

2011

Civil Recourse and Separation of Wrongs and Remedies

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FLORIDA STATE UNIVERSITY LAW REVIEW



CIVIL RECOURSE AND SEPARATION OF WRONGS AND REMEDIES

Arthur Ripstein

VOLUME 39

FALL 2011

NUMBER 1

Recommended citation: Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163 (2011).

CIVIL RECOURSE AND SEPARATION OF WRONGS AND REMEDIES

ARTHUR RIPSTEIN*

INTRODUCTION	163
I. PRIVATE WRONGS.....	169
II. WRONGS AND THEIR REPAIR	177
III. PRIVATE RIGHT AND POSITIVE LAW.....	179
IV. THE INCORPORATION STRATEGY AND GOLDBERG AND ZIPURSKY'S OBJECTIONS	182
A. <i>The Standard of Care</i>	188
B. <i>Duty</i>	191
C. <i>Remedies</i>	195
D. <i>Powers and the Plaintiff's Initiative</i>	198
V. CONCLUSION	203

[Wittgenstein] once greeted me with the question: “Why do people say that it was natural to think that the sun went round the earth rather than that the earth turned on its axis?” I replied: “I suppose, because it looked as if the sun went round the earth.” “Well,” he asked, “what would it have looked like if it had looked as if the earth turned on its axis?”¹

INTRODUCTION

Although Ben has discussed my work in print before,² this is the first occasion I have had to return the favor by discussing his. We have been discussing philosophy for more than forty years, so my remarks are, at least in that sense, long overdue. John, too, has written about my work, both with Ben³ and on his own,⁴ and we have had many conversations about our respective work, most of them consisting of my insisting that we don't disagree, and John's attempting to articulate the sense in which we do. This, too, is an overdue opportunity for me to return the favor.

Having been slotted into a session on John and Ben's views about corrective justice, my focus will be what I will suggest are their misunderstandings of it. In the past I've tried to convince them that their illuminating account of civil recourse is not an alternative to a correc-

* Professor of Law and Philosophy, University of Toronto. I am grateful to Peter Benson, Paul Hurley, Dennis Klimchuk, Jason Nyers, and Stephen Smith for comments on an earlier draft, and to Ernest Weinrib and Ben Zipursky both for comments and, even more so, for many decades of conversations.

1. G.E.M. ANSCOMBE, AN INTRODUCTION TO WITTGENSTEIN'S TRACTATUS 151 (1959).

2. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 *passim* (2003).

3. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 *passim* (2010).

4. John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828 *passim* (1999); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 *passim* (2003).

tive justice view, but either a complement to it or a component of it. Still, Goldberg and Zipursky repeatedly use the idea of corrective justice as a foil against which to contrast their own view of civil recourse. Most of their case against corrective justice consists in variations on the claim that if corrective justice were the organizing structure of tort law, it would look very different than it does.

My purpose here is to set the record straight on corrective justice and to show that the empirical features of tort law for which corrective justice is putatively unable to account are actually direct expressions of it. The same four allegations show up again and again in their writing, but, with respect to each of them, Goldberg and Zipursky have not only failed to establish their case, but have failed to so much as state a cause of action. If the doctrinal structure of the law is exactly as they contend, each feature to which they draw attention is consistent with corrective justice. Three of the four allegations focus on remedies; they seem much more nearly ready to accept the corrective justice account of wrongs. But the burden of my argument will be to show that the corrective justice account of wrongs generates the corrective justice account of remedies and, further, that properly understood, the idea of recourse is the appropriate way of instantiating the corrective justice account.

Goldberg and Zipursky seek to separate civil recourse from corrective justice by showing that tort law, at least as it is found in the United States of America, does not work in the ways in which corrective justice theory says that it must. The strategy of separation, in turn, rests on a separation between wrongs and remedies, a separation between ideas of risk and ideas of ordinariness, a separation between abstract characterizations of rights and contingent social norms, and, finally, a separation between a wrong done against the plaintiff and her power to exact a remedy. I shall argue that none of these separations can be made.

Before doing so, however, some preliminary matters must be addressed. The first of these is that the term “corrective” sounds irredeemably and irremediably remedial. Whether this is so of course depends on how it is understood, but distinguished scholars of tort law, including Jules Coleman and Stephen Perry, have, in the process of articulating an alternative to the economic analysis of tort law, used the term “corrective justice” to refer to what is arguably a remedial view, a view that is supposed to explain why defendant owes plaintiff a duty to repair harms for which defendant is responsible. Indeed, Coleman goes so far as to compare the principle of corrective justice to the principle of retributive justice and to characterize both as principles that do not presuppose a unique characterization of the nature of wrongdoing, and so, at least in principle, as consistent with a variety of different accounts of the nature of the

wrongs to be corrected.⁵ Perry, by contrast, characterizes it in terms of the correction of harms for which the tortfeasor is responsible, where that responsibility, in turn, is to be analyzed in terms of having had an adequate capacity and opportunity to avoid causing those harms.⁶ It is not my purpose here to engage with the important work of Coleman and Perry or to examine its relation to that of Goldberg and Zipursky; unlike some others, they do not criticize corrective justice for being merely remedial.⁷ I mention it here only by way of contrast with the account I will be developing.

In order to mark that contrast more clearly and, more generally, to avoid these distracting apparent implications of the term “corrective justice,” I had thought to call it instead “co-rective justice,” that is, the justice of right between persons. Since that is cumbersome and, when overheard in conversation, still misleading, I then thought it might be a good idea to shorten it to “rective justice” or, for purposes of brevity of expression, just to “rect.” Unfortunately, my bilingual spellchecker keeps changing that to “*recht*,” Kant’s word for “right,” so I will use the vocabulary of corrective justice and the vocabulary of right interchangeably.

Second, Zipursky and Goldberg also criticize my colleague Ernest Weinrib’s specific formulation of corrective justice on the grounds of it being excessively metaphysical, and, in so doing, thereby failing to come to terms with the fact that tort law is a human institution.⁸ In its place they recommend what they call “pragmatic conceptualism,” which focuses on the conceptual structure of tort law, but does so in a way that purports to be less metaphysically laden and leaden. I will have more to say in what follows about pragmatic conceptualism.⁹ My own characterization of right will be avowedly conceptual and, I hope, for present purposes, adequately pragmatic. I will work with a minimal conception of what it is to give a conceptual account: to focus on a legal area in conceptual terms is to characterize the form of reasoning in which its characteristic concepts figure and the inferential

5. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 31-34 (2001).

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

7. See, e.g., Gregory C. Keating, *Is Tort a Remedial Institution?* (Univ. S. Cal. Law, Legal Studies Research Paper Series, Paper No. 10-10 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633687.

8. Zipursky characterizes Weinrib’s formalism as “metaphysically elaborate and antipragmatic.” Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 458 (2000). The word “pragmatic” is spoken in many ways, but I take Zipursky’s contention to be that Weinrib overlooks the contingency that runs through legal institutions. He later sets out what he takes to be the requirement for a proper conceptual theory: “independence from metaphysically rich notions in explaining and expounding the theory.” *Id.* at 469 n.45.

9. Bear in mind that avoiding metaphysics is much more difficult than denouncing it. As Allen Wood once remarked to me, “Empiricism is the *a priori* theory that there is no *a priori* knowledge.”

relations between them. To say that they figure in a form of reasoning is to say that they figure in a certain way, independent of the particular matter to which the reasoning is applied. Rather than attempt to reduce these abstract concepts to other types of concepts that are thought to have, for example, a better empirical or scientific pedigree or to replace them with such concepts or to do entirely without the concept of a concept and focus exclusively on the empirical psychology of decisionmaking,¹⁰ my conceptual account will focus on how those concepts figure in reasoning. In order to deflect any accusations of being excessively metaphysical, I take no stand here on what, exactly, concepts are, or where they reside, or even about whether talk about concepts residing is a helpful metaphor. In keeping with my concern to avoid metaphysical side issues, I will also avoid all reference to the concept of a “practice” which seems to me to be at least as empirically dubious and as packed with metaphysical subtleties and theological niceties as anything to be found in any of Aristotle, Kant, or Hegel.¹¹ Again, it is sometimes said that the reasons that courts give are mere window dressing for conclusions reached on some other basis. In offering a conceptual account, I will take those reasons at face value, since the charge of window dressing almost always reflects a general assumption that the reasons offered by courts provide no guidance in deciding cases. But the only way to assess *that* allegation is to look at the reasoning in which the reasons characteristically figure. In what follows, I assume that Zipursky and Goldberg intend their account to be conceptual in the same sense.

Third, Goldberg and Zipursky acknowledge the importance of the corrective justice critique of economic and other instrumental approaches to law. That critique, as formulated initially by Weinrib and Coleman, argues in its broadest form that economic analysis is one-sided in a way that makes it unable to explain the most basic and familiar features of tort law.¹² By focusing only on the question of what incentives will lead defendant to take the appropriate level of precaution, economic analysis is unable to explain why plaintiff, in

10. See, e.g., WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960); W.V. Quine, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY & OTHER ESSAYS* 69 (1969) (arguing against the “idea idea” in the philosophy of language); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007) (applying Quine’s philosophical naturalism to issues in legal philosophy).

11. I do not mean to deny that there are useful ways to talk about practices, as when an organization generates a list of “best practices” for handling a certain type of recurring issue, or when the House of Lords issued a “Practice Statement” explaining its decision to entertain the possibility of overturning its own precedents. My objection is only to the thought that talk about social practices provides any illumination of such well-worn philosophical concepts as that of a norm, or a rule, rather than presupposing those concepts.

12. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 46-48 (1995); see also JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 20-21 (2001); Jules L. Coleman, *The Structure of Tort Law*, 97 *YALE L.J.* 1233, 1245 (1988).

particular, should be the one who recovers those damages, and equally unable to explain why the measure of those damages should be plaintiff's injury. Other instrumentalist accounts, including those that focus on compensation in addition to deterrence, introduce the plaintiff into their analysis but face a different version of the same difficulty. In addition to being unable to explain why a plaintiff, in particular, should be the one charged with policing defendant's conduct, they double their difficulties by also being unable to explain why defendant, in particular, should be the one charged with compensating plaintiff. The corrective justice critique of instrumental accounts does not deny that those accounts are able to generate elaborate explanations of incentive structures, administrative convenience, and so on. Their difficulty, from the point of view of the corrective justice critique, is that they render the basic structure of a tort action, in which plaintiff recovers from defendant because defendant has wronged her, as merely coincidental. On an instrumentalist account, plaintiff's allegation that she is entitled to a remedy because she has been wronged by defendant plays no part in the court's resolution of the dispute between them; indeed, for an instrumentalist, the dispute between the parties that the court purports to resolve is not the ground of defendant's liability to plaintiff at all. It is simply a convenient opportunity to pursue some other purpose. This is not only a failure to emphasize what the corrective justice theorists think most important; it is a failure to recognize the force of the "because" in the formulation "plaintiff recovers from defendant because defendant has wronged her." The central claim of corrective justice is that a private dispute is to be resolved exclusively in terms of the transaction between the parties, what one person has wrongfully done to another, rather than on one or both of what one has wrongly done, and what has happened to another.

Goldberg and Zipursky acknowledge the fundamental importance of the corrective justice critique of economic analysis and their broad debts to the work of corrective justice scholars more generally.¹³ By building on it they have played a central role in the reinvigoration of discussions of duty in American legal scholarship. Their objection seeks to adopt the same focus on the mode of reasoning in order to show that corrective justice fails to account for the structure of tort law. The dialectical structure of the debate thus comes down to this: starting off with the idea that tort law is, as Goldberg and Zipursky put it, "a law of wrongs,"¹⁴ does this show that it is a structure of corrective justice, of civil recourse, or both?

13. See generally Goldberg & Zipursky, *supra* note 3.

14. *Id.* at 918, 985. See also John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007).

Against this background, and putting to one side the charge of being merely remedial and the accusation of excessive metaphysical ambitions, by my count, Goldberg and Zipursky offer four arguments that are supposed to show that the corrective justice account fails to capture the fundamental structural and conceptual features of tort law. The first of these is the charge that corrective justice cannot account for the diversity of different interests protected by tort law.¹⁵ Coming from the opposite direction, the second is that it cannot account for the diversity of different remedies given by courts when wrongs are committed.¹⁶ The third is that corrective justice theory cannot explain why a tort suit is initiated by the aggrieved plaintiff, that is, why the plaintiff has the power to proceed against the defendant who she alleges has wronged her, rather than the state stepping in to correct the injustice done by defendant.¹⁷ Fourth, and finally, Goldberg and Zipursky charge that in the tort of negligence, corrective justice is unable to explain the way in which ordinariness figures in the characterization of reasonable care.¹⁸ Although Goldberg and Zipursky refer to the first of these four challenges as the “hodgepodge” problem, I do not think that the four challenges themselves are merely a hodgepodge. Indeed, I think that three of them are explicitly variations on a single theme, according to which corrective justice is insufficiently attentive to the role of social and institutional contingency in the law. The fourth, concerning the role of the state, and the nature of the private power exercised by an aggrieved plaintiff, is partially distinct, but even it points to a distinctive feature of contemporary legal institutions and charges that the corrective justice account makes this feature unintelligible. The challenges are supposed to add up to the conclusion that rather than a system of corrective justice, “tort is a civilized alternative to vengeance—civil recourse for the plaintiff, which is appropriately channeled through and cabined by law.”¹⁹ Were they successful, the challenges would show that tort law is not a matter of corrective justice, but a mere cabining of impulses to which a civilized society dares not give free rein.

