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Three Concepts of Rights, Two of Property

CHARLIE WEBB*

Abstract—Sometimes rights are taken to describe concrete, bottom-line entitlements, sometimes a kind of ground of such entitlements. This difference reflects, so I suggest, not so much disagreement or uncertainty as to the nature of rights as different applications and senses of the term ‘right’, each expressing a different idea or concept. Much work on rights is compromised by a failure to distinguish these concepts of a right, nowhere more so than in private law, where it accounts for difficulties lawyers have faced when seeking to distinguish personal (*in personam*) and proprietary (*in rem*) rights.

1. *Introduction*

[A] duty is the invariable correlative of that legal relation which is most properly called a right or claim.¹

A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that person to have the duty.²

In this article I examine and query a particular understanding of rights, common within private law. This sees rights as divisible into two basic categories: personal and proprietary. This division, at least as typically drawn, illustrates, so I shall argue, a broader confusion of distinct ideas or concepts of rights, concepts which find their respective expression in the two statements which open this article. Since each of these concepts of a right, as set out in these statements, is framed by reference to its relationship to the concept of a duty, this is where I shall start.

* London School of Economics and Political Science, c.e.webb@lse.ac.uk. My thanks in particular to Chris Essert.

¹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook (ed), Yale UP 1919) 39.

² Joseph Raz, *The Morality of Freedom* (OUP 1986) 171.

2. Duties

The primary subject of any duty is some person or group facing a choice about what to do. The significance of the duty is to make a certain choice non-optional: if I am under a duty to ϕ , I have no option not to ϕ .³ So understood, duties are conclusive. While there may be various ways I can go about complying with this duty, on the question of whether to ϕ in one or other of these ways the matter is settled: I must.⁴ Some ways of thinking and talking about duties seem to show that duties needn't be conclusive in this way. I might ask whether I must do my duty or how I should respond where my duties conflict, each suggesting that there may be duties I may reasonably not perform. One way to make sense of such formulations is as suggesting that the stated duty is only purported or prima facie, so that the question I am asking is whether what is apparently or ordinarily my duty *really is* my duty.⁵ Alternatively we might say that these are true duties, on the basis and in the sense that this is indeed what I must do from a particular point of view or by reference to a particular norm or set of values, but that the question of what I must do—and hence whether I may be at liberty to breach these duties—is settled only once the full range of relevant considerations, norms and values are factored in. On this latter view, that I owe a particular duty still stands as a practical conclusion, but it one which is only provisional or presumptive.

Perhaps there is a sense of 'duty' which is not even presumptively conclusive in this way.⁶ Certainly, in law, 'duty' is sometimes used differently. On occasion, when it's said that

³ Hence duty and privilege (or liberty) are, as Hohfeld put it, jural opposites: Hohfeld (n 1) 36, 38-9. By the same measure, if I have a privilege to ϕ , it means I owe no duty not to ϕ .

⁴ For a fuller account of duties (= obligations) in keeping with the one I am sketching here, see Christopher Essert, 'Legal Obligation and Reasons' (2013) 19 *Legal Theory* 63.

⁵ In any case, the possibility of conflicting duties may not pose a challenge to the view of duties taken here. At least within man-made normative systems, like any system of positive law, it is possible for its norms to give conflicting directions. Where they do, those to whom those conflicting norms are addressed face the question of what they should then do and those charged with setting and applying those norms may likewise be required to determine which of these norms should, in these circumstances, take priority. But none of this requires us to reject the idea that each duty is put forward as conclusive of what its addressees must do.

⁶ One influential view of duties sees them as identifying reasons which need not be conclusive but only exclusionary: see eg Joseph Raz, *Practical Reason and Norms* (OUP 1999). So, on this view, what makes it the case that I have a duty to ϕ is that, on top of my reasons to ϕ , I have reason to disregard some (though not necessarily all) reasons *not* to ϕ . But *this* idea is not one which is captured by saying

a defendant owes a duty to ϕ , it means only that he is liable to be ordered to ϕ . For instance, when it's said that a duty to give up unjust enrichments arises immediately upon receipt of the enrichment, all this appears to mean is that it's at this point that a court would, if called upon, order the enrichment to be given up.⁷ At other times, a defendant is said to owe a duty to ϕ simply on the basis that he would come under some other duty or liability if he failed to ϕ . This is the way some understand duties of care.⁸ But, for the most part, the duties identified in law are put forward not as mere conditions of liability but as practical demands. And so, where the law provides that I am under a duty to ϕ , it gives me a direction it presents as conclusive: I must ϕ .

The full statement of any duty will set out the person who is the subject of that duty, the conduct required or proscribed and the conditions of its application.⁹ If A owes a duty to ϕ , once the content of ϕ is specified, A knows what it is he has to do and, when the conditions of its application are laid out, he knows when he has to do it. So I owe a duty to submit my tax return on time. To comply with that duty I need to know what counts as a properly completed tax return and where and when I must send it. Now I may well want to know more before I decide to comply. Who says I have to do this? Why? What happens if I don't? But the duty—its content, the practical direction it gives—is completely stated without this information. Similarly statements of duties are complete without reference to some person or group to whom the duty is owed.¹⁰ Is my duty to submit my tax return owed to H M Revenue and Customs, to

'I must [or am required/bound to] ϕ '. Accordingly, this view fails, I think, to account for the way we routinely think and speak about duties and misdescribes the idea (or concept) of duty employed in such formulations. At the very least, if there is a sense or idea of duty which is not conclusive in this way, this is not, so it seems to me, the sense or idea of duty employed in law generally and in private law in particular; cf John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 309-14.

⁷ And hence recipients unaware that they have been unjustly enriched aren't expected, nonetheless, to take steps to make restitution. When it is suggested that the duty to make restitution of unjust enrichment does or ought instead arise only when the recipient becomes aware of the relevant facts which render the enrichment unjust (see eg Stephen A Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 *Texas LR* 2177), what appears to be uncertainty or disagreement as to what duties the recipient really owes is in fact no more than the playing out of these differing uses of the word 'duty'.

⁸ See eg Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013) 65: 'To say that a person owes a duty of care in a particular situation means (and means only) that the person will be liable for causing damage by negligence in that situation.'

⁹ Raz (n 2) 50.

¹⁰ This leaves open the question of whether all duties are owed to someone (though the argument which follows brings out what it would mean for certain duties *not* to be owed to someone). It does however suggest that, even for duties which *are* owed by A to B, the duty is not simply or indeed primarily (one

the public at large, to nobody at all? If my concern is only to know how this duty is meant to factor in to my practical reasoning, this question just doesn't arise. Duties are directive and the direction they give is complete when I know what it is that I must do. Again, I may want to know more before I choose to comply. Perhaps knowing to whom the duty is owed would be useful information in this regard. But it is not information I need either to make sense of or to comply with that duty.

What is the additional information conveyed when we say that A's duty is owed to B? One answer: if A's duty to ϕ is owed to B, it means that B has a right that A ϕ . Indeed on one understanding, to say that A owes B a duty to ϕ just is to say that B has a right that A ϕ . This understanding of rights and of their relationship to duties is Hohfeld's. Of the various distinct concepts identified by Hohfeld which get described as 'rights', one—claims or rights 'in the strictest sense'—is defined as the correlative of the concept of duty: 'if [B] has a right against [A] that he shall stay off the former's land, the correlative (and equivalent) is that [A] is under a duty toward [B] to stay off the place'.¹¹ But, while Hohfeld's account does its job of distinguishing this concept from some other concepts sometimes labelled 'rights', by defining this concept of right precisely by its correlativity and equivalence to the idea of a duty owed to B, it gets us no nearer to understanding what owing a duty to B means. Instead it gives us another way of framing the same question: to ask what it is for A's duty to ϕ to be owed *to B* is to ask what it is for *B to have a right* that A ϕ .

