2 The attitude of commitment 252
5.3 'May one be pardon'd and retain the offence?' 255
6. Further illustrations and troubling cases 264
7. Conclusion 271

Chapter 7 – Conclusion 273
1. Introduction 273
2. What explains the pattern of covariance? 275
3. What explains disturbances in the pattern? 280
3.1 The desideratum of authoritativeness 287
3.2 The desideratum of moral determinacy 290
4. Are disturbances to the pattern pernicious? 295
4.1 Is this just to raise a debate about the value of coherence? 299
4.2 Can there be a unitary property regime? 303
4.2.1 Mistake 303
4.2.2 Value pluralism 306
5. Conclusion 315

Bibliography 317

Table of Cases

ENGLAND & WALES	Page(s)
AA v Persons Unknown [2019] EWHC (Comm) 3556	132
AG's Reference (No 1 of 1985) [1986] QB 491	293
Ashdown v Telegraph Group [2001] EWCA (Civ) 1142	202
Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508	30
Attorney-General v Blake [2001] 1 AC 268	65, 242
Bank Mellat v Her Majesty's Treasurer (No. 3) [2013] UKSC 38, [2014] AC 700	143
Barclays Bank v Various Claimants [2020] UKSC 13, [2020] AC 973	56
Barton and Booth v R [2020] EWCA Crim 575	88
Benkharbouche v Embassy of the Republic of Sudan [2015] EWCA Civ 33, [2016] QB 347 (CA)	56
Benkharbouche v Embassy of the Republic of Sudan [2017] UKSC 62, [2017] 3 WLR 957 (SC)	56
Beresford v Royal Insurance Co Ltd [1938] AC 586	228, 231, 239
Blades v Higgs (1865) 11 HL Cas 621	32
Borders (UK) Ltd v Commissioner of Police of the Metropolis [2005] EWCA Civ 197	147
Bowmakers v Barnet Instruments [1945] KB 65	3, 7, 11, 36, 53, 135, 167, 174, 198, 199, 200-207, 253-259, 267, 268, 277, 289
Bridgman v Green (1755) 2 Ves Sen 627	223
Case of Swans (1592) 7 Co Rep 15b	32

Chase Manhattan Bank v Israel-British Bank [1981] Ch 105	293
Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147	222
Cleveland v United States [2019] EWHC 619 (Admin)	88
Costello v Chief Constable of Derbyshire Constabulary [2001] EWCA Civ 381, [2001] 1 WLR 1437	83, 100, 159, 160-2, 256, 272-3
Coventry v Lawrence (No. 1) [2014] UKSC 13, [2014] AC 822	55, 145, 255
Doodeward v Spence (1908) 6 CLR 406	32
DPP v Patterson [2017] EWHC 2820 (Admin)	88
Dunbar v Plant [1998] Ch 412	227, 229-232, 235
East India Company v Sandys (1682) 1 Vern 127, 23 ER 362	127
Edwards v Ddin [1976] 1 WLR 942	133
Elias v Pasmore [1934] 2 KB 164	201
Ellerman's Wilson Line v Webster [1952] 1 Lloyd's Rep 179	134
FHR European Ventures v Cedar Capital Partners [2014] UKSC 45; [2014] 3 WLR 535	293
Fisher v Bell [1961] 1 QB 394	111, 114, 115, 118, 119
Forder v Forder [1927] 2 Ch 291	111
Francome v Mirror Group Newspapers [1984] 1 WLR 892	171
Glyn v Weston Feature Film Co [1916] 1 Ch 261	201
Gordon v Chief Commissioner of Metropolitan Police [1910] 2 KB 1080	255
Gough v Chief Constable of the West Midlands [2004] EWCA Civ 206	272, 273
Gray v Barr [1971] 2 All ER 949	215

Gray v Thames Trains [2009] AC 1339	56
Hedley Byrne Ltd v Heller & Partners [1964] AC 465	56
Henderson v Dorset NHS Trust [2020] UKSC 43, [2021] AC 563	210, 233-235, 258, 291
Henderson v Wilcox [2015] EWHC 3469 (Ch), [2016] 4 WLR 14	236
Hibbert v McKiernan [1948] 2 KB 142	54
Hughes v Clewley, The Siben [1996] 1 Lloyd's Rep 35	145, 256
Hunter v Canary Wharf [1997] AC 655	34
Hyde Park Residence v Yelland [2001] Ch 143	201, 202
Indian Oil Corporation v Greenstone Shipping (The Ypatianna) [1988] QB 345	156
Ivey v Genting Casinos Ltd [2017] UKSC 67, [2018] AC 391	55, 87-88
Les Laboratoires Servier v Apotex Inc [2014] UKSC 55, [2015] AC 430	225
Lion Laboratories v Evans [1985] QB 526	202
Low v Blease [1975] Crim LR 513	133
Malone v Commissioner of Police of the Metropolis [1980] QB 49	200, 253, 256
Melluish v BMI (No. 3) [1996] AC 454	110, 112
Midland Insurance Co v Smith (1881) 6 QBD 561	142
P (Adoption: Unmarried Couple), Re: [2008] UKHL 38; [2009] 1 AC 173	303
Parker v British Airways Board [1982] QB 1004	13, 158, 277-8
Patel v Mirza [2016] UKSC 42, [2017] AC 467	56, 135, 199, 204, 225, 255, 258
Powell v McRae [1977] Crim LR 571	133-4, 293

R (Best) v Chief Land Registrar [2015] EWCA Civ 17; [2016] QB 23	7, 8, 9, 10, 53, 55, 135, 136, 162, 164, 175, 193, 205, 241, 259, 267, 268, 269, 277, 291, 297
R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22, [2020] AC 491	130, 131
R (Sinclair Collins Ltd) v Secretary of State for Health [2011] EWCA Civ 437, [2012] QB 394	56
R v B [2018] EWCA Crim 73	88
R v Chief National Insurance Commissioner Ex p Connor [1981] QB 758	231
R v Ghosh [1982] QB 1052	88
R v Gilks (1972) 56 Cr App R 734	10, 293
R v Gimbert (John David) [2018] EWCA Crim 2190	85
R v Gomez [2001] 2 AC 241	10
R v Hinks [2001] 2 AC 241	4, 6, 8, 9, 10, 13, 19, 39, 45, 52, 58, 60, 65, 74, 76, 77, 88, 89, 90, 92, 100, 112, 114, 116, 118, 124, 135, 151, 175, 178-180, 182-3, 193-5, 204-5, 260, 265, 267-9, 271-2, 279, 291, 293-4, 296, 298, 305
R v Peters (1843) 1 Car & K 245	134
R v Reed (1842) Car & M 306	134

R v Registrar General, ex parte Smith [1991] 2 QB 393	18, 215
R v Shadrokh-Cigari [1988] Crim LR 465	293
R v Smith [2011] EWCA Crim 66; [2011] 1 Cr App R 30	6-10, 19, 43, 45, 59, 64-5, 88-9, 92, 100, 106, 112, 116, 135-6, 140, 142, 157-8, 161, 168, 169, 171, 201, 204, 206-7, 258-9, 262, 265-9, 291, 302-4
R v Turner [1971] 2 All ER 441	10, 193, 293
R v Waya [2012] UKSC 51, [2013] 1 AC 294	147, 255
R v White (1912) 107 LT 528	134
Raymond Lyons v Metropolitan Police Commissioner [1975] QB 321	115-16, 265, 278, 285, 301
Re Crippen [1911] P 109	232
Re Dellow's Wills Trust [1964] 1 WLR 451	229
Re Giles [1971] 3 All ER 1141	233
Re Hall [1914] P 1	228, 232, 260
Re Holgate [1971] (unreported)	235, 236
Re Houghton [1951] 2 Ch 173	235
Re Land (Dec'd) [2007] 1 WLR 1009	233
Re Northern Ireland Human Rights Commission's Application for Judicial Review [2018] UKSC 27, [2019] 1 All ER 173	294
Re Pitts [1931] 1 Ch 546	235
Re Pollock [1941] Ch 219	235, 236

Rees v Darlington Memorial Hospital [2004] 1 AC 309	56
Saunders v Edwards [1987] 1 WLR 1116	42, 157
Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287	145
Spring v Guardian Assurance [1995] 2 AC 296	56
Stockdale v Onwhyn (1826) 5 B&C 173; 108 ER 65 (KB)	39, 201-2
Stockdale v Onwhyn (1826) 2 Carrington and Payne 163; 172 ER 75 (Assizes)	203, 304
Unwin v Hanson [1891] 2 QB 115	115
Vakante v Governing Body of Addey and Stanhope School (No 2) [2004] EWCA Civ 1065, [2004] 4 All ER 1056	240
Warshaw v Eastman Kodak Company 252 SE 2d 182 (1979)	200
Webb v Chief Constable of Merseyside Police [2000] QB 427	144, 159, 174, 200, 255, 256, 259, 268, 272, 273
Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146; [2016] Ch 529	56
Westdeutsche Landesbank v Islington LBC [1996] AC 669	293
Wilkes v DePuy [2016] EWHC 3096 (QB); [2017] 3 All ER 589	96
Williams v Natural Life Limited [1998] 1 WLR 830	56
XX v Whittington Hospital [2020] 2 WLR 972	56
Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37; [2010] QB 1	4, 53, 54

UNITED STATES OF AMERICA

Broder v Zeno Mauvais Music Co 88 Fed 74 (1898)	201
Exxon Shipping v Baker 554 US 471 (2008)	281

Hoffman v Le Traunih 209 F 375 (1913)	201
National Life & Accident Insurance Co v Turner 174 So 646 (1937)	236
New York Mutual Life Insurance Company v Armstrong 117 US 591 (1886)	222
People v Otis 235 NY 421 (1923)	91-3, 120, 156-59, 161, 266
Provident Life & Accident Insurance Co v Carter 345 So 2d 1245 (1977)	236
Riggs v Palmer 115 NY 506 (1889)	42, 208-220, 222, 224, 226-8, 233, 239, 241, 245-6, 249, 251-2, 261, 271, 291
Shellenberger v Ransom, 31 Neb 61; 47 NW 700 (1891)	221
Southern Life & Health Insurance Co v Mack 17 So 2d 370 (1944)	236

AUSTRALIA

Ball v Consolidated Rutile [1991] Qd 524	56
Bathurst City Council v PWC Properties Pty Ltd [1998] HCA 59	113
Re Tucker (1920) 21 State Reports (New South Wales) 175	227
The Public Trustee of Queensland v The Public Trustee of Queensland & Ors [2014] QSC 47	228
Troja v Troja (1994) 33 NSWLR 269	227, 230

CANADA

Bursey v Bursey (1960) 58 DLR (2d) 45	143
Hickey (1970) 21 DLR (3d) 368	56
Lundy v Lundy (1895) 24 SCR 650	228

Whitelaw v Wilson [1934] 3 DLR 554 228, 231

NEW ZEALAND

Henderson v Walker [2019] NZHC 2184 132

Re Cash [1911] NZLR 577 228

Ruscoe and Moore v Cryptopia [2020] NZHC 728 132

Table of Statutes

Anti-Social Behaviour Act 2003 30

Civil Partnership Act 2004 29, 53

Coroners and Justice Act 2009 142

Criminal Damage Act 1971 94, 99

Forfeiture Act 1982 229, 230, 250

Holocaust (Return of Cultural Objects) Act 2009 30

Land Clauses Consolidation Act 1845 31

Law of Property Act 1925 30, 31, 32, 94, 101, 110, 274

Misrepresentation Act 1967 31

National Health Service Act 2006 30

Parsonages Act 1865 31

Prison Act 1952 30

Proceeds of Crime Act 2002 250

Sale of Goods Act 1893 31, 94

Stamp Duty Land Tax Act 2015	29
Suicide Act 1961	229
Theft Act 1968	7, 10, 75, 85, 94, 99, 101, 116, 117, 133, 279, 293
Torts (Interference with Goods) Act 1977	85, 93, 94, 98, 99, 101, 111
Tribunals, Courts and Enforcement Act 2007	156

Chapter 1 – Introduction

1. Property and wrongdoing

This project investigates how English & Welsh law regulates property and wrongdoing. Wrongdoing here is understood in John Gardner's sense – that is, the breach of a legal duty.[1] 'Property and wrongdoing' not only involves the breach of other-regarding duties – i.e. wrongs toward other people's private property, such as theft, trespass, criminal damage and conversion – but also wrongs involving property *tout court*. There are items, like child pornography or weapons, which are unlawful to possess or deal in entirely, regardless of any proprietary interest any other person has in the item. Prohibitions over such items might be ultimately grounded in the interests others have in not being harmed but, wherever they may be grounded, such duties are certainly not grounded in the proprietary interests of specific persons.

Every municipal legal system in the world regulates property and wrongdoing, and some supranational systems do as well. The ways in which this is done are varied and complex. Multiple agencies and areas of law play a role. This thesis is concerned with only two areas of law: private law and criminal law. (What is meant by 'private law' and 'criminal law' is explained below in section 5.2.) This thesis project catalogues some of the relations that hold between private law and criminal law as they concern

[1] John Gardner, 'Wrongs and Faults' in Andrew Simester (ed) *Appraising Strict Liability* (OUP 2005).

property. The focus is on property/wrongs, and not on any other areas of interaction between the two domains. The relevant agency of the state in view will mainly be the courts.

How are we to know what relations hold between the two areas of law? The method adopted in this thesis is to look at trends in case-law. Cases involving property and wrongdoing come up in both criminal law and private law. The tendency in these cases is for *covariance* between private and criminal law where property is concerned. What this means is that where private law and criminal law refer to laws governing the *objects* and *allocation* of property interests,[2] these laws will be consistent with one another. Indeed, consistency is frequently assured by civil and criminal courts treating one another's pronouncements as sources of relevant law. In many cases, therefore, the rules being applied are consistent with one another because they are identical with one another. I will explain further what I mean by consistency after I have given an illustration of it.

Here is the example. If a question arises in a case as to whether some tangible object has the status of 'property' in law, the outcome is likely to be the same whether it was decided by a criminal court or a civil court. If there was a question of allocation, whether this was an explicit issue in the case or merely an assumed premise from which other issues fall to be decided, the tendency is for civil and criminal courts to

[2] I will speak throughout about 'property rights' and 'property interests' but these phrases are intended to be interchangeable. No significance attaches to the choice of which one is used.

allocate an item to the same person(s) as one another. Thus if there was a litigation about your carriage running over my petunias, the courts would usually accept that (i) carriages and petunias had the status of property; and (ii) the carriage was yours and the petunias mine. Their acceptance would not differ whether the case was one in private law trespass or one of criminal damage. To be sure, the precise ingredients of the tort are not the same as the offence, but any effect that this difference has on liability will be apparent from the prior laws that were relied upon and the reasoning in the case.

So covariance does not mean that private law and criminal law are coextensive. What it does imply is that although the definitions and types of wrongs may be different in private law and in criminal law, the fact that a legal wrong of some kind has been committed will often be treated as relevant to the determination of an allocation/rights-object question. For instance, the fact that something is unlawful to deal in at criminal law is relevant to deciding whether it has the status of property in private law.[3] Likewise, the question of whether private law would allocate an object to a particular person as a result of a transaction is relevant to deciding whether that object belongs to the person for the purposes of establishing the ingredients of a common law offence. Of course, what is 'relevant' is not what is decisive, and a 'tendency' does not foreclose exceptions.

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[3] This will be called 'the *Bowmakers* doctrine' following the case of *Bowmakers v Barnet Instruments* [1945] KB 65 (CA). It is discussed in Chapters 5 and 6 below.

Nevertheless, this trend is replicated in the majority of cases and so it is referred to in this thesis as a *pattern of covariance*. Rarely is the courts' approach made explicit, but one member of the House of Lords has said in a theft case:

> The truth is that theft is a crime which relates to civil property and, inevitably, property concepts from the civil law have to be used and questions answered by reference to that law.[4]

This description of what courts do is also in evidence in other cases. For instance, the Court of Appeal had to decide whether ejaculated sperm could be the object of a property right in a private law action.[5] In coming to its decision, the court considered criminal law precedents and was persuaded by them. It discussed the effect of a statute that prescribed how to deal with ejaculated sperm, and which criminalised a failure to abide by itself. It was implicit in the court's reasoning that the existence of the statute and the criminal courts' precedents were relevant, and that they bore on the question of whether sperm could be the object of a property right in tort law. This was so obvious from the judgment that, unlike the House of Lords in the theft trial, the Court of Appeal never even stated that this is what it was doing. One consequence of this approach is that private law does not normally reward what criminal law prohibits, and criminal law does not normally condone what private law proscribes. In this way, norm conflict is largely avoided.

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[4] *R v Hinks* [2001] 2 AC 241 (HL) 263-4 per Lord Hutton.

[5] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1.

As I am interested in judicial decisions, the observables in the pattern of covariance are the reasoning and outcomes in private and criminal law cases. The hope is that both the reasoning and the outcomes in private law and criminal law cases are consistent. (It is a contentious matter as to whether and how cases make rules,[6] but I will assume without further discussion that the reasoning and outcomes are integral to making rules.) The word 'consistent' glosses the fact that (a) some court decisions are made on the basis of the very same laws, and (b) some court decisions are made on the basis of laws on property which are unique to one area of law (say, criminal law) but whose concepts relating to property are interpreted consistently with those concepts of another area of law (say, private law).

'Consistency' does not just mean the avoidance of norm conflict (although I would describe norms that are neither contrary to one another, nor contradictory of one another, as consistent with one another). Consistency also includes the avoidance of value conflict. There is great scope for value conflict in law, including between rule-of-law values and other values. We are sometimes alerted to the existence of value conflicts when laypeople speak of the law giving 'perverse incentives' or something along those lines. There are a number of ways in which the law expresses values. In Chapter 6, particularly, we will employ this extended meaning of consistency to discuss judicial decisions which evince reactive moral attitudes to wrongdoing that affects property.

[6] Grant Lamond, 'Do Precedents Create Legal Rules?' (2005) 11(1) Legal Theory 1.

2. Breakages in the pattern

A pattern of covariance thus comprises cases which demonstrate consistency in the laws governing the objects and allocation of property interests, together with the values expressed by those laws. In England & Wales, the pattern of covariance is not unbroken. There are a number of cases that buck the trend. Let me give three examples. The three examples are the cases of *R v Hinks*,[7] *R v Smith*[8] and *R (Best) v Chief Land Registrar*.[9]

To begin with, take *R v Hinks*. The House of Lords held that receiving a gift can amount to theft in criminal law. The defendant in *Hinks* was the carer of a man who gave her a large sum of money and a television set. He was of lower-than-average intelligence but competent to make gifts at private law. It was accepted in court that the gift was valid as a matter of private law; no duress or undue influence being proven. This is to say that the defendant, Hinks, would have won in a private law suit if the man who gave her the items had sued for their return. Nevertheless, she was convicted for stealing 'property belonging to another'. This is so even though private law would say that the money and TV were her own. This finding by the majority provoked Lord

[7] *Hinks* (n 4).

[8] *R v Smith, Plummer and Haines* [2011] EWCA Crim 66; [2011] 1 Cr App R 30.

[9] [2015] EWCA Civ 17; [2016] QB 23.

Hutton's dissent, quoted above, saying that questions of property in criminal law had to be answered by reference to civil law.

In civil law, the requisite mental capacity to make a gift varies depending on the gift's scale and impact. If the subject matter and value of the gift are trivial, the donor need not have a high level of understanding.[10] Conversely, if the gift disposes of the donor's only valuable asset then a high degree of understanding is necessary.[11] In general, the donor must have an understanding of the general nature and effect of a gift of the relevant kind.[12] If a settlor lacked mental capacity, the court may set the gift aside.

The civil law on mental capacity should be put to the jury when it is relevant in criminal cases, and the dissenting judgments in *Hinks* give examples of previous criminal cases that turned on the donor's capacity.[13] Lord Hutton considered that the trial judge's directions to the jury were defective if the trial judge failed to set out the law on capacity.[14] One complication, noticed by Lord Hobhouse, was that the expert evidence was equivocal on the question of the donor's capacity.[15] Lord Hobhouse observed that the prosecution may not have advanced their case clearly on the grounds of mental incapacity, as distinct from undue influence or fraud. Of course, a person of

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[10] *Re Beaney* [1978] 1 WLR 770, 774.

[11] ibid.

[12] *Re K* [1988] Ch 310, 313; *Williams v Williams* [2003] EWHC 742 (Ch), [43].

[13] See, e.g., *R v Mazo* [1997] 2 Cr App R 518.

[14] *Hinks* (n 4) 260.

[15] *Hinks* (n 4) 261.

full capacity may have a gift set aside if it was induced by fraud, coercion or undue influence.

Where there is a relationship of trust and confidence, the civil law will make a presumption of undue influence if very large gifts (such as those in *Hinks*) are made. The presumption will be rebuttable only by proof of full, free and informed thought on the part of the donor.[16]

It will be clear from the foregoing discussion that the defendant in *Hinks* could have been convicted in line with the existing civil law – either because the gift could be challenged on grounds of the donor's capacity or on the grounds of undue influence. However, the question certified before the House of Lords asked about an 'indefeasible' gift. Lord Hobhouse concluded that the House should proceed on the assumption that no vitiating factors such as incapacity or fraud were present, because the gift could not be described as indefeasible if such factors were indeed present.[17] In response to the certified question, the majority of the House concluded that the pattern of covariance could be disturbed and Hinks stood convicted. By contrast, the minority judges did not believe that receiving an unimpeachable gift could constitute theft in the absence of any vitiating factors that might undermine the donor's consent in transferring the articles.[18]

[16] *Re Craig, Meneces v Middleton* [1971] Ch 95.

[17] *Hinks* (n 4) 261.

[18] *Hinks* (n 4) 267, 276.

In *Hinks*, Lord Hobhouse noted that convictions could be overturned on the basis that they do not properly apply private law.[19] A failure to appropriately apply the civil law of property amounts to an error of law, which would be overturned on a successful appeal. Nevertheless, there remain numerous cases that disrupt the pattern of covariance. One purpose of this project is to discover the reasons for that. In another example, *R v Smith*, the court held that heroin was 'property belonging to another'. The accused appealed his conviction for robbery on the basis that his victim could have no property interests in heroin that were capable of being assumed by him. If it was illegal for the victim to have had the heroin, then the heroin could not have belonged to the victim. The accused's argument assumes a parity of treatment between criminal law and private law, but the Court of Appeal denied that this matters. His conviction stood.

An issue in *Smith*, and indeed in other criminal law cases, is the importance of the particular indictment. The indictment is important because it establishes the legal basis upon which the defendant is prosecuted. It is also important for fair labelling. In *Smith*, the Court of Appeal began by observing that the indictment had been altered so that it no longer referred to stealing cash but to stealing drugs instead. The ground of appeal in *Smith* was that the accused was convicted of an offence not known to law.

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[19] *Hinks* (n 4) 264.

The court summarised the ground of appeal as follows: ‘a person cannot be guilty of stealing something which it is unlawful for anyone to possess.’[20] However, the court held that ‘nothing… [which] would be regarded as “property” for the purposes of the Theft Act ceases to be so because its possession or control is, for whatever reason, unlawful or illegal or prohibited.’[21] The court noted that matters may stand differently in private law. However, it said, ‘this is not an appropriate context in which to consider the impact of civil law concepts on the law of theft.’[22] This project will go on to discuss the relevant civil law concepts, including the doctrine in *Bowmakers v Barnet Instruments* on the treatment of prohibited drugs in private law.[23] The Court of Appeal avoided such an inquiry and instead resorted to a pragmatic line of reasoning. It reassured itself that a civil judge ‘would immediately refer the papers to the Director of Public Prosecutions.’[24] It continued: ‘Carried to its logical conclusion, the argument would suggest that the drug misusing community is permitted to conduct itself in the context of what would otherwise be theft from each other with impunity. The public interest would hardly be secured by the inevitable public warfare which would ensue.’[25] Chapter 4 addresses the fear, expressed in *Smith* and elsewhere, of leaving a legal lacuna should the civil and criminal law covary.

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[20] *Smith* (n 8), [4].

[21] *Smith* (n 8), [7].

[22] *Smith* (n 8), [9].

[23] [1945] KB 65 (CA).

[24] *Smith* (n 8), [9].

[25] ibid.

I wish to put aside one preliminary objection to the inclusion of *Smith* as an exemplar case about property and wrongdoing. The objection to *Smith* might be that it is inapt as an example of any doctrine on *property* per se, due to the distinction between acquiring a right and having mere ('factual') possession. It might be said that whether the drug dealer in *Smith* acquired a proprietary right was irrelevant. The issue in the case was whether heroin was 'property belonging to another' within the meaning of section 1 of the Theft Act 1968. The objection goes that section 5 of the Theft Act provides that property 'belongs to' a person if she has possession or control of it or any proprietary right or interest in respect of it. Since the drug dealer had 'possession or control' of the heroin, this suffices for the purposes of section 5, irrespective of whether he had any proprietary rights in it. It should be noted that this point did not go unnoticed in the case itself. As the judgment recorded, the ground of appeal was that 'the person who owns *or is in unlawful possession* of drugs has no rights in the drugs'.[26] The court nevertheless made a positive finding on the status of heroin as property in its judgment. It stated the law as follows: 'Nothing… [which] would be regarded as "property" for the purposes of the Theft Act ceases to be so because its possession or control is, for whatever reason, unlawful or illegal or prohibited.'[27]

The objection to including *Smith* in a collection of cases about property is misplaced for two reasons. The first reason is that before any item can 'belong' to any person, it

[26] *Smith* (n 8), [6], emphasis added.

[27] *Smith* (n 8), [7].

must be an object that is recognised at law as being 'property'. Under the *Bowmakers* doctrine, it is not clear that heroin is capable of being property. If we slightly change the facts of *Smith* so that it was not drug trafficking but people trafficking, then we see immediately how odd a charge of robbery would look. The indictment would be a nullity because people cannot be 'property'.

The second reason the objection is misplaced is a methodological one. The judgment in *Smith* itself did not adopt the interlocutor's line of reasoning. My methodology throughout the thesis is to take the cases at face value. I am not trying to improve the decisions. Improving them would not help advance our understanding of the main puzzle in the thesis. All it does is tweak the appearance of the pattern of covariance, by correcting a microcosmic imperfection in the pattern. Any of the cases above, *Hinks* or *Smith*, might be justified on other legal or moral grounds than the ones given in the decisions themselves. I will not look for alternative grounds for the decisions nor will I assume at the outset that the grounds given in the judgments were mistaken. Doing so tells us the answer to whether there is something wrong in the individual case but does not answer the puzzle about the pattern of covariance.

The third example of a case that breaks with the pattern of covariance is *R (Best) v Chief Land Registrar.*[28] The Court of Appeal in *Best* decided that title to land could be acquired by a squatter in adverse possession, even though his squatting constituted a criminal

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offence.[29] The squatter applied to be registered as the owner of some land he had been squatting on. The Land Registry refused his application because squatting on residential property had become a criminal offence during the time he was doing it. *Hinks* and *Smith* were criminal law cases, but *Best* was not. So the Court of Appeal in *Best* looked at private law in a lot more detail than in those cases. It considered private law defences, such as limitation and the doctrine of *ex turpi causa non oritur actio*, and decided that they would not prevent the applicant from being registered as owner. An investitive private law power could be exercised by squatters in order to acquire title to land despite a criminal prohibition on exercising those powers or permissions.[30] Furthermore, the criminal prohibition did not prevent that title from being registered even though this had the effect of divesting ownership from the previous proprietor.

Adverse possession, which commences in a tortious wrong,[31] is paradoxical even without the added complication of section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPOA'). This statute made it an offence to live or intend to live in a residential building having entered it as a trespasser. Even though LASPOA makes reference to the private law doctrine of trespass, the legislation does not explicitly say whether it was intended to affect the private law

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[30] Another way to view the strangeness of *Best* is as follows. A squatter gains a title to land by possession (albeit inferior to the owner's, until expiry of limitation). By criminalising 'living in a building having entered as a trespasser', the law is denying squatters the liberty to do what they will with their own land to which they have title. Viewed in this way, *Best* is like *Hinks*.

[31] The intriguing and paradoxical nature of adverse possession, when it involves norm conflict purely *within* private law, falls outside the terms of reference of this thesis project, however.

doctrine of adverse possession. The Land Registry, carrying out its official duty of maintaining the register, rejected Best's application to be registered as owner because it was 'substantially defective'. Best applied for judicial review of the decision. As the Court of Appeal put it: 'The only material question in practice is whether concepts of illegality should prevent acquisition of a legal title by a trespasser.'[32] That question was answered in the negative. Sales LJ held that Parliament did not intend LASPOA to have any effect on the law of adverse possession.[33] He believed that the doctrine of illegality would introduce uncertainty into the scheme for land registration. Titles gained by adverse possession and entered onto the register might be challenged later as unlawfully acquired.[34] The effect on unregistered land would be similarly disruptive as the effect on registered land. The court said, 'Section 17 [of the Limitation Act 1980]... was intended to provide assurance of good title in any case where the chain of title might conceivably include a relevant period of adverse possession.'[35] In unregistered land, there is 'no supervising regulator to police title and the operation of any illegality argument.'[36]

At the time of the *Best* decision, the Supreme Court had recently handed down a number of decisions restating the test for illegality. The majority of the Court of Appeal

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[32] *Best* (n 9), [100], per McCombe J.

[33] *Best* (n 9), [80].

[34] *Best* (n 9), [74].

[35] *Best* (n 9), [74].

[36] *Best* (n 9), [66].

(Sales and McCombe LJJ) applied a test for illegality that was developed in *Hounga v Allen*.[37] Though it is no longer the leading case, *Hounga* required the court to balance competing public policies. The majority held that the balance of public policy lay in favour of registering Mr Best's title. However, it wanted to reserve its position in respect of other types of criminally unlawful activity, such as murder.[38] Arden LJ, concurring as to the outcome in the case, preferred to avoid an analysis based on public policy.[39] The leading case on illegality is now *Patel v Mirza,* and *Patel* does not emphasise public policy as much as did the judgment in *Hounga*. [40]

It might be argued that the offence in *Best* is not focused on possession, but on living and/or intending to live somewhere. However, possession will be present in the usual case. The Court of Appeal thought that there was an equivalence between the conduct criminalised by LASPOA and adverse possession.[41] Granted – the offence can be committed by trespassing and merely intending (mentally) to live there in future. This is an intention to take possession. A squatter caught 'in the act', so to speak, just after trespassing but before taking any meaningful possession of the property may thereby commit the offence. However, in the more usual case, the squatter will be in possession of the property. It is impossible to live somewhere without also being in possession of

[37] [2014] UKSC 47.

[38] *Best* (n 9), [67]. Chapter 6 discusses acquisition by killing.

[39] *Best* (n 9), [111]-[112].

[40] [2016] UKSC 42, [2017] AC 467.

[41] Sales LJ said: 'Section 144… criminalises conduct… which previously had merely been unlawful in civil law.' *Best* (n 9), [3], [7].

the place. In unregistered land, possession is the root of title whereas the register is the root of title in registered land.[42]

Thus the cases of *Best*, *Hinks* and *Smith* represent a disruption to the usual pattern of covariance.

3. The puzzle

The challenge is to say what, if anything, is wrong with cases like these. My aim is not to show that there was a doctrinal misstep in any one of them, nor is it to provide a template for a better judgment in any of the three cases. The challenge is not to assess *these cases* in particular but to assess the significance of the pattern of covariance overall, and in so doing, assess the significance of breakages to the pattern. For although *Best*, *Hinks* and *Smith* stimulate the inquiry – in that they are much discussed and on many undergraduate syllabi – they are merely illustrative of a puzzle. The broader question is whether cases that manifest a divergence between private and criminal law where property is concerned are pernicious; and, if so, why.

It is no answer to this broader question to say *Smith*, *Hinks* and/or *Best* are plain wrong. It is my view that they are wrong – I give my reasons later[43] – but the soundness of my

[42] *Best* (n 9), [26].

[43] My reasons are given in Chapter 6. That chapter comes after I have laid the groundwork and established some potential criteria for criticising cases. I remain, however, open to other views on the merits of the individual decisions. My view is particularly tentative concerning *Best*. However, as my focus has been on legal theory rather than doctrine in specific cases, I do not have strongly-held and

view is beside the point. Perhaps each of the cases could do with better reasoning, but this kind of objection merely excludes an individual decision from the class of cases that manifest divergence between the two areas of law. It is the pattern of covariance itself, as well as actual or hypothetical deviations from it, that is of interest.

The three cases were selected because they are instances of a larger problem. The larger problem concerns the laws which govern the *objects* and *allocation* of property interests. (*Allocation* here compresses the acquisition and the termination of property interests. I will refer interchangeably to 'property interests' and 'property rights' without any significance attaching to the choice of phrasing.) The laws which govern the objects and allocation of property interests usually covary between private and criminal law, yet they do not in these three examples. *Smith* concerns what counts as property, or the candidate objects of a property interest (controlled drugs). *Hinks* concerns acquisition of property (unimpeachable gifts). *Best* concerns defences to another's claim on one's property i.e. the termination of one's own property interests (the expiry of a limitation defence and/or the availability of an illegality defence). Like *Hinks*, the cases of *Smith* and *Best* do additionally raise acquisition questions. Both the latter defendants acquired property in breach of legal duties: in *Best*, the duty not to trespass; in *Smith*, the duties not to rob nor to possess controlled drugs.

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extensively-developed views on individual cases. I readily concede that the general conclusions I come to must have implications for particular cases, though.

Doing away with any one of these three cases would not do away with our puzzle. There are several other decisions that break the pattern of covariance.[44] Though they seem to be disparate examples of divergences between civil and criminal law, they have one thing in common. All of them are at the interface of property and wrongdoing. One of the major themes that this work advances is that there is indeterminacy in English & Welsh law over what impact wrongdoing has on property rights. It is clear that wrongdoing is relevant. It is clear that wrongdoing is not always dispositive. More than that is difficult to say with certainty. Even after providing explanations for the pattern of covariance over the course of this project, a significant degree of indeterminacy remains.

It is not only that one cannot confidently extrapolate and generalise from decided cases to novel situations, for that is to express doubt about predicting an outcome in a case. By way of example, it is challenging to add to the list of items subject to the *Bowmakers* doctrine beyond what has been decided in case-law (and even decided cases are open to doubt). The uncertainty goes beyond guessing results of hypothetical cases. Even if one has a hunch about broadly which way a court would incline, the uncertainty extends over what doctrine a court might use to achieve that result. James Goudkamp and Lorenz Mayr observe:

[44] Some examples: *R v Gomez* [2001] 2 AC 241: an act expressly or impliedly authorised by the owner of goods could be a prohibited appropriation of the goods within section 1(1) of the Theft Act 1968. *R v Turner* [1971] 2 All ER 441: the accused drove his car away from a garage, where he had left it to be repaired, without paying for the repairs. He was convicted of the theft of his own vehicle. *R v Gilks* (1972) 56 Cr App R 734: property was held not to have passed to a bookmaker's customer and so he was convicted of theft, but private law would hold that the property had passed (according to Archbold (2016), 21-63). These examples are all criminal law cases, but see the following chapters for further examples of some private law cases also.

> The application of the [illegality] doctrine in the context of actions for interference with chattels has been largely neglected by theorists. There are also significant lacunae in this area of the law, with no cases that provide definitive guidance as to whether the doctrine applies in particular situations.[45]

The indeterminacy is not limited to chattels or the doctrine of illegality. Rather, the topic of illegality and chattels provides an impressionistic flavour of the indeterminacy that exists more generally as a doctrinal matter in the law wherever property and wrongdoing are concerned. I raise the question of doctrinal gaps not because I can, or will, resolve the gaps I come across into true propositions of English law. I cannot and do not. It is the phenomenon of indeterminacy in this area itself that is significant; a point Chapter 7 embroiders.

Our interest in laws that govern the allocation and objects of property interests follows from what it is that property regimes do. Joseph Raz explains that

> Rights are relations between right-subjects, which are always persons, though not always natural persons, and right-objects, which are either persons, or physical objects, or abstract legal entities (e.g. shares). […] Laws instituting rights fall into three categories: they are either investitive laws, or divestitive laws, or constitutive laws. Investitive laws specify the ways in which rights can be acquired. Divestitive laws determine the ways in which rights can be disposed of. Constitutive laws specify the consequences of being a right-holder.[46]

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[45] James Goudkamp and Lorenz Mayr, 'The Doctrine of Illegality and Interference with Chattels' in Andrew Dyson et al (eds), *Defences in Tort* (Hart 2015) 245.

[46] Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon 1980) 176. See also Neil MacCormick, 'Rights in Legislation' in Peter Hacker and Joseph Raz (eds), *Law, Morality and Society* (OUP 1985).

A 'property regime', as I use that term, is all those laws which institute property rights.[47] It includes what I have been calling 'allocative laws' i.e. laws that invest and divest people of their interests in rights-objects. Further, a property regime contains laws which specify the consequences of being the holder of proprietary rights.[48] Finally, a property regime determines which tangible and intangible things can be the object of proprietary rights. On this characterisation of a property regime, the puzzle is not restricted to a handful of untoward court decisions. Legal wrongdoing appears to affect every aspect of the property regime – investitive, divestitive, constitutive and rights-object defining laws – and yet its precise effect is indeterminate. All we can point to is an imperfect pattern of covariance.

Perhaps this is not as unusual as I make out. After all, wrongdoers do not often stick their heads above the parapet for the sake of contributing to the common law. The Court of Appeal commented with surprise:

> One might have expected there to be decisions clearly qualifying the general [investitive] rule where the circumstances are that someone finds a chattel and thereupon forms the dishonest intention of keeping it regardless of the rights of the true owner or of anyone else. But that is not the case. There could be a number of reasons. Dishonest finders will often be trespassers. They are unlikely to risk invoking the law, particularly against another subsequent dishonest taker…[49]

[47] See, similarly, Eveline Ramaekers, 'What is Property Law?' (2017) 37 OJLS 588, 616. Ramaekers includes laws governing the registration of proprietary interests which is particularly salient for a property regime, by comparison with Raz's more generic interest in legal rights. She says a property regime is 'a system containing a core of property rights surrounded by a framework of rules… that regulates the acquisition, registration, destruction and third party effects of those property rights'.

[48] Constitutive laws receive rather less attention in this project than allocative and rights-object laws, but treatment of them can be found in Chapter 5.

[49] *Parker v British Airways Board* [1982] QB 1004, 1010 per Donaldson LJ.

That is all very well but I persist in thinking the puzzle a deep one. Although cases like *Hinks* are much discussed, the scholarship does not recognise the significance of the indeterminacy of which they are a symptom. To see why, consider some basic assumptions about the minimum content of legal systems. HLA Hart thought legal systems necessarily institute property regimes given facts about human nature, human vulnerability and the scarcity of resources.[50] A regime must provide for sanctions in order to guarantee adequate protection.[51] Law & economics scholars present the same idea, arguing that the law establishes a complex coordination scheme for property.[52] Raz, while disagreeing with John Austin that a property regime is a necessary feature of our *concept* of a legal system,[53] believes that no legal system could persist in a stable way without some protection for property.[54] The property regime instantiates a necessary connection between law and morality, in his view.[55]

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[50] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 192.

[51] ibid., 199. There, Hart said this about property in the context of discussing sanctions: 'We may say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a natural necessity; and some such phrase is needed also to convey the status of the minimum forms of protection for persons, property, and promises which are similarly indispensable features of municipal law.'

[52] See e.g. Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, 1725.

[53] John Austin, 'The Uses of the Study of Jurisprudence' in his *The Province of Jurisprudence Determined* (Noonday Press 1954) 367-368.

[54] Joseph Raz, *The Concept of a Legal System* (n 46) 25 (critiquing John Austin). In *Practical Reason and Norms* (OUP 1975), Raz says that legal systems must regulate property but the necessity is factual, not logical. The minimum content is required if a legal system is to persist but it is not an identifying feature of a legal system (at 168-169). It is not clear that the identifying features of a legal system are best described as having a logical necessity, as Andrei Marmor points out. They are more plausibly thought of as necessary given our concept of a legal system (here referred to as 'conceptual necessity'): Andrei Marmor, *Positive Law and Objective Values* (OUP 2001) 39 at his footnote 22.

[55] Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 American Journal of Jurisprudence 1, 3.

That England & Wales institutes a property regime is beyond doubt. The curiosity is that the content of this regime appears incomplete insofar as there is indeterminacy over the effect of wrongdoing on its rules. As soon as you have a property regime established by law, the law needs to contemplate its own breach. Once the law has made authoritative allocations of property, there is a clear risk of these being upset. It seems inevitable that once you have property, you will have theft. Once a coordination scheme is in place, its benefits could be put in jeopardy. A legal system cannot merely deter or sanction breaches of its rules; it must also provide for the proprietary consequences of breaching its directives or invalidly using the normative powers it grants to individuals to affect the distribution. Or so our *a priori* commitments lead us to believe.

If regulating property and wrongdoing is a fundamental feature of legal systems, and if English law performs this task in a way that is unexpected given our theoretical commitments, then this is a puzzle that merits inquiry. The inquiry should not focus on private law or criminal law in isolation – but both together, within the legal system as a whole. Moreover, it would improve our understanding of the puzzle if we pray in aid insights from the theory of law and of legal systems. That is the approach in this project. Although I make some reference to cases from other common law jurisdictions, it is not an exercise in comparative law. Those cases show that the question of the relationship between property and wrongdoing is not confined to

England & Wales. However, England & Wales has a particularly pronounced version of the puzzle; its interface between criminal and private law is disorganised.[56]

If I am correct about the extent of indeterminacy then there are some fundamental things that we do not know about the property regime and/or the relations between private and criminal law in our own legal system. Maybe all this does is show that there is something deficient about the English & Welsh legal system. That being so, maybe what English law needs is reform. In my view, that conclusion would be too quick. The response assumes that a perfect pattern of covariance is possible and/or that departures from the pattern are pernicious. We have not established that yet. Something may be pernicious in purely legal terms i.e. it is wrong as a doctrinal matter by the lights of the law of a legal system. It may be pernicious for non-legal reasons, such as manifesting an injustice. It may be both at once. Before applying such criteria to this legal system, it is appropriate to find out more about the present state of affairs. We have not diagnosed an explanation for covariance or for deviations from it.

Chapters 3 to 6 give an explanation for the pattern of covariance. Chapter 7 outlines an explanation for deviations from the pattern. Chapter 7 also discusses the possibility that we ought not to conclude that English law is suboptimal but rather to rethink some of our assumptions about property regimes altogether. It does so by posing the question of whether it is possible to have something that I will be calling a 'unitary property

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Matthew Dyson, 'Introduction' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 1, 10.

regime', which is a property regime that exhibits a regular pattern of covariance between private and criminal law where property is concerned.

4. What explains the pattern of covariance?

4.1 *Four fixed features of the legal system*

To assess its significance, we need to understand what explains the pattern of covariance. To this end, I examine the interaction between private and criminal law within four specific features of the legal system. The four features are as follows:

(i) the technical language used to express laws regulating property,

(ii) the concurrent jurisdiction of the civil and criminal courts over property and wrongdoing. 'Concurrent jurisdiction' here means that the authority to determine legal questions about property is given both to civil courts to and criminal courts,

(iii) the property right that is ownership, and

(iv) the maxim that wrongdoers should not benefit from their wrongdoing.

This occupies Chapters 3 to 6. The argument is that the four features above are necessary conditions for the pattern of covariance. More explicitly, the laws which constitute the property right, the technical lexicon expressing property laws, concurrent civil and criminal jurisdiction and the attitude manifested in the

'wrongdoers' maxim are necessary conditions for the perpetuation of the pattern. However, they are not necessary and sufficient conditions – whether individually or jointly – because, as we have seen, there is case-law which breaks the pattern. Yet, at least in those cases where there is covariance, some or all of these four features are part of the explanation.

Note I do not make the further claim that these features are *themselves* necessary to a legal system or property regime. This is just how England & Wales has instituted its property regime, as have other states where common law holds sway. A pattern of covariance could alternatively be achieved by stipulating for covariance in a civil code,[57] but that is not the legal system we have. They are necessary conditions for the perpetuation of the pattern *ceteris paribus*.

The four features were chosen because they are central to the operation of the property regime as it happens to be organised in England & Wales. Furthermore, they were chosen because they are enduring features which have persisted over some time.[58]

[57] The inspiration for this suggestion is a French doctrine known as *chose jugée* that had the effect of creating 'unity of fault' between civil and criminal law, at least until it was modified in the year 2000. See further Valérie Malabat and Véronique Wester-Ouisse, 'The Quest for Balance Between Tort and Crime in French Law' in Matthew Dyson (ed), *Comparing Tort and Crime* (Cambridge UP 2015) 86-87. More generally, the reason that the inquiry is confined to England & Wales is because Scotland has a very different legal tradition derived from Civilian Law. For some differences this makes to the intersection between contract law and property law in the respective countries, see Sue Farran and David Cabrelli, 'Exploring the Interface Between Contract Law and Property Law: a UK Comparative Approach' (2006) 13(4) Maastricht Journal of European and Comparative Law 403.

[58] The four features under scrutiny can be expected to endure for some time yet. Language is examined in Chapter 3. Modern state law cannot do without technical language, even though language itself changes over time. Even if there is an alteration in the way that particular laws are expressed, some aspects of the norms might endure. For example, even where a statute is modified, the concepts it uses are more resistant to change. And, ideally, law should not be subject to frequent change. Jurisdiction is another of the features examined (Chapter 4). That has been known to change but very slowly and

Finally, they all connect private and criminal law in some way.[59] If it is correct that these features partly explain the pattern of covariance, this vindicates approaching the puzzle from the perspective of the legal system as a whole rather than from any particular area of law in isolation.

Any objection along the lines that other features of the legal system should have been chosen in preference to these ones is not apt; the assertion here is that these features form part of the explanation but not that this is, by any means, the whole explanation. All the features chosen are constructs of the legal system itself: jurisdiction, the laws constituting ownership, the aphorism that wrongdoers ought not to benefit from wrongdoing and the technical jargon used to state laws in English. Due to the fact that the observables which make up the pattern of covariance are court decisions, the focus is on the judgments. It is not on their consequences. Law's purposes, functions, or effects (intended or otherwise) in the real world are largely left out of account. Some

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infrequently. In medieval times, the distinction between criminal and civil jurisdictions was not well-developed. It emerged organically over time. Then again, in Victorian times, there was a deliberate change to jurisdiction when the common law and Equity were merged by statute. Concurrent jurisdiction, in one guise or another, has therefore been around for quite some while. Likewise the legal relations that constitute the property right (Chapter 5) and the maxim that wrongdoers ought not to benefit from wrongdoing (Chapter 6) emerged at one time and doubtless changed over the centuries, but they have also persisted.

[59] The way in which these features connect private and criminal law is not identical between features. As to language: when it comes to property, there are a host of technical terms that are common to both. As to jurisdiction, authority over property and wrongdoing is also common to both areas of law, albeit they are not coextensive. As to the property right, a maximal specification of ownership as it exists in English law would take in both private and criminal law. Finally, the maxim that wrongdoers ought not to benefit their wrongdoing is usually only cited in civil cases but its reference to wrongdoing includes criminal wrongdoing. Furthermore, it is of general application across the law, being a canon of statutory interpretation (for example). See *R v Registrar General, ex parte Smith* [1991] 2 QB 393 for the 'exception to statutory rules on public policy grounds if application of the rule would enable someone to benefit from their own serious crime'.

mention is made of law's capacity to guide its subjects and officials, but there is no attempt to gesture at any all-things-considered justification(s) for any part of the property regime.

A peculiarity of the discussion around cases like *Hinks* and *Smith* is that law's functions are normally only aired when their proponent is seeking to justify departures from the pattern of covariance. The court in *Smith* justified its decision on the basis that it was the function of the criminal law to keep the peace and not to vindicate individual property rights.[60] I grant all such assertions when made by courts. However, I am rather more sceptical when views like this are put forward by commentators, as the discussion in the next chapter of other responses to the puzzle will show. This is because this type of response sidesteps the puzzle rather than addressing it. Litigation is not nakedly instrumental in the way this sort of response assumes. Process and reasoning are at least as crucial. And yet, the best explanation for departures from the pattern is that courts find themselves in a quandary between achieving what they perceive to be the best outcome in a case and perpetuating the pattern of covariance. This prospect is explored briefly in Chapter 7. This, however, is to anticipate later parts of the thesis. For now, I return to an overview of the explanation for the pattern of covariance.

4.2 *Guarantees and constraints*

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[60] *Smith* (n **Error! Bookmark not defined.**), [4].

The fuller explanation presented in the following chapters is that the presence of these four features in the legal system *guarantees* and/or *constrains* some aspect of a decision in a case, with the effect that the case perpetuates the pattern of covariance. Recall that the pattern of covariance is our shorthand for consistency in the rules that determine what counts as property and the allocation of property in every case involving property wrongs.

The fact that property is concurrently regulated by private and criminal law influences decision-making in cases involving property wrongs. The influences are variegated and subtle; they may not be so apparent as, say, the *ratio decidendi* of a judgment. Indeed, their influence on the pattern could come about in convoluted ways. For example, there may be an influence on legal concepts mediated through the meanings of words, or perhaps on an intermediate step in the reasoning, rather than the final result, or even an unstated premise within the legal argument. Calling them guarantees and constraints is a way to precisify their influence. Constraints rule out certain potential avenues for deciding cases, though there may be many left over, whereas guarantees predetermine some aspect of the decision.

> A g*uarantee* predetermines some salient consideration for the judge (such as the content of a rule or concept in the law. Where such a rule or concept is applicable to a case, by extension the guarantee determines that issue in the case. Note that this is not the same as determining the outcome of the entire case.)

> A *constraint* excludes certain options for deciding the dispute, or an issue that is part of it (such as the interpretation of a rule or the evidence before the court). However, it may leave several possible options open or only one – it would depend on the case and the type of constraint it was.

Evidently, there is scope for overlap between guarantees and constraints given that both of them have the effect of restricting a judge's options. If there is but one course open to a judge by virtue of the operation of a constraint then it may appear similar to a guarantee. By way of example, it is difficult to know whether to characterise the rules of mathematics as guarantees or constraints on judges making orders for the payment of money – whether that be a criminal fine or private law damages. Imagine that the sum awarded for damages is assessed at £2 and costs also at £2. The rules of addition guarantee that £2 + £2 is £4 and, simultaneously, the same rules constrain a judge from ordering any other amount of money to be paid. A helpful distinction to bear in mind between guarantees and constraints is that a guarantee is sufficient, by itself, for some consideration to obtain in a judgment, whereas a constraint is not.

As the arithmetic example shows, there are many sorts of guarantees and constraints that influence various aspects of adjudication. The broader category to which guarantees and constraints belong is that of influences on judicial decision-making. Many things influence judicial decision-making, including (infamously) what the

judge had for lunch. My focus is somewhat narrower than this. The guarantees and constraints discussed here have a strong connection to the law itself because they precisify the influence of the four features above on the case-law. The case-law, in turn, is the observable data that forms the pattern of covariance. These four features of the legal system and property case-law are fairly classical subject-matter for a treatise that takes an internal perspective on the law.

I do not wish to give the impression that all the influences that I address comprise the positive law itself. The set of influences is open-ended and it is a heterogenous set. Some influences on judicial decision-making clearly are part of the law, such as the rules that constitute legal ownership and the rules that define the authority of the civil and criminal jurisdictions. They influence judges because they must be applied in decisions. Others are slightly more removed from law itself – they include the demands of using technical language to express laws, and the tendency of judges to treat law's commands as morally sound.

This thesis focuses on the guarantees or constraints that are pertinent to judges, which is not to deny that there may be guarantees or constraints that apply to other officials within a legal system – those deriving from the constitution, say, which bind the legislature or executive. The latter will not be discussed, however. I will point out the influences on judges which result in the sustenance of or departure from the pattern of covariance, many of which involve familiar desiderata of judicial craft – such as a preference for parsimony and an awareness that law guides its subjects.

My interest in adjudication, specifically, is because guarantees and constraints on adjudication have their greatest effect when the positive law runs out. The case is therefore unregulated, save for the operation of these sorts of influences. Such occasions arise frequently in property/wrongdoing cases because of the indeterminacy that exists in the doctrine. Some of the cases cited in the following chapters are examples of unregulated cases. In unregulated cases, there is scope for creative determination of the matter,[61] within the parameters of the options left after the constraints are accounted for and/or left underdetermined by any guarantees. Or so the theory goes. If these influences operate in the way I have just proposed, we can expect the pattern of covariance to be replicated even in 'gap' cases.

But it is not; we know that there are breakages in the pattern. My argument is that the guarantees and constraints here identified explain the pattern of covariance so far as it goes. The way the four features contribute to the pattern of covariance is that the influences that they give rise to affect most cases most of the time – i.e. they illuminate the considerations that settle the preponderance of cases as a verifiable empirical matter. However, something further is needed to explain deviations from the pattern. One possible explanation is that these influences can be discounted or disregarded in certain cases. Sometimes a constraint will mean that a court could not but do otherwise. Sometimes a court would be unwise to do otherwise. A constraint may

[61] Joseph Raz draws a distinction between cases that call for applicative determination rather than creative determination in 'The Institutional Nature of Law' in his *The Authority of Law* (Clarendon 1979) 108-109.

leave only one course open, or it may leave only one *wise* course open. Constraints can be transgressed when they are only constraints of prudence rather than constraints of sheer impossibility. (The rules of arithmetic are an example of constraints of possibility itself. To transgress these is simply to fall into error. From the legal perspective, rules of law are like rules of arithmetic.)

In some cases, deciding on which course is most prudent is finely balanced. Some countervailing considerations that explain deviations away from covariance are outlined in the final chapter. Whether it is pernicious to discount or disregard the guarantees and constraints ultimately depends on whether it is even possible to have near-perfect consistency in the rules that determine what counts as property and the allocation of property in every case involving property/wrongdoing. I conclude the thesis with some thoughts on that issue. Whether near-perfect covariance is possible is a question that shades into what is desirable about covariance. The value of covariance is a question unanswered by this project. In the final chapter, I offer two desiderata of effective property regimes. These are not criteria for assessing the justice or overall goodness of property regime, merely its effectiveness. I do not provide an account of a judge's role responsibility, either, whether in the face of settled or indeterminate law.[62] Deciding what is valuable about covariance requires us to take a view on many

[62] I presume, without arguing for it, that judges have an attitude of commitment to the law. This assumes the truth of Raz's argument that it is a necessary condition for a legal system to be in force that judges act on the view that laws are valid reasons for action: Raz, *Practical Reason and Norms* (n 54) 171. The law of England & Wales is clearly in force and, one must therefore assume, this background condition is met. No additional claim is made that a judge ought, all things considered, to have such an attitude.

additional questions that this project does not analyse. They include the goodness of the property regime and the role responsibility of judges. For reasons set out in the final chapter also, existing bodies of scholarship – like that on the value of coherence – do not exhaust the need to ask these questions, though they may well bear on the issues in this thesis.

4.3 ***The claims defended***

The guarantees and constraints are influences on adjudication which arise due to four fixed features of the legal system. They are as follows.

Feature (i) the property right that is ownership

The private law and criminal law duties of non-owners guarantee the owner's right to security of possession of his property; (Chapter 5)

The private law and criminal law duties of owners are a constraint on the owner's freedom to use his property; (Chapter 5)

Feature (ii) the technical language used to express laws regulating property

By using the same technical vocabulary, both civil and criminal cases fix the conventional meanings of those terms for the purposes of the lexicon expressing property laws; (Chapter 3)

Limiting the number of different meanings attached to a single technical term is a constraint for both private and criminal law. In the majority of cases, therefore, when private and criminal law use technical words from the property lexicon, they mean the same thing by them. (Chapter 3)

Feature (iii) the concurrent jurisdiction of the civil and criminal courts over property and wrongdoing

Coordination rules constrain courts exercising the civil jurisdiction and courts exercising the criminal jurisdiction from creating norm conflict (Chapter 4).

Feature (iv) the maxim that wrongdoers should not benefit from their wrongdoing

An attitude of commitment to the moral soundness of criminal laws, which were or would be breached by the recipient of property, constrains officials applying private law's distributive rules; (Chapter 6)

To summarise the argument, the four features above are necessary conditions for the perpetuation of the pattern of covariance because they influence adjudicative decision-making by ensuring the inclusion and/or exclusion of certain pertinent considerations

in a case that involves property and wrongdoing. Though they are necessary, we know they are not always dispositive of cases because the pattern of covariance does not obtain. They are thus neither individually nor jointly necessary and sufficient. Given this, each chapter that follows aims to establish the main claim(s) while also accounting for cases that are outliers as far as the pattern of covariance is concerned.

5. Terminology and assumptions

Before proceeding to the substance of the argument, the remainder of this chapter clarifies key terms and articulates some assumptions that will inform the coming chapters.

5.1 *The term 'property'*

This section of the chapter samples a few uses of the word 'property'. This is in order to draw conscious attention to terms that lawyers parse without really thinking about it, and to familiarise these terms and their usages for any reader who is not a lawyer. I differentiate four senses of the term 'property' and then introduce some nomenclature I will use to disambiguate between the senses throughout the thesis whenever ambiguity is a danger.[63]

[63] I will use this terminology wherever ambiguity is a danger in my own writing. The problem is that there is still ambiguity in the literature and cases I draw on. I cannot save everyone else from

A subordinate aim of this section, one that is rhetorical rather than argumentative, is to paint an impression of the distribution of discourse about property throughout law and society. This provides indirect support for my assertion that the appropriate approach to the puzzle is one that takes into account the context of the whole legal system, rather than discrete pockets of law. Indeed, the word 'property' appears ubiquitously in law. It crops up in lots of different contexts, and it can be put to many uses. Reading legal scholarship, one comes across such intriguing sentences as: 'The community should not be allowed to so limit what measures the owner of the property may undertake that the property ceases to resemble property.'[64] The word 'property' appears three times in that sentence. On the last occasion that it appears, it is being used in a different sense to the first two times.

Take one instance of the word 'property', as it appears in the Civil Partnership Act 2004. This Act allows courts to make 'property adjustment orders' when a civil partnership comes to an end.[65] Or, elsewhere, some legislation might provide for a method of calculating tax on 'residential property transactions.'[66] Here the word

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ambiguity, and space often precludes a detailed inquiry into which sense of 'property' an author might mean or what are the various implications attached to the different senses of 'property' for that author's argument.

[64] Robert Pfeffer, 'Losing Control: Regulating Situational Crime Prevention in Mass Private Property' (2006) 59 Oklahoma LR 759, 795.

[65] Civil Partnership Act 2004, schedule 5, part 2, paragraph 6.

[66] Stamp Duty Land Tax Act 2015, section 1.

'property' is being used adjectivally. It is being used as a description of what kind of transaction or court order the legislation applies to.

The word 'property' does more than just that, though. Lawmakers use 'property' in statutes that define what objects have that status for the Act's purposes, or what people may do with objects having that status. This is the first context that I want the reader to bear in mind. Here, the word 'property' is being used as a noun. In this first sense, 'property' indicates a thing. That 'thing' might be land or a lollipop. It is any item which the law counts among the objects that constitute 'property'.[67] I make the doctrinal assumption that not every conceivable thing in the world has the status of *property-as-thing* at law. An example of law ascribing this status is the definition given in the Law of Property Act 1925, which says that unless the context requires otherwise, '"property" includes any *thing* in action'.[68] Call this sense *property-as-thing*.

Once we know what object the noun denotes, then reams of rights, powers, privileges and immunities can be specified and elaborated with reference to it. An Act may grant a power to museums to return property to Holocaust victims,[69] and another Act may give power to prison governors to destroy or dispose of unauthorised property in prisons,[70] and yet another Act may define the power of a government Minister to

[67] For example, the Anti-Social Behaviour Act 2003, section 67, defines the term 'domestic property'.

