

THE TORTOLOGICAL QUESTION AND THE PUBLIC-PRIVATE RELATIONSHIP IN
TORT LAW

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1. Introduction

Part of the enduring value of Hutchinson and Morgan’s ‘The Canengusian Connection’¹ lies in the light it sheds on how significantly scholars or judges’ theoretical views shape their views as to what the outcome of a particular tort case should be, and just how much these theoretical positions can diverge. Through the words of the Canengusian judges, Hutchinson and Morgan explore a number of points on which tort theories diverge – including the purpose of tort law, the principles that inform it, the interests it protects, and the manner and extent to which it assigns blame and transfers responsibility for wrongs to another.

However, quite apart from the issues on which the judges directly speak their minds, ‘The Canengusian Connection’ also sheds significant light on an issue which none of the judges directly addresses, but on which each of them nonetheless implicitly takes a strong position – namely, the question of whether tort law’s essential nature should be seen as being purely private, or whether it should be seen as being principally public. Both positions have long pedigrees and vocal defenders, both amongst the Canengusian judges and amongst academics in the real world. The proponents of the private approach argue that tort law is entirely private in that it remedies harm caused by one individual to another through providing a private right of action.² The proponents of the public approach, by contrast, argue that tort law is primarily public, in that the actions it provides and the rights it protects have the effect of allocating risk and of shaping conduct by incentivising or disincentivising particular types of action and hence,

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1 Allan C Hutchinson and Derek Morgan, ‘The Canengusian Connection: The Kaleidoscope of Tort Theory’ (1984) 22 *Osgoode Hall Law Journal* 69–113.

2 The classic examples of this approach are theories centred around the idea of corrective justice. See e.g. Jules Coleman, *The Practice of Principle* (Oxford: Clarendon Press, 2001); Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007)

ultimately, affect society more broadly.³ There is also a middle way, adhered to by some tort theorists which holds that tort law should be conceptualised in a more pluralistic way as incorporating elements of both private and public purposes.⁴

In this essay, I argue that Hutchinson and Morgan present an accurate overview of the range of academic positions on the public-private relationship in tort law, but fall significantly short of capturing the complex nuances of the positions taken by common law judges on this relationship. This oversight highlights a serious lacuna in modern tort theory, namely, the failure of tort theorists to engage with the position – repeatedly expressed by the senior judiciary – that tort law intrinsically combines public and private aspects, and to do so in a manner that encompasses a broad range of sources and perspectives.

I elaborate on this lacuna through a comparison with the debates surrounding a particular issue in Christian theology, namely, the combination of human and divine natures in Christ. Christian theologians often speak of what they call the ‘Christological question,’ traditionally presented in the words of the gospel, as Christ asking ‘Who do you say I am?’⁵ Its central point, however, is understanding what it means to say that Christ is both wholly man and wholly God, and what it means to say that these two natures meet and are united in his person.⁶ Most Christian theologians agree that the Christological question lies at the heart of Christian theology, and many theological differences were traditionally depicted as having their roots in differing Christologies, for the manner in which one understands who Christ is will necessarily determine what we understand his significance for the individual believer to be.

3 The classic example of this approach is the law and economics school. See e.g. Richard A Posner, *The Economic Analysis of Law*, 6th edition (New York: Aspen Publishers, 2003) 383-385, Steven Shavell, ‘Liability for Accidents’, chap. 2 in: A.M. Polinsky and S. Shavell, editors, *Handbook of Law and Economics* (Amsterdam: Elsevier, 2007) 139–182

4 For instance, those who argue that tort law should be seen as incorporating elements of both corrective and distributive justice. See e.g. James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006)

5 See e.g. Jacques Dupuis, *Who Do You Say I Am? Introduction to Christology* (New York: Orbis Books, 1994).

6 Oliver Crisp, *Divinity and Humanity: The Incarnation Reconsidered* (Cambridge: Cambridge University Press, 2007) 1-5, 118-20.

The problem of the private-public relationship in tort law can be conceptualised through an analogous question – which I here call the ‘tortological question’ – that, like the Christological question, ought to be at the centre of tort theory. As several scholars have pointed out, tort law can only be understood if we acknowledge that it is both wholly private and wholly public, and that it is consciously so, because through the history of tort law, both its private and public aspects have been deliberately made use of by legislatures and judges.⁷ It is the fact that these two very different natures can, and frequently do, combine in one institution that creates the dilemma of tort theory. The private nature of tort law pushes it in the direction of doing justice on the facts of a case, of a focus on moral principles and of flexibility; the public nature of tort law pushes it in the direction of setting principles which guide the conduct of individuals in society, of an express focus on regulating conduct by promoting the desirable and acting against the undesirable, and of a focus on policy.⁸ The thrust of the tortological question, then, is to understand the extent to which, and the manner in which, these two natures actually combine in modern tort law, and what this combination means for our understanding of tort.⁹

In the following pages, I present a tortological reading of ‘The Canengusian Connection’ and of the trends in modern tort scholarship on which it is a commentary. I seek to make three points through this reading. First, I seek to demonstrate that the differences between the judges as to the purpose and content of tort law are rooted in profound differences of tortology, which represent fairly accurately the varying tortological positions prevalent in modern academic scholarship. Secondly, I argue that the positions taken by the Canengusian judges also illustrate several problems with modern tortology, most importantly, the limited range of tortological positions it takes, its refusal to expressly consider the tortological question, and the growing divide between judicial and academic perspectives on tortology.

7 See e.g. Steve Hedley, ‘Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century’, in: Andrew Robertson and Tang Hang Wu, editors, *The Goals of Private Law* (Oxford: Hart, 2009) 193–214

8 Hanoch Dagan, ‘The Limited Autonomy of Private Law’ (2008) 56 *American Journal of Comparative Law* 809–833 at 811-819.

9 In the following discussion, I equate the ‘private’ tendency in tort law with the aspects of Christology oriented towards the ‘divine’ aspect of Christ, on the basis of the strong tendency towards transcendental arguments found in that school. Similarly, I analogise the ‘public’ tendency with the aspects of Christology oriented towards the ‘human’ aspects of Christology on the basis of its tendency to historical and empirical argument.

Finally, I draw upon twentieth century typologies of Christology and the Christological theories of Dietrich Bonhoeffer to examine how we might articulate a more nuanced theory of the law of tort.¹⁰

2. Modern tortology and ‘The Canengusian Connection’

Although the tortological question is rarely expressly asked, most theoretical work in tort law implicitly takes a position on the question in the course of discussing the nature of tort law. Unlikely in Christology, however, positions in tortology tend to cluster around the extremes. At one extreme, we have certain theorists of the corrective justice school who, in an argument that would have been worthy of Eutyches,¹¹ declare that tort is wholly private, and that to impute even a semblance of public character to it violates its integrity and renders it incoherent. Any public purposes it may seem to serve are fully subsumed within the private, and to endow them with an existence independent of the private is to fundamentally misunderstand the form of tort law:¹² whilst tort law may *enable* the pursuit of public goals, it is not *about* the pursuit of public goals.¹³ Not all who see the nature of tort law as being principally private see this type of corrective justice as being at the heart of tort law – some scholars prefer to view it as a means for vindicating rights against their wrongful infringement,¹⁴ or of protecting the interests of one against encroachment by another¹⁵. All, however, agree that the nature of tort law must be sought in analysing the manner in which it relates the claimant with the respondent.

10 Dietrich Bonhoeffer was a priest and theologian in the German Lutheran Church in the inter-war period. In addition to his theology – regarded as one of the most original of the 20th century – he also played a leading part in organising church and civic resistance to Hitler. He was executed by the Nazi government in 1945.

