
Method and Fit: Two Problems for Contemporary Philosophies of Tort Law

William Lucy*

This essay examines two contemporary philosophical accounts of tort law and seeks to show that they face two closely related problems: that of method and of fit.

The first problem holds that the method philosophical accounts of tort law actually adopt is in one vital respect structurally similar to that used by Economic Analysis of Law. The difficulty that arises is that these philosophical accounts of tort law cannot therefore distinguish themselves from economic accounts on the ground that they are methodologically superior. There is, in fact, a degree of parity between these philosophical accounts of tort, on the one hand, and economic accounts, on the other, with regard to the way in which they accommodate the details of, and the views of the participants in, the institution of tort law, its constitutive practices, and doctrines. This, of course, is *not* to say that the content of our two sample philosophical accounts of tort law is the same as the content of economic accounts.

The second problem raises this question: how much of an institution, and its constitutive practices and rules, must a philosophical account of it fit? The two philosophical accounts of tort examined here have been criticized for failing to fit some allegedly significant features of the law. It is argued that one particular instance of this criticism is misguided and, more generally, that it is sometimes a mistake to expect too close a fit between normative explanations and the institutions and practices to which they relate. And this, of course, is *not* to argue that there should be no close connection at all between such accounts and their objects.

The discussion of the problems of method and fit paves the way for some more general reflections on method in private law. These reflections, though tentative, might also have implications for general legal philosophy.

Cet article se penche sur deux conceptions philosophiques contemporaines du droit de la responsabilité délictuelle et tente de démontrer que celles-ci soulèvent deux problèmes : celui de la méthode et celui de la correspondance.

Le premier problème émane du fait que la méthode adoptée par les conceptions philosophiques du droit de la responsabilité délictuelle est, à un égard fondamental, structurellement similaire à celle utilisée pour l'analyse économique du droit. Cette similarité entraîne une difficulté puisque ces conceptions philosophiques du droit de la responsabilité délictuelle ne peuvent pas, sur la base d'une supériorité méthodologique, se distinguer des analyses économiques du droit. Il y a, en fait, un degré de parité entre les conceptions philosophiques du droit de la responsabilité délictuelle et les analyses économiques, parité qui provient de la façon dont celles-ci s'adaptent aux caractéristiques et aux points de vue des participants de l'institution du droit de la responsabilité délictuelle, de ses pratiques constitutives et de ses doctrines. Cela dit, l'auteur ne soutient *pas* que le contenu des deux conceptions philosophiques du droit de la responsabilité délictuelle soit identique à celui des conceptions économiques.

Le second problème soulève la question suivante : quel degré de correspondance devrait exister entre, d'une part, une institution et ses pratiques et règles constitutives et, d'autre part, la conception philosophique de cette institution ? Les deux conceptions philosophiques de la responsabilité délictuelle étudiées dans l'article ont fait l'objet de critiques en raison de l'absence d'une correspondance suffisante entre celles-ci et certaines caractéristiques significatives du droit de la responsabilité délictuelle. L'auteur soutient qu'une de ces critiques est malavisée et que, de manière générale, ce serait une erreur de s'attendre à une correspondance trop parfaite entre des explications normatives et les institutions et pratiques auxquelles elles se rapportent. Ce faisant, l'auteur ne prétend *pas* qu'il ne devrait pas y avoir de liens étroits entre ces conceptions et les objets auxquelles elles s'attachent.

Ces remarques au sujet des problèmes de méthode et de correspondance préparent le terrain pour une réflexion d'ordre général sur la méthode en droit privé. Ces réflexions, quoique provisoires, pourraient également alimenter les réflexions sur la philosophie juridique en général.

* LL.B. (Leeds), M.Jur, M.A. (Econ) (Manchester); Professor of Law, School of Law, University of Manchester, U.K. Part of this paper was presented at the Australian Society for Social and Legal Philosophy meeting in Auckland, New Zealand in June 2006. I am grateful to the participants for their thoughts and attention and, in particular, to Peter Canc, Tom Campbell, and Jim Evans. I also impinged upon Stuart Toddington's time and patience, for which I am grateful, and owe a debt of gratitude to Georgos Mousourakis, for a reminder of old times. The comments of the *McGill Law Journal* referees were also most helpful and much appreciated.

© William Lucy 2007

To be cited as: (2007) 52 McGill L.J. 605

Mode de référence : (2007) 52 R.D. McGill 605

Introduction	607
I. The Elephant in the Room	610
II. Bilateralism	612
A. <i>The Method</i>	615
B. <i>A Problem Shared Is Still a Problem</i>	619
III. Corrective Justice	629
A. <i>Substantive Standing and the Liability to Correct</i>	631
B. <i>Three Problems</i>	637
1. <i>Two Problems with Substantive Standing</i>	637
2. <i>Bluntness and the Liability to Correct</i>	643
IV. Made-to-Measure Philosophy	648
Conclusion	655

Introduction

Thomas Carlyle's view of economics as a "dismal science" would surely meet resistance from proponents of what can felicitously be called "first wave" North American law and economics.¹ This wave of law and economics ("EAL") is that body of scholarship engaged in extending the alleged insights of neoclassical economics to all aspects of legal doctrine and procedure, including almost every aspect of the design and operation of legal systems. It is embodied in texts like Richard Posner's classic *Economic Analysis of Law* and more recent additions such as Robert Cooter and Thomas Ulen's *Law and Economics* and Steven Shavell's *Foundations of Economic Analysis of Law*.² First-wave EAL's almost imperial range distinguished it from vanguard law and economics, which was concerned in the main with only obviously economic areas of legal doctrine like, for example, U.S. antitrust law. Furthermore, both the intellectual leaders and some of the most zealous proponents of first-wave EAL extended their analyses well beyond the confines of the law. It thus seemed that there was almost no aspect of social life that this approach could not explain.³ Indeed, such has been the ostensible intellectual success of EAL that even a notable nonzealot has said it is "the most important development in legal scholarship of the twentieth century."⁴

¹ Carlyle, of course, had "political economy" in mind but this body of thought is close enough to what we currently regard as economics for the quip to be serviceable. See Thomas Carlyle, *Latter-Day Pamphlets; Translations from Musæus, Tieck, Richter* (London: Chapman and Hall, 1903) at 37, 128. For two helpful general treatments of the context and range of North American law-and-economics scholarship and its various strands, see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995) at 301-419; Anthony Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Oxford: Hart, 2006) at 1-34. That the influence of EAL has spread far beyond North America is obvious from recent scholarship. See e.g. Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, U.K.: Edward Elgar, 2000); Jürgen G. Backhaus, ed., *The Elgar Companion to Law and Economics*, 2d ed. (Cheltenham, U.K.: Edward Elgar, 2005) vol. 1-4. The term "first wave" is taken from Megan Richardson, "The Second Wave in Context" in Megan Richardson & Gillian Hadfield, eds., *The Second Wave of Law and Economics* (Sydney: Federation Press, 1999) 2 at 2.

² Richard A. Posner, *Economic Analysis of Law*, 6th ed. (New York: Aspen, 2003); Robert Cooter & Thomas Ulen, *Law and Economics*, 4th ed. (Boston: Pearson Education, 2004); Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Belknap Press of Harvard University Press, 2004). It is worth noting that Shavell moves away from the narrow wealth-maximization conception of efficiency once favoured by Posner to a supposedly more flexible and complex notion of social welfare (*ibid.* at 2-4, part VII). This move does not ensure that Shavell's conclusions are radically different from Posner's.

³ See e.g. Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1976); Gary S. Becker, *A Treatise on the Family* (Cambridge: Harvard University Press, 1981) (offering economic explanations for social discrimination, timing of marriage, irrational behaviour, etc.). See also Elisabeth M. Landes & Richard A. Posner, "The Economics of the Baby Shortage" (1978) 7 J. Legal Stud. 323.

⁴ Bruce Ackerman, quoted in Cooter & Ulen, *supra* note 2 at 3.

This essay is not directly concerned with first-wave EAL, which, in light of the previous paragraph, might seem perverse. Hopefully, the impression of perversity dissipates once the true focus of the essay is stated: its concern is with one particularly interesting noneconomic reaction to two of EAL's core claims as they are applied to tort law. The reaction in question is that of those jurists and philosophers who champion the notion of corrective justice as the key to understanding tort law. The overarching issue in what follows is not, however, the moral or political acceptability of corrective justice, for it seems that as an intuitive or common sense matter corrective justice always has greater normative appeal than efficiency, the value EAL emphasizes. The concern is instead with the adequacy of the explanation and understanding of tort law offered by proponents of corrective justice, this issue being explored with an eye to the supposed methodological inadequacies of the EAL account.

The first argument offered here raises the issue of method—the issue of how theorists should go about constructing broadly “philosophical” accounts of tort (or any other aspect of) law—and illuminates a particular problem that it presents.⁵ The problem is neither that there is no obvious or agreed-upon method for the task of offering a philosophical account of tort law, nor that there is a plethora of such methods. Rather, the problem unearthed is that, though economic and corrective justice accounts of tort law are apparently very different bodies of thought, and though they begin from ostensibly very different starting points, they ultimately differ radically neither in their method nor in the structure of their theoretical “outputs”. Clearly, the substance of those theoretical outputs is indeed very different: the notion of corrective justice and the way in which it characterizes tort law is quite unlike the notion of efficiency and its characterization of tort. Yet the way in which these competing accounts come to the conclusion that one or other notion—either corrective justice or efficiency—informs and explains tort law is very similar. There is thus, surprisingly and contrary to first impressions, some degree of methodological parity between both economic and noneconomic accounts of tort law. This is indeed a problem if proponents of noneconomic accounts of tort law regard their enterprise as completely different from, and methodologically superior to, that engaged in by proponents of EAL.

The second argument offered here raises the issue of fit. This issue also plays a role in the first argument and is probably best regarded as but a particular manifestation of the general issue of method. The fit issue can be captured by a

⁵ By the term “philosophical” I do not intend to distinguish accounts of tort law that draw their inspiration from either ancient or contemporary philosophy from those accounts that draw upon other disciplines. Rather, I mean only to highlight a difference between what could be called “purely doctrinal” accounts of tort law, such as we might find in some textbooks, on the one hand, and accounts that seek a “deeper” understanding of the nature or structure of the law, on the other. For present purposes, then, both the economic accounts of tort law and the noneconomic accounts featured in this essay are “philosophical”, though it is often tempting to regard only the latter, because of their sources of inspiration, as “properly” philosophical.

seemingly innocuous question: which features of the area of law in question must a philosophical account accommodate? This question is explored in a manner quite different to the first argument: the second argument, unlike the first, is principally a *defence* of corrective justice accounts of tort law. It defends noneconomic accounts against a criticism not unlike one frequently aimed at EAL, namely, that it is a bad fit with the detail of the law. A central claim of the second argument is that this fit “problem” is to some extent bogus, that it is a mistake to expect accounts of the normative basis of tort (or any other area of) law to fit all or very many of the details of legal doctrine. If this claim is correct, then it presents a difficulty for corrective justice accounts of tort law. The difficulty arises when such accounts are commended because they fit the detail and structure of tort law better than economic accounts. For it seems to be the case that both corrective justice and economic accounts of tort fail to fit some features or details of the law. The principal difference between them is thus not that one account fits the detail or structure of tort law and the other does not. Rather, they differ in the aspects of the law that they fit and those that they fail to accommodate. The problem then arises (which is not tackled here) of how to determine where the balance of explanatory advantage lies between these accounts.

Three additional points should be noted about these two arguments. First, they have a relatively narrow focus. They are developed with reference to only two, albeit exemplary, instances of noneconomic philosophy of tort law: those belonging to Jules Coleman and Ernest Weinrib.⁶ It is undeniable that the work of these two scholars has been both incredibly fruitful and influential in the field. While the work of other jurists in this area is also undoubtedly significant, that work is often an extension of or engagement with the pioneering efforts of Coleman and Weinrib. Their work is thus the focal point of what follows. Second, the two arguments are closely related and, in fact, illuminate different aspects of the same general issue. Since these arguments are not therefore genuinely independent, it is no surprise to find each to some extent featuring in the other. They have been separated here only to aid exposition.

The third point is that the two arguments need not assume that there is still intellectual life in first-wave EAL, but they do. This is to deny neither that there are some difficulties with this body of scholarship, nor that this wave of EAL might be being slowly submerged by an altogether less monomaniacal and zealous form of law-and-economics thinking.⁷ Neither point completely undermines the claim that first-wave EAL attempted to illuminate the nature and underpinnings of large chunks of private law in general, and tort law in particular, in an admirably clear, general,

⁶ Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Ernest J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

⁷ See especially Michael J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993). See also Cass R. Sunstein, ed., *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000).

rigorous, and apparently social-scientifically serious way. Nor do these two points undermine another obvious truth. At the time the first wave of EAL scholarship was taking shape, many of its claims were regarded as *prima facie* compelling by noneconomic theorists. Indeed, it is no great exaggeration to say that the attempt to take these claims seriously brought the noneconomic accounts of tort law considered here into existence. It is more than likely that, without EAL, the two noneconomic accounts examined here would lack the salience they currently have.

The discussion divides into four. Part I briefly and simplistically sketches two core EAL claims, which are neither interrogated nor explicated in what follows. Part II then considers one noneconomic riposte to one of these claims, while part III considers another. The noneconomic riposte examined in part II consists of Coleman's and Weinrib's arguments about tort law's bilateral structure. The examination of those arguments requires some consideration of the method that Coleman and Weinrib deploy to generate their accounts of tort law and it is here that the problem of methodological parity arises. The emphasis of part III is slightly different from that of part II for, instead of tackling Coleman's and Weinrib's arguments directly, it evaluates an interesting critique of Coleman's and Weinrib's ripostes to the second EAL claim. Although Coleman's and Weinrib's ripostes differ from one another in many respects, it is nevertheless appropriate to speak of "one" riposte here because they are the same in this crucial aspect: both invoke the notion of corrective justice. It is in the course of considering the critique of this corrective justice riposte that the fit issue arises. It should also be noted that the bilateralism and corrective justice ripostes considered in parts II and III are usually run together and support one another to some degree. It is therefore artificial to separate them in this way, though doing so clearly illuminates some of the issues in play. Part IV attempts to sketch a more general moral that the arguments of parts II and III might illustrate, though the link between this moral and the arguments that precede it is, as will be seen, far from incorrigible.

I. The Elephant in the Room

Two core claims of first-wave EAL are relevant here: first, that the form in which the law is presented to us is of little interest ("the surface-froth claim"), and, second, that the immanent rationality of all branches of law is efficiency ("the efficiency claim").

The surface-froth claim denies that there is much, if anything, to be learned from taking the law seriously in its own terms. The claim was most famously made by Posner in his description of the significance of the reasons judges give for their decisions in particular cases: "[O]ften the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions. Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds, many of which may turn out to have an economic character."⁸ The

⁸ Posner, *Economic Analysis of Law*, *supra* note 2 at 25.

forces and considerations determining judicial decisions are thus unavailable for easy inspection, despite their obvious importance in the effort to understand how and why the law develops and changes. This skeptical attitude to the surface appearance of judgments is easily extended to other aspects of the law. So, for example, it can be invoked to dismiss the ostensible form of legal doctrines and statutes that are rich in apparently noneconomic concepts like “rights”, “duties”, “wrongs”, “obligations”, et cetera. If we understand these aspects of the legal world in the form and terms in which they are presented to us by judges, textbook writers, and statute drafters, then—the implication is—we will miss much. Such an understanding is, indeed, a *misunderstanding* according to most proponents of first-wave EAL. Perhaps the most important function of the surface-froth claim and the skeptical attitude to legal doctrine it embodies is that it casts doubt on the utility of attempting to reconstruct and rationalize legal doctrinal development in the way the best of our textbooks and other legal commentaries do. It raises not the question (tabled some time ago) “Is your textbook really necessary?”⁹ but, rather, grounds an altogether more radical verdict: “Your textbook is entirely pointless and misleading.” No one could therefore accuse EAL of being intellectually conservative.

The efficiency claim tells us what is beneath the surface froth doing all the work. While judges might say that their reasons for decision are thus and so, having no obvious economic interpretation, and while legal doctrines and statutes look unlike the ukases of efficiency, the truth of the matter lies deeper. For, despite appearances, some or other version of efficiency is indeed the driving force of legal doctrinal development.¹⁰ Just as Molière’s M. Jourdain has been speaking prose for decades without knowing it,¹¹ so common law judges have, on the whole, unwittingly followed the requirements of efficiency in legal doctrinal fields as apparently diverse as contract, tort, crime, tax, and admiralty. On this view, the notion of efficiency functions as both a conservative and reformatory force. In the former role it allegedly underpins many of the doctrines and decisions with which we are familiar, while in the latter it operates to highlight doctrinal and other legal mistakes (decisions and statutes that are inefficient). It thus illuminates the desired direction of legal development. One of the most significant claims EAL makes about efficiency is that it is, despite a few alleged doctrinal toeholds, principally *implicit* in the law. It thus seems that neither judges, legislators, nor litigants often or ever explicitly set themselves the goal of doing what efficiency requires. They nevertheless generally hit upon efficient solutions by means of something like an invisible-hand process: the unintentional outcome of many intentional actions by judges, legislators, and litigants is that the law is broadly efficient.

