Understanding Private Law’s Remedies

by

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Abstract

The fundamental question of private law’s remedies is how do subsequent remedial actions rationally address prior failures. This question can be approached either intrinsically or extrinsically. While the former justifies and explains the remedial action from within the original plaintiff-defendant relationship, the latter welcomes external principles and goals. The arguments of this thesis fit within an intrinsic approach to private law’s remedies. To this end, several arguments are levied against the extrinsic perspective, and, in particular, its confidence in the separation of rights and remedies. For positive inspiration, it looks to two leading intrinsic theoretical accounts—those of Ernest Weinrib and John Gardner, respectively—with an eye to revealing what, if any, meaningful differences there are between the two.

Using the language and logic of practical reasons and reasoning, this dissertation suggests that remedies can be understood in one of two ways. First, the remedy is just the same as the original reason. If I fail to pay my debt on the date it is due, my subsequent remedial action in paying it later is carried out because of the original reason, namely, that I owe a debt to someone. Second, the remedy is a reflection of certain second-order reasons that are part of the original (operative) reason. These are reasons not to act for certain other reasons that counsel against the performance of the first-order reason to do the obligatory action. These reasons stick around and
tell you to do *something*; that doing nothing is not optional. If I break your toe, I can no longer satisfy the original reason not to break your toe; however, I can and must do something to address my initial failure. The content of this reparative action is constrained by the original reason not to break your toe. While its first-order strength is no longer available—one can no longer act for the reason it recommends—it can nonetheless provide guidance with respect to what the next-best thing might be.
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Chapter 1
Introduction

1 Subject matter

Why is it that, when things don't go as they are supposed to, reparative actions are sometimes called for? This idea plays out in many spheres of our lives: I promise to bring wine over for dinner. I forget. You may now legitimately expect some sort of reparative behavior on my part: that I apologize, that I make a quick trip to a nearby wine store, that I offer to replace the bottle you must now provide from your cellar, and so on. I step on your foot. You would expect that I get off of it, apologize, ask if you are okay, and so on. You overpay on a debt, following which you may expect your creditor to return the overpayment. The question that preoccupies this thesis is this: how it is that reparative actions are connected to the original act requirements. Specifically, how and why is it that remedial actions somehow do make up for the fact that things did not go as they were supposed to in the first place? The primary concern is not with every day moral, ethical, or social situations, but with legal ones, specifically, those associated with a particular sphere of law, private law.

Private law consists of legal interactions and relations that do not necessarily involve the state as a direct participant.¹ Through private legal actions, one individual, the plaintiff,

¹ Private law, Black’s Law Dictionary defines, is “used in contradistinction to public law. The term means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private Individuals.” (Black’s Law Dictionary, 7th ed, sub verbo, “private law”. For general agreement with this definition, see: Stephen Waddams, Dimensions of Private Law: Categories and
may bring another individual, the defendant, to legal account for his behavior with respect to the former's legally recognized entitlements. 2 This accountability may ultimately take the form of a reparative action. Whatever obligation the defendant may have had prior to a court order in the plaintiff's favor, a court-ordered remedial obligation stands out as authoritative and coercive because of its state-sanctioned origin and the attached negative consequences should the defendant fail to comply. These possible consequences include: garnishment of wages, seizure of assets, and (in the case of refusal to comply with certain equitable orders) the possibility of imprisonment for contempt.

Private law distils into three ways that a plaintiff may bring a defendant before a court, demanding that he be ordered to perform a remedial action: the law of torts, the law of contract, and the law of unjust enrichment. 3 The law of torts involves the violation or anticipated violation of one's legal right (in one's person or property) by another; the law of

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2 For the sake of clarity, I use male pronouns to refer to the defendants and female pronouns to the plaintiffs in private law actions.

3 By calling it the law of “unjust enrichment” as opposed to, say, the law of “unjust enrichments,” I am implying, I recognize, that the law of unjust enrichment is similar to that of contract as opposed to that of torts in being a unified rather than plural subject. Whether this is so is beyond the scope of this dissertation to argue for or against. Cf. Stephen A Smith, “Unjust Enrichment: Nearer to Tort than Contract” in Robert Chambers, Charles Mitchell, and James Penner, eds, Philosophical Foundations of the Law of Unjust Enrichment (Oxford: Oxford University Press, 2009) 181. It might also be noteworthy that I am not talking about fiduciary relationships. The remedial issues raised by fiduciary law are a topic in their own right. I am confident that the arguments presented here can be applied to fiduciary law as well, but that is for another day.
contract concerns the voluntary creation of legal rights and duties between individuals; and the law of unjust enrichment marks out situations where an individual, absent wrongdoing, possesses a benefit that he or she has no legal right to retain. These types of entitlements—that is, those that are exigible against another individual and not against the state directly—form the general subject matter of this dissertation. More narrowly, however, it focuses not on the initial entitlements—for example, the entitlement to be free from tortious injury—but on the consequences of their infringement. My primary subject matter is private law’s remedies, not its causes of action. Even more narrowly, I center my analysis on remedies for tortious wrongdoing. This is because it is within the law of torts that the theoretical puzzles of remedial law are the most obvious. It is in tort law that the remedy seems furthest from the original norm: notably, my court-ordered payment of $1,000 seems quite different from the initial prohibition that I not break your arm. By contrast, remedies in contract, such as

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4 Skepticism about the existence and distinctiveness of these three heads of private law is notable, especially unjust enrichment and contract. For skepticism with respect to the former, see: Steve Hedley, Restitution: Its Division and Ordering (London: Sweet & Maxwell, 2001). For skepticism with respect to the latter, see: Grant Gilmore, The Death of Contract (Columbus: The Ohio State University Press, 1974).

5 As will become clear, however, insofar as the nature of the initial entitlement determines or shapes the legal consequence of its breach, I am equally concerned with it.

6 Notably, the term “cause of action” has been at times associated with the term “remedy.” In this understanding, a legal advisor might say that one’s remedy for a breach of contract is an action for breach of contract. This is not what I mean by remedy. For discussion on this point see: Peter Birks, “Rights, Wrongs, and Remedies” (2000) 20:1 Oxford J Legal Stud 1 at 10-12; Rafal Zakrzewski, Remedies Reclassified (Oxford: Oxford University Press, 2005) at 11.

7 Some might view the phrase “tortious wrongdoing” as redundant. I formulate it thus to distinguish it from contractual wrongdoing (i.e. breaches of contract).
expectation damages and *a fortiori* orders of specific performance, seem to be simply the continuation of the original contractual obligation: the performance of the contract. Similarly, in unjust enrichment, the repayment of a nongratuitous transfer of value seems identical to the initial action that triggered the restitutionary claim, namely, the failure to repay the nongratuitous transfer of value.

2 Aims

If I damage something of yours, if I do not perform my part of our contract, or if I refuse to return your mistaken payment, common sense recommends that I, respectively, take steps to repair the damage, perform (to the extent possible) my contractual obligations, or return your accidental payment. It is fortunate that, for the most part, the law deviates very little from common sense, given its imposition of remedial obligations for these three recognized heads of private law: tort, contract, and unjust enrichment.

If both common sense and the law agree, how is it that, for legal theorists, these situations generate fierce debate, with some going so far as to doubt the existence of certain remedial duties? This dissertation confronts both the skepticism and discord regarding private law’s remedial institutions. I argue that the remedies story can be told simply and clearly through a careful analysis of reasons; that understanding private law’s remedies requires recognition and acceptance of certain basic facts about reasons for action. The import of this

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dissertation includes, but goes beyond, the goal of beneficial clarification. Notably, a salient feature of private law’s remedies is that the defendant (the breaching party) is not a willing participant. He is brought to court at the behest, that is, at the say-so, of the aggrieved party (the plaintiff). Further, if the plaintiff’s claim succeeds, the defendant is made to perform remedial actions, again, not voluntarily, but at the say-so of the court. This is just to say that private law’s remedies are coercive. As coercive orders imposed on private individuals by a state actor (the judiciary), at the behest of another private individual, private law’s remedies demand justification.

An apparently modest goal of this thesis is to provide arguments that support the common sense position that the justification for private law’s remedies is not wholly separate from the fact that remedial actions somehow rationally address, respond to, or mitigate the defendant’s initial failure to do as he ought to have done. Private law’s remedies seem to have at least something to do with putting the aggrieved party in the position she would have been in had the complained of behavior not occurred. In the words of Lord Blackburn,

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9 This statement is not without contention, although it finds home in many treatises and textbooks on remedies as well as judicial opinions. Keel v Banach, 624 So (2d) 1022 at 1029 (Ala 1993): “The basic rule of tort compensation is that the plaintiff should be put in the position that he would have been in absent the defendant’s negligence.” See also RESTATEMENT (SECOND) OF TORTS §903. See also: United States v Hatabley, 257 F (2d) 920 (10th Cir 1958): “The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.”

Two theories of private law – law and economics and civil recourse – for their respective reasons deny this make-whole approach to understanding private law’s remedies. I begin with it, not to prejudge the case in my favor, but because it itself needs to be justified. For a recent and interesting (and non-economic) rejection of the make-whole approach, see Scott Hershovitz, “Corrective Justice for Civil Recourse Theorists” [2011] 39 Fla St UL Rev 107 at 121: “A wrongdoer cannot put his victim in the position she would have been absent the wrong. But he might be
I do not think that there is any difference of opinion as to its being the general rule that, where injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.\(^\text{10}\)

This is all very well in practice, but how does it work in theory? An overarching aim of this dissertation is to make philosophical sense of Lord Blackburn’s claim: to explain and justify as fundamental this feature of private law’s remedies; to demonstrate how it is that a defendant’s subsequent (that is, post-wrong) actions somehow do appear to make it as if the wrong never occurred?\(^\text{21}\)

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\(^{10}\) *Livingstone v The Rawyards Coal Company* (1880), 5 AC 25, at 39 (HL (S)) [*Livingstone*]. Lord Blackburn’s words arise in the context of tort law, but we can see similar restorative goals in the law of contract, where the aim of expectation damages is to put the plaintiff in the position she would have been in had the contract been performed, and the law of unjust enrichment, where the aim of restitutionary damages is to restore, to the extent possible, the plaintiff to the position she occupied prior to the defendant’s unjust enrichment. See *Chronister Oil Co v Unocal Refining & Marketing*, 34 F (3d) 462 at 464 (7th Cir 1994): “The point of an award of damages, whether it is for a breach of contract or for a tort, is, so far as possible, to put the victim where he would have been if the breach or tort had not taken place.”

\(^{21}\) John Gardner refers to this as the “well-known mystery of how reparation or restitution may serve to correct [wrongdoing].” (John Gardner, “The Purity and Priority of Private Law” (1996) 46 UTLJ 459 at 474 [Gardner, “Purity and Priority”]). Allan Beever questions the mysteriousness of Gardner’s “mystery:” “If there is such a mystery, however, it is not well known and it is notable that Gardner does not cite any discussion of it.” Beever does admit, however, that “[o]f course, the common sense notion may be philosophically suspect and require proper analysis, but that does not justify presenting it as if it were in violation of common sense.” (Allan Beever, “Our Most
3 Reasons

This dissertation argues that a proper understanding of reasons provides one plausible avenue to support the above common sense position: that remedies aim to rectify. I urge that reasons are one, but not necessarily the only, way to provide arguments in support of common sense and, as I will demonstrate, legal practice. Notably, an alternative view, one that I devote considerable space to exploring, the Kantian approach, also provides a viable route. My aim is the modest one of providing another set of arguments, one that does not necessarily require the invocation of Immanuel Kant’s philosophy, to establish similar, though not identical, conclusions. It should not be surprising that names like “Kant” and “Hegel” do more to alienate than make comfortable the majority of private law scholars. Thus, my intention is to provide a less intimidating, more inviting, account of how private law’s remedial actions make sense. To this end, I argue that all of private law’s remedies can be understood through an analysis of certain features of reasons and of practical reasoning. In a nutshell, one performs remedial actions because of one or more of the reasons that initially supported the original action that one failed to perform when one was required to. This sounds simple, and I hope to show that it is in fact this simple, but not an insignificant amount of philosophical tinkering is nonetheless necessary to establish it. For instance, what it is to be a reason is not as straightforward as we

Fundamental Rights” in Donal Nolan & Andrew Robertson, eds, Rights and Private Law (Oxford: Hart Publishing, 2012) 63 at 81, n 68) [Beever, “Fundamental Rights”]. This is precisely the task I set myself: to analyze and justify this common sense notion and demonstrate that it really is in fact common sense. Thus, I respond to the critics who doubt that the aim of remedies is to make it as if the wrong never happened.
might hope. With a promise to flesh out my position more substantially in Part 3, here now let me provide a sketch of what I take a reason to be.

A practical reason is a consideration that counts in favor of or against the performance of a given action.\(^\text{12}\) That it is snowing is a reason for me to wear my wool toque; that he is thirsty is a reason for him to drink this glass of water; that she is in distress is a reason for him to help her. Part 3 sets up this overarching argument by highlighting the relevance of reasons in private law and attempting to come to terms with just what sort of reasons might be our concern. I conduct this exploration in light of the extensive and complex literature on the nature of reasons and practical reasoning in particular. I view the legal reasoning of private law as a specific instance of the more general field of practical reasoning. So, while lessons from practical reasoning may be applied to the legal sphere, specific features of the legal world should be kept in mind. Most notably, a private law dispute immediately involves not one, not two, but *three* reason-responsive entities: the plaintiff, the defendant, and the court. As such, a goal of this thesis is to analyze how and to what extent the reasons of the court (the reasons provided by the court) reflect the reasons a defendant may already have to perform a remedial action *vis-à-vis* the plaintiff. If the reasons are the same, then the defendant’s reasons serve as one way to justify the court’s reasons. If not, we must look elsewhere.

A subset of these arguments in favor of reasons has to do with how reasons might be distinguished from other possible basic units of analysis for private law. Rights and duties

\(^{12}\) In contrast to a *practical* reason, a *theoretical* reason is a consideration that counts in favor of or against the holding of a, or a certain set of, belief(s).
(obligations) are the two alternatives that stand out in the literature. I take a right to be a certain type of reason; a reason that is necessarily correlative structured—that is, a reason that gives rise to a duty in another. As such, a focus on reasons is not inimical to a rights-based account. In fact, since part of this dissertation’s aim is to provide another way to establish the truth inherent in rights-based accounts, I would hope that it would not be. The concept of obligation, however, is more complicated. I will reveal that semantic slippage between the terms duty and obligation has created unnecessary confusion and, as a result, neither term is desirable. More specifically, sometimes obligation is used as synonymous with the correlative of a right and sometimes it is not. Sometimes obligation refers to the general “obligatoriness” of an action and sometimes to the specific mandated action itself. This confusion is not impossible to resolve, but it has generated sufficient problems in private law scholarship so as to justify reasons as a preferable unit of analysis. The bulk of my arguments in favor of reasons constitute Part 3. In Parts 1 and 2 my aim is to show how we can understand the essential features of private law remedies by analyzing the reasons involved.

4 Structure

4.1 Part 1: perspectives on private law’s remedies

I begin with a question of perspective, what some might call method. What approach should we take to understand private law’s remedies? Should we understand them from within the private law relationship—that is, evaluating them from the perspective of the original norms involved in the cause of action or should we see such original features merely as triggers to and conditions of the remedial question that is then left open? I draw a basic distinction between existing theories, what I call intrinsic and extrinsic perspectives. The orientation of an intrinsic
account is *backward-looking*, while that of an extrinsic account is *forward-looking*. The disagreement between the two centers on the relevance of the state of affairs prior to the complained of wrong or behavior. Let me explain.

The hallmark of an intrinsic theory is its commitment to the non-necessity of an independent principle of repair. In other words, all that is (normatively or logically) required to explain the defendant’s remedial obligation is the original (tortious, contractual, or restitutionary) relation between the plaintiff and the defendant. It is precisely what should have been the case before that tells us what to do now. That I spilled the milk means I should cry over it and if it’s your milk, take steps to sop it up, pour you another glass, apologize, etc. By contrast, an extrinsic theory—of which law and economics is the most prominent example, but other examples include legal realists, some critical legal studies scholars, and, as I will argue, civil recourse theorists—may be defined precisely by its commitment to such an independent principle. Under such an account, compensation is owed because, and insofar as, it furthers some goal external to the immediate relation of the parties, for example, deterrence of wrongdoing or efficient loss-allocation. Extrinsic scholars think that, basically, there is no use crying over spilled milk and that, once the milk is spilled, we just need to think about what we should do now with no reference at all to what should have been the case before. For this reason, I characterize their orientation as prospective. I argue that extrinsic accounts fail on two distinct, but related, levels.

First, such accounts provide an inaccurate description of the institutional structure of private law. Extrinsic accounts are unable to explain why it is the *defendant* who must perform a court-ordered action *vis-à-vis* the plaintiff, and also why it is the *plaintiff* who is entitled to
demand and receive such performance. This constitutes the well-worn bilateralist critique of instrumentalist accounts.\textsuperscript{13} This criticism reveals a further failure of extrinsic accounts: that although their overall apparatus could feasibly provide a justification for private law’s remedies, it does not coincide with our sense of the justice involved in such remedial awards. We could envision a different type of private law from that which we currently practice. However, given the private law we do have and given our preexisting normative commitments regarding individual autonomy and responsibility, extrinsic accounts fail to provide an appealing answer to private law’s central question: how is it that when a defendant fails to do something he should have done, the subsequent actions a court orders him to undertake are, first of all, justified and, secondly, really do seem to address his initial failure? In other words, extrinsic accounts struggle to answer the straightforward question of why and how it is that the defendant’s subsequent remedial action rationally addresses by responding to and often mitigating his prior failure to do as he ought to have done in the first place. This is just another way of saying that extrinsic accounts do not accord with common sense. Given that they generally present themselves as accurate (realistic) depictions of the way things truly are (as opposed to, say, the way we would like them to be), the fact that their conclusions run counter to our intuitions about reparative actions and the reasons that support them is particularly worrying.

4.2 Part 2: intrinsic approaches

In light of the failures associated with extrinsic accounts, I advocate an intrinsic perspective with respect to private law’s remedies. Within leading intrinsic accounts, however, we have what appears to be meaningful disagreement over just how it is that the original obligation transmits its normative force to the remedial obligation. Kantian legal theorists, Arthur Ripstein and Ernest Weinrib, assert what I call the unity thesis, according to which the remedial obligation retains the normative force of the original obligation simply because it is the same obligation.14 John Gardner suggests an alternative, what he calls the continuity thesis, according to which the remedial obligation continues the normative force of the original obligation, but is a different obligation.15 What continues here is an aspect of (a reason that supported) the original obligation. Ultimately, I reject the ability of the continuity thesis to remain distinct from the unity thesis, arguing that it is instead a subtly different description of what is in essence the same phenomenon. One goal of this argument is to draw out the shared strength of the intrinsic approaches, to reveal the true nature of the disagreement as one more related to terminology than to substantive argument. It is my hope that this analysis will enable future work that addresses the real threats to a common sense understanding of remedial justifications in private law.


Further, my approach suggests subtle improvements for existing intrinsic accounts. To this end, I suggest a renewed attention to the reasons involved in private law actions, specifically, the reasons the defendant has for performing or not performing a certain action vis-à-vis the plaintiff. I propose that remedial actions can be explained as a simple fact about the nature of reasons. Joseph Raz articulates the germ of this idea in what he calls the “conformity principle”, according to which, “[o]ne should conform to reason completely, insofar as one can. If one cannot, one should come as close to complete conformity as possible.”¹⁵ In other words, if I have a reason to φ, but do not φ, this failure to φ does not mean I no longer have a reason to perform certain actions that will get me as close to φ as possible in light of my anterior failure. My argument urges a return to simplicity: that private law’s remedies reflect this general feature of reasons. I argue that sometimes the reason the defendant must perform an ameliorative action relates directly to the first-order, or operative, reason he had to perform the original obligation in the first place. Given the passage of time and/or the inability to perform the original obligation, he still must satisfy (to the extent still possible) the original (operative) reason that remains and continues to exert normative force, demanding satisfaction; only now he must satisfy it in a different way. Here, auxiliary reasons—reasons that identify how one is to satisfy the operative reasons—illuminate. Such reasons may change after breach of an anterior obligation, although the operative reason does not. This accounts for the continuity and also unity of remedial obligations in private law. At

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¹⁵ Raz, “Personal Practical Conflicts,” supra note 15 at 189. For Gardner’s explicit acknowledgement of his debt to Raz, see Gardner, “Part 1,” supra note 15 at 33, n 56.
other times, there is nothing that a defendant can do that can be seen as somehow satisfying the demands of the operative reason. In such cases, we must look deeper into the structure of obligations to understand what part of the original obligation carries on. Here I suggest that it is the mandatory force of obligations that continues. Obligations consist of a first-order reason to do the mandated action and a second-order reason not to act for certain reasons. When nothing the defendant can do is able to count still as satisfying the original reason, it is this second-order reason that sticks around and that continues to exert obligatory force, instructing those to whom it applies that the earlier breach of the obligation cannot be ignored or treated as a matter of crying over spilled milk. As will become clear, this same story can be told using the language of rights (and, therefore, the language of obligations/duties if one understands them as the necessary correlatives of rights). A focus on reasons, I suggest, has certain benefits over a rights-based one. In particular, it allows us to see more clearly the two different ways in which the original and remedial reasons are connected.

Part of this thesis’ overarching aim is to highlight real disagreement through revealing the lack of substance in certain putative disputes. As such, Part 2 concludes with an analysis of corrective justice and the role it plays in explaining private law’s remedies. Both leading intrinsic accounts rely to varying degrees on corrective justice to ground private law’s remedial obligations. I suggest that here there is in fact an important difference in terminology between the leading intrinsic theorists’ respective accounts, but that the disagreement has little effect on their underlying theories. What it does reveal, however, is the importance of grasping just what it is that demands reparative actions. I call this something a reason, and, as I will demonstrate in Part 3, a reason of particular kind. One leading intrinsic theorist calls this
something a “right,” specifically, a Kantian right, while the other remains mute as to this substantive question. Thus, through the examination of corrective justice, we can see what amounts to a real disagreement between the two leading intrinsic accounts. Further, I introduce and respond to arguments that portray corrective justice as either becoming something like an external independent principle of repair or simply redundant. I conclude by advocating, as I did with respect to obligations, care in regard to the use of the term “corrective justice.” It admits more than one possible (and plausible) meaning. In one sense, a robust and thick sense, it refers to the reason for reparative actions. In the alternative, thin sense, it refers only to the operation of transferring back. With respect to this latter characterization, I explore several tricky remedial situations where understanding it as such appears to require its advocate to accept certain substantive arguments about the nature of private law’s remedies and their grounds.

4.3 Part 3: reasons

Part 3 examines the implications of my chosen focus: reasons. It is here that I explore directly the relationship of reasons to rights and obligations. One danger of a focus on private law as an instance of practical reasoning and the reasons of private law as just types of practical reasons is that private law could lose its distinctiveness. Thus, one question for Part 3 is whether we can draw a sensible distinction between private law’s remedial reasons and reasons in general. To show how my thesis does not make everything a matter of private law—that my generalist thesis about the nature of reasons is not monopolistic—I suggest a particular type of reason as apt for private law, what I call interpersonal reasons.
At this stage, I reintroduce certain key tenets of the Kantian approach. For Kantians, the ultimate value of private law is that of personal autonomy understood as independence from the choice and actions of another. Private law, under their analysis, solves a particular moral problem of how persons, understood as equal possessors of autonomy, can live together, forming projects, etc. A consequence of this approach is to limit what reasons are relevant for private law. The only private law reasons for Kantians are rights. Since rights are understandable as a certain type of reason, my reason-based approach is not inimical to rights-based approaches. In fact, it seems that in certain areas of law, one might prefer to talk about reasons as opposed to rights. This argument, however, relates to the grounds of liability rather than the remedial result of liability and, as such, lies outside the scope of this thesis. My approach thus provides a potential avenue to allow us, should we so desire, to bring more within the sphere of private law.

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17 One such area is the law of unjust enrichment, where understanding either the plaintiff’s basis of liability or the ground of her remedy as a right proves difficult.

18 Whether or not certain phenomena ought to be part of our private law is a different sort of question than the question this thesis directly confronts. To say that private law should be concerned with certain matters and not others is to adopt implicitly a particular jurisprudential stance with respect to the concept of law. For those who see law as a necessary solution to certain moral problems, it is clear that only some phenomena and not others are the appropriate province of law. Law is not intended, on this natural law approach, to solve all our moral problems, just those it is necessarily fit to remedy. My approach aims to be more interpretive than prescriptive in this sense. I try to take the private law as I find it and, as I find it, it includes explicitly exemplary damages and other legal doctrines that certain natural law accounts would find objectionable. My interpretive aim is to find the explanation or explanations that best fit the legal phenomena as I find it. To this end, I roughly adopt Stephen Smith’s methodology of interpretive legal theory. According to Smith, there are four interpretive criteria: fit, coherence, morality, and transparency. Fit refers to the extent that the theory is consistent with the cases and rules that make up a certain area of law. Coherence refers to the ability of a theory to make intelligible a given body of law in the context of other
areas of law, allowing the entirety to be viewed as somehow unified or at the very least not obviously contradictory. *Transparency* relates to how much the actual reasons given by the law-makers (in my case, judges) line up with the proposed theory. Finally, *morality* concerns the theory’s ability to provide a justification for the law—to paraphrase Ronald Dworkin, a theory should try to show the law in its best light. (Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 4-5) [Smith, *Contract Theory*].
PART 1. PERSPECTIVES
Chapter 2
Extrinsic and Intrinsic Perspectives on Private Law’s Remedies

5 Introduction

Why, when a plaintiff experiences the facts that amount to a private law action, do we not consider it simply to be crying over spilled milk? Why is it not the case that here, as in many other areas of life, we are not content to let losses lie where they fall and where complaints about them amount only to hand-wringing? Why, in private law, do successful complaints yield results? Such questions center on the nature of the connection between complaints and results—that is, between the initial grounds or entitlements and the con/subsequent effects or remedies. Our concern is with how the normative force of the initial relationship between the plaintiff and defendant might carry over to the remedial stage. In the typical scenarios of private law—contract and torts—the plaintiff possesses a legally recognized interest prior to the event that attracts legal attention. In contract, it is the interest in having one’s contractual agreements kept; in tort, the legal entitlement to have one’s property and person free from injury and unauthorized use. We might also state this relation in terms of duty: in contract, the defendant is under a duty to keep his contractual agreement, in tort, not to interfere wrongfully with the person and property of another.


20 I exclude unjust enrichment here not because I consider it atypical, but because the existence and nature of the right preceding the moment of injustice is controversial.
Thus, the fundamental question for an understanding of the connection between private law’s primary and remedial institutions is: what happens to this original relationship upon its infringement? What happens to the plaintiff’s original right and the defendant’s original duty? Do they disappear, transform, or get replaced? We might also view this as an inquiry into the justificatory source of remedial obligations. If the connection between primary and remedial relations is not only causal, but also normative, then we have the beginning of a justificatory story for private law’s coercive force at the remedial stage—that is, the stage when the court orders that the defendant perform a given action vis-à-vis the plaintiff.

6 Two perspectives: intrinsic and extrinsic

Put in this way, the fundamental question for a theoretical analysis of private law’s remedies becomes an inquiry into how the normative force of remedial obligations should be understood. And, here, we have a choice between alternatives. According to the first, the normative force of the remedial obligation is (somehow) generated and determined by the original obligation. Its justification is internal. For the second, an internal restriction does not apply: the justification can be external, located in an independent principle of repair or compensation. For the first, the relationship between private law’s primary and remedial institutions is normative through and through; for the second, the essence of the relationship is causal only—the normativity comes from without, not within. While the original relation is the
reason (understood in a normatively robust way) for the remedy under the first approach, under the second it is the condition only.  

Broadly (but also exhaustively) speaking, the above are narrower manifestations of two methods for approaching any subject matter: from within or from without.  

Ernest Weinrib has forcefully argued for what he calls an internal approach to “understandings”—that is, human creations that are themselves understandings: “Private law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we must express this intelligibility in terms of purpose, the only thing to be said is that the purpose of

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21 Ernest Weinrib draws the same distinction between what he calls the “reason conception” and the “condition conception” of remedies: “In the first way, originally formulated in Aristotle’s account of corrective justice and later elaborated in the philosophical tradition of natural right, the causative event is the reason for the remedial response. In the second way, paradigmatically set out in Kelsen’s pure theory of law, the causative event is the condition of the remedial response.” (Weinrib, “Two Conceptions,” supra note 14 at 3).

22 Another way to frame this distinction is to say that the values served by remedial obligations in the first sense are internal to the values served by the original normative interaction, while in the second sense such values can be imported from anywhere. Weinrib’s notion that the value of private law is purely to be private law is an extreme example of the first solution. Similarly, if we take the value of private law’s remedial obligations to be serving the external end of overall goodness in the world, we will find ourselves at the opposite extreme: abstracting completely from the particular reasons generated by private law relationships. Although law is undeniably capable of instrumentality and can be used to serve numerous values, this does not mean it isn’t better understood within its different spheres as serving uniquely suitable values. Just like what a knife is good at is cutting, private law also serves a particular value or set of values.

I aim to run a middle course between these two extremes. While I admit the possibility of multiple values that private law might serve, I deny that the value served at the remedial stage is distinct or separable from the value served prior to the complained of injustice. In other words, we do not need to be a monist about value or private law to occupy an intrinsic position with respect to private law’s remedies.
private law is to be private law.”23 This is in stark contrast to external approaches that examine an area from or through the perspective of another discipline or idea. The prime example of such an approach is law and economics. Here, questions of law are understood as questions of economics but with a legal subject matter. What I call an intrinsic approach is somewhat narrower than an internal approach, but can still fruitfully be viewed as standing in opposition to external approaches. Intrinsic approaches examine private law’s remedies from within, specifically, from within the original private law relationship itself.

In more formulaic terms, let D stand for the defendant, P for the plaintiff, and the variables x and y for specific (and potentially different) actions. If D has an obligation to do x-for-P, but fails to execute it, how is it that his doing y-for-P counts as x-for-P? Is there something about the initial obligation (x-for-P) that is satisfied by the subsequent action (y-for-P) or is this action (y-for-P) required because of some normative feature of the world independent of D(x-for-P)? The question thus is whether private law’s remedies look like this:

(i) D(x-for-P) + failure to (x-for-P) \(\rightarrow\) D(y-for-P)?

or this:

(ii) (If D(x-for-P) + failure to (x-for-P)) + (if D(y-for-P) = independently valuable—i.e. serves an external value) \(\rightarrow\) D(y-for-P)?

Formula (ii) and its explanation and moderate defense makes up this first substantive chapter of Part 1. Here, I confront the extrinsic accounts of private law’s remedies. Most in this camp happen to be economists, but there are also some who are legal realists and even some critical legal studies scholars. They think that, basically, there is no use crying over spilled milk and

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23 Weinrib, The Idea of Private Law, supra note 1 at 5.
that, once the milk is spilled, we just need to think about what we should do now with no reference at all to what should have been the case before. Perhaps controversially, I include in this account a modern approach to tort law, civil recourse theory. This is somewhat controversial as civil recourse theory is notable for its avowed opposition to economic accounts. Despite civil recourse theory’s explicit disapproval, I will show that, like its alleged opponents, civil recourse theorists treat the initial relationship between the plaintiff and defendant as merely a condition for the remedy rather than as the reason for it. As such, they require something beyond the original relation to explain and justify the remedial obligation. This need, I assert, places them within formula (ii) above.

How is it that the remedial action somehow makes up for, that is, satisfies, the initial failure to do as one ought to have done? What is it about paying compensatory damages, i.e., monetary awards that put the aggrieved party in the position she would have occupied were it not for the wrong, that makes it as if the complained of behavior did not occur? More dramatically, once a wrong occurs, why is any remedial action called for? Answers to these questions relate to the structure of remedial obligations. Recall the two rival forms. According to formula (i), the normative force of the remedial obligation is (somehow) generated and determined by the original obligation. The justification is internal. It is precisely what should have been the case before that tells us what to do now. That I spilled the milk means I should

\[24\] For development of this distinction, see Weinrib, “Two Conceptions,” supra note 14.

\[25\] I will subsequently demonstrate that civil recourse’s position in this regard proves incoherent and that attempts to avoid it only serve to strip the civil recourse theorist’s account of its identifying separation thesis between rights and remedies.
cry over it and if it’s your milk, take steps to sop it up, pour you another glass, apologize, etc.\textsuperscript{26}

For the second (formula (ii)) an internal restriction does not apply; the justification is external, located in an independent principle of repair (compensation).

Notably, formula (i) is the simpler of the two and, generally speaking, we should favor simplicity. But notice also that, in formula (ii), the first clause (D(x-for-p) + failure to (x-for-p)) is not strictly necessary to produce the result D(y-for-P). It is sufficient that D(y-for-p) serves an independently identified principle. D’s obligation to x-for-P plus his failure to x-for-P is irrelevant to the desirability of D(y-for-p).\textsuperscript{27} If we believe that there is something to the fact that D has failed to do what he ought to have done in determining whether D should now do something remedial, then we ought to be at least initially skeptical of (ii). In light of its simplicity, we might wonder why so many scholars either explicitly or implicitly reject it. This chapter posits an explanation. The explanation relates to several apparent oddities in the intrinsic approach, specifically, those generated by a particularly powerful understanding of it

\textsuperscript{26} As Allan Beever has recently stated, “[i]there is surely no remedy more basic than the repair of a wrong. If I wrongly injure you, the most immediate duty I have is to repair that injury. If I promise to do something for you, the fundamental duty I have is to perform that promise. If I do not, then my immediate duty is to make good my failure to do so. These are common sense notions.” (Beever, “Fundamental Rights,” \textit{supra} note 11 at 81).

\textsuperscript{27} Perhaps this argument moves too fast. Instead, we might say that D(x-for-p) + failure to (x-for-p) is a necessary \textit{condition} for D(y-for-p). If this is the case, however, then something more must be built into D(y-for-p) and the value it serves. That is, the value it serves must somehow be tied to the first clause. If this is the case, however, the value strictly speaking is no longer independent. A way around this lies in the civil recourse theory to be discussed in Chapters 3 and 4. Here, the idea is that D’s violation of a relational norm (x-for-p) triggers a privilege in P to seek redress from D via state institutions. Without the violation, therefore, P cannot (has no substantive standing) to request redress (y-for-p).
that asserts that remedies are “the same thing as the right, looked at from the other end.”\textsuperscript{28} If the remedy is in fact identical (normatively) to the original right that was violated, there is no need to look outside the relation to justify or explain the remedial action. If it’s the same thing, then it’s the same thing. In the role of devil’s advocate, I raise challenges to this idea of unity. Such challenges cast doubt on characterization of the remedy as a right. If the remedy is not a right, it cannot be normatively identical to the original right that was infringed. Further, if it is something different, then there is conceptual space left to justify it through considerations lying outside of the original right-obligation relation.

7 Rights

Before we introduce the challenges to an intrinsic account, preliminary gestures toward the meaning of “rights” are helpful.\textsuperscript{29} Just what is this concept that intrinsic theorists posit is the same at the primary (original) and secondary (remedial) stages of private law’s relationships? The literature divides between rival conceptions of rights, the will (or choice) and interest theory. According to the latter, rights stand for interests of another that rise to the level of sufficient importance to justify placing others under duties to respect them.\textsuperscript{30} According to the

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\item \textsuperscript{29} I will have more to say on this concept in subsequent chapters. For now, a cursory definition is sufficient.
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former, rights are about protecting individual choice. Generally, those who advocate an intrinsic approach toward private law adopt a will theoretical approach. In fact, matters prove less straightforward than this. As I will subsequently show, one powerful intrinsic account rejects characterization as either a will or an interest theory, while still another tacitly adopts an interest theoretical stance. Nonetheless, the former’s emphasis on autonomy and freedom as the hallmark of individual rights renders the following arguments applicable. With respect to the latter, I will also demonstrate how an interest theory approach to rights yields similar problems.

As such, the concept of rights employed in the following three subsections is broadly-speaking will-theoretical. On this approach, for something to be called a right, the following features are necessary:

1. It may be waived at the holder’s say-so;
2. It may be enforced at the holder’s request;
3. It may be extinguished at the holder’s election;
4. It corresponds to a duty held by and exigible against another;


5. If violated, its holder has standing to complain and demand redress.

With this definition in mind, three situations stand out as posing problems for an intrinsic and broadly will-theoretical approach to private law’s remedies: a defendant’s insolvency, limitation periods, and the defense of necessity. Each seems to show that the original right is something quite different from the remedial consequence of its infringement.

The significance of a division between the will and interest theories revolves around a certain type of analytical method. Broadly speaking, this is a kind conceptual analysis that inquires into the necessary and sufficient properties of an idea. As I will argue in the following chapters, this type of analysis creates the putative problems we find levied against intrinsic theories. In other words, because of the thought that our primary interest lies in finding the necessary and sufficient features of rights, we run into problems when something we think of as a right appears to lack one of these so-called necessary features. If, as I will suggest, we suspend our interest in conceptual analysis of this sort and inquire more deeply into the nature and justification of the thing we are examining—in the case of this dissertation, the plaintiff’s receipt of the defendant’s reparative act—the problems that we think exist vanish.32

7.1 Insolvency

If a judicial remedy is seen as a right possessed by the plaintiff against the defendant, i.e., something that arises from a successful legal action by the former against the latter, then the

fact of a defendant’s insolvency is potentially problematic. If the defendant is insolvent and the plaintiff is not a secured creditor, then she will have no guarantee of his performance of the remedial duty he owes to her. The plaintiff has no control over the enforcement of the remedial obligation. The remedy, as such, fails to possess one of the key features of legal rights understood as manifestations of an individual’s exclusive control.

To understand this phenomenon fully, let’s take a closer look at the nature of insolvency regimes. First, it is important to remember that rules of insolvency are not common law rules, but creatures of statute. The only rule available at common law is that of first past the post. An individual is deemed insolvent when his “liabilities exceed the value of his tradable rights.” At this point, the unsecured creditors of the insolvent may appoint a trustee in bankruptcy who will liquidate all available rights of the insolvent and use the proceeds to pay off the insolvent’s debts. The resulting pool of liquidated assets is known as the bankrupt’s


34 In Canada, bankruptcy and insolvency are regulated by the Bankruptcy and Insolvency Act RS C 1985, c B-3 [“BIA”].

35 Swadling, supra note 33 at 507.

36 Ibid at 508. According to the BIA, a “bankrupt” is a person who has made an assignment or against whom a bankruptcy order has been made. (BIA, supra note 34, s 2), while an “insolvent” is a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and (a) who is for any reason unable to meet his obligations as they generally become due, (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (BIA, supra note 34, s 2).
estate. The bankrupt’s estate is divided in accordance with the regime imposed by the relevant statutory instrument. Customarily, according to such insolvency statutes, categories will be drawn up among the various unsecured creditors. These categories are subsequently ranked in an order of priority, with the first being fully paid off first, followed by the second, and so on, until the bankrupt’s estate is exhausted. Within each category, the rule of pari passu governs the distribution.\(^\text{37}\) This rule provides for the equal treatment of creditors belonging to the same class. As a consequence of this regime, it remains a real possibility that an unsecured creditor, if too far down in the priority rankings, could come away with nothing. In assessing the overall fairness of such a distribution, it bears noting that victims of torts committed by the insolvent are unsecured creditors for the purposes of bankruptcy and insolvency law.

Given the possibility of zero recovery, it is difficult in such a situation to maintain that the plaintiff has a right to a remedy flowing from the defendant, or the defendant’s estate. Equally, it seems to be a stretch of language’s ordinary meaning to say that the defendant has a duty to provide the plaintiff with her judicially bestowed remedy. If ought implies can and the defendant cannot perform this duty—it is a legal and physical impossibility for him—we are hard-pressed to conceptualize the defendant’s relationship to the plaintiff as one of a right to a corresponding duty.\(^\text{38}\)

\(^{37}\) Each creditor within each class is paid ratably. (BIA, supra note 34, s 141).

\(^{38}\) For an illuminating discussion on just what “ought implies can” means, see John Gardner, “Reasons and Abilities: Some Preliminaries” (paper derived from presentation at workshop In Pursuit of Reason: Engaging Joseph Raz on Reason and Value, May 2006 at the Institute of Philosophy, University of London) [unpublished].
This, however, is all too easy. One could object that the original remedial right to the defendant’s debt is not affected; that it retains its conceptual structure as a right despite the supervening insolvency regime. This regime is nothing more than a distributive (redistributive) schema that overlies the relationship between the plaintiff and defendant. In this way it would be analogous to shared liability among joint tortfeasors: while the plaintiff sues the first defendant for the tort, this does not expunge the second defendant’s potential remedial obligation to the plaintiff if the plaintiff had elected to sue him instead. In this latter situation, the plaintiff’s remedial right is fully enforced by the action against first-defendant such that the plaintiff no longer has a right of action against second-defendant. It is now up to first-defendant to seek contribution from his partner in tort, the second-defendant. We may view both regimes as a way in which a distributive policy interacts with underlying remedial rights without necessarily obviating them.

Notwithstanding the above objection, if we understand rights to entail correlative duties, the fact that a bankrupt defendant no longer has a remedial duty enforced by law seems to undercut the existence of a remedial right properly so called. For example, in torts governed by a negligence standard, that a defendant cannot meet the objective standard of care, notably does not relieve him of his duty not only to take care, but also to succeed in taking care.39 By contrast, in the remedial relation, the defendant’s incapacity does appear to relieve

39 In fact, we can argue that the trying portion of this duty is irrelevant. A defendant may be driving utterly negligently, but unless this failure to drive with care causes injury, there will be no liability. For discussion on duties to try versus duties to succeed, see John Gardner, “Obligations and Outcomes in the Law of Torts” in P Cane and J Gardner, eds, Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday (Oxford: Hart Publishing, 2001) 111 [Gardner, “Obligations & Outcomes”].
the defendant of his remedial obligation toward the plaintiff. One possible explanation for this
difference could be that in the first scenario a potential plaintiff has a right that the defendant
not injure her as a result of his negligence—that is, the plaintiff has a right that the defendant
succeed in taking due care. In contrast, in the remedial situation, the plaintiff possesses no
such right to the defendant’s success in meeting his putative duty of reparation. Returning to
the contribution objection, we may now respond that here the choice regarding which
defendant to sue is left to the plaintiff, but in the case of insolvency, the plaintiff’s choice is
potentially ineffective. That the plaintiff has the risk of no choice with respect to the
enforcement of the remedy to which she is entitled belies the understanding of remedies as
instantiations of rights, understood as legally recognized manifestations of one person’s choice
over the actions of another. Thus, it at least initially appears that the original relationship and
the remedial relationship are fundamentally separate and separable. If what the aggrieved
party possesses prior to the complained of behavior is properly considered a right, but what
she has after the wrong seems something less than a right, how can it be that the remedy is “
the same thing as the right, looked at from the other end”? Returning to our insolvency point,
it appears that because the repayment of the creditor’s debt is conditional on her debtor’s
solvency, the creditor’s entitlement to be repaid is something less than a right if we understand
a right as a manifestation of its possessor’s choice and, therefore, not vulnerable to such
conditionality.

7.2 Statutory and equitable bars

Often the plaintiff is successful in meeting all of the required elements of a cause of action, but
will be denied a remedy due to the operation of a statutory or an equitable bar. The best
known statutory bar is provided for by limitations acts,\textsuperscript{40} pursuant to which a plaintiff is barred from seeking relief if she brings her claim past the legislatively stipulated time period (two years for most actions).\textsuperscript{41} Rationales relate to values of finality and certainty, allowing potential defendants to act in the world free from the ever-present prospect of litigation. The bars also function as disincentives for plaintiffs to sit on their rights. Despite these attractive policy rationales, statutory bars pose difficulties for the traditional account of remedies as rights, and thus also for the further argument that what occurs at the remedial stage is normatively identical to the original right-duty relation. Here again, the plaintiff’s ability to choose whether to waive or initiate proceedings lies outside of the ambit of her choice. Her choice is circumscribed.

