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THE FAILURE OF UNIVERSAL THEORIES OF TORT LAW

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ABSTRACT
Many scholars have offered theories that purport to explain the whole of the law of torts. At least some of these theories do not seem to be specific to a single jurisdiction. Several appear to endeavor to account for tort law in at least the major common law jurisdictions or even throughout the common law world. These include Ernest Weinrib's corrective justice theory, Robert Stevens's rights theory, and Richard Posner's economic theory. This article begins by explaining why it is appropriate to understand these three theories as universal theories of tort law and why it is important that they be so understood. This explanation draws upon various overt claims (or other strong intimations) made by the theorists themselves to the effect that this is how their respective accounts should be understood. The article then proceeds to test these theories, all of which are leading accounts of tort law, against the evidence in Australia, Canada, the United Kingdom, and the United States. The parts of tort law on which we focus are (1) the breach element of the action in negligence, (2) the law that determines when a duty of care will be owed in respect of pure economic loss, (3) the law that governs the availability of punitive damages, (4) the defense of illegality, and (5) the rule in Rylands v. Fletcher and its descendants. The article concludes that none of the theories is a satisfactory universal account of tort law. All of them suffer from significant problems of fit in that they cannot accommodate (often even approximately) the areas of law that we discuss. Although each of the

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theories contains a great many valuable insights, they all nonetheless fall well short of accomplishing that which they are held out as providing. In the course of this analysis, the article explains why this is an appropriate line of criticism and identifies the degree of lack of fit that we regard as being "significant."

I. INTRODUCTION

It is currently fashionable to offer accounts of tort law that purport to explain it in its entirety. Every few years, a new theoretical model appears on the market and is touted as the best explanation on offer. Take, for example, Ernest Weinrib's *The Idea of Private Law*.[1] Although this book is addressed to private law generally,[2] it quickly emerges that Weinrib's main mission is "to understand tort law."[3] His most fundamental contention is that "Tort liability reflects corrective justice,"[4] and much of Weinrib's book is an attempt to demonstrate "the immanence of corrective justice in tort law."[5] For instance, in Chapter 6, Weinrib takes his readers to features of "negligence liability [that] illustrate ... the formalist idea that corrective justice is immanent within a sophisticated system of private law."[6] In Chapter 7, Weinrib's goal is to prove that several of tort law's doctrines that are generally thought to impose strict liability—a form of liability that Weinrib regards as inconsistent with corrective justice[7]—properly understood "are either extensions of fault liability or are ways in which the common law regulates the use of property in accordance with corrective justice."[8] The foregoing makes it explicit that Weinrib's overarching enterprise is to show that his corrective justice theory fits tort law.

More recently, Robert Stevens has offered an alternative explanatory account of tort law. In *Torts and Rights*,[9] Stevens defends what he calls the "rights-based model" of tort law. According to this model, "[t]he law of torts is concerned with the secondary obligations generated by the infringement of primary rights. The infringement of rights, rather than the infliction of loss, is ... the gist of the law of torts."[10] In endeavoring "to show ... the truth"[11] of this conception, Stevens deals systematically with most aspects of tort law. He argues that "the rights-based model of the law of torts gives a better account of the common law as we find it"[12] than other models.

1. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).
2. *Id.* at 20.
3. *Id.* at 3.
4. *Id.* at 134.
5. *Id.* at 171.
6. *Id.* at 146.
7. *See* Section II.E.2.
8. WEINRIB, *supra* note 1, at 172.
9. ROBERT STEVENS, TORTS AND RIGHTS (2007).
10. *Id.* at 2 (footnote omitted).
11. *Id.* at 3.
12. *Id.* at 306.

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Stevens's claim, therefore, like Weinrib's, is also that tort law conforms to his explanation of it.

As a final illustration of a writer who offers an explanatory theory of the whole of tort law, consider Richard Posner. In his *Economic Analysis of Law*, Posner contends that tort law (and the law generally) "is best (not perfectly) explained as a system for maximizing the wealth of society."[13] The opening sentence of *The Economic Structure of Tort Law*, which he co-authored with William Landes, claims that "the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation."[14] In these works (and in a staggering number of other contributions)[15] Posner draws attention to many aspects of tort law that he believes substantiate this claim.

The foregoing theorists all seek to *explain* tort law, as the quotations we supply here make abundantly clear. Whether they succeed in their endeavor is one of the most important questions in modern private law scholarship. In order to answer it, it is necessary to judge the work of these theorists by reference to the body of law that the theorists purport to explain. Does the *explandum* fit the *explanans*? In order to do this, it is first necessary to ascertain the legal system or systems with which the theorists in question are concerned.

Stevens is explicit regarding the jurisdictional scope of his theory. In *Torts and Rights* he writes, "I have focused on English cases for no better reason than that this is the material which I know best. *However, the book would look much the same if I had primarily used the case law of any other common law jurisdiction.*"[16] Stevens's claim that his theory is applicable to the common law world as a whole could scarcely be made more starkly, and elsewhere he specifically attempts to extend it to Australia.[17] By contrast, Weinrib does not make it crystal clear with which jurisdiction or jurisdictions he is concerned. Nowhere in *The Idea of Private Law* (or, so far as we can tell, in any of his many other relevant writings) does Weinrib state explicitly which countries he is discussing.[18] Nonetheless, he seeks to support his theory by reference

13. Richard A. Posner, Economic Analysis of Law (7th ed. 2007), at 25.

14. William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987), at 1.

15. *See, especially*, Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972); Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 Int'l Rev. L. & Econ. 127 (1981); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851 (1980); William M. Landes & Richard A. Posner, *Causation in Tort Law*, 12 J. Legal Stud. 109 (1983); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* Philosophical Foundations of Tort Law 99–112 (David G. Owen ed., 1995); Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 Ind. L.J. 469 (2013).

16. Stevens, *supra* note 9, at vii (emphasis added).

17. *See* Robert Stevens, *The Divergence of the Australian and English Law of Torts*, in Torts in Commercial Law 37–62 (Simone Degeling, James Edelman & James Goudkamp eds., 2011).

18. The same can also be said of Allan Beever, Rediscovering the Law of Negligence (2007), which offers an important elaboration of Weinrib's theory of tort law as applied to the tort of negligence.

to many cases from Australia, Canada, the United Kingdom, and the United States. The fact that he proceeds in this way strongly suggests that Weinrib considers there is sufficient uniformity in the law in these jurisdictions to entitle him to draw on materials from any of them. And, given this assumption of substantial uniformity, he presumably also believes that the theory that he builds from the law in several jurisdictions must in turn apply to those jurisdictions. Overt confirmation that his theory is intended to be multi-jurisdictional in terms of its explanatory power appears in more recent work. Although he stops short of naming particular jurisdictions, Weinrib does state that his theory is applicable to "the private law relationships, as found in sophisticated legal systems."[19] At a minimum, then, this confirms the fact that Weinrib does not regard his theory as being confined to just one jurisdiction.

Similar remarks can be made about Posner's work. In defending his economic explanation of tort law, Posner does not specify the full array of legal systems with which he is concerned. But, as with Weinrib, he tellingly often cites, without any words of qualification, decisions from the United States and the United Kingdom in support of his theory.[20] In *Law and Legal Theory in the UK and USA*, not only does Posner write that "in general English judges use their common sense effectively to approximate the results that an economic analyst would recommend,"[21] he also does nothing to distinguish the very many different common law jurisdictions found in the United States. He therefore clearly believes that the various systems of tort law in the United States and in the United Kingdom are sufficiently similar that his economic theory is the best explanation available of tort law in both countries.[22]

As we have just noted, there is compelling evidence—in both the form of explicit claims and strong intimations—that Weinrib, Stevens, and Posner are all concerned with tort law throughout the common law world. The daring nature of their claims is therefore hard to overstate. For not only do they assert that they can account for *all* of tort law within a single jurisdiction[23] (itself a tall order), they also believe themselves to have an explanation of tort law that is valid across *all* common law jurisdictions.[24]

19. Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 291 (2011).

20. For an illustration of Posner drawing on English authorities, *see* Landes and Posner, *Positive Economic Theory*, *supra* note 15, where the landmark cases of Rylands v. Fletcher, [1865] 3 H. & C. 774; 159 Eng. Rep. 737 (Ex. Ch.), *aff'd*, [1868] L.R. 3 H.L. 330 (H.L.); Bolton v. Stone, [1951] A.C. 850 (H.L.); Blyth v. Birmingham Waterworks Co., [1856] 11 Ex. Ch. 781, [1856] 156 Eng. Rep. 1047 (Ex. Ch.); and Paris v. Stepney Borough Council, [1951] A.C. 367 (H.L.) are cited.

21. RICHARD A. POSNER, LAW AND LEGAL THEORY IN THE UK AND USA (1996), at viii.

22. *See, especially, id.* at 39–67. We are not alone in reading Posner in this way: *see, e.g.*, STEVENS, TORTS, *supra* note 9, at 92.

23. It is axiomatic that none of these theorists is concerned with, for instance, just one tort or a handful of torts. Their accounts are addressed to tort law generally.

24. Some of these theorists may go further still by claiming that they can account for tort law not merely as it presently exists but for all of its history. Consider, e.g., Stevens, *Divergence*, *supra*

They are offering, for want of a better description, universal theories of tort law. Their self-imposed task is to show that their respective models are the best available. The main purpose of this article is to test whether their theories can justifiably be rolled out throughout the common law world.[25]

As is obvious from what we have said so far, the critique that we employ in this article is one based on fit. We consider this to be an appropriate way of engaging with the various theories because, as we have shown, the target theorists are fundamentally concerned to demonstrate that their accounts fit the law. Although this type of criticism is entirely conventional,[26] this does not mean that this article adds nothing to existing treatments of the theories in question. Our enquiry is original in what it is testing, namely, whether the theories in issue constitute plausible universal theories of tort law.

Beyond this, however, the article also makes a series of further substantial contributions to existing scholarship. We mention four further ways in which the analysis that we offer is important. First, revealing that the theories in question are universal in nature opens the door to a novel line of criticism, namely, the fact that the theorists in question, despite the universal nature of their accounts, frequently cherry-pick rules that are consistent with their models and attempt to marginalize or simply ignore corresponding rules in other jurisdictions that are incompatible. Second, many of the problems of fit that we canvass have not previously been identified. Third, no one, so far as we know, has looked at the various theories simultaneously. Examining them alongside each other for the purpose of determining how satisfactorily they accommodate particular aspects of tort law reveals features of the theories—including weaknesses—that have not previously been recognized. Fourth, although most of the theories under consideration have previously been put to proof in just one or two jurisdictions,[27] this article, uniquely, subjects the theories to scrutiny in all of the major common law jurisdictions.

note 17, at 39, where he asserts that the rights model of tort law has a longer history in the law than other models. Weinrib's claims seem not to be limited to common law jurisdictions: *see* the text accompanying *supra* note 19.

25. It would be worth investigating the theories as universal theories even if Weinrib, Stevens, and Posner confined their theories to just a single jurisdiction.

26. *See, e.g.*, Andrew Burrows, *Damages and Rights, in* RIGHTS AND PRIVATE LAW 435–458 (Andrew Robertson & Donal Nolan eds., 2012); and John Murphy, *Rights, Reductionism and Tort Law*, 28 OXFORD J. LEGAL STUD. 393 (2008) (testing Stevens's rights theory against English law); Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 OXFORD J. LEGAL STUD. 471 (1996) (tackling Weinrib's corrective justice theory in the context of English law); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 (2006) (arguing that the descriptive claims of Goldberg and Zipursky's theory are problematic when assessed against tort law in the United States).

27. *See* citations *supra* note 26.

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We concentrate on the theories of tort law advanced by Weinrib,[28] Stevens, and Posner. We are conscious of the fact that variations on the ideas propounded by these theorists have been developed by other writers,[29] and that there are also distinct theories of tort law on offer. However, we focus on the writings of these target theorists partly because of limitations of space but primarily because their theories are in vogue.[30] They are all deservedly very widely discussed[31] and they all make very valuable contributions to tort law scholarship.[32] Occasionally we refer to the writings of other theorists, particularly the scholarship of John Goldberg and Benjamin Zipursky, who have also developed a theory of the entirety of tort law—their "civil recourse theory."[33] There are compelling reasons to believe that they, too, intend their theory to be universal in nature.[34] However, we have not selected them for

28. Weinrib, perhaps to a greater degree than the other theorists considered here, has changed his tune in relation to his model of tort law in certain important respects. This is not surprising given the length of time over which Weinrib has been writing. However, for the purposes of this article we look mainly to his seminal work, THE IDEA OF PRIVATE LAW (WEINRIB, *supra* note 1), although we take account in various places of certain of his other writings. We have chosen to proceed in this way for two main reasons. First, this is Weinrib's most sustained defense of his corrective justice model by a considerable margin. Second, it is important to ascertain whether the analysis advanced in this work is valid despite the fact that Weinrib may have retreated from or modified certain of the claims that he made in it. Simply because Weinrib has changed his position in relation to certain points does not mean that he is correct to have done so.

29. Jules Coleman, for example, has offered several versions of his corrective justice theory of tort law, all of which differ in certain respects from that of Weinrib; *see* JULES COLEMAN, RISKS AND WRONGS (1992), at 303–385.

30. Although Posner's scholarship belongs to what is often called the "first wave" of law-and-economics analysis, and although later generations of economic analysis have been predominantly concerned to supply *prescriptive* rather than explanatory accounts of the law, there is little or nothing of Posner's pioneering work that is now considered by law-and-economics scholars to be obsolete or wrongheaded. Rather, it is generally taken to be foundational and in this sense retains current appeal. For a detailed account of the various "waves" of North American law-and-economics scholarship, *see* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995), at 301–419.