11 Eutyches of Constantinople, the chief proponent of what eventually came to be known as the Monophysite heresy, took the Christological position that Christ had only one nature - divine - and that any humanity he seemed to have was fully subsumed within the divine.

12 Ernst Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995).

13 See e.g. Jules Coleman’s discussion of whether tort law can properly be said to have a risk-spreading or insurance function Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) 207-208

14 Robert Stevens, *Tort and Rights* (Oxford: Oxford University Press, 2007).

15 Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart, 1997).

At the other extreme, we have the neo-Arians of the law and economics movement,¹⁶ to whom tort law is entirely about the regulation of behaviour through providing appropriate incentives and disincentives with a view to achieving an efficient distribution of resources. This, they argue, is the primary function of tort law. Any private purposes are at best incidental to, or side-effects produced by, this overarching goal.¹⁷ Once again, not all tort theorists on the public end of the tortological spectrum assign such a prominent role to efficiency. Others see the goal as being permitting private enforcement of legal rules,¹⁸ a combination of risk-spreading, loss-distribution, and loss-prevention,¹⁹ or even a mix of different policies reflecting the “desires and interests” of the general public.²⁰ But all are agreed that the key to understanding the nature of tort law is to analyse the intersection between its domain and the domain of the broader social or public interest.

Our views as scholars on whether the character of tort law is principally public or private, and of the precise private or public goals it serves, have a significant influence on the manner in which we describe, interpret and apply the rules of tort law, as well as our normative views as to which rules are desirable and which are not. The Canengusian judges follow this pattern. Like many modern tort theorists, they do not directly engage with the question of the public-private relationship in tort law, but a reading of their texts can nonetheless reveal a lot about their views and, in the process, about modern tort scholarship.

Doctrin J, for example, tells us that issues of policy are for the legislature, and not for judges. The separation of powers demands that judges not search for whatever principles may lie behind or be immanent in the rules of

16 Arianism, based on the teachings of Arius of Alexandria, denied that Christ had two natures, and took the Christological position that Christ was a created being - not an eternal one - of the same substance as other created beings and lacking the divine attributes of God. Law and economics, similarly, rejects the idea that tort law can have any transcendental or purposes of the sort championed by proponents of the private perspective, but must be seen as simply a political human institution no different from other political institutions.

17 See e.g. William Landes and Richard Posner, *The Economic Structure of Tort Law* (Cambridge, MA: Harvard University Press, 1997).

18 Edward Rubin, ‘Punitive Damages: Reconceptualising the Runcible Remedies of Common Law’ (1998) *Wisconsin Law Review* 131–156.

19 Guido Calabresi, ‘Some Thoughts on Risk Distribution and the Law of Torts’ (1961) 70 *Yale Law Journal* 499–553.

20 Leon Green, ‘Tort Law Public Law in Disguise’ (1959) 38 *Texas Law Review* 1–13.
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law. Their job is simply to determine what the rules are and intelligently apply them.²¹ What does this tell us about Doctrin J's views on the private-public divide? Quite a bit. Although Doctrin J's name might suggest that she speaks for doctrinal scholarship generally, her views in reality represent only one side of what is a deep divide within doctrinal scholarship, one whose origins lie in the public approach and whose popularity has been on the wane in Commonwealth jurisdictions as the popularity of more private-oriented approaches has risen. The roots of the divide go back at least as far as the late eighteenth century, but they become most visible in the mid-nineteenth century in the form of two competing approaches taken by treatises about tort law. These are best embodied, respectively, in the tort treatises of Charles Addison²² and Fredrick Pollock.²³

Addison's *Wrongs and their Remedies* was the first book on English tort law (it had been preceded a few years earlier in the US by a work by Francis Hilliard). Tort law, Addison declared in the preface to the first edition of his work, was concerned with the invasion of legal rights, and its object was "the protection of our property, and the security of our persons and reputation."²⁴ Having made this point, Addison concerned himself no further with attempting to detect any general principles – instead, he presented a litany of torts, subject by subject, whose only connection with each other, as far as the book tells us, appears to be the conjunction of a wrongful act and legal damage.²⁵

Addison's approach is quite clearly rooted in the Austinian theory that law is simply a command issued by the sovereign, backed by the threat of a sanction, and entirely separate from morality. As such, it belongs to the public end of the spectrum: the state chooses to provide a party with an action in tort for its own purposes, and it is for the courts to give effect to that, not to enquire into the nature or desirability of those purposes or even what they might be. Doctrin's position is that of Addison, and as such it presents a sharp contrast with the dominant approach in contemporary doctrinal scholarship in the Commonwealth, namely, the approach begun by

21 Hutchinson and Morgan (n. 1) 71.

22 Charles Greenstreet Addison, *Wrongs and their Remedies, being a treatise on the law of torts* (London: Stevens and Sons, 1860).

23 Frederick Pollock, *The Law of Torts: a treatise on the principles of obligations arising from civil wrongs in the Common Law* (London: Stevens and Sons, 1887).

24 Addison, *Wrongs 1st ed* (n. 22) i-vii.

25 Charles Greenstreet Addison, *Wrongs and their Remedies, being a treatise on the law of torts*, 2nd edition (London: Stevens and Sons, 1864) 1-17.

Peter Birks and continued by others of his school which, in its Romanist influences and search for organising taxonomic principles, belongs firmly within the private-oriented approach to the nature of tort law.²⁶

The Birkisian approach to tort has, however, much in common with the approach taken by Pollock. Pollock, and others of his school, deeply disliked Addison's strong positivism. Holmes' review of Addison's book in the *American Law Review* was unfavourable. He criticised the book's lack of cohesion and its organisation, and said that the subject could only be treated properly by a writer who could deal with it philosophically.²⁷ Pollock was even more scathing – in a review of Winfield's *Province of the Law of Tort* written some years after Addison's death, he dismissed Addison as someone “for whose judgment nobody now cares a farthing”, declared that Addison's “book on Tort was only less bad than his book on Contracts,” and went on to take a swipe at those “who see nothing but shreds and patches in the law of civil wrongs.”²⁸

Unlike Addison, the framework of whose treatise evidences no search for any overarching principle in tort law, Pollock's chief concern was identifying precisely such a principle, which he found in Ulpian's *alterum non laedere*²⁹ and the Church Catechism's ‘hurt nobody by word or deed’ (both expressed, he stressed, as legal and not moral principles).³⁰ Pollock was not the first to advocate such an approach – Francis Buller had taken a very similar view nearly a century previously in his treatise on *Nisi Prius*.³¹ Nor was it the only candidate competing to be named the underlying principle of tort law. William Jones had in 1781 argued that the common law should be understood in terms of a tripartite division of standards of liability, analogous to the divisions of Roman law (and, although he does not mention it, also to the approach that came to be codified in the *Allgemeines Landrecht*, the late 18th century Prussian code of laws prepared by Fredrick

26 See e.g. Peter Birks, ‘Definition and Division: A Meditation on Institutes 3.13’, in: Peter Birks, editor, *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 1–35, esp. pp. 2-4, 21ff.

27 Oliver Wendell Holmes, ‘The law of Torts. By C.G. Addison, Esq.’ (1871) 5 *American Law Review* 340–341 at 341.

28 Frederick Pollock, ‘The Province of the Law of Tort. By Percy H. Winfield’ (1931) 47 *Law Quarterly Review* 588–589 at 589.

