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IN DEFENSE OF THE LIBERAL JUSTICE THEORY OF TORTS: A REPLY TO PROFESSORS GOLDBERG AND ZIPURSKY

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Introduction

For years, instrumentalist theorists—representing a loose confederation of pragmatists, realists, and economists—have dismissed the corrective justice theory of tort law as anachronistic.[1] While they concede that tort law may once have righted private wrongs, they submit that it no longer serves this purpose. Today's tort litigation is brought mostly against large organizations or corporate entities, not private individuals.[2] When tort judgments are rendered, liability often is based on important public policy considerations like compensation and deterrence, not

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[1] *See* THE AMERICAN LAW INSTITUTE'S REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *reprinted in* 30 SAN DIEGO L. REV. 371, 386 (1993) ("Although this corrective justice rationale continues to maintain its hold on the popular mind and to have important scholarly exponents, its premises have become progressively less resonant with the real world of tort litigation."); Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59, 90 (1999)("As we reach the twenty-first century, . . . it seems appropriate we acknowledge that modern corrective justice scholarship with its nineteenth-century conceptual apparatus is . . . an anachronism and should be treated as such."); Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2280 (criticizing Ernest Weinrib's formalist approach to corrective justice as being "totally disengaged from the lively policy debate that rages over the present performance of the tort system."); Stephen D. Sugarman, *Doing Away With Tort Law*, 73 CAL. L. REV. 555, 603 (1985)) (arguing that corrective justice's requirement of individualistic justice "is thoroughly unrealistic today.").

[2] In support of his critique of corrective justice, Rabin cited statistics from a Department of Justice study indicating that in 1992, "organizations" were named as defendants in 96% of toxic tort cases, 99% of products liability cases, 86% of premises liability cases, and 73% of medical malpractice cases. *See* Rabin, *supra* note 1, at 2273 (citing STEVEN K. SMITH, ET AL., BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 4 (1995)).

personal fault.[3] Even when fault is determined, faulty parties frequently escape punishment by shifting their losses to insurance companies, employees, customers, and stockholders.[4] Thus, liability is not so much an issue of moral responsibility, as it is a question of political and social expediency.[5]

Recently, the instrumentalists have been joined by a couple of unlikely allies: Professors John C.P. Goldberg and Benjamin C. Zipursky. Although both Goldberg and Zipursky have professed an affinity for corrective justice theory and have described their work as building on its insights,[6] they now seem more determined to marginalize or discredit it. Indeed, in a tandem of articles published in the *Georgetown Law Journal*,[7] these corrective justice "insiders" have not just challenged the theory they claim to support, but have virtually left it for dead.

Like the instrumentalists, Goldberg and Zipursky's main complaint is that corrective justice theory fails to accurately describe or interpret our modern tort system. However, unlike the instrumentalists, these insiders wage a comprehensive assault, attacking corrective justice theory at every level.[8] They question its substan-

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[3] *See* Nolan & Ursin, *supra* note 1, at 72 (By the mid-1970s, "[t]raditional tort theory, with its focus on doctrinal analysis and fault, appeared tired, passe, [and] obsolete.").

[4] *See* Sugarman, *supra* note 1, at 603-04 (arguing that corrective justice cannot account for such loss shifting); Nolan & Ursin, *supra* note 1, at 72 ("[T]he view that tort law was a mechanism of corrective justice shifting losses between individuals seemed archaic in an age of insured motorists, no-fault auto plans, and manufacturers and other enterprises that spread losses through insurance and the price of goods and services.").

[5] *See* Sugarman, *supra* note 1, at 604 ("[I]n practice tort law has become a process for having one insurer pay another, which is far removed from any meaningful sense of individual justice.").

[6] *See* John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1647 n.56 (2002) [hereinafter Goldberg & Zipursky, *Unrealized*] (praising corrective justice theory for emphasizing the importance of 'bipolarity' to tort law); John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1515-17 (2002) (registering broad sympathy with Professor Weinrib's efforts to provide a theory that treats tort law as a coherent practice that centrally concerns responding to wrongs); John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1739, 1771 (1998) [hereinafter Goldberg & Zipursky, *Moral*] (crediting corrective justice theory with offering "powerful and insightful critiques" of instrumentalist theories and with making "important strides" toward the development of an alternative).

[7] *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

[8] Professor Goldberg offers seven pointed criticisms. First, corrective justice theory fails to provide an adequate explanation of the tortious concept of wrongdoing. *See* Goldberg, *supra* note 7, at 576. Second, corrective justice does not accurately describe important structural features of tort law like the award of punitive and compensatory damages. *See id.* Third, while corrective justice explains the bipolar framework of tort litigation, it does not, or at least has not, accounted for the practice of using juries to decide disputes. *See id.* at 576-77. Fourth, because corrective justice theory focuses asymmetrically on defendants' responsibilities, and virtually ignores plaintiffs' rights, it cannot explain why the law empowers, but does not require, plaintiffs to enforce those responsibilities. *See id.* at 577. Fifth, the more tort law pursues instrumental goals like deterrence and loss spreading—specifically, by altering concepts, like causation, that commonly are associated with corrective justice—the less it conforms to the idea of corrective justice. *See id.* Sixth, corrective justice fails to define its interrelationship with other juridical considerations, like social welfare, and appears to lack any practical limitations. *See id.* at 577-78. Seventh, and finally, because corrective justice is not prescriptive, but merely descriptive, its value to the tort system remains unclear. *See id.* at 578.

Professor Zipursky raises three, somewhat overlapping, objections of his own. First, although corrective justice may explain why tortfeasors pay compensatory damages to their victims, it cannot account for

tive content, denouncing its vapid and misleading account of tort law's core concept of wrongdoing.[9] They critique its structural framework, decrying its inability to account for key tort characteristics like compensatory, punitive, and nominal damages, as well as injunctive relief and jury participation.[10] They even challenge its scope and purpose, bemoaning its lack of practical limits and questioning its practical value.[11]

Seeing no solutions to these problems, the insiders wax pessimistic. Goldberg, for his part, laments that corrective justice "operates at such a high level of abstraction as to offer not so much a theory of tort, as a theory of the structure or form of tort;" and "[e]ven then, it has not yet offered a fully adequate account of that structure."[12] Zipursky's assessment is even more dismal.[13] He still endorses some aspects of corrective justice,[14] and professes to "join forces with corrective justice theorists" in the battle against economic determinism.[15] However, Zipursky finally concludes that (1) the current tort system "does not embed principles of corrective justice," (2) we must be "more circumspect about the relation between justice and tort law," and (3) judges who wish to apply rather than revise the law "should place little faith in notions of corrective justice."[16]

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punitive or nominal damages, nor can it account for the host of injunctive remedies that tort plaintiffs regularly enjoy. *See* Zipursky, *supra* note 7, at 710-13. Second, corrective justice theory does a poor job of explaining the tortious concept of wrongdoing, often suggesting that plaintiffs have "substantive standing" to sue certain wrongdoers when tort law says they do not. *See id.* at 714-18. Finally, corrective justice theory posits that tortfeasors bear a duty to repair their wrongs, yet it cannot explain why plaintiffs may not enforce that duty immediately or why defendants may refuse to make payment until a lawsuit is filed and a final judgment is rendered. *See id.* at 718-24.

[9] *See* Goldberg, *supra* note 7, at 576-77; Zipursky, *supra* note 7, at 714-24.

[10] *See* Goldberg, *supra* note 7, at 576-77; Zipursky, *supra* note 7, at 710-13.

[11] Professor Goldberg alone articulates this criticism. *See* Goldberg, *supra* note 7, at 577-78.

[12] *See* Goldberg, *supra* note 7, at 581.

[13] Zipursky bases his assessment of corrective justice on an analytic process he calls pragmatic conceptualism. Greatly simplified, pragmatic conceptualism is the examination of the structures, doctrines, and practices of the law for the purpose of identifying "core" concepts and principles that courts generally must respect and perpetuate. *See* Zipursky, *supra* note 7, at 706-09; *see generally* Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000)(presenting a comprehensive discussion of this process). According to Zipursky, corrective justice fails as a descriptive theory because it cannot explain many of tort law's core features. *See* Zipursky, *supra* note 7, at 710-24. Obviously, as the remainder of this article attests, I question Zipursky's conclusion. However, I also have doubts about his methodology. Without a normative framework, Zipursky's wholly descriptive process seems to lack any means of critical evaluation. Although it might be able to locate common or prominent concepts, it cannot tell us whether they are essential or merely auxiliary, or are redeemable or fully expendable. And while it may reveal certain misfits between theory and practice, it cannot tell us which of the two is flawed.

[14] For example, Zipursky agrees with corrective justice theory that "[o]ur tort system clearly puts great emphasis on damages, and particularly on compensatory damages." *See* Zipursky, *supra* note 7, at 749. He also agrees that the tort system "makes use of the concept of making whole, and of a principle that the plaintiff is entitled to be made whole." *Id*

[15] *Id.* at 755.

[16] *Id.* at 756. Zipursky goes on to propose a new theory of tort law called civil recourse. Civil recourse is a state-operated system, which, under a social contract rationale, empowers victims to sue (take legal recourse against) wrongdoers for breaches of relational duties supported by legal norms. *See id.* at 735-36, 741-44. Such wrongdoers, however, are not bound by any "corrective" duty to repair their victims' losses; rather, they are merely vulnerable (liable) to legal action. *See id.* at 720-21.

These are powerful indictments. They are persuasive because they reach wider and dig deeper than any of the criticisms previously offered by the instrumentalists. They are all the more compelling because they come from sympathetic critics. Perhaps the instrumentalists' assault could be written off to bias or one-dimensional thinking. However, the same cannot be said of Goldberg and Zipursky. As corrective justice insiders, one would expect them to find ways to vindicate and preserve their philosophical "friend." If they cannot come to its defense—or worse still, if they are willing to join its detractors—why should anyone continue to take it seriously?

In this article, I hope to answer that question. To do so, I will respond to each of the criticisms raised by Goldberg and Zipursky—tracking their arguments

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Although the soundness of Zipursky's theory is beyond the scope of this article, it suffers from two obvious deficiencies, which deserve brief mention here. First and foremost, it is underinclusive. According to Zipursky, the right to civil recourse is always triggered by some form of legal wrongdoing. *See id.* at 743-44. However, wrongdoing is not a requirement of strict liability, which arises irrespective of fault. In footnote 116 of his article, Zipursky openly admits that he does not address the question of strict liability. *See id.* at 727, n.116. In an apparent attempt to justify his omission, he notes that "some of what is referred to as 'strict' liability nevertheless involves the commission of legal wrongs and therefore provides no problem for my view." *Id.* The remaining forms of "nonwrongful" strict liability, he argues, are "quite rare and call[] for special analysis." *Id.* However, neither rationalization salvages Zipursky's theory. Even if some strict liability theories really are wrong-based, the fact is, courts do not openly characterize them as such. Calling them wrongful torts does not explain their current no-fault characterization, nor does it explain why courts have engaged in such subterfuge. As for the other, truly no-fault strict liabilities, they cannot be so easily dismissed. Under tort law's current theoretical paradigm, strict liability is not just some insignificant aberration, as Zipursky seems to suggest, but rather forms one-half of tort law's dyadic "fault/no-fault" structure—a structure, which has existed, by most accounts, since the law's very inception. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 30 (5th ed. 1984) (attributing this structure to the early actions of trespass and case).

Ironically, Zipursky's theory is not just too narrow, it is also too broad. Zipursky states that a legal wrong is *not* a moral wrong. *See* Zipursky, *supra* note 7, at 743, 746. It also is *not* "fault or responsibility." *Id.* at 746. Instead, legal wrongs are "forms of wrong and are derived from norms that enjoin them and attach to them a species of opprobrium." *Id.* at 746-47. As to the underlying norms, Zipursky says that they are "legal," *id.* at 743, serve as "guidance rules," *id.*, impose "duties of noninjury," *id.*, and are "relational" and multitudinous, with different norms underlying different torts. *See id.* at 744, 748. But this is as far as he goes. Rather than clarifying the substantive content of tort law, Zipursky only seems to raise more questions. What, for example, is the difference between a moral and a legal wrong? What is the species of opprobrium created by a legal wrong? If it is not moral indignation or some lingering sense of unfairness, how is it different? Which norms enjoin legal wrongs? Why does tort law enforce some norms and not others? What is the difference between a norm violation and an act of injustice? Where do these norms come from? How do they achieve "legal" status? Which legal norms are amoral and which are not? Which amoral norms support which tort doctrines and why? What values underlie both the selected and excluded norms? Why is the substance of each tort normatively different when the structure for all torts is based on the single concept of relationality?

To his credit, Zipursky acknowledges that many fundamental tort questions still remain unanswered. *See id.* at 748. However, he decides not to pursue these issues, citing the limited scope of his article and referring readers to his previous publications. *See id.* (citing Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in the Age of Mass Torts, in* PHILOSOPHY AND THE LAW OF TORTS 214 (G. Postema ed., 2001); Goldberg & Zipursky, *Moral, supra* note 6; John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); Goldberg & Zipursky, *Unrealized, supra* note 6; Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649 (1998). Unfortunately, Zipursky's prior efforts appear similarly ambiguous. I, for one, found no real answers to my questions. Nevertheless, I urge others to read for themselves and draw their own conclusions.

in the order mentioned above (first by content, then by structure, and then by scope and purpose). However, I will not simply point out the weaknesses in their claims. I will, more importantly, present and defend an alternative, "liberal" justice theory of torts.[17] This theory confirms the importance of corrective justice to our understanding of modern tort law. But it does not stop there. It places corrective justice in context.[18] It shows that corrective justice is an integral and clearly delineated part of a larger ethical and political system, and when this system adheres to its core values, it can and does operate within practical constraints to fulfill the law's ultimate objective: the dispensation of private justice.

I. The Content of Tort Law: Wrongs and Wrongdoing

I will begin, as Professor Goldberg does in his *Georgetown* piece, with the concept of wrongdoing. The insiders offer three general arguments on this issue. First, they contend that corrective justice is substantively banal because it does not have much to say about wrongdoing. Next, they assert that corrective justice is analytically asymmetrical in that it dwells too much on the defendant's responsibilities and not enough on the plaintiff's rights. Finally, to the extent corrective justice addresses wrongdoing at all, they suggest that its explanations are conceptually inaccurate, since they often deviate from those used in tort law.

A. Substantive Banality

Although both insiders seem concerned about corrective justice's substantive banality, it is Goldberg who specifically addresses this issue in his criticisms. Goldberg remarks that "corrective justice theory's emphasis on structure and formalities, though not objectionable for banality, is more objectionable when understood as a failure to explain what, if anything, corrective justice theory has to say about tortious wrongdoing."[19] According to Goldberg, the concept of wrongdoing

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[17] I use the term "liberal" here in both its moral and political senses. Specifically, it means (1) freedom is the paramount human value and (2) protecting that value is the primary obligation of government.

[18] In considering corrective justice, most tort theorists have focused exclusively upon a few pages of Aristotle's work—specifically, Book V of his *Nicomachean Ethics*. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 153-63 (J.E.C. Welldon trans., Prometheus Books 1987). They also have fixated solely upon the words on those pages. They generally have not examined the ethical system of which it was a part or the political and social values upon which it was based. This article takes a broader perspective. It looks not only at Aristotle's theory of corrective justice, but also at the values, concepts, structures, theories, and assumptions, which explain and support it. Moreover, it does not just examine corrective justice in the abstract, but also considers its practical application in both ancient and modern times.

This contextual adjustment will allow us to see corrective justice in a completely different light—not as the vapid and truncated concept imagined by the insiders, but as an important piece of a full-blown, liberal justice theory of tort law. Indeed, we shall discover a theory that not only possesses moral values and political principles similar to our own, but which, because of its foundational affinities, is especially amenable to inclusion in our system of justice. While this theory integrates the notion of corrective justice, it also invokes other justice concepts and supplies them with the moral and political backing they require. As so constituted, such a theory helps to explain what corrective justice alone cannot. More importantly for our present purposes, it can finally answer most, if not all, of the criticisms of the insiders, and in time, perhaps even convert them into true believers.

