

# Florida State University Law Review

---

Volume 39 | Issue 1

Article 6

---

2011

## Corrective Justice for Civil Recourse Theorists

Scott Hershovitz  
1@1.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

---

### Recommended Citation

Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 Fla. St. U. L. Rev. (2011) .  
<http://ir.law.fsu.edu/lr/vol39/iss1/6>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

# FLORIDA STATE UNIVERSITY LAW REVIEW



CORRECTIVE JUSTICE FOR CIVIL RECOURSE THEORISTS

*Scott Hershovitz*

VOLUME 39

FALL 2011

NUMBER 1

---

Recommended citation: Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011).

# CORRECTIVE JUSTICE FOR CIVIL RECOURSE THEORISTS

SCOTT HERSHOVITZ\*

## I.

The central claim of civil recourse theory is undeniably true: tort *is* a system of civil recourse. To say that tort is *civil* is to say that it is peaceful rather than violent and that it is part of private law not public law. To say that tort provides *recourse* is to say that it allows plaintiffs to seek remedies from defendants. Whatever else one might think about tort, it is a peaceful means for private plaintiffs to seek remedies from defendants. Any theory of tort must acknowledge this fact, but no theory need treat it as important, and most do not.

John Goldberg and Ben Zipursky are outliers. They think the fact that tort is a system of civil recourse is very important. Indeed, they argue that it is the key to understanding both why we have tort law and why tort law has the rules that it does. They have developed a theory of the institution, grounded in a claim of political morality. According to Goldberg and Zipursky, victims of wrongdoing have a right to seek redress from those who have wronged them. In a civilized society—one which restricts private violence—that right is held against the state, which must provide a civil avenue of redress for legal wrongs. Tort law is structured so as to implement this requirement.<sup>1</sup> If a plaintiff shows that the defendant has legally wronged her, a court judges the defendant liable, most commonly (but not only) for money damages.

Goldberg and Zipursky's picture of tort has a familiar ring to it, in part because we have thus far said little to distinguish it from the corrective justice account that many philosophers champion.<sup>2</sup> Accord-

---

\* Assistant Professor, University of Michigan Law School. Thanks to Jules Coleman, Daniel Halberstam, Don Herzog, Jill Horwitz, John Goldberg, Richard Primus, Bill Miller, Peggy Radin, Don Regan, Arthur Ripstein, Alex Sarch, Gil Seinfeld, David Uhlmann, and Ben Zipursky for helpful comments and conversations. I also benefitted from discussion with participants at the Symposium on Civil Recourse Theory at The Florida State University College of Law.

1. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1643 (2002) ("The reason the court system makes available rights of action in tort cases is that the system is built on the idea that those who have been wronged are entitled to some avenue of recourse against the wrongdoer. But, in a civil society, private violence is not permitted, even where there has been a legal wrong. The state therefore ordinarily must make some avenue of recourse available to the victim. It does this through the courts, via the tort system.").

2. In contrast, we have said enough to distinguish it from the economic account of tort law, which takes costs to be the organizing concept of the institution, not harms or wrongs. See Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147 (2006).

ing to corrective justice theorists, tort law enforces duties of repair that arise in response to wrongdoing. It is fair to say that corrective justice theorists have not emphasized the fact that tort is a system of civil recourse.<sup>3</sup> But that thought is easily accommodated by a corrective justice account: Tort is a system of civil recourse *in respect of claims of corrective justice*.

Or so one might think, but Goldberg and Zipursky do not. They present civil recourse theory as a competitor to the corrective justice account, not as a complement to it. The indictment has three counts. The first says that corrective justice cannot explain the diversity of remedies available in a tort suit.<sup>4</sup> Corrective justice offers a neat explanation of compensatory damages, which may be fairly said to repair the loss a plaintiff suffered. But tort awards other sorts of damages—nominal and punitive—which may not be fairly said to fix anything, at least not if we take the labels seriously. On top of that, tort sometimes grants injunctive relief that is prospective rather than corrective.

The second charge in the indictment is that corrective justice fails to account for the proliferation of standing requirements in tort law.<sup>5</sup> As *Palsgraf* teaches, a plaintiff must prove more than that the defendant committed a wrong that caused her a loss.<sup>6</sup> She must show that the defendant wronged *her*. Though some would dispose of this requirement in negligence, it is deeply entrenched throughout tort law.<sup>7</sup> For example, a defamation plaintiff must show that the statement she complains about was of and concerning *her*, not just that it was defamatory and caused her harm.<sup>8</sup> Likewise, a fraud plaintiff must show that *she* was duped by the defendant's misrepresentation; it is not sufficient to show that she was harmed when somebody else was fooled.<sup>9</sup> If tort aimed at corrective justice, the civil recourse indictment charges, it would hold defendants liable for all the losses caused by their wrongdoing, or at least those that were foreseeable; it would not limit liability through standing requirements.

The final count in the indictment alleges that corrective justice misconstrues the normative structure of tort.<sup>10</sup> On the corrective jus-

---

3. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 100-03 (2010).

4. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 710-13 (2003).

5. *Id.* at 714-18.

6. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

7. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 15-40 (1998).

8. *Id.* at 17-18.

9. *Id.* at 18-19.

10. Zipursky, *supra* note 4, at 718-21.

tice picture, tort enforces a duty of repair that arises out of the defendant's wrongdoing. But tort does not hold that the defendant is under a duty to compensate the plaintiff until *after* judgment has been rendered against her. Elsewhere, the law marks the fact that a duty to pay damages exists *before* a suit to enforce it. Defendants in contract actions, for example, may be liable for prejudgment interest on the ground that payment should have been made at the time specified in the contract. Not so defendants in tort suits. Tortious wrongdoing renders one liable to have a duty to pay damages imposed through a lawsuit, but the wrongdoing does not generate that duty directly, at least not so far as the law is concerned.

The success of the civil recourse indictment depends, in part, on how one renders the principle of corrective justice. For example, if corrective justice requires that society annul losses wrongfully caused,<sup>11</sup> then all three charges may have some bite. If instead corrective justice requires that wrongdoers repair losses suffered by those whose rights they have invaded,<sup>12</sup> then the first and third charges might be troublesome, but the second is not. And, if corrective justice is not centrally concerned with losses, but instead aims to restore a normative equilibrium disturbed by wrongdoing,<sup>13</sup> then the first charge loses force insofar as noncompensatory remedies may help restore that equilibrium.

Though I think the civil recourse critique of the leading conceptions of corrective justice is in some respects misguided, I do not want to join up to the thrust and parry here. My aim in this Article is to show that there is a better conception of corrective justice than the ones that Goldberg and Zipursky target, that this conception of corrective justice is untouched by the civil recourse critique, and that civil recourse is best understood as a corrective justice account of tort. In other words, I aim to explain corrective justice for civil recourse theorists.