The equitable bar of \textit{laches} functions with respect to equitable remedies in a similar fashion as the statutory bar does with respect to common law remedies.\textsuperscript{42} The upshot of this equitable bar is the same as its statutory counterpart: the plaintiff’s putative right to a remedy is rendered ineffective by a force outside her immediate control. It may be objected that the plaintiff could have chosen to exercise her right in a timely way, and, hence, the application of the bar is in this sense under her control, that is, subject to her choice; however, this objection

\textsuperscript{40} See, for example, \textit{Limitations Act}, S O 2002 c 24 schedule B [“\textit{Limitations Act}”].

\textsuperscript{41} “Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.” (Ibid at s 4).

\textsuperscript{42} Other equitable bars—such as the requirement of clean hands for those seeking equitable remedies—relate to the plaintiff’s potentially unconscionable behavior and, as such, appear to be under her control and therefore not in conflict with the traditional account.
misses the point that a key feature of rights *qua* rights is no longer present if the bar is in place. The right itself is subject to a limitation lying outside of the plaintiff’s choice.\(^{43}\)

Both the statutory regimes of insolvency and limitation periods pose difficulties for the traditional account’s view of remedies as rights. In both, the plaintiff is unable to enforce her remedial “right” as against the defendant due to a practical, statutory, technical or doctrinal circumstance that lies outside of her immediate relation with the defendant. If the ability to choose to exercise, or waive, or enforce, or waive enforcement is a necessary condition to establish that one possesses a right, then the lack of this feature in the plaintiff’s relationship to her remedy proves a significant problem for the thesis that holds remedies are rights and for the further thesis that the remedial right is (normatively) identical with the initial right.

### 7.3 The necessity defense

In sections 7.1 and 7.2, we examined two areas of law where a supervening force turns the plaintiff’s right into something that seems like less than a right. These scenarios, however, do not in themselves demonstrate conclusively that remedies are not rights. After all, the argument is always available that the law in these areas is simply mistaken, that it draws the

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\(^{43}\) A commonly levied objection with respect to the application of equitable bars is that equitable remedies are not, in contrast to common law remedies, available as of right. Instead, the awarding of equitable remedies, such as specific performance or injunction, is a matter of judicial discretion. This objection exaggerates the discretionary quality of equitable remedies. It is, I suggest, is a distinction without difference given (i) the fusion of equity and common law and (ii) the fact that equitable remedies are applied in as principled and rule-constrained a way as common law remedies are, such that to characterize such remedies as “discretionary” is misleading. For similar arguments, see Andrew Burrows, *Remedies for Torts and Breach of Contract*, 3d ed (Oxford: Oxford University Press, 2004) at 604; Zakrzewski, *supra* note 6 at Chapter 6.
wrong distributive balance between the rights of the plaintiff and the interests of the defendant or society at large, and perhaps further, that the drawing of such a distributive balance falls outside the scope of private law’s appropriate concerns. Hence, as additional support for my preceding arguments, I focus on a situation where the lack of fit between remedies and rights is not merely a technical or doctrinal matter potentially resolvable by law reform, but rather raises a potential moral dilemma that casts doubt on the appropriateness of characterizing all remedies as rights: the necessity defense. When this defense is invoked, we generally say that the defendant was within his rights to commit a tort, but that, equally, the plaintiff has a right to compensation for the consequent loss suffered on the basis that the defendant committed a wrong. Often this situation is described as paradoxical since the defendant’s actions appear, simultaneously, to be both right and wrong. Moreover, such scenarios appear to suggest further evidence in favor of the separation of the original from remedial relations. In other words, it seems that the principles that govern the former do not determine the latter. The question of initial entitlement is a separate inquiry from the question of remedy. Subsequently and significantly, this may suggest that independent principles of compensation are legitimate—a troubling conclusion for an intrinsic account.

To begin our examination of the defense of necessity, let’s look closely at Joel Feinberg’s thought experiment involving a frozen hiker. A hiker finds himself without food or

shelter in the middle of a blizzard and breaks into a boarded up cabin.45 Upon entering, he burns the cabin owner’s furniture for warmth and eats his involuntary host’s food. We would not say the hiker was “wrong” in doing this; we might say, in fact, by virtue of necessity, he was justified in behaving as he did. And part of what it means to be justified seems to be that, on at least some level, one acted rightly. Furthermore, we would judge anyone, including the cabin owner herself, who tried to prevent him from performing these life-preserving acts, in so doing, to be in the wrong. This final implication merits further thought. Let us imagine that the cabin owner is somehow remotely able to repel the hiker from her cabin, making it impossible for him to burn her furniture or eat up her food.46 This creates a direct conflict between the entitlement of the hiker to preserve his existence and the right of the cabin owner to the exclusive possession of her property. On the one hand, we do not deny the cabin owner’s rights with respect to her property. In fact, these rights are the basis for the cabin owner’s likely subsequent private law action against the hiker in tort. On the other hand, by restricting her from interfering with the hiker’s use of her property, we appear to say that she has no right to prevent the trespass and destruction of her property from a necessitous interloper. How can these two ideas be reconciled? The mystery deepens when we consider the hiker’s position more closely. It seems, following the cabin owner’s lack of right to stop him, he is free to make use of her property. Once, however, he has entered the cabin without her consent, burned the furniture, eaten her food, and now returned from the mountain back to the world inhabited by


46 Montague, supra note 44.
tort actions and law courts, we would immediately expect him to be ordered by a court—at the insistence of the cabin owner, now plaintiff—to pay for the damage incurred as result of his trespass.

How does Feinberg's hypothetical address the problem of describing a remedy as a right? It seems to cast doubt on the orthodox view that the remedy and original right are normatively identical. The cabin owner’s original right is to the exclusive possession, use, and enjoyment of his property. The remedy for this, one would think, if we adhere strictly to the orthodox approach, would be an injunction against the hiker’s threatened trespass. We would think that the cabin owner ought to be able to prevent the anticipated breach of her rights. The law, however, demonstrates that this is not so. In Ploof v Putnam, the defendant (Putnam) owned an island and a dock. The Ploof family was enjoying a sail when a storm threatened their safety. The inclement weather forced them to moor at Putnam’s dock, and this they did, but without Putnam’s permission. Putnam’s servant unmoored their boat and as a result it was

One answer lies in the apparent difficulty arising from the need to conceive of all claims for compensation as arising from a wrong. The cabin owner’s remedy of compensation is grounded on the hiker’s breach of duty in trespassing on and destroying her property. Accordingly, the hiker has committed a wrong by interfering with the cabin owner’s rights, and it is this wrongdoing that generates her subsequent duty to compensate him for his losses. Simultaneously, however, she has acted rightly or justifiably in using his property as evidenced by his lack of right to stop her. The issue, therefore, is how a right to a remedy can arise from a rightful action. In other words, it is difficult to reconcile the fact that the hiker acted within her rights with the claim of the cabin owner that this behavior nonetheless generates a duty on her to compensate for the harmful consequences of her (rightful) actions. While this dilemma may be more easily resolved by disabusing ourselves of the likely mistaken notion that all remedies arise from wrongs, it nonetheless serves to highlight the difficulties one encounters by insisting on perceiving all remedies as rights.

47 One answer lies in the apparent difficulty arising from the need to conceive of all claims for compensation as arising from a wrong. The cabin owner’s remedy of compensation is grounded on the hiker’s breach of duty in trespassing on and destroying her property. Accordingly, the hiker has committed a wrong by interfering with the cabin owner’s rights, and it is this wrongdoing that generates her subsequent duty to compensate him for his losses. Simultaneously, however, she has acted rightly or justifiably in using his property as evidenced by his lack of right to stop her. The issue, therefore, is how a right to a remedy can arise from a rightful action. In other words, it is difficult to reconcile the fact that the hiker acted within her rights with the claim of the cabin owner that this behavior nonetheless generates a duty on her to compensate for the harmful consequences of her (rightful) actions. While this dilemma may be more easily resolved by disabusing ourselves of the likely mistaken notion that all remedies arise from wrongs, it nonetheless serves to highlight the difficulties one encounters by insisting on perceiving all remedies as rights.

48 81 Vt 471, 71 A 188 (1908).
wrecked upon the land. This not only destroyed the boat, but also caused injury to members of the Ploof family. The Vermont Supreme Court held Putnam legally responsible for the injuries suffered by Ploof. Further, the court held that Ploof had not committed a trespass because, as a result of the necessitous circumstances, Putnam had lost his right to exclude the Ploof family and their boat from his property. This case exemplifies the disconnect between the content of the initial right and its subsequent remedy. That is, how can we say that Putnam simultaneously has a right to the exclusive use and possession of his dock, but that he cannot exclude what would, absent the necessitous circumstance over which he has no control (and so no responsibility), certainly amount to a trespass by Ploof?\textsuperscript{49} Justice O’Brian’s reasons in \textit{Vincent v Lake Erie Transportation Co}\textsuperscript{50} perhaps stand as further evidence that a different type of analysis from one that is solely rights-centered is appropriate at the remedial stage:

\begin{quote}
Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life, but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.
\end{quote}

In \textit{Vincent}, the defendant boat owner tied up to the plaintiff’s dock without his consent in the middle of a lake squall. The defendant was found not to have committed a wrong, but was

\begin{footnotes}
\item[49] Arguably, any case that awards monetary damages for a non-monetary injury illustrates this point as well, although less starkly.
\item[50] 124 NW 221(Minn SC 1910).
\end{footnotes}
required to pay the plaintiff compensation for the damage caused when his boat slammed into the dock during the storm.

All of this is just to say that it is at least initially plausible that what goes on at the remedial stage is not necessarily wholly determined by the original right-duty relationship. Cases like *Ploof* and *Vincent* seem to shed doubt on the identity of the plaintiff’s original and remedial rights. In subsequent sections, I aim to reconcile these cases with an intrinsic account, but for now the doubt they cast is sufficient to justify serious consideration of the possible appeal of an extrinsic account, that is, an account that not only permits but also recommends a separation between the original right/duty relation and the subsequent remedial relation.\(^{51}\)

8 A look outside

The purpose of section 7 was to reveal why it is the case that the apparently simple answer proposed by an intrinsic account—that the reason for the remedy is generated by the initial

\(^{51}\) What about the alternative conception of rights, that of the interest theory? Can it, better than the will theory, show that the original right and remedial right are identical? These two theories are fundamentally the same in the sense that both are analytic endeavors, looking to find what the necessary and sufficient properties of these things that we call “rights” are. The core position of the interest theory is that certain interests of others rise to a level of sufficient importance such that we can say another is under a duty with respect to said interests. Rights thus appear to be individuated according to the interests they serve. To show that the initial and remedial rights are the same, therefore, all we need to do is show that they serve to protect the same interests. At least superficially, this would seem far from the case. Remedies appear to fulfill interests quite distinct from those of the original right. Returning to Feinberg’s hypothetical, the interest the cabin owner has in keeping trespassers off of his property is on its face a different interest from the trespasser’s *ex post facto* payment of compensation for damage done to said property. The initial interest is one of exclusive possession, whilst the remedial interest seems to be something more along the line of getting paid a fair rental value for the expropriative use of one’s property. (See Chapter Three for a more thorough analysis of the interest theory with respect to this question).
entitlement—is doubted. This doubt stems from the combination of certain additional premises: first, that the intrinsic thesis is an identity thesis, counseling the identity of remedies and rights; and, second, that our inquiry into rights is an analytic one into their necessary and sufficient properties. Both of these premises are widely accepted in the literature and, although, not wholly accepted here (as will become apparent), they are appropriate to the present aim of explaining why the intrinsic thesis has been met with skepticism. What the three situations—insolvency, bars, and defenses—reveal is a potential gap between the original right and its subsequent remedy. Thus, it would appear that the remedy is (a) not a right properly understood and so (b) cannot be seen as a different manifestation of the same normative phenomenon. This gap brings with it certain concerns about justification. If it is true that the remedy is distinct from the right, how is it, or can it be, justified? In the case where we say they are the same, the justification for the remedy is the same as the justification for the right. But when we perceive these two phenomena as analytically distinct, the temptation to view them as normatively distinct as well is great, and as such we invite the possibility of an external justification.

One school of thought celebrates the separation of right from remedy as a realistic take on the judicial enterprise. According to this approach, it is only after the judge has made an order, that we can call the plaintiff’s claim a right and the defendant’s remedial action a duty. That is, the right is contingent on a legally authoritative say-so. In essence, this is the legal realist position, the dominant modern incarnation of which is law and economics. This account makes up the first extrinsic account to be analyzed. Law and economics is not the only
theoretical approach to endorse a separation thesis regarding private law rights and remedies.\textsuperscript{52} Notably, Benjamin Zipursky and John Goldberg's civil recourse theory also adopts it. As civil recourse is the more philosophically sophisticated threat to intrinsic accounts, it warrants separate treatment, and thus is the subject matter for Chapter 3.

8.1 Law and economics

The legal economist views private law disputes as essentially distributive problems. The key question is who should bear the cost for losses. The question of loss-allocation is answered by determining who is the cheaper loss avoider. The overarching principle is the efficient maximization of some externally measurable value, generally, wealth or welfare.\textsuperscript{53} With respect to the common law, Richard Posner has famously declared that it evolves in a “wealth-maximizing” direction.\textsuperscript{54} One may doubt whether this is in fact descriptively the case, but the reality or falsity of Posner’s claim does not necessarily detract from the possible appeal of the prescriptive statement that the law should aim for wealth-maximization, that law should be efficient at this kind of allocation. The nub of this idea is that an external principle, in Posner’s world a “wealth-maximizing” norm, furnishes the justification for remedial allocation. What evidence of this can be found in our common law jurisprudence? A lack of fit with the law as it

\textsuperscript{52} In Part 2, I will more controversially suggest that under a certain interpretation, those who advance a corrective justice approach to private law might also be adopting an extrinsic-like perspective.


is is not necessarily damning of a legal theory since it is part of the role of a theoretical account of law that it offers a critical stance vis-à-vis the law. Still, evidence of the theory working itself out in the law remains illustrative if not necessarily supportive of said theory.

*Spur Industries Inc v Del E Webb Development Co*\(^{55}\) is a case often cited as evidence of an economic trend in nuisance law. Here, the plaintiff (Del E Webb) a developer of “Sun City”, a planned residential community, sought an injunction against Spur Industries, a cattle feedlot operator. The area developed by Webb had been farmland since 1911 and had had feedlots on it since 1956. Development began in 1959. The complaint was that Spur’s feedlots constituted a nuisance due to the flies and odor attributable to the running of said cattle feedlots drifting over the southern portion of Sun City. This drift rendered the Sun City’s residents unable to enjoy the outdoor living that Webb had specifically promised in its promotional material. Finding that Spur was responsible for an actionable nuisance, Cameron VJ enjoined Spur from operating its feedlots. In other words, the only way to abate the nuisance was for Spur to relocate. However, the court further held that Webb must indemnify Spur for its costs to relocate. In ordering what is known as an indemnified injunction, the court made the following relevant arguments:

Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of courts for the rights and interests of the public.

\(^{55}\) 494 P (2d) 700 (Ariz SC 1972).
Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitably or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for the reasonable amount of the cost of moving or shutting down.56

The law and economics gloss of Spur is clear. In the absence of a voluntary arrangement between the plaintiff and the defendant to allocate the costs, the court imposes what the parties would likely (reasonably) have agreed to such that whichever valued the right more gets it, but at a reasonable cost. The developer gained from the cheap cost of a rural land tract and so should, in fairness, have to pay for this advantage. This he does through indemnifying the costs imposed on those noisome neighboring users who must leave as a result. It is as if the plaintiff and defendant were to have contracted ex ante for nuisance-free land; in other words, Webb would have paid Spur for its costs of abating the nuisance (here the cost of closing down and relocating).

56 Ibid.
In essence, Guido Calabresi and Douglas Melamed have argued just this.\textsuperscript{57} According to Calabresi and Melamed, legal systems face two (separate) questions. The first, which they call the “problem of entitlement” is a first-order question and goes to who wins in a situation of conflicting interests. In terms of nuisance for noise, the question is: who holds the entitlement the noise- or the silence-lover.\textsuperscript{58} In light of the answer to the first, the second is a modal question, wherein the state must now decide how to protect the entitlement. It is this latter question, the remedial question, that is both my and Calabresi and Melamed’s focal interest.

In the Calabresi and Melamed framework, the state may employ three different rules to protect entitlements: property rules, liability rules, and inalienability rules.\textsuperscript{59} According to the first, “[a]n entitlement is protected by a property rule to the extent that someone who wishes

\textsuperscript{57} Guido Calabresi & Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (April 1972) 85:6 Harv L Rev 1089. Richard Epstein provides the following helpful and concise description of the difference between property and liability rules:

A property right gives the individual the right to keep the entitlement unless and until he chooses to part with it voluntarily. Property rights are, in this sense, made absolute because the ownership of some asset confers sole and exclusive power on a given individual to determine whether to retain or part with an asset on whatever terms he sees fit. In contrast, a liability rule denies the holder of the asset the power to exclude others or, indeed, to keep the asset for himself. Rather, under the standard definition he is helpless to resist the efforts by some other individual to take the thing on payment of its fair value, as objectively determined by some neutral party.


\textsuperscript{58} Calabresi & Melamed, \textit{supra} note 57 at 1090.

\textsuperscript{59} Ibid at 1092.
to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”\(^{60}\) By contrast, according to the second, “whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.”\(^{61}\) Finally, if no transfer of the entitlement is permitted, then the entitlement is said to be inalienable.\(^{62}\)

We may easily apply this framework to the law of nuisance. Leaving out the inalienability rule, there are four possible rules that could govern a claim of nuisance:

- **Rule #1**: The polluter may only pollute if his neighbor allows it.\(^{63}\)
  
- **Rule #2**: The polluter may pollute, but must compensate his neighbor for the damage his polluting causes.\(^{64}\)
  
- **Rule #3**: The polluter may pollute at will and can only be stopped by his neighbor if his neighbor can pay him to cease.\(^{65}\)

Rule #1 protects the plaintiff’s right to be free from pollution with a property rule. That is, it represents the recognized legal remedy of an injunction. Rule #2 protects this same right, but

\(^{60}\) Ibid.

\(^{61}\) Ibid.

\(^{62}\) Ibid.

\(^{63}\) Ibid at 1115-1116.

\(^{64}\) Ibid at 1116.

\(^{65}\) Ibid.
with a liability rule. The polluter may pollute, but will have to pay damages for so doing. Finally, rule #3 anticipates the possibility of the polluter’s right to pollute—a right that is protected by a property rule. Rule #3 is a finding that there is no entitlement to be free of a nuisance; it is an entitlement to pollute. These three rules, at the time Calabresi and Melamed wrote, were already reflected in the nuisance pollution literature. Calabresi and Melamed’s important contribution is a fourth rule that encompasses a possibility not covered by the rules 1, 2, and 3, namely, that the protection of the polluter’s entitlement to pollute is protected by a liability rule:

**Rule #4:** The polluter may pollute, but his neighbor may stop him and if he does he must compensate him (the polluter).

Rule #4 consists in the allocation of an entitlement to pollute protected not by a property rule, as is the case in rule #3, but by a liability rule. In law this takes the form of an indemnified injunction. *Spur* represents just such a case. The feedlot was entitled to pollute, but this entitlement was protected only by a liability rule such that the feedlot’s neighbors were able to infringe this entitlement (by enjoining the nuisance) provided they paid the objective cost for it—here, the cost incurred by Spur in relocating its feedlot enterprise. What we should take from the above economic analysis of *Spur* is its illumination of the hallmark of an extrinsic

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66 Ibid at 1121.

account, what I call the separation thesis with respect to private law’s rights and remedies. In a nutshell, its position is that how we decide what is an entitlement is a separate (or separable) question from how we might subsequently decide to protect it. One overarching goal of this thesis is to demonstrate that although a separation thesis of this sort is analytically possible, that is, we can obviously talk about rights and remedies separately, it is normatively problematic.

Wrotham Park Estate Co Ltd v Parkside Homes Ltd\textsuperscript{68} also seems to support the economists’ position that private law is about assigning entitlements to whichever party values them more by allowing a party in the “wrong” to pay \textit{ex post} for his infringement. In Wrotham, land belonging to the defendants (Parkside Homes) was subject to a restrictive covenant held by the plaintiffs (Wrotham Park Estate). The covenant forbade development of the land except by approval of the plaintiffs. Without seeking or acquiring the plaintiffs’ consent, and operating under flawed advice that the covenant was not binding, the defendants constructed fourteen homes. The plaintiffs sought a mandatory injunction for the demolition of the houses. This was denied on the basis of excessive waste; however, the plaintiffs were entitled to damages \textit{in lieu} of injunction valued at £2,500. The words of Brighton J in arriving at this figure are illuminating:

In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant.

\textbf{...}

\textsuperscript{68} [1974] 1 WLR 798; [1974] All ER 321 [\textit{Wrotham}].
I think in a case such as the present a landowner faced with a request from a developer which, it must be assumed, he feels reluctantly obliged to grant, would have first asked the developer what profit he expected to make from his operations. With the benefit of foresight the developer would, in the present case, have said about £50,000 for that is the profit Parkside concedes it made from the development. I think that the landowner would then reasonably have required a certain percentage of that anticipated profit as a price for the relaxation of the covenant, assuming, as I must, that he feels obliged to relax it. 69

Some commentators have urged that this amount represents the lost opportunity to bargain. 70

This is clearly fictional since in Wrotham no such opportunity to bargain can be imputed as the plaintiffs were adamant from the start that they had never wished to bargain and the court further found this as a fact. Hence, Wrotham seems amenable to a law and economics interpretation. The overall efficiency of allowing the defendant to build profitable houses outweighs the plaintiffs’ interest in keeping the land development-free. Moreover, since the transaction was not entered into ex ante, “compensation” must be paid ex post. The defendant merely has to pay after the fact for the “cost” of his infringement. 71

69 Ibid. See for comparison: Athans v Canadian Adventure Camps Ltd (1977), 17 OR (2d) 425 (HCJ). Here, an expert water-skier sued a public relations firm for copying a distinctive photograph of him skiing. In succeeding on the cause of action of misappropriation of personality, the plaintiff’s damages were measured according to what the plaintiff would have reasonably bargained for to consent to permission to the release of his image.


71 The above analysis is restricted to tort law, but notably law and economics does not so limit itself. The doctrine of efficient breach in contract is an oft-cited example of the power of economic analysis in the legal context. Less often discussed is the economic literature within the third branch of private law, the law of unjust enrichment. Relative to the other heads of private law, economic analysis of the law of unjust enrichment is scarce. Beatson and Bishop’s co-authored work, however, presents one notable exception. In its simplest terms, their argument is that
just as the law of torts (negligence) strives to minimize the social costs of accidents, so too does the law of unjust enrichment function to minimize the social costs of mistakes. (Jack Beatson & William Bishop, “Mistaken Payments and the Law of Restitution” (1986) 36 UTLJ 149 at 150. In their own words, “[m]istakes are wasteful, but avoiding them can be expensive.” (Ibid at 150). In essence, liability under Beatson and Bishop’s model is justified if the costs of taking precautions to ward off mistaken payments are less than the reliance and adjudication costs of reversing said payments. (Ibid at 159). For criticism of Beatson and Bishop et al. see Tang Hang Wu, “The Role of Negligence and Non-Financial Detriment in the Law of Unjust Enrichment” [2006] 14 Restitution L Rev 55.

While Beatson and Bishop’s economic reduction of the law of unjust enrichment carries some appeal, it is not the most viable law and economics candidate as two trenchant criticisms reveal. First, Beatson and Bishop’s arguments may be characterized as armchair reasoning as their model is notable for its lack of empirical support. (RJ Sutton, “Mistaken Payments: An Inner Logic Infringed” (1987) 37 UTLJ 389 at 411). Second, this methodological criticism is echoed in the more general skepticism about the general law and economics presumption, one adopted by Beatson and Bishop, that the law is able to provide incentives to take efficient precautionary measures. (Mark Gergen, “What Renders Enrichment Unjust?” (2001) 79 Tex L Rev 1927). Against Gergen, one could argue that the law might reflect efficient decisions or precautions even if it does not create them. This challenge, however, requires extensive empirical evidence to support it, and this evidence is notably missing in Beatson and Bishop’s account).

These criticisms do much to discredit Beatson and Bishop’s interpretation of law and economics, but not necessarily the discipline’s application to unjust enrichment as such. Hanoch Dagan has a stronger argument for the applicability of law and economics (or more accurately, with respect to Dagan, a legal realist approach) to unjust enrichment. (Hanoch Dagan, The Law and Ethics of Restitution (Cambridge: Cambridge University Press, 2004). According to Dagan, unjust enrichment represents a compromise between the competing interests of the payor’s liberty to make a mistake and the payee’s security of receipt. As such, Dagan views unjust enrichment as distributing the risk and harm of mistaken payments between payor and payee. Thus, Dagan offers a more robust economic analysis than Beatson and Bishop, one that takes into account not only efficiency, but autonomy as well.

If, however, our concern is not solely efficiency, but also includes autonomy-related concerns, two questions emerge: (1) what autonomy concerns – what factors – are important; and (2) what do we do when concerns of efficiency and those of autonomy conflict? (I should be careful here to note that many economists would not equate wealth-maximization with efficiency. Autonomy concerns would be included in the determination of whether a given law, say, were efficient. That is, the process by which an outcome is reached can be reflected in its efficiency. In-depth evaluation of this issue, however, lies outside the ambit of my thesis). In response to the former, Dagan provides a scheme of factors that are relevant for analyzing mistakes, organized around the relative ability of each party to be the cheaper cost avoider. For example, a commercial party is in a better position to gather information so
Again, the crux of the law and economics position is its perception of a meaningful separation between the initial entitlement stage and the subsequent liability stage. Who has the initial entitlement does not dictate who will bear the liability. The initial entitlement ought to go to the person who values it most and the liability ought to attach to the cheapest cost as not to make a mistake than is a private party. As an aside, while initially intuitively appealing, I am not sure this argument proves convincing. Given the diffuse nature of corporate responsibility and general lack of accountability in corporate governance structures, one might expect an individual, minding her own resources, would be in a better position to avoid mistakes, although, notably, not in a better position to insure against them once they occur.

Yet, question (2) remains a problem, exemplifying the problem of incommensurability. Dagan admits claims will inevitably conflict and will need to be balanced, but maintains that, provided the balance is an informed one, this is acceptable. Some commentators appear swayed by this reasoning: Andrew Tettenborn, “Review of Hanoch Dagan’s *The Law and Ethics of Restitution*” [2005] 13 Restitution L Rev 245 at 247. I, however, am not. While Dagan offers us perhaps not the worst scenario, I doubt that it is near the best. Even if informed, such a choice among conflicting – if not, incommensurable – principles gives rise to uncertainty. Uncertainty of this sort (that is, not mere penumbral uncertainty, but core uncertainty) is anathema to law as it undercuts one of the core principles of the rule of law: that law functions as a guide for human behavior. (Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) at 210-229 [Raz, *The Authority of Law]*). To have two criteria of distribution – autonomy and utility – will lead to likely conflict. It should be noted that Dagan, in fact, has three factors that make a moral claim: autonomy, utility, and community. Rather than decreasing the likelihood and intensity of conflict, the third factor only adds to it. If we can agree that one of law’s key functions is to avoid or resolve such conflict, then any theory that permits or encourages these conflicts (even if in an informed manner), and provides no formula for deciding between them, should be rejected.
avoider. Moreover, what the original entitlement is plays no normative role in determining the content of the consequent remedy. The two stages are connected only in that they serve the monistic utilitarian principle upon which law and economics is based: maximize aggregate wealth/welfare/utility. It is the separation thesis of private law’s remedies that represents the most inimical position to intrinsic accounts. Law and economics arguments are helpful in showcasing this thesis starkly. But in order to provide a robust defense of intrinsic accounts, a stronger advocate of this thesis must be confronted. This is the approach earlier alluded to, that of civil recourse theory. For all of its expository utility, to the audiences I seek to address, law and economics is a straw man. A trenchant criticism of law and economics from this strategic vantage is that it cannot on its own generate any reason why the bipolarity of private law’s interactions should be perceived as central.\textsuperscript{72} I want instead, therefore, to test the intrinsic account against a stronger opponent, one that at least initially appears to take this bipolarity seriously: civil recourse theory.

Chapter 3
Civil Recourse

9 Introduction

The hallmark of extrinsic accounts is their adherence to what I call the separation thesis between rights and remedies. According to this thesis, determinations of original entitlement and subsequent remedy, though causally linked, are separate inquiries. “Separate” admits a variety of different meanings. Something can be analyzed separately yet still remain understandable as the same thing. We can also mean substantively separate, as in the separateness of two different substances. Extrinsic theorists take themselves as endorsing a substantive, not just analytic, separation between rights and remedies. I hope to show that most of the arguments that lead them to this conclusion in fact only support an analytic separation between rights and remedies. As a result, space is left for a substantive, or normative, connection. This is not to say that substantive arguments are not provided by extrinsic accounts—they are—but, as I will demonstrate, these ultimately prove unsatisfactory. The law and economics literature explicitly and clearly exemplifies the separation thesis, but it is not alone. Even theorists that seem to treat the bilateral structure of private law seriously are also found under the thrall of the separation thesis. In this chapter, I examine one particularly entranced approach, that of civil recourse theory.

Recall, under my understanding, an intrinsic account is one that requires no new normative information at the remedial stage. There is no call for an additional principle of repair. All that is logically and normatively required is the original right-duty relation. Civil recourse theories appear to take seriously the relationship between the plaintiff and
defendant. They acknowledge that tort law, for example, consists of rights of the plaintiff that the defendant wrongs. These wrongs lead to the possibility of the plaintiff recovering a remedy from the defendant. *Prima facie*, therefore, civil recourse theory seems in line with intrinsic theories proposed by scholars like Ernest Weinrib, to the extent that the latter has even playfully suggested the removal of the word “not” from the title of a prominent civil recourse theorist’s article, “Civil Recourse, Not Corrective Justice.”

The structure of this chapter is straightforward. First, I set out the main building blocks of the civil recourse account. Next, I reveal its extrinsic character. The present aim is to paint a sympathetic picture of civil recourse theory, leaving the rejection of it and the other extrinsic accounts canvassed earlier for Chapter 4.

10 Civil recourse: a broad outline

As Andrew Gold has recently noted, it “is no longer true” that civil recourse theory offers “a unified approach to tort law.” Following its initial formulation, civil recourse theory has been challenged and refined by a variety of scholars. Here, we will focus on the foundational aspects of civil recourse theory.

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branched out, and, with its numerous adherents embracing different aspects of it, we might now better understand it as “a collection of theories.”\(^{76}\) Although notable, the diversification of civil recourse theories is not my focus.\(^{77}\) As in the preceding chapter, my concern is with outlining a particular type of approach to private law’s remedies, an extrinsic approach. Such an approach is identifiable, I suggest, by its adherence to the separation thesis between rights and remedies. In other words, this account considers the question of entitlement to be separable from the question of remedy. With this concentration, the articulation of civil recourse theory I look to is that of its original authors, Benjamin Zipursky and John Goldberg.

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\(^{76}\) Gold, “Taxonomy” supra note 74 at 65.

In its negative moments, civil recourse theory is a critique of existing theories, including both intrinsic and extrinsic accounts. Positively, it holds itself out as an alternative to the leading intrinsic theory, corrective justice theory, and the leading extrinsic theory, law and economics, claiming to be “a third way of understanding tort law.” It is civil recourse’s positive arguments with which I am primarily concerned.

Given civil recourse’s self-understanding as distinct from both corrective justice and law and economics (i.e., from both of the leading intrinsic and extrinsic accounts, respectively), how can we plausibly understand, as I have suggested, it to be an extrinsic account? The answer is that the hallmark of the intrinsic account—that the original right is all we need to look at to determine the appropriate remedy—is markedly (and proudly) absent from the civil recourse thesis. Notably, civil recourse does not invoke an external principle of compensation in the way a paradigmatic extrinsic account does. In fact, it holds itself out as an alternative to such “allocative” theories. Nonetheless, by advocating a separation of right from remedy,

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78 Zipursky, “Rights, Wrongs, & Recourse,” supra note 75 at 4. That civil recourse theory should take as its subject matter not just tort law, but private law as a whole is affirmed by Benjamin Zipursky: “Oman quite appropriately selects private law—not just tort law—as the subject matter that civil recourse theory should be aspiring to explain.” (Benjamin Zipursky, “Honor and Civil Recourse: A Response to Nathan Oman’s The Honor of Private Law” (2012) Vol. 80 Res Gestae 59 at 59) [Zipursky, “Honor and Civil Recourse”]. And again: “Civil recourse, so understood is, we think, a broad concept that can and does encompass not only torts, but contracts and other domains of private law.” (Goldberg & Zipursky, “Civil Recourse Revisited,” supra note 75 at 349).

79 Law and economics theories of private law can be fairly viewed as allocative in that they pride themselves as solely concerned with the efficient allocation of wealth (or rights or value) between competing individuals (entities). I am not so sure this description is as equally or fairly applied to corrective justice theorists, unless one adopts John Gardner’s view about questions of justice—that they are all essentially allocative questions. Corrective justice, on Gardner’s view, is an allocative question concerning addition and subtraction – that is, allocation back. Yet, other
civil recourse theory implicitly allows for such considerations to be brought in, regardless of how unwelcome its proponents pretend them to be. More ambitiously, my argument is one that was latent in the preceding chapter, namely, that the acceptance of the separation thesis entails the risk of extrinsic characterization.

10.1 Relational wrongs

The civil recourse story involves three components: 1) the concept of a relational wrong, 2) the feature of a right of action, and 3) a principle of civil recourse. When a particular type of wrong occurs, a wrong toward another (a relational wrong), the wrong-sufferer is uniquely possessed of a right of action (what is referred to in the literature as “substantive standing”) to demand redress from the wrongdoer. This legal right of action, so the civil recourse story goes, is the manifestation of a principle of civil recourse, namely, that the state owes its citizens an avenue of private redress for relational wrongs.

Let’s examine more closely the concepts of relational wrong and relational wronging. A relational wrong is a breach of a relational directive, a type of a norm that makes mandatory or prohibits certain types of conduct directed against another. Theories of corrective justice would reject this allocative description, maintaining that the law of torts is not about allocating loss, but about protecting rights and restoring the material means of exercising them.

80 “To say that it is a ‘relational legal wrong’ (or ‘relational wrong’) is to say that there is a relational directive under which the act is a legal wrong.” (Zipursky, “Rights, Wrongs, & Recourse,” supra note 75 at 59).
“simple directives.” Simple directives forbid or make mandatory a certain type of behavior. In the former negative incarnation, a simple directive possesses the following form: “For all x, x shall not A.”\(^8\)\(^1\) Thus, a simple wrong consists of x A-ing.\(^8\)\(^2\)

Michael Thompson’s analysis of “monadic”, “non-relational”, or “monopolar” instances of normativity illuminates our understanding of simple legal directives. Monadic instances of normativity are as follows:

<table>
<thead>
<tr>
<th>X did wrong in doing A</th>
<th>X did wrong in not doing A</th>
</tr>
</thead>
</table>
| X has a duty to do A   | X has a duty not to do A  |\(^8\)\(^3\)

An example of a simple directive would be the prohibition against possession and distribution of narcotics. Possession of a narcotic would violate this directive and thus is a simple wrong.\(^8\)\(^4\)

In other words, it is a wrong by virtue of violating a directive that makes no reference to

\(^8\)\(^1\) Ibid at 59.

\(^8\)\(^2\) The positive incarnation would be: “For all x, x shall A.” Here the corresponding simple wrong is x failing to A in situations where the directive applies. A legal example would be the positive duty on American citizens (all x) to file their income taxes with the IRS every year.

\(^8\)\(^3\) Michael Thompson, “What is it to Wrong Someone? A Puzzle about Justice” in R Jay Wallace, Philip Pettit, Samuel Scheffler, & Michael Smith, eds, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press, 2004) 331 at 338. I have omitted the final two pairs of monadic statements: “X has a right to do A” and “X has a right not to do A”. For explicit association of these forms of monadic deonticity with the criminal law. (Ibid at 334).

\(^8\)\(^4\) One should note that certain criminal prohibitions, in particular those found in Part VIII of the Canadian Criminal Code, “Offences Against Persons,” can be understood both as simple and relational directives, breaches of which generate both simple and relational wrongs. This is reflected in the law, where nonconsensual physical contact can form the subject matter of both a civil lawsuit (the tort of battery) and a criminal charge (the offense of assault). Zipursky explicitly acknowledges this situation in Zipursky, “Rights, Wrongs, & Recourse,” *supra* note 75 at 60, n 219.
another individual. It is a wrong simply because the action itself is prohibited. When we ask why what X did is considered a wrong, the straightforward answer is that this action was forbidden. Monadic or simple wrongs are not the wrongs that concern us, as they are not the wrongs of private law.

Let’s look at those that do and are. These wrongs, civil recourse theorists note, are relational as they essentially involve wrong to another: “Relational directives ... enjoin persons to treat or to refrain from treating other persons in a particular way. ... They all share roughly this form: For all x, for all y, x shall not A y.” Again, Thompson helpfully tabulates this idea for us:

- X wronged Y by doing A
- X wronged Y by not doing A
- X has a duty to Y to do A
- X has a duty to Y not to do A

Stephen and Julian Darwall note with approval civil recourse theory’s recognition of these obligations as those appropriate for civil wrongs:

In our view, civil recourse theory captures an important truth about the structure of relational or bipolar legal obligations, which we take to be the kind that are normally involved in torts, namely, that injured victims of violated bipolar obligations owed to them have a distinctive standing to hold their injurers responsible that neither third parties nor the community at large have.


86 Thompson, supra note 83 at 335.

We might be tempted to elide the difference between simple and relational wrongs as follows: It seems possible to define relational wrongs in the same way in which we defined simple wrongs: as violations of a directive. In the case of relational wrongs, the action forbidden is more robustly described as involving a wrong to another. In some ways this is true. If we compare criminal law with tort law, we can see that both may often involve the same subject matter. If I hit you, then I not only commit the crime of assault (violating the simple directive of the criminal law that forbids such interference with the personal integrity of another), but also the tort of battery. The relevant difference between the two is the manner in which the wrongs are addressed. In criminal law, the state, the author of the directive, chooses whether to prosecute me. In tort law, you, the victim of my wrong, get to decide. We can thus see, at base, that the reason that the action forbidden by a relational directive is considered wrong is that it is a wrong to another.

One helpful way to understand the distinction between simple and relational wrongs is to pose the question of whether there is a fundamental difference in who gets to complain of the wrong once it has occurred. Who has grounds to complain when a simple directive is violated? If a parent directs her child to brush his teeth and he refuses, it seems that only the issuer of the demand has anything like a claim that rises to the level of a complaint. By contrast, if a parent tells her children not to steal the other’s toys, and the elder child steals her younger sibling’s GI Joe action figure, then it seems that the younger has a special ground of complaint against the elder. Conceivably, the parent (the issuer of the directive) also has a ground to complain, but this only proves the point that such grounds are distinct from the younger’s—that is, from the victim’s. Hence, we would have two different kinds of wrong
involved: one is the wrong of a violating a simple directive, and the other is a wrong against another embodied in a relational directive. The younger child’s ground of complaint is, in a nutshell, the civil recourse conception of the legal rule of substantive standing: the victim of a relational wrong has distinct grounds to complain of a wrongdoer’s actions. With this in mind, let’s now turn to the second component of the civil recourse story, the right of civil action.

10.2 Right of action

Civil recourse theorists claim that a feature of tort law (and arguably all of private law) that is missed by alternative approaches (namely, law and economics and corrective justice theories) is that in every case it is the plaintiff who sues the defendant. According to this rule, which has a black letter equivalent in every tort action: “[a] plaintiff cannot win unless the defendant’s conduct was a wrong relative to her, i.e., unless her right was violated.” In other words, the “substantive standing rule says that P has a right of action against D for T-ing only if


90 Ibid at 4. For more recent formulation, see Zipursky & Goldberg, “Torts as Wrongs,” supra note 75 at 957:

for each tort, it is a condition of liability that the defendant’s tortious conduct be a wrong relative to the plaintiff. We have sometimes referred to this condition as a “substantive standing” requirement. It is a “standing” requirement because it goes to the issue of whether the plaintiff is an appropriate person to assert a claim against the defendant. It is “substantive” because the rules that determine tort standing are among those that define the wrong(s) for which a plaintiff is suing.

When we reformulate this rule in terms of rights, it becomes: “A plaintiff has a right of action against a defendant only if the defendant violated the plaintiff’s right. This means that a plaintiff has a right of action against a defendant only if there is a legal norm proscribing individuals from doing a particular sort of wrong to others, and defendant has done that wrong to a plaintiff.” (Zipursky, “Rights, Wrongs, & Remedies,” supra note 75 at 64).
D T’d P.”91 How should we understand this right of action? Apparently in a number of ways as Zipursky and Goldberg refer to this ability of a plaintiff to take a defendant to court (to the state) and demand some sort of remedy at times as a “right” (a “right of action”), at others a “privilege”,92 and at others a “power”:93 “The law... recogniz[es] a privilege and creat[es] a power in the person whose rights were violated to act against the rights-violator through the authority of the state. In doing so, the law creates what is literally a right of action against the rights-violator.”94 In just two sentences, Zipursky has invoked three Hohfeldian terms—terms that Hohfeld intended to be used to clarify the more general term of “rights.” Let’s take a closer look at the Hohfeldian scheme to clarify in turn what civil recourse theorists mean when they say “right of action.”

In *Fundamental Legal Conceptions*, Wesley Newcomb Hohfeld set out to reduce all legal relations to their fundamental (atomic) parts.95 He considered that “[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal


92 Ibid at 81.

93 Ibid at 80.

94 Ibid at 85 [underline added].

problems frequently arises from the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties.’ In other words, rights and duties are not the fundamental building blocks of legal relations. Instead, jural relations consist of eight legal concepts, forming four paired correlative or opposing relations, tabulated as follows:

Table 1—Jural Opposites

<table>
<thead>
<tr>
<th>Right</th>
<th>No-right</th>
</tr>
</thead>
<tbody>
<tr>
<td>Privilege</td>
<td>Duty</td>
</tr>
<tr>
<td>Power</td>
<td>Disability</td>
</tr>
</tbody>
</table>


97 Or as follows:

Jural Opposites

(right privilege power immunity

(no-right duty disability liability

Jural Correlatives

(right privilege power immunity

(duty no-right liability disability

(immune duty disability liability

(right privilege power immunity

(duty no-right liability disability

(immune duty disability liability
<table>
<thead>
<tr>
<th>Immunity</th>
<th>Liability</th>
</tr>
</thead>
</table>

Table 2—Jural Correlatives

<table>
<thead>
<tr>
<th>Right</th>
<th>Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Privilege</td>
<td>No-right</td>
</tr>
<tr>
<td>Power</td>
<td>Liability</td>
</tr>
<tr>
<td>Immunity</td>
<td>Disability</td>
</tr>
</tbody>
</table>

Less schematically, if A has a right that B Φ or refrain from Φing, then B has a duty to A to Φ or refrain from Φing; if A has a privilege against B to Φ or refrain from Φing, then B has a no-right that A Φ or refrain from Φing; etc. With respect to the jural relation of opposition, if A has a right that B Φ or refrain from Φing, then A does not have a no-right that B Φ or refrain from Φing, and so on.\(^9^8\) A claim-right is understood in terms of its correlative: duty. It is a legal claim

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\(^9^8\) Andrew Halpin notes that Hohfeld’s use of the word “opposite” is not without ambiguity. Expanding on criticisms first presented by Albert Kocourek, in *Jural Relations*, 1st ed (Indianapolis: The Bobbs-Merrill Co., 1927), Halpin notes three different possible meanings of “opposite:” opposite of *extreme*, opposite of *negation*, and opposite of *alternative*. (Andrew Halpin, *Rights & Law Analysis & Theory* (Oxford: Hart Publishing, 1997) at 32-33). As Halpin defines them: “An opposite of extreme involves the utmost progression or regression of a common quality. An opposite of negation simply involves the absence of the term. An opposite of alternative involves the presence of another term which is mutually exclusive with the first term, without the relationship of common quality existing in an opposite of extreme.” (Halpin, at 33).
possessed by an individual (A) that another individual (B) Φ or omits to Φ. 99 Thus, B can be understood to be under a duty (to A) either to Φ or omit to Φ. A privilege, subsequently redefined by Glanville Williams as a “liberty”, allows an individual (A) either to Φ or not to Φ without interfering with a claim-right of another (B). In other words, or correlatively-speaking, B has a no-right with respect to whether A does or does not Φ. 100 A has no duty with respect to B as to whether he (A) Φs or does not Φ.