[19] Goldberg, *supra* note 7, at 576.

is merely "a placeholder standing in the middle of corrective justice theory and needs explication."[20]

Goldberg's critique, however, is substantively deficient in two respects. First, it fails to acknowledge any of the substantive characteristics of wrongdoing contained in Aristotle's description of corrective justice. Second, and more important, it completely overlooks the other portions of Aristotle's work, which both amplify and clarify this concept.

Aristotle described corrective justice as a particular kind of justice which seeks to redress wrongs occasioned by voluntary or involuntary transactions.[21] It is true that, in his discussion of corrective justice, Aristotle does not talk much about wrongdoing. However, he does speak of *wrongs*. A wrong occurs when one party to a transaction receives an undeserved gain and the other incurs an undeserved loss.[22] As so defined, a wrong displays a number of distinctive characteristics. It is *unequal*, since it disturbs the moral equilibrium, which exists between parties before a transaction.[23] It is *unjust* because it fails to give each transacting party what he deserves.[24] It is *imbalanced* and *disproportionate* insofar as it produces an illegitimate gain for one party and an illegitimate loss for another.[25] And, it is *unfair* because it gives one party a freedom of action—indeed, a power of domination—not granted to either his victim or anyone else.[26]

Even without further elaboration, Aristotle's description of wrongs suggests a working definition of *wrongdoing*. If wrongs are unequal, unjust, imbalanced, and unfair, then wrongdoing—the active catalyst of such wrongs—would seem to share these same characteristics. Such a conception of wrongdoing, though highly generalized, is certainly more than the vacuous placeholder imagined by Goldberg. But this is not all that Aristotle had to say on the subject. In fact, Aristotle copiously elaborates on the question of wrongdoing *elsewhere* in his *Ethics*. Unlike the insiders, Aristotle never considered corrective justice to be a self-contained ethical concept. Rather, he viewed it as merely one, relatively small, part of a much grander moral system. Thus, to fully understand Aristotle's notion of wrongdoing, one cannot fixate on his discussion of corrective justice, but must absorb his work as a whole. When this is done, a truly rich and comprehensive conception of wrongdoing ultimately emerges.

This conception first begins to take shape in Aristotle's discussion of virtue. According to Aristotle, there are three conditions for virtuous action. First, the actor

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[20] *Id.*
[21] *See* ARISTOTLE, *supra* note 18, at 150.
[22] *See id.*
[23] *See id.* at 154.
[24] *See id.* at 157, 163-64.
[25] *See id.* at 154-57.
[26] *See id.* at 144-45, 148, 150-51, 155.

must exhibit a *power* of agency.[27] Thus, both his action and its consequences must originate from his will and remain in his control, and may not be directed by external forces like compulsion.[28] Second, the actor must act with *knowledge* of the surrounding circumstances; including who he is, what he is doing, how he is doing it, what he is doing it with, what or whom he is doing it to, and to what end.[29] Acts committed in ignorance are not subject to praise or blame, unless the actor himself is to blame for being uninformed.[30] Finally, the actor must act according to a deliberate *choice*.[31] Because chosen acts display moral purpose and character, only they can determine the actor's virtue.[32]

Having disclosed the conditions of virtuous action, Aristotle next examines its content. In Aristotle's view, all virtuous action strives for the mean between excess and deficiency.[33] This mean is a standard of right conduct "determined by reason or as a prudent man would determine it."[34] Although the mean is always based on reasonableness, it can impose different requirements for different types of transactions.

As noted earlier, Aristotle identifies two types of relevant transactions, involuntary and voluntary. Involuntary transactions, like our modern tort transactions, typically proceed from unilateral acts.[35] To be virtuous, a unilateral action must satisfy a standard of respect, which lies between the extremes of abject submission and absolute domination.[36] Respect, in this sense, is not simply a deferential regard; it is a negative restraint of liberty. Under this standard, a unilateral actor must show due care and concern for the interests of others, limiting his freedom to an extent consistent with a like liberty in those around him.[37]

Voluntary transactions, by contrast, are formed bilaterally. Since they appear in products liability cases and cases involving special relationships—like landlord-tenant, doctor-patient, common carrier-passenger, and innkeeper-guest—they also are a concern of tort law. However, because they arise by mutual agreement, they are subject to a different standard of evaluation: the standard of reciprocity.[38]

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[27] *See id.* at 50, 74-76, 169-70.
[28] *See id.* at 66, 68-69.
[29] *See id.* at 50, 71-72, 169-70 .
[30] *See id.* at 83.
[31] *See id.* at 50, 66-67.
[32] *See id.* at 72-76.
[33] *Id.* at 54.
[34] *Id.* at 55.
[35] Specifically, Aristotle explains that involuntary transactions are initiated either in secret—as in cases of theft, adultery, poisoning, pandering, enticing away slaves, assassination, and bearing false witness—or by violence—as in cases of assault, imprisonment, murder, rape, mutilation, slander, and contumelious treatment. *See id.* at 150.
[36] *See id.* at 150-51, 153, 163-64.
[37] *See id.* at 165. Aristotle's concern for protecting individual freedom and equality is expressed in his theory of political justice, which he describes as "such justice as exists among people who are associated in a common life with a view to independence, and who enjoy freedom and equality." *Id.* at 165.
[38] *See id.* at 157-59.

Like corrective justice, reciprocity seeks the mean between gain and loss.[39] However, unlike corrective justice, reciprocity requires positive proportional requital.[40] It ensures that he who gives must also receive, and that each party gives as good as he gets.

Transactional standards aside, every act can be judged on its own merits. Some acts—like murder, theft or many of our current intentional torts—have no mean.[41] Intrinsically wicked, these acts display vice no matter how "well" they are performed.[42] However, other acts cannot be so easily diagnosed. They may be performed wrongly—meaning, excessively, deficiently or, in a word, negligently—or they may be done virtuously. For these acts, one cannot make snap judgments, but must judge them in context, examining their factual circumstances and analyzing them with prudence or practical wisdom.[43]

Although such wrongful acts may take many forms, Aristotle splits them into categories of general and particular injustice. Acts are wrongful in the general sense when they proceed from ordinary, non-relational vices like anger, cowardice or incontinence.[44] Since these vice-based acts were proscribed by Greek law, Aristotle also describes them as unlawful.[45] Certain acts, however, do not display any of these general vices. Rather, they are unjust only in the particular, "relational" sense that they create unfair imbalances among equal parties. Synthesizing these forms of justice, Aristotle concludes that the unjust—meaning the wrongful—is actually "what is illegal or what is unfair."[46]

Aristotle then moves from the general to the specific. Drawing from his definitions of virtue and justice, Aristotle offers a detailed taxonomy of wrongdoing. He begins by noting that people may hurt each other in one of three ways: deliberately, by mistake or by mishap.[47] Mishaps—or unavoidable accidents, as we call them today— are not wrongful at all because they arise involuntarily, "contrary to expectation" and from forces outside the actor.[48] However, deliberate acts and mistakes are different. They proceed from the actor's power of agency, and are informed by his actual or potential knowledge of the surrounding circumstances.[49] Thus, they are susceptible to blame and censure.

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[39] *See id.* at 157.
[40] *See id.* at 159-63.
[41] *See id.* at 56.
[42] Aristotle lists murder, theft and adultery as examples of such inherently wicked acts. *See id.*
[43] *See id.* at 44-45, 65.
[44] *See id.* at 147-48.
[45] *See id.* at 144-45, 149.
[46] *See id.* at 147-48.
[47] *See id.* at 171-72.
[48] *Id.* at 170-71.
[49] *See id.* at 169-72.

Between these two forms of misconduct, Aristotle considers mistakes to be the lesser evil, but an evil nonetheless. Although mistaken actors, like negligent tortfeasors, do not act with malice or deliberation, they *do* give in to vices like laziness, ignorance or carelessness, and they *do* exercise control over their victims.[50] Sometimes, they foolishly disregard known risks of harm.[51] Other times, they overlook risks by failing to keep themselves informed.[52] Since they do not desire to inflict harm, they are not morally wicked. But they also are not completely innocent. Because they possess, or could possess, the knowledge and power necessary to prevent the harm, they are, at the very least, active agents of injustice.

Like mistakes, deliberate wrongs originate from ordinary vices like envy, spite or intolerance. However, unlike mistakes, deliberate wrongs proceed from rational choice and personal will.[53] In this regard, deliberate wrongs are much like our modern intentional torts. Their object, or at least their determined effect, is to cause harm to other people. Thus, they always carry greater moral responsibility. Indeed, because deliberate wrongs are willed from within, their wickedness lies not just in the manner or consequences of their performance, but in the very actors who choose to commit them.[54]

Beyond mistakes and deliberate wrongs is a third type of misconduct. These wrongs are not wrongful *per se*. Rather they are wrongful *only* in relation to others. In other words, they spring not from any ordinary personal vice, but solely from the vice of injustice.[55] Aristotle says these wrongs are unfair.[56] Although not otherwise wicked, unfair wrongs create moral imbalances by bestowing undeserved gains on some parties and inflicting undeserved losses on others.[57] In many cases, they may be legal or even desirable. However, they are motivated by personal gain and are committed with the purpose or at least the knowledge that such gain will come at someone else's expense.[58] In this sense, unfair wrongs are not unlike most activities currently subject to strict liability. They are censurable, even if venial or beneficial, because they arise from grasping motives and produce unfair consequences.[59]

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[50] *See id.* at 171.
[51] *See id.*
[52] *See id.* at 83.
[53] *See id.* at 169-70, 171-72.
[54] *See id.* at 171-72.
[55] *See id.* at 147-48.
[56] *See id.* at 147-50.
[57] *See id.* at 153, 163-64.
[58] *See id.* at 147-48.
[59] *See* ALAN CALNAN, JUSTICE AND TORT LAW 209-11 (1997)(arguing that many strict liability activities are wrongful because they infringe rights without consent or public necessity and distribute losses in an unfair manner); Alan Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 604-05 (1998)(arguing that strict liability activities violate post-transactional duties of care).

However, just characterizing an act as deliberate, mistaken or unfair is not enough. In fact, for Aristotle, it is merely one-half of a complete moral analysis. Since wrongs are inherently relational, one also must examine the individual who is acted upon. When that individual voluntarily accedes to the wrongful act or willingly accepts its consequences, he is not wronged no matter how bad the act may appear to be. As Aristotle explains, "a person may be hurt, and may suffer what is unjust, voluntarily, but he cannot be the voluntary victim of injustice."[60] Granted, the actor's conduct is still wrongful. But it is not wrongful *toward the recipient.* By giving his consent, the recipient effectively releases the actor from personal responsibility *to himself,* even if he does not, and cannot, negate the act's social or spiritual immorality.

Assembling these ideas, we see a robust conception of wrongdoing that substantially mirrors its tortious counterpart. Under Aristotelian theory, wrongdoing is a fault-based concept founded on values of lawfulness, liberty, fairness and equality. It consists of intentional misbehavior (deliberate acts), negligence (mistakes) and strict liability activities (unjust acts) that are faultless yet unfair. Intentional wrongdoing is inherently culpable unless otherwise excused or justified. By contrast, unintentional wrongdoing is culpable only under the peculiar circumstances in which it is committed, and even then, only if it violates an objective standard of prudence. Although it takes various forms, wrongdoing generally arises from a misuse or abuse of one's knowledge, power and control, and generally excludes conduct consented to or voluntarily assumed by the person it harms. It creates gains (unearned benefits) and imposes losses (coerced harms). It displays excess (self-absorption) and deficiency (neglect of care for others). It seeks imbalance (in relations, rights and interests) and eschews proportionality (in liberty and security). And, it either ignores the dictates of reciprocity (in special relationships) or offends our sense of reasonableness (in nonrelational transactions).

B. Analytical Asymmetry

The second insider criticism in this area is a corollary to the first. According to Goldberg, even when corrective justice speaks to the issue of wrongdoing, it says too little about the victim. To use Goldberg's words, "[c]orrective justice theorists . . . focus asymmetrically on the defendant's obligations and thereby fail to attend to the way in which the legal system specifies the role of the plaintiff who seeks redress on the basis of such obligations."[61] "If tort aims to assign responsibility to wrongdoers or for wrongfully caused losses," Goldberg wonders, "why is it set up so as to leave enforcement of those responsibilities optional with the plaintiff?"[62]

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[60] ARISTOTLE, *supra* note 18, at 174-75.
[61] Goldberg, *supra* note 7, at 577.
[62] *Id.*

"Why," he continues, "should the plaintiff get to determine when this class of obligations will be enforced?"[63]

At first, Goldberg's criticism may seem well-taken. Because wrongdoing is so critical to corrective justice, that concept certainly has received a great deal of attention—perhaps even more than it deserves.[64] But the tort community's preoccupation with wrongdoing hardly provides a basis for condemning corrective justice theory. While it may signal a skewed scholarly trend,[65] it certainly does not prove that the theory behind the trend *itself* is conceptually asymmetrical.

In fact, a close examination of that theory reveals just the opposite. Corrective justice is an inherently symmetrical, tightly cohesive and seamlessly integrated moral system. It cannot be dissected into parts and studied in separate pieces. Instead, it must be accepted as a complete entity and analyzed as a whole.

At bottom, corrective justice provides an ideal framework for redressing transactional wrongs. A wrong is a unique moral event shared by at least two people. It is signified by one person's undeserved gain and another's undeserved loss. As factual matter, the wrongdoer's gain is usually connected to the victim's loss by the force of the wrongdoer's causal agency. However, from a normative standpoint, the connection between wrongful gain and wrongful loss always forms from both sides.

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[63] *Id.*

[64] As Ernest Weinrib has recently noted:

Just as tort law assumes the existence of rights but concentrates on specifying what constitutes an infringement of those rights, so tort theorists preoccupy themselves with the role of wrongdoing while ignoring the significance of rights or taking them for granted. Then the abstraction that reflects the nature of the wrongdoing assumes greater salience than the abstraction that reflects the nature of the infringed right.

Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 156 (2001).

[65] This asymmetrical approach to corrective justice found expression in the early work of Jules Coleman, one of that theory's leading proponents. Coleman recognized a fundamental disconnect between wrongdoing and loss; and more specifically, between the duty to repair and the right to recovery. Thus, he spent a great deal of time looking at each side separately, trying to find a way to attach it to the other. Originally, Coleman offered an "annulment" theory of corrective justice. *See* JULES L. COLEMAN, RISKS AND WRONGS 306-11 (1992). Focusing primarily on the victim's loss, Coleman concluded that the point of corrective justice was to annul unjust losses, but noted that it did not place the duty to repair such losses upon any particular person. *See id.* at 309-10. Next, in his "relational" thesis, Coleman concentrated on the concept of wrongdoing. *See id.* at 311-18. Here, he argued that wrongdoing creates certain rights and duties. *See id.* However, he concluded that the wrongdoer's duty was not necessarily to repair the victim's actual loss, but merely to correct his own wrongful conduct—a responsibility that might be satisfied merely by giving an apology. *See id.* at 320-21. Finally, Coleman sought to reconcile his two theses. In his "mixed conception" of corrective justice, Coleman asserted that that theory only imposes upon wrongdoers a duty to fix wrongful losses for which they are causally responsible. *See id.* at 318-24, 326. Although this duty gives the victim grounds for seeking compensation from the wrongdoer, it does not prevent the victim from receiving redress from other sources. Indeed, under the mixed conception, the loss could be annulled by virtually anyone. *See id.* at 327.

What links the two are rights and duties. Rights and duties can be either objective or subjective. In writing his *Ethics*, and developing the concept of corrective justice, Aristotle clearly embraced the idea of objective rights and duties.[66] Objective rights and duties are those required by natural law. They identify entitlements and obligations that each person *should* have in order to lead a virtuous life. However, neither good is specifically enforceable against anyone else. The holder of an objective right does not, by virtue of that right, have the power to force others to respect it. Likewise, the bearer of an objective duty cannot be forced by others to perform it. Because objective rights and duties tell us how people should behave, they are a necessary part of any system of justice. However, without an enforcement mechanism, they cannot compel the sort of interpersonal rectification required by corrective justice.

This coercive power belongs exclusively to subjective rights and duties. A subjective right is a claim-right. It gives its holder a claim to certain entitlements—a claim that can be pressed against specific persons.[67] These persons, in turn, carry subjective duties which make them vulnerable to the other's claim. Since corrective justice seems to create claims to rectification, it must, if it is to accurately describe our current tort system, also be supported by subjective rights and duties.

