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Civil Recourse, Not Corrective Justice

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INTRODUCTION

Corrective justice theory is based on a simple and elegant idea: when one person has been wrongfully injured by another, the injurer must make the injured party whole.[1] Justice requires that when one person has been wrongfully injured by another, the injurer make the injured party whole. This idea of justice presupposes the Aristotelian idea of normative equilibrium.[2] Certain occurrences, such as when one party wrongfully injures another, disturb this equilibrium. Corrective justice consists of the restoration of this equilibrium. American tort law recognizes the corrective justice ideal by providing a mechanism through which defendants who have wrongfully injured plaintiffs are required to compensate those plaintiffs for their injuries, and thereby make them whole insofar as this is practically possible.

The elegance of corrective justice theory has led some to regard it as a set of platitudes,[3] yet it has recently captured the attention of a wide range of philosophers and become the focus of sustained legal theory.[4] There are four reasons for corrective justice theory's philosophical vitality. First, and most

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* Professor, Fordham University School of Law. Some of the text in the first half of this paper has been published in a setting that is more oriented toward jurisprudence than torts, in my article *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000). I have benefited from the comments of Peter Benson, Bruce Chapman, Jules Coleman, Jill Fisch, Jim Fleming, Katherine Franke, Abner Greene, John Goldberg, Alon Harel, Jody Kraus, Brian Langille, Linda McClain, Antonia New, Jacqueline Nolan-Haley, Gideon Parchomovsky, Dan Richman, Arthur Ripstein, Tony Sebok, Scott Shapiro, Martin Stone, Steve Thel, Lloyd Weinreb, Ernest Weinrib, and Ian Weinstein. Audiences at Columbia Law School, Fordham University School of Law, Hofstra University School of Law, University of Toronto Faculty of Law, Yale Law School, and the Analytic Legal Philosophy Conference at the Institute for Law and Philosophy at the University of Pennsylvania have also offered helpful discussions of an earlier draft of this article, entitled *Pragmatic Conceptualism, Civil Recourse, and Corrective Justice*. I gratefully acknowledge the support of a Fordham University Summer Research Grant.

1. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS (1992); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW (1998); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

2. ARISTOTLE, NICOMACHEAN ETHICS, Book 5.4 (M. Ostwald trans., 1962). The suggestion that there is an equilibrium or form of equality between private parties that is restored by private law is Aristotle's, but the idea that the rectification of gains and losses is normative, rather than factual, is Weinrib's Kantian adaptation of Aristotle. WEINRIB, *supra* note 1, at 80–84, 114–36.

3. *See, e.g.*, Robert Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261 (1996) (criticizing corrective justice theory as impractical and overly intellectual (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995))); Gary J. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (recognizing role for corrective justice as one among variety of normative frameworks).

4. *See supra* note 2.

obviously, the preeminence of law and economics in tort law analysis[5] has led many legal scholars to view corrective justice theory as naive, simple-minded, and irrelevant to what tort law is really about—efficiency.[6] In response, the intellectual discipline of philosophy has been conjoined with law in an attempt to turn the tables on the economists. According to this view, it is the economic theories that are untenably simplistic because the underlying structure of the law can only be understood in the context of a rich and subtle theory of the structure of justice.

A second reason for the emergence of corrective justice theory as a sustained area of philosophical scrutiny comes from within the domain of political philosophy. It is not only economists who have rejected the idea of corrective justice. Late-twentieth century liberal political philosophy is similarly hostile to the idea.[7] Much of liberal political philosophy has revolved around the debate between utilitarians and their opponents. Within this debate, John Rawls's theory of justice has been viewed as the emblem of the possibility of a non-utilitarian account of justice.[8] Rawls's notion of justice, like Dworkin's theory of equality and numerous other liberals' accounts, bears an uneasy relationship to the corrective justice view articulated above. To put it simply, a contemporary liberal in North America or Great Britain—or any common-law jurisdiction for that matter—will have a great deal of trouble accepting that the value of any extant legal system depends on its restoration of normative equilibrium because that individual will reject the claim that our inegalitarian status quo represents normative equilibrium.[9]

A third reason for pushing hard on the idea of corrective justice pertains to an equally broad intellectual trend in American legal thinking—that of instrumentalism.[10] The instrumentalist sees the law as a means for the realization of various social goals. Most law-and-economics scholars are instrumentalists, but they represent only a fraction of the instrumentalists in the legal academy. Hand in hand with instrumentalism is the view that all law is really a matter of public

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5. William Landes and Richard Posner have made the most thorough and impressive attempt to provide a positive theory of tort law from an economic perspective. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); *see also*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987) (constructing extensive economic theory of accident law); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (developing and demonstrating utility of entitlements model of property and torts); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (providing classic economic analysis of accident law).

6. *See, e.g.*, Rabin, *supra* note 3.

7. *See, e.g.*, Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (D. Owen ed., 1995).

8. JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993).

9. *Cf.* Ken Cooper-Stephenson, *Corrective Justice, Substantive Equality, and Tort Law*, *in* TORT THEORY 48 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993) (challenging effort to treat corrective justice as independent of distributive justice).

10. *See generally*, ROBERT S. SUMMERS, PRAGMATIC INSTRUMENTALISM IN TWENTIETH CENTURY AMERICAN LEGAL THOUGHT: A SYNTHESIS AND CRITIQUE OF OUR DOMINANT GENERAL THEORY ABOUT LAW AND ITS USE (1981) (arguing that tort law is best understood as form of public law).

law, even areas like torts, property, and contracts, which are purportedly devoted to the recognition and enforcement of rights among private parties.[11] This view has proven difficult to square with the idea, apparently central to corrective justice, that legal rights and duties under tort law should be understood as embodiments of moral rights among private parties.[12] Corrective justice theory views tort law as a matter of "private law" in an important sense, yet today's legal academy finds the very idea of private law conceptually incoherent, politically retrogressive, or both.

Although corrective justice theorists have contested the place of instrumentalism in the normative assessment of the law, they have challenged its role in the interpretive and explanatory domain with equal vigor.[13] This brings us to a fourth and quite different source of inspiration for corrective justice theory. Much modern work in the analysis of law has been dominated by a reductive form of instrumentalism, typically accompanied by legal realism: to explain some legal doctrine is to explain what is accomplished by it, and to explain some vexing legal term, such as "duty," is to explain the range of policy choices concealed by it.[14] Corrective justice theorists like Jules L. Coleman and Ernest J. Weinrib have rejected this form of legal explanation and have demanded, both implicitly and explicitly, that theorists account for the concepts embedded within the law on their own terms.[15]

These four aspects of corrective justice theory—its aspiration to surpass law and economics by adequately interpreting the structure of our actual tort law; its claim to articulate a commendable aspect of political order distinct from distributive justice and compatible with liberal individualism; its challenge to public law and public policy justifications in favor of a conception of private law; and its place for a conceptualistic, rather than an instrumentalist, form of legal analysis—are characteristic features of the leading theories. These features also suggest why corrective justice theory has recently enjoyed a notoriety within substantive legal philosophy that is not explained by the significance of its subject matter, the law of torts.

Notwithstanding my estimate of its importance—or perhaps because of it—this Article provides a sustained critique of corrective justice theory and offers a theory of tort law in its place. The view I present—the model of "rights,

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11. *See, e.g.*, David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 859–60, 905–08 (1984).

12. *See generally* COLEMAN, *supra* note 1, at 361 (analyzing structure of moral reasons in corrective justice and arguing that legal structure of tort law is best understood as embodying such reasons).

13. *See* COLEMAN, *supra* note 1, at 377–81; WEINRIB, *supra* note 1, at 1–21.

14. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1762–64 (1998) (describing emergence of reductive instrumentalism in tort law and focusing on reduction of "duty" element in negligence law).

15. *See generally* COLEMAN, *supra* note 1, at 382–83 (rejecting economists' attempts to overcome corrective justice criticisms by redefining terms); WEINRIB, *supra* note 1 (arguing that adequate justifications and explanations of tort law require understanding concepts on their own terms, rather than providing reductive explanation).

wrongs, and recourse"—differs strikingly from corrective justice theory in several key respects. Most prominently, this view does not utilize the notions of rectification, normative equilibrium, or a duty of repair. However, it still draws its inspiration and methodological bearings from corrective justice theory, even as it aims to provide a superior account of the structure of tort law to that offered by both law and economics and corrective justice theory. To that end, the model of "rights, wrongs, and recourse" recognizes and attempts to explain the tension between tort law and ideals of distributive justice; it challenges, and attempts to replace, the corrective justice theorists' account of what it means for tort law to be a non-instrumentalist form of private law; and it attempts to interpret tort law as the embodiment of a set of principles.

Part I begins by briefly presenting leading versions of corrective justice theory and compares their "bipolarity" critique of law and economics[16] to criticism of corrective justice theory as too metaphysical and formalistic. Part I then provides a nonmetaphysical and flexible foundation referred to as "pragmatic conceptualism." Pragmatic conceptualism and corrective justice theory combine to present a powerful critique of law and economics.

Part II turns Weinrib's and Coleman's structural critique on its head, presenting three aspects of the structure of tort law that undercut corrective justice theory. First, I argue that although corrective justice theory treats the duty to make whole as the fundamental principle of tort law, the law itself contains a diversity of remedies, many of which bear no relation to "making whole." Second, I depict a broad swath of tort doctrine in which defendants who have—by tort law's own standards—tortiously and foreseeably injured plaintiffs, and therefore should be deemed to have a "duty of repair" under corrective justice theory, are nevertheless not held liable. Third, I argue that corrective justice theorists mistakenly analyze the law as containing an unconditional affirmative legal duty of tortfeasors to pay those whom they have injured, when a close analysis reveals, however, that actually such legal duties do not exist. Rather, tort judgments represent liabilities, not duties to pay. Thus, corrective justice theory cannot be saved by shifting to a functionalistic model.

Part III offers a theory of civil recourse in place of the alternatives that have been rejected.[17] We cannot grasp the phenomenon of a tortfeasor's liability to a

16. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 494–526 (1989). The argument referred to in the present article as "the bipolarity argument" is intended to cover the argument by that name, *id.*, as well as very similar arguments labeled variously as, the argument from "the structure of tort law," COLEMAN, *supra* note 1, at 373–82, the argument from "correlativity," WEINRIB, *supra* note 1, at 114–44, and the argument from the "bilateral" structure of tort law, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 13–24 (2001).

17. The view advanced here was introduced in Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) [hereinafter *Rights, Wrongs, and Recourse*] and has been developed in Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649, 661–62 (1998) [hereinafter *Legal Malpractice*]; Goldberg & Zipursky, *supra* note 14, at 1828–29; and Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of*

plaintiff unless we place it within a more accurate procedural context. The state does not impose liability on its own initiative. It does so in response to a plaintiff's suit demanding that the defendant be so required. The state provides the plaintiff with a right of action against the defendant for damages or other relief only if the defendant has wronged the plaintiff in a manner specified by tort law. In permitting and empowering plaintiffs to act against those who have wronged them, the state is not relying upon the idea that a defendant has a pre-existing duty of repair. Instead, it is relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them. Civil recourse, not corrective justice, explains the concepts and principles embedded in our tort law and displayed in its plaintiff-defendant structure.

The Conclusion revisits the four features of corrective justice that have contributed most to legal theory and shows that civil recourse improves on corrective justice theory in each of these respects.

I. PRAGMATIC CONCEPTUALISM AND THE STRUCTURAL CRITIQUE OF LAW AND ECONOMICS

Corrective justice theory[18] explains tort law as the embodiment of a deonto-

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Mass Torts, *in* PHILOSOPHY AND THE LAW OF TORTS 222–23 (G. Postema ed., 2001). The most recent and extensive prior discussion is in Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 632–44 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter *Philosophy of Private Law*].

18. While I explicitly include the work of Stephen Perry within my discussion and critique of corrective justice theory, there are several other important tort theories that fall under the broad rubric of "corrective justice theory," which I do not centrally address in this Article. These include the theories of Richard Epstein, George Fletcher, and Arthur Ripstein. The latter theorists place much less emphasis than, for example, Perry, on the claim that liability in tort normally springs from the defendant having committed a legal wrong or a wrongful act upon the plaintiff. For this reason, I am not persuaded that their views are properly allied with the structural critique as I articulate it in the text of this Article. They also place considerably less weight on "duties of repair" than Coleman, Weinrib, and Perry. In effect, therefore, I discuss and criticize a somewhat narrower version of corrective justice theory than is sometimes used. On the other hand, several other theorists follow corrective justice so defined. *See, e.g.*, Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 550–77 (1992); James Gordley, *Tort Law in the Aristotelian Tradition*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 131 (D. Owen ed., 1995); Richard Wright, *Right, Justice and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159 (D. Owen ed., 1995). Moreover, Epstein has abandoned his view, and Fletcher's important work has been carried forward in detail by Gregory Keating, who is explicitly not a corrective justice theorist. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

It is not yet clear to me exactly how Ripstein's impressive and comprehensive new book fares, given the criticisms of corrective justice theory I offer in Part II and the positive arguments I offer in Part III. *See* RIPSTEIN, *supra* note 1. In light of our agreement on certain basic issues about relationality, recourse, and rights of action, there is reason to believe the framework constructed in this Article will harmonize better with his views than with those of others. *See* Ripstein & Zipursky, *supra* note 17 (explaining causation requirement in mass tort cases in terms of relationality, recourse, and risk-ownership). On the other hand, it does appear that several of the points raised below—particularly regarding the diversity of remedies—will cut against certain aspects of Ripstein's views.

logical, rather than a utilitarian, set of values.[19] One who causes a wrongful injury to another is obligated to compensate the other for the injury caused. The existence of such an obligation, quite apart from the law, flows from the fact that the wrongful injurer is responsible for the injury wrongfully inflicted on the other.[20] The obligation is to make whole the victim of the injury for which one is responsible, and this obligation to make whole—a duty of repair, more succinctly[21]—flows from treating the wrongful injuring as a matter of moral principle.

Now, the tort theorist need not develop a foolproof theory of morality or moral metaphysics, for whether we are dealing with the "true" morality, or even whether there is such a thing, is not really the point. The point is that our tort law—whether it can ultimately justify doing so or not—embodies the kind of moral principles and rationales just articulated.[22] It labels certain kinds of conduct as "tortious" or "legally wrongful"; it traces out the consequences of those wrongful acts in others; and, within limits, it requires the wrongdoers to compensate the injured parties. The reasons for requiring wrongdoers to provide compensation are reasons entrenched in our system; they are reasons about the duties of repair owed by the wrongdoers (tortfeasors) to those whom they have injured. Moreover, when these duties of repair are dispatched—when the defendants pay the plaintiffs—a sort of justice is done.[23] The wrongful injury is rectified when the defendant carries out the obligation to compensate the plaintiff. In this sense, courts applying the common law of torts see to it that corrective justice is done—that the defendant-injurer provides the compensation owed to the plaintiff-victim, thereby correcting the improper disturbance created, so far as possible.[24]

An exceptionally interesting aspect of this account, provided by both Weinrib and Coleman, is what they call the "bipolarity" argument.[25] Typically, the classic tort case involves two parties, a plaintiff and a defendant. In such a case, the question before the court is whether the defendant should have to compensate the plaintiff. If the plaintiff wins, then the defendant must compensate the plaintiff. But the compensation is not simply a fine or a penalty of some amount that provides an incentive for the defendant to take care in the future. And the

19. WEINRIB, *supra* note 1, at 134–35 (explaining duty of reparation in terms of rights).

20. COLEMAN, *supra* note 1, at 373–74; Perry, *supra* note 1, at 497.

21. WEINRIB, *supra* note 1, at 134–35.

22. COLEMAN, *supra* note 1, at 382–84.

23. *Id.* at 381.

24. WEINRIB, *supra* note 1, at 142–44.

25. *See supra* text accompanying note 1; *see also* Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233,1247 (1988) (discussing "formal concept of corrective justice" with "case by case/victor-injurer scheme of tort litigation"); Martin Stone, *On the Idea of Private Law*, 9 CAN. L.J. & JURISPRUDENCE 235, 253 (1996) (defining corrective justice as "one person [being] responsible for the harmful effects of her actions on another"); WEINRIB, *supra* note 1, at 63–66 (discussing the "bipolarity" of corrective justice); *id.* at 134–36 (applying bipolarity analysis to tort law); *id.* at 145–70 (applying bipolarity analysis to negligence law); *id.* at 210–14 (drawing implications for economic analysis).

defendant does not simply pay this amount to the state; she pays it to the plaintiff. Conversely, the plaintiff is not merely compensated, as she would be by a governmental relief program, for example. The plaintiff is compensated in the amount of her injury. Moreover, the payor is not simply another entity like an insurer. Rather, the party held liable and required to pay, even if she obtains financial assistance from elsewhere, is the defendant.

Hence, tort litigation brings to the fore quite a neat pairing: a defendant who must pay to the plaintiff not just any amount, but precisely the amount of the plaintiff's injury; and a plaintiff who is entitled to receive precisely the amount of her injury, and is entitled to receive it not *simpliciter*, but entitled to receive it *from the defendant*. This is a long way of saying that the tort system requires an injurer to cover an injury of a particular party and entitles the party to recover for a particular injury from the defendant. In the sense that the defendant and plaintiff are two poles of a relationship within which the compensation travels, and within which it stays, tort law is intrinsically bipolar.

The corrective justice theorist maintains that this bipolarity feature is a concrete version of, and is best explained by, the duty-of-repair model of tort litigation.[26] The defendant must pay not just any amount, but the amount of the plaintiff's injury, because the payment is not a penalty per se, but the rectification of an injury that the defendant inflicted. This is the same reason the payment does not go into general state revenue; even if the plaintiff is rich, she is entitled to payment in the amount of her injury. Similarly, the defendant does not pay just any amount to anyone; the payment is a taking of responsibility for injury wrongfully inflicted.

Once he has the structure of his model of bipolar tort litigation in place as a fundamental feature of tort law, Weinrib puts it to critical use. If the account of tort law in terms of corrective justice is compelling because it is capable of explaining why the aforementioned features of tort law are *essential*, the converse is true of instrumentalist accounts of tort law, particularly economic accounts. In accounts such as that offered by William M. Landes and Richard A. Posner's *The Economic Structure of Tort Law*,[27] it is at best fortuitous or accidental that economic incentives are designed as they are in our system: the plaintiffs are the injured parties and the sanction matches the loss, in our system. This structure is hardly essential. Although several leading economic scholars, such as Louis Kaplow and Steve Shavell, have, in effect, concluded that the structure of tort law is probably not optimal from an economic point of view,[28] this is not the point of the bipolarity critique. Instead, the point is that whatever putative explanation of bipolarity the economist offers, these features are merely contingent, relative to their fundamental account of what tort law is.

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26. COLEMAN, *supra* note 1, at 374–75; WEINRIB, *supra* note 1, at 134–36.

27. LANDES & POSNER, *supra* note 5.

28. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1097–1102 (arguing that current structure of tort law—in part because of overemphasis on notions of "fairness"—is probably suboptimal in number of ways from welfarist point of view).

