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# The Taxonomy of Civil Recourse

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# THE TAXONOMY OF CIVIL RECOURSE

ANDREW S. GOLD\*

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## I. INTRODUCTION

In its early years, civil recourse theory offered a unified approach to tort law.<sup>1</sup> As its applications have spread, and as its adherents have grown in number, this is no longer true. Civil recourse theory now incorporates several distinct approaches to private law topics, and some of these approaches diverge in important respects.<sup>2</sup> As it has developed, civil recourse theory has become a collection of theories.<sup>3</sup>

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\* Visiting Scholar, Harvard Law School; Professor of Law, DePaul University College of Law. I wish to thank participants in the Symposium on Civil Recourse Theory at The Florida State University College of Law for helpful comments. I also thank John Goldberg for helpful comments on an earlier draft. Any errors are my own.

1. The seminal article is Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) [hereinafter Zipursky, *Rights*]. See also Benjamin Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 623-655 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Zipursky, *Private Law*]; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]. Recent additional works by Benjamin Zipursky and John Goldberg are, presumably, also well within the orthodoxy of civil recourse theory. See, e.g., 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 (2005) (suggesting a constitutional grounding for a right to redress); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1162 (2007) [hereinafter Goldberg & Zipursky, *Moral Luck*]; John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) [hereinafter Goldberg & Zipursky, *Torts as Wrongs*].

2. For theories that arguably diverge from the standard civil recourse approach see, for example, Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873 (2011) (describing private rights of action in loss allocation terms); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011) (describing recourse in terms of retaliation in contract settings); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007) (describing recourse in terms of revenge in punitive damages settings); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009) (offering, arguably, a functionalist view of civil recourse); and Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011) (suggesting that civil recourse may be a component of the best corrective justice account, not a competitor to it).

3. The nature of these intramural disputes should be familiar to corrective justice theorists. While there are certain common features, corrective justice approaches to private

This Article shows how civil recourse theory has ramified. Both the conceptions of recourse and the remedies implicated by those conceptions are distinct from one theory to another. This Article further suggests that these divergences are not fatal to civil recourse theory, and indeed may represent a strength of the approach. If civil recourse theory is sufficiently flexible, it can account for fields as disparate as tort, contract, and unjust enrichment. It can also account for remedial variations within those fields. Civil recourse theory may help explain why remedies are typically focused on expectation damages in contract law, while in tort law they range from nominal relief to punitive damages.

Part I explains the principle of civil recourse in general terms and provides a brief summary of civil recourse theory in its traditional form. Part II shows that there are now several distinct civil recourse theories, each of which diverges in important ways from the others. A crucial concern for each theory is to define what it means for one person to “act against” another.<sup>4</sup> There is a spectrum of potential civil recourse conceptions, including: (1) a form of recourse concerned with the enforcement of primary or remedial rights, (2) a form of recourse concerned with holding defendants accountable for their wrongs, and (3) a form of recourse concerned with private revenge. This Part explains the differences between these conceptions. Part III discusses the challenges that these divergent approaches produce. This Part also suggests how a pluralist approach—one located within a civil recourse rubric—might address these challenges. Part IV then concludes.

## II. THE PRINCIPLE OF CIVIL RECOURSE

To begin, we need a basic idea of what civil recourse theory is. Civil recourse theory originated in the tort setting, with a focus on explaining the conceptual basis of tort law. Like corrective justice approaches, civil recourse theory emphasizes the rights and duties immanent in private law reasoning.<sup>5</sup> A key feature of the civil recourse account, however, is that it also emphasizes the role of private rights of action.<sup>6</sup> On the civil recourse view, where one individual violates the

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law differ in a variety of ways. See Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 19 (1995) (describing significant variations among corrective justice accounts of tort law). Civil recourse theory now shows a similar variance.

4. This is not the only way in which recent civil recourse theories may diverge. There is some indication that there are also methodological distinctions. Zipursky, for example, adopts a pragmatic conceptualist approach to civil recourse theory. Cf. Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000) (describing pragmatic conceptualism and reasons for adopting such an approach). Some civil recourse theorists, however, have assessed civil recourse in terms that suggest a more functionalist understanding.

5. See Zipursky, *Civil Recourse*, *supra* note 1, at 742.

6. See *id.* at 746-47.

rights of another, the wronged party is entitled to seek recourse in a court of law by initiating a private right of action. In other words, private law is designed so that a wronged party may act against the wrongdoer through a state-provided venue.

Benjamin Zipursky provides a helpful statement of the core principle undergirding civil recourse theory:

By recognizing a legal right of action against a tortfeasor, our system respects the principle that the plaintiff is entitled to act against one who has legally wronged him or her. I call this the principle of civil recourse. The legal principle that the victim of a tort has a right of action against the tortfeasor is an instance of this more general idea.<sup>7</sup>

This principle—that a wronged party has a legal entitlement to act against the wrongdoer—is the central component of civil recourse theory.