[68] Law of Property Act 1925, section 205(1)(xx) (emphasis added).

[69] The Holocaust (Return of Cultural Objects) Act 2009, section 2.

[70] Prison Act 1952, section 42A.

transfer the property of one public body to another public body.[71] Wartime laws have 'authorize[d] the competent naval or military authority… for the purpose of securing the public safety or defence of the realm… to take possession of any land, building, or other property.'[72] Laws can put conditions on exercises of power or remove powers to deal with property.[73] In *Mulliner v Midland Railway*, for example, a railway company was held to have no competence to grant private interests over some of its land, which was dedicated to public purposes.[74] All these examples are statutory ones applying to the state's executive. They are laid out here just because they are clear cases, being legislative, and not because the powers of officials are the focus of the project. Rarely are the general proprietary rights, powers, privileges (etc) of private persons so explicitly set out, having instead accreted over centuries of common law.

Once there are several such legal relations specified with reference to 'property', the word can come to represent a customary aggregate of them. Sometimes lawyers talk of a person 'having property' in a thing, or 'the property passing'[75] from one person to another. When it is used like this, the word means a characteristic collection of rights, immunities, privileges, and powers which are associated with 'property' as a thing. So

[71] National Health Service Act 2006, section 213.

[72] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 578 per Lord Parmoor.

[73] See, for example, the Law of Property Act 1925, section 22, on conveyances on behalf of 'infants and lunatics'. Similarly the Parsonages Act 1865, section 4; the Land Clauses Consolidation Act 1845, section 14.

[74] *Mulliner v Midland Railway* (1879) 11 ChD 611, 619-21.

[75] Misrepresentation Act 1967, section 4(1), is an example. It has now been repealed.

the Sale of Goods Act 1893 said that '"property" means the general property in goods, and not merely a special property.'[76] When 'property' is taken in this way to be a collective noun referring to a set, we can contrast a subset of the collectivity against the whole. Somebody could then have 'special property' – as the Sale of Goods Act says.[77] Or they might have 'qualified property'[78] which is in contradistinction to 'absolute property', where absolute property refers to an indefeasible and/or complete (rather than defeasible or partial) set of customary legal relations. If nobody may have proprietary legal relations with the thing in question, it is said that there is 'no property' in it. For example, it is often said that there is 'no property' in a corpse.[79] Using 'property' in this sense now sounds somewhat old-fashioned, but desuetude never fazed English law. Competent users of legal language will understand 'property' to mean a customary aggregate of legal relations. Call this meaning *property-as-legal-relations*.

Speaking of 'legal relations' will put Wesley Newcomb Hohfeld in mind.[80] – However, *property-as-legal-relations* is not here intended to be a neologism for

[76] Sale of Goods Act 1893, section 62(1).

[77] The Law of Property Act 1925, section 205(1)(xx), says that the collective noun might refer to an individual member of the set. It says that unless the context otherwise requires, '"property" includes… any interest in real or personal property.' (That latter use of the word 'property' means *property-as-thing*; the former use of the word 'property' means *property-as-legal-relations*.)

[78] For example, *Blades v Higgs* (1865) 11 HL Cas 621, 631; *Case of Swans* (1592) 7 Co Rep 15b.

[79] *Doodeward v Spence* (1908) 6 CLR 406. I leave aside whether this statement is true; it is here just illustrative of usage.

[80] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 28 - 59 (setting out eight 'jural relations'—right, duty, privilege/liberty, no-right, power, liability, immunity, and disability).

Hohfeldian ownership. Possibly ownership is synonymous with ‘general property’ or ‘absolute’ property – nothing in the discussion turns on this. The point is that ownership is merely one particular and expansive cluster of legal relations which allocate a thing to a person. It is important to make this plain here.

Scholars since Hohfeld have used his writings to construct various ‘bundle’ theories about property. Chapter 5 will discuss one bundle theory, proposed by Tony Honoré, though it is not a Hohfeldian one.[81] Honoré’s is a theory about how ownership should be conceptualised. Bundle theories are controversial in the academy these days but hold great sway in common law. As *Halsbury’s Laws of England* observes, English law has ‘a tendency to identify the corporeal thing with the aggregate of rights which make up the entire right of ownership.’[82] We have already seen an example of this tendency in the intriguing sentence that we started with. That sentence was supposed to be parsed as follows: ‘The community should not be allowed to so limit what measures the owner of the property (*-as-thing*) may undertake, that the property (*thing*) ceases to resemble property(*-as-legal-relations*).’

There is another meaning of ‘property’ that is also associated with a collective, but slightly different to the aggregate of legal relations just mentioned. The word ‘property’ is sometimes used to truncate a more expansive phrase, namely ‘the law of property’ or ‘property law’. It is used this way, for example, by someone criticising Peter Birks’

[81] James Penner, *Property Rights: A Re-Examination* (OUP 2020) 10.

[82] *Halsbury’s Laws* (5th edn, 2012) vol 87, para 1.

taxonomy of private law. Birks thought that the law of property arose because events like consent-giving and wrongdoing gave rise to it.[83] His critic replies: 'An event must be something that happens in the world and, whatever else it may or may not be, property is not something that happens.'[84] By this the writer means that the law of property is not a natural kind. Somebody else might say, 'a property analysis of the same question would give you a different answer.' What they mean is that your perspective would change if you applied a collectivity of rules known to them combinedly as 'property [law]'. Or they may say (as the House of Lords did in an action for the tort of nuisance), 'We are concerned here essentially with the law of property.'[85] The court meant that the rules on nuisance, a tort, should be grouped in with other rules of the mass known as the law of property. The whole group of these rules can be gestured at by using 'property' in its taxonomical sense. This taxonomical sense of 'property' will be designated hereafter by the term *property-as-taxonomy*. Determining the precise extent of the aggregate of property rules, or which rules it actually comprises, is not important to my project because of the whole-system approach adopted. However, as a concession to those who think these demarcations are important, the next subsection of this chapter posits my working assumptions about what 'property law', 'private law' and 'criminal law' include.

[83] Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623, 628 and 631.

[84] Kelvin Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355, 364.

[85] *Hunter v Canary Wharf* [1997] AC 655, 723 per Lord Hope. Donal Nolan would also place the tort of nuisance alongside some other general rules that might apply to *property-as-thing*: Nolan, '"A Tort Against Land": Private Nuisance as a Property Tort' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 459, at 475 and 486. See, similarly, Peter Cane, 'What a Nuisance!' (1997) 113 LQR 515, 515.

The fourth, and last, sense of 'property' that I want the reader to keep in mind is heard in judgments and writing about law. It is even more normatively loaded than *property-as-legal-relations* or *property-as-taxonomy*. An example of taxonomical use which I gave earlier could be said to employ it. The example was 'a property analysis of the same question would give you a different answer'. This could be understood differently from the way I suggested above. I suggested that the speaker was recommending the application of property rules to the problem. But the expression could also be understood as recommending that some *values* associated with property should determine the analysis, rather than some *rules* associated with property. The context may make that clearer. Say 'the question' in question is how human gametes should be protected in law. The question is whether we should use a property framework or a privacy heuristic instead. The speaker could have been recommending a property heuristic.[86] In that context, then, the term 'property' could relate to values.

An instance of usage which more clearly relates to values is John Berger's saying that 'people believe in property'.[87] Berger does not appear to mean that 'people believe that there exists property law' or that 'people believe that things exist'. He appears to say that people have faith in, or identify with, the values of the property regime. It is

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[86] For an argument of this type, see Rebecca Rausch, 'Reframing Roe: Property over Privacy' (2012) 27 Berkeley J Gender L & Just 28.

[87] John Berger, 'Understanding a Photograph' in his *Understanding a Photograph* (Penguin 2013). It is clear that Berger is talking about values from the context. He says, 'Property, as it once was not, is now inevitably opposed to all other values.' This is a clear indication that he is mainly concerned with *property-as-values*.

beyond the scope of this project to elicit exactly what those values might be.[88] However, this thesis is committed to the Razian view that law makes the claim that its directives give valid reasons for action. Law's claims are vehicles for expressing certain values it maximises through the property regime. In the course of discussing the *Bowmakers* doctrine and the maxim that wrongdoers ought not to benefit from wrongdoing, we will encounter some of law's claims. For now, our purpose is just to disambiguate some meanings of the word 'property'. This latest usage will be labelled *property-as-values*.

I drew out four ways in which the word 'property' can be understood by competent users of legal language. Those uses could be pointing to a thing, to a host of legal relations, to values and to a taxonomical category. I called them *property-as-thing*, *property-as-legal-relations*, *property-as-values*, and *property-as-taxonomy*. We saw that 'property' can function as a noun or adjective. Probably it can fulfil other linguistic functions too, and probably it has more than four meanings – assuming I have even defensibly individuated the four meanings above. The polysemy of property is something that we will come back to in Chapter 3. For the time being, it is sufficient to introduce the terminology that will be used in later discussions.

[88] There is a lot of empirical literature on what people's beliefs and attitude towards property are. See, for a sample, Robert C Ellickson, *Order Without Law: How Neighbours Settle Dispute* (Harvard University Press 1994); Paul Babie et al, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40 Houston Journal of International Law 797 and Babie et al, 'The Idea of Property: A Comparative Review of Recent Empirical Research Methods' (2019) 26(2) Indiana Journal of Global Legal Studies 401; Donald J Kochan, 'Pride & Property: An Interdisciplinary Analysis of Their Symbiotic Relationship' (2018) 27 Southern California Interdisciplinary LJ 255.

5.2 'Private' law, 'criminal' law, 'property' law

Taxonomies organise information to suit the purposes and interests of the organiser. There is no innate significance to any of the conventional classifications within law. As Robert Stevens memorably puts it: 'Unlike the division of a cake, several methods of dividing the law can co-exist, with different approaches being useful for different purposes… That it is useful to compartmentalise the law does not mean that individual areas can be understood in isolation.'[89] There are some who disagree, though, and the next chapter responds to views that propose taxonomies can somehow solve the puzzle.

I myself resort to the terminology of 'private law', 'criminal law' and 'property law' only to pick out the referents conventionally associated with those phrases within the linguistic community of legal theorists, and not to suggest they have inherent significance. To deny they have innate significance is not the same as denying taxonomies can have consequences. The arrangements we make to suit our purposes almost invariably have consequences. If they did not, we would be irrational to make any arrangements because such things could never serve our ends, or any ends at all. I implicitly conceded there are consequences to taxonomy in my insistence on casting a system-wide net for the relevant rules on property and wrongdoing but confining the relevant system to England & Wales. So I am not dispensing with categories. It is just

[89] Robert Stevens, *Torts and Rights* (OUP 2007) 284.

that the category am I using is more esoteric than the conventional categories of 'private law', 'criminal law' or 'property law'.

Categorisation does have consequences, and even unintended consequences – as Peter Birks worried about.[90] Any selection criteria conceal some features and present others as salient; the risk is this may misdirect our attention away from what is important. This risk is why I insist on the relevance of my preferred categorisation. However, there is no inherent significance in any of the conventional categories used by the legal community, nor in any slightly reformed taxonomy based on these. The significance of a taxonomy lies only in its usefulness for the purposes of the organiser (or, from a more detached outlook, its usefulness for what it reveals about the self-understanding of that community). One purpose an organiser may have in categorising the law is to assist their practical reasoning. I do not deny that one possible consequence of our dividing the law into different taxonomies may be that this enables us to sequence or compartmentalise our practical deliberation.

When I use the locution 'rule X belongs to area of law Y', I mean 'Y' to refer to the conventional classifications that are familiar from our legal education, scholarly treatments and the historical development of the common law. This is warranted, given that the conclusions of legal philosophical writing ought not to stray too far from the self-understanding of the actors within a legal community.[91] The scope to stray in

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[90] Peter Birks, *An Introduction to the Law of Restitution* (OUP 1985).

[91] Julie Dickson, *Evaluation and Legal Theory* (Hart 2001).

this particular project is very narrow indeed, for I have no prescriptive ambitions such as reforming the state of the law or recommending how much covariance there should ideally be.

My rationale for insisting on the relevance of both private and criminal law is that laypeople making practical deliberations about property are subject to both areas simultaneously. Law would hold little interest to me if it did not profoundly affect people in their day-to-day lives. The decision in *Hinks* was justified by the majority as helpfully relieving juries of the task of applying difficult civil law norms.[92] However, this is ironic because those same jurors are expected to be guided by complex civil norms in their ordinary lives. I maintain, therefore, that an inquiry into property and wrongdoing must take into consideration both private and criminal law rules if it hopes to yield any insights that would speak to the understanding of law that its subjects have.

In the relevant legal community of which I am part, 'private law' is conventionally taken to include the law of tort, contract, and unjust enrichment. The law of equity and trusts may or may not be included[93] – it makes no difference because case-law dataset used in this project is largely confined to common law in any event. More

[92] *Hinks* (n 4) 253 per Lord Steyn: 'While in some contexts of the law of theft a judge cannot avoid explaining civil law concepts to a jury (e.g. in respect of section 2(1)(a)), the decisions of the House of Lords eliminate the need for such explanations in respect of appropriation. That is a great advantage in an overly complex corner of the law.'

[93] The law of equity, which prior to the Judicature Acts of 1873-1875 operated as a separate jurisdiction to common law, has over centuries had a piecemeal intervention into private law.

specifically, the thesis largely discusses torts (wrongs) relating to tangible things.[94] Some scholars assimilate property law to private law, whereas others hold it apart.[95] Nothing turns on this for my purposes. This is because nobody denies that both property law and private law are part of civil law. By speaking of 'private law', I broadly wish to isolate the civil law that applies to individual subjects. I disregard the civil law which directs officials. In section 5.1 above, some samples of the latter were given – legislation empowering government ministers, for example, or instructing judges and civil servants on the calculation of tax revenue. If this is 'public' civil law, then I am interested only in 'private' civil law.

The relevant observables in the pattern of covariance are 'private' civil law regulating property/wrongs and criminal law regulating property/wrongs. 'Criminal law' here is all the law adjudicated by the Criminal Division of the courts and tribunals system in England & Wales. 'Civil law' is all the law remaining that is not criminal law. Making the cut this way, along the seam of jurisdiction, is consistent with the organisation effected within the legal system itself.

[94] It is no intention of mine to suggest intangibles are somehow not property-as-thing, but their treatment is confined to a discussion of the case of *Stockdale v Onwhyn* (1826) 5 B&C 173 in Chapter 5.

[95] To take just two examples out of a vast literature on taxonomy, compare John Gardner and George Gretton. Whereas Gardner says glibly that 'the law of property can be regarded as a long footnote to the law of torts' (*From Personal Life to Private Law* (OUP 2018) 14), Gretton says 'there exists an area of law, property law, which deals with transfer of rights, with limited rights, and with the ranking of rights, which belongs to neither the law of things nor to the law of obligations, but which applies to both.' (see his 'Ownership and its Objects' (2007) 71(4) Rabel Journal for Comparative and International Private Law 802, 832).

So Chapters 3 to 6 will assume – conditionally, for the sake of argument – a taxonomical picture of English law whereby there is a basic division between civil and criminal law, tracking the division between the two types of jurisdiction exercised by the courts. Within this scheme, property law forms a part of civil law. Private law is part of civil law, and property law is a subcategory of civil law – whether it is also a subcategory of private law does not matter. This is consistent with many of the views that Chapter 2 takes issue with. It is appropriate to engage those views on their home turf.

5.3 *Other assumptions*

This project prays in aid legal theory about nature of law and legal systems. Much of what I say follows or adapts Joseph Raz's writings. I presume the truth of many of his arguments, which I believe to be true of at least English law, whether or not they are generally true of municipal law or legal systems. Later chapters are predicated on the following claims,[96] inspired by Raz, although I do not defend them at length:

> 1. Law claims moral authority. By this I mean that law claims it gives its subjects valid moral reasons for action.

[96] Raz also argues that law claims supremacy over other normative systems but I make nothing of that in this project. Many objections to these three claims deny they are *necessarily* true of legal systems. Those objections do not bite on my narrower claim that English & Welsh law claims moral authority and comprehensive practical authority.

> 2. Law claims comprehensive practical authority. By this I mean that legal systems do not acknowledge any limitation on the spheres of behaviour that they may regulate, unless that limitation is self-imposed.

One interesting upshot of the discussion in later chapters is that these claims can be in tension with one another. By claiming jurisdiction over the most unsavoury types of behaviour, law may compromise the moral quality of the reasons for action that it gives as a result of deciding murky disputes. One judge memorably encapsulated the problem by saying a court has to

> steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirt and refuse all assistance.[97]

This tension is discussed in Chapter 4. It has the potential to explain some departures from the pattern of covariance. It is worth stating the Razian presuppositions upfront because if we were to start out with a different framework of general jurisprudence then alternative types of explanations for covariance, or deviations from covariance, might well suggest themselves. The preoccupations of this project have something in common with Ronald Dworkin's interest in coherence and in *Riggs v Palmer*.[98] Dworkin's work, however, is engaged with only to the extent he speaks specifically of

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[97] *Saunders v Edwards* [1987] 1 WLR 1116, 1134 per Bingham LJ.

[98] 115 NY 506 (1889).

property and wrongdoing. That is to say, select extracts from his oeuvre are treated exclusively for their claims about special jurisprudence; there is no attempt to engage with his general jurisprudence.

In addition to the assumptions above relating to general jurisprudence, the project presupposes certain matters about special jurisprudence. I presume the following is true of the private property regime in England & Wales:

> 3. The court in *R v Smith* is correct to say that at least one function of the property regime is to keep the peace i.e. to settle disputes over resources that would otherwise be disruptive of public order and the stability of allocations effected by the legal system;
>
> 4. English law recognises ownership. It has a concept, or perhaps multiple concepts, of ownership;
>
> 5. Following David Fox, the laws of property apply by default. That is to say, *property-as-legal-relations* will apply without more to anything having the status of *property-as-thing*. Once the preconditions of 'thing-hood' are met, the rules of the property regime apply and are difficult to escape. Contracting out may modify some of them, but many rules are non-optional. Criminal laws are among the non-optional rules.

I lay these assumptions out upfront because they inform the chapters that follow and it may be helpful to the reader to have them made explicit at the outset. If they provoke disagreement at this stage then I request that the reader grant them for the sake of argument and see where these premises take us. If they have explanatory potential, as I think they do, then this is evidence in favour of their truth (to my mind).

6. Conclusion

This project investigates covariance as well as inconsistencies between criminal law and private law in the allocation of proprietary rights or over the objects of a proprietary right. Case-law concerning property and wrongdoing raises the question of the relation between the two areas of law for any legal system. It is therefore appropriate to draw on the resources provided by theories of law and legal systems, as well as theories of property. The hypothesis to be tested in the following few chapters is that certain constraints and guarantees which affect judicial decision-making explain covariance. These constraints and guarantees arise because of four fixed features of the legal system, each of which forms the subject-matter of a chapter. However, this is by no means a complete explanation; the thesis makes no claim to exhaustivity. Along the way, a subsidiary aim of the project is to find explanations for departures from the pattern of covariance. The final chapter summarises these findings and addresses some implications. Before we approach testing the hypothesis, though, we look at what

literature exists on the thesis question already. Chapter 2 discusses various models[99] of the relations between private and criminal law that might explain covariance and/or inconsistency.

[99] Throughout, I will refer to these interchangeably as 'models of the legal system' or 'models of the relations between private and criminal law'.

Chapter 2 – Some Responses to the Puzzle

1. Introduction

Reactions to *Hinks* were not complimentary of the judgment. 'It certainly looks very odd that a man who has done no more than exercise his civil law rights in relation to a chattel should be guilty of stealing it', observed Sir John Smith.[1] 'Looking odd' is another way of saying that the reasoning in *Hinks* was not what we had come to expect from the pattern of covariance. ATH Smith cautioned that this sort of reasoning, taken to its logical conclusion, means the owner of any property can be prosecuted even though nobody else has an interest in it.[2] The picture of law that it suggests is certainly an unfamiliar one. It does not reflect how we normally think about property outside of the results in these particular cases. These commentators were anxious about the effect that criminal law has for everyday dealings with property. It is natural to be concerned with the ramifications of breaking a pattern of covariance, both within and beyond the law. I focus on what these cases imply for the legal system, on the understanding that we care about the internal affairs of the legal system because of their wider effects on society.

This chapter sets out some possible responses to departures from the pattern of covariance. There is not much literature directly on the puzzle itself, so I extrapolate from proposed models of how private and criminal law relate to one another. Of course, there are many more models than I can canvass here. I will discuss five views that I call the *dependence*,

[1] JC Smith, 'Civil Concepts in the Criminal Law' (1972) 31(1) CLJ 197, 216.

[2] ATH Smith, 'Can Proscribed Drugs Be the Subject of Theft?' (2011) 70(2) CLJ 289.

building block, *mutatis mutandis*, *different functions*, and *distinct domain* views. They are hypothetical stances that one could adopt toward the pattern of covariance and represent a way to illustrate competing inclinations on the phenomenon. Each of these models may be indifferent, opposed or committed to maintaining the pattern of covariance. They do not exhaust the possible responses to the puzzle, but they do represent attitudes commonly held within the legal community.

For each view, I give a generalised formulation of the view as an ideal type. I then cite statements, taken from the published work of scholars, which exemplify the view. I am, however, hesitant to typecast scholars as being of one persuasion rather than another. Due to customary specialisation within the academy, most scholars have not consciously examined their own vaguely-formed instincts on how the various components of the legal system fit together. These instincts are the product of their legal education, or limited to a particular context to which they have turned their attention. Quite frequently, their work provides only qualified support for a certain position and/or can be understood to support more than one of the positions. The polysemy of the word 'property' and the slipperiness of taxonomical labels like 'private law' do not make faithful interpretation easier. Frustratingly, the most that can be said about some of the views is that they are undertheorised, and so it is impossible to make any conclusive assessment of their merits.

Each of the five views can be presented either as a description of the law or as a prescription for the law. Their strengths and weaknesses differ depending on which reading is preferred. Three of the views are plausible neither as descriptions nor as prescriptions. Two views fare decently as description, but not as prescription. These two partially successful views are the ultimate contenders by the end of the thesis. They are the *mutatis mutandis* and

dependence views, but this thesis is not the arena in which they do battle to the death. I remain agnostic as to which of them, if any, ultimately succeeds. In Chapter 7, I propose a tie-breaker question to help us decide between them, namely whether a near-perfect pattern of covariance is even possible. Because this question shades into whether it is desirable, it helps us to evaluate the *mutatis mutandis* and *dependence* views as prescriptions.

2. The 'building block' view

Prominent in some literature is a tendency to refer to property as a 'building block' concept. Grantham & Rickett, for example, say property is 'one of the fundamental building blocks of the Anglo-American legal tradition'.[3] Ronald Dworkin also believes something like this. He says that there exist 'substantive concepts through which the law is stated, like the concepts of a contract and of property.'[4] The impression given is that property is like a building block – that is, a basic concept upon which more complex legal propositions are built. The 'building block' metaphor conjures up a mental image of the six quadrilateral faces of a cuboid, giving the impression that it does not vary wherever it appears in the taxonomy of law.

Thus any model of the legal system that presents the relation between property in private law and in criminal law as one of identity is, for our purposes, characterised as a *building block* view.

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[3] RB Grantham and CEF Rickett, 'Property Rights as a Legally Significant Event' [2003] CLJ 717, 726.

[4] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 105.

> *Building block*: the laws governing the objects and allocation of property interests in private and criminal law are identical. They are identical because the concepts of property in private and criminal law are identical.

Not all those who espouse the *building block* view will do so for the same reasons, nor will their fully fleshed out accounts be identical to one another. For Dworkin, the *building block* view flows from his commitment to law as integrity. Compare his account to Richard Epstein's, who is another *building block* theorist. Epstein sets out his view in more detail than Dworkin does and it is clear that they would not be in complete agreement. For Epstein, 'property comes first'[5] and he thinks (unlike Dworkin) that contract is not quite on a par with it. Property comes first because tort protects property and contract transfers property (although they also do other things, he acknowledges). Nonetheless, these three are 'not simply an arbitrary assemblage of categories, but reflect a powerful, if unarticulated, view of the world.'[6] For Epstein, property is not only a building block of legal thought but 'a basic building block of nature.'[7] Others who have used the 'building block' metaphor have not been quite as effusive. There is scope for variation, then, even among proponents of a *building block* view.

Dworkin, Epstein and Grantham & Rickett advance a straightforward view of the relationship between private law and criminal law notions of property. For them, property in criminal law *just is* property in private law. They are identical; they are one and the same. Never mind for now what these various authors mean by 'property'; it could be any

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[5] Richard Epstein, 'The Ubiquity of the Benefit Principle' (1994) 67 Southern Cal LR 1369, 1369.

[6] ibid.

[7] ibid.

(or all) of the four meanings identified in the previous chapter. Whatever they mean, the important point is that the concept is not confined to a specific area of law like private or criminal law, on their view. Holders of a *building block* view would therefore be opposed to decisions like *Hinks*.

2.1 ***Problems with the building block view***

The *building block* view fails as a description of English & Welsh law. The pattern of covariance is imperfect in English & Welsh law. The view is subject to too many counterexamples. It would not be possible for a *building block* theorist to cast every decision that departs from the pattern as wrong-headed whilst remaining faithful to doctrine. That would involve much more than minor reforms to law – including eliminating the doctrine of adverse possession.

The Epsteinian variation of the theory is also descriptively flawed. It cannot be the case that the property regime in law is simply the analogue of property 'in nature' or in morality. This is because morality is indeterminate about most things that a legal property regime needs to make determinate. Later chapters will expand on this point.

As a prescription, the *building block* theory is implausible. It is not clear what advantages such a strong thesis has over a weaker claim that would accept some deviation from the pattern of covariance on consequentialist grounds. The esoteric appeal of law as integrity or property as a building block of nature is insufficient, in my view.

In contrast to the identity claim made by *building block* theorists, other theorists have maintained a strict non-identity claim. The next section examines responses that (try to) do away with the puzzle in this way.

3. The 'distinct domain' view

The economists Guido Calabresi & Douglas Melamed have been blamed for popularising the view that the law of property, the law of obligations and criminal law are totally separate.[8] This may be apocryphal, but if that is really the result of their writings then it is hardly the intention of their famous article 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral'.[9] Calabresi & Melamed were at pains to set themselves against those who tended to see all three taxonomies as separate.[10] They proposed an integrated analysis that saw everything as an 'entitlement'. Further, they are evidently not using the word 'property' in the way a lawyer would, but rather in a more specific sense meaning an entitlement that could be freely sold.[11] For this reason, nothing they say is automatically applicable to the taxonomies that are conventional within the legal community, which are what interest us. Nevertheless, an unwitting side effect of their paper may have been that they showed that a purist could separate out property and crime and obligations, if they so wished. Perhaps this possibility itself has outlasted the details of Calabresi & Melamed's article.

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[8] See e.g. Nicholas McBride & Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 30.

[9] (1972) 85(6) Harvard LR 1089.

[10] ibid., 1089.

[11] ibid., 1092, 1105.

Given that economic theories of private law are usually contrasted with deontic theories, it may be surprising to find out that Ernest Weinrib is a prominent *distinct domain* theorist. Weinrib favours a theory of private law based on Kantian right. He agrees with *dependence* theories (outlined below) that criminal law is a statement of society's values.[12] However, he does not think this is enough to make it desirable that criminal law should be 'enshrin[ed]… as dominant' in private law.[13] Weinrib thus endorses a non-identity view of the relation between private and criminal law. He, and any other *distinct domain* theorist, would not be opposed to deviations from the pattern of covariance. It is not clear to me whether he would be indifferent to deviations or positively committed to their necessity for distinguishing private law from other domains of law.[14]

> *Distinct domain*: whatever else they may be, the laws governing the objects and allocation of property interests in private and criminal law are not identical.

It is fair to say that Weinrib's views on the matter have altered over the years. In an article from 1976, Weinrib appears to take a holistic view of the law. He seems to allow that private-law courts should 'attempt to contribute sensibly to the whole regulatory pattern' of law,[15] though he doubts whether the attempt could ever be successful (for reasons we

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[12] Ernest Weinrib, 'Illegality as a Tort Defence' (1976) 26 University of Toronto LJ 28, 43.

[13] ibid.

[14] I am grateful to Luke Rostill for posing the following question: Whilst Weinrib may be opposed to rules of criminal law within the domain of private law, need he oppose the use of private law rules within criminal law (such as the rules of ownership within the law of theft)? I presume he must, for otherwise there would be considerations of corrective justice within criminal law and the distinctive modes of legal ordering must collapse. However, I cannot ascertain what his position would be through textual analysis and I therefore leave open the possibility that he could be indifferent.

[15] Weinrib, 'Illegality as a Tort Defence' (n 12), 44.

will come onto). However, by 1995, his view is less accommodating. In *The Idea of Private Law*, he says that criminal 'illegality as such is not relevant to the direct interaction of doer and sufferer', which for him is what private law is all about. Because of this, considerations of illegality are inconsistent with corrective justice.[16] Corrective justice, in Weinrib's view, is what constitutes the 'categorical difference between private law and other legal orderings'.[17] So there is no room for criminal law within private law, in the end. Weinrib is committed to there being what he calls 'distinctive modes of legal ordering',[18] and what I call taxonomies. For reasons given in section 5.2 of Chapter 1, I do not think 'private law' has any innate moral significance in the way Weinrib wishes.

Yet there are others who think, like Weinrib does, that taxonomies count for quite a lot in this debate. Irit Samet feels that Weinrib's unease is understandable, even though she does not want to go as far as he does in insisting on a separation of criminal from private law. She is sympathetic to the instinct that 'these are (and should remain) separate areas of law.'[19] She says that courts should not allow the law to make 'fun of itself'[20] – that is, contradict itself in an embarrassing way. But she thinks embarrassment only occurs when there is a 'conflict between different strands of the same legal field.'[21] It is therefore important to know what the 'same legal field' is, because this will determine whether covariance is required to stop the law making fun of itself. Samet thinks that family and

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[16] Ernest Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 169, at his footnote 53(3).

[17] ibid., 57.

[18] ibid., 10.

[19] Irit Samet, *Equity: Conscience Goes to Market* (OUP 2019) 159.

[20] ibid., 166.

[21] ibid., 166.

property law, for example, may well be inconsistent with one another in a way that is quite acceptable.[22] Talking about *Best* (the case of the squatter being registered as owner, despite criminal prohibitions), Samet says that 'even the need to maintain coherence between different aspects of a well-delineated field like the law on squatting'[23] can give way to other considerations. The emphasis Samet places on taxonomies is inconsistent (because it sometimes gives way), and it is not anyway clear what count as 'fields' on her account. Her emphasis on fields must therefore be linked to something else – namely, functions. We will come onto the *different functions* view and revisit Samet in that context, because she does not appear to be a committed distinct domainer. Before that, we outline problems with the *distinct domain* view.

3.1 *Problems with the distinct domain view*

As a description of English & Welsh law, the *distinct domain* view fails. It is opposed to the doctrine of *ex turpi causa* importing criminal law considerations into private law. Yet that doctrine exists. By extension, the *Bowmakers* doctrine must be an anathema to it, as will any case in private law that takes account of criminal law. Although there is indeterminacy in English & Welsh law over what impact wrongdoing has on property rights, all sorts of wrongdoing are treated as relevant in all sorts of ways. There is a permissive rule of procedure that allows courts to draw on precedents decided by either criminal or civil courts. We referred to *Yearworth v North Bristol NHS Trust*[24] (a private law dispute) at the

[22] ibid. I am not sure how she would class the Civil Partnership Act cited in Chapter 1 at footnote 34, but that is an aside because this thesis is not concerned with categories *within* civil law. It is concerned with the divergences between private and criminal law.

[23] Samet, *Equity* (n 19), 167.

[24] [2009] EWCA Civ 37; [2010] QB 1.

beginning of Chapter 1. The Court of Appeal in *Yearworth* referred to two criminal cases when deciding if sperm counted as property in private law. Similarly, in *Hibbert v McKiernan*[25] (a criminal appeal), the court considered four civil cases and two criminal ones. This is not unusual. What is thought to be unusual, such that it requires comment or explanation, is where the two areas of law take a different view on these questions. The boundaries between taxonomies are more porous than the *distinct domain* view would allow. The view is highly stipulative about what constitutes private law and therefore has to jettison any ambition toward description (and, with it, any potential for explaining the law as is) or go to extraordinary lengths to maintain a correspondence with the legal doctrine as we find it.

As to its prescriptive plausibility, I will mention only one consideration against the *distinct domain* view. The appeal of a law arranged around Kantian right is debatable, but I will not labour this point. The consideration I will discuss, one that militates against indifference to a pattern of covariance, is parsimony. Both the *distinct domain* and *building block* views are very simple claims that address the relation between private and criminal law in terms of identity. However, the *distinct domain* view is the more unlikely of the two. On the *distinct domain* view, we are indifferent to there being multiple, unrelated, conceptions of property within law. A strong version of the distinct domain view would posit multiple senses of *property-as-thing*, *property-as-legal-relations*, *property-as-values*, etc, within discrete taxonomies. I know of no account that specifies these multiple senses, but that does not by itself rule out the possibility of giving such an account. However, any such account would lose out to the *building block* view on grounds of parsimony. (It would also

[25] [1948] 2 KB 142.

suffer from some of the defects of the *different functions* view, which are discussed at subsection 4.1 below.)

A desire for parsimony carries more weight in law than it does in, say, the natural sciences. This is because a good law should be easily comprehensible and capable of guiding ordinary people in their daily lives. The ordinary people include judges (and other officials like the Chief Land Registrar in *Best*) and juries applying the law. So a desire for simplicity (therefore parsimony) is often seen in law. For example, the Supreme Court tries to 'save the law from anomaly and incoherence'.[26] It says that it is an issue of 'some importance' that we 'reconcile public and private law in the domain of land use where they occupy much the same space.'[27]

In another Supreme Court case, both 'cheating'[28] and 'dishonesty'[29] were held to have the same meaning in private law as in criminal law. In that case, Lord Hughes pitched the parsimony argument high, saying there 'can be no logical or principled basis for the meaning of dishonesty… to differ according to whether it arises in a civil action or a criminal prosecution.'[30] The default inclination seems to be toward parsimony unless the court can be persuaded that there is a logical or principled basis to depart from it. The House of Lords has said this more than once. Much like Irit Samet, Lord Steyn held that

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[26] *Coventry v Lawrence (No. 1)* [2014] UKSC 13, [2014] AC 822, [157] per Lord Sumption.

[27] ibid., [155].

[28] *Ivey v Genting Casinos Ltd* [2017] UKSC 67, [2018] AC 391, [38].

[29] ibid., [63].

[30] ibid.

'coherence must sometimes yield to practical justice',[31] implying that coherence is a priority that gives way only when there are good reasons to do so.

This desire is seen across the law, and not just in respect of the law of property, as you might expect. So it is said that 'proportionality' means the same thing whether it arises under human rights law or under European Union law.[32] Also that the right to a fair trial has the same content under either of those areas of law.[33] Lady Hale has made the parsimony assumption explicit in the context of employment: 'Until... recent developments, it was largely assumed that a person would be an employee for all purposes - employment law, tax, social security and vicarious liability.'[34] The zest for coherence goes beyond concepts, interpretation of particular words, and the content of rights. It is strong enough to motivate decisions about the appropriate legal test to be adopted and about appropriate outcomes in cases.[35] (As before, it does not matter whether these are true statements of law. The point is only to show what desiderata drive courts.)

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[31] *Williams v Natural Life Limited* [1998] 1 WLR 830, 837. See also *Barclays Bank v Various Claimants* [2020] UKSC 13, [2020] AC 973, [29].

[32] *R (Sinclair Collins Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, [21], [133], [196]-[200].

[33] *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2017] 3 WLR 957, [78]; see also the Court of Appeal judgment, [2015] EWCA Civ 33, [2016] QB 347, [71].

[34] *Barclays Bank v Various Claimants* (n 31), [29].

[35] The Court of Appeal was 'persuaded that where… contractual and tortious duties to take care… exist side by side, the test for recoverability of damage for economic loss should be the same': *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch 529. A similar motivation is seen in other countries also. For Australia, see *Ball v Consolidated Rutile* [1991] Qd 524, 546: 'It would be a quite unsatisfactory state of affairs if upon the same facts… the plaintiffs were able to avoid satisfying the test for proximity and recover in nuisance damages for economic loss' that were not recoverable in negligence. In Canada, too: *Hickey* (1970) 21 DLR (3d) 368 (Nfld SC), [16]-[17]. For other English examples, see *Hedley Byrne Ltd v Heller & Partners* [1964] AC 465 and *Spring v Guardian Assurance* [1995] 2 AC 296. See also: *Rees v Darlington Memorial Hospital* [2004] 1 AC 309, [105]; *XX v Whittington Hospital* [2020] 2 WLR 972, [64]-[66]; *Gray v Thames Trains* [2009] AC 1339, [76]-[77]; *Patel v Mirza* [2017] AC 467, [155], [191].

So there are good reasons to favour parsimony in the law, which is not to say there are decisive reasons. This is not a fatal argument against the *distinct domain* view. However, the view also suffers from some of the limitations of the *functions* view, see section 4.1 below. I do not think it withstands the argument from parsimony in Chapter 3 nor the arguments against it in Chapter 5.

Neither the *building block* view nor the *distinct domain* view is particularly plausible as description or prescription. In what follows, three further views are introduced and all have a greater claim to plausibility than the two above. On two of the views introduced below, worries about deviating from the pattern of covariance may be dismissed. The *functions* view says that private law and criminal law diverge because they pursue different functions. The *mutatis mutandis* picture is one of mixed convergence and divergence between criminal and private law. By contrast with these two, a third view, the *dependence* view, favours the pattern persisting.

4. The 'different functions' view

The *functions* view justifies departures from the pattern of covariance on the ground that private law and criminal law pursue different functions to one another. My target here is not the generic claim that law pursues various functions. Nor is it the claim that law's concepts and rules are informed by the functions pursued. These are both plausible claims that are in the neighbourhood of the *functions* view and which lend it an air of innocuousness that it does not deserve when deployed as a response to the puzzle identified in this thesis. The pattern of covariance is composed of very particular observables, i.e. the reasoning and outcomes of judicial decisions, and not rules or

concepts. Rules and concepts are prior to the determination of cases. They would exist even if there were no litigation ever. The slight complication is that case-law contributes to the rules and concepts we have, but it usually does so gradually and in the course of applying settled law. Save for unusual occasions like test cases in the ultimate court, case-law is not a *tabula rasa* for the creation of new rules and concepts, shaped as instruments toward some end. The *different functions* view justifies departures from the pattern in case-law, specifically. My quarrel is with the view when it is offered as a response – a justificatory response – to the puzzle.

> *Different functions*: the laws governing the objects and allocation of property interests in private law and in criminal law ought to covary if and only if private and criminal law are pursuing the same functions.

The House of Lords justified its own decision in *Hinks* in this way. The majority said: 'The purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be some disharmony between the two systems.'[36] Seemingly, there is nothing to take issue with in these bland-sounding sentences. They echo some of Raz's views on value pluralism. Like Lord Steyn, Raz thinks the law should ideally speak in one voice and if it did so this would simply be a by-product of it being just, correct, morally sound.[37] However, he says, sometimes coherence has to be sacrificed. This follows from two things. First, incoherence

[36] *R v Hinks* [2001] 2 AC 241 (HL), 252 per Lord Steyn. I take it that Lord Steyn may just as well have said 'functions' as 'purposes' in his dictum. Throughout the text, I interpret and use the terms 'functions' and 'purposes' synonymously.

[37] Joseph Raz, 'The Relevance of Coherence' in his *Ethics in the Public Domain* (OUP 1994), 312, 315.

inevitably results from political compromise.[38] Second, the demands of morality are not always reconcilable because morality is not systematic in its demands.[39] However, this is where Raz departs from Lord Steyn. Raz believes the value of coherence follows from the moral situation that value pluralism puts us in. Given value pluralism, no state or legal system can manifest to the highest degree all the virtues there are.[40] It must choose certain values to the exclusion of others and maximise some of the chosen values to the detriment of others. Adhering to the chosen values promotes efficient administration and allows us to retain the benefits of a scheme of coordinated action.[41] This, for Raz, is the value of coherence. These complexities are skated over by Lord Steyn. I imagine that one attraction of the *different functions* theory is the reassuring notion that the law can simultaneously maximise many virtues. Despite this, functionalists rarely engage with the implications of value pluralism. The implications are explored further in Chapter 7.

The *different functions* argument is the most encountered one amongst those who are sanguine about departures from a pattern of covariance. The Court of Appeal in *Smith* had recourse to a *functions* argument too. The court was not particularly troubled by the suggestion that the convicted robber might not be liable in private law for taking the heroin.[54] This was because it thought that criminal and private law pursue different functions, viz. crime is concerned with keeping the peace and not with vindicating individual property rights.

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[38] ibid., 303, 314.

[39] ibid., 314.

[40] Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 American Journal of Jurisprudence 1, 3.

[41] Raz, 'The Relevance of Coherence' (n 37) 317.

Whether or not that is true, it brings to light a number of tacit assumptions the *functions* view makes. It assumes the possibility of individuating functions and areas of law. It further assumes there are one or more functions (*A*, *B*) pursued by a single area of law, *X*, to the exclusion of their pursuit by other areas of law (*Y*, *Z*). These assumptions are implausible, but they do at least help us see why the functionalist view is proposed as a resolution to the puzzle in this thesis. Taking a *functions* view allows a judge to be attentive to a predetermined subset of reasons (say, only those in favour of *A* or *B* if it is a case brought in *X*), and weigh these most heavily in the balance. The justification for tipping the deliberative scales in this way is that the legal system overall is still able to maximise multiple, and perhaps incommensurable, values because each taxonomy predetermines the value to be pursued. This simplifies decision-making. Below, I outline some ways in which these assumptions weaken the *functions* view. Before that, I set out various statements indicative of scholars' support for the view.

We return to Irit Samet's tentative sympathy for the *distinct domain* account. Samet is not wholeheartedly a distinct domainer. Rather, Samet says, the law as a whole pursues different, and sometimes competing, purposes.[42] Weinrib was a functionalist before he was a distinct domainer. In his early writings, he was pessimistic over whether private law could ever reinforce criminal law in an intelligent way. He thought that reinforcing criminal law requires knowing *why* we have criminal law, and it was 'impossible' to imagine any resolution to that question.[43] In later life, he was slightly more optimistic that we could conduct the same inquiry satisfactorily with respect to private law. He said,

[42] Samet, *Equity* (n 19), 160.

[43] Ernest Weinrib, 'Illegality as a Tort Defence' (n 12), 44.

knowingly tendentious, that we have private law so that it can be private law.[44] Weinrib can only understand private law from within it. (He is against accounts of the law that look outside of law for its functions. Given what he says in *The Idea of Private Law*, he must now also be against accounts which permit you look outside *a particular area* of law for the functions of *that area* of law.[45]) But in 1976, he was content to say that private and criminal law simply pursued different functions.[46]

It is difficult to tell what Raz's position would be. Although Raz sets himself against global coherence theories of law and/or of adjudication, he approves of 'coherence of doctrine in specific fields'.[47] He calls this local coherence. He says 'sound moral principles are consistent, and should be consistently applied in law,'[48] generating pockets of coherence where the institutional setting of a court permits this. Some moral doctrines are pure ones, Raz says, without competing concerns. It would be extremely convenient if each legal taxonomy corresponded to a pure moral doctrine, but Raz gives us no general reason to think that the borderlines of specific legal fields are any safeguard against the competing demands of value pluralism, or indeed political compromise.[49] Value pluralism could underline the value of maintaining a pattern of covariance, or alternatively incline the other way.

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[44] Ernest Weinrib, *The Idea of Private Law* (n 16) 5, 8.

[45] ibid., 3-8.

[46] Ernest Weinrib, 'Illegality as a Tort Defence' (n 12), 44-45.

[47] Raz, 'The Relevance of Coherence' (n 37), 314.

[48] ibid., 315.

[49] ibid., 315.

Raz follows Barbara Baum Levenbook, who is also in favour of coherence within branches or areas of law.[50] Levenbook herself goes slightly beyond local coherence, allowing that law from one or two areas may be relevant to a third area, but explicitly shies away from giving any account of how to identify an area of law.[51] Raz himself does not say how locality should be understood within his endorsement of local coherence. Taxonomy is one way of understanding locality, but it is not clear how we should draw the lines. Shall we partition criminal and civil law, or shall we partition property law and non-property law? And how exactly shall we do this? These sorts of uncertainties plague the *functions* view, and it is to them we now turn.

4.1 *Problems with the different functions view*

There are several problems with the *functions* view. I will mention some that apply to the view generally, rather than to specific variants of it. The most obvious objection is the one which Weinrib noticed in 1976 in relation to criminal law: we can disagree about which function the relevant area of law pursues.[52] Because we disagree about functions, some people think that private and criminal law pursue the same function. They say that one of the purposes of tort law is to protect property (as Richard Epstein did),[53] which could also be said of the law of theft. We can generalise the point. As Malcolm Thorburn sees it, the

[50] Barbara Baum Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) Law and Philosophy 3, at (e.g.) 367, 371, 372.

[51] ibid., 371. Raz also says he cannot descend into the detail of cases: Raz, 'The Relevance of Coherence' (n 37), 318.

[52] If you agree with the later Weinrib, you might be against functionalism altogether.

[53] Others who think this include: CSP Harding and MS Rowell, 'Protection of Property versus Protection of Commercial Transactions in French and English Law' (1977) 26 ICLQ 354, 355; Kelvin Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355, 365.

function of criminal law is to reinforce standards found in other parts of the law.[54] On Thorburn's view, criminal law prohibits many of the same things that tort law does.[55]

It does not matter for present purposes whether Thorburn is right or not. The rest of this thesis will not canvas all the possible views on the functions of private law and all the possible views on the functions of criminal law, and then argue against some whilst promoting others. Notice only that the *functions* view is not as comforting or dispositive as many people would want it to be. It is not a useful way to address the puzzle because, even amongst its proponents, the competing claims soon reach an intractable stalemate. The claims and counterclaims are imprecise. They are not easily commensurable against one another. It is not always obvious whether they are offered up as description or prescription. I will consider description and prescription together, finding the *functions* view lacking in both regards.

For a start, the term 'property' is polysemous and therefore confounds description. Even those who agree that both private and criminal law 'protect property' can finesse their claims further. Do they protect the property of individuals, or the property rights of individuals? (*Property-as-thing*, or *property-as-legal-relations*?) Do they protect the property regime overall (*property-as-taxonomy*) rather than the rights of individuals? Do private and criminal law value property for the same reasons and protect it against the same threats, or do they address entirely different sorts of wrongs from one another (*property-as-values*)? It would be immensely difficult to formulate and then defend an answer to any of these

[54] Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in Anthony Duff et al (eds), *The Structures of the Criminal Law* (OUP 2011).

[55] See also Eveline Ramaekers, 'What is Property Law?' (2017) 37 OJLS 588, 608 at footnote 76.

questions, even a descriptive answer. Law pursues functions, but it does so more haphazardly and opportunistically than a functionalist would allow. Its functions are not neatly boxed in by taxonomies. The burden of defending the view is so weighty that nobody could realistically discharge it.

There are many further difficulties for a defender of the view. Firstly, people hold up different success conditions for what it is to fulfil a function. Remember that the criminal law in *Smith* was said to diverge from the civil law because criminal law keeps the peace instead of vindicating property rights. For Andrew Ashworth, those are one and the same thing.[56] Both areas of law protect an established distribution pattern of material goods.[57] Not so for Eveline Ramaekers: 'It might be said that criminal law can also act as an enforcer of property law, but that would not be entirely correct since a criminal procedure could only lead to a fine or a prison sentence. It would not deal with the return, replacement or repair of any property stolen and/or damaged.'[58] Evidently there is disagreement about what it takes to fulfil a function, which in turn casts doubt on whether an area of law pursues that function.

None of this is helped by the fact that it is no easier to enumerate individual functions than it is to enumerate individual areas of law. Indeed, in lots of very general ways, private and criminal law could be said to be driven by the same concerns just by virtue of both being

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[56] Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6(1) OJLS 86, 89.

[57] See also *Brooks v Metropolitan Police* [2005] UKHL 24, [2005] 1 WLR 1495, [30] where Lord Steyn said that keeping the peace includes protecting property.

[58] Ramaekers (n 55), 608 at footnote 76. An interesting corrective to this view is Matthew Dyson and Sarah Green, 'The Properties of Law: Restoring Personal Property through Crime and Tort' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press 2014).

law. They make binding precedent, for example, which was why Sir John Smith worried about the unanticipated ramifications of *Hinks*. The *functions* view does not help us to gain clarity when functions can be pitched at various levels of abstraction and commentators are able to talk past one another.

Another objection to the *functions* view leads on from this. It is not obvious that each discrete area of law (assuming we can satisfactorily segregate them) pursues a single function. One field of law could pursue several functions at the same time. It could share them with another area of law too. Simply pointing to different functions of two areas of law does not mean that these must be pursued to the exclusion of everything else, or all of the time. Value pluralism requires legal systems to prioritise certain values because it is impossible to maximise every single virtue.

This is why criminal law and private law will sometimes lend their distinctive powers and processes to one another. Take the famous case of *Attorney-General v Blake*, when an injunction was granted in private law to prevent a breach of the criminal law.[59] It is an illustration of how private law will assist in the pursuit of criminal law's aims in a case where criminal law itself, for whatever reason, is ineffectual. The assistance goes in both directions. Criminal law lends its aid to private law too. It does so every time there is a penal sanction for breaching an order in a civil case.

This is not an uncommon or implausible thought. As James Edwards says:

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[59] This possibility was first recognised by the House of Lords in *Attorney-General v Blake* [2001] 1 AC 268.

> We have reason to use things to fulfil shared functions as well as distinctive ones. The distinctive function of a hammer is to drive nails into holes. But if I need a bookend, and have nothing else to hand, I also have reason to use my hammer to prop up books on my shelf. This is true even if using the hammer as a bookend makes it less good at driving nails.[60]

The point he is making is this. Even if each area of law has a distinctive function, it need not pursue it at all costs. Even if it is correct to say that private and criminal law generally pursue different functions, this falls short of establishing that they should do so *in every case*. In order to deploy functionalism as a response to the puzzle in this thesis, rather than as a general observation about law, the functionalist needs to say when a judge would be justified in pursuing the function(s) customary to an area of law and when he would be justified in departing from that function. To extend Edwards' hammer/nail vignette: using the hammer as a bookend is justified unless the bookshelf itself is falling off the wall for want of a nail. Having a bookend in such a situation is useless and even dangerous.

It is very simple to think of circumstances when we ought to switch our use of something like a hammer. It is much more difficult to say where the balance should lie between certainty and flexibility in law, not least because litigation is not nakedly instrumental. There is a complex interaction between means and ends in case-law. Procedure and reasoning are just as important as outcomes. This is not acknowledged when we justify a decision on the sole basis that it is a means to some particular end served by an area of law.

The *different functions* view is an unsatisfactory response to the broader puzzle in this thesis because it avoids engaging with whether covariance is valuable in itself. Functionalism is permissive of modifying rules and concepts for a certain sort of consequential reason, but

[60] James Edwards, 'Criminal Law's Asymmetry' (2018) 9(2) Jurisprudence 276, 289.

does not recognise any counterweight value in the retention of a pattern of covariance. As a descriptive matter, I am not sure concepts are so malleable that they can be massaged at the level of individual case outcomes. It might be different with rules. It might be possible to tailor the rules governing the objects and allocation of property interests in every case so that they were most appropriate to the function of the context in which they were raised, but this would come at a cost. The cost is not limited to familiar rule-of-law concerns like predictability, certainty, non-retroactivity and equality of treatment. It extends further, to two desiderata of property regimes specifically, and is discussed in Chapter 7.

The *functions* view is widespread among those who are insouciant about inconsistencies in criminal and private law's treatment of property. But it does not prove as much as its proponents would like it to. Functionalism runs into difficulties over what counts as a function, what counts as the same function, what counts as an area of law, what it is for an area of law to pursue a function, and when an area of law may pursue shared or other functions. The views are imprecise and not easily clarified. All these are descriptive problems. There are prescriptive problems too. Even if a variant of a functionalist view were broadly correct, it would overreach if proffered as a resolution to the puzzle in the thesis. An area of law that usually pursues a single function need not do so in every case and at all costs. As a prescription, the *functions* view allows our casuistic judgments to be the final arbiters of the functions to be pursued in each case. It permits backward reasoning to fit rules, concepts and outcomes to particular ends. There are rule-of-law hazards with such an approach, to say the least. Section 5 of Chapter 4 adds to these worries by doubting whether the view can serve as a *justificatory* answer, specifically, to the puzzle in this thesis.

5. The 'mutatis mutandis' view

We now move on to two views that have more to commend them than any of the ones outlined above. They are the *mutatis mutandis* view and the *dependence* view. Both of these views fare decently as description, but not prescription. We take first the *mutatis mutandis* view because it is a useful contrast to functionalism, being similarly permissive of deviations from the pattern of covariance, and yet is more persuasive. The *mutatis mutandis* view has rarely been overtly defended,[61] but I venture that it is among the unexamined beliefs that numerous scholars hold about law. It is a weaker version of the *building block* view, being a defeasible identity claim. The idea is that there are good *pro tanto* reasons for covariance, hence we see the pattern of covariance in the majority of cases. However, the view is weaker than *building block* because it does not insist on there being absolute reasons for covariance. It can therefore also explain deviations from the pattern.

> *Mutatis mutandis*: there are *pro tanto* reasons for the laws governing the objects and allocation of property interests in private law and in criminal law to covary, but no absolute reasons.

The *mutatis mutandis* view has the descriptive benefit of being able to explain both the existence of the pattern and deviations from the pattern. It is sensitive to value pluralism in that it accepts coherence has value but not ultimate value. It has the advantage over

[61] I am therefore grateful to Sandy Steel for suggesting the formulation of it that appears in this thesis. Of all the authors I have read, Graham Virgo comes the closest to giving a worked-through defence of it, but he does not use the language of reasons. In an article, he says 'the functions of criminal and tort law are such that difference will be common and can be justified. But the fundamental point is that where difference cannot be justified, the principle of consistency should apply to the interpretation of common concepts.' Graham Virgo, '"We Do This in the Criminal Law and That in the Law of Tort": A New Fusion Debate' in Stephen Pitel et al (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013) 117.

functionalism in that it does not insist that the defeating reasons must stem from the function pursued by a particular taxonomy of law. However, this permissiveness is also its prescriptive weakness. The view tells us very little about the sorts of reasons that weigh in the balance, either in favour or against covariance. Indeed, the main limitation of the *mutatis mutandis* view is that it is underspecified and, on the rare occasions that it is explicitly defended, the defence seems to be ad hoc.

Stuart Green is an unusual example of someone who has a book-length treatment of a question related to this thesis's research question.[62] Promisingly, he begins by confining his inquiry to what should count in criminal law as *property-as-thing*, which is a gain in clarity on the term 'property'. Thereafter, unfortunately, he simultaneously (and seemingly unknowingly) endorses several of the views sketched in this chapter at the same time. It is for this reason that I categorise him as a *mutatis mutandis* theorist; he is open to an assortment of considerations for/against the perpetuation of the pattern of covariance.

On the one hand, he seems to be of the *distinct domain* persuasion to the extent that he claims to give necessary and sufficient conditions for something to count as property for the purposes of the law of theft.[63] On the other hand, his necessary and sufficient conditions are not in fact sufficient because he concedes that slaves meet his conditions but that he would not consider them property in the eyes of theft law.[64] This is because we need to consider 'the underlying concerns that colour the "propertization" of such things

[62] Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press 2012).

[63] ibid., 6. He does so partly in order to provide some guidelines for how legislatures should draft theft statutes.

[64] ibid., 214.

on their own terms.'[65] This latter consideration now makes him sound like a *functions* or *mutatis mutandis* theorist. He says that 'we need to balance the concerns of theft law itself with those of other law, if any, that governs the property at issue'.[66] Again this sounds like a *functions* theory, with criminal law having certain concerns and other areas of law having their own concerns. It is obscure, however, as to how one can 'balance' functions. According to Green, the purpose of theft law is to protect the interests of society as a whole in the legal system of property rights, whereas the purpose of private law is to protect the property rights of individuals.[67]

Further, he acknowledges that one of his proposed necessary and sufficient conditions – excludability – is affected by what law we have. You can make something excludable by legally excluding people. Therefore, in the final analysis, the question of whether we can or should exclude seems to be at large. We seem to have ended up at square one, at least if Green's aims are prescriptive.

Thinking about whether we can legally exclude people brings to mind the question of whether private law does so independently of criminal law. This aspect of Green's thinking aligns him with *dependence* theorists (below). Indeed, in the introduction to the book, he writes that 'theft law is dependent on the law of personal property, intellectual property, contract and agency in ways that no other criminal offense is.'[68] This makes him sound like he endorses a *dependence* theory, but it is not clear to me what precisely he means by

[65] ibid., 206.

[66] ibid., 205; 208.

[67] ibid., 208; 212.

[68] ibid., 2.

this comment. He may mean that this is the state of the law at present, but that he would not wish for this state to continue. However, this latter interpretation is belied by things he says, such as the idea that theft is partly constituted by a 'positivist conception that turns on often technical conceptions of property, ownership, abandonment and the like'.[69]

Ultimately, Green's account shares features of *dependence* theories, *functions* theories, *distinct domain* theories and, to the extent that he worries about 'propertization' (i.e. *property-as-values*), *mutatis mutandis* theories which leave the relevant considerations at large. I therefore count him as a *mutatis mutandis* theorist, albeit one who has made the effort to explicitly defend his view.

5.1 *Problems with the mutatis mutandis view*

The non-committalness of the *mutatis mutandis* view is also its saving grace. It has the capacity to explain both the existence of the pattern of covariance and deviations from it. The fallacy of *functionalism* is that it is too stipulative about what functions two different areas of law pursue. Although it avoids stipulation, the *mutatis mutandis* view unfortunately gives us few tools to assess which departures from the pattern are supported by defeating reasons and which are unjustified. It seems very open to all kinds of reasons. If Stuart Green is a representative example of a proponent of this view, then his willingness to accommodate many rival models of the legal system within his one account of the law is both a strength and a weakness.

[69] ibid., 205.

The lack of detailed literature on the *mutatis mutandis* view makes any further discussion of it rather speculative, so I will not engage in it. It is quite possible that the flaws I have identified in the view could be overcome by a fully theorised account of the model. However, the dearth of existing literature also shows that this thesis pursues a novel project.

6. The 'dependence' view

Unlike the *different functions* and *mutatis mutandis* views, a *dependence* view is committed to the continuation of the pattern of covariance. It has a superficial resemblance to a *building block* theory. It is importantly different, however, because it does not make an identity claim. Instead, it makes a claim about dependence. The notion of dependence in law takes its inspiration from literature in metaphysics, but has not been expounded in sufficient detail by its proponents to provide a compelling response to the puzzle in the thesis. The usual way dependence is understood in law is in terms of change; thus, *A* depends on *B* when a change in *B* is necessary and/or sufficient for a change in *A*.[70] To give some varied examples, the crime of bigamy depends on the civil law concept of marriage; the existence of the Supreme Court of the United Kingdom depends on the Constitutional Reform Act 2005 which created it; the content of law depends on the words used to state law.

