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Introduction

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

The book investigates the place and significance of standing in private law. It develops a simple idea: that we should attend more to 'standing', conceived as a power to hold another accountable before a court, as a distinct private law concept.

In public law, standing is a well-known concept, and the existence of standing rules well-recognised. Yet to the private lawyer, standing is a relatively foreign concept. It even appears to have gone missing. It seems conventional wisdom that private law does not have, or need, standing rules. Eminent tort and administrative law scholar, Peter Cane, has for example observed that 'The requirement of standing only applies to actions in respect of public law wrongs. The reason for this is not entirely clear'.[1]

Moreover, the very idea of standing is itself not at all straightforward. I share Joseph Raz's worry that, even though the term is used in legal discourse, we lack a firm grasp over the idea of 'standing'. In a debate with Stephen Darwall over the possibly related idea of 'authority', Raz has said of the idea of standing that 'we do not have an unproblematic grasp of the phenomena referred to. Nor is it entirely clear what the term refers to in its legal use'.[2]

Our difficulty is compounded by a lack of suitable vocabulary and conceptual apparatus to differentiate 'standing' from another concept: 'rights'. In a wide range of contexts within private law doctrine and scholarship, what we might think of as standing has been referred to variously as a 'right to sue',[3] 'right to enforce',[4] or 'right of action'.[5]

But, as Wesley Hohfeld warned us, the word 'right' is famously ambiguous.[6] For the unwary, these labels can mislead. The question "who can *enforce* a right?" can be conflated with and collapsed into a separate distinct question: "who has the right?". Two questions are asked, but often, only one answer is given. It is assumed they are in essence the same question. They are not. As I shall aim to show in this book, they can admit of different answers, even if only exceptionally so.

And that is not all. Standing's distinctive role within private law doctrine has furthermore been subsumed within yet another broader notion – 'privity' – itself an inadequately understood cluster of ideas.

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1 Peter Cane, *An Introduction to Administrative Law* (2nd edn, OUP 1992) 44-45.

2 Joseph Raz, 'On Respect, Authority, and Neutrality: A Response' [2010] Ethics 279. Cf Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' [2010] Ethics 22; Stephen Darwall, *The Second-Person Standpoint* (Harvard University Press 2009).

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

4 eg Contracts (Rights of Third Parties) Act 1999; Law Commission, *Privity of Contract* (Report No 242, 1996) paras 3.30-32; cf Robert Nozick, *Anarchy, State and Utopia* (Basic Books 2013) 80-81.

5 eg *Blake v Midland Railway* (1852) 18 QB 93, 110 (Coleridge J); *Seward v Vera Cruz* (1884) 10 App. Cas. 59 (HL), 67 and 70 (Lord Selborne LC); *Lord Sudeley v Attorney General* [1896] 1 QB 354 (CA) (Esher MR), 359-60; *Donoghue v Stevenson* [1932] 1 AC 562 (HL), 609-10 (Lord Macmillan); *Davies v Powell Duffryn Associated Collieries* [1942] AC 601 (HL) 610 (Lord MacMillan), 614 (Lord Wright); s1 Fatal Accidents Act 1976.

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

We are therefore in a situation ripe for misunderstanding and error.

It is against this backdrop that this book enters the conversation. It argues that a key reason why standing has been relatively overlooked and under-conceptualised, receiving meagre attention from private lawyers, is because it has been obscured from plain sight. It has been swallowed up by the more dominant and capacious concept of a 'right'.

'Right' does indeed play an indispensable role to our understanding of private law, but it should not monopolise private law's remedial terrain. Standing is a distinct and separable private law concept that can, and should, be distinguished more clearly from 'right' – that, in nutshell, is the central overall argument of this book.

Doing so is necessary for the continued rational development of private law doctrine. It is also necessary for a deeper theoretical understanding of standing's significance, and its place within what John Gardner has termed 'the remedial apparatus of private law', a complex matter 'extremely hard to explain and defend'.[7]

It is in this vein that this book seeks to contribute, and hopes to make some modest progress. One of its key motivating ideas is that, to gain a fuller picture of private law's remedial apparatus, understanding the rights and duties we have against one another is insufficient. We need also to better understand the enforceability (or un-enforceability) of these duties and rights. It is this aspect of private law's remedial puzzle, that this book examines through the lens of 'standing', and the mystery of its supposed disappearance.