Notably, the traditional version of this theory emphasizes redress of wrongs, rather than redress of wrongful losses.<sup>8</sup> One of its strengths is that a right of civil recourse can then explain why there is such a variety of remedies in tort law.<sup>9</sup> While corrective justice theories can suitably account for compensatory damages in tort law, many corrective justice theories struggle to explain why tort law provides for damages in cases where no wrongful losses were suffered. Likewise, many corrective justice theories struggle to explain punitive damages. The civil recourse notion that people have a right to act against someone who has legally wronged them readily accounts for such cases.<sup>10</sup>

Another purported strength is that civil recourse theory offers an explanation for the structure of tort law. Private rights of action can, perhaps, be explained by some corrective justice accounts, but they are not an obvious outcome under those approaches. Moreover, substantive standing requirements add a further challenge.<sup>11</sup> Ordinarily, only one whose rights were violated will have standing to sue. A limited private right of action makes perfect sense, however, under the view that people should be able to act against someone who has

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7. *Id.* at 735.

8. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 954-57 (discussing torts where recourse is available, but where there is no loss capable of being shifted).

9. See Zipursky, *Civil Recourse*, *supra* note 1, at 710-13 (noting how corrective justice accounts struggle with the diversity of remedies in tort law); *id.* at 748-52 (discussing the applicability of civil recourse theory to the diversity of remedies in tort law).

10. Some corrective justice theories can be harmonized with a civil recourse approach if civil recourse is appropriately limited. For a recent account of how corrective justice and a conception of civil recourse can be harmonized, see Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163 (2011).

11. See Zipursky, *Civil Recourse*, *supra* note 1, at 714-18.

wronged them. Given that the state typically precludes individuals from exercising self-help on their own, the private right of action is a substitute means for a wronged party to act against a wrongdoer.

This is not to say that the traditional formulation of civil recourse theory offers an ideal explanation of all private law fields. The principle of civil recourse has been challenged on normative grounds.<sup>12</sup> And, as applied to nontort settings, it has been challenged on grounds of doctrinal fit.<sup>13</sup> The originators of civil recourse theory have offered responses, however. In addition, new adherents have offered variations on the civil recourse account which address these challenges. What is significant is how civil recourse theory has evolved as a consequence. Over time, several components of civil recourse theory have been modified, or else elaborated in ways that differ from the original account. These variations are the subject of the present Article.

One way of looking at the emergence of these new civil recourse theories is to see them as responses to perceived challenges for the original theory. Alternatively, it may be that civil recourse theory has uncovered several distinct intuitions about what it means to “act against” another. Once we delve into the idea of recourse, it apparently includes several perspectives, and each of these perspectives is recognizable from outside the legal domain. Our legal system may draw on more than one of these nonlegal conceptions of how a wronged party can appropriately respond to being wronged, and civil recourse theory may now reflect these multiple conceptions.

Whatever the cause, it is increasingly clear that civil recourse theory is not one theory, but several. The next Part of this Article will briefly delineate three primary conceptions of civil recourse. As will become clear, the differences between these conceptions are not minor. Each form of recourse instantiates a separate norm, and each has its own remedial implications.

### III. DISTINGUISHING CONCEPTIONS OF CIVIL RECOURSE

#### A. *Civil Recourse as Enforcement*

Given its origins, it is unsurprising that tort law dominates civil recourse theory. One civil recourse divide opens up when we attempt to account for other fields within private law, such as contract law or unjust enrichment.<sup>14</sup> Contract law is not generally seen as an area of

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12. See *infra* notes 42 and 46 and accompanying text.

13. See Gold, *supra* note 2, at 1917 (suggesting civil recourse theory, in its traditional form, does not adequately explain contract law).

14. Indeed, one of the alleged bases for adopting civil recourse theory—the distinction between a liability and a duty to pay—is substantially weaker in the contract and unjust enrichment settings. See Zipursky, *Civil Recourse*, *supra* note 1, at 719-20 (suggesting

law that concerns a wronged party's right to "act against" another, at least not if "acting against" another is taken to mean responding to an affront, demanding satisfaction, or otherwise answering a wrong by holding the wrongdoer accountable.<sup>15</sup> Contract law is more readily seen in terms of enforcing agreements. Thus, if contract law is explainable in terms of civil recourse, our idea of recourse may need to incorporate an enforcement concept.

Consider the following hypothetical case. In a prelegal society, Jack and Jill reach an agreement. Jack wishes to have his house built, and Jill is skilled in construction. In turn, Jill wishes to have a table that Jack owns. Jack and Jill agree that Jill will help build Jack's house, and in return Jack will give Jill the table. After days of difficult labor, Jill successfully builds Jack's house. It is clear that she has met the terms of the agreement, and Jack admits as much. However, Jack refuses to provide the table.<sup>16</sup>

Under these circumstances, Jill initially has a primary moral right to the performance of the agreement—that is, to Jack handing over the table. Jill also has a remedial moral right to receive the table, assuming Jack breaches. Yet, Jack might refuse to comply with his remedial duty. This, in turn, implicates an additional moral concept. Under a commonly held view of morality, Jill would then be able to legitimately take the table, given Jack's unwillingness to hand it over.<sup>17</sup> This latter privilege is a matter of enforcement and will be referred to here as a moral enforcement right.

We can imagine a bystander asking Jill: "So, are you going to find some way to hold Jack accountable? His lack of respect for you is just unacceptable." Jill might respond: "I'm not really interested in whether Jack is held accountable. I just want the table he owes me." Of course, Jill might also wish to hold Jack accountable for his wrongful conduct. The point is that, for present purposes, such accountability is a side issue. She is less concerned with righting the

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that a duty to pay is ripe prior to a monetary judgment in these areas, but not in the tort law setting).

15. This is not to deny that, in certain circumstances, contract breaches do implicate moral outrage. On this topic, see Tess Wilkinson-Ryan & David A. Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003 (2010) (studying the psychological impact of contract breaches).

