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## Rights and Private Law

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### I. INTRODUCTION

**I**N RECENT YEARS a strand of thinking has developed in private law scholarship which has come to be known as ‘rights’ or ‘rights-based’ analysis. This kind of analysis seeks to develop an understanding of private law obligations which is driven, primarily or exclusively, by the recognition of the rights we have against each other, rather than by other influences on private law, such as the pursuit of community welfare goals. Rights-based theories of contract,<sup>1</sup> torts<sup>2</sup> and unjust enrichment<sup>3</sup> have been developed. A number of doctrines within the law of tort have been subjected to rights analysis.<sup>4</sup> Thinking on the law of property has been informed by innovative analysis of the nature of property rights.<sup>5</sup> The relationship between primary rights and the second-

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<sup>1</sup> See, eg, P Benson, ‘The Unity of Contract Law’ in P Benson (ed), *The Theory of Contract Law* (Cambridge, Cambridge University Press, 2001) 118. On rights-based theories of contract more generally, see SA Smith, *Contract Theory* (Oxford, Oxford University Press, 2004) 140–58.

<sup>2</sup> R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007).

<sup>3</sup> See, eg, EJ Weinrib, ‘The Normative Structure of Unjust Enrichment’ in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford, Hart Publishing, 2008) 21.

<sup>4</sup> See, eg, A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007); P Benson, ‘Should *White v Jones* Represent Canadian Law: A Return to First Principles’ in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (Oxford, Hart Publishing, 2007) 141; JW Neyers, ‘Rights-Based Justifications for the Tort of Unlawful Interference with Economic Relations’ (2008) 28 *Legal Studies* 215; JW Neyers, ‘The Economic Torts as Corrective Justice’ (2009) 17 *Torts Law Journal* 162; D Nolan, ‘“A Tort Against Land”: Private Nuisance as a Property Tort’ ch 16 of this book; E Chamberlain, ‘Misfeasance in a Public Office: A Justifiable Anomaly within the Rights-Based Approach?’ ch 19 of this book.

<sup>5</sup> Notably B McFarlane, *The Structure of Property Law* (Oxford, Hart Publishing, 2008).

ary rights triggered by their infringement has been the subject of ongoing debate.<sup>6</sup> Notions of rights are also assuming greater importance in private law in other respects. Human rights instruments are having an increasing influence on private law doctrines in a number of jurisdictions, and increasingly attention is being paid by private law scholars to the rights that claimants have to particular court orders, and to the rights arising from the making of those orders.<sup>7</sup> A debate has also arisen in the law of unjust enrichment as to whether there is an obligation to make restitution of rights which is distinct from the obligation to make restitution of value.<sup>8</sup>

While thinking about rights has been influential across the whole spectrum of private law, the law of torts has been the primary focus of much recent rights analysis and the field of the most intense debate. Rights analysis in tort law is strongly associated with anti-instrumentalism and the idea that the law of torts is and should be concerned primarily or exclusively with notions of interpersonal morality, rather than the pursuit of community welfare goals. Because tort law has become the primary site of contest between instrumentalist and non-instrumentalist conceptions of private law, rights analysis has been at its most provocative and vociferous in relation to tort law, and has attracted an equally vehement response from its critics. While the chapters in this collection concern the role of rights analysis in a number of different areas of private law, tort law inevitably attracts the most attention.

## II. WHAT IS RIGHTS ANALYSIS?

Since private law is generally understood to concern the rights and duties which we owe each other, at first blush it seems unlikely that analysis of private law in terms of rights will prove to be particularly insightful or illuminating. First impressions can, however, be misleading, and closer inspection reveals that what has come to be known as rights (or ‘rights-based’) analysis of private law does offer a distinctive and important take on private law, both at a general level, and with reference to particular private law doctrines. What, then, *is* ‘rights analysis’? The central claim of rights analysis is perhaps best summed up by Robert Stevens when he says that ‘Private law is simply about the rights we have one against another’.<sup>9</sup>

<sup>6</sup> See, eg, R Zakrzewski, *Remedies Reclassified* (Oxford, Oxford University Press, 2005).

<sup>7</sup> SA Smith, ‘The Rights of Private Law’ in A Robertson and HW Tang, *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 113; SA Smith, ‘Rule-Based Rights and Court-Ordered Rights’ ch 8 of this book.

<sup>8</sup> This issue is explored by B McFarlane, ‘Unjust Enrichment, Rights and Value’ ch 20 of this book; E Bant, ‘Rights and Value in Rescission: Some Implications for Unjust Enrichment’ ch 21 of this book.

<sup>9</sup> R Stevens, ‘The Conflict of Rights’ in A Robertson and HW Tang, *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 139, 141.

Similarly, Ernest Weinrib has written that ‘The various branches of civil liability work out the circumstances under which the defendant can be said to have or to have done something that is inconsistent with a right of the plaintiff’.<sup>10</sup> Rights theorists also frequently define rights analysis by reference to what it is *not*. Hence Stevens contrasts his conception of torts as ‘infringements of primary rights’<sup>11</sup> with what he refers to as the ‘loss model’, according to which ‘the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not’,<sup>12</sup> and similarly Nicholas McBride contrasts his rights-based view of tort law with the belief that the function of tort law is to determine when a claimant is able to claim compensation for a loss that the defendant has caused the claimant to suffer.<sup>13</sup> In a similar vein, rights theorists based in the United States frequently contrast their conception of private law with a rival conception grounded in the American legal realist tradition, according to which liability is not a response to violations of rights but instead ‘a state-imposed sanction for undesirable conduct’, with the result that private law is ‘a “mere” means by which governmental officials in given historical periods have pursued certain policy objectives’.<sup>14</sup> On this conception, although private law may be conventionally formulated in terms of rights and duties, these rights and duties are merely devices ‘for signifying a condition for a claim to arise and the person in whose favor it arises’.<sup>15</sup>

If, then, we pose the question of what private law is about if it is *not* about rights and duties, we can see that at least two responses are possible. The first is that private law is regulatory law, and is largely composed of liability rules designed by the state to incentivise us to act in ways which the state considers to be in the public interest. Under this approach, the central normative message of private law is frequently conceptualised in ‘either/or’ terms: *either* you conform with the (apparent) norm *or* you pay for not doing so—the choice is yours. The second response is that large tracts of private law—particularly, but not exclusively, the law of tort—are concerned not with the protection of primary rights but with compensation for loss. Like the former view, this conception of (elements of) private law may also embody the legal realist claim that ‘private law

<sup>10</sup> EJ Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 *University of Toronto Law Journal* 349, 353. See also S Perry, ‘The Role of Duty of Care in a Rights-Based Theory of Negligence Law’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 79, 81 (‘the core of tort law concerns certain fundamental moral duties and their correlative rights’).

<sup>11</sup> Stevens, *Torts and Rights*, above n 2, at 3.

<sup>12</sup> *ibid.*, at 1.

<sup>13</sup> NJ McBride, ‘Rights and the Basis of Tort Law’ ch 12 of this book, text accompanying n 13.

<sup>14</sup> JCP Goldberg and BC Zipursky, ‘Rights and Responsibility in the Law of Torts’ ch 9 of this book, text accompanying n 3.

<sup>15</sup> P Jaffey, ‘Liabilities in Private Law’ (2008) 14 *Legal Theory* 233, 244.

is public law', with loss compensation being justified by reference to concerns of distributive justice or the social desirability of 'loss-spreading'. If, however, private law is limited on this loss compensation approach to the compensation of *wrongful* losses, then that might be thought to move it closer to the realm of interpersonal justice. At this point, the contrast with a rights-based approach becomes less distinct, since while 'wrongful' could simply connote 'unjust' (or the breach of a duty 'in the air'), it might also be thought to entail a 'wrong', which would in turn entail a violation of a right.<sup>16</sup>

The nature of rights analysis can also be explored by identifying a number of central characteristics of this approach to private law. One such characteristic is that rights analysis is *structural*, in the sense that rights theorists have a particular interest in the structures which underlie private law. Hence Allan Beever claims in his rights-based account of the law of negligence that when viewed in the right light, negligence law can be seen to possess 'a conceptually coherent, indeed conceptually *unified*, structure',<sup>17</sup> while Stevens describes his book *Torts and Rights* as 'foundational, trying to make clear the structure of the law',<sup>18</sup> a claim endorsed in two critical assessments of his work.<sup>19</sup> Another leading rights theorist, Weinrib, describes the Aristotelian concept of corrective justice as the 'form of the private law relationship'<sup>20</sup> and 'the unifying structure that renders private law relationships immanently intelligible'.<sup>21</sup> A corrective justice approach, therefore, 'attempts to bring to the surface the structure of normative thought latent in the institutions and concepts of a liability regime'.<sup>22</sup>

A connected characteristic of rights analysis is that it is *monist* rather than pluralist: the claim of rights theorists is not therefore that some parts of private law—or of the particular area of private law under scrutiny—are best understood in terms of rights, but that all (or almost all<sup>23</sup>) of

<sup>16</sup> For an argument that not all wrongful losses result from wrongs, see J Coleman, *Risks and Wrongs* (Cambridge, Cambridge University Press, 1992) ch 17.

<sup>17</sup> A Beever, *Rediscovering the Law of Negligence*, above n 4, at 30 (emphasis in original). See also at 515 ('The law of negligence has a structure, and it is our primary role as academics to discover what that structure is').

<sup>18</sup> Stevens, *Torts and Rights*, above n 2, at vii.

<sup>19</sup> See J Murphy, 'Rights, Reductionism and Tort Law' (2008) 28 *Oxford Journal of Legal Studies* 393, 394 ('an attempted reductionist account of the way in which *the structure* of tort law can best be understood') (emphasis in original); P Cane, 'Robert Stevens, *Torts and Rights*' (2008) 71 *Modern Law Review* 641, 644 ('Stevens' account is structural').

<sup>20</sup> EJ Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995) 75.

<sup>21</sup> *ibid.*, at 19.

<sup>22</sup> Weinrib, 'Corrective Justice in a Nutshell', above n 10, at 356. On the relationship between rights and corrective justice, see part IX below.

