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A Spectrum of Actions for Wrongs: From Tort Law to Pure Enforcement

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I. General Introduction to Private Enforcement

A major legal trend emerging in the twenty-first century is a renewed preference for private enforcement.[1] Increasingly, states are granting individuals private actions to achieve public goals, such as safeguarding market competition or protecting the environment.[2] What is new is that instead of using the means of public law, plaintiffs are enlisted as enforcers of the law.[3] When they sue, they not only demand redress for their injury but also help the state enforce its public laws by deterring infringers. Polluters, cartelists and insider traders thus have an additional, private regime

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[1] S Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the US* (Princeton, Princeton University Press, 2010); RA Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA, Harvard University Press, 2019); F Bignami and RD Kelemen, 'Kagan's Atlantic Crossing: Adversarial Legalism, Eurolegalism, and Cooperative Legalism in European Regulatory Style' in TF Burke and J Barnes (eds), *Varieties of Legal Order* (New York, Routledge, 2017); A Wigger and A Nölke, 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement' (2007) 45 *Journal of Common Market Studies* 487.

[2] B Ewing and DA Kysar, 'Prods and Pleas: Limited Government in an Era of Unlimited Harm' (2011) 121 *Yale Law Journal* 350; P Cane, 'Using Tort Law to Enforce Environmental Regulations?' (2002) 41 *Washburn Law Journal* 427. 'Tort law' is provisionally defined here as extracontractual liability for legal wrongs, not the common or civil law definition of what tort law is.

[3] EH Caminker, 'Private Remedies for Public Wrongs under Section 5' (1999) 33 *Loyola of Los Angeles Law Review* 1351; AS Gold, 'Private Rights and Private Wrongs' (2016) 115 *Michigan Law Review* 1071.

of enforcement facing them. From a practical perspective, this entails that individuals and firms are increasingly subject to ex-post liability actions and not an *ex-ante* regulatory regime.[4] From a legal perspective, the distinction between private and public law, always tenuous, seems even harder to maintain. In fact, private law may need to change to adapt to enforcement considerations if it is to become an effective instrument in attaining policy goals.

The main actors behind this shift have been the United States (US) and the European Union (EU). The US legal system has been pioneering in mobilising plaintiffs through both tort law and federal statutes to act as enforcers – 'private attorneys general'.[5] This tendency only increased after the wave of deregulation starting in the 1970s, even though significant backlash has since been observed in the face of the tort reform movement. Political scientists, like Robert Kagan, have called this distinct American phenomenon 'adversarial legalism'.[6] Important features of this judicialised model of regulation are class action suits, large law firms that are highly specialised, extensive discovery rights, trial management, litigation funding, and jury trials.[7] Crucially, adversarial legalism also involves changes to substantial law, such as punitive damages, market share liability, tailor-made rules on standing and laxer causation tests that might diverge from general tort law rules.[8] All these changes incentivise individuals to act as 'private attorneys

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[4] CD Kolstad, TS Ulen and GV Johnson, 'Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?' (1990) 80 *The American Economic Review* 888.

[5] WB Rubenstein 'On What a "Private Attorney General" is—And Why it Matters' (2004) 57 *Vanderbilt Law Review* 2129; H Schweitzer and K Woeste, 'Der "Private Attorney General": Ein Modell für die private Rechtsdurchsetzung des Marktordnungsrechts?' in 'Rechtsvergleichung im Vergleich der Zeiten, Rechtsordnungen und Theorien' (20 September 2020) 36 *Tagung für Rechtsvergleichung*, ssrn.com/abstract=3695965. This term can be attributed to Judge Frank in *Associated Industries of New York, Inc v Ickes*, 134 F 2d 694, 704 (2d Cir 1943).

[6] Kagan (n 1).

[7] ibid 43.

[8] See, eg, D Yablon, 'Proximate Cause in Statutory Standing and the Genesis of Federal Common Law' (2019) 107 *California Law Review* 1609. For a comparison with the EU, see K Lenaerts and K Gutman, '"Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 *The American Journal of Comparative Law* 1.

general' and align their private goal of procuring compensation with the public goal of enforcing the law.

Somewhat later than the US, the EU – driven by its decentralised political structure – began to grant rights to individuals to achieve the aims of its founding treaties.[9] In the post-war years, the influence of US law became increasingly conspicuous on the European continent for various reasons, such as the increasing levels of transatlantic commerce.[10] Litigation as a method to enforce policy exhibits many different features that were initially foreign to European legal systems but are slowly taking root. EU law has been instrumental in this regard. In the words of the European Court of Justice, the 'vigilance of individuals' was essential in supervising the completion of the Treaty goals.[11] Entrepreneurial plaintiffs have long used private actions to effect change to their national laws by referring cases to the ECJ.[12] The Commission too made heavy use of private actions to supplement the enforcement of its legislative initiatives.[13] Collective actions, especially opt-out class action suits, once a standout feature of American law, are now expanding in the Member States, leading to a completely novel litigation style in private law.[14] Substantive and procedural changes have been less far-reaching in Europe than in the US, leading *Kelemen* to name the equivalent phenomenon 'Eurolegalism'.[15] Certainly, however, EU law has considerably

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[9] RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, MA, Harvard University Press, 2011).

[10] On this phenomenon, see R Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 243.

[11] Case C-26/1962 *NV Algemene Transport – Van Gend and Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1, 13.

[12] See generally F Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Cheltenham, Edward Elgar, 2015).

[13] ibid, see esp the Introduction.

[14] TL Russell, 'Exporting Class Actions to the European Union' (2010) 28 *Boston University International Law Journal* 141. On collective actions and how they challenge existing theories of private law, see ch 12 of this volume.

[15] Bignami and Kelemen (n 1) 36.

changed national private laws by introducing new rules on collective redress, new remedies and, most importantly, new grounds of liability.[16]

However, this chapter will not attempt an analysis of the increasing judicialisation of policy questions.[17] Rather, the focus will be on the field of private enforcement from a theoretical tort law perspective, aiming at categorising the various private enforcement actions as *existing in a continuum with tort liability*. The aim is to explore what happens to the general tort rules when operating in a private enforcement regime. I focus on the distinction between private and public law, which I claim is more gradational than generally assumed and can explain the interaction between enforcement actions and private law. In section II, I posit that private enforcement forms part of a broader tendency regarding the blurring of the public–private divide in law that has led to an influx of public law elements into private law. I also discuss what this influx means for private law. I claim that the term 'tort law' obscures a distinction between a core of 'private/tortious' rights of action that aim broadly at redressing wrongs and a distinct subcategory of other rights of action more oriented towards enforcement. Then, in section III, I analyse private enforcement as a coherent subcategory of tort law, separate from its core. Testing this hypothesis, I develop a model of thinking about these distinctions, dividing all civil actions based on the extent to which they aim at redressing wrongs or enacting public policy. The main claim is that private enforcement can be thought of as a hybrid category along this spectrum, between pure private law and pure enforcement (or regulation). In the conclusion, I expound on why it is desirable that this hybrid cause of action should be thought of as a special category of tort law from a theoretical and practical perspective.

II. Private Enforcement as Private Law

A. Private Law and Relationality

[16] On the field of tort law see, eg, P Giliker, *Research Handbook on EU Tort Law* (Cheltenham, Edward Elgar, 2017).

[17] In this sense, I will not analyse private enforcement generally, which can also extend to contract, property or restitution law.

Private enforcement happens largely through actions for damages, either individual or collective.[18] These actions are understood as tortious in many jurisdictions. There are many practical problems arising in terms of how to organise private law litigation to achieve the new-fangled 'public' goals of the law. American law has been said to use certain actions as 'the default regulator of safety and economic power'.[19] These actions mobilise private plaintiffs 'to identify and deal with problems that have not been adequately addressed by other institutions'.[20] Private law, when operating in this mode, does not just have to give a right to the victim to sue the infringers for compensation but has many more factors to consider. For instance, it must factor in which plaintiffs are effective enforcers ('private attorneys general') and which actions should be deterred or encouraged, given the likelihood of errors by courts. It also must find a way to achieve coordination with public enforcement so that civil actions and public fines will complement each other.[21] Policy arguments are necessary for the operation of this area; in fact, they are ingrained into it. Both the legislature, when designing the regime of liability, and the courts, when interpreting it, must take them into account.

