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A Thoery of Redressive Justice

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A THEORY OF REDRESSIVE JUSTICE†

This article proposes a new category of justice between individuals, in light of recent developments in corrective justice theory and civil recourse theory. This category – redressive justice – governs the enforcement of rights by a wronged party against the party who committed the wrong. More precisely, it governs the undoing of a transaction between two parties, either by a right holder, or by a party acting on a right holder's behalf. As the article indicates, redressive justice is importantly distinct from leading conceptions of corrective, distributive, retributive, and preventive justice. In addition, redressive justice can help explain diverse legal fields, ranging from tort to contract to unjust enrichment.

Keywords: corrective justice, civil recourse, continuity thesis, right of redress, private law theory

I *Introduction*

This article proposes a new category of justice between individuals. This category – redressive justice – governs the enforcement of rights by a wronged party against the party which committed the wrong. More precisely, it governs the reversal of a transaction, either by the right holder, or by someone acting on the right holder's behalf. As such, redressive justice is importantly distinct from leading conceptions of corrective, distributive, retributive, and preventive justice.

The argument will build on recent insights in corrective justice theory, particularly those of John Gardner. If Gardner is right, corrective justice

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is that type of justice which concerns norms of 'allocating back.'[1] That is, corrective justice addresses the reversal of transactions, rather than addressing allocations in general. In this way, corrective justice stands in an important contrast to distributive justice. Allocating back from one party to another is a special case, unlike other modes of allocation.

As Gardner understands corrective justice, however, it regulates the conduct of the person from whom a transfer back is to be made, or it regulates someone acting on that person's behalf.[2] That is, it involves the conduct of duty bearers. This view leaves unaddressed another subset of norms; for there is another type of justice that concerns allocating back – redressive justice. This other category of justice governs the conduct of a wronged party in undoing the effects of a wrong.[3] Redressive justice tells us when, how, and on what grounds an individual *right holder* may exercise a privilege to undo wrongful losses she has suffered.[4]

In making these claims, this article will also develop insights from civil recourse theory. As John Goldberg and Benjamin Zipursky have shown, private law fields often incorporate a principle of civil recourse: where one party has legally wronged another, the wronged party may act against the wrongdoer.[5] A variety of legal doctrines suggest that it is this principle and not a wrongdoer's duty to repair which underpins private rights of action. The present article will describe a type of interpersonal justice which can be reconciled with the principle of civil recourse.

As will be developed, redressive justice is not a mirror image of corrective justice. Properly understood, redressive justice stands apart as its own category. In part, this is a matter of asymmetrical application. Certain fact patterns are legitimate contexts for corrective justice without

1 See John Gardner, 'What Is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 Law & Phil 1 at 11 [Gardner, 'What Is Tort'].

2 See ibid at 10.

3 A notable prior use of the phrase 'redressive justice' is Joshua Kleinfeld & Jorg Schaub, 'The Place of Redressive Justice in the Concept of Justice,' online: SSRN <http://ssrn.com/abstract=1666407>. The conception of redressive justice in Kleinfeld & Schaub's work is substantially different, however, from the conception in the present article.

4 'Wrongful' losses are emphasized here, as they are the typical legal context. In instances of unjust enrichment, a case can be made that redressive justice governs allocating back in circumstances where there have been no wrongful losses; see text accompanying notes 106–10, discussing unjust enrichment.

5 See Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vand L Rev 1; Benjamin C Zipursky, 'Philosophy of Private Law' in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 623; John CP Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale LJ 524.

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being legitimate contexts for redressive justice. Certain fact patterns implicate both types of justice but with divergent remedies. But there is also a deeper distinction between the corrective and the redressive. Even where both types of justice call for the same basic reversal of a transaction, the authorship of this reversal matters. Corrective justice and redressive justice have different moral significance, given that different parties are responsible for bringing about the relevant just outcome.

There are also explanatory pay-offs to focusing on redressive justice. An appreciation of redressive justice can enrich our understanding of when it is legitimate to allocate back through legal institutions.[6] It can also help us to understand those legal institutions better. Many private law fields (tort, contract, unjust enrichment) are concerned with justice in the undoing of transactions. If civil recourse theorists are right, then corrective justice theories face explanatory hurdles in each of these settings. For example, some corrective justice theories struggle to explain why the only party with standing to initiate a private right of action is the party whose rights were violated.[7] Redressive justice offers responses to these concerns.

Corrective justice is not the only explanatory option that focuses on undoing transactions. Contrary to the standard account, there are two distinct types of justice concerned with undoing transactions, rather than one. Redressive justice is a good fit for a variety of fields, extending well beyond tort law. And redressive justice can explain key features of a wronged party's private right of action. Indeed, redressive justice offers a way to join a core insight from the corrective justice camp (the central importance of allocation back for private law) together with a core insight from the civil recourse camp (the central importance of a wronged party's right to act against the wrongdoer).

This article proceeds in several steps. PART II analyses recent insights in corrective justice theory. On a leading view, corrective justice norms govern the conduct of duty bearers or parties acting on their behalf. PART III analyses recent insights in civil recourse theory. PART IV assesses the

6 It can do so, moreover, without requiring us to rely on a complex notion of vicarious agency. See Gardner, 'What Is Tort,' supra note 1 at 11, suggesting that a vicarious agency argument is needed to explain how an individual can be regarded as conforming to corrective justice when another party allocates back on behalf of that individual. This topic will be discussed at greater length below.

7 See Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Geo LJ 695 at 714–8, discussing standing requirements in tort law [Zipursky, 'Civil']; Jason Solomon, 'Equal Accountability through Tort Law' (2009) 103 Nw UL Rev 1765 at 1800 [Solomon] (same). But see Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' (2011) 39 Fla St UL Rev 163 at 198–203 [Ripstein, 'Civil Recourse'] suggesting corrective justice can explain these features.

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challenges that recent understandings of corrective justice will face. This Part suggests that a duty-based account of corrective justice runs into difficulty explaining private law norms. PART V assesses the challenges confronting civil recourse theory. This Part suggests that the apparent disconnect between civil recourse theory and theories of justice is problematic. PART VI proposes a conceptually distinct category of redressive justice. This Part also indicates the benefits to recognizing redressive justice as a distinct category. PART VII discusses the soundness of redressive justice as a moral norm. PART VIII assesses the relationship between redressive justice and private law. This Part suggests that, in many cases, civil recourse will constitute a form of redressive justice. Moreover, it suggests that civil recourse may be accounted for in redressive justice terms. PART IX then concludes.

II *Corrective justice theories*

In order to see the distinctive nature of redressive justice, it will be helpful first to review recent work in corrective justice theory and civil recourse theory. This article will begin with corrective justice and in particular with John Gardner's recent approach to the topic. Theorists often argue that a key feature of corrective justice is that it provides agent-relative reasons for a wrongdoer to rectify a wrong (or rectify a wrongful loss). Gardner's account concludes that corrective justice is distinctive because it involves 'allocation back' – the undoing of transactions. As will become clear, this insight is important in its own right. It also opens up a conceptual space for redressive justice. Once we see what characterizes corrective justice on Gardner's account, we can more easily recognize the value of redressive justice as an independent type.

A THE BASIC IDEA OF CORRECTIVE JUSTICE

Corrective justice generally concerns the repair or rectification of wrongs or wrongful losses. It thus has a characteristic mode of operation. In Aristotle's famous description, corrective justice involves an arithmetic relation.[8] For example, if A has wrongly taken four apples from B, corrective justice would call for A to provide B with four apples, or with their equivalent in value. Four apples would be subtracted from A's holdings, and four would be added to B's holdings.

8 Aristotle, *The Nicomachean Ethics*, translated by JEC Welldon (Amherst, NY: Prometheus, 1987) bk V, ch 7.

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While the above example is straightforward, elaborating the principle of corrective justice is not straightforward. Defining corrective justice with precision is difficult, given the many areas in which theorists disagree on its features.[9] There is disagreement as to whether the losses required to invoke corrective justice must be wrongful.[10] There is also disagreement as to whether corrective justice is concerned with rectifying wrongful losses, or rectifying wrongs as such.[11] And there is disagreement as to what counts as a wrong.[12] Each of these disputes is substantial.

It is thus challenging to prove that one account is the proper understanding of corrective justice. Yet, if we accept certain premises about corrective justice, we can distinguish corrective justice from another equally important type of justice: redressive justice. With this in mind, the sub-parts that follow will describe John Gardner's recent account of corrective justice. There are other influential views of corrective justice which the reader might adopt for these purposes, but Gardner's theory presents the relevant issues most directly.[13] With this background in place, we will then be ready to consider redressive justice.

9 See Jules L Coleman, 'The Practice of Corrective Justice' (1995) 37 Ariz L Rev 15 at 19 [Coleman, 'Practice'], describing significant variations among corrective justice accounts of tort law.

10 See ibid, noting disagreement as to a wrongfulness requirement.

11 Compare Jules Coleman, *Risks and Wrongs* (Oxford: Oxford University Press, 1992) at 320–4 [Coleman, *Risks*], discussing this distinction and arguing for a view under which it is wrongful losses which are corrected, with Ernest J Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 Theor Inq L 107 at 132, n 33, contending that Coleman has misunderstood the juridical conception of corrective justice. Weinrib's account of corrective justice in tort law is set forth at Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) at 134–6 [Weinrib, *Idea of Private Law*].

12 See Coleman, 'Practice,' supra note 9 at 19, noting disagreement as to what counts as a wrong.

13 As will become apparent, a key concern is whether a corrective justice theory views corrective justice as governing the conduct of duty bearers in particular. In addition to Gardner's account, other theories which take this approach include the 'mixed conception' of corrective justice. See Coleman, *Risks*, supra note 11 at 303–24, presenting this conception; and Stephen R Perry, 'The Mixed Conception of Corrective Justice' (1992) 15 Harv JL & Pub Pol'y 917, discussing this conception. Another approach might view corrective justice as governing the conduct of both duty bearers and right holders in undoing wrongs or wrongful losses. This perspective will also contrast with the approach taken in this article, for reasons developed in the text accompanying notes 99–112. On the theory developed in this article, the authorship of an allocation back is significant for determining the type of justice at issue.

B CORRECTIVE JUSTICE AND 'ALLOCATION BACK'

One of the most basic concerns for corrective justice theory is to explain how corrective justice differs from distributive justice.[14] Like other recent corrective justice theorists, Gardner seeks an account of corrective justice which views it as a distinct norm of justice – separable from distributive justice.[15] Gardner does not argue that corrective justice is different from distributive justice based on its concern with agent-relative reasons for action.[16] Indeed, he rejects the view that the relevant duty to correct a wrong is agent-relative.[17] In his view, 'be it corrective or distributive, an injustice perpetrated by anyone is in principle everyone's business, and anyone at all has reason to help in securing its avoidance.'[18]

Something else makes corrective justice distinctive on this view. According to Gardner, corrective justice addresses a special type of allocative question. It involves an *allocation back* from one party to another. As he explains:

> Something has already shifted between the 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.[19]

14 For a helpful discussion of this issue and an attempt to address it, see Coleman, *Risks*, supra note 11 at 303–11. A related issue concerns our ability to justify corrective justice, in light of distributive justice norms. For works assessing the relationship between the two types of justice, see Peter Benson, 'The Basis of Corrective Justice and Its Relationship to Distributive Justice' (1992) 77 Iowa L Rev 515; Stephen R Perry, 'On the Relationship between Corrective and Distributive Justice' in Jeremy Horder, ed, *Oxford Essays in Jurisprudence* (Fourth Series) (Oxford: Oxford University Press, 2000).

15 In describing Gardner as a corrective justice theorist, it is important to clarify that his understanding of tort law is not *solely* corrective-justice-based. His account of tort law finds that corrective justice can help explain tort law – indeed, that corrective justice is a necessary part of an explanation – but does not indicate that corrective justice is sufficient to explain tort law. See Gardner, 'What Is Tort,' supra note 1 at 5–6, suggesting that 'any complete explanation of tort law . . . cannot but invoke considerations of corrective justice'; ibid at 25, discussing the import of a moral norm of corrective justice to the justification of tort law.

16 But *c.f.* Coleman, *Risks*, supra note 11 at 314–5, describing a view of corrective justice that involves agent-relative reasons for acting.

17 See Gardner, 'What Is Tort,' supra note 1 at 11.

18 Ibid.

19 Ibid at 9–10.

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This feature separates corrective justice from distributive justice. As Gardner explains: 'A norm of corrective justice is a norm that regulates (by giving a ground for) the reversal of at least some transactions.'[20]

On the other hand, Gardner adopts a 'proposition (c),' which states as follows: '[A] norm of corrective justice only regulates the actions of the person from whom the transfer back is to be made *or another person acting on behalf of that person.*'[21] This proposition takes into account the common view that corrective justice is a type of justice that concerns the conduct of the wrongdoer, in particular, while opening up the possibility that individuals other than the wrongdoer can play a role in its exercise.[22]

We will return to proposition (c) later in this article, as it is a significant boundary line for corrective justice. Before doing so, the next section will explain how Gardner's approach ties into questions of morality. For Gardner has an illuminating account of how the legal norm of corrective justice may be justified in moral terms.

