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PRAGMATIC CONCEPTUALISM

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INTRODUCTION

Economic accounts of tort law tell us why tortfeasors face monetary sanctions for certain sorts of conduct. That is not enough, according to corrective justice theorists Jules Coleman and Ernest Weinrib.[1] Economic theories[2] do not offer an adequate explanation of why the defendant is required to pay these monetary sanctions to the plaintiff. Perhaps some argument can be made that it is efficient to reward private parties for bringing tort actions. Yet even if this were plausible, it would make the plaintiff-driven nature of tort law a purely contingent matter. The plaintiff-defendant structure of tort law is essential to it, not merely contingent. The economic account is therefore fatally flawed, like an account of the criminal law that fails to mention the role of the state, or an account of Shakespeare's literary genius that fails to mention his poetry. This is called the "bipolarity" critique of law and economics.

Corrective justice theory claims to explain the bipolar structure of tort law in a nonreductive manner that preserves its centrality to tort law. It begins by purporting to find analytical errors of the economist. The imposition of

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1. *See, e.g.*, Jules L. Coleman, RISKS AND WRONGS (1992); Ernest J. Weinrib, THE IDEA OF PRIVATE LAW (1995). *See also* Arthur Ripstein, EQUALITY, RESPONSIBILITY AND THE LAW (1998); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

2. The most thorough, and impressive, attempt to provide a positive theory of tort law from an economic perspective is that of William Landes and Richard Posner. William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987). *See also*, Guido Calabresi, THE COSTS OF ACCIDENTS (1970); Steven Shavell, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

liability in torts does not represent a mere sanction: It represents the recognition of the defendant's *duty of repair*. Moreover, the defendant's tortious conduct is not tortious or socially harmful in the abstract. It is a wrongful injuring *of the plaintiff*. By synthesizing these two points, we can forge an explanation of the bipolar structure of tort law. The law infers from the fact that the defendant has wrongfully injured the plaintiff that the defendant owes a duty of repair to the plaintiff. The imposition of liability is a recognition of that duty. Because it is a duty owed to the plaintiff, liability runs to the plaintiff, not simply to the state. In an Aristotelian spirit, this basic notion of private law is called "corrective justice." In the parlance of the law, the point is simply that tort law is about having tortfeasors make their victims whole.

The debate between the corrective justice theorists and the economists raises a more purely jurisprudential question about what legal theories must do to be acceptable. For while economists are boasting about their ability to *explain away* the plaintiff-driven nature of tort law in a reductive manner, corrective justice theorists are stating that *a theory that merely explains away structural features of the law in a reductive manner is for that very reason inadequate*. In short, the bipolarity critique rests on a methodological demand that an interpretive legal theory must provide a nonreductive account of the conceptual structure of the substantive law. The question posed by this article is whether there is a defensible basis for the corrective justice theorist's methodological demand. I shall argue that there is.

Ernest Weinrib's formalism is the most extensive effort to provide a jurisprudential defense of the corrective justice theorist's methodology.[3] Because formalism is metaphysically elaborate and antipragmatic,[4] I suggest that it does not provide a suitable foundation for the bipolarity critique. Drawing from strands of pragmatism in analytic philosophy of language,[5] from Jules Coleman's work in tort theory, and from prior work of my own[6] and with my coauthors John Goldberg[7] and Arthur Ripstein,[8] I construct a

3. *See esp.* Weinrib, *supra* note 1.

4. *See infra* text accompanying notes 41–46.

5. *See, e.g.*, Wilfrid Sellars, *Reflections on Language Games*, reprinted in Wilfrid Sellars, SCIENCE, PERCEPTION AND REALITY 321 (1963).

6. *See* Benjamin C. Zipursky, *Legal Coherentism*, 50 S.M.U. L. REV. 1679 (1997) (explaining jurisprudential significance of development of pragmatism in philosophy of language and epistemology, and endorsing nonrealist form of legal pragmatism); Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649 (1998) (advancing conceptualistic form of pragmatism in opposition to legal realism).

7. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733 (1998) (outlining possibility of noninstrumentalist and conceptualistic, but pragmatic, conception of duty in negligence law). *See also* John C.P. Goldberg, *The Life of the Law* (reviewing Andrew Kaufman, CARDOZO (1998)) 51 STAN. L. REV. 1419 (1999) (arguing against Kaufman and Posner that Cardozo was not a realist but a pragmatic conceptualist).

8. *See* Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in PHILOSOPHY IN U.S. TORT LAW (G. Postema ed., forthcoming) (arguing that contemporary problems in mass torts can be sensibly and pragmatically resolved within a conceptualistic framework).

view labeled "pragmatic conceptualism." Like formalism, it asserts that a theory that claims to account for what the law says must provide an account of the concepts and principles embedded in the law, and that an account of the *functions* served by the law will not necessarily capture the concepts embedded in it. On the other hand, the deployment of a conceptualistic approach is entirely rooted in practices, and in this sense is metaphysically modest. The bipolar structure of tort law is particularly important in tort theory because it displays critical features of the concepts and principles embedded in tort law. The failure to explain these structural features in a nonfunctionalist manner is therefore a fundamental failure of law and economics, one that undercuts its claim to have an adequate account of what the tort law is.

Pragmatic conceptualism is important on its own right, quite apart from its place in the refutation of economic theories of tort law. Economic theories of tort law are merely the most extreme examples of instrumentalism in legal theory. Indeed, instrumentalism itself is a particularly salient version of *functionalist* theories in the law, which utilitarians, deontologists, Aristotelians and pluralists alike may endorse. The argument for pragmatic conceptualism provides the basis for an argument against a broad range of functionalist legal theories. It restores a place for conceptualism in law while avoiding the conservative and transcendental tendencies of discredited formalist theories.

The article falls into three parts. Part I sets forth the bipolarity critique and the debate between corrective justice theory and law and economics that has ensued, and argues that the critical conceptualistic premise is corrective justice theory's requirement that a legal theory capture the concepts embedded in the law. Part II develops and defends *pragmatic conceptualism* and uses it to justify the conceptualistic premise, and the bipolarity critique. Part III sketches the broader implications of pragmatic conceptualism in tort theory and beyond.

I. CORRECTIVE JUSTICE THEORY AND THE STRUCTURAL CRITIQUE OF LAW AND ECONOMICS

A. Overview of Corrective Justice Theory

Jules Coleman and Ernest Weinrib are clearly the leading figures in corrective justice theory today. Coleman's *Risks and Wrongs* and Weinrib's *The Idea of Private Law* present similar critiques of law and economics, and my initial exposition will therefore present "the corrective justice" critique as if it were one view. However, the difference in the jurisprudential frameworks of Weinrib and Coleman is a major topic of analysis later in Part II. Because I

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shall ultimately attempt to defend a jurisprudential framework similar to Coleman's, I shall lead with his substantive views.[9]

The core principle of corrective justice, on Coleman's view, is that a person who causes a wrongful loss in another has a duty to rectify that loss. That is because, if one person's loss is caused by another's wrong or wrongful conduct (and certain other conditions are met), then the loss is the wrongdoer's *fault*. The principle of corrective justice treats the loss as his responsibility because it is his fault. In recognition of his responsibility for the loss, it assigns to him an obligation to rectify the victim who suffered the loss. To oversimplify, one who injures another through wrongdoing has an obligation to correct the injury because it was his fault. Coleman claims that in our moral, linguistic, and intellectual community, we have available to us a conception of *corrective justice* and that the above-stated principle is central to this conception. As a logical matter, this is presented in the first instance as a claim about a certain moral concept, not as a claim about the law.

The second phase of Coleman's theory addresses the law of torts. It argues that the set of practices, institutions, and texts that together comprise "tort law" is best understood as an embodiment of the principle of corrective justice. Tort law constructs definitions of what shall count as legal "wrongs" and "wrongdoings," and "wrongful loss." If a defendant has inflicted a loss on a plaintiff through a legal "wrong" or "wrongful conduct" so defined, then the defendant incurs a legal obligation to rectify that loss. Our tort law's system of imposing liability on defendants if they have tortiously injured plaintiffs is essentially a system of corrective justice. The tort law requires defendants who have wrongfully injured plaintiffs to make them whole.

B. The Structural Critique of Law and Economics

Over the past two decades, Coleman has offered a variety of criticisms of economic approaches to tort law.[10] The phrase "law and economics" in tort law does not denote just one view, and Coleman has offered detailed criticisms of particular interpretive and particular prescriptive theories, both from within a broadly speaking "economic" framework and from outside that framework. However, in *Risks and Wrongs*,[11] drawing upon his earlier article *The Structure of Tort Law*,[12] Coleman presents what he apparently

9. It appears that Coleman's substantive views in tort theory may have changed in the past few years. *See* Jules Coleman & Arthur Ripstein, *Mischief & Misfortune,* 41 MCGILL L.J. 91 (1995). For the purposes of this article, when I refer to Coleman's substantive views in tort theory I will be referring to the views expressed in RISKS AND WRONGS. If there was a shift in his views, there is no evidence that it was motivated by any of the sorts of concerns raised in this article.