[70] See, for an example of this understanding, in a different context, Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) OJLS 461. They simply say that 'a norm depends on a statute when the repeal of that statute can be expected to lead to a change, in the sense of the abolition or alteration, of that norm.' (at 470) This way of describing what I call dependence has similarities to other notions like 'supervenience' (e.g. Jaegwon Kim, *Mind in a Physical World* (MIT Press 1998) 14).

Many scholars have thought that dependence captures the relationship between private and criminal law as they concern property. For example, James Penner says, 'the criminal laws regarding theft depend upon the laws of property and so to understand how to apply the law of theft requires that one understand the law of property.'[71] Neil MacCormick says that criminal law 'necessarily presupposes the existence of that elaborate and interlocking set of laws which define and regulate the institution of property.'[72] Jeremy Waldron talks about 'the systemic connections between propositions of private law (e.g. rules of property) and propositions of criminal law'.[73] Anthony Duff says 'our understanding of theft is structured by the law of property'.[74] We saw already that Stuart Green thought 'theft law is dependent on the law of personal property...'[75]

Given that a dependence view is so prevalent, it is surprising that it has never been defended in detail. Jack Beatson & Andrew Simester have the most considered suggestion about the relationship, and even this appears only in a case note (on *Hinks*).

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[71] James Penner, *The Idea of Property in Law* (OUP 1997) 33. See also ibid., 3, 82.

[72] Neil MacCormick, 'Rights in Legislation' in Peter Hacker and Joseph Raz (eds), *Law, Morality and Society* (OUP 1985) 203.

[73] Waldron talks about 'the systemic connections between propositions of private law (e.g. rules of property) and propositions of criminal law' though it is not clear to me from the context whether he only attributes this view to Felix Cohen and does not himself share it: Jeremy Waldron, '"Transcendental Nonsense" and System in the Law' (2000) 100(16) Columbia LR 16, 27.

[74] Anthony Duff, 'Responsibility, Citizenship and the Criminal Law' in Anthony Duff and Leslie Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) at his footnote 13.

[75] Green (n 62), 2. The *mutatis mutandis* view is compatible with a weak version of a *dependence* thesis. It would be consistent with the *mutatis mutandis* view to argue that some few dependence relations hold, at least sometimes. But, of course, the view could conceivably be formulated in terms of relations that are not dependence.

> Property offences are designed to protect property rights. Unlike crimes such as assault, the rights being protected are necessarily rooted in the civil law. Remove dependence on the law of property, and property offences have no rationale.[76]

This intriguing statement makes a number of claims which need unpacking. Beatson & Simister say that private property law provides the rationale for having certain criminal offences, and the criminal law depends on private law for this rationale (for *property-as-values*, in other words). Criminal law depends on private law also for its content, their view implies. The 'property rights' which Beatson & Simester talk of are *property-as-legal-relations*. Due to the brevity of treatment, this quotation does not accurately state Beatson & Simester's full view on dependence. The quotation suggests that the relation of dependence runs one way – that criminal law depends on private law. However, it is clear that they think there is interdependence between the two areas of law. That is to say, they think that in some respects criminal law depends on private law whilst in other respects private law depends on criminal law. One example of this that they give later in the same case note is the doctrine that prevents killers from inheriting their victim's property. We will discuss this doctrine in Chapter 6.

> *Dependence*: the laws governing the objects and allocation of property interests in private law and in criminal law covary to the extent that private law depends on criminal law, or vice versa.

A *dependence* view is attractive as description because it provides a deeper explanation for the existence of the pattern of covariance without being as overly simplistic as the *building*

[76] Andrew Simester and Jack Beatson, 'Stealing One's Own Property' (1999) 115 LQR 372, 374.

block view or as noncommittal as the *mutatis mutandis* view about which reasons are in the balance when we decide whether to perpetuate a pattern of covariance. When two observables vary according to a reliable and regular pattern, it is natural to think that there is some reason or explanation behind it. Dependence goes quite some way to giving an explanation. It tells us precisely which features of private and criminal law give rise to a dependence relation, and it turns out that there are lots of candidate features. One possibility is given by Lord Hutton in *Hinks*, which is that the Theft Act 1968 referred to civil law norms.[77] Another possibility, given by Penner, is that 'many of the most fundamental constitutive features of the law of property are actually found in the law of wrongs, both civil and criminal.'[78] If one law refers to another, as Lord Hutton supposes, then there is clearly dependence as to the content of that law. If one law partly constitutes a body of law, as Penner believes, then there is clearly dependence because sets depend on their members. Dependence provides many promising avenues for investigation,[79] and is also capable of explaining the pattern of covariance so far as it goes. Its proponents can draw succour from observations in Chapters 3 to 6 because some of their conclusions are compatible with the claim that private and criminal law are interdependent. However, the *dependence* view has significant drawbacks.

6.1 *Problems with the dependence view*

[77] *R v Hinks* [2001] 2 AC 241, 263-264.

[78] Penner (n 71), 74. Here Penner talks of constitutive features, whereas elsewhere he speaks of dependence. I do not know if he means to express the same claim by these different locutions.

[79] The avenues of investigation are too many for all of them to be taken up within the scope of the thesis, but some of the features picked out by a dependence relation were the basis for the four fixed features of the legal system identified in Chapter 1.

The *dependence* thesis gives a rich descriptive explanation for the pattern of covariance, but one that is subject to all the counterexamples of departures from the pattern. Given that Beatson & Simester elucidated their dependence account in response to *Hinks*, the thrust of their response is rather difficult to discern. Counterexamples of cases like *Hinks* abound. Their status as precedents is no lesser than those cases which do maintain a pattern of covariance. What is left of the relation of dependence? What follows from impugning a dependence relation? It is not clear to me how a *dependence* theorist would answer. On examination, the *dependence* thesis appears far more complex than any of its enthusiasts realise. This is because a notion of dependence that originated in metaphysics does not transfer straightforwardly to law, for reasons I will elaborate on. It is offered by Beatson & Simester as a prescription – that is, as a diagnosis of what is wrong with *Hinks*, and presumably also as a corrective for such cases. If indeed *dependence* can serve as a prescription, much more needs to be said about it.

The crux of my objection is that dependence is characterised as a rule of change. *A* depends on *B* when a change in *B* is necessary and/or sufficient for a change in *A*. Yet in *Hinks* we have an example of a situation where there was no underlying change in private law and yet the criminal law unexpectedly changed. If our observables were something in the natural world, then producing change would be an indication of itself that a relation of dependence obtained. Unexpected changes would be reliable epistemic indications that our understanding of the laws of nature themselves should be revised. However, the relata we are concerned with for the puzzle in this thesis are not physical facts. The relata are abstract objects grounded in social facts. Propositions of man-made law can be breached without being falsified. HLA Hart established that each legal system had a rule of change. That must be correct; it is apt given the nature of law as an abstract object grounded in

social facts. The best exegesis of Beatson & Simester's view now seems to be that there was a breach of the rule of change in *Hinks*. Yet none of the proponents of a *dependence* thesis present it explicitly as a claim about the rule of change in England & Wales. Nor do they acknowledge the difficulties of transposing concepts from philosophy of physics into philosophy of law.

Knowing that the dependence thesis is a claim about the rule of change is not enough to dispel worries about its capability to act as a prescription. If we are to say that the House of Lords in *Hinks* unlawfully breached the rule of change, we must presuppose that they ought not to have done so. They ought to have realised that rules of private law were applicable and binding on them. That is to say, applying the English & Welsh rule of recognition would have alerted the court to the fact that *dependence* is the requisite rule of change. The *dependence* view now looks quite expensive in that it is a claim about the rules of recognition and change in the legal system. The view assumes that the rule of recognition makes provision for the relationship between two component areas of the legal system. This assumption may well be true – I am only pointing out how much is left unsaid by proponents of the view. However, if it is right that the rule of recognition makes provision for the relationship between two component areas of the legal system, *and* if I am correct in asserting that there is a lot of indeterminacy in cases involving property and wrongdoing, then the situation amounts to indeterminacy in the rule of recognition.

A *dependence* theorist will criticise cases that deviate from the pattern of covariance for creating uncertainty in the rule of recognition. However, the 'so what?' question remains. What is the prescriptive force of a *dependence* view once such uncertainty exists? I cannot answer this question myself, but I will voice a doubt. If we take Andrei Marmor's account

of the rule of recognition, then a judge has less reason to perpetuate the pattern of covariance, and less reason to recognise *dependence* as the rule of change, once the rule of recognition is uncertain. Marmor argues conventional rules can constitute a social practice like law only if the rules are actually followed.[80] As he puts it, 'only practised conventions are conventions.'[81] Therefore, once there are breakages in the pattern of covariance, the dependence view has less prescriptive purchase. The dependence view therefore runs out precisely when it is most needed. Of course, a *dependence* theorist could reject Marmor's account of the rule of recognition. How they might do so, and what alternative account they would provide, I do not know and will not consider further. It is frustrating that a thesis with such promise is so undertheorised, despite having illustrious proponents.

To summarise, a *dependence* thesis provides a promising descriptive account of the pattern of covariance. However, it cannot account for departures from the pattern even though it is put forward as a response to the puzzle in the thesis. As a prescription, it appears to run aground. A full account of it would have to mount many argumentative steps, which no *dependence* literature has yet attempted.

7. Conclusion

This chapter has traced five proposed models of the relations between private and criminal law as they concern property. This exercise aimed to map possible responses to the central puzzle. One proposed model was the *building block* theory. The *building block* theory said

[80] Andrei Marmor, 'Legal Conventionalism' in Jules Coleman, *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001) 211.

[81] ibid.

that a single concept of property is used throughout the law irrespective of which taxonomy we are talking about. This is an identity claim. It claims property in criminal law *just is* property in private law. They are identical. A strong version of this thesis, like that expressed by Epstein, would claim that they are identical in every respect. They are one and the same conceptually, terminologically, and so on. To use the vocabulary introduced in Chapter 1, *property-as-thing*, *property-as-legal-relations*, and *property-as-values* would be identical across private and criminal law according to a strong version of the *building block* theory. A building block is a uniform shape that can be plugged into any gap within a structure that uses such blocks as its foundational material.

We saw that some people deny this. They claim the precise opposite. They say there is a cleavage between private and criminal law which must rend property asunder too. This was called the *distinct domain* view because of its emphasis on taxonomy. The *building block* and *distinct domain* views are strong claims that address the relation between property, criminal law and private law in terms of identity. However, the claims they make are in direct opposition to one another. The *building block* view makes an identity claim, whereas the *distinct domain* view makes a non-identity claim. Neither one is plausible descriptively or prescriptively.

There is a third view that addresses the relation in terms of identity, the *mutatis mutandis* view. This is a defeasible identity view. It has a descriptive advantage over the other two in that it can explain the phenomenon of the pattern of covariance in the majority of cases, and can also explain the significant minority of cases that diverge. However, the explanation is a thin one. It gives no account of which reasons weigh in the balance. Its shortcomings follow from its under-specification, making it appear ad hoc.

A much richer descriptive account was found in the *dependence* thesis. However, the *dependence* thesis also suffered from undertheorising. It was unable to explain departures from the pattern of covariance, even though it is presented as a response to the puzzle in the thesis.

Neither the *mutatis mutandis* view nor *dependence* view offered much by way of prescription. Their partial descriptive success marks them out as the more plausible views on offer. Given the problem of under-specification, the thesis does not attempt to adjudicate between them. It remains agnostic on their eventual success, though it does suggest one way to decide between them in Chapter 7.

The thesis most commonly encountered as a response to the puzzle is also the least appealing. This is the *different functions* view. A number of variants of the *functions* view exist, but there are generic shortcomings with the view such that I am sceptical that they could be overcome in further argument. The view is not persuasive descriptively and, when offered as a justificatory response to the puzzle, is too stipulative to be desirable all things considered. As Chapter 4 outlines, it may also be irreconcilable with a service conception of authority, such as that put forward by Joseph Raz.

The next four chapters provide an explanation for the pattern of covariance which is not that of any model above. Many of the conclusions can be accommodated within the *dependence* and *mutatis mutandis* views but the explanation here is in terms of guarantees and constraints, and it would be for proponents of those views to adapt my conclusions to suit their particular model. Chapter 7 has a proposal for what sort of prescriptive question

we should be asking in order to decide between the *dependence* and *mutatis mutandis* views. It is a tiebreaker question of whether a 'unitary property regime' – one that exhibits a regular pattern of covariance between private and criminal law where property is concerned – is possible. Before that, the next chapter, Chapter 3, has as its main target the *distinct domain* view.

Chapter 3 – Language

1. Introduction

The next four chapters elaborate on the central argument of this thesis, namely that the pattern of covariance is explained by guarantees and constraints that arise due to four features of the legal system. Each chapter looks at one feature. That subject of this chapter is language. Private and criminal laws are expressed in the same technical terms when it comes to property; terms such as 'fixtures', 'corporeal hereditaments' and 'liens'. I will call this stock of words 'the property lexicon' as a shorthand. The fact that both private laws and criminal laws are given content by the property lexicon inspires this chapter's two main claims. One claim is about a constraint, and the other about a guarantee. By way of reminder, constraints rule out certain potential avenues for deciding cases, though there may be many left over, whereas guarantees predetermine some aspect of the decision.

> A g*uarantee* predetermines some salient consideration for the judge (such as the content of a rule or concept in the law. Where such a rule or concept is applicable to a case, by extension the guarantee determines that issue in the case. Note that this is not the same as determining the outcome of the entire case).
>
> A *constraint* excludes certain options for deciding the dispute, or an issue that is part of it (such as the interpretation of a rule or the evidence before the court). However, it may leave several possible options open or only one – it would depend on the case and the type of constraint it was.

First, the constraint identified in this chapter. Any linguistic term is only capable of bearing a finitude of meanings. If a word has too many different meanings associated with it, then it would fail to convey anything – effectively or at all. This is as true in colloquial speech as it is in law. For this reason, courts pursue what I call 'the deflationary objective' of minimising the possible number of meanings associated with a technical term. The deflationary objective is a component of the courts' preference for parsimony, which Chapter 2 argued could not be accounted for by a *distinct domain* model of the legal system. Avoiding proliferation of meanings constrains courts which are deciding cases about property and wrongdoing from interpreting the applicable laws in unconventional ways. Unconventional interpretations introduce new meanings. Courts thus tend to apply the laws in the same way as one another, whether they are civil courts or criminal courts, reproducing the pattern of covariance. This constraint does not prevent deviations from the pattern altogether; it does not suppress every non-standard use. However, here the second claim of the chapter comes in: by repeatedly using the same terms of art, both criminal law and private law cases contribute to establishing the meaning of these terms. Both jurisdictions give conventional meaning to the words in the property lexicon by applying rules expressed in those words.

A study of legal language is an obvious place to begin our inquiry, because law is a linguistic practice. Laws are recorded and communicated through language. People often say that law 'speaks with a single voice' when two areas cohere.[1] I do not think their use

[1] This phrase is used by e.g. the Court of Appeal in *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 WLR 1437, [34]; Joseph Raz, 'The Relevance of Coherence' in his *Ethics in the Public Domain* (OUP 1994), 311; Ronald Dworkin, *Law's Empire* (Hart 1986) 165; Henry Hart, 'The Relations between State and Federal Law' (1954) Columbia LR 489, 489; Samantha Besson, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?' (2004) 10 ELJ 257.

of this metaphor is an accident. Speech utilises language, and language reveals legal reasoning. Furthermore, language is a good place to begin because is easily accessible to us. We have it available in cases, legislation and secondary literature. Linguistic practices shape our understandings of concepts.[2] Language can therefore be expected to have great sway over the case-law that applies rules regulating the allocation and objects of property interests.

2. The feature under examination

The starting point, for the purposes of this chapter, is that statements of private law and criminal law are expressed in the same terms. Law contains plenty of technical words, and both areas of law use the same technical words in respect of property. Technical words applying to property are the epitome of legalese; writers tend to use them as paradigm instances of jargon. Raz, for one, chooses 'fee simple' and 'floating charge' as his examples.[3] These are straightforward examples – you might think they are too straightforward. You could say they are proper nouns that coalesce around some uncontroversial characteristics, that they are rarely mentioned within criminal law, and that they cannot tell us much about relations between private and criminal laws.

This is not so. There is a whole cavalcade of property words that we could add to these. We are not only dealing in nouns but also with verbs ('belongs', 'vests'), adjectives

[2] Kenneth Einar Himma, 'Reconsidering a Dogma: Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy' in Michael Freeman and Ross Harrison (eds), *Law and Philosophy* (OUP 2007) 5. John Searle goes as far as saying that institutions like property or money could not exist without language (Searle, 'Social Ontology: Some Basic Principles' (2006) Anthropological Theory 12, 14).

[3] Joseph Raz, 'The Identity of Legal Systems' in his *The Authority of Law* (Clarendon 1979) 78.

('qualified', 'in rem'), adverbs ('absolutely', 'beneficially'), and so on. There is a whole property lexicon that is common to private and criminal law. It is true that criminal law does not have recourse to it as often as does private law.[4] Nor does criminal law regulate land so often as it does chattels. However, there are offences such as criminal damage, aggravated trespass and adverse possession of a dwelling which do apply to land. (It is even possible to steal land, provided one has power of attorney to sell or dispose of it.[5]) It is not unheard of, much less is it improper, for criminal law to use the entire lexicon of property that we see in private law.

'Property' is itself one word that is common to both areas of law. The Theft Act 1968 uses the term 'property' and the phrase 'belonging to another'. The Torts (Interference with Goods) Act 1977 uses 'co-owner' and 'property in the goods'. Case law does the same. Of course, a single word can have two very different meanings. Such a word is known as a 'homonym'. Examples are the words 'bark', 'bolt' and 'jam', which could be nouns or verbs. The constellation of words around property also includes some homonyms. Take the word 'mine'. 'Mine' could be a possessive adjective meaning 'belonging to me' or a noun that might refer to a bomb or a site for underground excavation of minerals. If I am going to argue that the terms in the Theft Act and Interference with Goods Act partly explain how we come to have consistent norms in private and criminal law, I will need to show that the use of the same words is not a coincidence. I will need to show they are not

[4] The role of ordinary words is considered below at section 6.2.

[5] Theft Act 1968, section 4(2)(a) and *R v Gimbert (John David)* [2018] EWCA Crim 2190. The point can be extended. It may satisfy the *actus reus* of theft for a non-owner to offer anything for sale, even land, having regard to sections 3 and 6 of the Act. Section 3 defines appropriation as assuming the rights of owner or dealing with the property as owner. Section 6 defines the intention to deprive as an 'intention is to treat the thing as his own to dispose of regardless of the [owner's] rights.'

(mere)[6] homonyms. I contend that someone holding a *distinct domain* view would need to show that these terms are indeed mere homonymns, as the next section will demonstrate.

The strategy this chapter adopts is as follows. I will first argue that the *distinct domain* view must be committed to the presence of homonyms as an explanation for words that are common to private and criminal law. I then give reasons why the property terms in criminal and private law are not homonyms. This is a negative project. After that, I undertake a positive project in response to a renewed version of the homonymy objection. I suggest a role that these words do in fact play. Terms of art help courts reason from the particulars of the case before them to the general doctrine relevant to that case. This role that technical words play in legal language would be lost if law deployed homonyms because too many different sorts of doctrines would be indicated at once. Finally, I turn away from the *distinct domain* view to sketch some linguistic implications of other models of the relations between private and criminal law as they concern property. This is meant to bulk up the positive project and further clarify the way language works in law. It helps us also to better understand a motivation for the *functions* view better.

3. *Distinct domain* theories must commit to homonymy

[6] Using 'homonym' in this sense is sometimes referred to as 'mere homonymy'. Aristotle was keen to distinguish those homonyms that arise by chance and have nothing in common with one another (*Nicomachean Ethics*, 1096b26–27) from those which overlap in meaning because there are core usages of the term and non-core usages. Homonymy, as I use it in this chapter, is mere homonymy. Chapter 7 briefly discusses an argument that there is a core concept of property in every legal system, which is common to both private and criminal law. This concept may well be the referent or core meaning that the terms in this chapter pick out. The non-core meanings may well be localised *conceptions* of the concept. There is not the space to explore this possibility further within the scope of this thesis.

This section imagines how one set of interlocutors – *distinct domain* theorists – would explain the property lexicon. It says little about the other models of the legal system, leaving that to the penultimate section. The *distinct domain* view, recall, is the view that:

> *Distinct domain*: whatever else they may be, the laws governing the objects and allocation of property interests in private and criminal law are not identical.

How can someone maintain that the laws are not identical if the words that partly constitute the laws are in fact identical? Their view must commit them to saying that terms like 'property' or 'things in action' when they appear in criminal law are homonyms, their textual resemblance to identical terms in private law being nothing to the point. The *distinct domain* view of taxonomy implies that the locution 'property' when used in private law has a referent fixed by private law. Equally, it implies, the locution 'property' when used in criminal law has a referent fixed by criminal law. This is necessary if the modes of legal ordering are to remain distinct from one another – 'categorically different'[7] as Weinrib puts it – each with their own concerns, and the requisite rules and concepts to embody these concerns.[8] If language imports the concerns of one taxonomy into the rules of a different taxonomy, the boundaries of the categories would begin to blur in a way that a distinct domainer would condemn. Yet, this is exactly what happens in the legal systems we know.

[7] Ernest Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 57.

[8] Believing that the concerns of an area of law inform its norms and concepts is a commitment common to the *distinct domain* view, *different functions* view, and other views. It is plausible to think law pursues functions and that the functions are shared between areas of law. The implausibility is in believing that the borders of a taxonomical category fix the functions of that category. It is also in believing that any function is exclusive to a particular category.

A recent high-profile example is *Ivey v Genting*, a case in private law.[9] The Supreme Court in *Ivey* fixed the meaning of the term 'dishonest' for the purposes of private law as well as criminal law.[10] Given that the very same conduct could be the subject of a criminal law prosecution or a private law case, the court could see 'no logical or principled basis for the meaning of dishonesty' to differ.[11] It therefore adopted a test for dishonesty from trusts law.[12] If the test for dishonesty reflected the concerns of private law then private law's concerns were now those of criminal law too. I surmise that a distinct domainer would resist such a move. Of course, this single example does not falsify their descriptive claim (of non-identity) nor their prescriptive claim. What it does is illustrate the courts' preference for parsimony, which the *distinct domain* view will struggle to accommodate.

To make the burden of explanation weightier for the *distinct domain* view, consider what a distinct domainer would have to say if they are to explain or defend cases which depart from the pattern of covariance, cases such as *Smith* or *Hinks*. Recall that *Smith* was the case of the drug dealer who was convicted of robbery because he took 'property belonging to another' – namely heroin belonging to another drug dealer. He argued the heroin could not be 'property belonging to another' because the criminal law prohibited possessing or

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[9] *Ivey v Genting Casinos Ltd* [2017] UKSC 67, [2018] AC 391, [74].

[10] This was confirmed in *Barton and Booth v R* [2020] EWCA Crim 575. *Ivey* was also followed in *DPP v Patterson* [2017] EWHC 2820 (Admin), [16], *R v B* [2018] EWCA Crim 73, [72] and *Cleveland v United States* [2019] EWHC 619 (Admin), [49]. The old test for dishonesty was found in *R v Ghosh* [1982] QB 1052.

[11] ibid., [63]. Matthew Dyson has suggested to me that Lord Hughes, who gave the majority judgment, was looking for an opportunity to overrule *Ghosh*. To that extent, his argument goes, *Ivey* is not really evidence of the courts' preference for parsimony. If that preference is really in doubt, the reader is directed to examples of it other than *Ivey* in Chapter 2 at section 3.1. I do not mean that this is a subjective preference. There are good *pro tanto* reasons for it, as section 6 below shows.

[12] ibid., [74].

selling proscribed drugs. His victim could therefore have no proprietary rights in heroin that were capable of being interfered with. The Court of Appeal was unimpressed with this argument and upheld his conviction on the basis that criminal law keeps the peace. A distinct domainer, or indeed a *different functions* theorist, may well concur that keeping the peace is the concern of criminal law but not of private law. Turning to the case of *Hinks*, this involved a woman being prosecuted for stealing a gift that was already hers according to private law. Although the stolen property was a gift that was unwisely made, it was nonetheless a valid gift at private law. On the *distinct domain* view, those four words at issue in *Hinks* and *Smith* – 'property belonging to another' – must be homonyms, with a referent other than their private-law referent. There must be $property_1$ and $property_2$, $belonging_1$ and $belonging_2$ with meanings that track their respective taxonomical boundaries.

It could be that *distinct domain* theorists would not defend cases like *Smith* and *Hinks* but instead wish to remain indifferent. No distinct domainer has specifically addressed the issue of identical words, so far as I am aware, and it remains a problem for the theory regardless of individual case outcomes. However, it is not so unlikely that they would commit to the presence of homonyms.[13] Graham Virgo moots this as a possible view in his attempt to model all the various types of relationship that private and criminal law

[13] Some slight evidence that the homonymic view might be a distinct domainer's view is provided by Lisa Austin. Commenting on Ernest Weinrib's account of property, she makes a point that corresponds with what I have said. She says: 'The idea that private law is a distinct normative category is… not self-evidently false. What the critical views often disregard is the important focus that the distinctiveness claim brings to questions of what I would call legal architecture – legal doctrine and the relationships between legal doctrines.' (Lisa Austin, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (CUP 2018) 1). An interest in 'legal architecture' and the 'relationships between legal doctrines' suffuses my project too. For this reason, I think it surprising Weinrib does not express a view on legal language.

could have.[14] Although he rejects it himself, it is one of three models that he can imagine others hold. Furthermore, Jim Harris has given voice to something like the view I attribute to distinct domainers. It reads as follows:

> How could one possibly assume, in advance of contextual enquiry, that all and only that which is 'property' for the purpose of constitutional provisions is also 'property' for the purposes of divorce jurisdictions, formality rules, and revenue law?[15]

In this statement, Harris articulates some linguistic commitments that may also inform the *distinct domain* view. He first rejects an identity view, like the *building block* view, by denying that 'all and only that which is "property"' in one area of law can be read across to another area of law. Harris secondly, in the briefest of terms, makes reference to the 'purposes' of areas of law. Thirdly, and crucially, he says one cannot assume 'in advance of contextual inquiry' that the meaning of 'property' will be the same across taxonomies. In other words, it all depends on context. One can know nothing in advance of context.[16] This is where he appears to endorse the sort of linguistic commitment a *distinct domain* theorist might put forward. (In fact, reading the sentence above in context complicates the picture.[17] It

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[14] Graham Virgo, '"We Do This in the Criminal Law and That in the Law of Tort": A New Fusion Debate' in Stephen Pitel et al (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013) 98.

[15] James Harris, *Property and Justice* (OUP 1996) 12.

[16] This thought is inspired by some views on philosophy of language more generally – specifically, radical contextualism. Radical contextualists, like John Searle, deny the distinction between semantics and pragmatics. I am assuming a distinct domainer must take a radical contextual position on language.

[17] The quotation above appears within the following paragraph. Its position is indicated by parentheses.

> It would… be foolish to attempt a universal definition of the word 'property' such that it would enable conclusions to be read off from any constitutional or statutory provision which employed the term. […] Deductions from purportedly universal definitions of the word 'property' are to be deplored. At the same time it is possible to get a grip on the essential features of those universal institutions known as property institutions. If it were not, a vast swathe of argument, in the history of political philosophy and in everyday political controversy, would be without focus.

We can therefore contrast Harris' view with the position I attributed to *distinct domainers*. First, Harris cautions against scholars formulating universal definitions; he says nothing about *laws* which give meaning to other laws. Second, Harris concedes that there are 'essential features' which we must understand in order

suggests Harris is not a *distinct domain* theorist. Like other writers, he appears to endorse several different stances all at the same time, due to the fact he is writing without sensitivity to which model of the legal system he holds in his mind.) Whatever Harris's actual view, he gives a useful statement of what a *distinct domain* thesis might say about language.

The argument in this chapter gives reasons to expect the property lexicon to be used consistently between private and criminal law. Contra Harris, this expectation is held 'in advance of contextual inquiry'. A competent listener understands utterances in context, of course. A competent speaker takes this into account. A competent speaker should use terms in ways that are familiar to their listener. If they are not going to do this, they should be explicit about it or risk being misunderstood. If what Harris is saying is that meaning depends entirely on context, then this is incorrect. Context does not supply all meaning. Technical terms themselves have an important function, as I will show.

4. Why homonymy is implausible: a first pass

We can illustrate the expense of holding a commitment to homonymy with a case from the United States. This case, *People v Otis*, shows the contortions that a court must go through to uphold a conviction that countermands the phrasing of a statute.[18] During the prohibition era, the National Prohibition Act made it illegal to possess alcohol, including

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for a discourse about property to make sense. He thinks we can talk cross-contextually about property institutions, and I take the English & Welsh legal system to be such an institution. If Harris thinks we can talk about property sensibly across many different contexts – law, philosophy, politics – then clearly context alone is insufficient to determine meaning.

[18] *People v Otis* 235 NY 421 (1923) (New York Court of Appeals).

the whisky that the defendant was convicted of stealing.[19] A provision of that Act said that 'no property rights shall exist' in contraband. A prerequisite of the offence of theft in New York at the time required the property to be owned by someone. (This is similar to the provisions in *Smith* and *Hinks*.) Notwithstanding this, the New York Court of Appeals upheld a conviction for theft.

The defendant in *Otis* argued that there could be no owner if no property rights could exist in the whisky. Therefore, the definition of theft was not satisfied. The court agreed that construing the words of the statute broadly did not help to answer the question of how there could be larceny in contraband. 'If we give the broadest possible construction to these words there is no answer.'[20] Having come to a dead end with linguistic interpretation, the court resorted to a *distinct domain* type of view. It decided that the sole purpose of the provision was to protect law enforcement officials from legal challenge at private law by dispossessed holders of contraband. In other words, the provision had a narrow application which was confined to private law. Still further, it was confined to private law claims against a particular kind of official. The implication seems to be that this section of the Prohibition Act was not applicable to criminal law, so it had no effect on the preconditions required to make out the offence of theft.

Aware that this created an odd exceptionalism, the court felt compelled to rationalise its view within the framework of the general law. It decided that 'property rights in such liquor are not forever ended [by the statute]. They pass to the government',[21] presumably

[19] 41 Stat. 315, tit. 2, § 25.

[20] *People v Otis* (n 18) 424.

[21] ibid., 425.

upon expropriation. Saying that property rights 'pass' still appears to contradict the words of the statute, even if its effect was confined to private law. For presumably that reason, the court seemed uncomfortable even with its own conclusion. Finally, it asserted that the conviction could anyway be upheld on the alternative basis that stealing the barrels in which the liquor was contained was sufficient to meet the terms of the indictment and therefore to satisfy the offence.

Otis nicely illustrates the cost of adopting a view that compels courts to interpret the property lexicon inconsistently between different taxonomies. The New York Court of Appeals was seemingly unpersuaded by its own reasoning, and eventually asserted the conviction could be upheld on a different basis. On the other hand, there is force in Jim Harris's instinct that different taxonomies pursue purposes that sometimes require them to interpret words in a manner bespoke to that purpose. How do we account for this? Let us begin by examining some of the statutes that govern the allocation and objects of property interests in criminal law and in private law.

Statutes are useful places to stipulate meaning, if stipulation is called for. They often include a section on how to interpret words within them. This gives us a good place to start the inquiry. Let us compare the way in which property terms are defined in a handful of criminal and private law statutes. Starting with private law, the Interference with Goods Act says this: '"goods" includes all chattels personal other than things in action and money'.[22] Goods are defined by pointing to a concept (chattels personal) which has a meaning fixed by an established body of doctrine, and then subtracting two concepts

[22] Torts (Interference with Goods) Act 1977, section 14(1).

(money, things in action) that would otherwise be understood as referred to within that meaning.

The Theft Act has a similar tactic of pointing to a body of doctrine when it defines 'property'. It says: '"Property" includes money and all other property, real or personal, including things in action and other intangible property.'[23] This statement is a hopeless tautology unless you understand that it is indicating a term – property – and referencing its conventional meaning, one fixed by a body of doctrine. Unlike the Interference with Goods Act, the Theft Act is saying that nothing has been left out. The Law of Property Act 1925, a private law statute, has the same approach. '*"Property"* includes any thing in action, and any interest in real or personal property.'[24] We can generalise this point beyond the specific examples deployed here; the drafting style is common to many statutes.[25] Battersby and Preston, in their classic paper on the Sale of Goods Act 1893, express a view that many lawyers would take to be obvious. They say that the concepts 'property', 'title' and 'owner' (words which appeared throughout that Act, now repealed) can only be understood by reference to the general law of property.[26]

So let us clear some ground. If we are to discredit *distinct domain* views, we need to ascertain whether the words used in these statutes are homonyms. Are the words 'goods' and 'property' homonyms? They obviously are. 'Good' is an adjective as well as a noun.

[23] Theft Act 1968, section 4(1).

[24] Law of Property Act 1925, section 205(1)(xx).

[25] See e.g. the Criminal Damage Act 1971, section 10; the Insolvency Act 1986, section 436.

[26] Graham Battersby and AD Preston, 'The Concepts of "Property", "Title" and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 MLR 268, 268.

'Property' could mean 'a quality or trait'. Yet these are not the meanings that this chapter is concerned with. I hope the context the words appeared in and knowledge of their conventional usage gave the reader no doubts about that. The question should really be refined. The question is whether these words are homonyms *in a purely technical sense*. Are they homonyms when they appear in law, quite separately from their quotidian usage? That is the real question.

You might think that I have already conceded as much. We collected some instances of the word 'property' being used in various different senses, in Chapter 1. We must concede, then, that the word 'property' – surely an example of a property-word *par excellence* – is at the very least polysemous when it appears in legal talk. Polysemes are words with multiple senses that are etymologically and semantically related.[27] We can contrast them with homonyms, which are words that are coincidentally identical when written down, but have no similarity in their meaning.[28] Both polysemy and homonymy could be sources of ambiguity, but I am only worried about homonymy. This is because polysemy is consistent with there being a systematic relation between different senses of a word, whereas homonymy is not.[29] The argument in this chapter is not an argument against the existence of linguistic ambiguity *per se*. Linguistic ambiguity prevails in language outside of law as much as it does here.[30] Conceding that 'property' is polysemous does nothing to establish the case for terms of art being homonymous.

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[27] Yael Ravin and Claudia Leacock, 'Polysemy: An Overview' in Yael Ravin and Claudia Leacock (eds), *Polysemy: Theoretical and Computational Approaches* (OUP 2000) 2.

[28] ibid.

[29] ibid. I cannot here go into what these relations consist in. They could be, for example, different inflections of the same root. Much more would need to be said, and there is not the space here.

[30] Timothy Endicott, 'Law and Language' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), at section 2.2, available at <https://plato.stanford.edu/archives/sum2016/entries/law-language/>. (last accessed 1 October 2018)

Homonyms are different from polysemes. If a word is a homonym, the relevant meaning should be effortlessly discernible from the context. The meanings that homonyms pick out are usually wildly divergent from one another. Competent speakers are rarely at risk of confusing traffic 'jams' with condiments or tree 'bark' with a dog's woof. They would rarely need to be used in the same context, where it was unclear which was meant. We have no such assurance on a homonymic picture of law. Take the term 'co-owner', a term that is part of the property lexicon and could appear within private law or within criminal law. If it was a homonymic term of art, co-owner_1 would differ from co-owner_2 in a very limited way. Using the same word in different taxonomies would render statements of law ambiguous between two technical meanings – particularly if they would naturally arise in the same context and be used in that context.

Courts know of the risk of creating homonyms, and of the imperative to maintain clarity. Let us take a real case by way of example. The question in the case was whether a man who had received a hip transplant could claim in tort law for having defective goods (the artificial hip) implanted into his body. As a preliminary issue in the proceedings, the court had to consider what constituted a defect, and whether the 'legitimate expectation' of a consumer was the right test. However, the court declined to use the phrase 'legitimate expectation' in the context of private law because it was a term of art in public law.[31] The court's instinct was a good one. Using the same term would be confusing in one of two ways. Either it would be confusing to have the same term of art for two unrelated technical meanings, or it might seem to imply that administrative law doctrine was relevant to

[31] *Wilkes v DePuy* [2016] EWHC 3096 (QB); [2017] 3 All ER 589, [71].

private law. (The reasons why administrative law doctrine risked being seen as relevant is explained below.) This was not what the court wanted.

As the court was well aware, the nature of language imposes a constraint. If language is to be capable of effectively conveying meaning, then the meaning(s) of a word must be relatively stable. The number of meanings for a particular word must remain relatively low or else the risk of interchanging one meaning for another unintended meaning would be too great. At the most extreme, a language where all words were replaced by one word would be useless. Law is an artificial, technical language, propounded by official speakers, and so it can aim at perfect clarity more easily than natural language can. I call this 'the deflationary objective', referring to minimising the number of meanings associated with a particular term of art.

Given that law must contend with linguistic indeterminacy already, and given that official speakers are aware of the risk of competent listeners exchanging one meaning for another, why would law use homonyms if it could be avoided? The *distinct domain* theorist could retort that it does not sound outlandish to suggest that law recognises 'belonging$_1$' in private law and 'belonging$_2$' in criminal law (and maybe even 'belonging$_3$' in administrative law… etc) on the grounds that having just one language to communicate in constrains law to choose from what is already in the dictionary, unless it wants to invent words. That is easier for a legislature to do than for a court, and our focus is on courts. Yet even a legislature, the *distinct domain*er could say, wants to stay in touch with ordinary language. Graham Virgo mooted a view such as this.[32] He does not recommend it, though, because it would cause unnecessary confusion and complication in the law.

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[32] Virgo, (n 14).

The *distinct domain* interlocutor may rejoin that the law just is confusing and complicated. They might add that I do, after all, accept the phenomenon of linguistic ambiguity. However, this is still a far cry from the picture of law where duplicate homonymic words abound, their meaning fixed by imprecise taxonomical boundaries. This picture is, I think, *too* confused to be realistic given our experience of actual legal-linguistic practices. I do not agree that law is as one anthropologist describes it: 'persons and constituencies speaking at cross-purposes in a half-shared language that each may conceive of as law.'[33] I think many lawyers would baulk at that description. Perhaps they are self-aggrandisingly delusional to do so. Yet this picture portrays law in the way Ronald Dworkin assumed nobody would accept when he formulated the 'semantic sting'. The 'semantic sting' was supposed to be a *reductio ad absurdum*, not a serious picture of law. Even the most ardent critics of legal language, like Jeremy Bentham, thought lawyers were deliberately obscurantist rather than hapless buffoons. The way that the homonymic picture portrays law is unfamiliar. The reason why it is unfamiliar is important, though. This picture of confusion appears strange because it does not take sufficient account of the way that language works in law.

The *distinct domain* thesis is inconsistent with the role that the property lexicon plays in legal language. Recall the Interference with Goods Act: '"goods" includes all chattels personal other than things in action and money'. This definition gives a meaning by reference to a general category and then omits two concepts which would otherwise be

[33] Paul Dresch, 'Legalism, Anthropology and History: A View from the Part of Anthropology' in Paul Dresch and Hannah Skoda (eds), *Legalism: Anthropology and History* (OUP 2012) 13.

understood as falling within it. This is exactly as you would expect when there is a non-standard use of a term. That it is non-standard needs to be clearly publicised. In the Interference with Goods Act, this is achieved by a special section on interpretation. If that were not the case, something would have gone awry in the way that language is ordinarily used. A competent lawyer would understand the term 'chattels personal' as including 'money' because this is its conventional use. Moreover, it is conventional to both private law and criminal law. Lawyers would expect the unqualified phrase to mean what doctrine said.

A statute may regulate a specific subset of what is conventionally understood by the unqualified term 'goods'; this is achieved by stipulation in the section on interpretation. An interpretation section goes some way to meeting Jim Harris's worry about wanting flexibility. Legislation may modify what would otherwise be taken to be the meaning of a word so that it better suits the purpose of the legislation. If this is what Harris meant by 'contextual inquiry' (consulting a section on interpretation), then there would be no quarrel with it. But the need to consult statute-specific definitions arises not because we have no expectations in advance, but because we do have such expectations. If these expectations are not to mislead competent speakers and listeners, they must be taken into account in the drafting.

The *distinct domain* theorist might then counter as follows: this chapter repeatedly asserts that the expectations of competent users of legal language are fixed by doctrine at large, unconfined by taxonomy. Yet if I grant that there can be statute-specific modifications, can it not be assumed at the outset that the body of doctrine which the statute is pointing to is a *local* body of doctrine? Thus the Interference with Goods Act and the Law of

Property Act must refer only to private law. The Theft Act and Criminal Damage Act refer only to criminal law. I would find that surprising. It runs against the grain of courts' practice. Firstly, courts may dispute the above assignment of legislation to particular jurisdictions (private or criminal). Courts are more comfortable with the designations 'civil law' and 'criminal law' than 'private law' and 'criminal law'.[34] The distinct domainers' preferred taxonomies are not the courts' preferred taxonomies. Secondly, the presence of homonyms runs counter to the trend identified in Chapter 2, which showed courts favouring parsimony where possible. Thirdly, private and criminal law alike need to resolve cases that raise property questions. Whilst theoretically each taxonomy could have its own separate notion of property, experience tells us otherwise. The courts refer to one another's case law on these questions. This practice of the courts is not unusual. What is thought to be unusual, such that it requires comment or explanation, is where the two areas of law take a different view on these questions.

It is noteworthy that case-law which departs from the pattern of covariance does so explicitly. By way of example, the Court of Appeal in a private law claim for the recovery of goods suspected to be stolen was anxious to reassure itself that its findings would accord with the criminal law.[35] (This case is further discussed in the next chapter, at section 4.3 et seq.) When the courts cannot reassure themselves, they highlight and explain departures.[36] The argument of this chapter leads us to expect exactly this. If courts did not do so, it would denude legal language of meaning. Listeners need to be told when something *sui*

[34] This is a generalisation based upon the language of the cases discussed in this thesis. The nomenclature of 'private law' comes from scholarship, whereas the procedural law of England & Wales itself has divided its jurisdictions into designations known as 'civil' and 'criminal'.

[35] *Costello v Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437, [31].

[36] *R v Hinks* [2001] 2 AC 241, 252 and *R v Smith* [2011] EWCA Crim 66; [2011] 1 Cr App R 30, [4].

generis is going on. Private law and criminal law are reliant on each other to keep the language stable and meaningful. Deviations from meaning shared by the two areas must be kept to a minimum and highlighted when they occur. Otherwise the common language loses its communicative potential.

Wherever there is a danger of exchanging one meaning for another, unintended, meaning, it is necessary to specify further what is meant. The kind of specification that you might expect would resemble the Interference with Goods Act or in the cases which depart from the pattern. A speaker would refer to a conventional meaning and specify the extent to which they deviated from it. This definitional strategy is especially useful in common law, wherein laws refer to other laws which are uncodified. By way of example, English law has a particularly hard time defining what objects count as property (*property-as-thing*) and there is a good deal of indeterminacy in the doctrine. Defining *property-as-thing* is what section 4(1) of the Theft Act and section 205(1)(xx) of the Law of Property Act 1925 are trying to do. Section 14(1) of the Interference with Goods Act is trying to do this for a subset of what counts as property. Brian Simpson provocatively depicted common law as 'basically an oral tradition, still only imperfectly reduced to published writing' which was 'written in a private language as late as the seventeenth century'.[37] Simpson said this in the context of describing lawyers as a linguistic community, which they are. The homonymic picture does not take sufficient account of the conventions of this linguistic community.

In the ordinary case, a case which does not advertise that it is interpreting a technical term in an unusual way, the pattern of covariance tends to be replicated. Avoiding a

[37] A W B Simpson, 'The Common Law and Legal Theory' in A W B Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (Clarendon 1973), 95-96.

proliferation of meanings constrains courts from unconventional interpretations of the property lexicon. Unconventional interpretations introduce new meanings. Courts thus tend to apply the laws in the same way as one another, whether they are civil courts or criminal courts, reproducing the pattern of covariance. As we have seen, this is not a total constraint. Certainly more can be said. Indeed, there are further objections that a *distinct domain* thesis might put forward. The distinct domainer's objection from ambiguity could be pressed in a renewed way that I consider in a dedicated section below. It deserves a thorough treatment because the response to it requires me to elaborate on my claim that the conventional meanings of terms in the property lexicon are untethered to a specific taxonomy.

5. The homonymy objection renewed

The *distinct domain* theorist may have yet another objection. The objection might be that I over-egged the pudding with respect to how much confusion would proliferate if their view was true. Private and criminal law seemingly function well enough, despite the fact that some cases do diverge from the pattern of covariance. Given that the law functions relatively well, is it not strange that eminent lawyers from Bentham and Dicey onward have complained about the ambiguity of property words? Might these complaints and the purported compulsion of the deflationary objective be exaggerated counsels of perfection?

As the paradigm example of legal jargon, the property lexicon has unquestionably been the target of ire over the years. Bentham, always short-tempered on the subject of legal

language, did not hold back when it came to property.[38] Albert Venn Dicey directed scorn at the terms 'personal property' and 'chose in action' because 'they are technical without being precise, or, when apparently popular, are full of latent ambiguity.'[39] I do not think Dicey would have any quarrel with the argument in the previous section because he complained that most lawyers did not understand the 'necessity'[40] of definition. Subsequent generations of writers said similar things. Hart said there were three problems with property – the problem of definition, of justification and of distribution.[41] Wesley Newcomb Hohfeld famously disambiguated four senses of 'right'[42] using property as his illustration. Tony Honoré – discussing ownership – identified three senses in which the word 'title' could be used,[43] to which Robin Hickey adds a fourth.[44] Luke Rostill criticises usages of the superadded term 'possessory title' and recommends that the law of property should adopt terminology with greater accuracy and less ambiguity.[45] So an interlocutor would be in good company if she argued that property law is particularly plagued with ambiguity yet marches on.[46]

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[38] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone Press 1970, originally published in 1789) 211.

[39] Albert Venn Dicey, *Can English Law Be Taught at the Universities?* (Macmillan 1883) 12.

[40] ibid., 13.

[41] HLA Hart, *Punishment and Responsibility* (Clarendon 1968) 4.

[42] Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16.

[43] Tony Honoré, 'Ownership' in his *Making Law Bind* (Clarendon 1987).

[44] Robin Hickey, *Property and the Law of Finders* (Hart 2010) 167.

[45] Luke Rostill, 'Terminology and Title to Chattels: a Case Against "Possessory Title"' (2018) 134 LQR 407, 408.

[46] For some of that good company see, e.g., Peter Birks, 'The Roman Concept of Dominium and the Idea of Absolute Ownership' (1985) Acta Juridica 1, 26; George Gretton, 'Owning Rights and Things' (1997) 8 Stellenbosch Law Review 176, 180.

From that perspective, acknowledging the polysemy of 'property' and glibly adding that all language exhibits some ambiguity would not be enough of a response. However, if an interlocutor did adopt the argumentative gambit of saying property law manages to function despite centuries of criticism over its terminology, this may prove to be a double-edged sword. Whilst it may seem that property law manages to get along day-to-day despite all this ambiguity, there have been sustained calls to sort out the problem. The problem may be explained by Dicey's historical account of textbook-writers neglecting definition, but that does nothing to commend the *distinct domain* view. As a description of law, the homonymic picture is unfamiliar. As a prescription, it meets with the disapproval of many scholars.

I do not think, in fact, that these complaints about the ambiguity of technical property words advance even the distinct domainer's descriptive argument. To show why, there is more to be said about how technical terms function. In the section above, I made the case for the first claim of this chapter – namely that the fact laws are expressed through a common terminology imposes a constraint on the number of possible meanings a single technical term can bear whilst being capable of conveying anything useful, still less of conveying it with minimal ambiguity. Yet the point about ambiguity nevertheless persisting can be pressed. The section below looks further at terms of art. It provides an account of how they operate in law, substantiating the second claim of this chapter. The second claim is that by repeatedly using the same terms of art, both criminal law and private law cases establish the conventional meaning of these terms. In law, technical terms play a role that we will describe as 'flagging'. A technical term 'flags' to a competent speaker that there exists a body of doctrine that governs the application of that term.

6. Response

Let us return to Dicey, quoted above, and allow him to stand in the role of *distinct domain* interlocutor, because he raises two interesting charges against the property lexicon. Dicey complained firstly that the property lexicon contained words that were 'technical without being precise'. Secondly, he said, the non-technical words – those ordinary words in general currency – were 'full of latent ambiguity'. In subsection 6.1, we will consider the first issue. What is the function of technical words? In subsection 6.2, we consider Dicey's second issue: how do we cope with ordinary words in law?

Legal language is often technical, and the property regime seems particularly so. Some technical words have no equivalent in ordinary language, usually because they are not expressed in that language (they are in Latin, for example. This is a clue that indicates to the hearer that they are terms of art). Other words have a technical meaning in law but are in everyday currency too. 'Property' itself is such a word. Dicey complained about ambiguity with both the terms of art and the technical words like 'property' which were, simultaneously, ordinary words.

Many lawyers would have sympathy with this. Dicey grumbled about Victorian-era textbooks, but modern ones do not seem able to do much better.[47] *Crossley Vaines' Personal Property* opens apologetically: 'Personal property is a formless subject. For practical

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[47] It might be objected that it is unfair to point the finger at textbook writers in the way Dicey does. They are merely trying to give a descriptive account of something that is itself vague, it might be said. This might be thought to be merely symptomatic of a deeper issue in the law itself, unless you ascribe a crucial role to textbooks as informing officials.

purposes, the only true modern definition of personalty is the slightly comic one that it is not realty.'[48] The *Law of Personal Property* takes a similar approach to *Crossley Vaines* in a chapter titled 'the boundaries of property': 'Personal property as the residual category of property law (once interests in land are excised) is the repository or dumping-ground for allegedly new species of property right.'[49] It is interesting to compare the choice of wording in each textbook. The gist of the complaint remains the same whether we talk in the highly technical language of 'personalty' (like *Crossley Vaines*) or in the more ordinary voice of 'personal property' (like the editors of the *Law of Personal Property* and Dicey himself). These examples seem to bear out Dicey's two-point grievance.

6.1 *What is the function of terms of art?*

Let us begin with the first of Dicey's complaints, that the words are 'technical without being precise'. Let us ask ourselves what function technical words play in legal language. Is their purpose to make it more precise? In this section I consider two accounts of technical words that suggest otherwise. One of them is Jeremy Waldron's, in which he gives a *dependence* thesis of the relationship between private and criminal law. The other is Frederick Schauer's, who discusses property words although he does not commit to any account of the relations between taxonomies. For both these authors, the point of technical language is not to maximise precision. Schauer says that terms of art are labels for complex areas of legal doctrine.[50] Waldron, independently, says something similar. He says they

[48] ELG Tyler and Norman Palmer (eds), *Crossley Vaines' Personal Property* (5th edn, Butterworths 1973) 3.

[49] Michael Bridge et al (eds), *Law of Personal Property* (Sweet & Maxwell 2013) 1-057.

[50] Frederick Schauer, 'Hohfeld on Legal Language' in Shyam Balganesh, Ted Sichelman and Henry Smith (eds), *The Legacy of Wesley Hohfeld* (Cambridge University Press, forthcoming)

are 'flags' which direct attention to the internal systematicity of law.[51] In this subsection, I examine their two accounts. (I prefer the terminology of 'flag' to that of 'label' because of the point made earlier: we are not just dealing with technical nouns here. 'Flagging' at least describes a function, even if infelicitously.)

Systematicity, says Waldron, is the fact that an operation performed on one member of a set impacts other members of that set, and their relations with one another.[52] For Waldron, 'operations' are applications, changes, or repeal of rules.[53] Terms of art come into the picture as 'flags'. (This is Waldron's preferred nomenclature, which I adopt.) The technicality of technical terms alerts us to the fact that we are dealing with web-like structures of rules, rather than isolated propositions.[54] Here is an illustration of flagging in action. The flagging action will, I hope, take place in the reader's own mind as they read the following example. If the experience resonates with the reader in the way I anticipate, then they will have a first-hand impression of the process happening.

Let us look at utterances which give definitions. Say that you are told: 'lot meadows may be regarded as a movable freehold'. This sentence purports to tell you what lot meadows are. However, the reader may sense that there is doctrine concerning the phrase 'lot meadow' and 'movable freehold' of which they are unaware. As Waldron points out, the impression is that we are dealing with interconnected rules rather than isolated propositions. We are given an impression of systematicity, even if we are ignorant of the

[51] Jeremy Waldron, '"Transcendental Nonsense" and System in the Law' (2000) 100(16) Columbia LR 16.

[52] ibid., 19 at footnote 14.

[53] ibid., 25, 40.

[54] ibid., 23.

system. Another example. Say that you are told that the 'casual revenues of the Crown are those that arise from time to time' and that they include 'bona vacantia' and 'the revenues derived from droits of Admiralty'. These definitions are intended to be helpful. Yet they would be entirely unilluminating unless the flagging function occurs. If ever an utterance were completely self-contained, it ought to be an utterance that defines terms. You ought not to have to look elsewhere to understand it. So if ever there were a counterexample to the flagging function, it should be in a statement giving a definition. Yet even (or especially) definitions that include technical terms exhibit the flagging function.

Flagging elucidates how my second claim, as to guarantee, works. A body of doctrine, which both private law and criminal law contribute to, predetermines the meanings of technical words. Thus in a new suit, laws are interpreted consistently because the terminology through which the laws are expressed flags the same body of doctrine. Nevertheless, it is somewhat obscure in Waldron as to how exactly the technical terms achieve their function of flagging up systematicity.[55] The illustrations given above are mine, offered in a friendly spirit which I hope accords with his intentions. However, Waldron is not the only person to have noticed flagging. We turn, then, to Schauer's work.

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[55] Waldron implies that the abstraction of these terms is the key to how they operate as flags (see e.g. Waldron, '"Transcendental nonsense"' ibid., 22-24). There is much more to be said on how technical terms function than the brief outline in this chapter. This chapter argues *that* they function this way without giving an account of *how*. Nor does it consider whether they play any other functions. However, there exists a wealth of literature on how they operate, and on legal reasoning more broadly. For example, Lon Fuller talked of 'simplifying fictions' in the law, and included classifications among them (Lon Fuller, *Legal Fictions* (Stanford University Press 1967) 106-107). Andrew Gold and Henry E Smith speak of 'modularity' as the way that law tames complexity: 'Scaling Up Legal Relations' in Shyam Balganesh, Ted Sichelman and Henry Smith (eds), *The Legacy of Wesley Hohfeld* (Cambridge University Press, forthcoming). Adriano Zambon says that certain uses of the label for the broader category can be regarded as 'synecdoche', which is to say a figure of speech that substitutes the whole for a part: 'Property: A Conceptual Analysis' (2019) 38 Revus 55.

Schauer, without referring to Waldron, would consider it almost 'trivial' that phrases like '"covenants running with the land"' exist as 'covering terms for vast swaths of doctrine'.[56] Schauer's contribution is to show that legal reasoning needs some way of getting from the particular to the general.[57] Technical terms indicate that there is a vast swathe of doctrine that applies; that the token is an instance of a type. Both Schauer and Waldron, then, are discussing how language facilitates the use of categories in legal thought. As Schauer says, 'Legal rules not only prescribe results, but they also create (or recognize) the categories of conduct to which the rules apply.'[58]

Tony Honoré likewise notes that most laws possess a certain generality.[59] He adds that:

> the law categorises actions, events, personalities, and conditions in a special way and then, from their subsumption into the appropriate category, draws conclusions as to the legal position of the *dramatis personae* and *res*, their possibilities of acting and suffering, and their mutual relations.[60]

Thus, contra Dicey, the role that technical words play in legal language is not to prime it for accuracy. As Honoré, Schauer and Waldron suggest, the role that terms of art play is to highlight the interconnections between rules, to scale up from the particular to the general. At the level of the general, there may be some loss of precision. The words could not be more precise than the doctrines they flag up. Technical words indicate which legal categories apply to the case at hand. If there were two (or more) such categories, as the

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[56] Schauer, 'Hohfeld on Legal Language' (n 50).

[57] ibid.

[58] Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 Vanderbilt LR 265, 265.

[59] Tony Honoré, 'Real Laws' in Peter Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon 1977) 108.

[60] ibid., 112.

homonymic picture suggests, with their boundaries tracking uncertain taxonomies, confusion would result.

The homonymic picture sounds even more inapposite if it is supposed to describe the category that is the property regime. It is notable that Honoré mentioned the *res* in the quote above. Although Honoré was talking about more than just the laws relating to property, 'property' is a particularly interesting species of category. This is because it is difficult to escape being caught by it. Notice, for example, how broad are the statutory definitions (as from the Law of Property Act 1925) cited above. Not only are they broad, it is difficult to disapply them by agreement. Obviously, things which are inanimate cannot evade their categorisation by choice. But nor can the people around them customise many of the laws that apply to *property-as-thing* particularly easily.[61] In David Fox's words, the law of property is a 'default' category.[62]

I will give two examples, taken from case law. First, take the rule that 'under the general law, chattels fixed to the land become the property of the owner of the land'.[63] The House of Lords had to decide, for the purposes of tax law, whether this rule could be disapplied through a contract. It held that it could not. The word 'belong' in the statute must refer to the general law.[64] The second example is similar. In a case about the validity and

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[61] Defining *property-as-taxonomy* to be any and all laws relating to *property-as-thing* would be both over- and under-inclusive. A default approach is a one-size-fits-all approach, and therefore it inevitably requires modifications at the margin. (Hence also why the *building block* view is unrealistic.) Property's default-ness is the source of tension that motivates many worries like Jim Harris's. The worry is about retaining enough flexibility in the application of default rules. However, looking for flexibility in the meaning of words is not the answer. Stipulating non-standard usages, as legislation and courts do, alleviates many of these worries.

[62] David Fox, 'Cryptocurrencies in the Common Law of Property' draft research paper available at SSRN (16 August 2018), pages 2-3, <https://ssrn.com/abstract=3232501> (last accessed 17 January 2019).

[63] *Melluish v BMI (No. 3)* [1996] AC 454, 469.

[64] ibid., 474.

construction of a will, the Court of Appeal held that, 'it is impossible to give the ownership of property to a person in possession, and at the same time to direct that he shall not have the ordinary rights and incidents of ownership.'[65] What both of these cases suggest is that the doctrine flagged by the property lexicon is a 'default' category. That is to say, its application is broad and its confines are difficult to escape once the preconditions are met.[66] Contracting may modify some of them, but many consequences are non-optional. The homonymic picture misses the default nature of the category that is property. Technical words flag the existence of the broader category, not a more local taxonomy.[67]

Of course, a statute can modify conventional meanings to suit its specific purposes, as we have seen. Long-established drafting practice does so by contrasting a context-specific notion against a general notion deriving from the common law. As was observed in a case called *Fisher v Bell*, 'Parliament, when it desires to enlarge the ordinary meaning of… words, includes a definition section enlarging the ordinary meaning.'[68] A definition section could also restrict, rather than enlarge, meaning – as the Interference with Goods Act does by excluding 'money' and 'things in action'. For now, and to summarise this section, it suffices to note that so long as private and criminal law use the same technical terms, both areas must pursue the deflationary objective. This constraint facilitates the flagging

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[65] *Forder v Forder* [1927] 2 Ch 291, 311.

[66] (This is, of course, not the same as it having no limits whatever or being all-encompassing. See note 61 above.)

[67] To say that they do this is not to concede that technical words are meaningless. Alf Ross claimed that the words 'ownership' and 'right' were mere 'tools of presentation'. They are 'solely a means by which it is possible – more or less accurately – to visualise the content of a set of legal rules' which, on his view, meant they were 'meaningless'. (See Alf Ross, 'Tû-tû' (1957) 70(5) Harvard LR 812, 820 and his *On Law and Justice* (Stevens & Sons 1958) 170-175.) This view must be mistaken. It is far from meaningless, and indeed very useful, to visualise the content of a set of rules.