16. For further discussion of this hypothetical, see Gold, *supra* note 2, at 1877-80.

17. This presumes that the manner of taking the table would not cause unnecessary or disproportionate harm to Jack. I discuss this issue further in a draft paper. See Andrew S. Gold, *A Theory of Redressive Justice* (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=1940594>. Some theorists may also argue that Jack could appropriately resist Jill's enforcement efforts in a state of nature. Cf. Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1415-21 (2006) [hereinafter Ripstein, *Private Order*]. This latter view, however, need not preclude the position that civil recourse is grounded in a principle of enforcement.

wrong than with righting the wrongful loss by taking the table. And, if that is so, her privilege to take the table implicates a distinct norm.

Notice that, on this view, Jill is not necessarily worried about the affront of being wronged. Nor is resentment necessarily a driving force for her conduct.<sup>18</sup> She wants the table. The moral concern, for present purposes, lies with the legitimacy of those acts she might take to correct the wrongful loss she has suffered due to Jack's breach. On this account, the central issue is not the redress of wrongs as such, but the redress of wrongful losses.<sup>19</sup>

If we interpret private rights of action—and civil recourse—in terms of legitimately held enforcement rights, a significant number of legal doctrines can be explained.<sup>20</sup> In contract law, it is possible to explain the consideration doctrine, as well as the prevalence of the expectation damages remedy over other types of compensation.<sup>21</sup> It is also possible to explain the judicial tendency to award expectation damages in lieu of specific performance.<sup>22</sup> In each case, the substantive standing of the plaintiff to bring suit also makes sense.<sup>23</sup> In short, the legal enforcement right tracks a moral enforcement right.

We can understand Jill to be “acting against” Jack when she takes the table (through legal or nonlegal means). From this perspective, in providing for a private right of action, the law of contracts is recognizing a legal entitlement in a party who would, in a state of nature, possess a moral enforcement right. The legal entitlement empowers the plaintiff to act through the state to repair the wrongful losses suffered due to a breach of contract. Her private right of action, then, offers a civil means to “act against” a wrongdoer (with “acting against” understood in enforcement terms). Since self-help is ordinari-

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18. For a civil recourse approach that draws a connection between resentment of wrongs and tort law, see Solomon, *supra* note 2, at 1785-90.

19. Cf. JULES L. COLEMAN, *RISKS AND WRONGS* 325 (1992) (discussing a corrective justice concern with correcting wrongful losses, rather than wrongs as such).

20. In Hohfeldian terms, this could be a privilege. However, it is a privilege that is also joined by a duty of noninterference, and I will refer to enforcement rights with this understanding of their implications. For further discussion, see Gold, *supra* note 2, at 1903 n.144.

21. See Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 42-43 (2009) (addressing the prevalence of expectation remedies); *id.* at 43-44 (discussing the consideration doctrine).

22. See *id.* at 53-58 (discussing how a promisee's ownership interest in promised performance may be trumped by the import of the promisor's autonomy in certain circumstances).

23. Here I draw on the work of Stephen Darwall and Margaret Gilbert. See Gold, *supra* note 2, at 26 (citing STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* 18 (2006); Margaret Gilbert, *Scanlon on Promissory Obligation: The Problem of Promisees' Rights*, 101 J. PHIL. 83, 99-101 (2004)). Both provide helpful examples of situations in which moral intuitions would support a special standing on the part of a right holder.

ly prohibited by the state, the state provides an entitlement to enforce the deal (or the monetary equivalent) through a private right of action.<sup>24</sup>

I will refer to this account as an “enforcement account” of civil recourse. A theory of this type links our understanding of recourse to a commonly held moral perspective.<sup>25</sup> It is a perspective grounded in moral rights. And this view has interpretive benefits, especially in the contract law setting. We can understand the wronged party in contract cases to have a special moral standing to enforce the agreement. Moreover, while the morality of private enforcement is no doubt controversial,<sup>26</sup> it is not counterintuitive in the way that a revenge-based view of contract law remedies would be.

Ordinary contract breaches are poor cases for vengeance, especially where the breach may be inadvertent or hard to avoid. Indeed, even the notion of “getting satisfaction” is a questionable fit for much of contract law. Broken contracts often implicate accountability, but contractual promisors are strictly liable for breach. As a result, in some cases it is doubtful whether a broken contract even involves an affront to the wrongdoer sufficient to support resentment. An individual may, nevertheless, have an entitlement to enforce a contract through specific performance or expectation damages.

The fact that courts could sincerely believe they are recognizing a moral entitlement thus counts in favor of the enforcement account of recourse as an explanation of contract law. Courts could plausibly be drawing on this conventional moral perspective. Although some theorists reject a unilateral standing to enforce on the part of a wronged individual,<sup>27</sup> the idea that we have a natural right of redress in certain cases is, for many people, intuitively reasonable. That understanding, in appropriate cases, will implicate enforcement.

In addition, such an account allows us to address a variety of private law fields which civil recourse theory is otherwise poorly suited to explain. Even if we feel that a revenge-based or accountability-based view of civil recourse fits certain areas of the law, it is a poor fit not only for the run of the mill contract case, but potentially also for many negligence cases.<sup>28</sup> A revenge-based or accountability-based

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24. For helpful discussion of this Lockean structure, see Zipursky, *Private Law*, *supra* note 1, at 637-40; Goldberg, *supra* note 1, at 541-45.

