I Can Explain That

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James Goudkamp & John Murphy, *The Failure of Universal Theories of Tort Law*, 21 **Legal Theory** 47 (2015), available at SSRN.

Richard Posner has claimed that tort law is best understood as a means of incentivizing actors to take cost-efficient precautions against inflicting losses on others. “Not so!” says Ernest Weinrib, who insists that tort is an embodiment of corrective justice. Against both, Robert Stevens maintains that tort law defines and vindicates rights we have against each other. How are we to decide which of these theories, if any, offers the best interpretation of tort law?

In their provocative article, *The Failure of Universal Theories of Tort Law*, Professors Goudkamp and Murphy make a basic, important, yet oft-ignored point: to assess the validity of an interpretive theory, one must be clear on the object of interpretation. About what body of law are Weinrib, Posner, and Stevens theorizing? What permits these and other interpretive theorists to claim support from, or to dismiss as erroneous, decisions issued by American, Australian, Canadian, and English courts? Until we answer this question, we can’t assess whether any of them have offered fitting interpretations.

More pointedly, Goudkamp and Murphy argue that the aforementioned theories, as well as others, badly overreach. (Full disclosure: the authors suggest in passing that this critique applies to the civil recourse theory that Benjamin Zipursky and I have propounded.) The problem, they say, is that each purports, explicitly or implicitly, to provide an interpretation of a pan-national entity that sometimes goes under the name of “the common law of tort.” Under present conditions, no theorist can hope to offer a satisfactory interpretation of this body of law because … well … there is no such body of law. The rules that have been adopted by the national or subnational units that supposedly comprise the common law of tort (or “Anglo-American tort law”) are inconsistent.

For example, Posner’s theory famously hinges on the thought that, in negligence cases, courts have settled on the Hand Formula conception of breach. Goudkamp and Murphy point out that, at best, Posner’s claim fits U.S. decisions, not decisions from Australia, Canada, and England. Indeed, Weinrib claims in support of his corrective justice account that courts approach the breach question in a manner that is largely *insensitive* to precaution costs—an approach he associates with Lord Reid’s opinion in the English decision of *Bolton v. Stone*. Yet even if this is what Lord Reid had in mind, other English judges and judges in other commonwealth countries seem to apply notions of breach that are at least somewhat cost-sensitive. Meanwhile, Stevens claims as a “plus” for his rights-based theory that it can explain the absence of liability for negligence causing pure economic loss. (There is no right, he says, to mere economic expectancies.) Yet Goudkamp and Murphy tell us that Australian and Canadian law sometimes allow recovery for such loss.

The Failure of Universal Theories of Tort Law sounds a valuable cautionary note. Any scholar who purports to offer an interpretive theory of a body of law (rather than, say, a wholly prescriptive theory) must be attentive to the question of what is being interpreted, as well as the reach of the interpretation—that is, the level of detail at which the interpretation is supposed to provide explanations. Moreover, it is both fair and useful to have a pair of grounded skeptics “call out” theorists for maintaining that their theories have unique doctrinal entailments. Posner really does seem to be committed to asserting that courts have in fact adopted a Hand Formula conception of reasonable care. (That is, unless we are to treat his appeals to doctrine as mere window-dressing.) Weinrib seems no less committed to claiming that courts across common law jurisdictions have embraced a largely cost-insensitive conception.

Still, I wonder if Goudkamp and Murphy's charge of overreach can be turned against them. Or perhaps it would be fairer to say that they are not as precise as they might be in explaining what counts as a "universal" tort theory, and hence are coy as to the reach of their argument.

I would submit that their beef is not with *all* theories that purport to make sense of the common law of tort. Rather, it is with theories that purport to derive fully specified substantive rules of the common law of tort from general principles. It is only theories of this extraordinary ambition that can be shown to fail upon proof of doctrinal disagreement. Notably, on this reading, even if Goudkamp and Murphy's argument is valid, it leaves lots of room for interpretive theories of Anglo-American tort law.

Suppose Australian courts long ago rejected *Vaughan v. Menlove's* insistence on an objective standard of care in favor of a subjective standard. Now imagine a theory asserting that Anglo-American tort law is concerned to define and prohibit interpersonal injurious wrongs, and to empower victims of those wrongs to obtain redress from those who have wronged them. This theory (after it is more fully elaborated) may have a lot to say about what the common law of tort is and how it differs from criminal law, contract law, etc. It may also have robust doctrinal implications. (For example, it may tell us that strict liability that results from courts' having adopted relatively unforgiving definitions of legal wrongs counts as genuine tort liability, whereas strict liability that is fully detached from any notion of wrongdoing does not.) But the fact that the theory does not call for a unique answer to the question of whether negligence law's standard of care should be objective or subjective hardly seems like a ground for deeming it a failure. Different courts define torts and tort defenses differently. But when they do so, they understand themselves, and we understand them, as operating within the domain of tort law. If this were not the case, then there would be no basis for asserting the existence of conflicting rules *of tort law*.

Goudkamp and Murphy provide a healthy dose of lawyerly skepticism about academic theories that treat tort law as a brooding omnipresence. But their intended prey is an exotic creature. What they aim to hunt down is not grand theory but *grandiose* theory: theory that aims to explain Anglo-American tort law on terms that leave no room for doctrinal variation. The theories they criticize probably are guilty of moments of grandiosity. And yet it surely remains possible to theorize across jurisdictions. If there can be a Restatement of "Torts," there can be theories of U.S. tort law. And if there can be theories of U.S. tort law, there can be theories of Anglo-American tort law. Tort theory should pay attention to jurisdictional boundaries. It needn't be confined by them.

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