[68] *Fisher v Bell* [1961] 1 QB 394, 399.

function of technical words, allowing competent users of technical language to trace the systemic connections between rules and to scale up from tokens to types. The flag directs the court to the appropriate body of doctrine, usually ensuring the application of that body of doctrine to the case at hand. This leads to covariance of rules governing the allocation and objects of property rights. Repeated applications by both civil and criminal courts entrenches the conventional meaning of terms in the property lexicon.

6.2 *What is the function of non-technical terms?*

In this second subsection, we address Dicey's worry about terms that have a technical meaning in law but are also in ordinary currency. With reference to case-law, we will see that this worry arises from the fact that it is not always clear whether these expressions are flagging the doctrine or not.

In the tax case relating to the default-ness of property law, the House of Lords was asked to decide whether 'belonging' was a term of art.[69] 'Belonging', like 'property', is a word in quotidian use. The phrase 'property belonging to another' was at issue in both *Hinks* and *Smith*. When quotidian words appear in legal language, the question arises as to whether they are meant in a technical or folk sense. Is the term flagging up a body of doctrine? The

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[69] *Melluish v BMI* (n 63), 462 records the winning party's argument as follows: 'In construing "belongs" in section 44 one cannot jettison ordinary legal thinking. Section 46(2) shows that the parliamentary draftsman had classic legal property analysis in mind […] So one cannot forget legal analysis and just ask the man in the street "does the equipment belong to the taxpayer company?" One cannot answer the question in Schedule 17 without meticulous property law analysis.' Although this was the winning party's argument, Lord Browne-Wilkinson did quote with approval a Court of Appeal decision that decided 'belonging' was not a term of art. However, the Court of Appeal also said ordinary people understood 'belonging' in the same way that the law does: 'I agree that "belong" and "belonging" are not terms of art. They are ordinary English words. It seems to me that, in ordinary usage, they would not be satisfied by limited interests. For example, I do not think one would say that a chattel "belongs" to X if he merely had the right to use it for five years.' (at 477)

institution of property looms large in folk imagination, and so perhaps brings up more instances of ambivalent flagging than other, more specialist, areas of law. This could be why Dicey claimed that such terms were full of latent ambiguity. As we know, context makes a difference. One difference context can make is to unsettle the flagging function of technical words.

Contrast words like 'property' and 'belonging' with 'fee simple' or 'demesne'. The latter two words are technical terms with no counterpart in ordinary language. There, flagging is usually clear because such terms are singular and distinctive. Compare this with a legal utterance which uses the terms 'property' and 'belonging'. This utterance may appear very similar or identical to its quotidian counterpart, and this is why the question arises as to whether its context assists in deciding whether the technical or everyday meaning is the right one. In between these two extremes, there are words like 'title', 'trust' and 'charge' whose usage and context within a legal statement will make it unlikely that their meaning is ambiguous between the technical and non-technical variants. Thus the Australian High Court has declared that 'as a general rule, a term such as "trust" is to be taken, unless a contrary intention appears, as having been used by the legislature in its legal and technical sense.'[70]

What this discussion shows is that there is no watertight demarcation between technical and non-technical terms. The dichotomy Dicey introduced is more of a continuum. This is because law uses ordinary language. As Schauer points out, the solution is not to do away with everyday language in law (were such a thing even possible). This is because

[70] *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59, [48].

'the law does not only speak to lawyers and judges. Law speaks as well to its subjects, and it often does so without the intermediation of legal experts.'[71]

In their original case-note on *Hinks* that was quoted in section 6 of Chapter 2, Beatson & Simester sigh that 'the difficulties caused by *Hinks* manifest a more general point, that the interaction between principles of criminal law and civil law can cause problems. It has always been thus.'[72] They mention the case called *Fisher v Bell*. That case was one of several decisions wherein criminal law statutes which penalise 'offering' something for sale were interpreted as flagging the contract law meaning of 'offering'. There are a range of views on the correctness of these decisions, and on the applicable principles of interpretation.[73] The detail of those debates need not detain us. The general problem is the same one, as Beatson & Simester point out. The general problem is whether the statute should bear a meaning that derives from private law. The uncertainty is over whether the word 'offer' flags up a body of contract law doctrine.

The details of those debates do not matter because they can be quite simply boiled down. What divided commentators was whether the conduct that the criminal law penalised was conduct that was only intelligible within the framework of rules set up by contract law. Was it only penalising conduct which could result in a *binding contract for sale*, or was it penalising actions that were otherwise intelligible without the legal framework of private

[71] Schauer 'Hohfeld on Legal Language' (n 50).

[72] Andrew Simester and Jack Beatson, 'Stealing One's Own Property' (1999) 115 LQR 372, 375.

[73] See Roderick Munday, '*Fisher v Bell* Revisited: Misjudging the Legislative Craft' (2013) 72(1) CLJ 50 for an overview. See further below.

law? It seems to me that this is the question at the heart of all these cases.[74] It is also why the *functions* argument we saw in Chapter 2 has such appeal – it simplifies decision-making by furnishing courts with a way to reason through an answer to the question I posed. If you know the function which the area of law in question pursues, then you adopt whichever interpretation of the statute can fulfil that function.

There may well be cases where the legislature did not intend a technical meaning when they use language that is technical and simultaneously in ordinary currency. In my view, such cases will be few and far between where private law and criminal law are concerned with property. However, *Raymond Lyons v Metropolitan Police Commissioner*[75] is potentially such a case. In *Raymond Lyons*, a youth handed a diamond ring to some jewellers for valuation. The jewellers became suspicious and telephoned the police, believing the ring to be stolen. The youth did not come back to the jewellery shop. When nobody claimed the ring from the police, the jewellers applied to the magistrates court for the ring to be returned to them. By section 1(1) of the Police Property Act 1897, a magistrate could order the return of property in the police's possession to the person who appeared to be the owner. The jewellers argued that they had good title as against the whole world save for

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[74] The submission that 'Parliament must be taken to know the law' decided the case of *Fisher*. Put another way, Parliament intended the technical words to function as flags; it did not use a term of art ignorantly and by coincidence. Much of the commentary on *Fisher* revolves around answering exactly this question. Munday (ibid.) agrees with the reasoning of Lord Parker in *Fisher* (n 68) 399. He says that account should be taken of draughtsman's conventions. Against those who advocate for the purposive approach or the 'mischief rule', he says the risk of doing so is the creation of new criminal offences without warning. *Bennion on Statutory Interpretation* and Smith, Bailey and Gunn say that the Act uses technical language and therefore must be construed technically (*Bennion on Statutory Interpretation* (5th edn, Sweet & Maxwell 2008), 1206-7; SH Bailey et al, *Smith, Bailey and Gunn on The Modern English Legal System* (5th edn, Sweet & Maxwell 2007), § 6.013. See also *Unwin v Hanson* [1891] 2 QB 115, 119 per Lord Esher MR.) Yet others have said *Fisher* is an example of 'literal' interpretation, by which they are presumed to mean the same thing as *Bennion* (e.g. Catherine Elliott and Frances Quinn, *English Legal System* (12th edn, Pearson 2011) 53; Gary Slapper and David Kelly, *English Law* (2nd edn, Routledge 2006) 51.)

[75] [1975] QB 321.

the true owner, and that possession of this kind was ownership.[76] Unfortunately for them, however, the jewellers did not appear to the magistrates to be the owners, because an unknown third party was. The magistrates did not order the ring to be returned therefore.

The jewellers appealed, but their appeal was dismissed. Lord Widgery CJ held that the statute's reference to 'owner' should be understood in the everyday sense. 'The popular meaning of "owner" is a person who is entitled to the goods in question, a person whose goods they are, not simply the person who happens to have them in his hands at any given moment.'[77] The distinction with the Theft Act's wording (at issue in *Hinks* and *Smith*) is clear. The Police Property Act empowered magistrates to return the item to anyone who 'appeared' to be the owner. It did not require them to settle a legal question by reference to private law (or indeed by reference to any law at all), nor to inquire into facts. It gave them power to dispose of things without needing to make their orders intelligible within the framework of property law. Section 1(1) of the Police Property Act 1897 could be read as instructing magistrates to dispose of any item before them as they see fit. However, I would not go that far myself because the word 'owner' constrains the magistrates' discretion to someone who appears to be an 'owner' at law,[78] or within an accepted notion of 'owner' in ordinary discourse. Likewise, it does not seem to me that the Theft Act

[76] Their argument relates to a doctrinal debate in English law, which is beyond the scope of this thesis. For discussion of the general problem, although not as applied to this particular case, see Luke Rostill, 'Relative Title and Deemed Ownership in English Personal Property Law' (2015) 35 OJLS 31.

[77] *Raymond Lyons* (n 75), 325.

[78] This is confirmed by the statute giving the magistrates a different power where the owner cannot be ascertained. That second power is extremely broad, however, and so the practical effect of the provision may be that a magistrate can dispose of property in any way they see fit. The fact of endowing a second power does suggest, though, that 'owner' is meant in a technical sense. The section reads that a court may 'make an order for the delivery of the property appearing to the magistrate or court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem meet.'

exempts decision-makers from applying a technical meaning. Nothing in the language of that Act nor the context in which it appears (as compared with the more permissive language of 'appearance' in the Police Property Act 1897) suggests that it employs non-technical meanings. The interpretation section of the Theft Act may indicate that the Act modifies the technical meaning, but not that it disapplies it.

To conclude, it may be uncertain whether terms that have a technical meaning in law but are also in ordinary currency are intended in a technical or folk sense. An attraction of the *functions* view is that it gives courts a simple way to answer this question. Some cases that depart from the pattern of covariance can be explained thus. We now, in the last section of this chapter, briefly sketch the linguistic commitments of other models of the relations between private and criminal law that we surveyed in Chapter 2.

7. The linguistic commitments of other models of the legal system

What any of the proponents of the rival models of the legal system would say about linguistic practice is guesswork. I will, therefore, be brief. Much of this chapter has been concerned to discredit the *distinct domain* view. It has argued against the presence of technical homonyms in law. This is a proposition that the *distinct domain* view must endorse if it is to explain how statements of law relating to property are partly constituted by the same stock of words, whether they are private laws or criminal laws.

What can be said about the *different functions* view? Recall that this is the view that:

> *Different functions*: the laws governing the objects and allocation of property interests in private law and in criminal law ought to covary if and only if private and criminal law are pursuing the same functions.

One thing that has already been said is that functionalism offers a way to reason through the central interpretive question that cases like *Fisher v Bell* and *Hinks* raise; namely, whether the conduct that criminal law penalises is conduct that is only intelligible within the framework of rules set up by private law. The *functions* view may be thought to be attractive for providing an interpretative solution. If you know the function which the area of law in question pursues, then you adopt whichever interpretation of the statute can fulfil that function. This is disarmingly simple, and may be a false friend. There are limitations to this as a theory of interpretation.[79] Whether it can justify the outcome of a case, all things considered, will depend on all the considerations of that case.

I have mentioned some general considerations that will be relevant to many cases. They are the deflationary objective which facilitates flagging and the preference for parsimony. A court is not at liberty to create neologisms nor to depart from a conventional technical meaning just to suit the justice of a single case. What it can do is to signal that it is not using a term conventionally in order to serve the justice of a single case (and courts sometimes do), but to resolve every instance of linguistic ambiguity in this way would leach any sense out of the terms in the property lexicon.

[79] It is not clear whether I have been faithful to its proponents in calling it a theory of interpretation. Due to undertheorisation, the *functions* view is rarely articulated as an account of linguistic interpretation. Sometimes it is expressed by its proponents just as an analytical truth.

In addition to these general considerations, each case will raise its own that bear on the justificatory potential of a *functions* approach. By way of example, Roderick Munday discusses one in relation to *Fisher v Bell*. He has 'no quarrel with the notion that criminal law and the law of contract pursue different objectives.'[80] He argues, however, that this cannot be the only consideration when interpreting a statute. He argues that Parliament's intention must be gleaned from the text and from 'modern drafting habitudes'.[81] Not doing so risks creating criminal offences without fair warning, and fails to give defendants the benefit of doubt when there is ambiguity as to the meaning of utterances.[82]

I wish to quickly put aside one tempting line of objection that asks for an explanation for every term of art that whose established meaning is different as between private law and criminal law (such as the term 'self-defence'[83]). My objection to the *functions* view is only to its use as a justificatory response to departures from the pattern of covariance. This project has no call to explain every concept, like self-defence, which – it is established – will not covary. The point I have been making is that conventional use contributes to the pattern of covariance; I have not claimed that lexical meaning is entirely determined by the word itself. Further, there are many elements that distinguish the property lexicon from private defence, including the fact that property is a status-endowing default category which captures a great deal more norms than 'self-defence'.

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[80] Munday (n 73) 54.

[81] ibid., 55.

[82] ibid., 63.

[83] The test for self-defence in private law was the subject of a House of Lords decision in *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962. The House of Lords decided that the test should not be the same as that in criminal law on the grounds that the two areas of law pursue different functions. For this reason, a functionalist might raise this counterexample as an objection to the discussion above. However, I do not think it is on point.

As to the other models of the relations between private law and criminal law, the *building block* and *dependence* views would be committed to some systemic relation between the meaning of terms, if they tolerated multiple senses at all. The *mutatis mutandis* view would be more accommodating of variation. Stuart Green, who I earlier dubbed as a *mutatis mutandis* theorist, notes the expense to his view if he cannot accommodate *People v Otis* (discussed at section 4 above). He asserts that 'virtually all Anglo-American authorities agree that stealing contraband does constitute theft'.[84] He acknowledges that a problem arises in respect of language but does not try to resolve it, instead simply voicing his agreement with the court's interpretation of the Prohibition Act. In the next chapter, I give an alternative account of why so many authorities conclude that stealing contraband is theft.

8. Conclusion

Two hypotheses were advanced in this chapter to explain the pattern of covariance. One related to a constraint and the other to a guarantee. The constraint begins from the premise that a single word can only bear a limited number of meanings before it loses efficacy in communicating the relevant sense. The property lexicon is used to compose statements of rules, both in criminal law and in private law. The lexicon is comprised of technical terms. Technical terms flag to competent speakers that there exists a body of doctrine which fixes their meaning. Part of their function is to help us reason from tokens to types, from the particulars of a case in front of the court to the general category of law that regulates that

[84] Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard UP 2012) 212.

case. Courts are authoritative speakers and are well aware of the constraint this imposes on their use of language. They therefore pursue the deflationary objective, minimising non-standard uses of technical terms. This, in turn, means that both the civil and criminal courts together predetermine the conventional meanings associated with technical terms. This is the second claim of the chapter.

Both claims go some way to explaining how the pattern of covariance is reproduced. There is conventional meaning fixed by a body of doctrine which both private and criminal law courts contribute to. At the same time, there is limited scope for non-standard usage whilst observing the constraint. A constraint excludes certain options for deciding the dispute or an issue that is part of it (such as the interpretation of a rule), while a guarantee predetermines some salient consideration for the judge such as the content of a rule or a concept. The result is that the laws which govern the allocation and objects of property interests tend to be interpreted in a very similar way, and the pattern of covariance is replicated.

The chapter also hinted at some explanations for departures from the pattern. One possibility is that the flagging function is sometimes deposed wherever it is uncertain whether a term of art is intended in its technical meaning or an ordinary meaning which it is also capable of bearing. The *functions* view peddles a seemingly attractive way to reason through this question, but it will depend on the reasons that apply to the particular case as to whether this solution can justify the outcome. The next chapter takes up again the question of the justificatory plausibility of functionalism.

However, the *different functions* thesis was not the main target for this chapter. The chapter responded to a *distinct domain* objection that criminal and private law are using the same word to mean unconnected things, and further that meaning is derived solely from law emanating from the same taxonomy. We should not accept the homonymic picture. We talk of 'the law of property', not 'the laws of properties', because linguistic practices and convention tell us that this is appropriate. In the next chapter we look further at the phenomenon of authoritative speakers. We examine the feature of the legal system that is private and criminal law's shared jurisdiction over property. The word 'jurisdiction' comes from the Latin 'juris dicere' which means *to speak law*.

Chapter 4 – Jurisdiction

1. Introduction

The previous chapter pointed out that civil[1] and criminal courts use the same technical vocabulary for stating rules that govern the allocation and objects of property rights. They do so because both civil and criminal courts decide cases about property. This chapter focuses on that fact. Lawyers often talk of cases raising questions to be answered by the court. Adopting this manner of speaking, Waldron told us that technical terms give us the apparatus to reason from particular to general. He did so using the terminology of 'question and answer'. He said that using technical terms allows us to relate the questions and answers raised in cases to one another.[2] Similarly, Matthew Dyson has commented, 'Something is a legal system because within its sphere of operation, it will answer every legal question, at least once it has been asked. Where there is an adjudicative function to the law, the process must culminate in resolution. A legal system could be thought the smallest unit within which there must always be an answer.'[3] The metaphor of question and answer is not particularly precise.[4] However, Waldron and Dyson do illuminate two

[1] Nobody speaks of 'private law courts' but I take private law to be a subset of civil law, so I will take private law courts to be a subset of civil courts.

[2] Jeremy Waldron, '"Transcendental Nonsense" and System in the Law' (2000) 100(16) Columbia LR 16, 25 and 26. See also James Goudkamp and Lorenz König, 'Illegal Earnings' (2018) 9 Journal of European Tort Law 54, 77.

[3] Matthew Dyson, 'Ligations Divide and Conquer: Using Legal Domains in Comparative Legal Studies' in G Helleringer and K Purnhagen (eds), *Towards a European Legal Culture* (Hart 2014) 123.

[4] The 'question' which the court must answer could refer to the question(s) identified by the parties to the dispute, often presented to the court in skeleton arguments as the legal issue(s) to be determined in the case. It could refer to an interpretation or reinterpretation, by commentators, as to the matters in dispute. It could alternatively be taken to mean something commonly referred to as broader 'questions of policy or principle' raised in a case. This is by no means an exhaustive list, and I do not want to enter into a discussion of how we should best analyse such terminology.

important facts. Those facts are that, firstly, questions of allocation and the objects of property rights arise in civil and criminal litigation alike. The second fact is that a court possessed of jurisdiction must answer all questions that are necessary to resolving a dispute it is seised of.

Waldron helped us to see, in Chapter 3, that private and criminal law jointly predetermine conventional meanings of terms in the property lexicon by using them. Chapter 3 suggested that the pattern of covariance was thus partly a product of the consistent interpretation of laws which employ the property lexicon. Technical words flag the presence of a body of doctrine that determines their meaning. Both private and criminal laws contribute to that body of doctrine. This chapter builds on the conclusions of Chapter 3. It goes further than saying that private and criminal law consistently interpret property laws and/or contribute to the doctrine that determines their conventional meaning. This chapter maintains that criminal and private law apply some of the very *same* laws to 'answer questions' about property – frequently if not invariably.[5] For example, private law rules on valid acquisition disprove accusations of theft (in the preponderance of cases, putting aside a case like *Hinks*). Raz says, 'it is the fact that a set of laws of recognition are maintained by the practice of the same law-applying organs that indicates that they are all part of *one* legal system.'[6] Civil and criminal courts are law-applying organs that maintain a practice of recognising each others' laws. Dyson, above, also made a claim about the identity of legal systems. His argument was that legal systems are individuated by being

[5] The laws which comprise private and criminal law are, obviously, not two sets of identical laws. It follows from Chapter 3 that both areas of law will interpret the laws in their own jurisdiction, as well as laws in the other jurisdiction, consistently when technical property words express those laws.

[6] Joseph Raz, 'The Identity of Legal Systems' in his *The Authority of Law* (OUP 1979) 96 at his footnote 30 (emphasis added).

the smallest unit which claims epistemic authority over any legal question it has been asked. This chapter develops an intuition which is similar to Raz and Dyson's: namely, that the nature of legal systems holds insights for the pattern of covariance.

The legal system that is England & Wales distributes authority over property between two jurisdictions: civil and criminal. Both jurisdictions make authoritative pronouncements about property in the course of determining legal disputes. Moreover, this chapter argues that these disputes are determined on the basis of a set of norms about property which are shared between private and criminal law (alongside some norms that are unique to either private law or to criminal law). Oftentimes, criminal courts and civil courts make decisions on the basis of norms which are common to both jurisdictions. Indeed, I will argue below that the rules which determine the authority of each jurisdiction make reference to laws about property in order to specify the extent of criminal courts' and civil courts' respective spheres of operation. The property laws referred to in jurisdictional rules are some of the same laws, whether we look at the rules defining the criminal jurisdiction or the rules defining the civil jurisdiction. This is the first claim of the present chapter.

However, it is not enough to ensure covariance that two authorities apply a set of rules that is partly shared between them. The legal system therefore has several additional mechanisms to avoid norm conflict. The second major claim of this chapter is therefore a claim about the constraint of avoiding norm conflict. Section 3 below argues that the two concurrent jurisdictions must reconcile their coincident authority. The legal system has an interest in avoiding conflicts of authority, and coordinating rules serve this function. The courts of both jurisdictions are assisted by various coordination rules to avoid making

findings of fact and/or law that are at odds with one another. The effect of this constraint is to perpetuate the pattern of covariance.

Having started with explanations for the pattern of covariance, the second half of the chapter changes tack. The second half of the chapter proposes an explanation for a certain type of departure from the pattern. It argues that the results in the cases on contraband (raised in Chapter 3) are explained, *inter alia*, by the fact that legal authority over property is split across two jurisdictions. These are intricate arguments that require us to first unpick the notion of jurisdiction itself. Section 2 begins with this.

2. The feature under examination

This section clarifies what the feature under discussion – jurisdiction – is. I then argue that civil and criminal courts decide cases partly on the basis of the same laws, and illustrate the impact this arrangement has on the exercise of their jurisdictions.

2.1 *What is 'jurisdiction'?*

Giving an account of jurisdiction is adjectival to my main purpose. However, the feature we are concerned with in this chapter is jurisdiction and it is helpful, therefore, to set out what I take jurisdiction to be. Jurisdiction is a concept often discussed but rarely analysed. In everyday life, we often talk of individual people having jurisdiction. By this, we mean their domain or sphere of decision-making.[7] It is not so different in law. To speak of

[7] Gerald Gaus analyses a person's private property as giving them some jurisdiction, using these terms. See Gerald Gaus, 'Property' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012).

'jurisdiction' as it relates to legal institutions like courts is to refer to the allotted powers, duties and permissions of law-creation and law-application to those institutions. The jurisdiction of each institution is the *effect* of its total assigned powers, duties and permissions. It is this aggregate effect which tempts us to talk in bounded spatial metaphors like 'sphere' and 'domain'. Whilst there may be powers and permissions, their exercise is limited by duties or territorial effect, etc.[8] Hence the common way of speaking about jurisdiction is in metaphors of boundaried space.

If I wish to describe somebody's jurisdiction or allot jurisdiction to someone, it is natural to do so by the use of a criterion or several criteria. For example, if I am sending my partner to buy picnic food, I might specify their sphere of decision-making by saying, 'Just get anything nice and vegetarian.' In this example, my partner's jurisdiction is limited to purchasing anything that satisfies the criteria of being both nice and vegetarian – the former criterion being much broader than the latter.

Turning to the law, we find something similar. We are familiar with jurisdiction designated on the basis of some criterion or several criteria. The legal institutions we are concerned with in this project are courts. I will hereafter be concerned with adjudicative

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Timothy Endicott talks of a mother's jurisdiction, discussed further below (Endicott, 'Interpretation, Jurisdiction, and the Authority of Law' (2007) 6 American Philosophical Association Newsletter 14). The idea that property-holding conveys legal jurisdiction, in a non-colloquial sense, has a long pedigree in English law, particularly in feudal times. See also *East India Company v Sandys* (1682) 1 Vern 127, 23 ER 362.

[8] The jurisdiction of courts is a complex constituted by more granular legal relations that include powers, permissions and duties. Here is an example of each. Courts have a legal duty to dispose of every case they are properly seised of, according to the law. Courts have powers to make interim orders and to take advantage of evidential presumptions, but no duties to do so. Courts have permissions to control the uses of expert evidence proposed by the parties, but this may not have been codified into any explicit procedural power. They also have permissions incidental to the performance of their duties, as well as permissions we do not normally think of as important – such as dispensing with advocates' formal dress requirements.

jurisdiction rather than any jurisdiction of entities other than courts (like nation states, for example). Here are examples of criteria which have described or allotted powers, duties and permissions of law-creation and law-application to courts. Some criteria are narrow, such as an ad hoc war tribunal given jurisdiction over unlawful acts occurring during a particular conflict. The criteria could alternatively be broader than this. Territorial extent is a criterion that is closely associated with jurisdiction.[9] In England & Wales, there are courts whose names hint at the fact that the criteria specifying their jurisdiction refer to a specific body of laws.[10] Thus we speak of employment tribunals, social security tribunals, tax courts and patent courts. Sometimes jurisdiction is specified by the *absence* of any limitations on the type of laws that an institution may apply. The East India Company Charter of 1661 granted the company 'power to judge all Persons, belonging to the said Governor and Company, or that shall live under them, in all Causes, whether civil or criminal, according to the laws of this Kingdom.'[11] Today, this would be called a 'general jurisdiction'.

The important point to note for the purposes of this chapter is that English & Welsh law commonly specifies jurisdiction with reference to bodies of particular substantive laws. When we talk of the 'criminal' jurisdiction and 'civil' jurisdiction, we are talking about allotted powers, duties and permissions according to criteria specifying which substantive rules may be created and applied by which officials/institutions.[12] By way of example, a

[9] But there have existed legal systems that did not specify territorial extent, and instead were defined by the religious source of their laws.

[10] The claim is not that this is the *sole* means by which jurisdiction is specified.

[11] cited in Shaunnagh Dorsett and Shaun McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23(4) Griffith Law Review 569, 576.

[12] For a sense in which courts 'create' law, see Joseph Raz, 'The Institutional Nature of Law' in his *The Authority of Law* (OUP 1979) 109-111 (distinguishing applicative determinations and creative determinations).

classic definition of a crime was that it is ‘a wrong whose sanction is remissable by the Crown, if remissable at all.’[13] This specifies that a crime is an illegality which only one institution, the Crown, has any power to remit, and that even the Crown may not have this power in respect of every such illegality. Glanville Williams then retorted: ‘we must distinguish... not between crimes and civil wrongs but between criminal and civil proceedings. A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings.’[14] Both these attempts to define a crime refer to the assignment to certain officials and institutions of duties, powers and permissions relating to crime. Whereas criminal courts are uniquely tasked to administer criminal procedure, both criminal courts and civil courts are assigned powers, duties and permissions to apply and create substantive rules relating to property.

In order to avoid clumsy, convoluted phrasing, I will refer in what follows to ‘substantive’ rules/laws and ‘jurisdictional’ rules/laws. Broadly, by ‘jurisdictional’, I mean the rules that are constitutive of the institution that is a court, whereas ‘substantive’ refers to every ordinary law of general application – such as the laws of contract formation and the prohibition on fraud. More precisely, ‘jurisdictional’ laws are the powers, duties and permissions of law-creation and law-application designated to an institution – and these norms may be further specified by reference to certain criteria. Those specifying criteria could include particular bodies of ‘substantive’ laws; ‘substantive’ laws being those very

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[13] CS Kenny, *Outlines of Criminal Law* (Cambridge UP 1902) 15.

[14] Glanville Williams, ‘The Definition of Crime’ (1955) Current Legal Problems 107, 123.

familiar duties, powers, and permissions that regulate the everyday conduct of law's subjects.

It may be objected that my account of jurisdiction is inadequate because it does not distinguish sufficiently between merits and jurisdiction, a distinction which is commonly made in the context of decisions in administrative law. I will make only a brief response given that I wish to proceed to the main claims of the chapter. Whilst it is true to say that every *ultra vires* decision is 'wrong', it does not follow that every wrong decision is *ultra vires*. This is because lawyers mean many different things when they say a decision is 'wrong.' My account of jurisdiction, which argues that jurisdiction is specified according to substantive bodies of rules, may entail that a judgment is wrong every time it misapplies those substantive rules or applies some other rules which it is not empowered to apply. (I say 'may' because much depends on the totality of its jurisdictional rules, which will often allow for some law-creation as well.) Such a decision, because wrong on the merits, is then also *ultra vires*. The objection is that collapsing the two concepts of merits and jurisdiction does not chime with the way we usually think about these concepts in administrative law.

In response, I note that the leading English case on jurisdiction, *R (Privacy International) v Investigatory Powers Tribunal,*[15] holds that merits and jurisdiction are 'interdependent'.[16] Thus my account is orthodox because it explains the nature of this interdependence. The distinction that administrative lawyers draw could be merely one of emphasis, rather than between two independent concepts which I conflated. It seems likely to me that the

[15] [2019] UKSC 22, [2020] AC 491.

[16] ibid., [109] and [112].

'wrongness' of some decisions is best described by focusing on their substantive incorrectness, whereas the wrongness of other decisions is best described by focusing on breach of jurisdictional rules rather than the merits. A dissenting judge in *Privacy International* believed that merits and jurisdiction were conceptually distinct, but did not say what the distinction was.[17] In view of the doctrine, I do not consider that the account of jurisdiction given here is revisionist. More could be demanded of it by way of perspicuity, but it suffices for the purposes of the chapter.

2.2 *Civil and criminal courts make decisions on the basis of a shared set of norms*

Civil and criminal courts make decisions in legal disputes over property by applying a set of norms that is partially shared between them and partially unique to each jurisdiction. In order to make the case that some norms are common to both jurisdictions, I will provide illustrations from the case-law. It is by inference from case law that I make the argument that civil and criminal courts apply many of the same laws in property disputes. This helps to explain the existence of a pattern of covariance.

To illustrate, I take it to be a fairly uncontroversial proposition that private law rules impact the criminal courts' jurisdiction over property. Those private law rules originate

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[17] ibid., [203] per Lord Sumption. Timothy Endicott has suggested to me that 'jurisdiction' refers only to allotted powers, not duties. I do not see the advantage in a minimal description where a maximal one can more accurately capture *all* the norms that bear on an institution (see further my comments at footnote 8 above). More tentatively, this account of jurisdiction runs into some of the theoretical difficulties that beset accounts of the state that conceive of legal authority not as a claim-right to rule but merely a liberty. The liberty account cannot, for example, explain the fundamental feature of a legal decision that prevents its subjects from acting on competing decisions. For more discussion, see Leslie Green, 'Legal Obligation and Authority' in *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N Zalta (ed), accessible at <https://plato.stanford.edu/archives/win2012/entries/legal-obligation/> (last accessed 4 March 2021).

from exercises of the civil jurisdiction over property. In a common law legal system, binding rules are made when courts exercise their jurisdiction. In this subsection, we examine three types of rules. They are the types we have been discussing all along: rules on what can be the object of a property right, rules on investiture and rules on divestiture of property rights.

Starting with the objects of property rights, the fact that something counts as *property-as-thing* in private law is normally sufficient to give criminal courts jurisdiction over it. Imagine that a new type of thing comes into being, and is declared to be property in private law. If a criminal offence is committed involving the new thing, this will ordinarily be sufficient for a criminal court to issue a warrant concerning that offence. To make this example more concrete, think of cryptocurrencies. These are a new kind of thing and courts have recently had to determine their status.[18] A court in New Zealand approved the forfeiture of cryptocurrencies under New Zealand's Criminal Proceeds (Recovery) Act 2009, which permitted expropriation of 'property'. A later judgment commented, 'An assumption was made that [cryptocurrencies] did fall within the definition in terms of that legislation.'[19] The 'assumption' referred to is the expectation of covariance. If cryptocurrencies are 'property' for the purposes of private law then the criminal court can seize them under the legislation enabling it to expropriate property.

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[18] In New Zealand, in a case called *Ruscoe and Moore v Cryptopia* [2020] NZHC 728, the court raised (of its own volition) the question of whether it ought not to recognise cryptocurrencies as property because of their use by criminals (at [129]). It decided to recognise them partly because the barristers argued that not doing so would have a detrimental effect on other parts of the law, including insolvency, restitution, succession and commercial law (at [52]). The court therefore proceeded on the unstated assumption that these other areas of law were relevant to the question before it. This is because, as Raz led us to expect, courts within a single legal system maintain the same rule of recognition. The same assumption that these other areas of law were relevant can be seen in English and Welsh law. In England and Wales, on cryptocurrencies, see *AA v Persons Unknown* [2019] EWHC (Comm) 3556, at [55] and [61].

[19] *Henderson v Walker* [2019] NZHC 2184, [94].

Similarly, take criminal law statutes such as those prohibiting theft, fraud and burglary. As the legislation refers to 'property', it is a condition precedent of the criminal court's exercising its jurisdiction that the offence concerns *property-as-thing*. In a criminal appeal, *Low v Blease*, a conviction for burglary was quashed on the grounds that electricity was not 'intangible property'.[20] It is not unusual, therefore, to see the law summarised like this (as it is in a leading practitioners' text): 'Electricity cannot be property and so when electricity is "obtained" the only available offence is [a specific provision relating to abstracting electricity in section 13 of the Theft Act 1968].'[21] Presumably the legislature enacted a separate provision regulating the abstraction of electricity because the Act did not otherwise treat electricity. This is all as we would expect.

We take, secondly, rules on investiture. Pleading private law's rules on valid acquisition of property is usually enough to repudiate an accusation of theft. Take *Edwards v Ddin*[22] or *Powell v McRae*[23] for example. In the former case, *Edwards,* the accused was acquitted because private law rules on acquisition of property meant that the accused had not appropriated property 'belonging to another'. The accused, Ddin, drove to a garage and an attendant poured petrol into Ddin's petrol tank, which was partially full already. Ddin then drove away without paying for the petrol. The court was persuaded that ownership of the petrol was transferred to Ddin when the petrol entered the tank. In particular, the court was struck by the submission that the garage could not recover the petrol once it was

[20] [1975] Crim LR 513.

[21] David Ormerod and David Perry (eds), *Blackstone's Criminal Practice 2019* (OUP 2019), B4.144.

[22] [1976] 1 WLR 942.

[23] [1977] Crim LR 571.

in the defendant's tank. The prosecution argued that the sale was conditional upon payment. The prosecution's argument was rejected at first instance and on appeal. The High Court reasoned that under a contract of sale, property passes when it is intended to pass.[24] There was no express term in the contract for sale between the garage and Ddin which could help the court ascertain when the property was intended to pass. Therefore, the court applied the law governing implied contractual terms. At the time of the decision, the Sale of Goods Act 1893 was in force (although it has now been repealed). The Sale of Goods Act 1893 therefore governed the contract. Section 18 of the Act provided that where a seller delivers goods to a buyer and does not reserve a right to dispose of them, he is deemed to have unconditionally passed property in the goods to the buyer.[25] The garage's inability to retrieve the petrol is salient because of section 18. It would have been unrealistic for the garage to reserve a right to dispose of the petrol once it was in Ddin's tank. Furthermore, the court rejected the prosecution argument that section 5(3) of the Theft Act was applicable. Section 5(3) states that property is to be regarded as belonging to another where the accused is under an obligation to the other to deal with the property in a particular way. The prosecution argued that Ddin was under an obligation to remain in the garage until he had paid for the goods. The appeal court was not convinced. The unanimous court thought that section 5(3) was inapt because the petrol had been handed over, and there was no obligation to deal with the petrol in any particular way. There certainly was a contractual obligation to pay for the petrol, but ownership in the petrol had already passed to Ddin. I mention *Edwards v Ddin* here not because I agree with the result but because it demonstrates the usual case of covarying acquisition rules. The criminal court applied sale of goods legislation just as a civil court would.

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[24] *Edwards v Ddin* (n 22) 944.

[25] ibid., 945.

I do not rule out the possibility that a conviction could have been achieved by different reasoning, without doing damage to the pattern of covariance. One possibility, not proposed by the prosecution, is that the common law rules of mixture could have secured a conviction. This possibility is remote because it is likely that the legislation superseded the common law. For completeness, I mention the possibility that the doctrine of mixture may have provided the court with an alternative way of reasoning about the property passing. Under the rules on mixture at common law, the act of combining Ddin's old petrol with the new petrol would result in co-ownership of the mixture. By driving away, Ddin could be said to be ousting the co-owning garage from the property. That argument, had it been advanced by the prosecution, may also have been rejected as unrealistic by a court, due to the garage's inability to retrieve the petrol in the tank in any event.

To take another example of covarying investiture rules, consider *Powell v McRae*. In that case, a turnstile operator was bribed by a person without a ticket and charged with theft. However, according to the law of trusts at that time, the bribe could not be said to 'belong to' his employer. The turnstile operator could only be said to have acquired another's property if the bribe was held on trust for another, i.e. his employer. He was therefore acquitted. The strong impression given by these cases is that criminal law courts are making decisions on the basis of the same investiture rules as a civil court would.

Finally, the rules on divestiture. Usually, private law's rules on the divestiture of property rights are sufficient to deprive the criminal courts of jurisdiction to convict. A number of

criminal cases have held that abandoned property cannot be stolen.[26] If no crime has been committed, the only permissible exercise of jurisdiction is to dismiss a prosecution. (And, indeed, there are powers of case management exercisable before a full prosecution for dismissing a case. Even midway during a trial, the defence may submit a plea of no case to answer.)

In summary, the exercise of the civil jurisdiction over property has led to the propounding of private law rules about property. In many cases, these rules endow or deprive the criminal courts of jurisdiction over particular prosecutions involving property. The impression given is that many cases are decided on the basis of the very same rules relating to property allocation and property objects.

Making decisions on the basis of the same laws does contribute to a pattern of covariance, but it is not enough by itself to ensure covariance. (The reasons are many. One reason is that the applicable rules are only partially shared; there are many rules unique to each jurisdiction. Another reason is that legal decision-making is not mechanistic, so even if there were two people applying exactly the same set of rules, they would not always come to identical outcomes. To borrow a metaphor from the courts, the left hand may not know what the right hand is doing.[27]) I am therefore not presenting this particular claim as a guarantee, at least not in the absence of constraints that operate symbiotically. In addition to making decisions on a partially shared basis, the legal system has mechanisms to avoid norm conflict. The case for this particular constraint is made at section 3 below.

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[26] *Ellerman's Wilson Line v Webster* [1952] 1 Lloyd's Rep 179; *R v White* (1912) 107 LT 528; *R v Peters* (1843) 1 Car & K 245; *R v Reed* (1842) Car & M 306.

[27] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, [99].

Even so, the puzzle that we encountered in the first chapter arises. Counterexamples exist in each of the categories of investiture, divestiture and the objects of property rights. *Hinks* was our example of investiture, as it concerned acquisition by gift. *Best* was an example of both investiture and divestiture (as this is the best account of how adverse possession operates). In *Best*, unlike the examples given in this subsection, the question was not whether the civil rules impacted upon the criminal jurisdiction but whether the criminal jurisdiction altered civil rules of acquisition and termination of property rights. *Smith* was our example both of investiture and of the possible objects of property interests. It concerned a conviction for taking heroin, an item that imaginably falls within the *Bowmakers* doctrine, but which was held to be 'property' and moreover 'belonging to another'. Due to the endurance of the puzzle, section 4 below provides an explanation for one sort of case that deviates from the pattern of covariance. This is the kind of case that *Smith* represents – a case about contraband articles.

Separately, I stress here the influence of criminal law on civil law (at issue in *Best* and *Smith*) to avoid a reader inadvertently forming the impression that my view is similar to Epstein's. Epstein would hold that property in private law is foundational and prior to criminal law. This is not my view. If, as I argue, criminal courts' jurisdictional powers are specified (*inter alia*) with reference to the substantive law of property then criminal courts are equipped to make rulings on property in the way that everyone accepts civil courts are. The silence of private law on any property issue does not deprive criminal courts of the jurisdiction to decide that issue should it arise in litigation. In fact, we do see criminal courts making creative determinations of property disputes instead of merely making

applicative determinations on the basis of existing private law rules.[28] It is this concurrence of jurisdiction that gives rise to a constraint, as I go on to argue in section 3.

3. A constraint: avoiding norm conflict

To recap on the preliminaries, English law contains powers, permissions and prohibitions over property. Correspondingly, civil and criminal courts are allocated powers, permissions and duties to decide cases on the basis of these norms – or, in each case, some of the norms. Their jurisdiction is specified by reference to substantive rules, including rules governing the allocation and objects of property rights. At present, this legal system's authority over property and wrongdoing is overdetermined because both civil and criminal courts have authority over wrongful behaviour in respect of property. It is not coextensive, but it overlaps. The rules specifying the sphere of operation of each jurisdiction make reference to some of the same laws.

It would be tempting to conclude that decisions made on the basis of the same laws alone explains the pattern of covariance. However, that would be too quick. Quite obviously, a decision-maker must proceed on the basis of consistent facts too. However, even proceeding on the basis of the same facts *and* laws does not by itself ensure the consistent *application* of those laws by two separate authoritative institutions. This is despite the fact that criminal and civil courts recognise each other's pronouncements as law. Some of those pronouncements are made with authority that is shared between the jurisdictions,

[28] Thus, for example, Alistair Hudson has argued that it was largely criminal courts who developed the common law on abandonment, rather than civil courts: 'Is Divesting Abandonment Possible at Common Law?' (1984) 100 LQR 110.

others with exclusive authority. How, then, do we account for the full extent of the pattern of covariance?

This section argues that the coincidence of regulation gives rise to a constraint. Reconciling their concurrent authority is desirable not only in terms of the content of substantive pronouncements in judicial decisions about property and wrongdoing, but it is also desirable to make consistent the very rules which determine the extent of criminal courts' and civil courts' respective spheres of operation. To this end, the legal system has a number of coordination devices to avoid norm conflict. These devices operate as constraints, which is to say, they rule out certain options for deciding the dispute or an issue that is part of it (such as the interpretation of a rule or the evidence before the court). A thought experiment, immediately below, motivates the argument for this constraint.

3.1 *A thought experiment*

This thought experiment imagines the emergence of an adjudicative jurisdiction whose remit overlaps with an existing adjudicative jurisdiction within the same legal system. Two concurrent jurisdictions now coexist. I argue that conflict between them is inevitable unless they mutually specify their limits in such a way as to avoid it. The point is that coincidence of regulation carries an inherent risk of creating norm conflict and/or practical dilemmas. That risk will be realised at some point in time given the laws of probability.

Here is an illustration. Imagine that the law of Toytown has always contained laws on the subject of building blocks. As part of its internal arrangements, in 2023, the Toyteunian legal system divides the regulation of building blocks between two adjudicative

jurisdictions. Where there used to be a single jurisdiction, there are now concurrent 'red' and 'blue' jurisdictions. Red courts now have jurisdiction over substantive laws relating to red blocks and blue courts have jurisdiction over substantive laws relating to blue blocks. The legislation specifies nothing more about their respective spheres of competence than this. It mandates, however, that any proceedings relating to building blocks must be brought in the appropriate jurisdiction: red or blue.

The two jurisdictions must surely determine answers to the following questions: *what counts as a 'block'? Does a pyramid count, or only cubes? What is a 'red block' and what is a 'blue block'? Who regulates purple things? Is it legitimate to paint a blue object red, and for which reasons?* In other words, the courts need to decide on the extent of their own authority, and on any areas of potential overlap. Further, they must come up with the same determinations. Not doing so risks issuing conflicting authoritative rulings, creating practical dilemmas for the citizens of Toytown. Practical dilemmas are also likely to arise due to inconsistent interpretations of the jurisdictional rules in the 2023 legislation that established the new jurisdiction. These two risks are expanded upon below. To generalise, there is an inherent risk of the courts creating inconsistent substantive law within the area of overlap, or creating inconsistent jurisdictional rules when determining the ambit of their own authority. As a matter of practical necessity, some reconciliation will eventually be required. They had better be adjudicating on the basis of consistent substantive and jurisdictional rules or else risk practical dilemmas.

3.2 *Risk of conflicting rulings on substantive law*

Law claims practical authority. It is therefore capable of putting law's subjects in practical dilemmas when its directives are contrary to, or contradictory of, one another. I will argue that whenever jurisdictions are specified by overlapping criteria, they risk norm conflict. What is meant by 'overlapping criteria'? The assignation of adjudicative jurisdiction to an institution is achieved, I have argued, by reference to criteria. Where an institution's jurisdiction is specified by criteria that are, in whole or part, identical with another institution then those criteria 'overlap'. Civil and criminal courts' jurisdiction partially overlaps. The two jurisdictions thus risk creating practical dilemmas if, and to the extent that, they make rulings that conflict. A non-legal example of an institution comprising of several overlapping adjudicative jurisdictions would be a collegiate university. In this institution, constituted by several colleges as well as the university itself, there could exist numerous disciplinary committees. The disciplinary committee of a college whose statutes defined that committee's jurisdiction by reference to the university's rules of conduct would have a competence that overlapped with that of the university's central disciplinary committee. As with civil and criminal courts, the university and college committees would risk making rulings that conflict.

I assume here that practical dilemmas are undesirable and that law endeavours to avoid them. (The sketch of an argument for why can be found in section 5 below.) This is a defensible assumption, because legal systems have innumerable priority rules and coordination rules whose purpose is precisely to avoid conflicts within the legal system and between legal systems. This is evidence that lawmakers in fact desire to avoid conflicts. The existence of a body of rules known as 'conflict of laws' in international law would be absurd were it not possible for directives to put people into dilemmas. Norm conflict frequently arises because multiple laws are made on the same subject-matter or addressed

to the same individuals by different authorities. These authorities made these laws because their jurisdiction was specified so as to enable them to do so. Within municipal law, the same norm-conflict problem arises. Chapter 2 quoted one example of norm conflict in English law, about which it was said: 'it certainly looks very odd that a man who has done no more than exercise his civil law rights in relation to a chattel should be guilty of stealing it.'[29]

Here is an example intended to show that wherever jurisdictions are specified by the same or similar criteria, they risk norm conflict. Imagine I am a member of a chess club in Oxford and a chess club in London. My membership obligates me to play for my club in scheduled tournaments. Should these two clubs schedule a tournament on the same day, I will be in a practical dilemma. There are a few things to notice about this example. The jurisdiction of the two chess clubs is, let us imagine, specified by reference to the game of chess and their own members. They are geographically distant, but there are no territorial limitations to their jurisdiction. To that extent, they share specification criteria, but in no sense do they claim unlimited competence or ultimate authority. What each club does is make practical demands on members, which is how a potential for practical conflict comes into being. The rules of each club presumably carry the same rank; they bind the addressee equally. There is no obvious way to prefer one over the other and no order of priority is determined by the rules themselves. The clubs can, in most cases, avoid practical conflict by happenstance, but they may need rules to avoid it. The greater the extent of overlap and the greater the similarity between specification criteria, the greater the risk of practical conflict.

[29] JC Smith, 'Civil Concepts in the Criminal Law' (1972) 31(1) CLJ 197, 216.

In English & Welsh law, the civil and criminal jurisdictions share many more criteria than the chess clubs. They are specified by the same substantive law, the same addressees, and the same territorial extent. Unlike the chess clubs, they do not have the option of being unaware of the other's existence because they are part of the same legal system and practise its rule of recognition. A civil court recognises the laws that specify its own jurisdiction as well as those that specify the jurisdiction of a criminal court. (One upshot, by way of example, is that it is a legal error to give judgment without considering relevant precedent.) Civil and criminal courts do not merely 'answer the same questions' coincidentally, but on the basis of a single body of rules i.e. English law. This creates the risk of conflict. Many rules are stated with generality and only some are confined by other rules (derogations, exceptions, limitations, etc). The risk of creating norm conflict between substantive laws is higher within the English & Welsh property regime than it is for the two chess clubs. This is because when two jurisdictions coexist and are specified by reference partly to the same criteria, the directives that result from their judgments will also overlap to some degree. The greater the overlap in the laws they give effect to, the greater the risk of conflicting directives in judgment.

The unavoidable risk of conflict is managed by a legal system in several ways. Two of those ways will be mentioned here for illustration. In England & Wales, there are both legal rules and legal authorities whose function includes coordinating among different authorities in order to minimise conflicts in their rulings on the substantive law. An example of a such a legal rule is the one that determines an order of priority between civil proceedings and criminal proceedings arising out of the same facts. Although the content of the so-called 'timing rule' has changed over the course of history, there has always been

some such rule.[30] Matthew Dyson corrects a misperception that English law does not have an order of priority between criminal and civil law. Whilst it is true that English law has no generalised theory of their relationship, unlike many Civilian legal systems,[31] it has particularised rules determining specific potential practical conflicts.[32] Having priority rules is necessary if practical conflicts are to be avoided. Given both jurisdictions' powers to compel the production of evidence, there is an attendant risk of requiring people and things to be in two places at once. Further, there is the risk of making conflicting authoritative pronouncements about the same facts.

The timing rule is an example of a coordination rule. Aside from rules, there also exist institutions or authorities whose function includes coordination. The UK Supreme Court is one. The legal system has a single apex court to coordinate the pronouncements of various subordinate judicial tribunals. As one Canadian court put it:

> [T]here must reside somewhere a supreme judicial authority to watch over the proceedings of all inferior tribunals, and to keep the scales of justice even and uniform. The same principle forms a part of the law of every civilized state in the world. *Were it otherwise, there would frequently be conflicting decisions,* which must introduce a positive difference in the rules of justice, — "alia lex Romae alia Athens."[33] (emphasis added)

An apex court would not be a sufficient safeguard against the risk of conflict all by itself because appeals to it are initiated by litigants and it can only hear a finite number of those

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[30] The rules are sketched in *Midland Insurance Co v Smith* (1881) 6 QBD 561 at 568.

[31] For a rare example of a codified priority rule in England & Wales, see the Coroners and Justice Act 2009, Schedule 1, paragraph 2. This determines priority as between the criminal law and the (civil) coroner's jurisdiction for wrongful death cases.

[32] Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71(1) CLJ 86, 86-88.

[33] *Bursey v Bursey* (1960) 58 DLR (2d) 45, at 168. For a UK case treating these issues, see *Bank Mellat v Her Majesty's Treasurer (No. 3)* [2013] UKSC 38, [2014] AC 700.

petitions. The civil and criminal jurisdictions therefore must, at a minimum, adopt coordinating rules to supplement any coordinating institutions. The courts in both jurisdictions must abide by the content of the coordination rule adopted if they are to keep the benefits of coordination. This is a constraint which arises out of the need for coordination in the first place. The courts of one jurisdiction cannot disregard nor unilaterally alter the coordination rules without the risk of conflict recurring.

The effect of this constraint is to perpetuate a pattern of covariance. The courts of both jurisdictions are assisted by various coordination rules to avoid making findings of fact and/or law that are at odds with one another. Thanks to the timing rule, findings of fact which support legal rulings as to the allocation of property rights will usually be consistent. Similarly, making determinations on the basis of the very same norms will direct the decisionmaker toward a set of particular facts. For example, if two people correctly apply the same investitive rules, they will likely pick out the same proprietor as a matter of fact (though this is not guaranteed for the reasons discussed above). Imagine a rule of English law says the 'proprietor' is any first possessor in time. Anyone wishing to correctly apply this rule and discover the identity of the proprietor will investigate facts that reveal the first possessor in time. If a previous authority has already found such facts, a subsequent authority should concur if they wish to avoid the risk of norm conflict.

That is a very simplified example. Here are some real ones. There exist a number of cases where civil courts refuse to make orders that either put the addressee in breach of criminal law or that could encourage the addressee to breach the criminal law.[34] This should not be

[34] The latter formulation is from *Webb v Chief Constable of Merseyside Police* [2000] QB 427, 445: 'I would not... rule out the possibility that circumstances might arise where the court would refuse relief where to grant it would be "indirectly assisting or encouraging the plaintiff in his criminal act."'

surprising when we recall that civil and criminal courts maintain the same rule of recognition. Court orders express substantive rulings which can conflict with criminal law. A court's order will bind the parties in the proceedings at the very least. Further, depending on its content, the court order may create precedent that has an effect on the law itself. (Note that this is not the only explanation for courts' unwillingness to make such orders. The phenomenon of orders that put the addressee in breach of criminal law or encourage the addressee to breach the criminal law is taken up again in later chapters.)

Although most criminal law rules may not be *applicable* in a private law dispute, courts avoid creating norm conflicts in their disposal of proceedings because criminal law is recognised by civil courts as law. In *The Siben*, the court refused to transfer an illegal prostitution racket from one party to another or to recognise that the business had any monetary value that could result in an award of damages.[35] The Supreme Court has, in another case, endorsed that approach. It quoted with approval the sentiment that courts were not 'tribunal[s] for legalising wrongful acts' and noted that 'the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay.'[36] Civil courts recognise criminal wrongs even though they are not assigned powers to penalise such wrongs. They avoid using the powers they do have to create norm conflict. Civil courts avoid granting a remedy that permits a wrong to be continued where that would be contradictory of a criminal prohibition. Or, at least, that is what happens in cases that replicate the pattern of covariance. In later sections of this chapter, sections 4 and 5, we will look at cases that do not covary. However, before

[35] *Hughes v Clewley, The Siben* [1996] 1 Lloyd's Rep 35 (HC) 62, 65.

[36] *Coventry v Lawrence (No. 1)* [2014] UKSC 13, [2014] AC 822, [103] quoting *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 315-316.

that, the next subsection discusses a second risk inherent in concurrent jurisdiction – the risk of conflicting jurisdictional rules and practical dilemmas arising from jurisdictional rules.

3.3 ***Risk of conflict arising from jurisdictional rules***

Recall the thought experiment about Toytown above: new legislation specifies only that one jurisdiction adjudicates substantive rules relating to red blocks and the other adjudicates substantive rules relating to blue blocks. This legislation states a jurisdictional rule but leaves courts to work out the precise division of labour between them. This toy example has a historical counterpart in Scotland. The Scottish experience exhibits the risk of conflict when courts do not coordinate their interpretation of ambiguous jurisdictional rules. Recall that jurisdictional rules are those constitutive of a court's sphere of decision-making, defining that particular institution's authority. They are the powers, duties and permissions of law-creation and law-application designated to that institution

In the nineteenth and early twentieth centuries, the jurisdiction of the civil and criminal courts in the United Kingdom was the subject of numerous court decisions. Notably, in Scotland, there did not exist a single apex court of review but two distinct ones – one dealing with criminal and the other with civil appeals. The jurisdictional rule for Scotland stated that civil courts would review all 'proper civil' matters and criminal courts all 'proper criminal' ones. Thereafter, a series of cases attempted to interpret what was properly civil and what properly criminal. Each new distinction that was introduced itself

raised further ambiguities.[37] Law is made on appeal and decisions giving effect to vague laws are often appealed. The case law proliferated because of practical dilemmas faced by lawyers and judges. It was not clear to many lawyers where to file petitions or begin prosecutions. Judges were unsure whether to remit cases to another court for review, or to determine a case themselves (especially if there was overlapping competence). Needless to say, uncertainty in jurisdictional rules generates dysfunction within the legal system. This was not ameliorated in the Scottish case by having a single coordinating institution or authority. Without such institution or authority and under a vague jurisdictional rule, widespread confusion resulted.

The Scottish courts attempted better specification by dividing labour exclusively, and avoiding overlap where possible. We see a similar pattern in English & Welsh law where property and wrongdoing are concerned. The English rule on expropriation and double jeopardy is an example of a coordination rule adopted to avoid potential undesirable effects of civil and criminal courts' overlapping jurisdiction. Even though punishment is the province of the criminal courts, generally, I have argued in Chapter 2 that it is wrong-headed to be too insistent about the functions pursued by any particular area of law.

A case in point is the award of non-compensatory damages in private law. The position in England & Wales is that exemplary damages are available in a private law suit except where their award would constitute double jeopardy for the defendant due to prior confiscation proceedings in the criminal courts.[38] This is because exemplary damages

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[37] An outline is given in an anonymous contemporaneous comment in the Journal of Jurisprudence: 'Civil and Criminal Jurisdiction' (1858) 2 Journal of Jurisprudence 276. For similar uncertainty afflicting England and Wales, see the summary in Lindsay Farmer, 'The Obsession With Definition' (1996) 5 Social & Legal Studies 57, 64-65.

[38] *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197.

'punish and deter outrageous conduct on the part of a defendant',[39] even though punishment is usually meted out by criminal law. Exemplary damages were awarded, and pending confiscation proceedings adjourned, in the case of *Borders (UK) v Commissioner of Police*. That case concerned a street trader who had persistently and cynically stolen goods from eight bookshops and turned a profit on selling the books. *Borders* thus clarified the position in private law, whilst *R v Waya* confirmed that the criminal jurisdiction takes a consistent line. *Waya* confirmed that if, as a matter of restitution in private law, misappropriated monies has been returned to the victim, the criminal law will not make a confiscation order because to do so would be disproportionate punishment.[40]

Pace the *different functions* theorists, private and criminal law do not always pursue different functions. Sometimes they pursue very similar ones. How could it be otherwise when the two adjudicative jurisdictions have overlapping specification criteria? Both jurisdictions have powers to require wrongdoers to disgorge benefits. Reconciling the way the two jurisdictions carry out these functions is a practical necessity, because the same defendant is potentially subject to both adjudicative jurisdictions.

To summarise the discussion so far, I have argued that when two jurisdictions coexist and are specified by reference to criteria which are wholly or partly identical, their directives risk conflicting. Where two jurisdictions are specified by their competence to adjudicate on certain substantive laws, the risk is unavoidable. We saw from the examples of Toytown and historical Scotland that even strenuous attempts to specify jurisdictional

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[39] ibid., [43] and see also at [52].

[40] *R v Waya* [2012] UKSC 51, [2013] 1 AC 294, [28].

rules in such a way as to avoid overlap does not eliminate the need for coordination. There is then the potential for two types of practical dilemma. The first one arises for citizens subjected to contrary or contradictory substantive rules. Another type of practical dilemma afflicts mainly officials, and results from uncertainty as to the rules that determine jurisdiction itself. There is a practical necessity for legal systems to adopt rules that minimise the risk of such conflicts. These rules are coordination rules. In most cases, coordination rules constrain courts from departing from the coordination solution and/or unilaterally changing the rule. In this way, courts resolve disputes without creating norm conflict and/or practical dilemma. The effect is to replicate the pattern of covariance in cases involving property and wrongdoing.

4. Complications arising from concurrent jurisdiction

In this chapter, I have argued that courts make decisions in property and wrongdoing cases on the basis of a partially shared set of norms. They are equipped to apply those norms because the rules that constitute their jurisdiction are specified by reference to those norms. Applying the same norms does not ensure covariance, although it undoubtedly goes some way to explaining how the pattern arose. Even though it can result in consistency, independently applying the same norms gives rise to a risk of conflicting pronouncements. Furthermore, having jurisdictional criteria that partially overlap creates a risk of practical dilemmas too. In response to the risk, legal systems adopt coordination rules that act as constraints on courts' decision-making and thus minimise the risk of conflict.

All this explains the pattern of covariance, so far as it goes. However, the coordination constraints are loose ones. We see a number of cases that depart from the pattern of covariance despite the constraints. The latter half of this chapter considers complications for the pattern of covariance that arise from the exercise of concurrent jurisdiction. Our discussion highlighted the fact that modern municipal legal systems regulate behaviours in multiple ways. The English and Welsh legal system's jurisdiction over property and wrongdoing is overdetermined.

