Canadian Journal of Law & Jurisprudence XXXIV No.2 August 2021, 493-514

© The Author(s), 2021 doi: 10.1017/cjlj.2021.4

Recognizing One More Wrong

Allan Beever

Critical Notice:
Recognizing Wrongs
by John C.P. Goldberg and Benjamin C. Zipursky*

1. Introduction

Recognizing Wrongs is the latest instalment from the leading civil recourse theorists John Goldberg and Benjamin Zipursky. It is a defence of the theory of tort law that they have developed, together and apart, for more than two decades. Unlike their earlier book on tort,[1] this instalment does not focus on tort doctrine. Instead, it presents, elucidates, and defends from criticism the position that underlies its authors' analysis of that doctrine. The book is both welcome and important. It is also very well-written: clear and accessible. Because of this, the book is not only the authors' latest statement of their theoretical position, it will also serve as a good entry point for those coming to the debate for the first time. If, for instance, you have ever wondered with respect to rights-based approaches to tort law generally, 'Why do people think like this?', this book provides a very accessible answer.

As usual, when reviewing a book, it is important to interpret the work in the light of its intended audience. Who is this book for? In the case of *Recognizing Wrongs*, the answer is very clear. It is for American legal scholars. Its arguments are explicitly aimed at US academics. Its authors maintain that US academic thought is unable to understand tort law, because it approaches that law via theoretical frameworks inconsistent with that law's structure. The two main aims of the book are to demonstrate this and to defend an alternative framework that better fits the law and so renders that law intelligible.

Though I am very sympathetic with this project, I should immediately confess that I am not a member of this intended audience. I am a New Zealander whose work on tort has focussed primarily on the laws of what we somewhat erroneously label the Commonwealth.[2] I am, then, an outsider looking in. Thankfully, given the geographical location of this journal, that seems fitting. Most of the readers of this review will also be outsiders looking in. Because

*John CP Goldberg & Benjamin C Zipursky, *Recognizing Wrongs* (The Belknap Press of Harvard University Press, 2020) pp 392, ISBN 978-0674241703.

Many thanks to Andrew Botterell for his very helpful comments on an earlier draft of this article.

Allan Beever, Professor of Law, Auckland University of Technology, New Zealand. allan.beever@aut.ac.nz

1. See John CP Goldberg & Benjamin C Zipursky, *The Oxford Introductions to U.S. Law: Torts* (Oxford University Press, 2010).
2. It is erroneous because the vast majority of Commonwealth jurisdictions are ignored in our investigations.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

of all this, I will not attempt to review the book as an insider. Those 'south of the border' and a long way north of here can make their own judgements. Instead, I will content myself with two questions: What do we Commonwealth lawyers have to learn from this work? Alternatively, what could we teach it?

Let us begin with Goldberg and Zipursky's statement of their basic position.

> Our legal system recognizes in various ways that each of us is entitled to be free of certain kinds of interferences (or to have certain things done for us). The more serious government is about enjoining these interferences, and the more serious each of us is about complying with the relevant norms of conduct, the more powerful is the argument that *rights* are at stake. When a right of this sort is violated, the victim should be able to demand certain things from the wrongdoer. Yet a demand of this kind would be hollow if the wrongdoer were simply free to ignore it. Thus, the state renders the victim's demand legally enforceable, so long as it is authenticated through the judicial process. In opening courthouse doors, government gives victims an avenue of *civil recourse*.[3]

I need to stress that this is not intended by its authors to be an uncontroversial launching pad for their analyses. On the contrary, as the authors present it, it is the thesis to be defended; its supporters massively outnumbered in US academia by those who think it not merely mistaken but obviously wrong, even fatuous. This must strike a Commonwealth lawyer as curious, as many here agree with this general picture of the law, even if they might disagree with other notions found in *Recognizing Wrongs*. For many now, despite all our other differences, the idea that tort law responds by imposing remedies for the violations of rights is almost trite. This gives rise to an immediate concern. Do I need *Recognizing Wrongs* to preach to me if I am already converted? If this book advances a thesis that we already believe, is it worth reading?

The answer is certainly yes, but why is that? There are, it seems to me, at least two answers to that question. The first is the one given by the authors themselves. They maintain that it is only their specific theory—civil recourse theory—that can properly capture and explain what it is that we all agree on. In particular, Goldberg and Zipursky argue that civil recourse is to be preferred to corrective justice theory in this regard.[4] In this, I will argue that they are mistaken. But their mistake is highly instructive and leads to fruitful developments that enrich corrective, or what I will call (for reasons I will explain below) commutative, justice theory. The second answer is not given by the authors. It is that *Recognizing Wrongs* has a lot to teach us about the gulf between legal academia in the US

3. John CP Goldberg & Benjamin C Zipursky, *Recognizing Wrongs* (The Belknap Press of Harvard University Press, 2020) at 31.

4. For the record, my claim is not that corrective justice theory is widely accepted in the Commonwealth. Some have suggested that this is the case, but if my own experience is any indication, outside certain hallowed halls and gatherings most Commonwealth tort lawyers (especially outside Canada) continue to operate without any theoretical understanding of the law whatsoever. Rather, my claim is that most would accept that remedies in tort law are the law's responses to violations of rights, and that the issue is whether civil recourse or corrective justice theory (or some other account) provides the better theoretical explanation of this.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

and in the Commonwealth.[5] Examining this gulf is useful, not only for its own sake, but also because it should enable us to understand ourselves a little better. It is here that I begin.

2. US v Commonwealth Tort Scholarship

As noted above, and as Goldberg and Zipursky themselves accept, civil recourse theory is closely related to corrective justice theory.[6] With a few exceptions,[7] the latter has been most prominently promoted by jurists in the Commonwealth. My own work belongs to this school of thought. In developing our theories, we have had to respond to conflicting conceptions of tort law, just as Goldberg and Zipursky do in *Recognizing Wrongs*. But those of us whose work has focused on the Commonwealth[8] have needed to combat targets noticeably different from the targets identified in *Recognizing Wrongs*. Goldberg and Zipursky's antagonists are those who understand tort law through the lenses of rival theories. Law and economics is, of course, the most famous of these, but it is only one such movement. Goldberg and Zipursky also direct their attention to those who understand tort law in, to use their term, a 'dual instrumentalist' fashion, focussing on deterrence and compensation as the two fundamental goals of the law. This is an idea that has been prominent in the Commonwealth too, of course; but the US version of it is different to the one found on our side of the fence. In the US, the notion that tort law has these two goals rises to the level of a genuine theoretical approach; in the Commonwealth, it is treated more as a piece of common sense. Likewise, some in both the US and the Commonwealth approach tort law in terms of a list of the law's perceived social goals, but peculiar to US analysis is a well-developed theoretical account and analysis of those goals. To put it a little too bluntly, legal realism is a largely unexamined mantra for many legal scholars in the Commonwealth, but it is a developed theory for those in the US. Even those in the US who insist that tort law is an indecipherable mess do so armed with some general theory to back them up, be that poststructuralist, Marxist, or whatever.[9] For this reason, the argument of *Recognizing Wrongs* spells out a debate *between* theoretical positions. The authors realise that the way to get people in their jurisdiction to accept the position outlined in the passage quoted above is to get them to see that it outlines a better theoretical understanding of tort law than alternative theoretical understandings.

