PUNISHMENT AND PRIVATE LAW

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I. The Controversy

A. Introduction

A sharp contrast is often drawn between the criminal law and private law, and this contrast frequently provides a platform for the claim that punishment rather than compensation is the province of the criminal law whereas the reverse is true for the private law. This understanding has long enjoyed substantial support. As Glanville Williams observed almost 75 years ago, '[i]t is commonly said that the civil action for damages aims at compensation, as opposed to the criminal prosecution which aims at punishment'.[1] A remarkable feature of this claim is its mutual exclusivity. It denies that either field pursues both ends. Given this book's purpose we do not need to evaluate the proposition that the criminal law's purpose is punishment rather than compensation.[2] We merely note that it misses an important part of the truth in view of, for example, the power of the criminal courts to make compensation orders.[3] Although the goal of compensation is admittedly less significant than that of punishment, it is a function of the criminal law nevertheless.

As for the other half of the claim – that private law is about compensation rather than punishment –it too is a half-truth. One the one hand, it is undoubtedly the case that compensation is central to at least parts of private law. Consistently with this, compensatory damages is the only remedy for torts that is available as of right.[4] On the other hand, private law recognises several remedies that are avowedly non-compensatory, such as punitive (or exemplary) damages and restitutionary damages. The claim is also mired in controversy especially in so far as it suggests that punishment does not have, or should not have, a place in private law. Those who oppose private law operating as an engine of punishment[5] draw upon several well-rehearsed arguments. It is these arguments that render punishment in private law controversial, and we begin this chapter by exploring them with reference to the chapters that comprise this collection. Many of these arguments are advanced in the context of punitive damages, which is private law's

1 G Williams, 'The Aims of the Law of Tort' (1951) 4 Current Legal Problems 137, 137.

2 For discussion, see A Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 OJLS 86.

3 See, eg, the *Powers of Criminal Courts (Sentencing) Act* 2000 (UK) s 130. Note also the provision in many jurisdictions for criminal injuries compensation schemes: see, eg, the Criminal Injuries Compensation Act 1995 (UK).

4 This led John Gardner to argue that 'tort law cannot be understood without understanding the primacy of the reparative … in its remedial doctrines': J Gardner, *Torts and Other Wrongs* (OUP 2019) 22. cf R Stevens, *Torts and Rights* (OUP 2007) who rejects the proposition that tort law aims at compensation and maintains that supposed 'compensatory' damages are in fact damages that are awarded in substitution of the right that the defendant violated.

5 Judicial statements opposed to punishment having a place in private law include *Rookes v Barnard* [1964] AC 1129 (HL) 1221 (Lord Devlin); *Broome v Cassell & Co* [1972] AC 1027 (HL) 1086–87 (Lord Reid); *Patel v Mirza* [2016] UKSC 41, [2017] AC 467 [108] (Lord Toulson).

most explicit manifestation of a concern with retribution. But they can be (and sometimes expressly are) extended so as to constitute objections to punishment in private law more generally, and it is clear that the debate about whether punishment has a place in private law goes far beyond the institution of punitive damages.

B. Punishment is inconsistent with the nature of private law

It is often claimed that punishment is incompatible with the nature of private law. Ernst Weinrib's influential theory of corrective justice[6] supplies a well-known example of the idea that is in play here.[7] A key strand in his theory is the proposition that private law is correlative in that it is focuses on neither just the perpetrator of the wrong nor just the victim nor even on both the perpetrator and victim independently. Instead, it is asserted that private law is concerned with both the perpetrator and victim as an interacting pair. Weinrib contends that, by virtue of private law's bilateral structure, which he claims is its 'most striking feature',[8] private law cannot be adequately explained by considerations that relate only one of those parties or even by considerations that concern both parties seen separately. Punishment, because it focuses on the wrongdoer, is a one-sided consideration and hence, in Weinrib's view, inconsistent with the nature of private law. Thus, he writes that 'under corrective justice damages are compensatory not punitive'.[9]

Weinrib's important account of private law has rightly been extensively debated.[10] Space precludes detailed consideration of it in this chapter and it is necessary to confine ourselves to making two basic points. The first is that while there is undoubtedly considerable truth in the proposition that private law is bilaterally structured, Weinrib arguably overplays his hand. Thus, there are numerous well-documented respects in which private law deviates significantly from the paradigm of correlativity. Of particular relevance for present purposes is the fact that private law is sometimes explicitly concerned with punishment. The most obvious (but certainly not the only) instance of this concerns punitive damages which, as their name implies, are explicitly aimed at retribution. Seeking to explain away this difficulty for his account of private law, Weinrib is driven to say that punitive damages are in reality sometimes another species of award. Thus, he argues that when punitive damages are awarded on account of the defendant's having acted with a profit motive, which is one of the three situations in which they are available in England,[11] they are masquerading as restitutionary damages.[12] In their chapter in this volume, Goudkamp and Katsampouka argue that this account of punitive damages is as implausible as it is imaginative.[13] They observe that it cannot explain,

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[6] E Weinrib, *The Idea of Private Law* (Harvard University Press 1995); E Weinrib, *Corrective Justice* (OUP 2012).

[7] See also A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 105–10.

[8] Weinrib (1995) (n 6) 1.

[9] ibid, 135 n 25 (arguing that damages under corrective justice are not punitive). cf P-W Lee, 'Contract Damages, Corrective Justice and Punishment' (2007) 70 MLR 887 (arguing that punitive damages can be reconciled with corrective justice).

[10] See, eg, P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471; J Goudkamp and J Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21 Legal Theory 47.

[11] *Rookes v Barnard* [1964] AC 1129 (HL).

[12] For another attempt to recast punitive damages as being, in reality, a different species of award, see R Stevens, *Torts and Rights* (Oxford, OUP, 2007) 85 (arguing that punitive damages are in fact damages awarded as a substitute for the claimant's right that the defendant violated).

[13] See Goudkamp and Katsampouka, p.***.

among other things, the fact that punitive damages are calibrated not by reference to the gain made by the defendant (that being how restitutionary damages are quantified) but in view of (or at least principally in view of) the defendant's culpability. In any event, Weinrib's argument does not nothing to account for the two other situations in which punitive damages can be awarded in Engalnd, and it does not cater for other jurisdictions where punitive damages can be awarded in cases that do not fall within the three categories in which English law is prepared to grant the remedy.

Our second and more fundamental point is that even if one accepts the premise that private law is bilaterally structured, the conclusion that private law should not accommodate unilateral concerns such as punishment, which conclusion Weinrib apparently invites his reader to accept, is a *non sequitur*. In other words, the fact that a particular model may explain the law or a good portion of it as it presently stands does not mean that the law should be changed so as to bring it into increased conformity with that model. Just as no one would think that it follows from feminist accounts of the law that the law should be developed so as to further entrench gender inequalities, simply pointing to respects in which private law is bilaterally orientated identifies no reason in support of its being so structured.

C. Punishment of the defendant involves a windfall to the claimant

Where a claimant suffers loss as a consequence of the defendant's wrong, the claimant will be entitled to compensatory damages. Although the claimant is in principle entitled to be fully compensated for their loss, there are compelling reasons to think that most claimants are undercompensated, sometimes significantly. For example, the claimant may not choose to pursue each and every item of loss suffered because certain items may be thought to be too minor or too expensive or too difficult to justify proving. Similarly, it is a notorious fact that where the claimant seeks redress in respect of future losses, the process of reducing those losses to a present day capital sum may leave the claimant shortchanged because of unrealistic assumptions about the rate of return that the claimant can safely achieve on the award.[14] In the US, there is an added procedural issue: a successful litigant ordinarily cannot recover their legal costs incurred in the suit from the losing party.[15] The result is that these costs will be paid from the claimant's compensation often leaving the claimant very far from fully compensated. Even in other parts of the common law world where costs shifting is permitted, the successful party in litigation is not indemtnified in respect of their costs and, typically, only around two-thirds of the costs is recoverable.

Where the compensatory damages awarded leave the claimant undercompensated, any punitive award that is made can indirectly serve to compensate the claimant. The purpose of such an award is not, of course, compensation but compensation will be among its effects. To this extent, punitive awards are compensatory and it is awkward to characterise such awards as involving a windfall to the claimant. However, in certain situations punitive awards will be extra-compensatory, as where the compensatory

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[14] For discussion, see P Cane and J Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th ed, CUP, 2018) 145–149.

[15] *Alyeska Pipeline Service Co v Wilderness Society* 421 US 240, 243 (1975) (the so-called 'American Rule').

damages fully compensate the claimant, or where the claimant has suffered no loss,[16] or where the punitive award is sufficiently large that it goes beyond any shortfall in the compensatory award. Where a punitive award is extra-compensatory, it will, by definition, place the claimant into a better economic position than they would have been in had they not been wronged.[17] This is sometimes thought to be objectionable.[18] It is asserted that not only has the claimant not done anything to justify being made the beneficiary of such munificence but, from the claimant's perspective, whether or not their economic situation is improved in this way is generally a matter of luck. It is certainly true that it may be a matter of chance from the claimant's viewpoint whether they are 'fortunate' enough to be wronged by a defendant who deserves punishment, and a given claimant may, as a consequence of a punitive award being made, recover more than another claimant who suffers identical or even more extensive damage.

