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A MORAL RIGHTS THEORY OF PRIVATE LAW

ANDREW S. GOLD*

ABSTRACT

Private law—the law of torts, contracts, and property—is at an interpretive impasse. The two leading conceptual theories of private law—corrective justice and civil recourse theories—both suffer from significant weaknesses. Given these concerns, private law may even seem incoherent. The problem is not insurmountable, however. This Article offers a new way to understand private law. I will argue that private law is best understood as a means for individuals to exercise their moral enforcement rights.

Moral enforcement rights exist when an individual may legitimately use coercion to force another individual to comply with his or her moral duties. Not all interpersonal relationships implicate moral enforcement rights. However, when moral enforcement rights do exist, the law typically provides a private right of action. Indeed, the private right of action fills an important need, given the backdrop of existing legal regulation. Individuals usually may not coerce a wrongdoer on their own, and thus require some other mechanism to do so. The private right of action can be seen as a substitute means of enforcement given that the state ordinarily prohibits self-help.

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Recognizing this basis of private law allows us to explain a variety of private law remedies from compensatory damages to injunctive relief. It also accounts for the characteristic structure of the private right of action. In this way, a moral rights-based theory offers an important advance over leading corrective justice accounts. At the same time, a moral rights-based theory also provides an appealing basis for the private right of action. As a result, it avoids the normative doubts that often beset civil recourse theories.

Finally, this Article has important normative implications. A moral rights understanding helps us to assess whether private law should be reformed in those cases in which legal and moral practices overlap. In such cases, it is often thought that if legal principles diverge from moral principles, the legal principles should be changed. Interpreting the private right of action as a means to exercise moral enforcement rights suggests that core private law doctrines converge with conventional moral principles.

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INTRODUCTION

Legal theorists are in a bind. One might expect that after years of debate the conceptual basis of private law would be settled. Yet private law—the law of torts, contracts, and property—has proven difficult to explain in conceptual terms. It is not that there are no theories available. Leading accounts ground private law in principles of corrective justice¹ or civil recourse.² Unfortunately each of the existing approaches has significant weaknesses. This Article offers a new theory, grounded in individuals' moral enforcement rights.

A corrective justice theory focuses on the judicial tendency to order remedies that make a plaintiff whole. The law, on this view, rectifies injuries caused by a legal wrong.³ For corrective justice theorists, private law is thus explained in terms of a wrongdoer's duty to correct a wrong, or a wrongful loss.⁴ In contrast, a civil recourse theory focuses on the structure of the private right of action. This theory argues that private law fields—most commonly,

1. For leading corrective justice accounts of tort law, see JULES L. COLEMAN, *RISKS AND WRONGS* (1992) [hereinafter COLEMAN, *RISKS AND WRONGS*]; ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992). Although many corrective justice theorists focus on tort law, there are also significant corrective justice accounts in the contract law setting. See Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118 (Peter Benson ed., 2001); Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013 (2007); Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1 (2009).

2. For leading civil recourse accounts, see Jason Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 643-44 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Zipursky, *Private Law*]; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82-86 (1998) [hereinafter Zipursky, *Rights, Wrongs, and Recourse*]; see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (suggesting a constitutional grounding for a right to redress); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007) (suggesting a recourse-based account of punitive damages).

3. See, e.g., WEINRIB, *supra* note 1, at 142-44 (describing liability in private law as corrective justice).

4. See, e.g., COLEMAN, *RISKS AND WRONGS*, *supra* note 1, at 374 (describing tort law in terms of an injurer's duty to make good a loss).

the law of torts—are best understood in terms of the plaintiff's right to redress if she was wronged by another.⁵ Civil recourse theories explain the private right of action as a means for wronged parties to act against the person who wronged them.⁶ This notion sounds in revenge, in holding someone accountable, or in “getting satisfaction.”

Moral enforcement rights suggest a new way to see the private law structure. A moral enforcement right exists when an individual has the moral standing to coerce another individual in order to prevent or correct a wrong.⁷ This idea has been recognized in moral philosophy, but its significance is underappreciated in legal theory.⁸ We can better understand private law if we see it as a legal path for individuals to force compliance with their moral rights in cases in which such individuals have legitimate standing to use coercion. The claimant's act of enforcement is then the central feature of private law.

A hypothetical may help to illustrate. In a state of nature, assume that two individuals, *A* and *B*, reach an agreement. *A* agrees to give *B* a useful thing he possesses—let us say a table—in return for *B* working on *A*'s behalf for several hours—let us say assistance in building a house. *B* proceeds to do this work according to the agreement's terms and then requests the table. *A* owes a duty, pursuant to the agreement, to give *B* the promised table. Suppose *A* refuses to hand it over. In such a case, *A* has a continuing responsibility to hand over the table. Moreover, *B* would be justified in taking the table from *A*, irrespective of *A*'s continued refusal to provide *B* with the table.

In this prelegal state of affairs, the result of the agreement, assuming the table originally belongs to *A*, is that *B* has a primary moral right to the table, and *A* has a primary moral duty to provide the table to *B*. When *A* fails to provide the promised performance, *B* has a remedial moral right to the table—or if that is no longer an

5. See generally Zipursky, *Private Law*, *supra* note 2.

6. See *id.* at 646 (describing the right of action in tort law as “a power to act against the defendant through the state”).

7. For a discussion of the link between moral rights and coercion, see *infra* Part II.A.1-2. Although I refer to it as a right, in Hohfeldian terms, the moral enforcement right can be denoted as a “privilege.” See *infra* note 144.

8. For a discussion of this type of standing in moral philosophy, see *infra* Part II.A.3.

option, a right to the next best thing—and *A* has a remedial duty to provide the table—or the next best thing. Primary and remedial moral rights and duties are not the only normative concepts at issue in this fact pattern, however. There is also the question of suitable responses to a breach. It is here that a moral enforcement right comes into play. This is a distinct moral concept, and it provides a means to understand private law.

B's justifiable responses to *A*'s failure to meet his remedial duties are implicated by these facts. Not all violations of moral rights correspond to justifiable coercion. In this case, however, *B* has a moral right to force a remedy. Under the facts of this hypothetical, it would be appropriate for *B* to simply take the table from *A*, presumably without violence, if *A* continues in his refusal to hand over the table. *B* might forgive *A*'s failure, but, morally speaking, she would be within her rights to take the table.⁹ *A* would also have a corresponding moral duty not to interfere with *B*'s efforts to take the table from him, a reflection of his original moral duty to provide the table pursuant to the agreement.¹⁰

But what if we are no longer in a state of nature? Strictly speaking, private law enforces legal rights and legal duties, not moral rights and moral duties. As such, it is not immediately obvious how private law is implicated by the above series of moral rights, duties, and legitimate coercive remedies—the law refers to distinctly legal concepts.¹¹ The law's provisions need not correspond to the moral rights and duties that exist in a state of nature with respect to promises, agreements, and other interpersonal relationships.

Although it is true that moral rights and legal rights are distinct, we can understand them as normatively related. One way of interpreting private law is to see it as a substitute for a wronged party's

9. On the potential for divergence between one's moral duties and one's moral rights, see Jeremy Waldron, *A Right To Do Wrong*, 92 *ETHICS* 21, 24-25 (1981).

10. Or so I will argue. There are theorists whose work suggests that, in a state of nature, a party in the wrongdoer's position would be appropriately able to resist. See Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *VA. L. REV.* 1391, 1415-21 (2006).

11. The view that legal and moral concepts are distinct does not preclude them from intersecting, however. For an insightful analysis of how legal practices and moral practices sometimes overlap, see Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708 (2007).

right to rectify or prevent violations of her primary moral rights.¹² In a civil society, self-help is often prohibited. When moral rights would be legitimately enforceable by a wronged party in the absence of a civilized state, it is appropriate for the wronged party to have an alternative avenue for enforcing them. The legal rights and powers that constitute private law can thus be conceptually linked to individuals' underlying moral rights and duties.

Consider the case of a wrong that has already been committed. All else equal, the commission of a wrong means the wrongdoer is now morally required to do the next best thing to performing his or her primary obligation.¹³ The wrongdoer might not do so. Corrective justice, in other words, might not be forthcoming. We can then see the private right of action as a substitute for obtaining justice by means of self-help.¹⁴ When individuals are subject to the state's regulations and no longer permitted to bring about corrective justice on their own, their moral right to correct a wrong still remains.¹⁵ The state accordingly takes on an obligation to provide an alternative legal means of enforcement in those cases in which self-help would otherwise be justified.

Notably, the aim of private law on this account is not to bring about corrective justice as such; rather, it is to enable private individuals to bring about corrective justice when they are entitled to do so.¹⁶ The private right of action may be grounded in corrective

12. Civil recourse theorists offer a related, but distinct, argument concerning the private right of action. For these theorists, private law is a substitute for acts of recourse by means of self-help. See, e.g., Zipursky, *Civil Recourse*, *supra* note 2, at 735-38.

13. See John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 32-33 (2011) (discussing a theory of corrective justice along these lines); see also Joseph Raz, *Personal Practical Conflicts*, in *PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS* 172, 189-93 (Peter Baumann & Monika Betzler eds., 2004) (analyzing the continuity of reasons for action).

14. As noted below, the private right of action may also, on this theory, serve as a substitute for acts of preventive justice taken by means of self-help. See *infra* notes 97-98 and accompanying text. The argument in this Article is not bound to a corrective justice understanding of private law remedies.

15. In Locke's view, for example, there is an inalienable right to redress. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, in *POLITICAL WRITINGS OF JOHN LOCKE* 261, 265-66 (David Wootton ed., 1993); see also Zipursky, *Civil Recourse*, *supra* note 2, at 735-37 (discussing how this idea may be understood to underlie the private right of action).

16. In this sense, private law is private, and it can be fairly described as neutral. See Zipursky, *Private Law*, *supra* note 2, at 634 (noting how this area of law is private); *id.* at 653-54 (assessing how this area of law can be considered neutral).

justice in certain cases—the availability of suit often stems from the wronged party’s right to bring about corrective justice through a state-provided means. That said, the key to understanding private law is to recognize that, even in these cases, the private right of action is a means of exercising moral enforcement rights.

At the same time, the private right of action is not about the wronged party’s right to act against another, or at least not as civil recourse theorists conventionally understand it.¹⁷ Bringing suit may, for some, be a way of seeking recourse, but the law is not concerned with recourse as traditionally described.¹⁸ Moral enforcement implicates a different value from getting satisfaction. The private right of action instead involves a legal power to use the courts as a source of remedies based on a moral enforcement right—for example, the right to bring about corrective or preventive justice¹⁹—which is in turn based on a primary moral right—for example, the right to contractual performance.²⁰ So construed, the private right of action is an avenue of enforcement, provided to those individuals who may legitimately use coercion to accomplish this end.

I will refer to the above understanding as a moral rights theory of private law. Like the leading alternatives, this Article seeks to develop an interpretation consistent with the internal point of view of legal actors. The Article is therefore premised on a structure of

17. If “acting against” another is construed with sufficient breadth, it becomes possible to view the theory of private law presented in this Article as a distinct form of civil recourse theory. For discussion of this potential viewpoint, see Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. (forthcoming 2012). An important distinction is that the theory described in this Article will often be concerned with the redress of wrongful losses, not wrongs as such. Conventional civil recourse theory focuses on the redress of wrongs as such. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) [hereinafter Goldberg & Zipursky, *Torts as Wrongs*].

18. Or, ordinarily it is not. I leave open the possibility that this is exactly what punitive damages accomplish. Cf. Sebok, *supra* note 2, at 1006-08.

19. Other types of justice might also be implicated. I will develop this possibility in a future paper. See Andrew S. Gold, *Redressive Justice* (Feb. 4, 2011) (unpublished manuscript, on file with author).

20. To speak more precisely, we may say that the moral enforcement right is derived, at least in part, from the reasons for action that support the wrongdoer’s primary duty. In a corrective justice case, it may no longer be possible to perform the original obligation pursuant to its terms; that obligation no longer exists. Cf. Gardner, *supra* note 13, at 45-46 (suggesting how primary rights can be related to secondary rights on a “right-in, right-out” principle).

rights, duties, wrongs, and remedies. Starting from this foundation, the argument proceeds in several steps. Part I introduces the two leading conceptual accounts of private law—corrective justice accounts and civil recourse accounts. Both of these accounts offer important insights based on the concepts used in judicial reasoning, and they provide background for the discussion to follow.

Part II explains the idea of moral rights and how it fits in with a particular conception of interpersonal morality. This Part then develops the distinction between an individual's primary moral rights and an individual's legitimate right to coerce compliance from others—that is, an individual's moral enforcement rights. This Part also explains how ideas of standing are connected to these moral enforcement rights.

Part III demonstrates how moral enforcement rights can be linked to the private right of action. In many cases, the state precludes individual actors from exercising self-help. Drawing on social contract theory, this Part suggests that the state thus takes on an obligation to provide an alternative means for individuals to exercise their moral enforcement rights. The private right of action is the means that the state has provided. This Part then explains how a variety of private law remedies are understandable in these terms. In addition, it shows how this interpretation of private law improves on leading corrective justice and civil recourse accounts.

Part IV considers the normative implications of the moral rights approach. Recently, legal theorists have critiqued the rationale of existing law based on its perceived divergence from interpersonal morality. For example, some argue that contract law diverges undesirably from the morality of promising in light of the rationale of contract law remedies.²¹ Such critiques generally overlook the role of moral enforcement rights. By linking moral enforcement rights to the private right of action, this Article suggests a different way to understand these issues. As a result, we can better assess whether private law is in need of reform. Finally, the Conclusion summarizes the overall significance of a moral rights-based theory.

21. See, e.g., Shiffrin, *supra* note 11, at 733-36.

I. CORRECTIVE JUSTICE AND CIVIL RECOURSE

A. *Interpretive Methodology*

At the outset, a brief discussion of methodology may be helpful. This Article offers an interpretive account of private law. There are myriad ways to explain private law.²² Interpretive accounts focus on rendering a legal practice intelligible. In other words, they “highlight[] its significance or meaning.”²³ In order to do so, an interpretive approach calls on theorists to explain the law in a way that is consistent with the internal point of view of legal actors.²⁴ This methodology has several implications.

