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## What Does Tort Law Do? What Can it Do?

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## Monsanto Lecture

### WHAT DOES TORT LAW DO? WHAT CAN IT DO?

Scott Hershovitz\*

#### I.

It's not hard to describe what tort law does. As a first approximation, we might say that tort empowers those who suffer certain sorts of injuries or invasions to seek remedies from those who brought about those injuries or invasions. The challenge is to explain why tort does that, or to explain what tort is trying to do when it does that. After all, it is not obvious that we should have an institution specially concerned with the injuries and invasions that count as torts.

To see why it is not obvious, consider two women of roughly the same age, Betty and Alice. Betty has been blind since birth due to a genetic disorder. Alice was blinded only recently, when she was overtaken by fumes from a chemical spill caused by a truck driver's negligence. In at least one respect, Alice and Betty are similarly situated. Both must navigate the world without sight. Thus, we might expect that the law would treat them in similar ways, at least insofar as their blindness is concerned. And to a certain extent, it does. Blindness might qualify both Alice and Betty for disability benefits, or it might bring them within the protection of anti-discrimination statutes. But tort law allows Alice to claim much more robust compensation for her blindness than the law makes available to Betty. In tort, Alice can claim compensation for the difference between what she can earn without her sight and what she could have earned with it. She can also claim compensation for emotional distress she suffers as a result of her blindness. But tort does not offer this sort of compensation to Betty, and no other body of law does either.

The difference between Alice's and Betty's status in tort cannot be explained by any present feature of their conditions. Of course, it is possible that Alice is worse off. It may be that she is more distressed than Betty, because she experiences her blindness as a loss. Or it may be that Alice's earning potential is less than Betty's, because Betty adapted

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to blindness as a child. But tort does not grant Alice a claim to compensation for the degree to which her present condition is worse than Betty's. It grants her a claim to compensation for the degree to which her condition is worse than it was when she had sight, so Alice may receive compensation for a base level of reduced earning power or emotional distress that Betty also experiences.

The contrast between Alice and Betty reveals something important about tort law. Tort may help Alice deal with her blindness, but her blindness is not the ground on which tort law helps.<sup>1</sup> After all, Betty has roughly as strong a claim to aid on that ground as Alice does, yet she is left to fend for herself.<sup>2</sup> This won't come as a surprise to anyone who is even passingly familiar with tort law. To claim compensation through a tort suit, a plaintiff must always allege more than that she is presently in a state which warrants aid. And in some cases, a plaintiff doesn't even need to allege that; there are torts for which a plaintiff need not prove an injury at all, let alone an injury that would warrant the aid of others. But this basic fact about tort law poses a puzzle: What warrants treating Alice differently than Betty? What is tort trying to do when it empowers Alice to claim compensation?

## II.

Tort theorists divide over the answer to these questions. According to the view popular among economists, tort law empowers Alice to claim compensation for reasons that have little to do with her. Recall that Alice is blind as the result of a chemical spill caused by a truck driver's negligence. On the economic view, tort law aims to promote an efficient allocation of resources to safety.<sup>3</sup> It does this by creating incentives for people to take cost-justified precautions. In requiring the truck driver to pay for the costs he negligently imposed on Alice, tort law encourages

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<sup>1</sup> This point must be made with some care. Alice's blindness may determine the shape and size of the aid she is offered, but the fact that she is blind is not the reason for that aid. Otherwise, Betty would be entitled to it too.

<sup>2</sup> If Alice's condition is presently worse than Betty's, we might have more reason to help Alice or reason to help Alice more. But it is far from certain that Alice is worse off than Betty, and if she is, that is an artifact of the cases I have constructed. Instead of comparing Alice to Betty, we could compare her to Carol, who is also congenitally blind but suffers several additional congenital impairments that are collectively more severe than the distress or limitations Alice encounters because of the way her blindness came about. If Carol's condition were worse than Alice's, then we would have more reason to help Carol or reason to help Carol more. However, like Betty, Carol will get no relief from tort law.

<sup>3</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 28 (1987) ("[M]uch of tort law can be explained on the simple hypothesis that it is indeed a system for bringing about an efficient allocation of resources to safety.").

similarly situated drivers to consider such costs when deciding how much care to take with respect to others' safety.

It is tempting to think that this explains why Betty does not have an action in tort. Betty's blindness did not result from anyone's negligent or inefficient behavior, so tort law cannot reduce the incidence of blindness like Betty's by encouraging anyone to invest additional resources in safety.<sup>4</sup> But we don't yet know why Betty doesn't have a claim to compensation in tort, because we don't yet know why anyone does have a claim, including Alice. Tort law promotes an efficient allocation of resources to safety by extracting payment from those who fail to take cost-justified precautions. The money collected does not have to be transferred to the people hurt by inefficient behavior; it could just as well be deposited in the state's treasury, or passed on to those most in need. If the goal is to promote an efficient allocation of resources to safety, there is no need to involve Alice.