<sup>23</sup> See, eg, Stevens, *Torts and Rights*, above n 2, at 242 (describing the tort of misfeasance in a public office as 'an exception to the rule that the deliberate infliction of loss, absent the violation of a right, is not actionable').

it is. Hence Beever's reference to the 'conceptually *unified*' structure of negligence law,<sup>24</sup> and Peter Cane's characterisation of Stevens' account of the law of torts as 'unitary in that it understands all torts to be protective of specific primary rights'.<sup>25</sup> Similarly, John Murphy describes Stevens' account as 'reductionist', in the sense that it 'seeks to identify a single norm, goal, principle or feature that explains or underpins the disparate causes of action that comprise tort law',<sup>26</sup> while in his book *Contract Theory* Stephen Smith presents rights-based theories of contract law as a unitary explanation of 'the entirety of contract law'.<sup>27</sup> This concern with presenting a unitary account of private law has given rise to a number of contributions by the rights theorist Jason Neyers, in which he has sought to reconcile private law doctrines which at first sight seem difficult to explain in terms of rights with the rights-based approach.<sup>28</sup>

Rights theorists themselves are also keen to emphasise that their goal is an *interpretive* one: to give the 'best account' of private law or particular private law doctrines. According to Stevens, for example, the 'first task of the academic lawyer is to explain the law so that it makes coherent sense and to account for it in the best possible light'.<sup>29</sup> Similarly, Beever describes his account of negligence law as an 'interpretive theory', by which he means an attempt to 'help us to make sense of the law and to see it in a coherent and meaningful light'.<sup>30</sup> Smith plausibly distinguishes interpretive accounts of the law from what he calls descriptive accounts, historical accounts and prescriptive accounts.<sup>31</sup> When rights theorists self-identify as interpretivists therefore, they are telling us that they are not setting out simply to describe the current law, nor to explain how and why the law has developed as it has, nor to put forward an account of

<sup>24</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 30. By this, Beever says that he means that 'the various stages of the negligence enquiry ... are seen as parts of a conceptually integrated whole' and not as 'a series of conceptually separate questions' (ibid).

<sup>25</sup> Cane, 'Robert Stevens, *Torts and Rights*', above n 19, at 644. This should perhaps be 'almost all': see above n 23. Although Stevens says that 'there is little underlying unity' to the *law of torts* (*Torts and Rights*, above n 2, at 299), Cane's point is that *Stevens' account* of the law of torts is unitary in that he conceives of all (or almost all) torts as violations of primary rights.

<sup>26</sup> Murphy, above n 19, at 394.

<sup>27</sup> Smith, *Contract Theory*, above n 1, at 107.

<sup>28</sup> See JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287; Neyers, 'Rights-Based Justifications', above n 4; Neyers, 'The Economic Torts as Corrective Justice', above n 4; JW Neyers, 'Explaining the Inexplicable? Four Manifestations of Abuse of Rights in English Law' ch 11 of this book. See also E Chamberlain, 'Misfeasance in a Public Office', above n 4, in which Erika Chamberlain argues that the tort of misfeasance in a public office can be reconciled with the rights-based approach.

<sup>29</sup> R Stevens, 'Damages and the Right to Performance: A *Golden Victory* or Not?' in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Oxford, Hart Publishing, 2009) 171, 198. See also Stevens, *Torts and Rights*, above n 2, at vii ('This book seeks to paint the best picture of the common law of torts which can be rendered').

<sup>30</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 21.

<sup>31</sup> Smith, *Contract Theory*, above n 1, at 4-5.

what the ideal law would be. Instead, their aim is to provide the most plausible, coherent and appealing account of the law *as it stands*. This of course imposes significant constraints on these theorists, as well as giving us criteria—fit, coherence, morality and transparency, according to Smith<sup>32</sup>—by which we can evaluate their analysis of private law on its own terms, with the caveat that of course opinions may differ both as to the criteria to be used in the evaluative process and as to the relative weight to be attached to them.<sup>33</sup>

The work of rights theorists of private law can also be described as *formalist*.<sup>34</sup> We mean by this that rights theorists believe that ‘the general, structural concepts of private law ... determine the result (or the rule) to be applied in particular (types of) cases’.<sup>35</sup> In this sense, formalism can be contrasted with the realist view that private law cases are entirely or largely determined by policy determinations, for which general, structural concepts merely provide a foil. As Christian Witting puts it in his discussion of Beever’s work on negligence law:

The argument of the formalists is against the idea that much of tort law is to be explained in terms of policy choices and that various tort doctrines do no more than ‘mask’ policy-based decision-making.<sup>36</sup>

In place of policy, we find ‘principle’, with Beever describing his work on the law of negligence as a project ‘to re-establish general principle in our understanding of the law of negligence’,<sup>37</sup> its aim ‘to show that the law of negligence can be understood in a principled way without appeal to policy’.<sup>38</sup> While acknowledging the difficulty of distinguishing the two, Beever defines ‘principle’ as ‘the rules and the doctrine of the law itself’, and ‘policy’ negatively as ‘everything apart from principle’.<sup>39</sup> This *internalist* perspective<sup>40</sup> is also apparent in the work of other rights theorists, such as Weinrib, who contrasts his ‘internal’ account of private law with what he terms ‘functionalist’ analysis,<sup>41</sup> and Stevens, who argues that it is

<sup>32</sup> *ibid*, at ch 1.

<sup>33</sup> Some rights theorists appear to attach particular significance to the criterion of coherence, for example (see, eg, Beever, *Rediscovering the Law of Negligence*, above n 4, at 22–25; Weinrib, *The Idea of Private Law*, above n 20, at 29–46), while Beever argues that the criterion of transparency ‘requires special treatment when applied to the law of negligence’ (*Rediscovering the Law of Negligence*, above n 4, at 28). See further A Robertson, ‘Rights, Pluralism and the Duty of Care’ ch 15 of this book.

<sup>34</sup> See, eg, Weinrib, *The Idea of Private Law*, above n 20, at ch 2.

<sup>35</sup> M Stone, ‘Formalism’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press, 2002) 166, 189.

<sup>36</sup> C Witting, ‘The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence’ (2008) 71 *Modern Law Review* 621, 623.

<sup>37</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 39.

<sup>38</sup> *ibid*, at 71.

<sup>39</sup> *ibid*, at 3.

<sup>40</sup> *ibid*, at 34–35.

<sup>41</sup> Weinrib, *The Idea of Private Law*, above n 20, at 11.

illegitimate for judges to decide tort cases by reference to considerations of public policy, and who explicitly distinguishes his approach from that of other tort scholars whom he describes as legal realists.<sup>42</sup> Rights theorists' internalist perspective is closely tied to the fact that their work is characteristically *non-instrumentalist*, in other words that it 'construes law as being internally intelligible and thus requiring no reference to purposes external to itself'.<sup>43</sup> Weinrib's account of private law is radically non-instrumentalist in this sense, so much so that he describes both Charles Fried's promise theory of contract<sup>44</sup> and George Fletcher's account of tort law<sup>45</sup> as instrumentalist on the grounds that they treat private law as a servant of, or means of implementing, a non-instrumental morality.<sup>46</sup> Similarly, Smith characterises rights-based theories of contract as 'concerned with duties that contracting parties owe to each other rather than any broader social goal',<sup>47</sup> and both Stevens and Beever deny that the law of torts is an instrument of social policy, claiming instead that it is founded on a base of 'fundamental' or 'moral' rights.<sup>48</sup>

We should note, however, that not all rights theorists are opposed to the use of policy arguments and instrumentalist reasoning in private law adjudication. When it comes to the law of tort, for example, there is a clear division between rights theorists, such as Beever and Stevens, who maintain that judges should avoid policy-based reasoning altogether, and others, such as McBride, who, while acknowledging that arguments from principle should take centre stage, reject the notion that 'considerations of what is in the public interest are *never* relevant to claims in tort'.<sup>49</sup> While it is possible, therefore, to identify certain distinguishing features which appear to characterise the work of all those who self-identify as rights theorists, some take a more uncompromisingly non-instrumentalist position than others.

### III. WHAT IS MEANT BY 'RIGHTS'?

Since our focus is on private law, the rights which we are primarily interested in are rights against others, as opposed to rights against the state

<sup>42</sup> Stevens, *Torts and Rights*, above n 2, at ch 14.

<sup>43</sup> Weinrib, *The Idea of Private Law*, above n 20, at 50–51.

<sup>44</sup> C Fried, *Contract as Promise* (Cambridge MA, Harvard University Press, 1981).

<sup>45</sup> GP Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537.

<sup>46</sup> Weinrib, *The Idea of Private Law*, above n 20, at 48–55.

<sup>47</sup> Smith, *Contract Theory*, above n 1, at 140–41.

<sup>48</sup> See, eg, A Beever, 'Our Most Fundamental Rights' ch 3 of this book; Stevens, *Torts and Rights*, above n 2, at 329–37.

<sup>49</sup> McBride, 'Rights and the Basis of Tort Law', above n 13, text accompanying n 29. See also Perry, 'The Role of Duty of Care', above n 10, at 83 (refusing to 'rule out the possibility that the best moral theory of rights has a consequentialist dimension').

(such as ‘human rights’).<sup>50</sup> At least three different general meanings of the word ‘right’ are discernible in the private law context.<sup>51</sup> The first is what Wesley Hohfeld called a ‘claim’, by which he meant a legal right which correlates with a legal duty.<sup>52</sup> An example of a ‘claim right’ of this kind is a right not to be battered or a right not to have others trespass on your land. Claim rights are in their very nature fully specified, absolute and conclusive, with the full specification providing ‘for all possible contingencies, so that the right is absolute or conclusive in that it can never be justifiably overridden’.<sup>53</sup> It follows that it is logically impossible for claim rights to conflict. The assertion of a claim right in this sense is no more than a positivistic assertion as to the import of the law—a conclusion to a legal question<sup>54</sup>—from the standpoint of the beneficiary of the rule in question. Primary claim rights, which correlate with primary duties or obligations, can be distinguished from secondary claim rights, which are triggered by the violation of primary claim rights, and which correlate with secondary duties or obligations to make reparation.

Some rights theorists believe that there are also such things as ‘moral rights’, which exist quite apart from the state.<sup>55</sup> These moral rights can in a sense therefore be described as ‘extra-legal’, although they may of course ground ‘legal’ claim rights which the state will enforce.<sup>56</sup> According to Stevens, these moral rights ‘are capable of being deduced from the nature and experience of ourselves, and the world and society in which we live’.<sup>57</sup> The nature of moral rights of this kind has been the subject of extensive philosophical debate, which it is not possible to do justice to here. Nevertheless, Stevens does make it clear that in his view moral rights share at least one characteristic of legal claim rights, in that the violation of a moral right triggers a secondary moral right to reparation.<sup>58</sup> Needless to say, not everyone agrees that there are such things as moral rights at all. On the contrary, it can be argued that the assertion of a ‘moral right’ is no more than a subjective opinion as to what the moral position is, and (perhaps) what the legal position ought to be. On this sceptical view, rights ‘cannot, therefore, have a real objective existence outside the

<sup>50</sup> See further Stevens, ‘The Conflict of Rights’, above n 9, at 146–49.

<sup>51</sup> There are also other, more specific meanings, such as ‘rights of action’, but where appropriate these are dealt with in later parts of this chapter.

<sup>52</sup> WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 32.

<sup>53</sup> P Jaffey, ‘Duties and Liabilities in Private Law’ (2006) 12 *Legal Theory* 137, 141.

<sup>54</sup> Stevens, ‘The Conflict of Rights’, above n 9, at 143.

<sup>55</sup> See, eg, Stevens, *Torts and Rights*, above n 2, at 329–37; Beever, ‘Our Most Fundamental Rights’, above n 48.

<sup>56</sup> This is something of a terminological minefield, because as Beever points out (‘Our Most Fundamental Rights’, above n 48, text accompanying n 37 ff) some philosophers have taken the view that private *law* is ‘conceptually prior to the state’.