C THE CONTINUITY THESIS

Gardner seeks to show how corrective justice can help explain tort law. If corrective justice is aptly described in terms of allocating back and if it is subject to proposition (c), then tort law may, indeed, fit a corrective justice pattern. Tort law allocates back, and arguably, it involves the state apparatus acting on behalf of the wrongdoer. Tort law may instantiate a legal norm of corrective justice.

Assuming these premises, however, we may still need something more. A legal norm of corrective justice could itself call for justification.[23] Can the legal norm also be supported by a moral norm of corrective justice? Gardner's response to this challenge is based on an idea he calls the 'continuity thesis.' This thesis suggests that, all else equal, those reasons

20 See ibid at 10.

21 See Gardner, 'What Is Tort,' supra note 1 at 10 [emphasis in the original].

22 That said, Gardner does not believe that proposition (c) provides us with a difference between corrective justice and distributive justice. For example, when the state redistributes wealth through a system of taxation, he argues, 'it does so on behalf of those from whom it levies taxes'; ibid at 13. What distinguishes corrective justice from distributive justice is that corrective justice involves allocating back.

23 For helpful discussion of why the legal norm of corrective justice could itself require justification, see ibid at 14–7. Among other concerns, the legal norm may amount to an empty vessel, subject to radically different interpretations. This flexibility means that both deontological and consequentialist accounts are explanatory options. See e.g. Richard A Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 J Leg Stud 187, providing an efficiency account of corrective justice. A moral norm of corrective justice can thus fill a significant gap that is not resolved by noting a legal norm of corrective justice.

which justify a primary obligation will also justify a secondary obligation when the primary obligation has not been met.[24]

Consider the following example, which Gardner uses to illustrate his theory:

> I promise to take the children to the beach today, but an emergency intervenes and I renege on the deal. Let's say I was amply justified in doing so. One of my students, let's say, was in some kind of serious and urgent trouble from which only I could extricate him, and only by devoting most of the day to it. In spite of this ample justification for letting the children down today I am now bound, without having to make a further promise, to take them to the beach at the next suitable opportunity (if there is one).[25]

Of course, on these facts, it is no longer possible to keep the promise perfectly. The day at the beach has already passed; any future visit to the beach is at best a close substitute. A substitute performance will nevertheless be called for.

While it may no longer be possible to meet the original obligation (which was either performed or not), 'those reasons in favour of the action that contribute to its obligatoriness can be conformed to more or less perfectly.'[26] It is still possible to comply, to some degree, with the reasons for action which supported the original obligation to take the children to the beach. Every reason for action 'is potentially a reason for multiple actions.'[27] It may no longer be possible to take the children to the beach today, but it may be quite possible, and obligatory, to take the children to the beach on the next suitable occasion.

Based on these common sense moral intuitions, Gardner suggests the following principles:

> If all else is equal, the reasons that were capable of justifying a primary obligation are also capable of justifying a secondary one. I will call this the 'obligation in, obligation-out' principle. And the explanation for it that I have just sketched out I will call the 'continuity thesis'. It is the thesis 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.[28]

24 See Gardner, 'What Is Tort,' supra note 1 at 33. A related norm is also described by Joseph Raz. See Joseph Raz, 'Personal Practical Conflicts,' in Peter Baumann and Monika Betzler, eds, *Practical Conflicts: New Philosophical Essays* (Cambridge, UK: Cambridge University Press, 2004) 172 at 189–93, analysing the continuity of reasons for action.

25 See Gardner, 'What Is Tort,' supra note 1 at 28.

26 Ibid at 30.

27 Ibid at 31.

28 Ibid at 33.

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On this basis, we can also see a grounding for corrective justice in morality. Payment for the losses that one wrongfully occasions by breaching an obligation is a way to provide the 'best still-available conformity with, or satisfaction of, the reasons why one had the obligation.'[29] Corrective justice is supported by the continuity of our reasons for action when we have wronged others.[30] Notably, this account also allows us to understand why private law remedies should echo the content of pre-wrong obligations, without saying that these pre-wrong obligations have simply been transformed.

III *Civil recourse theory*

A THE PRINCIPLE OF CIVIL RECOURSE

Civil recourse theory paints a different picture of private law.[31] In contrast to corrective justice approaches, which typically emphasize the defendant's duty to undo a wrong or a wrongful loss, civil recourse theory focuses on the plaintiff's private right of action. Civil recourse theory suggests that the key to understanding private law fields is to understand the plaintiff's right to legal redress when the plaintiff has been wronged by another individual.[32]

As Benjamin Zipursky describes the principle of civil recourse:

> 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.[33]

29 Ibid at 34. The basis for the primary and secondary obligations will, of course, vary with the complexities of each fact pattern. As Gardner indicates, there is no reason to think that promissory cases are a unique circumstance for present purposes; see ibid at 38–9.

30 For Gardner, the 'continuity thesis' is, in part, a means of explaining the manner in which secondary obligations echo primary obligations. An alternative approach to this continuity concern is to suggest that an individual's obligation continues in existence after a wrong is committed. For an example of this type of approach, see Ernest J Weinrib, 'Two Conceptions of Remedies' in Charles Rickett, ed, *Justifying Private Law Remedies* (Oxford: Hart, 2008) 3 at 26; Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 Wm & Mary L Rev 1957 at 1978–82.

31 Or so it is claimed by civil recourse theorists. There is a live debate among private law theorists as to whether civil recourse theory can be squared with corrective justice accounts. For a suggestion that civil recourse and corrective justice converge, see Ernest J Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Fla St UL Rev 273 [Weinrib, 'Civil Recourse'].

32 See Zipursky, 'Civil,' supra note 7 at 746–7.

33 Ibid at 735.

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

Certain noteworthy features are shared by both theories. Corrective justice theories and civil recourse theories both recognize a private law system of corresponding rights and duties, wrongs, and remedies. They both see the bilateralism of private law and consider it to be important. But in many cases, where the corrective justice theorist will find a duty of repair in the aftermath of wrongful conduct, the civil recourse theorist will find a liability to suit.

B THE CIVIL RECOURSE CRITIQUES OF CORRECTIVE JUSTICE ACCOUNTS

Part of what motivates civil recourse theory is a set of doctrinal features that do not clearly fit the corrective justice understanding of private law, particularly tort law. These doctrinal features are consistent, however, with a structure in which a wronged party has an entitlement to act against the party who wronged her. In order to clarify what is at stake in this debate, it may be helpful to review the primary civil recourse critiques of corrective justice accounts.

1 *the variety of remedies*

One critique is based on the variations in tort law remedies, several of which are hard to square with corrective justice norms.[34] The most salient example is punitive damages. This type of remedy is readily grounded in retributive norms or in deterrence goals, but it is not readily seen in terms of a wrongdoer's correction of a wrong (or at least not in the sense of correction which corrective justice theorists often use). People do not usually have duties to punish themselves, and punitive norms are not ordinarily associated with corrective justice.[35]

Moreover, punitive damages are not the only damages that are problematic. Nominal damages may also raise concerns. In some cases, no apparent losses have been suffered by the plaintiff, yet damages are available.[36] This can happen, for instance, in cases of trespass. At least for those corrective justice accounts that emphasize loss allocation, this may also be a significant challenge. Corrective justice accounts that focus on a normative equilibrium, like Ernest Weinrib's, may be unaffected by

34 See ibid at 710–3.

35 See Stephen A Smith, 'Why Courts Make Orders (and What This Tells Us about Damages)' (2011) 64 Curr Legal Probs 51 at 59 [Smith, 'Why Courts'], noting, with respect to punitive court orders, that 'we do not have duties to punish ourselves.'

36 See John CP Goldberg & Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Tex L Rev 916 at 954, noting torts which 'do not set loss as a condition of liability.'

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this challenge, but other corrective justice theories may have a problem of doctrinal fit.

The status of injunctive relief has also been questioned.[37] What does it mean to say that an *ex ante* injunction is correcting a wrong? Whatever wrong might be prevented by the injunction has yet to occur, and it seems like *ex ante* prevention and *ex post* correction involve different types of conduct. A corrective justice theorist might try to avoid this latter problem by arguing that secondary duties to remedy a wrong are simply transformed versions of primary duties. Yet, while this argument would link pre-wrong and post-wrong remedies, it would arguably still leave corrective justice with applications beyond corrective fact patterns.

2 *the substantive standing doctrine*

Civil recourse theorists also emphasize the standing that a wronged party has to bring suit against the wrongdoer. The ordinary rule in tort law – and in a very large part of private law – is that the only party who may bring suit is the party whose rights were violated. This doctrine, known as the 'substantive standing' doctrine, means that even a party who was foreseeably harmed by a wrongdoer's improper conduct may not be able to bring suit based on the harm suffered.[38] Not every foreseeable harm involves an injury that violated the would-be plaintiff's rights.

The substantive standing doctrine is arguably a challenge for corrective justice accounts, since it limits the applicability of private law remedies in settings where a wrongdoer presumably has a responsibility to correct a wrong. As Zipursky argues: 'The problem . . . is that although there is wrongful conduct that causes the injury and the imposition of liability would restore the plaintiff, there is still no liability.'[39] Some corrective justice accounts have offered explanations of the private right of action and its limitations.[40] That said, the substantive standing doctrine at least raises the possibility that something other than corrective justice is involved in private law – in this case, much depends on one's theory of corrective justice.

3 *the alleged absence of a pre-judgment duty to pay damages*

Another argument looks at the consequences of a wrongdoer's failure to repair a wrong in a timely fashion. Under many corrective justice theories, a tortfeasor should owe a duty of repair from the moment of

37 See Zipursky, 'Civil,' supra note 7 at 713, noting that injunctive relief cases 'are not cases of defendants taking responsibility for the harm they have caused.'

38 See ibid at 714–6.

39 Ibid at 716.

40 E.g. Weinrib, 'Civil Recourse,' supra note 31 at 282–5.

the tort. If that premise is correct, we should also anticipate that legal doctrine will reflect this duty of repair and that the effects of non-compliance with this duty will be legally evident. Civil recourse theorists suggest that this is inconsistent with legal doctrine as it actually exists.

Zipursky argues that the law recognizes affirmative legal duties for one person to pay another in a variety of contexts but that, prior to a judgment, it does not do so in the case of torts.[41] For example, he suggests that '[t]here may be a private contract under which there is a promise to pay that creates a legal obligation to perform the contract.'[42] Or, there may be a court order 'enjoining one person to pay another.'[43] These are cases in which the law provides for affirmative legal duties to pay, and in each case, non-payment is a legal wrong.

Where private law provides for legal duties to pay, however, there are characteristic results when payment is not made in a timely fashion. As Zipursky argues,

> [I]n all of these cases, the legal duty to pay is ripe prior to a monetary judgment of a court. The failure to pay upon this ripening, prior to judgment, may result in legal consequences that follow from having committed the legal wrong of failing to pay. For example, one who fails to pay under a contract will incur pre-judgment interest because payment is owed at the time the contract specifies for performance, not at the time a court reaches a judgment.[44]

Tort law does not implicate these legal consequences when someone fails to pay pre-judgment damages. Consequently, in Zipursky's view, tort does not implicate a pre-judgment duty to pay.[45]

It should be noted that there are strong dissents from these arguments. John Gardner has recently questioned this perspective under the law of England and Wales.[46] As his work suggests, the award of statutory interest in those jurisdictions may indicate a pre-order duty to pay

41 See Zipursky, 'Civil,' supra note 7 at 719–20.

42 See ibid at 719.

43 See ibid.

44 See ibid.

45 See ibid at 720. Nathan Oman has suggested that contract law shares the same feature. In a recent article, he claims that there is no pre-judgment duty to pay damages in contract law. See Nathan B Oman, 'Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law' (2011) 39 Fla St UL Rev 137 at 139 [Oman]: 'There is no duty to pay damages in either tort or contract law.' In addition, Stephen Smith has recently argued that damages orders do not replicate pre-existing legal duties. See Stephen A Smith, 'Duties, Liability, and Damages' (2012) 125 Harv L Rev 1727 at 1727–8: 'Rather than imposing ordinary or even inchoate duties to pay damages, the common law merely imposes liabilities to pay damages.'

46 See John Gardner, 'Torts and Other Wrongs' (2011) 39 Fla St UL Rev 43 at 58, n 56 [Gardner, 'Torts'], citing support for the view that statutory interest is awarded on

damages.[47] Robert Stevens has questioned the argument for similar reasons.[48] Various corrective justice theorists implicitly agree. Whatever the merits of the no-duty-to-pay thesis, it is far from a consensus position.[49] The no-duty-to-pay thesis is, nevertheless, an important challenge for corrective justice approaches to private law remedies.

C THE MORAL ENTITLEMENT TO DEMAND REDRESS

Civil recourse accounts are generally offered by their proponents as the best available interpretation of private law fields.[50] Yet civil recourse theorists often avoid defending the principle of civil recourse on normative grounds. Recently, this has started to change. Jason Solomon has argued that civil recourse can be grounded in a desirable norm of equal accountability.[51] In addition, Zipursky has now argued that civil recourse involves a moral entitlement to demand redress, at least as a matter of positive morality.[52] Both accounts are important – this article will focus on Zipursky's account as an example.

