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Book Review: Concepts All the Way Down

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— Book Review —

CONCEPTS ALL THE WAY DOWN*

JOHN C.P. GOLDBERG AND BENJAMIN C. ZIPURSKY,
RECOGNIZING WRONGS (CAMBRIDGE, MASS.: BELKNAP
PRESS OF HARVARD UNIVERSITY PRESS, 2020).

Peter M. Gerhart[†]

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INTRODUCTION

Two of the most prolific and respected tort scholars, John C.P. Goldberg and Benjamin C. Zipursky, have published a vital summation of their ideas about tort law; they call the book *Recognizing Wrongs*.¹ This is not a collection of their many articles on tort law; it is a freshly written, comprehensive exposition of their beliefs about tort law’s central concepts. To those who have faithfully read their articles over the years, much will sound familiar; but even those readers should read this book to understand the coherence of their arguments.

The book states a claim and defends it against real or imagined detractors. The claim is this: “tort law empowers persons to obtain

* A wise philosopher was asked what held the earth up. “A giant turtle,” the philosopher replied. “But what holds up the turtle?” his questioner asked. “Oh,” the philosopher answered, “another turtle. In fact, it is turtles all the way down.”

† Late John Homer Kapp Professor of Law, Case Western Reserve University. This review was accepted for publication shortly before the author’s untimely passing.

1. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

redress from those who, in the eyes of the law, have wrongfully injured them.”² At one level, this claim is definitional and descriptive. Yes, if a court finds that the defendant has committed a wrong, the court will provide the victim with redress. Students learn that on the first day of their class in tort law. Looking back at how judges decide cases, we can say with confidence that in every instance in which a court has granted relief, it has found that the defendant committed a wrong that entitles the plaintiff to that relief. We can also say with confidence that in no case in which a judge has denied relief on substantive grounds has the defendant committed a wrong. However, the authors intend their book to be more than a 350-page tautology. They intend the book to be a major statement about the nature of law and legal reasoning. Indeed, it is.

The authors develop and defend a form of legal reasoning they call “pragmatic conceptualism.”³ They develop a theory of rights—the right to civil recourse and redress—that seeks to stand on its own, quite apart from the content of what legal materials prohibit or enable. They develop a theory of rights and remedies that shows the relationship between the two in non-instrumental terms. They claim that we can recognize wrongs by understanding the concept of wrong developed in prior determinations of wrongful behavior. Finally, they claim that because tort wrongs are set apart from other wrongs, they are unique and distinctive (two of the authors’ favorite words). These are formidable accomplishments by talented scholars. The book presents a positivist approach to understanding tort and discusses the kind of objections that other scholars of a positivist persuasion might have to the idea that tort law is about the redress of wrongs.

The question raised by the book, and by this review, is whether conceptualism is a helpful way of viewing tort law, or, by extension, any law. The authors apparently believe that the alternative method of understanding tort law is instrumental. Instrumental theories define the field of tort law by what it accomplishes, and the authors repeatedly cast aspersions on instrumental views of tort scholars.⁴ The authors offer pragmatic conceptualism as the antidote. If one believes that conceptualism and instrumentalism are the only methods of understanding tort law, one might be inclined to agree. However, those are not the only options; it is possible to have non-instrumental, non-conceptual theory of tort law, as I will show below.⁵ What is puzzling

2. *Id.* at 147. *See also id.* at 2 (“Tort law . . . is a law of wrongs.”).

3. *Id.* at 5.

4. The major references to instrumentalism are in *id.* at 73–81, but they recur throughout the books, including *id.* at 210, 212–14, 255–56, 264–66, and 360–62.

5. These theories are explained in fuller detail in PETER M. GERHART, TORT LAW AND SOCIAL MORALITY (2010).

is that the authors are clearly capable of developing such an approach to tort law, but they have chosen not to. I will try to unpack that puzzle in this review.

I situate the main ideas of *Recognizing Wrongs* within the general contest between positivist and natural-law approaches to understanding a body of law. I then claim that the authors are trying to turn a positivist, conceptual approach into a natural law approach, and I show how they are doing so as a counterweight to an instrumental approach. Ultimately, I believe that this attempt to merge positivist with natural law theory is unsuccessful, primarily because a concept cannot define its own content. However, the authors have also overlooked the possibility of having non-instrumental theories of tort law that are superior to conceptual theories. This, in turn, allows me to identify a shortcoming of positivism—namely, the failure to offer a theory of what the law does *not* prohibit or enable. Recognizing wrongs is one thing; recognizing non-wrongs is another.

I. POSITIVISM V. NATURAL LAW

We can best understand this book's perspective in light of the jurisprudential contest between positivist and natural law theories of what a legal system entails. The Goldberg and Zipursky account is positivist through and through; it shuns any direct appeal to ideas that one might associate with natural law theory. According to positivists, the law is what lawmakers prohibit or enable, and what the law prohibits or enables is simply a social fact about what lawmakers have decided.⁶ In the context of this book, the law is a series of conduct rules for which courts give redress. If courts identify certain behavior as negligent and determine that the negligence connects in a specified way to a victim's harm, the court has established the grounds for finding a wrong and providing redress. Positivists have a sophisticated theory of rights and a sophisticated theory of legal interpretation, and Professors Goldberg and Zipursky exploit both with great skill. They even add details (and vocabulary) to the positivists' story.

Positivists view legal requirements to be the output of the legal system—the things that legislators and judges say people ought to do or refrain from doing. They understand law in terms of rules and doctrine—the output of the institutional system by which lawmakers determine prohibitions and enablements. In that sense, positivists operate on the surface of the law; they identify an automobile by its definitional characteristics, without looking under the hood to see what

6. The foundation of modern positivism is H.L.A. HART, *THE CONCEPT OF LAW* (1961). Its adherents include scholars such as Joseph Raz, John Gardner, and Scott Shapiro. *See generally* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JOHN GARDNER, *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* (2012); SCOTT SHAPIRO, *LEGALITY* (2011).

makes it work. Moreover, because they ply the surface, positivists are both separatists and literalists.⁷ Positivists, or at least these positivists, take at face value what judges say they are doing, and they use that literal language to identify that which separates one area of law from another.⁸ As a description of what the law prohibits or enables, the book is accurate: tort law provides redress for wrongs. However, what does that tell us about law?

