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## The Honor of Private Law

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## ARTICLES

### THE HONOR OF PRIVATE LAW

Nathan B. Oman\*

*While combativeness is central to how our culture both experiences and conceptualizes litigation, we generally notice it only as a regrettable cost. This Article offers a less squeamish vision, one that sees in the struggle of people suing one another a morally valuable activity: the vindication of insulted honor. This claim is offered as a normative defense of a civil recourse approach to private law. According to civil recourse theorists, tort and contract law should be seen as empowering plaintiffs to act against defendants, rather than as economically optimal incentives or as a means of enforcing duties of corrective justice. The justification of civil recourse must answer three questions. First, under what circumstances—if any—is one justified in acting or retaliating against a wrongdoer? Second, under what circumstances does the state have reasons for providing a mechanism for such action? Finally, how are the answers to these questions related to the current structure of our private law? This Article offers the vindication of wronged honor as an answer to these three questions. First, I establish the historical connection between honor and litigation by looking at the quintessential honor practice, dueling. Then I argue that the vindication of honor is normatively attractive. I do this by divorcing the idea of honor from unsavory associations with violence and aristocracy, showing how it can be made congruent with certain core modern concerns. In particular, when insulted parties act against wrongdoers, they reestablish the position of respect and equality that the insult upset. I then show how having the state provide plaintiffs with a means of vindicating their honor avoids making the political community complicit in the humiliation of its citizens and provides those citizens with a means of exercising their agency in ways that provide a foundation for self-respect. Finally, I show those areas of private law where honor operates most powerfully as a justification for providing recourse through the courts, while acknowledging that it operates less powerfully as a reason in other areas.*

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## INTRODUCTION

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 not making some abstract statement about the legal consequence of negligence. Rather, he is threatening to strike back at the person who hurt him. Likewise, litigation is a gladiatorial enterprise, a struggle between opposing champions bent on claiming victory for their clients. It is common to speak of lawyers as “hired guns” or “junkyard dogs.”<sup>1</sup> The unusually litigious are seen as being touchy, contentious, and aggressive.<sup>2</sup> Oddly, while combativeness is central to how our culture both experiences and conceptualizes litigation, this fact has garnered very little scholarly attention. At best, it is noticed as a regrettable cost of the legal system.<sup>3</sup> This Article articulates a less squeamish vision of litigation, one that sees in the very struggle of people suing one another a morally valuable activity: the vindication of insulted honor.

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1. This was our family’s affectionate designation for my great uncle, a successful plaintiff’s attorney in Utah who made his fortune representing farmers and ranchers in suits against railroads and mining companies.

2. See generally PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1994); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

3. See, e.g., ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 100–01 (2000) (discussing bitter litigation between Art Buchwald and Paramount Pictures and noting that “[t]heir process for resolving their dispute was so inefficient that fighting the battle cost six times more than the amount awarded”).

Private law theory is dominated by two philosophical families. On one side are consequentialists, best represented by the partisans of law and economics, who believe that areas such as torts and contracts should be arranged so as to create efficient incentives.<sup>4</sup> On the other side are various rights-based theorists who believe that private law can and should serve non-instrumentalist goals.<sup>5</sup> Among this latter group a debate has developed between the partisans of corrective justice and the partisans of civil recourse theory.<sup>6</sup> Occurring mainly within tort theory but bleeding into contracts scholarship as well, the dispute hinges on whether private law should be thought of as enforcing a wrongdoer's duty to make the victim of his wrongdoing whole or whether tort and contract should be thought of as institutions that empower plaintiffs to act against defendants.

To date, the civil recourse theorists have relied primarily on formalistic arguments, if one can use the term "formalistic" in a non-pejorative sense. The recourse theorists have sought to show how their approach better fits the institutional structures of private law. They have been less successful at explaining the normative value of allowing plaintiffs to act against defendants. To the extent that such normative arguments have appeared, they have overwhelmingly been couched in the language of individual rights and liberal political philosophy. In contrast, this Article justifies civil recourse by appealing to the idea of honor rather than to liberal notions of rights. In so doing, it seeks to connect debates in the theory of private law to a recent surge of interest, among historians and other scholars in the humanities, in the idea of honor.<sup>7</sup>

The normative problem of civil recourse can be broken into at least three discrete but inter-related questions. First, there is the question of under what circumstances—if any—one is justified in acting or retaliating against a wrongdoer. Can such action be justified? Second, there is the question of under what circumstances the state has a good reason for providing a mechanism for such action. Even if one is justified in retaliating against a wrongdoer, what reason is there for the state to involve itself in the process? Finally, assuming that we have answers to the previous two questions, how

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4. *See infra* notes 11–18 and accompanying text.

5. *See infra* notes 19–29 and accompanying text.

6. *See infra* Part I.B.

7. *See generally* KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* (2010); JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2002); SHARON R. KRAUSE, *LIBERALISM WITH HONOR* (2002); WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* (1990); WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006); WILLIAM IAN MILLER, *HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* (1993); FRANK HENDERSON STEWART, *HONOR* (1994); ALEXANDER WELSH, *WHAT IS HONOR?: A QUESTION OF MORAL IMPERATIVES* (2008); BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (25th anniversary ed. 2007); Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 *HOFSTRA L. REV.* 501 (2004); C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 *VAND. L. REV.* 1805 (2001); Stephen Darwall, *Two Kinds of Recognition Respect for Persons* (2009) (unpublished paper) (on file with the Fordham Law Review).

are those answers related to the current structure of our private law? Are the civil wrongs that currently give rise to a private cause of action the sort of wrongs that justify acting or retaliating against a wrongdoer? Do the reasons that justify the state's involvement in this process apply equally to all civil wrongs or does civil recourse provide a more powerful justification for empowering plaintiffs in some circumstances rather than others?

This Article offers answers to all three of these questions. It focuses on a single feature of civil recourse, namely, the way in which the law empowers plaintiffs to act against defendants. Rather than looking to liberal theories of rights, however, it looks to older notions of honor and its vindication, showing not only how these ideas continue to motivate our laws but also why we might want them to do so. I begin the argument by establishing a connection between the common law and the vindication of wronged honor through an exploration of the relationship between litigation and the quintessential practice of honor: dueling. Having established the connection between honor and litigation, I then turn to the three normative questions posed by civil recourse theory.

First, I argue that the vindication of honor is a normatively attractive form of action. I do this by divorcing the idea of honor from unsavory associations with violence and aristocracy, showing how it can be made congruent with certain core modern concerns. In particular, when insulted parties act against the wrongdoers that have victimized them, they reestablish the position of respect and equality that the insult upset. I then show how having the state provide plaintiffs with a means of vindicating their honor both avoids making the political community complicit in the humiliation of its citizens and provides those citizens with the means for exercising their agency in ways that provide a foundation for honor and self-respect. Finally, I show those areas of private law where honor operates most powerfully as a justification for providing recourse through the courts while acknowledging that honor operates less powerfully as a reason in other areas.

The remainder of this Article proceeds as follows. Part I provides a brief and opinionated overview of modern private law theory, showing how this Article's argument about honor fits into contemporary scholarly debates. Part II illustrates the close connection between honor and civil recourse by examining the historical relationship between litigation and the practice of dueling. Part III then offers a normative defense of civil recourse based on the vindication of honor. The Article concludes by discussing some of the implications and limitations of the defense of honor offered herein.

## I. THE REVIVAL OF PRIVATE LAW

For most of the last century the idea of private law as a conceptually distinct subject has been treated with suspicion. Beginning at least with the publication of Oliver Wendell Holmes's *The Path of the Law*, many, if not most, legal thinkers have assumed that private law is best thought of as

simply an idiosyncratic form of public regulation.<sup>8</sup> To be sure, the distinction between private law and public law has never disappeared from legal discourse, but for many it is something of a theoretical embarrassment.<sup>9</sup> The present, however, is an unusually fertile moment in the theory of private law. The field now has the benefit of two generations of sophisticated law and economics scholarship devoted to interpreting, elucidating, and critiquing the law of contracts, tort, and property. More recently, philosophers of law have turned their attention to the area, offering criticisms of economic interpretations of the law and putting forward counter-theories. The result is a rich intellectual discussion, one that is again exploring the distinctive character of private law. To understand the contribution that honor might make to our understanding of private law, it is necessary to see how it fits into this ongoing debate.

#### A. *Law and Economics and the Corrective Justice Response*

Modern private law theory began in 1960. Picking such dates is always arbitrary, but in that year Ronald Coase published his article *The Problem of Social Cost*,<sup>10</sup> which formulated what afterwards became known as the Coase Theorem.<sup>11</sup> This argument laid the foundation for much of modern law and economics scholarship, providing a framework that scholars could apply to a wide range of topics. Coase's article was followed by other seminal pieces in the 1960s, and by the 1970s, law and economics had taken shape as a distinctive approach to legal theory with the publication of

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8. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461–65 (1897) (arguing that law—including private law such as tort and contract—should be conceptualized as an instrument serving public policy goals); see also David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 889–92 (1984) (arguing that tort law should be arranged to advance regulatory goals).

9. Writing in the heyday of the Critical Legal Studies movement, Duncan Kennedy declared, after working through the arguments in his eight-page article, that “one simply loses one’s ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything.” Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982). Strangely enough, closing in on three decades after the publication of Kennedy’s article, people continue to refer to private law and public law on a regular basis.

10. See RONALD H. COASE, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), reprinted in *THE FIRM, THE MARKET, AND THE LAW* 95 (1988).

11. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 25 (5th ed. 1998) (“The new law and economics began with Guido Calabresi’s first article on torts and Ronald Coase’s article on social cost.” (citing COASE, *supra* note 10; Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961))). Coase himself never formulated the Coase Theorem as a formal theorem, but this has not stopped others from stepping into the breach. Posner’s definition reads, “The most celebrated application of the concept of opportunity cost in the economic analysis of law is the Coase Theorem. The 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.” *Id.* at 8. See generally Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397 (1997) (providing an intellectual history of the Coase Theorem).

Guido Calabresi's *The Costs of Accidents* and Richard Posner's *Economic Analysis of Law*.<sup>12</sup>

Law and economics, of course, is far more than a theory of private law. If anything, it is hostile to divisions between private and public law, preferring to see the whole of the corpus juris through the lens of economic efficiency.<sup>13</sup> The key positive insight of law and economics scholarship is that law creates incentives and that the effect of those incentives on behavior can be modeled using the tools of neoclassical economics, the rational actor model, and transaction-costs economics.<sup>14</sup> Its key normative claim is that these incentives should be arranged so as to maximize aggregate social wealth.<sup>15</sup> There is nothing about either of these claims that is necessarily confined to traditional private law fields such as torts and contracts. Nevertheless, private law has proven a fertile area for law and economics scholarship, leading one partisan of the approach to enthuse that it "is the touchstone of private law scholarship, a key that appears to unlock every door."<sup>16</sup> Even more sober authors have declared, "As in private law scholarship generally, economic analysis is the dominant paradigm in contemporary contracts scholarship."<sup>17</sup> Something very similar could be said of the law of torts or property.<sup>18</sup>

The very success of law and economics has acted as a spur to alternative approaches to private law. After a period of relative neglect, more

12. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); POSNER, *supra* note 11; Calabresi, *supra* note 11. For a somewhat hostile recounting of the rise of the law and economics movement, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 83–105 (1995).

13. Posner writes,

Among the disciplines that have challenged the legal doctrinalists' monopoly of legal studies, pride of place belongs to economics, which has made great progress in the last thirty years and, applied to law, has revolutionized the profession's understanding of fields of law as disparate as antitrust, torts (mainly accidents), contracts, corporations, and bankruptcy. At the academic level it has made inroads into most other legal fields as well, ranging from adoption to zoning.

RICHARD A. POSNER, *OVERCOMING LAW* 84–85 (2d ed. 1995).

14. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353 (1990) (noting that the basic assumption of law and economics is that "people are rational maximizers of their satisfaction").

15. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE*, at xvii (2002) ("Our thesis is that social decisions should be based *exclusively* on their effects on the welfare of individuals—and, accordingly, should not depend on notions of fairness, justice, or cognate concepts."). See generally Guido Calabresi, *An Exchange About Law and Economics: A Letter to Ronald Dworkin*, 8 *HOFSTRA L. REV.* 553 (1980) (defending the desirability of efficiency as a normative criterion); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487 (1980) (same); see also Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 *HOFSTRA L. REV.* 563 (1980) (attacking both arguments).

16. F.H. BUCKLEY, *JUST EXCHANGE: A THEORY OF CONTRACT*, at xi (2005).

17. Jody S. Kraus, *Philosophy of Contract Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 687, 687 (Jules Coleman & Scott Shapiro eds., 2002).

18. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *CORNELL L. REV.* 1123, 1141 n.58 (2007) (noting that law and economics is arguably the dominant theoretical approach to tort law today).

philosophically inclined theorists have once more turned their attention to topics such as tort and contract.<sup>19</sup> The first round of philosophical work on private law focused on the bilateralism of private law actions. Bilateralism refers to the way in which plaintiffs and defendants are related in private litigation so that money damages by defendants are always paid to plaintiffs to whom the law gives no claim on anyone else.<sup>20</sup> For example, in torts, only victims can sue tortfeasors, and tortfeasors are the only people victims can sue. They are not, for example, given a claim against a public insurance fund. As philosophically minded critics of law and economics scholarship have pointed out, if liability is supposed to be about the creation of optimal incentives this bilateral structure makes no sense.<sup>21</sup> Indeed, the point was noted earlier by economists, who recognize for example that assessing expectation damages against contract breachers may force them to internalize the costs of breach, leading to efficient breach decisions, but that giving those damages to plaintiffs leads to over-reliance and inefficient behavior on the part of promisees.<sup>22</sup> The payment to plaintiffs creates moral hazard problems and there is no a priori economic reason that the incentivizing of defendants should be left to the plaintiffs that they have wronged.<sup>23</sup> A better justification of this feature, philosophical critics have argued, can be found in the idea of corrective justice.<sup>24</sup>

Corrective justice was first defined, rather enigmatically, by Aristotle, who wrote, “[T]hat which is just in private transactions is indeed fair or equal in some sort, and that which is unjust is unfair or unequal; but the proportion to be observed here is not a geometrical proportion . . . but an arithmetical one.”<sup>25</sup> The distinction Aristotle drew between geometric and

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19. See STEPHEN A. SMITH, *CONTRACT THEORY* 41–52 (2004) (summarizing contemporary debates in the philosophy of contract law). See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

20. See Nathan B. Oman, *The Failure of Economic Explanations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 846–51 (2007) (discussing the nature of bilateralism).

21. See, e.g., Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988) (book review).

22. See generally Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985); Aaron S. Edlin, *Cadillac Contracts and Up-front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. ECON. & ORG. 98 (1996); Aaron S. Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691 (1983); William P. Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract*, 15 RAND J. ECON. 39 (1984); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980); Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q.J. ECON. 121 (1984).

23. See Coleman, *supra* note 21, at 1240–47 (offering a philosophical critique of economic explanations of tort law’s bilateral structure); Oman, *supra* note 20, at 846–59 (making a similar argument in the context of contract law).

24. See, e.g., Coleman, *supra* note 21, at 1248–53; Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409–11 (1992).

25. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 4, at 148 (F.H. Peters trans., C. Kegan Paul & Co. 1881).



arithmetic ideas corresponds to the distinction between distributive and corrective justice. In referring to their mathematical properties, Aristotle was seeking to elucidate their basic structure rather than their substantive content, a distinction similar to that drawn by John Rawls between the concept of justice and various conceptions of justice.<sup>26</sup> The concept of distributive justice is geometrical because it allocates the good things of life to people in proportion to their possession of some morally relevant characteristic. The characteristic chosen by different conceptions of distributive justice varies. For egalitarians, this might be humanity, which all people possess in equal measure, while for philosophical aristocrats, it might be virtue, which some have in greater abundance than others.

Corrective justice, in contrast, is indifferent to the moral characteristics of different people, but simply seeks to correct transactional wrongs by arithmetically subtracting from a wrongdoer to compensate her victim.<sup>27</sup> Corrective justice theorists of private law have argued among themselves over precisely how the idea should be interpreted. The chief point of contention is whether the idea requires fault on the part of a defendant or whether the mere invasion of a plaintiff's rights should give rise to a duty to compensate.<sup>28</sup> All agree, however, that wrongdoers have such a duty to make their victims whole, and that the bilateral structure of private litigation enforces this duty.<sup>29</sup>

### B. *The Civil Recourse Critique of Corrective Justice*

The most recent round of private law revivalism has focused on a different feature of civil liability: private standing.<sup>30</sup> Private standing

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26. See JOHN RAWLS, A THEORY OF JUSTICE 9 (rev. ed. 1999) ("The concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role.")

27. See ARISTOTLE, *supra* note 25, bk. V, ch. 4, at 148 ("For it makes no difference whether a good man defrauds a bad one, or a bad man a good one, nor whether a man who commits an adultery be a good or a bad man; the law looks only to the difference created by the injury, treating the parties themselves as equal, and only asking whether the one has done, and the other suffered, injury or damage.")

28. Compare JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001), COLEMAN, *supra* note 19, 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), Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987), and Coleman, *supra* note 21, with WEINRIB, *supra* note 19, Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987), Weinrib, *supra* note 24, Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002), Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 1 (2001), and Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992).

29. For an argument that as a matter of existing law no such duty to pay damages exists, see Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, FLA. ST. U. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1906753>.

30. See generally John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003)

refers to the fact that the law does not force transfers from defendants to plaintiffs as an independent enforcer of some norm of corrective justice.<sup>31</sup> Rather, the private law empowers plaintiffs to act against defendants. Plaintiffs may choose to bring suit against tortfeasors and contract breachers, but the law does not require that they do so. Rather, it waits entirely on the plaintiff's decision to sue. Until she brings an action, nothing happens. Benjamin Zipursky and John Goldberg, the chief proponents of what has been dubbed civil recourse theory, have argued that this plaintiff-centered system of private law cannot be adequately explained by either economic analysis or the duty of corrective justice.<sup>32</sup>

Economic theorists might seek to justify private standing by arguing that it represents a form of dispersed enforcement. The idea is that we need a system of penalties for breach of contract or sub-optimal investment in precautions to avoid torts.<sup>33</sup> The information and resources of government prosecutors, however, are limited, so we empower the plaintiff as a kind of private attorney general to enforce efficiency norms.<sup>34</sup> The problem with such an argument is that it fails to explain why the plaintiff must be the victim of the defendant.<sup>35</sup> If our only goal is disaggregated enforcement, then information of wrongdoing, rather than the fact of being victimized, ought to be sufficient to empower plaintiffs.<sup>36</sup> Indeed, this is precisely what we see in systems that are explicitly designed as disaggregated enforcement mechanisms, such as *qui tam* actions under whistle-blower statutes.<sup>37</sup> In such cases the plaintiff need not be a victim of the defendant's wrongdoing but may sue as a way of enforcing public policy merely on the basis of information.<sup>38</sup>

Corrective justice theory faces a similar difficulty. The idea of corrective justice explains why a wrongdoer ought to have a duty to compensate his victim. It is not clear, however, that empowering plaintiffs is best explained

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[hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 623 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Zipursky, *Philosophy of Private Law*].

31. See Zipursky, *Civil Recourse*, *supra* note 30, at 699 ("The state does not impose liability on its own initiative. It does so in response to a plaintiff's suit demanding that the defendant be so required.").

32. See *id.* at 699–709 (critiquing the law and economics approach); *id.* at 709–33 (critiquing corrective justice theory); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 45–52 (1998) (critiquing the law and economics approach); *id.* at 70–82 (critiquing corrective justice theory); see also Goldberg, *supra* note 30, at 601–05 (contrasting corrective justice and civil recourse).

33. See Oman, *supra* note 23, at 843–46 (discussing economic theories of disaggregated enforcement). See generally Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011) (same).

34. See Oman, *supra* note 20, at 858 (discussing dispersed enforcement of contract liabilities).

35. See *id.* (noting "the basic contradiction between efficient breach and efficient reliance").

36. See *id.* at 858–59 (highlighting economic arguments).

37. See *id.* at 858 ("In a *qui tam* action, the successful plaintiff is essentially paid a bounty for bringing a lawsuit that, rather than righting a personal wrong, serves simply to enforce a public policy.").

38. *Id.*

as an effort to enforce this duty.<sup>39</sup> For example, one could create a system in which one had a duty to compensate and where the failure to perform this duty was a crime.<sup>40</sup> In other words, the duty to compensate might be enforced by prosecutors. Understanding private litigation as the disaggregated enforcement of such a duty runs into the same sorts of problems that seeing private litigation as the disaggregated enforcement of efficiency-promoting fines faces. Limiting the enforcement to actions by victims is something that Aristotle's arithmetical principle does not explain.<sup>41</sup> Rather, Aristotle tells us to subtract from wrongdoers and add to victims but seems indifferent as to who does the counting, adding, and subtracting.<sup>42</sup>

Recourse theorists insist that there is some distinctive normative goal that is vindicated by giving citizens the ability to proceed in court against those that have wronged them. Zipursky and Goldberg's normative defense of civil recourse is based on a reading of Locke's *Second Treatise on Government*.<sup>43</sup> According to Locke, all men in the state of nature have the right to enforce natural law by acting to punish those who violate its demands.<sup>44</sup> It is the delegation of this right to enforce natural law that gives rise to the state's power to legislate and punish crime.<sup>45</sup> This delegation is

39. Cf. Zipursky, *Civil Recourse*, *supra* note 30, at 714–18 (noting the difficulties with understanding tort law as enforcing duties of corrective justice).

40. Cf. *id.* at 712–13 (highlighting another critique of corrective justice theory).

41. See ARISTOTLE, *supra* note 25, bk. V, ch. 4, at 148 (“[T]hat which is just in private transactions is indeed fair or equal in some sort, and that which is unjust is unfair or unequal; but the proportion to be observed here is not a geometrical proportion . . . but an arithmetical one.”).

42. *But see* Alan Calnan, *In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky*, 1 N.Y.U. J.L. & LIBERTY 1023, 1028–32 (2005) (arguing that Aristotle's claim that consent vitiates injustice explains why corrective justice requires the empowering of victims). I do not find Calnan's argument persuasive. It seems to me that Aristotle uses the notion of consent to explain why there is no duty to repair an injury suffered as a result of consented-to activity, such as injuries suffered in the boxing ring. Calnan, it seems to me, unjustifiably extends this principle to require some further choice by the victim after the fact in order for the duty to compensate to arise.

43. See Zipursky, *Civil Recourse*, *supra* note 30, at 735 (discussing Locke); see also Goldberg, *supra* note 30, at 541–44 (same); cf. Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873 (2011) (arguing that private law instantiates pre-legal moral enforcement rights).

44. Locke writes:

[T]hat all Men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, which willeth the Peace and Preservation of all Mankind, the Execution of the Law of Nature is in that State [i.e., the state of nature], put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

45. See *id.* at 342 (“And thus the Commonwealth comes by a Power to set down, what punishment shall belong to the several transgressions which they think worthy of it, committed amongst the Members of that Society, (which is the *power of making Laws*) as well as it has the power to punish any Injury done unto any of its Members, by any one that is not of it, (which is the *power of War and Peace*;) and all this for the preservation of the property of all the Members of that Society, as far as is possible.”).

not absolute. In addition to the right to punish transgressors of natural law, writes Locke, man “has besides the right of punishment common to him with other Men, a particular Right to seek *Reparation* from him that has done it.”<sup>46</sup> This right to seek reparations for damage done is, like the right to self-defense, inalienable.<sup>47</sup> Accordingly, the state must provide an avenue that allows for the citizen’s “appropriating to himself, the Goods or Service of the Offender,”<sup>48</sup> if it is going to prohibit self-help with the criminal law and the like.

### C. Justifying Civil Recourse

While Zipursky and Goldberg have offered a reading of Locke’s *Second Treatise* in support of civil recourse theory, they have not yet offered a comprehensive normative defense.<sup>49</sup> For example, while they have offered an interpretation of Locke’s writings, they have not tried to explicitly link civil recourse theory to Lockean ideas of self-ownership.<sup>50</sup> They thus fail to explain exactly how the fictitious Lockean social contract operates as a justification.<sup>51</sup> Civil recourse theory identifies an important structural feature of private law actions. Goldberg and Zipursky have made a plausible case that this feature rests on a normative foundation independent of corrective justice or economic efficiency. The precise nature of that normative foundation, however, remains open to debate and interpretation.

Jane Stapleton, for example, has taken issue with numerous aspects of Goldberg and Zipursky’s theory.<sup>52</sup> At the heart of Stapleton’s criticism is her pluralistic approach to tort.<sup>53</sup> Accordingly, she is skeptical of what she calls “the extremes of ‘high theory’ fashions” and “the race to the

46. *Id.* at 291.

47. *Id.* at 291–92 (describing the right to reparation for damage done and noting that one “cannot *remit* the satisfaction due to any private Man, for the damage he has received”).

48. *See id.* at 292.

49. *See* Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1779 (2009) (noting that civil recourse theorists have not offered a full normative justification of their position).

50. *Cf.* Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 13–17 (2009) (offering a detailed theory of the substantive basis of contractual obligations based on Lockean theories of property acquisition).

51. As Zipursky has written:

The Lockian social contract metaphor cannot take much pressure, as sympathetic critics from Hume to Rawls have pointed out. The metaphor is often taken as a placeholder for a broader argument based on the existence of reasons for members of a group of persons within a state to regard a state bounded by certain norms as legitimate and authoritative and to act as members of it, reasons conditioned on the like-minded acceptance of other persons in the state. This is not the place to undertake the project of unpacking the metaphor; a vast contractarian and anti-contractarian literature exists on this topic. But assuming it is not incoherent generally to try to unpack contractarian arguments in this manner, it is worth looking at what it would mean in the context of private rights of action.

Zipursky, *Philosophy of Private Law*, *supra* note 30, at 642.

52. Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529 (2006).

