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Paying for Health Care and Private Law's Internal Point of View

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15.1 INTRODUCTION

American private law is, paradigmatically, judge-made common law.[1] In the century since Legal Realism swept the academy, it is generally considered to be, at bottom, the product of judicial policymaking.[2] From this perspective, the still-persistent conceptual language of common law judging is a façade, obscuring the distributional reasoning beneath. If this is right, we might ask courts to offer comprehensive novel solutions to complex social problems – though wonder why they, beset by well-worn democratic and epistemic limitations, ought to engage in general policymaking.[3]

Against this picture, private law theorists have recently defended an alternative view of private law that takes seriously its language and conceptual structure, from an internal point of view.[4] According to these theories, it *is* possible, and sometimes desirable, to take private law's internal structure seriously, and reason about its basic concepts and commitments.[5] Common law judging may not be general-interest policymaking, but in applying the basic logic and internal language of private law to novel circumstances, courts can sometimes mitigate difficult social problems.

This chapter offers a case study in applying the internal logic of private law to unanticipated social circumstances, drawn from health care finance. Most Americans have health insurance, and the prices charged for their health care are set in opaque volume negotiations between insurers and providers.[6] The relatively small percentage of Americans who don't have insurance, or receive care that their

[1] Jeffrey A. Pojanowski, Private Law in the Gaps, 82 Fordham L. Rev. 1689, 1689 (2014).
[2] Joseph William Singer, Legal Realism Now, 76 Calif. L. Rev. 465, 467 (1998).
[3] David O. Brink, Objectivity in Law and Morals 19 (2000).
[4] Andrew S. Gold et al., The Oxford Handbook of the New Private Law (2020).
[5] Id.
[6] Mark A. Hall & Carl E. Schneider, Patients as Consumers: Courts, Contracts, and the New Medical Marketplace, 106 Mich. L. Rev. 643, 648 (2008).

insurer does not cover, don't benefit from these negotiations. Instead, providers charge wildly inflated "book prices" – the listed prices for services that virtually no one pays.[7] Patients who fail to pay these prices, however, can be sued for breach of contract. What remedy?

Contract law is, at bottom, organized around enforcing agreements.[8] So where parties agree on a price for services, courts will enforce that price as expectation damages.[9] Where they agree to exchange services for payment but fail to specify a price, a court will supply an alternative that approximates what they would have agreed on, a reasonable price.[10] And, as common law courts have increasingly recognized, the prices "charged" by health care providers are not reasonable.[11] Leaving the task of determining a reasonable price to the jury, upon consideration of all relevant evidence, follows from the basic structure of private law and the concepts it deploys.

Of course, this hardly *solves* the many difficulties of health care finance. But courts can legitimately do this themselves (regardless of whether, for institutional, political economy reasons, they are likely to do so). Beyond, regulating health care costs no doubt requires legislative and regulatory intervention, of which there has been a great deal.[12] At the margins, however, private law may play a role.

15.2 CONCEPTUAL REASONING AND COMMON LAW

Conceptual reasoning is famously, or infamously, part and parcel of the "common law method."[13] Judges and juries routinely consider whether novel facts fall within the boundaries of traditional concepts – whether a particular relationship counts as "ownership," whether a certain party's statements are an "offer," etc. They purport to do so by reasoning about the internal structure of the relevant concepts, rather than pursuing the best outcome of the case from an economic or social perspective. To the Legal Realists and conceptual nominalists in Law and Economics and Critical Legal Studies that followed them, this kind of "formalist" reasoning is a façade – a distraction from the policy analysis courts ought to apply in resolving cases, and are anyway.[14]

[7] Casey W. Baker et al., Don't Cash That Check! Identifying Risks to Medical Billing and Collection Practices under the Doctrine of Accord and Satisfaction, 16 Rutgers Bus. L. Rev. 308, 309 (2021).

[8] Charles Fried, Contract as Promise: A Theory of Contractual Obligation 5–6 (2d ed. 2015).

[9] Restatement (Second) Contracts § 347.

[10] Id. § 204.

[11] Infra Part II.

[12] Consolidated Appropriations Act, H.R. Res. 133, 116th Cong. (2020) (enacted); 45 C.F.R. § 180.20 (2023); see also Chapter 14 in this volume.

