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Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law

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WHY THERE IS NO DUTY TO PAY DAMAGES: POWERS, DUTIES, AND PRIVATE LAW

NATHAN B. OMAN*

ABSTRACT

This Article was part of a symposium on the rise of civil recourse theory. It contributes to this debate by defending a simple but counterintuitive claim: There is no duty to pay damages in either tort or contract law. The absence of such a duty provides a reason for believing that civil recourse provides a better account of private law than does corrective justice. Corrective justice is committed to interpreting private law as creating duties for wrongdoers to compensate their victims. In contrast, civil recourse sees the law as empowering plaintiffs against defendants. My argument is that a careful analysis of the doctrines surrounding pleading, payment of damages, accord and satisfaction, and judgments reveals that our law gives plaintiffs the power to extract wealth from defendants but does not impose duties on defendants to compensate those that they have wronged. The structure of my argument is borrowed from a much older exchange between Oliver Wendell Holmes, Jr., who thought that contract law imposed a duty to perform or pay damages, and Frederick Pollock, who denied that the payment of damages was part of the duty to keep a contract. I side with Pollock against Holmes and think that the Englishman's argument provides a useful model in the debate between corrective justice and civil recourse.

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I. INTRODUCTION

It is a good time to be a theorist of the private law. After a period during which the manifest power of economic analysis of torts and contract seemed to have driven most other approaches into the shadows, philosophically minded lawyers and law professors (and a few legally minded philosophers) have turned their attention to what in more civil climes is referred to as the law of obligations.¹ The result is a lively debate between the partisans of competing noneconomic theories of tort and contract. Central to these discussions is the disagreement between corrective justice theorists, who see private law as a means of enforcing a wrongdoer's duty to compensate the person that

* Associate Professor, William & Mary Law School. This Article grew out of a series of exchanges with Curtis Bridgeman, John Goldberg, and Benjamin Zipursky, for which I am grateful. Neal Devins, Andrew Gold, and Stephen A. Smith provided extensive and helpful comments. All errors, of course, remain my sole responsibility. As always I thank Heather.

1. Rather than defend my use of the term private law or the coherence of talking about private law as a unique field, for purposes of this Article I am using the term to refer to torts and contracts. The civil law of obligations also includes what we would call the law of unjust enrichment or quasi-contract. In this Article I do not purport to be opining on the theorization of unjust enrichment.

he has wronged, and civil recourse theorists, who see private law as empowering plaintiffs to act against those that have wronged them.

To those unfortunate enough not to work in the philosophy of private law, the distinction between these two approaches may seem too fine to matter. A philosopher, of course, could respond that increasing our understanding, finding a theory that cuts closer to the joints of reality, provides its own justification. Others, however, might respond that simply discovering an elegant theory of law is not ultimately aesthetically important enough to justify itself. “Theories of law,” Michael Moore has observed, “are pretty poor art.”² There are, however, at least two reasons to suppose that this debate matters.

First, both corrective justice and civil recourse theories are offered as interpretations of our law as it currently exists or, at any rate, normative reconstructions that plausibly identify core normative concerns of the private law. Virtually any plausible theory of adjudication starts with the premise that like cases should be treated alike and that judges should decide new cases in accord with preexisting law. Even those who assert that judges do and should feel free to decide cases on the basis of open-ended policy considerations rather than past precedent argue that such open-ended policy considerations require that the law remain stable and minimally coherent.³ Hence, both traditional and pragmatic models of judging require that judges decide at least some cases in accordance with the law’s internal norms. Accordingly, it behooves us to discover the content and structure of those norms.

Second, interpretive theories are an important element in normative debates over law reform. For example, in the law of torts, the status of punitive damages is currently controversial in the United States. Numerous states have enacted tort reform statutes. The debate pits two powerful constituencies—plaintiffs’ attorneys and businesses—against one another. Adjudicating the debate between corrective justice theorists and civil recourse theorists cannot lay these controversies to rest, but it is relevant to how one views the issues. Punitive damages present an embarrassment for corrective justice theories, because punitive damages are by definition noncompensatory. On the other hand, civil recourse theorists view the private law as empowering plaintiffs to act against defendants rather than as vindicating a right to compensation per se. Accordingly, most civil recourse theorists have argued that their approach provides justifica-

2. Michael Moore, *Theories of Areas of Law*, 37 SAN DIEGO L. REV. 731, 733 (2000).

3. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 124-57 (1990) (arguing that even open-ended, pragmatic adjudication requires an appreciation for the value of continuity in the law).

tion for punitive damages.⁴ Of course, regardless of which theory one takes as the best interpretation of the private law, one may believe that there are compelling independent reasons for limiting punitive damages. Nevertheless, for a corrective justice theorist, such limitations will be seen as less violent to preexisting law and can even be seen as an extension of its inner logic by limiting anomalous elements from the law. For a civil recourse theorist, in contrast, limiting such damages marks the abandonment of a key normative element in our current law.

This Article contributes to this debate by defending a simple but counterintuitive claim: There is no duty to pay damages in either tort or contract law. The absence of such a duty provides a reason for believing that civil recourse provides a better account of private law than does corrective justice. Corrective justice is committed to interpreting the private law as creating duties for wrongdoers to compensate their victims. In contrast, civil recourse sees the law as empowering plaintiffs against defendants. My argument is that a careful analysis of the doctrines surrounding pleading, payment of damages, accord and satisfaction, and judgments reveals that our law gives plaintiffs the power to extract wealth from defendants but does not impose duties on defendants to compensate those that they have wronged. The structure of my argument is borrowed from a much older exchange between Oliver Wendell Holmes, Jr., who thought that contract law imposed a duty to perform or pay damages, and Frederick Pollock, who denied that the payment of damages was part of the duty to keep a contract.⁵ Pollock sought to demonstrate the absence of the duty to pay damages through an analysis of the doctrinal structure of contract law, particularly its pleading requirements. I side with Pollock against Holmes and think that the Englishman's approach provides a useful model in the debate between corrective justice and civil recourse.

The remainder of this Article proceeds as follows. Part II provides a background to the debate between the corrective justice and civil recourse theories. Part III revisits the Holmes-Pollock debate over the nature of contractual liability. Part IV seeks to apply Pollock's argument to current law and argues that there is no duty to pay

4. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 604-05 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 749-52 (2003) (discussing punitive damages). It is also worth adding, however, that by uncoupling the measure of damages from compensation, civil recourse may also provide a justification for subcompensatory damages. See, e.g., Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 557-60 (2011) (arguing that civil recourse theory explains the pervasive use of subcompensatory damages in contract).

5. See *infra* Part III.

damages. Part V anticipates and responds to some of the objections that could be made against my argument. Part VI concludes.

II. FROM CORRECTIVE JUSTICE TO CIVIL RECOURSE

Civil recourse theory has arisen out of a quarrel between economic and individual rights theorists of private law, mainly torts. According to law and economics scholars such as Richard Posner, Guido Calabresi, and Richard Epstein, the law of torts serves the goal of economic efficiency by forcing agents to internalize the costs of their actions and thereby incentivizes them to make optimal levels of investment in precaution.⁶ On this view, damages in a tort suit are merely a fine, a kind of Pigouvian tax placed on externality-creating behavior.⁷

Critics such as Jules Coleman and Ernest Weinrib offer a different vision of damages.⁸ A tort suit, these critics argue, always has a bilateral structure.⁹ The plaintiff and defendant are connected to one another through the institution of liability. To put the point in more concrete terms, the primary remedy in tort consists of monetary damages, and those damages are always paid from losing defendants to victorious plaintiffs. This payment always occurs because the defendant has committed a legal wrong and the plaintiff was the victim of that wrong. Yet, if tort law is simply a set of fines to incentivize the defendant, then this structure makes little sense. Why should the fine be paid to the plaintiff? Once the money is extracted from the defendant, the incentive effect is fully realized, even if the extracted money were given to the government or—similarly—thrown down a rat hole and burned. Giving the money to the plaintiff provides no incentive to the defendant, and by providing—admittedly sporadic and ad hoc—accident insurance to victims, damages create a moral hazard problem, making them economically perverse. Likewise, why

6. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 213-71 (8th ed. 2011); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961); Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151 (1973).