53. *See id.* at 1557 (expressing frustration with grand theories of tort law).

reductionist bottom of legal analysis in U.S. tort discourse.”<sup>54</sup> She takes particular issue with the defense that Goldberg and Zipursky mount of Cardozo’s famous opinion in *Palsgraf v. Long Island Railroad Co.*<sup>55</sup> Zipursky insists that civil recourse reveals all tort duties as relational duties, that is, duties owed to particular classes of people rather than to the world at large.<sup>56</sup> Stapleton, however, believes that this view commits civil recourse to a normatively unattractive vision in which some people are treated as second-class citizens without a claim on the care of their fellows.<sup>57</sup> She also believes that “there are areas of tort law that can only be accounted for in instrumental terms, for example torts that are explicitly based on the violation of some public policy such as the tort of retaliation by an employer against an employee.”<sup>58</sup>

Coming from a very different position, Alan Calnan, a proponent of corrective justice theory, has offered a critique of civil recourse based on his more unitary approach to tort.<sup>59</sup> Calnan defends what he calls a liberal justice theory of corrective justice.<sup>60</sup> One of his chief criticisms is that civil recourse theory, despite the protestations of its proponents, actually exalts vengeance. “Goldberg argues,” he writes, “that the law uses compensatory damage awards to exact retribution against wrongdoers, a practice which presumably slakes the blood-thirst of their victims.”<sup>61</sup> Not only is the slaking of blood thirst not normally seen as a morally attractive pursuit, Calnan argues that money damages are a peculiarly bad way of doing it: “Taking money is hardly the practical or moral equivalent of intentionally or negligently inflicting harm. It is neither as severe nor as personal as the action it requires.”<sup>62</sup> Civil recourse is thus doubly damned for both pursuing normatively questionable ends and for doing so ineffectively.

One of the most ambitious attempts thus far to provide a normative defense of civil recourse has been undertaken by Jason Solomon.<sup>63</sup> Solomon begins by acknowledging the force of many of the criticisms leveled against civil recourse theorists, noting that Zipursky and Goldberg have thus far failed to provide a fully articulated normative justification for their framework.<sup>64</sup> Solomon seeks to fill this gap through a two-part argument. The first part of the argument seeks to rescue civil recourse

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54. *Id.*

55. 162 N.E. 99 (N.Y. 1928).

56. See Zipursky, *Civil Recourse*, *supra* note 30, at 715–16 (discussing the holding in *Palsgraf*).

57. Stapleton, *supra* note 52, at 1530–31 (criticizing treatment of some citizens in theory as “second-class”).

58. *Id.* at 1531.

59. Calnan, *supra* note 42, at 1072 (“I have tried to show that the concept of corrective justice explains a lot more of tort law than they are willing to admit.”).

60. *Id.*

61. *Id.* at 1059.

62. *Id.*

63. Solomon, *supra* note 49.

64. See *id.* at 1779 (“Goldberg and Zipursky see their primary task as interpretive, and as a result, have mostly avoided the task of defending a law of ‘civil recourse’ as one that is worth having.”).

theory by demonstrating that contrary to the claim put forward by John Finnis and others,<sup>65</sup> we are morally justified in addressing resentment against our wrongdoers and demanding some satisfaction from them.<sup>66</sup> Solomon draws here on the work of Stephen Darwall, who has defended what he calls the second-person standpoint.<sup>67</sup> On this view, morality consists not only of abstract moral rules but also of moral powers that victims have to make demands on their wrongdoers.<sup>68</sup> There is a difference between claiming that there is an abstract moral duty not to tread on other people's feet and a victim who says to a wrongdoer, "Hey! *You* stepped on *my* foot!" This second example is a claim by the victim of peculiar moral authority vis-à-vis the person standing on his foot. This claim of authority is an instance of the second-person standpoint.<sup>69</sup> Solomon then seeks to show how tort law embeds this second-person approach in our political institutions. He writes, "From the state's perspective, by establishing a system whereby individuals can hold those who have wronged them *legally* accountable, the state underscores the *moral* accountability we have toward one another as well. The state does this simply by establishing the system and making it available."<sup>70</sup>

To summarize, civil recourse theorists have identified an important structural element of private law. An adequate interpretation of that law requires an account of private standing. The justification for this feature, however, remains in doubt. The remainder of this Article takes up the normative question of civil recourse theory. Is it normatively desirable for victims to act against those who have wronged them? Should the state provide a means for them to do so? Do the current institutions of private law fulfill this function? In the sections that follow, I argue that answers to these questions can be found in the apparently anachronistic idea of honor. I begin by showing the historical relationship between private law and honor by recovering the surprising connection between litigation and dueling.

## II. DUELING AND CIVIL LITIGATION

The vindication of wronged honor was an important part of the private law's development of a system of redress. This connection between civil recourse and the vindication of honor can be seen most dramatically in the

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65. See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW, *supra* note 30, at 57 ("At its root the theory of recourse treats as worthy the emotional impulse of a victim of wrongdoing to 'get even,' by 'act[ing] against'—having recourse against—the rights-violator. This impulse is in most if not all respects contrary to the true principle, do not answer injury with injury." (citing Zipursky, *supra* note 32, at 85)).

66. See Solomon, *supra* note 49, at 1785–97 (detailing the moral arguments behind such a proposition).

67. See generally STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006).

68. See *id.* at 99–104 (discussing moral accountability in second-person standpoint theory).

69. See *id.* at 39–48 (highlighting examples of the second-person stance).

70. Solomon, *supra* note 49, at 1810.

relationship between litigation and the quintessential mode of vindicating one's honor: the duel. During the heyday of the duel in the eighteenth and early nineteenth centuries, litigation in court was consistently seen as a competitor with pistols on the field of honor.<sup>71</sup> Both social practices involved a wronged victim acting against the person who insulted him in order to vindicate his honor.

The idea that the common law exists to provide subjects and citizens with a means of vindicating their honor has a long pedigree. In his influential commentary on the Magna Carta in *The Institutes of the Lawes of England*, Sir Edward Coke wrote:

The law is called *rectum* [right], because it discovereth, that which is tort, crooked, or wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injurie . . . . It is called Right, because it is the best birth-right the Subject hath, for thereby his . . . honor, and estimation are protected from injury, and wrong . . . .<sup>72</sup>

Likewise, when discussing the seriousness of being accused of treason, Coke references the threat to “the life, honour, fame, liberty, blood, wife, and posteritie of the party accused.”<sup>73</sup>

Blackstone similarly associates the wheels of civil justice with the vindication of personal honor. Citing Montesquieu approvingly, he writes:

[I]n free states the trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty, and in all governments, he adds, the formalities of law increase in proportion to the value which is set on the honour, the fortune, the liberty, and life of the subject.<sup>74</sup>

Notice that Blackstone sees the complexity of judicial machinery as being a result in part of the value placed on the honor of the subject. The formalities of the law are necessary to vindicate the subject's honor and prevent overreaching by the state.

Elsewhere, Blackstone identifies the wrongs redressed by the private law in terms of insults. “The more effectually to accomplish the redress of private injuries,” he writes, “courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined, and wrongs prohibited.”<sup>75</sup> In seeing the common law as a bulwark of the weak against the “insults of the stronger,” Blackstone was drawing on a rhetorical trope that Coke had invoked a century and a half earlier. Working his family motto into his commentary, Coke wrote, “That the Common lawes of the Realme [are] . . . the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all; *lex est*

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71. See *infra* notes 78–95, 100–01 and accompanying text.

72. 2 EDWARD COKE, *THE SELECTED WRITINGS OF SIR EDWARD COKE: INSTITUTES* 872–73 (Steve Sheppard ed., 2003).

73. *Id.* at 949.

74. 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*423–24.

75. *Id.* at \*2–3.

*tutissima cassis*, and *sub clypeo legis nemo decipitur*.”<sup>76</sup> Like a knight errant, the law was seen as the champion of the honor of the weak against the insults of the strong.<sup>77</sup>

The link between civil recourse and the vindication of honor can be seen most clearly in the historical relationship between litigation and dueling. Consider the rise of the eighteenth-century action of criminal conversation. At common law, “*crim con*” as it was known was neither criminal nor a conversation. Rather, it was a civil cause of action for cuckoldry in which a wronged husband could sue his wife’s lover for money damages.<sup>78</sup> The legal basis for the action lay in the doctrine of coverture, which merged a wife’s legal identity into that of her husband, allowing him to sue her paramour for what amounted to trespass.<sup>79</sup> (The misogyny inherent in the theory behind the action did not go unremarked on by contemporary proto-feminists.)<sup>80</sup> In the late seventeenth century, a cuckolded husband often would challenge his wife’s lover to a duel as a way of vindicating his honor.<sup>81</sup> With the rise of *crim con* in the eighteenth century, however, dueling gave way to litigation. Rather than meeting on the field of honor, husbands and lovers faced off in the courtroom, and rather than exacting blood, a husband sought damages for the invasion of his “property.” The size of judgments in *crim con* cases, coupled with England’s draconian debt laws, often allowed husbands to use the civil courts to literally drive their adversaries into exile.<sup>82</sup>

Conflicts over infidelity were hardly the only area where law served as a substitute for dueling over offended honor. Honor was also important for

76. 2 COKE, *supra* note 72, at 871. The Latin maxims translate as “law is the safest helmet” and “under the shield of law no one is deceived.” *Id.* at 871 nn.151–52 (providing translations of the Latin maxims).

77. Something of this basic sensibility is carried forward in the so-called “open courts” provisions in thirty-nine state constitutions. See David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992) (listing the thirty-nine state constitutional provisions). Most of these provisions assert that the courts must be open “freely and without purchase.” *E.g.*, IND. CONST. art. 1, § 12. Others state that courts must be available to redress harms to “property or character.” *E.g.*, MINN. CONST. art. 1, § 8. These constitutional guarantees carry forward both aspects of the classical common law’s conception of civil redress. First, they insist that the law must be available to the poor and the weak. Second, they associate insults—wrongs to character and reputation—with the violation of personal security or the security of one’s property.

78. See LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530–1987*, at 231–300 (1990) (giving the history of the action of criminal conversation from its rise at the end of the seventeenth century to its abolition in 1857).

79. See *id.* at 231–34 (discussing the origins of criminal conversation actions in the writ of trespass on the case).

80. One woman remarked in 1735:

Our law gives the husband the entire disposal of his wife’s person, but she does not seem to retain any property in his. He may recover damages on any man who shall invade his property in her, but she cannot recover damages for any woman who shall invade her property in him.

*Id.* at 242 (citation omitted).

81. See *id.* at 237–41 (discussing dueling between husbands and lovers).

82. See *id.* at 236 (noting that during the eighteenth century, Boulogne and Calais hosted large populations of English expatriates driven from their country by judgments in *crim con* cases).



the development of military law. According to Blackstone the court martial is a “court of chivalry and honour,”<sup>83</sup> yet the idea of honor presented an acute problem for eighteenth-century military law. Among British officers, the ethos of gentlemanly honor, with its emphasis on courage and self-discipline, was an important aspect of military virtue.<sup>84</sup> Touchiness on points of honor, however, frequently led to duels between officers.<sup>85</sup> The resulting ill feelings, violence, injuries, and occasional deaths, in turn, reduced military effectiveness.<sup>86</sup> Accordingly, the Articles of War, which formed the core of eighteenth-century military law, prohibited dueling.<sup>87</sup> Officers, however, continued to require a mechanism with which to vindicate their honor in the face of perceived slights.

This problem was solved by the charge of “conduct unbecoming an officer and a gentleman.”<sup>88</sup> As the lawyers of the Judge Advocate General of the time noted, the offense was so vague as to raise what today would be conceptualized as due process concerns.<sup>89</sup> Nevertheless, the very ambiguity of the offense proved useful. It allowed officers to charge one another with “conduct unbecoming an officer and a gentleman” in situations that would otherwise have led to duels.<sup>90</sup> Courts martial in effect became courts of honor in which insulted or otherwise aggrieved officers could transform a literal confrontation with swords or pistols into a bloodless tourney of litigation.<sup>91</sup> To be sure, the Articles of War and courts martial were unable to entirely suppress dueling among officers, but they did limit and channel it.<sup>92</sup>

The relationship between litigation and dueling is also on display in the politics of the early American republic, where affairs of honor became an important part of public life. This can be seen most dramatically in the death of Alexander Hamilton at the hands of Aaron Burr in a duel arising out of Hamilton’s criticisms of Burr during the latter’s unsuccessful gubernatorial bid in New York.<sup>93</sup> Joanne B. Freeman, however, has documented the way in which the culture of honor permeated national politics in the early republic.<sup>94</sup> According to the elaborate rules of the code duello, litigation could act as a substitute for dueling depending on the

83. See 3 BLACKSTONE, *supra* note 74, at \*337.

84. See Arthur N. Gilbert, *Law and Honour Among Eighteenth-century British Army Officers*, 19 HIST. J. 75, 75 (1976) (discussing the role of honor and courage).

85. See *id.* at 80 (noting that dueling continued despite official prohibition).

86. See *id.* at 79 (listing the consequences of dueling within the ranks).

87. See *id.* (reproducing the section of the Articles of War prohibiting dueling).

88. See *id.* at 76 (describing it as the “classic ‘honour’ crime”).

89. See *id.* at 77 (discussing the concerns of the Judge Advocate General).

90. See *id.* at 86 (highlighting the need for a legal method to resolve such disputes).

91. See *id.* at 87 (“In other words, the Court Martial could serve as a duelling substitute and play a role in settling disputes which might otherwise have ended in the death of one of the disputants.”).

92. *Id.* at 80.

93. See generally INTERVIEW IN WEEHAWKEN: THE BURR-HAMILTON DUEL AS TOLD IN THE ORIGINAL DOCUMENTS (Harold C. Syrett & Jean G. Cooke eds., 1960) (documenting the Burr-Hamilton duel).