My aim in this Article will be to show that none of the objections holds up. All rest on a misguided conceptualization of corrective justice. Having accepted the relational nature of wrongdoing and the fundamental importance of wrongs to the law of tort, Goldberg and Zipursky give up on the idea of relational wrongs too quickly. Each of the objections does not introduce a counterexample to the corrective

15. Goldberg & Zipursky, *supra* note 3, at 954-57.

16. *Id.* at 960-63.

17. *Id.* at 957-60.

18. *Id.* at 978.

19. 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, 1581 (2006).

justice account, but rather points to the specific way in which the abstract concepts of private right may be realized in determinate human institutions. From the standpoint of the conceptual account, this is all for the good, since, as I will also show, the cabining of impulses is not something of which a relational conceptual account could be given.

The Article is structured as follows: Part I sets out, in brief and highly abstract terms, a conceptual account of Kantian Right.²⁰ Part II provides a characterization of what it is to remedy a private wrong from the standpoint of Kantian Right. Part III explains why these abstract ideas of right require concrete instantiation in legal institutions. Part IV returns to the four challenges Goldberg and Zipursky raise and shows that each of them can be understood as not merely a possible instantiation but, fundamentally, the central instantiation of the abstract ideas in legal institutions. Part V concludes with some reflections on conceptualism and contingency.

I. PRIVATE WRONGS

Private law governs relations between private persons; the private law of tort protects person, property, and reputation against wrongs by other private persons. For purposes of exposition, and reasons of space, I will put torts involving reputation to one side.²¹ In character-

20. IMMANUEL KANT, *Metaphysical First Principles of the Doctrine of Right*, in THE METAPHYSICS OF MORALS Ak. 6:205, at 35 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). I develop Kant's account of private right in more detail in ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009). The Kantian view developed here is not to be confused with the view that Goldberg and Zipursky characterize as Kantianism, which they say has "[r]ightly or wrongly" been taken to insist that "insofar as one is in the business of identifying genuine wrongs (rather than using the term 'wrongs' as an empty placeholder), one must focus on acts and not results lest mere happenstance be allowed to infect what should be non-contingent judgments of right and wrong." Goldberg & Zipursky, *supra* note 3, at 936, 942. For Kant, a wrong is an interference with another's freedom; as such, wrong is relational and always necessarily comprehends a transaction between two parties, rather than any monadic feature of either of them.

21. A few words are in order, if only to preempt any suggestion that I do so because a Kantian view cannot explain wrongs against reputation: torts of defamation protect your right to your own good name, which is, as Kant remarks, an innate right (one that does not require an affirmative act to establish it) that exists only externally (in the words and thoughts of others.) See KANT, *supra* note 20, Ak. 6:295, at 111-12. Wrongs against reputation involve using a person's reputation in a way that he or she has not authorized. They are, to use the terminology developed below, trespass-based. That is why no showing of either fault or harm is required, and why, in the absence of harm, general damages are assessed. Most significantly, you do not have a right to reputation because reputation is useful to you. Instead, you have a right to reputation regardless of whether it is useful to you or not, but you have a claim against those who interfere with it because you have a right, not because it is useful. That is why defamation must always be about and concerning the plaintiff in particular. The plaintiff herself might well suffer loss or disadvantage because of damage done to the reputation of another. But that does not give rise to a cause of action. Your reputation is something you already have, which is yours to develop and provides the basis on which others decide whether to interact with you and on what terms. I plan to take these topics up in more detail in "Your Own Good Name," a chapter of ARTHUR RIPSTEIN, *PRIVATE WRONGS: TORT LAW AS PHILOSOPHY* (forthcoming 2014).

izing those wrongs, private right is concerned exclusively with the means that a person uses, and abstracts completely from the ends being pursued through the use of those means. As the law of wrongs, tort law's focus on the means a person has, and the ways in which he or she is entitled to use them, both sets the problem to which it is the solution and generates the contours of that solution.

Private right is concerned with means in two senses. First, the interests that it characteristically protects—person and property—are protected as means, that is, as the conditions of a person's ongoing capacity to set and pursue purposes, rather than as aspects of a person's well-being. Private right begins with the familiar idea that in order to set and pursue a purpose, you must take yourself to have means available that you take to be sufficient to achieve it. You can wish for something that you have no means of achieving, but you can only choose to do something by taking up means towards it. Your means may prove inadequate, or circumstances may frustrate you. Or perhaps it turns out that you succeed but come to regret having chosen the path that you did. But to act for the sake of achieving an end, you need to use means. The means that you have are, from the point of view of the law of tort, just your own person, that is, your bodily powers and mental capacities (as well as your reputation) and whatever things outside of your body which are yours, that is, your property. Your property counts as your means because you alone, as against other private persons, are entitled to determine the purposes for which it will be used. That is why someone can wrong you by using your property without your permission, even if you suffer no measurable loss. Again, although there is something potentially misleading about saying that you have your own physical and mental powers merely as means, the misleading impression can be allayed by focusing on the contrastive sense in which this is intended. To say that they are yours, as against others, is finally to say that you, rather than anyone else, are the one who gets to decide how they will be used. That is, once more, why you can be wronged if somebody touches you without your authorization: that person uses your person—your body—for a purpose that you have not set.

In characterizing your entitlement in terms of the means that you have, private right pays no attention to the ends for which you might use those means. Against this background, it is misleading to characterize private right as protecting interests, if this is taken to mean that the interests protected have normative significance, or can even be characterized, apart from the rights that protect them. To the contrary, each person's entitlement to use his or her own means, and determine how they will be used, gets its normative significance from being part of a system of rights, that is, a system of restrictions on each person's behavior in which each may enjoy independence from

all of the others. The idea of independence is itself relational; relational rights are not granted to protect interests taken to matter apart from them; interests are protected on the basis of rights.

These rights are relational in a highly specific sense: they involve non-comparative relations. If I say that one ball is heavier or hotter than another, I relate them to each other comparatively; each has a mass and temperature apart from the other and could have that mass and temperature if it were the only thing that ever existed. If I characterize someone as an uncle, I am describing him in relation to some niece or nephew; nobody is an uncle to any degree whatsoever except in relation to the offspring of his siblings, and anyone who is an uncle at all is entirely an uncle; unclehood does not come in degrees. "Wrong" is like "uncle," not like "mass" or "temperature." In characterizing an act as a wrong or a person as a wrongdoer, the law of tort works with a non-comparatively relational conception of wrongs. It follows from this that although the *object* of a right such as your horse or your right arm will have a magnitude and a degree in the sense that it is what it is apart from juridical relations to others, your right to it has neither a magnitude nor a degree. It is your entitlement to constrain the conduct of others in a certain way, which you either have or lack with respect to a given object. That is the sense in which private right is to be characterized in terms of a form of reasoning: the rights figure in reasoning in the same way, as a constraint on the conduct of others apart from the specifics of the object of the right. Neither how bad it would be for you to have a right violated or how burdensome it would be for others to be constrained by it is relevant to its existence. Rights in private law are relational and all reasoning about them reflects and preserves their relational nature.

A purely relational right does not serve to protect an interest in your means that can be characterized apart from the right that protects it; to the contrary, the sense in which your means are your own is that you alone, as against others, are entitled to determine the purposes for which they will be used. Your right is the constraint on the conduct of others, and if someone violates your right, the constraint on that person's conduct survives and provides the basis for the remedy.

Second, as well as characterizing the interests protected by the law of tort in terms of the means that you have and your concomitant entitlement to decide which purposes to pursue, the restrictions imposed by the law of tort restrict the means that others may use. Just as the entitlement to your person and property does not depend on the purposes for which you are using them, so, too, the restrictions on others imposed by your right to person and property do not depend on the purposes that those others might be pursuing. Wrongs against person and property restrict the use of means in two straightforward

senses: First of all, the law of tort prohibits trespasses of all forms. You are not entitled to use or even touch another person's body or property without that person's permission, and you are not allowed to do so quite apart from whatever worthy or unworthy purpose you might be pursuing. Second, you are not entitled to injure other people, either in their person or their property, by using your own property in ways that characteristically cause such injuries.

The first set of restrictions generates a wide variety of trespass-based torts; the second set generates what I have elsewhere described as "harm-based" torts, including both nuisance and negligence. In a trespass-based wrong, liability is premised on defendant's use of plaintiff's person or property. Defendant need only intend to use something that is another's, and a trespass can be committed, even if defendant did not, or even could not, know the title of the thing being used.²² This structure is clearest in the case of simple trespass to land, which is a wrong against the owner of the land, even in cases in which the trespasser made an honest or even unavoidable mistake with respect to title or the location of the boundary line. The same structure applies in trespasses against chattels and, at least in principle, with respect to trespass against persons, even if, as it turns out, there are few cases in which defendant has made an innocent mistake as to whether this particular person had authorized the touching in question. The absence of any requirement that defendant should have known in trespass follows from the fact that each person's entitlement to use his or her means to set and pursue his or her own purposes can be exercised consistently with everyone else using their own means, and each person's entitlement to use those means does not shade over into any entitlement whatsoever to use means belonging to another. The structure of trespass is formal in that the nature of the right at issue, and so of the wrongs that violate it, can be characterized apart from the specifics of the object of the right.

In harm-based torts, by contrast, rights are qualified in part on what the defendant should have thought about. Harm-based torts concern the side effects of one person's use of his or her own means on the ability of others to continue using their own means. For example, the tort of nuisance is organized around the thought that a landowner's use and enjoyment of his or her own land will inevitably have side effects on his or her neighbors. Something counts as an actiona-

22. Goldberg characterizes trespass as "a tort that combines an element of intentionality with an element of strict liability." 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, 598 (2005). The characterization of liability as strict makes things unduly complicated; the wrong consists in using what belongs to another, not in failure to take account of something. So, too, with the characterization of intentionality; you can only use something intentionally.

ble side effect if it interferes with the neighbor's ability to use and enjoy his or her own land. Given that some side effects are inevitable, the question of whether a particular side effect constitutes a nuisance turns into the question of whether it is excessive in relation to the ability of a plurality of neighbors to each use and enjoy his or her own land, consistent with the ability of other neighbors to do the same.

In the tort of negligence, the same general form of reasoning prohibits people from injuring each other's means through dangerous use of their own means. As people use their means, whether their own bodies or chattels, some side effects on others are inevitable, including injuries to others. The law of negligence characterizes the relations between persons that give rise to restrictions on how each may permissibly use his or her own means and enters into the determination of whether defendant's conduct was too dangerous, that is, whether it was of a type that, in the circumstances, was too likely to interfere with plaintiff's security of his or her means. Once more the account is formal: whether defendant has wrongfully damaged or destroyed plaintiff's means is determined in abstraction from the particular features of those means, and so apart from how bad it is for plaintiff to be deprived of them, or how costly it was for defendant to avoid damaging them.

This austere structure of protecting each person's means against use by others, or damage through the excessive side effects of other people's use of their means, generates the familiar structure of the law of tort. Most importantly, it generates the fundamental distinction between nonfeasance and misfeasance, that is, between wronging someone and failing to confer a benefit on that person. To interfere with what another person already has is a wrong, but to fail to provide aid to that person, no matter how badly that person needs it, is not. Again, to interfere with someone's person or property is a wrong, but to fail to protect that person or property is not. And, to interfere with something upon which another person depends but does not own is not a wrong. Most significantly, a bad motive—the pursuit of a worthless or evil end—does not make an otherwise permissible act wrongful.²³ Thus, the Holmesian doctrine of *prima facie* tort sits uneasily with torts as a law of wrongs.

These distinctions reflect the way in which private right is fundamentally a doctrine of means. That is why if someone needs something, but has no way of getting it, private right takes no interest. Private right only protects what people already have. For the same reason, if you carelessly or even maliciously destroy something upon

23. I take this issue up in detail in Arthur Ripstein, *Motive and Intention in Tort Law*, Lecture Before the Tort Law Research Group, Faculty of Law, University of Western Ontario (Nov. 3, 2010).

which another person depends, but does not own, you do no wrong as against that person, but wrong only the owner of the object. As a systematic doctrine of means, private right represents all questions of entitlement, whether to the security of your means or the scope within which you may use them, in purely relational terms. You do not have a right that your means be secure; you have only a right that others not damage them by acting in characteristically damaging ways; you do no wrong by using your means dangerously if you do not injure another's means. That is just to say that your entitlement to your means constrains other persons as their entitlement to theirs constrains you.