7. See Alan J. Meese, *The Externality of Victim Care*, 68 *U. CHI. L. REV.* 1201, 1221-23 (2001) (discussing tort law and Pigouvian taxes).

8. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992) [hereinafter COLEMAN, *RISKS AND WRONGS*] (analyzing liability, risk and damages in tort law); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13-24 (2001) [hereinafter COLEMAN, *THE PRACTICE OF PRINCIPLE*] (discussing bilateralism); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) (discussing corrective justice and correlativity); Jules L. Coleman, *The Structure of Tort Law*, 97 *YALE L.J.* 1233 (1988) (book review) (comparing the deterrence argument with the private enforcement argument); Ernest J. Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403 (1992) (arguing that Aristotle's formalism enables us to appreciate the distinctive coherence of private law relationships).

9. See COLEMAN, *RISKS AND WRONGS*, *supra* note 8, at 374-75 (discussing bilateralism); WEINRIB, *supra* note 8, at 114-26 (same). Weinrib prefers the term correlativity rather than bilateralism.

not sue the person who could prevent the loss at the cheapest cost? For example, as a matter of law, the plaintiffs in a wrongful death suit over a company's failure to install some multi-million dollar piece of safety equipment may not sue the bystander who walked indifferently by the bleeding victim, even though the bystander could have saved the victim with a simple and all but costless tourniquet. In this situation, however, the bystander is clearly a cheaper cost avoider than the company.

Given such objections, Coleman and Weinrib argue that economics cannot explain the bilateral structure of a tort suit, but the much older idea of corrective justice can.¹⁰ According to Aristotle, the earliest theorist of corrective justice, "that which is just in private transactions is indeed fair or equal in some sort, and that which is unjust is unfair or unequal; but the proportion to be observed here is not a geometrical proportion . . . but an arithmetical one."¹¹ This justice of private transactions—corrective justice—is arithmetical because it is a matter of subtraction and addition.¹² In the case of a tort suit, it is the subtraction from the defendant and the addition to the plaintiff. The purpose is not to provide proper incentives but rather to vindicate the duty owed—in justice—by wrongdoers to make their victims whole. The approach is *ex post* rather than *ex ante* in its orientation, seeking to correct past wrongs rather than create incentives for future behavior.¹³ It thus rejects the normative orientation of econom-

10. See generally Coleman, *supra* note 8, at 1248-53 (differentiating the tort theory of recovery from a corrective justice standpoint and an economic standpoint); Weinrib, *supra* note 8, at 403-21.

11. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 148 (F.H. Peters trans., 14th ed., Kegan Paul, Trench, Trubner & Co. n.d.) (1881), available at <http://www.archive.org/stream/nicomacheanethic1893aris#page/n5/mode/2up>.

12. Distributive justice constitutes the geometric principle of justice as it divvies up the good things of life on the basis of some morally relevant characteristic of the recipient. Distributive justice is thus a kind of ratio—hence the reference to geometry—between the goods distributed and the amount of the morally relevant characteristic possessed. Different conceptions of distributive justice, of course, differ as to the morally relevant characteristic, even if they have the same geometrical structure. Corrective justice, in contrast, is indifferent to moral characteristics of different people, but simply seeks to correct transactional wrongs by arithmetically subtracting from a wrongdoer to compensate her victim. See *id.* ("For it makes no difference whether a good man defrauds a bad one, or a bad man a good one, nor whether a man who commits an adultery be a good or a bad man; the law looks only to the difference created by the injury, treating the parties themselves as equal, and only asking whether the one has done, and the other suffered, injury or damage.")

13. Compare COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 8, at 13-24, COLEMAN, RISKS AND WRONGS, *supra* note 8, Jules Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987), Coleman, *supra* note 8, at 1240-53, Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992), and Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15 (1995), with WEINRIB, *supra* note 8, Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 429-50 (1987), Weinrib, *supra* note 8, Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992), and Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107 (2001).

ics, which looks at future incentives rather than the compensation for past wrongs.

Civil recourse theorists consist mainly of heretics from within the corrective justice camp.¹⁴ They share a skepticism toward economic interpretations of tort law and believe that tort theory must be held accountable for the basic structural features of tort liability.¹⁵ Their critique of corrective justice theory thus has a similar structure to the corrective justice critique of economic accounts of tort law. In their view, corrective justice has failed to account for a key aspect of liability, namely, the fact that tort law empowers plaintiffs to act against defendants.¹⁶ Tort law, they argue, does not enforce a duty of corrective justice.¹⁷ Rather, it empowers the plaintiff to seek recourse against the tortfeasor in the courts.¹⁸

Corrective justice, they argue, cannot account for this power-conferring aspect of tort law.¹⁹ Corrective justice correctly notes the way in which tort liability connects tortfeasors and victims as plaintiffs and defendants.²⁰ What civil recourse theorists deny is that this bipolar connection is defined primarily or exclusively in terms of the tortfeasor's duty to make the victim whole.²¹ Rather, the bipolar relationship is defined by the way the law gives a wronged plaintiff power over his wrongdoer.²² In this sense, tort litigation is similar to—but not identical to—the blood feuds that form the Teutonic preexistence of the common law.

14. See Alan Calnan, *In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky*, 1 N.Y.U. J.L. & LIBERTY 1023, 1023-27 (2005) (discussing the relationship between civil recourse theorists and other individual rights theorists of tort law).

15. See generally Goldberg, *supra* note 4 at 583-627; Zipursky, *supra* note 4; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (criticizing and offering a substitute theory of corrective justice); Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 623 (Jules Coleman & Scott Shapiro eds., 2002).

16. See, e.g., Zipursky, *supra* note 4, at 699 ("The state does not impose liability on its own initiative. It does so in response to a plaintiff's suit demanding that the defendant be so required.")

17. See *id.* at 709-32 (critiquing corrective justice theory); Goldberg, *supra* note 4, at 601-05 (analyzing the goals of tort law).

18. See Goldberg, *supra* note 4, at 601 ("Tort law is a law for the redress of private wrongs because it empowers victims in particular ways.")

19. See Zipursky, *supra* note 4, at 709-10 (noting the difficulty of the corrective justice theory).

20. See Goldberg, *supra* note 4, at 601-05 (discussing the connection between tortfeasors and victims).

21. See Zipursky, *supra* note 4, at 710 ("I argue that tort law frequently imposes remedies that, in the circumstances, are not aimed at having the defendant make the plaintiff whole, so the recognition of a right in tort cannot be isomorphic with the recognition of a duty of repair.")

22. *Id.* at 734 ("When the state has recognized a right of action, and when a plaintiff has proven it, the state both permits and empowers a plaintiff to act against a defendant.")

While civil recourse theory smacks of vengeance, there are at least two important differences. First, and perhaps most importantly, the power that plaintiffs acquire over tortfeasors is extremely limited. They may not exact bloody retribution. Modern tort law dispenses with the *lex talionis*, and the most that a tort victim may hope for is the extraction of wealth from the tortfeasor. This is the civil in civil recourse.²³

Second, civil recourse theorists insist that they are not defending mere vengeance, but rather showing how tort law vindicates the demands of justice. Benjamin Zipursky and John Goldberg, the two most prominent civil recourse theorists, for example, have sought to justify empowering plaintiffs on the basis of their reading of the Lockean social contract tradition.²⁴ Locke posits that in the state of nature every person has the right to enforce the law of nature against those that violate it.²⁵ The authority of the state to punish violations of the law of nature arises from the delegation of this power.²⁶ The delegation, according to Locke, is not absolute. Each person retains the natural right to act against those that personally wrong him.²⁷ The state's suppression of violence, however, would leave people without the means of exercising this right unless it also provided a means of civil recourse.²⁸ Alternatively, Jason Solomon has offered an elaborate defense of civil recourse based on the "second-person standpoint" articulated in moral philosophy by Stephen Darwall.²⁹ According to Solomon, tort law governs situations in which one is both entitled to feel aggrieved and entitled to act on the basis of that

23. *Id.* at 750 ("Of course, it is crucial to our civil system that . . . physical violence is not permitted: monetary damages through civil litigation is the remedy.")

24. *Id.* at 735 (discussing Locke); Goldberg, *supra* note 4, at 541-44 (same).

25. Locke wrote as follows:

[T]hat all men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, which willeth the Peace and *Preservation of all Mankind*, the *Execution* of the Law of Nature is in that State [i.e., the state of nature] put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690).