94. See generally FREEMAN, *supra* note 7.

social status of the offending party. Social equals—gentlemen—had to be challenged to a duel in the case of insult, while a social inferior could be sued in the courts for libel or defamation.<sup>95</sup>

The culture of dueling persisted into the nineteenth century, but became increasingly fractured along sectional lines.<sup>96</sup> In 1838, the Kentucky Congressman William J. Graves killed the Maine Congressman Jonathan Cilley in duel.<sup>97</sup> The affair garnered national attention and led to widespread condemnation of dueling in the North, where the older code of honor with its emphasis on gentlemanly touchiness about perceived slights and insults was replaced by a more commercial vision of honor centered on personal honesty and trustworthiness.<sup>98</sup> In such a vision, litigation provided an adequate substitute for the code duello. “No longer constitutive of the individual’s entire identity and unable to adapt to the modern world, the code of honor ceded the field to the narrower, legal modes of satisfaction.”<sup>99</sup>

It is important to realize that the code of honor was never confined merely to stylized insults. For example, Andrew Jackson, one of the most notorious duelists in American history, was reportedly counseled by his mother, “Never . . . sue anybody for slander or assault and battery. Always settle them cases yourself!”<sup>100</sup> The story is interesting for two reasons. First, Jackson’s mother saw dueling and litigation as potential substitutes for one another. Second, her sense of honor extended beyond mere insults to traditional torts like assault and battery, with the content of honor’s protected sphere being defined by legal language. Indeed, one of the last duels fought in the South, at Savannah in 1877, arose out of a dispute over a contract between two lawyers.<sup>101</sup>

None of this discussion is meant to imply that the common law in some way endorsed dueling. To the contrary, the law sought with varying degrees of success to suppress dueling.<sup>102</sup> Blackstone, for example, discusses dueling in the chapter of his *Commentaries* devoted to homicide. There he castigated the practice as one where “both parties meet avowedly with an intent to murder . . . in direct contradiction to the laws of both God and man; and therefore the law has justly fixed the crime and punishment of murder on them, and on their seconds also.”<sup>103</sup> Yet it is clear that

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95. *See id.* at 129 (noting that printers risked “a caning or libel suit” for publishing pamphlets that insulted political elites).

96. *See* LaCroix, *supra* note 7, at 505–06.

97. *See id.* at 529–36 (detailing one of the most “infamous” duels in American political history).

98. *See id.* at 507 (“In this way, the law replaced the code of honor’s conception of individual life as entirely public—and personal insults as therefore worthy of public settlement—with a new idea that public redress ought to be limited to certain types of insult affecting certain special realms of human activity.”).

99. *Id.*

100. Frank T. Wheeler, *Satisfaction Due a Gentleman: Early Conflict Resolution*, 8 J.S. LEGAL HIST. 1, 2 (2000).

101. *See id.* at 6–9 (recounting the events leading to the Adams-Richards duel in 1877).

102. *See generally* Wells, *supra* note 7.

103. 4 BLACKSTONE, *supra* note 74, at \*199.

Blackstone strongly sympathized with the desire to vindicate one's honor by acting against the person who had transgressed it. Hence, he worried that prohibitions on dueling demand of gentlemen "a degree of passive valour [such that] . . . the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom."<sup>104</sup> Accordingly, Blackstone thought that:

[A] method [must] be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the insult.<sup>105</sup>

Likewise, in the 1814 case of *Merest v. Harvey*,<sup>106</sup> the court of common pleas upheld the damage award in a trespass case using Blackstone's reasoning. "It goes to prevent the practice of duelling," stated Justice Heath, "if juries are permitted to punish insult by exemplary damages."<sup>107</sup>

Strikingly, one of America's most important apologists for dueling in the nineteenth century took a very similar position. In his influential 1858 how-to manual for duelists, former South Carolina Governor John Lyde Wilson<sup>108</sup> denied that he was "an advocate of duelling."<sup>109</sup> He wrote:

The indiscriminate and frequent appeal to arms, to settle trivial disputes and misunderstandings, cannot be too severely censured and deprecated. . . . But in cases where the laws of the country give no redress for injuries received, where public opinion not only authorizes, but enjoins resistance, it [sic] needless and a waste of time to denounce the practice.<sup>110</sup>

Note how Wilson, like Blackstone, links dueling to the absence of adequate legal redress for wrongs and the social demand that insults to honor be answered.<sup>111</sup> Both of them, in short, believed that law should provide redress for affronts to personal honor.

104. *Id.*

105. *Id.*

106. (1814) 128 Eng. Rep. 761, 5 Taunt. 442 (C.P.).

107. *Id.*; see also Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1008–15 (2007) (discussing the relationship between injury and insult in early tort cases involving punitive damages).

108. See LaCroix, *supra* note 7, at 515–19 (discussing Wilson's background and influence).

109. JOHN LYDE WILSON, *THE CODE OF HONOR; OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING* 4 (1858).

110. *Id.* at 6.

111. Elsewhere, Wilson defends dueling with Lockean arguments that bear a striking resemblance to those marshaled by Zipursky and Goldberg in favor of civil recourse theory. After invoking the classic Lockean argument in favor of revolution, and analogizing the insulted gentleman to the victim of tyranny, Wilson writes:

How many cases are there, that might be enumerated, where there is no tribunal to do justice to an oppressed and deeply wronged individual? If he be subjected to a tame submission to insult and disgrace, where no power can shield him from its effects, then indeed it would seem, that the first law of nature, self-preservation, points out the only remedy for his wrongs.

While the claim that civil litigation is, like the duel, a means of vindicating one's honor may seem initially implausible, history suggests otherwise. This history, of course, does not provide a normative defense of civil recourse. Nor does it demonstrate that our current law can be seen as redeeming lost honor. It does, however, suggest that such ideas, far from being a fanciful analogy to litigation, have long been concretely associated with it. This in turn suggests the value of further examining these ideas, in effect providing a *prima facie* warrant for the more detailed arguments that follow.

### III. A MODERN DEFENSE OF HONOR

Can honor provide a normative justification for civil recourse today? Initially, an affirmative answer to this question seems unlikely. To modern ears, invoking honor seems quaint at best. At worse, it has a jingoistic and aristocratic sound, suggesting the exaltation of violence and abusive, inequalitarian social relationships. Accordingly, honor finds few defenders among contemporary scholars.<sup>112</sup> Hopefully the previous section has established a historical and interpretive connection between the idea of civil recourse and the vindication of one's honor. The task of this section is to persuade the reader that the vindication of personal honor through litigation is normatively desirable. The task has four parts. First, I must extricate the idea of honor from unsavory associations with anachronistic, aristocratic societies. Second, I must provide a normative defense of victims of insults to honor acting against those that have wronged them. Third, I must provide reasons why the state should provide a mechanism for vindicating one's honor. Finally, I must show how the particular normative defense that I have offered connects to the structure of private litigation.

#### A. *Honor in a Modern World*

The term "honor" has a distinctly anachronistic flavor to it. It calls forth images of knights errant, duelists, and others inhabiting an atavistic moral universe that seems far removed from the modern world. Peter Berger provided an apt summary of this attitude, writing:

Honour occupies about the same place in contemporary usage as chastity. An individual asserting it hardly invites admiration, and one who claims to have lost it is an object of amusement rather than sympathy. . . . At best, honour and chastity are seen as ideological leftovers in the

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*Id.* at 4–5; *cf.* Goldberg, *supra* note 30, at 541–44 (noting that under Locke's theory of government, individuals give up a portion of their right to self-preservation upon emerging from the state of nature); Zipursky, *Civil Recourse*, *supra* note 30, at 735 (stating that Locke argued for the use of deadly force in only limited circumstances). Note how Wilson links the legitimacy of dueling to both the absence of a legal redress and to the law of nature, in particular the right of self-preservation. *Cf.* LOCKE, *supra* note 44, at 291–92 (discussing how the natural right of self-preservation requires that "the Magistrate" provide a means of redress).

<sup>112</sup> Few defenders, but not no defenders. *See generally* APPIAH, *supra* note 7; KRAUSE, *supra* note 7; WELSH, *supra* note 7.

consciousness of obsolete classes, such as military officers or ethnic grandmothers.<sup>113</sup>

The bare fact of anachronism, of course, is not an argument against honor, unless one subscribes to a kind of chronological snobbery whereby the present is always presumed to be wiser than the past. Indeed, private law is itself old fashioned—if not, one hopes, anachronistic—predating fields such as administrative law, constitutional law, or even criminal law by many centuries.<sup>114</sup> Anachronism, however, does raise two possible concerns. The first is that honor is associated with moral ideas that we now have good reasons for rejecting. The second is that whatever its justifiability in the past, honor is somehow unfit for modern societies.

According to one influential interpretation, honor was a value of hierarchical, aristocratic societies, but in the modern world honor has been transformed into the more democratic idea of dignity.<sup>115</sup> Honor, on this theory, is associated with one's status within a social hierarchy in which institutions provide the primary definition of roles and identities.<sup>116</sup> Hence, for example, the honor of a knight in feudal society was defined in terms of his position within a social hierarchy. It entitled him to the deference of social inferiors, while making him honor-bound to show similar deference to those above him on the social ladder.<sup>117</sup> Closely associated with this institution- and hierarchy-bound conception of honor is honor's alleged failure to differentiate between external status and internal moral worth.<sup>118</sup>

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113. Peter Berger, *On the Obsolescence of the Concept of Honour*, reprinted in LIBERALISM AND ITS CRITICS 149, 149 (Michael J. Sandel ed., 1984).

114. Such anachronism, however, may provide fodder for functionalist interpretations of private law. While little remarked upon today, for example, Oliver Wendell Holmes offered a theory of legal anachronism in which rules and institutions developed in the past to serve now obsolete purposes survive into the present only because they serve current needs quite different than those that gave them life. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5–33 (Mark DeWolfe Howe ed., 1963) (setting forth Holmes's theory of legal development).

115. See CHARLES TAYLOR, *The Politics of Recognition*, in PHILOSOPHICAL ARGUMENTS 225, 226 (1995) (“As against this [archaic] notion of honor, we have the modern notion of dignity, now used in a universalist and egalitarian sense, where we talk of the inherent ‘dignity of human beings’ or of citizen dignity.”).

116. See Berger, *supra* note 113, at 151 (“[H]onour is a direct expression of status, a source of solidarity among social equals and a demarcation line against social inferiors.”); Darwall, *supra* note 7, at 4–5 (“*Honor respect* . . . mediates and underlies an essentially hierarchical social order of honor. It recognizes someone [ ] as having a *specific* social status that not just anyone can have, and it helps constitute that status in a way that is very different from the relation between the second-personal respect involved in mutual accountability and equal authority or dignity.”).

117. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 249 (1983) (“In a hierarchical society like that of feudal Europe, a title is the name of a rank attached to the name of a person. To call a person by his title is to place him in the social order and, depending on the place, to honor or dishonor him.”).

118. See Darwall, *supra* note 7, at 5 (“It is important that honor respect is a kind of recognition rather than appraisal respect. It consists neither in any form of esteem nor in any view of someone as worthy of esteem, nor, for that matter, as worthy of honor. As with recognition respect of any kind, we honor someone by how we conduct ourselves toward her, by regulating our conduct in certain ways. It is something we broadly *do*. Honor

The feudal knight had honor because of his status rather than any particular quality that he might possess. Such honor as he had in the possession of some noble character trait—such as courage or strength—lay in its recognition by others rather than the mere fact of its existence. To be sure, he could be shamed by his actions but only to the extent that they were public, holding him up to scorn before others.

Perhaps the chief proponent of this narrative is Charles Taylor. In his magisterial *Sources of the Self: The Making of the Modern Identity*, he traces what he sees as the evolution of Western moral consciousness from an external ethic of honor to an internal ethic of dignity.<sup>119</sup> According to Taylor, the idea of honor is tied to an ethic that places ultimate importance on the self reflected back by the regard of others.<sup>120</sup> What matters is how we are thought of, our external reputation and esteem. He then traces the replacement of this ethic by one that increasingly turns inward, grounding moral worth not in external regard but rather in a person's internal contemplation of himself.<sup>121</sup> He ties this development to the rise of Cartesian philosophy with its emphasis on the internal intellectual activity of the knower, as opposed to earlier epistemological systems that emphasized the intelligibility of the universe.<sup>122</sup>

One can see something of the intellectual shift posited by Taylor in the debates over dueling in antebellum America discussed above. Northern anti-dueling activists emphasized the importance of inner integrity over public reputation, arguing that Southern dueling was based on a shallow concern with the appearance of character as opposed to its reality.<sup>123</sup> In contrast, antebellum duelists continued to live in a world where there was no sharp distinction between inner moral worth and external social regard.<sup>124</sup> Fitting the debate into Taylor's typology, Northerners were

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respect is thus unlike any attitude, like esteem, which we may simply *have* toward a person.”).

119. See generally CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989); TAYLOR, *supra* note 115, at 225–56.

120. See TAYLOR, *SOURCES OF THE SELF*, *supra* note 119, at 3–91 (discussing identity and the nature of the good).

121. See *id.* at 111–99 (tracing inwardness of this ethic).

122. See *id.* at 143–58 (describing the emergence of Cartesian philosophy).

123. See LaCroix, *supra* note 7, at 529 (“Dueling was beginning to lose its usefulness in the North because it revealed nothing about individuals’ inner character at a time when northerners were increasingly focused on the role of private morality in a commercial society.”).