<sup>57</sup> Stevens, *Torts and Rights*, above n 2, at 330.

<sup>58</sup> *ibid.*, at 336.

law', and so cannot be used as justificatory concepts that determine the content of the law.<sup>59</sup>

In any case, it is obviously important that those writing about rights and private law distinguish clearly between the legal and the moral meaning of the word 'right':

Because the two senses of the word [are] so closely intertwined in common parlance, there [is] a strong tendency for the one to collapse into the other ... and for legal scholars to base their ostensibly objective descriptions of the law on their own subjective moral evaluations.<sup>60</sup>

The risk of slippage of this kind is most acute when reference is made to more general rights, such as the 'right to bodily integrity' or the 'right to reputation'. General rights of this kind have been aptly described by James Penner as a device for describing constellations of norms which organises them on the basis of the interests which the various norms in the system reflect.<sup>61</sup> Note, however, that this tells us nothing about what *kind* of norms we are dealing with, nor *which* system the norms are to be found in. It follows that references to general rights of this kind could be references either to a constellation of *legal* norms which protect a particular interest<sup>62</sup> or to a constellation of *moral* norms which protect a particular interest. As McBride emphasises, on the first of these two meanings, general rights of this kind—which he calls 'liberty/interest rights'—are merely expressive, so that when we refer to the (general legal) 'right to freedom of expression' all we are saying is

that the law takes some steps to protect my freedom of speech from being interfered with by other people by, for example, granting me coercive rights [claim rights] requiring other people not to interfere with my freedom of speech, or by granting me exemptions [immunities] from certain legal rules that would otherwise allow other people to interfere with my freedom of speech ... My freedom of speech is not protected because I have 'a right to freedom of expression'. Rather, I have a 'right to freedom of expression' because my freedom of speech is protected.<sup>63</sup>

By contrast, on the second of these two meanings, where what is meant is a general *moral* right, the assertion of the right is expressive not of what the legal position is, but of what the speaker considers the moral position to be (and therefore, perhaps, what the legal position *should* be). This inherent ambiguity in the terminology of general rights means that it is particularly important that all those who write on the role of

<sup>59</sup> TT Arvind, 'Beyond "Right" and "Duty": Lundstedt's Theory of Obligations' ch 6 of this book, text following n 31.

<sup>60</sup> *ibid*, text accompanying n 56 (referring to the views of Anders Vilhelm Lundstedt).

<sup>61</sup> JE Penner, 'The Analysis of Rights' (1997) 10 *Ratio Juris* 300, 312.

<sup>62</sup> As McBride points out ('Rights and the Basis of Tort Law', above n 13, text accompanying n 34), these legal norms may include Hohfeldian immunities as well as claim rights.

<sup>63</sup> *ibid*, text accompanying nn 40–41 (footnotes omitted).

rights in private law make it clear precisely what they mean when they refer to general rights of this kind. Finally, we should note that those who deny the existence of moral rights ought logically to refer to general rights only in the legal sense, but that in practice even moral rights sceptics sometimes use the language of general rights rhetorically when what they actually mean are the *interests* which they believe justify legal claim rights. This slippage is unfortunate, because of course rights and interests are not the same thing.<sup>64</sup>

#### IV. IS RIGHTS ANALYSIS DISPOSITIVE?

To the extent that rights-based analysis of private law is concerned only with identifying and understanding the primary rights that underlie private law, it does not offer any direct guidance as to what the law should be. As John Goldberg and Benjamin Zipursky observe in chapter 9 of this book, rights theory is primarily concerned with understanding the structure of the law, and in this respect does analytical rather than normative work. The main focus of Stevens' book *Torts and Rights*, for example, is on understanding the structure and operation of the law of torts through the identification and analysis of categories of 'claim rights' in the Hohfeldian taxonomy. And as we have seen, the identification of a legal claim right is merely a description of what the law *is*, and cannot tell us what the law *should be* on a particular issue.

It would, however, be a mistake to suppose that rights-based accounts of private law are devoid of normative implications. There are at least three reasons for this. The first is that rights theorists believe that the system of private law rights should be consistent and coherent (or at least that it should be *interpreted* in as consistent and coherent a manner as possible). It follows that the recognition of a particular claim right is questionable if it does not fit within a broader, coherent set of recognised claim rights or with what Beever calls 'general features of the common law'.<sup>65</sup> The identification of bundles or categories of claim rights, and the insistence on coherence and consistency within and between those categories, therefore give rights analysis a limited normative agenda. To say, then, that *x* has no claim against *y* because *y* has infringed no right held by *x* may mean that any authority that exists in the case law to support such a claim must be wrong because any claim right held by *x* against *y* could not be accommodated within a coherent framework of rights. Thus, for example, Beever argues that the decision of the House of Lords in *White v Jones*<sup>66</sup> (allowing disappointed beneficiaries to recover damages from the

<sup>64</sup> Penner, above n 61, at 306.

<sup>65</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 62.

<sup>66</sup> *White v Jones* [1995] 2 AC 455 (HL).

testator's negligent solicitor) was incorrect because any right of the beneficiaries would have to be based on the intentions of the testator with respect to his estate, but rights of this kind are governed by the law of wills, and according to the law of wills on the facts no such right existed.<sup>67</sup> Stevens observes that the decision in *White v Jones* 'appears anomalous' because 'We do not have rights good against the rest of the world to be assisted in inheriting wealth', but justifies the outcome as 'a controversial attempt to vindicate the testator's contractual right against the solicitor to performance.'<sup>68</sup> The requirements of consistency and coherence demand not only that the courts deny rights which do not fit within established categories or bundles of rights, but also that the courts do not impose arbitrary or anomalous limits on established categories of rights. Thus, Stevens criticises the restrictions on the recognition of duties of care not to cause psychiatric illness to secondary victims imposed by the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*<sup>69</sup> on the basis that if arbitrary limits are to be imposed on the right 'that each of us has ... good against others that they take care not to damage our mental, as well as physical, health', this is something that ought to be done by the legislature, rather than the courts.<sup>70</sup>

The second reason why rights analysis may have normative implications is the claim of some rights theorists that the private law rights recognised at common law should be determined solely by reference to interpersonal moral rights. Theorists of this stripe do not always agree on the precise nature of the relationship between moral rights and private law. Weinrib argues, for example, that moral rights do not underlie or provide an external justification for private law, but are inherent in it. On this view, 'Kantian right supplies the moral standpoint' that is immanent in the structure of the private law relationship, and it is a mistake to suppose that private law is in the service of moral arguments that are 'external to the law's self understanding'.<sup>71</sup> For Stevens, on the other hand, it is the decisions of common law judges that give certain moral rights the force of law.<sup>72</sup> Nevertheless, Weinrib and Stevens agree that moral rights provide the only legitimate justification for common law judges to recognise private law rights. A corollary of the claim that common law rights should be derived solely from interpersonal moral rights is that the existence or otherwise of a common law right cannot and should not be determined by reference to considerations of policy or community welfare. Since this rejection of policy-based reasoning in private law adjudication has been

<sup>67</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 266.

<sup>68</sup> Stevens, *Torts and Rights*, above n 2, at 178–81.

<sup>69</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL).

<sup>70</sup> Stevens, *Torts and Rights*, above n 2, at 54–55.

<sup>71</sup> Weinrib, *The Idea of Private Law*, above n 20, at 19, 49.

<sup>72</sup> Stevens, *Torts and Rights*, above n 2, at 330–32.

such a strong feature of recent rights analysis, this issue will be discussed further in part VIII below.

The third reason why rights analysis may have normative implications is that it is clear that at least some rights theorists think that there are limits on what can count as a private law right. Stevens has identified at least three such limits. First, he argues in his chapter in this book that because a ‘wrong, or injury, occurs in a moment of time’, it is ‘meaningless to talk of a right not to be caused loss’,<sup>73</sup> in other words that such a right is (as McBride puts it) ‘conceptually impossible’.<sup>74</sup> Secondly, Stevens argues that ‘courts cannot create rights which require the answer to questions they cannot give’,<sup>75</sup> and that since in his view courts are not entitled to engage in policy reasoning, it follows that courts cannot recognise rights (such as a right not to be insulted) which would be so broad in their prima facie scope that they would have to be cut back by reference to countervailing policy considerations. Finally, Stevens argues that the rule of law requires that the rights we have are capable of being determined in advance,<sup>76</sup> and that this explains why the list of recognised property rights is ‘closed and determinate’ so that, for example, parties cannot create any form of property right ‘good against everyone that they choose’.<sup>77</sup> Other theorists have also placed limits on what they perceive to be acceptable as private law ‘rights’. According to Weinrib, for example, there can be no right not to be exposed to risk, because on his Kantian approach to corrective justice, rights are ‘juridical manifestations of the will’s freedom’, and the ‘absence of the prospect of injury is not itself a manifestation of the plaintiff’s free will’.<sup>78</sup> Richard Wright also relies upon Kantian right to argue in his defence of the objective standard of care in negligence that our rights in our person and property ‘must be defined by an objective level of permissible risk exposure by others which ... must be equally applicable to all and objectively enforced’.<sup>79</sup> This question of what limits there might be on the recognition of particular rights is further explored by Roderick Bagshaw in his chapter in this book.<sup>80</sup>

Careful attention to the normative claims of rights theorists may, however, distract attention from a significant feature of rights analysis, which is its powerful rhetorical and, some would say, ideological effect.<sup>81</sup> Rights talk holds out the promise of an attractively simple understanding of com-

<sup>73</sup> R Stevens, ‘Rights and Other Things’ ch 5 of this book, text accompanying n 12.

<sup>74</sup> For criticism of this idea, see McBride, ‘Rights and the Basis of Tort Law’, above n 13, part VI(D).

<sup>75</sup> Stevens, *Torts and Rights*, above n 2, at 338.

<sup>76</sup> *ibid*, at 339.

<sup>77</sup> *ibid*, at 340.

<sup>78</sup> Weinrib, *The Idea of Private Law*, above n 20, at 157.

<sup>79</sup> RW Wright, ‘The Standards of Care in Negligence Law’ in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 249, 259.

<sup>80</sup> R Bagshaw, ‘The Edges of Tort Law’s Rights’ ch 14 of this book.