25. This link to a commonly held moral perspective can also have interpretive advantages. Cf. STEPHEN A. SMITH, *CONTRACT THEORY* 13-24 (2004) (describing a “morality criterion” for interpretive theories of law).

26. See Ripstein, *Private Order*, *supra* note 17, at 1415-21 (discussing the legitimacy of unilateral enforcement by parties).

27. See *id.*

28. With regard to revenge, compare Solomon, *supra* note 2, at 1813 (suggesting that “there is little if any evidence that the motive of most tort plaintiffs is to make the defend-



form of civil recourse is also a questionable basis for injunctive relief, for in these cases no wrong has occurred. The plaintiff is not trying to hold another party responsible—the plaintiff is instead trying to make sure that her rights will be respected. Again, a notion of enforcement rights is a better fit than a notion that the plaintiff is being enabled by the state to hold someone accountable for that person's wrongdoing.

Furthermore, an enforcement account of recourse explains the standardization of remedies prevalent in certain private law fields. When we consider contract law, this is an important benefit. Civil recourse theorists have often argued that their approach is superior to a corrective justice approach in light of the diverse remedies tort law provides. That diversity is thought to fit well with a form of recourse that emphasizes accountability. Contract law is not nearly so diverse in its remedies, however, and this suggests a different kind of recourse is operating in the contractual context. While we can draw conceptual inferences from the remedies which private law courts apply, these inferences are as valid where remedies are homogenous as they are in cases where remedies are diverse.

Why is it that contract law so consistently adopts the expectation remedy? Shouldn't accountability sometimes call for more damages, or less? Although the variability in remedies gives civil recourse an advantage over corrective justice accounts in the tort arena, the absence of this variability is meaningful in the contract arena. Civil recourse theorists may respond that damages designed to make someone whole are simply an outer boundary on acceptable recourse,<sup>29</sup> but this raises a further question: why should there be such an outer boundary? It seems like a remarkable coincidence that the outer boundary should fit so well with the value of a contractual promise.<sup>30</sup>

An answer to these challenges is to adopt a civil recourse theory that derives the legal right of action from a moral enforcement right. Enforcement rights suggest that specific performance, or the equivalent in value, will be the type of remedy selected in the majority of contract cases. The expectation remedy undoes wrongful losses, and it is this outcome which, in the typical contracts case, a plaintiff

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ant 'suffer' at all, and they certainly do not wish for the defendant to suffer in the way that they have").

29. See Oman, *supra* note 2, at 533 (explaining that civil recourse theory "views expectation damages as an upper limit on retaliation by plaintiffs against defendants"); Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 947 (suggesting, in tort settings, that "the victim's loss normally sets the outer boundary of the remedy that courts will provide to victims of wrongs when they successfully sue those who wrong them").

30. The problem, if anything, is more pronounced when we consider the law of unjust enrichment. See Gold, *supra* note 2, at 1917-19 (discussing unjust enrichment and civil recourse theory).

would be morally entitled to insist upon.<sup>31</sup> A focus on enforcement also helps explain why compensatory damages—designed to make the plaintiff whole—should have such a central place in tort law. Tort law may not solely implicate the undoing of wrongful losses, but this is at least a central theme of tort law.<sup>32</sup> From the enforcement perspective, this remedial feature is predictable.

As this discussion suggests, a focus on enforcement differs from the common understanding of civil recourse.<sup>33</sup> The enforcement account of civil recourse theory is generally concerned with undoing wrongful losses, rather than the wrong itself.<sup>34</sup> The enforcement account has the advantage of treating compensatory damages as an implication of recourse, rather than as a rule of thumb or as a prudential boundary. Further, the enforcement account explains the standardization of certain private law remedies as an inferential outcome of civil recourse itself.

### B. Civil Recourse as Accountability

The enforcement account is different from the way in which civil recourse proponents have conventionally described their theory. The enforcement account addresses a form of recourse typically concerned with undoing wrongful losses. The plaintiff's remedy, and the basis for that remedy, therefore varies from the standard conception of recourse. Under the enforcement approach, a wronged party's private right of action is derived from her enforcement right, and not from the resentment the wronged party feels about being wronged, nor from the wronged party's need to hold the wrongdoer accountable.

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31. For an argument that contract law can be seen in terms of loss allocation from a corrective justice perspective, see Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 *FORDHAM L. REV.* 3013, 3020 (2007). Bridgeman's argument is similar in some respects to the argument I am endorsing, but developed in terms of corrective justice rather than civil recourse.

32. In this respect, I agree with those corrective justice theories which emphasize loss allocation. Cf. COLEMAN, *supra* note 19; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449 (1992).

33. It may well be questioned whether this enforcement-based account is a civil recourse theory. Cf. Gold, *supra* note 2, at 1876-81 (suggesting a focus on enforcement rights as an alternative to the civil recourse approach, as conventionally stated). That said, several private law theorists view the above enforcement-based conception as implicating a form of civil recourse. In addition, the concept of civil recourse seems capable of including enforcement. The enforcement account nonetheless gives us a different recourse principle from the idea of getting satisfaction that is often associated with the phrase "civil recourse theory."