124. LaCroix provided an apt summary of this stance, writing:

[T]hey viewed as completely permeable the boundary between themselves, their morals, and their society; therefore, one could argue, they did not conceive of it as a boundary at all. (And further, one could argue, such a boundary did not exist.) Thus, the question “Do I duel to validate my own conception of myself as a gentleman or to achieve external validation from those around me when assembled in their corporate form as ‘society’?” would have been unthinkable to the early-nineteenth-century dueling gentleman because the order of his universe hinged on the belief that these two forms of validation were identical, that self-conception as a gentleman was worthless without providing society with the opportunity to judge for itself.

*Id.* at 513–14.

shifting toward the modern notion of human dignity, while Southerners continued to be motivated by an older ethic of honor.

If the dominant narrative about honor is correct, then we seem to have good reasons for rejecting it. Few today are willing to defend the kind of hierarchical and aristocratic society that would allow some to maintain their honor by demanding deference from social inferiors on the basis of their office or status. Rather, we are much more likely to subscribe to a universal ideal of human dignity. Dignity in this egalitarian and democratic sense, however, is not something that one acquires by either great deeds or social status. Rather, it is something that everyone possesses through the mere fact of being human.<sup>125</sup> For example, it is not the sort of thing that one can lose, even when one commits atrocious crimes.<sup>126</sup>

Likewise, the concept of honor, with its emphasis on public regard, seems dangerously disconnected from real moral worth. As Falstaff declares before the climactic battle in *Henry IV, Part 1*:

Well, 'tis no matter; honor pricks me on. Yea, but how if honor prick me off when I come on? How then? Can honor set to a leg? No. Or an arm? No . . . What is honor? A word. . . . Therefore I'll none of it. Honor is a mere scutcheon; and so ends my catechism.<sup>127</sup>

For Falstaff, honor may cause one to risk life and limb but it is ultimately without substance. It is “a mere scutcheon”—an outward sign—with no real worth. Indeed, to the extent that it calls forth unjustified acts of violence or self-immolation, it is positively pernicious. As a more modern poet bleakly wrote of the soldiers of the Great War, “They went arrayed in honour. But they died . . . .”<sup>128</sup> On this view, the concept of honor is dangerous precisely because it might motivate people to acts of great self-sacrifice or violence on the basis of mere public esteem. In its most grotesque form, such an emphasis on reputation as the arbiter of moral worth could hold up manifestly wicked acts such as racist lynchings as honorable endeavors.<sup>129</sup>

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125. See Darwall, *supra* note 7, at 6 (“When we think that even scoundrels have a dignity that entitles them to respectful forms of treatment (say, in holding them accountable), we clearly have something other than esteem in mind. The idea is not that personhood is somehow an admirable quality: [w]hat is in play here is not appraisal but recognition.”).

126. As Martha Nussbaum writes, “Even where malefactors are concerned . . . while punishments must be meted out for reasons including both the deterrent and the retributive, a concern with the dignity of the offender should always be solidly built into the system of punishment . . . .” MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 174–75 (2004).

127. WILLIAM SHAKESPEARE, *THE FIRST PART OF HENRY THE FOURTH* act 5, sc. 1, lines 125–41 (Bertrand Evans, ed. 1963). It is worth noting that Falstaff speaks in prose, an unheroic idiom but one that conveys a certain realism that iambic pentameter lacks.

128. SIEGFRIED SASSOON, *Banishment*, in *COUNTER-ATTACK AND OTHER POEMS* 44, 44 (1918).

129. See WYATT-BROWN, *supra* note 7, at 402 (“Lynch law, vigilantism, and charivaris were the ultimate expressions of community will. They established the coercive lines between acceptable and unacceptable behavior for all members of the Southern social order.”).

There are reasons to believe, however, that this critique of honor is overstated. Honor need not be associated exclusively with inegalitarian societies. The anthropologist Frank Stewart has usefully distinguished between what he calls vertical honor and horizontal honor.<sup>130</sup> Vertical honor refers to the status and public esteem that one gains by virtue of one's place in a social hierarchy from those below him on the social ladder.<sup>131</sup> Horizontal honor consists of the respect that one gets from a group of peers, what Stewart calls the "honor group."<sup>132</sup> Something like this distinction runs through the writing of the classical common law theorists of the sixteenth century.<sup>133</sup> Coke speaks of how the law provides redress for "injury[] and wrong" to a subject's "honor, and estimation."<sup>134</sup> However, in most of the cases where Coke or other classical common law writers such as Hale or Selden speak of honor, they are talking about the honor associated with feudal tenures and offices.<sup>135</sup> When Coke and Blackstone insist that "[t]he king is likewise the fountain of honour,"<sup>136</sup> they are referring to this vertical notion of honor. Strikingly, however, they seldom connect this idea of honor within an aristocratic hierarchy to the honor vindicated by civil redress through the courts. Rather, this second form of honor is something at least potentially possessed by all subjects and protected by the law. In other words, the honor vindicated by the common law right of redress was a horizontal rather than vertical form of honor.

While notions of vertical honor may be out of place in a modern democracy, there is nothing inegalitarian about retaining the respect of one's peers. Indeed, one might think of citizenship in a modern republic as itself a kind of honor group, in which one claims the right to be respected by a group of equals.<sup>137</sup> On this view, to be dishonored is to be placed outside the community of equals. It is to not be accorded that respect to which membership in the political community makes one entitled. Such a notion of honor is congruent with widely held notions of equal citizenship and equal claims to respect and concern from the political community. To be sure, it would be a mistake to reduce the idea of honor to a Kantian notion of respect, but it would also be a mistake to suppose that the concept of honor only makes sense within hierarchical, aristocratic societies.

Likewise, there are reasons for believing that any shift from honor to dignity has not entirely extirpated the earlier idea from modern society. First, the "old" notion of honor was never purely a matter of public esteem.

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130. See STEWART, *supra* note 7, at 54–63.

131. See *id.* at 59.

132. See *id.* at 54 (describing the context of this "honor right").

133. See generally Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD UNIV. COMMONWEALTH L.J. 155, 165 (2002) (discussing the legal thought of Coke, Hale, Selden and other sixteenth-century common law theorists); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD UNIV. COMMONWEALTH L.J. 1, 22–27 (2003) (same).

134. 2 COKE, *supra* note 72, at 872–73.

135. See, e.g., 1 COKE, *supra* note 72, at 56.

136. See, e.g., 1 BLACKSTONE, *supra* note 74, at \*271.

137. See WELSH, *supra* note 7, at 9–21 (building off similar findings from anthropology and psychology).



In discussing the notion of honor, Aristotle was clear that what matters is not simply the good opinion of others, but rather the good opinion of the virtuous.<sup>138</sup> To be honorable was not simply a matter of being famous but of having the set of excellences—virtues—that entitled one to a good reputation. The mere calumnies of those known to be without virtue are no dishonor. Similarly, the inward morality that Taylor documents has found it remarkably difficult to do without the idea of an observer, if only a hypothetical one. This can be seen clearly, for example, in the moral philosophy of Adam Smith, which is organized around the idea of an impartial spectator whose judgments seem remarkably similar to the good reputation among virtuous men espoused by Aristotle.<sup>139</sup>

Furthermore, honor continues to be a part of our conceptual apparatus, even though we frequently disguise the fact with democratic sounding language. This can be seen most clearly in our use of the word “dignity” itself. When Taylor and those subscribing to his narrative about the history of honor use the term, it refers to some intrinsic value that all human beings have. Dignity is thus closely tied to egalitarian ideas of equal worth and liberal conceptions of human beings as the holders of inalienable rights. We might, for example, say that slavery is an affront to the idea of human dignity. This does not imply that a slave lacks dignity. Indeed, it is precisely the fact that the slave is endowed with human dignity regardless of his social status that makes slavery grotesque. It is not that enslavement takes away one’s dignity but rather that it refuses to acknowledge such dignity. Even slaves have human dignity. This is precisely what gives the idea its liberal and egalitarian traction.

On the other hand, we have another way of using the term dignity. We might say of an older man of experience and wisdom that he behaves with great dignity. There are a number of things to notice about this usage of the term. First, it is egalitarian. The older man’s dignity is not a matter of socioeconomic class. On the other hand, the dignity we are talking about is not universal. Some people are not dignified. Civil rights marchers had dignity. Those screaming vile epithets at them were without dignity. Second, dignity in this sense is something that can be lost as opposed to merely not being recognized. When a mugger pushes a dignified matron into the mud, she is humiliated. Her dignity is taken away. This is true even if we do not understand her moral worth as being diminished and even if we understand that dignity of a sort can be maintained in the midst of victimization. The evil of the mugger’s shove lies not simply in his refusal

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138. See ARISTOTLE, *supra* note 25, bk. VIII, ch. 8, at 267 (“On the other hand, those who desire the honour or respect of good men and men who know, are anxious to confirm their own opinion of themselves; they rejoice, therefore, in the assurance of their worth which they gain from confidence in the judgment of those who declare it.”).

139. See, e.g., ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 50–51 (Arlington House, 1969) (1759) (comparing our self-interested assessment of right conduct with “the cool and impartial spectator”); see also WELSH, *supra* note 7, at 168–82 (discussing the role of honor in Adam Smith’s theory of the impartial spectator); cf. Stephen Darwall, *Smith’s Ambivalence About Honour*, 5 *ADAM SMITH REV.* 106 (2010) (discussing Adam Smith’s criticisms of the ethic of honor).

to recognize the inherent human dignity of the old woman. It also lies in the fact that it takes away the more particularistic dignity she had before the shove. Likewise, dignity may be lost through one's own actions. Bill Clinton lost dignity through his sexual peccadilloes in the Oval Office.<sup>140</sup> When he played Moses before Pharaoh in Cecil B. DeMille's *The Ten Commandments*, Charlton Heston acted with dignity; when he histrionically waved aloft a Kentucky rifle at an NRA rally and made pledges about prying it loose from his cold, dead hands he was not acting with dignity.<sup>141</sup>

The dignity discussed in these examples may be related to the dignity of universal human worth, but it is clearly not the same thing. It does not reside equally in all people. It is not an inherent feature of humanity. It can be lost or diminished through either one's own actions or through the actions of others. Sharon Krause has observed, "When the word dignity is used in this way it is a democratic euphemism for honor, because it is tied to exceptional action, high achievement, and extraordinary character."<sup>142</sup> While her emphasis on honor as a basis for action leads her to overstate the extent to which dignity is tied to noteworthy acts, she is surely right that the idea of honor continues to exist within our moral discourse, albeit cloaked in democratic euphemism.

#### *B. Acting to Vindicate One's Honor*

An honor-based defense of civil recourse, however, requires more than simply the rehabilitation of the idea of honor for a modern, democratic society. It must also explain why a victim acting against a wrongdoer that has dishonored him or her is normatively attractive. In *A Theory of Justice*, Rawls argues that the idea of self-respect is a key aspect of living a good life. "Self-respect is not so much a part of any rational plan of life," he writes, "as the sense that one's plan is worth carrying out."<sup>143</sup> Elsewhere, he elucidates this idea:

[S]elf-respect implies a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue our endeavors. It is clear then why self-respect is a primary good. Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them.<sup>144</sup>

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140. The case of Bill Clinton's loss of dignity is complicated in part because in his case, part of the dignity at stake was tied to an office. Hence, one can speak of him diminishing the "dignity of the Presidency." Clinton, however, did more than simply tarnish the dignity of his office. He also tarnished his own personal dignity. See, e.g., WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* (1998); Editorial, *Date with Destiny*, DALL. MORNING NEWS, Aug. 16, 1998, at J2.

141. Compare *THE TEN COMMANDMENTS* (Paramount Pictures 1956), with Osha Gray Davidson, *All Fired Up: The NRA Makes a Lot of Noise, but That Doesn't Help the Gun Owners of America*, WASH. POST, June 4, 2000, at B1.

142. See KRAUSE, *supra* note 7, at 16.

143. RAWLS, *supra* note 26, at 155.

144. *Id.* at 386.

Rawls acknowledges that self-respect is tied to the respect of others.<sup>145</sup> Our self-respect is a function, in part, of others' acknowledgment that we are entitled to respect. The implications that he draws from this fact, however, are couched entirely in the idiom of public law. He speaks in terms of duties of respect toward others, and of the need for beneficent social planners in the original position to ensure a just distribution of self-respect through the principles of distributive justice that Rawls advances.<sup>146</sup>

One can see honor in this discussion clothed in the kind of democratic euphemism discussed above. Self-respect is esteem toward one's own life, an esteem bolstered by the esteem of others. This is honor. What is missing from Rawls's discussion is an appreciation for the value of agency, in particular, self-assertion in the face of attacks on one's self-respect. To be sure, Rawls sees self-respect as a wellspring for action—"confidence in one's ability . . . to fulfill one's intentions"<sup>147</sup>—but he sees little role for agency in maintaining one's self-respect. Rather, Rawls conceptualizes it as something that one is gifted by the basic structure of society, a form of entitlement to be distributed like welfare payments or voting rights.<sup>148</sup>

Self-respect, however, cannot simply be distributed by a third-party. In this Homer was a more acute student of the human condition than Rawls. In *The Iliad*, honor is not ultimately dispensed by the gods, but is gained by heroic actions. "Fight like men, my friends," urges Patroclus, "Now we must win high honor for Peleus' royal son . . ." <sup>149</sup> It is deeds that win the honor, even honor for another. Obviously, the blood-thirsty agency exalted by Homer cannot be justified, but he is right to focus on the role of human action in maintaining self-respect. "By disconnecting abilities from self-esteem," writes one critic, "Rawls makes self-confidence into an assertion rather than an achievement."<sup>150</sup>

Humiliation poses a particular threat to self-respect. In this context humiliation is more than simply embarrassment. It is something that one person does to another person. When a person insults another, that person denies that the insulted party is entitled to respect, placing them in a subordinate status to the person offering the insult. A person vindicates her honor by acting against the person that offered the insult and forcing the insulting party to respond in a way that acknowledges the equality of the insulted party, in effect enacting her entitlement to be treated with respect, her honor. The logic of dueling illustrates how this is so.