29 Pollock, *The Law of Torts* (n. 23) 9.

30 Pollock, ‘Province’ (n. 28) 589.

31 Francis Buller, *An Introduction to the Law relative to Trials at Nisi Prius* (London: C. Bathurst, 1772) 35.

the Great and Fredrick William II).³² Jones' approach enjoyed a brief period of popularity and continues to have its proponents to this day, but it is Pollock's approach that is characteristic of the private approach in modern doctrinal tort scholarship in the common law world, down to his emphasis on Romanist sources.

The two judgments that follow Doctrin J's in 'The Canengusian Connection' also follow on from these two threads within doctrinal scholarship. Mill J follows in the tradition of Addison – from the perspective of tortology, he is Doctrin J. without the latter's insistence on the separation of powers, and it is only to be expected that he and Doctrin J agree on so much in their respective judgments. Like Doctrin J, his judgment places him firmly at the public extreme of the tortological spectrum. Unlike Doctrin J, however, he does not conceal his position behind the mystery of the law. Negligence, he argues, fulfils an important social function. This social function, the purpose of tort law, he declares, is to promote the efficient allocation of resources in society.³³ The way to do this is by minimising risk and uncertainty at a level that encourages individuals to take the "socially efficient level of precautions."³⁴ Legal rules should be framed and applied in a manner that achieves this purpose.

Mill J's argument is framed in terms that, to the modern reader, invoke the early work of Richard Posner and the law and economics movement that grew out of it. The approach itself, however, is much older. As England points out, the direct ancestors of the economic approach to law are the late 19th century works of Otto van Gierke and Victor Mataja,³⁵ and can be traced back even further to the utilitarians (as Mill J's name was probably intended to suggest). The economic approach is, of course, not the only theory that regards tort law as being mainly public in nature. Other public-oriented approaches that have been popular in the twentieth century include Roscoe Pound's sociological jurisprudence, accounts that focus on tort law's role as a means to achieve distributive justice in the Aristotlean sense,³⁶ or

32 Jones, Buller and their relationship to early nineteenth century legal thinking are discussed in David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) 164-174.

33 Hutchinson and Morgan (n. 1) 82.

34 *Ibid.* 79.

35 Izhak England, *The Philosophy of Tort Law* (Aldershot: Dartmouth Publishing, 1993) 97-100.

36 Gregory C Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 *California Law Review* 193-224.

equality more generally,³⁷ those who see it as a tool to restrain abuses by the rich and powerful (such as large corporations)³⁸ and more recent scholarship that focuses on tort law's role in distributing risk and responsibility across society in a more equitable way.³⁹

Wright J takes his cue from the other, more private-oriented thread within doctrinal scholarship – that represented by Buller and Pollock, and their search for a unifying principle behind tort law. He places the focus squarely on the individual, and on the harm suffered by an individual as a result of another's act. The “deep sense of morality and rights” which “pervades the common law” demands that such a violation of an individual's integrity and autonomy be rectified. This, and nothing less, is the purpose of tort law.⁴⁰ In placing this principle at the centre of his account, Wright J is very close to Pollock, but where the two diverge is in Wright's willingness – indeed, insistence, invoking Cicero⁴¹ – that consideration be taken of the moral and philosophical basis of the no-harm principle, in contrast to Pollock who insists on distinguishing and dissociating the legal principle from a mere moral imperative⁴² although he was willing to concede that it had a moral basis.⁴³ His approach most closely approaches that of the corrective justice theorists, and in particular the more philosophically inclined amongst them, such as Ernst Weinreb.

The main difference between Mill and Wright JJ and their doctrinal counterparts lies not so much in their tortological views as in extent to which they expressly discuss the basis of their positions and demonstrate a willingness to take these into account in determining the outcomes of actual cases. The position of the last two judges is, however, substantially different, in that they fundamentally question whether tort law has any role at all to play in the modern legal system, and come to the conclusion that it does not. Nonetheless, their judgments reveal fairly strong positions on the

37 Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (London: Ashgate, 2007).

38 Thomas H Koenig and Michael Rustad, *In Defense of Tort Law* (New York: NYU Press, 2001).

39 Arthur Ripstein, ‘Private law and private narratives’, in: Peter Cane and John Gardner, editors, *Relating to responsibility: Essays for Tony Honore on his eightieth birthday* (Oxford: Hart, 2001) 37–59.

40 Hutchinson and Morgan (n. 1) 90.

41 *Ibid.* 87.

42 Pollock, ‘Province’ (n. 28) 589.

43 Pollock, *The Law of Torts* (n. 23) 9.

question of whether the nature of tort law – or the system that each of them believes ideally ought to take its place – lies towards the public or the private ends of the spectrum.

Prudential J. argues that tort law is outdated, that it does not achieve the balance between social purposes and individual purposes that it needs to,⁴⁴ and that it must therefore be replaced – his favoured solution is a comprehensive insurance-based compensation scheme for traffic accidents.⁴⁵ This speech reveals little about what he believes the nature of contemporary tort law to be, but it reveals much about what he believes it *ought* to be – namely, ensuring that the balance between individual and social interests remains at an appropriate level, and that the individual is shielded from the dangers attendant upon modern life in a manner that meets the interests both of the individual and society.⁴⁶ This, too, is a public-oriented perspective on the tortological question, but one which differs significantly from those traditionally associated with the common law. Prudential J's perspective owes, instead, much more to twentieth century notions of the role of the welfare state that first appeared in the writing of political philosophers, and to ideas as to risk and blame that were first articulated in the middle of the twentieth century by sociologists and anthropologists. These ideas ultimately found their way into the realm of legal scholarship, both through policy documents such as the Pearson Report in the UK⁴⁷, which sought to re-conceptualise the relationship between the tort system and the welfare state by replacing significant parts of tort with no-fault insurance or strict liability regimes, and the work of legal scholars. As a result, they have little sympathy for or connection with the preservation of traditional doctrine as an end in itself and, unsurprisingly, Prudential J would overthrow not just the notion of fault, but most of the theoretical apparatus that supports modern tort law, including the notion of harm and legal injury. Yet, ultimately, he does not do so. Because, he says, of his respect for the separation of powers – the reform he desires to see must be left to the legislature to action.⁴⁸

44 Hutchinson and Morgan (n. 1) 96-97.

45 *Ibid.* 98-102.

46 *Ibid.* 99-100.

47 *The Report of The Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Cmnd. 7054.

48 Hutchinson and Morgan (n. 1) 103-104.

Lefft J, by contrast, spends much of his speech discussing the role that tort law plays. His view is not positive. Tort law's role is principally ideological – to create an illusion of justice and objectivity that in reality places society in bondage.⁴⁹ Like Prudential J, he too sees a balance between the interests of society and the individual as having an important place in tort law, but the practical result he sees is vacillation, indeterminacy and arbitrariness.⁵⁰ Tort law suggests that it is appropriate to treat life and death as economic events, and that any injury can be remedied by money – a thought he finds dehumanising and repellent.⁵¹ The only solution is completely to restructure the institutions of society, to redistribute information and knowledge so all are aware of the nature and extent of the risks to which they are exposed, and to democratise society at the level of everyday life and not just political organisation.⁵² This view, which owes much to the Critical Legal Studies movement of the 1980s, is once again clearly rooted in a view of the nature of tort law as being public.⁵³ The purpose it actually serves is upholding existing social structures through legitimising them,⁵⁴ whereas the purpose it – or its replacement – *ought* to serve is the creation of a just society where each individual is given the means to let them attain their innate potential,⁵⁵ both of which demonstrate a view of tort law as being principally a tool that should serve the public or social interest. There is very little room in his theory for tort law to be regarded as principally about the protection of private interests, except where the public interest demands the protection of a private interest – as, for example, in the free availability of information and knowledge that he espouses.

