TORT IN PRIVATE LAW THEORY: WHERE ARE WE NOW?

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ABSTRACT

In this survey of current common law tort theory, I note the overwhelming dominance of the descriptive over the normative: most writers are taking it for granted that ultimately there can only be one true conception of tort, and that the plethora of theories on offer indicates confusion, rather than that tort is not and never has been a unified entity. This descriptive approach squeezes out many questions tort theorists might ask themselves – at the head of these, the questions whether tort is actually a beneficial institution, or whether the issues it addresses might better be tackled in different ways. This descriptive approach is relentlessly inward-looking: there are many voices within the modern academy debating the value of modern tort law, but until the obsession with descriptive theory abates, most legal theorists will be deaf to them. Ultimately this 'inward turn' is not sustainable: if tort really has no normative merits, it does not deserve to survive; if it does, its supposed merits must surely be statable and debatable.

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In a democracy, it is unthinkable that generally applicable laws will be based on one single underlying value or principle[*].*

Private Law Theory seems to be emerging as a new discipline[1]. Its concerns include many different perspectives on what private law is, how it can be justified, and in what respects it needs further development or reform. While the bulk of the literature (at least in English) is common law, and most of that from the US, it increasingly includes contributions from European private lawyers, particularly those with interests in EU private law[2]. Tort is of course an important part of this; and this modern tort theory is certainly deserving of critical attention.

Yet while it is fair to describe the new literature as wide-ranging, this is all a matter of perspective. Driven by recent concerns about the nature and value of private law, the gaps in what it covers – jurisdictionally, historically, intellectually – are vast. And confusingly, while the questions the literature asks have already been asked for many years (perhaps for as long as there have been laws), most of those considering the issues do not consider themselves to be 'theorists' of any stripe; some, indeed, have responded to the new private law theory by insisting that they do not support, or benefit from, theory of any sort. As a reaction to the particular theories that have achieved recent prominence, this is perhaps understandable. From a wider point of view, it indicates a failure of imagination. Anyone who thinks they know what tort is, or what value it has, is to that extent at least a tort theorist; whether they *explicitly articulate* that theory is a matter of their writing practices. In this account of modern tort theory, I give a prominent place to those – perhaps the majority of those who study and use tort law – who viscerally reject the products of the most recent theoretical scholarship.

In surveys such as this, there is a danger of misplaced monism: portraying the ongoing dialogue as one big debate, when in fact there are several unconnected debates; and presenting a collection of writers as a single school when in fact little or nothing binds them together. As to the latter, I will immediately plead guilty. I seek to identify common themes in the issues writers address, and try not to be overly distracted by differences in how they address those themes. It is a common thing, indeed, that the positions each writer most vigorously and effectively criticises are the ones closest to what they themselves believe. As to the former charge, there are indeed many instances of writers failing to engage with other perspectives, perhaps deliberately avoiding battles they are not convinced they can win. This notable feature of the ongoing dialogue is precisely what I hope to call attention to. Within the common law tribe, there are indeed some members who are refusing to talk to other members – often, not for lack of common concerns, but because each feels that they do

[*] Martijn Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 9.

[1] See particularly Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theory* (Elgar 2020); Simone Degeling, Michael Crawford and Nicholas Tiverios (eds), *Justifying Private Rights* (Hart 2020); Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021); Stefan Grundmann, Hans-W Micklitz and Moritz Renner, *New Private Law Theory – A Pluralist Approach* (Cambridge University Press 2021). For commentary see Steve Hedley, 'Private Law Theory: The State of the Art' (SSRN 2021).

[2] Grundmann and others, *New Private Law Theory* (previous note) – though this is very light on torts, see principally ch 15.

not know where to begin. What I argue is that this is not an inevitable feature of the debate but rather a curable weakness in it, which subsequent scholarship may perhaps address.

In part I of this article, I set out the background: the context in which the nature of common tort is being debated, and previous disputations which have led the dialogue to the state it is now in. In part II, the sketch out what I am calling 'the middle ground': the standard position of most of those writing on torts. This is in a way the most challenging section, as most of those writing would deny (some quite aggressively) that they have any particular theory in mind; I aim to spell out the usual implicit theoretical backdrop, and identify theorists who have explicitly argued for something of the sort. In part III, I consider those theorists explicitly aiming to encapsulate actually existing tort law in one clear package, usually (as will become apparent) at the expense of any theory as to what tort is actually *for*, what socially desirable purposes it serves – in other words, those who privilege tort's description over its normative aspects. In part IV, I consider those who have taken the opposite line, focusing on how tort could be modified to serve the public good more effectively than it now does. Part V concludes.

I. Questions, questions

Tort's hostile environment

The best place to start is with a notorious and rather inconvenient truth: a significant proportion of current community members are extremely unconvinced of the merits of the tort system, for reasons which (no doubt) involve some misconceptions, but which nonetheless contain significant elements of truth. Everyone is familiar with the cost of insuring oneself against being sued, and the prospect of being sued can come to mind relatively quickly. A 'compensation culture', which is what many people suppose themselves to be living in, is not seen as a safe community where wrongs are deterred and compensation is promptly available, but as a hostile one where personal initiative and common-sense behaviour are deterred by the prospect of wrongful litigation. Tort's processes are considered slow and expensive. Public distaste is particularly noticeable in relation to economic aspects. It is all too easy to regard many tort claimants as gold-diggers (money is, after all, the only thing the system offers most claimants), and it is common knowledge that most successful claims result in a quiet no-liability-admitted settlement rather than a triumphant vindication of the claim. Cynicism as to the lawyers' role in the process is rampant, many suspecting that the legal professionals do much better from tort than do their clients[3].

Tort therefore appears to many not as a justified institution but as a leading instance of governmental regulation gone mad. The liability is simultaneously too much *and* never

[3] On 'compensation culture' see eg Annette Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *Modern Law Review* 349.

enough: the cost of the system seems unreasonably high, yet its reach never seems broad enough or quick enough to deal with the more deserving cases.

This scepticism as to tort's merits is represented in government up to a point, along with other conflicting points of view. Yet other points of view have their supporters as well; government as a whole simply *does not know* what it thinks about tort, or at least has no one simple agenda in relation to it[4]. This has been the case for quite a while now. 'Tort reform' has been an established if controversial presence in US politics for something like half a century. In the UK, a Royal Commission was established in the late 1970s to consider some broad questions of tort and its rationale; but (after apparently irreconcilable differences amongst commission members) it recommended only incremental reforms, and indeed asserted that broader questions were not within its remit[5]. Developing a *rationale* for tort is simply too broad a task for governmental policy makers; it is all they can do to keep it running.

So, for the last half century, such reforms as there have been have aimed either at making the system cheaper or more efficient, or at dealing with specific problems that have emerged. It is a prolonged legislative game of whack-a-mole. Changes to litigation funding, procedural changes (particularly the modern stress on encourages mention and early settlement), standardisation of damages, minor restrictions on liability – all can readily be traced to governmental calculations of the costs that tort imposes on their voters. In the UK, this drive for efficient use of funds has done much to diminish claimant access to tort (by the virtual abolition of legal aid in this context) and to increase public disdain for it (by enhancing the role of market processes in its funding): the overall trend is not so much *reforming* tort as *privatising* it[6]. And some US commentators discern legislative gridlock: positions for and against tort liability are now so well dug in that no significant movement can be expected from legislatures[7]. Significant debate usually occurs only on relatively minor topical issues, such as when tort liability should be available to benefit victims of Covid-19[8].

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[4] For an introduction to the issues at a theoretical level see Peter Cane, *Key Ideas in Tort Law* (Hart 2017) ch 8.

[5] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* 1978 Cmnd 7054 ('the Pearson report'). For context see Peter Bartrip, 'No-Fault Compensation on the Roads in Twentieth Century Britain' (2010) 69 *Cambridge Law Journal* 263, 274-281; for contemporary comment see David Allen, Colin Bourn and Jon Holyoak (eds), *Accident Compensation After Pearson* (Sweet and Maxwell 1979).

[6] On UK governmental reforms and their motivation see especially Annette Morris, 'Deconstructing Policy on Costs and the Compensation Culture' in Eoin Quill and Raymond Friel (eds), *Damages and Compensation Culture – Comparative Perspectives* (Hart 2016) ch 8; Annette Morris, 'Personal Injury Compensation and Civil Justice Paradigms' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Elgar 2019) ch 4.

[7] On the political unattractiveness of no-fault schemes see Robert Rabin and Nora Freeman Engstrom, 'The Road Not Taken: Perspectives on No-Fault Compensation for Tobacco and Opioid Victims' (2022) 70 *DePaul Law Review* 395.

[8] Heidi Li Feldman, 'From Liability Shields to Democratic Theory: What We Need From Tort Theory Now' (2022) 14 *Journal of Tort Law* 373; Christine Tomkins, Craig Purshouse, Rob Heywood, José Miola, Emma Cave and Sarah Devaney, 'Should doctors tackling covid-19 be immune from negligence liability claims?' *British Medical Journal* 2020;370:m2487; Anthony Sebok, 'The Deep Architecture of American COVID-19 Tort Reform 2020-21' (2022) 71 *DePaul Law Review* 473; Sierra Stubbs and John Witt, 'Tort Law's New Quarantinism: Race and Coercion in the Age of a Novel Coronavirus' (2022) 71 *DePaul Law Review* 613 (2022).

Tort theory emerges

Against that hostile background across the common law world, we seen in the last half-century a rise in scholarly interest in the theory of tort, seeking an explanation or justification of the liability[9]. It is certainly no surprise that these academic enquiries began to grow in prominence at much the same time as public scepticism of tort was becoming a mainstream concern; nor that the bulk of the theorising came from US, the home of 'tort reform'. Neither is it very surprising in retrospect that much of the writing involved taking sides for or against law-and-economics, which has been in the process of establishing itself as a major sub-discipline within the US law school. This essay is not concerned to trace causes – it is difficult to say to what extent these developments have stimulated the academic debate. Yet whatever the reasons, tort lawyers felt the need for some solid grounding for tort, which some found in economics, others in moral or political philosophy, and yet others in law's own traditions.

In principle, of course, the question of tort's justification could have arisen much earlier. Contrasting with the mediaeval view of tort as a mere miscellany, the notion that tort forms a coherent unity (rather than a mere jumble of miscellaneous remedies) had been around since the late 19th century, and views of what holds tort together have famously been expressed from that time onwards[10]. Yet pursuing those questions was always a minority sport amongst tort academics, and until relatively recently it might not have been thought that tort had a future at all. The subject was always full of archaisms; by the mid 20th century it was a common progressive view that it was a mere historical relic, doomed to be absorbed into the growing welfare state[11]. Yet when the political winds turned fully against tort, this was in parallel with attempts to reduce the welfare state *as well*. So the struggle turned out to be rather different from what had been envisaged.