I. The Backdrop

I position the book's central argument in relation to existing debates within private law theory in this section. The following sections will outline this book's structure and provide a short overview of each chapter's key claims.

In writing this book I certainly do not claim to be starting entirely anew, as if from a *tabula rasa*. Rather, as I explain further in Chapter 2, I build on the shoulders of giants past. Unfortunately, I am unable to acknowledge fully here every contributor, without whom this book would take a quite different form.[8] That would be to try the reader's patience, disorientate them with an overload of detail, and anyway be overly digressive. To keep this introduction concise and accessible, I describe only some of the most relevant major influences which have informed my thinking.

Private law and its theory is a rapidly growing field of increasing importance around the common law world. I come from and write within a tradition focussing on the private law doctrine of England and Wales. But, given the topic of inquiry, my work inevitably bears marks of influence from the other side of the Atlantic. In the three plus years spent writing the DPhil on which this monograph is based, counting from its inception in October 2016 as an MPhil, several ground-breaking monographs have been published, each engaging with those preceding it.[9] Where possible, I have strived to incorporate important developments, if relevant and necessary to this book's central argument, within the final text.

In this book I build upon an existing vein of literature providing 'rights-based' accounts of private law, seeking to complement and supplement that body of work. A Hohfeldian analysis of 'rights' talk in private law doctrine is employed to sharpen and deepen our understanding of fundamental legal concepts like 'claim-rights', 'duties', 'powers', and 'liability'. 'Rights-based' is defined expansively for our purposes. It includes any account which treats the rights and duties that we have against and owe each other, as indispensable to an understanding of private law.[10]

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7 John Gardner, *From Personal Life to Private Law* (OUP 2018) 4: '…I have come to grasp over the years that the remedial apparatus of private law is extremely hard to explain and defend. I had underestimated the scale of the ethical and the philosophical challenges. This book is testimony both to the scale of the challenges and the very limited progress I have made, so far, in meeting them. I feel that with private law I have only slightly bettered my frustrating attempts to understand what is going on in criminal law.'

8 For which, see *Bibliography.*

9 Arthur Ripstein, *Private Wrongs* (HUP 2016); John Gardner, *From Personal Life to Private Law* (OUP 2018); Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019); John Gardner, *Torts and Other Wrongs* (OUP 2020); Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020).

10 Reviewing the field see Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011). Examples include Robert Stevens *Torts and Rights* (OUP 2007); John Gardner, *From Personal Life to Private Law* (OUP 2018); Gardner

To help the reader situate where this book sits within the larger literature occupying the field, three main strands of thought informing my thinking can be sketched in broad, but hopefully not overly simplistic, brush strokes. Not all of them are, I believe, necessary to accepting my main claims. But I have erred on the side of inclusion in favour of the reader better understanding the motivation for this book, and my angle of approach.

First, this book develops, but in different directions, an insight traceable to Benjamin Zipursky's work on 'substantive standing' within American tort law doctrine,[11] which he in turn accredits to Ernest Weinrib's treatment of *Palsgraf v Long Island Railway Company* in *The Idea of Private Law*.[12] Zipursky argued that standing requirements are buried within the rules which define the wrongs that tort law recognises, and thus could be found within the 'substantive' norms of tort law. This idea was subsequently developed in important joint work with John Goldberg into a theory of Civil Recourse, marking a shift of their focus to justifying the maxim *ubi ius, ibi remedium*, a modern restatement of which was recently published as *Recognizing Wrongs*.[13] Broadly speaking, my book can be understood as building upon and supplementing a similar line of inquiry commenced by Zipurksy's pioneering work from across the Atlantic, asking if it also holds true for a different source material (English private law), and focussing on different sides of the puzzle within the larger spectrum of private law. This book covers tort law, but it also devotes substantial attention to contract law, the law of unjust enrichments, and relatedly the law of trusts – albeit only from the perspective of the trustee's and not the beneficiary's rights. More specific points of departure are detailed where appropriate throughout the book.