Consider, for example, that the plaintiff is the person paid by the defendant in our tort system. On the corrective justice account, it is plain why this is so: The plaintiff is the party who has been injured by the defendant's wrongful conduct. Because tort law revolves around the idea that the defendant has a duty of repair to the party he or she injured, it is straightforward that the defendant must make his or her payment to the plaintiff, and not simply to the state, the attorney, or some other party. By contrast, on the economic account, requiring defendants to pay when they have engaged in tortious conduct is based on the prospect that such payments, ex ante, will provide an incentive to similarly situated actors to refrain from engaging in tortious conduct (unless it is worth doing so, in which case it is not tortious). In this sense, liability in tort plays the same functional role as a penalty or fine within a regulatory system. If this is so, however, it does not seem to matter whether the payment is made to the plaintiff or to someone else—all that matters is that the defendant is forced to part with the money, not who receives it.

Posner and others have argued that the goal of making the injured party the beneficiary is to provide people with incentives to sue, thereby saving the state money it would otherwise need to spend on enforcement.[29] Moreover, it is also efficient to permit the injured party to sue because it is cheaper for that party to gather information for evidence.[30] The corrective justice theorist responds in two ways. First, there are plenty of reasons to doubt the plausibility of these functional explanations, and law and economics scholars are increasingly wary of wholeheartedly endorsing them. Second and more importantly, even assuming that there are benefits to this structure from an economic point of view, it is simply a contingent matter that this is so. Ten years from now, for example, it may be more efficient to let state attorneys general receive the money. Yet, if we changed the law so that negligence actions were brought only by the state and so that the state received payment in such actions, the remaining system would no longer be tort law. It would be something else—a kind of regulatory enforcement system perhaps, but not tort law. This thought experiment indicates that the plaintiff-beneficiary aspect of tort law is essential, rather than merely contingent. A parallel argument can be provided for each of the essential features indicated above: that plaintiffs can bring actions, that the compensation matches the payment of the defendant, and that the defendant's payment is intended to equal the plaintiff's harm. According to corrective justice theorists, the law and economics account provides a fundamentally inadequate explanation of tort law because it misses the essential significance of all these aspects of the law's structure. This, in short, is the bipolarity argument against law and economics offered most prominently by Weinrib[31] and Coleman.[32]

29. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 176 (3d ed. 1986).
30. *See id.* at 563.
31. Weinrib, *supra* note 16, at 503–06.
32. COLEMAN, *supra* note 1, at 380–82.

Although Weinrib and Coleman disagree about a great deal in tort theory, they seem to agree that the bipolarity critique is a powerful argument that economists have never adequately met or even taken seriously. Yet, there is reason to be concerned that the force of the bipolarity argument has not been adequately explained. At least three interpretations of the bipolarity argument exist. Although I initially suggest that each of these interpretations is problematic, I will ultimately endorse a reconstruction of one version of the argument—the conceptualist—which I believe to be sound.

The first, or conventional, version of the bipolarity argument takes a rather soft view of what it means for an aspect of tort law to be "essential"—that is, "very important" or "central." According to this view, certain aspects of tort law are so significant that an account that fails plausibly to explain their structure and importance is, for that very reason, defective. Because there are several important and interconnected features of tort law that cannot be explained persuasively by the economic theory of tort law, the economic account is ultimately very weak.[33]

The second, or "essentialist," version of the argument adopts a literal and metaphysical view of what it means for certain aspects of tort law to be "essential" to it. Following Aristotle, certain things or activities have features that are so significant to being a thing or activity of that kind that, if they are lacking, the activity or thing would not be of that kind. Accordingly, to say that the bipolar structure is essential to tort law is to say that it would no longer be tort law if that structure were lacking. Economic accounts of tort law fail to capture these essential qualities of the bipolar structure and are therefore inadequate.[34]

The third version lies in between the first two, treating the ascription of essential features as distinct in kind from merely the characterization that some features are so important that they must be explained convincingly, yet not assuming an essentialist Aristotelian ontology of law. "Essential," in this version, has little to do with the identity of tort law as tort law. The point is not that, without bipolarity, we would have a different kind of activity or institution. Rather, the point of saying that the injured person's role as plaintiff is essential to tort law is that the principle that the injured person is entitled to be compensated by the injurer is constitutive of this part of the law, just as the principle that the defendant must pay the plaintiff is constitutive to the law. This is like saying that the concept of a right to vote must be part of an explanation of a democratic system of election, and cannot simply be explained away. The right to vote is not the essence of election law in the sense that, without it, we would no longer be dealing with election law; it is the essence of election law in

33. *See id.* at 378–85 (stressing centrality of structural features of tort law and unpersuasiveness of economic account).

34. Weinrib, *supra* note 16, at 493–94; *cf.* Ernest J. Weinrib, *Legal Formalism: On the Imminent Rationality of Law*, 97 YALE L.J. 949 (1988) (developing essentialistic jurisprudence in some ways). In later works, Weinrib plainly rejects essentialism.

the sense that it is the law. On this account, the concept of a duty to repair and a right to recovery, and of rectification and making whole, constitute the law. I shall call this the "conceptualistic" account.[35]

All three versions of the argument face problems, both as accounts of what corrective justice theorists are trying to say, and in their own right. The conventional account is plainly not what Weinrib had in mind, and the same appears to be true of Coleman. Moreover, the conventional account, although extremely promising, is clearly incomplete in light of the sophistication of the second-best theories and path-dependency arguments economic analysts have offered.[36] Finally, considering the complexity of normative and descriptive issues that theorists bring to bear in theory evaluation, even if the economic account failed on these highly important features, the argument between accounts might still remain alive.

The essentialist account is somewhat plausible as a version of some of Weinrib's articles and even of some of Coleman's statements.[37] The problem is that, even assuming its Aristotelian ontology is cogent, the essentialist account rests on a wholly undefended methodological premise—that a theory of an area of the law needs to explain not only features of the law but also why the essential features are essential. Certainly, neither Weinrib nor Coleman has offered an argument for this rather demanding desideratum. And no arguments are particularly plausible. One can concede that an attractive feature of the corrective justice account is that it does treat certain features as essential, which one would plausibly categorize as essential. But that is far from saying that the failure to provide a theoretical apparatus for treating these features as essential is a fatal defect.

I have argued elsewhere and will argue here that the conceptualistic account is both the soundest and the most plausible version of these theorists' critiques. The bipolarity critique does not, at its core, fault economics for failing to produce a good functional explanation. It faults the economist for failing to recognize that an explanation of the law in terms of its functions, however useful it may be in many contexts, is not an adequate form of interpretation of the law. Something beyond a functional explanation of the law is needed. The economist cannot provide, nor even remain consistent with, a plausible nonfunctional account. In particular, functional explanations are inadequate, accord-

35. Although this Article discusses the conceptualist account, my analysis and defense of this account is more thoroughly explained and analyzed in Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000). Both Weinrib's and Coleman's accounts can be sympathetically reconstructed along these lines. For a Wittgensteinian version of this argument, see Stone, *supra* note 25. In a book published since *Pragmatic Conceptualism*, Coleman has endorsed the version I presented in that work. COLEMAN, *supra* note 16, at 10 n.12.

36. *See* Zipursky, *supra* note 35, at 464–67 (explaining and addressing second-best theories and path-dependency arguments).

37. *See generally* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); *cf.* COLEMAN, *supra* note 1, at 382.

ing to the corrective justice theorist, because they fail to provide an analysis of the concepts embedded within the law.

The corrective justice theorist's structural argument thus rests upon the methodological premise that an account of the law is inadequate if it fails to provide an analysis of the concepts embedded within the law. I will call this the "conceptualistic premise." A rough and preliminary version of this argument and its application is as follows: Analyzing the concepts embedded within legal materials is necessary to identify the content of those legal materials; identifying the content of those legal materials is necessary to state what the law is; a theory of the law is inadequate if it cannot state what the law is; thus, an account of the law is inadequate if it does not provide an analysis of the concepts embedded within legal materials. When we add the premise that purely functional explanations of the law do not provide analyses of the concepts embedded in the law, we may infer that purely functional explanations are inadequate. Thus, because the standard law-and-economics account of tort law provides a purely functional explanation, we may conclude that it is inadequate.

The prior paragraph reveals that the disagreement between law and economics and corrective justice on the strength of the "structural critique" is rooted in a deeper disagreement over the methodology of legal theory. Although it puts forward an argument on behalf of a certain, conceptualistic methodology, this is really only the shell of an argument. It is unclear what it means for concepts to be "embedded in the law," what it means to "identify the content of the law," what it means for the law to have "content," and what it means to state what "the law is." Conversely, it is unclear why functional explanations are incapable of explaining what the law is and how they really differ from analyses of concepts embedded in the law. More broadly, if we are to understand the structural critique, we need an account of why there is an important sense of "what the law is" that conceptualistic analyses are able to capture and purely functional explanations are not.

The discussion above suggests that the divide between the philosophers and the economists over the soundness of the "bipolarity critique" consists, in part, of a disagreement over the role that conceptual analysis ought to play in an account of the law. Weinrib, Coleman, and other philosophers focus on an explanation of the concepts and principles that are in the law, as these concepts and principles appear on their face and as they are deployed in ordinary inferences by legal participants. In contrast, Posner and economists believe another question ought to be asked: What function is being served by this or that feature of the law? Posner is operating within an instrumentalist methodology in legal theory that traces back to Oliver Wendell Holmes and which has dominated tort theory in the past century.[38] Hence, it is not surprising that, even among traditional tort scholars, the economic accounts have typically evoked a

38. Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 42–45.

more sympathetic reaction than the philosophical ones. Indeed, although I believe the importance of corrective justice theory has been appreciated by philosophers, it has not been adequately recognized by traditional tort scholars.[39]

In broader terms, the conceptualistic basis of the bipolarity critique has met with resistance because tort scholars are pragmatic thinkers who look for pragmatism even when they shop for a theory. To them, corrective justice theory seems to be the opposite of pragmatic. Leading corrective justice theorists, such as Weinrib, trumpet their theories as "formalistic," but "formalism" is a pejorative term in American legal academia. Indeed, for the vast number of American legal academics who cling to the ill-defined Holmesian mix of functionalism, instrumentalism, legal realism, and utilitarianism that currently travels under the label "pragmatism," the only truly uncontested point of theory is that they are *not* formalists. The point does not merely concern terminology, for what corrective justice theorists are asserting—and, as I have suggested, one of the very reasons their work is so philosophically important—is that it is a mistake to treat all analysis of law as a depiction of the social goals it serves. Pivotal terms and concepts within the law have meaning apart from their functions. This assertion challenges a central dogma of American legal thought, a dogma that took root first and most firmly in Holmes's own treatment of the common law of torts.[40] Pragmatists cling to this dogma not simply because it supports their practical work, but because they believe any other approach to law is an indulgence in the airy world of make-believe rights and duties, leading to self-satisfaction but relying upon nonexistent or undiscoverable moral truths. In short, corrective justice theory seems to indulge either Blackstone's natural law approach or Langdell's formalism, and both are complete non-starters for the contemporary tort scholar.

It is a mistake, however, to think of corrective justice theory in terms of an archaic, antipragmatic, or transcendentalist approach to the law.[41] Indeed, I have recently argued in a related article that there are powerful reasons growing out of pragmatism itself to recognize the sort of interpretive jurisprudence that theorists such as Coleman, Weinrib, Stephen Perry, and Arthur Ripstein are offering.[42] I call this view "pragmatic conceptualism."[43] The identification of

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39. *See supra* note 3.

40. *See generally* OLIVER WENDELL HOLMES, THE COMMON LAW (1881); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

41. *See generally* Ripstein & Zipursky, *supra* note 17 (arguing that contemporary problems in mass torts can be sensibly and pragmatically resolved within conceptualistic framework); Goldberg & Zipursky, *supra* note 14 (describing and employing pragmatic form of conceptualism used by Cardozo in torts); Zipursky, *Legal Malpractice*, *supra* note 17 (describing conceptualistic form of pragmatism in opposition to legal realism); *see also* John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1436–55 (1999) (arguing, against Kaufman, that Cardozo was not realist but pragmatic conceptualist).

42. Zipursky, *Pragmatic Conceptualism*, *supra* note 35.

43. *Id.* at 474–78 (locating pragmatic conceptualism within matrix of contemporary jurisprudential theories). A 1998 draft of the current article was entitled, "Pragmatic Conceptualism, Civil Recourse, and Corrective Justice." Part I of that article was separately published as *Pragmatic Conceptualism*; the

critical concepts within the law is possible within a framework that is practice-based, holistic, and open to revision. This form of legal theory is not itself impractical—rather it is practically necessary for identifying what the law is, which, in turn, permits us to ask questions about whether the law should be changed. Properly understood, the philosophical sophistication of corrective justice theory solidifies, rather than spoils, its powerful critique of law and economics.

The key to pragmatic conceptualism is the recognition that if, as pragmatists contend, our practices are partially constitutive of our ways of thinking, then the understanding of legal concepts requires an understanding of the structure of practical inferences in which our legal concepts and principles are involved. Corrective justice theory's critique of law and economics can be reformulated in these terms. What is essential to tort law's structure is that courts infer from a defendant's wrongful injuring of a plaintiff that the defendant must compensate the plaintiff for the injury imposed. Corrective justice theory explains this pattern in terms of a principle that states that one who has wrongfully injured another has a duty of repair running to the victim. The key to understanding the structure of the law is simply understanding that principle. Displaying the normative basis for such a principle of repair facilitates a deeper understanding of the legal principle and of the concept of a duty of repair. The law and economics account treats it as a merely contingent matter that the defendant pays the plaintiff rather than the state and that the defendant's liability matches the plaintiff's loss, rather than being a fine, or higher or lower. The law and economics account offers no explanation of the principle that there is a duty of repair; it attempts, instead, to explain this principle away. But because the principle is constitutive of the law, and because the pattern of inferences in which the principle is enmeshed constitutes the substance of the principle, a theory of the content of the law that omits this principle has failed to explain the core of the law's content. It is entirely inadequate, much like a piece of statutory interpretation that leaves out the text entirely.

The point, on this pragmatic conceptualist account, is not that corrective justice theory offers a better rational reconstruction of the law than law and economics. Rather, the point is that the common law of torts itself consists of a set of concepts and principles.[44] It is one thing to say why the principles and

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more extensive Parts II & III evolved into the present article. The concept of pragmatic conceptualism was gestured at by myself and coauthors, John Goldberg and Arthur Ripstein, in early drafts of Goldberg & Zipursky, *supra* note 14, at 1811 *et seq.*, Ripstein & Zipursky, *supra* note 17, at 215, and Zipursky, *Legal Malpractice*, *supra* note 17, at 690 (favoring conceptualistic pragmatism of Cardozo over Prosser's reductionism). Pragmatic conceptualism as a jurisprudential theory was developed in the earlier drafts of this article and then published in *Pragmatic Conceptualism*. Jules Coleman's book, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY, *supra* note 16, takes up pragmatic conceptualism at a number of levels.

44. *Accord* Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 796, 807–15 (explaining nonstandard interpretation of Dworkinian view of principles in law); *see* Zipursky, *supra* note 35, at 472, nn.55–56 (developing principles-based theory of tort law).

concepts serve a function we wish them to serve. It is another thing to say what those principles and concepts are. Without a doubt, the first and more functional approach is vitally important in legal theory and in adjudication. But the second is fundamental in giving an account of what the law is. A theory of the function of the law that undermines a serious and candid account of the content of the law is unacceptable. Coleman and Weinrib's bipolarity critique shows that this type of deficient theory is precisely what economists have offered.

This form of conceptualism is pragmatic in three respects. First, as explained above, it rejects a transcendental or metaphysical approach and sees the law as rooted in our legal practices. Second, the claim that several important tort concepts should not be understood functionally is not to be understood as a claim about the essence of legal concepts, but as a contingent claim about the content of many legal concepts in tort. Under this view, it remains an open possibility that certain legal concepts, like "restraint of trade," for example, may be understood in a reductive instrumentalist manner. The question is whether the role of the concept itself in our practices reveals that one deploying it must explicate it in terms of a policy judgment about its effects and then read back into the legal vocabulary. The pragmatic conceptualist, unlike the formalist, is ready for this possibility, but unlike the Holmesian, does not assume it.

Finally, the conceptualist I envision takes a certain approach in describing the content of the law. His or her theory is neither what the law ought to be, nor ultimately, how cases should be decided. Unlike the formalist, the pragmatic conceptualist recognizes that pragmatic thinking will, and should, often play a significant role in adjudication. But even to identify when the law is applied, extended, revised, or rejected, we need to have some sense of what the law is. This requires identifying what concepts and principles structure tort doctrine. Once that is done, particular cases will commonly require judges to ask themselves how the concepts and principles before them would be cogently and pragmatically applied. Judges may also be required to ask whether there are circumstances warranting the revision or rejection of some part of the law and whether their institutional competence warrants such revision. The pragmatic conceptualist judge, in applying the law, would be watchful of the impact of the law, but his or her first question would be how to apply in a sensitive manner the concepts and principles that are already embedded in doctrine.

Pragmatic conceptualism ironically vindicates a certain sort of pluralism, but does so in a manner that undercuts the aspirations of law and economics. Unlike law and economics, it does not describe what results a body of law produces. However, this information about the function of the law, assuming it is not built into particular concepts of the law in the manner described, is nevertheless relevant to evaluating the law and to deciding, when appropriate, how the law should be fashioned. But there is no reason to assume that the law will be serving one kind or pattern of functions. The law achieves all sorts of results, many of them good. It is not obvious why only one function should be

accommodated. By contrast, the pattern of concepts and principles embedded in the law is supposed to represent the structure of propositions and inferences that constitute the law, just as a statute must be understood to have one meaning, even if it serves many different functions; awareness of those functions leads judges to articulate and craft the statute in various different ways. The corrective justice theorist does not aim to announce one more function, only one that is morally more worthy than others. He or she aims to set forth what the principles of tort law *are*.[45] By contrast, the economist's insistence on simply setting forward a putative function of tort law leaves the economist open both to pluralism and to the charge that he or she omits a view of the most important question—what the law is.

II. A CRITIQUE OF CORRECTIVE JUSTICE THEORY

We have focused thus far on the corrective justice theorists' reasons for thinking that the economist's interpretive account of tort law is inadequate. This is the destructive aspect of corrective justice theory. However, the more prominent aspect of the theory is constructive. Coleman and Weinrib offer positive accounts that claim to explain the structure of tort law and the concepts and principles within it. In this Part, I argue that corrective justice theory is itself unable to meet the high conceptualistic standards that it sets for tort theory.

The duty of repair is central to corrective justice theorists' explanation of the bipolar structure of tort law.[46] The central question is how the law infers from a defendant's conduct and its impact upon the plaintiff the imposition of liability that runs to the plaintiff. Corrective justice theory answers that this inference is mediated through the concept of a duty of repair. Under this view, the law of torts embeds a principle, stating that one who wrongfully injures another is responsible for the losses he or she creates.[47] It contains another principle, to the effect that one who is responsible for another's loss also has a duty to repair that loss. Hence, a defendant who wrongfully injures a plaintiff is responsible for the loss she creates in the plaintiff. It follows that defendants have a duty to repair plaintiffs' losses. By imposing liability upon the defendant to the plaintiff, tort law is recognizing this duty from the defendant to the plaintiff. To grasp the concept of wrongfully injuring in the tort law, and to grasp the concept of liability imposition is to grasp their place in this network of principles and the

45. The point here is not that a unique account of meaning is possible or desirable. It is the softer point that the notion of a function does not even aim at uniqueness, whereas the idea of meaning or content does.