Natural law scholars, by contrast, are a diverse group, unified by the fact that they find positivism to be uninteresting. Despite their diversity, non-positivists (as natural law scholars are sometimes known) have one thing in common. They believe that legal analysis ought to strive to understand what determines the law's content; they seek to know what factors or values determine what the law prohibits or enables. In the context of tort law, they seek to understand what determines whether a person has committed a wrong of the kind that entitles a plaintiff to redress. They seek, in other words, to understand law by its inputs, by the mode of reasoning a judge uses to determine whether the defendant has been negligent or has committed a battery—not by its outputs—the occasions when a judge or jury finds that the person has been negligent or committed a battery. They look under the hood of the law and seek to understand how the law operates and what happens, for example, if we change the design of the carburetor. They understand that the automobile will still be an automobile, but they wonder if it will operate in the same way.

Because they are a diverse group, natural law lawyers present diverse visions and methodologies. John Finnis understands law to derive from the concept of practical reasonableness.⁹ Ronald Dworkin understands law to be determined by legal principles.¹⁰ Economists believe that law emanates from the concept of efficiency.¹¹ Although these perspectives differ, they have in common the belief that the best way to understand legal requirements is to understand the factors and values that determine what the law prohibits or enables.

Consider differences between the two perspectives. Positivists view law as a system of outputs (the rules and doctrines that judges and

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7. The tendency toward separation and literalness may be connected. The authors find no substantive unity in tort law, GOLDBERG & ZIPURSKY, *supra* note 1, at 56, but they maintain that tort law is a distinctive kind of law. *Id.* at 56–58.
 8. As we will see, although the theory of civil recourse applies to many doctrines, the authors work hard to show that civil recourse in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and in contract law are distinctive enough to inhabit a separate realm. *Id.* at 30, 35–36, 39, 44.
 9. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100 (2d ed. 2011).
 10. *See generally* RONALD DWORKIN, *LAW'S EMPIRE* (1986).
 11. *See generally*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

legislators produce); non-positivists view law as a system of inputs (factors and values that determine the rules or doctrine). The positivists ask the *what* question; they want to understand the concept of law by what the law prohibits or enables. Non-positivists ask the *why* question; they want to know why the law prohibits or enables some behavior but not others. Positivists ask about the essence of law. Professors Goldberg and Zipursky seek to answer this favorite positivist question by arguing that the essence of tort law is about the redress of wrongs. By contrast, natural law lawyers believe that the essence of law is in the method of reasoning by which the law creates or recognizes legal norms, which cannot be put into a simple rule.¹²

The two perspectives influence legal advocacy differently. When advocates argue for one interpretation of legal doctrine over another, they often make positivist arguments. They are arguing, “here is the best interpretation of what the law prohibits or enables.” However, advocates frequently make non-positivist, natural law arguments as well. As an example, consider the many suits against the manufacturers of DES, a drug that caused harm and that the manufacturers marketed inappropriately.¹³ The plaintiffs could prove that the manufactures were negligent but could not prove which manufacturer caused the injury to which plaintiff. Despite the plaintiffs’ inability to prove “but for” causation, the plaintiffs were allowed to recover at least a part of their damages by asserting that each manufacturer’s market share was a good proxy for demonstrating the requisite causal connection between a manufacturer’s negligence and a victim’s harm.¹⁴ This result—the definition of a new wrong—could be explained only by natural law arguments. In contrast to the positive perspective, advocates often argue for one interpretation of the law over another by arguing about what the law *should* prohibit or enable.

12. The title of their book, *Recognizing Wrongs*, is an oblique (and unacknowledged) reference to H.L.A Hart’s notion that the Rule of Recognition allows judges to distinguish valid from invalid legal norms. HART, *supra* note 6, at 97–99. This is important to positivism because it allowed Hart to avoid the issue of *why* the law prohibits or enables what it does. The odd thing about the Rule of Recognition is that no one has ever stated what the rule says—what the rule’s content consists of. If the rule is procedural only—if it just identifies valid from invalid pronouncements based on following prescribed procedures—then the rule simply tells lawmakers to follow prescribed processes. However, if the Rule of Recognition allows a judge to distinguish wrongs from non-wrongs, then we ought to be able to articulate what the rule provides. The basis of determining why the law prohibits or enables some conduct, and does not prohibit or enable other conduct, cannot be just a matter of judicial intuition or say-so.

13. *See, e.g.*, *Sindell v. Abbott Labs.*, 607 P.2d 924, 925 (Cal. 1980).

14. *Id.* at 937. The DES cases serve as a centerpiece of Ronald Dworkin’s theory of legal interpretation. RONALD DWORIN, *JUSTICE IN ROBES* 49 (2006).

The distinction between positive law and natural law also reflects a different orientation toward legal rights. To non-positivists, rights are what the law defines based on the factors and values that lawmakers use as a part of their reasoning to resolve disagreements that come before them. For positivists, rights are what determine whether a person has committed a wrong. If the opponent has a right to a remedy, that is because the defendant has committed a wrong. More concretely, to a positivist, the maximum speed through a school zone is the speed limit the legislature has set. To a non-positivist, that is not an interesting legal fact; to a non-positivist, the interesting question is under what circumstances, if any, a judge or legislature would excuse a person from disobeying the positive law.

Positivists see the legal system as a closed system in which the law determines the law; law is what legal authorities say it is. To non-positivists, the law is an open system, inviting new arguments based on non-law insights. Positivists believe that the law's normativity derives from a form of reasoning that is distinct from the practical reasoning that people use in the everyday affairs. Natural law lawyers, by contrast, see the law as working out the requirements of human interaction based on non-legal inputs—the factors and values that make up practical reasoning.