But Alice is involved, and centrally so. It takes a plaintiff to start a tort suit, and the plaintiff must be the person whose rights were invaded by the conduct that is the subject of the complaint. Why? Economists give two sorts of explanations. One is keyed to the fact that the potential victims of torts are often in a position to take precautions against their own injuries. The worry is that if actual victims do not receive compensation for their injuries, potential victims may overinvest in their own safety.<sup>5</sup> But this explanation is not persuasive, for the law could treat an overinvestment in one's own safety as just another kind of inefficient behavior to be discouraged. And there's no reason to think that the forum to prevent overinvestment has to be a lawsuit, let alone a lawsuit between two private parties.<sup>6</sup>

The second explanation of the role that plaintiffs play in tort suits starts from the observation that it would be expensive and intrusive for the government to pressure people to take cost-justified precautions if it

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<sup>4</sup> For simplicity's sake, let us ignore the possibility that someone is at fault for Betty's congenital condition.

<sup>5</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10, at 192 (7th ed. 2007) (stating that damages must be paid to the victim rather than the state because otherwise the victim "may take too many precautions").

<sup>6</sup> See Jules L. Coleman, *The Structure of Tort Law*, 97 *YALE L.J.* 1233, 1244 (1988) (reviewing WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) & STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)) (observing that the claim that "victims are included so that we may induce them to take efficient precautions and to avoid taking inefficient precautions, rests on the mistaken premise that including someone in litigation is the only way to influence her behavior") (footnote omitted).

had to gather all the information necessary to do so on its own.<sup>7</sup> Thus, it turns out that Alice can provide an important public service. When she files suit, she notifies the court that the truck driver was careless, which gives the court an opportunity to impose the appropriate penalty. According to this explanation, Alice's role in the process is epistemic. So why does she get compensation if she proves her claim? As a kickback. Or more charitably, as an inducement to bring the claim to court and pursue proof of it. Thus, it turns out that on the economic view, the ground of the compensation that tort offers Alice is not her blindness, or even the truck driver's negligence in bringing it about. Rather, the ground of her compensation is the state's desire to harness Alice's information and energy in its effort to promote an efficient allocation of resources to safety.

As an interpretive matter, this explanation of the plaintiff's role in a tort suit is implausible. It treats tort suits as if they are private attorney general actions, vindicating primarily public rather than private interests. This is surprising, to say the least. Tort suits do not employ any of the procedural devices by which we commonly recognize such suits (*e.g.*, prevailing plaintiffs in tort suits are not typically entitled to attorneys' fees, nor do they sue as relators, as plaintiffs in *qui tam* actions do). And, more worrisome, if tort suits are private attorney general actions, then the category may be all encompassing.

But the real problem with the claim that tort awards damages so that plaintiffs have an inducement to sue is not that it is surprising. The problem is that it doesn't solve our quandary. Quite the opposite, in fact. We now have a new mystery: Why is the entirety of a tort judgment paid to the plaintiff? *Qui tam* statutes nearly never offer a bounty that large, and it seems likely that a smaller award would be sufficient to induce suit, at least in many cases. And the old mystery still hums alongside: We haven't yet figured out why Alice is the only one empowered to file suit. Often, the person whose rights are invaded will be in the best position to call out negligent behavior, but in many cases, she will be in no better position than others, and often others will be in a better position than her. If Betty happens to be a dispatcher at the trucking company and knows more about the driver's negligence than

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<sup>7</sup> See POSNER, *supra* note 5, § 6.10, at 192 (stating that damages must be paid to the victim rather than the state because "otherwise the victim will have no incentive to sue"); see also Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 48 (1972) ("By creating economic incentives for private individuals and firms to investigate accidents and bring them to the attention of the courts, the system enables society to dispense with the elaborate governmental apparatus that would be necessary for gathering information about the extent and causes of accidents had the parties no incentive to report and investigate them exhaustively.").

Alice, she might be a better plaintiff. She might know things that Alice would not even know to ask about. But tort law doesn't offer a bounty to the person best suited to bring a claim; it offers the person who was wronged the opportunity to seek compensation, without regard to her relative epistemic position.

Much of this has been said before,<sup>8</sup> but it is difficult to vanquish the economic view. One can always keep the story going by appealing to more costs, so let's play one more round of the game. "Perhaps," an economist might concede, "there will be instances in which Betty would be a better plaintiff than Alice, but it would be difficult and expensive to formulate and administer a rule that in every situation conferred a claim on the person best suited to bring it. Since one can expect that those hurt by inefficient behavior will often have the information and energy necessary to pursue compensation, adopting a rule that empowers those people to bring tort suits will achieve the best results on the whole, even if a more nuanced rule might have seemed better absent administrative costs."

There is something to this thought, but not enough to answer the question why Alice and Alice alone has a claim to compensation for her blindness. Even if it is sensible to prefer Alice to Betty on the ground that Alice is likely to be the better plaintiff, it is hard to see why we would carry this preference so far that we would decline to let Betty sue when Alice forgoes a perfectly valid claim. But that's the rule. Betty may not step into the breach even if she can definitively establish that the truck driver negligently injured Alice. From an economic perspective, this is puzzling. It reduces the likelihood that tortfeasors will face consequences for failing to take cost-justified precautions, dampening the incentive to act efficiently. Thus, to think the rule justified on economic grounds, we'd have to posit costs from allowing Betty to sue that would outweigh the obvious gains.

One cost might be complexity. In a system in which many people could bring a claim arising out of a single tort, courts would have to choose among them, or figure out how to coordinate their claims. But even though complexity is a real cost, it is far from clear that it is sufficient to justify our rigid insistence that only the person wronged may sue. In some contexts, courts require people to compete to prosecute a claim. For example, federal courts sometimes choose the lead counsel in a class action by assessing the quality and cost of the

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<sup>8</sup> See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 12–24 (2001); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* § 2.9.1, at 46–48 (1995).

representation different lawyers can provide.<sup>9</sup> We could imagine a rule that set up a similar contest for the right to be a plaintiff in a tort suit. We might even hold a reverse auction, giving preference (among those epistemically qualified) to the person who would accept the least compensation. That would allow the state to profit from the difference between what the defendant pays and what the plaintiff takes.