⁹ W.L. Twining, “Is Your Textbook Really Necessary?” (1970) 11 *Journal of the Society of Public Teachers of Law* (New Series) 81.

¹⁰ Posner, *Economic Analysis of Law*, *supra* note 2 at 249-71.

¹¹ Molière, “The Would-Be Gentleman” in Ian Maclean, ed., *Molière, Don Juan and Other Plays*, trans. by George Gravely & Ian Maclean (Oxford: Oxford University Press, 1989) 258 at 281.

Neither of these claims is evaluated or further considered. Both have, of course, been contested and neither can now stand without some degree of amendment. They are nevertheless important to what follows because they fulfill the role of opposites against which two features of the noneconomic accounts explored here react. The first feature of these two noneconomic accounts is the argument from the bilateral structure of tort (and private) law; this is in part a riposte to EAL's surface-froth claim. The second feature is that both accounts invoke the notion of corrective justice, which is intended to displace EAL's argument from efficiency.

II. Bilateralism

The argument from tort law's bilateral structure fits well with the notion of corrective justice. The bilateral argument holds that what makes tort law in particular, and private law in general, distinctive is the nature of the relationship between claimant and defendant.¹² The principal features of this relationship are (1) claimant alleges that defendant has wronged him and thus seeks a remedy from defendant; (2) the remedy consists of defendant having to do something to correct the wrong—for example, defendant may be required to pay an amount of money to claimant commensurate with the loss defendant's wrong caused the claimant; (3) claimant must sue defendant—the person who has allegedly caused his wrong—rather than a wealthier third party or the state; and (4) defendant, if liable, must compensate claimant rather than direct claimant to a wealthier third party or the state.

On this view, tort law adjudication is primarily a backward-looking process given normative significance by the notion of corrective justice. This idea holds, in general terms and subject to some conditions, that one is duty bound to put right some of the wrongs one does to others. Applied to tort law, corrective justice allegedly provides a normative explanation of why claimants sue defendants (rather than wealthier third parties); why defendants adjudged liable must compensate claimants and, in some cases—though much depends on the particular theory of corrective justice in play—why the remedy must take the form it usually does in tort. More generally, what corrective justice does is to highlight agent-specific reasons for action in certain contexts: when a responsible being has actually wronged another (or is answerable for such a wrong) in some specified way, he or she has a duty to the victim. That duty is not a duty binding on all humankind simply by virtue of their membership in that group: it is a duty binding on a specific person to another specific person that arises as a result of either the conduct or status of the former. Our duty to alleviate human suffering, by contrast, is probably binding upon us regardless of our conduct and is owed to all who are suffering.

¹² For versions of the argument, see e.g. Jules L. Coleman, "The Structure of Tort Law" (1988) 97 *Yale L.J.* 1233; Coleman, *The Practice of Principle*, *supra* note 6 at 13-24; Weinrib, *The Idea of Private Law*, *supra* note 6 at 1-55. The argument is called the "bipolarity argument" in some discussions. I follow current English legal usage in using "claimant" instead of "plaintiff".

The substance of the bilateral critique of EAL is not that EAL lacks an account of the bilateral structure of tort law. It clearly has such an account.¹³ Rather, the critique is that EAL's account of the bilateral structure of tort law is either contingent or ad hoc. These two claims, though they might be assumed to be the same, need not be so regarded in every respect. While they share the overarching claim that EAL's account of the structure of tort law is deficient, the deficiency can take different forms. The contingency deficiency is this: EAL is unable to provide a sufficiently secure foundation for the bilateral structure of tort law because it cannot rule out the possibility that in some circumstances efficiency will require that some or other aspect of that structure be abandoned. So it might be that in the circumstances of some case or cases, efficient deterrence or compensation requires a claimant to be compensated by someone other than the defendant, or that the damages the defendant usually has to pay to the claimant be redirected. That EAL cannot rule out such possibilities in advance, combined with the fact that it cannot say anything more of the bilateral relationship between claimant and defendant than that, as things stand, it just so happens to be broadly efficient for one to sue the other, is the essence of the contingency deficiency.¹⁴

Of course, one may wonder exactly why this alleged deficiency is problematic. It becomes so if tort law is regarded as a manifestation of some or other set of moral necessities and the relation between claimant and defendant is one of those necessities. If this relation is indeed of crucial moral importance, and if it must "therefore" be embodied in tort law, then this deficiency is certainly serious. But it should not be assumed either that the relation between claimant and defendant is of crucial moral importance or that, if it is, it must be embodied in the law. The moral status of the relation must be spelled out and a crass legal moralism, in which the law is assumed to embody every significant feature of morality, cannot be accepted without argument.¹⁵ Furthermore, the fact that the EAL account of the relation between claimant and defendant is contingent in this sense is not obviously a problem in light of the history and development of tort law in common law jurisdictions. That history is one in which contingency seems to loom larger in the development of the law than do the edicts of some or other moral necessities. There have been sufficient

¹³ For interesting analysis, see Steven Shavell, *Economic Analysis of Accident Law* (Cambridge: Harvard University Press, 1987) at 262-76.

¹⁴ See Coleman, *The Practice of Principle*, *supra* note 6 at 17-23; Benjamin C. Zipursky, "Pragmatic Conceptualism" (2000) 6 *Legal Theory* 457 at 457, 461. Weinrib has a related objection that holds that EAL makes tort law incoherent. See *The Idea of Private Law*, *supra* note 6 at 32-38. The objection, however, depends on a questionable conception of coherence.

¹⁵ There are only two British jurists who come close to espousing such a legal moralism. See James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Indianapolis: Liberty Fund, 1993); Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

moral mistakes in tort (and private) law's history as to make implausible the claim that it is the embodiment of a defensible moral blueprint.¹⁶

The ad hoc deficiency critique claims that EAL's account of the structure of tort law is unsatisfactory because it is determined by the theoretical commitments of EAL as opposed to the features of that structure itself. Something like this point is sometimes captured by the charge that EAL's account of the structure of tort law is "unprincipled", the theory determining the nature of the object to be explained rather than the object determining the theory.¹⁷ As a matter of common sense intuition and traditional social-scientific orthodoxy, this objection to EAL appears perfectly sound but is, on reflection, rather more complex than first appears. One complexity arises thus: when the object to be explained is part of the fabric of social life, it is unlikely to be understood without some knowledge of how those whose conduct in part constitutes it actually understand it. That knowledge can in some sense rightly be regarded as "theoretical" and, furthermore, need not be univocal: participants might well disagree over how the aspect of social life in question is best understood. Another complexity arises from this question: what features of the object of theoretical reflection must a theory or account or explanation or understanding capture?¹⁸ The answer noneconomic accounts of tort law give is: "The structure of tort law, at the very minimum." But matters become awkward when some effort is made to articulate the basis of this answer. This, of course, is not to imply that noneconomic accounts lack an answer; far from it. When we ask why this and other features of tort law must be accommodated by any respectable account of the institution and its constitutive practices, the answer is something like this: "The best available method tells us so."¹⁹

¹⁶ See e.g. *Bartonshill Coal v. Reid* (1858), 3 Macq. 266, 6 Week. Rep. 664 (H.L.); *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905).

¹⁷ See Coleman, *The Practice of Principle*, *supra* note 6 at 17. That EAL's overarching theory gets in the way of its understanding of tort law is, it seems to me, the motif of Ernest J. Weinrib, "Understanding Tort Law" (1989) 23 Val. U. L. Rev. 485. See *ibid.* at 503-10.

¹⁸ The terms "theory", "account", "explanation", and "understanding" are used interchangeably in what follows; while philosophers of the social (or human) sciences used to draw an important distinction between the latter two, no such distinction is intended here. For present purposes, all four terms and their cognates or admixtures refer to nothing more than attempts to understand some aspect of social reality at a level of abstraction and generality higher than that of our "folk" or everyday understandings. For a discussion of this kind of terminological laxity as it arises in accounts of adjudication, see William Lucy, *Understanding and Explaining Adjudication* (Oxford: Oxford University Press, 1999) at 45-97.

¹⁹ Nothing important turns on the use of the terms "institution" and "practice(s)". For current purposes the distinction between them is that the former refers to complex social structures while the latter refers to less complex social structures. Institutions are often constituted in part by practices. Both are also in part constituted by the convergent conduct of individuals, either rule-guided or purely conventional, and in part constituted by beliefs held by individuals. Both are also in some sense "social facts".

These two areas of complexity and the ways in which noneconomic accounts of tort law deal with them preoccupy the remainder of this part and the next. The issue they generate in this part is that of the grounds upon which noneconomic accounts privilege the bilateral structure of tort law. Since an important part of their critique is that EAL cannot adequately accommodate this feature of tort law, we need to know how, on noneconomic accounts, (1) we obtain knowledge of the bilateral structure of tort law, and (2) why that structure must be regarded as important or fundamental. Although a plausible response to these issues is necessary for the critique of EAL to have force, we will see that the responses given by Coleman and Weinrib are problematic. This becomes evident when we elucidate the method they and other noneconomic theorists of tort law employ. This is done in section A. In capsule form, the method holds that theorists' knowledge of the bilateral structure of tort law and its significance rests on the understandings of participants in the institution itself. The method deployed by Coleman and Weinrib to generate an understanding and explanation of tort law thus insists that accounts of the institution are built up from and either accommodate or are compatible with the "participants" or the "internal", "juristic", or "legal" perspective.

One implication of this is that EAL's alleged inability to adequately account for the bilateral structure of tort law arises from the inadequacy of its method: EAL cannot capture the viewpoint of participants whose conduct and practices in part constitute the institution. By contrast, Coleman's and Weinrib's accounts of tort law supposedly have an important advantage over economic accounts—their capacity to explain and understand a fundamental feature of the institution—that derives from the method they deploy. Yet, while the method adopted by Coleman and Weinrib is fairly clear, what is insufficiently appreciated is that they struggle to take the method seriously. Their commitment to it is actually not much stronger than EAL's commitment. Although first-wave EAL's commitment to this method is minimal, the commitment of these two noneconomic accounts is only marginally stronger, turning out to be both shallow and problematic. That, at least, is the argument of section B. It warrants the conclusion that, despite superficially great differences, both economic and noneconomic accounts of tort law yield theoretical results distant from the views of participants in the institution.

A. The Method

There is a broad and relatively unambiguous consensus among "orthodox" jurists about the method required to provide an adequate understanding and explanation of law.²⁰ Variations on this method are employed by jurists concerned with the most

²⁰ I spell out what the "orthodoxy" is as a matter of general jurisprudence in Lucy, *Understanding and Explaining Adjudication*, *supra* note 18 at 1-17. How this position manifests itself in some philosophy of private law scholarship is incompletely explored in William Lucy, "The Crises of Private Law" in Thomas Wilhelmsson & Samuli Hurri, eds., *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot: Ashgate, 1999) 177.

abstract questions of legal philosophy, such as those about the nature of law and adjudication, and by those philosophers of private law who eschew both EAL and the many versions of critical legal studies. The key tenet of this method is clear: any adequate theoretical account (or explanation or understanding) of any social action, practice, or institution must, in the first instance, capture the way in which that action, practice, or institution is understood by those whose patterns of behaviour and thought constitute the action, practice, or institution. Let us label this “the methodological injunction”. In Herbert Hart’s hands, this injunction was expressed in the language of the “internal point of view” and “the internal aspect of rules.”²¹ For Hart, a theorist who took up the internal point of view would provide a *prima facie* adequate account of legal rules and a legal system, since that account would illuminate how those who accepted those rules and that system understood the rules and system.²² Although the substance of his account of law and adjudication is quite different from Hart’s, Ronald Dworkin also embraced the internal or participants’ point of view as a fundamental methodological injunction.²³ So, too, albeit in slightly different language, do Coleman and Weinrib in their accounts of the nature of tort law.²⁴

The assumption that gives the methodological injunction initial plausibility—and that requires that theorists attempting to understand or explain some aspect of social life capture the viewpoint of those whose conduct and beliefs in part constitute that aspect of social life—is hard to deny. It holds that social action is purposive and rule-governed; therefore, it can only be fully understood or explained in light of the purposes, goals, and values it is supposed to serve. It seemingly follows that access to those purposes, goals, and values is best provided by determining what those whose behaviour, patterns of thought, and expectations constitute the action (or practice or institution) think are its purposes, values, and goals. That reference to the goals of an action is indispensable for a proper understanding of the action is obvious from many simple, low-level examples. Consider, for instance, someone raising his or her arm. To understand this in anything more than purely physiological or neural terms, an account is needed of the social context in which it occurred and the agent’s own view of both that context and his or her conduct. Only then will it be known whether the arm-raising event was (1) an action the agent did on his or her own as opposed to a reflex or some other event that just happened to them; and (2) what the meaning (or

²¹ H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 89, 56.

²² See e.g. *ibid.* at 88-91.

²³ See Ronald Dworkin, *Law’s Empire* (Oxford: Hart, 1998) at 11-15. Note, however, the possibly dissonant remarks in Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press of Harvard University Press, 2006) at 12, 15.

²⁴ See Coleman, *Risks and Wrongs*, *supra* note 6; Coleman, *The Practice of Principle*, *supra* note 6; Weinrib, *The Idea of Private Law*, *supra* note 6. Coleman’s interests do, of course, reach far beyond philosophy of tort law. See *The Practice of Principle*, *ibid.* at 13-24. It is a mistake to assume that Coleman and Weinrib are the only philosophers of private law to subscribe to this methodological injunction. See also Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995) at 153-210.

point, purpose, or goal) of the conduct was (it could have been, *inter alia*, a vote in a ballot, a sign that danger threatens, or part of a dance routine). It seems reasonable to extrapolate from the apparent indispensability of reference to the internal or participants' point of view in such instances to such reference being indispensable for an understanding and explanation of *all* social practices and institutions. Such practices and institutions are, after all, not much more than amalgams of many particular instances of conduct. On this basis, then, rests the appeal of the methodological injunction. Are Coleman and Weinrib committed to it? Of the two, Coleman's commitment is, in the first instance, most obvious and unambiguous.

Coleman's commitment to the methodological injunction arises from the endorsement, in *Risks and Wrongs*, of both "top-down" and "middle-level" theory.²⁵ The distinction between the two is important for Coleman, though he engages in both: his account of contract is an instance of the former, while his account of tort is an example of the latter. He writes:

In top-down explanations, the theorist begins with what she takes to be the set of norms that would gain our reflective acceptance, *at least among those practitioners who adopt the internal point of view*. Then she looks at the body of law ... and tries to reconstruct it plausibly as exemplifying those norms. Parts of the law ... [may] fail to be plausibly reconstructed ... [and] identified as mistakes ...²⁶

By contrast, the theorist engaged in middle-level theory will "immerse[] herself in the practice itself and ask[] if it can be usefully organized in ways that reflect a commitment to one or more plausible principles."²⁷ From these statements, it seems that the primary difference between the two approaches is their respective starting points. Middle-level theory begins with an attitude of some deference toward the action, practice, or institution; the trajectory of its account or explanation moves from within the action, practice, or institution as the participants understand it to an assessment of its nature, function, and content. By contrast, the starting point of top-down theory is a set of norms that might account for the nature, function, and content of the action, practice, or institution in question. The action, practice, or institution is then "read in light of" such norms, the principal constraint upon this process being the participants' own views of the action, practice, or institution.

Whether or not the distinction between top-down and middle-level theory is ultimately defensible is unimportant for present purposes. More significant is what both approaches have in common: each, albeit with different degrees of stringency, embraces the internal point of view. That much is obvious from the statements just quoted. But, lest there be any doubt about this, consider one more of Coleman's remarks about method: he "is concerned to understand law *from the standpoint of practitioners* who ask not only, 'How may we carry on this practice in a way that is

²⁵ *Supra* note 6 at 8.

²⁶ *Ibid.* [emphasis added].

²⁷ *Ibid.*

faithful to its inherent norms?', but rather, 'How may we carry on this practice in a way that is faithful to norms that are both inherent in it and reflectively acceptable to us?'"²⁸ If this is not an unambiguous endorsement of the methodological injunction, it is hard to envisage what such an endorsement might look like.

