CIVIL RECOURSE OR CIVIL POWERS?

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Civil recourse theory, as its name implies, sees private law as providing a means by which individuals may have recourse against those who have wronged them, albeit in a civilized manner. Of course, no one would deny that much of private law does in fact provide private individuals with a means of recourse, but civil recourse theorists take pride in the fact that their theory, unlike competing theories, sees the right to recourse as the focal point of private law. By contrast, law and economics scholars argue that the rules of tort law, for example, aim to regulate conduct by providing individuals the incentives to take appropriate levels of caution, where what counts as “appropriate” is whatever would maximize welfare. But they cannot explain why enforcement of these rules is left to private plaintiffs, who can choose to enforce or not as they please. Corrective justice theorists have a very different view of the aims of tort law, but a similar problem. For corrective justice theorists, tort law aims (very roughly speaking) to do justice among the private individuals to a suit rather than provide incentives for society at large. Wrongdoers have a so-called secondary duty to repair the harm caused by the breach of a primary duty, such as the duty to take due care not to harm others. But even if corrective justice theorists are correct that wrongdoers have such secondary duties, it is again not clear why the state would leave enforcement of those duties to the whims of private

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2. Zipursky, Civil Recourse, supra note 1, at 734-38.


parties, with the result that much wrongdoing will go unaddressed if the victims choose not to pursue the matter.

Civil recourse theorists argue that the central feature of private law is the empowerment of private citizens to bring claims to address wrongs done to them. These theorists argue that the right to bring civil claims is justified by a similar precivil right to respond to wrongdoing. Drawing on social-contract theory, in particular that of John Locke, civil recourse theorists argue that in the state of nature, individuals would have a right to respond to wrongdoing committed against them. This right to respond is part of the compromise of the social contract, one of the things we give up in exchange for the benefits of living in an orderly society. But we do not give up that right for nothing; rather, in exchange we receive a right to respond to wrongdoing in a civilized fashion within the confines of the justice system. The state is justified in helping one citizen act against another because a victim has a moral right to act, or would have such a right in a state of nature. In fact, the state is not only justified in providing such avenues of recourse, it is perhaps even required to do so as a condition of its legitimacy.

It is not entirely clear, however, just how different civil recourse theory is from corrective justice theory, and indeed, in this conference we heard vigorous arguments that it adds little or nothing to the framework already provided by corrective justice theorists. Most of those arguments took place among tort scholars. I enjoyed them as a spectacle, but as a contracts scholar I do not have a dog in that fight. I am, however, quite interested in the claim that civil recourse is a theory not just of tort law, but of private law more broadly speaking.

It is my goal here to raise serious doubts about civil recourse theory’s ability to explain private law generally, and contract law in particular. However much we can distinguish between civil recourse theory and corrective justice theory, I argue that both suffer similar shortcomings when offered as explanations of contract law. Both theories, at least as commonly understood, see private law as a response (of some sort) to wrongdoing, but contract law is for the most part not concerned with wrongdoing. With some effort, both theories may be made to fit the structure of contract law to a certain degree, but only when they are so stripped of normative content as to be largely structural. In short, if civil recourse theory is understood just to be the

6. Id. at 738-39.
view that the private law empowers plaintiffs to bring claims, then it is certainly true. But if it goes further and argues that the empowerment is based on a prelegal right to respond to wrongdoing, then it cannot explain our modern contract law, however well it may explain tort law. Moreover, I argue that this result is inevitable because contract law is a matter of power-conferring rules rather than duty-imposing rules, and civil recourse theory is not equipped to explain areas of law that are designed to enable rather than admonish.

I. WRONGDOING AND CONTRACT LAW

Corrective justice theorists argue that tortfeasors incur a so-called “secondary” duty to repair the wrongs that their wrongdoing causes.9 Civil recourse theorists argue that tort victims have a right to respond to wrongs done to them by others.10 In both cases, however, there is presupposed an underlying primary right and duty. For example, a driver has a duty to her passengers not to drive carelessly, and those passengers have a right against the driver not to be harmed by her careless driving. If the driver breaches that duty and injures her passengers, then according to the corrective justice theorists she incurs a secondary duty to repair their injury (as best she can), and according to the civil recourse theorists the passengers gain a right to respond to the driver for her wrongdoing. Presumably, in the standard case all of these rights and duties exist prior to government (“prior” in the logical, and not necessarily temporal, sense). The argument is that the rules of tort law reflect these prelegal rights and duties and are at least to some extent justified by them. For that reason, we expect the legal rules to correlate to some degree with the prelegal rights and duties. So tort law asks, for example, not only whether the driver caused the accident, but to what degree the driver was at fault in doing so, to what degree the passengers may also have been at fault, and to what degree their injuries were foreseeable.