Of course, it's an empirical question whether a rule like that would give us more bang for our buck than the rule we have. But that means that we don't know whether economists have an adequate explanation of the fact that Alice and Alice alone has standing to file a tort suit complaining of her injury. We can speculate that the costs and benefits line up so that the standing requirement is efficient, but this would be a rather happy coincidence, given that we've not tested any alternatives.

This sort of problem is endemic to economic explanations of tort doctrine. Time and again, they bottom out in speculation about costs and benefits we don't know much about.<sup>10</sup> Moreover, it is hard to imagine that a more empirically-informed analysis would vindicate the economists' vision of tort. If tort's aim in empowering Alice to claim compensation for her blindness is to promote an efficient allocation of resources to safety, it seems quite possible, perhaps even likely, that the cure is worse than the disease. The administrative costs associated with tort are enormous and the benefits uncertain, at least insofar as accident reduction is concerned. This accounts for the ambivalence many economists have toward tort. But it also makes it doubtful that the best answer to the question why tort treats Alice differently than Betty lies in a story about efficiency.

### III.

So we are back to the questions we started with: What warrants treating Alice differently than Betty? What is tort trying to do when it empowers Alice to claim compensation? One lesson we might draw from the challenges that economists face in answering these questions is that we'd do well to look for something non-contingent about Alice that warrants treating her differently than Betty. That is, we'd do well to look for something about Alice that we can be sure isn't true of Betty too. We have already ruled out the possibility that Alice's present condition can play this role. For all we know, Betty may be worse off than Alice, but

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<sup>9</sup> FED. R. CIV. P. 23(g).

<sup>10</sup> I develop this point in *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010).

even if she is not, nothing about Alice's claim turns on her status relative to Betty.

Alice's claim might, however, depend on her status relative to someone else. Philosophers who write about tort commonly argue that the reason tort treats Alice differently than Betty is that Alice was wronged. Betty had bad luck in a genetic lottery, but Alice's injury was not just bad luck. Someone is responsible for it. The aim of tort law, philosophers commonly say, is to do corrective justice between Alice and the person who wronged her. And the first piece of evidence that philosophers cite is the fact that tort empowers Alice to claim compensation from the very person whose negligence injured her, or from someone else who the law deems responsible for that person's torts.

One happy feature of this line of thought is that it is faithful to the language of tort law. Historically, the word "tort" designated a wrong.<sup>11</sup> And tort doctrine is replete with words linked to rights and wrongs. For example, to prevail on her negligence claim, Alice must establish that the truck driver *breached a duty* which he *owed* her. This linguistic affinity gives the philosophers' account a leg up on the economic account, which recasts tort in notions like *efficiency* and *cost* that are mostly alien to the doctrine. But merely pointing out that Alice was wronged and that tort law regards this as a predicate of her claim is not enough to answer the question what warrants treating Alice differently than Betty. We can grant that Alice was wronged and that the success of her claim in tort depends on this, but we still need an explanation of why the fact that Alice was wronged counts as a ground for empowering her with a claim to compensation that Betty does not have.

This is where corrective justice enters the picture. The reason tort grants Alice a claim to compensation against the person who wronged her, many philosophers say, is that granting her that claim is a way of doing corrective justice, or, perhaps better, a way of empowering Alice to demand corrective justice for herself. But now we must ask: What is corrective justice, and why should we want to do it? Many philosophers dodge the second part of this question. They say that tort implements or embodies a principle of corrective justice, but they refrain from saying that the principle is morally sound, or that we have sufficient reason to pursue corrective justice through tort law.<sup>12</sup> This means that many philosophers don't fully answer the question what warrants treating Alice differently than Betty. Instead, they describe what they take to be

<sup>11</sup> 18 THE OXFORD ENGLISH DICTIONARY 275 (2d ed. 1989).

<sup>12</sup> See, e.g., COLEMAN, *supra* note 8, at 5 ("The defensibility of corrective justice as a moral ideal is . . . independent of its role in explaining tort law[.]").



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tort's ground for treating Alice and Betty differently, without saying whether it is a good ground or a good enough one.

John Gardner, however, has recently attempted to explain both what corrective justice is and what is valuable about doing it. According to Gardner, norms of *justice* are norms "for tackling *allocative* moral questions, questions about who is to get how much of what."<sup>13</sup> A norm of *corrective* justice, Gardner says, addresses a particular kind of allocative question:

Something has . . . shifted between . . . two parties. The question of corrective justice is not the question of whether and to what extent and in what form and on what ground it should now be allocated among them *full stop*, but the question of whether and to what extent and in what form and on what ground it should now be allocated *back* from one party to the other, reversing a transaction that took place between them. A norm of corrective justice is a norm that regulates (by giving a ground for) the reversal of at least some transactions.<sup>14</sup>

There are obvious echoes of Aristotle here, who thought of corrective justice as a matter of addition and subtraction to reverse wrongful transactions.<sup>15</sup> And Gardner is not alone in following Aristotle; most contemporary philosophers who write about corrective justice hold broadly Aristotelian views, though they quibble over the details. What's novel about Gardner's work is that he proposes to explain what good a norm of corrective justice might do, or rather, what good we might do in adhering to a norm of corrective justice. Since that explanation is just what we need before we can accept corrective justice as the answer to the question what warrants treating Alice differently than Betty, I want to present Gardner's argument in some detail.