Two further remarks on the nature of the relationship between rights and privileges provide additional clarification. First, by possessing a claim-right, A necessarily also possesses a privilege—a privilege as to whether to exercise the claim-right. I have a right that you do not

I understand Hohfeld’s use of opposite to mean alternative. Thus, the presence of one fundamental conception entails the absence of its opposite. Arthur Corbin also adopts this interpretation of Hohfeld: “No pair of opposites can exist together. That is, when a person has a right he cannot have a no-right with respect to the same subject matter and the same person.” (Arthur L Corbin, “Legal Analysis and Terminology” (1919-1920) 29 Yale LJ 163 at 166). Glanville Williams also interprets jural opposites as contradictions. This leads Vivienne Brown to caution us about the difficulty in understanding concepts as contradictories. She argues that while propositions about concepts can be contradictories – that is, as two statements, which, if one is true, the other is necessarily false and where both cannot be false, for example: “I have a duty to A to Φ” and “I do not have a duty to A to Φ” – concepts cannot. (Glanville Williams, “The Concept of Legal Liberty” (1956) 56 Colum L Rev 1129; Vivienne Brown, “Rights, Liabilities and Duties: Reformulating Hohfeld’s Scheme of Legal Relations?” (2005) 58 Curr Legal Probs 341 at 348).

99 Hohfeld, supra note 96 at 13. As Vivienne Brown argues, Hohfeld’s understanding of rights does not correspond to our ordinary understanding of the term. We ordinarily, she suggests, understand a right to entail direct protection for that which we have a right to do (or omit from doing). By contrast, “Hohfeldian claim-rights … provide protection by virtue of the action required of the duty holder.” (Brown, supra note 98 at 341).

100 Hohfeld, supra note 96 at 14-21.
walk across my land without my consent, but it lies with me whether to enforce it by either forcibly ejecting you or by seeking a court-ordered injunction against your wanderings. In other words, a claim-right possessed by A that B Φs entails a privilege belonging to A that B not-Φ. We can thus say that a claim-right with a positive content is normally accompanied by a liberty with a negative content.\(^{101}\) Second, a privilege does not directly entail a duty against others not to interfere with its exercise. Privileges do not enjoy duties as their correlates. Rather, the exercise of a privilege is typically protected \textit{indirectly} by its possessor’s claim-rights. Taking the privilege of choosing whether to wear one’s hat, Nigel Simmonds explains,

For example, I have a duty not to assault you, and you have a claim-right that I should not assault you. Without assaulting you it may be difficult for me to interfere with your practice of wearing a hat. My duty not to assault you in that sense serves to protect your privilege to wear a hat; but it is not correlative to the privilege, and is logically separable from it. Thus one could imagine a game wherein I try to wear my hat and you try to prevent me from doing so. By consenting to play such a game I have exempted you from your duty not to carry out certain minor assaults upon me (such as knocking my hat off). I retain my privilege to wear a hat (since I am under no duty \textit{not} to wear one) but you are under no duty not to prevent me from wearing a hat.\(^{102}\)

\(^{101}\) This insight is Glanville Williams’ (G Williams, \textit{supra} note 98), also see Brown, \textit{supra} note 98 at 346.

\(^{102}\) Simmonds, \textit{supra} note 95 at xiv. Halpin argues that none of the examples provided by Hohfeld (or by Williams) prove that privileges are fundamental concepts, distinct from rights; as such, he would likely have a similarly dismissive view of Simmonds’ example.
While a person with a privilege has a liberty to Φ (or not to Φ), a person with a power has the capacity to alter the legal relationships of another.\textsuperscript{103} A classic example is the offeree’s position \textit{vis-à-vis} the offeror in the law of contract. Once the offer has been made, the offeree has a power to alter her relationship with the offeree. She has the power to change the legal relationship from that of no contractual obligation to one of contractual obligation, with its attendant structure of correlative rights and duties. The offeror, for his part, once the offer is made, is described as being under a \textit{liability} with respect to the offeree to have his legal status changed by the offeree’s actions (specifically, the action of acceptance).\textsuperscript{104} In contrast to a liability, an immunity is possessed by an individual “who is free to enjoy a legal relation without

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\textsuperscript{103} I should note here the dispute between the volitionist and non-volitionist understandings of power. According to the volitionists, a defendant committing a tort has a power \textit{vis-à-vis} the plaintiff victim to change the legal relationship between the two. Arthur Corbin and Matthew Kramer exemplify this position. Corbin cites as an example of a power in the Hohfeldian scheme the following: “(d) A has the legal power, by assaulting B, of creating a secondary right to damages in B.” (Corbin, \textit{supra} note 98 at 169). Corbin later qualifies this by stating we must “observe that a legal power is not always accompanied by a legal privilege; there may be a duty not to use it.” (Corbin, \textit{supra} note 98 at 169). Representing the non-volitionist proponents are Joseph Raz and Peter Jaffey who accuse the volitionist account of legal power of leading to absurdity. Briefly, the power needs to be a legal power – implicitly something recognized by law. It is paradoxical, if not perverse, to understand the defendant’s ability to commit a tort as a \textit{legal power} – that is, a power defined by law to break the law. In Raz’ own words:

I have argued that one cannot identify a legal power with the ability to perform an act which has legal consequences. This would yield the paradoxical consequence that people have legal power to break the law. (Do we need powers for \textit{that}?) A legal power can only be identified by the reasons which led the law (i.e. the institutions which make and sustain it) to attach these legal consequences to the act. The act is an exercise of a legal power only if the reason for attributing to it the legal consequences it has is held desirable to enable people to perform that act as a means to achieve those consequences if they so wish.


\textsuperscript{104} Hohfeld, \textit{supra} note 96 at 21-27.
it being changed by another person.”¹⁰⁵ Thus, a landowner (A) has an immunity relative to another's ability (say, B's) to alienate A's legal interest in his own land.¹⁰⁶ B, in this position, Hohfeld describes as being under a disability (vis-à-vis A's decisions regarding the dispossessio of his (A's) land).¹⁰⁷

With Hohfeld's terminology in mind, let us return to our civil recourse theorists. Recall their usage of three Hohfeldian terms—privilege, power, and right—in articulating their theory: “The law... recogniz[es] a privilege and creat[es] a power in the person whose rights were violated to act against the rights-violator through the authority of the state. In doing so, the law creates what is literally a right of action against the rights-violator.”¹⁰⁸ The plaintiff possesses a privilege, that is, a no-duty, against the wrongdoer to seek redress. In other words, the defendant has no right to stop her and the plaintiff is under no duty not to proceed. In a pre-civil condition, this privilege would permit the plaintiff to seek and exercise various forms of self-help. In a civil society, such self-help is no longer generally available except in very limited circumstances:¹⁰⁹

¹⁰⁵ Halpin, supra note 98 at 30.
¹⁰⁶ Hohfeld, supra note 96 at 28.
¹⁰⁷ Ibid at 28-29.
¹⁰⁸ Zipursky, “Rights, Wrongs, & Remedies,” supra note 75 at 85. [My underline]
¹⁰⁹ See Roscoe Pound’s Jurisprudence (St Paul, MN: West Publishing, 1957) § 142, at 351-352: “It is a general principle that one who is or believes he is injured or deprived of what he is lawfully entitled to must apply to the state for help. Self-help is in conflict with the very idea of the social order. It subjects the weaker to risk of the
The defendant has violated her legal rights and that violation entitles her to a remedy as against the wrongdoer.

One can imagine this remedy taking various forms, including a legal privilege of self-help. However, self-help is for the most part forbidden by the modern state.\textsuperscript{110}

Thus, the government in “disabling” a victim’s “state of nature” ability to exercise her privilege of self-help creates a power to demand redress from the defendant. Recall that a power correlates with a liability; ergo, the defendant is understood as liable to the exercise of the plaintiff’s power.\textsuperscript{111} While the privilege and power aspects of the “right” of action seem to form an arc between the two poles of the plaintiff and the defendant, what is termed a “right” is arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it.” Notably, Pound acknowledges legal recognition of limited rights to self-help at 349, 352, 356.

\textsuperscript{110} Goldberg & Zipursky, “Torts as Wrongs,” supra note 75 at 973. Also see Goldberg, “Constitutional Status,” supra note 75 at 544, 602, and in particular 606, where he states,

[g]overnment, by taking on the task of maintaining civil society, obtains from individuals a variety of powers that they would otherwise be entitled to exercise. Thus, apart from special cases such as self-defense, the victim of a wrong is by law disabled from responding to the wrong on his own, or with the aid of friends or kin. … With resort to self-help blocked by the law, government is obligated, at least to some degree, to provide an alternative path for the attainment of satisfaction.

\textsuperscript{111} For a recent endorsement of this point, see Jules Coleman, “Mistakes, Misunderstandings, and Misalignments” (2012) 121 Yale LJ 541 at 549 [Coleman, “Mistakes”]:

the remedy in tort is the conferral of a power on the plaintiff—a power to impose a liability, not a liability as such. / A power provides its possessor with an option. He has the authority to impose the liability, but he is not required to do so. As Hohfeld pointed out nearly a century ago, liabilities are normative correlates of powers. If \( B \) has a power with regard to \( A \), then \( A \) is vulnerable to \( B \)’s exercise of that power. \( A \) is liable in that sense.
held by the plaintiff as against the state. It is the state that has the correlative obligation to provide an avenue of civil recourse for aggrieved plaintiffs.\textsuperscript{112}

To summarize, the plaintiff has a power correlating to the defendant's liability, and she has a right correlative to the state's duty. The content of the plaintiff's power is the right to have the defendant perform some sort of state-ordered reparative action toward her. The content of the plaintiff's right is that the state provides an avenue of civil recourse for the plaintiff to exercise her power. The defendant, notably, is under no legal duty with respect to the plaintiff until the court orders him to be under one. Helge Dedek aptly describes this relationship as triangular:

Triangularity is what characterises the model of private law relations as expounded by Zipursky. As a counterpoint to Weinrib's bipolarity, Zipursky's idea of corrective justice emphasises the importance of civil recourse; the focal point of his philosophy of private law is therefore not a rights/duties relationship between wronged and wrongdoer, but the 'right of action' the right to act through the state against the defendant. ... In Zipursky's model, corrective justice indeed unfolds as a triangular transaction, as a detour through the state without taking the shortcut between wronged and wrongdoer: an obligation on the part of the defendant is neither a necessary nor a sufficient condition of a right of action.\textsuperscript{113}

\textsuperscript{112} Coleman avoids this move away from tort's bipolarity by arguing that when the plaintiff exercises her power, the defendant's liability to this exercise transforms into a duty. The liability, in other words, is a liability to be placed under an obligation (an obligation of the defendant to pay damages to the plaintiff). Ibid.

This triangularity has lead some scholars, notably Ernest Weinrib, to raise concerns that the plaintiff, following the defendant’s wrongdoing, has no right, only a power:

if the plaintiff has a power and not a right (and, correspondingly, the defendant is under a liability and not under a duty), then the occurrence of the wrong creates an interval during which the plaintiff has no right, thereby interrupting the continuity of the right into the remedy. ... [C]ivil recourse denies that there is any right for the plaintiff to enforce. Instead the plaintiff is merely exercising a power to apply to the court to create a new right. In making these criticisms, the theory of civil recourse goes seriously off the rails.  

Goldberg and Zipursky directly confront and reject this criticism: “Notwithstanding his typical generosity and patience in engaging our ideas, Weinrib has mischaracterized our position by attributing to us the view that a person who was the victim of a tort “lacks a right“ and has only a power. We have never taken that position.” What has been their position then? Simply this:

that (a) the legal system provides the victim of a tort with a legal power to exact damages or another remedy from the tortfeasor upon proof that the tortfeasor wronged her—this legal power is a right (just as, for example, the power to vote is a right)—and (b) the plaintiff has a right in a second sense, in that the state, in providing the plaintiff with a legal power, recognizes its own duty to the plaintiff to provide an avenue of civil recourse. The political (and constitutional) right of the plaintiff to a state-facilitated private power is correlative to a state duty to provide such a power. The tort


115 Goldberg & Zipursky, “Civil Recourse Revisited,” supra note 75 at 362.
defendant does not have a legal duty to pay, however, until the right is exercised. Instead, what the defendant has, under the law, is a liability to pay.\textsuperscript{116}

With respect to “(b),” the plaintiff has a right, the content of which is a legal power, and the state has a legal duty correlative to this right. What is unclear is “(a).” Saying that this “power-right” is just like the power to vote deepens the confusion. The so-called power to vote is better described as a privilege since exercising one’s voting “power” does not usually effectuate a direct change on any (if one votes for the losing candidate, say) legal relations. Moreover, it is difficult to see who has the correlative liability to this power. Furthermore, if the remedial right-duty relation is ultimately one between the plaintiff and the state, what is its normative justification? It is clear that if the remedial right-duty relation were between the plaintiff and defendant, the normative justification could just be the initial right-duty relation and its breach—in other words, the wrong itself. But civil recourse theorists have rejected this easy bipolarity—this “shortcut between wronged and wrongdoer.” So how do they justify the remedial right of action? The answer lies in their principle of civil recourse.

\textbf{10.3 Principle of civil recourse}

According to the principle of civil recourse, “an individual is entitled to an avenue of civil recourse—or redress—against one who has committed a legal wrong against her.”\textsuperscript{117} In its inception the principle seemed justified through vengeance-style arguments. It was the “quasi-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{116} Ibid at 362-363.
\item \textsuperscript{117} Zipursky, “Rights, Wrongs, & Recourse,” supra note 75 at 5.
\end{itemize}
\end{footnotesize}
The "retributive" nature of recourse that explained the civil standing requirement. The idea of recourse was said to be in the "same conceptual family as the retributive notion of eye for an eye," and further that "[i]t is essential to our ordered society that we do not permit private retribution for the violation of legal rights ... In other words, where the state forbids private vengeful retribution, fairness demands that an opportunity for redress be provided by the state." This is the narrative of vengeance: Before the advent of the modern state, we were able (legally, though maybe not always physically) to avenge our own wrongs by exacting private retribution on those who wronged us. The modern civil state frowns on such activities for a variety of sensible reasons, two examples of which are: that right and wrong are subjectively determined by parties who are too close to the impugned act to be impartial and that the types of actions taken as redressive could be disproportionate to the complained of behavior. As a result of such concerns, private acts of retribution are made illegal or strictly curtailed. In such a way, "[o]ur society ... avoids the mayhem and crudeness of vengeful private retribution." Therefore, in a social-contract-like deal individuals, in return for giving up their privileges of private redress, may demand that the state provide some quid pro quo. This quid pro quo is civil recourse, in particular, the institution of tort law itself and the courts that administer it. Notably, the vengeance story is no longer told by civil recourse theory's original

118 Ibid.
119 Ibid at 83-84.
120 Ibid at 84.
121 Ibid at 85.
author, Zipursky,\textsuperscript{122} although other civil recourse theorists have recently given it pride of place.\textsuperscript{123} Goldberg and Zipursky’s recent writings on the subject are quick to disavow this retributive reliance: “Tort redress is not to be confused with vengeance. Vengeance is an unregulated response by which a victim seeks satisfaction directly and by means of her choice.”\textsuperscript{124} And even more explicitly: “in the absence of a modern bureaucratic state, a law of wrongs perhaps was useful in channeling the passions of those keen to act on their vengeful dispositions and in thereby keeping the peace. But we moderns are well past the point of

\begin{footnotesize}
\textsuperscript{122} Zipursky, “Substantive Standing,” \textit{supra} note 75 at 315.


Goldberg and Zipursky admit that a victim’s demand for recourse originates in feelings of blame and indignation. They also assert that the objective of civil recourse is not to shift losses but to rectify wrongs. But if recourse does not mean shifting the victim’s loss to the wrongdoer, it must mean imposing a new loss on the wrongdoer in return for harm done. Imposing a loss in return for harm done, as an expression of blame and indignation, is the essence of revenge. Thus, by sponsoring civil recourse, the state provides injury victims with a controlled form of revenge. Moreover, Goldberg and Zipursky concede that the tort victim’s entitlement to recourse is not a moral entitlement but a legal entitlement based on violation of norms that do not (or do not always) correspond to a moral duty. Civil recourse, therefore, is not only revenge, but morally naked revenge.

\textsuperscript{124} Goldberg, “Constitutional Status,” \textit{supra} note 75 at 602.
\end{footnotesize}
needing a body of law that indulges base instincts of this sort.”\textsuperscript{125} If it’s not revenge and if social contract theory is only illustrative, not justificatory,\textsuperscript{126} then from what does the principle of civil recourse derive its normative force such that it can be the principle upon which substantive standing and in turn the right of action are based? In the next chapter, I will present my skepticism on this point, but for now my purpose is to present the civil recourse account in its own light and on its own terms only so that we might reveal its non-intrinsic character.

While, distancing themselves from a vengeance narrative, Goldberg and Zipursky indicate that the justification for civil recourse comes from the moral and political values served by the principle itself:\textsuperscript{127} “the issue is not whether some people desire redress against those they perceive as having wronged them. Rather, the question is whether the state does well to provide an avenue for such recourse.”\textsuperscript{128} Goldberg and Zipursky locate the value in the idea “that comes near to being captured by the hoary maxim: ‘[w]here there’s a right, there’s a remedy.’”\textsuperscript{129} The maxim, \textit{ubi jus ibi remedium}, reflects in turn certain liberal-democratic values

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\item \textsuperscript{125} Goldberg & Zipursky, “Torts as Wrongs,” \textit{supra} note 75 at 972. For this last point, they cite Emily Sherwin, “Compensation and Revenge” (2003) 40 San Diego Law Rev 1387 at 1400.
\item \textsuperscript{126} Goldberg & Zipursky, “Torts as Wrongs,” \textit{supra} note 75 at 974. See also Goldberg and Zipursky, “Civil Recourse Revisited,” \textit{supra} note 75 at 364: “[civil recourse] largely accepts Ripstein’s advice that civil recourse theory be disengaged from a notion of justified retaliation and be rendered less dependent upon Lockean social contract theory.”
\item \textsuperscript{127} Goldberg & Zipursky, “Torts as Wrongs,” \textit{supra} note 75 at 974.
\item \textsuperscript{128} Ibid at 973.
\item \textsuperscript{129} Ibid.
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about how individuals are to treat one another. In effect, a state that did not provide recourse for wrongs would not respect the equality of its citizens:

Part of the state’s treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them. Relatively, a legal and political order that respects an individual’s right not to be treated in a certain manner cannot permit persons to invade such rights with impunity.\textsuperscript{130}

A defendant breaches a relational legal directive and thus commits a relational (legal) wrong—a wrong against the plaintiff. Since where there is a right there is a remedy, the plaintiff must be able to seek redress—that is, claim a remedy. Because the plaintiff is the wronged party, she and she alone has substantive standing to sue the defendant. This substantive standing is the condition of her right of action. Absent substantive standing, the plaintiff’s claim discloses no cause of action and will be dismissed accordingly. The right of action in turn is premised on, and is the legal instantiation of, the moral and political principle of civil recourse. Note that the plaintiff’s right at this stage correlates to a duty held by the state, and not the defendant, to provide an institutional avenue for her to seek redress. It is only \textit{once} the court decides in favor of the plaintiff and orders the defendant to perform a remedial action \textit{vis-à-vis} her that the defendant will find himself under an obligation.\textsuperscript{131}

\textsuperscript{130} Ibid at 974.

\textsuperscript{131} “A plaintiff’s entitlement to a right of action against a tortfeasor thus involves obligations of both tortfeasor and state. The state recognizes itself as obliged to empower the plaintiff to act in some manner against the defendant and acts on that obligation by permitting the plaintiff to exact damages or have the defendant enjoined against performing certain acts. \textit{Once} the state has so acted (by entering a judgment), the defendant incurs a legal obligation
As the above analysis of Hohfeld helps to make clear, there are two distinct but equally basic normative relations at work in the civil recourse theory. The first is a power-liability relationship between the plaintiff and defendant. It involves a relational wrongdoing by the latter against the former and culminates in a legal power of the former correlative to the latter’s liability to be brought before a state institution. The second is a right-duty relationship between the plaintiff and the state. This consists of a plaintiff’s right of an avenue to civil recourse and the state’s duty to provide such an avenue through the institution of its courts and tort law, in particular, its remedial aspects. Thus the liability relationship is severed from the remedial relationship. It is this separation of liability from remedy that I suggest turns the civil recourse account into something potentially extrinsic. It is to civil recourse’s perspective on remedies that I now turn.

10.4 Remedies

On the civil recourse view the original right/duty relation appears disconnected from the remedial relationship.\(^{132}\) “[I]t is critical to distinguish the question of whether a plaintiff has a right of action from the question of what form of remedy is available to her if she does have a

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right of action.” Civil recourse theory leaves the question of determination of remedies (both the type and, in the case of monetary damages, the quantum) “open”:

The principle of recourse, by contrast [to corrective justice theory], leaves plenty of conceptual space for non-compensatory damages. It states that a person is entitled to civil recourse against one who has wronged her, but leaves open the question of what form of recourse ought to be afforded.

By contrast [again, to corrective justice theory], to understand a tort as a wrong that generates a right of action in its victims leaves the issue of remedies open.

In other words, the question of whether a plaintiff has a right of action (possesses substantive standing) is distinct from the remedial question: “The question of whether a plaintiff has a valid tort claim is distinct from the question of what sort of remedy she is entitled to if she does have a claim.”

The separation of right from remedy leaves open the possibility that the grounds, the reasons for, said rights and remedies are also different. That is, the question of why there is a right of action may have a different answer from that of the question of why a certain remedy

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133 Zipursky, “Rights, Wrongs, and Remedies,” supra note 75 at 88. Notably, that the plaintiff is entitled to a remedy is not left so open.

134 Zipursky, “Rights, Wrongs, and Remedies,” supra note 75 at 96. See also Benjamin Zipursky, “Substantive Standing,” supra note 75 at 308: “The question of whether there is a right of action and a right to redress does not answer what the remedies shall be or why.”


136 Ibid at 961.
should be awarded: “Whether the plaintiff enjoys a right of action against the defendant in light of what the defendant has done to her is distinct from the question of the remedy to which she is entitled should there be such a right. The former turns on whether the defendant wronged the plaintiff. If so there is a right of action.”\textsuperscript{137} The original right relation turns on whether the defendant wronged the plaintiff. In other words, a plaintiff has a right of action if an antecedent right of hers was wrongfully interfered with by the defendant. This is just another way to say that the defendant’s commission of a relational wrong (his breach of a relational directive) grounds the plaintiff’s right of action. What is left less clear is what exactly the remedial obligation turns on. From the foregoing passage, however, we can see that it is the fact of the right of action that gives rise to the remedy. The plaintiff is “entitled” to a remedy “should there be such a right.” Given the right, there must be a remedy; \textit{ubi jus ibi remedium}. So what is left open on the civil recourse scheme is not whether there should be a remedy, but what the type of remedy should be. The contours of the original right and its violation do not, in other words, determine the nature of the subsequent remedial obligation.

One worry about this type of openness is that it leads potentially to an undesirable remedial indeterminacy. What guidance do civil recourse theorists provide? Only the following: “In assessing whether a particular form of recourse is appropriate or at least permissible, society may reasonably consider whether a plaintiff’s having been wronged in a certain way by a defendant serves as a sound basis for permitting the plaintiff to exact a certain sort of

\textsuperscript{137} Ibid at 965.
remedy from the defendant.”¹³⁸ This is unhelpful. Our first worry here should be with the slackening of remedial standards. We seem to be no longer concerned with whether a remedy is “appropriate,” but only with whether it is merely “permissible.” My guess is that this would preclude such draconian instances as visceral eye-for-an-eye remedies, but it is unclear what further work “permissible” does. The idea of a “sound basis” also is empty without some understanding of what the nature of the relationship between a right of action and its remedy is. If we understand remedies and rights as unified, then it is clear what a sound basis would be: the sound basis for the remedy is that of the right and only that of the right.

Thus, by separating the questions of right and remedy and by leaving the form of the latter open, the civil recourse theorists welcome extrinsic characterization. This is because there is nothing in their theory that excludes the requirement of an independent remedial principle. In fact, the theory seems to require it. Without some sort of external independent principle we are left with an undesirable consequence of remedial indeterminacy. If any remedy, provided it is not impermissible, is an acceptable form of recourse, we face a deeply troubling remedial world where the justification for remedies is nebulous. More significantly, while the ground of a remedy on the civil recourse approach clearly is the fact of the prior right (or more accurately the wrongful interference with it), we can see that this connection is gossamer thin when the question of what form such a remedy can take is left so open and without guidance. The infringement of a right appears nothing but the condition for the remedy—a happening in the world that creates the possibility for a state-sanctioned remedial

order. This, I will suggest, strips remedial obligations of the strongest argument for their
legitimacy: that the reason for the remedy just is the same reason that grounded the original
right. And if this is the case, if we simply say the right’s infringement is merely a condition of
the remedy, we ignore all the beneficial normative work that can be done by the original
reason itself in determining the type of remedy that is appropriate.

11 Conclusion

The overarching goal of this chapter was to highlight the key arguments of the civil recourse
account while showing its close affinity to extrinsic-type approaches. In the following chapter, I
continue this analysis, but in a more critical tone.
Chapter 4
Against the Separation Thesis

12 Introduction
Chapter 2 introduced potential reasons to reject an intrinsic perspective on private law’s remedies, namely, that it left insolvency, statutory and equitable bars, and the defense of necessity difficult to explain. Recall that one way to characterize the intrinsic understanding of private law is as viewing remedies and rights as normatively identical, as the same thing looked at from different perspectives. The first section of this chapter responds to these initial reasons for intrinsic account doubt, after which I take a more critical look at the candidate extrinsic approaches: law and economics and civil recourse theories, respectively. If it turns out that our reasons for doubting the intrinsic approach fail to hold up under careful scrutiny, and if it is further the case that opposing arguments are not without their own, and possibly, deeper difficulties, then the case has been made for a renewed openness to the viability of an intrinsic account.

13 Insolvency, bars, and defenses
The key point of the insolvency critique was that it becomes difficult to say the plaintiff has a right to a remedy from the defendant when the defendant apparently can avoid his correlative duty if he is insolvent. If we are arguing that what the plaintiff has at the beginning is a right and that this is identical to what she possesses at the remedial stage, it doesn’t seem to make sense that her remedial right can somehow be negated by the defendant’s insolvency.

Let’s look at three possible responses: First, the focus on the choice character of a right is misplaced. We could, that is, reject the will/choice theory with respect to rights. In other
words, whether the plaintiff can elect to exercise her right is not the essential feature of a right and, therefore, it can still be considered identical (normatively) to the original right-duty relation. In its stead, so the argument goes, we should adopt an interest theory with respect to rights, according to which an interest must be of sufficient importance to render someone else under a duty to respect, protect, or preserve it.

This first response, however, fails. If we want to say that the original right-duty relation is reflected in a normatively identical remedial right-duty relation, then how can it be that what was of sufficient importance to give rise to an obligation at the initial stage is no longer of such importance at the remedial stage. The following tort law example illuminates: One’s interest in one’s bodily integrity is an interest of sufficient importance to ground a duty in another not to interfere with it. Let’s say that Arnold is run over by Beth as a result of Beth’s careless driving. Beth is a bankrupt. Although we can say that Beth was under a duty not to infringe Arnold’s right to bodily integrity, at the remedial stage, we, in denying Arnold’s ability to recover, seem to be saying that his interest at this stage is not only insufficient to ground such a duty, but is in fact a different interest. In fact, it is the different nature of the interests at stake at the original and remedial stages that extrinsic theorists trot out as conclusive support for their argument that the two stages are separable, each asking different questions:

139 What this and other similar examples might demonstrate, although I do not wish to explore this possibility further here, is that interest theories as a general matter are unable to offer a unified view of rights and remedies with respect to certain claims—that is, claims where the subject matter of the remedial award is different from the subject matter of the original right (e.g., damages). This is because the subject matter of the right at each stage appears to be different. I believe that there might be a way of explaining a type of unity between right and remedy by focusing on one type of interest, but this way out is also a path away from the debate between the will and interest theorists.
The set of values that would undergird a moral right to demand responsive conduct to a breach of some relational duty is not identical to the set of values that would underlie the justifiability of the relational directive giving rise to that duty. The reasons underlying a norm requiring that one keep the intimate confidences of a friend are not identical with the reasons underlying a norm according to which one would be entitled to hold a friend accountable for a hurtful disclosure of such confidences, for example.  

In other words, the interest protected by the original tort law directive, is one thing, and the interest served by allowing a plaintiff to demand responsive action from the wrongdoer for its violation is another.

So much then for this first response. Let’s entertain the second. Here, I suggest, it is not quite right to say that Arnold’s right to recover or claim to recover is denied. The very fact that Beth’s insolvency operates to absolve her of her legal obligation to execute Arnold’s compensation presupposes the existence of his claim in tort to recover. In other words, Arnold’s entitlement to a remedy and Beth’s obligation to pay remain alive. What insolvency changes is the ability to execute the remedy, not the right to the remedy as such.

This is part of the stronger response to the insolvency problem. What this problem further conceals is the difference between the normative idea of a right and its object—that is, its mundane subject matter. If I own a potted plant, this means I have a right against you that you do not carelessly or intentionally smash it. It does not mean, however, that I have a right to its continued survival or current level of intactness. If a gust of wind blows it over, my dog uses it as her source of fiber for the day, or my overly solicitous attentions give it root rot, this is just

my bad luck, poor dog training, or shoddy plant husbandry. The defendant’s insolvency is just like this kind of misfortune. As Arthur Ripstein explains, “[t]he coat which is the object of the right is..., like all natural objects, subject to generation and decay, and your right to it is not a right to its persistence or even your continued possession of it; it is a right that others not use the coat or damage or destroy it in certain ways.”

To put this point somewhat differently, rights and coats are different types of “things.” Rights are relations, not “things” at all. Coats have a physical, temporal existence dictated by the innate limits of material objects. Aside from those imposed on them by their possessors, rights are not so limited. Rights are relationships between a possessor and those against whom they are possessed. It is not, therefore, correct to say I have a right to a coat or a right to a specific sum of money. What I have a right to is a limitation on your behavior vis-à-vis certain interests of mine. This argument, drawing on the distinction between the right and its object, applies equally to the objection concerning statutory and equitable bars to recovery.

An example clarifies the point that in situations of bankruptcy and limitations what is extinguished is not the right at all but only the defendant’s responsive action, the thing that is now the object of the right. Let’s imagine that ten years ago, Arnold injures Beth. Mistakenly thinking that today he is still under a legal obligation to pay her compensation, he does. He cannot, as the law currently stands, recover his mistaken payment. This is what Lord


142 The doubt cast on the mistake of law bar in Deutsche Morgan Grenfell Plc v Her Majesty’s Commissioners of Inland Revenue and another [2006] UKHL 49 could under certain interpretation change all of this however.
Mansfield famously referred to as the “ties of natural justice.” The point is that the defendant is viewed by the law as still being under an obligation to the plaintiff. As such, his payment discharges the obligation regardless of whether the law is able to compel the obligation’s performance in the first place. Perhaps the right is unenforceable, but its continued existence is clear. In sum, to the challenge of the insolvency and limitation critiques that the right and remedy could not be considered normatively identical because the latter appeared waivable at the instance of the defendant’s insolvency or through the passage of time, we can say this is simply not the case at either the doctrinal or theoretical level. The remedial right persists although its ability to be executed might be extinguished.

The third possible response builds on the insight of the second—that rights are relations, not things. It questions the entire project that undergirds and so also generates the problem raised by the insolvency and limitations critiques. Recall, the argument against the intrinsic approach that these critiques provide is this:

P1. Rights have necessary and sufficient properties by which one can identify them as rights.

P2. According to the will theory, a necessary property of a right is the choice of the right-holder.

143 Moses v Macferlan (1760), 2 Burr 1005 KB.

144 See also Allan Beever’s suggestion that situations like these are the way equity helps the law do justice. Law, because it consists of rules, and rules are generalizations, often fails to do justice (give people what they deserve) in particular situations. Equity smooths out the edges of law. It makes it unjust to be a stickler for one’s rights, for example. (Allan Beever, “Aristotle on Equity, Law, and Justice” (2004) 10 Legal Theory 33 [Beever, “Aristotle”]). See also: John Gardner, “The Virtue of Justice and the Character of Law” (2000) 53 Curr Legal Probs 1.
P3. In situations of insolvency and where limitations periods apply, the putative right-holder does not have a choice with respect to the enforceability of her so-called right.

C1. Following P1, P2, and P3, the remedy is not a right and, therefore, the right and remedy are distinct concepts.

Or:

P1. Rights have necessary and sufficient properties by which one can identify them as rights.

P2’. According to the interest theory, a necessary property of a right is that it stands for an interest that is of sufficient importance to place another under an obligation.

P3’. In situations of insolvency and where limitations periods apply, the interest of the right-holder is different at the original and remedial stages.

C1. Following P1, P2’, and P3, the right at the initial stage is different from the right at the remedial stage because they protect different interests and as such ground different duties, and hence are not identical.

My suggestion here is that we reject P1. P1 implies that the analytic features of a concept are equivalent to its substantive features. In other words, if a part of a concept is identified as necessary to the establishment of something as a manifestation of that concept, its lack will indicate the unavailability of the concept. What if this conceptual approach is inapt for the project of understanding private law’s remedies? What if an inquiry into the nature of rights should not be one into their necessary and sufficient properties, but rather into the normative significance of what it means to have a right. The normative significance of rights lies in the feature of correlativity that rights qua relations necessarily imply. The plaintiff’s initial right vis-à-vis the defendant is that he φ or refrain from φ-ing. Her subsequent remedial claim is identically correlative: a claim that he φ or refrain from φ-ing, or, if he has φ’d or not-φ’d, then to do some remedial action that comes as close to φ-ing or refraining from φ-ing as is possible.
How this can be the case—that is, what stories might need to be told to show the connection from the original to remedial relations—I examine in Chapter 5. For now, all that I want to establish is that the insolvency and limitations critiques get much of their rhetorical strength from a certain method of conceptual analysis, a method that is not necessarily the most apt for our subject matter: the normative implications of remedial relations.

The above rebuts the insolvency and limitation critiques, but what about the issues raised by necessity? Recall that here the question was: how is it if the plaintiff has a right to exclude the defendant from her property, she is not able to do so in situations of necessity? The defense of necessity is a worthy subject matter in its own right, so my comments here intend to be neither comprehensive nor conclusive.

One way to understand how this might work is to accept that rights do not exist in isolation from one another. Rather, they form a system, wherein they interact with one another and, as such, are not absolute. We might say that they are not all created equal: some rights are worth more relative to others. In a system, certain rights are necessarily prior to others.¹⁴⁵ My right to bodily security is a necessary precondition for my right to property. Being the embodied beings that we are, I could not own property if I did not have the physical presence to effect this right.¹⁴⁶ A consequence of this analysis is that situations like the frozen hiker no longer seem to pose much of a problem. In such situations, the right to one’s bodily

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¹⁴⁶ The possibility of disembodied beings having property is well beyond the scope of this thesis and perhaps reality as well.
health and well-being trump the rights of another to protect his or her property. This is because, in a system of rights, we cannot logically understand the latter as overawing the former. This also explains the remedy. At the remedial stage what confronts us is a property-versus-property situation. The hiker cannot say that his right to eat the cabin owner’s food and burn her furniture somehow trumps the cabin owner’s right to be paid compensation for this. Cases like Vincent and Ploof can be analyzed similarly. In Ploof, for example, the Ploof family suffered injury to their persons as they were on the boat that was forced out of the defendant’s (Putnam’s) safe harbor.\footnote{A further question, but one that lies outside the scope of this dissertation, is what if there was no one on the ship? This just seems to be a case of pitting property right against property right. Moreover, why is it the case that, in Vincent, the ship-owner didn’t have to pay for the fair rental value of tying up at the dock? That he had to pay compensation for the damages caused is obvious, but why not for the rental value that he essentially expropriated? An answer to this could be that the damage order for the dock includes within it a notion of fair rental value.} In all of these cases, however, the owner of the property that is used in situations of necessity is not treated as if she didn’t have a right. Her remedies are constrained by the necessitous situation,\footnote{Specifically her preventative injunctive remedies, also known as her quia timet remedies.} but this is a reasonable response to the vicissitudes of life. Necessity is tricky, but it is also notably the exception and not the general rule. As such, its power to threaten intrinsic accounts is curtailed.

In fact, the problem raised by situations of necessity instead of posing a threat to an intrinsic account of private law’s remedies, counts in its favor. The core puzzle emerging from necessitous situations is this: how is it that interference with another’s right is permitted in situations of necessity, but nevertheless gives rise to a duty to pay compensation? In a normal
tort situation, the interference with one’s right is wrongful. We can thus sidestep the difference between the intrinsic and extrinsic accounts somewhat and simply say that it is because the defendant’s action was wrongful that he now must pay compensation. If we had a “tort fairy,” a fantastical being that could magically travel back in time to the instant before the tort was committed, he wouldn’t hesitate to enjoin the defendant’s action, in a normal tort situation. If the action could be enjoined, then sensibly if it occurs, it must at least be compensated for. Hence, situations of necessity are prima facie odd. If we could invoke our tort fairy in these scenarios, he would not enjoin the defendant’s interference with the plaintiff’s right. In fact, as we can see from the facts and reasoning of Ploof, if the plaintiff tries to stop the defendant from interfering with her exclusive property possession, then she (the plaintiff) would be committing a wrong! This is just perhaps a way of saying that in some sense the defendant’s action in cases of necessity is not merely not wrongful, but “rightful.” But then, if it is “rightful”, why does the defendant subsequently have to pay compensation?

Richard Epstein offers the following explanation of cases like Vincent. In such cases, the defendant benefits from his volitional act of tying up to the plaintiff’s dock: the defendant secures his ship from certain destruction. If the defendant owned both the ship and the dock,

149 Thanks to Denise Réaume for this useful, though sadly only mythical, creature. See also Hershovitz, “Harry Potter,” supra note 77.

150 The intrinsic approach would further explain this situation by arguing that the reason the remedy is awarded is for the same reason that we had for the original right. In its purest form, the argument would be that it is the same right. More on this later. An extrinsic approach could say something along the following lines: a remedy is awarded because we want to deter wrongful behavior with harmful consequences. The wrong in both cases is in this sense the reason for the remedy, but only in the intrinsic case is the wrong really just another way of referencing the underlying right.
then he would bear the cost of his act: the damage to the dock. So it just isn’t fair, Epstein urges, to say that the plaintiff should pay for the advantage that the defendant gains by sole virtue of the fact that the dock is the plaintiff’s, not the defendant’s. In essence, this transforms a situation of necessity into a question of distributive justice. The question becomes as between the defendant and the plaintiff, who should bear the loss?²⁵¹

The two weaknesses in Epstein’s story center around causation and the notion of advantage. It is not clear why mere causation should be the criterion for distributing loss. As Ronald Coase famously pointed out, the plaintiff and defendant are equally causally responsible for the losses.²⁵² Epstein’s paradigm cases of causation—A hitting B, A frightening B, A causing B to hit C, and A creating a dangerous condition—²⁵³— are notoriously ad hoc. Why these instances? Why not others? He could argue that it is because of the role played by the benefit, notably, that he who receives the benefit of an action must pay for it. This seems

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intuitive until we consider some archetypal tort cases such as battery.\textsuperscript{154} Let’s say a doctor performs a life-saving operation on me without my consent. Clearly I have benefited. Without the operation I would not even be here to complain about it! But does this mean I have to pay for the doctor’s services? No, quite the contrary. In such a situation it is the doctor who has committed the tort and it is he who must pay. So much for Epstein’s principle of benefits-received.

Let’s return to our as yet unresolved problem: why is it when a defendant acts rightfully in a situation of necessity, he must nevertheless compensate the plaintiff? In such cases, if it were at all possible, a preventative injunction would not be awarded, but the second-best remedy of damages nonetheless is. How is it the case that the plaintiff seems not to have a right to exclude the defendant from her property, but later has a right to demand compensation for his trespass? There are two possible ways to answer this question, each deriving their explanatory power from different conceptions of rights.\textsuperscript{155}

The first is what is known in moral philosophy scholarship as a \textit{generalist} picture about rights. Rights here are understood as unrestricted in scope, but not absolute. A right may exist, but under certain circumstances interference with it may be permitted. Interference in such

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\textsuperscript{154} Upon reflection, we can see multiple other cases where a benefit is transferred but no liability arises. If I live downstairs from you in a poorly insulated building, and spend $100 a month to heat my apartment with the result that your heating costs are nil (notably, if you did decide to heat your apartment, my heating costs would go down), there is no liability in unjust enrichment. If you erect a fence, thus saving me the cost of putting up my own and perhaps even increasing the shade I need in my yard to grow my prized impatience, I owe you nothing for this benefit I receive.

\textsuperscript{155} Thanks to Andrew Botterell for making this distinction clear to me.
circumstances is not considered wrongful (not a violation), but is permitted (an infringement).\textsuperscript{156} If we conceptualize one’s right as a wiffle ball (a slow-moving spheroid object with holes), we can see that infringements are possible without exploding the right. The sphere (the right) remains after it is interfered with. The alternative is a specificationist picture.\textsuperscript{157} Rights, so understood, are restricted as to their scope, but absolute within it. On this approach, if there is an interference with a right, this simply means there was no right to begin with. Rights just are conclusive determinations that no interference is permissible (absent the consent of the right-holder, in which case the putative interference is just that, putative). Within its scope, the right is absolute sovereign.

The strongest argument against specificationist views of rights is the one from “moral residue.”\textsuperscript{158} How is it that in circumstances of necessity, the frozen hiker acts permissibly, within his rights, in breaking into the cabin, but still owes the cabin-owner compensation? Under the specificationist conception of rights, the cabin owner has a right-to-exclude-trespassers-except-in-situations-of-necessity. In other words, the cabin owner never had a right to exclude the necessitous hiker. If this is the case, why do we think and why does the law support a duty to pay compensation? That is, what is the right to be paid compensation based on if not the violation of the anterior right to exclude?

\textsuperscript{156} For distinction on infringement versus violation, see Judith Jarvis Thomson, “Rights and Compensation” (1980) 14:1 Nous 3.


\textsuperscript{158} Judith Jarvis Thomson, \textit{The Realm of Rights} (Cambridge, Mass: Harvard University Press, 1990) at 82-104.
We can see a parallel between generalist approaches and intrinsic approaches with respect to how they answer this apparently puzzling question about the justification for compensation. For both, what explains the compensation is the continued existence of the original right. It is because the owner continues to have the right to exclusive possession of her property that she may claim compensation from the justified trespasser. In my view, existing intrinsic accounts might still run into problems here. It seems contradictory to say that the owner has a right to exclusive possession but during times of necessity no right to exclude. The type of argument that I will develop more fully in subsequent chapters is that what situations of necessity do is make impossible the first-best action demanded by the original reason. It is no longer possible to respect the right-holder’s exclusive possession and use of property. The original reason is not to interfere with the right-holder’s property, full stop. (A specificationist answer to this would be that the right is not to interfere with the right-holder’s property except in situations of necessity). Thus, appearances to the contrary, situations of necessity are fundamentally the same as situations where a wrong has occurred: the first-best is no longer possible, the damage is done. But just like situations of wrongdoing, just because the first-best is no longer possible, doesn’t mean you no longer have to do anything to satisfy the original reason. Rather, now you have an obligation to do the next-best thing and, if that’s not possible, the next-next-best thing, and so on. To put matters simply, when a reason is defeated (or a right infringed) it is not the case that it is cancelled, that it falls out of the normative picture completely. It continues to exist, demanding certain actions that can factually come as close as possible to its satisfaction.