This structure of means is central to Goldberg and Zipursky's other signature contribution to contemporary tort theory, their emphasis on the fundamental role of duty in the law of negligence. Each person's right to person and property is also thereby correlative to a duty on the part of others to avoid interfering with person and property. The "duty question," so prominent in negligence cases in the early part of the twentieth century, still prominent in Commonwealth legal systems, and, until Goldberg and Zipursky's intervention, very much on the defensive in American law, concerns whether plaintiff and defendant are in the right relationship to give rise to a legal obligation.²⁴ The "no duty" cases are all cases in which plaintiff fails to state a cause of action either by failing to allege,²⁵ or by alleging but failing to establish,²⁶ that the vulnerability of her means generated a prospective constraint on defendant's conduct. If defendant owed plaintiff no duty, then, whatever the other defects in defendant's action, and whenever the loss to plaintiff occasioned by the defective action, no wrong has taken place.

In the same way, the causation requirement for all harm-based torts reflects the fact that tort law is a doctrine of means. You do not wrong another person by doing something that is prone or even likely to interfere with her means; you only wrong her if you interfere with those means. Merely putting those means at risk is consistent with another person being able to use them as he or she sees fit.

For the same reason, not just any causal relation between defendant's conduct and plaintiff's loss constitutes a wrong. An injury is only wrongful if it is within the ambit of the risk that makes defendant's conduct negligent. If defendant did not need to look out for a

24. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1745-77 (1998).

25. See *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch. of Pleas); *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

26. See *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928); *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (Can.).

particular aspect of plaintiff's safety, loss to that aspect is not the realization of a wrong, no matter how defective defendant's conduct or serious plaintiff's loss. Remoteness—what American courts call “proximate cause”—is relational because risk is.

This characterization of private right as a doctrine of means is conceptual in Zipursky's intended sense since it characterizes the broad doctrinal structure of private right in terms of the interrelations between a set of concepts regarding the ways in which each person can use his or her own means to set and pursue his or her own purposes and is bound only by the entitlement of others to do the same.

In laying out the structure of right, I have focused on the way in which one person's entitlement to what he or she already has constrains the conduct of others. These constraints, in turn, generate the concept of a wrong, which is just an action inconsistent with another's entitlements. Because the entitlements are constraints on the conduct of others, the wrongs are always relational; private right asks not what someone has done, or what has happened, but what one person has done to another.

The characteristic questions that courts ask in processing a tort action reflect this conceptual structure, and facts enter into the court's determinations as premises in reasoning within this structure. In harm-based torts, questions of duty, remoteness, and standard of care (or their analogues)²⁷ all focus on the structure of plaintiff's entitlement as against defendant in order to determine whether defendant has completed a wrong against plaintiff. In trespass-based torts, the inquiry focuses on whether defendant used something of plaintiff's without plaintiff's authorization. All of these inquiries are fact-sensitive, but the facts are classified through the concepts. None of behaving badly, causing loss, or causing loss as a consequence of behaving badly is enough. The factual inquiry follows the conceptual sequence.

Corrective justice is a principle *for* courts, rather than either an empirical description of a tendency in their decisions or a normative principle that they should implement which makes no essential reference to their operations. The principle of corrective justice directs a court to resolve a private dispute entirely in terms of what transpired between the parties and provides the relevant concepts with which to characterize the transaction. It does not, apart from the decision or anticipated decision of a court, tell the parties how to resolve their

27. For example, in the tort of nuisance, the locality rule functions as the analogue of the standard of care, and physical proximity stands in for the duty question. In cases of negligent misrepresentation, the question of the person to whom a representation was made goes in the “duty” slot, the question of the transaction with respect to which the representation was made into the “remoteness” slot, plaintiff's reliance into the “causation” slot, and standard accounting practice into the “standard of care” slot.

dispute. Nor does it impose a moral duty of repair of which a court's task is to remind the parties. Absent a demand by the plaintiff, as affirmed by the court, there is no such duty. The parties are free to resolve their dispute as they see fit, because it is a dispute about their rights as against each other, and each of them is entitled to exercise those rights as he or she sees fit. A court resolving a dispute in terms of corrective justice looks only to the transaction that is the subject of the dispute and so reasons in a specific way.

A form of reasoning is much more abstract than any of its instances, and to say that courts characteristically engage in a form of reasoning is not to make an empirical generalization which is subject to refutation by any counterexample or even to offer a hypothesis that holds true most of the time. Instead, it is more like the concept of an argument, understood as a series of claims that support a given conclusion. The basic way of thinking about argumentation is to start with good arguments, those in which the premises support the conclusion. It is perfectly consistent with this way of thinking about what an argument is to acknowledge that people sometimes, perhaps often, or even usually make bad arguments, that is, ones in which the premises do not support the conclusion. A bad argument is defective as an argument because of its failure to conform to the standards relevant to giving grounds for a conclusion. It is also possible to concede further that on occasion people try to get other people to believe things without so much as trying to provide a rational basis, through a variety of means.

Private right, as I have characterized it so far, is an abstract mode of argumentation about the rights that purposive beings have against each other. Such an account is consistent with conceding that courts do not always consistently follow it. In such cases, the court's reasoning is defective because it fails to conform to the standards relevant to resolving a dispute between two persons solely in terms of what transpired between them. Factors independent of the transaction are irrelevant. Because the concepts of private right are abstract, particular doctrines and decisions need to be interpreted in terms of them, so that, for example, if some torts appear to involve nothing more than a "pay as you go" rule for engaging in dangerous activities, the corrective justice approach recommends examining them and seeing whether, in fact, they involve wrongs after all rather than concluding too quickly that they are marginal or even outside tort law.²⁸ For reasons to be explained in Part III, its abstract structure shows how issues must be framed without always resolving them. Further, because it is a form of reasoning, the corrective justice approach provides the re-

28. *Contra* Goldberg & Zipursky, *supra* note 3, at 951-52 (characterizing *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (appeal taken from Eng.) (U.K.)).

sources for distinguishing between correct and incorrect instances of it. It can characterize at least some apparent counterexamples as misapplications of its requirements. For example, if a court engages in explicitly non-relational reasoning, whether utilitarian or punitive, or in talk about duty or proximate cause as “control devices” or analysis of pure economic loss in terms of “floodgates,” it may be that the best characterization of what it is doing is as a defective instance of resolving a dispute about a relational wrong. The point here is not that corrective justice must be saved in the face of recalcitrant data, but rather that the claim that tort law embodies a principle of corrective justice is an analysis of a mode of reasoning. As such its analytically basic case is its successful operation. If it never operated successfully, there could be no grounds for analyzing tort law in terms of it. But its normative structure allows departures from it to be identified as misapplications of a set of integrated concepts.

II. WRONGS AND THEIR REPAIR

My characterization of private right so far has been exclusively in terms of rights and duties; I have said little, as yet, about wrongdoing and nothing about its repair, except whatever might be implicit in the characterization of the relevant duties, that is, that someone who breaches a duty owed to another wrongs that other. My purpose in this Section is to further explicate what is implicit in the characterization of the relevant duties, so as to provide an account of wrongs and their remedies. Because remedies are remedial, the availability and justification of a remedy must always depend upon the antecedent existence of a right; because rights must form a consistent set, the specification of the underlying rights can be completed without any reference to any wrong actually occurring.

From the standpoint of private right, a wrong is simply an interference with means to which plaintiff has a right. As the example of harmless trespasses shows, a wrong need not involve any loss. Conversely, as the “no duty” cases show, a loss need not involve a wrong, even if it is brought about through defendant’s misconduct towards others.

When a wrong occurs, however, the same set of concepts that generated the underlying rights and correlative duties also generates an account of remedies. Put in the barest conceptual terms, the idea is simple: if someone interferes with a right that you have, the right does not thereby cease to exist. Since your right is to the exclusive use and security of your means, you remain entitled to the security of your means, even if another interferes with those means and so with your right. A remedy serves to “preserve what is mine undiminished.”²⁹ The most transparent example of this structure is in the tort

29. KANT, *supra* note 20, Ak. 6:271, at 91.

of conversion. If I convert your property, perhaps by taking your raincoat instead of my own, it does not cease to be your raincoat as a result of my wrong against you. The reason that you have a right to reclaim it³⁰ is that it is still your coat. But the fact that the coat, *qua* physical object, exists through both the wrong and its remedy is not essential to the conceptual structure that is at issue. The persistence of the coat is inessential; the persistence of the right is essential. To say that the right persists is to say that the constraint on my conduct does: I am not allowed to act in a way that is inconsistent with your claim to the coat.

The coat which is the object of the right in this example is, like all natural objects, subject to generation and decay, and your right to it is not a right to its persistence or even your continued possession of it; it is a right that *others* not use the coat or damage or destroy it in certain ways. If I take your coat, I violate that right, but my wrongful act does not change the right. The sense in which the right persists is just that the fact that it is yours was a constraint on my action, a constraint which I violated (whether knowingly or otherwise). It would be no constraint on my action if I could abolish it simply by acting contrary to it; you would have no right to your coat, as against me, if I could extinguish any such right simply by acting contrary to it. So it remains your coat after I take it; I must give it back because I was not supposed to take it.

The same structure applies in cases of so-called “make whole” damages in a negligence action, which give you back the equivalent of thing that you lost. If I negligently destroy your coat, the coat no longer exists. But your right to your coat—that is, the constraint on my conduct generated by the fact that you, rather than I, are the one who is entitled to determine how it will be used—is not changed by the fact that I acted contrary to that right. Destroying the coat does not extinguish the right understood as a constraint on my conduct. If the coat no longer exists, that constraint may call for different specific actions. My duty to repair, to restore to you the means to which you have a right against me, takes the form of a duty to replace the means of which I have deprived you. The duty to replace those means comprehends plaintiff’s entitlement to both possession and use of what she had. Not only must the coat be restored to your possession, but, also, if as a result of the destruction of your coat I deprive you of the particular use of it, I must also restore that to which you had a right, namely the use of the coat. Your entitlement to damages for the loss of use follows from the fact that the thing of which I deprived you—in this example, your coat—was yours to use, that is, that you

30. Or in English law, where there is no right to replevin or *vindicatio*, a right to damages in conversion.

have it as a means with which to set and pursue purposes as you see fit. You did not have a right to it because it was useful. Instead, it is useful *to you* because you have a right to it; it is your means, and so you alone have a right to its usefulness.³¹ If it were not yours, then, no matter how useful, indeed necessary, to you it might have been, you have no right to its usefulness—which is just the direct implication of the distinction between nonfeasance and misfeasance as it figures in the “no duty” cases.³²

III. PRIVATE RIGHT AND POSITIVE LAW

The account I have given of the broad structure of tort law as a doctrine of means, whereby it protects each person’s means against both use by others and certain side effects of other people’s use of their means and remedies any wrongs by restoring means or their equivalent, is, to say the least, highly abstract. Indeed, it might seem to be so abstract as to be incapable of deciding any cases. I now want to suggest, however, first, that its abstractness is a fundamental virtue and, second of all, that it requires institutional expression in order to decide most cases. I say “most” because the fundamental distinction between nonfeasance and misfeasance is already sufficient to identify a class of cases in which plaintiff simply fails to state a cause of action. If plaintiff alleges that he suffered a loss as a result of defendant’s breach of a contract with a third party, plaintiff fails to state a cause of action; the same result obtains if plaintiff’s allegation concerns a tort against a third party. So, too, if plaintiff concedes that there was no apparent connection between defendant’s activity and the prospect of injuring her. Such an unforeseeable plaintiff is conceptually incapable of claiming that defendant should have taken account of her safety; as unforeseeable, she is thereby in the class of persons of whom no account can be taken. So, too, if plaintiff’s allegation is that defendant fails to take the minimal steps that a minimally decent human being would take to accommodate her needs or aid her in her efforts, she necessarily fails to state a cause of action. The-

31. On the use and usefulness of the object of a right to what is yours as the basis of consequential damages, see Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1727 (2007).

32. Goldberg and Zipursky object to corrective justice on the grounds that it should lead exclusively to “make-whole” damages, and so is unable to explain consequential damages, which they refer to by the unfortunate and misleading name of “parasitic damages.” Goldberg & Zipursky, *supra* note 3, at 963. The latter term is usually taken to describe damages that are not consequential on a wrong but which plaintiff recovers anyway as a result of having suffered a different wrong. See Lord Denning’s disparaging remarks about parasitic damages in *Spartan Steel & Alloys Ltd. v. Martin & Co.*, [1973] 1 Q.B. 27, 28. My colleague Ernest Weinrib has a more detailed discussion of consequential damages in his contribution to this Symposium, which I wholly endorse; my comments above are meant only to indicate the abstract structure that is at issue. See Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273 (2011).

se cases are not trivial, and they provide an interesting analytical structure for a first-year torts course. However, most cases require more; indeed, more is required even in most cases in which plaintiff ultimately fails to state a cause of action. The more that is required is institutions and the development of legal doctrine.