One response to the windfall objection involves emphasising that its gripe is not, in fact, with the defendant being punished but with the claimant benefiting from the punishment. The complaint would fall away if sums extracted from the defendant were paid to the state or, indeed, if the punishment effected a setback to the defendant's interests without any other person realising a corresponding gain.[19] As such, the windfall argument is not, in fact, an argument against punishment in private law but an argument against punishing the defendant in a manner that enriches the claimant. Another reply to the windfall complaint takes issue with the notion that the claimant has not done anything to merit having their position improved. For example, it is sometimes suggested that the claimant in activating the machinery of the legal system in order to see that punishment is imposed where it is deserved is providing a valuable public service (or, as Sharkey puts it in her chapter, 'acting as a private attorney-general'[20]) and that they should be remunerated for that work (or at least have some incentive to undertake it).[21] As against this it may be replied that the receipt enjoyed by the claimant is unlikely to correspond to the amount of work done by the claimant given that that is not the basis on which punitive awards are assessed.

D. Punishment is ineffieicnt

Some law-and-economics scholars oppose punishment in private law on efficiency grounds. The criticism is often advanced in the context of the law of contract as part of

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16 In England, it seems that punitive damages cannot be awarded in the absence of loss: see *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [26], [32]. cf *Derbyshire v Lancashire CC* [1983] 133 NLJ 65; *Cumber v Chief Constable of Hampshire* (Portsmouth County Court, 21 May 1993); *Akhtar v Ball* (Walsall County Court, 10 July 2015). It appears that there is no such limitation in Canada: *Atlantic Lottery Corp Inc v Babstock* 2020 SCC 19, [130], [163], [169].

17 This is acutely drawn out in *Hall v Hebert* [1993] 2 SCR 159 (SCC) 175.

18 Eg, Lord Reid in *Broome* (n 5) 1086 refers to awards of punitive damages as involving 'a pure and undeserved windfall at the expense of the defendant'. Similarly, Allan Beever (Beever (n 7) 107 (footnote omitted)) writes that 'a claimant cannot justly demand to be put in a better position than she would have been in had she not been wronged. She cannot be owed a windfall. This is even clearer in contract. A claimant cannot be owed to be placed in a better position than she would have been had the contract been performed'.

19 Several jurisdictions in the US have provided for 'split-recovery' statutes pursuant to which punitive damages will be diverted to the state or a public fund. Some states have achieved the same end as a matter of common law. For discussion, see Sharkey, p.**. See also the reform proposal in France considered by Rowan, p.**.

20 Sharkey, p.**.

21 *Whiten v Pilot Insurance Co* 2002 SCC 18, [2002] 1 SCR 595 [37].

the efficient breach thesis, which has achieved greatest credence in the US.[22] On this view, the spectre of a punitive award being made would impede the parties' ability to act or renegotiate (with certainty) and would hinder the efficient reallocation of resources through breach. A typical illustration is as follows. A seller refuses to honour its contract with the buyer to supply goods at a price of £1,000 and instead seizes upon a lucrative opportunity to sell the same goods to a third party for £1,500. The buyer can obtain equivalent goods in the market for £1,300. Pursuing these alternative arrangements leads to a Kaldor-Hicks efficient outcome.[23] The outcome becomes Pareto efficient[24] if, as the law requires, the seller also pays the conventional measure of £300 compensatory damages (being the difference between market and contract prices) to the buyer. Imposing a punitive award on top of this sum does not increase efficiency, On the contrary, a punitive award of more than £200 is counterproductive as it deters the seller from taking up the alternative transaction. Further, the seller's ability to evaluate the alternative transaction is impaired if it cannot predict what sum (if any) it might have to pay the buyer by way of punitive damages.[25]

Contracting parties can achieve greater certainty by agreeing in advance the sum payable for a breach of contract (liquidated damages). Such agreements are regulated by the rule against penalties. Richard Posner once described the rule as a 'major unexplained puzzle in the economic theory of the common law'.[26] The rule was not, of course, crafted with efficiency in mind and economic arguments about its merits can (and do) go either way.[27] Much depends upon the underlying assumptions and complexity of the economic model used. Suppose in the example above that the parties agreed in advance that the seller would pay £600 damages for non-delivery. Looking only at the matter *ex post*, such an agreement deters efficient breach but this is far from the whole story. A full analysis entails consideration of the parties' pre-contractual and pre-breach conduct, including how parties arrive at particular figures as liquidated damages and the function of the clause in signalling reliability in performance or assigning to one or the other party the burden of 'insuring' against the risk of non-performance.[28] Adding the rule against penalties into the mix raises questions about the level at which the rule cuts in, whether the rule should apply only to certain breaches (eg, 'opportunistic' breaches as opposed to 'efficient' ones) and how the existence of the rule might increase transaction costs and affect the parties' negotiations for a release from liability after breach or in anticipation of breach.[29]

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22 See, eg *Patton v Mid-Continent Systems Inc* 841 F 2d 742, 750–51 (Posner J) (7th Cir, 1988). cf. W Dodge, 'The Case for Punitive Damages in Contract' (1999) 48 Duke LJ 629.

23 A reallocation is Kaldor-Hicks efficient when it produces a net benefit.

24 A reallocation is Pareto efficient when at least one person is made better off and no one is made worse off.

25 For doubts regarding the claim that punitive damages awards are unpredictable, see Goudkamp and Katsampouka, p.**.

26 R Posner, 'Some Uses and Abuses of Economics in Law' (1979) 46 University of Chicago LR 281, 290.

27 There is a substantial literature. For an overview, see G De Geest and F Wuyts, 'Penalty Clauses and Liquidated Damages' in B Bouckaert and G De Geest (eds), *Encyclopaedia of Law and Economics* vol 3, (Cheltenham, Edward Elgar, 2000).

28 See, eg, *Lake River Corp v Carborundum Co* 769 F 2d 1284, 1289 (7th Cir, 1985) (Posner J) ('the parties … will, in deciding whether to include a penalty clause in their contract, weigh the gains against the costs—costs that include the possibility of discouraging an efficient breach somewhere down the road—and will include the clause only if the benefits exceed those costs').

29 See also the discussion in Courtney, Ch 12.

Debates about whether punishment is efficient have also arisen in the tort context.[30] Typically, the focus here is on the problem of under-detection.[31] Suppose that D1 negligently injures C1 in a hit-and-run accident and escapes detection. The law cannot charge the consequences of D1's behaviour to him because he cannot be identified. There is hence a concern about under-deterrence. However, the law can address this by extracting from other negligent drivers sums in respect of the loss that they cause plus, where appropriate, an extra amount – a punitive award – that reflects the fact that some motorists, such as D1, will avoid detection. The sum falls, on this account, to be calculated in view of the probability of detection. It should be observed that this efficiency-based justification for punitive damages, while it might be normatively defensible, does not clearly comport with the law as it stands. For example, although it is true that punitive damages are calculated with deterrence in view, the primary criterion according to which the award if assessed is the defendant's culpability.[32]

E. Insufficient procedural safeguards

Another standard objection to punishment in private law is that private law lacks the procedural safeguards for which the criminal law provides.[33] One premise of this argument is that the imposition of punishment is qualitatively more onerous than an obligation to pay compensation and other non-punitive awards and the conclusion is that that the conditions for imposing punishment in private law ought to be, but are not, as robust as those applied in the criminal law. As to the premise, while it is certainly the case that state-imposed punishment is draconian, it is less clear that the obligation to pay (for example) compensation in the sum of £100 is qualitatively less burdensome than a fine of the same amount.[34] For one thing, an obligation to pay compensation is often paired (especially in the tort context) with a public determination that the defendant behaved defectively in some way. In other words, a finding of civil liability has the potential to be stigmatic in the same way as a criminal conviction and sentence.[35] Further, defendants, especially when uninsured, may regard the obligation to pay compensation as indistinguishable from a penalty. It was for this reason that Peter Birks claimed that 'every award of damages has a penal … function'.[36] We observe in passing that whereas awards of even compensatory damages may well be perceived by defendants as punitive, Birks clearly went too far in contending that punishment is the purpose of every damages award. It does not follow from the fact that a given damages award may be perceived as punitive that the function of the award is punitive. We return to this theme below.

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30 For discussion, see J Coleman, *Markets, Morals, and the Law* (OUP 1998) ch 6; AM Polinsky and S Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 Harvard L Rev 869.

31 See Sharkey, p. ***.

32 In *W v W* [1999] 4 LRC 260 (PC) 263 Lord Hoffmann said that '[t]he main purpose' of punitive damages 'is to punish the defendant'.

33 *Broome* (n 5) 1087 (Lord Reid) ('palm tree justice').

34 For further discussion of this point, see A M Honoré, 'The Morality of Tort Law — Questions and Answers' in D Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1997) 88–90.

35 This theme is powerfully developed in P Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998).

36 P Birks, *Civil Wrongs: A New World* (Butterworths 1992) 79. Consider also Peter Cane's remark that 'even compensatory damages may have a punitive element': Cane (n 35) 170.

As to the conclusion that private law should not countenance punishment on account of the lack of procedural safeguards, it is true that, in general, the protections that apply in private law are much less robust than those that exist in the criminal law. Focusing for the moment on the position in England, consider the following illustrations.