---

11. This was once Jules Coleman's view, see Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L. REV.* 349, 365 (1992), and it may be his view once again, see Jules L. Coleman, *Epilogue to Risks and Wrongs: Second Edition* 30 (Yale Law School, Public Law Working Paper No. 218), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1679554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679554).

12. This is the view that Coleman defends in JULES L. COLEMAN, *RISKS AND WRONGS* 198 (1992).

13. Versions of this view are defended by, among others, Ernest Weinrib and Arthur Ripstein. See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 270 (1999); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 67 (1995).

## II.

As I just indicated, there are several competing formulations of the principle of corrective justice. However, for our purposes, what the leading contenders share is more important than what separates them. John Gardner attempts to capture the commonality when he says that “[n]orms of corrective justice regulate the allocation of goods back from one person to another.”<sup>14</sup> The idea that the domain of corrective justice is *allocating back* (as opposed to allocating full stop, which Gardner says is the domain of distributive justice) comes from Aristotle, who took corrective justice to be a matter of addition and subtraction to reverse wrongful transactions.<sup>15</sup>

There are no doubt cases where doing corrective justice requires allocating back. Take a simple one: Tom steals Jerry’s ball. What does Tom owe Jerry? His ball is an obvious answer. But what if Tom breaks Jerry’s leg? Jerry still has his leg, so it can’t be allocated back. If Tom could unbreak Jerry’s leg, that would seem in order, and we might think of it as an allocating back of sorts. Healing Jerry’s leg restores what he started with. But already we are one step removed from an allocation of a good back from one person to another. Repair is not the same as return.

The trouble mounts. It is far from easy to unbreak a leg. They take time to heal, and there is almost always pain and inconvenience involved. We can’t allocate back the time lost, pain suffered, or inconvenience endured. We can’t even repair them, the way we might a leg. And sometimes we can’t repair a leg, at least not as good as new. For all this, we are apt to think that Tom should compensate Jerry, and I’ve got no quibble with that. But compensation is another step removed from allocating back. It is not return or repair; when Tom compensates Jerry, Tom gives him something he never had before.

If corrective justice were simply a matter of allocating back, it would be a principle of vanishingly small scope, reserved for the rare case in which a transaction can be reversed. But there are a number of strategies available to anyone who wants to preserve a more robust role for an Aristotelian picture. The first step is to talk about Jerry’s “loss,” rather than his broken leg. The abstraction helps one to imagine that a gain of a similar magnitude will erase the loss, as if everything happens on a bank ledger. But broken legs don’t zero out. No sum of money returns someone who has been injured to the posi-

---

14. John Gardner, *What is Tort Law for? Part 1: The Place of Corrective Justice*, 30 L. & PHIL. 1, 14 (2011). Alternatively, he says that “[a] norm of corrective justice is a norm that regulates (by giving a ground for) the reversal of at least some transactions.” *Id.* at 10.

15. See ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 87-89 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000).

tion they would have been in had the tort not been committed, unless their injury is monetary.<sup>16</sup>

After the abstractions come metaphors. According to the most familiar, Tom must pay whatever it takes to make Jerry whole (a cruel thought when Jerry has been dismembered). What does that mean? Economists have an answer: Tom must pay Jerry a sufficient sum of money to make him indifferent between the life he would have had his leg never been broken and the life he has now. Even if Tom cannot put Jerry in the position he was in before, Tom can put him elsewhere on an indifference curve that includes that point. This is not a crazy thought. Sometimes there is a sum that leaves one indifferent to an injury, especially when repair or replacement are genuine options. But only a person whose life has never been touched by tragedy could think *indifference* a sensible aim when we are dealing with devastating injuries or serious violations. What is the sum of money that would make one indifferent to having been raped? Or to the death of one's spouse? Or to the loss of one's sight? Money can do many things—pay for therapy, rehabilitation, home renovation, vacation, distraction, antidepressants, and sedatives. Sometimes, money may even allow the victim of a serious injury to build a life she would not trade for the one she had before. But an unwillingness to go back to the way things were does not signal indifference to the injury one suffered.<sup>17</sup> You can fill your life with new joys, yet still miss those beyond your reach. Even when moving on is better than moving back, a life not led may always be a source of regret. The thought that people who suffer devastating injuries or serious violations can be made whole is a comforting one, but there is no reason to think it true.<sup>18</sup>

---

16. Some think the right sum of money is what the plaintiff would have demanded as a price for submitting to the injury. But this is a nonstarter because tort injuries are suffered involuntarily. We can ask what price a person would charge for permission to break her leg, but we cannot ask what price she would charge to have it broken without her permission, as permission is built into the sale.

17. Is there an equivocation here? Maybe. The answer depends on whether economists use "indifference" as a technical term with a stipulated definition, or whether they intend indifference curves as an interpretation of our ordinary notion of indifference. I treat them as doing the latter because the case for using indifference curves to judge when a victim has been made whole depends on their capturing our ordinary notion of indifference. To see this, imagine that economists called them *B*-curves instead of indifference curves. We would need an argument to explain why *B*-curves are appropriate tools for judging when people have been made whole. It is hard to imagine a plausible argument that does not rest on the claim that *B*-curves tell us when people are indifferent in the ordinary sense.

18. Incommensurability is part of the problem here, but only part. One may consider the quality of their life preinjury and postcompensation commensurable, such that one can say that one's postcompensation life is at least as good or better than one's preinjury life. And yet, one may still regret the injury, for the pleasures that it has left beyond one's

This raises a problem for a whole category of proposals about the content of corrective justice. If corrective justice requires annulling losses, we are out of luck, except when an injury involves property that can be returned or replaced. We can't annul a rape or the death of a loved one, and calling them "losses" doesn't change that. We are also out of luck if corrective justice requires that we repair losses, rather than annul them. What sort of repair can we offer the plaintiff whose injury is terminal cancer? If we face the problem honestly, the answer is none, at least not for his cancer. However, that is not a happy answer, so it is tempting to seek refuge in abstraction and metaphor, where we can make the poor man whole even as doctors cut bits of him away.

This is not a minor quibble. The cases that cause trouble for the Aristotelian picture are far more common than cases where allocation back is possible. But even the simple case we started with—Tom steals Jerry's ball—is not nearly so simple as it seems. What about the time Jerry was without his ball? That cannot be returned or repaired or replaced. And, even if Jerry did not miss his ball, there is the matter of the *stealing* to deal with. If all Tom does is return Jerry's ball, he does just what we would expect him to do had he innocently come to possess it. When Tom acts wrongly, we expect him to do more. At the least, we expect him to apologize, which suggests that even in the simple case, justice calls for something that is not an allocating back, but rather a giving of something new.