[13] Shyamkrishna Balganesh & Gideon Parchomovsky, Structure and Value in the Common Law, 163 U. Pa. L. Rev. 1241, 1242 (2015).

[14] Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935); Duncan Kennedy, Form and Substance in Private Law Adjudication, 88 Harv. L. Rev. 1685 (1976).

Recently, this view has come under sustained attack by theorists of the so-called New Private Law school – a disparate group united by a commitment to taking seriously the language of the law from an internal point of view.[15] These theorists, drawing on different philosophies of language and concepts than legal nominalists, argue that traditional private law conceptual reasoning is possible, often sufficiently determinate, and in principle not coextensive with outcome-oriented policy reasoning.[16] As a descriptive account of private law, if internal reasoning is possible, and judges *act* as though it is largely what they do, then perhaps the burden is on those insisting on the external considerations of economics and social power to prove that private law doctrine is inexplicable without them.[17]

Whatever the outcome of this philosophical debate, if an internal, conceptual account of private law is indeed possible, it might have a number of normative advantages. First, the species of conceptual analysis characteristic of private law reasoning might be epistemically preferable for judges.[18] An individual judge can reason on their own about whether a particular arrangement falls within the concept "contract" but is unlikely to have access to the empirical generalizations required to pursue the best all-things-considered social outcome. Similarly, conclusions about concepts can carry over to cognate domains of law – concluding something is a "corporation," for instance, tells us about both its contractual capacities and tort responsibilities, saving judges from conducting bespoke policy analysis across contexts.[19]

Moreover, taking the language of the private law seriously helps contribute to its coherence. On a nominalist view, since a core private law concept like reasonableness is just a conclusory term for certain distributional consequences, there is no a priori reason for it to have the same content across legal domains, or even cases. In contrast, internal, conceptual theories take the private law as a coherent system – if the same word is being used in various places in the law, the burden is on the skeptic to show that they are not in fact the same concept, as surely the public would be inclined to interpret them.[20]

Finally, a conceptual theory of private law can help make sense of the legitimacy of courts as expositors of private law in a democratic system. Normative questions ought generally to be resolved by democratically responsible representatives.[21] As I have argued at greater length elsewhere, judges are not democratically

[15] Gold et al., supra note 4.
[16] Ernest J. Weinrib, The Idea of Private Law (1995).
[17] Andrew S. Gold, The Right to Redress 18 (2020).
[18] Felipe Jiménez, A Formalist Theory of Contract Law Adjudication, 1121 Utah L. Rev. 1157–65 (2020).
[19] Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 Colum. L. Rev. 16, 25–26 (2000).
[20] Ernest J. Weinrib, Corrective Justice 323 (2012).
[21] Fabienne Peter, Democratic Legitimacy and Proceduralist Social Epistemology, 6 Pol. Phil. & Econ. 329 (2007).

responsible, and if the private law is just policy, it isn't clear why we ought to follow judicial pronouncements.[22] But understanding much of private law as the entailments of certain basic concepts or commitments mitigates this problem.[23] We would need to be convinced only that – at least tacitly, or by acquiescence – the people have endorsed that there ought to be a law enforcing agreements and that we've delegated to judges the predominately descriptive work of hashing out what that means.

Importantly, even the strongest defenders of the role of concepts in common law recognize that our private law is not *just* made up of delegated concepts and their entailments. Many rules *are* obviously the result of policy, often tied to a particular time and place – say, the Rule Against Perpetuities.[24] These policy rules are (at least phenomenologically, for many people) qualitatively distinct, often not difficult to distinguish from, and of a less compelling provenance than those derived directly from the basic concepts of the private law.[25]

Finally, although much of the impetus of the Realist critique of conceptualism was motivated by its perceived inability to address modern policy problems, the method has in fact proven quite flexible and adaptable.[26] Concepts are not delimited by their past application – courts can legitimately apply the basic structure of contract law to entirely unanticipated circumstances.[27] And because the policy rules of the common law lack both the systematic role and the democratic legitimacy of its more basic principles, courts act legitimately in preferring the latter to the former where they conflict.[28]

Of course, for all its flexibility, common law conceptual reasoning could hardly resolve all contemporary social or economic challenges on its own. Broader, policy-motivated changes to the private law's basic structure must come from legislatures rather than courts.[29] But common law reasoning can do something, and health care finance offers a case study in what.