The authors are not only positivists; they are also conceptualists. Conceptualism is perfectly consistent with positivism because concepts such as duty, right, and wrong play an important structural role in any account of the law.¹⁵ If a judge finds that the defendant's negligence did not cause the plaintiff's harm, the judge will find that the defendant committed no wrong. This makes causation an important structural feature of the law of torts; every case necessarily involves the element of causation. Concepts are therefore an important way of defining the proof burdens on a plaintiff—the elements that the plaintiff must prove in order to be entitled to redress. No one doubts the structural role of concepts in organizing law. Indeed, concepts are an important way of identifying the social problems that the concepts must resolve.¹⁶ However, the structural features of legal concepts are determined by the positive output of the legal system. They are summaries of what

15. Indeed, H.L.A. Hart, the father of modern positivism, has been referred to as a conceptual positivist. *See, e.g.*, David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *COMMON LAW THEORY* 134, 135 (Douglas E. Edlin ed., 2007).

16. Take, for example, the *ad coelum* concept, which embodies the idea that the landowners have dominion above and below the surface of their property. The content of the concept is constantly changing as technology creates opportunities for intrusions by telephone wires and overflights by aircraft and drones. Yet the concept remains as a reminder that legal sources must address the spatial dimension of ownership, a persistent social issue. *See* PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 223–24 (2014).

the plaintiff must prove in order to prove that the defendant has wronged the plaintiff in a way that entitles the plaintiff to redress. The question is what determines the content of the law's concepts, and that is a major point of contention about the nature of law.

The authors of *Recognizing Wrongs* want us to understand the content of legal concepts by the concepts themselves. They want us to understand the legal concepts not only as a description of what the law requires or enables, but also as an input into determining the content of the concept. They seek to turn their conceptual, positivist theory into a kind of natural-law theory, asserting that the law's concepts serve as structural features and also serve as inputs that determine what the law prohibits or enables. They want us to believe that concepts like duty, right, and wrong are more than structural markers that help us organize our understanding about how the legal system operates. They believe that courts use these concepts as inputs to determine what the law prohibits and enables.¹⁷ They believe that a conceptual account can help us understand both *what* the law prohibits or enables and *why* the law requires what the law prohibits or enables. Pragmatic conceptualism, if successful as a methodology for understanding tort law, would serve as both input and output for determining what legal sources prohibit or enable. The authors would have developed both a natural-law theory and a positivist theory.

As a sword to wield against instrumental theories, this strategy makes some sense. If concepts can define their own content, then we would not need instrumental theories. We would understand the law's requirements (legal outputs) by its input. The law's goal would be to recognize wrongs; law would be a closed system whose only purpose was to work out the content of legal concepts.

However, the authors have not made a convincing case that concepts define their own content. Moreover, they have overlooked that possibility on non-instrumental theories of law.

II. INSTRUMENTALISM AND TORT THEORY

The authors offer their theory as an alternative to instrumental theories—theories that understand tort law to be determined by a goal that is external to tort law. They associate instrumentalism with Legal

17. The authors recognize that they must discuss “how courts go about defining, identifying, applying, and revising the directives at [the] center [of torts].” GOLDBERG & ZIPURSKY, *supra* note 1, at 209. Moreover, they call their account of tort “an account of the substance of tort law’s rules.” *Id.* at 186. What differentiates this account of tort from non-positivist scholars is that these authors believe they can use concepts as inputs to decide when a wrong has been committed. They understand how courts go about their work at a conceptual level, rather than based on the non-legal factors and values that are non-instrumental but that determine what the law prohibits or requires.

Realism, at least in one of the ways in which they understand Legal Realism.¹⁸ The authors seem to believe that any approach to tort law that is not conceptualist will be instrumental; instrumentalism and conceptualism are, for them, the mutually exclusive modes of thought that determine the content of legal rules.¹⁹ Because they reject instrumentalism, they seek a conceptual account.

The authors are correct in their doubts about instrumentalism. Understanding the law's output in instrumental terms misunderstands the relationship between the law's inputs and outputs. While I agree that instrumental theories are inadequate as theories of tort law, Professors Goldberg and Zipursky have missed an important point—namely, that non-conceptualist approaches need not be instrumental. Conceptualism is not the only non-instrumental legal theory of tort law. The contest, when properly understood, is between non-instrumental views of tort law and conceptual theories.

By instrumental theories, the authors mean theories that treat tort law as a way of achieving goods that are external to the law: goods like deterrence, or compensation, or efficiency. Their anti-instrumental views are correct. The view that tort law is determined by what tort law achieves mistakes the law's outputs for the law's inputs. We can admit that if a court redresses a wrong, it will deter the wrongful conduct, but that does not make deterrence the aim of the system. If deterrence were the aim of the system, lawmakers would create causes of action for those put at risk by (for example) unreasonable behavior, even for uninjured plaintiffs. Similarly, if the aim of tort law were compensation, we would swiftly conclude that tort law is a particularly inappropriate way of compensating people who have been injured. Insurance works much better.

The author's real target apparently is the economic approach to tort law, although the idea that efficiency is an instrumental theory is only partly correct. In its economic form, efficient theories of tort law resemble conceptual theories. They focus on the law's output and find

18. The authors actually provide two views of Legal Realism. One is the instrumental view. The other we might call the pattern view. They describe non-instrumental Legal Realism reasoning in the following terms: "If all goes well [when we consider individual cases], social-scientific scrutiny of the data will reveal patterns that can serve as the basis for predicting future outcomes and for rational law reform." GOLDBERG & ZIPURSKY, *supra* note 1, at 74. The search for patterns is indeed a way of searching for inputs that can usefully distinguish between conduct that judges call wrongs and conduct that judges call non-wrongs. However, the search for patterns must look for patterns among the inputs into determining what the law prohibits or enables, and not at the prohibition and enablements themselves. The authors do not follow up on the idea that examining patterns of case outcomes enables one to determine the factors and values that distinguish wrongs from non-wrongs.