10. *See generally* Jules Coleman, MARKETS, MORALS AND THE LAW (1988).

11. Coleman, *supra* note 1, at 374–85.

12. Jules Coleman, *The Structure of Tort Law,* 97 YALE L. J. 1233 (1988) (reviewing William L. Landes & Richard S. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987) and Steven Shavell, THE ECONOMIC ANALYSIS OF ACCIDENT LAW (1987)).

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regards as the most powerful interpretive argument against a wide range of economic theories of tort law that intend to be interpretive, including Landes and Posner's. This is *the argument from the bipolar structure of tort law.* Notably, Weinrib has offered similar arguments in *The Idea of Private Law*,[13] drawing most prominently from his article *Understanding Tort Law.*[14]

Tort law, according to Coleman, has certain essential features. An interpretive theory is inadequate if it fails to explain these features. Several of these features are structural, and pertain to the nature of tort litigation. Litigation obviously involves (at least) one plaintiff and (at least) one defendant. The defendant does not simply pay a fine to the state, in accordance with rules of liability that have been broken. Rather, the defendant pays money to the plaintiff and does so precisely because the plaintiff has suffered a certain loss from the defendant's conduct. The money paid to the plaintiff is not an optimally set sanction. The liability is keyed to the loss of the plaintiff in question. Indeed, it is liability for that loss; it is not that the money is paid to the state and then the state compensates the plaintiff. The question before the court is whether the plaintiff should be required to bear her own loss, or whether the defendant should be required to rectify that loss.

The law and economic model of tort law cannot account for these essential features, according to Coleman. If, as Landes and Posner (for example) maintain, the point of imposing liability is to ensure that actors receive an appropriate level of deterrence for their conduct,[15] then there is no particular reason why the monetary sanction must be paid to the plaintiff. It could simply be paid to the state or to a third party. Landes and Posner argue that paying the award to the plaintiffs gives them an incentive to litigate,[16] but this argument is unsatisfactory for several reasons. First, it is far from clear why on this model it should be victims, not the state or some other party (attorneys), who bring claims; hence, it is not clear why we should want victims to have an incentive to litigate.[17] Second, the incentive-to-litigate point is clearly contingent rather than essential. Thus, on the economic view, there would be no essential departure from what the tort law is doing now if the proceeds of judgments always went to charities and suits were brought by Government officials. Yet Coleman argues that this is wrong: It is an essential part of what we understand tort law to be doing that liability runs *to* the victim of the tort.[18]

13. Weinrib, *supra* note 1, at 46–48.
14. Ernest Weinrib, *Understanding Private Law*, 23 VAL. U. L. REV. 485 (1989).
15. Landes & Posner, *supra* note 2, at 9–12.
16. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).
17. The suggestion that victim-standing lowers information costs is not particularly persuasive. We certainly deem deterrence to be an extremely important goal in criminal law, and yet we do not reward victims for pursuing causes of action there and do not appear to believe that giving them standing and making them beneficiaries of the action is necessary in order to lower information costs.
18. Coleman, *supra* note 1, at 380–82.

Relatedly, the economic model cannot explain why the defendant's liability is equivalent to the plaintiff's loss. To be sure, there is an argument that an actor choosing to maximize expected individual utility (or wealth) will end up aggregating social utility (or wealth) if he is forced to bear the costs he imposes on others (at least where there is negligence), but this falls short of explaining why the defendant should be required to pay the plaintiff's costs exactly. That is because we have no reason to believe that the defendant can reasonably be expected to be held liable for all and only the costs he in fact wrongfully imposes on others. Only a fraction of the costs imposed on potential plaintiffs are ever converted into tort actions, and only a fraction of those tort actions prevail.[19]

The economic theory also misses out on the central idea of compensation in tort law. When courts impose liability on a defendant and require that he pay the plaintiff, they are doing something quite special—they are forcing defendants to compensate, or to "make whole," the plaintiff. Compensation *is* making whole. For the economic theory, by contrast, it is only accidental that the payment of the defendant restores the plaintiff. The point of the payment is to do three separate things—to sanction defendants, to reward plaintiffs for litigating, and to overcome what would otherwise be an incentive for plaintiffs to take inefficient precautions against (otherwise uncompensated) injury to themselves. To the extent that they require the same amount, it is fortuitous. But in our actual tort law, our actual institutions, our actual practices, and our actual opinions, that is not so. It is both the point and the content of the defendant's liability that it restore the plaintiff's loss, that it compensate the plaintiff for that loss.[20]

Another remarkable structural feature of tort law is that, while it rejects the idea of letting losses lie where they fall and recognizes the appropriateness of shifting losses, it contemplates only a tiny domain of parties to whom the losses can be shifted: only defendants or potential defendants (or those who insure them). But as Calabresi has shown, there is a wide variety of parties who could, in principle, be the cheapest cost-avoiders, and it is in fact a contingent matter who would most cheaply avoid various costs.[21] Finally, it is an important fact of our legal system that the resolution of a dispute about whether the defendant is to be held liable is in a deep sense *backward-looking*. The question is about what the defendant did and how it affected the plaintiff, as well as about the nature of the context in which these actions and events transpired. Yet on the economic account, whether liability *should* lie ultimately depends on an answer to a question about the

19. This point is made in a very different context by two leaders in the economic theory of tort law, arguing from a prescriptive point of view that the availability of damages beyond the cost of the plaintiff's injury should turn on reduced likelihood of detection, and recognizing that in our actual tort law, it does not. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: an Economic Analysis*, 111 HARV. L. REV. 869 (1998).

20. Coleman, *supra* note 1, at 381–82; Weinrib, *supra* note 1, at 143–44.

21. Coleman, *supra* note 1, at 378–79, 381. Coleman's discussion of cheapest cost-avoiders implicitly refers to Calabresi's discussion in Calabresi, *supra* note 2.

future, not about the past. The economic account is *forward-looking*, not *backward-looking*.[22]

Corrective justice theory contrasts sharply with the economic account, on Coleman's view. Corrective justice theory explains each of the above-mentioned features in a manner that illuminates the concepts of tort law, rather than replacing them. The defendant must pay the plaintiff because liability is liability *to* the plaintiff, not simply liability *tout court* (which must be paid to someone or other). The imposition of liability is not a fine or a sanction. It represents the legal system's judgment that the defendant is responsible for the plaintiff's loss. This judgment is the reason that the defendant has an obligation to rectify the plaintiff's loss by compensating the plaintiff for her loss. Hence, the amount paid (in the normal case) is not *accidentally* or *contingently* the amount of the plaintiff's loss. The defendant is being held responsible *for this loss*, and that is why the loss represents the exact amount of the liability. Similarly, the plaintiff is compensated for her loss not, in the first instance, because our system is judging that her injury needs to be compensated and it would be efficacious to assign the defendant liability of the same magnitude. Rather, our system is judging that the plaintiff ought to be compensated for her loss because the defendant wrongfully caused it and is therefore responsible for it.

C. Law and Economics Replies: Functionalism versus Conceptualism

Responses to the structural critique fall into three broad categories: the ad hoc instrumentalist, the global instrumentalist, and the pluralist. The ad hoc instrumentalist looks closely at each of the features presented by the corrective justice theorist and argues that despite the apparent disconnect between the structure of tort law and economic goals, closer analysis reveals that there are reasons—even economic reasons—underlying this structure.[23] For example, paying victims is efficient because it gives them an incentive to sue and provides a cheaper nonpublic enforcement system whose enforcers have low information-costs. Similarly, the amount of the compensation is keyed to the size of the injury because anything more would overdeter by expanding the true social costs of the activity, and anything less would underdeter. Ingenious accounts of this sort have been offered to illuminate many of the structural features of tort law that corrective justice theorists highlight as allegedly inconsistent with the economic theory.

A second response also clings tight to instrumentalism, but adds a broad methodological perspective. The global instrumentalist questions what is taken to be a basic premise of the structural critique, namely, the premise

22. Coleman, *supra* note 1, at 374–75.
23. *See generally* Landes & Posner, *supra* note 2.

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that the structure of the law must reflect in some simple manner the structure of the values or principles touted by the legal theory. To put it differently, the structural critique envisions a law that would ideally realize the values of the law and economic approach; points out that the actual structure of our tort law differs from this hypothesized ideal; and concludes that the economic approach cannot be right. The global instrumentalist criticizes this form of argument. The critiques fall into at least two subcategories: second-best arguments and path-dependency arguments.