The reasons why we have more than one jurisdiction are many.[41] It is certainly plausible that one of those reasons is that the legal system can better realise certain purposes it has, when there are two jurisdictions.[42] The thought that I will pursue in this section is not that one, though. Mine starts from Raz's argument that legal systems claim to have authority to regulate any type of conduct. The more plural the powers of a legal system to regulate conduct, the stronger this claim to authority appears. Regulating property is a core function of legal systems. The judicial competence to regulate property is spread across two adjudicative jurisdictions. This puts the claim to have authority to regulate any aspect of social practice concerning property on firm footing. Both civil and criminal courts maintain the English & Welsh legal system's claim to have authority to regulate any type of behaviour relating to property. This fact, I will argue, generates complications for the pattern of covariance. Complications arise due to the peculiar institutional nature of a

[41] For some suggestions, see Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 OJLS 86, 89; Victor Tadros, *The Ends of Harm* (OUP 2011) 279.

[42] This is not, however, the *different functions* view. That view is objectionable only as a response to departures from the pattern of covariance. The more benign statement that law pursue different functions in general is not my target here. Tadros' and Ashworth's arguments (see n 41 above) do not yet give us cause to be sanguine about one part of the legal system pursuing a function that would *undermine* another part of the legal system, but I also do not know Ashworth's or Tadros' view on the *dependence* and *different functions* theses.

court, and its mandate to decide any case it is seised of. I will argue that neither jurisdiction embraces the prospect of reducing its authority over property disputes and that this has led to some departures from the pattern of covariance. That particular court's authority over the dispute can only be maintained by deviating from covariance. To see why, more exegesis is needed of Raz's argument that legal systems claim comprehensive practical authority.

4.1 *Legal systems claim comprehensive practical authority*

The jurisdiction of a legal institution is the sum of the norm-creating and/or norm-applying duties, powers and permissions of that institution. Dismissing a case for lack of jurisdiction is significant because it impacts a municipal legal system's claim to have comprehensive practical authority (or, at least, it impacts the perception of this claim). A 'claim to comprehensiveness', as I will call it by way of shorthand, is the claim made by municipal legal systems to have the authority to regulate any type of human behaviour.[43]

This subsection offers a friendly reconstruction of Raz's argument. It may not be faithful to Raz's own beliefs, but it will serve the purpose in this chapter. Raz argues that the claim to comprehensiveness is one of three features that distinguish municipal legal systems from other normative systems. It is thus necessary, says Raz, to our concept of a municipal legal system. His original argument, though I think it correct, is subject to objections which it is not possible to treat here.[44] The argument of this section is instead that the claim to

[43] Joseph Raz, 'The Institutional Nature of Law' in his *The Authority of Law* (Clarendon 1979) 116-120; Joseph Raz, *Practical Reason and Norms* (OUP 1999) 149-154.

[44] For example, Andrei Marmor says Raz overreaches in that that the claim to comprehensiveness is a feature of the modern state or political sovereignty rather than of law itself (*Positive Law and Objective Values* (OUP 2001) 40-43). Given that Marmor thinks law is a vehicle through which the modern state expresses

comprehensiveness is in fact made by the English & Welsh legal system – with no further assertions about any other legal system, real or hypothetical.

The version of the claim to comprehensiveness defended in this chapter, modified from Raz's formulation, is that *legal systems do not acknowledge any limitation on the types of behaviour*[45] *that they can regulate, unless the limitation is self-imposed*.[46] This formulation deserves some unpacking. Saying that legal systems do not acknowledge limitations avoids complications about exactly how this claim is made.[47] A legal system, in the right circumstances, need not make any explicit or specific claim about the extent of its jurisdiction. As Timothy Endicott notes, the claim is often made by implicature, as when a legislature passes legislation on the presupposition that it has an authority capacious enough to permit it to do so.[48] But, I would add, seldom do legal systems exist in the rarefied conditions that allow for absolute silence on their claim to comprehensiveness. Self-imposed limitations represent the comprehensiveness claim made partially explicit – we might see these in constitutions, for example. More to the point, the legal institutions that we are here concerned with, courts, inevitably face circumstances when they must

its claim to political sovereignty, and given that the explanandum of this thesis is English & Welsh municipal law, Marmor's critique of Raz does not affect this chapter. Further, the sense in which Marmor uses the term 'necessary' is different from the use made of it in this thesis. For him, 'the question is whether history notwithstanding, this link is necessary or not' (40). The course of history is not irrelevant to the analysis in this thesis, which asks what connections hold given things as they presently are.

[45] Note that Raz speaks interchangeably of 'spheres' and 'types' of 'human behaviour' or 'behaviour', and of 'norm-actions'. I take him to mean the same thing each time, and for there to be no particular significance attaching to any of these phrases.

[46] Raz, 'The Institutional Nature of Law' (n 43) 116; Raz, *Practical Reason and Norms* (n 43) 150.

[47] This question has generated a lot of literature in the context of law's claim to moral authority. See e.g. John Gardner, 'How Law Claims, What Law Claims' in his *Law as a Leap of Faith* (OUP 2012) and Luis Duarte D'Almeida & James Edwards, 'Some Claims About Law's Claims' (2014) 33 Law & Philosophy 725.

[48] The claim itself is a metonymy, as Endicott also points out in the same sentence. Endicott, 'Interpretation, Jurisdiction, and the Authority of Law' (n 7).

decide on the extent of their own jurisdiction. This is because their jurisdiction is specified by reference to substantive law, which is linguistically ambiguous. Thus vagueness about the extent of jurisdiction is inevitable.

It is also inevitable that courts are forced to confront it. A legal system cannot remain noncommittal on its claim to comprehensiveness for very long. This is due to the unique character of courts as a type of legal institution. Once a court is seised of a dispute, it must make an authoritative determination of the dispute in question. If it has no jurisdiction to adjudicate the dispute, then this issue of law must itself be resolved by the court. If a dispute is well-founded (i.e. it discloses a recognisable legal question), then it is unheard of for a court to disclaim jurisdiction itself and further be unable to identify any other court within the legal system that possessed the requisite adjudicative jurisdiction. To do so would be to abandon the claim to comprehensiveness. It would also be to abandon a type of authority that legal systems claim. Legal systems claim not only practical authority but also epistemic authority about the law of the legal system itself. Court judgments never read: 'we don't know'. Legal systems provide definitive statements of their subjects' legal obligations according to that system. This is a point that Matthew Dyson was quoted as making at the start of this chapter. He said:

> Something is a legal system because within its sphere of operation, it will answer every legal question, at least once it has been asked. Where there is an adjudicative function to the law, the process must culminate in resolution. A legal system could be thought the smallest unit within which there must always be an answer.[49]

[49] Dyson (n 3) 123.

Timothy Endicott has countered that legal systems need not claim that there are/not limits to their authority. He says legal systems are unspecific about the extent of their authority. Law claims the authority needed for its purposes and does not give a general statement of its purposes.[50] In a sense, this must be true, for even the most general statement of law's purposes that is at the same time informative faces a practical hurdle. The fullest specification of law's authority which it is even helpful to supply must come in excruciating detail. It is not obvious that the endeavour is worthwhile given the restrictions on time and resources that legal institutions face. (I note also, for the avoidance of doubt, that this chapter is concerned with *claims* to authority and not with justified authority, for which there must be limits.) Thus, while legislatures and constitutions can be noncommittal about their jurisdiction or purposes, a judge deciding a particular case does not have this luxury. The legal system overall is committed to a comprehensiveness claim, through its courts having to determine questions of jurisdiction that will inevitably arise given the persistence of a municipal legal system over enough time. Unlike constitutions and legislatures, courts cannot maintain a strategic silence forever.

The extent of a legal system's authority must be the authority of all of its legal institutions' jurisdictions put together. If a legal system assigns authority over X to A and to B concurrently (but to no other C) then that legal system's authority over X is the combined jurisdiction of A and B. Where property is concerned, then, a court renouncing even its own jurisdiction over something as minor as a single dispute is significant enough to impact the legal system's claim to comprehensiveness. This is especially the case where –

[50] Endicott, 'Interpretation, Jurisdiction, and the Authority of Law' (n 7), 19.

as in England & Wales – uncodified rules about jurisdiction make reference to substantive laws about property, and where the comprehensiveness claim is made by implicature.

We are here concerned with *claims* to authority rather than realities, so impressions are important. It must be remembered that the claim to have comprehensive practical authority does not necessarily correspond to the legal system's *de facto* or justified authority. But claims and appearances are important. To have authority, one must above all be effective. This makes perception important. Furthermore, legal authorities must assure even law-abiding people of their efficacy, to say nothing of 'bad men'.[51] A disclaimer by private law or criminal law courts over a type of behaviour relating to property, together with courts' legal incompetence to endow another legal institution with their own disclaimed duties/powers/permissions, means relinquishing authority that the legal system would otherwise claim. Even if that same type of behaviour is still subject to an authority claim by the remaining adjudicative jurisdiction, the impression given is of deregulation.

The above sketch of how the claim to comprehensiveness is maintained, and of its driving forces, is very abstract. In order to make this somewhat theoretical discussion vivid, the section below provides two case-studies.

4.2 *Claiming comprehensive practical authority*

[51] Joseph Raz, 'The Obligation to Obey: Revision and Tradition' in his *Ethics in the Public Domain* (OUP 1994) 344.

As a corollary of their claim to comprehensiveness, legal systems have a tendency to aggrandise disputes to themselves. Two illustrations will here be provided of the English & Welsh legal system co-opting a dispute concerning property and wrongdoing. The illustrations are instances of courts monopolising disputes and thus wresting jurisdiction from individuals over their own property-related conflicts. They are not illustrations of a legal system claiming supremacy over any other normative system. Although Raz argues legal systems do claim such supremacy, and that this is entailed by the comprehensiveness claim, I will not examine those additional arguments. These illustrations do not involve any contestation with a different normative system.

The first example is from cases of wrongful mixture – cases where a defendant impermissibly mingles the claimant's property with her own. The resultant mixture is co-owned between them as a matter of law, a remedy that the High Court long deliberated upon before settling on it.[52] Self-help is ruled out unless the innocent proprietor wants to risk committing trespass to the mixture, so it seems the victim must rely either on the wrongdoer or the court to extract and deliver his share to him if he wants to divide the mixture. Of the two options, it is likely he would rely on the court (and/or the potential for legal action to persuade the wrongdoer), channelling wrongful mixture cases into law. The second example also involves law monopolising remedial activity in property disputes. The Tribunals, Courts and Enforcement Act 2007 abolishes self-help involving taking goods in another's possession (except to pay off a debt).[53]

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[52] *Indian Oil Corporation v Greenstone Shipping (The Ypatianna)* [1988] QB 345, 371.

[53] By a combination of section 65 and Schedule 12.

These are two examples, decisions by a court and a legislature respectively, of the legal system taking disputes out of the hands of law's subjects and claiming the authority to resolve them for the legal system instead. These illustrations are intended to show the comprehensiveness claim being made by implicature in the determination of property disputes. They show the English & Welsh legal system resisting (real or perceived) threats to its comprehensiveness claim by claiming jurisdiction from legal subjects. In the next section, some more difficult cases are examined. They involve departures from the pattern of covariance motivated by the legal system's claim to comprehensive practical authority.

4.3 *Departures from covariance due to the comprehensiveness claim*

Chapter 3 promised an explanation of some difficult cases that we encountered, like the one about bootleg whiskey raised by Stuart Green: *People v Otis.*[54] Green himself seemed to believe that a *mutatis mutandis* approach was the only way of explaining how a court could convict someone of stealing bootleg whisky when there existed a statute saying 'no property rights shall exist' in the contraband. My suggestion will be that maintaining law's claim to comprehensive authority explains cases such as *Otis* and *R v Smith*. *Smith* is another contraband case, involving a conviction for stealing prohibited drugs from a dealer. The instinct of a court is to interpret its jurisdiction as encompassing a case if dismissing it for lack of jurisdiction would undermine law's claim to comprehensiveness. Acquitting defendants like Otis and Smith would be relinquishing some of the court's jurisdiction over black markets in contraband, even though the law deplores the existence of such markets in the first place. As Bingham LJ said in *Saunders v Edwards*, a court must

[54] 235 NY 421 (1923) (New York Court of Appeals).

> steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirt and refuse all assistance.[55]

Of course, courts would still have jurisdiction to convict for possessing or dealing contraband, but they would have decried their jurisdiction in relation to property offences involving items that have a black-market value (even if that value is not legitimate in the eyes of the law). Self-restraint is, of course, compatible with the claim to comprehensiveness but, in each case, it is a matter of whether this is (perceived as) a true case of self-limitation or whether criminals have found 'a loophole'.[56] This is not to say that Otis and Smith were justly convicted. Explanation is not justification. In both cases, two different sorts of consideration were at play. One was the constraints and guarantees that usually result in covariance. The other was the pull of the claim to comprehensive practical authority.

This difficulty was recognised by the court in *Parker v British Airways.*[57] *Parker* considered the tricky position of a person who finds property while they are trespassing i.e.

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[55] *Saunders v Edwards* [1987] 1 WLR 1116, 1134 per Bingham LJ.

[56] When it comes to concrete cases, there is likely to be reasonable disagreement about how to analyse each one. Does any particular example count as a clear case of a legal system abandoning the comprehensiveness claim? In such debates, an interlocutor would be anxious to know exactly how Raz and I individuate 'types of behaviour' in the formulation defended above. In such a debate, Raz could also insist that any particular example was in fact the legal system self-limiting or an acceptable strategic silence (although the plausibility of that response would depend on the constitutional authority of the legal actor relinquishing jurisdiction to make an ultimate legal rule). If the limitation of authority is contingent and subject to revocation, it is more likely to be a case of legal self-restraint. If, on the other hand, the law seems to have been backed into a corner, then the limitation is likely to be imposed from the outside (or, at least, perceived that way).

[57] [1982] QB 1004.

committing a private law wrong. The court wondered whether such a wrongdoer obtained any rights to the found object at all. There were grounds for thinking the trespasser got no rights whatever, especially because of the maxim that wrongdoers should not benefit from their wrongdoing. Granting the trespasser rights in the property would therefore be undesirable, not least for the incentive it represented. However, equally undesirable was 'a free-for-all situation... in [which] anyone could take the article from the trespassing finder.'[58] Similar judicial worries could exist about a free-for-all in contraband. We see here the court's instinct for absorbing property conflicts into the legal system, rather than letting them remain outside it. The court in *Parker* alighted on a resolution to this problem by giving rights in the found property to the occupier of the land whom the trespasser was wronging. Because the court understood that it had to reconcile competing considerations, it came to a solution that allocated the property in a way that it was satisfied was consistent with its deprecation of trespass as wrong.

It is possible some similarly elegant solution could also be found for contraband cases – a solution that does not depart from the pattern of covariance. In England & Wales, there is no coordinating legal institution whose purpose is to maintain the comprehensiveness claim alongside the internal consistency of property doctrine specifically. If such a body existed, it could (for example) initiate confiscation proceedings before any private party could sue the police for the return of seized contraband or stolen goods. (This suggestion was made by May LJ in *Webb v Chief Constable of Merseyside Police.*[59]) Precedents like *Otis* exist because the comprehensiveness claim is maintained by the peculiar institution that is a court. Courts deal in particular cases on particular facts and must resolve every dispute

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[58] ibid., 1009.

[59] [2000] QB 427, 446-447.

they are properly seised of. Saying *law* makes claims (figuratively speaking) is not to say that judges intend, or even are necessarily aware of, their part in making claims on law's behalf. Courts may be swayed by considerations that are obscure to them, but which can be illuminated by legal philosophy. In the absence of a coordinating authority, law's impetus toward comprehensiveness (especially in suits initiated at the behest of private persons) has led to some breakages from the pattern of covariance.

We discussed contraband and trespassing finders above, but stolen goods raise similar problems. All three are situations where there is a possibility of a legal vacuum, or unregulated zone, if jurisdiction is declined because a court disapproves of the activity concerned. Consider a case like *Costello v Chief Constable of Derbyshire Constabulary*, where a suspected stolen car was returned to its dubious dealer.[60] The Court of Appeal held that the expiry of the police's statutory power to retain things meant that the claimant could take back the car. It did not reserve that remedy to a true owner. Rather, it found that a thief had a 'possessory title' which, while 'frail and likely of limited value' would be good against anyone except someone who held a better title. It is noteworthy that the court in *Costello* was conscious of the risk of conflicting pronouncements. It made a point of reassuring itself that it was not bringing about a result that would be inconsistent with criminal law. It said, 'This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he has himself stolen.'[61]

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[60] [2001] EWCA Civ 381; [2001] 1 WLR 1437.

[61] ibid., [31].

You might think that *Costello* raises no covariance problems, therefore. However, the case is interesting because the court was aware that law's claim to comprehensive practical authority might compromise law's claim to moral authority. (Law's claim to moral authority is discussed more fully in Chapter 6.) The Court of Appeal said:

> There are authorities... which reveal a natural moral disinclination (on occasion expressed in terms of public policy) to recognise the entitlement of a thief, receiver or other wrongdoer to the protection by the law of his possession, and one decision... refusing such protection.'[62]

As the dictum indicates, it was by no means clear before *Costello* that private and criminal law do covary on this point. In the penultimate section of this chapter, I will expand on the disquiet felt by courts at recognising the entitlement of a thief to the protection of the law. Regardless of the result in *Costello* itself, I think this intuition gestures at some of the reasons why departures from covariance might be thought pernicious. These reasons are taken up in the final chapter.

5. Problematising deviations from covariance

This section provides one perspective on why cases that do not covary may appear pernicious. In so doing, it also responds to views like functionalism which are untroubled by departures from covariance. I anticipate that the arguments in this chapter would largely pass unremarked upon by theorists of the *dependence*, *building block* and *mutatis mutandis* persuasions. A distinct domainer would resist the argument that rules specifying the remit of the two adjudicative jurisdictions share criteria that refer to partly identical

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[62] ibid., [31].

substantive rules. This is because the greater the overlap in criteria, the less distinctive the two domains. However, so much the worse for the *distinct domain* theory, as a descriptive matter, if it cannot account for concurrent jurisdiction. The *functions* theorists have their riposte to non-covarying cases like *Otis* and *Smith*, which is that private and criminal law pursue different functions. This sounds convenient but is unsatisfactory.

This chapter has begun to make a case as to why that may be. Law claims practical authority. Where private and criminal law provide divergent guidance to legal subjects, whether explicitly through posited legal directives or through the implications and incentives that can be derived from those directives, it may place people in practical dilemmas. Now, it may be thought that this is not catastrophic so long as people can practically reason and have the option to avoid coercion or force. Those people may experience discomfort, but law is not alone in creating practical dilemmas. However, this sanguinity is unwarranted. I want to suggest that it is troubling when law, specifically, puts people in practical dilemmas. And further, that it is particularly troubling when *property* law does so. This requires me to sketch some commitments that I will not defend here but, to the extent that any functionalists share them, they have reason for disquiet about their response to the puzzle investigated in this thesis. (These commitments are elaborated upon in the final chapter.)

Take *Costello,* the stolen vehicle case above. On the face of it, *Costello* poses no covariance puzzles. Yet the court was sensible of a 'natural moral disinclination' to return the car to the plaintiff. Why? The prohibition against theft exists in a legal system alongside a private law that permits a thief to sue for the return of stolen goods. This stance, as we have said, has the advantage that courts need not refuse jurisdiction over suits to restore stolen goods.

There is no conflict of mandatory norms here: there is a legal power to acquire at private law but no permission to exercise it due to criminal law. (Similarly with adverse possession. The officials in *R (Best) v Chief Land Registrar*[63] grappled with exactly this problem, and it cannot be dismissed as easy.) It all has to do with law's claims to authority and the normal justification[64] for having authority.

If you believe – as those influenced by Joseph Raz do – that law should compel people to conform to reasons only when they would better comply with the reasons that otherwise apply to them following law's intervention,[65] then you can see why this situation is undesirable. It is undesirable for the legal system to judge on the one hand that people are better off being compelled to refrain from stealing cars (at criminal law), but on the other hand permitting the pursuit of the banned behaviour at private law. Putting the stolen goods into a thief's hands is to assist in bringing about a result condemned by the prohibition on theft, even though the court concedes a thief's title is frail. The judgement that people ought to be compelled is undermined if made inconsistently by different areas of law. If you have a service conception of authority, as Raz does, it is difficult to see how an authority is providing a service at all when it places its subjects in a situation of norm conflict. Usually, therefore, a court will balk at bringing about or encouraging by court order a state of affairs that is contrary to the criminal law.

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[63] [2015] EWCA Civ 17; [2016] QB 23.

[64] It is my belief that, as an empirical matter, many of law's subjects believe something like the normal justification thesis. I have no empirical backing for this view. However, it is not uncommon to see humorous-because-accurate bumper stickers saying things like, 'I always follow orders except when they are stupid'. This gives a layman's sense that the speaker is applying the normal justification thesis to an epistemic authority.

[65] Raz, 'Authority, Law and Morality' in his *Ethics in the Public Domain* (n 51) and Raz, *The Morality of Freedom* (Clarendon 1986), 70-80.

I make these points here because, as I said in Chapter 2, my contention is that functionalism is no response to the puzzle in this thesis. Certainly it is no *justificatory* response, in my view. Of course, the brief remarks in this section do not negate every variation on a functionalist position, and it may be there are justificatory strategies open to a functionalist which I have not anticipated. After all, this is only the *normal* way to establish justification according to one influential philosopher, not the sole way. Indeed, Raz has made some suggestions for those facing norm conflict. 'The question is whether the relative merits of the background reasons, those for and against each of the rules, count in the correct determination of each such conflict.'[66] However, this does not help to show how the law is providing a service. Furthermore, it is concerning if you share certain commitments about property law.

In brief, those commitments are as follows: people have difficulty accessing background reasons concerning how they ought to behave around things in the absence of law. In my view, the background reasons relating to property are indeterminate without the existence of law, even where there exist conventional practices or non-legal social rules. The point made by Tony Honoré is apt here. Law sometimes makes morality more determinate.[67] Where property law is concerned, then, the failure of law to provide practical authority is especially worrying.[68] All the more so when we recall that law channels property disputes away from self-help mechanisms in its maintenance of the comprehensiveness claim yet

[66] Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' in his *Between Authority and Interpretation* (OUP 2009) 143.

[67] Tony Honoré, 'The Dependence of Morality on Law' (1993) 13 OJLS 1.

[68] It might be the *different functions* theorist's view that a legal system pursues these various functions because all are valuable and it is not possible to prioritise any single one. If so, then it is hard to imagine how one of law's subjects can easily carry out the task of prioritisation for themselves. This may mean we are in a situation of moral tragedy, as Joseph William Singer moots, discussed further in Chapter 7 at subsection 4.2.2.

leaves its subjects to avoid or resolve norm conflicts it has created. Furthermore, property allocations bind third parties and thus affect more subjects than the single person fixed by the practical dilemma. All this suggests that covariance has particular salience for the property regime.

Raz further notes that authorities may adopt cooperative relations or hostile relations with one another. Two adjudicative jurisdictions do not have the option of hostile relations, as they maintain the same rule of recognition. This is why the two jurisdictions adopt coordination rules and why judges avoid making court orders that cause or encourage breaches of the law. This is also the reason for the embarrassment of the legal officials in *Best*. The Chief Land Registrar could gainsay neither private law nor criminal law. Nor could the court. But the court was obligated to find an 'answer' to the legal 'question' of what the Registrar ought to do in his practical dilemma. As I hope this section has shown, legal systems have an interest in avoiding this kind of norm conflict, and it is far from irrational for them to maintain their many mechanisms for the avoidance and resolution of norm conflict.

6. Conclusion

The laws of property are interwoven into both the criminal and civil jurisdictions. This chapter has proposed two factors that contribute to explaining the incidence of the pattern of covariance, and a third observation that explains certain departures from the pattern in black market cases (i.e. cases of contraband and stolen goods, or in any other situation where there is the threat of a legal vacuum if law maintains its claim to moral authority and disdains jurisdiction on that basis).

The first claim was that civil and criminal courts make decisions in legal disputes over property by applying a set of norms that is partially shared between them and partially unique to each jurisdiction. The second claim was that civil and criminal courts are constrained by coordinating rules and authorities which assist them to avoid norm conflict. The effect of this constraint is to perpetuate a pattern of covariance. The courts of both jurisdictions are assisted to avoid making inconsistent findings of fact and/or law. Coordination rules and the desideratum of avoiding norm conflict also result in consistent interpretations of the jurisdictional rules that define the authority of civil and criminal courts over property.

These two claims contribute to our explanation of the pattern of covariance. The third claim was about cases that depart from the pattern. In certain cases, courts are reluctant to decline jurisdiction due to the legal system's claim to have comprehensive practical authority. Courts, unlike constitutions and legislatures, cannot simply maintain strategic silences about the claim to comprehensiveness. The consequence is that some cases involving stolen or banned goods depart from the pattern of covariance. However, this claim to have comprehensive practical authority comes at the cost of law's claim to legitimate authority. These points will be taken up again in Chapters 6 and 7. Before that, the next chapter examines how the property right is shaped by norms issuing from both private and criminal law.

Chapter 5 – Ownership

1. Introduction

So far the discussion has largely been on investitive and divestitive laws – that is, the rules on allocation of property interests. Alongside allocative rules, said Raz, a property regime will also contain constitutive rules that specify the consequences of being a right-holder, together with rules that define the objects of rights.[1] This chapter discusses the rules constitutive of ownership, which is a paradigmatic property interest. Toward the end of the chapter, I touch on *property-as-thing* – that is, the items in the world which are capable of being the object of a property interest at law. My interest is in the *Bowmakers* doctrine, which (on one interpretation, at least) provides that some articles are not *property-as-thing* when they are unlawful to deal in. The *Bowmakers* discussion is continued into the next chapter as well.

The previous chapter pointed out that there is concurrent jurisdiction over property in private law and in criminal law. Few theorists discuss the criminal law in their accounts of private property, and even fewer foreground it. Yet without criminal law, the private property right as we know it would be unrecognisable. The focus of this chapter will be on the contribution of criminal law duties to the property right or ownership (I will use the two terms interchangeably). The role of criminal law stands in greater need of articulation than private law. Among the few theorists who give attention to criminal law within their

[1] Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon 1980) 176, quoted in Chapter 1 at section 3. Constitutive laws specify the consequences of being a right-holder, says Raz. Because these laws are fairly determinate as a doctrinal matter, they have not been the focus of the thesis project to the same extent as allocative and rights-object rules.

accounts of ownership are Tony Honoré and James Penner. Their accounts are examined for what they reveal about what criminal law adds to private law's regulation of property. Evidently, two theorists do not by themselves manage to say all that can be said about this topic.[2] However, a synthesis of the most convincing parts of their work yields two claims that this chapter will defend. The first claim is a guarantee. It is that criminal law duties on non-owners guarantee the owner's right to security of possession of their property (section 3). The second claim is one of constraint. It is that criminal law duties on owners are a constraint on their freedom to use things (section 4).

Stated this way, these two claims could seem quite familiar and trite. The impression of triteness may be because of a misunderstanding that I wish to preclude first of all. It may appear that my talk of 'guaranteeing security of possession' and 'constraining freedom' refers to the influence that laws actually have on conduct, an influence that is observable through empirical study of behaviour in England & Wales. However, that is not what is meant here. Guarantees and constraints are influences on judicial decision-making, as Chapter 1 established. The claim of this chapter is that judges treat the criminal law duties of owners and non-owners as giving them real reasons for action. Judges do this because the contribution of criminal law to the property regime is that it helps secure the benefits of that coordination scheme. So the claim is not that criminal law duties have their desired effect on the conduct of law's subjects – they may or may not; it is an empirical question – but that judges must apply these duties in court cases as if they gave law's subjects valid reasons for action. Far from being trite, the claims are interesting for the light they shed

[2] For some more general suggestions about why there are two areas of law governing property, suggestions that are not limited to a discussion of the concept of ownership, see Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 OJLS 86, 89; Victor Tadros, *The Ends of Harm* (OUP 2011) 279.

on cases that deviate from the pattern of covariance. These cases 'look odd'[3] to us, as Sir John Smith said, because judges are not influenced in the way we expect. This chapter throws up more puzzles than it resolves, as might be expected in a subject so enormous and contested as ownership. For that reason, Chapter 6 continues some of the discussion here.

I would not wish this chapter's emphasis to obscure my overall stance that both areas of law are needed to define legal relations between owners and non-owners. My own view is that both private and criminal law are necessary for a full specification of the legal relations that constitute ownership. However, the contribution of private law to a private property regime is much less contentious and therefore not worth stressing. Most authors take it so much for granted that ownership is the province of private law that no other kinds of laws are ever discussed. (Indeed, this arrangement of the legal taxonomy has been assumed throughout this thesis so as to meet sceptics on their own terms.) It seems obvious for various reasons. One is that the civil jurisdiction deals with the bulk of litigation that is paradigmatically thought to concern property including conveyancing, wills & probate, commercial leases, residential landlord & tenant disputes, land registration, issues affecting agricultural land, and so on. In England & Wales, there is a specialist property tribunal that hears these matters which exists alongside the High Court. Another reason that ownership may seem obviously to be in the domain of private law is that many of the rights, liberties, powers and permissions which owners enjoy issue from private law. To the extent that a reader demands more explanation of the intuition that ownership is expounded mainly in private law, it is inherent in both Penner and Honoré's accounts,

[3] JC Smith, 'Civil Concepts in the Criminal Law' (1972) 31(1) CLJ 197, 216.

discussed below. (The previous two chapters go some way to establishing this also, given that they discuss the contribution of both private and criminal law to property.)

This much is common ground between James Penner and Tony Honoré, even though they are associated with different camps of property law scholarship. While Honoré is associated with the 'bundle' picture of property and Penner with an 'essentialist' view, that debate is orthogonal to the concerns of the present chapter. Their specific points of agreement and disagreement as concern this chapter do not relate to their characterisation (correctly or otherwise) as essentialist or bundle theorists. On either of their views, criminal law is necessary for a full specification of ownership. The sections below consider the extent to which either author gives a theoretical account of the role of criminal law, as distinct from discussing criminal law merely because England & Wales happens to institute concurrent jurisdiction over property.

The locution of 'full specification' is intended to gloss the different ways in which each author arrives at his account. Honoré says the property right comprises eleven incidents, not all of which need to be present in any particular instance of an ownership relation between person and thing. Penner's description of an owner's rights, powers (etc) corresponds with Honoré's incidents but by a process of derivation from a central right to use things. (In his more recent scholarship, Penner emphasises the process of derivation rather more. He prefers to speak of ownership having a 'tripartite' structure – namely the right to immediate exclusive possession, powers of transfer and powers to permit what would otherwise be trespass.[4] Nevertheless, he insists that this is consistent with his earlier

[4] James Penner, *Property Rights: A Re-Examination* (OUP 2020) 13, 14.

account and is merely a change of emphasis.[5] Given that Penner refers to his own earlier work in his most recent work, I take what he says more recently to be developing rather than recanting his earlier work. Where Penner specifically departs from earlier views, I will note this.) One could talk of Penner's account just in terms of that central right, and/or one could say with Honoré that not all his incidents are necessary to any particular individual-to-thing relation. I speak of 'full specification' because a more minimal summary of either author's view could be given without reference to criminal law, but criminal law should be mentioned in order to do justice to their full account.

2. The property regime is a coordination scheme

Here are some propositions that I do indeed think are trite. However, they motivate the two claims that follow about influences on judges' reasoning. Human beings find ourselves in conditions of resource scarcity, particularly in late modernity with a rising population and depleted natural resources. We need things in order to sustain life, and in order to lead flourishing lives. These facts give rise to a coordination problem that legal systems resolve using their authority to allocate resources among us.[6] The property regime in England & Wales represents a solution to a coordination problem. In order to retain the benefits of this solution, law's subjects must abide by the allocations it makes. Some will not do so. When these detractors are brought before a court, judges must treat the duties breached as having given the detractor valid reasons for action. If judges do not, the benefits of the coordination solution may well be lost.

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[5] ibid., 27.

[6] See e.g. Henry E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, 1725.

Courts have sometimes had to expressly reiterate to recalcitrant defendants:

> There are no privileged classes to whom [the law] does not apply. […] It is sometimes said […] that all are free to break the law if they are prepared to pay the penalty. This is pernicious nonsense. The right to disobey the law is not obtainable by the payment of a penalty or licence fee. It is not obtainable at all…[7]

The dictum's discussion of payment to disobey the law hints at one way in which criminal law has an important role to play in securing the benefits of coordination. Certain features of private law result in its having lesser expressive effect and lower potential for deterrence than criminal law. The following features are typical of private law, even while they are not inevitable. The first feature is the plaintiff's right to damages as a default remedy, meaning that private law awards are frequently monetary. Another typical feature of private litigation is that insurers often conduct the litigation on behalf of the parties, with variable input from their insured. This severs the personal connection between the actor whose conduct is the subject of litigation and the outcomes in the litigation itself.[8]The third typical feature of private law is that the state has no special standing as a party in civil cases, whereas it is unique in having a privileged position as prosecutor in criminal cases. These three features mean that the expressive effect of private law duties is muted by comparison with criminal laws. Criminal sanctions have greater potential for specific and general deterrence precisely because they do not share these three features which are typical of private law.

[7] *Francome v Mirror Group Newspapers* [1984] 1 WLR 892, 897 (CA).

[8] I have phrased the thought in this way because I acknowledge that the influence of insurance in tort claims is not straightforward. In particular, the relationship between insurance and personal responsibility is sensitive to context and generalisations must be made with caution: Rob Merkin and Jenny Steele, 'Policing Tort and Crime with the MIB: Remedies, Penalties and the Duty to Insure' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 25.

Regardless of actual levels of conformity (on which I have no knowledge), the legal system itself is not disinterested in which of its laws are criminal. This is because law's normative guidance is intended to be general. It should not be variable, depending on the subject's own desires and their ability to pay for the realisation of these. Although the court here focused on wealthy agents, there might also be equivalent concerns about poverty in an imaginary legal system that replaced its criminal laws with private law. Even the present legal system knows unsecured creditors of a debt. People who lack the means to satisfy a damages claim are often *de facto* immune from suit, and a legal system that relied entirely on private law duties would have problems not only with the impunity of the rich but also with judgment debts that are effectively unenforceable. Criminalising a behaviour ensures that the expressive effect of that duty is both general and loud.

The reason that law's normative guidance may become particularised to individual agents, rather than generalised, in the absence of criminal law is because private law's main enforcement mechanism (money damages) is internal to the property system. It is no curb on owners' authority because it relies on the distributive rules of the property regime itself.[9] Payment of damages is not an enforcement measure that takes us outwith the influence of a proprietors' existing zone of authority. An effective legal system must somehow retain the superior authority to ensure the orderly operation of the very regime which grants

[9] An interlocutor might object that my argument only tends to show why there should be more non-monetary civil remedies or criminalisation of more behaviours. My response is that there are lots of reasons to avoid overcriminalisation and to limit the availability remedies of specific performance. The countervailing reasons include respect for subjects' autonomy and the inability of legal systems to supervise specific performance. This is by no means an exhaustive discussion of countervailing reasons. It is only to say that the focus of my discussion is on one single interest that the legal system has – namely, retaining the superior authority to ensure the orderly operation of the very regime which grants owners authority. The legal system will have other interests, against overcriminalisation (for example), that fall outside the scope of this argument.

owners authority. In order to do so, it is reliant on a kind of authority that it reserves to itself. Within state legal systems, the state monopolises lawful force, including the power to impose or levy coercive sanctions or penalties.

The existence of criminal duties helps avoid a conflict of authority between owners and the legal system itself. Criminal law duties serve as priority rules, making clear to the agent what the balance of reasons that apply to them is, and which considerations are excluded by the existence of the duty. An owner must decide what to do in light of various normative entities that apply to her – duties, powers, permissions – that emanate from different parts of law, both civil and criminal. The different sources of these laws means that some kind of priority must be set between them if the law is to effectively guide millions of people carrying out mundane activities involving things. So commonplace are these types of activities, and so low is the scope for individual recourse to official determinations of what the subject ought to do, that the guidance must be incredibly clear. Criminal laws serve as unambiguous priority rules. Criminal laws which comply with rule-of-law ideals will be stable and carry fair warning, as well as disincentivising nonconformity because of their coercive sanctions. It does not take a legal expert to conclude that they take priority over other normative entities emanating from other parts of law.

All this may indeed be trite, and it would not deserve the emphasis that I am giving it were it not for an objection from the *distinct domain* tradition. That tradition, recall, holds that the laws governing the objects and allocation of property interests in private and criminal law are not identical, whatever else they may be. Some distinct domainers would resist the portrait I painted above about how criminal law figures in practical reason. Their objection

would run as follows:[10] criminal law regulates the relations between the state and its citizens whereas private law regulates the bipolar relation between citizens who are one another's equals. Such an interlocutor would perceive criminal prohibitions as relevant only against the state, so that restrictions on the way one deals with one's things do not properly form part of the private property right. The practical upshot of this view is that one's property rights are differently enforceable against other individuals as against the state.

To illustrate, were I to bring a civil suit to recover possession of some item that was banned (say, a gun for which I had no license) then a court should grant my suit if it was brought against a private individual. According to a distinct domainer, my disentitlement to a gun at criminal law is irrelevant to the legal relations between myself and another citizen. However, the objection goes, things are different were I seeking to recover my gun from the police, as the police represent an arm of the state. Many of the cases we encountered in previous chapters (e.g. *Webb*, *Costello*) are suits against the police. Actions for recovery of goods from the police seems to be the main occasion on which unlawful things emerge from the murky underworld into the full-frontal gaze of the courts. For this reason, the *distinct domain* thesis is opposed to my assumption that the *Bowmakers* doctrine extends to lawsuits between private citizens.

It is in response to this objection that I labour the points here. Criminal law duties are not only relevant vis-à-vis state actors. They are relevant to litigation against parties generally because they help secure the benefits of the coordination scheme that the property regime represents. If the law has set up a coordination scheme in relation to property, that scheme

[10] I am grateful to Simon Douglas for suggesting the line of reasoning in this paragraph.

must coordinate *action* in order to be effective. Sufficient number of people must take the law to give valid reasons for the mandated action, instead of seeing it as simply imposing (monetary) liability when it comes across defectors from the scheme. What can the law do about this, other than to pass the requisite criminal laws? Judges must apply these duties in court cases as if they gave law's subjects valid reasons for action.[11] The claims defended in this chapter are that criminal law duties on owners and on non-owners influence judicial reasoning by predetermining or ruling out certain avenues for deciding a case. Criminal law duties influence the pattern of covariance because judges must apply them as if they give true reasons for action. This no longer sounds so trite.

3. Duties on non-owners guarantee the owner's right to security of property

We turn now to establish the first main claim of this chapter, which is that duties on non-owners influence judicial decisions by predetermining the salient consideration for the judge, which relates to an owner's security of possession. If correctly applied by the judge, a duty on a non-owner not to damage or steal will result in an outcome that protects the owner's security of possession wherever that duty is breached. This does not mean such criminal duties are *owed* to owners. The claim is instead that the owner's security of possession predetermines the outcome of the case by providing an overriding consideration above any other considerations a judge may have in mind, including maximising utility or the like. Predetermining the outcome of a judge's deliberation preserves the benefits of the coordination solution instituted by the legal system.

[11] Joseph Raz argues that for a legal system to be in force, it is necessary that judges should act on the view that laws are valid reasons for action: Raz, *Practical Reason and Norms* (OUP 1975) 171. As England & Wales is a legal system in force, I take it that judges do so act.

It is constitutive of the status of owner that a person benefits from this sort of protection. The pattern of covariance is usually maintained because allocative rules pick out the same person as beneficiary of the protection of law, whether in private law or criminal law – *Hinks* being an example of where things unusually went awry in this regard. *Best*, the case of adverse possession contrary to criminal law, is a particularly complicated departure from covariance and I do not discuss adverse possession in this chapter except to briefly mention what Honoré says about it. (Needless to say, this section will indicate one reason why adverse possession is paradoxical but it will not discuss any other dimension of that complex puzzle.)

The claim in this section is arrived at by drawing on Tony Honoré's scholarship after examining James Penner's. Penner believes that duties on non-owners guarantee an owner's interest in the *use* of their property.[12] Is it fair to modify the claims of a property essentialist with reference to those of a bundle theorist? I think so. There are many different stripes of 'bundle' and 'essentialist' scholar, and these are not always helpful labels. Tony Honoré's account of ownership has much in common with Penner's, and indeed Penner himself took inspiration from parts of Honoré's work. Honoré's subject-matter is similar to Penner's. Penner was interested in the 'idea of property' or the claim of right in 'having property' (among other things, perhaps).[13] Honoré's subject was the concept of ownership.

[12] Penner, *Property Rights* (n 4) 10, 27. In Penner's more recent writings, he says there is an internal justificatory relationship between our interest in use and the exclusion of others by law. For instrumentalist reasons to do with its inability to directly protect use, law instantiates duties on others to exclude themselves: Penner, *Property Rights* (n 4) 197-198. He is concerned that he sometimes elided the justification of the right with its formal structure in his earlier work (ibid., 141 at his footnote 8).

[13] James Penner, *The Idea of Property in Law* (OUP 1997) 72; Penner, *Property Rights* (n 4) 201 refers to a 'theory' of property and a concern with the 'structure' of title or ownership. However, as Stephen Munzer points out, Penner 'oscillates' in his description of the subject-matter of his inquiry. In addition to talk of 'having property' and 'the idea [or concept] of property in law', Munzer lists three further ways in which Penner describes his thesis: Stephen R Munzer, 'Property and Disagreement' in James Penner and Henry

It was thus a conceptual inquiry, like the 'idea of property' in Penner. Honoré's was a conceptual inquiry into *ownership*, often referred to as 'having property' in ordinary speech – presumably this was also what Penner intended by it. Like Penner, Honoré's concern is as much with legal systems as it is with property. Honoré noticed the commonalities between various legal systems that recognise what he called 'full liberal ownership', and provided a paradigm through which to assess their similarities and differences. He was highly sensitive to the relationship between the general and the particular, and so there is a second level of analysis to his paper. As well as the concept of ownership in general, as instantiated in any given legal system, Honoré discussed the conditions under which particular individual-to-thing relations would constitute ownership at law. However, unlike Penner, he made no commitments to the scope of property law as a category. To use the terminology introduced in Chapter 1, both Penner and Honoré give accounts of *property-as-legal-relations* but only Penner gives an account of *property-as-taxonomy*.

They also differ in the emphasis they place on the legal relations that comprise their accounts. While Penner is mainly concerned with the duties of non-owners, Honoré is intent on keeping in sight the duties of the owner herself. He emphasises that property owners are 'subject to characteristic prohibitions and limitations'[14] as a corrective to accounts of private property that focus on the rights and liberties of property-holders. He stresses that duties (as well as liabilities) form part of the compound concept of ownership.

Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 294. Honoré's study therefore overlaps with Penner's, at least partially. Honoré does also discuss proprietary interests or 'lesser interests' but they do not dominate his discussion: AM Honoré, 'Ownership' in his *Making Law Bind* (OUP 1987) 176-178.

[14] Honoré, 'Ownership' (n 14) 166.

3.1 *Penner's theory of property in outline*

In the course of his book, *The Idea of Property in Law*, Penner makes several claims that led me to characterise him as a *dependence* theorist in Chapter 2. That earlier work is my main focus here, and not his more recent *Property Rights: A Re-Examination*. This is because *Property Rights* does not mention criminal law – just private law[15] – and Penner's own theory is set out only in the course of responding to the theories he is critiquing. Where Penner does modify his earlier work or places a different emphasis on parts of it, I will note this. His work is a congenial place to begin the inquiry of this chapter because there is much common ground between us. His project, like mine, is as dedicated to explicating legal systems as it is to explicating property.[16] He too has a Razian picture of legal systems. He believes that legal systems are 'systematic', which for Penner means that they are comprised of laws (and bodies of laws) which interact. It is 'almost certain'[17] that rules will depend on other legal material for definitions and salient concepts, says Penner. To illustrate, he says, 'criminal laws interact with property laws: one can only steal property, and so in order to convict someone of theft we must be sure that a taking of property has been committed.'[18] A legal system is systematic because rules within it form interdependent networks.[19]

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[15] Although there is one reference to a '*general* property norm that one is not allowed to interfere with the tangible property of others' in Penner, *Property Rights* (n 4) at 8, all other references are to the law of tort, contract or equity: Penner, *Property Rights* (n 4) 12, 16, 139-141, 147-155. The index pinpoints only three references to criminal law, of which two are footnotes, and none of which are relevant to our purposes.

[16] Penner, *The Idea of Property in Law* (n 13) 37.

[17] Penner, *The Idea of Property in Law*, (n 13) 32.

[18] Penner, *The Idea of Property in Law* (n 13) 32. See also 35.

[19] Penner, *The Idea of Property in Law* (n 13) 34, 37.

It is therefore important to Penner's project, as it is to mine, to look for the 'relations' and 'various complex connections' between laws.[20] Here, however, there is a divergence in our approaches. Given the interconnections between laws, Penner thinks it important to individuate laws and branches of law from the morass. He is keen to save the law of property from what he calls an 'identity crisis'. This crisis arose because the idea of property has fragmented so much that it has become 'a deficient concept'.[21] Penner therefore modifies a scheme devised by Raz to individuate laws. Penner applies this scheme to individuate *branches* of law, predominantly 'property law' amongst others. (The results of this taxonomy are discussed further below at subsection 3.1.1.) The kind of relation that Penner is primarily interested in is 'the relation between the branch of law itself and the norms that it comprises, for example in the way that the rules of title form part of the law of property.'[22] Accomplishing this will save the idea of property from its identity crisis, he thinks. Penner therefore advances an argument that each branch of law reflects an interest that we have. In the case of property, this interest is in the use of things.

I will not comment in detail on Penner's overall strategy of individuation. Unlike Penner, this thesis does not aim to save the idea of property from fragmentation, if indeed property is even disintegrating. I will therefore discuss Penner's strategy only to the extent the aims of this thesis require it. To that end, it might be thought that Penner is making an argumentative gambit criticised in Chapter 2, which therefore needs refutation. Chapter 2 challenged the adequacy of offering taxonomy as a justificatory answer to the puzzle over what explains departures from covariance. But it does not seem to me that Penner is

[20] Penner, *The Idea of Property in Law* (n 13) 56.

[21] Penner, *The Idea of Property in Law* (n 13) 1.

[22] Penner, *The Idea of Property in Law* (n 13) 56.

offering his taxonomy as an answer to that particular puzzle. If he wished, he could support the outcome in *Hinks* in a way that is consistent with his taxonomy, on the grounds that *Hinks* is an example of two branches of law pursing different interests. Although this reaction to *Hinks* is not closed to Penner, I do not think he would actually respond in that way.

Instead, Penner is best characterised as a dependence theorist, it seems to me.[23] If he ever addresses anything like the *Hinks* puzzle directly, he speaks of it in terms of dependence. For example, he mentions in passing that 'the criminal laws regarding theft *depend* upon the laws of property and so to understand how to apply the law of theft requires that one understand the law of property.'[24] (emphasis added) Other statements he makes likewise presuppose a pattern of covariance. He says, 'the law of theft seems to depend on the criminal law and the law of property working together, for theft is the criminal taking of property.'[25] His understanding of theft is that its reference to *property-as-thing* must correspond to private law's notion of *property-as-thing*: As he says, 'one can only steal property, and so in order to convict someone of theft we must be sure that a taking of property has been committed, rather than say, the fraudulent acquisition of a valuable

[23] Of the various camps set out in Chapter 2, Penner fits most naturally into the dependence camp. Certainly he is not a distinct domainer, despite his view that coherence within domains follows from his taxonomy. He indicated, for example, that it would be 'a pretty awful state of affairs' in his mind if a legal system had 'two kinds of ownership' (Penner, *The Idea of Property in Law* (n 13) 146). Here, he would seem to reject a view attributed to distinct domainers in Chapter 3. Although he says the law of trusts 'can be regarded' as creating a 'second, complete, law of property in the same legal system', he says that since the unification of the legal and equitable jurisdictions, they are applied by the same courts as one system (ibid., 133). He thus appears to hold a view similar to mine in Chapter 4. In reality, his overall position might be closest to a *mutatis mutandis* theorist because he does not straightforwardly address himself to the *Hinks* problem and so I have sought to tentatively reconstruct his views from among a multiplicity of statements made in his book, not all of which point to his inclinations in a clear way.

[24] Penner, *The Idea of Property in Law* (n 13) 33.

[25] Penner, *The Idea of Property in Law* (n 13) 3.

service like hotel accommodation.'[26] His reference to private and criminal law 'working together' suggests Penner would analyse *Hinks*, and other instances where they do not work together, as transgressions of a dependence relation.

This reconstruction of his view is speculative because he does not explain what he means by his various, scattered references to dependence. Like many other writers quoted in this thesis, his attention is on other issues and these ideas are expressed in passing. Penner may not have spent time considering the puzzle posed in this thesis because he assumes the problem won't arise. He assumes branches of law will be coherent. Penner offers the following summary of his book: 'The reader can expect a sustained elaboration of the different norms, different rights, rules, duties and powers which together compose a *coherent* body of law, that branch of law which is called "property".'[27] (emphasis added) On a couple of other occasions,[28] he similarly asserts without much argument that individuating branches of law by attending to the interests they serve will produce coherence. Penner equivocates as to how strongly he wishes to put this argument. At times, he suggests that the interest underlying an area of law *justifies* that area of law. (For example, 'by attending to interests… we get… a basis for assessing whether some body of legal norms, which may be coherently organised for some purpose or other, is truly to be regarded as a real branch of law.'[29]) He also advances consequentialist arguments, saying that injustice will result from being inattentive to underlying interests.[30] At other times, he

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[26] Penner, *The Idea of Property in Law* (n 13) 32.

[27] Penner, *The Idea of Property in Law* (n 13) 52. For a more recent (if brief) reference to coherence, see Penner, *Property Rights* (n 4) 13 at his footnote 47.

[28] See also Penner, *The Idea of Property in Law* (n 13) 3, 12-13 and 58 for references to coherence.

[29] Penner, *The Idea of Property in Law* (n 13) 58. See also at pages 12-13.

[30] Penner, *The Idea of Property in Law* (n 13) 12-13.

expresses his ambition as wishing to show individuation of laws is merely a 'sensible' project.[31] At the same time, he wants to be sensitive to how the law organises itself,[32] but there is no guarantee that it will do so according to underlying interests or in a coherent way.

Where Penner does recognise that coherence difficulties may arise, his discussion is not elaborately theorised. In a footnote, he describes any body of law which contains 'rules which are actually legally incompatible' as 'a mess'[33]. Theories of law (such as his, presumably) may find it impossible to resolve messes. The limited role he attributes to theory could explain the brevity of his discussion on the point elsewhere in the book. He does note that many crimes are also torts, raising the question of how private and criminal law relate to one another. He says that single, complete laws may be nested within others and that when this occurs 'a different branch of law may arise'.[34] Criminal law recognises interests which are additional to those of tort law, according to Penner, and thus a different branch of law arises. But what if criminal law recognises interests that conflict with those of tort law, rather than corroborating them? No response is given by Penner at that particular juncture. However, later, he does acknowledge interests sometimes conflict. At this point, he resorts to a *dependence*-type argument, saying that 'this kind of connection between laws, when they must take account of each other because of the interaction of the fundamental interests they serve, is arguably the most important connection a law has with

[31] Penner, *The Idea of Property in Law* (n 13) 48.

[32] Penner, *The Idea of Property in Law* (n 13) 42, 58. See also at pages 12-13, 48, 63 and Penner, *Property Rights* (n 4) 145.

[33] Penner, *The Idea of Property in Law* (n 13) 59 at footnote 62.

[34] Penner, *The Idea of Property in Law* (n 13) 57.

other laws.'[35] These comments, though not squarely confronting the problem, reflect his adamance that areas of law must 'take account of each other' and 'work together'. Ultimately, then, I would class Penner as a *dependence* theorist, but one who has not yet given firm arguments for people to come around to his viewpoint. It seems reasonable to surmise that Penner would disparage departures from a pattern of covariance.

3.1.1 *Penner's 'exclusion thesis'*

In order to see why Penner thinks criminal law duties on non-owners safeguard an owner's interest in use, we must first understand what Penner takes each area of law to be. Here is how Penner individuates the different branches of law and their underlying interests. Criminal law is underpinned by the interest of self-conception we have in not acting maliciously to harm others.[36] Underlying tort law is our interest in not being harmed ourselves.[37] Property law is the legal recognition of our interest in the exclusive use of things. Finally, 'private law' comprises the branches of property, tort, contract and restitution.[38]

We are now in a position to try to unpack what Penner means when he says that 'many of the most fundamental constitutive features of the law of property are actually found in the law of wrongs, both civil and criminal.'[39] It is clear that Penner thinks the law of civil

[35] Penner, *The Idea of Property in Law* (n 13) 63.

[36] Penner, *The Idea of Property in Law* (n 13) 55, 57.

[37] Penner, *The Idea of Property in Law* (n 13) 142.

[38] Penner, *The Idea of Property in Law* (n 13) 59.

[39] Penner, *The Idea of Property in Law* (n 13) 74. Here Penner talks of constitutive features, whereas elsewhere he speaks of dependence. I do not know if he means to express the same claim by these different

and criminal wrongs together define what counts as property and who has property rights.[40] I will not discuss these particular two short claims of his because they are not developed in his own work. This subsection instead examines Penner's 'exclusion thesis'. The exclusion thesis is central to Penner's argument and therefore more developed than his other remarks quoted above. As he puts it, 'the exclusion thesis at its simplest is that law protects our interest in things by imposing duties on others.'[41] The criminal law is one source of duties on others to exclude themselves from property that is not their own. If Penner is correct, therefore, ownership depends on criminal law exclusion duties.

The exclusion thesis is the idea that our moral interest in the use of things is transformed by legal systems into a particular guise. That guise is the property right, or ownership, with which we are familiar in liberal legal systems. The owner's interest in using a thing is assured by requiring non-owners to exclude themselves from it. The legal system places non-owners under duties not to trespass, not to steal, and so on. In his more recent scholarship, Penner calls the duty not to interfere with the property of others 'the BPrN' which stands for 'the Basic Property Norm – the Property Exclusionary Norm for Tangible Property'.[42] He says that 'the right to exclude is a right of immediate exclusive possession, protected by BPrN, which entails via that possession the liberty to use the property as one wishes.'[43] Although he no longer speaks of criminal law rules in his recent work, criminal laws do meet his description of the Basic Property Norm.

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locutions. For a different, more recent formulation, see Penner, *Property Rights* (n 4) 16: 'The tripartite structure of title relates property both to the law of tort and to the law of… contract.'

[40] For statements on the definition of property, see: Penner, *The Idea of Property in Law* (n 13) 3, 32, 33, 82. His views on the definition of who has property rights can be found at: ibid., 100-101, 139, 141.

[41] Penner, *The Idea of Property in Law* (n 13) 68. See also Penner, *Property Rights* (n 4) 26, 197-200.

[42] Penner, *Property Rights* (n 4) 16, 139.

[43] Penner, *Property Rights* (n 4) 26.

This ensures the greatest possible freedom for the owner in using a thing as she likes. Not only are her uses unconstrained by other people, the law itself leaves her at large to imagine such uses as she may. The law takes this approach rather than 'instituting a series of positive liberties or powers to use particular things.'[44] The property right is thus a right to a negative liberty, says Penner.[45] It is the liberty to dispose of one's property 'as one wishes within a general sphere of protection.'[46] While our interest in use justifies the property right, exclusion is 'the practical means' by which the interest is protected or its 'formal essence'.[47]

What role does Penner ascribe to criminal law duties on non-owners? Undeniably, as a descriptive matter, criminal law in fact imposes such duties. Pointing this out is sufficient for the purpose of this thesis, which only seeks to explain the relations that hold between private and criminal laws as they currently are. However, this will not do for Penner's purposes because his aims are less tame. He wants to give 'the driving analysis of property in legal systems'.[48] The best reconstruction of Penner's view beyond the descriptive must lie in his taxonomy of legal domains. In a review article (written subsequently to his book), Penner bristles at John Gardner's suggestion that 'the law of property can be regarded as mainly a long footnote to the law of torts'.[49] He says Gardner misunderstands the function

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[44] Penner, *The Idea of Property in Law* (n 13) 71. See also *Property Rights* (n 4) 17-18.

[45] Penner, *The Idea of Property in Law* (n 13) 73.

[46] Penner, *The Idea of Property in Law* (n 13) 73.

[47] Penner, *The Idea of Property in Law* (n 13) 71.

[48] Penner, *The Idea of Property in Law* (n 13) 72.

[49] John Gardner, *From Personal Life to Private Law* (OUP 2018) 14.

of property law, and by extension, private law (of which property and tort are both part). As he sees it, property law is 'not duty-imposing, but power-conferring…; that is, property law is largely *facilitative*, regulating liberties and powers that go with title.'[50] (emphasis in the original) If the main function of private law is facilitative rather than duty-imposing, the duties must come from elsewhere. By a process of elimination, criminal law must be the major source of the duties on non-owners to exclude themselves. (It is not obvious to me that all or any such duties are underpinned by the interest of self-conception we have in not maliciously harming others.[51] Rather, it seems that others' interests more straightforwardly ground these duties, but that is by the by.) Although Penner does not say this in terms, it is possible that behind his analysis is an idea that private law and private property maximise liberal freedoms. He says that property is 'a protected sphere of indefinite and undefined activity, in which the owner may do anything with the things he owns.'[52] The duties on non-owners in criminal law are connected with facilitative private laws in order to define the scope of the owner's liberty – in other words, his property right.

Against Penner, we might ask why a legal system could not adopt a different sort of 'practical means' to protect our interest in things. Indeed, we can imagine a legal system which attaches 'perquisites' to the status of ownership, with permitted uses defined in general terms. It is an approach that legal systems already have adopted for legal statuses

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[50] James Penner, 'Book Review: From Personal Life to Private Law by John Gardner' (2019) 10(2) Jurisprudence 300, 300. In a footnote on the same page, Penner goes on to say that even private law cases that are ostensibly about breach of a duty will turn on prior issues relating to facilitative laws. Through such judgments, the facilitative laws are expounded. For example, a case about conversion will often consider acquisition rules.

[51] Contrast the view of Stuart Green in section 5 of Chapter 2 for an example of possible disagreement here. According to Green, the purpose of theft law is to protect the interests of society as a whole in the legal system of property rights, whereas the purpose of private law is to protect the property rights of individuals.

[52] Penner, *The Idea of Property in Law* (n 13), 72.

other than ownership, and Penner himself recognises that English feudal law once adopted a similar approach with positive covenants that 'ran' with the land.[53] Penner's response involves a claim of practical necessity.[54] Penner tells us that there are just too many uses that owners can put property to. An enormous but finite number of rights to particular uses would be unworkable.[55] Instead, 'it is more practical to say simply that one has the right to dispose of property in any way that one wishes… but only in so far as those dispositions are protected by specific duties on others to exclude themselves from the property.'[56]

Penner quotes Jim Harris to the effect that the set of an owner's liberties is open-ended and fluctuating.[57] It would be impossible to exhaustively list them all, as presumably a law-making official must. Furthermore, Harris argues, prevailing cultural norms around what is an acceptable usage of a thing would impose modifications on the list in any event. It is true that compiling the initial list would be cumbersome – exactly how cumbersome depending on the level of generality at which the law was expressed. It is also true that modifications to the list may frequently be required – how frequent depending on the rate

[53] Penner, *Property Rights* (n 4) 17.

[54] In his most recent work, Penner lists a few of the 'numerous instrumental considerations' that weigh in favour of BPrN (Penner, *Property Rights* (n 4) 198-199). I believe he means by 'instrumentalist' what I mean by 'practically necessary'. The instrumentalist considerations include (i) the fact that some chattels are single-use-only and do not permit multiple uses before they are used up entirely, (ii) the low information costs of BPrN, following Merrill & Smith, and (iii) the importance of privacy in residential dwellings.