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145. *See id.* at 155–56 ("Now our self-respect normally depends upon the respect of others. Unless we feel that our endeavors are respected by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing.").

146. *See id.* at 155–60 (discussing the role of self-respect in the deliberations of agents in the original position).

147. *See id.* at 386.

148. *See* KRAUSE, *supra* note 7, at 18 ("Thus self-esteem is a good to be distributed, according to Rawls, and in a just society it will be distributed equally.").

149. HOMER, *THE ILIAD* 421 (Robert Fagles trans., Viking Penguin 1990).

150. KRAUSE, *supra* note 7, at 19.

During its heyday, dueling was condemned as an immoral and irrational practice, and historians have generally echoed this judgment.<sup>151</sup> Dueling was not without its own logic, however. The gentleman who challenged another gentleman to a duel did a number of things.<sup>152</sup> First, he demonstrated not only bravery but also the high value that he placed on his own honor.<sup>153</sup> He showed the world that he was willing to risk death rather than suffer an insult. Second, he forced his rival to address him as an equal.<sup>154</sup> By attacking him physically—albeit via the highly stylized rules of the code duello—a duelist forced his opponent quite literally to acknowledge him as an adversary on equal terms. It was not violence per se that achieved this equality.<sup>155</sup> Rather, it was the way in which the stylized violence of dueling created a confrontation where the insulting party had to meet the insulted party on equal terms.<sup>156</sup>

Only social equals could challenge one another to duels.<sup>157</sup> A gentleman would never challenge a tradesman to a duel or vice versa. More importantly, the practice of the duel eliminated distinctions *between* gentlemen.<sup>158</sup> For example, in 1829, the Duke of Wellington fought a duel with the Earl of Winchilsea.<sup>159</sup> The duel came at the height of the debate over Catholic emancipation, and Winchilsea had published a pamphlet accusing Wellington of dishonest political tactics.<sup>160</sup> Despite the fact that both men had noble titles, they actually occupied quite different social positions.<sup>161</sup> Wellington was the hero of Waterloo and the Peninsular campaigns of the Napoleonic wars.<sup>162</sup> He was also Prime Minister.<sup>163</sup> He thus occupied the apogee of political life as both the first soldier and leading statesman of the realm.<sup>164</sup> Winchilsea, in contrast, was a comparative nobody, a political crank on the fringe of the aristocracy.<sup>165</sup> Yet on the dueling field both men were equals, gentlemen defending their honor without any formal recognition of the gulf in prestige that separated Wellington from Winchilsea.<sup>166</sup>

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151. See, e.g., APPIAH, *supra* note 7, at 31–37 (condemning dueling as immoral and irrational).

152. See *id.* at 19–22; LaCroix, *supra* note 7, at 512.

153. See APPIAH, *supra* note 7, at 13; LaCroix, *supra* note 7, at 512–14.

154. See APPIAH, *supra* note 7, at 15; LaCroix, *supra* note 7, at 512–14.

155. See APPIAH, *supra* note 7, at 25; LaCroix, *supra* note 7, at 512–14.

156. See APPIAH, *supra* note 7, at 19; LaCroix, *supra* note 7, at 512–14.

157. See APPIAH, *supra* note 7, at 15; LaCroix, *supra* note 7, at 512–14.

158. See APPIAH, *supra* note 7, at 15–16; LaCroix, *supra* note 7, at 512–14.

159. See APPIAH, *supra* note 7, at 3–6 (discussing lead-up to the duel).

160. *Id.* at 8 (“He alleged that the king’s first minister had dissembled in offering his financial support for the creation of King’s College London as an Anglican institution to counterbalance the recent secular foundation of London University.”).

161. *Id.* at 8–9 (noting the different social positions of the two men).

162. *Id.* at 3.

163. *Id.*

164. *Id.* at 3–4.

165. *Id.* at 9 (describing the Earl as “a peer of no personal importance, but a stalwart upholder of Church and State”) (internal citation omitted).

166. *Id.* at 15 (“Wellington treated Winchilsea as a gentleman in challenging him to a duel.”).

The duel can be usefully contrasted here to the practice of caning, a form of stylized violence that reinforced contempt rather than equality.<sup>167</sup> When a social inferior insulted a gentleman's honor, there was never any question of fighting a duel. Such disputes about vertical honor could either be resolved via a suit for libel or slander, or more directly by a private beating.<sup>168</sup> Such a beating, while violent, was not the equivalent of a duel. A gentleman need not be directly involved and could send his servants to perform the deed.<sup>169</sup> Indeed, part of the abandonment of the duel in the antebellum North can be attributed to the way that litigation came to be seen as more like dueling and less like caning. As Northern society became more egalitarian, the importance of distinctions between gentlemen and common people receded.<sup>170</sup> This did not mean that the concept of honor lost its meaning, only that it no longer took its meaning from a hierarchical social structure.<sup>171</sup> Instead, all free citizens came to be seen as in some sense a peer group. Rather than adopting the view that this meant that everyone should duel with everyone, however, antebellum Northerners came to see litigation as a sufficient means of redeeming one's honor even with peers.

Obviously, the stylized attempted murder of the duel cannot be morally justified. Its underlying logic, however, illuminates why acting against someone to vindicate one's honor is normatively defensible. An attack invites a response in kind from the person being attacked. This reflexive response creates a situation of acknowledged equality between the parties at the moment of confrontation, even if one party is ultimately stronger than the other or if the means of attack and defense are constrained. In his short story *His Private Honour*, Rudyard Kipling illustrates the way in which a fair fight can establish equality and respect across social castes and hierarchies.<sup>172</sup> In the story, a young lieutenant in the British Army humiliates a grizzled old soldier.<sup>173</sup> The difference in military ranks reinforced the social gulf between the upper class, educated lieutenant and

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167. See FREEMAN, *supra* note 7, at 172.

168. See *id.* at 174 (discussing an incident between Representatives Lyon and Griswold that ended in a fracas on the House floor); LaCroix, *supra* note 7, at 515 ("Most duels arose out of a verbal slight in which one gentleman called into question the character of another by using certain coded words such as 'puppy,' 'liar, poltroon, [or] coward.'" (citing Joanne B. Freeman, *Dueling as Politics: Reinterpreting the Burr-Hamilton Duel*, 53 WM. & MARY Q. 289, 299 (1996); WYATT-BROWN, *supra* note 7, at 360)).

169. See FREEMAN, *supra* note 7, at 172 (noting the practice of "caning"); LaCroix, *supra* note 7, at 512–14 (describing the code of honor).

170. See LaCroix, *supra* note 7, at 545–51 (noting the decline of dueling in the North).

171. See *id.* at 568 ("Imploring the duelist to abandon the quest to throw the correct shadow onto the screen of his society and back onto himself, opponents of dueling such as Beecher, Dwight, and Colton attempted to invert the dynamic of honor so that the right to call oneself a gentleman would derive from internal character rather than external reputation, from virtue rather than its hollow reflection.").

172. RUDYARD KIPLING, *His Private Honour*, in MANY INVENTIONS 151, 151–80 (1926).

173. The lieutenant, Oules, struck the soldier, Ortheris, with a riding cane during a drill. *Id.* at 163–64.

the barely literate cockney veteran.<sup>174</sup> The young lieutenant struggles with how to restore the soldier's honor in a world where fixed hierarchies of rank and status seem to preclude the two men ever meeting as equals.<sup>175</sup> Finally, the two men agree to meet in a fair fight.<sup>176</sup> In the melee of punches thrown and dodged, the lieutenant is shorn of the protections of hierarchy and is literally forced to meet the wronged man on equal terms.<sup>177</sup>

It goes without saying, of course, that a confrontation to vindicate one's lost honor necessarily involves the danger of violence and arbitrary outcomes based on the strength of the parties rather than the merits of their respective moral claims against one another. Indeed, the danger of unregulated private recourse is at the heart of the civil recourse theory to which this Article seeks to contribute.<sup>178</sup> The manifest dangers of private retaliation, however, should not blind us to the way in which acting against someone in a way that demands a defensive response establishes an equality that gives the lie to the inequality inherent in the original insult. Notice also, that this equality-in-confrontation cannot be established through a third party punishing the offender. Indeed, the appeal to the power of a third party can be a declaration of powerlessness that reinforces rather than challenges the original insult. Likewise, an "unfair fight" such as an ambush or a gang of servants sent to cane an uppity social inferior cannot perform this task. Rather, what is needed is a situation in which the insulted party strikes out against the insulting party in a way that demands a response predicated on the equality and fairness of the confrontation. A fair fight after an insult re-establishes respect and honor.

### C. *Reasons for the State to Provide Recourse*

A defense of civil recourse, however, must also explain why the state has good reasons to empower plaintiffs to act against defendants who have wronged them. Another way of posing the same problem is to imagine a world in which the private law did not exist and there was no way for victims of wrongs to act against those that have wronged them. This is, in effect, the strategy adopted by Goldberg and Zipursky.<sup>179</sup> They claim that in such a world the state would be failing to meet its duties under a Lockean social contract. By suppressing private violence, the law could deprive persons of their due, argue Goldberg and Zipursky, because man has, in the words of Locke, "besides the right of punishment common to him with other Men, a particular Right to seek *Reparation* from him that has done

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174. *Id.* at 164 ("After seven years' service and three medals, he had been struck by a boy younger than himself!").

175. *Id.* at 166–67.

176. Unless invited Ortheris to go shooting with him and when they were away from the camp, the two men agreed to fight. *Id.* at 176–78.

177. *Id.* at 178 ("I got 'im one on the nose that painted 'is little aristocratic white shirt for 'im.").

178. See Zipursky, *Civil Recourse*, *supra* note 30, at 734–36 (discussing the civility of civil recourse theory).

179. See Zipursky, *Philosophy of Private Law*, *supra* note 30, at 640–42.

it.”<sup>180</sup> To avoid this injustice, the state has a duty to provide its citizens with a system of private law.<sup>181</sup> We can adopt a similar strategy for thinking about the vindication of one’s honor. What evil would result were it impossible for those who are humiliated to act against those that have dishonored them?

Consider an example from Charles Dickens’s novel *A Tale of Two Cities*.<sup>182</sup> In the book, the Marquis Evremonde, driving his carriage recklessly through the streets of Paris, kills the young son of a humble sans culotte named Gaspard.<sup>183</sup> Evremonde throws a coin at the man to compensate him for his loss, but only after berating him for not taking better care of his children and for endangering Evremonde’s horses.<sup>184</sup> The grief stricken man grovels in the pavement before the Marquis, and the thoroughly cowed pre-revolutionary crowd of onlookers does nothing.<sup>185</sup> As Evremonde drives away, however, someone throws the coin back into his carriage in an act of anonymous defiance.<sup>186</sup> Gaspard, the father of the dead boy, subsequently murders the Marquis.<sup>187</sup>

In a sense, the story of Gaspard and the Marquis Evremonde is the story of a tort. There is negligence and wrongful death. Dickens has constructed his story so as to offer moral condemnation on several different levels. At the outset, we are invited to loathe the Marquis Evremonde. He is selfish, thoughtless of others, and cruel. Interestingly, his villainy is not lessened by his nod toward the duty of corrective justice. After all, he does throw a coin to Gaspard. There are two things that are worth noting about the tossed coin. First, the Marquis acted on the duty of corrective justice without any agency on Gaspard’s part. Indeed, throughout the encounter Gaspard remained prostrate. Second, while the amount that the Marquis tendered to the grieving father may have been too little—and therefore his fulfillment of the duty of corrective justice a sham—this is not why the incident of the coin serves to further excite the disgust of the reader. In part this may simply be because the loss of a child to a loving father can never be compensated for, and the offer of so trifling an amount was an insult to the memory of Gaspard’s son. Imagine, however, that rather than throwing a coin into the mud, the Marquis dropped a chest containing more wealth than the impoverished Gaspard or his son would have realized in a lifetime of toil. Such an act would have been as complete a discharge of the duty of corrective justice as would be possible under the circumstances, but still it would arouse the reader’s ire against Evremonde. There is some sin beyond inadequate compensation that the Marquis has committed with his coin. It is a gesture of contempt.

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180. LOCKE, *supra* note 44, at 291.