---

5. At least this is true of private law academia. It may or may not be true of legal academia in general.
6. They refer to these theories as cousins: See Goldberg & Zipursky, *supra* note 3 at 17.
7. See Jules Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) and Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001).
8. I say this because, as we will see, a significant portion of Commonwealth scholarship in this area has not been focussed on the Commonwealth, but has instead been focussed on the US.
9. Or, at least, it is generally accepted that the ones who do not can be ignored, perhaps because they do not inhabit the well-ranked law schools.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

As already glimpsed, things are very different in the Commonwealth. Here, at least outside Canada, law and economics in the American sense has made barely a dent in our understanding of the law.[10] Moreover, few of those who adopt instrumentalist approaches to law do so because this is a consequence of their general theoretical positions. It is rather because they have and want no theory. For these commentators, tort law is a tool that can be used for whatever goal one has and there is not much more to be said. The world of Commonwealth tort law is populated by many who insist that tort law is an indecipherable mess and feel no need to arm themselves with any theoretical support for that view. It is meant to be something that can be detected just by looking. Accordingly, corrective justice theorists in the Commonwealth are sometimes accused of being 'system builders' (despite the fact this is really a compliment), while Goldberg and Zipursky themselves are said to have the wrong system.

In fact, the difference is even more pronounced than this. At various points, Goldberg and Zipursky present their theory as, in some important ways, 'getting back to basics' with respect to tort law. The easiest way to see this is to compare their theory with Richard Posner's economic analysis of tort. As Goldberg and Zipursky point out, following earlier work by Ernest Weinrib and Jules Coleman, Posner's view is that the doctrines of tort law must routinely be 'explained away' since they do not relate to economic concerns. The duty of care and factual causation are well-known cases of this. With respect to the latter, for instance, Posner insists that "the idea of causation can largely be dispensed with in an economic analysis of torts,"[11] despite the fact that it is one of the law's core doctrines. For Goldberg and Zipursky, these core doctrines are where our analysis should begin. In my view, this is a considerable strength of *Recognizing Wrongs*, and of Goldberg and Zipursky's work in general. The point to be made now, however, is that Goldberg and Zipursky are concerned that some may find this approach unsophisticated in comparison with, for example, the high degree of technical expertise found in modern law and economics.

This is not in any way to criticise *Recognizing Wrongs*. On the contrary, I think Goldberg and Zipursky are right to rebel against this false sophistication. The point I want to bring to the reader's attention is how different things are in the Commonwealth. Here, there are two related challenges. The first is to get commentators to see that what might be called constructive interpretation of legal doctrine—in which, for instance, the interpreter tries to render an area of legal doctrine in a maximally coherent fashion even if that means rejecting some of the specific pronouncements of courts—is worth pursuing. The second challenge is to get commentators to accept that theoretically informed analysis of the law has a valuable contribution to make, though at one level this means that the analyst's job is less simple than it would be were she to focus solely on the positive

10. Legal reform is, of course, another matter; though I still think it true that it has made relatively little impact.

11. William M Landes & Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) at 229.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

legal materials. Just to take one example, I have often heard Commonwealth academics express irritation at the notion that it might be valuable to consider the views of Aristotle, let alone—God help us—Kant.[12]

In this regard, Commonwealth law is probably the only subject in existence that still clings to the notion that its self-understanding is sufficient. American law left this behind long ago. For this reason, it can be difficult for Commonwealth and US lawyers to talk constructively about their subject to each other. One of the great things about *Recognizing Wrongs* and like work is that it finds common ground in this regard. It holds out the possibility, then, for reopening dialogue.

In this connection, it is fitting to remark that those in the Commonwealth who are sceptical of the corrective justice approaches that have been advanced in this area may well find that *Recognizing Wrongs* is a very approachable access point to this kind of thought. Aristotle and Kant, for instance, are as foreign to the pages of this book as they are—or at least were—to Commonwealth law journals. The case presented is at least almost as down to earth as any Commonwealth lawyer could want.

I have been speaking of the differences between US and Commonwealth legal academia. I now want to talk about a hidden connection. As we have seen, the basic thesis promoted by Goldberg and Zipursky is one that many Commonwealth lawyers would happily accept. But why is this? As Goldberg and Zipursky point out, this view is not consistent with the idea, say, that tort law is a system of compensation and deterrence. But that view is also widespread in the Commonwealth. What is going on here?

I think that there are two answers. The first we have almost seen already. When you disdain theory, the chances are that you will find yourself adopting conflicting theories.[13] One reason, then, that both views can apparently coexist in the Commonwealth is that commentators have just not cared about the contradiction.[14] There is a more interesting answer, however.

The idea that tort law is best understood as a system of deterrence and compensation was, of course, an American invention. It was slowly absorbed in the Commonwealth along with other American ideas such as legal realism, with which it is in various ways connected. It was perhaps a dominant view in the Commonwealth around the turn of this century. For reasons that I will not detail, but are presented in *Recognizing Wrongs*,[15] this view was felt to be inadequate in the US and so other theories, especially law and economics, were elucidated as

12. I once had an article rejected on the basis that the theorists considered in it were German and that this was inappropriate as the subject matter of the article was English law. The reviewer helpfully suggested alternative theorists, though I never got the chance to remind him or her that John Stuart Mill belongs to another jurisdiction. This happened in 2000. For reasons discussed below, I doubt that it would happen now, though when it comes to reviewing, anything is possible.

13. *Cf* John Fleming, *The Law of Torts*, 9th ed (LBC Information Services, 1998) at 8-15.

14. Thus, I was once asked by a leading commentator whether, if I had to choose, I would rather be coherent or right. I confess to having been flummoxed by this question. I still am. How could one be right without being coherent?

15. Goldberg & Zipursky, *supra* note 3 at 209-31.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

replacements. Importantly, corrective justice theory was developed in the Commonwealth (and in the US) as a response especially to that movement. It is no accident that this occurred most powerfully in Canada and that the primary focus of Canadian academics was US legal scholarship.[16]

I have said that the core thesis of *Recognizing Wrongs* would be at least generally accepted by most contemporary Commonwealth tort scholars. But I doubt that this would have been true at the turn of the century. Naturally, I cannot be sure; but what is clear is that this view was rejected by many of the leading Commonwealth scholars of the late twentieth century. Let us take just one example, in my view the greatest such scholar—not coincidentally the man who plays the role in the tale of Commonwealth tort law that William Prosser plays with respect to US tort law—John Fleming.[17] For Fleming, tort law was not a law of rights, wrongs and remedies. On the contrary, it was a piece of social regulation aimed at, or properly aimed at, social welfare.[18] The idea expressed in the quoted passage with which this discussion began was an idea against which Fleming deployed the considerable power of his arguments. And yet I think we can now say that this war was lost. To put this more positively—and this is something that I think is yet to be fully recognised—corrective justice theory has been extraordinarily successful in changing the way that people think about the law.[19] This is so even though the detailed claims of corrective justice theorists continue to be hotly debated or even rejected. English lawyers may still have no more time for Kant than they have for German strikers during a penalty shootout but, without their realising it, he and his ancient Greek friend have indirectly changed their world.