To illustrate his argument, Zipursky provides a list of fact patterns where one party has wronged another and the wronged party then makes a demand on the wrongdoer in response. For instance, he describes a case in which one party has stolen a coveted, signed baseball from another party. The victim responds, 'You stole from me. Give it back!'[53] Zipursky suggests that, in such cases, the demand is appropriate, at least under widely accepted norms of positive morality. Indeed, he suggests

damages awards on the basis that there was a duty to have paid the award before it was awarded.

47 See ibid, noting that, on this view, 'an award of tort damages places a retrospective legal duty on the defendant, a duty to have paid the award before it was awarded.'

48 See Robert Stevens, 'Rights and Other Things' in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* 115 (Oxford: Hart Publishing, 2011) at 133–4. Stevens also draws on unjust enrichment law for further support; see ibid.

49 It is possible that corrective justice may explain damages awards even if these damages awards create new duties. Arguably, wrongdoers have inchoate duties to pay damages before a court's decision, and these inchoate duties are then crystallized by the court's damages award. See Gardner, 'Torts,' supra note 46 at 55: 'The tort plaintiff claims unliquidated damages and the court liquidates them, i.e., crystallises them into a monetary sum, which can then be recovered as a judgment debt.'

50 They are also offered from a political theory perspective. E.g. Zipursky, 'Philosophy of Private Law,' supra note 5 at 639–40. As John Goldberg has demonstrated, this basic conception has a long historical pedigree. See John CP Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale LJ 524.

51 See Solomon, supra note 7.

52 See Benjamin C Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Fla St UL Rev 299 at 323–35.

53 Ibid at 325.

that, under these norms, 'one who was wronged by another is entitled to demand responsive conduct of a sort from the wrongdoer and have such demands complied with.'[54]

Zipursky provides several reasons for thinking that this sociological claim is justifiable. These reasons include a variety of considerations but broadly fall under the following categories: self-respect, self-protection, and self-worthiness; agency recognition; the duty/responsibility linkage; reconciliation of wrongdoer and victim; and schemes of rights and goods.[55] This moral entitlement to demand responsive conduct also has an interesting additional feature. Zipursky contends that, as a conceptual matter, the question of whether someone has a right to make such demands for ameliorative conduct is independent from the claim that the wrongdoer has a prior duty to provide this conduct.[56] The wronged party's moral entitlement, in other words, may fit awkwardly with common corrective justice understandings.

Notably, this recent work suggests an understanding of civil recourse in terms of morality and not just legal entitlements. Yet this work still maintains a wall between civil recourse theory and justice-based accounts of private law. Zipursky recognizes that people are inclined to describe the tort system 'as a system that corrects injustices, or that does corrective justice.'[57] But he apparently sees this view as a desirable perception that people have rather than a reflection of conceptual links between justice and private rights of action. He is quick to note that '[d]oing corrective justice is one of many things that tort law sometimes accomplishes,' and he adds that 'its capacity to do so is not basic to the account of private rights of action.'[58]

IV *Challenges for the corrective justice account*

Having introduced these two approaches, it is now time to consider how each approach fares against its critics. We will begin with the corrective justice side. Corrective justice theories face challenges from several directions. For example, some corrective justice approaches face the concern that they describe norms of corrective justice that are hard to distinguish from other norms of justice, such as distributive justice or retributive

54 Ibid at 326.
55 Ibid at 326–7.
56 Ibid at 335.
57 Ibid at 339.
58 Ibid at 340.

justice.[59] Other corrective justice approaches face concerns that they offer a redundant norm for legal explanatory purposes, or that they describe a norm that does not really involve a form of correcting.[60]

Gardner's approach offers a cogent response to these challenges. His corrective justice account describes norms that are readily distinguishable from distributive- and retributive-justice norms. Norms of allocation back are distinctive norms. The continuity thesis also provides a compelling account of corrective justice in moral terms, while helpfully separating primary rights and duties from secondary rights and duties. Corrective justice on this account is both morally plausible and, in an important sense, corrective. There are, nonetheless, significant challenges to Gardner's account.

This Part will assess objections to both the allocation-back picture and to Gardner's theory of corrective justice as applied to legal content. These objections do not concern the merits of Gardner's understanding of corrective justice as such. Instead, they raise doubts as to whether this account will help explain private law. Gardner may have accurately described moral norms of corrective justice without successfully matching these norms with the doctrines of tort law and, by extension, private law.

A THE CONCERN THAT 'ALLOCATION BACK' IS NOT WHAT COURTS DO

An initial concern is that allocation back is a bad fit for many private law remedies. The issue is not that certain exceptional remedies fall outside the theory. Punitive damages are admittedly not an example of corrective justice, at least on most accounts. Many theorists would agree that such damages are a special case.[61] Indeed, Gardner suggests that the continuity thesis does not ordinarily explain general damages – that is, damages designed to cover certain irreparable consequences of a tort or

59 The 'annulment view' of corrective justice may face this concern. See Coleman, *Risks*, supra note 11 at 310, discussing challenges for an annulment view of corrective justice.

60 Approaches which treat remedial duties or rights as transformed versions of primary duties or rights are open to the redundancy charge. For an example of this critique, see Gardner, 'What Is Tort,' supra note 1 at 49. See also Zoe Sinel, 'Concerns about Corrective Justice' (2013) 26 Can JL & Jur 137 at 144–5, discussing the concern that corrective justice may be redundant on this type of account; Oman, supra note 45 at 158, n 121 (same). Approaches that treat *ex ante* injunctive relief as a form of corrective justice are open to the objection that they do not involve a corrective remedy. For examples of this critique, see Zipursky, 'Civil,' supra note 7 at 713; Andrew S Gold, 'A Moral Rights Theory of Private Law' (2011) 52 Wm & Mary L Rev 1873 at 1915.

61 Some suggest that making this exception is problematic, however; see Zipursky, 'Civil,' supra note 7 at 712–3.

breach of contract.[62] If Gardner's account can nevertheless explain basic reparative damages, this, in itself, is a major accomplishment.

Some, however, have suggested that allocation back does not even fit well with reparative damages. This claim presents a more significant challenge for a corrective justice theory. In this case, we are confronting the heart of what corrective justice theorists seek to explain, and it is highly implausible that a corrective justice theory of private law can meet its explanatory aims if it is unable to account for reparative damages.

The challenge is typically raised in the tort law setting. For example, Scott Hershovitz has argued that corrective justice accounts are well suited to explain property-related torts but poorly suited to explain a variety of other tort scenarios. Consider Hershovitz's example:

> Tom steals Jerry's ball. What does Tom owe Jerry? His ball is an obvious answer. But what if Tom breaks Jerry's leg? Jerry still has his leg, so it can't be allocated back. If Tom could unbreak Jerry's leg, that would seem in order, and we might think of it as an allocating back of sorts. Healing Jerry's leg restores what he started with. But already we are one step removed from an allocation of a good back from one person to another. Repair is not the same as return.[63]

As this example suggests, allocation back requires further analysis when extended to personal injuries.

Fortunately, a response is available. First, we need to recognize that a full allocation back is an aspiration.[64] The core idea in seeking the 'next best thing' is to get as close as one can to undoing a transaction, given the limitations of legal institutions and the inability to turn back the clock. (The very notion of a 'next best thing' suggests that there is a 'best thing' it falls short of.) Indeed, we may have good reasons not to allocate back to the fullest possible extent. In some cases, allocation back might be exorbitantly expensive, or it might involve the creation of new harms which could be worse than the original injury. But a partial allocation back can still be measured against the goal of complete reversal of a wrongful transaction.

Second, we should understand that any amount of allocation back is still allocation back. As Gardner describes the setting of an allocation back, '[s]omething has already shifted between the two parties.'[65] Allocation

62 See Gardner, 'What Is Tort,' supra note 1 at 47.

63 Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Fla St UL Rev 107 at 110 [Hershovitz, 'Corrective'].

64 See Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 59: 'Where the defendant is required to make good the claimant's consequential loss . . . this is the law's attempting to reach the nearest approximation of the wrong not having occurred.'

65 Gardner, 'What Is Tort,' supra note 1 at 9.

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back involves a reversal of this prior shifting of whatever that something is. One implication of this idea is that there is a distinctive allocative event whenever any quantum of this initial shifting is reversed. If A wrongly converts five apples from B, the return of two of those apples would still be an allocation back.

Unsurprisingly, corrective justice theorists are aware that the complete reversal of a transaction can be difficult or impossible. Weinrib argues that tort law 'places the defendant under the obligation to restore the plaintiff, *so far as possible*, to the position the plaintiff would have been in had the wrong not been committed.'[66] Gardner argues that '[c]orrective justice . . . is rendered rational, all else being equal . . . by the residual possibility of restoring things, *at least in some measure*, to where they would have been had one not occasioned their loss.'[67] These explicit qualifiers are important recognitions that corrective justice does not completely reverse the effects of a wrong.

Yet Hershovitz contends that these qualifiers are insufficient, given the frequent inadequacy of the legal response to a wrong. As he notes, '[I]n an awful lot of cases, we can't do anything like put the plaintiff in the position she would have been in had the wrong not been committed, so if we are doing that insofar as possible, we are doing it not at all.'[68] There are numerous examples in which we cannot come close to putting someone back in the position she would have been in had the wrong not been committed. Post-defamation, we may not be able to restore someone's reputation. Money damages will not be adequate after a rape, and negligence that results in death is impossible to undo.

While the inadequacy-of-remedies claim is clearly correct, there is still a flaw in Hershovitz's argument. The inadequacy of an allocation back does not mean that the idea of allocation back is inapplicable to the fact pattern. To conclude that we cannot put the plaintiff back in the position she would have been in is quite different from concluding that we are not allocating back at all. Moreover, if we accept the idea that norms of justice are norms that govern allocations, it appears that the norms which govern a partial reversal of a transaction are still norms of justice.

Allocations back can qualify as a form of justice even if they are not the justice we would hope for, all things considered. It can also make sense to say that such allocations are truly allocations back even when they fall short of their aim of making someone whole. In this regard, an allocation back conception is different from some other proposed understandings of corrective justice. For example, Hershovitz's own account of corrective

66 Weinrib, *Idea of Private Law*, supra note 11 at 135 [emphasis added].
67 Gardner, 'What Is Tort,' supra note 1 at 37 [emphasis added].
68 Hershovitz, 'Corrective,' supra note 63 at 116.

justice suggests it involves a form of 'getting even.'[69] Suppose that we use this account as an illustration. Notice that, on a 'getting even' view of corrective justice, there will be many cases in which there is no way to ever be precisely 'even.' Does one ever 'get even' in a case where negligence resulted in death? Perhaps we can still talk of 'getting even' in such a case despite the inability ever fully to do so. One might, nevertheless, think that, if the plaintiff has not become fully 'even,' then the plaintiff simply hasn't 'gotten even,' full stop.

In contrast, allocation back need not face this concern. We can readily talk of allocation back despite an inability to ever completely undo a transaction. Even a tiny bit of allocation back is still allocation back. Unlike 'getting even' – which may imply that one needs to actually be 'even' after the responsive conduct occurs – the notion of allocation back does not imply that someone is fully made whole. To make this concrete, imagine a very poor tortfeasor who negligently injures his victim's leg and cannot afford to pay full compensation. If the only feasible compensation after this wrongful injury is the defendant's payment of one quarter of the medical bills, this would still be an allocation back – it would be a partial undoing of the wrongful transaction. It would also still be a form of justice, albeit a disappointing one. The case might be different if an allocation-back conception meant that an individual must successfully be made whole, but that is not something which this conception requires.

B THE ENFORCEMENT CHALLENGE TO THE CONTINUITY THESIS

While allocation back may plausibly fit core tort law remedies, the proposed nature of the allocation back raises further challenges. Gardner's account offers an elegant analysis of corrective justice, its distinctive features, and its potential moral grounding in an individual's reasons for action. It may also be accurate as an account of corrective justice as a moral norm. Unfortunately, given an aim of explaining private law, this account remains problematic. Gardner's primary focus is on the duties of the party from whom an allocation back is to be made, and as a result, his account poses several concerns.

Initially, we might conclude that Gardner's conception of corrective justice focuses on the wrong thing. Even if we assume that the moral norm of corrective justice that Gardner describes is a sound moral norm, private law is very much concerned with a wronged party's rights. The continuity thesis is very much a duty-focused account. This raises a

69 Ibid at 118, describing a tradition of thinking about corrective justice that involves getting even.

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potential question of doctrinal fit, since rights-based and duty-based accounts of private law may not converge. Does a focus on an individual wrongdoer's conformity with corrective duties match legal reasoning?

There is a ready answer for this first concern. As Gardner notes, the continuity thesis is consistent with a rights-based understanding of allocation back. Indeed, the reasoning which supports the 'obligation-in, obligation-out' principle allows us to recognize what he calls the 'right-in, right-out' principle: 'whoever has a primary right (e.g., a right not to be libeled) also gets a secondary right (a right to reparative damages in a libel suit) upon violation of that primary right.'[70] Rights and duties, in this context, are correlative.[71] In light of the relationship between a wrongdoer's duties and a right holder's corresponding rights, a right-in, right-out principle follows readily from the continuity thesis.