19. The authors carefully distinguish between an account of the law's overall worth and the ends that the law seeks to achieve. *Id.* at 343 n.1.

tort output to be efficient and therefore economic.²⁰ However, that too confuses the output of the tort system—what it prohibits or enables—with the reasons that determine the output of the system. The law defines the wrongs of tort in terms of the values that judges balance against each other to determine whether the defendant has committed a wrong. The balance of values is necessarily efficient if the law correctly measures and balances those values. However, efficiency is not the goal of the system; efficiency is the result that occurs if tort law correctly evaluates and balances the values. The values and how they are balanced are the determinants of wrongs, and thus of redress. If the outcome is efficient, it is only because, in light of the values that judges used and the balance of those values, no other outcome would improve one person's well-being without lowering another person's well-being. Economists have not come to grips with the fact that a large number of social arrangements satisfy that criterion and that judges employ a fairness norm to determine which such arrangement is just.²¹

Economic theories of law look to be instrumental because they posit that the law is designed for that efficiency end. Given the indeterminacy of the efficiency criterion, however, we can see that the economic approach simply substituted the word *efficiency* for the word *fairness* as a description of the law's output. Both fairness and efficiency are words to describe the conclusion that judges reach, but they do not serve to mark the instrumental goals of the field because they leave open the question of what inputs make an output efficient (or fair). The economic account of law made an important advance by showing that what determines the outcome of a disagreement is the balance of values at play in a case. However, the economic account cannot identify what the values are or how a judge should balance them. What determines outcomes is the values that judges deploy and the method by which juries balance those values when they determine whether the defendant has committed a wrong.

In fact, tort law is non-instrumental. In tort cases, judges address disagreements between people about how people ought to behave when they interact.²² Judges do not have a goal in mind except to work out the conditions under which one person is responsible for the well-being of another person. That is not an external goal; it does not favor plaintiffs or defendants.²³ It does not say that the goal is to award

20. See, e.g., POSNER, *supra* note 11, at ch. 6.

21. KEN BINMORE, NATURAL JUSTICE 2, 75 (2005).

22. Professors Goldberg and Zipursky continually emphasize the relational nature of torts. See, e.g., GOLDBERG & ZIPURSKY, *supra* note 1, at 92.

23. The authors betray their non-instrumental prejudices in their discussion of product liability. There they refer repeatedly to various iterations of product liability as being either pro-plaintiff or pro-defendant, and they do so in a normative, not a descriptive way. See, e.g., *id.* at 303, 305–08, 310–11, 316–18. The idea that law has the goal of favoring victims over

compensation or to deter conduct that causes harm. It does not define the goal as efficiency, except insofar as tort law balances the underlying factors and values in a way that minimizes the total harm from human interaction. Tort law is instrumental only in the sense that tort law's aim is to define the fair and efficient terms of human interaction. Tort law serves to provide an intuitional method for determining the requirement of justice. Judges achieve that goal when they consider the facts and values that are relevant to that end. That method of reasoning produces the results of distinguishing wrongful from non-wrongful behavior, under the theory of justice that judges develop as they are deciding disagreements.

Under this view, legal concepts do not have a pre-defined content. The concept of duty, right, and wrong has the meaning that judges give it. Those concepts, as the authors suggest, play a structural role, acting as a placeholder denoting the social problems that judges must resolve to separate wrongs from non-wrongs. However, the concept of duty, for example, plays no normative role except as the summation of what courts have decided in the past and as a reflection of the factors and values that will influence how they will define the concept of duty in the future.

III. PRAGMATIC CONCEPTUALISM

To support their claim that concepts can determine their own content, the authors have developed a methodology called pragmatic conceptualism, one that is supposed to develop a conceptual basis for determining the content of relevant tort concepts. Although I believe the effort fails, it is clear from their discussion that the authors are fully capable of developing a non-instrumental, non-conceptual view of tort law, but are unwilling to do so. That raises the question of why they are resistant to a non-conceptual approach, and the answer, I believe, is that doing so is inconsistent with their positivist leanings. To support this conclusion, let me review their treatment of the iconic *Palsgraf v. Long Island Railroad*.²⁴ I will let the authors describe the facts.

A man leapt onto the open space at the end of a train car as the train was pulling out of the defendant railroad's station. Two conductors employed by the railroad tried to steady him by pushing and pulling him onto the train. In the process, they dislodged a newspaper-wrapped package he was carrying under his arm. The conductor did not know—and had no reason to know—that the package contained powerful fireworks, which fell

injurers or vice versa suggests that the law is instrumental in a way the authors sought to avoid. In fact, judges determine the fair and efficient terms of interaction between injurers and victims, without choosing sides as a way of working out the fair terms.

24. 162 N.E. 99 (N.Y. 1928).

onto the tracks, exploding upon impact. The explosion was powerful enough to blow away a chunk of the railway platform and to cause reverberations around the station. As a result, a large metal scale, located on the platform perhaps thirty feet away from the point where the package fell, toppled onto Mrs. Palsgraf, a ticketed customer who was waiting for a different train. She sued the railroad for negligence. A jury found for her, and a divided intermediate appellate court affirmed.²⁵

New York's high court reversed, finding that, despite the conductors' negligence, the railroad was not responsible for Mrs. Palsgraf's injury.²⁶ The question the court faced can be framed as follows: why did the railroad escape liability for their negligence (knocking the package out of a passenger's hand) that caused the plaintiff harm? The authors provide a perfectly sound answer: the railroad employees had no reason to think that the package contained explosives, a point they made in the quoted passage and reinforced in a footnote.²⁷ It seems to me that this is the operative fact that explains Judge Cardozo's holding and the meaning of the *Palsgraf* case for tort law. An actor will not be responsible for risks that they could not know about, which they did not create, and which they did not, because of a relationship, have an obligation to find. Courts had long held that a person who is not charged with knowing or controlling a risk is not responsible for harm caused by the risk, especially where the risk was hidden.²⁸

Moreover, this view of the case is not instrumental. It does not lead one to view tort law as a system of deterrence or compensation or toward some economic goal. Those are outputs of the system of tort law, but not tort law's goal. In particular, this reading does not say that the *Palsgraf* opinion desired to achieve efficiency. It simply recognizes that tort law does not hold a person responsible for risks about

25. GOLDBERG & ZIPURSKY, *supra* note 1, at 199.

26. *Palsgraf*, 162 N.E. at 99–101.