This question Hohfeld didn't address. Among those who have addressed it, two principal answers, or sorts of answer, have been given. One is that B has a right that A ϕ (A's duty to ϕ is owed to B) where a sufficient connection exists between that duty and some interest of B's. The other is that B has a right that A ϕ (A's duty to ϕ is owed to B) where B is empowered to waive and/or enforce that duty. The former gives what tends to be called an interest theory and the latter a will theory of rights, with interest theories differing one from

end of) a relation between the duty holder and some other person or entity. Hohfeld's account is sometimes read as supporting the view that duties are, by their nature and so in all cases, one end of a normative relation, with the consequence that, if one rejects the idea that duties are always owed to someone else, one is rejecting Hohfeld's notion of a duty and the broader framework into which it slots. I don't think Hohfeld demands this reading and, in any case, I don't see why those who think some duties are not owed to someone else can't endorse Hohfeld's account of those that are. See too N E Simmonds, 'Rights at the Cutting Edge' in Matthew H Kramer, N E Simmonds and Hilel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) 222.

¹¹ Hohfeld (n 1) 36, 38.

another on the precise connection they require between A's duty and B's interests and will theories varying on the type or combination of powers needed to make B a right-holder.¹²

The different answers will and interest theories give to the question of what it means to have a right suggest different answers to the question of what rights we have. On interest theories, one has a right where one's interests are relevantly connected to or served by another's duty. As we all have such interests, we all have rights. On will theories, to have a right is to have some measure of control over another's duty, through powers of waiver or enforcement. It therefore appears that those who lack the capacity to exercise such powers have no rights. Nonetheless the disagreement between will and interest theorists is not as deep as it may appear. Where the will theory denies rights that the interest theory recognises, this isn't because it denies these duties. No will theorist reckons we're at liberty to batter children and the comatose. Nor need will theorists dispute that the duties we owe not to harm such persons serve and may be grounded in their interests. All, it seems, that will theories claim when they deny these persons rights is that they aren't empowered to waive or enforce these duties. But this conclusion is, in turn, one no interest theorist need reject. The same is true in reverse. Some duties can be waived and enforced by persons who have no interest in their performance, or who have no interest sufficient to justify their imposition. On will theories, these persons have rights that these duties be performed; on interest theories they do (or may) not. But this needn't reflect any disagreement about the allocation of these powers or about the content or basis of these duties.

So, though the two theories differ on what rights people have, they entail no differences on the questions of what duties we owe, what justifies those duties or who can waive or enforce them. Nor does there appear to be some further normative question which an inquiry into rights answers and so on which these theories *do* differ. On interest theories, to say B has a right just is to make a claim about the content or justification of some duty of A's; on will theories, it is to make a claim about B's powers of waiver or enforcement in respect of some such duty. Where will and interest theories differ is on which of these questions B's having a right goes to, not on the answers these questions receive.¹³

¹² Not all accounts which offer what can be described as will or interest theories of rights are put forward as answers to the question of what it means for A's duty to ϕ to be owed to B, and in the following section I examine a different sort of interest theory. For now, I'm addressing only those that are.

¹³ An alternative take is that will and interest theories offer not different understandings of what a right is but merely different tests for how we identify who holds rights. This may be what Kramer means when he describes his as a theory of 'right-holding' rather than a theory of rights: Matthew H Kramer, 'In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017) 49. But I don't think this is

What this means is that, where these theories offer different accounts of what rights we have, it is because each understands this question differently. For interest theorists, to ask if B has a right that A ϕ is to ask if there is some sufficient connection between B's interests and A's duty to ϕ , whereas for will theorists it is to ask if B has certain powers of waiver and enforcement in respect of that duty. But these are simply different questions. When they are both framed in terms of whether B has a right against A, the term 'right' is being used in different senses.

The real disagreement between will and interest theorists is which of these senses of 'right' is in fact true to the relevant features of rights discourse: which of these senses or ideas is the one we employ when we talk about B having some right or other against A?¹⁴ The challenge both theories face is that, by this measure, each seems to miss certain clear and established features of how we think and talk about rights. As such, it's no surprise to see attempts to expand these theories or to develop new theories to capture the instances of rights talk existing accounts miss. There is, however, an alternative conclusion we might draw, one that suggests that the real problem is not the inadequacy of these accounts' understanding of rights but rather their over-ambition.

The fact that each of these accounts misses certain conventional uses of the term 'right' marks a failing of these accounts only if they aim to capture all relevant uses, or at least (something like) all paradigmatic or uncontroversial examples of their use.¹⁵ But what if

true of the accounts others have offered. So the standard will theory is that rights *are*—and are not simply accompanied by—a distinctive sort of power (see eg H L A Hart, 'Bentham on Legal Rights' in A W B Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (Clarendon Press 1973) 196-7: 'The case of a right correlative to an obligation then emerges as a special case of a legal power in which the right-holder is at liberty to waive or extinguish or to enforce or leave unenforced another's obligation').

¹⁴ So if children's rights serve as a test case for theories of rights (cf Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Right' in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1984)), it's not because they bring out *normative* failings or misunderstandings of theories which deny children rights but rather because they reveal an important truth about our linguistic practices: we do indeed talk and think of children having rights, and hence an understanding of rights which leaves no room for children's rights fails to capture the idea of a right as it is used in everyday rights discourse. Making the same point: Simmonds (n 10) 213.

¹⁵ Is this their aim? Some think so (see eg Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 *Ethics* 202, 203). For others a sound theory of rights may involve some departure from conventional usage, so long as that departure is not too great or is warranted by its analytical usefulness (see eg Matthew H Kramer, 'Rights without Trimmings' in Matthew H Kramer, N E Simmonds and Hilel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) 72-3, where the will theory is said to 'flout

standard rights discourse does not in fact employ the term ‘right’ in any such single sense? The central insight of Hohfeld’s account was that the term ‘right’ is used ‘indiscriminately’ to cover a range of fundamentally distinct, ‘sui generis’ concepts.¹⁶ And while Hohfeld did not himself discriminate between different understandings of his notion of rights ‘in the strictest sense’—the sort of right I’m addressing now—his account should at least caution against any presupposition that, even within this subset of rights talk, there is just the one idea of a right in play. Indeed, the apparent intractability of the debate between will and interest theorists might be thought to lend some support to the view that there is no one common concept or sense of ‘right’ here, for, if there isn’t, little wonder all attempts to identify that concept have failed.

So here is an alternative lesson we might take from the debate between will and interest theories: there is no single sense of ‘right’ employed in statements of the kind ‘B has a right that A ϕ ’, no single sense or way in which A’s duties may be owed to B.¹⁷ Where will and interest theories go wrong is in thinking that the idea of a right each identifies not only does but should account for all the ways in which these sorts of formulations are correctly used. Once we reject the assumption that this part of rights discourse employs the term ‘right’ in some single sense, to capture some single idea, we can, on this reckoning, see the truth in both will and interest theories. Sometimes, when we say B has a right that A ϕ , what we mean is that A’s duty to ϕ serves or is grounded in some interest of B’s, while, at other times, when we say B has a right that A ϕ , we mean instead that A’s duty to ϕ can be waived and/or enforced by B, each convention identifying and employing a distinct concept of a right.

3. *Rights as Conclusions and Rights as Reasons*

The rights we’ve considered so far have all been rights that some other person conduct himself in some specified way; the content of the right matching the content of its correlative duty. Many familiar rights, however, don’t fit this model. Take, for instance, the rights to life, to

too many linguistic intuitions’ and is criticised for the ‘bizarreness’ of its classifications). Cf Finnis (n 6) 203: ‘If one wishes to apply the Hohfeldian analysis, therefore, one must first *stipulate* which of these two meanings of “claim-right” one is going to adopt, and must bear in mind that, whatever meaning one adopts, one’s subsequent ascriptions of claim-rights will not always correspond with legal usage.’ See too Simmonds (n 10) 211-2.