31. Weinrib's work on corrective justice has been the subject of at least one symposium: *Formalism, Corrective Justice and Tort Law Symposium: Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. i (1992). Stevens's rights theory is the main focus of RIGHTS AND PRIVATE LAW (Donal Nolan & Andrew Robertson eds., 2012). Some of the articles in which Posner developed his economic theory of tort law (*see* the sources mentioned in *supra* note 15) are, of course, among the most cited law journal articles in the world.

32. For example, Weinrib's writings have raised the consciousness of private lawyers generally to some major shortcomings of functionalist (or, more specifically, law-and-economics) accounts of tort law. In a similar vein, Stevens's theory has done much to expose the inexplicability of torts that are actionable per se on a loss-based view of the law of torts.

33. Their writings are voluminous. Their main contributions (writing separately or together) include Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law Torts*, 51 VAND. L. REV. 1 (1998); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007). A reasonable conspectus of their work to date on civil recourse theory can be found in John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

34. Goldberg and Zipursky are much less clear than one would hope on the issue of which system or systems of tort law they are endeavoring to explain. (We are not alone in thinking this; *see, e.g.*, John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43 (2011), at 43.) At a minimum, they are endeavoring to explain tort law in the United States since they cite

separate treatment. Their account is in several key respects very similar to Stevens's.[35] Goldberg and Zipursky condemn attempts to understand tort law as a system for allocating losses caused by accidents and instead "argue . . . for the *descriptive* superiority"[36] of a rights-based (or, as they generally prefer to put it, wrongs-based) view. We have chosen to focus on Stevens rather than on Goldberg and Zipursky primarily because Stevens generally applies his theory to more of the rules in which we are interested in this article than do Goldberg and Zipursky and because Stevens's theory is nakedly universal in its claims. However, we believe that what we say about Stevens's theory often also holds true for Goldberg and Zipursky's, although we do not seek to establish that this is the case.

In the final section of this article, we seek to fend off a few general objections that might be pressed against our analysis. We explain, inter alia, why it would be unconvincing to respond to our analysis by asserting that the theories are interpretive theories rather than explanatory and that we have ignored aspects of tort law that the theories can explain. However, a doubt that we want to address squarely at the outset that might be entertained in relation to our enterprise is whether it makes sense to test the theories in question as universal theories. It might be thought that it would be better to ask, first, whether the theories are plausible accounts of tort law in their "home" jurisdictions before testing them against a range of common law jurisdictions. There are two points that we want to make in this connection. The first is that this work has already largely been done elsewhere. Complaints have often been made that the theories concerned do not fit the law in specific jurisdictions. We see no point in traversing the ground that has been covered by others.[37] But, more fundamentally, we doubt that the theories really have a "home" jurisdiction. As we have shown, the authors of the theories in question clearly do not confine themselves to individual

materials from a wide range of jurisdictions in that country. But they also frequently reference English decisions and, with use of the phrase "Anglo-American tort law", seem to suggest that English tort law and United States tort law are siblings rather than distant cousins; *see, e.g.*, Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 33, at 968. When they speak at gatherings of Commonwealth lawyers, they do not modify their theory; *see, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibility in the Law of Torts*, *in* RIGHTS AND PRIVATE LAW 251–274 (Donal Nolan & Andrew Robertson eds., 2012), which is based on a lecture that they delivered in England. The same can be said of articles that they publish in Commonwealth law journals; *see, e.g.*, Benjamin C. Zipursky, *Civil Recourse and the Plurality of Wrongs: Why Torts Are Different*, N.Z. L. REV. 145 (2014). It is reasonable to infer, therefore, that they too consider that their theory holds true throughout the common law world.

35. Some writers also see a strong connection between the work of Goldberg and Zipursky and Weinrib's corrective justice theory. *See, e.g.*, Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011); Weinrib, *Civil Recourse*, *supra* note 19. *Cf.* Zipursky, *Civil Recourse, Not Corrective*, *supra* note 33. We do not deny that these theories have much in common. However, we see the link between Stevens and Goldberg and Zipursky as being the closer one. And, either way, it is possible to bracket, at least in a rough-and-ready way, the work of Goldberg and Zipursky with that of other scholars.

36. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 33, at 920 (emphasis added).

37. *See, e.g.*, the sources mentioned *supra* note 26.

jurisdictions. As such, it is insufficient to test the theories against the law in just one jurisdiction.

II. FIVE SIGNIFICANT PROBLEMS OF FIT FOR THE UNIVERSAL THEORIES

In this part of the article, we discuss problems of fit that the three theories in question encounter when they are applied to the law in Australia, Canada, the United Kingdom, and the United States. We assess the theories by reference to five areas of tort law: (1) the breach element of the action in negligence; (2) liability for negligently inflicted pure economic loss; (3) punitive damages; (4) the defense of illegality; and (5) the rule in Rylands v. Fletcher and its descendants.

We have selected these areas primarily because they present *significant* problems of fit for the theories under consideration qua universal theories. We concentrate on significant problems of fit because we are eager to avoid it being justifiably suggested that we have selected de minimis problems. (We recognize that there will inevitably be at least *some* mismatch between a theory of a given area of the law and the law in that area.) What, then, do we mean by a "significant" problem of fit? We regard a problem of fit as being "significant" if it is: (1) well out of line with a core tenet of the theory concerned; (2) of practical importance by virtue of the regularity with which it is applied; *and* (3) found in a multiplicity of jurisdictions. This is, we think, an extremely demanding test for significance. We have deliberately set a particularly high bar (and probably far higher than is necessary) so that there is no doubt that the problems of fit that we identify below are genuinely significant.

Needless to say, many other problems of fit additional to those that we have just mentioned also exist, but we confine ourselves to these five problems because they meet our exacting test of significance. We discuss each of the five problems in turn, explaining why they present difficulty for Weinrib's corrective justice theory, Stevens's rights theory, and Posner's economic theory. We do not always consider these theories in the same order as we believe that the best sequence in which to address them depends on the area of law in question.

It is vital to appreciate that the goal of this part of the article is *not* to highlight differences in the law between the jurisdictions with which we are concerned. Simply drawing attention to such differences would be pointless for current purposes. That is because the theories in question may be able to account for more than one rule that governs a given factual scenario. Proceeding in this way also may result in important problems of fit being overlooked since a rule that a theory cannot explain may be adopted in all of the jurisdictions in issue. The overarching aim of this part of the article is, rather, to explain why rules that are found in the jurisdictions in question cannot be accommodated by the theorists in issue.

A. The Breach Element of the Action in Negligence

1. Economic Theory

Different tests are used in different parts of the world to determine when the breach element of the action in negligence is satisfied. According to conventional wisdom, the test that is used in the many jurisdictions in the United States is that propounded in United States v. Carroll Towing Co.[38] American law students are usually taught that in this famous case, Judge Learned Hand laid down an algebraic formula for ascertaining whether the defendant had breached his duty of care. According to this formula, the breach element is determined by reference to the probability of damage to the plaintiff materializing ("P"), the burden of taking precautions ("B"), and the loss that the defendant's conduct caused to the plaintiff ("L"). If PL is greater than B, the defendant is adjudged to have breached his duty.

Although the Hand formula has been enshrined in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm[39] and is accepted by many American treatise writers as representing the law,[40] we acknowledge that some scholars consider it to have at best a shaky foothold in American tort law.[41] *Carroll Towing* is not even a tort case (it is an admiralty case), and in it Judge Learned Hand was dealing with the plaintiff's fault rather than the defendant's. However, for the purposes of this analysis, we proceed on the basis that the conventional understanding is correct, namely, that the Hand formula specifies when the breach element will be satisfied in the United States.

The Hand formula is presented by Posner as powerful evidence in support of his theory of tort law.[42] Indeed, it is probably fair to say that the Hand formula is the main jewel in the crown of that theory. Posner claims that the Hand formula is used not just in the United States but also in the United Kingdom, even if it is not on the lips of English judges.[43] He writes, "I do not know how many English judges have heard of the Hand

38. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir., 1947).

39. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3 (2010). Wright describes this section as "explicitly adopt[ing] an almost totally unconstrained, reductionist, cost-benefit test of reasonableness in negligence law": Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 Am. J. Juris. 143 (2002), at 161.

40. *See, e.g.*, Prosser and Keeton on Torts 173 (David Owen et al. eds., 5th ed. 1984); Dan Dobbs, The Law of Torts (2000), at 340–348.

41. *See, e.g.*, Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 Theoretical Inquiries in L. 1 (2003); Benjamin C. Zipursky, *Sleight of Hand*, 48 Wm. & Mary L. Rev. 1999 (2007).

42. *See, e.g.*, Landes & Posner, Economic Structure, *supra* note 14, at 85–88.

43. Posner is correct that the formula is rarely mentioned by English judges. Indeed, it is mentioned only exceptionally in Commonwealth jurisdictions more generally. We searched high and low for references to the Hand formula by Commonwealth judges. We were able to unearth only a handful of occasions on which it was mentioned. Instances when it was referred to include *Western Suburbs Hosp. v Currie* [1987] 9 NSWLR 511, 523–524 (C.A.) (Austl.); Rentway Can. Ltd./Ltée v. Laidlaw Transp. Ltd., [1989] 49 C.C.L.T. 150, para 46 (H.C.J.) (Can.); *Cekan v Haines* [1990] 21 NSWLR 296, 306 (C.A.) (Austl.); Ultramar Can. Inc. v. Ship Czantoria, [1994] 84 F.T.R. 241, para 125 (Can.); Opron Constr. Co. v. Alta., [1994] 151 A.R. 241, para 702 (Can. Alta. Q.B.); *Dovuro Pty Ltd. v Wilkins* [2000] F.C.A. 1902, (2000) 182 A.L.R. 481, para

formula. But I think that if it were explained to them they would accept it as a fair description of the modern English law of negligence."[44] The relevant problem for Posner is that the Hand formula is simply not used outside the United States. It has been stressed by the courts in several jurisdictions that the breach element is not determined in a mathematical way or by a calculus.[45] Furthermore, factors other than those referred to in the formula are often considered. As Justice McHugh said in the decision of the New South Wales Court of Appeal in Western Suburbs Hospital v. Currie: "Negligence is not an economic cost/benefit equation. Immeasurable 'soft' values such as community concepts of justice, health, life and freedom of conduct have to be taken into account."[46] Equivalent statements have been made in other jurisdictions.[47] While textbook writers in Commonwealth countries often refer to the Hand formula in passing, they do not suggest that it constitutes the law in the jurisdiction with which they are concerned.[48] For these reasons, Posner's account suffers from significant difficulty when applied outside the United States.

It might be thought that this conclusion has been reached too hastily since Posner never actually claimed that the Hand formula is employed anywhere with mathematical precision. It might also be argued that the Hand formula is broad enough to allow for all costs and benefits to be weighed, and not merely those that are explicitly economic in nature. On this basis, the Hand formula could be seen as capable of accommodating the "soft" values referred to by Justice McHugh. Such values are, it might be said, simply certain nominate factors that are relevant to a cost-benefit analysis. Despite some ostensible appeal, this line of argument is ultimately unpersuasive. To begin with, the various "soft" values of liberty, justice, and life are not easily cashed

96 (Austl.); Re Commins and Civil Aviation Safety Auth., [2004] AATA 1330, (2004) 86 ALD 637, para 23 (Can.); Twin Cities Mech. & Elec. Inc. v. Progress Homes Inc., [2005] N.L.T.D. 134, [2005] Nfld & PEIR 314, para 41 (Can.); Gemoto v. Calgary Reg'l Health Auth., 2006 ABQB 740, (2007) 2 W.W.R. 243, para 21 (Can.); Blackstrap Hospitality Corp. v. Aztec Amusements, (1992) Ltd., [2009] ABQB 74, para 88 (Can.).

44. POSNER, LAW AND LEGAL, *supra* note 21, at 41 (footnote omitted).

45. "Reference to 'calculus,' 'a certain way of performing mathematical investigations and resolutions,' may wrongly be understood as requiring no more than a comparison between what it would have cost to avoid the particular injury that happened and the consequences of that injury": *N.S.W. v Fahy* [2007] HCA 20, (2007) 81 ALJR 1021, para 57 (Austl.) (footnote omitted); "What is involved . . . is not a calculation; it is a judgment": *Mulligan v Coffs Harbour City Council* [2005] HCA 63, (2005) 223 CLR 486, para 2 (Austl.).

46. *Western Suburbs Hosp.*, *supra* note 43. The High Court of Australia has made similar remarks on several occasions: *see, e.g.*, *Fahy*, *supra* note 45, at paras 6, 125 (stressing that the question of breach is not resolved by way of a "calculus" and cannot be determined in a scientific or mathematical way).

47. *E.g.*, in Ridge v. Baldwin, [1964] A.C. 40, 65 (H.L.) Lord Reid remarked that "[t]he idea of negligence is . . . insusceptible of exact definition."

48. *E.g.*, John Fleming, speaking principally about Australian law, noted that "the reasonable person is by no means a caricature cold blooded, calculating Economic Man": JOHN G. FLEMING, FLEMING'S THE LAW OF TORTS (Carolyn Sappideen & Prue Vines eds., 10th ed. 2011), at 140, para 7.130. This passage is materially identical to the corresponding one in the ninth edition, the last edition of this book that Fleming himself authored: JOHN G. FLEMING, THE LAW OF TORTS (9th ed. 1998), at 132.