Weinrib's commitment to the methodological injunction arises from two steps taken in *The Idea of Private Law*.²⁹ However, as will be seen in section B, this commitment is at one point fairly shallow. The first step consists of Weinrib's arguments against functional accounts of law. The second is his effort to offer an account of tort law that captures its "internal structure", "self-understanding", or, in a cognate phrase, that is "immanent" within the law.³⁰ Functionalist accounts of law, for Weinrib, are a diverse family of views united in the belief that any adequate account of law must understand it in light of its goals. Weinrib's principal charge against this belief is that, in seeking to understand law in terms of goals external to it—in the sense that they are not obviously and explicitly marked in legal doctrine—functionalist accounts either cannot represent, or actually misrepresent, how law is understood by those whose conduct and beliefs in part constitute it.³¹ As a result, the accounts of law offered by functionalist theories are remote from "juristic experience".³² Furthermore, such theories are guided by the questionable assumption that the law cannot be understood in its own terms, that it must, to be intelligible, be explained in light of something external. In this respect, functionalist theories embody a common sense assumption about explanations, namely, that an adequate explanation of some phenomenon—Y, for example—must utilize terms neither identical nor reducible to Y. But even in common sense this assumption does not

²⁸ *Ibid.* [emphasis added].

²⁹ *Supra* note 6. Weinrib's recent work adds little to the methodological matters raised in *The Idea of Private Law*, *ibid.* See e.g. Ernest J. Weinrib, "Correlativity, Personality, and the Emerging Consensus on Corrective Justice", online: (2001) 2:1 *Theor. Inq. L.* 4 <<http://www.bepress.com/til/>>; Ernest J. Weinrib, "Corrective Justice in a Nutshell" (2002) 52 *U.T.L.J.* 349.

³⁰ *The Idea of Private Law*, *ibid.* at 5, 14, 18.

³¹ There are two ways in which this aspect of Weinrib's indictment of functionalism could be understood. One is that he regards all reference to functions (and related categories like purposes, goals, or values) as being references to something outside the conduct, practice, or institution in question. Another is that he regards the particular functions that functionalists ascribe to law as being external to it. There seems no reason to accept the first view, since it is simply implausible to think that all functions must in some way be "external" to the thing in question (what, exactly, is "external" in giving the function of a knife or a particular dance and why should this be thought problematic?). If Weinrib's true view is the second, then his antifunctionalism is not incompatible with the methodological injunction's invocation of point, purpose, or value of an action, practice, or institution. His argument, as against functionalists, is that what participants accept as the purposes, goals, or values of some conduct, practice, or institution are internal to that conduct, practice, or institution. At least, he thinks this is true in the case of law and other notions and practices like love and friendship. For more on Weinrib's sometimes puzzling antifunctionalism, see Joseph Raz, "Formalism and the Rule of Law" in Robert P. George, ed., *Natural Law Theory* (Oxford: Clarendon Press, 1992) 309; Martin Stone, "On the Idea of Private Law" (1996) 9 *Can. J.L. & Jur.* 235 at 242-43.

³² Weinrib, *The Idea of Private Law*, *supra* note 6 at 3.

always obtain. As Weinrib observes, there are many things—love and friendship among them—that we think need not (perhaps even should not) be understood in terms external to themselves. Private law, Weinrib suggests, may be of this type; its only “function”, if that word must be used, is to be private law.³³

We still lack a particularly sturdy peg on which to hang Weinrib’s commitment to the methodological injunction. A one-off invocation of “juristic experience” is too slender a reed for this purpose. Evidence of a more robust nature is found in Weinrib’s views as to what an adequate account of private law (and, by extension, tort law) must look like. Such an account must treat “private law as an internally intelligible phenomenon by drawing on *what is salient in juristic experience* and by trying to make sense of legal thinking and discourse in their own terms.”³⁴ Treating private law in this way, reflecting juristic experience, “direct[s] us to our experience of the law, *especially the experience of those who are lawyers*. This experience allows us to recognize issues of private law and to participate in its characteristic discourse and reasoning.”³⁵ It does not appear unreasonable to regard these statements as evidence of a commitment to the methodological injunction, or something very similar. Furthermore, if they do not illustrate a concern with the understandings of participants in the practices and institution of private law, then how is the emphasis on “juristic experience”, “the experience of ... lawyers”, and “internal intelligib[ility]” to be understood? If the experience of lawyers is not the experience of participants in the practices and institution of “law”, and if juristic experience is neither the experience of lawyers nor participants in the “law”, then who or what are the “participants” in this institution and its constitutive practices? Yet, read naturally and charitably, the statements just quoted suggest at the very least a *prima facie* commitment to the methodological injunction. How else could the following statement plausibly be interpreted?

An internal account deals with private law on the basis of the *juristic understandings that shape it from within*. Jurists share, if only implicitly, assumptions about the institutional and conceptual features that their activity presupposes, about the function these features play in their reasoning, and about the significance of coherence for the elaboration of a legal order.³⁶

Whether Weinrib’s commitment is any stronger than *prima facie* is one of the issues explored next.

B. A Problem Shared Is Still a Problem

Coleman and Weinrib’s commitment to the methodological injunction raises a difficulty that in one light can be seen as nothing more than a specific aspect of the

³³ *Ibid.* at 5.

³⁴ *Ibid.* at 2-3 [emphasis added].

³⁵ *Ibid.* at 9 [emphasis added].

³⁶ *Ibid.* at 13 [emphasis added].

issue of fit. The difficulty arises thus: what should theorists do when the account of tort law they offer—which, in accord with the methodological injunction, aims to capture what participants regard as significant features of the institution—does not actually reflect the views of all participants? This is clearly a problem of fit by virtue of the dissonance between some aspects of the theory in question and the views of some participants. Suppose, as against Coleman, that there are some participants in the practices and institution of tort law that understand it in the way either Richard Epstein, George Fletcher, or proponents of EAL do.³⁷ Suppose, as against Weinrib, that some participants do not understand tort law in terms of either Aristotle's conception of corrective justice or Kant's notion of abstract right. These or similar suppositions are not implausible because some judges—predominantly lawyers, certainly participants in the institution, and surely loci of juristic experience—have displayed a taste for characterizing tort law in terms antithetical to those used by Coleman and Weinrib. The American judge Learned Hand's formula for negligence liability is but one noteworthy example.³⁸ Moreover, these suppositions are clearly plausible if the interpretative attitude has taken hold in a community. In that case, citizens come to regard their institutions and practices not simply as existing but as having value, taking them to serve some interest or purpose or to enforce some principle. The requirements of their institutions and practices are not taken to be "necessarily or exclusively what they have always been taken to be but are instead sensitive to [their] point."³⁹ In such a context, it is not surprising to find more than one account of the point, purpose, or value of an institution like tort law in circulation. And this, of course, is exactly the context in which the fit problem arises.

There are at least two conceivable responses to this particular manifestation of the fit problem. One is to insist that a theoretical account of any social practice or institution must accommodate the views or language of participants at the outset only. The substantive theoretical language of the account offered need not explicitly capture or embody the language and views of participants; it must nevertheless be connected to them, but only in the sense of being an explication thereof. On this view, the theoretical account of the institution and its constitutive practices makes *explicit* what is *implicit*, articulating the commitments participants incur by virtue of what they do and say. Another response is to maintain that explanations and understandings

³⁷ Richard A. Epstein, "A Theory of Strict Liability" (1973) 2 J. Legal Stud. 151; George P. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv. L. Rev. 537; Shavell, *Economic Analysis of Accident Law*, *supra* note 13.

³⁸ *United States v. Carroll Towing*, 159 F.2d 169 at 173 (2d Cir. 1947). Also apparently antithetical to corrective justice accounts of tort law is the dictum of Traynor J. in *Escola v. Coca Cola Bottling*, 150 P.2d 436 at 440-43 (Cal. 1944). For a discussion of this dictum, see Ernest J. Weinrib, "The Insurance Justification and Private Law" (1985) 14 J. Legal Stud. 681. For some of Justice Posner's thoughts about EAL in the courtroom, see *In re High Fructose Corn Syrup*, 295 F.3d 651 (7th Cir. 2003). For a sustained argument that economic concepts do very little genuine work in judicial decisions, see Richard W. Wright, "Hand, Posner, and the Myth of the 'Hand Formula'", online: (2003) 4:1 Theor. Inq. L. 4 <<http://www.bepress.com/til>>.

³⁹ Dworkin, *Law's Empire*, *supra* note 23 at 47.

of social practices and institutions based on the methodological injunction need only accommodate or be consistent with *some* views of *some* participants. Those attracted to this response must then offer a justification for the limitation invoked: why, for example, is it permissible for a theoretical account of tort law to accord only with the views of participants of a certain class or type, or with the views of only sixty per cent (or more or less) of participants?

It is clear that Weinrib adopts the first response to the fit problem:

An internal understanding of private law reaches corrective justice and the Kantian concept of right by reflecting on the juristic experience of private law and on the presuppositions of that experience. ...

The relationship between private law and its theory can be formulated as a difference between what is explicit and what is implicit. In one sense, the theory is implicit in the functioning of private law. Because they are categories of legal theory rather than ingredients of positive law, corrective justice and Kantian right are not themselves on the lips of judges. But even though these theoretical categories do not figure explicitly in the discourse of private law, they are implicit in it as a coherent justificatory enterprise, in that they provide its unifying structure and its normative idea. They are as present to private law as the principles of logic are to intelligible speech.⁴⁰

Thus the fact that features of Weinrib's account of the normative basis of private law are absent from, or simply do not fit with, the language and understandings of some participants is not on this view an embarrassment. At least, not a first glance. It does, however, suggest that Weinrib's commitment to the methodological injunction is not as deeply rooted as might be assumed, since participants' views inform his account only at the beginning, having no great impact on its theoretical output. Furthermore, a second and more discriminating glance shows that this response to the fit problem is indeed a cause for embarrassment. It arises thus.

Posner claims that EAL unearths "[t]he Implicit Economic Logic of the Common Law."⁴¹ EAL does this by examining the material at the forefront of juristic experience—legal doctrine—in light of the ukases of efficiency or wealth maximization. And, while EAL allegedly offers an ad hoc or contingent account of the bilateral structure of tort law, it certainly offers interesting and intelligible accounts of some of tort law's other features and doctrines. And, although Weinrib clearly gives a *prima facie* plausible account of tort law's bilateral structure, his account of tort is not in general obviously better than the economic account. This is because there are some features of tort that Weinrib's account just does not fit: the most interesting example is perhaps strict liability.⁴² Hence, the balance of explanatory advantage does not clearly fall in Weinrib's favour. Nor can it be said, as against EAL and in favour of Weinrib's account of tort, that economic accounts of tort

⁴⁰ *The Idea of Private Law*, *supra* note 6 at 19-20.

⁴¹ *Economic Analysis of Law*, *supra* note 2 at 249.

⁴² *The Idea of Private Law*, *supra* note 6, c. 7.

are completely alien to participants. Some participants, as we have already noted, offer accounts of tort that utilize concepts central to EAL. If, by contrast, it is argued against EAL that the majority of participants in the practices constitutive of tort law do not speak the language of economic analysis, then the reply is equally plain. EAL aims (as does Weinrib's account) to capture what is implicit in the institution and its constitutive practices—what participants take for granted—and to make explicit what holds various features of the institution together.

Here, then, is the reason why Weinrib should be embarrassed. Despite the many declarations that his account of tort law is “internal”, “immanent”, or in accord with “juristic experience”, its methodological structure appears no different from that of EAL. Both embrace a version of the surface-froth claim, since neither approach regards the fact that many or some participants do not speak their theoretical language—be it either the language of efficiency or of corrective justice—as problematic. There is no problem here because, in giving theoretical accounts of tort law, each approach supposedly articulates what is *implicit in* rather than what is *explicitly stated about* the institution and its constitutive practices. In giving an account of tort law, both approaches take seriously some aspects of what some participants think, say, and do, albeit each approach takes different aspects seriously. And neither approach regards itself as duty bound to take all aspects of all participants' views seriously. One of the primary advantages of Weinrib's account of tort law thus seems to have disappeared. The impression gained from his attack on functionalist approaches to law, and his arguments in favour of “internal” accounts, is that the latter are in some way more consistent with or closer to the views of participants. The implication is that this proximity is a significant virtue, presumably because the closer to participants' views a theory is, the more accurate or fruitful or illuminating it is likely to be. But the substance of Weinrib's account is not obviously closer to the views of participants than the accounts offered by EAL. Both are distant, albeit in different ways, from the participants' (or the internal or the juristic) point of view. The embarrassment for Weinrib, then, is that of methodological parity with EAL.

A final point must be noted before turning to Coleman's response to the fit problem. It concerns Weinrib's claim, in the long quotation above, that corrective justice and Kantian right are present in tort and private law in the same way as are principles of standard logic in intelligible speech. This does not establish much distance between Weinrib's account and economic accounts because this intelligibility claim, if it is taken to imply that theories of tort law that do not invoke corrective justice and Kantian right are unintelligible, is an exaggeration. Discourse that ignores the rules of standard logic yields contradictions and is often unintelligible in other ways. But economic accounts of tort law that eschew Kantian right and corrective justice, though they might be objectionable for other reasons, are plainly neither unintelligible nor contradictory. We might not like what EAL says, but we can undoubtedly understand what it says.

There are textual hints that suggest Coleman favours the second response to the fit problem.⁴³ In *Risks and Wrongs*, he criticizes accounts of tort law offered by Fletcher, Epstein, and proponents of EAL because they do not fit the “core” of tort law. That core consists of

two features, one structural, one substantive. The structural feature is that in the typical case decisions about who should bear a loss are rendered within a framework restricted to victims and those individuals they identify as their injurers ... The substantive feature is that if a victim can show that her loss is wrongful in the appropriate sense, the burden of making good her loss falls to the individual responsible for it.⁴⁴

If it is plausible to regard professors of tort law as participants in that institution or, if that is implausible,⁴⁵ it is nevertheless plausible to think that their theoretical views have adherents among participants, then Coleman’s response to those views, and the fit problem in general, is unambiguous. To those participants who view the institution in the ways suggested by Fletcher or Epstein or EAL, Coleman says: You have misunderstood the core of your own institution. On this view, only those participants whose views of the institution and its constitutive practices capture the core are taken seriously in any theoretical account of the institution. Yet on what grounds is this limitation justified?

At first glance this limitation seems suspiciously convenient for Coleman since his corrective justice account of tort law comfortably fits the core. Furthermore, suspicion toward this solution to the fit problem increases once two issues are considered. These issues do not form a coherent package but this is irrelevant. They are independent problems and, while the two cannot consistently be affirmed together, each must nevertheless be dealt with. It seems that Coleman fails in this.

The first issue is posed by a denial: the accounts of tort law provided by Epstein, Fletcher, and proponents of EAL do not fail to accommodate the core of tort law. This denial can, furthermore, be accompanied by an assertion: these alternative accounts of tort law’s core simply accommodate the core in a manner different from Coleman’s account and, in the process, throw additional light upon other, closely related features

⁴³ I ignore the textual evidence that suggests that Coleman also adopts the first response on the ground that, if he does, he faces the same embarrassment that threatens Weinrib. There are also indications in Coleman’s recent reflections on method in general jurisprudence that he would regard this issue as altogether too social-scientific for his current taste. See Jules L. Coleman, “Methodology” in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2004) 311. Since these reflections are not directly addressed to issues of philosophy of tort law, and since their implications for that enterprise are far from transparent, they are not further considered here.

⁴⁴ Coleman, *Risks and Wrongs*, *supra* note 6 at 198.

⁴⁵ Just about every invocation of the methodological injunction, be it within philosophy of private law or jurisprudence in general, is marked by a failure to ever specify exactly who “participants” in the institution of law and its constitutive practices (or some segment thereof) might be.

of the law and other systems of regulation.⁴⁶ So, for example, proponents of EAL could concede that their account of the bilateral structure of tort law is not “necessary” in any strong sense, thus accepting that their explanation of why claimants sue defendants is supposedly less fundamental than Coleman’s. But since economic accounts offer insights into other aspects of tort law—and because *ex hypothesi* the core is not regarded as fundamental in Coleman’s sense by each and every participant in the institution—why must this be considered a failing of economic accounts? Some participants might regard the core of tort law as simply a historical accident and, since there are many such in the common law, this possibility is surely not remote. But it nevertheless seems that Coleman’s inclination is to maintain that participants who hold this view are in the grip of a mistake. Yet the basis of this mistake is far from transparent.

Moreover, the claim that the accounts in competition with Coleman’s fit tort law’s core, but in different way than does his account, seems even more plausible when the theories of Epstein and Fletcher are borne in mind. For in one respect, namely, their emphasis upon the notions of wrongfulness and corrective justice, the substance of these accounts is much nearer to some participants’ views than is the substance of economic accounts of tort law.⁴⁷ If it is indeed true that these competitor accounts of tort law fit its core, then Coleman must find another basis, consistent with the methodological injunction, on which to recommend his account.⁴⁸ The argument to that end might also show why participants who do not regard tort law’s core as fundamental in the same way as does Coleman are mistaken.