¹⁶ Hohfeld (n 1) 36.

¹⁷ For a different argument to a similar conclusion see Tim Hayward, ‘On Prepositional Duties’ (2013) 123 *Ethics* 264, cf Siegfried Van Duffel, ‘The Nature of Rights Debate Rests on a Mistake’ (2012) 93 *Pacific Phil Q* 104, William A Edmundson, *An Introduction to Rights* (2nd edn, CUP 2012) 105.

freedom of expression, to bodily security, to privacy. None of these identifies any particular duty-bearer or any particular performance the right-holder is due; nor do they resemble any other Hohfeldian relation. There are ways one might nonetheless seek to reconcile these rights with Hohfeld's account. One is to view these rights as inchoate or incomplete, requiring further specification to fix their content. When that context is fixed, it will be through a catalogue of claim-rights and other Hohfeldian relations. Alternatively, we might see these rights just as such collections of individual Hohfeldian elements, so that my right to bodily security is the aggregate of my various rights that others not kick, punch, throttle me, and the like. There's no reason to doubt the possibility and the convenience of bundling together individual elements from Hohfeld's scheme.

But if this accounts for their form, it misses their function. For me to have a right that you ϕ just for you to owe me a duty to ϕ . The right I have against you and the duty you owe me are just two aspects, or possibly just alternative descriptions, of a single legal relation. Accordingly, there is no sense in which my right justifies or grounds the duty you owe me. Rather such rights, like their correlative duties, operate as practical conclusions, identifying the concrete demands we can make of one another.¹⁸ By contrast, rights taking the form 'right to [life, freedom of expression, privacy, bodily security etc]', as they are commonly used and understood, work differently. Rights such as these are often offered in support of, or by way of explanation for, particular claims we make or duties we owe. So I might appeal to my right to privacy to support my claim that you not publish my tax return; you might identify your right to bodily security to explain why I mustn't give you life-saving but unwanted medical treatment. Here these rights operate as reasons, considerations weighing for or against the recognition of concrete claims and duties and other Hohfeldian relations. When rights are offered as reasons, they aren't reducible to the various claims and duties they are taken to ground. The reason I have a claim-right that you not punch me isn't that I also have a claim-right that you not kick me; your duty not to punch me doesn't find its justification in the duties others owe not to punch me too. If my right to bodily security grounds these claims duties, it grounds them individually and collectively.

¹⁸ I want to remain neutral here between the will and interest theories discrete concepts of [claim-]rights, nonetheless we might note in passing that the language of 'demands' fits a lot better with the will theory; the comatose don't issue demands. Though rarely acknowledged, the prevalence of talk of right-holders 'demanding' or 'asserting' tells of how commonplace the will theory's understanding of rights is; while the difficulty of finding an equivalent formulation which would be consistent with interest theories is further indication that it misses certain everyday aspects of how we think and talk about rights.

The idea of rights as reason may be fleshed out in different ways, with different accounts of rights identifying different sorts of reasons. For Raz, for example:¹⁹

To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, ie that an aspect of his well-being is a ground for a duty on another person.

On this view, I have a right when some aspect of my well-being—in other words, some interest of mine—is capable of justifying another’s duty. This may sound much the same as some of the interest theories discussed already, but the difference comes in the right’s place in the grounding of the duty: for here the right is identified as the ground of the duty rather than with the duty (and correlative claim) it grounds, and hence as a premise rather than as a conclusion.²⁰

As with the apparent disagreement between the will and interest theories examined previously, what distinguishes accounts which see rights as conclusions and those which see them as reasons isn’t their different understandings of the duties we owe or of the reasons we owe them. The sort of account of rights Raz sets out doesn’t deny that others owe us a range of duties not to interfere with our bodies in various ways, duties which strictly correlate to claims that others not treat us in such ways. The sort of account Hohfeld gives doesn’t require us to deny that these claims and duties are, or may be, grounded in our interest in being free of such interference. Where these accounts differ is in what element of this chain of reasoning the right identifies: the reason or the conclusion. So these aren’t competing conceptions of some single concept of a right, vying for the same conceptual space. Rather they are simply different

¹⁹ Raz (n 2) 180. See too *ibid* 183: ‘Rights are the grounds of duties in the sense that one way of justifying holding a person to be subject to a duty is that this serves the interest on which another’s right is based.’ I use Raz’s account of rights through the rest of this article as just one application of the broader idea of the concept of a right as a reason for bottom-line claim-rights and duties. Those not taken by Raz’s interest theory of rights should still endorse the basic distinction between the two concepts of right which I am using that theory (in part) to illustrate.

²⁰ See too Hugh Breakey, ‘Who’s Afraid of Property Rights? Rights as Core Concepts, Coherent, Prima Facie, Situated and Specified’ (2014) 33 *Law & Phil* 573, 578-9. It’s true that Raz ((n 2 181) also describes rights as ‘intermediate conclusions in arguments from ultimate values to duties’, and, more generally, the identification of what rights we have and what interests support them will often, perhaps invariably, require appeal to other goods and values. The distinction I’m drawing is between an idea of rights which sees rights as playing some role in the grounding of duties and one which identifies them with, or sees them as equivalent to, those duties.

ideas, different concepts, each occupying a distinct place and playing a distinct role in accounts of duties and practical reason.²¹

The relationship between, on the one hand, the concept of a right as a reason (here onwards: R-rights) and, on the other, the Hohfeldian concept(s) of a right (or: C-rights) set out previously is analogous to the relationship between the concepts of a principle and a rule as framed by Dworkin, at least on one reading of his account.²² A principle is a reason in favour of some practical conclusion. Principles needn't be decisive in the cases to which they apply, since there may be other considerations which also apply to some or all of these cases and which point some other way. All the application of a principle requires is that the principle be accorded its proper place and weight in making the relevant determination. Rules by contrast are conclusive: if a rule applies, it settles what decision is to be reached. One way this might be put is that rules cannot be outweighed or defeated (or not without threatening their status as rules). But, at least on the understanding of rules I have in mind here, this is because rules don't fall to be weighed or otherwise factored in alongside other considerations in determining the answer to some practical question. The rule is not itself a consideration but rather the conclusion of an assessment of such considerations.²³

So say there is a principle that wrongdoers shouldn't profit from their wrongdoing. This principle means that there is a reason, wherever wrongdoers stand to profit from their wrongs, to take action to prevent this. This principle therefore weighs in favour of the conclusion that contract breakers, as one class of wrongdoer, should be stripped of any gains they make from breaching their contracts, a conclusion that can then be expressed as a rule with this content. But acceptance of the principle doesn't mean that there should be such a rule. Before we can determine whether we should have this rule, we must also factor in other principles, other considerations which also bear on such cases and which may point away from requiring contract breakers to give up their gains. If those countervailing considerations defeat or outweigh that principle, they may justify some other rule, one which permits some or all contract breakers to retain the profits they've secured through their breaches.

In the same way, if I have an R-right to my bodily security, this provides a reason to take others to owe duties to refrain from acts which may cause me physical harm or otherwise interfere with my person, duties which correspond to C-rights that those others refrain from

²¹ Cf Peter Jaffey, *Private Law and Property Claims* (Hart Publishing 2007) 40-42.

²² Ronald Dworkin, *Taking Rights Seriously* (Belknap Press 1977) 22-28, 71-80.