These, then, are the tortologies we see in ‘The Canengusian Connection.’ One which pretends not to exist, but leans towards the public; one which unashamedly treats tort law as having a public nature; one which treats it as having a purely private nature; and two more who treat it as having a public nature, but deny that it plays any desirable role and would do away with it altogether to be replaced by something radically different. In the next

49 *Ibid.* 105.

50 *Ibid.* 106.

51 *Ibid.* 106-108.

52 *Ibid.* 108-109.

53 The Critical Legal Studies movement strongly criticised the public-private distinction as being an atavistic remnant of legal formalism. See e.g. Duncan Kennedy, ‘The Stages of the Decline of the Public/Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 1349–1357

54 Hutchinson and Morgan (n. 1) 105.

55 *Ibid.* 109.

section, I discuss some key themes which these tortologies illustrate. As I show, these themes are of continuing relevance in pointing to a fundamental flaw in academic debates about tort law.

3. Academic and judicial tortologies

Three features of the judgments in ‘The Canengusian Connection’ deserve special comment.

First, as I discussed in the previous section, each of the Canengusian judges has a very clear position on the private-public relationship in tort law, yet in sharp contrast to writings in theology, none of the judges expressly discusses his or her position in these terms. It is left to the reader to infer from each judge’s decision whether he views tort law as being principally public or principally private. In consequence, none of the judges explains why they believe that tort law should properly be regarded as being, as the case may be, either wholly private or wholly public. Their views on the private-public relationship in tort law are the postulates from which they start – the judgments give no suggestion that they are the produce of reasoned consideration. For all the room Mill devotes to refuting the arguments of his fellow judges, he does not question his fundamental assumption that tort law principally serves a public function, not a private function. Wright J’s Aristotelean ethics-based argument is perfunctorily dismissed because it offers no insights “into the source of the norms by which the conduct was judged wrongful.”⁵⁶ The same holds, in reverse, for Wright J. He finds Mill J’s argument morally unacceptable,⁵⁷ but fails to explain why a morally acceptable account of tort law is to be preferred over an account of tort law that is centred on social efficiency, or why rights are trumps over social welfare.

Unfortunately, although this particular type of discourse is by no means universal, it is the rule rather than the exception in academic tort scholarship. We regularly assert that tort law is a part of private law, but rarely explain what, precisely, it is about tort law that would make it wrong of us to classify it as yet another a branch of public law – a species of regulation, for example – and vice versa.⁵⁸ Much like Mill J and Wright J, we

56 Hutchinson and Morgan (n. 1) 77.

57 *Ibid.* 87.

58 Cf. Steve Hedley’s criticism of internalist accounts of law in Hedley (n. 7).

are prepared to justify and explain the attractiveness of our position on the public-private relationship in tort law, but seldom explain why the contrary position could not provide just as effective a set of postulates to start with.

Secondly, the positions taken by the Canengusian judges cluster around the ends of the spectrum. Without exception, each judge bases his or her decision either on the postulate that the law of tort is wholly private and *not* public, or that the law of tort is wholly public and *not* private. There is no concession to the idea that it might in some way represent a combination of both. The only judge who comes close is Wright J. But he does this, in a manner reminiscent of Weinrib, from whose corrective justicist theories his views seem to be drawn. And, like Weinrib, he ultimately dismisses the public aspects he discusses: tort law, on his conceptualisation, remains clearly and exclusively private. Equally, it is notable that the majority of opinions cluster around the public end of the spectrum – even the spokeswoman for doctrinal jurisprudence puts forward a version rooted in a public, not private, view of the public-private relationship in tort, and the only judge who takes a private-leaning position, Wright J, too, finds it necessary to grant some concession to the public-oriented approach, even if he rejects Mill J’s version of this approach.⁵⁹

In both these points, ‘The Canengusian Connection’ again stands in sharp contrast to modern theological writing about Christology which rarely takes an extreme position. And, once again, it accurately captures features of modern academic tort scholarship, certainly as it stood when the piece was written but to a significant extent also today. This view is not universal. Some writers – such as James Gordley⁶⁰ and Richard Wright⁶¹ – accept that tort law must be discussed and analysed in terms both of public and private functions, which they categorise as reflecting, respectively, distributive justice and corrective justice. But they are in a minority. The majority insist dogmatically that one, and only one, of these can represent the true nature of tort law. Partisans of tort’s private nature may concede that tort law as actually practised by the courts sometimes does incorporate features of public law, but these, they argue, are errors that rob tort law of its coherence and which should be eliminated to preserve its intelligibility and coherence

59 Hutchinson and Morgan (n. 1) 93-94.

60 Gordley (n. 4).

61 Richard Wright, ‘Substantive Corrective Justice’ (1992) 77 *Iowa Law Review* 625–664 at 707-709.

as a distinct body of law.⁶² Similarly, those who hold the nature of tort law to be principally public might concede that judges do sometimes base their decisions on their idea of what is a ‘just’ outcome without regard to economic efficiency or the public purpose of tort law, but argue that courts who do this are making a mistake, and preventing tort law from discharging its true social function – whether that be redistribution or wealth maximisation.

Equally, at the time the piece was written, theoretical accounts of tort law (and obligations in general) grounded in public approaches were by far the dominant ones in academic writing, a situation described by Peter Birks as “the long unchallenged hegemony of the welfare aspect of civil wrongs” in which “the normative purposes of civil wrongs have been forced into an incidental or subsidiary role” – a balance he sought to correct.⁶³

Thirdly, and most significantly, although the article takes the form of five judgments, the five perspectives on tort law do not actually come anywhere near resembling real decisions. In part, as Mullender points out in his contribution, this is because they are far more dogmatic in describing their positions than judges are. But more fundamentally, the reason the five perspectives strike us as being so different from what real judges would say is that real judges, as discussed below, take a far more nuanced view of the public-private relationship in tort law than do any of the five fictional judges in ‘The Canengusian Connection.’

Consider, for example, the statement of Lord Denning which Mill J. invokes in his opening salvo: that common law adjudication is “a matter of public policy” which judges must resolve.⁶⁴ This, he believes, justifies and supports his view that tort law is, at its core, an instrument with which to pursue socially desirable goals. Yet Lord Denning, whose own concern to do justice on the facts of a case has been much remarked on,⁶⁵ is an unlikely poster-boy for the sort of approach Mill J. advocates, and he himself did not take such a narrow view of public policy. ‘Policy’, as he used it, simply meant the reason behind a rule, which could just as easily be the private one of doing

62 Ernst Weinreb, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485–526 at 492.

63 Peter Birks, ‘Editor’s Preface’, in: Peter Birks, editor, *Wrongs and Remedies in the Twenty-first Century* (Oxford: Clarendon Press, 1996) v–x at vi–vii.

64 *Home Office v Dorset Yacht Co Ltd* [1969] 2 QB 412, 426.