1. In principle, the criminal law places the burden of proof on all issues on the prosecution and requires that the prosecution establish liability beyond reasonable doubt. By contrast, the civil law requires defendants to bear the burden of proof on various issues, most notably so-called 'affirmative defences',[37] and requires liability to be established on the balance of probabilities.
2. The criminal law is committed to the idea that conduct that is proscribed should be defined as precisely as is reasonably possible.[38] Conversely, private law does not place the same premium on certainty. Thus, it has often been claimed that, compared with the position in the criminal law, conduct that attracts civil liability is sometimes defined in fairly vague terms.[39] The tort of negligence is typically cited as an illustration of this[40] on account of the tort's simply imposing an obligation to take reasonable care but without stipulating specifically that which must be done in any given situation.
3. In the criminal law, it is thought important that maximum sentences be fixed, and that the sentence imposed be no higher than it stood at the time that the offence concerned was committed.[41] It is doubtful that the civil law contains similar protections. Thus, the jurisdiction to award of punitive damages, which is the clearest illustration of punishment in private law, is not suject to a definite ceiling.[42]
4. The admissibility of hearsay evidence is subject to various restrictions in criminal proceedings[43] whereas the hearsay rule does not apply in civil litigation.[44]

Although there clearly are major differences between the criminal law and private law in terms of the procedural safeguards on the imposition of punishment, the significance of these differences can be, and often is, seriously overstated. Consider the following points.

1. It is well known that, in criminal proceedings, the burden of proof on various issues is regularly placed on the defendant and, further, that there are widespread departures from the principle that the prosecution must establish the elements of offences beyond reasonable doubt.[45] Reality and rhetoric in the criminal law routinely diverge from each other radically in these respects. Further, although the standard of proof in the civil law is always the balance of probabilities, that standard is more difficult to meet where serious wrongdoing is alleged. The logic

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37 See J Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 138–39.

38 For discussion, see, eg, J Horder, *Ashworth's Principles of Criminal Law* (OUP 2019) 81–84.

39 See, eg, Gardner (n 4) 181–82.

40 ibid.

41 Article 7(1) of the European Convention on Human Rights states in relevant part: 'Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'.

42 Although awards of punitive damages in claims against the police in malicious prosecution are confined to particular brackets based on the rank of the police office involved: *Thompson v Metropolitan Police Commissioner* [1998] QB 498 (CA). Consider also the federal constitutional restrictions in the US, which are discussed by Sharkey in her chapter: p.***.

43 Criminal Justice Act 2003 (UK) Pt 11, Ch 2.

44 Civil Evidence Act 1995 (UK) s 1.

45 See A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306.

underpinning this rule is that it is inherently less likely that a defendant will have acted, for example, fraudulently than negligently with the result that, before a finding of fraud is made, clear and convincing evidence will be required, and greater evidence than would be needed to justify a finding of negligence.[46] While this is certainly not the same thing as requiring proof according to the criminal law standard, in view of this rule the bald remark that the civil law dispenses punishment according to a lower standard of proof than the criminal law oversimplifies matters.

The point can be carried further. Although the standard of proof in private law is formally the balance of probabilities, it is arguable that the the courts sometimes informally apply a more demanding standard because it is thought unfair that D should liable for 100 per cent of C's loss simply upon C establishing that it is marginally more probably than not that D acted as alleged. Thus, Peter Cane writes:[47]

> while in theory a person might be liable in tort on a bare balance of probabilities, in practice the test operates in an imprecise way and actually depends on the court being *satisfied* that the tort more probably than not caused the harm. An adjudicator is unlikely to feel such satisfaction unless the probability that the tort cause the harm is not just greater than even, but considerably greater than even.

2. The criminal law often scores particularly poorly in terms of the precision with which it defines prohibited conduct. For example, it is notorious that the criminal law provides extensively for negligence-based liability,[48] which form of liability is often thought, as we have observed, to offer relatively little guidance to defendants as to how, specifically, they should proceed. It follows that the claim that criminal law provides enhanced safeguards by virtue of its insisting that offences be precisely defined is, at least unless it is heavily qualified, overstated.
3. A key idea in sentencing offenders, which has been prominent ever since Bentham's writings on the subject, is what Andrew Ashworth dubs the principle of parsimony, that is, the notion that punishment should be minimised as far as possible.[49] The same idea has clearly taken root in private law.[50] Thus, it is well established that awards of punitive damages are subject to 'if but only if test'.

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46 'When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury': *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL) 586 (Lord Nicholls).

47 Cane (n 35) 166 (emphasis in original).

48 HLA Hart claimed that 'English law is rather sparing in its punishment of negligence in the sense of unintentional neglect to take reasonable precautions against harm to others, and apart from a few isolated situations, it can be said that negligence is only punishable as a crime if it results in death (where it constitutes one species of manslaughter) or if it is shown in driving motor vehicles on the road: not only is there the offence of driving without due care and attention but there is also the more severely punished offence of causing death by dangerous driving': HLA Hart, *Punishment and Responsibility*, 2nd ed (Oxford, 2008) 132. This may or not may not have been true in Hart's time. But it is certainly not the case today: see Goudkamp and Katsamoupoka, p.**.

49 A Ashworth, *Sentencing and Criminal Justice*, 6th ed (CUP 2015) 103.

50 See also Bant and Paterson, Ch 10, on the concept of proportionate punishment.

According to this test, punitive damages can be granted only if the compensatory damages awarded do not sufficiently punish and deter.[51] This restriction is reflected in Lord Nicholls's remark in *Kuddus v Chief Constable of Leicestershire Constabulary* that punitive damages are 'a remedy of last resort'.[52] Further, if punitive damages are awarded it is clear law that they should be kept to the bare minimum necessary to fulfil their goals. Thus, in *Thompson v Metropolitan Police Commissioner* Lord Woolf MR stressed that punitive damages 'should be no more than is required' by their purpose of 'marking … disapproval' of the defendant's conduct.[53]

F. Second-order disputes

The arguments considered in the foregoing subsections address whether punishment has a place in private law at all. Yet, even those who oppose punishment in principle usually concede that private law is sometimes in the business of punishing, as when, for example, it awards punitive damages. Assuming (or conceding) that punishment plays some role in private law opens up numerous further controversies. Although the disputes in this regard are, in a sense, secondary, this should in no way distract attention from the fact that at least several of them are major debates in their own right and are, accordingly, considered extensively in the various contributions to this book. We single out five for special mention.

The first concerns the perennial controversy as to why punishment in the form of punitive damages is permitted in tort (or at least in relation to certain torts) and yet, in the case of at least some jurisdictions, regarded as anathema to contract[54] and equity.[55] As a matter of principle, the differential treatment is justified only if tort law can be sufficiently distinguished from contract and equity. Arguments for or against punitive damages in contract and equity often proceed in two steps. By induction from tort cases or from theory, they identify essential conditions for the award of punitive damages. Next, they consider whether the same conditions exist for a breach of contract or breach of equitable duty.[56] These arguments may be supplemented by reference to considerations specific to each field. In contract, for example, certainty and efficiency are often touted as particularly important objectives[57] and the claim is sometimes made that it follows that punitive damages should, in view of these goals, be unavailable in the claims for breach of contract (although the implication that the values of certainty and efficiency are less important in other parts of private law is highly contestable, as is the

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51 *Rookes* (n 5) 1128; *Whiten* (n 21) [74].

52 [2001] UKHL 29, [2002] 2 AC 122, [63].

53 [1998] QB 498 (CA) 517.

54 This position is often traced to *Addis v Gramophone Co Ltd* [1909] AC 488 (HL). More recently, Lord Hoffmann said that 'the purpose of the law of contract is not to punish wrongdoing': *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 15. See also *Gray v Motor Accident Commission* (1998) 196 CLR 1 [13]. cf *Whiten* (n 21).

55 *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298. cf *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA); *Norberg v Wynrib* [1992] 2 SCR 226 (SCC) 299–300.

56 See, eg, N McBride, 'A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract' (1995) 24 Anglo-American LR 369.

57 See English Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) Part V para 1.72.

assumption that making punitive damages available in the law of contract would undermine them). In Chapter 9 Barnett contends that punitive damages in contract can be justified in certain circumstances.