²³ This is not to deny that one may reason from rules: eg since I have [or since there is] a rule that I keep my promises, I must keep this promise I made to Erika. The point instead is that, so conceived, rules are not considerations which go to determining what one ought to do but rather determinations of what it is that one ought, all things considered, to do.

such actions. This R-right falls to be weighed against other considerations, other interests, including others' R-rights in their own bodily security, and these other considerations will, on occasion, make it reasonable for others to act in ways which threaten such harm to me and so to deny me certain C-rights that they refrain from so acting. So others may be at liberty (= owe me no duty not) to do violence to me if my actions unreasonably threaten them and if this is a reasonable means to avert this threat. But if I am thereby denied a C-right that you refrain from such violence, this doesn't entail that my R-right is denied, only that it is, in this instance, outweighed. Here too we might say that the scope of our R-rights is set not by the C-rights and duties by which they are realized and protected but by the scope of the reasons they provide. In this way, we can agree that I have an R-right to my bodily security—agreeing, that is, that I have an interest in my bodily security which is capable of grounding duties on others—while disagreeing on how it should be protected and how conflicts with other such rights and considerations should be resolved, with this disagreement then played out in different views on what C-rights I should have, what duties others should owe me.

4. *Rights Models of Tort*

Failing to recognize the distinctiveness of these concepts of rights—in particular the distinction between what I have termed R-rights and C-rights—has caused a number of problems within private law. As I shall go on to suggest, I think this explains some of the difficulties lawyers have faced when attempting to distinguish personal and proprietary rights. Before then, I want to give another brief illustration of this confusion of concepts.

In *Torts and Rights*, Robert Stevens defends what he calls the 'rights model' of the law of torts. In the opening pages, he sets out what he takes to be distinctive about this model:²⁴

Two incompatible conceptions of the law of torts are discernible within the common law. The first, and probably dominant, conception is that the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not. ... This conception of the law of torts I shall call the 'loss model'. There is another conception of the law of torts. ... A tort is a species of wrong. A wrong is a breach of a duty owed to someone else. A breach of duty owed to someone else is an infringement of a right they have against a tortfeasor. Before a defendant can be characterized as a

²⁴ Robert Stevens, *Torts and Rights* (OUP 2007) 1-2. For a response to Stevens which has some similarities to, though also some important differences from, the arguments I make here, see Nicholas J McBride, 'Rights and the Basis of Tort Law' in Donal Nolan and Andrew Robertson, *Rights and Private Law* (Hart Publishing 2012) 335-6, 343-5, 350-1.

tortfeasor the anterior question of whether the claimant had a right against him must be answered. ... The infringement of rights, not the infliction of loss, is the gist of the law of torts. This conception of the law of torts I shall call the 'rights model'.

Here Stevens follows Hohfeld.²⁵ For A to owe B a duty to ϕ is for B to have a right that A ϕ and so any breach of such a duty is, at the same time, the infringement of such a right.²⁶ If torts are wrongs, and wrongs are breaches of duty owed to another, B's failure to ϕ can't be a tort unless A has a right that A ϕ . All true. But, as we've seen, Hohfeld's account sets no limits on what duties we might owe to each other, and hence no limits on what (C-)rights we have. Accordingly, this sort of rights model is compatible with any and every conceivable set of primary right-duty relationships. All it requires is that tort claims do depend on there being a breach of some such duty.

Yet Stevens takes the rights model to be incompatible with the loss model. Why? We can imagine duties not to cause loss, with whatever additional qualifiers we wish to add, and so of C-rights not to be caused (certain) losses. There is nothing unintelligible or conceptually impossible about, say, a duty to take care not to cause another loss save where certain justifying or excusing conditions obtain.²⁷ Indeed this is exactly how lawyers have, for the most part, understood the tort of negligence. As Stevens notes, those who take the view that negligence is about compensation or loss-allocation are often also inclined to see the law's references to duty here as illusory: that these 'duties' are no more than statements of the conditions in which losses will be recoverable. This further step *is* incompatible with the rights model, since to

²⁵ As confirmed a couple of pages later (*ibid* 4): 'Hohfeld distinguished four usages of "right": a claim right, a liberty ..., a power and an immunity. These four usages of "right" are exhaustive.'

²⁶ Infringement here, as in the passage from Stevens, equates to violation: cf Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990) 122. When rights are identified as bottom-line, all-things-considered conclusions, there is no scope for non-wrongful rights infringements and hence no distinction to be drawn between infringing and violating rights.

²⁷ Cf Stevens (n 24) 2, 338. In a later essay, Stevens contends that duties not to cause loss are indeed conceptually impossible: Robert Stevens, 'Rights and Other Things' in Donal Nolan and Andrew Robertson, *Rights and Private Law* (Hart Publishing 2012) 119. The argument: wrongs are committed at 'moments in time', so if loss is suffered it must be a consequence of the wrong. He doesn't say why he thinks this follows (see too McBride (n 25) 363-4). Does he mean that wrongs are committed at the moment in time the wrongdoer acts (and hence before any loss which results from those acts)? If so, this would likewise preclude all duties (not) to cause particular outcomes; duties could only be to try or to intend. And so, even then, it would leave room for duties to try (/take reasonable care) not to cause loss and duties not to act with the purpose of causing loss, and with this a distinction between loss-based and other duties.

deny that duties of care are genuine duties is to deny that negligence claims are founded on a breach of duty and corresponding right violation. But nothing in the loss model requires this extra step. And if we don't take it, the loss model is a rights model.

The claim of incompatibility would make better sense if the rights model understood 'rights' as R-rights. The model would then present one understanding of what sorts of duties tort law deals in—say, only those which are grounded in some aspect of the claimant's wellbeing—an understanding which can then be contrasted with one which, like the loss model, places no such limits on the duties to whose breach tort responds. But then we don't get to this sort of rights model just by showing that a tort is a breach of a duty owed to another. All duties owed to others correspond to C-rights held by those others. This is a conceptual truth, true by definition. But the same can't be said of the idea that all such duties are or need be grounded in individual interests and hence reflect R-rights.²⁸

Indeed the rights model Stevens goes on to offer seems to presuppose something like Raz's understanding of rights. As one illustration, take Stevens' discussion of *Smith v Bush*.²⁹ The claimants suffered loss as a result of paying over the odds for a house in reliance on a careless survey which the defendant surveyors provided for the claimants' would-be mortgagee. The claim succeeded. Stevens reckons that 'it is extremely difficult to construct any right that the claimants could assert was infringed'.³⁰ If, as Stevens claims, we are simply following Hohfeld, there's no difficulty at all. There are any number of constructions of the form 'B has a right that A ϕ ' which the defendants' conduct infringed: 'Bush has a right that Smith take care when producing the survey', 'Bush has a right that Smith take care to ensure that Bush doesn't end up paying too much for the house', 'Bush has a right that Smith check to see if the chimney of the house is likely to collapse', and so on. All of these are fully intelligible and coherent as statements of possible C-rights.

Of course, the question for the court wasn't whether such formulations are possible but whether it should endorse any of them, whether it should recognise any of these rights and their corresponding duties. But this is a question Hohfeld's scheme cannot answer. If, by contrast, we take an R-rights model, we see a possible basis for criticising *Smith*: what aspect of the claimants' wellbeing, what interest of theirs, was sufficient to ground any of these possible duties? Do we have any interest of such importance as to justify requiring others who have made no undertakings, and who have no independent responsibility to us, nonetheless to take care to advance or secure our economic circumstances? Only by understanding rights in this

²⁸ Again, for those unpersuaded by Raz's interest theory, replace 'interests' with 'freedom' or whatever other idea might alternatively make rights reasons.

²⁹ *Smith v Eric S Bush* [1990] 1 AC 831 (HL).

³⁰ Stevens (n 24) 43.

way, can we make sense of his claim that *Smith* exemplifies the loss model but is ‘anomalous’ under a rights model. There are two rights models of the law of torts: one—the model of C-rights—a model of its form, the other—the model of R-rights—a model of its content and basis. *Torts and Rights* elides these two models; the rights model it presents not the rights model it identifies and defends.