65 See e.g. Francis Bennion, ‘Lord Denning and the Judicial Role Part 2’ (2005) 169 *Journal of Professional Negligence* 74–77

justice by a wronged individual, as the sort of public reason Mill J had in mind. He did not always distinguish ‘policy’ from ‘principle’ as carefully as the Canengusian judges do, and indeed, he himself used the two somewhat interchangeably. Compare, for example, his statement in *The Road to Justice* that contract cases frequently involved “divergent public policies: the one which demands the enforcement of contracts: the other which seeks to prevent the abuse of it”⁶⁶ with his famous holding in *Bishopsgate Motor Finance v Transport Brakes Ltd*⁶⁷ that, in English law, “two principles have striven for mastery. The first is for the protection of property... The second is for the protection of commercial transactions.”⁶⁸ As these quotes should make apparent, the two terms are, to him, not very different in their import. And, equally, in each case the contrast Lord Denning sets up is not between two competing *public* goals, but between one goal of the sort that a system of tort law whose nature was public might be expected to pursue, and another goal that can only be pursued by a system of tort law that is private. Nowhere is there any hint of the postulate Mill J holds to be self-evident – that the public goal is the only one that matters, not the private one. To the contrary, Lord Denning’s view of policy, where public-oriented and private-oriented objectives both form part of the law, to be balanced in coming to a conclusion, is very far removed from Mill J’s far more simplistic notion, which simply assumes that the public interest overrides any private claims to justice.

In a similar fashion, Wright J’s reading of Lord Scarman’s holding in *McLoughlin v O’Brian*⁶⁹ reflects a far narrower and far more straitjacketed approach than Lord Scarman himself took. Lord Scarman did indeed contrast ‘principle’ and ‘policy’ and hold that the courts’ role was restricted to questions of principle, and did not encompass questions of “social, economic, and financial policy.”⁷⁰ Yet what Lord Scarman appears to have understood by ‘principle’ does not fit neatly into the private end of a private-public dichotomy. According to Lord Scarman, the application and expansion of principle by the courts was necessary and desirable to keep the common law *socially* relevant. In words that echo the comments of Mill J⁷¹

66 Alfred Thompson Denning, *The Road to Justice* (London: Stevens and Sons, 1955) 95.

67 [1949] 1 KB 332.

68 *ibid.* 336-7

69 [1983] 1 AC 410

70 *ibid.* 431

71 Hutchinson and Morgan (n. 1) 78.

rather than Wright J, he explained that the law must meet the demands of contemporary society. Courts must ensure that that the law does not become “irrelevant to the consideration, and inept in its treatment, of modern *social* problems” (emphasis supplied).⁷² The application of principle, Lord Scarman went on to add, had within it the flexibility to take account of imperatives such as certainty, and of the risk of opening the floodgates, both of which could be applied in a manner that was in keeping with the area of law with which the courts were concerned.⁷³ Although he believed that certainty and the ‘floodgates’ argument had little role to play in negligence, his willingness to recognise the principles, coupled with his emphasis on the necessity of ensuring that law was able to respond to modern social problems, strongly suggest that Lord Scarman’s juxtaposition of ‘principle’ and ‘policy’ was not intended to exclude the possibility that tort law could or did have a public aspect. Arguably, the circumstances he discusses in the course of explaining his views on ‘principles’ fall quite squarely within what Lord Denning described as ‘policy.’ They also bear a strong resemblance to the idea of “renewal and adaptation of the law to meet changing social needs,” which Bell refers to in his analysis of the use of policy arguments in judicial decisions⁷⁴ and, as Bell goes on to argue, there are clear reasons to view the duty of care as a means of incorporating policy considerations into discussions of the limits of the tort of negligence⁷⁵

What, then, did Lord Scarman mean by saying that policy was not the province of the courts? The conclusion of his judgment offers us an insight as to what his concern was. Why, he asks, should the courts leave the question of drawing lines of ‘policy’ to exclude “socially undesirable” outcomes to Parliament and not take on the role themselves? Because, he answers. the issue is not justiciable, because “the considerations relevant to a decision” of social, economic or financial policy “are not such as to be

72 *ibid.* 430

73 *ibid.* 431

74 John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983) 40. It is worth noting that the narrower meaning of policy adopted by Lord Scarman is used by some academics. See e.g. Andrew Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’, in: Andrew Robertson and Tang Hang Wu, editors, *The Goals of Private Law* (Oxford: Hart, 2009) 261–280 at 262-267, who unlike Lord Denning excludes considerations of justice between the parties from the scope of ‘policy’.

75 Bell (n. 74) 43. There is some historical support for this in, e.g., Ibbetson’s discussion of the use by 19th century judges of the duty of care to control what they believed to be excessive findings of liability by juries Ibbetson (n. 32) 170-5.

capable of being handled within the limits of the forensic process.”⁷⁶ This view of the reason why the courts should avoid assuming a role in determining policy would seem to have more in common with Lon Fuller’s idea of polycentricity⁷⁷ than with the absolute exclusion of anything not directly connected with identifying or correcting wrongs that one associates with the ideas of corrective justice in whose service Wright J invokes it.

This approach, which assumes that tort law has both private and public functions, is characteristic of the common law judiciary. A number of cases decided since the writing of ‘The Canengusian Connection’ have made it very clear that this is now the dominant judicial approach in the common law. Examples include Lord Hoffmann’s express statement in *White v. Chief Constable of South Yorkshire*⁷⁸ that the earlier view that tort law should “aspire to provide a comprehensive system of corrective justice” had now been abandoned “in favour of a cautious pragmatism,”⁷⁹ and the statement of Lord Steyn in *Macfarlane v Tayside Health Board*⁸⁰ that tort law is “a mosaic in which the principles of corrective justice and distributive justice are interwoven.”⁸¹

From elsewhere in the Commonwealth come cases such as *Haris v Bulldogs Rugby League Club*⁸², a negligence action brought by spectators who had been hit by fireworks set off during a football match, in the course of considering which the court expressly took into account the social utility of holding football matches. Within this category also belong the two-stage test in *Anns*,⁸³ with the room it gave to the court to take into account ‘any factors’ in determining whether or not a duty of care existed. The three-part test set out in *Caparo*,⁸⁴ although significantly different from the *Anns* principle, also reflects an acknowledgment of the co-existence of public and private aspects in tort, if the principle is interpreted through the lens of the cases applying it. In *Marc Rich v Bishop Rock*,⁸⁵ for example, the court considered whether it

76 *ibid.* 432

77 Lon L. Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353–409.

78 [1999] 2 A.C. 455

79 *ibid.* 502

80 [2000] 2 A.C. 59

81 *ibid.* 83

82 [2006] NSWCA 53

83 *Anns v Merton LBC* [1978] AC 728.

84 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

85 [1994] 1 W.L.R. 1071

would be “just, fair and reasonable” to impose a duty of care on a voluntary classification society in relation to the certificates of seaworthiness it granted. It answered the question in the negative, and took into account a broad range of factors – including the availability of insurance and the potential effect of finding a duty on what was clearly a socially desirable activity. These can only be described as rooted in the public aspect of tort law.

This approach is also evidenced in the long line of decisions of the House of Lords involving public authorities or bodies exercising statutory powers, in which the court balanced the private interest of the claimant against the public interest involved in permitting the authority in question to discharge its functions properly,⁸⁶ and by the cases where the courts have spoken about the prevailing “compensation culture”⁸⁷ – an approach that has since received statutory recognition in the Compensation Act 2006. In none of these cases did the court automatically conclude that public or private function of tort law automatically overrode the other – they spoke, rather, of the need to balance the two, and appear to view this as being intrinsic to tort law. In harder cases, a choice may have to be made between the two, as Lord Steyn pointed out in *Macfarlane* but this choice is made *on the specific facts of a case*, and does not reflect a general rule that the one or the other must always be the one that is chosen. The judicial view of the public-private relationship in tort law is thus far more nuanced than the polarisation of the Canengusian judges on a public-private axis would suggest or support.

