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HYBRID TORTS AND EXPLANATORY TORT THEORY

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This article examines the problem of fit caused by "hybrid torts" for several contemporary, explanatory theories of tort law: those belonging to Ernest Weinrib, Robert Stevens, and John Goldberg and Benjamin Zipursky. The term hybrid tort is intended to capture a cause of action that is treated routinely by practitioners, judges and doctrinal jurists alike as a tort proper even though its ingredients suggest that it is only part tort and part something else (like, for example, equity). The central argument of the article is as follows: at tort law's borders with other legal categories, there exists a number of hybrid actions that are widely acknowledged to be torts but which comprise a range of juridical components, some of which are typical within tort law and some of which are more germane to some other legal category. This set of hybrid actions suggests that—whatever theoretical neatness might dictate—tort law's boundaries are fuzzy and porous, not clearly defined and rigid. This fuzziness in the object of theorization naturally casts doubt on the apple-pie neatness of the theories in view. In addition, the obvious response—that these juridically mixed causes of action are not proper torts (and therefore do not require explanation)—is shown to be unavailable to the theorists whose work is examined given that each of them commits to explaining the law as it presents itself. Put differently: since the law as we encounter it clearly treats these hybrid actions as torts, they cannot be dismissed in this way. Nor, it is argued—for a combination of reasons that establish their practical significance—can these hybrid torts be dismissed as irrelevant.

Cet article examine le problème d'adéquation posé par la « responsabilité délictuelle hybride » pour plusieurs théories contemporaines explicatives : celles défendues par Ernest Weinrib, Robert Stevens, ainsi que John Goldberg et Benjamin Zipursky. Le terme « responsabilité délictuelle hybride » vise à désigner une cause d'action qui est traitée systématiquement par les practiciens, les juges et les auteurs de doctrine comme de la responsabilité délictuelle même si ses composantes suggèrent qu'il ne s'agit qu'en partie de responsabilité délictuelle et en partie d'autre chose (comme de l'*equity*). L'argument au cœur de l'article est le suivant: aux frontières entre la responsabilité délictuelle et d'autres catégories du droit, il existe de nombreux recours hybrides qui sont largement connus comme relevant de la responsabilité délictuelle, mais qui sont composées d'un éventail de composantes juridiques, dont certaines sont caractéristiques de la responsabilité délictuelle et d'autres en lien plus étroit avec une autre catégorie du droit. Ce nombre de recourses hybrides suggère que — peu importe l'ordre théorique imposé — les frontières de la responsabilité délictuelle sont troubles et poreuses, sans définition claire ou rigide. Ce flou entourant l'objet théorique qu'est la responsabilité délictuelle jette naturellement un doute sur l'ordre favorisé dans les théories étudiées. De plus, la réponse évidente — que ces cas à la frontière de plusieurs théories juridiques ne constituent pas de la responsabilité délictuelle à proprement parler (et ainsi ne nécessitent pas d'explications) — est présentée comme invalide pour les théoriciens présentés, dont le travail est examiné en tenant compte du fait que chacun d'eux s'engage à expliquer le droit tel qu'il se présente. Autrement dit, celui-ci traite clairement ces cas hybrides comme de la responsabilité délictuelle, ils ne peuvent être rejetés de cette catégories. Ils ne peuvent pas non plus être rejetés comme hors de propos, même si certains l'affirment pour plusieurs raisons reliées à leur portée pratique.

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> Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra.
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> Oliver Wendell Holmes, Jr[1]

> [It is] a hopeless task to draw a sharp picture corresponding to the blurred [object].
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> Ludwig Wittgenstein[2]

Introduction

The aim of this article is to show that, taken together, certain torts—which I label "hybrid torts" because they straddle two legal categories—pose a significant problem of fit for leading, explanatory theories of tort law in so far as they set out to explain *tort law as a whole*. The principal theories falling into this category are those belonging to Robert Stevens, Ernest Weinrib, and John Goldberg and Benjamin Zipursky.[3] It is fairly obvious that any given tort deserves to be explained (or, at least, ought not to be ignored) by a theory which sets out to provide an explanatory account of *all of tort law*, unless the tort in question can be seen as anomalous, marginal or trivial.[4] A tort will be none of these if it is well-

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1 *The Common Law* (Boston: Little, Brown & Co, 1881) at 127.

2 *Philosophical Investigations*, translated by GEM Anscombe (Oxford: Basil Blackwell, 1953) at 36.

3 Weinrib's most accessible account of tort law is relatively short and can be found in Ernest J Weinrib, "Understanding Tort Law" (1989) 23:3 Val U L Rev 485 [Weinrib, "Understanding Tort Law"]. Large chunks of this article are replicated, almost word for word, in Weinrib's principal work, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) [Weinrib, *The Idea of Private Law*]. Since the book (which is mainly about tort law) expands on certain matters discussed in that article, reference is made hereafter to both sources. Robert Stevens, in his book *Torts and Rights* (Oxford: Oxford University Press, 2007) [Stevens, *Torts and Rights*], leaves virtually no aspect of the subject untreated: he is clearly concerned to present a theory of tort law as a whole. The same ambition can be attributed to Goldberg and Zipursky's examination of tort law over a long period of time (but for a general conspectus, see John CP Goldberg & Benjamin C Zipursky, "Torts as Wrongs" (2010) 88:5 Tex L Rev 917 [Goldberg & Zipursky, "Torts as Wrongs"]). Partly for reasons of limited space, and partly because much of what they say either chimes with Weinrib's pioneering work or that of my other target theorists, I do no more than refer here and there to the recent theories of tort law propounded in Allan Beever, *A Theory of Tort Liability* (Oxford: Hart Publishing, 2016) [Beever, *Theory of Tort*] and Arthur Ripstein, *Private Wrongs* (Cambridge, Mass: Harvard University Press, 2016).

4 There is implicit acknowledgement of this in the fact that leading tort theorists do not generally ignore the data that they cannot explain. So, for example, Beever explores a number of possible ways in which inducing breach of contract *might* be understood before concluding that it is an anomalous cause of action (Beever, *Theory of Tort*, *supra* note 3 at 146–54). Similarly, Stevens devotes considerable effort to explaining why several exceptions to the privity of torts rule in which he places so much store can be overlooked or tolerated even though they cannot be accommodated by his theory, see generally Stevens, *supra* note 3 at 173–98. And Goldberg and Zipursky begrudgingly concede

entrenched, its credentials *qua* tort have never seriously been challenged by either judges or jurists, and it possesses considerable practical significance (on account of its being invoked regularly by litigants). If a putatively explanatory theory of tort law cannot account for well-established, widely recognized and practically significant torts, then that theory may fairly be described as being beset by a significant problem of fit.[5]

What is perhaps less obvious is why the array of hybrid torts upon which this article focuses should also require explanation by such theories and why, when they cannot be so explained, they should be thought of as presenting a significant problem of fit for those theories. The simple reason why they ought to be explained by the theories in view is that the relevant theorists all implicitly commit themselves to providing such explanation.

That Weinrib is committed to explaining all causes of action that are widely recognized as being torts cannot be doubted given the method underpinning his theory. He makes clear that "the point of departure for theorizing about tort law—as well as about anything else—is experience" since, crucially, such "experience allows us to recognize a tort issue."[6] For him, "[a]n inquiry into the nature of tort law is...a visit to the familiar landmarks of our legal world,"[7] which involves "drawing on what is salient in *juristic experience*"[8] and, in particular, "the experience of those who are lawyers."[9] In other words, if a particular action comprises a "familiar landmark" within the world of tort law, this is good reason for it to be treated as an object of theorization.

Stevens is similarly committed. On more than one occasion in *Torts and Rights*, he makes plain his determination to explain "the law as we find it"[10] and, as we shall see, the law as we find it (whether ideally or not) most certainly treats hybrid torts as part of tort law. They ought therefore to come within the compass of his theory.

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that the rule in *Rylands v. Fletcher* (as well as its United States counterpart, the rule concerning ultrahazardous activities) cannot be explained by their theory (Goldberg & Zipursky, "Torts as Wrongs", *supra* note 3 at 951–52).

5 Because torts that are well established and practically important are regarded as orthodox, there is no real scope for a tort theorist to dismiss them as aberrant or anomalous.

6 Weinrib, "Understanding Tort Law", *supra* note 3 at 490.

7 *Ibid*.

8 See Weinrib, *The Idea of Private Law*, *supra* note 3 at 2–3 [emphasis added].

9 *Ibid* at 9.

10 See e.g. Stevens, *Torts and Rights*, *supra* note 3 at 74, 306.

Finally, Goldberg and Zipursky are no less tethered to popular conceptions of tort law in developing their theory. They expressly adopt the Hartian position that a legal system (or body of rules) can best be understood from what Hart labelled the "internal point of view" or "internal aspect of rules."[11] Signing up to this internal point of view, they insist that the "first move in an effort to theorize a subject is to work with, rather than dismiss as empty, the ways in which those acting within a practice make sense of it."[12] In other words, they defend a strong prima facie case for regarding "tort law to be what it appears to be"[13] and thereby presumptively undertake to explain those actions—including hybrid torts—that are generally taken to constitute part of tort law.

It is perhaps worth spelling out why hybrid torts present a particular problem of fit for explanatory theories. The plausibility of each of my target theories is intimately linked to the idea that tort law has clearly defined and rigid borders. Without such borders, there is an inescapable problem which besets such theories. It is this: if the boundaries between tort law and other legal categories are indistinct, or if they are porous, then the very idea that there exists a discrete body of law to which the theory in question applies, and against which that theory may be tested, is called into question. In short, blurred boundaries carry with them unavoidable ramifications for the explanatory ambitions of the theorists in view given Wittgenstein's observation (quoted above) that it is impossible to paint a clear picture of a fuzzy object.

Now of course, not all torts are equally well entrenched, and the practical significance of some torts is undoubtedly dwarfed by that of others. From this emerges one ostensibly attractive escape route for tort theorists who find themselves confronted by the problem of fit posed by hybrid torts. The escape route involves showing that the hybrid torts are anomalies, or otherwise insignificant causes of action. Either way, the action in question can be portrayed as something which need not be explained, for there is no need to account for actions that are not proper torts, or actions that are mere trivial exceptions to the norm. As we shall see, however, no

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[11] HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994) at 56, 89. Though it matters not for present purposes, it may be noted that Goldberg and Zipursky actually run together two ideas that Hart treated as being separate. The "internal aspect of rules," for Hart, is a property of rule-governed behaviour as opposed to habitual behaviour (*ibid*). By contrast, the "internal point of view" refers to the point of view of those whose habitual behaviour and beliefs constitute the aspect of the social world we are attempting to understand (i.e., the law). Taking up the internal point of view may, of course, lead one towards the former; but it need not necessarily do so.

[12] John CP Goldberg & Benjamin C Zipursky, "Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties" (2006) 75:3 Fordham L Rev 1563 at 1577.

[13] *Ibid*.

such escape route can plausibly be invoked in relation to the hybrid torts considered in this article. They are all too firmly entrenched and/or significant to be sidelined. Any attempt to dismiss the actions in question as something other than torts involves a flagrantly Procrustean approach to theorization. The claim that hybrid torts X, Y, and Z fall outside tort's clear and rigid borders is an unpersuasive assertion of convenience, contradicted by the conception of these actions held by judges and jurists alike.

The article proceeds as follows. In Part I, I set out three key claims made by all of my target theorists that clash in some profound way with the various hybrid torts I consider. In turn, they are the claims that tort law is (1) necessarily bilaterally structured, (2) exclusively part of private law, and (3) categorically different from other branches of private law. In Part II, I explain fully what I mean by hybrid torts. In particular, I highlight how they come into existence and illustrate the classificatory problems they are apt to cause. In Part III, I address another prefatory issue: the matter of when and why *certain types* of legal category ought, *in theory*, to be discrete. The matter is discussed in order to make the important point that not all legal categories are alike, and that only certain types of legal category ought in principle to be distinct from other, neighbouring categories within the same classificatory scheme. I then show that tort law is one such category which should, in theory, be distinct from other legal categories.

In Part IV—having established the theoretical position—I demonstrate how things are very different in practice. I do this by identifying a range of hybrid torts which serve to blur tort law's boundaries with a number of neighbouring categories. In Part V, I argue that because these actions are routinely treated as torts, they have important ramifications for my target theories. The fact that in practice there are no firm borders between tort law and other legal categories makes it difficult to accept any explanatory theory which proceeds from the assertion or assumption that such rigid borders exist. In Part VI, I consider a superficially compelling objection to this conclusion. The article then ends with a series of concluding remarks.