Two standard criteria for a successful interpretation are fit and coherence. In order to be convincing, an explanatory account must show some degree of fit between the theory and the cases that the theory seeks to explain.²⁵ Otherwise, it is fair to say that the theory is not actually interpreting private law as it actually exists. Coherence is also a basic aim. Although coherence is by no means guaranteed in a field developed over centuries by multitudes of judges, it is reasonable to expect that legal principles will generally hang together.²⁶ Moreover, if private law is truly incoherent, it will be quite difficult to render it intelligible.²⁷ Some pluralism in the law is no doubt inevitable. That said, an interpretive account attempts to find a unifying principle that explains the core features of a legal field.

The particular type of social practice at issue suggests additional measures by which to assess a legal interpretation. Law is a purposive activity, and it is an activity that expressly relies on a variety of concepts meaningful to legal actors.²⁸ Given these facts, two

22. Cf. Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT 1, 10 (Jules Coleman ed., 2001) (“There is no uniquely correct explanation of a concept, nothing which could qualify as *the* explanation of the concept of law.”).

23. STEPHEN A. SMITH, *CONTRACT THEORY* 5 (2004).

24. See *id.* at 14 (suggesting that “to understand the human practice of law, it is necessary to take account of how law is understood from the inside—by legal actors”).

25. See *id.* at 7-11 (describing the fit criterion).

26. See *id.* at 11-13 (describing the coherence criterion).

27. See *id.* at 12-13 (discussing the interpretive concern with intelligibility).

28. Cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS*

additional criteria are often proposed: a morality criterion and a transparency criterion. Both are relevant when we consider theories of private law.

The morality criterion suggests that a good interpretive account of private law can be expressed in terms of conventional morality.²⁹ This is not to say that an interpretation must show the law to actually be moral.³⁰ Instead, the concern is whether the law could at least be viewed as moral by legal actors. The law's self-understanding is that the law has authority—people ostensibly have a moral duty to follow the law's directives—and this claim of authority makes most sense if the law is normatively within the mainstream.³¹ All else equal, an interpretation of the law that is morally acceptable under conventional moral principles, or that judges could at least sincerely think is morally acceptable, is more plausible than an interpretation that shows a significant divergence between the meaning of the law and established moral precepts.³²

The transparency criterion is also an important factor. The law is transparent to the extent that the reasons courts give for their decisions are their actual reasons.³³ One might interpret the law without regard for judicial language, perhaps concluding that judges are insincere in their express reasoning.³⁴ Or, alternatively,

IN THE MAKING AND APPLICATION OF LAW 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Foundation Press, Inc. 1994) (1958) ("Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living").

29. See SMITH, *supra* note 23, at 13-24 (describing the morality criterion).

30. One might hold such a view. For present purposes, a moderate version of the morality criterion is adopted. Under this version, it is enough if legal actors could sincerely believe that the law is consistent with morality. On the distinction, see *id.* at 13.

31. See *id.* at 15 (noting that "laws are understood, from the inside, as providing morally good or justified reasons to do what the law requires"). This is not to say that law actually has the authority it claims to have or is commonly thought to have. Cf. Laurence Claus, *The Empty Idea of Authority*, 2009 U. ILL. L. REV. 1301, 1302-06 (critiquing the idea that law as such has authority).

32. See SMITH, *supra* note 23, at 15-24 (developing this point and offering a moderate morality criterion for assessing interpretive accounts of the law).

33. See *id.* at 24-32 (analyzing this assumption); see also JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 21 (2001) [hereinafter COLEMAN, *PRINCIPLE*] (critiquing economic explanations of tort law because they render "obvious and intuitively transparent features of tort law mysterious and opaque").

34. See SMITH, *supra* note 23, at 26 ("Particular instances of judges consciously misrepresenting their reasoning undoubtedly exist, but it is just not plausible to suppose that the vast corpus of legal reasoning, which was created by countless individuals over centuries, is

one might think that judges operate under a delusion—deciding cases on the basis of different reasons from the reasons they themselves perceive.³⁵ Both of these assumptions are accurate in individual cases. But it is reasonable to think that most judges are sincere in what they express in their opinions and relatively accurate in setting forth the basis of their reasoning.³⁶ The transparency criterion thus calls for an explanatory account that accepts the reasons courts give as the actual basis for decision.

In some cases, it is appropriate to consider a further criterion. Consilience can be important when more than one theory adequately fits the legal doctrine under review. Under the norm of consilience, an explanatory account is better if, all else equal, it can explain more legal phenomena than the alternatives.³⁷ Consilience is not always decisive in explaining legal phenomena. However, it is relevant for present purposes. Even if prior interpretations of private law are viewed as adequate in terms of fit, coherence, morality, and transparency, I will suggest that this Article explains more of the legal phenomena at issue than leading alternatives.

This brings us to a pragmatic question. It may still be asked why we should desire an interpretive account—of what use is an account that recognizes the internal point of view? Interpretation may be interesting as an academic exercise, but perhaps it is unhelpful when we assess how the law should be. However, there are good reasons for developing such an account, even if one's first priority is normative.³⁸ As Stephen A. Smith notes, "Before attempting to

all the result of a mass effort by judges to misrepresent what they are doing.")

35. See *id.* at 28 ("[I]t seems implausible, in light of their training and sophistication, that all or even many judges are in the grips of a collective false consciousness—and if it were plausible, then it seems likely that legal theorists would be in the grip of similar forces.").

36. See *id.* at 26.

37. See COLEMAN, PRINCIPLE, *supra* note 33, at 38-41 (discussing the role of consilience for explanatory accounts). As will be elaborated below, one potential advantage of the account in this Article over leading corrective justice accounts is that it explains a greater scope of legal phenomena.

38. There are important critics of recent interpretive approaches to private law, however. See, e.g., Steve Hedley, *The Shock of the Old: Interpretivism in Obligations*, in STRUCTURE AND JUSTIFICATION IN PRIVATE LAW 205 (Charles Rickett & Ross Grantham eds., 2008) (discussing the importance and effects of interpretivism); see also Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 326-36 (2007) (suggesting that Stephen Smith's and Jules Coleman's reliance on a transparency criterion does not adequately take into account the

reform the law, reformers must understand the law that they are planning to reform.”³⁹ Indeed, for some purposes, an account that adopts the internal point of view is indispensable. In certain contexts, we need to know what the law presently is. So long as doctrines like *stare decisis* carry normative weight, it is important to understand the concepts embedded in existing legal doctrine.⁴⁰ Moreover, as will be developed later, an interpretive account allows us to address normative theories that call for a correspondence between the law’s rationale and the tenets of interpersonal morality.⁴¹

In light of these considerations, this Article seeks to understand private law concepts from the internal point of view. Legal theorists have elaborated several criteria for the successful interpretation of a legal practice, including fit, coherence, morality, transparency, and consilience. Perfect compliance with each of these criteria may not be feasible.⁴² That said, they provide important guidelines. This Article seeks to reach an acceptable outcome under each of these criteria.

B. The Bilateralism Challenge

Emphasizing the concepts used in judicial decision making causes problems for certain explanatory accounts of private law. Assuming that courts mean what they say, it is difficult to square core features of private law with consequentialist interpretations of legal doctrine.⁴³ The reasoning of private law cases is, in core areas,

importance of determinacy). In addition, some have questioned the stringency of the fit criterion as applied under certain interpretive approaches. See William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 637-43 (2007).

39. See SMITH, *supra* note 23, at 6.

40. See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 476-77 (2000) [hereinafter Zipursky, *Pragmatic Conceptualism*].

41. See *infra* Part IV.

42. Cf. SMITH, *supra* note 23, at 13 (concluding, with respect to the coherence criterion, that “a requirement of perfect unity seems not only unattainable in practice, but also inappropriate in theory”).

43. It may be possible to adopt a transparency criterion while accepting a consequentialist account of the underlying basis for a legal institution. The difficulty is in adopting a consequentialist account of the legal reasoning expressed in judicial opinions. See COLEMAN, PRINCIPLE, *supra* note 33, at 36 n.20 (suggesting that an economic account could explain tort law “at the grand level of political theory”). It is true that occasionally judges are quite explicitly consequentialist in their reasoning. The question, however, is whether such reasoning

deontological—private law reasoning is usually concerned with the duties that one party owes to another as a result of their particular interactions.⁴⁴ The private law regularly invokes a backward-looking analysis based on conduct that has already occurred.⁴⁵

At the heart of private law is a conception of relational duties and rights. A relational duty is a duty owed by an individual to persons or classes of persons, in contrast to a general duty to simply act in a certain way.⁴⁶ A duty to keep a promise, for example, is specifically owed to the promisee, and not to anyone else. A relational right is similar. It is held against a person or class of persons. It is not a general right that a certain outcome transpire, but a right that exists with respect to a particular counterparty.

The recurrent appearance of relational rights and duties in private law can be explained and justified in a variety of ways, but the implications of these concepts pose difficulties for consequentialist accounts of private law. Remedies that redress violations of relational rights and correspond to relational duties typically involve a bilateral structure—these remedies involve payments from the wrongdoer to the wronged party.⁴⁷ Consequentialist accounts, such as efficiency-based accounts, do not require this bilateral relationship. Indeed, such accounts could easily be in tension with bilateral remedies.⁴⁸

is characteristic of the practice being interpreted. *Cf. id.* at 26 n.3 (calling into doubt the possibility that judges in the tort law setting aim at efficiency, although recognizing that some individual judges are overtly interested in obtaining efficient results).

44. More precisely, private law is dikaiological—it involves relational rights and duties, not merely duties as such. For analysis of this distinction, see Michael Thompson, *What Is It To Wrong Someone? A Puzzle About Justice*, in REASON AND VALUE 333, 338 (R. Jay Wallace et al. eds., 2004).

45. See COLEMAN, PRINCIPLE, *supra* note 33, at 16-18 (critiquing the “forward-looking” aspects of economic accounts of tort law); Zipursky, *Pragmatic Conceptualism*, *supra* note 40, at 462 (noting that the determination of liability involves a backward-looking analysis).

46. For an illuminating discussion of relational duties and their place in tort law, see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1825-39 (1998). It is also worth noting that, in many cases, the duties at stake are agent-relative rather than agent-neutral. On the idea of agent-relative norms, see DEREK PARFIT, REASONS AND PERSONS 27 (1984). See also Robin Bradley Kar, *Hart’s Response to Exclusive Legal Positivism*, 95 GEO. L.J. 393, 429 (2007), noting this feature of moral and legal obligations.

47. This argument is well developed in COLEMAN, PRINCIPLE, *supra* note 33, at 16-18.

48. See Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 851-53 (2007) (noting the challenge that overreliance

This provides the basis of an argument known as the bilateralism critique.⁴⁹ Courts are apparently concerned with the idea that a wrong has occurred between the parties to a dispute. Indeed, the rights, duties, wrongs, and remedies in private law are all connected. Courts determine that a wrong occurred in light of the parties' relational rights and duties. Remedies, in turn, are provided *because* a wrong was committed.⁵⁰ The bilateral structure of private law, in other words, is central to private law decision making. This is a substantial challenge to an efficiency account that takes the transparency of judicial opinions as a guideline.⁵¹ Efficiency accounts can explain this bilateral structure, but they treat it as a contingent legal feature rather than a fundamental component of private law reasoning.⁵²

As developed below, corrective justice accounts are a leading response to the bilateralism of private law. They suggest that the payment of damages from the wrongdoer to the wronged party is a correction of the wrong committed. Civil recourse theories are a more recent alternative approach, and they are similarly effective. They suggest that the payment of damages from the wrongdoer to the wronged party is part of a system under which the wronged party is empowered to act against the wrongdoer. Both accounts take seriously the relational rights and duties at issue in private law disputes. The strengths and weaknesses of these approaches will be discussed in turn.

poses for economic accounts of contract remedies).

49. See COLEMAN, PRINCIPLE, *supra* note 33, at 18 n.7 (describing the history of this critique).

50. See SMITH, *supra* note 23, at 31 (noting that, under the legal view, damages are "intended to remedy a past harm").

51. The extent to which the transparency of judicial opinions should be assumed is still an open question. There are arguments for rejecting a transparency criterion as currently applied. See Kraus, *supra* note 38, at 326-36; Oman, *supra* note 48, at 846-50. If, however, one concludes that transparency is an appropriate assumption when interpreting private law, then consequentialist accounts face a serious hurdle. See SMITH, *supra* note 23, at 31 (developing this point in the contract law setting).

52. See Zipursky, *Civil Recourse*, *supra* note 2, at 701-09 (analyzing the contingency of bilateralism under an efficiency account).

C. Corrective Justice Theories

Corrective justice is a longstanding theme in private law,⁵³ and it offers an intuitively appealing explanation of the relational rights and duties, wrongs, and remedies in private law. This form of justice seeks to correct wrongs committed by *A* against *B* by requiring *A* to compensate *B* in the amount of *B*'s loss.⁵⁴ In cases where *A* possesses something which belongs to *B*, corrective justice would require *A* to restore that thing or its equivalent to *B*. For example, if *A* stole property from *B*, corrective justice would require the return of the property to *B* or its equivalent in value.

Liability under a corrective justice approach views the parties as correlatively situated—the plaintiff and defendant have corresponding rights and duties.⁵⁵ The plaintiff is entitled to the right that the defendant infringed upon and therefore has a corresponding entitlement to a remedy that restores what was lost or its value.⁵⁶ Likewise, the defendant has a duty not to infringe upon the plaintiff's right and has a corresponding duty to undo the injury he caused.⁵⁷ The judicial remedy reflects this interpersonal relation. Indeed, the judicial remedy is often thought to constitute corrective justice and not solely to help attain it.⁵⁸

Moreover, the normative appeal of corrective justice is easy to recognize in a variety of tort and contracts cases.⁵⁹ Making a

53. See WEINRIB, *supra* note 1, at 56 ("Aristotle's account of corrective justice is the earliest—and in many respects, still the definitive—description of the form of the private law relationship.").

54. See *id.* at 62 ("[Corrective justice] focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner."). The classic development of this idea is in V ARISTOTLE, *THE NICOMACHEAN ETHICS* 153-57 (J.E.C. Welldon trans., Prometheus Books 1987).

55. See Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 59 (2003).

56. See *id.* at 60.

57. See *id.*

58. See Gardner, *supra* note 13, at 2 ("Corrective justice is a special kind of justice that, according to Weinrib, the law of torts helps to constitute, and not merely to serve.").

59. It should also be noted that there are some cases in which a corrective justice rubric may be questioned on normative grounds. In particular, commentators focus on cases in which correcting a wrong would restore a distributively unjust status quo. See Solomon, *supra* note 2, at 1774-75 (discussing this concern).

wronged party whole appeals to a basic principle of conventional morality. When one person wrongs another, the wrongdoer ordinarily takes on a moral duty to remedy that wrong.⁶⁰ Corrective justice accounts often build on this idea. On this view, private law remedies are premised on the wrongdoer's responsibility for correcting the wrong he or she committed.⁶¹ The private law may not always succeed in erasing the effects of a wrongful act.⁶² Nevertheless, it can offer the next best thing.

