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Evaluating Goldberg and Zipursky's Civil Recourse Theory

Cover Page Footnote

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EVALUATING GOLDBERG AND ZIPURSKY'S CIVIL RECOURSE THEORY

Jane Stapleton*

INTRODUCTION

Professors John Goldberg and Benjamin Zipursky claim that they have formulated (the beginnings of) a theory that captures the distinctive character of tort law and the distinctive role that core concepts such as duty play within it.¹ They argue that their “civil recourse” theory provides a better explanation and model of the norms of tort law than that offered by efficiency and corrective justice theories.² Civil recourse theory can be reduced to seven main claims, two of which are uncontroversial statements about tort law: that a plaintiff must establish all elements of a cause of action before she can ask for a remedy; and that, once these are established, tort law has separate doctrines that determine which remedy will be afforded her. In relation to each of the remaining five claims, I have major reservations.

One claim, analyzed in Part IV below, is that we *must* see tort “obligations”³ as prospective mandatory directives that enjoin and guide conduct,⁴ a claim I will label the “guidance directives” claim.⁵ Tort law

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1. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 Fordham L. Rev. 1563, 1590 (2006) (claiming that their theory captures the “distinctive role” of tort law).

2. See John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 Md. L. Rev. 364, 402-03 (2005); see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 Geo. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1 (1998) [hereinafter Zipursky, *Rights, Wrongs*].

3. In contrast to John Goldberg and Benjamin Zipursky, I use this term neutrally to mean, for example, the rule about defamation, the rule about public nuisance, and so on. I do not accept that the fact that we use this term in the law of torts mandates that we accept Goldberg and Zipursky’s prospective guidance claim.

4. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733, 1744-45 (1998) (arguing that duty in negligence law must be understood in terms of genuine concepts of obligatory conduct, not just in terms of liability); Goldberg & Zipursky, *supra* note 2, at 386 n.56; Zipursky, *Rights, Wrongs, supra* note 2, at 58.

5. Goldberg and Zipursky have argued that duties in tort law should be understood, at least in part, as having “a sort of normative content not identical to moral duties, but nevertheless similar in the injunctive force that they carry with them.” Goldberg & Zipursky, *supra* note 2, at 386 n.56.

consists not merely of liability rules setting out the price tags for below-standard conduct, but also, assert Goldberg and Zipursky, of directives to obey that generate an "obligation" to meet that standard of conduct. To the contrary, I will argue that there is nothing in tort doctrine that mandates this perspective; it is an inconvenient lens through which to see areas of tort law such as strict liability torts. It is not a claim that is needed in order to attack the duty-to-the-whole-world claim that Goldberg and Zipursky rightly disparage in the tort of negligence. Such guidance directives would often be unable to focus an actor's conduct in the way that Goldberg and Zipursky claim, and, if seen as a claim that these guidance directives are "relational" (only owed to those who will be entitled to sue if the mandated standard is breached), it risks unattractively callous interpretations of the law, for example that the law gives an occupier of land the prospective advice that he can ignore the well-being of a trespasser to whom he owes no duty in the tort of negligence. In my view, to the extent we might view tort law as providing prospective guidance directives, these are best seen as general non-relational guidance to citizens: do not defame; do not assault; do not act unreasonably.

Another wider claim of civil recourse theory, analyzed in Parts V and VI, is that we *must* see tort law as "relational"⁶ in analytical structure. Goldberg and Zipursky's general motivation is to debunk the alleged orthodoxy among U.S. academic tort scholars that, in the tort of negligence, the duty is, as they contend Oliver Wendell Holmes asserted,⁷ owed to the whole world subject to the Prosser-created⁸ gloss of ad-hoc instrumentally driven exceptions. According to Goldberg and Zipursky, tort norms such as the duty of care in negligence are relational in analytical structure—owed to classes of persons—rather than non-relational—owed to the world.⁹ It seems that by "relational" Goldberg and Zipursky mean, at least, that a tort plaintiff must always satisfy some nonuniversal requirement before she is entitled to sue. I will argue that this is clearly the most convenient way to describe areas of the law such as who can bring a claim in negligence involving affirmative duties, emotional harm, and pure economic loss.

Nonetheless, I will argue that in "traditional" physical loss cases such as *Palsgraf v. Long Island Railroad Co.*¹⁰—that is, cases where the defendant's own positive careless act directly causes physical injury to the plaintiff—it is an extremely unattractive perspective. It is not attractive because, even if one perceives tort norms such as the duty element in negligence as merely notification of threatened sanctions, it suggests that

6. Goldberg & Zipursky, *supra* note 4, at 1744 (arguing that a satisfactory descriptive and prescriptive account of the tort of negligence "must conceive of duty as relational" (emphasis omitted)); see also Zipursky, *Rights, Wrongs*, *supra* note 2.

7. See generally Oliver Wendell Holmes, *The Common Law* (1881); Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

8. William L. Prosser, *Handbook of the Law of Torts* §§ 29-31, at 172-82 (1941).

9. Goldberg & Zipursky, *supra* note 1.

10. 162 N.E. 99 (N.Y. 1928).

there is a group of “second-class” citizens who, though they were directly physically injured by the negligent act of the defendant, are not entitled to petition the law to sanction the careless party. Moreover as noted earlier, the distasteful discriminatory message of the law would be compounded if we accepted Goldberg and Zipursky’s claim that any prospective guidance directives given by tort law limit the actor’s radar to those who will, *ex post facto*, be entitled to sue if the actor contravenes the mandated standard. It would mean, for example, that the prospective guidance from public nuisance is that polluting the environment of many “second-class” citizens is acceptable, and the polluter need have no one on his “radar” so long as he avoids causing “special damage” to someone. It would also carry the same distasteful prospective message in those negligence areas where only certain parties can sue: affirmative duties, emotional harm, and pure economic loss.

A further controversial claim of civil recourse theory, analyzed in Part VII, is that failure to conform to a tort standard is also judged “relationally.”¹¹ For example, in the tort of negligence, it is not sufficient that the plaintiff establish that the defendant owed her a duty and that the defendant’s carelessness directly caused her physical injury: She must show “relational breach,” in other words, that the defendant’s conduct was “careless in relation to her.” Yet whether or not we were to accept the guidance directives claim, I will argue that there is no inexorable doctrinal logic that requires us to accept the relational breach claim and that it cannot stand with case law precedents. Furthermore, I will argue that we should not choose this analytical arrangement because it is unnecessarily awkward and also carries with it distasteful discriminatory messages: for example, that, in the tort of negligence, one person owed a duty of care can complain when the carelessness of the defendant’s conduct broke his leg but that another person owed a duty cannot complain when the defendant’s carelessness broke her leg.

Another claim of civil recourse theory, analyzed in Part VIII, is that we must “reject[] a reductive-instrumentalist account of ‘duty’ in terms of the pros and cons of liability rules, and [take] seriously the idea that duty refers to a kind of obligation.”¹² The reductive account, Goldberg and Zipursky claim, provides no guidance to courts and invites lawless judicial discretion and *ad hoc* decision making. Yet, I will argue that, while courts often do engage in pluralist reasoning, there are areas of tort law that can only be accounted for in instrumental terms, for example torts that are explicitly based on the violation of some public policy such as the tort of retaliation by an employer against an employee.¹³ Moreover, by neglecting the fundamentally different functions of final courts of appeal and trial courts,

11. Goldberg & Zipursky, *supra* note 4, at 1820; Zipursky, *Rights, Wrongs, supra* note 2, at 8.

12. Goldberg & Zipursky, *supra* note 4, at 1826.

13. Restatement (Third) of Employment Law §§ 4.01-.02 (Discussion Draft Apr. 27, 2006).

Goldberg and Zipursky fail to perceive the force of precedent to guide and structure the development of the law. Finally, I will argue that, while Goldberg and Zipursky contend that “the duty element of negligence calls for a circumscribed inquiry into whether a given actor is obligated to conduct himself with reasonable care for certain interests of certain others,”¹⁴ they do not provide a coherent account of how this results in a pattern of legal duties that sometimes tracks nonlegal obligations, is sometimes narrower, and, at other times, is more extensive. They acknowledge the pattern but fail to account for it. Thus we are told that there are obligations “embedded” in the law, but not how they, rather than others, came to be embedded.

A final claim of civil recourse theory, analyzed in Part IX, is that it provides an account of what is distinctive about the law of torts. Yet, I will argue, there is nothing in the theory that might not also be claimed about other areas of the private law of obligations. As I show, distinctive features of tort law *can* be stated, but they cannot be reduced to some unitary theory.

In short, although civil recourse theory is, predictably, superior to cruder reductionist accounts of tort law because it confronts the complexity of the contours of the law of torts, its descriptive claims are problematic. They generate awkwardness and inconvenience at the center of the theory’s account of tort law. Had Goldberg and Zipursky placed more emphasis on the fact that the analytical arrangement of legal concepts is a matter of choice rather than inherently mandated,¹⁵ they may have seen that their project is a normative one: to persuade lawyers to choose the conceptual arrangements Goldberg and Zipursky prefer.

I. INCIDENCE RULES: WHO CAN SUE WHOM FOR WHAT

At this point it might be helpful if I briefly set out my own views on the sort of perspectives on tort law that might be fruitful. In my opinion, a richer understanding of tort law would be gained by asking, in relation to each tort, the choice of sanctioned conduct, what interest was being protected, and the remedial array accessed by establishing the cause of action.¹⁶ A most important lens with which to view tort law is what I have called the “incidence rule”¹⁷ of each tort. An incidence rule is that element

14. John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. Cal. L. Rev. 329 (2006) (abstract).

15. This choice is also profoundly influenced by one’s stance on the political question of institutional competition between judge and jury. See W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921 (2005); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 Tex. L. Rev. 1699 (1997); Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in *Exploring Tort Law* 262 (M. Stuart Madden ed., 2005).

16. Peter Cane, *The Anatomy of Tort Law* (1997).

17. Jane Stapleton, *Cause-in-Fact and the Scope of Liability for Consequences*, 119 L.Q. Rev. 388 (2003); Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory,”* 50 UCLA L. Rev. 531 (2002) [hereinafter Stapleton,

or elements of a cause of action which specify who can sue whom and for which types of complaint. It specifies the class of persons in relation to whom the defendant's failure to meet the relevant standard will trigger the concern of the law and attract one of its remedial responses.

In the tort of private nuisance, the requirement that the plaintiff have an interest in the relevant land is part of the incidence rule. In the pocket of strict liability rules for harm caused by wild animals, the requirement that the defendant own, possess, keep, or harbor the animal is part of the incidence rule. In the tort of negligence, the incidence rule is captured by the duty concept: It is within the analytical category of "duty" that the law sets out, in relation to that tort, who can sue whom, and for which classes of complaint. By means of the duty device the law sets out the incidence for the tort of negligence, and this incidence forms a complex and limited pattern. A mature jurisprudence on "duty" would reveal the diverse legal concerns and values that produced that pattern.