I. Three Shared Claims

I make the assumption that anyone who has chosen to read this article is likely to be fairly familiar with the main elements of the theories propounded by Weinrib, Stevens, and Goldberg and Zipursky. As such, instead of offering a summary of all their core claims, I limit myself to picking out three major claims that are common to each of the theories in view. I alight upon these claims because they are the key ones that are challenged by one or more of the hybrid torts I consider in this article.

A. Tort Law's Bipolarity

All of my target theorists subscribe to the view that tort law is characterized in part by its bilateral structure: the idea, that is, that torts link two, and only two, parties (the claimant and the defendant). In each of their hands, though the terminology varies, this two-party characteristic is elevated to the status of structural imperative. For Weinrib, the phenomenon is described in terms of tort law's bipolarity.[14] Stevens prefers the term "privity";[15] while Goldberg and Zipursky express the structural imperative in terms of "relational wrongdoing."[16] But whichever term is used, the core claim is just the same.

There is scarcely a page of chapter 3 of Weinrib's principal work, *The Idea of Private Law*, which does not mention his commitment to the notion that corrective justice operates in relation to purely bipolar relationships. And in a subsequent chapter, he goes on to assert that "corrective justice necessarily connects two parties, no more and no less."[17] Likewise, Stevens is adamant that in tort, "[t]he only person who can enforce a right is the right-holder, and persons who suffer loss because of the infringement of someone else's right do not have standing to sue."[18] Finally, Goldberg and Zipursky reveal their attachment to the structural imperative in their treatment of the judgment of Cardozo CJ in *Palsgraf v. Long Island Railroad Co*.[19] Invoking what was said in that case, they put the matter this way: "a tort plaintiff 'sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.'"[20] At the heart of this claim is their insistence that the wrongs of tort law must be "personal to" the claimant. Put otherwise, torts involve the breach of a legal duty owed by defendant X to claimant Y. It is not enough that X has in some basic (moral) sense acted wrongfully. Nor is it enough that X has simply caused harm or loss to Y by virtue of his volitional conduct. For an act to be tortious, they insist, it must have been wrongful on

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14 See e.g. Ernest J Weinrib, "Deterrence and Corrective Justice" (2002) 50:2 UCLA L Rev 621 ("so far as corrective justice is concerned, the norms of tort law—and indeed of private law more generally—reflect ... the bipolar structure of private law" at 623).

15 Stevens, *Torts and Rights*, *supra* note 3 at 173.

16 See e.g. Goldberg & Zipursky, "Torts as Wrongs", *supra* note 3 ("[t]he duty-imposing norms of tort law are relational norms" at 960).

17 See Weinrib, *The Idea of Private Law*, *supra* note 3 at 175.

18 See Stevens, *Torts and Rights*, *supra* note 3 at 173.

19 248 NY 339, 162 NE 99 (1928).

20 Goldberg & Zipursky, "Torts as Wrongs", *supra* note 3 at 958. They go on to claim that in tort, "rights of action are generated only in those who have been wronged" (*ibid* at 60).

the part of X *and* towards Y (or a class of persons to which Y belongs) given that "[t]he wrongs of tort law spring from relational directives."[21]

B. Tort Law is Exclusively a Branch of Private Law

A second claim common to all of the theories in view is that tort law belongs exclusively to the private law domain. This conception of tort law is fundamental to the theory advanced in Weinrib's *The Idea of Private Law*. In his view, the public/private divide is reflected in two incompatible modes of ordering: corrective justice and distributive justice. Private law is animated by the former, while public law is animated by the latter.[22] Stevens, likewise, believes that "[t]orts belong within private law."[23] He reinforces the point by reference to the way in which crimes that have tort law counterparts (like battery) can be distinguished from those tortious counterparts. While the former are characterized by "a duty owed to society in general (crimes)," the latter involve the "breach of a duty owed to individual members of society (torts)."[24] And it is because torts are characterized by such private duties (and their correlative rights) that Stevens sees tort law as belonging exclusively to the domain of private law.[25]

Just the same belief can be found in Goldberg and Zipursky's theory of tort law. They state openly that there is something "distinctively 'private' about tort"[26] and that they "conceive of torts as private wrongs."[27]

C. Tort Law is a Discrete Legal Category

All of the theorists whose work is examined here consider tort law to be a discrete legal category, even though there is considerable disagreement among them as to whether or not the law is unified by a single organizing concept.[28] They all agree that there is a fundamental distinction

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21 Benjamin C Zipursky, "Civil Recourse and the Plurality of Wrongs: Why Torts are Different" (2014) 1 NZLR 145 at 149.

22 The claim is implicitly rather than explicitly made: see Weinrib, *The Idea of Private Law*, *supra* note 3 at 73–74. For details of this implicit claim, which relies on various express claims made here and there that need to be stitched together, see William Lucy, "What's Private about Private Law?" in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 47 at 52–58.

23 See Stevens, *Torts and Rights*, *supra* note 3 at 284.

24 *Ibid.*

25 See *ibid.*

26 Goldberg & Zipursky, "Torts as Wrongs", *supra* note 3 at 919.

27 *Ibid.*

28 Kantians, of course, believe that there is such a concept: corrective justice. Other theorists, like Stevens, Goldberg and Zipursky do not commit on this front. They instead

to be drawn between tort and its nearest neighbour, contract, along the lines that tortious obligations are imposed upon the parties whereas contractual obligations are created by them.[29] Equally, all agree that tort law is categorically distinct, not just from contract, but from other familiar branches of private law, such as unjust enrichment and equity. Stevens, for example, states unequivocally that "the law of torts is...[a] basic category,"[30] and he elaborates upon its separation from other legal categories in these terms:

> "Torts" is a catch-all category of "other wrongs". It is the category of wrongs which are not breaches of contract or equitable wrongs. Breach of contract has conceptual unity. The category of equitable wrongs is unified by their historical provenance in the chancery division of the High Court. Torts has no unity other than that it is what is left after the other two categories of wrongs are excluded.[31]

Although he says no more about the difference between tort and equity, Stevens does reiterate elsewhere in *Torts and Rights* his commitment to the idea that tort law is categorically separate from contract. He says, "[t]he law of torts is...quite different from the law of contract which [is]...a unity concerned with one primary right arising for one reason: agreement."[32]

In strikingly similar terms to Stevens, Goldberg and Zipursky also assert that "[t]ort is indeed a basic category of law."[33] It is one, they say, of just "a handful of fundamental legal categories such as Contracts, Proper-

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center their accounts upon the structural phenomenon of rights infringements (or wrongs, as they often prefer to call them).

29 In the language of some prominent rights theorists, contract, but not tort law, is the law of "consensually defined duties" (Goldberg & Zipursky, "Torts as Wrongs", *supra* note 3 at 919). Stevens, another rights theorist, also emphasizes the fact that, unlike contractual promises, torts do not generate primary rights: see *Torts and Rights*, *supra* note 3 at 286–87. By contrast, the corrective justice theorist Ernest Weinrib highlights the fact that "the difference between tort law and contract law lies in the origin of the right" adding that "[i]n tort law [but not contract] the plaintiff's right exists independently of the defendant's action" (*The Idea of Private Law*, *supra* note 3 at 136). This shared emphasis on the fact that the defendant's conduct is the source of the relevant right in contract is hard to square with the fact that many contractual obligations are non-consensually imposed, such as statutory and common law implied terms.

30 Robert Stevens, "Private Rights and Public Wrongs" in Matthew Dyson, ed, *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014) 111 at 144 [Stevens, "Private Rights"].

31 See Stevens, *Torts and Rights*, *supra* note 3 at 286.

32 *Ibid* at 299.

33 Goldberg & Zipursky, "Torts as Wrongs", *supra* note 3 at 918.

ty, and Criminal Law."[34] They not only see tort as one fundamental part of private law, but also as one that can be distinguished from the other such parts. They assert forthrightly "that torts...[are] different from breaches of contract"[35] and then they move on to explain, more expansively, that tort can also be distinguished from equity in the following way:

> Tort law empowers the plaintiff to obtain redress as against the defendant who wrongfully inflicted the "hit," or injury...Equitable wrongs are a different kettle of fish...The [equity] plaintiff does not take a "hit"; she is not rendered less than intact. Rather, the wrong is a betrayal of trust...Tort's wrongs lead the state to empower the plaintiff to demand and obtain from the defendant conduct that is responsive to the defendant's wrongful injuring of the plaintiff. Equity's wrongs lead the state to empower the plaintiff to demand and obtain from her fiduciary an accounting as to the fiduciary's handling of the matters with which he has been entrusted...So, we can after all distinguish torts.[36]

Weinrib is just as insistent that tort law is a discrete part of private law. While he eschews the familiar language of 'legal categories', he nonetheless maintains that tort law, taken as a whole, is "a mode of legal ordering" such that "before we assess the soundness of any tort decision, we can recognize that it belongs to tort law rather than [for example] to criminal law or administrative regulation."[37] In other words, for Weinrib, tort law is "a *distinct* mode of ordering";[38] one which possesses "features that are constitutive of our conception of tort law."[39] He states expressly what he perceives to be the key difference between contract and tort at some length:

> Both tort law and contact law rectify losses through corrective justice...[However,] [t]he difference between tort law and contract law lies in the origin of the right. In tort law the right exists inde-

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34 *Ibid* at 953.

35 *Ibid* at 920. They also invoke regularly, throughout the paper, Prosser's notion of torts as "wrong[s] other than breach[es] of contract" (see e.g. *ibid*).

36 John CP Goldberg & Benjamin C Zipursky, "Civil Recourse Revisited" (2011) 39:1 Fla St UL Rev 341 at 351. See also John CP Goldberg & Henry E Smith, "Wrongful Fusion: Equity and Tort" in John CP Goldberg, Henry E Smith & PG Turner, eds, *Equity and Law: Fusion and Fission* (Cambridge: Cambridge University Press, 2019) ("equity operates at the boundaries of tort law...[which] presupposes an account of tort as a body of law that actually has some boundaries. The key distinction between tort and equity is...[that] [t]ort law is for the most part 'first-order' law. It specifies, in relatively general terms, legal duties that we owe to one another... Equity is not conduct-guiding in this way...it is a gap-filling, second-order regime" at 310–11).

37 Weinrib, "Understanding Tort Law", *supra* note 3 at 491.

38 *Ibid* at 492 [emphasis added].

39 Ernest Weinrib, "The Special Morality of Tort Law" (1989) 34:3 McGill LJ 403 at 406.

> pendently of the defendant's action; the damage award therefore aims at eliminating the effects on the plaintiff of the defendant's wrong. In contract law, the parties themselves create the plaintiff's right to the defendant's performance of the promised act; the damage award therefore gives the plaintiff the value of that performance.[40]

Relying heavily on the notion of "normative loss" (as opposed to factual loss), Weinrib also explains at some length what he perceives to be the way in which tort law and unjust enrichment come apart.[41] Though he does not specifically address the distinctions between tort law and other areas of private law, it nonetheless seems to follow from his characterization of tort law as "a distinct mode of legal ordering" that he sees tort law as having sharply defined borders.

Taken together, the three claims to which all of my target theorists subscribe make it clear that they all believe tort law to be (i) structured bilaterally, (ii) part of private law, and (iii) within private law, a discrete legal category. Although they do not always spell out *in detail* the ways in which they perceive tort law to be separate from certain other legal categories, it is nonetheless apparent from what they do say that they think this way. The very fact that they each devote time and space to establishing the divide between tort and its closest neighbour, contract, tends to suggest (though it does not strictly entail) that they also believe there to be a rigid divide between tort law and its more remote neighbours (such as unjust enrichment and equity) with which it has a much less obvious connection or affinity.

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40 Weinrib, *The Idea of Private Law*, *supra* note 3 at 136. Typically, Kantians see innate rights as being the source of the particular rights protected by tort law. And the possible objection that tort law protects a good deal more than our innate rights—because, for example, there are several torts which protect proprietary rather than bodily interests—is typically met with the riposte that the defendant's acting in a fashion that is inconsistent with the plaintiff's proprietary rights can best be understood in terms of acting in a way that "is inconsistent with the plaintiff's right to control or use the good [or other property]" (Beever, *Theory of Tort*, *supra* note 3 at 74). This right to pursue one's own purposes by use of one's property is also the nub of Arthur Ripstein's very similar thesis: Ripstein, *supra* note 3 at 29–34.