Many philosophers would parse this differently. They would say that returning the ball is a matter of corrective justice, but apologizing is not, even though it may be morally obligatory.<sup>19</sup> I do not see the attraction of this view, except to the extent it helps preserve an allocating back picture of corrective justice, which is in any event misguided. There are many modes of putting wrongs right (returning, repairing, replacing, compensating, apologizing), and they are deeply intertwined with one another. In some circumstances, a sin-

---

reach, or for the pains with which it forces one to live. Even if one thinks that everything of value is commensurable, there is no reason to think that agents should be indifferent between different allotments of pleasure and pain so long as they sum to the same. As Don Herzog puts it, an agent indifferent to the composition of the pleasures and pain that contribute to her utility is either "willfully blind or crazy." DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* 125 (1985). On incommensurability and corrective justice, see Margaret Jane Radin, *Compensation and Commensurability*, 43 *DUKE L.J.* 56 (1993).

19. See, e.g., COLEMAN, *supra* note 12, at 329 ("The particular duty [corrective justice] imposes is to repair the loss. There may be other agent-relative reasons for acting that arise as a consequence of wrongfully injuring another, for example, the duty to apologize or to forbear from future harming, but these are not derived from corrective justice."); see also Gardner, *supra* note 14, at 35 n.58.



cere apology obviates the need for compensation; in others, the failure to compensate undermines the credibility of an apology freely given. In light of these sorts of relations, it is natural to suppose that there is an overarching set of moral norms that govern the circumstances in which the various modes of putting wrongs right should be employed, and in what mixture. I am inclined to think that *that* is the domain of corrective justice. The mistake is trying to cram everything into an Aristotelian model on which doing corrective justice requires reversing wrongful transactions.

There is, however, one last strategy to consider before we give up on the Aristotelian picture. According to Ernest Weinrib, it is a mistake to focus on material losses, like Jerry's broken leg. In his view, corrective justice responds to normative gains and losses, which may or may not coincide with their material brethren, but are always present in equal measure when one person wrongs another.<sup>20</sup> This seems like a promising approach because it shifts the subject away from the source of our trouble—our inability to reverse or even repair many material losses.

To evaluate Weinrib's suggestion, we need to get clear about what normative gains and losses are. Weinrib says that they are "discrepancies between what the parties have and what they should have according to the norm governing their interaction."<sup>21</sup> Thus, one can suffer a material loss (i.e., a reduction in one's holdings) without sustaining a normative loss; if I pay money in satisfaction of a debt, then I have less money than I did before but not less money than I ought to have. Likewise, one can obtain a material gain without sustaining a normative gain; this happens every time you get your paycheck. The converse cases hold too. You suffer a normative loss, but not a material loss, if your boss fails to issue your paycheck on time. And, you enjoy a normative gain without a material gain if your creditor fails to collect on a debt you owe.

With this distinction in hand, we can evaluate Weinrib's suggestion that the task of a court is to "undo the injustice of the correlative gain and loss"<sup>22</sup> that attend wrongdoing. The loss side of the equation is not difficult to understand, at least when Tom steals Jerry's ball or negligently breaks his leg. In both cases, Jerry loses something to which he was entitled; he has both a material loss and a normative loss. Many people have thought it troublesome for the Aristotelian

---

20. Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 286 (1994) ("[C]orrective justice is concerned with the correlativity of normative, not material, gain and loss.").

21. *Id.* at 282-83.

22. *Id.* at 282.

picture that only in the first case—where Tom takes Jerry’s ball—does Tom have a material gain. After all, Tom doesn’t acquire anything when he breaks Jerry’s leg. But Weinrib says that corrective justice is concerned with the normative side of the equation, and that Tom has a normative gain in both cases. What is Tom’s normative gain when he breaks Jerry’s leg? Since Tom doesn’t enjoy a material gain, the only way in which he could have a normative gain is if in virtue of having broken Jerry’s leg, he now has more than he ought to have. And that’s just what Weinrib says has happened. Normative gains and losses, he says, are “surpluses and shortfalls not from what the parties had before the unjust act, but from what the parties ought to have in view of the requirements of corrective justice.”<sup>23</sup> The idea is that once Tom breaks Jerry’s leg, he incurs a liability to Jerry, and until he discharges it, he enjoys a normative gain.<sup>24</sup>

This has a certain elegance to it, but it is circular. On Weinrib’s picture, corrective justice calls for undoing normative gains and losses. What are the normative gains? They are the gains that corrective justice requires that we undo. Weinrib is attempting to solve the problem of the missing gain by fiat. Corrective justice itself creates the gain needed to offset the victim’s loss.<sup>25</sup>

Even if we set the circularity aside, however, Weinrib does not redeem the Aristotelian picture. He explains why we should think a wrongdoer enjoys a gain which we can offset against his victim’s loss, but he doesn’t give us any reason to think we can do the offsetting. If corrective justice requires that a wrongdoer compensate his victim, then when he does so, his normative gain will be undone. But the victim’s normative loss will not be. The only way to undo a normative loss is to give a person what she was entitled to have in the first

---

23. *Id.* at 289.

24. *See id.* at 283 (“A party may realize . . . a normative gain but no material gain: if I negligently injure another, I am liable for my wrongdoing, but my resources have not been increased by the wrong . . .”).

25. The loss in the broken leg case doesn’t pose the same problem because there is another norm against which we can judge that Jerry has less than he ought to—the norm that says Tom may not break Jerry’s leg. The same will be true of the gain in other cases. When Tom takes Jerry’s ball, for example, we can say that Tom has more than he ought to by reference to property norms. The circularity arises in cases in which a normative gain or loss can only be identified by reference to a norm of corrective justice, but that is a rather large class of cases. Indeed, Weinrib seems to think that all cases fit in that class, as he holds that the norms that establish primary duties—e.g., that Tom may not break Jerry’s leg—are themselves norms of corrective justice. If so, the circularity runs even deeper. However, as Gardner points out, this aspect of Weinrib’s view is a “nonstarter,” as “[m]ost torts are not injustices at all, let alone corrective injustices. They are violations of norms of honesty, considerateness, trustworthiness, loyalty, humanity, and so on.” Gardner, *supra* note 14, at 23-24 (discussing WEINRIB, *supra* note 13, at 76).

place, and rarely is that money.<sup>26</sup> So how does Weinrib make sense of monetary damages for nonmonetary injuries? He employs a familiar metaphor. “Through the notion of damages,” he says, an “injury takes the form of something repayable: a monetary amount is debited against the defendant’s moral account with the plaintiff, and the payment of this sum discharges the defendant’s liability and wipes the ledger clean.”<sup>27</sup> In the end, even Weinrib must flatten all injuries into losses so that they can be undone by a gain.