The second issue facing Coleman’s account is that of the significance of the core. Why is the core of tort law dominant, such that any theory that does not accommodate it must be classed a failure? Two arguments are clearly unavailable to Coleman in response to this question. He cannot, first, maintain that participants in the institution regard the core as crucial in the way he does, since *ex hypothesi* not all do (we are assuming that some participants’ views echo those of Epstein, Fletcher, or EAL). This response simply begs the question against these opponents. Nor can Coleman argue that the views of participants who take the core seriously in the way he does are more important than the views of other participants. At least, he cannot

⁴⁶ They therefore have the virtue of unifying previously discrete issues (Jules L. Coleman, “Second Thoughts and Other First Impressions” in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998) 257 at 299) or “consilience”, as Coleman subsequently calls it (*The Practice of Principle*, *supra* note 6 at 41-53). For possible instances of consilience, see Shavell, *Economic Analysis of Accident Law*, *supra* note 13 at 186-290.

⁴⁷ One example is Epstein’s discussion of causation (a vital component of wrongfulness/wrongdoing on almost every lay conception of corrective justice). See “A Theory of Strict Liability”, *supra* note 37 at 160-71. Another is Fletcher’s “paradigm of reciprocity”, which resonates with many of our pretheoretical assumptions about the infliction of harms and costs on others (“Fairness and Utility in Tort Theory”, *supra* note 37 at 543-56).

⁴⁸ I examined some possible responses that Coleman might make to this issue in William N.R. Lucy, “Rethinking the Common Law” (1994) 14 *Oxford J. Leg. Stud.* 539 at 558-64.

argue in this way on the basis of his theory of corrective justice, since this normative explanatory theory of the institution is then apparently determining the shape (the core) of that which it purports to explain. This seems suspect if we expect Coleman's corrective justice account of tort law to illuminate features of the institution that must in some significant sense be independent of that account. One obvious indicator of such independence is that the features in question are, in the first instance, identifiable without recourse to the theoretical account utilized to explain them. Expecting some features of the theoretical object to be independently identifiable in this way leaves room for different theories or accounts to offer competing explanations and understandings of those features. And it is on the basis of their relative success or failure in fitting such features that rival accounts can be assessed.⁴⁹

But if the features of an institution that a theoretical account must accommodate are determined exclusively by the theoretical account itself, then this indicator of success or failure is otiose. If it is the case that Coleman's corrective justice theory both identifies the core and determines why it is the most significant feature of tort law, and his account comfortably accommodates this feature, this cannot be used to discredit alternative theories. This is because, if alternative theoretical accounts of the institution function in the same way as Coleman's appears to, then those accounts themselves determine which features of the institution are significant and why. They are thus guaranteed to succeed, yet not, of course, in the same way as is Coleman's theory. For there is no reason why these alternative theories must regard as significant those features of the institution that Coleman's theory regards as important.

The general difficulty for Coleman here is the distance between his theoretical account of tort law and the features of that institution that any theoretical account must fit in order to be plausible. If his theory determines what features of the institution are significant, then his theory presumably cannot fail to fit them; it therefore manifests the ad hoc deficiency that allegedly also ensnares economic accounts of tort law. Judged solely on the basis of the arguments in *Risks and Wrongs*, Coleman lacks a satisfactory way of tackling this difficulty. That he recognizes the difficulty is plain from his subsequent work.

In *The Practice of Principle*, Coleman summarizes his view of the relation between tort law and corrective justice thus:

Starting at ... the ground level, we have practices of corrective justice—a system of practical inferences that purports to determine when the imposition of a liability is justified. The structure of these inferences in tort law gives determinate content to its [tort law's? corrective justice's?] key concepts, and thereby makes explicit the requirements of the principle of corrective justice; while at the same time the principle of corrective justice organizes the concepts of tort law, explains the nature and structure of the inferences those concepts license, and in doing so, guides the practice of tort law. The principle of

⁴⁹ Coleman accepts that some features of tort law are theory-independent. See *Risks and Wrongs*, *supra* note 6 at 383, 480; "Second Thoughts and Other First Impressions", *supra* note 46 at 301.

corrective justice, in turn, occupies a mid-level between the practices of tort law and an upper-level principle of fairness in allocating the costs of life's misfortunes. Here again the higher principle is said to be given determinate content by the practices subordinate to it, while at the same time guiding and constraining them.⁵⁰

This passage marks Coleman's deployment of a holistic approach to explanation and justification. It derives from a more general semantic and epistemic philosophical position he calls pragmatism. It also promises a quick and easy solution to the problem broached in the previous paragraph. For current purposes, the key feature of a holistic approach is that "the content of every concept depends to a greater or lesser degree on the content of every other."⁵¹ Thus, the content of corrective justice is in part provided by the institution of tort law and its constitutive practices, the institution itself being a manifestation of corrective justice. Corrective justice both informs and is informed by a more abstract notion of fairness that also exercises some normative force over the practices of tort law, the latter being a detailed manifestation of the notion of fairness as applied to the distribution of human misfortunes. Coleman's statement of the precise way in which corrective justice explains tort law—

when we see the inferential practices of tort law in the light of the principle of corrective justice, they hang together in a way that makes the best sense of those practices. Add to this the fact that tort law is plainly a normative practice, and that the way corrective justice makes sense of it is by expressing the norm that governs it⁵²

—must be read in light of his commitment to holism. Thus, the direction of the explanation is not just one way, from corrective justice (*explanans*) to tort law (*explanandum*). Each must to some extent illuminate and determine the other.

What are we to make of Coleman's holism: does it dispel the threat of the ad hoc deficiency and eradicate any doubt about the lack of distance between his theoretical account of the institution of tort law and the institution itself? Not completely, for this doubt has two dimensions. One dimension is the distance from institution to theoretical explanation, the issue here being that the features of the former, and their significance, must surely be identifiable independently of the latter. The other is that a good explanation or understanding must have some effectiveness within the institution; it must do some discernible work in determining or illuminating at least some of the moves participants make within the institution. We already know that Coleman has little to say about the former in *Risks and Wrongs*. What, if anything, do his thoughts in *The Practice of Principle* add?

Not a great deal, though there is an interesting absence in *The Practice of Principle*. He still maintains that any account of tort law must explain the core, but he lacks a legitimate argument as to why the core should be considered important. Such

⁵⁰ *Supra* note 6 at 54-55.

⁵¹ *Ibid.* at 55.

⁵² *Ibid.*

an argument must, remember, rest neither on unanimity among participants in the institution nor derive the core's importance from the theoretical account that seeks to understand or explain the core. One might therefore expect to find in *The Practice of Principle* an argument demonstrating the significance of the core in some other way. This expectation is not fulfilled. There is, indeed, no explicit recourse to the methodological injunction in that part of *The Practice of Principle* that develops Coleman's own view of the relation between tort law and corrective justice. The injunction does appear in Coleman's discussion of the internal point of view, where his principal interest is Hart's account of rules. But it is not in play elsewhere. Since Coleman does not invoke the methodological injunction, he has no obvious argument to justify the significance of the core. At least, he has no such argument that draws upon the views of participants.

Yet this might be an exaggeration. For, although Coleman does not explicitly invoke the methodological injunction in his discussion of tort in *The Practice of Principle*, he might do so implicitly. The vehicle of this implicit commitment, it could be argued, is Coleman's statement of the type of analysis *The Practice of Principle* embodies: it offers a "conceptual analysis" of tort law. Providing a "conceptual analysis of a social institution is to identify the central concepts that figure in it, and to explicate their content and their relationships with one another: we identify the criteria for the proper application of each key concept in the domain and ... show what these ... criteria have in common."⁵³ And how are the central concepts and criteria of tort law to be identified, if not by recourse to the views of participants? When taken in conjunction with one of Coleman's criticisms of economic accounts of tort—they overlook the "inferential practices of participants"⁵⁴—there is suggestive evidence that the methodological injunction is in play, albeit in a background role. But to state this argumentative line is to show its very obvious limitation. For even if Coleman is implicitly committed, by virtue of doing conceptual analysis, to the methodological injunction, restating that commitment does not answer the questions already raised about it. What is currently required from Coleman is a methodologically sound argument showing the significance of the core; the fact that he does, despite first impressions, invoke the methodological injunction in *The Practice of Principle* does not satisfy this requirement. It is, rather, to arrive at a point where the requirement becomes salient, assuming participants in the institution do not speak with one voice on either what counts as the core or why it is significant.⁵⁵

Coleman tackles the second dimension of the distance problem in more direct terms in *The Practice of Principle*, though his treatment is not entirely satisfactory. This is primarily because his demonstration of the way in which participants' moves

⁵³ Coleman, *The Practice of Principle*, *supra* note 6 at 13.

⁵⁴ *Ibid.* at 25.

⁵⁵ He maintains that "[a]ny conception of the core of tort law is bound to be controversial" ("Second Thoughts and Other First Impressions", *supra* note 46 at 297) but the reasons for this view are not stated; the thought is offered *en passant*.

within tort law can be illegitimate from the perspective of corrective justice is redundant. Two points show this. First, note how odd, from the perspective of current tort law, would be one of the moves that Coleman rules out. He holds that fairness “mediated by corrective justice” requires that no one be permitted to unilaterally set the terms of interaction with other individuals.⁵⁶ This, he says, rules out any move in tort law to adopt a subjective standard of fault or negligence. He is undoubtedly right about this. But note how this choice—is the standard of the duty subjective or objective?—is quite unlike any that actually faces current participants in the institution. When faced with doctrinal choices, participants frame those choices in terms of the specific doctrine in question. They ask, for example, what the nature is of the duty owed by one who is alleged to have created a private nuisance, or what the standard of care is of one who professes special skill or expertise. It is doubtful that participants ever question whether the standard of the duty is subjective or objective.

This brings the second point to the fore. Coleman’s attempt to show that corrective justice rules out some moves within tort law, thereby also showing that corrective justice is to some extent independent of that which it aims to explain, succeeds only in eliminating moves current participants are never likely to make. The move he claims corrective justice rules out is not now available in tort law. That is to say: the issue of whether the standard of the duty of care in negligence is subjective or objective is not a live one. The standard of the duty is objective and that is more or less certain.⁵⁷ Thus the fact that corrective justice rules out a move in the institution that is unlikely to be considered by participants is a dubious endorsement. This is rather like saying our theoretical account of chess rules out what the rules of chess forbid: how does that reflect to the credit of the theory? What surely would redound to the credit of our theoretical explanation would be this: its capacity to rule out moves that are actually conceivable and currently open within the institution and its constitutive rules and practices. Whether or not Coleman’s theory of corrective justice does that is unclear.

The conclusion to this section is clear. With regard to Coleman, the position is that the ad hoc deficiency looms over his account of tort law just as it looms over economic accounts. Weinrib, too, struggles to distinguish his account of tort law from economic accounts, albeit in a quite different respect. While the surface-froth claim is a hallmark of EAL, and is quite possibly the reason why many participants find economic accounts of tort law counterintuitive, Weinrib’s account also relies on something like that claim. It is undoubtedly foolish to deny that there are similarities between economic and noneconomic accounts of tort law, but these two particular similarities are of special significance. Their existence undermines what, as compared

⁵⁶ *The Practice of Principle*, *supra* note 6 at 57.

⁵⁷ There is some doubt around the edges. See e.g. *McHale v. Watson* (1964), 111 C.L.R. 384 (H.C.A.); *Mullin v. Richards*, [1998] 1 All E.R. 920 (C.A.). For a critical assessment of the standard of the duty-of-care rule for children and its cognates, see Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003).

with EAL, could be regarded as uniquely different and distinctive about Coleman's and Weinrib's accounts: their ability to offer a theory of tort law that is both a methodologically respectable fit with participants' views and intellectually deep.

III. Corrective Justice

For Coleman, Weinrib, and others, corrective justice is the notion that gives tort law its normative intelligibility. Although corrective justice raises many interesting questions, only one is tackled here: what is the proper relationship between it and tort law? Since corrective justice is offered by Coleman and Weinrib as the theoretical explanation of many of tort law's features and much of its content, this is again a question about the way in which a theoretical (and in this case normative) explanation must "fit" its object. This question becomes salient primarily because it is generally accepted that tort law's bilateral structure is not the *only* feature that an account of tort must explain. As a general matter, this is surely right, since it is usually assumed that a respectable social-scientific account of an institution, practice, or segment of conduct must, other things being equal, aim to be as general as possible. The more segments of conduct of a similar type that a theory explains, or the more aspects of a practice or institution it gives an account of, the better. Such generality can, however, be bought at too high a price, for some general theoretical accounts can function as a Procrustean bed, lopping off the elements of the theoretical object that make it particular and different.

The difference between the issue tackled in part II and the question of how well corrective justice fits the institution and cognate practices of tort law is that the former is conceptually prior to the latter. The overarching question there was "What aspects of an object must a theory of that object accommodate?" The concern was therefore with how theorists identify and determine the significant features of the theoretical object. Here, the features and significance of the theoretical object—tort law—are more or less taken for granted. The question is, instead, "How well does the alleged normative explanation or theory (corrective justice) fit that object (tort law)?"⁵⁸ For Coleman this question is no longer open: "[W]hether or not corrective justice is an ideal to which the law should aspire, it is the principle that best explains what tort law is."⁵⁹ There is truth in this claim insofar as corrective justice appears to fit neatly with, and provide a plausible normative basis for, the bilateral structure of tort law. And, if this claim is true, it provides a ready-made rejoinder to EAL's efficiency claim. For that claim is undermined not just because efficiency is

⁵⁸ Talk of "normative explanations" and of the "normative intelligibility" of tort law, or of its "normative basis" or "normative foundation" does not, in this context, carry any implication that tort law is indeed normatively justified. Attempts can be made to make an institution normatively intelligible without morally or politically endorsing that account of its normative intelligibility. For consideration of some the varieties of foundation talk in this context, see William Lucy, *Philosophy of Private Law* (Oxford: Clarendon Press, 2007), c. 7.

⁵⁹ *The Practice of Principle*, *supra* note 6 at 12.

normatively troubling when conceived as a significant moral or political value; it is also weakened because efficiency cannot, when compared with corrective justice, give a properly noncontingent or non-ad hoc account of tort law's bilateral structure.

Is it, then, a mistake to reopen this question? Perhaps so. However, there are two conceivable arguments that question the supposedly virtuous tight fit between corrective justice and tort law that Coleman, Weinrib, and others envisage. What these arguments share is that each regards this tight fit as a vice rather than a virtue. They also have this feature in common: neither is particularly powerful. The first maintains that, as opposed to providing an independent justification for tort law, corrective justice is actually immanent in the institution itself. Corrective justice thus cannot serve as a justification or explanation of tort law because it lacks the necessary distance from its object.⁶⁰ The underlying idea is that justifications and explanations of an object "O" must be in terms different from those constitutive of O. Hence, a good explanation or justification of O must invoke notions A, B, and C and these must be neither identical nor reducible to O. The second objection makes a claim that is the reverse side of the ad hoc deficiency that allegedly undermines EAL's account of tort law's bilateral structure. It holds that corrective justice has no independent moral, political, or other normative value, having been recalled from rightful oblivion to provide ostensible legitimacy for an institution badly in need of genuine justification. When aimed at economic accounts of tort law, the ad hoc deficiency holds that the theory in question (EAL itself) illegitimately determines the contours of that which is to be explained (tort law).⁶¹ When directed at corrective justice accounts, the deficiency holds that the explanatory theory (corrective justice) is illegitimately conjured up to fit that which must be made to appear normatively intelligible (tort law).

The best response to this version of the ad hoc deficiency is to show the general plausibility, power, and range of corrective justice. This Coleman and Weinrib have endeavoured to do and, while their accounts of corrective justice certainly face some problems, they cannot be said to have failed in this task. Corrective justice is now the central idea in philosophy of tort law and this is in the main a result of the work of these two jurists. The idea remains interesting and fruitful, which is surely enough to undermine the claim that it was conjured up in a vain attempt to support the unsupported. Coleman and Weinrib also have ready but not completely unproblematic replies to the first objection. Weinrib's reply consists of his understanding of what it is to give a non-functional, immanent, or internal account of law in general and tort law in particular.⁶² On this view, the distance between

⁶⁰ The objection is most often aimed at Weinrib. See Robert L. Rabin, "Law for Law's Sake", Book Review of *The Idea of Private Law* by Ernest J. Weinrib, (1996) 105 Yale L.J. 2261 at 2269 (Weinrib's account of tort law allegedly suffers, among other ailments, from being "reflexive" and "hermetic"). The general issue is best explored in Stone, "On the Idea of Private Law", *supra* note 31.

⁶¹ It was maintained in part II, above that this problem also besets Coleman's account of tort. See text accompanying notes 48-57, above.

