

2014

A Theory of Civil Liability

Nathan B. Oman

William & Mary Law School, nboman@wm.edu

Repository Citation

Oman, Nathan B., "A Theory of Civil Liability" (2014). *Faculty Publications*. 1669.
<https://scholarship.law.wm.edu/facpubs/1669>

A THEORY OF CIVIL LIABILITY

*Nathan B. Oman**

INTRODUCTION

When legal theorists reflect on the law they often do so at one of two levels of abstraction. On one hand, there are discussions devoted to the question, “What is law?” They seek to provide an account that makes sense of law in the broadest sense as a social phenomenon. This is the terrain of H.L.A. Hart’s *The Concept of Law* and the debates among natural lawyers, interpretivists, and the multiplying sects of legal positivists that Hart has spawned.¹ On the other hand, there is of late a growing body of theoretical literature devoted to particular substantive areas of law. Hence, for example, we have debates over the normative foundations of contract law or the analytic coherence of tort law.² This Article asks a question pitched at an intermediate concept: what is civil liability?

Civil liability is not the same thing as the concept of law writ large. Nor can it be reduced to a particular substantive body of law such as torts, contracts, or restitution. As this Article demonstrates, it also cannot be reduced to the law of remedies, although the structure of that law has much to teach us about the nature of civil liability.³ Rather, when lawyers apply the law of torts or contracts to a set of facts, they construct an argument whose conclusion will be either “the defendant is liable” or “the defendant is not liable.” To be sure, we often speak of contractual liability or tort liability.⁴

* Professor, William & Mary Law School. I am grateful for helpful comments from Jason Solomon and the participants at a conference at King’s College London, where I presented an earlier version of this Article. Alex Lurie provided excellent research assistance. As always, I thank Heather.

¹ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 47 (1986) (setting forth an interpretive theory of law); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 280-81 (1980) (setting forth a natural law theory of law); H. L. A. HART, *THE CONCEPT OF LAW* 181-82 (1961) (setting forth a positivist theory of law).

² See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 1 (1981) (offering a theory of contract law); STEPHEN A. SMITH, *CONTRACT THEORY* 5 (2004) (offering a summary of contemporary contract law theory); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 3-4 (1995) (offering a theory of tort law).

³ See, e.g., Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137 (2011) (offering a detailed discussion of the law governing damages in order to defend civil recourse theory against corrective justice theory).

⁴ See, e.g., *Ramp Operations, Inc. v. Reliance Ins. Co.*, 805 F.2d 1552, 1558 (11th Cir. 1986) (“[C]ontractual liability was expressly excluded from the scope of the insurance policy.”); *Terry v. State Farm Mut. Auto. Ins. Co.*, 677 N.E.2d 1019, 1022 (Ill. App. Ct. 1997) (“[W]e conclude that the language of section 5(b) of the Act that refers to a legal liability to pay damages refers to liability in tort, not contractual liability under an underinsured motorist policy.”).

We understand both things, however, to be instances of a single phenomenon. The adjective is etiological, telling us how liability arises, rather than constitutive, marking off dramatically different legal phenomena. Hence, the law of remedies provides rules regarding possible responses to the fact of civil liability. Generally, however, the law of remedies is indifferent to how civil liability arises.⁵ Levying on a tort judgment is usually identical to levying on a restitution judgment. Of course nothing is ever entirely simple in the law. Hence, for example, the availability of equitable relief in contracts involving personal services differs from the availability of such remedies in nuisance cases.⁶ Even here, however, we can speak coherently of the application of a single irreparable injury rule to differing factual circumstances.⁷

Broadly speaking, reflection on civil liability as such falls into two camps: liability as duty and liability as cost. These camps in turn map onto broader divisions within legal theory between moral theories of law versus economic theories of law, the *ex post* perspective versus the *ex ante* perspective, and deontological theories versus consequentialist theories. Both the duty theory and cost theory, however, mischaracterize the way that liability relates plaintiffs and defendants to one another and in so doing obscure the role of civil liability in a liberal political order. This Article offers a third theory, arguing that civil liability is first and foremost a kind of vulnerability to private aggression. Admittedly, civil liability sharply limits the extent of both the defendant's vulnerability and the plaintiff's lines of attack. The plaintiff cannot act against the defendant until a court has declared the defendant liable; generally, the plaintiff must act through a government agent such as a sheriff, and the scope of what a victorious plaintiff can do to a defeated defendant's person and property is constrained. Still, a declaration of liability means that the defendant is now vulnerable to the plaintiff's agency in a way he was not previously vulnerable.

Upon a moment's reflection, the fact that so much of our law—essentially all of the substantive *corpus iuris* devoted to the imposition of civil liability—is concerned with creating and defining vulnerability to private aggression is odd. At least since Thomas Hobbes, the state—and by extension the law—has been seen as a solution to the problem of vulnerability. The purpose of the state is to suppress private aggression. The liberal

⁵ See generally DAN B. DOBBS, DOBBS LAW OF REMEDIES § 1.1 (2d ed. 1993) (“The law of judicial remedies determines the nature and scope of the relief to be given to a plaintiff once that plaintiff has established a substantive right by appropriate in-court procedures.”).

⁶ See generally *id.* (“Availability of particular remedies depends much on the facts of the case.”).

⁷ See generally *id.* § 2.5(1) (“In many instances courts formulate the adequate legal remedy rule by saying that equitable relief is denied unless the plaintiff could show that, without such relief, he would suffer an irreparable harm.”); see also Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 693 (1990) (“[Courts] invoke the irreparable injury rule as well. Sometimes they rely solely or principally on the irreparable injury rule, and leave the application of some more specific rule merely implicit in their statement of the case.”).

theorists who followed Hobbes have been justifiably suspicious of the increasing competence of the state and have sought to set forth the limits of its legitimate reach. By and large, however, they have tended to agree with Hobbes on the basic task of the law: protecting members of the community from aggression. To be sure, they have disagreed as to whether what was being protected is the mere peace of the commonwealth or some bundle of rights. They have agreed, however, that the first task of the law is the suppression of private aggression. The theory of civil liability put forward in this Article challenges this basic assumption. The law does not suppress private aggression. Rather, law limits and channels it.

Why would this be so? This Article argues civil liability responds to problems created by the very success of the modern state in suppressing private aggression. In particular, that success creates two problems. First, people who are invulnerable to retaliation face fewer costs to misbehavior. It is easier for them to renege on their agreements and engage in misbehavior toward others without fear of retaliation. Admittedly, one might solve such problems by further expanding the punishments meted out by the government. Civil liability, however, represents another solution, namely the careful relaxing of the protection provided by the modern state. We allow plaintiffs to act against defendants in tightly controlled circumstances and within tightly circumscribed limits. In so doing, we render agents vulnerable to one another and thus encourage peaceful cooperation. The second problem is that the very success of the modern state in suppressing wrongdoing tends to render victims, especially law-abiding victims, passive in the face of wrongs. There is value, however, in letting victims be active in the face of those that harm them. By allowing them to be actors in their own stories—rather than passive spectators—we let them hold those that have harmed them responsible.

Viewing civil liability as a form of vulnerability also helps to organize contemporary private law theory. That theory is generally deeply fragmented. For example, theories of tort law and contract law often proceed without deeply engaging one another. This should make theorists of private law uneasy. Despite their differences, for example, both tort law and contract law share many of the same features. Both are bilaterally structured, relating plaintiffs and defendants to one another as alleged victim and alleged legal wrongdoer. Both of them involve remedies that are in some sense transitive, requiring defendants to pay plaintiffs or carry out some action in favor of plaintiffs. Finally, both fields are plaintiff centered, giving victims control over the decision to sue, prosecuting suit, and seeking any particular remedy. Despite these similarities, however, the kinds of substantive theories offered to justify tort and contract law seem remarkably dissimilar. This Article argues that what these fields share with one another is the basic feature of civil liability. By understanding civil liability as vulnerability, we are able to ask questions that get at the conceptual relationship between differing fields of private law.

The remainder of this Article proceeds as follows. Parts I and II look at the two most common views of civil liability: duty and cost. Part III argues that neither of these theories adequately captures the concept of civil liability, which is best understood as a form of vulnerability. Part IV sketches out the problems for which civil liability is a solution. Finally, Part V relates the theory of civil liability offered in this Article to contemporary debates in private law theory.

I. LIABILITY AS DUTY

It is natural to think of law in terms of duties. We speak easily of the duty to keep a contract, the duty to respect the property of others, or the duty to refrain from unjustified harm to another's person.⁸ Indeed, if we think of substantive areas of law as either imposing legal duties or else as granting the power to create legal duties, then perhaps civil liability is simply a conclusion that one has failed to comply with a set of legal duties.⁹ Hence, at the conclusion of a lawsuit involving breach of contract, the declaration that the defendant is liable simply means that the defendant has failed to perform the duties imposed on him by the contract.

A duty theory of civil liability, however, requires more than simply a failure to comply with a legal duty. After all, to be found guilty of a crime is also a conclusion that one has failed to comply with a legal duty. Yet the divide between criminal guilt and civil liability matters. We speak at times of criminal liability, but we are talking about something that is quite different from civil liability.¹⁰ Being found guilty of a crime has different legal consequences, different social repercussions, and a different cultural meaning.¹¹

⁸ See, e.g., *United States v. Thomas*, 82 U.S. (15 Wall.) 337, 348 (1872) ("But where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may . . ."); *Wise v. W. Union Tel. Co.*, 172 A. 757, 760 (Del. Super. Ct. 1934) ("Two of the three great main heads of duty with which the law of torts is concerned are: (1) The duty to abstain from willful injury; and (2) The duty to respect the property of others.").