27. The authors “reemphasize that the conductors had no reason to suspect that the package contained explosives.” *Id.* at 199 n.30 (quoting *Palsgraf*, 162 N.E. at 99 (Cardozo, J.) (“Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.”)). My own analysis would add that in the context of helping passengers onto the train, the employees were not required to treat the package as if it might have contained explosives.

28. *Parrot v. Wells, Fargo & Co. (The Nitro-Glycerine Case)*, 82 U.S. (15 Wall.) 524 (1873) (finding that an actor who opens, with a chisel, a package that turned out to contain nitroglycerine is not responsible for the resulting explosion). This is a specific example of the general principle that “if the accident was attributable to a ‘superhuman or irresistible’ cause—to an ‘act of God’—the defendant would not be liable; that as a general principle no man shall be responsible for that which no man can control.” *Rodgers v. Central Pac. R.R. Co.*, 8 P. 377, 377 (Cal. 1885).

which they have no knowledge and no obligation to inquire. Admittedly, it marks tort law as a system for assigning responsibility for risks,²⁹ but that is a description of what the tort system does and is not a description of what the tort system wants to achieve.

What is puzzling is that Professors Goldberg and Zipursky did not stop at this non-instrumental, non-conceptual explanation for concluding that the railroad committed no wrong toward Mrs. Palsgraf. Instead, they want us to understand *Palsgraf* as an instantiation of a newly minted concept—the concept of substantive standing (or, as they sometimes call it, the “proper-plaintiff principle”).³⁰ They want to understand the outcome to rest on a “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*.”³¹ This is, of course, descriptively accurate. However, one might ask whether the “broader claim” actually adds anything to our understanding of the *Palsgraf* case, or to our understanding of tort law. If the finding that determined the outcome in *Palsgraf* is that the railroad employees did not know, and were not charged with knowing the risk the package held, does it add anything to add a label of “substantive standing” to the analysis? True, it makes *Palsgraf* look to be less particularistic, but I have already showed that the general principle that determined the outcome is that a defendant is not responsible for risks of which she was unaware and is not charged with knowing. One might well ask whether the new concept does any “work.”

For example, the authors use the concept of substantive standing (the proper-plaintiff concept) to argue for the limited duty of a therapist to parents whose relationship with their daughter has been impaired in the course of the therapist’s treatment. The authors say that the mixed results of the cases are an instance of substantive standing (the parents not being the proper plaintiff). Yet, the authors explain the absence of standing by relying on the therapist’s duty of loyalty to the patient.³² If that is the operative fact—the relevant input into the determination of no-duty—then does calling this an example of substantive standing add anything? After all, if cases with different determinants are grouped together under a new concept, then the concept has no common core and cannot determine its own content. How would an advocate or judge know how to prove or whether to find substantive standing? What factor or values would determine whether a judge should rule for or against substantive standing?

29. See, e.g., GERHART, *supra* note 5, at 140–41.

30. GOLDBERG & ZIPURSKY, *supra* note 1, at 198.

31. *Id.* at 201.

32. *Id.* at 298–301.

The fact is that the new concept of substantive standing is but a synonym for “no-duty.” If the actor has no duty to the victim, the victim will not have substantive standing; if the victim does have substantive standing, it will be because the defendant had a duty to the victim. The authors have simply repackaged the concepts of duty and no-duty under a new name, without adding something of value to our understanding of what determines whether an actor has a duty to the victim. The authors invented a new concept to apply to existing doctrine without adding content to the concept that did not previously exist.

Yet, in the context of their book, the authors’ approach is understandable. They take cases in which judges determine that the defendant had no duty to the plaintiff and transform it into the positive concept of substantive standing. This fulfilled the authors’ obligation to positivism, taking a negative (the concept of no-duty) and turning it into a positive (the concept of substantive standing). This allows them to present a positivist view of the wrong of tort, without exploring or even acknowledging the well-defined no-duty principle that determines whether the defendant has committed a wrong. They have added an element of substantive standing to the plaintiff’s proof requirements, without adding any insights into how the plaintiff will prove, or the defendant will disprove, substantive standing.

In doing so, the authors have exposed a weakness in the positivist conception of law, to which I now turn.

IV. THE PROBLEM OF POSITIVISM

Positivism focuses on what the law prohibits or enables, but not on what the law allows. Modern positivism is based on the theory that law is what the law commands. H.L.A. Hart broadened that concept to include what the law enables, so that positivism includes what the law enables people to accomplish, such as through writing contracts or wills. However, positivism offers no account of what the law permits one to do—that is, what the law does not prohibit or have to enable. This is a mistake, for what the law allows is just as important as what the law prohibits or enables. More importantly, one cannot determine *why* the law allows what it allows simply by knowing what behavior the law recognizes as a wrong.

We accept the positive premise that we can know the law by what it prohibits or enables because we accept the foundational premise of the Anglo-American legal system—namely that what the law does not prohibit, the law allows. This premise is not, however, an inevitable foundation of a legal system. It is conceptually possible to have a legal system built on the principle that the law prohibits all behavior except that which the legal system allows. That would be a legal system based on allowances, rather than prohibitions; on permissions, rather than

commands. Legal systems in totalitarian regimes emphasize the importance of focusing on what the legal system allows. One need only consider the law defining the institution of slavery to observe such a system. If a person owns another person, the other person is allowed to undertake activities only with the owner's permission.

One might think that what the law prohibits also defines what the law allows. It might be thought that Professors Goldberg and Zipursky, by offering a theory of what the law prohibits (wrongs), also offer a theory of what the law allows (non-wrongs). We might, for example, say that *Palsgraf* defined a non-wrong by the principle it applied. However, that is true only if one is willing to determine what the law allows by looking at the absence of determinants that make a conduct a wrong. That is what our authors have done; as I said, they have created the concept of substantive standing to define a non-wrong in a positive way. However, that misunderstands the no-duty principle and the importance that it plays in tort law. The factors and values that serve as inputs into the no-duty principles are not just the absence of a wrong. The dividing line between wrongs and non-wrongs rests on substantive principles that a theory of wrongs cannot capture.