<sup>81</sup> See Arvind, ‘Beyond “Right” and “Duty”’, above n 59.

plex legal phenomena, and offers us an appealing image of ourselves as the powerful bearers of rights. But the principal rhetorical power of rights discourse lies in the space between the positive and normative claims, between legal rights and moral rights. As we have seen, the inherent ambiguity of the term ‘rights’ allows for an effective slippage between the positive and the normative. Claims about rights can therefore acquire a justificatory force through uncertainty as to whether reference is being made to the content of the law or its conceptual underpinnings. In the space between positive and normative claims as to whether we do or do not have particular rights, there is a danger that particular conclusions and outcomes may come to appear self-evident rather than argued for. This matters because, while rights theorists may be on relatively solid ground when making claims about the positive legal rights individuals have against each other, the terrain of underlying moral rights is highly contestable and contested.<sup>82</sup>

## V. RIGHTS AND DUTIES

Claim rights correlate with duties, and so the claim rights instantiated by private law are mirrored by duties (or obligations) which enjoin conduct. This is true both of primary claim rights, which correlate with primary duties, and secondary claim rights, which correlate with secondary duties. Rights in this sense cannot exist without duties. Duties (such as the duty not to possess illegal drugs) can exist without correlative rights,<sup>83</sup> but in the Hohfeldian scheme duties owed to others cannot. Attempts have been made to show that there are exceptions to the Hohfeldian correlativity thesis, though it is questionable whether these have been successful.<sup>84</sup> The matter need not detain us here. For our purposes, it is enough to say that rights and duties to others are always (or almost always) just two different ways of looking at the same jural relationship, with the ‘right’ perspective that of the person who benefits from the relationship, and the ‘duty’ perspective that of the person burdened by it.<sup>85</sup> It follows that rights and

<sup>82</sup> See *ibid.*

<sup>83</sup> See further Goldberg and Zipursky, ‘Rights and Responsibility’, above n 14, part II(A).

<sup>84</sup> See, eg, N MacCormick, *Legal Right and Social Democracy* (Oxford, Clarendon Press, 1982) 161–62, critiqued by Penner, above n 61, at 309–10. See also the disagreement as to whether private law duties can be owed to foetuses who lack legal personality: compare Beever, *Rediscovering the Law of Negligence*, above n 4, at 386 with R Perry, ‘Correlativity’ (2009) 28 *Law and Philosophy* 537.

<sup>85</sup> See J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) 205: ‘In short, the modern vocabulary and grammar of rights is a many-faceted instrument for reporting and asserting the requirements or other implications of a relationship of justice from the point of view of the person(s) who benefit(s) from that relationship’ (emphasis in original).

duties to others are ‘interdefined: neither is prior to the other’;<sup>86</sup> they are ‘the same thing, just viewed through different ends of the telescope’<sup>87</sup>—hence Stevens’ observation that he could just as easily have given his book *Torts and Rights* the title *Torts and the Duties We Owe One to Another*, ‘though that wouldn’t have been quite so snappy’.<sup>88</sup>

Despite the simplicity of the duty/right relationship when seen in these terms, the correlativity thesis gives rise to at least two possible complications for rights theorists. The first, which is more apparent than real, relates to strict liability. Superficially, there might appear to be a difficulty with identifying the duty which is breached when a tort of strict liability is committed. There is in fact no problem here, however, once it is understood that when it comes to strict liability wrongs (including many instances of breach of contract) the duty is a duty not to bring about a particular outcome, as opposed to a duty to take reasonable steps not to bring about a particular outcome.<sup>89</sup> The correlativity thesis therefore poses no barrier to a rights-based analysis of strict liability torts such as battery and trespass to land. A distinction must however be drawn between torts like these, which impose primary norms enjoining certain conduct (battering, trespassing, etc) and liability rules which do not enjoin conduct at all, but simply lay down that in eventuality *x*, *y* has a claim against *z*. These kinds of liability rules are considered in part VI of this chapter.

The second possible complication relates to negligence law. Here, the difficulty is that although rights theorists have been anxious to emphasise that the duty of care element of the negligence inquiry is a real requirement, grounded in considerations of interpersonal justice, and not just a policy-driven ‘control device’,<sup>90</sup> they have arguably given insufficient consideration to the implications which their analysis of the duty issue has for the nature of the right or rights which underlie liability in negligence. After all, if rights theorists believe that the duty of care is a duty in the

<sup>86</sup> J Finnis, ‘Natural Law: The Classical Tradition’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press, 2002) 1, 24. Note that while BC Zipursky, ‘Rights, Wrongs and Recourse in the Law of Torts’ (1998) 51 *Vanderbilt Law Review* 1, 64, describes relational legal rights as ‘just the analytical reflex’ of relational legal duties, Weinrib (*The Idea of Private Law*, above n 20, at 123–24) argues that when right and duty operate as correlatives, ‘they constitute an articulated unity’ (emphasis in original), and that they should not therefore be regarded ‘as analytic reflexes of each other’.

<sup>87</sup> McBride, ‘Rights and the Basis of Tort Law’, above n 13, text accompanying n 33.

<sup>88</sup> Stevens, ‘Rights and Other Things’, above n 73, text accompanying n 4.

<sup>89</sup> Note that *pace* John Gardner, this is emphatically *not* a distinction between a ‘duty to try’ and a ‘duty to succeed’ (J Gardner, ‘Obligations and Outcomes in the Law of Torts’ in P Cane and J Gardner (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on His 80th Birthday* (Oxford, Hart Publishing, 2001) 111). Both are duties to succeed, but while one is a duty to succeed in not bringing about a particular outcome, the other is a duty to succeed in not bringing about a particular outcome through falling short of an objective standard of reasonable conduct.

<sup>90</sup> See, eg, JCP Goldberg and BC Zipursky, ‘The Restatement (Third) and the Place of Duty in Negligence Law’ (2001) 54 *Vanderbilt Law Review* 657; NJ McBride, ‘Duties of Care—Do They Really Exist?’ (2004) 24 *Oxford Journal of Legal Studies* 417.

Hohfeldian sense,<sup>91</sup> then it follows that the correlative right must be a right not to be exposed to unreasonable risks of certain kinds of interference with one's bodily integrity, personal property and so forth. As well as being both counter-intuitive and philosophically problematic,<sup>92</sup> this conclusion would be at odds with the well-established principle that actions in negligence arise only when the defendant's unreasonable conduct results in damage to a protected interest of the claimant. One rights theorist who has addressed this issue head-on is Stephen Perry, who identifies the true duty in negligence cases as a duty 'not to harm others as a result of acting negligently towards them', as opposed to a duty of care.<sup>93</sup> If this is correct, however, then the claim that the duty of care is not a real duty (a claim apparently anathema to many rights theorists) turns out to be true after all, at least if the word 'duty' is understood in Hohfeldian terms.<sup>94</sup> Nor can the duty of care concept be rescued by reformulating it (as Stevens does in his chapter in this book<sup>95</sup>) as a 'duty of care not to injure', because that formulation of the 'duty of care' concept is clearly not the one employed by lawyers, who mean by 'breach of (the) duty (of care)' sub-standard conduct which *may foreseeably* cause the claimant injury, not sub-standard conduct which *does in fact do so*.<sup>96</sup> Of course, none of this means that a negligence standard is in any way incompatible with rights analysis, and it is difficult to see the force in Cane's claim that strict liability 'is a necessary corollary of a system of rights',<sup>97</sup> since it is hard to see why a system of rights not to suffer injury through negligent conduct would not be a system of rights nonetheless.

## VI. RIGHTS AND LIABILITIES

Where a private law right is violated, this will usually<sup>98</sup> trigger a right of action, which in Hohfeldian terms is a power in the person wronged to bring an action against the wrongdoer. This power correlates with

<sup>91</sup> As Stevens certainly does: 'The duty of care reflects a correlative right. This right is a real right' (*Torts and Rights*, above n 2, at 291).

<sup>92</sup> On the philosophical difficulties, see Perry, 'The Role of Duty of Care', above n 10, at 92-107.

<sup>93</sup> *ibid.*, at 101. Weinrib appears also to take the view that the duty is one of non-injury: see 'Corrective Justice in a Nutshell', above n 10, at 353 ('freedom from the injury of which the plaintiff is complaining is both the content of the plaintiff's right and the object of the defendant's duty').

<sup>94</sup> For discussion of this issue with reference to Beever's rights-based account of negligence, see P Cane, 'Rights in Private Law' ch 2 of this book, text accompanying n 35 ff.

<sup>95</sup> Stevens, 'Rights and Other Things', above n 73, text accompanying n 8 ff.

<sup>96</sup> See, eg, WVH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (London, Sweet & Maxwell, 2010) para 5-1 ('Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant').

<sup>97</sup> P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002) 198.

<sup>98</sup> For the argument that it does not always do so, see Stevens, 'The Conflict of Rights', above n 9, at 150.

a ‘liability’ of the wrongdoer, in the sense that the wrongdoer is now susceptible to legal action. It follows that private law ‘both recognises Hohfeldian claim rights ... and grants to those whose rights have been violated a Hohfeldian power’.<sup>99</sup>

Private law liabilities are not always triggered by wrongs, however. Examples are obligations arising in the law of unjust enrichment and according to the principles relating to salvage and general average. In these cases the defendant is not susceptible to legal action because he or she has violated a right of the claimant, but simply because the law has laid down that in circumstance *x*, *y* has a claim against *z*.<sup>100</sup> Liabilities like this are distinguishable from strict liability wrongs such as battery because the legal norm in question does not *prohibit* anything, so that the obligation to pay money is a primary obligation, as opposed to a secondary one triggered by a breach of duty (a wrong) on the part of the defendant.<sup>101</sup>

Some liabilities of this kind are traditionally classified as falling within the law of tort. A good example is the liability that arises under the Consumer Protection Act 1987 (UK) where damage is caused by a defective product. The central provision of the 1987 Act, section 2(1), states simply that ‘where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage’. The legislation therefore imposes no duty, but only a liability.<sup>102</sup> As a result, a variety of actors involved in the production and distribution of the defective product are made potentially liable, with none of the constraints to which a duty-imposing norm would be subject. Another example may be the rule in *Rylands v Fletcher*:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there something likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima

<sup>99</sup> Goldberg and Zipursky, ‘Rights and Responsibility’, above n 14, text following n 34 (referring specifically to tort law).

<sup>100</sup> As Peter Jaffey says, in such cases ‘C acquires a claim against D if a certain contingency materializes, but D does not have a duty to prevent it from materializing’: ‘Duties and Liabilities in Private Law’, above n 53, at 146. See also Stevens, *Torts and Rights*, above n 2, at 100 (‘a primary obligation triggered by the fulfilment of a condition’).

<sup>101</sup> As Zipursky points out (‘Rights, Wrongs and Recourse’, above n 86, at 59), a legal wrong means that there is ‘a directive legal norm enjoining people from engaging in that act’. We therefore disagree with Gregory Keating when he says that ‘Strict liability in tort ... attaches to conduct that is ... not wrongful’ and that in the case of strict liability ‘the primary obligation is to make reparation for harm fairly attributed to one’s *justified or faultless* conduct’: GC Keating, ‘Is the Role of Tort to Repair Wrongful Losses?’ ch 13 of this book, text following n 83 (emphasis in original). In our view, this is true of liability rules of the kind under discussion, but not of strict liability wrongs such as breach of contract, trespass to land, etc.