Gallons of ink have been spilt on private enforcement and its advantages and drawbacks. This literature compares the relative strengths of private and public enforcement and discusses its legitimacy from an institutional standpoint.[22] The potential for abusive litigation is often

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[18] Again, here I use 'tort' in the wide sense, as the law of liability for civil wrongs. The narrower definition used in common law systems, which could exclude some actions when not based on common law, will be indicated with the designation 'common law torts'. I prefer the designation 'tort law' to the unwieldy, 'non-contractual liability arising out of damage caused to another': *cf*, eg, C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich, Sellier European Law Publishers, 2009) bk VI.

[19] ML Rustad, 'Torts as Public Wrongs' (2010) 38 *Pepperdine Law Review* 433, 522.

[20] RB Stewart, 'Crisis in Tort Law? The Institutional Perspective' (1987) 54 *University of Chicago Law Review* 184, 198; L Green, 'Tort Law Public Law in Disguise' (1959) 38 *Texas Law Review* 1.

[21] See, eg, a list of considerations in SB Burbank, S Farhang and HM Kritzer, 'Private Enforcement' (2013) 17 *Lewis & Clark Law Review* 637, 669.

[22] ibid.

highlighted as a major preoccupation.[23] However, from a private law-theoretical perspective, there needs to be more awareness of the increasing prevalence of private enforcement actions. The main reason is that private enforcement cuts right through what is arguably the most fundamental distinction in tort law theory: between instrumentalist and non-instrumentalist viewpoints.[24]

The consequentialist/instrumentalist account perceives tort as a means to an end. Tort should maximise welfare – as all law – or tort should aim to achieve a specific policy objective.[25] Private enforcement with its deterrence or regulatory objective fits well there. The other group of theories is non-consequentialist and grew largely as a reaction to instrumentalist accounts.[26] They view tort law as redressing wrongs or mirroring moral or legal right/duties existing between a wrongdoer and a victim.[27] Liability is based on a relational wrong or a (unjust) transaction between the two parties. Thus, any remedies, foremost compensation, express the *correlativity* or *relationality* of that right and duty.[28] This is why the victim can sue the wrongdoer – they can demand the correction of the wrong. These latter theories make a point of accounting for the features of tort law as it currently stands, criticising instrumentalist accounts as not giving an accurate picture of what tort is about and as struggling to explain why private law retains many

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[23] See, eg, JH Beisner and CE Borden, 'Expanding Private Causes of Action: Lessons from the US Litigation Experience' (Institute for Legal Reform, 2005).

[24] J Gardner, 'What Is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 *Law & Philosophy* 1; RA Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 *Indiana Law Journal* 469; S Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134 *LQR* 214.

[25] WM Landes and RA Posner, 'Modern Tort Theory' (1980) 15 *Georgia Law Review* 851; S Shavell *Foundations of Economic Analysis of Law* (Cambridge, MA, Harvard University Press, 2003).

[26] See, eg, the seminal work by EJ Weinrib, *The Idea of Private Law* (Oxford, Oxford University Press, 2012); RA Epstein, 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 151; JL Coleman, 'The Structure of Tort Law (1988) 97 *Yale Law Journal* 1233.

[27] See JCP Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 *Georgetown Law Journal* 513, and a more sceptical discussion in S Hershovitz, 'Harry Potter and the Trouble with Tort Theory' (2010) 63 *Stanford Law Review* 67.

[28] See, eg, P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *OJLS* 471.

relational features. In this way, they highlighted the importance of the public–private divide.[29] I will call those non-instrumentalist theories and their main iteration in tort law *wrongs-based theories*.[30]

While this debate has raged for many years in Anglo-American legal thought, in continental Europe, the scholarly analysis of private law remains more doctrinal.[31] Arguably, this doctrinal methodology stands closer to non-instrumentalist approaches for the same reason: it starts from the law as it currently stands and accepts at least prima facie the validity of its concepts. It is also less reliant on normative perspectives, like (some of) law and economics.[32] In civil law systems, redressing the wrong and procuring compensation from the wrongdoer is the main goal, whereas deterrence remains a secondary, if not incidental, goal.[33]

Hence, private enforcement might be confusing for tort scholars of both strands. Here, private law seems to do both things at once and does so *explicitly*. Private law remains relational but only to a degree – perplexingly for the instrumentalists. However, plaintiffs sue defendants not just for compensation but to enforce public policy by deterring potential infringers. Those actions are thus complex and play a more diverse role.[34] Crucially, damages suits will substitute for what could be perceived as public law functions. Toxic torts or environmental liability help set industry

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[29] For a brief overview of such criticisms see Goldberg (n 27) 524ff.

[30] This is not meant to side with a specific account at this stage, but is shorthand for many different theories including corrective justice, civil recourse, and wrongs- (and rights-) based views, which all arguably share core features.

[31] On the limited reception of law and economics in European legal thought, see E Mackaay, *Law and Economics for Civil Law Systems* (Cheltenham, Edward Elgar, 2013).

[32] See comparative overview, see H Koziol, 'Comparative Conclusions' in H Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Austria, Jan Sramek Verlag, 2015) 746ff.

[33] See from a German perspective, E Deutsch, 'Die Zwecke des Haftungsrechts' (1971) 26 *Juristenzeitung* 244; from an English law point of view, see G Williams, 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 137.

[34] Rustad (n 19) and Ewing and Kysar (n 2) (analysing the importance of tort as a regulatory mechanism).

standards, product liability impacts product safety, and IP liability protects the intellectual property of creatives and firms.[35]

Therefore, from a non-instrumental perspective, relationality between a duty and a right is not the same as in most torts. Deterrence-based approaches better fit the picture of an area of law that explicitly aims to minimise infringements. At the same time, the same tort rules are often applied, including features such as causation, fault and compensatory damages, which are essential elements of the non-instrumentalist account. The upshot is that as private enforcement is neither about the redress of private wrongs nor about deterrence *only*, neither theory fits.

B. Relational Tort Rules and Private Enforcement

This theoretical impasse can explain the numerous practical problems that arise when applying tort as private enforcement. First, tort law is based on general clauses (as in most civil law systems) or, in any case, makes use of general concepts, such as proximity, foreseeability and fault.[36] Even in special statute-based areas of private law, claims that arise are not exhaustively regulated by the statute.[37] There is either a general part that utilises common concepts drawn from tort, or there are open-ended terms that need to be filled out. Thus, statutory rules on private enforcement, such as environmental or product liability, inevitably must be complemented by general private law rules, which were designed for a different purpose and have an interpersonal character. One would expect that when tort law does not give an answer, enforcement considerations would somehow seep into these concepts.

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[35] Interestingly, some of those areas belong to tort law under the civil law traditions but not in the other jurisdictions, where 'common law' tort is more restrictively perceived; BC Zipursky and JCP Goldberg, 'Torts as Wrongs' (2010) 88 *Texas Law Review* 917 (emphasising that tort is a special type of civil wrong).

[36] See generally, G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006).

[37] See, eg, the German traffic liability law, or the railway liability statutes. Similar observations can be made for many statutory causes of action both in the US and in Europe.

Here is an example. Many non-consequentialists insist that fault liability is central to tort law, as it attaches to ideas of responsibility.[38] In assessing fault, the relationship between the two parties should be the main consideration due to the correlation between rights and obligations.[39] Does the connection become looser the more we approach the domain of private enforcement, given that this link between defendant and plaintiff is less important due to the additional enforcement goal? In fact, why should we care so much about fault when the law aims to enforce a general goal? At the very least, we could relax the requirements to ensure that enough plaintiffs win their cases so that the conduct is deterred.[40] It thus seems these accounts cannot fully explain all of tort practice in areas of private enforcement, as it ignores reasons governing liability that are external to the interparty relation. Tort must be adjusted to accommodate both aims. Nonetheless, it is hard to find a compromise between two goals that seem to contradict each other.

Comparative research can be illuminating here. In the US, many private enforcement damages actions which would be considered tortious in Europe are instead based on federal statute.[41] They are not considered part of tort law at all and have different elements and goals.[42] Nonetheless, they also rely on tort law-like concepts such as causation, proximity, etc.[43] Moreover, those actions form part of private law in a broad sense: they concern horizontal relationships

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[38] Of course, many of them can accommodate instances of strict liability one way or another, *cf*, though, Weinrib (n 26) 167ff.

[39] Cane (n 28).

[40] Of course, certain consequentialist and deterrence-based accounts might argue *against* relaxing fault standards. My point is that fault is not *essential* to these accounts, so there is no principled reason to retain the fault standard, as some non-consequentialists would argue

[41] SF Sperino, 'Statutory Proximate Cause' (2012) 88 *Notre Dame Law Review* 1199. See, eg, the Racketeer Influenced and Corrupt Organizations (RICO) Act 18 USC §§ 1961–1968 (1970) and the Clean Water Act (CWA) 33 USC §§ 1251–1387 (1972).