It is not clear whether Aristotle had subjective rights and duties in mind when he penned his *Ethics*. Some scholars believe that subjective rights did not arise until the fourteenth century, when they were recognized by the English cleric-philosopher, William of Ockham.[68] Other scholars believe that they developed in the 1100s during the Franciscan debate over evangelical poverty.[69] However, there is also support for the notion that subjective rights originated in antiquity, and that Aristotle himself was one of their earliest proponents.[70] If so, one may surmise that he intended corrective justice to be both a template for identifying transactional injustices and a practical weapon for combating them. But even if this were not his intention, his theory of corrective justice could still be used to support such a system.

Aristotle's theory is compatible with a liberal conception of rights and duties. Although Aristotle believed in abstract or absolute justice, he also endorsed the idea of political justice. Aristotle defined political justice as "such justice as exists among people who are associated in a common life with a view to *independence*, and who enjoy *freedom* and *equality*."[71] Political justice guarantees people the autonomy

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[66] *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 21-22, 28 (1997).

[67] *See id.* at 28

[68] *See id.* at 13-14 & nn. 5, 7 (listing advocates of this view and focusing, in particular, on the work of Michel Villey).

[69] *See id.* at 34-42, 54-77.

[70] *See* Fred D. Miller, Jr., *Aristotle's Theory of Political Rights*, *in* ARISTOTLE AND MODERN LAW 309-50 (Richard O. Brooks & James Bernard Murphy eds., 2003) (offering evidence that Aristotle recognized subjective rights).

[71] ARISTOTLE, *supra* note 18, at 165 (emphasis added).

necessary for making voluntary choices, which, in turn, are necessary for pursuing virtue.[72] To have autonomy, however, people have to have rights and duties. Only rights can give people the freedom of choice, and with it, the power to protect that freedom from outside incursion. Likewise, only duties can prevent people from usurping the freedom of others and jeopardizing their moral equality.

The only question is whether these rights and duties are subjective, personal and privately enforceable, or are merely objective and general, and thus not legally enforceable at all. We do know that the ancient Greeks, at the time of Aristotle, permitted private parties to sue others who had caused them harm.[73] We also know that Aristotle believed that an aggrieved party should "have recourse to a judge" who was obligated to redress that party's wrong by compelling corrective action by his wrongdoer.[74] Both facts appear to confirm the existence of subjective rights and duties. At the very least, such evidence seems to imply their presence, since Aristotle's overarching moral theory would be virtually impossible to implement without them.

This liberal conception of rights and duties explains why a wrong, as used in corrective justice theory, must always receive holistic analysis. Subjective rights and duties never exist alone. When they arise, they arise together.[75] Moreover, such rights and duties are not divisible. Rather, they are inseparable. Indeed, they are but opposite sides of the same coin.[76] A subjective duty obligates its bearer to respect the rights of a specific individual or group of individuals. It also renders the bearer vulnerable to intrusion by the same person or group.[77] Conversely, a subjective right entitles its holder to expect a certain degree of deference from the duty-bearer. If that deference is not forthcoming, it also empowers the right-holder to take some action against him.[78] Because subjective rights and duties are inseparable, the breach of such a duty always violates somebody's subjective right. By the same token, the violation of such a right always entails the breach of someone's correlative duty.

When a duty-bearer breaches his subjective duty, he receives a wrongful gain. Specifically, he exercises more freedom—a freedom of carelessness—than his duty permits.[79] Likewise, when a right-holder's right is violated, he sustains a wrongful loss. Here, the right-holder loses the liberties of exclusion and self-determination that his right requires.[80] Because the right and the duty are merged, so are the resulting gain and loss. Thus, the duty-bearer's gain is never unilateral.

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[72] *See id.* at 66-67, 73.
[73] *See* ROBERT FLACELIERE, DAILY LIFE IN GREECE AT THE TIME OF PERICLES 228-29 (1996).
[74] ARISTOTLE, *supra* note 18, at 155.
[75] *See* CALNAN, *supra* note 59, at 594.
[76] *See* CALNAN, *supra* note 59, at 42.
[77] *See id.*
[78] *See id.*
[79] *See id.* at 72.
[80] *See id.* at 99-100.

Instead, his gain is always taken from some other person. Naturally, the converse is also true. When a right-holder sustains a loss, that loss always produces a gain for some derelict duty-bearer.

Occasionally, the gain and the loss are tangible and identical, at least in the sense that both are embodied in the same material thing. Thus, if *D* takes *P*'s widget and refuses to give it back, *D*'s gain (in possessing the widget without paying for it) is virtually the same as *P*'s loss (in being dispossessed of the widget without receiving something of equivalent value).[81] However, these situations are extremely rare. Many times—as when *D* carelessly injures *P*'s body—*D* merely inflicts a tangible loss on *P* without receiving any tangible gain. Other times—as in cases of technical trespass where *D* merely invades the airspace of *P*'s property—*D* may cause no tangible loss to *P* at all. Nevertheless, when a duty is breached and a right is violated, there will always be at least some gain and some loss.

The reason is that, as protectors of freedom, subjective rights and duties always carry moral value. The duty-bearer who violates another's rights—even if he causes no actual damage—gains a benefit of moral superiority.[82] He gets to treat that person as the means to the end of his own happiness, not as an end worthy of dignity and respect. Likewise, the right-holder who incurs this treatment is correspondingly debased. He is transformed from a moral agent into an object of exploitation and coercion. In the process, he not only loses his freedom, he also loses his claim to moral equality.

Because subjective rights and duties interlock so completely, every right-duty combination produces a completely unique moral relationship. The duty-bearer owes his obligations *only* to the person who holds the correlative right. Similarly, the right-holder can exercise his protective power *only* against the corresponding duty-bearer. The result is a private and personal network of entitlements and liabilities shared *exclusively* by these two parties.[83]

This does not mean that other rights and duties may not govern their relationship. For example, if the state enacted a criminal law against battery, every citizen would owe a duty to the state to refrain from such conduct, and the state would receive a right to punish all violators. However, the existence of such "public" rights and duties does not in any way diminish the exclusivity of the parties' private moral relationship. Even in the face of such legislation, a risk-creating actor still may owe a private, subjective duty of care to his potential victims, and any party who is endangered or actually injured still may enjoy a private, subjective right to protection or correction.[84] In this relationship, the right-holder, not the

[81] The gain and loss are "virtually" the same because the unsolicited taking inflicts an intangible dignitary loss upon the victim which may not be redressed by the mere return of the stolen item.
[82] *See* CALNAN, *supra* note 59, at 35, 100-01, 103, 133-34, 167, 1-68.
[83] *See id.* at 41-42, 47-48.
[84] *See* Calnan, *supra* note 59,*id.* at 605-06.

state, possesses the exclusive power to enforce the duty-bearer's private duty, and the duty-bearer possesses the exclusive vulnerability to the right-holder's power.

This exclusivity characteristic has obvious ramifications for corrective justice. Under this theory, the wrongdoer's gain is the exclusive concern of his victim. In fact, the wrongdoer's gain *is* his victim's loss. The wrongdoer does not disrespect, disempower or debase in a vacuum, but dehumanizes a specific person. Whatever he gains from such misconduct necessarily comes at the expense of that party. By the same token, the victim's loss does not just magically appear. It is brought about, and defined by, the person who inflicts it. Indeed, it effectively makes the victim the wrongdoer's moral slave, forcing him into a role of abject submission. Because the wrong is personal, outsiders cannot end it; only the wrongdoer can release the victim from his moral bondage and only the victim can release the wrongdoer from his moral depravity.[85]

So, does this mean, as Goldberg seems to assume, that the victim *must* enforce the wrongdoer's duty? Certainly not. The mere fact that the victim has the exclusive *power* of correction does not necessarily require that he *use* it. The right to corrective justice can be exercised at the holder's option. Indeed, it is designed to replenish his freedom of choice, not to curtail it. In this way, the corrective justice right is not unlike other private rights. For example, if I pay for a weekly landscaping service, I may have a contractual right to have my grass cut, but nothing within that right also obligates me to force the landscaper to show up, even if I do not want him to. To some people, perhaps even Professor Goldberg, the optional nature of corrective justice may seem odd. They fear that if the victim does not seek corrective justice then the wrongdoer will get away with an injustice. This might be true from a social justice standpoint, if, for instance, the wrongdoer's deed is criminal and the state fails to prosecute. From a corrective justice standpoint, however, this concern is completely misplaced. As Aristotle once observed, no one can be a voluntary victim of injustice.[86] Thus, an injured person who freely and voluntarily chooses to accept a loss by foregoing his right to corrective justice, necessarily, by that action, also extinguishes his right to claim that his loss is unjust.

C. Conceptual Inaccuracy

The insiders' final argument in this series is that, even when corrective justice is substantive and properly focused, it does not accurately explain the concept of tortious wrongdoing. Indeed, Professor Zipursky, in his article, provides several illustrations of this deficiency. Because Zipursky discusses each illustration, I will do the same. However, like Zipursky, I cannot provide extended analysis. Given the number and complexity of these issues, I will seek merely to point the reader in the right direction.

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[85] *See* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 73-74 (1993) (discussing both the unique moral injury caused by a tort and the means for redressing such an injury).
[86] ARISTOTLE, *supra* note 18, at 174-75.

1. Overinclusiveness

Zipursky's first claim is that corrective justice's conception of wrongdoing is overinclusive, characterizing as wrongful some acts that tort law does not. For Zipursky, such overinclusiveness leads to a substantive standing problem.[87] Specifically, some plaintiffs who would have a substantive right to sue in corrective justice have no such right under the current tort system. This problem, in turn, is caused by the concept of foreseeability. According to Zipursky, corrective justice relies on the concept of foreseeability to define wrongdoing and to determine the liabilities of wrongdoers.[88] He notes, however, that tort law does not do the same. In some cases, it relieves defendants of liability even for reasonably foreseeable injuries.[89] Thus, he argues, tort law's conceptions of wrongdoing and substantive standing are considerably narrower than the ones contained in corrective justice theory.

Zipursky supports his overinclusiveness argument with the following case illustration: "[P]arents who are traumatized when a surgeon's negligence on the operating table disfigures their child will not be able to recover from the surgeon for this trauma—even though our tort law now views emotional trauma as sufficiently real to be compensable, even though it regards the surgeon's negligence as a legal wrong, and even though the emotional impact on parents of having their child disfigured is surely foreseeable."[90] However, Zipursky's illustration, and the conclusions he draws from it, are overstated. Tort law is not as restrictive, and corrective justice is not as unrestrictive, as he makes them out to be.

On the tort side, Zipursky states unequivocally that the parents are without a remedy. However, this is far from clear. Certainly, if the parents had witnessed the operation, they might recover as bystanders.[91] Alternatively, if the parents themselves shared a special relationship with the surgeon, they might be viewed as direct victims of the surgeon's negligence.[92] Such a relationship is not so far-fetched, since, assuming the child is a minor, the parents not only would have hired

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[87] *See* Zipursky, *supra* note 7, at 714-18.

[88] *See id.* at 715-18.

[89] *See id.* at 715-16.

[90] *Id.* at 717.

[91] Under the foreseeability test of *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968), a bystander generally may recover for emotional injuries if he can satisfy the following criteria: (1) he is located at the scene of the accident, (2) he suffered a direct emotional impact from his sensory and contemporaneous observance of the accident, and (3) he is closely related to the victim. At least one court has held that a parent who witnesses a negligent medical procedure performed on his child meets these criteria and is entitled to bystander recovery for his emotional distress. *See* Carey v. Lovett, 622 A.2d 1279 (N.J. 1993) (father was in the delivery room when his baby was negligently delivered by the defendant- doctor).

[92] *See* Burgess v. Superior Court, 831 P.2d 1197 (Cal. 1992) (mother who suffered emotional distress from the negligent delivery of her child was a direct victim of the doctor's negligence); *Carey*, 622 A.2d 1279 (same); *see also* Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278 (Cal. 1989) (mother who was involved in family psychiatric therapy was a direct victim of the therapist's molestation of her child); Molien v. Kaiser Hosp. Found., 616 P.2d 813 (Cal. 1980) (husband who was told by his wife, per

and paid the surgeon, they also would have received the surgeon's informed consent information and executed the consent form on their child's behalf. Moreover, if the surgeon's malpractice was extreme and outrageous, and if he either knew or recklessly disregarded a risk that his conduct would cause the parents severe emotional distress, he might be liable for the parents' actual trauma, no matter where the parents were or what relationship they may have had with him at that time.[93] Finally, even if the parents could not recover under any of these theories, they still might seek compensation in a derivative action for filial consortium.[94] Such an action, which provides parents relief for the loss of their child's "love, affection, society, companionship, comfort, care and moral support," redresses the emotional damage caused to their relationship, including the relational trauma brought about by their child's disfiguring injury.[95]

On the corrective justice side of things, Zipursky makes three interconnected arguments: (1) the concept of foreseeability alone determines the morality of the surgeon's act; (2) the moral quality of that act is the sole basis for judging the surgeon's moral responsibility; and (3) the assessment of moral responsibility is exclusively deontological in nature. In each case, however, Zipursky's claim is both misconceived and overbroad.

Regarding the first point, Zipursky gives foreseeability far more weight than it actually deserves. Foreseeability is an important factor in moral analysis, but it certainly is not decisive. It is accompanied, and inevitably limited, by a number of other factors. For example, in judging the morality of an act, one would want to know not just whether it creates foreseeable risks, but also what kinds of risk it creates. Does it threaten persons or only property? Does it risk death or mere inconvenience? Does it endanger many or just a few? One would also need to examine the virtue of, and motive behind, the act. Was it done to harm or help? Was it a "best effort" or only a "lame attempt"? Did the actor deliberately impose the risk or just inadvertently overlook it? Finally, one would have to determine whether, and to what extent, the actor possessed the power to control or influence that risk. Could it have been stopped or would it have arisen no matter what? Was the actor in control or was control actually wielded by someone or something else?

Given these considerations, it is impossible to tell from the facts provided by Zipursky whether the surgeon above committed a moral wrong against the par-

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her doctor's instructions, that she had syphilis and that he should be tested, was a direct victim of the doctor's misdiagnosis of the wife).

[93] *See* Kunz v. Deitch, 660 F. Supp. 679 (N.D. Ill. 1987) (permitting a father to bring an action for intentional infliction of emotional distress against his daughter's maternal grandparents after they took custody of the child for seven months and later placed her up for adoption).

[94] A number of states now allow filial consortium claims. *See* Robert Michael Ey, Annotation, *Cause of Action by Parent for Loss of Child's Consortium, in* 7 CAUSES OF ACTION 2d 319 §§ 3-4 (2003) (listing states).

[95] Miller v. Westcor Ltd. P'ship., 831 P.2d 386, 393-94 (Ariz. 1992) (allowing a claim for filial consortium based on evidence that the child sustained disfiguring burn injuries which could cause her to develop self-image problems, which in turn, could affect her future relationship with her parents).

ents. We do know that his negligence precipitated the parents' emotional reaction. But there is still much we do not know. Did the surgeon inform the parents about the risk of a mishap? Did he disclose his experience with such procedures? Did he give the parents an opportunity to retain another surgeon or to reject the procedure entirely? Did the surgeon receive compensation for his services? Was the surgery necessary to save the child's life? Was it otherwise successful in curing the child? Perhaps, once this additional information is known, Zipursky's conclusion would still be correct. But even if it were correct, evaluation of the surgeon's moral responsibility would not be nearly as easy as Zipursky seems to suppose.

No matter what conclusion one reaches about the surgeon's conduct, that conclusion alone could never end the discussion of his moral responsibility. Why? Because corrective justice judges *trans*actions, not just actions. Thus, it must undertake a bilateral analysis, examining *both* the act *and* the injury—the gain *and* the loss—*together* as an inseparable unit. It also requires a balance and accommodation of the parties' conflicting interests.[96] It must weigh the actor's right to act as he pleases against the injured party's right to be secure.[97]

Thus, in the illustration mentioned above, a court of justice could not simply find that the parents' emotional trauma was foreseeable and award them compensation for their loss. Rather, it would have to ask a number of additional questions. What duty did the surgeon owe the parents? What did the surgeon gain from their transaction? Was this gain unearned or undeserved? How difficult would it be for the surgeon to protect the parents from this particular type of harm? Was the parents' loss unexpected and unavoidable? How will a liability judgment impact both the doctor's ability to practice medicine and the parents' ability to recover from their loss? When all the evidence is in, maybe the transaction will still appear wrongful; maybe it will not. However, one thing is sure: the final judgment, whatever it may be, will not rest exclusively on the moral propriety of the surgeon's conduct.