The second-best argument sets forth fundamental reasons relating to the nature of a legal system of rules why a system aimed at producing the optimally efficient solution in each particular case would not itself be an efficient system.[24] Conversely, a system that is efficient on the whole will not necessarily realize an efficient outcome in each of its aspects or applications. Hence, in many respects, our system provides a set of second-best solutions. It does not follow that the failure of our system to reflect optimal solutions is evidence that it should not be understood in economic terms. On the contrary, suitably rich economic analysis actually illuminates both the content of the ideal and the reason the structure of our tort law does not precisely realize it.

The path-dependency argument concedes that our tort system was not created with the goals of the economist in mind. It is even willing to assume that initially our tort system may not have been efficient. But it points out the evident historical fact that in each period of our history, our society has molded the inherited legal system to fit society's perceived needs. The system we now have is not the one we started with, but neither is it the one we would have created from scratch to serve the functions that we now regard as central to justifying the institutions of the tort law. The features pointed out by the corrective justice theorist are indeed relics of quite different ideas, but this does not dictate how tort law is now best understood.[25]

Finally, the pluralist credits the corrective justice theorist with having some useful insights, while nevertheless adhering to his own model.[26] He argues that the capacity of corrective justice theory to offer one kind of explanation of tort law does not necessarily entail that economic analyses should be rejected. Tort law may be serving several different functions simultaneously.

All of these replies are based on a certain understanding of the form of

24. Two articles by Mark Geistfeld have been particularly useful in coming to grips with the responses of the economists: Mark Geistfeld, *Corrective Justice, Economics and the Positive Analysis of Tort Law,* in PHILOSOPHY IN THE U.S. TORT LAW, *supra* note 8; Mark Geistfeld, *The Analytical Structure of Tort Law* (unpublished manuscript).

25. A sophisticated, and nonhistorical, version of the path-dependency argument and of pluralism, is offered by Bruce Chapman, *Pluralism in Tort and Accident Law: Towards a Reasonable Accommodation,* PHILOSOPHY IN U.S. TORT LAW, *supra* note 8.

26. *See, e.g.,* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice,* 75 TEX. L. REV. 1801 (1997).

argument that the corrective justice theorist offers. They presuppose that the corrective justice theorist is aiming to show that because the structural features of tort law are so different from what they would be if its purpose were really as the economist says, the economists *could not* be correctly identifying its function. The replies then explain the divergence between the structure the tort law would have according to an alleged idealization of its economic function and the structure it actually has.

I believe this set of replies would be cogent and substantial (though not necessarily persuasive) if the structural critique really did proceed as just described. But the economist in fact mischaracterizes the real substance of the corrective justice critique. For that critique does not at its core fault economics for failing to produce a good functional explanation. It faults the economist for assuming that an explanation of the law in terms of its functions will provide an adequate form of interpretation of the law. The corrective justice theorist argues that something beyond a functional explanation of the law is needed; that the economist cannot provide it; and that the economist cannot even remain consistent with a plausible nonfunctional account. In particular, functional explanations that do not provide an analysis of the concepts embedded within the law fail to provide the core of what an account of the law must give.[27]

The corrective justice theorists' structural argument thus rests upon a methodological premise, namely, that an account of an area of the law is inadequate if it fails to provide an analysis of the concepts embedded within the law.[28] Here is a rough and preliminary version of an argument for this conceptualistic premise and for its application in the bipolarity critique:

27. The pragmatic conceptualisit critique mounted here leaves open the possibility that some functional accounts of parts of tort doctrine will, in fact, explain certain concepts in the law if the content of those concepts is tied to some functional notion. *See* Part II.C, *infra.* It is not the fact that the explanation is functional, standing alone, that makes it sufficient as a form of legal interpretation; it is that, combined with the contingent fact that the concept in question is one whose content—whose role in the inferences the law uses—happens to be given functionally. The thrust of the subtantive arguments in the bipolarity critique is not that this *could* not be true of most central tort concepts, but that it *is* not; that their nonfunctionalist, conceptualistic accounts are necessary; and that functional notions are not the core of the inferential role played by these concepts.

28. I do not wish to suggest that this is the only methodological foundation that could be given to the bipolarity critique, or, more generally, to the corrective justice theorists' critique of economic accounts. Most obviously, this article does not discuss the possibility of a Dworkinian methodological foundation that faults the economic account on fit, justification, or both; doing justice to such a position would require more space than I have here. Briefly, any such account will have to decide whether fit is to be understood conceptualistically or in some other manner; I believe that Dworkin's position would require fit to be understood conceptualistically. If so, the level of justification would not be reached, because the corrective justice theorist has shown that the economist does not achieve minimal fit, conceptualistically understood. On the other hand, if fit were judged more permissively, then the economists' replies above might apply (although whether they suffice even on a more permissive standard is unclear); if so, the level of justification would take center stage. We would then be dealing with an argument whose major claim was normative, in the first instance, rather than structural and doctrinal, and this would not reflect the nature of the arguments actually put forward by Coleman and Weinrib.

Analyzing the concepts embedded within legal materials is necessary for identifying the content of these legal materials; identifying the content of these legal materials is necessary for stating what the law is; a theory of the law is inadequate if it cannot state what the law is; thus, an account of an area of the law is inadequate if it does not provide an analysis of the concepts embedded within legal materials. When we add the premise that purely functional explanations of the law do not provide analyses of the concepts embedded in the law, we may infer that such explanations are inadequate. When we further add that law and economics provides a purely functional explanation of tort law, we may conclude that law and economics is inadequate as an account of tort law.

The prior paragraph reveals that the disagreement between law and economics and corrective justice concerning the strength of the "structural critique" depends on a deeper disagreement on the methodology of legal theory, and it sketches an argument on behalf of a certain, conceptualistic methodology. But this is really only a sketch. For it is not at all clear what it is for concepts to be "embedded in the law," what it is to "identify the content of the law," what it is for the law to have "content," and what it means to state what "the law is." Conversely, it is unclear why functional explanations are incapable of explaining what the law is, and how functional explanations really differ from analyses of concepts in the law. More broadly, if we are to understand the structural critique, we need an account of why there is an important sense of "what the law is" that conceptualistic analyses are able to capture and purely functional explanations are not.

The next part of this article constructs an argument for the conceptualistic premise and uses this argument to defend the bipolarity critique. I note in passing, however, that both Coleman and Weinrib could be interpreted as offering an argument that is more dependent upon what might be called an "essentialistic premise" than a conceptualistic premise. Weinrib explicitly refers to Aristotle as a major source of both his substantive tort theory and his metaphysics and epistemology.[29] He grounds his requirement for an account of the forms internal to tort law on a quasi-Aristotelian ontology, which relies heavily upon a notion of "form" that is essentialistic.[30] Moreover, he frequently alludes to the need for an account that respects the idea

29. Weinrib, *supra* note 1 at 19, 25ff. (developing classical formalism as jurisprudential basis).

30. Weinrib is cautions to reject certain forms of essentialism, namely, those that would be satisfied with the identification of features that were demonstrably not contingent, *id.* at 30, or those that relied upon establishing a semantic point about the use of phrases, such as "tort law." *Id.* at 31. Ultimately, I believe that Weinrib's formalism is intended to be, and is, a form of conceptualism. *Id.* at 205 ("Now it is true that the formalist account is avowedly and unabashedly conceptual."). Nevertheless, his development of the notion of "Form in Juridical Relationships" as the methodological and jurisprudential basis of his formalism sustains the charge that at some important level, the existence of attributes whose ontological character is *essential* is pivotally important to Weinrib's formalism, as he himself understands it. "Form" is explained as having three interrelated aspects: character, means of classification, and principle of unity. These are explained in a manner that makes extensive reference to the idea of

that there is something tort law simply *is*, most strikingly when he compares tort law to "love."[31] Although Coleman clearly does not depend on an Aristotelean ontology in the manner Weinrib does, he nevertheless appears to rely in some places on the fact that the economist is forced to treat as *accidental* or *contingent* the features highlighted by the bipolarity critique.[32] It is easy to assume that he must therefore be depending upon a sort of essentialism about an area of the law—tort law. There are many problems, I believe, with this sort of essentialism. Although it is a strand of the bipolarity critique, it is not the only strand of argumentation; and for reasons expressed below, it suggests a level of metaphysical baggage it is preferable to do without. I mention it here only to put it to one side; the conceptualistic argument developed below does not rely upon a form of essentialism.