46. COLEMAN, *supra* note 1, at 361; WEINRIB, *supra* note 1, at 122–23; Perry, *supra* note 1, at 508.

47. *See, e.g.*, COLEMAN, *supra* note 1, at 374; Perry, *supra* note 1, at 507–08; *cf.* WEINRIB, *supra* note 1, at 135 ("[T]ort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed."). The concept of responsibility for loss plays a lesser role in Weinrib's theory than in Coleman's or Perry's; in Weinrib's theory, rectification plays a greater role.

web of inferences they spawn. This, in turn, is not possible unless one recognizes that a duty of repair is what links wrongful injuring to the imposition of liability.[48]

The problem with this account, I will argue, is that our actual tort law is not constituted by this pattern of inferences and, more particularly, does not give a central role to a duty of repair or to the principles deploying this concept, upon which corrective justice theorists rely. I make this argument in three interrelated ways: First, I argue that tort law frequently imposes remedies that, in the circumstances, are not aimed at having the defendant make the plaintiff whole, so the recognition of a right of action in tort cannot be isomorphic with the recognition of a duty of repair. Second, I argue that tort law systematically declines to permit recovery by plaintiffs who have suffered injuries that are the fault of a tortious defendant, undercutting the claim that liability imposition proceeds from a principle that tortfeasors have a duty of repair to those who have suffered injuries for which they are responsible. Third, I argue that even within paradigmatic "duty of repair" cases under the tort law, corrective justice theory inaccurately describes the structure of a duty of repair by failing to respect the distinction between a liability and an affirmative duty to pay.

A. THE DIVERSITY OF REMEDIES

The corrective justice framework treats the task of explaining tort law as a task of explaining why the costs associated with a plaintiff's loss are shifted, via a court's liability imposition, to the defendant.[49] It is neatly tailored to this question, treating the ground of imposition for that loss to be a duty to repair that loss. This is not, I shall argue, a virtue of corrective justice theory, but rather a limitation that provides an independent ground for rejecting the theory. The problem is that courts do many things in tort law once they have decided that the defendant committed a tort upon the plaintiff; the imposition of liability for the wrongful injury created by the defendant is simply one of many remedies granted—a particular form of compensatory damages. In fact, courts award plaintiffs a variety of remedies beyond compensatory damages and, even within compensatory damages, typically utilize an array of measures not connected in a straightforward way to the wrongful injury itself.[50]

Tort law separates the questions of whether there was a tort and what the appropriate remedy should be. In a variety of cases such as nuisance, trespass,

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48. *See, e.g.*, COLEMAN, *supra* note 1, at 380–82; WEINRIB, *supra* note 1, at 143 ("Liability transforms the victim's right to be free from wrongful suffering at the actor's hand into an entitlement to reparation that is correlative to the defendant's obligation to provide it. The remedy consists not in two independent operations—one penalizing the defendant and the other benefiting the plaintiff—but in a single operation that joins the parties as obligee and obligor.").

49. This specification of the object of explanation is particularly clear in Arthur Ripstein's work. RIPSTEIN, *supra* note 1.

50. *See generally* 4 FOWLER V. HARPER, FLEMING JAMES & OSCAR S. GRAY, THE LAW OF TORTS 489–678 (2d ed. 1986) (discussing damages in accident cases).

invasion of privacy, libel, product liability, and misrepresentation, a number of injunctive remedies are available and frequently granted. These remedies include, for example, negative injunctions on the use of land in property torts,[51] injunctions to expunge public records in libel and privacy cases,[52] injunctions to abate toxic materials in product liability,[53] and reformation and rescissions in misrepresentation cases.[54]

Within the realm of damages, there is again a variety, including nominal,[55] compensatory,[56] and punitive,[57] at a minimum. I say "at a minimum" not only because a variety of costs, such as court fees and prejudgment interest, are often part of a remedy, but also because the phrase "compensatory damages" itself contains a diversity of subcategories along two dimensions. On the one hand, we may distinguish compensatory damages that go to the predicate injury in light of which there is a tort at all—for example, the costs associated with physical injury in an automobile accident. On the other hand, there is a range of consequential damages that may also be compensable, such as the lost wages flowing from that injury.[58] Along another axis, there are many different damage types, including not only compensation for physical injuries, property damage, and economic loss,[59] but also nonpecuniary damages for pain and suffering,[60] harm to reputation,[61] emotional trauma,[62] and loss of enjoyment of life.[63] Whether all these damages really belong to one category of "compensatory damages" is a subtle question, which I will simply note at this stage.

The diversity of remedies undercuts corrective justice theory for two reasons. First, there are substantial areas of tort law that corrective justice theory is forced to leave unexplained. For example, although one who has wrongfully injured another has a duty to repair that loss, this principle does not explain why courts impose punitive or nominal damages. By definition, these types of damages do not concern responsibility for the loss created. Corrective justice theory is similarly unable to explain why a variety of injunctive remedies are available.

There is a second, deeper problem. The diversity of remedies indicates that

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51. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 1338 (2000) (noting that injunctions are available for nuisance claims).

52. *Id.* at 1194 (explaining that courts sometimes order public records expunged).

53. *See, e.g.*, N.C.R. Corp. v. U.S. Mineral Prod. Co., 649 N.E.2d 175, 178 (Ohio 1995) (basing action for asbestos abatement on product liability).

54. DOBBS, *supra* note 51, at 1379–80.

55. STUART M. SPEISER, ET AL., THE AMERICAN LAW OF TORTS 456.57 § 8:4 (1985).

56. *See, e.g., id.* at § 8:5.

57. *See, e.g., id.* at § 8:45.

58. *Id.* at §§ 8:26–27.

59. *Id.* at §§ 8:28–35.

60. *See, e.g., id.* at §§ 8:19–20.

61. *See, e.g.*, DOBBS, *supra* note 51, at 1189.

62. *See, e.g.*, Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980) (holding that mother could recover damages for emotional distress incurred while watching son suffer and die).

63. *See, e.g.*, DOBBS, *supra* note 51, at 1052.

the issue of whether there is a right of action in tort is distinct from the issue of what the remedy should be. Pragmatic conceptualism demands that we capture the concepts and principles embedded in the law, and that we grasp the pattern of inferences in the law. Corrective justice theory deems the commission of a tort by the defendant to give rise to an inference of a duty of repair. But, as I have argued, it is possible for the plaintiff to have a right of action in tort without reaching the question of whether defendant has a duty of repair. So, although the commission of a tort by the defendant gives rise to a right to some sort of remedy in the plaintiff, the existence of this right to a remedy cannot be dependent upon the plaintiff being the owner of a loss and therefore the beneficiary of the defendant's duty of repair. It is therefore the case that, even when compensatory damages are awarded, corrective justice theory misses a link in the inference from tortious conduct to the imposition of liability.

Corrective justice theorists might adopt either a reduction or an illegitimacy defense, as I call them, in response to this sort of criticism. The reduction defense claims that remedies other than damages, or nominally noncompensatory damages, are really compensatory damages by another name. For example, it may be tempting for the corrective justice theorist to treat punitive damages as a special form of compensatory damages aimed at capturing a range of costs usually omitted from compensatory damage awards, such as dignitary harm, attorney's fees, or other costs associated with litigation.[64] This approach offers an incomplete and unpersuasive account of the actual law of punitive damages, however appealing it may be as a normative account. To illustrate, it does not explain why the availability of punitive damage awards is conditioned on whether the defendant's conduct was wanton or willful.[65] And just as importantly, to adopt such an approach would constitute a significant concession for the corrective justice theorist, who aims to explain the concepts in the law. The attempt to reduce punitive damages to a form of compensatory damages is an attempt not to explain, but to explain away.[66]

The illegitimacy defense takes the bull by the horns and argues that certain remedies that are nominally part of tort law are in fact alien from the conceptual structure of tort law.[67] Punitive damages will again serve well as an example. Historically, one might argue, tort law functioned as a coherent system for enforcing duties of repair and restoring normative equilibrium. However, at some point, a few courts who misunderstood the structure of the tort system permitted individual tort cases to be the occasion for the imposition of punish-

64. *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reforms*, 39 VILL. L. REV. 363, 378–79 (1994).

65. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 10 (5th ed. 1984).

66. *See* Zipursky, *supra* note 35, at 473–76 (analyzing special significance of conceptualistic explanations in common law).

67. Weinrib, for example, rejects punitive damages as failing to fit within the normative structure of tort law. WEINRIB, *supra* note 1, at 135 n.25.

ment on the defendant, grafting a little piece of essentially criminal law onto the private law. Hence, our current system is almost entirely concerned with compensatory damages, but it is a slight hybrid with an underdeveloped and undisciplined form of criminal law that is permitted within private litigation.

Although this is an illuminating line of argument to which I will return in the constructive section of this Article, there are serious problems with it in this form. First, the corrective justice theorist who takes this route is voluntarily taking a loss in the battle among interpretive theories. This is a concession that what appears to be part of tort law is not really so: It must be excised root and branch if we want to see what is really part of tort law. Second, the effort to use history to soften the impact of removing punitive damages will not work. Punitive damages, in fact, have a long pedigree within the tort law, and it appears that they are viewed as legitimate parts of the private law.[68] Indeed, although the English legal system was long aware of the possibility of requiring damages to be paid to the state, punitive damages traditionally went to the injured party.[69] Moreover, in articulating why punitive damages go to the plaintiff, courts refer to an idea that goes beyond public retribution and deterrence and implicates the idea of private law—they refer to the plaintiff's entitlement to vindication in light of the nature of the wrong done.[70] By definition, we are not dealing with compensation here, so corrective justice theory is inapt, but an explanation in terms of a "graft" of the criminal law is equally inapt for the reasons just articulated.

A broader problem with this line of argument is that even if, contrary to fact, it could persuasively depict punitive damages as alien to the private law, and even if it could withstand the sacrifice of this piece of private law, there is much more that would need to be sacrificed. There is a wide variety of injunctive remedies in tort law that are quite obviously not part of the criminal law and are indeed part of private law. Thus, when a nuisance plaintiff seeks an injunction, when a fraud plaintiff seeks rescission, or when a libel plaintiff seeks expungement, each has established an actual or anticipated tort, but each seeks a private remedy other than damages. When a court grants the remedy, it is doing so because of the parties' rights under tort law. But these are not cases of defendants taking responsibility for the harm they have caused. To treat all remedies of the tort law other than compensatory damages as grafts, and not as within the law itself, is to concede that one's theory is unable to explain a substantial area of the law. Finally, neither the reduction nor the illegitimacy defense addresses the larger problem that the diversity of remedies poses for corrective justice theory—the lack of a direct link between the notion of a right of action and the imposition of liability.

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68. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 4–5 (2000).

69. *Id.* at 168.

70. *Cf.* Margaret Jane Radin, *Essay: Compensation and Commensurability*, 43 DUKE L.J. 56, 85 (1993) (setting forth noncommodified conception of compensatory damage awards).

B. STANDING

Corrective justice theory commends itself as superior to law and economics because it offers an account of whom tortfeasors are required to pay and why they are required to do so. More generally, it purports to offer an account of the "plaintiff-driven" structure of tort law. The account runs roughly as follows: Tortfeasors have created certain losses in others for which they are responsible. Courts, recognizing responsibility for those losses, infer a duty of repair and consequently impose liability. This liability is, in effect, the recognition of a debt from the tortfeasor to the person who, prelitigation, is saddled with this wrongful loss. Thus, bearers of wrongful losses for which tortfeasors are responsible are the beneficiaries of liability imposition. In this sense, corrective justice theory offers an account of which plaintiffs will have standing to bring a tort action.

Like the prior section, this section does not challenge the cogency of the set of principles just depicted. Rather, it challenges the contention that our actual tort law embeds these principles and concepts. The problem is that our tort law does not, in fact, make tortfeasors liable to those who have suffered wrongful losses for which the tortfeasors are responsible. I will argue that in a wide range of cases, tort law declines to impose liability on defendants in favor of the bearers of those wrongful losses. Being the bearer of a wrongful loss for which the defendant is responsible is therefore not sufficient to generate liability to the plaintiff. Again, this observation undercuts the claim, inherent in corrective justice theory, that our tort law is based on a principle that those who wrongfully injure others have a duty of repair for the losses flowing out of those injuries for which they are at fault.

The argument I offer is somewhat indirect. First, from a doctrinal point of view, what determines whether the plaintiff is the beneficiary of liability imposition is a feature that I have elsewhere labeled "substantive standing."[71] Second, substantive standing is not coextensive with the category of being the bearer of a wrongful loss for which the defendant is responsible. It follows that being the bearer of a wrongful loss for which the defendant is responsible does not necessarily make one the proper beneficiary of liability imposition.

Our law of torts has rules that determine which private parties are allowed to sue defendants for torts they have committed. As I have argued at length in a prior article,[72] these rules demonstrate a fundamental and pervasive feature of tort law: A plaintiff may recover against a defendant for a tort only if the defendant's conduct was tortious relative to the plaintiff. The tort under which the plaintiff claims a right of action determines the substantive standard of "wrongfulness-relative-to plaintiff." If the defendant's conduct was not a wrong to the plaintiff in this substantive sense, then the plaintiff would not have a right of action against the defendant; the plaintiff would lack standing. I have labeled

71. Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 4.
72. *Id.* at 15–40.

this feature of tort law the "substantive standing" rule and demonstrated its applicability throughout tort law.[73]

Several examples will be helpful. A plaintiff who sues a newspaper for the tort of defamation must prove that the newspaper defamed the plaintiff individually—the newspaper's defamatory publication must have been about the plaintiff in relevant part—or a right of action would be lacking, even if the plaintiff was injured by the defamation.[74] A plaintiff who sues a poacher for trespassing upon land must prove that the land trespassed upon was land to which the plaintiff had a right.[75] A plaintiff who sues a lawyer for malpractice must prove that the lawyer breached a duty owed to the plaintiff; there would not be a right of action, for example, if the lawyer whose negligence hurt the plaintiff was representing an adversary in litigation.[76] A plaintiff who sues for fraud must prove that the content of the misrepresentation actually deceived her in some way; if the plaintiff did not rely on the misrepresentation in any way, that person cannot sue for fraud, even if she was harmed.[77] A similar rule holds for every tort. The most famous illustration is in the law of negligence, which holds that a plaintiff injured by a defendant's careless conduct has no right of action against that defendant unless the carelessness was a breach of a duty of care owed to the plaintiff. Judge Cardozo applied this principle explicitly in his famous *Palsgraf* decision,[78] and implicitly in the almost equally famous *MacPherson v. Buick Motor Co.*,[79] in which he saved a plaintiff's cause of action against an automobile manufacturer by holding that a manufacturer has a duty of due care that runs to automobile users.

The substantive standing rules are most startling in the wide range of cases in which the defendant commits a tort in a context in which it could have been foreseen that the commission of this tort would injure the plaintiff. Yet courts often deny recovery in these cases on the grounds mentioned above: The defendant's conduct was not wrongful relative to the plaintiff. These cases

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73. *See id.* at 15–39 and cases cited therein.

74. Johnson v. S.W. Newspapers Corp., 855 S.W.2d 182 (Tex. Ct. App. 1993).

75. Lal v. CBS, Inc., 726 F.2d 97, 100 (3d Cir. 1984) (holding that only person in possession of property may recover for defendant's trespass).

76. Friedman v. Dozorc, 312 N.W.2d 585 (Mich. 1981) (holding that physician who was sued by client-patient had no legal malpractice claim against patient's attorney).

77. Rosen v. Spanierman, 894 F.2d 28, 30 (2d Cir. 1990) (plaintiff herself must have relied upon fraudulent statement).

78. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) (holding defendant-railroad not liable for injuries to plaintiff standing on platform because defendant's agent, a guard, breached no duty owed to plaintiff when he steadied another passenger hanging from departing train by pushing him onto train, causing passenger's package of fireworks to fall and explode, which caused scales to fall and strike plaintiff. "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away.").

79. 111 N.E. 1050, 1053, 1055 (N.Y. 1916) (holding defendant-car manufacturer liable for plaintiff's injuries resulting from defective wheel, regardless of whether there was privity of contract between defendant and plaintiff, because defendant owed duty to plaintiff to manufacture car safely, and this duty included inspecting component parts). *See* Goldberg & Zipursky, *supra* note 14 (depicting relationality and substantive standing in negligence law, particularly as exemplified in *MacPherson*).

include, for example, when a plaintiff is injured by defamatory statements directed at a spouse or partner,[80] when an adversary is hurt by insufficiently prepared litigation against him,[81] when a lender is injured by fraudulent statements made by a defendant to a borrower from that lender,[82] when a plaintiff is emotionally injured by the negligent killing of a lover,[83] and when a plaintiff is financially injured by the negligent destruction of the sole means of access to her business establishment.[84] In these cases, the substantive standing rules apply to deny recovery, notwithstanding the reasonable foreseeability of injury to the plaintiff. An important point about the substantive standing requirement is that it reveals a conceptual structure quite different from that of corrective justice theory. The problem in all of the above cases, is that although there is wrongful conduct that causes the injury and the imposition of liability would restore the plaintiff, there is still no liability.

An initially impressive response to this problem, consistent with corrective justice theory, is that the notion of responsibility must be analyzed carefully before any inferences are drawn about the cases in which corrective justice demands that compensatory damages not be the only available remedy. Although the meaning of "compensatory" in the phrase "compensatory damages" is not transparent, surely the compensatory damages remedy forms the core of tort law. Hence, by and large, the system sees to it that those who have duties of repair to the victims of torts dispatch those duties of repair. In this manner, tort law is about doing corrective justice. Diversity of remedies, substantive standing, and the liability/affirmative duty distinction are all quibbles. The corrective justice theorists are basically accurate with respect to a duty of repair. However, it is not enough, the objection continues, to say that the defendant committed a legal wrong and that the legal wrong caused harm to the plaintiff. The defendant's duty of repair depends upon the defendant being responsible for the injury he or she caused to the plaintiff. Mere causation of the injury by a wrongful act is not sufficient for application of the moral concept of responsibility for the injury. Something more is required in our concepts of corrective justice. Accordingly, it is not sufficient in our actual law.

Stephen Perry's work takes this view and offers an account of the notion of responsibility for outcomes within our concepts of corrective justice.[85] In

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80. Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 17 n.15.

81. *See, e.g.*, RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE 490 (4th ed. 1996) ("Historically, attorneys' malpractice exposure for negligence has been limited to their clients.").

82. Peerless Mills, Inc. v. AT&T, 527 F.2d 445, 447 (2d Cir. 1975).

83. *See* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (rejecting emotional harm claim by unmarried cohabitant).