26. *See id.* at 342 ("And thus the Commonwealth comes by a Power to set down, what punishment shall belong to the several transgressions which they think worthy of it, committed amongst the Members of that Society, (which is the *power of making Laws*) as well as it has the power to punish any Injury done unto any of its Members, by any one that is not of it, (which is the *power of War and Peace*) and all this for the preservation of the property of all the Members of that Society, as far as is possible.")

27. *Id.* at 273 (stating that man "has besides the right of punishment common to him with other Men, a particular Right to seek *Reparation* from him that has done it").

28. *Id.* at 292 (describing the right to reparation for damage done and noting that one "cannot *remit* the satisfaction due to any private Man; for the damage he has received").

29. *See* Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1791-94 (2009).

feeling.³⁰ Hence, recourse is not about vengeance but the vindication of moral rights.³¹

The disagreement between corrective justice and civil recourse theories presents at least two different debates. First, there is the normative debate about whether the substantive values embodied in each theory are morally attractive. Second, there is an interpretive debate about which theory best accounts for our current legal institutions. The remainder of this Article is concerned with this second question.

H.L.A. Hart provided a distinction that gives us one way of understanding the differing claims that each theory makes about the structure of private law. Much of Hart's philosophy was articulated in response to the work of John Austin, which sought to reduce the entire concept of law to the idea of commands issued by a sovereign and backed by threats.³² Hart's most famous response was to point out that from the "internal point of view," law consisted of more than simply a threat; it also purported to offer a reason for acting one way or another.³³ Hart's second and less-celebrated response to Austin was to point out that the law does more than simply create duties.³⁴ It also empowers people. The rule that a will requires two witnesses or that an administrative agency may promulgate regulations does not consist of commands to do one thing or the other.³⁵ Rather, such rules give testators and regulators certain powers that they may then use or not use as they see fit.³⁶

Corrective justice theories can be understood as positing a duty on the part of tortfeasors and contract breakers to pay damages to those that they harm. Civil recourse theories, in contrast, deny that there is a duty to pay damages. Rather, a tort or a breach of contract creates a power in the plaintiff, the power of acting against the defendant and extracting from him or her whatever wealth or other recompense the law will allow. The theories thus see lawsuits in very different terms. For a corrective justice theorist, when a plaintiff sues a defendant, the plaintiff is asking the law to force the defendant to fulfill a duty—the duty to pay compensation—that the defendant has failed to carry out. For a civil recourse theorist, in contrast, there is no such duty. Rather a tort or breach of contract makes the defend-

30. *See id.* at 1784-97 (discussing the moral foundations of recourse theory).

31. *See id.* at 1810 ("One might say, then, that tort law supports a particular moral order of equal accountability.").

32. *Compare* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 9-33 (Isaiah Berlin et al. eds., 1954) (1832) (setting forth Austin's command theory of law), *with* H.L.A. HART, *THE CONCEPT OF LAW* 18-81 (2d ed. 1994) (criticizing Austin's theory).

33. *See* HART, *supra* note 32, at 91-94 (discussing the internal point of view).

34. *See id.* at 27-29.

35. *See id.*

36. *See id.*

ant vulnerable to the plaintiff's newly acquired power to proceed against the defendant. There is not, however, a duty on the defendant's part to pay damages. Whether the defendant will be forced to relinquish property depends entirely on the plaintiff's decision to use his power.

The dichotomy between duty and power provides us with a manageable way of posing at least part of the question as to which theory provides a better interpretation of current law. When a tortfeasor commits a tort or a promisor breaches a contract, is there a duty to pay damages?

III. HOLMES AND POLLOCK ON THE DUTY TO PAY DAMAGES

By a happy coincidence this question was the subject of debate nearly a century ago between two of the common law's greatest early contract theorists: Oliver Wendell Holmes and Frederick Pollock. The exchange arose out of Holmes's option theory of contract. He first seems to have groped toward this argument during a series of lectures at Harvard Law School in 1872. His original target was John Austin, who insisted that legal duties consisted of nothing more than commands of the sovereign backed by legal threats. Holmes was unpersuaded. Austin's theory, he in effect argued, implausibly reduced civil liability to a sanction attached to a sovereign command. But, Holmes insisted, "[t]he notion of duty involves something more than a tax on a certain course of conduct."³⁷ He continued that "an absolute command does not exist—penalty or no penalty—unless a breach of it is deprived of the protection of the law, which is shown by a number of consequences not accurately determinable in a general definition, such as the invalidity of contracts to do the forbidden act."³⁸ A decade later, he sharpened his argument, writing in *The Common Law*:

The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.³⁹

Knowingly or unknowingly, Holmes was echoing the earlier thought of Austin's patron Jeremy Bentham, who wrote that "[a] *fixed* penalty is a *license in disguise*."⁴⁰

37. Oliver Wendell Holmes, Jr., Book Notices, 6 AM. L. REV. 723, 724 (1872).

38. *Id.* at 724-25. This book notice, written by Holmes, is generally accepted as being based on his Harvard lectures, of which no copy survives. See generally 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, at 76-77 (1963).

39. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1923) (1881).

40. JEREMY BENTHAM, *Last Epigrams and Sayings*, in A BENTHAM READER 359, 363 (Mary Peter Mack ed., 1969).

Pollock disagreed. Between 1874 and 1932 the two men carried on a voluminous correspondence.⁴¹ Tellingly, in 1874 Pollock sent the first letter of the exchange in response to the *American Law Review* article in which Holmes first began to articulate his option theory. “As to duty in cases of contract,” Pollock wrote, “I think the enforcement when practicable of specific performances clearly distinguishes the ‘sanction’ from what you call a tax on a course of conduct.”⁴² The disagreement between the two men on the nature of contractual liability would continue for more than fifty years.

In 1928, Pollock put his objections in another series of letters, this time using the language of common law pleading, which he had immersed himself in as a legal historian. “[H]ow [do] you escape censuring the common form of declaration in *assumpsit*[?]” he challenged Holmes.⁴³ “Don’t you want an averment of *neither* performance *nor* tender of damages[?]”⁴⁴ Holmes responded by insisting that Pollock was arguing against a straw man. He wrote:

With regard to contracts I will bore you no more except to say that your suggestion that I ought to criticize the declaration in *assumpsit* for not denying tender of damages, shows the persistence of the impression that I say that a man *promises* either X or *to pay damages*. I don’t think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable *simpliciter*.⁴⁵

Pollock, however, was not quite ready to concede the point and fired off his reply two weeks later. “I don’t see the way to any neat contrast-parallel between contract [and] tort liability.”⁴⁶ He continued:

There is no act I have committed beyond being born to make me liable for my own trespasses when I trespass: whereas I am not in a position to be liable for my cattle trespassing unless I choose to keep cattle, which in fact I don’t. But the language and pleading of our law make no distinction until it comes to assuming a position which makes me answerable to some certain person or sort of persons *e.g.* invitees in my place of business—the original *super se assumpsit* inducing a declaration in Tort is typical of this.⁴⁷

For a reader living in the world of notice pleading, understanding Pollock’s argument can be difficult. He initially understood Holmes

41. See generally 1 HOLMES-POLLOCK LETTERS (Mark DeWolfe Howe ed., 2d ed. 1961); 2 HOLMES-POLLOCK LETTERS (Mark DeWolfe Howe ed., 2d ed. 1961).

42. 1 HOLMES-POLLOCK LETTERS, *supra* note 41, at 3.

43. 2 HOLMES-POLLOCK LETTERS, *supra* note 41, at 233.

44. *Id.*

45. *Id.*

46. *Id.* at 234.

47. *Id.* at 234-35.

as claiming that contractual liability consisted of a disjunctive promise to perform or to pay damages.⁴⁸ Pollock in effect conceded that there was a duty to perform a contract, but he questioned whether the payment of damages constituted a form of contractual performance.⁴⁹ Put another way, he denied that there was a contractual duty to pay damages. This did not mean, of course, that he thought it was impossible to force a defendant to pay a plaintiff damages, only that the payment of such damages was not a duty arising out of the contract itself. In support of his claim, he looked to the pleading requirements for the action of *assumpsit*, the common law writ traditionally used for the enforcement of contracts not under seal. Under the writ system, the rules of pleading were exacting.⁵⁰ The failure to plead every element of the legal wrong would result in the dismissal of the plaintiff's suit upon demurrer by the defendant.⁵¹ In an action of *assumpsit*, it was necessary to plead that the defendant had undertaken to do some action and had failed to perform as promised.⁵² It was not necessary, however, to plead that upon failing to perform the defendant had also failed to pay damages. Yet, if payment of such damages was a way in which the promisor's duty could be fully discharged, Pollock argued, surely the plaintiff would be required to plead the failure to tender damages.⁵³ Accordingly, Pollock concluded that there was no duty to pay damages in the case of nonperformance.⁵⁴ Rather, there was simply a duty to perform, as this was the only duty whose failure needed to be proven at trial.