181. Zipursky, *Philosophy of Private Law*, *supra* note 30, at 642.

182. CHARLES DICKENS, *A TALE OF TWO CITIES* (Modern Library ed. 1996) (1859).

183. *Id.* at 138–40.

184. *Id.* at 139–40.

185. *Id.* at 140.

186. *Id.* at 140–41.

187. *Id.* at 163.

It is important to see, however, that Dickens is not simply condemning the villainy of the Marquis Evremonde in this story. Beyond his fictional Marquis, Dickens is condemning the ancien regime in France. Lest readers misunderstand the object of his critique, Dickens wrote in his Preface to the novel:

Whenever any reference (however slight) is made here to the condition of the French people before or during the Revolution, it is truly made, on the faith of the most trustworthy witnesses. It has been one of my hopes to add something to the popular and picturesque means of understanding that terrible time . . . .<sup>188</sup>

Dickens condemns the ancien regime by showing the way in which it humiliated ordinary people. This evil did not lie in the fact that the Marquis was a villain. Villains exist in every society. Rather, the ancien regime humiliated Gaspard by denying him any agency against his wrongdoer.

Dickens's critique of the ancien regime lay in the situation in which it placed Gaspard. He had no means of seeking redress against the Marquis. He had no legal rights against the Marquis. He could not even challenge him to a duel. The lack of recourse stripped Gaspard of any ability to respond to the way in which the Marquis's actions asserted the absence of any entitlement to respect on his part. In his helplessness Gaspard was in effect made complicit in his own humiliation. Reduced to groveling silently in the street, Gaspard's inability to respond reasserted the Marquis's insult to him and his son. In this sense the evil that he suffered at the hands of the ancien regime in his humiliation is akin to the evil created in a case of compelled speech. In this case, he was effectively kept from denying his own lack of honor and coerced to in effect reassert the insult against himself. The murder Gaspard commits thus becomes more than simply an act of revenge. It is the means by which he asserts his entitlement to respect—his honor—in the face of a system that denies it.

Of course, the artistry of Dickens's tale lies in part in its multiplicity. One cannot reduce Gaspard's action to the simple vindication of honor. He is also acting out of revenge and grief at the loss of his son. Within the narrative economy of Dickens's treatment of the ancien regime, however, the murder of the Marquis serves to illuminate the humiliation that it visited upon its citizens. Tellingly, Gaspard is executed in the novel, the only appearance of the law in the story serving as a reminder of how it barred all avenues of action against the Marquis.<sup>189</sup> In short, the Marquis treats Gaspard and his loved ones with contempt, humiliating them, and the evil of the ancien regime lies in part in the way in which it deprives Gaspard of any means of vindicating his honor against this humiliation.

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188. *Id.* at ix. Dickens went on to write, "though no one can hope to add anything to the philosophy of Mr. Carlyle's wonderful book." *Id.* Modern historians have been less enamored of Carlyle's vision of a wholly prostrate and tyrannized French population under the ancien regime than was Dickens. See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 183–99* (1989) (discussing liberal legal reforms in the decades before the Revolution).

189. See DICKENS, *supra* note 182, at 212–18.



To see how civil recourse responds to the evil of dishonor, consider another, less enduring work of fiction, John Grisham's novel *The Rainmaker*.<sup>190</sup> The story revolves around a recent law school graduate who is left to set up solo practice with a single client, the family of a young man dying of leukemia whose health insurance company wrongly cut off his medical care. The boy dies, and the young lawyer pursues a wrongful death action against the insurance company. The drama of the book centers on the David and Goliath struggle of the poor family and their neophyte lawyer against a powerful company that believes it can treat the weak defendants with contempt. A key piece of evidence in the trial is a letter sent by the company to the mother denying one of her many appeals for payment under the policy. In the letter, the company's claims officer writes that given her repeated unsuccessful importuning she must be "stupid, stupid, stupid."<sup>191</sup>

To be sure, Grisham's novel is a contrived morality tale, but it is precisely in the contrived moral action of the story that its theoretical interest lies. It reveals an important aspect of what is at stake in civil litigation. The evil being addressed is more than simply the loss suffered by the plaintiff. It is the way in which the defendant's conduct treats the plaintiff with contempt. Grisham's use of the insulting letter from the company is a ploy to dramatize this. In one of the climactic scenes of the novel, the mother of the dead boy is cross-examined by the insurance company's lawyer. "What're you going to do with the money if the jury gives you ten million dollars?" he asks. "Give it to the American Leukemia Society," she responds. "Every penny. I don't want a dime of your stinkin' money."<sup>192</sup> What matters about this scene is not its realism but rather the fact that it has a conceptual integrity. Her response makes moral sense. Notice, it makes no dramatic sense to see her as pursuing optimal levels of investment in avoiding breach of contract. Likewise, her refusal of the money disclaims the demands of corrective justice. She is not seeking compensation for her loss. Rather, by acting against the company she is no longer forced to be complicit in her own humiliation. She is not Gaspard groveling in the street. By acting against the company she forces it to treat her as an equal, if only as an adversary within the contrived confrontation of the courtroom. In short, she vindicates her honor.

It is important to understand that the same effect could not be achieved if the insurance company were simply prosecuted for fraud or some other crime. By suing the company, by standing up to it, the mother transformed herself from a passive victim into an agent, an equal who could demand and receive respect. Seeing criminal sanctions as sufficient to rectify the evil of the situation falls into the Rawlsian trap of seeing self-respect as something that can be dispensed by a beneficent state. Likewise, it is possible to imagine an alternative plot line in *A Tale of Two Cities* in which the

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190. JOHN GRISHAM, *THE RAINMAKER* (1995).

191. *Id.* at 16 ("Dear Mrs. Black: On seven prior occasions this company has denied your claim in writing. We now deny it for the eighth and final time. You must be stupid, stupid, stupid!").

192. *See id.* at 342.

Marquis Evremonde was punished by a virtuous king. In such a story we might feel that Evremonde had received justice, but it would also reinforce Gaspard's humiliation rather than allow him to redeem it. There is a difference between being rescued or defended, and achieving self-respect by redeeming one's honor. Civil recourse allows for the regaining of honor in the face of its loss by giving the victim a means of acting against a wrongdoer.

Civil recourse does not guarantee anyone's honor or self-respect. Such is beyond the ability of law to guarantee. Rather, it provides a means by which agency can be exercised in the assertion and defense of one's honor. Agency thus serves to mediate differences of dignity and honor. As discussed above, not everyone possesses honor in the same degree. Suppose a victim of a civil wrong does not wish to assert him or herself against the tortfeasor or contract breaker. The victim may hold their honor cheap. The law allows people to make that choice. It does not punish affronts to honor. Likewise, suppose that a person without apparent dignity decides to sue in the face of an insult. Imagine a clown, who in the course of his slapstick normally submits to good natured horseplay from the audience. The clown is the opposite of the dignified matron imagined above, a person without apparent honor. The clown may nevertheless be allowed to sue in battery against the person who unjustifiably shoves him should he choose to do so. At that moment, the clown may be without dignity, but this is not a defense for the tortfeasor. By empowering the clown to act, the law not only provides him with the means of vindicating honor that already exists, but also provides him—and all other plaintiffs—a tool with which to construct and defend it.<sup>193</sup>

#### *D. Civil Recourse and Our Private Law*

Finally, a defense of civil recourse requires more than showing that the state has reasons for providing victims with a means of acting against those who have dishonored them. It must also show that the actual institutions of our private law can be plausibly understood in such terms. One might believe that the state should provide a means for victims to vindicate their honor but deny that this is what litigation actually does or that such concerns can be connected to the substantive law of torts and contracts.

##### 1. Litigation

As discussed above, allowing civil recourse does not guarantee anyone's honor. Rather it gives plaintiffs one tool with which to defend or establish their honor. The limited role of recourse in the struggle for honor accounts in part for the agonistic experience of litigation. Suing someone is more

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193. Cf. KRAUSE, *supra* note 7, at 19 ("Self-respect, which is a necessary condition of agency, cannot be guaranteed without undercutting agency. We must have enough self-respect to have the desire for self-respect, but not so much that we no longer need to reach for it. Rawls means to support agency by democratizing self-respect in the form of equal 'self-esteem,' but in fact he undercuts agency.").

than simply a petition for redress. It is an act of aggression by the plaintiff against the wrongdoer. Likewise, the process of litigation is a battle and a struggle. Understandably, this agonistic aspect of litigation is frequently deplored.<sup>194</sup> Americans, we are told, are too litigious and quarrelsome.<sup>195</sup> There is no doubt some truth to these claims, but in this sense litigation-happy Americans are like eighteenth-century gentlemen touchy about their dignity and eager for a duel, or like Homeric heroes, willing to incur great costs to vindicate their slighted honor. The argument offered here does not deny that litigation has costs. Rather, it asserts that the agonistic struggle of private law is not simply a cost. By empowering victims to act, civil recourse creates the struggle that is itself a process of giving citizens a way of vindicating their honor and asserting the bases of their self-respect in the face of attack.

The vindication of wronged honor also fits nicely with the adversary system. Generally speaking, the procedural rules that seek to ensure the fairness of the adversary process are justified on one of two grounds. First, these rules can be seen as promoting better deliberation by judicial decision makers.<sup>196</sup> The idea is that the contending arguments of litigants are the best way of getting at the truth, which will emerge from the competition of the parties. Second, we might justify these rules as increasing the legitimacy of outcomes.<sup>197</sup> Litigants are more likely to defer to the final decision of the court and regard it as justified if the decision emerges from a process in which they have been given an opportunity to present their arguments. The vindication of wronged honor suggests a third option. Rather than acting as an epistemic aid to decision makers or a prop to their legitimacy, the adversary system may be seen as an end in itself. The purpose of the adversary system is to provide a forum for a fair fight between the plaintiff and the defendant, and it is in the very process of this struggle that the plaintiff's honor is vindicated.

## 2. Tort Law

The claims of honor are strongest in the case of intentional torts, particularly those that are aimed directly at a subject's standing before others, such as the torts of libel or defamation. Such actions arise out of situations in which the tortfeasor has deliberately treated the victim as an object that he can harm with impunity. On the other hand, most of tort litigation does not consist of such intentional torts.<sup>198</sup> Rather, the vast

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194. See PHILIP K. HOWARD, *LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW* 68–92 (2009).

195. *Id.* (decrying the rise of frivolous lawsuits).

196. See, e.g., Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *IND. L. REV.* 65, 127 (2003) (“An adversarial process will improve deliberation by expanding the depth and breadth of the issues brought before the court.”).

197. See, e.g., Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 *VAND. L. REV.* 483, 501 (2007) (“Overall, the U.S. legal system relies on an adversarial process—a clash of opposing discursive positions—for its legitimacy.”).

198. See generally Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *MD. L. REV.* 1093 (1996).

majority of tort actions arise under the doctrine of negligence.<sup>199</sup> Negligence need not require any deliberate insult to the victim.<sup>200</sup> Indeed, in many negligence suits the tortfeasor may be subjectively unaware of the victim. In these cases the claim that tort law serves to vindicate the wronged honor of the plaintiff seems weak. Likewise, many torts involve strict liability where it is not even necessary to demonstrate that the defendant failed to use reasonable care.<sup>201</sup> In such situations it seems even more tenuous to regard litigation as vindicating insulted honor. There is nevertheless evidence that both negligence and some forms of strict liability fit within the argument put forward in this Article.

While negligence may not involve deliberate wrongdoing toward the plaintiff, conceptualizing the wrong suffered in terms of insult is not difficult. Care is a form of respect. For example, among the Bedouin, treating a guest with honor is tied up in caring for a guest's needs.<sup>202</sup> Honor requires that one consider and direct attention toward the person bearing that honor. This is the opposite of a negligent action. Someone who is negligent in effect fails to direct care toward a person deserving of such care. Rather, the negligent person ignores her victim or fails to give him the level of attention to which he is entitled. To commit such an action can send a powerful message of indifference and even contempt. In this sense, negligence is insulting.

Medical malpractice, one of the most commonly litigated species of tort, illustrates this point.<sup>203</sup> When hospitals negligently harm a patient, lawyers will often counsel the hospital to avoid any admission of wrongdoing to the harmed party.<sup>204</sup> The rationale for such an approach is simple enough to see: such admissions could later be used against the hospital in litigation.<sup>205</sup> There is evidence to suggest, however, that in many cases a simple apology by the hospital mollifies the anger of victims, leading to easier settlements and less litigation.<sup>206</sup> Such a result, however, makes little sense from either an economic or corrective justice perspective. The economic account of tort law suggests that plaintiffs should use the admission inherent in an apology to maximize their return in litigation. Corrective justice theories, in turn, suggest that apologies are irrelevant to

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199. *Id.* at 1099–1108 (describing the dispute pyramid, a visualization tool for understanding the tort litigation system).

200. See RESTATEMENT (SECOND) OF TORTS § 281 (1965) (listing elements of negligence tort).

201. See *id.* § 519 (describing the strict liability standard).

202. See STEWART, *supra* note 7, at 86–88 (explaining Bedouin honor rules).

203. See, e.g., Jennifer Arlen, *Contracting over Liability: Medical Malpractice and the Cost of Choice*, 158 U. PA. L. REV. 957 (2010) (providing recent statistics on malpractice cases).

204. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1011 (1999) (describing medical malpractice litigation strategy).