The difficulties with the allocating back picture of corrective justice are not news.<sup>28</sup> Aristotle was aware of them.<sup>29</sup> And even first-year law students get that damage awards nearly never put anyone

---

26. One of the challenges in reading Weinrib is that he switches back and forth between an Aristotelian idiom, in which he talks about gains and losses, and a Kantian idiom, in which he talks about rights and duties. When writing in the Aristotelian idiom, Weinrib seems to agree that to undo a normative loss the defendant must give the plaintiff what she was entitled to have in the first place. He says that a defendant “is required to undo the consequences of his or her wrongful act by making good the [plaintiff’s] factual loss.” WEINRIB, *supra* note 13, at 129. But when he writes in the Kantian idiom, he allows that a plaintiff’s right might be restored by an award of damages that is the monetary equivalent of her injury. See Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273 (2011). These are not two different ways of stating the same idea; awarding damages changes the consequences of the defendant’s wrongful act without undoing them. In any event, even Weinrib’s more flexible Kantian approach is bound to fail in any case in which the injury does not have a monetary equivalent.

27. Weinrib, *supra* note 20, at 288.

28. The best statement of many of them is in Radin, *supra* note 18, at 60. Radin addresses the challenges posed by incommensurability, and they are significant. However, it is important to see that incommensurability is only one source of trouble for the Aristotelian picture. Indeed, we would not reach the question whether, say, bodily integrity is commensurable with money if we were capable of turning back time to reverse injuries wrongfully caused. The move to compensation already constitutes recognition that we are not capable of allocating back.

Arthur Ripstein is the rare corrective justice theorist who confronts the difficulty head on. He observes that “money is an imperfect means of making it as though an injury had never happened.” RIPSTEIN, *supra* note 13, at 58. And he acknowledges that money damages cannot make someone who has been physically injured whole. *Id.* at 116-17. But he nevertheless says that “insofar as they enable a plaintiff to adapt to his or her situation, money damages are an appropriate way of transferring the loss so that it becomes the injurer’s problem to decide how to deal with what is properly his or her loss.” *Id.* at 58. Here again, the abstraction obscures more than it illuminates. In most cases, the plaintiff must deal with her injury; it cannot be transferred to the defendant. Though damages may ease the defendant’s burden, the defendant who is ordered to pay them suffers a new loss; he does not acquire the plaintiff’s.

29. Consider this passage: “‘Gain’ is what it is generally called in such cases, even though in certain cases it is not the appropriate term, for instance, for one who struck another—and ‘loss’ for the one who suffered—but when the suffering is measured, it is called a loss for one party and a gain for the other.” Weinrib, *supra* note 20, at 279 (quoting ARISTOTLE, NICOMACHEAN ETHICS V.41132a11 (Ingram Bywater ed., 1894)). Weinrib takes this passage to confirm his view that Aristotle was interested in normative gains and losses. See *id.* at 279, 293. But it is hard to see why Aristotle would opine that “gain” is not an “appropriate term” for cases involving physical violence if he had a Weinrib-like view. I think Aristotle was acknowledging that his picture is artificial as applied to many cases.

in the position they would have been in absent the tort. Thus, discussions of corrective justice are chock full of qualifiers:

Thus tort law places the defendant under the obligation to restore the plaintiff, *so far as possible*, to the position the plaintiff would have been in had the wrong not been committed.<sup>30</sup>

Corrective justice . . . is rendered rational . . . by the residual possibility . . . of restoring things, *at least in some measure*, to where they would have been had one not occasioned their loss.<sup>31</sup>

But these qualifiers are a dodge. They are a tempting dodge, to be sure, because there are cases where we can do things that approximate putting the plaintiff in the position she would have been in absent the tort. Jerry can get his ball back in replevin, and one who has suffered economic losses consequent on a physical injury can have the money restored to her bank account. But in an awful lot of cases, we can't do anything like put the plaintiff in the position she would have been in had the wrong not been committed, so if we are doing that insofar as possible, we are doing it not at all.

What, then, are we doing when we compensate the defamation plaintiff whose reputation cannot be restored? Or the parent who has lost her child? Or the victim of a battery that was offensive but not harmful? Gardner acknowledges that, on the Aristotelian picture, we are not doing corrective justice. He says that damages for pain and suffering, emotional distress, bereavement, and the like "are not reparative in the strictest sense," as they "are paid in respect of certain irreparable results or consequences of a tort."<sup>32</sup> He calls such damages "quasi-reparative" because they look to be reparative though they are not, and thus allow "some of the placatory social meaning of effecting reparation" to "spill[] over."<sup>33</sup> On Gardner's view, the point of such damages is to "assuage frustration, resentment, and other kinds of ill-feeling that afflict plaintiffs."<sup>34</sup> I do not doubt that damages assuage hurt feelings, and that may be a good reason to award them. But I dissent from the view that one has a claim that sounds in justice only if one's injury can be repaired. And I dissent from the thought that compensating plaintiffs for pain and suffering or bereavement is a tack on, separate from the business of corrective justice.

The Aristotelian tradition of thinking about corrective justice reflects a deep desire to overcome what (to tweak a phrase from Rawls)

---

30. WEINRIB, *supra* note 13, at 135 (emphasis added).

31. Gardner, *supra* note 14, at 37 (emphasis added).

32. *Id.* at 47.

33. *Id.*

34. *Id.*

we might call *the circumstances of corrective justice*.<sup>35</sup> We cannot undo what we have done. No matter how hard we wish that we could turn back time when a trigger is pulled or a driver hits a child, we cannot. The moment one person wrongs another, the wrong is part of our history, indelibly, and we must decide how to go on. We can ignore the wrong, and often we do. We can try to ameliorate its effects. We can apologize. We can promise not to do it again. We can punish the wrongdoer. But the one thing we cannot do is return to the way things were.

The Aristotelian picture is seductive because it holds out the promise that we can go back. We can return, and when that doesn't work, we can repair, and when that doesn't work, we can replace, and when that doesn't work, we can make whole by rendering indifferent. It may be that we should do these things when we can. But the fundamental demand of corrective justice cannot be that we allocate back, reverse wrongful transactions, or return a victim to the position she would have been in absent the wrong. All too often we can't do anything like that, and we can never do it completely. Yet, we still must find a way to right wrongs.