⁶² *The Idea of Private Law*, *supra* note 6 at 1-22.

object and theoretical explanation is not as wide as on the view that informs the objection. Coleman's response is found in the notions of consilience and embodiment,⁶³ both of which serve to reduce the distance between object and explanation. Since the issue of corrective justice being too close a fit with tort law, and the related aspects of both Coleman's and Weinrib's methods that it raises, have already been subject to a good deal of analysis, they are henceforth set aside.⁶⁴

This does not mean, however, that the issue of fit can be completely sidestepped: it simply arises in a different form. An altogether more unusual and relatively recent objection to the corrective justice accounts of tort law offered by Coleman and Weinrib has been formulated by Benjamin Zipursky.⁶⁵ It is unusual because, as opposed to accepting the assumption informing both objections just noted, Zipursky rejects it. Rather than arguing that corrective justice is too close to that which it supposedly explains and makes normatively intelligible, Zipursky maintains that it is in fact too far away. He claims there are at least two fundamentally significant features of tort law that corrective justice, as articulated by Coleman and Weinrib, does not but should accommodate. Zipursky is therefore likely either to reject Coleman's view that corrective justice provides the best normative explanation of tort law, or to hold that it is indeed the best available normative explanation but that, as such, it is still not very good. Two questions immediately arise about Zipursky's challenge to corrective justice accounts. First, what are the features that these accounts should but do not accommodate? Second, why must these features be accommodated by any acceptable account of tort law?

A. Substantive Standing and the Liability to Correct

The first feature is what Zipursky calls the "substantive standing" rules of tort law.⁶⁶ These hold that "a plaintiff cannot win unless the defendant's conduct was a wrong relative to her, i.e., unless her right was violated."⁶⁷ Substantive standing rules

⁶³ *The Practice of Principle*, *supra* note 6 at 37-102.

⁶⁴ See e.g. Lucy, "Rethinking the Common Law", *supra* note 48; Stone, "On the Idea of Private Law", *supra* note 31; Zipursky, "Pragmatic Conceptualism", *supra* note 14. Methodological matters also underlie some of the reservations expressed in Rabin, *supra* note 60 and are central to Martin Stone's scrupulous "The Significance of Doing and Suffering" in Gerald J. Postema, ed., *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 131. For the best general treatment of these and related issues as they arise for philosophy of private law, see N.E. Simmonds, "The Possibility of Private Law" in John Tasioulas, ed., *Law, Values and Social Practices* (Aldershot: Dartmouth, 1997) 129.

⁶⁵ See e.g. Benjamin C. Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 *Geo. L.J.* 695 [Zipursky, "Civil Recourse"]; Benjamin C. Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts" (1998) 51 *Vand. L. Rev.* 1 [Zipursky, "Rights, Wrongs, and Recourse"]. For two other interesting instalments of this project, see Benjamin C. Zipursky, "Philosophy of Private Law" in Coleman & Shapiro, *supra* note 43, 815; Zipursky, "Pragmatic Conceptualism", *supra* note 14.

⁶⁶ "Rights, Wrongs, and Recourse", *ibid.* at 10.

⁶⁷ *Ibid.* at 4.

"state[] the conditions under which an individual is ... empowered to act against a defendant: only when she has been legally wronged by the defendant, only when her own legal right has been violated by the defendant."⁶⁸ Thus described, substantive standing rules seem simultaneously obvious and mysterious. For lawyers and many nonlawyers alike, it goes without saying that legal action for tortious wrongs can be brought only by one who was a victim of the alleged wrongdoer's conduct. Since this is obvious, it seems mystifying how the legal rules that elaborate this point within the context of particular torts can present a problem for accounts of corrective justice. Surely there is no chance of these accounts overlooking these rules? Zipursky's answer is clear: the substantive standing rules are indeed overlooked by corrective justice accounts of tort law.

The operation of the substantive standing rules is probably best illustrated by Zipursky's example, the famous New York case of *Palsgraf v. Long Island Railroad*.⁶⁹ An employee of the defendant railroad company negligently shoved a passenger onto a departing train. As a result, the passenger dropped the box he was carrying that contained fireworks. The fireworks exploded on impact and the explosion dislodged some scales at one end of the platform. The scales fell and injured the claimant. The claimant sued the railroad company in negligence for the personal injury suffered. It was accepted that the defendant had been negligent and some of the judges also conceded that there was a causal connection of sorts between his breach of duty and the claimant's harm. The claimant's action nevertheless failed because the harm to her was not a reasonably foreseeable result of the defendant's breach. In giving the majority judgement, Chief Justice Cardozo held, *inter alia*, that "[r]elatively to [the claimant], there was no negligence at all," and that "[w]hat the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'wrong' to anyone."⁷⁰ The requirement in *Palsgraf* that the claimant establish that she was wronged is, for Zipursky, a standing rule:

It concedes that the defendant has violated a legal norm and that the plaintiff is injured, but specifies how the plaintiff must be situated in order to have a right of action against the defendant. The criterion offered for standing, according to the analysis in *Palsgraf*, is that the plaintiff herself must have been legally wronged (her right must have been violated) under the substantive norm in question—in this case, negligence. Because the criterion for standing offered by this rule is in this sense substantive, I shall refer to it as the "substantive standing rule."⁷¹

According to Zipursky, there are many similar rules in other areas of tort law. This claim, like that about *Palsgraf* in particular and negligence in general, is surely undeniable.

⁶⁸ *Ibid.* at 5.

⁶⁹ 162 N.E. 99, 248 N.Y. 339 (App. Ct. 1928).

⁷⁰ *Ibid.* at 99-100.

⁷¹ "Rights, Wrongs, and Recourse", *supra* note 65 at 10.

Zipursky thinks corrective justice accounts of tort law fare badly when faced with the substantive standing rules. He says that

in a wide range of cases, tort law declines to impose liability on defendants in favor of the bearers of ... wrongful losses. Being the bearer of a wrongful loss for which the defendant is responsible is therefore not sufficient to generate liability to the plaintiff. ... [T]his observation undercuts the claim, inherent in corrective justice theory, that ... tort law is based on a principle that those who wrongfully injure others have a duty to repair for the losses flowing out of those injuries for which they are at fault.⁷²

Slightly more equivocal is Zipursky's view of how corrective justice accounts fail in their treatment of these doctrinal rules. For, despite the unambiguous nature of the statement just quoted—which appears to commit Zipursky to the claim that corrective justice accounts and the substantive standing rules are incompatible—he makes other statements in which the problem is less severe. So, on at least one occasion his language suggests that the problem is that corrective justice accounts offer an implausible explanation of the substantive standing rules. On another, he conceives the difficulty as an oversight, corrective justice accounts being incompletely cognizant of the substantive standing rules.⁷³ And it is also possible, though the textual evidence is weak, that Zipursky thinks the problem is instead that corrective justice accounts fail to provide a respectable normative justification for substantive standing rules.

The strongest version of Zipursky's argument holds that corrective justice accounts are incompatible with the substantive standing rules. This is stronger than either the claim that corrective justice accounts offer an implausible explanation of these rules or that they overlook them. Since an implausible explanation might be made plausible, the implausibility accusation is hardly fatal. Furthermore, this accusation brings in its wake questions about why that which is supposedly implausibly explained *must* be explained and about the criteria of "plausibility". Nor does oversight, though certainly a failing, entail incompatibility. That corrective justice accounts of tort law overlook some feature of the law does not mean that such accounts lack the capacity to explain that feature. And since Zipursky apparently sidesteps the issue of the normative justification for substantive standing rules,⁷⁴ it seems unlikely that his complaint against Coleman and Weinrib is that they offer an implausible normative justification for these rules. An important issue to be addressed is, then, Zipursky's incompatibility claim and its supporting arguments. Before turning to it—the task is undertaken in section B—Zipursky's other argument

⁷² "Civil Recourse", *supra* note 65 at 714.

⁷³ "Rights, Wrongs, and Recourse", *supra* note 65 (corrective justice "has difficulty accommodating the substantive standing rule" at 79); "Civil Recourse", *ibid.* (corrective justice "misses the true structure of tort law" at 754). If one misses something, one can be reminded of it; that something is difficult to accommodate does not mean that it is impossible to accommodate.

⁷⁴ "Rights, Wrongs, and Recourse", *ibid.* at 5-6.

showing the allegedly great distance between corrective justice accounts and the details of tort law must be stated. This is the “liability to correct” argument.

The second feature of tort law that corrective justice accounts must fit, according to Zipursky, is its conferral, upon claimants, of a power to take legal action against defendants. Correlative to this, tort law subjects defendants to a liability to correct the wrong they have done. Zipursky is surely right about this. It is, first, false that claimants have a duty in tort law to sue those who have allegedly committed torts against them. Claimants can bring legal action if they wish, but they are not obliged to do so. At most they have a Hohfeldian power to bring legal action.⁷⁵ Second, it seems mistaken to think that a defendant has a tort law duty to repair the wrong she has allegedly done to the claimant prior to the claimant exercising the power to bring legal action and a court deciding that the defendant is indeed liable. The most that can be said here is that the defendant faces a potential Hohfeldian liability to correct the alleged wrong; that, of course, is quite different from having a duty to correct that wrong.⁷⁶ In normal circumstances, a genuine legal duty must be discharged as soon as it arises and is, within some limits, strict. Such duties cannot be sloughed off because they are inconvenient or demanding. A legal liability, by contrast, is inert until such as time as it is triggered and there is no guarantee it will ever be triggered and converted into a duty. Further, the “inert-ness” of liabilities in tort law is evident from the fact that claimants have no duty to pursue legal action.

The import of these two seemingly incontrovertible points is, according to Zipursky, clear: corrective justice accounts of tort law do not appreciate the first and thus cannot accommodate the second. This is because corrective justice accounts hold that tort law embodies two principles:

[T]he law of torts embeds a principle, stating that one who wrongfully injures another is responsible for the losses he or she creates. It contains another principle, to the effect that one who is responsible for another's loss also has a duty to repair that loss. Hence, a defendant who wrongfully injures a plaintiff is responsible for the loss she creates in the plaintiff. It follows that defendants have a duty to repair plaintiff's losses. By imposing liability upon defendant to the plaintiff, tort law is recognizing this duty from defendant to the plaintiff.⁷⁷

Corrective justice accounts err because of their commitment to the second principle. For, “even with paradigmatic ‘duty of repair’ cases under the tort law, corrective justice theory inaccurately describes the structure of a duty of repair by failing to respect the distinction between a liability and an affirmative duty to pay.”⁷⁸ While there are many affirmative legal duties to pay—the legal obligation to pay taxes is one—there is no such duty in tort law:

⁷⁵ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1923) at 50-60.

⁷⁶ See *ibid.* at 36-38.

⁷⁷ “Civil Recourse”, *supra* note 65 at 709 [footnotes omitted].

⁷⁸ *Ibid.* at 710.

[A] defendant's tortious injury to another does not give rise to a [legal] duty of repair unless that defendant has, at a minimum, been sued. The defendant does not ordinarily have a freestanding legal obligation to pay independent of any action against her. ... [F]ailure to pay does not breach any statute, private agreement, or principle of the common law requiring payment prior to suit, if in fact the tort was committed. The defendant remains legally entitled to his or her money at least prior to judgment. Tortfeasors may, as a legal matter, wait to be sued. They will face no additional liability for bad faith failure to pay, even if they have sufficient reason to know that they committed a tort and that a plaintiff will likely prevail against them in litigation, and even if the conditions are such that a moral duty to pay may be recognized. Declining to pay is well within the defendant's legal rights in every sense.⁷⁹

Zipursky clearly thinks that corrective justice accounts espouse a principle that wrongdoers have a duty to correct their wrongs, while the law does not espouse this principle. He also thinks this more than a minor misdescription. Its significance, though, is difficult to fathom, for it is uncertain how such a misdescription can become so fundamental as to completely undermine corrective justice accounts.

What is needed here is just what was needed with respect to rules of substantive standing: an argument showing that these features of tort law are crucially important. The argument Zipursky offers to this end is methodological. He claims that the method most likely to illuminate the nature of tort law is "pragmatic conceptualism".⁸⁰ As against functionalist approaches, the predominant instance of which is EAL, pragmatic conceptualism does not explain tort law by reference to whatever goals the institution and its practices serve, either intentionally or unintentionally. Rather, the pragmatic conceptualist's

methodological premise [is] that an account of the law is inadequate if it fails to provide an analysis of the concepts embedded within the law. ... A rough and preliminary version of this argument and its application is as follows: Analyzing the concepts embedded within legal materials is necessary to identify the content of those legal materials; identifying the content of those legal materials is necessary to state what the law is; a theory of the law is inadequate if it cannot state what the law is; thus, an account of the law is inadequate if it does not provide an analysis of the concepts embedded within legal materials.⁸¹

If Zipursky's characterization of philosophical pragmatism is correct, and the doctrine itself plausible, then our practices and institutions "are partially constitutive of our ways of thinking ..."⁸² Thus "the understanding of legal concepts requires an understanding of the structure of practical inferences in which our legal concepts and

⁷⁹ *Ibid.* at 720.

⁸⁰ *Ibid.* at 706; "Pragmatic Conceptualism", *supra* note 14.

⁸¹ "Civil Recourse", *ibid.* at 705. For a similar statement, see Zipursky, "Pragmatic Conceptualism", *ibid.* at 465-66.

⁸² Zipursky, "Civil Recourse", *ibid.* at 707.

principles are involved.”⁸³ Seen in this light, corrective justice accounts of tort law hold that

[w]hat is essential to tort law’s structure is that courts infer from a defendant’s wrongful injuring of a plaintiff that the defendant must compensate the plaintiff for the injury ... Corrective justice theory explains this pattern in terms of a principle that states that one who has wrongfully injured another has a duty of repair ... to the victim. The key to understanding the structure of the law is simply understanding that principle.⁸⁴

The substantive standing rules and the liability to correct are obviously embedded in tort law and must therefore be explained in such a way as to illuminate the inferences they license and their animating principles. If Coleman and Weinrib are indeed pragmatic conceptualists, then they must offer “an explanation of the concepts and principles that are in the law, as these concepts and principles appear on their face and as they are deployed in ordinary inferences by legal participants.”⁸⁵

The methodological import of pragmatic conceptualism is much the same as the methodological injunction outlined in part II. The principal difference is one of pedigree, the latter tracing Coleman’s and Weinrib’s methodological commitments to broadly Hartian and social-scientific roots, the former placing them within the tradition of American philosophical pragmatism (or naturalism).⁸⁶ That the two approaches are not necessarily incompatible is, of course, obvious; nor is it a surprise that the philosophical and social-scientific roots of this methodological commitment are diverse. Equally obvious is that an approach that explicitly insists on accounts of practices and institutions taking up the participants viewpoint is more immediately subject to the problems outlined in part II than is pragmatic conceptualism. This does not imply that pragmatic conceptualism is immune to these or closely related problems since, on Zipursky’s account, pragmatic conceptualism is also committed to taking the participants’ viewpoints seriously.

The arguments from substantive standing and liability to correct are only two of the three that Zipursky offers against corrective justice accounts.⁸⁷ What follows illustrates three substantial weaknesses (two of which overlap) in these two arguments. The conclusion is that the gap that exists between corrective justice accounts of tort and the detail of the law itself is nowhere near as troubling as Zipursky suggests. The argument is that some degree of distance between the two should be expected and thus that this aspect of the fit issue is not problematic. In this context, in which normative (usually moral or political) theories are invoked to cast

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at 705.

⁸⁶ For a helpful discussion of American philosophical naturalism and its jurisprudential echoes, see Brian Leiter, “Naturalism and Naturalized Jurisprudence” in Bix, *supra* note 46, 79.

⁸⁷ The third, which highlights the variety of remedies in tort law, is not considered here. See Zipursky, “Civil Recourse”, *supra* note 65 at 710-13. Nor is Zipursky’s intriguing discussion of the true nature of both tort and private law. See “Philosophy of Private Law”, *supra* note 65.

light upon the features of institutions and practices, these “problems” might instead illuminate the nature of the task as opposed to failures in its execution. Some degree of distance—or a certain lack of fit—between normative explanatory theory and the detail of the law might be unavoidable. That, at least, is the argument offered here.

B. Three Problems

The first two problems affect Zipursky’s argument from substantive standing. The strong version of this argument holds that corrective justice accounts of tort are incompatible with the rules of substantive standing. One problem here is that this incompatibility is bogus, primarily because Zipursky gives too little attention to the related notions of wrongfulness and wrongdoing in both tort law and corrective justice. It is argued that, insofar as corrective justice theories invoke notions of wrongfulness and wrongdoing, they are clearly not incompatible with the standing rules of tort law. If that is correct, then the focus must shift to the plausibility of what corrective justice theories say about the standing rules. And what they say about those rules might be internally incoherent or otherwise implausible. This presents a second problem for Zipursky. For, if his implausibility charge against corrective justice accounts of the standing rules in part insists that these accounts do not adequately fit those rules, then he sets an unrealistically high threshold for corrective justice (or any other) accounts of tort law. That is the second argument offered below. Its substance is the same as the argument that underpins the third problem, though the latter besets Zipursky’s argument from the liability to correct rather than the argument from substantive standing.