84. Zipursky, *Rights, Wrongs and Recourse*, *supra* note 17, at 17–34; *cf.* Rickards v. Sun Oil Co., 41 A.2d 267, 268 (N.J. 1945) (denying recovery by plaintiff, whose sole means of access to work was destroyed when defendant crashed into drawbridge. The court held that the plaintiff's right to recover must be grounded in a violation of duty. Here, when defendant destroyed the bridge, the duty to replace the bridge rested with the county government).

85. *See* Perry, *supra* note 1, at 503–12.

Perry's view, a defendant cannot properly be said to have owed a duty of repair for an injury that the defendant could not have foreseen.[86] The content of foreseeability is not exhausted by the content of the wrong in question. Even though we must look to the range of foreseeable harms to decide the issue of negligence, the question of whether the defendant was negligent, for example, is distinct from that of whether the injury the defendant caused was so unforeseeable as to defeat the ascription of responsibility to the defendant. The constraint of foreseeability in our non-legal practices of blame ascription reflects something deep in our notion of responsibility; similarly, the constraint of foreseeability in tort law's rules of imposing liability for wrongfully caused loss reflects a deep-seated connection between foreseeability and our notion of responsibility.

Unfortunately, the responsibility defense exacerbates, rather than solves, the substantive standing problem for corrective justice theory. Remarkably, the doctrines that fall under the rubric of substantive standing do not impose a duty of repair upon defendants even for reasonably foreseeable injuries caused by wrongful conduct. Thus, parents who are traumatized when a surgeon's negligence on the operating table disfigures their child will not be able to recover from the surgeon for this trauma—even though our tort law now views emotional trauma as sufficiently real to be compensable, even though it regards the surgeon's negligence as a legal wrong, and even though the emotional impact on parents of having their child disfigured is surely foreseeable. The reasoning underlying such a decision is that the wrong in question is the breach of a duty of due care to the child, and the plaintiff is not entitled to recover unless the conduct in question was a wrong relative to her. The question is not whether this result is morally correct. The point is that recovery is denied to a plaintiff who has foreseeably been seriously injured, even when the concept of responsibility articulated by Perry seems fully applicable. Such decisions, and huge areas of doctrine along the same lines, therefore undercut rather than validate the notion of responsibility Perry puts forward.

Jules Coleman's account of responsibility in *Risks and Wrongs* is different than Perry's and arguably immune from the critique of the prior paragraph. According to Coleman, the defendant's responsibility, hinges on whether the loss in question was the "defendant's fault."[87] For a loss to be the defendant's fault, it must fall "within the scope of the risks that make that aspect of [the defendant's] conduct at fault."[88] Hence, Coleman appears to build into his notion of responsibility the kind of nexus between conduct and injury that tort law actually reflects.

If Coleman's analysis of responsibility works to save corrective justice theory as an account of our actual tort law, it does so at too high a cost. Perry's account is powerful precisely because it explains the duty of repair within tort law as an

86. *Id.*
87. COLEMAN, *supra* note 1, at 346.
88. *Id.*

embodiment of a notion of responsibility that we can find intelligible. To be sure, Coleman's account may come closer to a certain aspect of tort law than Perry's does, but it does so by turning the notion of "fault" into something that is purely a construction of the "nexus-requirement" that seems to exist in our actual tort law. Coleman gives us no idea of why this nexus requirement is, from an analytical point of view, a necessary constituent of when a loss is a defendant's "fault." Yet the notion of fault is obviously central to his analysis of defendant's responsibility; more accurately, Coleman's inclusion of the phrase "defendant's fault" in his account of when a loss is the defendant's responsibility is obviously central to his claim that he has provided an account of responsibility that is theoretically satisfying. If "fault" is a placeholder for a nexus-requirement that already happens to exist in tort law, then it is an illusion that responsibility has been accounted for in terms of fault.

There is a second problem with Coleman's account which is, from a doctrinal point of view, more serious. As a matter of fact, our actual tort law permits plaintiffs to recover for harms that are not within the risk of that which made the defendant's conduct wrongful. Recovery is permitted when these harms are part of "consequential damages," but not part of the predicate injury itself. Hence, a plaintiff whose leg is accidentally crushed by a slow steamroller will recover for the injury of the crushed leg, but also for the emotional trauma and the lost wages associated with that injury and its aftermath, even if the failure to avoid emotional and financial harm are not aspects of what makes the steamroller conduct wrongful. Being "at fault" in Coleman's sense is therefore not necessary for a defendant to be responsible for a plaintiff's loss under our actual tort law.[89]

C. THE CONCEPT OF A DUTY OF REPAIR

1. The Distinction Between Liability and Affirmative Duty to Pay

The diversity of remedies and standing objections reveals a deeper problem at the core of corrective justice theory—the concept of the duty of repair itself. Corrective justice theory maintains that a defendant who has committed a legal wrong against a plaintiff that causes her injury thereby incurs a duty of repair to that plaintiff. To understand tort law is to understand this principle, and to explain the tort law is to explain the grounds of this principle. Corrective justice theorists offer such explanations: Coleman, in terms of responsibility, fault, and rights;[90] Weinrib, in terms of normative equilibrium and reciprocity;[91] and Perry, in terms of outcome responsibility.[92] All of these explanations tell us why

89. I have not dealt here with Weinrib's explanation of what I call the substantive standing requirement. This is discussed and criticized in Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 73–75.

90. *See supra* text accompanying note 22–28, 87–88.

91. *See supra* text accompanying note 22–28.

92. *See supra* text accompanying note 85–86.

one who wrongfully injures another has an obligation to rectify the injury. In this sense, they explain why there is a duty of repair.

At the root of this account lies a very basic premise: Tort law contains a principle stating that a tortfeasor has an affirmative legal duty to pay compensatory damages to the plaintiff. By understanding the moral principle that performing this act is something the defendant has a moral duty to do, we gain insight into the legal principle that the act is one the defendant has a legal duty to perform. The law, however, does not contain this principle. Rather, the law imposes liability upon a tortfeasor. For the reasons I explain below, the existence of a rule under which liability is imposed is quite different from the existence of a norm under which there is an affirmative legal duty to pay the plaintiff.

The law creates or recognizes affirmative legal duties to pay in several different scenarios. For example, the government is enjoined by statutes to pay beneficiaries of certain programs.[93] Private parties are enjoined by tax laws to pay the government.[94] Private parties are enjoined by courts to pay restitution to investors they have defrauded.[95] Private parties are duty-bound by contractual agreements to pay one another certain amounts. And courts, acting under the common law, enjoin parties to return property (and, in some cases, funds) to their rightful owners.[96] In each of these cases, the failure to pay would, in fact, be a legal wrong. In each area, plaintiffs frequently prevail over nonpaying parties that are held liable precisely because they had an affirmative duty to pay that they did not fulfill.

There are private or public norms that enjoin the defendant to pay in all of these cases. Hence, there may be a statute that enjoins the government to pay certain persons certain benefits on the condition that they meet certain qualifications. There may be a private contract under which there is a promise to pay that creates a legal obligation to perform the contract. There may be an insurance agreement that requires the payment of certain benefits upon the occurrence of certain conditions. There may be a court order or injunction enjoining one person to pay another. Similarly, in all of these cases, the legal duty to pay is ripe prior to a monetary judgment of a court. The failure to pay upon this ripening, prior to judgment, may result in legal consequences that follow from having committed the legal wrong of failing to pay. For example, one who fails to pay under a contract will incur prejudgment interest because payment is owed at the time the contract specifies for performance, not at the time a court reaches a judgment. An insurer's refusal to pay on a policy judged to be

93. *E.g.*, 42 U.S.C. §§ 401–02 (1994).

94. *See, e.g.*, I.R.C. § 1 (2000) (imposing taxes on private individuals).

95. *See, e.g.*, *In re* Drexel Burnham Lambert Group Inc., 995 F.2d 1138, 1141 (2d Cir. 1993) (describing how Michael Milken agreed to establish a $400 million civil restitution fund with the SEC in conjunction with his guilty plea on charges of securities fraud).

96. *See generally* DAN B. DOBBS, 1 LAW OF REMEDIES CH. 4 (2d ed. 1993) (discussing restitution as a remedy for torts and other civil wrongs).

applicable will face additional liability precisely because it has not lived up to its legal duty to pay, which ripens prior to judgment. The government similarly faces sanctions for failing to live up to its affirmative legal duty to pay benefits even when there has been no litigation. This is because the duty is an affirmative legal duty that is ripe prior to a judgment.

Tort law is like none of the above areas. There is no statute in tort law imposing a duty to pay. There is no private agreement to pay that is being enforced through the tort law. There is no common law norm requiring the defendant to pay—liability is required, but the failure to pay is not prohibited by tort law.

If the "affirmative duty to pay" view applied to tort law, it would have the following implications: What generates a moral duty to pay, according to the corrective justice theorists, is the wrongful injuring of another. The legal analogue should be that the legally wrongful injuring of another should give rise to the legal duty to pay. Hence, just as a legal duty to pay under a contract is ripe when a condition of the contract is performed, or just as a government duty to pay a beneficiary is born when the beneficiary meets the conditions, so should a legal duty to pay compensatory damages in tort arise when the wrongful injuring occurs.

But that is not at all how our system works. Under our system, a defendant's tortious injury to another does not give rise to a duty of repair unless that defendant has, at a minimum, been sued. The defendant does not ordinarily have a freestanding legal obligation to pay independent of any action against her.[97] As indicated, the failure to pay does not breach any statute, private agreement, or principle of the common law requiring payment prior to suit, if in fact the tort was committed. The defendant remains legally entitled to his or her money at least prior to judgment. Tortfeasors may, as a legal matter, wait to be sued. They will face no additional liability for bad faith failure to pay, even if they have sufficient reason to know that they committed a tort and that a plaintiff will likely prevail against them in litigation, and even if the conditions are such that a moral duty to pay may be recognized. Declining to pay is well within the defendant's legal rights in every sense. The commission of a tort does not therefore create an affirmative legal duty to pay; instead, it creates a legal liability to the plaintiff. The concept of liability describes one who is legally vulnerable to certain actions by another. A liability, as Hohfeld explained, is

97. One means of trying to rescue corrective justice theory is to argue that the duty of repair exists and is based upon wrongful injuring, but that the duty does not ripen until a plaintiff brings an action. This suggestion is unpromising from a number of different angles. If it is meant to rely upon the indeterminacy of the facts, it is unpersuasive, for the same applies even where the facts are clear. Otherwise, the principles set forth by Weinrib, Coleman, and Perry suggest that a duty exists once the tortious injury has been inflicted; no special ingredient of an action by the plaintiff is needed to make the duty come into existence. Hence, it must be that a failure to sue is taken as some kind of waiver of a right, correlative to the duty, that already exists. This view is incoherent. It involves saying that the tortious injury gives rise to a duty, but that the failure to sue defeats the duty; however, suing brings the duty to life again.

correlative to a power in another.[98] In torts, the liability of a defendant to a plaintiff is correlative to a power of the plaintiff against the defendant. As a result of injuring another, a tortfeasor becomes vulnerable to an action by a plaintiff. To be sure, liability attaches because the defendant has wronged the plaintiff. But to say that a plaintiff is empowered and permitted to act against the defendant because of the defendant's wrongful injuring of the plaintiff is not the same as saying that a freestanding legal obligation results from the tortious injury itself.

2. Avoiding Misunderstandings

a. Mere Liability Rules. Two misunderstandings make it difficult to grasp the view that tort law involves legal liabilities, and not legal duties to compensate. First, one may think that by treating a defendant's obligation to pay damages as a liability, I am adopting the view that tort law consists of mere liability rules. Jules Coleman and Jody Kraus[99] have attributed this view to Guido Calabresi,[100] I have attributed the same view to Holmes and Posner,[101] and it is clear that a wide range of economic scholars accept the view that tort law consists of mere liability rules.[102] However, I have joined Coleman, Kraus, and numerous other scholars from H.L.A. Hart[103] to the present in criticizing this view. Tort law does not merely contain rules that describe when persons shall be held liable. It also enunciates norms that designate certain courses of conduct as tortious and, in a sense, as legally wrongful, or as violations of legal rights. In so doing, tort law is injunctive and guiding.[104] We do not understand tort law as merely announcing prices for activities.

Nothing I have said thus far undercuts the view of tort law as containing guidance rules and as enjoining conduct. It is crucial to separate two questions: (1) what is the force, content, and nature of the rules that designate conduct as tortious, and which specify legal rights and wrong; and (2) what is the nature of the requirement that a defendant who has violated such rules must pay damages to the injured party? The criticism of Calabresi and economists pertains to their insistence that, in designating certain conduct as tortious—injuring someone through careless driving, for example—they identify only what the consequences will be, rather than classify and enjoin tortious conduct as something

98. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

99. Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 *passim* (1986).

100. *See generally* Calabresi & Melamed, *supra* note 5.

101. Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 42–45.

102. *See, e.g.*, Kaplow & Shavell, *supra* note 28, at 1097–1102 (implicitly adopting liability rule view by treating mere liability rules as paradigmatic of tort law, and understanding their effect merely in terms of incentives to avoid assignments of damages).

103. H.L.A. HART, THE CONCEPT OF LAW 88 (1961).

104. *See* Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 890–908 (1997).

not to be done. The view I express here, on the nature of duties of repair, is not in any way an answer to questions of type (1). It is an answer to questions of type (2). It does not follow that just because tort law contains rules of conduct that create legal duties of conduct, that the breach of such a legal duty creates an affirmative legal duty of repair.

More generally, in treating tort law as a realm of liabilities rather than duties, I do not mean to undercut the moral status of tort law, its directives, or its remedies. Indeed, I believe that this view leads us to recognize a similarity between tort law and criminal law, which is an area where legal norms contain serious normative force. The imposition of liability is in some ways like the imposition of a punishment.[105] The imposition of a punishment by a court is not an injunction to the defendant to serve a sentence. Rather, it serves first as a declaration of what the state is permitted to do to the defendant, as punishment, in light of the crime committed, and second, as an enforcement through the judicial branch of a course of action for which the animating force is the state as executive branch. Likewise, the imposition of a liability is not an injunction to pay; rather, it is permission to take—more specifically, a declaration that what the defendant has, which was once free from the plaintiff's taking, is no longer so free.

The analogy to criminal law crisply illustrates the discussion above regarding liability rules. It does not follow from the denial that criminal law creates an affirmative legal duty to serve a sentence, that the prohibitions of criminal law are mere liability rules; this inference is a nonsequitur. It is similarly fallacious to infer from the denial that tort law creates affirmative legal duties to pay, that the prohibitions of tort law are mere liability rules.

b. Obligations to Compensate Plaintiffs. A second confusion that leads corrective justice theorists towards their view is the idea that the "duty of repair" view is essential if we are to recognize that those who injure others *ought* to repay those they injure and not simply face a legal vulnerability. This view obviously begs the question if it is simply asserting that tortfeasors have an affirmative legal duty of repair arising out of their commission of a tort. Alternatively, one could argue that tortfeasors have a moral duty of repair arising from the fact that they tortiously injured the plaintiff. In this view, our legal system is best interpreted as serving the function of enforcing moral duties of repair. I believe that this initially appealing view is quite important in corrective justice theory. But I reject it for numerous reasons, most notably because it is a form of functionalism, and not a form of conceptualism.[106]

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105. Of course, as I argue later in the article and have argued elsewhere, there are many vitally important differences between liability and punishment—understanding punitive damages requires understanding the difference between the state permitting a private party to act punitively, and the state imposing punishment itself. *See infra* text accompanying notes 153–54; *see generally* Ripstein & Zipursky, *supra* note 17 (explaining state's role in punishment compared to its role in tort action).

106. *See infra* Part II.D.

There seems to exist an intermediate view, which runs roughly as follows: A person who knows that she committed a tort upon another and therefore would be liable if she were sued and if the system were to function in a just manner, ought not simply regard her liability in terms of the potentiality that she will be forced to pay. On the contrary, she ought to compensate the plaintiff rather than wait to be sued. Moreover, practical experience seems to confirm this understanding, as many defendants—including corporate defendants—compensate those they have injured prior to any judgment being rendered. Hence, legal actors do, after all, understand the system as one that imposes duties to compensate, at least where it is clear that the tort did, in fact, occur.

Hostility to my view that tort law involves liabilities, but not affirmative legal duties of repair, seems to rest in part on the perception that I am rejecting the view in the paragraph above. I am not. Nothing about the recognition of obligations to pay compensatory damages prior to litigation undercuts the claim that tort law imposes liabilities in the first instance. Indeed, to answer the questions of when one ought to pay prior to being sued, what one ought to pay, and why, one must recognize that we are dealing with a system that imposes liabilities. Defendants who pay plaintiffs prior to being sued undoubtedly do so for a variety of reasons. Perhaps the most common reason involves settlement: It is prudent to pay a smaller liability now and protect oneself against a larger liability later to avoid the financial and reputational costs of litigation. The phenomenon of settlement does not involve recognition of a legal duty of repair, but of a personal interest in the settlement.

The analysis is more complicated when a defendant pays a plaintiff because she believes that the plaintiff needs the money, or because he or she concedes liability and believes it is wrong to force the plaintiff to sue first. I do not know how common these phenomena are, but let us suppose, for the purposes of argument, that they are either common or ought to be common. Would this show that there is a legal duty of repair? It is doubtful. It would show, at most, that persons believe that there is not only a prudential basis, but also a moral duty, to pay one's potential legal liabilities, in some cases even before there is any enforcement. Indeed, perhaps there *is* such a duty in some cases. If there is such a duty, it is not because, by operation of the structure of the law, one becomes legally obligated to pay. On the contrary, it is because there may be certain moral considerations—the values of being part of a cooperative system, recognizing others' needs, and not overburdening the litigation system, for example—which give us reason to pay our legal liabilities before they ripen into lawsuits or enforceable judgments.

The analogy to criminal law may once again be useful. There may be reasons of prudence, morality, and law for a criminal defendant to surrender to the authorities if she knows she has committed a crime, and similarly there may be reasons for a defendant to comply with a sentence that has been handed down and to act in accordance with the manifest intention of the prosecutor to enforce the sentence. It is inefficacious to resist, it thwarts the rule of law and threatens

public security, and it often violates independent legal norms. But it hardly follows from this that the imposition of a sentence is best understood in terms of the recognition of an affirmative duty to serve the sentence. To treat the imposition of liability as recognition of an affirmative duty of conduct—the conduct of paying—is as much of a mistake as it would be to treat the imposition of a sentence as the recognition of a duty to serve.

D. SHORTCOMINGS OF A FUNCTIONALIST CORRECTIVE JUSTICE THEORY

1. Recasting the Duty of Repair

The prior three sections emphasized that the principles and concepts highlighted by corrective justice theory must match the principles of tort law itself. These sections offered a great deal of evidence of a substantial mismatch between the theory and the law. In this section, I entertain a line of defensive responses that corrective justice theorists may want to counterpose. The theme of these responses is that the prior critiques have pushed unrealistically hard on the structural points and that corrective justice theory is still tenable as an overarching theory of what tort law is really about: requiring tortfeasors to compensate those whom they have injured. Tortfeasors have a moral duty of repair, for the reasons offered by corrective justice theorists. Tort law is designed to see to it that these moral duties of repair are dispatched and that normative equilibrium is thereby restored.