When I first became a legal academic in 2000, it was routine for reviewers to respond to my work with incredulity on the basis that there was *simply no alternative*—that was the phrase used—to policy-based accounts of tort law. The idea that tort might be profitably analysed as a law of rights, wrongs and responses frequently did not compute. But that is not true now. No one could now claim that there is no alternative to policy analysis, at least not without dating oneself in an unflattering fashion. Of course, the policy-based view of law may still be the best one and debate about the merits of these views is still alive; but only one quite ignorant of the debate of the last two decades could seriously claim that there remains no alternative.

---

16. I am of course referring especially to Ernest J Weinrib and his seminal work, Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) which has had an enormous, and yet still underappreciated, impact on legal understanding.

17. See especially Fleming, *supra* note 13.

18. E.g. "the principle concern of the law of torts nowadays is with the casualties of accidents, that is, of unintended harm. In this wider field, the law is concerned chiefly with distributing losses which are an inevitable by-product of modern living, and, in allocating the risk, makes less and less allowance to ideas of punishment, admonition and deterrence." *Ibid* at 4. See also *ibid* at 8-15.

19. Unsurprisingly, this is especially true for academic lawyers, but the influence is not so confined. See e.g., *Deloitte & Touche v Livent Inc*, 2017 SCC 63 and *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

Is it just that we are two decades ahead of the Americans? Yes, we are. This is unmissable in *Recognizing Wrongs*. But before condescending, we ought to remember that we have them to thank for our progress. Moreover, the power of their views, against which we have reacted, is surely part of the explanation for their delay. It is worth reflecting on the fact that, though they could have progressed by themselves, we could not have progressed without them. It could not have happened the other way around.

3. Civil Recourse v Corrective and Commutative Justice

Again, as Goldberg and Zipursky note, many have thought that civil recourse is a version of corrective justice theory.[20] This is a claim that Goldberg and Zipursky have steadily rejected. In this section, I explain why they are wrong to do so. In order to demonstrate this point, I examine some of the objections to corrective justice theory presented in *Recognizing Wrongs*.

A. Rights v Powers

Let us begin with the following passage.

> As an account of tort damages, corrective justice theories fail … In short, they mistake a liability/power relation for a duty/right relation. Let us concede for purposes of argument that a tortfeasor owes her victim a *moral* duty to repair losses associated with the injury [in fact, Goldberg and Zipursky reject this idea[21]]. Tort law recognizes no comparable legal duty. If there were such a legal duty, then, upon the commission of a tort, the plaintiff would, in principle, have a legal right to payment and the defendant would be obligated to make payment. Yet that is not the case. Suppose *D* is prosecuted for and convicted of the crime of aggravated drunk driving, with the aggravating factor being that he smashed into *P*'s unoccupied car. Suppose, further that *P* never bothers to sue *D* in tort. Absent such a suit (and assuming there is no order of restitution made in the criminal case), *D* has no legal duty to compensate *P*. This even though there has been a determination in a court of law that *D* committed conduct that fits the definition of a tort, and even though there is no difficulty in valuing the harm caused. *D*'s failure to send *P* an amount of money equal to the value of the damage might be immoral. But it is not the breach of any legal duty that *D* owes *to P*.
>
> To be sure, the commission of a tort has a legal consequence. But it is not the creation of a legal duty owed by tortfeasor to victim. It is instead the creation of a legal power, and with it, a corresponding liability. To commit a tort is to render oneself *vulnerable* to being sued and to having a court authenticate the suit's demand for payment of compensation. When a court authenticates a plaintiff's claim and demand, it issues an order stating that the defendant owes the plaintiff the amount of compensatory damages determined by the factfinder, thereby adding tort

20. Goldberg & Zipursky, *supra* note 3 at 233 and Ernest J Weinrib, "Civil Recourse and Corrective Justice" (2011) 39:1 Fla St UL Rev 273.

21. Goldberg & Zipursky, *supra* note 3 at 162.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

> debtor/tort creditor as a new aspect of the relation between defendant and plaintiff. If payment of the debt is not forthcoming, the plaintiff can then request and obtain additional relief, such as an order from the court attaching the defendant's assets, or garnishing the defendant's wages.[22]

There is clearly something right about this. A tort victim has a power to bring suit against a tortfeasor and the tortfeasor is under a corresponding liability (ie liability to be sued). Also, if a court finds in favour of a plaintiff, that person gains a right over the defendant that did not before exist, a right corelative to a new duty in the defendant. Nevertheless, Goldberg and Zipursky's argument fails, ultimately because it commits a fallacy of ambiguity.

It will help if we set up our discussion in the following way. Let us say that *P* does end up suing *D*, alleging that *D*'s negligent driving caused her to suffer a loss worth $200,000. And let us imagine that the court finds in her favour and requires *D* to pay her that sum. Let t_1 be the time of the accident, t_2 be the time after the accident but before the court's decision, and t_3 be the time of that decision. Goldberg and Zipursky's position is that at t_2, *P* has a power to sue *D* for negligence and *D* is under a corresponding liability, but at t_2 *P* has no right to compensation against *D*. That right does not come into existence until t_3.

We will start with the negative side of this argument, with the notion that there cannot be a right in *P* at t_2. What is the argument for this view? Crucially, Goldberg and Zipursky provide no argument. They merely assert four times that there is no such right.

In order to see this, I must ask the reader not to add a premise to the argument provided. This premise—which I will call the hidden premise—is that it is in the nature of a legal right that the right holder is entitled to direct enforcement. Let me put this more formally.

> The Hidden Premise
> If *A* possesses a legal right against *B* that *B* do *x*, then *A* can force *B* to do *x* without having to take *B* to court.

This premise entails, of course, that if *A* cannot so force *B* to do *x*, then *A* does not have a legal right against *B* that *B* do *x*. As I say, this premise is not in Goldberg and Zipursky's argument, so I must request the reader not to impute it. My prediction is that the reader will sorely be tempted to do just this, however, since the argument now under consideration requires the hidden premise in order to be sound. In fact, the argument is set up so that it is psychologically difficult not unconsciously to add the hidden premise. We must not do this, however, as Goldberg and Zipursky's wider position requires the rejection of the hidden premise, and rightly so.