[55] Penner, *The Idea of Property in Law* (n 13) 72. See also *Property Rights* (n 4) 17: feudal law was inefficient and inflexible.

[56] Penner, *The Idea of Property in Law* (n 13) 72.

[57] James W Harris, 'Ownership of Land in English Law' in Neil MacCormick and Peter Birks, *The Legal Mind: Essays for Tony Honoré* (Clarendon 1986), quoted in Penner, *The Idea of Property in Law* (n 13), 72. (I cannot myself find the passage from the citation Penner gives.)

of change of cultural norms. Yet it seems a stretch to say this would be an impossible legal system.

The present approach of English law has not insulated it from responding to changes of cultural norms around acceptable use of things like human body parts and handguns. Perhaps, though, the imaginary legal system would encounter more 'gap' cases than English law – cases where the law runs out – and would therefore have to adopt rules of closure. A rule of closure is a 'sweeper' mechanism: a generalisation that we fall back on where no other doctrine assists us. The rules of closure would help officials and citizens in the imaginary legal system to reason through such gap cases. It would provide them with a rule that applies to any situation where a more specific provision as to permitted usage of property does not apply. Indeed, this thought points to the impression that there is a suppressed premise to Penner's argument. Penner is assuming that the legal system in question has a rule of closure to the effect that any action which is not prohibited is permitted. This would be in keeping with a liberal conception of the state and of private property,[58] so this is not a criticism of his argument. It does cast doubt, though, on whether his necessity claim is most faithfully cast as one of practical necessity rather than a preference for a particular closure rule, given certain political commitments. If the practical problem could be surmounted, and a workable doctrine of ownership based on limited and explicit permissible uses found, would Penner still favour BPrN? If Penner would still favour BPrN, then his account is based on conceptual necessity within a liberal paradigm rather than a practical necessity based on insufficient alternatives.

[58] In his most recent work, Penner's account emphasises both a justification in personal autonomy and 'instrumental' (or, as I call it, practical) considerations. Compare *Property Rights* (n 4) 27-8 with 198-199.

To recap, we started with Penner's assertion that the law of wrongs partly constitutes the law of property. His fuller elaboration of this assertion turned out to be an account of ownership and its justification. From his perspective, the property *right* cannot be extricated from property *law* because the same interest justifies both, the latter merely being the formal essence of the former and/or a practical means of protecting it. (Of course, whilst the property right must be crucial to property law, I am not persuaded that it is coextensive with property law nor that it is necessary to settle the boundaries of property law in order to comprehend the property right.) Penner tells us that we need criminal and civil duties on non-owners because a full specification of the property-right-holder's freedoms is impossible as a practical matter. These duties on others part-constitute property law and/or the property right. Though he speaks of it as a practical necessity, the type of necessity Penner has in mind might more candidly be thought of as a conceptual necessity for a liberal paradigm of the state and of ownership. A conceptual necessity is consonant with the title of his book and his declared aim of exploring the *concept* of property within the legal system.[59] At least, that was the proposal this section made on Penner's behalf. He does not himself give an argument for why there is any connection with criminal law, or why it is necessary rather than mere happenstance or convenience.

Nothing I have said above is fatal to Penner's account, often because his account is either difficult to pin down or altogether silent in the parts that I have focused on. This does not mean it lacks any merit, but I think a different explanation can be given of the role that non-owners' duties play, one which captures some of the best intuitions of Penner's account without raising the same worries. Penner's account can be improved with a

[59] Penner, *The Idea of Property in Law* (n 13), e.g. at 2, 74.

modification that brings it closer to Tony Honoré's. Honoré takes duties as his focal point also. Where Penner says an owner's liberty is *defined* and/or *guaranteed* by the duties of *non*-owners, Honoré would say it is *circumscribed* by duties *owed to* others. The point they both make is that the extent of this liberty (which the law endows on owners) is set by legal duties – they differ as to whether those are the duties of owners or non-owners. Honoré does have a place in his scheme for the duties of non-owners, but they relate to the owner's right to security and not to his right of use. I think Honoré's account has more explanatory power, for reasons explained below. By comparison with Penner, Honoré demonstrates a more defensible relation between the private and criminal laws as they relate to ownership.

3.2 *Honoré's necessity claims*

As I did when discussing Penner, I will outline Honoré's theory of property generally before honing in on more specific claims within it. Honoré says ownership is the greatest possible interest in a thing that a mature liberal legal system will allow to individual persons. It is formed of eleven cardinal features, which Honoré calls 'incidents'. They include the rights to income and capital from the thing; the right to security of ownership and the absence of a term on the continuance of ownership; the rights to possess, use, manage, and transfer the thing; a liability to execution for debt and a duty to prevent harmful uses of the thing. The final incident is the residuary character of ownership, which is to say that the termination of other interests in the same thing will inure to the benefit of the owner. Honoré makes the following necessity claims:

(1) For any individual-to-thing relation to constitute ownership, the incident of residuality is necessary but not sufficient.[60]

(2) For any legal system to recognise ownership, it must have the concept at (1) above.[61]

(3) For any legal system to recognise ownership, it must be possible for all eleven incidents to inhere in a single person.[62]

(4) For any legal system to recognise ownership, it must provide for some rules which allow a person to be put into exclusive control of a thing, or to regain exclusive control.[63]

(5) For any legal system to recognise ownership, remedies for violations of her possessory right must be available to the owner, at least where no other person has a right to exclude the owner from the thing.[64]

(6) For any legal system to recognise ownership, it must not recognise a general power on the part of the state to expropriate things (regardless of whether or not this is subject to compensation).[65]

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[60] Honoré, 'Ownership' (n 14) 179.

[61] ibid., 177.

[62] ibid., 165.

[63] ibid., 166.

[64] ibid., 168.

[65] ibid., 171.

(7) For any legal system to recognise ownership, it must not let widespread wrongful conversion go unchecked (even if damages are generally paid upon conversion).[66]

Some of these claims commit Honoré to propositions about criminal laws concerning property, not merely private laws. The next subsection will discuss some of them, focussing on the last one (Honoré's proposition (7)). Section 4 will discuss another (Honoré's proposition (3) above).

3.2.1 *Claim (7) – checking conversion*

Proposition (7) above is an argument for having and enforcing criminal laws protecting property, subject to a factual precondition. In addition, claims (4) and (5) potentially refer to criminal law, subject to the content of actual laws. Claims (4) and (5) are arguments for having and enforcing laws that resemble private law – at least, the private law of England and Wales – although the ends in (4) and (5) are also fulfilled to some extent by extant criminal laws. Indeed, English & Welsh law fulfils Honoré's conditions, as he intended.[67] Claim (7) makes the case for criminal law duties of non-interference, if a factual

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[66] ibid., 171.

[67] Honoré wanted to illuminate the common features of ownership across different legal systems. He was careful to couch his claims in terms of conceptual necessity, rather than making a claim about necessity in all possible worlds. He said: 'it would be rash to assert that the features to be discussed are *necessarily* common to different mature systems' (ibid., 162 (emphasis in the original)). Instead, 'they exist *de facto* and can be explained by the common needs of mankind and the exigencies of contemporary life.' (ibid., 162) This is a weaker claim than HLA Hart's (see Chapter 1, section 3, at footnotes 19 and 20). Honoré does not say all legal systems must recognise ownership. To the extent they do, this is explained by facts about the present time. He does not say those facts necessitate recognition of ownership; the relation is one of explanation.

conditional pertains. If conversion is widespread, Honoré says, a legal system must check it or else lose the incident of the right to security. The unchecked loss of this incident would cause the disappearance of the institution of ownership. (This does not elevate the right to security to being necessary to the concept of ownership because of the conditional about the prevalence of wrongful conversion.[68]) By 'checking', I take him to mean the suppression of wrongful conversion via an effective and lawful method of deterrence and sanctions. Checking requires criminal laws. Honoré stipulates that damages would not be sufficient 'checks', even if there was general compliance with remedial orders in private law. This is a subtle argument and requires some more exegesis.

The point Honoré is making pervades his overall argument. It has to do with the guidance and expressive functions of law. For him, there is a 'vital distinction between acts which a legal system permits as rightful and those which it reprobates as wrongful.'[69] Central to Honoré' view of law was that duties should not be breached. A legal system should secure that they are not. If primary private law duties not to interfere with goods are regularly disregarded, the primary duties have failed to have their appropriate effect on practical reasoning and to perform their appropriate expressive function about what is wrongful. For Honoré, this remains true even when secondary duties to compensate are regularly followed. I have tried to flesh out this intuition at section 2 above, by explaining that coordination schemes must coordinate action if they are to be successful. The rewards of coordination would be lost if interference with property by non-owners was commonplace

[68] I take his reference to conversion to be a synecdoche: a particular term standing in for a more general one. There is no handy general term which encompasses all actionable private law interferences with land and chattels.

[69] Honoré, 'Ownership' (n 14), 171.

and people simply paid for their breaches of duty. As John Gardner puts it, compensation is only 'next best'.[70]

Claim (7), then, is a plausible claim that ownership has a necessary connection with criminal law duties that guarantee the owner's right to security of possession. Interferences may or may not affect an owner's use; that is contingent on the facts and the owner's intentions for the property. In every case, though, security of possession would be affected. Admittedly, proposition (7) has a factual precondition regarding the prevalence of conversion. If it succeeds, though, what does it tells us about the puzzle raised in this thesis? It gives us qualms about how consistent with the institution of ownership is a case of adverse possession, like *Best*. However, it gives no knock-down argument so long as adverse possession remains exceptional. If it remains an exception, the persistence of the institution of ownership is not seriously challenged. Nor is the overall guidance or expressive function of the law put into question (though the official and litigants in *Best* itself still face practical dilemmas). However, it makes a case like *Hinks* doubtful. Further, proposition (7) is not the only claim Honoré makes involving criminal law. Another follows in section 4.

3.3 *Duties inconsistent with rules of allocation*

In this subsection, I will motivate the incongruity of a case like *Hinks*.[71] Honoré's proposition (4) argues that for any legal system to recognise ownership, it must provide

[70] Gardner, *From Personal Life to Private Law* (n 49).

[71] Similarly, see *R v Turner* [1971] 2 All ER 441 noted in Chapter 1 at footnote 13.

for some rules which allow a person to be put into exclusive control of a thing, or to regain exclusive control. As a corollary of (4), there must be what Honoré calls rules of allocation. According to him, protecting merely present possession is insufficient for the notion of *right* to possess. A legal system must have rules that allocate things to dispossessed persons in order for it to have the concept of possession *by right*.

Many authors think something similar. It is a common view that property rules allocate things to people. Waldron certainly thought so; indeed, for him, this was the primary function fulfilled by the concept of a property right.[72] Waldron believes property systems exist to avoid pervasive conflict over scarce resources. Recall also from Chapter 1 that Epstein said: 'no general theory of tort law, however powerful or profound, can tell us who owns what at the outset'.[73] Epstein therefore thought that there must exist a set of rules that did tell us who owns what. Epstein believed that tort law presupposes these allocative rules, found in property law. Similarly, yet conversely, Harris commented that 'there could be no legally protected interests in land if there were no trespassory rules, civil or criminal, according privileged enjoyment to some persons' and that case-law is 'preoccupied with identifying [proprietors]'.[74] These authors, and more of many different theoretical persuasions, underscore rules allocating things to people. By their lights, the result in *Hinks* is a strange one because the acquisition rules in private law ought to have

[72] Jeremy Waldron, *The Right to Private Property* (Clarendon 1988) 32.

[73] Richard Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 Journal of Legal Studies 49, 52.

[74] Harris (n 57) 144. (While Epstein thinks tort law presupposes the existence of property law, Harris thinks that property law presupposes the law of obligations. To my mind, the clarity of their claims is not aided by their speaking in terms of broad taxonomies of law.)

served to allocate the stolen goods to the defendant. By the usual operation of these allocation rules, the defendant was convicted of stealing something that she owned.

It is difficult to see whose security of possession is being protected when the person charged with breaching a duty of non-interference is the same person who the rules of allocation pick out as being the beneficiary of such a duty. The sense one gets is that the jury thought the rules of allocation had picked out the wrong person; that there was a breach of the donor's security of possession, but not one that law recognised through doctrines of undue influence, fraud and the like. Perhaps someone like Stuart Green, who believes the purpose of theft law is to protect the broader property regime rather than the interests of individual rights-holders,[75] or Alan Bogg and John Stanton-Ife,[76] might respond as follows. A case like *Hinks*, though perhaps deplorable for rule-of-law reasons, nevertheless does serve the interests of society as a whole in having a property regime that protects the vulnerable. It is not clear to me that this response has anything to do with the property regime, rather than protecting the vulnerable more generally.[77] It is unclear what is being protected about the property regime – what more a property regime is than the rules governing allocation and the objects of property laws. Perhaps a property regime represents whatever is valuable about individuals being allocated these objects, but that is just another way of speaking about the benefits of having a coordination solution at all. It is not a sufficient basis to justify convicting someone who has not upset the rules of the coordination scheme.

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[75] Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press 2012) 208, 212.

[76] Alan Bogg & John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 Legal Studies 402, 403.

[77] Bogg and Stanton-Ife, ibid., would call mine a 'reductionist' view, but they are also open to the suggestion that criminal law could develop a separate legislative offence of exploitation which addresses these concerns.

Indeed, I find it hard to see how the defendant's conduct jeopardises the existence of the scheme so much that society's interest in its existence is threatened.

4. Duties on owners are a constraint on their freedom to use their things

This section defends the second main claim of this chapter, namely that owners' duties constrain their freedom to use their property. Once again, this is not a factual assertion about the effect the criminal law in fact has on the conduct of owners. Rather it is a claim about how law presents owners' balance of reasons and what influence this has on the pattern of covariance. If, as I argued in section 2, the fact that a duty emanates from criminal law signals to owners that this duty takes priority over any other laws or reasons the owner may wish to invoke, and if judges act on the basis that criminal laws give valid reasons for action, then the pattern of covariance is maintained. It is maintained because any conflicting private law will not take priority in the balance of reasons and the criminal duty will prevail over it. A proprietor who has not conformed his conduct to the duties imposed by criminal law and who comes before a judge will not succeed in persuading the judge to give effect to private law rather than criminal law, because the criminal duty acts as a constraint on the judge's reasoning.

This, at least, is what happens in the usual case. So orthodox does it seem that Tony Honoré amended his paper on ownership in light of criticisms that this was unexceptional and had nothing to do with property whatever. An early draft of his paper stated: 'I may use my car freely but not in order to run my neighbour down, or to demolish his gate, or

even to go on his land if he protests; nor may I drive uninsured.'[78] What Honoré appears to be arguing is that there is no private law permission to do these things (derived from the right of ownership); an owner's liberty according to private law covaries with criminal law due to the effect of criminal duties on the proprietor's balance of reasons. This assumes a picture of reasons whereby an owner's set of reasons is not identical to a non-owner's, although the upshot will be the same in each case (i.e. it is impermissible to breach a duty). The owner has powers and/or permissions that others lack, an authority which was given to him by law, and the law must therefore anticipate potential norm conflict and resolve a priority of norms. To do that, it requires criminal duties. Criminal law negates any impression that owners are licensed, by virtue of the authority conferred by ownership, to commit criminal wrongs. (This is particularly pertinent to cases of self-defence and self-help.)

Certain scholars challenged Honoré to show there was any connection whatever between general criminal laws (or 'property-independent' laws) and the property right. Waldron doubted whether prohibitions on use was an incident of ownership. He saw prohibitions as general 'background' constraints on action, having no necessary connection with entitlement to things (though he also did not press the point, not believing much turned on it).[79] Waldron, like Penner, Harris and Honoré, makes reference to a nonspecific sphere of liberty once background constraints are taken into account. Harris makes a related point, distinguishing between what he calls property-*independent* and property-*dependent* prohibitions. Property-dependent prohibitions are those that prevent owners exercising privileges or powers, which they have *qua owner*, in a harmful way – the tort of nuisance

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[78] Honoré, 'Ownership' (n 14) 174.

[79] Waldron (n 72) 32-33.

being an example.[80] As Honoré's amendment of his paper shows, he thought there was merit to this criticism. A later draft continued the paragraph thus: 'These restrictions are of course not confined to owners. Anyone who drives a car has similar duties. *The owner's position is special in that he must not allow others to use his car in these harmful or potentially harmful ways*.'[81] From this, the incident was modified from the prohibition on harmful use to the prevention of harmful use.

The incident of prevention of harmful use is not our subject. I digress over it because there is one context in which the generality of criminal prohibitions – their indiscriminate application to owners as to non-owners – comes into its own. That context is the *Bowmakers* doctrine. Consider again the ordinary incidents of ownership: rights to possess and transfer, rights to income and capital, etc. In relation to some items, the criminal law makes many or all of these incidents impermissible. It is generally an offence to manufacture, possess, purchase, sell, transfer or acquire any of the following items: prohibited weapons including smooth-bore revolvers and rocket launchers, landmines and cluster bombs, child pornography, and radioactive matter (without a permit). If there are criminal prohibitions that apply to people generally, prohibitions which are weightiest in most people's balance of reasons, then can any incidents of ownership attach to such items?

[80] James W Harris, *Property and Justice* (OUP 2002) 34.

[81] Honoré, 'Ownership' (n 14), 174.

4.1 *What things can be owned?*

Both Penner and Honoré briefly discuss another kind of relation between private and criminal law. This second claim is about what kinds of things can be the objects of ownership. Honoré says:

> In nearly all systems, there will be some things to which not all the standard incidents apply, some things which cannot be sold or left by will… some things (imperial purple dye, flick-knives, Colorado beetles) which it is forbidden to own or to use in certain ways. When the differences between these cases and the paradigm are striking enough, we are tempted to say the things in question cannot be owned.[82]

This claim holds that a thing's status as *property-as-thing* depends on the absence of certain criminal law restraints. Honoré's suggestion resembles the unsuccessful defence in *R v Smith*. The accused in *Smith* denied liability for robbery on the basis that his victim could have no property rights in the drugs. If the victim had no proprietary rights then there was nothing that was capable of being assumed by a thief. This defence ought to have been accepted if Honoré is correct, but it was not. *Smith* was a criminal conviction, justified by the court on the grounds that criminal law is concerned to keep the peace.

The position is different at private law. The suggestion that what counts as property in private law is affected by illegality comes from *Bowmakers v Barnet Instruments*. There, the court held:

> A man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has

[82] Honoré, 'Ownership' (n 14) 163. Penner makes similar points, though in the context of state expropriation. He says certain criminal law duties that prohibit owners' liberties would count as expropriation by the state: Penner, *The Idea of Property in Law* (n 13), 100-101 and Penner, *Property Rights* (n 4) 142 at his footnote 14.

> converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff [...][83] It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. No doubt, there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise.[84]

This dictum suggests that 'books' are property, but 'books' qualified by the word 'obscene' are not. Obscene books and other goods that are 'unlawful to deal in' will not be restored to a previous possessor at their behest in private law. The case-law is unclear on exactly what sort of articles will be classified as 'things which are unlawful to deal in'. *Bowmakers* refused to enumerate what other things might fall within it. In an American case, the court declined to order that a photo processing company return some obscene photographic slides to the plaintiff.[85] Note, contrary to the *distinct domain* thesis, that this was a suit between two private actors and not between a wrongdoer and the state. The Court of Appeals of Georgia distinguished between obscenity that is contrary to criminal law and obscenity that is not. The class of things unlawful to deal in thus appears to be responsive to the state of the criminal law.

Extrapolating further than this is speculative.[86] As I have been arguing throughout, a great deal of doctrinal indeterminacy surrounds cases at the intersection of private property and

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[83] The omitted words were disapproved by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399. They concern the test for illegality in contract law and do not bear on the question in this chapter. Other parts of the dictum were approved.

[84] *Bowmakers v Barnet Instruments* [1945] KB 65 (CA), 71-72.

[85] *Warshaw v Eastman Kodak Company* 252 SE 2d 182 (1979) (Court of Appeals of Georgia). Though 'obscenity' may sound quaint to modern ears, I would venture that child pornography falls under the *Bowmakers* doctrine even today.

[86] Extrapolation is made more difficult because there are ambiguities in the *Bowmakers* quote above. The meaning of 'dealing' in this context is vague. Is it intended to encompass anything from possessing, to

criminal wrongdoing. A little guidance does exist in precedent, some of it obiter dicta. English cases subsequent to *Bowmakers* have added controlled drugs[87] and foreign currency (which was held in contravention of a statutory prohibition)[88] to the class. It has been suggested that there is no property in seditious documents, but the point was not tested in the case.[89] Of course, *R v Smith* concerned a conviction for stealing controlled drugs. It therefore appears that controlled drugs count as objects of a property right in criminal law, but not in private law. *Smith* represents a departure from the pattern of covariance.

The lack of clarity and the dearth of case law leave a question about why bad things are debarred from being the object of property rights. I will first look to what clues are given by the courts themselves. Thereafter, I will sketch what I take to be Honoré's explanation. I give my own explanation in the next chapter. The indeterminate state of the doctrine does not afford any way to choose between Honoré's or my explanation.

The search for principle leads into the realm of copyright, which has been denied to things which are obscene[90] or immoral.[91] I should be clear that it is not intellectual property that this chapter is interested in, and the common law on copyright is used as an analogy. Nonetheless, considering copyright is useful because *Bowmakers* refers to obscene books as its example, which suggests that similar principles are at play. It is also useful because the

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using, to trading? Alternatively, does it bear a restricted or technical meaning similar to 'handling' of stolen goods?

[87] *Webb v Chief Constable of Merseyside Police* [2000] QB 427, 444.

[88] *Malone v Commissioner of Police of the Metropolis* [1980] QB 49 (CA), 64, 70-71.

[89] *Elias v Pasmore* [1934] 2 KB 164 (HC), 174.

[90] *Stockdale v Onwhyn* (1826) 5 B&C 173 (KB); *Broder v Zeno Mauvais Music Co* 88 Fed 74 (1898).

[91] *Glyn v Weston Feature Film Co* [1916] 1 Ch 261; *Hoffman v Le Traunih* 209 F 375 (1913).

courts have explicitly maintained an inherent jurisdiction to refuse copyright protection 'if the work is (i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) [or which] incites or encourages others to act in a way referred to in (ii).'[92] Like the court in *Bowmakers*, the Court of Appeal declined to limit the circumstances to (i), (ii) and (iii) alone.[93] It emphasised that 'copyright is assignable and therefore the circumstances must derive from the work in question, not ownership of the copyright.'[94] In this sense, the copyright doctrine is analogous to the *Bowmakers* doctrine because it is set against a badness inherent in the thing. The claimant himself need not have done anything wrongful.[95]

Stockdale v Onwhyn is a source of some general statements about why the law might want to retain jurisdiction to refuse copyright protection. The claimant in *Stockdale* was a publisher of 'a history of the amours of a courtezan'. The work was obscene and libellous, and was contrary to criminal law. Five thousand bootleg copies were made by a second publisher. The plaintiff brought the action to recover damages at common law. He sought the common law monetary remedy in an attempt to distinguish cases in equity that were against him. However, the court unanimously denied any remedy. Holroyd J said:

> In my judgment it would be preposterous for a Court of Law to say that a right of action is acquired by being the first publisher of a book, when that publication is liable to be punished as a grievous offence; and no one can doubt that the publication of the work in question was such an offence.[96]

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[92] *Hyde Park Residence v Yelland* [2001] Ch 143 (CA), [66].

[93] ibid.; *Ashdown v Telegraph Group* [2001] EWCA (Civ) 1142.

[94] *Hyde Park v Yelland* (n 92), [66].

[95] *Lion Laboratories v Evans* [1985] QB 526, 537, 538, 550.

[96] *Stockdale v Onwhyn* (n 90), 177.

Littledale J agreed: 'It is plain that no such foundation for the right exists when the very publication of the book is an offence against the law.'[97] Abbott CJ said:

> In order to establish such a claim, [the plaintiff] must, in the first place, shew a right to sell; for if he has not that right, he cannot sustain any loss by an injury to the sale. Now I am certain no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work, a right of action can be given against any person who afterwards publishes it?'[98]

The plaintiff's lawyer provocatively answered:

> Suppose a party to have stolen the book, could he say that he is not guilty of larceny, because the book was of an improper tendency... [T]he doctrine ought to be pushed one step further, if it is applied at all; and a Court should hold that even the paper was not protected, if converted to such a use.[99]

The plaintiff's lawyer intended his remark to be a reductio ad absurdum, but it was accepted as a correct statement of law. The answer given in the case is that 'everyone who comes to seek the protection of the law for his property must shew that property to be worthy of that protection.'[100] In Chapter 6, I will develop this thought of the court's in *Stockdale*. Laws have an expressive function and make moral claims. Judges act on the basis that laws do give valid, moral reasons for action. This is a constraint; it rules out certain avenues for deciding a case. Before we get to that, I will conclude this chapter

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[97] ibid., 178.

[98] ibid., 176.

[99] *Stockdale v Onwhyn* (1826) 2 Carrington and Payne 163, 168-169; 172 ER 75, 77.

[100] ibid., 166.

briefly with a reconstruction of what I think would be Honoré's own explanation of the *Bowmakers* doctrine.

4.2 *Honoré's claim (3) – totality of incidents*

Honoré thought that, for any legal system to recognise ownership, it must be possible for all eleven incidents to inhere in a single person. That proposition is pitched at the level of the legal system as a whole. Would Honoré also say that for any given item to count as *property-as-thing*, it must be possible for all eleven incidents relating to that item to inhere in a single person? Perhaps. Generalised criminal prohibitions on possession, manufacture, etc might prevent all eleven incidents arising in respect of certain articles that are subject to the *Bowmakers* doctrine. Discrete individuals, maybe, could be counted as owners if they had a statutory authorisation or license that provided a defence to a criminal charge. However, if these people were few and far between and 'the differences between these [banned items] and the paradigm are striking enough,' then Honoré thinks, 'we are tempted to say the things in question cannot be owned.'[101]

Evidently this is a reconstruction of a tentative view expressed in a single sentence. This explanation of the *Bowmakers* doctrine assumes that the doctrine prevents primary proprietary rights arising, rather than imagining the doctrine inhibits the recognition of legal rights of repair or enforcement.[102] It is unclear whether this interpretation is supported

[101] Honoré, 'Ownership' (n 14) 163.

[102] Frederick Wilmot-Smith provides a helpful triptych of the various rights affected by the illegality doctrine as falling into classes of primary, secondary and tertiary rights: 'Illegality as a Rationing Rule' in Alan Bogg and Sarah Green (eds), *Illegality after Patel v Mirza* (Hart 2018).

by the doctrine.[103] Quite apart from doctrine, there is also a question of principle. Does this argument of no-right collapse into an argument of no-remedy if there exists at least one person or agency which can enjoy all eleven incidents in relation to the thing? If so, there are perhaps fewer articles falling into the *Bowmakers* doctrine than I have mooted above. I will not resolve these questions here but spend some time in the next chapter on the argument for there being no-remedy.

5. Conclusion

This chapter examined the argument that a maximal specification of the property right as it exists in English law would take in both private and criminal law. Tony Honoré and James Penner both argued this, and it gives us reason to doubt the *distinct domain* thesis. First, Penner's exclusion thesis was aired but not ultimately endorsed, in part because he believes non-owners' duties safeguard owners' *use* rather than security. Next, Honoré's tentative view that criminal laws guarantee the owner's right to security of possession (at least, if certain empirical conditions obtain) was buttressed with an argument that this was necessary to secure the benefits of the coordination scheme that the property regime instantiates. Cases like *Hinks* and *Best* look questionable in this light.

A second claim of the chapter was that criminal duties constrain owners' freedoms to use their things. Criminal laws thus help proprietors avoid mistakes in practical deliberation.

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[103] Since the case of *Patel v Mirza* (n 83), the state of doctrine is uncertain. *Patel* deprecated a test for illegality known as the reliance test, which had been partly developed by the *Bowmakers* case. However, it also expressly approved other parts of the judgment in *Bowmakers*, cited at footnote 83 above, adding that 'There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation...' ([110]-[111] per Lord Toulson.)

Private law duties are not well-suited to this function because their default remedy is internal to and dependent upon the property regime itself. Damages are reliant on, rather than transcendent of, the authority granted to owners by existing rules of allocation and distribution. This all seems rather passé until we notice that it may shed light on a curious kind of relation between private and criminal law. This is the idea that a thing's status as *property-as-thing* depends on the absence of certain criminal law restraints. It is an idea that would give us grounds to criticise the case of *Smith* but unfortunately received scant attention from its proponents. The *Bowmakers* problem is taken up again later, in the next chapter, discussing the maxim that wrongdoers may not benefit from their wrongdoing.

Chapter 6 – Profiting from Wrongdoing

1. Introduction

The previous chapter discussed how criminal laws both guarantee owners' security and constrain owners' freedom. Tony Honoré pointed out that criminal laws against theft, burglary, criminal damage (and so on) protect an owner's right to security of tenure and possession of the thing. The criminal law does this by deterring misappropriations of property and, often, enforcing its prohibitions with sanctions for their breach. A second proposition trailed in Chapter 5 was the *Bowmakers v Barnet* doctrine. This provided doctrinal support for Honoré's idea that laws which criminalise certain incidents of ownership can result in some thing, which might otherwise be *property-as-thing*, not having this status. An example could be a landmine or, perhaps, an illegal drug.[1] As he explained, the law limits both the extent of an owner's liberty as well as the occasions on which ownership can be obtained over things. Limitations are imposed in the social interest.

Andrew Simester concurs. He says, 'the criminal law is society's statement of what behaviour is unacceptable to the community. If the legal system is to be an effective whole, then civil law must not be permitted to derogate from that statement.'[2] Nicholas McBride expresses something similar. 'Given that society currently takes the view that the possession and trade

[1] Compare McBride's assertion at text to n 3 below with the case of *Smith,* discussed in Chapter 1 and below.

[2] Andrew Simester, 'Unworthy but Forgiven Heirs' (1990-1991) 10 Estates and Trusts Journal 217, 226-227.

of cocaine should be proscribed, the law's refusal to allocate the status of "property" (and all that comes with that status) to a bag of cocaine seems entirely justified.'[3] Simester and McBride make these observations in a different context to Honoré, though. Theirs is not an elucidation of the concept of ownership. Instead, they are discussing how civil courts respond to criminal wrongdoing in private law suits that concern property.

This chapter asks how civil courts treat criminal wrongdoing in cases of unlawful acquisition of property. The topic is clearly an enormous one – a complete answer would catalogue every relation between private and criminal law(s) as they concern property. That task would be made even more difficult because the pattern of covariance itself is far from clear in wrongful acquisition cases. Ronald Dworkin noticed this in his discussion of *Riggs v Palmer*.[4] *Riggs* is a New York case that concerns an attempted acquisition of property by wrongdoing. In it, a grandson who had murdered his grandfather was debarred from inheriting under the old man's will. Dworkin proposed that the resolution of this case turned on the principle that wrongdoers should not benefit from their wrongdoing. He noticed an imperfect pattern of covariance: 'Our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession…'[5] This chapter looks at one small piece of the topic of unlawful acquisition. It examines acquisition by killing, like Dworkin did.

[3] Nicholas McBride, 'The Defence of Illegality: Not a Principle of Justice?' in Alan Bogg and Sarah Green (eds), *Illegality after Patel v Mirza* (Hart 2018) 93.

[4] 115 NY 506 (1889).

[5] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 41.

Dworkin's explanation for the imperfect realisation of the principle that no man may profit from his own wrong lay in the nature of a principle itself. He said, 'I call a "principle" a standard that is to be observed not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'[6] It was part of Dworkin's 'general attack on positivism'[7] to demonstrate there exist principles in the law and that they are unlike legal rules. On his account, 'a principle like "no man may profit from his own wrong" … states a reason that argues in one direction but does not necessitate a particular decision.'[8] This was why there is an imperfect pattern of covariance, on Dworkin's view.

The aim of this chapter is to provide an explanation of cases like *Riggs* that is different from Dworkin's. Wrongful acquisition cases raise a problem for officials, namely a practical question of what official action is consistent with holding an attitude of commitment toward criminal laws that have been breached by the would-be acquirer. I am calling the view that laws give valid moral reasons for action an 'attitude of commitment'.[9] It is a standard disposition of judges that they treat law's commands as justified. My explanation of *Riggs* and similar cases is that this attitude constrains judges applying private law's investitive rules in

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[6] ibid., 39.

[7] ibid., 38.

[8] ibid., 42.

[9] This assumes the truth of Raz's argument that it is a necessary condition for a legal system to be in force that judges act on this view: Joseph Raz, *Practical Reason and Norms* (OUP 1975) 171.

cases of wrongful acquisition.[10] Judges are constrained to decide the civil dispute in a way that is consistent with law's claim that criminal laws give valid reasons for action. Where norms of private law and criminal law are concurrently relevant to the facts, there is often no law that explicitly and precisely prescribes the requisite official action (as opposed to the conduct demanded of law's subjects). Thus arises an instance of the problem some positivists call the problem of law's normativity. This explanation will be developed in section 5 below, once Dworkin's own proposal has been interrogated. Dworkin charged legal positivists with having no explanation of a case like *Riggs* other than to say 'the judge reaches beyond the rules he is bound to apply (reaches, that is, beyond the "law") for extra-legal principles he is free to follow if he wishes.'[11] The explanation here is not that one, and yet it is available to someone who associates themselves with the (broad) positivist tradition as Dworkin conceived of positivism. Although the application of the term 'positivism' and self-identification under this label is contentious, the thesis has throughout presupposed and drawn heavily on theories from Hart, Raz and others whom Dworkin saw as his targets in *Law's Empire* and *Taking Rights Seriously*. This chapter will not respond to every line of Dworkin's 'attack' on legal positivism.[12] Nor will it provide a theory of rules or directly address the question of whether there exist legal principles in Dworkin's sense of the term. Instead, the chapter casts doubt on the view that the maxim 'wrongdoers should not benefit

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[10] Rules of acquisition are distributive. This chapter says nothing about the approach to be taken in a case that demands *corrective* justice.

[11] Dworkin, *Taking Rights Seriously* (n 5) 46. See also at 33, 38, 57 and Ronald Dworkin, *Law's Empire* (Hart 1986) 9, 117.

[12] In particular, the strand of argument emphasized in *Law's Empire*, that legal positivists could not explain the judges' disagreement about the grounds of law in *Riggs*, falls beyond the scope of the thesis.

from their wrongdoing' states a true moral principle or can perform the task set for principles in *Law's Empire.*

That task was to *fit* and *justify* an existing part of legal practice.[13] I leave aside *fit* because I am not qualified to comment on US doctrine.[14] I simply note that many scholars have proposed different, plausible explanations for the case. Rather, I focus on *justification*. I suggest that the maxim is not obviously a moral principle, and that legal practice is better explained by my own picture involving a judicial attitude of commitment toward criminal laws. It is not the partial realisation of a moral principle that explains the pattern of covariance we see in English law. I then illustrate my picture with case studies taken from law across the Commonwealth. Although Dworkin saw it as grist to his mill, the overall aim of this chapter is to show that *Riggs* does not support his theory in the way he thought it did. Naturally, I do not pretend to give a complete answer to his multifaceted theory of law, many parts of which this chapter leaves untouched, nor is that my intention. My focus is the pattern of covariance in wrongful acquisition cases. Let us begin with the decision in *Riggs*.

[13] Ronald Dworkin, *Law's Empire* (n 11) 228.

[14] This thesis is on the subject of English and Welsh law. Dworkin himself, at least in *Taking Rights Seriously* (n 5), sometimes cautiously limited himself to the US (see page 46). *Law's Empire* (ibid.) proffered a more general theory of law.

2. *Riggs v Palmer*

Riggs is an unexceptional common law case. It was decided using commonplace techniques. There are ample grounds for the decision within the judgment itself: the use of precedent, maxims of the common law and canons of statutory construction, amongst others. Here, in outline, are the reasons given by the judgment.

2.1 *The decision in outline*

The respondent murdered his grandfather in order to come into an inheritance that was, at that time, bequeathed to him. His murder pre-empted a change of the will out of his favour. As the court noted, he had been convicted and was serving his sentence.

The ruling was expressed succinctly. The New York Court of Appeals said: 'He cannot vest himself with title by crime.'[15] This was due to 'general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.'[16] Because the New York Court of Appeals spoke of it as a maxim, I will do so too. I will reserve the term 'principle' for the specific sense meant by Dworkin. The court did make reference to a 'principle' in one part of the judgment. It believed that 'the principle which lies

[15] *Riggs v Palmer* 115 NY 506 (1889), 513.

[16] ibid., 511.

at the bottom of the maxim, *volenti non fit injuria*'[17] applied. It did not, however, say what that principle was.

Having stated the underlying maxims, the court subsequently reasoned by analogy. Just as the grandson would not have got title to property if he had tried to take it by force, fraud, or undue influence,[18] he could not get it by murder. Parts of the judgment seem to treat the instinct that he should not inherit as axiomatic. It asks rhetorically, 'What law, human or divine, will allow him to take the estate and enjoy the fruits of his crime?'[19]

The human law that might be thought to have such an effect was the Statute of Wills, which defined the validity conditions for a will in New York. The statute was silent as to murder. However, the court was outraged by the suggestion that 'general laws passed for the orderly, peaceable and just devolution of property... should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate'.[20] It resorted to 'familiar canon[s] of construction'[21] which avoided this result. The majority in *Riggs* relied on precedent too. There had been similar outcomes in cases where the murderer was a beneficiary under a life insurance policy, rather than a will.

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[17] ibid., 514.

[18] ibid., 513-515.

[19] ibid., 514.

[20] ibid., 511.

[21] ibid., 509.

Gray J, dissenting from the outcome, did not dissent from the majority's moral disgust. He did not 'hesitate to assent to views which commend themselves to the conscience.'[22] But, for him, the matter did not lie within the domain of conscience. He understood the battle to be one of legislative interpretation. If the will fulfilled validity criteria provided by legislation, that was the end of the matter. (Incidentally, forty-eight US States now have the *Riggs* rule incorporated into legislation; the remainder rely on common law precedent.[23])

Gray J also alluded to an argument that might be made by a *distinct domain* or *different functions* theorist. He thought that the majority was imposing an additional punishment on Elmer by depriving him of property.[24] The majority denied this. They argued that, before the murder, Elmer had no entitlement and could have died before his grandfather and/or the will could have been amended by the grandfather. The judgment 'takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.'[25]

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[22] ibid., 515.

[23] Lisa Kisabeth, 'Slayer Statutes and Elder Abuse: Good Intentions, Right Results? Does Michigan's Amended Slayer Statute Do Enough to Protect the Elderly?' (2013) 26 Quinnipac Probate Law Journal 373, 377.

[24] *Riggs v Palmer* (n 15), 517, 519.

[25] ibid., 514.

In the discussion that follows, I will largely sideline the two issues – additional punishment[26] and statutory interpretation[27] – which divided the dissent from the majority. It is the majority judgment that is of interest because it represents a typical approach to the wrongful acquisition of property.

2.2 *Dworkin on* Riggs

Dworkin believed that the Statute of Wills said nothing about murder simply because the legislature had not thought about it at all.[28] This makes *Riggs* a difficult case, for Dworkin, and judges in such cases have especial need for recourse to 'principles, policies and other sorts

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[26] This assumes Elmer had an entitlement, but that is the very question the court had to decide. A better view is that there is a limit placed on the power to acquire when the acquisition is via killing. This suggestion comes from an English case, *Gray v Barr* [1971] 2 All ER 949, 964 per Salmon LJ. In *Gray*, the killer is referred to as being under a 'disability' i.e. an incapacity to receive property. It is not clear whether we should regard nullities or invalid uses of a power as penalties or as punishments. A *distinct domain* or *different functions* theorist might deny that depriving someone of property is punishment rather than a penalty, following Joel Feinberg's distinction between the two: Feinberg, 'The Expressive Function of Punishment' (1965) 49(3) *The Monist* 397, 400. This raises issues that there is no room to treat here.

[27] I am grateful to Timothy Endicott for pointing out the following curiosity. Although the focus in the *Riggs* litigation itself was upon a statute, it is arguable that the statute is a distraction. The relevant legal rule is whatever law provides that an executor must distribute an estate in accordance with the terms of a valid will. A statute defining conditions of validity may say nothing about the underlying duty, which is likely to derive from common law. This is an intriguing possibility and not one that I am competent to comment upon due to my lack of knowledge of New York law. If (contrary to this view) statutory interpretation is not a distraction, there is a lot that could be said about it. A detailed discussion of this literature is excluded for reasons of scope. See e.g. Jim Evans, 'A Brief History of Equitable Interpretation in the Common Law System' in Tom Campbell and Jeffrey Goldsworthy (eds), *Legal Interpretation in Democratic States* (Ashgate 2002) and Timothy Endicott, 'Are There Any Legal Rules?' (2001) 5 Journal of Ethics 199, 212 and 217. In English law, *R v Registrar General, ex parte Smith* [1991] 2 QB 393 discusses the history to the 'exception to statutory rules on public policy grounds if application of the rule would enable someone to benefit from their own serious crime'.

[28] Dworkin, *Law's Empire* (n 11) 16, 19. The majority's explanation for the statute's silence is that the common law already covered the situation of a murderous legatee (*Riggs v Palmer* (n 15), 513).

of standards'[29] rather than rules. The standard that Dworkin says determined *Riggs* was the principle that no man may profit from his own wrong.

> After the case is decided, we may say the case stands for a particular rule (e.g. the rule that one who murders is not eligible to take under the will of his victim). But the rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule. In *Riggs*, the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute.[30]

So the case was not difficult because of linguistic ambiguity in the statute.[31] Any sense of unclarity, he says, is 'because *we* think the case for excluding murderers from a general statute of wills is a strong one, sanctioned by principles elsewhere respected in the law.'[32] He then says the description 'unclear' is the result rather than the occasion of Hercules' method of interpreting statutory texts. Hercules is an ideal-type imaginary judge that Dworkin uses to illustrate his proposed method of adjudication, which Dworkin called 'law as integrity'. Law as integrity holds that 'propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice.'[33] His method of statutory interpretation

[29] Dworkin, *Taking Rights Seriously* (n 5) 38, 45. Although Dworkin spoke of 'policies' and 'other standards', I will not try to provide an exegesis of his views on them here.

[30] Dworkin, *Taking Rights Seriously* (n 5) 45.

[31] Dworkin, *Law's Empire* (n 11) 17, 351.

[32] Dworkin, *Law's Empire* (n 11) 352 [italics in the original]. By 'we', I take him to mean the relevant political community and/or competent lawyers. I am not sure what he means by 'elsewhere' in the law. It has a taxonomical edge but may just be an empty expression.

[33] Dworkin, *Law's Empire* (n 11) 225.

demands that judges proceed from a fiction that a single author – 'the community personified, expressing a coherent conception of justice' – created the law in question.

Hercules, according to Dworkin, identifies the statute as unclear only after he has ascertained that the maxim 'wrongdoers ought not to benefit from wrongdoing' binds him. Hercules must ascertain whether it is outweighed by any other principles of morality or justice. Having found no principles that outweigh it, he concludes the statute is unclear. Hercules must then interpret the legislation using the maxim as a background standard. He should presume that a single author created the Statute of Wills alongside any other relevant law. The maxim justifies his adoption of a new rule. Further, the maxim should portray the community's legal practice in the best light possible, and promote a consistency of principle that 'law as integrity' requires.[34]

What makes *Riggs* a difficult case, in my view, is that it sits at the juncture of private law property and criminal wrongdoing. The case requires a judge to decide whether and how the two bodies of law interact, and there was indeterminacy over this. *Riggs* raises a question about the systematicity of law, and Dworkin saw this. Yet there is nothing in *Riggs* that leads one inexorably to endorse 'law as integrity', as I shall explain.

The reason that the maxim was cited in *Riggs* is because the lawyers in that case relied on common law precedent that expressed the maxim, such as the case denying a murderer the

[34] Dworkin, *Law's Empire* (n 11) 228. This reconstruction amalgamates Dworkin's writings at various periods during his scholarship. It has necessarily meant glossing large parts of his theory. It has not been possible to enter into a detailed examination of what most faithfully represented his view and whether it changed over time.

benefit of their victim's life insurance policy. At the same time, the maxim does express a strong intuition, as evidenced by the horror expressed in the judgment. In the next section, I ask whether the maxim is a principle in Dworkin's sense.

3. A Dworkinian principle?

What sort of entity is expressed by the phrase 'wrongdoers should not profit from their own wrongdoing'?[35] Is it a principle in Dworkin's sense? A short diversion is in order to establish what Dworkin took principles to be. A principle is a requirement of morality or fairness that justifies the slayer rule (as the rule in *Riggs* is known). Yet the maxim does not obviously express a true moral principle, as we will see when we examine its grounds. Even if it does state a true moral imperative in murder cases – which is not self-evident, as I go on to argue – I am not sure it can justify every application of the slayer rule in its full ambit. This suggests that a better explanation of legal practice is in order. Section 5 provides it.

3.1 *Dworkin's account of principles*

The argument in this chapter assumes it would be an affront to Dworkin's theory of law if the maxim was incapable of justifying the cases it is applied to because it is not a true requirement

[35] I shall treat similar utterances as expressing equivalent ideas and thus interchangeable. So both 'no one shall be permitted to profit by his own fraud' and 'no one shall take advantage of his own wrong…' (as the judgment in *Riggs* expressed it, see text to n 16 above) refer to aspects of the same maxim or moral principle (if it exists). If I am wrong and there are subtle differences, then I do not think these are material to the account given here. Utterances that make reference to what *courts* ought to do, however, I do not treat as equivalent. This is because they identify an agent.

of morality. In this subsection, I want to defend this assumption by following the course of Dworkin's changing thoughts on the nature of principles. My aim is not to get to the bottom of what a Dworkinian principle is, but only to defend the narrow claim that the maxim in *Riggs* must express a true moral principle in order to serve the purpose it plays in Dworkin's account.

In some parts of *Taking Rights Seriously*, Dworkin gave an account of principles that denied this. He said that principles had their origin 'in a sense of appropriateness, developed in the profession and the public over time.'[36] Moreover, if it no longer '*seemed unfair* to allow people to profit by their wrongs' the principle would fall into desuetude.[37] It goes without saying that the legal profession or the public's view on what is fair or appropriate need not coincide with the demands of morality.

Joseph Raz pointed out that this account grounds principles entirely in social facts and sounds like an instance of custom.[38] It is inconsistent with the account Dworkin gives elsewhere in the same chapter and is not reflective of his eventual view. In *Law's Empire*, Dworkin amended his view. He was troubled by the problem of how true moral principles could justify unjust laws, such as the Fugitive Slave Act. He wanted to avoid saying that an unjust law is not law.[39] He therefore distinguished 'abstract' justice from the scheme of justice adopted by a

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[36] Dworkin, *Taking Rights Seriously* (n 5) 58.

[37] ibid. (emphasis added).

[38] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823.

[39] Dworkin, *Taking Rights Seriously* (n 5) 326, 339, 341.

particular political community.[40] A judge, such as Hercules, must adopt principles that offer the best justification for settled law, even if they fall short of moral correctness.

It is difficult to know what to make of this idea. Hart scathingly said:

> If all that can be said of the theory or set of principles underlying the system of explicit law is that it is morally the least odious of morally unacceptable principles that fit the explicit evil law, this can provide no justification at all.[41]

Dworkin had a response to this,[42] and various friendly proposals have been made on his behalf.[43] It is not necessary for us to light Dworkin's way out of this thicket because *Riggs*, after all, was not a case about a seriously unjust law. Recall that *Riggs* was a hard case because there was a gap or indeterminacy in the law. In these cases, said Dworkin, the court 'cites principle as its justification for adopting and applying a new rule.'[44] We can expect that the maxim represents a true requirement of morality,[45] at least in such a case. The court has, after all, fashioned a new rule on the basis of a principle, not outweighed by any other requirement of morality or justice, that was felt to give the morally right result.

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[40] Dworkin, *Law's Empire* (n 11) 202.

[41] HLA Hart, *Essays on Bentham* (OUP 1982) 151.

[42] Ronald Dworkin, 'Reply' in Marshall Cohen, *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth 1984) 259; *Law's Empire* (n 11) 202-206.

[43] See e.g. TRS Allan, 'Interpretation, Injustice and Integrity' (2016) 36(1) OJLS 58 and Stephen Perry, 'Two Models of Legal Principles' (1997) 82 Iowa LR 787. There is a lot of other literature on principles besides.

[44] Dworkin, *Taking Rights Seriously* (n 5) 45. A fuller extract is given at n 30 above.

[45] Allan proposes that Dworkin cannot maintain an unstable position and should adopt the view that 'the judge's duty of fidelity to law combines with his conviction that legal principle always dictates a determinate answer to guarantee that legal and moral obligation perfectly coincide': Allan (n 43) 59. Perry says principles must 'be perceived by judges as falling within a certain range of moral plausibility' whilst also being grounded partly in 'a social source': Perry (n 43) 810.

3.2 *Does the maxim state a true moral principle?*

In order to be a principle in Dworkin's sense, the maxim must, firstly, state a requirement and, secondly, the imperative must be grounded in morality or justice.[46] Dworkin set out the following notion of justice under law as integrity: 'if we accept justice as a political virtue, we want our legislators and other officials to distribute material resources… so as to secure a morally defensible outcome.'[47] We therefore can expect the maxim to state a true requirement of justice. At the very least, it ought to express a true requirement of justice in a murder case, even putting aside the full ambit of the slayer rule. And doesn't it? Most people would balk at allowing a murderer to gain from his victim's death. The moral horror which undergirds this maxim has never been better expressed than by the Nebraskan Supreme Court:

> Had he been allowed to take it at her death, caused as it was, he would have taken it by purchase rather than by inheritance, and at a price of such enormous iniquity that the mind shudders at its mention – the murder of his own motherless daughter.[48]

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[46] There is a further success criterion which I presuppose. The requirement of morality or justice must be expressed by the maxim itself; it cannot be a generic requirement of morality or justice that could justify any number of different rules and/or be satisfied without requiring wrongdoers to disgorge profit. So, for example, the justification cannot be something so general as reassuring the public, assuming this is a good, because many actions would satisfy this requirement and it has little connection with profit or wrongdoing.
John Finnis is someone who enlists the intuitive appeal of the *Riggs* maxim to buttress his argument for the justification of punishment in general: John Finnis, *Natural Law & Natural Rights* (2nd edn, OUP 2011) 263. I do not think Dworkin would follow him in that.

[47] Dworkin, *Law's Empire* (n 11) 165.

[48] *Shellenberger v Ransom*, 31 Neb 61; 47 NW 700 (1891), reported in Charles S Lobingier, 'Supreme Court of Nebraska. *Shellenberger v. Ransom et Al.*' (1891) 39(4) The American Law Register (1852-1891) 265.

A slew of stagecoach robberies in Westerns, tontine murder mystery comedies,[49] and scheming blondes in films noir,[50] have promoted killing as the paradigm instance of wrongdoing-to-acquire in the popular imagination. Perhaps unsurprisingly, then, the law of England and Wales contains the slayer rule.[51] But there is more than cold-blooded murder in the case-law. Intuitions dilute as they get further away from this clear case. Can a beneficiary under a will inherit if they are convicted of manslaughter? What about someone with a defence of insanity? Let us look first at how English courts have reasoned in a paradigm case, like *Riggs*. We can then see, in section 4, how the reasoning plays out in cases more remote from the paradigm.

Like the New York Court of Appeals when it said 'he cannot vest himself with title by crime',[52] the English courts declared that 'no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.'[53] However, the emphasis here is rather on the reasons that *a legal system* would have for enforcing rights acquired in the breach of its own directives. Any influence from moral principles, if it exists, is not made explicit. An earlier English case had said, 'it is incumbent on a court of equity to act by such a rule as tends most to discountenance the

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[49] See e.g. *The Wrong Box* (1966, Columbia Pictures) based on the eponymous novel by Robert Louis Stevenson (1889).

[50] See e.g. *Double Indemnity* (1944, Paramount Pictures).

[51] It is more commonly called 'the forfeiture rule' in England and Wales. For simplicity, I will refer to it as 'the slayer rule' even when speaking about England and Wales.

[52] *Riggs v Palmer* 115 NY 506 (1889), 513.

[53] *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156. See also *New York Mutual Life Insurance Company v Armstrong* 117 US 591 (1886).

crime.'[54] 'Discountenance' is an archaic verb. In modern legal language, it might be glossed as *deter* or *disavow* or *dissociate from*. These responses are proposed by certain expressive and retributive accounts of criminal law, more on which in section 5. What these dicta are not is illustrative of Dworkin's explanation for legal practice.

If the maxim that wrongdoers ought not to benefit from wrongdoing has moral grounds, it is surprisingly difficult to ascertain what they are. Dworkin treats them as self-evident. He appears to take for granted that the reader will accept the maxim states a moral principle, because he never in all his writings elaborates on the mere assertion.

One possibility is that this is a requirement of distributive justice. Honoré baldly says so: 'They make money out of what is seen as wrongdoing; and distributive justice bars members of a community from profiting from their own wrongdoing.'[55] Yet this gets us no further because it does not tell us which principle of distribution is being alluded to. Perhaps the additional premise Honoré needs is provided by David Ross. Ross suggested that the distribution of pleasure according to moral desert is a fundamental good.[56] He asks us to compare a world in which the virtuous are happy and the vicious miserable with a world in which the virtuous are miserable and the vicious happy.[57] Most of us would prefer the first world.[58] This,

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[54] *Bridgman v Green* (1755) 2 Ves Sen 627, 628.

[55] AM Honoré, 'The Dependence of Morality on Law' (1993) 13 OJLS 1, 13. It may be that Honoré meant to refer not to critical morality but rather 'what is *seen as* wrongdoing' and therefore some assurance rationale.

[56] W D Ross, *The Right and the Good* (OUP 2002, first published 1930) 138, 140.

[57] ibid., 138.

[58] Lawrence Becker notes this intuition is referenced in the Book of Job in Christian theology: Becker, *Property Rights: Philosophic Foundations* (Routledge 1977) 84.

however, begs the question. *Why* do we prefer the first world, and *should* we? Ross is merely pointing to the intuition we started with, but is unable to explain it.

Despite its intuitive attractiveness, there are a number of problems with appealing to such a theory.[59] I will skip over the obvious objection that it would be immensely difficult for a legal system to realise any such distribution in practical terms.[60] To take the most glaring of the remaining problems: granting Ross's argument does not justify the *Riggs* maxim. Ross's thought experiment presumes an allocation on first principles without the intervention of human agency. That is not our world. In our world, we face two additional practical questions. Should anyone intervene in the existing distribution? If so, who? A court, deliberating on the *Riggs* maxim, is deliberating about *re*distributing benefits and burdens. It must face the question of what justifies deprivation in this instance. Most contemporary theories of punishment proceed from the motivating thought that imposing suffering calls for justification.[61] Ross's theory does not provide any.

The force of this objection is stronger because a court is a very specific kind of moral agent, and perhaps not the right kind. It can only react to disputes brought before it. It cannot ensure the uniform application to the entire political community of any distributive principle that it

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[59] Many of these are pointed out in Becker, ibid., 83-86.

[60] Ross's thought experiment is a far cry from the distributive capacity of a legal system. A legal system would need to correctly identify virtue and allocate an appropriate quantum of pleasure to the virtuous. Whilst it is true that the law treats the acquisition of property as valuable – as a reward or benefit – this is not the same as it being able to allocate pleasure directly.

[61] At some points in his work, Ross does not commit himself. He says: 'If virtue deserves to be rewarded by happiness (*whether or not vice also deserves to be rewarded by unhappiness*) …' (Ross, n 56, 135; emphasis added).

applies in a particular case. The institutional nature of courts, as reactive to suits, prevents this. Indeed, Dworkin noticed this when he said that many wrongdoers profit from their wrongs. Some do so legally, and some do so undetected by law enforcement. He thus identified a tension with his principle of justice under law as integrity, whereby officials ought to ensure a morally defensible distribution of material resources. It does not seem to me that a principle's dimension of weight provides a satisfactory dissipation of this tension. We have no assurance that the principle is applied to all those cases in which it is most weighty because civil courts do not have the institutional competence to carry out distribution on a population scale.

The second glaring problem with relying on Ross's theory is that its notion of desert – even if suitable as a criterion for allocating pleasure and pain, praise and blame – is not obviously apt as a criterion for allocating property. For example, we might wish to allocate property based on privation or need. Yet the most needy are not necessarily the most virtuous. Nor does the notion of wrongdoing in the maxim necessarily track moral wrongdoing. The reference to wrongdoing in the maxim is to *legal* wrongdoing.[62] (There is some rumbling in the English case-law of a more general idea of 'turpitude', but that was cashed out by the Supreme Court in terms of criminal or 'quasi-criminal' acts.[63]) Criminal or 'quasi-criminal' wrongdoing is not

[62] For an example of this presumption, widely made, see James Goudkamp & Lorenz Konig, 'Illegal Earnings' (2018) 9(1) Journal of European Tort Law 54, 75. An award 'will be wrongful only if some other set of rules within the legal system identifies the claimant as being an unworthy recipient of the award'.

[63] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430, [23]-[29]. The status of this case is uncertain following *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

necessarily moral wrongdoing. It is not evident that the *Riggs* maxim states a true moral principle because the truth of the principle depends on whether the law is sound or not.

Neither distributive justice nor moral desert, nor a combination of them, seem to persuasively ground the maxim. Perhaps some other moral ground, not yet identified, can do so. I have not conclusively shown that the maxim in *Riggs* is not a moral precept. I have merely doubted it by posing some questions about its self-evidence. However, I hope I have shown that there is a serious explanatory burden that Dworkin did not discharge.

If moral grounds can be found for the maxim, do they apply to the full scope of the slayer rule? In the next section, we examine common law doctrine on the slayer rule in more detail. We look at cases which move away from the paradigm of deliberate killing with intention to acquire. The moral intuition we have about *Riggs* is weakened in cases where there is no intention to acquire, or where the killing itself is unintentional. Yet the slayer rule applies unabated to such cases. This suggests a different explanation of legal practice than that given by Dworkin.

4. The slayer rule in the common law

Examples abound of deliberate killing without any intention to acquire property. Among them are cases of assisting or encouraging someone else to commit suicide (by suicide pact or euthanasia). And then there are murders motivated by hatred, revenge, fear, jealousy (etc) — that is, motivated by anything except a desire to acquire. There are also cases where the killing

itself was unintended. This section considers each of these variants on the *Riggs v Palmer* situation by reference to dicta predominantly from England & Wales but also elsewhere in the Commonwealth. This is to avoid a charge that I have scurrilously changed the subject away from what Dworkin was talking about. Dworkin presented his view of the nature of principles as part of a general theory of law, applicable as much to the United States as to elsewhere. Comparing English law with that in other places answers a potential objection that the slayer rule has developed idiosyncratically in one particular jurisdiction i.e. that the political community in any given jurisdiction has adapted the rule to its very peculiar conception of morality. It allows us more confidently to attach significance to what judges say about the rationale for the rule.[64]

4.1 *Deliberate killing with no intention to acquire*

Varying the facts from those in *Riggs* does not change the result. Killers are disentitled from acquiring property resulting from the death. This is so even though acquisition was never their aim. The rule is not about removing financial incentives to kill. Judicial dicta are adamant on this point. An Australian case confirms the rule is not grounded in 'a disapproval of greed. The basis of the doctrine is public policy, an abhorrence of the notion that one may profit from killing another, an *odium occidionis*.'[65] The New South Wales Court of Appeal thus detaches the rule from any supposed rationale that crime does not pay.[66] The Canadian courts

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[64] Note that I have not placed any weight on whether judges call it a 'rule', a 'principle', a 'policy'.