It is a familiar feature of practical thought, both in the law and elsewhere, that abstract concepts figure in the appropriate formulation of the fundamental moral ideas, while, at the same time, those concepts can mostly just be related to each other and are difficult or impossible to explicate in some other, seemingly more neutral vocabulary. Nor is this feature restricted to practical thought. The difficulties of explaining something as simple as counting without recourse to such mathematical concepts as succession are well known in the philosophical literature.³³ But the issue is particularly clear in practical contexts. Indeed, the issue provides at least part of the impetus for both legal realism and the economic analysis of law, both of which insist that ordinary legal thought is one or more of capacious, indeterminate, conclusory, or circular on the grounds that it cannot be explicated in terms of social policy or economic efficiency. What economic analysis and legal realism regard as vices are, in fact, the virtues of practical thought, and the ambition of a conceptual account of an area of practical thought is precisely that it displays the relevant form of reasoning. Lack of determinacy would be a deficiency of the form of reasoning in which courts engage in resolving private disputes if it could only be vindicated by being reduced to some other form of reasoning.³⁴

But if the realist and economic critique of ordinary legal concepts fails to show that those concepts are illicit, it is nonetheless correct to point to the partial indeterminacy of abstract categories and their inability to resolve many concrete disputes. The realist's imaginary opponent who purports to resolve every legal case merely by deduction from concepts is, indeed, impossible. The realist's mistake is in concluding from this that concepts are irrelevant. Still, relevant

33. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 56-57 (G.E.M. Anscombe trans., 1953); see also Martin Stone, *The Significance of Doing and Suffering*, in *PHILOSOPHY AND THE LAW OF TORTS* 131 (Gerald J. Postema ed., 2001).

34. In saying this I don't mean to suggest that there is no question about whether, all things considered, one ought to reason in this way, although I would insist that the question of which things need to be considered can only be addressed within a specific form of reasoning; the importance of various ends, both in general and for particular agents, individual or collective, who are charged with making decisions, only emerges within a particular appropriate form of reasoning. So any question about the "all things considered" appropriateness of the tort system would need to be located within a broader political philosophy charged with examining the legitimate bases of the exercise of state power and the relation between the two forms of *dominium* distinguished in the Middle Ages, *proprietas* and *iurisdictio*, private law and public law. An "all things considered" question is not, simply as such, a question about the overall balance of good and bad consequences.

though they are, insofar as they figure in such claims as that a certain level of noise is excessive or that defendant failed to exercise reasonable care towards plaintiff, they need to be made more determinate. Otherwise, they would turn out to be “weasel words”³⁵ through which disputants seek to advance positions on which the concepts are silent, and decisionmakers leave themselves the room to make whatever decisions seem right in their own eyes.

Not every abstract form of reasoning that is potentially indeterminate in its application requires institutional expression, but the set of concepts organizing private right plainly do. Private right characterizes the conceptual structure in which each person’s entitlement to use his or her own means is constrained by a like entitlement on the part of others. That is, the requirements are systematic. Further, if everyone has the same type of entitlements, the requirements are also objective in the familiar legal sense of that term. The unusually sensitive plaintiff gets no solace from the law. Nor does the incompetent who tries his best get treated differently than others. Instead, the law purports to hold everyone to the same standards on the grounds that everyone has the same formal right to the security of what he or she already has.

These twin demands of systematicity and objectivity entail that the conceptual structure of private right can only be made to apply to particulars if it is applied in the *same way* for everyone; otherwise, it is inadequate to its own internal structure. That doesn’t mean that you could not try your best to act in accordance with right in the absence of legal institutions. But, it does mean that an authoritative determination is required in order to give effect to right. Right governs relations between private persons, and the answer, with respect to any dispute between any pair of persons, must be the same for both of those persons with respect to that dispute. So the austere structure must be made more determinate, characterizing uses as ordinary, demarcating the classes of persons of who account must be taken when engaged in various activities, and deciding what counts as being careful enough. Far from overlooking the fact that tort law is a human institution, the rights-based account explains why the relevant conceptual order can only be realized in a human institution that supposes itself to be entitled to resolve disputes and impose its resolutions on the parties.

The rights-based account also focuses on another respect in which abstract concepts of right need to be made institutional: it is only by being made both systematic and enforceable that private rights comprise a system in which everyone’s means are protected. Although

35. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 96 n.39 (1975).

the broad structure of corrective justice can be characterized in abstraction from institutions, it cannot be given effect except through them. General legal rules must issue from an authoritative source; particular orders authorize compulsion in light of the law.³⁶

In keeping with the official topic of the Symposium, I now want to focus on the question of whether, as a conceptual account, the characterization of corrective justice I have offered is adequate to the law of tort that Goldberg and Zipursky seek to explain. The question of how to determine whether an abstract account is adequate to something encountered in experience—whether characterized in terms of confirmation, verification, or application—is not, on its own, a conceptual matter. However, it needs to be addressed in a way that is consistent with the conceptual nature of the inquiry. Even though the concepts do not apply themselves, I want to suggest that, just as they require institutional expression in order to give determinate answers, so, too, they require a specific kind of institutional expression. The concepts are abstract, but contentful, rather than being concrete and exceptionless.

IV. THE INCORPORATION STRATEGY AND GOLDBERG AND ZIPURSKY'S OBJECTIONS

With this in mind, I now want to return to the four objections. Recall that these were, in order, that corrective justice cannot account for the diversity of wrongs, that it is unable to comprehend the broad spectrum of very different remedies, that it fails to explain why a tort suit takes place at plaintiff's initiative and involves not a right to a remedy or duty to repair but rather a power on the part of the plaintiff to exact a remedy, and, finally, that the corrective justice account is entirely at odds with the social nature of tort law and the ways in which it considers standards of ordinariness.

Each of the objections can be read as an instance of a broader strategy running through Goldberg and Zipursky's writing, a strategy of characterizing legal doctrine as the incorporation and formalization of social norms that are antecedent to it and contingently taken up by it, based on general assessments of weight or significance. This strategy is in turn infused with a contrast between the ordinariness of tort law and high abstractions about risk and rights. I am not sure of the depth of their commitment to this strategy; in developing other aspects of their view, they do not seem to rely on it. Each of the objections is formulated in terms of it. I take no stand here on whether these are incautious overstatements or are instead implications of their rejection of views that are too "metaphysical." I hope they are the former, for I will endeavor to show that the incorporation strate-

36. I explain this in more detail in *Force and Freedom*, RIPSTEIN, *supra* note 20.

gy in indefensible and that, stripped of it, civil recourse theory is indistinguishable from corrective justice.

The strategy is particularly clear in the case of the fourth objection, which is explicitly concerned with the way in which the empirical figures in tort law. Zipursky advocates a “civil competency” analysis of the reasonable person standard in the law of negligence.³⁷ After correctly pointing out that the Learned Hand test, much beloved of law professors, though disliked by courts and abhorred by juries, fails to connect in any meaningful way with the practice of courts, Zipursky goes on to offer an alternative, focused on what an ordinary person would do.³⁸ He approvingly quotes from Baron Alderson’s speech in *Blyth v. Birmingham*: “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”³⁹ Zipursky takes this to show that the reasonable person doesn’t figure as an abstraction, but rather as a kind of concrete particular. The law is filled with wording like this. Most famously, as stated in Lord Atkin’s celebrated speech in *Donoghue v. Stevenson*, “I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.”⁴⁰ The same framing of the issue is addressed to the question of standard of care in Lord Reid’s speech in *Bolton v. Stone*: “It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life.”⁴¹ This appeal to the ordinary—the claim civilized society makes on its members and the standards that guide ordinary people—is, according to Zipursky’s account, evidence that the standard of care is concerned with ordinarieness, rather than with risk. In the tort of negligence, “unreasonable” does not mean “too dangerous” but something closer to “substandard.” As he puts it, “Undoubtedly, a waiter’s careless dropping of a plate is sometimes the product of unreasonable risk-taking, but there is no reason to believe it always is. There is no reason to believe that whenever someone injures another through careless conduct, like dropping a plate, it is the result of an unreasonable risk having been taken. If I trip walking down the sidewalk, or if I aspirate my Diet Coke somewhat and choke, these misperformances of mine are not

37. See Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2033-41 (2007).

38. See *id.* at 2013-22, 2033-41.

39. *Id.* at 2017 (quoting *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047 (Exch. Div.) 1049; 11 Ex. 780, 784).

40. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) at 583 (appeal taken from Scot.).

41. *Bolton v. Stone*, [1951] A.C. 850 (H.L.) 867 (appeal taken from Eng.).

necessarily products of risk-taking. The waiter's dropping the soup is no different."⁴² The choice of examples makes it clear that the careless person is identified in terms of typical competence and without any reference to the rights of others.

The same strategy figures in their characterization of duties. Although they accept the rights-based account of duties as essentially and irreducibly relational, they sometimes represent the duties that the law incorporates as legally significant only because they happen to have been so incorporated. Thus, as I understand their framing of the issue, a plethora of relational social duties are informally enforced in our society.⁴³ The law chooses some of these and turns them into binding legal duties. This is why the duties in question unsurprisingly form a hodgepodge; each of the duties is what it is apart from incorporation into the law of tort and survives as a member of the law of tort because of the official acts of recognition which instill legal status upon it: "[W]hen a judge makes clear that she is talking about legal duties when she is deciding a case, not moral duties, she is indicating that she is identifying obligations within an institutionally entrenched web."⁴⁴ It is not that institutions entrench a web of concepts by relating them to particulars; instead, the claim appears to be that the fact of institutional entrenchment makes disparate norms into a web.

The strategy figures yet again in the account of recourse: "Instead, it is to appreciate that tort is a civilized alternative to vengeance—civil recourse for the plaintiff, which is appropriately channeled through and cabined by law."⁴⁵ There are social motivations that lead people to become angry or worse when they believe themselves to have been wronged. The plaintiff "feels aggrieved or injured"⁴⁶ and the tort system channels these impulses, bringing procedure to bear on the anger. If this substitution of process for feeling is to succeed, the court must award remedies on the basis of something other than restoring that of which the aggrieved plaintiff was deprived.

The same incorporation strategy figures, finally, in the account of remedies, which are presented as social norms the significance of which does not depend on their relation to the rights the violation of which they are supposed to remedy. Immediately after characterizing tort as a law of recourse rather than right, Goldberg and Zipursky explain how this ineluctably leads to the diversity of remedies:

But it is also to appreciate and accept that successful tort plaintiffs will sometimes be entitled to something more than "justice" de-

42. Zipursky, *supra* note 37, at 2018.

43. Goldberg & Zipursky, *supra* note 3, at 937-38.

44. *Id.* at 953.

45. Goldberg & Zipursky, *supra* note 19, at 1581.

46. Goldberg & Zipursky, *supra* note 3, at 943.

mands or even permits, at least if justice is understood as the achievement of a just distribution of gains and losses as between tortfeasor and victim. Here, the most obvious example is the egg-shell plaintiff, who may stand to recover a huge amount of compensation from a minimally culpable defendant. It is questionable whether justice is being done in such cases, but our tort system authorizes this sort of outcome because tort law is not a scheme for restoring a normative equilibrium as between doer and sufferer. It is, for better and worse, a law for the redress of private wrongs.⁴⁷

I want to suggest, however, that the flaw is not with corrective justice but rather with the incorporation strategy and its accompanying picture of the law of tort as a mode of social control, whose function it is to cabin reactive attitudes by channeling them into the court system, thereby both reducing the harmful and entropic effects of self-help, through the selection of a canonical set of wrongs that will be actionable, and the development of a plurality of remedies calibrated to defuse the impulses that make them necessary. Each of the objections turns on the incorporation strategy: duties form a hodge-podge because they have been incorporated based on a sense of seriousness, not violations of rights; remedies have been incorporated because judges thought them apt; ordinary care is severed from ideas of risk and reintroduced as the idea that ordinary conduct is less aggravating; the requirement that plaintiff alone has standing to enforce her rights is amputated from the rights being enforced only to be reassembled as an aspect of American law that is supposed to be both essential and merely empirical.