In fact, the judgment will not even be exclusively moral, at least not in the way Zipursky seems to think. Although corrective justice may have been framed as a deontological ideal, it has been used, both in ancient and modern times, as a moral component of a larger political system. Now, as then, both the system and its components depend on liberal values. As Aristotle noted, freedom is a necessary precondition to political justice, which in turn, is a necessary precondition to moral choice and action.[98] Thus, part of the government's job, and part of the task of a state-run system of corrective justice, is to preserve and balance people's freedoms. Indeed, in our liberal-democratic culture, which generally does not attempt to compel virtuous behavior, this is the tort system's primary function.

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[96] *See* CALNAN, *supra* note 59, at 36.
[97] *See id.* at 35-36.
[98] *See* ARISTOTLE, *supra* note 18, at 79, 81, 86, 169.

In such a system, justice seems to require a liberal, or mild moral, definition of wrongdoing,[99] not one that is strictly deontological. Granted, liberal wrongdoing, like its deontological cousin, relies on the concept of foreseeability, since foreseeability delimits both the scope of an actor's positive freedom and the zone of negative freedom afforded to everyone else. However, unlike its deontological counterpart (as framed by Zipursky), liberal wrongdoing is not defined by that concept. Instead, it balances foreseeability with other liberty interests. In some cases, mere foreseeability may be enough to trigger a finding of fault. However, in other cases, foreseeability may be narrowly circumscribed or overpowered by competing concerns.

This interplay between foreseeability and freedom is well-illustrated by the case of *McCollum v. CBS, Inc.*[100] In *McCollum*, nineteen-year-old John McCollum killed himself after listening to music recorded by rock singer, Ozzy Osbourne, and marketed by his record company CBS. John's estate, suing on his behalf, brought a negligence action against Osbourne and CBS, contending that Osbourne's provocative lyrics, which were targeted to "troubled" youths, prompted John's death.[101] The California Court of Appeals disagreed and dismissed the plaintiffs' claim, holding that neither defendant owed John or his estate a duty of care.[102] In deciding the duty issue, the court acknowledged that the foreseeability of John's suicide was a key issue.[103] However, it also made clear that foreseeability was not its only, or even its most important, consideration; the court also had to weigh the defendants' freedoms of speech and artistic expression under the First Amendment.[104] The court found these liberty interests to be compelling. Realistically, the defendants could not prevent such injuries unless they censored their lyrics or stopped producing controversial music altogether.[105] According to the court, this price was too high. Here, the defendants' freedom to make and sell music simply outweighed the plaintiffs' freedom to be protected against its potentially harmful effects. Thus, even though the defendants may have foreseen that their music might influence and ultimately injure someone like John, their decision to market it was not wrongful in the liberal-moral sense of that term.

Liberty interests aside, the simple truth is, no system of private justice could ever repair every foreseeable harm to every person, no matter how determined it was to do so. As I shall demonstrate later on,[106] the *practice* of corrective justice contains both express and implied limits. These limits ration justice on the

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[99] This liberal conception of wrongdoing is mildly moral because, although it faults people for failing to respect the equality, dignity and freedom of others, it generally does not fault them for engaging in non-virtuous, but otherwise self-regarding activities.

[100] 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

[101] *See id.* at 189-91.

[102] *See id.* at 195-97.

[103] *See id.* at 195.

[104] *See id.* at 191-95, 197.

[105] *See id.* at 195, 197.

[106] *See infra* Part III.B.

basis of desert. Thus, while it might provide full relief to parties with serious physical injuries, it might have to deny or limit recovery to those with less certain and less debilitating harms, including, perhaps, the parents in Zipursky's hypothetical.[107] Granted, such a system may not be ideal. However, it remains fair and just—even if it does not correct every deontological wrong—so long as it gives the most deserving people ample justice most of the time.

2. Underinclusiveness

Zipursky's second inaccuracy claim is the reverse of the first. In addition to being overinclusive, he argues, the concept of corrective justice may actually be *under*inclusive. In these situations, parties classified as wrongdoers by tort law are nevertheless relieved of moral blame by corrective justice theory.[108] According to Zipursky, this discrepancy arises when the actor has "low intelligence."[109] The actor may engage in an activity in which he is entitled to participate, may conduct himself to the best of his ability, but still be found liable if he causes someone harm.[110] To Zipursky, "it is far from clear why [he] should have a moral duty of repair to the one [he] injures."[111] In fact, Zipursky contends "that the breach of a moral duty of due care cannot be inferred from the failure to comply with a standard of conduct if the defendant's diminished capabilities substantially undermine [his] ability to comply with that standard."[112]

Although this claim has initial appeal, it too contains serious flaws. From a deontological perspective, there is no doubt that an actor's moral responsibility depends on his ability to know of and control the consequences of his behavior. It is also clear that, at a certain point, a person's capabilities may be so low that he can no longer be held morally accountable for his actions, at least not in any deontological sense. However, Zipursky has not necessarily identified that point. He argues that no moral culpability attaches if the person's diminished capacities *substantially undermine* his ability to meet the standard of ordinary care. I disagree. A person whose intelligence merely *hampers* his compliance efforts may still be capa-

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[107] Although, as Zipursky notes, emotional injuries are now compensable, this was not always so. In fact, until fairly recently, pure emotional injuries were not compensable at all, or were compensated only in rare situations. *See* DAN B. DOBBS, THE LAW OF TORTS 835-36 (2000). Various reasons have been offered for this cold reception. For example, emotional injuries are difficult to identify and quantify. *See id.* at 823, 836. Because of their elusiveness, they are easily falsified. *See id.* at 822, 836. Emotional injuries generally are less liberty-restricting than physical injuries. *See id.* at 822. Insofar as people are emotionally interconnected, and emotional responses are triggered in different ways in different people, they are extremely hard to control and contain, and actions based on emotional distress are hard to limit. *See id.* at 824. Thus, even after emotional distress actions began to emerge, they were both highly disfavored and narrowly circumscribed. *See id.* at 836-38. Even today, courts continue to cite these reasons to restrict such actions or to inhibit their extension. *See* Thing v. La Chusa, 771 P.2d 814 (Cal. 1989)(citing arbitrariness and difficulties in line-drawing as bases for further restricting recovery for bystander emotional distress).

[108] *See* Zipursky, *supra* note 7, at 726.

[109] *Id.*

[110] *Id.*

[111] *Id.*

ble of complying. The fact that he may find it *harder* than most to comply does not automatically relieve him of the moral responsibility to do so. He might be required to acquire information, assistance, or skills that he does not already possess. Or, he might be expected to refrain from participating in activities that he does not understand or cannot comprehend. However, unless his mental abilities completely *prevent* him from exercising ordinary care, he still remains a moral agent, and he still continues to bear at least some responsibility for his conduct.

The larger and more important question is whether persons totally incapable of compliance—a group I shall call the mentally incompetent—have the same moral status. Here, Zipursky's argument appears considerably stronger. Certainly, as I have noted above, the mentally incompetent are not deontological wrongdoers. Nevertheless, their conduct also is not morally neutral. As players on a social stage, the mentally incompetent are just as susceptible to the demands of justice as everyone else.

Justice, we have seen, is premised on values of fairness and equality. To sustain those values, justice generally requires that all people abide by the same social standard. Of course, when equity so requires, the standard can be adjusted, so long as the adjustments comport with the law's underlying value system. As I will explain more fully later on, American tort law, which values liberty and security, uses the criteria of risk and need to adjust its liability standard.[113] The riskier one's behavior, the more threatening it is to the freedom of others. Thus, the greater his responsibility under the standard will be.[114] Conversely, the more vulnerable one's freedom, the more freedom he needs to protect it. Thus, the further the standard will drop in his favor.[115]

When applied to the mentally incompetent, this justice scheme supports the current liability rule—a rule that essentially requires them to act at their own peril. Insofar as the mentally incompetent are incapable of acting reasonably, they are, under a literal interpretation, inherently *un*reasonable people. Since reason is necessary to safe social interaction, they also are, in a strict probabilistic sense, abnormally dangerous. Using the risk criterion, therefore, they may be required to meet a heightened standard of care.

Although the need criterion generally may relax the standard, it offers no relief to the mentally incompetent. The need criterion dispenses greater freedom only to those who can benefit from it. For example, children receive greater freedom of action under the lower, reasonable child standard because they both need and can use that freedom to experience life, make mistakes, and develop the knowl-

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[112] *Id.*

[113] *See* CALNAN, *supra* note 59, at 88-95; *infra* Part IV.A.

[114] *See id.* at 183-84, 185.

[115] *See id.* at 185-86.

edge expected of responsible adults.[116] The mentally incompetent, by contrast, have the need but not the ability to do anything about it. No matter how much extra freedom they receive, they will never come any closer to meeting society's standard of justice.[117] Thus, there is good reason, from a liberal standpoint, for keeping that standard intact.

If one also considers the *victims* of the mentally incompetent, the reasons for maintaining that standard grow even stronger. Justice is not simply about punishing morally undesirable behavior; it is also about correcting inequalities between and among people. Corrective justice, in particular, seeks to correct the imbalances that result from private transactions. When the mentally incompetent harm other people, their transactions create imbalances that are no less important or real than those caused by the able-minded. In fact, they create the very gains and losses that corrective justice seeks to repair.

Obviously, a loss is a loss no matter who causes it. However, it may be hard to imagine how the mentally incompetent can benefit from unrestricted but involuntary conduct. Yet they actually do "gain" three important advantages. First, they enjoy an unjustified and dangerous freedom of "unreasonableness." Second, they receive an illiberal and unprecedented power of subjugation, converting their victims into unwilling benefactors who must sacrifice their interests for the mentally less-fortunate. Finally, they benefit from an obvious double standard, acting according to their own subjective whims while others adhere to an objective rule of law. Although they may not seek such advantages, or even know that they exist, they still gain from their actions, and those gains still come at the expense of their neighbors. Thus, no matter what their level of cognition, their transactions still fall within the realm of corrective justice.

In saying this, I do not mean to suggest that the current rule *actually derives* from the concept of corrective justice. It may just as easily have sprung from fear, distrust or contempt. Further research is necessary to determine its true history. All I am saying is that the liberal concept of corrective justice at least lends the rule some support. This does not mean that there are not other just solutions to the problem. Society may gain by encouraging or permitting the mentally incompetent to engage in social interaction. If so, then corrective justice might relieve them of responsibility, and require the state to compensate their victims. This would move the law closer to its deontological roots, yet still not offend its basic principles of justice. Because I am not a descriptive purist, I am not particularly concerned about finding a coherent explanation for the law's current state. Rather, I am more concerned about identifying the law's aberrations and in finding ways to fix them.

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[116] *See id.* at 183.
[117] *See id.* at 183-84.

3. Disproportionality

In his next claim of inaccuracy, Zipursky faults corrective justice for failing to adequately explain the apparent disproportion that often exists between wrongdoing and tort liability. Specifically, Zipursky notes that a defendant's duty to pay compensation for his tort regularly exceeds—sometimes to the extreme—the degree of moral fault displayed by his conduct.[118] So, if the defendant's rather trivial act of carelessness results in a catastrophic loss to his victim, he is required to pay the entire amount of the victim's damage, even though his wrongdoing, in moral terms, pales in comparison to the loss.

Before addressing the merits of this argument, I first must note that Zipursky's description of this phenomenon is itself somewhat lacking. Zipursky poses a hypothetical in which the house guest of a property owner slips on snow left on the latter's negligently shoveled driveway, causing the guest to tear the cruciate ligament in his knee.[119] He supposes further that the guest requires surgery and hospitalization, misses four months of work, requires home care and eight years of medical therapy, misses a prepaid ski vacation, loses the ability to play most sports and suffers agonizing pain, and probably will continue to do so for the rest of his life, all at a cost of $555,000.[120] He then summarily concludes that "[i]t is a far reach—even assuming all the facts—that [the property owner's] moral duty of repair amounts to $555,000."[121]

However, Zipursky fails to explain why this is such a reach. If the property owner creates a hazard which presents a high risk of serious harm, then springs that hazard on a reliant and trusting acquaintance, why is he without a moral responsibility to answer for the very losses his hazard was likely to cause? Unfortunately, Zipursky has no answer to this question. He merely adds that the property owner's failure to pay this amount "would not be considered a failure to comply with her moral duties," that neither the property owner nor anyone else would think her remiss for failing to pay this sum, and that the guest would not even expect such payment.[122] Once again, however, he fails to substantiate his conclusions in any way. Perhaps he assumes, without saying, that everyone involved would consider $555,000 too steep a fine for the moral indiscretion of mis-shoveling snow. If so, he completely misconstrues the offense. It is not the unilateral act of bad shoveling, but the imposition of a serious hazard upon, and the infliction of serious injury to, an unsuspecting victim that constitutes the property owner's wrong.

In my view, the moral dimensions of this wrong are not self-evident. They certainly do not support Zipursky's bald assumption that the property owner has

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118 *See* Zipursky, *supra* note 7, at 727-29.
119 *See id.* at 728.
120 *See id.*
121 *Id.*
122 *Id.*

only a negligible duty to repair. In fact, as I will discuss below, common and accepted notions of responsibility may actually contradict, rather than bear out, that assumption.

Zipursky's assessment of proportionality in tort law is deficient in another respect as well. Contrary to Zipursky's depiction, tort law does not have a consistent position on this issue. It is true that tort law separates fault and damages into separate elements of proof. It is also true that, in judging one element, juries are not supposed to consider the other. Thus, it is possible for a jury to issue a large damage award that reflects only the existence, not the degree, of the defendant's fault.

However, the law also openly espouses a firm commitment to proportionality. For example, the doctrine of comparative fault attempts to proportion a defendant's liability to his percentage of allocated fault. Thus, if the jury believes that the plaintiff's loss exceeds the defendant's level of culpability, it may lower the defendant's fault percentage—allocating responsibility to other parties, other persons not in court or other causal forces—to achieve the appropriate balance.[123] At other times, the proportionality principle is expressed in the element of duty. Indeed, the rules for emotional distress, pure economic loss, and negligence *per se* all are grounded, at least in part, in the idea that the defendant's liability should not be disproportionate to his fault.[124] Thus, even if Zipursky were right about the apparent disproportionality in damage awards, he does not, and cannot, explain the law's countervailing normative inclinations.

As to the merits of Zipursky's disproportionality claim, I do not believe he is right, at least not entirely. Corrective justice corrects transactional wrongs, not just tangible injuries. As noted previously, a transactional wrong consists of an undeserved gain by one party and an undeserved loss by another. At first, the gain and the loss may seem completely separate. On a scale from 1 to 10, 10 being the greatest, the wrongdoer's gain may appear to have a unit-value of 3, while the victim's loss may appear to have a unit-value of 7. If the wrongdoer must pay the full value of the victim's loss, his liability may seem disproportionate to his fault.

However, this analysis rests on a false premise. Under corrective justice, the gain and the loss are actually inseparable. The wrongdoer's gain is defined by the loss it inflicts on the victim, and the victim's loss is defined by the benefit it bestows upon the wrongdoer. This explains why, in negligence law, the probability and magnitude of the loss threatened by a defendant's conduct are important ingredients in the determination of his negligence.[125] The more people he endangers, the

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[123] *See* DOBBS, *supra* note 107, at 504, 508-10, 532-34.

[124] *See* Thing v. La Chusa, 771 P.2d 814, 826-27 (Cal. 1989)(emotional distress case); People's Express Airlines, Inc. v. Consol. Rail. Corp., 495 A.2d, 107, 110 (N.J. 1985)(economic loss case); Perry v. S.N., 973 S.W.2d 301, 308 (Tex. 1998)(negligence *per se* case).

[125] These are the "P" and "L" factors in Judge Learned Hand's famous "B<PxL" formula for determining negligence. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

more likely his conduct will cause harm; and the more serious the harm he threatens, the more he stands to "get away with" if he is not brought to justice.

