The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation

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“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property[.]”

The thesis of this article is simple and startling: equity, acceding to persistent commercial pressure, has effectively eliminated the divide between property and obligation, or between property rights and personal rights. Equity has achieved this

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* This material was first published in Equity in Commercial Law (Simone Degeling & James Edelman eds., Thomson Lawbook Co. 2005), and is republished with very minor amendments here with the permission of the publishers and editors.

1. WILLIAM BLACKSTONE, 2 COMMENTARIES *2.
in partnership with the common law and statute, but equity initiated the process and played a dramatic and innovative developmental role.

This idea that there has been a collapse of boundaries is no mean assertion, especially given the widely perceived importance of property, and the general assumption that there is a sharp doctrinal and functional divide between property and obligation. Most lawyers are familiar with Professor Sir Roy Goode’s 1987 article on ownership and obligation. He notes that all legal systems sharply distinguish “property rights from mere personal rights to the delivery or transfer of an asset. I own property; I am owed performance of a transfer obligation.” Important consequences follow from the distinction, or so we always assume.

_**Lawyers are not the only ones to observe the division. Economists, too, are passionate advocates:**_

Property rights . . . are among the most critical social institutions, providing the basis for resource-use decisions and for the assignment of wealth and political power. As such, the property regime profoundly influences both economic performance and income distribution in all economies. Property rights define the accepted array of resource uses, determine who has decision-making authority, and describe who will receive the associated rewards and costs of those decisions. Accordingly, the prevailing system of property rights establishes incentives and time horizons for investment in physical and human capital, production, and exchange. Cross-country differences in property rights result in important differences in economic development and growth . . . . The property-rights structure is also critical for the environment and natural resource use . . . [and] for establishing and protecting individual social and political rights within a society.

All this warms the hearts of property lawyers. But doubts soon surface. Fifteen pages later, this same economist notes that “[i]t is useful to view property rights as contractual outcomes negotiated by parties . . . .” And Goode, still focusing on the divide between “owe” and “own,” observes a mere five pages into his analysis that “most obligations owed by B to A to transfer an asset to A are _proprietary_ in nature rather than merely personal . . . .” He puts this down to equitable developments.

The difficulties are equally clear to many undergraduates. The typical common law classification scheme suggests that property is divided into real and personal property; personal property is, in turn, divided into choses in possession and choses in action (tangible and intangible property respectively). And then comes the rub.

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4. _Id._ (citation omitted).
5. _Id._ at 155.
7. It is possible to make the scheme more specific by dividing personal property first into chattels real
Not all choses in action are property: put more starkly, not all obligations are property. Those “chooses” that are not property, or “property rights,” are merely personal rights, or personal obligations. The boundary is never defined. Indeed, it is often described as subject to revision according to social and political norms.

Lack of a definitive boundary does nothing to diminish academic vigour in asserting the importance of the divide. This is not a matter of pure semantics or irrelevant jurisprudence. The distinction is critical for the very practical reason that property rights appear better protected than personal rights. Criminal law, tort law, and public/constitutional law may all afford property rights additional protection, but the starkest illustrations of the benefits of property rights are seen as insolvency protection, and as the opportunity to recover windfall gains (or unauthorised profits) when property rights have been misused. These special protective rights are not unqualified, but the general perception is that they operate to protect property rights, not personal rights.

It contradicts this perception to suggest that the supposed divide between property and obligation (and especially between proprietary and non-proprietary intangibles) is no longer sustainable. In supporting this claim, this chapter proceeds in two parts. The first part considers the historical development of a dramatically expanded notion of property. It shows how obligations, or personal rights, have been increasingly treated as property. The second and longer part demonstrates how each of the traditional tests commonly regarded as useful in distinguishing between property and obligation is disintegrating. Attributes once thought to be specific to “property” are increasingly being accorded to all manner of rights. In sum, these two parts suggest that not only is the class of property rights expanding, but that rights that continue to be labeled as “personal” are receiving “proprietary” protection. In short, the doctrinal and functional divide between property and obligation is disappearing.

I. EXPANDING THE NOTION OF PROPERTY: TURNING OBLIGATION INTO PROPERTY

The goal in this section is simply to show that, over time, certain types of once purely personal obligations have come to be treated as property. The transition has been largely the result of equity’s incursions, although common law and statutory developments have supported and reinforced the change. The assertion is not controversial, and the detail needs only to be summarised here. Of course, the assertion depends on the definition of property. This issue is revisited in the next section, where some of the most commonly accepted divisions between property and obligation are examined. For the moment, it is enough to adopt the widely accepted notion that property is “usable wealth.” From amongst a long list of rights of

(leases) and chattels personal (other), and then dividing the latter into choses in possession and choses in action. Choses in action can then be further subdivided into documentary intangibles and pure intangibles, but neither of these complications affects the point being made.

8. For further detail, see SARAH WORTHINGTON, EQUITY 51-86 (2003) [hereinafter WORTHINGTON, EQUITY] (arguing that equity has dramatically expanded the notion of property, not that there is no longer a division between proprietary and personal rights). See also SARAH WORTHINGTON, PERSONAL PROPERTY LAW: TEXT AND MATERIALS chs.1, 8 (2000) [hereinafter WORTHINGTON, PERSONAL PROPERTY LAW] (providing a more general discussion).
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enjoyment typically associated with ownership or other proprietary interests, the choice is made that the truly essential features of property rights are that right-holders can transfer their rights, and can exclude third parties from interfering with their rights. These twin attributes of “transferability” and “excludability” characterise property rights. Put another way, those with property rights can control allocation and access.

The early common law approach was to accord proprietary status to real property (land) and to tangible personal property (goods), but not to intangible property. Intangible property was not assignable; it was not usable wealth. This boundary between property and obligation accords with the (now crude) view of property as a “thing.” Tangible “things” were accorded proprietary advantages and proprietary protection; intangible “things” were characterised as personal rights against specific parties, and were not regarded as proprietary.

Equity completely overturned this state of affairs. It dramatically expanded the category of “property,” or proprietary rights, by acting on two fronts. The story is well known. First, it permitted the assignment of “personal obligations” that were unassignable at common law. Debts, shares, and other contractual claims thus became usable wealth. The possibility was further extended to include rights to future benefits: claims to future dividends, interest payments, royalties and such could all be sold immediately for value, in advance of entitlement to the underlying payment. In this way, future benefits could be capitalised immediately and put to their most efficient use by those agreeing to the exchange.