### III.

Contemporary tort doctrine embraces the Aristotelian picture of corrective justice. Courts often say that “[t]he basic rule of tort compensation is that the plaintiff should be put in the position that he would have been in absent the defendant’s negligence.”<sup>36</sup> To be sure, the difficulties with the Aristotelian picture are not lost on lawyers. The *Second Restatement of Torts* observes that when a “tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position.”<sup>37</sup> Yet, the Restatement goes on to suggest that courts can achieve a “very rough correspondence”<sup>38</sup> between damage awards and the extent of suffering, reflecting the

---

35. Rawls uses the phrase “the circumstances of justice” to refer to the conditions which make it necessary that we have principles of justice for dividing the benefits and burdens of cooperative social arrangements. JOHN RAWLS, *A THEORY OF JUSTICE* 126-27 (1971). Of course, he has distributive justice in mind. *See id.*

36. *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993). Sometimes they remember to include a qualifier. *See, e.g., Porter v. City of Manchester*, 849 A.2d 103, 118-19 (N.H. 2004) (“[T]he usual rule of compensatory damages in tort cases requires that the person wronged receive a sum of money that will restore the person as nearly as possible to the position he or she would have been in if the wrong had not been committed.”).

37. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a, (1979). For an insightful analysis of the passage this statement is contained in, see Radin, *supra* note 18, at 69-71.

38. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a, (1979).

dominant view that the point of tort damage awards is to make the plaintiff as near to whole as money can.<sup>39</sup>

The idea that the purpose of tort damages is to make the plaintiff whole is a relatively recent development. As Goldberg has detailed, the make-whole metaphor entered tort law in the mid-nineteenth century.<sup>40</sup> It was part of a shift from what Goldberg calls a model of *fair* compensation to a model of *full* compensation. Before the shift, tort damage awards were expected to reflect the character of the defendant's wrong, in addition to the severity of harm inflicted. Thus, fair compensation might have amounted to more or less than full compensation for a plaintiff's loss.<sup>41</sup> Lawyers in this era were apt to say that the point of tort damages was to provide the plaintiff satisfaction,<sup>42</sup> rather than restore her to the position she would have been in absent the tort.

Talk of satisfaction belongs to a different tradition of thinking about corrective justice, one whose animating metaphor is getting even rather than making whole. Getting even has a bad rap these days. Even Goldberg and Zipursky take care to distance themselves from the violent practices the phrase calls to mind.<sup>43</sup> But the metaphor is not inextricably linked to violence. In fact, we regularly employ a notion of evenness today. Here's a story that should sound familiar. Tom borrows money from Jerry. Sometime later Tom helps Jerry, let's say by arranging a job interview. When Tom later tenders repayment, Jerry says, "Don't worry about it, we're even." What does that mean? I take it that it doesn't mean that Jerry has judged Tom's services to be worth just the money owed, such that had the debt been a bit more he would have asked for a few dollars to make up the difference. I don't even think it means that he has judged that Tom's services are worth approximately the debt owed, with the difference

---

39. See John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 n.2 (2006) (collecting supporting citations).

40. *Id.* at 447-62.

41. See *id.* at 437, 458-59.

42. See *id.* at 440-45.

43. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 602 (2005) ("Tort redress is not to be confused with vengeance. Vengeance is an unregulated response by which a victim seeks satisfaction directly and by the means of her choice. For good reasons, Anglo-American law allows almost no room for it. Because it is unmediated, vengeance runs high risks of error, overkill, additional violence, and ongoing feuds, which tend to work against the resolution of disputes and to undermine civil order. Even when the law permits self-help—e.g., recapture of chattels—it limits the privilege by requiring that it be done peaceably. Redress through law, as Locke and Blackstone understood, is a substitute for vengeance."); see also Zipursky, *supra* note 7, at 85 ("Our society thus avoids the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving individuals powerless against invasions of their rights.").

in either direction too small to trifle over. In other words, Jerry has not judged that he has been made whole in respect of the debt. Rather, he has declared the debt satisfied.

It is important to see that this declaration is not made true or false by some independent set of facts, like the market value of helping someone get a job interview relative to the quantum of the debt. It is performative; by saying “we’re even,” Jerry is attempting to make it so.<sup>44</sup> It might not work. Like all performatives, Jerry’s declaration has *felicity conditions* which must be satisfied for the declaration to succeed.<sup>45</sup> If I approach two strangers on the street and say, “I now pronounce you husband and wife,” they are not thereby married. This is in part because I do not have the authority to marry them, and also because the rest of the ritual has not been performed. But if I said those words under the right conditions, the result would be a marriage.

What are the felicity conditions for Jerry’s declaration that he and Tom are even? There are many—e.g., Tom must be a person and not a cat—but given our present concerns, some are more important than others. First, Tom must not reject Jerry’s declaration. Why would Tom do that? Well, if Tom’s debt was large and his assistance slight, he might worry that Jerry is being canny: Tom will be left feeling that he owes Jerry a debt because he knows that neither one of them really thinks that they are even. But the debt will be difficult to pay because it is no longer monetized. Tom might think it better to pay cash while he can. Or, Tom might resist for the opposite reason—because the services rendered were significant and the debt owed slight. In that case, he will be offended by Jerry’s proposal. He will pay, but he won’t help Jerry again.

This way of putting things makes it sound as if Jerry is valuing Tom’s services relative to the quantum of the debt, and of course he is. But it is important to see that Tom and Jerry are not even merely because Tom has done something that Jerry might plausibly regard as of sufficient value to satisfy the debt. They are not even until they jointly decide to regard one another as even. You can see why the performative is important if you vary the story. Suppose that Jerry simply accepts payment from Tom, and then later arranges for Tom and his wife to have dinner at a nice restaurant in thanks for Tom’s help with the interview. We wouldn’t for a moment think that the original debt had been paid when the interview was arranged, such that Jerry’s acceptance of payment was really an acceptance of an

---

44. On performatives, see J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

45. *See id.* at 12-24.

overpayment, giving rise to a new debt that the dinner then paid off. Tom's assistance does not satisfy the debt he owes Jerry unless and until they decide that it does. They do not find themselves even; Jerry declares them even.

Of course, even if accepted, Jerry's declaration is not sufficient to render him even with Tom. The declaration has other felicity conditions, and what we just saw points to the most important: prior to the declaration Tom must have done something which could plausibly count as grounds for it. That is vague, and I will try to flesh it out in moment, but it is not toothless. If Tom did nothing to benefit Jerry, and Jerry said "we're even" as an act of charity, he might succeed in forgiving Tom's debt, but he would not render them even. Tom would still be indebted, just in a different way.