Yet judicial tortologies, taken by themselves, present an unsatisfactory account of tort law. In the cases cited above and in other cases where courts have considered the question of the relationship between public and private purposes in tort law, they have tended to speak in terms of a balance, or of the need to make a difficult choice between the two in specific cases. What principles one applies in making this choice, the decisions do not tell us. In a legal system which values consistency, this silence is problematic. If the rules and principles on which a choice is made are unclear, it is difficult, if not impossible, to determine whether the courts have, in fact, been consistent in deciding similar cases – or, indeed, whether two cases were in fact similar in

86 See e.g. *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, where the court held that there were “cogent reasons of public policy for holding that no common law duty of care should be owed” (*ibid.* [115] per Lord Rodger)

87 See e.g. *Tomlinson v Congleton Borough Council* [2003] UKHL 47 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15

substance.⁸⁸ It is for this reason that the growing divide between academic and judicial approaches to the public-private relationship in tort law is a cause for concern – not so much because it would, if it continues, consign to irrelevance the role of academic tort scholarship, but also because it produces an impoverished vision of tort law where judges, deciding from case to case, lack the professional space to articulate a framework for tort that goes any way beyond “shreds and patches”, and the majority of academics, clinging to their singular visions of tort law, refuse to do so.

What, then has prevented the emergence of more closely integrated accounts in tort law? Why have we, made so little progress in capturing the “modern interweaving of public and private”, as Steve Hedley put it, within our theoretical frameworks?⁸⁹ And how can we present a theoretical account of the relationship between tort law’s private and public functions that avoids the monist dogmatism that is so accurately captured in ‘The Canengusian Connection’ but, at the same time, also avoids lapsing into a purely case-by-case approach with little role, if any, for the formulation or articulation of principles, as a simple reading of judicial decisions would suggest? In the next section, I return to the analogy with christology with which I began this essay and argue that it provides a framework which lets us analyse the roots of this problem, and which points the way towards an approach that lets us start bridging this gap.

4. Rethinking tortology

The core problem of understanding how one entity can have two very different natures is one which Christian theology has had to deal with for a very long time. In sharp contrast to tort theory, there is a virtual consensus in contemporary Christian thought that these two natures coexisted and were united – schools that held otherwise have for the most part been consigned to the category of extinct heresies. There is also a consensus that the study of the nature of Christ must be informed by his works – what he actually said and did.⁹⁰ It is not identical to the study of his works – that is

88 Cf. Englard’s criticism that this would render the law incoherent. Izhak Englard, ‘The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law’, in: David G. Owen, editor, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 183–195 at 186

89 Hedley (n. 7) 203.

90 Gerald O’Collins, *Christology: A Biblical, Historical and Systematic Study of Jesus* (Oxford: Oxford University Press, 2009) 1.

the subject of another sub-discipline within theology called soteriology – but it is inseparable from it, because the gospels – and Christian doctrine – identify him through his words and actions.⁹¹

The differences that continue to exist in christology, and which underlie contemporary debate, are rooted in differing perspectives as to the role and importance one ought to assign to historical and social scientific argument as opposed to arguments from scripture. The similarity of this dichotomy to the internalist–externalist dichotomy in tort scholarship – the phraseology of ‘external’ and ‘internal’ accounts is also used to describe christological positions – makes a comparison particularly relevant. As I discuss in this section, an examination of the various positions represented in modern christological debate sheds a significant amount of light on what exactly is missing in the five opinions that make up ‘The Canengusian Connection’ – and, more generally, in modern academic tort scholarship. This, in turn, points to the reasons why academic scholarship is so poor a mirror of actual judicial attitudes to tort, and to reasons behind the growing gap between academic and judicial accounts of the public-private relationship in tort law.

David Ford classifies modern christological positions into five typological categories, based on their positions on historical and scriptural argument.⁹² At one extreme (Type 1) are the theorists whose starting point is in modern thinking, to which they try to fit traditional scriptural teaching, rejecting the portion of those teachings that do not fit. At the other extreme (Type 5) are the theorists whose starting point is scripture, and who reject all external frameworks as having no relevance to understanding the nature of Christ. In between these two extremes are three other, more moderate frameworks. Type 2 – typified by the theology of Rudolf Bultmann – seeks to reinterpret traditional teaching in modern terms, and to present theological claims in “rational, general, universal” terms – in other words, stripped of the traditional ‘mythological’ language and the world-views that were prevalent at the historical moments when key doctrines were formulated. Type 3 sees the possibility of a range of external and internal descriptions of Christ – for example, the Christ of history and the Christ of faith – which are in harmony, but as at the same time so distinct that it is impossible to integrate them within a general all-encompassing framework. Type 4 agrees with the

91 David Ford, ‘Christology’, in: Adrian Hastings, Alistair Mason and Hugh Pyper, editors, *The Oxford Companion to Christian Thought* (Oxford: Oxford University Press, 2000) 114–118 at 114.

92 Ford (n. 91) 117-118.

preceding type as to the existence of a variety of frameworks, but takes the view that external frameworks – of the sort espoused by Types 1, 2 and 3 – cannot be permitted to dictate our understanding of Christ. The essential framework for this must come from traditional Christian testimony; however, within this framework there is room for dialogue with other disciplines.

In ‘The Canengusian Connection’, by contrast, the positions taken by the judges cluster around the extremes. Doctrin CJ, with her emphasis on the law, and the law alone, rejecting all considerations of policy or, indeed, of the possibility of external insight, is the precise counterpart of Type 5 theorists, representing in this respect most ‘internalist’ theorists of law. But so, too, is Wright J, and the particular version of the corrective justice school his decision represents. His willingness to engage with the idea of rights might suggest a willingness to look to other frameworks – notably, Aristotelean ideas of commutative justice, Kantian notions of right and other similar ideas drawn from the Western tradition of moral philosophy. However, the writings of the corrective justice writers he represents make clear that this engagement is only possible to the extent these ideas are already immanent in the law. Purely moral arguments, even if non-instrumental in nature, must be held to be extrinsic to proper legal discourse – to do otherwise is to reject the law’s coherence and autonomy.⁹³ External frameworks cannot and should not be permitted to dictate our understanding of tort law. There is, in other words, no representative of Type 4 theories amongst the Canengusian judges, in that none of them shows a willingness to engage in the trans-disciplinary dialogue that is its hallmark.

At the other extreme, Prudential J represents Type 1 almost perfectly, in treating modern thinking – in his case, risk avoidance – as being the appropriate starting point, and rejecting all of traditional doctrine that does not fit within this framework. And, once again, so does Mill J. Despite his seeming acceptance of the framework of tort law – unlike Prudential J, he does not recommend its abolition – he, too, rejects all traditional doctrine. There is no attempt to seek to reinterpret the traditional concepts or categories of tort law within the framework of his theory, or to restate the law in language that reflects modern, rational ideas, stripped of the terminology associated with older world-views. Instead, he calls for a

93 Weinrib (n. 12).

wholesale replacement of traditional tort doctrine with a new, efficiency-based principle.