[42] In fact, prominent tort theorists define the area of tort law in juxtaposition to such statutory actions as antitrust damages; see BC Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 *Florida State University Law Review* 299. Likewise, one of the most prominent antitrust scholars *explicitly* states that antitrust is not tort law: H Hovenkamp, *The Antitrust Enterprise* (Cambridge, MA, Harvard University Press, 2009).

[43] Sperino (n 41).

between individuals. Several tort law rules are adopted *in toto*; in other cases, separate statute-specific tests are designed by courts. They do this to better adapt to the enforcement exigencies of each specific area, achieving the desirable level of deterrence.[44] What is more, the exact relationship between tort and statutory liability remains obscure.[45] Therefore, the American example illustrates that tort law and enforcement-oriented civil liability can be thought of as different things, each demanding different tests of causation, fault etc – even though the lines between tort and statute are admittedly blurred. At the same time, it shows that spillages between a system of enforcement and a system of rights and wrongs are unavoidable.

The theoretical impasse is exacerbated in EU law because Member State *tort* law is utilised instead of federal statutes. Tort provides the basis of the action in EU private enforcement due to the principle of procedural autonomy.[46] As a rule, the EU does not create new causes of action but relies on existing national ones, only modifying them through the principles of effectiveness and equivalence. Therefore, in the EU, Member State tort law itself will need to adapt to the needs of enforcement. In fact, it has a better chance of doing so; to the extent that national tort provisions conflict with EU law, those national rules are set aside. In this sense, the EU is a great illustration of the conflict described. The European Court of Justice has as its mission to allow enforcement considerations inherent in EU law to take effect and has prompted many changes to Member State tort laws.[47] For instance, it introduced laxer rules on causation, strict liability and particular

[44] For instance, in the private enforcement of US antitrust law, this is the rationale behind excluding from claiming damages 'ineffective' plaintiffs that could otherwise sue in tort; see CD Floyd, 'Antitrust Victims without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions' (1997) 82 *Minnesota Law Review* 1.

[45] On this see generally Yablon (n 8).

[46] Wilman (n 12).

[47] K Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist* 13. Arguing for this fundamentally instrumental orientation and rationality of EU private law, see R Michaels 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword et al (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 139.

remedies, bespoke rules on standing etc.[48] In the *von Colson* case, the ECJ posited that the purpose of EU anti-discrimination legislation dictated that the national law remedy giving effect to EU law could not just be compensatory but also had to develop a deterrent effect.[49] Other examples are the private enforcement of competition law,[50] the IP rights directive,[51] the Unfair Commercial Practices Directive, etc.[52]

Of course, the peculiarity of private enforcement is not a feature of only US or EU law.[53] Even in *purely internal situations*, the same phenomenon can be observed. In national law, private enforcement will either be based on case law, statutes or certain provisions of the civil codes. Statutes will not cover the whole action but only make pointillist modifications to general private law. Therefore, tort law again at least residually regulates the area of private enforcement. Many rules will be provided by general tort law, and we should see how abstract terms like causation or fault change to fit the aims of this area.[54] Therefore, irrespective of the private law system

[48] FG Wilman, 'The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies It Provides For' (2016) 53 *Common Market Law Review* 887.

[49] Case 14/83 *von Colson v Land Nordhein-Westfalen* [1984] ECR 1892, [28]: 'to ensure that [the damages award] is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation'.

[50] Parliamentary and Council Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1.

[51] Parliamentary and Council Directive 2004/48/EC on the enforcement of intellectual property rights, OJ L157/45.

[52] Parliamentary and Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L149/22.

[53] See very prominently Michaels (n 47). The fundamentally instrumental nature of EU private law is a misconception often shared by scholars. However, *private enforcement* is what is instrumental and not EU law per se; it just happens that the EU tends to promote forms of private enforcement. While I cannot fully defend this claim here, see G Bacharis and S Osmola, 'Rethinking the Instrumentality of European Private Law' (2022) 30 *European Review of Private Law* 457.

[54] There is a wider definition of tort law in civilian systems; in fact, the term 'tort' law is not used in many legal orders.

investigated, some areas of it seem to be less attached to the private relationship between the parties and more to the public goal of enforcement or deterrence.

C. The Public–Private Divide in Civil Actions

As defined in this chapter, private enforcement denotes the attainment of public policy goals through civil actions: it represents a peculiar public–private mix. In this section, I will analyse the main theoretical problems that arise from the blurring of private and public law. The crux of the issue is that private law, when employed as private enforcement, initially strays away from its traditional role of setting the rules for relations between individuals.[55] Public and private law become increasingly difficult to distinguish.[56] For many scholars, however, it is still important to differentiate between the two.[57] This is because private law exhibits a relational structure that reflects what happened between the two parties to a transaction (relationality). Thus, the introduction of public elements into tort law may necessitate a change in its structure. However, assuming that private enforcement cares less about this relationality or is at least oriented towards an instrumental purpose, perhaps a new category of tort law with its own principles should be carved out.

As mentioned, there is a customary image of private law as providing the playbook for individuals' interactions or a framework for persons who have bound each other by contract, who share familial ties, or who have wronged each other or engaged with one another's property in

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[55] This traditional picture exists in some way both in common and civil law systems. However, doubt was expressed even in the 1960s: see F Bydlinski, *Privatautonomie Und Objektive Grundlagen Des Verpflichtenden Rechtsgeschäftes* (Vienna, Springer, 1967).

[56] On a modern attempt to do so, see H Dagan and BC Zipursky, 'Introduction: The Distinction between Private Law and Public Law' in H Dagan and BC Zipursky (eds) *Research Handbook on Private Law Theory* (Cheltenham, Edward Elgar, 2020).

[57] See, eg, JCP Goldberg 'Introduction: Pragmatism and Private Law' (2012) 125 *Harvard Law Review* 1640, 1641–42.

some manner. The private autonomy of formally equal persons is its fundamental principle.[58] Private law is not an instrument, but is constitutive of the very freedom that we enjoy as individuals.[59] The whole structure of private law reflects this, such as via the preference for default instead of mandatory rules: the law is there to facilitate transactions, not to shape them outright.[60]

Of course, this picture of private law was itself created during the modern era. In reality, private enforcement has always been around.[61] This is because public enforcement was largely absent. For instance, even the collection of taxes – the pre-eminent domain of the state – was often outsourced to private tax collectors.[62] Many early modern regulations, such as the English statute of monopolies (the precursor of US antitrust legislation),[63] originated in the form of private enforcement, using individuals to enforce policy rather than vindicate private rights. Criminal prosecutions were often initiated by individuals rather than by the state, and it was not until late into modernity that criminal law was thought of as concerning harm to the sovereign and not just

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[58] This may be thought as outdated given the influx of human rights thought; see S Grundmann 'On the Unity of Private Law from a Formal to a Substance-Based Concept of Private Law' (2010) 18 European Review of Private Law 1055.

[59] One of the main proponents of such a theory in contact law is Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd edn (Cambridge, MA, Harvard University Press, 2015) 132: 'The law of contracts, just because it is rooted in promise and so in right and wrong, is a ramifying system of moral judgments working out the entailments of a few primitive principles–primitive principles that determine the terms on which free men and women may stand apart from or combine with each other. These are indeed the laws of freedom.'

[60] H Schweitzer, 'Vertragsfreiheit, Marktregulierung, Marktverfassung: Privatrecht als Dezentrale Koordinationsordnung' (2020) 220 *Archiv für die civilistische Praxis* 544, 545.

[61] F Parisi et al, 'Deterrence of Wrongdoing in Ancient Law' in G Dari-Mattiacci and DP Kehoe (eds), *Roman Law and Economics: Volume II: Exchange, Ownership, and Disputes* (Oxford, Oxford University Press, 2020).

[62] On the intermingling of criminal and delictual elements, see N Jansen and S Steel (trs), *The Structure of Tort Law* (Oxford, Oxford University Press, 2021) 175.