In earlier work, I have emphasized the crucial importance of incidence rules to the stability of, indeed to the possibility of, causes of action.¹⁸ When they are not taken into account, they can undermine the cogency of theoretical approaches. For example, some scholars such as Stephen Perry and Ernest Weinrib have argued that general strict liability is impossible and incapable of generating determinate results.¹⁹ This is true, but the reason Perry and Weinrib advance for this state of affairs is a truism and applies to all causes of action requiring the causing of harm. The reason they give is that there will be an infinite number of factors but for which the harm would not have been produced, and, if there were no other conditions of liability except the causation requirement, this would produce unacceptably unbounded liability. What these scholars fail to acknowledge is that in a real legal system this disastrous state of affairs is prevented by *all* liabilities being enclosed by incidence rules; there are always conditions of liability in addition to any causal requirement. *Any* general liability would be "impossible."

Comparative Economic Loss]; Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menu*, in *The Law Of Obligations: Essays in Celebration of John Fleming* 59 (Peter Cane & Jane Stapleton eds., 1998) [hereinafter Stapleton, *Duty of Care*]; Jane Stapleton, *Good Faith in Private Law*, 52 *Current Legal Probs.* 1, 20 n.41, 28-30, 33-35 (1999); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequenc.*, 54 *Vand. L. Rev.* 941 (2001) [hereinafter Stapleton, *Legal Cause*].

18. Stapleton, *Legal Cause*, *supra* note 17, at 984 n.106.

19. See Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 *Can. J.L. & Jurisprudence* 147 (1988); see also Ernest J. Weinrib, *Causation and Wrongdoing*, 63 *Chi.-Kent L. Rev.* 407, 419 (1987) ("The need for artificial limitation confirms that strict liability is not theoretically viable."). Note that it is highly misleading to describe the tort of negligence as "accident law." One may breach the duty of care non-accidentally. Similarly, since a person can breach a strict liability norm, it is wrong to describe strict liability as "liability without fault": It should be "liability regardless of fault."

Take the tort of negligence in which damage is the gist of the action:²⁰ General fault-based liability here is just as “impossible” as general strict liability. When a plaintiff suffers harm that is actionable in this tort, the injured plaintiff will be able to frame plausible allegations of fault against many defendants that would satisfy a but-for relation to her harm. Unless confined, this “voracious” feature of the open-ended unreasonableness standard would render the tort unacceptable in its reach and therefore “impossible.” The duty requirement confines the incidence of this cause of action to manageable limits. In short, what makes negligence possible and workable in the real world is exactly the doctrinal feature that makes strict liability possible and workable: an incidence rule producing the limited incidence or “pockets” of liability we see both in the tort of negligence (e.g., in affirmative duty, emotional harm, and economic loss claims) and on the isolated occasions when the common law recognizes strict obligations.²¹

Wherever courts are called upon to determine the detailed incidence of a tort, such as when they are resolving a duty dispute in the tort of negligence, they take account, or at least say they take account, of a wide array of legal concerns, some of which can be described as “moral,” some of which can be seen as “economic,” some that may best be captured by the term “administrative,” and so on.²² Some concerns are general, such as the concern with indeterminacy, and some are very specific, such as the law’s concern not positively to encourage abortion.²³ The concerns of relevance to the law are typically incommensurable, and wise, reasonable people might disagree on their resolution—that is why we select judges to decide the matter.

The rich, complex interplay of these concerns produces the fine detail of the incidence rule of the relevant tort, such as where and when a duty of care is owed in the tort of negligence. Much hard doctrinal work is needed here to dig below crude slogans to discover and evaluate the wide array of concerns that courts see as weighing in favor of allowing a tort to operate in the circumstances of a case and those that are seen to militate against this. For example, in the tort of negligence, between the duty-to-the-world bright-line slogan and the no-duty-to-rescue slogan, we find complex trade-offs between legal concerns.

By understanding the rich balancing that goes into the fashioning of incidence rules, we would not be tempted to read terms such as “duty” in

20. Jane Stapleton, *The Gist of Negligence, Part II: The Relationship Between “Damage” and Causation*, 104 L.Q. Rev. 389 (1988).

21. Finally, we could note that the same applies to conduct such as honesty; it is only mandated by law in pockets defined by specific incidence rules. Dishonesty per se is not illegal; for example, plagiarism of ideas is not per se illegal.

22. The characterization may be interchangeable. For example, the concern about indeterminacy of liability might be framed as an instrumental concern or, alternatively, as a fairness-to-defendants concern. Note that the insurability of the parties is not a legitimate concern. Jane Stapleton, *Tort, Insurance and Ideology*, 58 Mod. L. Rev. 820 (1995).

23. Stapleton, *Duty of Care*, *supra* note 17.

the tort of negligence as anything more than the label for the incidence rule of the tort. Specifically, we would avoid the problems involved in the claim that the pattern of duties represents mandatory guidance directives (see Part IV below). In the rest of the common law world, lawyers see no-duty holdings as performing this more nuanced function of controlling liability.²⁴ Since it is understood that duty determinations require the subtle balancing of many complex legal concerns, crude no-duty *rules of law* are rarely recognized. In contrast, and as the restatement process illustrates so well,²⁵ U.S. common law generates numerous bright-line no-duty rules of law. These serve as jury gatekeeping devices, though this function is under-acknowledged in the academy,²⁶ no doubt a phenomenon related to the generally schizophrenic attitude to the jury²⁷ in the U.S., where there is a deep fracture that divides the loud rhetoric of the importance of jury decision making and the typically covert maneuvers that are made to prevent issues reaching the jury. Indeed, this pressure in the United States to reduce legal concerns to such gatekeeping rules seems to me to be one of the most striking of the characteristics that distinguish U.S. tort law from that in non-U.S. common law systems. My point is that, in order to generate jury gatekeeping devices, U.S. common law tends to recognize more stark rules of law and this also seems to fuel, or at least lend momentum to, unhelpful extremist theories.

II. CIVIL RECOURSE THEORY

We now turn to Goldberg and Zipursky's theory. As first elaborated, it was motivated by hostility to what they claim to be the academic orthodoxy concerning the tort of negligence: that there is in the tort of negligence a Holmesian duty to the whole world, subject to Prosserian policy exceptions generated solely by instrumental concerns. One of their general goals in constructing civil recourse theory was to provide a non-reductive normative explanation for the existence of the duty step in the tort of negligence and a justification for it. For example, they seek to provide a coherent conceptual analysis of "no-duty" cases in the tort of negligence where, although a person has been injured by the carelessness of the defendant, not only is the defendant not liable overall to that person, but the person does not even have a cause of action against the defendant. Examples here include cases where the defendant could easily but does not restrain a stranger from driving carelessly and physically injuring the plaintiff (the no-affirmative-duty-to-rescue-a-stranger case), where the carelessness of the defendant caused the plaintiff to suffer pure economic loss, and where the carelessness of the defendant caused the plaintiff to suffer pure emotional harm.

24. J.G. Fleming, *Remoteness and Duty: The Control Devices in Liability for Negligence*, 31 Can. B. Rev. 471 (1953).

25. See Stapleton, *supra* note 15.

26. *Contra* Powers, *supra* note 15.

27. See Stapleton, *supra* note 15.

More recently, Goldberg and Zipursky have extended their argument by asserting that civil recourse theory is a general theory of and captures what is distinctive about tort law generally. They argue that tort law is a law of prospective guidance directives notifying individuals as to what conduct of theirs will constitute private relational wrongs to another that will, in turn, establish the standing of the other to seek redress from the court. For purposes of analysis, it is convenient to split this redress-for-private-relational-wrongs theory into distinct claims.

1. *Relational Norms*: Tort norms *must* be seen as built on “relational” norms²⁸ without the idea of which basic features of tort doctrine are inexplicable.²⁹ Here, “relational” does not mean that the parties were in some pre-injury social relationship; it is well settled that a defendant can owe a tort obligation to a complete stranger, as in the classic tort-of-negligence case of a speeding driver “running down” a pedestrian. By torts being “relational,” Goldberg and Zipursky mean “relational in [their] analytical structure”³⁰ rather than non-relational. Thus, they argue that whenever a tort obligation is imposed on a party it is in relation to a class, and the plaintiff must establish that the defendant owed a duty to her alone or to a class which included her, that she was one of those who held a “right” to the conduct mandated by the tort norm. Showing the defendant owed a duty to the state, or to the “whole world,” or to another person, is not sufficient.

2. *Pattern of Tort Norms*: This is not simply generated by a reductive-instrumentalist assessment of the pros and cons of liability rules.

3. *Guidance Directives*: The law of torts is properly seen as mandated “ought” guidance rules prospectively directing behavior. Specifically, these rules direct the behavior of those whom the “relational duty” has mandated should be on the obliged party’s “radar screen.”³¹ Tort doctrine should not be seen as, or merely as, *ex post* liability rules pricing conduct.

4. *Relational Breach*: Failure to conform to the relevant standard laid down by the tort is also a relational concept: “relational breach.” For example, in the tort of negligence, the plaintiff must establish not only that the defendant owed a duty to a class that included her, but also that the defendant breached a duty of care to a class which included her and, therefore, committed a “wrong” to her.³² Not only must a duty be owed to her, but the behavioral standard generated by that duty of care is one for her protection, and she must prove it was breached. Showing the defendant breached a duty owed to another person, even if that person was in the duty class to which the plaintiff belonged, is not sufficient.

28. Goldberg & Zipursky, *supra* note 4, at 1824.

29. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 599 (2005).

30. Goldberg & Zipursky, *supra* note 4, at 1826 (emphasis omitted).

31. Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 Kan. J.L. & Pub. Pol’y 156, 158 (2000).

32. Zipursky, *Rights, Wrongs, supra* note 2, at 8.

5. *The “Substantive Standing Rule”*:³³ This represents the portal to remedial recourse: Only once the plaintiff has shown that she had a “right” (under a relational duty owed to her by the defendant) and that she had suffered a “wrong” to her (as the result of a relational breach suffered by her or by a class of which she was a member) can a plaintiff possess the “substantive standing” to seek recourse. Only where this substantive standing rule is satisfied does a plaintiff obtain a “right of action”³⁴ to obtain “civil recourse.”

6. *Remedial Array*: The rights of recourse to redress the “wrong” vary between torts. The question of exactly which avenue of recourse, which remedy the law will provide in the circumstances, is a separate matter from liability and one that may be influenced by a complex array of legal concerns.

7. *Captures Distinctiveness of Torts*: Finally, Professors Goldberg and Zipursky claim that civil recourse theory captures what is distinctive about tort law.