First, Goldberg and Zipursky say that if *D* was under a legal duty to compensate *P* at t_2, then "the plaintiff would, in principle, have a legal right to payment

22. *Ibid* at 162-63 [emphasis in original]. See also Stephen A Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford University Press, 2019).

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

and the defendant would be obligated to make payment. Yet that is not the case."[23] It is clear here that the crucial claim is asserted and not argued for. That was surely intentional. The argument is meant immediately to follow.

> Suppose *D* is prosecuted for and convicted of the crime of aggravated drunk driving, with the aggravating factor being that he smashed into *P*'s unoccupied car. Suppose, further that *P* never bothers to sue *D* in tort. Absent such a suit (and assuming there is no order of restitution made in the criminal case), *D* has no legal duty to compensate *P*.[24]

Without the hidden premise, this conclusion does not follow from the treatment of the example. Moreover, it is far from clear what the example is meant to show. Let us continue.

> This even though there has been a determination in a court of law that *D* committed conduct that fits the definition of a tort, and even though there is no difficulty in valuing the harm caused. *D*'s failure to send *P* an amount of money equal to the value of the damage might be immoral. But it is not the breach of any legal duty that *D* owes *to P*.[25]

Again, the conclusion does not follow from this argument unless we add the hidden premise. Without that premise, the 'argument' is a repeated assertion broken up by the discussion of an irrelevant example.

The argument, then, is enthymemic. But why cannot Goldberg and Zipursky add the hidden premise? Why can they not say that *P* has no right against *D* at t_2, because *P* cannot have that purported right enforced without taking *D* to court? The answer is that this view is quite inconsistent with Goldberg and Zipursky's wider position.

Let us turn our attention to a different right. Corrective justice and civil recourse theorists are committed to saying that *P* had right a to her body and that *D* violated that right. This violation occurred at t_1. The right itself existed not only at t_2 and t_1, but before the tort was committed. In fact, it existed from the moment *P* was born. But when *P* goes to court, it is this right and this violation upon which she bases her claim against *D*. This is the position to which we are all committed, but it would be impossible given the hidden premise. If we accept that premise, we would have to say that no such right could exist before t_3.[26] This is because *P* cannot insist on the direct enforcement of that right but must instead take *D*, or any potential defendant, to court. Accepting the hidden premise here, then, would force us to conclude that *P*'s 'right' to her body was only a power (a power to take a person to court if the person acted in some inappropriate

23. Goldberg & Zipursky, *supra* note 3 at 162.
24. *Ibid*.
25. *Ibid* at 162-63.
26. One might respond to this by noting that before the violation of the right to her body, *P* had nothing to complain about and that is the reason she could not take *D* to court. That, of course, is correct. But the point is that we still want to say that *P* had the right, and yet it is not a right that can be enforced without going to court. Hence, its existence is inconsistent with the hidden premise.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

ways—note that we could not say, if the person violated *P*'s right). But the civil recourse theorist cannot say that. Surely, no one wants to say that. And if we bit that bullet, what would we say about the violation? Does *D* violate *P*'s power? That would be nonsense. In summary, when *P* takes *D* to court, she does not ask for the retrospective creation of her right to her body; she brings that right to court with her, a reality entirely unaffected by the fact that the only way to get this right enforced is to go to court. We cannot accept the hidden premise.

Perhaps one might reply that we can speak of a right to the body in advance of t_3, as that right has been established in a myriad of past cases; but we cannot say that *P* has a right to compensation on the same basis. But this is surely backwards. What past cases have explicitly established is the ability of plaintiffs to gain compensation; it is from this that we *infer* the existence of a right to the body. The right to the body is more abstract and less directly implicit in the case law than the right to compensation.[27]

Alternatively, one might argue that we can infer a right to the body at t_2 because its existence is uncontroversial; whereas the point of the trial is to determine whether *D* has a duty to pay compensation to *P*. Until that is determined at t_3, we cannot say that this right exists. Frequently, however, this is not the case. Sometimes, the existence of the primary right is controversial (which is why, for instance, we have litigation in property law), the court must decide whether it exists, and yet we do not want to say that the court creates the right in its judgment. The general point is that, if civil recourse theory is to make sense, then it must be possible to say that rights exist even if their existence is controversial. It must also be possible to say that rights have been violated, even though it may be controversial both that they exist or, if they exist, that they have been violated.

Think about this now from the other side. We want to say that the court *correctly* rules in favour of *P* and *rightly* orders *D* to pay *P* $200,000 at t_3. But that can be the case only if there is some truth that predates the court's decision with which the court's ruling fits. According to this truth, *P* has an entitlement *vis-à-vis D*. This truth is what the corrective justice theorist calls a right that the plaintiff holds against the defendant to be compensated to the tune of $200,000. This truth must, of course, exist at t_2. The civil recourse theorist is exactly as committed to the existence of this truth as the corrective justice theorist, the only difference is that he refuses to call this a legal right. Why?

The only possible answer found in *Recognizing Wrongs* is the one we have already seen: this cannot be a legal right, as *P* cannot directly enforce it, instead having to take *D* to court. However, if it is an entitlement that explains why the court's decision was correct—that is, why it was legally right for the court to rule as it did—then why should we be barred from referring to it as a legal right? Moreover, as we have seen, the civil recourse theorist has no business claiming

27. This is part of the reason that tort theorists have had a hard time convincing others of the merits of their approaches to economic loss in the law of negligence: tort scholars were used to thinking in terms of secondary but not primary rights.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

that this entitlement cannot be a legal right, since she is committed to the existence of other legal rights no less abstract.

Other contexts also reveal that the hidden premise must be rejected, for instance. If *A* has an obligation in law to do *x*, but that obligation is unenforceable for some reason,[28] does *A* have a legal obligation to do *x*? The hidden premise insists that the answer is No. But that is to oversimplify the situation. The answer is both yes and no.

Of course, none of this is to deny that Goldberg and Zipursky notice something of importance about the way the law functions. The point is that what they notice is consistent with corrective justice theory. The task is not to insist that one side is mistaken, but to see how both can be right. Instead of pulling together, in the same general direction, however, we insist on fighting a war with each other, a war in which we are our own victims.[29]

B. Civil Recourse v the Tradition

We continue with that theme via discussion of another of Goldberg and Zipursky's objections to corrective justice theory: their rejection of the notion that the point of tort damages is to "make the plaintiff whole."[30] The task here is not to engage with this issue for its own sake. The point is to say something about how research of this kind should understand itself.

In rejecting corrective justice theory on the basis of what it says about the point of tort damages, Goldberg and Zipursky refer to the work of Ernest Weinrib, Arthur Ripstein, and John Gardner. Based on their rejection of the claims of these theorists, they reject corrective justice theory *in toto*.