When we review the content of certain private law remedies, there is also a good fit with legal doctrine. Many standard legal remedies are designed to make the claimant whole.⁶³ Compensatory damages in tort law and expectation damages in contract law can both be understood in terms of corrective justice.⁶⁴ Arguably, restitutionary remedies are corrective as well.⁶⁵ And, even when compensation falls short of fully repairing an injury, compensatory damages may still be understood as an effort to correct.⁶⁶ Remedies that correct a wrong are not the only remedies available in private law, but they are core examples.⁶⁷

Endorsing a corrective justice rubric does not resolve all of the controversial issues in private law.⁶⁸ Corrective justice has a major explanatory advantage over its consequentialist rivals, however. It is one of the few explanations of private law that can adequately account for the bilateralism of private law rights, duties, and reme-

60. See Gardner, *supra* note 13, at 28-37 (analyzing this feature of morality).

61. See COLEMAN, RISKS AND WRONGS, *supra* note 1, at 374 (describing tort law in terms of an injurer's duty to make good a loss).

62. Indeed, even a perfectly crafted corrective remedy cannot change the fact that a wrong was committed in the first place. See Gardner, *supra* note 13, at 35-36 (discussing this issue).

63. See, e.g., *infra* note 201 and accompanying discussion (discussing the compensatory remedy in tort law that makes a claimant whole).

64. See, e.g., COLEMAN, RISKS AND WRONGS, *supra* note 1, ch. 18 (tort law); Gold, *supra* note 1, at 46 (contract law).

65. See, e.g., Ernest J. Weinrib, *Correctively Unjust Enrichment*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 31, 31 (Robert Chambers et al. eds., 2009).

66. See Gardner, *supra* note 13, at 33-34.

67. See *infra* note 202 and accompanying discussion.

68. Notably, this type of theory does not identify which primary rights and duties private law will recognize. See SMITH, *supra* note 23, at 147 ("Corrective justice is meant to explain (secondary) duties to repair rather than (primary) duties not to cause wrongful losses. Primary duties must be explained on other grounds.").

dies.⁶⁹ Efficiency-based accounts sometimes suggest that the bilateralism of private law is a second-best approach, given various institutional constraints on private law.⁷⁰ These claims may be accurate from an economic standpoint, but they do not address the conceptual problem. Corrective justice accounts can explain bilateralism as a core feature of private law doctrine.

At first glance then, corrective justice may seem like a convincing way to explain private law concepts of right, duty, wrong, and remedy. Unfortunately, corrective justice accounts suffer from their own set of explanatory weaknesses—weaknesses that the civil recourse theory brings into focus.

D. Civil Recourse Theories

Like corrective justice accounts, civil recourse accounts build on relational rights and duties, wrongs, and remedies. A civil recourse theory argues that private law fields are best understood in terms of the plaintiff's right to redress through the courts when the plaintiff was legally wronged by another individual.⁷¹ But the focus of a recourse-based approach is not upon whether the law corrects a wrong (or wrongful loss) by making the victim whole. Instead, civil recourse theorists suggest that the law enables a wronged party to have a proportional response to a wrong.⁷² As Benjamin Zipursky, a leading recourse theorist, explains, "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."⁷³

Under this account, the structure of the private right of action is a core feature of private law.⁷⁴ Significantly, the private right of action involves three parties, not two. It involves a relation between

69. For a detailed account of how economic explanations struggle to explain bilateralism in a way that corrective justice does not, see COLEMAN, PRINCIPLE, *supra* note 33, at 13-24.

70. *Cf.* Oman, *supra* note 48, at 858 (analyzing this possibility as an explanation for the bilateralism in contract law).

71. See Zipursky, *Civil Recourse*, *supra* note 2, at 746-47.

72. See *infra* note 201 and accompanying text.

73. Zipursky, *Civil Recourse*, *supra* note 2, at 735 (emphasis added).

74. See *id.* at 733-34, 738.

the party who was wronged, the state, and the wrongdoer.⁷⁵ Private rights of action implicate a legal power held by the plaintiff—a power to initiate the state’s response to the defendant’s wrongdoing.⁷⁶ The state’s role is thus contingent. But for the plaintiff’s decision to sue, the state will play no role in providing redress for the wrong committed against the plaintiff.

For civil recourse theory, the private right of action gives us insight into the nature of private law reasoning.⁷⁷ From this perspective, the aim of private law is not necessarily to make the plaintiff whole.⁷⁸ If it were, we might expect the state to intervene of its own accord, as occurs in the criminal law setting.⁷⁹ Instead, private rights of action are a constant feature of private law adjudication.⁸⁰ Corrective justice approaches, at least in some cases, are not well-suited to explain why private law should be so focused on private rights of action. If private law is understood as a means for civil recourse, this structure is readily explained.

Corrective justice accounts may also have difficulty explaining the substantive standing requirements of private law.⁸¹ The private right of action is not available to just anyone who wishes to bring suit. Under the typical common law approach, it is only the wronged party who is in a position to initiate a private right of action.⁸² A plaintiff must have had *her* rights violated by the defendant in order to bring suit—merely suffering foreseeable harm is not necessarily enough to provide standing.⁸³ This structure places the wronged

75. See *id.* at 738-39.

76. For a detailed discussion of this structural feature, see *id.* at 733-39.

77. See *id.* at 738 (“[W]e may understand [certain tort law] principles as instances of a more general principle that one who has been legally wronged is entitled to a private right of action against the wrongdoer.”).

78. See *id.* at 737.

79. Cf. Solomon, *supra* note 2, at 1800 (“[I]f tort law is about restoring the moral order in some sense, then perhaps the state should enforce this moral order itself.”).

80. See Zipursky, *Civil Recourse*, *supra* note 2, at 737-38.

81. See Solomon, *supra* note 2, at 1800; Zipursky, *Civil Recourse*, *supra* note 2, at 714-16 (analyzing the substantive standing rule in tort law); Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 2, at 40-42, 72-79 (same).

82. See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 2, at 15-40 (describing a variety of tort law doctrines that share this feature).

83. See Zipursky, *Civil Recourse*, *supra* note 2, at 717-18.

party at the center of the private action in a way that need not follow from a corrective justice premise.⁸⁴

In addition, corrective justice accounts often focus on the wrongdoer's remedial duty to correct the wrong he or she committed.⁸⁵ This raises a fit objection to the extent that corrective justice theory grounds private law on this remedial duty. Private law—in particular the law of torts—frequently fails to provide judicial remedies for a wrongdoer's failure to pay compensatory damages until a court orders such damages.⁸⁶ According to the recourse theorists, this omission suggests that tort law is not premised on corrective justice norms.⁸⁷ Presumably, if compensatory damages were grounded in a duty to correct a wrong, such damages, at least in cases of intentional delay, would be a matter of course.⁸⁸

Finally, civil recourse accounts allege that the variety of remedies available through the private right of action conflicts with corrective justice theories.⁸⁹ Injunctive relief and punitive damages are good examples. At least in some cases, the law does not make a wronged party whole, and in other cases, it seems to be providing additional forms of compensation beyond what corrective justice would require. This is especially clear in the case of injunctive relief—there is not yet a wrong to correct when a court issues an injunction against future wrongdoing.⁹⁰

The civil recourse perspective explains many of these features. For one thing, it explains private law's substantive standing requirements. Civil recourse proponents argue that the apparent aim of private law is to enable the plaintiff to act against the party who wronged her.⁹¹ This explains why the private right of action is not

84. For a discussion of corrective justice theories that do try to explain this feature, see *infra* note 183.

85. See Zipursky, *Civil Recourse*, *supra* note 2, at 697-98.

86. There are, however, cases in which prejudgment interest is awarded. In addition, there are important areas of private law outside of tort law that more clearly suggest a prejudgment duty to pay. See *infra* note 210 for further discussion of this issue.

87. See Zipursky, *Civil Recourse*, *supra* note 2, at 718-21.

88. For further discussion of this claim, see *infra* note 210.

89. See Zipursky, *Civil Recourse*, *supra* note 2, at 710-13.

90. See *id.* at 713 (noting that injunctive relief cases "are not cases of defendants taking responsibility for the harm they have caused"). This argument depends, of course, on the view that corrective justice is solely concerned with *ex post* responses to wrongs or harms.

91. See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 2, at 86.

available to redress an individual's foreseeable losses that result from wrongs committed against a third party.⁹² The value of acting against another is, naturally, specific to the person who was wronged.⁹³

The state's role in this process is also explained. Recourse theorists argue that enabling a wronged party to act against the party who wronged her can be normatively desirable,⁹⁴ or at least that such an understanding is a plausible interpretation of the private law perspective.⁹⁵ The individual's power to act against a wrongdoer by means of the state can then be understood as something that the state is obligated to provide.⁹⁶ The private right of action on this account is a substitute for the right of self-help that would otherwise exist in a state of nature.⁹⁷ Under this theory, the right of recourse is a right retained by individuals when they are the victims of wrongdoing.⁹⁸

From a pragmatic perspective, it is easy to see why the state prohibits self-help in the setting of the typical private law dispute. Self-help could easily escalate into feuds and bloodshed.⁹⁹ The right

92. *See id.* at 89.

93. *See id.* at 87 ("The answer is that entitlement to recourse does not spring from the need precipitated by injury. It springs from the affront of being wronged by another.")

94. *See* Solomon, *supra* note 2, at 1807 (suggesting, in support of a civil recourse account, that "[t]ort law, and the accountability it enforces, affirms that our activities and our life plans are *ours*, and that we must answer for the harm that comes from them if we take insufficient care").

95. It is clear that some recourse theorists do not intend for their arguments to provide a full-fledged normative defense of civil recourse. *See* Zipursky, *Civil Recourse*, *supra* note 2, at 750 ("My aim is not to defend the vindictive impulses that I have been describing."); *id.* at 755 (emphasizing that the aim in his article is "interpretive and not normative").

96. *See id.* at 739 ("The right of action—insofar as it is correlative to a duty—is correlative to an obligation in the state to privilege and empower persons to act against those who have wronged them.")

97. *See, e.g., id.* at 735-37 (describing how acting through the state against the person who has legally wronged you can be understood in social contract terms); Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 2, at 85-86 (same).

98. *See* Zipursky, *Civil Recourse*, *supra* note 2, at 746-47.

99. *See* Goldberg, *supra* note 2, at 602 ("Because it is unmediated, vengeance runs high risks of error, overkill, additional violence, and ongoing feuds, which tend to work against the resolution of disputes and to undermine civil order."); Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 2, at 85 (noting that, under a civil recourse approach, "[o]ur society ... avoids the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving individuals powerless against invasions of their rights"); *cf.* Solomon, *supra* note 2, at 1781 (discussing and critiquing this argument).

to recourse, however, can be exercised through a more civil, state-provided avenue: the private right of action.¹⁰⁰ Civil recourse theories suggest that the private right of action is an entitlement that the state is bound to provide.¹⁰¹ On this view, courts provide private rights of action as a rightful avenue of recourse, one that the plaintiff deserves to have.¹⁰²

An important difficulty with the recourse approach is that it at least appears to endorse a natural right to revenge.¹⁰³ It seems unlikely that the majority of courts understand private rights of action in terms of revenge. Not all civil recourse proponents support a revenge-based reading: recourse may simply refer to holding someone accountable, or getting “satisfaction.”¹⁰⁴ Nevertheless, even so construed, recourse implicates a vindictive impulse that is quite controversial.¹⁰⁵ And, assuming that recourse, whether construed as revenge or as getting satisfaction, is appropriate in certain cases, it remains doubtful whether the typical breached contract or negligence action would be a suitable fact pattern to support such a norm.¹⁰⁶ Civil recourse accounts do an admirable job of fitting

100. See Zipursky, *Private Law*, *supra* note 2, at 642.

101. See *id.* (“[T]he state—having deprived individuals of other means of self-help—is obligated to empower individuals with an avenue of civil recourse through the courts.”).

102. See *id.*

103. See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 2, at 55-58 (critiquing civil recourse accounts on the theory that they treat as worthy the impulse to get even); see also Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1406-13 (2003) (concluding that retributive actions may be justifiable, but critiquing acts of private revenge). That said, revenge also has its proponents. See, e.g., PETER A. FRENCH, THE VIRTUES OF VENGEANCE 89-91 (2001); see also JEFFRIE G. MURPHY, GETTING EVEN 17-26 (2003) (suggesting vindictive behavior is not always irrational or immoral).

104. Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1162 (2007) (describing tort victims who have been “injured in a way that warrants their thinking that someone else is responsible for mistreating them and that their wrongdoer is an appropriate person from whom to demand redress or satisfaction”).

105. See Solomon, *supra* note 2, at 1779-84 (assessing this concern).

106. Notably, some civil recourse theorists may reject the idea that contract law is best explained in civil recourse terms. Cf. Zipursky, *Civil Recourse*, *supra* note 2, at 719-20 (distinguishing contract law from tort law in terms of duties to pay prior to a court judgment). Segregating contract law in this way would avoid a fit objection. This move raises a different problem, however. Why should we not pursue a theory of private law that can explain both tort law and contract law, not to mention other subfields such as unjust enrichment? Civil recourse theorists have criticized those corrective justice theorists who would lop off punitive damages when explaining tort law, see *id.* at 712-13, but a variation on this critique may

certain structural features of private law—private actions and substantive standing requirements—but they raise doubts on the normative side.¹⁰⁷

In addition, civil recourse accounts do a poor job of explaining why it is that the law so frequently does provide remedies that are corrective of wrongs, or more precisely, wrongful losses. Why should “getting satisfaction” for the affront of being wronged by a negligent act have such a predictable, corrective outcome: compensation designed to make the victim whole? Why do contracts cases so frequently result in expectation damages? Private law remedies are not always corrective in their nature, but statistically speaking, they certainly show a corrective pattern.¹⁰⁸

E. Summary

In different ways, the corrective justice approach and the civil recourse approach both respond to the structure of rights, duties, wrongs, and remedies that runs throughout private law. In each case, the primary rights of the plaintiff are seen to correspond to the primary duties of the defendant, and in cases in which these rights have been violated, courts recognize that a wrong has occurred. At this point, however, the two theories part ways. The nature and, to some extent, the basis of judicially provided remedies are quite different for each theory.