15.3 HEALTH CARE PRICING

American health care finance is – perhaps an understatement – odd. Most Americans, some 90 percent, finance their health care in whole or in part with

[22] James Toomey, Property's Boundaries, 109 Va. L. Rev. 131, 145–54 (2023).
[23] Id.
[24] Adolf Reinach, The A Priori Foundations of the Civil Law 131 (John F. Crosby ed. & trans., 2012).
[25] Id. at 131.
[26] Balganesh & Parchomovsky, supra note 13, at 1243; Leslie Y. Garfield Tenzer, Social Media and the Common Law, 88 Brook. L. Rev. 227, 263 (2022).
[27] Andrew S. Gold & Henry E. Smith, Sizing Up Private Law, 70 U. Toronto L. J. 399, 493 (2020).
[28] Balganesh & Parchomovsky, supra note 13, at 1243.
[29] Toomey, supra note 22, at 136.

health insurance.[30] Insurers are, therefore, the primary payors of health care services. Representing many insureds, insurers have substantial bargaining power, and they use it – negotiating volume pricing with health care providers. Thus, most health care is paid for by insurers to providers, on behalf of insureds, based on prices negotiated in the aggregate by the insurer and provider.[31]

But these prices actually paid for most care, nominally volume "discounts" (some portion of which presumably is an actual volume discount), don't appear in the prices that providers ostensibly *charge* for services. That is, although it might be that no insurer is paying more than US$X for a colonoscopy, US$X may be, at least, nominally, a volume "discount" from the provider's "charged" price of US$2X. Or US$5X, why not. If the price to be paid for the vast majority of care has already been negotiated, there's no reason for providers not to "charge" whatever they want.[32] "It is a little game we play. [The providers] put it on the bill, [the insurers] tear up the bill."[33]

The problem is that not *all* care is paid for by insurers. Some 8 percent of Americans do not have health insurance.[34] And, even for those with insurance, insurers rarely agree to pay for *all* of an insured's health care expenses. Most prominently, insurers may dramatically limit the amount they will pay for so-called "out-of-network" care – care received by providers with whom the insurer does not have a preexisting relationship.[35]

This care (like all care) is *billed* at the listed prices. But patients receiving these bills cannot take advantage of the negotiated prices paid by insurers – either they don't have one, or their insurer has not negotiated with this provider. In this example, then, we have an individual patient with a bill for US$2X or US$5X for a colonoscopy – without recourse to any discount – even though overwhelmingly colonoscopies in the United States go only for US$X. Of course, because many people without health insurance are judgment-proof to the tune of US$5X, US$5X

[30] Katherine Keisler-Starkey & Lisa N. Bunch, Health Insurance Coverage in the United States: 2021, U.S. Census Bur. (Sept. 13, 2022), https://www.census.gov/library/publications/2022/demo/p60-278.html.

[31] George A. Nation III, Contracting for Healthcare: Price Terms in Hospital Admission Agreements, 124 Dick. L. Rev. 91, 94 (2019).

[32] George A. Nation III, The Valuation of Medical Expense Damages in Tort: Debunking the Myth That Chargemaster-Based "Billed Charges" Are Relevant to Determining the Reasonable Value of Medical Care, 95 Tul. L. Rev. 937, 942 (2021).

[33] Casablanca (Warner Bros. 1942).

[34] Keisler-Starkey & Bunch, supra note 30.

[35] Matthew B. Lawrence, The Social Consequences Problem in Health Insurance and How to Solve It, 13 Harv. L. & Pol'y Rev. 593, 599 (2019) (other patients that might actually be billed the full list price include international patients, those with "high-deductible" plans, and some tort victims); George A. Nation III, Determining the Fair and Reasonable Value of Medical Services: The Affordable Care Act, Government Insurers, Private Insurers, and Uninsured Patients, 65 Baylor L. Rev. 425, 430 (2013).

rarely ends up getting paid to the provider in these cases either.[36] But such cases nevertheless impose a tremendous amount of stress and hardship on individuals.[37]

This result is perverse, in the sense that it could not possibly be the product of coherent conscious design. Whether as a negotiating position or as an effort to recoup perceived losses on coercive contracts with insurers (particularly Medicare and Medicaid), providers are incentivized to "charge" arbitrarily high prices for their services, with no relationship to the content of the service and almost never paid. Only the un- or under-insured are ever even purportedly on the hook for these prices.