34. In some cases, such as injunctive relief, this notion of recourse would serve a different purpose. In an injunctive relief case, enforcement would involve a primary right, and it would predate a wrong. For further discussion of injunctive relief as it relates to civil recourse theory, see Gold, *supra* note 2, at 1915 (noting that injunctions are "[not] a clear case of acting against another, at least not in the usual civil recourse sense").

In contrast, repairing losses is not a focal point for traditional civil recourse theory. Instead, it is the redress of wrongs as such. This is amply demonstrated in a recent paper by John Goldberg and Benjamin Zipursky. In *Torts as Wrongs*, they note that loss allocation is an important component of many corrective justice accounts.<sup>35</sup> And they argue that civil recourse theory is superior to these corrective justice theories in part because civil recourse theory emphasizes wrongs, and not allocation of wrongful losses.

In the tort setting, this focus on redress of wrongs has advantages. As Goldberg and Zipursky note, in tort law there are a variety of well-recognized, nonperipheral torts which cannot easily be explained in terms of loss allocation. For example, there are cases of trespass and battery in which no apparent losses are suffered, yet damages are available.<sup>36</sup> In addition, Goldberg and Zipursky suggest that there are cases in which courts "make whole" the plaintiff through compensation for harms that do not adequately translate into a loss allocation rubric.<sup>37</sup> Goldberg and Zipursky thus contend that their civil recourse account is superior to several leading corrective justice accounts because a loss allocation approach is a poor fit for tort law doctrine.

Given this concern with redress for wrongs as such, we can readily see that the traditional conception of recourse is not about enforcement. What, then, is the traditional conception? Classic civil recourse theory suggests that a wronged party should be able to respond to the *affront* of being wronged.<sup>38</sup> "Acting against" the defendant is a way that the wronged party can hold a wrongdoer accountable for wronging the plaintiff. Or, in another formulation, it is a way that the

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35. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 925-26 (citing COLEMAN, *supra* note 19, at 329; ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 48-58 (1999); Perry, *supra* note 31, at 449-50). It should be noted that Goldberg & Zipursky express some uncertainty whether Arthur Ripstein's current position falls into this category. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 928 n. 68; cf. Arthur Ripstein, *As If It Had Never Happened*, 48 WM & MARY L. REV. 1957 (2007). As they note, however, Ernest Weinrib's corrective justice account of tort law is concerned with wrongs. Cf. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 134-35 (1995).

36. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 954 (noting torts which "do not set loss as a condition of liability").

37. See *id.* at 960-61.

38. See Zipursky, *Rights*, *supra* note 1, at 87 ("The answer is that entitlement to recourse does not spring from the need precipitated by injury. It springs from the affront of being wronged by another.").

wronged party can get satisfaction.<sup>39</sup> I will refer to this conception as the “accountability” view of civil recourse.<sup>40</sup>

Although redress of wrongs is at the core of the accountability view, this approach to civil recourse does not argue that private rights of action are grounded in revenge. Accountability and revenge are not the same thing.<sup>41</sup> They are conceptually different, and they have distinct normative implications. Indeed, the ability to explain civil recourse without linking it to revenge is an important result for civil recourse theories precisely because of the normative implications. Revenge is a highly controversial basis for private rights of action, and the concern that recourse may be about revenge has drawn significant criticism of the recourse approach.

For example, John Finnis has recently critiqued civil recourse theory on the ground that it views revenge as an appropriate justification for the state’s involvement in private disputes. As Finnis argues: “At its root recourse theory treats as worthy the emotional impulse of [the] victim of wrongdoing to ‘get even,’ by ‘act[ing] against’—having recourse against—the rights violator.”<sup>42</sup> Assuming the premises of this argument, it offers an important challenge for recourse-based explanations of private law. On the other hand, if civil recourse is not about revenge, this would be one way, perhaps, of avoiding Finnis’s critique.<sup>43</sup>

Unsurprisingly, civil recourse theorists have been careful to distinguish their elaboration of recourse principles from a justification of revenge. Goldberg and Zipursky suggest that civil recourse involves a principle such that tort victims may “demand redress or sat-

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39. Cf. Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1162 (describing tort victims who have been “injured in a way that warrants their thinking that someone else is responsible for mistreating them and that their wrongdoer is an appropriate person from whom to demand redress or satisfaction”).

40. One might also describe this as a “wrongs-based” conception of recourse. However, the private revenge understanding, described below, is also a wrongs-based view of recourse, and it differs significantly from the accountability view of civil recourse.

41. Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 406 (2005) (denying that the idea of civil recourse is a way of referring to vengeance).

42. See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 1, at 1, 55-58 (alteration in original) (citation omitted) (critiquing civil recourse accounts on the theory that they treat as worthy the impulse to get even); see also Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1406-13 (2003) (concluding that retributive actions may be justifiable, but critiquing acts of private revenge).