To review: so far we’ve dispatched our initial doubts concerning the intrinsic thesis. Situations of insolvency and limitations periods though sufficient to raise our earlier suspicions
about the account’s adequacy have now been revealed as only apparent problems. The defense of necessity also can be accommodated within an intrinsic framework, although I recognize that full exposition of this thought warrants separate treatment.\textsuperscript{159} Now we turn our skeptical eye to the alternative theory, the extrinsic approach, beginning with the law and economics account.

\section{Law and economics}\label{lawandconomics}

Let’s take a closer look at the leading cases in the economists’ arsenal: \textit{Spur} and \textit{Wrotham}. Recall the economist’s explanation of \textit{Spur}: in the absence of a voluntary arrangement between the plaintiff and the defendant for cost-allocation, the court imposes its own. To this end, it imposes an economically efficient solution—what the parties would have reasonable agreed to so that whoever valued the right (entitlement) more would receive it, but at a reasonable cost. In this case, the court made it as if Webb (the contractor) would have paid Spur (the feedlot operator) the costs for Spur to abate the nuisance (in this case, the costs of relocating his feedlot operation). This explanation is an \textit{ex post facto} rationalization, however. The court could have just as well (if not better) secured economic interests of efficiency by refusing the injunction and allowing the parties to sort out for themselves which of them valued the right more.\textsuperscript{160} An economist would respond, however, that such court abstention

\textsuperscript{159} Such treatment is anticipated in future work.

\textsuperscript{160} I suggest that the reason the court avoided this strategy was that the real aggrieved party was not the developer (who had sold the affected plots), but the residents of Sun City who had purchased the land under false representations of its habitability. Thus, the appropriate cause of action would have been between the residents and
would only place higher transaction costs, so this cannot be the full response to the economic account.

Another way to look at Spur is as recognizing a negligence tort for pure economic loss. It is normally the case that tort law excludes recovery for economic loss that is not consequent an actionable injury. The developer foresaw that its actions would cause the feedlot operators a certain loss. There was no right from which Spur could say its loss flowed since the injunction was found in favor of Webb. Spur’s loss, in fact, flowed from the operation of the law as it enforced Webb’s right through the imposition of an injunctive order. This appears to be identical to the nonactionable situation where a Starbucks moves in next door to an independent java joint. While there is no injunction in the coffee case, the analogy holds as, in this case, as in Spur, there is a foreseeable loss and no wrongdoing from which the loss can be said to flow. The Starbucks foresees (in fact hopes) that it will displace the market share of its neighbor. Does this mean it should have to indemnify it for its relocation costs? I would think

Webb for negligent misrepresentation or the like. In forcing Webb to pay to abate the nuisance it “brought [the] people to,” the court accomplished indirectly what it could not directly.

161 A notable exception to this general rule can unfortunately be found in Canadian jurisprudence: Canadian National Railway Co v Norsk Pacific Steamship Co [1992] 1 SCR 1021 [Norsk]. For the confusion that Norsk has unwittingly generated, see the recent Prince Edward Island Court of Appeal case of Hubley v Hubley Estate 2011 PECA 19. Here, the wife of the deceased sued his estate for the damages she suffered as a result of his death caused by his own negligent driving. This is a case of pure economic loss. Absent Norsk, we could understand this case as not giving rise to a cause of action as the wife had no right as against her husband for his continued existence. Obviously, if another driver had negligently killed him, she would have a claim against said driver because she does have this right relative to another, but not relative to her husband himself.
not. Under this interpretation of *Spur* the decision is plainly wrong. The more forceful response to the economic interpretation is to understand *Spur* for what it is, an outlier. If the law of torts truly manifested Calabresi and Melamed’s fourth rule wouldn’t we have more examples to trot out than *Spur*?\textsuperscript{162}

Let’s turn now to the second case, *Wrotham*. Recall here a similar possible economic interpretation is *prima facie* available. The court declined to provide the plaintiff with an injunction because to enforce such a remedial right would result in significant economic loss—the destruction of the houses built contrary to the plaintiff’s restrictive covenant. Instead, the court estimated what the plaintiff would reasonably have sold his right for had a bargain been made. An economic approach would say that this case clearly shows that the entitlement flows to whichever party values it more.

There is something strained about this interpretation. In the first place, the plaintiffs in *Wrotham* were quite clear that under no terms would they have released their restrictive covenant over the land. So it is simply misleading to say that the defendant developer in this action valued the entitlement more. This can’t be the economists’ strongest answer. Instead, their argument has to be something like the overall goodness (benefit, utility, or what have you) of allowing the breach of the plaintiffs’ right entitles the defendant to breach it. If this is the case, however, two odd consequences crop up. First, it fails to explain many of private law’s

\textsuperscript{162} A deeper problem with such a remedy is that, looking at it, we have no way of knowing what its justification is. The remedy is not a response to the wrong at all. It only serves to confuse our understanding of what the initial cause of action was.
permitted actions that seem counterintuitive to utility-maximization. Why should we have the concept of an individually enforceable right when it is always vulnerable to defeat against some aggregate utility scheme? I doubt private law as a whole would stand up well to an efficiency test. Second, such a gloss fails to explain why the plaintiffs in *Wrotham* should get anything at all. What is the efficiency there?

An alternative interpretation is proposed by Rob Stevens.\textsuperscript{163} He argues that the damages awarded in *Wrotham* are “substitutive” of the right infringed. The £2,500 awarded, on Stevens’ interpretation, is “the sum which might reasonably have been demanded for the relaxation of the covenant: ie the market value of the right infringed.”\textsuperscript{164} Stevens dismisses the explanation that this award reflects what the plaintiff would have asked for in *ex ante* bargaining and so represents compensation for a lost opportunity to bargain on two grounds. First, as I mentioned earlier, this doesn’t explain cases like *Wrotham* where it is a finding of fact that the plaintiffs never would have agreed to relax the covenant. Second, it fails to explain why courts look to the reasonable value of the right rather than what the plaintiff would have been prepared to accept as compensation *ex ante*.\textsuperscript{165} That is, it fails to explain why the


\textsuperscript{164} Stevens, *Torts and Rights*, supra note 163 at 67.

\textsuperscript{165} Ibid at 68.
valuation is objective rather than subjective. Stevens’ analysis is the preferable one. It makes better sense of existing doctrine. It further coheres better with our intuition that rights aren’t bargaining chips, but rather normatively significant markers of our individual freedom. There is something wrong about rights interferences, not just inefficient. Further it avoids remedial indeterminacy by linking the remedy with the right. We can understand what the right is from looking at the remedy.

From the above critical analysis of the economistic understanding of private law several useful lessons can be drawn. First among these is that there is something misguided about an economic interpretation of private law. As Zipursky notes, “The failure to explain [the bipolar structure of tort law] in a nonfunctionalist manner is ... a fundamental failure of law and economics, one that undercuts its claim to have an adequate account of what tort law is.” A dominant feature of private law actions is undeniably that they involve *transactions* between *two* persons, a plaintiff and a defendant. Law and economics approaches cannot easily account for this. Not only are third parties—that is, parties not directly linked to the transaction—and

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166 Moving from interferences with the rights over land to a more contentious area of law – unjust enrichment – we can see here as well that the law and economics explanation fails to account for the salient features of this area of law. Briefly, the law of unjust enrichment allows a plaintiff to exercise an *in personam* right of repair or return against a defendant who somehow, through no necessary fault of his own, has received a benefit from the plaintiff for which he did not give good value in return and which is not a gift. Law and economics explanations of this area of law are surprisingly (given law and economics putative dominance in much of private law and its universalizing ambitions) rare. The core attempt has been undertaken by Beatson and Bishop. According to them, the duty of restitution insure against the inefficiency of mistaken transfers.

their interests not relevant to a private law action, but also certain interests of the plaintiff and defendant are equally irrelevant. For example, the relative needs, desires, and particular goals of the plaintiff or the defendant are irrelevant in findings of liability. The forward-looking goals that law and economics focuses on, such as deterrence, loss spreading, etc, while undeniably beneficial upshots of the practice, are not fundamental to it. We would recognize as a tort regime one which did not deter or punish or allocate losses, provided it continued to achieve justice between the plaintiff and the defendant following a [mis]transaction that links them as “doer and sufferer.”

15 Civil recourse

Law and economics approaches, for my intended audience, are something of straw men. A more plausible threat to intrinsic approaches is introduced by civil recourse theory. As such, I devote the remainder of this chapter to the exploration and exposure of its weaknesses.

15.1 A Frankenstein account of rights

In Chapter 3, I drew attention to the multiple meanings that civil recourse theorists Goldberg and Zipursky assign to a plaintiff’s right of action—it is at one time a “right,” at another a “privilege,” and at others a “power.” Though this might generate puzzlement in their readers, it does not necessarily implicate the authors in a corresponding confusion. Hohfeld himself viewed claim rights, privileges, powers, and immunities as specific instantiations of the broader genus of right. Criticism, therefore, must go deeper: Goldberg and Zipursky vacillate between two competing conceptions of “right,” that of the will/choice theory and that of the interest theory, whilst simultaneously denying allegiance to either. Zipursky presents an “account of relational duties [that] is distinct from other accounts of relative duties offered by
analytic philosophers... [one which] also differs from most theories of legal rights in the analytic philosophy literature, in being neither an interest theory, nor a choice theory.”

Neither interest nor will theory, civil recourse is both. Earlier I rejected that this distinction was meaningful. I argued that our inquiry into the nature of remedial relations was not one that hinged on the analytic properties of rights. Notwithstanding this rejection, the distinction illuminates the disconnect in civil recourse theory between rights and remedies. As such, it is further evidence of civil recourse’s endorsement of the separation thesis and hence its ultimate characterization as an extrinsic theory.

Recall that interest theories understand rights as interests of persons that are of sufficient importance to give rise to a duty in another to protect, preserve, or promote it. This is essentially Joseph Raz’ definition: “‘x has a right’ if and only if x can have rights, and other

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168 Zipursky, “Rights, Wrongs, and Recourse,” supra note 75 at 64, n 227. In Zipursky and Goldberg’s most recent co-authored piece, they are clear that their approach does not require the conceptual apparatus of an interest-theory concept of rights:

Regardless of whether the institution of torts law has some deep connection to basic human interests, it is plain that, as a doctrinal matter, the specific duties and rights articulated by tort law do not merely enjoin and give rights against interferences with basic interests. On our account, it is the inherent relationality of tortious wrongdoing, rather than the nature of the interest being protected or vindicated, that in the first instance links torts to rights.

(Goldberg & Zipursky, “Rights and Responsibility,” supra note 75 at 262).

things being equal, an aspect of x’s well-being [his interest] is a sufficient reason for holding some other person(s) to be under a duty.\textsuperscript{170} By contrast, the central attribute for the will theory is the ability of the holder to do with the right as he or she chooses:

The idea is that of one individual being given by the law exclusive control, more or less extensive over another person’s duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it ‘unenforced’ or may ‘enforce’ it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the

\textsuperscript{170} Joseph Raz, “On the Nature of Rights” (1984) 93 Mind 194 at 195; and see also Raz, \textit{The Morality of Freedom}, supra note 30 at 166. For the application of this definition to legal rights, see Joseph Raz, “Legal Rights” (1984) 4 Oxford J Legal Stud 1 at 14: “An individual has a right if an interest of his is sufficient to hold another to be subject to a duty. His right is a legal right if it is recognized by law, that is if the law holds his interest to be sufficient ground to hold another to be subject to a duty.”

According to James Sherman’s recent gloss on Matthew Kramer’s interest theory:

The following are independently necessary and jointly sufficient conditions for person A to hold a genuine legal … right against a person B:

(1) The right, when actual, protects, preserves or promotes one or more of A’s non-vicarious interests;

(2) The fact that one or more of A’s non-vicarious interests have been harmed is sufficient to establish that B has breached a duty he bears;

(3) There is some person or persons who possess the power to enforce A’s right, when actual;

(4) A’s right, when actual, is protected by immunities against most forms of divestiture.

(Sherman, \textit{supra} note 169 at 8).
continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.\textsuperscript{171}

Goldberg and Zipursky offer an uneasy compromise between the will and interest theory. Their articulation of the primary (superstructural) rights of tort law appears in line with the interest theory, while their analysis of the secondary (remedial) rights of tort law is will theoretical. For them, the primary rights of tort law are the rights one has that precede a court’s remedial order. Violation of such rights constitutes a tort (a wrong). With respect to “how legal rights are normally conceived”, Zipursky argues, “[t]ort law prohibits individuals from interfering with others’ interests in certain ways. The tortious action is a prohibited—and in that sense,


I would prefer to show the special position of one who has a right by mentioning... the choice which is open to one who has a right as to whether the corresponding duty shall be performed or not. For it is, I think, characteristic of those laws that confer rights... that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorised to act on his behalf.

I would, therefore, tender the following as an elucidation of the expression “a legal right”: (1) A statement of the form “X has a right” is true if the following conditions are satisfied:

(a) There is in existence a legal system.

(b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.

(c) This obligation is made by law dependent on the choice either of X or some other person authorised to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorised person) so chooses or alternatively until X (or such person) chooses otherwise.
illegitimate—interference with an *interest*. 172 The relevant interests that they identify fit within an interest theory: “Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways.”173

The interests protected by the law of torts, for reasons of justiciability and considerations of policy, are limited. 174 For instance, they do not include communal or public interests. Instead, they are essentially confined to the following sorts of individual interests: “Bodily integrity, possessory interests, personal space, freedom to transact, the maintenance of one’s standing in the eyes of others—each of these is an important interest, interference with which may amount to the commission of a tort.”175 These are the rights—that is, the interests—that tort law’s substantive rules aim to protect.

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172 Zipursky, “Rights, Wrongs, and Recourse,” *supra* note 75 at 56 [emphasis added]. Also see at 87-88:

> The law marks out a set of interests that each of us has in remaining free from the interferences of others, and a set of prohibitions against interfering with these interests of others. It thereby recognizes a set of rights in each person to be free from certain actions of others and a set of duties in each to refrain from interfering with certain interests of others. When one person invades another’s right, she fails to respect that special set of interests that the other person is entitled, by law, to have her respect.


174 Ibid.

175 Ibid at 941; Goldberg & Zipursky, “Civil Recourse Revisited,” *supra* note 75 at 349:

> In a tort case, the plaintiff has been injured by another person’s wrongdoing. The injury is a kind of interference with interest, including (but not limited to) certain interferences with interests in one’s bodily integrity, one’s ownership and use of property, one’s freedom of movement and decisionmaking, one’s privacy, and one’s reputation.
Matters are sharply different at the remedial stage. Notably, the conception of rights that civil recourse theorists apply to tort’s remedies is not an interest-themed one. Rather, it possesses the central attribute of will theory: the right-holder’s choice. Goldberg’s recent writings speak unambiguously to this point:276

Tort law is a law for the redress of private wrongs because it empowers victims in particular ways. Most importantly, the decision to complain about an alleged wrong lies uniquely with the victims.277

...

A right to redress is... a legal power conferred on a victim to pursue an action against the alleged wrongdoer if she chooses.278

...

The core claim of redress theory is that tort law’s distinctiveness resides in conferring on individuals (and entities) a power to pursue a legal claim alleging that she (or it) suffered an injury flowing from a legal wrong to her by another. How that claim is pursued and resolved is, accordingly, a matter for the victim to decide.279

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176 See also Zipursky, “Honor and Civil Recourse,” supra note 78 at 67 http://ir.lawnet.fordham.edu/res_gestae/9:

a private right of action in tort [is] a right that the plaintiff has discretion to exercise or not to exercise… What plaintiffs do understand … is that the right to make this decision—and certain key steps along the way in carrying out the decision (like whether to settle or whether to go to trial) are choices that belong to the plaintiff.

177 Goldberg, “Constitutional Status,” supra note 75 at 601 [emphasis added].

178 Ibid at 602 [emphasis added].

179 Ibid at 605 [emphasis added].
Notably, the remedial relationship is not one of right-duty, for Goldberg and Zipursky, but rather power-liability. This means that the defendant does not have an obligation toward the plaintiff by virtue of his wrongdoing, but only by virtue of a court order declaring him liable to the plaintiff for the performance of a remedial obligation. The remedial right is variously described thus as a “privilege,” as a “power,” as a “right of action,” as something the plaintiff “may,” “can,” or “is entitled” to exercise. This language is quite at home in will theoretical conceptions of rights.

In Zipursky’s recent writings on the subject, however, we can see a subtle shift away from the will/choice theory with respect to remedial relations. Zipursky motions toward interests (values) that are served by the “right to demand responsive conduct”: “allowing individuals to act self-preservatively to maintain respect and dignity for themselves, to allowing others to understand the significance of their hurtful actions to others and take ownership of them, and to fostering reconciliation.”180 I critically analyze these values and the work they do in guiding remedial considerations in section 15.2. This is further evidence of civil recourse’s adoption of the separation thesis between rights and remedies since, for the first time, civil recourse theorists have explicitly set out the distinct values served by remedies. This bifurcated treatment of tort law’s rights should come as no surprise for it reflects a distinctive feature of civil recourse theory, namely, the separation of rights from remedies: “It is crucial to separate two questions: (1) what is the force, content and nature of the rules that designate conduct as tortious, and which specify legal rights and wrongs; and (2) what is the nature of the

requirement that a defendant who has violated such rules must pay damages to the injured party?" 181

15.2 No connection between rights and recourse

This “crucial” separation reveals a fundamental lack of connection between the two stages, creating a gap that cannot help but leave the remedial stage without clear explanation or justification. Notably, for Zipursky, providing an explanation for the duty of repair is of serious importance:

The question of how one is obligated to conduct oneself toward another is different from the question of what one ought to do if one harms another through breach of that obligation. Perhaps one should repair the harm done to another to whom one has breached a duty. But what we need is an explanation of why one should provide this repair. ... [W]e need an explanation of how breach of a duty is connected to the obligation to repair harm done by that breach. 182

Here, we place the civil recourse theorist’s explanation under the spotlight and reveal that it, in fact, possesses none of the promised explanatory strength, and hence has no justificatory power.

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181 Benjamin Zipursky, “Civil Recourse, Not Corrective Justice,” supra note 73 at 721 (see also at 710 and 719). See also: Zipursky, “Rights, Wrongs, and Recourse,” supra note 75 at 74.

182 Zipursky, “Rights, Wrongs, and Recourse,” supra note 75 at 74 [emphasis in the original]. The context of this quotation is ironically Zipursky’s criticism of Weinrib’s alleged failure in this regard. Similarly, Zipursky in “Civil Recourse, Not Corrective Justice,” supra note 73 at 712 criticizes corrective justice theorists for missing “the inference from tortious conduct to the imposition of liability.”
Recall the civil recourse narrative: A defendant breaches a relational legal directive and, thus, commits a relational (legal) wrong against the plaintiff. Because where there is a right there is a remedy, the plaintiff must be able to seek redress—that is, claim a remedy. Because the plaintiff is the wronged party, she and she alone has substantive standing to sue the defendant. This substantive standing is the condition of her right of action. Absent substantive standing, the plaintiff’s claim will be disposed of as disclosing no cause of action. The right of action in turn is premised on and is the legal instantiation of the moral and political principle of civil recourse. Note: the plaintiff’s right at this stage correlates to a duty held by the state, not the defendant, to provide an institution for her to seek redress. It is only once the court decides in favor of the plaintiff and orders the defendant to perform a remedial action vis-à-vis her that the defendant will find himself under an obligation.¹⁸³ A consequence of this story and what gives it ultimately its extrinsic flavor—is that the question of remedies is left “open.”¹⁸⁴ I will suggest that the remedies “door” is not just left “open” by civil recourse theory, but is rather blown off its hinges.

¹⁸³ “A plaintiff’s entitlement to a right of action against a tortfeasor thus involves obligations of both tortfeasor and state. The state recognizes itself as obliged to empower the plaintiff to act in some manner against the defendant and acts on that obligation by permitting the plaintiff to exact damages or have the defendant enjoined against performing certain acts. Once the state has so acted (by entering a judgment), the defendant incurs a legal obligation to the plaintiff.” (Goldberg & Zipursky, “Torts as Wrongs,” supra note 75 at 974 [emphasis added]).

¹⁸⁴ Zipursky, “Rights, Wrongs, & Recourse,” supra note 75 at 96; Goldberg and Zipursky, “Torts as Wrongs,” supra note 75 at 962.
In a nutshell, the two parts of the civil recourse story—(1) that torts are relational wrongs, and (2) that remedies are the eventual product of duties owed by the state to the plaintiff as a possible consequence of its providing her with an avenue of civil recourse—cannot coherently coexist. The first dictates a remedy that reflects relational wrongdoing. If something is a relational wrong its remedy, if it is to be properly called this, cannot be non-relational. A civil recourse theorist might insist at this point that the relational remedial status is retained but now it is the state that is the relevant relater. This is obviously unsatisfactory and not the relation we are getting at. If I owe you $50, and your mother, seeing your cash shortfall, gives you $50, this third party maternal action in no way expunges my debt toward you. Similarly in the case of civil recourse, the defendant’s obligation to the plaintiff cannot be satisfied by the state. The external dimension of civil recourse theory, in other words, cannot be sustained on a theoretical foundation that takes as its starting point the observation that torts are (relational) wrongs.

In the past, civil recourse theorists have advanced two possible justifications for the right to civil recourse (and the state’s correlative duty to provide institutions for its exercise). According to one, civil recourse exists so that aggrieved parties don’t take matters into their own hands. Civil recourse, as such, is a preferable substitute for private vengeance. In a related fashion, the second putative justification is that the state provides us with a right of civil recourse as a kind of Lockean *quid pro quo* for our innate rights of private vengeance.\(^{185}\)

\(^{185}\) The answer that it comes from social contract, arising from the substitution of legal recourse for self-help, is equally unsatisfactory. Perhaps your mother gives you the $50 so that you don’t wreak vengeance upon me. Does
Neither of these justifications is currently accepted by Zipursky. He now “largely accepts [the] advice that civil recourse theory be disengaged from a notion of justified retaliation and be rendered less dependent upon Lockean social contract theory.” As a preferable substitute to either retaliation or social contract, he offers a moral account of the right to demand responsive action that grounds the plaintiff’s legal right to so demand. Zipursky’s arguments here are pivotal as they address what was before a serious omission in civil recourse theory, a failure to explain adequately where the remedial right came from.

It was precisely this right to recourse that civil recourse left unexplained. Why is it the case when my right is violated—when the defendant infringes a legal relational wrong—do I have a right to redress? Where does it come from? Earlier arguments offered by Goldberg and Zipursky seemed to be that it sprang automatically from the law’s treatment of the defendant’s conduct as tortious and from the “hoary common law maxim” that where there’s a right, there’s a remedy. But these are both unsatisfactory. The fundamental question remained why does the infringement of a right generate a right to a remedy? What is it about the plaintiff’s suffering of a wrong that makes it something more than mere crying over spilled milk? The problem persisted that this state of nature right of repair that tort law civilly replaces

this motivation in any way change our relationship as creditor and debtor? Clearly not. Practically it might, but normatively it cannot.

186 Goldberg & Zipursky, “Civil Recourse Revisited,” supra note 75 at 364.

with a right of civil recourse was left unexplained. In Zipursky's most recent writings we have the beginnings of an answer. The right of repair is grounded in a preexisting moral right. This is the moral right to demand responsive conduct from someone who breaches a relational directive—i.e., someone who commits a wrong against another. As Zipursky explains, “the fact of having been wronged by another generates not only a basis for complaining of having been wronged by the other, but also a basis for a demand for ameliorative conduct by the wrongdoer.” Zipursky calls these bases the “demand-accountability norms of positive morality.” In addition to positing these norms, Zipursky articulates their defense. In brief, such norms are supported (justified) by five considerations: 1) self-respect, self-protection, and self-worthiness; 2) agency recognition; 3) duty-responsibility linkage; 4) reconciliation of wrongdoer and victim; and 5) schemes of rights and goods.

Zipursky's new remedial account merits further explication. To this end, let's look at each value set to see what work, if any, each does to (a) distinguish remedial values from those which undergird the original entitlement and (b) help guide us in our determination of what remedy is appropriate following the infringement of the original entitlement. With respect to (b), recall our earlier worries about the remedial indeterminacy generated by an account that

188 Zipursky, “Substantive Standing,” supra note 75 at 332.

189 Ibid at 326: “Under widely accepted social norms governing interpersonal relationships, one who was wronged by another is entitled to demand responsive conduct of a sort from the wrongdoer and have such demands complied with.”

190 Ibid at 326-327.
prides itself on leaving the remedies question "open." Perhaps, we might hope, these newly articulated values will help to constrain civil recourse’s, until now, essentially unbounded remedial frontiers.

The first value Zipursky identifies is that of self-respect, self-protection, and respectworthiness.\(^1\) If one is wronged, “one is entitled to act self-preservationally, defensively, and self-restoratively \textit{in response to having been mistreated}.\(^2\) Given criticisms of his vengeance-implying arguments, Zipursky is quick to disavow that this is an entitlement “to act violently or inflict physical harm.”\(^3\) But, then, what is it an entitlement to? “[T]ypically [it] entail[s] the right to demand ameliorative conduct.”\(^4\) What this ties into for Zipursky is the value of sticking up for oneself, for not taking matters lying down, for asserting one’s dignity in the face of those who would detract from it. We can see this at work in certain circumstances. The child who is bullied and liberated of her milk money daily, by not standing up for herself, fails to serve the value of self-respect and self-protection. But what about the Christian teaching of turning the other cheek? At times, it is at least arguable, that turning the other cheek and not standing up for oneself could be considered a more profound way to establish the value of self-worth. Moreover, it is unclear how this value plays out in practical remedial

\(^{191}\) Ibid at 327.

\(^{192}\) Ibid [emphasis in the original].

\(^{193}\) Ibid.

\(^{194}\) Ibid.
situations. Zipursky doesn’t tell us what kinds of actions are those that would promote, realize, or instantiate this value. He tells us that violence does not and that doing nothing also does not, but it doesn’t appear that the reason these do not promote (realize or instantiate) the value have anything to do with the value itself. As I suggested, turning the other cheek, in fact, could count in favor of self-respect. Furthermore, as historical and literary evidence of blood vendettas and duels show, many have taken violent means as the way to establish self-respect.

Perhaps the next identified value fares better; this is the value of agency recognition.\textsuperscript{395} While self-respect is served by the plaintiff’s demanding ameliorative conduct from the wrongdoer, the value of agency-recognition is served by the defendant’s taking responsibility for his wrongful behavior and its deleterious consequences. Again, however, the assertion of the value of accountability tells us very little about what the appropriate responsive action might be. A defendant can take responsibility for his behavior by simply apologizing, for example, but is this all that is required?

It seems that these two values, the one, plaintiff-related, of self-respect and the other, defendant-related, of accountability, make up the focal values of tort law’s remedies. As Zipursky expresses the thought, “[t]he right to make such a demand [a legal demand for responsive conduct] is rooted in the right to self-preservative, defensive, and self-restorative conduct. Similarly, a defendant’s legal vulnerability—liability—is rooted in the defendant’s

\textsuperscript{195} Ibid at 328.
moral accountability and moral responsibility for the wronging, the injuring of the plaintiff.” Nonetheless, Zipursky outlines three more potential values that distinctly justify the demand-accountability norms of positive morality—that is, the norms that ground the (remedial) right to demand responsive conduct. The third value or consideration noted by Zipursky is what he calls the “duty/responsibility linkage.” On this, Zipursky states, “that it is part of what it is, for us (given how we conceive of duties), that relational duties are accompanied by obligations and standing to demand responsive conduct.”

I think what Zipursky is articulating here is that it is just how we understand the notion of duty to understand someone as accountable, that is, as owing an obligation to the person one is accountable to. If he is trying to say something along the lines that relational wrongs generate relational obligations, or relational remedies, then it is hard to disagree. This, in fact, is the essence of Weinrib’s corrective justice position. If Zipursky spelled out this consideration more, he might get from it more than he has bargained for. The requirement of correlativity, if integrated in the way Weinrib and others interpret it, guides us quite restrictively with respect to questions regarding remedies. So this can’t be what Zipursky means here. Rather, he must be taken as suggesting a narrower idea: that it is just the case that, given our “social understanding” of relational wrongs, that these generate “standing to hold the wrongdoer accountable.”

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196 Ibid at 336-7.
197 Ibid at 328.
198 Ibid at 329.
199 Ibid at 328.
profoundly similar to his earlier invocation of the principle of *ubi ius ibi remedium*, where there’s a right, there’s a remedy. As such, it does not satisfy us in our search as we are still left wondering why is it that case that where there’s a right, there’s a remedy, or why the remedy isn’t merely an apology.

The fourth value identified by Zipursky is in fact the most promising with respect to our search for some guidance in regard to remedial limits. This is the consideration of reconciliation of wrongdoers and victims.\(^\text{200}\) There are two parts to this reconciliatory value, two ways in which remedies serve “the possibility of harmonious intercourse in society.”\(^\text{201}\) First, the remedy itself is a form of reconciliation, “in permitting interaction to go forward and in forestalling conflict.”\(^\text{202}\) Second, accountability for wrongdoing makes up the necessary background practices upon which many relationships depend for their continued existence. Zipursky doesn’t elaborate on this, but we can easily see his point: contracts, as a practice, depend to an extent on the availability of a practice of accountability for contractual breaches. I called this the most promising value so far because we can see how the goal of reconciliation might provide certain constraints. We wouldn’t want to over-award or under-award because, in doing so, we would make reconciliation less likely. If a party comes away from a dispute feeling hard done by, he or she is unlikely to let the matter drop and might seek more informal (and

\(^{200}\) Ibid at 329.

\(^{201}\) Ibid.

\(^{202}\) Ibid.
possibly generate infinite) reprisals. Similarly, the systemic value of a regime of accountability is also a factor to consider in making award determinations. Nonetheless, the value of reconciliation does not tell us what it is to be over-awarded or under-awarded apart from the subjectively felt injustice of the parties involved.

The final value Zipursky points to, the “schemes of rights and goods,” builds on the idea introduced above: that rights to demand accountability help constitute and support the initial rights themselves. Zipursky elaborates,

[t]he right to demand return of property that was taken or repair of property that was broken plays a substantial role in constituting what it is for there to be personal property in which an individual has a property right. More straightforwardly, the right to assistance from the wrongdoer in helping to recover from a physical injury inflicted helps to protect that interest prospectively and after the fact too; the compensation obtained through demands has at least instrumental value.204

Once again, Zipursky can be taken to mean two things. First, it seems he is saying that the right to make a demand of repair just is part of what it means to have certain underlying entitlements. An intrinsic theorist would wholly accept this position. Second, the availability of remedies protects initial entitlements instrumentally. My interests in my person and property are protected by the existence of remedial awards should they be interfered with. An intrinsic theorist would not object to this either. The fact that remedies have instrumentally beneficial

203 Ibid.

204 Ibid.
effects is no threat to these theories. They only caution that instrumentality is not to be viewed as the primary aim remedial obligations. Returning to our critical stance with respect to Zipursky’s posited values, we must ask whether this final value helps to guide us in the determination of the type of remedy available. Unfortunately, it does not. Any number of remedial awards could instrumentally protect underlying entitlements. Also, simply saying that rights mean one has a remedy if they are interfered with, doesn’t go very far in telling us what types of remedies would be appropriate. In sum, Zipursky still leaves open what type of remedy would best serve this value.

Thus far I have demonstrated that none of the values or considerations that Zipursky relies on help to guide us in our determination of what type of remedial response is appropriate. This, if we recall, is point (b) from above. Now I want to turn our attention to the preceding point, (a), and ask if the remedial values that Zipursky identifies are distinct form those which underlie the initial entitlement, and, if so, by virtue of what? Zipursky is adamant that values are distinct: “The set of values that would undergird a moral right to demand responsive conduct to a breach of some relational duty is not identical to the set of values that would underlie the justifiability of the relational directive giving rise to that duty.”205 How are the considerations of self-respect, agency recognition, the linkage between duty and responsibility, reconciliation, and schemes of rights and goods distinct from the values that underlie the relational directive that gives rise to the original duty? As an illustration, Zipursky provides the example of intimate confidences in the context of friendship: “The reasons

205 Ibid at 330.
underlying a norm requiring that one keep the intimate confidences of a friend are not identical with the reasons underlying a norm according to which one would be entitled to hold a friend accountable for a hurtful disclosure of such confidences. While the former are undergirded by the “values of trust in a friendship and the importance to individuals of delimiting others’ awareness of private facts of one’s life,” “[t]he latter indirectly involves such values, but in the first instance pertains to allowing individuals to act self-preservatively to maintain respect and dignity for themselves, to allowing others to understand the significance of their hurtful actions to others and take ownership of them, and to fostering reconciliation.” How “indirect” is this involvement? It seems to me that the only reason why, say, one’s self-respect is threatened by an unresponded to breach of trust is that it is derivative of the breach of trust. If we ask why one’s self-respect is threatened, we come up with the answer that a breach of trust is a form of disrespect. Likewise, the reason we find the trust-breacher accountable is because he breached the trust, full stop.

Zipursky’s subsequent point that acknowledges the substantive, but denies the analytic, link between these two sets of values illuminates the distinction between his extrinsic account and the rival intrinsic accounts. It further reveals, I will suggest, the unsustainability of extrinsic accounts:

206  Ibid.
207  Ibid.
The larger point is that even if one accepts, as I do, that a person's right to demand responsive conduct for an injury is connected to whether that injury was a breach of duty to him or her, one need not and should not accept that the connection is analytic. The notion of being accountable to another for one’s breach of duty to that other is not built into the notion of a breach of duty to the other. It is a substantive, not an analytic connection. If there is a right of responsive conduct, it does not flow from the very idea of a right not to be mistreated. The relational directive itself, and the values underlying it, generate the right not to be mistreated (if there is one). The right to hold the wrongdoer to account (if there is one) is based on a set of values that justify a set of demand-making and demand-accommodating practices.208

Contrary to this, I assert that the *separation* of right and remedy is only *analytic*,209 while their connection is substantive in the sense that they are of the same substance or subject matter. In other words, while we can analyze the two stages as separate—that is, we can sensibly talk about the plaintiff’s right as distinct from her remedy—substantively they are the same normative phenomenon. How we tell this story about the substantive identity or continuity is a matter of some disagreement within the intrinsic camp, but the ultimate position is for the most part settled that the connection is not the indirect one that civil recourse posits and praises.

208 Ibid at 330.

209 Notably, Zipursky and I here mean different things by “analytic.” He does not mean analytic in the sense of “for the purposes of analysis.” Rather, his denial of the analytic connection between right and remedy is a denial of their conceptual equivalency. I argue that it is precisely this lack of conceptual equivalence that turns civil recourse into an extrinsic account. One way to avoid this conclusion would be to adopt the meaning of analytic that I present here.
Civil recourse theorists insist upon a separation between rights and remedies, but seem to acknowledge that part of what it means to have a right is to have a right to make some sort of demand should the right be interfered with. In what follows I examine the consequences of this position. Notably, Zipursky does not say that these generate a right to recourse, but a right to demand responsive action from the wrongdoer. In the example he uses, a boyfriend cheats on his live-in girlfriend. In this situation, the boyfriend only has a duty to move out when the girlfriend demands it of him. Prior to her demand, no duty to do anything, according to Zipursky, exists. The right to make the demand, however, comes from the demand’s legitimacy: “The right to make the demand does not derive from the duty to perform the act. Rather, the duty to perform the act—if there is one—comes from the legitimacy of the demand.”\(^{210}\) But, one wonders, what is it that makes the demand legitimate if not the fact that she is entitled (has a right) not only to make the demand, but also to have it complied with? Moreover, Zipursky’s formulation makes it difficult to understand spontaneous reparative conduct.\(^{211}\) The stronger point, argued for earlier, is that the kind of demand that the aggrieved victim makes is not shaped by her right. Zipursky seems to suggest that this could be a demand to do anything. We should find this to be worrisome as it invites radical remedial indeterminacy. If, however, Zipursky, looks to the original right to define the limits of what can be seen as an appropriate remedial response, then he becomes indistinguishable from intrinsic

\(^{210}\) Zipursky, “Substantive Standing,” supra note 75 at 334.

\(^{211}\) See note immediately above for Zipursky’s response to this. In a nutshell, it has to do with serving a particular virtue of not having to make the demand in the first place.
accounts. That is, if the original right-duty relation determines the subsequent remedial relation, then the connection is firmly established.

The source of the right to demand reparative conduct is different in the case of certain nondestructive property wrongs, however. Here, “[i]f Wayne demands that Jane return his laptop, she will have at least a prima facie duty to do so. But Jane has a duty to do so even prior to Wayne’s demand; more importantly, Wayne’s demand does not trigger Jane’s duty. Her duty comes from the fact that Wayne owns the laptop that she took.”212 It would seem then that the destruction of the laptop destroys the right to the return of the value of the computer while if the computer is not destroyed, Wayne’s property right survives. This misconceives what property rights are. Property rights aren’t rights to things; they are rights against other people with respect to such things. Why should Jane’s wrongful use of Wayne’s laptop change his rights with respect to it? If she idly surfs the internet, he gets his computer back as of right; if she snaps it in two, then he only has a right to demand she make some reparative action.

Zipursky next considers continuous wrongs. Here, like the case of the misappropriated laptop, the victim has a right not just to demand reparative conduct, but also to have the wrongful conduct stop. “In this case,” Zipursky explains, “there is a duty to comply with the demand that preexists the demand itself, because the duty is just the primary duty of conduct.”213 This leads to the situation where breaking my toe but getting off of it (before I demand you do) is a

\[\text{212} \] Zipursky, “Substantive Standing,” supra note 75 at 334.

\[\text{213} \] Ibid.
normatively different situation from my continuing to crush your foot. I am not sure we should be keen to accept this counterintuitive conclusion.

A final feature of Zipursky’s account that invites criticism is his identification of the “reason” for the reparative conduct being the demand: “The interesting normative claim is that people are entitled to make demands that will serve as reasons … for the addressee to respond accordingly.”214 And, again: “It would hardly follow … that the boyfriend would have a duty to move out even if she did not so demand … Her right to have him perform certain acts because of what he did to her is in part her right to initiate a demand that he perform these acts.”215 I would suggest that perhaps the demand crystallizes what particular action the wrongdoer must do that from the victim’s perspective would constitute reparative conduct. Because the victim has asked for it, we may assume that what she asks for is what would count for her as an appropriate response. Regardless, the reason that the wrongdoer must do this action cannot be the demand itself. It must instead be the grounds of the demand. When the boyfriend is asked why he moved out, he won’t respond because his girlfriend demanded it, and if he does, he’ll be immediately asked why she so demanded it, rather, he will say, if he is being honest, it is because he was unfaithful.

What we should note from the above is that there is in fact a double separation in the separation thesis endorsed by civil recourse theorists. There is not only the familiar separation

214 Ibid at 326.

215 Ibid at 332.
between the original right and the remedial right, but also between the duty to compensate and the preexisting moral duty to compensate that flows from the breach of a right. For civil recourse theorists, no such preexisting moral duty to compensate flows from rights breaches. Instead, what we get is a right to demand reparative conduct. As noted above, this creates odd situations where continuing interferences with rights and non-destructive interferences with rights appear to generate stronger remedial entitlements than noncontinuous and/or destructive ones do. In fact, what this is is just the mirror of a separation thesis between rights and remedies. If the plaintiff’s right and remedy are distinct, then so must be the defendant’s original duty (not to interfere with the plaintiff’s right) and his remedial duty. In Zipursky’s terms, this would be the difference between breaches of duties and accountability for duties. What this reveals, I suggest, is the oddity of this account with respect to our common sense notions about responsibility. It seems strained to say that my breach of a duty is one thing and my accountability for this breach another; however, this is precisely the argument that Zipursky makes: “the idea of a duty owed to another does not entail second personal-accountability. Such accountability may be inferred where a set of substantive norms and values about the rights to demand responsive conduct are embraced.”216

16 A renewed intrinsic preference

In private law, it is not contentious, or at least it shouldn’t be, to say that we find the defendant owes an obligation of reparation to the plaintiff by virtue of a special relationship he has with her. The relationship is a transactional one. It is because of the fact of the defendant’s

216 Ibid at 332.
mistransactional behavior that he now owes her some sort of reparative act. The fact of his original duty in combination with his failure to conform to it is the reason for, not merely the condition of, the subsequent remedial obligation.\textsuperscript{217} If we are committed to understanding private law’s remedies as responses to [mis]transactions between individuals, then an extrinsic account is unappealing if not incoherent. Even an extrinsic account, such as civil recourse, that seems to take seriously the private wrongdoing of tort law offers a remedial narrative that is inconsistent with what it itself identifies as tort law’s key feature: relational wrongs.

Contract damages are not owed because losses experienced or gains not realized due to contract breaches are something we all have reason to avoid (although we might), but because of the contract itself, because of the original relation between the parties. Similarly, tort damages aren’t owed just because harm and interference to person or property are bad things,\textsuperscript{218} but because of the tort itself—that is, the flawed interaction between two persons. It is not the case that we say, “it is a bad thing—generally—to suffer from breach of contract or tort, and so someone ought to remedy it.” I do not, of course, mean to imply that such a statement or such a regime is impossible. Obviously, it is quite possible: for this, we need look no further than New Zealand’s statutory scheme for accident liability and our own mandatory automobile insurance. However, this is emphatically not the system of private law shared by most, and, perhaps, some might argue, it is no longer a system of private law anymore. Furthermore, the remedial duty is not one that can be discharged by simply anyone. The

\textsuperscript{217} Weinrib, “Two Conceptions,” supra note 14.

\textsuperscript{218} Or the values offered by Zipursky in Zipursky, “Substantive Standing,” supra note 75.
salient feature of private law remedies is that it is the defendant—the tortfeasor, the contract breaker, or the unjust enrichment recipient—who is subject to the duty. A theory of private law must adequately explain this phenomenon, or, justify its being explained away. An intrinsic account does not need to look outside the immediate relationship of plaintiff and defendant to explain the defendant’s subsequent remedial obligation. The reason for the remedial obligation is connected to the reason for the original obligation analytically, not just causally. In the chapters of Part 2, I canvass two leading intrinsic accounts with an eye to setting the stage for my improved argument within this genre.

219 For a statement to the contrary, see Zipursky, “Substantive Standing,” supra note 75 at 330: “The notion of being accountable to another for one’s breach of duty to that other is not built into the notion of a breach of duty to the other.”
PART 2. INTRINSIC APPROACHES

Part 1 introduced a fundamental division with respect to how the question of private law’s remedies can be approached—that is, either intrinsically or extrinsically. As between the two, the former made better sense not only of private law’s remedial doctrines, but also of our commonsense reactions to questions about what we ought to do when matters go awry. Part 2 considers two leading intrinsic approaches, focusing on how each solves the puzzle of remedial actions: why is it when I fail to do as I should have done, I now have a reason to do something else and, moreover, how does this something else make up for my initial failure? It highlights the strengths and weaknesses of these two approaches and concludes by suggesting a new and preferable way to consider private law’s remedies.
Chapter 5  
Unity and Continuity

17 Introduction—crying over spilled milk?
So far we have examined in some detail the difficulties with approaches that counsel the separation of private law’s rights and remedies. I have labeled these theories “extrinsic” to account for and highlight their principal consequence: When the original right/duty relationship is shorn from the remedy, then something more, something extra, is necessary to explain and justify the remedy. In other words, a separation of right and remedy leads to the requirement of an independent principle or principles of repair (or redress in the case of civil recourse theorists) to explain and justify the remedial consequences of initial wrongs.