[65] *Troja v Troja* (1994) 33 NSWLR 269 (New South Wales Court of Appeal) 299, approved in *Dunbar v Plant* [1998] Ch 412 (CA) 425.

[66] See also *Re Tucker* (1920) 21 State Reports (New South Wales) 175, 180.

have taken the same view: 'This principle of public policy... should apply regardless of what the intention or motive or the ultimate object of the act may be.'[67] The English courts maintain a similar stance.[68] The House of Lords has said that it is 'immaterial whether the criminal knows or not of the intended gift.'[69] These dicta are borne out in further variations on *Riggs,* considered below.

4.1.1 Euthanasia and assisting suicide

Euthanasia is murder in the eyes of the criminal law. By definition, though, it is not motivated by a desire to benefit in material wealth. Nonetheless, an Australian court has ruled that 'it is irrelevant [to the application of the slayer rule] that the offender may have been motivated to ease suffering or to have acted at the request of the deceased.'[70] The offender in that case had provided prescription medicine to a friend of his, in order that the friend could end his own life. The friend left everything to the offender in his will, but the slayer rule precluded the will from coming into effect. The rule applies to euthanasia and assisting suicide. The court said: 'This is one of those few remaining clear-cut situations about which citizens can be absolutely

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[67] *Whitelaw v Wilson* [1934] 3 DLR 554 (Supreme Court of Canada); *Lundy v Lundy* (1895) 24 SCR 650 (Supreme Court of Canada).

[68] *Re Hall* [1914] P 1, 7; *Re Cash* [1911] NZLR 577, 580.

[69] *Beresford v Royal Insurance Co Ltd* [1938] AC 586 (HL). The logic appears to be that a criminal who is not motivated by money will not, it must follow, be deterred by deprivation of it. So the courts must get on with applying the rule they consider most appropriate in such cases.

[70] *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors* [2014] QSC 47 (Supreme Court of Queensland), [19].

certain.'[71] The Australian court was strongly influenced by a decision of the English Court of Appeal: *Dunbar v Plant*.[72]

4.1.2 Suicide pacts that fail

Dunbar v Plant concerned a suicide pact between two lovers. One of them survived it. The family of the deceased fiancé did not want the surviving fiancée taking sole interest in the house that the couple had bought together, their joint bank accounts, and the proceeds of his life insurance policy. The insurance policy was made out in her favour. Since she had expected to die herself, she never had any intention to acquire property by the suicide pact. But she had committed the crime of aiding and abetting suicide.[73]

The Court of Appeal unanimously held that the slayer rule applies to suicide pacts. The ambit of the rule was determined by the nature of the crime. A serious crime that had fatal consequences, committed deliberately, would invoke the rule. The particular means used (whether violent or not) was neither here nor there.[74] Philips LJ thought that the court came more readily to this conclusion than it would have if Parliament had not passed the Forfeiture Act 1982. The Forfeiture Act 1982 permits a court to grant relief from the slayer rule, or (as English law calls it) the forfeiture rule.[75] The reference to forfeiture derives from the previous

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[71] ibid., [9].

[72] *Dunbar* (n 65). See also *Re Dellow's Wills Trust* [1964] 1 WLR 451.

[73] Suicide Act 1961, section 2.

[74] *Dunbar* (n 65) 426.

[75] Forfeiture Act 1982, section 1(1).

Forfeiture Act of 1870. The 1870 Act abolished the rule that felons' property is forfeit to the Crown. The modern confiscation statutes are not as automatic in their operation. This leaves a gap for the courts to fill. It was in this context that the common law developed the slayer rule. The new Forfeiture Act allows courts to modify the effect of the slayer rule where 'the justice of the case' demands it.[76] The rule cannot be modified in murder cases, however.[77]

The Act says that the justice of the case involves 'the conduct of the offender and of the deceased and such other circumstances as appear to the Court to be material.'[78] The most material of those circumstances, according to a majority of the Court of Appeal, was whether the culpability of the beneficiary attracted the censure of the rule at all.[79] The minority judge thought that this was one consideration among many, but not the paramount one. He felt utterly unable to adjudicate on relative moral culpability.[80] This theme reappears throughout judicial thought on the slayer rule. An Australian court put it this way: 'There is something a trifle ludicrous in the spectacle of Equity judges sorting felonious killing into conscionable and unconscionable piles.'[81] The minority in the Court of Appeal preferred to take into account additional factors, which included the deceased's intention that his fiancée should benefit from his life insurance policy.[82]

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[76] Forfeiture Act 1982, section 2(2).

[77] Forfeiture Act 1982, section 5.

[78] Forfeiture Act 1982, section 2(2).

[79] *Dunbar* (n 65) 438.

[80] *Dunbar* (n 65) 428 per Mummery LJ.

[81] *Troja v Troja* (n 65) 299.

[82] *Dunbar* (n 65) 428.

So far we have considered the wrongdoer's intentions, not the victim's intentions. Our discussion aims to find out what the rule is, as well as the reasons why it is that way. So far it seems that the wrongdoer's intention to benefit is not what drives the slayer rule. This is because the rule applies even where the wrongdoer does not intend to benefit. The slayer rule does not exist to dissuade greed. Can we similarly exclude the victim's intention as irrelevant to the rationale? We cannot do so quickly. For there are several authors who believe that the slayer rule is displaced if a will in the killer's favour is reaffirmed between the act of killing and the eventual death of the victim.[83] The minority decision in *Dunbar v Plant* gives them some succour, but their view goes against the grain in the general trend of cases. None of the cases suggest that the slayer rule is applied because the courts are putting themselves into the mind of a victim who knows that they were murdered. As Simester says, 'disentitlement [is not] contingent upon a presumption that the testator did not intend the killer to take *qua* killer.'[84] In two scenarios, the slayer rule applies contrary to the victim's wishes that the killer should benefit.[85] Indeed, it applies even to state benefits, such as widow's pension, where the victim is not the person doing the conferring.[86] Given all of this, we can conclude that the victim's intention that the wrongdoer gain is just as irrelevant as the wrongdoer's desire that

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[83] TG Youdan, 'Acquisition of Property by Killing' (1973) 89 LQR 235, 236; J Chadwick, 'A Testator's Bounty to His Slayer' (1914) 30(118) LQR 211, 212-213; *Halsbury's Laws* (5th edn, 2016) vol 102, para 39.

[84] Simester (n 2), 225.

[85] Simester points out that the slayer rule has been applied unmitigatedly to other unsuccessful suicide pacts: *Whitelaw v Wilson* (n 67). It was also applied to life assurance taken out by someone who committed suicide (while suicide was still a crime in English law): *Beresford v Royal Insurance Co Ltd* (n 69).

[86] *R v Chief National Insurance Commissioner Ex p Connor* [1981] QB 758 (CA).

he should gain.

4.2 *Manslaughter*

We turn now to cases where there is no intention to kill, i.e. manslaughter cases. In these cases, necessarily, there cannot be any intention to acquire either. The rule established in murder cases bars acquisition in cases of manslaughter as well.[87]

> It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.[88]

The strength of the intuition in murder cases reverberates into manslaughter cases. In *Re Hall*, the first case to directly address manslaughter, the court considered itself bound by the precedents on murder, yet also endorsed their reasoning. 'The distinction [between murder and manslaughter] seems to me either to rely unduly upon legal classification, or else to encourage what, I am sure, would be very noxious — a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted.'[89] The court is hesitant to make 'sentimental speculation' about degrees of relative culpability, much like the Australian court which thought it ridiculous to sort crime into 'conscionable' and 'unconscionable' piles. This is not what we might expect if the rule is justified by a principle

[87] *Dunbar* (n 65) 435-436.

[88] *Re Crippen* [1911] P 109, 112.

[89] *Re Hall* (n 68), 6, 7-8.

about allocating property according to moral deserts. An inquiry into relative desert would be warranted if Dworkin was right to say that legal practice in slayer cases is explained by a moral principle which varies in weight.

Courts are very resistant to making assessments of the moral quality of the defendant's action.[90] They apply the rule reluctantly sometimes but apply it nonetheless.[91] On Dworkin's explanation of *Riggs*, this is puzzling and suboptimal. It might be caricatured as 'mechanical jurisprudence'. However, the Supreme Court has recently reaffirmed the application of the rule and its grounds in an illuminating way. The appellant in *Henderson v Dorset NHS Trust*[92] killed her mother during a psychotic episode. The respondent NHS trust admitted breaching their duty of care by failing to return her to hospital prior to this episode. She pleaded guilty to manslaughter on grounds of diminished responsibility and was detained in a secure hospital under order of the criminal court. Part of her damages claim related to the lost inheritance of her mother's estate by virtue of the slayer rule, which had not been disapplied under the Forfeiture Act 1982. (This chapter is concerned with that part of her claim that relates to the

[90] In *Re Giles* [1971] 3 All ER 1141, 1145-1146, the court accepted that 'the principles of public policy on which the courts act change' but was 'not… concerned to analyse the ground on which the courts have established this rule' because it would require judges to differentiate between those cases which were 'tragic' and those where relaxation of the rule would be 'harmful and dangerous'.

[91] *Re Giles* (ibid.) and *Re Land (Dec'd)* [2007] 1 WLR 1009 are examples In *Giles*, the deceased's wife killed him with a single blow from a chamber pot. She pleaded guilty to manslaughter on grounds of diminished responsibility. The court was persuaded by the argument against sentimental speculation. While the case was a tragic one 'as are many of the cases in which a person kills a near relation, sometimes out of love for that person,' there were good reasons to retain a rule rather than a more flexible principle.

In *Re Land*, a gross negligence manslaughter case, the rule was applied against an only child with learning difficulties who had cared for his bedridden mother until her death from bed sores and breast cancer. The court was moved to say: 'The rule will... be applied even where the public interest does not require it (and even where its application may be contrary to the public interest)…' [18].

[92] [2020] UKSC 43, [2021] AC 563.

lost inheritance alone, because no other head of loss could be said to be profit from wrong. So-called 'sanction shifting' or corrective justice cases fall outside this thesis project's terms of reference.)

Before the Supreme Court, the appellant emphasised her lack of moral culpability for the killing as a ground for recovering the inheritance and distinguishing precedent. Her claim was rejected. The court said 'the crucial consideration… was the *fact* that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected.'[93] The fact of a criminal conviction is a proxy rule that avoids a direct assessment of the moral quality of the act. The appellant argued that the hospital order demonstrated that the criminal court did not find her to have significant personal responsibility. The Supreme Court responded: 'the fact that there may be no penal element to the sentence imposed by the criminal court [does not] alter matters. … A conviction for manslaughter by diminished responsibility still involves blame. … Moreover, the fact of a criminal conviction for manslaughter is itself punitive.'[94] There was a public interest in the court condemning unlawful killing.[95]

The appellant invited the Supreme Court to take a different view of personal responsibility to that of the sentencing court, on the basis that private and criminal law pursue different

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[93] *Henderson* (n 92), [83] (emphasis added).

[94] ibid., [109].

[95] ibid., [129].

functions. The invitation was not taken up for reasons that will be familiar from Chapter 4.[96] There was a high risk of inconsistent decisions. The court did not want to propose a new method of inquiry into the morality of what the claimant did.[97] It must assume that the criminal court's disposal of the matter was appropriate.[98] The crux of the matter was that it was 'desirable for the criminal and civil courts to be consistent in the way that they regard what the claimant did'.[99] The Supreme Court cited a Canadian case that had held this to be so. This is the rationale of preserving the integrity of the legal system, familiar to us from a long line of cases on illegality. We should understand references to the integrity of the legal system to mean just this, the 'consistent… handling of the plaintiff's criminal conduct and its consequences',[100] and not the Dworkinian sense of law as integrity. Evincing inconsistency might undermine public confidence in the law.[101]

Importantly, the claimant in *Henderson* was not acquitted on grounds of insanity. The slayer rule does not extend to cases of insanity (or to causing death by dangerous or careless driving).[102] It is acquittal that marks insanity out as exempt from the slayer rule. It distinguishes the plea from one of diminished responsibility. In *Re Holgate*, the Court of Appeal refused to allow someone convicted of manslaughter to plead, in a subsequent civil

[96] ibid., [100].

[97] ibid., [108].

[98] ibid., [47].

[99] ibid., [46].

[100] ibid., [46].

[101] ibid., [46], [119], [121].

[102] *Re Houghton* [1951] 2 Ch 173; *Re Pollock* [1941] Ch 219; *Re Pitts* [1931] 1 Ch 546.

trial, that he was insane. Burgess VC said: 'It would be quite wrong of me to say that two affidavits now filed stating that he was insane should be accepted by me as proof to [counter the fact of the conviction]... so that it should be held for the purposes of inheritance of property that he was not to be taken to have committed the offence of manslaughter.'[103]

It is probably safe to conclude that killing in self-defence is not caught by the rule. Indeed, some American courts have held this.[104] The question has not come before an English court, but it is likely that a court would hold that all killings which do not attract the censure of the criminal law also fall outside the slayer rule.[105]

4.3 *Modes of acquisition*

The slayer rule is a general one. It applies across the board to any mode of acquiring property that involves devolution upon death. There are many ways that property can be acquired upon the death of another.[106] The slayer rule applies to inheritance under a will; to intestate

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[103] *Re Holgate* [1971] (unreported); reported in TK Earnshaw and PJ Pace, 'Let the Hand Receiving It Be Ever So Chaste....' (1974) 37(5) MLR 481, 487.

[104] *Provident Life & Accident Insurance Co v Carter* 345 So 2d 1245 (La App 1977); *Southern Life & Health Insurance Co v Mack* 17 So 2d 370 (La App 1944); *National Life & Accident Insurance Co v Turner* 174 So 646 (La App 1937).

[105] John G Ross Martyn, Nicholas Caddick, and JHG Sunnucks, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (20th edn, Sweet & Maxwell/Thomson Reuters 2013), 73-05. Note that this does not mean that a civil court must treat an acquittal as proof that the accused did not commit any crime. The civil court applies its own standard of proof: *Dunbar v Plant* (n 65); *Re Pollock* (n 102).

[106] Some general guidance about what types of rights were affected by the slayer rule was given by the High Court in *Henderson v Wilcox* [2015] EWHC 3469 (Ch), [2016] 4 WLR 14, [16]. See also the list of scenarios provided for by US state legislation in Linda Maki and Alan Kaplan, 'Elmer's Case Revisited: The Problem of The Murdering Heir' (1980) 41(4) Ohio State LJ 905, 945.

succession (by operation of law where there is no effective will); to a policy of life insurance; and in the doctrine of survivorship (where the killer was previously a joint tenant with the victim, and is now entitled to the whole interest).

We have considered many shades of wrongdoing, ranging from avaricious murder, through intentional but non-covetous killing, to manslaughter. The slayer rule encompasses all of these. However, killing while insane and motor manslaughter probably fall outside the slayer rule. Thus the slayer rule's application in private law is quite firmly pegged to the characterisation of the killing as criminal. As well as trying to ascertain the extent of the rule, we have tried to find its rationale. Neither the killer's motive nor the victim's presumed wishes provide a rationale. How, then, should we explain legal practice in slayer rule cases?

5. What explains legal practice in slayer rule cases?

5.1 *Analysing 'ought' statements*

As prefigured by the discussion of David Ross's thought experiment in subsection 3.2 above, it seems to me that the most natural way of reading the maxim 'wrongdoers ought not to benefit from their wrongdoing' is as a statement evaluating a state of affairs. That state of affairs describes the distribution of goods across a population according to moral desert. As a moral claim, it is susceptible of truth or falsehood. I left open that it could be true; but, if it is, its grounds are mysterious and Dworkin does not assist.

Dworkin told us it states a reason which inclines the court in a particular direction. This, too, is obscure. Bernard Williams' analysis of different senses of the term 'ought' is illuminating here.[107] He distinguishes between statements which express that a state of affairs ought to be the case and statements about how it *comes about* that things ought to be the case.[108] He compares the statements

(1) Someone ought to help that old lady;

and

(2) Jones ought to help that old lady.

Statement (2) is action-guiding in a way that (1) is not. For Williams, (2) states a moral obligation, whereas (1) can support (2) only when something further is added – 'a special kind of reason why it ought to be the case that someone do a particular action.'[109]

The statement that 'wrongdoers should not benefit from their wrongdoing' is of the same kind as (1) above – 'someone ought to help that old lady'. The maxim describes a particular distribution of goods, those goods being proceeds of wrongdoing. It is a partial description; it does not make a thoroughgoing recommendation as to whom the proceeds should be redistributed to. Nevertheless, it is a proposition that recommends an outcome relating to one aspect of the consequences of a wrong: the aspect concerning the material proceeds of

[107] Bernard Williams, 'Ought and Moral Obligation' in his *Moral Luck* (Cambridge University Press 1981).

[108] ibid., 116.

[109] ibid., 116-117.

wrongdoing. It is certainly not an action-guiding proposition without more. Of course, this does not prevent it stating a rule, a Dworkinian principle, and/or a Dworkinian policy.[110] Dworkin acknowledges that the expression of a standard is not always sufficient to indicate what type of standard it is, nor is the role it plays sufficient to do so.[111] Indeed, it is common for legal and non-legal rules to be expressed in the form of (1) above – take 'cycles must not be placed against walls', for example – and a familiar aspect of the problem of the normativity of law. How do such statements guide action, and what additional reasons are needed before one can determine what to do?

I cannot provide a full answer to these questions, but I believe this is the right location for the inquiry. Far from being an explanation of legal practice in slayer rule cases, adverting to moral principles deepens the puzzle. There is another possible explanation, one consistent with the judicial dicta explored in section 4. (Providing an accurate description of the social situation was Dworkin's own criterion for success, at one time anyway.[112]) The alternative explanation is this: the question in cases like *Riggs* is what, practically, an official exercising the civil jurisdiction ought to do when faced with a rule that only explicitly gives laypeople and/or criminal law officials any direction.[113] It is in this sense that it is a case with some

[110] A Dworkinian policy is 'a standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change): Dworkin, *Taking Rights Seriously* (n 5) 38-39.

[111] ibid., 44.

[112] ibid., 47.

[113] This is a possible reason for why the dicta so often refer to what is the 'court's business' or the 'reasons' a 'system of jurisprudence' might have. The maxim itself is often couched in terms of how a court should respond; see e.g. 'a man is not allowed to have recourse to a court of justice to claim benefit from his crime'. (*Beresford v Royal Insurance Co* (n 69) 598-599 per Lord Atkin.) For another example, '… the defence of illegality is an appeal to a self-evident legal principle or policy that justice, and access to it, does not require *courts and tribunals to assist litigants* to benefit from their illegal conduct, if it is inextricably bound up in their claim'

indeterminacy, calling for creative determination. Yet the indeterminacy does not entail that judges have unfettered discretion to decide the case, nor need a positivist insist on that explanation. Precisely the opposite:[114] to locate this as an aspect of the problem of the normativity of law is to ask what the effect of settled law is. Yet in answering this practical problem about the effect of settled law, judges need not (and, in fact, actively avoid) resort to assessment on the basis of the wrongdoer's individual deserts. Judges do not assess the morality of the conduct of the person making a claim to some property. Instead, they take into account coarse-grained legal considerations, such as the fact of conviction or acquittal.

The considerations judges do in fact resort to are reducible to the desideratum that 'criminal and civil law are consistent in their handling of the wrongdoer's conduct and its consequences' (*Henderson*). This is how best to understand all the references to the 'integrity of the legal system' and 'discountenancing wrongs', as well as the emphasis placed on the fact of a conviction. Judges tend to show a disposition to be committed to the soundness of criminal law when deciding property disputes. Criminal law constrains a judge's discretion to respond to the wrongdoing. The judge must respond in a way that is consistent with them holding an attitude of commitment[115] toward that criminal law. This is so even though the judge is

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(*Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] EWCA Civ 1065, [2004] 4 All ER 1056, [2] – emphasis added).

[114] It is strange that Dworkin thought this would be the positivist's riposte given that Hart vigorously resisted the idea that judges have unfettered discretion during his discussion of why it is mistaken to regard law as merely a prediction of what judges will do in *Concept of Law* (OUP 1961) 142-143.

[115] HLA Hart called this the 'reflective critical attitude' and the 'internal point of view' (ibid., 56). These are a little clumsy, and I do not want to imply that I accept his account of it. Joseph Raz, John Gardner, Jules Coleman, Leslie Green, Scott Shapiro and others have discussed the problem and made their own refinements. Calling it an 'attitude of commitment' is meant to remain agnostic on the detail of any of these accounts.

applying private law rules, such as the Statute of Wills, and exercising the civil jurisdiction. The next two subsections expand on this argument and explain why it is relevant to property particularly.

5.2 *The attitude of commitment*

The *Stanford Encyclopedia of Philosophy*'s entry on 'Legal Positivism' traces the historic development of positivist scholarship via the imperativalist thought of Jeremy Bentham and John Austin through to Hans Kelsen's more contemporary writing. It contains the following remark about the decisive objection to their work that paved the way for more recent scholarship. Kelsen and the imperativalists miss 'important facts, such as the point of having a prohibition on theft; the law is not indifferent between, on the one hand, people not stealing and, on the other, stealing and suffering the sanctions.'[116]

This criticism is well-founded. Law is not reducible to a set of directives enjoining officials to apply sanctions because posited laws often underdetermine what officials ought to do according to the law. It is left very unclear. A case like *Best* arises precisely because the Chief Land Registrar must decide what effect the law criminalising residential trespass has upon his official duties. The same goes for the judges in that case, and in *Riggs*. As Leslie Green has written elsewhere: 'Because law is systematic in character, to identify norms we will often have to understand how various parts of that system operate together. […] What the law

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[116] Leslie Green and Thomas Adams, 'Legal Positivism', in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> (last accessed 21 June 2021).

requires of anyone, on any matter, is the net effect of *all* of this.'[117] The example he gives is statutory law, but in a common law system things are rarely so simple. Where we have a variety of sources of relevant law, each containing few (if any) explicit directions to officials, it may be a complex task to derive guidance for official action.

Yet how does it improve upon the imperativalist picture to say the law is 'not indifferent' between people not stealing and being punished for stealing? There are several ways to understand the point.[118] The one I will develop at length here adapts what Joseph Raz has called 'the legal point of view'.[119] Raz's explanation starts with Hart's insight that law is a rule-based social practice.[120] The participants in this practice exhibit a regularity of behaviour when conforming their conduct to the rules of the practice. This can be observed by an outsider to the practice, and Hart called this the 'external aspect' of the practice. Participants understand their own behaviour as being guided by a common standard – as being more than

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[117] Leslie Green, 'The Normativity of Law: What Is the Problem?' draft paper, pp10-12 <https://www.uvic.ca/victoria-colloquium/assets/docs/Green_Normativity.pdf> (last accessed 21 June 2021), emphasis in the original.

[118] One of them is similar to what was discussed in Chapter 2. Subsection 4.1 of that chapter responded to *different functions* theorists by saying that sometimes private law has to reinforce criminal law. Simester, above (n 2), said that private law must not be permitted to derogate from society's statement of what is absolutely unacceptable. A similar intuition could be behind Green and Adams' view. 'The point' of the theft prohibition is to deter theft, Green and Adams say. The point of the murder prohibition is to deter murder. If criminal law has failed when it has failed to prevent prohibited conduct, then civil law would be compounding criminal law's failure by permitting wrongdoers to recover what they wanted to gain by their acquisitive transgressions. James Edwards says: 'Criminal law's primary functions are preventive. We can see this by considering two possible worlds. In the first, there are no murders, robberies or rapes. In the second, all murderers, robbers and rapists are arrested, detained, tried and punished. Ceteris paribus, we have most reason to want criminal law to bring about the first world. We have reason to want it to bring about the second only if it fails to bring about the first.' ('Criminal Law's Asymmetry' (2018) 9(2) Jurisprudence 276, 292.) Edwards attributes this view to Hart. This type of reasoning also explains *Attorney-General v Blake* [2001] 1 AC 268, discussed in Chapter 2.

[119] Joseph Raz, *Practical Reason and Norms* (OUP 1975) 170.

[120] Hart (n 114) 56, 86.

mere habit. This is the 'internal aspect' of the practice, and those who do so regard themselves take the 'internal point of view'. It is accompanied by participants using common standards to criticise deviation from the rules by others, to require conformity from others, and to acknowledge the legitimacy of criticism and demands when made by others.

One manifestation of the internal point of view is the expression of the practice's demands in normative language. An example we saw above was 'no person can obtain, or enforce, any rights resulting to him from his own crime.'[121] Of course, using normative language is not a sufficient condition for having the internal point of view, because we speak in such terms about (for example) ancient legal systems without having an attitude of commitment to these systems.[122] We can use normative language to express a norm as if it gave valid reasons for action, without also expressing a commitment to it giving valid reasons for action. Raz calls such instances 'detached statements' of norms.[123] However, if we do commit to the view that a norm gives a valid reason for action then we have an 'attitude of commitment', as I am describing it. (So my view departs from Hart's 'internal point of view'.) Furthermore, when we demand that others behave in a certain way on the basis that the norm gave them valid reasons for action, we make a moral claim.[124] Raz calls these 'committed statements'. To say that the law is 'not indifferent' to the incidence of theft is to say that law makes a moral claim to the effect that its subjects ought to refrain from theft.

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[121] See text to n 88 above.

[122] Raz, *Practical Reason and Norms* (n 119) 171.

[123] ibid., 175; see also Raz, *The Authority of Law* (2nd edn, OUP 2009) 306.

[124] Raz, *The Authority of Law*, ibid., 307-308.

Moral claims are made on behalf of law by its officials. Within the general population, a variety of perspectives on the law will exist. But, as Raz points out, for a legal system to be in force, it is necessary that judges should act on the view that laws are valid reasons for action.[125] After all, it is judges that make demands of law's subjects on law's say-so. Slayer rule cases give us a wealth of committed statements or moral claims that judges have made. This might make it appear as if moral principles were in play, but judges' claims may be false (unlike moral principles, if they are to justify anything). Committed statements endorse the moral claims of criminal law but they are not Dworkinian principles.

5.3 *'May one be pardon'd and retain the offence?'*

In *Ashley v Chief Constable of Sussex Police*, the court said that 'one of the main functions of the criminal law is to identify, and provide punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good order of society.'[126] This statement echoes Green and Adams' view that law is not indifferent to the incidence of theft, by reference to criminal law's functions. Those functions are, first, to identify acts that ought not to be performed. Second, to punish their performance. If we read *Ashley* as making a committed statement, then we see how the fact that criminal law *identifies* killing as unlawful is relevant to a judge deciding whether a killer should inherit. You might think that killing is prohibited because it is damaging to the good order of society or, with Simester, that 'the criminal law is

[125] Raz, *Practical Reason and Norms* (n 119) 171.

[126] [2008] UKHL 25, [2008] 1 AC 962, [17].

society's statement of what behaviour is unacceptable to the community.'[127] These functions of criminal law give its prohibitions a relevance in private law regardless of whether private law pursues other functions. Alternatively, you may think with Waldron, Honoré, Harris and Penner that the duties imposed upon others safeguard an owner's property right. If duties are to realise these aims, they must be relevant to a judge deciding how she ought to apply private law's distributive rules in a case like *Riggs*. For someone with an attitude of commitment, all these rules give valid reasons for action and exclude further reasons. The excluded reasons might include reasons to pursue private law's usual functions. (This thought is taken up again in the next chapter.)

A judge deciding a case like *Riggs* must act, and must be seen to act, consistently with holding an attitude of commitment to the norms the wrongdoer has transgressed. As the quote from *Ashley* points out, criminal law not only identifies but sanctions conduct. In all the cases above, the wrongdoer has been punished. A judge is constrained, further, to act consistently with the attitudes expressed by state punishment. This is why the case-law makes repeated references to being consistent in the way courts regard what the wrongdoer did, avoiding inconsistent decision-making between the two jurisdictions, the public interest in condemnation, and so on. On the theories of punishment that I find most plausible, punishment is justified (when it is justified) at least in part because it expresses the appropriate reactive attitudes to wrongdoing.[128]

[127] See text to n 2.

[128] Punishment constitutes censure and/or hard treatment. Some theorists say that our duty to respond will typically require both of these – communication of censure and 'dissociation' or repudiation of the wrong within the context of a relationship between two moral agents: Leora Dahan Katz, 'Response Retributivism' (2021) 40 Law and Philosophy 585, 594. She proposes this using language reminiscent of the *Riggs* maxim:

This makes sense of the statement that a court must respond in such a way as to most discountenance the crime. Committing to the claim that murder is wrong entails a commitment to responding with the appropriate reactive attitude. (Most people take this to be a true moral claim, which is perhaps why the maxim as applied to *Riggs* seems self-evident.) Murder is morally wrong, and we respond appropriately with reactions of condemnation. However, when we move away from the central case, things are more complicated. It is not so obvious that all the killings in the cases above – suicide pacts, euthanasia – are morally wrong; hence, they are less attractive as examples of moral principles in law. They do not serve Dworkin's purposes quite so well. Nevertheless, the law is equally committed to the proposition that they are all morally wrong.) In a case like *Henderson*, those reactive attitudes have already been expressed by the criminal court, which is why the Supreme Court was not persuaded that it should hold the appellant lacked personal responsibility on account of the making of a hospital order. It said that a conviction for manslaughter involves blame and that it ought to reinforce the condemnation.

One objection is to doubt there is any inconsistency with holding a committed attitude, and/or with previously expressed reactive attitudes, for a court to award property to a wrongdoer. The response to this objection is that officials will wish to avoid both actual and

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'where there are relations between the wrongdoer and the potential respondent that render the wrongdoing relevant within the context of the relations, to simply allow the relationship to continue without pause or modification, *allowing the benefits conferred on the wrongdoer by the relationship to continue to flow*, bears moral significance…' (593) If Dahan Katz is correct, this may explain why courts are so concerned with the use of *the law* to acquire benefits from wrongdoing. Many maxims refer to prohibiting the law from being used as an instrument of fraud or preventing abuse of process, etc. The law provides a facility, the system of rules that facilitates transfer, and withdraws this benefit when there is wrongdoing.

perceived inconsistency. A free moral agent can afford to be concerned only with the former but an institutionalised system making moral claims on an entire population must be concerned with both. I deal with them in turn.

To begin with, the law treats receipt of property as a benefit. As Raz observes, normative powers are recognised in law because they are considered to be desirable means to a legitimate end.[129] (Or, at least, that is so in the ordinary case.) Acquiring property is seen as beneficial because property has exchange value and its accumulation carries advantage of many kinds. There is fairly broad societal consensus on this point. Larry Solum, for example, explicitly associates the idea of getting benefits at law with the gaining of property, and notices that this is leverage the law has over Oliver Wendell Holmes' "bad man".[130] The operation of the property regime is in law's gift. Is it, then, inconsistent for a court to condemn an action while letting a wrongdoer retain its profits?

In *Hamlet*, Shakespeare poses this question but does not answer it. King Claudius, who has killed his brother in order to succeed to the throne and has married his sister-in-law, the Queen, muses:

> My fault is past. But, O, what form of prayer
> Can serve my turn? 'Forgive me my foul murder'?
> That cannot be; since I am still possess'd
> Of those effects for which I did the murder,

[129] Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46(1) Aristotelian Society Supplementary Volume 59, 87.

[130] Larry Solum, *Legal Theory Lexicon* blog, 'The Bad Man Thought Experiment', December 2018, available at <https://lsolum.typepad.com/legaltheory/2018/12/legal-theory-lexicon-the-bad-man-thought-experiment.html> last visited 27 June 2021.

> My crown, mine own ambition and my queen.
> May one be pardon'd and retain the offence?[131]

Claudius wonders whether it undermines his prayer for pardon and the concomitant authenticity of his remorse to retain the benefits of his fault. Shakespeare strikes here at a widely-shared intuition. Daniel Butt responds to Claudius' question in no uncertain terms: 'The belief that certain acts are wrong and should not be performed on account of their harmful consequences commits one to … seek to undo the effects of injustice.'[132] Indeed, he argues that we make a 'conceptual error' if we hold otherwise. It is not entirely clear what concept he is referring to, but I read him as saying that one does not know what it is to be opposed to injustice if one is unwilling *to oppose* injustice under the right conditions.[133] If your attitude does not include a willingness to mitigate the consequences, then you do not have what I called 'the attitude of commitment'.[134] Butt's exact words are as follows, 'We make a conceptual error if we condemn a given action as unjust, but are not willing to reverse or

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[131] William Shakespeare, *Hamlet*, Act III, scene 3.

[132] Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (OUP 2008) 128.

[133] Butt is here talking of compensation for historical injustice. I have added 'under the right conditions' to gloss the fact that he is speaking of the appropriate response from *beneficiaries* of past wrongs, like King Claudius. There is a much larger literature on whether and how wrongdoing concerns moral agents more generally. See TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press 2008) 139-140; Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 48-49; John Gardner, 'Relations of Responsibility' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment and Responsibility: The Jurisprudence of Anthony Duff* (OUP 2011) 89.

[134] So much more could be said about what it is to act consistently with holding an attitude of commitment. There is a wealth of literature on the judicial role and judicial craft, including instances when judicial disobedience is the only ethical course. This thesis project does not provide a full account of judicial role responsibility and I can only gesture to relevant considerations that would need to be addressed if a full account were provided.

mitigate its effects … The refusal undermines the condemnation.'[135] Conceptual error or not,[136] we may doubt the sincerity of a professed attitude when an agent is unwilling to act on it.

The force of this point is particularly strong where the agent in question has authority to reverse or mitigate the effects of wrongs, has been petitioned to do so (as in *Riggs*), and must make a public response. To be consistent with the criminal court's condemnation, the response must reaffirm the attitude of commitment even when a civil court is addressing the material consequences of the wrong and not dealing with the offender themselves. A *different functions* theorist might press the following objection. Why cannot the civil court pursue another moral imperative, such as clemency or mercy, and leave the losses to lie where they fall? Such arguments are made most often when the incompleteness of the maxim stares us starkly in the face i.e. when the wrongdoer is pitiable and there exists no worthy recipient of the funds were she disgorged of them. It may be possible in such cases for a court to pursue another moral ideal, but only if doing so is not excluded by the law.[137] In cases of wrongful killing, the courts have determined that any reasons to pursue other moral impulses have been excluded.

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[135] Butt (n 132) 128.

[136] I leave aside minor complications like akrasia.

[137] Unlawful killing is a paradigmatic moral and legal wrong – any non-excluded reasons that officials and law's subjects may act on are relatively well-defined (see also n 138 below). In section 6, we see another illustration of the same phenomenon (i.e. criminal laws constraining courts applying private law's distributive rules) but where the pattern of covariance is less regular and the courts have seen fit to act on unexcluded reasons.

Two points will indicate why. First, the moral claims of the directive breached by the wrongdoer need reinforcing because the courts are mopping up after somebody who, by definition, did not conform themselves to what the law holds out as valid reasons for action. In these circumstances, it may be thought particularly salient to reinforce the validity of the reasons and the aptness of the reactive attitudes that followed nonconformity. Secondly, in at least some slayer rule cases, the court is being petitioned by aggrieved parties to reinforce those same reasons. It is being given an opportunity to do so; one that is likely to be inviting to a moral agent which is expected to act transparently and with the publicity appropriate to the promulgation of norms. There is a risk of the attitude of commitment appearing insincere and the courts are anxious not to 'bring the law into disrepute', as the cases say. While some wrongdoers have clearly elicited the courts' sympathy, courts have felt incompetent to act on anything like a flexible moral principle calibrated to a wrongdoer's circumstances, let alone unconstrained discretion.[138] Rather, they reasoned their way to a rule that adopts the fact of a criminal conviction as a proxy for the moral deserts of the offender. This is one way in which the nature of law, as an institutionalised system, inhibits it perfectly tracking morality. It is therefore implausible that the full ambit of the slayer rule is justified by a true moral principle, even if individual cases caught by the rule might be.

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[138] Indeed, it took the legislative introduction of the Forfeiture Act 1982 before courts had a discretion, and even then it does not apply to murder cases. The Proceeds of Crime Act 2002 reconciles the civil and criminal jurisdictions to disgorge assets. Section 6(6) modifies the criminal court's duty to make a confiscation order, and converts it into a discretionary power, wherever the loser whose property represents the defendant's proceeds of crime either has brought, or proposes to bring, civil proceedings to recover his loss. See Chapter 4 for a discussion of reconciling the jurisdictions' concurrent authority over property.

A perceived inconsistency will constrain a court no less than any actual inconsistency. Law's moral claims will be thought to lack legitimacy if they are contrary to a strong moral intuition held by a sufficient proportion of the public. This thought may be behind John Finnis' assertion that disgorging wrongdoers' profits is required for assurance to the wider public.[139] Considerations of assurance are amplified 'if political theory posits a significant connection between the state and public, this is further grounds for requiring public intelligibility.'[140] Widespread suspicion of the sincerity of judges' attitude of commitment is at least as damaging to law's claims as actual inconsistency.

One final point remains to be made. Promulgating public claims about the reasons for action applicable to an entire state is not an exercise in subtlety. Inevitably, the claims themselves or their uptake will lack nuance that an ideal moral code would include. This is particularly so when those conforming their actions to the reasons given by law will do so without the advice of a legal professional. Where property is concerned, this is predominantly the case. Firstly, there are hundreds upon thousands of quotidian interactions between people and things that are routine and pass undetected by legal systems. Not every, nor even most, interaction or transaction will require legal enforcement – including violations of the criminal law. If every shoplifter was actually prosecuted, supermarkets would not need to keep reminding shoppers of the prospect. Secondly, there are many semi-official functions relating to property that are carried out by private parties – such as trustees, guardians ad litem, executors of wills, and so on. Their knowledge of the law will range from the rudimentary to a full qualification in law.

[139] Finnis (n 46) 262, 263.

[140] Dahan Katz (n 128), 602 at her footnote 47.

It is easier to deliberate and act upon law's claims when they aggregate consistently with one another. Generalisations like 'wrongdoers may not profit from wrongs' are helpful rules of thumb.

This leads to a last remark about why *Riggs* may have seemed to Dworkin to be a fine example of morality at play in law. *Riggs* was a case about property. A property regime is constituted by social conventions and/or by law. In their absence, morality would be highly indeterminate on the question of what we ought to do with things.[141] There is no general moral answer to the question of whether a legal system ought to have a slayer rule and, if so, the extent of such a rule. Furthermore, what people ought to do with things depends partly on what others are doing. Such information would be hard to come by in the absence of a legal system. Law makes morality more determinate by creating a coordination scheme that is its property regime, and this changes what we ought to do.[142] Our understanding of the morality of property is largely shaped by law's claims, then.[143] Law's claims about the morality of property are especially prominent. What I called *property-as-values* in Chapter 1 includes law's claims about the morality of property. The plethora of moral claims around property may be why *Riggs* seemed to Dworkin to be an exemplary case of the existence of legal principles.

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[141] This paragraph draws on Honoré, 'The Dependence of Morality on Law' (n 55).

[142] Raz, *Authority of Law* (n 123) 248.

[143] Not only does law change what people ought to do, they are socialized within a particular legal system. Law therefore obscures their access to moral reasons that would have existed in a counterfactual world without law, by overlaying those reasons with legal ones. It thus affects their ability to reason about property in a world with law.

6. Further illustrations and troubling cases

The pattern of covariance in slayer cases is generated because judges' actions are constrained by a requirement of consistency with the attitude of commitment and with reactive attitudes attendant on criminal sentences. Of course, slayer cases are not the only instance in which an indeterminacy arises in the law and judges must decide what to do. Gap cases arise frequently where wrongdoing and property are concerned. A separate example where we see an attitude of commitment toward criminal law constraining judges is in cases of refusal to make court orders that would bring about states of affairs condemned by the criminal law. The cases are private law actions for recovery of goods or their value. It may be that there are no property rights over things which cannot be dealt in, per the *Bowmakers* principle discussed in the previous chapter. Alternatively, it may be that there are such rights but the court will deny a remedy. The proper analysis is a doctrinal question that I will not try to resolve, but I return to its potential significance below after a further discussion of doctrine.

The Exchange Control Act 1947 made it mandatory to sell foreign currency to the Treasury or to an authorised dealer unless the bearer obtained authority to retain it in his own possession. In *Malone v Commissioner of Police of the Metropolis*, the police lawfully seized foreign currency from Malone, though not for breach of the Exchange Control Act. He sued for its return. Roskill LJ said 'it would not be right... to grant a mandatory injunction for the return of the foreign currency, even if, contrary to my view, the plaintiff were entitled to recover on other grounds.'[144] This was a question of the correct official action in light of the Exchange

[144] *Malone v Commissioner of Police of the Metropolis* [1980] QB 49, 71.

Control Act and the state of affairs that a court could bring about. Bringing about that state of affairs would be inconsistent with an attitude of commitment; 'it would not be right…'.

Roskill LJ did not rest his decision on this ground,[145] and went on. He held that the claim would fail whether or not the doctrine of *ex turpi causa* applied.[146] No cause of action for the return of the money even arose, in the Court of Appeal's view, to invoke the defence. Presumably this was because the claimant had no property right in the currency, and this in turn was due to the Exchange Control Act 1947 and the *Bowmakers* doctrine. Yet the influence of the attitude of commitment is still evident in the judgment. The Court of Appeal was clearly concerned about its own role as grantor of relief. It believed that the court should raise the question of illegality whether or not the defendant did, and this in fact happened in the case. Roskill LJ asked,

> Ought the court... to lend its aid to grant an equitable remedy to a plaintiff who, in relation to the foreign currency, had no lawful right to immediate possession, to enable him to regain immediate possession from the defendant whose taking of the foreign currency from the plaintiff under the search warrant was lawful?[147]

The quote makes clear that the court is concerned about putting the thing into the hands of someone whose holding of it is *prima facie* prohibited. It did not want to make a court order compelling a situation that involved illegality, whether or not that order licensed this particular plaintiff.

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[145] ibid.¸ 71G.

[146] ibid.

[147] ibid., 71.

Similar considerations arose for the Supreme Court when it considered whether a remedy could be granted condoning a pre-existing situation that involved illegality. In a nuisance case, when should the court award damages rather than an injunction? While an injunction would abate the nuisance, damages would permit it to continue at a cost. The court said it was not 'a tribunal for the legalising of wrongful acts'.[148] There are clear equality of arms issues about allowing wrongdoers to simply pay up, but that is not the overriding consideration. As argued in Chapter 5, if the law has set up a coordination scheme in relation to property, that scheme must coordinate *action* in order to be effective. Subjects must take the law to give valid reasons for action, instead of seeing it as simply imposing liability for detected breaches. Such cases call for an attitude of commitment to be reaffirmed. The efficacy of coordination schemes provides another reason why the law is not 'indifferent' between the commission of offences and the imposition of sanctions.

There are some complications in the case-law, however. In *Webb v Chief Constable of Merseyside Police*, the claimant successfully obtained an order for the return of money which the police believed was profit from drug trafficking. It held: 'If Roy Webb were claiming the return of controlled drugs seized by the police, that would come within the [*Bowmakers*] exception. But money is not something which it is unlawful to deal in at all.'[149] Webb successfully acquired something in breach of criminal law duties, so challenging the overgeneral assertion that one

[148] *Coventry v Lawrence (No. 1)* [2015] UKSC 50, [2015] 1 WLR 3485, [103].

[149] *Webb v Chief Constable of Merseyside Police* [2000] QB 427, 444.

cannot vest oneself with title by crime.[150] One way for a defender of the decision in *Webb* to argue that it does not trouble the analysis in this chapter is to say it concerned suspected offences rather than convictions. What differentiates it from slayer rule cases is the court cannot invoke the proxy rule of the fact of a criminal conviction. If the thing itself does not fall into the *Bowmakers* principle, the court cannot be sure *on the facts* that it is making an order that will bring about a state of affairs prohibited by criminal law.[151] Of course, this is evidence of one way in which the criminal and civil jurisdictions have come to a rapprochement in their rules on the proving of facts and on findings of fact – the reasons for needing rapprochement were given in Chapter 4.

The court in *Webb* also noted that Roskill LJ explicitly did not rest his decision in *Malone* upon his concerns about injunctive relief. Unlike Roy Webb, Malone wanted the prohibited item back. Would things have been different if he had only been asking for the equivalent value in sterling? Another case, *The Siben*,[152] gives an indication that seeking monetary relief would not have changed the fact that Malone got no remedy. *The Siben* was a yacht that was given by the plaintiff to the defendant as part of the consideration for the transfer of a business. The

[150] See also *Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080 (CA) and *Patel v Mirza* (n 63). For further rationalization of such cases, see Joshua Getzler, 'Unclean Hands and the Doctrine of Jus Tertii' (2001) 117 LQR 565. For the principles applicable to recovering the proceeds of crime since the Human Rights Act 1998, including a requirement of proportionality, see *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

[151] This suggestion is made in *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 WLR 1437, [34] per Lightman J. This distinction is rather unconvincing in the case of *Costello* itself because the judge at first instance in *Costello* found that the claimant knew the vehicle to be stolen and the Court of Appeal could see no grounds to appeal these findings of fact (at [8]). At the very least, then, the facts amounted to a finding that Costello committed trespass against the goods of another, even if not a finding to the criminal standard of proof that Costello had committed any crime of receiving stolen goods.

[152] *Hughes v Clewley, The Siben* [1996] 1 Lloyd's Rep 35 (HC).

court found that the plaintiff had been induced to enter into the contract by misrepresentation, and the plaintiff sought a rescission of the contract. He wanted the yacht to be returned to him, and he wanted the business to be returned to the defendant. The defendant resisted this because he said that the business was an illegal business. It was a discotheque with a sideline in prostitution.

The High Court agreed: 'A Court of Equity should [not] make an order which would in principle have the effect of transferring an illegal business from one party to another.'[153] But this did not mean denying any remedy at all. The court would award damages. It would award the claimant the value of the yacht, but deducting the value of the property (the business) that now would remain in his hands.[154] Clarke J held that 'the court will not attach value to a business which is set up for partly immoral purposes and which is therefore illegal'[155] and no deduction was made. This suggests that illegal property has no value in damages, should damages be sought instead of an equitable remedy. However, it is equally consistent with there being no right to value in the first place.

It is not my purpose here to try to rationalise legal doctrine about acquisition of property in breach of duty. I am only trying to indicate how far the analysis in section 5 goes. The analysis covers slayer rule cases and courts' remedial powers because both of these raise the same problem for officials, namely a practical question of what official action is consistent with an

[153] ibid., 62.

[154] ibid., 63.

[155] ibid., 65.

attitude of commitment toward criminal laws that either have been breached by the applicant or will be breached by the making of a court order. I venture that it could explain the *Bowmakers* doctrine, discussed in the previous chapter – though this is a doctrinal question I do not seek to definitively answer.[156] I provided a tentative reconstruction of Tony Honoré's argument in the previous chapter which indicated that *Bowmakers* might be a doctrine which negates any primary proprietary right arising. In this chapter, I have presented an alternative explanation whereby criminal law is a constraint on official action, rather than a creator of duties or rights for law's subjects in private law.[157]

Secondly, this chapter has sidelined doctrines that are associated with the slayer rule but not reducible to it, such as the *ex turpi causa* doctrine. *Henderson* said that 'whilst preventing someone from profiting from his own wrong is not the rationale of the illegality defence, it is… linked...'[158] I have excluded similar equitable doctrines, such as the maxim that he who comes to equity must come with clean hands, from the scope of this thesis. It could be that the analysis here extends to cover these doctrines too, but more would need to be said. The *Bowmakers* doctrine is also associated with the doctrine of illegality. However, it is more

[156] To do so would be to enter into an excruciating analysis of *Patel v Mirza* (n 63), which is entirely unclear on the point. It deprecated a test for illegality known as the reliance test, which had been partly developed in the *Bowmakers* case. However, it also expressly approved other parts of the judgment in *Bowmakers*, adding that 'There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on [the reliance test].' (See *Patel* (n 63), [110]-[111] per Lord Toulson.)

[157] For an example of the latter type of argument in the context of investitive laws rather than laws defining the possible objects of a property interest, see Robin Hickey, *Property and the Law of Finders* (Hart 2010), 152. Hickey suggests a reading of the case-law on acquisition by finding wherein the honesty obligations on finders of lost property are imposed by the criminal law of theft rather than being indigenous to private law.

[158] *Henderson* (n 92), [119]. Lord Toulson in *Patel v Mirza* (n 63) called the maxim a 'policy consideration' which was relevant to illegality (at [99]-[101]), while Lord Kerr called the maxim a 'traditional justification' for the illegality doctrine (at [143]).

plausible to speak of a *body of* doctrine on illegality rather than a single rule.[159] I have touched on aspects of that body of doctrine but my comments do not extend to all of it.

Before concluding this chapter and moving on to our last chapter, a word on the cases we began with in Chapter 1 and have been referring to throughout. Even though this chapter has been concentrated on civil claims for the return of prohibited items, it has elucidated one possibly reason why the criminal case of *R v Smith* is a mysterious breakage in the pattern of covariance. According to *Bowmakers* and *Webb*, Smith had not appropriated anything because his victim had no property right in the drugs. *Smith* cannot be justified by the analysis here and the conviction appears wrongful. Chapter 4 proposed that the pattern of covariance did not hold because of law's claim to comprehensiveness. That is not a justification of the decision, merely an explanation. It would seem that law's claims can come into tension with one another: in *Smith*, the claim to comprehensiveness won out at the cost of law's claim to moral authority.

Best cannot be justified by the analysis here, or not easily. The Land Registry was displaying an attitude of commitment when it refused to register the squatter's claim. The court, however, concluded there were unexcluded reasons that it could act upon. It ordered the Land Registry to register the squatter's title, effectively becoming what the Supreme Court pejoratively called 'a tribunal for the legalising of wrongful acts'.[160] Honoré said that the

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[159] Frederick Wilmot-Smith, 'Illegality as a Rationing Rule' in Alan Bogg and Sarah Green (eds), *Illegality after Patel v Mirza* (Hart 2018) 112.

[160] See text to n 148.

incidence of adverse possession cannot be too high in effective property regimes, and he told us this is because non-owners' duties guarantee owners' rights.

Hinks cannot be justified either. Dworkin would pour scorn upon it as retroactive decision-making. The only way to explain it is as McBride does.[161] The jury formed a view that the defendant was dishonest and deserved to be convicted. Proceeding on a direct moral assessment of the defendant is unsupportable, not least because there is no safe way to do it when the assessment itself is dependent on law's allocation of things to people. Perhaps Hinks breached a moral precept not to exploit the vulnerable, but she breached no legal duty. She thus lawfully acquired the property and should not have been convicted of stealing it. Her case is a cautionary tale about the dangers of 'sentimental speculation', as *Re Hall* put it. Law cannot perfectly reflect morality even if it tried. This is because of its institutional nature and because of the very indeterminacy of morality in law's absence.

7. Conclusion

Dworkin's explanation for the imperfect pattern of covariance in wrongful acquisition cases was that the maxim 'wrongdoers ought not benefit from their wrongdoing' is not dispositive in the way rules are. It is a moral principle and has a dimension of weight. In some wrongful acquisition cases, it would be outweighed. In a case like *Riggs*, it justified the adoption of the slayer rule. I have doubted that the maxim is a true moral principle. I have proposed,

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[161] Nicholas McBride, *McBride's Guides* blog, 'R v Hinks', available at <https://mcbridesguides.files.wordpress.com/2014/04/r-v-hinks.pdf> (last accessed 1 June 2021).

following Bernard Williams, that it is a claim evaluating a state of affairs. This does not mean that it is impossible for the maxim to state a true requirement of morality or justice, but it does trouble the presupposition that the maxim is capable of straightforwardly guiding Hercules' action. Dworkin has not discharged the burden of explaining how it can justify the slayer rule, in its full ambit or at all.

How an evaluative statement guides action is unclear, but it is part of a problem familiar to positivists – namely, an aspect of the problem of law's normativity. Positivists have written on that problem, and they do not say that judges have unconstrained discretion to apply non-legal considerations, as Dworkin anticipates they will. My own suggestion, in this chapter, is that judges are constrained to act in a way that is consistent with having an attitude of commitment to criminal laws. In slayer rule cases, they are further constrained to act in a way that is consistent with reactive attitudes expressed by criminal courts. In *Bowmakers*-type cases, an attitude of commitment toward criminal law constrains courts from using their remedial powers to bring about states of affairs that are condemned by criminal law. The consistency constraint explains aspects of the pattern of covariance. But throughout this chapter, we have seen the pull of other considerations, including a desire to come to a result that appears morally appropriate. These other considerations disrupt the pattern of covariance. The final chapter asks what to make of all these countervailing considerations. Is it pernicious to disrupt the pattern of covariance? And if so, why?

Chapter 7 – Conclusion

1. Introduction

It is a feature of legal systems that they allocate things to people. Not every thing is allocated; only a certain class of things is designated with the status of *property-as-thing*. There is then posited a scheme of legal relations that people have in respect of *property-as-things*. The legal relations specify what may or may not be done with, or to, the thing. These legal relations comprise both private and criminal laws. The law identifies person(s) who occupy a privileged position in relation to the thing – they are holders of proprietary interests and/or rights. When these legal relations are expressed in terms of deontic modalities, they are usually consistent with one another, but this thesis has puzzled about occasions when that is not the case. Several chapters came up with examples of rules that were contrary or contradictory of one another. Our motivating worry, expressed by Sir John Smith, was that it 'looks very odd that a man who has done no more than exercise his civil law rights in relation to a chattel should be guilty of stealing it'.[1] Here we have a private law right (or perhaps a permission derived from a right) that is contradictory of a criminal law prohibition.

Why would this 'look odd' to a lawyer? Three reasons have suggested themselves during the course of our discussion. Firstly, it looks odd because the law claims practical authority. Instances of norm conflict, even if they are resolvable or avoidable, impair law's effectiveness as a practical authority because law's subjects and its officials are thrown

[1] JC Smith, 'Civil Concepts in the Criminal Law' (1972) 31(1) CLJ 197, 216.

upon their own faculties in deciding what to do. An official's capacity to avoid or resolve conflicts, when compared to a layperson's, will vary. The thesis has focussed on officials – judges, mainly – but laypersons should not be forgotten. Opinions will vary on how desirable it is to leave citizens deciding for themselves. Whatever your view on that, the point is that it 'looks odd' because law is not doing well by the lights of its own claim to be a practical authority over property matters. As to judges deciding for themselves, a full account of the proper judicial role would take us too far from the confines of the thesis. I do not wish to presuppose any such account so will instead highlight junctures at which the argument requires such an account in order to be taken toward a conclusion that is prescriptive about the way law ought to be.

It looks odd, secondly, because the law claims moral authority. It claims its reasons are valid reasons for action. The ways in which it does this are myriad and complex, and this thesis has barely scratched the surface of the phenomenon. However, Chapter 1 called this *property-as-values* and we saw an example in Chapter 6. Criminal sanctions express reactive attitudes to behaviour that law prohibits. Law's moral claims assist its subjects to conform their conduct to its demands even when they do not know the law in detail. They refrain from proscribed behaviour and engage in permitted behaviour,[2] but may wonder about the validity of their reasons when the self-same conduct is both proscribed and permitted. For officials who must adjudicate as if they held an attitude of commitment to the law, norm conflicts call for even more delicate deliberation than they do for law's subjects.

[2] Waldron, paraphrasing Robert Nozick, says 'the rules of property determine for each object at any time which individuals are entitled to realise which of the constrained set of options socially available with respect to that object at that time.' Jeremy Waldron, *The Right to Private Property* (Clarendon 1988) 32.

The third reason norm conflict ‘looks odd’ to a lawyer is simply because it is not what we have come to expect. By and large, private and criminal law take the same objects to be *property-as-thing* and recognise the same legal relations holding between any given person and any given thing. I called this a ‘pattern of covariance’. The observable in the pattern was the reasoning and outcomes in private and criminal law cases. Much of the case-law in the dataset that is English & Welsh law contributes to establishing the pattern, but a significant minority of cases do not. How should we assess these cases and our lawyer’s expectation? The proposal was to find an explanation for the pattern of covariance in terms of guarantees and constraints within adjudication. The points made above, about law’s claims to practical and moral authority, form part of the explanation. But it was left to this chapter to determine whether they, and any other explanations we found along the way, give us decisive arguments against disturbing the pattern of covariance.

2. What explains the pattern of covariance?

Guarantees and constraints on judges’ reasoning explain the pattern of covariance. The foregoing chapters made the following claims which, individually or jointly, explain the incidence of covariance:

(1) By repeatedly using the same terms of art, both criminal law and private law cases contribute to establishing the meaning of these terms. Both jurisdictions give conventional meaning to the words in the property lexicon by applying rules expressed in those words. The tendency is for the laws that utilise these terms to be interpreted in the same way as one another wherever proprietary concepts are relevant, whether they be criminal or private laws. The phrase ‘property belonging

to another' was at issue in the outlier cases of *Hinks* and *Smith* but was not interpreted in a way that one might expect given the pattern of covariance.

(2) Limiting the number of different meanings associated with a single technical term is a constraint for both private and criminal law. Terms of art help courts relate the particulars of the case before them to the general doctrine which determines the meaning of that term. Competent users of technical language can thus trace the systemic connections between rules and scale up from tokens to types. Flagging the appropriate body of doctrine usually ensures the application of that body of doctrine to the case at hand. This role that technical words play in legal language would be lost if law deployed homonyms because too many different sorts of doctrines would be indicated at once. In the majority of cases, therefore, when private and criminal law use technical words from the property lexicon, they mean the same thing by them. However, compare *Raymond Lyons v Metropolitan Police Commissioner*[3] where a statutory reference to the 'owner' was held to have been properly interpreted in a popular, non-technical sense.

(3) Both the criminal and civil jurisdictions make authoritative pronouncements about property in the course of determining legal disputes. Moreover these disputes are often determined on the basis of a set of norms, governing the allocation and objects of property interests, which are shared between private and criminal law (alongside some norms that are unique to either private law or to criminal law). However, simply applying the same laws will not guarantee consistency in the absence of

[3] [1975] QB 321.

additional constraints. Coordination rules constrain courts exercising the civil jurisdiction and courts exercising the criminal jurisdiction from creating norm conflict. This includes avoiding inconsistent substantive rulings as well as conflicting interpretations of the sphere of operation of each jurisdiction. By a combination of these mechanisms, the two jurisdictions make consistent findings of fact and law.

However, certain complications arise for the pattern of covariance from the fact of concurrent jurisdiction. Having two jurisdictions puts law's claim to comprehensive practical authority on a firm footing, and a court of either jurisdiction is reluctant to decry its own authority if that would jeopardise (or appear to jeopardise) the comprehensiveness claim. This explains some of the case-law, which does not covary in the expected way. Acquitting defendants in cases such as *Otis* and *Smith* would be relinquishing some of the court's jurisdiction over black markets in contraband, even though the law deplores the existence of such markets in the first place, risking the creation of a legal vacuum.

(4) The duties of non-owners guarantee the owner's right to security of possession of his property. It is constitutive of the status of ownership that an owner benefits from the protection of law whenever there are unauthorised interferences with his security of possession. An owner's security of possession predetermines the outcome of the case by providing a consideration which overrides others. This preserves the benefits of the coordination solution that the property regime represents. The pattern of covariance is usually maintained because allocative rules pick out the same person as beneficiary in private law and in criminal law. Cases

like *Hinks* and *Best* depart from the pattern of covariance here in that the rules of investiture and divestiture did not covary in the way one might expect.