Outside the limited world of ‘The Canengusian Connection’, things are slightly better, but not significantly so. Tort scholars in the real world do not show the disdain for other approaches that the Canengusian judges do. With the exception of a few extreme purists (such as the neo-Arian law-and-economists discussed above) scholars who principally focus on the public aspect of tort law acknowledge that it has a private aspect, pay attention to the work discussing it and acknowledge that it makes an important contribution to tort scholarship. Similarly, scholars who focus on the private aspect of tort law, too, frequently acknowledge the insights which studies of its public aspect have to offer (although, again, they too have their contingent of modern-day Monophysites who deny the possibility of there being a public aspect to tort law). There are even a small number of tort scholars who have attempted to present integrated theories of tort law that acknowledge its melding of public and private natures. Some – such as James Gordley⁹⁴ and Richard Wright⁹⁵ – have sought to do so within a broadly Aristotlean framework, or related frameworks that conceptualise the natures in terms of distributive and corrective justive.⁹⁶ Others have looked elsewhere. Izhak Englard, for example, has attempted to use the Copenhagen interpretation (of quantum mechanics) as a framework within which to integrate the public and private aspects of tort law.⁹⁷

Yet this has not produced the tort law equivalents of the intermediate typologies discussed above. For all that public-oriented theorists acknowledge the importance of the theories exploring the private structure of tort law, they rarely attempt to produce their own doctrinal accounts, which reinterpret the traditional private-oriented doctrinal concepts in which the law is expressed in fresh, public-oriented terms, as Bultmann and other Type 2 theorists of christology have done. The same applies to private-oriented theorists. Even those who appreciate the value of studies of the public aspect of tort law seldom consider the implications of these studies for their understanding of the structure of tort law. It is not just the framework of their understanding of the nature of tort law that comes from

94 Gordley (n. 4).

95 Wright (n. 61).

96 See e.g. William Lucy, *Philosophy of Private Law* (Oxford: Oxford University Press, 2006) 376-418; Dagan (n. 8)

97 Englard, ‘Complementarity’ (n. 88).

traditional private-oriented approaches, but also the entire content. Integrated theories, too, have not found the place at the heart of mainstream academic tort theory that the judicial approaches discussed in section 2 suggest they should have.

Table 1, which locates the Canengusian judges and some of the theorists discussed in this paper on a tortological spectrum derived from the five Christological typologies, highlights this divide. All private theorists fall within Type 5 – the canonical internalist position. And whereas internalists (Type 5) are spread across the possible range of opinions on the private-private question, externalists cluster around the public end of the spectrum. Even worse, type 2 is not present at all, reflecting the failure (discussed above) of externalists to produce their own reinterpretations of tort doctrine, and types 3 and 4 are only present in a few, isolated ‘thought’ pieces rather than in a systematic literature.

Nature	Type 5 (internal)	Type 4	Type 3	Type 2	Type 1 (external)
Private	Wright J Pollock Birks ‘Corrective Justice’				
	Mixed	Gordley Wright	England		
Public	Doctrin CJ Addison	Green			Mill J Lefft J Prudential J Posner

Table 1: The modern tortological spectrum
The Canengusian judges are highlighted in bold.

The result is an academic tort scholarship that suffers from many of the flaws that led the German theologian Dietrich Bonhoeffer to produce his famous critique of twentieth century Christian theology. Bonhoeffer’s starting point was his argument that the Christian theology of his day was complicit in reducing the role of God to those few gaps that science could not fill. As the world increasingly came of age, Bonhoeffer said, man found

that he was increasingly able to do without God. Liberal theology reacted to this by accepting the increasingly limited role that was assigned to God, whereas conservative theology reacted by attempting to convince the world that it in reality could not live without God. Bonhoeffer took the view that both approaches were deeply flawed. They produced a God inhabiting the ever-shrinking domain of areas which modern secular knowledge could not answer. When the day came when secular knowledge was capable of answering the ‘ultimate questions’, no role would be left for God. This sort of theology, he said, misunderstood and misrepresented the nature and role of Christ.⁹⁸

Bonhoeffer’s idea of a ‘God of the gaps’ should be familiar to tort scholars. Common law scholars, lawmakers and judges have struggled to define the scope of tort law almost since the time of its recognition as an independent area of law. Broom in his commentaries on common law faithfully followed the wording of the Common Law Procedure Act 1852, and defined a tort as “a wrong, independent of contract.”⁹⁹ This phrase was also adopted by Underhill as the title of his treatise on tort, and with modifications continues to be used to this day. Salmond on Torts, for example, defines a tort in the following terms: “A tort is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or a trust or other merely equitable obligation.” Attempts to remedy the negative phrasing of this definition have usually ended up arguing for erasing the distinction between a breach of contract and tort, and treating the former as part of tort law rather than contract law. Whatever the academic merits of this argument, it tells us very little about what distinguishes what we today commonly understand as tort law.

Negative definitions of this type suffer from the same problems for which Bonhoeffer criticised accounts of theology which led to a “God of the gaps”, namely that they tell us very little positive about what tort is for. But so, from the perspective of Bonhoeffer’s critique, do accounts of tort law that treat it as being principally a means for the enforcement of rights or principles whose existence is independent of tort law. Tort law, in these accounts, occupies whatever domain the law at any moment chooses to assign to it by deciding to create, or withhold, particular rights. This domain

98 Dietrich Bonhoeffer, *Letters and Papers from Prison: The Enlarged Edition* (London: SCM, 1971) 325-327.

99 Herbert Broom, *Commentaries on the common law, designed as introductory to its study* (London: W. Maxwell, 1856) 658.

shrinks or expands at the choosing of the legislature (or other system that is claimed to be the source of the rights upheld by tort law). If, for example, the law chooses to remove accidents from the domain of tort law and assign them to some other branch of law, as Prudential J so strenuously argued it should, then so it will be. There is nothing that we can deduce from tort law itself about its proper role. It has been reduced to the status of a mere means of enforcing principles obtained from elsewhere, not a source of principle in its own right. Yet, much as Bonhoeffer argued that contemporary theologies misrepresented the true nature and role of Christ, and as the account of judicial tortologies in the previous section demonstrates, this is patently not how judges view tort law and does not reflect the nature of tort law as practised in the courts.

How, then, might we structure a theoretical framework that is capable of representing the interwoven character of public and private in tort law, by re-integrating the academic study of the structure of tort law and of the public impact of tort law? Bonhoeffer took the view that the problem was, fundamentally, a problem of christology. Christology, Bonhoeffer argued, frequently asked the wrong questions. It either spent too much time considering the question of ‘how’ or ‘whence’ – how it could ever be possible for two natures to be united in one person, or whence these two natures came. Bonhoeffer dismissed these as, fundamentally, being concerned with the ‘alchemy of the incarnation’ rather than with the central question of Christology.¹⁰⁰ To get to the root of this question, Bonhoeffer said, requires a more nuanced and positive Christology, and a positive definition of the role of the church and Christ which placed Christ at the centre of human existence, not its margins. Part of the answer, according to him, lay in realising that a focus on Christ’s works as a means of understanding his nature was in effect an evasion of the central questions of christology. Rather than starting with the works and proceeding from there to the nature, therefore, Bonhoeffer argued that ‘act’ and ‘being’ must be seen as part of an integrated whole. Christology must draw upon the study of Christ’s words and deeds, but it must never be reduced to the study of his words and deeds – its questions are more fundamental.¹⁰¹ Christ must, instead, be understood through his presence in the world and through his presence in history, and in either case must be placed at the centre of our

100 Dietrich Bonhoeffer, *Christology* (London: Collins, 1966) 27-37.

101 *Ibid.* 37-40.

interpretation. Whilst other disciplines must be engaged with, it is Christ that must be the starting point, not the world.¹⁰²

There are analogies between Bonhoeffer's approach to the problem of the union of divine and human in Christ and the general problem of the union of public and private natures in tort law, which point to how and why tort theory falls short. The Canengusian judges – again, like many academic theorists – either start with a focus on the functioning of tort law, i.e. its works (Prudential J, Lefft J and Mill J), or on its structure, i.e. its nature (Doctrin J and Wright J). The result is that none of them considers the works and structure as aspects of an integrated whole, as Bonhoeffer suggests in the context of theology. This then influences the manner in which they relate to insights offered by other disciplines. Mill J and Prudential J are led by the findings of other disciplines to the extent that these disciplines, rather than tort law, form their starting points. Wright J and Doctrin J, by contrast, reject other disciplines altogether in their eagerness to place an autonomous understanding of tort law at the centre.