II. PRAGMATIC CONCEPTUALISM AND THE BIPOLARITY CRITIQUE

A. Weinrib's Formalism

Within the corrective justice literature, the most extensive defense of conceptualism against functionalism is Weinrib's. Indeed, I believe Weinrib's sustained and forceful critique of functionalism in private law is a remarkable achievement that has given corrective justice theory some of its magnetism in legal theory. Weinrib explicitly endorses a jurisprudence of formalism and rejects functionalism.[33] He argues (i) that the content of the law cannot be understood without an understanding of the form of the concepts within the law, and that, therefore, an analysis of the form of these concepts is necessary to rendering the law intelligible;[34] (ii) that functionalism is unable to explain how the law can *be a coherent order and is capable of genuine justification*,[35] and that, therefore, functionalism (unlike formalism) is unable to display the sense in which the concepts within the law cohere with one another and constitute a juridical unity;[36] and (iii) that functionalism (unlike formalism) is unable to display the respects in which various parts of the law justify one another, and that, therefore;[37] functionalist

an essence. "Through reference to the ensemble of characteristics that give a thing its character, we comprehend the thing in question as what it is; in classical terminology, we grasp its nature or essence. . . . Form goes to species as well as to essence. . . . Form is the abstracted representation of what connects the essential attributes to one another, so that together they determine the thing's character. . . . *Id.* at 27. Weinrib then asserts that "[t]he legal formalist understands juridical relations in the light of this venerable notion of form." *Id.* at 28.

31. Weinrib, *supra* note 14, at 526.
32. Coleman, *supra* note 1, at 383.
33. Weinrib, *supra* note 1, at 1–55; Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).
34. Weinrib; *supra* note 1, at 22–29, *especially* 28–29.
35. *Id.* at 44
36. *Id.* at 39–44.
37. *Id.* at 36–38; Weinrib, *supra* note 14, at 502.

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justifications always demand that the law reach farther than it actually does. This view is intended to accomplish several different projects within jurisprudence and metaphysics more generally. But among its most significant aims is that of defeating functionalism within tort theory, and of doing so, in part, by demanding that a theory of tort law provide an analysis of the concepts embedded in tort law. In this respect, what Weinrib calls "formalism" can be understood as a means of arguing for what I have called "conceptualism."

Weinrib's subtle and sophisticated philosophical work on formalism has now generated a substantial secondary literature.[38] As many scholars have pointed out and as Weinrib has recognized, there are several serious objections his theory must overcome. These include the objection that his formalism demands an abstraction from human welfare, an abstraction that is untenable in light of the fact that the law is a human institution;[39] that the level of coherence he demands in law is untenably high and elevates the desideratum of theoretical elegance to a necessary condition of law;[40] and that his conception of justification is cramped and unable to accommodate complex, but genuine, forms of justification of legal provisions and human institutions.[41] I do not wish to flesh out these debates here. Rather, I wish to point to a set of reasons, in addition to the concerns raised above, for wanting to generate an alternate, nonformalistic framework within which to defend conceptualism.

First, Weinrib appears to endorse a natural law jurisprudence, rejecting not only positivism, but also any view that treats legal officials as creators, rather than mere elaborators, of the law.[42] In this very important sense, Weinrib appears to deny that law is a human *creation*. Not only realists and positivists such as Hart and Holmes fall outside this view,[43] but also a wide

38. *See, e.g.*, Martin Stone, *On the Idea of Private Law*, 9 CANADIAN J.L. & JURIS. 235 (1996), for a particularly important contribution to this literature. Stone's Wittgensteinian reinterpretation of Weinrib in that review has influenced my pragmatic understanding of corrective justice theory. With respect to Weinrib more generally, there are large aspects of Weinrib's theory, most notably its importation of Kant and Hegel, that I simply have not undertaken to address at the present time. This is not to say that I deem them irrelevant to a full assessment of this theory. On the contrary, I recognize that Weinrib's particular synthesis of Kant, Hegel, and Aristotle presents a substantially different version of corrective justice theory and of conceptualistic jurisprudence than those derived from Coleman and Perry, and that certain ideas, such as "normative equilibrium," should only be removed from his framework with a high level of caution.

39. *See, e.g.*, Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in TORT THEORY 24 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993).

40. *See* Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2270–72 (1996) (reviewing Ernest J. Weinrib, THE IDEA OF PRIVATE LAW (1995)) (criticizing Weinrib's methodological emphasis on coherence and form).

41. *See* Chapman, *supra* note 25.

42. *See* Weinrib, *supra* note 14.

43. *See, e.g.*, H.L.A. Hart, THE CONCEPT OF LAW (2d ed. 1992) (concept of law is concept of humanly created systems of rules); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), reprinted in 110 HARV. L. REV. 991 (1997) (analyzing law as a human creation).

range of antipositivists, such as Dworkin and Fuller.[44] Although they believe that the content of the law, and its status and nature as law, depend on the answers to normative questions, they nevertheless view the law as a social creation. In an important sense, Weinrib's formalism denies this;[45] and insofar as it does so, it is committed to the existence of a legal order not of human creation. In this respect and insofar as its essentialistic language is intended to be understood in a manner that genuinely adopts an Aristotelean ontology for tort law, Weinrib's views are *metaphysically elaborate*.

Second, Weinrib's formalism leaves little room in his theory for the possibility of reasoned practical assessment of the law. Weinrib not only rejects functionalism; he leaves no room for the idea that it is worth knowing what functions the law serves and how well it serves these functions.[46] He therefore leaves insufficient room for the normative idea that *how well the law serves certain functions* is relevant to whether the law ought to be kept, or revised, and relatedly, for the potential relevance of the question *how well certain functions would be served were the law interpreted one way* (rather than another). Moreover, his theory leaves us with no obvious account of how changed values can be incorporated into reasons internal to the law, for a judge to answer legal questions differently from his or her predecessors. For these reasons, his view is not only antifunctionalistic, it is *antipragmatic*.

I believe that for many modern legal theorists, the desirability of metaphysical modesty and the capacity for rational pragmatic revision of the law are very firmly anchored starting points in the reflective equilibrium of their legal theorizing. Consistency with these jurisprudential convictions is virtually a desideratum for many. Thus, if the cost of being a conceptualist is being a Weinribian formalist, many legal theorists will understandably reject conceptualism. This is not necessarily to argue against Weinrib's position, nor to suggest that these points are beyond argument. It is, in

44. Ronald Dworkin, LAW'S EMPIRE (1986) (explaining law in terms of human practices, notwithstanding the rejection of positivism and legal realism); Lon L. Fuller, THE MORALITY OF LAW (2d ed. 1964) (view of law as created human system leaves room for notion of moral constraints on concept of law).

45. *See* Weinrib, *supra* note 31. The Yale article displays an enthusiastic embrace of what Critical Legal Studies scholars targeted as "legal formalism," including the metaphysics these scholars assigned to that view. *The Idea of Private Law*, *supra* note 1, written seven years later, arguably works from a less metaphysically robust view; Weinrib has suggested this to me in personal conversation. In any case, however, *The Idea of Private Law*, *supra* note 1, still depends upon the idea that it is vitally important to understanding the nature of law to understand the Aristotelean point that law has a certain form, which is to be understood in essentialistic manner, and relatedly that grasping the form of law is vital to understanding both its nature and its essence. *See* note 28, *supra*. Whether such ideas can ultimately be harmonized with a form of pragmatism is an interesting question that I will not address here. It is clear, however, that if one takes as a desideratum for a legal theory not merely *ultimate consistency with pragmatism*, but also independence from metaphysically rich notions in explaining and expounding the theory, then Weinrib's Aristotelean formalism in earlier or later versions does not satisfy this desideratum.

46. *See, e.g.*, Rabin, *supra* note 38.

effect, to give a practical reason for wanting to know whether there is a defense of conceptualism that differs from Weinrib's formalism—that is metaphysically modest and pragmatic. Because Jules Coleman's jurisprudential work is overtly positivistic[47] and pragmatic, and because he nevertheless appears to endorse conceptualism in tort theory, I turn to his work to explore the compatability of the two.

B. Conceptualism and the Pragmatic Theory of Meaning

Tort law, according to Coleman, is constituted by a particular set of social practices in which certain persons are required to compensate certain others under a variety of conditions, and all persons are, in a sense, enjoined by social norms from engaging in certain conduct, on pain of incurring duties of repair to those injured. In his article *The Practice of Corrective Justice*,[48] Coleman suggests that these practices incorporate a concept of corrective justice and that a similar concept of corrective justice is incorporated in certain social practices that are not necessarily part of our legal institutions. In short, a practice of holding wrongdoers to have a moral duty of repair and of attributing responsibility and blame to them for injuries they have wrongfully caused to others is related in some way to the practices that constitute tort law and the political and legal institutions to which it is connected. *Risks and Wrongs* can probably be interpreted as suggesting that there is a moral concept of corrective justice that guides, and is embedded in, certain nonlegal practices, and that tort law can usefully be explained as exemplifying this concept. *The Practice of Corrective Justice* can then be understood as asserting that this concept explains the practices that constitute having a law of torts.