For some time, these two approaches have been the leading explanations of private law that build on the internal point of view. Yet the two accounts are very much at odds. Critics of corrective justice theories question whether such theories have adequately addressed

apply to those civil recourse theorists who would divide tort law from contract law. Arguably, private law should be viewed as a whole.

107. While recognizing their plausibility, Jason Solomon has recently attempted to allay the normative doubts about recourse theory. See Solomon, *supra* note 2, at 1779-80. Solomon provides an important contribution to this debate, but there is insufficient space here to discuss the nuances of his argument. That said, for reasons similar to those that challenge other recourse theories, it is questionable whether the notion of recourse Solomon describes can be squared with the internal point of view of legal actors.

108. See *supra* notes 64-66 and accompanying text. The issue is particularly salient in the contract law setting, where loss-correcting remedies are available on a strict liability basis. Cf. Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 *FORDHAM L. REV.* 3013 (2007).

the private right of action and its substantive standing requirements.¹⁰⁹ Critics of civil recourse theories question the normative premises of a recourse-based system.¹¹⁰ This Article will offer an alternative. Individuals have moral enforcement rights when they are wronged or, in some cases, when they are likely to be wronged. I will argue that it is these moral enforcement rights that lie at the heart of private law.

II. THE MORAL RIGHTS APPROACH EXPLAINED

The thesis of this Article is that private law is grounded in a wronged party's moral enforcement rights. In order to better explain the concepts at issue, this Part will begin with a brief foray into recent work in moral philosophy. A specific kind of moral reasoning is at stake here. In essence, the entitlements that dominate private law decision making involve the "second-person" standpoint. This standpoint offers a particular way of thinking about our obligations with reference to what we owe to one another. It is not the same kind of reasoning that we use if we take a utilitarian approach to social policy. Second-personal reasoning calls for a distinct, authority-based approach to moral questions.

In a recent book, the philosopher Stephen Darwall has explained what the second-person standpoint means.¹¹¹ It is a standpoint that requires us to think in terms of a particular kind of interpersonal relationship, one that is bilateral. When we are assessing reasons for action, second-personal reasons call for an understanding of what one person can claim from another.¹¹² Thus, "[a] second-personal reason is one whose validity depends on presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason's being addressed person-to-person."¹¹³ Its implications are linked to the specific individuals

109. See *supra* notes 75-84 and accompanying text.

110. See *supra* note 107 and accompanying text.

111. See generally STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* (2006).

112. See *id.* at 4 ("What makes a reason second-personal is that it is grounded in (*de jure*) authority relations that an addresser takes to hold between him and his addressee.").

113. *Id.* at 8.

involved—one person may be able to claim something from another when a third person would lack the authority to do so.¹¹⁴

The contrast between second-personal reasoning and other moral perspectives can be significant, most notably due to the second-person standpoint's agent-relative implications.¹¹⁵ First-personal moral reasoning is the kind of practical reasoning we engage in as individuals when determining how we should act.¹¹⁶ Third-personal reasoning is the type of practical reasoning concerned with states of the world—it is outcome focused and agent-neutral.¹¹⁷ Second-personal reasoning is the kind of practical reasoning we engage in when figuring out what we owe to another person and, relatedly, what that other person can demand from us.¹¹⁸

To use Darwall's hypothetical, imagine a case in which one person wrongfully steps on your foot.¹¹⁹ You might argue to this individual that the world would be a better one if unconsented foot stomplings did not occur, given the pain they cause.¹²⁰ Presumably, you could make a convincing case in favor of your argument. However, you might instead demand that the wrongdoer stop stepping on your foot, speaking either as the victim or as a member of the moral community whose members do not treat each other in this way. This demand would give the wrongdoer a different kind of reason to cease his activity.¹²¹

This latter second-personal reason for the wrongdoer to cease is an agent-relative reason. As Darwall suggests, "If [the person stepping on your foot] could stop, say, two others from causing gratuitous pain by the shocking spectacle of keeping his foot firmly planted on yours, this second, claim-based (hence second-personal) reason would not recommend that he do so."¹²² The second-personal

114. *See id.* at 7 (noting how second-personal reasons are agent-relative).

115. *See id.* at 7-8.

116. *See Kar, supra* note 46, at 426.

117. *See DARWALL, supra* note 111, at 9-10 ("What the second-person stance excludes is the third-person perspective, that is, regarding, for practical purposes, others (and oneself), not in relation to oneself, but as they are (or one is) 'objectively' or 'agent-neutrally' (including as related to the person one is).").

118. *See id.* at 8 (defining second-personal reasons).

119. *See id.* at 5.

120. *See id.* at 5-7 (discussing this type of reasoning).

121. *See id.* at 7 (discussing this type of demand).

122. *See id.*

reason for action is thus very different from a standard consequentialist reason. The victim's argument involves an address to the foot stomper as the specific individual who is responsible for the conduct at issue.

As will become evident, this type of moral reasoning can shed light on legal obligations. The rights, duties, wrongs, and remedies that run throughout private law are a match for the type of moral reasoning we see from the second-person standpoint.¹²³ Legal rights, duties, and causes of action all implicate personal authority and accountability. Before proceeding to consider the legal structure of rights and duties, however, we will want to first review a particular moral concept, the concept of a moral right.

A. The Link Between Moral Rights and Private Enforcement

Moral rights are a classic example of a second-personal concept, and they are central to the present interpretation of private law.¹²⁴ Given the ambiguities in the phrase "moral rights," some elaboration is required. The relation between contract law and promising is helpful for these purposes, as it allows for the demonstration of several key distinctions respecting moral rights. Accordingly, Part II.A will review several promise-related fact patterns. The argument developed here is not limited to these settings, but it is usefully illustrated by them.

As will be developed, some moral rights are legitimately open to enforcement, but others are suited, at most, to a demand that the duty holder comply with his or her duties.¹²⁵ Moreover, appropriate responses to a breach vary among different actors. Legitimate verbal responses to a breach of moral rights, such as denunciation, implicate the standing we all have as members of the moral commu-

123. Cf. Kar, *supra* note 46, at 438-47 (indicating that the second-person standpoint offers a way to understand both moral and legal obligations).

124. For a discussion of how claim rights fit into second-person moral reasoning, see DARWALL, *supra* note 111, at 18-20. Most importantly, a right in this sense "includes a second-personal authority to resist, complain, remonstrate, and perhaps use coercive measures of other kinds, including, perhaps, to gain compensation if the right is violated." *Id.* at 18 (emphasis added).

125. Cf. Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOOD HALL L.J. 273, 293 (1995) (discussing the importance of enforceable rights with respect to contract law).

nity, but other responses, such as coercion, may implicate the special standing of the right holder alone.¹²⁶ To the extent a coercive response to the infringement of a right is legitimate, different individuals may have different standing to respond.¹²⁷

These distinctions will become relevant when we return to the subject of private law later in this Article. They suggest an important parallel between moral and legal reasoning. The moral rights that private parties are justified in enforcing in a state of nature are the type of moral rights that the law generally permits them to enforce by means of the private right of action.¹²⁸ And a plaintiff's standing to initiate a private right of action is, for the most part, reflective of that individual's standing to enforce her moral rights outside the legal sphere.¹²⁹ A review of common intuitions regarding moral rights will thus set the stage for our subsequent interpretation of private law.

1. Moral Rights Defined

Moral rights for purposes of this Article exist in those cases in which an individual has a legitimate claim to something and one or more other individuals have a moral duty corresponding to the right holder's claim. In this sense, moral rights are analogous to the legal idea of a claim right.¹³⁰ Such rights involve more than a mere interest in an outcome; they are relational rights that correspond to the duties of others.¹³¹

The next question concerns enforcement. Assuming moral rights exist in a particular case, what is the significance of a moral rights violation? The enforcement implications of moral rights were

126. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 178 (1955).

127. See *id.*

128. See *infra* notes 166-78 and accompanying text.

129. See *infra* Part III.

130. The classic discussion of legal claim rights—and privileges, powers, and immunities—is found in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

131. See *supra* notes 46-48 and accompanying text. One could also argue for moral rights that do not correspond to a duty of any particular person. For a recent discussion of such arguments, see Ronen Perry, *Correlativity*, 28 LAW & PHIL. 537 (2009). This possibility, although theoretically interesting, is not generally relevant to the private law issues discussed in this Article.

famously elaborated by H.L.A. Hart in his article *Are There Any Natural Rights?*¹³² As Hart recognized, moral rights are closely tied to legal rights. According to Hart, "the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules."¹³³

A key feature is that moral rights, when present, are consistent with a legitimate use of coercion to make rights violators comply. As Hart explains:

The most important common characteristic of this group of moral concepts is that there is no incongruity, but a special congruity in the use of force or the threat of force to secure that what is just or fair or someone's right to have done shall in fact be done; for it is in just these circumstances that coercion of another human being is legitimate.¹³⁴

This point is not just about legal enforcement, however. Moral rights are potentially consistent with self-help. Hart suggests that it is "a very important feature of a moral right that *the possessor of it* is conceived as having a moral justification for limiting the freedom of another."¹³⁵

For present purposes, our concern is with the moral legitimacy of coercing compliance through physical force. Some moral rights have a congruity with the use of force or the threat of force.¹³⁶ In these cases, force means something more than a rebuke or denunciation. Other moral rights are considered inconsistent with this forceful type of response.¹³⁷ This distinction will matter when we assess private law. Moral rights that have a congruity with the use of force

132. See Hart, *supra* note 126, at 175-91.

133. *Id.* at 177.

134. *Id.* at 178.

135. *Id.* (emphasis added).

136. *Id.*

137. A good example of this latter category of moral right is an ordinary promise with no reliance or consideration involved. It is commonly thought that the promisee has a moral right to performance but that coercion would be inappropriate if the promisor breaks the promise. See Gold, *supra* note 1, at 20 n.95.

or the threat of force—beyond a mere demand for compliance or a rebuke—are the focus of this Article.

For clarity, I will refer to cases in which a breach of a primary moral right would support a demand or rebuke, and nothing more, as cases involving a *weak* moral right.¹³⁸ On the other hand, I will refer to cases in which a breach would support the use of force or the threat of force as cases involving a *strong* moral right.¹³⁹ In each instance, the content of the primary moral right may be the same—for example, the performance of a promise—but the enforcement implications of a wrongdoer's failure to act consistently with his corresponding duty would be different.

2. Moral Enforcement Rights as a Distinct Category

When do moral rights support the use of force if a wrongdoer has violated their terms? That is, when are they strong moral rights? This can be a difficult normative question, one which varies considerably from one context to another—for example, harm to property, physical injury to a person, and violation of promises.¹⁴⁰ That said, certain cases are both recognizable and intuitively plausible examples of situations in which individuals acquire or possess strong moral rights. Promises offer a helpful illustration of how such distinctions respecting the legitimate use of force may arise.

Consider an ordinary promise, one without preconditions and without reliance. Suppose *X* promises to have lunch with *Y* and then

138. I have discussed this distinction in previous work. See Andrew S. Gold, *Consideration and the Morality of Promising*, in *EXPLORING CONTRACT LAW* 115, 127 (Jason W. Neyers et al. eds., 2009). As noted in that paper, it offers a potential justification in promissory morality for the doctrine of consideration. For a similar categorization of rights, see ADAM SMITH, *LECTURES ON JURISPRUDENCE* 9, in *V THE GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH* (R.L. Meek, D.D. Raphael, & P.G. Stein eds., Liberty Fund 1982) (1762) (distinguishing “perfect” and “imperfect” rights).

139. See Gold, *supra* note 138, at 127.

140. The most clear-cut cases implicating strong moral rights involve bodily injury. More difficult questions are raised by encroachments on property or violations of agreements. It would require at least one separate paper to analyze what features of these fact patterns account for the existence of a strong moral right in those cases in which such rights exist. I would hypothesize, however, that conceptions of ownership play a central role in explaining the more difficult cases. For analysis of how ownership-related concepts contribute in the contractual sphere, see generally Gold, *supra* note 1.

five minutes later tells *Y* she has changed her mind. In such a case, one may not coerce a promisor to keep her word except to the extent that we count making a rebuke as a type of coercion.¹⁴¹ It would not strike most of us as a legitimate response for an individual to forcibly make a promisor keep her word in this case, even granting that the promise is morally binding. The reason for this is not based in law but in morality. The primary moral right to performance and the remedial moral right to performance or its equivalent do not correspond to a legitimate use of physical force by the promisee to make sure that the promise is kept or that an appropriate remedy is provided.

For other promises, the situation is different. As I have argued in prior work, when a promisee meets the terms of a conditional promise, the promisee is now in a position to claim ownership of the promised performance.¹⁴² Based on the labor and effort expended, the promisee is in a different situation with respect to the promise in such cases. Under these conditions, the promise results in a strong moral right.

For example, imagine the hypothetical case from the Introduction to this Article. *B* labors for hours to build *A*'s house with the understanding that this labor will trigger a promissory obligation on the part of *A*—*A* will now owe performance, the act of providing *B* with a table, in light of *B*'s hours of effort. Given her efforts, *B* can claim ownership of the promised performance: the transfer of the table. She may even take the table if *A* is unwilling to provide it to her. Because of her efforts to meet the terms of the agreement, *B* is *not* in the position of an ordinary promisee—coercive enforcement is now legitimate.

All else equal, a promisee's claim to the promised performance in such cases is sufficiently strong that the promisee deserves to be able to make the promisor keep his word, or at least deserves to be able to make the promisor provide a monetary equivalent in

141. For a suggestion that such a rebuke is a type of authoritative pressure, see Margaret Gilbert, *Scanlon on Promissory Obligation: The Problem of Promisees' Rights*, 101 J. PHIL. 83, 89 (2004) [hereinafter Gilbert, *Scanlon on Promissory Obligation*].

142. See generally Gold, *supra* note 1.

damages.¹⁴³ The promisor's future action—performance—now belongs to the promisee.

People may not agree that coercion is plausible for every individual case of promissory obligations. Sometimes coercion would be unjust. However, under the right circumstances, many would find that promises can have this feature—to wit, the promisee is justified in using coercion to enforce the promise's terms.

I will refer to this right to bring about a coercive remedy as a "moral enforcement right."¹⁴⁴ It is not hard to think of similar examples outside the contractual sphere. Moral enforcement rights arise in a variety of contexts. If *A* steals a piece of property from *B*, *B* would possess a moral enforcement right with respect to that property. Within limits, she would be able to legitimately use force to retake the property or, if it is no longer available, to coerce *A* to pay the monetary equivalent. As these examples suggest, moral enforcement rights plausibly arise in a sizable subset of moral rights cases.