Sceptics might suggest that this expansion is too limited to contribute to the agenda suggested here. It permits the assignment of the benefits of personal contracts; the burdens remain with the original obligor. To take the simplest of examples, a creditor can assign the benefit of the debt owed to her, but the debtor cannot assign his obligation to pay his creditor unless, of course, his creditor consents to substitute performance from the transferee. However, this rather limited form of assignment of benefits, not burdens, accords with the predominant commercial pressure to convert these contractual rights into “usable wealth.” It is the benefits, not the burdens, that the parties are keen to assign, so as to capitalise their value. Indeed, precisely analogous rules apply to transfers of tangible property, where it is exceedingly difficult (although not impossible) to ensure that positive burdens run with the property. Buyer One may agree with his Seller that the fire breaks will be cleared annually on his newly acquired farm, or that an artistic object will be displayed only in certain ways. If the farm or the artwork is transferred to a new buyer, Seller can rarely insist that Buyer Two comply with the same restrictions,

11. See Worthington, Equity, supra note 8, 51-86 (explaining that all of these new rights are uncontroversially regarded as assignable, and also as attracting some powers to exclude third parties).
12. It is important to take care, of course, not to contract to transfer the money to be received in the future, but rather to transfer the existing right to the future income stream. See Norman v. Fed. Comm’t of Taxation (1963) 109 C.L.R. 9 (Austl.).
13. The three-way agreement between debtor, creditor, and transferee is typically achieved by novation of the original debtor/creditor contract.
unless the two have contracted directly with each other to that effect. In some circumstances, this inability to ensure that positive burdens run with tangible and intangible assets can reduce the economic value of the assets in question. The next section makes it clear that all three branches of the law—equity, common law, and statute—have made advances to improve matters on this front, while balancing the need to protect Buyer Two from unexpected burdens. But the difficulties across the board only serve to reinforce the similarities in treating tangible and intangible assets as “property.”

As well as expanding the class of rights that were assignable, equity’s second strategy was simply to create completely new forms of property. It did this by permitting novel divisions of certain “bundles of rights” (property rights) that the common law had previously regarded as indivisible, and then, over time, re-classifying these novel bundles as “property” rather than “obligation.”

To understand this second strategy, it is necessary to go back a step. Dividing property between different parties is commercially attractive. At common law, such divisions are possible. Tangible things (land and goods) can be co-owned, with several owners sharing the sum total of the relevant property rights. In the simplest case, a division of rights between co-owners can give them interests that are qualitatively the same, even if quantitatively different. Co-ownership of a horse, for example, might divide ownership rights ½: ¼: ¼. More sophisticated strategies allow different parties to have different types of interests in the same asset, not merely different shares of the interest. With tangible personal property, the common law allowed the parties to split ownership and possession between different parties. With land, the common law went even further and allowed different parties to have sequential ownership interests along a time-line, via the doctrine of estates. In this way, the practical and commercial benefits of divided property ownership were recognised and accommodated by the common law. Although these common law options for divided ownership appear limited (especially for tangible personal property), their innovative potential should not be underestimated. For example, the simple division of ownership and possession of goods permits different forms of leases (with all manner of associated covenants), hire-purchase agreements, pledges, contractual liens, retention of title sales, bailments, and more.

Equity dramatically expanded upon these rather meagre common law possibilities for divided interests. It did this through the creation of trusts and charges. These two structures are often assumed to be equity’s greatest legacy to the law. Their enormous commercial significance goes without saying. These devices began as contractual arrangements (“personal obligations”), and slowly evolved until they were unequivocally recognised as delivering new (divided) property interests in the underlying tangible or intangible assets. The terms “trust” and “charge” disguise the enormous flexibility permitted within these categories. Taking each in turn, “trusts” permit the division of interests according to the common law model (that is, shared and sequential ownership) regardless of the nature of the underlying asset. But this is just the start. Trusts enable endless innovation and division, limited only by the imagination of interested commercial parties. Assets can be subdivided at will, and different types of rights can be parcelled out to

15. See WORTHINGTON, EQUITY, supra note 8. “Asset” is used very loosely as shorthand for bundles of rights, whether proprietary or personal.
different parties. Using the trust, for example, rights associated with company shares can be divided to give certain parties the voting rights, others the dividend rights, and still others the rights to bonus issues. Even this does not exhaust the divided rights that are possible because of the trust. Consider the many formal and informal arrangements that are now considered to deliver trust structures of divided ownership. The best known include Quistclose trusts, building retention trusts, and constructive trusts arising in response to contracts of sale or, occasionally, family agreements.

“Equitable charges” are a more recent legal innovation. They evolved in a similar fashion to trusts, however, and now provide enormous flexibility in enabling contracting parties to structure security arrangements that accommodate their individual needs and circumstances. The rapid evolution and growing commercial significance of equitable charges can be seen clearly in the evolving debates surrounding the granting of security over after-acquired assets, the recognition of floating charges and automatic crystallisation clauses, and, most recently, the possibility that a lending bank could take a charge (a “charge back”) over the debtor’s account with the same bank. The ability of well-advised creditors to protect themselves against their debtor’s insolvency using such devices quickly led to parliament providing statutory protection for certain classes of unsecured third parties, especially against floating charge holders. This, in turn, led to a fresh round of debates (still on-going) about the accurate characterisation of parties’ arrangements as creating these vulnerable floating charges rather than some other form of proprietary protection such as a fixed charge, a contractual lien in the context of construction contracts, or legal ownership or a trust in the context of retention of title agreements. For our purposes, the outcomes of these debates are

19. Other than sales of goods, where the Sale of Goods Act 1979 (Eng.) and its Commonwealth equivalents provide an even more aggressive default rule, so that legal property is rebuttably presumed to pass to the buyer at the time of the contract of sale, notwithstanding that delivery and payment of the price occur at some later stage. See Sale of Goods Act, 1979, 28 & 29 Eliz. 2, c. 54, § 18 (Eng.).
20. See WORTHINGTON, PROPRIETARY INTERESTS, supra note 19, chs. 3.9, 4.10-4.14.
22. See In re Yorkshire Woolcombers Ass’n, [1903] 2 Ch. 284.
not important in themselves. What is important is that they serve to reinforce, rather dramatically, the notion that “obligations” between parties often count as “property” of one sort or another.

To summarise, this section suggests that, over time, equity made two very significant moves. It treated common law obligations as property, simply by permitting their assignment and providing some protection for the assignees. It also treated obligations to divide property rights as being in themselves new forms of property. Put bluntly, equity converted obligations into property.29

The previous assertion tests “property” by the twin attributes of assignability and excludability, but even measured in this simple way, there has been a radical change in what is assigned to the “obligations” box and what to the “property” box. In itself, of course, this is not sufficient to establish that the divide between obligation and property has disappeared. The divide may simply have moved to a different place. The next section seeks to advance the case for disappearance.

II. Attributes Said to Distinguish Property from Obligation

In the previous section it was suggested that the hallmarks of property are “assignability” and “excludability”; in other words, property rights are assignable, and they entitle their holders to exclude others from their enjoyment. Neither characteristic needs to be absolute. Indeed, short reflection suggests that there are no assets that entitle their holder to absolute rights to enjoy, to transfer, and to exclude others. The burden of this section is to show that these two attributes, along with several other attributes commonly regarded as indicative of “property” rather than “obligation,” no longer successfully serve this function. None of the attributes discussed below provides a criterion for confidently allocating an asset to either the “property box” or the “obligations box.” Whatever may have been true in the past, it now seems that these attributes are, to varying degrees, apt to describe all manner of assets; there is no clear distinction between property and obligation. In this sense, the divide between property and obligation is disappearing.