I believe that many who call themselves "corrective justice theorists" would endorse the aforementioned position. It is a remarkable view, however, because it is not a form of conceptualism. On the contrary, it is a form of functionalism. It purports to explain tort law by setting forth what tort law accomplishes: the enforcement of moral duties of repair. Proponents of this view would claim that its "corrective justice" nature is not undercut by the fact that the imposition of liability is not itself a recognition of a duty of repair. It is enough that duties of repair are enforced and dispatched through this system. We understand the system better by grasping the deeper moral reasons for why there are moral duties of repair to be enforced. But the insight into these moral reasons gives us a better appreciation of the function of the system, not necessarily a deeper appreciation of the procedural mechanisms the system uses to realize that function.

Just as the economist depicts tort law as a system that achieves efficiency by deterring risky conduct, so does the moralist's version of corrective justice theory depict tort law as doing justice by enforcing moral duties of repair. Both are fundamentally teleological views: They explain the law by reference to the functions it serves, without actually laying bare the concepts that are deployed within the law. This aspect of certain corrective justice theories is obscured because the evaluative framework deployed is a deontological one, rather than a

utilitarian one.[107] More generally, the deontological aspect of corrective justice theory, its focus on the relations between private parties as opposed to the interests of the state and its willingness to take moral concepts seriously, undercut the plausibility of referring to it as a form of reductive instrumentalism. It is nevertheless a form of functionalism—a deontological functionalism.

Until this stage, this Article has contrasted the instrumentalism of the economist with the conceptualism of the corrective justice theorist, and has suggested that the most important divide between the two views is the methodological and jurisprudential divide between functionalism and conceptualism. We now see that this was an incomplete picture of the landscape. An important part of corrective justice theory has been the nature of the values alleged to be enforced and realized through tort law—a difference in moral outlook, not simply in methodology or jurisprudence. Because corrective justice theory does not appear to withstand the rigors of pragmatic conceptualism, the question arises as to whether its reconstruction within a deontological functionalist approach is more promising. I argue that it is not.

Initially, there are two powerful arguments against a deontological functionalist account of corrective justice theory. The first is ad hominem. I have demonstrated above that both Coleman and Weinrib, in their bipolarity critiques, have utilized a conceptualist foundation in methodology and jurisprudence.[108] Moreover, each has rejected a functionalist explanation as a matter of jurisprudence, quite apart from its ability to explain away the data and the plausibility of its normative underpinnings. These arguments have borne a great deal of weight in the debate at the many junctures where the economist has supplemented his or her argument with sophisticated considerations pertaining to second-best theory, path-dependency, and pluralism. Weinrib and Coleman cannot, on pain of self-contradiction, support their critique of law and economics while shifting to deontological functionalism at the same time. There is, moreover, little evidence that they wish to do so. With regard to these theorists—the leaders of the field and the pioneers of the bipolarity argument—the functionalism of deontological functionalism is fatal to their critiques. If there are responses to the powerful structural critique of bipolarity, they will have to come from elsewhere.

Second, and of at least equal importance, I offered an argument in Part I that a functionalist account of tort law is inadequate; that a satisfactory tort theory must contain a conceptualist account; and that a functionalist account is untenable if it renders fundamental structural features of the law anomalous. My argument depended in no way upon the nature of the values that it was putatively the function of the law to further or to enforce. It is therefore equally applicable to deontological functionalism. Of course, it left open the possibility

107. *Deontological* frameworks take the concepts of duty, obligation and right to be more fundamental in morality than the concepts of happiness or utility. *Utilitarian* frameworks take the latter concepts to be more fundamental than the former.

108. *See supra* Parts II.A–C.

that knowing what functions the law serves is valuable from a theoretical, adjudicative, and moral point of view. But at the interpretive level, we want a theory that tells us what the law is, and a purely functionalist account cannot do this.

I believe the aforementioned points are sufficient to undercut the aspirations of the deontological functionalist version of corrective justice theory as an overarching tort theory. However, for those who are not persuaded by pragmatic conceptualism, it is worth seeing why this version of corrective justice theory has limited appeal in any case.

2. Tort Law and Moral Duties of Repair

a. The Trigger of the Duty of Repair. Many of the injurious acts that give rise to liability in tort law do not give rise to a moral duty of repair because they are not moral wrongs. For example, imagine a person of low intelligence who is involved in activity in which she is entitled to participate, conducting herself to the best of her ability. If this person's conduct falls below the level of care of an average reasonable person and injury ensues, it is far from clear why she should have a moral duty of repair to the one she injures. But liability would be imposed. This was the situation in the old chestnut, *Vaughan v. Menlove*,[109] prominently cited by Prosser and Keeton. And tort law's considerable insensitivity to "the infinite variety of temperament, intellect, and education which make the internal character of a given act so different in different men" was of course a central premise of Holmes' well-accepted argument that it is objective fault that triggers liability in tort.[110] The objectivity to which Holmes pointed was twofold: involving conceptual independence from both the defendant's state of mind—culpable or otherwise—and his particular capabilities. Let us leave to the side the question of whether breach of a moral duty of due care can be predicated upon acts that are objectively wrongful in the first sense, focusing instead on Holmes' second meaning. I contend that breach of a moral duty of due care cannot be inferred from the failure to comply with a standard of conduct if the defendant's diminished capabilities substantially undermine her ability to comply with that standard. As Stephen Perry has argued forcefully, a moral duty of care presupposes the capacity to conform one's conduct to a standard.[111] To an important extent, however, our actual negligence law ignores differences in the capacities of individuals.

The common law of torts outside of negligence law provides a vast array of examples in which liability is predicated upon the commission of what is considered a "legal wrong," which is not plausibly construed as a moral wrong. For example, walking upon someone's land while reasonably believing it to be

109. 132 Eng. Rep. 490 (C.P. 1837).

110. HOLMES, *supra* note 40, at 108.

111. Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72 (G. Postema ed., 2001).

one's own is a trespass to land.[112] Similarly, to publish a statement that readers understand to defame a plaintiff is to commit the tort of libel even if it was not intended to defame anyone.[113] In a more modern spirit, to injure someone by selling a defective product is a legal wrong even if there was no failure in the diligence of the seller.[114]

It will do no good here for the advocate of the "moral duty of repair" view to label these as aberrant cases of strict liability. These cases, which appear repeatedly through all of negligence law—land torts, reputational torts, as well as product liability—are hardly aberrant. Moreover, they are not, in a very important sense, cases of strict liability. They are cases in which a defendant's conduct is deemed to be a wrong in the following sense: Persons are legally enjoined from engaging in such conduct, and the conduct itself—arguably unlike that of the defendant in *Rylands v. Fletcher*,[115] for example—is deemed by the law to be faulty. They are strict or no-fault only in the sense that moral culpability does not seem to attach to the relevant concept of tortiousness in each case, even though the act triggering liability is enjoined by law. But this only underscores the fact that these are cases not of moral wrong, but of legal wrong.[116]

b. The Extensiveness and Onerousness of Liability Imposition. I have thus far focused on the nature of the wrong that allegedly triggers a duty of repair, and not on the nature of the duty of repair triggered. If a duty of repair account is going to explain the imposition of liability in tort, then the duty of repair must match the liability imposed. Yet, when we look at the extent of liability imposed in tort, this becomes quite implausible. Tort law requires tortfeasors to cover past, present, and future medical expenses, lost wages, and pain and suffering, as well as compensation for lost capacities, to the extent sufficient to make the plaintiff whole.[117] Tort law also traditionally imposes these obligations without reference to the defendant's degree of tortiousness or to collateral sources of payment.

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112. RESTATEMENT (SECOND) OF TORTS § 164(a) (1991).

113. *See, e.g.*, Hulton & Co. v. Jones, [1910] A.C. 20, 23 (H.L. 1910) (holding defendant authors liable, although they did not know of plaintiff's existence, because plaintiff's friends understood defamatory article to refer to him).

114. *See, e.g.*, Greenman v. Yuba Power Prods., 377 P.2d 897, 900 (Ca. 1963) (holding manufacturer of power tool liable for injuries to plaintiff, who was using tool in way it was intended to be used, and whose injuries resulted from defect in design and manufacture).

115. 3 L.R.-E. & I. App. 330, 335 (H.L. 1868) (noting that hiring competent engineers to construct reservoir on one's property is in itself perfectly lawful, but holding defendant strictly liable for harm caused to others as a result of this "ultrahazardous activity").

116. This article does not address my views on strict liability. As the foregoing paragraph demonstrates, I believe that some of what is referred to as "strict" liability nevertheless involves the commission of legal wrongs and therefore provides no problem for my view. I share the methodological commitment of Weinrib, Posner, and many others, to the view that true strict liability is quite rare and calls for special analysis.

117. DOBBS, *supra* note 51, at 1047–53.

Consider the following example.[118] Smothers and Jones work together as associates in a law firm. Smothers is the head of a litigation team of which Jones is a member, and Smothers invites the team to her house for dinner. Jones tears the cruciate ligament in his knee on the inadequately shoveled driveway. He requires surgery and hospitalization, the costs of which amount to $250,000 ($240,000 are covered by medical insurance). He misses four months of work because of this injury, and three months are unpaid (lost wages of $30,000). He requires some home care ($20,000). His future medical therapy can be expected to cost approximately $10,000 per year for the next two years and $5,000 per year for the subsequent six years. A fair and modest jury would award him an additional $5,000 for a ski vacation that he has already paid for and missed, $50,000 because he will not be able to play most sports in the future, and $150,000 for the agonizing pain that has been associated with the injury and that he can expect every day for the rest of his life. The judgment in this hypothetical case would total $555,000.

The liability imposition that a duty-of-repair theory must explain in a case like that of Smothers and Jones is $555,000. Let us assume that Smothers has some moral duty of repair to Jones, quite apart from any litigation. It is a far reach—even assuming all the facts—that Smothers's moral duty of repair amounts to $555,000. Smothers's failure to pay Jones $555,000 would not be considered a failure to comply with her moral duties. Smothers would not consider herself remiss for failing to pay this amount, nor would others. Jones would not expect this amount, as a moral matter. Even as parents tell their children that they have a responsibility to pay for what they break and to help those who are injured (particularly by them), it is hard to believe that such responsibilities would embrace duties of this magnitude, at least under such circumstances. Part of what is remarkable here is that the extent of duty that would be incurred seems unconnected to the degree of fault displayed.

Another aspect of the problem is that the degree of liability is onerous in the extreme. Ordinary people frequently injure others through failure to take the care they ought to take. When such cases are litigated, the results are like those above. As Jeremy Waldron has forcefully argued, the financial liability imposed on defendants, particularly given the often minor nature of the misdeed that triggers liability—a momentary lapse in attention while driving, for example—is extraordinary relative to ordinary moral standards of what is owed.[119] If this Article were addressed to the normative critique of tort law, and pre-

118. The example assumes that being invited as part of a team of persons from work, in a context where professional benefit was expected, the injured party would be classified as an invitee—that would clearly be the case if a client were invited over for dinner—or, alternatively, that the common law distinction between invitee and licensee was abolished. The damages calculations are hypothetical, but not unrealistic. *See, e.g.*, Seffert v. L.A. Transit Lines, 364 P.2d 337, 342 (Cal. 1961) (affirming 1959 trial verdict in ankle injury case for $187,903.75, where total pecuniary loss, including lost wages and medical expenses, was under $54,000).

119. Waldron, *supra* note 7, at 388–91.

sumed a corrective justice framework, this might be a reason to alter the tort law. But this Article's aim is to interpret tort law, and as such, the fact that prototypical liability imposition falls beyond the periphery of our convictions about moral duties of repair undercuts corrective justice theory as it is understood.

c. The Insensitivity of Liability Imposition to Extrinsic Considerations. Imagine that Jones suffers an accident in a General Motors car as a result of a defect in the car, and suffers the identical injury to that described above. Under these circumstances, it is much easier to conclude that General Motors has a moral duty of repair to Jones in the amount of $555,000. Conversely, if Smothers were someone for whom anything beyond a few thousand dollars would be a great financial strain, and if Jones happened to be a billionaire, it would be much harder to conclude that Smothers had a $555,000 moral duty of repair. I suspect many people share these views. What this hypothetical tends to show, however, is that our beliefs about moral duties of repair are sensitive to distributive considerations. General Motors's wealth, as well as its capacity to pay a large amount, are relevant to the question of whether it has a moral duty of repair; conversely, if Jones is a billionaire the victim's need for funds, or lack thereof, is morally relevant to the existence and magnitude of the injuror's moral duty of repair. However, under the common law of torts, these facts are legally irrelevant as to whether General Motors or Smothers is liable to Jones for compensatory damages.[120] This again tends to show that the inference from tortious injury to liability imposition does not travel through the intermediary of a moral duty of repair.

These arguments are really only a sampling of the ways in which our convictions about moral duties of repair diverge systematically from the conditions of liability imposition. Our moral convictions about the existence and extent of a tortfeasor's duties of repair are sensitive to an array of features extrinsic to whether there was a wrongful injury to the plaintiff and what would make the plaintiff whole. These features include, for example, whether and how badly the victim needs compensation, not just her entitlements; what funds the defendant can draw on to compensate the plaintiff; and whether there are other claims on those funds—for example, her children's needs, or in the case of GM, the needs of other injured parties. Yet, tort law's imposition of liability is insensitive to these considerations.

All these considerations show that the imposition of liability for compensatory damages does not track the existence or scope of a moral duty of repair. Indeed, they tend to show that, although imposing liability may frequently cause moral duties of repair to be dispatched, the fit between liability imposition and the duty of repair is quite poor.

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120. *But cf.* DOBBS, *supra* note 51, at 1068 (explaining that defendant's financial status relevant to punitive damages).

3. Normative and Interpretive Problems with the Functionalist Model of Corrective Justice Theory

The functionalist corrective justice theorist may argue roughly as follows: The paradigmatic cases of tort law involve the imposition of liability for compensatory damages upon one who has a moral duty of repair. In this manner, tort law sees to it that moral duties of repair are dispatched. One may concede that the law sometimes does other things—as with punitive damages or injunctive relief. But it hardly follows that the enforcement of moral duties of repair is not what the law primarily does, or that understanding the justifiability of the law insofar as it enforces compensatory damages is not a major step in interpreting it. Similarly, the law may be somewhat underinclusive; there may be categories of persons to whom moral duties of repair are owed who lack standing. But this is probably because, as a practical matter, the law must create categories that appear somewhat arbitrary from a moral point of view. Similarly, there are reasons for this underinclusiveness that go to the public and generalizable nature of a legal system. These reasons demand an objective standard of care that may not perfectly capture the conditions under which a genuine moral duty of repair would exist. This may generate the puzzling feature of liability in which there is no moral duty of repair. But again, we understand such a system best by seeing it as aspiring to enforce a moral duty of repair and tempering that aspiration with the realities of legal process. Finally, although the scope of the compensatory damages remedy offered in tort law deviates in a wide range of cases—perhaps in most cases—from what would intuitively constitute a moral duty of repair, this again must be understood in terms of the realities of a functioning public legal system. Our legal system selects a variety of costs of reparation as the basis for the content of the general duty of repair and then gives this general set of guidelines to a jury to determine the scope of the duty. This choice is practicable and workable as a general matter and serves to help approximate and generalize what is in some sense an indeterminate moral duty of repair.

There are three major problems with this view, apart from those already discussed. First, this view effectively concedes that corrective justice theory plays a far less significant role in understanding tort theory than it wishes to claim. The interesting theoretical work on the view just described is that which explains why tort law deviates in all the ways it does from the moral framework whose function it is to enforce. Thus, we need theories to explain why the legal system must objectivize fault in ways that depart from our moral concept, why compensatory damages are so large and insensitive to moral concerns, and so on. The principles identified by the corrective justice theorist are just the first chapter. The rest of the book rests on principles that are instrumentalist, policy, and legal process theory. This is, in many ways, the most common objection the legal academy has had to corrective justice theory and represents an important line of methodological critique of moralistic theories of tort law from Oliver

Wendell Holmes through James A. Henderson, Jr.[121]

Second, the functionalist version of corrective justice theory has no resilience to interpretive theories that import other values, even if those other values do not fit into the conceptual structure of corrective justice theory. A deterrence theorist may first claim that a central function of tort law is to deter legal actors from engaging in socially harmful conduct, and then use such a theory to interpret what tort law is about. This claim is not contradicted by the corrective justice theorist's contention that a function of tort law is to ensure that duties of repair are dispatched. It is possible that both are true. Indeed, many other things may be true of what tort law does: it helps to meet human needs, it spreads costs, it reinforces social norms, it encourages the efficient allocation of resources, and so on. Some find it intellectually satisfying to reduce functions down to one framework, but there is no particular reason, on the functionalist view, to suppose that this can be done. This is because the adoption of a "functionalist" perspective is little more than a commitment to displaying the patterned nature of many of the effects, the connection of that pattern to features of the tort law, and the significance of those effects with respect to some value or values.[122] Because tort law plainly has a wide variety of consequences that are significant on many evaluative dimensions, a plurality of functionalist approaches, at a descriptive point of view, is inevitable. Again, this is a reason to doubt that a functionalist perspective will permit corrective justice theory to play anything like the dominant role it wishes in explaining tort law.

Finally, one of the great appeals of the functionalist perspective is that it meshes naturally with practical normative approaches to adjudication and to lawmaking. Once we see what ends are furthered by various aspects of tort law, or what values are promoted by it, we are typically in a good position to evaluate assertions about how tort law should be extended, crafted, applied, or revised. However, this consideration again undermines the aspirations of corrective justice theorists. Once we recognize that it is not only the enforcement of moral duties of repair, but also deterrence, compensation, insurance, efficiency, and so on, which the law, in some sense, functions to promote, the contention that tort law ought to be interpreted so as to further corrective justice becomes

121. HOLMES, *supra* note 40, at 108–14 (explaining generality of legal standards in part by process considerations); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468–82 (1976).

122. A less stark way of putting the point is that corrective justice theory loses its resilience against plausible pluralistic accounts once it concedes its inability to work at the conceptualistic level and satisfies itself with providing a plausible explanation of why our system endorses what tort law ends up doing, for it is presumably consistent to adopt several types of rationales for endorsing what our system accomplishes. *See* Schwartz, *supra* note 3. Obviously, a Dworkinian framework presents itself as a plausible functionalistic account that uses coherence and integrity as a stalwart against pluralism. The text indicates why a Dworkinian serious about fit would find the functionalist version of corrective justice a problematic approach in tort law. More generally, my argument presumes without elaboration that a corrective justice theory will not cohere well with certain moderately stated instrumentalist values.

problematic. We need an argument from a first-order normative point of view that the restoration of normative equilibrium and the enforcement of duties of repair are of paramount importance. In light of the skewed nature of the duties of repair, the refusal of corrective justice theorists to integrate distributive concerns, and the conceded importance of human needs and meaningful regulation of risky activities, most corrective justice theorists—including Coleman, Weinrib, and Perry—wisely decline to offer such arguments. However, this provides another reason for regarding the functionalistic version of corrective justice theory as unattractive and simultaneously explains why conventional scholars, who tend to presume a functionalist viewpoint, have not been especially sympathetic to the powerful arguments offered by corrective justice theory against instrumentalist alternatives.