In this chapter, I provide arguments in support of the alternative approach, the intrinsic approach. This is an approach that emphasizes the normative connection between rights and remedies. Putting it starkly, I argue that it just cannot be the case that the reasons that initially applied to the plaintiff and defendant have no role to play with respect to the subsequent reasons that apply at the remedial stage. That the defendant wronged the plaintiff, in other words, is the reason, not merely the condition, for the defendant’s subsequent remedial action.\(^{220}\) The fundamental question for intrinsic accounts is this: How is it that the mandatory force of an initial legal obligation remains intimately connected with the mandatory force of a

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\(^{220}\) Hence, intrinsic accounts are starkly opposed to Kelsenian approaches, a prime example of which is Stephen Smith’s recent contribution to the literature. (Stephen Smith, “Duties, Liabilities, and Damages” [2012] 125 Harv L Rev 1727). Smith argues that, at the remedial stage, the relevant rules are those that apply to officials, instructing them how best to respond to the original wrongdoing. It is hard not to view Smith’s and similar theories as somehow opposed to the commonsense understanding of reasons: when one fails to do what one initially ought to do, one must still do something, something which aims to do insofar as possible what one initially ought to have done.
secondary legal obligation of repair? In other words, how do intrinsic theorists maintain and explain the connection that they hold to be so central? This chapter examines three stories about how the normative continuity between rights and remedies plays out. Current legal scholarship—in the respective works of John Gardner and of Ernest Weinrib (and other Kant-inspired legal theorists)—furnishes the first two ways in which the normative force of remedial actions might be explained without recourse to an independent principle of repair.\(^{221}\) In this chapter’s concluding portion, I suggest a third possibility.

John Gardner, following Joseph Raz,\(^ {222}\) relies on the force of the rationale for the primary obligation—specifically, the reasons why it is obligatory—to explain the existence of the secondary obligation of reparation.\(^ {223}\) The rationales for both the original (primary) obligation and its remedial (secondary) counterpart are the same, though, for Gardner, the obligations themselves are not.\(^ {224}\) The Kantian lawyers, specifically Ernest Weinrib and Arthur Ripstein, agree with Gardner that the rationales are the same, but deny that the resultant obligations are different. For them, that the rationales are the same entails that the original obligation and its remedial counterpart are also one and the same, simply viewed from different ends of the same normative transaction.

\(^{221}\) If such a principle of repair were required, the internal remedial enterprise of private law would lose its distinctiveness, blurring into any situation where repair is desirable.

\(^{222}\) In particular, Joseph Raz, “Personal Practical Conflicts,” supra note 15.


\(^{224}\) It is left unclear whether Raz would endorse this latter claim on the separateness of the obligations.
In what follows, I demonstrate first that Gardner’s approach collapses into that of the Kantians; and, second, that, although the Kantian structure is desirable, it struggles to explain the obvious fact that remedial actions are often only the next-best or next-next-best thing. In light of this, I suggest and develop a novel account: one that aims to make better sense of the next-best character of certain common remedies.

18 Continuity through identity—the Kantian approach
How, Arthur Ripstein asks, do “[monetary] damages really ... make it as if a wrong never happened?”225 Simple, Ernest Weinrib replies, “once the defendant destroys the plaintiff’s object, the specific action that the duty requires is different, but it is not a different duty.”226 Normative continuity between wrongdoing and repair is maintained through recognition that the original duty (and its correlative right) is the same as the remedial duty (and its correlative right). The normative relations of right and duty stay the same, although their respective contents are transformed by the breach.227

Immanuel Kant, for Weinrib and Ripstein, is the philosopher who most clearly and seriously grasped this idea. The upshot of this broadly Kantian argument I call the “unity thesis.” Here, the rights and duties of private law are best understood through the careful analysis of a single Kantian tenet—the “Universal Principle of Right”—

accord to which “[a]ny action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”

Under the Universal Principle of Right, persons are understood as essentially independent—that is, agents whose choices are their own, and more significantly, not those of another. The freedom is of the negative variety: freedom from the will of another. Thus, the fundamental just relation between rational agents is that each is master of his or her own sphere of purposiveness. Notably, it is not that each agent has an entitlement to the actualization of the content of her particular plans, but rather that her capacity to generate such plans must be her own, that is, is not interfered with by the innate and equal purposiveness of another.

On this view, when I have a right, that is because my status as a human agent gives me certain claims to be independent of and from your choice and your actions. My right is fundamentally a protection of my own choice, and so, unless I choose to waive or abandon it, the right remains intact. So it just doesn’t makes sense to say that when a defendant wrongs a plaintiff, the plaintiff’s right goes away. There is no normative change if an agent violates the

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228 Immanuel Kant, *The Metaphysics of Morals* (1785), translated by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 6:230. It should be noted that it is Kant’s “Postulate of Right” that extends the Universal Principle of Right to external objects of choice. Such external objects of choice are the objects of concern for much of tort law (that is, torts that do not concern personal injury and death) property, contract, and unjust enrichment law. Precisely how the Postulate does this is outside the scope of this thesis. I am skeptical about its success, but since the Kantian approach examined here is found unsatisfying for other reasons, arguments against the Postulate are not necessary.
Universal Principle of Right. It cannot be that by virtue of his wrongdoing a wrongdoer deprives a fellow autonomous agent of her right to independence from his choice. As Ripstein notes,

[i]f I deprive you of something to which you have a right, I wrong you. The very idea that I could do that to you depends on the fact that by wronging you I do not extinguish your right. ... The normative situation is unchanged, because a person can only lose a right to something through a voluntary act of abandonment or transfer, and not always even that way. An involuntary transaction in which someone takes, damages, or destroys something that is yours does not change your rights. It only changes your ability to exercise them.\(^{229}\)

The right remains, although the means to its full realization might be set back. The duty of repair is thus simply the duty to restore these means, to restore the same right:

The compensation simply gives me back what I had all along, because my right to what I had survives any wrongs committed against it. If I damage your vase, you do not cease to have a right to it. So, too, if I break your arm: you still have, as against me, a right to your arm intact. This is just to say that you have a right to cancel the consequences of my wrong, and so a right to compel me to compensate you by giving you back what you had before. ... The basis of liability ... is just your right to what you had all along.\(^{230}\)

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\(^{229}\) Arthur Ripstein, “As If It Never Happened,” *supra* note 14 at 1978-79. See also Ripstein, “Separation,” *supra* note 132 at 177: “When a wrong occurs, however, the same set of concepts that generated the underlying rights and correlative duties also generates an account of remedies. Put in the barest conceptual terms, the idea is simple: if someone interferes with a right you have, the right does not thereby cease to exist.” See also Weinrib, “Civil Recourse and Corrective Justice,” *supra* note 73 at 279.

Notably, the original obligation-right relation does all the normative work at both the initial and remedial stages. It is because I continue to have a right to my vase and to my intact arm that I can justly demand compensation from you, the person who has broken them. The Kantians thus have no need for an external (independent) principle of compensation to justify the remedial obligation.

This analysis operates clearly at the level of common sense. We can see it at work in more mundane situations. Although I present arguments in Part 3 about the distinctiveness of private law’s reasons, this feature of reasons—that they continue to exert force notwithstanding an individual’s failure to act in conformity with them—may also be seen in everyday, non-legal situations. Let’s say that next week your mother is turning eighty, but you are planning to be out of town and will not be able to drop by to wish her a happy birthday in person. Let us further assume that your mother hates having her birthday remembered. You ask me to go in your place. I promise to do just this. If I am asked why I am going to pay her a visit, I might respond that it’s because it’s her birthday. But that actually doesn’t make sense. Remember, I can’t refer to your mother’s benefit, because she would prefer it if I forgot. If pressed further, however, I will make essential reference to our promise. What if I do forget? If I am now doing an action to make up for my memory lapse (buying her flowers, apologizing to you, seeing her at the next available opportunity) and am asked again why I am doing what I’m doing, I will naturally refer again to our promise. In this way, the Kantian legal theorists provide us with a fairly straightforward explanation for the connection between rights and remedies: Remedies just are different manifestations of the same freedom that the right originally was understood to be a manifestation of.
19 Continuity of reasons or of rationale—Gardner’s approach

The following from Weinrib and Gardner, respectively, starkly reveals their disagreement: 231

Weinrib: The defendant’s breach of the duty not to interfere with the embodiment of the plaintiff’s right does not, of course, bring the duty to an end, for if it did, the duty would—absurdly—be discharged by its breach. 232

Gardner: [Following its breach] my original obligation is, we should now be able to agree, discharged (put to an end) by its breach. 233

Let us explore how Gardner arrives at this, according to Weinrib “absurd,” conclusion.

It begins with his endorsement of Joseph Raz’s “conformity principle:” “One should conform to reason completely, insofar as one can. If one cannot, one should come as close to complete conformity as possible.” 234 Raz here is merely stating what he considers a truism about reasons. Even if outweighed or overruled, reasons do not by virtue of this cease to be reasons for the action that they recommend. 235 Take an uncontroversial case: I am planning to

231 This disagreement, I will subsequently show, is more apparent than actual since Gardner and Weinrib mean different things by the term “obligation.” For Gardner, an obligation is what Kant takes to be a duty—that is, one of the specific actions made mandatory by an obligation. They also mean something different by “discharged:” while Weinrib means “satisfied,” Gardner means “removed from active service.”

232 Weinrib, The Idea of Private Law, supra note 1 at 135.


235 Only if reasons are canceled (or satisfied) do they disappear.
make myself eggs on toast, but lack eggs. My preference is for brown eggs. Thus, I have a reason to buy brown eggs. Unfortunately, you have purchased the last remaining carton of brown eggs, leaving only standard white eggs remaining. The same reason I had to buy brown eggs tells me to purchase the white eggs.

Now, a more complex example: I promise to pick you up from the airport. On my way, I spot a single-car accident. I stop to help and because of this fail to meet you when your flight lands. It is now impossible for me to make it on time. Does this mean I no longer have either a reason to do so or any reason to do something that will contribute to your getting picked up? Clearly, it does not. My original reason does not disappear just because it was outweighed by the more urgent demands of another. I still have a reason to do something to serve the value that would have been served by picking you up as promised. I have reason(s) perhaps to apologize to you, to explain the (legitimate) reasons for my breach, to pay for your cab fare, etc. No new normative principle is required. We do not ask, as an extrinsic theorist might, “What does one do when one fails to pick someone up from the airport?” This inquiry is unnecessary. The remedial actions required by your failure are justified by your original promise.

The tenacity of reasons is further illustrated by the following situation: Imagine that, before I leave for the airport, you call me and say another friend has offered to pick you up and

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236 Let us say that my way to the airport is a strange one, consisting primarily of back roads along which I more often than not am the only vehicle.
so you no longer require me to. In this situation, we may say I no longer have any reason to drive to the airport, to pay for your cab fare, to apologize, to explain myself etc. Your releasing me from my promise is what Raz refers to as a “cancelling condition.” Assuming the non-existence of any relevant cancelling condition, reasons do not disappear unless satisfied. This is just what it is to be a reason for something.

Gardner takes this principle about the nature of reasons and applies it to a certain type of reason, a categorical and mandatory reason—that is, an obligation.237 Obligations, according to Gardner, are different from general reasons in that they do not allow for imperfect conformity.238 Unlike reasons, it is not possible to satisfy an obligation more or less; you either perform it or you do not. Obligations function like lights’ ON/OFF, not their dimmer, switches. Once an obligation fails to be satisfied, it simply is breached and can no longer be fulfilled.

The puzzle is why does it make sense to perform a remedial obligation at all? In claiming that by failing to perform the initial obligation that obligation ceases to exist, Gardner sets himself the task of explaining why it is that performing the remedial obligation does seem somehow rationally related to the initial obligation. In other words, how do we account for the fact that when we “imperfectly” perform an obligation—that is, we do the next-best thing to perfect performance—somehow the effects of our initial failure are mitigated and further we

237 How it is that obligations can be reasons, given Raz’s position that reasons are fundamental, I explain in more detail subsequently.

seem to be responding rationally to the underlying rationale of the original obligation?\textsuperscript{239} Gardner's answer is that this apparent “imperfect” conformity is actually perfect conformity with a \textit{new} obligation, an obligation that is grounded in and called for by (some of) the same reasons that grounded the first obligation and which failed to be satisfied, but, because of the nature of reasons, did not as a result disappear.

Gardner explains the rational connection between the original obligation and the secondary obligation through what he calls the “continuity thesis:” “the thesis that the secondary obligation is the rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due.”\textsuperscript{240} It is this thesis that allows Gardner to provide an account of remedial obligations without invoking an independent principle of compensation.

Combining the conformity principle and the continuity thesis, the basic gist of Gardner’s theory can be expressed as follows: (1) I have an obligation to φ at t\textsubscript{1}. (2) My obligation to φ at t\textsubscript{1} is supported by various reasons, at least one of which is the operative reason, while others are auxiliary.\textsuperscript{241} (3) I fail to φ at t\textsubscript{1}. (4) I can no longer, because of (3),

\textsuperscript{239} Ibid at 30.

\textsuperscript{240} Ibid at 33.

\textsuperscript{241} An operative reason is a reason for which belief in it entails the attitude that I ought to do as the reason recommends. To take my earlier example: I promise you that I will call on your mother on her birthday; today is her birthday. The operative reason leading to the conclusion that I ought to call on your mother today is the fact of my promise to you. Auxiliary reasons are different. They serve to identify the act that the operative reason provides reason to perform and, in situations of conflict, help determine the weight of conflicting reasons. In the example above, the auxiliary reason is the fact that today is your mother’s birthday. This tells me how to execute my
conform to all of the reasons I had to φ at t₁. (5) However, I can conform to some of them. (6) I have a new obligation, an obligation to θ at t₂. (7) The content of θ is to be drawn from the rationale I had at t₁ to φ. (8) In θ-ing I come as close as possible to conforming to the reasons I had to φ.

Like the Kantians, therefore, Gardner also does not need to invoke an external principle of compensation to ground the secondary duty. Unlike the Kantians, however, he considers the duty to be a new obligation. Notably, Raz does not make this further move. Given his treatment of the following two examples, it is perhaps more plausible to think he considers the remedial and original obligation to be the same:²⁴²

Example 1:

If I have reason to give you $10 and I can only give you $8, then that same reason is a reason to give you the $8.²⁴³

Example 2:

So if I have reason not to damage your property, and I do damage your fence, I have reason to compensate you, that is, to mitigate the consequences of failure, and this

²⁴² It should be noted, however, that Raz is only talking about reasons, not obligations, although the fact that one has an obligation is a reason.

²⁴³ Raz, “Personal Practical Conflicts,” supra note 15 at 190.
reason is the very same reason I had initially (the reason not to trespass or not to disturb your peace).  

Given Gardner’s self-admitted Razian pedigree, why does he rock the (Kantian’s) boat and insist that the remedial duty is new and the original obligation discharged by its breach?  

To answer this, we must analyze how Gardner understands obligations. Obligations, for Gardner, are special kinds of reasons. He takes reasons to be facts, considerations existing in the world by virtue of which certain propositional statements are true, counting either for or against a certain action, belief, or emotion. Thus, the fact that I have a duty is a special type of reason—a mandatory and categorical reason—for or against the action or omission that is its object. A reason is a fact that counts in favor of φ because φ-ing would be an appropriate response to some value—it would promote, protect, respect it, etc. When Gardner states that the duty comes to an end consequent its breach, what he is saying is that the fact of the duty...  

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244 Ibid at 191.

245 The best understanding of this lies in Gardner’s perhaps unintentional trading on the ambiguity of the term obligation, conflating it with duty. Gardner explicitly treats these terms as synonymous.

246 For Gardner, like Raz, an obligation in the air is not a reason because an obligation is not a fact by virtue of which some proposition’s truth may be assessed. Only facts can be reasons. However, the fact that one has an obligation is, for both, a reason. Throughout, I will say, “has an obligation” and mean by this “the fact that one has an obligation.” See Gardner, “Part 1,” supra note 15 at 31 Raz, Practical Reason and Norms, supra note 241 at 51. Raz makes the same point as Gardner does about obligations about rules.

247 For a clear argument that reasons are facts and not beliefs, see Gardner & Macklem, “Reasons,” supra note 19. Of course, reasons can be beliefs, but the contents of beliefs can’t be reasons. To argue otherwise leads to impermissible bootstrapping. See Raz, Practical Reason and Norms, supra note 241 at 18.
more accurately, the fact that I have the duty) no longer exists. I can no longer do what it tells me to do; it can no longer perform its key normative role of guiding my actions directly. Considering Neil MacCormick’s example of a (justified) breach of a promise to take one’s children to the beach today, Gardner notes, “the obligation to go to the beach on the next suitable occasion is a different obligation, because it calls for a different action, from the original obligation to go to the beach today.” Whether Gardner’s thesis about the individuation of obligations is persuasive is a matter for the next section; what is important here is just that we understand it.

In sum, Weinrib, Ripstein, Gardner, and Raz all share a commitment to eliminating the need for an independent principle of compensation to justify remedial obligations. This is what makes their respective accounts intrinsic. For the Kantians, the duty does not disappear, but remains and continues to exert normative pressure on those to whom it applies. By contrast, Gardner retains normative continuity not through the identity of the duties, but through the identity of their rationales and some of their reasons. Neither account is free from difficulty. In the following section, I will demonstrate their respective troubles, but urge that their overall task of grounding the remedial obligation in the internal features of the originating normative relation is a laudable one in light of the more profound difficulties faced by extrinsic accounts that I set out in the preceding chapters.


249 Raz, it seems, holds that the reasons (provided they are not cancelled) do not disappear and so continue to demand conformity since this is just what reasons do.
20 Discontinuities in the continuity thesis

The first significant problem for Gardner’s approach is generated by his principle for individuating duties. He states explicitly that duties should be individuated according to the action that they make mandatory.\(^{250}\) This principle of individuation, without perhaps the assistance of a more nuanced understanding of action theory,\(^{251}\) produces some odd results.

First, it is uncontroversial that many (if not most) of our duties are duties to perform more than one action. Take, for example, the duty of a bailee.\(^{252}\) It is his duty to maintain the bailed property in such a way as a reasonable owner would. This duty makes mandatory several different actions: not to leave the shed where the bailed property is stored insecure, not to destroy the property, among others. It does not make sense to refer to each of these as a different obligation. They are all grounded in the obligation of being a bailee. Second, the same action can easily be conceived as being made obligatory by more than one obligation. Let’s say the speed limit is 35 kph. This is the legal duty imposed by the province, commanding me not to drive significantly above or below this stated limit. Suppose that I also promise my mother that I will drive under 35 kph. This limit means something to her, apart from the fact that it is the law. My promise to my mother is separate from my obligation to obey the law.

\(^{250}\) In his own words, “obligations (and more generally norms) are individuated according to the action that they make obligatory.” Gardner, “Part 1,” supra note 15 at 29.

\(^{251}\) Perhaps a distinction between act-tokens and act-types could help. Act-types can be understood as more general descriptions of actions, while act-tokens are the particular acts. Take the example of “A repaying her debt to B” as an act-type. A may repay this debt in a number of different ways – that is, by performing a number of different act-tokens, such as: “repaying B immediately,” “repaying the debt in cash,” etc.

\(^{252}\) I thank Ernest Weinrib for this illustration.
can see that they are distinct if we imagine that the government raised its speed limits to 45 kph. Although I am no longer bound legally to drive at 35 kph, I am still bound to perform this action by virtue of my promise to my mother. Likewise, if my mother changed her mind and released me from my promise to her, no one would say I am now at liberty to speed. Yet Gardner would have to say that the obligations were the same, as they make mandatory the same action, and this can’t be right.

A further difficulty with Gardner’s individuation thesis for obligations lies in how he justifies a different individuation thesis for reasons, when he, following Raz, thinks of obligations (or, more accurately, the fact that one has an obligation) as reasons. The following passage on the individuation of reasons is, on its face, quite confusing:

An obligation is not a reason, but the fact that one has an obligation is a reason – a reason of special force – for doing whatever one has an obligation to do. However, it is not only a reason for doing that very thing. Reasons are individuated differently from obligations. Every reason for action is potentially a reason for multiple actions. This is true even of the fact that one has an obligation, understood as a reason for action.\(^{253}\)

It seems, then, that obligations are just more specific reasons for action. That is, obligations pick out a particular action that must be performed, while reasons indicate a more general action that can be complied with in a number of different ways. Is this right? Yes and no. What Gardner is trying to argue, I imagine, is that obligations serve two roles in providing reasons for action. First, as obligations, they make the act obligatory. If I have an obligation to φ and x-ing

contributes to \( \phi \)-ing, then I ought to \( x \). Second, as operative reasons, obligations generate other reasons (both instrumental and constitutive—what the literature calls auxiliary reasons) to perform actions that contribute to my ultimately \( \phi \)-ing. These actions on their own are not severally obligatory; however, they derive their justifications from an obligatory reason for action, the obligation.

The double role of obligations in practical reasoning, however, fails to save his individuation thesis for obligations. It is unclear, in other words, why a secondary (remedial) obligation is not just one of the further instrumental or constitutive actions called for by the primary obligation. I will explore this possibility more fully at the close of this chapter. Given my primary obligation to take my children to the beach today, in other words, it is not clear why it is not the case that taking my children to the beach tomorrow given the additional fact that today has passed is not just an auxiliary reason helping me identify how I can best (in light of the changed circumstances) satisfy my operative reason (my promise). Saying that each makes a different action mandatory is unhelpful insofar as any obligation makes various actions mandatory, although all can be described under the single action of “perform your obligation.”

A further, perhaps more telling, problem with Gardner’s approach lies in understanding how it is that the force of the reasons for the original obligation—those which make it obligatory—transmit this normative pressure to the remedial obligation, making it obligatory, for the same reasons, but yet as a different obligation. What makes the original duty obligatory is relatively clear—for example, it could be the fact that you made a promise—but it is unclear what grounds the remedial duty for Gardner. Unless we wish to run afoul of Hume’s Guillotine
(by deriving an ought from an is), we cannot say that the non-normative fact of one's breach generates a (normative) reason like a remedial obligation. Moreover, if we say that one ought to make good on one's breaches, then we are introducing an independent principle of repair. To take the promise example, if I am explaining to another why I am taking my children to the beach tomorrow, I might say because I failed to do as I originally promised. If, however, I am pushed to explain why failing to do as I promised is normatively significant, all I am left with is the explanation that I made a promise—that is, the original obligation. Hence, if we trace the normative force back to the original obligation, then Gardner's view appears to collapse into an endorsement of the Kantian's unity thesis, where the only relevant normative feature is and remains that of the original obligation.²⁵⁴

Gardner could respond that because, for him, rights are based on protected interests, this collapse is overstated. The obligation is based on underlying reasons and, given the change in circumstances, these can give rise to new obligations. I have certain reasons not to take your coat: it is winter and you need it to keep you warm or it possesses a certain resale value, e.g. Once I take it, these reasons cannot demand that I not take it because I have already taken it. They no longer, in other words, serve the role of guiding my actions. Instead, these same reasons tell me to give the coat back. There is, as such, a difference compared to the Kantian view, according to which I must give the coat back and I must not take in the first place because it is yours.²⁵⁵ Nonetheless, the reasons for Gardner stay the same, even though he identifies

²⁵⁴ Section 21 explores this argument further.

²⁵⁵ Thank you to Arthur Ripstein for this example and insight.
different reasons as relevant than would a Kantian. As such, his continuity still relies on a type of identity. The reason I must give the coat back, for Gardner, is based on the same rationale for not taking it in the first place, although he will call it a different obligation because it is impossible to be guided by the actions mandated by the initial obligation (not to take the coat).

We should also note that the reasons are not actually the same. Gardner, though acknowledging the “extra reason” provided by the fact of the obligation’s breach, does not seem to recognize that this fact fundamentally changes the set of reasons that potentially grounds the new remedial obligation. Again, however, if he were to say that the breach is the fact that provides the justification for the obligation, he risks endorsing an independent principle of compensation, one which is engaged whenever there is a breach of obligation. In sum, Gardner’s account fails to explain the normative continuity between his primary and secondary obligations and also fails to explain how we can sensibly maintain them as distinct.

21 Collapse of continuity into unity

Recall the compellingly contrary quotations from Weinrib and Gardner:

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256 In Gardner’s words, “the extra reason for action that consists in the very fact that it was obligatory not to have done what one did.” (Gardner, “Part 1,” supra note 15 at 35).
Weinrib: The defendant's breach of the duty not to interfere with the embodiment of the plaintiff's right does not, of course, bring the duty to an end, for if it did, the duty would – absurdly – be discharged by its breach.\(^{257}\)

Gardner: [Following its breach] my original obligation is, we should now be able to agree, discharged (put to an end) by its breach.\(^{258}\)

My argument here is that the difference lies only in the definition of the terms “obligation” and “duty;” that, in fact, Weinrib and Gardner are saying exactly the same thing.

Weinrib relies on a Kantian understanding of duty and obligation, according to which those two terms refer to different things: Duty is the “matter of obligation” while obligation is: “the necessity of a free action under a categorical imperative of reason.”\(^{259}\) What does this mean? It means that the duty is a specific action required in order not to violate the obligation.

There can be many ways to discharge (and to violate) one's obligations, but the fulfillment of different duties (understood now as different specific actions) does not entail that there are a corresponding number of different obligations. In other words, obligations are not individuated according to the action that they make mandatory, for they can make multiple actions mandatory (i.e., create multiple duties), but remain the same obligation. Gardner, notably, refuses to draw any real distinction between duties and obligations, but it is clear that what he terms “obligation” is what Kant and Weinrib would refer to as a “duty.” So Gardner thinks that


\(^{258}\) Gardner, “Part 1,” *supra* note 15 at 32.

\(^{259}\) Kant, *supra* note 228 at 6:222.
“obligation” and “duty” are synonyms. That is, Gardner's understanding of “obligation” is as a specific action. This is reflected in his thesis for individuating duties according to the actions they make mandatory. What this means is that there actually isn't a dispute here. Both Weinrib and Gardner think that different acts are required before and after the breach. But they use the word “obligation” differently, and so Weinrib thinks that the same obligation covers both actions—although they are different duties—and Gardner thinks they are different obligations.

22 No room for regret

In light of the failure of Gardner's theory, we might be tempted to endorse the Kantian account, wherein the continuity is achieved by identity and there is no need to understand the obligations as separate. This would also be a mistake, however, as the Kantians struggle to explain a key feature of many remedial obligations—a feature intended to be captured by Gardner’s theory—namely, that remedial obligations (often) are second-best obligations. That doing the next-best thing is not as good (by definition) as doing the best thing (which would be in this context the immediate performance of one’s obligation) is a feature apparently ignored by the Kantian view.

Recall that the primary and secondary obligations on the Kantian approach are one and the same obligation. A distinction between the two is merely expository, not substantive. They are the same obligation, different only in virtue of the time of their application and their content. Normatively speaking, fulfilling an obligation pre- or post-wrong amounts to fulfilling the same obligation. As such, the nuance we perceive in one’s performing one’s duty outright and one’s subsequent mitigatory actions following one’s failure is lost or at the very least obfuscated in the Kantian approach.
What the Kantian approach fails to explain is the normative and rational gap that exists between performing one's obligation and failing to and subsequently fulfilling some action of repair. If these were indeed identical—two sides of the same coin—then our moral reactions to them would be equally identical. Yet, plainly, they are not. Someone who performs his or her obligations immediately is more praiseworthy than someone who breaches and subsequently repairs. There exists between these two acts—of doing and repairing—a rational remainder. This rational remainder between doing the best and doing the next-best thing is aptly captured by Raz and Gardner. They conceive of it as an unbridgeable gap, a gap that we *rationally* respond to through the emotion of regret. This is reflected in Raz's second important implication of his conformity principle: “Not being able to conform with reason completely is a matter of regret, which it may be appropriate to share with another if the reason is a relational reason addressed toward that person.”

Some might rightly object that the challenge of regret is not an appropriate criticism of the Kantians. For the Kantians, regret is a matter of ethics (of virtue), not of right (of law). It is irrelevant, juridically speaking. The regret that arises from the failure to do as one had reason to do is, thus, from the juridical point of view, irrelevant. For Gardner this is not a problem,

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261 Raz, “Personal Practical Conflicts,” *supra* note 15 at 189; and Raz, *Practical Reason and Norms*, *supra* note 246 at 203.

262 I thank Doug Weck and Nick Sage for independently each bringing this to my attention.
since all reasons, for him, are irreducibly the same. There are no different kinds of reasons, juridical (legal) and moral. They are just the same reason from different perspectives.

The true problem with the Kantians is not, therefore, the failure to give regret its due place because it has no (juridical) place. The problem is the failure to recognize as normatively salient the difference between doing as reason requires you when it requires you, and doing the next-best thing. A Kantian might object that the breach is normatively relevant because of the fact that it is a breach, the normative relevance of which results in certain institutional effects, the most normatively significant of which is getting a remedy. To accept this argument means one must adopt the Kantian perspective on rights: that they continue to exist as substantially the same normative phenomenon through both time and change. The aim of this dissertation is not to demonstrate that the Kantian picture of rights is wrong in this regard; rather, it is to see if we can tell the same sort of story, the story about the unity or continuity of private law’s original and remedial relations, but without using the language and metaphysical concepts that make up Kantian right. As such, my project is to see whether this story can be told through an analysis of reasons. If the why of our remedial obligations is simply the result of how reasons work, then we will have another argument in favor of an intrinsic approach to the understanding of private law’s remedies. Further, a focus on reasons allows us to see more nuance with respect to the gap left behind on occasion between performing one’s original obligation and the subsequent performance of one’s remedial obligation. Zipursky puts his finger directly on the issue in the closing paragraph of “Substantive Standing, Civil Recourse, and Corrective Justice,” noting that it is an illusion
that the payment of compensation in tort is a way of complying with the primary duties of tort law. The cold hard truth about tort law is that there are many—perhaps most—mistreatments of one person by another that cannot be addressed in a way that leaves plaintiffs intact. The duties not to mistreat by battering, negligently laming, libeling, defrauding, and so on, are duties whose breach very often cannot be undone. The law of torts does not nullify, reverse, or neutralize the mistreatment or the wrong.\textsuperscript{263}

While I submit the contrary—that the payment of compensation is just a way of complying with the primary duties of tort law—I acknowledge the force of Zipursky’s point. If we follow the Kantian approach, it does seem like we commit ourselves to the position that the breach is undone or the obligation somehow met by the reparative act. My focus on reasons promises to allow for increased nuance with respect to how it is that this payment of compensation truly does rationally address the original wrongdoing.

23 A stab at synthesis

We might be tempted to argue that, with respect to the remedial obligations of private law, the Kantians and Gardner share in a portion of the truth, if we understand their respective theories as directed toward two \textit{different} types of remedial obligation. One type, neatly grasped by the Kantian, is the direct enforcement of the primary obligation. This corresponds to specific performance for breach of contract and injunction for nuisance. Here, the remedial obligation plainly just is the original obligation. The other type seems to be better understood by Gardner, although work remains to be done to figure out how he can achieve continuity. Here, we have the creation of secondary obligations from the ashes of primary obligations. The

\textsuperscript{263} Zipursky, “Substantive Standing,” \textit{supra} note 75 at 340.
relevant areas of private law remedies here would be damages for tort, expectation damages for breach of contract, and so on.

Notably, however, a theory such as Gardner’s that deals with second-best obligations should not, on its face, have a problem with the situation where the first-best could still be achieved. But even here there are problems with both accounts. Even remedies that seem to aim at promoting the exact state of affairs as mandated by the original private law obligations are second-best. It is better not to create a nuisance at all than to be ordered to have it enjoined. It is better to perform one’s contracts immediately than to have a court order one to do what one’s contract bound one to do. So there remains a rational gap between doing the best and doing the next-best thing that the Kantians seem to struggle with. With respect to Gardner, his problem of achieving continuity simply is the problem of private law’s remedies as I have set it out. A more nuanced intrinsic account is thus in order.

24 A simplified account

The aim of this chapter, although predominantly critical, is not exclusively so. In a more positive vein, it contains the following suggestion: That we give renewed attention to the reasons involved in private law actions, specifically, with the reasons the defendant has for

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264 However, in Zoë Sinel, "Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment" (2011) 31: 3 Oxford J Legal Stud 551, I suggest certain problems that arise for Gardner in this context.
performing or not performing a certain action *vis-à-vis* the plaintiff.\textsuperscript{265} Under this account, we may avoid much of the confusion introduced by the term “obligations.” The concept of obligation has a role to play in explaining the remedial imperatives of private law, but it is one that is intimately tied to an understanding of obligations as a complex concept consisting of two types of reasons.

To this end, I propose that remedial actions can be explained as a simple fact about the nature of reasons. Joseph Raz articulates the germ of this idea in his “conformity principle.” Recall, according to this principle, “[o]ne should conform to reason completely, insofar as one can. If one cannot, one should come as close to complete conformity as possible.”\textsuperscript{266} This is just a truism about reasons. Let us take an uncontroversial case: I am planning to make myself a grilled cheese sandwich, but lack cheese.\textsuperscript{267} My preference is for (Canadian) cheddar. Thus, I have a reason to buy cheddar. Unfortunately, you have purchased the last remaining block of cheddar, leaving only Swiss cheese remaining. Even though there is no cheddar, I still really want a grilled cheese sandwich. The same reason I had to buy cheddar—that I wanted a grilled cheese sandwich—tells me to purchase the Swiss. Now, let’s look again at our more complex example: my promise to pick you up from the airport.

\textsuperscript{265} In subsequent chapters I highlight as one of the strengths of a reason-based account, its ability to encompass and explain with ease the reasons that apply to the other reason-responsive entities involved in private law disputes, namely, the plaintiff and the court.

\textsuperscript{266} Raz, “Personal Practical Conflicts,” *supra* note 15 at 189; Gardner, “Part 1,” *supra* note 15 at 33, n 56 for explicit acknowledgement of Razian influence.

\textsuperscript{267} Thanks to Chris Essert for inspiring this example.
On my way, I spot a single-car accident. I stop to help and because of this fail to meet you when your flight lands. It is now impossible for me to make it on time. Does this mean I no longer have either a reason to do so or any reason to do something that will contribute to your getting picked up? Clearly not. My original reason does not disappear just because it was outweighed by the more urgent demands of another. I still have a reason to do something to serve the value that would have been served by picking you up as promised. I have reason(s) perhaps to apologize to you, to explain the (legitimate) reasons for my breach, to pay for your cab fare, etc.

The tenacity of reasons is further illustrated by the following situation: imagine that before I leave for the airport, you call me and say another friend has offered to pick you up and so you no longer require me to. In this situation, we may say I no longer have any reason to drive to the airport, to pay for your cab fare, to apologize, to explain myself etc. Your releasing me from my promise is what Raz refers to as a “cancelling condition.”

Assuming the non-existence of any relevant cancelling condition, reasons do not disappear unless satisfied. This is just what it is to be a reason for something.

Note that often, when we explain or justify our actions, we do so by reference to increasingly more general claims: Why should I have Swiss cheese? Because I want to eat cheese. Why do I want to eat cheese? Because I am hungry and so I want to eat.

In sum, there is a level of generality at which the explanation for the defendant to perform a remedial action toward the plaintiff continues to apply invariantly across her failure to do so. A defendant can satisfy this overarching general reason to different degrees. He conforms completely when he pays a debt when it comes due and when he manages to avoid damaging plaintiff’s property. Upon failure to conform completely, the original reason continues to exert normative force, demanding further actions that amount to conformity.
inasmuch and insofar as remains possible with the more general reason she possesses. What is left over between partial and complete conformity is generally a matter of rational regret.

We can also talk about this structure in terms of obligation, although matters get a bit more technical. In the language of obligations, my account can be expressed as an implicit requirement of Gardner’s account. Let me say more here about potentially saving Gardner’s account from the discontinuity noted above. In a recent article, we might read Gardner as retreating from the continuity thesis and toward the unity account:

When I fail to perform a duty that I owe to someone, there is something that I still owe that person afterwards. Strictly speaking, I still owe him performance of the duty, which continues to bind me. But if it is too late to perform – the dirty deed is done – I now owe him the next best thing.\textsuperscript{268} I owe it to him to put him back, so far as it can now be done, into the position he would have been in if I had done my duty in the first place. This is true whether his life was disrupted by me or not. It is true even if he did not notice the violation. However, where his life was disrupted, the negative value of the disruption combines with the residual force of the duty I originally violated to create a powerful case for reparation, and indeed a powerful case for the legal recognition and enforcement of a reparative duty. Needless to say this line of thought requires a great deal more work before it holds up. But properly developed, it explains a lot.\textsuperscript{269}

Here, he appears to say that within the original duty is contained a remedial duty—that the original duty, in addition to mandating performance of the action it requires, also possesses

\textsuperscript{268} Gardner’s footnote (n 20) here is to Joseph Raz’s “Personal Practical Conflicts,” \textit{supra} note 15. Here, he also mentions, “much the same idea is floated by Weinrib in \textit{The Idea of Private Law} at 135.”

"remedial force" which once "the dirty deed is done" requires performance of the next-best thing. He could be read as now advocating that the duty is the same—the "strictly speaking" and nod (in a footnote to the above quoted text) to Weinrib might indicate this—but this clearly doesn't line up with his earlier writing where he's quite explicit that the remedial duty is new and the original duty "discharged."²⁷⁰

Even if he had, this wouldn't solve Gardner's problem about what it is that continues post-breach. But his co-authored piece with Timothy Macklem on reasons provides a hint as to what this could be. According to Gardner and Macklem, when a mandatory reason is not complied with, what sticks around is the exclusionary force of the reason. It's now no longer a reason to exclude reasons that count against performance of the action it mandates, but a reason to exclude reasons simply to forget about its breach:

Every time one does not do what any reason would have one do, be that reason mandatory or otherwise, a trace is left on one's life. This is always in principle a matter of regret, for as we saw reasons do not lose their force as reasons merely because they are defeated. Where ordinary reasons are concerned, however, this enduring force, like the original force of the reasons in question is merely advisory. It may weigh heavily, but all the many and well-known reasons not to regret also weigh heavily and often justify one in getting on with one's life regardless.

Where one fails to do as a mandatory reason would have one do, however, the enduring force of the reason is different. It continues to be a mandatory reason even after one's failure. Just as some reasons not to perform the required action were excluded by virtue

²⁷⁰ In personal correspondence, Gardner has assured me that he has not abandoned his “discharged-by-breach” thesis.
of the fact that the action was required, so some reasons to forget all about one's non-performance of the action afterwards are excluded. In other words, it is not so easy to brush aside the failure to do as a mandatory reason would have one do. It cannot just be a matter of pointing out that one would have a better life if one stopped crying over spilt milk. This is true a fortiori where the mandatory reason is also categorical, for here changes in one's goals do nothing to eliminate the reason's application, and this is true no less when the time for performance is past. One cannot escape the blemish on one's life by a simple change of direction. The rational pressure that this creates is the familiar pressure for various remedial and purgatory reactions, such as apology, payment of compensation, penance or punishment.271

To understand this passage, we must recognize that, for Gardner, an obligation consists of two parts. The first is a straightforward reason to do the action that the obligation mandates. I have an obligation not to steal your bicycle. The first part of the obligation is a reason telling me not to steal your bicycle. It could in turn give rise to various other reasons that would assist or enable conformity with this first-order reason, for example, if daily I were tempted to liberate your bicycle from your unlocked garage on my way to work, it would provide me a reason to choose a different route, perhaps to buy you a lock, etc. In addition to this reason not to steal your bicycle, an obligation consists of a second part, a second-order reason, a reason not to act for certain reasons that might counsel against acting on the first-

271 Gardner & Macklem, “Reasons,” supra note 19 at 467. Gardner also notes in footnote 36 at the end of this passage that “[t]he same forces create the rational pressure for retrospective emotions such as guilt, shame and regret.”
order reason.\textsuperscript{272} That I don’t have my own bicycle and enjoy the feeling of wind in my hair as I merrily bike around are strictly speaking reasons for me to “borrow” your bicycle. The reason not to steal your bicycle is \textit{obligatory} precisely because it preempts these reasons. I cannot act on these reasons and consider my action rational. Such reasons, in other words, are excluded. They do not enter into the balancing scale when I’m figuring out what to do about my bikeless state.

If I do breach my obligation and abscond with your bicycle, it is clearly now impossible for me to conform to the first-order reason. Having stolen it, I can no longer not steal it. But what about the second part of the obligation? What about its exclusionary force? On Gardner’s analysis, we might say that it is precisely the exclusive force of the obligation that sticks around, excluding reasons to treat the obligation’s violation as just crying over spilled milk. This is a reflection of the mandatory nature of the obligatory reason.\textsuperscript{273} Thus, if we understand obligations as protected reasons, the continuity of the original reason extending to the remedial reason is coherent. The first-order reason to perform the action is discharged by the breach. One can no longer do what the obligation mandated one to do. However, the exclusionary reason (the second prong of the protected reason—reasons not to act on reasons contrary to the performance of the first-order reason) sticks around. It is not discharged.

\textsuperscript{272} This, I suggest, is what Gardner is referring to when he says “the extra reason for action that consists in the very fact that it was obligatory not to have done what one did.”

\textsuperscript{273} Its categorical nature is reflected in that one’s whim not to be obligated is irrelevant. We can see this reflected equally easily in the law, where one’s personal desire not to be bound by the law is irrelevant from the law’s perspective. Law demands conformity irrespective of personal whims.
Gardner, I submit, unintentionally misleads when he talks about the rationale of the original reason being what sticks around. This isn’t quite right. What sticks around is the deontic structure (form) of the obligation. It is the fact that an obligation consists of two types of reason (a first-order reason to x and a second-order reason not to act on reasons not to x) that accounts for the continuity between primary and secondary obligations. The first-order obligation is sometimes discharged, but the exclusionary force sticks around. The rationale does come into play, but only at the stage of determining the appropriate content of the secondary obligation. Thus the structure provides the normative force, whilst the rationale gives evidence for the appropriate content.

Thus, there are on my account two ways in which continuity between the original and remedial obligation can be explained. One, as immediately outlined above, relies on the continuity of the exclusionary reason. This applies in situations where it is impossible to conform even in part to the original (operative) reason. Torts that culminate in the destruction of property, marring of bodies, or death are clear examples of this. Doubts as to the continuity have led some theorists to doubt that there can be any analytic connection between the original and remedial rights and duties of private law. The above shows how this is not a necessary conclusion to draw. The second relates to situations where conformity with the original (operative) reason is still possible. Here the operative reason cannot be completely conformed to in a temporal fashion, but it would be perverse to understand remedial actions as

274 Seem in particular, Zipursky, “Substantive Standing,” supra note 75.
anything other than attempts to come as close as possible to conformity with the first-order reason of the obligation.

25 Conclusion
My modified intrinsic account has the following benefits. At the level of formal structure it is in many ways indistinguishable from the intrinsic accounts of Weinrib and Gardner presented herein. This is a strength of intrinsic approaches generally and one that I would not easily abandon. Instead, I want to bring more into what counts as the “inside.” My focus on reasons allows me to do just this. My account offers a general view about the nature of reasons in all contexts, not just legal or private law contexts. This reflects, I contend, our intuitive understanding of law, according to which law is just one of the many ways in which we ascertain how we ourselves ought to act and how we may evaluate the actions of others.

One of the more significant upshots of my approach is that it explains the following apparently contradictory phenomena: 1) that remedies do seem to ameliorate past wrongful conduct and 2) that remedies do not make it as if the wrong never happened. The continuity between the original right and the remedial right is explained through the nature of either first-order or second-order reasons depending on the nature of the original right interference, but we can grasp that there is something left over. The gap makes sense now; we can see it as the rational space left behind when one does not conform completely and immediately to the reasons one has. Finally, the strength of my proposed account is that it simplifies what I think is intuitively a simple situation: if we fail to do as we ought to have done, we cannot simply walk away and wash our hands of it, we continue to have to do something to account for our failure
inasmuch as possible. And when we do, we do something that in fact does seem to rationally respond to our initial failure. In sum, sometimes you do need to cry over spilled milk.
Chapter 6
The Role of Corrective Justice

26 Introduction

The preceding chapters have drawn and relied on the following distinction between intrinsic and extrinsic accounts: the former, unlike the latter, has no need of an independent principle of repair. Intrinsic accounts generate remedial obligations from within—that is, from the plaintiff and defendant’s original relationship. To be consistently intrinsic, an account must be self-sufficient in this regard. If it is shown to require an appeal to some external principle, then the account on its own is insufficient to explain and justify remedial obligations. In other words, if something more comes relevantly into the picture, then something more than the relationship between the parties is needed to justify and explain the remedial relationship. So much then, our story would conclude, for such a so-called “intrinsic” account.