41 *The Idea of Private Law*, *supra* note 3 at 140–42. Two clear-cut situations involving unjust enrichment are identified: (i) cases in which there is no wrongful act on D's part, but D nonetheless gains at C's expense by virtue of a mistaken payment; and (ii) cases in which, although D has acted wrongfully, the claim in unjust enrichment is "the mirror image" of the typical tort claim (since C suffers no factual loss but D has made a factual gain).

II. Hybrid Torts

When a novel case comes before the courts, judges sometimes create a new cause of action by drawing upon an array of interconnected legal principles. These principles may be taken from cases that belong to different legal categories; yet, despite its mongrel heritage, the resulting cause of action is very often labelled a tort.[42] Over time, it gets treated by practitioners, students, and teachers of the law alike as though it were an entirely quotidian member of the 'tort law' family. But whether such actions deserve to be treated in this way—as though they were 'thoroughbred' torts—is a question that is seldom asked. As we will see, however, it is an important question for the purposes of assessing the merits of explanatory theories of tort law. To be clear, the critical matter is not whether tort law is capable of providing a home for such actions. It plainly is. Rather, the critical question is about how such hybrid torts ramify for explanatory theories.

The problems that these actions cause for such theories arise because—in a metaphor to rival the idea that tort law can be seen as the common law's Swiss army knife[43]—it can also be seen as the common law's vacuum cleaner. The metaphor is apt because it is generally tort—as opposed to contract, equity, unjust enrichment or any other legal category—that is called upon to house hybrid actions that are constructed from an array of principles found in cases that belong to different legal categories. Examples are in no short supply.[44]

I can conveniently start with *Lumley v. Gye*.[45] This is nowadays almost invariably regarded as a tort case. Indeed, it is the very case in which the tort of inducing breach of contract was first properly launched.[46] But a lit-

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42 A prime example is the action for misuse of private information minted in *Campbell v MGN Ltd*, [2004] UKHL 22 at para 14 [*Campbell*], and discussed at length in Part IV, below.

43 See Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 197 [Beever, *Law of Negligence*].

44 For a discussion of many more than are considered in this article, see generally Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge, UK: Cambridge University Press, 2003). And for an example of an area of law (e.g., undue influence) in which a home in equity is preferred to tort, see Stevens, "Private Rights", *supra* note 30 ("[w]here one party *deliberately* exploits the hold they have over another by virtue of their relationship of excessive influence, this can and does constitute a form of wrongdoing, what [*sic*] but for its history in equity would be called a tort" at 125).

45 (1853), 2 El & Bl 216, 118 ER 749 [*Lumley* cited to El & Bl].

46 An analogous yet older cause of action—for enticement of a servant—had existed since the fourteenth century. This however was of very limited scope and certainly not a close approximation to the modern tort of inducing breach of contract: see DJ Ibbetson, *A*

tle reflection soon reveals that the case could just as plausibly have been classified as part of the law of contract: as a rule of accessory liability *within contract law* according to which the duty to make reparation for loss arising from a breach of contract is extended beyond the immediate contract breaker to the person who procured that breach.[47]

Tort law contains several rules of accessory liability.[48] Why should contract law not do likewise? Certainly, Erle J came very close to saying that it should when he declared in *Lumley* that "he who procures the wrong...may be sued, either alone or *jointly with the agent*, *in the appropriate action for the wrong complained of*."[49] Critical here are the words, "jointly...in the appropriate action for the wrong complained of," for this suggests a rule of 'contract law' which mirrors tort law's rules on concurrent tortfeasance. Paul Davies appears to adopt this understanding. He contends that, "[l]liability under *Lumley* should not be crammed under the umbrella of the economic torts," and that it is better seen as a particular instance of accessory liability belonging "[i]n the contractual context."[50] So why does this classificatory difficulty matter from the perspective of contemporary tort theory? It matters for at least three reasons.

First, *Lumley* helps illuminate the fact that tort law *as it presents itself* is not the sharply defined body of law that explanatory theories proclaim it to be. More specifically, *Lumley* casts doubt on the idea that tort law has discrete and non-porous boundaries by virtue of the fact that the relevant wrong in that case was a breach of contract, while the action as a whole lay in tort.[51] It cannot plausibly be argued that the relevant wrong

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Historical Introduction to the Law of Obligations (Oxford: Oxford University Press, 1999) at 66.

47 Something close to this was said of inducing breach of contract in the now leading case of *OBG Ltd v Allan*, [2007] UKHL 21 at para 5 [*OBG*]. The point is echoed in Paul S Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015) at 177–221.

48 The most well-known is arguably the vicarious liability doctrine (depending on whether one prefers the master's tort or servant's tort interpretation); but there are also rules on procurement, authorization and ratification of torts which operate to like effect: see Robert Stevens, "Non-Delegable Duties and Vicarious Liability" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Hart Publishing, 2007) 331 at 333–34.

49 *Supra* note 45 at 232 [emphasis added].

50 Davies, *supra* note 47 at 6–7.

51 In *AI Enterprises Ltd v Bram Enterprises Ltd,* Cromwell J (delivering a judgment on behalf of the entire Supreme Court of Canada) spoke openly of "the tort of inducing a breach of contract" (2014 SCC 12 at para 80). So too was it treated as a tort in *Drouillard v Cogeco Cable Inc,* 2007 ONCA 322 at para 13, Rouleau JA; and there are repeated references to the "*Lumley v Gye* Tort" in the leading English case of *OBG* (*supra* note 47).

was the breach of a free-standing duty not to induce the breach of contract, for the reasons that follow.

One possible source of such a duty would be the contract itself. The making of a contract by X and Y might be thought to generate an obligation that binds Z not to induce breach thereof. But this cannot be right, for any such duty created by the contract would be contractual in nature and, as such, an action for breach thereof would lie in contract, not tort. Furthermore, and more fundamentally, it is trite to state that the privity of contract principle stands in the way of X and Y generating rights and duties that apply to parties other than themselves.

Another, subtler way of establishing a direct duty owed by D to C relies on the idea that the contract's formation generates a secondary, *tortious* (not contractual) duty not to induce a breach of the contract. Indeed, it is exactly this view that Stevens holds. He writes: "all contract rights carry with them a right good against everyone else that they do not induce the infringement of the contractual right."[52] However, this understanding—the nub of which is that there exists a freestanding tortious duty not to induce a breach of contract—is contradicted by authority. In the leading case of *OBG Ltd v. Allan*[53] their Lordships repeatedly stated that liability under *Lumley* is accessory, not primary. Yet, liability would be primary if there were any direct duty owed by D to C along the lines that he suggests.[54] Given such weighty countervailing authority, and bearing in mind the fact that no reported decision has ever lent support to the existence of such a duty owed by D to C, the inescapable truth remains that what is key in a case of inducing breach of contract is that quintessential element of contractual liability: the breach of a contractual duty. The action is therefore hybrid in the sense that it mixes tortious and contractual touchstones of liability: it combines the tort law requirement of intention with the need for a contractual duty that gets broken.[55]

The second reason why *Lumley* is problematic for my target theorists is that it confounds the shared claim sketched earlier that torts are centered upon duties imposed by virtue of a rule of law. The only relevant du-

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52 Stevens, *Torts and Rights*, *supra* note 3 at 281.

53 *Supra* note 47.

54 It also follows from the fact that liability is secondary that we can reject the idea that the contractual rights held by X and Y are treated as a species of property with which Z is bound not to interfere. Interference with another's property would also entail a form of primary liability.

55 Breach of contract does not routinely require intention or carelessness: liability is ordinarily strict.

ty for the purposes of the *Lumley* tort[56] is, as we have just seen, the contractual duty in play. Since this duty is plainly generated by the parties' agreement, it must follow that the tort cannot be explained in terms of the breach of a duty imposed by law. Only if one dismisses what the courts have repeatedly said about liability being secondary rather than primary in this area can one begin to argue that *Lumley* liability is based on a duty imposed by law. But that, of course, involves an obvious departure from explaining the law as we find it.[57]

The third reason why *Lumley* poses explanatory problems for the theorists in view is this: inducing breach of contract breaks the structural imperative to which they all subscribe. That, recall, is that torts are bilaterally structured around private law rights held directly by C against D. As already noted, the language used to describe this feature varies. There is talk of bipolarity, relational wrongdoing, and the privity of torts. But the core claim is always the same: torts involve wrongs committed by D against C where the wrong in question entails the breach of a duty owed directly by D to C. The *Lumley* tort cannot be made to fit the structural imperative because the House of Lords was perfectly clear in explaining the three-party nature of the action in *OBG*.[58]

Of course, the blushes of all my target theorists could be spared if, somehow, it could be shown that inducing breach of contract were somehow an exceptional, anomalous or unprincipled action precisely because it obfuscates (or violates) the putative boundary between contract and tort. If the *Lumley* tort could be sidelined in this way, then my target theorists need not concern themselves with the fact that it clashes with core tenets of their theories. So, can it be dismissed as anomalous or *sui generis*? I suggest that it cannot.

The mere fact that the action is rooted partly in the soil of contract law (since the relevant duty is contractual) and partly in that of tort law (since

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[56] Although in *OBG* their Lordships made clear that inducing breach of contract is a rule of accessory liability, they nonetheless repeatedly referred to it as the "*Lumley v Gye* Tort" (see e.g. *OBG*, *supra* note 47 at para 17, Hoffmann LJ). For reasons of economy of expression, I simply say "*Lumley* tort."

[57] Both Beever and Stevens offer arguments about why the courts are mistaken in their description of the liability in the *Lumley* tort as secondary: see Beever, *Theory of Tort*, *supra* note 3 at 108–09; Stevens, *Torts and Rights*, *supra* note 3 at 275–78. However, all that they manage to show is that the form of secondary liability in the *Lumley* tort cannot be cashed out in terms that equate to existing forms of secondary liability. Nothing, in principle, stands in the way of the new forms of secondary liability. There is no single conception of such liability. Procuring the commission of a tort, for example, involves a markedly different form of secondary liability than is engaged by the vicarious liability principle, or by the concept of assisting in the commission of a tort.

[58] *Supra* note 47 at paras 8, 32.

C must show intention) does not *per se* render it an anomaly. Many other actions have (or have had) affinities with both branches of the law. As long ago as the fourteenth century, there was a class of cases that sounded in the tort of trespass that today would be regarded as cases of contractual misperformance.[59] And, in the modern era, an action under section 2(1) of the *Misrepresentation Act 1967* (UK) equally centres on mixed touchstones of liability. In terms that bear an obvious affinity with the reasonableness standard in the law of negligence, the *Act* requires the defendant to have made a false representation to the claimant in the absence of reasonable grounds for believing that what he said was true. At the same time, with an obvious link to contract law, the claimant must also have been induced to enter into a contract and suffered loss as a result thereof. *Lumley*, in other words, is by no means alone in having mixed affinities.

If we cannot plausibly regard *Lumley* as anomalous, we have little choice but to take seriously the idea that inducing breach of contract is best thought of as a hybrid tort, whose touchstones of liability are connected both to contract and to tort. But a single, mongrel common law action is not nearly enough to pose a substantial challenge for the theories in view. Were it the sole example, the relevant theorists could well seek to argue that tort law is *sufficiently distinct* from other legal categories for their theories to remain credible. We must, therefore, explore in some depth the question of whether legal categories can and do overlap to a significant degree (somewhat like the different sectors in a Venn diagram). As we shall see, many other well-established common law actions also serve to blur tort law's boundaries in this way even though a respectable theoretical case can be made against their being able to do so.

But before turning to those matters, it is necessary to head off one possible objection to my using the concept of a 'hybrid tort' to test the explanatory power of the theories I have chosen to examine. The objection runs as follows. There is a logical flaw in seeking to establish the existence of hybrid torts since the concept of a hybrid tort presupposes the existence of distinct legal categories. Without a clear *ex ante* conception of, say, tort and equity, so the argument goes, it is meaningless to say that action X is a hybrid of tort and equity.

Despite ostensible appeal, the objection is unfounded. This is because it is perfectly possible to speak of a hybrid of X and Y without settling quite what the difference is between X and Y. Biologists, for example, uniformly accept that it is possible to breed a hybrid of the domesticated

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[59] For a fuller account, see Ibbetson, *supra* note 46 at 43–48. And for the reason why there was never concurrent liability in contract and tort, see *ibid* at 89.

horse (*equus ferus caballus*) and the nearly extinct Asian wild horse (*equus ferus przewalskii*). Yet, what they cannot do is rely on this hybrid to prove the distinctiveness of the two parent species in the usual biological way, namely, the sterility of any offspring produced by interbreeding.[60] By analogy, I think it is possible to speak meaningfully of hybrid torts without such torts being necessarily suggestive of the distinctiveness of the two legal categories.