[63] Statute of Monopolies 1623 (21 Jam 1 c 3). The successful plaintiff could recover double costs as well as treble damages, a precursor of similar rules in many areas of private enforcement.

to the victim of the crime. Thus, Parisi et al argue that all tort law began as a type of private enforcement.[64]

The delineation between public and private law norms as we know it today only really came to be in the nineteenth century and persists in (partly) different ways in the civil and common law systems.[65] At some point during the process of the formation of nation-states in Europe, a clear distinction between private and public emerged.[66] As a result the actual legal system started to reflect this divide – by splitting in two. In civil law, separate systems were created to regulate vertical and horizontal relationships. Civil codes only regulated private law, whereas public law in many countries belonged to the jurisdiction of a completely different court system with its own rules and procedures.[67] In common law too, this division was introduced.[68] Thus, the sharp distinction between the two is a relatively modern phenomenon.

III. Private Enforcement is both Public and Private

There were always voices pointing out the artificiality of the public−private distinction. Legal realists insisted law is always coercive, and private law elements such as personal autonomy and freedom of contract only obscure policy choices made by courts.[69] Picking up the baton, the law

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[64] Parisi et al (n 61) 14. J Kortmann, 'The Tort Law Industry' (2009) 17 *European Review of Private Law* 789, 799ff fns 50–59.

[65] F Bydlinski, 'Kriterien und Sinn der Unterscheidung von Privatrecht und Öffentlichem Recht' (1994) 194 *Archiv für die civilistische Praxis* 319.

[66] See JH Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1968) 17 *Journal of Public Law* 3, 4 (emphasising that this distinction does not track the same lines in common and civil law).

[67] See JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford, Oxford University Press, 2000).

[68] For a historical overview see Allison (ibid).

[69] See LL Fuller, 'American Legal Realism' (1934) 82 *University of Pennsylvania Law Review and American Law Register* 429; H Pihlajamäki, 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' (2004) 52 *American Journal of Comparative Law* 469.

and economics school claimed all private law should aim at maximising efficiency, highlighted the benefits of private enforcement and praised the American tradition of decentralised private law in achieving public goals.[70] The purity of private law was seen dismissively as an artefact of formalist thought.[71] Legal doctrine did not do anything else but obscure what really was at stake in each case. Moreover, the pragmatic approach of many courts, especially in the US, did not tolerate distinctions between private and public law.[72]

A second development that shook the image of private law purity came with the tendency towards deregulation, liberalisation and privatisation that has reared its head in the last decades.[73] A general turn in the political economy of developed economies since at least the 1980s, favouring less state intervention, meant that private enforcement started gaining prominence again.[74] Regulatory enforcement increasingly relied on private attorneys general to compensate for the lack of funding for regulators' activities caused by deregulation..

Lastly, in addition to anti-formalism and deregulation, another development contributing to the erosion of the public−private divide was the growing influence of US law, notable for its reliance on private enforcers. Since its early days, US law has heavily relied on private individuals to enforce the law and created many tailor-made lawsuits and remedies to achieve this. This American style of private enforcement was sharply distinguished from the rest of the common law

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[70] GS Becker and GJ Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 *Journal of Legal Studies* 1.

[71] MJ Horwitz, 'History of the Public/Private Distinction' (1981) 130 *University Pennsylvania Law Review* 1423; D Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685 (criticising the distinction).

[72] Goldberg (n 57) 1641.

[73] BT Fitzpatrick, 'Deregulation and Private Enforcement' (2020) 24 *Lewis & Clark Law Review* 685. See also very extensively, R Podszun, *Wirtschaftsordnung durch Zivilgerichte: Evolution und Legitimation der Rechtsprechung in Deregulierten Branchen* (Tübingen, Germany, Mohr Siebeck, 2014).

[74] See Wigger and Nölke (n 1).

and dubbed 'the American peculiarity'.[75] A renewal of efforts to create a robust system of private enforcement in the US was galvanised by the strong consumer rights movement in the 1960s.[76] All those parallel shifts created a strong impetus to ignore the distinction between public and private law, including when it comes to the enforcement of the law.

Nonetheless, it is also worth noting that this development did not take place across the board. Private law continues to regulate contracts between individuals, mostly under the same rules. Torts still give rise to claims of compensation for wrongful injury because of a traffic accident or the negligence of a doctor. The tried and tested private law concepts fulfilled their mission well there, and practitioners kept relying on them.[77] It would be inconceivable (except to some lawyer-economists) not to ask that the plaintiff prove the existence of a causal relationship when they accuse a defendant of having harmed them. Moreover, fault liability remains the norm.[78] In sum, relational considerations and the traditional private law doctrine fit well with most of the existing practices in the area.[79] Private law is still taught in universities as a separate subject, even though it is famously difficult to find the exact line of delineation.[80]

Despite this, the push for private enforcement has become noticeable. Civil liability might not have even existed before, but the legislator establishes it for reasons of systematic under-deterrence in an area of public interest (securities markets, competition law, product safety). One

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[75] JM Glover, 'The Structural Role of Private Enforcement Mechanisms in Public Law' (2011) 53 *William and Mary Law Review* 1137.

[76] S Rose-Ackerman, 'Regulation and the Law of Torts' (1991) 81 *American Economic Review* 54; A Lahav, *In Praise of Litigation* (Oxford, Oxford University Press, 2017).

[77] SA Smith, 'Taking Tort Seriously' (2021) 71 *University of Toronto Law Journal* 415, 417.

[78] See generally Wagner (n 36).

[79] JCP Goldberg, 'What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform' (2006) 59 *Vanderbilt Law Review* 1075, 1077–78: '*contrary to compensation-and-deterrence theory, the tort system is* not *best understood as arming victims with the power to sue* in order to serve public goals'.

[80] On the continuing existence of the distinction as a mainstay of legal education, see A Hellgardt, 'Die Universitäre Rechtslehre und die Dichotomie von Öffentlichem Recht und Privatrecht' (2020) 7 *Zeitschrift für Didaktik der Rechtswissenschaft* 199.

hypothesis that can be advanced is that tort or quasi-tort liability seems to have split as a result. Many actions continue to primarily redress wrongs – they retain their private character. Others *mostly* or *solely* serve private enforcement. Put otherwise, tort law executes either or both 'tasks', but in varying degrees according to the cause of action. This creates theoretical problems as it often does not track national law distinctions. For this, we need to find out how private enforcement relates to and is distinguished from tort law.

IV. Private Enforcement as Hybrid Private-Public Law: The Spectrum

A. Sorting Actions for Wrongs as per the Degree of Relationality

In this section, I will develop the hypothesis set out above in terms of how rights of action interact with enforcement considerations. I will analyse torts and other civil actions as a spectrum depending upon how public or private an area of liability is. I posit that private enforcement through civil actions includes different types of claims, which are positioned in the middle of a spectrum of what can be called private law in the widest sense, ie, *all civil actions in horizontal relationships*.[81]

My main point is that no civil action that forms part of private enforcement can be understood as private law in the sense with which we are concerned. If any citizen has a right to sue in civil court for harm not to themselves but to the public (*actio popularis*), it is obvious that this is no matter of private law as defined in the previous section, because it lacks its necessary relational structure.[82] At the same time, not every area of private law can be thought of as private enforcement: in some cases, enforcement or deterrence considerations play no role. We can,

[81] I choose to frame the spectrum in terms of civil actions instead of 'torts' because the latter, as used by many scholars, carries a specific meaning that implies the existence of relational duties and rights. This does not reflect the content of certain enforcement actions that do not enact such duties. Therefore, I use this neutral term in a way to include all privately initiated lawsuits for harm incurred, irrespective of whether there is a private wrong but excluding eg contractual and restitutionary cases.

[82] This structure is normative as well as descriptive, as analysed above.

therefore, think of a civil action spectrum ranging from pure private law to pure enforcement actions that form, for all intents and purposes, part of public law.

Positioning actions in this spectrum depends on many factors, which all relate to the *relationality* necessary for conceptualising private law relationships. As mentioned, relationality forms the 'general organizing feature for justification of liability'.[83] Private law should only rectify relational wrongs and be structured accordingly. An obligation is a rope through which two parties are tied, a '*vinculum juris*',[84] and connects defendant's liability and plaintiff's entitlement.[85] Taking this relationality as the starting point in this conceptualisation, there are certain criteria that could allow us to understand where each civil action falls. All of them relate to the closeness of the relationship between the parties and their obligations. The looser this connection is, the closer we are to public law and enforcement. In turn, this relationality refers to two distinct areas: that of *primary obligations*, ie the violation of which gives rise to tort liability in the first place; and *secondary obligations*, ie the remedial structure of a tort suit, and substantive and procedural elements of liability. On the level of primary obligation, it has already been mentioned that private enforcement actions concern public harm or violations that are not strictly private. On the level of secondary obligations, most private enforcement regimes have bespoke rules such as substantive changes or procedural tools to facilitate enforcement that make the civil suit no longer revolve around two parties (think of causation rules or class actions or of the participation of regulators).