The second flashpoint is whether, within tort law, punitive damages should be available across the board or withheld in relation to certain causes of action, such as that in negligence. In England, the availability of punitive damages was previously restricted by the notorious 'cause of action' (or 'pre-1964') test.[58] Pursuant to that rule, punitive damages were available only in causes of action in which they had been awarded prior to 1964, that being the year in which *Rookes v Barnard*[59] was decided. The House of Lords abolished this much maligned rule in *Kuddus*.[60] Despite this development major doubts remain as to whether punitive damages can be awarded for, in particular, the tort of negligence. Goudkamp and Katsampouka observe that there are no cases in England in which punitive damages have been awarded for that wrong.[61] Even in other jurisdictions where punitive damages can be awarded for negligence, argument has broken out as to whether the award should be made only where certain conditions are satisfied. In New Zealand, for example, punitive damages can be awarded in a claim in negligence only where the defendant intended to injure the claimant or was subjectively reckless with respect to the risk of injury.[62]

A third debate concerns the circumstances in which, if punishment in private law is justified, the defendant's conduct merits a retributive response. For example, those who support the availability of punitive damages in contract must specify the types of breach that qualify for an award. Adjectives like 'deliberate' are too vague and almost certainly set the bar too low. The concept of 'wilful' breach has gained more traction in the US but there is no clear consensus about its meaning.[63] Corbin caustically remarked that 'its use indicates a childlike faith in the existence of a plain and obvious line between the good and the bad, between unfortunate virtue and unforgivable sin'.[64] In *Whiten v Pilot Insurance Co*[65] the Supreme Court of Canada referred to 'egregious' or 'outrageous' conduct[66] – terms familiar to tort lawyers in Commonwealth jurisdictions – but then tacked on the puzzling requirement of an independently actionable wrong before punitive damages can be awarded. The main difficulty with this prerequisite is it will be a matter of happenstance whether or not there is an independently actionable wrong and it conflates the remedy for *this* breach of contract with the other wrong (which, curiously, can be another breach of contract).[67] Barnett's contribution in Chapter 9 proposes a different set

58 (n 53.
59 (n 5).
60 (n 52) [63].
61 Goudkamp and Katsampouka, p.**.
62 *Couch v Attorney General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.
63 R Craswell, 'When is a Willful Breach "Willful"? The Link between Definitions and Damages' (2009) 107 Michigan LR 1501; O Ben-Shahar and O Bar-Gill, 'An Information Theory of Willful Breach' (2009) 107 Michigan LR 1479; S Thel and P Siegelman, 'Willfulness Versus Expectation: A Promisor-Based Defense of the Willful Breach Doctrine' (2009) 107 Michigan LR 1517.
64 AL Corbin, *Corbin on Contracts*, vol 5 (West Publishing Co 1951) 545.
65 *Whiten* (n 21) [68], [70], [72].
66 See also *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26, [2017] 2 SLR 129 [135]–[136] (rejecting punitive damages for breach of contract as a general rule but not excluding the possibility of such damages for a 'particularly outrageous type of breach').
67 See also J Swan, 'Punitive Damages for Breach of Contract: A Remedy in Search of a Justification' (2004) 29 Queen's LJ 596; J McCamus, 'Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada' (2004) 41 San Diego LR 1491.

of criteria to determine when punitive damages ought to be available in claims for breach of contract.

A fourth battleground concerns the relationship between punitive remedies and other responses. Punitive damages are explicitly aimed at punishment. But certain other remedies also appear to be implicitly concerned, at least in certain circumstances, with punishment. Rowan discusses this in her chapter,[68] and gives several illustrations, including principles that disapply or attenuate the doctrine of remoteness of damage.[69] Whether or not these and other rules are indeed infused with a punitive agenda is controversial. Beyond this major dispute questions also arise as to whether the law should provide for several punitive mechanisms[70] (is there not a concern of double or disproportionate punishment?) and whether certain devices or meting out punishment are better suited for the task than others. Arguably, punishment should be dispensed by and only by punitive damages on the basis that punitive damages are explicitly concerned with punishment and because principle requires that their award be fixed by reference to (principally) the defendant's culpability, in contrast to certain of the other rules in question which instead tether the amount of punishment imposed to the claimant's loss.

A fifth issue that has generated significant debate is whether punitive damages should be insurable.[71] On the one hand, if punitive damages are awarded in order to punish, one may think that, consistently with the position that obtains in relation to criminal law sanctions,[72] contracts of liability insurance in respect of them should be pro tanto unenforceable. On the other hand, it has been suggested that if punitive damages are not insurable claimants may have little or no incentive to claim them and the realisation of certain of their stated goals, such as public denunciation of the defendant and appeasement, may, in turn, be impeded. The issue of insurability is touched upon by Sharkey in her chapter.[73] We describe in further detail below her thesis is that punitive damages should be reinvented as damages awarded in respect of societal harm. Reimagined in this way she argues that they should be insurable and that there is no legitimate basis for sequestering them from other species of compensatory damages in relation to which no issue regarding insurability arises.

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[68] Rowan, p.**. See also Goudkamp and Katsampouka, p.** and Bant and Paterson, p. ***.

[69] In English law the orthodox view is that the 'reasonable contemplation' remoteness rule applies irrespective of the nature of the breach, but some scholars argue that it ought to be relaxed for deliberate breaches (see, eg, J Gordley, 'Responsibility in Crime, Tort and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Role?' in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press, 1998) 198–200) or where the loss is deliberately caused (see, eg, N Andrews et al, *Contractual Duties: Performance, Breach, Termination and Remedies*, 3rd edn (London, Sweet & Maxwell, 2020) para 23.055). Consider also *Principles of European Contract Law*, art 9:503, comment B and note 5 (exception for 'intentional' or 'grossly negligent' breaches).

[70] Roberts and Richardson address this issue In their chapter at pp.**.

[71] See, generally, Law Commission of England and Wales (n 57), Part V, paras 1.234–1.248.

[72] *Askey v Golden Wine Co* [1948] 2 All ER 35 (CA) 38.

[73] Sharkey, p.***. See also Rowan, p.** (observing that a proposed provision to permit punitive awards barred the awards from being insurable).

II. Punishment

A. Terminology

The term 'punishment' does not have an accepted or stable definition in private law, which is a theme with which Kit Barker engages in his chapter. One meaning (and probably the core meaning) looks to the purpose of a given rule. When used in this sense, a particular rule is punitive when it pursues a retributive agenda. Its aim is to inflict some sort of sanction on the wrongdoer on the grounds of desert. The sanction may take a variety of forms, punitive damages being the most obvious example. Another sense of the term 'punishment', as identified by Barker, concerns a rule's effects. The consequences of a rule may be perceived as punitive even if they are not imposed with the aim of punishing the wrongdoer.

B. Overt and covert punishment

Some private law rules are overtly punitive in terms of their aim. For example, it is beyond seriously argument that punitive damages are awarded with the aim of punishing the defendant given the repeated judicial pronouncements to that effect at the ultimate appellate level, the fact that the defendant must behave outrageously before the jurisdiction to award them will be available and the fact that they are assessed with the defendant's culpability in view. It is true that punitive damages are often said to discharge other functions, such as deterrence,[74] appeasement[75] and vindication,[76] and that the various functions of a punitive award may compete or conflict with each other.[77] The diversity of functions that punitive damages serve is reflected in the range of names by which the award is known. Thus, beyond punitive damages, the remedy is in certain jurisdictions regularly referred to as exemplary damages,[78] which usage perhaps emphasises the goal of deterrence. But none of this changes the fact that punitive damages are explicitly awarded for the purposes of punishment.

Certain rules in private law, although not expressly aimed at punishment, are perhaps nevertheless concerned with punishment and, as such, dispense punishment covertly or informally.[79] We touched on this possibility above,[80] but it is worth our deepening the discussion. Consider aggravated damages. The purpose of these damages, at least notionally, is to compensate the claimant for mental distress suffered on account of the insulting way in which the defendant wronged the claimant.[81] However, despite the formal position it is arguable that aggravated damages are, or at least are sometimes,

74 *Rookes* (n 5) 1221.
75 *W v W* (n 32) 264.
76 *A v Bottrill* [2002] UKPC 44; [2003] 1 AC 449 [29].
77 For discussion, see B Chapman and M Trebilcock, 'Punitive Damages: Divergence in Search of a Rationale' (1989) 40 Alabama LR 741.
78 This appears to be the dominant terminology in Australia.
79 This theme is developed by Rowan as regards French law: see Rowan, ***.
80 See the text accompanying n 69.
81 *Rookes* (n 5) 1221.

awarded in order to punish.[82] Thus, in the law of contract, a leading commentator has suggested that a distinction between damages for mental distress and punitive damages is often hard to draw.[83]

While that may well be so in some cases, damages for mental distress are an awkward way to smuggle punishment into contract, and questions thus arise as to whether it is sensible to mete out punishment in this way. The treatment of mental distress damages varies among the major common law jurisdictions. In Australia and England, such damages are confined to breaches causing physical injury or inconvenience, and to breaches of contracts that have as an important object the provision of pleasure, relaxation or peace of mind.[84] However, it is not obvious why the latter class of contracts calls for special treatment and it would appear to rule out claims for 'punitive' damages by corporate claimants. This view also shifts the focus onto the nature of the claimant's injury and away from the defendant's culpability, which is a critical factor in the award of punitive damages. In many cases involving claims for non-pecuniary damages the breach is not egregious[85] and it may involve mere carelessness.[86] Smuggling might seem to be unnecessary (or less necessary) in Canada, where punitive damages can exceptionally be awarded for breach of contract.[87] In any event, the Canadian law on the recovery of mental distress damages is more generous to claimants than that in Australia and England. Recovery is determined by foreseeability, with the object of the contract being a significant factor.[88] Unsurprisingly, such damages are regarded as compensatory and are awarded in a wider range of situations than punitive damages.[89] The position in the US is unsettled, with opinion divided over whether emphasis should be placed on the nature of the contract, the nature of the breach or both.[90] Looking to the nature of the breach arguably facilitates punishment disguised as damages for mental distress. Yet almost all US jurisdictions have held firm against awarding punitive damages solely on the basis of a 'wilful', 'wanton' or 'bad faith' breach of contract.[91]

Another illustration of a rule that may involve covert punishment is an account of profits.[92] An account of profits for breach of an equitable duty, or contravention of statute, is usually not regarded as being punitive in nature.[93] Supporters of this view may

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82 See Goudkamp and Katsampouka, p.**.