That all sounds perfectly reasonable as an account of tort law. And there are those who have argued that contract law works in a similar fashion. Most famously, Charles Fried argued that contract law is based on the “promise principle,” according to which the rules of contract law are based on the moral obligations of promisors to live up to their self-imposed commitments.11 The primary duty under such an account is the duty to keep one’s promises; the breach of the promise constitutes a breach of that duty; and damages represent the promi-

10. See Zuprski, Civil Recourse, supra note 1, at 738-39.
sor’s secondary duty in light of his breach—or, under the civil recourse view, the plaintiff’s right to bring a suit is based on the promisee’s right to respond to the wrongdoing of the broken promise.

For Fried, the duty to keep a promise has a decidedly Kantian flavor.\textsuperscript{12} Kantian or not, it is familiar and quite plausible. Indeed, much of the literature on both civil recourse and corrective justice (in both tort and contract) is full of references to venerable and aged sources, apparently in an attempt to show that the underlying norms are not only uncontroversial, they are deeply embedded in our culture and have been for centuries. Thus, Zipursky appeals to Locke and, to a lesser degree, Blackstone;\textsuperscript{13} Goldberg seconds him on Locke, and further emphasizes Blackstone, Coke, and the like.\textsuperscript{14} Weinrib famously locates the roots of corrective justice in Aristotle.\textsuperscript{15} And Nate Oman outdoes everyone by tracing a version of civil recourse theory all the way back to the Bible (the Old Testament, no less) and the Homeric epics.\textsuperscript{16}

But no matter how well established the moral duty to keep one’s promises is—and, by the way, among moral philosophers it may not be so well established as one would think—that moral duty does not seem to factor into modern, Anglo-American contract law much at all. This is a point I have argued elsewhere,\textsuperscript{17} so I will not belabor it here. It will suffice for now to give just a few bits of evidence.

Most tellingly, contract law, unlike most of tort law, has a strict-liability standard. That means that no inquiry is made into why one breached. Thus, even if the breaching party has a very compelling story—a lost job, a crash in the economy, an unexpected competing moral obligation such as a sick relative—such stories are generally not even entertained in court. (What limited excuses are available are usually explained as an interpretation of the original agreement, and thus not really a matter of breach at all.\textsuperscript{18}) Conversely, if one is a particularly nefarious breacher, very little is likely to come of it. Punitive damages are not awarded except for very narrow exceptions, and so-called “willfulness” only matters on the margins and in certain circumstances.

Perhaps more importantly, promises are generally only enforceable when supported by consideration. There was a time when one could make one’s promise legally enforceable just by being careful


\textsuperscript{13} See Goldberg, supra note 7, at 541-59.

\textsuperscript{14} See Weinrib, supra note 4, at 56-83.

\textsuperscript{15} Nathan B. Oman, Consent to Retaliation: A Civil Recourse Theory of Contractual Liability, 96 Iowa L. Rev. 529, 531 (2011).


\textsuperscript{17} Id. at 3034-39.
enough to make the promise in the prescribed formal manner that
would highlight the solemnity of the occasion, but for the most part
courts are now only interested in picking out bargained-for exchanges.\textsuperscript{19} In fact, in many cases courts go out of their way to acknowledge
a promisor’s moral obligation even as they refuse to enforce the con-
trat.\textsuperscript{20} The moralist Fried is forced simply to dismiss the considera-
tion doctrine as a historical accident.\textsuperscript{21} Accident or no, it is the first
cut in our contract law between those promises that are enforceable
and those that are not. Moral obligation, by contrast, seems to play
no role at all.