This shows that an act is required,<sup>46</sup> but not just any act will do. There are loose conceptual constraints on what acts can serve as a ground for Jerry's declaration. In addition to ruling out cases where Tom has done nothing, we can rule out cases in which the act in question harmed Jerry. For example, if Tom blocked Jerry from getting a job, his interference could not serve as the ground for declaring his debt paid. Another conceptual constraint is more significant: Tom's action must be proportional to the debt. As I said before, if Tom's debt was significant and his assistance slight, Tom would likely resist Jerry's declaration, but even if he acquiesced, Tom and Jerry would not be even. This is a tricky condition to apply. Though the requirement that Tom's act be proportional to the debt is a conceptual constraint, the determinants of what counts as proportional are mostly social. Societies (and the people within them) diverge widely in what they value and how, but while there is a great deal of latitude on such questions, presumably there are moral limits on what sorts of things people can properly regard as proportional.<sup>47</sup>

There are more wrinkles to uncover here—e.g., there are social constraints that are not connected to proportionality<sup>48</sup>—but we have made enough progress to return to our quest to understand corrective justice. Here's the payoff: the fact that we can declare ourselves

---

46. Or something act-like. There are cases where forbearance will suffice.

47. Does the proportionality condition collapse us back into the Aristotelian picture? No. As we'll see in a moment, a surprisingly wide range of corrective action can count as proportional, including much that does not fit Aristotelian descriptions of what corrective justice requires. And that is a good thing, because as we saw before, we often cannot do what the Aristotelian picture says we must. The proportionality condition limits what the performative can do, but the performative is necessary precisely because we cannot make sense of making whole, rendering indifferent, and the like.

48. To see one, shift the story: Imagine that Tom helps Jerry get a job interview, and Jerry, feeling indebted, offers to cut Tom a check. Tom wouldn't dream of accepting, and he might be offended at the offer. In our society, there are debts that cannot be settled in cash.



even helps us cope with the circumstances of corrective justice. A wrongdoer cannot put his victim in the position she would have been in absent the wrong. But he might be able to do something which will allow them to declare themselves even. The something might be full compensation on an Aristotelian make-whole model. Whether compensation of that sort will be sufficient ground for a declaration that the wrongdoer and victim are even will depend in part on culture and context. If it is not enough, it might be a good start. Often, however, putting the victim in the position she would have been absent the wrong will not be the thing that supports the declaration because nothing like that is possible, or nothing like that is appropriate.

Our judgments about what it takes to get people even are nuanced. Imagine again that Tom breaks Jerry's leg. What would Tom have to do to allow Jerry to declare them even?<sup>49</sup> It is hard to say without knowing something about Tom and Jerry's relationship, and also just what Tom did. If Tom and Jerry are friends, and Tom was merely negligent in breaking Jerry's leg, it is easy to imagine that a sincere apology will suffice. Of course, Tom may feel that he ought to do more than simply say that he's sorry; he might feel like he ought to demonstrate it, by accompanying Jerry to the hospital, or bringing him food, or offering to take on chores around Jerry's house while he recovers. It may even be that Tom would feel obligated to offer to pick up Jerry's medical bills or other out-of-pocket expenses, but it is not hard to imagine Jerry declining that offer. Cash is an awkward medium of exchange in the context of a friendship.

In contrast, if Tom and Jerry are not friends, bringing Jerry food or doing chores around his house would be intrusive, and the offer to pay bills much less fraught. Jerry might accept, though even here it is easy to imagine him rejecting the offer. He might consider, among other things, how sincere Tom's apology is, how much of a hardship it would be for Tom to assume his bills, and what his insurance will cover. The story is different yet again if Tom intentionally injured Jerry, as it is doubtful that absent coercion Tom would agree to do anything that might allow Jerry to declare them even, and it is doubly doubtful that Jerry would be satisfied with an apology or even an offer to pay his expenses.

---

49. Tom and Jerry might get even through means other than an explicit declaration. If Tom apologizes and Jerry accepts, for example, Jerry's acceptance might render them even, subject of course to many felicity conditions. Or the same might be accomplished implicitly, as when Jerry tells Tom, "I really appreciate your help, but you've gone beyond the call of duty." Thus, the question I've posed in the text—what would Tom have to do to allow Jerry to declare them even—is a stand in for a more general question about what Tom must do to lay the conditions for some performative to render them even.

Notice how different this calculus looks from the one associated with the Aristotelian picture. Tom's bringing Jerry food does not reverse the wrongful transaction, allocate a good back from Tom to Jerry, or put Jerry in the position he would have been in absent the wrongdoing. At best, it mitigates one small burden Jerry faces, and it may not even be much help with that. But it's just the kind of thing that would allow Jerry to declare that he and Tom are even, assuming they started out as friends.<sup>50</sup>

Of course, friends rarely face off in tort suits. The more interesting cases for our purposes are those that involve strangers. And among those cases, the most interesting are those in which the parties cannot reach an agreement on what will render them even, or do not want to try. To this point, I have focused on the conditions under which Jerry might declare that he and Tom are even. But Jerry is not stuck if Tom won't play ball. He can try to get even in the classic sense: he can seek revenge.

This is the sort of thing that Goldberg and Zipursky are keen to distance themselves from. But it is important to understand that revenge is a way of coping with the circumstances of corrective justice. Once Tom has taken Jerry's eye, Jerry cannot get it back. Taking Tom's eye will not make Jerry whole, but at many times and places, it would have gotten him even, in his own eyes and in others'. How does revenge work that magic? It is not a performative, as it is not a speech act. But it is something close—a performance—subject to felicity conditions much like those attached to Jerry's declaration.<sup>51</sup> Indeed, an act of revenge implicitly declares that the act renders the parties even. To serve as the ground for that declaration, the act itself must be proportional to the wrong. It is not surprising, therefore, that cultures that embraced revenge as a way of doing corrective justice had elaborate schemes for determining what constituted a proportional response, starting with the most famous equivalence of all—an eye for an eye.

We have trouble thinking that way; it sounds unaccountably brutal. But the violence was not pointless. Consider the following story from medieval Iceland, retold by Bill Miller:

---

50. Incidentally, this points to yet another reason to worry about the Aristotelian picture: its rigidity makes it difficult to see how it can account for the ways that corrective justice intersects with friendship. The Aristotelian picture provides a formula—reverse wrongful transactions—that does not take account of the relationship between the parties. But relationships make a big difference. We expect friends to put wrongs right rather differently than strangers.

51. See AUSTIN, *supra* note 44, at 18-19 (observing that “infelicity is an ill to which *all* acts are heir which have the general character of ritual or ceremonial”).