Goldberg and Zipursky sometimes articulate their understanding of tort law as a structure of social control in the vocabulary of a broadly Lockean social contract theory, according to which the legal right to recourse is a form of compensation given to citizens in return for their surrender of what might be thought of as an executive right of nature.⁴⁸ As Zipursky first put it, “While the state takes away the

47. Goldberg & Zipursky, *supra* note 19, at 1581.

48. See, e.g., John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 441 (2006) (“Understandably, government generally declines to restore that right in the form of a broad, positive-law self-help privilege.”). In a footnote to this sentence Goldberg explains what makes this understandable: “Among other things, declining to do so discourages continuing cycles of vengeance, protects wrongdoers from excessive retaliation, and empowers victims who might otherwise be unable to retaliate.” *Id.* at 441 n.22. See also Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 84 (1998) (“It is essential to our ordered society and our legal system that we do not permit private retribution for the violation of legal rights. Having been wronged is neither an excuse nor a justification for violence against or taking from another, except in rare cases. The law prohibits and criminalizes violence as a reaction to legal wrongs. That is, indeed, part of what is sometimes meant by ‘the rule of law.’ Nevertheless, the often touted principle, ‘*Ubi jus, ubi remedium*’—where there’s a right there’s a remedy—expresses the widely shared conviction that if one has been wronged, one ought, in fairness, to have some recourse through the state against the wrongdoer. In other words,

liberty of private retribution, it offers a right to civil redress in its place. While it creates in each a vulnerability to action under the law, it provides in return protection from the threat of private retribution.”⁴⁹ He later wrote, “The natural right to seek redress is conceded in return for a right of civil redress, a private right of action.”⁵⁰ The account is broadly Lockean because it does not hew to Locke’s own claim that the executive right is a right to enforce rights.⁵¹ They understand it as less of a right and more of an inclination or urge to get even with those against whom you suppose yourself to have a grievance. Having prohibited barbaric recourse, the state placates the aggrieved by providing civil recourse in its place.

In different places Goldberg and Zipursky express varying degrees of commitment to this account. Sometimes it seems to undergird their entire approach, but other times they mention only the consistency of their view with such an approach. I do not propose to resolve the question of the degree of their commitment to it. Instead, I will urge that they repudiate it entirely; although it provides a clear point of contrast with corrective justice theory, it generates an unstable amalgam of conceptual and empirical factors. That amalgam is not only inconsistent with corrective justice, but also with the idea of relational duties. From the point of view of placating anger, factors other than the breach of relational duties may be relevant. For example, the motive with which an injurer acted may make a considerable difference to how the injured plaintiff feels about the injurer’s conduct. Indeed, even if no duty existed, bad motives generate resentment. So the person who callously stands by as another drowns invites blame, resentment, and anger, as does the person who performs an otherwise legal act out of malice. From the perspective of blame and anger, it is difficult to see why relational duties in particular would be the focus of such an account, or why the desire to harm wouldn’t figure more centrally in it.⁵²

where the state forbids private vengeful retribution, fairness demands that an opportunity for redress be provided by the state.”). “Our society thus avoids the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving individuals powerless against invasions of their rights.” *Id.* at 85.

49. Zipursky, *supra* note 48, at 86.

50. Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 642 (Jules Coleman & Scott Shapiro, eds., 2002).

51. In *Two Conceptions of Tort Damages*, Goldberg does talk about “restoring rights,” but it is difficult to see how this is consistent with his claim about remedies as distinct from the rights the wronging of which they remedy. Goldberg, *supra* note 48, at 441.

52. The root of the difficulty is not with Goldberg and Zipursky’s focus on what have come to be called “reactive attitudes,” such as anger, indignation, and resentment. *See, e.g.*, P.F. STRAWSON, *FREEDOM AND RESENTMENT AND OTHER ESSAYS* (1974); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994). For an account relating these to relational features of morality, see STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006). There is a significant tradition in jurisprudence, the central text of which is Adam Smith’s *Lectures on Jurisprudence*, which

More fundamentally, the Lockean contractarian account admits of two interpretations. One possibility is that the claim of right is basic and structures the remedy, but “state of nature” recourse is barbaric only because of the lack of competent institutions. On this first reading, the conceptually basic case, through which action and reaction are understood, is the one where claims of right are decided on their merits, rather than through force, and the alternative to barbarism is to set up institutions that do corrective justice.⁵³ Civil recourse serves to make this possible; parties concerned to protect their rights would set up institutions that do justice between them. On the second reading, barbarism is the basic case and the idea of rights, both as asserted and as assessed on its merits, is derivative, something that positive law has taken up as a way of domesticating grievance.⁵⁴ This latter account is at odds with a corrective justice account because it represents the case in which claims are decided through force as conceptually basic. It identifies a good that recourse is supposed to serve or promote which makes no reference to the merits of an aggrieved plaintiff’s claim. On this approach, the object of the social contract is not the upholding of rights but the satisfaction of grievances.

makes moral sentiments of approval and resentment central, but takes the objects of those attitudes to be what Smith calls “Perfect rights,” which he characterizes as “those which we have a title to demand and if refused to compel an other to perform.” ADAM SMITH, LECTURES ON JURISPRUDENCE 9 (R.L. Meek et al. eds., 1978). He later identified these with rights to security of person and property, the importance of which he traces to the benefits of certain patterns of human interactions. *Id.* at 9-10. On Smith’s account, the reactive attitudes are warranted by wrongs, and remedies for wrongdoing are, as a corrective justice account would suggest, just the enforcement of the rights themselves. *Id.* at 10. I take no stand here on whether Smith’s sentimentalist program for private rights can be completed successfully. I mention it here only because Goldberg and Zipursky appear to depart from it, characterizing civil recourse as a substitute for private revenge that is required to placate unruly sentiments, organized by a set of norms distinct from those that organize the wrongs.

53. Adam Smith’s *Lectures on Jurisprudence* provides a sentimentalist version of this first approach:

For 1st., the resentment of the offended person leads him to correct the offender, as to make him <?feel> by whom and for what he suffers. Resentment is never compleatly, nor as we think nobly gratified by poison or assassination. This has in all nations and at all times been held as unmanly, because the sufferer does not by this means feel from whom, or for what, the punishment is inflicted.—2dly, the punishment which resentment dictates we should inflict on the offender tends sufficiently to deter either him or any other from injuring us or any other person in that manner. 3dly, resentment also leads a man to seek redress or compensation for the injury he has received.

SMITH, *supra* note 52, at 105. For Smith, private revenge is a crude version of the legal requirements of punishment and compensation, not the basic case which they replace.

54. Compare this with James Fitzjames Stephen’s often quoted claims that “[t]he criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.” JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863).

The ambiguity between these two approaches permeates the social contract argument in another way as well. The contention that the state deprives citizens of a natural right of redress *and so* must give them a right of civil recourse *in its place* can either be interpreted as an application of the corrective justice ideas it is meant to replace, focused on the need for a party who deprives another of something to which the other has a right to provide an equivalent, or in terms of the need to provide an alternative to private revenge in order to placate unruly passions.

The second approach would require the incorporation strategy and may well provide its underlying motivation. It would explain each of the four contrasts with corrective justice that Goldberg and Zipursky assert. A grievance-based account would focus on the fact that social norms have been taken up, regarding the principle of their selection as a “for better or worse” feature of positive law. It would note that remedies are selected on the basis of something other than the organizing ideas of private right. It would allow the ordinariness of defendant’s conduct to screen out grievances, refusing to empower people who complain about ordinary behavior on the part of others, and would thematize plaintiff’s power to proceed against defendant as having its basis in the generic fact that plaintiff was legally wronged, rather than in the specific right of plaintiff that was violated.

I will work my way through each of the instances of the incorporation strategy in turn.

A. *The Standard of Care*

Consider, first, the standard of care. Although it is not obvious how anyone, whether social scientist or court, could be in a position to satisfy themselves on this question, I am prepared to concede that people are more likely to “feel aggrieved or injured” if they are injured through the conduct of others that falls below the “standards which guide ordinary careful people in ordinary life.” But that is not enough to provide any support for Zipursky’s bolder contention that the standard of care is not concerned with risk-taking at all. Much depends on what, precisely, is meant by “risk-taking.”⁵⁵ If it is taken to mean, as an economic interpretation of the Learned Hand test proposes, the calculated decision to take a risk, then certainly questions about ordinary care and the standards that guide careful people have no bearing on whether defendant decided unwisely with respect to a particular risk. So Zipursky’s argument is successful against the economic interpretation of the Learned Hand test. The conventionalist account he proposes in its place is less successful. Although there may be waiters who make a calculated decision to carry too many

55. Zipursky, *supra* note 37, at 2018.

bowls of soup at one time, the clumsy waiter who spills breaches the standard of care regardless of what, if anything, he was thinking about. But the correct conclusion to be drawn from this is not that carrying soup clumsily is defective because most people don't do it or even because most careful people don't do it. Instead, the correct conclusion to draw is that carrying soup clumsily is defective *because it might spill on someone*. The modal idea that it *might* spill is, of course, just the idea of risk; the modifier "on someone" is the relational idea of risk to someone in particular. The restaurateur who tells the waiter to be careful need not have made an explicit calculation in order to conclude that it is too risky, but the sense in which it is too risky is just the prospect of the waiter spilling soup on someone.⁵⁶

Breach of a relational duty is not so much as engaged by talking about the sort of clumsiness or incompetence in aspirating my drink. Clumsiness is a non-relational feature of me, which can be made relational in either of two ways. First, someone could treat it as comparatively relational, remarking that Arthur is clumsier than Ben. Second, one could make it non-comparatively relational by considering whether Arthur was clumsy *towards* Ben. The former might be relevant to a comparative inquiry (including the sort of inquiry in which that Goldberg and Zipursky contend loss allocation engage) but doesn't go to any claim plaintiff might have. Again, although plaintiff's *anger* or some other feeling, and so her impulse towards retaliation, might be piqued by defendant's clumsiness, any such impulse has no legal place except in relation to a wrong. The only way defendant's competence or its lack is relevant to plaintiff is if it is competence or otherwise *in relation to her*; is it the kind of thing that characteristically jeopardizes her right? But that is just the question of risk; as Cardozo remarks in the *Palsgraf* case, risk is a term of relation.⁵⁷ Neither "clumsy" nor "incompetent" is. That is why an unforeseeable plaintiff's attitude towards the platform guard whose clumsiness caused her injury is of no significance.

If, in order to be relevant to the breach of a relational duty, ordinariness must itself be analyzed in relational terms, then the idea of ordinariness cannot, without more, be used to cast any doubt on the corrective justice approach. In order to make it into a genuine com-

56. Stumbling or aspirating aerated beverages are misleading examples in another respect. Each characterizes a result, rather than the manner in which the result came about. Someone can fall or gag without any incompetence. The same point applies to careful waiters who sometimes spill soup. With respect to spilled soup, finders of fact might take themselves to have enough general knowledge about the world to conclude that the doctrine of *res ipsa loquitur* applies in such cases, and so take the fact that the soup spilled on plaintiff as strong circumstantial evidence that the waiter was careless towards plaintiff. But even in those cases, the circumstantial evidence suggests that conduct was too dangerous in the sense of being too likely to go wrong.

57. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928).

parison, we would have to determine how, based on the corrective justice approach, the requirement that people avoid excessive danger to others, or excessive interference with their neighbors more generally, could be made determinate and given effect by a finder of fact charged with determining, in relation to a concrete dispute, whether defendant had been careful enough. And here, it seems, the corrective justice account has a straightforward answer.

Aristotle was the first to write of corrective justice, and his formulation of the most general form any such answer might take still commends itself. Aristotle remarks that there are fundamental limits to any purely theoretical analysis in determining what virtue requires in a concrete situation.⁵⁸ He is not suggesting that virtue admits of no theoretical analysis, only that, if you are trying to make yourself virtuous, the thing to do is stop reflecting and, turning on your own good judgment, try and pick a *phronimos*, an exemplar to copy, to make yourself more like one.⁵⁹ Aristotle's discussion of corrective justice is included in his catalogue of the virtues and the same thought applies to it. If you want to know what it is to be careful—given that, at the most abstract level, being careful is just a matter of limiting the foreseeable side effects of your conduct to the level that is the inevitable concomitant of pursuing your purposes in a public world in which others do the same—you ask what ordinary careful people do. The ordinary careful person serves as an exemplar, without being an ideal of complete virtue; as exemplar, the ordinary careful person shows what actual people can achieve and so sets an achievable norm.⁶⁰ Any such characterization runs the risk of circularity, but it is difficult to see why this would be objectionable⁶¹ since the task is to instruct the finder of fact as to how to frame the issue, *how to think about* whether defendant was being careful enough on this occasion. That is why Lord Reid's discussion of the standard of care in *Bolton v. Stone* consists largely of platitudes—if the risk is fantastic and far-fetched, you may ignore it, if it is “infinitesimal” then you may normally ignore it, but if the risk is real you just have to stop what you are doing, even if that means that “if cricket cannot

58. See generally ARISTOTLE, THE NICOMACHEAN ETHICS bk. VI (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.).

59. See *id.*

60. As Smith points out, the careful and prudent person may warrant only a certain “cold” esteem rather than the full admiration of the fully virtuous person. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 253 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

61. Unless it is assumed, as some advocates of economic analysis wish to, but Goldberg and Zipursky do not, that all tort concepts must be reducible to concepts expressible without remainder in some other vocabulary. On the nature of circularity in common law reasoning, see Martin Stone, *Legal Positivism as an Idea about Morality*, 61 U. TORONTO L.J. 313, 314 (2011).

be played safely on a ground, it should not be played at all.”⁶² His further gloss, in *Wagon Mound II*, adds a further near-platitude: you are not allowed to ignore infinitesimal risks imposed by your conduct if you could go about your own purposes in a way that is just the same from your point of view and makes it significantly safer for somebody else.⁶³ The platitudes remain helpful because they all concern something that ordinary people already know how to do. The thing they know how to do is not how to be ordinary, but rather how to be careful. Private right gives a characterization of what it is to be careful and why carefulness raises issues of justice. It doesn’t give instructions on how to be careful. It tells you what is at stake, how to frame the question, and *how* to think about it, not *what* to think about it. But once you know how to think about it, the obvious thing to do is to consider the familiar examples, both as particulars and as abstract archetypes.

