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Civil Recourse Revisited

John C.P. Goldberg
1@1.com

Benjamin C. Zipursky
2@2.com

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CIVIL RECOURSE REVISITED

JOHN C.P. GOLDBERG
BENJAMIN C. ZIPURSKY

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We are delighted and daunted by the depth of the articles that The Florida State University Law Review's Symposium on Civil Recourse Theory has generated. Happily for us, many offer substantial new contributions to civil recourse theory. But our friends and commentators also have not shied away from critique, nor should they have. Either way, we have learned a great deal. Either way, we feel the ball has been advanced. And either way, we are inclined to respond, if only briefly.

Part I of this Response offers some remarks on methodology, responding, with assistance from Gabe Mendlow, to concerns raised by Emily Sherwin. Part II addresses an issue raised in different ways by Curtis Bridgeman, John Gardner, Andrew Gold, Nathan Oman, and Anthony Sebok. The issue is whether civil recourse theory can capture what is distinctive about tort law while also providing a useful framework through which to understand other branches of law, especially contract law. Part III acknowledges two of the articles that deepen civil recourse theory from both a moral and political philosophical point of view: those of Julian and Stephen Darwall and Jason Solomon, respectively. Conversely, Part IV focuses on the most pointedly critical articles: those of Ernest Weinrib, Arthur Ripstein, John Gardner, and Scott Hershovitz. All are gracious and welcoming in one respect. They invite us to rejoin the fold of corrective justice theorists. They also suggest that civil recourse theory misses essential features of tort law that corrective justice theory captures and that our critiques of corrective justice theory fall flat. Each has contributed greatly to our effort to strengthen the theoretical foundation of civil recourse theory and to examine with greater care our reasons for challenging corrective justice theory.

I. CIVIL RECOURSE THEORY AND INTERPRETATION

Emily Sherwin is right to characterize civil recourse theory as an interpretive theory.¹ It aims to make sense of the concepts and categories that lawyers, judges, and legislators deploy when dealing with the legal dimensions of certain kinds of interpersonal interactions. Broadly speaking, our inquiry has proceeded on the assumption that these concepts and categories hang together as a reasonably coherent set (although we would be willing to reject this assumption, should it become untenable).

We can make these points clearer by focusing, as Sherwin does, on civil recourse specifically as an interpretive theory of Anglo-American tort law. English-speaking lawyers, judges, legislators, and laypersons operate with certain conceptions of what it means to commit a tort, or to commit a particular tort such as negligence. They likewise have conceptions of what it means to sue or be sued in tort, what it means for a judge and jury to decide a tort case, what it means for the defendant to be ordered to pay damages in light of having committed a tort, and so forth. In turn, jurists deploy a more refined conceptual vocabulary that, among other things, distinguishes tort from contract, distinguishes different torts from one another, defines elements of and defenses to torts, and recognizes the distinct but overlapping roles that legislatures, courts, and juries play in the articulation, application, and reform of tort law. As applied to tort, civil recourse theory seeks to understand these concepts as interconnected pieces of a whole. It aims to explain what courts mean when they use the term “tort” in connection with a host of related concepts—for example, duty, fault, intent, malice, causation, proximate cause, reliance, injury, comparative fault, liability, damages, injunction, and so on—that figure centrally within a practical undertaking that is characterized by adversarial proceedings, initiated and controlled in the first instance by a putative injury victim and addressed to the question of whether a court should issue a judgment that holds another person liable to the putative victim for having injured the victim by committing a legal wrong against her.²

Assessing this contemporary practice in light of its historical origins, and with the tools of analytic, moral, and political philosophy, we have argued that tort law, both in general and in its particulars,

1. Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 227 (2011).

2. In method, civil recourse theory most obviously stands apart from functionalist or instrumentalist theories that treat legal institutions, doctrines, and concepts as tools for the achievement of some specified value or goal. For a functionalist, one succeeds in explaining a concept such as duty or causation when one succeeds in explaining the things that are accomplished when the concept is invoked (such as limiting aggregate liability or discouraging claims for which there is unlikely to be reliable evidence as to the claimant's injury). Our approach also stands apart from the sort of formalism embraced by Ernest Weinrib. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1-46 (1995).

is best made sense of as a law of civil recourse. It is a law of wrongs, in that it sets standards of conduct and enjoins people from injuring others by failing to meet those standards. It is also a law of recourse, in that it empowers victims of these wrongs to demand of the wrongdoer responsive action as redress for the wrong. To understand tort law as a law for redressing wrongs involving injuries is to see why it proceeds by private lawsuits rather than by official enforcement actions, and why it requires a complainant to establish not merely that the defendant engaged in risky or otherwise antisocial conduct, but that she, the complainant, suffered an injury at the hands of a person who wronged her. And it is to see why the outcome of a successful complaint is a liability—a vulnerability of the defendant to a legally enforceable demand of the complainant requiring the defendant to do something for her in light of having wrongfully injured her.

Sherwin identifies two problems with our interpretive methodology, one more serious than the other.³ The less serious problem concerns the difficulty of determining the degree of “fit” between a theory that purports to be interpreting a body of law and the body of law itself.⁴ Interpretation is not simple reportage or description; it has an inherent element of reconstruction. Whenever one offers a theory of a certain area of law, one will confront cases or doctrines that seem to contradict the theory, at which point the theorist is left to explain them away or to pronounce them anomalous. For example, as Sherwin again rightly notes,⁵ we have suggested that (at least on one plausible reading of the case) the torts chestnut of *Rylands v. Fletcher* does not, strictly speaking, constitute a tenable application of the principles at the core of the body of tort law as a whole, and to that extent it is not a true tort case.⁶ How can a fair-minded observer gauge whether our account of tort law as civil recourse is being responsive to the law it claims to be interpreting rather than imposing an artificial order? Sherwin complains that our writings “provide[] no assurance that the principle [of civil recourse] is actually embodied in [tort] law.”⁷

3. See Sherwin, *supra* note 1, at 238. In addition to the two problems discussed in the text, Sherwin skeptically wonders at the end of her paper “why tort law should be susceptible to principled explanation,” given that it is “a human artifact, produced by many decisionmakers over a long period of time.” *Id.* at 241. One of us has offered some responses to this supposed puzzle. See John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1241-46 (2008).

4. See Sherwin, *supra* note 1, at 238-39.

5. *Id.* In short, we argue that, if *Rylands* is best read as imposing liability notwithstanding that the defendant in that case did everything the law required of him, then it cannot be a true tort case, because tort liability presupposes the commission of a wrong, that is, the violation of an applicable legal directive. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 951-52 (2010).

6. (1868) 3 L.R.E. & I. App. (H.L.) 330 (appeal taken from Eng.).

7. See Sherwin, *supra* note 1, at 239.

This criticism is dramatically overstated, unless Sherwin is using the word “assurance” idiosyncratically to refer to a notion of unimpeachable demonstration. Can we demonstrate to all fair-minded people that we have found the principle of civil recourse in tort law, rather than inserting it? Perhaps not. But if not, we are hardly alone. No other view of tort meets this standard, including the deflationary view—to which Sherwin seems attracted—that tort law is a “rationally inexplicable heap.”⁸

But if the question is really whether we have given *assurances* that our interpretation of tort law is sound, we think the answer is unequivocally “yes.” Here, some genealogy may be relevant. We came to civil recourse theory through tort law. We did not first find the principle of civil recourse in Locke or Rawls and then stamp it onto tort law. More to the point, we have made it our business to engage tort law at multiple levels (some would say *ad nauseam*) by examining its history, institutional structure, central doctrines, and leading cases, old and new. We have devoted no less effort to explaining why the alternative interpretations offered by theorists in other camps fall short. All along we have said that the proof for civil recourse theory must be in the pudding. At this point, we would like to think, we have put together an impressive confection.⁹ Whether we have or not, we have surely said enough to provide readers with assurances that we are not just making up the principle of civil recourse and then forcing tort law to conform to it.

The more serious difficulty, according to Sherwin, resides in the nature of interpretive theories.¹⁰ Work like ours, she supposes, aims to locate a normative principle immanent in the law.¹¹ As such, it is dependent on the state of the positive law: it cannot depart too dramatically from extant law without losing its claim to be an interpre-

8. *Id.* at 241. After all, there is a lot of evidence—for example, torts treatises, the torts Restatements, the points of convergence across multiple jurisdictions’ tort law, the common content of Torts courses—to suggest that tort law is vastly more ordered and coherent than would be an “inexplicable heap” of judicial decisions.