Even if the probability of harm is low and the number of potential victims small, an otherwise innocuous act may seem more blameworthy if it results in a foreseeable, catastrophic injury. Thus, while parking a car on a hill without setting the emergency brake may seem to be a relatively minor indiscretion, it may appear downright reprehensible if the car rolls down the hill and seriously injures a pedestrian. Initially, the unit-values for the gain and the loss might appear to be roughly as stated above: 3 for the gain and 7 for the loss. In reality, however, the gain and the loss combine to form a wrong with a unit-value of 10. Because justice lies in the mean between excess and deficiency, and the mean in this case is 5, the defendant should pay, and the plaintiff should receive, 5 units of value. To the extent that the defendant's 5 unit-value transactional liability exceeds our original 3 unit-value appraisal of his conduct, corrective justice may actually explain why tort defendants sometimes must pay damage awards greater than their apparent fault.

Interestingly, juries appear to be innately predisposed to this corrective justice approach to liability. Studies show that tort juries reach decisions through a holistic process.[126] They tend to overlook legal instructions and render an "overall" judgment of responsibility, often commingling various elements of the plaintiff's cause of action.[127] According to Neal Feigenson, "they may blur distinctions between judgments of responsibility and judgments of compensation, so that the former is improperly influenced by perceptions of the severity of the injury and the latter is improperly influenced by perceptions of blameworthiness."[128] Specifically, Feigenson notes a "severity effect," whereby juries attribute greater fault to defendants who cause more severe injuries than they do to defendants who inflict relatively minor injuries.[129] Indeed, in one study, researchers presented to two different test groups the same car parking hypothetical mentioned above. The first group was told that the car hit a tree stump; the second was informed that the car struck a person. When asked to evaluate the car owner's responsibility, the second group—which assumed the more serious injury—allocated more blame to the owner than the first.[130]

Admittedly, the corrective justice approach does not exactly mirror the approach currently used in tort cases. Because the plaintiff's right to compensation is always supposed to reflect the amount of his actual loss, the defendant sometimes may pay more than his moral gain and the plaintiff sometimes may receive more

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126 *See* NEAL FEIGENSON, LEGAL BLAME 17 (2000).

127 *See id.*

128 *Id.*

129 *See* Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 147-48 (1995).

130 *See* Elaine Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73, 77 (1966).

than his moral loss. Going back to our earlier example in which the defendant's gain is estimated at 3 and the plaintiff's loss is estimated at 7, we saw that corrective justice might require the defendant to pay and the plaintiff to receive 5 units of value. Under the tort system, however, the defendant would have to pay 7 units for the plaintiff's loss, and the plaintiff would be entitled to receive 7 units of compensation. Here, the defendant's liability actually does exceed his moral gain by 2 units. Thus, corrective justice and tort law are not entirely consistent on this issue. But, then, neither are they as far apart as Zipursky makes them out to be.

4. Recourse, Not Repair

Zipursky's final claim of inaccuracy concerns the duties underlying the concept of wrongdoing. Under corrective justice theory, an act of moral wrongdoing supposedly triggers the wrongdoer's duty to repair the victim's loss. According to Zipursky, however, tortious wrongdoing creates no such duty.[131] Instead, it merely activates the victim's right of recourse and makes the wrongdoer vulnerable to that action.[132] The victim's right of recourse *does* give rise to a corresponding duty in the state to make such recourse available.[133] However, it does *not* obligate the *wrongdoer* to pay the victim *damages*.[134]

On this point, Zipursky hits some but misses more, and ultimately strikes out. He correctly identifies the two-tiered structure of the tort system. The government provides a system for civil recourse, and private citizens use this system to settle their scores. What Zipursky misses is that both tiers of this system are rooted in the concept of justice.

The government's relationship to its citizens is a matter of political justice.[135] Since Americans value freedom, the primary obligation of American government is to fairly distribute, promote, protect, and preserve individual liberties. This is what a liberal government "owes" its citizens and also what each citizen is "due."[136] Our government maintains the tort system, and creates various tort rules, to fulfill its duty of political justice.

When citizens interact, either voluntarily or involuntarily, they also form relationships. Their relationships are matters of private justice. Private justice requires citizens to treat each other fairly, exercising their freedom in a way that does not unduly restrict the freedom of others.[137] Thus, each citizen is "due" a certain amount of care and respect from those who threaten his interests. If this entitlement is violated, and the violation results in someone's harm, the state may take action

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131 *See* Zipursky, *supra* note 7, at 720.
132 *See id.* at 720-21.
133 *See id.* at 739.
134 *See id.* at 720.
135 *See* CALNAN, *supra* note 59, at 20-21, 121; *see also* Calnan, *supra* note 59, at 586-88.
136 *See* CALNAN, *supra* note 59, at 20, 25, 121.
137 *See id.* at 20, 121.

itself, or it may authorize the victim to secure his freedom on his own—specifically, by filing a tort suit.[138]

According to Zipursky, the victim's harm establishes his right to civil recourse—a right that merely entitles him to go to court. To get redress, he then must prove that his alleged wrongdoer breached a relational duty of care.[139] Once again, Zipursky starts off on the right track. Certainly, American tort law is based on rights and duties. Also, no one can question that there is a right to civil recourse, and that it is correlative to the government's duty to protect individual liberties. There is not even a doubt, in my mind, that relational duties underlie all torts. The problem is that Zipursky fails to tie these truths together. He says that the right and the wrong are separate, that an act of wrongdoing imposes on the wrongdoer no duty of repair, and that the victim receives no corresponding right to corrective justice. Unfortunately, he is wrong on all counts.

In a prior book, I explained how rights and duties support a liberal conception of tort law.[140] Rights come in two varieties. Primary rights identify protected liberty interests. These rights are not absolute, but operate as prima facie markers of entitlement.[141] All primary rights are equipped with secondary rights. Secondary rights secure primary rights by giving their holders the power to interfere with the interests of others.[142]

Secondary rights can be compulsive, preemptive, regulatory, corrective or punitive. A compulsive right allows the holder to compel someone to do as he says.[143] A preemptive right permits him to stop another's conduct.[144] A regulatory right authorizes him to control the manner in which another behaves.[145] A corrective right—the right which implements corrective justice—empowers him to invade another's interests to repair a transactional wrong.[146] And, a punitive right enables him to inflict punishment upon a wrongdoer.[147]

These rights are not mutually exclusive. Rather, two, three, four or all five of these rights can accompany a given primary right.[148] The proper allocation depends on the justice concept of proportionality. The more important the primary right, the larger the number of secondary rights that will be assigned to defend it.[149]

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138 *See* Calnan, *supra* note 59, at 586-88, 593.
139 *See* Zipursky, *supra* note 7, at 744-46.
140 *See* CALNAN, *supra* note 59, at 23-30, 121-29.
141 *See id.* at 23.
142 *See id.*
143 *See id.* at 24.
144 *See id.*
145 *See id.*
146 *See id.* at 23-24.
147 *See* Calnan, *supra* note 59, at 597-98.
148 *See id.* at 598-99.
149 *See* CALNAN, *supra* note 6259, at 95.

When someone engages in risky behavior, he develops a duty of care to those he endangers. The dangerous act, in turn, immediately connects that duty to the rights of the endangered—thus establishing moral relationships between the actor and his potential victims—and automatically triggers the latter's secondary rights.[150] From that instant, the actor becomes vulnerable to whatever powers his potential victims possess, and he remains vulnerable until he ends the threat.[151]

If a potential victim holds any pretransactional (compulsive, preemptive or regulatory) rights, he may use them to protect his underlying primary right. His power, however, is not unlimited. His secondary rights are conditional because he is beholden to the dictates of justice. For example, someone threatened with battery typically possesses a preemptive right of self-defense. This right gives the potential victim the power to try to stop the impending contact, but it is not absolute. To exercise this right the victim must generally satisfy two conditions. First, he must reasonably believe that he is in imminent danger of being battered. Second, he must use only a reasonable amount of force: presumably, an amount proportionate to the threat and minimally necessary to end it. If both of these conditions are met, the potential victim's preemptive right applies, and he is empowered to proceed.[152] However, if either condition is violated, the right remains dormant and he must proceed at his own risk.

Corrective rights come with similar conditions. When an act results in injury, the victim's corrective right kicks in, however, justice constrains its use. Zipursky suggests that the right to civil recourse arises automatically upon the commission of a legal wrong.[153] But it does not. Indeed, his position is both too narrow and too broad.

It is too narrow because the right to recourse—meaning, the right to haul someone into court—may be invoked even without an *actual* wrong. All the plaintiff needs to do is *assert* a wrong in his complaint. Even if a jury later concludes that this assertion is false, the plaintiff's right to avail himself of the system and to use it to compel the defendant's participation is in no way diminished.

Zipursky's thesis is too broad because it fails to recognize the preconditions, besides proof of actual wrongdoing, that the plaintiff must meet in order to bring and win a tort suit. One may not use the civil justice system for recourse, or corrective justice, or what have you, unless he has a reasonable belief that a wrong has been done. In addition, he must couch his claim in acceptable legal terms, asserting only legally recognized causes of action. He must file his action within a specified time. He must use the proper format in his legal papers. He must prose-

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[150] *See id.* at 47-48.
[151] *See id.*
[152] *See id.* at 27-28, 169.
[153] *See* Zipursky, *supra* note 7, at 734-35.

cute his action in a timely fashion. He must cooperate in discovery. Most importantly, he must demonstrate, at trial, that he has been wronged.

Although there are various ways of interpreting Zipursky's theory to account for these preconditions, none of these interpretations is wholly satisfactory. If Zipursky means to argue that wrongdoing includes any act that *seems* wrongful at the time of its commission, and this appearance merely triggers a right to *sue* the defendant, then his theory fails because he ignores the other substantive and procedural preconditions to using that right. If he means to say that such apparent wrongs actually entitle the plaintiff to do something *more* to the defendant—like take his money or abate his activity—then that right commences as soon as the wrongful act is completed, and the plaintiff would be able to assert it immediately. However, this is the very interpretation of corrective justice which caused him to reject that theory in favor of the theory of civil recourse. Perhaps Zipursky intends to say that only *actual* wrongs create a right to civil *access*. If so, his assertion would still be problematic, since the determination of actual wrongdoing does not take place until well after the court system has been accessed. Finally, Zipursky might mean that actual wrongs activate a right to some form of *redress*. But then, what gives the plaintiff the right to initiate a lawsuit? If legal wrongs require legal recognition, and such recognition must await the conclusion of the lawsuit, Zipursky cannot explain, any better than corrective justice theory, where the power to institute litigation resides.

The only explanation that solves these problems is the one I have offered above. A corrective right arises immediately after a person is injured. That right is conditional, not absolute, and is premised on concepts of reasonableness and balance. It empowers the victim to initiate a lawsuit, but only if he specifies reasonable grounds for relief. It allows him to maintain such an action, but only if he acts diligently and obeys a number of procedural safeguards. It entitles him to a judgment of liability, but only if he proves that the defendant acted unreasonably by exceeding his fair share of freedom. Once this showing is made, the preconditions to the right are satisfied, and the victim is entitled to force the defendant to repair the wrong. In this sense, there really is a right to corrective justice, not just civil recourse, and it really is attuned to the chords of justice.

II. The Structure of Tort Law and Litigation

The insiders' attack next moves from the content of corrective justice to its structure and methodology. Supposedly, corrective justice is structured so as to require a wrongdoer to repair the loss of his victim. If this is so, the insiders maintain, it does not explain why tort law permits plaintiffs to recover punitive and nominal damages. It also does not explain why tort plaintiffs can obtain a diverse array of injunctive remedies. Even when tort law awards compensation, they argue, it does not truly restore the victim, but merely provides him some sense of satisfaction. Finally, they assert that, because corrective justice theory appears to contain

no procedural methodology, it may not be able to explain why tort cases are resolved by juries.

A. Punitive and Nominal Damages

Both Goldberg and Zipursky raise the concern about punitive damages.[154] They claim that corrective justice merely repairs wrongful losses. Thus, if that theory were to explain any tort remedy at all, it would come closest to explaining compensatory damages. However, punitive damages are not compensatory. Instead, they are *extra*-compensatory. They do not restore the status quo; they punish past behavior. As a result, corrective justice simply cannot account for them.

This position is founded on two misconceptions. The first concerns corrective justice theory itself. As I have argued earlier, the purpose of corrective justice is not just to repair losses, although it regularly succeeds in doing so. Rather, its purpose is to correct *wrongs*.[155] A wrong is the combination of an undeserved gain and an undeserved loss.[156] Where the defendant's conduct is reckless, willful, wanton or malicious, his gain is especially great. He does not just violate the standards of fairness and equality, he repudiates them altogether. Indeed, by deliberately subjecting others to harm, he elevates himself far above both the law and the citizenry it is entrusted to protect.

This political and moral gain gets added onto the normal gain that arises from merely unfair conduct.[157] For example, suppose D commits a malicious intentional tort against P, and that P sustains 3 units of actual loss as a result. Suppose further that, because of the heinousness of D's act, his gain is estimated not at a low to intermediate unit-value—as might be expected for ordinary negligence—but at a unit-value of 7. Since the combined wrong has a unit-value of 10, justice would require splitting the wrong at its mean value of 5. D would then have to pay, and P would be entitled to receive, 5 units of value. In tort terms, the "compensatory" damages for P's actual loss would be 3 units. However, the corrective award would exceed that amount by 2 units. Thus, corrective justice actually would support what tort law now regards as an extra-compensatory form of damage.

Anticipating this argument, Zipursky contends that it contains two defects. First, he argues that "it does not explain why the availability of punitive damage awards is conditioned on whether the defendant's conduct was wanton or willful."[158] However, my explanation does just that. As noted above, such egregious misconduct deviates farther from social and moral norms than mere negligence, thus enhancing the wrongdoer's gain. Second, Zipursky asserts that this theory

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[154] *See* Goldberg, *supra* note 7, at 576; Zipursky, *supra* note 7, at 711-13.
[155] *See* CALNAN, *supra* note 59, at 99.
[156] *See id.*
[157] *See id.* at 103, 168.
[158] Zipursky, *supra* note 7, at 712.

really attempts to describe punitive damages as another form of compensatory damages which seek to redress dignitary harms.[159] He condemns this approach because, in his view, it does not attempt to explain modern tort law so much as it attempts "to explain [it] away."[160]

However, this argument reveals the insiders' second misconception. They seem to assume that punitive damages have been a fundamental feature of American tort law from time immemorial. Yet this is far from the truth. Extra-compensatory damages did not even appear in *English* tort law until the eighteenth century.[161] At that time, juries began returning verdicts that exceeded the amount of the plaintiff's claimed loss.[162] Because these verdicts were not accompanied by explanations, appellate courts were forced to grope for reasons to sustain them.

By the mid-nineteenth century, two different lines of reasoning had developed. Some courts, and some commentators, surmised that these extra damages were levied to punish the defendant and to deter him and others from committing future acts of misconduct.[163] However, other courts and commentators believed that they were designed to compensate plaintiffs for dignitary harms.[164] Courts and legislatures in America eventually transplanted these approaches into American tort law. Most adopted the punitive explanation. However, even to this day, some jurisdictions refuse to recognize punitive damages, electing instead to award additional damages to redress dignitary harm.[165]

Perhaps one could say that corrective justice is off-base because it fails to account for the punitive remedy that most jurisdictions now provide. But one could just as easily say that corrective justice has it right, and that its corrective calculus has simply been misunderstood or obfuscated by courts hoping to promote their own political or social agendas. Although Goldberg and Zipursky reflexively defend the first interpretation, nothing in their respective critiques of corrective justice leads us any closer to the right conclusion.

The arguments about nominal damages are very much the same. Like punitive damages, nominal damages are not compensatory. They simply permit the jury to award a nominal sum of money—usually just a few dollars—to signify that the plaintiff was wronged, even if he sustained no actual damage. Thus, according to the insiders' critique, nominal damages fall outside of corrective justice's descrip-

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159 *See id.*

160 *Id.*

161 *See* Alan Calnan, *Ending the Punitive Damage Debate*, 45 DE PAUL L. REV. 101, 106 (1995).

162 *See id.* at 107.