E. SUMMARY

Like a textualist in statutory interpretation, corrective justice theorists purported to be able to constrain the ad hoc mess of functionalist thinking in the interpretive aspect of tort scholarship.[123] We now have a better sense of why corrective justice theorists thought it was so important to stay clear of functionalist methodologies: If corrective justice theory does depend on a sort of functionalism then it is unable to take the high ground over law and economics interpretively. Furthermore, because it focuses on such a relatively narrow set of evaluative concepts, and because it emphasizes interpretative accuracy, it is unlikely to accomplish much of what a functionalist reasonably seeks in a general prescriptive approach to live issues. However, I have argued that conceptualism, not functionalism, really lies at the heart of the corrective justice theorist's work. Moreover, the pragmatic conceptualistic framework constructed in Part I provided a cogent jurisprudential basis for thinking that a certain type of theory would be able to constrain this functionalistic mess and be able to articulate a workable account of the basic principles that constitute the law, as a starting point for larger prescriptive questions. However, as I argued in sections II.A, II.B, and II.C, the substance of corrective justice theory is not adequate to meet the demands of pragmatic conceptualism.

Coleman and Weinrib purport to have carved tort law at the joints, but the joints are not where they have cut. The principle that a plaintiff must be made whole is not the very core of actionability in tort, although it is the most prominent of several principles at the level of remedies. We need an independent account of why there are rights of action at all, and this account must leave room for the diversity of remedies that tort law actually offers. A plaintiff's right to sue in tort does not depend on whether he or she suffered a loss as a result—even a foreseeable result—of a defendant's tortious conduct. The right to sue depends on whether the law treats what the defendant did to the plaintiff

123. *See* Zipursky, *supra* note 35, at 463–68.

as tortious. A court's judgment is not recognition of a defendant's pre-existing affirmative legal duty to pay the plaintiff; it is recognition of a defendant's liability to the plaintiff. A tort theory must capture the diversity of remedies, the nature of standing, and the concept of liability if it is to satisfy the demands of pragmatic conceptualism. The model of rights, wrongs, and recourse, offered below, aims to satisfy these demands.

III. THE MODEL OF RIGHTS, WRONGS, AND RECOURSE

A. RIGHTS OF ACTION: REVISITING THE PLAINTIFF-DEFENDANT STRUCTURE OF TORT LAW

Both corrective justice theory and law and economics take a certain view of the basic phenomenon of a tort case. For the economist, the basic fact is the defendant's liability. The corrective justice theorist criticizes this view and suggests that the basic fact is really a duty of repair owed by the defendant to the plaintiff. But both of these views start with the defendant. I suggest that corrective justice theorists have not yet fully appreciated the nature and significance of the plaintiff-defendant structure of tort law and that we may better understand the conceptual structure of tort law if we look at it from the other end.

The plaintiff-defendant structure of tort law does not merely embrace the fact that the defendant pays the plaintiff, or that the plaintiff's injury determines the extent of compensatory damages. A central and not merely derivative phenomenon of tort law is that a plaintiff sues a defendant. If the plaintiff is successful, the plaintiff forces the defendant to pay money, to cease a certain activity, or to act in other ways the plaintiff seeks. The point is that tort cases ultimately require courts to respond to demands by plaintiffs and ultimately require courts to answer various questions about whether plaintiffs are entitled to what they are seeking. Questions about what the defendant has done are ultimately subsidiary to questions about what the plaintiff is entitled to get. These questions are part of what our law considers when deciding what plaintiffs may do. The set of legal provisions that constitutes tort law is ultimately directed to a set of practical questions courts face about whether plaintiffs are entitled to act in various ways against defendants, through the state.

Civil litigation generally, and tort litigation in particular, commences with a private individual's complaint, which alleges certain facts about what the defendant has done and what injury the plaintiff has suffered, and which asserts that, in light of these facts, the plaintiff is entitled to certain remedies. It is critical to understand the triangular structure of this set of statements. The plaintiff seeks to have the defendant be forced to pay or, perhaps, actually seeks to take certain of the defendant's assets. The state conditions the permissibility of taking assets on having a judgment against the defendant, and, in turn, it conditions the entering of a judgment against a defendant on various grounds: There must be a valid type of action with a favorable fact-finding or a default

judgment. Thus, under these conditions, the state will permit, and at times empower, the plaintiff to act against the defendant in certain ways. The questions the law answers are under what conditions plaintiffs will be so empowered, against which defendants, and for what sorts of remedies.

A private individual in the modern legal state is enjoined by a variety of laws from acting against other private individuals. For example, even if someone has negligently broken the fence around my house, and I find this fence-breaker, I do not have the legal right to take his wallet and remove from it enough cash to pay for the broken fence. There is a range of actions against others that a private individual simply lacks the legal power to take. For example, I cannot attach the fence-breaker's bank account because I lack the legal power to do so. The same applies for getting others to do things: I am not permitted to force a newspaper editor at gunpoint to expunge a record of an article about me, and I am not empowered to order him to do so on pain of legal sanction. It is part of the rule of law, and part of the security and liberty we have from the acts of others, that individuals are neither permitted nor empowered to act in these ways as a general matter.

When the state has recognized a right of action, and when a plaintiff has proven it, the state both permits and empowers a plaintiff to act against a defendant. For example, if I prove that the fence-breaker negligently broke my fence and that it will cost $200 to repair it, I can have her adjudged liable to me for that amount; this means that I am actually empowered to take possession of $200 worth of her assets if she does not pay me. The judgment of liability is, in effect, a judgment that she is vulnerable to my taking two hundred dollars from her under certain procedures. Similarly, if I prove that the newspaper defamed me, I may be empowered to demand that it expunge the defamatory reference on pain of sanctions, which I will have imposed.[124] A private right of action, then, is a privilege and a power to act against another in a certain way. It is best understood against a backdrop where there is no permission or power to perform such actions, and indeed, where there is a right against such actions.

Private rights of action are, of course, found in innumerable areas of the law—not only in torts, but in contracts, property, and throughout statutory schemes that implicitly or explicitly recognize private rights of action. My claim, therefore, is not that private rights of action define tort law. On the contrary, their pervasiveness tends to show that something else must define tort law (if it is to be defined). What is special in tort law is that a plaintiff's right of action is inferred from the defendant having committed a tort upon the plaintiff. A conceptualist tort theory should explain this fundamental feature of the law.

Corrective justice theory points to an explanation of private rights of action, but the core of that explanation has been rejected above.[125] A corrective justice

124. *See, e.g.*, Bradford v. Mahan, 548 P.2d 1223, 1231 (Kan. 1976) (holding that court has equitable power to order expungement of false and defamatory statement in police records).

125. *See supra* Part II.A–C.

theorist would argue that a defendant's duty of repair explains both why the plaintiff has a right of action in tort against the defendant and why the defendant must pay the plaintiff compensatory damages. The basic problem with this account is that it requires the legal system to recognize an affirmative legal duty of repair that is triggered by wrongful injury when the legal system does not actually do so. Hence, the account fails. The legal duty of repair is ultimately a matter of liability, not of affirmative obligation. But to say that there is liability is not to explain why there is a right of action; it is to characterize the form the right of action typically takes. The challenge is to explain why a wrong in tort gives rise to a right of action by the plaintiff against the defendant, and to offer an explanation that does not rely upon the existence of a defendant's affirmative legal duty of repair.

I suggest that corrective justice theory has simply rearranged the genuine structure of tort law. The fact that a defendant has wronged the plaintiff is pivotally important in torts, not because it creates a duty of repair in the defendant, but because it gives the plaintiff a right of action against the defendant. Having been wronged by the defendant, the plaintiff is now entitled to act against the defendant. By recognizing a legal right of action against a tortfeasor, our system respects the principle that the plaintiff is entitled to act against one who has legally wronged him or her. I call this the principle of civil recourse.[126] The legal principle that the victim of a tort has a right of action against the tortfeasor is an instance of this more general idea. In what follows, I attempt to explain the principle of civil recourse and to show how it illuminates the structure of tort law. I will not attempt to justify this principle, except to the extent that explaining it will involve illuminating its intelligibility and normative appeal.

To afford a right of action to the victim of a tort is to recognize that the victim has a right of response to what the defendant did. In this respect, a right of action in tort, focused on the right to respond to a legal wronging in the past, may be compared to self-defense in the criminal law, which recognizes the right to preempt an anticipated wrongdoing by another. I have elsewhere offered an account of self-defense that, following Locke and others, posits a contractarian basis for general laws prohibiting aggression against another.[127] As George Fletcher has illuminatingly articulated the Lockean point, we reserve for ourselves the privilege to act against another with potentially deadly force in a narrow range of cases in which deadly or severe harm from an aggressor is imminent.[128] This is a way of stating the more basic point that membership in a state ought not to require the alienation of all raw liberties to act with deadly

126. *See* Zipursky, *Rights, Wrongs, & Recourse*, *supra* note 17, at 82; Zipursky, *Philosophy of Private Law*, *supra* note 17, at 643–44.

127. Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 606–08 (1996).

128. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996).

physical aggression against an unconsenting other; one is entitled to at least some radius of liberty in the domain of self-protection. In particular, the law of self-defense recognizes that one is entitled to act against another in a genuine self-defense scenario.[129] The legal privilege to do so may be understood as the legal embodiment of this principle.

The privilege of a private party to act through the state against one who legally wronged her may be understood as the converse of self-defense. Individuals are permitted to take the money of another if it is in the context of executing a judgment that has been entered against the other. This is an exception to the general rule against taking the assets of others, a rule whose normative basis can be understood in contractarian terms. The exception to the general rule suggests that there is, to put it in the figurative terms of the contractarian, a reservation of the liberty to act against persons in the type of situation in which tort plaintiffs act against tort defendants. We know what is special about the context in which self-defenders act against attackers. We now need to look more deeply into what is special about the context in which successful tort plaintiffs act against their adversaries.[130]

Just as self-defense scholars have highlighted the fact that self-defense is forward-looking, so corrective justice theorists have pointed out the backward-looking nature of tort law. Although self-defense is ultimately grounded in the entitlement to preempt wrongs against oneself that have not yet occurred, a private right of action in tort is grounded in the entitlement to redress wrongs against oneself that have already occurred. Tort law embodies the principle that one is entitled to an avenue of recourse against another who has committed a legal wrong against her.[131]

An entitlement to an avenue of recourse against wrongdoers is initially repugnant to many modern ears because it suggests that there is a right to attack those who have been wrongdoers. This objection is deeply misguided. If the question is when a person may use violent force against another (as it is in the doctrine of self-defense), then the entitlement to redress wrongs is plainly insufficient in our system of law. This is a critical aspect of the law of self-defense and it is plausible that it goes to the root of the idea of a state, in the manner suggested in the paragraph above. But a right of action in our civil law is quite a different matter than the use of violent force, as reflected in the doctrine of self-defense. Indeed, an earmark of our civil legal system is that it does not involve violent remedies, but civil remedies; it does not involve punishment. Moreover, a right of action cannot be acknowledged outside of the context of a highly formalized system of civil law that conditions the exercise of the right in a wide variety of ways and that subjects it to untold levels of

129. *Id.*

130. Zipursky, *Philosophy of Private Law*, *supra* note 17, at 640–44.

131. *Id.* at 645–46; Zipursky, *Rights, Wrongs, & Recourse*, *supra* note 17, at 88–90.

process. Finally, of course, it is not a mere privilege; it is, in fact, a legal power that the state creates.

Similarly, it is easy to misconstrue my account as one based on retribution or *lex talionis*. Neither label is accurate. The point is not that defendants deserve to be held liable, sanctioned, or punished. Rather, the point is that the state may not stop plaintiffs from acting against defendants in a certain way, and that the state is furthermore obliged to provide plaintiffs with an avenue of recourse through which they are empowered to do this. It may be that a plaintiff focused upon what the defendant "deserved" would not sue, or would not execute on a judgment for all to which she was entitled. Put differently, it is entirely consistent with the account offered that the result of the operation of the system would not lead to greater retributive "justice" on many occasions, perhaps even on any. And it is certainly consistent with the rejection of the notion of retributive justice in the tort system or elsewhere.

To be sure, the feeling within a plaintiff that leads her to litigate, and which private rights of action permit to be exercised, is often a desire to "get even." An important fact about our tort system is that it does, in a sense, provide a civil alternative to getting even. Perhaps this is an important function of our tort system. This does not imply, however, that my account of the tort system is a functionalist one that points now to a new function worth serving—the function of permitting vengeful desires to be satisfied in a civil system. Rather, I am articulating the concept of a right of action based on having been wronged and examining what commitments are entailed by recognition of this concept in our system.

My employment of the social contract apparatus and my analogy to self-defense were really only heuristic devices aimed at illuminating the basic idea of civil recourse. I believe the idea is familiar in the law and in many walks of life. When a legislature creates a statute prohibiting eavesdropping,[132] sexual discrimination,[133] or invasion of privacy,[134] and creates private rights of action under those statutes, we understand intuitively what the goal is. These statutes are not, in the first instance, about making sure that those whose conversations are bugged or who are sexually harassed are "made whole"; it is about permitting those who have been wronged in the relevant sense to have an avenue of recourse against the wrongdoer. Similarly, when my daughter comes to me complaining that her sister knocked her down (accidentally or intentionally), her complaint is not aimed at making herself whole; rather, it is an effort to secure, through me, an acceptable avenue of recourse against her sister. Our tort law is about courts—not parents or civil society, not family or court-announced duties

132. *See, e.g.*, 18 U.S.C. § 2520 (2000) (providing federal private right of action against electronic eavesdroppers).

133. *See, e.g.*, 42 U.S.C. § 2000e (Title VII) (2000) (providing federal private right of action for employment discrimination, including sexual harassment).

134. *See, e.g.*, N.Y. CIV. RIGHTS LAW §§ 50–51 (2001) (providing private right of action for misappropriation of name or likeness).

of conduct, and not statutory rules. But it embodies a principle of recourse that is recognizable from diverse aspects of our experience with others.

B. RIGHTS OF ACTION, RECOURSE, AND DUTIES OF REPAIR

1. Rights of Action, not Duties of Repair

Let us now return to our concerns over the duty of repair. Tort law contains a legal principle of the following sort: One who has been defamed by another is entitled to a private action against that other. Hence, when a plaintiff sues a defendant claiming that she was defamed by her, and a jury accepts the plaintiff's factual allegations, the court takes the facts to be as plaintiff asserts and takes the plaintiff to be requesting that she be empowered to act against the defendant through the civil system. A court makes an inference that takes as one set of premises the set of facts alleged, and as the other premise the aforementioned principle. It infers that the plaintiff is entitled to judgment, and this leads to a practical inference that culminates in a judgment for the plaintiff against the defendant. When the remedy is damages, the court's act literally empowers the plaintiff to be satisfied with the defendant's assets. When the remedy is injunctive relief, the court empowers the plaintiff by converting her application for an injunction into an order with which the defendant must comply on pain of a sanction for contempt. Tort law contains many primary or secondary principles that state that one who has been treated in a manner the law specifies as a wrong is entitled to a private action against the wrongdoer. I have suggested that we may understand these principles as instances of a more general principle that one who has been legally wronged is entitled to a private right of action against the wrongdoer.

To understand the law from a pragmatic conceptualistic point of view is to understand this provision of the law as something more than a general rule. It is to understand it as a provision that our system applies as a principle that one who has been wronged is entitled to, or has a right to, act against the wrongdoer. The principle-like (as opposed to rule-like) character of this provision explains why corrective justice theorists are right to try to grasp the provision from a moral point of view. The problem is that their explanation fails. They claim that the recognition of the plaintiff's entitlement emanates from a more fundamental, legally entrenched principle that the defendant has a duty to pay. This analysis fails for several reasons, most prominently because our legal system, in fact, contains no norms enjoining the defendant to pay, and because our legal culture does not deem defendants obligated to pay absent litigation. Yet, there is nothing in the principles set forth by corrective justice theorists that warrants giving any significance to the fact that the plaintiff has sued.

The idea of civil recourse explains the principle that one who has been legally wronged is entitled to a private action against the wrongdoer and does so without tripping over the problems faced by corrective justice theory. The court enters judgment for the plaintiff out of respect for a principle that the wronging

by the defendant is what entitles the plaintiff to a private action against the defendant. The plaintiff's bringing of a formal claim against the defendant is not simply an application by the plaintiff to have the court recognize and enforce the defendant's freestanding duty of repair. It is an attempt by the plaintiff to act against the defendant through the state. Hence, it is not correct that defendants have legal duties of repair that they are simply not called upon to dispatch absent litigation. The plaintiff's filing suit is the commencement of an action against the defendant, and the very question of whether the defendant will be held liable is a question of whether the plaintiff is genuinely entitled to an avenue of recourse—to an action—against the defendant.

The role of the state in a tort action is not to enforce a duty of the defendant's, but to empower a plaintiff with a claim. To be sure, the plaintiff's claim is a *right* in the sense that it is something to which the plaintiff is entitled, and in the sense that it is a right to act against the defendant. It is therefore natural to suppose that there must be some duty in the defendant to which the right is correlative. But that is to get confused about the structure of the right based on the identity of the party against whom the right holder is entitled to act. The right of action—insofar as it is correlative to a duty—is correlative to an obligation in the state to privilege and empower persons to act against those who have wronged them. More accurately, insofar as tort law embeds legal principles recognizing rights of action, the conceptual structure of the legal principles involves a form of right that is correlative to a duty in the state, not in the defendant.

There is a threefold ambiguity in the phrase "right of action" that can easily lead to confusion from a different direction. Consider the statement that there is a right of action for medical malpractice. First, this statement sometimes asserts that, in light of the rules, norms, and principles of our tort system, a person is legally entitled to prevail in litigation and win a judgment against one who committed malpractice against that person. Second, to say that there is a right of action for a person who has been injured by medical malpractice is to assert sometimes that in light of the rules, norms, and principles of our tort system, a person is legally entitled to sue one whom she can, alleging upon information and belief that a particular person committed medical malpractice against her. It should be clear that I have been utilizing the first sense of "right of action" and not the second. However, there is a third sense of "right of action" that I have also been using. In this sense, to say that there is a right of action is not simply to assert that the relevant legal authorities imply that the plaintiff ought to prevail. It is to point to a principle entrenched in the law that states that persons who have been wronged are entitled to an action against the wrongdoer, as a matter of right, because they have been wronged. The analysis of civil recourse from a normative point of view was aimed to render morally plausible the principles that ground rights of action in this third sense, but the core of my claim about the tort law is that principles in this third sense are embedded as legal principles in our tort law and therefore constitute the existence of rights of action in the first sense.

The distinction between the first and third senses is especially important because there are parallels to the phrase "duty of repair." Arguably, what is sometimes meant by saying that one who committed medical malpractice has a duty of repair to the victim is that in light of the rules, norms, and principles of our tort system, the malpractitioner will be liable for a judgment to the victim, assuming the victim sues and the jury correctly assesses the facts. This is analogous to the first sense of "right of action," and so long as it is kept clear, I have no objection to the use of the phrase "legal duty of repair" for this purpose. However, the notion of a "duty of repair" can also be interpreted in the third manner to suggest that there is a legally entrenched moral principle stating that it is the duty of one who committed malpractice to make the victim whole, and one may assert that duties of repair in this third sense ground duties of repair in the first sense. Indeed, I have argued that this is precisely what corrective justice theory says but that this is false. I have argued, moreover, that rights of action in the third sense bear the explanatory burden as to why plaintiffs may obtain judgments against tortfeasors, and, correlatively, why tortfeasors are held liable to plaintiffs. In this important sense, private rights of action are prior to duties of repair.