9. On the particular issue of whether civil recourse theory flounders by treating *Rylands* as a marginal case, it is worth emphasizing two points we have made elsewhere. As a matter of doctrine, *Rylands* is in fact a marginal case. Since it was decided, all manner of accident victims have understandably attempted to harness it as a means of relieving themselves of the burden of having to prove fault on the part of the defendant. Yet courts have steadfastly resisted making *Rylands* a template, instead confining its operation to the narrow category of “abnormally dangerous activities,” which is constituted almost exclusively by the operation of reservoirs, the use of explosives, and the keeping of wild animals. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 259 (2010). *Rylands* is also at the margin of tort in another sense. It is a case in which the plaintiff fell just short of making out several different tort claims (for example, negligence, trespass, and nuisance). *Id.* at 267-68. As such, it is one that closely resembles a tort case, even though, technically, it is not.

10. See Sherwin, *supra* note 1, at 239.

11. *Id.* at 240.

tation. Yet, there are no guarantees that extant law is sound from the perspective of morality. Thus, it is entirely possible that a principle derived from extant law will not be “a good one.”¹² And, Sherwin adds, this hypothetical danger is probably realized in the case of civil recourse theory. For, on her view, the principle of civil recourse valorizes what is in fact a morally suspect system through which plaintiffs are unjustifiably permitted to act on vengeful dispositions toward persons who have injured them by inflicting harms on defendants by depriving them of assets, and the like.¹³

The differences between recourse and vengeance are discussed elsewhere in this Response and this Symposium.¹⁴ But we can begin our reply to this aspect of Sherwin’s critique by noting our agreement with two points made by Gabe Mendlow.¹⁵ We share his view that it is facile to treat the imposition of liability on a defendant as a plaintiff inflicting “harm” on the defendant.¹⁶ A plaintiff who obtains a damages payment from a defendant because the defendant has carelessly damaged her property is not “taking a whack” at a defendant. Tort law is a law of civil recourse precisely because it substitutes a regime of legal rights, duties, and powers for a regime of retaliatory harming. A plaintiff who recovers damages, like a creditor collecting a debt, is obtaining something from the defendant to which the plaintiff is legally entitled. We further agree with Mendlow that, even if one were to assume that the typical tort plaintiff is motivated to proceed against a defendant out of a vengeful disposition toward the defendant, that fact would not suffice to establish that tort law is a law of vengeance.¹⁷ For these reasons and others, we think Sherwin cannot hold out civil recourse theory as realizing the risk that interpretive theory will valorize demonstrably unattractive normative principles.

More broadly, we think Sherwin errs in treating the risk of valorization as a defect inherent in interpretive theories. At best, her argument holds against a particular variation on interpretive theory, and it is a variation to which we do not subscribe. The risk that an interpretive theory will end up treating “mere” legal principles as first-best expressions of moral principle is present only if one supposes—as Ronald Dworkin famously supposes¹⁸—that the extraction of principles from legal materials necessarily involves interpreting

12. *Id.*

13. *Id.* at 240-41; *see also id.* at 235-36.

14. *See* Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 31 (2011); Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299 (2011).

15. *See* Gabriel Seltzer Mendlow, *Is Tort Law a Form of Institutionalized Revenge?*, 39 FLA. ST. U. L. REV. 129 (2011).

16. *Id.* at 131.

17. *Id.* at 134.

18. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* 228-32, 240-50, 254-58 (1986).

those principles so as to render them the best they can be from the perspective of morality. We are not on board with this aspect of Dworkin's thought and accordingly have never suggested that civil recourse theory provides the best interpretation of tort law because it makes tort law as morally attractive as possible. Quite the opposite, we have invoked Holmes's famous metaphor of "get[ting] the dragon out of his cave" to convey that, for us, interpretation is to a significant degree independent of ultimate moral judgments.¹⁹ To say that tort law is a law for the redress of wrongs is to *understand* it, not endorse it full stop. At most, our approach to interpretation is weakly normative. It grants that tort law is reasonably coherent, rather than a mess, and that it instantiates and furthers values (such as responsibility and accountability) that are recognizable to us. This is still a far cry from an all-things-considered endorsement. For moral reasons, a scheme of civil recourse may sometimes need to give way to law or other institutions organized on other principles.

It may be that Sherwin—again perhaps with Dworkin in mind—has run together two different levels at which civil recourse theory operates, in the process conflating how the theory plays out with respect to two different activities: law application and law reform. Tort law's being best understood as a law of civil recourse has certain implications, in our view, for how judges within a common law system are to decide cases. Roughly speaking, their job is to apply the law, and this entails that they are obligated to decide tort cases in a manner faithful to tort law's rules and principles. As tort law is best understood as a law of civil recourse, judges deciding tort cases must, absent special circumstances, accept the principle of civil recourse and trace out its implications for their decisions.²⁰ But this is not because they must regard the principle of civil recourse as making tort law the best it can be. Rather, it is because of their institutional role in our legal system as law appliers. By contrast, legislators and those who propose law reforms, though they are surely obligated to understand the nature of the law they seek to reform, are not so constrained. Both a judge and a legislator might, on a given occasion, reasonably or even correctly conclude that morality requires tort law to give way to some other kind of law, such as a compensation scheme. But in the ordinary course, a judge is not empowered to rely

19. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law From the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1578 (2006).

20. We do not mean to suggest that courts can or should simply deduce proper decisions from the principle of civil recourse. Although tort cases occasionally raise issues that implicate the principle directly—for example, the question in *Palsgraf* of whether a plaintiff may sue as the vicarious beneficiary of a breach of a duty owed to another—in most instances, the principle constrains the ways in which courts should reason about the issues before them rather than dictating a unique result.

on that conclusion as a reason to refuse to apply principles of tort law that would otherwise apply, whereas a legislator is entirely free, within constitutional limits, to seek to reform the law to conform to that conclusion.

II. THE SCOPE OF CIVIL RECOURSE THEORY: TORT, CONTRACT, AND BEYOND

Several of the Symposium articles discuss whether civil recourse theory is a theory of tort law or a theory that can help make sense of other departments of private law, including contracts. On this question they reach conflicting answers.

Curtis Bridgeman offers that civil recourse theory is probably not capable of generating an account of contract law.²¹ Whereas tort can fairly be described as law that empowers victims of wrongs to obtain recourse against wrongdoers, contracts cannot.²² If, as part of a bargained-for exchange, one promises a certain performance, one is subject to liability for failing to perform, even if one fails only after taking extraordinary measures to perform. So recourse for contract breaches does not seem to be predicated on conduct that can meaningfully be described as wrongful.²³ At the end of the day, Bridgeman argues, the mismatch between civil recourse theory and contract law stems from the fact that contract law is not law that imposes obligations. It is instead power-conferring law—law that enables parties to change their legal relations.²⁴

Andrew Gold reaches more or less the opposite conclusion. He supposes that civil recourse theory admits of multiple conceptions, including a “rights-enforcement” conception that stands apart from an accountability-for-wrongs conception.²⁵ The former, he adds, provides a useful account of contract law. By virtue of a contract, a promisee gains an entitlement to demand the promisor’s promised performance and, with that, an entitlement to take steps to enforce the promise in the event she suffers a loss because it is breached. The promisee can insist on enforcement because she enjoys a moral right to its enforcement.²⁶ Contract law is a law of recourse in that it enables a person who holds a certain kind of moral right as against another to enforce that right in the face of the other’s rights violation.²⁷

21. See Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. ST. U. L. REV. 1, 12-16 (2011).

22. See *id.* at 12.

23. *Id.* at 4-5.

24. *Id.* at 12.

25. See Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65, 68-73 (2011).

26. *Id.* at 70-71.

27. Nathan Oman’s Symposium article aims to establish a different point—namely, that torts and breaches of contract generate for the breaching defendant a liability to the

From a different angle, John Gardner also suggests that the notion of civil recourse is general enough to cover contract and tort, as well as the law of “equitable liability.”²⁸ However, he sees this breadth as creating a problem for civil recourse theory. That the theory is broad enough to encompass these other bodies of law demonstrates, to his mind, that it cannot of itself capture what is distinctive about torts. According to Gardner, what makes tort law distinctive is not the idea of civil recourse, but rather the idea of repairing losses resulting from breaches of noncontractual duties. Tort, he says, is that part of the law of civil recourse concerned with corrective justice in a primarily reparative mode, as regards losses flowing from breaches of noncontractual duties.²⁹ An adequate civil recourse account of torts, he thus concludes, will have to make use of the concept of corrective justice and will have to concede that tort is fundamentally about repairing losses.³⁰

It will help situate our responses to these lines of inquiry to say a word about the orientation of our work and our use of certain terminology. We are first and foremost torts scholars. Tort law is the area of substantive law in which we have the greatest claim to expertise, and it is primarily through tort law that we have engaged with civil recourse theory. We simply have not given contract and other adjacent bodies of law the same sort of attention we have given to tort. One manifestation of this lopsidedness in our attention is terminological. We have on occasion used the terms “recourse” and “redress” interchangeably.³¹ Thanks in part to the Symposium articles, we now see that it is important to draw a distinction between these two terms.