Holmes's response was to insist that he didn't regard the duty to pay damages as arising from the contract itself.⁵⁵ It was not that the promisor promised to perform or pay damages. Rather, he thought that the law simply imposed the duty to pay damages regardless of what the parties intended.⁵⁶ Pollock's reply again fell back on the logic of the writ system. According to Holmes's clarification, as Pollock understood it, the contract is not the source of the duties.⁵⁷ Rather, it

48. *See id.* at 234 ("I did suppose, not alone it seems, that you[, Holmes,] conceived a contractual promise as being in ultimate analysis for performance or damages . . .").

49. *See id.* at 233.

50. *See* RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 279-81 (2006) (discussing the common law pleading system).

51. *See id.* at 280 ("Moreover, the writs were extremely narrow, and it was easy for a plaintiff to establish at trial a right to recovery that was different from the writ she had chosen. The price to pay for this 'variance' was steep—the plaintiff lost.")

52. *See generally* J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888) (providing a historical survey of *assumpsit*).

53. *See* 2 HOLMES-POLLOCK LETTERS, *supra* note 41, at 233.

54. *Id.*

55. *See id.* ("I don't think a man promises to pay damages in contract nay more than in tort.")

56. *See id.* ("He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable *simpliciter*.")

57. *Id.* at 234-35.

is merely a fact about the world that gives rise to a duty to pay if the promisor happens to fail to do certain things. In torts, Pollock argued, certain actions—trespass to land, for example—give rise to liability without any other fact other than the brute existence of the tortfeasor on the victim's property.⁵⁸ Other torts—trespass by cattle, for example—require a prior undertaking by the tortfeasor—the ownership of cattle in Pollock's example.⁵⁹ Yet, in a tort action, this prior undertaking by the tortfeasor need not be pleaded. In contrast, in an action of assumpsit the prior undertaking—the contract—by the promisor must be plead. If the contract was simply a fact about the world that happened to be a predicate to liability rather than a fount of obligation, Pollock argued in effect, then why does the action of assumpsit require the plaintiff to plead the existence of the contract but an action of trespass by cattle does not require the plaintiff to plead the tortfeasor's choice to keep cattle?⁶⁰ The correspondence does not record an answer from Holmes.

The Holmes-Pollock exchange is instructive for two reasons. First, while Pollock is not arguing about the merits of civil recourse or corrective justice, it is striking that he concluded that there was not a duty to pay damages in lieu of performance.⁶¹ Second, and more importantly, his careful attention to the writ system forces the question of a duty to pay damages down to a very concrete inquiry into whether there is evidence that the law regards the tender of damages upon breach of an obligation—or the absence of such tender—as an element of any cognizable legal wrong. Pollock's method provides a useful model for approaching the debate between corrective justice and civil recourse theories. While we are a century or more removed from the formalities of the writ system on which he relied, his basic approach can be applied to current law. We can look to the ways in which the law recognizes the elements of a duty in its pleading requirements or elsewhere in the rules surrounding a particular act such as the tender of money after a tort or breach of contract.

IV. TENDER OF DAMAGES AND CURRENT LAW

Just as Pollock looked carefully to procedural and remedial law to test whether Holmes's description of contract matched the structure of common law liability, a careful examination of the same bodies of law reveals that failing to pay damages does not breach a legal duty. Upon the commission of a tort or the breach of a contract, there is no duty to tender damages. Certainly, the absence of such tender is not

58. *Id.*

59. *Id.*

60. *See id.* (“[W]hereas I am not in a position to be liable for my cattle trespassing unless I choose to keep cattle, which in fact I don't.”).

61. *Id.* at 233.

an element of any cause of action, and the tender of damages is not a defense. This, in turn, suggests that corrective justice theorists are mistaken when they posit that tortfeasors and contract breachers have a duty to make their victims whole. As a matter of law, no such duty exists. Indeed, even after a plaintiff has successfully obtained a judgment against a defendant, with the exception of a few special circumstances, there is no duty to tender damages. A defendant may simply ignore the judgment without committing any additional legal wrong. These claims can be supported by looking closely at the doctrines surrounding settlement, accord and satisfaction, and the levying of judgments.

As Pollock noted, in order to establish a cause of action for breach of contract or in tort, it is not necessary to allege the failure to pay damages.⁶² Pleading standards today are much more liberal than they were under the writ system.⁶³ This does not mean, however, that Pollock's argument is without force today. Even under these relaxed standards, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁶⁴ Furthermore, Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a defendant to file a demurrer to any complaint for "failure to state a claim upon which relief can be granted."⁶⁵ "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"⁶⁶ We thus have a body of law devoted to analyzing the elements of the duties that must be breached to give rise to a cause of action in tort or contract. It is difficult to prove a negative, but there does not seem to be any case in which a complaint asking for relief in a tort case or a contract case has been dismissed under Rule 12(b)(6) for failing to allege that the defendant failed to tender damages. On the other hand, a contract case will be dismissed under Rule 12(b)(6) for failing to allege the existence of a contract or its breach by the defendant.⁶⁷ Likewise, a tort suit may not survive a motion to dismiss if it fails to allege negligent or otherwise tortious behavior by the defendant, but failing to allege tender of damages is likely to be harmless to the

62. *See id.* at 235.

63. *See* FREER, *supra* note 50, at 278 ("[P]leading practice today is more forgiving than it was in earlier eras.").

64. FED. R. CIV. P. 8(a)(2).

65. FED. R. CIV. P. 12(b)(6).

66. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

67. *See* *Grisby v. Wilberforce Univ.*, No. 3:05-cv-014, 2007 U.S. Dist. LEXIS 49062, at *19 (S.D. Ohio 2007) (dismissing breach of contract claim because the plaintiff failed to allege breach).

plaintiff's cause.⁶⁸ Yet, if the tender of damages were a duty that arose upon breach of contract or commission of a tort, then it seems that one ought to plead its failure in order to state a claim for relief.

Our current law, however, goes beyond merely not requiring that one plead tender of damages. In most cases, evidence of pretrial payment of damages by the defendant is not even admissible. Federal Rule of Evidence 409 codifies the old common law rule on this point, prohibiting the introduction of “[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury.”⁶⁹ The rule, however, only precludes the admission of the evidence to prove liability.⁷⁰ For example, if the location where an injury occurred is in dispute, a defendant's tender of medical expenses might be admissible if the circumstances surrounding the tender provided factual evidence as to where the injury occurred.⁷¹ Pointedly, in this case, the evidence is admissible precisely because the fact of tender itself is not an element of the plaintiff's case for liability.⁷²

This rule is generally defended on humanitarian grounds.⁷³ Often people will offer help to those in distress not because they are admitting fault but simply as an act of compassion.⁷⁴ Such behavior should be encouraged, and keeping it from being used against the Good Samaritan later in court seems wise.⁷⁵ Such a justification for the rule could be consistent with a duty to pay damages, and the rule itself

68. See *Aaronson v. Vital Pharms., Inc.*, No. 09-cv-1333 W(CAB), 2010 U.S. Dist. LEXIS 14160, at *17 (S.D. Cal. 2010) (refusing to dismiss complaint for failure to specify amount of damages).

69. FED. R. EVID. 409; see also *Flieg v. Levy*, 133 N.Y.S. 249 (N.Y. App. Div. 1912) (applying the common law rule); *Brown v. Wood*, 160 S.E. 281, 283 (N.C. 1931) (same); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:62 (3d ed. 2007) (discussing the relationship between the common law rule and the Federal Rules of Evidence).