The second strand of thought comes from a three-way-debate conducted over many years between Goldberg and Zipurksy, Corrective Justice theorists like Ernest Weinrib and Arthur Ripstein, and others (like John Gardner) who occupy a middle ground between them. The debate is complex, taking place at different levels and various pressure points. Amongst other things, it concerned the exact scope and significance of 'Civil Recourse' and relatedly, the role of the state and its courts in the enforceability of a citizen's private law rights and duties. Against the legal economist's models of 'liability' imposed on defendants unilaterally,[14] a key insight of Corrective Justice theorists was to stress the interpersonal nexus between duty-bearer and right-holder – their bilateral',[15] 'relational',[16] or 'bipolar'[17] structure – as a core feature of private law relations. In response, Civil Recourse Theorists argued that this is only part of the story: it mis-classifies the basic phenomenon to be explained.[18] What needs to be grappled with instead is how, post-wrong, there arises a 'triangle of legal relations'[19] – the claimant, defendant, and the *court* are all involved as participants in the remedial process

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Torts and Other Wrongs (OUP 2020)*;* Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (HUP 2009); Arthur Ripstein, *Private Wrongs* (HUP 2016)*;* Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020); Ernest Weinrib, *The Idea of Private Law* (revised edn, OUP 2012); Ernest Weinrib, *Corrective Justice* (OUP 2012); Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007).

11 Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1.

12 248 NY 339 (1928). Ernest Weinrib, *The Idea of Private Law* (OUP 1995) 159-64 is accredited by Zipursky at (n 11) 10-11. See fn 30.

13 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020).

14 On 'liability rules' see most famously Guido Calabresi and Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 1089 Harvard LR 85.

15 Arthur Ripstein, *Private Wrongs* (HUP 2016) 36; Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64, 75: 'bilateral structure'; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 581: 'bilateral nature of the necessary relation'.

16 Ripstein, 'Private Authority' (n 15) 75: 'irreducibly relational'; John Gardner, *From Personal Life to Private Law* (OUP 2018) 20: 'relations of duty'.

17 Ernest Weinrib, *The Idea of Private* Law (OUP 1995) 2: 'bipolar relationship of liability'; Ripstein *Private Wrongs* (n 15) 5: 'Both the dispute and its resolution are bipolar'.

18 Benjamin Zipursky, 'Civil Recourse Theory' in Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 55-58; *Recognizing Wrongs* (n 13) 154.

19 Benjamin Zipursky, 'Philosophy of Private Law' in Coleman, Kenneth and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 636-37.

leading up to an award of damages. Thus, for them, wrongs generate 'private rights of action'[20] conceived as 'triangular'[21] or 'trilateral',[22] as a 'power to have the state alter the legal relations between the parties'.[23] Within this debate, key influences are John Gardner's argument that 'civil recourse' is a principle of wider expanse and explanatory scope than Goldberg and Zipursky had initially realised or laid claim to,[24] which he later developed in *Personal Life to Private Law,*[25] and also Arthur Ripstein's response to Civil Recourse Theorists in *Private Wrongs*, that it is a general feature of *every* private right that it is the rightholder – not the state – who determines whether to enforce it.[26] I have landed somewhere between Gardner and Ripstein in this book. I explain the phenomenon observed in our positive law through a general legal rule functioning to reserve to right-holders an exclusive power to enforce these rights, but to which exceptions can, and do, exist. I also argue that the rule is best justified not analytically or conceptually, but rather, by a mixture of overlapping non-instrumental and instrumental reasons.

Third is Stephen Smith's book on Remedial Law, *Rights, Wrongs, and Injustices: The Structure of Remedial Law*, the first monograph published in the *Oxford Private Law Theory* series. Smith, who seems most aligned with Goldberg and Zipursky on the matters sketched out above, understands and taxonomizes the law of remedies as a general law of court 'rulings' or 'orders'. In his book, Smith alludes only very briefly to the issue of 'standing' – conceived as requests for a court order – and the general puzzle posed by it in two and a half pages.[27] This book expands upon and develops that line of work, but from a different angle. Like Smith's book, the focus is on English private law, mixing a philosophical approach to a private law puzzle with extensive doctrinal analysis to support its central claims. While our claims about the existence of standing rules and their content are broadly aligned, differences exist due in large part to Smith's commitment to a 'liability-only' thesis which denies the existence of secondary duties to damages and rights to restitution, a commitment I do not quite share.[28] (On that matter I am aligned more with Gardner).[29]

Lastly, the excellent contributions of two scholars to the field in particular should also be acknowledged. One is Ori Herstein's work on 'standing', from which I have learnt very much, and on which I rely at various points.[30] The other is Nicolas Cornell's work on rights, wrongs, and the 'standing to complain'.[31] Cornell seeks to detach wrongs, which he associates with the notion of having 'standing to complain', from rights. I explain our similarities and differences more in Chapter 11.[32] In sum: while on the surface we both endorse the conceptual separability of standing from rights, I operate with a very different conception of a private law wrong, and its

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20 John Goldberg and Benjamin Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 918; John Goldberg and Benjamin Zipursky, 'Civil Recourse Revisited' (2011) 39 Florida State University Law Review 341, 363.