An Icelander named Skæring gets into a dispute with some Norwegian merchants who have put into port in Iceland. They chop off his hand (merchants in those days were tough guys and were often themselves indistinguishable from Vikings). Skæring runs to his kinsman Gudmund, who is the local big man, and asks for help. Gudmund, with a group of men, rides to the Norwegian ship and demands that they compensate Skæring at a price he, Gudmund, shall name. The Norwegians agree, and Gudmund hits them with a very stiff price, almost as much as they would have been expected to pay had they taken Skæring's life. They balk at paying the price named, despite having agreed beforehand to pay whatever Gudmund adjudged to be appropriate; they argue that the hand of an undistinguished guy like Skæring should not carry such a high value and that Gudmund is simply gouging them, not adhering to certain norms of reasonableness. Gudmund says, OK, forget it. I will myself pay Skæring the exact amount I adjudged you to pay, 'but I shall choose one man from amongst you who seems to me of equivalent standing with Skæring and chop off his hand. You can then compensate that man's hand as miserably as you wish.' The Norwegians pay up.<sup>52</sup>

The Icelanders in the story did not regard taking an eye for an eye as *the* recipe for corrective justice, akin to the Aristotelian proposal that wrongful transactions should be reversed. For them, an eye for an eye was a failsafe. It provided a way of doing justice unilaterally, which was important in a world without tort law. But an eye for an eye was also what economists call a penalty default rule, encouraging wrongdoers to take their victim's claims seriously.

Much more seriously, Miller observes, than we do. We set the price for an eye after it has been taken, and that price never matches up to what the victim would have demanded in return for permission to take it. But, as Miller explains, the law of the talion got people that price:

The talion structures the bargaining situation to simulate the hypothetical bargain that would have been struck had I been able to set the price of my eye *before* you took it. It does this by a neat trick of substitution. Instead of receiving a price for the taking of my eye, I get to demand the price you will be willing to pay to *keep* yours. It is not so much that I think your eye substitutable for mine. It is that you do. You will in fact play the role of me valuing my eye before it was taken out, and the talion assumes that you will value yours as I would have valued mine.<sup>53</sup>

---

52. WILLIAM IAN MILLER, EYE FOR AN EYE 51 (2006).

53. *Id.* at 49-50.

Miller goes so far as to suggest that there were fewer one-eyed people wandering around in talionic societies than we have around here, because we sell our body parts at a discount.<sup>54</sup>

I do not want to romanticize the talion. I just want to emphasize that as a way of coping with the circumstances of corrective justice, it had virtues. It also had costs—extraordinary costs. To start, the penalty default only works if people think the threat is real. Every once in a while you have to gouge someone's eye out or chop off a hand to maintain your credibility.<sup>55</sup> Moreover, as Miller points out, we are surely wealthier for our willingness to sell body parts at a discount: "Imagine if the costs of replacing horses with automobiles meant that every road fatality gave the victim's kin a right to kill or to extract a ransom measured at the value the person at fault placed on keeping his life!"<sup>56</sup>

If modern life depends on our willingness to accept less in the way of compensation for injury, that may be reason enough to resolve disputes our way. But we should not flatter ourselves by thinking that our practices are *the* just ones, or even that we do justice better. We do justice differently, and not nearly so differently as we might suppose. One reason that Goldberg and Zipursky worry about revenge is the risk that it will lead to endless cycles of violence. "Because it is unmediated," Goldberg says, "vengeance runs high risks of error, overkill, additional violence, and ongoing feuds, which tend to work against the resolution of disputes and to undermine civil order."<sup>57</sup> But talionic societies had ways of keeping things from getting out of hand. One of the most important was the possibility of presenting a dispute to a third party for a decision as to what would render a wrongdoer and a victim even. In Old Norse, the third party was called an *oddman*,<sup>58</sup> but similar sorts of folks could be found wherever the talion was in use. Oddmen were a way of outsourcing the performative necessary to get the parties even, and their work was subject to a familiar felicity condition. As Miller explains, "the oddman's job [was] to prevent getting even from getting out of hand by selling both parties on a plausible conception of evenness."<sup>59</sup>

---

54. *Id.* at 54-55.

55. *Id.* at 51-52.

56. *Id.* at 55.

57. Goldberg, *supra* note 43, at 602.

58. MILLER, *supra* note 52, at 9 ("For us, 'being at odds' means we are in the midst of a quarrel, and it meant that in Old Norse too; to resolve that quarrel you needed to get back to even. To do that you often had to bring in an oddman, a *third* party, to declare when the balance was even again if the law did not so provide or the parties could not agree among themselves as to how to strike it. You needed odd to get even or you would forever be at odds.")

59. *Id.*

In opening this section, I said that contemporary tort doctrine embraces the Aristotelian picture of corrective justice. But the getting even picture runs much deeper in tort's veins. Indeed, tort law embodies it. We prohibit private violence as a response to wrongdoing, but we maintain the institution of the oddman, in the form of judges and juries. When parties cannot negotiate their way back to even, we offer a judicial failsafe—compulsory process, followed by garnishment and attachment. A wrongdoer who will not bargain can be haled into court and forced to submit to a jury's judgment as to what will render him even with his victim. Though courts are fond of saying that the plaintiff should be made whole, that is not in fact what juries are asked to do. They are typically instructed to award "fair and reasonable" compensation for a plaintiff's injury,<sup>60</sup> and in the cases where the wrongdoing is willful and wanton, they may go beyond, and award punitive damages too.

Our courts don't do justice simply by moving money around. They do justice in the only way it can be done—performatively. Whether they succeed does not depend on whether they make plaintiffs whole or put them back where they once were. If it did, courts couldn't do justice in most cases. Whether courts succeed in doing justice depends on whether people regard the remedies awarded as sufficient to render prevailing plaintiffs even. That is, it depends on whether their performance is persuasive. Seen in that light, the Aristotelian rhetoric that pervades contemporary court doctrine may be a clever marketing strategy, but it is not much more.

#### IV.

It should be clear by now that I do not think that civil recourse theory is a competitor to a corrective justice account of tort law. I think it *is* a corrective justice account, and a better one than the more familiar sort. I suspect that Goldberg and Zipursky deny this only because they mistakenly conflate the concept of corrective justice with the Aristotelian picture of it.<sup>61</sup> After all, they stress that the

---

60. JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 476 (2d ed. 2008).

61. *Id.* ("It is common for courts and commentators to describe the aim of a compensatory damage award as that of 'making the plaintiff whole' or 'restoring the *status quo ante*.' The picture evoked by these metaphors is that an award of money will erase the tort by fully compensating the plaintiff for all the harms associated with it. Indeed, an entire school of thought about tort law—corrective justice theory—is built around this metaphor. Following Aristotle's conception, corrective justice scholars argue that tort law is best understood as concerned to take away whatever the tortfeasor has 'gained' from committing the tort (in terms of wealth, or the excess liberty he has implicitly claimed for himself) while restoring to the plaintiff whatever she has lost, thereby restoring a preexisting equilibrium.").

key concepts in tort law are wrongs and recourse, and it is hard to see what recourse for wrongs would be, if not corrective justice.