5. Rights Good against the World

Lawyers draw a distinction between property rights and personal rights or (as is usually regarded as equivalent) rights in *rem* and rights *in personam*. It is usual too to see this division as exhaustive of legal rights. On this view, the single class of legal rights is fully divisible into two mutually exclusive sub-classes of legal right. An alternative view is that there are some legal rights that are neither personal nor proprietary. Here personal and proprietary rights are mutually exclusive but not exhaustive sub-classes of a single class of legal rights. It is this alignment and opposition of personal and proprietary rights which both views endorse that I shall address here.

An influential and illustrative example of this orthodox view is provided by Birks. Birks thought that the distinction between these two classes of right rested on their ‘exigibility’. The classification of a given right as personal or proprietary is determined by asking against whom can it be asserted.³¹ On this basis, personal rights, or, (for Birks) synonymously, rights *in personam*, are those exigible only against a particular person:³²

[A] right *in personam* is a right against a person in the sense that it is a right that that person make some performance. The claimant holds the string and the other end is around the other’s neck ... [T]he right is not called ‘personal’ because it belongs to a person but because it is exigible against, and only against, the person who must make the performance.

We might then expect proprietary rights to be defined as those rights whose exigibility isn’t so limited and which are instead exigible against a wider and/or open-ended class of people. But this isn’t quite what Birks said. Instead, he defined proprietary rights (rights *in rem*) as follows: ‘a right *in rem* is one whose exigibility is defined by reference to the existence and location of

³¹ See Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 49, Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 28.

³² Birks, *Unjust Enrichment*, *ibid* 164.

a thing, the *res* to which it relates.³³ And again: '[r]ights *in rem* are in principle demandable wherever the *res* (the thing) is found and hence against anyone who has it or is interfering with it.'³⁴

Defining the two classes of right in these terms leaves space for a third possible class of rights: those which aren't exigible only against a given individual—and so cannot be classed as personal rights—but whose exigibility is not determined by reference to the location of a particular thing. After some initial reluctance to give up on the orthodox view that these two categories were exhaustive, Birks came to accept the possibility of a third class of right, identifying rights to bodily integrity and to reputation as examples.³⁵ Nonetheless, he concluded that this orthodoxy could be maintained if we take legal rights to be limited to rights which are 'realizable in court'. On this basis, he excluded all rights which fall into this third class since these were 'superstructural' and 'never directly realized in court'.³⁶ This move created its own problems. If we say that my right to bodily integrity is not itself realizable in court on the basis that any claim I bring inevitably takes the form of a (personal) right demanding that some specified person refrain from manhandling me, the same must also be true of any property right. For even where property rights are capable of direct vindication, 'realizations' of that right will likewise come through claims brought against a single defendant requiring that he give up the asset or its value.³⁷ Conversely, if we're to say that proprietary rights are realizable in court notwithstanding that their protection is dependent on the assertion of some ancillary personal right, we can say just the same of these supposedly superstructural rights. Either we exclude superstructural rights, in which case we lose property rights too, or we accept that there are not two classes of right but three.

However we iron this out, we see here signs that the proper relationship between personal rights and proprietary rights is not one of alignment and opposition. The assumption underlying the classification of rights as either personal or proprietary is that there is a single class of rights which is capable of simple sub-division. But the very term 'superstructural

³³ Birks, *Introduction* (n 31) 49.

³⁴ Birks, *Unjust Enrichment* (n 31) 28. See too *ibid* 165: 'A right *in rem* is a proprietary right or simply a property right. The string in the claimant's hand is attached, at the other end, to a *res*, a thing.'

³⁵ *Ibid* 30. Previously, Birks, aware that such rights did not meet his definition of proprietary rights, insisted that such rights were personal, notwithstanding that they could be asserted against an indefinite number of people: see Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 10.

³⁶ Birks, *Unjust Enrichment* (n 31) 30.

³⁷ See Peter Birks, 'Misnomer' in W R Cornish, Richard Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present and Future—Essays in Honour of Gareth Jones* (Hart Publishing 1998) 22-4.

rights' and Birks' claim that these rights are only ever asserted and given effect through ancillary or derivative personal rights, suggests that not all rights are of the same order or operate at the same level. Moreover, the fact that property rights appear to share the same structural features as these 'superstructural' rights suggests that the problem lies not just with this third class of rights but, more fundamentally, with our understanding of the relationship between the classes of personal and proprietary rights.

The cause of these tensions in Birks' account is its failure to distinguish two common but distinct understandings of what it means to say that a right operates *in rem*. The first sees property or *in rem* rights as rights 'good against the world' or as against people generally.³⁸ This leads to a division between (1) rights that can be asserted only against a particular individual or perhaps some closed set of individuals and (2) rights that can be asserted against a wider and/or indeterminate class. It is this understanding which informs Birks' use of exigibility as the basis for the personal-proprietary divide and gives him his definition of personal rights. It can also be seen in his reference to personal rights being 'bipolar', the implication being that proprietary rights, being exigible against a wider class, are not.³⁹ However, as we've seen, Birks didn't define proprietary rights as rights good against people generally, but rather as rights exigible against those holding or interfering with the relevant thing. Here we see the influence of a second understanding of proprietary, or *in rem*, rights: as rights to or in things. This is also evident in a metaphor Birks employed, whereby right holders were to be understood as holding a string tied to the object of that right. With personal rights this string is tied to another individual, the person under the correlative duty to render the specified performance. By contrast, when a right is proprietary the string is attached, not to a person or group of people, but to a thing.⁴⁰

Classifications of rights by the range of people against whom they can be asserted take as their template a Hohfeldian C-right: B has a right that A ϕ . If A is the sole person or a member of some determinate group that B can demand ϕ , then B's right is personal. If A is simply one of some indeterminate class that B can demand ϕ , then his right is, on this understanding of the division, *in rem*. As Hohfeld saw, rights *in rem* are then simply combinations of rights *in personam*: that B has a right that people generally ϕ means that B has a right that A¹ ϕ , that A² ϕ , that A³ ϕ ... and the fact that these can all be grouped together

³⁸ See eg John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (4th edn, John Murray 1873) 381-2, Austin Wakeman Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17 *Columbia LR* 269, 273-4, Lionel D Smith, *The Law of Tracing* (Clarendon Press 1997) 50.

³⁹ Peter Birks, 'Introduction' in Peter Birks (ed), *English Private Law: Volume 1* (OUP 2000) xxxix.

⁴⁰ Birks, *Unjust Enrichment* (n 31) 165.

doesn't mean we cannot also take them in isolation.⁴¹ This alone suggests that the categories of rights *in rem* and rights *in personam* are not simple sub-divisions of the class of rights. Nor is this the only way rights *in rem* may break up.

To know into which class a given right falls, we need to know who owes that duty and, to know this, we need to determine the proper content of ϕ . However, rights can be stated in different terms and at different levels of generality. My right not to be assaulted means that, if I am standing in front of you, I have a right that you not punch me, poke me or stamp on my toes; if I'm crossing the road you are driving down, I have a right that you not run me over; if you are carrying me on your shoulders, I have a right that you not drop me. My right not to be falsely imprisoned means I have a right that you not lock me in my office without justification; if you nonetheless do so, I have a right that you let me out. These context-specific rights and the directions they give to the duty-bearer speak to particular individuals at particular points in time, but not to others. My right that you not falsely imprison me is mirrored by rights I have against people generally and so operates, in this sense, *in rem*. Yet, where you are solely responsible for me being locked in my office, of all those who could secure my release, you alone are duty-bound to do so. Or consider the duty of care owed by road-users to those in their vicinity. Not only will the practical demands of that duty differ at different times—sometimes requiring you to stop, sometimes just slow down, on occasion speed up; sometimes to turn left, sometimes right ...—but, at any given point in time, my right that others drive carefully may mean different things for different drivers.