⁹ See generally Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727-28 (2008) (discussing contract as a power-conferring rule).

¹⁰ See, e.g., Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 694 (1993) ("Conventional lay wisdom holds that criminal liability and criminal commitment are different from civil liability and civil commitment . . .").

¹¹ See, e.g., Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 785 (1989) ("Criminalization and other repressive measures deny people, to a substantial degree, control over the course of their lives. By attaching the stigma of criminal conviction, by disrupting people's lives through the processes of trial and conviction, and often through imprisonment, they affect not merely the ability to engage in one particular activity but the general control one has over the course of one's life.").

John Austin provides one way of understanding the relationship between substantive legal duties and civil liability. Austin formulated a distinction between what he called primary rights and duties and secondary rights and duties.¹² Primary rights and duties are those that we associate with substantive areas of law such as contracts, torts, or property. Hence, for example, we say that the law of negligence imposes on everyone a primary duty to exercise the care of a reasonable person in avoiding injury to the person or property of another.¹³ Likewise, the law of property centers on a property owner's right to exclude others from his property and to enjoy the economic benefits generated by the property, such as harvesting timber from a piece of real estate.¹⁴ Secondary rights, in contrast, specify the legal consequence of violating a primary right or failing to comply with a primary obligation. For example, one might claim that when one violates the primary duty of care imposed by the law of negligence and harms another, a secondary duty to pay compensation to one's victim arises. Likewise, one might argue that upon breaching a contract to build a house a secondary duty to pay damages arises.¹⁵

Austin's framework lends itself to formulating a duty-based theory of civil liability. On this view, civil liability consists of the secondary duties that arise upon the breach of the primary duties associated with particular substantive bodies of law that do not impose criminal penalties. More would be required than this, of course, to fully specify a theory of civil liability. Austin's framework, for example, can readily be applied to criminal law.¹⁶ Hence, we could say that the penal code creates a primary obligation to refrain from murder and specifies a secondary rule laying out the punishment to be inflicted on the murderer.¹⁷ For example, one might couple Austin's framework with an understanding of secondary obligations as obligations of repair or compensation to present a more fully specified theory

¹² 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 788-800 (Robert Campbell ed., 4th ed. 1873) (discussing the distinction between primary and secondary rights and duties).

¹³ See RESTATEMENT (SECOND) OF TORTS § 282 (1965) (setting forth the definition of negligence).

¹⁴ See generally MARK THOMPSON, LAND LAW 2 (1995) (discussing the incidents of ownership in real property).

¹⁵ *Photo Prod. Ltd. v. Securicor Transp. Ltd.*, [1980] A.C. 827 (H.L.) 849 (Lord Diplock) ("Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach . . ."); see also Brice Dickson, *The Contribution of Lord Diplock to the General Law of Contract*, 9 O.J.L.S. 441, 451 (1989) (describing Lord Diplock's application of primary and secondary rights to contracts).

¹⁶ Indeed, Austin himself uses the criminal law in articulating the distinction between primary and secondary obligations. See 2 AUSTIN, *supra* note 12, at 791 ("Under the department of the law which relates to secondary rights and duties I include Procedure, civil and criminal.").

¹⁷ See MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962) (setting forth the definition of murder); *id.* § 210.6 (setting forth the penalty for murder).

of civil liability. An expansive version of the corrective justice theories offered in torts and contracts might provide examples of such a theory.¹⁸

Another approach to a duty-based theory of civil liability dispenses with the Austinian distinction between primary and secondary duties. Rather we could say that substantive law imposes duties of conduct on legal agents and that even when they fail to live up to those duties, the initial obligation remains, albeit in an attenuated form.¹⁹ For example, one might say that even after one breaches a contract, the obligation to perform the contract remains.²⁰ Because breach has rendered exact performance impossible, however, the obligation to perform now takes the form of an obligation to do the next best thing.²¹ Thus, if I promise to build a house according to certain specifications and the house does not comply with the terms of the contract, my residual contractual obligation takes the form of an obligation to pay the difference in value between what was promised and what was delivered.²²

This residual obligation approach to civil liability has some advantages over its Austinian cousin. By jettisoning the distinction between primary and secondary obligations, it no longer requires that we posit some separate principle such as corrective justice or a duty of repair to explain the difference between the secondary rights and obligations of criminal law and civil liability. Rather, civil liability can be seen as the residual force of substantive legal obligations, while criminal law concerns itself with the distinct question of punishment. Hence, the law of murder deals with the punishment of intentional homicide, while civil liability for wrongful death represents the residual force of one's legal obligation not to kill transformed into a duty to pay money damages to the surviving victims of one's homicide.

Duty, however, is not the only way in which one might conceptualize civil liability.

II. LIABILITY AS COST

Oliver Wendell Holmes famously claimed that the obligation to keep a contract means the obligation to perform or the obligation to pay damages

¹⁸ See, e.g., Stephen A. Smith, *The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?*, 36 *LOY. L.A. L. REV.* 1037, 1053 (2003) (“The general idea underlying the concept of corrective justice is that we have a duty to repair or ‘correct’ wrongful losses that we have caused Corrective justice is meant to explain duties to repair (secondary duties) . . .”).

¹⁹ See generally Ernest J. Weinrib, *Two Conceptions of Remedies*, in *JUSTIFYING PRIVATE LAW REMEDIES* 3 (Charles Rickett ed., 2008) (discussing the role of remedies in the reason conception).

²⁰ See Nathan B. Oman, *Promise and Private Law*, 45 *SUFFOLK U. L. REV.* 935, 943-44 (2012) (arguing that remedial obligations in contract law can be seen as the continuation of the initial obligation to keep a promise).

²¹ See *id.*

²² See *id.*

in the event of breach, and nothing more.²³ This so-called option theory of contract is an example of a cost theory of civil liability. On Holmes's view, liability for breach of contract consists of nothing more than what amounts to a tax on a particular form of conduct, a cost imposed by the state via liability.²⁴ As Jeremy Bentham observed, "A *fixed* penalty is a *license* in *disguise*."²⁵ Nor need a cost theory of liability be confined to contracts. In correspondence with Frederick Pollock, Holmes made clear that he regarded liability for tort in the same terms, namely as a cost imposed on a particular course of conduct.²⁶

The most enthusiastic modern disciples of the Holmsian view have been the devotees of the law and economics movement. This approach to liability ultimately traces its roots to the English economist Arthur Cecil Pigou, who identified taxation as a solution to the problem of negative externalities.²⁷ When agents can reap the benefits of certain actions while throwing the costs onto others, they will engage in more of the activity than is socially optimal.²⁸ The solution, argued Pigou, was to align personal incentives with social incentives by imposing on the agent a tax equal to the externalized cost of his conduct.²⁹

Law and economics scholars deepened Pigou's insight by introducing the idea of legal entitlements to the model. Ronald Coase noted that in a

²³ O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."); see also O. W. HOLMES, JR., THE COMMON LAW 301 (Am. Bar Ass'n 2009) (1881) ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment [sic] has gone by, and therefore free to break his contract if he chooses.").

²⁴ See, e.g., Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered. Failure to honor an agreement under these circumstances is a movement toward Pareto optimality . . .").

²⁵ JEREMY BENTHAM, *Last Epigrams and Sayings*, in A BENTHAM READER 359, 363 (Mary Peter Mack ed., 1969).

²⁶ Letter from Justice Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Dec. 11, 1928), in 2 HOLMES-POLLOCK LETTERS 233 (Mark DeWolfe Howe ed., 2d ed. 1961) ("I don't think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable *simpliciter*.").

²⁷ See generally Charles K. Rowley, *An Intellectual History of Law and Economics: 1739-2003*, in THE ORIGINS OF LAW AND ECONOMICS 3 (Francesco Parisi & Charles K. Rowley eds., 2005) (discussing the intellectual origins of modern law and economics scholarship).

²⁸ A symmetrical but opposite problem arises when agents generate goods whose benefits they do not fully capture. In this case, the externality causes less production of the good than is socially optimal.

²⁹ See ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 192 (Transaction Publishers 2002) (1952) ("It is, however, possible for the State, if it so chooses, to remove the divergence in any field by 'extraordinary encouragements' or 'extraordinary restraints' upon investments in that field. The most obvious forms which these encouragements and restraints may assume are, of course, those of bounties and taxes.").

world where agents can costlessly bargain with one another, Pigouvian inefficiencies should not arise because those who bear the costs of an agent's conduct should be willing to pay him not to engage in the conduct so long as its marginal costs to them is greater than its marginal benefit to the agent.³⁰ Alternatively, if we simply give the victims of the agent's conduct the right to stop him, then the agent should purchase the right to act from the right holder, provided again that his marginal benefit exceeds the marginal costs to his victims.³¹ In either case one can reach an efficient outcome without Pigouvian taxation. This result depends, however, on the assumption that everyone is informed and rational and—crucially—faces no transaction costs.³² In the real world, of course, transaction costs are ubiquitous.³³ Accordingly, legal entitlements will only produce efficient outcomes if they are allocated properly, namely in the manner they would be allocated by a market with zero transaction costs.³⁴

Coase's insight was expanded by Professor Guido Calabresi and Douglas Melamed, who argued that any legal entitlement can be protected by either a "property rule" or a "liability rule."³⁵ A property rule allows only a voluntary transfer of a legal right.³⁶ A liability rule allows a non-consensual transfer of a legal right provided that compensation is paid *ex ante*.³⁷ According to Calabresi and Melamed, when transaction costs are

³⁰ See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6-7 (1960) (arguing that agents can bargain to optional outcomes without liability); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.1 (8th ed. 2011) ("The [Coase Theorem], slightly oversimplified, . . . is that if transactions are costless, the initial assignment of a property right will not affect the ultimate use of the property.").