1. Two Problems with Substantive Standing

Zipursky claims, not unimpeachably, that “the fundamental basis of corrective justice theory ... is that justice requires that a tortfeasor restore those whom his *wrongdoing* has injured.”⁸⁸ This captures much of what Coleman and Weinrib have to say about corrective justice, provided that “tortfeasor” is replaced with “wrongdoer”.⁸⁹ Zipursky’s additional statement that corrective justice theories “claim[] that ... tort law, in recognizing and enforcing legal duties of repair [for wrongdoing], can be understood as an *embodiment* of”⁹⁰ corrective justice also captures the tenor of much of what Coleman and Weinrib say. What, then, is the problem?

According to corrective justice theory, the fact that a plaintiff has suffered harm as the result of a defendant’s *wrongdoing* is what triggers an obligation on the part of the tortfeasor, and should therefore trigger liability. As a *wrongdoer*, the

⁸⁸ “Rights, Wrongs, and Recourse”, *supra* note 65 at 71 [emphasis added].

⁸⁹ Coleman, *Risks and Wrongs*, *supra* note 6 at 318-24, 361-85; Coleman, *The Practice of Principle*, *supra* note 6 at 55-59; Weinrib, *The Idea of Private Law*, *supra* note 6, c. 3.

⁹⁰ Zipursky, “Rights, Wrongs, and Recourse”, *supra* note 65 at 71 [emphasis added].

defendant should have to pay for the harm, because it is not fair that the innocent plaintiff should be made to bear the burden of the loss. ... [F]rom this perspective ... the substantive standing cases appear most problematic. Beginning with *Palsgraf* itself, we have a completely innocent plaintiff who has suffered real harm as a result of something the defendant did, and we have a jury finding that the defendant acted tortiously. Why *not* make the defendant pay?⁹¹

As is explicit in this passage, Zipursky holds that while corrective justice accounts are committed to the defendant paying in such cases, the law is not. But matters are not quite as clear-cut as Zipursky thinks.

In *Palsgraf*, as we know, the answer to Zipursky's question was that the defendant should not be made to pay because his conduct was not a wrong to the claimant. From the perspective of Coleman's and Weinrib's accounts of corrective justice, is there anything actually wrong with this answer? One thought suggests not: both accounts of corrective justice insist that a duty to correct arises only when there is a wrong or wrongdoing and, in tort law, "wrong" certainly does not mean the kind of free-floating wrong rejected by Cardozo in *Palsgraf* but rather wrong to a particular claimant. Moreover, this notion of wrongfulness and wrongdoing must be expanded further to adequately represent the law, since in order for some aspect of the defendant's conduct to be a wrong to a particular claimant it must interfere with some or other of the claimant's legally recognized interests.⁹² Indeed, the interference might actually have to take a particular form to be legally recognized. But, since both Coleman and Weinrib insist that a corrective justice duty arises only in the presence of wrongfulness or wrongdoing, how are their accounts of corrective justice incompatible with the standing rules, which themselves tell us what some "wrongs" must look like in order also to be torts?

It is true that the accounts of wrongs and wrongdoing offered by Coleman and Weinrib lack the detail of tort law's catalogue of wrongs and wrongdoing.⁹³ Unsurprisingly, the law's catalogue is not identical to those provided by these two theories of corrective justice, but non-identity is not incompatibility. Tort law's catalogue of wrongs and wrongdoing is found in the doctrinal requirements for each and every tort—doctrinal requirements that, when examined carefully, disclose both the interest or range of interests protected by the tort in question, the range of interference prohibited, and the type(s) of conduct that can bring about such interference. The law's catalogue of wrongs and wrongdoing is thus constructed from both the perspective of claimants and their protected interests, and defendants and

⁹¹ *Ibid.* at 72 [emphasis added, last emphasis in original].

⁹² Some jurists draw a distinction between wrongs and wrongdoing (see Coleman, *Risks and Wrongs*, *supra* note 6 at 330-31), but this is not always helpful. In the text I use "wrongdoing" and "wrongfulness" interchangeably, though I have offered reasons elsewhere why the latter is preferable and what its components are. See Lucy, *Philosophy of Private Law*, *supra* note 58 at 206-24.

⁹³ Coleman, *Risks and Wrongs*, *ibid.* at 329-60; Weinrib, *The Idea of Private Law*, *supra* note 6 at 63-66.

their conduct. And the substantive standing rules can plausibly be viewed as one element of this catalogue. That Coleman and Weinrib say little about the detail of these rules (they do not actually address them at all under this rubric) might be a problem, but insofar as both insist that there must be wrongfulness/wrongdoing in order to trigger a duty to correct, it is mistaken to maintain that their position is actually incompatible with these rules. The most that can be said is that their accounts of wrongs and wrongdoing are not the same as those contained in the law and this, clearly, is a matter of plausibility rather than incompatibility.⁹⁴ If it is a lack of identity between Coleman's and Weinrib's accounts of wrongs and wrongdoing, on the one hand, and the account of wrongs and wrongdoing latent in tort law, on the other, that makes corrective justice theories implausible, then the criteria of plausibility must be made explicit.

Two observations suggest that the real dispute between Zipursky, on the one hand, and Coleman and Weinrib, on the other, is (despite initial appearances) about the plausibility of the account the latter give of substantive standing. First, both Coleman and Weinrib make some effort to unpack the components of their theories, particularly notions like fault, wrong, and wrongdoing, so as to show that corrective justice makes sense of tort law. Their arguments to this end could well be extended to include the standing rules. The second observation is that Zipursky spends some time attempting to undermine these efforts.⁹⁵ Weinrib offers an account of *Palsgraf* that is in substance much the same as Zipursky's;⁹⁶ what Zipursky finds objectionable about it is that it apparently commits Weinrib to a Hohfeldian correlative between a claimant's right to repair and a defendant's duty to correct. This, says Zipursky, mixes up primary rights and duties with secondary remedial rights and duties.⁹⁷ While this particular point might be well made, it is not the important issue here. The important issue is this: Weinrib's account of corrective justice does indeed labour to elucidate the significance of the relationship between claimant and defendant. His theory is thus concerned with just the issue that informs the rules of substantive standing. For Weinrib, as a matter of corrective justice theory, a wrongdoer only owes a duty to correct to one she has wronged, in the specific sense of having infringed a specific protected interest. And, as a matter of tort law, this is the import of the standing rules.

Coleman's account of corrective justice also might have the resources to explain the standing rules. Coleman holds that for conduct to be a tortious and a corrective justice wrong, it must be faulty and the harm it creates must "fall[] within the scope of the risks" that make it faulty.⁹⁸ Zipursky's objection to this is twofold. First, the argument turns "the notion of 'fault' into something that is purely a construction of the 'nexus-requirement' that seems to exist in our actual tort law" and thus Coleman

⁹⁴ See Zipursky, "Civil Recourse", *supra* note 65 at 716-18.

⁹⁵ See e.g. "Rights, Wrongs, and Recourse", *supra* note 65 at 70-79.

⁹⁶ Weinrib, *The Idea of Private Law*, *supra* note 6 at 159-64.

⁹⁷ "Rights, Wrongs, and Recourse", *supra* note 65 at 74-75.

⁹⁸ *Risks and Wrongs*, *supra* note 6 at 346.

fails to show "why this nexus-requirement is ... a necessary constituent of when a loss is a defendant's 'fault.'"⁹⁹ Second, he observes that, as a matter of tort law doctrine, defendants are sometimes liable for losses beyond the scope of the risk that makes the conduct faulty.¹⁰⁰

We have, then, a series of apparently minor disagreements between Zipursky, on the one hand, and Coleman and Weinrib, on the other, about how the standing rules are best explained as a matter of theory. Zipursky undoubtedly aims to show that the accounts of the standing rules provided by Coleman and Weinrib are either internally implausible or otherwise problematic. But it is also clear that he does not succeed. Or, at least, he is far from showing that either Coleman's or Weinrib's account of the standing rules is fatally flawed. Think, for example, of Zipursky's response to Weinrib. Surely it is just a minor argumentative misstep on Weinrib's part that has led him to mix up primary and secondary rights. It seems fairly easy to carry out the necessary amendments to Weinrib's argument suggested by Zipursky's observations without in any way seriously undermining the overarching account of corrective justice. Of course, if Weinrib's intention is that his account of corrective justice must offer an accurate description of each and every feature of tort law, then this suggestion is unacceptable. But why think that Weinrib's theory is intended to be, or should be, descriptive in this very stringent sense? Zipursky's argument against Coleman embodies an equally dubious assumption. Zipursky thinks that Coleman, in arguing that corrective justice makes tort law normatively intelligible, is duty bound to demonstrate the (surely normative) necessity of features of the law like the "nexus-requirement". Why? Why must a theory explain—in the sense of showing the normative necessity of—each and every feature of its object? This seems a particularly demanding standard of theoretical success.

It is clear that Zipursky must have a view of what an adequate account of the standing rules look like. It is also clear that he thinks the accounts offered by Coleman and Weinrib inadequate. It is therefore important to articulate the criteria of adequacy in play here. That task is, however, difficult because Zipursky himself gives no detailed account of the standing rules. He is often content to show only that they pose a problem for corrective justice as "a positive [descriptive] theory of tort law."¹⁰¹ Yet because he seems convinced that the standing rules must be *explained in some detail* by corrective justice theories, we have some implicit guidance on this matter. Explaining the standing rules in some detail seems to mean, according to Zipursky, showing their normative necessity, explaining their form, and, perhaps, explaining their substantive content. It is thus not enough, on Zipursky's view, for corrective justice theories simply to be compatible (or not incompatible) with these rules. The obvious question is, of course, this: why must theories of corrective justice, which are

⁹⁹ Zipursky, "Civil Recourse", *supra* note 65 at 718.

¹⁰⁰ *Ibid.*

¹⁰¹ "Rights, Wrongs, and Recourse", *supra* note 65 at 71.

primarily intended to make tort law normatively intelligible, fit or accommodate the detail, form, and substance of this specific segment of legal doctrine?

At this point recourse might be had to the methodological implications of pragmatic conceptualism. If Coleman and Weinrib are indeed pragmatic conceptualists, as Zipursky thinks they must be, then their theories should give an account of the concepts embedded in the law. The doctrine of substantive standing clearly is one such concept (or body of concepts) and it also licenses and thus explains a range of “ordinary inferences [made] by legal participants.”¹⁰² If Coleman and Weinrib cannot account for these rules, or if they offer implausible accounts of them, then their theories fail to satisfy their own methodological commitment. There is, however, room to question some of the alleged implications of this commitment.

One such implication seems to be this: pragmatic conceptualism insists that all accounts of an institution must fit each and every one of its features in form, detail, and substance. So, a corrective justice account of tort law must fit, in the sense of providing an account of their normative basis or intelligibility, all the doctrines and features of tort law. But simply stating this supposed implication shows its implausibility: as a criterion of theoretical adequacy, it is much too demanding. This seems particularly obvious when some participants in a practice or institution themselves regard aspects of it as beyond the pale of normative intelligibility. This is often true of some or other aspect of legal doctrine or process and all participants—practitioners (including judges and lawyers) and commentators (academic and other)—give vent to such views at some point. While historians and sociologists might offer interesting accounts of how and why currently objectionable doctrines became rooted in the law, it does not follow that it is incumbent upon jurists to make such doctrines normatively intelligible. Participants can and do regard such doctrines as mistakes, inconsistent with the rest of the law and its constitutive values. Why, by contrast, are jurists bound to accommodate such doctrines?

Moreover, even if the substantive standing rules are regarded by participants as morally and politically unimpeachable, this still does not dictate that an account of the normative basis of tort law must accommodate them. The question of which features of an institution a theory of the institution must accommodate is surely open, except in one sense: a theory must accommodate enough of an institution and its practices to count as being about that institution and its practices. But this is so minimal a requirement that all (or almost all) of the theoretical accounts of tort law currently available, including those offered by Coleman, Weinrib, and proponents of EAL, are likely to satisfy it. How, then, are we to choose between these accounts? One way is on the basis of which theory accommodates most of the law’s features. The snag here is to articulate why a theory that accommodates more is better. An alternative basis for this choice is to adopt the theory that accommodates more of what the participants in the institution regard as significant about it but, if participants

¹⁰² Zipursky, “Civil Recourse”, *supra* note 65 at 705.

do not speak with one voice on this issue, the problems highlighted in part II simply recur. Yet another possibility is to choose the theory that best captures those features of the institution regarded as morally significant by some participants.¹⁰³ But, in the absence of unanimity among participants, the difficulties encountered in part II arise again.

For present purposes, the crucial point is not how this choice should be made. Rather, the important issue is what all three responses just canvassed have in common. What they share is that each accepts the possibility of a lack of fit between normative account, on the one hand, and some features of the institution to be explained, on the other. If, by contrast, Zipursky's pragmatic conceptualism insists on an exact fit between normative account and each and every feature of the institution to be explained, then it is a truly exceptional and demanding approach.¹⁰⁴ If, as a general matter, accounts of institutions, practices, or segments of conduct must fit every aspect of such institutions, practices, and conduct—if no feature can fall beyond the reach of the proffered explanation—then a satisfactory account or theory seems impossible.

Zipursky undoubtedly thinks corrective justice theories must accommodate the substantive standing rules. It does not necessarily follow from this that he also thinks corrective justice theories (or any other kind of theory, for that matter) must fit all the fine doctrinal details of tort law. He could hold, for instance, that some doctrinal details—the rules of substantive standing perhaps—are more important, and thus deserving of more theoretical attention, than others. But whatever option Zipursky favours faces difficulties. If the latter, then a compelling argument must be provided to show why some doctrinal details are more important than others. So far, we have been unable to find such an argument. If the former, then he needs an argument to rebut that which follows. It consists of three general considerations that suggest it is a mistake to expect any particular moral or political theory—whether or not corrective justice is one of its constituents—to explain or make normatively intelligible the fine details of some or many legal doctrines.¹⁰⁵ Since they serve to undermine Zipursky's argument from the liability to correct as well as the argument emerging from

¹⁰³ For a superb treatment of how a choice akin to this becomes salient at the level of general legal theory, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 3-22.

¹⁰⁴ There is, for example, no such demanding requirement of fit in the most ambitious account of law and adjudication we currently have. See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth Press, 1978) at 118-23; Ronald Dworkin, *Law's Empire*, *supra* note 23 at 227-60.

¹⁰⁵ Henceforth I speak only of "moral theories" but also include under that rubric political morality. Coleman and Weinrib have different views as to corrective justice's status within our scheme of moral and political values. For examples, see Lucy, *Philosophy of Private Law*, *supra* note 58 at 259, n. 16. The argument these three considerations generate is neither *prima facie* incompatible with pragmatic conceptualism nor does it obviously collapse into an objectionable functionalism. See Zipursky, "Pragmatic Conceptualism", *supra* note 14 at 463-67, 474-78. It cannot therefore be briskly rejected by Zipursky.

substantive standing, these considerations are elucidated in the following subsection. Taken together, the three considerations amount to an argument from “bluntness”.

2. Bluntness and the Liability to Correct

Zipursky’s argument from the liability to correct highlights a tension. It is between tort law and what for Coleman and Weinrib is a fundamental principle of corrective justice. The principle holds that one who wrongfully injures another has a duty to correct the harm done to the victim, while tort law contains no such principle. The most that can be said of the law is that it subjects defendants to a liability to correct the tortious wrongs they do, that liability only becoming a duty once a court has ruled in the claimant’s favour.¹⁰⁶ What is the force of this point? One thing to note is that there is no secure ground from which to challenge the principle of corrective justice that Zipursky says is in play here. While a number of textual quibbles might be raised, there is little genuine doubt that Coleman and Weinrib are committed to something like that principle, either directly because they espouse it or something like it explicitly, or indirectly, by virtue of the other things they say. Since Coleman and Weinrib are committed to this principle, then surely their theories are undermined by Zipursky’s argument?

Not necessarily. Much depends on the scale of this “mismatch between the theory and the law,”¹⁰⁷ on whether or not principles of corrective justice must be an exact characterization of the law, and on what it means to claim that such principles are “embodied”¹⁰⁸ or “exemplified”¹⁰⁹—or “internal to”,¹¹⁰ “immanent in”,¹¹¹ “inherent in”,¹¹² or “make sense of”¹¹³—the law. Both Coleman and Weinrib make one or more of these latter claims about corrective justice and its components, yet neither regards corrective justice as a descriptively accurate statement of some or all segments of tort law doctrine. Indeed, their actual usage of these terms suggests that they see the relation between principles of corrective justice and tort law as altogether looser than that between an object and a descriptively accurate proposition about that object. So, when Coleman says that “the central concepts of tort law ... hang together in a set of inferential relations that *reflect* a principle of corrective justice,”¹¹⁴ it seems plainly uncharitable to interpret this as meaning that the principle in question describes legal doctrine. Similarly, Weinrib’s claim that corrective justice and Kantian right are components of an internal account of tort law certainly does not commit him to the

¹⁰⁶ See Zipursky, “Civil Recourse”, *supra* note 65 at 718-30.