The railroad had a duty to Mrs. Palsgraf; she was a passenger on their property. The reason the Long Island Railroad committed no wrong toward Mrs. Palsgraf is that the railroad was not expected to treat the package with more care than they would treat a package of bagels. Despite the railroad's general duty toward Mrs. Palsgraf, they had no duty with respect to the behavior of the conductors because, as Judge Cardozo said: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."³³ Therefore, the risk to be perceived is the ambit of the protection to be given. This was not just a determination that the railroad had done nothing wrong. It was a determination about *why* the railroad had done nothing wrong. Moreover, the *why* of the law matters because the *why* of the law allows us to determine how the no-duty principle will be applied in other cases.

More generally, the no-duty principle substantively limits one person's responsibility for the well-being of another, a principle determined by the relationship between the defendant and the risk. The no-duty principle reflects the substantive notion that no person can call on another to confer a benefit unless the other has a relationship to the risk that the person faces. That substantive notion cannot be captured simply by saying that the defendant has not wronged a plaintiff. Rather, the no-duty principle is what separates private tort law from public law. Legislatures can surely create duties of one person to another outside the context of assigning responsibility for risks, but tort law does not. In the colorful words of one New Jersey judge: "The result of this rule has been a series of older decisions to the effect that one

33. *Palsgraf*, 162 N.E. at 100.

human being, seeing a fellow [person] in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown.”³⁴

In short, conceptualists can turn the no-duty principle into the concept of no substantive standing, but doing so does little to reveal, and does a great deal to hide, the substantive determinants of duty and no-duty. The concept of substantive standing is but a shorthand description of the output determined by a great many factors that influence when an actor has not wronged a plaintiff, but it does not reveal those factors.

V. CONCEPTS AND DOCTRINE

Thus far, I have argued that concepts cannot create their own content and that for that reason they play no role in determining what the law prohibits or enables. A conceptual approach, in the positivist tradition, can tell us *what* the law requires or enables, but it cannot tell us *why* the law prohibits or enables what it does. Accordingly, concepts cannot help us understand what determines legal doctrine or how legal doctrine evolves. In the remainder of this review, I will illustrate the shortcoming of conceptual approaches by considering other examples from *Recognizing Wrongs* that show why concepts are unhelpful ways of determining the content of rights, duties, and wrongs.

A. Rylands v. Fletcher

Consider the difficulty in determining *why* judges would call certain conduct a wrong. In the venerable case of *Rylands v. Fletcher*,³⁵ the defendant built a reservoir in coal country in order to operate a mill. The reservoir collapsed into an underground mine shaft, flooding an adjacent mine. The judges hearing the case held the defendant responsible for the resulting damage, even though the plaintiff could not show that the reservoir’s owner did anything wrong. They held that the defendant committed a wrong, although what determined the holding was not clear. At first view, this looks like a case of liability without fault, since the owner was responsible for the resulting harm despite the plaintiff’s inability to prove a wrong. That is how generations of casebooks and treatises have portrayed the case.

However, the judges hearing the case did not refer to strict liability as the grounds of the decision. They wrote only about liability for the “non-natural use” of the property; the case’s precedential meaning

34. Lombardo v. Hoag, 566 A.2d 1185, 1186–87 (N.J. Super. Ct. Law Div. 1989), *modified on appeal*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993).

35. [1868] 3 L.R. 330 (H.L.) at 330. The case was called *Fletcher v. Rylands* in the Court of Exchequer, 159 Eng. Rep. 737, 737 (1865); 3 H. & C. 774, 774, and in the Exchequer Chamber, [1866] 1 L.R. 265 (Exchequer Chamber) at 265.

depended on what was non-natural about the use of the property. Because the plaintiff could prove no wrong, Professors Goldberg and Zipursky take the case to be an exception to their concept of wrongs. And because it stands in opposition to their theory of wrongs, they have to distinguish the case, which they do by noting the difference between what they call “licensing-based liability” and a demanding standard of conduct. The former is liability for engaging in the activity, and the latter is liability that fails to meet a heightened standard of care. On this basis, they attempt to read *Rylands* out of the tort canon, calling it an “exceptional case” whose grounds of liability “are so distinctive as to locate it at or beyond tort law’s conceptual boundaries.”³⁶

The authors are correct that the tort world conceives of *Rylands* as a case of strict liability. However, if they fully appreciated non-instrumental, non-conceptual reasoning, they did not have to classify the case as “at or beyond tort law’s conceptual boundaries.” It all depends on what the judges meant when they referred to the “non-natural” use of the land, which is the reason they gave for their result.³⁷ Consider this alternative. The defendant had the reservoir prepared in coal country. The defendant must have known that in coal country underground shafts are common, such that to dig below the land’s surface was to risk running into one of the shafts. In that event, a reasonable defendant creating a reservoir would have inspected the property more closely to make sure that the digging of the reservoir would not interfere with the mineshafts. The owner failed to do that. Building the reservoir may not have been a “non-natural” use of the property, and would not have caused this damage, if the mill owner had built the reservoir outside of coal country.³⁸ However, building a reservoir was a “non-natural” use of property in coal country, especially when done without investigating the possible damage that could occur.

We must recognize that, in 1868, judicial understanding of the mechanics of negligence and the behavior of a reasonable person may not have been developed enough to understand that reasonable people will sometimes investigate possible dangers before they act. Certainly, judges would decide *Rylands* on that basis today; not fulfilling one’s duty to investigate is now well entrenched as a wrong.³⁹ Had the authors

36. GOLDBERG & ZIPURSKY, *supra* note 1, at 191.

37. [1868] 3 L.R. at 339; *see also id.* at 340 (referring to a landowner bringing something onto property “which was not naturally there”); [1866] 1 L.R. at 279 (Blackburn, J.) (using similar language in the Exchequer Chamber).