³¹ See Coase, *supra* note 30, at 2-6 (introducing and analyzing a hypothetical example of this phenomenon).

³² POSNER, *supra* at 30, § 3.6.

³³ One study concluded that roughly 40 percent of the U.S. private economy could be classified as transaction costs. See John Joseph Wallis & Douglass C. North, *Measuring the Transaction Sector in the American Economy, 1870-1970*, in *LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH* 95, 97, 121 (Stanley L. Engerman & Robert E. Gallman eds., 1986).

³⁴ POSNER, *supra* 30, § 3.6 ("It does not follow, however, that the initial assignment of rights is immaterial from an efficiency standpoint. Since transactions are never costless in the real world, efficiency is promoted by assigning the legal right to the party who would buy it . . . if it were assigned initially to the other party.").

³⁵ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes 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. . . . 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."). Note, Calabresi and Melamed use the term "liability" in a very specific sense to refer to money damages as a remedy. This is obviously different than the more general way in which I am using the term "civil liability" in this Article.

³⁶ See *id.*

³⁷ See *id.*

low the property rule will induce bargaining to an efficient outcome.³⁸ When transaction costs are high, the law should adopt a liability rule.³⁹ This will allow the entitlement to flow to the party willing to pay the most for it via court judgment and therefore presumably the party with the highest marginal utility from the right.⁴⁰ Again the result is an efficient allocation of resources. In effect, liability substitutes a government-set price in situations where high transaction costs prevent the emergence of market prices.

With this background, it is possible to see how the cost theory of civil liability differs from a duty theory of civil liability. A duty theory rests crucially on the idea of legal normativity. One ought, at least in a legal sense, to comply with the obligations of the substantive law, and civil liability is a response to the failure of an agent to comply with that obligation.⁴¹ Furthermore, the response itself takes the form of some further duty. Under a cost theory of civil liability, in contrast, there is nothing wrongful in any sense in violating someone's legal entitlement.⁴² The only concern is that the price of doing so be properly calibrated through property and liability rules. Civil liability, on this view, expresses no normative demands on one's behavior. Its sole purpose is to impose costs on certain kinds of conduct, costs that we encourage agents to weigh against the benefits of the conduct. In Razian terms, in a cost theory of civil liability, liability does not offer an exclusive reason to refrain from a course of conduct.⁴³

³⁸ See *id.* at 1127 ("It should be emphasized, however, that where transaction costs do not bar negotiations between [parties], or where we are sufficiently certain who the cheapest cost avoider is, there are no efficiency reasons for allowing intentional takings, and property rules, supported by injunctions or criminal sanctions, are appropriate.").

³⁹ See *id.* at 1106 ("Often the cost of establishing the value of an initial entitlement by negotiation is so great that even though a transfer of the entitlement would benefit all concerned, such a transfer will not occur. If a collective determination of the value were available instead, the beneficial transfer would quickly come about.").

⁴⁰ See *id.* at 1106, 1110.

⁴¹ H.L.A. Hart captured this difference when he distinguished between being "obliged to" do something and having "an obligation" to do something. HART, *supra* note 1, at 80 ("[The assertion that someone is obliged to do something] is often a statement about the beliefs and motives with which an action is done . . ."); *id.* at 81 ("[T]he statement that a person had an obligation . . . remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience.").

⁴² See, e.g., Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 23-24 (1989) ("For those who believe in the parties' freedom to determine their rights, efficient breach means that the promisee's contractual right may be appropriated without his consent if that which was promised to him can be used in a way that would yield profits exceeding his loss.").

⁴³ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 16-19 (1979) (discussing legal authority as a kind of exclusive reason).

III. LIABILITY AS VULNERABILITY

Both the duty theory and the cost theory suffer from the same difficulty. Both theories assume that civil liability consists of some kind of enforcement by the state. For the duty theory, civil liability consists of the state forcing the defendant to comply with some secondary duty of repair or the like. Alternatively, the state forces compliance with the residual duties left in the wake of breached substantive obligations. Likewise, the cost theory sees civil liability in terms of enforcement. It differs from duty theories in its view of how civil liability offers reasons for action. The duty theory suggests that one should comply with the primary and remedial obligations of private law precisely because they are obligations. They offer normative reasons, even moral reasons if one has an obligation to follow the law or if the duties instantiated in private law have independent moral force. The cost theory, in contrast, offers a reason for action only in the sense that the tax imposed on a particular course of conduct by the law should figure in one's all-things-considered calculations of personal utility. If one agrees to pay the tax, then there is no reason not to act. Civil liability is simply the state coercing payment of the tax.

This emphasis on law as a mechanism of state enforcement sits comfortably within most liberal narratives about the proper role of the law. Liberalism begins with an appreciation for the coercive capacity of the state and the need to confine it to its proper sphere. There is, of course a lively intra-liberal debate about what the proper role should be. Classical liberals and libertarians insist that the reach of the state must be sharply limited.⁴⁴ Modern egalitarians, so-called "high liberals," insist on the need for the state to act to ensure just distributive outcomes.⁴⁵ Both schools of thought, however, focus their attention on the agency of the state and view law as an instrument of that agency. Hence, the focus of the duty and the cost theories is on what the state does to those that are civilly liable. Asking a simple question reveals the problem with this approach: if I breach a contract, commit a tort, or do some other private wrong, what would the state do to me? Upon a moment's reflection, the answer is "Nothing at all."⁴⁶ No legal

⁴⁴ See, e.g., F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 1-2, 4-6, 285-87 (1960); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix, xi (1974).

⁴⁵ See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 3-5, 83-89 (1971). The phrase "high liberals" was coined in an article by Samuel Freeman, who defined "high liberalism" as meaning "the set of institutions and ideas associated with philosophical liberalism, which I take to be the high liberal tradition. Its major philosophical advocates in each century from the eighteenth to the present are [Immanuel] Kant, [John Stuart] Mill, and [John] Rawls." Samuel Freeman, *Illiberal Libertarians: Why Libertarian Is Not a Liberal View*, 30 *PHIL. & PUB. AFF.* 105, 106 (2001) (footnote omitted).

⁴⁶ See Oman, *supra* note 3, at 161 ("There is no duty to pay damages in a tort or contract suit. This claim may seem odd to many, but it accords quite well with our current law. Rather than imposing such a duty, the common law empowers the plaintiff to act against a liable defendant, extracting wealth from

authority would step in to impose a Pigouvian tax on my behavior. Likewise there is nothing that guarantees or even requires that I comply with some duty of repair or the residual obligations of the duty of care. Rather, nothing happens unless the plaintiff chooses to act. A plaintiff must bring suit, and upon a declaration that the defendant is liable the plaintiff is given control of the remedial machinery that acts against the defendant. For example, the plaintiff controls whether a writ of fieri facias issues to the sheriff instructing him to seize the defendant's property. The same is true to a certain extent with the criminal law. Nothing happens unless a prosecutor chooses to act. The difference is that—at least in theory—the prosecutor acts as an agent of the public, albeit one who exercises enormous discretion.⁴⁷ He or she has a duty to “take Care that that the Laws be faithfully executed.”⁴⁸ A civil plaintiff has no such duty. Rather, he or she owns his or her claims, which are treated as a piece of personal property.⁴⁹ Public officials, in contrast, who treat the powers conferred by their offices as personal property have generally committed a crime (such as accepting bribes when they try to sell that power).

The plaintiff's power over the civil claim is problematic for both duty and cost theories. For a duty approach, the problem is that the law does not even in theory enforce the duties in question.⁵⁰ A civil plaintiff is not like a public prosecutor exercising discretion over how best to advance the aims of the law.⁵¹ Rather, the plaintiff acts as a principal. Indeed our ordinary moral discourse around litigation recognizes this fact. There are times when we recognize that the decision not to sue is praiseworthy and the decision to

him if the plaintiff wishes. This structure is more consistent with civil recourse theory than the demands of corrective justice.”).

⁴⁷ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . .”), *overruled on other grounds by* *Stirone v. United States*, 361 U.S. 212 (1960); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 634 (1999) (“The prosecutor, as a representative of the state, must serve this objective and ‘do justice.’”).

⁴⁸ U.S. CONST. art. II, § 3.

⁴⁹ See Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 *HASTINGS CONST. L.Q.* 373, 374 & n.3 (2009).

⁵⁰ See generally Oman, *supra* note 3, at 137-38, 142.