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out in economic terms. This is important because judicial consideration of factors that are not reducible to economic values is flatly inconsistent with Posner's purely *economic* theory of tort law. Furthermore, we doubt whether Commonwealth courts (or at least those in Australia) just balance all costs and benefits for the simple reason that "life, liberty, and justice" are incommensurable values. They cannot be compared according to any common metric. This, too, is highly significant since Posner's economic model is predicated on relevant considerations being susceptible to being weighed.

2. Corrective Justice

For the other theorists with whom we are concerned, the converse problem exists. That is, they are unable to explain the fact that the Hand formula is used in the United States. This is properly conceded by Weinrib. He admits that his theory cannot accommodate the Hand formula because that formula takes cognizance of the burden on the defendant of taking precautions.[49] Pursuant to his theory, a factor that is relevant to liability must be bilateral in the sense that it is concerned with the relationship between the parties.[50] However, the cost to the defendant of taking precautions is not something that connects the parties to each other. It is a unilateral consideration that is concerned solely with the defendant. Although Weinrib admits, therefore, that his corrective justice theory does not accommodate the law regarding the breach element of the action in negligence in the United States (surely a major concession), he claims that his theory fares much better when attention is turned to other jurisdictions. He says that "the English and Commonwealth approach to reasonable care ignores [the burden on the defendant of avoiding the risk] almost completely."[51]

Weinrib is badly mistaken here about the state of the law. Although it is true that the cost to the defendant is not always as explicitly and directly factored into the determination of the breach issue by Commonwealth courts as it is by the Hand formula, the suggestion that the cost to the defendant of taking precautions is irrelevant or nearly irrelevant is manifestly false. Weinrib's analysis of the law on this point[52] relies heavily on the landmark Australian case of Wyong Shire Council v. Shirt.[53] There, in one of the most celebrated opinions in Australian tort law, Justice Mason said that the cost of taking precautions *is* a factor to consider in determining whether the defendant breached her duty. His Honor wrote: "The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the *expense, difficulty and inconvenience of taking alleviating action and any other*

49. WEINRIB, *supra* note 1, at 148.
50. *Id.* at 120–121.
51. *Id.* at 148.
52. *Id.* at 148 n 2.
53. *Wyong Shire Council v Shirt* [1980] 146 CLR 40 (H.C.) (Austl.).

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conflicting responsibilities which the defendant may have."[54] *Shirt*, therefore, far from supporting Weinrib's theory, actually undermines it.

Weinrib also cites the famous English decision in Bolton v. Stone[55] in support of his claim that in Commonwealth jurisdictions the burden on the defendant of avoiding the risk in question is "ignor[ed] ... almost completely."[56] In this case the plaintiff was injured when she was struck by a cricket ball that had been hit out of the cricket ground. It is true that Lord Reid's opinion contains some remarks that are in tune with Weinrib's position. For example, his Lordship said, "I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played at all."[57] However, it is very doubtful whether Lord Reid really meant to say that the practicability of taking precautions is *irrelevant*, given that in two subsequent cases he indicated that the cost of precautions should be taken into account.[58] Furthermore, even if he did hold that view when he delivered his speech in *Bolton*, it is doubtful whether that section of his speech forms part of the *ratio decidendi* of the case. The Appellate Committee that heard the appeal in *Bolton* comprised five Law Lords. The committee unanimously upheld the finding of the trial judge that there was no breach of duty, and all five Law Lords delivered speeches. Only Lord Reid can be read as suggesting that the cost of taking precautions could be disregarded in that case, a fact that Weinrib omits to mention.

Many English judges[59] as well as judges elsewhere in the Commonwealth[60] have said that the cost of taking precautions is relevant (though by no means central) to the issue of breach of duty. It is thus unsurprising that commentators have noted that the cost to the defendant of taking precautions is a salient factor in determining whether the breach element of negligence is satisfied. John Fleming, for example, summarizing the gist of the authorities, wrote: "That the cost [to the defendant of avoiding the risk of injury] ... is a relevant factor cannot be doubted."[61] Because the cost of implementing risk-prevention measures is a factor to consider in deciding whether there has been a breach in all Commonwealth jurisdictions as well as in the United States, Weinrib's theory suffers from a significant problem of fit. It does not admit of universal application.

54. *Id.* at 47–48 (emphasis added). This passage has essentially been put on a statutory footing in many Australian jurisdictions: *see, e.g.*, *Civil Liability Act 2002* (NSW) §5B (Austl.).
55. Bolton v. Stone, [1951] A.C. 850 (H.L.).
56. WEINRIB, *supra* note 1, at 148.
57. *Bolton*, *supra* note 55, at 867.
58. In Morris v. West Hartlepool Steam Navigation Co., [1956] A.C. 552, 574 (H.L.), Lord Reid said that "the difficulty and expense and any other disadvantage of taking the precaution" must be weighed in deciding whether there is a breach of duty. Also, in the *Wagon Mound (No 2)* [1967] 1 A.C. 617, 642 (P.C.) (Austl.), he opined that "a reasonable man would only neglect . . . a risk [of very small magnitude] if he had some valid reason for doing so, *e.g.*, that it would involve considerable expense to eliminate the risk."
59. *See, especially*, Latimer v. AEC Ltd., [1953] A.C. 643, 653 659, 662–663 (H.L.).
60. *See, e.g.*, Botting v. B.C., [1996] 27 B.C.L.R. (3d) 106, para 30 (Can.).
61. John Fleming, *The Economic Factor in Negligence*, 108 LAW Q. REV. 9, 9 (1992).

3. Rights Theory

Stevens rightly acknowledges that his theory faces a significant problem whenever cost to the defendant is taken into account by tort law.[62] The problem arises because this consideration has nothing to do with the plaintiff's rights.[63] Because cost to the defendant is relevant to determining whether there is a breach of duty (a fact that Stevens notes)[64] in all of the jurisdictions with which we are concerned, Stevens's theory suffers from a major problem of fit. In an attempt to mitigate this difficulty, Stevens seeks to discredit Posner's economic account of tort law,[65] which champions the consideration of cost to the defendant. However, this attempt to rescue his theory rests on a logical error.[66] This is because *even if* Stevens's criticisms of Posner's theory are convincing, that would not support Stevens's own theory. The fact that one theory is inadequate does not thereby make a rival theory acceptable. Stevens's move, repeatedly made throughout his *Torts and Rights*,[67] is akin to stating that the heliocentric theory of the universe (the theory that the sun is at the center of the universe) provides the best explanation of the position of objects in the universe simply because the geocentric theory (the theory that Earth is at the center of the universe) is flawed. It is a classic example of what philosophers call the fallacy of the excluded middle. The difficulty Stevens's account suffers from in relation to the breach element in negligence actions therefore remains, and it means that his theory cannot claim universal truth.

B. Negligently Inflicted Pure Economic Loss

1. The Law

All of the jurisdictions with which we are concerned adopt different approaches to the recognition of a duty of care in respect of negligently inflicted pure economic loss. In Australia, the question in each case is whether the "salient features" of the proceedings call for a duty to be recognized.[68]

62. Stevens, Torts, *supra* note 9, at 92–93.

63. One might argue that our rights depend at least in part on how burdensome certain conduct required by those rights would be for others. This is not, however, how Stevens perceives the rights protected by tort law. In his view, the rights protected by the common law "are inevitably derived from moral rights" (*id.* at 331). He also remarks: "[m]oral rights are capable of justification independently of their utility or consequences. . . . Utilitarian or consequentialist arguments for their recognition . . . are otiose" (*id.* at 333).

64. *Id.* ("it is observably true that in a claim based upon the defendant's negligence, the courts take into account the costs and benefits of a defendant's actions in determining whether he is liable") (footnote omitted).

65. *Id.* at 93–97. Stevens's assault on Posner's theory comes from many directions. We do not address whether the assault succeeds because, as we explain, that fact is irrelevant to the success or failure of Stevens's own theory.

66. This point is Peter Cane's; *see* Peter Cane, *Torts and Rights*, 71 Mod. L. Rev. 641, 643 (2008).

67. Numerous illustrations are given in *id.*

68. *Perre v Apand Pty Ltd.* [1999] HCA 36, (1999) 198 CLR 180 (Austl.); *Woolcock St. Invs. Pty Ltd. v CDG Pty Ltd.* [2004] HCA 16, (2004) 216 CLR 515 (Austl.).

Salient features include the plaintiff's vulnerability,[69] the risk of imposing indeterminate liability,[70] the control enjoyed by the defendant over the circumstances that led to the plaintiff suffering injury,[71] the defendant's knowledge,[72] and the need to protect individual autonomy.[73] In Canada, the *Anns* test is used to determine when a duty of care arises,[74] including in cases involving negligently inflicted pure economic loss.[75] According to the *Anns* test, the issue of whether a duty of care is owed is resolved in two stages. The first stage involves enquiring whether there is sufficient "proximity" between the parties. If the necessary proximity exists, the second stage becomes relevant, where it is asked whether there are any policy considerations that limit or exclude a duty.

The position in the United Kingdom contrasts starkly with that in Australia and Canada. In the United Kingdom, a distinction is drawn between three types of case: (1) those involving an assumed responsibility; (2) those involving what is often referred to as "relational economic loss" (that is, pure economic loss caused to the plaintiff by virtue of the knock-on effect of the defendant having negligently harmed the property or person of a third party in which or in whom the plaintiff had an economic interest); and (3) those in which the plaintiff has purchased property that is inherently (but not obviously) defective and therefore not worth what the plaintiff paid for it. In relation to cases that fall within either the second or third of these categories, the courts have steadfastly refused to impose a duty of care.[76] By contrast, a duty of care may arise in the first type of case.[77] The courts generally employ two tests in this regard, the relationship between which is unclear:[78] the *Caparo* test[79] and an assumption of responsibility test.[80] The *Caparo* test asks whether the injury to the plaintiff was a foreseeable

69. *See, e.g.*, *Graham Barclay Oysters Pty Ltd. v Ryan* [2002] HCA 54, (2002) 211 CLR 540, paras 84, 149, 321 (Austl.).

70. *See, e.g.*, *Perre, supra* note 68, at paras 32, 50, 106–113, 298–299, 335–340, 395.

71. *See, e.g.*, *Burnie Port Auth. v Gen. Jones Pty Ltd.* [1994] 179 CLR 520, 551–552 (H.C.) (Austl.).

72. *See, e.g.*, *Crimmins v. Stevedoring Indus. Fin. Comm.* [1999] HCA 59, (1999) 200 CLR 1, paras 43, 46, 101–102, 233 (Austl.).

73. *See, e.g.*, *Perre, supra* note 68, at paras 114–117, 133, 300, 335.

74. Originally developed in Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.).

75. Nielson v. Kamloops (City), [1984] 2 S.C.R. 2 (S.C.C.) (Can.); Hercules Mgmts. Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (S.C.C.) (Can.); Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co., [1992] 1 S.C.R. 1021 (S.C.C.) (Can.).

76. *See, e.g.*, Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd., [1986] A.C. 785 (H.L.), in respect of relational economic loss; and Murphy v. Brentwood Dist. Council, [1991] 1 A.C. 398 (H.L.), in relation to defective property cases.

77. *See, e.g.*, Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.); Henderson v. Merrett Syndicates Ltd., [1995] 2 A.C. 145 (H.L.); White v. Jones, [1995] 2 A.C. 207 (H.L.).

78. As to which, *see* James Goudkamp, *A Revolution in Duty of Care?*, 131 LAW Q. REV. 519 (2015).

79. Developed in Caparo Indus. Plc. v. Dickman, [1990] 2 A.C. 605 (H.L.).

80. For a recent application of the assumption of responsibility test at the highest level, albeit not in a pure economic loss case, *see* Michael v. Chief Constable of South Wales Police, [2015] UKSC 2, [2015] A.C. 1732.

consequence of negligence on the part of the defendant, if the parties were in a relationship of proximity, and whether it would be fair, just, and reasonable to recognize a duty of care. The assumption of responsibility test enquires as to whether the defendant assumed responsibility for the plaintiff's interests and whether the plaintiff in turn relied upon the defendant.

In the United States, a duty of care may arise in respect of pure economic loss in cases resulting from a negligent misstatement made by a person where that person intends the statement to guide the plaintiff or a group of which the plaintiff is a member and the plaintiff relied upon that statement.[81] A similar rule applies in relation to negligent provision of services.[82] The position is complicated, however, as regards other types of case in which pure economic loss is negligently inflicted because of a diversity of views taken in different states. That said, most states for other types of pure economic loss cases have tended to adopt a robust exclusionary rule, which is often referred to interchangeably as the "economic loss doctrine" or the "economic loss rule."[83] That exclusionary rule was endorsed by §766C of the Restatement (Second) of Torts.[84] The foregoing means that speaking very broadly, the handling of negligently inflicted pure economic loss cases is the same in the United States as in the United Kingdom. A duty of care can sometimes arise where responsibility is assumed in relation to the provision of statements and services, but in other types of case a duty is denied.