We might first briefly note the two “high theories” that Goldberg and Zipursky claim to be the competitors to their approach, corrective justice and economic analysis. As any sort of descriptive³⁵ theory of tort law, corrective justice has great difficulty accommodating such stable features of tort law as vicarious liability, affirmative duties,³⁶ and strict liabilities. It has yet to account for the differing remedial responses across the torts; why there are significant doctrinal differences between common law jurisdictions; how and why tort entitlements change over time within a single jurisdiction; why common law judges take explicit account of distributive justice concerns in tort law;³⁷ and why someone physically

33. *Id.* at 10.

34. *Id.* at 8.

35. Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 Oxford J. Legal Stud. 471 (1996); Robert L. Rabin, *Law For Law's Sake*, 105 Yale L.J. 2261 (1996) (reviewing Ernest J. Weinrib, *The Idea of Private Law* (1995)).

36. The theory does not cleanly accommodate vicarious liability because it rests on a status constructed by society (e.g., employer); nor does it accommodate affirmative duties because such duties depend on expectations/concerns/values external to the parties to the suit. In general, it is noteworthy that corrective justice would provide little understanding of those cultures where the law recognizes group responsibility much more widely.

37. See, e.g., *McFarlane v. Tayside Health Bd.*, [2000] 2 A.C. 59, 83 (H.L. 1999) (appeal taken from Scot.) (U.K.) (Lord Steyn) (“In my view, it is legitimate in the present case to take into account considerations of distributive justice. That does not mean that I would decide the case on grounds of public policy. On the contrary, I would avoid those quicksands. Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. If it were necessary to do so I would say that the claim does not satisfy the requirement of being fair, just and reasonable.”); *White v. Chief Constable of S. Yorkshire Police*, [1999] 2 A.C. 455, 510 (H.L. 1998) (appeal taken from Eng.) (U.K.) (Lord Hoffmann) (“[S]uch an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of

injured by the careless conduct of another may not recover in the tort of negligence. More basically, corrective justice provides no theory of entitlements and so is helpless to explain the huge variety of torts that we see.³⁸ The legal economists, who have also failed to provide a coherent theory of rights, are confounded by the retrospective focus of tort litigation; this is reflected in their failure adequately to account for causation and damage requirements in many torts. By definition, they also need to strain their approach to account for courts being concerned with what might seem to be predominantly noneconomic concerns such as the concern that tort law not positively encourage abortion.

Thus, the civil recourse model of tort law is definitely an improvement on efficiency and corrective justice models. First, it seeks to address and accept tort law as it exists, and, so far, Goldberg and Zipursky seem to have expounded on the theory without slyly editing case authorities so that, by reverse engineering, they can achieve a better "fit" with the theory. This criticism can readily be made of certain exponents of the other theories. There is no talk of bits of tort and tort reasoning "corrupting" the acceptable bits.³⁹

Secondly, civil recourse theory does not fall into the trap of depending on the assertion of some "goal" of tort law such as "compensation" or "deterrence" or "loss-spreading."⁴⁰ These may be the effects of the imposition of tort liability, but none could be the goal of tort; otherwise, no injured plaintiff suing an insured wrongdoer would ever lose!⁴¹ Finally, it can accommodate legal difference between jurisdictions and over time.

III. QUIBBLES

Let me first deal with some relatively minor complaints I have about the civil recourse theory. First, it is certainly coherent to assert that, at the time before injury, a person who is owed a duty of care by the defendant has a "right," but such a framing highlights the fact that Goldberg and Zipursky have so far failed to explain the absence of injunctive relief in the tort of negligence for the "right-holder."⁴² If I have a "right" not to be physically injured by the carelessness of another, why can I not ask for an injunction to prevent that injury? At the very least, Goldberg and Zipursky need to qualify their notion of "right" so that it matches the distinction they draw

persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.").

38. Bernard Rudden, *Tortiousness*, 6 & 7 Tul. Civ. L.F. 105 (1991-92).

39. See Ernest J. Weinrib, *Does Tort Law Have a Future?*, 34 Val. U. L. Rev. 561, 561 (2000) (concerning "the internal corruption of tort law's conceptual structure").

40. Stapleton, *Duty of Care*, *supra* note 17. Unlike statutes, we cannot definitively state what a certain area of common law is for.

41. Similarly, one effect of vicarious liability in practice is to shield the employee-tortfeasor, something that could not coherently be a goal of tort law.

42. The patterns of formal availability and actual issuance of injunctive relief are complex. See, e.g., Douglas Laycock, *The Death of the Irreparable Injury Rule* (1991).

between liability and remedy, between the notion of the individual to whom the defendant will be liable and the notion of that individual being entitled to a specific remedy. One suggested phrasing might be that such an individual has an “inchoate right” at the pre-injury stage.

Next, Goldberg and Zipursky coin a number of terms that do not describe new notions and are therefore obfuscatory. Principal among these is the “substantial standing rule” (claim 5 above). Put to one side the objection that Goldberg and Zipursky often fail to distinguish “standing” to try to convince the court and fact-finder that the elements of the cause of action are satisfied from “standing” to claim a particular remedy from the court once liability has been established. My primary objection to Goldberg and Zipursky’s “substantial standing rule” is that there is nothing new about it. Indeed, it is not a rule at all but simply a label⁴³ for the basic proposition that a plaintiff must establish the elements of the relevant cause of action before the defendant will be held liable for having “wronged” the plaintiff and before the plaintiff is entitled to ask for a remedy.

It is the complex analysis and judgment of competing legal concerns that determines what those elements are, not the “*application* of the substantive standing rule”⁴⁴ as Goldberg and Zipursky state. Goldberg and Zipursky are right that neither the law and economics nor corrective justice accounts of tort law can account for the restrictive elements and limited incidence of torts—why, for example, some plaintiffs fail to satisfy elements even though injured by the conduct of the defendant which violates the tort’s behavioral standard.⁴⁵ Yet while they note this phenomenon, under the unhappy label of the substantial standing rule, Goldberg and Zipursky are also unable to provide a theoretical account for its existence, whether that be a theory of rights or a theory of wrongs. Not unexpectedly they have also not yet perceived from this failure that such a unitary theory of rights and wrongs in tort is an impossible goal. When Goldberg and Zipursky assert that a plaintiff fails because her right was not infringed by the defendant, that no wrong was done to her by the defendant and so she did not satisfy the substantive standing rule, this merely “conceals courts’ real reasons for denying liability.”⁴⁶ Explanations are feasible however. As I have explained earlier, one obvious pragmatic explanation of why those

43. This means that many of the references made to it by Goldberg and Zipursky are highly misleading. For example, Professor Zipursky states that the substantial standing rule provides the “doctrinal key,” Zipursky, *Rights, Wrongs*, *supra* note 2, at 6; that the substantial standing rule *provides*, rather than is, the “limitation on when one person is entitled to recourse against another,” *id.* at 7; that “three prominent problem areas of negligence law present striking illustrations of the substantive standing rule at work,” *id.* at 27; and that “the substantive standing rule dictates denial of recovery even where there is foreseeability,” *id.* at 77.

44. *Id.* at 32 (emphasis added); *see also id.* at 55 (noting “the contours of liability produced by the substantive standing rule”).

45. Other examples include why the stranger who suffers emotional harm cannot claim, why the person who, though she did not rely on it, suffers economic loss in consequence of a fraudulent statement cannot sue in deceit, etc.

46. Zipursky, *Rights, Wrongs*, *supra* note 2, at 53.

elements exist and the incidence of a tort is limited is so that the tort can be workable and “possible,” and local explanations for specific limitations may also be feasible. But in my view the incidence rules of the various torts are not reducible to a general theory.

Finally, to the extent the theory decouples the right to recourse and the form of recourse granted⁴⁷ (claim 6 above), it provides an accurate descriptive account of the law of torts. But more needs to be said. I would like to see an account of, say, the phenomenon that some remedies are available as of right and some are only available at the discretion of the court. Additionally, Goldberg and Zipursky’s exposition of civil recourse theory is often so vague and overstated that it seems to cover vast areas of private law, but in an imprecise way. For example, their statements would suggest that, when a person is entitled to sue for breach of contract, she has been “wronged.”⁴⁸ Similarly, the breadth of their statements suggests that the law of contract issues prospective guidance directives so that the person had a “right” to performance. A final peripheral objection that can be made to Goldberg and Zipursky’s exposition of their civil recourse theory is that they often fail to make clear whether by “tort” they mean the field of dozens of separate torts,⁴⁹ or merely the tort of negligence.

IV. THE “GUIDANCE DIRECTIVES” CLAIM

The conference that prompted this essay took as its jumping off point H.L.A. Hart’s work on the “internal view of law”⁵⁰ which concerned the patterns of and reasons for an individual’s compliance with the law. Initially, Goldberg and Zipursky flirted with the idea of calling in aid this work of Hart,⁵¹ specifically to bolster their claim that tort norms must be seen as *ex ante* guidance (ought) rules that enjoin certain conduct and forbid other conduct (claim 3 above). On reflection, they now seem to acknowledge that, since their theory is not primarily concerned with compliance, Hart’s work on the “internal view of law” is of only marginal relevance to it. But a critic of Goldberg and Zipursky’s guidance directives claim might well point out that Hart would accept that participants in a legal system might have different perspectives on a primary rule such as a tort rule. For example, one participant might see the tort of negligence as a pricing mechanism, while another, because he regards legal directives as legitimate reasons for action in themselves, might see it as a guidance

47. Zipursky, *Civil Recourse*, *supra* note 2, at 748–49 (emphasizing the importance of distinguishing the question of whether a claimant is entitled to an avenue of recourse against a defendant from the question of the nature of the remedy to which a plaintiff is entitled).

48. Zipursky, *Rights, Wrongs*, *supra* note 2, at 5 (“A private right of action against another person . . . exists only where the defendant has committed a legal wrong against the plaintiff and thus violated her legal right.”).

49. Rudden, *supra* note 38.

50. H.L.A. Hart, *The Concept of Law* (2d ed. 1994).

51. Zipursky, *Civil Recourse*, *supra* note 2, at 721.

directive mandating how he should behave independently of the sanction. Similarly, a person might see one tort as a pricing mechanism and another tort as a guidance directive. Nothing in the work of Hart suggests that he thought we could, let alone that we need to, determine that one perspective on tort law is legally “correct,” or that we must see all of tort law as guidance directives.