Gardner starts his case for corrective justice with a story, the premise of which is that he promised to take his children to the beach on a particular day.<sup>16</sup> Alas, on the appointed day an emergency intervenes. One of Gardner's students finds herself in serious and urgent trouble, from which only Gardner can save her. So he fails to keep his promise to

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<sup>13</sup> John Gardner, *What is Tort Law for? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 6 (2011).

<sup>14</sup> *Id.* at 9-10.

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

<sup>16</sup> Gardner, *supra* note 13, at 28. Gardner credits Neil MacCormick for the example. *Id.* (citing NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY 212 (1982)).

his children. Gardner says that even though he was justified in breaching the promise, he is now bound, without any further promise, “to take them to the beach at the next suitable opportunity (if there is one).”<sup>17</sup> And if there is no suitable opportunity, or none soon, then perhaps to the ice rink instead.

This strikes me as just right. Insofar as broken promises to his children are concerned, Gardner has just the attitude a parent should have. But the interesting part lies in what Gardner says next, in explanation of why he has the remedial obligation he takes himself to have. He asks: “Am I bound to take [the children] to the beach tomorrow for reasons that are entirely different from the reasons that I had to take them to the beach today?”<sup>18</sup> And he answers:

Surely not. Why me? Why the children? Why the beach? Why tomorrow? Clearly there is some sense in which my broken promise continues to exert a hold over me after I break it, a sense in which it continues to shape what I am bound to do. Of course, it is too late for me to keep my promise perfectly. I promised to take the children to the beach today and today is gone. But is it also too late for some kind of *imperfect* performance? I can’t make it today, but I can still take them [to] the beach some time, and if it can’t be today, well tomorrow is close, and the closer to perfect performance of my promise, you might think, the better. There is an element of continuity here, something that carries through from my original obligation into my obligation now. Was the former discharged (i.e. put to an end) by its breach? Perhaps not entirely. It seems to leave some traces of itself, some echo, behind for later.<sup>19</sup>

Ultimately, Gardner concludes that he can’t partially perform the obligation his promise created. That obligation, he says, was extinguished when the time for performance passed. In its place, there is a new obligation, different than the old. But though he can’t partially perform the original obligation, he can still partially conform to the reasons that supported it in the first place, which continue to exist even though Gardner did not do as those reasons originally obligated him to do.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 28–29.

<sup>19</sup> *Id.* at 29.

To illustrate: It is plausible that one reason Gardner's promise obligated him to take his children to the beach on the day he promised to take them is that failing to do so would cause disappointment. But, Gardner points out, a broken promise does not entail a fixed quantity of disappointment. Gardner can act to limit his children's disappointment by taking them to the beach at the next suitable opportunity. Moreover, Gardner says, his reason not to disappoint his children in the first place "is also a reason to minimize their disappointment if [he] cannot but disappoint them," as "[r]easons, unlike obligations, allow for imperfect conformity."<sup>20</sup> Thus, Gardner concludes, it is the possibility of partially conforming to the reasons that supported the original obligation to keep his promise that explains his remedial obligation to take his children to the beach on the next suitable day. Gardner sums up his conclusion in what he calls the *continuity thesis*, which holds that "the secondary obligation is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due."<sup>21</sup>

What light does the continuity thesis shed on corrective justice? Gardner says that "[t]he normal reason why one has an obligation to pay for the losses that one wrongfully occasioned (i.e. that one occasioned in breach of obligation) is that this constitutes the best still-available conformity with, or satisfaction of, the reasons why one had that obligation."<sup>22</sup> Of course, having failed to avoid causing those losses in the first place, one can't fully conform with one's reason to avoid causing them, even if one can come close by making good the losses. Gardner refers to the bit that one can't conform with any longer as a "rational remainder,"<sup>23</sup> and he says that the existence of such a remainder is a reason to feel regret and related emotions, and perhaps to express those emotions in an apology. But, Gardner adds:

The case for doing corrective justice . . . is not . . . the same as the case for regret, remorse, and guilt. It is in a way the opposite case. These emotions are rendered rational, all else being equal, by the impossibility of making things better, by the impossibility of restoring what was lost by what one did. Corrective justice, by contrast, is rendered rational, all else being equal, by the residual possibility of doing so, i.e. by the residual

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<sup>20</sup> *Id.* at 33.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 33-34.

<sup>23</sup> *Id.* at 34-35.

possibility of restoring things, at least in some measure, to where they would have been had one not occasioned their loss.<sup>24</sup>

This completes Gardner's answer to the question what warrants treating Alice differently than Betty. As we said at the start, Alice was wronged and Betty was not. By granting Alice a claim to compensation from the truck driver, tort empowers her to demand second-best conformity with the reasons that supported the truck driver's obligations not to injure her in the first place. Those reasons survived the truck driver's breach of his duty, and the value in tort law is that it empowers Alice to see to it that the truck driver conforms to those reasons the best he can now.