2. Rights Theory

Stevens starts his discussion of negligently inflicted pure economic loss from the premise that the common law recognizes no general right to economic well-being.[85] Given his belief that tort law is about the infringement of rights, he goes on to assert that, "[since] the infliction of economic loss does not per se infringe any right of the plaintiff ... [it] is not therefore prima facie recoverable."[86] In making such claims, Stevens encounters significant difficulty in relation to the law in both Australia and Canada, for in both of those jurisdictions such losses may sometimes be recovered. In Australia, as noted above, a plaintiff may be able to obtain damages in respect of negligently inflicted pure economic loss according to the salient features test, whereas in Canada such losses may sometimes be recovered under the *Anns* test. Stevens rightly admits this clash with his theory.[87] In an attempt to overcome the problem, Stevens criticizes the law in Australia

81. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM §5 (Tentative Draft No. 2, 2012).
82. *Id.*, §6.
83. *See* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, n. 3 (2009).
84. *See also* RESTATEMENT (THIRD) OF TORTS, *supra* note 81, §7.
85. Regarding this premise, *see* Kit Barker, *Relational Economic Loss and Indeterminacy: The Search for Rational Limits*, *in* TORTS IN COMMERCIAL LAW 171–172 (Simone Degeling, James Edelman & James Goudkamp eds., 2011).
86. STEVENS, TORTS, *supra* note 9, at 21.
87. Stevens, *Divergence, supra* note 17, at 45–49.

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and Canada. So, although he asserts the superiority of the English approach (according to which damages for relational economic loss are irrecoverable on grounds that chime with his rights theory), he denounces two of the leading Australian cases on the recoverability of damages for negligently caused pure economic loss which conflict with his theory—namely, Caltex Oil (Australia) Pty v. The Dredge "Willemstad"[88] and Perre v. Apand Pty Ltd.[89]—on the basis that they comprise instances of judicial "radicalism." This "radicalism," he believes, inheres in the fact that the courts permit recovery in them without "articulat[ing] any right [that was] violated."[90]

In relation to Canadian law, Stevens's criticism can only be inferred. While he does not directly discuss the relevant Canadian cases, he maintains that "the greatest 20th century judicial disaster in the law of torts was the decision of the House of Lords in *Anns v. Merton London Borough Council*."[91] And, of course, as noted above, it is the *Anns* test that is still used in Canada (thereby providing the means by which claims for negligently inflicted pure economic loss may succeed in that country).

Thus, in relation to both Australia and Canada, Stevens's message is clear: the courts in both of these jurisdictions have erred in their treatment of negligently inflicted pure economic loss. The inference is that he thinks that the law in both countries ought to be changed. Stevens's analysis, however, does nothing to rescue his theory. This is because his argument is a prescriptive one. Such arguments, we believe, do nothing to keep the promise made by Stevens to provide an explanation of the law as it exists.[92] If someone offers an explanatory theory, as Stevens does, then the self-imposed task that they must perform is to account for the law as we find it. In saying this we do not, of course, mean to suggest that scholars should never engage in prescriptive analysis of tort law. Our point is simply that it is self-evidently impossible to show that a given rule fits a purportedly explanatory theory by contending that the rule should be altered in order that it conform to the theory.

Stevens's treatment of assumed responsibility cases is also suspect. In his view, the assumption of responsibility cases in which damages in respect of pure economic loss have been recovered are unproblematic because in such cases a right to economic welfare does exist. On his account, the defendant's objective manifestation of willingness to undertake a responsibility toward the plaintiff is a right-generating act by analogy with the rights created by gratuitous bailment and by virtue of estoppels and express trusts.[93] In all such cases, according to Stevens, the fact that the defendant has voluntarily assumed a responsibility toward the plaintiff confers upon the plaintiff a

88. *Caltex Oil (Austl.) Pty v Dredge Willemstad* [1976] 136 CLR 529 (H.C.) (Austl.).
89. *Perre*, *supra* note 68.
90. Stevens, *Divergence*, *supra* note 17, at 49.
91. *Id.* at 53.
92. *See* the text accompanying *supra* notes 9–12.
93. STEVENS, TORTS, *supra* note 9, at 10–11 and 33.

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right that the plaintiff would not otherwise have. On this basis, he suggests, the assumed responsibility cases in tort law are consistent with his theory: the plaintiff possesses a right the infringement of which enables her to sue the defendant. A major problem with this explanation, however, is that Stevens offers no reason at all as to why the law in relation to bailment, estoppel, or express trusts should be thought to provide a better guide to the way in which tort law should be understood as handling voluntary assumptions of responsibility than, for example, the law of contract, where, of course, gratuitous undertakings are not prima facie binding and hence do not invest the promisee with a right that he would not otherwise possess. Stevens's explanation is simply question-begging.

3. Corrective Justice

The idea that torts are infringements of rights also plays an important role in Weinrib's corrective justice theory, although it does not have quite the same prominence in his account as it does in Stevens's (where rights occupy center stage). Weinrib writes: "A right immediately signifies the existence of a correlative duty; harm or loss does not. Neither the harm as something suffered by the plaintiff nor the process of suffering it at the defendant's hand establishes a link between the parties that is at once correlative and juridically normative."[94] The fact that Weinrib embraces these propositions exposes his theory to essentially the same difficulty as that which afflicts Stevens's when it comes to the law governing negligently inflicted pure economic loss. Frequently, courts across the common law world take into account factors beyond whether the defendant has infringed the plaintiff's rights (if they take that consideration into account at all) in deciding whether to impose a duty of care in respect of pure economic loss. The focus is often on the fact that the plaintiff has suffered pure economic loss and on how to delimit the circumstances in which damages for such loss can be recovered.

A regularly discussed consideration in this connection, and perhaps the most noteworthy for present purposes, is the prospect that recognizing a duty of care will impose indeterminate liability on the defendant.[95] This is widely acknowledged as a reason for excluding a duty of care in respect of pure economic loss. That judges take this consideration into account is highly problematic for Weinrib because judicial anxiety about exposing the defendant to indeterminate liability has nothing to do with the rights of the plaintiff. It is a unilateral consideration that concerns only the defendant. The fact that the specter of indeterminate liability is a reason for excluding

94. Ernest J. Weinrib, Corrective Justice (2012), at 51.

95. *See, e.g.*, *Can. Natl Ry.*, *supra* note 75, at 1137, 1153, 1160, 1173, 1176–1183; *Perre*, *supra* note 68, at paras 32, 50, 106–113, 298–299, 335–340, 395; Customs & Excise Commrs. v. Barclays Bank Plc., [2006] UKHL 28, [2007] 1 A.C. 181, paras 74, 100.

a duty in all of the jurisdictions with which we are concerned cannot be explained by Weinrib's theory. This is properly conceded by Weinrib.[96]

4. Economic Theory

Posner contends that efficiency demands the denial of recovery in cases of negligently inflicted pure economic loss. In his view, such cases involve only private costs and no social costs. (On Posner's definition, "a social cost is a diminution in the total value of society's economic goods; a private cost is a loss to one person that produces an equal gain to another.")[97] Because only social costs matter from his economic perspective—where there is no diminution in aggregate social wealth there is no behavior that needs to be deterred[98]—claims in respect of negligently inflicted pure economic loss should be rejected. While the point about private costs and social costs is Posner's main reason for taking this position, he also marshals several subsidiary arguments. Prime among these are the related contentions that plaintiffs in pure economic loss cases are better able than defendants to quantify their loss *ex ante*[99] and that the risk of indeterminate liability presented by such cases is a serious impediment to the prospect of efficient precaution-taking by defendants.[100] We will assume that Posner is correct in saying that efficiency coincides with the law allowing losses to lie where they fall in pure economic loss cases. Yet if this is what efficiency entails, Posner's theory encounters substantial problems.

In all of the jurisdictions with which we are concerned, tort law permits damages to be recovered in pure economic loss cases involving an assumption of responsibility in certain circumstances. Posner admits the difficulty that this poses for his theory in the course of discussing the decision of the House of Lords in White v. Jones.[101] In this case, a testator instructed his

96. WEINRIB, *supra* note 94, at 56–57. Weinrib does not seek to mitigate the difficulty that the law presents for his theory. He simply describes the law governing the recovery of damages for negligently inflicted pure economic loss as having suffered from a "jurisprudential decline"; *id.* at 57. Even if this claim is correct, it does not insulate his theory from the difficulty presented by the law.

97. Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 737 (2006). Much the same analysis is embraced in William Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 4 (1982).

98. Posner makes this argument by way of a hypothetical example in which access to A's store is negligently obstructed by B, and A's loss of profits is matched by an equal gain enjoyed by rival store owners. There is no social cost, because no goods are lost (they remain unharmed in A's store), and prices do not rise because of a shortage, because "most retail establishments operate most of the time with a bit of excess capacity in order to handle peak demands"; Posner, *Common-Law Economic Torts*, *supra* note 97, at 736–737.

99. "[E]fficiency may be promoted by shifting the legal responsibility for an accident from the injurer to the victim," Posner writes, because the latter knows clearly what he stands to lose and she is therefore "in a better position to avoid the loss by taking appropriate precautions or by buying insurance"; *id.* at 739. By contrast, a defendant would face huge problems associated with the *ex ante* quantification of losses, which would serve to "prevent [her] . . . from determining how much [she] should invest in precautions" and make it "difficult, and indeed probably impossible . . . to buy insurance against liability"; *id.* at 737.

100. *Id.* at 739.

101. White v. Jones, [1995] 2 A.C. 207 (H.L.). It might be doubted whether this case is properly understood as an assumption of responsibility case; *see, e.g.*, Peter Benson, *Should*

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attorney to amend his will to include his two daughters as beneficiaries of his estate. The attorney carelessly failed to follow these instructions, with the result that the daughters inherited nothing. Property that the father intended them to receive instead devolved to other individuals. The daughters successfully sued the attorney for negligence. Because the daughters' loss was a gain to the beneficiaries of the estate, it was a merely private loss. Accordingly, says Posner, in such a case, we can expect the courts to "let the loss lie where it has fallen."[102] But this is not what happened. Like claims have succeeded in all of the other jurisdictions with which we are concerned.[103] And, of course, the difficulty for Posner is not confined to disappointed beneficiary cases but extends to all assumption of responsibility cases.

What is the situation with respect to other negligently inflicted pure economic loss cases? As noted already, in the United Kingdom and the United States a strong exclusionary rule prevents damages from being recovered (unless responsibility has been assumed). This rule is consistent with Posner's analysis. However, the law is very different in Australia and Canada. We observe above that in those jurisdictions pure economic loss claims are sometimes permitted even in the absence of an assumed responsibility. This result is, by Posner's reckoning, inefficient. The clash with his theory is considerable.

C. Punitive Damages

1. The Law

The availability of punitive damages varies considerably throughout the common law world. In some Australian jurisdictions, the circumstances in which they may be awarded have been severely confined by legislation. This legislation either abolishes them entirely[104] or eliminates them in certain contexts, such as in claims in respect of personal injuries caused by negligence.[105] In other parts of Australia, the availability of punitive damages is determined by the common law. At common law, punitive damages are awarded in order "to punish the defendant for conduct showing a conscious

White v. Jones Represent Canadian Law: A Return to First Principles, *in* EMERGING ISSUES IN TORT LAW 141 (Jason W. Neyers et al. eds., 2007), at 167; NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, TORT LAW (4th ed. 2012), at 191. However, scholars frequently treat it in this way; *see, e.g.*, BEEVER, *supra* note 18, at 303; Kit Barker, *Wielding Occam's Razor: Pruning Strategies for Economic Loss*, 26 OXFORD J. LEGAL STUD. 289 (2006), at 290; and this is how three of the majority judges in *White* regarded it, *id.* at 268, 274, 293–294 (Lords Goff, Browne-Wilkinson, and Nolan, respectively). We proceed on the basis of this understanding.

102. POSNER, LAW AND LEGAL, *supra* note 21, at 47.

103. *See, e.g.*, *Hill v Van Erp* [1997] 188 CLR 159 (H.C.) (Austl.); Earl v. Wilhelm, [2000] SKCA 1, (2000) 189 Sask. R. 71 (Can.); Graham v. Bonnycastle, [2004] ABCA 270, (2004) 354 A.R. 266 (Can.); Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958).

104. *See, e.g.*, *Personal Injuries (Liabilities and Damages) Act 2003* (NT) §19 (Austl.).

105. *See, e.g.*, *Civil Liability Act 2002* (NSW) §21 (Austl.); *Civil Liability Act 2003* (Qld) §52 (Austl.).

and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again."[106] The law governing punitive damages in Canada is broadly similar to the Australian common law. The rule in Canada is that punitive damages "may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency."[107]

The test for the award of punitive damages in the United Kingdom is much more stringent than in both Australia and Canada. The House of Lords in Rookes v. Barnard[108] famously confined punitive damages to just three types of case. These are (1) cases involving oppressive, arbitrary, or unconstitutional conduct on the defendant's part; (2) cases in which the defendant acted with the intention of making a profit; and (3) cases in which an award of punitive damages is authorized by statute. In the United States, most jurisdictions permit punitive damages to be awarded, typically where the defendant's conduct "constitutes an extreme departure from lawful conduct."[109] In many states, legislative caps on the quantum of punitive damages have been enacted and provision has been made for a proportion of any punitive damages awarded to be redirected to a government agency. In a few states, punitive damages can be awarded only when legislation authorizes their award.[110] The general picture that emerges from this melee is that punitive damages are available in all of the jurisdictions with which we are concerned but that their availability differs considerably from one part of the world to another.

2. Corrective Justice

The situation in relation to punitive damages poses an insurmountable challenge for Weinrib's theory. Corrective justice, Weinrib tells us, involves placing "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."[111] It follows that punitive damages, which are not reparative in nature, do not effect corrective justice. This is rightly conceded by Weinrib. He writes, "under corrective justice damages are compensatory, not punitive."[112] The challenge that punitive damages present to Weinrib's theory is more acute in some parts of the world than in others. The problem is probably most pronounced in the case of the United States, where punitive damages are generally awarded more freely than anywhere else.