70. FED. R. EVID. 409 (noting that such evidence is only “not admissible to prove liability for the injury”).

71. See *Great Atl. & Pac. Tea Co. v. Custin*, 13 N.E.2d 542, 545-46 (Ind. 1938) (“The court overruled the objection and permitted the appellee to answer, that the manager said to her that she must have it (the injury) taken care of right away and send the bill to him. There is a dispute between the appellant and appellee as to whether appellee was injured at all in appellant's store.”).

72. See *id.* at 546 (“The evident purpose of this testimony was to support appellee in her contention that the injury was caused as she had described.”).

73. See *Galarnyk v. Hostmark Mgmt.*, 55 Fed. App'x 763, 765 (7th Cir. 2003); *Oldenburg v. Sears, Roebuck & Co.*, 314 P.2d 33, 41 (Cal. Ct. App. 1957); *Grogan v. Dooley*, 105 N.E. 135, 136 (N.Y. 1914).

74. See *Grogan*, 105 N.E. at 136 (“In the case at hand the defendants made a spontaneous offer of assistance, and are now told that, in doing so, they made evidence against themselves. The law would be doing wrong to employers and scant service to employ[ees] if it throttled the impulses of benevolence by distorting humane conduct into a confession of wrongdoing.”).

75. See *Oldenburg*, 314 P.2d at 41 (“Logic and reason support this view. If a contrary rule were adopted, it would tend to deter, instead of encourage, one who has injured another from giving aid.”).

would still allow a defendant to introduce evidence that he or she tendered payment to the plaintiff as a defense. It is striking, however, that none of the judicial elaborations of the rule ever discuss how the exclusion of this evidence bears on meeting the burden of proving some duty to pay damages.⁷⁶ Furthermore, while payments of medical expenses may be used to offset any final damage award, the mere fact of tendering damages is not a defense to liability. For example, in some jurisdictions any money already tendered by the defendant to the plaintiff at the time of the suit need not be raised at the answer stage in the pleadings where affirmative defenses are normally raised.⁷⁷ Rather, the fact of payment may be raised later when calculating damages, suggesting that tender is irrelevant to the question of liability.⁷⁸ This issue has not been explicitly addressed under the Federal Rules.⁷⁹

Likewise, there is not a duty to tender damages for breach of contract. Of course, one can tender payment for an unliquidated or disputed debt under the doctrine of accord and satisfaction.⁸⁰ If the tender is accepted, accord and satisfaction is then a defense against the original contractual liability.⁸¹ An accord and satisfaction, however, constitutes a new contract in place of the old contract, rather than the performance of a duty associated with breach.⁸² To be sure, in the classic case where a debtor tenders a check with “payment in full” scribbled someplace on it, the teree’s consent may become somewhat attenuated.⁸³ Even the most formalistic jurisdictions, however, require the tender to be accepted to extinguish liability on the origi-

76. Again, it is difficult to prove a negative. I have not seen any cases in which this has happened.

77. See, e.g., *Edwards v. Passarelli Bros. Aut. Serv., Inc.*, 221 N.E.2d 708, 711 (Ohio 1966) (allowing an insurance company to obtain an offset via post-trial motion in the face of the plaintiff’s argument that the failure to raise the issue earlier rendered it res judicata).

78. See, e.g., *Walsh v. Boston Sand & Gravel Co.*, 175 F. Supp. 411, 414 (D. Mass. 1959) (crediting amounts previously paid by defendant to injured seaman in order “to avoid double payment”); *Spielman v. New York, New Haven & Hartford R. Co.*, 147 F. Supp. 451, 453 (E.D.N.Y. 1956) (railroad’s payments of medical expenses would be deducted from amount of judgment thereafter awarded); *Lundy v. Calmar S.S. Corp.*, 96 F. Supp. 19, 22 (S.D.N.Y. 1951) (advance payments by defendant shipowner would be deducted from libellant’s damages).

79. See, e.g., *MUELLER & KIRKPATRICK, supra* note 69, § 4:62, at 175 (“There is state precedent, sometimes generated in the context of a specific statutory scheme, that utilizes a post-trial motion procedure to reduce the judgment by the amount of the advances.”); 23 *CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE* § 409 (3d ed. 1998).

80. See 13 *SARAH HOWARD JENKINS, CORBIN ON CONTRACTS: DISCHARGE* § 70.1 (Joseph M. Perillo ed., 2003) (describing the accord and satisfaction doctrine).

81. *Id.*

82. See *RESTATEMENT (SECOND) OF CONTRACTS* § 281(1) (1981) (“An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty. Performance of the accord discharges the original duty.”).

83. See, e.g., *Deuches v. Grand Rapids Brass Co.*, 215 N.W. 392, 393 (Mich. 1927) (discussing such a situation).

nal contract.⁸⁴ Tender alone, on the other hand, does not discharge any duty associated with the contract. For instruments governed by the Uniform Commercial Code, the requirements are more exacting. The tender must be made in good faith, and the offer of an accord must be conspicuous.⁸⁵ In short, the one area where contract doctrine explicitly addresses the treatment of tender of what might be characterized as damages after breach neither imposes a duty of tender nor allows the bare fact of tender to act as a defense.

The absence of a legal duty to pay damages, however, is most dramatically illustrated by the way in which judgments are treated. In a tort or contract action, a successful plaintiff will obtain a judgment of liability against the defendant. The defendant, however, does not thereby acquire a duty to pay the judgment to the plaintiff. Rather the plaintiff is empowered to act against the defendant, taking his property to satisfy the judgment. As the leading American treatise on the subject summarized it:

Ordinary money judgments reflect an adjudication of liability but they do not enter any command to the defendant. Money judgments rendered by the old separate law courts and most money judgments today are in a form which says that the plaintiff shall have and recover of the defendant the sum of \$10. Since this was not a personal order, the defendant who does not pay was not jailed for contempt. Instead, enforcement is achieved indirectly by seizing the defendant's property.⁸⁶

Strikingly, the failure to pay an ordinary judgment is not a legal wrong. It does not give rise to any additional liability or other sanction.⁸⁷ Indeed, it is not unheard of for plaintiffs to fail to collect on a

84. See, e.g., *Consol. Edison Co. of New York v. Arroll*, 322 N.Y.S.2d 420, 423 (N.Y. Civ. Ct. 1971) ("The company argues that the nature and volume of its operations does not allow for an examination by bank employees of each and every check it receives for language written thereon which could bind it to an accord and satisfaction. . . . I cannot accept this conclusion.").

85. U.C.C. § 3-311 (2005) (requiring "conspicuous statement" on instrument tendered as satisfaction and "good faith" by the tenderer).

86. 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 1.4, at 14-15 (2d ed. 1993).

87. *Id.* Something like this also seems to be the rule in English law. As one English textbook puts it, "If the judgment is for money, a sheriff or sheriff's officer is directed to seize goods belonging to the defendant and, after selling them, to pay the plaintiff out of the proceeds." F.H. LAWSON, *REMEDIES OF ENGLISH LAW* 8 (2d ed. 1980). Execution on the person as opposed to the property of the defendant has been sharply limited under English law:

Imprisonment for debt was abolished by the Debtors Act [of] 1869, except where a debtor could but would not pay; and debts owed to the Crown were exempted from the Act. By the Administration of Justice Act [of] 1970, which made general the power to attach earnings, imprisonment was further restricted so as to apply only to persons who default in the payment of maintenance and certain rates and taxes.

Id. at 9. Even in these cases, however, actual imprisonment is exceedingly rare.

judgment, either because the defendant has no nonexempt assets or because the plaintiff lacks the resources to locate the defendant's assets.⁸⁸ While attempts to hide assets from creditors may give rise to additional remedies to the plaintiff under the law of fraudulent conveyances, the bare failure to pay the judgment does nothing.⁸⁹

Another way of approaching the issue is to contrast an ordinary judgment in a tort or contract case with debts where the law does impose an affirmative duty to pay. For example, child support obligations involve more than simply a power in the beneficiary to extract wealth from the obligor by levying against his or her property.⁹⁰ Rather, the law imposes an affirmative duty to pay such debts.⁹¹ Failure to pay the debt can result in imprisonment for contempt of court.⁹² Indeed, in some jurisdictions failure to make child support payments is a crime that can be prosecuted by executive branch officers.⁹³ Likewise, some jurisdictions create similar duties in cases of alimony or property settlements, punishing debtors who fail to pay such obligations.⁹⁴ Tax liability is another situation in which there is an af-

When it occurs at the present day, civil imprisonment is almost always by way of committal for contempt of court. . . . Such imprisonment is rare except of husbands who deliberately fail to pay sums they have been ordered to pay by way of maintenance to their wives or have molested them in defiance of a court order.