<sup>102</sup> cf, eg, Occupiers’ Liability Act 1957 (UK), s 2(1): ‘An occupier of premises owes the same duty, the “common duty of care”, to all his visitors’.

facie answerable for all the damage which is the natural consequence of its escape.<sup>103</sup>

Although the word ‘must’ in this passage might be thought to impose a duty, the qualification ‘at his peril’ could be taken to mean that the person who makes the accumulation is not under a duty to ‘keep it in’, but simply that if he does not do so he will be liable for the damage which it causes. This interpretation is reinforced by the fact that liability under the rule attaches to the person who accumulates the thing that escapes, not the person who causes the escape to occur.<sup>104</sup> It could therefore be argued that a claim under the rule in *Rylands v Fletcher* ‘arises from a primary-liability relation that allocates to D the risk of loss to C without imposing on him a duty to prevent it’.<sup>105</sup>

The existence of liability rules of this kind would only pose a problem for rights theorists if they were making the implausible claim that *all* private law actions arise out of rights violations. Nevertheless, such rules would appear to have taxonomical implications for rights theorists, since if as they argue a tort is a wrong and the law of ‘torts’ is the law of wrongs, then liabilities of this kind are no more the business of tort law than are mistaken payments or claims to general average.<sup>106</sup> If, by contrast, the law of ‘tort’ is thought to concern not only rights violations but also ‘compensation for loss’, then since these are liabilities to make good damage done, they can be seen as falling within the ambit of tort law as so conceived. In addition, the fact that liability rules of this kind are not the result of wrongs may have implications when it comes to substantive questions such as causation and the assessment of compensation. Although the courts sometimes bend the rules on causation to hold a wrongdoer liable, it does not necessarily follow that they should do the same when the defendant is innocent of any wrongdoing. Similarly, the principle that a wrongdoer should make good all the losses flowing from his or her wrong (subject to remoteness principles) does not apply, and more generally the courts should not feel bound in such cases by general principles of compensation which presuppose the existence of a wrong. As Peter Birks pointed out, ‘not-wrongs ... offer no general licence to mistreat the defendant’.<sup>107</sup>

<sup>103</sup> *Fletcher v Rylands* (1866) LR 1 Ex 265 (Exch Cham) 279–80 (Blackburn J).

<sup>104</sup> See K Oliphant (ed), *The Law of Tort*, 2nd edn (London, LexisNexis Butterworths, 2007) para 23-35.

<sup>105</sup> Jaffey, ‘Liabilities in Private Law’, above n 15, at 240. See also Murphy, above n 19, at 400.

<sup>106</sup> Hence, in NJ McBride and R Bagshaw, *Tort Law*, 3rd edn (Harlow, Pearson Education, 2008), the discussion of the rule in *Rylands v Fletcher*, liability under the Consumer Protection Act 1987 (UK) and civil liability for public nuisance is to be found not in the part of the book entitled ‘Torts’, but in the part entitled ‘Alternative sources of compensation’.

<sup>107</sup> P Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 *Oxford Journal of Legal Studies* 1, 33.

We should not leave the topic of rights and liabilities without advertising to the lawyer economists who conceive of the law of tort as *largely composed* of liability rules.<sup>108</sup> As we saw earlier, this conception of tort law is radically at odds with rights analysis, since while rights theorists believe that the duties imposed by private law are duties enjoining ‘citizens to behave in certain ways and to refrain from behaving in other ways’<sup>109</sup> (and conversely that rights conferred by private law are rights that others behave in certain ways and refrain from behaving in other ways), under the liability rule analysis, to say that the defendant has a ‘duty’ to do *x* is just to say that he or she will have to pay a sum of money if they do not, and to say that the claimant has a ‘right’ is just to say that they will have a claim for compensation if they suffer a particular kind of injury.<sup>110</sup> One thing which unites all rights theorists, therefore, and which distinguishes them from the economists, is the belief that rights and duties in private law are *real*, that they are what they appear or claim to be.<sup>111</sup>

## VII. RIGHTS AND REMEDIES

Scholars working in private law commonly draw a distinction between the primary rights that we have against others that they behave in particular ways (eg, that they perform contractual obligations owed to us and do not batter us) and the secondary, remedial rights that arise from the violation of those primary rights (eg, the right to damages for breach of contract or battery). In addition, there is increasing attention being paid in private law scholarship to the nature of the power enjoyed by a person whose rights have been violated to ‘have the state alter the legal relationship between the parties’<sup>112</sup> by instituting legal proceedings, and the correlative liability on the part of the wrongdoer.<sup>113</sup> According to Murphy, Hohfeld would have considered the relationship brought about by the violation of a primary right to be a power/liability relation of this sort, and not a claim right/duty relation, and Murphy himself argues that

<sup>108</sup> See, eg, RA Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29; G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard Law Review* 1089.

<sup>109</sup> Zipursky, ‘Rights, Wrongs and Recourse’, above n 86, at 58.

<sup>110</sup> *ibid.*, at 55–56.

<sup>111</sup> See, eg, Weinrib, *The Idea of Private Law*, above n 20, at 143 (‘liability reflects the defendant’s commission of an injustice. Liability is not therefore the retrospective pricing or licensing or taxing of a permissible act’); Goldberg and Zipursky, ‘Rights and Responsibility’, above n 14, text following n 30 (‘the duties of tort law are not disjunctive duties to forbear or pay ... They are duties of conduct’).

<sup>112</sup> BC Zipursky, ‘Philosophy of Private Law’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press, 2002) 623, 633.

<sup>113</sup> See the work of Zipursky, *ibid.* and below n 115, and Smith, above n 7.

a person who has been wronged does not have a claim right against the wrongdoer that is correlative to a duty on the part of the wrongdoer to pay damages, but only a power to sue, which is correlative to a liability on the part of the wrongdoer that is contingent on the making of a court order.<sup>114</sup> Similarly, Zipursky has argued that it makes no sense to say that a tortfeasor has a duty to pay damages which exists prior to being sued and which is somehow waived if the victim fails to sue.<sup>115</sup>

In fact, however, Hohfeld explicitly distinguished what he called the secondary or remedial right/duty relation from the power/liability relation which we call a right of action. In an article on the nature of stockholders' individual liability for the debts of a corporation, Hohfeld made it clear that in his view the infringement by X of a primary right held by A gives rise to a new legal relationship between X and A in which X is under a secondary or remedial duty to pay damages to A, and that if 'X fails to act under his remedial duty, A has ab initio the power, by action in the courts, to institute a process of compulsion against X.'<sup>116</sup> In other words, although Hohfeld accepted that the right of action itself was a power/liability relation, he regarded this as complementary to, rather than inconsistent with, the notion that the victim of a wrong has a claim right to damages against the wrongdoer which subsists from the time the wrong is committed until the making of a court order.<sup>117</sup> This is also the view of Stevens, who argues that the fact that the right to damages arises immediately upon commission of the wrong, and is not contingent upon the making of the court order, is demonstrated by, for example, the rules governing payments before action and interest on damages awards.<sup>118</sup>

Because we naturally conceive of the law of 'torts' as a law of 'wrongs', it is 'wrongs' that tend to capture our attention and organise our understanding of the subject. Rights analysis offers a valuable corrective to this pattern of thought by forcing us to consider on what, if any, primary rights the notion of wrongdoing depends. Paradoxically, however, the most striking claims of rights theorists, and the most significant implications of rights analysis, may well be those that concern secondary or remedial

<sup>114</sup> Murphy, above n 19, at 397.

<sup>115</sup> BC Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695, 720.

<sup>116</sup> WN Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) 9 *Columbia Law Review* 285, 293–94. We are grateful to TT Arvind for bringing this passage to our attention.

<sup>117</sup> In his chapter in this book, Helge Dedek argues that William Blackstone also recognised the existence of a remedial right distinguishable from the right of action, although in Blackstone's view this right was an incomplete or inchoate one until it was rendered complete and determinate by the intervention of the law, so that the natural remedial right could 'only come into its own with the help of the state': H Dedek, 'Of Rights Superstructural, Inchoate and Triangular: The Role of Rights in Blackstone's *Commentaries*' ch 7 of this book, text following n 201.

<sup>118</sup> Stevens, 'Rights and Other Things', above n 73, text accompanying nn 79–80.

rights, rather than primary rights. That is because it is in the approach to remedies that the contrast between the rights-based model and rival models of private law is at its most stark. According to Andrew Burrows, the rights-based approach to remedies ‘constitutes a radical and novel reinterpretation of the law’<sup>119</sup> and offers explanations of legal rules that are otherwise difficult to justify. As a result, rights-based analysis has ignited debate on a number of significant remedial issues in private law.<sup>120</sup>

There is no difficulty in explaining specific remedies on the rights-based approach: they directly enforce the primary right by giving the claimant the very thing to which he or she is entitled. Indeed, as Stevens has pointed out, the fact that damages are considered inadequate and specific performance justified where the claimant suffers no loss as a result of a breach of contract would seem to indicate that the law is concerned with giving effect to contractual rights, rather than preventing loss.<sup>121</sup> In Stevens’ view, where the primary right cannot or should not be specifically enforced, the claimant is entitled to an award of damages in substitution for the right. These ‘substitutive damages’ represent the value of the right infringed. In this way, the law of damages aims, not to compensate loss, but to give the claimant the ‘next best’ thing to not having the right violated. Stevens substantiates this claim by setting out numerous examples in contract and tort where the law awards damages even though the claimant suffers no loss, in the sense of being ‘factually worse off’, as a result of the violation of his or her rights.<sup>122</sup> It does not follow, however, that the claimant’s loss is irrelevant to the assessment of damages under Stevens’ approach. On the contrary, he makes it clear that in addition to an amount representing the value of the right, a damages award may include consequential loss arising from the infringement of the right.<sup>123</sup>

Determining the value of a right that has been infringed is, in many instances, quite straightforward and simply another way of understanding what courts routinely do. The value of a right can often be assessed by reference to the market price of the thing that is the subject of the right. The value of a contractual right to buy goods at a particular price, for example, is the difference between the contract price and the market price at the time of the breach. In other cases, such as those involving the right to reputation or bodily integrity, the value of a right does not have any ‘naturally correct quantification’, and in these instances ‘the courts have no choice but to set out guidelines’ for its assessment.<sup>124</sup>

<sup>119</sup> A Burrows, ‘Damages and Rights’ ch 10 of this book, text following n 111.

<sup>120</sup> See Burrows, above n 119.

<sup>121</sup> Stevens, *Torts and Rights*, above n 2, at 57.

<sup>122</sup> *ibid.*, at 59–91; Stevens, ‘Damages and the Right to Performance’, above n 29, at 198.

<sup>123</sup> Stevens, *Torts and Rights*, above n 2, at 60–61.

<sup>124</sup> *ibid.*, at 78–79.