21 On 'The Triangularity of Private Rights of Action' see Zipursky, 'Philosophy of Private Law' (n 19) 636-37; Zipursky, 'Civil Recourse, Not Corrective Justice' [2003] Georgetown Law Journal 695, 733: 'It is critical to understand the triangular structure of this set of statements…'; cf Goldberg and Zipursky, *Recognizing Wrongs* (n 13) 124: 'the "right to civil recourse" refers to a particular kind of triangular right…'

22 Discussing the move towards 'trilaterality', see Kit Barker, 'Private Law, Analytical Philosophy and the Modern Value of Wesley Newcomb Hohfeld' (2018) 38 OJLS 585, 607-09.

23 Zipursky, 'Philosophy of Private Law' (n 19) 633-37.

24 John Gardner, 'Torts and Other Wrongs' (2011) 39 *Florida Statute University Law Review* 43; re-printed as John Gardner, *Torts and Other Wrongs* (OUP 2020) Ch 1. Cf John Goldberg and Benjamin Zipursky, 'Civil Recourse Revisited' (n 20) 367-69; Goldberg and Zipursky, *Recognizing Wrongs* (n 13) 56-61.

25 John Gardner, *From Personal Life to Private Law* (OUP 2018)

26 Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) Ch 9.

27 Stephen Smith, *Rights, Wrongs, Injustices: The Structure of Remedial Law* (OUP 2019) 129-131.

28 See Ch 5.II 'A General Standing Rule'.

29 John Gardner, 'Damages Without Duty' [2019] University of Toronto Law Journal 1. And also Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283.

30 Ori Herstein, 'Understanding Standing: Permission to Deflect Reasons' (2017) 174 Philosophical Studies 3109; Ori Herstein, 'Justifying Standing to Give Reasons: Hypocrisy, Minding Your Own Business, and Knowing One's Place' (2020) 20 Philosopher's Imprint.

31 Nicolas Cornell, 'Wrongs, Rights, and Third Parties' (2015) 43 Philosophy & Public Affairs 109.

32 Ch 11.V.A.ii.

relation to directed duties and claim-rights, which I think better tracks the positive law, and from which Cornell wants to depart.

II. This Book's Structure

The overall argument of the book is advanced in three broad steps, so the book is correspondingly structured in three sequential parts.

Part I on 'Conceptualising Standing' sets the stage, unpacking the concept of standing within private law. A definition of standing is introduced, and standing is distinguished from other neighbouring concepts which could obscure it from view. It is argued that an implicit general standing rule exists across the law of obligations, although exceptions to said rule could and do exist:

> Only the primary right-holder has the standing (a power) to sue to enforce his rights (and no one else). | *A General Standing Rule*

The existence of the general standing rule explains why private law enforcement appears to take on a bilateral form – the bilateral shape of the correlative claim-right and duty relation is generally accompanied by an equally bilaterally shaped correlative power and liability relation: the standing to sue and the liability to be sued. This explains why, as Ernest Weinrib is most famously known for saying, it is 'the basic feature of private law [that] a particular plaintiff sues a particular defendant'.

Part II on 'Standing's Doctrinal Distinctiveness' has an overarching goal: to show how recognising standing as a distinct private law concept can help us to understand, illuminate, and perhaps even resolve debates and difficulties in private law doctrine. It demonstrates the doctrinal significance of the claims in Part I, by engaging in extended analyses of contentious doctrines within each of the three main branches of the law of obligations: the law of contract, torts, and unjust enrichments. The law of trusts is also relatedly discussed in the treatment of unjust enrichment – a body of law that cuts across the historical divide between Common Law and Equity, it proponents advocating fusion in favour of coherence.[33] A key aim is to show, with concrete doctrinal examples, how and why recognising and understanding standing's distinctiveness can help us to better interpret, and develop, the trickier and thornier bits of these areas of law.