In recent years, some theorists have struggled to pull contract law
within the corrective justice or civil recourse camps. For example,
Nate Oman argues that since biblical times private parties have tak-
en certain sorts of agreements seriously enough that they actually
authorized violence against their own persons if the agreement were
to be broken.\textsuperscript{22} In ancient times this authorization was made vivid
and unmistakable by the symbolic act of animal sacrifice. By publicly
sacrificing an animal, a promisor said to the promisee—and, im-
portantly, to his own kin—that if he should break his promise, the
promisee was entitled to take such violent action against him. Oman
highlights the adversarial nature of litigation in modern legal sys-
tems and argues that it is a civilized version of the sort of martial
conflict that would have taken place in precivil societies.\textsuperscript{23} Civil re-
course theorists are often accused of advocating revenge, a charge
that seems to make them squeamish at best, but Oman’s message to
them is to buck up and bite the bullet.\textsuperscript{24} Private rights of action are
rights to attack in court, and such attacks are acceptable because
they replace the real-life attacks that used to occur outside of court.

Fascinating as his view is, though, it bears little relationship to
the central doctrines of modern contract law.\textsuperscript{25} While one likely has a
moral obligation to keep one’s promises, moral obligations are a mat-
ter of degree. Broken promises generally do not give rise to the sort of
justified outrage that, say, intentional injuries do. In order for civil

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\item [19.] 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 2:2 (4th ed. 2007) ("Centuries before the recognition of simple contracts, promises under seal were held binding. . . . The obligation of the maker of a sealed instrument under the common law was dependent solely on whether certain forms were observed.").
\item [20.] See, e.g., Mills v. Wyman, 20 Mass. (3 Pick.) 207, 211 (Mass. 1825) ("A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it.").
\item [21.] Fried, supra note 11, at 28-39.
\item [22.] Oman, supra note 16, at 531.
\item [23.] Id. at 545-51.
\item [24.] Id. at 533.
\item [25.] It may not correspond to much of modern morality either.
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recourse theory both to explain and justify, it must presumably be able to identify compelling primary obligations, the breach of which would give rise not only to rights to respond, but rights to respond that are compelling enough to demand the state's help. And finally, there would need to be some level of correspondence between the particular rules of contract law and the underlying primary duties and rights to respond.

As I mentioned above, contract law has a strict liability standard. Defendants are not allowed to give reasons that justify their nonperformance, nor are plaintiffs allowed to give reasons why the defendant's nonperformance was particularly galling in the present case. Similarly, executory promises are enforced nearly as readily as half-completed exchanges (I say "nearly" because reliance will allow a plaintiff to avoid certain defenses), even though presumably they would give rise to much less reason for outrage than half-completed exchanges. And perhaps worst of all for Oman's argument, punitive damages are not enforced even if consented to at the outset.26 People often find the state's unwillingness to enforce punitive liquidated-damages clauses perplexing, but an example similar to the one Oman mentions justifies the state's reticence: suppose I agree that if I breach you may punch me in the nose. If upon breach I refuse to let you punch me, should the state hold me down so that you can take a swing? Most of us find state-assisted private violence unpalatable, to say the least. But the example may be unpalatable not only because of the violence, but also because it is state-assisted private vengeance or punishment. Punitive liquidated-damages clauses are of course not so graphic, but are objectionable for similar reasons. Perhaps some private wrongs are bad enough to warrant state-assisted private punishment—for example, the sort of egregious wrongs that lead to punitive damages in tort law—but we generally do not believe broken promises rise to that level.

While Oman sees contract law and practice as a passionate exercise, others have gone to the opposite extreme, seeking to make contract law fit corrective justice and/or civil recourse theory by reducing it to a lifeless structure. For example, I myself have argued that corrective justice and contract law can comfortably coincide despite contract law's indifference to moral considerations.27 The key, I argued, is to understand the act of contracting as creating a legal entitlement to performance, the frustration of which gives rise to a secondary duty on the part of the contract breaker to pay damages to the promisee.28 The right to performance, on this view, is akin to a property

27. See generally Bridgeman, supra note 17.
28. Id. at 3022; see also Ernest J. Weinrib, Punishment and Disgorgement as Contract Remedies, 78 Chi.-Kent L. Rev. 55, 64-70 (2003).
right, where infringements are a matter of strict liability. Contracts give the promisor a duty to repair (in accordance with corrective justice theory); and, they also empower the promisee to bring a claim against the promisor in the event of breach (in accordance with civil recourse theory). But my argument gave no account of the source of the duty to keep one’s promise to begin with. Rather, it just treated the right to performance as a given fact. As Richard Craswell has pointed out, this view is consistent with just about any theory of why contracts are enforceable, and thus it is not at all clear that it explains contract law in any important way.