To assert that tort law is a law of *civil recourse* is to assert that tort law arms a person with a legal power against a person (or institution or entity) to do something in response to a certain kind of quandary or difficult situation in which she finds herself. The term “recourse” refers to the provision to the complainant of an avenue of response, as opposed to leaving her with no lawful way to respond to

victim’s claim for relief rather than a duty to make reparations. See Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137 (2011). However, he offers this claim as evidence that contract law, like tort law, is best understood not as instantiating a notion of corrective justice, but as a law of civil recourse that empowers promisees to obtain recourse against those who breach a legally enforceable promise made to them. *Id.* at 139.

28. John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43, 47 (2011).

29. *Id.* at 60.

30. *Id.* at 61.

31. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1138 (2007) (“Tort law identifies conduct that is wrongful in the particular sense of being a mistreatment of one by another, and provides recourse through law to the victim against the wrongdoer. It is, in short, a law of wrongs and redress, not a law of punishment on the basis of blame or desert.”).

the quandary, and leaving her dependent upon the discretion or choice of the other person. The flipside of recourse is liability and accountability. To provide recourse to a person is to give her a means of holding another liable and in that sense accountable to her. Individuals typically understand these kinds of quandaries as ones in which they are *entitled* to hold the other accountable in some way.

Civil recourse so understood is, we think, a broad concept that can and does encompass not only torts, but contracts and other domains of private law. Persons who want a body of law that will empower them against another and who believe they are entitled to such law include not only the injured tort victim, but also, for example, the disappointed contract promisee, the betrayed trust beneficiary, and the dispossessed owner who can locate but not retrieve her chattels. Civil recourse theory aims to explain this domain of law. At the same time, it distinguishes areas such as criminal law or regulatory law, which are not principally concerned with empowering individuals to act upon their claims of right against others.

Within the relatively broad category of civil recourse law, tort stands out as *law for the redress of wrongs*. Here “redress” means something narrower than recourse—it is a particular kind of response to the breach of a particular kind of quandary. In a tort case, the plaintiff has been injured by another person’s wrongdoing. The injury is a kind of interference with interest, including (but not limited to) certain interferences with interests in one’s bodily integrity, one’s ownership and use of property, one’s freedom of movement and decisionmaking, one’s privacy, and one’s reputation. To say that tort is law for the *redress of wrongs* is thus to say that it is the branch of the law of civil recourse that empowers a person who has suffered an injury to obtain a response from one who wrongfully injured her. But *redress* is not the only kind of recourse private law provides, and having been wrongfully injured is not the only kind of quandary for which our system provides civil recourse; there are other kinds of interactions between and among people that generate occasions for recourse that stand apart from the wrongs-and-redress category.

With the distinction between redress and recourse in mind (redress being a form of recourse), we can outline a response to Gardner. He finds it telling that we have not discussed “equitable wrongs.”³² This category encompasses actions for breach of trust, breach of fiduciary duty, and breach of confidence, through which claimants typically seek restitution or disgorgement from an actor who has abused a position of trust for personal gain.³³ Our inattention to equitable wrongs, Gardner argues, demonstrates that, in our zeal to present

32. Gardner, *supra* note 28, at 47.

33. *Id.* at 46-47.

civil recourse theory as an alternative to corrective justice theory, we have painted ourselves into a corner.³⁴ To insist that tort law is *not* law for the repair of wrongful losses is to deny ourselves access to the very thing that separates torts from equitable wrongs. Properly understood, tort law is that branch of civil recourse law concerned with the reparation of wrongful losses, whereas the law of equitable wrongs is civil recourse law concerned with the recapture of wrongful gains. We have said nothing about equitable wrongs, Gardner suggests, because if we did say anything about them, we would have to concede that, as a theory of tort, civil recourse theory cannot stand apart from corrective justice theory.

In one respect it is difficult for us to respond to this criticism. Jurists in the United States do not routinely use phrases like “equitable liability” and “equitable wrongs” to describe a genus or species within law.³⁵ We have not been ducking the issue of equitable wrongs: until now, we had no reason to suppose that it is an issue to which we need to attend. To be sure, courts in the United States recognize actions for breach of fiduciary duty and breach of confidentiality. But it is not clear whether these form their own category or instead are aspects of other bodies of law, such as the law of agency.

Let us assume, however, that equitable wrongs of the sort Gardner has in mind do form a distinct class. Is there a way of capturing how this class would stand apart from the class of torts without resorting to the idea that tort is law for the repair of wrongful losses? We believe there is. The easiest way to see this is to invoke a standard American usage. In legal and lay discourse, it is common for tort law to be referred to as “personal injury law.” Although a tort need not involve an injury “to the person,” and, in that respect, the phrase might be misleading, there is a deeper sense in which tort law is especially about “personal injury.” As we have explained in detail in prior work, the injury and the wrong are in an important sense unified in tort law, for the wrongs are in part constituted by the fact that they include the injury.³⁶ A tort victim claims that the defendant rendered her less than *intact* (even if only temporarily). The plaintiff has taken a certain kind of *hit* from the defendant, a hit to her body, to her reputation, to her dominion over her land, to her personal property, to her privacy, and so on. It is not surprising that the historical

34. *Id.* at 58-59.

35. Gardner correctly surmises that our silence on this issue has something to do with a divide between U.S. law, on the one hand, and U.K. and commonwealth law on the other. *Id.* at 43-44. But the divide is not, as he suggests, related to muddles resulting from our multiplicity of jurisdictions, nor to our reliance on jury trials. *Id.* It is rather that there is no convention in U.S. jurisprudence of recognizing “equitable wrongs” as a category more or less on par with the categories of tort and contract.

36. Goldberg & Zipursky, *supra* note 5, at 941-45.

core of the subject was the “trespass with force and arms.”³⁷ Tort law empowers the plaintiff to obtain redress as against the defendant who wrongfully inflicted the “hit,” or injury. Such redress might, and frequently does, include repair for the loss concomitant upon the hit, but it need not do so.

Equitable wrongs are a different kettle of fish. The commission of this kind of wrong does not involve a defendant injuring a plaintiff. The plaintiff does not take a “hit”; she is not rendered less than intact. Rather, the wrong is a betrayal of trust, a trust that was integral to the legal relationship, and essential to why the trustee possessed the de facto power that enabled him to betray that trust. Accordingly, the form of recourse in question is not an empowerment to redress (or seek redress for) a wrongful injury. Rather, (a) the plaintiff is empowered to use the court to re-order the relationship in accordance with what the relationship of principal and fiduciary required; (b) the plaintiff is empowered to “call to the carpet” the fiduciary, and discipline the fiduciary qua agent. Tort’s wrongs lead the state to empower the plaintiff to demand and obtain from the defendant conduct that is responsive to the defendant’s wrongful injuring of the plaintiff. Equity’s wrongs lead the state to empower the plaintiff to demand and obtain from her fiduciary an accounting as to the fiduciary’s handling of the matters with which he has been entrusted, and the undoing of transactions undertaken in violation of his fiduciary obligations, irrespective of whether those transactions injured the plaintiff.

So, we can after all distinguish torts from equitable wrongs without conceding that tort law is inherently law for the repair of losses. Tort law is a law for the redress of injurious wrongs. This same formulation helps us craft an initial and provisional position on the relationship between civil recourse theory and contract law. As is well known, modern contract claims for damages emerged out of “tort” law (though it was not then called that) through the action on the case for assumpsit.³⁸ Recognized assumpsit claims included those brought for losses caused in reliance on certain promises or undertakings that went unfulfilled. These were understood as wrongs for which the law provided redress. Because they involved injuries resulting from reliance on another’s undertakings, and hence interferences with decisional autonomy, they were treated as torts.

Eventually the category of contract claims for damages emerged in contrast to the category of tort claims, with the former being understood as predicated upon obligations that obtain through agreement

37. GOLDBERG & ZIPURSKY, *supra* note 9, at 9-11 (discussing the origins of modern tort law in the writ of trespass *vi et armis*).

38. See generally A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975).

rather than being imposed by law.³⁹ When that happened, some of the aforementioned assumpsit cases, because they involved obligations determined by agreement, became part of contract law. As a result, what we today call “contract” claims sometimes recognize as grounds for liability certain claims that could just as easily be deemed tort claims. That is, contract law, like tort law, sometimes operates as a law for the redress of wrongs.