Which issues concerned the theorists at first? In the early years of modern tort theory (say circa 1990), the battle lines were very firmly drawn: tort was based either on a theory of justice (usually 'corrective justice') or on the promotion of economic efficiency. What is striking from today's perspective is that the battle-ground was both descriptive *and* normative. Supporters of corrective justice argued that tort was *and should be* based on that conception of justice – indeed, some even toyed with the idea that a society which respected its members' rights *must* necessarily provide an institution at least similar to tort[12]. Lawyer-economists retorted that tort should be *and was* based on efficiency concerns, Richard Posner famously arguing that judges were, despite contrary appearances, intuitive economists, and properly so[13]. Furious disputation ensued[14]. In time, however, the artificiality of this dispute became apparent. There

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[9] Early classics were Jules Coleman, *Risks and Wrongs* (Cambridge University Press 1992) and Ernest Weinrib, *The Idea of Private Law* (Harvard University Press 1995).

[10] On early tort theory see James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart 2021) chs 2-3; Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge University Press 2015) ch 2.

[11] eg Patrick Atiyah, 'An Autobiographical Fragment' in GP Wilson (ed), *Frontiers of Legal Scholarship* (Wiley 1995) 34, 38; Peter Cane, *Key Ideas in Tort Law* (Hart 2017) 105-106.

[12] Though ultimately that argument proved very hard to sustain. See Coleman, *Risks and Wrongs* (above, n 9) ch 19; Sandy Steel, 'On the Moral Necessity of Tort Law: The Fairness Argument' (2021) 41 *Oxford Journal of Legal Studies* 192. *Contrà* see Avihay Dorfman, 'Relational justice and torts' in Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theory* (Elgar 2020) ch 19 at 323-328.

[13] On the goals of early law-and-economics see Steve Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134 *Law Quarterly Review* 214, 221-224.

[14] For a review of Private Law Theory as at 2007 see William Lucy, *Philosophy of Private Law* (Oxford University Press 2007).

is no good reason for supposing that common law in fact *does* take into account economic considerations, whether or not we think it *should*[15]; and while there is much in tort's rhetoric that suggests that tort *does* take into account corrective-justice-type reasoning, arguments that it *should* tend to be pretty circular, proving merely that if it ceased to do so it would be a very different institution – it would no longer be tort. As Ernest Weinrib had suggested all along, 'corrective justice' is a theory of what tort *is*; whether legal systems *should* provide for tort liability on that model is a different sort of question entirely, a matter of politics rather than interpersonal morality.

So the two warring factions were not really engaging with one another, though not everyone realised this at first. In the last decade (to put it no earlier), this message has got through to most of those still listening, and the two enquiries have pulled apart. Lawyer-economists now hardly ever argue that common law tort *is* efficient (indeed, that question is probably too vague to be answered) – rather, law-and-economics has much to say on what would be the most efficient rules for tort lawyers to have. So they are all about what tort law *should be*. And there has been no serious attempt to refute them[16]. As John Gardner noted, it is entirely possible to argue that the economists have done their sums wrong, but that's just another economic argument[17]. The only way to avoid law-and-economics *entirely* seems to be by abandoning argument on the desirability of the tort system altogether.

Their opponents, by contrast, are all about what tort law *is*, and tend to avoid normative questions; they have turned inward, seeking a better *description* of tort while withholding judgement on its desirability as a social institution[18]. From that point of view, a clear answer to what tort *is* renders the question of tort's justification irrelevant: we need not say that a radically different system would be better or worse than what we have, only that it would no longer deserve the name 'tort'. That does not necessarily mean that this camp dismiss reform out of hand; but it becomes something they feel excused from discussing, and are quick to say that it is unfair to criticise tort for failing to be something other than it is, or for failing to achieve objects it was never designed to achieve. In practice, this means that the question of reform is neglected, and indeed is barely mentioned beyond insisting that judges should not be reformers, or at least not while on the bench.

This drawing-apart, this tacit admission that *describing* tort and *justifying* it are utterly different enterprises, is striking, because it is *not* what we see elsewhere in private law theory. In contract theory and in theories of property and equity, the descriptive and the normative go hand-in-hand. It is obvious why any tolerably just market economy needs these institutions, and debate over precisely how they are to be implemented can proceed with a large amount of common ground. The *is* and the *ought* go together. Those who prefer to talk of doctrine are not necessarily at the throats of those who prefer to talk of economics, nor are they always proposing radically different solutions; those who prefer to talk of form are not

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[15] For a review of the literature see Nuno Garoupa and Carlos Gómez Ligüerre, 'The Evolution of the Common Law and Efficiency' (2012) 40 *Georgia Journal of International and Comparative Law* 307 (2012).
[16] Barbara Fried, 'The Limits of a Nonconsequentialist Approach to Torts' (2012) 18 *Legal Theory* 231.
[17] John Gardner, 'Backwards and Forwards with Tort Law' in Joseph Campbell, Michael O'Rourke and David Shier (eds), *Law and Social Justice* (MIT Press 2005); reprinted in John Gardner, *Torts and Other Wrongs* (Oxford University Press 2019) ch 4.
[18] Kenneth Abraham and George White, 'The Inward Turn and the Future of Tort Theory' (2021) 14 *Journal of Tort* Law 245.

at daggers drawn with those who prefer substance[19]. The argument that we need to look at private law both from within and without is a common one in private law theory, indeed not particularly controversial any more[20].

Why is tort different? Surely not because it is any less fundamental; most likely the reverse. The interests to which tort relates would be quite inadequately protected merely by granting a right of action against infringers. Our bodily integrity and health, our earning power, our property and our reputations cannot be adequately protected *merely* allowing you to sue someone who diminishes them. The great divide in tort theory is between those examining how the law protects our collective interests, and those who insist that the 'tort' aspect of this protection is somehow distinct from, indeed barely comparable to, the other aspects[21]. Tort protects our fundamental interests in a manner quite different from other protective institutions; the descriptivists try to capture tort's uniqueness, normativists ask whether that unique institution is the best we can do, or whether it should be improved or replaced.

The state of play

With this in mind I now proceed to my main business, which is to survey current writings on tort theory. A noticeable feature of the modern tort scholarship is the broadening of the range of attention – across cultures, across time, across other academic disciplines. Noteworthy are Bussani and Sebok's *Comparative Tort Law*[22], Goudkamp and Nolan's *Scholars of Tort Law*[23], Sandy Steel's English translation of Jansen's *The Structure of Tort Law*[24], Robbennolt and Hans's *The Psychology of Tort Law*[25], Paula Giliker's account of *The Europeanisation of English Tort Law*[26], Sinai and Shmueli's account of the surprisingly modern theories of Moses Maimonides[27], Anthony Gray's historical account of the common law drift from strict liability of towards negligence[28], and Paul Mitchell's history of early-20th-century tort[29]. And last but by no means least, Peter Cane's deceptively slight *Key Ideas in Tort Law*[30], which pithily explains the different viewpoints from which tort can be seen, and the stakes involved in describing it one way or another. The general range of theoretical approaches is impressive; for those who feel that tort must be understood from multiple different perspectives if it is to be understood at all, now is a good time to be in a law library.

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[19] eg Schwartz and Markovitz note that in relation to contract law 'there is a striking convergence of function and form', but for tort there is a more oppositional approach: Alan Schwartz and Daniel Markovits, 'Function and Form in Contract Law' in Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021) ch 15 at 259-259.

[20] eg Steve Hedley, 'Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart 2009) ch 8; Felipe Jiménez, 'Justifying Private Law' (SSRN 2021).

[21] Gregory Keating, 'Form and Substance in the "Private Law" of Torts' (2021) 14 *Journal of Tort Law* 45.

[22] Mauro Bussani and Anthony Sebok (eds), *Comparative Tort Law: Global Perspectives* (Elgar 2017; now 2nd ed 2021).

[23] James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart 2019).

[24] Nils Jansen, *The Structure of Tort Law* (Sandy Steel trans) (Oxford University Press 2021).

[25] Jennifer Robbennolt and Valerie Hans, *The Psychology of Tort Law* (New York University Press 2016).

[26] Paula Giliker, *The Europeanisation of English Tort Law* (Hart 2014).

[27] Yuval Sinai and Benjamin Shmueli, *Maimonides and Contemporary Tort Theory: Law, Religion, Economics, and Morality* (Cambridge 2020).

[28] Anthony Gray, *The Evolution from Strict Liability to Fault in the Law of Torts* (Hart 2021).

[29] Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge University Press 2015).

[30] Peter Cane, *Key Ideas in Tort Law* (Hart 2017).

But what does it all mean? We now have much more and much better quality data available to answer the question 'What is Tort?', but what is the answer to the question? What, indeed, is really the question? A strange feature of the current debate is that while the rest of private law theory seems to be moving towards a recognition of multiple valid perspectives on the law[31], tort theory is largely trapped in an oppositional struggle, with supporters of different viewpoints insisting that they alone have captured the essence the thing.

II. The Middle Ground

Anti-theorists?

Common lawyers tend to think of themselves as not having much use for theory. Law usually stands on its own within the academy; the law school has no natural or pre-ordained place within university disciplines. There is some study of jurisprudence or legal theory, but for all but a dedicated few this study reveals merely that there are several (apparently mutually incompatible) views of what law is, which is generally regarded as vaguely interesting but only rarely useful. And the more doctrinally-focused lawyers at least are usually faintly embarrassed when filling in the 'methodology' section of their grant applications. 'I propose to read the cases, the statutes and academic commentary on same. I will then draw appropriate conclusions. And that's it.'

It's all nonsense, of course. Common lawyers have very definite ideas as to what they are about, as to what theories and methodologies are appropriate in addressing legal questions – as quickly becomes apparent if, for comparison, you ask non-lawyers to tackle those same questions. It is the idea of 'theory' that is the problem. Most tort lawyers honestly deny having any 'theory' of tort, and indeed with the rise of theoretical debate that I'm concerned with here, have been saying so with greater and greater force[32]. This school of thought – which I'm calling here 'the middle ground' – rears its head mostly when on the offensive. Notably, most explicit exponents of this point of view are based outside the US, which dominates other aspects of the debate[33]. Recent examples are John Murphy's recent argument that '[t]ort is not now – nor has it ever been – in the process of working itself pure'[34], and Jane Stapleton's insistence that tort is not one thing, a homogenised and emulsified material 'like carrot purée'[35].

[31] eg Martijn Hesselink, 'Anything Goes in Private Law Theory? On the Epistemic and Ontological Commitments of Private Law Multi-Pluralism' (2022) 23 *German Law Journal* 891.
[32] See eg Warren Swain, 'The Law of Obligations, the Common Law and Legal Change: A View from the Gutter' (SSRN 2016). For a brief review of the anti-theory approach see Craig Purshouse, 'Flourishing Under Private Law? A Critique of McBride's Explanatory Theory' (2021) 34 *Canadian Journal of Law and Jurisprudence* 239, 239-240.
[33] For reflections on US/commonwealth differences as to theory see Allan Beever, 'Recognizing One More Wrong' (2021) 34 *Canadian Journal of Law and Jurisprudence* 493.
[34] John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 *Canadian Journal of Law and Jurisprudence* 413, 442.
[35] Jane Stapleton, *Three Essays on Torts* (Oxford University Press 2021) xvii.

The rejection of 'theory' seems to involves at least two things: firstly, an extreme dissatisfaction with the more explicit theories that have been elaborated, which are nonetheless taken as exemplars of what 'theory' is; and secondly, a feeling of inadequacy when it comes to building better theories, perhaps because it seems to involve skills and resources that lawyers haven't traditionally been very familiar with.