Part III on 'Justifying Standing' discusses the justifiability of the general standing rule within the law of obligations, and relatedly, the justifiability of exceptions to that rule. By design, matters of justification have been left mostly to a separate final part. Why so structured? Although it may be impossible to completely sever the evaluative from the conceptual, the hope is that even if the reader were disinclined towards the justifications advanced in Part III, the doctrinal and analytical contributions made in Parts I and II could still stand on their own feet, and be accepted by even a reader with radically opposing evaluative commitments, rather than being rejected wholesale on those grounds alone.

III. Overview by Chapters

Here are short summaries of each chapter's key claims to help navigate this book.

Chapter 2 introduces key ideas which I consider basic to my larger project in this book, unpacks some trickier ones, and clarifies the terminology used in the book. It also elaborates on some foundational commitments that I assume, but do not fully defend here.

Chapter 3 argues that standing ought not to be mixed up with other 'rights' potentially at play within the larger remedial context of a private law dispute. Contrary to the misleading labels in legal discourse (eg 'right to sue', 'right to enforce', or 'right of action'), standing is not a 'right' in the sense of a Hohfeldian claim-right, whether a right against a defendant, a court, or even the state. Instead, it is better understood and conceived as a Hohfeldian power to sue and enforce distinct private law rights and duties. This lets us better differentiate between the *enforcer* – who has standing, and the *subject-matter of enforcement* – typically a directed duty

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33 Leading accounts of unjust enrichment are more-or-less fusionist in their approach. See eg James Edelman and Elise Bant, *Unjust Enrichment* (Hart 2016) 21-24. Influenced by Peter Birks, they are motivated by the governing ideas that like should be treated alike. For Birks, history alone is not a good reason for continued differentiation, or for giving multiple different answers to the same question. As far as possible, common law and equitable doctrines should be incorporated into a coherent, rational body of law: Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia LR 1, 1-25. See also Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 OJLS 1.

owed by a defendant to another, who in Hohfeldian terms, possesses a correlative 'claim-right'. An important but frequently neglected implication, fleshed out through the rest of the book, is that a mere change in the enforcer's identity cannot (and should not) change the post-enforcement result. For instance, if what is sought to be enforced is X's right to damages, any sums awarded go to the right-holder, X, whether that same right is enforced by the attorney-general, a state-regulator, or some third-party individual, Y. Y has standing only. The destination of damages does not change simply because the right to damages is now being enforced by someone else. Ditto the enforcement of a primary right by someone else – that does not change the conduct necessary to comply with the right – whether a right to restitution, or a contractual right to performance et cetera. *Private law rights and duties remain invariant across different enforcers*; distinguishing more clearly between standing, a power of enforcement, from the underlying subject-matters of enforcement, reveals this under-appreciated truth.

Chapter 4 argues relatedly that standing – conceived as a claimant's power to hold another accountable before a court, thereby subjecting that other to its jurisdiction – also ought not to be collapsed into a different power: the court's power to make orders. An account is put forth of how three necessary components of private law's remedial structure – a claimant's standing, a defendant's liability, and a court's orders – are related. How this account differs from the Civil Recourse theorists' model of 'private rights of action' generated by relational wrongs, is also explained.

Bridging from Part I to Part II of the book, Chapter 5 lays out two general claims advanced in this book over Part II, at a higher level of abstraction. The first is that, as a general descriptive claim about private law doctrine, there exists an implicit standing rule relating standing to private law rights, so that standing and rights typically coincide in a single holder. This rule thus reserves to right-holders a special place within private law's remedial structure: enforcement is generally exclusive to the right-duty relation. The second is that it is the instances of standing without rights, where the two are detached are held by different persons, that are exceptional to private law doctrine. These claims are presented through two corresponding puzzles: a *puzzle about standing rules,* and *a puzzle about standing without rights.* The latter puzzle relates to the existence of what I call *right-less enforcers* – non-right-holders with standing to enforce someone else's rights, but without their very own primary right. It is argued that the reason we do not commonly observe their widespread existence throughout private law doctrine, is because of the general standing rule. *Right-less enforcers* are perceived as irregular or exceptional, meeting with clear resistance within private law doctrine, precisely because their detachment is exceptional in nature. The general rule explains the exceptionality of these instances. And the exception(s) prove the existence of the general rule.