¹⁰⁷ *Ibid.* at 724.

¹⁰⁸ Coleman, *The Practice of Principle*, *supra* note 6 at 8.

¹⁰⁹ *Ibid.*

¹¹⁰ Weinrib, *The Idea of Private Law*, *supra* note 6 at 11.

¹¹¹ *Ibid.* at 23.

¹¹² Coleman, *Risks and Wrongs*, *supra* note 6 at 7.

¹¹³ Coleman, *The Practice of Principle*, *supra* note 6 at 8.

¹¹⁴ *Ibid.* at 9-10 [emphasis added].

view that either component is a description of some segment of legal doctrine; these components, remember, are “*implicit* in the functioning of private law.”¹¹⁵ They confer normative intelligibility upon doctrine and its structure; in doing so, it seems unlikely that they must also describe the details of doctrine.

If it is wrong—at least with regard to Coleman’s and Weinrib’s theories—to expect principles of corrective justice to be exact replicas of tort law doctrines, then the fact that those principles do not accurately characterize the liability to correct is not particularly troubling. Moreover, any residual worry about this mismatch is dissipated by this thought: it is surely possible to have a duty in morality that is embodied as a liability in law and a liability in morality or politics (to pay taxes, perhaps) that is a duty in law. Both possibilities are likely if the law sometimes serves to make some moral duties both more precise and more tractable.¹¹⁶ Denying the possibility of a disjunction here comes close to assuming an exact overlap between both the modal form and substantive content of a specific critical or positive morality and the law. This assumption betrays a crass legal moralism, whose hallmark is that the law should incorporate exactly the form and content of a specific critical or positive morality.¹¹⁷ Such a legal moralism clearly cannot be accepted without argument. Furthermore, the first of the three considerations that make up the argument from bluntness suggests that, as an empirical matter, such a legal moralism is unlikely to take hold in common law systems.

The consideration is this: common law systems are subject to a range of entropic forces that weigh against them embodying exactly a specific critical morality. In large part the tort law of the common law world is the work of many judicial minds, rarely acting in concert and deciding many, many cases over a couple of centuries or so. That the outcomes of this process of plural (but rarely group) deliberation will neatly cohere with the content of a specific critical morality seems unlikely, if only because of the numbers of people and the time scale involved.¹¹⁸ Further, while the blueprint provided by a critical morality might quite easily be embodied and internalized in one person’s life and conduct, it is surely very unlikely to be easily translated into the decisions of many judges over decades or centuries. In addition, the discursive common law system of adjudication, in which each judge sitting in an appellate case is entitled to give their reasons for deciding a case one way rather than another, might well undermine a rigid legal moralism. This is principally because even in a

¹¹⁵ Weinrib, *The Idea of Private Law*, *supra* note 6 at 20 [emphasis added].

¹¹⁶ For a helpful exploration of this theme, see Tony Honoré, “The Dependence of Morality On Law” (1993) 13 *Oxford J. Legal Stud.* 1.

¹¹⁷ The distinction between critical and positive moralities is drawn, albeit somewhat allusively, by H.L.A. Hart in *Law, Liberty and Morality* (Stanford: Stanford University Press, 1977) at 20-24. For two examples of not particularly crass legal moralism, see Stephen, *supra* note 15; Devlin, *supra* note 15.

¹¹⁸ On the public and (limitedly) collective aspects of common law reasoning and adjudication, see Gerald J. Postema, “Philosophy of the Common Law” in Coleman & Shapiro, *supra* note 43, 588 at 594-95.

minimally pluralistic judicial context, such a position will undoubtedly be subject to the public scrutiny of other judges and, as a result, will likely be diluted.¹¹⁹ Finally, the pressure to decide cases—judges cannot postpone decision indefinitely—and the imperative to ensure that the legal system functions efficiently and in accord with common sense, mitigate against the law always and ever embodying the requirements of a specific critical morality. This kind of “systemic” consideration might well be either incompatible with those requirements or free from their influence, yet they are nevertheless salient for judges when deciding cases.¹²⁰ A gap can thus open between the requirements of law and those of a particular critical morality.

The fact that there is often a large degree of overlap between the positive morality of a society and its law does not provide succour for the legal moralist. The overlap that exists usually obtains only at the most general level. As a matter of positive morality, in our society it is most likely true that we think care should be taken against accidentally injuring others and that we should do as we undertake or promise. Both notions are also reflected in the law of our society. Yet it is far from clear that either notion can actually guide the application of the law in any meaningful sense. Why this might be so is explained by the second and third considerations that make up the argument from bluntness.

The second holds that particular legal doctrines and rules are blunt insofar as they “do not precisely embody any moral principle. Blunt laws are obliquely related to the values that they serve, and they may be so related to several distinct and perhaps incompatible values.”¹²¹ That some legal rules and doctrines appear perfectly compatible with different moral principles that might be generated by incompatible moral theories seems fairly obvious. The rule in the English contract case of *Williams v. Roffey Bros.*,¹²² for example, might just as well be supported by either deontological or utilitarian principles of either positive or critical morality. So, too, could many, many other rules of private law. Of course, it might be argued that the moral principles invoked to support the rule in *Williams v. Roffey* are not substantively different but are meta-ethically different. Substantively similar moral principles might, that is, be generated by moral theories that are incompatible in terms of what they regard as morally important, or different in terms of the account they offer of the nature, basis, and range of moral knowledge. If incompatible meta-ethical theories

¹¹⁹ The common system was (and perhaps still is) one in which judicial pluralism and diversity was rare. Interesting, historically informed thoughts on this issue are found in A.W.B. Simpson, “The Common Law and Legal Theory” in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) 77.

¹²⁰ Such considerations are most likely to form part of what Neil MacCormick calls “consequentialist” arguments in adjudication (*Legal Reasoning and Legal Theory* (Oxford: Clarendon Press 1978) at 129, c. 6).

¹²¹ N.E. Simmonds, “Bluntness and Bricolage” in Hyman Gross & Ross Harrison, eds., *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992) 1 at 12.

¹²² (1989), [1991] 1 Q.B. 1 (C.A.) [*Williams v. Roffey*] (merely doing what one is already contractually bound to do can be good consideration for a subsequent promise).

can converge in terms of their substance, then they could generate identical judgments on the rights and wrongs of legal decisions like *Williams v. Roffey*. Yet this does not undermine the point about the bluntness of some legal rules and doctrines; rather, it reinforces it. For, if different meta-ethical theories converge in substantive judgments, and those judgments are embodied in the law, how can the legal doctrines and decisions that embody them favour one meta-ethical theory over another? It is, instead, surely reasonable to expect such legal doctrines and decisions to be blunt between such competing meta-ethical theories.

It could be objected that the case in favour of legal doctrinal bluntness is made too easy by the assumption that legal doctrines should favour one meta-ethical theory over another. Deniers of bluntness might argue that they have no such expectation of legal doctrine. What they expect, rather, is that particular legal doctrines and rules will be supported by or compatible with only one substantive moral principle. If this is indeed their expectation, then the best way to show that it is reasonable is by producing supporting examples. In Zipursky's case, for instance, this could be done by showing that one and only one substantive moral principle supports the standing rule in *Palsgraf* and cognate rules throughout tort law. He does not attempt this task and an indication of its difficulty can be gleaned by considering almost any tort case. What single substantive moral principle, for example, uniquely supports the decision in *Donoghue v. Stevenson*?¹²³ Which moral principle, out of those available, is unique in its ability to support the ruling in *Bolton v. Stone*?¹²⁴ It is prima facie unlikely that such principles will be found. Rather, there is often either a glut of substantively (somewhat) different moral principles capable of supporting a single decision or doctrine, or no principle at all.

The possibility that some legal rules and doctrines can be completely without moral support, in the sense that neither a specific meta-ethical theory nor a particular substantive moral principle confers salience upon them, is the core of the third consideration. It is that moralities might themselves be blunt in the sense that they lack the wherewithal to either support or provide answers to specific legal doctrinal questions. This should not be a surprise. In broad terms, positive moralities are a matter of rules of thumb that engage only with the generalities of morally commendable and morally objectionable conduct. When faced with dilemmas and other instances of crisis, as well as with matters of detail, positive morality is least likely to guide us. Critical moralities can and sometimes are intended to fill this void, but building a complete theory of moral right and wrong on the basis of exceptional cases is itself problematic.¹²⁵ Whatever we might think about the capacity of both positive morality and particular critical moralities to generate answers to specific questions, one thing is clear: neither kind of morality appears well equipped to

¹²³ [1932] A.C. 562 (H.L.) (duty of care imposed on manufacturer to ultimate consumer of product).

¹²⁴ [1951] A.C. 850 (H.L.) (running the risk of foreseeable damage is not itself enough to establish liability in negligence).

¹²⁵ This is so because they are unlikely to be a good guide to the generality of our moral beliefs.

support or answer the specific, detailed doctrinal questions that arise in the appellate courts. Think again of *Williams v. Roffey*. Is it sensible to expect an answer from either positive or a critical morality to the question of whether doing what one is already contractually bound to do is good consideration for a subsequent promise? Or reasonable to think that morality, of whatever kind, generates a single answer to the question raised in cases like *South Australian Asset Management v. York Montague Ltd.*, about the range of a valuator's duty?¹²⁶

The answer to these questions is most likely a resounding “no”, and not only because some legal rules are “merely” matters of *determinatio* or convention.¹²⁷ It therefore seems that the condition Zipursky apparently sets for corrective justice theories to succeed—that they fit the form, substance, and detail of legal doctrine—is just too demanding. However, note that the argument from bluntness does not show that theories seeking to make tort law normatively intelligible can *never* make sense of the liability to correct or the standing rules; nor has it shown that corrective justice theories are *unable* to make sense of these two features. The argument has not even shown that corrective justice and other theories of tort law are *not required* to give an account of these particular features of the law. The argument has, however, cast doubt on the wisdom of expecting such theories to give an account of most or all of the doctrinal details that constitute any area of law. If it is persuasive, then this argument shows why it is a mistake to expect Coleman's and Weinrib's theories of corrective justice to accommodate, or to make normative sense of, features of tort law like the rules of substantive standing and the liability to correct. If that expectation is mistaken, then so, too, is criticism of these theories for failing to accommodate such features.

The arguments of this section have diagnosed a general problem in Zipursky's discussion of Coleman and Weinrib: he requires too close a fit between theory and object. Zipursky's apparent insistence that theories of corrective justice fit the form, detail, and substance of tort doctrine implies that the relation between theoretical accounts and their objects must be very close, more akin to that between human bodies and their skin than to that between human bodies and their clothing. It is time to address the question of the relation between theories (or accounts, explanations, or understandings) and their objects in more general terms. This is done in the following part, which is a brief effort to draw a general lesson from the arguments of parts II and III.

¹²⁶ [1996] 3 All E.R. 365 (H.L.).

¹²⁷ For a discussion of *determinatio*, see Finnis, *supra* note 103 at 284-89. Finnis suggests that while there is no “happy English equivalent” of *determinatio*, Hans Kelsen's suggestion of “concretization”, or possibly “implementation”, would be a rough equivalent (*ibid.* at 284, n. 16).

IV. Made-to-Measure Philosophy

A person who is trying to understand is exposed to distraction from fore-meanings that are not borne out by the things themselves.¹²⁸

It is a commonplace among most jurists that theoretical accounts of any area of the law, including tort, must fit some of the law's principal structural and doctrinal features. It is also often assumed that such accounts must, where possible, make those features both intelligible and normatively respectable. The import of the arguments in parts II and III is clear. First, they show that it is often unclear why some or other structural or doctrinal feature should be regarded as theoretically important and thus worthy of explanation. Second, they show that some such features may be beyond the reach of some normative explanations.

The requirement that nonskeptical accounts of tort law—or any other complex institution or set of practices—must fit the institution and attempt to make it intelligible is always likely to be problematic.¹²⁹ One obvious reason for this is that some accounts might fit some features of the institution while other features are accommodated by other accounts. Different accounts might also make different sense (normative or other) of one and the same feature or set of features. That being so, how are we to judge which of these competing accounts better satisfies the requirements of fit and intelligibility? Insofar as the answer to this question is a matter of judgment, the possibility arises that there might be more than one reasonable reply. Hence, while undoubtedly demanding, the fit and intelligibility requirements may not always generate clear answers to questions about the relative success of particular theories of tort law or any other institution or set of practices. Furthermore, the more complex the institution and set of practices in question, the greater the space for differences to arise along the dimensions of both fit and intelligibility. But it should not be assumed, in light of the variability between theories that this possibility permits, that fit and intelligibility requirements do no genuine work in discriminating between competing theories. These two requirements demand that those who offer an account of an institution or set of practices must take that or them seriously in their particularity and detail. The crucial issue is how much of this particularity and detail is significant, and thus how much must be accommodated by an acceptable theory.

It is easy to caricature this demand with an attempted *reductio*. It could be said that taking tort law seriously in its particularity and detail is what our textbooks do and they, obviously, are not theoretical or philosophical or jurisprudential accounts of tort law. While this is to some extent true—if taken in conjunction with the caveat that some legal textbooks are assuredly philosophically or jurisprudentially

¹²⁸ Hans-Georg Gadamer, *Truth and Method* (New York: Seabury Press, 1975) at 236.

¹²⁹ Some of the most interesting recent skeptical accounts of tort and private law originated with American critical legal studies. Their skepticism derives from a set of claims that law is "ideological", "political" or "contradictory". A classic of the genre is Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685.

significant—the *reductio* need not be accepted. For, while it is obvious that theoretical accounts of tort should not simply replicate our textbooks, neither should they disregard significant features of the law. Without implying that the process is wilful, it is clear that some accounts of tort law, among which we can include those offered by Coleman, Weinrib, and proponents of EAL, do indeed overlook some features of the institution that some participants regard as significant. This weakness is often conjoined with an inability to justify the decision to regard some features of the institution as theoretically significant, either by reference to the views of participants or on some other ground. These accounts, then, miss significant features of the institution (Weinrib's dismissal of strict liability and Coleman's account of product liability) and fail to justify why other features are regarded as significant (Coleman's struggle with tort law's "core", Weinrib's dubious privileging of an "internal" understanding of tort). Why?

One possible answer is this: these accounts of tort law approach their object with some philosophical precommitments to the fore. One such precommitment is attitudinal. It is probably hardly ever explicitly articulated and describing it is thus a hazardous business. But it seems likely that an assumption informing much of the philosophical and jurisprudential literature is that tort law in particular and private law in general are in need of philosophical attention. The ailments of these areas of law—the principal one being the entropic forces that shape them—can be cured by a dose of philosophical rigour. That precommitment is often joined by some or other substantive commitment like, for example, the belief that corrective justice (or some other normative notion) is the key to understanding tort or private law. Only in light of some such notion will the underlying coherence of the law be disclosed; only some such notion as this keeps the forces of entropy at bay. One baleful consequence of substantive precommitments like these is that the object of the theoretical account can unwittingly be shaped in the image of the precommitment, often with results that Procrustes would be proud of.

This might be avoided by according the institution and its constitutive practices a proper respect. That term, along with cognates like taking it seriously and appreciating its particularity, can sound alarmingly vague and in one sense it is: it is not possible, in advance, to specify in detail what it means to give an institution or practice or segment of social conduct "proper respect". One thing that clearly need not be included in this idea is moral or political respect. That is, one can give an institution or practice or segment of conduct proper respect without accepting that it is morally or politically commendable. Beyond this, what it is to give proper respect to an institution, practice, or aspect of conduct is only genuinely disclosed by trying to understand and account for the institution, practice, or conduct in question. The matter could be put thus: taking the institution, practice, or conduct seriously, or in its own terms, is to approach it with as few philosophical or theoretical precommitments as possible and to respect its possible particularity and detail. The claim that this ought to be our approach denies neither that some loosely theoretical precommitments make it possible for theorists or philosophers to perceive the institution, practice, or conduct in question, nor that some such precommitments generate the theorist's or philosopher's interest in the first instance.