#### IV.

Gardner's answer is elegant, but not persuasive.<sup>25</sup> The trouble comes right at the start when Gardner endorses the Aristotelian view that "[n]orms of corrective justice regulate the allocation of goods back from one person to another."<sup>26</sup> I do not doubt that there are cases in which doing corrective justice requires allocating a good back. If our truck driver stole Alice's car, we might demand that he return it, and this demand would probably strike us as part of doing justice in the case. But our truck driver didn't steal Alice's car. He blinded her when he carelessly caused a chemical spill. And the one thing we can't demand of the truck driver is that he return Alice's sight. Alice's sight is simply not the kind of good that can be allocated back.

This is not an anomalous case. The tort of conversion often, but not always, involves the misappropriation of a good that can be returned, but most torts do not involve a transfer that can be reversed in that way. And strikingly, neither does the wrong on which Gardner builds his case for the value of corrective justice. Gardner breached his promise to take his children to the beach, and in doing so, we might suppose that he wronged them (though since he was justified, he did not act wrongly in wronging them). But Gardner did not wrong his children by taking anything from them. There's nothing to allocate back. There's no transaction that he can reverse. This means that if there is justice to be

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<sup>24</sup> *Id.* at 37.

<sup>25</sup> The arguments in this section and the one that follows draw on similar arguments that I develop at greater length in *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 117 (2011).

<sup>26</sup> Gardner, *supra* note 13, at 14.

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done in respect of Gardner's broken promise, it cannot be corrective justice, at least not as Gardner construes it.

Why doesn't Gardner see this? I suspect the answer is that he is willing to indulge a set of abstractions and metaphors, whose main function is to elide the fact that most wrongs do not involve a transfer that can be reversed. The most common of these abstractions papers over the particular injuries that victims suffer (broken bones, damaged reputations, frustrated ambitions) by calling them "losses."<sup>27</sup> This way of speaking makes it easy to imagine that we can achieve the Aristotelian aim of reversing wrongful transactions by requiring wrongdoers to offset their victims' "losses" with "gains" of similar magnitudes. And ever since Aristotle, many have succumbed to the thought that wrongdoing always confers on the wrongdoer a gain sufficient to do the offsetting.<sup>28</sup> But this is patently false. Gardner didn't gain much if anything when he breached his promise to his kids, and if he did gain something (his student's gratitude, perhaps), it's not the kind of thing he can transfer to his children. The same goes for the truck driver. If he gained anything when he negligently caused the chemical spill, it's probably not the kind of thing he could hand over to Alice. So if we require the truck driver to compensate Alice, we are not offsetting her loss with his gain, as we might cancel out a debit with a credit on a bank ledger. Alice's "loss" doesn't disappear. And despite what philosophers have sometimes suggested, it doesn't shift to the truck driver either.<sup>29</sup> Alice's "loss" is a physical injury and a permanent one. She can't shift her blindness to the truck driver any more than he can allocate her sight back.

These problems are not lost on Gardner. Recall that he says that "[c]orrective justice . . . is rendered rational . . . by the residual possibility of restoring things, at least in some measure, to where they would have been had one not occasioned their loss."<sup>30</sup> The qualifier *at least in some measure* is there to mark the fact that much of the time a wrongdoer can't put the victim in the position she would have been in absent the wrong, or anything close to it. We can't "reverse the wrongful transaction" for someone who has been raped, or slandered, or falsely imprisoned. And

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<sup>27</sup> See, e.g., *id.* at 34 ("[T]he reasons why one must pay for the losses that one occasions are the very same reasons why one must not occasion those losses in the first place, when it is true that one must not occasion them.").

<sup>28</sup> In recent years, the leading proponent of this sort of view has been Ernest Weinrib. I criticize Weinrib's view in Hershovitz, *supra* note 25, at 113-15.

<sup>29</sup> See, e.g., ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 58 (1999) ("[I]nsofar as they enable a plaintiff to adapt to his or her situation, money damages are an appropriate way of transferring the loss so that it becomes the injurer's problem to decide how to deal with what is properly his or her loss.").

<sup>30</sup> Gardner, *supra* note 13, at 37.

we can't do it for Alice either. To be sure, we might be able to nibble around the edges. We might demand that the truck driver make up the difference between what Alice will earn without her sight and what she could have earned with it. That would put her bank account in roughly the position it would have been absent the wrong.<sup>31</sup> But it won't put Alice in the position *she* would have been in absent the wrong, not even close.

That it is impossible to reverse the wrongful transaction in cases like Alice's makes corrective justice seem a strange answer to the question why tort treats Alice differently than Betty. If corrective justice is what Gardner says it is, then tort law just can't do it, or at least not much of it. Moreover, it turns out that much of what tort law does doesn't involve corrective justice. A major component of the damages the truck driver will pay will be intended to compensate Alice for her pain and suffering. But even if those damages mitigate Alice's emotional distress, they won't do it by putting Alice in the position she was in before the injury. They will do it by helping her to build a life that accommodates the injury with which she must live. I think that's a worthy aim for tort law, but it is not a manifestation of corrective justice, at least not as Gardner conceives it.<sup>32</sup> And that implies that corrective justice is at best a partial answer to the question what tort law aims to do when it empowers Alice with a claim to compensation.