Goldberg and Zipursky seem to be arguing not simply that it might, on occasion, be fruitful to see the law of torts as guidance directives, but that in some conceptual sense we must do so. Why? In his paper for this conference, Professor Zipursky seems to say that we must see the law of torts as norms of conduct that enjoin individuals to act in certain ways merely because of the language in which the law states its rules. This seems to mean that if a rule (such as one stated as a “duty”) is formulated in such a way that “its force . . . is imperatival and its content is directive,”⁵² we must see it as guidance enjoining conduct. But I cannot credit that Zipursky really intends us to read this passage in such a literal way. After all, where the law uses the notion of the “duty to mitigate,” this in no way enjoins conduct. In any case, Zipursky then pulls back to the statement that

[t]he possibility of its force being imperatival and its content directive depends, to a large extent, on the existence of conventional social practices of treating them as such within the community[,] . . . [and] there are practices within our legal system according to which statements that appear in certain contexts are understood as having certain meaning and force.⁵³

The circularity of this latter approach is completed by the assertion that “[a] competent member of a legal system understands primary rules within a legal system as enjoining conduct”; the participant “recognizes the internal aspect of rules, from which she is equipped or sensitized to take primary rules as having a certain injunctive force and pressure.”⁵⁴ Quite apart from the fact that a “competent member” of a legal system might be struck by the absence of injunctive relief in the tort of negligence despite its “duty” terminology,⁵⁵ this “internal aspect” approach really boils down to the bald assertion that the “citizen who is sufficiently trained and nurtured in our legal culture to have a sense of what legal rules are [and] what they mean”⁵⁶ would see all tort norms as Professor Zipursky wants us to: as guidance norms.

52. Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 *Fordham L. Rev.* 1229, 1239 (2006).

53. *Id.* (emphasis omitted).

54. *Id.* at 1239, 1247-48.

55. In the tort of negligence, the plaintiff’s “right” to be treated with care by the defendant is not bolstered by access to injunctive relief. Why is it that injunctive relief is formally available in nuisance though not in negligence is certainly an important question, but there is no evidence yet that its answer will reveal something profound, universal, or distinct about the law of torts?

56. *Id.* at 1241.

For my part, I remain unconvinced that there is anything in the expression or operation of tort norms that mandates the guidance perspective. I do not see that this is what tort law “is,” or what tort law “stands for.” I would be happy to accept that the guidance perspective is a more convenient lens through which to see certain aspects of tort law, such as punitive damages and injunctive relief. Yet, at the same time, I find this perspective a less useful approach to strict liability torts (such as conversion),⁵⁷ and to the general absence of “duty” language in torts other than negligence.

I suspect the “guidance directives” claim was bolted on to civil recourse theory to bolster its central claim about the relationality of tort law (claim 1 above), and the attack on the duty-to-the-whole-world idea in the tort of negligence that is associated with Holmes. As we have seen, Goldberg and Zipursky assert that their relationality theory accounts for no-duty holdings in a way that the duty-to-the-whole-world orthodoxy is unable to do without awkwardly dismissing them as exceptions. They seek to bolster this “relational duty” claim by also asserting that we must see tort “obligations” as guidance directives.

Their strategy seems to be as follows. Goldberg and Zipursky think that the neatest conceptual arrangement is to conceive of duties being owed to limited classes (e.g., where the mother and a stranger both suffer emotional harm after witnessing a child being run over by a careless driver, the mother falls within the class to whom the driver owes a duty but the stranger does not). They also believe that if a person reads tort duties as guidance directives, then if the duty directs the taking of care with respect to a limited class, it is likely to have “greater psychological grip”⁵⁸ than it would have if it directed the taking of care to the whole world. It is therefore not a surprise, they claim, that tort law does not impose such non-relational duties but rather seeks to focus our minds on certain actors we must have in mind when we conduct ourselves. We cannot, they argue, organize our lives if we are under a legal duty to take care of everyone, so we are only under focused legal duties even though these may be owed to strangers, such as pedestrians.

I believe there are large objections to this approach. First, it is unnecessary: We can attack the idea of a duty-to-the-whole-world approach without any claim that duties must *always* be seen as relational,⁵⁹ so there is no need to make claims about guidance. Second, even were we to accept

57. I believe that Goldberg and Zipursky’s theory needs to accommodate laws that are not “obligations” in the sense that “ought” implies “can,” though I do acknowledge that a strict liability norm can affect the conduct of repeat players via second-order avenues. These include where the imposition of strict liability on repeat players gives them an incentive to develop techniques for identifying risks that are not reasonably foreseeable and/or controllable given existing technology (“technology forcing”), and where imposition of strict liability prompts such players to reduce their level of the relevant activity.

58. Goldberg & Zipursky, *supra* note 4, at 1841; *see also id.* at 1832-39.

59. *See infra* Part V.

the “guidance directives” claim about the way tort law operates, there may be many occasions on which tort could not provide the “prioritizing” guidance with its greater psychological grip that Goldberg and Zipursky claim. For example, suppose the duty rule is that an auditor owes a duty of care to the company it audits but not to shareholders who bought in reliance on the audit. The fact that the duty is limited to only some foreseeable victims of a careless audit has no impact on the mandatory guidance to the auditor, which is the same as if the duty were owed to the whole world: Perform the audit with reasonable care. In the same way, the careless driver being under a duty to the mother but not the stranger can have no functional impact on his conduct.

Similarly, Goldberg and Zipursky, in their paper for the conference, seems to think that, unless we see tort law in terms of enjoined obligatory conduct, we will be forced to see it as “a law of liability rules, or that it is whatever judges say it is, or that it is what the occasion demands.”⁶⁰ I disagree. We might, for example, reconceptualize every tort, including the tort of conversion, in terms of prospectively informing people when they would be “transgressing a right” or “violating a mandated standard,” either of which could avoid any tone of prospective “duty” or “obligation.”

Finally, Goldberg and Zipursky argue that these guidance directives are “relational directives”⁶¹ in that they pinpoint who should, *prospectively*, be on your radar. For example, in the tort of defamation this is anyone in the world, while in private nuisance it is only those with an interest in land with which you might interfere. But Goldberg and Zipursky also describe the rights of action to obtain civil recourse, which are acquired when all elements of the cause of action are established, as “relational” in the sense that they pinpoint who, *ex post facto*, is entitled to sue. For example, in the tort of defamation it is only the defamed person who has a cause of action, while in private nuisance it is the person with an interest in the land affected. Critically, in the tort of negligence, Goldberg and Zipursky use the term “the relational conception of duty” to refer both to the notion of *prospective* relational directives and the *ex post facto* notion of who it is that can sue for their injury caused by the unreasonable conduct of the defendant. In my opinion, these two ideas, the prospective injunction and the *ex post facto* control device on who can sue, need to be separated so that a more palatable conceptual arrangement is uncovered under which the guidance allegedly given is simple and relates to the whole world. Let me explain.

It is absolutely clear that only some victims of carelessness can sue the careless party. It is therefore obfuscatory to think in terms of a duty that is always owed to the whole world, and Goldberg and Zipursky are absolutely right to urge any U.S. scholars who still cling to this doctrinal relic to abandon it. But it does not necessarily follow that any guidance directive

60. Goldberg & Zipursky, *supra* note 1, at 1592.

61. Zipursky, *Rights, Wrongs*, *supra* note 2, at 60.

given by the tort of negligence must be seen as only relating to that set of people. In other words, *even if we were to accept the claim that tort norms are prospective guidance directives, we do not have to accept that they are "relational" and limited to those who might potentially sue under the tort.* Indeed, in my view, not only is it inconvenient to do so, but there are also significant downsides to such an approach.

Against the benefits Goldberg and Zipursky assert come with seeing tort as giving guidance directives focused on a limited class of people, I would set the costs of doing so. First, how could the guidance to the careless driver—the mother of anyone you run over should be on your radar screen but not a stranger to that victim—be coherent? Second, do we want to see the tort of public nuisance as giving no guidance to the potential polluter whose conduct will injure a section of the public, so long as no one will be injured in a special way?

I would argue that a more congenial reading is to see a tort as consisting of a *simple*, not relational, directive⁶² to guide behavior *prospectively* (consisting of the general *standard* of conduct mandated by that tort: do not defame; do not emit noxious odor from your premises; conduct yourself with reasonable care), and a separate *incidence* rule⁶³ which merely pinpoints, *ex post facto* and for comprehensible legal reasons, why not all injured by a contravention of that standard can sue. This "incidence rule" understanding of the duty of care can accommodate the "notion that the law carries intrinsic motivational force"⁶⁴ for many people (because it would be the general mandated standard of conduct that guides). It would eliminate the risk that tort is being seen to give callous guidance messages in no-duty contexts, while still accommodating the reality that in many contexts the victim of tortious conduct falls outside the incidence of the tort in the sense of him not being able to sue. In short, a better prospective guidance perspective is that, to the extent tort law guides, it does so by telling us how to behave, not by telling us who can sue.

V. THE RELATIONALITY CLAIM

The key claim of civil recourse theory (claim 1 above) is that tort obligations, such as the duty of care in the tort of negligence, are relational in analytical structure—owed to classes of persons—rather than non-relational—owed to the world.⁶⁵ Whatever this claim means, it could not draw support from the form of remedy in the relevant tort. We must distinguish the question of whether a right is a right in *rem* (imposes an obligation on persons generally) or a right in *personam* (imposes an

62. *Id.* at 59-66.

63. Aspects of this include the following: "the of and concerning" element in the tort of defamation; the interest in land requirement for private nuisance; the special damage requirement in public nuisance; the temporal/spatial/relationship duty requirements in relation to negligently inflicted emotional harm.

64. Goldberg & Zipursky, *supra* note 4, at 1841.

65. Goldberg & Zipursky, *supra* note 1.

obligation on a definite person), from the question of whether a remedy is in rem or in personam. Where, as in the tort of negligence, we know the remedy is in personam, this does not dictate that the right must also be in personam. For example, an owner's right in land is a right in rem, even though his remedy against a trespasser is in personam, viz an action for damages.

A. Bipolarity

At one point Zipursky defines "relational" in the following way: A law that prohibits a person from polluting is a "simple" law to be contrasted with a law prohibiting murder which is "relational" because it concerns a prohibition on the way persons treat "*other persons* in a particular way."⁶⁶ If this bipolarity were all Goldberg and Zipursky had meant by "relational," this would have been an acceptable if banal point to make, and certainly not one that is unique to tort law or even to private law generally. Bipolarity is an even wider characteristic of the adversarial system; we could state that in criminal law, cases are between an alleged offender and a prosecutor.

B. Must Establish Independent Claim

But Goldberg and Zipursky claim their theory tells us what is *distinctive* about torts. It is trite law that a plaintiff cannot simply piggyback on another's claim. For example, the fact that A breached her contract with B and this breach caused loss to C, does not in itself establish that C can sue A for breach of contract or in any other area of private law. The fact that X defamed Y, which humiliated Z, does not in itself establish that Z has a civil law claim against X. If when Goldberg and Zipursky assert that their "conception of duty is relational"⁶⁷ they are simply stating this trite point, that would be fine. But do they mean even more than this?