43. Another possibility would be to defend revenge. Cf. PETER A. FRENCH, THE VIRTUES OF VENGEANCE 89-91 (2001); see also JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS 17-26 (2003) (suggesting that vindictive behavior is not always irrational or immoral).

isfaction.”<sup>44</sup> Zipursky notes that in describing the principle of civil recourse, he is in no way supporting the normative position that tort law serves the function of “permitting vengeful desires to be satisfied in a civil system.”<sup>45</sup> While the initiation of a suit may often be linked to a plaintiff’s desire for revenge, Goldberg and Zipursky’s account is not about the endorsement of vengeful desires.<sup>46</sup>

Jason Solomon, in turn, defends civil recourse on normative grounds. He understands tort law to be a system of equal accountability. In Solomon’s view, Finnis’s critique calls for a “morally appealing norm and political justification” in support of civil recourse.<sup>47</sup> Drawing on Stephen Darwall’s account of second-person morality, Solomon suggests that tort law involves a “demand for some kind of answer and measure of justice,” rather than “the infliction of a like injury.”<sup>48</sup> In his view, tort law is not about the state supporting an urge to retaliate, but instead about the state supporting “the instinct to hold another accountable.”<sup>49</sup>

We can accordingly discern a distinct, non-revenge-based conception of civil recourse. It is an accountability-based conception, and it has its own interpretive strengths. The conception of civil recourse in terms of holding a wrongdoer accountable has the advantage of explaining a large variety of remedies characteristic of tort law. Symbolic remedies, on the one hand, and punitive damages, on the other, are both explicable in terms of a wronged party’s entitlement to act against a wrongdoer in a civil, proportionate manner. Likewise, compensatory tort damages can be addressed as a type of accountability.

### C. Civil Recourse as a Means for Revenge

Yet, as civil recourse theorists have distanced their approaches from a revenge-oriented approach, another divide becomes evident. Not all theorists are troubled by the idea of private rights of action as a means of obtaining revenge. In some contexts, the idea of an entitlement to pursue vindictive impulses may be a very good fit with legal doctrine, and it may also be justified under certain theories of

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44. See Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1162.

45. See Zipursky, *Civil Recourse*, *supra* note 1, at 737.

46. The fact that civil recourse theorists do not all view recourse in terms of revenge—and that they offer an interpretive, rather than a normative, account—does not necessarily resolve the morality concern, however. As Stephen Smith has argued, it is reasonable to think that a good interpretive account will involve legal principles that judges could at least sincerely believe are morally legitimate. See SMITH, *supra* note 25, at 18-19. Consequently, whether it is grounded in revenge or “satisfaction,” civil recourse theory must contend with the question of moral plausibility.

47. See Solomon, *supra* note 2, at 1781.

48. See *id.* at 1814 (emphasis omitted).

49. *Id.*

justice. Revenge may be particularly relevant in the remedial setting. Punitive damages, Anthony Sebok has argued, can readily be explained in terms of revenge.<sup>50</sup>

Efforts to link punitive damages and retributive norms predate civil recourse theory. If one thinks that punitive damages are retributive, one might argue that punitive damages are a means by which plaintiffs punish certain torts on behalf of the state.<sup>51</sup> Sebok, however, suggests that public retribution is an inadequate explanation of punitive damages. As he notes, claims in tort are personal.<sup>52</sup> Sebok instead concludes that it is private revenge which accounts for punitive damages, and, in doing so, he offers a distinct theory of civil recourse.

Drawing on Jean Hampton's theory of retribution, Sebok contends that punitive damages may serve a compensatory function.<sup>53</sup> But in the punitive damages setting, he indicates that it is private revenge which is truly at stake, rather than public retribution. Punitive damages are, on this account, a means of providing a victim with redress where there was a willful violation of the victim's rights.<sup>54</sup> The victim's role in bringing the case is important, for it allows her to "make claims about the rightful treatment that she was owed."<sup>55</sup> On this understanding, the legal system "is underwriting the victim's right to decide whether and how the wrongdoer will suffer punishment."<sup>56</sup>

Among other concerns, the role of emotions can raise doubts about the desirability of revenge as a ground for legal actions. Emotions are often thought to distort our reasoning where revenge is at issue. Yet Sebok suggests that the connection between revenge and the wronged party's emotions need not rule out an explanation of punitive damages that is premised on revenge.<sup>57</sup> The legal process mediates such emotions, and, in any event, the underlying moral judgments about the injustice of a case may still be accurate.<sup>58</sup>

Granting these points, Sebok's argument may still raise concerns of the type that Finnis offers. The effect of emotions on our reasoning powers is only one basis for questioning a legal venue for private revenge. Nevertheless, Sebok's account has the advantage of providing

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50. See Sebok, *supra* note 2 and accompanying text.

51. See *id.* at 1026 (discussing this theory).

52. See *id.* (noting that "[c]laims of wrongfulness in tort are personal").

53. See *id.* at 1023 (citing Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992)).

54. See *id.* at 1028 ("The theory of civil redress should provide a . . . reason for giving to the victim of a willful violation of a protected interest the power to claim that the court should annul the wrong through punishment.").

55. *Id.*

56. *Id.*

57. See *id.* at 1021.

58. See *id.* at 1020-21.

an especially good fit with legal doctrine in the punitive damages context. As an interpretive matter, this doctrinal fit can be meaningful, even if the normative concerns are legitimate.

This Article will not debate the moral merits of revenge. That said, it matters whether civil recourse is best seen as part of a system for the pursuit of revenge, even if this only occurs in a subset of private law. Revenge is not the same sort of norm as accountability, and it is significantly more controversial. Whatever its explanatory strengths in the realm of punitive damages, revenge is a questionable basis for private rights of action outside of the punitive damages context. Indeed, if revenge is the best explanation of punitive damages, this presents a potential difficulty for civil recourse theory.