Of the two leading intrinsic accounts analyzed in the preceding chapter, a major theoretical component common to both has been ignored. This is the role played by a particular form of justice, corrective justice. The Aristotelian principle of corrective justice, according to which an agent who causes a wrongful loss or receives a wrongful gain has an obligation to make good that loss or restore that gain to its sufferer, is widely accepted as part of (if not the whole of) the rational explanation for private law’s remedies. Gardner and Weinrib both regard this principle of justice as a necessary to comprehend private law relations. As we will see, Weinrib seems to say that it is also sufficient, while Gardner maintains only its necessity. In this chapter, we inquire into the nature of this principle, specifically, whether it is something extra, something distinguishable and separate from and thus external to the
immediate relationship between the plaintiff and defendant? In other words, is it, under either of Weinrib or Gardner’s respective accounts, an independent principle of repair? If so, this would be cause for serious concern, as this would challenge the intrinsic/extrinsic distinction I have drawn, converting the former into an instance of the latter. Alternatively, we might conclude that there is no role for corrective justice to play in intrinsic accounts at all, that corrective justice is not part of the original relationship of the plaintiff and defendant and since only this relationship is necessary to ground obligatory remedial actions, corrective justice is unnecessary. Ultimately, I caution against both of these interpretations. Corrective justice does have a role to play in intrinsic accounts of private law’s remedies and this role is not properly characterized as extrinsic. To demonstrate this, we must embrace a more nuanced understanding of just what the virtue of corrective justice is. This I introduce following criticism of what has been so far suggested and broadly accepted in the literature.

My critical arguments are as follows: First, under what I call a thin account, which limits corrective justice’s role to the remedial stage, corrective justice seems to become just the sort of independent principle that is anathema to an intrinsic account. If it is necessary to invoke the principle of corrective justice to ground the defendant’s remedial obligation, we are looking to a feature outside the normative relation of plaintiff-defendant. Second, an attempt to salvage corrective justice’s role by adopting a more robust conception of the principle, one that conceives of corrective justice as constitutive of the plaintiff and defendant’s relationship from the outset of their interaction, what I call a thick account, succeeds in avoiding extrinsic characterization, but at the apparent cost of rendering corrective justice redundant.
One of the goals of this chapter is to see whether a profound difference between our leading intrinsic approaches exists with respect to corrective justice. Recall the collapse of Gardner’s continuity thesis into Weinrib’s unity thesis as evidence of only an apparent difference. Our question, therefore, is whether there is a substantial disagreement between the two with respect to how corrective justice plays out in private law’s remedies. My answer to this is yes and no. While Gardner’s remedial or thin account explicitly rejects Weinrib’s juridical or thick account, I will show that an application of the former to certain spheres of private law reveals the necessary presupposition of something like the latter’s robust idea of corrective justice. As such, part of the purpose of the critical arguments of this chapter is to isolate the nub of our intrinsic theorists’ disagreement.

27 Review: intrinsic and extrinsic perspectives
The private law theories this chapter focuses on are the intrinsic accounts of private law.275 Broadly speaking, such theories take up an internal perspective toward private law, evaluating private law on its own terms.276 In other words, private law is understood as explicable through its own concepts and not through some “external referent.”277 My understanding of an internal perspective is narrower. I take up an internal perspective with respect to private law’s remedies

275 See preceding chapters for arguments in favor of intrinsic accounts.

276 The clearest expression and endorsement of this position is found in the opening pages of Weinrib’s The Idea of Private Law: “one must understand private law from a perspective internal to it. / … [This] approach treats private law as an internally intelligible phenomenon by drawing on what is salient in juristic experience and by trying to make sense of legal thinking and discourse in their own terms.” (Weinrib, The Idea of Private Law, supra note 1 at 2-3).

277 Ibid at 21.
and not necessarily towards private law as a whole.\textsuperscript{278} The intrinsic thesis, therefore, just is that the explanation of private law’s remedies lies within an understanding of the original rights and duties that constitute private law’s primary relations.

We may easily distinguish the intrinsic approach from “extrinsic” theories. Such theories, recall, approach private law from an external perspective. Its institutions and concepts are evaluated and made intelligible from without. As a result, they may take the question of remedy to be wholly separate from questions involving the original right/duty relation. Whether the plaintiff has a right and the defendant a duty is one thing, and whether the defendant has a remedial obligation and the plaintiff a right to a remedy is another. A clear example of this approach lies in law and economics literature. Take Calabresi and Melamed’s \textsuperscript{279} infamous fourth rule, discussed in greater detail in Chapter 2. Here the plaintiff is awarded the “right” to live free of the defendant-caused nuisance, but must pay the defendant compensation for his cost in being so enjoined. While the plaintiff is awarded the right, it is the defendant in a sense who gets the remedy.

Earlier, I argued that private law’s remedial institutions receive better interpretive treatment under an intrinsic lens. This conclusion is supported by certain truisms of practical reasoning, especially, about how reasons for action play out in situations where complete conformity is no longer possible. I argued that just because the contract is breached, the tort

\textsuperscript{278} It might be the case that an internal perspective towards remedies \textit{entails} a thoroughly internal perspective toward the whole of private law. Consideration of this lies outside the ambit of this thesis however.

\textsuperscript{279} Calabresi & Melamed, \textit{supra} note 57.
committed, or the unjust enrichment not immediately returned does not mean that the original reasons to perform the contract, not to commit the tort, or not to retain the unjust enrichment disappear. To think this would render most if not all of our remedial actions unintelligible. In other words, the original relationship (contractual, tortious, or restitutionary) between the plaintiff and defendant continues to exert normative force, mandating the defendant's remedial actions. It simply doesn't make sense to say that this original reason disappears by virtue of an individual's failure to conform to it. Reasons (whether obligatory or other) do not disappear by virtue of an individual's failure to respond appropriately to them. Instead, they stick around, demanding whatever conformity remains possible. So it is with reasons generally, and so it is with private law's remedies. The logic of private law is happily not utterly divorced from the general structure of how we understand our world and the (practical responsibility of) agents that function within it.

Because intrinsic accounts generate remedial obligations from within—from the original relationship (and the reasons that constitute this relationship) between plaintiff and defendant—they are committed to the non-necessity of an independent principle of repair. All that is normatively and logically required to justify the defendant's remedial obligation is the original relation (tortious, contractual, or restitutionary) between the plaintiff and the defendant. By contrast, we may define extrinsic accounts by their endorsement of just such an independent principle. Compensation, for example, is owed because it will further some goal external to the immediate relation of the parties, for example, deterrence of wrongdoing, efficient loss-allocation, or the necessity of a public institution of private redress. With this distinction in mind, let us turn to the core subject of this chapter's analysis: corrective justice.
28 Corrective justice as orthodoxy

Corrective justice plays a pivotal role in intrinsic theories.\textsuperscript{280} Corrective justice is the intrinsic form of remedial relations, it is the internal value of private law, and is thus an acceptable ground for remedial obligations.\textsuperscript{281} A close look at its origin reveals why it is the most frequently invoked brand of justice in private law scholarship. Famously, Aristotle identified two forms of (particular)\textsuperscript{282} justice, that is, two ways in which interpersonal relationships may be regarded as just:

Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that which plays a rectifying part in transactions between man and man.\textsuperscript{283}

\textsuperscript{280} An apparent exception is civil recourse theory. Benjamin Zipursky and John Goldberg see their account as opposed to extrinsic accounts, but also reject corrective justice explanations. (See Zipursky, “Rights, Wrongs, and Recourse,” \textit{supra} note 75 at 4, where Zipursky claims that civil recourse marks “a third way of understanding tort law.”) Earlier I argued that civil recourse theories, understood by their own logic, are better interpreted as extrinsic rather than intrinsic approaches to private law. (Chapter 2).


“(A)” references distributive justice, the distribution of social goods and burdens by the state according to a principle of distribution, and “(B)” corrective justice, where the justice is transactional in nature, concerning immediate relations between persons.

The distinction between (A) and (B) further marks out two categorically different forms of equality that correspond to public and private considerations of justice, respectively. To illustrate the form of equality for distributive justice, let $X$ and $Y$ represent two abstract persons. Alongside $X$ and $Y$, let us posit an external principle to function as the criterion of distribution: public-spiritedness in the service of the polis, to take an appropriately Aristotelian example. The more $X$ or $Y$ partakes in this criterion of distribution, the larger their deserved shared of the relevant social goods (represented by the lower-case letters $x$ and $y$). Thus, the form of equality for distributive justice can be represented as a ratio: $X : Y = x : y$.

By contrast, corrective justice requires no external principle of distribution for its form of equality. Its equality is the equality that exists between two parties to a transaction. Aristotle’s instructive illustration for this form of equality is a series of three lines:

\[
A \quad E \quad A' \\
B \quad B' \\
D \quad C \quad F \quad C'
\]

Line BB’ represents the baseline, the hypothetical starting position shared by lines AA’ and CC’. Imagine that CC’ takes from AA’ a segment, AE, and adds it to itself as represented above as segment DC. Imagine further a point F on the line DCC’ such that CF is equivalent to AE. We can now say that DCC’ is greater than EA by DC plus CF. To arrive at the equality necessary to

\[284\text{ Weinrib, The Idea of Private Law, supra note 1.}\]
return to the equal starting point of AA′=BB′=CC′, we must detach DC from line DCC′ and reattach it to line AA′ (now the abbreviated line EA′).

If AA′ represents the plaintiff and CC′ the defendant, with BB′ functioning as a reminder of the parties’ original baseline, it becomes obvious why Aristotle’s account of corrective justice appeals to private law theorists. In a tort situation where that the defendant converts the plaintiff’s property. The defendant (CC′) takes segment AE from the plaintiff and adds it to his own rendering it the new enlarged line DCC′. Corrective justice demands that DC be returned to the, now wrongfully shortened, line EA′ so that all lines return to their pre-wrong state—that is, all are the length of BB′.

The aptness of corrective justice appears even more evident in the law of unjust enrichment. The gist of the cause of action in unjust enrichment is that the defendant, through no necessary fault or action of his own, has come into possession of something that

285 Conversion works particularly well to illustrate the way in which Aristotle’s corrective justice maps onto tort law. In other torts, however, it is notable that the gain of the defendant is not materially equivalent to the plaintiff’s loss. If the defendant negligently smashes into the plaintiff’s mailbox with his car, we would be hard pressed to say that the defendant realized any material gain from this wrong, let alone that the gain he realized would be equivalent (or even necessarily connected to) the loss suffered by the plaintiff. Weinrib has noted that the gain we (and Aristotle) are talking about here is not a material gain, but a normative one. The gain is the defendant’s extra bit of freedom he has exercised in trampling on plaintiff’s rights. This precisely mirrors the plaintiff’s normative loss of having her rights trampled on. See Weinrib, “The Gains and Losses of Corrective Justice” (1994) 44 Duke LJ 277 at 286: “corrective justice is concerned with the correlativity of normative, not material, gain and loss.”) For recent criticism of this, see Hershovitz, “Corrective Justice for Civil Recourse,” supra note 9 at 114-115.

286 For doubts, see Sinel, supra note 264.
once belonged to the plaintiff and which the plaintiff did not transfer with true consent.\textsuperscript{287} In legal terms, (1) the defendant receives a benefit (is enriched) (2) from the plaintiff (at the plaintiff’s expense) (3) that it is unjust for the defendant to retain.\textsuperscript{288} Hence, it is easy to see why many legal scholars see reasons of corrective justice as the most fitting explanation for the duty of restitution for unjust enrichment.\textsuperscript{289} In the Aristotelian language of corrective justice,

\begin{quote}
I am leery of saying “with defective consent” as it is an oversimplification. For example, it leaves unexplained unjust enrichment cases where the unjust factor – i.e., what triggers restitution – is a failure of consideration as a result of a subsequent judicial finding that the contract, once duly entered into, is now void. In these cases, there is obviously good consent since there had to be to ground the contract in the first place. See Kleinwort Benson Ltd v Lincoln City Council (1998) [1999] 2 AC 349 HL (Eng). Furthermore, consent is generally considered legally effective in unjust enrichment in the sense that it is sufficient to pass title from the plaintiff to the defendant.
\end{quote}

\begin{quote}
What “unjust” means in the context of unjust enrichment is contested. Proponents of the (English) “unjust factors” approach construe “unjust” to entail the presence of one or more of the recognized common law unjust factors (viz. mistake, duress, failure of consideration, and undue influence). What is unjust about the transfer is that the plaintiff’s consent was vitiated or impaired as result of the presence of one or more unjust factor. Ignorance has controversially been forwarded as an additional unjust factor since, a fortiori, it entails the utter absence, not just mere impairment, of consent. By contrast, proponents of the absence of basis approach locate the ‘unjustness’ in the lack of legal justification for the defendant’s retention of the benefit—that is, the transfer cannot be explained by contract, gift, or some other legally recognized ground.
\end{quote}

\begin{quote}
The at times uncritical adoption of corrective justice as a framework for unjust enrichment can further be attributed to the comparative difficulties legal theorists have encountered when attempting to apply this framework to the law of torts, in particular, negligence torts. The most challenging obstacle for viewing certain torts as an instance of corrective justice is the lack of equivalence between the plaintiff’s loss and the defendant’s gain. That is, in a typical negligence-governed tort action, while the defendant’s breach of his duty of care vis-à-vis the plaintiff results in (material) loss to the plaintiff, the defendant will rarely reap any consequent (material) gain from his injurious behavior. By contrast, in unjust enrichment, the loss of the plaintiff is identical with the defendant’s gain. It is precisely what the plaintiff has lost by virtue of the mistransfer that the defendant has gained: line segment DC is identical to AE; in fact, it is line AE. With respect to negligence’s lack of equivalence between the plaintiff’s loss and the defendant’s gain, Weinrib has a sensible solution. He considers the relevant gains and losses to be normative, not material. The normative loss is the infringement of plaintiff’s right and the normative gain is the defendant’s over-stepping his sphere of rightful action. The material losses and gains are, for Weinrib, only
\end{quote}
the unjust enrichment cause of action would look something like this: the plaintiff’s holdings are exemplified by line AA’, the subtraction from the plaintiff’s wealth is line AE, the addition to the defendant’s holdings is line DC, and the operation of the restitutionary duty is the transfer back of DC from line DCC’ to EA’. Thus, the parties CC’ and AA’ are restored to the position they occupied before the unjust subtraction; they are restored to the baseline of BB’.

Far from unequivocal, the principle of corrective justice admits several interpretations. Here, I limit the analysis to two, one thick and one thin.\textsuperscript{290} Conveniently, the thick and thin manifestations of the infringement of right and their function is to serve as a means to quantify damages. Weinrib, \textit{The Idea of Private Law}, supra note 1 at 115-120. For a trenchant criticism of Weinrib’s argument, however, see: Perry, \textit{supra} note 151 at 478-488.

Notably, this adoption of the Aristotelian language of corrective justice is not limited to legal theorists. Judges too explicitly invoke it: \textit{Regional Municipality of Peel v Canada} [1992] 3 SCR 762 at 804, where McLachlin J [as she then was], speaking for the Supreme Court of Canada, states, “[t]he concept of ‘injustice’ in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted.”

Robert Stevens has recently introduced a similar, but threefold, taxonomy of corrective justice accounts. (Stevens, “Rights and Other Things,” \textit{supra} note 163). The first is a formal account of corrective justice. Here, corrective justice does not do the justificatory work, but instead itself requires justification. (Stevens, “Rights and Other Things,” \textit{supra} note 163 at 144). Stevens associates this account with John Gardner. I agree with this attribution. According to a formal account, corrective justice simply describes a \textit{pattern} of allocation, an allocation back, a correction. One could thus imagine several unappealing possible patterns of corrective justice, for example, “all gifts must be returned.” The formal patterned approach to corrective justice, notably, can be seen in all three of Stevens’ categories. The second Stevens refers to as a “weak” or “trite” formulation of corrective justice, which he associates with Jules Coleman. The essence of this position is that once the primary rights are violated, we should do the next best thing to the wrong never having occurred. Stevens thinks this is an obvious, but uninteresting claim. (Ibid at 145). This is the type of corrective justice I would associate with Gregory Keating and to a lesser extent John Gardner, to be discussed below. The third approach to corrective justice Stevens associates with Ernest Weinrib, calling it the “broader conception” or the “fat version” of corrective justice. (Ibid at 145-46). This is identical to my “thick” account to be introduced in section 29.1. According to it, not only our secondary (remedial)
conceptions of corrective justice line up with two formulations of the intrinsic account, what in the preceding chapter are labeled the “unity” and “continuity” theses respectively. The thick conception views corrective justice as constitutive of the plaintiff and defendant’s relationship from the outset of their interaction. When combined with its corresponding private law theory, the unity approach, the result is corrective justice’s redundancy. The thin conception limits corrective justice’s role to the remedial stage. Combining this version of corrective justice with its private law correlative, the continuity approach, appears to render corrective justice as precisely the sort of independent principle that is anathema to intrinsic accounts. Again, if it is necessary to invoke the principle of corrective justice to ground the defendant’s remedial obligation, we are looking to a feature outside the normative relationship of plaintiff-defendant.

As a reminder, despite its critical tenor, this chapter is reluctant to conclude that corrective justice has no role to play in private law remedial relations. The similarity in form between the defendant’s obligation of repair and Aristotle’s conception of corrective justice forcefully suggests the contrary. My aim is rather to challenge certain preconceptions about how obvious this role actually is. By way of conclusion, I advance an alternative understanding of the role corrective justice might play, one that avoids its characterization as a redundant or extrinsic feature.

rights, but also our primary rights (our rights to property and bodily security) can be justified by reference to corrective justice: “It can justify the right to the toy aeroplane, and not just the obligation to pay for negligently smashing it.” (Ibid).
Two conceptions of corrective justice and two intrinsic approaches to remedies

The acceptance of corrective justice as a, if not the, animating principle of private law is all too often sweeping and uncritical. Few of those who call on it devote much time to exploring its interpretive nuances. This is an unfortunate omission as there is in actual fact little consensus on what corrective justice means and what, therefore, its role in private law can be. In what follows, I analyze two possible interpretations alongside the private law theories in which they find their respective homes.

Thick corrective justice and the unity approach

On a thick interpretation, corrective justice permeates the total plaintiff-defendant interaction from the original right and duty through to the remedial right and duty. This thick version is at home in what I call the “unity” approach to private law’s remedies, a leading proponent of which is Ernest Weinrib. Weinrib recognizes the formal limits of Aristotle’s account of corrective justice, that the type of equality—how the parties are equal—is empty. According to Weinrib, Immanuel Kant and GWF Hegel, two millennia later, supply the arguments to fill this gap. The Kantian conception of right and the Hegelian conception of abstract right provide the content for the structure of corrective justice. Kant and Hegel also furnish the framework for the unity approach to private law’s remedies. The combination of a thick corrective justice theory with a unified understanding of rights and remedies, I suggest, has the unhappy consequence of rendering corrective justice unnecessary in any rational explanation of remedial actions.

Kant’s idea of right forms the foundation for the unity approach to private law’s remedies. According to Kant, what it means for me to have a right is that, within the scope of
the right, I am free from the choice and actions of another. I am a self-determining agent with the capacity to set, and to try to realize, objectives external to myself. Thus, equally essential to my being the type of being that I am is that I am not other-determined. Others do not have the freedom (the right) to decide for me or to act upon me without my say-so. In fact, this just is what it means to be free: that others don’t decide for me. I am free because I am not other-determined. Further, in order that my claim to freedom (to right) is not a contradiction, I must recognize that others have normatively identical freedoms (rights) with respect to my actions and me.\textsuperscript{291}

The consequence of this recognition is that each human agent possesses a sphere of equal freedom relative to that of every other human agent. Violations or intrusions into such spheres are acts against right (or wrongs). Wrongs do not expunge rights. It cannot be the case that by virtue of my wrongdoing I deprive you of your right. Because your right is an embodiment of your freedom, actions opposed to your freedom cannot annul it. If they did, your “right” would not be a right properly so-called. This is because a right just is freedom from the choices and actions of others. When I wrong you, rather than destroying your right, what I do is harm or set back certain means you have to its full actualization. When the law orders me to restore those means to you either in specie or in its equivalent value through a calculation of monetary damages, all it is doing is ordering me to give you back these means. In other words, the right, understood as a manifestation of freedom, cannot be destroyed by acts contrary to freedom. Physical things, however, undoubtedly can be and are so destroyed. We can thus restore one’s material ability to exercise one’s freedom by restoring to one the means one had

\textsuperscript{291} This is the universal aspect of Kant’s Universal Principle of Right.
or their equivalent. These are the means that you have to actualize the right—the right that you have had all along.292 This is the unity thesis with respect to private law’s remedies. The obligation the defendant has to repair is the same obligation that he initially had not to interfere with the plaintiff’s right. It is the same because the two obligations are *normatively identical*: they are different manifestations (in time and in content) of the same respect for another’s freedom (right).

How does the Kantian notion of freedom (right) works itself out *vis-à-vis* Aristotle’s formal corrective justice? Weinrib argues that Kantian right supplies the correlative content necessary for the correlative form. I suggest, however, that the two conceptions—Aristotle’s corrective justice and Kant’s right or Hegel’s abstract right—are two ways of describing the same phenomenon/relation. If this is so, then there is no need to invoke “corrective justice” in addition to Kantian right. Weinrib seems to support this interpretation:

* Aristotle’s corrective justice, Kant’s concept of right, and Hegel’s abstract right all refer—though in different terms—to the same bipolar structure of a correlative doing and suffering. Aristotle expresses this correlativity as a gain realized by the doer at the expense of the sufferer. Kant and Hegel, on the other hand, relate the immediate interaction of doer and sufferer to the juridical structure of right and correlative duty. In natural right theory, the embodiment of the abstract will in one’s body and property creates rights that other agents are under a duty to respect. The duty is owed specifically to the holder of the right, and the violation of that duty entitles the holder of the right to a legal remedy.

292 For a clear and persuasive picture of this see Ripstein, “As If It Had Never Happened,” *supra* note 14.
The differences between the Kantian-Hegelian and the Aristotelian accounts of private
law are expository, not substantive.²⁹³

When Weinrib later states that “Aristotle’s account of corrective justice is inchoately
Kantian,”²⁹⁴ we may take this to mean that the Kantian account represents an evolution of an
idea, one that was originally Aristotle’s, but which in essence remains the same idea. Aside
from pedagogical utility (helping us perhaps to distinguish distributive from corrective justice),
it isn’t clear what work corrective justice does that it is not already done in a more evolved form
by Kantian right.

When we ask why is it that the defendant must pay compensation to the plaintiff upon
his wrongful destruction of the object of her choice (i.e., property), the answer simply is that
she has a right to the control over her means that said property represents (i.e., is the physical
manifestation of). The answer, in other words, lies wholly within Kantian right. There is no
need to call upon anything further. More specifically, we do not need to say that it is a matter
of corrective justice that her means be restored. Corrective justice might accurately describe
the end result of the transfer back—the situations of the plaintiff and defendant now may be
described as correctly just—but it does nothing with respect to grounding it. The
justification is completely taken care of by the structure of Kantian right.

[emphasis added].
²⁹⁴ Ibid at 424.
Thus, under a thick account of corrective justice, corrective justice is subsumed by the more robust notion of Kantian right, leaving corrective justice with no substantive role to play. I realize that for Kantian legal theorists everything really just is one thing. For example, the right and the remedy are one as are the defendant’s respective duties at both the initial and remedial stage. As such, proponents of the unity thesis might take what I’ve just said as an argument in their favor. It is difficult, however, because it makes no practical difference, not to see corrective justice on this approach as redundant. Corrective justice as justice, as a virtue, has no specific role other than reinforcing the noted correlativity of the plaintiff-defendant relationships of which private law consists. In the next section, we see whether a thin conception of corrective justice fares better.

29.2 Thin corrective justice and the continuity approach
What it is that corrective justice is seen to respond to distinguishes thick from thin. For the thick account, it is a corrective injustice. The two parties interact as persons bearing Kantian right. If the interaction constitutes an interference with either bearer’s personhood, then this is a disruption of the abstract equality of persons established by a system of Kantian right: “the injustice that corrective justice corrects is essentially bipolar.”295 This inequality is a corrective injustice: “The idea that correlativity informs the injustice, as well as its rectification, is a central insight of the corrective justice approach to the theory of liability.”296

295 Weinrib, The Idea of Private Law, supra note 1 at 64.

Commenting on Weinrib’s claim that “the injustice that corrective justice corrects is essentially bipolar,” Gardner notes,

Reading this quickly, one reads it as a reiteration of the illuminating observation that corrective justice is itself essentially bipolar. But it is in fact a much stronger claim. It is the claim that not only corrective justice, but also the injustice which it corrects, is essentially bipolar. And from this Weinrib means us to proceed to the conclusion that the injustice which corrective justice corrects, being bipolar, is itself corrective injustice. ... But this position is obviously untenable: it generates an infinite regress. ... reasons of corrective justice are reasons to restore the parties to the relative positions they were in before, or would have been in apart from, some transaction between them. Corrective injustice consists in action against such reasons. But if the transaction which gives rise to reasons of corrective justice must also itself count as a corrective injustice, then it too must have involved action against reasons to restore the parties to the relative positions they were in before, or would have been in apart from some further transaction. And so on ad infinitum. The mistake which leads to this regress obviously lies in the idea that corrective justice only corrects corrective injustices. What we correct in corrective justice is, basically, some wrong we did. That wrong may sometimes be a failure to correct some earlier wrong we (or somebody else) did; it may be some further corrective injustice. But it need not be. It may equally be a distributive injustice. Or it may not be an injustice at all, but an act of (say) sheer dishonesty or pure inconsiderateness, and wrongful for that reason alone.297

Gardner’s criticism of Weinrib is a criticism of any thick version of corrective justice. Given that Gardner defines corrective justice as consisting simply of reasons to allocate back, then it doesn’t make much sense to say that the original relationship between the plaintiff and defendant is illuminated by corrective justice. This original relationship (unless it is one of

conversion or perhaps even of unjust enrichment) often has nothing to do with any question of allocation. When I negligently run over your foot, I do not act against reasons that might exist for returning to you the value of your bodily integrity and a life without pain and suffering. If a third party interferes wrongfully with my subsequent action of compensating you for your crushed toe, then this is a corrective injustice—an action against reasons of corrective justice—but this is not the only type of wrongdoing nor is it even close to the core type of wrongdoing that private law is concerned with. Corrective justice, for Gardner, is thus limited to the remedial stage. I call this the “thin” conception of corrective justice.298 For Gardner,

The question of corrective justice is ... the question of whether and to what extent and in what form and on what ground it [the something that has shifted between the two parties] should now be allocated back from one party to the other, reversing a transaction that took place between them. A norm of corrective justice is a norm that regulates (by giving a ground for) the reversal of at least some transactions.299

It is the justice of adding and subtracting, of allocating back. The wrong it responds to can be a corrective injustice, another injustice, or anything wrongful on its own without necessarily being an injustice (understood in the thin sense as a wrongful allocation).300

298 Sinel, supra note 264.
300 While Gardner criticizes the logic of the thick version of corrective justice, others take issue with its interpretative accuracy. According to Gregory Keating, for instance, it is misleading to give the concepts of wrong and its reciprocal right “an essentially remedial interpretation,” by which he means interpreting the wrong and right as illustrations of corrective justice. (Gregory C Keating, “Is Tort Law a Remedial Institution?” Center in Law, Economics and Organization: Research Paper Series and Legal Studies Research Paper Series, USC Center in Law, Economics and Organization Research Paper No. C10-11, USC Legal Studies Research Paper No. 10-10, 3
One goal of this chapter is to show that Gardner’s criticism of Weinrib is not quite fair. What Gardner means by corrective justice is very different from Weinrib’s intended usage. As such, it isn’t actually a criticism to say, as Gardner does, that given his (Gardner’s) definition of corrective justice, Weinrib’s understanding is vulnerable to the *reductio* he presents. In other words, Gardner defines corrective justice as simply reasons to allocate back. If this is the case, then it would be absurd to say that all the injustices corrective justice corrects are corrective injustices. But, notably, this is *not* how Weinrib defines corrective justice. For him, “corrective justice gets its peculiarly personal conception of tortious wrongs from its preoccupation with the remedial dimension of tort. Tort law’s remedial responsibilities are correlative to *in personam* rights. Duties of reparation in tort are owed to named plaintiffs and owed by named defendants. Remedial rights are held by and against particular persons; particular plaintiffs are bound to particular defendants through defendants’ tortious injury of plaintiffs. Corrective justice theory is quite right about all of this, quite right to insist on the bilaterality of remedial rights and duties and on the “unity of doing and suffering.” Primary rights and obligations, however, are not personal in this way. Primary rights and obligations are omnilateral, not bilateral. (Ibid at 31).

It is, however difficult to get a firm hold on Keating’s underlying theoretical allegiance, as he appears to vacillate between endorsements of the continuity and unity accounts. Here, he sounds wedded to a Gardnerian account with its focus on second-best and the language of primary and secondary obligations:

Remedial responsibilities in tort are subordinate, not fundamental. They are conditioned on and arise out of failures to discharge antecedent primary obligations. Those primary obligations are the ground of tortfeasors’ secondary responsibilities to repair the harms wrought by their torts. Repairing harm wrongly done is a next- or second-best way of discharging an obligation not to do the harm wrongly in the first place. (Ibid at 2).
justice is the idea that liability rectifies the injustice inflicted by one person on another.” It is the idea of correlativity. All it asserts is that if the remedy is a response to the injustice and the remedy is correlatively structured, then the injustice to which corrective justice responds must also be correlatively structured: “corrective justice draws out ... correlativity’s normative implications. For corrective justice, the point of liability is to correct an injustice between the parties. This correction can occur only if the structure of the injustice matches the correlative structure of liability.”

As I argued earlier against extrinsic theorists, a bilateral or relational wrong requires a relational remedy. My mother paying me the money you owe me in no way discharges your debt to me. This is the idea of corrective justice presented by Weinrib; it is clearly not the same as Gardner's idea that corrective justice is only about allocations back.

In sum, on a thin account, corrective justice is essentially remedial, regulating transfers back and the grounds of said transfers. Just as the thick description of corrective justice found itself at home within a specific theoretical perspective on private law's remedies (the unity approach), so too does the thin conception have its theoretical home: the continuity approach. Unlike the unity approach, the continuity approach conceives of the primary and secondary obligations (the original and remedial obligations) as distinct obligations. In order to remain within the intrinsic genus, however, it must still be the case under the continuity approach that


there is a deep and essential connection between the two obligations. They are distinct, but nonetheless intimately and rationally connected.

The puzzle is why does it make sense to perform a remedial obligation at all? In claiming that by failing to perform the initial obligation that obligation ceases to exist—“[following its breach] [m]y original obligation is, we should now be able to agree, discharged (put to an end) by its breach”304—Gardner sets himself the task of explaining why it is that performing the remedial obligation does seem somehow rationally related to the initial obligation.305 Gardner’s answer, recall, is that the apparent imperfect conformity with the original obligation that remedial actions seem to entail is actually perfect conformity with a new obligation, an obligation that is grounded in and called for by (some of) the same reasons that grounded the first obligation and which failed to be satisfied, but, because of the nature of reasons, did not as a result disappear. This rational connection between the primary and secondary obligations is explained through what Gardner calls the “continuity thesis:” “the thesis that the secondary obligation is the rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due.”306

Recall that the gist of Gardner’s theory is as follows: (1) The defendant has an obligation to φ at t₁. (2) His obligation to φ at t₁ is supported by various reasons, at least one of which is

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304 Ibid.
305 Ibid at 30.
306 Ibid at 33.
the operative reason, while others are auxiliary. (3) He fails to φ at t₁. (4) He can no longer, because of (3), conform to all of the reasons he had to φ at t₁. (5) However, he can still conform to some of them. (6) He now has a new obligation, an obligation to θ at t₂. (7) The content of θ is to be drawn from the rationale he had at t₁ to φ. (8) In θ-ing, he comes as close as possible to conforming to the reasons he had to φ. Like the Kantians’ unity thesis, therefore, Gardner, through his continuity thesis, appears to avoid calling upon an external principle of compensation to ground the secondary duty. Unlike the Kantians, however, he considers the duty to be a new obligation.

The apparent problem with the continuity approach is that corrective justice is no longer rationally connected to the original injustice or wrong. This is because, for Gardner, corrective justice is simply an operation: it is an allocation back along with the grounds for the allocation. If it is no longer connected, then how do we justify or explain its existence? Where does it come from and why? We might be tempted to think that it becomes an independent principle of repair. In other words, at the remedial stage we are asking a different question.

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307 An operative reason is a reason for which belief in it entails the attitude that I ought to do as the reason recommends. For example: I promise you that I will call on your mother on her birthday. Today is her birthday. The operative reason leading to the conclusion that I ought to call on your mother today is the fact of my promise to you. Auxiliary reasons are different. They serve to identify the act that the operative reason provides reason to perform and, in situations of conflict, help determine the weight of conflicting reasons. In the example above, the auxiliary reason is the fact that today is your mother’s birthday. This tells me how to execute my operative reason: go today to visit your mother. See Raz, Practical Reason and Norms, supra note 241 at 33-35.

308 In Chapter 4, I questioned the ability of the continuity thesis to retain its intrinsic character while simultaneously avoid collapsing into the unity account.

309 It seems, if we take a Keating-inspired gloss on the problem, that we have certain kinds of omnilateral wrongs causing loss, we need an external principle of corrective justice to govern allocations back.
from the initial stage. This is just a consequence of understanding the two obligations to be distinct. At the remedial stage the goal seems to be satisfying some externally given principle of corrective justice, a principle that notably did not necessarily exist at the original stage and so now enters at the secondary stage as something outside the original relationship. When we ask, therefore, why the defendant must pay the plaintiff compensation, our answer is no longer the straightforward, “because the defendant wronged her,” but the rather more strained, “because it is the correctively just action to take.” Clearly something has gone awry if this is how we must explain remedial obligations.

This, however, is not a completely fair description of Gardner’s idea of corrective justice. For Gardner, corrective justice is not a normative principle in the robust sense that it grounds transfers back. In a real sense, corrective justice does come from nowhere, so it is no surprise that it seems unconnected to the original obligation. Section 30 below contains a closer examination of this idea that corrective justice simply consists of reasons to allocate back in the context of private law’s remedies.

Notably, the thick version within the unity approach does not face this problem. This is because, recall, under that account, corrective justice permeates the entire relationship between the plaintiff and defendant from the very beginning. What corrective justice corrects is necessarily a corrective injustice. As such, we can see the reasons of corrective justice at the initial stages and so find them easily continuing through to the remedial stage. The continuity thesis, despite its name, struggles to establish this continuous connection. Thus, while the problem faced by the thick account is the lack of substantive role left for corrective justice, the problem for the thin account is the converse. Corrective justice here appears to come in independently (and inexplicably from the point of view of the original obligation) as an
extrinsic and stand-alone justification for private law’s remedies. In this regard we might think that it challenges its proponents’ coherent advocacy of corrective justice within an intrinsic approach. This criticism, however, does not stick to Gardner. His account is so thin that it does not present corrective justice as a justification at all, but merely as a description of the reparative allocative actions that make up private law’s remedies. As I will examine shortly, this thinness merely pushes back the problem of what it is that justifies private law’s remedies. In fact, Gardner’s account of allocation back presupposes a certain robust understanding of private law and its remedies.

30 Potential solutions

For a meaningful and coherent role for corrective justice within an intrinsic approach toward private law’s remedies, I offer a two-part solution. The first part concerns the type of intrinsic account private law’s remedies reflect, while the second relates more directly to the role corrective justice can play. Since the preceding chapters set out the first, the focus here is on the second.

Viewing private law’s obligations as reasons, allows us to see more nuance for the role of corrective justice. Specifically, we might be tempted to look at the difference between the reasons that apply to the judge versus those which apply to the defendant. While the defendant, we might say, is not motivated by reasons of corrective justice, the court may apply these from its removed perspective. In other words, the defendant does not pay

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310 The judicial perspective is removed because, not being a direct party to the action, he or she is disinterested.
compensation to the plaintiff because of reasons of corrective justice, but because of his initial wrongdoing—that is, his original actions against reasons he had (and continues to have) to not act against certain protected interests of the plaintiff. Here, I suggest that we look at the principle of corrective justice as something that applies to an individual tasked with answering a question of justice. The reason that the defendant must perform a remedial action vis-à-vis the plaintiff, in other words, is not necessarily a reason of corrective justice, although it might be if he sets himself up as a judge of his own actions. This is because the defendant is not being asked a question of justice, a question of how and upon what ground he should allocate something to another. It is only when a matter comes before a third party tasked with answering such questions, do reasons of corrective justice become particularly relevant.

In this way, the role corrective justice plays in private law is similar to that played by the principle of rationality in practical reasoning. When an agent acts rationally, he does not do so for or because of reasons or principles of rationality. As Scanlon has aptly summarized,

The behavior of a rational agent will (at least to a significant degree) exhibit the regularities described by requirements of rationality. But this is not because the agent sees this way of behaving as required by principles that she must be guided by. A rational agent who believes that p does not accept arguments relying on p as a premise because she sees this as required by some principle of rationality to which she must conform. Nor does she generally do it “in order not to be irrational.” Rather, she will be willing to rely on p as a premise simply because she believes that p. Similarly, a person who believes that doing A would advance some end of hers will not see this as counting in favor of A because some principle requires her to so count it, or because she must do this in order to avoid irrationality. Rather, insofar as she is rational she will see the fact that A would advance this end as a reason for doing A simply because she has the end in question. Ideas of rationality and irrationality belong to a higher-order form of
reflective thought that we need not engage in when, for example, we see that we have reason to take means to our ends.311

Similarly, we don’t act out of or because of a principle of corrective justice when we act in correctively just ways. If I owe you $10, I don’t pay you the $10 because corrective justice requires it—that is, for reasons of corrective justice. I pay you the money because I owe it to you. My reason for repayment of my debt (from my point of view) has nothing to do with refraining from acting in a correctively unjust way, but simply to do with paying my debt.312

Just because the agent him or herself does not act out of or from a principle of corrective justice, however, does not mean the principle has no role to play in evaluating whether an action is correctively just. It is open for others to invoke the principle to criticize or praise me for failing to or for succeeding in fulfilling it. Most notably, it is open to judges to do so. The same idea is at work with respect to the principle of rationality, as Scanlon notes: “Nonetheless, a person who violates these requirements [requirements of rationality] can be described correctly by others as irrational, and she can so describe herself. Moreover, irrationality of this sort is a defect, a failure to meet standards that apply to us.”313 For example, if I believe that p, but refuse to rely on it as a premise in my future reasoning, others witnessing this can appropriately and correctly criticize that I am reasoning irrationally.


312 These two reasons, however, might be interpreted as existing at different levels of generality. My reason to repay the debt might just be an instantiation of the more general, higher-order principle to act in accordance with reasons of corrective justice. I thank Arthur Ripstein for this insight.

313 Scanlon, supra note 311 at 4.
Likewise, if I fail to pay my debt to you, others can criticize me (invoking the principle of corrective justice) for failing to conform to corrective justice. Judges can go so far as to order my conformity with the principle. They can act, in other words, on the basis of reasons of corrective justice.

This is not to say that it would be impossible for an agent to pay his debt, for example, because it was the correctively just thing to do, but that this is the exception rather than the rule. Judges, by contrast, can be seen as more commonly invoking something like the principle of corrective justice in their reasoning. Judges can do this because they are essentially evaluating conduct, not acting on first-personal or even second-personal reasons, but rather on third-personal reasons. More significantly, the question a judge is being asked is necessarily an allocative question: who wins, the plaintiff or the defendant? Thus reasons of justice, it appears, are uniquely reasons for judges qua judges.

The above attempt at solving corrective justice’s dilemma of redundancy and externality contains the following serious difficulties: First, it doesn’t make sense for a judge to criticize a defendant for failing to act for reasons of corrective justice if the defendant did not already have reasons of corrective justice potentially applying to him. In this way the principle of corrective justice becomes like the principle of rationality, a higher order principle that applies to all of us. So there has to be something in the interaction between the plaintiff and the defendant at the initial stage that contains reasons of corrective justice. Or there has to be something in the nature of the misallocation itself that generates reasons of corrective justice for both the defendant and the judge to subsequently act upon. It is this latter possibility, it seems, that a conception of corrective justice that wants to keep corrective justice distinct
from other questions of how to behave must accept. The former is the one embraced by the Kantians. To take this perspective, however, is to reduce all questions of corrective justice into questions of Kantian right. In doing so, corrective justice as a distinct virtue loses its meaningfulness. Second, it places too much emphasis on the motivations of the parties. Corrective justice has nothing to do with motivation. When the defendant discharges a debt, this is the correctively just thing to do regardless of why he does it. Likewise, a court might simply be enforcing the law and have no reasons of corrective justice as part of its relevant motivation set.

Recall that the problem of redundancy is not considered a problem by an account that views such redundancy as only further evidence of an ultimate unity—i.e., the Kantian approach. As such, the criticism I have levied here against the thick version of corrective justice, while for those like myself who want to isolate a particular role for corrective justice to play, has bite, it does not strictly speaking cause the Kantians too much, if any, discomfort. Gardner’s approach appears different in that it allows us to see corrective justice as an essentially remedial operation. My worry with his version was that this disconnected corrective justice sufficiently from the original obligation so as to risk making it into an extrinsic principle. Let us now inquire whether this putative problem cannot be solved using the tools that Gardner’s continuity approach itself provides.

I suggest that, within the continuity approach, we can see corrective justice as sometimes, but not always, just the way to do the next-best thing. Private law interactions that involve allocations back entail reasons of corrective justice for both the defendant and the judge, but those without allocations back do not. In other words, sometimes the only way to
do the next-best thing is by conforming to reasons of corrective justice. If doing the next-best thing is within the original reason, which I have argued is just a truism about reasons, then corrective justice does not come from without and, therefore, is wholly compatible within an intrinsic account.

Let’s explore further this idea that by following reasons of corrective justice this is just what might amount to the next-best way to satisfy one’s original obligatory reasons. The clear-cut case is that of unjust enrichment. Here there has been a failed allocation, a misallocation. To refuse to allocate the mistransferred value back would be to act against reasons of corrective justice. Rescission of contract, in this regard, is similar. The parties transfer back the benefits received under the contract in accordance with reasons of corrective justice. In my mind, these, and conversion torts, along with misallocation of profits are the only private law remedies that can be neatly explained as instances of Gardnerian corrective justice. Not all remedies, in other words, are entitlements to corrective justice, understood as an *allocation back*. Corrective justice is not always the next-best way to achieve conformity with the original reason.

If Gardner wants to include more into his corrective justice account—and here I am thinking primarily of expectation damages for breach of contract, but also of most of tort law’s compensatory remedies—then, I suggest, he must presuppose something like Weinrib’s account of corrective justice and Kantian right. Let me explain. If Gardner wants to say that the payment of expectation damages is an operation of corrective justice, then he must understand such a payment as an allocation back. This means that he must be committed to something like the Kantian picture of contract law wherein the plaintiff is understood as
having, at the time of contract formation, a right to the defendant’s performance. The defendant, we can say, must transfer back to the plaintiff the right she had all along: the right to his future performance. Failure to do so would thus amount to acting against reasons of corrective justice. We can see a similar story needing to be told in tort law. It is hard, some might say, to see monetary damages for tortiously-inflicted injury as reasons of corrective justice. The defendant received nothing, it seems, from the plaintiff that he now must allocate back to her. Again, the Kantians have a neat answer to this: the defendant has deprived the plaintiff of the material means to actualize her freedom and in so doing has taken (normatively-speaking) these means for himself; he has more freedom than he is entitled to. It is these means or their equivalent that he must transfer back. It is a transfer back, rather than a transfer full stop, because the defendant has in fact received a normative gain by acting outside of his legitimate realm of freedom.

Notably, we do not have to adopt the Kantian picture to see how monetary damages help make up for the original wrong. Simply, we don’t have to see them as instantiations of corrective justice. Instead, we can understand them in the second way I outlined: as actions mandated by the obligatory nature of the original operative reason not to harm someone through one’s tortious behavior. Obviously, the first-order operative reason—not to cause harm—can no longer be satisfied, but this doesn’t mean that the tortfeasor can pretend that, and act as if, nothing happened. The second-order aspect of the obligation—that which gives it its mandatory nature—tells him to do something. The court steps in and crystallizes just what this something is.
This chapter leaves its reader with a choice. Our first option is this: We can adopt the robust understanding of corrective justice wherein it and its reasons are indistinguishable from Kantian right. The benefit of this option is that we can talk about all of private law’s remedies as instantiations of corrective justice. And, the second option is: We can see reasons of corrective justice as ways to sometimes do the next-best thing. Depending on what one views as the grounding for the operation of corrective justice, this could result in limiting corrective justice to situations where there has been a misallocation and we’re now asking for an allocation back.