A more challenging difficulty involves the structure and aim of private law reasoning. Recall that Gardner's proposition (c) is the proposition that 'a norm of corrective justice only regulates the actions of the person from whom the transfer back is to be made *or another person acting on behalf of that person.*'[72] Private law often forces a wrongdoer to correct a wrong, but it is not obvious how this state action occurs *on behalf of* the wrongdoer. Given proposition (c), we will need to develop an explanation of private law in terms of vicarious agency such that the state effectively acts for the wrongdoer.[73]

This vicarious agency problem is not a minor difficulty for corrective justice theories of private law.[74] How is a court acting on our behalf

70 See Gardner, 'What Is Tort,' supra note 1 at 46.

71 See ibid at 45–6, explaining why, on Gardner's account, primary and secondary obligations will correspond to primary and secondary rights.

72 See text accompanying note 21.

73 As Gardner puts it, we need to explain 'how there can be an agent who acts on my behalf, such that on occasions I can be regarded as having conformed to norms of corrective justice even though it was someone else that did the allocating back for me'; ibid at 11. The vicarious agency of the state is not the only potential challenge here. One might similarly question whether we have corrective justice when a third party, such as a bank, brings about the allocation back. The fact not only that the conduct may be brought about by different parties from the wrongdoer but that it may be coerced could also be significant; *c.f.* Richard W Wright, 'Right, Justice, and Tort Law' in David G Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995) 159 at 178 [Wright], questioning whether coerced conduct can satisfy a corrective justice obligation.

74 Gardner himself suggests that explaining how vicarious agency would work is 'a tricky task,' and he does not provide a full account in his tort theory paper. See Gardner, 'What Is Tort,' supra note 1 at 11. This task may be rendered more difficult by self-help cases. On at least some theories of self-help, it seems questionable whether the individual performing the self-help is understood to act for the wrongdoer who necessitated this remedy.

when it orders us to pay damages to someone else? When a tort plaintiff sues, is her claim understandable as a claim that the defendant should be assisted in meeting his responsibilities? Admittedly, vicarious agency may not be an insoluble problem. If we are ready to view the government as acting on our behalf when it forces us to meet norms of distributive justice through taxation, we could conceivably do the same for corrective justice.[75] This would, nonetheless, call for an intricate explanation of our private law system. Even if vicarious agency is up to the job, we might seek a simpler explanation of how private law is related to justice in allocating back.[76]

Furthermore, as a factual matter, courts simply may *not* be acting on behalf of wrongdoers when they coerce a defendant to pay up. The possibility that they could be so acting does not mean that they are. The answer to this question is contingent on the content of judicial reasoning. Whether or not vicarious agency allows us to link corrective justice to private law in the abstract, there is still a descriptive concern regarding the actual legal point of view. Thus far, we have only suggested that it is possible in the abstract for vicarious agency to do the necessary work.

Given our private law system, we have reason to question whether courts are acting on behalf of wrongdoers, or at least, that they understand themselves to be doing so. In part, the concern is structural. As the civil recourse theorists suggest, the structure of private law is centred around the plaintiff's private right of action.[77] This structure gives plaintiffs a right of redress through the legal system. This right of redress will only occasionally be exercised by plaintiffs, and this raises doubts whether the aim of private law adjudication is to bring about a wrongdoer's compliance with his or her remedial duties. In some cases, it is also debatable whether a defendant owes a pre-judgment duty of repair. It could well be that existing legal doctrine is consistent with a duty-

75 See ibid, giving this example. See also GA Cohen, 'If You're An Egalitarian, How Come You're So Rich?' (2000) 4 Journal of Ethics 1 at 2, discussing the view that individuals discharge their responsibilities collectively through taxation. Liability insurance is also a potentially helpful illustration for these purposes. See Gardner, 'What Is Tort,' supra note 1 at 11, n 25, discussing the insurance case.

76 It should be noted that, even if corrective justice is considered adequate to the explanatory task, it may still be that redressive justice provides a more convincing account. The arguments to come are thus not dependent on the reader's rejecting the possibility of a corrective-justice-based interpretation of private law. In addition, it may be that private law is best explained by several types of justice in combination. In that instance, a convincing corrective justice account would not rule out a redressive justice component to private law.

77 See supra note 7 and sources cited therein.

based understanding of corrective justice, but it is by no means an obvious inference from corrective justice norms to private rights of action.

In addition, the continuity thesis does not adequately ground rights of redress: there is a potential mismatch between those cases when a right holder can legitimately seek redress and those cases in which a wrongdoer will have a remedial duty to do 'the next best thing.' Even a right-in, right-out principle does not entail a right of redress, if redress is understood as a type of enforcement.[78] A right to enforce a remedy (or have someone else enforce that remedy) is different from a remedial right.[79] The remedial right could exist without the right holder (or perhaps anyone else) being able to legitimately enforce it.

For example, if one person promises to have lunch with another, we can readily conclude that the lunch promise creates a moral duty to have lunch. If that promise is breached, then all else equal, we can readily conclude that the promisor owes a remedial moral duty to have lunch at the next best opportunity, or to provide some other version of the 'next best thing.' Each of these duties would correspond to a moral right in the promisee. It in no way follows from the practice of promising that the promisee could enforce this promise by coercive means. The promisee might have a remedial moral right to have lunch with the promisor, but many of us would still find that she has no moral enforcement right.[80]

We might thus conclude that the continuity thesis is correct, yet never think that the right holder is justified in forcing the rectification of a wrong. Nothing in the continuity thesis is sufficient on its own to justify a coercive right of redress. A principle of obligation-in, obligation-out is

78 Here, there is an important ambiguity to avoid. If 'right of redress' were understood to refer to a right to the outcome when wrongful losses have been corrected – by whichever party – then the right-in, right-out principle would be on point. The distinctive feature of the private right of action, however, is the right holder's privilege *to bring about* that outcome. It is this aspect which we cannot readily explain by a right-in, right-out principle. A right of redress, for present purposes, concerns the exercise of such a privilege.

79 It should be emphasized that we are concerned with moral rights at this stage rather than legal rights. Some contend that legal rights are by definition enforceable by coercion; see Matthew H Kramer, 'Rights without Trimmings,' in Matthew H Kramer, Nigel Simmonds, and Hillel Steiner, *A Debate Over Rights* (Oxford: Clarendon Press, 1998) 7 at 9: 'A genuine right is enforceable. (Unlike a purely moral claim – which is also enforceable in certain ways – a genuine legal claim is enforceable through the mobilizing of governmental coercion, if necessary.)'

80 Even if the reader concludes that some form of remedial enforcement right is legitimately present here, the key point is that this is a contingent outcome. The mere presence of a remedial moral right does not logically entail a moral enforcement right, nor does the continuity thesis point to the presence of such a right.

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not the same as a principle of obligation-in, right of redress-out, and the right-in, right-out principle need not lead to a right-in, right of redress-out principle. This raises an interpretive difficulty, since private rights of action are plausibly premised on a plaintiff's right of redress. In other words, Gardner's analysis of corrective justice may be accurate as an account of corrective justice from a moral perspective, but this vision of corrective justice may not be what justifies private law.

C SUMMARY

Corrective justice theorists have ably shown how corrective justice can be viewed as an independent norm of justice. Given certain conceptions of corrective justice, corrective justice need not collapse into distributive or retributive justice. In addition, as corrective justice accounts have grown increasingly sophisticated, the case for the soundness of corrective justice as a moral norm has been strengthened. While the contours of corrective justice are much debated, the idea of corrective justice as a desirable and distinctive practice is increasingly plausible.

The explanatory role for corrective justice, on the other hand, continues to be a challenge in legal contexts. Recent corrective justice theorists have focused on a type of justice which governs the conduct of the wrongdoer. Doing so has provided important insights about corrective justice and its relation to morality. This perspective, however, can make it more difficult to explain the features of private law. Does the substantive standing rule fit well with corrective justice? Does legal doctrine actually include a pre-judgment duty to pay damages? More generally, is the state really acting on the wrongdoer's behalf? Given these questions, it is worthwhile to consider whether there is a type of justice that governs the conduct of the right holder who wishes to undo a wrongful transaction. This article will suggest that there is such a type, and that it is distinct from corrective, distributive, retributive, and preventive justice.

V *Challenges for civil recourse accounts*

Of course, one might simply move past the question of what type of justice private law instantiates and focus instead on the civil recourse approach. It is entirely possible that an adequate theory of interpersonal justice just doesn't match up with private law content. Civil recourse theory might still allow for an explanation of private law even if no justice-based understanding fits our legal practices. It is certainly well situated to account for the various difficulties discussed in the last part of

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this article. With that in mind, it is worth thinking about the challenges for civil recourse theory before proceeding further.

A THE VENGEANCE CHALLENGE

Civil recourse theory is generally offered as an interpretive account, and this has posed problems, given the sometimes doubtful motivations that underlie one person's choice to act against another. Arguably, civil recourse theory suggests that private law remedies are a means for plaintiffs to seek revenge for the wrongs they have suffered. A private law system that is premised upon facilitating revenge, however, is a questionable match for the private law system we have.

John Finnis has offered one of the leading critiques of civil recourse theory based on a concern with revenge. 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.'[81] This claim, if accepted, could call into question the explanatory power of the civil recourse account. The problem is not merely that a vengeance-oriented tort law or private law would be unattractive but that it is improbable that such a perspective is consistent with the law's self-understanding.

Civil recourse theorists are generally quick to note that they do not endorse the vindictive impulses that may underlie private rights of action.[82] They have also indicated that their theory does not incorporate a principle of vengeance.[83] Rather, civil recourse involves a form of accountability, or a form of 'getting satisfaction.'[84] While there can no doubt be an overlap with revenge or retribution in practice, these concepts are distinct. Such responses should alleviate the vengeance concern, particularly given the salience of accountability as an attribute of private law doctrine.

81 John Finnis, 'Natural Law: The Classical Tradition,' in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 1 at 57. See also Emily Sherwin, 'Interpreting Tort Law' (2011) 39 Fla St UL Rev 227 at 235, discussing the sometimes 'vengeful nature of victim's demand for recourse.'

82 E.g. Zipursky, 'Civil Recourse,' supra note 7 at 750, indicating that his aim is not to defend the vindictive impulses described in the article.

83 See John CP Goldberg & Benjamin C Zipursky, 'Civil Recourse Revisited' (2011) 39 Fla St UL Rev 341 at 344–5 [Goldberg & Zipursky], discussing differences between recourse and vengeance.

84 For further discussion of this reading of civil recourse, see Andrew S Gold, 'The Taxonomy of Civil Recourse' (2011) 39 Fla St UL Rev 65 at 73–6 [Gold, 'Taxonomy'].

B THE REMEDIAL FIT CHALLENGE

Separating civil recourse from vengeance will not necessarily solve all of the interpretive puzzles that confront civil recourse theory. This is especially evident when we leave the realm of torts and begin concentrating on other fields of private law. In contracts cases, it is questionable whether accountability is what underpins the private right of action, and the idea of 'getting satisfaction' may be even more foreign. Likewise, these norms are a doubtful match for unjust enrichment law – a setting in which there may not even be a wrong to be redressed.

For example, consider the contract setting. Suppose that Jack enters into a contract with Jill, and he breaches when he fails to pay her $100 for a vase that she sold him. If Jill brings suit to enforce, she could plausibly say that she has no interest in holding Jack *accountable* for his wrongful behaviour, and the idea of getting satisfaction might be surprising to her. Jill could argue that all she really wants is the money that is owed to her. Nothing more or less. And with appropriate adjustments, the same type of fit concern arises in unjust enrichment cases. Several areas of private law seem focused on the enforcement of remedial rights (or even primary rights), a type of conduct that is qualitatively different from holding someone accountable.[85]

This challenge is readily met by civil recourse theorists if they are ready to extend civil recourse to include a plaintiff's power to enforce and not just a power to hold accountable or get satisfaction. To the extent that civil recourse is restricted to accountability or getting satisfaction, on the other hand, there will be a significant fit concern in the non-tort arena (and, perhaps, in some of the tort arena as well). Recent work by civil recourse theorists suggests that they are open to an enforcement-based conception of recourse in at least some settings.[86] If so, this fit concern should recede, and the theory can be fruitfully extended to fields like contract law.

C THE JUSTICE-BASED CHALLENGE

There is, however, another fit concern. Private law adjudication is typically understood to be a mechanism for doing justice.[87] This understanding is not just a convenient by-product of judicial decision making. The justice in private law is not merely an outcome which we hope will transpire if

85 For further discussion of civil recourse as a means of enforcement, see ibid at 68–73.

86 See Goldberg & Zipursky, supra note 83 at 347–49, assessing the applicability of civil recourse theory to contract law.

87 On the connections between adjudication and norms of justice, see John Gardner, 'The Virtue of Justice and the Character of Law' in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 238; Smith, 'Why Courts,' supra note 35 at 82–3.