The discussion proceeds in a fashion that reflects a further oddity in the orthodox property/obligation divide. Rights are either specifically categorised as “property,” or they are not. If they are not, then they are merely personal—they are “obligations.” From this it follows that all the standard tests focus on the attributes of “property.” Absence of the attributes means the asset is “not property” and so is merely “obligation.” The argument in this part is therefore that these property attributes no longer provide any defensible means of distinguishing between two types of assets, one “property” and one “obligation.”

29. This might be expected to cause problems on at least two fronts: the types of interests that are recognised as “proprietary” appear to become infinitely variable as the particular contractual terms differ, so offending the *numerus clausus* rule and its justifications; and third parties may seem to be treated unfairly in being expected to recognise such a vast spectrum of property rights, and facing liability for unwittingly infringing them.
A. Property Terminology

Lawyers must be careful with language, and clearly, loose language does not mean that implicit inaccuracies automatically become legal doctrine. Nevertheless, some usages are instructive. When we talk of a company’s property, for example, we certainly do not mean to refer only to the tangible “things” owned by the firm, as distinct from all the other rights owed to it by third parties. In the same vein, when we say that a trust cannot be created unless there is “trust property” held by the trustee on trust for the beneficiaries, we include within the notion of “trust property” both tangible “things” owned by the trustee as well as every type of obligation owed to the trustee for the benefit of the trust. And when either a company or a trustee becomes insolvent, the assets available for division amongst the creditors include all the relevant tangible and intangible assets (i.e. the entire pool of property and obligations). Recent doctrinal and functional discussion of “asset partitioning,” or divided patrimonies (in civil law jurisdictions), involves a similar bundling of property and obligation. The “asset partitioning” does not discriminate at all between different assets, or different forms of wealth. With affirmative asset partitioning, all corporate wealth or trust wealth is partitioned, segregated as a pool dedicated to service the claims of the corporate or trust creditors rather than the shareholders’ or beneficiaries’ creditors; conversely, with defensive asset partitioning, all the shareholders’ or beneficiaries’ wealth, in whatever form, is partitioned, preserved intact against the claims of the corporate or trust creditors. In short, our common use of language affords no help in distinguishing between property and obligation. This is so even when we appear to use the distinction technically, as in requiring identification of trust “property,” or an insolvent’s “property.”

B. The Ambit of Property Rights

Professor Honoré described ownership as “the greatest possible interest in a thing which a mature system of law recognizes.” Perhaps derived from this, there is increasing currency given to the notion of property as a bundle of rights which includes residual incidents operating in favour of the owner once all other claims have been met. Rights are proprietary if they encompass this broad scope; otherwise they are personal. Again, however, the approach does not appear to assist in distinguishing between property and obligation.

This claim is best shown by example, and the clearest modern example comes from corporate law scholarship. There the notion of residual rights is frequently used, admittedly, more often by economists rather than by lawyers. The analysis usually proceeds along the following lines: residual rights indicate ownership; the shareholders have residual rights to the company’s property on insolvency, so the shareholders own this property; as owners, they have the right to control its use, and to do so by controlling the board of directors. This is clearly too crude. Either we have misconceived the meaning of residual rights (perhaps employees and creditors also have such rights?), or these rights do not invariably suggest property ownership.

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31. Honoré, supra note 9, at 108.
By contrast, the accepted analysis, at least for lawyers, is that the shareholders do not own the company’s assets: they do not need to, and there are significant advantages if they do not. Because of express or default rules in their share contract, however, they have ultimate residual rights to the company’s property on its insolvency. The vulnerability of this residual claim provides the necessary motivation for shareholders to monitor the corporate managers. Other groups are at risk of poor corporate management, but their risk is not quite so great (they are further up the chain), and their coordination costs are much higher, especially if their interests are diverse. This analysis explains why the monitoring role might reasonably be left to shareholders. However, it does not provide automatic justification for shareholder control of corporate management or the managers’ need to run the company exclusively in the shareholders’ interests. Some other justification is needed for that. And, finally, it delivers all this without the need to differentiate between property and obligation: the consequences follow because the shareholders, as a group, have uniform residual contract/obligation rights.

So, again, identifying residual rights may indicate “property,” but equally it may indicate “obligation”; it is not a distinguishing attribute.

C. Property Rights May Take Only a Limited Number of Forms—the Numerus Clausus Principle

It is commonly observed that most legal systems recognise only a limited (and non-expanding) number of property interests. Personal rights, by contrast, can be structured in an infinite number of ways to suit the parties’ personal needs. This alleged restriction on the possible forms of property is known as the numerus clausus (closed number) rule. Civil law jurisdictions certainly have such a rule, and it is supposedly the reason why trusts do not exist in these jurisdictions. The common law rule, if there is one, is much more ambivalent. Equity’s permitted subdivision of interests in assets, and the concomitant creation of new forms of property, especially forms that can be specially tailored by the parties to suit their own personal requirements, appears to offend the numerus clausus rule. In this respect, at least, equitable property rights appear much more like personal rights, and it is not at all evident that the numerus clausus rule places any real restrictions on the property/obligation divide in common law jurisdictions.

In any event, the rationale for the rule has been shown to be suspect. If the goal is simply to reduce the number of property options because of some perceived efficiency in this, then it fails. The desired variety of rights which might operate in relation to property can usually be achieved by contract in any event, although with greater effort and therefore greater inefficiency. The principle thus serves as an ineffective (and inefficient) restraint. Indeed, jurisdictions that did not expand the variety of their property rights by incremental development have generally sought to

32. See Sarah Worthington, Shares and Shareholders: Property, Power and Entitlement, Part I, 22 COMPANY LAWYER 258 (2001) (exploring the nature and extent of a shareholder’s legal entitlement to have a company’s business conducted so as to maximize shareholder value); Sarah Worthington, Shares and Shareholders: Property, Power and Entitlement, Part II, 22 COMPANY LAWYER 307 (2001) (exploring the nature and extent of a shareholder’s legal entitlement to have a company’s business conducted so as to maximize shareholder value).

33. Rudden, supra note 14, at 239.
do this later, via statute, and to do so in a manner that accords these rights proprietary status, or at least some measure of protection from interference by third parties.\textsuperscript{34} For example, civil law jurisdictions are increasingly adopting trusts legislation;\textsuperscript{35} the United States, which did not initially grant judicial recognition to the floating charge, now achieves the same ends via the \textit{United States Uniform Commercial Code} Article 9; and several jurisdictions, including Hong Kong, recently legislated to ensure the validity of charge backs.