Weinrib attempts to mitigate the problem from which his theory suffers in this regard by suggesting that in at least some situations, punitive

106. *XL Petroleum (NSW) Pty Ltd. v Caltex Oil (Austl.) Pty Ltd.* [1985] 155 CLR 448, 471 (H.C.) (Austl.).
107. Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 196 (S.C.C.) (Can.).
108. Rookes v. Barnard [1964] A.C. 1129 (H.L.).
109. David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 730 (1989).
110. For the details, *see* DOBBS, *supra* note 40, at 1074–1075.
111. WEINRIB, *supra* note 1, at 135 (footnote omitted).
112. *Id.* at 135 n 25.

damages are properly understood as restitutionary damages. He points out that under the second category identified in *Rookes*, punitive damages can be awarded where the defendant has sought to make a gain. In Weinrib's words, "In Cassell & Co. v. Broome, [1972] App. Cas. 1027 (H.L.), Lord Diplock explained this second category in terms of unjust enrichment. This explanation would make this category, at least, consistent with corrective justice's treatment of illegitimate gains."[113] Two things need to be noted here. First, this analysis does nothing to explain away the first and third categories identified in *Rookes* or the fact that punitive damages are available in other jurisdictions in cases that fall outside the second category in that case.[114] Second, and more fundamentally, it is abundantly clear that punitive damages are not restitutionary.[115] Punitive damages may be awarded under the second category in *Rookes* even if the defendant has not in fact made any gain (a mere intention to make a gain can be sufficient to bring a case within that category).[116] The test, as laid down by Lord Devlin in *Rookes*, is whether the defendant "with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk."[117] The crucial issue according to Lord Devlin's formula is the defendant's motivation, not the result.[118]

Furthermore, even where a defendant has made a gain as a result of her tort, the award of punitive damages is calibrated according to the need to punish the defendant rather than the size of the gain made. Calibration of the award by reference to the quantum of the gain is what is required if Weinrib is to succeed in his attempt to accommodate the second category in *Rookes* within his theory. Hence, at least since Broome v. Cassell & Co. Ltd.,[119] it has been clear that punitive damages awarded under the second category in *Rookes* will often need to exceed the defendant's gain so that the purpose of awarding damages in category 2 cases, namely, "to teach a wrongdoer that tort does not pay,"[120] will be achieved. Andrew Burrows notes that this "crucial additional point [shows] that damages under [the] second category are not concerned merely to reverse the defendant's unjust enrichment."[121] For these reasons, Weinrib's restitutionary analysis fails to explain away, even

113. *Id.* Lord Diplock wrote that the second category in *Rookes*, *supra* note 108, is "analogous to the civil law concept of enrichessement indue"; *id.* at 1129.

114. *Rookes*, *supra* note 108, was expressly rejected in Australia in *Austl. Consol. Press Ltd. v Uren* [1969] 1 A.C. 590 (P.C.), affirming (1967) 117 CLR 221 (H.C.) (Austl.); and Canada in Vorvis v. Ins. Corp. of B.C., [1989] 1 S.C.R. 1085 (S.C.C.) (Can.).

115. Even if they were, it is arguable that restitutionary damages are inconsistent with corrective justice. *See generally* Prince Saprai, *Restitution Without Corrective Justice*, 14 RESTITUTION L. REV. 41 (2006). We remain silent on this issue for present purposes.

116. "I do not think that the argument that the defendant could not make a profit here defeats the plaintiff's claim"; Archer v. Brown, [1985] 1 Q.B. 405 (Q.B.) 423 (Pain J.).

117. *Rookes*, *supra* note 108, at 1227.

118. For an illustration of a case in which the defendant had a profit motive but made no profit yet was nonetheless required to pay punitive damages, *see* Drane v. Evangelou, [1978] 1 W.L.R. 455 (Ch. D.).

119. Broome v. Cassell & Co. Ltd., [1972] A.C. 1027 (H.L.).

120. *Id.* at 1130.

121. ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 414 (3d ed. 2004).

in part, the significant problem of fit that punitive damages present for his theory.

Weinrib also seeks to insulate his theory from the existence of punitive damages on the twin grounds that such damages are awarded only exceptionally and that their very existence is contentious.[122] He writes that punitive damages are "encased in controversy"[123] and claims further that the House of Lords in *Rookes* "unequivocally repudiate[ed]" them as "anomalous" and "restricted their scope to the minimum allowed by precedent."[124] Weinrib also notes that punitive damages are unavailable in civil law jurisdictions.[125] The apparent intention of this discussion is to portray punitive damages as a de minimis problem of fit for his theory. We do not dispute the accuracy of any of the observations that Weinrib makes in this connection. However, we doubt whether they deal convincingly with the problem that punitive damages pose for his theory. It is true that awards of punitive damages are relatively rare in the United Kingdom.[126] But this point does little to insulate Weinrib from the present critique, given that his theory extends to all of the jurisdictions with which we are concerned, and outside the United Kingdom the award of punitive damages is much less confined.[127] In the context of a universal theory, it is illegitimate to cherry-pick the law of just one jurisdiction in order to defend one's theory, especially when the law of the jurisdiction concerned differs markedly from that elsewhere.

3. Rights Theory

The fact that punitive damages are generally available throughout the common law world is highly problematic for Stevens's theory. Stevens is alive to the challenge that they present. He acknowledges, "it may be objected that punitive damages are . . . inconsistent with a rights-based model of the law. If the courts are concerned to punish the defendant for his wrongdoing, it can be argued that this goes beyond mere vindication of the plaintiff's rights."[128] Stevens responds to this challenge by contending that punitive damages—like compensatory damages—are substitutive for the right that is infringed.[129] The idea is that "[t]he more outrageous the defendant's

122. In making these claims, Weinrib's analysis sits uncomfortably with his argument, just discussed, that punitive damages in the second category in *Rookes*, *supra* note 108, are actually restitutionary damages.

123. Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT. L. REV. 55 (2003), at 84.

124. *Id.*

125. *Id.*

126. "Punitive damages [are] a remedy of last resort"; Kuddus v. Chief Constable of Leicestershire Constabulary, [2001] UKHL 29, [2002] 2 A.C. 122, para 63.

127. "[I]n other common law jurisdictions, in particular Australia, New Zealand, Canada and the United States, punitive damages have continued to flourish"; LAW COMMISSION, AGGRAVATED, PUNITIVE AND RESTITUTIONARY DAMAGES, Report No. 247 (1997), 104 n. 567. This remark would now need to be qualified in relation to Australia in light of the later statutory changes in that jurisdiction: *see* Section II.C.1 *supra*.

128. STEVENS, TORTS, *supra* note 9, at 85.

129. *Id.*

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conduct, the greater the infringement of the right and the greater the substitutive award."[130] Stevens then draws his readers' attention to aspects of the law on punitive damages that are consistent with this way of understanding them. Good illustrations (Stevens's, not ours)[131] include the fact that punitive damages are paid to the victim (in most jurisdictions) rather than to, for example, the state[132] and the fact that the procedural and evidential protections conferred upon defendants that are found in criminal law proceedings are not generally given to tort defendants who are sued for punitive damages. These rules make sense if the focus of tort law is on the violation of the plaintiff's right.

However, as Stevens concedes,[133] there are other rules governing the award of punitive damages that stand in the way of this interpretation of them. When these other rules are considered cumulatively, they show that punitive damages are not a species of substitutive damages. We note some of these rules here, not all of which are acknowledged by Stevens.

(1) It is well established that the defendant's wealth is a material factor to consider in determining the quantum of punitive damages.[134] This fact contradicts Stevens's explanation of punitive damages. It shows that punitive damages are not driven by a concern to vindicate the plaintiff's right. The economic wealth of the defendant has nothing to do with the plaintiff's rights.

(2) The courts in awarding punitive damages take account of the need to deter the defendant and others from engaging in the conduct in question.[135] This principle cannot be explained by a rights-based account of tort law. This is because it is aimed at incentivizing the defendant and third parties to act in particular ways rather than ensuring that punitive damages vindicate a right enjoyed by the plaintiff.

(3) The fact that in the United Kingdom, punitive damages are available only if the case falls within one of the three categories identified in *Rookes*[136] is a problem for Stevens's account of punitive damages. If, as he claims, they are awarded to vindicate the plaintiff's right that was infringed by the defendant, why are they available only in the three situations recognized in *Rookes*? Those are plainly not the only situations in which, if tort law is about the vindication of rights, a plaintiff's right might be egregiously infringed.

(4) In all jurisdictions, the courts must exercise restraint both in deciding to award punitive damages (they are "a remedy of last resort")[137] and, if the decision is made to award them, in determining their quantum.[138] The existence of this constraint is inexplicable from a rights-based approach. If egregious violations

130. *Id.*
131. *Id.* at 86–87.
132. *Cf.* the position in some jurisdictions in the United States: *see* DOBBS, *supra* note 40, at 1075.
133. STEVENS, TORTS, *supra* note 9, at 87.
134. *See, e.g.*, John v. MGN Ltd., [1997] Q.B. 586, 625 (C.A.); RESTATEMENT (SECOND) OF TORTS §908, cmt. e (1965).
135. *See, e.g.*, *Broome*, *supra* note 119, at 1073.
136. *Rookes*, *supra* note 108.
137. *Kuddus*, *supra* note 126.
138. *Rookes*, *supra* note 108; *Gray v Motor Accident Commission* [1998] 196 C.L.R. 1, para 20 (H.C.) (Austl.).

of rights require a larger award of damages than would be provided by compensatory damages in order to vindicate the right, punitive damages should be available as of right whenever there is such a violation.

(5) Stevens's explanation cannot account for the fact that where the defendant has been punished by the criminal law (or by other means) in respect of the conduct about which the plaintiff complains, an award of punitive damages might be reduced or precluded for that reason.[139] If the concern is with the vindication of the plaintiff's rights, the fact that the defendant has already been punished ought to be irrelevant.

(6) Stevens cannot explain the rules that apply where there are multiple plaintiffs who are deserving of an award of punitive damages. The law here is that the court should divide the punitive damages award equally between the plaintiffs.[140] This is inconsistent with Stevens's rights-based explanation of punitive damages. It means that only by chance will the quantum of the punitive award reflect the gravity of the violation of any given plaintiff's right.

As noted, Stevens concedes that the evidence in favor of his explanation of punitive damages is not "all one way."[141] There are some aspects of the law on punitive damages that he can explain. However, there is a great deal more for which he cannot account. The clash between what the law is and his theory is significant. The simple truth is that unless the foregoing features of the law of punitive damages (several of which are not mentioned by Stevens) are disregarded, punitive damages cannot be brought within the scope of his rights theory. Allan Beever summed up the insurmountable obstacles that rights theorists face as a result of punitive damages when he said: "in awarding punitive damages, a court cannot be taken to be concerned with the rights of the plaintiff. The court is expressing condemnation of the defendant, but condemnation of the defendant does not imply vindication of the plaintiff."[142] We agree.

4. Economic Theory

Posner explains punitive damages as promoting optimal deterrence. He writes, "Tort ... price[s] conduct that [it] wishes to discourage or at least regulate. The optimal price will sometimes exceed the harm to the victim."[143] Posner gives various illustrations of situations where he believes an award of punitive damages is required. He suggests, for instance, that punitive damages should be awarded where they are necessary to strip a defendant of a profit that she made as a result of the tort (that is, where the compensatory award is insufficient to eliminate the profit). He also argues that punitive damages are needed where the tort is "concealed" (Posner gives the example of a hit-and-run accident) and the probability of detection is

139. Walker v. CFTO Ltd., [1987] 39 C.C.L.T. 121 (O.N.C.A.) (Can.); AB v. Sw. Water Servs., [1993] Q.B. 507 (C.A.); *Motor Accident Commission*, *supra* note 138.

140. Riches v. News Grp. Newspapers Ltd., [1986] 1 Q.B. 256 (C.A.).

141. STEVENS, TORTS, *supra* note 9, at 87.

142. Allan Beever, *The Structure of Aggravated and Punitive Damages*, 23 OXFORD J. LEGAL STUD. 87 (2003), at 99.

143. POSNER, LAW AND LEGAL, *supra* note 21, at 54.

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consequently low. Where the probability of detection is low, he contends that punitive damages (or some other form of punishment, such as a criminal law sanction) ensure that the law sufficiently deters.

There are overwhelming difficulties with Posner's account. In the first place, he cannot explain why only the victim of a tort is entitled to sue for punitive damages. If the goal of awarding punitive damages is to ensure that people are optimally deterred, it is nonsensical to limit to victims the right to sue for punitive damages. The probability of a punitive award being made where one is required on efficiency grounds would be greatly increased if this constraint did not exist. In short, it is inefficient to permit only the plaintiff to bring proceedings for punitive damages. Beever notes that a possible reply to this point is that such a rule might provoke excessive litigation, and that a rule that permitted all and sundry to sue for such damages would therefore yield a net loss to society.[144] However, the risk of excessive litigation is minimal given (1) the principle that the courts should proceed cautiously in awarding punitive damages;[145] and (2) the many well-known legal devices that are in place to control excessive litigation.[146] A second obstacle for Posner's account is the fact that with the exception of some jurisdictions in the United States, it is permissible to insure against liability to pay punitive damages.[147] This rule regarding insurance is inefficient because the person who needs to be deterred will not be made to pay. It is therefore inconsistent with Posner's theory. Third, Posner cannot explain the fact that in the United Kingdom, punitive damages are, pursuant to *Rookes*, restricted to three categories of case. On his explanation, they should be available wherever they are needed to ensure that awards sufficiently deter.