Others have argued for similar “entitlement” or “transfer” theories in more detail, specifically Peter Benson before me and Andrew Gold after. Benson and Gold have much more to say about the source of the right to entitlement, locating its origin in property rights. These property rights are traced to pre-legal ownership of one’s own body and labor. (Benson, especially in his early work, relies heavily on Hegel in structuring his account; Gold relies heavily on Locke.) Gold takes the further step of explaining how it is at least conceptually possible to reconcile corrective justice with civil recourse. This is not the place to respond to those arguments. Suffice it to say that, though intriguing, I find them implausible—both the underlying moral claims and the fit between our modern contract law and these claims. They build all of private law on the shaky foundations of rights of first acquisition and “ownership” of one’s body and one’s labor.

It seems, then, that civil recourse theorists are in the same situation as corrective justice theorists. Both theories claim to be theories of private law generally, but have only flourished as theories of tort. As explanations of contract law, they either collapse into merely structural theories, or else rely on implausible moral claims that


33. See Gold, supra note 30.

even if true do not fit the norms of contract law well. Of course, my
cursory claims here have not proven any such thing, and in truth I
have been unfairly dismissive of a great deal of worthwhile scholar-
ship. But that is because my aim here is not to jump back into those
trenches, but rather to take a step back and think about why it may
be the case that no such theory could explain contract law. In the
next part of this Article, I try to explain why these theories of con-
tract are doomed from the start. Drawing on Hart’s distinction be-
tween power-conferring and duty-imposing rules, I briefly argue that
(a) contract law is a matter of power-conferring, not duty-imposing
rules, and (b) as such, it is an unlikely candidate for anything more
than a purely structural corrective justice or civil recourse theory.

II. CONTRACT LAW AS A SET OF POWER-CONFERRING RULES

The legal philosopher H.L.A. Hart famously distinguished be-
tween two types of legal rules, duty-imposing rules and power-
conferring rules.35 Duty-imposing rules are rules which, as their
name implies, impose duties on citizens.36 Importantly, these duties
are imposed on citizens whether the citizens wish them to be imposed
or not.37 So, for example, the rules of criminal law forbid murder,
thief, and other undesirable social behavior, and they forbid such beh-
avior for everyone, not just those citizens who choose to be bound by
the rules. The same can be said for duties in tort law, such as the
rules that forbid both certain kinds of intentional acts and the rules
that demand that due care be taken.

By contrast, the law also includes power-conferring rules.38 Power-
conferring rules are rules that enable actors to act so as to create a
legal change if they so choose.39 So, for example, the law sets out the
steps by which a legislature can create certain kinds of legal change
if it so chooses, even as it does not insist that the legislature make
such changes. Similarly, a private party may execute a legally en-
forceable will if she so chooses, or a couple may marry if they so
choose. These decisions will be given legal effect so long as the indi-
viduals follow the steps laid out by law. But the law does not require
anyone to marry or (with few exceptions) bequeath property to any-
one, and it is largely indifferent as to whether anyone wants to do so.
Rather, it simply empowers them to do so if they so choose.

Whether contract law is a matter of duty-imposing rules or power-
conferring rules is not entirely clear and has been the subject of some

36. Id. at 27.
37. Id.
38. Id. at 27-28.
39. Id.
debate recently.\textsuperscript{40} Hart claimed that it is a matter of power-conferring rules, though he did not elaborate as to why.\textsuperscript{41} More importantly, he did not explain how to tell power-conferring rules from duty-imposing rules. It seems likely that the answer depends a great deal on one’s understanding of contract law.

For instance, the most obvious example of a power-conferring theory of contract is Randy Barnett’s consent theory of contract law.\textsuperscript{42} Barnett argues that the most important pillar of contract law is an individual’s consent to be bound.\textsuperscript{43} On his view, contract is similar to a form of private legislation whereby parties are empowered to create special legal obligations for their own benefit. These obligations are freely chosen, and unless the parties manifest an intention to be legally bound, they should be free to keep their promises or not as they choose.

By contrast, an obvious example of a duty-imposing theory of contract would be one of the theories that collapses contract law into a form of tort law.\textsuperscript{44} According to these theories, the fact that individuals choose to take on an obligation is not nearly so important as is often supposed. Instead, contract law is just one part of a general law of obligations, according to which liability is imposed more because of a benefit received or harm given than because of any willful choice to be bound by the promisor. Indeed, for these theorists, promises are only artificially placed at the center of contract law through the vehicle of implied promises. For these thinkers, a more accurate and justifiable view of contract law would focus less on promises and more on harms (like tort law) or benefits (like the law of unjust enrichment). Presumably such a law of contracts-as-obligations would be primarily made up of duty-imposing rules.