Alternatively, if the reason for the principle is to prevent the multiplication of sub-interests in assets, so as to ensure that dealings do not become difficult and inefficient, then it also fails. It controls the \textit{types} of interests that may be created, but not the numbers of parties who may hold such (restricted) interests, and it is the latter that is likely to make dealings inefficient.\textsuperscript{36}

Finally, if the principle is designed to protect property owners by alerting strangers to the property rights they must respect, and does so by affording third parties easy notice\textsuperscript{37} or easy verification\textsuperscript{38} of these property packages, then it also fails. Once we examine the strategies the law employs to protect property owners (and, indeed, all right owners), it becomes clear that the strategy is \textit{not} to limit the number of recognised property rights (adhering to the \textit{numerus clausus} principle), but to limit the number of \textit{risks} to which a stranger can be exposed and which might count as unauthorised interference with the rights of others.\textsuperscript{39} A large degree of flexibility as between the originating parties, A and B, could be accommodated without increasing the information costs for C if the broad rules of liability imposed on C are few and simple. This means that there is no need to adhere to the \textit{numerus clausus} principle, as long as a simple philosophy is applied in constructing the remedial regime. The approaches usually adopted are described later in this essay.\textsuperscript{40}

In summary, the \textit{numerus clausus} characteristic does not enable common lawyers to differentiate between property and obligation, and in any event the perceived advantages of the rule appear overrated.

\begin{enumerate}
\item[34.] For other approaches, see George L. Gretton, \textit{Trusts without Equity}, 49 \textit{Int'l \\ & Comp. L.Q.} 599 (2000) (assessing trusts as patrimony).
\item[35.] See Hansmann & Mattei, \textit{ supra} note 16, at 458; David Hayton, \textit{English Trusts and Their Commercial Counterparts in Continental Europe, in Extending the Boundaries of Trusts and Similar Ring-Fenced Funds, supra} note 16, at 23.
\item[38.] See Hansmann \& Kraakman, \textit{ supra} note 36.
\item[39.] See Merrill \& Smith, \textit{ supra} note 37, at 25 (taking the view that the \textit{numerus clausus} principle plays an important role here).
\item[40.] Here a simple example suffices. All the characterisation and recharacterisation problems associated with floating charges—especially in the context of construction contracts and retention of title agreements—are at root related to the proper treatment of certain third parties, and to determining whether they have statutory rights in the underlying asset (since the \textit{Insolvency Act 1986} (U.K.) gives preferred creditors rights against assets subject to floating charges). They are not related to determining whether the charge agreement between $A$ and $B$ is limited to a known form of property interest.
\end{enumerate}
D. “Excludability”: Property Rights are “Good Against the World”

Property rights are commonly described as “rights in rem,” “good against the world” (or at least a section of it), and “multital.”41 Personal rights, by contrast, are described as “rights in personam,” only good against the obligee, and “paucital.”42 This is a formal, but perhaps less informative, assertion of the idea of excludability. Restated as they are here, two ideas may be unwittingly confused in these descriptions (or maybe wittingly). First, property rights are still often described as rights in an asset, not simply rights to an asset (orthodoxy suggests the latter would be rights in rem, and personal rather than proprietary).43 This distinction now lacks force or accuracy. Equity has ensured that rights to assets are commonly accorded all the attributes of property rights.44 The evolution was described earlier in this article. In truth, this now outdated notion of “rights in rem” replicates the equally outdated early idea of property as a “thing.” The more modern conception of property is as a “bundle of rights,” and, moreover, a bundle of rights exercisable against people, even if in relation to a thing.

The second theme in this labelling emerges in the multital/paucital distinction: rights in rem are good against the world; purely personal rights can usually only be enforced against mutually consenting parties. But this focus is on something other than our property/obligation divide. Under this classification, all tort claims are in rem since they bind all the world in relation to trespass, nuisance, negligence, and such like. “Things” are protected by these general defensive claims, but so too are personal rights: we now have the tort of inducing a breach of contract, for example, interfering with obligation, rather than with property.45 This means that rights may be classified as in rem, or good against the world, even though we would not usually think of them as “property” in any real sense, but rather as “obligations” that are simply and similarly protected by claims that may be advanced against the whole world.

Once again, the familiar “property attribute” no longer provides a reliable distinction between property and obligation.

E. Property is Assignable

As noted earlier, it is no longer possible to suggest that “property” is assignable, but “obligations,” or contract rights, are not. The modern rule is that both are assignable, but both may have specific practical or procedural limitations on assignment imposed by common law or statute for reasons of public policy.46 These limitations do not serve to distinguish “property” from “obligation.” Indeed, greater

42. Id. at 69-74.
43. Goode, supra note 2, at 433-34.
44. See id. at 438.
45. See Lumley v. Gye, (1853) 118 E.R. 749; see also Daniel Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 COLUM. L. REV. 504, 513-29 (1980).
restrictions apply to the assignment of some forms of tangible property (the clearest elements in the “property” category) than apply to the assignment of most “obligations.” Consider the restrictions on assignment of certain categories of land, or certain categories of goods (such as national art treasures, or petrol in periods of national shortage). Put another way, public policy determines whether a particular bundle of rights is assignable, and it does this without regard to the property/obligation divide. And when public policy determines whether it is appropriate to sell human beings into slavery, cell lines to research laboratories, or rights to litigate to the highest bidder, it does not first decide whether these rights are property. It moves immediately to the core controversies. Once again, the attribute does not serve to define a given right as property rather than obligation.

F. Property is Accorded Superior Legal Protection

We commonly assume that property is better protected by the legal system than contract, or obligation. This remedial insight was articulated more formally by Calabresi and Melamed almost thirty years ago. They suggested that property rights are distinguishable because they are protected through “property rules,” not merely through “liability rules.” Put in more familiar language, injunctions and specific performance are the norm in protecting property rights, rather than mere payment of compensation. Once again, however, this preferential remedial approach no longer seems to track any meaningful property/obligation divide.