38. Importantly, the damage did not occur when the reservoir breached its walls. The damage occurred because the water leaked out of the bottom of the reservoir into an abandoned mine shaft. [1868] 3 L.R. at 332.

39. The duty to investigate conditions that might make a product or service not reasonably safe is embedded in the duty to warn and the duty to design reasonably what one puts on the market. *See, e.g.,* *Richter v. Limax*

been more attuned to the factors that determined whether a defendant has committed a wrong, Professors Goldberg and Zipursky could have understood the wrong of building a reservoir in coal country without checking on the location of underground shafts.

B. Product Liability

In their thorough review of product liability doctrine, the authors attempt to show that their theory of wrongs works to disclose the content of tort law's conduct rule in product liability cases. Their review is an able summary of this body of law, but at crucial points, the summary misses product-liability law's inner workings. First, the authors perpetuate the idea that product liability imposes strict liability for product defects.⁴⁰ They do not notice that the term strict liability adds nothing to the analysis; all of the "work" is done under the concept of defect. If there is a product defect that injures the plaintiff, the manufacturer is liable, just as a seller of services is "strictly" liable when its negligence causes harm. Second, they miss the real impact of the product-liability doctrine, which is to put pressure on the manufacturer to take more responsibility for bad things that happen when consumers use their product. This includes the imposition of responsibility for making the product crashworthy,⁴¹ which is to design a product that would prevent injuries even if its design did not give rise to the accident itself. It also includes the obligation to investigate instances of harm caused by their product and to be proactive in thinking about ways of improving the design of the product to reduce the risk of harm.⁴²

However, aside from omissions like these, there is something strangely incongruous about the authors' analysis of product liability law. I had thought their theory was that product liability's conduct rule defined a wrong, while courts determine injury based on the results from the wrong. Yet here, the authors seem to be talking about a wrongful injury, as if the injury were wrongful in and of itself. At the end of their discussion of product-liability law, they summarize their views with this sentence: "The Reporters and many courts have failed to recognize that a firm that sells a defectively designed product that

Int'l, Inc., 45 F.3d 1464, 1468–69 (10th Cir. 1995); *see also* GERHART, *supra* note 5, at 165–66, 210.

40. The authors equivocate about the role that strict liability plays in product defect cases. At one point, they put "strict products liability" in quotation marks. GOLDBERG & ZIPURSKY, *supra* note 1, at 302. In the main, they continue the common usage of calling product liability strict liability for "defects," without digging into the concept of wrong for marketing a defective product. *Id.* at 302–03.

41. *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 500–02 (8th Cir. 1968).

42. For a fuller development of this argument, see GERHART, *supra* note 5, at 165–66, 208–11.

injures a consumer during ordinary use has *wrongfully* injured the consumer.”⁴³

If this sentence means that the injury was wrongful because it resulted from a defect, the sentence is unexceptional. That meaning puts the focus back on the question of defect: what does the plaintiff have to prove in order to show that the product was defective? That is simply asking the conduct rule question: “has the plaintiff showed what was wrong with this product” or “what wrong does this product contain?” The authors’ only response to that question is to repeat the tests the courts have come up with to determine whether a defect exists. Their theory of defects as wrongs adds little to what we know about how to recognize a defect. However, their reference to *wrongful injury* (my emphasis on the word *injury*) suggests that they have something else in mind. That reference seems to suggest that we can somehow evaluate the injury and call it wrongful apart from the conduct rule that determines whether the conduct is wrongful. That would be a radical departure from tort law as we know it, for it would suggest that we should find liability based on the act of injuring another, rather than from the defendant’s conduct. Whichever reading we give this passage, the concept of wrongs the authors present cannot illuminate the concept of defect.

C. Redress

The authors make a significant contribution to the literature by linking the concept of redress to the concept of civil recourse. This is the idea that the redress of wrongs in tort relates to a theory of political participation that is quasi-constitutional. They do this through the *ubi jus* maxim, which provides that where there is a right there is a remedy. In their view, when a defendant has a duty to avoid wronging a plaintiff, the plaintiff has a right of redress against the defendant. The maxim is obviously accurate but circular, and the authors know they have to break through the circularity. The question is how one conceives of duty in a way that breaks through the circularity.

Consider the authors’ summary statement: “Whenever a person has been wronged by another through a violation of a relational directive, that person is entitled to be provided with a right of action by the state.”⁴⁴

The authors seem to think that relational directives are what make the *ubi jus* maxim non-circular—that is, if the law’s conduct rule says “do not wrong this person” and the defendant nevertheless violates the rule, the person has the right to redress. To be sure, *ubi jus* describes what occurs in most tort cases where the court finds that a wrong has been committed. That, however, is just a truism without analytical

43. GOLDBERG & ZIPURSKY, *supra* note 1, at 319.

44. *Id.* at 99.

content. I fear that by concentrating on what conduct the law calls a *wrong*, the authors have (once again) misunderstood the force of the no-duty concept—the determination of when the law does *not* provide redress. Could it be that the authors have the causal arrow running the wrong way? Could it be that a wrong in tort law describes the kind of relationship that matters, rather than that the relationship describes the kind of wrong that matters?

To reach their conclusion, the authors contrast relational duties with what they call “simple” duties.⁴⁵ They view a duty to the state to be a simple, non-relational duty. Under this nomenclature, for example, the requirement that a person have a valid driver’s license is said to be non-relational, while the obligation to drive non-negligently is said to be a relational duty. However, this distinction seems to be artificial. Violating a duty to the state is relational; it pertains to the relationship between the person who is duty bound and the state. It is wrong to drive without a driver’s license, which is relational in the sense that the wrong is a wrong toward the community of people represented by the state. Accordingly, relationality in the authors’ sense cannot provide the characteristic that links the right to redress and the commission of a wrong in tort.