205. *Id.*

206. See Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1271 (2006) (noting a study of plaintiffs in medical malpractice that showed that “37% wouldn't have filed suit had the doctor fully explained and offered an apology to begin with”).

the rights and duties of the parties. The victim has still suffered a loss at the defendant's hands. On the other hand, if part of what motivates tort litigation is the logic of Gaspard and *The Rainmaker*—the desire to vindicate the insult suffered at the hands of the tortfeasor—then the power of apologies makes sense. Apologies do nothing to create efficient levels of investment in precaution or compensate victims for losses. They can, however, remove the insult involved in a tort by disclaiming the meaning inherent in the actions of an Evremonde, namely that the victim is a person undeserving of respect and care.

Strict liability presents a stronger challenge to the idea of litigation as the vindication of wronged honor. Indeed, I am inclined to side with Jane Stapleton at this point and admit that certain aspects of the law of torts may be best conceptualized in terms of compensation or loss spreading.<sup>207</sup> The claims of such an approach seem strongest in the case of strict liability torts. Yet even here, the idea of civil recourse as the vindication of wronged honor is not completely without substance. Consider the classic strict liability tort of engaging in some ultra-hazardous activity, such as using explosives.<sup>208</sup> There are at least two ways of seeing the damages that could flow from such an activity as an affront to someone's honor. First, one could note that the decision to use such explosives itself can be an insult. This seems odd. The building demolition crew that uses C-4 and takes every precaution not to harm anyone is not engaged in insulting behavior in the same way that a negligent driver, for example, fails to show proper respect for others. Yet the building crew has taken actions that it knows may, despite its best efforts, result in harm to others. In this sense, it has held the security of others as a thing it need not entirely respect.

The second way of thinking about strict liability and the vindication of honor is to see the rule as serving an evidentiary function. The idea here is that there are certain activities that are so dangerous that rather than proving negligence, it may in effect simply be assumed.<sup>209</sup> If strict liability serves this function then it may be seen as insulting in the same way that negligence is seen as insulting, namely as a failure to show proper care.<sup>210</sup> The difference is that in the strict liability case the necessity of proving the absence of care is dispensed with for idiosyncratic practical reasons.<sup>211</sup> There are, of course, problems with this approach, the most striking being that strict liability acts as more than simply an evidentiary presumption. It

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207. See Stapleton, *supra* note 52, at 1538.

208. See RESTATEMENT (SECOND) OF TORTS § 520 (1965) (listing elements of ultra-hazardous activity tort).

209. See *id.* cmt. f.

210. See *id.* § 281 (noting duty of care as one of the elements of a negligence tort).

211. See *id.* § 519 cmt. d (“It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur.”).

forecloses the possibility of the defendant raising its non-negligent—indeed exemplary—conduct as a defense.<sup>212</sup>

### 3. Contract Law

Even accepting the arguments made above, one might contend that while the vindication of wronged honor fits with actions such as libel, defamation, and intentional torts such as fraud or battery, it is disconnected from contract law. This objection could take two forms. The first is that the doctrinal structures that define contractual liability simply do not pick out situations involving insult or humiliation of the breachee. The second is that the vindication of honor does not describe the motives of litigants in contract cases.

To a certain extent the doctrinal objection has merit. For example, one might imagine a law of contracts where the doctrines of formation were organized so as to pick out the sort of agreements whose breach would result in insult. Likewise, one could imagine that the doctrines surrounding breach itself could be organized so as to allow a plaintiff to sue successfully only when the breach could plausibly be seen as an insult to someone's honor. There are reasons to suppose, however, that whatever the structure of such an imaginary legal system would look like, it does not closely match the one that we have. For example, gratuitous promises, whose breach might be deeply insulting, are unenforceable unless they are supported by consideration or fall into one of the exceptions to the consideration rule.<sup>213</sup> Likewise, contract law generally treats a wholly inadvertent and innocent breach no differently than a deliberately humiliating one.

Despite these powerful arguments, however, there are doctrinal elements in both formation and breach that do seem to protect wronged honor. If we accept that the breach of deliberately made promises is to be treated as more insulting than the breach of less well thought out contracts, then the doctrine of consideration is less of a stumbling block than it initially appears. As Lon Fuller long ago argued, the doctrine of consideration can serve as a form as much as anything.<sup>214</sup> Formal requirements, in turn, serve to pick out contracts that are more likely to be deliberately made and considered, what Fuller called the precautionary and channeling functions of consideration.<sup>215</sup> The same point could be made with contracts under seal.<sup>216</sup> Likewise, the duty of good faith performance picks out a set of

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212. *See id.* § 519 (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”).

213. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1262 (1980) (“[G]ratuitous promises of gifts or unilateral pledges to confer benefits remain legally unenforceable.”).

214. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

215. *See id.* at 800–01.

216. *See id.* at 801 (“To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective.”).

contract breaches that do seem plausibly related to insults to one's honor.<sup>217</sup> This doctrine has frequently been used to provide a remedy against a promisor whose conduct, while within the letter of the contract, nevertheless constitutes an abuse of power or discretion.<sup>218</sup> For example, a secured lender who uses his discretion to call a loan can be subject to lender liability using a good faith theory if it can be shown that the exercise of the discretion arose out of a personality conflict or other argument.<sup>219</sup>

The motivation of parties in contract litigation may seem far removed from questions of offended honor. Rather, much of the legal and scholarly discourse around contracts assumes that parties are hard-headed economic calculators.<sup>220</sup> Research in behavioral psychology, however, suggests otherwise. People have more intense feelings of being wronged in cases involving a relationship of trust.<sup>221</sup> Hence, researchers have found that given identical economic damages, lay people will generally demand greater compensation in cases where the damages are caused by breach of contract rather than tort.<sup>222</sup> In particular, people become more offended by breach of contract the more they feel that they have been treated as suckers.<sup>223</sup> Hence, intentional breaches call forth more intensity than accidental breaches, and damages caused by breach of contract made with a third party call forth less intensity.<sup>224</sup> In short the victim of breach who feels exploited "is not only angry at the perpetrator, but he is also humiliated and self-conscious. A sucker feels some self-blame for having voluntarily engaged in a transaction with a scoundrel."<sup>225</sup> There is thus good evidence that lay people experience breach of contract as a form of contempt, an affront to their sense of themselves, an attack on their honor. Hence, one could see contract litigation as a form of retaliation against the dishonoring breacher.<sup>226</sup>

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217. See generally Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

218. See, e.g., Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 WM. & MARY L. REV. 1533, 1540–41 (1994) (noting one example involving a dispute between farmer and buyer over timing of harvesting); see also Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 332–48 (1988) (discussing cases involving this conception of good faith).

219. See *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985) (discussing the abuse of discretion by a secured lender and the resulting liability under the duty of good faith).

220. See POSNER, *supra* note 11, at 101–08 (discussing economic incentives in contract litigation).

221. See Cass Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 537–38 (2005) (giving the example of the contrast between a theft by an anonymous pickpocket versus a family babysitter).

222. See Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 419, 422 (2009).

223. See Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1018 (2010) ("When people feel suckered and morally outraged, they are particularly offended and in turn demand more compensation.").

224. See *id.* at 1032–33 (interpreting results of experiments conducted).

225. *Id.* at 1018.

226. *Id.* at 1043 ("Our results suggest that, at a minimum, the experience of being suckered makes people more likely to seek punitive or supracompensatory damages.

## CONCLUSION

Common law writers such as Coke and Blackstone saw the law as, in part, protecting a man's honor. "Lex est tutissima cassis," declared Coke's family motto.<sup>227</sup> It was the law that formed the armor that protected the weak from the insults of the strong. While modernity has sent much of the rhetoric of honor underground, insult, humiliation, and the vindication of stolen honor persist in our society, even if we choose to cloak them in the euphemism of democratic rights or human dignity. The modern state necessarily constrains much of our behavior, criminalizing the kinds of feuds and retaliation that served in earlier times to vindicate one's honor. Dickens's vision of the Marquis Evremonde in *A Tale of Two Cities*, however, shows the evil of a world in which those who suffer humiliation are without the means of acting against those who have harmed them. The helplessness of victims in such a world in effect forces them to re-enact the humiliation of the insult against them. This evil cannot be remedied by becoming the passive recipient of self-respect that is dispensed like a welfare right by the state. Rather, it is only in the agency of the victim in either forgiving and forgetting the wrong or acting against the wrongdoer that the humiliation of the wrong can be erased and the honor of the victim reasserted.

The arguments in this Article suggest that ultimately the vindication of honor provides a justification for civil recourse in the private law. Its claims are strongest in cases of intentional torts and breaches of the duty of good faith. It still has traction in the tort of negligence. When it comes to strict liability torts, however, its relationship to the law seems more tenuous. Ultimately, this muddy picture of the relationship between honor and the private law is not surprising. No institutions as complicated and long-lived as contracts and torts can be reduced to a single normative concern. Presenting such reductionism as the sine qua non of theoretical success is to condemn any attempt at interpretive theory to failure at the outset. And yet despite its messy pluralism the common law is not without its reasons, and we may hope for a theory that will render our law more sensible and provide us with reasons for shifting it in one direction or the other.

By the lights of this latter criteria, the vindication of honor offers some success. It provides us with reasons for believing that our current legal practices, in particular the practice of empowering wronged plaintiffs to act against their victimizers, rests on normative foundations that can be articulated in terms of honor. Furthermore, precisely because the vindication of honor does not track well across every civil wrong, it provides us with some critical bite. Liability in those areas of law such as strict liability where it is most difficult to find a justification in the vindication of honor are, *ceteris paribus*, less normatively justified than

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However, when people feel insulted by breach of contract, they instead may pursue different categories of legal remedies altogether.").

227. See *supra* note 76 and accompanying text.



those areas where the claims of honor seem stronger. Accordingly, for example, we should be more concerned about attempts to replace tort law with a system of no-fault social insurance in cases involving intentional torts than in cases of strict liability for ultra-hazardous materials. Likewise, the case for empowering plaintiffs to go after contract breachers is stronger, on civil recourse grounds, in cases involving a breach of the obligation of good faith. The idea of honor suggests revisiting the issue of fault in contract law, considering whether it might be wise to differentiate between intentional and inadvertent breaches.

Debates over tort reform provide other examples of honor's potential reach. Much of the controversy has centered on the question of punitive damages. Numerous states have passed statutes that limit the availability of such damages to cases where "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."<sup>228</sup> Likewise, in determining whether punitive damage awards run afoul of the due process clause of the Fourteenth Amendment, the Supreme Court has "instructed courts to determine the reprehensibility of a defendant by considering whether . . . the harm was the result of intentional malice, trickery, or deceit, or mere accident."<sup>229</sup> By focusing on intentional or malicious behavior, the law picks out those situations that are likely to result in the greatest insult to a plaintiff's honor and protects his right to the heightened recourse of punitive damages.

One might also employ the idea of honor critically. In this Article, I have suggested that the process of litigation provides a fair fight between litigants, one that allows a wronged party to re-establish her honor. While I believe that such an interpretation of private litigation is defensible, it is also true that it does not accord with many people's subjective experience of litigation. Far from being a dignified process, they may find the intrusiveness of discovery, the delays of the court, and the abstruse legal maneuverings of lawyers alienating and humiliating. On this view, the legal system stands condemned of failing to provide the very thing that it supposedly promises to private litigants. Even if one finds this darker view of litigation compelling—and there are many reasons for doing so—it is important to see the way in which the critique is strengthened by viewing

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228. *See, e.g.*, ALA. CODE § 6-11-20 (2010); *see also* CAL. CIV. CODE § 3294(a) (West 2010) (same); KY. REV. STAT. ANN. § 411.184(2) (LexisNexis 2010) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2010) (same).

229. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) ("Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it."); *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.").

private law through the lens of honor. The law's failure and hypocrisy are greater precisely because what the law promises is the recovery of lost dignity.

Ultimately, however, the arguments put forward in this Article cannot lay such controversies to rest. I have argued elsewhere that private law can and does pursue multiple goals.<sup>230</sup> There is nothing inconsistent with seeing compensation and more efficient incentives as parallel goals of private litigation, even if there will necessarily be messy trade-offs between these goals. The possibility of such pluralism, however, also casts in doubt the ultimate value of using private law to vindicate lost honor. In this Article, I have labored hard to show that honor and its vindication are values that deserve greater modern respect than they receive. It cannot be denied, however, that they have their costs. Indeed, if part of the value of private law lies in the forum that it creates for struggle between the parties, then the costs associated with litigiousness and conflict are a fixed part of vindicating one's honor through the law. These can no longer be seen merely as unfortunate byproducts of a system set up to serve other purposes, such as effective fact-finding and disaggregated enforcement. The very point of litigation may be to let people fight. Indeed, by reducing the risks of responding to insults—losing a lawsuit is not nearly as likely to be fatal as losing a duel with pistols at twenty paces—the private law may actually encourage this costly behavior. This Article has not attempted to evaluate these costs, but they cannot be dismissed as trivial. In the end, a reasonable person may conclude that the vindication of honor simply is not worth the candle. Before she makes that decision, however, our reasonable observer must grapple honestly with honor and the way in which our law provides for its vindication. Forcing that question is the ultimate measure of the success of this Article's argument.

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230. See Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1498–1506 (2005) (book review) (arguing for a pluralistic approach to the interpretation of contract law); see also Oman, *supra* note 20, at 867–74 (same).