163 *See id.* at 108. This group was led by the nineteenth-century legal scholar, Theodore Sedgwick. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 38-46 (1847) (Arno Press 1972).

164 *See* Calnan, *supra* note 161, at 108. Another respected nineteenth-century jurist, Simon Greenleaf, espoused this view. *See* 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 (4th ed. 1848).

165 *See, e.g.*, Minion Inc. v. Burdin, 929 F. Supp. 521, 523 (D. N.H. 1996); Veselenak v. Smith, 327 N.W.2d 261, 264 (Mich. 1982); Spokane Truck Dray Co. v. Hoefer, 25 P. 1072, 1074-75 (Wash. 1977).

tive capabilities.[166] However, the same analysis that applies to punitive damages also applies here.

Nominal damages typically are available only in intentional tort cases. Anytime someone commits an unjustified intentional tort, he gains more than tortfeasors who are merely neglectful. Indeed, this is true even if the intentional tortfeasor's motive is not malicious. This extra gain produces a correlative "moral" or "dignitary" loss for the victim. Although this intentional wrong is less severe than a malicious one, it is serious enough, both to the victim and the state, to justify an extra award of at least "nominal" damages.[167] Admittedly, this characterization may make such damages "compensatory" in the parlance of modern tort law. However, it does provide a sensible explanation for what would otherwise appear to be an almost nonsensical doctrine.

B. The Diversity of Remedies

In the next insider attack, Zipursky takes the "noncorrective remedy" critique one step further. If corrective justice is ill-suited to explain certain damage remedies, he reasons, it is virtually useless when it comes to explaining the wealth of other equitable remedies available to many tort claimants.[168] For example, plaintiffs can obtain injunctions to abate or regulate nuisances; compel retraction or expurgation of defamatory material from public records and private publications; remove asbestos from buildings, locations or products; or require reformation or rescission of fraudulently induced contracts.[169] Since corrective justice requires only restoration, not injunction, it cannot claim credit for these alternative forms of relief.

Zipursky's argument, however, rests on an unduly restrictive interpretation of correction. Even today, the verb "correct" does not just mean "to restore." It also means "to counteract or neutralize."[170] Together, these connotations cover most of the injunctive remedies cited by Zipursky. The landowner who seeks to stop a neighbor from emitting pollution into the air really desires to "counteract or neutralize" those emissions, and in so doing, "counteract or neutralize" the invasion to his property rights. The same holds true for the defamation victim who seeks retraction, the tenant who seeks asbestos removal and the contractual party who seeks reformation or rescission. In each case, the person requesting injunctive relief hopes to "counteract or neutralize" a present or impending wrong.

In most, if not all, of these situations, the use of equitable remedies may also have a restorative effect. As I shall explain more fully later on,[171] corrective justice is not just a substantive mandate; it is a remedial process. Part of a tort injury is

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[166] *See* Zipursky, *supra* note 7, at 711.
[167] *See* CALNAN, *supra* note 62, at 35, 103.
[168] *See* Zipursky, *supra* note 7, at 710-12.
[169] *See id.* at 710-11.
[170] 3 OXFORD ENGLISH DICTIONARY 961 (2d ed. 1989) (v., definition 7).

the process by which it occurs. Most victims are not asked to interact, and even when they are, the resulting transaction invariably exceeds their expectations. Either way, tragedy is thrust upon them without notice or consent.

Corrective justice reverses this process. It permits the victim to restore his sense of dignity and control by intruding into the life of his wrongdoer and commanding him to participate in a formal legal exercise. Injunctive remedies simply enhance this process. They empower the victim not just to command the wrongdoer to come to court, but to order him around outside of court as well.

Beyond such process considerations, injunctions may often help to make the plaintiff whole. For instance, a person who is libeled suffers a loss of his reputation. Since reputation lies in the hearts and minds of others, it cannot be readily restored through the award of damages. The best way to correct that loss is to negate the damaging effect of the defamatory statement. The only way to do this is to print a retraction which withdraws the false information and substitutes the truth. If circulated within the same community where the libel first appeared, the retraction can effectively, if not totally, repair the damage to the plaintiff's good name.[172]

What is interesting is that, even when injunctive relief is not so directly restorative, it nevertheless follows the dictates of justice. Nuisance cases are illustrative. A nuisance occurs when someone substantially and unreasonably interferes with another person's ability to use or enjoy his property.[173] To determine if an interference is unreasonable, courts generally apply a multifactor balancing test, weighing such things as the utility of the defendant's activities, his ability to change those activities without compromising their value, the utility of the plaintiff's property usage and the extent to which that usage is disrupted by the defendant's activities.[174]

If the court decides that a nuisance exists, it still must find an appropriate and proportionate remedy. Where the plaintiff's harm is relatively low, and the defendant's liberty interest is relatively high, damages seem to provide a fair and workable solution to the conflict. Here, the defendant may continue to conduct his activities, but he must pay for the losses those activities cause. Where, however, the plaintiff's harm is great, and the defendant's burden of change is not infeasible, an injunctive remedy may be more fitting.

Here, too, a court has several options. It can grant a permanent injunction, requiring the defendant to stop the activity entirely.[175] It can grant a partial injunc-

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[171] *See infra* Part III.C.

[172] By forcing the defendant to publicly declare that he made a false statement about the plaintiff, the retraction can also help to negate the defendant's wrongful gain.

[173] *See* RESTATEMENT (SECOND) OF TORTS § 822 (1979).

[174] *See id.* at §§ 826, 827, 828.

[175] *See* DOBBS, *supra* note 107, at 1338.

tion which regulates how the activity must be performed.[176] It can issue a conditional injunction—in essence, conditioning injunctive relief on a change in operation or the payment of permanent damages.[177] Or, it can grant a compensated injunction, forcing the defendant to change locations but compelling the plaintiff to pay for the move.[178] In each case, the court may not act arbitrarily, but must weigh the competing interests and select a remedy proportioned to the equities at hand.[179]

Although these equitable remedies may not always be perfect, they are, in a sense, always just, at least to the party who chooses them. As was noted earlier, injustice is always involuntary. Thus, a person who makes a voluntary choice cannot be the victim of injustice.[180] If injunctive remedies are not restorative, as Zipursky contends, then it is true that they cannot be justified by *corrective* justice. However, when they are offered as alternatives to corrective justice, and are voluntarily chosen by a tort victim, they become just in a much broader sense. Besides validating the victim's moral authority, they enhance his autonomy—first, by giving him the freedom of choice, and second, by empowering him to use that freedom to regulate or control his adversary. This may not be corrective justice, but it is a form of liberal justice, and a vitally important one at that.

C. Satisfaction, Not Restoration

So far, the insiders' structural arguments have merely attempted to paint corrective justice into a corner. It might explain compensatory damages, they assert, but it cannot account for much else. However, this is just the beginning. Goldberg actually makes a far more damning claim. He suggests that compensatory damages "cannot in fact cancel out wrongs, nor do they typically make the plaintiff whole in any meaningful sense."[181] Because such damages are not truly corrective, corrective justice cannot account for them either. At best, compensatory damages merely give the victim "satisfaction," a notion, Goldberg says, "that carries connotations of vengeance."[182]

Goldberg's account, however, is itself unsatisfying for three reasons. First, he misconstrues the "corrective" part of corrective justice. He assumes that correc-

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176 *See id.*

177 *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 309 (N.Y. 1970).

178 *See* Spur Indus., Inc. v. Del Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).

179 *See* DAN B. DOBBS, LAW OF REMEDIES 518-22 (2d ed. 1993).

180 *See* ARISTOTLE, *supra* note 18, at 174-75.

181 Goldberg, *supra* note 7, at 576.

182 *Id.* From a linguistic standpoint, the terms "satisfaction" and "satisfy" do not necessarily or even ordinarily connote vengeance. Instead, they mean to pay a debt, fulfill an obligation or make compensation, payment or atonement for an injury, offense or fault. *See* 14 OXFORD ENGLISH DICTIONARY 502, 504 (2d ed. 1989)) (defining "satisfaction" and "satisfy"). In this sense, they are roughly synonymous with "correction" or "correct," which mean to set right, rectify or cure an error or fault. *See* 3 OXFORD ENGLISH DICTIONARY 961 (2d ed. 1989)) (definitions 1, 2 & 3). In fact, the phrase "to satisfy" provides an especially accurate description of corrective justice, since it means both to make reparation *for* a wrong and to make reparation *to* a wronged person. *See* 14 OXFORD ENGLISH DICTIONARY 504 (2d ed. 1989)) (v., definitions 2 & 2.b).

tive justice requires things to be returned to their exact pretransactional state. Compensatory damages do not restore, he argues, because "they do not return the world to a pre-existing equilibrium."[183] "The commission of the tort," he continues, "has unalterably changed the world by creating a person who is now, and will forever be, the victim of a wrong."[184]

However, what Goldberg describes is *reproduction*, not correction. Reproduction means to produce again, present anew or repeat in a more or less exact copy.[185] Corrective justice does not now, nor has it ever, carried this connotation. Instead, it means to make equivalent or proportionally equal.

Aristotle explained this equivalency concept in discussing the corrective justice of exchange transactions. The justice of exchange does not require that the parties receive exactly what they had before. In fact, such a requirement would defeat the purpose of the transaction. Instead, Aristotle argues, justice is done so long as each party receives something of equivalent value in return for whatever he gives.[186] Since barter exchanges are not always possible, Aristotle recommends another standard of equivalency—money.[187] When goods are exchanged for an equal sum of money, the exchange is fair and just, even if neither party actually recreates the other's pretransactional world.

Second, Goldberg underestimates or undervalues corrective justice's corrective functions. Like Zipursky, Goldberg interprets corrective justice to require the repair of losses, and he interprets losses to mean tangible injuries. However, as I have already shown, both assumptions are inaccurate. Corrective justice seeks to correct wrongs, not losses. Wrongs are not just unilateral effects; they are bilateral events. Although they can cause tangible injuries, they can also leave intangible scars. Indeed, wrongs are both a *process* of degradation and the *state* of degradation that process brings about.

Corrective justice addresses each part of the problem. The process of wronging is all about power and control. By invading the victim's life without permission and forcing him to suffer the effects of that intrusion, the wrongdoer both imposes his own will on, and overpowers the will of, his victim. Corrective justice negates this power differential by placing the victim back in control.

Indeed, the *process* of corrective justice provides the victim a kind of procedural therapy. Some social science theories suggest that the harm of victimization

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[183] Goldberg, *supra* note 7, at 576.
[184] *Id.*
[185] *See* 13 OXFORD ENGLISH DICTIONARY 669 (2d ed. 1989) (v., definition 2, 3.a & 3.b).
[186] *See* ARISTOTLE, *supra* note 18, at 157.
[187] *See id.* at 160-63.

can be alleviated by litigating a lawsuit.[188] After having control wrested away by a wrongdoer, the victim can regain control by serving him with a complaint, forcing him to appear in court, making him answer questions about his conduct and requiring him to confront the legacy of suffering he has brought upon others. Victims also feel replenished and validated by participating in and controlling the litigation,[189] and by telling their stories "in a culturally meaningful context" before a trusted decision-maker in a dignified proceeding that shows that society values their humanity.[190] This feeling is not one of vengeful satisfaction, as Goldberg seems to suggest. Instead, it is a feeling of catharsis, empowerment, moral regeneration and procedural justice, all wrapped into one.

Unfortunately, even the best restorative process cannot make the victim feel completely whole. Because wrongs create moral imbalances, the restorative process must also negate this substantive state. Corrective justice strives toward this end as well. When the restorative process is over, it forces the wrongdoer to rectify the resulting wrong. Certainly, such rectification might include paying damages to the victim. But in theory, it could include any corrective gesture which annuls the parties' respective gains and losses.

In many ways, monetary damages are a natural choice for American corrective justice. For one thing, they are objective. A wrongdoer can fake an apology, and can perform community or personal service without sincerity or contrition. However, money has the same value for everyone, and when it is taken, the hurt is universal. In addition, money is liberal, or at least it harmonizes well with the concept of liberalism. In essence, money is just a symbol of freedom. The more money one has, the more freedom of opportunity he enjoys. Conversely and necessarily, the more monetary damage a wrongdoer must pay, the more freedom of opportunity he stands to lose. Money is also a great equalizer. As noted earlier, disparate things—like negligent acts and emotional scars—are hard to compare. Thus, it takes a standard medium like money to make them commensurate. Finally, money is moral. Although eye-for-eye requital may offer the most faithful means of offsetting gain and loss, the payment of monetary damages provides the most civilized yet accurate form of corrective justice we can hope to achieve.

Regardless of whether the wrongdoer pays damages or obeys an injunctive mandate, the corrective impact on the victim is just as real and substantial. The equity theory of social psychology suggests that "victims feel most satisfied when compensated by the injurer rather than a third party."[191] As one commentator has noted, "the restorative act that is necessary to compensate the plaintiff is one that is

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[188] *See* Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 57, 62 (1994).
[189] *See id.* at 62-64.
[190] *Id.* at 64.
[191] *See id.* at 57.

performed personally by the harm-doer, or in the tort context, the defendant."[192] This restorative benefit is not limited to equitable relief, but is produced as well by the payment of damages.[193] Either way, the victim feels the return of dignity, respect, power and control.

The experience of rape victims exemplifies this corrective transformation. As one commentator has noted, "rape victims who disidentify themselves with stereotypical victim roles by taking their recovery into their own hands recover faster, more fully, and may protect themselves from future victimization by refusing to assume passive and dependent roles."[194] "In repudiating her assailant's power to silence her through shame, guilt and fear," the commentator continues, "the rape victim who launches a civil suit rejects her attacker's dominance and reasserts her right to self-determination and sexual autonomy."[195] Granted, rape cases present a unique and especially egregious form of victimization, but they also evince the underlying moral imbalance underlying all torts, and they highlight the critical role that corrective justice plays in eradicating this condition.

Having overlooked these corrective functions of tort law, Goldberg argues that the law uses compensatory damage awards to exact retribution against wrongdoers, a practice which presumably slakes the blood-thirst of their victims.[196] But here too Goldberg stands on shaky ground. For one thing, Goldberg offers no evidence to support his argument. He merely declares the retributive objective of compensatory damages as if it were hardened fact rather than rank speculation.

Without proof, Goldberg's thesis appears weak or even counterintuitive. Vengeance generally connotes retaliation for a perceived offense. If tort law were truly committed to this objective, awarding compensation would be a very poor means to that end. Taking money is hardly the practical or moral equivalent of intentionally or negligently inflicting harm. It is neither as severe nor as personal as the action it requites. Surely, a closer approximation of vengeance could be achieved through other remedies, like injunctions abating or regulating the wrongdoer's activities. However, tort law typically permits such remedies only in exceptional circumstances. Thus, if, as the insiders argue, corrective justice has a hard time explaining why tort actions sometimes permit injunctive remedies instead of compensatory damages, Goldberg's "vengeance" theory has an even harder time explaining why these remedies are not used more often or all of the time.

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[192] *Id.*

[193] *Id.*

[194] Nora West, Note, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis*, 50 U. TORONTO FAC. L. REV. 96, 114 (1992).

[195] *Id.*

[196] *See* Goldberg, *supra* note 7, at 576; *see also* Goldberg & Zipursky, *Unrealized Torts*, *supra* note 7, at 1643-44.

It is not even entirely clear what sort of vengeful "satisfaction" Goldberg has in mind. Because he does not explain his interpretation, one must search for guidance. One clue might be found in the writings of the renowned utilitarian philosopher, Jeremy Bentham. Like Goldberg, Bentham equated punishment to satisfaction, noting that punishment can produce "a pleasure or satisfaction to the party injured."[197] But what exactly is this sense of pleasure? Obviously, if Goldberg means that it is the satisfaction of reversing a feeling of powerlessness or the pleasure of restoring one's sense of dignity, then his definition converges with our previous definition of correction. Bentham himself seems to have adopted a similar view, characterizing this form of satisfaction as "compensation, administered in the shape of self-regarding profit."[198]

Even if Goldberg interprets vengeance to mean the base satisfaction of inflicting a harm for a harm, he does not necessarily escape the reach of justice. While Aristotle distinguished corrective justice from "retaliation"—noting that "[t]he law of retaliation and the law of corrective justice in many cases do not agree"[199]—he did not diminish its moral significance. In fact, he conceded that "some people ... hold that retaliation is absolutely just."[200] Many others have agreed, justifying retribution on such moral grounds as fairness or abstract right.[201] Thus, regardless of whether vengeance satisfies the Aristotelian conception of corrective justice, it still holds an important and welcome place in a broader justice theory of torts.