D. The Defense of Illegality

1. The Law

There is considerable divergence in the law regarding the defense of illegality in the common law world. In Australia, both common law and statutory illegality defenses exist. The common law defense will apply if permitting recovery would be inconsistent with the legislative intention expressed in

144. Beever, *Structure*, *supra* note 140, at 103.

145. *See* the text accompanying *supra* notes 137–138.

146. We have in mind here the abuse of process tort, rules such as the loser-pays principle concerning legal costs (which obtains in most of the common law world), Part 36 offers under the Civil Procedure Rules, 1998 (UK) and equivalents in other jurisdictions, and restrictions on the ability of vexatious litigants to commence proceedings.

147. Lancashire Cnty. Council v. Mun. Mut. Ins. Ltd., [1997] Q.B. 897 (C.A.) (holding that it is permissible to insure against liability to pay punitive damages at least where punitive damages are awarded on the basis of vicarious liability); *Motor Accident Commission*, *supra* note 138. In some parts of the United States, it is permissible to insure against liability to pay punitive damages while in others it is not: *see* DOBBS, *supra* note 40, at 1063 for the details.

the criminal law statute that the plaintiff contravened.[148] The statutory defenses[149] are, overall, far more potent. The precise shape that they take varies considerably from jurisdiction to jurisdiction, but they generally apply where the plaintiff was injured while committing a serious offence and the commission of the offence was causally connected to the damage that the plaintiff suffered.[150] In Canada, the defense of illegality was severely confined by the landmark decision in Hall v. Hebert.[151] Pursuant to that decision, the defense will apply only where it is necessary to deny recovery in order to preserve the coherence of the legal system. The principal situation where the defense applies is where the plaintiff seeks damages in respect of a criminal law penalty imposed on him.

The law governing the defense in the United Kingdom is in a state of flux.[152] However, speaking very generally, the defense applies in the same circumstances as it does in Canada[153] and also where allowing recovery would be contrary to public policy.[154] In the United States, illegality is not formally a defense,[155] although the fact that the plaintiff was injured while acting illegally will frequently be relevant to other rules, most notably the

148. *Miller v Miller* [2011] HCA 9 (2011) 242 CLR 446 (Austl.).

149. *Civil Liability Act 2002* (N.S.W.) §§54–54A (Austl.); *Motor Accidents Compensation Act 1999* (S. Austl.) §47A (Austl.); *Criminal Code Act 1899* (Queensl.) §6 (Austl.); *Civil Liability Act 2003* (Queensl.) §45 (Austl.); *Civil Liability Act 1936* (S. Austl.) §43 (Austl.); *Civil Law (Wrongs) Act 2002* (Austl. Cap. Terr.) §94 (Austl.); *Personal Injuries (Liabilities and Damages) Act* (N. Terr.) §10 (2003) (Austl.); *Transport Accident Act 1986* (Vict.) §40 (Austl.); *Offenders (Legal Action) Act 2000* (W. Austl.) §5 (Austl.).

150. The details are given in James Goudkamp, *A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort*, 29 SYDNEY L. REV. 445 (2007).

151. Hall v. Hebert, [1993] 2 S.C.R .159 (S.C.C.) (Can.). *See also* HL v. Canada (AG), [2005] S.C.C. 25, [2005] 1 S.C.R. 401 (Can.); British Columbia v. Zastowny, [2008] S.C.C. 4, [2008] 1 S.C.R. 27 (Can.).

152. This is primarily due to the fact that a flurry of recent decisions at the ultimate appellate level regarding the defense do not really engage with each other: *see* Gray v. Thames Trains Ltd., [2009] UKHL 33, [2009] 1 A.C. 1339; Hounga v. Allen, [2014] UKSC 47, [2014] I.C.R. 846; Stone & Rolls Ltd. v. Moore Stephens, [2009] UKHL 39, [2009] A.C. 1391; Les Laboratoires Servier v. Apotex Inc., [2014] UKSC 55, [2015] A.C. 430; Bilta (UK) Ltd. (in liq.) v. Nazir, [2015] UKSC 23, [2016] A.C. 1. For an assessment of some of these authorities, *see* James Fisher, *The* ex turpi causa *Principle in* Hounga *and* Servier, 78 MOD. L. REV. 854 (2015); James Goudkamp, *The Doctrine of Illegality: a Private Law Hydra*, 6 UK SUPREME COURT YEARBOOK 254 (2015). As this article was going to press, the Supreme Court of the United Kingdom delivered judgment in Patel v. Mirza, [2016] UKSC 42. This decision came too late for it to be addressed in any detail.

153. The law in Canada was described in *Gray, supra* note 152, as adopting the "narrow rule." It was accepted in *Gray* that the narrow rule applies also in the United Kingdom. *See further* regarding *Gray* in James Goudkamp, *A Long, Hard Look at Gray v. Thames Trains Ltd.*, *in* THE JURISPRUDENCE OF LORD HOFFMANN: A FESTSCHRIFT FOR LEONARD H. HOFFMANN 31–58 (Paul S. Davies & J. Pila eds., 2015).

154. *Patel*, *supra* note 152, at para. 120 There is also a statutory illegality defense in the UK Criminal Justice Act, 2003, c. 44, §329. This defense is of fairly limited scope, and we leave it to one side in this article.

155. *See* Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53 (1995); J.H. King, *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011 (2002). The leading hornbooks on tort law in the United States contain no section on illegality as a defense.

doctrine of contributory negligence (or "comparative responsibility," as it is generally known in the United States in those jurisdictions that have abolished the all-or-nothing rule).

2. Corrective Justice

In a footnote in *The Idea of Private Law*, Weinrib concedes that the illegality defense clashes with his corrective justice theory. Recall that corrective justice is bilateral in nature, in the sense that it is concerned equally with both parties.[156] Rules, if they are to be explicable in terms of corrective justice, must therefore be bilateral too. It follows that the illegality defense is problematic for Weinrib because it focuses solely on the plaintiff rather than on the parties' relationship. As Weinrib puts it, "It is sometimes said . . . that a plaintiff who was negligently injured while committing an illegal act cannot recover. This defense is inconsistent with corrective justice, because illegality as such is not relevant to the direct interaction of doer and sufferer."[157]

The difficulty created by the illegality defense is most acute for Weinrib in the case of Australia and the United Kingdom, where the defense is relatively expansive. Weinrib might argue that the defense in Canada, which recognizes a much narrower version of the defense, is actually consistent with corrective justice. As noted above, in Canada the defense applies only when it is necessary to deny relief in order to preserve the coherence of the legal system. It might be thought that Weinrib can gain some mileage from this given the stress that he places on the law's coherence.[158] Weinrib suggests as much in the *Idea of Private Law*.[159] However, it is doubtful that the law in Canada coheres with Weinrib's theory. The fact remains that the defense, even in Canada, is triggered by a unilateral consideration, namely, the plaintiff's offence. Furthermore, the need to maintain coherence in the law generally is also something that falls outside the immediate interaction between the parties.

Overall, Weinrib is correct to see the illegality defense as posing a significant difficulty for his theory of tort law. He does not offer a sustained argument in an attempt to explain away the difficulty, and it is doubtful whether the difficulty that the defense presents can be explained away. The clash between Weinrib's theory and tort law on account of the illegality defense is unresolved.

3. Rights Theory

Stevens does not discuss the illegality defense in his *Torts and Rights* beyond saying that he does not need to address it because it is not a rule that is specific to tort law.[160] It is true that the defense is available throughout the

156. Weinrib, *supra* note 1, at 120–121.
157. *Id.* at 169 n 53.
158. *See, especially, id.* at 11–16.
159. *Id.* at 169 n 53.
160. Stevens, Torts, *supra* note 9, at 304–305.

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law generally.[161] However, we do not believe that it can justifiably be ignored by anyone who is offering a universal theory of the whole of tort law. This is primarily because in many jurisdictions the rules that govern the defense of illegality take on a distinct hue in the tort setting. The rules that control the defense in this sphere are often very different from those that apply in, for example, the unjust-enrichment setting.[162] We are also of the view that the defense cannot justifiably be disregarded given its obvious and considerable significance in modern tort law. Ultimate appellate courts in several of the jurisdictions with which we are concerned have considered it repeatedly in recent years,[163] and it has caught the interest of several legislatures.[164]

Stevens, in our view, needs to account for the illegality defense, given his mission to explain all of tort law. We also believe that he would be unable to do so. We have been influenced in this regard by a paper that Stevens wrote regarding the doctrine of contributory negligence. Stevens's position in that paper, which is also written from a rights-based perspective, is that contributory negligence should not be an answer to liability in tort.[165] The basic reason given in support of that contention is that the plaintiff's conduct, so long as it is not an intervening cause, is irrelevant to whether the plaintiff's rights have been infringed, and because tort law is fundamentally concerned with whether the plaintiff's rights have been infringed, contributory negligence should be irrelevant. In Stevens's words, "The reason why contributory fault should not be a defense is that the risks I run in relation to my own interests are nobody's concern but mine."[166] Stevens correctly surmises that if what matters is the fact that the plaintiff's rights have been violated (or, put differently, that the defendant has breached the duty that he owed the plaintiff), one would expect the plaintiff's conduct to be immaterial, provided that it is not such that no right of his has been infringed. This reasoning, we think, applies mutatis mutandis to the defense of illegality. If the focus is on the plaintiff's rights, it should not matter whether the plaintiff was acting legally or illegally. But that is not the law. Stevens's theory is, therefore, prima facie unable to account for the defense of illegality. This is a major difficulty for it.

A possible escape route available to Stevens is to argue that when the illegality defense applies, the plaintiff forfeits his right. According to this line of reasoning, when the illegality defense is engaged, there is no right that needs vindicating, and it is therefore appropriate that recovery is denied. This is a rights-based account of the illegality defense. This explanation of

161. "[The defense] applies across the board": Vellino v. Chief Constable of Greater Manchester, [2001] EWCA (Civ) 1249, [2002] 1 W.L.R. 218, para 44.

162. *Compare, e.g.*, the principles developed in the unjust-enrichment context in *Patel*, *supra* note 152, with those expounded in the negligence case of *Gray*, *supra* note 152.

163. *See, e.g.*, the cases mentioned *supra* note 152 in relation to the United Kingdom.

164. *See supra* notes 149, 152.

165. Robert Stevens, *Should Contributory Fault Be Analogue or Digital?*, *in* DEFENCES IN TORT 243–260 (Andrew Dyson, James Goudkamp & Fred Wilmot-Smith eds., 2015).

166. *Id.* at 253.

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the defense looks most plausible where the defense operates, as it does in some jurisdictions in certain contexts, not as a true defense but as a denial: a rule that prevents one or more of the elements of the cause of action in which the plaintiff sues from being satisfied.[167] Where the doctrine of illegality functions in this way, it may well be that the plaintiff, when the "defense" is triggered, has no right. However, it is clear that in all of the major common law jurisdictions the doctrine of illegality functions in at least some contexts as a true defense and does not merely strike at the elements of the plaintiff's action.[168] This is so most explicitly in Canada, where it has been stated at the highest level that illegality works exclusively as a defense and not, for example, as a principle that denies the existence of a duty of care.[169] When the doctrine of illegality functions as a true defense, this forfeiture argument runs into formidable difficulty. This is because it depends upon the shaky proposition that a defendant ceases to be under a legal duty when a defense is enlivened. The accuracy of this proposition is dubious, and this is particularly so in relation to defenses such as illegality.

When one commits a wrong, the the reasons that rendered the act concerned wrongful continue to exist even when they are outweighed by countervailing reasons. They do not vanish. The point can be nicely illustrated by way of the defense of defensive force.[170] Suppose that defensive force is used to kill a terrorist who was about to detonate a bomb, the blast from which would have killed many people. Killing the terrorist was obviously justifiable, at least if he could not have been prevented from exploding the bomb by less drastic means. However, equally plainly, the fact that the killing of the terrorist was justifiable does not mean that are no reasons not to kill the terrorist. We have reasons not to kill people even if they are terrorists who are about to murder many innocent people. What we are dealing with here is a situation in which the reasons not to kill the terrorist were outweighed by reasons in favor of killing him. Because the reasons not to kill the terrorist remain intact, so, too, it is plausible to think, does the legal duty not to commit batteries, even though a defensive-force defense applies.

This reasoning applies a fortiori where a nonjustificatory defense is in play. Reasons created by torts to refrain from committing particular acts clearly remain intact (and hence the defendant still owes a duty) when a nonjustificatory defense, such an immunity or illegality, applies. For in-

167. *See, e.g.*, Joyce v. O'Brien, [2013] EWCA (Civ) 546, [2014] 1 W.L.R. 70, where the plaintiff's illegality prevented the causation element of the action in negligence from being satisfied.

168. The details are given in JAMES GOUDKAMP, TORT LAW DEFENCES (2016), at 126–127.

169. *Hall*, *supra* note 151.

170. The illustration is taken from Kenneth Campbell's important paper on conflicts of practical reasons: Kenneth Campbell, *Offence and Defence*, *in* CRIMINAL LAW AND JUSTICE: ESSAYS FROM THE W.G. HART WORKSHOP, 1986 83 (Ian H. Dennis ed., 1987). *See also* JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW (2007), at 91–120, on whose analysis the discussion here also draws.

stance, a person who is entitled to diplomatic immunity obviously has reasons on this analysis not to commit a battery despite his immunity. He is still under a duty not to strike people. The same is true where the defense of illegality is enlivened. This means, of course, that offenders continue to have rights despite their offending. Accordingly, this forfeiture argument is of no assistance to Stevens.