31 Conclusion

To review: Under intrinsic approaches to private law—approaches that look inside for the justificatory apparatus of private law’s remedies—corrective justice’s pivotal role is not as clear-cut as its proponents would have one believe. More specifically, the two leading intrinsic theses with respect to private law’s remedies—the unity and continuity theses, respectively—face the following difficulties.

Under the unity thesis, corrective justice is thick, encompassing the entire relationship between the plaintiff and defendant. As such, corrective justice finds itself subsumed under the more robust, more evolved, concept of Kantian right. Kantian right (or its equivalents) is sufficient to explain the defendant’s remedial obligations in private law. Under the continuity thesis, corrective justice is thin, for the most part limited to the remedial relationship. Corrective justice’s independence from the original relationship seems to render it alien to the subsequent remedial relationship, thus turning it into an external principle of compensation and anathema to a pure intrinsic approach. Closer examination reveals, however, that, on one
interpretation of Gardner’s account, reasons of corrective justice just are the next-best way to satisfy the original obligation and, as such, are contained within the very idea of what it means to conform to the obligation in the first place.
PART 3. REASONS

In Part 1, I examined two ways to explain and justify private law’s remedies, either extrinsically or intrinsically. The former welcomes and, to an extent, is defined by a separation thesis between rights and remedies. The original rights may and often do have different rationales from the remedies that result from their infringement. Said infringements are merely conditions of, not reasons for, remedial awards. A consequence of this position is that, at the remedial stage, something extra, something extrinsic to the immediate relationship of the parties, is required to explain and justify the court-ordered remedial obligation. By contrast, intrinsic approaches offer a simpler and more intuitive picture: the reason the defendant must perform a remedial action vis-à-vis the plaintiff is because of his role in their original relationship. An extrinsic principle is not required. This latter approach, though not without its own difficulties, better explains our private law institutions as understood as manifestations of practical reasoning.

In Part 2, I explored two leading intrinsic approaches, the unity and continuity approaches, examining how each solved the puzzle of remedial action: namely, why is it when I fail to do as I ought to have done, I now have a reason to do something else and, moreover, how does this “something else” somehow mitigate my initial failure? I demonstrated that while the continuity thesis failed to distinguish itself from the unity thesis, this failure was instructive. It allowed us to grasp the following truth: to be fully intrinsic, the operative reason must be the same at both stages. The primary reason one performs a remedial action, in other words, often remains the primary reason one had not to perform the wrongful action in the
first place. This is the insight of the unity thesis, or Kantian approach. I tentatively counseled against full adherence to the Kantian form of the unity thesis because of the difficulties it faced with respect to explaining the normative difference between doing the best and doing the next-best action. The insight of the continuity thesis is its focus on reasons, in particular, that an obligation can be understood as a composite of first- and second-order reasons. This focus helps us understand situations where one can no longer have a reason to perform the first-order reason, that is, where the only reason one might have for trying to perform it is the symbolic one of trying, not trying-to-succeed. Even though one no longer can have a reason to try to succeed to perform the initial obligatory action, because it is no longer possible to succeed-by-trying or to succeed full stop, one, nonetheless, still has a reason to do something. This is because the exclusionary (the second-order) reason sticks around and instructs one to cry over the spilled milk while taking steps to mitigate its negative effects. I suggested that a focus on reasons permits the nuance we are looking for in a common sense understanding of this distinction. In short, I have advocated a renewed focus on reasons, the building blocks of practical rationality.

In Part 3, I examine more closely this shift from the language of rights (and duties or obligations) to that of reasons. I argue that reasons are particularly well suited for the task of explaining private law’s remedial obligations. In certain situations, that I have a reason to perform an initial action continues to be the operative reason telling me to perform certain remedial actions despite my initial failure to conform. I have argued that, though the operative reason remains the same, the ways in which one goes about satisfying it can be various. These ways are picked out by auxiliary reasons, reasons that tell us how specifically to conform to an
overarching operative reason. Moreover, understanding obligations as reasons allows us to separate obligations into their component parts of first-order and second-order reasons so that we might understand situations where the first-order reason can have no practical impact, but the second-order reason remains.

One of the benefits of my approach is its generality. The form of reasons I isolate is not limited in its application to private law alone. Rather, it extends to all areas where remedial action is called for. This, I suggest, is a strength, as it reflects just something basic about the nature of reasons—how they function in all practical aspects of our lives. If the why of legal reparative actions was somehow alien to the why of moral, social, or ludic reparative actions, this would militate against my hoped for common sense account of private law’s remedies. Nonetheless, as lawyers, we want to say that law is somehow distinctive. One of the strengths of the Kantian (unity) approach is its ability to separate coherently reasons of law (rights) from other reasons (moral reasons, for example). Thus the challenge I set for myself in Part 3 is whether I can identify some sort of golden thread that runs through the remedial reasons of private law.

To this end, I first broadly defend reasons as the basic unit for analyzing private law’s remedies through an examination of certain issues regarding the relationship of reasons to “rights” and to “obligations.” Here I develop more fully the argument that a focus on reasons allows for the nuance necessary to understand the normative connection between original obligatory states of affairs and remedial ones. Arguments for this comprise Chapter 7. Next, in

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[314] I consider this to be a benefit, although I recognize that some might see it differently.
the final substantive chapter of Part 3 and of this thesis, I acknowledge and confront certain worries about the reason-based approach. Taking the undeniable strength of the Kantian approach—that it is able to provide a clear criterion for intelligibly distinguishing the reasons relevant for private law from those of other normative spheres—I address the criticism that, far from merely allowing more into the private law picture, I have introduced the possibility of no limits at all. My first response to this is that the nature of my intrinsic thesis with respect to remedies precludes this as we have what is in essence a *nemo dat* principle with respect to remedies: you can’t get something at the remedial stage that was not there already at the original stage. Still, I would like to suggest more ambitiously that the reasons relevant in private law possess particular characteristics that distinguish them from other types of reasons.
Chapter 7
Reasons—Definition and Defense

32 Introduction
The aims of this chapter are two: first, to posit and defend a definition of what it is to be a reason, and, second, to defend reasons as a basic unit of analysis, one well-suited to explain private law’s remedies.

33 Reasons—definition
The literature on reasons and their role in practical reasoning cannot be characterized as one of amicable consensus. Controversies abound.\textsuperscript{315} The disagreements about the nature of reasons

\textsuperscript{315} One example of this is the controversy over whether reasons are facts or beliefs. I follow Macklem and Gardner by referring to them as facts. They provide the following persuasive example:

Suppose that a young woman, newly appointed to a position as a television presenter, has had the misfortune to attract the interest of a celebrity stalker, a man who is preparing to kill her. She knows nothing of this stalker, let alone of his murderous intentions. The police, however, have learned from their sources all about this man and his intentions, and they have been told that there is a letter bomb on its way to her. Having failed to intercept the bomb, do they have reason to warn the young woman, call her $C$, not to touch the post until they reach her house?

Of course they do. Who would deny it? But exactly what reason do they have? It is part of the very idea of a warning, like the idea of advice, that it draws another person’s attention to the reasons that, according to the warner or adviser, the other person \textit{already has}. For what they do to count as a warning, therefore, the police must be drawing $C$’s attention to a reason that, according to them, $C$ already has not to open her post. The reason is that there is a bomb in it. Of course $C$ is unaware of this reason. The police know of it and she does not. But if reasons were (true) beliefs then $C$ would have no reason not to open her post until she knew (and hence truly believed) that there was a bomb in it, and so would have no reason not to open her post until she was warned not to do so. From this it follows that her reason not to open her post could not possibly be a reason for the police to equip her with that knowledge. In other words, they have nothing to warn her of. This conclusion is bizarre. It follows that the fact that $C$ does not yet have the belief that she is in danger cannot be an obstacle to her having a reason to avoid that danger. The reason (for $C$ not to open...
cannot be comprehensively addressed in this thesis, but, where possible, I provide arguments for my chosen definition.

First, my engagement is with practical, not theoretical, reasons. My concern is with what reasons there are to perform (or order) some action, not with the reasons for arriving at some belief. Law is about action, not belief. It is clearly the case that laws can effectively order individuals not to behave in certain ways, but will prove ineffective in any direct orders about what to believe or think. Further, my concern, within practical reasons, is not with whether one

the post and for the police to warn C not to do so) is the fact that there is a bomb in the post, not C’s true belief in that fact, a belief which, at the time when it is needed to justify the warning, C does not yet possess.

(Gardner & Macklem, “Reasons,” supra note 19 at 445-446).

A further example is whether reasons should be considered, as Raz suggests, to “provide the ultimate basis for the explanation of all practical concepts.” (Raz, The Authority of Law, supra note 71 at 12). John Broome has suggested that reasons are not the basic normative concept, that the basic normative concept is an ought-fact and that reasons are to be explained by their role in explaining ought-facts. Some ought-facts, according to Broome, cannot be explained by reasons. They are instead explicable by something he calls a normative requirement. As interesting as this debate between Broome and Raz is, not much turns on it for my thesis. Whether we call them reasons or normative requirements or ought-facts, they are all part of what explains an action, i.e., makes it intelligible as an action. See John Broome, “Normative Requirements” (1999) 12 Ratio 398; John Broome, “Reasons” in R Jay Wallace, Phillip Pettit, Samuel Scheffler, & Michael Smith, eds, Reason and Value: Themes from the Moral Philosophy of Joseph Raz (Oxford: Oxford University Press, 2004) 28.

Others object to talking about reasons at all, arguing that reason is a mass noun like furniture, not a count noun, like chairs. Aggregation of reasons, therefore, is nonsensical. Perhaps there is such a thing as Reason, understood as whatever right reason would have one do or whatever the reasonable agent would do. This does not detract from the reality that there exist reasons behind most of our actions (at least considered ones).
complies with reason, but only with whether one conforms.\textsuperscript{316} It does not matter (to the law) whether you abide by the law out of some internal respect for it, but only that you abide by it full stop. When I accidentally respect your property rights this is just the same, from the law’s perspective, as when I do so with respectful intentions. Likewise, law-abiding intentions do not exclude liability. If I take your umbrella with the honest belief that it is mine, I nonetheless have wronged you. I have converted your property and am liable in tort regardless of my lack of intention to contravene the laws relating to personal property.\textsuperscript{317} Bluntly, law’s concern is with conformity, not compliance. I follow Raz in understanding conformity as performing the action that reason requires, and compliance as performing the action that reason requires \textit{for} the reason that requires it. Bernard Williams’ division between external and internal reasons also helps to illustrate this point.\textsuperscript{318} A reason is internal if and only if the truth of the sentence, “A has a reason to φ,” is conditional on the agent, A, possessing in his set of goals, aims, beliefs, or desires, a goal, aim, belief, or desire that will be satisfied, promoted, or met by φing: “A has a reason to φ iff A has some desire the satisfaction of which will be served by his φing.”\textsuperscript{319} By contrast, an external reason does not depend on an agent’s internal desire set for its truth:

\begin{footnotesize}
\begin{enumerate}
\item[316] For the distinction between conformity and compliance, see Raz, \textit{Practical Reason and Norms, supra} note 241 at 178.
\item[317] Notably, this intention would be of central relevance to the criminal law, marking the willful taking of another’s property, knowing it to be another’s, as the crime of theft.
\item[318] That Williams believed there were only internal reasons does not detract from the fruitfulness or force of the distinction.
\end{enumerate}
\end{footnotesize}
“The whole point of external reason statements is that they can be true independently of the agent's motivations.”\textsuperscript{320} Clearly, legal reasons are external.\textsuperscript{321} Their existence does not depend on the desires or goals of those to whom they claim to apply. It is never a good excuse or justification to say that you simply do not want to do—are not motivated to do—that which the law commands. Just as, when one does do what the law commands, from the legal perspective, it does not matter whether one does it because one personally wants to, because one wants to because the law tells one to, or simply by accident. Again, this is just another way of saying that the law cares only about conformity, not compliance.

Keeping in mind that I am concerned primarily with practical external reasons, we may now refine my definition of what it is to be a reason. I take a reason to be a consideration that counts in favor of or against the performance of a given action. The more technical definition is that a reason to \( \phi \) is a fact that counts in favor of \( \phi \). If \( p \) is a reason for \( A \) to \( \phi \), then \( p \) counts in favor of \( A \)'s \( \phi \)ing. That it is snowing is a reason for me to wear my wool toque; that he is thirsty is a reason for him to drink this glass of water; likewise, and this is the nub of the preceding arguments and those which follow, that he owes her \$10 is a reason for him to pay her \$10 and, further, that he injured her is a reason for him to perform a remedial act of some sort.

Sometimes, as in the case of unpaid debts, the original reason remains and demands satisfaction. If I owe you \$100 and fail to pay you, but later pay you \$40, it doesn’t make sense

\textsuperscript{320} Ibid at 107.

\textsuperscript{321} I do not mean here to imply that legal reasons are about truth. Truth here relates only to the truth of the proposition that “\( x \) is a reason.”
to think of my reason to pay you the remaining $60 as a reason separate from my original reason to pay you the $100. Similarly, if I step on your foot and don’t get off, then the original reason—the reason I had not to step on your foot in the first place—tells me to get off. Things are slightly different, but still, I argue, continuous, when the original reason can no longer be conformed to. Here what sticks around is the second-order aspect of the obligatory reason, the part of a reason that makes it mandatory. If I cause you pain and suffering by stepping on your foot, then because I did not avoid doing so by initially complying with the reason not to cause you such pain and suffering by standing on your foot, I now have a reason to do something to respond to, to try to ameliorate, your pain and suffering. Often this could be something as simple as a spontaneous apology. In law and in other situations where the loss is quantifiable and so can be crystallized, the appropriate response might be monetary damages.

34 Reasons—defense

We can see, therefore, that reasons are prima facie good units for analyzing the relevant actions of private law. Let’s examine this idea more closely. Joseph Raz famously claims that “[t]he normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons.” This is because reasons are evaluative facts. They relate to value in that they counsel action (or belief) because doing (or believing) some action (or belief) serves that value. The reasons law claims it provides are always intimately tied with the tacit claim that

following the law serves some value or values. Law is a normative enterprise; its constitutive reasons are worthy of study. Further, the area of law that I am directly concerned with involves judges (men and women) giving reasons to the parties before them. Specifically, they give reasons for the defendant (if liable) to perform some action on behalf of the plaintiff. In a typical two-party civil dispute, the plaintiff commences an action against the defendant, the responding party. The matter is brought before a court. The court is not only expected to settle the dispute, either in favor of the plaintiff or defendant, but is also expected to do so for reasons. The decision process private law litigants seek is a normative process. What they legitimately expect is a reasoned decision—that is, a decision based on the relevant reasons in favor of either the plaintiff's claim or the defendant's defense. As such, a focus on reasons is fundamental to understanding law's claimed normative force.

Another argument in favor of my focus on reasons relates directly to the general role reasons play in our practical (and theoretical) reasoning. Reasons serve two purposes: they act as guides for the agents themselves and they make intelligible the actions of other agents as actions. To put it simply, they are how we understand our own lives and those of others. Reasons link us as reasoning agents—those beings responsive to reason(s). Something that cannot act for or on a reason or reasons is not a reasoning being; it is a thing, something that is either acted on or affects us, but does not and cannot act with us or toward us. As Bernard Williams aptly put it: “If there are reasons for action, it must be that people sometimes act for those reasons, and if they do, their reasons must figure in some correct explanation of their
So, when we ask about the remedial *reasons* of private law, we are asking about what facts exist out there that rational agents can respond to and which serve as guides for and explanations of said agents’ behavior. Reasons link us intelligibly to our own actions and assist us in intelligibly understanding the actions of others.

In these ways, reasons are undoubtedly relevant to our understanding and justification of private law and its remedial institutions, but the question remains: what reasons and whose reasons should be our concern? Private law disputes immediately involve three reason-responsive entities: the plaintiff, the defendant, and the court. A full understanding of private law seems to demand all the reasons of all of the parties and their interrelation be grasped. Recall that, broadly speaking, the reasons we describe as legal reasons are practical reasons; they are reasons that either count in favor of or counsel against the performance of certain actions. Thus, an inquiry into legal reasons is one into the relevant action(s) that such reasons serve to recommend. For the plaintiff, the action is the cause of action itself, that is, her lawsuit, her request to the court for an order that the defendant perform a remedial action *vis-à-vis* her. For the (liable) defendant, the action is the performance of this remedial action as ordered by the court. The ground for defendant’s remedial actions should for the most part, as I will demonstrate, be the very reasons that motivated the plaintiff’s claim. As I proposed earlier, they are either the first-order reason to perform the original obligation or the second-order reason not to act on certain reasons—that is, treating the lack of conformity with the first-order reason as if it never happened. For the court, matters are more complicated.

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323 Williams, “Internal and External Reasons,” *supra* note 319 at 102.
Let us return to our earlier question about what these reasons could be. The relevant reasons for the plaintiff are the facts that recommend she levy a (legal) complaint against the defendant: that the defendant has breached his contract with her; that the defendant or his use of his property interferes with the plaintiff's reasonable enjoyment of hers; that the defendant has interfered or threatened to interfere with the plaintiff's person or property. Behind these, of course, are the plaintiff's interests in having her contracts kept, to exclusive possession and use of her property, and to non-injury. For the defendant, considerations that count in favor of his performing the remedial action have potentially two sources: (a) reasons he has before the court order and (b) reasons provided by the court order—specifically, the fact of the authoritative directive.\textsuperscript{324} If the defendant acted in a remedially responsive manner—for example, if subsequent to breaching his contract with the plaintiff, he responds by immediately paying her what she would have acquired had he not breached his obligation—we wouldn't need the court order nor would the plaintiff have any reason to pursue one. Continuing with our example, the ground of the defendant's remedial obligation just is the original reason he had to perform the contract: the fact that he and the plaintiff made a contractual agreement. Here, the justification for his remedial action is straightforward. Justifications are less transparent in the second type of situation, where the defendant's reparative action is not easily explicated in terms of the original reason he had. For example, if a defendant commits a tort against the plaintiff and he is subsequently ordered to pay the plaintiff a set sum for his injurious behavior, it is more difficult to see his behavior as dictated,

\textsuperscript{324} Source (b) consists of either the first-order (operative reason) or second-order (exclusionary reasons).
explained, or justified by the original reason he had—that is, the reason not to injure the plaintiff. The reason the defendant has to pay the plaintiff money seems to be just because this is what the court has now ordered him to do. As such, the question of justification here merits further examination. For this precise reason, compensatory awards for torts have formed the focal case for this dissertation. In particular, we want to know what it is that grounds the reasons the court has in these and similar circumstances to order the defendant pay a monetary sum to an injured plaintiff. If I break your toe, I can no longer satisfy the original reason not to break your toe; however, I can and must do something to address my initial failure. The content of this reparative action is constrained by the original reason not to break your toe. While its first-order strength is no longer available—one can no longer act for the reason it recommends—it can nonetheless provide guidance with respect to what the next-best thing might be. Its obligatory strength is retained through the second-order aspect of the obligation that does continue to the remedial stage. The original rationale for the initial obligation tells us what will count as next-best conformity with the first-order reason that now can no longer be completely satisfied.

35 Obligations and Reasons

35.1 Skepticism
If my focus is, as it seems to be, on the obligatory actions of the defendant, then why haven't I chosen as my basic unit of analysis the concept of obligation? In Part 2, I suggested that this concept generates confusion with respect to what turns out to be a simple fact about reasons. Furthermore, an obligation itself is reducible to reasons. For Joseph Raz and John Gardner, an obligation—or more accurately, the fact that one has an obligation—just is itself a reason for
that action. More technically, an obligation to φ consists of a first-order reason to φ and a second-order reason not to act for (some) of the reasons that recommend not-φ-ing. If an obligation just is a reason (or the fact that A has an obligation to φ is a reason for him to φ), then there is no methodological worry in focusing on reasons. Obligations simply are a particularly type of reason, a mandatory and categorical reason.325

What if, however, it is not the case that “the fact that one has an obligation is a reason—a reason of special force—for doing whatever one has an obligation to do?”326 This in essence is the position Chris Essert has put forward in a recent unpublished piece.327 He suggests, following Michael Bratman’s pioneering work in the field of intention, that obligations to φ can never be first-order reasons to φ. Obligations, he argues, are like plans or the concept of wrong, a verdictive conclusion on the reasons that exist. To consider them reasons in themselves commits the sin of bootstrapping. In a nutshell, Essert’s argument is that when we say an obligation exists, what we are saying is that as a product of our practical reasoning we have weighed the relevant reasons applicable in a given situation and come to a conclusion that they add up to an obligation to φ. In light of this, we cannot say that the obligation is itself a reason to φ. This would be like saying believing a belief is itself a reason to have the belief or having an intention is a reason on its own to perform the action. If we have a

325 We might further argue that obligations, because they consist of reasons, are not basic; rather, the concept of reason that explains them is. Moreover, the mandatory and categorical nature of obligations seems better attributed to their second-order component.


327 Chris Essert, “Legal Obligations and Reasons” Draft 7/20/11. Discussed with author’s consent
choice between Plan A and Plan B, our mere intention to do Plan A cannot be an extra reason to do Plan A. If it were, an unreasonable course of conduct could be made the most reasonable by virtue of our intention alone.

Even if Essert is right and obligations are not in themselves stand-alone first-order reasons to act for the action they mandate, they might still be reasons. They might be second-order reasons, that is, exclusionary reasons. These reasons guide the agent not to act for certain other reasons that countermand the required action. Moreover, Essert does not deny that there is a *relationship* between obligations and reasons. Obligations seem to be for him the settling up of the reasons for or against the required action. If just this much is true, then the case for studying reasons to get at our concept of obligation is met: a careful analysis of the building blocks of an obligation can only improve our understanding of the obligation itself.\(^{328}\) Further, Essert’s criticism does not adversely affect the remedial reason theses advocated here. First, it does not exclude the possibility that obligations just are exclusionary (second-

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\(^{328}\) Reasons might help us better grasp the nature of obligation, generally, but are they relevant for understanding legal obligations? Joseph Raz famously claims that “[t]he normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons.” (Raz, “Explaining Normativity,” *supra* note 322 at 67). See *supra* note 313 for Broome’s disagreement on this point. Law is, or at least purports to be, a normative phenomenon. Thus, following Raz, understanding reasons is essential to grasping the normativity of law. But do we have to endorse Raz’ monopolistic thesis about the role of reasons in normativity to accept the more modest assertion that reasons play an integral role in law? No, we do not. This is just because law understands itself as concerned with reasons: both the reasons it claims to be its own and the reasons of those over whom it exerts its authority.

Clearly, in a sense, Broome is correct in his criticism of Raz’s strong thesis about reasons. Things other than reasons have a role to play in normativity. If I believe \(p\), and \(p\) entails \(q\), then in Broome’s terminology, I am normatively required to believe \(q\). I could be mistaken about \(p\), however, meaning I have no reason to believe \(q\). In fact, I should not believe \(q\), but there is still a sense where if I believe \(p\) I *ought* to believe \(q\).
order) reasons. As such, the second-order reason that I have suggested carries on in certain situations where the first-order reason cannot be satisfied may continue to be understood as doing so. Second, even if he is right that obligations are verdictive conclusions and therefore cannot be first-order reasons in their own right, this does not negatively affect the other way I have suggested reasons can continue into the remedial stage: that it is just the original operative reason to ϕ that continues to demand satisfaction. Under Essert’s lens, it would just be whatever reasons that supported ϕ-ing in the first place that would continue on. All of this is just to say that certain doubts about reasons as a suitable unit of analysis for remedial obligations are rebuttable.

35.2 Obligations as rights—the Kantian story
In addition to being superior to obligations, reasons are a more approachable unit of analysis than the other customary alternative, rights. Let’s look more closely at this rights-based approach and how it might relate to a reason-centered account. Here, Arthur Ripstein’s comments regarding the consistency of Raz’ analysis of political authority with Kant’s are illuminating: “Kant’s account is consistent with Raz’s analysis so long as the idea of ‘reasons applying’ is understood in the right way. For Kant, the only relevant reasons are duties of right, and the state’s authority extends only to those duties, which cannot be coherently followed except in a rightful condition.”329 We can see from this that, for Kant, the notion that reasons somehow count in favor of certain actions does not have a place in Kantian right. This is because categorical reasons are the only normative things that can “count.” Nothing else

329 Ripstein, Force and Freedom, supra note 230 at 197, n 24 [emphasis added].
counts or can be seen as somehow “in favor of.” This is one way of getting across the idea that the relevant reasons in law are rights and consequently their correlative obligations. No other reasons are relevant from the legal point of view. It is thus quite easy for the Kantians to assert a connection between reasons and obligations because, for them, they are one and the same thing. This is the simplified version. Since we are discussing Kant, not surprisingly, matters are a bit more complex. In what follows, I will carefully set out why and how this Kantian conclusion comes to be. Since the complexity starts with the terms Kant employs, it helps if we set out the Kantian definitions of the following terms: reasons, rights, obligations and duties, and rightful condition.

My definition of reason(s) might seem quite alien to Kant. Reason, for Kant, is not a count noun. It is not something that can be added or subtracted from other reason(s). As Weinrib helpfully describes it,

According to Kant, the function of reason is to order concepts so as to give them the greatest possible unity combined with the widest possible application. ... The business of reasons is thus to systematize concepts as parts of an articulated unity.

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330 I thank Arthur Ripstein for this helpful clarification.

331 For the use of this distinction as applied to the concept of reason(s), see Derek Parfit, On What Matters (Volume 1) (Oxford: Oxford University Press, 2011) at 454, n 32: “When we claim that we have more reason or most reason to act in some way, we use the word ‘reason’, not as a count noun – like ‘tree,’ ‘lake,’ and ‘cow’ – which refers to particular reasons, but as a mass term – like ‘wood,’ ‘water,’ and ‘beef’ – which refers to some reason or set of reasons without distinguishing between these reasons.” From this, it is clear that what Kant means by reason is not a count noun, but it’s also unclear whether he would endorse its being a mass noun either. Reason, for Kant, seems not to intersect with either of these definitions.
An idea of reason is the ordering principle by which reason unifies a group of diverse concepts upon which it operates.\(^{332}\)

Right is the concept—the idea of reason—that unifies law for Kant. It is the only relevant reason for law. In this sense when we are talking to a Kantian about reason in law, we are simply talking about rights.

Kant provides the following definition of “right:”

The concept of right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of right),\(^ {333}\) has to do, first, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, second, it does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other’s choice. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law.


\(^{333}\) By this, Kant means to distinguish the concept of right from merely posited right: “What is laid down as right..., that is, what the laws in a certain place and at a certain time say or have said.” Kant, supra note 228 at 6:230.
Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.\textsuperscript{334}

This is Kant’s answer to my thesis’ overarching question: How can the actions of one individual make it such that another individual can legitimately authorize the state’s coercive mechanism \textit{vis-à-vis} him be legitimate? In other words, how can freedom be consistent with coercion? Kant’s answer is simply “[r]ight,” because, for him, “[r]ight and authorization to use coercion mean one and the same thing.”\textsuperscript{335}

If right is any action consistent with freedom, then any action inconsistent with right is inconsistent with freedom. Therefore, any action that is inconsistent with actions inconsistent with right is consistent with right. In Hegelian terms, coercion amounts to the “negation of the negation.”\textsuperscript{336} Thus, right is necessarily, at its essence, the authorization to coerce. Coercion—that is, authorized remedial action—is just what it means to have a right. Right and remedy are simply different stages of the same normative phenomenon, the phenomenon of freedom understood as right. The right represents the holder’s potential to authorize coercion on its behalf, while the remedy is the actualization of this potential. Normatively, however, the potential and its actualization are identical.

\textsuperscript{334} Ibid at 6:230 – 6:231.

\textsuperscript{335} Ibid at 6:232.

\textsuperscript{336} GWF Hegel, \textit{Philosophy of Right}, translated by TM Knox (Oxford: Oxford University Press, 1967) at paragraph 97[A].
Notably, it is not because I as an individual possess a right that you must respect it and are under an obligation toward me. The ground of the right, although based in my capacity for purposiveness as an independent (that is, free) rational agent, is not individualistic in this sense. Rather, what grounds right is our universal capacity for purposiveness. It is not simply that I am a purposive being, but rather that you are too. Right is grounded in the universalization of this freedom. Understanding this illuminates the following passage, in particular its emphasized portion:

right should not be conceived as made up of two elements, namely an obligation in accordance with a law and an authorization of him who by his choice puts another under obligation to coerce him to fulfill it. Instead, we can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone. ... Strict right rests ... on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal law. – Thus when it is said that a creditor has a right to require his debtor to pay his debt, this does not mean that he can remind the debtor that his reason itself puts him under obligation to perform this; it means, instead, that coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors, in accordance with a universal external law.337

Thus the remedial duty that the state places the defendant-debtor under to pay money to the plaintiff-creditor is not just a duty owed to this particular plaintiff. It is not that plaintiff by virtue of her will alone can coerce the defendant to pay. Rather, it is a universal duty, one “which constrains everyone,” that is the ground of the plaintiff’s ability to coerce via the state

337 Kant, supra note 228 at 6:232 [emphasis in the original].
the defendant’s performance, i.e., payment of his debt. Focusing on rights, this is the Kantian story about reasons, rights, and duties. A right is just the authorization to coerce. Ergo, rights and remedies (authorized coercions) are one and the same thing, just looked at from different temporal moments.

In successful actions, the defendant owes the plaintiff a remedial duty to perform. This is just what it is to possess a right: others must respect it. In the above-quoted passage from Ripstein, he limits the state’s authority to only such duties, duties of right. My question here is what does duty mean for Kant? Kant cryptically provides the following definition: “Duty is that action to which someone is bound. It is therefore the matter of obligation, and there can be one and the same duty (as to the action) although we can be bound to it in different ways.”

How is it that duty is not the same as obligation—that is, what does it mean to say that it is the “matter” of obligation? Generally, we may employ the terms duty and obligation as synonyms, provided that we acknowledge that, for some, duty is a more general term, encompassing duties that do not correlate to a right, such as, duties to preserve the environment, not to visit cruelty on animals, etc., while obligations are strictly limited to situations where there exists a correlative right as their ground. But this is not Kant’s distinction. To see what this might be, let’s turn to Kant’s definition of obligation. Kant defines obligation as “the necessity of a free action under a categorical imperative of reason.” What I think this means is that the duty is a specific action required in order not to violate the obligation. There can be many ways to

338 Ibid at 6:222.
339 Ibid.
discharge (and to violate) one’s obligations, but the fulfillment of different duties (understood as different specific obligatory actions) does not entail that there are a corresponding number of different obligations. In other words, for Kant, obligations are not individuated according to the action that they make mandatory, for they can make multiple actions mandatory (i.e., create multiple duties), but remain the same obligation.  

Here again we see the Kantian story about reasons-rights-remedies-obligations played out. If the relevant reasons just are rights and rights are the correlatives of obligations, the remedy is just one specific action (the Kantian idea of “duty”) made mandatory by the obligation that satisfies the obligation. In other words, it is all the same thing. Returning to Ripstein’s statement: “Kant’s account is consistent with Raz’s analysis so long as the idea of “reasons applying” is understood in the right way. For Kant, the only relevant reasons are duties of right, and the state’s authority extends only to those duties, which cannot be coherently followed except in a rightful condition.” We must note that the above does not apply (or at least not coherently) absent the rightful condition. But what is this rightful condition? The rightful condition emerges from defects in its conceptually preceding state, the state of nature. Ripstein provides the following helpful encapsulations of these defects:

Objects of choice cannot be acquired without a public authorization of acquisition; private rights cannot be enforced without a public mechanism through which enforcement is authorized by public law; private rights are indeterminate in their

340 For an apparently strikingly contradictory view, see Gardner, “Part 1,” supra note 15, where he explicitly states that obligations are to be individuated according to the actions they make mandatory.

341 Ripstein, Force and Freedom, supra note 230 at 197, n 24 [emphasis added].
application to particulars without a publicly authorized arbiter. Even the innate right of humanity is insecure in such a condition [the state of nature], both because no remedy is possible in case of a completed wrong against a person, and because even the protective right to defend your person against ongoing attack is indeterminate in its application.\(^{342}\)

This is of course already implicit in Kant’s understanding of right as synonymous with authorized coercion. Recall the earlier quoted passage:

"right should not be conceived as made up of two elements, namely an obligation in accordance with a law and an authorization of him who by his choice puts another under obligation to coerce him to fulfill it. Instead, we can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone. ... Strict right rests ... on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal law. – *Thus when it is said that a creditor has a right to require his debtor to pay his debt, this does not mean that he can remind the debtor that his reason itself puts him under obligation to perform this; it means, instead, that coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors, in accordance with a universal external law.*\(^{343}\)"

Hence, if we were to follow a Kantian analysis, it would be a mistake to analyze something like self-help remedies as the source of the normative force of law’s power.\(^{344}\) Returning to Kant, there is no “right” in the state of nature, understood as the potential to coerce authoritatively

\(^{342}\) Ibid at 181.

\(^{343}\) Kant, *supra* note 228 at 6:232

\(^{344}\) As an aside, this seems to be precisely the position of civil recourse theorists like Zipursky and Goldberg.
another with respect to the matter of one’s right. As Ripstein notes, even one’s innate right (in one’s person) is insecure, conditioned not only on one’s ability to defend oneself, but also to the extent of one’s ability to exercise it rightfully. The law—that is, public right—is the ground of the normative reasons for coercion.

Let us summarize the Kantian tale of the relationship between reasons and obligations. The only relevant legal reasons according to Kant are rights. Rights are understood as authorizations to coerce. They are spheres of individual autonomy, notionally or potentially equally shared by all rational agents. As such, for such equal freedom to be a coherently actualized idea, interferences with rights are forbidden. We are, in other words, under obligations of a negative character not to interfere with the equal freedom (rights) of others. In this way the reasons (rights) of (private) law just are its obligations. The Kantian story is not, therefore, a story about obligations, but rather about rights. Rights are a particular type of reason. This thesis argues that a focus on reasons can get us to the same conclusions as one on rights, but in a more intuitive (that is, less Kantian, and so less intimidating) way. I explore a potential avenue in the final chapter of this thesis.

35.3 Obligations—a different story

Recall that Gardner also has an apparently simple story about how reasons relate to obligations. Obligations, or more accurately the fact that an agent is under an obligation, for Gardner, simply are a special type of reason: “the fact that one has an obligation is a reason— a
reason of special force – for doing whatever one has an obligation to do.\textsuperscript{345} In the note to this sentence Gardner explicitly endorses Joseph Raz’ position that obligations\textsuperscript{346} are instances of valid rules, rules being comprised of a reason to act for the conduct set out and reasons to disregard some reasons for acting against the mandated conduct.

At first blush, Gardner’s position that obligations are reasons might seem identical to Kant’s claim that the only relevant reasons for law are rights (and thus the correlative obligations of said rights). But, as I argued in Chapter 5, we should be wary of drawing this conclusion. Gardner’s understanding of reasons, drawn primarily from the works of Joseph Raz, differs significantly from Kant’s; at least he would see it as such. What counts for Gardner (and for Raz) as a relevant reason for the law extends beyond rights. While right/obligation exhausts the content of the relevant legal reasons for Kant, for Gardner, obligation is just a particular, although a particularly significant, type of reason.\textsuperscript{347} For Gardner, in other words, rights are not coextensive with obligations: \textsuperscript{348} “P’s rights against D are not the same thing as

\footnote{345}{Gardner, “Part 1,” \textit{supra} note 15 at 31.}


\footnote{347}{One might suggest that this difference relates to their respective differences with respect to values. Kant is a value monist (like JS Mill). There is one value (autonomy). Gardner, by contrast, I think has a more pluralistic conception of value.}

\footnote{348}{For Gardner’s direct inspiration for this position, see Raz, \textit{Morality of Freedom}, \textit{supra} note 30 at Chapter 7.}
D’s obligations towards P. A right is not an obligation; rather it is the ground of (one or more) obligations. Yet, in the sentence that follows, Gardner continues:

All the same, there is nothing that counts as the violation of a right other than a failure to perform (one or more of) the obligations that it grounds. Thus the conditions under which D violates P’s rights – the conditions under which D wrongs P – are identical to the conditions under which D fails to perform (one or more of) his obligations towards P.

Obligations, we might conclude from this, for Gardner, are the equivalent of “duties” according to Kant’s definition of the term as “specified actions.” A right can give rise to a number of obligations, understood as specified actions (duties, for Kant; obligations, for Gardner). The violation of any of such specified actions (obligations, for Gardner) counts as a wrong. As I demonstrated in Chapter 5, this terminological clarification (or confusion as it appears given Gardner’s use of “obligations” where Kant means “duties”) is significant with respect to the alleged profound difference between the two leading intrinsic approaches.

Let us return to Gardner’s story about the connection between obligations, as he understands them, and reasons. For Gardner, like Raz, a reason is a fact that counts in favor or against some action (belief etc). Obligations (the fact that one has an obligation or obligations) are defined in terms of reasons, specifically in terms of exclusionary reasons: “Exclusionary


350 Ibid. See for comparison Weinrib’s claim that the reasons why D is liable are the same reasons (necessarily) why P’s right is violated. I’m not sure whether much can be made of the terminology difference – conditions vs. reasons – although see Weinrib, “Two Conceptions,” supra note 14 about the difference between the Kelsenian condition conception and the Aristotelian reason conception of remedies.
reasons are reasons for not acting for certain valid reasons.”\textsuperscript{351} Gardner argues that obligations exhibit this distinctive feature of exclusion:

The classic case in which exclusionary reasons perform this function of fortifying reasons against their opponents is the case of duty (also known as obligation). To have a duty to do something is to have a reason to do it that, (i) does not depend for its existence on one’s goals at the time, and (ii) is also a reason not to act for certain conflicting reasons. The first feature gives duties their \textit{categorical} character. Categorical reasons are those that are not hostage to the prevailing personal goals of the agent to whom they apply. One’s reasons to promise are often dependent on what one wants to achieve, but once one has promised the reason created by the promise does not bend to the changing winds of one’s ambitions. ... the second feature [:] ... A reason to do something that is also a reason not to act for certain countervailing reasons is a special kind of reason that is labeled by Raz a \textit{protected} reason. A protected reason is not merely the coincidental conjunction of a reason to act and an exclusionary reason not to act for certain countervailing reasons. The point is that the very same fact that is one’s reason to act is also one’s reason not to act for certain countervailing reasons. The very fact that one promised is both a reason to do what one promised and a reason not to be moved by the fact that doing it is now more inconvenient then it was when one promised. When a reason has this special protected structure we feels its forces as \textit{mandatory force}. We are \textit{required} to do what the reason would have us do. ... Duties are the special and important case of reasons that are both (i) categorical and (ii) mandatory.\textsuperscript{352}

Gardner and I both take obligations to consist of two types of reasons—or of a reason with two fundamental aspects. The first is a reason in favor of the action it makes mandatory. The

\textsuperscript{351} Raz, \textit{Practical Reason and Norms}, supra note 241 at 184.

\textsuperscript{352} Gardner & Macklem, “Reasons,” \textit{supra} note 19 at 465.
second is a reason not to act for certain countervailing reasons. Hence, for Gardner, the connection between reasons and obligations is easily comprehended. Obligations are just a special type of reason. They are reasons in the way that rules are reasons, possessing a two-part structure, consisting of a first-order reason in favor of the proposed action and a second-order reason mandating one not to act for certain countervailing reasons.

36 Conclusion

The above are two important stories for how obligations and rights and reasons interact. I set them out in detail so that we might clearly see the benefits of a reason-focused account. I suggest that talk about obligations often isn’t always helpful and worse can lead to confusion. We have already thus far noted confusion about what “obligation” means, viz., Kant’s definition of duty vs. Gardner’s definition of obligation. All that we need to talk about are reasons. What are the relevant reasons for private law remedial obligations—why is it that the law claims to oblige us to perform certain actions? How do these actions relate to one another? The story about how the actions relate does not need to make reference to rights or duties/obligations. Reasons themselves are normative facts, possessing normative force, demanding to be fulfilled. How they are fulfilled relates to the nature of both the operative reason and the circumstances that generate further auxiliary reasons. In Chapter 8, I suggest a way that we might understand reasons that provides the necessary limits for an account of private law.
Chapter 8
Interpersonal Reasons

37 Introduction

In this chapter, I confront a significant concern about a reason-based approach, namely, that it cannot give us a clear answer to why certain reasons are reasons specific to private law. Earlier I suggested that one of the strengths of a reason-based approach was that it made better sense of all situations where reparative actions were called for. My argument here was that it is a matter of intuitive sense that my reparative actions consequent breaches of promises, say, possessed a similar structure with respect to practical reasoning as did those involved when I breach a contract. I still believe this to be true. The law, to some degree, must and does track the reasons we have prior to its involvement. If I step on your toes, I have a reason to get off of them that does not exclusively flow from the law. Recall that this relates to the second aspect of the separation thesis. The first says that one’s initial reason not to, say, commit a wrong and one’s subsequent post-wrong reason to perform a reparative action of some sort are not necessarily connected. The second maintains that, whatever reasons one might have post-wrong, they are not connected to the reparative reasons that the court will direct one to do. This is another way of saying that there is no obligation to perform a reparative action prior to the court’s say-so. I firmly reject both aspects. In my view, the reasons provided by the court can be found within the original relationship, although the unique tripartite structure of civil actions brings with it increased relevance of particular reasons, specifically, reasons of justice (that is, of allocation).
Here, I explore the possibility that legal reasons can in some sense be distinguished from non-legal reasons. To this end, I look at an account (the Kantian account) that is able to make a careful and intelligible distinction between considerations that are relevant to private law and those that are not. First, I draw out the strengths of the rights-based approach in this regard, following which I suggest possible ways for my reason-based approach to retain these strengths, but without necessarily invoking something like Kantian right and the civil condition upon which it relies. Our inquiry is into whether a reason-based account can provide plausible answers to this basic question of demarcation.

38 Strengths of rights-based accounts

Law claims to possess the power to create authoritative reasons for those to whom it applies (and often even more than these). This is why the Kantians claim that all relevant legal reasons are duties of right, with right understood as the sphere of equal freedom. Only breaches of such duties can justify coercion. In other words, only for the sake of freedom can freedom be restricted. Morality also makes such claims of universal legitimacy, but, unlike law, it often cares not just about conformity, but also compliance. Morality sometimes cares, but law never does, whether you intend to follow moral dictates out of a sense of duty. Law only cares that you follow its dictates; it doesn’t care about your motivation for so doing.

It is true that morality isn’t always bothered about motivations. If I keep my promise or I give someone what is due to them, I am meeting my moral requirements regardless of my motivations for so doing. In other words, if I keep my promise for the wrong sort of reason—I am worried about social disapproval, I made a bet with a third party that I would keep my promise, or I intend to break my promise, but on accident and by ironic virtue of my promise-
breaking intention, I keep it—it still counts as keeping my promise. Thus, there appears to be something quite similar between law and morality with respect to what counts as conformity with their external duties. We must look beyond the conformity/compliance distinction to get at the salient difference.

The clearest articulation of the distinction between the spheres of law and morality lies in Kant’s distinction between right and virtue (law and morality). “The sum of those laws,” Kant sets out initially in his *Introduction to the Doctrine of Right*, “for which an external lawgiving is possible is called the *doctrine of right (ius)*.”  

To understand the depth of Kant’s meaning, we must analyze this simple sentence. First, Kant defines “laws” earlier as “[a] principle that makes certain actions duties.” Next, “external lawgiving” references the types of reasons for which an external incentive is possible. We may all agree, I think, that we cannot change in the right kind of way our beliefs or motivations through external force. If I threaten you with imprisonment unless you donate half your earnings to charity, this cannot count as fulfillment of a duty of benevolence since you did not do it out of charity, but out of fear of external sanction. External lawgiving—that is legal reasons backed by coercive force—can only extend to conformity with duties, not compliance with them. Thus, certain duties, such as duties of benevolence and duties to oneself, though still duties of virtue, are not the proper province of

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353 Kant, *supra* note 228 at 6:229.