Of course, in all these instances, were others to find themselves in the position you now find yourself in, they would owe the same obligations. My right that you stop as I cross the road in front of you may not, right now, be mirrored by rights that others not currently driving in my direction stop their cars. But if they too were heading my way, they too would have to stop. All this tells us is that the rule which requires drivers, and others, to take care not to do others injury is indeed one which applies generally. It is the combination of the generality of such rules and the diversity of the circumstances to which they apply that means that we can formulate the rights these rules support in different terms; some reflecting the general application of the rule, others its specific implications. So the general norms proscribing false imprisonment and directing drivers to drive carefully, and hence the rights and duties they generate, can be framed in terms which capture the full range of these circumstances. Yet the

⁴¹ On Hohfeld's preferred terminology, a 'right *in rem*' (or 'multital right') denotes not some such combination of claims (and liberties, powers and immunities) but *any one* of these individual relations. As such, each of these discrete relations is itself a right *in rem*, the '*in rem*' label telling us that it exists alongside a series of matching relations with other individuals: Hohfeld (n 1) 72-4.

unique setting in which any two individuals find themselves will, at least on occasion, translate into right-duty relations of unique content.

While not all legal rules adopt the model of double generality these rules follow—‘indicat[ing] a general type of conduct and apply[ing] to a general class of persons’—most do.⁴² This includes many rules conventionally treated as conferring only rights *in personam*. If I agree to sing you a song in return for you cleaning my windows, I have a right that you clean the windows and you have a right that I sing the song. The right that you clean my windows is one I can assert against you alone. Yet the rules of contract law which give us these rights and impose these duties apply generally. The generality of these rules means we can express the rights and duties they support in general terms too. Just as my right that you stop when I cross the road in front of you is one context-specific instantiation of my general right that others take care not to do me physical injury, so my right that you clean my windows can be seen as a context-specific instantiation of my general right that others perform their contracts with me.⁴³ So formulated, this right operates *in rem*.

Some might object that this *in rem* framing of contractual rights misdescribes the legal relations that obtain before entry into a contract. Until we contract, I have no contractual rights against you and you owe no contractual duties to me. Rather there exists between us a set of power-liability relations, by virtue of which we acquire rights and come under obligations when we act in the ways prescribed by the rules of contract formation. Indeed it might be said that, absent any contract, the supposed general right and duty I have described are empty, illusory. So when we say you have a duty to perform your contracts what we really mean is that, *if* you enter into any contracts, you will come under a duty to perform them. But, unless and until that condition is met, you are under not some inchoate or conditional duty but no duty at all.⁴⁴

Is this right? Compare rights and duties of confidence. If you come into possession of information which is confidential to me, you come under a duty not to pass it on. Some of these duties arise from the exercise of a power, others do not. Even in the latter cases, there is a sense in which the duty arises *de novo* upon the acquisition of the relevant information; you can’t pass on information until you have it. But, in this respect, it’s not clear that the duty is so different from some of the duties mentioned earlier: you can’t drop me until you’ve picked me

⁴² H L A Hart, *The Concept of Law* (3rd edn, OUP 2012) 21.

⁴³ If this formulation sounds awkward, consider the promissory equivalent: I have a right that others keep their promises, and its correlative: you (and others) have a duty to keep your (their) promises. In any case, what matters is not the awkwardness of such expressions but the validity of the rights and duties they express.

⁴⁴ For a fuller account of conditional rights and duties, sceptical of the sort of argument I offer here, see Jeremy Waldron, *The Right to Private Property* (OUP 1988) 117-24.

up, you can't punch me unless I'm within reach, indeed you can't do me any physical injury unless our circumstances presently enable this. So if we can say that we owe one another a duty to do each other physical injury even where, as now, there is nothing we could do to inflict such injury, we can likewise say that we owe one another a duty not to breach each other's confidence, even where neither of us is yet in a position to breach that duty through our possession of such information.

If this is true of duties of confidence which don't arise from the exercise of a power, why shouldn't it be true of those that do? If we can make sense of a general duty to maintain the confidentiality of confidential information we happen to come across, we can make sense of a general duty to maintain the confidentiality of confidential information others entrust us with. In both cases, something changes when we come into possession of such information. The general duty we owe is given new, concrete content: it is now *this* information which we must keep secret. When that change is brought about by intentional human act, we can also say that it comes about through the exercise of a power. What is true of these duties of confidence seems to me to be true too of contract.

So I think there is a good argument that the sorts of general rules found throughout private law, and so encompassing not just the law of torts but also the law of contract and unjust enrichment, give rise to duties which can be framed, more or less usefully, as general duties to ϕ (not to assault, to keep contracts, to make restitution of mistaken payments etc). Whether those duties make any immediate demands on us will depend on our circumstances. Sometimes the relevant circumstances will include factors within our control. At least in some cases where they do, we can be said to have a power in relation to the concrete applications of these duties and their correlative rights.⁴⁵ To say these duties are to this extent alike is not to deny that they are in other respects very different, not least with respect to their rationale. So it is true and significant that the law sometimes puts the concrete content of these duties under our control and nothing here calls into question the difference—a difference, at root, of point or rationale—between 'duty-imposing' and 'power-conferring' rules. But this is a difference to which Hohfeldian analysis is essentially, and wilfully, blind; its main benefit, and its principal limitation, being its focus on the form and structure of rights to the exclusion of all questions of rationale and substance.⁴⁶

⁴⁵ This is true, whether we take 'power' in the broad sense used by Hohfeld ((n 1) 50-1) or the narrower sense used, for instance, by Hart ((n 42) 27-8).

⁴⁶ If there is to be a non-arbitrary division along these lines, it will be one which, in contrast to how this division is typically understood and presented, is not merely formal but rather tracks differences in rationale. An illustration: for this sort of division to work, we need to know when it's appropriate to treat a context-specific right as an instance of a broader general right. Why is it correct to see my rights that

It is true that while some rights are good against people generally, others are not. But, given that rights can be stated in different terms and at different levels of generality, attempts to classify rights on this basis look arbitrary or *ad hoc*, while obscuring the basic likeness of rights falling either side of the divide. My right not to be falsely imprisoned is a right I have against people generally. If you lock me in my office, I have a right that you let me out, while others are at liberty not to. We can, therefore, class the former right as *in rem* and the latter as *in personam*. But my right that you not falsely imprison me just is right now a right that you release me. We should doubt the utility and reliability of an analytic scheme which requires, or even invites, their separation.

you not punch me and not drop me from your shoulders as instances of my broader right not to be assaulted? It can't just be that we are able, as a matter of language, to come up with a formulation which covers your not dropping me and more. After all, we should be able to find language which isolates any given set of act-tokens. Rather what justifies treating these particular rights and duties as instances of a wider, general right and duty is, I think, their common rationale or ground: the reason you (and others) mustn't punch me is also the reason why you (and they) mustn't drop me. This means, however, that how, if at all, a particular *in personam* right may be generalized into a right operating *in rem* depends on how we justify that right, meaning, in turn, that any attempt to maintain some distinction between these two classes of right cannot remain neutral on questions of justification. Consider: if you do punch me, I have a right that you compensate me for my injuries. Since it is you alone from whom I can demand this compensation, so framed, this right-duty relation operates only *in personam*. Might we nonetheless see this as just one particular instance of a general right-duty relation? (Leave aside the argument I make in the text, suggesting that we can always generalize the rights and duties which come from general rules.) One one view, compensating me for the injuries you caused by punching me just is what the reasons grounding your duty not to punch me now require. If so, we should see my right to compensation as another application of the same general *in rem* right that supports my right that you not injure me in the first place. But an alternative view is that we don't need to go back to the diverse reasons which support our various primary duties to explain why, in all cases, their breach presumptively justifies a claim for compensation. So it might be said that there is a distinct good in seeing that victims of wrongs aren't disadvantaged by having their interests set back, such that duties of compensation in respect of wrongfully caused losses don't differ in their rationale from one wrong to another. On this basis, we might conclude these rights and duties only ever operate *in personam*, bearing, at any point in time, only on the determinate class of those who have committed and suffered unremedied wrongs. (Notice how far this takes us from Hohfeld, for whom the rational basis of particular rights was wholly irrelevant to understanding their 'character' and their place in his analytic scheme: see eg (n 1) 76-7, where A's right that B not enter A's land and A's right, arising from a contract with B, that B not enter B's land are described as '*intrinsically considered*, of the same general character', with the former right differing 'only extrinsically, that is, in having many fundamentally similar, though distinct, rights [ie rights against others that they likewise not enter that land] as its "companions".')