Id. Hence, under English law—like American law—the primary effect of an award of money damages is to empower the plaintiff to act against the defendant's property via a writ of *feri facias* or a writ garnishment. The defendant, however, is not ordered to pay except in exceptional circumstances. *See id.* at 8-9 (describing court methods for enforcing a monetary judgment).

88. *See, e.g.*, George Norris Stavis, Note, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-Profit Litigators?*, 31 COLUM. HUM. RTS. L. REV. 209, 209 (1999) (noting the difficulty of collecting monetary judgments in human rights cases).

89. *See* PETER A. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS* § 1:12 (2006) (outlining commercial fraudulent disposition law).

90. *See, e.g.*, *Brown v. Brown*, 187 N.E. 836, 837 (Ind. 1933) (“The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.”).

91. *See infra* note 93.

92. *See* T.C. Williams, *Contempt Proceedings to Enforce Decree or Order in Divorce or Separation Suit for Support of Children*, 172 A.L.R. 869 (1948) (listing cases involving contempt proceedings to enforce an order for child support). Texas goes further, revoking licenses, including hunting licenses, of any person who fails to pay child support. TEX. FAM. CODE ANN. § 232.003(a) (West 2008).

93. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-509(A) (2000) (“The attorney general or county attorney may establish, modify or enforce such a duty of support by all means available, including all civil and criminal remedies provided by law.”); CAL. FAM. CODE § 5245 (West 2004) (“Nothing in this chapter limits the authority of the local child support agency to use any other civil and criminal remedies to enforce support obligations”); MASS. GEN. LAWS ANN. ch. 119A, § 2(a) (West 2008) (mandating agency enforcement of child support orders “through civil and criminal proceedings”).

94. *See, e.g.*, N.C. GEN. STAT. § 50-16.7(j) (2002) (authorizing civil contempt for non-payment of alimony orders); 23 PA. CONS. STAT. ANN. § 3502(e)(6) (West 2001) (same).

firmative duty to pay a debt, a duty that will result in a sanction for failing to carry it out.⁹⁵ Other examples exist.⁹⁶

In fairness, Vermont has enacted a statute that allows a judgment creditor whose judgment has not been satisfied within thirty days to demand a financial disclosure hearing.⁹⁷ “[T]he court after hearing may order the judgment debtor to make such payments as the court, in its discretion, deems appropriate. Failure to make such payments may be considered civil contempt of court.”⁹⁸ This statute, however, may be the exception that proves the general rule that damage awards merely empower plaintiffs rather than create duties to pay on the part of defendants. First, the Vermont statute is plaintiff centered. Nothing will happen if the judgment creditor chooses not to exercise his or her rights.⁹⁹ Furthermore, the judge’s ability to coerce payment from a judgment debtor has been restricted by applicable case law. In *Hale v. Peddle*, the Vermont Supreme Court overturned the contempt conviction of a judgment debtor who failed to pay in response to an order under the statute.¹⁰⁰ The court found that “[a]lthough the court has discretionary power to punish a party for contempt, noncompliance with a court order by itself is an insufficient basis for exercising that power.”¹⁰¹ The Vermont Supreme Court went on to state that contempt is only appropriate in cases where the defendant deliberately flouted a court order that he was capable of complying with.¹⁰² “Contempt cannot be used as a mere debt-collecting device.”¹⁰³ Furthermore, no other state seems to have fol-

95. See, e.g., I.R.C. §§ 6651, 6653 (2006) (adding civil penalty for failure to file return and for nonpayment of tax); I.R.C. § 7203 (2006) (criminal penalty for nonpayment of tax).

96. Bankruptcy courts can order debtors to turn over money for the benefit of creditors, although this procedure is arguably more analogous to the law of fraudulent conveyances. See Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 363-67 (2006). Courts will also order disgorgement of unjustly retained benefits for the benefit of judgment creditors. See, e.g., *Commodity Futures Trading Comm’n v. Armstrong*, 284 F.3d 404, 405-06 (2d Cir. 2002) (dismissing an appeal from a contempt order even though the contemnor had been imprisoned for over two years for failure to comply with a court order to turn over almost \$15 million worth of corporate assets); *Commodity Futures Trading Comm’n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1526 (11th Cir. 1992) (affirming contempt imprisonment for refusal to comply with a court order to disgorge profits from fraudulent sale of securities).

97. See VT. STAT. ANN. tit. 12, §5537(a) (2002) (“On request of a judgment creditor[,] . . . the court shall order the judgment debtor to appear before it and to disclose information relating to his or her ability to pay the judgment in full.”).

98. *Id.* § 5537(b).

99. See *id.* § 5537(a) (stating that initiation is “[o]n request of a judgment creditor”).

100. 648 A.2d 830 (Vt. 1993).

101. *Id.* at 831.

102. See *id.* (“[I]n order to hold a person in contempt, a court must find, based on evidence, that defendant not only refused to pay but also that he has the ability to make the ordered payments.”).

103. *Id.*

lowed Vermont in making an injunctive remedy available to collect ordinary debts.¹⁰⁴

In summary, there does not seem to be a duty to pay damages for tort or breach of contract. The failure to tender such damages is not an element of the legal wrong for either tort or contract. At the very least, the failure to pay compensation need not be plead. In tort, not only is there no requirement to plead the failure to tender damages, in most cases evidence of any attempt to tender damages could be excluded. Likewise, in contract, tender of damages has an effect on liability only if the tender is an offer that is accepted, thereby forming a new contract. Most strikingly, however, a judgment of liability generally does not create any legally recognized duty to pay damages. To be sure, it allows a plaintiff to forcibly take a defendant's property if she wishes to do so, and the threat of execution is generally sufficient to motivate solvent debtors to pay. This is not because of a failure of imagination on the law's part. There are debts where there is a duty to pay, a duty whose violation will result in sanctions. This, however, is not true in tort and contract cases. Here, the law empowers plaintiffs rather than imposing duties to compensate on defendants.

V. OBJECTIONS AND RESPONSES

There are at least three objections that can be made to the arguments in the preceding section. First, one could use the distinction between primary and secondary duties to reject the arguments. On this view, the apparent absence of a duty to pay damages arises from the fact that it is a secondary rather than a primary duty. Second, one could argue that too much is being made of a distinction that is essentially a historical accident. On this view, the apparent absence of a duty to pay damages results from the fact that the law of torts and contracts grew out of legal rather than equity procedure, and no importance should be attached to this fact. Third, one could argue that there actually is a duty to pay damages; it is simply a duty to which no legal sanction is attached. I articulate each of these objections and my responses below.

The first objection rests on the distinction between primary and secondary rights. According to John Austin, the law recognizes what he calls primary rights and duties and secondary rights and duties.¹⁰⁵

104. New York does have a statute that allows for treble damages in cases of a judgment debtor with three outstanding small claims judgments who does not satisfy the judgment within thirty days. See N.Y. UNIFORM CITY CT. ACT § 1812 (McKinney 2011). Even this statute, however, applies only to a fairly narrow class of judgment debtors.