83 E Peel, *Treitel: The Law of Contract*, 15th edn (London, Sweet & Maxwell, 2020) para 20.022. cf para 20.088.

84 *Baltic Shipping Co Ltd v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344 (HCA); *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732; *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, (2020) 377 ALR 209 [68]–[69].

85 A striking counter-example from the United States is *Wilson v Houston Funeral Home* 42 Cal App 4th 1124 (1996), where the court countenanced damages for emotional distress and punitive damages.

86 See, eg, *Heywood v Wellers* [1976] QB 446 (CA); *Baltic Shipping* (n 84); *Farley* (n 84).

87 *Whiten* (n 21).

88 *Fidler v Sun Life Assurance Co of Canada* 2006 SCC 30, [2006] 2 SCR 3 [44]–[49].

89 ibid [61]–[63]; *Honda Canada Inc v Keys* 2008 SCC 39, [2008] 2 SCR 362 [56]–[60]. There is no requirement of an independently actionable wrong. Nor is high-handed or oppressive conduct always essential.

90 The *Restatement (Second) of Contracts* (American Law Institute 1981) §353 refers to both whereas the *Restatement (First) of Contracts* (American Law Institute 1932) §341 stressed the nature of breach. See also D Hoffman and A Radus, 'Instructing Juries on Noneconomic Contract Damages' (2012) 81 Fordham LR 1221, 1226–29.

91 For a detailed account, see J Sebert, 'Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation' (1986) 33 UCLA LR 1565, 1629–47; W Dodge, 'The Case for Punitive Damages in Contract' (1999) 48 Duke LJ 629, 635, 646–51. The *Restatement (Second) of Contracts* (n 90) §355 only permits punitive damages when the conduct constituting breach also constitutes a tort for which punitive damages are recoverable.

92 See the discussions in this volume by Penner, p.*** and by Bant and Paterson, p.***.

93 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (HCA) 557; *Harris* (n 55) [306]–[310]; *OOO Abbott v Design & Display Ltd* [2016] EWCA Civ 98, [2016] FSR 27 [7]. See also *Sheldon v Metro-Goldwyn Pictures Corp* 309 US 390, 399 (1940).

concede that the remedy can operate harshly upon the defendant – either by comparison with other remedies or by reference to the sum calculated as the profits – but say that this establishes, at most, that the remedy may involve punishment in the 'effects' sense of the term. And since the remedy can be granted for unwitting or well-intentioned breaches,[94] even that characterisation is doubtful. On some occasions, however, an account of profits may be impledly aimed at punishment[95] and, consistently with this the defendant's culpability is sometimes taken into account in deciding whether to grant the remedy[96] or in denying an allowance for skill and effort.[97] Consider *Attorney-General v Blake*,[98] where a majority of the House of Lords awarded an account of profits as an extraordinary remedy for breach of contract. It is impossible to discount the egregious and criminal quality of Blake's conduct as a significant factor,[99] notwithstanding Lord Nicholls' analogies with breach of fiduciary duty and breach of confidence. As Lord Hobhouse observed in dissent, the claim had an 'essentially punitive nature'.[100] It seems that in ordering the account the House had punitive purposes in view although it is perhaps debatable whether these were explicit or implicit, at least in the case of the majority judgments.

Looking beyond awards that may be thought to be masquerading as punitive damages, there are many principles scattered throughout private law that are sensitive to whether the defendant acted reprehensibly. Even if a given principle is not explicitly punitive in aim, it might be argued that punishment is a covert objective. We mentioned some possibilities previously (eg, the disapplication or dilution of remoteness constraints[101]). As another example, consider fraud by a contracting party. A party cannot exclude liability for its own fraud.[102] There has been greater flexibility in English law to rescind contracts for fraud than for non-fraudulent misrepresentation[103] and the right to rescind for fraud is exempt from the 'inequity' qualification under statute.[104] And in insurance law, an insurer can refuse outright to pay a claim fraudulently made, even though part of the claim is justified.[105] Lord Sumption recently rationalised this rule on the basis that 'the law of insurance is concerned more with controlling the impact of a breach of good faith on the risk than with the punishment of misconduct'.[106] But it could equally be argued that an implicit purpose of these rules is to punish fraud.

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94 *Parker v McKenna* (1874) LR 10 Ch App 96, 124–25.
95 See further, Goudkamp and Katsampouka, Ch 8.
96 See, eg, *Seager v Copydex Ltd (No 2)*]1969] 1 WLR 809 (CA) (breach of confidence).
97 *Phipps v Boardman* [1965] Ch 992 (CA) 1021; *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (CA) 242 (revd on appeal on other grounds: (1984) 156 CLR 41 (HCA)); *Harris* (n 55) [48]–[49].
98 [2001] 1 AC 268 (HL).
99 ibid 275.
100 ibid 295.
101 See the text accompanying n 69.
102 *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351 (HL); *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61.
103 eg, the rule barring rescission of an executed contract of sale for non-fraudulent misrepresentation: *Wilde v Gibson* (1848) 1 HLC 605, 9 ER 897; *Seddon v North Eastern Salt Co* [1905] 1 Ch 326 (Ch D), now abrogated by Misrepresentation Act 1967 (UK) s 1(b). Courts may also, in practice, be slower to find that the party misled affirmed the contract.
104 Misrepresentation Act 1967 (UK) s 2(2).
105 *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] AC 1 [1]; Insurance Act 2015 (UK) s 12.
106 ibid [36].

C. *Liability and remedies*

Discussions regarding punishment in private law tend to focus on remedies. This may be an artefact of punitive damages being the most explicit manifestation of private law's pursuing a retributive agenda. However, the fact that debates about punishment in private law are often centred on remedies should not be permitted to deflect attention from the possibility that private law is also concerned with punishment in connection with the decision to impose liability.[107] Consider, for example, the doctrine of illegality. Although the doctrine sometimes operates only to diminish the quantum of the claimant's recovery,[108] its major role is to preclude the claimant from establishing liability against the defendant.

According to the classic exegesis in *Holman v Johnson*,[109] the doctrine's purpose is to prevent the court from sullying its hands by aiding a party who had transgressed the law. So understood, if the doctrine was punitive, it was only in the 'effects' sense of that term. However, during the twentieth century the law in (at least) the UK developed such that punishment was, or was arguably, among the doctrine's aims. Consistently with this, the parties' respective knowledge of, and extent of participation in, the illegal activity became relevant considerations in some categories of case, such as contracts that were apparently lawful but were entered into with the purpose of committing an unlawful act[110] or were performed in an unlawful manner.[111] Similarly, courts sometimes took account of the severity of any criminal punishment already imposed on the claimant for the conduct in issue.[112] This reflected a concern with proportionality and, perhaps, also the avoidance of 'double' punishment, and the same considerations may inform the award and assessment of punitive damages.[113] In the field of unjust enrichment the plea of illegality could be countered by the *locus poenitentiae* principle. So far as that principle demanded genuine repentance by the claimant in withdrawing from the transaction,[114] it might be seen as concerned with whether the claimant had engaged in punishment-worthy conduct.[115]

As to the position in the twenty-first century, the English Law Commission in its 2009 Consultation Paper, *The Illegality Defence*,[116] discounted punishment as 'an aim underlying the illegality doctrine' but acknowledged that a successful defence might have 'exactly this effect'. In *Patel v Mirza*[117] the UK Supreme Court likewise eschewed punishment as a

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107 For illuminating treatment, see Cane (n 35).

108 When the illegality doctrine functions in this way, the head of damages affected is often a future loss of earnings. For discussion, see J Goudkamp and L König, 'Illegal Earnings' (2018) 9 Journal of European Tort Law 54.

109 (1775) 1 Cowp 341, 98 ER 1120.

110 See, eg, *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 (QBD) 283.

111 *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828 (CA); *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338, [2013] QB 840.

112 See, eg, *St John Shipping* (n 110) 279–80, 292.

113 See, eg, *Gray* (n 54) [40]–[43]. The position in English law has become muddled: see Goudkamp and Katsampouka, p.**.

114 *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1 (KBD) 16; *Alexander v Rayson* [1936] 1 KB 169 (KBD) 190; *Berg v Sadler & Moore* [1937] 2 KB 158 (CA) 165.

115 cf Millett LJ's remark that 'genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent': *Tribe v Tribe* [1996] Ch 107 (CA) 135. Regarding the present status of this principle see G Virgo, 'Illegality and Unjust Enrichment' in S Green and A Bogg (eds), *Illegality after Patel v Mirza* (Hart Publishing 2018) 229–30.

116 English Law Commission, *The Illegality Defence: A Consultative Report* (CP No 189, 2009) paras 2.28–2.29.

117 (n 5) [108], [155], [184], [192], [213]–[214], [230]. The approach in *Patel* was recently affirmed by the UK Supreme Court in *Stoffel & Co v Grondona* [2020] UKSC 42; *Henderson v Dorset Healthcare University NHS Foundation*

function of the illegality doctrine and instead identified the doctrine's principal rationales as being to prevent wrongful profiting and ensuring that the law's coherence was not undermined.[118] At the same time, however, the majority in *Patel* in holding that the illegality doctrine should be governed by a test that balances a range of salient factors identified as material several considerations that seem to be sensitive to retributive justice. For example, Lord Toulson, delivering the principal majority judgment, considered that it was material to enquire as to the seriousness of the claimant's conduct and whether there was a marked disparity in the parties' culpability.[119] His Lordship also refered to the imperative of not imposing 'what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing'.[120] Thus, although punishment was not formally identified as purpose of the illegality doctrine, it seems that the doctrine is nevertheless sensitive to issue of retributive justice as evidenced by the test that controls its application. *Patel* has recently been followed by the UK Supreme Court in *Stoffel & Co v Grondona*[121] and *Henderson v Dorset Healthcare University NHS Foundation Trust.*[122] Those cases suggest that Lord Toulson's remarks in *Patel* regarding disproportionality should be understood as establishing a disproportionality check on the doctrine's application rather than a proportionality requirement that must be satisfied before the doctrine will be engaged.