But contract law also extends well beyond the “tort” form of recourse as redress. Indeed, liability in the paradigmatic modern breach of contract case—a failure to live up to an exchange-based promise irrespective of detrimental reliance—cannot be conceptualized as redress of a wrong involving personal injury. And yet, even though these cases take us outside the realm of redress, they do not take us outside the realm of civil recourse. As applied to this class of cases, contract law is law that empowers persons who have given consideration for a promise to demand the performance of the promise or to recover its value. Although not about responding to wrongfully inflicted personal injury, this part of contract law, no less than tort law, is—as Gold and Oman suggest—about empowering people to hold to account those who have breached certain duties to them. In contract (but not typically in tort, outside of property tort actions for injunction), holding accountable within *ex post* litigation *does* frequently involve requiring defendants to live up to their primary duties.⁴⁰

Contrary to Bridgeman, we see no incompatibility between the “strictness” of certain contractual obligations and the idea that contract law is civil recourse law.⁴¹ This is for two reasons. First, and most obviously, those contract actions seeking specific performance rather than damages involve a species of civil recourse quite different from redress. The plaintiff-obligee who stands disappointed by a defendant-obligor’s failure to perform is not necessarily in the position of someone who has been injured or has taken a hit. If she is seeking specific enforcement, it is not because she is in the quandary of being an injury victim and wanting to redress the injury; it is (at least typi-

39. It may be, as Bridgeman maintains, that contract law is in the first instance distinct from tort law by virtue of contract being power-conferring law, not duty-imposing law. Bridgeman, *supra* note 21, at 8-12. But of course the power that contract law confers is precisely the power to make arrangements of mutual obligation. That contract obligations are agreed upon, rather than “in the law,” is a key difference between tort and contract. Contract obligations are obligations nonetheless, and they are obligations owed to certain persons whom our law empowers to respond when breached.

40. Gold seems to suggest that a civil recourse conception of contract must rely on a notion of redress for wrongful loss, rather than redress for a wrong. *See* Gold, *supra* note 25, at 70. Though we agree that recourse in contract is distinct from redress in tort, we are not inclined to locate that distinction in terms of a distinction between recourse for a wrong and recourse for a wrongful loss.

41. *See* Bridgeman, *supra* note 21, at 5-6.

cally) because she still wants the contract to be performed. Civil recourse empowers the plaintiff to enlist the power of the state to force the defendant to perform. Whether nonperformance is plausibly described as “wrongful” may not be critical to the plaintiff’s right to specific enforcement if the right to specific enforcement is not best understood as *redress*, but only as recourse.

Second, however, even if we turn to contract actions for damages, and even if (following our earlier discussion) we conceive of such actions as invoking a notion of civil redress for wrongs, the so-called “strictness” of contract liability presents no obstacle for our view. It may be that many actionable breaches of promise do not involve unreasonable or faulty conduct by the breaching party—that party may well have taken extraordinary measures to perform, yet failed for reasons out of her control. It hardly follows that these sorts of breaches are incapable of being cogently described as “wrongs.” Rather, they might instead be wrongs that are not based on a notion of fault.

Tort law itself recognizes many kinds of acts that qualify as wrongs, notwithstanding reasonable conduct by the defendant.⁴² This is true, for example, of the wrong of trespass to land, as famously demonstrated by *Vincent v. Lake Erie Transportation Co.*⁴³ The ship captain’s decision to stay moored at the plaintiff’s dock during the storm was entirely reasonable. It was also a trespass—an intentional physical invasion of another’s land.⁴⁴ Hence the ship owner was liable. Likewise in tort, a manufacturer that, despite using great care, ends up selling a dangerously defective product that injures a consumer has committed a wrong. The wrong is that of physically harming someone through selling a defective product.⁴⁵ The same goes for breaches of contract. If in fact the promisor has made a suitably unconditional promise—for example, a promise to deliver, rather than to make reasonable efforts to deliver—then the failure to live up to the promise is a wrong, even if not a wrong involving fault and even if not the sort of wrong that warrants any sort of punitive response.

We can make this same point another way. The term “strict liability” has one negative connotation, but more than one positive connotation. The negative connotation is that liability does not turn on fault—that one can act faultlessly but still be held liable. This negative connotation does not yet tell us what the basis of liability actually is. Rather, there are at least two possibilities. Liability might be *wrong-based*, even though not fault-based. This is true of liability for trespass and products liability. Alternatively, liability

42. Goldberg & Zipursky, *supra* note 31, at 1143-45.

43. 124 N.W. 221 (Minn. 1910).

44. *Id.* at 221.

45. GOLDBERG & ZIPURSKY, *supra* note 9, at 286.

could be *indifferent to wrongdoing*. In this latter situation, there will be liability even if, in the eyes of the law, the defendant has in no way fallen short of an applicable rule or norm of conduct. Even if one may have acted in a manner that is consistent with every conduct-guiding rule and demand of the law (broadly conceived), one still must pay. As noted above, on one interpretation, *Rylands v. Fletcher*—the old bursting reservoir case—imposes this sort of liability.⁴⁶ It is only if liability for breach of contract is strict in the latter sense that civil recourse theory loses its grip on contract law. We see no reason to think that contract liability is strict in this sense.

We conclude this Part with a response to a different set of concerns, raised by Anthony Sebok, about the concept of “wrong” as it appears in civil recourse theory. Focusing on two facets of Blackstone’s thought, Sebok suggests that civil recourse theory is wedded to an odd and highly implausible notion of what it means to commit a wrong.⁴⁷ Blackstone treated what we now call tort law as law that empowers victims of wrongs to obtain redress for those wrongs.⁴⁸ And yet he also accepted the prevailing view of his time that civil litigation was an evil to be avoided, and hence he was untroubled by (and perhaps enthusiastically supportive of) aggressive use of criminal law to punish those who fomented or assisted others’ litigation.⁴⁹ This combination of positions strikes Sebok as puzzling. If tort law exists to empower victims of wrongs to pursue their claims, why would the criminal law of the same legal system be so keen to prohibit third-party assistance? How can a contemporary legal system committed to the principle of civil recourse punish a home inspector merely for selling home inspections to determine if homeowners might have breach of warranty claims against the builder of their homes?⁵⁰

To answer these questions, Sebok infers that Blackstone—and civil recourse theory more generally—must embrace a very peculiar view of what it means for one person to wrong another. On this view, one does not wrong another unless the victim of the wrong contemporaneously appreciates that she is being wronged.⁵¹ This, Sebok suggests, is the only thing that can explain why the homeowner who only later learns from an inspector that she was sold a defective house has not been wronged and, hence, why the likes of

46. (1868) 3 L.R.E. & I. App. (H.L.) 330 (appeal taken from Eng.); see also GOLDBERG & ZIPURSKY, *supra* note 9, at 255-68.

47. See Anthony J. Sebok, *What is Wrong About Wrongdoing?*, 39 FLA. ST. U. L. REV. 209, 209-11 (2011).

48. 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, 545-46 (2005).

49. Sebok, *supra* note 47, at 209-11.

50. *Id.* at 214-15.

51. *Id.* at 217-19.

Blackstone would be comfortable punishing the home inspector for fomenting litigation.⁵²

As Sebok recognizes, the solution he proffers to his puzzle would saddle civil recourse theory with an extremely implausible conception of wrongdoing. This “contemporaneous awareness” requirement would, for example, exclude from the category of wrongdoing a surreptitious poisoning or an assault on a person who happens to be sleeping. We certainly do not hold this view and, so far as we know, have never suggested that we do. We doubt very much Blackstone did either. The problem resides not with the concept of wrong that is deployed by civil recourse theory, but with Sebok’s framing of the puzzle. It is erroneous to suppose that there is a deep tension within a legal system, such as ours, that is both keen to empower victims to obtain recourse for wrongs and keen to discourage the fomenting of civil litigation.

Sebok’s *faux* puzzle is grounded in a misunderstanding of what it means for law to empower victims of wrongs to obtain recourse. He reasons as follows: If tort litigation exists to vindicate victims’ interests as against those who have wronged them, then more vindication can only be a good thing, and hence honest and efficacious efforts that promote such vindication—such as the efforts of the home inspector—ought to be tolerated if not endorsed.⁵³ In this chain of reasoning, there is a subtle but critical shift from a notion of civil recourse to the sort of “private attorney general” model of litigation to which civil recourse theory stands directly opposed.⁵⁴ The power to obtain recourse is an entitlement enjoyed by victims, not a tool for the implementation of a social policy. Civil recourse theory thus does not suppose that a state of affairs in which there are more frequent exercises of the right to civil recourse is better than one in which there are fewer. The whole point is to empower those who wish to have some way to respond to one who has wronged them, such that, if they prevail, they obtain redress. To say that it is their power to exercise is to deem irrelevant the question of whether, from a societal perspective, it would be better to have more people exercising that power. A legal system that recognizes rights of civil recourse is not a system that is thereby committed to the maximal exercise of such

52. *Id.* at 217-18.

53. *Id.* at 224.

54. See, e.g., John C.P. Goldberg, *What Are We Reforming? Tort Theory’s Place in Debate Over Malpractice Reform*, 59 VAND. L. REV. 1075, 1077-78 (2006) (“[C]ontrary to compensation-and-deterrence theory, the tort system is not best understood as arming victims with the power to sue in order to serve public goals.”); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012) (arguing that the modern embrace of a private attorney general model of tort law has impaired contemporary judicial decisionmaking and scholarship in torts).

rights, any more than a system that recognizes rights of self-defense is committed to the maximal exercise of such rights.