B. Duty

Goldberg and Zipursky suggest that the task of the law is to pick up on preexisting social duties. They draw attention to the “plurality” of fundamentally different interests protected by tort liability.⁶⁴ Goldberg is explicit about the role of law in recognizing particular interests as worthy of protection and vindication:

Specifically, it is used to refer to a set of individual interests that the law recognizes as worthy of protection and vindication. For example, even though interference with one’s interest in being free from annoyance—or in having aesthetically pleasing surroundings—might fairly be treated as a setback or harm to the victim, neither is treated by tort law as a sufficiently weighty interest to warrant recognition of duties on the part of others to refrain from or avoid interfering with that interest. If *D* acts carelessly with regard to *P*’s interest in not being annoyed so as proximately to cause *P* annoyance, *P* has no tort cause of action against *D* because the law of negligence does not regard the suffering of annoyance as the sort of harm that rises to the level of an injury, even though the annoyance is a loss or harm suffered by *P*.⁶⁵

The vocabulary of interests and the idea that they enter the law on the basis of factors external to ideas of wrongdoing is developed further in *Torts as Wrongs*:

62. *Bolton v. Stone*, [1951] A.C. 850 (H.L.) 867 (appeal taken from Eng.).

63. *See Overseas Tankship (UK) Ltd v. Miller Steamship Co. (Wagon Mound II)*, [1967] 1 A.C. 617 (H.L.).

64. Goldberg & Zipursky, *supra* note 3, at 941.

65. Goldberg, *supra* note 48, at 440 n.16; *see also* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 27-45* (2010) (discussing tort law’s “gallery of wrongs”).

Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person's well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition. In part out of a sense of the limitations as to what sorts of interferences and injuries are justiciable, and in part for policy considerations that have changed over time with changes in social norms and economic and political circumstances, courts and legislatures have never sought to render interferences with all such interests actionable.⁶⁶

I want to suggest, however, that focusing on interests protected and social norms distracts from the structure of reasoning in which the putatively diverse interests figure and that the norms express. Social norms figure in the determination of abstract concepts of right, and interests only matter if they can be brought under the concept of right. That means, at a minimum, that neither non-relational judgments about well-being nor comparative assessments of whether interests are "weighty" are the starting points for analysis. In giving effect to corrective justice, the positive law must, as Lord Atkin suggests, pay close attention to what is a social wrong. But it does so by already presupposing the concept of a wrong and so of what it is for one person to wrong another, as one person's violation of another's right. And here, the question of duty is not a matter of social norms at all, but rather a question of each person's right to the security of his or her person, property, and reputation. Freedom from annoyance is not insufficiently "weighty" as an "interest"; although it may have a significant impact on "well-being," it is the wrong sort of thing to be the object of a right. Because the "duty" question is antecedent to the question of standard of care (even though each concerns a different aspect of the same risk), it does not focus on how careful defendant needs to be but only on whether this sort of defendant, engaged in this activity, needs to be careful for the sake of this aspect of plaintiff's right. That question cannot be answered in terms of an interest that is characterized without reference to a right because interests are not constraints on the conduct of others.

Goldberg's choice of annoyance as an example⁶⁷ masks the significance of these structural features of duty by introducing an interest that his readers are likely to regard as trivial and leaving out any characterization of how the annoyance comes about. His example of aesthetic surroundings⁶⁸ is misleading in another way, as it looks like a busybody interest in restricting what others do with their own property and so is relational in the wrong direction. But neither of

66. Goldberg & Zipursky, *supra* note 3, at 937.

67. See Goldberg, *supra* note 48, at 440 n.16.

68. See *id.*

these captures what is distinctive about relational rights, and so the fact that the interests at issue will not be “weighty” enough is overdetermined. Both are cases in which no possible right is at issue and so provide no support for the contention that whether the law finds a right and correlative duty depends upon how weighty an interest is.

In order for institutions to make the requirement of looking out for the rights of others concrete, however, they inevitably engage in a task of judgment and classification: Is this case like that one or more like the other one? In asking such questions, courts are best understood as giving effect to the abstract requirements of right. In developing the law, the place of judgment is ineliminable. From this it follows that a contextual and incremental approach is likely to recommend itself. The point is not that this is the only logically possible way of making abstract relational norms concrete, but rather that it is one possible way, and the most obvious, and the most consonant with general concerns about the rule of law, which demand that citizens be in a position to have at least a general idea of what the law demands of them. The ways in which ordinary careful people think about the demands of social life are not the last word, but they can be taken to be instantiations of the general categories of right, and ordinary people can be in a position to assess their own conduct and that of others.

The advice to proceed with good judgment, contextually and incrementally, is itself like Aristotle’s advice about finding yourself a *phronimos*. It tells you why you need one but doesn’t tell you what to do. It just tells you how to think about it. But given that the purpose is to create a system in which each is entitled to use his or her own means, restricted only by the entitlement of others to do the same, there is no other place to look for guidance except in the way in which people living consistently with the entitlements of others order their lives.

At the same time, no amount of contextualization or good judgment can provide a basis for rejecting private right’s signature distinction between nonfeasance and misfeasance. The incorporation strategy has difficulty explaining why this should be so. In certain contexts, there are social norms prohibiting aggressively competitive behavior, and in others there are norms demanding that people contribute to the individual and collective well-being of others. In still other contexts, social norms strongly discourage people from standing on their rights. Were any of these norms not generally observed, social life would be much harsher than it is. At least some of these norms are relational, and at least some of those create a sense of grievance in those who are denied the benefits that compliance with them would provide. By focusing on the incorporation of preexisting social norms, rather than regarding the norms the law does take up

as instantiations of basic structures of rightful interaction,⁶⁹ Goldberg and Zipursky represent the law's failure to take up norms of mutual aid or generosity as sociologically and legally accidental, at least in cases in which the interests at stake are no less weighty. As such, they risk representing the law's insistence on the distinction between nonfeasance and misfeasance as itself an accident of positive law, a demarcation among the plurality of suitably relational duties that must be explained in terms of something non-relational. Yet, it is difficult to see how such an explanation could go, because the distinction between nonfeasance and misfeasance pays no attention to the weightiness of the interests that are at stake. Not only does the law permit people to ignore the impact of their conduct on the interests of others if no right is at issue. It also distinguishes between types of conduct that are equivalent in their impact on plaintiff's well-being or any other interest of plaintiff apart from the specifically legal interests protected by rights. The idea of substantive standing cannot be brought in to solve this problem because it can be taken in two ways. It could just be a name applied on a case by case basis to whatever interests are regarded as weighty, in which case it reproduces the difficulty it was supposed to solve. Alternatively, it could be taken to correspond to the idea of rights to person and property and so gives up on ideas of social norms being incorporated and interests being regarded as weighty.⁷⁰ By focusing on "weightiness," the incorporation strategy runs together a hypothesis about *why* someone might think that it was important to protect rights to person and property—because they matter to well-being—with an analysis of *how* the law conceptualizes them. The law does not conceptualize them as "weighty"; it conceptualizes them as rights. That is why, as Zipursky and Goldberg rightly observe, the law does not protect against pure economic loss, however weighty, but does protect against property damage and even trespass apart from their effects.

Juridical structure figures more prominently in Goldberg and Zipursky's discussions of doctrine than in their theoretical recon-

69. For present purposes, I take no stand on how best to ground those structures. The key point is that the structures organize the ways in which people are entitled to use their means. For example, Adam Smith's narrow category of "perfect rights" is grounded in the long term benefits for mankind of their recognitions but is supposed to comprehend rights to person and property and to provide grounds for enforcement. See SMITH, *supra* note 52, at 9. The structure on which Smith focuses can be characterized apart from the fact that positive law happens to have taken it up.

70. Zipursky reports that issues of substantive standing first came to his attention in fraud cases in which plaintiff only recovers if she relies on a fraudulent misrepresentation made to her. See Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299, 301 (2011). It is difficult to see what relation this structure could bear to that of interests being weighty. The person who relies on a representation made to her and the one who relies on one made to another person have the exact same interest in play, unless the interest itself is characterized in terms of the relation, rather than vice versa.

struction of it. In their exemplary essay on social host liability,⁷¹ they operate with a firm grasp of the relation between the abstract and contextual. By distinguishing between a social host and a tavern operator, they draw attention to the way in which various activities are conducted in this society as a way of characterizing what counts as being careful and towards whom. On a sufficiently thin characterization of foreseeability, both the social host of a party to which guests bring their own alcoholic beverages and the tavern keeper can foresee that their activities might lead to injury to users of the road as a result of drunk driving. The only way to distinguish them is to focus on the kind of activity, distinguishing between providing people with intoxicating substances and providing a venue in which people consume their own. But of course, just as abstract norms do not apply themselves to particulars, so, too, characterizations of activity-types do not apply themselves either. Instead, the salience of a particular activity depends in part on how it is understood in the society. At the same time, how it is understood needs to be parsed in terms of the fundamental legal concepts, such as the distinction between serving someone a mind altering substance and providing them with a venue to do what they will, knowing that serving such substances to themselves are among the things they will do. Such abstract concepts could perhaps without injustice be applied differently in a different society, but their social application is the way in which these people in this society do apply them. Looking to such factors, then, is not just the incorporation of an antecedent social norm; it is the application of a general requirement of right to a particular activity, which is classified in terms of a social norm.

C. Remedies

The same general structure applies to the issue of remedies. In determining plaintiff's right to get back what she already had, the court must first make a determination of what she had, including both what power or object it was and how she was using it. Any such determination will inevitably be contextual and will depend, to some extent, on how things are understood (or misunderstood) in the society. Goldberg and Zipursky repeatedly contend that "make whole" damages are at most a "default."⁷² Yet, their status even as a default is baffling from the point of view of civil recourse understood as domesticated anger. Their legal role in harm-based torts is not only as a default, which a court might reject in favor of some other measure. Instead, they provide the basis on which any further heads of damag-

71. John C.P. Goldberg, *Social Host Liability and Beyond: How to Think About Intervening Wrongdoing* (Sept. 2007) (on file with author).

72. *Cf.* Goldberg, *supra* note 48, at 443-44 (characterizing as a "guideline").

es are built. That is why harm-based torts enable defendant to avoid liability by identifying a supervening non-tortious cause of plaintiff's injury: by showing that he did not deprive plaintiff of anything to which she had a right against him, defendant addresses neither her grief nor her sense of grievance but does show that making her whole is not the expression of a constraint on defendant's behavior. On this understanding, rights and remedies are seamless. Not only do the rights of plaintiffs form an integrated system; remedies give effect to that system.

I do, however, want to pause to note that the "injustice" charge that Goldberg and Zipursky lay against tort law is itself unjust. Let me repeat the passage about eggshell plaintiffs, which I regard as representative:

Successful tort plaintiffs will sometimes be entitled to something more than "justice" demands or even permits, at least if justice is understood as the achievement of a just distribution of gains and losses as between tortfeasor and victim. Here, the most obvious example is the eggshell plaintiff, who may stand to recover a huge amount of compensation from a minimally culpable defendant. It is questionable whether justice is being done in such cases, but our tort system authorizes this sort of outcome because tort law is not a scheme for restoring a normative equilibrium as between doer and sufferer. It is, for better and worse, a law for the redress of private wrongs.⁷³

To the contrary, the eggshell plaintiff's recovery is a matter of justice. She recovers because she has been wronged; the extent of the injury determines the extent of the wrong and so, too, of the remedy. Perhaps Goldberg and Zipursky suppose that the only form of justice that counts would be the achievement of a "just distribution of gains and losses as between tortfeasor and victim,"⁷⁴ or one that makes liability a function of culpability. But any such form of justice, if indeed there is one, is comparative and only derivatively relational. And it

73. Goldberg & Zipursky, *supra* note 19, at 1581. Compare Zipursky's earlier formulation:

Our moral convictions about the existence and extent of a tortfeasor's duties of repair are sensitive to an array of features extrinsic to whether there was a wrongful injury to the plaintiff and what would make the plaintiff whole. These features include, for example, whether and how badly the victim needs compensation, not just her entitlements; what funds the defendant can draw on to compensate the plaintiff; and whether there are other claims on those funds.