Notice that if civil recourse theory were to carve out an area of doctrine that is grounded on principles of revenge, while explaining the rest of tort law without reliance on such principles, it could open itself up to a criticism often levied against corrective justice theories. Civil recourse theory would arguably be cordoning off an area of tort law for separate interpretive treatment.<sup>59</sup> Civil recourse theorists have been highly skeptical of such interpretive line-drawing. On the other hand, civil recourse theory cannot plausibly suggest that all of tort law (let alone all of private law) is grounded on revenge. It is quite counterintuitive to think that an ordinary negligence case would merit revenge, let alone that such cases are best explained in such terms. It would be even more counterintuitive to suggest that cases of innocent trespass are apt cases for revenge, or that ordinary cases of contractual breach are well suited for retribution. The revenge based reading of civil recourse is thus not only a distinctive reading, but can also present challenges for civil recourse theory as a theory of private law.

#### IV. TOWARD A PLURALISTIC ACCOUNT OF CIVIL RECOURSE

As the above discussion suggests, there are notable differences between civil recourse as enforcement, as accountability, or even as revenge. None of these approaches are readily reducible into the others.<sup>60</sup> And, furthermore, there are unique explanatory advantages to each approach. In light of their respective strengths and weaknesses, which civil recourse theory should be adopted?

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59. Cf. Zipursky, *Civil Recourse*, *supra* note 1, at 712-13 (suggesting that corrective justice theorists may not simply treat punitive damages as a graft onto private law).

60. It is possible, however, that one could view accountability and revenge as two different ways in which wrongs are annulled, dependent upon context. See Sebok, *supra* note 2, at 1028 (suggesting that compensation for simple negligence, and punitive damages for willful wrongs, are both means of annulling a wrong).

One could plausibly say that any of the above-described civil recourse accounts meet a threshold doctrinal fit requirement.<sup>61</sup> Likewise, they all have areas where they must address peripheral cases. The primary distinctions involve which cases each theory views as peripheral. Each civil recourse theory is able to account for one of the most basic structural features of private law: the private right of action. Each is able to account for substantive standing. And each is able to account for the concepts of rights, duties, wrongs, and remedies which permeate private law discourse. Where they tend to differ is in their explanations of particular remedies, and the normative plausibility of adopting such remedies for the wrongs at issue.

The difficulty for each approach is in the explanation of specific subparts of private law. How well does each theory explain the expectation remedy in contract law? The consideration doctrine? How well does each theory address damages for trespass cases where no harm was suffered that is capable of being allocated? How well does each theory address punitive damages? Injunctive relief?

All three conceptions of civil recourse offer insights that might be lost if we adopted only one variant. For this reason, we should avoid doing so. But what other options are there for civil recourse theory? A potential option would be to adopt the principle of civil recourse in very general terms. If it holds a sufficiently general meaning, recourse might cover enforcement of moral rights, accountability for wrongs committed, or even revenge. The right of recourse might be grounded in the wronged party's resentment, the aptness of her reaction to being wronged, or the morality of her claim to enforcement. "Acting against" another might include the coercion required in the recovery of property, in enforcement of agreements, in holding another accountable, or in obtaining punitive damages.

In other words, one could think of civil recourse in abstract terms. A generalized civil recourse approach—one which looks for principles common to each of the above civil recourse conceptions (such as enforcement, accountability, and revenge)—would be a way to account for a very large swath of private law. The main difficulty is that this approach would give us little guidance with respect to outcomes in particular cases. The principle of civil recourse would not tell us when punitive damages are fitting, for example. It would not tell us when allocation of losses is more appropriate than subcompensatory or su-

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61. For a helpful discussion of fit criteria for interpretive theories of private law, see William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605 (2007).



percompensatory remedies. Without more, an abstract conception of recourse would offer a highly indeterminate account of private law.<sup>62</sup>

Yet this is not necessarily cause for pessimism. Arguably, a form of pluralism would work as an alternative, with several distinct recourse norms coexisting in the private law doctrine. It seems unlikely that there is a workable principle for weighing one recourse norm against another,<sup>63</sup> but it may be possible to ascertain the types of situation in which particular recourse norms are most apt. There may be particular fields and subfields of private law where particular conceptions of recourse theory fit better than others.

First, consider a contracts case in which the promisor is forced by circumstances to breach despite acting in good faith.<sup>64</sup> The enforcement notion of recourse works well here. The promisee owns a right to performance, or at least has a right to the next best thing, regardless of the promisor's good intentions. Indeed, the enforcement notion of recourse is especially well-suited to cases in which the plaintiff has a proprietary interest at stake (whether it is an interest in performance or an interest in tangible assets). This notion of recourse is applicable even in the absence of misconduct on the part of the defendant. And, even if accountability norms are potentially applicable in such cases, the expectation remedy is a more obvious inference from the enforcement conception.

Second, consider a tort case where there have been no wrongful losses, or at least none which may readily be allocated. Suppose it is a case of accidental trespass on land and that the trespass caused no discernible change in the parcel of land at issue.<sup>65</sup> Assume the plaintiff seeks damages. The enforcement conception of recourse does not work especially well in this setting. Notice also that the idea of revenge would be appalling under the circumstances—it is very unlike-

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62. As Jody Kraus suggests, indeterminacy concerns may also be a reason to question the strength of an interpretive account. See Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007).

63. Cf. Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 686 n.1 (Jules Coleman & Scott Shapiro, eds., 2002) ("The challenge for [pluralistic contract theories] like the challenge for pluralistic normative theories in general, is to explain how their explanations and justifications can be defended in the absence of a master principle for ordering the competing values they invoke.").