Courts, by contrast, are less susceptible to this problem. Of their nature, courts deciding cases are both embedded in the structure and doctrine of tort law, and at the same time form an inseparable part of the working of tort law and of its effect on society. As a result they are, intrinsically, far likelier to view tort law as a combination of its works and its nature. The absence of an equivalent bridge in academic tort scholarship is a major factor contributing to the growing divide between academic and judicial perspectives on the public-private relationship in tort law. In drawing our attention to this existence of this divide and the breadth of this gap, 'The Canengusian Connection' both highlights the limits of academic tort theory and gives us tools to diagnose the reasons for these limits.

5. Conclusions

The discussion thus far has focused on using christology to highlight the reasons behind the problems in modern academic tort theory to which 'The Canengusian Connection' draws our attention. Much more work needs to be done before we can attempt to outline a theory that makes positive use of Bonhoeffer's insights, but I conclude by offering an example from legal history to suggest how we might go about formulating an integrated model.

102 *Ibid.* 43-47, 71-77.

Around fifty years ago, Vilhelm Lundstedt – a Swedish jurist who was a leading proponent of Scandinavian Legal Realism – in the course of a critique of American realist theories of the law of tort pointed out that Anglo-American writers rarely asked the question of why the *state* was at all involved in tort law. He argued that they tend to put forward various theories as to what they believed the purpose of tort law to be – the protection of certain interests, the achieving of corrective justice, and so on – but they hardly ever bothered to investigate the extent to which these theories were supported by the historical record. This, he argued, fundamentally hampered the ability of Anglo-American jurisprudence to present a theory of tort law that conformed to the experience of the law in the real world.¹⁰³

With some exceptions (e.g. James Gordley), this criticism remains valid today. Whilst a number of theorists have attempted to identify and describe the principles or logic inherent in tort law, less attention has been paid by these theorists to the question of why the state chooses to give effect to these principles or to a system based on this logic¹⁰⁴ – in other words, to what Dorfman in a recent paper described as the “public morality” of tort law.¹⁰⁵ This question is, however, much more frequently asked in legal history, and the picture when we examine specific moments in legal history is of close integration between the public and private aspects of the law.

Consider, for example, the mediaeval writ of trespass, which was the earliest discernable direct ancestor of the modern law of tort. ‘Trespass’, as numerous historians have pointed out, in those days simply meant ‘wrong.’ The wording of the writ of trespass tells us that an action in trespass lay where the wrongful act constituted a breach of the king’s peace. By the thirteenth century, this phrase had lost all practical significance. In theory, it meant that the litigant had to demonstrate that the wrong was done to him *vi et armis*, but histories of the law of obligations record how litigants creatively

103 A Vilhelm Lundstedt, *Legal Thinking Revised* (Stockholm: Almqvist and Wiksell, 1956) 337-396.

104 Even where the question is considered, it is usually in the form of an ought – why *might* a state justifiably be entitled to create a system of tort liability – rather than the question of why states *actually* create systems of tort liability. See e.g. Tony Honore, ‘The Morality of Tort Law’, in: David G. Owen, editor, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 73–95 at 76-78

105 Avihay Dorfman, ‘Can Tort Law be Moral?’ (2010) 23 *Ratio Juris* 205–228 at 206.

presented their facts to satisfy the formal requirement of force.¹⁰⁶ In origin, however, the term had a much more profound meaning, which gives us a clue as to why the mediaeval state concerned itself with the redress of private disputes. Amongst Germanic tribes, one way for a strong leader to legitimate his authority was by offering the protection of his peace. This was originally confined to protecting a favoured few, but it grew from there to cover the entire body of the king's 'subjects'¹⁰⁷ This idea eventually crystallised into the notion of the "king's peace," a peace that extended over everyone within the kingdom.¹⁰⁸ That, then, was the original idea behind the condition that a writ of trespass would only lie for a breach of the king's peace. The state, such as it was in mediaeval times, began to provide a remedy against certain serious private wrongs to reinforce the idea of his protection of the populace, and with a view to preventing them from escalating into worse disputes that threatened the peace of the community, from the maintenance of which the king drew his legitimacy. The king was, however, originally not the only source of peace that existed. There was also a notion of a local or communal peace, which was preserved by local institutions – such as local courts – which also included the protection offered by a local noble to places and individuals under his control.¹⁰⁹ Until the centralisation of authority in the thirteenth and fourteenth centuries turned them into inferior fora that only dealt with relatively minor matters, these courts had heard a range of matters.¹¹⁰ The emphasis that the king's courts would only hear cases that involved a breach of the *king's* peace, therefore, served to separate the matters that properly fell within his domain – that were the subject of his interest, because they involved force or affected property or had some other relevant impact – from those that did not.¹¹¹ There were, here, a complex mix of public factors that lay at the heart of the decision to offer a private remedy of the particular scope that was offered.

106 Ibbetson gives the example of a case where the negligence of a smith in shoeing a horse was described as an attack by the blacksmith, *vi et armis*, with swords and arrows, upon the claimant in which the blacksmith killed the horse by driving a rusty nail into its hoof. Ibbetson (n. 32) 45.

107 Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002) 26-27.

108 *Ibid.* 28-30.

109 Harding (n. 107) 79-81.

110 Robert C Palmer, *The County Courts of Mediaeval England, 1150-1350* (Princeton: Princeton University Press, 1982) 220-296.

111 Robert C Palmer, *English Law in the Age of the Black Death, 1348-1381* (Chapel Hill: University of North Carolina Press, 1993) 160.

Less benignly, as Palmer has argued, public factors also lay behind the expansion of the jurisdiction of the king's courts through the introduction of the action on the case. The action on the case was largely a product of the Black Death which, by wiping out a large proportion of the population of England, created serious threats to social stability and had the potential to radically alter the relations between the upper and lower orders of society. The upper orders responded to this threat by drawing together and by altering the law to permit themselves to more easily enforce obligations as against themselves, and more vitally against the lower orders. The action on the case was one of the tools introduced as part of this reaction, along with other devices as diverse as the Statute of Labourers, the regulation of the church and the action of covenant, as the result of a deliberate social policy.¹¹² Once again, therefore, the provision of a private remedy had at its heart a public purpose.

As these examples show, the interweaving of the public and private aspects of tort law is not simply modern, but has roots that go to the origins of the actions that evolved into tort. The starting point in the formulation of integrated theories must, therefore, be the realisation that the public and the private natures of tort law cannot realistically be regarded as being totally separate, as some extreme theorists would have it. At the same time, however, it is also insufficient to acknowledge the combination, but regard it as a mere mixture caused by the fact that legislative intervention has introduced policy considerations into tort law. The private and public aspects of tort law must, instead, be understood as being inextricably combined, such that the public flows from the private and the private from the public, with each present and fulfilled in the other.¹¹³ Any discourse on tort law which fails to understand this or place it at its centre will end up presenting a partial and ultimately unhelpful account of this branch of law that can see nothing more than "shreds and patches". Drawing our attention to the fragmented nature of such tort discourse is the most important – and most enduring – insight 'The Canengusian Connection' has to offer.

112 See *Ibid.* and esp. 9-27 and 220-293.

113 Cf. Robertson (n. 74) 279-280, which emphasises the need to understand private law's bipolarity and the role of policy considerations in shaping its rules.