105. See generally 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 788-800 (Robert Campbell ed., 4th ed. 1873) (discussing the distinction between primary and secondary rights and duties). John Austin was a leading utilitarian thinker, and therein lies a certain irony in his formulation of primary and secondary rights. Blackstone was a much-abused figure by utilitarians. Bentham wrote of "the universal inaccuracy and confusion which

Primary rights and duties specify the conduct that the law requires of citizens. For example, one has a duty not to trespass on another's land, and the owner of the land has a corresponding right to be free of such trespasses. "If the obedience to the law were absolutely perfect," Austin writes, "primary rights and duties are the only ones which would exist; or, at least are the only ones which would ever be exercised, or which could ever assume a practical form."¹⁰⁶ However, such is not the case. Persons often defy the law and fail to live up to the primary duties that it imposes upon them. When this happens, the violation of primary rights and duties gives rise to secondary rights and duties.¹⁰⁷

This distinction has been made explicit by Lord Diplock in the English law of contracts.¹⁰⁸ In *Photo Production Ltd. v. Securicor Transport Ltd.*,¹⁰⁹ he wrote that "a contract is the source of primary legal obligations on each party to it to procure that [w]hatever he has promised will be done is done."¹¹⁰ He went on to explain:

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay

seemed to my apprehension to pervade the whole" of the work. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 94 (F.C. Montague ed., Oxford Univ. Press 1891) (1776). The influence of Blackstone's thinking on remedies on Bentham's main jurisprudential heir, John Austin, is thus ironic. For Blackstone the private law was organized around a four-part structure of a right, wrong, action, and remedy. See Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1 (2000) (discussing Blackstone's typology and its relationship to Austin's thought). At each stage in the process the law defined the scope of the concepts. Hence, one had a legal right to quiet enjoyment of property. See 3 WILLIAM BLACKSTONE, COMMENTARIES *208-09 (1768). A trespasser committed a wrong when he entered property without the owner's consent. See *id.* at *209 ("Every unwarrantable entry on another's soil the law entitles a trespass by *breaking his close . . .*"). This gave rise to an action for trespass. See *id.* at *210 (describing the requirements of trespass). If successful, the action then provided the property owner with a remedy such as money damages. Austin adopted Blackstone's basic approach, but simplified it. See Birks, *supra*, at 4-6 (discussing Austin's simpler version of Blackstone's typology).

106. AUSTIN, *supra* note 105, at 790.

107. According to Austin:

All the rights and duties which I style sanctioning or secondary, are undoubtedly means or instruments for making the primary available. They arise out of violations of primary rights, and are mainly intended to prevent such violations: though in the case of the rights and duties which arise out of civil injuries, the secondary rights and duties also answer the subordinate purpose of giving redress to the injured parties.

Id. at 789.

108. See Brice Dickson, *The Contribution of Lord Diplock to the General Law of Contract*, 9 OXFORD J. LEGAL STUD. 441 (1989) (describing Lord Diplock's application of primary and secondary rights to contracts).

109. [1980] A.C. 827 (H.L.) (Diplock L.J.).

110. *Id.*

monetary compensation to the other party for the loss sustained by him in consequence of the breach¹¹¹

On this view a contract creates a primary obligation to perform. The obligation to pay damages is a secondary duty. Analogously, we might say that the law of torts imposes primary duties to exercise due care or not harm others with ultrahazardous substances. When these duties are breached, a secondary duty to pay damages arises.

This distinction can be deployed against the arguments put forward by Pollock and expanded on in the preceding section by pointing out that when a plaintiff files his pleadings, he is only alleging the breach of primary duties. Likewise, the breach of these duties and the consequences of that breach are the only things at issue in a civil litigation. Because the duty to pay damages is a secondary duty, it makes perfect sense that it is not the subject of pleading or proof in litigation.

Taking the Austinian framework for granted, however, it is still not clear that the secondary rights and duties involved in a civil wrong consist of a duty to pay damages. At best, the argument above explains why the failure to tender damages does not constitute an element of the wrongs of breach of contract or tort. The question remains, however, whether the effect of a wrong is a secondary duty by the contract breacher or tortfeasor to pay damages or a secondary right of the plaintiff to act against the defendant and extract wealth from him or her. At this point, all of the arguments marshaled above regarding remedies can be employed again, this time in defense of the more nuanced claim that there is no secondary duty to pay damages, only a secondary right to act against the defendant.

It is also worth noting that it is not clear that all corrective justice theorists would be comfortable employing the framework of primary and secondary duties to defend their theory. Ernest Weinrib seems to reject the distinction between primary and secondary rights and duties, at least insofar as it is applied to private law remedies.¹¹² In a recent essay, *Two Concepts of Remedies*, he contrasts the Aristotelian conception of remedies with that put forward by Hans Kelsen.¹¹³ According to Weinrib, Aristotle offered what he calls a “reason concep-

111. *Id.*; see also *Moschi v. Lep Air Servs. Ltd.*, [1973] A.C. 331 (H.L.) (Diplock L.J.) (setting forth the distinction between primary and secondary duties in contract); *R. V. Ward, Ltd. v. Bignall*, [1967] 1 Q.B. 534 (Diplock L.J.) (same); *London & Thames Haven Oil Wharves Ltd. v. Attwooll*, [1967] Ch. 772 (Diplock L.J.) (same); *Robophone Facilities, Ltd. v. Blank*, [1966] 1 W.L.R. 1428 (C.A.) (Diplock L.J.) (same); *C. Czarnikow Ltd. v. Koufos*, [1966] 2 Q.B. 695 (C.A.) (Diplock L.J.) (same); *Hardwick Game Farm v. Suffolk Agric. & Poultry Producers Ass’n, Ltd.* [1966] 1 All E.R. 309 (C.A.) (Diplock L.J.) (same).

112. See generally Ernest J. Weinrib, *Two Concepts of Remedies*, in *JUSTIFYING PRIVATE LAW REMEDIES* 3 (Charles E.F. Rickett ed., 2008).

113. See *id.* at 6 (“This juxtaposition of Aristotle and Kelsen brings out the contrast between what we may call the ‘reason conception’ and the ‘condition conception’ of remedies.”).

tion” of remedies.¹¹⁴ On this view, remedial duties are simply the extension of the original duties whose violation is the subject of suit.¹¹⁵ For example, if a person has a right to be free of the wrongful destruction of his property by another, that right does not cease to exist simply because it is violated by a tortfeasor. In this regard, Weinrib writes: “The survival of the right means that the duty correlative to it also survives. . . . Just as the plaintiff’s right continues, so the duty correlative to that right continues. As with the right, the content of the duty has been transformed by the defendant’s tort.”¹¹⁶ Continuing the argument, he asserts:

Just as the plaintiff’s right is no longer embodied in the specific object, which has been destroyed, but in an entitlement to receive the object’s equivalent from the defendant, so the defendant’s duty is no longer to abstain from its destruction, which has already taken place, but to provide the plaintiff with the object’s equivalent.¹¹⁷

In contrast, in Kelsen’s view the initial wrong is not a reason for the remedy, but merely the condition for its application.¹¹⁸ The “characteristic of the condition conception [is] that the remedy granted in any case serves purposes unrelated to the reason(s) for the imposition of the liability in the first place.”¹¹⁹ While Weinrib does not explicitly link his discussion to Austin’s framework, Peter Birks has spoken of the distinction between primary and secondary rights and duties in terms similar to those that Weinrib attributes to Kelsen’s theory. “It is essential to the understanding of the nature of civil wrongs,” writes Birks, “to dispel the illusion that compensation and such wrongs are intrinsically connected.”¹²⁰ Hence, in defending his Aristotelian conception of private law, Weinrib seems to foreclose the possibility of invoking Austin’s distinction as a defense.¹²¹

114. *Id.*

115. *See id.* at 12 (discussing the role of remedies in the reason conception).

116. *Id.*

117. *Id.* at 12-13.

118. *Id.* at 7.

119. *Id.* at 24 (internal quotation marks omitted).

120. Peter Birks, *The Concept of a Civil Wrong*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 31, 36 (David G. Owen ed., 1995). In *The Concept of a Civil Wrong*, Birks does not invoke Austin’s distinction, but he has done so in other work, making essentially the same point. *See* Birks, *supra* note 105, at 15 (“The rights which we ultimately enforce through the machinery of execution are not the rights which we stand on in making our claims in court.”).

121. It is not clear at this point, however, if Weinrib is defending the idea of corrective justice as an independent normative justification. As Stephen Smith has pointed out, the approach set forth in *Two Conceptions of Remedies* does not seem to require any notion of corrective justice. The remedial right is simply an extension of the original right to be free of tortious behavior, have one’s contracts performed, and the like. *See* Stephen A. Smith, *Why Courts Make Orders (And What This Tells Us About Damages)*, 64 *CURRENT LEGAL PROBLEMS* 51, 82 n.59 (2011).