On the descriptive side, it is relatively easy to demonstrate that tort encompasses an extremely wide range of liabilities, so diverse that any attempt to sum them up in a single formulation seems not merely simplistic but positively distorting. Writers who are both familiar with this and aware of the direction that private law theory has taken have pointed out the dilemma this leaves for the 'theorists'. John Murphy has really made this area his own, commenting on the poverty of theory in relation both to particular torts[36] and to the big picture[37]; he is not necessarily averse to exploring whether tort has some kind of internal structure, which (all other things being equal) might be of some significance, but 'all other things are seldom equal'[38]. Similarly Paula Giliker, while acknowledging systematisation of tort as a valuable goal, thinks there are severe limits to how far it can go[39]. US writers are perhaps more reluctant to take such an explicitly anti-theory stand, but quite a few are nonetheless happy to quietly subvert theory by contrasting it with what actually happens in real legal systems: as where Engstrom and Green note the barely discernible influence that tort theory has had on the *Restatement of Torts*[40]; or when Ken Abraham discusses lawyerly appeals to juror's emotions in ways that (designedly) never come to the attention either of appellate courts or academic commentators[41]; or when Gregory Keating discusses the dissonance between tort's traditional subject-matter and the issues it is now expected to resolve[42]; or when Ken Simons examines the appropriate level of generality to be employed when trying to link up what tort does and what theory *says* it does[43].

Particularly interesting is the growing scholarship on European tort law[44]. EU law is explicitly regulatory and instrumental: where it creates private rights, it does so for stated reasons, as part of wider scheme of government. Given that these rights are not totally dissimilar from those of traditional private law (and the nature of these rights being much debated[45]), this

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[36] See particularly John Murphy, 'Hybrid Torts and Explanatory Tort Theory' (2018) 64 *McGill Law Journal* 1; John Murphy, 'Misleading Appearances in the Tort of Deceit' (2016) 75 *Cambridge Law Journal* 301.
[37] John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 *Canadian Journal of Law and Jurisprudence* 413; John Murphy, 'The Heterogeneity of Tort Law' (2019) 39 *Oxford Journal of Legal Studies* 455.
[38] John Murphy, 'Tort's Hierarchy of Protected Interests' *Cambridge Law Journal*, forthcoming 2022.
[39] Paula Giliker, 'Codification, Consolidation, Restatement? How Best to Systemise the Modern Law of Tort' (2021) 70 *International and Comparative Law Quarterly* 271.
[40] Nora Freeman Engstrom and Michael Green, 'Tort Theory and Restatements: Of Immanence and Lizard Lips' (2021) 14 *Journal of Tort Law* 333.
[41] Kenneth Abraham, 'Shadow Tort Law: Lessons from the Reptile' (SSRN 2022).
[42] Gregory Keating, 'Is tort law "private"?' in Paul Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press 2020). See also Gregory Keating, 'Form and Function in Tort Theory' (SSRN 2022).
[43] Kenneth Simons, 'Justifying and Categorizing Tort Doctrines: What is the Optimal Level of Generality?' (2021) 14 *Journal of Tort Law* 551.
[44] On the nature of EU Tort Law see Paula Giliker, 'The Future of EU Tort Law' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Elgar 2017); Paula Giliker, 'A Common law of Tort: Is there a European Rift in the Common Law Family?' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations – Divergence and Unity* (Hart 2016) ch 5 (SSRN 2015).
[45] See especially: Olha Cherednychenko, 'Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law' in Mel Kenny and James Devenney (eds), *The Transformation of European Private*

invites the question whether the same might be true of those traditional liabilities as well. Yet the picture throughout Europe is one of nationalist resistance to any such re-thinking of traditional ideas; meanwhile, each national tradition itself contains mutually conflicting trends[46]. Indeed, most European lawyers seem to find a common European approach 'unthinkable', and 'it is highly unlikely that the national legislatures might succumb to a major shift in the tort law structure simply because of a European trend'[47]. '[F]or a traditional tort lawyer, EU law compensatory remedies may appear "impure" and overly influenced by policy elements'[48]. So, again, there is resistance to anything that looks too theoretical, or gives modern and official-sounding reasons for tort's doing what it has been doing for centuries. This may be why EU law stays out of the limelight in debates on private law theory, being in practice confined to products liability (never an important area of liability in Europe) and matters of funding and procedure (vital to the workings of the tort system, but so far of little interest to theorists). Here as elsewhere, the obvious differences between individual torts put up substantial barriers against attempts to say what tort 'is'.

On the normative side, this middle-ground school generally accepts that tort law has a number of different aims, and sees no inconsistency or incoherence in asserting that they are pursued simultaneously. Tort does a little bit for each of a range of problems, though it does not provide a complete solution for any one of them. So tort does *some* of the work of deterring bad behaviour (though it is not the only legal institution to do so). It also does *some* of the work of compensating the victims of misfortune, at least where tort's doctrines can link that misfortune to the activities of a particular defendant. It may also be a valuable tool for forcing the disclosure of data central to public safety[49]. At a more abstract level, tort is often thought to 'empower' the victims of wrongdoing[50], or to further community members' autonomy or mutual respect[51]. Whether any or all of this constitutes either 'regulation' or 'corrective justice' is largely a matter of terminology, on which in this view little turns.

In passing, we can note a general failure in such arguments to contextualise tort's practical operations sufficiently to measure these good effects, or to provide empirical evidence of them. For example, it's easy to assert that tort serves a need for public condemnation of wrongdoers, but does it really do so? Does the slow, and largely confidential, process of negotiation and settlement really amount to 'public condemnation'? Does the operation of insurance remove any sting such condemnation may have? Or (on the contrary) is the

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Law: Harmonisation, Consolidation, Codification or Chaos? (Cambridge University Press 2014), 148 (SSRN 2017); Ralf Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in Roger Brownsword, Hans-W Micklitz, Leone Niglia and Stephen Weatherill (eds), *The Foundations of European Private Law* (Hart 2011) ch 8; Hugh Collins, 'The hybrid quality of European private law' (same volume) ch 28; Guido Comparato, Hans-W Micklitz and Yane Svetiev, 'The regulatory character of EU private law' in Christian Twigg-Flesner (ed), *Research Handbook on EU Contract and Consumer Law* (Elgar 2016) ch 2.

[46] Leone Niglia, 'A "European" tort law? Comparative thoughts on an "essentially contested" private law institution' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Elgar 2017) ch 12

[47] Jonas Knetsch, 'European tort law in Western Europe' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Elgar 2017) ch 13, 356.

[48] Dorota Leczykiewicz, 'Compensatory remedies in EU law: the relationship between EU law and national law' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Elgar 2017) ch 3, 67.

[49] Elizabeth Burch and Alexandra Lahav, 'Information for the Common Good in Mass Torts' (2022) 70 *DePaul Law Review* 345.

[50] eg Ori Herstein, 'How Tort Law Empowers' (2015) 65 *University of Toronto Law Journal* 99.

[51] eg Hanoch Dagan and Avihay Dorfman, 'The domain of private law' (2021) 71 *University of Toronto Law Journal* 207.

combined effect of insurance costs and other expenses in fact *too* great, constituting over-deterrence of activities that need to be regulated but not positively discouraged? These are not questions that can be answered from the law reports alone; so, this variety of theorist rarely asks them at all. It is simply assumed, as if it were common sense, that tort does good in a variety of ways, but that cataloguing those ways is someone else's problem.

So this school acknowledge a wide range of normative aims for tort, and are largely unconcerned that others might regard the totality of their aims as vague, over-eclectic or even incoherent. Definitive statements as to the nature of tort are to be distrusted: 'there is little or nothing in the common law of torts that is either pre-ordained or forever off the agenda'[52]. And they are distrustful of any theory that seems too large or all-encompassing, being happy to draw on such theories but not taking any one of them too seriously. They are however also reluctant to make factual or theoretical enquiries that wander very far from traditional legal scholarship. Above all, they are *incrementalist*: tort avoids the Scylla of obsolescence and the Charybdis of politics by taking only relatively minor steps in whatever direction currently seems best. By this process tort can be said to be in a continuous process of socialisation, that is, of continually taking into account wider considerations than it hitherto has[53].

Theory

This is all very well in practice, but how does it stand in theory? What, if anything, do we read into the fact that most of the incremental changes proposed within the law school would be incremental *expansions* of liability, in an age when both public and legislative opinion evince considerable suspicion of tort? What are the limits to the usefulness of tort, which types of problem should it *not* be asked to solve? The incrementalist habit of thought discourages answers to this question, though there are a few who are prepared to address this as either a historical[54] or a theoretical[55] question. But it is a certainty that if lawyers do not answer such questions, then others will. And if this middle ground is loudest when it comes to rejecting the other theories on offer, what are they in favour of? They are vocal on what they are *against*; what are they *for*?

The polemical nature of most of the declarations here make this a hard question to answer, and indeed it's probably a mistake to assume that all would answer the question the same way. That said, the best description of this approach I've come across *expressed as a theory* is from John Goldberg and Ben Zipursky, who helpfully located it within modern tort theory by claiming that it was in fact their principal target[56]:

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[52] John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 *Canadian Journal of Law and Jurisprudence* 413, 442.
[53] Jason Varuhas, 'The socialisation of private law: balancing private right and public good' (2021) 137 *Law Quarterly Review* 141.
[54] eg Kenneth Abraham and G Edward White, *Tort law and the construction of change: studies in the inevitability of history* (University of Virginia Press 2022).
[55] eg TT Arvind, 'Obligations, Governance and Society: Bringing the State Back In' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2016) ch 12.
[56] John Goldberg and Benjamin Zipursky, 'Thoroughly Modern Tort Theory' (2021) 134 *Harvard Law Review Forum* 184; and see the same authors' *Recognizing Wrongs* (Harvard University Press 2020) 44-47.

> Tort law, on this view, is a messy business through which courts deliver some compensation, provide some deterrence, dispense some justice, and do some other stuff such that, if all goes well, they will impose liability in a manner that contributes to social welfare, broadly understood[57].

In doing so, Goldberg and Zipursky say, these 'social welfarists' declare a pox on the more explicitly theoretical schools, preferring to 'muddle through' difficult issues rather than explicitly declaring what they are trying to achieve. This is not a perfect definition, of course; Goldberg and Zipursky minimise the extent to which 'social welfarists' value doctrinal stability as one of the goods they seek to achieve (the better, perhaps, to portray *themselves* as the ones who are 'taking tort at face value'), and they acknowledge that '[b]ecause its adherents resist the thought that they have adopted any general approach to tort law other than a suitably down-to-earth and sceptical approach, it is not easy to isolate a canonical scholarly statement of this position, though there are countless particular instantiations of it in treatises and scholarly articles'[58]. Nonetheless, Goldberg and Zipursky's account is useful, because it clearly indicates the real point at issue: if what the courts do is arguably good, but that good is utterly unsystematic or even random, is it any the worse for that? Goldberg and Zipursky's implied 'Yes' and the middle-grounders' implied 'No' is a major division in current private law theory[59]. Do we praise the Good Samaritan for his generosity, or lambast him for his supposed lack of principle? Or is there something about being a judge that is fundamentally incompatible with being a Good Samaritan?