Coleman's account is pragmatic in at least two ways (and probably more). First, it is pragmatic because human practices take center stage in explaining certain concepts. This contrasts, for example, with Weinrib's account, according to which the form of the concepts themselves is deemed pivotally important. The focus on practices is an earmark of a broad strand of contemporary analytic philosophy. Like Hart, Dworkin, and many others, Coleman aims to demystify central jurisprudential problems by taking this "pragmatic" turn.

Second, Coleman would appear to be sympathetic to a form of pragmatism developed by Sellars, arguably shared in varying degrees by Quine and

47. For Coleman's positivism, see especially Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982), reprinted in MARKETS, MORALS AND THE LAW, *supra* note 10. For his pragmatism, see especially Jules Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33 (1995). More directly to the point, in *Risks and Wrongs*, Coleman expressly states that his anti-instrumentalism does not commit him to Weinribian formalism and is consistent with an emphasis on practices as primary, however, he does not elaborate there on the methodological differences between his own view and Weinrib's. Coleman, *supra* note 1, at 384–85.

48. PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995).

Davidson, and Hilary Putnam.[49] Like almost all modern views of truth and meaning, this one is holistic. It insists that we cannot know what words mean apart from their role in sentences, and we cannot know what sentences mean apart from their role in entire sets of sentences, or theories.[50] And like these views, it recognizes that attributions of content (or meaning) go hand in hand with the attribution of a certain sort of inferentional role to the propositions in which these concepts figure (or sentences in which the terms associated with the concepts are a part).[51] But what is particularly pragmatic about this view is that many of the inferences in question are practical inferences, inferences that end in action of one sort or another.[52] This pragmatic view of content can then be combined with important insights of the later Wittgenstein, and ordinary language philosophers, who emphasized that language must be understood in terms of a wide set of social practices that goes far beyond simply reporting facts to one another. We then end up with the view that to understand certain concepts is to understand the role they play within a certain set of social practices. Accordingly, to explain certain concepts is to display the structure and nature of the set of inferences, practical and otherwise, in which those concepts figure. Conversely, to explain certain practices is (in part) to articulate the set of concepts and principles that serve as the nodes of the practices, which link various aspects of the practical and linguistic practices in the area in question.

Although Coleman has displayed affinities for the foregoing sort of semantical view,[53] he has not explicitly endorsed one, nor has he explicitly combined it with his metatheoretical views on corrective justice.[54] However, I think such a combination is natural and fruitful, and yields the following sort of methodology. The data of interpretive legal theory arguably include at least the following: practices of states and of private parties in acting against (and sometimes not against) one another, such as suing, imposing liability, and defending; linguistic practices of the courts, parties, and lawyers of describing the conditions of liability in various ways, with various requirements and terms; and the phenomena of recognizing certain concepts and convictions as part of the law. An explanation of an area of the

49. For a discussion of the implications of the work of these thinkers for the possibility of a modest, pragmatic semantics of legal statements, *see* Zipursky, *Legal Coherentism*, *supra* note 6. As to Coleman's sympathies with the aforementioned thinkers, *see* Coleman, *supra* note 45.

50. Willard Van Orman Quine, *Two Dogmas of Empiricism*, reprinted in Willard Van Orman Quine, FROM A LOGICAL POINT OF VIEW (1953). For a useful caution against too facile an association between Quine and legal theory, *see* Brian Leiter, *Why Quine is not a Postmodernist*, 50 S.M.U. L. REV. 1739 (1997).

51. *See* Robert Brandom, MAKING IT EXPLICIT 87–94 (1994).

52. *See* Sellars, *supra* note 5.

53. *See* Coleman, *supra* note 41.

54. Since reading an earlier draft of this article, Coleman has, in fact, explicitly endorsed the semantical view and the metatheoretical view I call "pragmatic conceptualism," as well as the phrase itself. *See* Jules L. Coleman, THE PRACTICE OF PRINCIPLE: THE CLARENDON LECTURES IN LAW (forthcoming).

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law would consist of a theory that explained how all of these hung together—a theory that explained, for example, why liability is imposed only when juries "find" that causation has been established and why we speak and think of making a plaintiff whole.

Conceptualistic explanations in the common law of torts are bound to draw upon legal principles[55] for at least two reasons. First, as semantic holists point out, inferences are always from or to semantic entities with propositional content, and concepts alone do not have propositional content. Legal norms, and provisions embedded within legal norms, have propositional content. Not all legal norms are principles—indeed, some of the most interesting forms of conceptualism extant today are those of the textualists and rule-theorists who insist that many (or all) legal norms may not be understood as principles. But in the common law of torts, corrective justice theorists and a wide range of other theorists and jurists have recognized the presence of legal principles.[56] Second, part of what is involved in *explaining* concepts and principles is rendering them more intelligible. Pragmatic conceptualism suggests that a variety of concepts and principles in tort law constitute that area of the law. Identifying those concepts and principles is a large part of offering a legal theory. However, a closely related (and sometimes inseparable) part of legal theory is rendering the concepts and principles so identified intelligible from a normative point of view, and this latter task will also often involve the invocation of principles.

On this view, an aspect of Coleman's structural critique of law and economics could be put as follows: Our system includes claims by a plaintiff that a defendant has caused his injury and *therefore* should *compensate him for that injury*. What the court does is to impose a duty on the defendant to compensate the plaintiff. And that action of the state emerges as an inference from the finding that the defendant has caused the plaintiff's injury. The inference is licensed by a legal principle to the effect that a defendant who has wrongfully injured a plaintiff has a duty of repair to that plaintiff.

55. Larry Alexander and Kenneth Kress have mounted an important attack on legal principles in *Against Legal Principles*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279 (Andrei Marmor ed., 1995), reprinted with commentaries and responses in 82 IOWA L. REV. (1997). It would go beyond the scope of this article to respond to their arguments here. For the present, suffice it to say (1) that their attack focuses largely on a particular sort of justification for the deployment of legal principles in adjudication, one most closely associated with *Law's Empire*, *supra* note 44, and, as indicated in note 56, *infra*, I reject this model of the place of principles; (2) that the view developed here is a view of the content of the law, a view that relates to, but does not constitute, an ultimate normative theory of adjudication; and (3) that the view developed here, insofar as it rests on the primacy of principles as a particular sort of legal provision (as opposed to rules or other sorts of provisions), depends significantly on the common law status of torts, and pragmatic conceptualism may assume different forms that are more rule-dependent in other areas of the law.

56. I am sympathetic with Stephen Perry's reconstruction of a "normative primacy model of legal principles" to be found in Dworkin's early work. *See* Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 796, 807–15 (1997), *citing* Ronald Dworkin, *The Model of Rules I*, in Ronald Dworkin, TAKING RIGHTS SERIOUSLY 14 (rev. ed. 1977), *and contrasting its view of legal principles with that of* Dworkin, *supra* note 44.

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The tort law is not understood unless this principle is grasped. To grasp the principle is not simply to be able to articulate that form of words. It is also to possess the concept of a "wrong" (under the tort law), to possess the concept of an "injury," and to possess the concept of a "duty of repair." And to possess these is, in turn, to be able to apply them properly when a potential instance is presented, to be able to infer a range of legal statements from their applicability, and to be able to infer the proper disposition of the practical legal issues presented through them.

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

The corrective justice theorists' explanation of the causation element serves as an instructive example. No one would disagree that negligence doctrine contains an important general rule that one is liable for an injury of another only if one has caused that injury. Imagine that a person completely unfamiliar with our legal system were to need an explanation of this feature of negligence doctrine. A corrective justice theorist such as Weinrib displays this rule as an embodiment of a principle that one has a duty of repair to another only if one actually injured the plaintiff. Courts infer the existence of a duty of repair in the defendant from the fact that she was the one who injured the plaintiff (and from other components). It is only because *she did it* (caused the injury) that courts hold her responsible for it and impose a duty of repair on her to the plaintiff. To understand this part of negligence doctrine is, at least in significant part, to *grasp this idea*. The economists would bypass this idea and leap straight to an explanation in terms of the economic function served by holding defendants liable only if they caused an injury. They claim that it serves the function of avoiding overdeterrence (which would result in inefficient activity levels). The corrective justice theorist's central objection is not that this is false, but that it fails to offer an adequate explanation of what the law is; it omits the basic idea.

On the other hand, I do not think this argument takes us as far as we need to go. For the economist need not deny that corrective justice theorists illuminate tort law. And he need not deny that there are those who seek exactly the form of illumination that the conceptual analyses of the corrective justice theorists provide in their explanations of tort law. Thus, the

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economist may admit that his theory does not provide everything that some people want when they seek a theory of tort law. But this does not suffice to show that the economic theory and other functionalist theories are *inadequate*. They illuminate the law in a different manner, by showing what function it serves. No reason has been offered for demanding one particular form of explanation, the conceptualistic form. No reason has been offered for demanding that the criteria of adequacy for a legal theory should incorporate what appears to be the philosopher's taste for understanding human practices by understanding inferential connections among certain concepts. Or so I would argue, standing in the anticonceptualist's shoes. Thus, even if we have begun to build an account that permits a modest and pragmatic account of what it is to provide an explanation of a legal concept, we nevertheless need a jurisprudential account to explain why legal theories must provide explanations of legal concepts.