4. Economic Theory

The defense of illegality is an obvious and significant problem for Posner's account. Tort law, Posner claims, imposes liability where the defendant is the cheapest loss avoider, this being the most efficient rule. However, in Australia and the United Kingdom the defense may prevent liability from arising where liability should be imposed according to this criterion. Suppose that D acts unreasonably (according to the Learned Hand formula) and causes injury to P as a result. The efficient rule is for D to be held liable. However, in Australia and the United Kingdom, if the plaintiff was injured while acting illegally, he will be unable to recover if (in the case of Australia) his illegality was causally connected to the damage about which he complains or (in the case of the United Kingdom) recovery would be contrary to public policy (and the relevant policy factors go well beyond the variables in the Learned Hand formula). There seems to be a significant clash between the law in these jurisdictions and Posner's theory.

A reply available to Posner is that the illegality defense deters criminal behavior by the plaintiff and that even though it means that the defendant is not deterred by tort law where it applies, there is a net gain in societal wealth. However, this response is implausible for several reasons.[171] First, plaintiffs are unlikely even to know about the illegality defense and therefore cannot be deterred by it. As Lord Justice Millett observed in Tribe v. Tribe, the type of people who commit offences that are likely to trigger the defense are "unlikely to be ... studious reader[s] of the law reports."[172] Second, even if a given plaintiff does know about the defense, it is doubtful that she would be deterred by it. If the risk of being both punished by the criminal law and suffering serious personal injury in the course of an illegal enterprise is insufficient to deter the plaintiff, it is hardly likely that the risk that the plaintiff *might* be denied a remedy in tort that she *may* have otherwise enjoyed will make a difference to her decision-making process. Third, even if, contrary to what we have just suggested, the illegality defense may influence behavior, it may be just as likely to encourage offending as it is to deter it.[173] Suppose that P and D steal a car and that P is injured as a result of D's negligent driving. P is unlikely to be able to recover damages

171. *Cf.* the view of the Law Commission, which argued that the illegality defense can deter offending: LAW COMMISSION, THE ILLEGALITY DEFENCE: A CONSULTATIVE REPORT, Consultation Paper 189 (2009) at 2.19–2.23.

172. Tribe v. Tribe, [1996] Ch 107, 113–114 (C.A.).

173. This point has often been made: *see, e.g.*, *Tinsley*, *supra* note 154, at 368.

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from D in either Australia or the United Kingdom.[174] This makes such joint illegal enterprises cheaper for D than would otherwise be the case.

Can Posner explain the illegality defense in Canada? Recall that the main situation where the defense applies in Canada is where the plaintiff sues in respect of the loss that he suffers as a result of having a criminal law penalty imposed on him. It is efficient for the defense to apply in this context. Assuming that the criminal law produces the optimal gain to society in terms of wealth by imposing a sanction, it must be inefficient for tort law to reverse what the criminal law has done. And even if the criminal law has produced a suboptimal result, it is probably inefficient to have a second set of proceedings to correct the criminal law's errors (the efficient thing to do in this situation would be for the criminal law to correct its own mistakes via the appellate apparatus or for the criminal law to be changed by the legislature so that it produces an efficient outcome). Nothing need be said here about the situation in the United States, where no formal defense of illegality exists.

E. The Rule in Rylands and Its Descendants

1. The Law

The rule established by the nineteenth-century case of Rylands v. Fletcher[175] has evolved in different ways in different parts of the common law world. In the United States, it came to be understood as establishing a principle of strict liability that applies only to ultrahazardous activities.[176] In the United Kingdom, the rule is not confined to ultrahazardous activities,[177] although it does impose strict liability. In Canada, the relevant law—at least in the common law provinces—is substantially the same as that in the United Kingdom.[178] In Burnie Port Authority v. General Jones Pty Ltd.,[179] the High Court of Australia declared that, "[t]he rule in *Rylands v. Fletcher*, with all its difficulties, uncertainties, qualifications, and exceptions, should now be seen ... as absorbed by the rules of ordinary negligence."[180] The rule does not, therefore, exist as a discrete cause of action in Australia, and situations in which it would have applied are now simply determined by the tort of negligence.

174. *Miller*, *supra* note 148; *Joyce*, *supra* note 167.
175. *Rylands*, *supra* note 20.
176. In successive Restatements of Tort Law, the rule spawned by *Rylands*, *supra* note 20, is referred to as one concerning "ultrahazardous" and "abnormally dangerous" activities: Restatement of Torts §§519–524 (1965); Restatement (Second) of Torts, *supra* note 134, §520; Restatement (Third) of Torts, *supra* note 39, §20.
177. *See* Read v. J. Lyons & Co. Ltd., [1947] A.C. 156, 181–182 (H.L.) (Lord Simons).
178. *See, e.g.*, Tock v. St. John's Metro. Area Bd., [1989] 2 S.C.R. 1181, 1189–1190 (S.C.C.) (Can.); Aldridge v. Van Patter, O.R. 595 (H.C.) (Can.); Smith v. Inco Ltd., [2011] O.N.C.A. 628, (2011) 107 O.R. (3d) 321 (Can.).
179. *Burnie Port*, *supra* note 71.
180. *Id.* at 556 (Mason CJ, Deane J., Dawson J., Toohey J. & Gaudron J.).

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2. Corrective Justice

The rule in *Rylands*, which today exists in one guise or another in each of Canada, the United Kingdom, and the United States, clashes with Weinrib's theory by virtue of the fact that it imposes strict liability. According to Weinrib, strict liability is incompatible with his theory because strict liability affords preferential treatment to plaintiffs whereas corrective justice treats the parties as equals.[181] Unsurprisingly, the clash between the rule in *Rylands v. Fletcher* and Weinrib's corrective justice theory has not escaped his attention. In an attempt to ameliorate the problem, he seeks to show that the clash is merely apparent rather than real. He contends that the rule in *Rylands* is "an extension, not a denial, of the fault principle."[182]

He offers three arguments in this connection. The first is that the rule in *Rylands* merely "limit[s] rather than eliminate[s] the relevance of culpability."[183] This is because, he says, some of the defenses that are available in relation to the tort "show . . . that culpability is still operative."[184] In particular, Weinrib adverts to the defenses of act of God, vis major, and act of third party. His second argument is that the rule continues the idea accepted by the law of negligence that the riskier the activity, the greater the amount of care that is needed. Weinrib's claim here is essentially that at some point the activity becomes so risky that a "lack of care can be imputed from the very materialization of the risk."[185] The rule in *Rylands* is said to constitute the law's determination of the location of that point. The third argument is that the rule merely relieves "the plaintiff of the need to locate the specific faulty act" and that it cannot be implied from the fact that the activity in question was not an unlawful activity or that "all of the defendant's acts within the activity were faultless."[186]

We see difficulties in all of these arguments, which we mention below. However, before doing this, we want to lock horns directly with Weinrib's overarching contention that the rule in *Rylands* is an extension of the fault principle and does not, properly understood, impose strict liability. The simple fact is that the authorities preclude this interpretation. The courts have repeatedly stressed that the liability regime instantiated by the rule is strict. For example, in Cambridge Water Co. Ltd. v. Eastern Counties Leather Plc., Lord Goff (who delivered a speech with which the other Law Lords all agreed) said that "the principle is one of strict liability."[187] Similarly, the California Court of Appeals in Pierce v. Pacific Gas & Electric Co. said that "[t]he doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is

181. WEINRIB, *supra* note 1, at 177–179.
182. *Id.* at 188.
183. *Id.* (footnote omitted).
184. *Id.*
185. *Id.*
186. *Id.* at 189.
187. Cambridge Water Co. Ltd. v. E. Counties Leather Plc., [1994] 2 A.C. 264, 302 (H.L.)

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injured as a proximate result of that activity, *regardless of the amount of care he uses*."[188]

Weinrib's overarching assertion is untenable given the authorities, but it is nonetheless worth understanding precisely why the arguments that he offers in support of it are unconvincing. His first argument is that culpability is made relevant by certain defenses to liability arising under the rule in *Rylands*. The main problem with this argument is that even if it is accepted, it would not follow that the rule in *Rylands* is consistent with Weinrib's corrective justice theory of tort law. In order to demonstrate that the rule in *Rylands* complies with his theory, it is necessary to show, relevantly, not only that it imposes liability based on fault but also that the fault requirement is such that the parties are treated as equals. Merely because a given liability rule is based on fault does not mean that it complies with his version of corrective justice, which is a point that Weinrib himself makes elsewhere in *The Idea of Private Law*.[189] Critically for present purposes, the fault-based defenses to liability arising under the rule in *Rylands* mentioned by Weinrib do not result in the liability regime created by the rule treating the parties as equals. This is because the defenses are relevant only in limited situations. They do not apply in every situation (or even in most situations) in which the elements of the cause of action in *Rylands* are present and the defendant is faultless.

A good illustration of the point is Jones v. Festiniog Railway Co.[190] In this case, the defendants were held liable under the rule in *Rylands* in respect of sparks that escaped from a locomotive and caused damage to the plaintiff's land. Crucially, the defendants were held liable even though it was shown that they had taken all reasonable care and were hence faultless.[191] No defense applied. Another example is Humphries v. Cousins.[192] In this case, sewage escaped from the defendant's land through no fault of the defendant and damaged the plaintiff's land. No defense was engaged, and the faultless defendant was held liable under the rule in *Rylands*. Many further illustrations could be given but are unnecessary, for the short point to be taken from these cases is that contrary to Weinrib's analysis, the mere existence of fault-based defenses does not mean that the rule in *Rylands* treats the parties as equals. Rather, notwithstanding the existence of these defenses, the rule generally affords plaintiffs preferential treatment, contrary to Weinrib's corrective justice theory of tort law.

188. Pierce v. Pac. Gas & Elec. Co., 166 Cal. App. 3d, 68, 85 (Ct. App., 1985) (emphasis added). That liability is strict in respect of the harm caused by abnormally dangerous activities across much of the United States is confirmed in the RESTATEMENT (THIRD) OF TORTS, *supra* note 81, §20.

189. WEINRIB, *supra* note 1, at 177–178 (discussing the incompatibility of subjective forms of fault with corrective justice).

190. Jones v. Festiniog Ry. Co., (1867–1868) L.R. 3 Q.B. 733 (Q.B.D.).

191. *Id.* at 736.

192. Humphries v. Cousins, (1877) 2 C.P.D. 239 (1877) (Common Pleas).

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Weinrib's second argument in support of the proposition that the rule in *Rylands* is fault-based—that fault can be imputed to the defendant who is held liable under the rule given the dangerousness of the activity that led to the escape—is also unconvincing. Weinrib simply does not tell us why he thinks it is right to impute fault to a defendant who commits the tort in *Rylands*. However, *even if* he is correct in making this claim, this would not mean that the rule in *Rylands* is consistent with his version of corrective justice. Constructive fault is not the same thing as actual fault, and only a rule that is sensitive to actual fault treats the parties as equals. To say that a defendant who is not at fault should be deemed to be at fault does nothing to redress the favorable treatment that the rule in *Rylands* affords plaintiffs. It does nothing to explain why someone who is *actually* faultless may incur liability.

Weinrib's third argument for characterizing the rule in *Rylands* as imposing fault liability—that the rule merely relieves the plaintiff of the need to isolate a specific faulty act in a wider activity—holds no water either. Simply because the plaintiff in proceedings under the rule in *Rylands* does not have to prove that the defendant was at fault in committing a specific act does not mean that the defendant is at fault. There may be nothing faulty in the conduct of a defendant who commits the tort in *Rylands*.[193] There is nothing wrong per se in, for example, constructing a reservoir. The fact remains, therefore, that liability under the rule in *Rylands* may be attached to faultless conduct.

For the foregoing reasons, Weinrib's attempt to portray the rule in *Rylands* as being based on fault is unsuccessful. The rule in its various manifestations in Canada, the United Kingdom, and the United States is one of strict liability and, as such, is fundamentally incompatible with Weinrib's corrective justice theory.

3. Rights Theory

There is significant theoretical support for the notion that the rule in *Rylands* does not involve any wrong and hence no violation of a right. The logic underpinning this view is that a person may be held liable for this tort despite the fact that, to invoke the example already given, in accumulating water in a reservoir the defendant complied with all relevant standards of behavior. As Peter Jaffey puts it, "[a] claim under the rule in *Rylands v. Fletcher* . . . arises from a primary liability relation that allocates to D the risk of loss to [P] without imposing on him a duty to prevent it."[194] If this interpretation of the rule is correct, the rule presents a significant problem for Stevens's theory. This is because it contradicts Stevens's mantra that torts involve the breach of a duty/infringement of a right.

193. *See* the cases mentioned in the text accompanying *supra* notes 187–188.

194. Peter Jaffey, *Liabilities in Private Law*, 14 LEGAL THEORY 233 (2008), at 240. Other theorists who support this interpretation of the rule include Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 33, at 951; and MCBRIDE & BAGSHAW, *supra* note 101, at 468.

Stevens tries in two ways to deal with the difficulty that the rule in *Rylands* causes for his theory. He suggests, first, that it is an anomaly; and, second, that it should be regarded as a subset of the law of private nuisance.[195] Leaving to one side the fact that these claims are probably irreconcilable,[196] neither one rescues his theory from the problem of fit that the rule presents. It is not altogether clear what Stevens means when he describes the rule in *Rylands* as an "anomaly." If he means by this that the rule ought never to have been created, he is making a prescriptive claim. For the reasons given above,[197] such claims cannot rescue explanatory theories. They involve arguing that the data should be changed so that they fit the theory, whereas theories that seek to explain the law (which is how Stevens describes his theory) must take the law as it exists.