In a memorable passage, referring to corrective justice and related theories, one commentator has claimed that, "Much like a birthday sparkler, it would seem that the rights fad will eventually exhaust itself."[31] This was a remarkable thing to say given that "the rights fad" (in the sense intended) started with Aristotle's *Nicomachean Ethics* two and a half thousand years ago and has been a highly significant influence in guiding the development of Western private law for these millennia—a fact attested to in, for example, James Gordley's brilliant survey of the history of legal thought.[32] In Goldberg and Zipursky's writings, corrective

28. E.g., *A* owes *B* a contractual obligation to do *x*, but *B*'s ability to sue is time barred or is unenforceable for lack of formality, e.g. that the contract was not in writing where that is required by statute.

29. It is very likely that a source of the problem is the influence of certain jurisprudential theories on the authors of *Recognizing Wrongs*. For an analysis of these theories, see Allan Beever, *Law's Reality: A Philosophy of Law* (Edward Elgar, forthcoming) at ch 15.

30. Goldberg & Zipursky, *supra* note 3 at 154-68.

31. Christian Witting, "What are We Doing Here? The Relationship Between Negligence in General and Misstatements in English Law" in Kit Barker, Ross Grantham & Warren Swain, eds, *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart, 2015) 225.

32. See James Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013). See also Izhak Englard, *Corrective & Distributive Justice: From Aristotle to Modern Times* (Oxford University Press, 2009).

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

justice theory is presented as the creation of a few Canadians and one American, though it has recently been supplemented by a Brit or two. In reality, it has a two and a half thousand-year history and the list of its adherents could constitute a roll call of many of the most distinguished jurists ever to wield a pen. There is a great tradition of legal thought here—the greatest tradition—but we insist on ignoring it, even though we belong to it.

There are two points. The first is that corrective justice is a major school of thought and not the theory of a small handful of modern scholars. It is worth remembering that the greatest modern work in this area, Ernest Weinrib's *The Idea of Private Law*, presents itself as belonging to this school.[33] The school cannot be defeated by pointing to difficulties with the theories of some of its members. Even if Goldberg and Zipursky show that we should not accept the views of Weinrib, Ripstein, and Gardner, what does that tell us about Aquinas, Cajetan, Pufendorf, or a host of others?

The second point is that, if we understand the first point, our work may come to have a significance and a degree of influence that it is unlikely to possess given how things stand. Let me put it this way. I am not sure why, but theorists in this area—unlike in other areas of law—have a peculiar attitude. They seem to feel that the very definition of a tragedy would be finding someone who agrees with them. Thus, we now have a plethora of theories that to the rest of the world look like corrective justice theories but whose authors insist are, in fact, all crucially different from each other. Similarly, we have newly converted corrective justice theorists reserving their most withering criticism for other corrective justice theorists, writing as if the only corrective justice theory worth even considering was —of course—their own.

Goldberg and Zipursky are not guilty of that, but their insistence that their theory is a rival to corrective justice theory, rather than a member of that school of thought, damages the position of everyone. For example, in their conclusion they claim that, if Weinrib does not commit himself to the idea that tort law succeeds in creating justice in society (dynamic justice), then "he would have been correct all along to claim that there is little space between corrective justice theory and civil recourse theory."[34] Weinrib, however, has surely been extremely cautious not to commit himself to this position—or, indeed, much to some of his critics' frustration, to any political position. Weinrib's theory and Goldberg and Zipursky's theory contain differences, but they both belong to the same school of thought. The fact is that the debates between these Canadian and American theorists are debates among friends. It is time they were written that way too.[35]

33. See especially, Weinrib, *supra* note 16 at chs 3-4, 8.
34. Goldberg & Zipursky, *supra* note 3 at 358.
35. The point here is not one about the psychology of academic life—e.g., that we would have nicer careers if we wrote more kindly about each other—though I would also not wish to dismiss the significance of this. The point is rather one about accuracy. If the truth is that there is little that divides two theories, then it is not truthful for the theorists to present the theories

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

Having accepted that there may be little light between their theory and Weinrib's, Goldberg and Zipursky go on to say that, if that is so, "we would then insist ... that the label 'corrective justice' is misleading, and that the language of 'civil recourse' and 'redress for wrongs' is truer to the phenomena being described."[36] I have some sympathy with Goldberg and Zipursky here, but only some. Why did Weinrib use the term 'corrective justice'? Because he found it in Aristotle and because it is the name of a great tradition in legal thought (or almost the name, see below). It was not his name and he did not present it as such. The problem is that so many respondents—and Goldberg and Zipursky are among the least problematic in this regard—have taken the name as if it were a definition, thinking that the concept of corrective justice is best elucidated by looking up the meanings of the words 'corrective' and 'justice' in the dictionary. It is as if, wanting to know me better, you decide to conduct an etymological analysis of the name 'Allan'. 'Corrective justice' is a proper name. It has no necessary semantic content. We could in principle call its referent anything.[37]

That said, with hindsight, it probably was a mistake to have chosen the term 'corrective justice' given how people have understood the term and probably will continue to understand it. Moreover, in fact, for most of its history, corrective justice theory was in fact called *commutative* justice theory. That term is problematic also, but it would nevertheless have been a better option.[38]

For convenience, however, in the following I use 'corrective justice' as Goldberg and Zipursky do and 'commutative justice' to refer to the wider tradition of thought.

This discussion is related to another interesting feature of *Recognizing Wrongs*. Concerned that the intended audience of the book may find its thesis alien to ideas about tort law prevalent in the US, the authors take pains to show that the idea of civil recourse is embedded in US legal and political thought. They speak, for instance, of "the centrality to American legal thought—including American constitutional law—of the idea that when a person has suffered a legal rights violation at the hands of another (whether a tort or some other legal wrong), then, ordinarily, she is entitled to recourse against the wrongdoer"[39] and remark that "[t]he Declaration of Independence demonstrates that the principle of civil recourse is built into our national identity."[40] At times, it appears as if the authors think that civil recourse is at least especially, if not uniquely, an American concept.

---

otherwise. Also, if one's aim is to convince people that something like these theories must be correct, presenting them as miles apart is not likely to be a successful strategy.

36. Goldberg & Zipursky, *supra* note 3 at 358.

37. See also Allan Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013) at 67-69.

38. For a more detailed analysis of this terminology, see *ibid* at 63-80. One reason it would have been a better option is that it would probably have eliminated the error, so frequently made, of thinking that this form of justice by definition cannot account for the rights protected by tort law. For an example of this mistake, see Goldberg & Zipursky, *supra* note 3 at 231.

39. Goldberg & Zipursky, *supra* note 3 at 30.

40. *Ibid* at 35.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

The thesis is that the principle of civil recourse—and we might now say of commutative justice—is embedded in, for instance, the US Constitution. Goldberg and Zipursky argue that recognition of this ought to smooth the way for the reception of the idea that the same notion is embedded in US tort law. The irony, however—one that Goldberg and Zipursky also note—is that the norm is embedded in the US Constitution because it has for hundreds of years been embedded in tort law, US and foreign, and that foreign law, and foreign legal analysis, has been by far the most important in this regard.