C. The Jurisprudential Aspect of Pragmatic Conceptualism

The functionalist seeks to understand the law by understanding what it accomplishes, what values it serves or realizes. Although such an understanding is important and valuable for a wide variety of reasons, it is not, as a general matter, the same as an internal mastery of the concepts themselves. There is a difference between applying the concepts within the law itself—making the next move within a certain pattern of inferences—and extending the law so as better to fulfill the functions of the law. The conceptualist in law maintains that where there is a move that flows out of a mastery of the concepts within the law, that move is an application of the law. This move may not best serve the functions that make the law valuable; but this, in and of itself, does not show that it is not the law. Conversely, in the context of adjudication, it does not follow from the fact that a certain result flows from an application of the law that it should be applied. Perhaps the adjudicator should decide that other laws apply; that there are legal or nonlegal reasons why the law should not be applied; or that the law should be revised, ignored, eliminated, or relaxed. Perhaps functionalist considerations provide powerful reasons for the ajudicator to arrive at such decisions. But each of these avenues of departing from the content of the law, strictly construed, implicates a different set of justificatory considerations.

The pragmatic conceptualism I am advocating takes a famous critique of formalism and turns it on its head. The antiformalists of the early twentieth century confronted a version of formalism that treated the words of the law as wooden and rigid, and these antiformalists rightly noted that the words of statutes and the significance of holdings do not have a life in and of themselves, but only in virtue of the practices, purposes, and activities of those who use them. The users of legal systems breathe life into the law; otherwise it is lifeless. But these instrumentalists, such as Holmes, tended

to believe that this observation undercut the very notion that law was meaningful, and believed that we must understand law only in terms of its functions.

Ironically, the pragmatic inclinations of such thinkers have been replicated across virtually all of philosophy, and certainly across the philosophy of language and the theory of meaning.[57] Its pervasiveness has led to an entirely different view of the sense in which practices breathe life into words, sentences, and apparently fixed social forms and institutions. All of these are "social constructions" that have the content and significance they do only because of certain practices. But it is only because our practices have a certain texture of their own, available to those engaged in the practices, that they end up being what they are and having the content they have. Involvement in the practices, and the connections between the practices and other sorts of activities, are what give words their meaning and institutions their structure. But it follows from this that perhaps there is a way of understanding laws that is quite distinct from that advocated by the instrumentalist.[58]

A sufficiently pragmatic conceptualism turns legal realism on its head because it ends up making a place for the idea that the law itself has content. Legal provisions contain certain concepts the mastery of which involves making certain moves and extending the law in certain ways. The idea that "the law itself" governs can be understood as the idea that legal provisions authorize officials to act in a manner entailed by a grasp of the legal provisions. Hence, the notion of the content of the law "itself" is a notion of a domain of power for legal officials in which certain moves are licensed because they are part of what flows out of a mastery of the concepts within the law. Conversely, exercise of official power outside of this domain lacks the authorization that accompanies moves by the legal officials under the law itself, and exercise of official power in conflict with the content of the law itself appears to be a derogation of an obligation to apply the law.

A legal theory that contains only a functionalist account of an area of the law offers nothing by way of grasping this domain of moves that in some sense are built into the concepts of the law. This is a problem from the point of view of illuminating what the law is and of rendering intelligible the relevant area of law. But, as I have argued, it is also a practical problem, for

57. Zipursky, *Legal Coherentism*, *supra* note 6, at 1695–1705. It is somewhat misleading to suggest that the phrase "pragmatic inclinations" captures the practice-based view of meaning expressed in this paragraph, because the view is probably a Wittgensteinian one in the first instance, and it is misleading to label Wittgenstein a pragmatist. However, figures such as Putnam, Rorty, and Sellars—who do qualify as "pragmatists" by their own description—treat large aspects of the Wittgensteinian view within broad forms of holism and pragmatism.

58. Other scholars, including most prominently Hilary Putnam and Jules Coleman, have attempted to articulate jurisprudential positions that draw heavily from contemporary American pragmatism. Closely related, and more common, is the effort to draw jurisprudential morals from the late Wittgenstein, and my own prior work articulates a set of jurisprudential suggestions to be drawn from both pragmatists and Wittgenstein. *See* Zipursky, *Legal Coherentism*, *supra* note 6.

a first step in determining the answer to a legal question is determining how the concepts within the law apply to the question at hand. Although it may be useful in determining whether we should keep the law, or how we should change it, or how we should make new parts of it to match the old, the functionalist approach is incapable of saying what the law actually is, and that is a critical defect for any interpretive theory of the law.

While pragmatic conceptualism rejects the idea that the function of the law necessarily exhausts its content, it does not deny the significance of a functional analysis of the law in legal theorizing or in legal interpretation. Indeed, in many ways, a conceptualistic account can help us to see why functionalist considerations are important. Sometimes, the way the law does function or was intended to function will serve as evidence that certain concepts are embedded in the law. Sometimes, the concept embedded in the law is itself functional in content; for example, the notion of a restraint on trade in American antitrust law, for a wide range of cases, has its meaning tied to the question of whether its effect will be to reduce competition. Often, parts of the law are best interpreted as leaving very open concepts, which in turn often (though not always) are best interpreted as delegating a certain range of functional questions to the officials charged with applying the law. Yet while all of these considerations show that function often is relevant to identifying a concept, they are distant from the claim that identifying the content of the law is simply equivalent to identifying the functions it serves or was intended to serve.

Within adjudication, the conceptualist who identifies the content of a particular legal provision may of course decide that the proper application of that provision, and of the concepts it embodies, will lead to a different result than courts in the past have recognized. This is the core, for example, of Dworkin's account of *Brown v. Board of Education*.[59] Dworkin states that to strike down segregation was an application, not a revision, of the Equal Protection Clause because—in light of the conception of equality in the principle of equality embedded in the Equal Protection Clause—segregation constitutes a form of inequality literally outlawed by the Equal Protection Clause. Dworkin urges that prior decisions misapplied the concept and therefore misapplied the law. Similarly, in tort law, John Goldberg and I have recently argued that Cardozo's famous opinion in *MacPherson v. Buick*[60] is best understood along pragmatic conceptualist lines: Cardozo decided that when the conception of the duty of due care embedded within the law of negligence was properly applied, it was clear that automobile manufacturers owed a duty of due care to those who use their products, not simply to those who directly purchase them.[61]

Beyond the careful application of concepts to new times, conceptualism

59. 347 U.S. 483 (1954). *See* Ronald Dworkin, TAKING RIGHTS SERIOUSLY (1977).
60. 111 N.E. 1050 (N.Y. 1916).
61. *Id.* at 1053. *See* Goldberg & Zipursky, *supra* note 7 at 1812–25 (explaining *MacPherson* as simultaneously conceptualistic, progressive, and pragmatic).

recognizes the possibility that sometimes a judge ought to deviate from the concepts within the law. But it is important, at least from a jurisprudential vantage point, to know what is being done by such a judge. If we think that there are good reasons to make an exception for a particular situation or that many of the reasons for wanting a law to be structured one way in one situation do not apply to another situation, then it may be sensible to modify, relax, limit, expand, create, or refrain from applying the law in question. And it may be the case that a judge will be so situated that it is within her proper institutional role to act towards the law in one of these ways, perhaps for reasons the functionalist points out (or perhaps for other reasons). Of course, this is a large part of what judges do in common-law cases. But then this will involve a whole range of considerations about precedent, stare decisis, and institutional role that are simply elided by the functionalist account of what the law is. More importantly, the reasons the functionalist presents as premises in an argument that something is the law should often be understood as premises in an argument that something should be the law. This means that they must be able to bear a particular sort of weight in an argument with a different normative posture.

The purely functionalist approach is therefore inadequate at a practical level not because it always leads to the wrong answer, all told, about what should be decided. It may often lead to decisions that, all things considered, are justifiable or superior to others. It is inadequate, practically, because it skips a whole stage of legal analysis that ought to be included, and thereby distorts the entire process of determining how the law ought to be decided. The form of conceptualism I am advancing permits judges and scholars to be open to revision of the law, while nevertheless making room for the idea that the law has content and respecting the principle that the appropriateness of acting (in adjudication) depends not only upon the substance of the normative views upon which one is relying, but also upon the existence of legal, institutional, moral, and political reasons for thinking it an occasion to draw upon substantive normative views not embedded in the concepts of the law.