So there are a number of writers who now stress the usefulness of the whole range of tort theories as a valuable aid in understanding it – as a toolkit, not as an invitation to pick sides – regardless of the point that those who developed each theory often did so in order to *disprove* the other theories[60]. And some place the emphasis on the many angles from which tort can and *should be* viewed, no one perspective seeming very satisfactory[61].

But a solid theory of the nature of tort from this perceptive seems not yet to be available, if indeed it ever will be. The question clearly has some resonance, and we have some very imperfect answers already suggested. Many UK tort lawyers will recall the late Tony Weir's suggestion that we can and should get by without any recognisable theory, answering the descriptive issue with '[t]ort is what is in the tort books, and the only thing holding it together is the binding', and opining that the normative issue is 'a very stupid question'[62]. But as Danny Priel pointed out, it's far from a stupid question, and Weir himself suggested a number of answers to it, though he never put them in any kind of order, or suggested how they could be balanced or reconciled where they ran counter to one another[63]. Again, Nick McBride's

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[57] Goldberg and Zipursky, 'Thoroughly Modern Tort Theory' (above, n 56) at 816.
[58] Goldberg and Zipursky, 'Thoroughly Modern Tort Theory' (above, n 56) at 816, n 21.
[59] The same could be said of Beever's references to tort as 'the Swiss Army knife of the common law', which he evidently meant as a criticism, but which many would take as a point in its favour: see Alan Beever, *Rediscovering the Law of Negligence* (Hart 2007) 197.
[60] eg Gregory Keating, Fair Precaution' in Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theory* (Elgar 2020) ch 17; Cristina Carmody Tilley, 'Tort Law Inside Out' (2017) 126 *Yale Law Journal* 1242; Andrew Gold and Henry Smith, 'Sizing up private law' (2020) 70 *University of Toronto Law Journal* 489.
[61] Peter Cane, *Key Ideas in Tort Law* (Hart 2017).
[62] Tony Weir, *Tort Law* (Oxford University Press 2002) ix; discussed in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart 2019) 32. See also Paula Giliker 'Mr Tony Weir (1936-2011)' (same volume) ch 12.
[63] Danny Priel, '*Tort Law* by Tony Weir' (2003) 14 *King's Law Journal* 297.

account of the basic goods law might be thought to secure[64] could clearly be the *beginnings* of a theory of tort's rationale, but there is still much work to be done before this is a useful theory: clashes between conflicting goods are not well handled in the theory as it stands (arguably rendering the theory unfalsifiable[65]), and the goods themselves are not awfully well defined[66].

John Gardner's work is for present purposes more substantial, if inconclusive, and can perhaps serve as a bridge between (explicitly) theoretical perspectives and 'anti-theoretical' perspectives[67]. Starting with what he called a 'lawyer's view' or a 'textbook view' – torts as wrongs[68] – Gardner's consistent theme was the relative merits of that view and of others that had been suggested, almost invariably concluding that each view has *something* to be said for it. Torts *are* wrongs, but nonetheless can consist of an unavoidable breach of a strict liability: moral duties can be strict[69], and rule-of-law objections to strict liabilities are misguided[70]. Corrective justice has a role in tort, but it should not be overstated[71] – 'there is no tort law without corrective justice [but] there has to be more to tort law than corrective justice'[72] – and tort has distributive goals as well[73]. Relationality has a role in tort, but some theorists over-state it while others under-state it[74]. Objections to law-and-economics are futile if they are at root merely objections to the values economists assign to particular activities or things; the only substantial objection we can make is when what we *really* value isn't economic at all[75]. While negligence is in some respects a matter of the basic responsibility that adults have for their behaviour, it is in others an 'assigned' responsibility allocated by government[76]; legal determinations of the reasonableness of conduct are at root a resort to community values, law passing the buck to non-law[77]. And objections to 'instrumentalism' are misguided, unless that term is used in a very particular sense[78]. Gardner appreciated that these positions, while in no sense self-contradictory, would baffle '[t]hose with pigeonholing instincts'; and he acknowledged that they implied a rejection of the high degree of consistency that some legal

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[64] Nicholas McBride, *The Humanity of Private Law – Part I: Explanation* (Hart 2019) especially ch 4.
[65] Nicholas Tiverios, 'Review: *The Humanity of Private Law Parts I and II* by Nicholas J McBride' (2021) 26 *Torts Law Journal* 281.
[66] Craig Purshouse, 'Flourishing Under Private Law? A Critique of McBride's Explanatory Theory' (2021) 34 *Canadian Journal of Law and Jurisprudence* 239.
[67] I rely here principally on John Gardner, *Torts and Other Wrongs* (Oxford University Press 2019) (published posthumously), which consists of collected essays, the earliest of which dates from 2001; also on his *From Personal Life to Private Law* (Oxford University Press 2018).
[68] *Torts and Other Wrongs* (above, n 67) 103.
[69] *Torts and Other Wrongs* (above, n 67) ch 5, originally published as 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart 2001).
[70] *Torts and Other Wrongs* (above, n 67) ch 6, originally published as 'Some Rule-of-Law Anxieties about Strict Liability in Private Law' in Lisa Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014).
[71] *Torts and Other Wrongs* (above, n 67) ch 2, originally published as 'What is Tort Law For? Part I. The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1.
[72] *Torts and Other Wrongs* (above, n 67) at 78.
[73] *Torts and Other Wrongs* (above, n 67) ch 3, originally published as 'What is Tort Law For? The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014).
[74] *From Personal Life to Private Law* (above, n 67) ch 1.
[75] *Torts and Other Wrongs* (above, n 67) ch 4, originally published as 'Backwards and Forwards with Tort Law' in Joseph Campbell, Michael O'Rourke and David Shier (eds), *Law and Social Justice* (MIT Press 2005).
[76] *Torts and Other Wrongs* (above, n 67) ch 7, originally published as 'The Negligence Standard: Political not Metaphysical' (2017) 80 *Modern Law Review* 1.
[77] *Torts and Other Wrongs* (above, n 67) ch 9, originally published as 'The Many Faces of the Reasonable Person' (2015) 131 *Law Quarterly Review* 56.
[78] *Torts and Other Wrongs* (above, n 67) ch 10.

philosophers (wrongly, he thought) regard as obviously desirable. 'Any justification has to be coherent in the thin sense of intelligible. But Weinribian coherence (or Dworkinian integrity) is not, in my eyes, any kind of plus. Reality, including moral reality, is fragmentary'[79].

Some similar themes emerge from a recent essay by Jane Stapleton[80], though her theme is rather the failures of 'Grand Theory', and the sort of academic research that is appropriate in the light of that failure – which she terms 'reflexive scholarship', focusing on the judicial task and aiming to assist it[81]. Descriptively, she argues that all 'grand theories' (by which she seems to mean broad unitary visions of the nature of tort) fail, and for the same reasons: they ignore tort's diversity (across time[82], across jurisdictions[83]), and they attach too little weight to legal precedent, which is central to the legal enterprise[84]. Normatively, she is less critical – 'grand theory' may supply a useful normative challenge[85] – though the diversity of our concerns about law will always limit how useful any one theory can be[86], and she is unsurprised by the barely discernible impact such theories have so far had on the judiciary[87]. The law should aim to 'give effect to people's reasonable expectations in the context of relevant social facts and values'[88]; the courts should seek to reflect current public opinion but without trying to get ahead of it[89] – which in practice means they must be incrementalist[90]. She concedes that the courts are not very well-placed to keep the law in line with public opinion[91], but argues that the legislature isn't either, if not quite for the same reasons[92].

On the descriptive side, much of this school's work is demonstrably correct – there are always complexities wherever we look an individual cases, and theories which ostentatiously ignore them are to that extent simply inaccurate. Yet focusing on this alone makes it impossible to see the law as anything other than a mass of detail, rather than as a working system with describable tendencies and effects. We must not let the uniqueness of each tree prevent us from observing forests. Still less should we denounce those who study forests as delusional, or in the grip of some hopelessly abstract theory. Different writers address different questions.

Normatively, the appeal of incrementalism is an understandable reaction to the desperate situation tort finds itself in, but if we step back a little it is a serious admission of how little we understand it. Ernest Weinrib attracted much criticism for his assertion that tort has no purpose[93], but there is no huge difference between that position and the position that it has a

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[79] *Torts and Other Wrongs* (above, n 67) 82 n 10. See also *From Personal Life to Private Law* (above, n 67) 57, protesting against the polarisation of much writing in this area.
[80] Stapleton, *Three Essays on Torts* (above, n 35) essay 1.
[81] Stapleton, *Three Essays on Torts* (above, n 35) 17-20.
[82] Stapleton, *Three Essays on Torts* (above, n 35) 22.
[83] Stapleton, *Three Essays on Torts* (above, n 35) 23.
[84] Stapleton, *Three Essays on Torts* (above, n 35) 26.
[85] Stapleton, *Three Essays on Torts* (above, n 35) 20.
[86] Stapleton, *Three Essays on Torts* (above, n 35) 11.
[87] Stapleton, *Three Essays on Torts* (above, n 35) 2.
[88] Stapleton, *Three Essays on Torts* (above, n 35) 10.
[89] Stapleton, *Three Essays on Torts* (above, n 35) 32.
[90] Stapleton, *Three Essays on Torts* (above, n 35) 13.
[91] Stapleton, *Three Essays on Torts* (above, n 35) 29.
[92] Stapleton, *Three Essays on Torts* (above, n 35) 16, 30.
[93] 'If we *must* express this intelligibility [of private law] in terms of purpose, the only thing to be said is that the purpose of private law is to be private law': Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 5.

wide range of purposes which we are unable to enumerate or to weigh against each other in any principled way[94]. An earlier generation of theorists might have retorted that lawyers should leave those sorts of issues to legislatures, partly for reasons of democratic legitimacy and partly because legislatures are better placed to answer them; but while some still insist on the latter point at least[95], it has long been clear that few legislatures have much interest in that job, or are prepared to commit the level of resources that would be required to seriously tackle it. The 'middle ground' is simply a laboured attempt to keep the show on the road; whether it *deserves* to be kept on the road is not yet being seriously asked. Lawyers of all people should surely have something useful to say on this; but they seem reluctant to speak.

III. The Descriptivists

To many Europeans who associate US legal thought predominantly with legal realism, with law-as-politics and with suspicion of formalism, it seems paradoxical that the sternest insistence on private law as a non-political, intellectually autonomous, formal system should come from the US law school. And indeed much of the impetus for these ostentatiously 'non-political' theories is a reaction to realist thought, wishing to show that tort law is *not* 'public law in disguise'[96] or part of any reasoned scheme of government.

The trouble with denying any half-truth is of course of going too far, of compromising the case you make by over-stating it – in this instance, by insisting so much on what lawyers should see when they look *inward* into their own thought-processes that they forget to look *outward*, to why the law should matter to anyone else. This 'inward turn'[97] implicitly denies what earlier generations of common lawyers took for granted: that tort is a very varied (not to say jumbled) entity, that there are many ways in which it could develop, and that which way is best is not simply a matter of achieving doctrinal consistency but also brings in wider considerations: law reform should never be *solely* the preserve of lawyers. The wide range of different theories of tort is not treated as evidence that tort serves many different functions; rather, the assumption is that one of the conceptions must be the right one, and that the task of the tort theorist to identify that one right answer.