Other theories are not so easy to classify. It would appear at first that Charles Fried’s famous promise-based theory is also a duty-imposing theory.\textsuperscript{45} He sees contract law as based on the “promise principle,” by which he apparently means the moral duty to keep

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\textsuperscript{41} Hart, supra note 35, at 27-28.


\textsuperscript{43} Barnett, Consent Theory, supra note 42, at 303.


\textsuperscript{45} See Klass, supra note 40, at 1727, 1771.
\end{footnotesize}
one’s promises. According to Fried, moral principles do not “depend on fashion or favor”; rather, they apply whether individuals want them to or not. “Contracts must be kept because promises must be kept,” i.e., because of our moral duty to keep our promises. Thus, in his excellent recent work on the subject, Greg Klass lists Fried’s promise theory as a paradigmatic example of a duty-imposing theory.

However, on reflection, Fried’s view is not so easily classified. For one thing, for all his talk of morality Fried is also eager to classify his own theory as a liberal theory, one that is in part based on the state’s duty to insure that its citizens are as free as they can possibly be within the limits of a like freedom for all other citizens. He clearly feels more at home with Randy Barnett’s libertarian view than with the tort-like theories; indeed, such theories were the primary target of his book. For Fried, promising is not just another way that we might happen to harm others wrongfully, but rather is a way in which individuals can bind themselves through their own autonomous choice. Although he does not discuss the distinction between duty-imposing and power-conferring rules, it is clear that a principle motivation of Fried’s book is to establish that contract is different from tort precisely because the obligations of contract law are freely chosen.

Indeed, as John Goldberg and I argue in a recent paper, that distinction is a much more important distinction in the divide between contract and tort than merely noting whether a promise is present or not. We offer a test for whether a theory is duty-imposing or power-conferring. Very briefly put, the test comes down to whether one’s theory of contract would allow parties who enter into an agreement to avoid legal obligation even as they undertake a promissory moral obligation. In other words, suppose parties exchange promises which they mutually agree at the time of the exchange will be morally but not legally binding. Should the law enforce such promises?

Fried focuses on the fact that promissory duties are freely undertaken, but he does not highlight the distinction between moral promissory duties and one’s legal duty to keep a promise. Although we make promises of our own free will, once we have made a promise the moral duty to keep one’s promises applies whether one wishes it to or not. One can well imagine a moralist contract regime in which the

46. Fried, supra note 11, at 1.
47. Id. at 2.
48. Id. at 17.
50. Bridgeman & Goldberg, supra note 40.
51. That is not to say that the duty to keep a promise applies no matter what. In some situations we may be morally excused from performance, for example, because of competing and more compelling moral demands (I might be excused from my promise to have lunch with you if an emergency arises that morally requires my attention at that
moral duty to keep one’s promise is deemed so important to the state that the state chooses to enforce that duty whether the parties wished it to be legally enforceable or not, similar to many of the duties in tort law or criminal law. Indeed, we argue that a heretofore unappreciated problem with Fried’s theory is that it is hard to understand what sort of moral obligation could be so important as to undergird an entire body of law as important as contract law, yet so unimportant that the state would allow parties to eschew legal enforcement of that obligation so easily.52 On the other hand, if Fried would not allow parties to avoid legal liability for their promises, then contract law looks much more duty-imposing, and therefore much more tort-like, than he seems to think it is.

As we explain, as a matter of positive law, our current law is apparently unwilling to enforce such promises.53 Although the Second Restatement of Contracts does not require an express intention to enter into a legally binding agreement in order for there to be an enforceable contract, “a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”54 Comment b is even more explicit, “[P]arties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. In the absence of any invalidating cause, such a term is respected . . . like any other term . . . .”55 If our contract law were a tort-like, duty-imposing regime, grounded in the moral duty to keep one’s promise, then it might enforce promissory moral obligations even if the parties did not want enforcement. Just as parties are not free to opt out of the duty to take due care,56 we can imag-
ine a regime in which they could not opt out of the duty to keep their promises. The fact that our system is almost certainly not such a system, though, is relevant to whether civil recourse can succeed as a theory of private law, as I argue in the next part of this Article.