Pragmatic conceptualism is similarly modest and potentially flexible on several fundamental questions of jurisprudence. Obviously, I have disclaimed dependence on natural law, but I think the pragmatic conceptualist can equally disclaim dependence on fundamental tenets of positivism. I have not denied the possibility that the concepts embedded in the law are moral concepts or that they are embedded through moral principles—I have suggested the opposite. Nor have I said anything about whether their status as concepts embedded in the law presupposes a social facts thesis. On the other hand, I think the conceptualistic framework I have advanced is consistent with a positivism of a social facts thesis, and this is salutary in light of the fact that Coleman is a positivist in this sense. Similarly, were one to accept a form of positivism, I see no reason why my account would determine a choice between inclusive and exclusive positivists, for it is entirely

possible (for all I have said) that our legal system possesses a rule of recognition that conditions a putative legal norm's status as law on its satisfaction of certain moral criteria.

There is, perhaps, a sense in which conceptualism may be thought not simply to entail, but actually to constitute, a form of positivism. Hart suggested in *Positivism and the Separation of Law and Morals*[62] that this is sometimes what is meant by the term "positivism." One of the (five) "meanings of 'positivism' bandied about in contemporary jurisprudence," according to Hart, is

> the contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from criticism or appraisal of law whether in terms of morals, social aims, 'functions,' or otherwise.[63]

With the caveat that consideration of morals, social aims, and functions may be relevant to the identification and analysis of legal concepts, I am happy to be labeled as a positivist in this sense.[64]

D. Revisiting the Structural Critique

The structural critique comes into focus against the backdrop of pragmatic conceptualism. Let us look at what courts do in tort cases. They make a particular sort of practical inference, culminating in the imposition of liability upon a defendant. What gets fed into the court (as a court of *law*) is findings (or allegations) about what the defendant did and what happened to the plaintiff. The concepts and principles of tort law mediate the inference from these findings to the imposition of liability, and they do so through a variety of steps. The content of those concepts and principles is grasped only if we have an account of how these inferences are mediated. To grasp these concepts is to understand the content of the law.

Corrective justice theory provides a picture of the content of the concepts and principles in tort law that explains this mediating set of inferences in our law. Courts impose liability on a defendant *because* he wrongfully injured plaintiff. That the defendant wrongfully injured the plaintiff is the ground of a practical inference culminating in the imposition of liability. The principle that *a defendant who wrongfully injured a plaintiff has a duty to compensate the plaintiff* mediates this inference, according to the corrective

62. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 299 (1958).

63. *Id.* at 307–08 n.25. Hart attributes the quoted view to Bentham and Austin and implicitly endorses it himself, in explicitly defending the positivistic tradition that includes this view.

64. *But see* Zipursky, *Legal Coherentism*, *supra* note 6 (rejecting the social facts thesis and expressing reservations about the manner in which even inclusive positivism conditions the permissibility of moral considerations on social facts).

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justice theorist. In order to grasp how this principle yields the set of inferences we have, we need to see that our law categorizes the evidence input in terms of whether the defendant *wrongfully* injured the plaintiff, whether the defendant's conduct *injured* the plaintiff, and whether the defendant is *responsible* for the plaintiff's injury. Only when we obtain conceptions of wrongfulness, injury, and responsibility that simultaneously illuminate the manner in which the law categorizes cases and illuminate how this gives rise to an inference of a duty of repair, will we grasp the nature of the internal inferential connections that constitute tort law. It is because corrective justice theory claims to accomplish this task that it is a promising tort theory.

Conversely, the economist does not explain why the ground of an inference culminating in the imposition of liability on the defendant is something that happened to the plaintiff. Indeed, the reason for the imposition of liability, according to the economist, is the incentive it provides to engage in conduct that has the appropriate risk level, in light of our desire for optimal activity levels. Beliefs about appropriate risk levels do not have any particular connection to what happened to a particular plaintiff in a particular case. The *inferential* connection between (a) the facts that lead to the imposition of liability and (b) its imposition is opaque. This is the key to the bipolar critique: The economic model does not display the structure or content of the concepts in light of which facts about what happened to the plaintiff ground a practical inference culminating in the imposition of liability on the defendant.

A similar argument may be offered for each of the structural features pointed to by the corrective justice theorist. This is clear both for the fact that liability is *to the plaintiff* and the fact that liability is normally *in the amount of the plaintiff's injury*. According to the corrective justice theorist, a conception of rectification or restoration is embedded in the law; we must understand the imposition of liability as an imposition of a duty to restore or rectify an injury for which the defendant is responsible, if we are to grasp the nature of connection between what the plaintiff establishes and what the court ultimately requires the defendant to do. The economist lacks an account of these connections, according to the corrective justice theorist.

The economist responds by suggesting why the goal of tort law (efficiency) is better served if (a) the imposition of liability is determined in the way our system actually does determine it and (b) plaintiffs play the role they actually do play. But that is to change the question to a functionalistic one, away from the conceptualistic one. Tort doctrine contains elements that the law demands be "tracked" in the determination of whether to impose liability. The imposition of liability is the culmination of a form of practice structured by this doctrine. To provide an understanding of what functions are served by having this sort of practice is, no doubt, to provide a valuable form of self-consciousness, and one that can help us do better in interpreting, adjudicating, and revising the law. But it is different from

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having a grasp of the internal aspects of the concepts and principles themselves.[65]

Corrective justice theory therefore offers a deep and broad criticism of the economic theory. Corrective justice theory claims that tort law is constituted by various concepts and principles and that the economist's lack of a plausible account of these concepts and principles is manifested by his failure to provide a plausible conceptualistic account of certain basic structural features of the law. Because economic theory fails to account for these concepts and principles embedded in the law, it is inadequate. Corrective justice theory, which does provide such an account, is superior as an interpretive account of tort law.

This account leaves open, of course, the possibility that other theories will be of value in describing the function of tort law, or in offering a prescriptive account, and it leaves open the possibility that theories that fit within the constraints of an adequate conceptualistic framework could contribute a conceptualistic account of some aspect of the law.[66] In all of these respects (and probably others), forms of pluralism may be available.[67] But it remains the case that to fail to offer a conceptualistic account is a deep shortcoming, and that to offer a theory that is incompatible with any plausible conceptualistic account of the law is a fatal flaw in a theory that purports to capture what the law is.

65. It might be argued that Posner has attempted to meet the demands of conceptualism in his seminal article, *A Theory of Negligence*, *supra* note 16. That article analyzes the concept of the reasonable person in negligence law in terms of economic rationality, and claims to find this concept rooted in the case law, focusing on Judge Learned Hand's famous opinion in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). This account of what "reasonableness" means in negligence law has been the subject of serious criticism from a number of sources. *See, e.g.*, Ripstein, *supra* note 1; Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996). I have recently argued that a more fundamental shortcoming of the Hand standard analysis is the idea that notions of diligence, competence, and custom play a far greater role than Posner recognizes. *See* Zipursky, *Legal Malpractice and the Structure of Negligence Law*, *supra* note 6, at 673–79, 688.

66. *But see* note 64 *supra* (pointing to shortcomings of Posner's account of the concept of negligence). An early effort to produce an economic account that is consistent with corrective justice theory is found in Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981). Posner argues, in essence, (1) that Aristotle's conception of corrective justice is merely formal, and therefore permits an economically driven definition of "wrongs"; and (2) that economic theory itself justifies a privately driven system that imposes the costs of (economically defined) wrongs on defendants. Apart from the reasons offered by Coleman, Weinrib, and others, for doubting the plausibility of (2), and the reasons offered for doubting whether (1) captures our tort law, Posner's account fails because it explicitly treats the framework of bipolar litigation in a merely instrumentalist manner. But the larger, and, I believe, deeper point is that the economist who treats the corrective justice framework as a fixed point, but still treats efficiency as that to which the system aims, will be forced to treat the notion of a "wrong" in a reductive manner, and will, therefore, offer an inadequate and disingenuous account of the sense in which liability is infererred from the defendant having committed a wrong upon the plaintiff.

67. For a rigorous and illuminating account of several possible forms of pluralism in another common law context, *see* Jody Kraus, *Legal Theory and Contract Law* (1999) (unpublished manuscript).

III. IMPLICATIONS

A. Finding a Successful Conceptualistic Tort Theory

1. Law and Economics

Scholars of law and economics might respond to a critique of this nature by pointing out that their real goal is to model the effects that tort law is likely in actual fact to have. Closely related to this nonnormative approach is the hypothetical normative approach of modeling systems of tort law so that we know what sort of systems we ought to choose *if* we decide to aim for a system that serves certain goals, e.g., efficiency. I believe that the bipolarity critique as I have reconstructed it does not undermine either of these approaches.