Given this clear difference shown at both the level of primary and secondary obligations, private enforcement exhibits a different structure from general tort: it is not exclusively relationally organised. This means that the closer an area is to private enforcement, the looser the relationship between the parties is on the spectrum and vice versa. The binary structure of private law begins to break down, and so does the need for a binary justification of its rules. Private enforcement is a

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[83] Weinrib (n 26) 19; A Ripstein, *Private Wrongs* (Cambridge, MA, Harvard University Press, 2016) 36; P Cane, 'Anatomy of the Private Law' (2005) 25 *OJLS* 203, 205ff.

[84] See P Birks and G McLeod (trs), *Justinian's Institutes* (New York, Cornell University Press, 1987) J Inst 3.13 pr.

[85] H Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 833.

private–public hybrid and involves a different justificatory enterprise. Relationality is not necessary for its intelligibility.

Another main point here is that the distinction between public law and private law is not necessarily equivalent to the distinction between private and public enforcement, even though there are significant overlaps. One can privately enforce a public law statute,[86] and the state could conceivably assert private law rights through private courts (eg, when contracting in some commercial capacity). This renders the public–private divide even blurrier. Again, the question at stake is the connection of private enforcement to tort law, ie, to private law, a question that should generally be separate from the public–private distinction. Not all private law is private enforcement, and not all private enforcement is private law. The spectrum helps clear this question up.[87]

B. The Spectrum

Definition and taxonomy in law are useful for interpretation and are essential for the work of any lawyer. At the same time, no matter the exactness of technical language, the complexity of real-life phenomena frequently eludes neat groupings. Given the importance of the existing theoretical distinction between private and public law and, by extension, of consequentialist and non-consequentialist approaches to it, it is essential to engage with the pre-existing discourse on its own terms.[88] A spectrum is nothing other than a model for thinking about and making fine distinctions and can help conceptualise better the philosophical and practical problems that arise in this area.

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[86] Think of the Sherman and Clayton Acts and their private enforcement through damages actions, or environmental liability that also allows individuals or NGOs to sue for pure environmental harm.

[87] It aims at transparency to reflect the reasoning used by members of the practice; see JL Coleman *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, Oxford University Press, 2003) 21 for a criticism of transparency as a criterion, and JS Kraus, 'Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis' (2007) 93 *Virginia Law Review* 287, 326ff.

[88] That is, by considering both types of theories as offering valuable insights.

I should remind the reader that I aim to define private enforcement *conceptually* from a specific angle, namely when it is linked to tort law, not just *functionally* as the enforcement of some policy through private means.[89] This is because enforcement through private law means – ie, civil actions – forms a spectrum. This ranges from pure private law that conforms to the ideal type analysed in the previous section, to *qui tam* lawsuits that are essentially public law.[90] When plaintiffs are employed as bounty-hunters without having to allege harm to their own rights or interests, their relationship with defendants is not the same as in private law. A recent example from the US is the new anti-abortion legislation in Texas (SB8). Setting aside the content of the law, what is novel is that instead of having the government enforce the law, the bill gives the reins to private citizens.[91] Anyone can be a plaintiff in a suit against abortion providers or people who help obtain an abortion after a foetal heartbeat has been detected. No special connection between parties is required to establish standing to sue. This can be very widely understood as private law – after all, it involves private lawsuits between individuals. However, from a substantive perspective, it is nothing like private law: no interpersonal wrong has been committed; plaintiffs are enlisted as enforcers in what essentially amounts to a public enforcement substitute. In this grand scheme, private enforcement through tort law – where the law must both achieve the redress of wrongs and enforcement – lies somewhere in the middle. I will call this middle ground 'enforcement torts' to show that those actions are hybrid.

From one point of view, all tort law, in its most traditional mode, is private enforcement in a very wide sense. After all, it indubitably contributes to deterrence, and most scholars and legal

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[89] *cf* PD Carrington, 'The American Tradition of Private Law Enforcement' (2004) 5 *German Law Journal* 1413.

[90] *Qui tam* is a type of action based on a writ in common law that allows a private person to prosecute a lawsuit for the government. In the US, the False Claims Act authorises *qui tam* lawsuits to assist the Government in prosecuting cases to recover damages and penalties for fraud against the Government. If the case is successful, the relator earns a reward; see generally DF Engstrom, 'Private Enforcement's Pathways: Lessons from Qui Tam Litigation' (2014) 114 *Columbia Law Review* 1913.

[91] JCP Goldberg and BC Zipursky, 'Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas SB 8' (2021) 14 *Journal of Tort Law* 469: 'Unlike genuine tort plaintiffs, persons authorized to sue by S.B. 8 do not sue in their own right, for wrongs personal to them. Instead, their nominally personal actions are suits of the sort typically prosecuted by state officials'.

systems accept that deterrence is a parallel goal of tort law.[92] For ‘owning hazardous animals’ or ‘falling building liability’ (civilian types of strict liability that exist in many civil codes), naturally the aim of the law is, to a certain extent, private enforcement.[93] Even medical negligence could be thought of as private enforcement: doctors are aware of potential liability and may avoid errors as a result of their harm aversion. Therefore, private enforcement can take place irrespective of whether conditions encourage enforcers, such as punitive damages, efficient enforcer standing and class action suits.

However, not all private law has a *specific private enforcement task*, in the sense of *directly* aiming to achieve some public goal. Some areas of law explicitly have this as their main task, some as an ancillary task, and some do not care about enforcement at all. It would stretch the definition of private enforcement beyond any recognition to include all forms of tortious liability, including those such as battery or assault.[94] The right not to be harmed, the right not to be defamed and not to be unlawfully imprisoned all have been plausibly conceptualised as caring about wrongs or, in any case, the relationship between the parties. This is the so-called pure private/tort law.

Let us then call it ‘pure’ private law when no enforcement is targeted and ‘pure’ private enforcement when deterrence of offences is the only goal. Most forms of what we conceive as private enforcement regimes lie somewhere in the middle of the spectrum. Accordingly, this spectrum accommodates types of private enforcement, too: a sub-spectrum of private enforcement actions belongs to the wider spectrum of all civil actions. Some types of private enforcement are more closely aligned to public law than others, which retain many private law elements. This ties well with *Rubenstein’s* influential analysis of private enforcement actions as to their degree of

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[92] See, eg, S Steel ‘Deterrence in Private Law’ in H Psarras and S Steel (eds), *Private Law and Practical Reason: Essays on John Gardner’s Private Law Theory* (Oxford, Oxford University Press, 2023).

[93] Likewise, *Posner* gives the example of owing a tiger and its causing harm as an event that should be generally deterred; hence strict liability should be **[AQ?]** preferred; see RA Posner, ‘Values and Consequences: An Introduction to Economic Analysis of Law’ (John M Olin Law and Economics Working Paper No 53, 1998) 4.

[94] Under purely instrumentalist accounts, every area of tort law is private enforcement of some kind of goal. These accounts have rightly been criticised in the literature and I focus on actions that non-instrumental accounts of tort liability would understand as such.

intensity.[95] His own continuum, created for different purposes, could be usefully understood as forming a part of the broader spectrum of all civil actions developed here.

Both deterrence and the redress of wrongs are relevant in this middle part of the spectrum. Due to the mixed character of the tort suit, courts are called to balance values that are often thought of as incommensurable. The coherence inherent in private law (or at least its theory) is shaken. On the one end of the scale, that of strong correlativity and no enforcement, we have private law in its traditional image analysed above. In private law, the infringer is liable for the wrong committed against someone (private wrong), and only the victim of the violation has the right to sue (bilateral standing). The tort suit, its elements, procedures and remedies reflect this relational structure (structure of the claim). Thus, to position an action on the spectrum, the most important elements are a) whether public harm is redressed by the tort suit, b) who can sue, and c) how the tort suit is shaped. **[AQ: please introduce Figure 13.1 in the text] The figure below depicts this spectrum of actions for wrongs according to their correlativity, accompanied by examples of actions situated at different points along the spectrum.**

Private Law	**Enforcement torts**	**Pure Enforcement**
(*Not* private enforcement)	**(private enforcement)**	**(private enforcement)**
(negligence, battery, assault)	(competition, securities)	(qui tam, SB8)
Fully correlative	*Partly correlative*	*Not correlative*

Figure 13.1 Division of all civil actions according to the correlativity of the suit

C. Criteria for Positioning Areas of Tort on the Spectrum

[95] See Rubenstein (n 5) 2142ff.

i. Primary Obligations – Private and Public Wrongs

The most important element as to positioning an action is the wrong committed – whether it is private or public or both.[96] If a private wrong is at least partly redressed through a civil action, then it cannot be pure enforcement/public law. The action is always *at least* an enforcement tort, and most often private law. This might be thought to be a tautology: if tort is a law of private wrongs, a public wrong means that it is not private law anymore. However, the crucial point is that a tort action can redress a private and a public wrong *at the same time and to varying degrees*. Tort obligations might derive exclusively from what happened between plaintiff and defendant, or originate from this interaction but become institutionalised because of additional policy reasons, which some jurisdictions deem important enough to grant an action, and others not. In the latter case, the first-order duties might then not only be based on some relational concept such as corrective justice, but we need to look at whether there is something beyond them.