6. *Rights to Things*

The idea of a right *in rem* as one which can be asserted against people generally extends to an array of rights which have no particular connection to any *res* and so covers far more than is typically treated as property. This brings us to the second of the ideas we find run together in Birks' account: property as a right to a thing.

We saw earlier that one way to understand expressions of the form 'B has a right to X' is as shorthands for aggregates of rights of the form 'B has a right that A ϕ ', and perhaps other Hohfeldian incidents. This is how Hohfeld himself understood references to rights to a thing: all such rights are reducible to some set of discrete claim-rights, liberties, powers and immunities.⁴⁷ Critics have sometimes claimed that Hohfeld's account simply misdescribes the true legal position. Take Penner:⁴⁸

If Hohfeld's description of rights *in rem* is correct, then whenever Blackacre is transferred from one person to another, everyone else in the world exchanges one duty for another. Since rights correlate with duties, when A sells Blackacre to B, all persons who previously had a duty to A now have a duty to B, since B now has the bundle of Blackacre rights. The alternative, and I think better, view is that no one's but A's and B's rights and duties have changed. Everyone else maintains exactly the same duty, which is not to interfere with the use and control of Blackacre. It matters not the least to C, one of the multitude, who owns Blackacre. It matters not one whit to the content of his duty in respect of Blackacre that B now owns it instead of A. The duty not to interfere with the property of others is not owner-specific. We do not need to identify the owner in order to understand the content of the duty.

No doubt for most people most of the time it is irrelevant who owns a particular asset. They remain under a duty not to interfere with it irrespective of the identity of the present owner. Moreover, this duty is fully intelligible to those to whom it is addressed without reference to the owner's identity and so without knowing to whom the duty is owed.⁴⁹ I have argued that this is a general feature of duties. However, it is also true to say that this duty that each of us owes not to interfere with a given asset *is* owed to someone (in each of the senses examined in

⁴⁷ Hohfeld (n 1) 28-31, 74-91.

⁴⁸ J E Penner, *The Idea of Property in Law* (OUP 1997) 23.

⁴⁹ Though, again, there will be occasions when the duty-bearer will have reason to want to know who is entitled to the property, for instance if he is looking for a permission to use it.

section II) and that that someone is the owner of the asset at the present time. This duty that each of us owes to the owner corresponds to a right held by the owner that others refrain from such interference. Inevitably, therefore, where ownership of an asset is transferred from A to B, though we may say—correctly—that the duty each of us owes not to interfere with that asset remains unchanged, the duty that was previously owed to A is no longer owed to him but rather is owed to B. Equally, though A, prior to the transfer, had a C-right that others not interfere with the asset, it is clear that, following the transfer, he loses that right and it, or such a right, is held instead by B.

So Penner fails to find any true fault in Hohfeld's account. Other critics have taken a different tack, accepting Hohfeld's account as correct so far as it goes, but pointing out limitations of his analysis. Harris, for instance, argued that, though the law at any given time may be capable of reformulation in Hohfeldian terms, Hohfeld's approach fails to offer any assistance in determining the content of the law where it is unsettled or to accommodate any understanding of the law as a dynamic practice, whereby legal rights and relations change over time.⁵⁰ Similarly, some have pointed out that Hohfeld's analysis of rights *in rem* says nothing about why such rights come in bundles or the nature of the connection between them.⁵¹

In one sense, these criticisms are beside the point. Hohfeld's account doesn't seek to answer every question that we might have about our rights and duties and we can hardly fault it for not answering those questions it doesn't address. It is a theory of rights in the sense of what it means to have a right rather than a theory of what rights we have. If your interest is in what rights we have or why we have them, Hohfeld is clear: you need to look elsewhere. Nonetheless these limitations of Hohfeld's scheme matter, for present purposes, because the idea of property rights as rights to things is seen by these critics as answering some of the questions Hohfeld leaves open. And they are right to think this for, as we saw earlier, there is another way of understanding the formulation 'B has a right to X': not as an aggregate of Hohfeldian incidents but rather as their justification or rationale. On this view, the idea of a right to a thing explains rather than simply describes non-owners' duties of non-interference, owners' powers to transfer and license and so on. So, just as my right to bodily security—understanding 'right' as an R-right—justifies, *inter alia*, your duty not to kick me, so we can say that my property rights, similarly understood, justify the specific duties you (and others) owe not to trespass or to interfere with my assets.

That justification—the content and basis of the right to which it appeals—might be cashed out in different ways. On something like Raz's interest theory, we might, for instance, say the following. The duties of non-interference owners are owed and the use-privileges they

⁵⁰ J W Harris, *Property and Justice* (OUP 1996) 120-125.

⁵¹ See eg J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Rev* 711, 727.

possess secure for them a zone within which they get to determine the use of particular resources. The increased freedoms and opportunities owners are thereby accorded mean that we each have an interest in the establishment and maintenance of a system recognizing entitlements of this kind. And our interest in having such a system gives us reason to respect the entitlements legitimately accorded under that system and hence the duties of non-interference that these involve. We have, in short, rights—R-rights—both to the institution of such a system and to the assets we acquire under it. These rights can be labelled, alternatively, rights to things or rights to property.

7. Concepts of Property

Owners and others conventionally regarded as holding legal interests in property have claim-rights, powers, liberties and immunities connected to some asset or resource. For many purposes it will be convenient to refer to these Hohfeldian incidents collectively, as we do when we speak of leases, easements, trusts, estates and the like, each of these labels describing a distinct set of combinations of such incidents. We can refer to these various combinations collectively too, as we do when we describe leases, easements etc as kinds of property right. There is, therefore, a concept of a property right—the concept of a property right Hohfeld described—which *is* just a bundle of Hohfeldian incidents concerning a given thing. Hohfeld's account of property wasn't, therefore, mistaken. But what that account misses is that 'property' is also used to describe a different idea. This second concept of property doesn't capture a bundle of Hohfeldian incidents but rather identifies, or points towards, the reason for their recognition.

Neither concept of property gives us a straight division between personal and property rights. If we take the first concept of property, property rights are combinations of Hohfeldian incidents. Of those incidents, some but not all are C-rights, of which at least some are capable of being formulated so as to be good against people generally. Is there some incident or collection of incidents which is distinctive of property rights, so understood? One suggestion is that property rights are distinguished by a general C-right against others' physical interference with the relevant thing.⁵² While this looks to preserve the idea that property rights

⁵² See Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013). For a similarly restrictive, and similarly motivated, account (though this time allowing in intellectual property), see Arianna Pretto-Sakmann, *Boundaries of Personal Property Law: Shares and Sub-Shares* (Hart Publishing 2005). Cf Hohfeld (n 1) 97: 'A [as fee simple owner of Blackacre] has vested in himself, as regards Blackacre,

have a distinctive *in rem* (ie general) application, it leaves no meaningful contrast with personal rights. For one thing, this general right of non-interference will, at least on occasion, yield right-duty relations unique to the parties at that point in time. If you have my ball and I want it back, any duty to return it is yours alone.⁵³ Moreover, those who don't have property rights (so defined) may still have rights relating to that thing which are good against the world. If our agreement licensing my use of your land doesn't give me a right that others keep out, it may still give me a right that they not induce you to deny me access.