D. Limiting punishment

Private law's concern with punishment is sometimes negatively oriented, in that it seeks to limit it. In view of the way in which the illegality doctrine has been developed in the UK in *Patel* and in the cases that followed in the wake of that decision, the doctrine is perhaps such a limiting device. However, other, clearer, illustrations of rules that restrict punishment concern consensual punishment, especially the principles regarding agreed damages and forfeitures. Some rights to terminate contracts might appear to punish the contract-breaker, at least where that party loses the remaining benefit of the contract as a result of a comparatively minor breach. Rights to alter the parties' relationship in the future in some other manner adverse to the contract-breaker are also potentially punitive. In employment contracts, for example, the employer may have a power to suspend or demote an employee for misconduct.

Sanctions agreed by contract are controlled in various ways by the common law, the main doctrines being the rule against penalties and relief against forfeiture. A rationale offered for the rule against penalties, and occasionally for relief against forfeiture, is that they manifest the general proscription of punishment by contracting parties.[123] Since a

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Trust [2020] 43, and it is now clear, if it was not clear before, that the *ratio* of *Patel* applies not only in claims in unjust enrichment (that being the relevant context in *Patel*) but in claims brought in all branches of private law.

118 ibid, esp at [99]. cf English Law Commission (n 116) paras 2.5–2.27.

119 *Patel* (n 5) [107].

120 ibid [108].

121 [2020] UKSC 42.

122 [2020] UKSC 43.

123 *Priebe & Sons Inc v United States* 332 US 407, 418 (1947); *Legione v Hateley* (1983) 152 CLR 406 (HCA) 425, 445; *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 [31], [148], [254]; *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 258 CLR 525 [21], [253]. Some aspects of relief against forfeiture are plainly not concerned with punishment: see Courtney, p.*** and Tiverios and McFarlane, p.***.

court will not award punitive damages for breach, the parties should not be able to achieve the same ends by private agreement. Although superficially plausible, this justification is contestable. Consider the rule against penalties. The rule has been used to invalidate clauses without there being any obvious punitive purpose.[124] Recent developments in Australia and the United Kingdom herald greater deference to party autonomy in evaluating penalties.[125] Rather than asking whether the agreed sum is out of proportion to the claimant's loss occasioned by the breach as predicted at the time of contract – the traditional approach – the law in both jurisdictions now involves some form of 'legitimate interest' test. That is, the agreed sanction may protect some legitimate interest of the injured party in performance of the associated primary obligation, going beyond mere compensation for non-performance. But it is hard to see how preventing punishment, as a supposed rationale, is the exact obverse of the legitimate interests permitted under the new test. It is also doubtful that punishment explains why sanctions agreed in advance are subject to restrictions (eg, the rule against penalties) that are not applied to an equivalent agreement by the parties, post-breach, to compromise a damages liability.

Unsurprisingly, rival explanations for the rule against penalties exist. These include that it: (1) curtails unjustified attempts to deter breach or practically to compel specific performance;[126] (2) regulates substantive unfairness in a particular type of contract term;[127] and (3) addresses limits in contracting parties' cognition, which are especially salient in forecasting loss from breach.[128] Zou and Liu pick up on the first explanation in Chapter 14 in connection with employment contracts. They lament English law's willingness to embrace deterrence as a legitimate objective of an agreed damages clause, and regard it as incompatible with a worker's fundamental right to quit. In Australia, the rule against penalties extends to sanctions that are triggered by events other than breach of contract.[129] Courts there have adopted another perspective, which is to consider the function of the clause, in particular, whether it was intended to operate as a security for the fulfilment of another stipulation in the contract.[130] Again, it is far from clear that this perspective tallies with the punishment rationale.[131]

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124 See, eg, *Watts, Watts & Co Ltd v Mitsui Co Ltd* [1917] AC 227 (HL); *Bridge v Campbell Discount Co Ltd* [1962] AC 600 (HL) (on the assumption that the penalty rule applied in the circumstances). See also E Peel, *Treitel: The Law of Contract*, 14th edn (London, Sweet & Maxwell, 2015) para 20–131(c) (this point is not found in the 15th edn, which focuses upon *Cavendish*).

125 The leading decisions are, respectively, *Paciocco* (n 123) and *Cavendish* (n 123).

126 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Ltd* [1915] AC 79 (HL) 86 (Lord Dunedin); *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752 (QBD) 762–63. This view was rejected in *Cavendish* (n 123).

127 M Chen-Wishart, 'Controlling the Power to Agree Damages' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford, Clarendon Press, 1996) 271. cf *Cavendish* (n 123) [13]; C Goetz and R Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach' (1977) 77 Columbia LR 554, 592 ('no reason to presume that liquidated damages provisions are more susceptible to duress or other bargaining aberrations').

128 MA Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stanford LR 211, 225–36. cf RA Hillman, 'The Limits of Behavioural Decision Theory in Legal Analysis: The Case of Liquidated Damages' (2000) 85 Cornell LR 717.

129 *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205 [10].

130 ibid.

131 See Courtney, Ch 12.

III. Outline of the Book

A. Structure

Devising a structure for the book proved to be challenging. A split between theoretical analysis on the one hand, and doctrinal analysis on the other, suggested itself though a few chapters straddle that divide. As to the predominantly doctrinal chapters, we further contemplated grouping them all into a single compendious part and, alternatively, creating parts for each of the traditional categories of tort, contract and equity. Neither of these alternatives was appealing. The former treated diverse chapters as an undifferentiated mass, which is unsatisfactory. The latter approach does not easily accommodate the chapters concerned with contempt and statute.

We ultimately chose a structure comprising five parts, which we feel avoids the difficulties with the alternative arrangements just mentioned. Part I contains this introduction. Part II covers historical, theoretical and comparative aspects of punishment in private law. Part III discusses various aspects of punitive damages at common law and under statute. Punitive damages are such a central issue in discussions about punishment in private law that it seemed sensible to bracket these chapters together. Part IV examines limits placed upon the parties' freedom to agree punitive terms. We deal with this area separately as it raises distinct questions about punishment by private individuals (rather than by the state) and the boundaries of freedom of contract and party autonomy. Part V contains the conclusion, with suggestions for future development and reform. We now turn to each of the substantive chapters and address them with a view to enabling the reader to understand them in context of the debates to which they contribute.

B. Part II – History, Theory and Comparative Law

Part II opens with Barker's chapter on the meaning and function of punishment in private law, which lays the foundation for the rest of the book. Barker provides a historical account of the intermingling, and then gradual separation, of the civil and criminal law in the English common law. He then considers the meaning of the term punishment in private law, noting that usage is varied and that punishment can refer to judicial acts, the aims of those acts, or their effects. He identifies a combination of acts and purposes as being the most common meaning.

Barker's central – and striking – argument is that there is no such thing as punishment in private law in the 'purposes' sense of that term. He justifies his position from two perspectives. If, according to one perspective, punishment means 'doing justice', then punishment might take the guise of retributive justice, corrective justice or distributive justice. None of them, Barker argues, provides a convincing fit for the structure of private law. Retributive justice is hard to square with vicarious liability and liability insurance, and it is also a morally objectionable basis for constructing a general case for punitive damages. As for corrective justice, the primary function of punitive damages is not to compensate individuals for harm done to them, nor to compensate society for harm done to public interests. Even if punitive damages did have some utility, historically, to fill remedial gaps in private law, those gaps have closed or shrunk and there is little reason to rely upon punitive damages nowadays. Distributive justice would allocate certain defined sanctions among certain defined persons, according to their relative merit, whereas punishment generally assigns an indivisible burden to the defendant and without reference to the corresponding entitlements enjoyed by the claimant or other citizens.

Barker's other perspective canvasses pragmatic or instrumental considerations, such as protection or rehabilitation, deterrence, appeasement, and social messaging (including denouncing wrongdoing and marking rights). These, too, are found wanting. There are relatively few mechanisms for protection and rehabilitation in private law and it is not evident that courts consider that use of them constitutes punishment. Punitive awards, to be (optimally) effective as deterrents, would require sophisticated calculations based on a range of economic and behavioural considerations. They are manifestly not calculated in this way, even assuming the necessary information to be available. The appeasement and social messaging functions risk collapsing back into other rationales. So far as they have a distinctive role, it is at best minor or incidental to the nature of punishment.