3. Moral Enforcement Rights and a Claimant's Standing

The next salient feature of moral rights involves the wronged party's standing. It is one thing to determine that a breach of a moral right supports a coercive response. It is a separate question to determine whether any particular individual has a right to engage in this coercive response. Even when a primary moral right is so significant that its violation will legitimize coercive enforce-

143. Note that the present account should also be reconcilable with the type of contract theory developed by Stephen Smith. See Stephen A. Smith, *Towards a Theory of Contract*, in OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES 107 (Jeremy Horder ed., 2000). Smith rejects the idea that contracts could be grounded in a transfer of preexisting ownership interests in performance (contrary to my own view), yet concludes that contracts do involve the creation of a property-like interest in the promised performance.

144. For purposes of this Article, I will use the terminology "moral enforcement right." It is arguable that this moral relationship involves a "privilege" or "liberty," to use Hohfeld's terminology. See Hohfeld, *supra* note 130, at 32-36. However, the moral relationship in this case includes the idea that the wrongdoer may not interfere with the exercise of the privilege. Hohfeld describes privileges such that interference may, in some cases, be permissible. See *id.* at 35. For a helpful analysis of this type of distinction, see H.L.A. HART, *Legal Rights*, in ESSAYS ON BENTHAM 162, 171 (1982). See also Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 80-82 (2005) (using the language of rights to address conduct that corresponds to a duty of noninterference).

ment, it need not follow that any particular individual will possess a moral enforcement right. Only certain individuals (if any) may have the standing to coerce.

Darwall's insights are helpful in setting forth this feature of interpersonal morality. Recall that second-person moral reasoning is focused on authority relations between one person and another.¹⁴⁵ Darwall carefully separates the idea that someone should act in a particular way from the idea that standing exists to call on an individual to act in this way. As he notes, there is "a general difference between there being normative reasons of whatever weight or priority for us to do something—its being what we ought to or must do—and anyone's having any authority to claim or demand that we do it."¹⁴⁶

Generally speaking, all of us have the authority to demand that a wrongdoer comply with a particular remedial moral duty.¹⁴⁷ We are all plausibly able to call on others to do the right thing, although etiquette or tact may sometimes counsel restraint.¹⁴⁸ When it comes to claim rights, however, moral practices distinguish the second-person standing of a right holder from the standing of a member of the moral community. As Darwall notes,

In addition to there being weighty reasons against others stepping on your feet, indeed, in addition to members of the moral community having the standing to demand that people not step on your feet, if you have a right, then you have a standing to make a special demand against people who might step on your feet—you have the authority to resist, claim compensation, and so on.¹⁴⁹

145. See *supra* notes 111-12 and accompanying text.

146. See DARWALL, *supra* note 111, at 14.

147. See *id.* at 20 ("Just as a right involves an authority to claim that to which one has a right, so also is moral obligation conceptually tied to what the moral community can demand (and what no one has a right not to do).").

148. It should be noted that not all theorists would agree that standing is so universal. For example, Margaret Gilbert has questioned whether we each have standing simply as human beings to demand moral conduct of each other. That said, like Darwall, Gilbert argues that a special standing exists when a party owes something to the right holder. See MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION* 162 (2006) [hereinafter GILBERT, *POLITICAL OBLIGATION*].

149. DARWALL, *supra* note 111, at 18. A similar point is expressed in Stephen Darwall, *Law and the Second-Person Standpoint*, 40 *LOY. L.A. L. REV.* 891, 892 (2007) (indicating that the holder of a moral claim right could demand compensation if the duty holder does not perform,

In many cases, the right holder has a special standing—an individual authority—to demand compliance from the obligor or, perhaps, to claim compensation.

A good example of a moral right holder's special standing to respond to a breach appears in promissory morality. Margaret Gilbert offers a nice illustration of this moral viewpoint. Gilbert offers the example of a promise that she makes to the reader. As she indicates, "If I were to allow that I owe you performance, then I would recognize that you have the standing to upbraid me for nonperformance, or to insist on performance. Before the fact you could pressure me, saying in effect: 'Give me that! It's *mine!*'"¹⁵⁰ Notice, however, that people's intuitions about standing commonly change when a bystander enters the picture. As Gilbert suggests,

It is true that a bystander could say, "Give her that! It's *hers!*" The case in which I command you to give me what is *mine* is special, however. The bystander's standing to command you to give it to me can be questioned. My standing surely cannot be questioned. In the bystander's case, the riposte "It's none of your business!" makes sense. In my case, it does not.¹⁵¹

For a number of promises, no private individual can rightly force performance. Only some promises are legitimately enforceable. Assuming that forced performance, or forced compensation, is morally legitimate in the case of a particular promise, however, the idea that right holders possess a special standing is intuitively reasonable.¹⁵² On this view, the only parties who can lay claim to a moral right to force performance or compensation are those specific individuals who were promised the performance. Others may denounce nonperformance, but they cannot command a remedy; and more to the point, they cannot coerce one.¹⁵³

and noting that this standing to demand compensation is "not as a [member] of the moral community," but rather "as an individual involved in the transaction"). We can also see this type of standing recognized in Joel Feinberg's account of a claim right. See JOEL FEINBERG, *The Nature and Value of Rights*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 143, 150 (1980).

150. Gilbert, *Scanlon on Promissory Obligation*, *supra* note 141, at 101.

151. *Id.*

152. See GILBERT, *POLITICAL OBLIGATION*, *supra* note 148, at 162.

153. Gilbert, *Scanlon on Promissory Obligation*, *supra* note 141, at 101. As a normative matter, it may be questioned why such a special standing *should* exist. More generally, one

Conventional morality commonly includes the idea of special standing as a feature of moral rights. From this perspective, promisees not only possess a moral right to performance, but in appropriate cases, they uniquely possess standing to do something about a breach.¹⁵⁴ This same moral intuition is also applicable in other settings. If one person negligently injures another, a bystander could demand that the harm be corrected. It is questionable whether a third-party bystander has the standing to go over to the wrongdoer's house and force compensation for the injury. Any member of the moral community would have standing to demand that the wrong be remedied, but only the wronged party or someone acting on her behalf may have standing to forcefully remedy the wrong.¹⁵⁵

B. Summary

Moral rights commonly involve relational rights and duties: a right holder corresponds to a duty holder and vice versa.¹⁵⁶ Some moral rights have a special congruity with the use of forcible coercion to make the duty holder comply with his or her duties.¹⁵⁷ Moreover, right holders often possess a special standing to bring about this compliance. Third-party bystanders may not typically

might question whether second-person morality offers a correct view of what we ought to do. In describing this idea of special standing, however, I do not seek to demonstrate that such standing is mandated by morality as such. The interpretive account of private law in this Article will show how private law legal doctrines are understandable in terms of a particular conception of interpersonal morality. A consequentialist might dispute this conception on normative grounds while accepting that it is a part of commonly held moral intuitions. See *infra* note 236 and accompanying text. It is enough for present purposes that we recognize the notion of special standing as a widely held moral viewpoint, irrespective of its correspondence to our individual normative commitments.

154. Conventional morality does not always follow this principle, however. Often, a distinguishing factor is urgency. If an individual had his or her bag stolen by a thief, it would seem morally legitimate for a bystander to step forward and tackle the thief before the thief gets away. Bystanders may sometimes have the standing to enforce another individual's moral rights and not merely to request compliance. That said, both Darwall and Gilbert do capture a common intuition about special standing in the moral rights setting. See DARWALL, *supra* note 111, at 18; Gilbert, *Scanlon on Promissory Obligation*, *supra* note 141, at 83. I wish to thank Adam Hosein for suggesting the example described in this footnote.

155. See *supra* notes 150-53 and accompanying text.

156. See *supra* notes 130-31 and accompanying text.

157. See *supra* notes 132-34 and accompanying text.

step in and force compliance in these cases unless they are acting on behalf of the individual right holder.¹⁵⁸

This analysis suggests parallels between the structure of moral rights, duties, wrongs, and enforcement, on the one hand, and the structure of legal rights, duties, wrongs, and enforcement, on the other. The special standing of a wronged party in the moral setting is frequently reflected in legal contexts. Part III of this Article offers an explanation of why it is that legal and moral enforcement rights correspond in this way. Part III will also show how the moral rights theory improves upon prior explanatory accounts of private law.

III. THE LINK BETWEEN PRIVATE ENFORCEMENT AND PRIVATE RIGHTS OF ACTION

Civil recourse theorists devote substantial attention to the private right of action, in some cases justifying it in terms of a Lockean social contract.¹⁵⁹ Unsurprisingly, these theorists do not claim that an actual, real life social contract provides for civil recourse.¹⁶⁰ Instead, a social contract metaphor is used to explain the normative structure visible in private law doctrine.¹⁶¹ The present Article draws on this literature and its focus on the structure of private law. However, this Article will suggest a new way to understand what private rights of action accomplish.

As set forth below, the private right of action is neither about corrective justice nor about one individual “acting against” another—it is about giving an individual a means to enforce moral rights when that individual has standing to legitimately enforce them.¹⁶² Because the state frequently requires individuals to give up their extra-legal enforcement rights, the state provides a private right of action as a substitute. A plaintiff’s bringing suit in the courts is thus a way for the plaintiff to enforce her moral rights without engaging the state in any particular aim of correcting wrongs.¹⁶³ This

158. See *supra* notes 151-53 and accompanying text.

159. See Zipursky, *Civil Recourse*, *supra* note 2, at 735-38; see also Goldberg, *supra* note 2, at 541-44 (describing the Lockean theory of a right to redress).

160. See Zipursky, *Private Law*, *supra* note 2, at 642.

161. See *id.* at 654.

162. Unless, that is, “acting against” another is read in a different fashion from the notions of accountability currently adopted by civil recourse theorists. See *supra* note 17.

163. Cf. Zipursky, *Private Law*, *supra* note 2, at 654 (suggesting that “[c]hoices courts make

legal avenue of enforcement is given in exchange for the individual's otherwise purely private methods of self-help.

A. The Social Contract Metaphor and Private Law

It is worth revisiting the recourse theorist's suggestion that private law can be understood in terms of a Lockean social contract. As noted, the civil recourse approach has proven controversial due to normative doubts about the vindictive impulses underlying a right to act against another.¹⁶⁴ However, the Lockean structure that the civil recourse theorists espouse is separable from the standard civil recourse approach. The social contract metaphor offers a fruitful way to understand the characteristics of the private right of action without requiring us to adopt the more controversial civil recourse norms across private law.¹⁶⁵ As will become apparent, the argument fits quite well with a moral rights perspective.

John Locke famously posits that, in a state of nature, individuals have a right to punish wrongdoings.¹⁶⁶ This right of punishment is given up when entering a civil society, and in return the state takes on this role.¹⁶⁷ Yet there is another important natural right at issue in Locke's account, distinct from the right of punishment. Locke contends that individuals have a natural right to redress injuries they have suffered.¹⁶⁸ This right of redress belongs solely to the injured individual.¹⁶⁹

Locke argues that the individual's right of redress is also given up upon entering a civil society.¹⁷⁰ In return for this sacrifice, the state provides for redress.¹⁷¹ Much as the state takes over responsibility for punishment, it also takes over responsibility for redress of injuries. As Zipursky suggests, "The obligation of the individual not

about when individuals are entitled to prevail in private law are not necessarily, or even fundamentally, choices about which outcomes are best").

164. See *supra* note 107 and accompanying text.

165. See *infra* note 175 and accompanying text.

166. See LOCKE, *supra* note 15, at 264-65.

167. See *id.* at 304-05.

168. See *id.* at 265-66.

169. See *id.* at 266 (describing "[the right of] reparation, which belongs only to the injured party").

170. See *id.*

171. See *id.* at 305.

to engage in private punishment is conditional on the state's having undertaken that role."¹⁷² Similarly, he adds, "It seems likely that Locke held an analogous view as to the right to seek compensation for individual injuries. There is a natural right and power to seek compensation for an injury done to one."¹⁷³ The state's provision of redress for private wrongs can then be understood as an obligatory substitute for an individual's right to redress those wrongs through self-help.¹⁷⁴

Admittedly, Locke's account seems to involve a more proactive state role than we presently have; the private right of action leaves discretion in the hands of the plaintiff.¹⁷⁵ As William Blackstone notes, legal redress requires both the state and the plaintiff to play a role: "[W]herein the act of the parties and the act of law cooperate; the act of parties being necessary to set the law in motion, and the process of the law being in general the only instrument, by which the parties are enabled to procure a certain and adequate redress."¹⁷⁶ This concern is readily addressed, however.

Zipursky offers an illuminating account of how Locke's social contract theory and Blackstone's description of the right of action can be brought together: "The synthesis of Locke and Blackstone ... is the view that the power to alter a defendant's legal status through having a judgment entered against him—the private right of action—is something a private party who has been wronged is entitled to from the state."¹⁷⁷ Thus, "the natural right to seek redress is conceded in return for a right of civil redress, a private right of action."¹⁷⁸ Given that the state has generally prohibited self-help, the private right of action is an alternative means of redress that parties can choose instead.

172. Zipursky, *Private Law*, *supra* note 2, at 639.

173. *Id.*

174. This is not to say that self-help has been eliminated from private law altogether. Self-help is a notable remedy under Uniform Commercial Code Article 9. See U.C.C. § 9-609 (2008). Nor is this the lone example. For an insightful analysis of how self-help matters for contract law, see Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397 (2009).

175. See Zipursky, *Private Law*, *supra* note 2, at 640 (discussing how Locke's understanding "does not match the law we actually have").

176. 3 WILLIAM BLACKSTONE, COMMENTARIES *22.

177. Zipursky, *Private Law*, *supra* note 2, at 642.

178. *Id.*

This analysis offers an insightful account of private rights of action. But as elegant as this redress-based account may be, it suffers from an immediate challenge. In order for this Lockean argument to plausibly account for private law, there must be some justification for thinking in terms of a natural right of redress.¹⁷⁹ Our conception of redress matters. It is questionable whether the argument works if private law is a recourse-based system, at least as recourse is commonly understood. Why think the state should be obligated to offer a path for one person to act against another? Even if such responses are sometimes appropriate, why would we think they are appropriate for a run-of-the-mill contract violation or for a tort of negligence? This Article suggests an alternative to civil recourse (at least in its standard form): the state takes on the obligation to provide a substitute for self-help when moral enforcement rights are at stake.