The difficulty is not, as it seems to me, with the answers these descriptivists theorists give to the questions they ask, as with the questions themselves. Why should it matter whether we

[94] Which, again, is little different from what Weinrib himself said: 'Understood from the standpoint of mutually independent goals, private law is a congeries of unharmonized and competing purposes': *Idea* (previous note) 5.
[95] Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 *Oxford Journal of Legal Studies* 393. For Cane's actual experience with legislative processes, and how this relates to his views on this question, see Mark Lunney, 'Cane as Law Reformer: *Götterdämerung* or House of Cards?' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart 2021) ch 13.
[96] This is a much-used phrase, possibly inspired by Leon Green, 'Tort Law Public Law in Disguise' (I) (1959) 38 *Texas Law Review* 1, (II) (1960) 38 *Texas Law Review* 257.
[97] Abraham and White, 'The Inward turn' (above, n 18).

can give a simple answer to 'what tort is' or what it does, or whether we can cleanly separate it from other legal institutions? These questions might matter if they had implications for the value of tort as an institution, but these theorist's insistence on avoiding 'non-legal' issues has pushed away questions of that sort. The work that is now done in this context is now almost entirely descriptive; normative questions being defined out of the frame.

What tort is

Positively, there are a number of competing conceptions of what tort is, though nearly all of them begin by saying that torts are *wrongs*, which may be complained of by those with *rights* to do so. This is what is meant by the 'bilateral' character of tort: liability can only be established if we can identify both wrongful behaviour *and* a right-holder who may complain of it. This is often labelled as 'corrective justice', though that label carries various meanings in the literature. One prominent version of this is urged by Kantian scholars (notably Ernest Weinrib[98], Arthur Ripstein[99] and Alan Beever[100]); other versions by Jules Coleman[101], (up to a point) John Gardner[102] and (with some reservations) Rob Stevens[103]. 'Wrong' has obvious moral overtones. Some are content simply to treat tort as a matter of common-sense community morality[104], or at least as closely-related to it[105]. (Empirical enquiries into what community members actually think on this tend to complicate matters[106].) Most theorists however have particular conceptions of 'wrong' in mind, typically *moral* conceptions[107]. Some consider the relation between tort and morality to be rather looser[108]; and of those to accept some connection, not all think it follows that judges should be considering morality when they apply the law[109], though thinking of tort as morality tends to blur that distinction. There is much discussion of the problem that *strict* liability in tort seems at first glance hard to reconcile with any moral theory – to which a variety of answers are given[110].

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[98] Especially Weinrib, *Idea* (above, n 9); Ernest Weinrib, *Corrective Justice* (Oxford University Press 2016).
[99] Especially Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016).
[100] Especially Alan Beever, *Rediscovering the Law of Negligence* (Hart 2007); Alan Beever, *A Theory of Tort Liability* (Hart 2018). For other recent work on the Kantian view see Nick Sage, 'Relational Wrongs and Agency in Tort Theory' (2021) 41 *Oxford Journal of Legal Studies* 1012; Yitzhak Benbaji, 'Welfare and Freedom: Towards a Semi-Kantian Theory of Private Law' (2020) 39 *Law and Philosophy* 473.
[101] Especially Coleman, *Risks and Wrongs* (above, n 9) part III; Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) part 1.
[102] *Torts and Other Wrongs* (above, n 67) generally but especially chs 2-3. For commentary see Rebecca Stone, 'Distributing Corrective Justice' (SSRN 2022).
[103] For discussion see Robert Stevens, *Tort and Rights* (Oxford University Press 2007) 326-328. Stevens's reservations as to Weinrib's theory seem to focus on the word 'corrective', rather than its explicit grounding in Kantian right.
[104] eg Mark Gergen, 'Gerhart and Private Law's Melody of Reasonableness' (2021) 72 *Case Western Reserve Law Review* 355.
[105] eg Steven Schaus, 'A Simple Model of Torts and Moral Wrongs' (2022) 97 *Notre Dame Law Review* 1029.
[106] Willem van Boom, Chris Reinders Folmer and Pieter Desmet, 'Comparative Legal Culture and Tort Law - An Exploratory Experiment' (SSRN 2018).
[107] eg Craig Purshouse, 'Utilitarianism as tort theory: countering the caricature' (2018) 38 *Legal Studies* 24; Alexandra Trofimov, 'Negligence is not ignorance' (2022) 13 *Jurisprudence - An International Journal of Legal and Political Thought* 240.
[108] eg Rebecca Stone, 'Who Has the Power to Enforce Private Rights?' (SSRN 2022); Sandy Steel, 'Culpability and Compensation' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart 2021) ch 3.
[109] eg Felipe Jiménez, 'Private Law Legalism' (SSRN 2022).
[110] On strict liability see Anthony Gray, *The Evolution from Strict Liability to Fault in the Law of Torts* (Hart 2021); Marco Cappelletti, *Justifying Strict Liability: A Comparative Analysis in Legal Reasoning* (Oxford University Press

Missing from most of this is acknowledgement that legislation, the market and the practicalities of litigation all conspire to ensure that nearly all tort liabilities are met by insurers rather than by morally responsible tortfeasors; and the literature is only beginning to discuss how a 'wrongs'-based tort law would apply to harms caused by AI systems[111], or how it can respond to challenges from psychologists to tort law's conceptions of human responsibility[112]. The 'wrongfulness' of torts is deeply embedded within lawyers' heads, but can we see it anywhere else?

A recurrent issue from this theoretical perspective is the explanation of the remedy: how does the defendant's duty not to commit wrongs somehow transform into a duty to compensate the right-holder against whom the wrong was committed? Some argue that the duty to compensate (or 'duty of repair') can somehow be derived from the duty not to commit the tort (which Gardner called 'the continuity thesis'[113]); others argue that it may be necessary to postulate an additional form of justice ('redressive justice') to supplement the corrective justice implicit in tort norms[114]; yet others do not think that there is necessarily any simple relation between the wrongs and the remedy[115], or even suggest that the concept of 'wrong' may be dispensable here[116]. This ongoing debate has radical implications for 'wrongs' theories, which typically assert and rely on a close moral and social connection between claimant and defendant – somewhat jarring with the actual operation of the tort system, which typically allows actual wrongdoers to drop out of the picture, leaving the claimant to deal with an insurer.

Can the stand-out features of this approach – treatment of tort apart from other regulatory institutions, insistence on individual responsibility and liability, lack of attention to insurance – be seen as an exercise in 'virtue conservatism'[117], valuing tort not so much as a system of liability as for the traditional social values of mutual respect its language often seems to embody? Theorists rarely say this outright, and basing tort on individual responsibility radically underestimates the protection the law actually affords; it pushes the elaborate network of insurance provision into the background, when in fact that network is what makes

2022); Mark Geistfeld, 'Strict Products Liability 2.0: The Triumph of Judicial Reasoning Over Mainstream Tort Theory' (2021) 14 *Journal of Tort Law* 403; Cristina Tilley, 'Just Strict Liability' (SSRN 2022).

[111] eg Argyri Panezi,'Liability Rules For AI-Facilitated Wrongs: An Ecosystem Approach To Manage Risk And Uncertainty' (SSRN 2021); Kristen Thomasen, 'AI and Tort Law' (SSRN 2021).

[112] See Tess Wilkinson-Ryan, 'Psychology and the New Private Law' in Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021) ch 8; Valerie Hans and Jennifer Robbennolt, *The Psychology of Tort Law* (New York University Press 2016) 207-210.

[113] See Gardner, *From Personal Life to Private Law* (above, n 67) chs 3-4.

[114] Andrew Gold, *The Right of Redress* (Oxford, 2020). For commentary see books reviews by William Lucy (2022) 81 *Cambridge Law Journal* 200 and Erik Encarnacion (SSRN 2022).

[115] Stephen Smith, *Rights, Wrongs and Injustices – The Structure of Remedial Law* (Oxford University Press 2019) especially ch 8 (and see at 228 nn 12-14); reviewed by Steve Hedley (2021) 137 *Law Quarterly Review* 341.

[116] eg Emmanuel Voyiakis, *Private Law and the Value of Choice* (Hart 2019). For a range of views on this topic see Paul Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press 2020) essays 8-12.

[117] Prince Saprai, 'Never Let Me Go: Private Law and the Conservative Impulse' (SSRN 2022).

the modern law possible[118]. Indeed, in many respects it is easier to see the modern system as a defiant *rejection* of Victorian ideals of personal responsibility rather than a reflection of them.

So a description of tort on its own merely describes part of a wider whole. What is at issue is whether it nonetheless still makes sense to describe it in isolation, or whether this inherently misrepresents its modern condition. Some like to emphasise the historical dimension to this: so for example we have Roger Brownsword's thesis that tort is transitioning, from a simple fault-based model to a regulatory-instrumentalist model[119]. This is of course true so far as it goes; but this transformation has been ongoing for as long as tort has been recognisably modern, for a century if not longer. And approaches to tort which downplay both the institutional arrangements which make tort action possible, and the regulatory mechanisms which address the same dangers as does tort, serve definite values, and cannot be defended by insisting that they merely describe. The tactic of assuming that 'tort law' should be described in isolation from the rest of the law embodies a value-judgment desperately in need of justification; yet the current trajectory of the scholarship evades this. The description is from a very particular perspective, yet discussion of why *that* perspective has been adopted is hard to find.

What tort is not

Most of the more startling contentions of this school are not so much in their positive vision of tort, as in their suggestion that it is the *only* valid description of tort. These suggestions are to be found partly in explicit arguments, but also to a great extent in omissions: topics that are avoided, matters that are not mentioned when discussing what is vital to tort. Six key issues stand out: the wish to clarify and 'make sense of' tort, which other approaches are asserted not to do; support for 'formalism'; denial that tort is 'regulation'; neglect of tort statutes; neglect of procedural matters; and denial of the relevance of economic concepts and 'policy'.

The overall picture presented, then, is of tort as a self-contained and self-sufficient system with its own history and traditions. The implied normative manifesto is obvious: Leave Us Alone, and Let Tort Be Tort! Yet tort should not exist for the satisfaction of tort lawyers; this expensive and complex system is (presumably) permitted to exist only for the benefits it brings to the community, and maximising that benefit is a constant process of tweaking the law, the procedure and the various other legal institutions fulfilling similar roles. If some continuity in tort is discernible despite that, well and good, but tort does not exist in splendid isolation. As to the best description of this, it is all a question of balance:

(1) 'Making sense of tort': While this slogan has obvious attractions for students new to tort, as used in tort theory it is too frequently used simply to urge simplistic views of the law, neglecting the more complex views to be found in the actual cases. Coherence is desirable, but is only one of many desirable qualities; it has costs as well as benefits, and which of the two is

[118] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th ed Cambridge University Press 2018) especially ch 9; Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press 2013) especially chs 8-9.
[119] Roger Brownsword, *Law, Technology and Society – Re-imagining the Regulatory Environment* (Routledge, 2019) ch 10.

the greater must be determined on an instance-by-instance basis. 'Seek simplicity and distrust it'[120]. Historically, tort has never been a very well-ordered category[121]; and the modern demand that it should become one should not be treated as a statement of the obvious, for it is far from obvious. 'Tort law is not now – nor has it ever been – in the process of working itself pure'[122].