Of course, certain proponents of corrective justice theories might deny that public harm can exist parallel to the private wrong. Nonetheless, in enforcement torts, there can be little doubt that public harm is relevant as it constitutes the *immediate ground of liability*. In these cases, public harm is significant even if one adopts a wrongs-based perspective. Sometimes, the legislator will explicitly say that it is so (eg by mentioning the policy goal in the legislative text). More often, though, the first order duty itself will *at least partly derive from the public law violation*. In other words, without the violation of a public interest, there would be no cognisable private harm; there are no private legal duties or rights but only a public dimension. If the environment is not harmed, the plaintiff has no suit, even if they have suffered personal damage. Equally, if competition was not distorted, no right arises, even if the plaintiff has suffered damage; if a procurement process was legitimate, there is no suit even if you have suffered damage by being excluded. A public law

[96] As Coleman (n 87) 34 explains: 'much of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they – we – can reasonably demand of one another. The content of these duties is then further specified in the practice of tort law itself.' Other theorists posit that the first order duties also derive from corrective/interpersonal considerations; see generally on this point the work of ZNP Sinel, 'Understanding Private Law's Remedies' (Doctor of Juridical Science thesis, University of Toronto 2013) 169ff.

violation can be the trigger for private law harm. So, is every statutory tort private enforcement? I argue no. Some statutory torts care only about private wrongs, and it can plausibly be said that they merely specify the duty of care. This happens very widely in Germanic jurisdictions.[97] What is needed is a private right *plus* public harm – this is what enforcement torts are. They would not be triggered by just one; they need both. Is there public harm in that sense in negligence or battery? Even if there were, private law *does not require* it; a plaintiff does not have to prove that the breach of a duty of care also caused public harm.

Another way to delineate between private and public wrongs is to take inspiration from economics literature. A '*public bad*' denotes a condition producing undesirable effects that are non-excludable and non-rivalrous.[98] The undesirable effect cannot be limited only to some individuals or properties and does not dissipate as it spreads. In contrast, the typical tort is a '*private bad*'. It affects certain members of the community, and its effects weaken the further removed one is from the wrongful conduct.[99]

a. Indication: Rights versus Economic Loss

Wrongs in tort law generally involve a violation of rights to the person or property. Liability for pure economic loss, which is exceptional, can indicate the additional policy goal of a tort action. Normally such loss would not be enough to ground a claim; there must be an extra reason why it should give rise to liability. Pure economic loss or statutory liability (without intent to harm) is hard to ground because it is not relational, without additional elements. These elements could be rights-based, reliance-based, or policy-based. In the last case, public policy might create a private enforcement tort. So, when the law decides to protect against pure economic loss, one must be

[97] *cf* German Civil Code, para 823 II and Greek Civil Code, Art 914.

[98] On this convincing distinction between private and public bads that can help in separating torts from each other, see TW Merrill, 'Is Public Nuisance a Tort?' (2011) 4 *Journal of Tort Law* 1, 8ff. See also TW Merrill, 'Public Nuisance as Risk Regulation' (2022) 17 *Journal of Law, Economics and Policy* 347, 350: 'What a public nuisance does, insofar as it affects a right common to the general public, is to impose a risk of harm on the general public'.

[99] This is often reflected in ideas about proximate or intervening cause. If the injury is too 'remote' from the defendant's conduct, it is not deemed to be tortious.

careful and inquire why it gives rise to liability on this specific occasion. Courts are by no means in the position to grant such actions for all statutory or other wrongs that result in pure economic loss; in fact, they are reluctant to do so.[100] They only do this in specific circumstances, such as when there has been some assumption of responsibility or reliance – thus individualising the harm. Absent that, we should think about why economic loss concerns the law, and a parallel 'invisible' public harm might be the solution to this riddle. This happens, for instance, in unfair competition, antitrust and capital market torts.

b. Indication: Redressing a Systemic Problem

Another hint regarding the existence of a parallel public wrong is the existence of a systemic or societal problem that the law tries to address. This problem might refer to foundational goods of our society, such as the environment, for which the legislator creates special statutes by providing for civil actions aiming to solve problems not addressed by general private law. Often, this type of action helps enforce a wider regulatory regime or implicates efficiency or distributive justice considerations. For instance, in competition law, by granting actions in cases of pure economic loss due to possible counterfactual market conditions, the legislator makes clear their will to 'right the market' through private actions. These problems can be compared to the idea of 'externalities' found in legal economic thought.[101] An externality is the imposition of a cost on another party without consent or the provision of a benefit without prior agreement. Externalities create pure welfare loss, and their effect does not constitute merely a transfer of wealth from one party to another.[102] Classic tort liability alone cannot internalise all effects of this activity as the social costs

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[100] See generally JRS Prichard and A Brudner, 'Tort Liability for Breach of Statute: A Natural Rights Perspective' (1983) 2 *Law and Philosophy* 89. On this general reluctance in German law, see D Poelzig, *Normdurchsetzung durch Privatrecht* (Tübingen, Mohr Siebeck, 2012) 34ff. On the importance of rights in tort law, see EJ Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349, 352: 'For the defendant to be held liable, it is not enough that the defendant's negligent act resulted in harm to the plaintiff. The harm has to be to an interest that has the status of a right'.

[101] See R Cooter and T Ulen, *Law and Economics*, (New York, Harper Collins Publishers, 1988) 45.

[102] On this divergence, see I Gilead 'Tort Law and Internalization: The Gap between Private Loss and Social Cost' (1997) 17 *International Review of Law and Economics* 589.

are more significant than the private ones. All things being equal, externalities must be corrected by a wider regime that addresses all losses. On the contrary, when the loss is more localised and when information about the harm is easily available, the relationship between harm-doer and victim is close. We can then use tort law, and the binary structure is more than enough.

c. Indication: Complimentary Public Regulation that Co-shapes the Primary Obligation

Another indication of how enforcement-infected an area of liability might be is the fact that tort law substitutes or complements public regulation, especially in market-adjacent domains. In other words, a good indication is if this area has been created to fill a gap as a result of diminishing state regulation in a specific sector. If, due to the lack of a regulatory agency or parallel to an agency, there are individual enforcers with a right to sue, this is a tell-tale sign that the action granted to them aims to enforce a particular policy. Comparative regulatory studies can be instructive in this regard. It might be helpful to see whether an action that did not exist before in a jurisdiction does so in countries with similar tort systems. Examples are the statutory regimes in securities, shareholder, and private enforcement of competition law, which did not create any private rights of action in Europe in the past but did in the US.[103] Therefore, once created, those actions did not form part of the 'core' of tort law; they are private rights of action created to address some other public problem. Furthermore, complementary regulation might shape what is owed in the first place. Quite often, agencies first decide in public law whether securities law or competition law has been violated, and then follow-on claims are raised. The enforcement authority plays a direct or indirect role when litigating those claims, decisively influencing the bond between harm-doer and sufferer. For example, in competition law, the parallel regime of public enforcement influences the decisions of the courts; it binds them to any previous decision of the authority as per the European Damages Directive.[104] Competition regulators intervene as *amici curiae*, they issue decisions which trigger follow-on litigation, produce opinions on matters of law and give leniency

[103] *JI Case Co v Borak,* 377 US 426 (1964) (finding an implied private cause of action under § 14(a) Securities Exchange Act, 15 USC §§ 78a–78oo); PD Carrington, 'Protecting the Right of Citizens to Aggregate Small Claims Against Businesses' (2013) 46 *University of Michigan Journal of Law Reform* 537, 542–43.