III. CIVIL RECOURSE OR CIVIL POWERS?

My argument in this final part is relatively simple: Civil recourse (and perhaps corrective justice) is much better suited to explaining a system of duty-imposing rules than a system of power-conferring rules. That is fine, so long as the theory is confined to tort law, which is a system of duty-imposing rules. But much of the private law involves power-conferring rules. Therefore, civil recourse (at least in its more substantive form) is unlikely to succeed as a theory of private law generally.

Recall that civil recourse theory posits that private law is designed to empower plaintiffs to respond to wrongdoing. For that reason, it may sound at first as though civil recourse would be a natural fit with a set of power-conferring rules. But we must be more careful with our terminology. It is one thing for the state to empower plaintiffs by giving them a way to respond to wrongdoings done to them. It is yet another for the state to establish a legal system designed to allow private parties to create rights and duties where there were none before. The term “power-conferring rules” in Hart’s sense refers to the latter, that is, to rules that are designed to empower private citizens to change their legal rights and duties by following certain steps. The rules of tort law do give victims power, but limited to the power to respond to wrongs (usually in court), not to change what counts as a wrong in the first place.57

I argued above (and at more length elsewhere)58 that civil recourse theory is unlikely to explain contract law. Although contract law does empower the promisee to bring a claim, it does not seem to be motivated by any concern for wrongdoing by the promisor. In a state of nature, promisees may have a right to respond to the wrong done to them when the promisor fails to keep a promise, but even if that is true, that right seems to bear little resemblance to the vindication of rights in our law of contract. Modern contract law also empowers plaintiffs from a civil recourse theorist’s view; specifically, it empowers them to vindicate their contract rights. But the rights plaintiffs are empowered to enforce in modern contract law seem to be legal

57. We may well still want to call tort law power-conferring in this sense. Zipursky does, referring to Hart’s distinction. See Zipursky, Private Law, supra note 1, at 632. That is fine, so long as we keep the distinction in mind between a law which empowers citizens to create legal rights and duties and a law which empowers citizens to enforce legal rights and duties.

58. See supra note 17 and accompanying text.
entitlements, not moral rights to respond to broken promises (if there are such moral rights).

To illustrate the distinction better, consider one area of private law almost never discussed in the general philosophical literature on private law: the law of wills. There can be little doubt that the law of wills is a matter of private law, despite its neglect by private law theorists. Its exclusive concern is the passing of property from one private party (the decedent) to another private party (the beneficiary) upon the decedent's death and by the decedent's own choice. The law of wills does empower individuals to pass on property as they see fit, but it does not do so because individuals have a duty to pass on property in the state of nature.59 In fact, the law seems largely indifferent to whether individuals choose to pass on property to one person or another. It is merely an enabling law.

Of course, once a legal entitlement is established, the law of wills also empowers people in the sense that civil recourse theorists intend. A named heir in a will has the power to make a claim in court to obtain certain property bequeathed to her that remains in the possession of someone else. In other words, once her right to the property has been created, she is empowered to bring a claim. But the law of wills differs from the law of torts in that the former is designed to allow private parties to create such rights (or not, as they choose), whereas the rights and duties in criminal law or the law of torts apply to individuals regardless of their choice. The law simply imposes the obligations rather than setting up a system for private imposition of obligations at the choice of private parties.

Similarly, contract law is power-conferring in this same sense. The law provides a mechanism by which parties can change their legal rights and duties if they so choose. The law is indifferent as to whether A hires B to plow A's field in exchange for money, but if A and B decide to make such an exchange, contract law provides a way for them to make the agreement legally enforceable. If B breaches, the law may well provide a remedy for A. It is tempting at first to see contract law as addressing the wrong done to A by B, but as we have seen, contract law is not really responsive to wrongdoing. Moreover, A and B may opt out of legal enforcement despite the presence of moral wronging if they so choose.

If I am correct that the point of contract is not to respond to wrongdoing, then corrective justice theory and civil recourse theory are unlikely candidates to explain contract law, just as they cannot explain the law of wills. Corrective justice theory posits that private law, or tort law anyway, is primarily concerned with an injurer's duty to repair the damage his wrongdoing has caused. Civil recourse theo-

59. Forced heir statutes could arguably be an exception, but these are rare.
ry posits that private law, or tort law anyway, is primarily concerned with giving victims of wrongdoing a civilized method of responding to wrongdoings done to them that replaces their prelegal moral right to respond. Both are concerned with violations of a moral duty. But that is not the point, or at least not the main point, of contract law, just as it is not the main point of the law of wills. Power-conferring rules enable rather than admonish.