⁵¹ See, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *COLUM. L. REV.* 1655, 1703 (2010) (“Prosecution offices must make administrative choices about how to allocate finite resources. And, generally speaking, prosecutors make administrative choices pursuant either to broad policy objectives or to contextualized discretion (or some mix of the two).”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 57 (1991) (“The prosecutor is simultaneously responsible for the community's protection, victims' desire for vengeance, defendants' entitlement to a fair opportunity for vindication, and the state's need for a criminal justice system that is efficient and appears fair. Described accurately, the prosecutor represents ‘constituencies’—and several of them at one time.” (footnotes omitted)).

sue is blameworthy.⁵² In such cases, the problem with litigation is not that pressing the case would be an unwise use of discretion over enforcement. Rather, we recognize that in some cases asserting one's rights may be capricious, belligerent, or bullying.⁵³ In such cases, we would not castigate the victim who declines to sue for neglecting the enforcement of the law even when such an act of forgiveness and forbearance by a public prosecutor would be inappropriate.⁵⁴

A cost approach faces a similar objection. Such theories tend to assume that imposing liability always imposes a cost. Yet in many cases liability gives rise to no out-of-pocket cost because no suit is brought. Of course, one might meet this objection by expanding one's definition of costs to include the risk of out-of-pocket expenses.⁵⁵ Most of the articulated economic theories of civil liability, however, fail to do this. Instead, they tend implicitly or explicitly to adopt the simplifying assumption that liability results in payment. The real problem, however, is not that one cannot adapt a cost theory to the plaintiff-centered system of civil liability. Rather, the problem is that such accommodations are post hoc. As a matter of economic first principles there is no good reason for confining power over enforcement to victims.⁵⁶ Rather, it makes more sense to give enforcement

⁵² See, e.g., Editorial, *Medical Malpractice Reforms: One Rx for Oregon*, OREGONIAN (last updated July 29, 2012, 10:52 PM), http://www.oregonlive.com/opinion/index.ssf/2012/07/medical_malpractice_reforms_on.html (supporting a state health care reform proposal favoring mediation over litigation in disputes between physicians and patients); Hal Scott & Leslie N. Silverman, Op-Ed., *The Alternative to Shareholder Class Actions*, WALL ST. J. (Apr. 1, 2012, 5:48 PM), <http://online.wsj.com/article/SB10001424052702303816504577312373860495762.html> (promoting arbitration over litigation in disputes between investors and management).

⁵³ See Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 32 (2011) ("Suing someone is an aggressive act. Friends almost by definition do not sue each other. Family members only sue one another when the bonds of affection have been torn asunder by contention, rivalry, and wrongdoing. When a victim tells a tortfeasor, 'I am going to sue you!' . . . he is threatening to strike back at the person who hurt him.").

⁵⁴ The architect of the Model Penal Code, for example, argued that criminal prosecutors should not be in the business of dispensing forgiveness for crimes. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952) ("A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves.").

⁵⁵ Cf. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 263-64 (1974) (arguing that legal risk created by uncertain laws imposes economic costs on society).

⁵⁶ See Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 858-59 (2007) [hereinafter Oman, *Contract Damages*] ("[T]he plaintiff would recoup only an amount sufficient to encourage the optimal level of lawsuits, which is presumably the level at which the marginal social cost of litigation (including the cost of inefficient reliance) is exactly equal to the marginal social benefit from more efficient incentives for the breach of contract."); see also Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 562 (2011) [hereinafter Oman, *Consent to Retaliation*] ("Under efficiency theories,

power—and an incentive to use that power—to anyone with information about the defendant’s conduct, whether that person is a public prosecutor or a private whistleblower. The law, however, generally confines private rights of action to victims. Thus, there just doesn’t seem to be any discernible point, from a cost perspective, to what seems to be a key feature of civil liability.

The word “liable” points toward a better theory of civil liability. The root of the word lies in the Medieval Latin term *ligabilis*, meaning to be bound or tied.⁵⁷ The original idea seems to have been that one who was bound was exposed to whatever might be done to him. According to the *Oxford English Dictionary*, the term “in older use with wider sense” meant, “[e]xposed or subject to, or likely to suffer from (something prejudicial).”⁵⁸ Thus, for example, in *Paradise Lost*, Milton speaks of how the defeated Satanic hosts recoiled when they were “first with fear surprised and sense of pain” because before their defeat they were “[n]ot liable to fear or flight or pain.”⁵⁹ They are contrasted in the following lines with the “invulnerable saints . . . [i]nvulnerable, impenetrably armed.”⁶⁰ If one is not liable, one was invulnerable. If one is liable, however, to fear or flight or pain, then one is vulnerable to those things. Notice, that the core meaning of the term is exposure and vulnerability. The pain suffered by the fallen hosts of heaven is not a duty that they owe or a tax that they are required to pay. Rather, it is the unexpected exposure resulting from a defeat in battle.

Likewise, civil liability is best thought of in terms of vulnerability. To be liable means that one is exposed to attack in a way that one was not previously exposed. The property and liberty of a defendant who has been found not liable for some civil wrong remains protected from any further action by the plaintiff. Once a defendant is found liable, however, this changes. Now the plaintiff has the power to call upon the coercive apparatus of the state to do things to the defendant. In the absence of civil liability, this machinery lies inert. It is unlawful for a private party to employ it against an opponent. In many cases it is even unlawful for the state to employ the machinery against the defendant. Once the defendant is found liable, however, this changes. Now he is exposed. As he is no longer “[i]nvulnerable, impenetrably armed”⁶¹ by the protection of the state, the very coercive apparatus that protected him is now put at the disposal of the

plaintiffs are enlisted to incentivize optimal performance, while under moral theories, plaintiffs serve as enforcers of the obligation to perform one’s promises. This pragmatic argument, however, cannot explain the odd fact that only the promisee (or a third-party beneficiary) may bring an action for breach of contract.” (footnote omitted)).

⁵⁷ 8 THE OXFORD ENGLISH DICTIONARY 878 (2d ed. 1989) (stating the etymology of “liable”).

⁵⁸ *Id.* Within the list of definitions for “liable,” this particular definition can be found at “3. a.” *Id.*

⁵⁹ See JOHN MILTON, *PARADISE LOST*, bk. 6, ll. 391-397 (Gordon Teskey ed., W W Norton & Co. 2005) (1674).

⁶⁰ See *id.* ll. 397-400.

⁶¹ *Id.* l. 400.

plaintiff to use or not as he or she sees fit. To be sure, there are limits on the vulnerability of the liable defendant. Only certain remedies are put at the disposal of the plaintiff. What defines the legal status of civil liability, however, is precisely this precarious position of exposure to private attack by the plaintiff.⁶²

One might object that the diversity of remedies available in response to civil liability belies the claim that it can be unified under the rubric of vulnerability. Consider the remedy of specific performance for breach of contract. This seems to be an order requiring that one perform one's contractual obligations. Likewise, money damages in response for an action on a liquidated debt also seems to be a species of duty enforcement. Punitive damages might plausibly be seen as a species of personal retribution for egregious conduct, but compensatory damages for economic losses seem rather more like a form of cost shifting or insurance. Replevin seems to be a matter of requiring the return of property to its lawful owner, while money damages for conversion seems to be a species of forced sale. And so on. In all of these cases it would seem that what we are witnessing is not a kind of vulnerability to attack, but rather an effort by the state to coerce some desired state of affairs into being. In short: enforcement.

It is important to realize, however, that civil liability is not the same thing as the law of remedies. A finding that the defendant is liable to the plaintiff doesn't necessarily mean that any particular remedy will be available. Consider again the remedy of specific performance. In some cases a finding that Able is liable to Beth for breach of contract will give to Beth the right to demand specific performance of the contract.⁶³ In other cases—as, for example, when the contract involves a promise on the part of Able to provide personal services—specific performance will not be available.⁶⁴ Likewise, in some cases a court might find liability but be unable to award

⁶² The power that plaintiffs gain over liable defendants is practical rather than normative. My claim is not that the plaintiffs in bringing suit are exercising a normative power to impose new duties or obligations on defendants. Rather, I am claiming that once a court declares a defendant to be liable the plaintiff has the power to require that government officials seize the defendant's property and the like. The plaintiff also has the power to forbear from any further action against the defendant. Indeed, elsewhere I have argued that process of litigation imposes no duties on even defeated defendants to pay damages, duties that also do not exist upon commission of a legal wrong. *See generally* Oman, *supra* note 3, at 152-53. Of course, the reality of judgment-proof defendants and the cost of invoking the machinery of the state means that the practical power that plaintiffs acquire over defendants may be very limited, but my claim has never been that the vulnerability of liable defendants was massive or unlimited. Indeed, I think that the persistent invulnerability these problems create for certain classes of defendants is a powerful criticism of our current system of civil justice. I do not, however, believe that these normative criticisms are objections to the conceptual claim I am making in this Article. I am grateful to comments by Professor Joseph Raz at King's College London and private exchanges with Professors Ori Herstein and Benjamin Zipursky for sharpening my thinking on this point.

⁶³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981) (setting forth a general rule regarding the availability of specific performance).

⁶⁴ *Id.* § 367 (noting that specific performance is unavailable in personal service contracts).

compensatory damages—for example, in a case for breach of contract where the damages cannot be calculated with certainty.⁶⁵ To say that civil liability consists of vulnerability to attack by the plaintiff is to make a claim about the meaning of liability, not the meaning of particular remedies.