This is a bullet Gardner is willing to bite. He takes issue with theorists like Jules Coleman and Ernest Weinrib, who argue that corrective justice provides a complete answer to the question what tort law is for.<sup>33</sup> But I'm afraid that, for Gardner, corrective justice is even less of an answer than he thinks it is. Gardner suggests that we have to look beyond corrective justice for an explanation of the primary obligations in tort, like the obligation not to slander others or negligently injure them. But, he says, the "secondary obligations [*i.e.*, the obligations that follow from the breach of primary obligations] are, and cannot but be, obligations of corrective justice."<sup>34</sup> We've already seen that this is not

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<sup>31</sup> I say "roughly" because even here we do not try to match that position exactly. Tort damages are lump sum, not streams of payment. And we probably could not match the position exactly even if we tried. In the ordinary case, we will have a great deal of difficulty figuring out what Alice would have earned had she not been injured and projecting what she will earn now that she has been.

<sup>32</sup> Gardner is forthright about this. He says that damages for pain and suffering, emotional distress, bereavement, and the like "are not reparative in the strictest sense," as they "are paid in respect of certain irreparable results or consequences of a tort[.]" Gardner, *supra* note 13, at 47.

<sup>33</sup> *Id.* at 4-6.

<sup>34</sup> *Id.* at 50.

true of the obligation to pay pain and suffering damages. But on close inspection it's not true of any of the damages the truck driver must pay Alice. Recall that Gardner says that a norm of corrective justice is a norm for allocating a good back from one person to another, or a norm for reversing a wrongful transaction. Whatever we require the truck driver to pay Alice, he won't be doing either of those things. This means that, by Gardner's own lights, tort law does not impose any duties of corrective justice on the truck driver. And so it seems that corrective justice can't be the answer to the question what tort is trying to do when it empowers Alice with a claim to compensation.

V.

Unless Gardner is wrong about corrective justice. The Aristotelian view has dominated tort scholarship, but there is another tradition of thinking about corrective justice that might help us answer our questions about Alice and Betty. It is the tradition that takes corrective justice to be a matter of *getting even* rather than repairing wrongs, the tradition that gave us the phrase *an eye for an eye*, and the tradition that I had in mind when I decided that the truck driver would blind Alice, rather than injure her in some other way. The suggestion I want to pursue in the remainder of this essay is that the key to understanding what tort aims to do in granting Alice a claim to compensation lies in understanding how it is that *an eye for an eye* could be a formula for doing corrective justice.

Notice that if Gardner were right about what corrective justice consists in, *an eye for an eye* could not possibly be a formula for doing it. It's not a norm that regulates an allocation back, nor is it a recipe for reversing a transaction. The truck driver's eyes aren't much help to Alice. Taking them won't restore her sight or even increase the balance in her bank account. The violence seems pointless. So we must ask: If taking an *eye for an eye* doesn't make anything better, why have so many people in so many places regarded it as a way of doing corrective justice? What's the point of getting even?

It will be easier to grasp the point of getting even if we take a step back from revenge. Though we no longer settle disputes according to the law of the talion, notions of evenness continue to play a central role in our lives. Imagine an alternative history for Alice and the truck driver. The chemical spill never happens, but Alice hires the truck driver to help her move furniture. Over the course of the afternoon, Alice learns that the truck driver's son is ill and that he's having trouble getting his son an appointment with the specialist who is best suited to treat him. Alice happens to know the specialist, calls her on the spot, and she agrees to see the truck driver's son. At the end of the day, when

Alice takes out her checkbook to pay, the truck driver says, “Don’t worry about it. We’re even.”

What does that mean? Presumably, the truck driver is telling Alice that her debt has been satisfied; she no longer owes him anything for his services. But why would that be? To be sure, Alice helped the truck driver. But why did he help satisfy her debt? We can start by ruling out some bad answers. It seems unlikely, for example, that the truck driver has judged that Alice’s help in getting the appointment for his son was worth just the same as his services in moving the furniture. It is difficult to imagine that, had he worked a bit longer or taken the furniture up another flight of stairs, the truck driver would have asked for a small sum of money to make up the difference between the value of Alice’s services and the value of his. It also seems unlikely that the truck driver has judged that Alice’s help was worth roughly the same as his services. We could double the amount of work that the truck driver did—let him work all day rather than just the afternoon—and still imagine him refusing payment.

What these answers have in common is that they imagine that the truck driver has *observed* that Alice satisfied her debt. But it’s hard to see how he could have done that. There’s no market price for setting up an appointment with a specialist, and even if there was, the truck driver would surely have been within his rights to insist on payment for his services even after Alice set up the appointment. Of course, he would still owe Alice a debt of gratitude if he did. But her phone call didn’t extinguish her obligation to pay the truck driver. At least, it didn’t until the truck driver said that it did. And that’s the key to understanding what the truck driver means when he says “we’re even.” He’s not *observing* that Alice’s debt has been satisfied. Rather, he is *declaring* that it has been satisfied.

The lesson here is that the truck driver’s declaration—“we’re even”—is not made true or false by some independent set of facts, like the relative market values of moving services and referrals to surgeons. Rather, the declaration is performative.<sup>35</sup> By saying, “we’re even,” the truck driver is attempting to make it so. It might not work. Like all performatives, the truck driver’s declaration is subject to *felicity conditions*, which must be satisfied in order for it to succeed.<sup>36</sup> In this case, it is reasonable to suppose that one such condition is that Alice accept (or at least not protest) the truck driver’s proposal. If she insists on paying, they will not be even. Her debt will be discharged, but the

<sup>35</sup> On performatives, see J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J. O. URMSON & MARINA SBISA eds., 2d ed. 1975).