Stevens' rights-based approach to damages raises a number of important and controversial issues. He argues, for example, that most examples of 'gain-based' damages awards are better understood as awards in substitution for the right infringed.<sup>125</sup> Nominal damages appear anomalous under a loss-based approach, but can be justified under a rights-based approach on the basis that they are awarded in substitution for a right that is valueless, or that is infringed in an insignificant way.<sup>126</sup> Moreover, Stevens argues that punitive damages are justified not by deterrence considerations, but on the basis that 'the contumacious infringement of a right is more serious' than a less culpable infringement, notwithstanding the fact that the degree of culpability does not affect the value of the right infringed.<sup>127</sup> Damages awarded in substitution for the right therefore depend not only on the value of the right, but also on the manner and circumstances in which the right is infringed. If a rights-based approach requires a person who has infringed a right to restore the value of the right infringed to the victim, however, it is not immediately obvious why the quantum of the award should be affected by the nature of the infringement. It is also noteworthy that other rights theorists, such as Weinrib, have taken the view that exemplary damages have no place in private law, since they 'are geared, not to restoring the plaintiff's rights, but to punishing the defendant'.<sup>128</sup> A number of other objections have been made to Stevens' analysis of damages, and these are dealt with in some detail in the chapters by Burrows (a leading critic of the analysis) and Stevens in this book. Whatever conclusion is reached on the validity of Stevens' approach, there is no denying that it is a good illustration of the profound implications that rights analysis may have for our understanding of particular doctrines of private law.

### VIII. RIGHTS AND POLICY

A significant feature of contemporary rights analysis is a sustained attack on policy-based reasoning. Positive claims about the role of rights in private law often go hand in hand with negative claims about the illegitimacy of policy or community welfare considerations. Indeed, one of the primary motivations behind rights analysis seems to be a desire to rid private law of policy considerations. According to Cane, 'Rights, not policy' is the

<sup>125</sup> *ibid.*, at 79–84; Stevens, 'Rights and Other Things', above n 73.

<sup>126</sup> Stevens, *Torts and Rights*, above n 2, at 84–85; Stevens, 'Damages and the Right to Performance', above n 29, at 194–95. Burrows challenges this rationalisation of nominal damages in 'Damages and Rights', above n 119.

<sup>127</sup> Stevens, *Torts and Rights*, above n 2, at 86.

<sup>128</sup> EJ Weinrib, 'Two Conceptions of Remedies' in CEF Rickett (ed), *Justifying Private Law Remedies* (Oxford, Hart Publishing, 2008) 3, 24. See also A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87.

message of what he terms ‘rights fundamentalism’ reduced to its ‘bare essentials’.<sup>129</sup> While Hohfeld suggested that whether there should be claim rights in a particular situation or relationship was ‘ultimately a question of justice and policy’,<sup>130</sup> this is not a view shared by most contemporary rights theorists. If one takes the view that legal rights are derived from or give effect to moral rights, then policy considerations are irrelevant to the identification or determination of private law rights. For Weinrib, therefore, the illegitimacy of policy considerations is a necessary implication of the idea that moral rights are immanent in the very structure and nature of private law. And while Stevens accepts that the legislature can legitimately create private law rights for policy reasons, he argues that judges can only derive legal rights from moral rights.<sup>131</sup> On these understandings of private law, community welfare considerations can have no role to play in determining the rights that individuals have against each other. Nor can policy considerations serve as a justification for a court not recognising a private law right. To deny the existence of private law rights for reasons of community welfare is to confiscate what is due to the claimant and to treat him or her as a means to the ends of others.<sup>132</sup>

On the views of rights theorists such as Weinrib and Beever, policy considerations are simply irrelevant to the judicial task of identifying private law rights because such rights are based entirely on the considerations of interpersonal morality that are inherent in the principle of corrective justice. Beever himself says that ‘policy concerns are *irrelevant* to the conception of justice that informs the law of negligence’.<sup>133</sup> Nevertheless, Beever has made a very strong collateral attack on policy-based reasoning, and in doing so has put forward arguments similar to those made by Stevens. Beever and Stevens argue that judges lack both the technical competence to determine whether a particular decision is likely to be beneficial or detrimental to the community, and the political legitimacy to make such determinations.<sup>134</sup> Moreover, they say, reasoning by reference to community welfare makes decision-making more difficult, since policy arguments can often be advanced both for and against a particular rule or decision, and require the weighing of incommensurable considerations.<sup>135</sup>

<sup>129</sup> Cane, ‘Rights in Private Law’, above n 94, text following n 26.

<sup>130</sup> Hohfeld, ‘Some Fundamental Legal Conceptions’, above n 52, at 36.

<sup>131</sup> Stevens, *Torts and Rights*, above n 2, at 331.

<sup>132</sup> EJ Weinrib, ‘Does Tort Law Have a Future?’ (2000) 34 *Valparaiso University Law Review* 561, 566; Beever, *Rediscovering the Law of Negligence*, above n 4, at 176–77. See further the discussion in A Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 261, 277–79.

<sup>133</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 29.

<sup>134</sup> *ibid.*, at ch 5; Stevens, *Torts and Rights*, above n 2, at ch 14. See further Robertson, ‘Rights, Pluralism and the Duty of Care’, above n 33.

<sup>135</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 173–75; Stevens, *Torts and Rights*, above n 2, at 310.

Although, for the reasons given above, these collateral attacks on policy reasoning may not be necessary for some rights theorists, the vociferousness and persistence of arguments of this kind are significant features of much contemporary rights analysis of private law.

As noted above, the analysis of private law and private law doctrines by reference to rights does not necessarily involve a complete rejection of policy-based reasoning. Some rights theorists accept that collective interests have a legitimate role to play in determining what private law rights should be recognised by the courts. In chapter 12 of this book, for example, McBride argues that it is not a necessary feature of a rights-based theory of tort law that it makes no reference to the public interest. For McBride, the function of tort law is to make the world a better place by granting people rights that they can assert against others, and remedies to uphold those rights, and it would be irresponsible for the courts to disregard the public interest when deciding what rights should be recognised.<sup>136</sup> Perry has also advocated a pluralist rights-based understanding of tort law. This pluralism, Perry suggests, could take the form of a 'lexically ordered hierarchy' in which interpersonal moral considerations are given priority, but instrumental considerations such as deterrence or loss-spreading are brought into play when 'indeterminacy strikes' in the application of those lexically prior considerations.<sup>137</sup> Rights-based pluralism can also take the form of a relational approach to the identification of prima facie rights, which are defeasible on community welfare grounds. Pluralism of this kind is exemplified by the two-stage approach to the duty of care in negligence, which focuses primarily on relational considerations, but allows a prima facie duty to be overridden by policy considerations where recognition of the duty would be detrimental to community welfare.<sup>138</sup>

## IX. RIGHTS AND CORRECTIVE JUSTICE

The relationship between rights and corrective justice in private law theory is a complex one. As Cane points out in his chapter in this book, corrective justice theories were developed from the 1970s on in response to economic analysis of private law which was forward-looking and instrumentalist.<sup>139</sup> By contrast, corrective justice theorists adopted a backward-looking internalist conception of private law as a form of interpersonal morality

<sup>136</sup> McBride, 'Rights and the Basis of Tort Law', above n 13, text accompanying n 29, citing R Bagshaw, 'Tort Law, Concepts and What Really Matters' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 239.

<sup>137</sup> SR Perry, 'Professor Weinrib's Formalism: The Not-So-Empty Sepulchre' (1993) 16 *Harvard Journal of Law and Public Policy* 597, 618–19.

<sup>138</sup> See Perry, 'The Role of Duty of Care', above n 10, at 83–91 and the discussion in Robertson, 'Rights, Pluralism and the Duty of Care', above n 33.

<sup>139</sup> Cane, 'Rights in Private Law', above n 94, text accompanying n 22.

concerned with the *relationship between the parties*, as opposed to the parties ‘as solitary individuals or as members of a wider community’.<sup>140</sup> A narrow and a broad conception of corrective justice can be identified.<sup>141</sup> The narrow version of corrective justice conceives it as concerned solely with the *rectification* of injustices inflicted by one person on another.<sup>142</sup> This conception of corrective justice is of limited significance for private lawyers, since it purports to explain only the secondary obligations or duties of repair generated by breaches of primary obligations, and not the primary obligations themselves.<sup>143</sup> The second conception of corrective justice is broader, and conceives it as concerned with the ‘justice of interactions between individuals’ more generally.<sup>144</sup> On this conception, corrective justice not only tells us how the law should respond to an interpersonal injustice but also what amounts to an interpersonal injustice in the first place.<sup>145</sup> Since the terminology of ‘corrective’ justice implies the narrower conception, adherents of the broader conception have suggested that terms such as ‘interactive justice’<sup>146</sup> or ‘interpersonal justice’<sup>147</sup> could be used instead. Corrective justice on either conception can be distinguished from distributive justice, which, according to Weinrib, ‘deals with the sharing of a benefit or burden’ and ‘involves comparing the potential parties to the distribution in terms of a distributive criterion’.<sup>148</sup>

Some of the most prominent corrective justice theorists explicitly rely upon the idea of correlative rights and duties in their analysis of private law. According to Weinrib, for example, ‘Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions’,<sup>149</sup> and in sophisticated systems of private law, ‘the overarching justificatory categories’ expressive of this correlativity ‘are those of the plaintiff’s rights and the defendant’s corresponding duty not to interfere with that right’, with the injustice that liability rectifies consisting in the defend-

<sup>140</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 46. For a useful summary of the corrective justice idea, see Weinrib, ‘Corrective Justice in a Nutshell’, above n 10.

<sup>141</sup> See Stevens, *Torts and Rights*, above n 2, at 327–28.

<sup>142</sup> See, eg, J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, Oxford University Press, 2001) 32.

<sup>143</sup> See Stevens, ‘Rights and Other Things’, above n 73, text accompanying n 114, describing this ‘weak or thin’ version of corrective justice as ‘a trite claim of little importance’.

<sup>144</sup> See, eg, RW Wright, ‘Substantive Corrective Justice’ (1992) 77 *Iowa Law Review* 625; Beever, *Rediscovering the Law of Negligence*, above n 4, at ch 2.

<sup>145</sup> See, eg, Beever, *Rediscovering the Law of Negligence*, above n 4, at 59 (defining corrective justice as ‘that area of morality that determines how individuals should behave with respect to each other as individuals’). See also Smith, ‘The Rights of Private Law’, above n 7, at 115 (referring to the argument that ‘the idea of rectification contains within it, or at least is predicated upon, a particular understanding of wrongs and injustices and thus of the kinds of non-rectificatory duties the law should uphold’).

<sup>146</sup> RW Wright, ‘Private Nuisance Law: A Window on Substantive Justice’ ch 17 of this book, text accompanying n 4.

<sup>147</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 61.

<sup>148</sup> Weinrib, ‘Corrective Justice in a Nutshell’, above n 10, at 351.