D. The Role of the Jury

The insiders' last argument in this series focuses not on how tort law is structured, but on how it is administered in practice. Once more, Goldberg leads the charge. He asserts that corrective justice theory has not adequately specified tort law's "interpretive methodology"—meaning, it has not explained why juries interpret and apply the law in the real world.[202] Specifically, Goldberg queries, "[d]oes corrective justice theory regard itself as obligated to account for that important feature of American practice?"[203] "If so," he continues, "what is that account?"[204] "If not," he challenges, "on what grounds is it to be excluded as not central to the structure or practice of tort law?"[205]

Corrective justice actually does have an account of the jury system, and this account has several sources. As noted previously, Aristotle described corrective justice as having a tripartite structure. The parties, who represent the gain and the

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197 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 n.a (The Legal Classics Library 1986) (1780).
198 *Id.* at 167. n.a.
199 ARISTOTLE, *supra* note 18, at 158.
200 *Id.* at 157-58 (citation omitted).
201 *See generally* CALNAN, *supra* note 59
202 Goldberg, *supra* note 7, at 576.
203 *Id.* at 577.
204 *Id.*

loss of a wrongful transaction, are situated at opposite ends of an adversarial axis. In the middle of this axis is an impartial mediator, who, as the mean between these two extremes, is "a sort of personification of justice."[206] Although some translators have used the term "judge" to describe this mediator,[207] nothing in Aristotle's discussion seems to limit that concept to a single judicial officer. Indeed, for Aristotle, the important point was not to involve a trained civil servant, but to identify some neutral intermediary who could both accurately assess the parties' gains and losses and fairly equalize them.

In Aristotle's time, juries regularly fulfilled this function. Civil trials were presided over by a magistrate.[208] The magistrate was more of an administrator than a judge. He collected sworn statements and recorded the evidence offered by both sides, but did little else during trial.[209] The trial itself was presented to a large jury which consisted usually of 501 citizens drawn from Greece's ten tribes.[210] Before serving on a jury, each juror took an oath to apply the applicable law, and when no law applied, to adopt the most just solution to the dispute.[211] During trial, the jury sat quietly and listened intently while the parties introduced their evidence.[212] When the trial was over, jurors did not deliberate or consult with each other.[213] Instead, they simply voted with their consciences and in accordance with their oaths of justice.[214] Although the magistrate also served as a member of the jury and as the jury's foreman, his vote had no more weight than any other.[215] The verdict represented the majority vote of the jury. Once rendered, the jury's judgment was final. There were no appeals to higher courts.[216]

Although Aristotle did not specifically endorse the use of juries, he clearly believed that their role in civil litigation was critical to the law's rationalization. Aristotle argued that laws derive from two types of reason. Intuitive reason identifies first principles of justice.[217] Practical reason, or prudence, applies those principles to specific cases so that justice fits the facts.[218]

Insofar as juries use legal rules to resolve factual disputes, they perform the practical reasoning of tort law. This group analysis, though perhaps less "informed" than a judge's, actually enhances the law's rationality. For one thing, it

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205 *Id.*
206 ARISTOTLE, *supra* note 18, at 155.
207 *Id.* at 154 n.2.
208 *See* FLACELIERE, *supra* note 73, at 229.
209 *Id.*
210 *Id.* at 232, 235.
211 *Id.* at 243.
212 *Id.* at 229, 237.
213 *Id.* at 237.
214 *Id.*
215 *Id.* at 229, 235-36.
216 *Id.* at 239.
217 *See* ARISTOTLE, *supra* note 18, at 194.
218 *See id.* at 196-99.

tends to perfect the reasoning process. In theory, the collective perspective of the group can neutralize and overcome the bias of any single individual. At the same time, group experiences and values can provide a fuller and more accurate interpretation of community customs and norms, and come closer to a true understanding of natural law.

More importantly, jury decision-making can perfect the reason of the law itself. Early English common law, later adopted in America, recognized the Aristotelian dichotomy of strict law and equity.[219] Laws are written in general terms to do justice most of the time. When good laws lead to just results, they are to be strictly enforced.[220] However, given their generality, even good laws cannot always be right. When they threaten injustice, equity is supposed to make an exception, either by relaxing laws that are too harsh or by expanding laws that are too narrow.[221]

Juries embody this equitable instinct. As Thomas Green has observed, "from the outset of the common law period, trial juries were prepared to voice a sense of justice fundamentally at odds with the letter of the law."[222] In some cases, they stretched the definition of self-defense.[223] In others, they recognized defenses of accident, misadventure and victim fault.[224] In each scenario, they acted according to equity, tempering the ill-effects of necessarily strict but imperfect laws. In this sense, they did not so much apply the law as chase an ideal of fairness—an ideal inspired by practical reasoning and dedicated to the goal of justice.

None of this *proves* that *juries*, as opposed to judges, are *indispensable* to a system of corrective justice. But it does lead to three important conclusions. The concept of corrective justice certainly supports the use of decision-making intermediaries *like* juries. Corrective justice facilitates the practical reasoning process that is so critical to resolving fact-based problems *like* tort disputes. And, throughout history, juries actually have been used to implement civil justice systems *like* corrective justice.

III. The Scope and Purpose of Corrective Justice

From the content and structure of corrective justice, the insiders finally take their critique to its outer-reaches and beyond. They question not just how far corrective justice goes but what it goes to show. They argue that it goes far enough to bleed into the concept of distributive justice, or, possibly, to allow distributive concerns to bleed into it. Indeed, they contend that it goes so far that, unlike the modern law of torts, it has no practical limits. Worse still, it goes to these extremes

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219 *See* NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 99-106 (1990).
220 *See id.* at 99-101.
221 *See id.* at 101-06.
222 *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 52 (1985).
223 *See id.* at 35-46.
224 *See id.* at 86-93.

without any redeeming purpose. Though it may explain some of tort law, it fails to explain why anyone should care.

A. The Relationship Between Distributive and Corrective Justice

Zipursky sets up the first argument with a brief hypothetical. Imagine, he asks, that a person is injured while driving a defective car manufactured by a wealthy car company.[225] In this situation, he asserts, the wealth of the car manufacturer would make it easier to conclude that the manufacturer owed the driver a moral duty to repair.[226] Conversely, if the driver were a billionaire and the car company were cash-strapped, he posits, it would be much harder to find the same duty.[227] From this hypothetical, Zipursky concludes that the moral duty to repair, which corrective justice purports to explain, is heavily influenced by distributive justice concerns.[228] People do not seek merely to undo wrongs, they seek to redistribute wealth. If this is so, then corrective justice does a poor job of describing the actual basis of tort liability.

Curiously, Zipursky has his own argument backwards. When that argument is straightened out, it undermines rather than supports his main point.

Zipursky's main point is that corrective justice does not explain tort law the way it really is. Recall his punitive damage discussion. Zipursky admits that corrective justice might support an extra-compensatory award of damages, perhaps on the basis of repairing dignitary loss.[229] But he quickly reminds us that tort law actually calls them punitive damages, not dignitary damages, so the corrective justice explanation ultimately fails the test of descriptive accuracy.[230]

On the distributive justice issue, Zipursky argues the other way around. He faults corrective justice not for deviating from tort law's stated party line, but for failing to read *between* its lines. His switch here is fortuitous, since tort law and corrective justice actually say the same thing. In most tort actions, the defendant's liability must be based on fault. But even when liability is strict, it may never depend on financial status alone.[231] Indeed, except where punitive damages are at issue,[232] the defendant's wealth is considered irrelevant to the liability issue and may not be discussed.[233] Indeed, the mere mention of the defendant's insurance coverage can

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225 *See* Zipursky, *supra* note 7, at 729.
226 *See id.*
227 *See id.*
228 *See id.*
229 *See id.* at 712.
230 *See id.*
231 *See* DOBBS, *supra* note 112, at 13-15, 17-18.
232 "The defendant's financial status is a factor in determining the right amount of punitive damages." *See id.* at 1068.
233 According to the Federal Rules of Evidence, "evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully." FED. R.

provide grounds for reversible error.[234] Insofar as corrective justice also negates wrongs, and excludes consideration of the parties' pre-transactional status, it does exactly what tort law strives to do, even if it does not always succeed.

Another curious thing about Zipursky's argument is his assumption of empirical facts without empirical evidence. He may *think* that people conflate distributive and corrective justice issues, but he offers no *proof* that they actually *do*. In fact, such proof is hard to muster. While some studies do seem to identify both a "deep-pocket" and a "shallow-pocket" effect in tort cases,[235] several others suggest that a party's wealth has no bearing on either liability determinations or damage awards.[236] About the only thing this evidence establishes with any certainty is the uncertain footing of Zipursky's own stance.

Perhaps the most curious aspect of Zipursky's argument is his assumption that the concepts of distributive and corrective justice are inconsistent and irreconcilable. Although it is true that these concepts create separate justice models for different moral problems, it is not true that they must always be kept apart. In some contexts, like American tort law, they can be combined to form a cohesive system of liberal justice.

Zipursky's misunderstanding, like the misunderstandings of other corrective justice critics, derives from his misinterpretation of Aristotle. Aristotle believed that, as a *factual* matter, distributive justice and corrective justice apply to two different social circumstances. Distributive justice governs the *state* in its distribution of *public* funds.[237] Corrective justice, by contrast, regulates *private parties* engaged in *private transactions*.[238] In Aristotle's world, these two realms never overlapped. The Assembly's functions—of distributing taxes, titles, benefits, or property—were exclusively public. Meanwhile, the courts' role was exclusively private. They did not make laws or distribute goods like the Assembly. Instead, they merely gathered private citizens who resolved private disputes on the basis of the facts and equities at hand. As idealized models of justice, each system operated independently of the other. Distributive justice first ensured that citizens got from the state what they deserved. If a private transaction later disturbed these distributions, corrective justice then ensured that they were restored to their pretransaction levels.

For Aristotle, there was no moral conflict in using corrective justice to return transacting parties to a preexisting state of objective inequality because Aris-

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EVID. 411; *see also* Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1186-87 (1991).

234 *See* Ethel R. Alston, Annotation, *Admissibility, After Enactment of Rule 411, Federal Rules of Evidence, of Evidence of Liability Insurance in Negligence Actions*, 40 A.L.R. FED. 541 § 12 (1978 & Supp. 2004).

235 *See* Neil Vidmar, *The Performance of the American Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 878-79 (1998) (discussing such studies).

236 *See id.* (discussing such studies).

237 *See* ARISTOTLE, *supra* note 18, at 153.

238 *See id.* at 154.

totle adopted a different definition of equality for each form of justice. In making distributions, the state need not give every citizen the same share. It can give some citizens a larger or smaller share so long as the differences are based on fair distributive criteria.[239]

Aristotle recognized that such criteria might vary according to political ideology. Democracies might use free status as the appropriate criterion, while oligarchies might use wealth or nobility, and aristocracies might use excellence.[240] The chosen criterion establishes a geometric proportion between individuals, which, in turn, creates what Aristotle called an equality of ratios.[241] Thus, if the state determines, based on a criterion of excellence, that persons in group A are entitled to receive twice as much as those in group B, then subsequent distributions which follow this 2:1 ratio will always be just, even though group A consistently receives more shares than group B.

If a member of group A subsequently injures a member of group B in a private transaction, corrective justice merely requires restoration of the status quo. Using an arithmetic proportion, and a literal concept of equality, it takes from the A-member exactly what he has gained in the transaction and gives back to the B-member exactly what he has lost. Although the A-member and the B-member stood in objectively unequal positions before the transaction, their status relative to each other was fairly established. Thus, justice is served when they are returned to their prior state of geometric equality.

This does not mean that the concepts of distributive and corrective justice never coalesce. Quite the contrary, in a liberal-democratic legal system like our own, such a merger is practically unavoidable. Our civil justice system is different from the one that existed in ancient Greece. It is run by the state, not by the citizens. Moreover, it is conducted by a state official, the judge, who is both entitled and obligated to create and enforce rules of law.

In our system, these legal rules promote and protect freedoms. Once citizens relinquish their "natural" freedom to the state, the state must return to them a kind of "political" freedom.[242] Political freedom takes the form of rights and duties. Rights represent protected freedoms, while duties represent freedom restrictions.[243] By creating laws, including tort law, judges distribute these rights and duties to the citizenry.[244] Because the judge is a state official, and the "good" he distributes is a "public fund," the laws he creates are governed by the dictates of distributive justice.

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[239] *See* CALNAN, *supra* note 59, at 85, 88.
[240] *See* ARISTOTLE, *supra* note 18, at 151.
[241] *See id.* at 151-52.
[242] *See* CALNAN, *supra* note 59, at 25.
[243] *See id.* at 23, 64.
[244] *See id.* at 87, 117, 127-29.

To meet this standard, such laws must comply with distributive criteria that our society deems fair and just. Elsewhere, I have argued that American law, including American tort law, is based on three such criteria: merit, need, and risk.[245] Generally speaking, the more excellence one displays, the more the law will reward his efforts.[246] Likewise, the needier one becomes, the more the law will ease his vulnerability.[247] Finally, the more risk one imposes on others, the more the law will regulate his activities.[248] Under these criteria, some persons—like those facing emergencies or private necessities—enjoy more freedom of action, while other persons—like those engaging in abnormally dangerous activities—enjoy far less. The difference in treatment, though objectively unequal, is not unfair, since it comports with society's underlying sense of justice.

We see, then, that distributive and corrective justice are not necessarily at odds, but can and must be integrated to achieve a complete system of civil justice. Distributive justice determines the substantive content of tort law. Tort law, like all law, distributes freedoms to its citizens. So long as the law's doctrines and rules satisfy the prevailing distributive criteria, they are considered just, even if they distribute freedoms in an objectively unequal fashion. Corrective justice determines the law's form, structure, and methodology. The wrongdoing requirement locates the distributive rule that applies to a given transaction and signifies when the distributive equality established by the state has been disturbed. The bipolarity requirement identifies the parties affected by the disturbance. The judge and/or jury requirement provides an impartial fact-finder capable of fairly evaluating that disturbance. The gain and loss requirement quantifies the extent of the disturbance. And, finally, the reparation requirement ensures that the disturbance is rectified and the parties restored to their original state of proportional freedom and equality.[249]

Still, there may be cases in which that original state is skewed because of some failing in the distributive justice system. For example, suppose P is illegally denied equal job opportunities and, as a result, falls into poverty. Suppose further that he is later struck by a car negligently operated by D, who, by consistently cheating on his taxes, is unusually wealthy. Do the parties' unfair starting positions provide a justification, in corrective justice, to repair not only the transactional wrong, but the underlying distributive wrong?

In corrective justice terms, the answer is clearly "no." Employers, not D, owe P the duty of providing equal job opportunities. The wrong in denying these opportunities is not D's to repair. In any event, P's job opportunity "loss" was not

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[245] *See id.* at 88-89.
[246] *See id.* at 88.
[247] *See id.* at 89-92.
[248] *See id.* at 92-95.
[249] In *Justice*, I further explain the political relationship of all justice concepts, including the concepts of distributive and corrective justice. *See id.* at 116-18.

precipitated by D's negligent driving, nor did D directly gain from the employers' illegal activities. Consequently, insofar as P's poverty is concerned, there is nothing in the action between P and D for corrective justice to correct. Likewise, only the state has the right to enforce against D the public duties of the tax code, and only the state incurs a direct loss when D shirks these responsibilities. Without a direct stake in D's tax violation, P simply lacks the standing necessary to take away D's ill-deserved gain.[250]

B. Practical Constraints

Like Zipursky, Goldberg is skeptical of corrective justice's limits. However, Goldberg is not just concerned about its potential overlap with distributive justice. He worries that it has no limits at all. Thus, he asks for a strict accounting, arguing that "corrective justice theorists are obligated to offer some account of the interrelationship of justice to other considerations, including those of social welfare."[251] "Are judges," he inquires, "ever entitled to deny causes of action on policy grounds?"[252] More specifically, if the goal of tort law is to rectify wrongs, "are there pragmatic limits on that enterprise?"[253]

The answer to both questions is "yes." By its very terms, corrective justice possesses a number of inherent limits. It has structural and standing limits that prevent nonparty citizens and the state from intervening in private tort disputes or correcting the gains and losses of the actual parties. It has a scope limit that restricts its application to private transactions and precludes its use in purely social matters or in cases of illness, natural disaster, or *force majeure*. It has substantive limits that exclude from its use nonwrongful transactions and wrongful transactions that cannot be causally connected to both of the parties to the lawsuit. Finally, and perhaps most importantly, corrective justice has an aspirational limit that puts the goal of justice first, and makes all other tort goals subservient and subordinate to it.