C. Relation Pinpoints Who Can Sue

Do they intend "relational" to pinpoint who can, ex post facto, sue whom under the tort?⁶⁸ Again, this meaning would be acceptable, and it would crudely correspond to part of the idea that I have long referred to as the "incidence rule" for the cause of action.⁶⁹ Thus, for example, by considering the incidence rule for the tort of public nuisance, we find it only allows certain persons to sue (i.e., those who suffered special damage). If this is what Goldberg and Zipursky mean by "relational," they have merely restated the truism that a private law cause of action specifies which people get entitlements to sue which other people.

66. Zipursky, *Rights, Wrongs*, *supra* note 2, at 59.

67. Goldberg & Zipursky, *supra* note 4, at 1828.

68. "[D]uty [identifies] who is entitled to bring an action based on the defendant's negligent conduct." *Id.* at 1828.

69. *See supra* Part I.

In any case, as we have seen, the latter conventional description of private law is to be preferred because, unlike “relationality,” it allows us to avoid seeing the inability of the general public, *ex post facto*, to sue in public nuisance for their general injury as some callous indifference of the law of public nuisance to their suffering. Rather, the conventional approach allows us to accommodate this by the simple acknowledgement that there are, for good explicable reasons, limits on who is allowed to sue in this tort. In short, because the incidence rule language invites us to understand and explore the underlying reasons for the limited coverage of each tort, while avoiding any incoherent and unpalatable construction of tort norms, it is to be preferred to the “relationality” claim of civil recourse theory.

D. *Not All Can Sue: Must Establish Pre-tort Status*

But let us now consider the further possibility that, by “relational,” Goldberg and Zipursky mean something more than the conventional statement that a private law cause of action specifies which people are entitled to sue which people for which complaints. Might it be that by “relational” Goldberg and Zipursky mean that there is no tort that, *ex post facto*, specifies that the whole world is entitled to sue under it because the plaintiff must always possess a specific pre-tort status? No. We have seen that part of the incidence rule for a cause of action will address the question of whether a plaintiff must always have a special status to be entitled to sue. It is true that the incidence rule of one tort may only ever subject citizens of a certain status to the reach of its liability,⁷⁰ while others subject all citizens,⁷¹ and that the incidence rule in one tort may only entitle, *ex post facto*, citizens of a certain status⁷² to sue. However it is quite obvious that the incidence rules of some other torts, such as defamation, have no requirement for plaintiffs to have a special status to be entitled to sue and therefore entitle all citizens to protection from being defamed.⁷³ Moreover, in many torts the incidence rule not only sets out no pre-tort status requirements on who is entitled, *ex post facto*, to sue, but also imposes no pre-tort status limitations on those who are subject to the reach of its liability, as in the torts of assault, battery, defamation, and negligence.⁷⁴

70. Consider, for example, keepers of animals or the commercial supplier of a defective product.

71. Consider, for example, the torts of trespass and conversion.

72. Consider, for example, a landowner in private nuisance or a chattel owner in the tort of conversion.

73. Similarly, as we have seen in the context of defamation, Zipursky concedes that “each person has a relational legal duty to every other person to refrain from defaming that person.” Zipursky, *Rights, Wrongs*, *supra* note 2, at 63.

74. A few rare status-based immunities are exceptions. In other words, on a few rare occasions a particular status is, for policy reasons, allowed to trump all other concerns.

VI. THE PROBLEM OF RELATIONALITY IN TRADITIONAL NEGLIGENCE CASES: NOT ALL CAN SUE: MUST ESTABLISH SOME NONUNIVERSAL DOCTRINAL REQUIREMENT

Might it be that, by “relational,” Goldberg and Zipursky mean that there is no tort that, *ex post facto*, specifies that the whole world is entitled to sue under it because the plaintiff must always satisfy some other nonuniversal doctrinal requirement? There is certainly no doubt that important areas of torts fit this model, most notably areas of the tort of negligence such as affirmative duties, claims for emotional harm, and economic loss. But in what I call the “traditional” context of duty-to-stranger negligence cases such as *MacPherson v. Buick Motor Co.*,⁷⁵ Goldberg and Zipursky assert that the tort is still “relational” because “stranger-stranger is a particular category of relationship.”⁷⁶ It is hard to understand this opaque terminology.

I suspect that Goldberg and Zipursky resort to this terminology because they seek to debunk the idea that there is a duty to the whole world (subject to instrumentally inspired exceptions), and yet they do not see a way of doing so without embracing an equally extreme account. Namely, they view all torts as “analytically relational” in the sense that they all require a plaintiff to show that she satisfies some nonuniversal doctrinal requirement and that, therefore, for every tort, there will always be someone who cannot do so. Oddly, Goldberg and Zipursky fail to consider that one might reject the duty-to-the-whole-world idea without having to embrace this inverse extremist position.

Let me explain by starting with what I call “traditional”⁷⁷ negligence cases, namely those where the defendant’s own positive careless act directly causes physical injury to the plaintiff. A typical example is where a carelessly speeding motorist loses control and runs down a pedestrian, a complete stranger. What do Goldberg and Zipursky mean by “relational” in such traditional “running down” cases? What is it that constitutes the “relationship” between these two strangers in such a case? What is it that the plaintiff needs to establish before she is entitled to sue, except that it is her protected interest that has been invaded? I suspect that their argument goes along these lines: Even in traditional negligence cases, the duty of care is only ever owed to some persons, never to the whole world, because it is not owed to the class of persons to whom harm was “unforeseeable.”

This explains why Goldberg and Zipursky so fervently promote the view, which they say was also held by Justice Benjamin Cardozo, that one factor that is legitimately to be taken into account when courts are drawing the incidence rule for the tort of negligence (that is, in the duty analysis) is the

75. 111 N.E. 1050 (N.Y. 1916).

76. Goldberg & Zipursky, *supra* note 4, at 1830.

77. These are also sometimes called “running down” cases. *See generally* Stapleton, *Legal Cause*, *supra* note 17, at 944.

general degree of “the foreseeability of harm to a class of persons.”⁷⁸ They argue that where foreseeability is high it may outweigh factors militating against recognition of a duty,⁷⁹ but where it is low it may outweigh factors favoring the recognition of a duty.⁸⁰ They seem to argue that it will always be the case, even in traditional “running down” cases, that the general degree of the foreseeability of harm to *some* class of persons will be so low that that class will not be owed a duty by the party subject to the liability. It follows that, even in the tort of negligence in traditional cases where the duty can be owed to a complete stranger, the duty is not owed to the whole world.

Goldberg and Zipursky provide no justification for their view that the general degree of “the foreseeability of harm to a class of persons” is *appropriately* expressed as a concern at the duty stage, rather than as a case-by-case factor to be considered at the breach and/or scope-of-liability-for-consequences stage. Logic⁸¹ does not dictate this as the appropriate analytical shape of the tort. We can choose which issues are most conveniently dealt with in which analytical category. In my view, there are good reasons *not* to express foreseeability as a concern at the duty stage in what I have called “traditional” cases, and therefore the duty in such cases would appropriately be described as owed to the whole world. Let me explain.

I have argued that a convenient way to understand duty is as the analytical location for the court to consider and signal systemic concerns of the law.⁸² In other words, where a court wants to indicate that a concern is a systemic one it may signal this by elevating it to a “duty” concern—that is, a concern cited when the contours of a duty are drawn. As we have seen, one example is the concern with indeterminate liability; another is the concern that the law not be seen positively to encourage abortion. To illustrate, take the following “nontraditional” case (that is, one that is not where the defendant’s own positive careless act directly caused physical harm to the plaintiff): A homeowner fails to secure his property allowing a vandal to enter and thereby gain further entry to the property of a neighbor, which the vandal thereupon injures.⁸³ If a judge considers that the freedom of a homeowner to do with his property what he wants is a core value, the judge may see it as a systemic concern weighing against the recognition of a duty to secure it from invasion by vandals. Such a judge would

78. Goldberg & Zipursky, *supra* note 4, at 1820, 1838-39. Contrast, for example, W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 Vand. L. Rev. 739 (2005); Cardi, *supra* note 15.

79. This is how Goldberg and Zipursky explain *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976). Goldberg & Zipursky, *supra* note 4, at 1839.

80. See Goldberg & Zipursky, *supra* note 4, at 1818.

81. Contrast what the authors claim is “the logic of duty” in *id.* at 1821.

82. Stapleton, *Comparative Economic Loss*, *supra* note 17, at 538, 543; Stapleton, *Legal Cause*, *supra* note 17, at 950-53.

83. See, e.g., *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.*, 543 N.E.2d 769 (Ohio 1989).

“package” his “no-liability” holding in terms of “no duty.” Another judge might not want to elevate that concern to such a general status. He might allow recognition of a duty and trust to the fact-finder to conceive of a standard of care that is adequately generous to the owner and respectful of his interests. These are matters of choice, not analytical logic.

I do not doubt that Goldberg and Zipursky have reasons for wanting the general degree of the foreseeability of harm to a class of persons to operate as a systemic duty concern. My own view is that there is a very good reason *not* to elevate that factor to a variable in the duty analysis in traditional cases, and it is not the institutional preference for jury decision making that characterizes the U.S. debate on the point. It is the avoidance of distasteful discriminations between victims in relation to the protection from physical injuries in such cases where, by the defendant’s own positive careless act, he causes physical injury to the plaintiff. In traditional “running down” cases, packaging no-liability outcomes in terms of the defendant not owing the (unforeseeable) plaintiff a duty signals a discrimination between citizens in terms of their entitlements, *ex post facto*, to sue the tortfeasor who has injured them. This is distasteful. In jurisdictions that allow negligence claims by employees against employers, to justify the denial of liability in a traditional case on the basis that the employer owed “no duty” to his employee under the circumstances of the particular case might well be regarded as provocative in light of the past struggle by workers for health and safety at work. Similarly, to purport to justify the denial of the liability of a school in a traditional case to one of its pupils physically injured at the school on the basis that “no duty” was owed might also be regarded as risking a distasteful message.

Moreover, the message is unpleasant enough if seen merely as the refusal of a sanction for such unreasonable conduct. But, as we have seen, it appears particularly odious if one accepts Goldberg and Zipursky’s claim that duty also signals prospective guidance directives, the claim that we should see tort as focusing our radar onto only those to whom we owe a legal duty. Were we to accept that claim, the no-duty rule with respect to trespassers in the tort of negligence could no longer be seen merely as a denial of standing to sue and obtain recourse.⁸⁴ However, consider a prospective directive to the landowner that he need only take care of lawful entrants no matter how foreseeable the trespasser and no matter how unreasonably dangerous are the premises. Similarly, the law of public nuisance would now also appear as prospective directives as to how people are to treat each other. Moreover, relationality becomes a potential vehicle of prospective discrimination in conduct, as well as appearing to give the signal that tort law is callously indifferent to, for example, how much a

84. This bar, under the incidence rule rationale, can be presented as generated by a complex mix of concerns that do not discriminate in a prospective way between potential victims of any carelessness in which the defendant might indulge.

defendant pollutes so long as there are a lot of victims all injured in the same manner and degree. These are not palatable perspectives on tort law.