<sup>149</sup> *ibid.*

ant's 'having something or having done something that is incompatible with a right of the plaintiff'.<sup>150</sup> Rights, he argues, are therefore 'the normatively decisive components of the relationship between the parties in private law'.<sup>151</sup> The relationship between corrective justice and rights is also particularly marked in the work of Beever, whose rights-based theory of negligence law is expressly founded on the idea of corrective justice in the broad sense, which he defines as 'an area of interpersonal morality that both defines rights persons possess against each other as individuals and elucidates how one should respond to violations of those rights'.<sup>152</sup> As Goldberg and Zipursky point out, therefore, corrective justice theorists 'invoke the concept of right to fill out the key notions of wrongdoing, duty, and repair'.<sup>153</sup>

The strength of the relationship between rights and corrective justice is also indicated by the fact that some liability rules which do not embody a right/duty relation may be difficult to analyse in corrective justice terms, and may be better understood as being grounded in *distributive* justice. As Weinrib makes clear, one of the defining characteristics of corrective justice is that 'it links two parties and no more because a relationship of correlativity is necessarily bipolar',<sup>154</sup> whereas distributive justice 'admits any number of parties because, in principle, no limit exists for the number of persons who can be compared and among whom something can be divided'.<sup>155</sup> It follows, therefore, that a liability rule such as the one laid down by section 2 of the Consumer Protection Act 1987 (UK)—which imposes liability on a range of parties involved in the production and distribution of a defective product—may be more easily explicable as instantiating distributive, rather than corrective, justice. It does not necessarily follow, however, that all injustices which require correction are rights violations. Hence while the law of unjust enrichment has been explained in terms of corrective justice,<sup>156</sup> the orthodox view is that liability in unjust enrichment is not grounded on the violation of a primary right.<sup>157</sup>

<sup>150</sup> *ibid.*, at 352. See also Weinrib, *The Idea of Private Law*, above n 20, at 144 ('the intrinsic unity of the private law relationship can be seen in private law's embodying in its structure, procedure, and remedy the correlativity of right and duty').

<sup>151</sup> Weinrib, 'Two Conceptions of Remedies', above n 128, at 11. See also Weinrib, 'Corrective Justice in a Nutshell', above n 10, at 352, where he states that in negligence it is not enough that the defendant's negligent act resulted in harm to the plaintiff, since the 'harm has to be to an interest that has the status of a right'.

<sup>152</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 56.

<sup>153</sup> Goldberg and Zipursky, 'Rights and Responsibility', above n 14, text accompanying n 20.

<sup>154</sup> Weinrib, 'Corrective Justice in a Nutshell', above n 10, at 351.

<sup>155</sup> *ibid.*, at 351–52.

<sup>156</sup> See, eg, EJ Weinrib, 'Restitutory Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1; L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115.

<sup>157</sup> Although note that Weinrib, *The Idea of Private Law*, above n 20, at 141, describes the *retention* of the enrichment by the defendant as 'an infringement of the plaintiff's right'.

Similarly, Stevens describes the general liability clause of the French *Code Civil*, Article 1382, as ‘a principle of corrective justice’ even though the article makes no mention of any rights violation.<sup>158</sup>

If Stevens is right, then it would seem to follow that a commitment to private law as a form of corrective justice does not *necessarily* entail reliance on rights and duties as fundamental elements of the private law mosaic, even if in practice corrective justice theorists do tend to treat them as such. Conversely, not all ‘rights theorists’ rely on the concept of corrective justice in their scholarship, and some are explicitly critical of it. Stevens, for example, dismisses the narrow conception of corrective justice as ‘trite’,<sup>159</sup> and describes the broad conception as ‘implausible’, because the ‘scope of our rights is not solely determined by considerations of what is fair as between claimant and defendant, ignoring all others’.<sup>160</sup> Similarly, although Goldberg and Zipursky are rights theorists who argue in their chapter in this book that thinking about ‘torts in terms of rights ... will provide a more accurate account of tort law’s structure’ and will also ‘enable us to attain a greater appreciation of tort law’s normative underpinnings’,<sup>161</sup> they reject ‘the central metaphor of corrective justice’ on the grounds that it suggests that the state is ‘aiming to achieve justice by itself rectifying private wrongs’; in their view, by contrast, ‘the state, through tort law, empowers private parties to redress wrongs done to them, if they so choose’.<sup>162</sup> While, therefore, the linkages between rights and corrective justice in private law theory are undoubtedly strong ones, and many rights theorists could also be described as corrective justice theorists, it would be a mistake to treat rights theories of private law and corrective justice theories of private law as synonymous.

## X. RIGHTS AND TAXONOMY

There are always different ways of categorising and organising the norms which exist within any normative system,<sup>163</sup> and private law is a case in point. What implications, if any, does rights analysis have for the taxonomy of private law? As we saw earlier, general rights such as the ‘right to reputation’ and the ‘right to bodily integrity’ are themselves taxonomic devices, ways of organising norms on the basis of the interests which the various norms in the system reflect.<sup>164</sup> Because rights theorists are anxious to emphasise the centrality of rights in private law, they tend to favour

<sup>158</sup> Stevens, ‘Rights and Other Things’, above n 73, text following n 112.

<sup>159</sup> See above n 143.

<sup>160</sup> Stevens, *Torts and Rights*, above n 2, at 328.

<sup>161</sup> Goldberg and Zipursky, ‘Rights and Responsibility’, above n 14, text following n 1.

<sup>162</sup> *ibid.*, text following n 48.

<sup>163</sup> Penner, above n 61, at 311.

<sup>164</sup> *ibid.*, at 312.

a rights-based classification of private law. A good example of this is Stevens' view that the law of torts should be classified according to the primary right which has been infringed.<sup>165</sup> It is clear that by 'primary right', Stevens does not mean what he calls 'specific claim rights'<sup>166</sup> (such as the right not to be battered) but what he calls 'the claim rights which arise together for a common reason and which are specific to a larger bundle of different species of rights',<sup>167</sup> such as the rights to 'bodily safety', 'freedom of movement', 'reputation' and so on.<sup>168</sup> In practice, common law systems have tended to adopt a mixed approach, with a series of discrete nominate torts which are consistent with Stevens' taxonomy (the various forms of trespass, private nuisance, defamation, deceit, conversion, etc) operating alongside the tort of negligence, the scope of which is determined solely by the nature of the defendant's conduct. Unsurprisingly, therefore, Stevens favours the dismantling of what he calls the '*über*-tort' of negligence,<sup>169</sup> with cases of negligently caused personal injury being classified with battery, cases of negligently caused damage to personal property with conversion and trespass to goods, and so on.

In his chapter in this collection, Stevens makes what appears to be a stronger taxonomic claim, namely that:

[W]here the reason for the existence of the right is the same, the same wrong is committed. Infringements of the same right involve the same kind of wrong ... Conversely where different rights are infringed, different wrongs are committed.<sup>170</sup>

Again, here Stevens is obviously referring to rights in his general sense, but this time he is using the 'reason for the existence of the right' not only as a way of classifying different torts but as a way of defining what a tort is in the first place. In other words, whereas previously he seemed to be saying that we should classify the *wrongs* of conversion, trespass to goods and negligently causing damage to personal property together, he now seems to be saying that there is just one *wrong* of 'wrongful interference with personal property'. Furthermore, since the only example he gives of a reason for the existence of a general right is 'possession' as the reason for the existence of property rights,<sup>171</sup> it seems to follow that in his view even this approach would be overly specific, as there is just one general 'right to property' and hence just one wrong of 'violation of the

<sup>165</sup> Stevens, *Torts and Rights*, above n 2, at 299.

<sup>166</sup> *ibid.*, at 4.

<sup>167</sup> *ibid.*

<sup>168</sup> See *ibid.*, at 303, for the full list. Note that Stevens is careful not to refer to protected interests here, since he takes the view that 'one right may protect a number of different interests' and that 'one interest can be concurrently protected by a variety of different rights' (at 290).

<sup>169</sup> *ibid.*, at 295.

<sup>170</sup> Stevens, 'Rights and Other Things', above n 73, text following n 91.

<sup>171</sup> *ibid.*

general right to property'. Quite where that leaves the traditional division between real and personal property rights, not to mention the various different 'torts' on either side of the divide, is unclear.<sup>172</sup>

If we step back from the classification of torts to consider the 'law of torts' as a category in itself, we can see that the taxonomic implications of rights analysis are perhaps more radical than some rights theorists themselves appear to realise. Stevens, for example, defines the law of torts as 'concerned with the secondary obligations generated by the infringement of primary rights'.<sup>173</sup> This definition is, however, both over- and under-inclusive. It is over-inclusive because it follows that breaches of contract fall within the law of torts, and yet Stevens accepts that this is not the general understanding, and himself distinguishes breach of contract from torts.<sup>174</sup> More significantly, Stevens' definition is radically under-inclusive because it takes no account of the important role which the law of torts plays in determining the content of our primary rights.<sup>175</sup> This role is most obvious when it comes to those innate primary rights which we are owed simply by virtue of residing in a particular jurisdiction, such as claim rights protecting bodily integrity, freedom of movement, reputation and so forth. However, tort law also plays an important role when it comes to determining the content of acquired primary rights, such as property rights. This is because the law of trespass to land, private nuisance, conversion and so forth to a considerable extent tells us what the content of our primary property rights *actually is*.

Moving out to consider the relationship between tort and contract, again it becomes clear that rights analysis has significant taxonomic implications. Prominent rights theorists take the view that assumptions of responsibility which fall short of contract nevertheless create new primary rights and duties. They argue that this explains why although there is no general right not to suffer negligently inflicted economic loss, and no general right that others take reasonable steps to confer benefits on us, nevertheless liability can sometimes arise where the defendant has negligently inflicted economic loss or failed to confer a benefit by, for example, failing to take reasonable steps to rescue a claimant in peril. In these cases, it is argued, the source of the right is a prior assumption of responsibility by the defendant towards the claimant.<sup>176</sup> If this is correct,

<sup>172</sup> Perhaps sensing the radical implications of this analysis, Stevens seems to backtrack slightly, referring to the negligent and deliberate smashing of a car not as the same wrong, but as the *same sort of wrong*: *ibid*, text following n 92. As a result, the taxonomic implications of his analysis are rendered even less clear.

<sup>173</sup> Stevens, *Torts and Rights*, above n 2, at 2.

<sup>174</sup> *ibid*, at 11.

<sup>175</sup> While this is true of Stevens' definition of the law of torts at the start of his book, it is not true of his work as a whole. For a more nuanced analysis, which highlights the ambiguous scope of 'the law of torts', see the discussion in *ibid*, at 300.

<sup>176</sup> See, eg, Beever, *Rediscovering the Law of Negligence*, above n 4, especially at ch 8; Stevens, *Torts and Rights*, above n 2, especially at 9–14, 114–24.

then the primary right created by the assumption of responsibility would appear to have more in common with contractual rights than with innate 'personal rights' such as the right not to be battered.<sup>177</sup>

When it comes to classifying primary legal rights, arguably the two most fundamental distinctions are between rights that are innate and rights that must be acquired, and between rights that are good against everyone and rights which are good only against particular persons (in Hohfeld's terminology, 'paucital' rights and 'multital' rights<sup>178</sup>). 'Personal' rights and rights created by an assumption of responsibility fall on different sides of *both* these dividing lines. It follows that although on a conduct-based classification it may make sense to categorise fault-based obligations arising out of assumptions of responsibility along with other fault-based obligations, on the rights-based view of private law it seems more logical to classify primary rights which arise out of contracts, undertakings and other consensual acts (including assumptions of responsibility) separately from primary rights which do not.