[104] Directive 2014/104/EU (n 50) Art 8.

to whistle-blowers, a fact which excludes them from most of the consequences of civil law litigation against them.[105] Much enforcement tort litigation where there is a follow-on procedure – ie after an authority issues a decision – resembles an administrative procedure: the only question that remains is quantifying damages.[106] Wrongfulness, causation and fault have already been established. Those circumstances indicate that it is not a purely bilateral dispute that is being litigated. In most such cases, everything happens under the shadow of a public body that influences the procedure for policy reasons.

ii. Non-rightsholder Standing

The question of standing is different from the question of the right, analytically speaking. Standing is not to be understood procedurally, but in a substantive way: who has the entitlement to sue?[107] It forms an essential feature of any correlativity-based account of private law.[108] It has been plausibly argued that a general rule exists whereby standing belongs to the rightsholder. In short,

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[105] ibid Art 11.

[106] Civil actions can thus be divided into follow-on and standalone procedures. A follow-on suit is one that is initiated after a decision by an authority. A standalone suit is when the individual plaintiff prosecutes the wrong herself from the beginning to end. Of course, some follow-on actions are merely quantification exercises; others develop into complex litigation. Still, the gist is as follows: regulatory authorities have already heavily influenced the dispute before litigation is even considered as an option, exerting this influence as entities entrusted with duties derived from public law.

[107] For a comprehensive treatment of standing as a concept in private law, see T Liau, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (Oxford, Oxford University Press, 2023). *Liau* defines standing as a 'as a Hohfeldian power to sue and enforce distinct private law rights and duties'. In this way standing is different from the right that is being enforced, and thus 'Private law rights and duties remain invariant across different enforcers'. See also BC Zipursky (n 42) 340, which analyses standing as a substantive legal concept and recognises that in tort law as '[the plaintiff] does have standing to complain about what the defendant did, for it is she who was wronged by the defendant'. However, this relational directive incorporated in the substantive standing norm of (general) tort is weaker in enforcement torts. This conception of standing does similar work to the Germanic notion of the '*Anspruch*', which too allows for flexibility and conceptual clarity in separating between underlying entitlement to sue: see T Winkelmann, *Der Anspruch* (Tübingen, Mohr Siebeck, 2020) 509ff.

[108] Zipurksy (n 42) 315.

it could be argued that an area is closer to public law and further away from private law if standing is 'looser'. If people other than the rightsholder can sue for a relational wrong, or everyone can sue for a non-relational wrong (ie, when they are not rightsholders), this area is less private. If the general standing rule does not apply, this is an indication that the harm does not concern the plaintiff. That is, the action is not trying to redress a wrong committed against them. The law institutionalises that type of suit purely (or *mostly*) for enforcement reasons. In that sense, standing might reveal the reasons for tortious liability. Many areas of private enforcement have peculiar rules on standing, in the sense that they often do not allow the wronged parties to sue if, for instance, they would not be efficient enforcers. This can be done through rules on legal causation, duty of care rules, or explicit standing doctrines.[109] Alternatively, the law might grant suit to plaintiffs who admit they have suffered no harm because they are efficient enforcers. This strays from the general private law rule on standing. These arguments would not fly in private law but do in private enforcement. Standing might either be wider or narrower than in general private law, but this is not important. What matters is that it strays from the rights-holder standing rule. In private law, there should be a plausible case that the plaintiff has been somehow harmed by the defendant. If the state, by granting a civil remedy, is merely employing plaintiffs as bounty-hunters or as enforcers (allowing plaintiffs who have suffered no harm to their rights or interests), then this situation strays far away from tort law. As we saw, many types of private enforcement exist, some of which are closer or further away from traditional private law. On the other end of the spectrum, we have *qui tam* lawsuits, which are used in the US.[110] This is very close to public law and could hardly be called private law as it lacks the element of interpersonal wrongdoing.[111] These claims are very rare in Europe, where private enforcement is less utilised, but they are enlightening as to

[109] See, eg, the standing doctrine excluding indirect purchasers from suing in US antitrust law for reasons of effective enforcement. *Illinois Brick Co v Illinois*, 431 US 720, 735 (1977): 'the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue'.

[110] See Engstrom (n 90).

[111] See Goldberg and Zipursky (n 91) (arguing that they do not constitute private law). Nonetheless, those actions could be thought as private law from a more formal viewpoint that ignores substantive concerns of this kind.

the point I am making: standing rules might help us detect areas of private enforcement. **[AQ: please introduce Figure 13.2 in the text]**

The figure below demonstrates that the rules governing standing vary depending on where an action falls on the spectrum. As we progress along the spectrum, standing becomes increasingly disconnected from rightsholders.

Figure 2: Standing and private enforcement

Private Law	**Enforcement torts**	**Pure Enforcement**
(Not private enforcement)	**(private enforcement)**	**(private enforcement)**
(Only rightsholders can sue)	(Some non-rightsholders sue)	(There are *no* rightsholders)
Fully correlative	*Partly correlative*	*Not correlative*

FIGURE 13.2 GOES HERE

Figure 13.2 Standing and private enforcement

iii. Secondary Obligation: Structure of the Tort Suit and Correlativity

There can be a purely private wrong – which only the victim could complain about – but which is enforced through a purely public mode of enforcement.[112] Or a private suit that does not address private wrongs at all (if it is granted to someone who has not plausibly been wronged).[113] Therefore, a separate question from *what* tort law protects and *who* has the right to sue is *how* it protects that thing. If it protects the thing through private means, then it is more akin to private law. Substantive and procedural private law rules are not identical in all civil actions. However, there is an ideal type of tortious action that expresses the relationship of relationality between the parties and includes elements, defences and procedural rules that balance their interests (eg burden of proof rules). Nonetheless, in certain cases, the law consciously helps plaintiffs, assisting them in enforcing the law as it aims to achieve some public law goals. Private law thus adapts its rules

[112] This could look something the New Zealand no-fault scheme.

[113] For these types of actions see Liau (n 107) ch 12.

and equips the plaintiff with additional tools when it has a parallel enforcement aim: the changes can be both procedural and substantive.

a. Procedural Changes

Procedural facilitations include class action suits, the relationship to public enforcement, the possibility of having public law decrees/injunctions, intricate legal fees rules, extensive discovery rights and trial management.[114] All these procedural changes might make the plaintiff's position stronger compared to the defendant in a way unrelated to their substantive rights and duties. The participation and binding effect of decisions by regulatory authorities (decisions clearly not motivated by interpersonal considerations) might shift the balance in civil litigation. Burden of proof rules might also change in cases where an enforcement gap seems present. Thus, interpersonal rights and obligations are circumscribed through procedural means or limitations. Litigation and remedies depend on wider considerations. Lastly, the existence of collective actions is telling especially in the form of opt-out suits and where aggregate damages are awarded.[115] I should not overstate my case: all these procedures can exist in private law too. They are not decisive by themselves. Instead, they are indications pointing to the fact that the law is trying to make the work of some plaintiffs easier.

b. Substantive Changes

The substantive features of tort law include the conditions of liability and remedies questions. The structure of a tort suit is bilateral. This denotes the fact that victims sue harm-doers and do not instead seek redress from, eg, a social insurance scheme. The interrelationship of duty and right forms a structural feature and is reflected in liability elements like causation, fault and the heads

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[114] See generally Rubenstein (n 5).

[115] The specific issue of collective redress and its relation to enforcement is analysed extensively in ch 12 of this volume. I fully agree with the point Suzanne Chiodo raises there, that the mere existence of a class action regime (especially when opt-out **[AQ: opted out? Opt-out is fine here (indicates opt-out class actions regime]**) leads an area of law to veer closer to the enforcement side of the spectrum, where interpersonal considerations become less important, see S Chiodo, above n 14 **[AQ: to what is this referring? It is referring to the chapter by Suzanne Chiodo in this volume - hence it should read footnote n 15]**.

of damages. The content of these substantive impacts the question of whether interpersonal considerations are enacted, as, without them, a corrective justice or civil recourse scheme will be inconceivable.