To be sure, many interesting questions remain as to what stances the law should adopt toward efforts by third parties to enable or prompt civil litigation. We have not addressed these questions and, hence, have not formed a settled view as to whether, for example, it would be sensible and appropriate to prohibit conduct of the sort engaged in by the home inspector whom Sebok describes. Our present and more modest point is merely that Sebok misattributes to civil recourse theory an implausible conception of wrongdoing, and he does so because he falsely posits a tension between the idea that law provides civil recourse for wrongs and the idea that law ought to discourage (perhaps strongly) efforts by third parties to encourage others to pursue recourse.

III. CIVIL RECOURSE AND ACCOUNTABILITY

Stephen and Julian Darwall, Jason Solomon, and Andrew Gold each argues that a civil recourse account of tort law can, at least in some instantiations, occupy a conceptual space between corrective justice and revenge-based accounts, and as such presents a normatively defensible and perhaps even appealing account of tort law.⁵⁵ Like us, they have grounded their explanations of the principle of civil recourse in a notion of accountability and, more particularly, in the principle that one who has been wronged is entitled to hold the wrongdoer accountable for having wronged her. Stephen and Julian Darwall, drawing from Stephen Darwall's important book *The Second-Person Standpoint*,⁵⁶ have set civil recourse theory within a much broader framework of moral thinking, one which traces back to early natural law theorists.⁵⁷ The very concept of an obligation, on their view, contains within it the idea that the putative obligee stands ready to hold one to account for performing the obligation and to blame one who has breached the obligation.⁵⁸ The structure of private law, with legal claims against tortfeasors, mirrors the analytic structure of moral obligation. The right to hold a tortfeasor legally accountable through civil law is of a piece with the entitlement, morally, to blame and resent a person who has wronged one. For reasons discussed elsewhere in this Symposium, we disagree with the Darwalls about the nature and strength of these connections.⁵⁹ None-

55. See generally Darwall & Darwall, *supra* note 14; Gold, *supra* note 25; Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243 (2011).

56. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

57. See generally Darwall & Darwall, *supra* note 14.

58. *Id.* at 17-18.

59. Zipursky, *supra* note 14, at 330-31 (discussing and critiquing certain aspects of Stephen Darwall's account of moral obligation).

theless, we gratefully acknowledge that their contribution to this Symposium, as well as Stephen Darwall's earlier writings, have helped us to articulate more clearly the idea of recourse as a holding-to-account, as opposed to recourse as a wreaking of vengeance.

Jason Solomon's article pushes forward his own distinctive synthesis of Strawsonian and egalitarian ideas in elaborating civil recourse theory.⁶⁰ As in his prior work, the results are fresh, provocative, and illuminating. The current article is especially valuable in its implicit assertion that the right of civil recourse can be understood as a *civil right* that is part of a package of powers citizens are afforded in an egalitarian state.⁶¹ While Weinrib and Ripstein have plainly drawn a great deal from Kant,⁶² and while we have drawn from Locke,⁶³ Solomon perceptively reaches out to Rousseau for illumination of civil recourse theory.⁶⁴ Our principal misgiving about Solomon's analysis is one that he himself anticipates. The legal power to obtain recourse against wrongdoers is a civil right, and having that power is, in a legal system such as ours, an incident of full citizenship. Conversely, for a class of (adult, competent) people to be denied this power is for them to be denied the equal protection of the laws. Yet the relationship of the law of civil recourse to social equality is more oblique than Solomon's analysis perhaps suggests.

To see this, one need only look back to the long periods of our history in which the law granted the power to obtain recourse on a highly discriminatory basis. Even then, it would have been appropriate, in our view, to treat tort law (or what counted as tort law back then) as a law of civil recourse. This is because there is nothing inherent in the idea of civil recourse that prevents it from being instantiated within a legal system that tolerates and indeed practices discrimination on the basis of gender or race. What separates these earlier instantiations of the principle of civil recourse from modern ones is the embrace of a broad egalitarian norm, one manifestation of which is the idea that each person is entitled to an avenue of civil recourse.

Again, we share Solomon's view that part of the reason our legal system now permits A to have a court enter a judgment against B, when B has tortiously injured A, is that the system is committed to treating A as B's equal in several respects, and this is one of them. We question, however, the idea that a robust principle of equality is

60. See Solomon, *supra* note 55.

61. See *id* at 253-56.

62. See, e.g., ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009); WEINRIB, *supra* note 2, at 84-113.

63. See, e.g., Goldberg, *supra* note 48; Goldberg & Zipursky, *supra* note 5, at 982; Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 623, 637-42 (Jules Coleman & Scott Shapiro eds., 2002).

64. Solomon, *supra* note 55, at 253-54.

built into the very idea of civil recourse. It is not obvious to us, for example, that present-day disparities in access to legal representation violate the principle of civil recourse, though they might well run afoul of egalitarian norms or principles drawn from other parts of our law and morality. The evenhanded distribution of the legal powers to bring tort claims counts as an important kind of equality only if we have an independent account of the importance of having such a claim at all. It is, for example, principally because the right to vote is part of self-government, the right to speak is rooted in autonomy and freedom of conscience, and so on, that the evenhanded inclusion of citizens in the domain of rightholders is an important aspect of equality. By the same token, we need an independent account of the central value of a right of civil recourse. To his credit, Solomon, building in part on a Darwallian conception of the right to hold a tortfeasor accountable, is engaged in precisely that project.

IV. CIVIL RECOURSE AND CORRECTIVE JUSTICE

A central contention developed separately, but in parallel form, by Ernest Weinrib, Arthur Ripstein, and John Gardner, is that civil recourse theory cannot be superior to corrective justice theory, and its critique of corrective justice theory cannot be sound, because the only plausible version of civil recourse theory depends upon corrective justice theory for its justifiability, cogency, and capacity to capture the common law of torts. The plainest version of this argument asserts that a right of action in tort is only justified by proof that the defendant wronged the plaintiff because it establishes that the defendant has a duty to compensate the plaintiff for the injury caused; the duty to compensate is said to flow from the underlying primary duty. The gist of our response to that argument is contained in Zipursky's article from this Symposium.⁶⁵ On the negative side, Zipursky argues that a duty to compensate does not flow from a breach of the primary duty;⁶⁶ on the positive side, it offers a demand-based theory of the right of recourse.⁶⁷

Beyond this basic point of contention, however, each of the aforementioned corrective justice theorists has offered a battery of more specific criticisms. In addition, Scott Hershovitz has offered a general critique of the same form as those already mentioned: he, too, argues that civil recourse collapses into corrective justice.⁶⁸ In making this argument, however, Hershovitz self-consciously invokes a distinctive conception of corrective justice that, ironically, has more in common

65. See generally Zipursky, *supra* note 14.

66. *Id.* at 316-17.

67. *Id.* at 331-35.

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

with the idea of civil recourse than the idea of corrective justice as articulated in the work of other corrective justice theorists.⁶⁹ In this final section, we aim to respond briefly both to Hershovitz's general argument and to selected items in the bill of particulars presented by Weinrib, Ripstein and Gardner.

A. Weinrib

Weinrib's thoughtful and detailed contribution merits an article-length response.⁷⁰ We begin this partial response with his efforts to rebuff our criticism that corrective justice theory leaves insufficient room for the diversity of remedies, starting with injunctive relief in particular.⁷¹ As to injunctions, Weinrib offers that "corrective justice operates not only by requiring the defendant to repair a wrong once it has occurred, but also by granting the plaintiff an injunction that prevents the defendant from extending the wrong into the future."⁷² Because the "remedy is continuous with the right,"⁷³ on his view, the right to be free of a nuisance (for example) supports a right to an injunction if a nuisance is established.

At one level, Weinrib is clearly correct that the version of corrective justice theory he has put forward, which Ripstein has followed, accommodates injunctive relief quite comfortably. Two qualifications are in order, however. First, nothing in Weinrib's response provides aid or comfort to loss-based versions of corrective justice theory like Coleman's,⁷⁴ as opposed to the wrongs-based versions offered by Weinrib and Ripstein. Second, and more importantly, there is a significant theoretical price to be paid by even wrongs-based corrective justice theorists for integrating injunctive relief into their accounts of tort law. A tremendous selling point of Weinrib's account has been its pedigree, which traces back to Aristotle's *Nicomachean Ethics* and its proposition that corrective justice is an arithmetic (as opposed to a geometric) concept of justice.⁷⁵ Weinrib influentially synthesized this Aristotelian idea with a Kantian notion of right.⁷⁶ As to a tort claim culminating in an injunction, however, the Aristotelian aspect of the picture has now evaporated entirely. The enforcement of the right has nothing to do with "making whole" or the undoing of a transaction that results in a normative disequilibrium between injurer and

69. *Id.* at 120-25.

70. Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273 (2011).

71. *See generally id.* at 286-93.

72. *Id.* at 287.

73. *Id.* at 275.

74. *See* JULES L. COLEMAN, RISKS AND WRONGS 329-32 (1992).

75. *See* ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, Ch. 2-4, at 82-88 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.).

76. *See* WEINRIB, *supra* note 2, at 56-113.

victim. Injunctive relief involves enforcement of a primary right, not making whole in light of a prior invasion of primary right.

Weinrib's most vigorous criticisms, however, concern not injunctive relief but punitive damages.⁷⁷ We have maintained (especially Zipursky) that civil recourse theory offers a powerful account of the place of punitive damages in tort law, and corrective justice does not and cannot do so.⁷⁸ Weinrib's response is essentially as follows: (a) outside of the United States, the common law does not recognize punitive damages, only "aggravated damages";⁷⁹ (b) corrective justice theory can readily account for aggravated damages;⁸⁰ and (c) civil recourse theory cannot explain genuine punitive damages any better than corrective justice theory, but, given that the focus of civil recourse theory has to date been on American tort law, civil recourse theory has much more to be embarrassed about by punitive damages than does corrective justice theory.⁸¹

None of these three criticisms is well taken. First, Weinrib cannot succeed in limiting punitive damages to the United States by claiming that other common law jurisdictions recognize only "aggravated damages." For one thing, these are not the only two phrases used in non-U.S. jurisdictions: "exemplary damages," "vindictive damages," and "smart money" are also used, and "exemplary damages" remains a quite common usage in the United Kingdom. Even the phrase "punitive damages" continues to be used in commonwealth countries. Broadly speaking, while punitive damages and exemplary damages may be a particularly significant phenomenon in the United States, they are found across common law jurisdictions. A failure to explain punitive damages beyond an explanation of the particular conception of aggravated damages Weinrib puts forward is a significant shortcoming of any tort theory that purports to account for the common law of torts.

Second, it is far from clear that Weinrib really can explain aggravated damages. The key move is to treat this class of damages as a special case of compensation—namely, compensation for the "insult" atop the injury that attends malicious or wanton wrongs. Yet this move only goes so far. We have elsewhere suggested that corrective justice theory actually has trouble explaining aspects of standard-issue compensatory awards. For example, we are not convinced that a concept of making whole really sheds a great deal of light on pain

77. See Weinrib, *supra* note 70, at 289-93.

78. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 712-13, 750 (2003); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 136 (2005).

79. Weinrib, *supra* note 70, at 292.

80. *Id.*

81. See *id.* at 292-93.

and suffering damages or emotional harm damages.⁸² The concept of aggravated damages for dignitary loss—especially when a jurisdiction is not itself willing to treat such damages as an aspect of compensatory damages—is doubly strained when one tries to press it into the mold of making whole. While one’s health may be among the most important things a person has, it is not at all clear that one “has” one’s health in the sense that one might have a house, a car, or an intact pair of knees.⁸³ A fortiori, it is far from clear one has one’s “dignity” in the relevant sense. Certainly, there is little plausibility in the claim that a monetary damages award actually serves to repair a rupture in dignity.

Finally, Weinrib does not take seriously either the core of the civil recourse account of the common law of punitive damages or the use to which that account has been put in understanding contemporary American law. Part of our reason for treating making whole as a principle of remedies (rather than a principle of liability) is to emphasize that it operates only as a default in the common law of torts, one that can be overcome by proof that the defendant willfully or wantonly wronged the plaintiff. In such a case, full and fair compensation does not require a make-whole limitation, which is to say that the plaintiff is entitled to engage in something beyond self-restoration as against such a tortfeasor. In essence, the courts have concluded that the victims of malicious or willful wrongs are sometimes entitled to harness the legal system to be *punitive* or *vindictive* against wrongdoers. There is no pretense here that the damages are repairing some injury that was done, but they are nevertheless supplied by the court on the grounds that the nature of the defendant’s invasion of the plaintiff’s right warrants an extracompensatory award for the plaintiff. In different words, the plaintiff is provided with the chance to make the defendant “smart” and to hold the defendant up as an example to others. The concept of “aggravated damages,” at least as put forward by Weinrib, does not begin to capture this notion.

We agree with Weinrib that many jurisdictions, especially in the United States, have adopted a different conception of punitive damages, one that treats the plaintiffs as private attorney generals authorized to seek punitive damages in furtherance of the public’s interest in deterrence and punishment.⁸⁴ Like Weinrib, we have openly asserted that such a conception lies outside of the basic prin-

82. John C.P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibility in the Law of Torts*, in *RIGHTS AND PRIVATE LAW* 251, 264-65 (Donal Nolan & Andrew Robertson eds., 2012).

83. Zipursky, *supra* note 14, at 391.

84. Weinrib, *supra* note 70, at 290-91.

ciples of the common law of torts.⁸⁵ The civil recourse account, however, is capable of explaining why an extracompensatory concept of punitive damages that truly involves a notion of punitiveness as recourse does fit within a common law of torts. It is therefore able to explain in detail how the genuine recourse-based conception has morphed into the “public law” conception, and it is able to offer some comments on how and why these conceptions might be disentangled in the future. Weinrib’s too-swift embrace of the notion of aggravated damages, his minimization of the notion of punitive damages outside of American tort law, and his unwillingness to operate at his usual level of nuance in this area of law only serve to emphasize the superiority of the civil recourse account on this important topic.

Of greatest present concern to us is Weinrib’s misattribution to civil recourse theory of the view that a tortiously injured plaintiff has no right against the defendant, merely a legal power:

The second criticism [made by civil recourse theorists against corrective justice theory] is that if the plaintiff has a power and not a right (and, correspondingly, the defendant is under a liability and not under a duty), then the occurrence of the wrong creates an interval during which the plaintiff has no right, thereby interrupting the continuity of the right into the remedy. Whereas corrective justice conceptualizes the plaintiff’s suit as the attempt to enforce an existing right, civil recourse denies that there is any right for the plaintiff to enforce. Instead, the plaintiff is merely exercising a power to apply to the court to create a new right.

In making these criticisms, the theory of civil recourse goes seriously off the rails. . . .

. . . [T]he fact that the injured party has a power to sue the wrongdoer does not imply that the plaintiff lacks a right.⁸⁶

Notwithstanding his typical generosity and patience in engaging our ideas, Weinrib has mischaracterized our position by attributing to us the view that a person who was the victim of a tort “lacks a right” and has only a power. We have never taken that position. Rather, we take the position that: (a) the legal system provides the victim of a tort with a legal power to exact damages or another remedy from the tortfeasor upon proof that the tortfeasor wronged her—this legal power *is* a right (just as, for example, the power to vote is a right)—and (b) the plaintiff has a right in a second sense, in that the state, in providing the plaintiff with a legal power, recognizes its own duty to the plaintiff to provide an avenue of civil recourse. The political (and constitutional) right of the plaintiff to the state-facilitated private power is correlative to a state duty to provide such a power. The tort

85. See, e.g., GOLDBERG & ZIPURSKY, *supra* note 9, at 355-59.

86. Weinrib, *supra* note 70, at 284-85.

defendant does not have a legal duty to pay, however, until that right is exercised. Instead, what the defendant has, under the law, is a liability to pay: for example, the defendant stands in a position such that the plaintiff is entitled to demand that the defendant pay, conditional on her proving the tort was committed and her compliance with various procedural and jurisdictional requirements.