354 Ibid at 6:225.
law’s reach. This is what Kant means by “possible”—that it is normatively just. To say something is not possible is to say that it is not just.\(^{355}\)

While we might have reasons to act benevolently, these are not and cannot be legally coerced reasons.\(^{356}\) They are not the proper province of private law. The question, therefore, for an argument like mine is whether any helpful distinctions can be drawn to show what types of reasons are particularly relevant for private law. This is the goal of the remaining sections of this chapter.

39 Private law’s distinctive remedial reasons

In a real sense I do not have to discuss which reasons are the appropriate reasons for private law’s remedies due to the combination of my focus on remedies and my intrinsic thesis. I have argued that the only considerations that are relevant at the remedial stage are those that existed in some form or other at the initial stage. Considerations external to the parties’ original relationship are already excluded.\(^{357}\) This argument is sufficient to exclude the extrinsic accounts and the threat they bear of radical remedial indeterminacy. As such, my argument

\(^{355}\) I owe exegesis of this passage to Ernest Weinrib’s seminars on Kant’s legal philosophy.

\(^{356}\) Examples abound of areas where morality pulls us in one direction and the law another. See, for example, Beswick v Beswick [1968] AC 70 (HL), where the court held that a third-party beneficiary of a contract could not sue for its performance. The situation here could not have been more heart-melting. Mr. Beswick and his nephew came to a contractual agreement according to which in the event of the senior Beswick’s death, the younger would continue to maintain the elder’s widow in return for which he received full control of the elder’s business. Following Mr. Beswick’s anticipated demise, the nephew reneged on his contractual promise.

\(^{357}\) In Chapter 6 I introduced a possible challenge to certain intrinsic accounts—that some relevant remedial reasons (reasons of corrective justice) appear to come from without—but demonstrated that this was only an appearance of externalism.
here goes beyond what this thesis strictly requires. In fact, it might be one of the benefits of my reason-based approach that, unlike the Kantian approach, it remains agnostic as to the particular content of private law. That is, what the legal system picks out as matters of private law’s initial entitlements, although not arbitrary, is not necessarily morally determined by natural law. However, given the private legal entitlements we do have (contract rights, rights to person and property, e.g.), only a certain type of remedial structure is appropriate. In this way, I retain a non-deterministic picture on the legal entitlements we do have while rejecting the corresponding non-deterministic picture about the types of remedies that are available consequent the infringement of the former. Nonetheless, a deeper inquiry into just what sort of reasons private law’s remedies are is beneficial as it provides some guidance as to what type of reasons the corresponding initial private legal entitlements can be.

Let’s review. Reasons are considerations that count in favor of or against the performance of some action, or for or against the holding of some belief. Legal reasons are practical reasons, and, as such, their concern lies with actions, not beliefs. Finally, law cares about conformity, not compliance—it doesn’t matter why you abide the law, only that you do. Can we distinguish legal reasons further? And, if so, do private law’s remedies thus reveal themselves as consisting of a distinct reason type? To answer these and related questions, I canvass a number of different types of reasons, ultimately advocating what I call interpersonal reasons as the appropriate form of reason for private law’s remedies. My concern in this chapter is not with the subject matter of such reasons—in the case of torts and crimes, notably, the subject matter often overlaps—but with their form.
Even if there is a distinctive form of reason for private law’s remedial reasons, how will we know it when we find it? For this criterial purpose, I endorse what Stephen Darwall has recently referred to as “Strawson’s Point,” according to which, “[t]o be a reason of the right kind, a consideration must justify the relevant attitude in its own terms. It must be a fact about or feature of some object, appropriate consideration of which could provide someone’s reason for a warranted attitude of that kind toward it.” The following non-legal example illustrates this point: Frank is the CEO of an organization for which George is his precariously engaged employee. Frank tells a seriously unfunny joke, but George laughs. We would say George laughed for the wrong kind of reason, not out of humor, but out of sycophancy. Such a reason might justify George’s laughter, but it does not justify it for the reason we would normally justify laughing at a joke: that it’s funny. To see this point more clearly, say Hannah, hearing Frank’s “joke”, says to him: “That wasn’t funny. That wasn’t even a joke.” Frank cannot justify

358 Stephen Darwall, The Second-Person Standpoint: Morality, Respect, and Accountability (Cambridge, Mass: Harvard University Press, 2006) at 16 [emphasis in the original] [Darwall, Second-Person Standpoint]. Strawson himself used this point to show how practices of punishment and moral responsibility could not be justified by the social desirability of such practices in efficiently regulating behavior. (PF Strawson, “Freedom and Resentment” (1968)). Efficiency was the wrong kind of reason. We can see this is the case if we consider that a conceivably effective way to deter socially undesirable behavior is to punish the loved ones of wrongdoers. While this is desirable in that it is effective (let’s even say 100% effective), this cannot justify the practice of punishment. Whatever it is that is meted out to the family members is not punishment. What justifies punishment – what counts as the right sort of reason – is the moral culpability of the wrongdoer. What primarily grounds punishment is not forward-looking deterrent reasons, although such goals might possess some secondary justificatory significance, but rather the backward looking concept of desert. (See Ferdinand D Schoeman, “On Incapacitating the Dangerous” (1979) 16:1 American Philosophical Quarterly 27). Non-punishment of the innocent, in other words, trumps deterrence of crime. The desert-based understanding of criminal law’s punitive reasons, unlike deterrent-based explanations, is able to explain doctrines integral to the criminal law, such as “innocent until proven guilty” and “proof beyond a reasonable doubt.”
that it either was funny or was a joke by pointing to George's laughter. If he does, Hannah can inform him that George laughed only out fear of unemployment. This is simply because George's laughter is based on the wrong kind of reason to justify laughing at a joke qua joke. In other words, the rational explanation for a joke's inducing laughter is that it is funny, not that we desire the joke-teller to like us.

I have defined the right kind of reason to laugh at a joke in terms of what jokes are normally thought to be and to do: intentional expressions, verbal or non-verbal, aimed at arousing humorous reactions in others. Thus, reasons to laugh (respond appropriately) to a joke relate somehow to the broad notion of what it is to be a joke. This indicates that to understand what the right kind of reasons there are for private law's remedies, we must explore more generally what it is to be a remedy.

Etymologically, remedy is linked to medicine, coming from the Latin word *remedium*, which literally means to bring about a return to health (*mederi*, the root verb, meaning to heal and *re* meaning back). Hence, its first definition in the Oxford English Dictionary is:359 “[a] cure for a disease or other disorder of the body or mind; any medicine or treatment which alleviates pain and promotes restoration to health.” As this is not a medical thesis, the OED’s second definition provides a more apt definitional starting point: “[a] means of counteracting or removing an outward evil of any kind; reparation, redress, relief.” A remedy, it seems, is that

359 As noted by Zakrzewski, *supra* note 6 at 8-9. From the lexicographical definitions, Zakrzewski identifies the following three possible non-legal meanings of remedy: “(1) any means of preventing or obtaining relief from redress of some evil; or, more specifically (2) a treatment leading to such relief of the process of bringing about such relief; or (3) something forming part of or applied in the treatment or process.” (Ibid at 9).

which responds appropriately to a situation in the world that calls for such redress. Most legal writers (scholars, lawyers, judges) would acknowledge this stipulated definition. In fact, for most, the general function of remedial awards is: “to put the party complaining in the position that he or she would have occupied if the wrong had not been done.” For the common law’s classic articulation, we need only recall the famous words of Lord Blackburn:

I do not think that there is any difference of opinion as to its being the general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

We can take from this that the general idea of what it is to be a remedy is to somehow make it as if the parties occupied the position they would have had the complained of behavior not occurred.

Recalling our earlier position that reasons are facts, what fact (or facts) counts (or count) in favor of making an unfortunate situation in the world as if it never happened? Two immediate possibilities present themselves. First, we might say that it is simply by virtue of the unfortunate situation coming into existence that we (all) have reason to make it better. Pain and suffering are bad; remediation and amelioration are good. We all have reason(s) to


362 Livingstone, supra note 10.
promote good things and ameliorate bad things. In the alternative, we could imagine that it is because a particular agent caused (is responsible for) the suffering that he has a reason to resolve it. The reasons apply specifically to him because he has some special reason to provide relief. Using Thomas Nagel’s distinction between agent-neutral and agent-relative reasons, let’s assess these reasons in greater detail with an eye to clarifying just what sorts of reasons these are. The immediate aim of this analysis is not to answer decisively which reasons are relevant, but rather to get a picture of two initially persuasive candidates. Its additional benefit is to illuminate what I mean by “form” with respect to reasons.

39.1 Impersonal reasons
Let us examine the first possibility more closely: that it is simply by virtue of the objective misfortune of the situation that another is called to ameliorate to the extent possible. Thomas Nagel calls this an “agent-neutral” reason, and provides the following definition: “If a reason can be given a general form which does not include an essential reference to the person who has it, it is an agent-neutral reason.” For the sake of a symmetry that will become apparent

\[363\] For skepticism about the distinction between agent-relative and agent-neutral values, see Mark Schroeder, “Teleology, Agent-Relative Value, and ‘Good’” (January 2007) 17 Ethics 265: “There is no uncontroversial distinction between agent-relative and agent-neutral values.” (Schroeder, at 276). On the same page, however, Schroeder accepts as uncontroversial the distinction between what are “reasons for everyone and reasons that are reasons for only some people.” This, in essence, is the distinction I am trying to draw with respect to private law’s remedies: whether they are fundamentally “reasons for everyone” or whether they are “reasons for only some people.”

\[364\] Thomas Nagel, The View from Nowhere (Oxford: Oxford University Press, 1986) at 152 [Nagel, View]. Along with the term “agent-relative,” which I introduce below, the coinage of the term “agent-neutral” is correctly attributed to Derek Parfit, Reasons and Persons (Oxford: Oxford University Press, 1984) at 143. Nagel explicitly adopts Parfit’s terminology as a clarifying improvement of his earlier terms “subjective” and “objective.”
later, I prefer to call such reasons *impersonal* reasons. For impersonal reasons, it is just the fact that pain is bad objectively that gives anyone a reason to make it stop. Again from Nagel: “The objective badness of pain, for example, is not some mysterious further property that all pains have, but just the fact that there is reason for anyone capable of viewing the world objectively to want it to stop.”

To take a simple example, the fact that I have a toothache is a reason for anyone to take steps to ameliorate my pain by virtue of the fact that the pain I am suffering itself serves as a reason for its anesthetizing. No special relationship between the soother and sufferer is required. The pain could be removed by anyone, anything, or even by no one, simply dissipating on its own accord. There is no normative difference in any of these options with respect to its generating force, the objective badness of the pain: “[i]f I have a severe headache, the headache seems to me to be not merely unpleasant, but a bad thing. Not only do I dislike it, but I think I have a reason to get rid of it.”

More explicitly, an impersonal reason is a “reason for anyone to do or want something that ... would reduce the amount of wretchedness in the world.” Nagel’s argument is that if pain had only relative value—that is,

(Nagel, *View* at 152).

365 Nagel, *View, supra* note 364 at 144.

366 Ibid at 145.

367 Ibid at 152-153.
it is only because I dislike it that there is a reason for it to stop, then “people [would] have reason to avoid their own pain, but not to relieve the pain of others (unless other kinds of reasons come into play.”

39.2 Personal reasons
Let us turn to our second candidate: what Nagel calls “agent-relative” reasons and which I refer to as personal reasons. Here, it is because of the particular relationship the agent has with the fact in the world that she/he finds her/himself in possession of a reason to perform some action: “If ... the general form of a reason does include an essential reference to the person who has it, it is an agent-relative reason.” In other words, one cannot give a full statement of the reason without making reference to the person for whom it is a reason. This type of reason directly implicates an interest of the agent to whom it is relative.

368 Ibid at 159

369 Ibid at 145. For a helpful taxonomy of the different ways agent-relative reasons can be defined, see Michael Ridge’s Stanford Encyclopedia of Philosophy entry: “Reasons for Action: Agent-Neutral vs. Agent-Relative” http://plato.stanford.edu/entries/reasons-agent/

370 In his earlier work, The Possibility of Altruism, Nagel argued that every subjective reason or value must be understood to have an objective correlative. He asks us to imagine a situation where we are being tormented. Here, the relevant question we might ask is “how would you like it if someone were doing the same to you?” We ask this to get our tormentor to see the normative force of our complaint. Nagel argues that the tormentor would not only see that he would dislike it, but that he would also resent it. This resentment gives the tormentor a reason to stop: the reason is that the tormentor would not like it. We expect others (strangers) to respond to this same reason, the tormentee’s reason. So, argues Nagel, a person’s agent-relative reasons have normative force for other persons. (Nagel, Altruism, supra note 364 at 82-83). Nagel later changes his mind about this conclusion. In The View from Nowhere, he gives the example of my reason to climb Kilimanjaro giving no one else a reason to help me do so.
Nagel identifies three types of agent-relative (personal) reasons: reasons of autonomy, reasons of deontology, and reasons of obligation.\textsuperscript{371} Insofar as these reasons exist independently of impersonal values they are agent-relative reasons.

Reasons of autonomy are reasons that stem from the desires, projects, commitments, or personal ties of the individual agent. They provide an agent with “reasons to act in the pursuit of ends that are his own.”\textsuperscript{372} My personal desire to become a law professor, for example, is a reason of autonomy. Even if the greater good (an impersonal value) would not be served by my pursuit and fulfillment of this goal, I am not obliged to discard it in favor of a more objectively valuable career on the basis of this greater objective value. While my personal projects might get support from others, they do not (absent some further reason) demand such support by providing an impersonal reason for others’ assistance. These reasons are transparent in that others can see that they are reasons for me, but this does not mean that they themselves serve as reasons for others to act: “Each person has reasons stemming from the perspective of his own life which, though they can be publicly recognized, do not in general provide reasons for others and do not correspond to reasons that the interests of others provide for him.”\textsuperscript{373}

While reasons of autonomy function as limits on what we are obliged to do with respect to impersonal values, the second type of agent-relative reason, reasons of deontology, limit

\textsuperscript{371} Nagel, View, supra note 364 at 165.

\textsuperscript{372} Ibid.

\textsuperscript{373} Ibid at 172.
what we are permitted to do in the service of either impersonal or autonomous values. These reasons arise from the claims of other persons not to be mistreated in certain ways.\(^{374}\) “What I have in mind are not neutral reasons for everyone to bring it about that no one is maltreated, but relative reasons for each individual not to maltreat others himself, in his dealings with them (for example by violating their rights, breaking his promises to them, etc.).”\(^{375}\) The values served by these reasons in such cases cannot be explained merely in terms of neutral values, Nagel asserts, since “the particular relation of the agent to the outcome is essential.”\(^{376}\) What he means here, I gather, is that it is essential that it is I who keep the promise that I made to you. That someone else keeps my promise does not serve the value of my-keeping-my-promise-to-you. It is the wrong kind of reason.\(^{377}\)

The final type of agent-relative reason Nagel identifies is reasons of obligation. Such reasons stem from the “special obligations” we have toward those to whom we are closely related: our parents, children, spouses, siblings, fellow community members, fellow citizens, etc. They are non-contractual obligations to show special concern for some others. Our special relation to the reason is mediated by our special relationships. That I am a parent is a reason for me to act in a certain manner toward my children; that I am a Canadian citizen provides me

\(^{374}\) Ibid at 175.

\(^{375}\) Ibid at 165. See also: Ibid at 176.

\(^{376}\) Ibid at 176.

\(^{377}\) Notably, Nagel admits to being less confident that these deontological reasons resist agent-neutral interpretation. Ibid at 165.
with certain reasons (pay my taxes) because I’m Canadian; that I am married to you gives me a special reason to act as a spouse to you that those who are not married to you would not have and which I do not have towards others to whom I am not wed.

39.3 Interpersonal reasons
Nagel’s division between agent-relative (personal) and agent-neutral (impersonal) reasons is not exhaustive of the forms of reasons. A third potential category exists—what I call interpersonal reasons. This type of reason emanates from the relationship of the sufferer and injurer. This bears some notable similarity to Christine Korsgaard’s treatment of “intersubjective values:” “[v]alues are neither subjective nor objective, but rather intersubjective. They supervene on the structure of personal relations.”378 Values directly correspond to practical reasons: “to say that there is a practical reason for something is to say that the thing is good, and vice versa.”379 Humanity, or more accurately personhood, for Korsgaard, is the ultimate source of value: “On an Intersubjectivist interpretation, neutral reasons are shared, but they are always initially subjective or agent-relative reasons. So on this view, everything that is good or bad is so because it is good or bad for someone.”380 It is by virtue of my status as a person (as an end in myself, and not a means) that I can make claims on other persons (other ends) to treat me as such, or, more negatively, not to treat me as a non-

378 Christine Korsgaard, Creating the Kingdom of Ends (Cambridge: Cambridge University Press, 1996) at 276 [Korsgaard, Kingdom].

379 Ibid.

380 Ibid at 279.
ends, i.e., as a means. Thus, values don’t arise in isolation, but “from human relations.” More on the possible types of human relations and what this could mean for private law’s remedial obligations in a moment.

Korsgaard’s definition of intersubjective reasons shares similarities with what Stephen Darwall calls a “second-personal reason:” “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.” What is essential to note about such reasons (be they called, intersubjective, second-personal, or, my preferred term, interpersonal) is that they are irreducible to impersonal (agent-neutral) or personal (agent-relative) reasons. Such reasons, so understood, spring from the relationship(s) between persons. They promote interpersonal values, values being “neither subjective nor objective, but rather intersubjective. They supervene on the structure of personal relations.” Both Korsgaard and Darwall get at something Nagel misses: reasons that seem to spring from relations with others and whose form necessarily requires essential reference to the parties that make up said relationship.

I have introduced the different kinds of reasons. Now the tasks at hand are to: i) show these reasons to be in fact of different kinds—that is, irreducible to one another; ii) 

381 Ibid at 282.
382 For differences in their positions, see Christine Korsgaard, “Autonomy and the Second Person Within: A Commentary on Stephen Darwall’s The Second Person Standpoint” (October 2007) 118 Ethics 8.
383 Darwall, Second-Person Standpoint, supra note 358 at 8 [emphasis in the original].
384 Korsgaard, Kingdom, supra note 378 at 276.
demonstrate that personal and impersonal reasons fail to account for both our normative intuitions and the legal doctrine relevant to private law’s remedies; and iii) argue for the aptness of interpersonal reasons in this regard.

39.4 Impersonal, personal, and interpersonal—distinct categories
First, while impersonal reasons give anyone a reason to act, interpersonal reasons apply only to a person involved in the relationship that generates them.\textsuperscript{385} My promise to you that we will have lunch today cannot be met by anyone but me. If I send a friend of mine (perhaps even a famous friend you prefer to me) to lunch in my stead, I have not satisfied my promise; I have not satisfied the interpersonal reasons generated by the promise. The reason generated is not of the form have-lunch-with-you, but rather I-have-lunch-with-you. My conduct, in other words, is partly constitutive of the reason that recommends it. By contrast, impersonal reasons do not include the agent to whom they apply in this manner. If my promise to have lunch with you were understood as generating an impersonal reason, then your having an enjoyable companion to lunch with—regardless of who it was—would count as satisfying my promise. A legal example could be this: I mistakenly believe that I still owe you a debt. This debt, however, was already discharged. Operating under this misperception, I pay you $50. Let’s say my mother knows about this and is worried about my finances. She writes me a check for $50 to cover my losses in the event you refuse to transfer back my funds. The fact of my mother’s

\textsuperscript{385} I will discuss in the following section a potential criticism of this – that any reason (impersonal, interpersonal, personal) gives a reason for anyone to act by virtue of its being a reason.
payment in no way should discharge your duty to repay my mistaken payment. The duty of restitution, in other words, must come from you.

Second, interpersonal reasons are distinct from personal reasons. To argue this seems at first a more difficult task because superficially the two seem almost identical: both provide an individual agent a reason to act that is not shared by the world at large. Here, Nagel’s original terminology of subjective and objective is revealing. Recall, agent-relative reasons are “subjective” not intersubjective. They spring from interests relative and relevant only to the agent who possesses them. Unless the interests of another can be viewed as interests of oneself, no agent-relative (only potentially agent-neutral) reasons can arise from the relationship with another. This feature of Nagel’s agent-relative reasons leads Korsgaard to levy the following criticism against his so-called “deontological reasons:”

Nagel believes that his theory can accommodate the victim’s right to complain. ... But the theory that deontological reasons are agent-relative or only subjectively normative cannot accommodate it. If the deontological reasons were agent-relative, merely my property, my victim would not have the right to demand that I act on it. Consider a comparison. If you have an agent-relative reason to climb Kilimanjaro, and don’t do it, I may entertain the thought that you are being irrational. I can see what your reasons are. But if I have no reason to bring it about that you climb Kilimanjaro, as Nagel supposes, then I have no reason to talk you into doing it. I have no reason to do anything about your relative reasons ... I certainly don’t have a reason to complain of

386 This is the clearest reason that I know of for why there should be no defense of passing off in the law of unjust enrichment. See also subrogation of insurance claims.

387 Quotation to Nagel, View, supra note 364 at 184 omitted.
your conduct when you don’t act on them, and if I do, you may justifiably tell me that it is none of my business.\textsuperscript{388}

More importantly, interpersonal reasons are not conditional on the whims of the agent who has them. Personal reasons, by contrast, since they depend on the set of interests of the agent who possesses them, appear subject to this conditionality. Nagel’s strained attempt to understand deontological reasons as a type of agent-relative reasons proves rather than disproves this point. As Korsgaard notes, if we follow Nagel in characterizing deontological reasons as personal, then the “bad” that failure to conform to those reasons is bad \textit{for} is the torturer, not his victim. While no doubt it is in a sense bad for the torturer, for his virtue, immortal soul, etc., the salient sense of badness that Nagel is trying to isolate here is the badness that gives the victim a cause of complaint—that is, it is bad \textit{for her qua victim}.

\textbf{39.5 Interpersonal reasons as private law’s reasons}

Since each of these three kinds of reasons can be seen to support remedial action, my first argument in favor of interpersonal remedial reasons for private law is negative: private law’s remedial reasons are interpersonal because they are neither personal nor impersonal.\textsuperscript{389}

Impersonally, I could have a reason to provide a remedy by virtue of the objective fact that pain and suffering are bad. Personally, I could have a reason to provide a remedy by virtue of the

\textsuperscript{388} Korsgaard, \textit{Kingdom}, \textit{supra} note 378 at 297-298.

\textsuperscript{389} Notably, I have not argued for the missing premise that personal, impersonal, and interpersonal reasons cover the field of possible practical reasons. Clearly, they do not. Intrapersonal reasons are omitted, for example. Intrapersonal reasons, however, seem to me to be reducible to personal reasons as they are simply diachronic personal reasons.
fact that I am suffering, that someone who has a special claim on me makes me desire that they no longer suffer, that I don’t want to be the cause of another’s suffering etc. Interpretations of private law’s remedial reasons using personal or impersonal reasons are possible, but fail to account for integral features of the institutions as we find them. In sum, I suggest that the remedial reasons of private law for the defendant are best understood as interpersonal reasons. They arise because of an institutionally recognized relationship between the plaintiff and defendant and serve values that are constitutive of such relationships.

39.5.1 First negative argument: private law’s reasons, not impersonal

My argument here is neither that private law’s remedial reasons cannot be impersonal nor that the incidents of private law do not generate impersonal reasons. Rather, I argue that, given the private law remedial institutions we have, such reasons do not form the central case. What do I mean by this? Simply, that the given doctrines and institutions of private law are made the best sense of if we understand these reasons as interpersonal. Methodologically, I endorse Weinrib’s understanding of the task of legal theory: “to bring to the surface the most pervasive ideas latent in the law as a normative practice.” \(^{390}\) In other words, I take the law as I find it for the most part and moreover take how I find it seriously, on its own terms, as a human effort to arrive at a coherent normative system insofar as such an enterprise is possible.

Why should the remedial reasons of private law not be understood as impersonal? The brief answer is that such an understanding would obscure the core feature of private law: that it consists of normative nexus between two parties, the plaintiff and the defendant. The

\(^{390}\) Ernest J Weinrib, “Private Law and Public Right” (2011) 61 UTLJ 191 at 194. See also Stephen Smith’s interpretive theory as not inimical to this. (Smith, Contract Theory, supra note 18).
plaintiff sues the defendant for some wrong or injustice that the defendant is accountable to the plaintiff for. This aspect of private law is most famously captured by Weinrib’s sophisticated version of formalism, according to which, the form of private law consists in the direct linking of plaintiff and defendant.\textsuperscript{391} Unlike considerations of policy, wealth distribution, etc., no intermediate principle intrudes on this immediate relation between the doer and sufferer of the events that amount to private law’s actions.\textsuperscript{392} The essential bipolarity of private law indicates that the relationship between the two parties is correlative:

\begin{quote}

correlativity highlights the moral reason for singling out the defendant for liability. Because the actor’s breach of duty infringes the sufferer’s rights liability reflects the defendant’s commission of an injustice… Conversely, correlativity also indicates why the plaintiff in particular is entitled to recover. The defendant violates a normative bond not with the world at large but specifically with the person to whom the defendant owed the duty.\textsuperscript{393}
\end{quote}

One need not be a dyed in the wool Weinribian to recognize that the form of private law relations and the reasons that such relations essentially generate are bipolar/correlative. Benjamin Zipursky (along with John Goldberg and other civil recourse theorists) explicitly rejects Weinrib’s corrective justice thesis,\textsuperscript{394} but preserves his central insight that private law involves the immediate interaction of plaintiff and defendant (at least at the stage of

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\textsuperscript{391} Weinrib, \textit{The Idea of Private Law}, supra note 1 at 28.
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\textsuperscript{392} Ibid at 75.
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\textsuperscript{393} Ibid at 143.
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\textsuperscript{394} Zipursky, “Rights, Wrongs, & Recourse,” \textit{supra} note 75 at 5.
\end{flushright}
complaint initiation): “A plaintiff cannot win unless the defendant’s conduct was a wrong relative to her, i.e., unless he right was violated. ... [This] is a fundamental feature of tort law." Unlike criminal law, private law disputes are not initiated by the state, but by the citizen whose right has been (or is threatened to be) interfered with. If A witnesses B committing a tort against C, A has no (legal) recourse to sue B, although he might have certain reasons to perform other actions. Only C (or his estate, should he be killed) has the legal power to hold B to account and to extract a remedy from B. By contrast, in the realm of criminal law, even if the victim of an offence does not desire that the crown press charges, it is generally not up to him to make this decision.

Michael Thompson refers to correlative relations and the judgments they engender as “forms of bipolar normativity” or “forms of relation of right." Thompson nicely illustrates:

In all such judging, ... , I may be said to view a pair of distinct agents as joined and opposed in a formally distinct type of practical nexus. They are for me like the opposing poles of an electrical apparatus: in filling one of these forms with concrete content, I represent an arc of normative current as passing between the agent-poles, and as taking a certain path. Thompson explicitly draws the distinction in form between private law and criminal law along the lines of “properly bipolar” and “merely monadic” forms of deonticity:

395 Ibid at 4.
396 Thompson, supra note 83 at 335.
397 Ibid.
The zone in which juridical practices *paradigmatically* generate bipolar deonticity ... is of course so-called private law, the sort carried on under headings of contract, property, tort and so forth...\(^{398}\)

... The zone in which juridical institutions paradigmatically generate merely *monadic* deonticity, by contrast, is of course criminal law.\(^{399}\)

Gregory Keating has recently challenged this characterization of tort law, arguing that its primary obligations “are omnilateral not bilateral: they are owed by everyone to everyone else.”\(^{400}\) The reasons provided by tort law are obligations of harm-avoidance.\(^{401}\) Keating, however, maintains that the “[r]emedial responsibilities [of tort law], by contrast, are bilateral.”\(^{402}\) Hence, we can see Keating as arguing in a sense the converse of Zipursky and Goldberg. Zipursky admits the correlativity of the primary relationship between plaintiff and defendant, but denies that the remedy necessarily possesses a matching correlativity. For my present purposes, whether a correlative obligation can give rise to a non-correlative remedy or vice versa is not important. Both Zipursky’s and Keating’s disassociations of right from remedy were given attention in previous chapters. For now, all that is necessary is to see that Keating’s challenge fails to attach to my argument: that remedial obligations are bilateral. In fact, he explicitly endorses this.

\(^{398}\) Ibid at 343.

\(^{399}\) Ibid at 344.

\(^{400}\) Keating, “Is Tort Law a Remedial Institution?,” *supra* note 300 at 4.

\(^{401}\) Ibid at 25.

\(^{402}\) Ibid at 6.
Impersonal reasons, thus, do not fit the form of remedies in private law. They are not reasons of the form – Plaintiff v. Defendant – but rather of the form Crown v. Accused. They are not claims of “you owe me”, but rather demands of “don’t do that.” This is not a claim about the content of such reasons, only their form. To this end and in light of the above, I submit that the essential structure of private law’s remedial reasons is not impersonal.

39.5.2 Second negative argument: private law’s reasons, not personal

Next, remedial reasons of private law are not personal. Personal reasons spring from interests relative and relevant only to the interests of the agent who possesses them. In private law’s remedies, it seems to be the interest of the plaintiff (her claim for compensation) that grounds the defendant’s duty. Unless the plaintiff’s interests can somehow be seen as the defendant’s as well, no personal reason for the defendant to perform a reparative act can arise.403

Personal reasons don’t seem to be the right kind of reason to explain the central case of private law’s remedial obligations given that remedial obligations are categorical. They are not conditional on the whims of the agent who has them. Personal reasons, because they gain their traction from some desire or interest of their possessor, do seem conditional in this way. Yet, recall Nagel’s tripartite division of personal reasons, viz. reasons of autonomy, reasons of deontology, and reasons stemming from special obligations. Reasons of autonomy clearly—unless we endorse the explanation that it is for the defendant’s virtue—are not reasons of private law obligations, but what about the other two?

403 One possibility is that it is for the soul of the wrongdoer that compensation is owed. The point of the compensatory payment is not compensation for the plaintiff, but for the defendant himself to make up the moral deficit his action has produced. Clearly this is not how private law works.
Addressing deontological reasons first, Nagel explains,

These are agent-relative reasons which depend not on the aims or projects of the agent but on the claims of others. Unlike autonomous reasons, they are not optional.  

Deontological constraints add further agent-relative reasons to the system – reasons not to treat others in certain ways. They are not impersonal claims derived from the interests of others, but personal demands governing one’s relations with others.

Nagel goes on to describe the sphere where such deontological reasons arise and it looks quite a lot like the province of private law:

There are special obligations created by promises and agreements; the restrictions against lying and betrayal; the prohibitions against violating various individual rights not to be killed, injured, imprisoned, threatened, tortured, coerced, robbed; the restrictions against imposing certain sacrifices on someone simply as means to an end.

Why aren’t these reasons explicable by neutral values? What makes them “agent-relative” on Nagel’s terms? “In all these cases it appears that the special reasons, if they exist, cannot be explained simply in terms of neutral values, because the particular relation of the agent to the outcome is essential. ... Deontological reasons have their full force against your doing something – not just against its happening.” So what is relevant here is not the relationship

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404 Nagel, View, supra note 364 at 175.
405 Ibid 176.
406 Ibid.
407 Ibid at 176-77.
between the actor and the individual upon whom he acts, but between the actor and his act. Again, this doesn’t look like the right kind of reason for private law or its remedies. Recall here Korsgaard’s criticism of Nagel’s argument: it leads to the absurd situation that the torturer could reply to his victim that the pain and suffering he causes her is none of her business. In sum, if deontological reasons are personal reasons, they cannot account for the plaintiff’s ability to complain of her mistreatment at the hands of the defendant. If deontological reasons are not personal reasons, then we have come one step further in demonstrating that personal reasons are not the underlying reasons for private law’s (deontological) remedial obligations. Recall that, for Nagel, deontological reasons are reasons for a person not to perform a certain action. In this way, they are focused on neither desires nor outcomes. As such, for him, they are a distinct type of reason. What, however, they do not relate to are the claims of others. In this sense, they resemble Thompson’s characterization of the criminal law and, as such, are not the reasons of the right kind for private law.408

But what about Nagel’s third type of personal reasons, the “reasons of obligation?” Recall that this “third type of reason stems from the special obligations we have toward those whom we are closely related: parents, children, spouses, fellow members of a community or even a nation.”409 They consist in “a noncontractual obligation to show special concern for some of these others.”410 Can’t the obligations of tort law be described readily as

408 I thank Arthur Ripstein for this insight.
409 Nagel, View, supra note 364 at 165.
410 Ibid at 176-77.
noncontractual obligations to treat other members of one’s legal community with special concern? As Lord Atkin articulates it, “[w]ho, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directly my mind to the acts or omissions which are called in question.” Again, however, the reasons generated by such special obligations apply only to one party. While the trigger might be the relationship with another, this other possesses no normative significance otherwise. He is simply an event. All the normative significance lies in the agent’s orientation with respect to the relationship: whether it is one he feels gives him special reasons.

39.5.3 Positive argument: private law’s reasons, interpersonal
Neither personal nor impersonal reasons capture the central feature of private law’s remedial reasons, but do interpersonal reasons fare better? To see how they do, let us recall what it is to be a reason. Earlier I defined reasons as considerations that count in favor of some action, but I omitted from this definition a dependent clause: because to perform such an action would promote, preserve, or constitute some value. The relationship between reasons and value is not uncomplicated. It seems to descend into a kind of regress:

Query: Why did you have a reason to φ?

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411 M’Alister (or Donoghue) v Stevenson [1932] AC 562 (HL). George Eliot’s saintly character Dorothea contemplates similarly, “She sat down in the library before her particular little heap of books on political economy and kindred matters, out of which she was trying to get light as to the best way of spending money so as not to injure one’s neighbours, or—what comes to the same thing—so as to do them the most good.” Middlemarch (1871), 767. Dorothea’s conclusion would strike most of us as quite alien to law, one of the hallmarks of which is the absence (or at least nonequivalence with negative duties) of positive obligations.
Answer: Because $\phi$ing serves value $x$.

Q: Why is $x$ valuable?

A: Because there are reasons to promote, preserve, realize, or instantiate it.

This circularity doesn’t undermine my point; it establishes it. Reasons are intimately connected to value. Like the chicken and the egg, it doesn’t matter which came first. All that concerns us is that they are mutually interdependent.

Hence, a helpful way to understand interpersonal reasons is to ask what values such reasons serve. Korsgaard guides the way: “If values arise from human relations, then there are surely more possibilities. The claims springing from an acknowledgment of our common humanity are one source of value, but the claims springing from friendships, marriages, local communities, and common interests may be others.”[^412] Such reasons thus arise from relational institutions such as friendship, family, games, promising, planning, and private law. This is because the values constitutive of such institutions are interpersonal.

Let us take friendship. To be a friend in the true sense means to will one’s friend’s well-being for the sake of one’s friend. As John Finnis sets out:

In the fullest sense of ‘friendship’, A is the friend of B when (i) A acts (or is willing to act) for B’s well-being, for the sake of B, while (ii) B acts (or is willing to act) for A’s well-being, for the sake of A, (iii) each of them knows of the other’s activity and willingness and of the other’s knowledge, and (iv) each of them co-ordinates (at least some of) his activity with the activity (including acts of friendship) of the other so that there is a sharing, community, mutuality, and reciprocity not only of knowledge but also of activity (and thus, normally, of enjoyment and satisfaction). And when we say that A

and B act ‘for the sake of each other,’ we mean that the concern of each for the other is founded, not in devotion to some principle according to which the other (as a member of a class picked out by that principle) is entitled to concern, but in regard or affection for that individual person as such.\textsuperscript{413}

The idea rejected by Finnis that we act out of some friendship principle is just the idea that the reasons of friendship are impersonal reasons. Rather, the reasons generated by friendship arise from the relationship itself, from one’s affection or regard for one’s friend as one’s friend. This is not, Finnis subsequently reminds us, the same as acting from one’s own point of view or from the friend’s point of view, but rather: “one is acting from a third point of view, the unique perspective from which one’s own good and one’s friend’s good are equally ‘in view’ and ‘in play.’”\textsuperscript{414} Thus, the reasons involved are neither personal (that is, neither one’s own nor one’s friend’s), but interpersonal: reasons that supervene on and are generated by the relationship of friendship. Private law interactions—at the remedial stage—also generate interpersonal reasons. Weinrib notes this feature, pointing out that liability in private law is not assigned because of plaintiff’s need or because of defendant’s bad character: “private law looks neither to the litigants individually nor to the interests of the community as a whole, but to a bipolar relationship of liability.”\textsuperscript{415}

I should be careful to note that, as the practical institutions that they are, friendship, family, games, and private law generate impersonal and personal reasons as well as

\textsuperscript{413} John Finnis, \textit{Natural Law and Natural Rights} (Oxford: Clarendon Press, 1980) at 142 [emphasis added].

\textsuperscript{414} Ibid at 143.

\textsuperscript{415} Weinrib, \textit{Idea of Private Law}, supra note 1 at 2.
interpersonal reasons. My argument is not that private law and other relational institutions exclusively create interpersonal reasons, but that such reasons are constitutive of the institution itself such that we could not understand the true nature of the institution unless we understood it as giving rise to such reasons primarily. Personal and impersonal reasons are merely byproducts of the institution. For example, that families promote the stability of a state is an impersonal reason that counts in favor of supporting the family, but we would not understand this, unless we were deeply cynical, as the constitutive feature of family life and its ultimate justification.

40 Objection to distinctions among reasons
One serious objection to my proposed schematization of reasons is that there is no such thing; that, in fact, all reasons are impersonal in that they are accessible to everyone. All reasons, be they personal, impersonal, or interpersonal, recommend an action (or recommend against an action) or contribute to some good. Anyone can, in theory, comprehend what the reason recommends. This is in essence John Gardner’s view of reasons:

I tend to think that all reasons are ultimately the same reasons for everyone. Some reasons, of course, are such that they only leave logical space for a particular person to conform to them. If I promise or decide or threaten to φ then, assuming my doing so gives rise to a reason to φ at all, it is a reason for me to φ that is not a reason for others to φ. But even here, in my view, the reason is still a reason for everyone to contribute to my φing, to care about my φing, to regret or be anxious about my not φing, etc.416

Reasons are facts that exist in the world and count in favor of or against a certain action (for practical reasons) or belief/attitude (for theoretical reasons). Reasons thus are transparent and accessible to all. I think this is undeniably true.417

We can, and Gardner and I agree on this, all attend to the reasons of others. This is what makes their actions comprehensible to us. If it weren’t for this ability to attend universally to the reasons of others, others and their actions would be as mysterious to us as those of alien creatures, perhaps more so. However, implicit in Gardner is an allowance for the distinctions I draw. In the above passage, he recognizes that some reasons “are such that they only leave logical space for a particular person to conform to them.” There is a difference, therefore, in attending to reason and conforming to it. The remedial reasons of private law must be conformed to by the defendant. The reasons, in Gardner’s terminology, are “relational” (I prefer “interpersonal”) with respect to conformity. That others can recognize (attend to) such reasons and contribute to their conformity by the individual to whom they directly apply does not negate my thesis; rather, it supports it. One can see the judge as playing just this role: attending to the interpersonal reasons that apply to the defendant whilst recognizing that they do not have such an interpersonal tone vis-à-vis the judge him/herself.

To present matters somewhat differently, the facts that generate reasons are not impersonal, personal, or interpersonal; they are simply facts. The same set of facts can

417 One might think this is odd: why should I have any reasons to feel or do anything when you break a promise to someone other than me? But the reasons, on this analysis, do not have to be particularly strong ones. It is a matter of regret—understood as wishing things had gone differently—when people don’t keep their promises, regardless of whether I am the promisee or not.
produce or generate different reasons for different agents. The fact of the plaintiff’s injury at the hands of the defendant at one and the same time generates all three types of reasons. The plaintiff has personal reasons not to desire the injury and to hope for its amelioration; the defendant perhaps has a personal reason to undo his wrongdoing for the sake of his moral purity; the world at large has an impersonal reason to act appropriately with respect to the harm as understood objectively: to pay one’s condolences, not rub it in the injured party’s face etc. Key, however, is that this fact also generates an interpersonal reason for this defendant to restore this plaintiff to her pre-wronged position.

41 Conclusion

This final chapter steps outside the remedial framework that has, until now, preoccupied us. The remedial reasons of private law, I have argued, are a particular type of practical reason, namely, interpersonal reasons. These reasons arise from the nature of the private law relationship itself: a relationship that essentially involves the interaction between two parties. I argued that the relevant reasons can be neither personal, as such reasons involve only one party while ignoring the other, nor impersonal, as such reasons do not specifically involve either party. The interpersonality of private law’s remedial reasons is a natural fit with the intrinsic theory I have backed. Intrinsic perspectives on private law’s remedies do not look outside of the immediate relationship between the two parties to determine the availability and nature of the subsequent remedy. Interpersonal reasons support this perspective as, by their very nature, they are constitutive of this immediate relationship, while personal and impersonal reasons are not.
Chapter 9
Conclusion

This thesis has attempted to come to terms with what I view as the fundamental question of private law’s remedies, namely, how do subsequent remedial actions rationally address prior failures. I have suggested in Part 1 that this question can be approached either intrinsically or extrinsically. While the former justifies and explains the remedial action from within the original plaintiff-defendant relationship, the latter welcomes external principles and goals. The arguments of this thesis have fit within an intrinsic approach to private law’s remedies. To this end, several arguments were levied against the extrinsic perspective, and, in particular, its confidence in the separation of rights and remedies. For positive inspiration, it looked to two leading intrinsic theoretical accounts—those of Ernest Weinrib and John Gardner, respectively—with an eye to revealing what, if any, meaningful differences there are between the two.

The first chapter of Part 2 suggested that an apparent difference between Weinrib and Gardner concerning the continued survival of the underlying obligation was only that: apparent. It revealed the collapse of Gardner’s continuity thesis into a version of Weinrib’s Kantian unity thesis. The next chapter, however, revealed a difference between the two with respect to the role each assigns to corrective justice. I suggested here that the thinness of Gardner’s version of corrective justice seems to require the adoption of a more robust account, something perhaps along the lines of Weinrib’s juridical conception of corrective justice, to grasp the ground for its operation of allocation back. In light of the confusion generated by
both the real and the apparent disagreements between leading intrinsic accounts, I ventured my own intrinsic account of how the remedial story could be told.

Using the language and logic of practical reasons and reasoning, this dissertation suggests that remedies can be understood in one of two ways. First, the remedy is just the same as the original reason. If I fail to pay my debt on the date it is due, my subsequent remedial action in paying it later is carried out because of the original reason, namely, that I owe a debt to someone. Second, the remedy is a reflection of certain second-order reasons that are part of the original (operative) reason. These are reasons not to act for certain other reasons that counsel against the performance of the first-order reason to do the obligatory action. These reasons stick around and tell you to do something; that doing nothing is not optional. If I break your toe, I can no longer satisfy the original reason not to break your toe; however, I can and must do something to address my initial failure. The content of this reparative action is constrained by the original reason not to break your toe. While its first-order strength is no longer available—one can no longer act for the reason it recommends—it can nonetheless provide guidance with respect to what the next-best thing might be.

In the final portion of this thesis, Part 3, I addressed a specific concern generated by a reason-based approach, namely, that it did not possess adequate tools to defend the distinctiveness of private law’s reasons as reasons of private law. To this end, I introduced the idea of interpersonal reasons as those reasons distinctive of private law’s remedial relationships. Such reasons are constitutive of the immediate original relationship of the parties and, thus, applying my intrinsic thesis, also of the parties’ subsequent remedial relationship.
The aim of this thesis is not to break new ground on what is such a fundamental and overarching question for the law of remedies. Rather, more modestly, my goal was to suggest another way to approach the question, one that did not rely on the language and metaphysical arguments of Immanuel Kant. My hope is to make the point of intrinsic theorists—that the remedy and the right are really two manifestations of intrinsically linked normative events—plain to readers who would reject, out of hand, any analysis that references profound and profoundly difficult German philosophers.
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