Take some obvious examples. Rights that we might classify as purely personal (that is, as “obligations,” rather than “property”) often seem to be protected by “property rules.” For example, tort claims of all types are typically remedied by compensation, but also, quite commonly, by positive or negative injunctions. The difference in remedy does not turn on whether the damage has already been done, nor, any longer, on whether the rights that have been infringed are “proprietary.” Contract rights, too, are enforced using the full panoply of remedies. This remains true even when the rights infringed appear to be especially “personal,” rather than “proprietary,” such as those requiring personal services to be performed by the defendant for the claimant. Generalising, it seems that “obligations” are

49. Even if the damage is still only threatened, the claimant may be obliged to take compensation for the likely harm that will be caused, rather than be afforded an injunction. Lord Cairns’ Act (Chancery Amendment Act), 1858, 21 & 22 Vict., c. 27 (U.K.) (now re-enacted in the Supreme Court Act 1981, § 54).
50. Proprietary in the sense that the tort interferes with the claimant’s rights, and those rights are proprietary rather than personal (property rather than contract). At another level, all tort “rights” are sometimes considered “proprietary,” since they can be enforced against all the world—that is they are rights in rem. See discussion supra Part II.D.
sufficiently commonly protected by “property rules” for this form of enhanced legal protection to be of little use in distinguishing property from obligation.\(^\text{52}\)

The inability of this remedial attribute to provide a distinguishing test appears all the more stark when the issues are examined from the property perspective. Then we notice that our legal system does not necessarily protect some of the most uncontroversial “property” forms by means of property rules, but prefers, instead, to limit protection to liability rules. This is the approach taken by the common law in protecting goods (that is, tangible personal property). These assets are clearly property, but they are not (or not necessarily) protected by property rules: an owner whose goods have been converted by another is entitled to compensation rather than to specific recovery (unless the court exercises its statutory discretion to order the latter).\(^\text{53}\)

Generalising, the more accurate analysis seems to be that the special protective regimes that deliver performance rather than damages (Calabresi and Melamed’s “property rules”) are not afforded exclusively to property rights. Rather, they are afforded to all scarce rights, whether those rights are classified as property or as obligation. Once again, this aspect of the law’s remedial regime does not enable us to distinguish between property and obligation.

\(G.\) Property Carries an Entitlement to Proceeds

Property rights are commonly associated with automatic entitlement to any proceeds derived from the property. An owner can sell her car and keep the proceeds; she can hire the car out and the income is hers. The same is equally true of assets that are more on the margins of property and obligation: owners of shares or debts may sell these assets and keep the proceeds;\(^\text{54}\) and before such sale, they are entitled to the dividends or interest payments. But the same is also true of rights we class as pure obligations. Contracts of supply, or service, or hire can all be sold, and the proceeds belong to the seller;\(^\text{55}\) and if these personal rights are not sold, then any benefits that accrue from them belong to their owner. It seems that all assets carry with them an entitlement to proceeds, and this is equally true whether the assets are classed as property or obligation. This is not controversial.

Much more controversial, however, is whether this same entitlement to gains applies when the gains are made by third parties making unauthorised use of the rights, rather than made by the right-owner herself. In these circumstances, can the owner still insist that she is entitled to the benefits derived from her asset? In making this claim, the owner is asking for a “disgorgement” remedy (or “restitutionary damages” or “an account of profits”). Does this remedy map the property/obligation divide?

54. Sometimes the sale is subject to restrictions, or even prohibitions, but this is equally true of tangible property.
55. Again, the sale may be subject to restrictions, or even prohibitions, but this is no different from the earlier property examples.
This is difficult, because there is as yet no firm consensus on the availability of disgorgement as a remedy. The possibility of such a claim can arise in a variety of circumstances, and involve a wide range of assets. Depending upon the circumstances, different analyses are possible, and none has so far attracted consistent judicial (or academic) following. In an earlier essay, I discussed the paradigm case of a third party using a £1 coin to purchase what turned out to be the winning lottery ticket. The lottery winnings represent the “proceeds” from the £1 coin. Must these winnings be paid over to the original owner of the £1 coin? Does it matter whether the original owner remains the legal (or equitable) owner of the money throughout (that is, has a property right), or whether she has only a personal claim for recovery of its value from the third party (in unjust enrichment, for example)? Does it matter whether the third party was from the start a trustee of the money, or stole it, or received it completely innocently, perhaps by way of gift? Contract law and tort law can compensate the original owner for any harm suffered; the law of unjust enrichment can restore expropriated gains. But these remedies, if they are available, will rarely deliver much more than £1 (the original asset, perhaps plus some further amount for loss of use of the money for some period of time). Is there a rule that will also restore the third party’s windfall gains to the claimant?

If it is clear that the original owner has retained a property interest in the asset despite its transfer to the third party, then (at least in the UK) it is often assumed that she will be able to recover windfall gains from interfering third parties. A 1997 Court of Appeal decision suggests this conclusion follows naturally from the nature of property rights themselves: owners are entitled to the productive capacities of their assets, even when the gains are derived through the efforts of third parties. Many academic commentators reach the same conclusion, but explain it on the basis of unjust enrichment. I confess to remaining sceptical. Neither approach seems to be sufficiently discriminating. Both lead to results which strip gains equally from thieves and from innocent donees who fortuitously invest the mistaken gift profitably, even though they might just as readily have invested their own funds for their own benefit and left the gift untouched. I prefer an analysis that requires third parties to disgorge gains only when they have been made in defiance of some fiduciary obligation to manage the underlying assets in the owner’s interests. The weight of precedent also favours a more restrictive approach: barring the Court of Appeal case already noted, and one House of Lords case, other instances of true disgorgement all seem to arise in fiduciary contexts.

58. See, e.g., Peter Birks, Property, Unjust Enrichment and Tracing, 54 CURRENT LEGAL PROBLEMS 231 (2001); ANDREW BURROWS, THE LAW OF RESTITUTION (2d ed. 2002).
59. WORTHINGTON, EQUITY, supra note 8, at 98-102; Worthington, Justifying Claims to Secondary Profits, supra note 56, at 451.
60. In Foskett v. McKeown, Lord Millett based his conclusions primarily on the property analysis adopted in Trustee of the Property of FC Jones, but he also indicated that a fiduciary analysis (which was possible on the facts) delivers the same conclusions. Foskett v. McKeown, [2001] 1 A.C. 102; Trustee of the Property of FC Jones & Sons v. Jones, [1997] Ch. 159; see also Lord Millett, Proprietary Restitution, in EQUITY IN COMMERCIAL LAW, supra note 48.
61. This is rather than compensation (measured by “use value”) or restitution for subtractive unjust enrichment. See Sarah Worthington, Reconsidering Disgorgement for Wrongs, 62 MOD. L. REV. 218 (1999). But see, e.g., JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY (2002).
Clearly this area of the law is most unsettled. But the arguments need not be analysed in detail here. The goal here is simply to determine whether there is a difference between the legal protections delivered to property and those delivered to obligation. In the UK at least, this area of the law has prompted vehement debate. In seeking to protect obligation, commentators have advocated what amounts to analogous application of the House of Lords’ property analysis. They suggest that contract rights and property rights deserve equivalent protection; that expropriation of either is inappropriate; and that interference with either should be remedied by disgorgement in appropriate circumstances. The argument has been used to support both disgorgement and performance interest damages for breach of contract and disgorgement to remedy profitable torts or other wrongs. The cases do not yet go so far. Disgorgement is available. It is commonly awarded to remedy fiduciary and other equitable breaches of the claimant’s personal right to confidential or loyal service, even where the fiduciary has not interfered with any property owned (in equity) by his beneficiary. These breaches might be regarded as interference with the claimant’s (personal) right to a particular form of service from his agent. Early cases suggested that disgorgement was limited to the initial wrongful gain made by the defaulting fiduciary, and, moreover, that the remedy was restricted to a personal claim to the value of the gain. But this approach has now been radically revised. Full disgorgement of the initial gain and any proceeds derived from it is favoured; and the remedy is now considered to be proprietary (delivering insolvency protection to the injured claimant principal). The change in approach has attracted vocal adherents and equally vocal dissentients.