The actual approach of most law and economic scholars within legal academia is neither the empirical model nor the defended hypothetical normative account, however. Doctrinal rules are analyzed as crude instruments for recognizing efficiency goals, and this form of analysis is treated as inevitable. There is an evident aspiration to explain the law in economic terms and an evident belief that no other sort of explanation could be satisfactory. I have argued that precisely the opposite is the case. The economic model does poorly at saying what the law really is and at explaining it. To the extent that this model is retained, it should be retained as an empirical account of the actual (or predicted) effects of various aspects of tort law or revisions of it; or it should be retained as an account of appropriate policy, defended along with the necessary normative premises.

2. Corrective Justice and the Challenge of Tort Theory

The bipolarity critique should not be regarded as the last word in tort theory. On the contrary, it invites tort theorists to think about a variety of fundamantal structural features of tort law and to ask what sort of concepts and principles all of these features reveal. A successful and complete tort theory will need to be able to tell the whole story in a consistent and plausible way.

Corrective justice theorists may have overstated the strength of their own affirmative theory. I have argued elsewhere that just as the economists have ignored certain fundamental structural features of the law and thereby misdescribed the concepts embedded in the law, so too the corrective justice theorists have ignored other features of the law, with similar damage to the plausibility of their own theory. Thus, I have argued that they have ignored the concept of a right of action, the idea of civil recourse, the concept of a properly situated torts plaintiff,[68] and the variety of remedies in the tort law; and that they have, conversely, misinterpreted the structural features of tort law where it involves duties of repair.[69] Those arguments

68. *See* Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, at 70–93.

69. *See* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice* (draft of March 20, 2000) (unpublished manuscript, on file with author).

would take me beyond the scope of this article. The point here is simply that the defeat of the economic account from a pragmatic conceptualistic point of view does not mean that corrective justice theory is satisfactory.

B. Pragmatic Conceptualism, Deontology, and Neoformalism

Many leading works in corrective justice theory, and leading corrective justice "critiques" of law and economics, have clearly presented themselves as Kantian, Rawlsian, or more generally, deontological alternatives to the consequentialism (and often utilitarianism) of the law and economics scholars. I believe that this important historical fact about the corrective justice theorists has given rise to an understandable, but largely mistaken, view of the significance of corrective justice theory and its critique of law and economics. On this view, the debate in tort theory between corrective justice theory and law and economics is one more battlefront in the war between deontologists and rights theorists, on the one hand, and utilitarians and economists, on the other. The more fundamental debate, on this view, is a moral one between deontology and utilitarianism, and it is played out in many areas, such as constitutional law, criminal law, and contract law.

The picture of corrective justice theory as yet another deontological critique of a field dominated by utilitarian scholars contains more than a grain of truth, but it is seriously misleading. The point is not that tort law is justifiable for reasons of a different sort than the economist-cum-utilitarian has stated. It is the more elementary point that the economic or more broadly utlititarian reduction of the concepts and principles of tort law is unable to capture the content and nature of the law. And, I have argued, it prominently features the more methodological premise that the ability to account for legal concepts and principles is a sine qua non for an adequate legal theory. These contentions could be maintained by one who adhered to utilitarianism or to the single-minded pursuit of efficiency at the level of first-order morality.

I suggest that we see the corrective justice/law and economics debate as part of a larger controversy in legal theory, but not, in the first instance, as part of the deontology/utilitarian one. The real issue here is the contention that to capture the function of the law is to capture what the law is. Over the past decade, neoformalism has begun to flourish in the legal academy, as has the related view of textualism in statutory interpretation.[70] Both of these, like the core of the bipolarity critique, insist that in characterizing what the law *is*, we should not look first to what the law *does*. There is

70. *See, e.g.*, *Symposium: Formalism Revisited*, 66 U. CHI. L. REV. 527–942 (1999); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). Plainly, Schauer's formalism is prima facie opposed to pragmatic conceptualism, insofar as the former expressly privileges rules (rather than principles). As the text suggests, however, there may be a deeper commonality, namely, the commitment to identifying the content of the law in a manner not wholly dependent on the functions served by the law.

something for the law to be and for laws to mean that is not necessarily (or even usually) reducible to what is typically accomplished with them. Candid characterization of the law and faithful application of the law require careful attention to this content. Corrective justice theory's central, antireductionistic thrust puts it in the same camp as these other antifunctionalistic theories, a point made crystal clear by Weinrib's explicit and thorough embrace of the term "formalism" to designate the jurisprudential foundation of his view. I have argued that pragmatic conceptualism eliminates the shortcomings of formalism while retaining a rich and antifunctionalist notion of legal content suitable to tort theory. The similarities and differences between pragmatic conceptualism in tort theory and its formalistic cousins in other areas of legal theory is a topic that merits further attention.

C. Pragmatic Conceptualism and Legal Pragmatism

Pragmatic conceptualism is an outgrowth of contemporary pragmatism, but it differs strikingly from other forms of legal pragmatism. Legal academics have rightly taken notice of the important developments in American pragmatist thought, both that of Peirce, James, and Dewey, and more recently of Quine, Rorty, and Putnam. However, within the legal academy pragmatism has been interpreted to counsel the incorporation of favored political and moral goals into the activity of adjudication, while insisting upon a piecemeal and practical (as opposed to global and theoretical) approach to practical judgments.[71] In this respect, pragmatism has been seen as a sophisticated foundation for a contemporary version of legal instrumentalism.

Pragmatic conceptualism, while leaving space for context-sensitivity and practicality in adjudication, suggests that the predominant interpretations of the force of pragmatism for legal theory are misguided. I have argued that the deeper point of the pragmatist resurgence in philosophical thought is that our concepts—in law or out of law—have content only because of the web of commitments in which they are enmeshed, and that those commitments are themselves defined only in relation to a community's set of practices. Once we see the general point that concepts can be taken seriously even if they are irreducibly tied to practices, we see the more particular point that legal concepts can be taken seriously. To this extent, philosophical pragmatism tends to cut against the forms of reductionism that have typically been associated with it and points to a moderate form of conceptualism. Within adjudication, it tends to sustain respect for the idea that the law contains principles and concepts that have a certain integrity, rather than to view them as vessels into which incremental policy judgments are cautiously funneled. Pragmatic conceptualism recognizes that the concepts of the law have legal significance beyond any particular extension they are taken to

71. *See, e.g.*, Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

have at a particular point in time. In so doing, it demands a flexible and context-sensitive application of the law, finding a middle path between the formlessness of reductionism and the woodenness of traditional formalism. Beyond this, the conceptualist does not deny that judges often, perhaps always, have some reasons to be pragmatic or practical in applying the law to the facts before them. But the importance of being pragmatic in adjudication is not derived from some broad philosophical truth about the fundamental meaninglessness of legal language or the artificial nature of legal concepts, as some contemporary legal pragmatists seem to contend. Rather, it is to be derived and assessed in terms of moral, political, and institutional considerations pertaining to the role of courts within a system, to the likely impact of decisions upon individuals and groups of persons, and to a variety of other, more straightforwardly *practical*, considerations.

CONCLUSION

The debate between law and economics and corrective justice theory in the past decade has largely been viewed as a debate within tort theory. But it is much more than this. It is a debate over what an interpretive legal theory ought to be. Our Holmesian legal academy has taken it as a starting point that understanding the law is largely a matter of understanding how the law serves as an instrument for the realization of certain ends. Corrective justice theorists such as Coleman and Weinrib have challenged this basic assumption, and challenged it where it is taken to be strongest—in the common law of torts. To look only on what the law does is to miss the entire complexity and structure of the concepts and principles embedded in tort law. Those who interpret and apply the law occupy a point of view, within our practices, from which these concepts and principles have a texture of their own, which is not captured by looking at the ends served by the law. These concepts and principles are not merely philosophical niceties disguising a sort of policy machine. In a very real sense, I have argued, these concepts and principles are the law. However valuable it is to know what the law *does*—and I have argued that it is very valuable—it is important to know, as a first step, what the law *is*. A conceptualistic account is required to accomplish this first step. This is the larger point of the corrective justice theorist's critique of law and economics. If it is accepted, then the critique of law and economics as an interpretive theory of tort law is sound, and the economists' array of rejoinders is unpersuasive.

Conceptualistic theories of law have been disfavored in the past several decades because they appear implausibly elaborate at a metaphysical level and untenably rigid at a practical level. Drawing from the work of corrective justice theorists, I have argued for a form of conceptualism that suffers from neither of these shortcomings. It rejects any essentialist or transcendental status for legal concepts or principles, and instead explains the significance

of those concepts and principles in terms of their place within our practices. Although it demands a conceptualistic approach to the identification of the content of the law, it recommends an open-minded and flexible approach to the application of the law. Insofar as it remains practice-based in theory and practical in application, it constitutes a pragmatic form of conceptualism.

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