We must now turn to the matter of porous boundaries between legal categories: first in theoretical terms, and then as a matter of practical reality.

III. Tort Law as a Discrete Legal Category: Theory

The enterprise of dividing the law into categories is by no means novel. Blackstone made what is probably the most famous early attempt to classify English common law.[61] For him, the aim of so doing was "to render the whole intelligible to the uninformed minds of beginners."[62] He saw the provision of "a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities" as a means by which the work of "an academical expounder of the laws" could be facilitated.[63] In short, he attributed an expository function to the enterprise of legal cartography (as did late nineteenth century treatise writers who were concerned by the "disorderly condition of the law," and felt the need "to tidy it up, to systematise it"[64]).

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60 The usual biological test of whether two closely related animals belong to genuinely separate species turns on whether cross-bred offspring are born sterile (like an ass or a liger). The offspring of the two equine species in the text are not born sterile. So asserting that the parents belong to different species by reference to the sterility of their offspring does not work. On the other hand, it is clear that the Asian wild horse (commonly known as Przewalskii's horse) has an extra-chromosomal pairing. So it is possible to speak meaningfully of this particular type of horse even though it is not possible to say (in the conventional biological way) why it is different from the domesticated horse. For details of the difficulty associated with separating the two species, see E Ann Oakenfull & Oliver A Ryder, "Genetics of Equid Species and Subspecies" in Patricia D Moehlman, ed, *Equids: Zebras, Asses and Horses. Status Survey and Conservation Action Plan* (Gland, Switzerland: IUCN, 2002) 108.

61 See generally Sir William Blackstone, *Commentaries on the Laws of England*, bk 2 (Philadelphia: JB Lippincott, 1908). An earlier attempt to arrange the law systematically was made by Sir Matthew Hale in *The History of the Common Law of England and an Analysis of the Civil Part of the Law*, 6th ed (London: Henry Butterworth, 1820).

62 Blackstone, *supra* note 61 at 20.

63 *Ibid.*

64 AWB Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48:3 U Chicago L Rev 632 at 641. Neil Duxbury goes

Interestingly, Blackstone devised a scheme for carving up the law that has long since lapsed into desuetude (using categories like "the rights of persons" and "the rights of things"). However, the fact that his scheme is no longer in use does not necessarily imply that it was flawed in some way. It is simply that he classified branches of the law in a way that is no longer popular. This alerts us to two key points: the fact that there is no a priori right or wrong way to carve up the law, and the fact that any given case or rule of law could, in theory, be housed in more than one legal category so long as the categories in question do not belong to the same classificatory scheme.

This is possible because not all classificatory schemes share the same ambition. One might, for example, with very limited ambition, seek simply to distinguish statutory law from the common law, or domestic law from supra-national law, or public law from private law. With divisions of this kind, there is no reason why a particular tort case cannot form part of the common law category, the domestic law category, and the private law category. However, this observation does not assist us with the question of whether legal categories belonging to the same classificatory scheme may overlap. Take, for example, the classificatory scheme frequently used in relation to the law of obligations. Here we encounter the familiar categories of contract, torts, equity and unjust enrichment.[65] These legal categories have a markedly different relationship to one another than exists between categories like private law and statutory law. Whereas private law and statutory law belong to different classificatory schemes and are not mutually exclusive, the same cannot be said of contract, torts, equity and unjust enrichment. In theory, these represent distinct subsets of the higher-level legal category: the law of obligations. They are distinct from, yet complement, one another in the same way that private law is distinct from, yet complements, public law, and statutory law comes apart from, yet complements, the common law.

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so far as to describe this enterprise in terms of "a preoccupation with discovering and setting out in a coherent fashion the principles underlying what would often be a vast mass of relevant case law" (*Frederick Pollock and the English Juristic Tradition* (Oxford: Oxford University Press, 2004) at 188). See also David Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition" in William Twining, ed, *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 26 at 29–30.

65 This last example draws on, but is a greatly simplified version of, the legal taxonomy offered by the late Professor Peter Birks: see "The Concept of a Civil Wrong" in David G Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995) 31 at 31–33 [Birks, "Civil Wrong"]. That these are now widely recognized legal categories is a fact to which the large array of commensurately titled student textbooks, university courses, and practitioner's treatises readily testify.

The subdivisions within a particular classificatory scheme are easily understood: they are each constructed according to, and therefore reflect, some or other principle or criterion that is particular to that sub-category. For example, we might take as our starting category, the statutory laws of the last three centuries. We may then seek to divide these laws into three separate sub-categories. The first might comprise the statutory laws of the nineteenth century; the second, the statutory laws of the twentieth century; and the third, the statutory laws of the twenty-first century. No single statute could conceivably be housed in more than one of the subcategories.

More pertinently, we could start with the law of obligations and attempt to subdivide this into the aforementioned subcategories of contract, torts, equity and unjust enrichment. In each case, the question of where to place a given case or rule would be answered not, as under the previous scheme, by reference to the century in which it was decided, but by reference to some central juridical criterion that forms the hallmark of one or other of the subcategories. The criterion of mistaken payments, for example, is widely treated as the organizing principle behind the category of unjust enrichment.

Importantly, one consequence of treating certain juridical features as definitive in this way is that a given case ought, in theory, to belong to just one of the four named subcategories.[66] If the case is characterized by a mistaken payment, then it belongs in the box labelled 'unjust enrichment' and not the box labelled 'contract' or the one labelled 'torts'. In order to appreciate why this is so, it is necessary to make an important observation concerning the nature of the four sub-categories within the law of obligations. It is this: unlike the major categories within the Blackstonian scheme, the subcategories of contract, torts, equity and unjust enrichment fulfil important dispositive functions and are, for this reason, appropriately described as dispositive legal categories.[67]

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66 Occasionally, a case may display more than one set of key, juridical features. In such instances, pleading in the alternative (e.g., as either a breach of contract or a tort) may be possible: see text accompanying note 110, below.

67 The fact that they serve as dispositive legal categories does not preclude their having an expository use, too. There is no necessary tension between the two types of category. Indeed, when legal education was in its infancy, legal publishers were "preoccupied with the needs of practitioners" (Sugarman, *supra* note 64 at 52). Jurists, too, were concerned to provide practising lawyers with reliable guides to the law: see e.g. Duxbury, *supra* note 64 at 245. On the other hand, many modern expository categories cannot be put to dispositive ends. And they have not been designed to do so. For details, see Charlie Webb, "Treating Like Cases Alike: Principle and Classification in Private Law" in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 215 at 217–19.

At the heart of a dispositive legal category is a core juridical feature (or set of features). It is this core feature (or set of features) that gives the category both its conceptual unity and its practical utility.[68] Thus, when practitioners treat a case as belonging to a particular legal category, they do so because they think that it bears particular juridical attributes.[69] In turn, their presentation of the case in this way—as belonging to category X—will determine the way in which it is handled by the courts. As Charlie Webb puts it, "the classification of a case must tell us something about how the law should respond to it: what set of rules and principles we apply to it, what questions we ask and what tests we use."[70] So, for example, if a case of inducing breach of contract with an international dimension is presented as a tort case rather than a contract case, it will attract the application of the choice of law rules applicable to torts rather than those applicable to contract.[71] Similarly, a purely domestic case of inducing breach of contract will necessitate the application of the tort (not the contract) rules on limitation.[72]

The crucial point is this: since the subcategories within the law of obligations fulfil this dispositive function, they will in theory derive conceptual unity from a particular juridical core.[73] Peter Birks thought that he had identified such a core within tort law when he wrote (using the term "wrongs" in preference to that of "tort"[74]) that, "the only definitively essen-

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68 Peter Jaffey labels categories constructed in this way "justificatory categories" because, he argues, such categories "justify the common treatment of claims in terms of a common framework for determining when a claim arises" ("Classification and Unjust Enrichment" (2004) 67:6 Mod L Rev 1012 at 1030).

69 On the requirement of practitioners to do this, see Ibbetson, *supra* note 46 at 171–72.

70 *Supra* note 67 at 219.

71 See e.g. *AMT Futures Ltd v Marzillier mbH*, [2017] UKSC 13.

72 One segment of the *Limitation Act 1980* (UK) has the heading "Actions founded on tort" (ss 2–4A) while another segment is labelled "Actions founded on simple contract" (ss 5–7).

73 No such juridical imperative holds sway in relation to some expository legal categories, such as family law and medical law. These legal categories may perfectly well derive their conceptual unity from an organizing idea that is contextual in nature (e.g., the existence of a familial link between the principal litigants, or the prominence of a health care issue).

74 I acknowledge that, for Birks, an action *for damages* for a breach of contract would fall within the category "wrongs" (whereas actions for specific performance would be treated as falling within the category "consents") ("Civil Wrong", *supra* note 65 at 47). Yet nothing turns on this for present purposes. We are only interested here in the question of whether the various categories of obligations can overlap rather than with which particular actions fall within each category. In any case, Birks himself intimated that the terms "torts" and "wrongs" were interchangeable when he gave the second category in his fourfold classification the title "Torts (Wrongs) – Category 2" (*ibid* at 11).

tial feature of a wrong is that it is conduct which attracts its legal consequences by virtue of its character *as a breach of a primary duty*."[75] Notice that this conception of what belongs in the category 'wrongs' is a juridical one.[76] It looks to the specific, narrow question of whether a primary duty has been breached.

Much as Birks thought that wrongs comprised "a distinct category of obligation-creating event,"[77] it is doubtful whether matters are quite that simple. In common law jurisdictions where there exists a multiplicity of different torts (as opposed to the simple idea of tortious wrongdoing that one finds in continental legal systems),[78] tort law lacks the kind of conceptual unity that Birks and some of my target theorists would have us believe.[79] There is no simple juridical core that can be identified. Not only are torts notoriously heterogeneous in this respect,[80] but there are also many well-established mongrel actions that, regardless of the fact that they are uniformly treated as torts, call into play touchstones of liability more readily associated with more than one legal category. These hybrid torts militate against the idea that there exists a body of law that can be sharply defined in juridical terms in the way suggested by the theorists in view. In so doing, they undermine the very foundations of those theories.

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75 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26:1 UWA L Rev 1 at 40 [Birks, "Equity in the Modern Law"] [emphasis added]. In similar vein, the thing that enables his second category, "consents", to accommodate an action for specific performance (but not one for breach of contract) is the fact that this category centers upon the primary (not secondary, remedial) contractual duty (see *ibid* at 11).

76 Birks himself suggested that his scheme was based on different types of factual events. But for the compelling argument that "legal rights and duties do not arise from raw and unreconstructed happenings in the physical world, but from an interpretation of those physical happenings within the intellectual framework of the law" (giving Birks' scheme a juridical, as opposed to a factual basis), see RB Grantham & CEF Rickett, "Property Rights as a Legally Significant Event" (2003) 62:3 Cambridge LJ 717 at 722–23.

77 Birks, "Civil Wrong", *supra* note 65 at 51.

78 See e.g. France (where the idea of tort is that of *la responsabilité extracontractuelle*), arts 1240–44 C civ; Germany (*die unerlaubte Handlung*), art 823 Civil Code.

79 For a thoroughgoing analysis of Birks' work in this regard, as well as the work of others who maintain (and deny) that rigid categories can be found within the law of obligations, see generally Waddams, *supra* note 44.

80 Most obviously, liability bases vary from intentional wrongdoing (at one end of the spectrum, through fault-based liability (in the middle) to strict liability (at the other end). For further aspects of tort law's heterogeneity, see John Murphy, "The Heterogeneity of Tort Law" (2019) 39:3 Oxford J Leg Stud 455.

IV. Tort Law as Discrete Legal Category: Reality

A. Introduction

As observed earlier, dispositive legal categories which belong to the same classificatory scheme should, in theory, be discrete. At the heart of any such legal category is an organizing juridical principle (or set of such principles) and it is the application of this principle (or set of principles) to all cases within the category that ensures, in line with the rule of law, that like cases are treated alike. As was also noted above, when such organizing principles are used in order to classify cases, any given case ought to belong to just one such category. Webb, making much the same observation, explains the matter this way: "if cases within different classes will fall to be dealt with differently," that is, according to a particular organizing principle or set of such principles, "then it makes no sense to say that a case can fall within or straddle more than one category."[81]

The logic behind Webb's claim is impeccable, but the observation pays no regard to the fact that theory and practice often come apart. So, whatever we might say in theoretical terms about legal categories and the cases they house, we would be naïve to expect reality to be a perfect reflection of what theory dictates. Classificatory schemes, like the judgments to which they are applied, are human constructs. Like most such constructs, they frequently fall short of the ideal. So, from time to time we come across cases that, whether by design or by accident, cannot be slotted comfortably within the various conceptions of tort law proffered by my target theorists. These actions—though widely recognized as torts—bear obvious mongrel traits.