Zipursky, *supra* note 2, at 729. Even if these are "our moral convictions," they could at most be relevant to the issue of whether plaintiff's "entitlement" should prevail over them, not whether plaintiff has such an entitlement as a matter of justice. The latter formulation is more interesting because it addresses that issue head on. The two formulations are alike, however, in objecting to corrective justice as an account of law by introducing an undifferentiated idea of morality, showing that the law does not conform to it and concluding that the law therefore does not meet the requirements of corrective justice.

74. Goldberg & Zipursky, *supra* note 19, at 1581.

gives no ground for connecting plaintiff and defendant for purposes of the comparison of their non-relational features. Indeed, such a conception would have no room for the idea of a relational wrong at all, since it seems to presuppose that the wrong itself (and so the right that it violates) are matters of degree antecedent to the transaction between plaintiff and defendant. Perhaps this is what leads Goldberg and Zipursky to draw the sharp distinction that they do between wrongs and remedies, since their characterization of wrongs already abstracts from considerations of gain, loss, and comparative culpability. If, as they contend, tort law is a law of wrongs, however, then any righting of those wrongs must have the same formal structure as the wrongs themselves. The eggshell plaintiff recovers because she has been wronged, that is, because her right has been invaded. The right itself neither has nor lacks a magnitude or an extent, but the object of the right, and so the object of the invasion, has one. Defendant's wrongful act deprives plaintiff of something to which she had a right. The fact that depriving her turned out to be much more expensive than depriving others is not relevant; all that matters is that she has been wronged. The extent of an injury is just the extent of the invasion of her right, and so all that she gets back is what any plaintiff gets back, namely what she already had as a matter of right.⁷⁵ That is why plaintiff recovers; she is still entitled to that of which defendant deprived her, and her claim against the defendant depends on the fact that a right has been violated, not on the specifics of the object of the right, and so, as a special case of this, it does not depend on how expensive it is to compensate her. In other places, Goldberg and Zipursky raise the same objection in cases in which minor negligence leads to massive liability for lost income.⁷⁶ It may be that they mean to include such cases in the eggshell category. They are distinct, but no more difficult for corrective justice to explain: Having

75. It is not clear why, on the recourse theory, if it is distinct from corrective justice, thin-skulled plaintiffs would recover for the full extent of their injuries. Why would the measure of plaintiff's recourse be the extent of plaintiff's injury? Why would the law empower someone to recover on the basis of his or her own vulnerability rather than the way in which a typical or ordinary person others would respond to the same wrong? More generally, why would questions of the extent of *injury* be relevant to the extent of *liability* at all rather than making the *fact* of injury the *trigger* of liability measured in some other way, which was presented as the feature that distinguished civil recourse from corrective justice? Conversely, it is not clear why, on recourse theory, the ultrasensitive plaintiff rule would be part of the law of tort. The person who foreseeably, or even knowingly, causes injury to an unusually sensitive plaintiff is not liable. Yet, such a plaintiff has every reason to be aggrieved. Moreover, such an aggrieved plaintiff is blocked from taking matters into his or her own hands. Why, then, would there be no remedy? By contrast, on the corrective justice view, the reasonable person standard, the thin-skull rule, and the ultrasensitive plaintiff rule form an integrated set because they are all derived from the basic idea of each person's entitlement to what he or she already has.

76. See, e.g., Goldberg & Zipursky, *supra* note 14, at 1140-43; Goldberg & Zipursky, *supra* note 19, at 1581.

deprived her of something to which she had a right, defendant thereby deprived her of the use of that thing; if that thing was a chattel, defendant would have deprived her of the use to which she would otherwise have put it; if instead defendant deprived her of her skin, defendant thereby deprived her of the protection her skin would have afforded her.

D. Powers and the Plaintiff's Initiative

In the passage just quoted and others like it, it appears that Goldberg and Zipursky's rejection of corrective justice theory views it as an account which describes a pattern of benefits and burdens. Perhaps the contention that the fact that a tort suit is initiated by plaintiff, rather than by the state, provides an objection to corrective justice depends on a similar conception of what corrective justice must be. If corrective justice were concerned with achieving or restoring a pattern of holdings, then it would indeed be a mystery why litigation is initiated by the plaintiff rather than the state. After all, if the state is involved in seeing to it that justice is done, why leave it to the plaintiff's initiative? Indeed, if justice is important, it might be thought that it is too important to be left in plaintiff's hands. As Zipursky remarks, "A right of action is a privilege and a power, and the state is not committed to the normative desirability of its exercise, only to the right to have it."⁷⁷

Goldberg and Zipursky develop this point by arguing that if tort represented the principle of corrective justice, the defendant would be under a duty to make repair quite apart from plaintiff's power to demand it. If justice requires that a wrong be undone, then it would not be up to the victim of the wrong to decide whether to initiate proceedings against the wrongdoer. They suggest that were the law concerned to see to it that justice is done, in the case of a private wrong, the state would step in to enforce the right in something like the way in which some criminal fraud statutes require that the fraud repay those who have been duped and do not make the repayment conditional on any act on the part of the dupes. That is not, however, how the law of tort works; it gives the aggrieved plaintiff a power to proceed against a wrongdoer, but whether to exercise that power is left entirely at plaintiff's discretion.

Goldberg and Zipursky are certainly right to draw attention to the fact that the power lies in the hands of the plaintiff. Only plaintiff may compel defendant to repair the wrong. From this they conclude further that defendant is not under any legal duty to repair the wrong, since, they assume, were defendant under such a duty, then it would be within the purview of the state (or, for that matter, almost

77. Zipursky, *supra* note 2, at 741.

anyone) to see to it that defendant does its duty.⁷⁸ As Zipursky puts it, “The courts in tort law do not stand ready to facilitate the rectification of wrongdoing, or to restore a normative equilibrium, as corrective justice theorists maintain. Instead, they empower individuals to obtain an avenue of recourse against other private parties.”⁷⁹

If this structural feature of the law is to count as an objection to the corrective justice account, however, Goldberg and Zipursky would need to establish that the corrective justice account would lead to a different structure. If corrective justice were a matter of an appropriate balance of benefits and burdens as between plaintiff and defendant, it would be unclear why plaintiff in particular would have the power to enforce it. If it were a balance of benefits and burdens, then any party capable of bringing about the right balance would be under the same kind of duty to do so, or, at least, the party generally charged with whatever duties of distributive justice are applicable would be so charged.

If Goldberg and Zipursky were correct to characterize corrective justice in this way, then it would indeed be all but conclusive against an account of tort law in terms of corrective justice to point out that the aggrieved victim, rather than the state, commences a tort action. It would be decisive to contend that consequential damages in general and thin-skull damages in particular show that gains and losses are not distributed in accordance with culpability. More generally, the fact that the law does not act directly against defendant, but rather empowers plaintiff to do so is fatal to any view that makes corrective justice be a pattern of holdings that a court is charged with generating. All of these objections start from the thought that corrective justice must be conceived as a goal and tort law as a more or less reliable instrument for achieving the goal; each objection points out, in its own way, that tort law looks nothing like an optimal tool for achieving the goal, so understood.

But corrective justice is nothing like that; it is not the characterization of a worthwhile goal to be achieved. It follows that it is not a distributive theory, not even a small-scale version of distributive justice between plaintiff and defendant. It is not a theory of desert or proportionality, not an attempt to approximate a normative order in which suffering is proportionate to wickedness. Nor is corrective justice properly understood, as Goldberg and Zipursky contend some scholars have understood it, as a matter of loss allocation.⁸⁰ Allocating losses, at least as they characterize it, is an end to be achieved, and the question of who would do the best job of achieving such an

78. Goldberg & Zipursky, *supra* note 3, at 957-60.

79. Zipursky, *supra* note 2, at 755.

80. See Goldberg & Zipursky, *supra* note 3, at 926 (discussing Coleman and Perry).

end is, again, an open question with no presumption in favor of leaving the task in the hands of the plaintiff.

Nor does corrective justice ask “Prosser’s question” about what to do when faced with a negligent defendant and an innocent plaintiff. It is almost as though, having seen through Prosser-style doctrinal legal realism, Goldberg and Zipursky find themselves not fully able to accept that anyone could be even more extreme in rejecting it. But that is exactly the position of corrective justice.

Instead of being a matter of either distributive justice or loss allocation, corrective justice is concerned with rights governing the ways in which people are permitted to use their means in setting and pursuing their purposes. As a doctrine of means, in the sense characterized above, corrective justice makes every question of how a person’s means are to be used a question that is, in the first instance, for that person to decide. I can permit you to do what would otherwise be a wrong against me, I can enter into contractual arrangements with you, and I can acquiesce in what would otherwise be your unilateral creation of novel legal relations between us. That is, it is a general feature of *every* private right that “the state is not committed to the normative desirability of its exercise, only to the right to have it.”⁸¹ Within this structure, it is not merely unsurprising but inevitable that plaintiff alone is entitled to decide whether or not to stand on his or her rights in cases of wrongdoing. That is a general feature of a right as between private parties; the right holder determines whether to enforce it. If, as the corrective justice account contends, a right survives its own violation, the bearer of the right is the one who is entitled to decide whether to exercise the surviving right.

Moreover, because corrective justice is a principle for courts, it governs the binding arbitration of private disputes; it does not demand that disputes be resolved. The parties are free to negotiate whatever resolution they regard as satisfactory; the court concerns itself not with negotiation but with arbitration.

The familiar requirement that the plaintiff proceed against defendant reflects both the rights that are at issue and the role of a court as arbiter of disputes. Because it regards damages as grounded in and restoring the right that defendant has breached, Kantian right regards the right to damages as having the structure of every other right, and so something that plaintiff can invoke or decline to invoke. A right constrains the conduct of others, but the bearer of the right determines whether to exercise it. In this, a remedial right is no different from the primary right. It follows from this analysis that a tort suit must be initiated by plaintiff, simply because plaintiff, or someone authorized to act on plaintiff’s behalf, is the only one with

81. Zipursky, *supra* note 2, at 741.

standing to exercise any right that she has. That she can only exercise it through the court's procedures does not make it any different. The role of the court does place the onus on plaintiff to establish the elements of the wrong against her, but that requirement is a way of enforcing rights, not an alternative to their enforcement.

This structure of the right holder deciding whether to enforce a right is familiar in the traditional rule according to which the remedy in cases of nuisance is an injunction. Although American law has moved away from this idea,⁸² the rest of the common law world has continued to follow the rule laid down in *Shelfer v. City of London Electrical Lighting Co.*,⁸³ according to which an injunction is the remedy for a nuisance except in those cases in which the injury is small, easily compensated, and easily calculated, and the injunction would serve only to enable the plaintiff to oppress the defendant. In order to be granted an injunction, the plaintiff must establish that the defendant's conduct interferes with the plaintiff's use and enjoyment of his or her land. That is, plaintiff must establish that defendant's land use constitutes a legal wrong. At the same time, plaintiff could instead decide to simply put up with defendant's conduct. Plaintiff alone is charged with deciding, simply because it is plaintiff's right that is at issue.

It is not a satisfactory response to this structure to insist that the injunction does not enforce plaintiff's right to be free of the nuisance because if defendant owed plaintiff a duty of non-interference, the state would step in and enforce it instead. Yet, that is the apparent form of Goldberg and Zipursky's objection in the case of damages where the objection faces the same difficulty. Indeed, the same equation of having a duty with the prospect of direct enforcement by a public authority leads ineluctably to the conclusion that tort law does not include duties of non-injury, as a public authority does not directly enforce them either.

If defendant owes plaintiff a duty as a continuation of the right defendant violated, plaintiff alone is entitled to decide whether to hold defendant to that duty. The power of enforcement is the power to give effect to a right that already exists.⁸⁴ It is not an accident that a right can be enforced, and it is arguably an essential feature of legal rights that a procedure be available for giving effect to them. But

82. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

83. *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (A.C.) (Eng.).

84. The same point applies to the right to exclude a trespasser. A landowner's right to exclude empowers her to do so. If she declines or fails to do so, the state will not step in to do so instead. If a landowner fails to exclude for a sufficient period of time, the statute of limitations will apply, and a trespasser may gain a prescriptive right. The fact that the state plays no active role in enforcing a landowner's right to exclude does not show that the power to exclude is analytically unrelated to a right.

the power granted presupposes the existence and validity of the rights in question.