A tort liability is in some ways like a criminal liability. The commission of an armed robbery does not generate a duty to go to jail; it creates a liability to be sent to jail, assuming the prosecution can make its case. So, too, injuring someone through medical malpractice does not generate a duty to pay the injured plaintiff. Instead, it creates a liability to have a damages judgment entered against one, assuming that the plaintiff can make her case. There are, of course, many important differences. One is that a bank does not have a legal right to have a court send the robber to jail, but a patient does have a legal right to have a judgment entered against the physician, assuming the case is proved. Like corrective justice theorists, we believe that the plaintiff had a right not to be the victim of tortious wrongdoing, which right was violated, and that she has a right to have a judgment entered against the wrongdoer if she proves her case. And like Weinrib, we believe that it is the doing of the wrong to the plaintiff that generates the right of the plaintiff to have the judgment entered against the wrongdoer. The question that divides the two camps concerns *the nature of the linkage* between the plaintiff's right not to be legally wronged by the defendant and the plaintiff's right to have a judgment entered against the defendant if she proves her case. Corrective justice theorists believe that the person who has committed a tort at that moment incurs a freestanding legal duty to pay damages. The reason the plaintiff has a right to have a judgment entered against the tortfeasor is that the legal duty to pay, flowing from the prior legal wrong, is sitting there, as it were, awaiting formal legal recognition by the court. There is a sense in which we would like to believe this is true, but we simply do not think the positive law supports it. Nathan Oman's powerful and incisive contribution to this Symposium, in our view, cuts directly and very powerfully against this account.⁸⁷

A fundamental challenge of civil recourse theory is explaining how there could be such a right and how such rights could exist in a systematic manner keyed to whether the tortfeasor wronged the plaintiff, given that it is not based on the structure so attractively put forward by the corrective justice theorists. Ripstein's critique of civil recourse theory can be understood as asserting that no such explanation is available. He finds the only alternate route to be grounded in

87. See Oman, *supra* note 27, at 139.

an entitlement to avenge wrongdoing and rejects such a foundation for several reasons, including its being too morally unattractive to serve as a basis for the sort of interpretive account tort theorists are seeking.⁸⁸ Like Weinrib, Ripstein ends up inviting civil recourse theorists back into the fold, rightly pointing out that corrective justice theorists can also maintain that plaintiffs have a right in the sense of a legal power against tortfeasors and that corrective justice theory is capacious enough to accommodate the principle that victims are entitled to an avenue of civil recourse against wrongdoers.⁸⁹

We are, of course, grateful to Weinrib and Ripstein for inviting us to embrace corrective justice theory. More importantly, we should say clearly now (even if we might have erred on this point in the past) that we recognize that corrective justice theorists accept the principle of civil recourse and are able to accommodate it within their own framework. The problem is that even if we rejected our own explanation of why a victim is entitled to have a judgment entered against the tortfeasor, we would still not accept the corrective justice account, as an interpretive matter, in light of what we have here and elsewhere depicted as significant interpretive shortcomings. Although we are not persuaded by Weinrib to relinquish our concerns with his framework, and we have (in this Response) defended our own, it should go without saying that we are enormously grateful for the close attention he has given our work, just as we have been greatly enriched by his remarkable corpus of scholarship on tort law and private law more generally.

B. Ripstein

Ripstein's sustained and provocative critique of our work,⁹⁰ like Weinrib's and Gardner's, includes far more than we can address here with adequate care. Like theirs, it will have to be a topic of future writing. Several responses to Ripstein's critique may be found in Zipursky's contribution to this Symposium.⁹¹ It largely accepts Ripstein's advice that civil recourse theory be disengaged from a notion of justified retaliation and be rendered less dependent upon Lockean social contract theory. However, on the larger question of whether civil recourse theory actually *is* a form of corrective justice theory, it stands its ground. More than that, it offers a sustained response to Ripstein's account of the inseparability of right and remedy in the law of torts.⁹²

88. See Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 198-203 (2011).

89. See *id.*

90. See *id.*

91. See generally Zipursky, *supra* note 14.

92. *Id.* at 315-20.

Ripstein's article presents what could be called a *disjunctive challenge* for civil recourse theory.⁹³ It argues that either civil recourse theory reduces to a justified-retaliation, or vengeance-based account, or it simply turns into a form of corrective justice theory.⁹⁴ The former is untenable, but the latter gives up virtually all of what is distinctive about civil recourse theory. The Zipursky article rejects the disjunctive critique, offering a *demand*-based account of civil recourse theory.⁹⁵ Having been wronged generates in a plaintiff a right to demand responsive conduct of the wrongdoer. The justifiability of the demand does not presuppose a preexisting duty of responsive conduct on the defendant's part; civil recourse theory is therefore independent of corrective justice theory, not derivative of it. The Zipursky article also provides several reasons to conclude that the corrective justice account put forward by Ripstein cannot fully accommodate the variety of wrongs and remedies recognized in tort law and the law of remedies as it applies to torts.⁹⁶

In this Response, we take up the overarching theme of Ripstein's critique and briefly reply to it. Ripstein lays out four criticisms that we have made of corrective justice theorists like himself and Weinrib: "that corrective justice cannot account for the diversity of wrongs, that it is unable to comprehend the broad spectrum of very different remedies, that it fails to explain why a tort suit takes place at plaintiff's initiative and involves not a right to a remedy or duty to repair but rather a power on the part of the plaintiff to exact a remedy, and, finally, that the corrective justice account is entirely at odds with the social nature of tort law and the ways in which it considers standards of ordinariness."⁹⁷ He argues that all four criticisms reflect a single strategy on our part, which he calls "the incorporation strategy": "a strategy of characterizing legal doctrine as the incorporation and formalization of social norms that are antecedent to it and contingently taken up by it, based on general assessments of weight or significance."⁹⁸ He then offers a critique of the incorporation strategy and ends by concluding that "[f]reed of the incorporation strategy and the resulting bifurcation of rights and remedies, civil recourse is what the law of tort would look like if it turned on the axis of corrective justice."⁹⁹

Initially, while one or both of us has indeed asserted each of the above-mentioned criticisms of Ripstein,¹⁰⁰ and Ripstein is a self-

93. See Ripstein, *supra* note 88, at 186-88.

94. See *id.* at 186-88, 206-07.

95. See Zipursky, *supra* note 14, at 331-35.

96. See *id.*

97. Ripstein, *supra* note 88, at 168.

98. *Id.* at 182.

99. *Id.* at 207.

100. See, e.g., Goldberg & Zipursky, *supra* note 5, at 954-63, 978.

declared corrective justice theorist, it is misleading to characterize some of these criticisms as criticisms of corrective justice theory as such, and it is equally misleading to criticize the affirmative accounts we have put forward on that issue as aspects of “civil recourse theory.” For example, there is good reason to believe that a corrective justice theorist could accept a conventionalistic account of negligence law’s notion of a breach of a duty of care, while a civil recourse theorist could accept a Kantian account of the same concept. Similarly, while we have criticized loss-based corrective justice theorists for holding an inadequately broad conception of legal wrongs, wrongs-based corrective justice theorists could accommodate a broader conception of legal wrongs if they were able to offer a better account of remedies; it is their need to adopt a cramped account of remedies that restricts the breadth of their account of wrongs.

Ripstein is right that we have made an effort to put forward a tort theory that explains the sense in which the common law of torts and a variety of socially and institutionally embedded norms of conduct are synergistically related to one another.¹⁰¹ Indeed, we view this synergy as among the attributes of tort law that render it socially valuable. That does not mean, however, that we reject the aspirations of our legal system to root legal obligations and moral obligations in notions of right that are defensible from a first-order moral point of view. Like figures as diverse as Kant, Holmes, and Cardozo, we recognize how important it is that judges recognize and give force to the positive law, as actually decided, and recognize that such law is likely to be rooted in fairly basic and well-accepted norms of conduct. However, we have always understood Ripstein and Weinrib to accept this basic view, too. Conversely, we join them (and Kant and Cardozo) in thinking that there is some set of special moral concepts to which legal actors—judges and jurors at least—are aiming to give material content as they decide cases. No doubt we, as lawyers (not Kant scholars) in the first instance, are more drawn to the material, positive law side than Ripstein is. And we do not categorically reject the possibility that we may have, on occasion, overplayed the here-and-now (positive law and extant social norms), over normative structure and aspiration. With that said, we find it quite unlikely that the differences between civil recourse theory and corrective justice theory really reflect differences in the extent to which the incorporation of conventional social norms or the messiness of positive law play into the foundations of our respective views. And if we did, we are relatively confident that civil recourse theory would benefit from the comparison, for it is beyond us to imagine that lawyers, judges, and law professors cannot really understand the structure of tort law un-

101. Ripstein, *supra* note 88, at 182-85.

less they become more philosophically pure and Kantian than Goldberg and Zipursky.

C. Gardner

John Gardner's elegant critique of our views focuses on three interconnected criticisms: (a) that we do not give sufficient recognition to the principle that a successful tort plaintiff is entitled to reparative damages as a matter of right, and that it is the only remedy to which such a plaintiff is entitled as a matter of right;¹⁰² (b) that we do not provide any set of criteria that would adequately distinguish tort law from other forms of private law in which a right of recourse is predicated upon the defendant having breached a duty to the plaintiff;¹⁰³ and (c) that we mistakenly depict corrective justice theory and civil recourse theory as competitors, rather than recognizing that the questions to which each provides answers are not the same.¹⁰⁴

Happily, Gardner proposes a way that we could solve all three problems at once. If we recognize that civil recourse answers the question of why there is liability at all in torts, we could take corrective justice theory to address the question of what form civil recourse takes for torts, and what it is attempting to do. Once we admit that tort is about repair, and restoring what the tortfeasor damaged, we will see why torts is distinctive.¹⁰⁵ We need to change as to (a) in order to get the positive law correct; we need to change as to (b) in order to answer an important taxonomic question about tort law within private law. We need to change so that we can join forces with our friends Coleman, Gardner, Perry, Ripstein, and Weinrib—the corrective justice theorists.