15.4 HEALTH CARE PRICING AND COMMON LAW COURTS

When health care providers proceed to collections for payment of charged prices against a patient, they sue on a contract – a promise by the provider to care for the patient; a promise by the patient to pay. When a contract is breached, contract law generally requires the promisor to put the promisee in the position they would have been in if the promisor had performed – "expectation damages."[38] Where parties have made explicit promises to each other, those promises constitute expectation damages in the event of breach. Following this reasoning, many courts default to enforcing health care contracts as any other contract – holding patients to pay the price charged.[39]

On the other hand, contract law has long held that where parties do not agree on a price but intend to enter into a contract, the court will presume a reasonable measure of expectation damages.[40] And as George Nation has argued, contracts for care between patients and providers are not characterized by meaningful agreement on price.[41] Prices in health care contracts are not prominently disclosed to patients – the form contracts that patients sign consenting to care typically just agree to pay the provider's listed prices, whatever they may be.[42] Even compared to other form contracts, health care contracts much more clearly lack a real promise on the patients' part to pay a particular price.[43]

[36] Temple Univ. Hosp., Inc. v. Healthcare Management Alternatives, Inc., 832 A.2d 501 (Pa. Sup. Ct. 2003).

[37] George A. Nation III, Hospital Chargemaster Insanity: Healing the Healers, 43 Pepp. L. Rev. 745, 761–66 (2016).

[38] Restatement (Second) Contracts § 347.

[39] Allen v. Clarian Health Partners, 980 N.E.2d 306 (Ind. 2012); Holland v. Trinity Health Care, 791 N.W. 2d 724 (Mich. App. 2010); Shelton v. Duke Univ. Health Sys., Inc., 633 S.E. 2d 113, 114 (N.C. App. 2006).

[40] Restatement (Second) Contracts § 204.

[41] George A. Nation III, Healthcare and the Balance-Billing Problem: The Solution Is the Common Law of Contracts and Strengthening the Free Market for Healthcare, 61 Vill. L. Rev. 153 (2016).

[42] Nation, supra note 35, at 434–35.

[43] Id.

We might, then, expect courts to measure expectation damages in health care cases by seeking a reasonable price, rather than simply the amount charged by the provider. But if the prices charged by health care providers are not presumptively reasonable, how might courts go about determining them?

A growing collection of decisions in tort law where courts have similarly been called on to determine the reasonable cost of health care services offers one method. Tort law generally compensates plaintiffs for negligently caused harms, including medical costs.[44] Just as in contract cases where the parties did not agree on a concrete price, plaintiffs in tort cases are entitled to recover the reasonable cost of their care as the best measure of their actual harm.[45]

But in a world in which most care is paid for by insurers, calculating the reasonable cost of health care is complicated by the so-called collateral source rule. The collateral source rule has a substantive and an evidentiary component. The substantive component holds that plaintiffs are entitled to recover the cost of the harm the defendant's conduct caused, even if they have already been paid for it by a third party; a plaintiff can recover their medical costs even if they have already been paid by their insurer.[46] The evidentiary component of the collateral source rule bars evidence of any payments made on the plaintiff's behalf by third parties, including insurers.[47]

Strictly following the evidentiary component of the collateral source rule, some courts hold that a tort plaintiff is entitled to recover the billed price of their care, refusing to admit evidence, suggesting that the price was or could have been settled by a lower amount by the insurer.[48] But there is an alternative. A growing number of courts in this context charge juries to award "the reasonable value of medical services received by a particular plaintiff in a particular case" upon "consideration of all relevant evidence, notably including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer."[49] This approach appears to have been pioneered by the Supreme Court of South Carolina in a brief opinion in 2003,[50] and outlined more thoroughly by the Supreme Court of Ohio in 2006.[51] Since then, it has been endorsed by the highest courts of a number of states, and the Eleventh Circuit in maritime law.[52]