The possible distastefulness of a no-duty message is also an objection that can be made where then-Judge Cardozo's controversial judgment in the traditional case of *Palsgraf v. Long Island Railroad Co.*⁸⁵ is interpreted as a no-duty holding. If, as many read that judgment, Cardozo chose to package his no-liability conclusion in terms of "no duty," this might well seem distasteful to us in this and other traditional cases in the tort of negligence where the plaintiff had clearly been physically injured by the defendant's careless act.⁸⁶ In a traditional case, a no-duty packaging of the no-liability result sends the systemic message that one citizen, the pushed passenger, was entitled not to suffer physical injury, say, a broken leg, by the positive act of another whereas a second citizen, Mrs. Palsgraf, was not so entitled. This callous message unacceptably appears to rank different classes of citizens in relation to their entitlements to protection from having their legs broken by a careless defendant.

These disadvantages are avoided by packaging the no-liability result in traditional cases in terms of the characterization of the injury, not the victim. Each citizen owes a duty of care (to act as a reasonable person) where there is (as there virtually always is) a foreseeable risk that his positive act might cause physical injury to others (the general duty of care owed to all in the traditional case). However, the scope of liability for consequences for that obligation does not extend to all physical consequences of the careless conduct for explicable reasons. This reformulation of the result in the case from one in terms of no duty to one in terms of the injury falling outside the appropriate scope of liability for consequences allows a shift of focus from distinguishing between injured people to distinguishing between the different ways in which they were injured.

It is no surprise, therefore, that throughout the common law world the orthodox conceptual arrangement in traditional cases recognizes a duty to the whole world. In effect, this does not require the plaintiff to establish any foreseeability of harm to a limited class of which she was a member where what she has suffered is a physical injury caused by the defendant's own positive careless act.

Of course, in nontraditional contexts such as cases of pure economic loss, mental injury, and affirmative duties, we may not have such an objection, or at least not so strong an objection, to ranking the entitlements to protection according to the classification of the victim. Here, the duty/no-duty distinction between which citizens are entitled to sue seems to be much more acceptable. Consider, for example, victims suffering from psychological injury being distinguished merely on the basis of family relationship, etc.

85. 162 N.E. 99, 101 (N.Y. 1928).

86. Stapleton, *Legal Cause*, *supra* note 17, at 954 n.33.

If, then, it is part of Goldberg and Zipursky's conception of tort obligations being "relational" that they are only ever owed to some persons, or at least that every tort plaintiff must establish some nonuniversal qualification before she is entitled to sue, I think this is needlessly reductionist and obfuscatory, and leads to disturbingly divisive messages in traditional cases. An examination of the tort of negligence shows that a more convenient and descriptively accurate account of that tort is that a duty is owed to the whole world in traditional cases⁸⁷ but may only be owed to limited classes elsewhere. Such a statement can accommodate the fact that the definitional line between traditional and nontraditional cases can be hazy according to whether conduct is seen as an omission or an omission "embedded" in a positive course of conduct, as where the defendant had control of an instrumentality such as a car, a gun, or a knife that injured the plaintiff while being exploited by a third party.⁸⁸

This account can then be used to demand reasons from courts for their no-duty decisions in the nontraditional cases. This in turn will reveal reasons that do not suggest that the law is signaling its callous indifference to carelessness or its discrimination against certain people, but that it was other substantive factors, such as indeterminacy of liability or the freedom of action of a homeowner, that leads the law not to allow certain victims to sue.

Finally, it is worth reiterating the point made earlier: that torts other than negligence present Goldberg and Zipursky with insuperable problems on this point. For example, they concede that in the tort of defamation the norm requires that everyone have everyone else on their conduct radar. Goldberg and Zipursky attempt to force the norm in the tort of defamation into a *relational* form, by pointing to the fact that only the defamed person can sue once the norm has been breached. But this post-facto notification of who it is that can sue is irrelevant to the prospective guidance they claim the tort must be seen as giving. Whatever prospective guidance the defamation norm gives it is not "relational" in any coherent sense; it is prospective guidance to have on one's radar the whole world of persons with reputations.

87. Note that this does not hold true for rare cases of status-based immunities. The incidence of liability in negligence might be represented by a continent (corresponding to duty in traditional cases) and islands (corresponding to duty in some nontraditional cases) in a sea of freedom from liability.

88. Stapleton, *supra* note 15. A borderline case for the law might be as follows: A defendant is lawfully sitting on a park bench with his picnic utensils set out on the bench next to him. He consciously fails to prevent a toddler-stranger from picking up one of his sharp fruit knives with which the toddler then injures her playmate.

VII. THE PROBLEM OF RELATIONAL BREACH IN DUTY-BUT-NO-LIABILITY CASES

Goldberg and Zipursky do not adopt the no-duty reading of then-Judge Cardozo in *Palsgraf*.⁸⁹ They say the judge packaged his no-liability conclusion in terms of there being “no breach” to Mrs. Palsgraf that could have been proved. In the case, they assert that “[c]learly, the railroad did owe a duty of care to its customer [Mrs. Palsgraf], and there was no need for any discussion of reasonable foreseeability in order to establish this conclusion.”⁹⁰ The reversed sequence of reasoning is that *Palsgraf* treats reasonable foreseeability as a necessary condition⁹¹ for the recognition of a duty. A duty was owed to Mrs. Palsgraf, so this must mean that there was at least “foreseeability of harm to a class of persons” of which she was a member. Goldberg and Zipursky then assert that Mrs. Palsgraf failed in her claim because she “was complaining of the breach of a duty to a class of persons—those put at risk by the conductor’s actions with respect to the package-carrying passenger—of which she was not a member.”⁹² Presumably, they mean that, in relation to breach, the relevant class is “those *foreseeably* put at risk by the conductor’s actions” because the very fact that she was injured shows that she was put at risk.

Thus, it looks like what Goldberg and Zipursky are saying is that, at the duty stage, one is looking forward to a class foreseeably at risk. Since the way you operate a railway can foreseeably cause physical injury to a passenger, passengers are owed a duty. But when we come to breach, we do not simply ask if the defendant’s conduct was “careless,” in the sense that a reasonable person operating a railroad would not have conducted himself that way, bearing in mind those people that his duty says should have been on his radar. Instead, we are to look backwards and consider whether the relevant *consequences* to this *specific* plaintiff of the defendant’s conduct would have been foreseeable to the defendant, a claim I will call “relational breach” (claim 4 above). They assert that “the foreseeability of the harm that the plaintiff suffered at the hands of the defendant is relevant to the question of breach, because whether ordinary care entails taking precautions against particular injuries in specific circumstances turns, in part, on how foreseeable those injuries are to the defendant.”⁹³ The argument is that it is incoherent to conclude (and a fortiori impossible to prove) that a defendant can fail to meet the standard of care that the law mandates in relation to an injury that was not reasonably foreseeable. It would be incoherent, suggest Goldberg and Zipursky, for the law of negligence to lay down a behavioral standard if people cannot

89. 162 N.E. 99.

90. Goldberg & Zipursky, *supra* note 4, at 1820.

91. *Id.* at 1818.

92. John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657, 685-86 (2001); *see also* Zipursky, *Rights, Wrongs, supra* note 2, at 8.

93. Goldberg & Zipursky, *supra* note 4, at 1837.

conform to it, and it would be a bad idea to do so if compliance would require "extravagant" vigilance.⁹⁴ Since, in the opinions of Cardozo, Goldberg, and Zipursky, the consequence to Mrs. Palsgraf was unforeseeable, the conduct could not, as a matter of law, constitute a breach of the duty of care owed to her. No reasonable juror could find that there was something more the defendant could or should have done to protect her.

Though we *could* choose to design our analytical concepts to accommodate this idea of backward-looking "relational breach," an idea from Cardozo that Hart himself attacked,⁹⁵ I do not believe we do so at the moment, nor do I think we should move in that direction. There are three arguments against the claim that we must accept that this is what the law currently is. First, there is no inexorable doctrinal logic that requires us to accept the claim. We saw that it is trite law that a plaintiff cannot simply piggyback on another's tort claim. But this principle does not tell us when a plaintiff might be able to establish some sort of claim against the defendant in her own right.⁹⁶ To state that Mrs. Palsgraf could not piggyback on the negligence claim that the pushed passenger had does not establish whether or not she could establish one in her own right. So the real issue is always, what does it take for a plaintiff to establish her *own* cause of action? Mrs. Palsgraf needed to establish that she herself came within the incidence rule of the tort (and even Goldberg and Zipursky concede she *was* indeed owed a duty by the railroad) and to establish the remaining elements of the tort. If she could do so, this would show that she herself had been done a wrong by the defendant, a "relational wrong," that the defendant was liable, and that she had a right of recourse. Yet, contrary to the assertion of Goldberg and Zipursky,⁹⁷ nothing in this orthodox description requires us to conclude that the way she had to establish the breach element of the tort of negligence was to establish "relational breach." In other words, when a court says that "no wrong was done to the plaintiff" even though she was owed a duty by the defendant and even though she was injured as a result of the defendant acting carelessly, this does not necessitate the conceptual conclusion that there was "no breach" to her, and that therefore the breach element of the cause of action must be

94. Contrast, however, their problematic account of strict liability torts. It would be incoherent, suggest Goldberg and Zipursky, for the law of negligence to lay down a behavioral standard to which it was beyond the capacity of people to conform, and it would even be a bad idea if compliance to a standard would require "extravagant" vigilance. But there is an inescapable problem for them when they attempt to assert the guidance directive claim in the context of strict liability torts such as conversion, where compliance cannot even be secured by "extravagant" vigilance. Zipursky, *Civil Recourse*, *supra* note 2, at 727.

95. H.L.A. Hart & Tony Honoré, *Causation in the Law* 260-61, 286-87 (2d ed. 1984).

96. One application of such a discredited approach was the "privity fallacy" demolished in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

97. See, e.g., Zipursky, *Rights, Wrongs*, *supra* note 2, at 61 ("In the context of relational wrongs . . . it makes sense to ask whether the wrong was committed relative to a particular person.").

seen as “relational.” Such no-liability findings are equally consistent with a conceptualization that packages the rejection of the claim in terms of the consequence failing to come within the scope of liability for consequences of breach which is judged appropriate in the circumstances (i.e., the proximate causation element is not satisfied).