I have noted already the way in which inducing breach of contract has an equally strong juridical affinity with contract as it does with tort, but it is by no means alone in blurring the boundary between contract and tort. And nor is this boundary the only one that gets blurred. As we shall see, many of tort law's boundaries with neighbouring legal categories[82] are af-

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[81] See Webb, *supra* note 67 at 220. Webb accepts that certain cases are capable of what Peter Birks called alternative analysis. Yet this does not undermine his claim, since the only reason these exceptional cases can be analysed in two different ways is because they contain an array of potentially significant features, only some of which are relevant to action *x*, and others of which are relevant to action *y*. For details, see note 110, below.

[82] At a low level of classification, tort law ought, in theory, to be discrete from contract, equity, etc., as these all belong to the same scheme—namely, the one according to which the law of obligations is carved up. At a higher level of classification, however, tort law—as part of private law—ought to be distinct also from public law and European law, both of which (along with private law) comprise parts of a different classificatory scheme.

fected in this way by hybrid torts. So the point is inevitably reached where it becomes irresistible to conclude that tort law is not a discrete, sharply defined legal category with a sufficiently distinctive juridical core to support a neat and tidy theory of the same.

B. The Prevalence of Hybrid Torts

Sometimes, the way in which certain causes of action get classified seems to be attributable to the way in which influential jurists have interpreted key cases. For example, F.H. Newark elaborated a well-known account of the supposedly close relationship between the rule in *Rylands v. Fletcher* and the law of private nuisance. This account played a major role in causing the judiciary to treat the former, many years later, as nothing more than a sub-branch of the latter.[83] In *Cambridge Water Co v. Eastern Counties Leather plc*, Lord Goff quoted with approval a lengthy passage from Newark's article in which the latter had asserted that "*Rylands v. Fletcher* [is] a simple case of nuisance."[84] Some years later, in *Transco plc v. Stockport MBC*, Lord Hoffmann acknowledged that Lord Goff had merely been "[a]dopting the opinion of Professor Newark...that the novel feature of *Rylands v. Fletcher* was to create liability for an 'isolated' (i.e., unforeseeable) escape," but that *Rylands v. Fletcher* "was nevertheless founded on the principles of nuisance."[85] So, although some jurists contend that the rule does not, because of certain important peculiarities, form part of tort law,[86] the orthodox view is clear. The rule is formally not just part of tort law but, more specifically, part of the law of private nuisance.[87] Ultimately, it is Newark's treatment of the case all those years ago that seems to be responsible for this conception.[88]

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83 FH Newark, "The Boundaries of Nuisance" (1949) 65 Law Q Rev 480 at 487–88.

84 (1993), [1994] 2 AC 264 (HL (Eng)) at 298, [1994] 2 WLR 53. Even before this, in *Read v J Lyons & Co, Ltd*, Lord Simmonds had noted (and seemed influenced by) the fact that "text-books on the law of nuisance regard cases coming under the rule in *Rylands v. Fletcher* as their proper subject" ((1946), [1947] AC 156 (HL (Eng)) at 183, [1946] 2 All ER 471).

85 [2003] UKHL 61 at para 33 [*Transco*].

86 See e.g. Nicholas J McBride & Roderick Bagshaw, *Tort Law*, 4th ed (London, UK: Pearson, 2012) at 445.

87 The view that the rule in *Rylands v. Fletcher* is but a sub-branch of the law of private nuisance was unequivocally endorsed by the House of Lords in *Transco*, *supra* note 85 at para 9.

88 For more recent scholarship that takes issue with Newark's conception, see Donal Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 Law Q Rev 421; John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24:4 Oxford J Leg Stud 643.

Jurists are not alone, however, in making controversial classificatory decisions that have this effect. Occasionally, it is the courts themselves that must shoulder the responsibility. As Stephen Smith has observed, it is sometimes the case that "legal decisions themselves tell us how they ought to be classified and categorized—whether they are tort cases, contract cases, or whatever."[89] All that is required is that the relevant court declares a certain case to be part of tort law and, hey presto, thus is born a new 'tort' even if, in truth, the decision is only partly (or minimally) explicable in terms of familiar touchstones of tortious liability.[90] We can once again invoke *Lumley* as an example.

Although the question that arose in *Lumley* was a novel one involving accessory (not primary) liability, Erle J did at one point in his judgment say that "[i]t was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so."[91] Of course, his having said this is hard to square with that part of his dictum (considered in Part II, above) in which he suggested that the defendant might somehow be jointly liable *in contract* for the breach that occurred.[92] Equally, it is less than obvious why it necessarily follows from the fact that X has broken a contract with Z that Y (who procured that breach) should be considered a tortfeasor. But that is not the point. What is important is the fact that, ultimately, Erle J declared that the defendant was a tortfeasor. And in so saying, he provided a clear steer as to how cases of inducing breach of contract should be treated in the future. Ever since that landmark decision, *Lumley* has almost universally been regarded as establishing a form of tortious liability; and this is despite the fact that its hybrid nature has by no means gone unnoticed.

For example, in his discussion of *Lumley* in *OBG*, Lord Hoffmann acknowledged the mongrel nature of inducing breach of contract. He traced the tort's origins to an "old action on the case for enticing away someone else's servant" and noted that, in such cases, the only means by which a claimant could be granted a remedy against the person who induced the servant's breach of contract was by recourse to a certain "mix-

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89 Stephen A Smith, "Taking Law Seriously" (2000) 50:2 UTLJ 241 at 250.

90 Though not strictly relevant here, it is also interesting to note, *en passant*, that the Birksian idea that consent is the organizing concept at the heart of contract law may also be doubted. In contract law, consent is neither a necessary nor a sufficient touchstone. It is not necessary since certain statutory implied terms will be imposed upon contracting parties even if they object to them. And it is not sufficient since there must always be consideration in order for a contract to be binding.

91 *Lumley*, *supra* note 45 at 238.

92 See text following note 48, above.

ing and matching of the forms of action."[93] Even so, Lord Hoffmann was ultimately content to continue to treat inducing breach of contract as part of tort law. A sizeable section of his leading judgment in *OBG* was headed "Inducing breach of contract: elements of the *Lumley v Gye* tort"[94] and the phrase "*Lumley v Gye* tort" was used no fewer than twelve times in his speech as a whole.

The remainder of this section considers numerous other causes of action that are almost always regarded as part of tort law but which, in truth, have hybrid rather than pedigree characteristics. They are addressed according to the various boundaries that they tend to obfuscate.

1. Tort and Contract

A relatively modern development within tort law has been the preparedness of the courts to ascribe a duty of care in negligence on the basis of an assumption of responsibility by the defendant. This branch of the law of negligence has its origins in the principle first enunciated in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*.[95] As a subspecies of negligence, one might suppose that these assumption of responsibility cases would occupy a position at the heart of 'tort law'. It would be a mistake, however, to think of them in this way. In *Hedley Byrne* itself, Lord Devlin was keenly aware of the juridical propinquity of the case to contract law in which, of course, duties arising from a voluntary assumption of responsibility find their natural home. He specifically referred to the fact that the case before him was almost contractual in nature.[96]

The proximity of the *Hedley Byrne* principle to the law of contract was also noted in the later case of *White v. Jones*[97] where a solicitor negligently delayed carrying out a testator's instructions to amend his will. This delay resulted in financial disappointment for the intended legatees in whose favour the will should have been (but never was) amended prior to the testator's death. Ultimately, the case was treated as a further extension to the law of negligence. But notably, the Law Lords (some of whom explored

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93 *OBG*, *supra* note 47 at para 4.

94 *Ibid* at para 39.

95 (1963), [1964] AC 465 (HL (Eng)), [1963] 3 WLR 101 [*Hedley Byrne* cited to AC].

96 See *ibid* ("I have found in the speech of Lord Shaw in *Nocton v. Ashburton* and the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case" at 530). For a powerful critique of the treatment of assumed responsibility cases as negligence law, see Kit Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109:3 Law Q Rev 461 at 464. See also Michael Bridge, "The Overlap of Tort and Contract" (1982) 27:4 McGill LJ 872 at 885.

97 [1995] 2 AC 207 at 269 (HL (Eng)), [1995] 2 WLR 187 [*White* cited to AC].

this possibility at length) were acutely aware that the case might conceivably have been resolved by way of an extension to the law of contract. In particular, they made mention of the following juridical affinities with contract: the fact that the duty in question was (1) affirmative, not negative, in nature (2) founded upon an assumed responsibility, and (3) designed to protect an expectation interest.[98]

As noted already, all of my target theorists concede that it is in the sphere of contract, not tort, that one finds duties that are voluntarily assumed. They could, of course, point to the fact that in some (but by no means all) of the assumed responsibility cases the relevant duty was merely *deemed* to have been assumed, rather than consciously shouldered.[99] Yet, this only provides a partial response since it only accounts for some of the cases. And, even then, it is only a response available to non-Kantians (which is not to say that all non-Kantians consider *White* to be unproblematic).[100]

The reason why Kantians cannot invoke the response just mentioned stems from the fact that, even if the relevant duty was in fact deemed to have been assumed, it remains inexplicable by virtue of being affirmative in nature. To explain: affirmative duties are regarded as being incompatible with the principle of Kantian right insofar as they instantiate an obligation to promote another's welfare (rather than merely protect an equal right of independence in that person). In this regard, Weinrib is adamant that "private law deems no aspect of [the claimant's] welfare important enough to ground a positive obligation to forward it."[101] It is for this reason that he denies the existence of liability for nonfeasance in tort law.

Allan Beever is in agreement with Weinrib on this score[102] and, in an attempt to head off the challenge for his theory presented by the assumption of responsibility cases, he argues that it is preferable to treat cases

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98 See *ibid* at 258, 268–69.

99 For weighty judicial support of such *deemed* assumptions of responsibility, see *Caparo Industries Plc v Dickman*, [1990] 2 AC 605 (HL (Eng)) at 628, Roskill LJ, [1990] 2 WLR 358; *Smith v Bush* (1989), [1990] 1 AC 831 (HL (Eng)) at 862, Griffiths LJ, [1989] 2 WLR 790.

100 See e.g. Stevens, *Torts and Rights*, *supra* note 3, variously describing the case as "anomalous" (at 178), an "exceptional award" (at 180), and "*sui generis*" (at 182).

101 Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 22 [Weinrib, *Corrective Justice*]. See also *ibid* at 51; Beever, *Law of Negligence*, *supra* note 43 at 266. It is, of course, true that some of the relevant cases involve genuine assumptions of responsibility, for which reason the present point about *deemed* positive obligations has no purchase.

102 Beever, *Law of Negligence*, *supra* note 43 at 222. See also Ripstein, *supra* note 3 at 62–64.

like *White* as belonging to a category of law best labelled "consents".[103] He does not believe that they can be slotted into the law of contract because of the absence of consideration, but he argues strenuously that they have been wrongly pigeonholed as part of the law of negligence. He contends that this mischaracterization is due to the fact that there is a widely-held, yet ultimately mistaken, belief that "it is acceptable to inflict upheaval on the law of negligence but not on the law of contract."[104] Even so, it is clear that he sees these "consents" cases as being closer to contract law than tort. He takes the view that the doctrine of consideration—a mere "idiosyncrasy of the common law"[105]—is all that stands in the way of treating such cases as quotidian contract cases.

Beever is assuredly right that there is a general preference to use tort rather than contract in order to accommodate hybrid actions. And he may well be right, too, that the doctrine of consideration has relatively little going for it in theoretical terms. But neither point is relevant here. What matters for present purposes is that the assumption of responsibility cases blur the boundary between contract and tort in a way that many tort theorists either overlook or choose not to acknowledge.[106] They blur this boundary by virtue of the fact that some of the relevant touchstones of liability have an obvious affinity with contract while others seem more naturally aligned with tort. So, for all that we may say that the solicitor in *White v. Jones* owed a duty of care and that this duty was broken by virtue of the defendant's negligence (classic 'tort-speak'), we may equally well advert to the fact that the duty in play was voluntarily assumed and that the damages awarded were granted in order to repair a pure econom-

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[103] Beever, *Law of Negligence*, *supra* note 43 at 311. Stevens *may* think likewise. Although he does not go to the same lengths as Beever to explain his position, he does at one point assert that, "[a]ssumption of responsibility is the best explanation for the category of cases exemplified by *Hedley Byrne & Co v Heller & Partners*" (Stevens, *Torts and Rights*, *supra* note 3 at 34). Confusingly, however, within two paragraphs of saying this, he seems to abandon the idea of a separate category for these cases and appears happy to bring *Hedley Byrne* within the fold of tort law, saying that it is readily explicable according to his "rights-based model" (*ibid*). His rights-based model, of course, concerns only tort (*ibid*).