[44] Restatement (Second) Torts § 924.
[45] Restatement (Second) Torts §§ 911 cmt. h, 924 cmt. f.
[46] Restatement (Second) Torts § 920A(2).
[47] Id.
[48] Bonnell v. Carnival Corp., 2015 WL 12712609, at *3 (S.D. Fla. Jan. 20, 2015); Deperrodil v. Bozovic Marine, Inc., 842 F.3d 352, 360 (5th Cir. 2016).
[49] Higgs v. Costa Crociere S.P.A. Co., 969 F.3d 1295, 1312 (11th Cir. 2020).
[50] Haselden v. Davis, 579 S.E. 2d 293, 294–95 (2003).
[51] Robinson v. Bates, 857 N.E.2d 1195, 1200 (2006).
[52] Id.; Martinez v. Milburn Enters., Inc., 233 P.3d 205, 222–23 (2010); Stanley v. Walker, 906 N.E. 2d 852, 857 (Ind. 2009); see also Law v. Griffith, 930 N.E. 2d 126, 135–36 (Mass. 2010) (adopting a similar approach); Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1152 (2011) (Klein, J., dissenting) (same).

This procedural mechanism for arriving at the reasonable value of medical care from tort law might be reasonable for contract law.[53] In breach of contract actions, courts could point to this collection of tort cases construing reasonableness and hold that expectation damages are not necessarily the amount the provider charged – they are the reasonable value of the services (that, contract already acknowledges), determined by the jury upon consideration of all the evidence (which it currently does not).

15.5 REASONABLENESS AND PRIVATE LAW THEORY

This move would be consistent with and, indeed, illustrative of, the theory of private law as common law sketched above. Indeed, insisting on reasonable rather than pre-written damages demonstrates the possibility and value of taking seriously the internal logic of private law. First, at a basic level, this approach to calculating the reasonableness of medical expenses illustrates the possibility and value of conceptual reasoning. Next, for this reason, it is consistent with separation of powers. And finally, reasoning in the same way about reasonableness in contract and in tort demonstrates the systematic value of legal concepts.

15.5.1 *The Concept of Reasonableness*

Contract law is, at a basic level, committed to facilitating individuals in ordering their lives according to their aspirations.[54] It therefore enforces the agreements they actually make with one another. And where an individual has not in fact articulated their preferences, the best the law can do is come close.[55] That is where the concept of reasonableness comes in – estimating terms the parties might have agreed to, had they really discussed it.[56] This is the logic of the rule that where parties agreed to a contract but omitted a price term, the law will supply a reasonable one – straightforwardly derived from the basic principles and concepts of contract.

Of course, courts generally presume that the written terms of a contract represent the true agreement of the parties, and enforce them accordingly, prominently under the "parol evidence" and "plain meaning" rules.[57] From this perspective, we might think (and courts have) that health care contracts *do* include price terms, at least

[53] Waldron, supra note 19, at 25–26.
[54] Fried, supra note 8, at 5–6.
[55] Restatement (Second) Contracts § 347.
[56] John D. Wladis, Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Common Law, 75 Geo. L. J. 1575, 1607 n. 153 (1987); J. Gregory Sikak & Daniel F. Spulber, Givings, Takings, and Fallacy of Forward-Looking Costs, 72 N.Y.U. L. Rev. 1068, 1150–51 (1997).
[57] Restatement (Second) Contracts 9 3 Intro. Note. (1981).

incorporated by reference.[58] They are writings; they purport to commit the patient to pay the cross-referenced charged prices of the services to which they consent.

But this rule – taking a writing as the best evidence of the parties' actual agreement – is grounded in policy.[59] Contract law has no *basic* commitment to enforcing writings *qua* writings.[60] It has a *basic* commitment to enforcing agreements, written or unwritten.[61] There are, of course, good policy reasons to take writings in general as the best evidence of the actual agreement.[62] But enforcing writings for their own sake is hardly the point.