The second objection is to argue that the apparent absence of a duty to pay damages is simply a result of the historical accident that law courts provided remedies via a sheriff's ability to levy against property while the equity courts employed orders backed by the threat of contempt.¹²² These are simply two ways of enforcing the duty to pay, and nothing should turn on whether one employs one remedy or the other. This objection has a superficial plausibility. It is certainly true that the examples of duties to pay damages marshaled in the preceding section arise out of equity rather than law.¹²³

It is not true, however, that the common law was without remedies that coerced performance rather than simply allowing the attachment of property. For example, an action of replevin forced one in wrongful possession of goods to return the goods to their rightful owner.¹²⁴ Likewise, the action of ejectment allowed the rightful owner of land to force one in wrongful possession to vacate the property.¹²⁵ In addition, at one point in its history the common law did create a duty to pay one's debts on pain of imprisonment.¹²⁶ The last debtor's prison in England, however, was closed in 1862.¹²⁷ More pointedly, many American states have constitutional provisions that specifically outlaw imprisonment for the nonpayment of debt.¹²⁸ Indeed, courts have held that the debts discussed above—such as child support and alimony—that give rise to a threat of imprisonment are in some way extraordinary and therefore not within the scope of these constitu-

122. See DOBBS, *supra* note 86, § 4.3(1), at 586-89 (noting the different powers of equity and law courts use in fashioning remedies).

123. See *supra* notes 90-96 and accompanying text.

124. See F.W. MATTLAND, *THE FORMS OF ACTION AT COMMON LAW* 39, 50 (A.H. Chaytor & W.J. Whittaker eds., 1936) (outlining the history of replevin).

125. See *id.* at 46-50 (discussing the history of ejectment action).

126. See Ressler, *supra* note 96, at 359-62 (describing the history of imprisonment for debt in England).

127. See *id.* at 362 (“The last jail in England exclusively for debtors—the Queen’s Prison—closed in 1862 and was demolished in 1868.” (quoting *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 277 (Norval Morris & David J. Rothman eds., 1998))).

128. The following state constitutional provisions explicitly prohibit imprisonment for debt: ALA. CONST. art. I, § 20; ALASKA CONST. art. I, § 17; ARIZ. CONST. art. II, § 18; ARK. CONST. art. II, § 16; CAL. CONST. art. I, § 10; 15; COLO. CONST. art. II, § 12; FLA. CONST. art. I, § 11; GA. CONST. art. I, § 1, ¶ XXIII; HAW. CONST. art. I, § 19; IDAHO CONST. art. I, § 15; ILL. CONST. art. I, § 14; IND. CONST. art. I, § 22; IOWA CONST. art. I, § 19; KAN. CONST. B. of Rights, § 16; KY. CONST. B. of Rights, § 18; MD. CONST. art. III, § 38; MICH. CONST. art. I, § 21; MINN. CONST. art. I, § 12; MISS. CONST. art. III, § 30; MO. CONST. art. I, § 11; MONT. CONST. art. II, § 27; NEB. CONST. art. I, § 20; NEV. CONST. art. I, § 14; N.J. CONST. art. I, § 13; N.M. CONST. art. II, § 21; N.C. CONST. art. I, § 28; N.D. CONST. art. I, § 15; OHIO CONST. art. I, § 15; OKLA. CONST. art. II, § 13; OR. CONST. art. I, § 19; R.I. CONST. art. I, § 11; S.C. CONST. art. I, § 19; S.D. CONST. art. VI, § 15; TENN. CONST. art. I, § 18; TEX. CONST. art. I, § 18; UTAH CONST. art. I, § 16; VT. CONST. ch. II, § 40; WASH. CONST. art. I, § 17; WIS. CONST. art. I, § 16; WYO. CONST. art. I, § 5.

tional prohibitions.¹²⁹ This suggests, however, that they are in fact different than ordinary debts, giving rise to special duties not otherwise present.

The third argument is to claim that there is a duty to pay damages but it is an imperfect duty, one that does not give rise to enforcement by the state unless the plaintiff insists. In support of this claim, one might point to the fact that judges often speak of a duty to pay damages.¹³⁰ This point can be coupled with Hart's critique of Austin's theory of legal obligation. Recall that Austin insisted that the law consisted of nothing more than orders of the sovereign backed up by threats.¹³¹ Hart argued that Austin's formulation neglected to take account of law from the internal point of view.¹³² From this point of view, law is more than simply a system of sanctions.¹³³ It also claims authority and offers reasons for action independent of any threat of sanctions.¹³⁴ Accordingly, one could say that the law imposes a duty to pay one's debts. Even if a third party representing the state does not enforce that duty, the law nevertheless declares such a duty to exist, thus giving those subject to its authority a reason to pay up.

The problem with this approach is that it fails to explain the role of plaintiffs in contract or tort litigation. They are seen as enforcing a duty, but it is not clear that corrective justice offers us a reason as to why plaintiffs rather than prosecutors should enforce this duty. One might argue that plaintiffs enjoy the particular status that they do because the wrongs involved in private law are peculiarly relational wrongs.¹³⁵ The relationality of the wrong, however, explains why damages should be paid to plaintiffs. It does not explain why plaintiffs are uniquely empowered to bring suits. For example, we are left with the question of why money damages are not enforced with a regime analogous to that used by whistleblower statutes, where anyone

129. See Annotation, *Alimony or Maintenance as Debt Within Constitutional or Statutory Provisions Against Imprisonment for Debt*, 30 A.L.R. 130 (1924) (listing cases holding that imprisonment for nonpayment of alimony is not barred by constitutional provisions against imprisonment for debt).

130. See, e.g., *Bigby v. United States*, 188 U.S. 400, 409 (1902) (noting "duty to pay damages"); *Gonzalez v. Denning*, 394 F.3d 388, 394 (5th Cir. 2004) (same); *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996) (same).

131. See AUSTIN, *supra* note 32, at 13 ("Every law or rule (taken with the largest signification which can be given to the term *properly*) is a *command*.").

132. See HART, *supra* note 32, at 88 ("What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society.").

133. See *id.* at 79-80 (noting the problems with Austin's theory).

134. See *id.* at 48 ("Secondly, other statutes are unlike orders in that they do not require persons to do things, but may confer powers on them; they do not impose duties but offer facilities for the free creation of legal rights and duties within the coercive framework of the law.").

135. See WEINRIB, *supra* note 8, at 56-83 (discussing corrective justice and the idea of relational wrongs).

with information of wrongdoing can bring suit to seek compensation and is paid a modest bounty in return.¹³⁶

The duty to pay damages, if it exists, thus has a rather strange character. If this duty exists and is grounded in corrective justice, that theory fails to explain the plaintiff-centered remedial machinery that we currently have. Yet, the strongest argument in favor of positing such a duty would rest on the idea of the law's transparency. On this view, any successful interpretive theory of law must account for the way in which participants speak about the law, and judges do speak as though there is a duty to pay one's debts.¹³⁷ Without questioning the validity of the transparency criterion—and there are reasons to question it¹³⁸—we are left with a quandary. We can “save” judicial language but only at the cost of rendering much of our actual remedial law mysterious. Unless one subscribes to the implausible belief that the common law and its expositors are always absolutely consistent, even the most dedicated partisan of the transparency criterion will have to admit a certain opacity in the law. That being the case, it seems that an interpretive theory that abandons a certain amount of judicial dicta in order to capture the basic structure of remedial law ought to be preferred on transparency grounds to a theory that doggedly explains judicial dicta while rendering a complex body of operative rules opaque.

VI. CONCLUSION

There is no duty to pay damages in a tort or contract suit. This claim may seem odd to many, but it accords quite well with our current law. Rather than imposing such a duty, the common law empowers the plaintiff to act against a liable defendant, extracting wealth from him if the plaintiff wishes. This structure is more consistent with civil recourse theory than the demands of corrective justice. Of course, this Article's conclusion does not lay the competing claims of these theories to rest, but it does provide an additional reason for believing that civil recourse provides a better interpretation of the private law than does corrective justice.

136. 31 U.S.C. § 3729 (2006) (allowing individuals to file lawsuits against contractors who defraud the federal government and receive a portion of the proceeds). *See also* Oman, *supra* note 4, at 562 (discussing the possibility of enforcing duties to compensate with qui tam like actions).

137. *See* STEPHEN A. SMITH, *CONTRACT THEORY* 24-32 (2004) (discussing the transparency criteria in theories of contract law).

138. *See* Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1490-96 (2005) (criticizing the application of the transparency criterion to economic theories of contract law); Oman, *supra* note 4, at 566-71 (arguing that the transparency criteria makes limited demands on a successful interpretive theory of the law).