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things go well. A connection to justice appears to be a deeply ingrained component of the internal point of view. At least when it is working properly, legal actors see private law adjudication as doing justice.[88]

As noted above, civil recourse theorists often shy away from viewing civil recourse in justice terms. This is, perhaps, a reflection of their reluctance to accept the corrective justice picture. Even so, this tendency comes at a high cost. Civil recourse theorists are generally quite interested in the inferences that link private law concepts.[89] In explaining private law concepts, civil recourse theorists are certainly concerned with the internal point of view.[90] Yet, from the internal point of view, private law adjudication *does justice* if it is doing what it is supposed to do.

For civil recourse theorists, it is thus problematic to reject a conceptual link between civil recourse and justice. The civil recourse theorist may recognize that justice is sometimes achieved by private law remedies or that a perceived correlation between private law and justice is beneficial. He or she may conclude that these features are socially desirable. The problem, however, is conceptual: from the legal perspective, a properly functioning private law remedy brings about a form of justice between the parties to a dispute. The private right of action is clearly designed to lead to such private law remedies. Perhaps there are multiple types of justice which civil recourse brings about, and perhaps corrective justice is not the primary one. But if there is no conceptual link between civil recourse and justice, then civil recourse describes a private law that is hard to reconcile with the internal point of view.

D SUMMARY

While civil recourse theory initially faced some substantial challenges, its proponents have since clarified key elements of the theory. It is no longer the case that civil recourse is closely tied to norms of revenge or retribution, if it ever was. In addition, civil recourse theorists have increasingly shown how the principle of civil recourse can be linked to moral entitlements and not merely legal entitlements. Moreover, the versatility of civil recourse theory is increasingly apparent. Not only tort law,

88 Likewise, when adjudication is functioning poorly, legal actors will tend to see the results in terms of injustice. See Smith, ibid at 83: '[W]hen a judge makes an improper order, and in particular when he makes an improper damages order[], the language of justice is immediately invoked.'

89 See Zipursky, 'Civil,' supra note 7 at 707, adopting a 'pragmatic conceptualism,' and suggesting the importance of understanding 'the structure of practical inferences in which our legal concepts and principles are involved.'

90 E.g. John CP Goldberg & Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham L Rev 1563.

but contract law, and potentially even unjust enrichment law, can be partly explained in civil recourse terms.

Yet, to the extent civil recourse theory aspires to provide an account of private law from the internal point of view, it still must confront a major stumbling block. Civil recourse theorists have argued forcefully against corrective justice accounts, but in the process they have also avoided offering an alternative account of the justice in private law. Since the idea that private law adjudication does justice is one the most basic underpinnings of private law reasoning, this is a real gap. Even if one is convinced that corrective justice does not provide the answer, a civil recourse theory that can be conceptually linked to interpersonal justice should be a significant step forward.

VI *The place for redressive justice*

This brings us to the idea of redressive justice. A major insight in Gardner's account is the recognition that there is a distinctive type of justice concerned with 'allocating back.' This formulation provides a clean boundary line between corrective justice and distributive justice. A major insight in the civil recourse account is that a central feature of private law is a wronged party's entitlement to act against the party who committed the wrong. In combination, these insights suggest a new way of looking at the justice in private law.[91] Given proposition (c) – an intuitively plausible constraint on corrective justice – there is conceptual space for another form of justice in allocating back. Significantly, not all allocations back are made by a wrongdoer or made on a wrongdoer's behalf. This Part will explore the type of justice applicable to allocations back that are made by a right holder or made on a right holder's behalf.

A REDRESSIVE JUSTICE DEFINED

Let's start with two parties to a dispute. Suppose that we are concerned with 'the question of whether and to what extent and in what form and on what ground [something] should now be allocated back from one party to the other, reversing a transaction that took place between them.'[92]

91 That said, it should be noted that the conception of redressive justice described below might still be accepted by someone who rejects Gardner's particular account of corrective justice. The argument is not contingent on acceptance of a specific corrective justice theory (although on certain accounts redressive justice would become a subset of another category of justice).

92 Gardner, 'What Is Tort,' supra note 1 at 9–10, using this basic formulation to describe the question of corrective justice; see text accompanying note 19.

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Suppose, however, that we address this question to the conduct of the *right holder* in seeking redress, rather than the responsibilities of the duty holder in correcting a wrong. Our concern then is with the question of 'whether and how something may be allocated back' by a *right holder* from a *duty bearer*, 'reversing a transaction that took place between them.'[93]

It is reasonable to think that this question is concerned with justice, even if it is not necessarily concerned with corrective justice. After all, this question is a distinctly allocative question.[94] In addition, much like corrective justice, the concern is with allocating back – that is, the undoing of transactions. The primary distinction from the corrective justice case is that we now have a different party who is responsible for accomplishing the allocation back or (if the state is involved) a different party on whose behalf the allocation back is made. Where it is the right holder who is responsible for the allocation back, we have redressive justice.

The duty to correct will admittedly exist in many redressive justice cases, and it is common to analyse wrongs in terms of breached duties. Yet there is nothing unusual in thinking that there could be norms of justice peculiarly concerned with the permissible actions of right holders. Preventive justice – the type of justice concerned with such things as self-defence – involves the permissible actions of right holders. In that context, we may ask when it is appropriate for a right holder to use force to prevent a wrong. At least in the abstract, then, we might imagine a distinct type of justice that governs redress in the allocation back setting.

Care is needed in defining what type of right holder conduct is at issue. 'Redress' can mean different things to different people.[95] Here, redress covers the enforcement of primary or secondary rights. Under this definition, redress does not mean getting satisfaction against someone who committed a wrong. The concern of redressive justice, like that of corrective justice, is with the undoing of transactions – allocation

93 See text accompanying note 92.

94 See ibid at 6, arguing that norms of justice are 'norms for tackling *allocative* moral questions, questions about who is to get how much of what.' See also HLA Hart, *Punishment and Responsibility*, 2d ed (Oxford: Clarendon Press, 2008) at 21, describing principles of justice as principles 'concerned with the adjustment of claims between a multiplicity of persons.'

95 This is evident from recent work in the civil recourse literature, where 'redress' has been associated with the redress of wrongs involving personal injury. See John CP Goldberg & Benjamin C Zipursky, 'Civil Recourse Revisited' (2011) 39 Fla St UL Rev 341 at 352, suggesting that 'the paradigmatic contract case' will 'take us outside the realm of redress,' but not outside the realm of civil recourse. Unlike in Goldberg and Zipursky's reading, 'redress' as used in this article will cover the standard remedies in a breach of contract case.

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back – rather than with responding to wrongs as such.[96] Moreover, for legal explanatory purposes, a focus on undoing transactions is vital. Many private law remedies are a closer fit with norms of allocation back than with ideas of getting satisfaction or getting even.[97]

So construed, redressive justice takes the following form. It is a type of justice which governs 'whether and to what extent and in what form and on what ground [something] should be allocated back from one party to another, reversing a transaction that took place between them.'[98] However, this type of justice is subject to a proposition which I will call 'proposition (d)': *redressive justice regulates the actions of a right holder in allocating back, or of someone acting on the right holder's behalf.*[99] This proposition is what divides the redressive from the corrective.

Significantly, this form of justice between individuals allows us to explain the allocations back which private law courts regularly mandate, without calling on us to adopt the view that courts are acting on behalf of the wrongdoer when they issue such orders. In other words, we can avoid the vicarious agency challenge raised by proposition (c), and we can avoid the interpretive concern that courts, from an internal point of view, may in fact be acting on behalf of right holders rather than wrongdoers.

B THE ASYMMETRIES BETWEEN CORRECTIVE JUSTICE AND REDRESSIVE JUSTICE

A significant reason for our interest in redressive justice is the difficulty posed by proposition (c). But why not just revise proposition (c)? We could adopt a disjunctive version of the rule. Corrective justice might be defined as the justice of allocating back, subject to a 'proposition (c')': *corrective justice regulates the action of a duty holder in allocating back, or someone acting on the duty holder's behalf,* OR *it regulates the action of a right holder in allocating back, or someone acting on the right holder's behalf.* This would

96 Note that on some theories, the annulling of wrongs as such is a retributive concern. See Coleman, *Risks*, supra note 11 at 325, distinguishing corrective justice from retributive justice on this basis.

97 See Andrew S Gold, 'A Moral Rights Theory of Private Law' (2011) 52 Wm & Mary L Rev 1873 at 1915–9 [Gold, 'Moral Rights'] discussing remedies for contract breach and for unjust enrichment which do not fit well with a retribution or satisfaction-based norm.

98 See text accompanying note 92.

99 One might reject a role for vicarious agency with respect to redressive justice, but I can see no reason for doing so. In addition, unlike the corrective justice case (in which we may doubt that courts act on behalf of wrongdoers), there is nothing counter-intuitive in thinking that courts act on behalf of right holders.

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resolve the vicarious agency challenge, and there would be no need for proliferating categories of justice.

The answer to this question is twofold. First, it turns out that redressive justice and corrective justice are not mirror images. Not all fact patterns that implicate corrective justice necessarily implicate redressive justice, and vice versa. Second, we will likely lose important insights about justice in allocation back if we fail to attend to the differences between allocation back by duty bearers and allocation back by right holders (or parties acting on their behalf).

The possibility of collapsing categories of justice into a smaller set does not mean we will gain greater insight by doing so. For example, as Gardner notes, it is possible to redescribe the addition and subtraction that are characteristic of corrective justice in distributive justice terms.[100] Corrective justice can thus be seen as distributive justice. Such a move, however, 'fails to bring out that the [corrective] result depended on a special kind of norm designed to tackle a special kind of allocative question.'[101] Attending to this special kind of norm leads us to important insights about interpersonal morality.

This article will suggest a similar conclusion if we characterize redressive justice in terms of an expansive corrective justice category: such thinking would fail to bring out that there is a special norm involved when we pursue redressive justice. Even if we could adopt a view of corrective justice that would absorb redressive justice (i.e., by adopting proposition (c')), there are good reasons not to.

The hypothetical fact patterns in the next section will show that redressive justice is a salient conception of justice in allocating back and also that it can apply in circumstances where corrective justice is not applicable. There are cases where corrective justice applies such that a duty holder has a duty to allocate back, yet the right holder has no right to enforce her rights. There may also be important cases where a right holder can appropriately enforce her right to allocate back – an act of redressive justice – yet the counter party has no corresponding duty to allocate back.

Furthermore, it is a common intuition that it makes a difference whether a particular allocation back is authored by a wrongdoer rectifying his wrong or a right holder enforcing her rights. We often care if a wrongdoer gets the chance to fix the results of his conduct. Redressive justice may undo wrongful losses, but it does so with the wrongdoer in a different role and consequently with a different effect on the wrongdoer's status. Even if both a wrongdoer and a right holder could legitimately reverse a

100 See Gardner, 'What Is Tort,' supra note 1 at 9.
101 See ibid.

transaction, it matters which party is responsible for bringing about this outcome. A distinct type of justice results, depending upon the author of the allocation back.

Each of these points will be developed below, using a series of hypothetical examples.

1 *duties to perform without corresponding enforceable rights*

Suppose that Allen casually promises to give his coffee mug to Beth on a certain day, knowing that she has long admired the mug. Two minutes later, before Beth has relied in any way, Allen changes his mind. He tells Beth he is going to keep the coffee mug, and he fails to provide the mug on the chosen day. Under these circumstances, Allen would initially have a primary moral duty to perform as promised, and Beth would have a primary moral right to performance. Given his breach of promise, Allen would have a remedial moral duty to provide the coffee mug, and Beth would have a remedial moral right to the coffee mug.[102] But notice that, if Allen refused to hand it over, Beth could not, consistent with morality, force Allen to keep his word.[103]

Let's call this the 'Ordinary Promise' case. In this first case, corrective justice would govern Allen's conduct in providing the mug. Beth, however, would not be able to take the mug for herself, at least not consistent with justice in allocating back. Whatever rights Beth has with respect to the mug, they are not enforceable rights.[104] Redressive justice would not support efforts by Beth, or by a party acting on Beth's behalf, to coerce compliance with this ordinary promise.[105]

102 This article will bracket the question whether the remedial moral duty might give the promisor a choice between specific performance or payment of damages; see Jody S Kraus, 'The Correspondence of Contract and Promise' (2009) 109 Colum L Rev 1603 at 1629-31, analysing the complexity of remedial moral duties in the promissory setting.

103 It is possible that Beth could enforce her rights by demanding compliance and publicly shaming Allen. This sense of enforcement is not the sense used in this article, as it would not take the choice of compliance away from Allen.

104 On this feature of ordinary promises and its relevance to contract theory, see Andrew S Gold, 'A Property Theory of Contract' (2009) 103 Nw UL Rev 1 at 20–1 [Gold, 'Property Theory']. See also Peter Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33 Osgoode Hall LJ 273 at 293, critiquing Charles Fried's promissory account of contracts because it 'does not explain how the obligation to keep a promise is construed as something other than a merely ethical duty.'

105 To the extent that Beth might be able to take the coffee mug for herself without coercing Allen, this would still involve an asymmetry. Corrective justice would be satisfied by Allen's providing the coffee mug, yet it would not be just for Beth to take the mug for herself where the only basis for her conduct was an ordinary promise with which Allen refused to comply. I thank Brian Bix for emphasizing this non-coercive type of case.