Second, even if we were to accept the guidance directives claim, this would not necessitate seeing breach as relational. We could state the prospective guidance given to the defendant as a generalized obligation to act reasonably (at least with respect to the class to whom a duty is owed)⁹⁸ so that, for example, Mrs. Palsgraf would be able to establish breach of the duty of care owed to her by the fact that the defendant had acted carelessly towards the class through membership of which she derived the duty owed to her. Why can duty, but not breach, be derivative of mere membership in a class?

Third, a consideration of the applicable precedent at the time of *Palsgraf* shows that relational breach was definitely not necessitated by the applicable doctrinal architecture. Consider what it was about Mrs. Palsgraf that Goldberg and Zipursky take to have been unforeseeable. Presumably it could not be argued that it was her presence on the platform: She may have been little more than ten feet from the explosion and in clear sight of the tortfeasor.⁹⁹ According to Goldberg and Zipursky, Cardozo chose to embrace a “relational breach” requirement and to find that “there is no breach of a duty to a person with *injuries* that are difficult to foresee” because of a concern with the “range of conduct to which our norms may realistically hold [defendants] to be obliged.”¹⁰⁰ This conceptualization using relational breach, which incorporates the issue of the foreseeability of the plaintiff’s *injury*, locates a large area of decision making at the breach stage where the judge could, as Goldberg and Zipursky claim that Cardozo did in *Palsgraf*, throw the case out on the basis of no breach, as a matter of law.

More importantly, if we apply relational breach to a case involving a freakish consequence, such as *In re Polemis v. Furness, Withy & Co.*,¹⁰¹ the case would be thrown out before the issue of the scope-of-liability (i.e., proximate cause) step was reached. Yet, at the time of *Palsgraf*, *Polemis* was accepted, even by Cardozo,¹⁰² as laying down the applicable rule for the scope-of-liability step, specifically that a defendant *could* be liable for a

98. This would be the case if my suggestion (that we see the guidance as a simple non-relational directive to follow the standard of behavior that is mandated) is adopted.

99. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 105 (N.Y. 1928) (Andrews, J., dissenting) (“[G]iven such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff.”).

100. Zipursky, *Rights, Wrongs*, *supra* note 2, at 14 (emphasis added).

101. *In re Polemis v. Furness, Withy & Co.*, (1921) 3 K.B. 560 (U.K.). It is revealing that Goldberg and Zipursky rarely cite this important case despite its great significance in the context of *Palsgraf*.

102. *Palsgraf*, 162 N.E. at 101.

freakish consequence of his carelessness. Suppose X carelessly drops a log into the hold of a ship. Due to the freakish/unforeseeable gases in the hold, an explosion occurs, hurling debris onto the dock where a piece breaks Z's leg. If the injury to Z is unforeseeable, the logic of "relational breach" would conclude that Z has no cause of action in negligence against X because, as a matter of law, there can be no breach in relation to those harmed by unforeseeable, freakish means. The judge throws out the case before it reaches the scope-of-liability step for which *Polemis* was the authority for the proposition that there *could* be liability for freakish consequences.

Had the law embraced "relational breach," under which a plaintiff who suffered an unforeseeable/freakish harm would, as a matter of law, be prevented from establishing such a breach, why was there any need to shift from *Polemis* to a *Wagon Mound*¹⁰³/scope-of-the-risk rule for the scope-of-liability step? Indeed, many modern claims which were rejected on the basis that the plaintiffs harm was too freakish to come within this new *Wagon Mound*/scope-of-the-risk regime for scope of liability would have to be regarded as incorrectly explained. The "true" explanation would have to be that there was no breach as a matter of law. If we accept the notion that "[a] positive theory ought to be able to explain the doctrinal structure of the law,"¹⁰⁴ "relational breach" fails to explain the doctrinal location in the scope analysis of issues involving the alleged unforeseeability of the plaintiff's injury.

If we now move to consider the normative question of whether relational breach should be adopted, I would argue that it should not. It is a less convenient doctrinal arrangement than the orthodox arrangement for two reasons. First, it seems an unnecessarily awkward way of conceptualizing the tort of negligence; to say that, while you owe the plaintiff a duty by virtue of her membership in a class, the prospective guidance to you is not simply to take care with respect to that class; or to say that with the exact same piece of conduct the defendant may be in breach of his duty to a person owed a duty but not in relation to another. For example, "relational breach" seems an awkward arrangement from the perspective of a jury instruction. My guess is that, while a jury understands questions such as "was the pushing careless?" they are unlikely to understand a notion of "was the pushing careless in relation to the plaintiff?"

Second, there is a substantial symbolic disadvantage with "relational breach." It sends the distasteful message that, ex post facto, the defendant's conduct in relation to the passenger was unacceptable but acceptable in relation to the "second-class" citizen, Mrs. Palsgraf. In traditional cases, it is more attractive to reject claims on the basis of "unforeseeable" harm under scope-of-liability than no-duty or no-breach holdings because it sends

103. See *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound)*, [1961] A.C. 388 (P.C.).

104. Zipursky, *Rights, Wrongs*, supra note 2, at 41-42.

a more palatable symbolic message: one that does not suggest that the law distinguishes between *citizens* when it comes to guarding against and paying damages for, say, a broken leg but only distinguishes between routes to that *injury*. In short, “the traditional formulation, [where] culpability (negligence; breach) depends on the reasonable foreseeability of the array of risks shown by the evidence to have been created or exacerbated by the defendant’s conduct, not just the damage in suit”¹⁰⁵ is preferable because there is a very substantial symbolic advantage to coupling the “class” approach to duty,¹⁰⁶ with a similar “class” approach to breach,¹⁰⁷ and then locating within the scope-of-liability-for-consequences analytical step the explanation of why, in a traditional case such as *Palsgraf*, there is no liability to a person who is owed a duty of care and who had been injured by the carelessness of the defendant.

VIII. WHENCE THE PATTERN OF TORT NORMS?

The final claim of civil recourse we must consider is that the pattern of tort norms is not generated, at least not solely generated,¹⁰⁸ by a reductive-instrumentalist assessment of the pros and cons of liability rules (claim 2 above).¹⁰⁹ Put as modestly as this, this thread to civil recourse theory could hardly be attacked. It is obvious, or at least so it seems to me, that, whatever theory-minded academics might like to think, judicial reasoning in tort cases is often quite explicitly couched in non-instrumental terms. There can scarcely be a doubt that we owe moral duties, or that courts take some account of these when they consider whether to recognize a legal obligation, or that where tort duties track moral ones, there is a much greater chance that “that the law binds not simply by the threat of liability, but by the force of duty.”¹¹⁰

But tort law’s finely articulated incidence of obligations does not simply track moral duty, a point illustrated by the absence of a duty to attempt an easy rescue of a helpless stranger. Moreover, some aspects of tort law seem very much more easily rationalized on instrumental grounds, such as where, in *In re Exxon Valdez*,¹¹¹ the duty to avoid economic loss was limited to the fishermen and was not extended to the canneries,¹¹² and torts that are

105. David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 La. L. Rev. 1, 18 n.72 (1997).

106. Under this approach, a plaintiff need merely show she was a member of a class to whom a duty was owed.

107. Under this approach, the plaintiff can claim a breach was done to her by virtue of her membership in the duty class in relation to which the conduct was a breach.

108. See Goldberg & Zipursky, *supra* note 4, at 1828; see also *id.* at 1831-32 n.378, 1842 n.418.

109. See *supra* claim 2 set forth in Part II.

110. Goldberg & Zipursky, *supra* note 4, at 1847.

111. No. A89-0095-CV, 1994 WL 182856 (D. Alaska Mar. 23, 1994).

112. Stapleton, *Comparative Economic Loss*, *supra* note 17, at 564.

explicitly based on the violation of some public policy such as the tort of retaliation by an employer against an employee.¹¹³

A variety of concerns not only influences where a tort obligation is imposed, but also influences the determination of the appropriate scope of liability for the consequences of breach of the standard and the various remedial regimes for each tort, as well as how a remedy is chosen in an individual case. An adequate theory of tort law must encompass this pluralism if it seeks to respect real cases and actual judicial reasoning. Moreover, we should not be surprised by this phenomenon of pluralist reasoning in the cases.

When appellate courts determine whether a duty was owed, this is a form of judicial lawmaking.¹¹⁴ Our common law legal systems embrace a form of the separation of powers doctrine that accommodates this substantial judicial lawmaking capacity¹¹⁵ in the court of ultimate appeal and accordingly authorizes it to proceed with account being taken, as in legislative lawmaking, of a heterogeneous range of considerations. It is important to note that shifts in common law entitlements have redistributive consequences¹¹⁶ and, just as with the redistributive effects of statutes, these are legitimate consequences within our system of lawmaking. Perhaps, Goldberg and Zipursky have simply assumed that when courts and commentators use the term “policy,” this can only ever mean instrumental concerns. For this reason, and because it is often the case that a concern can be formulated either as a moral concern or as an instrumental one, we would be better advised to describe the factors that influence courts in the neutral language of “legal concerns.” This would have the advantage of undermining the extremes of “high theory” fashions and help arrest the race to the reductionist bottom of legal analysis in U.S. tort discourse.¹¹⁷

But Goldberg and Zipursky’s claim goes further than the observation that courts often consider non-instrumental factors. They assert that the Holmes/Prosser model, which claims there is a duty to the whole world subject merely to “judicially-crafted immunities from liability where necessary to further public policy,”¹¹⁸ “tends to leave judges and juries to

113. Restatement of the Law (Third) of Employment Law §§ 4.01-.02 (Discussion Draft Apr. 27, 2006).

114. See Stapleton, *supra* note 15; see also Jane Stapleton, *The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable*, in Centenary Essays for the High Court of Australia 242 (Peter Cane ed., 2004).

115. See Stapleton, *supra* note 15.

116. Indeed, this insight alone justifies lawyers taking the law and economics perspective seriously. A study of judicial reasoning would not be complete without reflection on the redistributive effects of legal change: For example, the landmark decision in *MacPherson* enriched consumers as a class. Macro law and economics provides an invaluable tool for exposing the politically sensitive issue of wealth redistribution beneath issues of legal change.

117. On possible reasons why there is far less interest in high theory in non-U.S. common law systems, see Stapleton, *supra* note 15; see also Stapleton, *Comparative Economic Loss*, *supra* note 17.