Turning to a comparative account, orthodoxy has it that punishment is alien to civil liability in continental legal systems. With reference to French law, Rowan probes this conventional view in Chapter 3. She points to a provision in a draft bill that would have expressly provided, had it been enacted, for the introduction of civil penalties to deter and punish. Rowan's central thesis is that, contrary to traditional wisdom, the civil law in France already informally recognises remedies that serve these ends. In developing this claim, Rowan points to agreed punishment in form of penalty clauses, the disapplication of remoteness restrictions where the defendant wronged the claimant deliberately or fraudulently or through gross negligence and the potential for judges to award augmented awards for non-pecuniary loss.[132] Rowan also addresses the *astreinte*, an enforcement device that is explicitly punitive, and which may bear some parallel to the provision for enhanced awards of interest in English law.[133]

In Chapter 4, Roberts and Richardson address the privacy context. They observe that the law in this area has historically shown little concern for punishment but that, due to changing social circumstances, pressure is gradually building for punishment to play a greater role in securing privacy interests. The evolving social conditions that they identify include the growing realisation that there is a public as well as private interest in privacy, heightened concern with data protection and emerging technologies. Roberts and Richardson, in a rich analysis that draws upon political philosophy and that has implications beyond the field of privacy, start from the position that because the criminal law is the primary mechanism for dispensing punishment, scope exists for private law to play only an ancillary role in this regard. They then identify situations in which private law can usefully complement the criminal law, such as where there are lacunae in the criminal law and where the criminal law is underenforced. Roberts and Richardson's chapter compels reflection on a host of fundamental questions about the relationship between private law and the criminal law, such as whether private law should be deployed to rectify shortcomings in the criminal law (as opposed to the criminal law simply being reformed), and whether and the extent to which the two areas of law should occupy

[132] For doubts about whether more liberal assessment of the claimant's non-pecuniary loss can properly be explained as involving punishment, see A Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in C Rickett (ed), *Justifying Private Law Remedies* (Oxford, Hart Publishing, 2008) 294.
[133] CPR 36.17.

some or all of the same territory (as opposed to law selecting one right tool for a particular job).

In Chapter 5, Penner considers the role of punishment in private law, at first generally, and then with particular reference to fiduciaries. He starts his general treatment of punishment with an assurance theory of prohibition, which is that a civilised society cannot stand idly by while wrongs are committed. It is society's moral duty to take the side of the victim in some suitably public and expressive manner. Society's response is not always to punish: punishment is justified when it is the only way of assuring citizens that, in respect of the wrong, the state takes their rights and interests seriously. Penner builds on this by adopting a familiar distinction between penalties and punishments.[134] Punishment, he says, has no place in a system of private law but sometimes the law does *penalise* civil wrongs. It imposes sanctions with the aim of regulating individuals' conduct so as to protect valuable social preferences or to co-ordinate behaviour in the pursuit of worthwhile activities. These activites include the practices of contracting, creating trusts, engaging in agency and so forth.

Applying this perspective to wrongful gains, Penner distinguishes between the defendant's duty to account for gains to which the claimant was already entitled, and the defendant's duty to disgorge other gains. The former duty is neither punishment nor penalty: the gain was always the claimant's. Situations of the second kind may constitute penalties. Because a bribe paid to induce disloyalty is not something to which the claimant was antecedently entitled, stripping the gain from the defendant is a penalty. Penner argues that *Boardman v Phipps*[135] illustrates the same idea applied to a fiduciary's breach of the no-conflict rule. So why is this windfall for the claimant accepted if it is a penalty but objected to if it is a punishment? Penner explains here that the beneficiary always has the power to approve or ratify the fiduciary's breach and so, in a broad sense, retains a form of authority over the fiduciary's conduct. He points out that since the fiduciary rules operate as a kind of regulatory penalty, they may not be, and are not designed to be, perfect deterrents.

Discussions regarding punishment in private law often centre on rules such as punitive damages and the penalty doctrine and little attention is given to what is, in some ways, the most obvious and ultimate expression of punishment in the civil law: the jurisdiction to punish contempt of court. This power is Rolph's concern in Chapter 6. Rolph concentrates on the divide between civil and criminal contempt. This distinction is often understood as that between breaches of orders and undertakings (civil contempt) and contempt in the face of the court and interference with the administration of justice (criminal contempt), and it has various (if relatively arcane) practical consequences. Rolph examines efforts that have been made to locate the basis of the dichotomy, such as the notion that criminal contempt is focused on punishment whereas sentences imposed for civil contempt are remedial and coercive. None of these efforts is found to be wholly successful. Rolph then considers calls to minimise or abolish the separation between the two species of contempt. His ultimate conclusion is that the distinction, although it generates anomalies and incongruities, will likely subsist for the foreseeable future. Rolph emphasises in this regard, among other things, the fact that the separation between criminal and civil contempt is entrenched in various statutes and that it has constitutional implications in some jurisdictions.

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[134] See, eg, J Feinberg, 'The Expressive Function of Punishment' (1965) 49 Monist 397.
[135] [1967] 2 AC 46 (HL).

C. *Part III – Punitive Damages*

The stated rationales for awarding punitive damages present numerous issues that go far beyond the overarching question whether punishment should have a place in private law. For example, it is often said that the goal of awarding punitive damages is to punish and deter, but is the punishment being imposed in the interests of retribution, or in order to deter, or with both of these ends in view? And given that the aim of punishment in the sense of retribution may not always support the same award of punitive damages as the goal of deterrence, how is the tension, or conflict, between these two functions to be resolved? It is with such taxing issues that Sharkey grapples in Chapter 7. Focusing on the position in the US, her main aim is to investigate courts' claims that they are acting retributively when awarding punitive damages and to suggest that they may in fact be concerned with making awards whose purpose is 'societal deterrence'. It is then argued, building upon previous her work in the field,[136] that developing punitive damages into 'societal damages' is normatively desirable, especially in certain contexts, such as the consumer protection setting.

In the course of her exegesis, Sharkey refers to several highly inventive schemes that have been devised in the US, by both judges and the legislature, for dealing with the windfall objection that inevitably looms large when it is suggested that awards should take cognisance of the societal harm that the defendant caused. These schemes include, for example, arrangements pursuant to which the punitive damages award will be reduced if the defendant agrees to make payments to various bodies which are well positioned to ameliorate the societal harm that they caused. These arrangements are remarkable at several levels seen from the perspective of lawyers elsewhere in the common law world, where the focus of punitive damages awards is firmly on retribution, and where punitive damages awards are at such at such a modest level[137] that redirecting them would have little or no impact in terms of addressing any societal harm.[138]

No central thesis is developed by Goudkamp and Katsampouka in Chapter 8. Their concern, instead, is to expose what they argue are a series of misunderstandings regarding punitive damages. Concentrating on English law, the errors that they identify encompass confusion as to what the law actually is as well as misperceptions of how it operates in practice. As to the former, they contend, for example, that recent cases that suggest that prior punishment of the defendant is irrelevant to the decision to award punitive damages are based on a misreading of earlier authorities. As to the latter, Goudkamp and Katsampouka argue, for instance, that the frequently-made claim that punitive damages awards are often excessive is inconsistent with the empirial evidence.[139] Other mistakes that Goudkamp and Katsampouka seek to identify include the widely-held belief that punitive damages are anomalous (they argue that a range of other remedies also manifest a concern with punishment), the suggestion that punitive damages are sometimes masquerading as disgorgement damages and the idea that merely negligent conduct cannot enliven the jurisdiction to award punitive damages. By seeking to correct assorted

[136] Especially CM Sharkey, 'Punitive Damages as Societal Damages' (2003) 113 *Yale Law Journal* 347.
[137] See Goudkamp and Katsampouka, p.**.
[138] The English Law Commission declined to recommend the enactment of legislation that would divert punitive damages awards from the claimant to the state or a public fund: Law Commission*, Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) Part V, paras 1.142–1.150, 1.158.
[139] J Goudkamp and E Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *OJLS* 90.

errors regarding punitive damages – they identify 10 in total – Goudkamp and Katsampouka's ultimate aim is to clear various obstacles that lie on the path to a better understanding of punitive damages.

Barnett tackles punitive damages in contract in Chapter 9. The title of her chapter, 'Exemplary Damages in Contract', reflects the terminology that is generally preferred in Australia. She relates the opposition to punitive damages in contract to various features of the law of contract including the fact that contractual duties are often strict and breach is 'demoralised', that contract law is not generally aimed at deterrence in that it 'tolerates' breach subject to the obligation to pay compensation and that damages, not specific performance, is the default remedy.

In this normative conflict Barnett finds the seeds of an argument in favour of punitive damages in contract. She explains that the defendant's culpability sometimes *is* considered in the way in which the courts formulate the measure of damages. Barnett then presents four criteria to guide awards of punitive damages. First, punitive damages are a 'last resort' option, when specific relief or other measures of damages are inadequate or unavailable. Secondly, the breach must be egregious or malicious. Thirdly, the injured party must have a 'legitimate interest' in performance of the contract. Fourthly, allowing the particular breach to pass unsanctioned would undermine the institution of contract or some public policy. She marshals cases to support these suggested requirements.