<sup>36</sup> See *id.* at 14–24.



truck driver will still owe her a debt of gratitude, which he will have to satisfy in some other way.

There are several additional felicity conditions that must be satisfied for the truck driver's declaration to succeed. Some are trivial (*e.g.*, Alice must hear and understand the truck driver's declaration). But one bears special mention. Though Alice's assistance and the truck driver's services need not have the same value (not even roughly) for the truck driver's declaration to render them even, not just anything goes. If the truck driver had spent weeks working for Alice, instead of just an afternoon, we wouldn't think her assistance sufficient to discharge her debt. A phone call—even an incredibly helpful one—cannot offset weeks of work. If in these circumstances, the truck driver says, "we're even," Alice should protest, and if she doesn't, we should think that she still owes him compensation for his services, whether he thinks so or not. We might capture this condition by saying that the value of Alice's assistance and the truck driver's services must be proportional to one another, though they need not be equal or even roughly so.

In practice, what this means is that Alice's assistance must be such that a reasonable person could see it as ground for the truck driver's declaration. This is because the performative will only work if it is persuasive; it will only work if the relevant audience can reasonably see the parties as even once they have been declared to be so. At the extremes, there are conceptual constraints on what can count as grounds for the truck driver's declaration. If Alice had not helped the truck driver at all, it wouldn't make any sense for the truck driver to declare that they are even in respect of her debt. And it would make even less sense if she had done something to hurt him instead. But the constraints that have real bite are social. What people will find persuasive is in large part a function of the practices and values that prevail in the relevant community. But even these social constraints are typically loose enough to accord a lot of latitude to the people party to the declaration, allowing them to express their own values through the decisions that they make.

We've meandered a bit from our initial question, but we are making progress in our effort to understand how it is that an *eye for an eye* could be a norm of corrective justice. We saw before that the Aristotelian conception of corrective justice flounders because it is rarely possible for a wrongdoer to do what it demands. But though it is rare that a wrongdoer can put his victim in the position she would have been in absent the wrong, it is almost always possible for a wrongdoer to do something that will benefit his victim. And it is possible—but by no means guaranteed—that a wrongdoer can do something that would support a declaration that they are even in respect of the wrong.

Sometimes wrongdoers set out to do this. Gardner wants to do something to make up for breaching his promise to take his children to the beach. As we saw, he can't put his children in the position they would have been in absent the wrong. If Gardner had not breached his promise, they would have gone to the beach today, but that's no longer an option. Gardner can, however, do other things to benefit his children. He can take them to the beach another day, or to the ice rink instead. And these are just the sort of things that would support a declaration that Gardner and his children are even in respect of the breach. Of course, it is unlikely that Gardner or his children will declare that they are even in so many words. But just as one can promise without saying, "I promise," one can declare evenness without saying, "we're even." An implicit declaration might be the product of negotiation. Gardner might say to his children, "I'm sorry, and I want to make this up to you. Would you like to go to the beach next Tuesday, or to the ice rink tomorrow night?" If the children pick and don't protest, that's an implicit declaration that a trip to the beach next Tuesday or the ice rink tomorrow renders them even. Or Gardner might choose himself. He might say, "I'd like to make this up to you. I'll take you to the ice rink tomorrow night." This is an implicit declaration that going to the ice rink tomorrow night renders Gardner and his children even. And absent protest, it is likely to do its work. This is not because some independent metric (like his children's indifference curves) tells us that going to the ice rink tomorrow is as good as going to the beach today. Maybe it is worse; maybe it is better. But unless Gardner's children hate the ice rink, or have some special attachment to the beach, going to the ice rink tomorrow seems like a proportional response to his wrong. Thus, it is the kind of measure that could underwrite a declaration that Gardner and his children are even in respect of the wrong.

This should all feel familiar. We navigate situations like this all the time, as we are wronged and wrong each other. But cases like Gardner's, in which the wrongdoer wants to set things right, are not the most helpful for our purposes. The more interesting cases are those where the parties cannot reach an agreement on what will render them even, or are not even interested in trying. There is, for example, no guarantee that the truck driver who blinds Alice will want to take action that would support a declaration that they are even, or that they could reach an agreement even if he did. But Alice would not be stuck if the truck driver refused to negotiate, for as we just saw, the declaration that renders wrongdoer and victim even need not be joint. Alice can make the declaration herself. In fact, that's just what people seeking revenge do.

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We are now in a position to see how it is that *an eye for an eye* could count as a formula for doing corrective justice. Putting the truck driver's eyes out will not restore Alice's sight, but with the right social background in place, it might get her even. How? An act of revenge is not a performative, but it is a performance, which implicitly declares that the act renders the parties even.<sup>37</sup> To serve as the ground for the declaration, the act of revenge must be proportional to the wrong. It is not surprising, therefore, that cultures that embraced revenge as a way of doing corrective justice had elaborate schemes for determining what constituted a proportional response, starting with an *eye for an eye*. The phrase did not qualify as a recipe for doing corrective justice because returning an injury in kind makes one's own injury better. It qualified as a recipe for corrective justice because people saw returning an injury in kind as a way of getting even.