2. Related Problems in Corrective Justice Theory

The rejection of the view that tort law is based on a fundamental principle that defendants owe duties of repair sheds light on a number of other fundamental problems, such as Waldron's point that tort law is immoral because momentary lapses in care regularly produce extremely onerous duties of repair.[135] The simple solution to this problem is to deny that our tort system is committed to the existence of a duty of repair—a fortiori, there is not a puzzling, morally disproportionate duty of repair. Rather, there is a right of action. And although that right will sometimes entail a legal vulnerability that is onerous, that is not at all the same problem.[136] Let us return to the example of Smothers and Jones. Smothers does not owe it to Jones morally to pay her $555,000, although she may have a moral duty of repair in a much lesser amount. But Jones is legally entitled to recover $555,000 from Smothers in light of the injury Smothers is responsible for having caused.[137] This legal right of action against Smothers is inferred from the fact that Smothers breached a legal duty to Jones not to injure him by failing to take the care owed to him. Jones is permitted to take from

135. Waldron, *supra* note 7, at 389.

136. *See* Ripstein & Zipursky, *supra* note 17, at 222–23 (distinguishing tort liability from punishment).

137. Note that when we view tort law as involving rights of action for damages, and not duties of repair, it becomes plausible that, just as first-party insurance is socially valuable because it alleviates the hardships that fall upon first parties, liability insurance is socially valuable because it alleviates the hardships on tortfeasors. More particularly, there is no reason to accept Waldron's statement that if tort law is unfair without a backdrop of liability insurance, then it is fundamentally unfair. Waldron, *supra* note 7.

Smothers, or have the state require Smothers to give him, the amount that would restore him. But this scenario does not consider what Smothers does or ought to feel about the appropriateness of giving Jones such damages.

A quite different problem often alleged to bedevil corrective justice theory pertains to its relation with distributive justice. It is quite unclear why corrective justice is not subsidiary to, or at least constrained by, distributive justice; the justice of restoring a certain state of affairs would seem to depend on that state of affairs being just from a distributive point of view. These points may well be sound from a normative point of view, but from the point of view of interpreting tort law, they are problematic, for tort law does not seem to take any interest whatsoever in the nature of the state of affairs restored. It is therefore puzzling that the principles of tort law should be asserted to be, in substantial part, predicated upon the appropriateness of restoring such a state of affairs.

This is, in fact, a cluster of problems, which deserves greater attention than I will be able to provide here. Nevertheless, it is worth noting that problems for the interpretive theory of tort law evaporate if we adopt the theoretical perspective that I have been advocating. For the state to provide a plaintiff with a private right of action, and to recognize a plaintiff's entitlement to a private right of action, is not for the state to commit itself to the view that things would be better, more just, or just in some sense, if the defendant were to compensate the plaintiff. Perhaps it is possible and perhaps it is common for "justice to be done" in an important sense when defendants are, in fact, forced to compensate plaintiffs. But this causes us to slip into a functionalist view of tort law again, albeit one that is, in at least one interesting sense, non-instrumentalist. However, when we focus on the conceptual structure of tort law, we see that the principles underlying a plaintiff's right of action against a defendant do not commit our system to this view and are not predicated upon this view. Hence, we never need to face the somewhat paradoxical question of why tort law is committed to the normative appropriateness of restoring the status quo, without any concern for the normative status of the status quo from a distributive point of view. A right of action is a privilege and a power, and the state is not committed to the normative desirability of its exercise, only to the right to have it.

C. CIVIL RECOURSE AND RELATIONAL WRONGS

1. Guidance, Liability, and the Distinctiveness of Torts

Among the chief motivations of corrective justice theory is a dissatisfaction with the suggestion—deeply entrenched in much law and economics work—that tort consists merely of liability rules. Both in sympathy with Hart's critique of Holmes and out of a pragmatist's recognition that legal theory must capture the viewpoint of participants in our practices, Coleman and Weinrib have insisted that tort law contains norms that specify a series of wrongs that are deemed unjustified and enjoined. Because these norms have been violated and because wrongs have been committed, defendants are required to pay plaintiffs.

Hence, contrary to the view of economists, the norms do not merely state that there will be liability for certain conduct. Instead, they state that certain conduct is wrongful, and connected norms impose a duty of repair because the norm of conduct was breached. This is part of the critique of law and economics and its failure to capture the concept of a wrong within tort law.

The model of rights, wrongs, and recourse retains the notion of a wrong as a violation of a legal norm that enjoins certain conduct. Moreover, it concurs with the assertion that a plaintiff is permitted to recover, and a defendant is required to pay, only because the defendant has breached such a norm. In both of these respects, this model joins corrective justice theory's critique of the pure liability rule view. As we will see, it also aims to deepen that critique. However, corrective justice theorists have tended to discuss this critique in tandem with a related point—that a defendant's requirement to pay is not a liability, but an affirmative obligation recognized by the law in light of the demands of corrective justice. For the reasons stated in Part II and Part III.A and B, I have rejected this view.

A deep fault line between the economists and the corrective justice theorists has thus been over the extent to which tort law's rules are guidance rules[138] that enjoin and specify obligations, and the extent to which those rules should be understood as stating the conditions of vulnerability to actions for damages.[139] I suggest that each of these views contains part of the truth. Tort law contains rules that articulate what acts constitute legal wrongs of conduct among private persons, and what obligations to forbear from such wrongs citizens have to one another. With regard to norms of conduct, corrective justice theorists are correct. However, tort law also contains rules stating that under a variety of conditions a plaintiff will have a right of action against a defendant. These rules do not enjoin defendants to pay; they state the conditions under which plaintiffs will be able to recover, and under which defendants will be vulnerable to such actions. To this extent, the economic view more nearly captures the concept of liability in tort.

I believe that the tendency to these two extremes rests on different, but equally powerful analogies: the corrective justice theorists to the domain of contract, and the economists to the domain of regulation. In contract, the obligation of conduct—the primary duty—generates a right of action in the plaintiff, at least in part because it generates an affirmative obligation to pay under the contract.[140] Thus, where we find a genuine primary duty of conduct in tort and a violation of that duty giving rise to a right of action in tort, it is natural to assume that there is a duty to pay as an intermediary. Conversely, in

138. *See* Nance, *supra* note 104, at 837.

139. *See generally* Zipursky, *Rights, Wrongs & Recourse*, *supra* note 17, at 55–70 (describing relational theory of tort under which tort rules understood as enjoining tortious conduct rather than as merely defining consequences for tortious conduct).

140. This does not deny that money actions for damages will often be more easily analyzed in a manner that analogizes them to tort actions.

the regulatory arena, when defendants have mere liability, the liability follows from the breach of a state rule that specifies that there will be such liability under certain circumstances, with the avowed goal of producing a regime that influences conduct by informing citizens what costs will accompany certain activities, but not by enjoining those activities. For the reasons already offered, the duty of repair analogy to contract ultimately fails, as does the regulatory model of the meaning of tort rules of conduct. Tort law is distinct from both contract and regulation. Consequently, we need an account of a domain of rules of conduct that genuinely enjoin behavior, but whose breach generates rights of action in the plaintiff, not duties of repair understood as affirmative duties to pay.[141]

In the last few paragraphs, we have arrived at this specification of what is needed by a discussion of the analytical shortcomings of competing theories at a broad level. But the same specification of what we need in torts is effectively produced by our discussion of the substantive standing requirement in tort.[142] That area of doctrine tends to show that the norms of tort law—understood as rules of conduct—pick out a domain of persons who have been "wronged" under those rules and limit standing to bring a right of action in tort to those persons. Neither the corrective justice view nor, as argued elsewhere, the economic model captures this standing phenomenon.[143] What is needed, again, is an understanding of a kind of legal norm that enjoins conduct, but simultaneously specifies a domain of persons who are entitled to a right of action in light of a violation of the norm. The model of rights, wrongs, and recourse, further developed below, aims to solve both of these problems.

2. Relational Legal Norms and Relational Wrongs

The norms of tort law set out a variety of legal wrongs.[144] These norms are legal and not necessarily moral. They are directive and conduct-oriented: they enjoin persons from treating others in certain ways and from interfering with others' interests in certain ways. They serve, in substantial part, as guidance rules. Nevertheless, these norms are explicitly announced and enforced by the judiciary through tort law. An important aspect of these norms is that they impose what Arthur Ripstein and I have called "duties of non-injury," not simply duties of non-injuriousness; their violation requires that the violator actually injure another in a certain manner, not simply that he acted in a way that could ripen or normally ripens into such an injury.[145] Hence, tort law's norms enjoin people from defrauding others, not merely from uttering fraudulent statements, from battering others, from trespassing upon others' land, and from injuring others through a failure to take the care they owe.

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141. Zipursky, *Philosophy of Private Law, supra* note 17, at 645–49.

142. *See supra* Part II.B.

143. Zipursky, *Rights, Wrongs & Recourse, supra* note 17, at 45–55.

144. *Id.*

145. *See id.*; *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636–41 (2002).

The norms of tort law are "relational" rather than simple.[146] This label presupposes a distinction between treating a predicate that refers to a wrong as a dyadic predicate as opposed to a monadic predicate. For example, the predicate "batters" is comfortably treated as dyadic: *X* battered *Y*. The predicate "commits arson" is comfortably treated as monadic: *X* committed arson.[147] Certain legal norms are best analyzed as containing monadic predicates: "No person shall intentionally set fire to an American flag" is a good example. The predicate "intentionally set fire to an American flag" is monadic here. By contrast, the norm "no one shall defame another person" can be understood as featuring a dyadic predicate. This norm is usefully analyzed as saying that for all *x*, and for all *y*, *x* shall not defame *y*. It can also be analyzed as containing a monadic predicate—by saying that for all *x*, *x* shall not defame another person. When a legal norm, in addition to being capable of analysis as containing a monadic predicate that enjoins a range of persons from acting a particular way, can also be analyzed as containing a dyadic predicate enjoining a domain of persons from treating a member of some range of persons a certain way, then I shall refer to the norm as a "relational legal norm."

Tort law consists of relational legal norms—the norms enjoining persons from battering another, assaulting another, defaming another, defrauding another, injuring another through failure to take due care or through selling a defective product, maliciously prosecuting another, trespassing upon another's land or interfering with the use of another's land, invading another's privacy, intentionally inflicting emotional harm upon another, interfering with the contractual relations of another, or interfering with prospective economic advantage of another. These norms of tort law can each be understood as containing a dyadic predicate. A violation of the norms of tort can be viewed as a relational wrong. Equally, a violation can be viewed as a breach of a relational duty imposed by tort law. In this manner, the relational norms of tort law can be viewed as imposing upon the persons within the domain of the norm, duties to treat or refrain from mistreating members of the range a certain way. Correlatively, in Hohfeldian manner, the norm imposes on members of the range—persons whom members of the domain have duties not to mistreat—legal rights not to be treated in that way by persons in the domain.[148]

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146. *See* Goldberg & Zipursky, *supra* note 14, at 1828–29; Ripstein & Zipursky, *supra* note 17, at 217–19; Zipursky, *Rights, Wrongs & Recourse*, *supra* note 17, at 218–20.

147. Of course, the sentence "Bob battered John" can also be analyzed as an instance of "*X* battered John"; thus, "battered John" could be viewed as a monadic predicate. Likewise, "Bob committed arson on John's place" could be treated as "*X* committed arson on *Y*'s place" and "committed arson [on someone's place]" could be analyzed as a dyadic predicate. I do not wish to comment on how pervasive this interchangeability is; my point is simply to reveal that I am not making any claim to exclusivity.

148. I think it unlikely that the account of rights offered here will fit squarely into an interest theory or a claim theory. On the point that a theory of rights should not incorporate the idea that the invasion of right generates an entitlement to a claim against the right invader, but rather should leave this as a substantive principle, I have found D.N. MacCormick's *Rights in Legislation* highly illuminating. *See*

3. Relational Norms and Standing

Only when we understand the norms of tort law as relational will we be in a position to understand what tort law's standing rules really mean. These rules limit rights of action to persons relative to whom the tort was committed. As Cardozo stated in *Palsgraf*, "What the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one."[149] As I observed above, only the defamed may sue for defamation, the battered for battery, the deceived for fraud, and so on. These statements actually mean something; they are not merely circular. The possibility of their meaning something depends on their appeal to a legal norm of conduct that has a particular structure, through which it is possible to distinguish potential plaintiffs. For example, *P* has a defamation action against *D* only if *D* defamed *P*. To put it differently, it is not enough that *D* violated a legal norm that enjoins persons from committing the act of defamation, even if *P* was foreseeably injured by the act. *P* must be within the range of persons whom the norm enjoins *D* from defaming, and *D* must have violated that prohibition by defaming *P*. This is what it means for the act to be wrongful, in the relevant sense, in relation to *P*.

Corrective justice theorists are, in principle, open to such an account of relational legal wrongs. Indeed, this account puts flesh on the bones of the basic notions of primary duties of conduct and correlative rights. It also broadens the account from negligence law to all torts, while simultaneously permitting a deeper account of negligence law. Finally, it complements the account I have suggested of tort law as merely private law, for it suggests that even though rights of action are private, the legal norms of conduct are, in an important sense, public.

Because corrective justice theory can accept the logical analysis of primary rights and duties, I believe it is capable of expressing and accommodating what the substantive standing rules actually mean—something that cannot be said of the law and economics analysis.[150] On the other hand, recognition of the structure of the legal norms of tort law only intensifies the problem for corrective justice theory in explaining why we have substantive standing rules. It is now palpably clear that a person could be the victim of a real injury caused by the defendant's commission of a tort, and that injury could be reasonably foreseeable and could be the defendant's fault, even if the defendant's tort was not an instance of a breach of a wrong to the plaintiff, under the relevant relational legal norm. Under such circumstances, corrective justice implies that the defendant should be liable to the plaintiff, but our actual tort law holds

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D.N. MacCormick, *Rights in Legislation*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 189 (P.M.S. Hacker & J. Raz eds., 1977).

149. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928).

150. *See* Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 17, at 40–70.

otherwise. Standing turns on relational wrongness, not on the defendant's fault or responsibility.

By contrast, when we begin with the notion of a right of action and link it with the notion of relational wrongs, the structure of standing law becomes clear. Substantive standing rules state that one has a right of action in tort only against a person who has wronged one. They embody a principle that the power and privilege to act against another through the state is conditioned on the other having wronged the plaintiff. This principle flows, in turn, from the idea that insofar as one is entitled to act against another through the state and insofar as one has any privilege to do so, it is only because one was wronged by the person against whom one is privileged to act. It is only the defendant's legal wrong to the plaintiff that gives rise to a privilege and power in the plaintiff to act against the defendant.

The idea of civil recourse helps to explain this principle. As argued above, rights of action can be understood as an avenue of recourse to which we are entitled in lieu of self-help. By permitting and facilitating this right of action against others, the state renders this form of recourse nonviolent and civil. But it also conditions the recourse for at least two reasons. On the one hand, potential defendants have an interest in security and in lawfulness—that acts triggering vulnerability to others will be legally defined. But notice, security, and rule-of-law concerns mesh with a second reason why the entitlement to civil recourse is conditioned. This is that, at a deeper level, the limitation of tort actions to those who have wronged the plaintiff goes to the basis of a right to recourse at all. As in the case concerning the privilege of self-defense, we are dealing with an exception to the state's general prohibition of taking and of violence against others. And as in the case of self-defense, the exception is not triggered by need or desire alone. The state relaxes its general rule in recognition of a privilege to act against others who have, themselves, acted against the person claiming the privilege. Thus, civil recourse is essentially responsive—it is because I have been wronged by this person that I am entitled to recover against this person. The privilege afforded is not a privilege to wrong another; these wrongs are forbidden, even responsively. Rather, it is a privilege to act against others civilly through the state.

I have already touched upon several respects in which civil recourse is civil, but we must introduce one more. The need for public and general conditions of defendant vulnerability and the basis of recourse in wrongs are combined in our system of civil recourse. Rights of action are not triggered unless the defendant wrongs the plaintiff, but the wrongs in question are not moral wrongs, nor are they what plaintiffs perceive as wrongs. They are legal wrongs to the plaintiff—violations of legal norms that demarcate certain ways of treating others as legally prohibited. Just as the form of response offered by a legal system of civil recourse is artificial, state-mediated, and governed by rules, so are the categories of wrongs themselves legal constructs that are mediated, defined, adjudicated, and made public by the state. But civil recourse is nevertheless a form of

redress, a form of action against another, and legal wrongs are conceptualized as forms of wrong and are derived from norms that enjoin them and attach to them a species of opprobrium.

The substantive standing rules within tort doctrine thus reflect a very basic principle within tort law that the right to act against another in tort arises from having been legally wronged by another. This principle exists because rights of action are a privilege and a power the state accords us in tort, precisely because we have been wronged and are therefore entitled to an avenue of recourse against the wrongdoer.

4. Rights, Wrongs, and the Distinctiveness of Torts

I suggested earlier in this section that other theorists' selection of analogies has skewed tort theory. Tort law is unlike contract law because rights of action are not grounded in an affirmative duty to perform, but it is also unlike regulatory law, as envisioned by the economist, because its norms enjoin conduct, rather than merely price it. We need an account that recognizes genuine rules of conduct but which considers a violation of those rules to generate liability to private parties. The model of rights, wrongs, and recourse provides exactly this account. Tort law consists of relational legal norms, the breach of which is always a wrong to some person or persons. It is that person or those persons who have a private right of action in tort.

The structure of tort law, so understood, is distinct from both contract and mere regulation, but it would be a mistake to think of it as peculiar or isolated. On the contrary, the structure I have just set out is exemplified by vast areas of law, both historically and in the present day. As a historical matter, a large array of litigation since at least the early medieval period in England has consisted of private actions brought by those who claimed that they had been legally wronged and were therefore entitled to some form of private legal redress through the courts. Tort law has developed out of this fundamental form of action. Yet, it would be a mistake to see the progression from a relational norm, through a wrong, to a right of action, as being unique to the common law. Today's federal and state law contains innumerable statutory norms that enjoin persons from treating others in certain ways and that simultaneously recognize private rights of action by those who have been wronged under these norms.[151] The closest kin of tort is not contract or regulation, but the private right of action by one wronged under statute.

5. Relational Norms and Tort Theory

The recognition of the place of directive relational norms in torts calls attention to a vitally important aspect of tort law that theorists have too often ignored. The bipolarity critique, and indeed much of the work falling under the

151. *See supra* notes 132–134.

rubric of corrective justice theory, has focused more on actionability of torts and on the institution surrounding rights of action, than on the rules whose violation triggers those rights of action. Because this article is a critique of that view, it too has focused on the question of actionability. Nevertheless, a large and important class of questions within interpretive tort theory pertains to the content of the relational legal norms of tort law.