Thus, if we take seriously the idea that the common law is built on a distinction between its basic concepts and commitments and a great deal of policy-driven prophylaxis, the health care billing cases offer a case study in their clash – we have a writing containing a purported price term presumably higher than any reasonable parties actually bargaining would agree upon, and no actual agreement on that term. This entails a systematic clash between the basic commitment of contract law to enforce actual or estimated agreements between private parties, on the one hand, and the prophylactic policy rule enforcing writings where they exist on the other. Courts ought not let policy presumptions in favor of writing get in the way of finding a reasonable cost where in fact the parties have not agreed on one, because only the latter is consistent with the basic functions and aspirations of contract law.

Moreover, the concept of reasonableness – everywhere it appears in private law – is not an algorithmic rule of calculation. It is a standard encompassing a range of fair and conceivable outcomes consistent with some mélange of basic morality, community norms, and intuitions.[63] Whether something falls within the concept of reasonableness is generally a question of fact, paradigmatically the domain of the jury.[64] Having concluded that contract damages in health care cases ought to be governed by reasonable prices, then, points toward their being a jury question – to be adjudicated within the jury's prerogative drawing community standards of what is reasonable. This is consistent with how reasonableness is understood throughout private law, rather than, say, courts' adopting an arbitrary mechanical rule that damages reflect some fixed percentage of prices charged or paid, or a penalty default rule designed to incentivize better drafting.[65]

[58] Restatement (Second) Torts § 920A(2).
[59] Lawrence M. Solan, Contract as Agreement, 83 Notre Dame L. Rev. 353 (2007).
[60] Restatement (Second) Contracts § 1.
[61] Crescente Molina, The Conceptual Foundations of Contract Formation in Reinach and the Foundations of Private Law (Marietta Auer et al. eds., forthcoming).
[62] Restatement (Second) Contracts 9 3 Intro. Note. (1981).
[63] James A. Henderson, Learned Hand's Paradox: An Essay on Custom in Negligence Law, 105 Calif. L. Rev. 165 (2017).
[64] G. Alexander Nunn, Law, Fact, and Procedural Justice, 70 Emory L. J. 1273, 1284–85 (2021).
[65] Wendy Netter Epstein, Price Transparency and Incomplete Contracts in Health Care, 67 Emory L. J. 1 (2017).

This analysis is perhaps even clearer in the tort context. Whatever the logic of the substantive component of the collateral source rule, its *evidentiary* component is policy-grounded prophylaxis – based on the generalization that evidence of third-party payments is more likely to cause greater harm in unreasonably low damages awards than its usefulness in determining reasonableness.[66] Whether or not this calculus and the empirical premises on which it is based are true generally, it is flatly and systematically false in the health care damages context.

The basic purpose of tort law is to redress wrongs.[67] The concept of reasonableness in tort damages plays a similar role as in the contract context – approximating a rough measure of actual damages for injuries that are not algorithmically measurable.[68] And just as there, a theory of private law distinguishing between its basic conceptual commitments and its policy prophylaxis explains why courts in these tort cases legitimately do not permit a strict reading of the evidentiary role of the collateral source rule to systematically frustrate ascertaining reasonable damages.

15.5.2 *Juries, Reasonableness, and Separation of Powers*

Moreover, this kind of conceptual reasoning is consistent with separation of powers. There are, of course, countless policy proposals for limiting the social harm of outrageous medical billing. George Nation, for example, has argued that the cost of medical services should be measured by the "average amount the hospital would be paid by private insurers" plus "between 10% to 15%."[69] Others argue that providers ought to accept the same payment for all patients,[70] or, perhaps, as Wendy Netter Epstein argues, courts should impose penalty default of US$0 in these contracts to incentivize providers to engage in actual bargaining.[71] Of course, maybe health care ought entirely to be paid for by the government.[72] But whether or not any of these are good ideas, they have no basis in the concepts of private law. Contract law's commitment to enforce freely made agreements could not possibly justify capping prices at X percent of some contractually exogenous price. No principle of tort law socializes medicine.

[66] Cutsinger v. Redfern, 12 So. 3d 945, 952 (La. 2008); Caylor v. Atchison, Topeka & Santa Fe Ry., 368 P.2d 281, 284 (Kan. 1962); Ellsworth v. Schelbrok, 611 N.W. 2d 764, 767 (Wis. 2000); Restatement (Second) Torts § 920A cmt. a, cmt. b.