(5) The duties of owners are a constraint on the owner's freedom to use his property. Criminal law duties take priority in an owner's balance of reasons, including over any private law permission or power which derives from the property right that is ownership. In this way, potential conflicts between permissive and prescriptive norms are anticipated/resolved in favour of the prescription. Thus there is covariance between criminal duties and private law norms. From this perspective, a case like *Smith* represents a departure from the pattern of covariance in that private law would not permit an 'owner' to recover an item that was unlawful to deal in, under the *Bowmakers* doctrine, but criminal law nevertheless recognised it as property belonging to another.

(6) An attitude of commitment to criminal laws which were, or would be, breached by the recipient of property constrains officials applying private law's distributive rules. If a legal system is to be in effect, judges must act on the basis that law gives its subjects true moral reasons for action. Wrongful acquisition cases raise a problem for officials, namely a practical question of what official action is consistent with holding an attitude of commitment toward criminal laws that have been breached by the would-be acquirer. Where private law and criminal law are both in play, there is often no posited law that directly prescribes the required official action. Thus arises an instance of the familiar but still perplexing problem of law's normativity. While the doctrine on wrongful acquisition through killing is by now fairly clear, a great deal of indeterminacy otherwise surrounds the effect of

> other sorts of wrongdoing on investitive rules. Indeed, each of the cases of *Hinks*, *Best*, and *Smith*, could be said to concern wrongful acquisition in some sense – not to mention others like *Webb* and *Costello*.

In the next section below, I continue the explanation for departures to the pattern of covariance that was begun in Chapter 4 and summarised at (3) above. Before doing that, I will briefly and tentatively hypothesise as to why the attitude of commitment did not prevail in the case of *Smith*. In that case, law's claim to moral authority and law's claim to comprehensive practical authority were in contest with one another. The attitude of commitment that I have said undergirds law's moral claims, which was decisive in the slayer cases and the *Bowmakers* cases, underdetermines how judges should decide *Smith*.

This is because there are multiple wrongs in *Smith*. A should not have possessed the heroin in the first place. B should not have stolen it. Only B was before the court; A was not. Of these wrongs, which one to disavow? Disavowing A's prior possession would have required the court to acquit B, for then B would not have committed any offence which requires taking property belonging to another. This kind of reasoning would deprive the court of jurisdiction over takings of items which are unlawful to deal in; an unregulated zone on which the criminal courts could not pronounce. This poses a threat to the claim to comprehensiveness, and that claim guided the judges' reasoning and won the day. This is so despite the fact that protecting A against B's theft undermines the moral claim that would be made by denying A recovery of the heroin or its value, should A sue for its return. The attitude of commitment should be sufficient to determine the case against him were A to sue for its return.

Note that I am not endorsing the court's decision in *Smith*, merely explaining it. It is my view that the right approach was to charge Smith with possession of prohibited substances and to acquit for robbery. This does no damage to the pattern of covariance, and is a decision that better accords with the rule of law.

Law's claims are a peculiar kind of explanation, though, because they are claims ascribed to law itself. How to conceive of law as an agent is a difficult question which I will not attempt to answer here, but it would be a mistake to think that just because *law* makes claims (figuratively speaking), judges intend, or even are aware of, their part in making claims on law's behalf. They may be guided by considerations that are obscure to them, but which can be illuminated by legal philosophy. Judges presuppose law's claims even while being conscious merely of applying its rules or exercising their discretion constrained by its rules. That peculiarity having been noted, let us move on to consider further explanations for departures from covariance.

3. What explains disturbances in the pattern?

Each of the chapters above mentioned some cases that seemed 'odd' because they did not covary in the expected way. *Hinks*, *Smith* and *Best* were held up as examples. What can we say about them now? Do we just say they are all anomalous but trivial in the grand scheme of property law? Do we say they are wrong and liable to be overruled? Or do we say that the dataset itself is flawed because it is merely a miscellaneous collection of ills, of which we cannot say anything sensible in its totality? As to the latter point, the category of cases that do not covary was intentionally broad. It catches a host of sins – wrongly-decided cases, cases of norm conflict, and cases that pursue different values to one another – so as

not to initially dismiss anything that might later prove important. The objective was to get clear on what exactly is wrong with these cases without presupposing that anything is (by avoiding the adoption of a selection criterion that presupposed what might be pernicious about the cases).

At the risk of sounding too reductive, I think we can discern a common thread that the dissonant cases exhibit. Once we can explain why cases diverge from the pattern of covariance, we are better able to distinguish what (if anything) is pernicious about them. Cases that disrupt the pattern exhibit alternative ways of settling the balance of different sorts of considerations that bear on adjudicative decision-making. In some cases, the balance of reasons will be fairly straightforward to establish. But in other cases, it will not. Reasons given by law may need to be weighed alongside moral reasons. The moral reasons themselves may conflict. This project accepts Joseph Raz's argument that 'moral pluralism means that various irreducibly distinct and competing values are valid… Furthermore, most of the time "the correct way of balancing the competing values" does not exist.'[4]

It may be thought that having legal rules avoids exactly this deliberative problem. But we must not forget that rules are imperfect reflections of the reasons and values that underlie them. As John Gardner says:

> Rules that exist to help us conform to other reasons cannot but be overinclusive or underinclusive relative to the reasons that they exist to help us conform to—relative (in other words) to the 'underlying' considerations on which we should act if we did not have the rule. Up to a point, the value of having the rule warrants our sticking to it even at the price of departures from what we would be justified in doing without it. But only up to a point. Sometimes we reach the point at which it would be better not to go along with the rule. The advantage that we gain from having the rule as a guide in… the 'usual' cases is not enough to compensate for

[4] Joseph Raz, 'The Relevance of Coherence' in his *Ethics in the Public Domain* (OUP 1994), 317. Perhaps it is an overstatement to say that the correct balance is indeterminate *most* of the time.

> the extent to which it now tips us away from what we would otherwise (apart from the rule) be justified in doing. Yet tailoring the rule to eliminate this will only reduce the valuable help that it gives elsewhere.[5]

The case-law in this thesis raises a particularly vivid example of Gardner's point because it involves rules from two different areas of law – private and criminal law. Rules developed in one context under one jurisdiction are applied in another context under a different jurisdiction, which may have different priorities (if not entirely different functions). Furthermore, these rules or many of them will apply by default, as Chapter 3 noted. There is little scope to avoid them, by contract, or otherwise once their precondition for application is met. That precondition is often something so simple as a thing being categorised as an object of property interests. Many disputes brought before courts ask the bench to adjudicate on the over- or under- inclusiveness of the rule relative to a brand new set of facts. The rule itself may not need reform because it may still be useful in its original context. Under these conditions, the court simply opts not to apply the rule to the instant case, and any expectation of covariation is thereby disappointed.

In a very difficult case, a moral reason is excluded by the relevant law and yet may appear to a judge to be a compelling reason for action. In such a case, the judge must also take into account the considerations that arise from being an official in a legal system (which I will call 'institutional considerations') that affect a court's ability to act on certain reasons. We saw an example of this in Chapter 6 with the worry about 'sentimental speculation' in slayer cases. *Riggs v Palmer* does not exhibit this particular issue because it was determined that the directive, the Statute of Wills, did not exclude acting on the overwhelming moral consideration that the plaintiff had killed in order to inherit. *Riggs* was easier to decide

[5] John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131(Oct) LQR 563, 571.

than, say, *Hinks* because the law had not excluded acting upon moral considerations that were (perceived as) decisive. Compare the majority in *Hinks*: 'Given the jury's conclusions, one is entitled to observe that the appellant's conduct *should* constitute theft, the only available charge.'[6] As Nicholas McBride retorts, after quoting from the House of Lords' judgment in *Hinks*, 'So the defendant was dishonest. No doubt she deserved to be convicted. But that is not the point. What counts is whether she was guilty under the law...'[7]

McBride points to the complication that the law's ability to realise perfect moral outcomes is hampered by its institutional nature. *Hinks* is a case that is wrong from the legal perspective. Not all the troubling cases are that simple. Here are two further examples we have seen of cases that exhibit the tension between moral desiderata and demands arising from law's institutional nature. *Webb v Chief Constable* and *Costello v Chief Constable* can both potentially be justified on the basis that civil courts ought not to confiscate the suspected proceeds of crime without the safeguards of a criminal trial. Such safeguards presumably have their origin in moral considerations over the liberty of the subject, but there is also a clear institutional concern with dividing labour between the civil and criminal courts. The institutional concern is to coordinate their respective jurisdictions over property, such that confiscation is reserved for the criminal courts (see further Chapter 4).

[6] *R v Hinks* [2001] 2 AC 241 (HL), 252 per Lord Steyn (emphasis added).

[7] McBride's Guides blog, 'R v Hinks', available at <https://mcbridesguides.files.wordpress.com/2014/04/r-v-hinks.pdf> (last accessed 1 June 2021).

A few years after *Costello* and *Webb*, the Court of Appeal somewhat unwillingly applied these cases, demonstrating the competing inclinations of sticking to a rule and doing justice in the case. In *Gough v Chief Constable of the West Midlands*, Potter LJ said:

> We are bound by the decisions of this court in *Webb* and *Costello* (in which the decision in *Jackson* does not appear to have been cited or considered). Nonetheless, I find it inherently rebarbative that, by means of private-law proceedings in detinue based on the superior possessory title of the claimant over property held by the police following seizure in the course of investigating a suspected offence, a person may be held entitled to recover and continue to enjoy property even though the court may be satisfied that he is not the true owner and has acquired the property illegally...[8]

I introduce this extract from the judgment not to establish a doctrinal point. (The doctrinal point Potter LJ makes is that *Costello* is wrong because *Jackson* was not cited to the court. In spite of this, *Gough* reluctantly affirmed *Costello*.) The concern of the thesis has never been to establish doctrinal truths about propositions of English law. I introduce the quotation because, in saying he finds it 'inherently rebarbative', Potter LJ articulates the tension that explains disturbances in the pattern of covariance. This tells us that even amongst judges, just as amongst legal theorists, there are differences of opinion about the importance of replicating the pattern of covariance, as opposed to disrupting it. There are differences of opinion about its value, and about its value relative to various institutional, moral and legal considerations that are relevant to judges deciding cases. In some litigation, it may appear compelling for the bench to act on excluded reasons. In other litigation, where the law has run out and a court must exercise its discretion, it might be difficult to determine what moral or institutional reason(s) are weightiest.

[8] *Gough v Chief Constable of the West Midlands* [2004] EWCA Civ 206, [48].

I do not claim this is a complete account of judicial reasoning, but it is enough to illustrate how non-covarying cases come about. It also helps to show why the *different functions* view is perceived as resolving the puzzle posed in this thesis. The main attraction is that it seems to simplify decision-making. Taking a *functions* view allows a judge to be attentive to a predetermined subset of reasons (say, only those in favour of corrective justice if it is a private-law suit), and weigh these most heavily in the balance. The proffered justification for tipping the deliberative scales in this way is that the legal system overall is still able to maximise multiple, and perhaps incommensurable, values because each taxonomy predetermines the value to be pursued. This solution is less attractive than it might appear. As Gardner tells us, over- or under-inclusiveness is a phenomenon that arises out of using rules. It is not a problem limited to litigation that crosses the boundaries of traditional taxonomies. Nor are taxonomies the answer. Insulating your deliberation against certain kinds of reasons is not the solution.

The phenomenon of over- or under-inclusiveness of rules relative to underlying reasons is not, therefore, the result of focusing on wrongs and property. The thesis question – whether departures from a pattern of covariance are pernicious – is an instantiation of a more general problem, as Raz points out. He articulates the question before courts that explains deviations from a pattern of covariance. 'Should they [the bench] deviate from what is otherwise the best solution in order to make the law speak with one voice?'[9]

[9] Raz, 'The Relevance of Coherence' (n 4) 313. What Raz means by 'speaking with one voice' is consistency, which he equates with not acting randomly and not changing one's mind (ibid., 311).

Raz also believes Dworkin would add a further condition, namely, not compromising to those I disagree with. This latter has rather more relevance to legislatures and so I will leave aside the interesting complications arising from compromise. I do not dispute that there must be a compromise to concerns of realpolitik. However, it is not particularly salient to the thesis because I do not think property rules are fraught with political compromise. They are largely perceived as apolitical in England & Wales. Most rules were settled centuries ago and not by Parliament. Large-scale Parliamentary forays into property law, like the Law of Property Act 1925, codified and tidied the common law rather than altering it drastically.

Enlarging the problem in the way Raz does shows the relevance of older debates about the value of coherence, of certainty, and of the virtue of the rule of law. In this concluding chapter of the thesis, I show how the thesis question is situated amongst these debates. One's response to the thesis puzzle implicates these prior debates. In section 4, I will point out some ramifications for property of taking positions in these debates. Even though the thesis puzzle is an instance of a more general puzzle, it has distinctive elements because it takes place in a property context. These will be what I concentrate on. My aim is not to persuade anyone to take any specific stance but to show what they might otherwise miss about the implications of their commitments.

The distinctive elements that give Raz's question particular salience in the property context are twofold. The following truths (or even truisms) about property complicate the choice between 'making the law speak with one voice' and giving effect to what is 'otherwise the best' outcome. The truisms are that it is desirable for a legal system's regulation of property (i) to be authoritative, and (ii) to make morality more determinate. Below, I explain the significance of each of these desiderata for Raz's question. To avoid misunderstanding at the outset, these desiderata do not ensure the justice or goodness of a property regime. They are only intended to capture some widely-shared assumptions about the need for coordination in the face of scarcity of resources and the unsuitedness of morality to resolve this coordination problem.

3.1 *The desideratum of authoritativeness*

A legal system is bound to make some provision for regulating property. This claim enjoys widespread support.[10] Human beings find ourselves in conditions of resource scarcity. We need things in order to sustain life, and in order to lead lives which are flourishing by our own metric. These facts give rise to a coordination problem that law must resolve using its authority to allocate resources among us.

Once the law has made authoritative allocations, there is a clear risk of these being upset. To put the point another way, once you have property, you have theft. Theft is just the paradigmatic way to upset a distribution. We can extrapolate the point further. As soon as you have a property regime established by law, the law needs to contemplate its own breach.[11] It cannot merely execute the first distribution; it must also provide for the legal consequences of breaching its directives or invalidly using the normative powers it grants to individuals to affect the distribution. If it does not, both officials and law's subjects will struggle to use these directives as effective practical guides. The minimum content of a legal system includes making provision for a property regime, but that 'minimum' involves both the making of directives as well as provision for the consequences of their breach. Failure in either of these respects would mean a legal system was radically incomplete. Huge gaps would exist in the law.

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[10] See the literature cited in Chapter 1, section 3, at text to footnotes 19 to 24.

[11] HLA Hart said, in the context of discussing sanctions, 'We may say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a natural necessity; and some such phrase is needed also to convey the status of the minimum forms of protection for persons, property, and promises which are similarly indispensable features of municipal law.' (HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 199) See similarly, John Austin 'The Uses of the Study of Jurisprudence' in *The Province of Jurisprudence Determined* (Noonday Press 1954) 367-368.

What is curious about the legal system of England & Wales is that it encounters exactly these sorts of gaps more often than might be supposed. Three sorts of rules have been the mainstay of this project: rules governing investiture, rules governing divestiture and rules determining the candidate objects of property rights. There is radical indeterminacy over each of these where wrongdoing is concerned. The Court of Appeal comments on this with surprise in *Parker v British Airways*: 'One might have expected there to be decisions clearly qualifying the general rule [in respect of lawful acquisition] ... But that is not the case.'[12] The court expected there to be precedents on investiture, but there were none.

As to the candidate objects of property rights, we have seen in Chapters 5 and 6 that there is ambiguity over whether a person can have any property rights in certain types of illegal objects which fall within the *Bowmakers* principle. The indeterminacy is no less when we consider investiture and the effects of unlawfulness on acquisition. Take four obvious modes of unlawfully acquiring property: *finding, taking, killing*, and *making*. There is doctrinal uncertainty about each. *Parker* (mentioned immediately above) was a case on *finding*. As to *taking*, a representative journal article is entitled 'Transfer of Chattels by Non-Owners: Still an Open Problem'.[13] As to *making*, a leading textbook notes that there is no clear rule in England about unlawful or non-consensual manufacture.[14] By comparison, the rule in respect of *killing* is relatively clear and was set out in Chapter 6 above. Finally, on the subject of divestiture, *Best* is an example of a case where the court had to decide a

[12] *Parker v British Airways Board* [1982] QB 1004, 1010 per Donaldson LJ.

[13] Andrew Tettenborn, 'Transfer of Chattels by Non-Owners: Still an Open Problem' (2018) 77(1) CLJ 151.

[14] Michael Bridge (ed), *The Law of Personal Property* (Sweet & Maxwell 2013), 9-038.

contest over the effect on title of criminalising squatting, including the availability of limitation and *ex turpi causa* defences.

The root of this problem is in the normativity of law, and in the systematicity of law. In a common law system, there is no exhaustive catalogue of how each law interacts with every other law. The uncertainty is magnified because authority over property is dispersed across both civil and criminal jurisdictions. Officials must figure out what practical action is required of them in cases where the relevant laws originate in private law as well as criminal law. Under such conditions of indeterminacy, cases arise frequently at the intersection of these areas of law, cases involving property and wrongdoing. The fact that we can explain why they arise, though, does not make it any the less surprising if you take the desideratum of authoritativeness as a theoretical prior. The curiosity remains even granting what was pointed out in *Parker*, and quoted in Chapter 1, that dishonest acquirers of property will evade the attention of the law.[15] Even though England & Wales is a legal system that – because of common law – relies on litigation for the discovery of its rules when they are indeterminate, the extent and endurance of the gaps are intimidating.

The net result of all this indeterminacy affects the legal concept of ownership itself in English law. This is because ownership is the sum of a variety of legal relations, as Chapter 5 discussed. Indeterminacy around many of the legal relations scales up to uncertainty about the concept itself. We saw, in Chapter 3, that the case of *Raymond Lyons* turned on whether a popular meaning of 'ownership' or a technical, legal meaning applied. Lord Widgery CJ said, 'The popular meaning of "owner" is a person who is entitled to the

[15] *Parker* (n 49) 1010.

goods in question, a person whose goods they are, not simply the person who happens to have them in his hands at any given moment.'[16] The latter proposition was what he took the legal conception of owner to be. I turn now to the second desideratum for a legal system regulating property, that of moral determinacy.

3.2 *The desideratum of moral determinacy*

Law must make provision for property, and its subjects would hope that whatever settlement is arrived at is authoritative. Its rules would be discoverable and clear. Its rules would be judiciously enforced. But that is not all that law's subjects might want. They also might hope that the distribution of property and the rules that regulate property were just. Further, they might hope the property regime maximised human sustenance and human flourishing. All this is to say that not every solution to the coordination problem posed by scarcity is as good as every other. A property regime represents the result of many choices which have moral implications.[17] Morality furnishes us with criteria for assessing different solutions to the problem. What it cannot do is determine the content of property law in detail.[18]

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[16] *Raymond Lyons v Metropolitan Police Commissioner* (n 75), 325.

[17] Joseph William Singer, 'Property as the Law of Democracy' (2014) 63 Duke Law Journal 1287, 1303 identifies five questions a legal system must address. 'Not only do democracies limit the kinds of property rights that can be recognized, but they also have something to say about how many people can be owners, who can become an owner, how long their rights last, and what obligations go along with their rights.'

[18] Singer, ibid., 1307 discusses different schools of thought in property scholarship. He observes that nobody 'argued that we can live with a property system that has no doctrine, no rules, no modules, no presumptions, and that we can replace all that with direct consideration of values like virtue and equality in every case… I do not know anyone who thinks that we would be better off if we had no legal doctrine at all and just treated each property case as one of first impression. I also do not know anyone who thinks that it is not important to develop property rights that are workable, transparent, and suited to the satisfaction of legitimate human preferences, desires, and values.'

The classic example of moral indeterminacy relating to property is taxation, discussed by both Raz and Honoré.[19] We all have a duty to contribute to our communities, but law is needed to set the rate and mechanisms to contribute. Theft is thought to be a paradigmatic example of moral wrongdoing, but this intuition cannot fill in the content of the Theft Act 1968. The broad outlines of theft and tax law are settled by the legislature, it is true, and our focus has been on courts. However, morality does not necessarily become any more determinate in casuistic judgements. An example was given in Chapter 6. Morality cannot determine whether a legal system should adopt the slayer rule. If the legal system does adopt the slayer rule, morality cannot determine the precise ambit of it. And yet legislators and judges must continue to make choices even though, as Raz puts it, 'moral pluralism leads to the permanence of conflict and to occasions in which social policies are adopted by choice rather than reason. In these instances, it is important to adhere to a policy once it is chosen.'[20] This desideratum I will call 'moral determinacy'.

The desirability of moral determinacy can be seen from the perspective both of officials and of law's subjects. Our reasoning about what we ought to do is partly determined by the information we have about the world we live in, as well as by what is allocated to us and to others. By creating a property regime, and moreover one connected to a global market of other property regimes, law changes what its subjects ought to do absent any such coordination scheme. Furthermore, as discussed in Chapter 6, law makes moral claims about property. Subjects are socialised in a milieu of such claims. Socialisation obscures subjects' access to moral reasons that would have existed in a counterfactual

[19] Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 248; AM Honoré, 'The Dependence of Morality on Law' (1993) 13 OJLS 1, 5-6.

[20] Raz, 'The Relevance of Coherence' (n 4) 317-318.

world without law. The existence of a property regime thus affects our ability to reason about property in our world, which has law.

I do not want to be understood to be suggesting that people are utterly helpless at making moral judgements when it comes to property. Nor am I making the improbable assertion that all socialisation is the sole product of law.[21] Law exhibits an asymmetry in that it denominates conduct as wrongful but has very little to say on what is righteous – what is generous, what is hospitable, etc. I am not generous if I donate my brother's money, even if I correctly guess that he won't mind. A moral assessment of generosity presupposes that we know what is mine; a moral assessment of hospitability presupposes an outsider with no license to be where she is but for my invitation, and no means of making herself comfortable but for my largesse. The rules of the property regime form part of a background against which we distinguish self-regarding and other-regarding actions. Without that normative framework, we would lack crucial information to make decisions about what we should do and to assess what others have done. Law's bias towards identifying what is wrongful and its silence about what is virtuous is not surprising when we consider that private property regimes give a broad margin to individuals to pursue their own modes of flourishing.

Moral determinacy is useful for practical deliberation even if the mixture of values that law instantiates is not one that we endorse ourselves. For example, my decision about whether or not to publish my journal article as open-access will depend on information about the intellectual property regime. Whatever I may personally think about the

[21] For a discussion from a sociological perspective as to how people become socialised as law's subjects, see Tom R Tyler and Rick Trinkner, *Why Children Follow Rules: Legal Socialization and the Development of Legitimacy* (OUP 2017).

morality of that regime, I can make a decision more easily if I can clearly see the moral choice I am confronted with.[22] Intellectual property law comprises both criminal and private laws. It is simpler to be guided by one set of rules rather than two, but the difficulty is mitigated if the two bodies of rules are consistent with one another. All the better if their moral claims are consistent because this provides a unifying thread that is easier to keep in mind.

For officials, moral determinacy is desirable because it may be impossible for them to otherwise decide on what the best moral outcome in the abstract. My quotation of Raz on the choice between law 'speaking with one voice' or giving effect to the best solution may have made it sound as if he presented these options in constant competition with one another. Yet we might hope they are not often so. Were the law to leave unexcluded a whole host of moral reasons for judges to act upon as they saw fit, then it would fail to make morality more determinate. This appears to be the upshot of the *different functions* or *mutatis mutandis* theories at times. Yet the best moral outcome is partly determined by the pattern of covariance i.e. by the rules adopted in law together with any expectation of covariance on the part of the public. Law's ability to perfectly reflect the demands of morality is inhibited by its institutional nature and the indeterminacy of morality itself. Were a judge to attempt to track morality directly, she would sacrifice some of the authoritativeness and moral determinacy of property law. To put the point another way, by aiming at perfectly justified authority, the law could end up with less *de facto* authority because it is leaving people and judges to decide for themselves what to do. Something

[22] It is partly for this reason that the illegality rule should not be made purposefully uncertain so as to befuddle and vex miscreants. As Justice Souter said in *Exxon Shipping v Baker* 554 US 471, 502 (2008): 'A penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another.'

like this is what Gardner was alluding to, above, when he said that 'the value of having the rule' i.e. its authoritativeness 'warrants our sticking to it even at the price of departures from what we would be justified in doing without it.'

To summarise this section, the explanation for irregularities in the pattern of covariance is that judges have weighed legal, moral and institutional reasons differently when they conflict. But it is misleading to characterise as dichotomous the choice between speaking with one voice and pursuing the best moral outcome. Very often there is no best moral outcome apart from the law because property law that is good qua law will be authoritative and morally determinate. Nevertheless, it is an attraction of the *different functions* theory that the law can simultaneously maximise many virtues, or so I surmise. I have, in Chapter 2, outlined my dissatisfaction with the *functions* view. The *mutatis mutandis* thesis better captures the attraction of pluralism.

The next section asks whether disturbances to the pattern of covariance are pernicious. I suggest that your theoretical disposition should be decided by your response to the question of whether there can be a unitary law of property. As noted in Chapter 2, models of how the two areas of law relate to one another are undertheorised. Many lawyers will have a vague inkling of where they stand, but most have probably unconsciously taken up their position. By setting out the implications, I hope to contribute to a more conscious examination of one's stance.

4. Are disturbances to the pattern pernicious?

I have presented case-law that departs from the pattern as instances of a court weighing different legal, moral and institutional reasons in a way that results in disruption to the pattern of covariance, and in a departure from the way these reasons are customarily weighed by courts. I have said little about the legal or moral propriety of their doing so, allowing that directives leave reasons unexcluded which courts do act upon. When this is the case, as where (for example) the court has a discretion given by law or a constitutional duty to change law, this is perfectly proper from the legal point of view. Or again, where the law has run out then it has excluded no reasons for action and courts may apply extralegal standards. This too is perfectly proper from the legal point of view. Although I do not give an account of the judicial role, I admit the possibility that acting on extralegal considerations may be *morally* appropriate even in cases where the law is determinate and does not permit this. Such a case would be mistaken, legally speaking, but will often bind other courts as precedent – or will bind them until, in time, it is overruled. All this is unexceptional: it is just how common law systems work and how common law evolves.

I have not expended much energy over whether any particular case is legally and/or morally rightly decided. However, I have given two criteria that I think favour maintaining the pattern of covariance – the desiderata of authoritativeness and of moral determinacy. In previous chapters, I suggested the explanation for the pattern of covariance lies in certain guarantees and constraints on adjudicating disputes concerning property. I conceded that these explanations are not the whole story, and that law's claims to comprehensiveness and to moral authority sometimes tip the balance in different directions. Doubtless there are other guarantees and constraints that I have not examined,

but I think we are now in a position to look at the overall picture. Chapters 3 to 6 gave an explanation for what generates the pattern of covariance and section 3 above sketched an explanation for instances of departure from the pattern. Explanation is not justification, though. Two criteria were given to favour the pattern, but they were not presented as conclusive reasons to maintain it. So, judged from the perspective of the legal system as a whole, are disturbances to the pattern pernicious?

Making the assessment from the perspective of the system as a whole is an approach that rejects placing too much emphasis on the decision in any one case, for I have conceded that every legal system will contain case-law that is unfortunate and/or mistaken. Making the assessment from a systemic perspective is to ask whether England & Wales should favour covariance of private and criminal law when it comes to property. It is to ask for the value of maintaining the pattern of covariance. I have argued that there is a surprising level of indeterminacy over cases that concern wrongs and property. So, as things turn out, there is ample opportunity for disrupting the pattern at the intersection of private and criminal law. This is due to the nature of making decisions case-by-case and the inevitability of human error.[23] The possibility is amplified where laypeople such as magistrates and juries have significant impact on adjudication,[24] and it is further amplified

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[23] Raz, 'The Relevance of Coherence' (n 4) at his footnote 69 notes that mistakes are a source of incoherence in law.

[24] In *Raymond Lyons* (n 75), 326 the division of labour between civil and criminal courts was acknowledged: 'It has been said over and over again that the latter summary procedure is not to be used in difficult cases involving tricky questions of title or large sums of money. It is much better that the civil courts should handle disputes of this kind.' Michael Hostetler argues that ignorance is responsible for deviations between areas of law in respect of property: 'One might imagine, for example, that when a legal system is relatively small and simple, most practitioners would be accomplished in several areas of law, and, as a result, developments in one area of law are likely to be consistent with the precedents in other areas of law. However, as the legal system becomes larger and more complex, the need for a practitioner to specialise becomes greater; as a result, some of the original common terms may evolve into terms of art.' (Hostetler, 'Intangible Property under the Federal Mail Fraud Statute and the Takings Clause: a Case Study' (2000) 50 Duke LJ 589, 589-590 at footnote 3.)

by other factors like concurrent jurisdiction and the sheer scale of legal adjudication over property. These factors lead us not to expect too much perfection in a pattern of covariance when assessing the overall picture. The warning from Hart is also apt. He says that, among legal theorists, 'the itch for uniformity is very strong'.[25]

When assessing the pattern, then, we should expect some departures from it due to the existence of indeterminacy and the inevitability of error. We should avoid an irrational lust for coherence and for admiring the state of the law just because it is the law. Yet these two observations are not what divide those who adopt different models out of the various relations between private and criminal law outlined in Chapter 2 above. I think if anyone says an 'itch for uniformity' is the only problem with the puzzle posed in the thesis, then this is too glib a response to it. The puzzle remains even when we have accounted for mistakes and theorists' psychological quirks. Having put forward the explanation for the pattern of covariance and its disruptions that I have, I conclude that three models out of Chapter 2, and are implausible. They are the *distinct domain, building block,* and *different functions* views. Each of the three fails descriptively and prescriptively.

If we leave aside the more implausible views, then we are left with two views that are more plausible, even though I have expressed doubts about their overall success. These are the *dependence* view and the *mutatis mutandis* view. To generalise, then, a *mutatis mutandis* theorist and a *dependence* theorist would take a different view on the non-covarying cases. A *mutatis mutandis* theorist might think any of these cases are independently objectionable, but that nothing unites them. She might regard some of these cases as undesirable, but for

[25] HLA Hart, The *Concept of Law* (OUP 1961) 32.

reasons attaching to the merits of each case. She would not be alarmed when assessing disturbances to the pattern from the perspective of the property regime as a whole. A *dependence* theorist, on the other hand, would be perturbed by the collectivity of cases. Her view is that the pattern ought to prevail. She would regard the frequent departures from covariance as an indication that the relation between private and criminal law, which ought to hold, is being disregarded. She would think that the correct approach to gap cases should be to replicate the pattern. Whereas the *mutatis mutandis* theorist's disapproval is contingent on the merits of an individual case, the *dependence* theorist is worried by the mere fact of inconsistency. Her worry might be dispelled if there were some overwhelming reason to depart from covariance, all things considered, but she would expect such occasions to be few and far between.

How can we decide between these two views? I expect that, to most lawyers, inconsistency is only troubling when present to a high degree. So long as the legal system runs tolerably well qua legal system, while anomie is avoided and conflicts over property channelled into legal and political dispute resolution mechanisms, the choice between the models is a matter of indifference. Another way of putting this point is that the present system in England & Wales satisfies the desideratum of authority to an acceptable degree in most people's minds. Add to this the fact that lawyers tend to specialise into discrete taxonomies and the result is that mental models of the legal system remain unexamined.

However, there is a distinction of principle between the *dependence* view and the *mutatis mutandis* view, it seems to me. A tiebreaker question is to ask whether there can be a unitary property regime. This chapter concludes by outlining why you might answer 'yes' or 'no' to that question, with some broader implications of doing so in legal theory. A

'unitary property regime'[26] here means law which exhibits a regular pattern of covariance between private and criminal law where property is concerned. A judge, faced with a dichotomy between making the law speak with one voice and what is otherwise the best solution, opts most often to replicate the pattern of covariance. Covariance minimises legal rules that are contrary to, or contradictory of, one another. Thus norm conflicts will be infrequent. The moral claims of private and criminal law concerning wrongs and property will be consistent with one another. In other words, there will be a high level of moral determinacy. If both the legal rules and law's claims are internally consistent then it will be simple for law's subjects to conform their conduct to the law. That legal system will exhibit the values associated with the rule of law, such as predictability and certainty. The property regime will evince the desiderata of moral determinacy and authority to a great extent.

4.1 *Is this just to raise a debate about the value of coherence?*

Before considering the question of whether there can be a unitary property regime, I wish to deal with a possible preliminary misunderstanding. The substantive question is not recreating an old debate about the value of coherence. 'Unitary' property law is not synonymous with 'coherence' or coextensive with coherence theories. Coherence

[26] The phrase 'unitary property law' is not intended to discredit bundle theories of ownership like Honoré's which was endorsed in Chapter 5. 'Unitary' is sometimes used as the contrastive to a 'fragmented' or 'disintegrating' property law. These worries were raised by Thomas Grey, 'The Disintegration of Property' in J Roland Pennock and John W Chapman (eds), *NOMOS XXII: Property* (New York University Press 1980). These types of worries moved, inter alia, James Penner to respond with *The Idea of Property in Law* (OUP 1997). Many of Grey's worries appear overstated – for example, 'property' does still seem to be a useful concept and category in legal and political philosophy. Others are not relevant to this thesis, such as whether debates between capitalism and socialism are now redundant, or what challenges are posed by property in intangibles. This thesis has largely ignored intangibles, just for reasons of scope and not because there is an implicit assertion that they are not properly part of property law. For discussion of Grey, see Gerald Gaus, 'Property' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012).

accounts of law and of adjudication are diverse, and their implications for property deserve a separate treatment to the concerns of this chapter. The argumentative work that coherence plays in individual accounts is equally diverse and may or may not coincide with the account given above of unitary property law. A coherence account of law or of adjudication will not necessarily arrive at a unitary property regime, and I want to illustrate this by reference to Dworkin's view. His theory is commonly credited with being a coherence theory,[27] and I will use it as my example on that assumption.

Dworkin's conception of property law, earlier classified as a *building block* thesis, does not arrive at anything like what I have stipulated as 'unitary property law'. This is due to peculiar features of his broader theory of law, including what he says about legal authority, that are radically at odds with the view of authority outlined at section 3 above. Dworkin is aware that readers might find his view 'preposterous'.[28] This is because his picture of the guidance law gives to its subjects is quite unusual. It is that every citizen participating in a social practice is in a self-involved 'conversation', the purpose of which is to discern their own intention in furthering that practice.[29] Whatever the merits of this view when applied to non-property law, it does indeed sound preposterous when we consider his brief remarks on a scenario that could be the subject of Chapters 5 and/or 6 above.

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[27] Dworkin is interpreted as having a coherence account by Susan Hurley, 'Coherence, Hypothetical Cases and Precedent' (1990) 10 OJLS 221, Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart 2005), and Ken Kress, 'Legal Reasoning and Coherence Theories' (1984) 72 Cal LR 369. Raz, 'The Relevance of Coherence' (n 4) does not regard Dworkin as having a coherence theory but for reasons that strike me as overly charitable to infelicities in Dworkin's writing. One of Raz's reasons is that Dworkin seems to mean different things by 'coherence'. It is not clear to me what relation coherence has with integrity in Dworkin's theory, but I take it to be a close relation. This kind of difficulty shows why this chapter is not the place for a full exploration of coherence theories or for an exegesis of law-as-integrity.

[28] Ronald Dworkin, *Law's Empire* (Hart 1986) 58.

[29] ibid.

Here is what he says in *Law's Empire* about a citizen reasoning over the *Bowmakers* principle or wondering whether to engage in wrongful acquisition of the sort discussed in Chapter 6. He says this is a case where citizens 'must decide *what* it [the public scheme of property] has assigned them either because its explicit rules are unclear or incomplete or because the abstract rights it deploys conflict in some other way.'[30] In such a case, the citizen must not be self-interested but must effect an egalitarian distribution of property. For law's subject, flirting with potential illegality,

> the question is then what that [public] scheme [of allocation], properly understood, should be taken to be… Each citizen must answer that interpretive question for himself, by refining and applying the compatible conception of equality he believes supplies the best interpretation of the main structure of the settled scheme.[31]

This is a gargantuan task for any person, particularly one who lacks system-wide information about distribution of property to make an assessment. It is an implicit rejection of the criteria of authority and moral determinacy conceived above, or perhaps of their desirability. This is quite deliberate on his part. He regards it as a virtue of this theory that it 'encourages a reciprocal interplay between law and morals in ordinary practical life, even when no lawsuit is in prospect and each citizen is a judge for and of himself.'[32] Hercules was an ideal-type judge but this expects of citizens that they be Hercules too. How many real-life counterparts Hercules has, I do not hazard a guess. My feeling is that he has few among law's subjects, even among legal professionals. The property regime would be truly shambolic if, every time the rules were unclear or incomplete (or people thought they were), citizens decided for themselves whether they were entitled to a thing

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[30] ibid., 300 (emphasis in the original).

[31] ibid.

[32] ibid., 301.

according to the value of equality. Quotidian interactions with property 'even when no lawsuit is in prospect' would be cumbersome and mentally laborious.

If the doctrinal indeterminacy over property and wrongdoing at the intersection of private and criminal law is as I claim it is, then every resident and visitor to England & Wales must make up for themselves a good proportion of the rules of English law. Dworkin tells them only that they must be guided by self-restraint and equality, for these are obligations constitutive of membership in a true political community.[33] Self-restraint and equality underdetermine the kinds of cases we started with (*Hinks*, *Best*, *Smith*, etc). I do not know what additional values law-as-integrity would supply to overcome the underdetermination of being guided by self-restraint and equality, and I expect that it would be up to each person's interpretation. It is not clear to me how to apply a concern for equality to a decision about whether the law has assigned oneself property which is unlawful to deal in or, alternatively, unlawful to acquire (for reasons that have little to do with equality).

Perhaps Dworkin has answers to these questions, but I do not. He presupposes that explicit rules can be incomplete or unclear – and so takes us no further than our own starting point for asking whether there can be a unitary property regime. His view of political association and of guidance/legal authority deny the value of the two desiderata that I posited in section 3 for property law and instead disperses the responsibility for realising the desiderata to law's subjects. His faith in political communities ascends into ideal theory, a far cry from *Hinks* or *Henderson* or *Riggs v Palmer*. In short, even one committed to the value of coherence in some sense will not necessarily conclude anything about the possibility of

[33] ibid., 201.

a unitary property regime, and therefore the bearing that coherence has on this topic must be left to another day. Just because two arguments have some similar premises, they will not inevitably arrive at the same conclusion. The conclusion of an argument depends on all its premises.

4.2 *Can there be a unitary property regime?*

The substantive question, 'can there be a unitary property regime?' will be approached in two stages. Firstly, I identify obstacles to the realisation of a unitary property regime. Secondly, I propose some implications for legal philosophy if this is a true obstacle. I remain agnostic on the conclusion. My intention is to show how the puzzle in this thesis has ramifications for some widely-accepted and influential views on the jurisprudence of property.

4.2.1 *Mistake*

One seeming obstacle – mistake, already identified above – can be put aside because it has been accommodated into the stipulation of what unitary property law would be. The stipulation was not meant to be understood as an improbably 'perfect' law, where perfection is judged according to whatever criteria are supplied by the doctrine of the legal system itself. In any event, legal systems have their own rules for correcting errors, and we are permitted to take a diachronic view of the law. What are the implications of the inevitability of error, though? One implication we should take seriously is that of unsafe convictions. Mistake as a source of departure from the pattern is worth lingering over

because any concern we have about unsafe convictions due to error is magnified when we are talking about convictions based upon deliberate departures from covariance.

To elaborate, one troubling consequence of criminal courts applying private law is that someone can be convicted of an offence which relied on some aspect of private law that was subsequently doubted in a civil court. For example, in *R v Shadrokh-Cigari*,[34] the defendant was convicted for theft of monies received as a result of a mistaken transfer. The Court of Appeal held that his bank retained an equitable proprietary interest. In so doing, it relied on a case that the House of Lords subsequently deprecated, though did not overrule.[35] There are also examples of acquittals based on private law doctrines which were subsequently doubted by courts exercising the civil jurisdiction.[36]

However, the phenomenon of acquittals on what may seem like a technicality is not galling compared to cases like *Hinks* where private law is contorted in order to secure a conviction.[37] The problem, thus diagnosed, is one of equality of treatment by the criminal law between a defendant who is acquitted because private laws do not support a conviction

[34] [1988] Crim LR 465.

[35] *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 was deprecated in *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

[36] *AG's Reference (No 1 of 1985)* [1986] QB 491 held that the making of a secret profit did not give rise to a constructive trust within the meaning of section 5 of the Theft Act 1968. As the equitable remedy was merely personal, there was no proprietary right or interest belonging to another that could be the subject of theft. However, the Supreme Court overruled that case, determining that the remedy for making a secret profit can be proprietary, in *FHR European Ventures v Cedar Capital Partners* [2014] UKSC 45; [2014] 3 WLR 535, [50]. In *Powell v McRae* [1977] Crim LR 571, a turnstile operator was bribed by a person without a ticket, but the bribe was held not to 'belong to' his employer and thus he was not convicted. *Powell* also can be regarded as overruled by *FHR European Ventures*.

[37] For other examples of such cases, see *R v Gilks* (1972) 56 Cr App R 734 where property was held not to have passed to a bookmaker's customer in order that the customer could be convicted of theft. (I rely on Archbold (2016), 21-63 for the doctrinal proposition that this was an incorrect application of private law doctrine.) See also *R v Turner* [1971] 2 All ER 441 where a vehicle owner was convicted of stealing his own car when he drove it away from a garage without paying for the repairs.

and one who is convicted only by deviating from covariance. Some courts opt to maintain the pattern of covariance, whether it results in an acquittal or not. Others pursue what they see as the best outcome regardless of private law on the point. The *dependence* theorist would have a useful contribution to make about this issue. A *dependence* view holds that a lawyer's expectation of covariance derives from the rule of recognition that mandates covariance. However, conventions exist only if they are actually practised by the community.[38] Departures from the pattern of covariance throw the existence of the convention into doubt. From the perspective of equal treatment before the criminal law, it is desirable that *some* convention should exist in order to coordinate the approach of officials who convict people.

A *dependence* theorist would thus be concerned if errors are so frequent as to throw the existence of the convention into doubt, and by the absence of a convention to guide decision-making where the law is indeterminate. A *mutatis mutandis* theorist might simply accept errors under the diktat that this is simply the price of pursuing the best outcome in each case.[39] The contest between a *dependence* theory and *mutatis mutandis* theory here depends on certain factual premises being true – namely, that the rule of recognition mandates covariance and, further, that the number of errors is so high such as to throw its

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[38] Andrei Marmor, 'Legal Conventionalism' in Jules Coleman, *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001) argues that the rule of recognition is a set of constitutive conventions. He does not commit to the view that the reasons for following a constitutive convention inhere in the fact that others follow it too (at 211). Rather, he says it is purely a moral question whether judges or anyone should engage in the social practice of law. However, once a person engages, there are legal obligations defined by the practice that establish how to further the practice (at 213).

[39] The Supreme Court has intriguingly observed that there exist situations in which 'the law is bound to operate incompatibly' even where a public body takes care to respect rights. See *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2019] 1 All ER 173, [34]. A similar sentiment was expressed in *Hinks* itself: 'The purposes of the civil law and the criminal law are somewhat different. In theory, the two systems should be in perfect harmony. In a practical world, there will sometimes be disharmony.' *Hinks* (n 6) 252.

existence into doubt. I have dealt with this obstacle to unitary property law by stipulating that there will be some errors but that they will be discovered before they undermine the existence of the relevant convention which states the rule of recognition for that legal system. I do not think this stipulation is unwarranted because errors and unclarity are often the subject of appeals to ultimate courts. The repeated invitations to the Supreme Court to restate the relations between private and criminal law in the *ex turpi causa* rule are an example of this.

4.2.2 *Value pluralism*

A more pressing obstacle to unitary property law is value pluralism, which was also prefaced above. Raz considered it to be a decisive objection against global coherence accounts of law and/or adjudication. Raz does not discuss property, so we cannot know what his own view on the possibility of a unitary property regime would be. However, Joseph Singer heartily embraces value pluralism as a cause of what he calls 'the paradox of property'. Singer says:

> The paradox is that sometimes the best way to express our values and our social and legal practices is by adopting what seem to be contradictory principles, even though we cannot now, and perhaps never will, be able to reconcile them fully. The truth of our moral situation may sometimes require us to stop trying to reconcile a contradiction.[40]

This section analyses Singer's view, as told through his own book, but additionally informed by Raz's views on value pluralism. I will begin with Raz, who provides a number of distinct challenges that value pluralism might pose to a unitary property regime.

[40] Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000) 205.

Firstly, value pluralism implies that value monism is incorrect.[41] This is not a true obstacle to unitary property law because unitary property law does not require value monism. It requires only that the mixture of values is consistent between private and criminal law.[42] Monism being incorrect does have implications in legal philosophy for anyone who insists that property law instantiates a single value, whether it be liberty, efficiency or some other value.[43]

A monist might rejoin that this dismissal is too quick, because their claim is only about one field of law and Raz himself accepts there can be local coherence. Raz does accept that there are what he calls 'pure' cases of local coherence, but the examples he gives suggest the property regime is not a pure case. His two examples are the doctrines that define fault in private law and doctrines of criminal responsibility. Raz believes that when law is coherent, this is a by-product of morality's coherence. These are called pure because value pluralism is 'irrelevant'.[44] Quite what this means I do not know, but value pluralism seems highly relevant to property law. Its relevance flows from the fact that things serve so many different social functions. Property is integral to the service of many values, both at the level of the individual person and of the community as a whole.[45] It would therefore

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[41] Raz, 'The Relevance of Coherence' (n 4) 315. See, similarly, Singer, *Entitlement* (n 40) 215.

[42] There is, then, some similarity with the accounts developed by the likes of Neil MacCormick and Barbara Baum Levenbook; see MacCormick, *Legal Reasoning and Legal Theory* (Clarendon 1978) and Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 Law and Philosophy 355.

[43] This is not the only problem with such accounts. As George Letsas and Prince Saprai point out, typically such theories do not specify whether the value has justificatory necessity, justificatory primacy or justificatory presumptiveness. Letsas and Saprai, 'Foundationalism About Contract Law: A Sceptical View' (draft paper, revised 7 August 2018, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211283>).

[44] Raz, 'The Relevance of Coherence' (n 4) 315.

[45] Indeed, Singer, *Entitlement* (n 40) 204 thinks this is the source of the paradox.

be particularly difficult for a legal system to maximise a single value above all others when it comes to property.

Once again, though, this is not an argument against a unitary property regime. Instead, it is part of the case for the desideratum of moral determinacy. If it is particularly complex to reason about the distribution of things and about what we should do subsequently with our own and others' things, it is incumbent on the law to assist its subjects and officials as far as it can. If matters really cannot be simplified, or not by law, this is a very interesting implication. But it is not warranted yet. A legal system cannot maximise every value and it must therefore choose some of them to prioritise. The unfettered pursuit of a different value in every single case would undermine the effectiveness of the legal system as a whole.

Raz would not dissent from this last statement, nor need a *mutatis mutandis* theorist. Raz believes coherence is valuable but that it does not have ultimate or independent value.[46] In particular, he endorses coherence where an institution has chosen to pursue a certain mixture of values out of many other possible mixtures. He says adherence to this choice reaps the rewards of a scheme of coordination and, indeed, this was part of our case for the desideratum of authoritativeness. It is further necessary, says Raz, for the efficient operation of institutions.[47] Again, this point was borne out in the thesis, especially by the discussion of needing to reconcile rules allocating jurisdictional powers, duties and permissions. We can also see it in *Best* where the Land Registry makes daily decisions on the basis of settled law.

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[46] Raz, 'The Relevance of Coherence' (n 4) 314, 317.

[47] Raz, 'The Relevance of Coherence' (n 4) 317.

Finally, Raz says, the rule of law favours adhering to the choice once made. Infrequent change allows knowledge of the choice to pervade society and, furthermore, the actions of the institutions which apply law become predictable. For McBride, the latter point is what makes *Hinks* so pernicious. One of McBride's complaints about *Hinks* was that it is 'a profound violation of the Rule of Law, to reinterpret the law in order to convict a particular defendant who deserves the label of criminal.'[48] A unitary scheme of property would have the virtues of the rule of law, and yet these are famously 'negative' according to Raz. He means that the virtue of the rule of law merely offsets damage the law could otherwise do, but it does not guarantee sound moral content in the law. For Raz, the rule of law no less than coherence can be sacrificed in the pursuit of other valuable aims.[49]

If the argument takes this turn, then value pluralism does pose a potential obstacle to a unitary property regime. Negative virtues could well lose out when pursuing the best outcome in a dispute, by comparison with positive values (such as doing justice in all the circumstances), which may well appear more appealing.[50] A *mutatis mutandis* theorist need not say it is open to the courts to pursue different values in every single case, but Chapter 2 criticised the *mutatis mutandis* view as ad hoc because it refuses to identify in advance when a court will, or ought to, pursue different values. Singer comments:

> What is coherent about the concept [of property] may be that it expresses fundamental human dilemmas – dilemmas we resolve in different ways at different times. This does not mean that those dilemmas can never be resolved, or that we cannot act or cannot give reasons to justify the way we respond to moral dilemmas. It means that our current moral commitments demand that we

[48] McBride (n 7).

[49] Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law* (n 19) 211, 222, 223.

[50] The constraints of the rule of law are among the indicators that tell us what sorts of 'good outcomes' law is simply unsuited to realise. Adherence to the rule of law is a matter of degree, and the 'unitaryness' of a property regime is also a matter of degree.

> continue to believe in values that urge us in opposite directions when it comes time to act.[51]

Thus, for Singer, ownership and obligation are always in tension; they are 'forever contested'.[52] There is a quietism in this which I find unnerving. The picture is one of value conflict within the legal system that is endemic, irrepressible and irresolvable. Yet one of the benefits supposedly secured by giving the legal system such extensive authority over distribution, even at the cost of having no guarantee about its justice, was to suppress conflict over resources. Perhaps the best that we can hope for, on this picture, is conflict channelled into court. Singer says that there are two reactions to the paradox within the academy. The first is to seek 'a theory, value, formula, decision making procedure, or a normative framework that will resolve the paradox, either in general or in the context of a specific problem.'[53] The *dependence* theory and the desideratum of moral determinacy evince this type of attitude. The second reaction is to 'acknowledge and express the contradiction and to articulate reasons for resolving it one way or the other without reference to a single overarching theory or formula.'[54] The *mutatis mutandis* theory falls into this second bracket. Singer calls these two camps 'the simplifiers' and 'the complexifiers'. Among the complexifiers, there are those who celebrate the paradox and those who think it tragic. If a unitary property regime is not possible due to value pluralism, this is indeed tragic. The legal system settled on a property regime in order to resolve a coordination problem, and it maintains its solution even at the cost of injustices produced

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[51] Singer, *Entitlement* (n 40) 205.

[52] ibid., 206. Similarly, Patrick Cockburn argues property is an essentially contested concept; see Cockburn, 'A Common Sense of Property?' (2016) 17(1) Distinktion: Journal of Social Theory 78, 80.

[53] Singer, *Entitlement* (n 40) 213.

[54] ibid.

by the settlement. The infamous example is *London Borough of Southwark v Williams*,[55] which held that necessity was no defence to an order for possession of a vacant building that was occupied by people in desperate need of housing. Lord Denning opined that:

> If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut. [...] So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and the good.[56]

If such a solution to a coordination problem does not have even the negative virtues of the rule of law, does not suppress property disputes but merely channels them into courts, then this really is a tragic state of affairs.

I remain agnostic on whether this moral dilemma arising out of value pluralism is in fact the state of affairs we face, but it has greater implications than Singer allows for it. He says that the only bone of contention between 'the simplifiers' and 'the complexifiers' is over judicial discretion.[57] The worry is that acknowledging the paradox gives judges too much discretion. Of course, judges would have discretion if law cannot suppress many of these conflicts to begin with, so we must channel them into law, and all values are at large for resolving them. I have supplied no full account of the judicial role so cannot commit to the appropriate ambit of a judge's discretion.[58] This is not the only implication, nor even the most interesting, as I have tried to show. Those who believe in value pluralism, and

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[55] [1971] Ch 734.

[56] ibid., 744.

[57] Singer, *Entitlement* (n 40) 213.

[58] By contrast, Singer has co-authored a joint statement with other scholars that commits to progressive property: Gregory Alexander, Eduardo Penalver, Joseph Singer and Laura Underkuffler, 'A Statement of Progressive Property' (2009) 94 Cornell LR 743.

who also think legal systems must make provision for property, find that one benefit of law doing so (moral determinacy) is impossible and another benefit (authoritative settlement) is impaired.

Another way of making this point, that may be more familiar to property lawyers than talk of a 'desideratum of authoritativeness', is to say that property rights bind all the world. They affect third parties to any particular dispute between two litigants. The value of certainty is particularly prized in markets so it is a radical implication indeed if certainty cannot be achieved by property law. In the remainder of this section, I sketch some other implications if a unitary property regime is impossible.

Recalling the argument made in Chapter 3, in order for a legal system to promulgate intelligible laws, it must have some concepts that express the connections between those laws. I argued that technical language 'flagged' to competent speakers that a body of doctrine was being referred to that governed the meaning of the technical term. However, I also noted there exist cases like *Raymond Lyons* which appeared to use the property lexicon in a non-technical way. If it turns out that the property lexicon is not among the terms which express connections between laws, because of the irresistible lure of pursuing the best outcome over making the law speak with one voice, there are implications for numerous theories in special jurisprudence.

One implication is that Jeremy Waldron is wrong when he argues that there is an abstract concept of ownership, of which each legal system has its own conception.[59] Could not

[59] Jeremy Waldron, *The Right to Private Property* (n 2) 31, 52, 53.

Waldron modify this so that each legal system could have plural conceptions of ownership? Waldron would resist this for a number of reasons. I will point to two. Firstly, he wants to show how the concept of ownership is useful in argument, including critical and comparative argument, about which municipal legal system has the better conception.[60] Secondly, Waldron argues that ownership is an 'organising idea'. He means it is a simplifying device for knowledge of legal rules that obviates citizens needing to learn them off by heart.[61] The organising idea may also play a role in legitimation of the property regime.[62]

Waldron is not alone in thinking like this – law & economics scholarship lauds the 'chunking' or 'modularity' of property law for its ability to reduce information costs.[63] Nor is Waldron wrong about the interaction between legitimating ideas and conformity with law. When ordinary people claim something belongs to them, they usually ground the justification for this assertion in the legal property regime. Further, the secure tenure of low-value objects depends largely on voluntary conformity with law, given that the costs of enforcement in criminal or private law are very high. This is not an objection to Singer, for legal systems are well capable of coping with dissentients, but it is merely an observation of some implications of his view.

[60] ibid., 26, 50.

[61] ibid., 42-43.

[62] ibid. There is renewed interest in folk concepts and cognitive science, a literature that I do not delve into in this short survey of a few implications of value pluralism for property law scholarship.

[63] See e.g. Henry E Smith, 'On the Economy of Concepts in Property' (2012) 160 U Pa L Rev 2097.

Further, there are local theories of private law and of criminal law that proceed, with Waldron, on the assumption that a single conception of property is present in the law of a legal system. To take two examples on the private law front, there is Robert Stevens' view that tort law supervenes on certain primary rights that it protects, including property rights.[64] There is also Henry Smith's assertion that property law 'delineate[s] a thing and set[s] up right that define violations in an on/off manner (boundary crossings, touchings).'[65] An 'on/off approach to delineating a thing' could not accommodate objects like the heroin in the case of *Smith*.[66] Both these accounts are incorrect if propositions of private law are contrary to, or contradictory of, propositions of criminal law and yet both are simultaneously true.

To take examples of accounts of criminal law which also could not accommodate competing conceptions of property within a single legal system, there is Malcolm Thorburn's view that criminal law is an enforcement tool of last resort for legal standards set out elsewhere in the law.[67] Thorburn was arguing against theories of criminal law that locate its moral basis *within* criminal law. His view is shared by McBride and by Beatson & Simester, at least when it is confined to offences concerning property. McBride says,

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[64] Robert Stevens, *Torts and Rights* (OUP 2007) 286, 303.

[65] Henry E Smith, 'Complexity and the Cathedral: Making Law & Economics More Calabresian' (2019) 48 European Journal of Law and Economics 43, 48. See also Thomas Merrill & Henry Smith, 'The Morality of Property' (2007) 45 William & Mary LR 1849, 1891; and Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31 J Leg Stud S453.

[66] By parity of reasoning, the House of Lords thought that if *being-married* was a status then *not-being-married* must also be a status: *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173. It seems that heroin might sometimes have the status of *property-as-thing* but not at all times or for all purposes. Yet this cannot be accounted for if we take a binary view of status, as either on or off – like Henry Smith does, and *Re P* shows it is natural to do.

[67] Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in Anthony Duff et al (eds), *The Structures of the Criminal Law* (OUP 2011) 101.

'The law of theft cannot dispense with the requirement for a violation of a property right because its whole purpose is dependent upon and secondary to the allocation of rights through property law.'[68] Beatson & Simester said, 'Property offences are designed to protect property rights. Unlike crimes such as assault, the rights being protected are necessarily rooted in the civil law. Remove dependence on the law of property, and property offences have no rationale.'[69] These references to 'rationale' relate both to criminal law's purpose but also to the consistency of law's moral claims. While *Stockdale v Ohnwyn* says, 'everyone who comes to seek the protection of the law for his property must shew that property to be worthy of that protection',[70] the criminal courts in *Smith* nevertheless protect the contraband property of a drug dealer because they are pursuing a different value of keeping the Queen's peace. If a unitary property regime is impossible due to value pluralism, the implications are that law's claims will sometimes be inconsistent with one another, and that law's purpose or rationale will be entirely fluid.

5. Conclusion

This is merely a sketch of a few implications of unitary property law being impossible. The implications ought to affect whether we see departures from the pattern of covariance as pernicious or not. Of the three options Singer sets out – simplification, tragic-complexity and cheerful-complexity – I think only the first two are plausible. They correspond with

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[68] McBride (n 7).

[69] Andrew Simester and Jack Beatson, 'Stealing One's Own Property' (1999) 115 LQR 372, 374.

[70] *Stockdale v Onwhyn* (1826) 2 Carrington and Payne 163, 166; 172 ER 75, 76.

two models of the relations between private and criminal law that are plausible, the *dependence* view and *mutatis mutandis* view.

There will be many other implications. Lawyers tend to have unreflectively taken a view on how the legal system fits together, and property's place within it. I have tried to show that the answer to the puzzle set out in this thesis – of figuring out why cases like *Hinks* 'look odd' and whether appearances are deceptive – is no smaller and no bigger than the legal system itself. It is no smaller in the sense that you cannot take property in isolation, stipulating that property is a matter of private law independent of criminal law. The correct perspective to take on property is that of law's subjects and officials, who must reason using law as a whole. I have tried to show that the doctrines of the property regime are determined by influences at the level of the legal system overall, such as law's claims to comprehensiveness and to moral authority, the nature of language and the concurrence of jurisdiction over property.

The puzzle is no bigger than the legal system in the sense that it is wrong to think property is 'a building block of nature'[71] or that morality is determinate enough about property in the absence of law and/or convention to be of practical use to anybody. I remain, however, agnostic on whether value pluralism implies that property law cannot be unitary. No other stance is tenable in the absence of a full account of the proper judicial role. The implications of this view are interesting and radical. If true, they should be taken seriously because they undermine a range of prevalent assumptions about property.

[71] Richard Epstein, 'The Ubiquity of the Benefit Principle' (1994) 67 Southern Cal LR 1369, 1369.

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