Disgorgement has also been advocated as the appropriate remedy for torts, especially proprietary torts. Some cases can be read as supporting this stance, but it is equally possible to interpret them as supporting either compensation or autonomous unjust enrichment claims in respect of the unauthorised use of the claimant’s asset. Finally, disgorgement is also available for breach of contract,
although the courts insist that this remedy is available only in exceptional circumstances.  

What conclusion can be drawn from all of this? Even though the state of the law remains unsettled, it is clear that there is no sharp divide between property and obligation in allowing right-holders access to the proceeds of unauthorised interference with the right. A narrow reading of the authorities (and my preferred reading) is that both property and obligation are protected in the same way. Both are typically protected from interference by either compensatory remedies (for torts or breach of contract) or by restitution (for unjust enrichment); exceptionally, both are also protected by disgorgement remedies, but only when the infringement is the result of interference by the right-holder's own fiduciary. The more common, wider, reading of the authorities reaches quite different conclusions, but is equally strong in aligning the treatment of property and obligation. This alternative approach sees both property and obligation as routinely protected by disgorgement remedies. In short, this attribute of entitlement to proceeds is, like all the others, equally inadequate in differentiating between property and obligation.

H. Property Rights “Run with the Asset”

Relatively recently, a further distinguishing characteristic of property rights has been suggested: a property right, unlike a personal right, “runs with the asset.” This sounds promising. It captures an attribute that we do regard as a characteristic of property. If a thief steals A’s car and sells it to C, A’s ownership of the car (A’s property rights in the car) run with the car, and can be enforced against C. It does not matter that A and C are strangers, and have reached no agreement between themselves about A’s rights.

This attribute of rights “running with the asset” is especially attractive if owners want to divide rights in an asset between several parties, and then allow the individual parties to deal with their respective rights independently of the other interest holders. Put generally, if A shares proprietary rights in an asset with B, and B then transfers the asset to C, will A’s interests in the asset persist and be enforceable against C? The commercial attractions of this result, at least to A, are clear. This is one of the classical attractions of property rights. But the concomitant risks to C are equally evident, especially if C is ignorant of A’s interests.

In the context of this chapter, two issues need to be resolved. The first is whether this idea of rights that run with the asset is a characteristic of property rights; the second is whether the same attribute is also evident with personal rights. To anticipate, it seems that both property and obligation are, once again, very similar.

[1896] 2 Ch. 538 (especially 541-2 per Lindley LJ). In Strand Electric & Engineering Co. v. Brisford Entertainments Ltd., it was commented that if the defendant had profited from the use, then disgorgement of those profits would not be required (per Somervell LJ) or might be (per Denning LJ). Strand Elec. & Eng’g Co., Ltd. v. Brisford Entm’ts Ltd., [1952] 2 Q.B. 246, 252, 255.


71. Hansmann & Kraakman, supra note 36, at 374.
At first sight it seems that the common law, at least, does consider property rights to run with assets. The earlier example of the theft of A’s car is illustrative. Closer examination shows something different, however. Across a range of property interests, the real focus seems to be better described as one protecting A only to the extent that this is consistent with preserving C’s rights, unless C knew or ought to have known of A’s competing interests: C is really in the line of sight, not A.

Examples make this clearer. If the subject matter is tangible property, then C can often be put on notice that others have rights to the asset simply because she knows that she does not hold those rights: the mere fact of the property’s existence is sufficient indication that other people have rights that need to be respected. She does not need to know who has those interests; all she needs to know is that she does not. The physical reality of the property acts as its own form of notice to the world that someone has interests that merit protection. This form of public notice, or some marginal variant of it, is used quite commonly. The rule applies to real and personal tangible property. It also applies to intangible rights that are “marked” by trademarks or copyright symbols. Strangers are liable, often strictly liable, for infringements of these ownership or possessory property rights.

But this type of rule has its limits. It works tolerably well in cases of potential theft, conversion, or trespass to tangible property, where C is made liable for unilaterally interfering with property rights she knows are not hers, even if she is unaware of the real owner’s identity. The rule seems less apt, however, when an intermediate party, B, purports to sell or give property rights to C, and C is then visited with the same remedial consequences because B turns out to be a thief or fraudster. The physicality of tangible property, or of copyright or trademark symbols, cannot serve as adequate notice to C if C intends a legitimate acquisition rather than a unilateral invasion of the relevant rights.

The law has developed further strategies to deal with this difficulty. The choice of different approaches to suit different circumstances appears designed to balance the fairness and costs of imposing the risk on one party as against the other. There are two extremes. The first confirms the merits in protecting A’s interests, but recognises the difficulties for C in discovering that these interests exist. The preferred strategy is then one that enables A to give better notice to the world of his interests by filing them on a public register. It matters little, it seems, whether the registry details A’s precise interests, or merely provides notice that A has some sort of interest. The filing system works because C can then be presumed to know of

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72. Merrill & Smith, supra note 37.
73. Notwithstanding this, the common law imposes strict liability for the tort of conversion. See Andrew Tettenborn, Conversion, Tort and Restitution, in INTERESTS IN GOODS 825 (2d ed., Norman Palmer & Ewan McKendrick eds., 1998), for a suggestion that conversion’s separate functions should be divided, and liability modified, so that there could be strict liability for recovery (a surrogate vindicatio); fault based tort liability, based on dishonesty or lack of good faith, enabling compensation for loss from misuse of the property; and strict liability enabling reversal of unjust enrichments arising from either the owner’s property or its proceeds. In this way, the common law tort-style liability would be brought into line with the equitable liability for “knowing receipt.”
74. As now happens in the U.K. when companies file charges with Companies House. See Companies Act, 1985, ch. 1, §§ 395-96 (Eng.).
A’s filed interests, whether or not she makes the effort to check the registry. C is said to have constructive notice of A’s filed interests, and A’s interests will then prevail over C’s if there is a conflict, even if C has acquired her interests innocently and for value. There are many illustrations of this strategy in operation: there are registries of interests in land, certain classes of security interests granted by corporate borrowers, and ownership of second hand cars.