[67] Steven Schaus, A Simple Model of Torts and Moral Wrongs, 97 Notre Dame L. Rev. 1029, 1030 (2022); John C. P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917 (2010).

[68] Nathaniel Donahue & John Fabian Witt, Tort as Private Administration, 105 Cornell L. Rev. 1093, 1137–38 (2020).

[69] Nation, supra note 41, at 189.

[70] Uwe E. Reinhardt, The Pricing of U.S. Hospital Services: Chaos behind a Veil of Secrecy, 25 Health Affs. 57, 58 (2006).

[71] Epstein, supra note 65.

[72] Elenore Wade, Health Injustice in the Laboratories of Democracy, 29 Geo. J. Poverty L & Pol'y 177, 177 (2022).

In contrast, holding that the basic commitments of private law supersede judge-made policy prophylaxis of already-dubious democratic provenance is an entirely legitimate judicial prerogative. And the same goes for recognizing that one of those basic concepts with the same name is in fact getting at the same idea in two distinct areas of private law.

Common law reasoning is a legitimate exercise of judicial prerogative because we have impliedly delegated to the judiciary the authority to apply the basic commitments of private law – we've decided that we want judges to enforce promises, and leave it to them to tell us what that means in particular cases.[73] In contrast, policy rules like the evidentiary role of the collateral source rule are best considered by democratically accountable legislatures.[74] If we reluctantly accept the existence and maybe the necessity of judicial prophylaxis based on policy experience, we can nevertheless insist that those rules be subsidiary to concepts more clearly given to judges.

15.5.3 *Conceptual Reasoning and Common Law Systematicity*

Finally, this move demonstrates the benefits of the systematicity of concepts in a broadly coherent common law.[75] The concept of reasonableness in contract and tort contexts is at least very similar – in both cases, it refers to a range of acceptable rough approximations of something that private law requires the court to measure but which it cannot do easily. If this is right, and the courts giving the question of tort damages to juries are right that theirs is the way to measure the reasonableness of health care prices, it makes sense for the courts to apply the same method of reasoning about the same basic concept in contract cases – admitting all relevant evidence.

After all, it looks like the concept *is* the same in both cases, and what is reasonable in tort is at least presumptively reasonable in contract.

In contrast, if we were to adopt the Realist view that all this just obscures policy reasoning with conceptual words, contract law's drawing on tort law holdings would be epistemically much more demanding – indeed, there is no a priori reason to assume that the policy considerations in both contexts are the same, and the court would have to prove to our satisfaction that measuring contract damages in this way would be as good idea as a policy matter as it is in tort.[76] Maybe it could, but any analogy between the contexts would be an empirically contingent coincidence.

Instead, if the concept of reasonableness is, at a basic level, the same in both places, courts can import conclusions about that concept across contexts without

[73] Toomey, supra note 22.
[74] Id.
[75] Waldron, supra note 19, at 25–26; Gold & Smith, supra note 27, at 492.
[76] Jiménez, supra note 18, at 1155–56.

relitigating policy considerations from the ground up.[77] Of course, there may be circumstances in which the concept of reasonableness might need to be understood differently in different situations, but recognizing the identity of the concept lowers the information costs of reasoning about those kinds of exceptions.[78]

15.6 CONCLUSION

The judicial response to the social challenges of contemporary health care pricing illustrates the mechanisms of taking seriously on its face the conceptual internal logic of private law – both its plausibility and its benefits. Nothing here, again, is offered as a comprehensive solution to the idiosyncrasies of American health care finance. Indeed, for more broader solutions, this understanding of common law tells us to look to legislatures and regulators – as we have.[79]

But the case study also illustrates that a conceptual theory of the common law – often caricatured as rigid and insensitive to complex contemporary problems – is not in fact *powerless* in responding to modern problems, captive to its own precedents. Where the policy rules adopted by those precedents contradict the basic concepts and principles of the private law – especially where courts can draw on similar reasoning about those concepts in related areas – they *can* respond to a variety of social developments and problems, giving us, at least, a private law that is rational, coherent, and democratically explicable.

[77] Waldron, supra note 19, at 25–26.
[78] Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 100 Yale L. J. 1 (2000).
[79] See supra note 12.