(2) 'Formalism': The claim that tort should become (or that, properly understood, already is) more formal in its reasoning has been made by a variety of tort theorists, possibly not always with the same meaning[123]; others have suggested that on the contrary this is merely a cover for nostalgia, and should be rejected[124]. No doubt simpler rules may often be preferable to complex ones, but we should certainly not be too ready to accept claims that they make the law simpler and easy to apply, when they often merely remove the difficulties to another area of enquiry.

(3) 'Tort is not regulation': This frequent claim (which, for some though not others, entails that it is irrelevant whether tort actually deters wrongdoers, and that punitive damages are not something tort should countenance[125]) seems to put the descriptive theorists in conflict with the dictionary; on most definitions at least, tort *is* regulation, though of course regulation can also exist in very different forms[126]. What seems to be meant is more precise: tort is not (or is not *only*) a set of official instructions as to proper behaviour, and the law's response to tortious wrongs should not be seen as punishment for misbehaviour[127]. There is some truth in this: official standards of proper behaviour tend to be embodied in criminal law rather than civil law, and public ignorance of tort law makes it an inept tool for such a task[128]. Yet that does not stop punishment from being recognised by the judges as *one* appropriate task for tort to perform, if only on occasion[129]. Those who deny tort a regulatory role seem to have a rather antiquated view of 'regulation': telling people what to do, and punishing them if they do disobey ('command-and-control regulation') is indeed a very imperfect technique, which is precisely why modern regulatory authorities treat it as merely *one* weapon in their armoury, preferring to communicate the reason for the regulation and build support for its goals. On the more expansive modern conception of 'regulation', it is far from obvious that tort does not

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[120] Alfred North Whitehead, *The Concept of Nature* (Cambridge University Press 1920) 163, quoted in this connection in John Murphy, 'Rights, Reductionism and Tort Law' (2008) 28 *Oxford Journal of Legal Studies* 393, 407.
[121] John Murphy, 'The Heterogeneity of Tort Law' (2019) 39 *Oxford Journal of Legal Studies* 455.
[122] John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 *Canadian Journal of Law and Jurisprudence* 413, 442.
[123] For discussion see Paul Miller, 'The New Formalism in Private Law' (2021) 66 *American Journal of Jurisprudence* 175.
[124] Geoffrey Samuel, 'Is Legal Neo-Formalism Nothing but Pastiche?' (2020) 15 *Journal of Comparative Law* 347.
[125] eg Kit Barker, 'Punishment in Private Law – No Such Thing (Any More)' in Elise Bant, Wayne Courtney, James Goudkamp and Jeannie Marie Paterson (eds), *Punishment and Private Law* (Hart 2021) ch 2; cf James Goudkamp and Eleni Katsampouka, 'Punitive Damages and the Place of Punishment in Private Law' (2021) 84 *Modern Law Review* 1257.
[126] Typical definitions of 'regulation' are as 'an official rule or the act of controlling something' (*Cambridge*) or 'rules made by a government or other authority in order to control the way something is done or the way people behave' (*Collins*).
[127] The claim takes various forms. See eg Donal Nolan, 'Tort and Regulation' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart 2021) ch 9.
[128] Nadia Sussman, 'The Reasonable Person's Ignorance of Tort Law in New Zealand' [2021] 2 *New Zealand Law Review* 277.
[129] James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *Oxford Journal of Legal Studies* 90.

qualify[130]. What should go without saying (but often doesn't) is that the picture is quite different in different contexts: some tort defendants have no regard to avoiding litigation, others pay more attention (and so can be 'regulated' by an understanding of what will avoid it).

(4) Neglect of statute: Writing in this area tends to focus almost exclusively on tort case law, with only minimal reference to statutes. There does not however seem to be any sensible argument that there are no true tort statutes, or that tort statutes are unimportant; they are simply passed over, and their conformity or otherwise with the descriptive vision of tort is not discussed[131]. Yet very often statutes are motivated precisely by a perception that some aspects of its operations are less than perfect; it seems a poor sort of theory that ignores these clues as to the nature and merits of the modern system; we must avoid the 'naivety … of viewing statutory interpretation as a separate subject, distinguishable from the substantive domains traditionally understood to exist in private law'[132].

(5) Neglect of procedure and actual arrangements for litigation: Again, issues of appropriate parties for litigation, procedures, and litigation funding are typically of little interest in these theories, which focus on the doctrine to be applied if a court considers liability, without asking whether or how it will be asked to consider it[133]. And the focus tends to be on the individual wrongdoer who could in theory be made to compensate, rather than the employer or insurer who will in practice have to do so. Again, the theories mislead by omission, and tort's strengths and weaknesses fail to emerge because there is no serious discussion of other avenues for redress available to those contemplating action in tort[134].

(6) Neglect of economic concepts and 'policy': And finally, there is a persistent unhappiness with any resort to economic thought or to public policy; a typical statement is Stephen Smith's, that '[t]he idea that we do not need to know anything about economics, sociology, or philosophy to understand tort law is not revolutionary'[135]. Yet economic, social and philosophical assumptions are baked into the descriptive theories now proposed, and to fail to advert to this is to accept those theories blindly. We cannot escape theory; we can only decide whether to discuss it or not. And to fail to do so is to pass up serious discussion of the value of tort as an institution.

Allan Beever, sensing the problem, proposes a truce: we should simply recognise that *tort law* is different from *the tort system*; and theoretical propositions about tort law should not be criticised merely because they are misleading (or even simply wrong) about how tort works

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[130] Jenny Steele, 'Regulating relationships: The Regulatory Potential of Tort Law Revisited' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart 2021) ch 10.
[131] James Goudkamp and John Murphy, 'Tort Statutes and Tort Theories' (2015) 131 *Law Quarterly Review* 133.
[132] Prue Vines and M Scott Donald in Prue Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press 2019) 14.
[133] eg Steve Hedley, 'The Unacknowledged Revolution in Liability for Negligence' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart 2018) ch 6.
[134] On which see eg Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th ed Cambridge University Press 2018) chs 11-14.
[135] Stephen Smith, 'Taking tort seriously' (2021) 71 *University of Toronto Law Journal* 415, 417.

in practice[136]. 'We do not realise that we are, in fact, fighting over different toys'[137]. But peace is hardly attainable on such a basis. As an abstract exercise, tort can no doubt be discussed while ignoring the real effects it has on peoples' lives; but it is hard to see what the point of such a discussion would be. And such an approach certainly does not constitute taking tort *seriously* – on the contrary, it treats it as some sort of game, played only in law schools, and deliberately deprived of all practical consequence.

Recognizing Wrongs

It seems appropriate to round off this account of descriptive theories by considering John Goldberg and Ben Zipursky's recent *Recognizing Wrongs*[138], which now provides a definitive statement of their theory of tort as 'civil recourse'[139]. As now explained, their theory is a doctrinally-focused account of tort as wrongs. While torts are rather various – 'we do not believe that the wrongs of tort law express a single, foundational principle'[140] – they are united by a number of features: the wrongs are legally recognised (by reference to current legal thought), they are injury-inclusive (an authentic and definable injury must be identified), they are relational (they are wrongs against an identifiable rights-holder), and they are civilly actionable (civil rather than criminal consequences follow)[141]. Tort law is private law, not public law, and developments which seem to blur that line are to be deprecated[142].

Goldberg and Zipursky are unapologetically descriptive: they are not interested in discussing whether addressing wrongs is best done through actions for money damages, but only in establishing that it is in fact done that way. While they announce themselves as opponents of both corrective justice and law-and-economics, they hold their fire until they see an argument that these theories are *already* explicitly part of the law, '[t]ort law is what it looks to be', rather than being a cover for something else[143]. They oppose those who judge tort by the social benefits it produces by observing that tort doesn't, in fact, make much attempt to assess those benefits[144]. Suggestions that judges follow instrumental goals are myths, and law-and-economics is dismissed as a theory of tort because the judges do not *say* that they are engaging

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[136] Allan Beever, 'Tort Law and the Tort System: From vindictiveness to vindication' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Elgar 2019) ch 24.
[137] Beever (previous note) at 453.
[138] John Goldberg and Benjamin Zipursky, *Recognizing Wrongs* (Harvard University Press 2020).
[139] Earlier writings include Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1; Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695; John Goldberg and Benjamin Zipursky, 'Torts as Wrongs' (2010) 88 *Texas Law Review* 917; and John Goldberg and Benjamin Zipursky, 'Civil Recourse Revisited' (2011) 39 *Florida State University Law Review* 341.
[140] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 26.
[141] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 26-30.
[142] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 65-73; John Goldberg and Benjamin Zipursky, 'Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas SB 8' (2022) 14 *Journal of Tort Law* 469.
[143] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 2.
[144] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 45-46.

in an economic analysis[145]. There is a brief exchange of views with Catherine Sharkey[146], over a prominent instance where the court explicitly uses an economic argument; Goldberg and Zipursky end up arguing that this does not count, because the court disagreed on the outcome of the argument[147]. Arguments that the courts should have regard to whether the law achieves good, or at least defensible, results for both parties are dismissed by suggesting that, on the whole, the courts do not actually do this [148].

How, then, is the law to be developed, or applied in novel cases? Their answer is 'dual constructivism', which seems to be rather difficult to describe succinctly, but which they explain in a rather Dworkinesque simile. The law of tort is like an art gallery exhibiting some classic and uncontroversial exemplars of particular artistic styles; the curators will of course wish to include modern examples where possible; and they will want to put like with like, grouping the individual works by reference to their similarities. So new additions are always a possibility, but the criterion is not whether justice or efficiency somehow requires the addition, but whether the new arrival fits with the existing collection[149]. 'Tort law is a constructed and curated gallery of wrongs'[150]. As Mark Geistfeld comments, '[r]ather than representing a new framework, dual constructivism is an elegant restatement of substantively sound analogical reasoning, the characteristic form of common-law analysis'[151].

Goldberg and Zipursky's reference to 'civil recourse' as indicating their core concerns now increasingly requires explanation – indeed they now admit it is 'potentially misleading', a better label being torts as redress for wrongs[152]. Tort is self-evidently an avenue of civil recourse which the state makes available to plaintiffs, but making that point the focus of the theory naturally leads others to questions of why the state provides redress in *this* form and not others. So Rebecca Stone asks whether we can realistically assess the adequacy of civil recourse without considering the justice of the political community within which it is being provided[153]; Louis Hensler asks whether the admitted role of the state in civil recourse compromises the claim that it instantiates *private* law[154]; Erin Kelly asks whether such civil recourse could extend to cases of historic wrongs[155]. And Mark Geistfeld notes that 'civil recourse' could equally describe a vision of tort which he regards as superior, one which

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[145] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 66-68; John Goldberg and Benjamin Zipursky, 'The Myths of *MacPherson*' (2016) 9 *Journal of Tort Law* 91. As Murphy notes in his review (John Murphy (2021) 80 *Cambridge Law Journal* 185, 186-187), they glide over the point that most modern lawyer-economists are not talking about what the law *is*, but about what it *should be* if we are to justify its considerable cost.