Part II demonstrates these claims through specific doctrinal examples in which standing and rights might or have come apart.

Together, Chapters 6 and 7 prove to the contract lawyer why standing should be taken more seriously as a distinct private law concept. The literature discussing contractual rights to performance, and rights to damages for their breach, is legion. But standing, as distinct from rights, has been overlooked. These chapters demonstrate how an elision of concepts – between rights and standing – has hampered our understanding of 'privity' and its reform, obscuring what is truly at stake. Over the two chapters, it is argued that privity is not a singular doctrine. Instead, it has multiple aspects – appeals to 'privity' are thus often references to an ambiguous cluster of only superficially similar, but analytically distinct component rules. One of these is a cautionary rule about the formation and acquisition of primary rights to contractual performance. Another is a rule about damages for breach of contract, and their direction. Yet another is, significantly, a standing rule. Because this complexity went by unnoticed, there was a missed dimension to the debate over privity and its English reform. A reform alternative – third-party standing, involving a *right-less enforcer* – was not considered. Its doctrinal plausibility and justifiability is examined in Chapter 7. In nutshell, the contention is that the key justifications mooted for reform are better treated as justification for extending standing, rather than rights, to a third-party, and that the value that 'agreements must be kept' supports this.

Chapters 8 and 9 prove why unjust enrichment lawyers should better distinguish between having rights to restitution, versus having the standing to enforce those rights. This would neatly resolve a long-standing debate over the best rationalisation of a landmark restitution case, *Re Diplock,*[34] and rescue it from being overruled in the aftermath of another recent landmark field-defining UK Supreme Court case, *Investment Trusts Companies*

34 *Re Diplock* [1948] Ch 465 (CA), on appeal from [1947] Ch 716 (Ch). Resolved on appeal as *Ministry of Health v Simpson* [1951] AC 251 (HL).

v HMRC, [35] which clashes with it head on. Though not yet realised by unjust enrichment lawyers, nor by the judges within the case itself,[36] *ITC* has changed the terms of this long-standing debate. *ITC* demands a tighter nexus between duty-bearer and holder of the correlative right to restitution, defining more narrowly what it means to be 'enriched at the expense of another': a necessary element of any enforceable right to restitution for unjust enrichment. This has also re-oriented the larger debate over the scope of unjust enrichment and its future development in English law more generally, creating a real need for this area of law to be re-assessed and rationalised. These chapters put forth a standing-based rationalisation of the *Re Diplock*-type situation, building on and fortifying an argument advanced first by Lionel Smith.[37] It is shown how a key mis-step, on the restitution orthodoxy, occurred by conflating standing with rights to restitution.

I go even further in Chapter 9, putting forth an analogy with trusts law procedures in which a trust-beneficiary can, exceptionally, enforce the trustee's right against strangers to a trust, and arguing that my preferred rationalisation better explains why the action in *Re Diplock* is notoriously known as a 'special' equitable one. It is special, not because it involved a novel source of sui generis rights to restitution (as restitution orthodoxy suggests), but because it involved an exception to the general standing rule, applicable not just narrowly within trusts law or contract law, but also within the law of unjust enrichment. It is no coincidence that judges and commentators had previously referred to the 'enrichment at the expense' requirement as one of 'privity'. Like 'privity of contract', 'enrichment at the expense of' too contains a standing rule, implicit within it, and is undergoing further unpacking and refinement as the subject develops further.

Lastly, and concluding Part II, Chapter 10 unpacks tort law's typical triplet bundle of 'rights': primary rights, the infringement of which constitute a tort; secondary rights to damages arising post-tort; and the standing (a power) to sue and enforce these rights. It is argued that these three typically coincide in a single holder, corresponding to two general rules within private law demanding their coincidence. However, it is conceptually possible for the three to be split up; even if only exceptionally so. Three such exceptional situations in which, abnormally, a non-victim appears to be deriving 'rights of action' from a tort done to someone else, are discussed: fatal torts, deceased testators, and pre-birth torts. A key argument is that the evidently anomalous or irregular nature of these challenging cases can be explained through the existence of two general rules, applicable within tort law doctrine. The reason these cases look so irregular to a tort lawyer is because they *are* exceptional. But they are exceptional in a less widely realised way – they are doubly exceptional – involving exceptions being made to two general rules. One about standing, and one about damages. Both rules are necessary to explaining why such cases are so 'anomalous' and exceptional. Their exceptionality, again, proves the generality of these rules:

If I breach your primary right, then any secondary duty I owe to pay damages is owed only to you (and to no one else).	*Damages and 'Directional Continuity'*
Only the primary right-holder has the standing (ie power) to sue to enforce his rights (and no one else).	*A General Standing Rule*

Part III comprises Chapters 11 and 12. They discuss, respectively and in turn, the justifiability of the general standing rule which demands the general exclusivity of enforcement by right-holders, and the justifiability of exceptions to that rule – ie the possibility of enforcement by an enforcer who is a non-right-holder, with standing only: a *right-less enforcer.*

Chapter 11 argues that even though the standing rule is general in the sense that it is applicable across a large range of private law, in particular the law of obligations – conceived here as including the traditional sub-categories of contact, torts, and unjust enrichment – there need not be a singular justification for this rule. Multiple reasons, each with different scope, and which could overlap, could together justify having such a rule. Twelve are raised and discussed, and it would not be very helpful to list them all here (interested readers might refer to the table of contents). What can be usefully said here to foreshadow what follows is that the non-instrumental reasons share a common normative shape or form.[38] They are values which would be undermined, were standing extended to others (ie a non-right-holder). Thus, a legal system which commits to a general standing rule that preserves enforcement exclusively for right-holders protects and contributes to these values.

35 *Investment Trusts Company v HMRC* [2017] UKSC 29, [2017] 2 WLR 1200.

36 *Re Diplock* (n 34) was not mentioned in *ITC* (n 35) at all

37 Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412

38 Except for one, relating to the duty-bearer, discussed for completeness.

These include 'private authority' and being in charge, independence and autonomy, not forcing a right-holder's cooperation, the priority of self-defence over other-defence, the right-holder's option to forgive, and his privacy. The chapter also argues that 'purely analytic' accounts are unsatisfactory, in part because they cannot accommodate the doctrinal possibility of right-less enforcers, discussed in Part II. It ends by discussing moral standing, and its possible relations to legal standing, concluding that while comparisons with accountability relations between right-holder and duty-bearer in morality can yield some helpful insights, the analogy has limits. There are structural differences between law and morality. It may be truism that 'all legal systems have judges', but not so in morality. Instrumental justifications can play more of a role within the law.

Chapter 12 is motivated by two related thoughts. That first, the exceptions to the rule must be related to the justifications for the rule, and that second, even if one were to enumerate a comprehensive laundry list of all instances of *right-less enforcers* in private law (which this book does not do), it is unlikely that they share a single uniform justification. Instead, it is more likely that several families or clusters of exceptions might be found, each with its own distinct justifications or set of justifications. The chapter thus concludes with an attempt to articulate some broader conditions under which clusters of exceptions might be justified, in the hopes that doctrinal development might be guided in a more systematic fashion than before.

These are conditions at a more general level which, if obtained, remove or defeat the objections to right-less enforcers, some of which were discussed in Chapter 11. They are: (i) right-holder consent, (ii) right-holder incompetence, and (ii) duty-bound standing. It is argued that for a right to be justifiably enforced by someone else, generally right-holder consent to enforcement should, where possible, be sought. Otherwise, outsider enforcement could be objected to as unjustifiably paternalistic. However, some situations exist in which the right-holder's consent is either impossible to seek, or even if possible, could be justifiably dispensed with. Examples of such situations are discussed under the broad header of right-holder incompetence, which includes physical incapacity and legal incompetence eg infants and minors or the mentally incapacitated. The last category, 'duty-bound standing' refers to a special set of situations where the right-holder does not hold his right beneficially for himself, but for the benefit of others. This could include trustees, and the personal representative of an estate. That this category has been generally overlooked by scholars within private law theory reveals a skewed focus in the field thus far; while it is true that within private law, as right-holders, we are not normally duty-bound to exercise our powers of suit to enforce our rights or not, that is only the 'normal' or 'general' position. That position obtains only in cases where the *right-holder holds his rights for his own benefit* – this is the general implicit assumption made by private lawyers and writers on the topic, many of whom take tort law as their paradigm case or starting point of focus.