Civil liability is a form of vulnerability because a judgment of liability means that a defendant is exposed in a way that he was not before. It may be unclear exactly to what he is exposed. Damages? Injunctions? Something else? There are, however, two elements present in all cases of civil liability. First, the person who is liable is subject to demands that the person who is not liable does not face. If a court declares that someone is in breach of contract, then his liberty and property are exposed in a way that they were not previously exposed. He may be required on pain of imprisonment to perform some act. His property may be subject to seizure in payment of some debt. In the absence of liability, however, laws against kidnapping and extortion would protect him from the kind of pressure that can be brought against his liberty once deemed liable. Likewise, laws against theft would protect his property from the kind of seizure to which it would be potentially exposed after a judgment of liability. Second, civil liability does not make a person generally vulnerable. Rather, it makes him vulnerable to a particular person, namely the plaintiff. At any point after the declaration of liability, the plaintiff can choose to exercise whatever powers the law gives her over the defendant or can choose to forbear.⁶⁶ A finding of liability may give rise to a claim for money damages, but if the plaintiff declines to swear out a writ of fieri facias against the defendant's property, nothing happens.

In short, civil liability consists of neither the substantive rules that give rise to its existence nor the remedial rules that specify the powers that it confers upon victorious plaintiffs. Rather, civil liability is the state of vulnerability that stands between substance and remedy.

IV. THE PROBLEM OF INVULNERABILITY

Political philosophers often mark the beginning of modern political thought with the publication of Thomas Hobbes's *Leviathan* in 1651. Hobbes was not, of course, a liberal. His *Leviathan* is a famously unconstrained and authoritarian sovereign.⁶⁷ Nevertheless, Hobbes did much to

⁶⁵ *Id.* § 352 (providing that damages must be calculated with certainty in order to be recovered).

⁶⁶ The plaintiff's power, of course, does not last indefinitely. There are—albeit very long—statutes of limitations on judgments. *See, e.g.*, N.Y. C.P.L.R. § 211(b) (MCKINNEY 2003); VA. CODE ANN. § 8.01-251(A) (Supp. 2013). Doctrines such as laches may further limit the time of exposure. BLACK'S LAW DICTIONARY 630, 953 (9th ed. 2009).

⁶⁷ THOMAS HOBBS, *LEVIATHAN* 128 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651) ("His power cannot, without his consent, be transferred to another; he cannot forfeit it; he cannot be accused by any of his subjects of injury; he cannot be punished by them; he is judge of what is necessary for

frame the way in which individuals relate to one another and to the state in subsequent political theorizing, especially in the English-speaking world. Liberal theorists who followed him offered dramatically different visions of the appropriate scope of the state. They shared with Hobbes, however, a basic sense of the problem for which the state is a solution. By and large, it is a framing of the political problem that remains part of the common sense of contemporary political discourse. That problem is the pervasive fact of individual vulnerability.

Hobbes begins with the state of nature. For him, this is a condition of unconstrained aggression and ubiquitous vulnerability. The result is not pleasant. "Hereby it is manifest that during the time men live without a common power to keep them all in awe," he wrote, "they are in that condition which is called war, and such a war as is of every man against every man."⁶⁸ On Hobbes's view, there is no individual escape from the state of war. No one person is so overwhelmingly strong or clever to long dominate his fellows unaided.⁶⁹ Accordingly, without some exit from the state of nature, mankind is doomed to an existence that is, in the famous phrase, "solitary, poor, nasty, brutish, and short."⁷⁰ Hobbes's solution is Leviathan, a collective person formed by an initial social contract and endowed with overwhelming coercive capacity. The result is a transition from a situation of ubiquitous exposure to attack to one in which each individual is essentially invulnerable except to the actions of the sovereign.⁷¹

Subsequent thinkers have traveled far from their Hobbesian origins. John Locke offered a rosier vision of the state of nature.⁷² He agreed with Hobbes, however, on the ultimate precariousness of life without the state and the need for centralized coercion to solve the problem of vulnerability.⁷³ Locke, and the liberal tradition that followed him, of course lacked

peace, and judge of doctrines; he is sole legislator, and supreme judge of controversies, and of the times and occasions of war and peace; to him it belongeth to choose magistrates, counsellors, commanders, and all other officers and ministers, and to determine of rewards and punishments, honour and order.").

⁶⁸ *Id.* at 76.

⁶⁹ *Id.* at 74 ("Nature hath made men so equal in the faculties of body and mind . . . yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others that are in the same danger with himself.").

⁷⁰ *Id.* at 76.

⁷¹ *Id.* at 219 ("The office of the sovereign . . . consisteth in the end for which he was trusted with the sovereign power, namely, the procuration of *the safety of the people*, to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself.").

⁷² See JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 16-18 (Lester DeKoster ed., William B. Eerdmans Publ'g Co. 1978) (1690).

⁷³ See *id.* at 20.

Hobbes's sanguine attitude toward unlimited state power.⁷⁴ They agreed, however, that it was legitimate for the state to act in order to eliminate the vulnerability of its citizens to private aggression.⁷⁵ Indeed, the legitimacy of the state is grounded in large part on the elimination of such vulnerability.

The elimination of vulnerability continues to be a dominant concern in contemporary political thought. For example, one can think of the high liberal tradition, with its seeds in the mid-nineteenth-century writings of John Stuart Mill and its most comprehensive modern statement in the work of John Rawls, as a response to vulnerability.⁷⁶ Rather than focusing on the negative liberties protecting one from vulnerability before the state, however, the high liberal tradition focuses on the state's duty to protect citizens from the accidents of disadvantaged birth or the adverse fortunes of the marketplace.⁷⁷ Notice, however, that even in these most recent formulations of liberal theory, the legitimacy of the state is tied to the elimination of vulnerability.

Civil liability thus represents something of a puzzle. If the purpose of civil liability is to compel defendants to perform their duties or pay the efficient price for their actions, then civil liability fits smoothly into the vision of law as an instrument of the state for eliminating vulnerability and misbehavior. On the other hand, if civil liability is about creating vulnerability to private attack, then it seems at odds with the liberal tradition. From the state of nature that so concerned Hobbes and Locke to the jaundiced view of the unregulated market that dominates the thought of modern egalitarians like Rawls, the purpose of the law is to limit the vulnerability of individuals. Why, then, should so much of the law be devoted to the *creation* of vulnerability?

The puzzle of vulnerability is heightened when one considers the form that the vulnerability of civil liability takes. Classical liberals and libertarians, for example, are willing to tolerate far more economic vulnerability than are high liberals, who believe that the state should create a generous system of social benefits to buffer the individual against the effects of bad

⁷⁴ Compare *id.* at 20-21 (outlining Locke's view that individuals consented to participate in centralized government by transferring some of their rights to a state power while retaining others), with HOBBS, *supra* note 67, at 128.

⁷⁵ See LOCKE, *supra* note 72, at 20.

⁷⁶ See JOHN TOMASI, *FREE MARKET FAIRNESS* 27-56 (2012) (providing a brief intellectual history of the roots of high liberalism).

⁷⁷ See, e.g., Ronald Dworkin, *Equality, Luck and Hierarchy*, 31 *PHIL. & PUB. AFF.* 190, 191 (2003) ("[P]eople [should] be made equal, so far as this is possible, in their opportunity to insure or provide against bad luck before it has occurred, or, if that is not possible, [they should] be awarded the compensation it is likely they would have insured to have if they had had that opportunity."); see generally Ian Carter, *Positive and Negative Liberty*, *STAN. ENCYCLOPEDIA OF PHIL.* (last updated Mar. 5, 2012), <http://plato.stanford.edu/entries/liberty-positive-negative/> (discussing the distinction between negative and positive liberties).

fortune or bad decisions.⁷⁸ Libertarian and classical liberal toleration for vulnerability, however, does not flow from the fact that such vulnerability is seen as a goal. Rather, the vulnerability of individuals to the vagaries of the market, for example, is seen as a necessary (if perhaps regrettable) result of a proper respect for individual rights. Alternatively, one might support a dynamic and largely unregulated market not because it leaves some people vulnerable, but because such a market is seen, in the aggregate, as providing greater social welfare or greater opportunities for upward social mobility.⁷⁹ Again, the vulnerability is an unfortunate side effect rather than a goal. The nature of this vulnerability also differs from that created by civil liability. It is not the vulnerability of persons to particular other persons. Rather, it is the toleration of a social system that leaves people vulnerable to what are conceptualized as essentially random accidents. This is true even if the vulnerability is justified by some notion of personal responsibility.⁸⁰ Hence, for example, one might believe that one should leave the lazy or the shiftless to the economic consequences of their decisions, precisely because they are lazy and shiftless—in other words, because the vulnerability is deserved. Even this kind of vulnerability, however, is not vulnerability to any particular person.