The virtue in revenge was that it provided victims a way to get even with wrongdoers unilaterally. And that opportunity had benefits even when victims didn't take advantage of it, as the threat of revenge was often enough to get wrongdoers to take their victims claims to redress seriously, lest they suffer a similar fate.<sup>38</sup> But revenge had costs too—tremendous costs. Every once in a while, someone has to put out an eye for the threat to be credible. And we are all familiar with stories in which revenge leads to reprisal, and cycles into a full-on feud. Cultures that practiced revenge had ways of keeping things from getting out of hand. One of the most important was a character that Icelanders called an *oddman*, a third party who would help resolve disputes by deciding what it would take to get parties even.<sup>39</sup> Oddmen were a way of outsourcing the performative necessary to get the parties even, and their work was subject to a familiar felicity condition. As my colleague Bill Miller puts it, "the oddman's job [was] to prevent getting even from getting out of hand by selling both parties on a plausible conception of evenness."<sup>40</sup>

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<sup>37</sup> And, as a performance, it is subject to felicity conditions. See *id.* at 18–19 ("[I]nfelicitly is an ill to which *all* acts are heir which have the general character of ritual or ceremonial[.]").

<sup>38</sup> WILLIAM IAN MILLER, *EYE FOR AN EYE* 54–55 (2006).

<sup>39</sup> *Id.* at 9. ("For us, 'being at odds' means we are in the midst of a quarrel, and it meant that in Old Norse too; to resolve that quarrel you needed to get back to even. To do that you often had to bring in an oddman, a *third* party, to declare when the balance was even again if the law did not so provide or the parties could not agree among themselves as to how to strike it. You needed odd to get even or you would forever be at odds.") (footnotes omitted).

<sup>40</sup> *Id.*

Though we no longer settle disputes according to the law of the talion, there is a deep continuity between the talion and tort law. We won't permit Alice to get even unilaterally; we won't permit her to put the truck driver's eyes out. And even if she did put his eyes out, we wouldn't think of her as even, as we no longer embrace an *eye for an eye* as a formula for doing corrective justice. But though we won't let Alice get even in the old fashion way, we will let Alice bring her dispute with the truck driver to an oddman, or rather to several, in the form of the judge and jury that will adjudicate her claim. Alice's tort suit plays a similar role to revenge. It is a failsafe. If Alice and the truck driver cannot negotiate their way back to even, she can ask a court to decide what the truck driver must do to render them even, and through the power of the court she can force him to do it.

## VI.

From the start, our questions have been: What warrants treating Alice differently than Betty? What is tort trying to do when it empowers Alice to claim compensation? In revenge, we have found our answers. A tort suit is not an act of revenge. But it aims to do the same thing that people taking revenge aim to do. That is, a tort suit aims to render wrongdoer and victim even in respect of the wrong. This means that philosophers are right to think that tort treats Alice differently than Betty because Alice was wronged. Alice and Alice alone has reason to get even. And philosophers are right to say that tort empowers Alice with a claim to compensation so that she may demand corrective justice. But they are mistaken about the way that tort law does corrective justice. Tort doesn't do corrective justice by reversing wrongful transactions or putting victims in the position they would have been in absent the wrong. It does corrective justice the only way it can be done—performatively. And the question whether it succeeds depends on whether the remedies that courts award are sufficient to make their performances persuasive.

Here we can learn from Gardner. Earlier, we rejected Gardner's view that tort law does corrective justice by restoring victims, insofar as possible, to the position they would have been in absent the wrong. Much of the time, tort law doesn't do anything like that because it can't do anything like that. But Gardner is right to suggest that tort remedies often require a second-best sort of conformity with the reasons that tortfeasors had not to injure their victims in the first place. One reason not to blind Alice is that doing so might diminish the resources available to her by compromising her ability to earn income. In demanding that the truck driver replace Alice's lost wages, we ensure that he conforms,

in a second-best sort of way, with his reasons not to diminish her resources. This is not, as we have seen, a way of restoring Alice to the position she would have been in absent the wrong. At best, it is a way of restoring her bank account. But the fact that we are apt to think that replacing Alice's lost income is something that the truck driver ought to do anyway (on account of the very reasons he had not to injure Alice in the first place) contributes to the likelihood that we will find the court's performance persuasive when it orders the truck driver to do so.

In other words, Gardner's continuity thesis can help us explain why courts order some of the remedies that they do. When a plaintiff has suffered pecuniary damage that the defendant had reason not to cause, it will often (though not always) seem sensible to require the defendant to make good the loss. Thus, we might expect courts to try to measure, as precisely as they can, a plaintiff's pecuniary losses. But when courts go beyond those losses and award pain and suffering damages or even punitive damages, they are not, as Gardner suggests, exceeding the ambit of corrective justice. If an award of those sorts of damages is what it takes to get plaintiff and defendant even in respect of the wrong, then they are every bit as much a part of doing corrective justice as compensation for lost wages or out-of-pocket medical expenses. Indeed, much confusion about corrective justice and tort law stems from taking damages for pecuniary losses as paradigmatic and attempting to assimilate the other remedies tort offers to them.

We'd do better to think the other way around. It is the remedies that courts offer for irreparable harm that are paradigmatic, as they wear their performative character on their sleeves. But it is important to see that pecuniary damages are performative too. When it is possible, restoring the plaintiff to the position she would have been in absent the wrong may make for a performance that persuades us that plaintiff and defendant are even. But there are other performances that might work, and we need persuasive ones even when the plaintiff's injury can't be repaired. That is what the law of the talion aimed to provide, and it is what tort law aims at too.