2 *duties to perform with corresponding enforceable rights*

Suppose instead that Allen promises Beth his coffee mug, if Beth will spend the day fixing a problem with his computer for him. The task is both difficult and, at times, mind-numbing. The mug is an ordinary mug, and probably worth much less than the hours of Beth's time. Beth agrees to the task, however, and at the end of the day she asks for the mug. Allen recognizes she performed exactly as agreed but refuses to turn over the mug, which he says he actually rather likes. Under these circumstances, many of us would conclude that it is perfectly appropriate for Beth to walk over to Allen's cubicle, pick up the mug, and walk away with it. If we feel uncomfortable with Beth's enforcing her rights unilaterally, we may conclude that this case is appropriate for enforcement by the state on Beth's behalf.

Let's call this the 'Contract for Personal Property' case. Beth initially has a primary moral right to Allen's performance of his promise. Should Allen refuse, she has a remedial moral right to his handing over the coffee mug after the fact. Yet this remedial moral right may be violated, just as the primary moral right may be violated. If it is clear that Allen is not going to provide the coffee mug, she has an enforceable moral right. All else equal, Beth may take the mug herself, or the state may legitimately take the mug on Beth's behalf.[106] In either event, this example differs from the Ordinary Promise case because it involves an enforceable right.

Corrective justice would again govern Allen's conduct. Allen would have a duty to provide the mug to Beth, in this way correcting the wrong he has committed by breaking his word. Should he do so, it would be corrective justice. In addition, redressive justice could now also have a role. Assuming that Allen is not going to correct the wrong in a timely fashion, redressive justice would govern Beth's conduct in taking the coffee mug for herself. In such a case, Beth (or the state) would not be acting on Allen's behalf – the acts of redress would be made on Beth's behalf.

3 *enforceable rights without corresponding duties to correct*

There may also be cases in which corrective justice would not apply, while redressive justice would apply. Imagine, instead of the above agreement between Allen and Beth, that Beth has accidentally left her own coffee mug on Allen's desk, intending to give the mug to another individual.

106 This article will leave open the question of whether legitimate enforcement requires a neutral third party. See Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Va L Rev 1391 at 1418, discussing this concern. Whether it is Beth, or someone acting on her behalf, in either case it would be redressive justice that governs the enforcement conduct.

Allen takes the mug, thinking it is a gift. Beth then calls Allen up on the phone, explaining her mistake. Assume that Allen has not changed his position in any way in reliance on the mistaken delivery. Nor has Allen committed any wrong. Allen may be unjustly enriched by Beth's error, however.

As Stephen Smith suggests, there is reason to question whether, as a matter of morality, one acquires an affirmative duty to return benefits that were transferred by mistake.[107] In such cases, the enriched party has neither consented to a duty, nor committed a wrong. There is no obvious manner in which the enriched party has harmed the party who made the mistake.[108] Arguably, what the enrichee owes is a duty not to interfere when the transferor seeks to retrieve the property at issue.[109]

Perhaps we will feel that the enrichee does have a moral duty to return the property if it is easy to do so (say, if Allen could just walk across the room and place the coffee mug on Beth's desk). But suppose instead that it would be quite costly for Allen to return the coffee mug. We might assume that Allen was transferred to a different office in another country and could only send the mug back to Beth at great expense. It will cost him hundreds of dollars to return the mug, and hours of effort. Let's call this the 'Unjust Enrichment' case.

In the Unjust Enrichment case, Beth can legitimately retrieve her property. Allocation back is appropriate, and redressive justice applies to these enforcement actions. On the other hand, it is at least debatable whether Allen would have a moral duty to return the coffee mug, especially if doing so would be costly.[110] Given certain perspectives on moral duties, corrective justice will become a questionable fit in such cases, while redressive justice has a definite place.[111]

107 See Stephen A Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Texas L Rev 2177 at 2194, suggesting 'that we reject the idea that there is in principle a duty to return benefits transferred by mistake.'

108 See ibid at 2182: 'The first normative problem raised by the orthodox account [of unjust enrichment law] is how to explain the existence of a duty that seems inconsistent with the harm principle.'

109 See ibid at 2194, suggesting 'that we regard our fundamental duty in this area of the law as a duty not to interfere with another's attempt to retrieve defectively transferred property.'

110 Several commenters have offered responses to this fact pattern under which there is a moral duty to return the enrichment under the given fact pattern. This article is not intended to resolve the question of whether such a duty exists. For present purposes, the point is that the asymmetry described here is conceptually possible and that it is an asymmetry that arises under a mainstream account of the morality of unjust enrichment fact patterns.

111 To use Stephen Smith's example, ibid at 2187: 'Suppose that what has been transferred by mistake is a cow, and suppose further that the owner of the cow lives a

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4 *redressive remedies that diverge in content from duties to perform*

We may also recognize cases in which corrective justice and redressive justice would both apply to the same fact pattern, but the content of the remedies appropriate to each would diverge. Suppose that we modify the prior contractual fact pattern. Imagine that, instead of providing a coffee mug to Beth, Allen has agreed that he will mow Beth's lawn for a week in return for Beth's work in fixing Allen's computer. Beth performs as agreed, and then Allen refuses to mow the lawn. In this case, it would be morally legitimate for Beth or the state to force monetary compensation (depending on the means used), but it would not be appropriate for Beth to coerce Allen to mow the lawn.[112]

Let's call this the 'Contract for Services' case. Coercing performance here would interfere improperly with Allen's autonomy or with his dignity as a fellow human being.[113] Allen does owe a corrective duty to mow the lawn, but Beth's enforcement right would only allow her to take the equivalent in value – expectation damages. The 'next best thing' for Allen to do is the act he promised to perform. But the remedies legitimately available to Beth have a different content. Redressive justice and corrective justice are both potentially applicable, but their remedial implications may differ.

5 *redressive remedies in the tort setting*

None of this is to deny that there are cases where the overlap between types of justice is more complete. Nor is the application of redressive justice limited to cases involving property or contractual performance. Consider a case where corrective justice and redressive justice substantially overlap. Imagine a tort case along the following lines. Allen negligently causes Beth to slip and fall, with the result that she breaks her leg. It is plausible, per the continuity thesis, to say that Allen will owe a secondary duty to pay for Beth's medical bills. If the money is paid, this would be

thousand miles away. Would anyone accept as self-evident that the transferee is under a duty to return the cow to its owner?' Note also that, if a similar type of divergence exists in tort settings, this could help account for areas of tort law that provide for private rights of action concerning legal wrongs that are not moral wrongs. *C.f.* Zipursky, 'Civil,' supra note 7 at 726–7, describing legally recognized torts where there is no moral duty of repair.

112 For further analysis of this type of problem, see Gold, 'Property Theory,' supra note 104 at 53–8.

113 See ibid at 56, discussing this value as it relates to contract enforcement. See also Anthony T Kronman, 'Paternalism and the Law of Contracts' (1983) 92 Yale LJ 763 at 779, describing a legal point of view under which 'even a contract of short duration that calls for the performance of routine and unobjectionable tasks is a contract of self-enslavement and therefore legally unenforceable if it bars the employee from substituting money damages for his promised performance.'

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corrective justice. It is also plausible to say that Beth should be able to demand that payment (and, in an appropriate fashion, to exact that payment from Allen). There is no obvious reason why the amount that Beth could claim as a matter of redressive justice will differ in quantity from the amount that Allen ought to provide as a matter of corrective justice (although the two categories could differ substantially in certain cases).

Let's call this the 'Tort Case.' Here, corrective justice and redressive justice will both fit the fact pattern, and, given our assumptions, they will call for the same allocation of funds. Allocation back is also an appropriate conceptual structure, despite the possibility that we can never put Beth in a situation like the one that existed before the wrong. The monetary payment still undoes the transaction to the extent possible, given the inability to turn back the clock. The possibility of symmetry in some cases, however, should not obscure the asymmetries in other cases. And, as will be developed below, even here there are reasons to think that corrective justice and redressive justice are importantly different.

6 *summary*

What we can see from these examples is that there are plausible cases where (a) Allen would have a duty governed by corrective justice, but Beth would have no enforcement right under redressive justice (the Ordinary Promise case); (b) Allen would have a duty governed by corrective justice, and Beth would have an enforcement right governed by redressive justice (the Contract for Personal Property case); (c) Allen arguably would have no duty under corrective justice, but Beth would have an enforcement right governed by redressive justice (the Unjust Enrichment case); and (d) Allen would have a duty governed by corrective justice, and Beth would have an enforcement right governed by redressive justice, but the remedies under each would diverge (the Contract for Services case). As these examples indicate, there is no necessary symmetry between corrective and redressive justice.

C THE SIGNIFICANCE OF AUTHORSHIP

Differences in outcome are not the only reason to differentiate corrective justice and redressive justice. Even if we put to one side those fact patterns where duty bearers have a duty to correct and right holders have no right to enforce (e.g. the Ordinary Promise Case), and those fact patterns where duty bearers arguably have no duty to correct but right holders do have a right to enforce (e.g. the Unjust Enrichment case), there is an additional reason to be interested in redressive justice as a distinct form of justice. It is commonly felt that it matters whether allocation back occurs at the hands of a wrongdoer or at the hands of a

right holder or someone acting on her behalf. Something is lost if our account of justice does not attend to this question of authorship.[114]

Let's return to the coffee-mug examples. Assume that Allen has wrongly taken Beth's coffee mug. He simply converted it to his own use. Imagine that Allen and Beth have an office mate, Charles, who is known for his absent-mindedness. Charles removes the coffee mug from Allen's desk in order to admire the mug's pattern. In the midst of conversation, he then inadvertently sets it down on Beth's desk. At this point, it is too late for Allen to correct much of the harm caused by his breach. He is largely unable to do the 'next best thing' by returning the mug, because Beth now has her coffee mug.

Allen's duties with respect to fixing the wrong (other than perhaps an apology) have become substantially moot.[115] Assuming Allen eventually felt bad about his breach, this is unfortunate from his perspective. Perhaps he can still try to make it up to Beth in some other way, but he cannot return her coffee mug himself. In addition, even if Allen feels no remorse, the outcome differs depending on which party repairs the effects of a wrong. For, in a corrective justice case, Allen has done as much as he can to comply with his duties. Corrective justice has a meaning for Allen, and for Beth as well, and that meaning is different from a mere return of the coffee mug by any means that happen to transpire.[116] It is a distinctly just outcome if Allen returned the mug himself, of his own choice.

A similar point holds when we compare corrective justice with redressive justice. It is meaningful whether the wrongdoer has repaired the

114 In making this claim, this article takes no position on the question of whether corrective justice involves agent-relative reasons for action. *C.f.* Gardner, 'What Is Tort,' supra note 1 at 11, concluding that conformity with norms of both corrective and distributive justice is a matter of agent-neutral concern; Coleman, *Risks*, supra note 11 at 310–1, distinguishing corrective justice from distributive justice on the theory that corrective justice involves agent-relative reasons for acting.

115 On apologies and their relation to corrective justice, see Scott Hershovitz, 'Harry Potter and the Trouble with Tort Theory' (2010) 63 Stan L Rev 67 at 97–8. See also Tony Honoré, 'The Morality of Tort Law: Questions and Answers' in David G Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995) 73 at 82: 'The *form* that our responsibility for an outcome should take remains an open question. An apology or telephone call will often be enough.'

116 This fact pattern also helps illustrate how redressive justice, like preventive justice, is concerned with liability rather than desert. The duty bearer does not deserve to be subjected to redressive acts; she is appropriately subjected to them if necessary to undo the transaction. See Jeff McMahan, 'Self-Defense and the Innocent Attacker' (1994) 104 Ethics 252 at 259–60, describing an analogous feature of preventive justice. Since it would no longer be necessary for Beth to retake the mug in order to undo the transaction – she now has it, thanks to a lucky accident – redressive justice would no longer support Beth in taking a mug from Allen.

effects of the wrong, or the right holder has repaired the effects of the wrong. Indeed, this is one reason why a redressive response is often considered inappropriate when we are certain that the wrongdoer will allocate back if given the opportunity. In an important respect, we may consider it more ideal – and differently just – if the wrongdoer has fixed the harms he caused.[117] If corrective justice is not forthcoming, however, redressive justice may be entirely fitting as a second best outcome.[118]

Corrective justice theorists have reason to emphasize the wrongdoer's duty to correct, and they are onto something important when they adopt constraints like Gardner's proposition (c). The fact of having wronged someone may never vanish, but the extent of a wrongdoer's cause for regret can vary significantly based on that wrongdoer's subsequent conduct.[119] The outcome is normatively different, as between the wrongdoer's rectification of a wrong and anyone else's rectification of that wrong. Corrective justice and redressive justice thus stand in normative contrast. Viewing corrective justice as one overarching category of justice in allocating back would obscure the importance of a *wrongdoer's* corrective conduct.[120]

Responsibility for the outcomes of our actions is closely tied to who we are.[121] Indeed, it may be a necessary part of our personal

117 This type of authorship problem may also arise under other categories of justice, depending on how the relevant category is theorized. For example, there is a question whether, under certain approaches to retributive justice, the punishment involved must be inflicted by the victim or may instead be inflicted by the state. See Jean Hampton, 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA L Rev 1659 at 1692.