B. The Moral Rights Perspective on the Right to Redress

Instead of thinking that a wronged party possesses a right to “act against another” when there has been a violation of her legal rights, we may recognize that the right of redress applies in cases where the wronged party has suffered a violation of a strong moral right. In those cases where the victim of a wrong would normally have a moral enforcement right, the state is obligated to provide an alternative means for the victim to bring about that enforcement. This interpretation avoids the thorny questions raised by a natural right to revenge or a natural right to get “satisfaction.”

The present account is also well-suited to explain the standing rules of private law. As noted previously, in the moral realm there is an oft-recognized distinction between the general standing that all members of the moral community have—the general standing to demand compliance with moral precepts—and the special standing that a right holder possesses.¹⁸⁰ There is a clear connection between this special standing and Locke’s passages on the natural right of redress.¹⁸¹

179. See *supra* note 103 and accompanying text.

180. See *supra* notes 147-53 and accompanying text.

181. See Stephen Darwall, *The Value of Autonomy and Autonomy of the Will*, 116 *ETHICS* 263, 277 (2006) (discussing a right holder’s special standing to exact compensation in Lockean

Locke's account of the state of nature is plausibly read as a depiction of a special standing to exact compensation possessed by individuals whose claim rights were violated. The Lockean argument appeals to the same kind of thinking that we see in second-person moral reasoning about which parties can make claims for redress of a violated moral right. Of course, the appropriate redress that should follow a violation—return of property, compensation, or specific performance—is also an important concern. Whatever the appropriate response may be, however, the standing to respond is held by the right holder alone, not the general public.

Many second-personal relations—notably, those involving moral claim rights—are such that the right holder has a special standing to respond in certain ways to the failure of the other party to perform his duty. Locke's analysis of the right of redress has the right structure to be understood in terms of this second-person morality.¹⁸² In other words, there is a way to understand the Lockean argument that does not implicate revenge or vindictive aims. Moral enforcement rights are readily described in terms of a natural right to redress.

It is also normatively plausible to think in these terms. A moral enforcement right tends to exist when a moral right holder has a particularly strong claim to compliance by the duty holder. Ordinary promises, for example, do not usually justify coercion when they are breached. The harms that result from broken contracts, thefts, batteries, and other serious breaches, on the other hand, involve a more significant type of injury. These are exactly the situations in which the state plausibly owes right holders a means of enforcement. In these cases, coercion by the right holder may be more than legitimate; the right to exercise such coercion may be an entitlement—that is, it may merit recognition in terms of a natural right to redress.

On this account, the private right of action will often be closely related to corrective justice. The legal right is derivative of the plaintiff's moral enforcement right against the wrongdoer, and the

terms).

182. See *supra* note 169 (suggesting that the Lockean right of redress belongs solely to the right holder). For a helpful discussion of how Locke's understanding involves an individual's enforcement claim in the state of nature, see Katrin Flikschuh, *Reason, Right, and Revolution: Kant and Locke*, 36 PHIL. & PUB. AFF. 375, 383 (2008).

content of that moral enforcement right will often be determined in light of corrective justice. Private rights of action are not, however, designed as a means for the state to bring about corrective justice. Corrective justice is not the law's function. The private right of action is an avenue for corrective justice in those cases in which the plaintiff possesses moral rights to coercively bring about corrective justice, given that self-help is no longer available. But it is the moral enforcement right itself that justifies the state's role.

Use of the private right of action is thus appropriately open to the plaintiff's discretion. Within this rubric, there is a reason why corrective justice is not a state-compelled remedy. The rights at issue belong to the party who was wronged.¹⁸³ She gets to decide whether to do something about being wronged, including whether to make use of her entitlement to enforce her rights.¹⁸⁴ If the state intervened as a matter of course, the party who was wronged would have less control over the counterparty's duties than her moral enforcement rights provide for.¹⁸⁵

183. Arthur Ripstein makes a similar point. See Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1981-82 (2007). He argues that if the state provided for corrective justice automatically, the state would encroach on the wronged party's rights. See *id.* Part of having certain rights is being able to decide whether they should be enforced. Ripstein suggests that the private plaintiff's power to bring suit "turns out to be a direct implication of the idea that tort law protects each person's entitlement to have her means subject to her exclusive choice." *Id.* However, unlike my own account, Ripstein's understanding of the plaintiff's rights in the private action setting is not grounded in an underlying moral right to private enforcement. Ripstein contends that the legitimacy of acting to redress the wrong is dependent upon a neutral third party's intervention, as is provided by the state. See Ripstein, *supra* note 10, at 1427. Unilateral enforcement, on this view, is unacceptable. See *id.* at 1418 ("Private enforcement is not merely inconvenient: it is inconsistent with justice because it is ultimately the rule of the stronger."); see also ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 165 (2009) (describing the Kantian critique of private rights of enforcement). I would question, however, whether the private right of action is best interpreted as a means to avoid the imposition of one private party's will upon another.

184. It might be asked, however, why we do not have a system in which the state offers to prosecute private law cases on the condition that the wronged party consents. Our system looks quite different. As Jason Solomon has recently indicated, the private right of action involves the plaintiff in more than just initiating the suit; she must also prosecute her suit. See Solomon, *supra* note 2, at 1805 (noting the tort system "not only allows the victim to privately initiate the suit, but also to privately prosecute the suit"). The plaintiff's role in prosecuting the case fits with the idea that the private right of action is a substitute for private enforcement; the private right of action is more than just a recognition that the wronged party should have a choice whether to waive her rights.

185. This is not to say that the state could not legitimately provide for state prosecution

C. Moral Enforcement Rights Versus Corrective Justice

This brings us to the diversity of remedies in private law. Some remedial measures, such as punitive damages, may not fit the idea that private law is concerned with moral enforcement rights.¹⁸⁶ However, the difficulty in explaining punitive damages need not be fatal for a moral rights-based theory of private law.¹⁸⁷ It is one thing to seek a unified, conceptual account of core private law doctrines and another to insist that the only plausible explanation must incorporate all of private law under one set of values.¹⁸⁸ Punitive damages are a special case, and they appear to implicate a distinct value.¹⁸⁹

On the other hand, all else equal, an explanatory account that explains more legal phenomena is better than an account that explains fewer.¹⁹⁰ Here the moral rights account has an advantage over standard corrective justice understandings. As civil recourse theorists note, private law includes injunctive relief, a legal remedy that is clearly not corrective of an existing wrong.¹⁹¹ The moral rights account of private law is more expansive than a corrective justice account in this regard. Such cases can be understood in terms of preventive justice, and preventive justice is easy to explain under the moral rights perspective.

of such wrongs or provide for various types of *qui tam*-styled rights of action. Such actions, however, would not stem from the same justificatory source as the private right of action. See Zipursky, *Private Law*, *supra* note 2, at 648 (discussing *qui tam* actions).

186. Arguably, one might posit a moral enforcement right to revenge or satisfaction from violators of a primary moral right. I do not see how the exercise of such a right would qualify as a form of enforcement, however, even if one did feel that moral right holders deserve this form of recourse. In addition, the normative concerns Finnis raises could also come into play. See *supra* note 103.

187. Doing so is controversial. Separating subparts of private law from the main corpus suggests that a theorist may be conveniently defining the topic of discussion to make it fit the theory. On the other hand, punitive damages are commonly understood to serve a distinct role from other judicially ordered remedies. For further discussion of this issue, see *supra* note 106.

188. See *supra* note 42 and accompanying text.

189. Cf. Gardner, *supra* note 13, at 47 (suggesting that general damages are “not reparative in the strictest sense”).

190. This follows under the *consilience* norm. See *supra* note 37 and accompanying text.

191. Zipursky, *Civil Recourse*, *supra* note 2, at 713. Again, this depends on the view that corrective justice remedies are solely available *ex post*.

The basic idea is incorporated into Locke's discussion of the right to redress. People have a natural right to preserve their property in addition to their lives.¹⁹² Sometimes we can act coercively before a wrong occurs. If one merits an avenue of redress *ex post* in certain cases, it is a small leap to recognize that, in appropriate circumstances, one could also merit an avenue of prevention *ex ante*. Indeed, *ex ante* prevention of a harm will often seem like a better option than *ex post* correction of a harm.

Preventive justice is grounded in some of the same concerns that motivate corrective justice.¹⁹³ Both types of justice are concerned with ensuring compliance with a primary duty or, failing that, the next best thing to compliance. Indeed, preventive justice is sometimes described as a prewrong counterpart to corrective justice. As the philosopher Jeff McMahan expresses this idea: "While preventive justice is concerned with the *ex ante* redistribution of harm in accordance with liability, *corrective justice*, which is the goal of the law of torts, is concerned with the *ex post* redistribution of harm, or loss."¹⁹⁴ Read broadly, tort law is concerned with both *ex ante* and *ex post* remedies, but McMahan's basic insight is correct.

Under certain circumstances, the moral right to enforce a duty antedates an actual wrong. Self-defense cases are the most salient example, but the role for preventive justice is also significant when it is clear a promise will be broken, at least in the setting of a strong moral right to performance. And the same point applies to antici-

192. According to Locke,

Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man or number of men in the world, hath by nature a power not only to preserve his property, that is his life, liberty and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others as he is persuaded the offence deserves.

LOCKE, *supra* note 15, at 304.

193. Ernest Weinrib has suggested that corrective justice "allows for injunctions that prevent unjust harm" for what I take to be a similar reason. See WEINRIB, *supra* note 1, at 144 n.41.

194. See Jeff McMahan, *Laws of War*, in THE PHILOSOPHY OF INTERNATIONAL LAW 493, 499 (Samantha Besson & John Tasioulas eds., 2010). As McMahan has noted elsewhere, however, the symmetry is not perfect. See Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 279 (1994) (providing a convincing argument, based on a hypothetical fact pattern, 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").

pated encroachments on property or anticipated tortious conduct. In such cases, preventive measures often implicate a moral enforcement right.¹⁹⁵

Legal remedies reflect these moral enforcement rights. Injunctions are not a measure of corrective justice when they are designed to prevent a wrong that has not yet happened. Nor are they a clear case of acting against another, at least not in the usual civil recourse sense.¹⁹⁶ They often come into play in cases where one party is likely to suffer a wrong and where the wrong will be difficult to repair after the fact.¹⁹⁷ These are circumstances in which, as a matter of morality, a would-be victim of a wrong could legitimately engage in preventive justice.

As such examples suggest, the moral rights perspective is not coterminous with at least some corrective justice accounts.¹⁹⁸ Moral enforcement rights explain certain noncorrective aspects of private law, notably the availability of injunctive relief. Injunctive relief targets wrongs that have not yet occurred and, thus, cannot yet be corrected. Although the concept of moral enforcement is closely related to corrective justice—frequently, a moral enforcement right will be a right to bring about corrective justice—the two concepts are not the same.

D. Moral Enforcement Rights Versus Civil Recourse

As noted, injunctive relief is hard to square with ex post corrective justice norms.¹⁹⁹ On the other hand, certain standard remedies in private law are difficult to square with conventional civil recourse

195. The main difference is that, in preventive justice cases, it is generally the enforcement of a primary moral right rather than a remedial right.

196. See *supra* note 90 and accompanying text.

197. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed. 1995).

198. There are also cases in which the law actually permits self-help to prevent wrongs. See Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges, and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 911 (1984). Note that a self-help feature of private law could be problematic for theories that view private law as a needed replacement for self-help due to the legal system's capacity to avoid unilateral enforcement. The moral rights theory in this Article is accepting of self-help as an option; private law is viewed as an obligatory substitute when self-help has been prohibited, but this view of private law is not inconsistent with residual self-help remedies.

199. See *supra* notes 89-90 and accompanying text.

norms. Judicial remedies support conceptual inferences about the private right of action, and those inferences are often in tension with the standard idea of recourse.²⁰⁰ If we review the different fields within private law, the challenge for civil recourse as an explanatory account becomes increasingly evident. At the same time, a review of these fields demonstrates that the moral rights account explains a considerable range of legal phenomena.

Tort law frequently provides a standard remedy—compensatory damages—and this remedy makes the plaintiff whole. The content of this remedy corresponds well with a moral rights account. It is somewhat odd that a remedy that makes the plaintiff whole, or the next best thing, should be so common if we live in a world of civil recourse focused on wrongs (rather than wrongful losses).²⁰¹ Yet this is not an open-and-shut case. Civil recourse theorists can readily point to other remedies as a way of countering this claim. Tort law includes various noncorrective legal responses to wrongs, most notably punitive damages.²⁰² Although the evidence cuts in both directions, civil recourse theorists might thus suggest that, overall, the workings of the private right of action add support for their argument.

200. This can be so even if we accept the civil recourse theorists' view that private law does not recognize an affirmative legal duty to pay in cases of a legal wrong. See Zipursky, *Civil Recourse*, *supra* note 2, at 720-21. Private law may well be structured around the creation of a legal liability when there is a wrong, but the remedies available may help us better understand whether that legal liability stems from notions of recourse or notions of moral enforcement rights. Zipursky rightly notes the importance of capturing the "pattern of inferences in the law." *Id.* at 712. Civil recourse theory recognizes the import of the private right of action but overlooks what the available legal remedies can sometimes tell us about that private right of action. Remedial patterns can indicate whether the private right of action is an avenue of recourse or an avenue of enforcement.

201. Recourse theorists have responded to this objection in part by focusing on a notion of proportionality. See *id.* at 749 ("Just as in self-defense, victims may not use force out of proportion to what is necessary to combat the kind of aggression they face, in private rights of action, plaintiffs are not normally entitled to take from the one who wronged them more than they need to be restored."). They also attempt to separate the default remedial outcome from the notion of reallocating losses. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 17, at 947 (suggesting that the make-whole remedy sets an "outer boundary" of the remedy courts will provide victims of wrongs). But why not have courts assess proportionality on a case-by-case basis? And why this precise outer boundary? There is no obvious reason to think that a proportional way of getting satisfaction is to be made whole. It may well be that a corrective remedy is the proportional remedy, yet it is not clear why the norm of getting satisfaction, or revenge, should lead to this conclusion.