The second approach is almost the complete reverse of the first. It favours C’s interests over A’s, and allows C’s interests to prevail so long as she is a bona fide purchaser for value without notice of A’s rights. The rule operates without a register of A’s interests. The burden is thus on A to inform third parties or, more often, to control the behaviour of his agent, B, to ensure that B does not do anything unauthorised to defeat A’s interests. Put another way, where A and B choose particular organisational structures to enable them to divide property interests efficiently between them, then they, not the outsiders (i.e. C), should shoulder the risk that poor internal management might enable B to deal with C in unauthorised ways. In these circumstances, A should lose his rights, not C. This protective strategy is the primary rule that operates when A is a company, B the board of directors, and C a party dealing with the company. By and large C is allowed to assume that all of B’s advances in dealing with A’s assets are authorised, unless C is either a donee or on notice that the transfer is in defiance of A’s legitimate interests. The same rule applies when A is the beneficiary of a trust, B is a trustee, and C is a stranger dealing with the trustee over the transfer of the trust assets.

Context helps to define commercial needs, and hence the appropriate style of rule. Contrast the protection afforded to C in any dealings with currency (the second style of rule) with those applying to her dealings with goods (the first style of rule, and with very few registers to assist in improving the protection offered).

As noted earlier, neither the magnitude of this problem, nor the ease of solving it, is assisted by the *numerus clausus* rule. As soon as parties wish to divide rights and deal with them independently, some form of verification or protection is necessary. This clearly increases the costs well beyond those necessary to operate a scheme of sole and undivided ownership, but the commercial advantages of division are overwhelming. Once this is conceded, then, as between a small and large number of possible divisions (or types) of property rights, the same verification rules are equally apt. This is easily illustrated. Consider the practicalities of filing: it is expensive because a registry needs to be established and the parties will incur costs in filing and in searching, but these costs are not further increased simply because what is filed is a novel form of private arrangement between A and B.

All of this can be summarised briefly. Property rights may indeed “run with the asset,” so A’s rights may be enforceable against C, but only if certain specific verification or protective rules permit this. These rules aim to balance the burdens and benefits of a system that permits bundles of rights to be divided, and the divided parcels to be transferred independently of the other co-owners.

The next issue is the important one for this chapter. Can obligations also “run with the asset”? Can the same protective strategies be used to achieve similar ends with obligations as with property?

There is no theoretical or doctrinal reason why the law should not permit this to happen. Nevertheless, the commercial attractiveness of this in relation to obligations is far more limited than it is in the case of orthodox property rights. This is because “contract bundles” are less commonly the object of unauthorised dealings in defiance of the original contract-holder’s rights (as happened in our stolen car example), and they are less frequently the object of commercially attractive subdivision that gives different co-owners different interests in an asset. This is when verification and protective regimes are especially useful. Nevertheless, although the need for contract rights to run with the asset is less extreme, there are situations where this would be commercially attractive.

Does the law then allow for this possibility, and adopt the protective strategies already noted in the context of property? Consider each of the earlier approaches in turn. Since contract rights are intangible, simple physical notice to the world is difficult (although there is a sense in which copyright and trademark labels might be regarded as protecting contract rights, rather than orthodox property rights). That leaves verification and protective strategies. First consider the use of registers of intangible assets. These do exist. As with registers of orthodox property rights, there is no need for registers to record every possible interest in every possible asset. This is a cost-benefit game. Registers are worth their costs if the rights being filed are especially valuable, even if the number of filings is relatively small over time (consider registers of land, ships and aircraft engines), or if the register is used often and by large numbers of the trading community (consider registers of security interests or second hand car ownership). Are there registers of “contracts”? Registers of intellectual property interests, such as patents, can be viewed in this way. So too can registers of security interests, especially in the United States, where the courts had denied the proprietary possibility of floating charges. Yet such contractual arrangements could be effectively enforced by filing under Article 9 of the United States Uniform Commercial Code. Filing certainly increases the variety of rights that can be accorded “proprietary” status, in the sense that they run with the asset. For example, there have been suggestions that negative pledges could usefully be filed. 77

The protective strategy is also used with contract rights. This strategy is the more efficient option where the contract rights are sufficiently valuable to warrant protection, but the dealings are sufficiently unique to make filing impractical. The types of contract rights that might warrant this protection are A’s right to use B’s assets in a particular manner (as in a contract of hire), or A’s claim against B that B use his property in specified ways, as defined by negative pledge agreements or agreements to vote shares in a pre-determined manner. In these circumstances, can A prevent C from using the asset in a manner that is inconsistent with A’s contractual rights? The law remains uncertain, but a line of cases suggests that A might obtain a negative injunction against C to prevent interference, provided C had notice of A’s rights when she acquired her own interests in the asset. 78

77. Id. at 414 n.79 (citing Barry E. Adler, Financial and Political Theories of American Corporate Bankruptcy, 45 STAN. L. REV. 311, 336-39 (1993); Barry E. Adler, Secured Credit Contracts, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 405-10 (Peter Newman ed., 1998)).

78. De Mattos v. Gibson, [1858] 45 Eng. Rep. 108 (Ch. 1858); see also WORTHINGTON, PROPRIETARY INTERESTS, supra note 20, at 101-16.
When rights recognised by equity were regarded as operating in personam, and so were seen as personal rather than proprietary, both equity’s bona fide purchaser for value without notice rules and knowing receipt rules could also have been regarded as major components of the protective regime. This would ensure that contract rights “ran with the asset” in an appropriate manner.  

There is a downside to all of this. Any regime that enables rights to run with the asset also enables increasing fragmentation of rights between different owners, and this is widely regarded as inefficient. It hampers advantageous dealings with the underlying asset because it leads to increased transaction costs and the risk of holdout problems, and these can soon become so large that they frustrate the efficient use of the asset. The problem is tempered somewhat by devices like the rule against perpetuities and limitations of actions. Moreover, registries of rights promote a market in re-bundling the rights, in much the same way as in the market for corporate control. Finally, the protective notice regime by its very nature is unlikely to produce significant fragmentation since A’s rights will generally only persist if C has adequate notice of their existence.

Once again, there seems to be no sharp divide between the law’s treatment of property and obligation in allowing rights to “run with the asset.” The differences that do exist appear to be more closely related to commercial needs than to legal limitations. The risk of interference and the commercial attractiveness of divided interests are both greater with orthodox property rights than with purely personal rights. Where this generalisation does not hold, the law seems to treat both types of interests in similar ways.

I. Property Rights Attract Insolvency Protection

Insolvency priority is widely regarded as the lynchpin of proprietary characteristics. Property rights are accorded insolvency protection; personal rights are not. In reality, this may be the least significant characteristic in making, or losing, the argument that there is a disappearing divide between property and obligation. This is because the logic of the property/insolvency link is not associated in some fundamental way with an attribute that distinguishes property from obligation. Rather, the distinction depends utterly on current insolvency policy. Consider two simple examples.