[104] See Beever, *Law of Negligence*, *supra* note 43 at 313. The upheaval that would be inflicted on contract law, were these cases to be housed there, would of course stem from the absence of consideration.

[105] *Ibid*.

[106] *Cf* Nicholas McBride who acknowledges the difficulty of placing assumed responsibility cases into one of the familiar legal categories. He writes, "a duty of care arising under *Hedley Byrne* is an anomaly – it behaves like a basic obligation in that breach of such a duty of care will amount to a tort, but it has much more in common with contractual obligations that are voluntarily assumed" (Nicholas J McBride, *The Humanity of Private Law: Part I – Explanation* (Oxford: Hart Publishing, 2019) at 41.

ic loss in the form of the claimants' dashed expectations (classic 'contract-speak').

The significance of looking forward in order to gauge expectation losses is not to be underestimated. Both corrective justice theorists and rights theorists look backwards, to what went wrong, when it comes to gauging tort damages.[107] The rights theorist is principally concerned to address the rights infringement that has occurred,[108] while the corrective justice theorist—as the name suggests—regards tort damages as the means by which the injustice suffered by the claimant is corrected. Expectation losses, by contrast, do not aim to restore the claimant to the position occupied before the wrong in question was committed. They seek to place the claimant in the position that he expected to occupy at some point in the future.[109]

In addition, it is vital to note that *White v. Jones* cannot be explained away on the basis of what Birks called "alternative analysis" (i.e., affording salience to different aspects of any given case so as to enable it to be dealt with either as a tort case (drawing on facets A, B, and C) or as a contract case (drawing on facets X, Y, and Z)).[110] It cannot be so analysed because the factors that were treated as salient in *White v. Jones* were the self-same factors that would have animated a contract action: the voluntary assumption of responsibility, the *omission* to fulfil the duty thereby created, and the need to repair the claimants' damaged expectations. Put bluntly, *White v. Jones* had but one set of liability touchstones.

Another example of a cause of action that is typically regarded as part of the law of torts, but which might just as well be seen through the lens

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[107] All of my target theorists accept that the *restitutio in integrum* principle occupies center stage in tort law. Weinrib, for example, is adamant that "tort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed" (Weinrib, *The Idea of Private Law*, *supra* note 3 at 135). Likewise, Stevens speaks of damages "replicating the position before the wrong" (Stevens, *Torts and Rights*, *supra* note 3 at 59).

[108] For Stevens, for example, damages are seen principally in terms of their being "awarded as a 'next best' substitute for the primary right" that was infringed (Stevens, *Torts and Rights*, *supra* note 3 at 60). He also concedes, however, that they can also be awarded (secondarily) "to eradicate a consequential economic loss" (*ibid* at 59).

[109] They are therefore not the norm in tort cases: see Waddams, *supra* note 44 at 156. Note also the hostility of La Forest J towards granting damages to tort claimants based on disappointed expectations regarding the quality of work in the construction of defective (but not dangerous) property in *Winnipeg Condominium Corporation No 36 v Bird Construction Co*, [1995] 1 SCR 85 at para 42, [1995] SCJ No 2.

[110] According to Birks, "alternative analyses select *different aspects of the facts* and thus depict different causative events...[Yet] it is no more possible for the selected causative event to be both an unjust enrichment and a tort than it is for an animal to be both an insect and a mammal" (Peter Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) 79:7 Tex L Rev 1767 at 1781 [Birks, "UE and WE"] [emphasis added]).

of contract law, is the 'tort' of two-party intimidation.[111] In *Kolmar Group AG v. Traxpo Enterprises Pvt Ltd*,[112] the defendant coerced the claimant (with whom it had a contract) into paying a higher price for various goods than had originally been agreed. At one point in his judgment Clarke J observed: "I am quite satisfied...that Kolmar agreed to amend the letters of credit to increase the price...as a result of illegitimate pressure amounting to economic duress on the part of Traxpo."[113] He went on:

> [t]he tort of intimidation is established where (i) the defendant makes a demand backed by a coercive and unlawful threat; (ii) the plaintiff complies with that demand because of the coercive and unlawful threat; (iii) the defendant knows or should have known that compliance with its demand will cause loss and damage to the claimant and (iv) the defendant intends its demand to cause loss and damage to the [claimant]...Those requirements are, as it seems to me, satisfied...[and] [a]ccordingly, Kolmar is entitled to $1,405,566.61 as damages for intimidation.[114]

It seems a matter of mere fortuity that the judge ultimately preferred to anchor his judgment to the tort of intimidation rather than, more simply, the juridical fact of economic duress (which he treated as the basis of the tort). The centrality of economic duress to the decision he reached suggests that the case could equally well have been dealt with according to a familiar set of contract law rules. Indeed, at one point in his judgment Clarke J even indicated as much.[115] In fact, perhaps the oddest facet of the case is that the judge ultimately plumped for imposing tortious liability. After all, the continued vitality of two-party intimidation had been specifically called into question just a few years earlier by the House of Lords in *OBG*.[116] As it stands, however, *Kolmar* provides a further example of a cause of action that is treated as tortious, but which draws heavily upon juridical ideas more typically associated with a different legal category. And in common with the assumed responsibility cases, *Kolmar* is not susceptible to Birksian "alternative analysis".[117] Whether addressed from a tort or a contract perspective, it is the self-same juridical feature—namely, "illegitimate pressure amounting to economic duress"—that is ultimately pivotal.

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[111] For a fuller account of this tort and of the extent to which it overlaps with contract law, see John Murphy, "Understanding Intimidation" (2014) 77:1 Mod L Rev 33 at 49–57.

[112] [2010] EWHC 113 (Comm).

[113] *Ibid* at para 93.

[114] *Ibid* at para 119–21, Clarke J.

[115] See *ibid* at para 93.

[116] See *OBG*, *supra* note 47 at para 61, Hoffmann LJ.

[117] See *supra* note 110 footnote text for an explanation of Birksian alternative analysis.

The preceding paragraphs advert to just a few instances in which it is impossible to disentangle fully contract and tort. There is, however, nothing very new or isolated about these examples.[118] Nor, apart from a desire for theoretical neatness, is there any basis for regarding them as anomalous. Tortious assumed responsibility cases have consistently been endorsed at the highest judicial level,[119] while the tort of two-party intimidation seems also to have survived the questions raised about its vitality in *OBG*.[120] There is, consequently, no doubt that the border between tort and contract is blurred in the law as we find it. And however much we may think that tort and contract should come apart neatly (in accordance with theory), it is at least noteworthy that Lord Goff cautioned his fellow judges against the "temptation of elegance" in *Henderson v. Merrett Syndicates Ltd (No 1)*.[121]

2. Tort and Equity

A prime example of the overlap that exists between tort and equity can be seen in the developing law on the misuse of private information. This body of law is hard to place in any single legal category since it has a pretty firm foothold in both tort and equity. On the one hand, the modern action in England for misuse of private information has its origins in the equitable wrong of breach of confidence.[122] Yet, on the other, it is nowadays often treated as part of the law of torts. This latter characterization

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[118] See generally CG Addison, *Wrongs and Their Remedies, Being a Treatise on the Law of Torts*, 2nd (London: V & R Stevens, Sons, & Haynes, 1864). For a discussion of "Quasi Torts," see Arthur Underhill, *A Summary of the Law of Torts, or Wrongs Independent of Contract* (London: Butterworths, 1873) at 25–29.

[119] See e.g. *Henderson v Merrett Syndicates Ltd (No 1)*, [1995] 2 AC 145 (HL (Eng)), [1994] 3 All ER 506 [*Henderson* cited to AC]. Cases of this stripe are also endorsed by the American Law Institute in American Law Institute, *Restatement (Second) of the Law of Contracts* § 355 (1981) (the situations envisaged there being those "involving consumer transactions or arising under insurance policies").

[120] For details of the tort's vitality in the wake of *OBG*, see Murphy, *supra* note 111 at 48–49.

[121] *Supra* note 119 at 186. Rather, he said, "there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy" (*ibid* at 193–94).

[122] The equivalent development in Canada formulated in *Jones v. Tsige* (2012 ONCA 32) is also arguably something of a hybrid in that its development was premised on rights provided under the *Canadian Charter of Rights and Freedoms* (s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*]) rather than common law rights. For detailed discussion of the case, see James Goudkamp & John Murphy, "Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories" in Andrew Robertson & Michael Tilbury, eds, *The Common Law of Obligations: Divergence and Unity* (Oxford: Hart Publishing, 2016) 279 at 295–96.

of the action owes a great deal to the speech of Lord Nicholls in *Campbell v. MGN Ltd*.[123] For there, after noting the way in which the action had "shaken off the limiting constraint of the need for an initial confidential relationship"[124]—which was a key touchstone of the equitable action for breach of confidence—his Lordship went on to state that "the tort is better encapsulated now as misuse of private information."[125] Although Lord Nicholls was admittedly in a minority of one in describing the action in this way, there has since been considerable judicial endorsement of the view that a new kind of tort action has materialized which is based on the misuse of private information.[126]

Such endorsement does much to settle the question of whether this action is rightly called a tort; but it is also important to notice its hybrid qualities. The fact that textbooks and treatises on both the law of torts and equity now fully discuss this form of civil liability is of course suggestive, but not definitive.[127] Much more telling is the fact that senior judges have revealed their willingness to treat the action as one within tort law while continuing to rely on touchstones of liability that include the quintessentially equitable consideration of whether the claimant behaved in an iniquitous way so as to deny her the reasonable expectation of privacy.[128]

Further areas of overlap between tort law and equity arise in the context of the common law action for passing off as well as in relation to the various statutory causes of action for infringement of intellectual property rights (such as breach of copyright and patent infringement). While all

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123 *Campbell*, *supra* note 42 at para 14.

124 The fact that C did not confide in D is not the only way in which the action for misuse of private information differs from the equitable wrong of breach of confidence; the availability of compensatory damages (as opposed to an equitable remedy) also suggests the tortious quality of this kind of wrong.

125 *Campbell*, *supra* note 42 at para 14 [emphasis added]. Note, however, that Peter Birks labelled breach of confidence an "equitable tort" as long ago as 1996 (Birks, "Equity in the Modern Law", *supra* note 75 at 48).

126 See e.g. *Murray v Express Newspapers*, [2008] EWCA Civ 446 at para 24, Clarke MR; *Imerman v Tchenguiz*, [2010] EWCA Civ 908 at para 65, Neuberger MR.

127 See e.g. McBride & Bagshaw, *supra* note 86 at 589–625; Edwin Peel & James Goudkamp, *Winfield and Jolowicz on Tort*, 19th ed (London: Sweet & Maxwell, 2014) at ch 13; Jamie Glister & James Lee, *Hanbury and Martin: Modern Equity*, 20th ed (London: Sweet & Maxwell, 2015) at 803–07.

128 See e.g. *Mosley v News Group Newspapers Ltd*, [2008] EWHC 687 (QB) at para 16, Eady J (misuse of private information) and *Gartside v Outram*, [1857] 26 LJ Ch 113 at 114, Wood V-C (breach of confidence).

such actions are, again, habitually regarded as torts,[129] it is notable that the first choice of remedy in such cases will often be an account of profits and/or an injunction to restrain further infringements of the claimant's rights. These remedies are, of course, equitable ones, and this only adds to the suggestion that these actions have as close an affinity with equity as they do with tort. Nor are they alone or anomalous in this respect. The liability imposed upon an accessory for knowing assistance in the breach of a fiduciary obligation (which obligation lies in equity) has also been judicially described as an "equitable tort",[130] and the decision in *A-G v. Blake*[131] suggested a fairly sizeable range of circumstances in which an account of profits might be available in tort law.[132]

3. Tort and Property Law[133]

One important overlap between tort and property law exists in the shape of the action for conversion. The problems presented by this tort for those who seek to theorize gain-based damages and the limits of restitution are fairly well known. But, for present purposes, it is only the way in which it blurs the boundary between tort and property law that warrants attention.[134]

Where D_1 steals C's coat and sells it to D_2, one remedial option open to C is to sue for re-delivery of the coat. This claim is founded upon C's possessory rights over the coat. It is a claim made directly against D_2. It can be distinguished from the alternative remedy of damages, which attends to the fact that C has suffered a loss by virtue of D_1's wrongdoing. Where C elects to claim re-delivery of the coat, the tort of conversion acts, according to Andrew Tettenborn, "as a kind of surrogate *vindicatio*, allowing

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[129] See e.g. Michael A Jones, ed, *Clerk & Lindsell on Torts*, 22nd ed (London: Sweet & Maxwell, 2018) at ch 25.