118 The possibility that one type of justice is second best to another type need not call into doubt the less desired type. See Gardner, 'What Is Tort,' supra note 1 at 23, describing the view that an exercise of corrective justice may be a partial failure for tort law.

119 One important distinction from a moral perspective may be that the rational remainder – the reasons for regret that a wrong was committed that exist even after we have tried to fix it – could be greater if a wrongdoer's corrective conduct was not voluntary. As Gardner indicates, we cannot ever cancel out the fact that we have committed a wrong, even if afterwards we have undone the effects of that wrong. See Gardner, 'What Is Tort,' supra note 1 at 35–7, discussing rational remainders and corrective justice. On the other hand, we can have fewer reasons for regret if we tried to fix what we did.

120 There may also be a parallel aspect to a right holder's redressive conduct. As Stephen Darwall has suggested, right holders have a special authority when it comes to responding to wrongs committed against them; see Stephen Darwall, *The Second-Person Standpoint* (Cambridge, MA: Harvard University Press, 2006) at 18. From this perspective, a right holder has done something different from a third party when she acts pursuant to this authority.

121 See Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999) at 29, noting that '[i]f actions and outcomes were not ascribed to us on the basis of our bodily movements and accompaniments, we could have no continuous history or character.'

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identities.[122] Yet ascription of responsibility for wrongs is not the only way that our identities are shaped by our actions. Our further actions after a wrong occurs are also ascribed to us. Someone who commits an act of negligence that harms another is responsible for that act. If this same individual voluntarily fixes the consequences of this negligence, he is responsible for the act of correction. His personal identity is changed for the better – he is not just responsible for committing a wrong. If instead someone else fixes the consequences of his negligence, that other party is responsible. Corrective justice and redressive justice have very different implications for duty bearers and right holders because they have very different authors.

The fact that the remedies involved may appear identical in their material effects should not obscure the differences between allocation back when authored by a wrongdoer and allocation back when authored by a right holder. Both types of allocation are meaningful but in different ways. Wrongdoers, right holders, and also third parties can quite plausibly care whose choice it is to undo a transaction – and see it as a different *kind* of justice depending upon which party brings this about.

D REDRESSIVE JUSTICE AND ITS DIFFERENTIATION FROM OTHER TYPES OF JUSTICE

At this point, it is worth considering whether redressive justice is truly distinct from other types of justice.[123] Unquestionably, redressive justice resembles other types of justice in important respects. The prior discussion indicates why corrective justice and redressive justice merit distinct categories. Even if one agrees that corrective justice and redressive justice contrast significantly, however, one might conclude that redressive justice is sufficiently similar to other types that it lacks a suitable boundary line.

122 Arguably, outcome responsibility is one of the most basic features of our identities. See ibid at 40: 'Our responsibility for what we do and for its outcome is inseparable from our status as persons. We cannot disclaim outcome responsibility without undermining that status; and outcome responsibility is therefore more fundamental than moral and legal responsibility, which are species of it.'

123 A similar concern besets corrective justice theories, since corrective justice could be seen to share the same space as distributive or retributive justice. It should be noted, however, that not all theorists consider differentiation to be a concern (or, at least, not all theorists face an identical differentiation challenge). Some theorists suggest that retributive justice is a subset of corrective justice; see e.g. Wright, supra note 73 at 175. Others appear to treat preventive justice as a form of corrective justice; e.g. Weinrib, *Idea of Private Law*, supra note 11 at 144, n 41, suggesting corrective justice allows for 'injunctions that prevent unjust harm.' Yet others are ready to conclude that corrective justice is in fact a type of distributive justice; e.g. Wojciech Sadurski, 'Social Justice and Legal Justice' (1983) 3 Law & Phil 329.

This Part will, therefore, analyse whether redressive justice is truly differentiated from its neighbours.

An initial candidate for overlap is preventive justice – the type of justice which covers self-defence and other-defence. Redressive justice clearly has a close relationship to preventive justice, as both address permissible conduct by right holders in relation to wrongs.[124] But preventive justice is concerned with the adjustment of harms *ex ante*. Redressive justice involves *ex post* concerns. Preventive justice and redressive justice thus address a distinct type of problem. To put the point another way, preventive justice is not concerned with allocating back, and redressive justice is. And, notably, there are cases of necessity where preventive justice would be improper but redressive justice would still plausibly apply.[125]

Retributive justice is another potential candidate. We might think that redressive justice involves acting against someone who has wronged you in a retributive manner.[126] Here, the difficulty centres on the remedy and its basis. Redressive justice is concerned with the undoing of transactions; it is not about punishment, vengeance, or holding someone accountable for their misconduct. This is not to deny that retribution has relevance for private law. For example, compensatory damages in tort may be redressive, while punitive damages may be retributive.[127] Yet it is to deny that redressive justice and retributive justice are the same thing.

Lastly, redressive justice differs from distributive justice. Distributive justice is concerned with allocation across a group (even a group of two).[128] Redressive justice, like corrective justice, is concerned with allocating back. As a legal matter, it is also characteristic of redressive justice that it may apply even in cases where the *status quo ante* is distributively unjust. The very rich plaintiff may, under redressive justice, successfully seek compensation from a very poor defendant based on that

124 As indicated, on some theories preventive justice and corrective justice appear to overlap; e.g. Weinrib, *Idea of Private Law*, supra note 11 at 144, n 41. A similar perspective might be proposed for preventive and redressive justice.

125 As McMahan notes, there is an asymmetry between preventive and corrective justice. See McMahan, supra note 116 at 279, discussing a necessity case where preventing a harm would not be legitimate, but correcting its effects after the fact would be. A similar asymmetry would exist when we compare redressive and preventive justice.

126 On the different senses of 'acting against' in civil recourse theory, see Gold, 'Taxonomy,' supra note 84 at 68–78, describing conceptions that cover enforcement, accountability, and revenge.

127 For a suggestion that different parts of private law may implicate different conceptions of recourse, see ibid at 78–82.

128 See Gardner, 'What Is Tort,' supra note 1 at 12–3, noting the possibility of local distributive justice between two parties.

defendant's tortious actions.[129] Distributive concerns can still be relevant to the availability of legal redress – bankruptcy cases attest to this.[130] Distributive justice is, nevertheless, a distinct norm of justice.[131]

There is a possibility of overlap between categories, both in law and in morality. In individual cases, private law might simultaneously achieve more just distributions; provide retribution against wrongdoers; provide corrective justice on behalf of wrongdoers; and also provide redressive justice on behalf of right holders. The overlap, however, is by no means guaranteed.

VII *The soundness of redressive justice*

This taxonomy of justice now brings us to a normative concern. The fact that a norm is a norm of justice does not mean that it is sound – that is, it does not mean that it is worth pursuing.[132] Is redressive justice a sound norm of justice? And if so, when is it sound? The analysis below will offer some initial thoughts on when redressive justice is likely to be sound, if it

129 In this respect, redressive justice shares features with corrective justice, which may similarly involve the restoration of an unjust *ex ante* distribution; see e.g. Coleman, *Risks*, supra note 11 at 304–5, describing corrective justice as a type of justice that permits distributive injustice. While redressive justice and corrective justice are distinct, they are both separable from distributive justice as norms of allocation back.

130 Distributive justice might also play a part in legal reasoning in spheres that are primarily concerned with redressive or corrective justice. See Anthony T Kronman, 'Contract Law and Distributive Justice' (1980) 89 Yale LJ 472, suggesting that rules of contract law can be used to implement distributive goals. In addition, we can coherently speak of the just distribution of redressive justice in those legal systems where some individuals have an opportunity for redress and others do not. For analysis of a related concern in the corrective justice setting, see John Gardner, 'What Is Tort Law For? Part 2: The Place of Distributive Justice' 1 at 6–18, online: SSRN <http://ssrn.com/abstract=2269615>.

131 Some readers of an earlier draft of this article have suggested instead that redressive justice may be a norm of procedural justice. This suggestion, while interesting, must ultimately fail. As indicated by the authorship argument earlier in this article, a distinctive feature of redressive justice is that it leads to different substantive outcomes with respect to the right holders and duty bearers involved in an allocation back. Likewise, where the state is involved, redressive justice is exercised on behalf of different parties from corrective justice. These considerations thus involve more than procedural fairness. Just as preventive justice is not merely a procedural variation on corrective justice, redressive justice is not merely a procedural variation on corrective justice.

132 See Gardner, 'What Is Tort,' supra note 1 at 17, 31–2, discussing the possibility that a norm of justice may not be sound. While this may appear counter-intuitive, the possibility makes sense once justice is understood in terms of norms of allocation. A norm of allocation could be a bad norm. This distinction also allows us to speak of norms of justice from the legal point of view, even if we are not certain whether those norms are in fact desirable in an ideal world.

is. As will become clear, the question of when redressive justice is sound is a complex one.[133] Given its context dependence, this Part will not try to resolve the issue of soundness for the entire category of redressive justice, but will instead suggest further lines of inquiry.

Many of the important questions about the legitimacy of redressive justice are variations on prior questions about corrective justice. For example, consider the case where a very rich individual enforces his or her rights in redressive justice against a very poor individual. In light of such fact patterns, one might suggest that redressive justice is only sound to the extent that it is consistent with distributive justice.[134] Such a conclusion would not necessarily mean that redressive justice is an undesirable norm, since it might still have room to operate within this limit. But this conclusion could substantially constrain redressive justice as a desirable practice.

For purposes of this article, such concerns will be bracketed. An analysis of the proper relation between redressive justice and distributive justice would largely repeat pre-existing arguments concerning the proper relation between corrective justice and distributive justice.[135] These are significant arguments, and well worth discussing. The present article, however, will focus on questions about the soundness of redressive justice that are specific to redressive justice rather than to allocation back in general.

A THE SOUNDNESS OF REDRESSIVE JUSTICE AS SUCH

A redressive justice sceptic might conclude that legitimate acts of redressive justice are non-existent, given the distinctive nature of redressive justice.[136] In particular, the sceptic might focus on the legitimacy of one individual's imposing his or her will on another. If we associate redressive

133 See Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990) at 116, noting that 'there do not appear to be any simple, nontrivial theses connecting claims with the permissibility of enforcing them' [Thomson]

134 This would not be the same as collapsing redressive justice into distributive justice. One might have a world (admittedly hypothetical) in which all ex ante distributions are just, and redressive justice could still cover the reversal of wrongful transactions. For a similar distinction in the corrective justice setting, see Gardner, 'What Is Tort,' supra note 1 at 15, discussing the view that distributive justice may be a condition on the sound exercise of corrective justice.

135 For further discussion, see the works cited in supra note 14.

136 Along these lines, a sceptic might argue that preventive justice involves an innate right of self-protection, while redressive justice would involve a right holder in illegitimate uses of force. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at 160–2, describing Kant's distinction between the entitlement to use force in cases of self-defence versus cases involving acquired rights, which cannot be enforced in a state of nature.

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justice with unilateral acts of coercion – even to enforce important moral rights – then we may conclude that redressive justice has no place as a sound moral norm. This conclusion could be reached even if, as an interpretive matter, it is thought that redressive justice norms underpin private law.

Leading theorists have expressed concerns about a wronged party's coercive responses to wrongdoing.[137] Arthur Ripstein, for example, builds on Kantian arguments to suggest that legitimate enforcement of an individual's remedial rights requires the neutral, third party role of the state. As he suggests, 'Private enforcement is not merely inconvenient: it is inconsistent with justice because it is ultimately the rule of the stronger.'[138] If this is correct, then a right holder would not legitimately be able to coerce the undoing of wrongful transactions without the imprimatur of the state. A redressive justice skeptic might adopt these arguments as a basis to challenge the soundness of redressive justice across the board.[139]

While this sceptical challenge raises important considerations, doubts about unilateral enforcement of rights need not call into question the soundness of redressive justice *per se*. The reason why is apparent when we consider the scope of redressive justice. Redressive justice is not limited to cases of purely private coercion: it includes cases where remedial rights are enforced by the state on behalf of a private party.[140] Although the legitimacy of private enforcement is an important issue in political and legal theory, our position on this issue does not determine whether redressive justice is a sound norm as a categorical matter.

Resolution of the debate over unilateral coercion tells us more about the legitimate applications of redressive justice than it does about whether redressive justice can be legitimate as such. When the state acts as a neutral third party, it is quite plausible to think that it acts on behalf of a right holder, consistent with proposition (d). Proposition (d) is disjunctive: it

137 See Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Va L Rev 1391 at 1415–21.

138 See ibid at 1418.

139 On the other hand, a pre-legal right to enforce has prominent defenders, Locke among them. See Katrin Flikschuh, 'Reason, Rights, and Revolution: Kant and Locke' (2008) 36 Philosophy and Public Affairs 375 at 383, comparing Kant's and Locke's views. See also Gold, 'Moral Rights,' supra note 97 at 1910–2, suggesting a broadly Lockean account of private rights of action.