We are told, for instance, that the US Constitution has the shape it does in part because:

> Thomas Jefferson was steeped in the law. Under the tutelage of George Wyeth, and in his eight years of law practice, Jefferson not only studied the writings of Edward Coke and Blackstone, he prepared detailed reports of cases from the English courts. As a result, he was quite familiar with "tort" complaints—that is, actions alleging wrongful injury brought under the old English writ system. Of the opinions that he studied and copied, Jefferson took special note of decisions issued by John Holt, Chief Justice of the King's Bench, that upheld claims by private citizens against government officials for injuries caused by breaches of their official responsibilities.[41]

Note that this is tort law influencing the Constitution and not the other way around. Goldberg and Zipursky hope that Constitutional thought might rescue thought about tort law. If so, that will be returning a favour. But it is also important to remember that this understanding of tort law was not invented by Wyeth, Blackstone, Coke, or Holt. It began with Aristotle and was fostered by the great jurists of the commutative justice tradition.

Moreover, no theorist could plausibly claim that civil recourse is the appropriate lens through which to analyse tort law and remain entirely neutral about the moral value of civil recourse. There are difficult questions here that cannot be dealt with now, but a civil recourse theorist must have some commitment to the value of civil recourse, even if that commitment is nothing more than a holding that others think that civil recourse is valuable. In law, explaining what the law is doing cannot entirely be divorced from explaining why the law is doing it. This is because law operates intentionalistically.[42] Legal actors act for reasons. They are trying to do things. Because of this, we would not know what to do with a theory that purported to explain tort law on the basis, say, that it perfectly matched the random outputs of some machine, even if it did perfectly match those outputs. The civil recourse theorist must at least think that someone might think that civil recourse was worth doing.

---

41. *Ibid* at 32 [footnotes omitted].

42. By this, I mean that law is a phenomenon created, maintained, and utilised through human intentionality. For an analysis of intentionality, see especially John R Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press, 1983). For an application of this theory to law, see Beever, *supra* note 29.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

But there is no theory in *Recognizing Wrongs* of why that might be. Goldberg and Zipursky memorably say that "the justifiability of the state's claim to authority depends, in part, on its recognition and implementation of the principle of civil recourse,"[43] but they do not quite say why. Answers are available, of course. There is something important about recognising in individuals rights that they hold, not just against the state, but against other individuals and requiring violators of those rights to account to the victims of those wrongs. Ultimately, civil recourse theory needs an account of what that something is, and it seems almost certain that the right place to get this account is commutative justice theory.

C. Legal Practice v Legal Analysis

In *Recognizing Wrongs*, Goldberg and Zipursky develop a position that they call dual constructivism. As they tell us, "On this view the wrongs of tort are 'constructions' (or 'reconstructions') of injurious wrongs explicitly or implicitly recognised in doctrine and in social norms."[44] The view that they present focusses on the history of judicial decision making. Of course, there is no substitute for reading their own account, but we can summarize their position by saying that the list of wrongs to which tort law responds is the creation of judges deciding cases throughout the history of the common law. This, naturally, is a process still underway. Here is a useful summary.

> Tort law's wrongs have emerged out of a process whereby judges, in response to complainants demanding redress, have been required to make judgments about wrongdoing and civil answerability on terms that litigants can to some degree recognize. The judges who have made tort law did not start with a substantive moral principle, and have never settled on one. Rather, they started with a small collection of basic wrongs—basic in being familiar and relatively uncontroversial—and then from time to time have refined, and revised the collection. This collection features both "classics" and important new works. One might imagine them, like artworks similar of genres, clustered together in thematically organized rooms (dignitary torts, property torts, tortious interference with one's ability to interact with others, and so on). Occasionally new rooms are added to house new wrongs. In sum, torts are neither one wrong nor a hodgepodge. Tort law is a constructed and curated gallery of wrongs.[45]

One of the reasons why this is important is that analysis of this kind has been lacking in commutative justice theory. Historically, of course, most theorists were not focussed on judges, as they were working with reference to civilian systems. It is probably fair to say that more modern commutative justice theorists, writing about common law systems, have neglected this also, however. We say, for instance, that tort law is a system of commutative justice, meaning that its doctrines are best explained as instituting a system with that normative structure, but we

43. Goldberg & Zipursky, *supra* note 3 at 120.
44. *Ibid* at 233.
45. *Ibid* at 237-38.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

have not said as much as we might have about how and why judges have created such a system. That is a lacuna that should be dealt with and Goldberg and Zipursky's work is very helpful in this regard.

But, again, Goldberg and Zipursky are wrong to think that their view is a rival of commutative justice theory.[46] These are theories of different things. Theirs is a theory of how the law came to have the structure of commutative justice or, if you prefer, civil recourse. The other theories are theories of that structure. Perhaps, though, Goldberg and Zipursky intend their account to explain both of these things. They appear to deny this, however.[47] This leads to another useful comparison between *Recognizing Wrongs* and other works of commutative justice.

The focus of modern commutative justice theorists has been devoted to revealing that, despite appearing as a hodgepodge of sometimes disordered actions, tort law and individual torts have a coherent normative structure. The aim has been to render the law rationally intelligible by interpreting it through the lens of that form of justice. There is no equivalent account in *Recognizing Wrongs*. Dual constructivism is not in any sense a replacement for this.

Take a simple example. The law of battery protects the right to the body. One might want to know why we have that right. That question can be taken in two ways. It could ask how it was that the courts in our system came to recognise the existence of that right. But it could also ask for the justification of the positive legal recognition of that right. Dual constructivism is an answer to the first, but not to the second, question. The second question is a perfectly legitimate question, however, and a complete theory of tort law requires an answer to it. That answer is provided by the commutative justice theories that Goldberg and Zipursky unfortunately set themselves against.[48]

Consider also *Palsgraf v Long Island Railroad Co*.[49] In this case, the defendant's employees negligently pushed a man onto a moving train. The man was carrying fireworks in an unmarked package. The package was dislodged and fell to the ground, causing the fireworks to explode. The plaintiff, who was standing far from the explosion, was injured. The majority of the Court, led by Cardozo CJ, found for the defendant on the ground the that plaintiff was not owed a duty of care. As Cardozo CJ insisted,

> Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all … Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is

46. *Ibid* at 233-34.
47. *Ibid* at 231, denying that civil recourse theory can account for the rights to which tort law responds.
48. E.g., Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) at ch 2 and Allan Beever, *A Theory of Tort Liability* (Hart Publishing, 2016) at ch 4.
49. 162 NE 99 (NY CA 1928) [Palsgraf].