First, suppose X is an individual, but is also the trustee of a trust and the sole director of a one-man company. If X becomes bankrupt, all the assets that appear to be his will have to be characterised as relating to one or other of his three different roles. Some will be personal assets, available to his creditors in his bankruptcy. Some will relate to the trust. They will not be distributable on X’s bankruptcy, but will be partitioned off and preserved for the trust beneficiaries. Others will belong to the company. First claim to them will be accorded to the company’s creditors, not


to X’s personal creditors: X’s personal interest will be limited to the net value of his shareholding. This common form of asset partitioning is effected without any thought of distinguishing between property and obligation. X’s personal assets will include both types of wealth. So too will the trust and corporate assets. Asset partitioning on insolvency, in this sense, is simply allocating patrimonies to their appropriate owners (X and the company), and dividing patrimonies between different roles (X’s personal activities and his activities as trustee). In doing this, there is no property/obligation divide in any sense that is relevant in this chapter.

Take a second case. This tests the property/obligation divide more severely. Consider the distribution of X’s personal assets amongst his own creditors. On X’s insolvency, all his wealth (proprietary and personal) is realised for the benefit of his creditors. If no creditors have proprietary claims, the entire asset pool will simply be shared amongst the claimants pro rata. This is regarded as the fairest way to proceed. By contrast, creditors who can identify an asset as “theirs” can take it, often in full satisfaction of their claims. The more privileged property-owning creditors there are, the smaller the pool for the unprivileged personal claimants, and the smaller the proportion of their losses that will be recovered. Insolvency losses are thus shifted from the privileged to the unprivileged. If a showroom owner becomes insolvent, for example, the paid-up purchaser of “the only pink car in the showroom” can take her car; the paid-up purchaser of “one of the four green cars in the showroom” cannot. Moreover, the latter purchaser cannot specifically recover his purchase payment, even assuming (rather unrealistically) that he can identify either it or its traceable substitutes amongst the debtor’s assets. Many creditors are in this unsecured position, unless they take security to preserve their interests.

Why does insolvency law permit this difference in treatment between different creditors, and, in our example, between different purchaser creditors? Elsewhere, I have called this the “musical chairs” element of insolvency law: the result for different creditors depends entirely on the timing of the debtor’s insolvency (that is, on the timing of when the music stops). The justification is relatively simple. The task of insolvency law is to maximise returns to all creditors by effecting an orderly distribution of the debtor’s assets. This goal is best achieved by a co-ordinated distribution process. Furthermore, viable enterprises should not be tipped into insolvency; this is unnecessarily costly for all concerned. The best mechanism to ensure these twin goals are met, and that creditors have no incentive to steal a march by acting unilaterally or to tip the debtor into early insolvency, is to insist that the pre- and post-insolvency rights of all creditors remain the same. There is then no situational advantage for anyone in moving the debtor into insolvency. This reasoning means that pre-insolvency property rights must be preserved, and in turn post-insolvency priority given to property owners.

The ability of creditors to take legal security (by means of proprietary interests) to preserve their priority is subjected to the same form of insolvency justification. In the end, security is seen as advantageous because it increases commercial activity.

81 Sale of Goods Act, 1979, 28 & 29 Eliz. 2, c. 54, §§ 16-18 (Eng.).
Parties who would not otherwise have access to funds for business (or domestic) expansion and development can make use of these resources. In any event, pragmatism suggests that commercial parties would make arrangements designed to achieve the same ends, at greater cost, if the law did not provide a structured mechanism. Nevertheless, parliament restricts the availability of this form of insolvency protection by imposing registration requirements and, in some cases, timing, vulnerability, and claw-back limitations.84

All of this makes perfect sense, and yet there is a gnawing reluctance to push this preferential proprietary analysis too far. As already noted, the Insolvency Act 1986 (U.K.) itself imposes limitations on the effectiveness of security. It also accords preferential status to certain contract rights, especially employee rights, on insolvency.85 And when property priority is delivered in the form of a proprietary remedy from the debtor, the courts are increasingly alert to the adverse implications for the unsecured creditors.86 Civil law jurisdictions are much happier to insist that some of these remedial property claims are contingent, not privileged. The United States is more restrictive than the United Kingdom. Indeed, the United States Uniform Commercial Code Article 9 filing regime, for all its assertions that property rights are proprietary, has effectively replaced the common law proprietary system of security with a statutory priorities system for obligations. Priority rules have replaced property rules. This makes it easier for the legislature to amend priorities without affecting non-insolvency property rights.

This complicated common law and statutory hierarchy of insolvency rights could be changed. There is nothing inevitable about the insolvency protection accorded to property rights.87 Theoretically, the system could deliver preferential status according to some completely different regime, perhaps according to the type of claim being advanced by the creditor. This would involve prioritising certain forms of claim over other forms, and ignoring whether or not they have traditionally been regarded as proprietary or not. This would overcome the problem that some claims, by their very nature, can never attach to any specific part of the pool of debtor’s assets, and yet these claims may well be thought more worthy than others that are able to assert such an attachment. Elsewhere I have argued that this sort of analysis may suggest that unjust enrichment claims should be given insolvency privileges above those accorded to compensation claims.88 Put more generally, insolvency is all about policy, and sharing losses amongst innocent parties. As a matter of policy, it is important to consider carefully the pre- and post-insolvency goals, and decide which rights should legitimately be privileged.

85. See Insolvency Act 1986, c. 45, §§ 40, 175(2)(b), 176A (§ 176A is a recent addition to the Act).
88. Finch & Worthington, supra note 68.
In summary, insolvency priority is currently treated as a defining characteristic of property, distinguishing it from obligation. The implications for the respective right holders are dramatic. Those with property rights often recover in full. This leaves a disproportionately diminished pool of assets for the personal right holders to share. The result is that they often receive nothing. This is all the more worrying when, as the rest of this chapter shows, we are becoming increasingly uncertain about how to classify rights as falling on one side of this privileged dividing line.

III. IS DISAPPEARANCE OF THE DIVIDE BETWEEN PROPERTY AND OBLIGATION SIGNIFICANT?

The significance of the conclusion that there is no longer any sharp divide between property and obligation depends upon your perspective. If given any credence, it will end the search for the Holy Grail, and that in itself might liberate a significant amount of academic effort.

Why do we have property? It is said to be necessary for all advanced and advancing societies to ensure greater productivity and commitment to effort. Parties who own assets know that they will derive the fruits of their labour, and they are then prepared to expend greater efforts. It is immediately obvious, however, that property is surplus to this equation, aside from making the point that common or community ownership does not work. Ensuring that not all wealth or property is held in common provides an incentive. This is as true of personal rights as it is of property rights.

On other fronts, too, the news of a merger is not dramatic. But this is not because the news itself lacks dramatic impact. Rather it is that we arrived at this position quite some time ago and have had time to adjust to the consequences. Centuries ago, commercial parties saw that all rights, whether contract or property, could perform as usable wealth. They then adapted their practices accordingly. Economists were next to appreciate that these rights have merged. The lawyers have lagged behind.89 Perhaps it is time to catch up.

89. But c.f. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922) ("Wealth, in a commercial age, is made up largely of promises.")