[130] See *Abou-Rahman v Abacha*, [2006] EWCA Civ 1492 at para 2, Rix LJ.

[131] [2001] 1 AC 268 (HL (Eng)), [2000] 4 All ER 385.

[132] See e.g. Craig Rotherham, "Gain-Based Relief in Tort after *Attorney General v Blake*" (2010) 126:1 Law Q Rev 102 at 102 and the sources cited therein.

[133] I appreciate that what follows may not be seen as problematic for someone who accepts the Birksian event-based classificatory scheme since there is nothing inconsistent under that scheme in positing that certain property-based claims may be triggered by events that warrant classification as wrongs. However, there are excellent reasons for doubting the worth of this event-based scheme: see e.g. Webb, *supra* note 67 at 225–32; Jaffey, *supra* note 68 at 1024 (where it is suggested that property law claims can be grouped together according to a specific kind of causative event overlooked by Birks—the invalid transfer).

[134] This matter is of significance so long as one sees property law as a sub-category within private law that is discrete from tort law. For a compelling defence of this conception of property law, see Jaffey, *supra* note 68 at 1022–24.

owners to get back their property...from a wrongful possessor."[135] Putting it this way illuminates the fact that—when re-delivery is sought—conversion is capable of being seen as a proprietary cause of action. In Tettenborn's view:

> [i]t is not really tort but personal property law; it affords not so much reparation for wrongful dealing, as machinery for an owner to get his property back. The law of obligations simply does...what in other systems is achieved by a separate proprietary cause of action.[136]

The point is a fair one. However, when a claimant invokes the fact that he has suffered a loss and sues for damages, conversion operates in a typically tortious way. The truth about conversion, then, is that it comprises another hybrid tort. The key touchstone of possession is a characteristically proprietary one. Furthermore, in line with the other hybrid actions considered above, the material events in a case of conversion are incapable of being explained away according to Birksian "alternative analysis". This is because the very same element—the non-consensual using, taking, retention or delivery to a third party of the chattel in question—is juridically significant whether what is sought is re-delivery or compensatory damages.

4. Tort and Unjust Enrichment

The tort of conversion also blurs the dividing line between tort law and unjust enrichment. It is uncontroversial that if D hands over to X goods belonging to C in respect of which C has a right to immediate possession, D will commit the tort of conversion.[137] It is equally trite to state that a failure to hand over goods to someone who has an immediate right to possess them also commits conversion.[138] Therefore, one would have thought that a case like *Chesworth v. Farrar*[139]—in which the executors of an estate of a deceased antique dealer who had both lost and sold certain goods belonging to the claimants—ought to have been resolved squarely on the basis of the tort of conversion. However, Edmund-Davies J remarked as follows:

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[135] See Andrew Tettenborn, "Conversion, Tort and Restitution" in Norman Palmer & Ewan McKendrick, eds, *Interests in Goods,* 2nd ed (London: LLP Reference Publishing, 1998) 825 at 825.

[136] Andrew Tettenborn, "Damages in Conversion—The Exception or the Anomaly?" (1993) 52:1 Cambridge LJ 128 at 131.

[137] See e.g. *Hollins v Fowler* (1875), 7 LRHL 757, [1874–80] All ER Rep 118.

[138] See e.g. *Howard E Perry & Co Ltd v British Railways Board*, [1980] 2 All ER 579, 1 WLR 1375.

[139] [1967] 1 QBD 407, [1966] 2 All ER 107 [*Chesworth*].

> [a] person upon whom a tort has been committed has at times a choice of alternative remedies, even though it is a *sine qua non* regarding each that he must establish that a tort has been committed. He may sue to recover damages for the tort, or he may waive the tort and sue in quasi-contract to recover the benefits received by the wrongdoer.[140]

In so saying, the learned judge made clear his belief that the facts in *Chesworth* were capable of grounding *either* an action in tort *or* one in quasi-contract. This was important in the case itself since an action in tort was time-barred. But it was also important more generally, since granting the claimant a choice as to the cause of action is qualitatively different from seeing conversion as something that is purely a tort that makes available different types of remedy. More simply, on Edmund-Davies J's understanding, *Chesworth* need not necessarily be treated as a tort case.[141] He could scarcely have been clearer when he said that a claimant in such circumstances is free to "waive the tort and sue in quasi-contract."[142] So long as the claimant adverts to the fact that the defendant has been unjustly enriched, the case, he said, could proceed along the lines of quasi-contract (a category of law that broadly equates with what would now be called unjust enrichment).

There is, however, a possible snag here, for it might still be said that *Chesworth* does not really blur the boundary between tort law and unjust enrichment. It might merely be a case of concurrent liability that is susceptible to alternative analysis: one, in other words, in which highlighting two *different juridical aspects* of the case (Birks used the language of causative events) would support two different types of action.[143] But are there really two different juridical aspects to *Chesworth* such that there is no genuine threat to the idea that tort and unjust enrichment are quite separate legal categories? I don't think that there are.

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[140] *Ibid* at 417.

[141] A similar interpretation of the waiver of tort idea can be found in *The Universe Sentinel*, [1983] 1 AC 366 (HL (Eng)) at 385, [1982] 2 All ER 67, Diplock LJ. But even if this is wrong, the case—and others like it involving actions for money had and received—may still be regarded as a hybrid action in that, where the gain made by the intermediary outstrips the claimant's loss, the remedy can only be seen as restitution for the tort of conversion (as opposed to compensation for loss (which is the tort law norm)). See also Andrew Burrows, *The Law of Restitution*, 3rd ed (Oxford: Oxford University Press, 2011) ("[t]he suggestion that damages can be restitutionary will still be regarded by many as a heresy, since it is generally taken for granted that, other than punitive or nominal damages, damages are concerned to compensate the claimant" at 647).

[142] *Chesworth*, *supra* note 139 at 417.

[143] Birks, "UE and WE", *supra* note 110 at 1785.

It is true that, for the purposes of the tort of conversion, the claimant must point to the commission of a wrong. It is equally true that the commission of a wrong does not formally animate a claim in unjust enrichment. However, it is difficult to see how one could establish an unjust enrichment in a case like *Chesworth* without adverting to, and relying on, the very same events/juridical features that illuminate the commission of a wrong. The event that grounds the wrong—the non-consensual transfer—is also what renders intelligible the claim that the transfer was a mistaken one, and thus one in which an action for unjust enrichment could be pursued. As Birks himself conceded, it is "the absence of [C's] consent [which] supplies the unjust factor."[144] So whether it is viewed through the lens of tort law or that of unjust enrichment, it is the absence of consent in *Chesworth* which is key. It supplies both the wrongfulness demanded by tort, and the mistaken payment that is central to unjust enrichment.

Accordingly, even if one accepts that, in theory, different aspects of the same case may support alternative forms of analysis (and thereby ground different causes of action), it is nonetheless true that in *Chesworth* a single, common juridical feature was in play.[145] And that being so, it is hard to see *Chesworth* as anything other than a hybrid tort case.[146]

Nor is *Chesworth* unique in this regard, for much the same can be said in relation to cases of deceit.[147] It is precisely because D (acting wrongfully) manages to deceive C into handing over his money that C can be said to have been mistaken in handing over that money. And it is not just the causative event that may be viewed through the lens of unjust enrichment in a deceit case. The same is true also of the damages payable. As Lord Wright once put it: "in the case of fraud the court will exercise its jurisdiction...to prevent the defendant from enjoying the benefit of his

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[144] *Ibid.*

[145] Although he is ultimately hostile to the reasoning in *Chesworth* (*supra* note 139), Graham Virgo accepts that although C's case was handled as though it were an action for something other than a tort (hence not being caught by the tort limitation period), the claim nonetheless "depended on proof of the commission of a tort" ("What is the Law of Restitution About?" in William R Cornish et al, eds, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) 305 at 326).

[146] For the suggestion that it could be analysed differently by importing into English law a particular German legal doctrine, see Thomas Krebs, "The Fallacy of 'Restitution for Wrongs'" in Andrew Burrows & Lord Rodger of Earlsferry, eds, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 379 at 387–88.

[147] See James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002) at 124.

fraud."[148] In other words, despite the tort law norm of attending to what C has lost, the damages in such cases will be computed with an eye on the fact that D stands to be unjustly enriched.

5. Tort and Public Law

As noted already, there is no *a priori* right way to categorize the law, and divisions drawn along very broad lines—such as domestic law and international law, or private law and public law—are certainly possible. That said, the legal categories associated with such broad divisions are often too large to be useful for expository purposes. Accordingly, they are usually further broken down into a series of subcategories. Tort is often regarded as one such subcategory within private law, and its status as such is something to which my target theorists subscribe, as we saw above.

Conceived in this way, tort law ought not, in theory, to overlap with any other category within the classificatory scheme to which private law belongs. More concretely, tort law ought not to overlap with public law since private law and public law are separate (but complementary) parts of a single classificatory scheme. Yet, in practice, there are several hybrid torts which confound this dichotomy.

One such hybrid tort is misfeasance in a public office. Unusually for a tort, this cause of action is animated by the infringement of a public, not a private, right. In the famous case of *Roncarelli v. Duplessis*,[149] for example, the defendant sought to deprive the claimant of something that the claimant only had by virtue of public law: a liquor licence. In recognition of this public law dimension to the tort, several scholars have been hazy in the way they describe it. R.C. Evans, for example, in recognition of its hybrid qualities, has dubbed it "an administrative tort",[150] while Mads Andenas and Duncan Fairgrieve describe it is as "the only specifically 'public law' tort in English law."[151] Peter Cane and Donal Nolan also label it a "public-law tort,"[152] while for Simon Dench, "[t]he tort of misfea-

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[148] See *Spence v Crawford*, [1939] 3 All ER 271 (HL) at 288, Sess Cas 52. See also *Powell v Aiken* (1858), 4 K & J 343 at 351, 70 ER 144; *Jegon v Vivian* (1871), LR 6 Ch App 742 at 761–62, 19 WR 365.

[149] [1959] SCR 121, [1959] SCJ No 1.

[150] RC Evans, "Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office" (1982) 31:4 ICLQ 640 at 640.

[151] Mads Andenas & Duncan Fairgrieve, "Misfeasance in a Public Office, Governmental Liability, and European Influences" (2002) 51:4 ICLQ 757 at 761.

[152] Peter Cane, *Administrative Law*, 5th ed (Oxford: Oxford University Press, 2011) at 218–19; Donal Nolan, "A Public Law Tort: Understanding Misfeasance in Public Of-

sance...is a solely public law remedy."[153] If ever there were a hybrid tort, then this is surely it. It is certainly the case that it conflicts with the claim made by all of my target theorists that tort law is exclusively a part of private law and concerned solely with private rights.

A second overlap between tort and public law occurs in certain common law jurisdictions where the breach of a particular constitutional and/or human rights guarantee is treated as a "constitutional tort."[154] Just as with misfeasance in a public office, the difficulty with classifying such actions as thoroughbred torts, at least from the perspective of the theories in view, inheres in the fact that they have nothing to do with the infringement of private law rights. Actions of this kind ground awards of "vindicatory damages" in several common law jurisdictions. Damages for such actions are designed to reflect the fact that "the right violated was a constitutional right."[155]

V. Implications of Hybrid Torts for Explanatory Theories

All of the hybrid torts outlined above present a significant problem of fit for at least one of the major explanatory theories of tort law under consideration. Some are even incompatible with all of these theories. The problem they present is that, together, they make it almost impossible to pin down exactly where the frontiers of tort law lie. In this regard, Wittgenstein's aphorism, set out at the head of this article, becomes salient for it is plainly the case that the more indistinct an object is, the more difficult it is to provide a clear and definitive theory of it. The more amorphous and juridically mixed tort law appears, the less it is amenable to

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fice" in Kit Barker et al, eds, *Private Law and Power* (Oxford: Hart Publishing, 2017) 177 at 177. Note that in Nolan's case the action, while treated as a tort, is firmly located within public law, *but only on the premise* that a particular conception of the public law/private law divide is sound: "the central thesis of the paper is premised on the assumption that a viable distinction can be drawn between private law and public law" (*ibid* at 178).