For example, causation is a central condition of liability. In many enforcement torts, ideas of responsibility based on what the defendant's action caused lose some of their prominence. A clear causal path cannot be proven with the same exacting standards; the wider processes are too complex, and counterfactuals hard to produce. This explains the relevance of (probabilistic) economic tests, instead of deterministic ones, for findings of causation, eg, in antitrust or environmental matters.[116] Second, the heads of damages awarded might be different. When the harm cannot be proven or estimated, the victim can be awarded the benefit gained by the perpetrator who acted unlawfully and culpably instead of damages. Another possibility is a very 'lax' quantification test, ie, the employment of the 'broad axe' when precise quantification is impossible.[117] Alternative methods of damage calculation may lead to the harm sufferer being awarded too much, but policy-wise, it is preferable that the plaintiff ultimately benefits rather than the tortfeasor.[118] Punitive or treble damage awards might be present. The absence of any relationship between harm and recovery often indicates that the law cares more about providing incentives to sue than about redressing wrongs.

Additionally, fault might be less important too. Fault is intimately linked to ideas of individual responsibility.[119] At the same time, it can be exceedingly difficult to prove in many regulatory cases, especially when complex corporate structures are involved. For this reason, the standard is often set at a low level or abolished entirely, aligning with public law standards.

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[116] *cf* HA Abele, GE Kodek and GK Schaefer, 'Proving Causation in Private Antitrust Cases' (2011) 7 *Journal of Competition Law and Economics* 847 (arguing that deterministic causation tests are not appropriate given the aims of the law).

[117] See, eg, the approach of English courts in *Royal Mail Group Limited v DAF Trucks Ltd* [2023] CAT 6.

[118] G Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder Legitime Aufgabe?' (2006) 206 *Archiv für die civilistische Praxis* 352, 464–46.

[119] On the various roles of fault, see S Steel, 'Culpability and Compensation' in J Goudkamp, M Lunney and L McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Oxford, Hart Publishing, 2022).

Therefore, fault is no longer central to the litigation process, as in general tort. Again, this would stray away from a necessary element of many wrongs-based theories.[120] It could, however, be explained again by the need to redress the public wrong as influenced by broader enforcement concerns. **[AQ: please introduce Figure 13.3 in the text] The figure below demonstrates the above relationship between the positioning of a suit on the spectrum and the corresponding changes in the secondary obligation.**

Figure 3: Changes in the secondary obligation

Private Law	**Enforcement torts**	**Pure Enforcement**
(Not private enforcement)	**(private enforcement)**	**(private enforcement)**
(Causation, Fault, No punitive remedies).	(new causal tests, fault, Punitive remedies)	(No tort elements necessary, only those establishing infringement)
Fully correlative	*Partly correlative*	*Not correlative*

Figure 13.3 Changes in the secondary obligation

V. Conclusion

In sum, not just private enforcement through tort actions but *all actions for wrongs* could be thought of as a spectrum that, at some point, blends into public law. The spectrum ranges from pure private (tort) law, enacting interpersonal considerations due to its structure and right-duty nexus, to pure enforcement, where civil actions aim not to protect one's rights but to achieve a public goal. In this conception, private enforcement actions lie in the middle. Of course, there are more and less 'private' forms of private enforcement. Nonetheless, those actions will more often resemble private than public law. The reason is that the most important element of private law is relationality, and private enforcement is always relational to a certain degree.

[120] EJ Weinrib, *Corrective Justice* (Oxford, Oxford University Press, 2012) 47ff.

How do we decide where to place actions on the spectrum? Formal characteristics like the presence of civil courts, civil actions and horizontal relationships exist in both; instead, the distinction relies much more on the *substance* of the claim.[121] First, unlike pure tort law actions, private enforcement actions do not concern only the plaintiff's own rights and interests but also a wider public goal (coexistence of private wrongs and public goals). In private enforcement actions, not only the victim but also others can sue (standing). Lastly, the structure of both the substantive claim and the litigation process are quite different, reflecting the above (structure of the claim).

It bears mentioning that how private or public an action is can vary across time.[122] In other words, laws enacted in the first instance to authorise enforcement actions could end up creating new torts and become private. Or it could also be that more and less intense forms of private enforcement are instituted or abolished, leading an action to move along the spectrum accordingly.[123]

Now, the crucial question is why this exercise is even useful. The demarcation of enforcement and general torts could be thought of as an obscure or self-evident distinction. The liminal borders are undeniably hard to define. Saying that something is *not quite a* tort needs to be accompanied by an account of why it is different from other torts in practice. After all, someone could also object that every tort is different from every other tort anyway. Nonetheless, the spectrum account can be helpful.

Picking an area of enforcement torts that lies in the middle of the spectrum, like competition damages, and comparing it with pure private law could show why it is essential to treat enforcement torts as a coherent category. The hypothesis is that different private enforcement

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[121] *cf* Chiodo, above n 14 **[AQ: to what is this referring?]**, which focuses on class actions, ie a procedural aspect. Nonetheless, applying a class action regime can imply many substantive changes, too, such as non-compensatory damages, lax causation and quantification tests, and an explicit enforcement goal. There, too, therefore, the substance of the claim changes.

[122] I thank John Goldberg for this observation. A good example of this phenomenon is analysed in JCP Goldberg and BC Zipursky, 'The Fraud-on-the-Market Tort' (2013) 66 *Vanderbilt Law Review* 1755.

[123] See, eg, the 21st-century introduction of the EU competition damages regime that moved liability away from the tort law paradigm; see N Dunne, 'Antitrust and the Making of European Tort Law' (2016) 36 *OJLS* 366.

actions can be positioned in different places along the enforcement scale and that this will have an equivalent impact on those conditions of liability that are left open to courts and the legislator to shape. Courts will generally be able to use policy arguments more freely to shape liability conditions to promote the enforcement goal. The legislator, too, will be able to detach themselves more easily from notions of tort law (such as fault) in creating rules for these areas (eg, when issuing an instrument like the EU Competition Damages Directive). In a way, properly categorising the enforcement content of a lawsuit should be promoted on constitutional and democratic grounds. That is because the democratic legislator has already *partly* shaped an area to enforce policy. They already have chosen to privilege some plaintiffs in their capacity as enforcers. The law creates rights and obligations for reasons of policy and not solely for reasons referring to the relationship between the parties. An insistence on the purity of private law and the wholesale application of its rules would be undue. The dominance, or at least the priority of interpersonal considerations, might not apply here.[124] Thus, the spectrum is an exercise in categorisation that operates as a heuristic, useful to use to fill gaps in the law and interpret its rules. There is a coherent category of enforcement torts that falls squarely in the middle and calls for bespoke rules.

After all, much of private enforcement is relatively novel, especially in Europe. EU law and US law often use concepts of general tort law to solve problems. This undue application of general private law norms might not be fit for purpose and might lead to systemic mistakes. Thinking about how enforcement-tinged an area is and neatly separating it from general tort law would help avoid those mistakes. Thus, while the spectrum *is* a categorisation with all the arbitrariness this includes, it is not a mere categorisation of previously disparate elements, but one

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[124] *cf* Merrill (n 98) 6: 'When one decides that a particular action is a "tort," this implies … that courts have a considerable degree of authority to define and revise the elements of the action and defenses to it. When one decides that a particular action is a "public action," in contrast, the implications for the allocation of institutional authority are quite different. Efforts to identify and vindicate public rights, under widely shared norms about the proper assignment of institutional authority, are generally regarded as being matters for the politically accountable branches of government to resolve. Determining whether public nuisance falls on the "public action" or the "tort" side of a conceptual divide … thus informs the allocation of institutional roles with respect to the matters covered by this action.' This specific point applies more widely to the hybrid enforcement torts.

that replaces another, less appropriate one.[125] The previous grouping of private enforcement suits as non-tortious is misleading, as there are unavoidable similarities. The same is true for universally using the general moniker 'tort' as the differences are also obvious. The spectrum provides a more nuanced approach.

Lastly, the enforcement spectrum leads users of the law to investigate the adjacent area of public law to solve problems. It leads them to coordinate with public law and the public goals of this area. Consider all the policy choices a public authority makes when enforcing regulation. Courts might have to undertake a similar task, depending on how enforcement-oriented or private an area is. Of course, private enforcement is a vast subject. However, it would be fruitful to take a closer look and to focus on the conditions of substantive liability in each enforcement action and investigate to what extent they change compared to general tort. This contribution should be understood as an invitation to look closer to these questions: action by action, condition by condition. Ultimately, we can carve out a new, coherent category of actions, one that unites private law and public interest.

[125] In this sense it is an exercise in coherence, tracking the common justificatory premise of hybrid actions. N MacCormick, 'Coherence in Legal Justification' in A Peczenik et al (eds), *Theory of Legal Science* (Dordrecht, Reidel, 1984) 235, 238.