In order for theorists and philosophers to be able to even perceive the institution, practice, or conduct that is the object of interest they must, of course, share the language of those whose conduct in part constitutes that aspect of social reality. This point is most obvious when undertaking anthropological or historical study, since groups distant from us in time, beliefs, complexity, and social structure are most difficult to "know". When it is said that knowledge of such groups cannot be obtained without learning their language, that is often literally true. But even groups with which we share a language are not immediately transparent to us simply by virtue of that fact: think, for example, of English- or French-speaking societies and their legal systems. Significant knowledge of the latter is not obtained by virtue of learning English or French, as any first-year law student will testify. Sharing a language simply makes the move towards "thinking like a lawyer" easier. Yet without an appreciation of the specific meaning of the concepts this group employs, no adequate understanding—an understanding participants themselves would find intelligible—of their conduct, practices, and institutions is possible. "Thinking like a lawyer," just like "thinking like a Zande tribesperson," is first and foremost a matter of mastering the language and hence the concepts of that group.

That language, like any natural language, is an interlinked system of discriminations, assumptions, and preconceptions about the social and natural worlds. It is also in part a language of self-description and evaluation, containing concepts and values specifying what a good lawyer or tribesperson is, as well as concepts illuminating what is in general good and bad. It is thus in no sense a value-free or perfectly neutral method of representing the world beyond language, lacking in theoretical constructs. It is, rather, in some sense a means of both organizing and having knowledge of the world.¹³⁰ On this broadly hermeneutic view, it makes no sense to think of language as a nonpurposive, nontheoretical means of appropriating the word; it is equally senseless to attempt to understand some social group's institutions, practices, or conduct without learning their language.¹³¹ But in learning the language of those whose conduct, institutions, or practices are the object of theoretical reflection, one must also take up the roughly theoretical commitments latent in that group's language. These precommitments are initially unavoidable, though they can at some point be interrogated and perhaps set aside.

¹³⁰ A picture supposedly in opposition to this (usually associated with unspecified unreflective empiricists) is that a language is possible that reflects "reality" immediately, with the use of theoretical constructs and evaluative terms. Both the latter and the former are sometimes taken to exceed the limits of empirical perception and thus regarded as somewhat dubious. Whether or not any philosopher or social scientist ever held such an empiricist view is a moot point, but it sometimes associated with John Locke. See Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979) at 129-312.

¹³¹ For the classic recent statement of this view, see Gadamer, *supra* note 128. For his view of the importance and awkwardness of precommitments (which he sometimes calls "fore-meanings") to understanding and interpretation, see *ibid.* at 235-74.

Similarly, the theorist or philosopher must have some roughly theoretical precommitments in order for an area of study to become salient.¹³² These determine the nature of the research questions on the agenda of a particular disciplinary group: thus sociologists' questions may well differ from those of the historian, economist, philosopher, or jurist, but all are conditioned by some assumptions about why particular questions are worth asking. No contemporary social or political scientist would, for example, think of developing a theory of holes in response to the question "Why are there holes and does their incidence vary between political systems?"¹³³ That question is not on the agenda of political or social science because neither those disciplines nor the wider culture in which they exist regard it as in any way interesting or worthwhile. Since all research questions are formed within a particular disciplinary and wider social context, specific questions only become salient for theorists if they are in some sense questions of the epoch, their salience in part determined by or a reaction to ideas, assumptions, and theories influential in the broader culture. That research questions are conditioned in this way provides one reason why no theorist will develop a political or social (as opposed to a cosmological) theory of holes. That this conditioning process exists does not imply that the process by which research questions are "determined" cannot itself be subject to interesting sociological, historical, economic, or philosophical study.

In these two instances it seems that some broadly theoretical precommitments are unavoidable. It might also seem that the claim that philosophers and jurists ought to approach the object of their study without precommitments is therefore dubious. But the theoretical precommitments that proponents of this latter claim have in mind need not be the same as those just elucidated. While those precommitments are indeed indispensable, other more substantive precommitments might not be. And it might be such substantive precommitments that undermine some theoretical accounts of tort law, in the sense of impeding appreciation of either some aspects of the institution or some aspects of the theory or method invoked. A particular conception of corrective or distributive justice, liability-responsibility, or efficiency surely counts as a substantive theoretical precommitment in the sense that it is neither essential to apprehend tort law nor vital in order to make a theoretical interest in that object salient or possible. Notions such as these should not, then, be to the fore at the *beginning* of an examination of tort law but may well be the *outcome* of such an examination.

¹³² See Max Weber, "Value-judgements in Social Science" in Walter G. Runciman, ed., *Weber: Selections in Translation*, trans. by Eric Matthews (Cambridge: Cambridge University Press, 1978) 69; Max Weber, "The Logic of Historical Explanation" in Runciman, *ibid.*, 111. See also Max Weber, "'Objectivity' in Social Science and Social Policy" in Edward A. Shils & Henry A. Finch, eds., *The Methodology of the Social Sciences* (Glencoe, Ill.: Free Press, 1949) 50.

¹³³ A closely related question was posed, not completely tongue-in-cheek, by Alasdair MacIntyre in *Against the Self-Images of the Age: Essays on Ideology and Philosophy* (Notre Dame: University of Notre Dame Press, 1978) at 260.

If conceptions of responsibility, efficiency, or corrective or distributive justice are indeed to the fore in many philosophical and jurisprudential accounts of tort law, it is no surprise that such accounts miss significant features of the institution and generate methodological puzzles. Such precommitments function rather like an ideal conception of the human body in tailoring clothes: the clothes produced will undoubtedly fit everyone in some respects but fit almost no one very well. If the ideal person of my stature has arms of a certain length, then clothes designed on that basis may fit me but they may not: it depends how closely I approximate the ideal. This is a general problem with off-the-peg tailoring. By contrast, made-to-measure or bespoke clothing is designed to fit me, not some ideal conception of a person of my age or height. Such clothing is made on the basis of a template—a series of measurements—of me, in all my particularity. I'm measured first, then the clothing is made to fit. Theoretical accounts of tort could be constructed in a similar way, but only if the institution is in the first instance treated in such a way as to appreciate all its particularities and significant features. Once that is done, it might well be "accounted for" in philosophical-cum-theoretical terms, the theory or account or explanation being designed to fit that particular institution and its principal contours.

Part of the moral that might be gleaned from the arguments in part II is therefore this: jurisprudential accounts, explanations, or understandings of tort law should be parsimonious in their theoretical precommitments and this parsimony must be both a matter of word and deed. Only if such parsimony is accepted is there a chance of an appropriate degree of fit (or, alternatively, distance) between theory and theoretical object. But what of the arguments of part III? Surely whatever lesson the arguments there might yield points in exactly the opposite direction, since the claim there was that it might be a mistake to expect a close fit between (normative) theory and object. Is there a contradiction here? Only if the options that face us are these: either a theory fits the object it seeks to explain or understand in all its details or it need not fit the details of its object at all. Simply to state this either-or is to see its implausibility. The claim that a theory must fit its theoretical object is not incompatible with the claim that a theory need not fit every detail of that object. Furthermore, there is considerable doubt as to the utility of a theory that accommodates every detail of its object. This doubt is independent of the argument from bluntness offered in part III.

The core of this doubt is that the theory envisaged runs the risk of being literally pointless. This is because a theory that accommodates every detail of its object is simply a redescription of that object and, without more, such a redescription *prima facie* lacks epistemological value. A literal redescription tells neither participants in, nor theorists familiar with, the conduct, institution, or practices in question anything they do not already know. Of course, it might be claimed of some theoretical redescriptions that they shed new light on some aspect of their objects yet, as the capacity of a theory to illuminate aspects of its object increases, so the likelihood of it fitting all aspects of that object decreases. This is because the effort to illuminate some or other aspect of the object in depth, so as to yield new insights or knowledge, is usually incompatible with a "complete" account of each and every aspect of the object. Furthermore, the utility of a theoretical redescription of an object that captures

each and every detail of the object (where the object is a complex segment of the social world) becomes even more questionable when the object is itself already theorized. And there is clearly a sense in which law in general, and private law in particular, is theorized. Both civil and common law systems are complex institutions that include a rich and formalized tradition of commentary and reflection on the law. For civil lawyers this is the fulcrum of “legal science”, while for common lawyers it is simply doctrinal scholarship. This work is principally a matter of pruning, tidying, and organizing existing doctrinal categories in light of legal developments, but it is also sometimes a matter of creating new, or reorganizing existing, categories. Moreover, in its most interesting forms this scholarship also seeks an understanding of existing legal categories and developments in light of the purposes and values that underpin those categories. It is thus neither theoretically unambitious nor philosophically uninteresting, though it sometimes purports to be both (and some instances of this scholarship do indeed live down to this billing). We may wonder why such a theoretically saturated institution needs additional theoretical redescription, which is not to say that more ambitious theoretical work cannot shed light upon it. Rather, it is to imply that such ambitious work will be more than a literal redescription of the institution and its constitutive practices.

But if ambitious and interesting theoretical work is unlikely ever to be just a redescription, why worry about corrective justice theories of tort law failing to accommodate aspects of the institution? Since such theories do not aim at a simple redescription, it is surely inappropriate to criticize them for a lack of fit. There is, however, no inconsistency here, provided the fit requirement is understood as a demand that a theory of an object must fit enough of that object to be a theory of it. How else, besides employing such a requirement of fit, can we be sure that a theory accurately captures that which it purports to explain? In addition, where the object in question is already theorized by participants themselves, it is vital that any higher-level theoretical explanation of the object rest upon an accurate understanding of it. And an accurate understanding of it for these purposes is *prima facie* one the participants have. Why? Because if the object in question is in part constituted by the conduct and beliefs of participants, then a theoretical account of the object that is consistent with that conduct and those beliefs is undoubtedly “of” that object as understood by participants. This dimension of the fit requirement also provides a means by which theorists who offer an account of an object can show that some aspects of the object are more significant (and thus more deserving of theoretical attention) than others. For, if participants regard those features as significant, that is suggestive evidence that they are indeed significant.

It might thus be said that theoretical accounts of complex aspects of social life like private law must fit (or explain) all the features of that aspect of social life that participants regard as significant. This is only a *prima facie* requirement, though, because allowance must be made for the possibility that agents can be mistaken both in their beliefs and in their understanding of their conduct and the practices and institutions of which it is part. Such allowance must be made if participants’ views are corrigible, which is simply a way of saying that our social world is one in which

ideology (in the critical- or false-consciousness sense) is possible.¹³⁴ This does not, however, make the prima facie requirement bogus: it constrains in the sense that justification is required for a departure from participants' views. Reasons must be given to show how and why participants' own views of the conduct, practice, or institution in question have gone wrong. Part of the argument of part II was that neither Coleman nor Weinrib does a good job of showing why participants whose view of tort law does not fit with theirs are mistaken.

Part II also accepts an assumption shared but also sometimes betrayed by Coleman and Weinrib, namely, that theories of private law must in some appropriate sense fit the institution and its constitutive practices. By contrast, the argument of part III is that it might be a mistake to expect particular moral or political accounts of private law to fit (in the sense of determining or explaining) particular aspects or decisions or developments within the law. Now, if a theory need not fit each and every detail of its object, there is no contradiction here. It is thus consistent to affirm both (1) that as a general matter theoretical explanations or accounts of objects must fit those objects in such a way as to be "of" those objects, and (2) that the content of some theoretical normative accounts may not throw much explanatory light on some aspects of some objects. The first claim is in effect an adequacy axiom for any theoretical account of any object, while the second simply highlights a feature (bluntness) of the content of some normative explanatory theories (like corrective justice) and some practices or institutions (like private law). But lack of contradiction at a general level clearly cannot eliminate the possibility of tension arising between these two claims in particular theories. So, have the arguments of parts II and III done anything more than illuminate this tension as it occurs within the theories of Coleman and Weinrib? Possibly not. Yet that is not a completely useless yield, since we now have an initially plausible but admittedly tentative explanation of why some noneconomic accounts of tort law fail in their theoretical ambitions. Knowing why an expedition to scale a particular mountain failed is a helpful prerequisite to a successful ascent. The failure might necessitate a change of route and a scaling back of ambition, but the value of the failed attempt is nevertheless undeniable.

¹³⁴ While not perhaps the first critical account of ideology, Marx's discussions in *Capital* are among the most enduring. See Karl Marx & Frederick Engels, *Capital I* in *Karl Marx, Frederick Engels: Collected Works* (London: Lawrence and Wishart, 2001) vol. 35 at 81-94, 185-86, 537-42; Karl Marx & Frederick Engels, *Capital II* in *Karl Marx, Frederick Engels: Collected Works* (London: Lawrence & Wishart, 2001) vol. 36 at 227; Karl Marx & Frederick Engels, *Capital III* in *Karl Marx, Frederick Engels: Collected Works* (London: Lawrence and Wishart, 2001) vol. 37 at 209. For other interesting and helpful sources among the glut of discussions of ideology, see Denise Meyerson, *False Consciousness* (Oxford: Clarendon Press, 1991); John B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge, U.K.: Polity Press, 1990) at 28-121. The principal difference between critical and noncritical accounts of ideology is that the former regard ideology as necessarily baleful and to be avoided; the latter do not. While some of Marx's early writings suggest a commitment to a noncritical account of ideology, the most explicit noncritical accounts have been developed by those writing under his influence. See Louis Althusser, *For Marx*, trans. by Ben Brewster (London: New Left Books, 1977) at 219-47.

The lesson of parts II and III is thus not as simple as might be hoped. It is, rather, hedged with qualifications, caveats, and cautions. This is not a reason to doubt the lesson, for the issues in play are complex. Equivalent issues have, indeed, dogged the social or human sciences from their inception. Whether they can be resolved by a switch in explanatory paradigms or the adoption of an allegedly radical new approach to social-scientific and philosophical explanation and understanding, has not been considered here.¹³⁵ Another issue has been touched upon frequently but only indirectly, even though it is vitally important to the overall argument offered. This looming background presence is the general issue of concept formation in the human (or social) sciences and the ways in which it impinges on jurisprudential accounts of tort in particular and law in general.¹³⁶ As a result, the case for tailor-made philosophies of tort law is not yet conclusively made out by the argument of this essay; neither is the charge that some existing accounts of tort law are off-the-peg. The overarching question of the essay, namely, that of the proper relation between tort law and jurisprudential theories of tort law, thus receives only an inchoate answer: the relation between them should be made-to-measure and not off-the-peg. The theoretical account should fit in all the right places without, of course, being too tight a fit. This implies neither that a theoretical account or understanding of tort law is impossible nor that particular kinds of philosophical or theoretical approach are unworthy.¹³⁷

Conclusion

The two noneconomic accounts of tort law examined here promised two distinct intellectual advantages when compared with economic accounts: first, a better understanding of the structure of the law (bilateralism) and, second, a better understanding of the law's normative basis (corrective justice). It was argued that the first promised advance is much more methodologically problematic than its proponents appreciate, while the second is nowhere near as problematic as one particularly interesting critic thinks. In addition, some general thoughts were offered about how the methodological problems facing Coleman's and Weinrib's corrective

¹³⁵ So, for example, no attention has been given to the possible effects on these issues of "the postmodern turn". For a useful outline of this family of approaches, see Steven Seidman, ed., *The Postmodern Turn: New Perspectives on Social Theory* (Cambridge: Cambridge University Press, 1994).

¹³⁶ The general issue is well treated in a now forgotten classic. See Clive Grace & Philip Wilkinson, *Sociological Inquiry and Legal Phenomena* (New York: St. Martin's Press, 1978). It also crops up intermittently in Roger Cotterrell, *The Sociology of Law: An Introduction*, 2d ed. (London: Butterworths, 1992).

¹³⁷ For an argument that comes close to making the first claim (albeit about private law as a whole), see Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003). For an instance of the second claim, see Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999).

justice accounts of tort law, as elucidated at various points in parts II and III, might be tempered. Those problems triggered the discussion in part IV, which elucidated some general considerations undoubtedly in play in the task of offering a "philosophical" account of any area of law.

It is perhaps worth noting that the issues of method and fit explored in this essay, and the specific problems to which they give rise, are unlikely to be unique to philosophical accounts of tort law. These two issues highlight some difficulties latent in any attempt to give anything more than a descriptive "chronicle" of any segment of the law. Such a chronicle would presumably be nothing more than a list of cases or statutory provisions or propositions of law (case A holds such and such, case B thus and so ... section 1 requires this, section 2 that ...). It would also presumably eschew any effort to either link the various propositions of law by, for example, asking why they should be regarded as belonging to this rather than that segment of law, or to organize them by, perhaps, reference to their function, aim, or value. Once a search for the unity or point or function of some area of legal doctrine begins, questions of method and fit become salient. How, for example, is the point or function of some doctrinal area determined—by reference to that area of law's effects in the wider world, by reference to what lawyers think its function is, or by reference to some account of what its point ought to be? And once this issue is broached, the issue of fit also arises, since it is (almost?) always true that accounts of the point or purpose of some segment of law fail to accommodate each and every doctrine or rule in that segment. To see these issues and to pose some of the difficulties they present is, of course, not to solve them. But, since any solution requires a clear statement of the problem it purports to cure, we may after all have made some progress here.