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

> protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. … The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime … He sues for breach of a duty owing to himself.[50]

Though, as *Recognizing Wrongs* points out, this is widely believed to be meaningless or incomprehensible in the US, Goldberg and Zipursky support Cardozo CJ's analysis by saying:

> According to this principle, a tort plaintiff cannot prevail by showing that the defendant acted wrongfully toward a differently situated person yet did not act wrongfully toward her. In short, to assess accurately the third prong of Cardozo's analysis, we must understand it to rest on the broader claim that, *in general, a tort plaintiff has a right of action against a defendant only if the defendant acted wrongfully toward (committed a wrong upon) the plaintiff, rather than having acted wrongfully exclusively toward others or in general*.[51]

Naturally, as a commutative justice theorist, I agree entirely with this analysis. Nevertheless, there a problem since the analysis intended to support Cardozo CJ's position is equally consistent with that advanced by Andrews J's, writing in dissent in *Palsgraf*. As Andrews J said:

> The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.[52]

Like Cardozo CJ's, Andrews J's position was that Palsgraf had, as Golberg and Zipursky put it, "a right of action against [the Long Island Railroad] only if the defendant" or, in this case, persons for whom the defendant was responsible, "acted wrongfully toward (committed a wrong upon)" Palsgraf.[53]

To support Cardozo CJ's position adequately, then, it is not enough to argue that liability follows wrongdoing; it is also necessary to elucidate the type of wrongdoing relevant to tort law. As far as I can see, there is nothing in the concept

50. *Ibid* at 101.
51. Goldberg & Zipursky, *supra* note 3 at 201 [emphasis in original].
52. *Palsgraf*, *supra* note 49 at 103.
53. Goldberg & Zipursky, *supra* note 3 at 201.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

of civil recourse as enunciated in *Recognizing Wrongs* that would help us choose between Cardozo CJ's and Andrews J's views. This is important because Goldberg and Zipursky correctly identify Cardozo CJ's judgment as a paradigm of the understanding of tort law that they aim to support. Again, we see that civil recourse theory cannot stand on its own. It requires the support of resources found in commutative justice theory.[54]

A similar issue arises in relation to *Rylands v Fletcher*. Water leaked from the defendant's reservoir, flooding the plaintiff's mine. In the most powerful judgment in the litigation, Bramwell B said:

> Now, what is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing he subjected himself to all consequences resulting from natural causes, among others, to the influx of all water naturally flowing in. But he had a right to be free from what has been called "foreign water," that is, water artificially brought or sent to him, directly, or indirectly by its being sent to where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly it is admitted an action would lie; and that it would, if they did it again. . . . The plaintiff's right then has been infringed; the defendants in causing water to flow to the plaintiff, have done that which they had no right to do. What difference in point of law does it make that they have done it unwittingly? I think none; and, consequently, that the action is maintainable. The plaintiff's case is—you have violated my right; you have done what you had no right to do, and have done me damage. If the plaintiff has the right I mention, the action is maintainable.[55]

This too is an approach that insists that tort liability is premised on wrongdoing, on the violation of the plaintiff's rights. But it is an approach that, if adopted generally, would result in a very different system of liability than the one that exists today. In particular, Bramwell B's judgment supports a regime in which strict liability would play a far greater role than it now does and in which there would probably be no place for a law of negligence. Because of this, civil recourse theory can say nothing as to why we might prefer the regime that we have to Bramwell B's hypothetical one (or *vice versa*). That is not a criticism of civil recourse theory per se. The point is that one might well want more than civil recourse theory provides. Being told that Bramwell B's vision was not followed as a matter of historical fact is not likely to satisfy the theoretically minded lawyer.

A related issue concerns Goldberg and Zipursky's attempt to show that US products liability law is, again despite appearances, consistent with civil recourse theory.[56] The story they tell is that, before this law was created, two other branches of law that had both strengths and weaknesses operated in this area. These were warranty and negligence law. One strength of the former was that

54. For commutative justice accounts of *Palsgraf*, and of the duty of care generally, see e.g., Ernest J Weinrib, "The Passing of *Palsgraf*?" (2001) 54:3 Vand L Rev 803 and Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007) at 123-28.
55. *Rylands v Fletcher* (1865), 3 H & C 774, 159 ER 737.
56. Goldberg & Zipursky, *supra* note 3 at 302-19.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

it provided protection for consumers without their needing to prove fault. The great weakness was that warranties operated only as between parties in privity: "because they were contractual in nature, they traditionally required privity between defendant and plaintiff. The ultimate manufacturer of the product or its distributor sometimes could not be held liable for breach of warranty if the product was purchased from an independent seller."[57] The great strength of the law of negligence, post *MacPherson v Buick Motor Co*,[58] was that it did not require privity. Its great weakness was that it did require proof of fault. According to Goldberg and Zipursky, what the courts did in creating products liability was fuse the most useful parts of these two laws.

> From within a dual constructivist framework, [the cases] mark sensible efforts to construct a new legal wrong out of existing legal materials. [One case] in effect grafted negligence law features onto what was basically a warranty-based tort claim, whereas [another] grafted warranty features onto what was basically a negligence-based tort claim.[59]

Goldberg and Zipursky present this as a good example of dual constructivism in action, but it surely also demonstrates why, with civil recourse theory alone, we are flying blind. What justifies the fusion that Goldberg and Zipursky claim occurred here?

The reason that warranty and negligence law were not earlier fused, and the reason why these areas of the law are not fused in Commonwealth law, is because they respond to entirely different considerations. A warranty is part of a contract. The reason that a warranty claim "traditionally required privity between defendant and plaintiff"[60] is not because of tradition, but because that is in the nature of a warranty. Saying 'You can recover for the breach of a warranty from the defendant though there is no privity between you and the defendant' is effectively to say, 'You can recover for the breach of a warranty from the defendant though there is no warranty between you and the defendant'. Likewise, that the law of negligence required fault was no quirk of history. It required fault because it was the law of negligence.

I am not claiming that the fusion was unjustified. What I am claiming is that whether it was justified is the central question—and specifically, for Goldberg and Zipursky, whether it can be justified consistently with the proper commitments of civil recourse theory—and there is nothing in *Recognizing Wrongs* that would help us to answer that question. Consider this passage.

> The *wrongfulness* at the core of the warranty-based tort claim . . . is the marketing of a defective product. This is a breach of a duty of noninjuriousness—it is conduct that generates an unacceptable risk of injury. When that risk ripens into an actual injury, the conduct becomes a breach of a duty of noninjury. Strict products

57. E.g., *ibid* at 307-08.
58. 111 NE 1050 (NY CA 1916).
59. Goldberg & Zipursky, *supra* note 3 at 309-10.
60. *Ibid* at 307.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

> liability, so understood, took from the law of warranty the idea that there is a wrong in providing a consumer with a product that does not perform as safely as the consumer was entitled to expect, yet anchored this expectation not in an explicit or implicit promise from seller to purchaser but in a legally imposed duty. And given that this class of warranty claim is triggered by a consumer's physical injury, rather than by the lost profits typically at issue in warranty litigation among businesses, it seems to belong more in the domain of tort than contract.[61]

How does one determine whether a product is defective? On what basis are we entitled to conclude that the defendant created "an *unacceptable* risk of injury" or that a product did "not perform as safely as the consumer was *entitled* to expect"? The crucial value judgements are all hidden here. Consider also:

> The upshot is that, although there is indeed a basis for seeing the advent of a strict products liability action as a recognition of an implied warranty claim grafted onto a tort foundation, there is also a basis for seeing it as the recognition of a reconfigured and more plaintiff-friendly negligence claim that ratchets up the manufacturer's duty of care.[62]

We are surely entitled to ask whether any of this grafting or ratcheting up is justified and, if it is, whether that justification is really consistent with the general thesis advanced in *Recognizing Wrongs*. On the face of it, it isn't.