If the main tradition of liberal theory sees law primarily as a response to a condition of vulnerability in the absence of the state, we can think of civil liability as a response to the problem of invulnerability created by the state. State of nature theories have been so deeply ingrained into our thinking that the assumption that vulnerability is an evil seems self-evident. Vulnerability, however, has its uses. To see the problem of invulnerability, consider the example of thermonuclear war.⁸¹ During the dark days of the Cold War, the Soviet Union and the United States and its allies created massive stockpiles of nuclear weapons.⁸² Initially, the Americans enjoyed a monopoly on The Bomb, one that gave the United States the ability to attack the Soviet Union with devastating force while leaving itself relatively

⁷⁸ See generally NOZICK, *supra* note 44 (defending markets as a mechanism for human liberty).

⁷⁹ See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. of Chi. Press 1982) (1962) (defending markets as a mechanism for social mobility).

⁸⁰ See generally HERBERT SPENCER, *SOCIAL STATICS* (D. Appleton & Co. 1873) (1851) (defending what became known as “Social Darwinism”).

⁸¹ See, e.g., HENRY A. KISSINGER, *NUCLEAR WEAPONS AND FOREIGN POLICY* 84-85 (1957) (“[W]e are vulnerable to a direct hostile attack. . . . But perhaps our dangers offer us at the same time a way out of our dilemmas. As long as the consequences of all-out thermonuclear war appear as stark to the other side as to us, they may avert disaster, not through a reconciliation of interests but through mutual terror.”).

⁸² See, e.g., MICHAEL D. GORDIN, *RED CLOUD AT DAWN* 288 (2009) (“[I]n early 1953, the United States had already built 832 nuclear weapons. Within a year, that number had risen to 1,161; in two years, to 1,630; and in three years, to 2,280.”); see also *id.* at 300 (“By the end of the 1950s, there were three nuclear powers (the United States, the Soviet Union, and the United Kingdom), all armed with both fission and thermonuclear weapons.”).

invulnerable to Soviet retaliation.⁸³ From the point of view of Russian strategists, this was a deeply dangerous situation. They insisted that only if the United States could be made vulnerable to a nuclear counterstrike would the U.S.S.R. be safe.⁸⁴

Once both sides were armed with nuclear weapons, however, a new problem presented itself. What if one side engaged in a preemptive first strike, using its nuclear weapons to destroy the retaliatory capability of the other side? Strategists on both sides of the Iron Curtain responded by increasing their arsenals, creating so many nuclear weapons that even the most devastating first strike couldn't guarantee that there would be no response. As the range and accuracy of first bombers and then ballistic missiles increased, the antagonists turned to submarines.⁸⁵ The idea was to have nuclear missiles under the sea where they could never be hit in a first strike, thus guaranteeing a counterstrike in any scenario. This then led to increasingly sophisticated submarines to hunt the missile submarines.⁸⁶ And so on, with ever more destructive technologies being devised to counter the last round of murderous innovations.

At the time, the logic of the nuclear arms race seemed utterly absurd to many.⁸⁷ Nations were sinking billions of dollars into expensive weapons in pursuit of the goal of mutually assured destruction.⁸⁸ Safety could only ex-

⁸³ See *id.* at 300 (“All the proliferators after 1945 had to face a world in which the United States already possessed these weapons—and . . . had already used them twice.”); *id.* at 28 (“The atomic monopoly—the control of this new weapon by the United States alone—contributed heavily to the emphasis on nuclear weapons for deterring the Soviet Union, and also to the sense of American exceptionalism that fueled the ideological fires of the cold war.”).

⁸⁴ See *id.* at 142-43 (quoting several Soviet nuclear physicists to reflect “the Soviets’ perception that they needed a nuclear bomb to deter an immediate attack by the atomic jingoists in Washington”).

⁸⁵ See Byard Q. Clemmons, *Sea-Launched Cruise Missiles: An Arms Control Proposal*, 38 NAVAL L. REV. 195, 196 (1989) (“During the 1950’s the United States developed a variety of long-range nuclear cruise missiles . . .”); *id.* at 197 (“The Soviet Union . . . has included [sea-launched cruise missiles] as part of its operational Navy since the late 1950’s.”).

⁸⁶ For an example of the American military’s stance on antisubmarine technology, see John P. Craven, *The Challenge of Ocean Technology to the Law of the Sea*, 22 JAG J. 31, 33 (1967) (“The symmetric problem of protection of the United States against ballistic missile submarines of a potentially hostile power is consequently of the utmost technical difficulty for the antisubmarine warfare systems designer. . . . Fortunately, there is a marked asymmetry in the geopolitical/geologic ability of presently identifiable, potentially hostile powers, which gives hope that the United States will be able to maintain the invulnerability of its strategic submersibles and, at the same time, be able to detect and counter any submarine threat . . .”).

⁸⁷ See, e.g., *DR. STRANGELOVE, OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Columbia Pictures 1964) (a dark comedy, directed by Stanley Kubrick and starring Peter Sellers, suggesting that the nuclear arms race was utterly absurd).

⁸⁸ See, e.g., GORDIN, *supra* note 82, at 270 (detailing the impact of the Soviet Union’s first nuclear weapons test on proposed military funding under the 1949 Mutual Defense Assistance Act: the Senate had proposed to reduce initial proposed allocations by 40 percent, but after the Senate became aware of the Soviet test, the proposed reductions were dropped and funding increased to 30 percent over the initial proposal).

ist, according to the nuclear war mavens, in a world in which everyone was maximally vulnerable to attack from everyone else. This logic reached its apotheosis in the 1972 Anti-Ballistic Missile Treaty, in which both sides of the Cold War pledged not to construct weapons designed to protect themselves from nuclear attack.⁸⁹ In other words, both superpowers promised to remain vulnerable to nuclear attack.

Despite the ghastly logic of nuclear deterrence, in the end it proved remarkably effective. There were two generations of international tension, but there was no massive World War III between NATO and the Warsaw Pact. Soviet tanks never poured across the plains of the German Federal Republic, and American missiles never rained down Armageddon on Russian cities.⁹⁰ With each round in the Cold War's nuclear chess game, the antagonists created systems that ensured the vulnerability of the other. This vulnerability, in turn, had the ironic effect of reducing aggression and conflict. To be sure, the Cold War saw vicious proxy wars, but the logic of mutually assured destruction prevented the kind of superpower conflict that most haunted the nightmares of the post-war generations.⁹¹ What is striking about this story is that the threat to peace during this period was less the Hobbesian war of all against all than the specter of an invulnerable power attacking its vulnerable foe. The solution was to create vulnerability to attack.

Contract law provides a more prosaic example of the same logic. One of the basic problems of contracting over time is the danger of *ex post* opportunism.⁹² When quid is exchanged simultaneously for quo, neither party is particularly exposed. On the other hand, if one party confers a benefit on the other party now in the expectation of a future benefit, the counterparty always faces the temptation to take the money and run. This temptation is particularly strong when the disappointed promisee has no means of retaliating against the breaching promisor. Seen in these terms, *ex post* opportunism is really a problem of invulnerability. Not surprisingly, in situations

⁸⁹ Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. V, ¶ 1, May 26, 1972, 23 U.S.T. 3435 ("Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.") (entered into force Oct. 3, 1972, unilaterally withdrawn from force June 13, 2002).

⁹⁰ Compare generally TOM CLANCY, *RED STORM RISING* (1986) (providing a fictionalized account of a World War III with conventional weapons in northern Europe, which teeters on the brink of becoming nuclear), with JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (2005) (recounting the tense—but World War III-free!—years of the Cold War and the final collapse of the Soviet Union).

⁹¹ See generally GADDIS, *supra* note 90 (discussing proxy wars between the United States and the U.S.S.R. in Africa, Asia, and Latin America).

⁹² See Oman, *Consent to Retaliation*, *supra* note 56, at 533 (discussing the problem of *ex post* opportunism).

where a promisor is vulnerable to retaliation, cooperative outcomes generally prevail.⁹³

Over the last few centuries, modern states have gradually increased their coercive capacity. As governments have acquired the administrative and technological tools to more effectively monitor and coerce their citizens, they have become increasingly effective at suppressing most forms of private aggression against liberty and property. The citizen of a modern state who chooses to take his neighbor's property or hold him hostage until he agrees to some demand will in all likelihood face criminal trial and incarceration. The result is that modern citizens are increasingly exposed to aggression by the state but are largely invulnerable to private aggression. To be sure, crime continues to exist and, in some communities, modern states tolerate shocking levels of interpersonal violence.⁹⁴ Such enclaves, however, are exceptional, and we view them as areas where the state has failed to fulfill its duties. Most of us assume that come what may our neighbors simply lack the ability to take our property or restrict our liberty and get away with it.

A certain amount of vulnerability in interpersonal relationships, however, is desirable. It is easier to cooperate with someone who is exposed to your displeasure in the event that he misbehaves. To be sure, in theory the state could foster such cooperation by simply punishing advantage taking and misbehavior such as ex post opportunism in contractual settings. In some cases, this is precisely what the state has done. The decision of the New Zealand government to abolish tort liability for personal injuries from motor vehicle accidents is an example.⁹⁵ However, we might be uneasy further extending the authority of public prosecutors. Imagine a world, for example, in which every breach of contract were treated as a petty crime to be prosecuted. One might conclude that creating effective enforcement for breach of contract would require such a massive expansion in the reach of law enforcement as to itself threaten individual liberty.