64. For example, a widget producer might contract to provide widgets to a customer and then, due to mistaken but entirely innocent business judgments, the widget producer might be unable to deliver given a lack of funds. In such a case there can still be liability for breach, even if the widget producer is morally blameless, and even if the customer has no cause for resentment or desire for revenge.

65. On the significance of innocent trespasses, see Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1145. On torts without losses, see Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 954-55.

ly that a modern court would be applying a revenge-based conception to an innocent trespass, and it is questionable whether the plaintiff would be thinking of revenge. Yet, there is a plausible conception of civil recourse that works here. Recourse as accountability can explain why a private right of action could be available.

Third, consider a brutal case of intentional battery. In this case, the notion of private revenge that Sebok offers in his account of punitive damages would likely fit the intuitions of many citizens, and this basis for the private right of action may also reflect the internal point of view for many courts. Putting aside the question of whether it is morally appropriate for courts to assist in revenge, and whether it is morally appropriate for the victim to engage in such conduct, the doctrinal fit is sufficiently strong (and, for some, the moral intuition may be as well) that a theory of revenge is at least plausible as an interpretive matter.<sup>66</sup>

Of course, we should be wary of an ad hoc pluralism in explaining private law. As John Goldberg suggests, “[c]ongenial pluralism” is a problematic answer to the grand theoretical debates over tort law.<sup>67</sup> Much of the concern raised by the pluralism Goldberg critiques, however, is likely a product of the theoretical approaches under consideration. We cannot readily discern a metaprinciple to address conflicts between, for example, consequentialist approaches and corrective justice approaches.<sup>68</sup> And, to simply balance these very distinct conceptions against each other produces an undesirable incoherence in the law.<sup>69</sup>

That said, there may well be room for pluralism within civil recourse theory, and this pluralism need not require a balancing or weighing of interests. A civil recourse pluralism may instead track commonly held intuitions about when a particular type of recourse is justified, or at least, when a particular type is an apt response to a given wrong. On this basis, one might conclude that an enforcement conception of civil recourse is a good fit for contract law, unjust enrichment, and certain tort remedies. One might conclude that an accountability-based civil recourse is a good fit for many other tort

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66. Note that there may also be cases in which more than one category of recourse plausibly applies. In many such cases, the amount of damages implicated by one category may also satisfy the amount implicated by another. For example, an enforcement-based form of recourse may also fully meet the requirements of accountability. In other cases, remedies may be cumulative, as with a tort claim that results in both compensatory and punitive damages.

67. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 579-80 (2003).

68. Cf. *id.* at 580 (noting the types of conflict which may arise between leading theories).

69. See *id.* (discussing the importance of the aspiration to coherence).

remedies. And, one might conclude in some cases that an outlet for private revenge is a good fit for the legal doctrine of punitive damages.

Goldberg and Zipursky recognize the "Hodgepodge Problem" that civil recourse theories face: there are a huge variety of interests which tort law covers.<sup>70</sup> Tort law is not just negligence law. Tort law also covers dignitary harms, intentional torts, tortious interference with contracts, and fraud. They argue, nevertheless, that civil recourse theory has the resources to address the Hodgepodge Problem. I agree. But, I would also consider the problem from a different angle. Tort law, and private law generally, can incorporate a variety of forms of civil recourse.

## V. CONCLUSION

Civil recourse theory has provided ground-breaking insights into tort law—and private law—by augmenting the insights of corrective justice theory. Civil recourse theory, like corrective justice theory, recognizes that private law fields have a conceptual structure that includes relational rights and duties, wrongs, and remedies. Yet, private law is also built around the idea of a private right of action, and it is characteristically only available to the individual whose rights have been violated, or are likely to be violated in the near future. In addition, certain areas of private law show a great variety of remedial options. Civil recourse theory makes sense of these features.

The principle of civil recourse, however, raises its own set of concerns. Perhaps in response to these concerns, civil recourse theory has begun developing into several distinct theories. The principle of civil recourse is now open to more than one interpretation. Some conceptions of recourse, especially where revenge is at issue, raise moral qualms. These qualms may cause us to doubt that the legal point of view truly incorporates such visions of recourse. Some conceptions of recourse are a poor fit with the remedial doctrines of nontort fields. These latter conceptions of recourse seem tailor-made to explain tort law, or punitive damages, but fit poorly with standard understandings of contract law or unjust enrichment.

The growing number of recourse conceptions does not, ultimately, mean that any individual civil recourse theory has adequately met its explanatory goals. Once our focus includes private law as a whole, there is no single conception of civil recourse that seems to fully cover the field—at least not without distorting the legal doctrines under scrutiny. This poses a substantial challenge. Civil recourse theorists have been appropriately concerned that the subject of an interpretive

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70. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 921-30.

legal theory should not be artificially curtailed so that the theory fits what it seeks to explain.

Even so, this Article suggests that civil recourse theory is sufficiently versatile to respond to these challenges. Civil recourse theorists are rightly cautious about adopting a pluralistic interpretation of private law. It may nevertheless be that a pluralistic approach to recourse theory is the best option we have, and the most descriptively accurate. Many different fact patterns will support a private right of action in tort law—some of these fact patterns may, in predictable fashion, support a particular type of recourse. If so, studying which type of recourse is appropriate should offer an opportunity to enrich civil recourse theory, and perhaps also to better address those areas in which it occasionally stumbles.