202. See Zipursky, *Civil Recourse*, *supra* note 2, at 712-13 (discussing punitive damages).

Contract law is different, however. An ordinary breach of contract is a wrong, but it is often not the type of wrong that calls for getting satisfaction or revenge.²⁰³ And even if we think contractual breaches could sometimes support civil recourse, the standard contractual remedies constitute a form of corrective justice.²⁰⁴ The expectation remedy is a predictable outcome in a successful contracts case. If contracts were explained by civil recourse, why would the form of recourse be so consistently fixed in its content? Punitive damages are rare.²⁰⁵ Furthermore, contract law includes the remedy of specific performance—a remedy that is readily explained in terms of moral enforcement rights but harder to square with recourse.²⁰⁶

One of the strengths of civil recourse theory is that it can explain a large variety of remedies in tort law. Contract law is far less variable, and the fixity of contract remedies tells us something about the private right of action in that sphere. That said, contracts cases involve wrongs, and at least some breaches, in rare cases, will support claims of punitive damages.²⁰⁷ It is conceivable, though difficult, to see contract law as a recourse-based section of the law.²⁰⁸ Contract law is not the only problem for a recourse-based interpretation, however. The law of unjust enrichment is even more difficult for a conventional civil recourse theory to explain.

Unjust enrichment cases do not, at least initially, arise from a defendant's wrongful conduct. The classic case involves a mistaken payment. For example, suppose that *Y* unwittingly receives *X*'s money through an error made by *X*. *X*, under certain circumstances, may legitimately coerce the return of this money, but it is a stretch

203. This is not to deny that breaches of contract may, in some cases, be taken as a cause for moral outrage. See Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is For Suckers*, 63 VAND. L. REV. 1003 (2010) (studying the psychological impact of contract breaches).

204. For discussion of the corrective justice underpinnings of contract remedies, see Bridgeman, *supra* note 1; Gold, *supra* note 1.

205. See William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 635 (1999).

206. Indeed, Zipursky indicates that the private right of action in contract law is premised upon a duty to pay under the contract. See Zipursky, *Civil Recourse*, *supra* note 2, at 742. It should be noted, however, that Zipursky considers specific performance cases to implicate civil recourse. See Zipursky, *Private Law*, *supra* note 2, at 646.

207. See Dodge, *supra* note 205, at 635.

208. For a recent account of contract law in civil recourse terms, see generally Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011).

to say that *Y* is a wrongdoer merely on the basis of his initial receipt of the money.²⁰⁹ The notion of a moral enforcement right can explain the private right of action in this type of case—the plaintiff may legitimately force a return of the money, whether or not the defendant has committed a wrong in initially receiving that money.

In contrast, consider the civil recourse perspective. When a plaintiff sues for restitution, is it plausible to say that the plaintiff wants to act against the defendant?²¹⁰ Is she not really just seeking the return of her money? A review of the legal response to unjust enrichment claims shows a clear pattern. The amount of the judicial remedy will almost unerringly be based on the value of the unjust enrichment.²¹¹ The restitutionary remedy fits the idea that courts are trying to undo a transaction rather than allowing a plaintiff to get even with a recalcitrant defendant. It is difficult to see this action in terms of recourse.

Like injunctive relief, this area of law may challenge the corrective justice theorist as well. There is an ongoing debate as to whether unjust enrichment cases truly implicate corrective justice or a localized form of distributive justice.²¹² But, again, the moral rights theory is not a corrective justice theory, and the idea of moral

209. The orthodox view is that no wrong has occurred in the case of an unjust enrichment. See, e.g., PETER BIRKS, *UNJUST ENRICHMENT* 22 (2d ed. 2005) (“There are acquisitive wrongs and hence there are cases of wrongful enrichment, but an unjust enrichment is never a wrong.”).

210. Unjust enrichment cases are significant in another respect. Civil recourse theorists contend that tort law is inconsistent with a corrective justice account because there is no required payment of prejudgment interest when a defendant who knows he or she will be liable delays paying damages prior to a judicial decision. See Zipursky, *Civil Recourse*, *supra* note 2, at 718-21. Stephen Smith has recently suggested, however, that Commonwealth jurisdictions refuse to order damages based on a failure to make timely restitution in unjust enrichment cases, and that unjust enrichment cases are understood to involve a prejudgment duty to make that restitution. See Stephen A. Smith, *Unjust Enrichment: Nearer to Tort than to Contract*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT* 181, 189 (Robert Chambers et al. eds., 2009). In Smith’s view, the duty to pay restitution in unjust enrichment cases is similar to the duty to pay damages in tort—in both cases there is a legal duty to pay, but there are no damages for late payment. See *id.* at 190. This interpretive possibility makes it difficult to draw a strong inference about the legal recognition of prejudgment duties based on the denial of damages for prejudgment delays in payment.

211. See Smith, *supra* note 210, at 183.

212. See Kit Barker, *The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora’s Box*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT*, *supra* note 210, at 146 n.1 (listing articles in support of corrective justice and distributive justice views of unjust enrichment).

enforcement rights fits well with the unjust enrichment cause of action. In cases of unjust enrichment, it is quite reasonable to think that the claimant should be able, as a matter of her moral rights, to force a return of the thing transferred or its equivalent in value.²¹³ The private right of action maps onto this moral rights understanding.

E. Summary

Although there is a place for corrective justice within a moral rights account, the above account does not reduce to a corrective justice theory.²¹⁴ This is especially clear in cases in which courts order injunctive relief.²¹⁵ But even disputes that do involve corrective justice do not necessarily mean that the law is about corrective justice.²¹⁶ Under the moral rights theory, a corrective justice entitlement belongs to the wronged party in appropriate cases,²¹⁷ yet corrective justice is not taken as a general aim of private law.²¹⁸ The private law is instead a means for an individual who possesses a moral enforcement right to exercise that moral enforcement right.²¹⁹ The private right of action constitutes that enforcement.²²⁰

Similarly, this account does not reduce to a civil recourse theory, at least not in its standard form. In terms of legal structure, the

213. Note that the argument can work even if one rejects the idea that the enriched party owes a moral duty to undo the enrichment. The notion of moral enforcement rights dovetails with Stephen Smith's suggestion "that we regard our fundamental duty in this area of the law [unjust enrichment] as a duty not to interfere with another's attempt to retrieve defectively transferred property." Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 TEX. L. REV. 2177, 2194 (2001). There may also be exceptions to this enforcement right in interpersonal morality, such as when the enriched party has changed her position in reliance on the mistaken payment. However, the law of unjust enrichment may also preclude recovery in such cases. See BIRKS, *supra* note 209, at 208-19 (discussing the change of position defense).

214. See *supra* text accompanying note 198.

215. See *supra* Part III.C.

216. See *supra* Part III.B.

217. See *supra* Part III.B.

218. See *supra* text accompanying note 16.

219. See *supra* Part III.B. Jason Solomon has also suggested the private right of action is a means to bring about justice, although his theory focuses on different aspects of second-personal morality. See Solomon, *supra* note 2, at 1771 (suggesting that tort law "provides a vehicle for individuals to bring about justice, and in doing so, vindicates the notion of a community of equals who are answerable to one another and expected to treat one another with equal respect").

220. See *supra* Part III.C.

civil recourse theorists are exactly right: private law involves a three-party relation with the state obligated to provide an avenue for a private individual to seek redress from a wrongdoer.²²¹ Yet much turns on the meaning of "redress."²²² The private action is not ordinarily about providing an avenue for revenge or for acting against another to address the affront of a wrong.²²³ In most cases, the apparent right to "act against another," which civil recourse theorists note,²²⁴ is better understood in terms of a claimant's right to bring about corrective justice or, in some cases, preventive justice.²²⁵ Recourse as traditionally conceived is not the underlying principle in these instances; rather it is the wronged party's moral enforcement right.²²⁶

A moral rights account makes use of the Lockean idea that there is a natural right to redress without implicating controversial norms of private revenge or even the idea of "getting satisfaction."²²⁷ The private right of action is a state-provided substitute for individuals' exercise of self-help.²²⁸ Having prohibited self-help, the state takes on an obligation to provide an alternative means for individuals to enforce their moral rights.²²⁹ The limitations on standing to initiate the private right of action make sense once we recognize how standing also applies in the realm of moral rights.²³⁰ And the notion of moral enforcement rights explains both corrective and preventive remedies.²³¹ The moral rights approach thus renders intelligible several core features of private law: private rights of action;²³² substantive standing;²³³ and a broad variety of remedial measures.²³⁴

221. *See supra* Part I.D.

222. *See supra* Part III.B.

223. *See supra* note 201.

224. *See supra* note 73 and accompanying text.

225. *See supra* Part III.C.

226. *See supra* Part III.C.

227. *See supra* Part III.B.

228. *See supra* text accompanying note 12.

229. *See supra* text accompanying notes 15-16.

230. *See supra* Part II.A.3.

231. *See supra* Part III.C-D.

232. *See supra* Part III.B.

233. *See supra* Part III.B.

234. *See supra* Part III.C-D.

IV. NORMATIVE IMPLICATIONS FOR PRIVATE LAW

An interpretive account of private law does not prescribe outcomes. Nevertheless, an interpretive account can have normative implications. As noted, the desirability of legal change often depends on how we understand the status quo.²³⁵ If we have a concern with reforming the law, it often matters what the existing law is. For example, stare decisis norms, if accepted, mean that the correct interpretation of legal doctrine can help us figure out how or whether the law should change.²³⁶ For normative theories that consider stare decisis to hold at least some force, an interpretive account has relevance.²³⁷

In some cases, however, an interpretive account has added importance. Some normative theories call for change to private law based on our understanding of the legal status quo. For example, scholars have recently criticized certain private law doctrines by claiming that their rationale diverges from principles of interpersonal morality.²³⁸ Arguably, such divergence is a serious problem. Yet before we can address the alleged problems caused by the law's rationale, we must first determine what that rationale is. This type of critique thus raises a basic interpretive question: what *is* the rationale of private law? If a divergence between legal and moral principles is problematic, then a sound understanding of private law concepts—from the internal point of view—is crucial to assessing private law.

Seana Shiffrin's recent work offers a good example of how an interpretive account can matter for these purposes. Shiffrin argues that certain types of divergence between law and morality are undesirable.²³⁹ In particular, when participation in a legal practice

235. See *supra* note 39 and accompanying text.

236. Cf. Zipursky, *Pragmatic Conceptualism*, *supra* note 40, at 476 (“[A] first step in determining the answer to a legal question is determining how the concepts within the law apply to the question at hand.”). We may wish to change the law, but a first step would still be to figure out what the law is, and this calls for an interpretive inquiry that takes seriously legal concepts.

237. See *supra* text accompanying note 40.

238. See, e.g., Shiffrin, *supra* note 11, at 710-12.

239. See *id.* at 715 (describing the conditions under which a divergence between legal and moral principles will burden moral agents).

involves simultaneous participation in a moral practice, she suggests that a divergence between law and morality should be avoided.²⁴⁰ The reason is that, in her view, moral agents should not be faced with conflicting messages about their duties, and a divergence between law and morality can create such conflicts.²⁴¹ Notice, however, that this argument is closely linked to one's understanding of the rationale that underlies private law.

Shiffrin's concerns are especially relevant to contract law. According to her account, contract law diverges from morality in light of the contractual overlap with promising.²⁴² A contract is often portrayed as a promissory relationship.²⁴³ And contract law doctrines, at least purportedly, are premised on the idea that people should feel free to breach their agreements as long as they pay damages.²⁴⁴ Promissory morality, in contrast, frowns upon a breach of promise even if damages are paid, and even if the breach is efficient.²⁴⁵ Consequently, contract law appears to disregard the moral duty that a promisor owes to a promisee.²⁴⁶ If Shiffrin is right, then the rationale of contract law conflicts with moral principles.

This Article offers an answer to this critique by suggesting a different way to understand contract law. Shiffrin focuses on a promisor's moral duties.²⁴⁷ Yet contract law, like other fields within private law, is best understood in terms of moral enforcement rights. Contract law is not about the contractual promisor's moral duties to the promisee, and so we should not be looking for contract law doctrines to parallel a promisor's moral duties. Once we consider moral enforcement rights, the meaning of contractual remedies changes. Part IV.B will suggest that, if we focus on a prom-

240. *See id.* at 717.

241. *See id.* at 715.

242. *See id.* at 722.

243. *See id.* at 721 ("U.S. contract law represents that a contract is an enforceable promise."). Not all theories of contract are grounded in promissory morality. *See, e.g.*, Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801 (2008). The relevant point for purposes of Shiffrin's theory is that contracts are represented in this way.

244. *See Shiffrin, supra* note 11, at 730-31 (describing such a view in terms of efficient breach theory).

245. *See id.* at 732 ("[A] virtuous agent cannot accept the economic benefits of breach as constituting a sufficient, or even a partial, contributory justification for the law's content.").

246. *See id.* at 722.

247. *See id.*

isee's moral enforcement rights, contract law may actually represent a convergence between legal doctrine and moral principles.

A. The Accommodationist Critique of Contract Law

As indicated above, Seana Shiffrin has recently offered an important claim about how the law should relate to morality. Her approach is known as accommodationism.²⁴⁸ Shiffrin contends that the law should accommodate interpersonal morality by avoiding certain conflicts between legal doctrine and moral principles.²⁴⁹ She then uses contract law as an illustration.²⁵⁰ If she is correct in her interpretation of contract law, then the principles that justify contract law are, quite possibly, contrary to the principles of interpersonal morality.²⁵¹ This conflict, in turn, is problematic for the moral agent.²⁵²

Shiffrin claims that moral agents should not have to contend with legal principles that conflict with their moral commitments. As she argues, "When the directives of law and morality regulate the same phenomena, moral agents have to negotiate two distinct sets of norms."²⁵³ These conflicting directives present an undesirable burden on moral agents, given that many individuals believe there is a moral duty to obey the law.²⁵⁴ The potential for this burden, in turn, suggests we should reform legal doctrine in order to avoid such conflicts.

Once we adopt this perspective, however, much will depend on the justification that actually underpins legal doctrine. Shiffrin contends that "the law and its rationale should be transparent and accessible to the moral agent."²⁵⁵ She also states that "the law's rationale should not present a conflict for the interested citizen qua moral agent."²⁵⁶ As these remarks suggest, the correct interpretation of the law is vital to the application of Shiffrin's normative theory.

248. *See id.* at 717.

249. *See id.* at 713-14.

250. *See, e.g., id.* at 720.

251. *See id.* at 709.

252. *See id.*

253. *Id.* at 715.

254. *See id.*

255. *Id.* at 718.

256. *Id.*

This follows because if we have not accurately interpreted the law, we may not have accurately discerned a divergence between legal principles and morality.