This Article, however, does not argue that a system of civil liability is required by basic principles of political justice or that it is superior to an alternative solution to the problem of invulnerability. Rather, it argues that civil liability is one possible solution to this problem. In effect, we foster cooperation by "turning off" the invulnerability provided by the modern state, allowing private aggression under strictly limited circumstances and

⁹³ See *id.* at 542-43 (discussing how cooperation develops when parties may retaliate against bad actors).

⁹⁴ See, e.g., Daniel Fisher, *Detroit Tops the 2012 List of America's Most Dangerous Cities*, FORBES (Oct. 18, 2012, 1:26 PM), <http://www.forbes.com/sites/danielfisher/2012/10/18/detroit-tops-the-2012-list-of-americas-most-dangerous-cities/> (explaining that Detroit is the most dangerous city in America, with the rate of violent crime at 2,137 per 100,000 residents).

⁹⁵ See Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976, 982-83 (1985) ("[A] victim, whether at fault or not, must apply to a government body, the Accident Compensation Corporation, for compensation.").

to a strictly limited extent.⁹⁶ Such limited vulnerability, rather than leading to the state of anarchic war that Hobbes associated with the vulnerability of the state of nature, can be justified as fostering precisely the kind of peaceful cooperation to which a liberal state aspires.⁹⁷

The problem of invulnerability takes a second form. Again, consider the relative success of the modern state in suppressing aggression. This does not mean, of course, that no wrongs are committed. But the number of wrongs is sharply limited. More importantly for our purposes, however, the ability of an individual to retaliate in the face of such wrongs is sharply limited. If you kill my son or daughter, it will be very difficult for me to pursue a vendetta against you without attracting the full attention—and overwhelming coercive capacity—of the modern state. The person who desires to remain law abiding either from prudence or from respect for the law is largely deprived of the means for personal retaliation against wrongdoers.

Normally, we don't regard revenge as a laudable response to wrongdoing.⁹⁸ Hence, it seems odd to claim that the constraints on misbehavior imposed by the coercive success of the modern state are a problem. This seems especially true where the state creates an apparatus for punishing those that wrong others. Hence, the criminal law constrains my ability to pursue vengeance against the person who kills my children, but it will also step in to punish the murderer. While revenge is not generally celebrated in our culture, we do place value on the agency of wronged victims, greater agency than is allowed by the impersonal, third-party apparatus of the criminal law.

Civil liability creates the conditions for such agency on the part of victims.⁹⁹ Professors Benjamin Zipursky and John Goldberg, for example, have argued that tort law exists to empower victims to hold those that have harmed them responsible for their acts.¹⁰⁰ The emphasis is on the agency of the plaintiff and the way that tort law empowers him or her. Zipursky has grounded the right to civil recourse in Lockean social contract theory, see-

⁹⁶ See generally Oman, *Consent to Retaliation*, *supra* note 56.

⁹⁷ See *id.* at 544-51 (discussing tit-for-tat strategies of retaliation and the way in which they can foster cooperation); see also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27-54 (1984) (same).

⁹⁸ See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1 (Jules Coleman & Scott Shapiro eds., 2002) (criticizing civil recourse theories as exalting the value of vengeance).

⁹⁹ See Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 *DUKE L.J.* 1109, 1149-54 (2013) (arguing for the importance of victim agency in private law).

¹⁰⁰ See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 529 (2005); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 *U. PA. L. REV.* 1733, 1743-44 (1998); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695, 718-21 (2003); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *VAND. L. REV.* 1, 6 (1998) [hereinafter Zipursky, *Rights*].

ing it as a reserve of the primordial right to enforce natural law.¹⁰¹ Others have grounded civil recourse in ideas of wronged honor, a peculiar “redressive” form of justice, or second-person (as opposed to third-person) forms of moral address.¹⁰² All of these theories seem to sit most comfortably within tort law—especially within the realms of negligence and intentional torts—with its emphasis on fault and wrongdoing. They all respond, however, to a particular kind of problem created by the relative invulnerability of citizens in the modern state. That problem is the essential passivity that a wrongdoer’s invulnerability to private attack imposes on victims.¹⁰³

Civil liability, in contrast, is both intentionally created and relationally structured. The vulnerability of a tortfeasor to a civil action by a tort victim is not an accidental or regrettable byproduct of tort law’s pursuit of another goal. There is a real sense in which the purpose of tort law is to impose civil liability on tortfeasors. This is not to deny that tort law serves various instrumental goals for which liability is a tool. While neo-formalists like Professor Ernest Weinrib insist that private law has no purpose other than to be private law, one need not adopt such a position to accept the claim that civil liability is in some sense the goal of tort law.¹⁰⁴ The same is true of the civil liability created by contract law. Furthermore, the vulnerability created by civil liability is not a general vulnerability in the face of broad forces. Rather, the vulnerability is sharply limited. The tortfeasor is not generally vulnerable to attack on the basis of his tortious conduct. Rather, he is vulnerable to attack only by a plaintiff armed with a judgment declaring that the tortfeasor is civilly liable.

In summary, the vulnerability of civil liability is structured so as to allow for sharp interpersonal conflict. This conflict is a potential solution to at least two problems created by the success of the modern state in suppressing private aggression. The first is the difficulty in fostering cooperation among parties that are relatively invulnerable to retaliation. The second is the suppression of the agency of victims in the face of wrongdoing. Seeing civil liability as a system of vulnerability and looking to the sorts of arguments that might justify such a regime also sheds light on how we might think about the relationship between different fields of private law, such as torts and contracts.

¹⁰¹ See Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND THE PHILOSOPHY OF LAW, *supra* note 98, at 623.

¹⁰² See Oman, *supra* note 53, at 34 (offering a defense of recourse theory grounded in the idea of vindicating one’s honor); see also Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1890 (2011) (offering a “redressive justice” defense of civil recourse); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1790 (2009) (defending civil recourse as an example of the second-person standpoint in morality).

¹⁰³ See generally Oman & Solomon, *supra* note 99 (arguing for the importance of victim agency in private law).

¹⁰⁴ Cf. WEINRIB, *supra* note 2, at 5 (“[T]he purpose of private law is to be private law.”).

V. VULNERABILITY AND PRIVATE LAW THEORY

Until recently private law theory outside of the realm of law and economics scholarship has been fragmented.¹⁰⁵ For example, torts scholars have pursued explanations of their field based on ideas of corrective justice.¹⁰⁶ With a few exceptions, this work has had little influence on contract theorists.¹⁰⁷ Rather, these scholars have focused their attention on concepts such as consent or promissory morality.¹⁰⁸ In this fragmented view of private law, differing areas of substantive law pursue essentially unconnected aims and respond to independent problems and concerns. The focus on the substantive normative basis for tort and contract thus raises the question of whether there is any broader unity to private law and, if so, what concepts provide this unity.

There are reasons both to be uncomfortable with an entirely fragmented vision of private law and skeptical of attempts to unify it under any contemporary theory. Consider the idea of corrective justice, which has been largely responsible for the revival of interest in moral theories of tort law. The idea seems to fit well with the system of fault and compensation that one finds in tort law and may even be expanded or modified to include strict liability torts.¹⁰⁹ By focusing on the bilateral relationship between plaintiffs and defendants, particularly the way that damages are paid from wrongdoers to victims, it provides a compelling criticism of economic theories of tort law.¹¹⁰ Strikingly, the very features of tort law that motivate the corrective justice critique of economic theories are also present in contract law.¹¹¹ Contract law also involves a bilateral relationship between plaintiffs

¹⁰⁵ Law and economics scholarship has never had any difficulty in unifying disparate theories of law. Rather, it has confidently argued that all of them can be understood and evaluated using the tools of microeconomic theory and the criterion of efficiency. In applying economic theory to a broad range of “non-economic” phenomena, this work has been heavily influenced by Professor Gary Becker’s ambition to unify social sciences under the banner of economic analysis. *See generally* GARY S. BECKER, *THE ECONOMIC WAY OF LOOKING AT BEHAVIOR: THE NOBEL LECTURE* (1996).

¹⁰⁶ *See, e.g.*, JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* (2001); JULES L. COLEMAN, *RISKS AND WRONGS* (1992) [hereinafter COLEMAN, *RISKS*]; WEINRIB, *supra* note 2; Ernest J. Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403 (1992).

¹⁰⁷ *But see* Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 183 (Peter Benson ed., 2001); Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 *FORDHAM L. REV.* 3013, 3014 (2007); Oman, *Contract Damages*, *supra* note 56, at 869-70.

¹⁰⁸ *See generally* STEPHEN A. SMITH, *CONTRACT THEORY* (2004) (summarizing contemporary debates in contract law theory).

¹⁰⁹ *See generally* Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 *IOWA L. REV.* 427 (1992); Jules L. Coleman, *The Practice of Corrective Justice*, 37 *ARIZ. L. REV.* 15 (1995).

¹¹⁰ *See* Jules L. Coleman, *The Structure of Tort Law*, 97 *YALE L.J.* 1233, 1240-42 (1988) (book review).

¹¹¹ Oman, *Contract Damages*, *supra* note 56, at 870.

and defendants.¹¹² Like tortfeasors, contract breachers pay damages to those whose legal rights they have violated.¹¹³ It seems natural that contract law and tort law are somehow normatively related to one another.