[146] Catherine Sharkey, 'Book Review: Modern Tort Law: Preventing Harms, Not Recognizing Wrongs' (2021) 134 *Harvard Law Review* 1423, discussing *Air and Liquid Systems Corp v DeVries* 139 S Ct 986 (2019).

[147] '[It] lacks substance, determinacy, and fidelity to the concepts underlying our law': Benjamin Zipursky and John Goldberg, 'Thoroughly Modern Tort Theory' (2021) 134 *Harvard Law Review Forum* 184, 196. Yet 'the fact that some judges disagree about how to implement a principle … does not mean that the concept lacks substance or determinacy': Guido Calabresi and Spencer Smith, 'On Tort Law's Dualisms' (2022) 135 *Harvard Law Review Forum* 184, 187.

[148] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 217-221.

[149] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) ch 8.

[150] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 238. See also Zipursky's argument that judicial development of tort law does not raise significant rule-of-law concerns: Benjamin Zipursky, 'Torts and the Rule of Law' in Lisa Austin and Dennis Klimchuk, *Private Law and the Rule of Law* (Oxford University Press 2014) ch 6.

[151] Mark Geistfeld, 'Tort Law and Civil Recourse' (2021) 119 *Michigan Law Review* 1289, 1294-1295.

[152] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 263.

[153] Rebecca Stone, 'The Circumstances of Civil Recourse' (2022) 41 *Law and Philosophy* 39.

[154] Louis Hensler, 'Civil Reconciliation Tort Theory: Making Torts Private Again' (SSRN 2022).

[155] Erin Kelly, 'Redress and Reparations for Injurious Wrongs' (2022) 41 *Law and Philosophy* 105.

largely dispenses with any notion that the defendant has engaged in mistreatment or misconduct, and simply asks whether the claimant has a right to compensation[156]. Yet addressing such questions would lead Goldberg and Zipursky in directions they do not wish to go. So the phrase 'civil recourse' has taken on a life of its own, in a debate to which Goldberg and Zipursky's characterisation of tort law is relatively unimportant[157].

Whatever their differences from the corrective justice theorists, most commentators think them relatively minor[158]. The theory has many of the features that are characteristic of the more descriptive theories: the announcement that certain liabilities simply aren't tortious, even though they are staples of tort courses[159]; awkwardly squeezing liability for defective products into the category of 'wrongs', apparently just to fit the theory[160]; down-playing of vicarious liability and insurance practically to the point of invisibility, thus giving a misleading picture of the burdens tort actually imposes[161]; open hostility to law-and-economics, even though they insist that it is not their principal target but is merely collaterally damaged[162]. These are typical targets of corrective justice theorists. Goldberg and Zipursky have *some* differences from *some* versions of corrective justice, though attempts to explain what they are get very technical very quickly[163]. One committed Kantian, while noting that Goldberg and Zipursky disagree with modern Kantians on several points of detail, nonetheless insists that all belong in the same school of thought[164]; he adds that given the long and rich history of corrective justice thinking, it is a travesty to deny membership of that school simply because of disagreements over some incidental statements by some of its modern members. 'I have to confess to being tired of reading works that present ideas with which I already agree as if they were objections to my entire worldview, as if they were brand new notions that belong to freshly minted theoretical approaches'[165].

And, as with many purely descriptive accounts of tort, we are left with the suspicion that normative questions are avoided not because the authors do not care about them, but simply because they do not wish to start an argument they suspect they would lose. The elaborate theorising – *suspiciously* elaborate, indeed, for a theory that (when all's said and done) merely tells us which liabilities are properly called 'torts' and which not – is merely designed to give

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[156] Mark Geistfeld, 'Tort Law and Civil Recourse' (2021) 119 *Michigan Law Review* 1289, 1290.
[157] For comment by Goldberg and Zipursky themselves see John Goldberg and Benjamin Zipursky, 'Replies to Commentators' (2022) 41 *Law and Philosophy* 127; Benjamin Zipursky, 'Civil Recourse Theory' in Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021) ch 4.
[158] As Zipursky notes, many are inclined to dismiss their differences from corrective justice theory as insignificant: Benjamin Zipursky, 'Civil Recourse Theory' (above, n 157) 53.
[159] *Rylands v Fletcher* (1868) LR 3 HL 330 is 'at or beyond tort law's conceptual boundaries': Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 191.
[160] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 153, discussed in Nicholas McBride (2020) 83 *Modern Law Review* 1124, 1125-1126.
[161] See Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 273-278.
[162] John Goldberg and Benjamin Zipursky, 'Thoroughly Modern Tort Theory' (2021) 134 *Harvard Law Review Forum* 184, 187.
[163] Discussed in Allan Beever, 'Recognizing One More Wrong' (2021) 34 *Canadian Journal of Law and Jurisprudence* 493; Tom Dougherty and Johann Frick, 'Morality and Institutional Detail in the Law of Torts: Reflections on Goldberg's and Zipursky's *Recognizing Wrongs*' (2022) 41 *Law and Philosophy* 1; Peter Gerhart, 'Book Review: Concepts All the Way Down' (2021) 72 *Case Western Reserve Law Review* 399.
[164] Beever, 'Recognizing One More Wrong' (above, n 163) 504.
[165] Beever, 'Recognizing One More Wrong' (above, n 163) 514.

tort solidity and immobility, so that would-be reformers can brusquely be told that whatever can be said in favour of a different set of rules, those rules cannot be regarded as part of the law of tort. This seems to be why they regard 'social welfarists' as allies of those who would reduce or even eliminate tort altogether: raising the question of how tort can better help society simply opens the door to those who answer that, on the whole, it doesn't help it much or at all[166]. Much better, think Goldberg and Zipursky, to insist on a rigid definition of what a tort is, and that anything else would not be a tort. That it means we approach every new issue with what the law already says, rather than asking what is the problem we are trying to solve, is simply an unfortunate collateral issue.

Leave it to the legislature?

Many members of an earlier generation of scholars might have believed that the justice or otherwise of the tort system was not their problem: that while they were free to call attention to any injustices they came across, ultimately such matters were the responsibility of the wise legislature, which would either correct the problem or authoritatively determine that it was no problem at all. An almost entirely descriptive approach to the law was therefore appropriate. But we do not believe in fairy tales any more, or at least not *that* fairy tale. The tort system is too large and too complicated, the demands on government too diverse, and the various vested interests too numerous, for legislative inaction to be treated as some official imprimatur, some determination that the system is satisfactory. And legislative ideas as to whether the current system is justified, or of how it can be improved, do not come from nowhere. One might have thought that tort lawyers would have a great deal to say on this. And legal theories which encourage them not to say anything at all do not seem conducive to a good legal system.

IV. The Normativists

What of those who consider wider normative questions, of the general desirability or otherwise of the law of tort? It must be said immediately that the theorising here has never been so all-encompassing or straightfoward as descriptive theories. For those who think of tort as basically a good institution, the goods it fosters are many and various, and on any close inspection highly arguable in particular instances; for those who think tort restrictive and wasteful, it nonetheless satisfies *some* legitimate needs which any civilised society will somehow provide for. So normative argument about tort is always likely to be complicated, and at a lower level of abstraction than the grand theorisation often attempted on the descriptive question. Even an apparently straightforward view such as that favoured by Patrick Atiyah – that tort does nothing useful which cannot be better accomplished by

[166] Goldberg and Zipursky, *Recognizing Wrongs* (above, n 138) 7-10; John Goldberg and Benjamin Zipursky, 'Thoroughly Modern Tort Theory' (2021) 134 *Harvard Law Review Forum* 184, 187.

insurance[167] – was not simple at all, because it required an explanation of how insurance law and practice could be modified to achieve this. So normative tort theory is always going to be a shy creature; some, indeed, might not spot it at all.

Whatever happened to law and economics?

While doctrinalists have abandoned the normative argument, so equally the economists have abandoned the descriptive argument. The claim that tort *as currently done* is a species of economic thought, famously made by Richard Posner, has been quietly abandoned in the literature, and it is far from clear that even Posner believes it today[168]. There is of course still the occasional issue over the Learned Hand criterion for breach of duty, which on its face certainly *looks* economic[169], but as a general matter it is very rare for anyone to argue that tort already *is* efficient. The argument is normative, to enquire into the costs of tort, with a view to their more efficient distribution. Are cost considerations are the *only* thing we should pay attention to? This is not something you will find lawyer-economists saying, and there is no reason to think they believe it, though they only rarely have occasion to point this out[170]. Consideration of costs makes sense as part of a wider debate, a debate which non-economists seem reluctant to engage in.

So limited, economic analysis of tort is still an active area of study, though it tends to keep itself to itself. It is rarely referenced by more doctrinal theorists. Now that the discipline of law-and-economics has become more mature and the work more detailed, much of it is tied to particular market sectors, rather than to particular legal doctrines, which increases its impenetrability to relatively doctrinal lawyers. Contributions which are too close to established private law theories to be ignored in this way tend to be somewhat defiant, calling attention to the issues that the private law theorists are *not* addressing, and expressing little interest in hashing out a joint approach that would satisfy all concerned[171]. Yet with the recent growth of research-handbook-style publishing, it is perhaps easier for non-specialists to access than ever before[172].

So an active body of scholars is at work. But for a number of reasons – the avoidances already mentioned, the very different categories into which lawyers and economists divide their subject-matter, the mutual impenetrability of their technical languages – the lawyers and the economists rarely compare notes. 'Most contemporary [law-and-economics] works appeal

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[167] Patrick Atiyah, *The Damages Lottery* (Hart 1997) ch 8.

[168] I have traced elsewhere the gradual withdrawal of the claim that judges are *in fact* guided by the economic consequences of their decisions: Steve Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134 *Law Quarterly Review* 214, 221-224. See also 'Economic Jurisprudence' in Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011) ch 5.

[169] See eg Gregory Keating, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 *Stanford Law Review* 311.

[170] eg Adam Davidson, 'Guido Calabresi's "Other Justice Reasons"' (2021) 88 *University of Chicago Law Review* 1626.

[171] Much cited is Fried's 'Limits'(above, n 16). See also Daniel Kelly, 'Law and Economics', in Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021) ch 6; Yotam Kaplan, 'Economic Theory of Tort Law' in Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theory* (Elgar 2020) ch 16.

[172] Jennifer Arlen (ed), *Research handbook on the economics of torts* (Elgar 2015); Francesco Parisi (ed), *Oxford Handbook of Law and Economics* (Oxford University Press 2017) vol 2 ch 3; Joshua Teitelbaum (ed), *Research Handbook on Behavioral Law and Economics* (Elgar 2018) chs 8-9.

mainly to economists or to a narrow group of specialists, and are not of much interest to mainstream law journal audiences'[173]. There is, therefore, a clear gap in the scholarship: the absence of anything to link legal and economic views of what tort is actually *for*, a question on which both legal and economic perspectives are undeniably central. But this gap cannot be filled until both concede that they have something to learn from the other. Or as Calabresi and Smith have recently put it,

> We think both 'sides' – if you want to call them that – miss something. At one level, tort law *is* about wrongs and redress. That is the private side of torts. And it is what courts do much of the time. At another level, tort law *is* about preventing harms or, if you like, about the regulatory needs of society. That is the public side of torts. And it is what courts do on occasion, and what legislatures and administrative agencies do very often. If you fixate only on one side or the other, you fail to appreciate the whole of tort law[174].