A wrong under negligence law is the injuring of another through breach of a duty of due care. What is the duty of due care? What does "duty" mean here? To whom is a duty of due care owed? How do its contours change with different relationships and different types of injuries? Fraud law enjoins deceiving others through false representations made with scienter. What is scienter? What is a representation? To what extent can concealments count as representations? Similar questions can be asked for every tort. This is obviously the stuff of court decisions, tort treatises, and tort courses. All of these questions go to the nature of the legal wrongs under our actual tort law. They call for an analysis of the concepts embedded in the law. Answering them substantively is a vital part of understanding tort law.

My clarification of the nature of relational wrongs and relational norms only highlights the importance of these questions in torts. My silence on these issues should not be taken to reflect any diffidence about the value of a pragmatic conceptualist approach to them, only a limitation on the scope of this Article. Indeed, in several other articles on tort theory, I apply a pragmatic conceptualist approach principally to analyze the nature of "wrongs" within various branches of tort law.[152]

D. CIVIL RECOURSE AND THE DIVERSITY OF REMEDIES

To claim that one person is entitled to an avenue of civil recourse against another leaves open the question of what sort of remedy should be available through that avenue of recourse. When courts grant a plaintiff's request for an injunction that enjoins the defendant to return goods defrauded from the plaintiff, abate a toxic product, recall some automobiles, provide medical monitoring, or release a falsely imprisoned prisoner, those courts are privileging and empowering victims to use the state to force wrongdoers to act in a particular way. The same goes for other injunctive measures.

A parallel analysis applies to damages. To award damages is to make the defendant liable to the plaintiff for a certain amount, entitling the plaintiff to take a certain amount from the defendant. To decide that the plaintiff has a right of action against the defendant is not to say whether taking damages is one of the things the plaintiff is entitled to do. And it does not answer the question of

152. *See, e.g.*, Goldberg & Zipursky, *supra* note 14; John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); Goldberg & Zipursky, *supra* note 145; Ripstein & Zipursky, *supra* note 17; Zipursky, *Legal Malpractice*, *supra* note 17.

what shall determine the extent of damages that the plaintiff is entitled to take, if the plaintiff is entitled to damages as a remedy.

Our tort system clearly puts great emphasis on damages, and particularly on compensatory damages. In so doing, it obviously makes use of the concept of making whole, and of a principle that the plaintiff is entitled to be made whole. On all of these points, the corrective justice theorist is correct, but he mistakes their significance. Our system appears to embody the principle that a person who has a right of action against another because of another's wrongful action is entitled to have the state force the defendant to pay damages that would make the plaintiff whole. This principle lies at the level of remedies, applicable once a right of action is already recognized. I believe that corrective justice theorists like Coleman and Weinrib misread this principle as stating that a wrongfully injured plaintiff ought to be made whole and, correlatively, that a defendant who wrongfully injured a plaintiff ought to make her whole. There is a slide here, and it is analogous to that which I discussed in the prior section. It does not follow from the fact that our system recognizes a privilege to have the state require a defendant to pay compensatory damages, that our system is committed to a freestanding obligation to give compensatory damages; nor does it follow that it is committed to the existence of the sort of right to compensatory damages that would entail the existence of such a duty.

The law pertaining to compensatory damages is illuminatingly examined through a focus on its limitations. A plaintiff who has established a right of action against a defendant is normally not entitled to take *more* than compensatory damages. Damages beyond this level are typically referred to as "punitive," and a plaintiff is only entitled to take punitive damages when it has been established that the wrong done by the defendant was willful or malicious. The characterization of extra-compensatory damages as "punitive" suggests the principle that is operating when the law forbids plaintiffs from taking from defendants more than they need, on the ground that doing so would be "punitive" or "vindictive." Just as in self-defense, victims may not use force out of proportion to what is necessary to combat the kind of aggression they face, in private rights of action, plaintiffs are not normally entitled to take from the one who wronged them more than they need to be restored. It is not that the status quo of the plaintiff's holdings is right or good in some abstract sense that implies that their restoration is good. Rather, it is that the amount required to return the plaintiff to the status quo that was disturbed by the defendant's wrong is a measure of what the plaintiff is entitled to get from the defendant, if the plaintiff establishes a right of action against the defendant.

The civil recourse model also provides room for noncompensatory forms of damages, including punitive damages. As sketched above, our tort law normally does not permit plaintiffs to force defendants to pay them more than they need to be made whole. There is some sense in which taking, or having the state force defendants to pay, more than is necessary for making one whole is "vindictive." The word "vindictive," which is used synonymously in the law

with the word "punitive," suggests that plaintiffs who seek such damages are not merely attempting to restore themselves. Rather, they are actually seeking to vindicate their rights by inflicting a sanction on the defendant; moreover, they are seeking to "be vindictive"—to act "in revenge" for the wrong done to them by the defendant. Although our tort law normally does not permit such a remedy, it makes an exception when the plaintiff has proven that the defendant "willfully" wronged him or her. In such cases, the law effectively treats plaintiffs as "entitled" to be vindictive in the sense described. This is rather like a rule that if *B* punches *A* in the nose to hurt *A*, *A* may punch *B*; but if *B* unintentionally hurts *A*'s nose, *A* may not punch *B*. Of course, it is crucial to our civil system that, even with punitive or vindictive damages, physical violence is not permitted: monetary damage through civil litigation is the remedy. However, this has not always been the case. In early medieval English law, for example, a plaintiff who proved that the defendant had committed a willful crime against him or her was personally entitled to inflict physical harm on the defendant, such as whipping him.[153] Ours, however, is a system of civil recourse, even when it is vindictive and punitive.

My aim is not to defend the vindictive impulses that I have been describing. Nor is it to defend the purported principle that those who have been willfully wronged are entitled to act on such impulses or to have an avenue of civil recourse through which to be vindictive or punitive. Rather, I am pointing out that such a principle is embedded in the law of punitive damages. Whether it is ultimately defensible as a normative matter is a further issue.

If this account is correct, not only corrective justice theorists, but also conventional tort scholars have badly misunderstood the structure of punitive damages. Both corrective justice theorists and conventional tort scholars typically treat punitive damages as falling into one of two categories: a misnamed element of compensatory damages or a graft of the criminal law. Conventional scholars, who do not work from a conceptualist base like the corrective justice theorists, are less apt to see punitive damages as ill-fitting because they view tort law as serving an ad hoc mix of goals in any case. As I will discuss below, these categories are helpful in accounting for some of the American case law on punitive damages. But, for the most part, these categories get punitive damages law backwards. The very reason for calling punitive damages "punitive" is that they go beyond compensatory damages. Moreover, the unavailability of punitive damages when there is no willfulness is anomalous if it simply represents an extra category of compensatory damages. As I have argued, our tort law is not a system aimed at restoring normative equilibrium; it is a system that permits those who have been wronged to have the state force certain remedies out of those who have wronged them. We need not squeeze punitive damages into a compensatory damages box.

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153. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 61–63 (1996).

Punitive damages need not be seen as essentially deterrent or retributive in nature, as a graft of the criminal law onto the tort law. To do so is to confuse two senses of the term "punitive." In one sense, "punitive damages" are synonymous with "state-inflicted punishment, in the form of a damages award"; "punitive" here means "serving as the state's punishment." But, as we have seen, "punitive damages" may also be understood as synonymous with "vindictive damages." In this sense, to award punitive damages is not necessarily to inflict punishment, but to permit the plaintiff to "be punitive," or to "be vindictive"—to inflict hardship upon the defendant out of resentment, spite, or the desire for revenge, not necessarily as an aspect of self-restoration. One reason to allow a system to permit such vindictive damage awards is that the state may think that plaintiffs would vicariously carry out the punishment role of the state; if our actual law of punitive damages reflected such a rationale, then the second sense of "punitive" would effectively draw upon the first. However, just as the state's permission of a compensatory damage award does not entail the state's commitment to the claim that defendants "ought" to make plaintiffs whole, the state's permission of punitive damage awards does not entail the state's commitment to the claim that defendants ought to be punished. It may simply reflect the principle that a plaintiff who has been willfully wronged is entitled to be punitive in this manner, if he or she so chooses. When we combine the analysis in this section with the earlier discussion of the purely private enforceability of tort law, we see that it is not plausible as a general matter to view punitive damages as an embodiment of a form of state punishment because, under the common law, the state is not permitted to enforce tort law even for cases in which punitive damages would be available.

The idea of punitive damages is therefore not necessarily alien to the structure of tort law. On the other hand, the account I have given thus far distorts the law of punitive damages as it exists today. Over the past few decades, enough courts have confused the two senses of "punitive" described above that the legal rationale for punitive damages has to a certain extent been modified, so that such damages constitute a form of punishment or a form of extra compensation. Hence, courts, in reviewing the permissibility of punitive damage awards, often look to whether the amount of the award is justifiable by reference to the state goal of deterrence.

In an interesting sense, however, contemporary punitive damages law does not undercut my account, but validates it. Punitive damages are currently treated as an area of the law that has somehow gone out of control, and my account suggests why. In the past ten years, many states have made forays into punitive damage reforms, and the United States Supreme Court, which views with great trepidation the Due Process Clause of the Fourteenth Amendment, particularly outside the civil rights area, has decided to declare certain punitive damage awards a basic violation of that Clause.[154] I suggest that what was once a

154. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (holding that two million dollar damage award excessive because company not on notice about magnitude of sanction that state would impose).

narrow but cogent part of our private law of torts has been, through a series of misunderstandings and well-intentioned instrumentalist improvisations, partially transformed into an ad hoc and arbitrary form of penal law. More particularly, punitive damage awards within the common law of torts imposed extra-compensatory awards on defendants, but they did so only to the extent that plaintiffs were entitled to such a remedy. Once the conceptualization of punitive damages shifts into a "state-punishment" mode, we begin to see plaintiffs receiving awards to which they are not entitled, and defendants understandably complaining that normal punishment standards of notice and non-arbitrariness have been flagrantly violated.[155] The nature and soundness of these developments in punitive damages law, as well as their constitutional status, merit further exploration. The present point is that even when the law has changed in a manner that reflects a divergence from the model of civil recourse I am constructing, the civil recourse model is essential to understanding and assessing the nature of those changes.

Finally, I do not wish to deny that the remedy of compensatory damages holds a privileged position within the law of torts. It is the most common remedy and the most important remedy; it is virtually always available in what has come to be seen as the paradigmatic tort—that of negligence. It is also typically the only form of damages available in that tort. But this dominance in the law of remedies is too easily mistaken for the core of a right of action at all. Instead, we must take this dominance as an indication of an important principle about damages: self-restoration is the limit where the wrong in question was simply that of negligently injuring another.

E. CIVIL RECOURSE AND CORRECTIVE JUSTICE

Corrective justice theory gives us a picture of what tort law does in successful litigation. It restores a normative equilibrium by imposing duties to compensate for injuries on the injurers who are responsible for them. In this way, a particular form of justice—corrective justice—is done. It is this picture, emanating from Aristotle, that seems both so simple and so captivating. But it is this picture that has proven inadequate to the realities of our actual tort law. For the law steadfastly insists that the state may not take its own initiative in seeing that corrective justice is done, and therefore casts doubt on the claim that doing corrective justice is what tort law is all about. It does not regard tortfeasors as having general duties of repair to those whom they have injured. And tort law frequently does many other things besides make whole. It makes less than whole, more than whole, and many other things unrelated to repair or the restoration of an equilibrium, thereby undercutting the suggestion that rectification of losses is at the very core of torts. Finally, the law has many opportunities

155. *Id.*

to restore normative equilibrium and to impose duties of repair on those who are responsible for causing injuries to others, but it passes over these opportunities out of a concern for the relationality of wrongs.

To be sure, normative equilibrium—if there is such a thing—is often restored, and duties of repair are often imposed and dispatched. Indeed, there is nothing in the model of civil recourse that prevents me from saying that the capacity to do corrective justice in these respects is a laudable feature of tort law. Perhaps doing corrective justice or imposing duties of repair should even be described as a function of tort law. But recall that the corrective justice theorists demanded something more from the economist. They demanded an account that fit like a glove. And this demand was not caused by obsessiveness or a lack of realistic expectations of theory; it was due to a jurisprudential interest in capturing the content of the concepts in the law. The point is not simply to produce a noninstrumental account of the law's value. Rather, it is to produce a nonreductive account of the concepts in the law, one which explains why the law has the structure it does. This is the heart of the corrective justice theorist's conceptualist critique of law and economics. If this critique is sound, its implications are ironic. It suggests that corrective justice theory cannot realize its own aspirations to provide a thorough nonreductive account of the conceptual structure of the law, even if it may constitute an important contribution to our understanding of the law. The irony is that this mirrors precisely what corrective justice has said about law and economics itself. A central difference, of course, is that the corrective justice theorist is giving non-instrumentalist and deontological accounts. But it does not follow that it is an account that fits the conceptual structure of the law or the concepts underlying it, and I have argued that it does not.

CONCLUSION

Corrective justice theory has recently attracted the attention of a wide range of philosophers and has become the focus of sustained legal theory. The reasons for this increasing prominence frame the larger aims of this Article. The common law of torts is the birthplace of Holmes' homespun brand of legal realism, functionalism, and cynicism about legal actors. We find no determinate rules or rational principles, but simply patterns of liability imposition from which we can predict the future. We do not find rights or duties that the law recognizes, but only functions that the law serves. Legal actors cannot really be expected to be guided by the law, except in the sense that they fear its sanctions. This Holmesian vision has now been extended throughout all of law and is treated by many legal academics as wisdom, the denial of which marks one as a naïf. But this vision's crowning achievement continues to be in tort law, where the nonreductive interpretation of tort doctrine is regarded as something of a joke, even by hornbook authors; where our normative questions are to be answered by a form of functionalism that is allied with our most esteemed social science, economics; and where it is safe for leading scholars and judges

simply to assume that tort damages will be treated by legal actors as a cost of doing business.

In this field, corrective justice theory assumes the role of the underdog, to put it lightly. In the judge-made law of torts, it proclaims that there is law apart from the policy decisions of judges. In the face of a system that undeniably bears significant weight in America's web of compensation and deterrence law, it denies that functionalist interpretations are central to grasping the law. In the wake of our leading judges, deans, and scholars declaring that the key insight of torts is that they involve mere liability rules, it insists that tort law really is about duty after all.

Although much of this Article critiques the already besieged corrective justice theory, I hope it is clear that I am joining forces with corrective justice theorists in these larger, and largely uphill, jurisprudential battles. Indeed, in each of the domains in which corrective justice theory has taken the offensive—as a superior analysis of the structure of tort doctrine, as a form of justice and political order different from distributive justice, as a conception of private law distinct from public law, and as a critique of instrumentalism—I have sought to expand and improve upon its ideas.

On the structure of tort doctrine, corrective justice theory powerfully argued that law and economics was inadequate because it failed to capture the bipolar structure of tort law. I strengthened that argument against a series of objections and provided it with a methodological framework consistent with contemporary pragmatic approaches to law. More importantly, however, I showed that corrective justice theory itself misses the true structure of tort law. Tort law is a system in which individuals are empowered to bring rights of actions against those who have committed torts—legal wrongs—against them, and in which individuals are entitled to certain remedies against tortfeasors. Clarifying the nature of wrongs, the nature of rights of action based on those wrongs, and the nature of the remedies available is pivotal to getting a clear picture of the structure of tort law. Neither law and economics, nor corrective justice theory, nor conventional deterrence-and-compensation scholarship has captured these basic facts about the structure of tort law. Regarding distinctions from distributive justice, I offer an account that is entirely nonteleological and which does not depend upon notions of distributive or corrective justice. The principles embedded in tort law nevertheless constitute a fundamental aspect of liberal individualism. The principle of civil recourse is simply that an individual who has been legally wronged is entitled to some avenue of recourse against the one who wronged her. Like other fundamental features of liberal individualism, the principle of civil recourse constrains and conditions the state's subjection of individuals to a system of rules, and its occupation of a monopoly of force. The state is obligated to permit and empower those who have been legally wronged to act, civilly, against those who have wronged them. The private right of action is the state's civil empowerment of individuals who have been wronged against the wrongdoer. Tort doctrine's categories of wrongs, conditions on rights of action,

and limitations of remedies shape and constrain this realm of rights into law. To be sure, individuals exercising their rights of action are often seeking to restore themselves, to "get even," or to achieve corrective justice, but the state's recognition that such individuals have a right of action must not be misinterpreted as an embrace of corrective justice. Whether an individual's exercise of his or her rights under such a system fosters distributive justice or corrective justice is a contingent matter.

For related reasons, the corrective justice theorists have commendably emphasized the importance of distinguishing private law from public law, but they have missed the most basic respect in which tort law is private. The courts in tort law do not stand ready to facilitate the rectification of wrongdoing, or to restore a normative equilibrium, as corrective justice theorists maintain. Instead, they empower individuals to obtain an avenue of recourse against other private parties. Because tort law fundamentally involves the empowerment and privileging of private parties to act against one another, and does so based on a principle that individuals are entitled to act against those who have wronged them, tort law is in one essential respect private law. On the other hand, the norms specifying what will count as a wrong, and the duties we have not to mistreat each other are public norms of conduct. The model of rights, wrongs, and recourse, therefore, displays torts as a particular kind of hybrid of private and public law.

Next, I have transformed the corrective justice theorist's challenge to the stranglehold of instrumentalist legal theories into a methodology of pragmatic conceptualism. Conceptualist theories need not be transcendental and rigid, like Weinrib's; they may be—and should be—rooted in practice, rather than metaphysical, and flexible rather than formalistic. Pragmatic conceptualism is practice-based and flexible. It therefore meets the economists and the conventional tort scholars head-on, and shows why the corrective justice theorist's structural critique is sound. Yet, from within a pragmatic conceptualist methodology, we have come to see that corrective justice theory itself fails to capture the content of the law.

Finally, I have been cautious throughout this Article to characterize my aims as interpretive and not normative. I shall conclude with a few tentative suggestions about this Article's normative implications. The model of rights, wrongs, and recourse is an account of the tort law that we have. If it is correct, we will have to become more circumspect about the relation between justice and tort law than many scholars suggest, not simply because of the shortcomings of our tort system in meeting its own aspirations, but because of its conceptual structure. The system does not embed principles of corrective justice any more than it embeds principles of economic efficiency. It permits those wronged to redress their wrongs, but whether this is doing justice is far from clear. If we, as citizens or policymakers, decide that we want to have a system designed to do corrective justice (as leading scholars have analyzed that notion), to promote efficiency, or to provide compensation to those in need, the structure of tort law

provides no assurance that we will achieve these goals, so we may have to rely on other institutions or change the tort law. Conversely, if judges want to apply the law, rather than revise it or make up their own, they should place little faith in notions of corrective justice or efficiency in interpreting the tort law. If they wish to craft the law with an eye to these values, they must be prepared to defend them in their own right, not on the ground that they are wired into the concepts and principles embedded in the law, and they must be prepared to defend their departure from the law we actually have. I would hope, however, that a prelude to the rejection of the law we actually have would be an effort to understand the content and structure of our law. That is what the model of rights, wrongs, and recourse aims to provide.