Closer examination, however, reveals that unifying contract and tort under the banner of corrective justice is likely to be difficult. First, the substantive duties in tort and contract do not obviously relate to one another. For example, tort law can be plausibly seen as imposing on agents the duty to take reasonable care not to harm the persons and property of another. Such a duty has no immediate connection to the legal obligation to perform certain voluntary agreements. To be sure, once such contractual duties exist one could think of them as the property of obligees which could be interfered with.¹¹⁴ This is more or less what the law does with tortious interference with contract.¹¹⁵ Contract law itself, however, does not rely on notions of fault, as the tort of negligence does. Rather liability in contract is strict and limited to the person obligated under the contract rather than running to all the world.¹¹⁶

Second, the apparent unity of tort and contract seems most intuitive when one examines the remedy of money damages. Yet both tort and contract cases can involve remedies other than money damages. For example, contract law provides for specific performance, which seems less about compensation than simply compelling performance with the underlying duty to keep a contract.¹¹⁷ In other cases, the courts will issue negative injunctions against conduct that is not forbidden by the contract but is inconsistent with its performance.¹¹⁸ In addition, contract cases can give rise to remedies, such as replevin or reformation of the contract, that are neither money damages nor injunctive.¹¹⁹ In some cases, contracts can give rise to

¹¹² *Id.* at 846 (“Any private lawsuit brings together a plaintiff and a defendant.”).

¹¹³ *Id.* at 833 (“Generally speaking, the remedy in contract law involves a transfer from a breaching party to an aggrieved party.”).

¹¹⁴ *See generally id.*

¹¹⁵ *See* RESTATEMENT (SECOND) OF TORTS § 766 (1979).

¹¹⁶ There are, of course, strict liability torts that have been defended on corrective justice grounds. *See generally* COLEMAN, RISK, *supra* note 106 (defending the compatibility of strict liability and corrective justice). Likewise, there is a lively debate as to whether duties in tort law run to all the world or whether they are relational, running only to particular right holders. *Compare* Zipursky, *Rights*, *supra* note 100, at 55-67 (arguing that tort law has a basically relational structure), *with* Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529 (2006) (criticizing the relational view of tort law).

¹¹⁷ *See* SMITH, *supra* note 108, at 398-403 (discussing autonomy defenses of the remedy of specific performance); *see also* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708, 722-23 (2007).

¹¹⁸ *See* *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687 (Ch.) 693; 1 De G.M. & G. 604, 618-19.

¹¹⁹ *See, e.g.*, 27 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 70:20 (4th ed. 2003) (“The equitable remedy of reformation will not make a new agreement for the parties but, instead, will establish and perpetuate the true, existing contract by making the instrument express the real intent of the parties.”).

remedies that do not even involve the intervention of a court, such as the right to take possession of personal property under a security agreement¹²⁰ or the setoff of debts owed to a breaching party.¹²¹ Furthermore, the role served by money damages can differ depending on the nature of the claim being asserted. Hence, for example, nominal damages are difficult to conceptualize as compensatory, serving more the role of a declaratory judgment.¹²² A contract action on a liquidated debt is more a matter of enforcement than compensation.¹²³ Once the complexity of contractual remedies is acknowledged, it is difficult to argue that compensation is the overriding goal of contract law.

Focusing on the idea of civil liability as the creation of vulnerability, however, offers a more promising approach to understanding the relationship between theories of tort and contract. These fields are not united by a common set of core substantive doctrinal concepts. For example, the idea of reasonable care which lies at the heart of negligence doctrine has no clear analogue in contract doctrine, where liability is triggered by breach, regardless of fault.¹²⁴ Nor are tort and contract clearly unified by a common set of normative goals. To be sure, there is some overlap, but it seems unlikely that tort and contract can be traced in their entirety to some common set of normative concerns.¹²⁵ What unifies these fields is the concept of civil liability. What they share is the common outcome of a successful suit in the fact of civil liability and the fact that the basic structure of civil liability is the same across different areas of law. Hence, successful plaintiffs in both contract suits and tort suits acquire the ability to do certain things to defendants which were previously forbidden. Civil liability renders both tortfeasors and contract breachers vulnerable to attack.

Rather than asking if there is some common normative concern that unites tort and contract, we should ask why each body of law results in civil liability. What unites the normative foundations of each field is the fact that creating vulnerability can advance their normative goals. For example, this Author has argued elsewhere that contract law's primary normative goal is

¹²⁰ See U.C.C. § 9-609 (2000) (right to take possession of collateral upon default without judicial intervention).

¹²¹ See U.C.C. § 9-340 (bank's right to setoff against deposit accounts upon breach).

¹²² See RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981) (discussing awards of nominal damages).

¹²³ I am indebted to Professor Stephen Smith of McGill University for drawing this argument to my attention.

¹²⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 236 cmt. a ("Every breach gives rise to a claim for damages, and may give rise to other remedies."); Omri Ben-Shahar & Ariel Porat, *Forward: Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1341 (2009) ("Tortfeasors can take measures to avoid accidents; contracting parties can take measures to avoid loss from breach.").

¹²⁵ See, e.g., Oman, *supra* note 53, at 64-65 (discussing the difficulty of explaining both tort and contract law as vindicating wronged honor).

the support of healthy markets.¹²⁶ Markets, in turn, are valuable because they provide a host of moral goods, such as mechanisms for social coordination between otherwise antagonistic people, the inculcation of desirable moral habits, and—not least—the creation of wealth. One of the primary impediments to the functioning of healthy markets is invulnerability.¹²⁷ Merchants and other market participants need to be able to retaliate against those that opportunistically abuse the trust inherent in market transactions.¹²⁸ Accordingly, contract law provides a mechanism by which those who wish to participate in the market can render themselves vulnerable to retaliation in the event that they breach their agreements.¹²⁹

Compare this account of contract law with so-called civil recourse theory in tort law. Zipursky and Goldberg have argued that tort law allows victims to hold wrongdoers accountable.¹³⁰ It does this by rendering tortfeasors vulnerable to private rights of action, allowing victims to act against those that have wronged them.¹³¹ The normative foundations that civil recourse theorists offer for tort law are quite different from the previously mentioned market-based argument in defense of contract law. For civil recourse theory, tort law is primarily an *ex post* response to wrongdoing which is concerned mainly with the moral standing of the victim *vis-à-vis* the wrongdoer.¹³² In contrast, the theory of contract law as a market-sustaining institution focuses on the moral desirability of a particular social practice (markets) and sees the law primarily as supporting that practice rather than vindicating the moral claims of particular individuals.¹³³ What these theories share with one another is not a common set of moral concerns. Rather, what they share is a common interest in justifying the imposition of a common legal status—civil liability—albeit for quite different reasons.

For purposes of the theory of civil liability offered in this Article, what is important is not the final merit of any particular theory of contract law or tort law. Rather, it is the claim that what unifies fields of private law is not any particular set of normative concerns. Private law seems to be morally pluralistic, and we should not expect it to center on a single normative goal

¹²⁶ Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 204 (2012) (“By limiting opportunism, lowering transaction costs, inculcating moral attitudes conducive to market exchange, and the like, contract law makes widespread exchange between strangers easier and more likely.”).

¹²⁷ See generally *id.*

¹²⁸ *Id.* at 209 (“[T]he availability of formal recourse in the event of breach gives market participants the confidence to engage in transactions that they would otherwise forgo out of fear of exploitation.”).

¹²⁹ See Oman, *Consent to Retaliation*, *supra* note 56, at 533.

¹³⁰ See Goldberg & Zipursky, *supra* note 100, at 1846-47.

¹³¹ See *id.*

¹³² See Solomon, *supra* note 102, at 1806.

¹³³ Oman, *supra* note 126, at 185-87.

such as corrective justice. Despite this pluralism, however, private law hangs together in a normative sense. What unites it is civil liability. Its normative unity lies not in the fact that it pursues a single normative goal, but that rendering defendants vulnerable to attack by plaintiffs advances all the normative goals it pursues.

CONCLUSION

As a concept, civil liability is rather less grand than the idea of law itself. It is rather more abstract, however, than particular areas of law such as tort and contract—let alone concrete doctrines such as negligence or breach. Occupying an intermediate position, it has garnered relatively little attention in contemporary debates in the philosophy of law. This is unfortunate. First, civil liability is one of the most ubiquitous legal phenomena that we encounter. If we take the work of the courts as a measure, it is more common than criminal punishment, a concept that has garnered far more attention. Its very omnipresence ought to make it worthy of attention. Second, civil liability is striking in the way that it unites apparently disparate fields of law. Tort law and contract law are quite different in terms of both their goals and their structures. They both, however, result in civil liability. Focusing on the concept of civil liability thus provides us with a mechanism for thinking about their relationship to one another.

Ultimately, the ideas of duty and cost, which are the most common ways of thinking about civil liability, do a poor job of capturing its basic structure. Both approaches tend to assume that civil liability is a mechanism by which the state coerces the conduct of defendants, either in the payment of a fine or the performance of some obligation. What these approaches miss is the primary role of the plaintiff's agency in civil liability. Civil liability does not ultimately consist of the state coercing a recalcitrant individual. Rather, it consists of rendering a defendant vulnerable to a plaintiff and then placing tools at the disposal of the plaintiff to take or restrict the defendant's property and liberty. Placing vulnerability at the center of our understanding of civil liability, in turn, provides a fulcrum for understanding its purposes and the way in which it relates otherwise disparate fields of law to one another.