153 Simon Dench, "The Tort of Misfeasance in a Public Office" (1980–83) 4:2 Auckland U L Rev 182 at 182 [emphasis added].

154 See e.g. *Crossman v R* (1984), 9 DLR (4th) 588 (on the *Canadian Charter*); *Monroe v Pape*, 365 US 167, 81 S Ct 473 (1961) (on the status of breaches of 42 USC § 1983 (2012)). *Contra R (Greenfield) v Secretary of State for the Home Department*, [2005] UKHL 14 at paras 18–19 (in relation to breaches of the Convention rights enshrined in the *Human Rights Act* (UK), 1998, c 24).

155 *Attorney General of Trinidad and Tobago v Ramanoop*, [2005] UKPC 15 at para 19. In this case, the claimant was assaulted by a police officer while being arrested, and the assault constituted a violation of his constitutional right to life, liberty and security of person under section 4(a) of the *Constitution of the Republic of Trinidad and Tobago Act* (Trinidad and Tobago), 1976, c 1, pt 1.

reductive theorization (in the sense that a single norm, principle, or other core juridical feature can be said to animate it).

As we have seen, hybrid torts are characterized by their mixed touchstones of liability. Amongst typically tortious considerations, we find interlopers like the proprietary concept of possession in the tort of conversion, the breach of contract requirement in the *Lumley* tort, and the relevance of a claimant's iniquitous behaviour in a case of misuse of private information. None of these chimes with Weinrib's claim that torts can be characterized by a simple set of familiar concepts, namely, "duty, proximate cause, factual cause, and the standard of reasonable care."[156]

VI. Irrelevance

It is one thing to point out that hybrid torts raise doubts about the widely held belief that tort law is a discrete legal category. It is quite another, however, to show that these doubts should be considered serious ones. If the extent of the boundary blurring for which they are responsible can be dismissed as trivial, or if the actions in question can be considered anomalous, then the plausibility of those theories which insist (and require) that tort law be a discrete body of law may nonetheless emerge relatively unscathed from the challenge posed by hybrid torts. Perhaps unsurprisingly, then, these irrelevance claims are frequently made.

Sometimes the irrelevance claim takes the form of a contention that a particular case was wrongly decided and that, as a consequence, the legal principle emanating from it should be regarded as a mistake. Such thinking seems to underpin Weinrib's assertion that "[i]nternal to the process of law is the incremental transformation or reinterpretation or even the repudiation of specific decisions so as to make them conform to a wider pattern of coherence."[157] Yet, there are limits to how readily this escape route—based on sidelining inconvenient decisions—can be invoked. For one thing, the common law can only "work itself pure"[158] within the accepted confines of the *stare decisis* principle.[159] Also, even if there is something to be said for now and again dismissing 'particular holdings' as wrong-headed, the sheer durability of certain cases and rules speaks powerfully against their plausibly being regarded as anomalies. Take, for ex-

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156 Weinrib, *Corrective Justice*, *supra* note 101 at 302.

157 Weinrib, *The Idea of Private Law*, *supra* note 3 at 13.

158 *Ibid.*

159 Note that reinterpretation does not necessarily involve doing violence to the *stare decisis* principle. For example, many cases have come to be reinterpreted as unjust enrichment (rather than contract or tort) cases in recent years without undermining their status as precedents.

ample, the tort of misfeasance in a public office, which has its roots in the ancient case of *Ashby v. White*.[160] This has often been said to be an anomalous tort. It was even singled out for possible abolition by the English Law Commission in fairly recent times. However, mindful of its longevity and the fact that numerous consultees defended its existence (on the basis that it "played a necessary role as a marker for particularly opprobrious action by public officials"),[161] the Law Commission abandoned any suggestion that it should be abolished.

Equally, we ought to bear in mind here the *communis error facit jus* principle, which has been endorsed by the courts on many occasions.[162] This principle, it will be recalled, operates to confer juridical legitimacy on rules of law that have been invoked and applied many times even though, when first minted, they may have been considered misguided. Any legal system which purports to take seriously both precedent and stability in the law must find room for the *communis error facit jus* principle.[163] And it is just this principle which belies Beever's claim that "it is impossible to support the existence of a tort of inducing breach of contract."[164] The action has been around for a great many years, and it has become firmly embedded as a legitimate part of the law by virtue of its repeated usage.

A second version of the irrelevance claim posits not that a certain case is wrong, but that a whole segment of the law has been created in error. Recall Weinrib's claim that even an "extensive and ramified jurisprudence"[165] can be sidelined as anomalous in order to allow the law to work itself pure. The problem with any such claim is that it invites us to consider a large number of cases as erroneous in one fell swoop. Yet the very fact that the number of cases is large speaks powerfully against doing this (at least if the objection is based on the fact that the area of law is inconsistent with a particular theory). Of course, a given line of authority may clash with a grand explanatory theory. But when this happens—where, in

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160 (1703) 1 Bro PC 62, 6 Mod 45.

161 UK, Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322) (London: 2010) at para 3.66.

162 Literally, "common error makes law" [translated by author]. The idea is this: a rule, though erroneously made, may nonetheless achieve orthodoxy through repeated usage. For a relatively recent example of its endorsement within the sphere of tort law, see *Hunter v Canary Wharf Ltd*, [1997] AC 655 at 717, [1997] 2 All ER 426.

163 See AWB Simpson, "The Common Law and Legal Theory" in AWB Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) 77 ("a customary system of law can function only if it can preserve a considerable measure of continuity and cohesion" at 95).

164 Beever, *Theory of Tort*, *supra* note 3 at 153.

165 Weinrib, *The Idea of Private Law*, *supra* note 3 at 13.

other words, there is a very considerable gap between the *explanandum* and the *explanans*—it seems more appropriate to question not the correctness of the line of authority, but whether the theory was ever very satisfactory in terms of explaining all of the law.

When a theorist suggests that an entire cause of action (rather than just an odd case) be abandoned, or suggests that it should be regarded as something other than a tort, their theory ceases to be explanatory and becomes prescriptive in nature.[166] This transition into prescriptive writing can be seen at work in connection with the tort of public nuisance, described by certain rights theorists as an anomalous cause of action. Stevens, for example, makes exactly this claim when he asserts "that public nuisance is *sui generis*."[167] In so saying, he seems happy to ignore the fact that public nuisance has been specifically endorsed as an extant tort at the very highest level,[168] not just in one common law jurisdiction, but in many. So much, then, for his repeatedly saying that he aims to explain the law as we find it. Nor can it help him that certain writers suggest that public nuisance is not even a tort of any kind,[169] let alone one that is an anomaly. Their doing so is equally countered by the fact that the courts have specifically labelled it a tort[170] and applied to it the tort rules on the limitation of actions.[171]

As noted already, Beever engages in a similarly Procrustean manoeuvre in relation to negligence cases predicated upon an assumed responsibility. His preferred approach is to repackage them as part of what he wants to call the "law of consents."[172] He adopts this position in spite of the numerous judicial endorsements of such cases as part of the law of negligence and it is consequently hard to consider his approach a genuine exercise in interpretive theory. Interpretative theory involves evincing the

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166 For an elaboration of why this is so, see James Goudkamp & John Murphy, "Tort Statutes and Tort Theories" (2015) 131:1 LQR 133 at 142.

167 See Stevens, *Torts and Rights*, *supra* note 3 at 188. The only basis that he offers for this claim is that "there is no general private law right to recover for losses suffered as a result of a crime" (*ibid*).

168 For trenchant criticism of the willingness of the authors of grand tort theories to do this, see Jane Stapleton, "Taking the Judges Seriously" (30 April 2018), online (video): <ox.cloud.panopto.eu> [perma.cc/2AQ8-8B84].

169 For the view that public nuisance may not be a tort at all, see McBride & Bagshaw, *supra* note 86 at 639.

170 See e.g. *In re Corby Group Litigation*, [2008] EWCA Civ 463 at para 20; *Hope and Glory Public House Ltd, R (on the application of) v City of Westminster Magistrates' Court*, [2009] EWHC 1996 (Admin) at para 55.

171 See e.g. *Mitchell v Milford Haven Port Authority*, [2003] EWHC 1246 (Admlty).

172 Beever, *Law of Negligence*, *supra* note 43 at 311.

best interpretation possible of what the *courts* have said. But when the courts are crystal clear on a matter—as they have been in relation to the category into which we must place assumed responsibility cases—it is hard to see how Beever can find conceptual space for the suggestion that they should be seen as part of a putative law of consents. The difficulty he faces on this front is only augmented once one recalls that he commits himself, in the construction of his theory, "to observ[ing] the way in which the judges developed *their understandings* of the case law...in order to produce a general account of the law."[173] A much more plausible understanding of his approach to these cases is that he simply resorts to prescriptive writing in order to avert their clashing with his theory.

The third and final form in which an irrelevance claim may be made relies upon the idea of triviality. In this guise, the irrelevance claim asserts not that a rule of law is wrong, but that it is so inconsequential in either practical or theoretical terms that it may legitimately be treated as causing no (or only *de minimis*) embarrassment to the main tenets of a theory. Stevens' rights-based account of tort law again furnishes a good example. In *Torts and Rights*, he attempts to trivialize the tort of misfeasance in a public office in two stages. He begins by making the point that it is a tort "of narrow scope", a "public tort...of narrow compass", "an exception...quite different from other torts."[174] Then, instead of acknowledging the significant revitalization of the tort in two fairly recent House of Lords' decisions,[175] he prefers to portray these modern cases in negative terms. He asserts that "[u]ntil relatively recently it [i.e., misfeasance in a public office] could be treated as of mainly historical interest."[176] Beyond such simple affirmations, however, he does not stray. Yet if he hopes to make good his triviality claim, he must do more than affirm. Blunt and largely undefended assertions of this kind are a long way short of compelling, rigorously constructed arguments in favour of sidelining a tort.

Conclusion

When theorizing category X, no necessary difficulty will be encountered by the fact that this category can be neatly disaggregated into a series of subcategories such as X_1, X_2, and X_3. So long as X_1, X_2, and X_3 are

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[173] *Ibid* at 29 [emphasis added]. Likewise, he says that "[t]he method employed [in *Rediscovering the Law of Negligence*] is to derive a theoretical understanding of the law from the case law" (*ibid* at 27).

[174] Stevens, *Torts and Rights*, *supra* note 3 at 242–43.

[175] See *Three Rivers District Council v Bank of England*, [2001] UKHL 16 at paras 41–70, Hope LJ; *Watkins v Secretary of State for the Home Department*, [2006] UKHL 17.

[176] Stevens, *Torts and Rights*, *supra* note 3 at 242.

all (1) discrete sub-categories of the broader category X, yet (2) related to one another in a particular way, and (3) demonstrably distinct from any other category of law from which category X is distinct, then the carving up of category X in this way ought to be uncontroversial. If, however, any of the conditions just described does not obtain, things will be very different. If subcategory X_1, for example, in fact lies somewhere on the border between category X and category Y, such that it becomes hard or impossible to pin down where category X stops and category Y begins, then successfully theorizing category X in a way that claims or presupposes a clear distinction between categories X and Y will be rendered much more difficult (perhaps even impossible).

If we now jettison the abstract idea of subcategory X_1 and replace it with the various hybrid torts considered in this article, it becomes obvious that tort law (the equivalent of category X), cannot simply be said to be distinct from other familiar categories such as contract, unjust enrichment and equity. Consequently, explanatory theories of tort which rely for plausibility on the foundational idea that tort law comprises a discrete body of law can be seen to founder. Not only do they fail to account satisfactorily for the sizeable range of significant hybrid torts that exist, they also fail clearly to set the four corners of their theory.

A final thought is this: though I doubt whether tort law can ever be entirely disentangled from neighbouring categories of law, I *do not* in so saying imply that the category 'tort law' is either meaningless or useless. I acknowledge that the courts frequently refer to 'tort law' or 'the law of torts', and that doing so serves a number of useful practical purposes. I can also see how a rough-edged conception of tort law is helpful to those engaged in teaching and learning the law. My claim is simply that the fuzziness of tort law's borders significantly undermines the plausibility of my target theories. They are all explanatory theories purporting to offer a clear account of tort law's nature and domain. They all treat tort law as though it were a discrete body of law with sharply-defined edges. Yet such treatment is unwarranted given the prevalence and effects of hybrid torts.