Consider then how the specifics of contract law fit into Shiffrin's argument. At first glance, Shiffrin is exactly right in drawing attention to contract doctrines. Contract law is a classic case of a legal practice that simultaneously implicates nonlegal moral norms. Contract law in the United States presents itself as a promise-based practice.²⁵⁷ And, indeed, ordinary citizens and legal theorists often draw a connection between contractual obligations and promissory obligations.²⁵⁸ Moral agents often see a breach of a contract to be a breach of a promise.²⁵⁹

This raises the possibility that the law of contracts diverges from promissory morality in an undesirable way. Indeed, such a divergence is precisely what Shiffrin claims, based on the manner in which contract law remedies breaches and the apparent reason for these legal features.²⁶⁰

Notably, efficient breach theory is a prominent part of the contracts literature.²⁶¹ A number of scholars have encouraged courts to facilitate efficient contractual breaches.²⁶² If contract law facilitates breaches of contract on such a basis—for example, by ordering expectation damages instead of specific performance²⁶³—then contract law has apparently adopted principles that conflict with the moral duty to keep one's word.²⁶⁴

257. See *id.* at 721 (“[A] contract [is] ‘a promise ... for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.’” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979))).

258. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

259. See Shiffrin, *supra* note 11, at 731.

260. See *id.* at 731-32.

261. See, e.g., Richard Craswell, *Contract Remedies, Renegotiation and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988).

262. See Shiffrin, *supra* note 11, at 730 (discussing varying scholarly approaches to the efficient breach theory).

263. See *id.* at 722-23 (indicating that the typical remedy is expectation damages, not specific performance).

264. There is, however, significant debate as to whether contract doctrines actually diverge from morality in the way Shiffrin claims. For an important challenge along these lines, see Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1 (2007), <http://www.harvardlawreview.org/media/pdf/cfried.pdf>.

In addition, contract law has a variety of remedial doctrines that do seem to facilitate breaches. For example, contract law tends to favor expectation damages over specific performance as a remedy.²⁶⁵ Shiffrin thus asks the following question: “Could the virtuous agent accept some version of efficient breach theory as a justification for these remedial rules?”²⁶⁶ Shiffrin argues that the moral agent would be put in the position of accepting laws that are justified by a rationale that is not consistent with her moral commitments.²⁶⁷ Contract law, on this account, presents an undesirable conflict between the law’s aim to facilitate certain breaches and the promise-keeping principles of the moral agent.²⁶⁸

B. The Import of Moral Enforcement Rights

For present purposes, let us assume that Shiffrin is right in her general accommodationist approach. Let us also assume that, under promissory morality, if a promisor breaches his promise, there is a duty to perform after the fact rather than a duty to perform or pay damages.²⁶⁹ Even if we adopt Shiffrin’s framework, it makes sense to take into account precisely how enforcement fits into promissory morality.²⁷⁰ Shiffrin focuses on moral duties,²⁷¹ but moral enforcement rights should also be a central concern. Promissory morality is not just a matter of primary duties or even remedial duties. It is, in addition, concerned with a promisee’s right to legitimately enforce certain promises.

265. See Shiffrin, *supra* note 11, at 722-23.

266. See *id.* at 731.

267. See *id.*

268. See *id.* at 732-33.

269. Not all theorists would necessarily agree with Shiffrin’s premises regarding promissory morality in the contract setting. See, e.g., Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009); Alan Schwartz & Daniel Markovits, *The Myth of Efficient Breach* (Yale Law Sch. Faculty Scholarship Series, Working Paper No. 93, 2010), available at http://digitalcommons.law.yale.edu/fss_papers/93.

270. It is important to note, however, that Shiffrin’s apparent concern is with promissory morality as such, rather than with promissory conventions. Cf. Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1551 n.2 (2009) (assessing the morality of promissory breach in terms of “nonlegal, objectively grounded normative principles”). This Article will use commonly held understandings of promissory morality as a starting point. Disagreement over promissory morality may nonetheless affect the conclusions reached.

271. See Shiffrin, *supra* note 11, at 709.

Recognition that private law is premised on moral enforcement rights can account for cases in which promisors owe a duty to perform, yet contract law will not require performance. For example, consider the rarity of specific performance.²⁷² Shiffrin suggests that “a promisor is morally expected to keep her promise through performance.”²⁷³ The promissory duty is not to perform or pay damages on this view. Yet contract law frequently permits a breaching party to pay damages rather than forcing performance. Shiffrin concludes: “If contract law ran parallel to morality, then contract law would—as the norms of promises do—require that promisors keep their promises as opposed merely to paying off their promisees.”²⁷⁴ Given the judicial reluctance to issue orders for specific performance, Shiffrin discerns a divergence from promissory morality.

Nevertheless, this Article suggests another way to view the problem. Promises are often seen as commitments to perform, not to perform or pay damages.²⁷⁵ Likewise, in cases of breach, a promisor’s remedial duty is often seen as a duty to perform after the fact, not to perform or pay damages.²⁷⁶ However, these moral principles do not entail that there is anything wrong with contract law or its rationale. The key insight is to see that, even in cases in which there is a remedial duty to perform, this does not automatically mean the promisee has a moral right to require performance. The move from moral duties to legitimate coercive responses is context dependent.

The important distinction here involves the line between what the promisee has a moral right to in terms of remedies and what the promisee has a right to in terms of *coercing* remedies. Perhaps as a default rule a promisee does have a remedial moral right to performance.²⁷⁷ But even so, the promisee’s moral enforcement right

272. See *id.* at 722-23. Another useful illustration is the consideration doctrine, discussed *supra* note 137 and accompanying text. Although Shiffrin sees a divergence between the cases in which courts enforce contractual promises and the cases in which promisors owe performance, Shiffrin, *supra* note 11, at 722-23, a focus on moral enforcement rights suggests that there is, for the most part, a convergence.

273. Shiffrin, *supra* note 11, at 722.

274. *Id.*

275. See Gold, *supra* note 1, at 54 (discussing this issue).

276. *Id.*

277. See Shiffrin, *supra* note 270, at 1567.

may nonetheless be an enforcement right to assess expectation damages. Remedial moral rights can differ in content from primary moral rights; so too moral enforcement rights can differ in content from remedial moral rights.²⁷⁸

Recall the story of the house and the table from the Introduction to this Article. *B* has a moral right to performance of a promise—delivery of a table on a certain date. *B* would also have a remedial moral right in the case of nonperformance. Her remedial moral right might call for delivery on the next available date. But granting these premises, it does not automatically follow that *B* has a right to *force* performance on that next available date. This is a separate question of promissory morality.

Depending on context, a promisee's moral enforcement right might take the form of compensation for nonperformance and nothing more.²⁷⁹ In some cases—for example, a long-term services contract—it might be immoral for the promisee to physically force the promisor to perform if the promisor refuses to do so.²⁸⁰ This moral constraint on enforcement could apply even if the promisor is morally obligated to perform or to do the next best thing.

On this basis, Shiffrin's critique of specific performance doctrine falls into doubt. It is true that the law occasionally precludes a promisee from seeking a specific performance remedy when the promisor is morally obligated to perform.²⁸¹ In such cases, however, promissory morality would likely also preclude the equivalent remedy of self-help. Contract law may therefore converge with promissory morality. In those instances in which a promisee possesses moral enforcement rights, contract law generally also provides for legal enforcement rights; in those cases in which the

278. See *supra* Part II.A.1-2.

279. Shiffrin recognizes that there could be distinctively legal reasons to adopt damages versus specific performance, for example, administrative costs. See Shiffrin, *supra* note 270, at 1568. My point is different. The suggestion here is that the reasons against specific performance need not be distinctively legal; there are reasons in the realm of interpersonal morality why a promisee may not have a moral enforcement right that includes specific performance under certain circumstances. Those same reasons carry over into the legal setting.

280. Cf. Gold, *supra* note 1, at 54 (discussing how forcing a promisor to perform can be similar to enslavement).

281. See Shiffrin, *supra* note 11, at 723.

promisee lacks moral enforcement rights, contract law tends not to permit enforcement.

If *A* had promised, instead of a table, that he would build a house for *B* in return for her labor in building his house, *B* would not have a moral enforcement right that would permit her to force *A* to start construction. The moral enforcement right in this case is not identical in content to *B*'s primary moral right nor to her remedial moral right. *B* has a primary moral right to the promised construction of the house, and she also has a remedial right to the next best thing if *A* breaches; but she does not have a moral enforcement right to *make A* perform. She would, instead, have a moral enforcement right to claim compensation.

It can be morally wrong—indeed, it can involve the commission of a wrong—to force someone to perform a burdensome service, even when that individual owes a duty to perform that service. In such cases, the promisor's autonomy should trump any moral enforcement right to force specific performance.²⁸² A moral agent would not have any greater freedom to force specific performance when we assess these situations in terms of moral rights than she would under the doctrines of contract law.²⁸³ The promisor's duty to perform can still be taken seriously in both settings—moral and legal.

C. Summary

Interpretations of private law can help us to see whether private law doctrines diverge from the principles of interpersonal morality. Some commentators see a divergence, at least with respect to contract law.²⁸⁴ These claims of divergence, however, are dependent on a particular view of the rationale for private law remedies.²⁸⁵

282. See Gold, *supra* note 1, at 53-58.

283. Indeed, there are various potential limitations on moral enforcement rights that could affect the availability of otherwise deserved remedies. Cf. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 109 (1990) ("If you think, with Locke, that there would be morality (though no law) in the state of nature, then I think you must agree that not just any bit of violent self-help is permissible in the state of nature.").

284. See *supra* text accompanying note 242.

285. See *supra* Part IV.A.

This Article calls these claims into doubt by explaining how private law is connected to a plaintiff's moral enforcement rights.²⁸⁶

Contract law, at least as it is commonly understood, involves individuals in the moral practice of promising.²⁸⁷ If core features of contract law are justified by norms that reject the implications of promissory morality, then contract law may raise serious concerns.²⁸⁸ Indeed, recent scholarship has argued that contract law should be reformed on this basis due to its allegedly inadequate appreciation for promissory obligations.²⁸⁹ This Article suggests a response.

Granting that ordinary promises result in a moral obligation to perform, not all promises create strong moral rights.²⁹⁰ In cases of breach, it may be morally questionable for a promisee to force the promisor to perform. Such coercion may in fact be immoral.²⁹¹ Only certain promises—promises for consideration being a classic example—result in a promisee possessing moral enforcement rights.²⁹² And, when moral enforcement rights do exist, specific performance will only sometimes be a morally appropriate means of enforcement.²⁹³

If the moral rights theory of private law is correct, then the private right of action is a reflection of the moral enforcement rights possessed by a plaintiff who was wronged.²⁹⁴ The private right of action offers a substitute means of enforcement, given the limitations on self-help.²⁹⁵ For contract law, the expectation damages remedy then makes good sense: a promisee often possesses a moral enforcement right to correct the promisor's wrong, but she may not use any means available.²⁹⁶ Certain limits on the legal remedy—such as limits on specific performance—correspond reasonably

286. See *supra* Part IV.B.

287. See *supra* note 257 and accompanying text.

288. See *supra* text accompanying note 268.

289. See *supra* Part IV.A.

290. See *supra* Part IV.B.

291. See *supra* text accompanying note 280.

292. Cf. Gold, *supra* note 138, at 116 (discussing the doctrine of consideration, moral rights, and coercion).

293. See *supra* text accompanying note 282.

294. See *supra* Part III.D.

295. See *supra* text accompanying note 12.

296. See *supra* text accompanying note 273.

well to the moral limits on what a promisee can legitimately do to enforce her moral rights.²⁹⁷

CONCLUSION

Conceptual accounts of private law usually take one of two forms: corrective justice accounts or civil recourse accounts.²⁹⁸ Both theories have offered powerful arguments against each other. Corrective justice accounts struggle to explain the variety of legal remedies that courts provide.²⁹⁹ Civil recourse accounts are often challenged based on the normative principles they seem to endorse.³⁰⁰ This Article offers an alternative approach, one that improves upon the leading alternatives.

Moral enforcement rights are the key to understanding private law.³⁰¹ A wronged party's use of coercion to correct a wrong is often permissible in a state of nature.³⁰² When certain moral rights are breached, the wronged party acquires a moral enforcement right to redress that wrong.³⁰³ For good reason, civil society largely prohibits self-help remedies. Yet the presence of the state does not mean that individuals give up their moral enforcement rights altogether.³⁰⁴ Drawing on the social contract metaphor, we can see the private right of action as a substitute for a wronged party's acts of purely private enforcement, available in those cases in which self-help would be appropriate but for the state's prohibition of such conduct.³⁰⁵

On this theory, the state's interest in private law is not in doing corrective justice as such but rather in empowering the plaintiff to act. The private right of action is the means that the state provides. The plaintiff is not generally given a right to revenge or even to satisfaction, however. For the most part, private rights of action are not vindictive. The plaintiff is instead empowered to bring about a

297. *See supra* note 279.

298. *See supra* text accompanying notes 1-2.

299. *See supra* Part I.C.

300. *See supra* Part I.D.

301. *See supra* Part III.B.

302. *See supra* text accompanying note 166.

303. *See supra* Part II.A.2.

304. *See supra* Part III.A.

305. *See supra* text accompanying note 174.

correction of a wrong (or wrongful loss) or to prevent that wrong in the first place. In other words, private law is designed to allow individuals to enforce their moral rights.³⁰⁶

Once we see private law in these terms, we can explain a number of core features of private law doctrine. The conception of moral rights and duties described in this Article is a conception that recognizes the special standing of right holders.³⁰⁷ The legal standing to initiate a private right of action reflects these commonly held moral principles. Various private law remedies are also explained. Moral enforcement rights account for legal remedies that make the plaintiff whole.³⁰⁸ Likewise, moral enforcement rights account for injunctive relief.³⁰⁹ The scope of the theory is also substantial. Various fields within private law—from torts, to contracts, to unjust enrichment—make sense under this theory.³¹⁰

Finally, the moral rights theory allows us to better assess certain normative claims.³¹¹ Recent scholarship has critiqued private law doctrine—in particular, contract doctrine—for a perceived divergence from the principles of interpersonal morality.³¹² This Article calls these critiques into question. Private law is best understood, not in terms of a defendant's moral duties, but in terms of a plaintiff's legitimate claim to enforcement.³¹³ Recognizing this feature of private law suggests that several controversial legal doctrines may actually represent a convergence with moral principles.

306. *See supra* Part III.B.

307. *See supra* Part II.A.3.

308. *See supra* Part III.D.

309. *See supra* Part III.C.

310. *See supra* Part III.D.

311. *See supra* Part IV.

312. *See supra* Part IV.A.

313. *See supra* Part IV.B.