In Chapter 10, Bant and Paterson identify patterns of reasoning spanning the common law, equity and statute, from which principles of proportionate punishment can be distilled. They begin with a survey of several common law jurisdictions and show that deterrent and punitive measures in the civil sphere can be found in a range of statutes, especially those dealing with intellectual property and consumer protection. They then concentrate upon a key piece of Australian legislation, the Australian Consumer Law (and on equivalent provisions in the Australian Securities and Investment Commission Act 2001 (Cth)). Bant and Paterson argue that courts often emphasise the deterrent function of sanctions imposed by statute without exploring the measures that are most apt to achieve that goal. Developing principles of proportionate punishment will, they say, improve the efficacy of statutory schemes and promote consistency in deterrence across statutory and common law regulatory mechanisms. On proportionality, they draw insight from the equitable remedy of an account of profits. The argument here notes the debate about the punitive nature of that remedy and eschews any suggestion that an account ought to be the only measure for civil penalties. An account can serve a deterrent purpose, which is consistent with punishment. Another advantage of drawing guidance from the account of profits remedy is that there are well-established principles regarding the calculation of an appropriate sum, addressing matters such as causation of gains, the defendant's own skill and effort exerted in producing them and the boundaries to be placed on the defendant's liability to account.

In Chapter 11, Morgan is concerned with vicarious liability for punitive damages. The notion that a defendant who is merely vicariously liable may be ordered to pay punitive damages has long elicited strong objections.[140] The basic point made in this regard is that

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[140] See, eg, *Kuddus* (n **) [131]; Beever (n 7) 96 ('vicarious liability for exemplary damages is an injustice of the first order); P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP, 2010) 43; A Tettenborn, 'Punitive Damages–A View From England' (2004) 41 San Diego L Rev 1551, 1567–68 ('it is entirely inconsistent with

it makes no sense for a defendant who is not themselves a wrongdoer but is simply vicariously responsible for someone else's wrong to be punished. One possible counterargument to the foregoing seeks to undermine the notion that vicariously liable defendants are not wrongdoers. This response can be developed by reference to the master's tort theory pursuant to which the master is imputed not with the liability of the servant but with the servant's acts such that the master is themselves a wrongdoer.[141] However, Morgan, observing that vicarious liability does not presently operate through the master's tort theory, approaches the problem differently.[142] Focusing on English law he argues that vicarious liability for punitive damages is unjustified where the punitive damages are awarded under the second *Rookes* category (ie, cases in which the defendant had a profit motive) but is warranted in relation to punitive damages awarded under the first *Rookes* category (ie, where there is oppressive, arbitrary or unconstitutional conduct by government servants acting as such). Morgan's argument in this regard ultimately rests on the imperative that the state act lawfully. The state, he emphasises, is uniquely positioned and allowing vicarious punishment of the state is warranted, he contends, by a concern to protect citizens from misuse of executive power and from the danger that the state may fail to deal properly with the wrongdoing of its own agents.

An important strand of the analysis focuses on the fact that in category one cases, the wrongdoing by the government's servant will almost always be criminal. Morgan points out that if one is considering the issue of punitive damages in category one cases that is only because, given the restriction on awarding punitive damages where other forms of punishment have been imposed,[143] the state has elected not to pursue the wrongdoer, whether through the criminal justice system or otherwise. Morgan identifies this as a reason to tolerate vicarious punishment of the state and, indeed, perceives the power to do so as an important bulwark against abuse by the state of its unique powers. It is interesting to observe that looking at the *Rookes* categories through the lens of vicarious liability, as Morgan does, sketches out a possible justification for distinguishing between different categories of case in which punitive damages can be awarded. The possibility is intriguing in circumstances where the *Rookes* categories are generally regarded as being fundamentally irrational, as is apparent from the fact that courts in other jurisdictions have refused to follow *Rookes*.[144]

D. Part IV – Limiting Punishment

Part IV contains three chapters about the limits of consensual punishment in contract. Courtney's analysis on agreed punishment in Chapter 12 opens this Part. He begins by introducing a distinction between penalties and punishment. He also concedes that the prohibition on punitive damages in contract is a formidable obstacle to permitting parties to agree punitive sanctions. That aside, there are, he argues, several reasons why the law might choose to forbid agreed punishment in contract *even if* it allowed punitive damages

[the] rationale [for punitive damages] to impose a penal sanction on a given defendant independently of the blameworthiness of that defendant').

141 For a defence of the master's tort theory, see Stevens (n **Error! Bookmark not defined.**) ch 11.

142 For a yet further strategy, see Sharkey, p.** (arguing that if punitive damages are reinvented as societal damages there should be no bar to vicarious liability).

143 For discussion of this rule, see Goudkamp and Katsampouka, **.

144 See Goudkamp and Katsampouka, **.

for breach. Some of these mirror general arguments against punishment in private law, namely, insufficient procedural safeguards, windfalls and a private citizen's lack of authority to punish. There are also concerns about the state enforcing private norms of punishment which are not necessarily compatible with those accepted by the community at large.

Courtney considers three sets of principles that limit punitive or excessive sanctions: the rule against penalties, relief against forfeiture and techniques to control the exercise of contractual powers. He argues that none of them is really concerned with preventing punishment according to the definition offered at the start of his chapter.[145] Rather, they tend to focus upon harsh treatment – penalty – and whether it is disproportionate to the breach of contract or its consequences. Courtney also points to limited instances in which contract law seems to tolerate punishment.

Tiverios and McFarlane continue the analysis of the rule against penalties and relief against forfeiture in Chapter 13. They collocate the doctrines through a series of contrasts: between the purposes of each of them; between law and equity; and between Australian and English law. The law can control objectionable terms either by rendering them void (the approach of the common law) or by upholding them as valid while restricting their enforcement (the solution adopted by equity). The chapter traces the common origins of the rule against penalties and relief against forfeiture and notes the recent divergence in Australian and English law over the breach requirement[146] and the role of equity in the former rule. The authors also note the controversy surrounding the requirement of a proprietary or possessory right as a basis for relief against forfeiture.[147] This requirement prevents relief against forfeiture from operating as a general restriction on termination of contracts; nor can it protect a claimant against losing 'mere' contractual rights.

The latter part of the chapter addresses internal consistency in the structure of the doctrines in Australia and England. Tiverios and McFarlane point out that the English rule against penalties is 'symmetrical': it only applies to clauses activated by breach and it restores the default remedy – common law damages – in the event that a penal clause is invalidated. In *Cavendish Square Holding BV v Makdessi*,[148] Lord Neuberger and Lord Sumption thought that this correspondence clearly marked the rule against penalties as being about regulation of remedies rather than substantive unfairness of terms. The requirement of a proprietary or possessory right for relief against forfeiture may be doubtful in principle but it does serve a pragmatic purpose. It prevents relief against forfeiture from spilling over into run-of-the-mill situations where an apparently harsh sanction is triggered without breach. It therefore respects the boundaries of the penalties rule as marked out in *Cavendish*. By contrast, there is no such concern for Australian law because the rule against penalties has been expanded to apply to sanctions not triggered by breach. Indeed, this development paves the way for the two doctrines to be reunified.

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[145] He combines HLA Hart's well-known definition of punishment (HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edn (Oxford, Oxford University Press, 2008) 4–5) with Feinberg's expressive theory of punishment (Feinberg (n 134)).

[146] Compare *Andrews* (n 129) [10], [46] with *Cavendish* (n 123) [12]–[13], [41]–[42], [129]–[130], [241].

[147] *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2013] UKPC 2, [2016] AC 923 [94]; *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd* [2019] UKSC 46, [2019] 3 WLR 852 [49]–[50]. See further PG Turner, 'What Delimits Equitable Relief from Forfeiture?' (2019) 78 CLJ 276; N Tiverios, 'The Forfeiture of Contractual Rights' (2020) 79 CLJ 17.

[148] (n 123) [13].

This would not be a trivial step, as there remain some substantive differences in the operation of the two doctrines. Tiverios and McFarlane conclude by identifying the changes necessary to accomplish it.

In Chapter 14, Zou and Liu consider the application of the rule against penalties to employment contracts, in particular, to 'bad leaver' clauses. The drafting of such clauses varies widely although the focus is often on the reason why the employment was terminated. An employee may be a 'bad leaver' if dismissed for misconduct. A more stringent form of clause applies to an employee who leaves voluntarily without an 'acceptable' justification, such as redundancy, retirement or illness. Alternatively or additionally, the 'bad leaver' definition may attach to the departing employee's breach of post-termination restrictions, for example, non-competition and non-solicitation covenants. Sanctions for being a bad leaver commonly include a reduction in or loss of, or failure to 'earn', a monetary bonus; forfeiture of share options; or a compulsory transfer of an existing shareholding.

Zou and Liu's thesis is that the rule against penalties is manifestly inadequate to regulate bad leaver provisions. They rely upon the 'right to quit' as being a fundamental freedom of an employee in modern labour law. The right to quit is supported by normative claims about personal freedom and autonomy; control of oppressive conduct by stronger parties (employers); and utilitarian and efficiency-type arguments. The critical failing of the rule against penalties in this context is that it is too easy for an employer to evade the breach trigger by careful drafting. Further, while deterrence can be a legitimate function of a penalty clause in general, this cannot be accepted in the context of bad leaver provisions because it is incompatible with the fundamental right to quit. Zou and Liu argue that there are no other suitable controls at common law (eg, restraint of trade) or under statute (eg, the Employment Rights Act 1996 (UK) or Modern Slavery Act 2015 (UK)) to address the problem. They propose statutory reform to target clauses that 'excessively interfere' with an employee's 'freedom to exit an employment relationship'. Whether a clause is excessive is, they argue, to be decided by weighing up the employee's freedom to exit against the employer's legitimate business interests.