One consequence of defining property rights by reference to a general C-right against others' physical interference with the thing is that property can exist only in tangibles. Much that is routinely treated as property is then cut from it. This narrowing of property's reach is necessary, so it's said, to ensure that the category of property rights 'excludes irreducibly dissimilar rights from the set'.⁵⁴ Alternatively, we might recognise that property has its central and its non-central cases, and extensions of property beyond its core applications will be on the basis of analogy not identity.⁵⁵ While property rights in intangibles indeed differ from those in tangibles, this development of property thinking is neither confused nor unprincipled, but instead reflects the diversity of features that make up its central cases, some of which will be present in these extensions, some absent.

In any case, if we're looking for commonalities in the diverse applications of property we find in law and beyond, we may do better to look for it not in the Hohfeldian relations through which proprietary entitlements are spelled out but in the thinking and reasoning which motivates their recognition. It is in such thinking and reasoning that we property understood as a sort of organizing idea or principle. This idea, as we have seen, channels a broader line of reasoning, one which identifies the value in giving private individuals authority to determine the use and disposition of particular resources—not merely physical things—with the general

multital, or *in rem*, "right-duty" relations, multital, or *in rem*, "privilege-no-right relations", multital, or *in rem*, "power-liability" relations, and multital, or *in rem*, "immunity-disability" relations. It is important, in order to have an adequate analytical view of property, to see all these various elements in the aggregate.'

⁵³ Hence Birks treated the right that some asset be returned, ancillary to a successful *vindicatio* (a straight assertion of a right *in rem*: 'That's mine!'), as a right *in personam*. See Birks (n 37) 22.

⁵⁴ Douglas and McFarlane (n 52) 222.

⁵⁵ Cf *ibid* 239. Moreover, if we take ownership of tangibles to be property's central case, we will still find more and less central cases of this central case. So, for some tangibles, it may be that ownership accords the owner limited, or indeed no, use-privileges but only empowers him to control others' use of the thing: see eg *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1. But it is a mistake to infer from cases like this that control of others' use is more important or integral to the idea of property than an owner's own use of the relevant item.

duties of non-interference owed to property holders (and their correlative C-rights to be free of such interference) serving to define and to protect the zone within which that authority is to be exercised.

While this concept of property, in contrast to that which merely aggregates particular Hohfeldian relations, gives us a category of property rights which is truly distinct from the category of personal rights, this distinctiveness is a result of their not being rights in the same sense at all. There is a concept of rights as claims corresponding to duties owed to the right-holder. This is the concept of rights employed in the category of personal rights. There is a distinct concept of rights as grounds for these claims and duties, a concept which cannot then be reduced to such claims and duties, individually or in combination. The category of property rights, when understood as more than aggregates of such personal rights and other Hohfeldian incidents, is a sub-class of this second concept of rights. So conceived, property rights don't rank alongside personal rights but should be classed next to other rights of the same kind—the R-right to bodily security, to reputation, to privacy and so on—each identifying a distinct interest capable of grounding duties and claims.

The division of rights as personal or proprietary, *in personam* or *in rem*, is seen as basic. 'The law of obligations coordinates with the law of property. Obligations and property are the two pillars of private law. Just as the law of obligations is the law of rights *in personam*, the law of property is the law of rights *in rem*.'⁵⁶ But when understood as a distinction between rights good against a single person or determinate group and those good against people generally, individual rights can often be allocated to either class depending on the terms in which we choose to state them. When taken as a division between rights against people and rights to things, we have a straightforward confusion of ideas. Often this does no harm. When it is asked whether, say, an unjust enrichment claimant has a proprietary or merely a personal claim, we know what's at stake: whether the claimant may also recover against third parties to whom the asset is later transferred, whether these claims rank ahead of those of ordinary creditors in the event of a defendant's insolvency. In such cases, framing the question in this way is a convenient and well-understood shorthand for a fuller inquiry into the range of legal relations arising from a particular event or transaction. But while there is no need to reframe familiar debates in unfamiliar terms, we should be wary of treating this division as anything more than such a shorthand. There is no sensible opposition of property and obligation. And while one important feature of property rights in tangibles is that they are contoured by obligations of non-interference owed generally, prioritizing this over other features risks missing much of property law does and almost all of why it does it.

⁵⁶ Birks, *Unjust Enrichment* (n 31) 29.

8. *Conceptual Inquiry*

All this raises a broader point, one I shall only flag up here, about the analysis of concepts like rights and property. No doubt this sort of analysis can and, if worth undertaking, should go beyond mere reporting of how that concept is conventionally used and understood, going on to spell out what is only implicit and to develop what is only imperfectly grasped in such understandings. Yet, if it's to succeed as an analysis of the concept as employed in the thought and discourse of some group, it must take its lead from how members of that group think and speak. At the same time, it's clear that the same concept can be expressed in different terms, clear too that the same term can carry different meanings, identifying different concepts. Because of this, analysis of a concept such as that of a right cannot proceed simply by tracking and elaborating uses of the term 'right'.

The problem this sort of project faces is, therefore, to distinguish, on the one hand, cases where differing uses and understandings of a given term reflect different understandings of some single concept—differences which may then be attributable to some having a less than perfect grasp of that concept—and, on the other, cases where such differences in use and understanding are instead explicable on the basis that they refer to different concepts. There are easy cases: we know 'bank' refers both to money banks and to river banks and ambiguous uses are quickly resolved. But, as Hohfeld's analysis shows, there are hard cases too, where the diversity of concepts captured by a single term is easily missed.

The existence of such hard cases means that sometimes apparent disagreements over, say, the nature of rights or the existence of particular rights are simply instances of talking past one another. That this state of affairs can endure may be attributable in part to the intransigence of those engaged in these debates. But it also reflects the fact that often these conceptual confusions cause no confusion on the ground, in our, or the law's, response to particular practical problems. The 'test case' of children's rights is not played out in the law's treatment of children. Similarly, we can all agree that I have a property right in this laptop on either of the concepts of property and any of the concepts of right discussed. That, for me, this right is what justifies your duty not to interfere with it, as well as my use-privileges and powers of transfer, while, for you, it is the aggregate of such claims, privileges and powers will rarely matter; indeed it will rarely come into view.

The fact that those engaged in debates about the nature of concepts such as rights take themselves, despite their disagreements, to be addressing the same phenomenon may be thought to support a presumption that these disagreements are real and not merely apparent. But one can see how the argument could be made the other way: the very fact that these debates endure, with each side fully understanding its opponents' position as well as its own, should

cause us to question whether indeed they are both talking about the same thing. Besides, what if one of us really does misapply the term ‘property’ or ‘right’ here? Whichever one of us does misapply it identifies instead some other idea, one which turns out not to be the concept typically or properly identified as, say, a right. Nonetheless, it’s not as though these different concepts are rivals, so that one must then give way. And how many others would it take to make the same mistake before this other concept becomes an additional sense of the term ‘right’ and so can be understood as an alternative concept *of a right*?

Language develops; a term originally employed to capture a single idea is stretched to capture related but distinct ideas. This sort of development is likely to be incremental. As time goes on, the fact that that single term is used for a diversity of concepts is likely to become more apparent and the differences between these concepts more stark. But, before we get to this point, differences will be more easily missed. One might add that this possibility is all the greater where the concepts we are dealing with aren’t fixed by their association to some observable or measurable object but denote purely abstract notions, identifiable only by the role they play in human thought and argument.