Other normative work

Outside of the closeted area of law-and-economics, there is a plethora of suggestions for liabilities or tasks that tort has not yet seized on but could usefully do so. Many (though by no means all) of these suggestions come from the US, which so often thinks in terms of individualistic solutions where Europeans think of community regulation. So tort is proposed as useful contributing to problems of misbehaviour by multi-national corporations[175], climate change[176], or rectification of historic wrongs[177]. International lawyers ask whether tort can help the victims of aggressive states[178]. And to some, the vagueness of the tort of public nuisance is a standing invitation to use it for a wide range of problems[179]. In short, we do not lack for suggestions as to what else tort can usefully do[180].

At a higher level of abstraction, much modern normative work tends to fall into one of two categories: it either accepts that, whatever its imperfections, tort is an established part of the legal system, and accordingly demands that there should be effective and equal access to it; or it discusses how tort might be absorbed into more comprehensive regulatory systems.

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[173] Kaplan, 'Economic Theory of Tort Law' (above, n 171) 285.
[174] Guido Calabresi and Spencer Smith, 'On Tort Law's Dualisms' (2022) 135 *Harvard Law Review Forum* 184, 184 (emphases in original).
[175] Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English courts: The Challenge of Jurisdiction' (2018) 14 *Utrecht Law Review* 6.
[176] Monika Hinteregger, 'Climate change and tort law' in Eva Schulev-Steindl, Monika Hinteregger, Gottfried Kirchengast, Lukas Meyer, Oliver Ruppel, Gerhard Schnedl, and Karl Steininger (eds) *Climate Change, Responsibility and Liability* (Nomos 2022) 383.
[177] Erin Kelly, 'Redress and Reparations for Injurious Wrongs' (2022) 41 *Law and Philosophy* 105.
[178] Haim Abraham, 'Tort Liability for Belligerent Wrongs' (2019) 39 *Oxford Journal of Legal Studies* 808.
[179] Leslie Kendrick, 'The Perils and Promise of Public Nuisance' (SSRN 2022).
[180] Abraham and White, 'The Inward turn' (above, n 18) 255-259; Colin Murray, 'The Radical Fringes of Tort Law' in Illan rua Wall, Freya Middleton, Sahar Shah and CLAW, *The Critical Legal Pocketbook* (Counterpress 2021) ch 19.

Equal access

Arguments in favour of tort are mostly hollow if tort is not in practice accessible to those who might in theory take advantage of it; and those arguments should certainly be looked at askance if there is significant bias or discrimination in tort's availability or practical remedies[181]. That many victims of torts either cannot sue, or face a very unequal battle against a better-funded defendant, is increasingly becoming a concern[182]. Particular issues here relate to remedies, especially defendant exploitation of the long wait that claimants may have before they receive any compensation[183]; those complaining that the tort has injured their health may find their recovery impeded by the need to constantly restate the harm that has been done to them[184]. Again, those complaining of assault and harassment may find that a remedy is in practice only available if they are prepared to agree to a confidential settlement, which strikes many of them as objectionable[185].

There is a substantial literature suggesting either that tort incorporates biases against disadvantaged groups which should be corrected[186], or that tort could potentially address such biases in other institutions[187]. The latter covers a wide field, including suggestions for recognition of a wider range of harms, increased actionability for discrimination and breach of basic civil rights, and enhanced protection for privacy and sexual autonomy[188]. Some writers root themselves carefully in tort's traditions – such as Anita Bernstein's argument that using tort to remedy intimate partner violence does not involve any real innovation, it simply employs it in a relatively unfamiliar context[189] – but most are happy to extend tort well beyond its traditional boundaries. Not all of these are immediately practical law reform proposals, and perhaps they are not intended as such; rather, they point to existing problems which deserve *some* solution. The value of arguments that tort is not the right way to solve them depends on whether another, superior, way has been identified. That tort law is not a good way to address distributive issues is an argument of long standing, the merits of which have been extensively debated[190]; but if nothing else is suggested, the argument that tort is better

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[181] eg Anne Bloom, 'The Future of Injury (Tort Law in the Wake of the Pandemic)' (2022) 71 *DePaul Law Review* 209.
[182] eg Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Harvard University Press 2019), on which see Andrew Higgins, 'What Price Are We Willing to Pay for the Dream of Equal Justice?' (2022) 42 *Oxford Journal of Legal Studies* 325.
[183] Gideon Parchomovsky and Alex Stein, 'Preliminary Damages' (2022) *Faculty Scholarship at Penn Carey Law* 2258.
[184] Ian Cameron, 'Compensation and Health' in Prue Vines and Arno Akkermans (eds), *Unexpected Consequences of Compensation Law* (Hart 2020) ch 3; Mary-Elizabeth Tumelty, 'Exploring the emotional burdens and impact of medical negligence litigation on the plaintiff and medical practitioner: insights from Ireland' (2021) 41 *Legal Studies* 633.
[185] Gilat Juli Bachar, 'The Psychology of Secret Settlements' (2022) 73 *Hastings Law Journal* 1; Jessica Bregant, Jennifer Robbennolt and Verity Winship, 'Perceptions of Settlement' (2021) 27 *Harvard Negotiation Law Review* 93.
[186] Anita Bernstein, 'Tort as yet another locus of gender injustice in the distribution of money' in Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theory* (Elgar 2020) ch 18; Ellen Bublick, 'Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured' (2022) 14 *Journal of Tort Law* 279.
[187] For listed 'techniques of bias' and 'solutions' see Martha Chamallas and Lucinda Finley (eds), *Feminist Judgments – Rewritten Tort Opinions* (Cambridge University Press 2020) 15-19.
[188] Tsachi Keren-Paz, 'Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law' (2019) 27 *Feminist Legal Studies* 33; Scott Skinner-Thompson, 'Anti-Subordination Torts' (2022) 83 *Ohio State Law Journal* 427; Sarah Lynnda Swan, 'Tort Law and Feminism, forthcoming in *Oxford Handbook on Feminism and the Law in the US*' (SSRN 2021).
[189] Anita Bernstein, *The Common Law Inside the Female Body* (Cambridge University Press 2019).
[190] See especially Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007).

than nothing is a powerful one. '[T]oday's private law is deeply implicated in the generation of structural disadvantage. A private law more concerned with extracting and hiding wealth than creating it might be thought to have a limited future'[191].

Absorption

The subject-matter of tort disputes is for the most part regulated not merely by the law of tort but also by other laws or law-governed institutions: criminal justice, social security, insurance, regulative bodies whether state or professional. The goals of the different institutions are not necessarily identical, but they certainly overlap: undesirable conduct is deterred from several angles, its victims compensated in a number of ways. Serious assessment of each institution's performance must necessarily take into account the others, and it may often be appropriate to modify one of them so as not to interfere with the others. In short, tort's application, and the desirable scope of its application, may vary drastically in different contexts, often in ways that might not be immediately apparent to those who study tort on its own[192].

This should not be thought of as a recent development. Arguably it has been so for as long as tort has been recognisably modern; tort in a recognisably modern form grew up together with insurance, joined at the hip. But it is also rather uneven. It is highly pronounced in relation to motor vehicle liability, with tort liability well-recognised as simply one element of a wider and deeper regulatory scheme, and the actual wrongdoer in collision cases effectively dropping to of the liability scheme, rather than being made to compensate their victim as most tort theorists would envisage[193]. Compensation for workplace injuries is increasingly becoming a matter of insurance rather than tort – the UK is unusual in retaining the form of tort liability here, though of course it is only the form, any actual payment being made by an insurer whether public or private[194]. And the scholarly literature increasingly recognises the futility of addressing such safety issues through tort's language of blame[195]. Similarly in a medical context, where many emphasise a culture of mutual trust and of learning from mistakes, tort's role being assessed by whether it contributes to that goal rather than by criteria that might be relevant in other contexts[196].

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[191] Simon Deakin, 'Private Law and the New Social Question' (2022) 23 *German Law Journal* 862, 862.

[192] For some of these questions see Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart 2015).

[193] For some of the issues see Rob Merkin and Jenny Steele, 'Policing Tort and Crime with the MIB: Remedies, Penalties and the Duty to Insure' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press 2014) ch 2; James Davey, 'A compulsory diet of chickens and eggs: the EU Motor Insurance Directives as a shadow tort regime' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Elgar 2017) ch 9.

[194] On treatment of workplace injuries in the UK see Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th ed Cambridge University Press 2018) ch 13. For the disappearance of US tort law in this context see Joseph Ranney, 'The Burdens of All: Progressive Origins of Accident Cost Socialization in Tort Law, 1870-1920' (2021) 105 *Marquette Law Review* 397 (2021).

[195] See Hodges, *Law and Corporate Behaviour* (above, n 192) chs 2, 5, 6 and 7; Jenny Steele, 'Regulating relationships' (above, n 130).

[196] eg Phoebe Jean-Pierre, 'Medical Error And Vulnerable Communities' (2022) 102 *Boston University Law Review* 327. On other issues see Tsachi Keren-Paz, Tina Cockburn and Alicia El Haj, 'Regulating innovative treatments: information, risk allocation and redress' (2019) 11 *Law, Innovation and Technology* 1; Colm McGrath, 'Alternative Compensation Schemes for Medical Malpractice in the United Kingdom' in Dobrochna Bach-Golecka (ed), *Compensation Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings: Comparative Law Perspectives* (Springer 2021) ch 18.

Considerations of this sort may eventually lead to tort's being absorbed into the web of regulation that addresses dangerous activities. That is not *quite* the same as actually abolishing tort, whatever reformers might want, though if the nature of the change is understood it would make it hard to insist on any unitary descriptive theory of tort. And sometimes – rarely – such debates even lead to suggestions that naked, unadorned tort liability is in some limited contexts the best solution to particular problems[197]. Yet tort's traditional mechanism – identifying who caused the harm and making them pay for it – is only rarely likely to be the best solution. Such defendants are not usually in a position to bear that financial loss any more than the claimants are, as the rise of liability insurance clearly indicates. Tort without insurance is not a practical system for more than a handful of problems; tort with insurance constantly poses the question whether insurance alone might be superior.

V. Conclusion

The rise of modern tort theory – both its appearance, and the form it has taken – is in some respects surprising. It is surprising both in the questions it asks and in the questions it avoids. And the debates described here are clearly not the end of the matter, though (as related) some of the issues discussed are becoming clear as dead ends. The important thing to bear in mind is that in principle these very different theories should not really be incompatible but merely ask different questions. Without some appeal to values, description is thin stuff; without some appeal to what is, values are utopian, or can easily be made to appear so.

[197] See Christopher French, 'Insuring Intentional Torts' (SSRN 2022) (discussing the pros and cons of denying deliberate tortfeasors liability insurance cover).