It may be that Goldberg and Zipursky's focus on plaintiff's power is supposed to show that defendant is not subject to a duty, but rather merely a liability, and they mean to draw attention to the fundamental role of a court in ordering a remedy. This, too, is not an objection to the Kantian account but rather a direct implication of it. Just as legal institutions are required to determine the application of concepts of right to particulars, so, too, they are required to authorize the enforcement of rights.⁸⁵ The rights of the parties provide the basis on which a court orders defendant to pay plaintiff, and in so doing empowers plaintiff to compel payment. The court must order the result because only a court is entitled to impose an enforceable requirement on any specific person.⁸⁶ The example of injunctions makes this point especially clear; because it is a coercive order, a court must order an injunction even though its content is identical to that of the duty to which it gives effect.

Kantian right thus sees that the specifically remedial aspects of tort law are continuous with the remedial aspects of, for example, contract law because the remedial aspects of each reflect the underlying rights. It would be highly artificial to suggest that plaintiff in a contract action gets a right of recourse, displacing her tendency towards private revenge, because she must, in her own name and of her own right, initiate proceedings against defendant who breached a contract with her and receives not only what defendant had promised but also consequential damages. It would be no less artificial to contend that contract law is not concerned with holding defendants to the commitments they have undertaken because it only gives plaintiffs a power to proceed against them,⁸⁷ or that there is no legal duty to pay for services for which one has contracted on the grounds that the state will not compel payment unless the creditor first demands it.⁸⁸ Instead, a more natural way of thinking of both of these depart-

85. I explain this in more detail in *Force and Freedom*, RIPSTEIN, *supra* note 20, at 107-44. Kant goes so far as to argue that the existence of procedures of public right, including courts, making rights enforceable after the fact is the precondition of private rights surviving their own violation and, so being, conclusive rather than merely provisional.

86. See Stephen Smith, *Why Courts Make Orders (And What This Tells Us About Damages)*, 64 CURRENT LEGAL PROBS. 1, 1-37 (2011).

87. See generally Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011). Even in those cases when non-expectation damages are awarded, whether based on reliance or restitution, the measure of the remedy is determined by the right violated.

88. In an earlier article, Zipursky assimilated the corrective justice view to the Holmesian "disjunctive" account of contract, according to which a contract imposed on promisor the duty to either perform or pay damages; Zipursky's suggestion was that if the remedy is the continuation of the duty in tort, then wrongdoing and its repair is an option available to defendants. Zipursky, *supra* note 48, at 70-76. Once more, this is not what corrective justice requires. The right survives its own violation in the sense that it contin-

ments of private law is as systems of rights in which the remedial aspect follows the underlying rights and in which the procedure whereby plaintiff asserts a right against defendant serves to give effect to those rights.⁸⁹ *That there is such a procedure* is fundamental to the enforceability and so to the force of those rights. But the procedure doesn't have some other function apart from giving effect to the rights.

V. CONCLUSION

It is time to take stock. I have suggested that the features of tort law that Zipursky and Goldberg point to as evidence of the inadequacy of corrective justice and the superiority of civil recourse are actually features that are not only consistent with corrective justice but of which corrective justice provides a superior and fully conceptual account. With respect to what we might call the narrow principle of civil recourse, according to which plaintiff has a power to enforce a right, civil recourse is not merely consistent with, but required by, corrective justice. I have also argued that the attempt to distinguish a more ambitious idea of civil recourse, understood as domesticated anger and retaliation, must fail. Not only does it fail to integrate with the relational nature of duty; it also falls into the very sort of functionalist instrumentalism that pragmatic conceptualism sought to leave behind.

In this concluding Section, I want to return to the general issue of what it is to give a conceptual account of an area of legal doctrine. Zipursky introduces the idea of pragmatic conceptualism in several

ues to constrain defendant, even if in changed circumstances different actions or omissions will be required to conform to the constraint. Moreover, the suggestion that the corrective justice view entails the Holmesian disjunctive view rests on a series of illicit inferences: first, the reduction of an imperative ("don't do A!") to a material conditional ("if A, then C") is treated as which is subsequently transposed into a disjunction ("not A or C"). That Holmes would be happy with such a reduction comes as no surprise, given his embrace of a predictive theory of law formulated in terms of advice to the so-called "bad man." See generally Oliver Wendell Holmes Jr., Supreme Judicial Council of Mass., *The Path of the Law*, Address Before the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 461 (1897). But the Holmesian approach is internally inconsistent, since it treats the resulting disjunction as an imperative. If defendant neither performs nor pays, whatever further results would follow would have to be added as yet another disjunct (perform or pay or face a contempt sanction) and so on *ad infinitum*. The same generality in the Holmesian approach permits the characterization of recourse in the same disjunctive terms: "If you injure another, you will be liable to recourse" is equivalent to "don't injure or accept recourse." Goldberg and Zipursky rightly insist on the imperatival nature of duty, Goldberg & Zipursky, *supra* note 19, at 1575-77, and would presumably also regard a court order granting a remedy as an imperative. Having done so, they cannot deny corrective justice theory the modal resources to which they legitimately help themselves.

89. In the unusual class of cases in which the right and power reside in separate persons—cases of third party beneficiaries to contracts—the third party has a power to enforce a right that resides in another person. There is a doctrinal puzzle about how this can be so, but the puzzle cannot even be formulated unless the power is understood to be the power to enforce a right.

stages. He first takes note of recent developments in the philosophy of language, concentrating especially on holism about meaning and the importance of inference. He then focuses on the role of concepts in structuring practices and argues that the key to understanding law lies in the recognition that judges create law rather than merely elaborating it.⁹⁰ The result is an account of what it is to explain a doctrinal area:

On the sort of pragmatism I am considering, to understand the concepts and principles within an area of the law is to grasp from within the practices of the law the pattern of verbal and practical inferences that constitute the relevant area of the law. Accordingly, to explain some area of the law is, in part, to display the concepts and principles the grasping of which constitutes understanding the law, and to do so in such a way as to make that form of understanding available. A criterion for a successful explanation will be the capacity to see how the verbal and practical inferences within the pattern “go on.” To understand a legal provision is to grasp the pattern of inferences that underlies how the law has been used and to be able to recognize a variety of scenarios in which the provision would or would not be exemplified.⁹¹

I think this approach has much to recommend because, despite the novel wording, it is methodologically indistinguishable from the Kantian formalism advocated by Weinrib.⁹² Talk of “moves,” “mastery,” “licence,” and “grasp” express the requirements of reasoning with concepts in a vocabulary borrowed from games and the exercise of bodily skill. However, following it through consistently leads to a narrow conception of the distinction between creating and elaborating law and with it to a rejection of the bifurcation between duties and remedies. That this bifurcation is given effect by the idea of incorporation, as deployed in relation to a social contractarian theory about the renunciation of private revenge, is not an accident.⁹³ Here,

90. See Zipursky, *supra* note 8 at 471-73.

91. *Id.* at 473.

92. Zipursky continues, “[T]he notion of the content of the law ‘itself’ is a notion of a domain of power for legal officials in which certain moves are licensed because they are part of what flows out of a mastery of the concepts within the law.” *Id.* at 475.

93. Zipursky’s original essay on pragmatic conceptualism takes as its focus the higher-order or “meta” question of the status of the conceptual connections examined and articulated: How are they possible? This difference makes no difference to the debate between corrective justice and civil recourse. Are they, as Kant would have it, synthetic *a priori*, or are they, instead, just immanent in, because constitutive of, a way of doing things that a group of human beings in a particular time and place happen to have adopted for reasons that may remain shrouded in the mists of history? Do we work outward from abstract concepts of right or inward from the structural features of existing law? Any such differences between the approaches can be ignored as they are irrelevant to the analysis of what this group of human beings is doing right now. If that is the question, then, exactly the same things need to be analyzed, in exactly the same way. Moreover, putting aside such purely philosophical concepts as the distinction between analytic and synthetic judgments, and that between *a priori* and *a posteriori* judgments, the same tools are available to both en-

it seems to me, Goldberg and Zipursky abandon conceptualism at the very point at which it is able to most illuminate its subject matter because they drive a wedge between rights and remedies, and indeed, a wedge between a right and the power to enforce it.

When a court seeks to determine whether defendant owes plaintiff a duty or when a finder of fact seeks to determine whether defendant exercised reasonable care, the question at issue enters into a chain of reasoning, the conclusion of which will be a finding that defendant is or is not liable. A conceptual account of this reasoning must make each of the elements of the determination of liability potentially relevant to the conclusion in support of which it is argued. If the court asks whether plaintiff was in the class of persons about whom defendant should have been thinking as defendant went about his or her business, the court must consider whether this situation is sufficiently similar to ones in which courts have found a duty in the past. That piece of reasoning looks to the settled law and interprets it in large part in terms of the familiar types of social expectations. It does not ask a question of the general form, "Is this what ordinarily goes on?" The same distinction applies with respect to standard of care: the court asks itself whether defendant was being careful enough by asking about the ways in which people who are careful towards others are careful in this kind of situation. It does not ask whether defendant's conduct was ordinary or whether it was competent by any other standard. If it made the latter inquiry into either the case of duty or standard of care, whatever result it reached would be inert from the standpoint of any further reasoning in which it might en-

terprises. All that either can do is focus on the form of reasoning that is involved. Whether it is characterized as a form of reasoning, or instead as a series of "moves" made in a "language game" is neither here nor there, because, on either account, the only question is whether, within the form of reasoning/language game or practice, a certain type of move licenses another, that is, does the conclusion that defendant owed plaintiff a duty of care, and breached that duty, lead to the conclusion that defendant must pay? Or is some other step required, apart from the analysis of the rights of the parties and what follows from them? There is also an apparatus common to both accounts, according to which we must ask who has standing to make various claims. It is no surprise that this should be so because the conceptualist elements in pragmatism, like the conceptualist elements in Kantian philosophy, owe a substantial historical debt to juridical ideas, in particular, the juridical idea of standing. That is not to say that they are derivative of this idea, but only that they employ it freely, and do so legitimately, whether concerned with law or with the philosophy of language, in so far as they are concerned with relations between human beings and the claims that one person may establish in relation to others. But all of this is to say that, in David Lewis's lovely turn of phrase, there must be "scorekeeping in a language game." David K. Lewis, *Scorekeeping in a Language Game*, 8 J. PHIL. LOGIC 339, 359 (1979). So this "meta" difference is not going to make any difference at all to any of the claims about the organizing concepts of that practice. And so it cannot possibly decide between civil recourse and corrective justice, nor even rule out the hypothesis that I have been pressing, namely that civil recourse is the way in which corrective justice is given effect. This is not merely an empirical claim about American law, but, more ambitiously, an analysis of what it is for one private person to have a right against another private person, namely, for the first person to have standing to enforce that right.

gage. If it asks the former question, by contrast, the question is always part of a larger inquiry as to whether defendant violated any right of plaintiff. The duty question asks whether there was a right, and the standard of care question (together with causation and remoteness) enters into the determination of whether the right was violated. In deploying this structure, judges can be said to be making law in a genuine, if narrow, sense; the law develops across time, and often a decision can go more than one way. Any specific determination goes on to shape the space within which subsequent cases are decided.

Goldberg and Zipursky grasp this point when they focus on duty but fail to recognize that the conceptual structure of duty must be preserved throughout the pattern of reasoning. Further, the claim to recourse when plaintiff is wronged can only be part of the same conceptual account that begins with the concept of duty—can only be the conclusion of a set of inferences in which duty is a basic premise—if recourse itself stands in inferential, rather than merely psychological or causal, relation to the underlying duties.

The domesticated revenge account of remedies also fails to fit into the kind of reasoning that is at issue in tort litigation. In order to determine whether a remedy is adequate as domesticated revenge, a court would either need to do a careful psychological study of the particular plaintiff or, if it used broader categories, need to know what kinds of plaintiffs are likely to come forward, what it will take to satisfy them, and so on. No such factors enter into a court's reasoning. Instead, most of the argument about remedy—the determination of what plaintiff may exact from defendant—takes the form of argument about rights—how people are allowed to treat each other. Plaintiff's contention that she has been wronged points to the nature of the duty the defendant owed to her, and defendant's conduct in relation to that duty, and thus to her rights. That it should be so is no surprise; if her claim to a remedy is her claim to the continuation of a right, her claim to a remedy finally rests on the fact that she doesn't cease to be entitled to constrain the defendant's conduct in relation to what is hers simply because defendant did something inconsistent with that constraint. The assessment of damages then turns on an examination of the *object* of the right—of what did defendant deprive plaintiff and of what, if anything, further was the plaintiff thereby wrongfully deprived? Plaintiff's leading of evidence with respect to the nature of her loss and the use that she was making or was about to make of the object of which she was deprived seem irrelevant to any question about placation. Yet, they are absolutely central to the question of right, of her entitlement to possess and use what is hers.

The bifurcation between rights and remedies is the fruit of the incorporation strategy, a focus on what legal institutions happen to have done rather than on what they are doing or how they are think-

ing. Freed of the incorporation strategy and the resulting bifurcation of rights and remedies, civil recourse is what the law of tort would look like if it turned on the axis of corrective justice.