There is a sense, however, in which the law of contracts is concerned with wrongings, and thus there is a sense in which the law of contracts does fit both civil recourse theory and corrective justice theory. The law of contracts empowers individuals to create legal entitlements, just as the law of wills empowers individuals to transfer an entitlement to property to an heir. Once an individual has had such an entitlement transferred to him, he has a legal right which the law will vindicate in many circumstances. The law recognizes a duty by the promisee to pay damages if she has breached (fitting with corrective justice theory), and empowers the plaintiff to enlist the power of the state to enforce that duty (fitting with civil recourse theory).

But saying this much points only to structure and not substance. It gives no account of why the plaintiff has a legal entitlement. The more interesting and robust version of civil recourse theory posits not just that the state empowers plaintiffs to bring a claim to enforce a legal entitlement, but also that the legal entitlement is based on a prelegal moral entitlement. It is not simply a system erected by the state for individuals to participate in as they choose, but rather a system that corresponds, to some degree, to prelegal moral rights and duties. Without this additional claim, civil recourse theory or corrective justice theory could be compatible with any account of the source of the rights and duties. They could track prelegal rights and duties, or they could be entirely a function of the current goals of the state that have nothing to do with prestate morality. The state could have the goal of maximizing welfare, for example, in which case perhaps we should turn private law over to those who study law and economics after all. Of course, maximizing welfare may itself be a prelegal moral imperative, so instead imagine a state that has arbitrary goals. For instance, a state could have the goal of employing as many lawyers and judges as possible, or it could have a dictator who simply liked to watch private-law disputes as a matter of sport. In these cases, the state may find all sorts of reasons for creating, or allowing the parties to create, legal entitlements that need not have anything to do with prelegal moral rights and duties. Enforcing these legal entit-

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60. On the distinction between wrongful loss and wrongdoing, see Bridgeman, supra note 17, at 3020-26.

61. Critics of tort law may argue that our own government, at least in some states, often seems to have this goal.
tlements would fit with the purely structural versions of corrective justice and civil recourse, but not with the more robust versions that claim a moral foundation.

As mentioned above, Richard Craswell has made a similar criticism of entitlement theories.\(^{62}\) Perhaps more tellingly, in his more recent book on corrective justice theory, Jules Coleman admits that corrective justice does not itself provide the source of the primary duties not to harm others that tort law enforces:

\begin{quote}
Corrective justice claims that when someone has wronged another to whom he owes a duty of care, he thereby incurs a duty of repair. This means that corrective justice is an account of the second-order duty of repair. . . . However, the relevant first-order duties are not themselves duties of corrective justice. Thus, while corrective justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them.\(^{63}\)
\end{quote}

Similarly, civil recourse theory is an account of the empowerment of individuals to respond to wrongdoing, but it does not provide an account of what constitutes wrongdoing in the first place.

None of this denies that civil recourse theory has been enormously helpful, as has corrective justice. Clarifying the structure of private rights of action is an extremely important exercise. It may also be the case that not just any account of those rights and duties is compatible with the identified structure.\(^{64}\) Goldberg and Zipursky have spent much of their careers spelling out the details of what the rights and duties embedded in tort law look like, and I find their work largely persuasive. In particular, I find the idea that tort law corresponds in some sense to prelegal moral rights to respond to wrongdoing quite persuasive. To the degree that it is, the stronger version of civil recourse theory—again, the claim that the right to respond is specifically based on a moral, prelegal right to respond—seems plausible for tort law.

But in order for it to be a plausible account of private law generally, it needs to do more than make the structural point that plaintiffs are empowered to respond. It needs to make good on the claim that the point of the practice is to empower plaintiffs to respond to wrongdoing even in contract law (plus perhaps the law of wills, property, trusts, etc.). Although scholars like Oman and Gold have tried to make good on this claim, I have suggested, without arguing here, that their arguments are unpersuasive, both on independent moral grounds and as explanations of the contract law we actually have.

\(^{62}\) Craswell, supra note 29, at 19-22.


\(^{64}\) Coleman claims as much about corrective justice. Id.
What I have argued here is that the shortcomings of those theories should be unsurprising, since civil recourse theory is unlikely to explain any area of law which is largely power-conferring rather than duty-imposing. Power-conferring areas of law enable rather than admonish, and therefore seem unlikely to be explained in any non-structural way by civil recourse or corrective justice.