If, by contrast, what Stevens means by describing the rule in *Rylands* as an anomaly is that it is an outlier within tort law[198]—and an outlier because it affords the plaintiff a cause of action without the defendant having breached any *ex ante* private right held by the plaintiff against the defendant—then, again, he is on shaky ground. This is so because there is nothing particularly unusual (still less unique) in tort law affording a cause of action in the absence of an *ex ante* private right on the part of the plaintiff. Many other torts (or rules of tort law) do likewise, such as the tort of causing loss by unlawful means, the dependency action afforded by the Fatal Accidents Act 1976 (UK),[199] the action for inducing breach of

195. STEVENS, TORTS, *supra* note 9, at 299. The implicit assumption made by Stevens in presenting this claim is that the tort of private nuisance is consistent with his rights theory. Stevens does not offer a sustained account of why he thinks that private nuisance is so explicable; he merely refers to the fact that it centers on proprietary right; *id.* at 63.

196. If the rule in *Rylands*, *supra* note 20, is simply a subset of the law of private nuisance, *and* the law of private nuisance is consistent with Stevens's theory, then there would be no reason for him to see the rule in *Rylands* as anomalous.

197. *See* Section II.B.2 *supra*.

198. This seems to be how Goldberg and Zipursky understand the rule. They describe the rule as a "sui generis" cause of action: Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 33, at 952.

199. In *Torts and Rights*, Stevens rightly acknowledges that the tort of causing loss by unlawful means and the dependency action created by fatal accidents legislation are incompatible with his account of the law; STEVENS, TORTS, *supra* note 9, at 188–190 and 174 respectively. (The former is inconsistent with his theory because a plaintiff has no right good against a defendant to trade or economic welfare, and the latter clashes because dependency claims are parasitic upon the infringement of a right held by the deceased rather than the plaintiff.) Stevens attempts to mitigate the difficulty that these actions pose by offering reasons to tolerate the results that they produce. In relation to the unlawful-means tort, Stevens argues that the action can be justified because it prevents the plaintiff from using third parties as a means to his own ends; *id.* at 188. In relation to the dependency action provided for by the 1976 Act, he argues that allowing dependents to sue results in a closer approximation to the wrong not having been committed than would be achieved if the award accrued to the estate; *id.* at 176. Even if these reasons are convincing, in neither case do they have anything to do with the plaintiff's rights. These maneuvers qua attempts to rescue his rights analysis from the difficulties presented by these actions are therefore mere distractions. They do nothing to change the fact that both actions are incompatible with his theory.

contract,[200] the action created by the Congenital Disabilities (Civil Liability) Act, 1976 (UK),[201] and the tort of public nuisance.[202] Given these actions, it is implausible to contend that the rule in *Rylands* is an outlier or in any way unique in constituting a tort that is not animated by the infringement of a private right held by the plaintiff.

Stevens's second argument—that the rule in *Rylands* has been subsumed within the law of private nuisance—proceeds on the assumption that the law of private nuisance is compatible with his theory. Stevens is certainly not alone in suggesting that the rule in *Rylands* is part of the law of private nuisance. Statements to this effect have often been made in the United Kingdom, including at the ultimate appellate level.[203] However, even if the action has been subsumed within the law of private nuisance in the United Kingdom, which is something that is hotly debated,[204] this has plainly not happened elsewhere in the common law world. In Canada, for example, the rule in *Rylands* and the action in private nuisance are separate.[205] It is also noteworthy that the reporters of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm regard the law of private nuisance as independent of the ultrahazardous activities rule. Although liability may arise in both fields simultaneously, no suggestion can be found in the

200. In relation to the action for inducing breach of contract, Stevens argues—contrary to what the House of Lords held in OBG Ltd. v. Allan, [2007] UKHL 21, [2008] 1 A.C. 1, paras 8, 45–64, 270, 302, 320—that the tortfeasor is liable not on the basis of the accessory liability but rather on the basis of an *ex ante* "accessory right" that we all have "good against everyone else that they do not induce the infringement of the contractual right[s] we hold": STEVENS, TORTS, *supra* note 9, at 281. So, for Stevens, what the House of Lords was happy to treat as a mere principle of tortious liability is better seen as a tort *strictu sensu*. This interpretation is contradicted by, and therefore unavailable in the wake of, the decision in *OBG*.

201. Stevens admits that the Congenital Disabilities (Civil Liability) Act, 1976, c. 28, (UK) confers an action where there is no right. He writes "that the plaintiff had no legal personality and consequently no rights at the time of the tort"; *id.* at 185. Stevens then discusses the history of the action and its scope. None of this has any relevance to his rights theory and consequently does nothing to explain away the difficulty that this action presents.

202. So far as public nuisance is concerned, Stevens, *id.* at 186–189, admits, rightly, in our view, that many of the cases in this area are incompatible with his rights account. The major difficulty that Stevens sees with the cases is that they lend support to the rival loss-based view of tort law (in that the plaintiff must suffer *loss* over and above that incurred by the public generally in order to sue.)

203. *See, e.g.*, *Cambridge Water*, *supra* note 187, at 304 ("the rule in *Rylands v. Fletcher* was essentially concerned with an extension of the law of nuisance to cases of isolated escape"; Lord Goff); Transco Plc. v. Stockport MBC, [2003] UKHL 61, [2004] 2 A.C. 1, para 9, 52, 92.

204. *See, e.g.*, Donal Nolan, *The Distinctiveness of Rylands v. Fletcher*, 121 LAW Q. REV. 421 (2005); John Murphy, *The Merits of Rylands v Fletcher*, 24 OXFORD J. LEGAL STUD. 643 (2004).

205. In *Smith*, *supra* note 178, the Ontario Court of Appeal acknowledged the way things had developed in the United Kingdom in *Cambridge Water*, *supra* note 187, and *Transco*, *supra* note 203. However, it stuck steadfastly to the distinction drawn between the two actions by the Supreme Court of Canada in *Tock*, *supra* note 178, paras 13–14. The court in *Smith* said (at para 68): "In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock*, the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing to provide a basis for liability distinct from liability for private nuisance or negligence."

Restatement that the bases of liability have been merged.[206] Accordingly, even if Stevens's claim that the rule in *Rylands* is now part of the law of private nuisance is an accurate description of the position in the United Kingdom, Stevens is still unable provide a compelling universal theory of tort law.[207]

4. Economic Theory

In contrast to the theorists so far considered, Posner is considerably more at ease with the rule in *Rylands* (or, more accurately, the American version of that rule concerning ultrahazardous activities). Writing with William Landes, he maintains that the ultrahazardous activities rule is mandated "where achieving optimal accident avoidance requires altering the defendant's activity rather than his care or the plaintiff's activity or care."[208] In such circumstances, "a rule of strict liability makes economic sense."[209] Posner further argues that the tort of negligence *would not* offer an adequate form of regulation in such circumstances. In his famous article, "A Theory of Negligence," Posner writes:[210]

> There is a serious limitation of the negligence system as a method of optimizing the allocation of resources to safety ... [so the courts] carved an important exception to the standard of negligence for ultrahazardous activities such as blasting. Those are by definition activities where unavoidable accident costs are great, and therefore where one is most likely to find that an alternative method of achieving the same result (digging instead of blasting) is cheaper when unavoidable accident costs are taken into account. A rule of strict liability—the rule applied to activities classified as ultrahazardous—compels them to be taken into account.

Given this stance, Posner cannot explain the law in all of the jurisdictions with which we are concerned. For in Australia, ultrahazardous activities are governed by the tort of negligence (into which body of law the rule in *Rylands* was subsumed, as noted above). So, although Posner's account may chime with the rules in the Canada, the United Kingdom, and the United States,[211] he is unable to accommodate the Australian position given that,

206. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS, *supra* note 39, §20, cmt. c, where private nuisance is contrasted with the strict liability rule for ultrahazardous activities.

207. Another attempt to relocate the rule in *Rylands*, *supra* note 20, that might conceivably be invoked in order to rescue Stevens's theory is to contend that the rule is not part of tort law at all and that it falls within another category of civil liability. This is how the rule is classified by, e.g., MCBRIDE & BAGSHAW, *supra* note 101, at 470. Their logic would appear to be as follows: (1) torts are wrongs that involve the breach of an *ex ante* duty; (2) the cause of action minted in *Rylands* does not fit this pattern because it does not require the breach of an *ex ante* duty; hence (3) the rule in *Rylands* is not a tort. Because McBride & Bagshaw are not our target theorists for the purposes of this article, and because their relevant comments are very brief, we do not engage with their analysis.

208. LANDES & POSNER, ECONOMIC STRUCTURE, *supra* note 14, at 107.

209. *Id.* at 111.

210. Richard A. Posner, *Theory of Negligence*, *supra* note 15, at 76.

211. This is a matter upon which he has himself remarked: "The Restatement's definition of ultrahazardous activities . . . coincides with the economic principles that make strict liability

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on his account, ultrahazardous activities require regulation by way of a strict liability rule. On the assumption that Posner is right in this regard—that is, that he is correct to suggest that there is "a serious limitation of the negligence system" in cases of this kind—the law in Australia is inefficient.

III. CONCLUSION

The theories of tort law that we have considered in this article purport to explain tort law throughout the common law world, as we demonstrated by offering at the outset explicit quotations or other very clear evidence from the writings of the authors of the theories in question. Although we have not sought to deny that each of these theories is capable of explaining a good deal of tort law, often across a multiplicity of jurisdictions, it has nonetheless been argued that they fall well short of their stated goal of being able to explain all of tort law in all the major common-law jurisdictions. We have endeavored to illuminate the significant degree to which they fall short by testing these theories against the evidence in Australia, Canada, the United States, and the United Kingdom. Five major areas of difficulty were highlighted, namely, (1) the breach element of the action in negligence, (2) the law governing the recognition of a duty of care in respect of pure economic loss, (3) punitive damages, (4) the defense of illegality, and (5) the rule in *Rylands* and its descendants. Although the theories in question can sometimes explain the law in relation to some of these rules in some of the jurisdictions in question, when looked at as a whole, these five important areas of tort law reveal a wide gulf between the claims made about tort law by these theories and the actual state of the law. Because of the size of this gulf, the theories concerned are not, contrary to what their proponents contend, satisfactory universal theories of tort law.

In reaching this conclusion we are conscious that several objections may be leveled at our analysis. We wish to anticipate two objections. The first possible objection is that the theories in question are intended to be interpretive rather than explanatory in nature. However, even if the theories are properly labeled as interpretive, as some suggest,[212] we do not think that this would undermine our analysis, for at least three reasons. First, it is telling that *the very theorists* on whose work we have focused have, as shown above, battled hard to prove that their theory provides the best fit of the

the preferred liability rule": LANDES & POSNER, ECONOMIC STRUCTURE, *supra* note 14, at 112. Certainly, the RESTATEMENT (SECOND) OF TORTS, *supra* note 134, §520, states that the relevant factors governing the ultrahazardous activities rule include the very high expected accident costs as well as the opportunity that the defendant had either to relocate or to desist from engaging in the specific activity altogether.

212. *See, e.g.*, Allan Beever & Charles Rickett, *Interpretive Legal Theory and the Academic Lawyer*, 68 MOD. L. REV. 320 (2005) (arguing that Weinrib's corrective justice theory should be understood as an interpretive theory).

law.[213] It is beyond serious argument that the great bulk of their relevant writings (and certainly those of their writings with which we are concerned for the purposes of this article) are aimed at showing that the law conforms to their account of it. Second, we doubt there is any material difference between explanatory theories and interpretive theories because both types of theory ultimately search out meaning in the law. Third, even if there were a material difference between explanatory and interpretative theories, it is widely agreed that an important criterion for measuring the success of an interpretative theory is fit with the thing that theory seeks to explain. Ronald Dworkin, a pioneer in this regard, insists that the first requirement of "any interpretation of any material" is that "it must fit that material."[214]

A second possible objection is that the theories in question are impervious to a lack of fit. Certainly, murmurings, and arguably more than that, can be found in the literature to this effect.[215] Nonetheless, we consider any such objection groundless. A theory that purports to explain something, including the law, fails to the extent that it does not explain the thing in question, at least if the mismatch between the theory and the thing is sufficiently great. As noted already, our target theorists go to great lengths to show that their theory fits the law, and they all contend that rival theories provide inferior explanatory power. We therefore consider the suggestion that any such theory is immune to challenge on the ground of fit to be self-evidently untenable. And although we have not identified the precise point at which a lack of fit becomes objectionable, we have nonetheless focused only on significant problems of fit (characterized as such according to an extremely demanding test for significance).

213. In the case of Weinrib, *see* the text accompanying *supra* notes 5–8; in relation to Stevens, *see* the text accompanying *supra* note 11; and with respect to Posner, *see* the text accompanying *supra* note 15.

214. Ronald Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173 (1985), at 177.

215. *See, e.g.*, Weinrib, *Civil Recourse*, *supra* note 19, at 291 (suggesting that divergence between tort law and corrective justice presents no difficulty for his corrective justice theory of tort law); BEEVER, REDISCOVERING, *supra* note 18, at 25 (contending that fit is just one of several criteria for judging a theory and thereby suggesting that a lack of fit might not be problematic).