D. Civil Recourse v the Real World

Recall that, according to civil recourse theory, the goal of tort law is to provide a means by which a plaintiff who has been wronged by a defendant can seek recourse from the defendant for that wrong. Thus, we are told that tort law is a "mechanism of accountability"[63] and that tort liability involves "the fulfillment—*recognition*—of a legitimate demand by an injury victim for responsive action from a wrongful injurer."[64] While this is a nice idea in theory, the problem is that this seldom happens in practice.

The most well-known point to be made in this context is that the plaintiff usually receives money, not from the defendant, but from the defendant's insurer. Goldberg and Zipursky's response to this objection is the standard one given by commutative justice theorists. The argument "relies on a false premise: namely, that if a person owes a duty to another, it is not possible for her to make a contractual arrangement with a third party to assist her in fulfilling the duty."[65]

However, while the argument works for a corrective justice theorist it is far from obvious that *Recognizing Wrongs* is entitled to it. *D* is able to get a third party to do the act that corrects the wrong that *D* did *P*. There is no problem here. But the reality of liability insurance does not sit so well with the idea that tort law is a "mechanism

61. *Ibid* at 310.
62. *Ibid* at 311.
63. *Ibid* at 9.
64. *Ibid* at 17 [emphasis in original].
65. *Ibid* at 274.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

of accountability"[66] or that tort liability involves "the fulfillment—*recognition*—of a legitimate demand by an injury victim for responsive action from a wrongful injurer."[67] Surely, if tort law is a mechanism of accountability, then defendants have to be held to account; and if tort liability requires responsive action from a wrongful injurer, then the injurer ought to be the one to take that responsive action.

The problem in fact goes deeper than this. The issue with liability insurance is not just who pays. It is that this insurance distorts the way that tort law operates in the world. If we take the UK as an example, for instance, then the most significant issues are that insurance is so important to litigation that (i) it generally occurs only when the defendant is insured, regardless of the strength of the plaintiff's position as a matter of law, and the damages are paid by the insurer; (ii) social welfare in fact plays a far more important role than tort law in compensating victims of torts; (iii) welfare plays so important an indirect role in funding tort litigation that those who do not receive welfare support are highly unlikely to receive any compensation through the law; (iv) the overwhelming proportion of tort damages are paid by insurance companies (94% in the UK) and almost all of the rest is paid by bodies that are self-insured, meaning that tortfeasors hardly ever pay tort damages; (v) potential plaintiffs are normally determined to settle rather than pursue claims through the courts, even if the result is significant under-compensation; and (vi) most tort payments are in fact for minor injuries and tort law appears to play only an insignificant role in providing compensation for major injuries.[68] Can we really say that this is a system of civil recourse in which plaintiffs hold those who have wrongly injured them to account? The problem, to put to bluntly, is that what is purported to be a system of civil recourse in which plaintiffs gain redress for wrongs done to them does not seem actually to achieve much civil recourse or redress. If this is not a problem for the theory, one wants to know why.

Moreover, there is evidence from the US especially that indicates that tort law does not function to give plaintiffs full redress for wrongs that they have suffered and, crucially, does not function in this way because *plaintiffs* do not want it to: they do not want it to *because they would regard the law as unacceptably unjust were it so to function*.[69]

As I have explained in detail elsewhere,[70] this is not, or need not be, a problem for corrective justice theory, as these theorists are concerned only to elucidate the justice that they find in the doctrines of the law. It may be that a system of justice is found in legal doctrine, though the law as it functions in the world does not achieve that system of justice. Or it may be that a system of justice is found

66. *Ibid* at 9.
67. *Ibid* at 17 [emphasis in original].
68. See Richard Lewis & Annette Morris, "Tort Law Culture: Image and Reality" (2012) 39:4 JL & Soc'y 562.
69. Tom Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" (2001) 35:2 Law & Soc'y Rev 275. I have discussed these issues in Allan Beever, "Tort Law and the Tort System: From Vindictiveness to Vindication" in Roger Halson & David Campbell, eds, *Research Handbook on Remedies in Private Law* (Edward Elgar, 2019).
70. Beever, *supra* note 69.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press

in legal doctrine, but that there exists a better system of justice that can be created and implemented in the world. The corrective justice theorist can accommodate this, but it is far from clear that the civil recourse theorist can. Can we really say, for instance, that tort law is a system of accountability that achieves very little accountability? At least, we need to hear more about this.

Finally, it is worth noting that the civil recourse theory found in *Recognizing Wrongs* is in many ways far more ambitious than corrective justice theory. Consider again this passage, for instance.

> Our claim is that, for individuals in a liberal-democratic political state such as ours, the justifiability of the state's claim to authority depends, in part, on its recognition and implementation of the principle of civil recourse.[71]

Note that this shows that Goldberg and Zipursky are committed not only to the idea that civil recourse explains the structure of tort's doctrines but that tort actually achieves civil recourse in the world. Given what has been said, one must now be concerned for the justifiability of the US state, and the basis of its claims to authority. Corrective justice theory, on the other hand, is committed to no such notions. If I am right, then, despite the fact that the doctrines of tort law reflect corrective justice, that form of justice is instantiated only sparingly in the 'real world'. But what we should make of that is another matter—a matter to which, I have argued, commutative justice theorists ought to be turning their attention.[72]

4. Conclusion

Recognizing Wrongs is a fine book. Undoubtedly, anyone interested in the theory of tort, in the US and outside it, will wish to read it and will learn much from it. In the eyes of this reader, its chief fault lies not in the view that it enunciates, but in its rejection of analyses it would more profitably regard as complementary. I have to confess to being tired of reading works that present ideas with which I already agree as if they were objections to my entire worldview, as if they were brand new notions that belong to freshly minted theoretical approaches. Unfortunately, there is *some* of this in *Recognizing Wrongs*. Though this will regrettably not be welcomed by its authors, I think that the best way to view *Recognizing Wrongs* is as a highly valuable contribution to the long and distinguished history of commutative justice theory.

71. Goldberg & Zipursky, *supra* note 3 at 120.
72. Beever, *supra* note 69.

https://doi.org/10.1017/cjlj.2021.4 Published online by Cambridge University Press