Corrective justice also contains implied limits. The concept of corrective justice is abstract and philosophical. It provides an ideal blueprint for resolving pri-

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[250] Even if corrective justice were not so clear on this matter, there would still be good moral and political reasons for reaching the same conclusion. Unlike legislative enactments or administrative regulations, tort actions are ill-equipped to handle large-scale social problems. Generally speaking, such actions cannot anticipate, manage or prevent future injustices. Instead, they can only respond to injuries already incurred.

Should these suits proceed, courts cannot set their own regulatory agendas, but may address only the issues raised by the parties, no matter how socially insignificant those issues may be. Juries, too, speak not for the interests of all, but only for the good of their communities; and when they voice their opinions, they usually rely not on vague notions of public policy, but on their own experiences, customs, and values.

Of course, judges can espouse broad moral principles, but they cannot impose these principles on everyone all at once. Instead, they must focus their analyses on the unique facts at hand and must limit their judgments to the particular parties who appear before them.

[251] Zipursky, *supra* note 7, at 577.

[252] *Id.*

[253] *Id.*

vate disputes. However, a *system* of corrective justice, like any social system, must operate within the realm of reality. In the real world, there are administrative limits to the pursuit of justice, just as there are limits to the pursuit of economic efficiency or civil recourse. Because there will never be enough courtrooms, judges, attorneys, staff, and jurors to accommodate all people who suffer moral wrongs, a corrective justice system can never do perfect justice. It can only do as much justice as the prevailing administrative conditions allow.

Such administrative constraints did not prevent the Greeks from implementing their own version of corrective justice, or from thinking that that system was just. In fact, Greek justice was replete with practical limitations. Courts did not hear cases everyday. Everything stopped on feast-days and days generally regarded as unlucky.[254] Because all jurors served in the Assembly, courts also went dark on days when the Assembly met.[255] When courts were in session, the parties faced various procedural limits. The length of a trial was generally limited to one day.[256] Each party had a limited amount of time to speak.[257] When the trial was over, a losing party who failed to garner more than one-fifth of the available jury votes could be forced to pay a fine—both as punishment for wasting the court's time and as a deterrent against making unfounded claims.[258] Although the Greeks strove for justice, they still rationed their resources to optimize their quest.

The Greeks in general, and Aristotle in particular, believed that the attainment of justice, or any virtue for that matter, was not possible outside of a political association.[259] This meant that political welfare was a necessary precondition to, and an implied limitation upon, the notion of corrective justice. A healthy state not only guaranteed people the freedom to make moral choices, it also adopted laws to guide them in the right direction.[260]

Today, the state still serves at least the first of these functions. It is therefore reasonable to assume that a modern system of corrective justice would continue to recognize some political limits—specifically, limits that help to preserve the state and keep the system running. For example, if the state faces a public health crisis like the swine flu epidemic, it might opt to handle such cases within the framework of a public compensation system, rather than process them through a system of corrective justice.[261] Likewise, since law enforcement agencies cannot secure public safety without a predictable budget or an autonomous group of policymakers, the state may wish to protect such agencies by limiting their duties or cloaking them

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254 *See* FLACELIERE, *supra* note 73, at 236.
255 *See id.*
256 *See id.* at 237.
257 *See id.*
258 *See id.* at 238.
259 *See* ARISTOTLE, THE POLITICS 59-61 (A. Sinclair trans., Trevor J. Saunders rev., Penguin Books 1992).
260 *See id.* at 55, 59-61.
261 *See* The National Swine Flu Immunization Program of 1976, 42 U.S.C. § 247(j)-(l) (2000).

with immunity[262] The thinking is that if the state secures freedom, and freedom secures justice, then corrective justice sometimes must give way to social or political necessity.

Finally, systemic corrective justice is bound by a couple of important philosophical limits. First, the very idea of justice imposes limits on how a system of justice can operate. Justice, we have seen, means balance and proportionality. It is getting or bestowing not too much or too little of something, but just the right amount.

Conceivably, in a world of limited resources, there could be either too much or too little corrective justice. If a corrective justice system sought to rectify every wrong involving any display of immorality or disrespect, it could not possibly decide all such claims within the lifetimes of the affected parties. Even people with grave and serious injuries would either go without compensation or be placed on a seemingly interminable waiting list. Conversely, if corrective justice were reserved exclusively for the victims of intentional torts, there would be a vast group of negligently harmed but deserving victims with serious injuries who would be left out in the cold. The goal of justice is to find the mean between such excess and deficiency. To locate this mean, a corrective justice system must adopt some appropriate limits, either by excluding the most speculative or trivial harms or by ignoring the most venial and insubstantial wrongs.

Barring all else, corrective justice would still face the constraints of practical reasoning. As Aristotle has taught us, practical reasoning consists of the prudent application of principles to problems with unique facts.[263] It is distinguishable from speculative reason in one critical respect: whereas speculative reason identifies fixed and immutable truths, practical reasoning finds truth in changing circumstances.[264] As circumstances vary, practical reasoning must constantly adapt to address them.

We have already seen evidence of this adaptability in the concepts of strict law and equity.[265] Where the law renders just results, practical reasoning requires its strict enforcement. However, where the facts make the law's application unjust, practical reasoning counsels a new, equitable approach. In this way, the "practical" part of practical reasoning ensures that the law remains true to its moral objectives. However, it also ensures that law retains a good bit of flexibility and pragmatic savvy, permitting it to adjust, alter and even narrow its substantive reach as times and circumstances may require. This explains why tort law can limit its duties and restrict its concept of foreseeability and still retain its sense of justice.

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[262] *See* DOBBS, *supra* note 107, at 268-73.
[263] *See* ARISTOTLE, *supra* note 18, at 196-99.
[264] *See id.*
[265] *See supra* notes 219–21 and accompanying text.

C. Explanation Without Justification

In the end, it really makes no difference how well corrective justice explains the limits of tort law, its concept of wrongdoing, its bipolar structure, its award of compensatory and punitive damages, its reliance on the jury system, or anything else for that matter. The insiders still say, who cares? "If all that can be said in defense of tort law is that it is intelligible," Goldberg muses, "is tort law a practice we ought to endorse?"[266] Even more pointedly, if corrective justice serves as nothing more than the law's neutral interpreter, why is it "a necessary or even important feature of a modern legal system?"[267]

Ironically, Goldberg himself provides part of the answer to his own question. In rejecting the conventional criticism that corrective justice has no point or purpose, Goldberg declares: "The point of tort law on corrective justice accounts is to deliver justice."[268] Unfortunately, he fails to grasp the full significance of this observation. Justice is not just an end; it is a virtue. Indeed, according to Aristotle, it is a complete and supreme virtue, "more glorious than the star of eve or dawn."[269] It is superlative, Aristotle notes, because "he who possesses it can employ his virtue in relation to his neighbors and not merely by himself."[270]

As a virtue, justice is tied to happiness. Happiness, Aristotle tells us, is a final good—that is, it is something everyone desires for its own sake and not as a means to some other end.[271] To achieve happiness, one must engage in "an activity of soul in accordance with reason."[272] Since the object of rational activity is the attainment of virtue, virtue is the key to happiness.[273] And, if virtue and happiness are inseparable, then the highest virtue of all—justice—is itself an essential good which requires no further justification.

Corrective justice, in particular, is virtuous in two different respects. It commands the state to give every citizen his "due" of freedom, and it commands citizens to give "due" respect to each other. The first type of virtue is public. It establishes the state's dignity and makes it worthy of obedience. The second type of virtue is private. It confirms each person's intrinsic value and makes others treat him with care.

As important as these characteristics are, they are not the only reasons for keeping corrective justice around. Corrective justice also provides a number of in-

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266 Goldberg, *supra* note 7, at 578.
267 *Id.*
268 *Id.* at 575.
269 ARISTOTLE, *supra* note 18, at 145.
270 *Id.* at 146.
271 *See id.* at 21-22.
272 *Id.* at 24.
273 *See id.*

strumental benefits. Although these benefits are diverse and far-ranging, they seem to fall into four distinct categories: social, political, cultural and personal.

The social benefits alone are legion. The corrective justice system allows us to catch and punish more wrongdoers. By deputizing individual citizens to serve as private attorneys general, this system makes it possible to redress injustices that the criminal justice system does not have the personnel or the resources to handle. The corrective justice system also makes correcting these wrongs more efficient. Tort victims who feel seriously aggrieved are more likely to track down and sue their wrongdoers, while those less offended are not. Such a selective approach seems preferable to the criminal justice alternative, where prosecutorial discretion is exercised by a group of detached and politically minded public officials.

Another social benefit of corrective justice is its educational and indoctrinating effect. Essentially, corrective justice teaches lessons about justice. It does so in the pleadings, briefs, attorneys' arguments and jury instructions. It tells people not just to obey the law or to refrain from committing crimes. It also tells them about everyday relational responsibilities and standards of reasonableness. Corrective justice makes these lessons available to all who wish to file a lawsuit, but directs them toward the select few who need to hear them the most. In fact, the entire practice of corrective justice has educational value. It inculcates habits of impulse restraint, due process and reasoned debate. Thus, just as one's practice of justice can lead him to formulate just practices, one's participation in a just practice can lead him to the practice of justice.

Corrective justice also serves an important political purpose. In fact, this purpose seems to be the same one underlying Zipursky's theory of civil recourse. In liberal democracies, justice is not simply a virtue; it is a right. Because of the social compact, the state has an obligation to secure our freedom from invasion, and we have a right to enforce that obligation. If the state, by its own authority, cannot guarantee our right to security, we have a right to secure it ourselves. As Zipursky notes, this philosophy sustains our privilege of self-defense.[274] However, it also establishes our right to civil recourse, or corrective justice, or whatever one wishes to call it. Through corrective justice, we can force our wrongdoers into court and compel them to right our wrongs. If we could not, we would lose much of our freedom, and the state would lose much of its political fidelity.

Such talk of rights suggests yet another purpose of corrective justice. Viewed as a right to self-help action, corrective justice is more than just a part of our political heritage: it is an important part of our cultural identity. America was founded by self-starters. It was nurtured on values of liberty, independence and self-determination. It is defined by its ethos of rugged individualism and fighting for what is right. Corrective justice both reflects and reinforces these same qualities.

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[274] Zipursky, *Civil Recourse, supra* note 7, at pp. 735-36.

Although it is run by the state, it operates on individual initiative. If someone feels wronged, he is empowered to rise up to defeat his foe. Far from relying on state largesse, he alone wields the power to determine his own destiny.

In the final analysis, corrective justice's most important job is also its most personal. Other social systems can regulate bad behavior or provide compensation for financial losses. However, only corrective justice can fully rectify tortious wrongs. As we have already seen, corrective justice is what separates gain from loss. It is what restores the moral imbalance between wrongdoer and victim. It is what empowers those who have been exploited, and what humbles their exploiters. More than anything else, it is what people want. As Neil Feigenson has found, jurors in tort cases seek nothing more than "total justice."[275] This means that they try to "balance accounts between the parties,"[276] they think about accidents in terms of "just deserts" instead of social utility[277] and they view the parties' dispute as a "morality play in which the good guy triumphs precisely to the extent that the bad guy gets his or her comeuppance."[278] What it really means, in short, is precisely what the insiders seek to deny: the determination of tort liability is actually a determination of corrective justice.

Conclusion

In answering the criticisms of the insiders, I have tried to show that the concept of corrective justice explains a lot more of tort law then they are willing to admit. However, this was not my primary purpose in offering such a response. Instead, I wanted to demonstrate that no descriptive theory—even one as comprehensive as corrective justice—can fully account for all of tort law. Further still, I wanted to show that, even if such a theory were possible, it would hold little value. Unless it can identify the law's underlying principles, and can reconcile them with the law's history and values, it can never tell us whether the law is good or bad or what it needs to do to get better.

Such an account of tort law is not only possible, but available. As I have explained in earlier works,[279] and have reiterated here, tort law is best understood as a form of liberal justice. This justice theory originated in ancient Greece and took root in medieval courtrooms. Founded on the principle of rationalism, it readily assimilated liberal values of autonomy, security and equality. Although it promoted the end of justice, it did not rely on a single justice ideal. Instead, it com-

[275] FEIGENSON, *supra* note 126, at 16.
[276] *Id.* (emphasis omitted).
[277] *Id.*
[278] *Id.* at 6-17 (citation omitted).
[279] *See generally* CALNAN, *supra* note 59, Calnan, *supra* note 59.

bined various justice concepts and blended them with the logic of practical reasoning.[280]

Today, liberal justice theory continues to provide a compelling account of tort law—an account that answers virtually all of the questions posed by the insiders. It explains the law's bipolar structure and the exclusivity of its parties. It explains the tortious concept of wrongdoing and the duty-breach-causation-harm format of its causes of action. It explains both compensatory and extra-compensatory damages and supports, if it does not fully justify, the award of injunctive relief. It explains both the adversarial dynamic of tort litigation and its jury-based interpretive methodology. Liberal justice even explains the law's practical limits and defines its relationship to other decisional factors.

However, like any descriptive theory, even a full-blown justice theory cannot account for everything. Like Zipursky's civil recourse theory, liberal justice theory does not capture the *modern*—that is, the amoral and no-fault based—concept of strict liability. For Zipursky, this failing proves fatal to his cause, since he believes not only that pure descriptive theorizing is possible, but also that he has discovered a pure descriptive theory of torts. For me, however, such gaps simply sound an alarm. Justice theory can and does explain *premodern* strict liability. As noted earlier, medieval courts imposed "strict law" whenever it was fair and just to do so.[281] Although special rules existed for special activities—like owning cattle or vicious dogs, starting fires or employing servants—these rules were never amoral or unjust. Instead, they were founded on the natural principle of reasonableness and governed by ethical notions of knowledge, power and control.[282] If this is true, then the important question is not, as the insiders might assert, whether justice theory can account for modern strict liability. Rather, the key question is whether modern strict liability is an aberrant departure from the justice theory that created it.

Seeing this is the first step in understanding justice theory's true value. It does not simply give us some answers about tort law, it forces us to ask the right questions—questions so compelling and fundamental, even the insiders cannot ignore them. For example, if justice was the original goal of Anglo-American tort law, what happened to that goal? Was its importance diminished by a cataclysmic shift in cultures and values, or was it merely expunged by realism, pragmatism and instrumentalism? If justice is no longer the law's primary goal, what goal is superior? If it is so expendable, why do judges keep writing about it, attorneys keep arguing about it and juries keep thinking about it? If the law is not based on the idea of just deserts, why does it enforce duties, vindicate rights and redress wrongs? Indeed, if fair treatment is not the law's objective, are we to assume that the law is committed

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[280] I fully recount the historical evolution of this theory in my recent book. *See* ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM (2005).

[281] *See supra* notes 223-25 and accompanying text.

to treating parties in ways they do not deserve? If so, what Anglo-American norm supports *that* concept? If the law shuns justice ideals of balance and proportionality, why does it rely so heavily on balancing tests and seek to coordinate liability with loss and punishment with offense? If it does not embrace the principle of classical rationalism, why does it apply a standard of reasonable care in most cases and various reasonableness concepts in all the rest? If the law does not operate on values of liberty, security and equality, what other Anglo-American values does it support? Most importantly, if the law does not possess both a moral and a political grounding, what gives it any credibility or binding authority? Unless and until the insiders address these questions, their skeptical approach to justice theory must itself be met with a good bit of skepticism.

[282] *See* CALNAN, *supra* note 280, at 248-74 (including a thorough review of the "rational" origins of these strict liability rules).