That brings us to the novel and interesting taxonomy of private law in Beever's book *Rediscovering the Law of Negligence*.<sup>179</sup> As far as property rights are concerned, Beever argues that the law of tort only 'enforces' primary property rights which are 'recognised by' property law, saying for example that 'in conversion, the claimant's primary right is a matter determined entirely by the law of property and about which tort law is silent'.<sup>180</sup> On its face, this appears to suggest that both the existence *and the content* of primary property rights are determined entirely by the law of property, which we have seen cannot be true, because the content of such rights must also be determined by reference to the causes of action that lie for their violation.<sup>181</sup> In any case, when it comes to personal rights such as the right to bodily integrity, Beever acknowledges that tort law both 'recognises' and 'protects' the right,<sup>182</sup> and this insight means that he is able to develop a classificatory scheme which seems better suited to the rights-based approach to private law than previous schemes based on Roman law taxonomies which did not even acknowledge the distinction between primary and secondary rights.<sup>183</sup>

Beever's scheme is organised around three main categories: Property, the Law of Persons and Consents.<sup>184</sup> An alternative way of expressing

<sup>177</sup> See Beever, *Rediscovering the Law of Negligence*, above n 4, at 282.

<sup>178</sup> WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710, 716.

<sup>179</sup> Beever, *Rediscovering the Law of Negligence*, above n 4.

<sup>180</sup> *ibid*, at 213.

<sup>181</sup> See further on this point (in the context of private nuisance) Nolan, above n 4.

<sup>182</sup> Beever, *Rediscovering the Law of Negligence*, above n 4, at 213.

<sup>183</sup> See, eg, P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1.

<sup>184</sup> The most fully developed version of Beever's scheme is to be found in Beever, *Rediscovering the Law of Negligence*, above n 4, at 311, although he acknowledges that even this version is not complete. It does not, for example, include unjust enrichment.

this threefold classification would be by reference to the primary rights themselves: for this, we could use the labels personal rights, property rights and consensual rights. In the light of the two apparently fundamental distinctions identified above, we might then define these rights as innate rights which we enjoy simply by virtue of residing within a particular jurisdiction<sup>185</sup> (*personal* rights, tracking a ‘law of persons’), acquired rights good against everyone (*property* rights, tracking a ‘law of property’), and acquired rights good only against particular persons (*consensual* rights, tracking a ‘law of consents’). On this approach, it is hard to see the need for any separate distinction between rights in rem and rights in personam (although Beever himself is reluctant to let it go) and the civilian distinction between the law of property and the law of obligations collapses.<sup>186</sup> Of course, not everyone will agree that even on the rights-based approach this is the best way of classifying private law, and rights sceptics are most unlikely to think that it is. The fact remains, however, that taking rights analysis seriously would appear to have very significant taxonomic implications.

## XI. RIGHTS AND THE STATE

We must finally consider the role of the state in a rights-based understanding of private law. Some rights theorists, such as Beever, argue that private law rights exist independently of the state.<sup>187</sup> The more orthodox view is that private law rights exist only if and to the extent that the state is willing to recognise and enforce them. This gives rise to the question of whether a person has a right against the state that the state realise that person’s private law rights against other individuals. This question can be answered at three levels: first, at the level of claim rights or ordinary domestic law; secondly, at the level of constitutional rights; and thirdly, at the level of moral rights.

First, as a matter of positive law, an individual could be said to have a right against the state that the state give effect to rights against other individuals through the granting of those remedies that are available as of

<sup>185</sup> See Smith, ‘The Rights of Private Law’, above n 7, at 133. As Birks pointed out, ‘Most of us enter the jurisdiction by birth’ (‘Rights, Wrongs, and Remedies’, above n 107, at 22).

<sup>186</sup> This is most clearly observable when torts such as private nuisance and conversion are analysed in rights terms: see Nolan, above n 4, part XI; S Green, ‘Rights and Wrongs: An Introduction to the Wrongful Interference Actions’ ch 18 of this book, text accompanying n 77 (criticising a purported bright line distinction between ‘torts’ and ‘property’).

<sup>187</sup> Beever, ‘Our Most Fundamental Rights’, above n 48. This was also Immanuel Kant’s view, although for Kant private law in the state of nature remained ‘necessarily imperfect’ because of the ‘inherent defects, the lack of concreteness of the regulations of natural law’: Dedek, above n 117, text accompanying n 207.

right.<sup>188</sup> This could be characterised as something analogous to a Hohfeldian claim right in the sense that it is correlative to a duty owed by the state to provide those remedies. Smith suggests that claimants hold ‘action rights’ of this kind against courts: ‘When claimants argue that they have a right to a particular “remedy” from the court, they are arguing that the law requires that the *court* do something—namely, make an order against the defendant.’<sup>189</sup> To the extent that this can accurately be characterised as an obligation on the part of the state, it is an obligation that is limited to redressing such wrongs as are recognised by the state through the granting of remedies that the state recognises as being available as of right. This obligation does not, therefore, require the state to recognise or give effect to any particular rights other than those recognised by the legal system in question.

The second kind of right that an individual may be said to have against the state is a constitutional right, or right under a human rights instrument, that the state recognise certain private law rights against other individuals. In most instances such rights against the state are procedural, and require only that the state provide access to a court and due process in the realisation of whatever private law rights are recognised under domestic law. Article 6 of the European Convention on Human Rights, for example, provides that everyone is entitled to a fair, public and timely hearing before an independent tribunal ‘[i]n the determination of *his civil rights and obligations*’.<sup>190</sup> Although in *Osman v United Kingdom*<sup>191</sup> the European Court of Human Rights appeared to interpret Article 6 as creating more than a merely procedural entitlement, the Court subsequently confirmed that Article 6 ‘does not itself guarantee any particular content for (civil) “rights and obligations” in the substantive law of the Contracting States’.<sup>192</sup> In some instances a constitutional right against the state can affect the content of private law rights, and oblige the state to maintain or implement a regime of private law rights that conforms to particular constitutional norms.<sup>193</sup> In chapter 4 of this book, François du Bois gives the example of the ‘*Bürgerschaft*’ decision in Germany, in which an ‘ordinary’ court upheld an exceptionally onerous guarantee contract on the basis that the creditor was not obliged to inform the surety of the risk she was running or to ensure that she understood the obligations she was

<sup>188</sup> The situation is of course more complicated with remedies that can be characterised as discretionary: see Smith, ‘The Rights of Private Law’, above n 7, at 119.

<sup>189</sup> *ibid* (emphasis in original).

<sup>190</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 6(1) (emphasis added).

<sup>191</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>192</sup> *Z v United Kingdom* (2002) 34 EHRR 3 [87].

<sup>193</sup> See JCP Goldberg, ‘The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs’ (2005) 115 *Yale Law Journal* 524.

undertaking.<sup>194</sup> This decision of the ordinary court was later found by the German Constitutional Court to have infringed the surety's constitutional right to autonomy and the principle of the 'social state'. In cases such as this, the state is required to recognise and give effect to such private law rights as are necessary to ensure compliance with individuals' constitutional rights.

At the third level, an individual may be said to have a moral right against the state that the state realise his or her private law rights. Zipursky and Goldberg have suggested that we do enjoy such a moral right.<sup>195</sup> Their argument is based in part on John Locke's *Second Treatise on Civil Government*,<sup>196</sup> and can relevantly be summarised as follows. In the state of nature, individuals have a right of self-preservation, which includes an entitlement to retaliate or seek reparation for wrongs done to them by others. By entering into civil society, individuals entrust to the state the power to redress injury caused by wrongdoing. In social contract terms, individuals are said to relinquish their entitlement to retaliate for wrongs in return for the state's commitment to provide an avenue of civil recourse. To put it another way, if the state insists that individuals do not retaliate in response to wrongs, then the state has an obligation to provide an avenue of redress, and an individual who is wronged has a correlative right, grounded in natural law or political morality, against the state. This argument therefore depends on the existence of two particular moral rights: a moral right to reparation from wrongdoers in a state of nature; and a moral right of civil recourse against the state if the freedom to seek reparation directly is taken away. As with all alleged moral rights, the existence of these two rights is inevitably contestable. It should also be apparent that Goldberg and Zipursky's theory of civil recourse differs markedly from corrective justice theories of private law, because while the latter are theories of interpersonal justice, their civil recourse theory is primarily concerned not with interpersonal justice per se, but with the obligation of the state 'to provide a body of law that defines wrongs and empowers victims of wrongs to respond to those who have wronged them'.<sup>197</sup>

Goldberg and Zipursky's idea that the state has an obligation to provide an avenue of civil recourse to a person who has been wronged

<sup>194</sup> Bundesverfassungsgericht [German Constitutional Court], 1 BvR 567/89, 1 BvR 1044/89, 19 October 1993 reported in (1993) 89 BVerfGE 214 (cited by F du Bois, 'Social Purposes, Fundamental Rights and the Judicial Development of Private Law' ch 4 of this book, text accompanying n 64).

<sup>195</sup> Zipursky, 'Philosophy of Private Law', above n 112, at 637-40; Goldberg, above n 193, 541-44; Goldberg and Zipursky, 'Rights and Responsibility', above n 14.

<sup>196</sup> J Locke, *Two Treatises of Government* (London, 1690) book 2.

<sup>197</sup> Goldberg and Zipursky, 'Rights and Responsibility', above n 14, text accompanying n 44.

also draws support from William Blackstone's *Commentaries*.<sup>198</sup> As Helge Dedek shows in his chapter in this book, this focus on the triangular relationship between the victim of a wrong, the wrongdoer and the state was a marked feature of Blackstone's seminal work on English private law.<sup>199</sup> Dedek argues that for Blackstone the very purpose of forming societies and states was to safeguard those rights which antedate societies, so that the 'principal aim and sole justification' of the state was the protection of rights.<sup>200</sup> It followed that for Blackstone citizens did indeed have a right to the establishment of institutions which ensured effective protection of their rights, and that government had a correlative duty to 'take the measures and create the institutional framework' that would guarantee such protection.<sup>201</sup> According to Dedek, Blackstone recognised that the citizen has a right against the state not only to an institutional framework for the protection of what we now call primary rights, but also to a particular remedial response from the state to the infringement of those rights. For Blackstone, from the moment of injury the victim of a wrong has an inchoate right against the wrongdoer to compensation, and that right is perfected only through the intervention of the state.<sup>202</sup> Dedek's chapter, along with others in this book, suggests both that private law rights have an important role to play in any fully developed theory of the state, and that the state has an important role to play in any fully developed theory of private law.

<sup>198</sup> Zipursky, 'Philosophy of Private Law', above n 112, at 641-42; Goldberg, above n 193, 545-59.

<sup>199</sup> Dedek, above n 19.

<sup>200</sup> *ibid.*, text accompanying n 151.

<sup>201</sup> *ibid.*, text accompanying n 174.

<sup>202</sup> *ibid.*, text accompanying n 183.