In a highly qualified form, we are willing to take up some aspects of Gardner's suggestion (and, indeed, have arguably done so already) that corrective justice theory, and its utilization of the right to be made whole, are important principles at the level of explaining what remedies are available in the common law of torts, and why. Nevertheless, several important qualifications are in order. First, as we suggested in Part II, tort law is a law of redress for wrongs, and the wrongs of tort law have a particular character. All of them involve not only an interference with an interest and not only a mistreatment but—in an important sense—a trespass, violation, or injury infliction. A tort is not simply a breach of a duty, but a breach of a duty of noninjury. Gardner is close to this point in suggesting that a duty of repair is critical, because there is a sense in which a

102. See Gardner, *supra* note 28, at 52-53.

103. See *id.* at 57-58.

104. See *id.* at 58-59.

105. See *id.* at 61.

tort is a twisting or breaking or intrusion or attack. However, once we understand that the duties breached and the rights in question are of a distinctive kind—rights against wrongful injuring—there is no need to distinguish the field more indirectly in terms of kinds of remedy available.

Second, while Gardner is right to recognize that we have accepted that there is a default remedy of compensatory damages (and right that we have been somewhat cagey or equivocal on this point),¹⁰⁶ we have never accepted that there is a default remedy of reparative damages. The notion of reparation, while important, is far too narrow to cover the wide range of torts for which compensatory damages are available. Libel, invasion of privacy, battery, assault, and even many medical malpractice claims empower individuals to demand compensation, even where there is simply no live option of repairing the damage that was done. Compensation is a broader notion that is still distinctive from the sort of punitive or retributive damages that is not available as a matter of right. A wrongdoer can be legally required to compensate her victim just as a parent might be morally required to compensate (or reward) one who rescues her child. Money is provided in recognition of what one person did to another and the change in welfare that doing so involved; it is not necessarily provided to restore the status quo in any sense or to render intact that which was damaged.

Third, while Gardner is perhaps correct in saying that we have been too equivocal about the importance of reparative (now reconstructed as compensatory) damages,¹⁰⁷ and while his contrast between punitive and reparative remedies is instructive,¹⁰⁸ he is probably too confident in his assertion that reparative damages are available as a matter of right in tort (and that injunctive remedies, for example, are discretionary).¹⁰⁹ This is probably quite exaggerated on both sides. In American nuisance law, it is still true that an injunctive remedy is subject to equitable defenses and that these defenses may involve the exercise of discretion by a trial judge. But this point is not aptly put by saying that the injunctive relief is discretionary; it is conceived of as a right, even if defeasible by equitable consideration. As hinted in Gardner's quotation of Andrew Burrows,¹¹⁰ equally serious affirmative defenses are available in claims for reparative damages, and these can either defeat a tort claim for reparative damages entirely (even if the tort itself is proven) or—as in the case

106. *See id.* at 52-53.

107. *See id.*

108. *See id.* at 53-54.

109. *Id.* at 53.

110. *Id.* at 54-55.

of comparative fault—constitute a ground for a damages award that is far from reparative.

Finally, and most importantly, even while we do recognize the importance of compensatory damages having pride of place, we insist (a) that this is a principle of remedies, not a principle concerning whether there shall be some redress for the plaintiff and (b) that the make-whole measure should be understood as an effort to flesh out the more basic idea that an injured plaintiff in a tort case is entitled to “fair and reasonable” compensation, and this in turn should be understood as an interpretation of what a tort plaintiff is entitled to exact (in the normal case), not as an account of what the defendant is duty-bound to provide or what justice requires be done.

D. *Hershovitz*

The first claim of Scott Hershovitz’s contribution is simple and powerfully defended, and it corresponds to the core of the argument against Weinrib’s continuity thesis and Ripstein’s linkage between right and remedy.¹¹¹ Hershovitz asserts that the Aristotelian conception of corrective justice is untenable as to the wrongs of tort, because things cannot really be put back to the way they were:

The Aristotelian tradition of thinking about corrective justice reflects a deep desire to overcome what (to tweak a phrase from Rawls) we might call *the circumstances of corrective justice*. We cannot undo what we have done. No matter how hard we wish that we could turn back time when a trigger is pulled or a driver hits a child, we cannot. The moment one person wrongs another, the wrong is part of our history, indelibly, and we must decide how to go on.¹¹²

Hershovitz’s defense of this claim is more eloquent than our own efforts to make just this point; we thank him for his help.

Surprisingly, however, Hershovitz does not reject corrective justice theory but argues instead that it is only Aristotelian and rectification-based corrective justice theories that are untenable.¹¹³ He sketches, alternatively, what might be called a “getting-even” corrective justice theory of tort law.¹¹⁴ Even if civil recourse theory might succeed as a critique of rectification-based corrective justice theory, he argues, it fails as a critique of getting-even corrective justice theory.¹¹⁵ Indeed, suggests Hershovitz, civil recourse theory is best understood

111. See Hershovitz, *supra* 68.

112. *Id.* at 116-17 (citing and drawing comparison with JOHN RAWLS, A THEORY OF JUSTICE 109-12 (rev. ed. 1971)).

113. See *id.* at 117, 125-36.

114. *Id.* at 118-19.

115. See *id.* at 126-28.

as a *version* of getting-even corrective justice theory.¹¹⁶ In providing victims of torts with an avenue of civil recourse against tortfeasors, tort law is allowing these victims to get even with tortfeasors. In that sense, tort law allows corrective justice to be done.

Even as we, in this Symposium, have devoted a good deal of effort to separate our views from revenge-based conceptions of tort, we concede that the elegance and potential power of Hershovitz's account give it some appeal. In the end, however, we would need to know a great deal more about his account to move in that direction, and what we currently know leads us to think it unlikely that we would do so. The principle reason is this: although we are willing to entertain Weinrib's use of the notion of "normative equilibrium" to enable the concept of corrective justice to expand beyond a naïve materialist notion of restoration, we are inclined to think Hershovitz's account moves too far from Aristotle to count as a version of corrective justice. The notion of "corrective justice" is at least partially teleological. The assertion that corrective justice is done carries with it an implication that the state of affairs in which the defendant pays the verdict is in an important sense an improvement on the state of affairs in which there is no tort claim brought or the verdict is never paid. By embracing civil recourse theory and rejecting corrective justice theory, we aim to convey the thought that, while our legal system takes the view that a plaintiff who is genuinely the victim of a tort is entitled to bring a tort claim and entitled to exact a remedy from the tortfeasor, it does not necessarily take the view that it is a *prima facie* improvement in any sense if the plaintiff does bring such a claim or a compensatory damages verdict is in fact paid. The state is duty bound to empower such a victim to bring a claim and to enforce if she does so, but this does not entail that justice is done if she brings the claim and that it is not done if she does not bring it.

Additionally, even Hershovitz's own account leads us to question whether tort law is really about getting even. Tort law (including the law of remedies that applies to tort cases) identifies what a successful claimant stands to obtain, and the liability a tortfeasor will face, if the parties cannot negotiate to what they think would render them "even." And, of course, the state prohibits unilateral vindictive action by the victim against the wrongdoer—regardless of whether the defendant has paid, refused to pay, negotiated, or refused to negotiate. All of this leads us back to an earlier statement one of us made: "tort law is about . . . *not getting even*, [but] about what the state gives us in place of getting even."¹¹⁷

116. *Id.* at 126.

117. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 100 (1998).

V. CONCLUSION

The idea of civil recourse goes back hundreds of years, at least, and is robustly articulated in the writing of Blackstone and Locke. In reintroducing it into Anglo-American tort theory, we hoped it would help us find a better way to understand the field of torts, and we aimed to generate a recognition of the normative standing of the tort plaintiff asserting her right of action, not simply the tort defendant facing up to liability. It is our good fortune that the idea of civil recourse has generated considerably more interest than this. Corrective justice theorists are eager to admit that the principle of civil recourse is fundamental to tort law, even if it does not displace corrective justice. Contract theorists and private law theorists generally claim that it is not simply torts but a wide range of private law that stands to be illuminated by reference to the principle of civil recourse. Moral and political philosophers have seen in civil recourse an expression of the fundamental notion that those who are wronged have a special standing to demand accountability from the wrongdoer.

As for ourselves, our primary interest remains the illumination of the field of torts, the rights of the tort plaintiff, the liabilities of the tort defendant, and the linkage between a civil wrong and the right of action that governments provide by way of offering civil recourse to injured persons—areas in which we have been met with substantial resistance from our most esteemed friends and colleagues. The ease with which civil recourse has been accepted as a basic idea within the domain of law and morality provides comfort and consolation for our “wounds” on the battlefield of torts scholarship. More seriously, the continual testing of civil recourse theory has proved indispensable in permitting us to make meaningful progress in our thinking.