140 This might also include cases of self-help, if self-help is understood in terms of a delegation from the state. See Malcolm Thorburn, 'Justifications, Powers, and Authority' (2008) 117 Yale LJ 1070 at 1118, describing cases in which '[t]he decision-making authority of ordinary citizens is derived entirely from their role as stand-ins for public officials who are unable to make those decisions themselves.'

suggests that redressive justice occurs when a right holder allocates back in enforcing his rights, *or* when another party allocates back on behalf of that right holder. Thus, if we conclude that unilateral coercion in order to undo a transaction is never legitimate, it could still make sense to say that a neutral, state-provided remedy is legitimate *and* constitutive of redressive justice.[141]

B THE SOUNDNESS OF REDRESSIVE JUSTICE IN PARTICULAR CASES

The soundness of redressive justice may also be assessed for specific categories of cases. To this end, many of the considerations that are relevant to the legitimate exercise of self-defence are also relevant to the exercise of rights of redress. As Jeff McMahan notes, there is a moral presumption against shifting of harms that applies in the self-defence setting.[142] Redressive justice implicates this same presumption. Redressive justice involves conduct designed to undo transactions that have already happened, and by extension, it involves conduct designed to shift harms from one party to another.[143]

Redressive justice is admittedly not an *ex post* mirror image of preventive justice. There are cases where preventive justice would be inapplicable *ex ante*, yet redressive justice may be entirely appropriate *ex post*.[144] Necessity cases, like the famous tort case of *Vincent v Lake Erie*,[145] are good examples. In these contexts, one individual commits a wrong against another as a way to protect herself or her property in an emergency. *Ex ante*, the emergency not only excuses the commission of the wrong; it also precludes the victim from legitimately preventing that wrong. But *ex post*, a redressive remedy for the resulting damages might still be entirely fitting.[146]

141 Note that it may also be useful to understand the idea of redressive justice even if it is not sound. Redressive justice appears to underpin much of private law – particularly contract law and unjust enrichment. It may also help to explain substantial parts of tort law.

142 See McMahan, supra note 116 at 252–3.

143 See ibid at 253, noting that, while a harm which has already occurred cannot literally be redistributed, 'it nevertheless counts as shifting the harm if a new harm is imposed on another person as a means of cancelling out the initial harm by fully compensating the victim.'

144 See ibid at 279, arguing for the view that 'one cannot infer the permissibility of preventing a harm from the fact that the harm wrongs the victim and imposes on the injurer a duty *ex post* to compensate the victim for the harm.'

145 109 Minn 456, 124 NW 221 (Minn 1910).

146 The point here is not solely legal but also moral. The right holder may legitimately deserve damages, even if he or she could not legitimately prevent the harmful conduct. For a helpful discussion of such necessity cases in moral terms, see Joel Feinberg,

Despite such asymmetries, several of the limitations on an individual's permissible actions under a preventive justice rubric will also be important considerations when assessing the soundness of redressive justice for particular fact patterns. Similar concerns apply in both settings. These include the severity and type of harm caused by the right holder's conduct in enforcing her rights, and the proportionality of that harm in comparison to the wrong at issue.

For example, on a commonly held view, there is generally no right to commit a wrong in rectifying a wrong.[147] Yet there may be particular cases where causation of harm in rectifying a wrong is legitimate.[148] If we adopt this position, we will want to consider what limitations may exist on this harmful conduct. Assume a victim of theft (or the state acting on the victim's behalf) has to break a cheap lock on the thief's garage in order to retrieve the stolen property. This might be a legitimate redressive act, depending on the circumstances. But tearing down a garage wall and destroying the thief's house might not be morally acceptable if this level of harm would not be required to retrieve the property. Presumably only a limited amount of harm or likely harm to the wrongdoer would be permissible under a sound norm of redressive justice.[149]

Or, suppose that the victim of a wrong will shortly receive a remedy from the wrongdoer, a remedy which will compensate the victim as fully as possible for the consequences of the wrong. It would arguably be improper for the victim to enforce her remedial rights, if she could just as readily receive a voluntary act of corrective justice from the wrongdoer instead. Redressive conduct is not necessary to bring about an allocation back in this case.[150] The legitimacy of the right holder's conduct could thus be contingent on the duty holder's post-wrong decisions.

Proportionality may also be a relevant limit on redressive justice. Suppose, for example, that we return to the Contract for Personal Property case. If Allen has wrongly refused to give Beth's coffee mug to her, and if

'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 Philosophy & Public Affairs 93 at 102.

147 See Coleman, *Risks*, supra note 11 at 306, describing view under which '[w]rongful gains and losses cannot be annulled so as to create other wrongful gains or losses.'

148 See ibid at 308, suggesting 'we might hold that it is sometimes permissible to impose a wrongful loss in order to eliminate another wrongful loss only if there is a significant or substantial difference between the loss eliminated and the loss created, not otherwise.'

149 See McMahan, supra note 116 at 277, suggesting that 'self-defense is in all cases subject to a requirement of minimal force – namely, that one must not cause a greater harm if one can defend oneself equally effectively by less harmful means.'

150 Although there are differences, this suggestion roughly parallels a necessity requirement in self-defence cases. For example, we may not kill an attacker in self-defence if we could easily prevent the attack by less harmful means.

she has a legitimate claim to take the coffee mug, redressive justice would not countenance Beth's killing Allen as a convenient way to acquire the mug. Irrespective of her privilege to take the mug, the means used would constitute an independent wrong against Allen and a disproportionate wrong as well. Indeed, even if the bare minimum of harm required to successfully take the coffee mug would involve killing Allen, this would not be sufficient to justify doing so.[151]

There are no doubt other criteria that are important in delimiting a sound norm of redressive justice. The above discussion is intended only to outline some of the issues that would need resolution. Focusing on these considerations suggests that redressive justice, if it is to be sound, will involve an interlocking set of normative concerns. It also suggests that there is a substantial benefit in turning our attention to redressive justice. Many of the above normative problems can be obscured by an emphasis on corrective justice – the other form of justice in allocating back.

VIII *Redressive justice and civil recourse theory*

Finally, it is worth considering the relation between redressive justice and theories of private law. The above analysis suggests that corrective justice – at least, if it is constrained by proposition (c) or a similar restriction – will have difficulty explaining certain features of private law. Such corrective justice accounts will struggle with problems of vicarious agency, as well as potential problems of doctrinal fit.[152] The challenge will be particularly acute if existing legal doctrine does not recognize pre-judgment duties of repair. In addition, private law involves more than just the state intervening to enforce a plaintiff's rights: the state intervenes at the option of the plaintiff. Private law thus implicates a three-party relationship: the plaintiff, the state, and the defendant are all involved.[153] This relationship is also in need of explanation.

Civil recourse theories help to explain this relationship. Like corrective justice approaches, a civil recourse theory emphasizes the rights and

151 Thomson makes a similar point in the preventive setting. See Thomson, supra note 133 at 114: 'You have a claim against me that I not smash your flamingo; all the same, it is not permissible for you to prevent me from doing so if the only means you have of preventing me – shooting me – are unacceptably drastic.'

152 This is not to say that all corrective justice theories will face the same difficulties. Arthur Ripstein indicates how a corrective justice approach can be combined with a narrow conception of civil recourse. See Ripstein, 'Civil Recourse,' supra note 7 at 198–203.

153 See Zipursky, 'Philosophy of Private Law,' supra note 5 at 635–6, describing the triangular relationship among the plaintiff, the state, and the defendant.

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duties immanent in private law reasoning.[154] A prominent feature of the civil recourse account is that it also emphasizes the role of private rights of action.[155] This account does so, moreover, in a way that does not depend on the existence of pre-judgment duties to repair a wrong. On the civil recourse view, where one individual violates the 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.

Civil recourse theory is not necessarily grounded in any particular type of justice. In fact, the theory as currently formulated suggests a disconnect between civil recourse and norms of justice. Depending on one's explanatory ambitions, this need not be a flaw. Yet civil recourse theory will be much more compelling as an explanation of private law fields if it can draw on a conception of justice between individuals.[156] The internal point of view draws a strong connection between private law adjudication and the doing of justice.

Civil recourse might constitute an exercise of redressive justice.[157] The key question is: what does it mean to 'act against' another? Redressive justice involves allocation back through a right holder's exercise of an enforcement right. Civil recourse theorists, in contrast, often emphasize holding someone accountable, or getting satisfaction, when they talk about 'acting against' another.[158] In some cases, civil recourse even sounds retributive.[159] If civil recourse is primarily a matter of retribution, then a redressive justice account of private law would be in tension with

154 See Zipursky, 'Civil,' supra note 7 at 742.

155 See ibid at 746–7.

156 As discussed above, private law remedies are, from the internal point of view, generally understood in terms of justice. See Smith, 'Why Courts,' supra note 35 at 82–3, analysing this feature of private law remedies.

157 This view would parallel a common claim in corrective justice theory. On the possibility that tort law has a constitutive relationship with corrective justice, see Gardner, 'What Is Tort,' supra note 1 at 2, noting the possibility that tort law has some ends which it helps to constitute, and not merely to serve. The idea that tort law has a constitutive relationship with corrective justice is also prominent in Ernest Weinrib's work; e.g. Weinrib, *Idea of Private Law*, supra note 11 at 19. A similar relation may exist for redressive justice.

158 For a helpful account of how this idea of getting satisfaction can impact tort remedies, see John CP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul L Rev 435.

159 For example, civil recourse could be retributive if we adopted Anthony Sebok's recourse-based account of punitive damages. See Anthony J Sebok, 'Punitive Damages: From Myth to Theory' (2007) 92 Iowa L Rev 957, accounting for punitive damages in terms of private revenge.

civil recourse theory. Even if it is grounded in 'getting satisfaction,' civil recourse will not fit with redressive justice norms.

Still, civil recourse can have other meanings. If we take civil recourse to include enforcement of a plaintiff's rights through private rights of action, then redressive justice will offer something important for civil recourse theory.[160] Assuming that redressive justice is apt in the relevant circumstances, it will help provide a basis in justice for civil recourse. So construed, a successful exercise of civil recourse will often constitute redressive justice – and, indeed, can be conceptually linked to redressive justice.[161]

Civil recourse theorists need not ground civil recourse in any form of justice in order for the theory to fit many of the core features of legal doctrine. As an interpretive theory, it may take a non-committal stance on the relation between recourse and justice.[162] The theory is, nevertheless, more cogent if it ties recourse to justice. When we interpret a human practice like private law, it is generally considered a plus if our account could plausibly reflect the morality of legal participants.[163] Legal actors understand private law remedies in justice-based terms.[164] If redressive justice underpins civil recourse, then there is a way to more closely link civil recourse theory to this legal point of view.

IX *Conclusion*

Redressive justice has been overlooked as an independent category, presumably because of the resemblance it bears to corrective justice or to retributive justice. Many cases of redress are functional equivalents of a

160 Notably, civil recourse can also include the exercise of enforcement rights. See Gold, 'Taxonomy,' supra note 84 at 68–73; also Goldberg & Zipursky, supra note 83 at 353, suggesting in the contractual setting that '[c]ivil recourse empowers the plaintiff to enlist the power of the state to force the defendant to perform'; Gold, 'Moral Rights,' supra note 97, discussing how private law can be interpreted in terms of moral enforcement rights.

161 The qualifier 'often' is used in order to take into account punitive damages settings and other limited circumstances in which private law does not involve allocation back. With these circumstances excepted, the suggested claim is that there is not only a correlation between civil recourse and redressive justice, but also a conceptual link between the two.

162 On the non-committal stance of civil recourse theorists, see Solomon, supra note 7 at 1779–84. On non-committal justifications more generally, see Gardner, 'What Is Tort,' supra note 1 at 4.

163 See Stephen A Smith, *Contract Theory* (Oxford: Clarendon Press, 2004) at 13–24, describing morality criteria for interpretive legal theories.

164 See Smith, 'Why Courts,' supra note 35 at 82–3, interpreting court orders in light of the common understanding that they involve a type of justice.

wrongdoer's correction of a wrong or a wrongful loss. Many other cases of redress overlap significantly with a retributive response to wrongdoing. This lack of attention may also stem from a sense that redressive justice is often a second best to corrective justice. Our focus naturally turns to a more ideal form of justice – correction by the duty holder – rather than the form of justice that governs exercises of redress.

The present article seeks to change this state of affairs. Redressive justice has a strong claim to be the type of justice that justifies private law. We can explain many private law remedies as redressive remedies, without having to argue that the state is acting on behalf of a wrongdoer. Redressive justice is also significant from a normative perspective. Justice in the undoing of transactions is a fundamental form of justice, and not all such cases involve a voluntary choice by a wrongdoer to correct his or her wrongdoing. The moral questions raised by a right holder's choice to enforce a remedy in such cases are important ones, and they cannot readily be subsumed within questions of a wrongdoer's remedial obligations.

When allocation back is brought about on behalf of a right holder, this has a unique significance. Moreover, a variety of legal settings are at best an awkward fit for corrective justice norms, given their focus on wrongdoer conduct. Redressive justice thus deserves a place alongside corrective, distributive, retributive, and preventive justice. In mapping out our norms of allocation, we will capture substantially more if we recognize that redressive justice has a distinct role in our moral and legal reasoning. In turn, recognizing this role may help us to better address the moral questions raised by private law adjudication.

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