Of course, given how deeply entrenched the Aristotelian picture is in contemporary thinking about corrective justice, it is fair to wonder whether we should let the Aristotelian theorists have the term and content ourselves to extol the virtues of getting even through civil recourse. I don't think we should cede the term. As we have seen, there is a tradition that links corrective justice with getting even that is roughly as old and venerable as Aristotle, though it has fallen out of fashion.<sup>62</sup> But even if corrective justice had always and only called to mind the Aristotelian picture, we should not hesitate to reject it in favor of a better one. To say that something is a matter of justice is to say, at the least, that it is something worth pursuing, and indeed, that it should be an object of significant concern. That commitment is held more deeply than any particular views about how justice is done. And, it means that there is an important difference between saying that tort is a system of civil recourse and saying that it is a way of doing corrective justice. The first describes the institution; the second takes a step toward justifying it.

Is the getting even picture a better conception of corrective justice than its more familiar contenders? For all the reasons we have explored already, I think the answer is yes. But one might worry that I have merely traded one set of abstractions and metaphors for another, and that the new metaphor is rather vacuous. That is right, but it is not a cause for worry: The emptiness of getting even is a virtue, not a vice. The problem with the Aristotelian picture is that it retreats to abstraction and metaphor because we cannot do the things it tells us we must—allocate back, reverse the wrongful transaction, or put the victim in the position she would have been absent wrongdoing. Moreover, the abstractions and metaphors it resorts to are misleading. Injuries are flattened into losses, which we can annul, make good, or wipe clean, even as people hobble around. One virtue of the getting even picture is that it allows us to be honest about what we can and cannot fix. In a way, both the Aristotelian and getting even pictures construe corrective justice as having the same aim—reaching a point where the victim's claims to redress are fully satisfied. But the Aristotelian picture gives a rigid vision of what it takes to get there, whereas the getting even picture makes space for the contingency of our practices and the creativity necessary to cope with the circumstances of corrective justice.

---

62. There are also etymological connections between justice and evenness. See MILLER, *supra* note 52, at 8-15.

If I am right to think that civil recourse is a corrective justice account of tort, we should be able to dispatch the civil recourse critique of corrective justice rather easily. We can start with Goldberg and Zipursky's first charge—that corrective justice accounts of tort explain compensatory damages but not the other remedies available in a tort suit. As we have seen, there is no special connection between compensatory damages and corrective justice. They are but one tool in a court's kit for rendering parties even. To be sure, they are a particularly useful tool. It will often seem fitting for a wrongdoer to make good a victim's pecuniary losses, so a judgment that includes compensatory damages may often make for a persuasive performance. Moreover, money is a good medium of exchange among strangers, and the transfer of money is relatively easy to supervise. Therefore, it makes more sense to order a tortfeasor to pay compensation than it does to require that he help out around the victim's house. But in many cases, compensatory damages won't do the trick, at least not fully. Sometimes, what a defendant has done is so egregious that full compensation is not sufficient, and punitive damages are the order of the day. At other times, an injunction will be warranted, perhaps to assure a plaintiff that the court will stand on her side if the defendant continues to infringe her right. And nominal damages allow a court to vindicate a plaintiff's right by acknowledging that it has been infringed. When a plaintiff is not injured, nothing more than public censure of the wrong may be necessary to get her even. Properly understood, all of the remedies courts offer in tort suits are tools for doing corrective justice.

We can make shorter work of the second count in the civil recourse indictment of corrective justice. Goldberg and Zipursky observe that tort has standing requirements, such that a plaintiff must prove that the defendant wronged her, not just that she suffered a loss in virtue of his wrongdoing. This, they suggest, is odd if one thinks that the point of corrective justice is to make victims whole. But that is not the point of corrective justice. The point is to give people who have been wronged an opportunity to get even, and one has not been wronged unless one's rights were violated. The standing requirements in tort law attempt to pick out people who have cause to get even. That is, they attempt to pick out those who have reason to resent, and not simply regret, a tortfeasor's behavior.

Finally, we come to Goldberg and Zipursky's observation that tort does not hold that a tortfeasor has a duty to compensate a plaintiff until after judgment is rendered. If one has an Aristotelian picture of corrective justice, this seems odd because the moment a wrong is committed, the wrongdoer has an obligation to put the victim in the position she would have been in absent the tort, or as near to it as he can. Tort will necessarily fail to do that if it does not award prejudg-

ment interest because the victim will be deprived of the time value of her money. Yet, tort doesn't award prejudgment interest; it does not recognize a duty to pay damages until it imposes one.

Mysterious as this looks from an Aristotelian perspective, it is rather simple to explain. Getting even is performative. Until a court declares that a defendant must pay damages, the defendant is not under a duty to do it. The duty that arises at the moment of wrongdoing is imperfect, or open-ended; a wrongdoer must take corrective action sufficient to support a declaration that the parties are even. Because that duty is imperfect, it might be satisfied in any number of ways. A court steps into the breach only when wrongdoer and victim can't negotiate their way back to even on their own. A court imposes a solution, but it is a mistake to think that the court's solution is a solution because it was all along the thing that should have been done. It is a solution because the court declares it one.

## V.

Let me close with a compliment. I have taken Goldberg and Zipursky to task for failing to see that they are, in fact, corrective justice theorists, but their sin is failing to know themselves, not failing to know tort law. Indeed, Goldberg and Zipursky have a sharper sense of tort than anyone has had in a long time, and they are right to think that the key to understanding tort is to see that it is a system of civil recourse. We live in a society that has lost sight of this. Increasingly, tort is thought of as just another regulatory tool. There are many reasons for that, but bad tort theory has certainly played its part. Much of the blame should be laid at the doorstep of economists, but corrective justice theorists must take their share too.

The Aristotelian picture has caused much mischief. Its emphasis on offsetting victim's losses contributes to the view that the point of tort law is to transfer money to tort victims. That is something tort law does, but it is not tort law's point. Goldberg and Zipursky deserve much credit for putting us in a position to see that the point of tort is to give victims an opportunity to get even with wrongdoers. They have failed to realize that this makes them corrective justice theorists, but they are corrective justice theorists of the best sort.