As the authors know, many wrongs do not result in a right of redress for the person injured by the wrong. That is the teaching of the negligence per se doctrine. That doctrine provides, in its positive form, that if legislation establishes a standard of care that actors must follow, violation of the standard of care *is* negligence unless excused.⁴⁶ That is the positive statement of the negligence per se doctrine. However, the doctrine has a negative form. If the legislature establishes a duty to the plaintiff (rather than a standard of care), the violation of the statute only creates a private right of redress if such redress can fairly be implied, as a matter of statutory construction, as the redress the legislature wanted. This is the lesson, for example, of *Uhr v. East Greenbush School District*.⁴⁷ There, the legislature required elementary schools to give tests for scoliosis. A school district that failed to give the test was found not to have wronged a student whose scoliosis would have been treatable had the test been given. The court refused to

45. *Id.* at 92–93.

46. This formulation comes from Justice Cardozo’s opinion in *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920). Some states have held that the violation of the standard is only a prima facie showing of negligence, which leaves it up to the jury to determine whether the violation of the standard is excused. *E.g.*, *N. Ind. Transit, Inc. v. Burk*, 89 N.E. 905, 909–10 (Ind. 1950).

47. 720 N.E.2d 886, 888 (N.Y. 1999); *see also* *Platz v. City of Cohoes*, 89 N.Y. 219, 223 (1882) (defendant driver violated statute prohibiting driving on Sunday but the plaintiff was not allowed to recover without proving the defendant’s negligence); GERHART, *supra* note 5, at 122–25 (expanding on this argument).

recognize a wrong in tort because the statute created a duty but not a standard of care. Legal doctrine thus creates a distinction between legislation that creates a standard of care (where the violation of the statute *is* negligence unless excused) and legislation that creates a duty (where there may well be a wrong without redress for the plaintiff).

What distinguishes legislation that establishes a standard of care from legislation that establishes a duty? It is the no-duty principle. Where no preexisting duty in tort law exists, that is, where the no-duty concept applies, there is no wrong in tort. Because the school district had no common-law duty to provide the scoliosis test to benefit its students, the creation of the wrong did not automatically create a remedy. In fact, the redress was thought not to be available for that wrong because providing a private remedy would upset the enforcement mechanism the legislature had chosen. The legislature can create a wrong without private redress and allow redress to be through administrative agencies. The negligence per se rule only comes into play when the defendant had a pre-existing duty to the plaintiff. The legislation then tells the defendant what to do in order to meet the standard of reasonableness. The no-duty rule gives legislatures the power to create a wrong without a remedy.

A similar lesson comes from the many exceptions to the negligence per se doctrine. Driving without a license is a wrong, yet a person injured by a driver who commits that wrong is not, for that reason, entitled to redress.⁴⁸ Driving on the left side of the road is a wrong, but doing so does not lead to redress if it is the reasonable thing to do under the circumstances.⁴⁹ Similarly, plaintiffs who violated an ordinance requiring pedestrians to walk toward the traffic can avoid contributory negligence when obeying the ordinance would subject them to an unreasonable risk.⁵⁰ In instances like these, there is a wrong without redress, even though the plaintiff was the intended beneficiary of the required conduct.

The difference between redress and no redress for a victim of a wrong stems from the difference between a wrong in a general sense and a wrong in tort. Tort wrongs are a subspecies of general wrongs. The dividing line between general wrongs and wrongs toward a plaintiff is not determined by whether the wrong was, in the words of the authors, a “relational legal directive.”⁵¹ When the legislature creates a duty, as it did by requiring schools to administer the scoliosis test, that

48. *See, e.g.*, *Dance v. Town of Southampton*, 467 N.Y.S.2d 203, 206 (App. Div. 1983).

49. *McVicker v. Kuronen*, 256 P.2d 111, 115–16 (Wyo. 1953) (custom developed to drive on left side of a rural road with a loaded truck because the opposite side was weaker; this was held not to be negligence per se).

50. *Tedla v. Ellman*, 19 N.E.2d 987, 991–92 (N.Y. 1939).

51. GOLDBERG & ZIPURSKY, *supra* note 1, at 92–93.

legislation creates a relationship with potential victims of scoliosis. It creates a duty that is a relational directive without necessarily providing redress. Similarly, the legislature creates a duty to have a valid driver's license, which is relational, but it does not create a right of redress. The directive to walk on the left side of the highway, toward the traffic, is a relational directive, but it does not create a right to redress if, under the circumstances, it would be unreasonable to obey the directive. The examples in the last paragraph that led to no redress were examples in which the victim could not show the requisite relationship between the wrong and the wrong of tort.

In other words, what the authors call simple duties are duties owed to the state and involve the relationship between the duty holder and the state. They sometimes give rise to a cause of action in negligence, and thus redress, and they sometimes do not. Whether they do does not depend on the relationship that led to the duty or to the identity of the person to whom the duty is owed. It depends on the relationship between the wrong of disobeying a legal requirement and the wrong of negligence. The right to redress does not reveal that wrong. With the right relationship between the wrong in a general sense and wrong in a tort sense, the commission of a wrong can lead to redress. Without that right relationship, we have a wrong without a remedy for the person injured by the wrong.

In short, in order to make *ubi jus* non-circular, one needs to understand the concept of duty, which requires one to understand the concept of no-duty. The concept of a wrong does not do that.

CONCLUSION

The concept of a wrong in tort is real; it plays a genuine role in tort cases. As a structural matter, it describes situations in which a court has found that the defendant must redress the victim because of the defendant's wrongful conduct toward the plaintiff. Beyond its structural role, the question I have raised is whether the concept of wrong has any predictive value in ascertaining how courts will determine wrongs when new disagreements arise about what the law requires or enables. Professors Goldberg and Zipursky have argued that when disagreements arise about what the law prohibits or enables, the concept of a wrong can determine whether a wrong has occurred. They offer their conception of wrong as an antidote to instrumental theories of tort that understand tort law to aim at achieving some goal that lies outside of tort law. I have argued that such an antidote is unnecessary because the tort law system can be understood as a system that has its own internal goal—namely to work out a theory of interpersonal responsibility for people living together in community. In the view I have presented, we cannot know the inputs into determining whether a wrong has occurred simply by reference to the structural concepts. While these concepts do help organize what the system seeks to work

out, the tort system does not rely on the concepts themselves to make a determination.