118. Goldberg & Zipursky, *supra* note 4, at 1767.

decide cases by means of the arbitrary, indeterminate, and doctrinally unstable device of factor balancing¹¹⁹ producing “a wide range of apparently ad hoc decisions at the level of liability.”¹²⁰ In contrast, they claim their approach holds out the hope of diminishing “reliance upon multi-factor analyses that are unmanageable, unprincipled, and unpredictable.”¹²¹

Goldberg and Zipursky provide no evidence to support this extreme claim. Rather they seem to have deduced it from a faulty vision of how the common law develops. They make little distinction between trial courts and courts of ultimate appeal, yet the tasks of these two classes of courts are fundamentally different. Trial courts do not start with a fresh indeterminate “unconstrained”¹²² slate: They ride the tracks of precedent more or less faithfully. Final courts must determine where the track of the law is to be laid, though even they do so within the broad confines of their constitutional role. Furthermore, Goldberg and Zipursky give a vague account of how the common law emerges. Sometimes they assert that “judicial announcements of rights and duties often serve the role of crystallizing norms that already have currency on certain shared social understandings.”¹²³ Elsewhere, we read that “the question of liability to the plaintiff does not turn on whether liability is morally permissible or socially desirable, but rather turns on whether defendant’s conduct breached an obligation to the plaintiff.”¹²⁴ Yet elsewhere, there is talk of obligations “implicit in the common law of torts”¹²⁵ and the statement that “[a] relational conception of the duty of due care . . . does not require abstract moral philosophy, but simply careful interpretation of the concepts of duty already present in the tort law [T]he relevant authority is the entire common law of negligence, which abounds with moral notions of duty.”¹²⁶

These statements could more or less be supported by case law, but is it a theory? On what grounds do final courts decide when to “crystallize” social norms and when not to? Where do these free-floating “obligations to the plaintiff” come from? How did obligations “implicit in the common law of torts”¹²⁷ or concepts already “embedded”¹²⁸ in the law get to be there?

In my view, Goldberg and Zipursky fail to provide an account of the way the common law develops in final courts of appeal which, often explicitly,

119. *Id.* at 1741; *see also id.* at 1840-42.

120. *Id.* at 1842.

121. *Id.* at 1847.

122. *Id.* at 1764; *see also* Goldberg & Zipursky, *supra* note 14, at 334 (decrying the judicial practice of “treating the duty element as but an occasion for judges to ask the open ended, policy driven, question of whether there are any reasons to deny juries the ability to imposed liability”).

123. Goldberg & Zipursky, *supra* note 4, at 1816.

124. *Id.* at 1824.

125. *Id.* at 1815.

126. *Id.* at 1847.

127. *Id.* at 1815.

128. Zipursky, *Rights, Wrongs*, *supra* note 2, at 57.

do balance a variety of legal concerns in a nonarbitrary, relatively determinate and stable way in order to judge, inter alia, whether the incidence rule of the relevant tort, specifying who can sue whom and for which types of complaint, should encompass the case at hand. Typically this proceeds in an incremental way because the final court, prima facie, accepts that precedents struck the appropriate balance between those legal concerns. All that is being considered is some minor extension or adjustment to the incidence of the tort, which had been suggested by those precedents. Occasionally, however, the final court concludes that a major adjustment is necessary. These decisions, such as *MacPherson v. Buick*,¹²⁹ are rightly regarded as the landmark cases of the common law. Alas, to the extent that Goldberg and Zipursky assert that the resolution of cases, be they incremental or landmark cases, can be understood in terms of the court applying "concepts already embedded in the law," they seem to be embracing the "fairy tale"¹³⁰ of the declaratory theory of the common law.

IX. A DISTINCTIVE THEORY OF THE LAW OF TORTS?

What might we want from an account of the law of torts? Broadly we want convenience and clarification without inhibiting a sharp focus on the rich detail of doctrine and without an unacknowledged normative agenda, so that we can identify the concerns of the courts in shaping this body of law and evaluate those concerns. Let me suggest at least four specific goals. First, the account should take seriously and accommodate the following phenomena: the complexity of the differing elements of the causes of action;¹³¹ the richness of the subset of those elements that form the incidence rule for the tort in issue; and the differing available remedial arrays between torts. Second, an account of torts should acknowledge, respect, and, without reverence, address the plurality of legal concerns present in the reasoning expounded by courts, distinguishing final courts of appeal from trial courts. Third, and related, it should contain an explanation of why it is that the contours of tort doctrines are contingent on time and

129. 111 N.E. 1050 (N.Y. 1916).

130. Lord Reid, *The Judge As Law Maker*, 12 J. Soc'y Pub. Tchr. L. 22, 22 (1973) ("There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. . . . But we do not believe in fairy tales any more.").

131. For example: why some torts are strict; why some require proof of an actionable form of damage while others are actionable per se. Given the existence of these latter torts, note the highly misleading assertion by Professor Zipursky that "the norms of tort law . . . impose . . . '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." Zipursky, *Civil Recourse*, *supra* note 2, at 743.

jurisdiction.¹³² In relation to these three goals, civil recourse theory does not suffer from the flaws of corrective justice theory or the law and economics account.

But a fourth goal of an account of the law of torts might be to capture what is distinctive about this area of law. Goldberg and Zipursky do claim that civil recourse theory captures what is distinctive about tort law (claim 7 above).¹³³ But I do not agree that they have achieved this. Much of what they assert about the law of torts applies equally well to other areas of the private law of "obligations." Indeed, it is often the case that the relational nature of legal norms is more obvious in these other areas such as the following:¹³⁴ restitution which is based on reversing certain bilateral transfers of wealth; equity which is based on certain bilateral status relationships attracting norms of altruism; and contract norms which are based on prior dealings/bargains between the two parties.

Yet, I believe, it is possible to suggest features of the law of torts that are, broadly, distinctive from other areas of the private law of obligations. One is that a person can commit a tort against a stranger with whom he had had no prior dealings and with whom he had no prior relationship. Another is that for torts, the measure of compensatory¹³⁵ damages is the sum needed to return the plaintiff to the position he would have been in had the defendant not conducted himself in a tortious manner (a point I have called the "normal expectancies" point).¹³⁶ A corollary and third distinctive feature of torts is that, though torts sometimes impose affirmative duties, nowhere does the law of torts impose a strict obligation to achieve a result.¹³⁷ But to accept that there are distinctive features of the law of torts does not imply that its distinctiveness can be reduced to some unitary theory. We can see what is distinctive about a tree, but we cannot reduce this to a unitary notion. Indeed, why would we want to do so?

The common law of torts is like a distinctive sculptured garden that is being built up by usually incremental contributions from generations of

132. The procedural and structural features of a specific jurisdiction affect the formation and presentation of tort doctrine. See, for example, the much greater use of "gatekeeping" rules of law in U.S. jurisdictions compared to jury-free common law systems.

133. See *supra* claim 7 set forth in Part II.

134. Jane Stapleton, *A New Seascope for Obligations: Reclassification on the Basis of Measure of Damages*, in *Classification of Obligations* 193 (Peter Birks ed., 1997).

135. Contrast punitive damages and levels of damages for torts that are actionable per se.

136. See generally Jane Stapleton, *The Normal Expectancies Measure in Tort Damages*, 113 L.Q. Rev. 257 (1997). In contrast, what is distinctive about contract law is that you can gamble on being better off on the occurrence of events (such as the performance of the co-contractor or on other events) over which you have no control. In tort law, there are no entitled results so the tort measure is fundamentally different from that applying to strict contractual obligations as to result, which is to reposition the contractual plaintiff to where she would have been had there been performance achieving the result promised (a measure I call "the entitled result" measure).

137. *Id.* at 267.

cases.¹³⁸ It cannot be reduced to a unitary idea, but this should not prevent us capturing its distinctiveness within a nuanced plural account.

X. SUMMARY OF MY POSITION

Let me sum up my own view. First, if we are to think of tort law as sending prospective guidance directives, I think it is more attractive to see these as simple non-relational directives (that do not discriminate between citizens) to abide by the mandated standard of conduct. Thus, for example, the tort of negligence signals that we should all act reasonably to one another, and the tort of defamation signals that we should not defame each other. This frees us to conceive of the incidence rule of the tort, such as the duty concept in negligence, as something else: a richly reasoned and textured control device to limit who, if anyone, can *ex post facto* sue when a defendant has breached the mandated standard.

Second, I accept that sometimes seeing incidence rules as relational (allowing only some victims of the defendant's breach of a mandated standard to sue) is helpful. For example, in the tort of negligence, many victims of the carelessness of the defendant are unable to sue where their claim rests on an allegation of an affirmative duty, or where their claim relates merely to emotional harm or pure economic loss. Choosing to present the limited pattern of liability for carelessness in such "nontraditional" cases in terms of legal duty being "relational" makes sense: We seem to be able to tolerate the discriminatory signal it sends concerning who can sue; and it invites courts to expose their systemic reasons for why liability for omission, emotional harm, and economic loss must be limited in the relevant circumstances. However, in "traditional" cases where a defendant's own positive careless act directly causes physical injury to the plaintiff, if we were to present no liability outcomes in terms of the defendant not owing the plaintiff a duty, this signals a personal discrimination between citizens which courts throughout the common law world have found too distasteful in these contexts.¹³⁹ In traditional cases, therefore, there is good reason to reject the idea that duty is relational and to accept that the duty is owed to the whole world.

Third, similar reasoning militates against the law choosing to package no-liability outcomes in traditional cases in terms of "relational breach." Suppose a defendant owed the female plaintiff a duty, and his conduct fell below the standard of a reasonable person and thereby caused injury to her such as a broken leg. If we chose to present a no-liability outcome in terms of there being no breach to that plaintiff (on the grounds that the way her injury resulted from that breach of the standard was unforeseeable), this would focus attention on her as a person. It would signal a discrimination between citizens in relation to their "right" not to have their legs broken by

138. See Stapleton, *supra* note 15.

139. This is particularly true if we were to adopt Goldberg and Zipursky's assertion that we must see tort law as *prospective* relational directives.

the unreasonable affirmative act of the defendant. In my opinion, when presenting the no-liability outcome in traditional cases such as this, it is normatively more desirable to focus attention on the process by which the plaintiff was injured than on her identity as an individual because the former does not signal discrimination between persons. I postpone to another time a detailed defense of my normative opinion on this issue.

CONCLUSION

In an avowedly *descriptive* project of extraordinary breadth and energy, Goldberg and Zipursky have constructed a relational vision of the law of torts in order to expose the inadequacy of accounts of tort law based either on a duty to the whole world subject to instrumentally based exceptions, or on some undefended “untethered moralism.” I have tried to explain why this project was unnecessary and has resulted in a civil recourse theory that is overblown in its claims, awkward and inconvenient in application, and internally incoherent in its account of the “guidance” it claims that the law of torts sends out. The analytical arrangement of legal concepts is a matter of choice rather than inherently mandated. There is no such thing as “the genuine structure of tort law.”¹⁴⁰ Had Goldberg and Zipursky reflected more on this fact, they may have seen that their project is actually a *normative* one, namely to persuade lawyers to choose the conceptual arrangements they prefer. Rebadged in this way, I have no doubt that their project would attract, and would deserve to attract, a much wider audience than it has heretofore.

140. Zipursky, *Civil Recourse*, *supra* note 2, at 735.