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On Selling Civil Recourse

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INTRODUCTION

It is an important question whether or not legal claims should be alienable. There are reasonable arguments that suggest that legal claims should be alienable, at least some of the time.[1] As the articles in this Issue attest, however, the topic is controversial. This Article considers a somewhat different question: What happens to a legal claim once it has been alienated? Interestingly, once a claim is sold it may not be the same as the original plaintiff's claim. Remedies that were apt pre-transfer may no longer be apt post-transfer.

For present purposes, let's assume that selling a legal claim does not raise any insurmountable problems with commodification. Likewise, let's assume that fairness-, efficiency-, and corrective justice-based arguments do not rule out a sale. These assumptions are controversial, but I wish to bracket the underlying concerns. Suppose instead that we focus on the alienability of legal claims from another perspective: civil recourse theory.[2] Arguably, civil recourse theory is fully consis-

* Professor, DePaul University College of Law. I thank Lynn Baker, John Goldberg, Steve Landsman, Tony Sebok, Stephen Smith, and Bradley Wendel for helpful comments on the ideas contained in this Article. This Article also benefitted from discussion at the 19th Annual Clifford Symposium on Tort Law and Social Policy, and at the 2013 Remedies Discussion Forum held in Prato, Italy. Any errors are my own.

1. *See, e.g.*, Lynn A. Baker, *Alienability of Mass Torts Claims*, 63 DEPAUL L. REV. 265 (2014) (critiquing arguments against the alienability of claims in the mass tort context); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (arguing that there are no a priori reasons to reject assignment of legal claims). Alienability might also be contingently legitimate, depending on certain empirical and normative premises. *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005) (discussing questions which arise depending on whether the alienation of claims should turn out to be rare or widespread). That said, there is a rich literature that opposes the alienability of certain property, and this literature could readily apply to legal claims. *Cf., e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing against alienability in some settings). For a helpful discussion of inalienability concerns as they relate to legal claims, see W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655 (2014).

2. For leading articles developing the civil recourse theory approach, see Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) [hereinafter Zipursky, *Rights*]; Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623 (Jules Coleman & Scott Shapiro eds., 2002); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]; John C.P. Goldberg, *The Constitutional Status of Tort*

tent with the alienability of legal claims.[3] Even so, the civil recourse approach may have significant implications if such sales are permitted. Insights from civil recourse theory suggest that the appropriate remedy for a legal wrong may change depending on who owns the claim.

According to the principle of civil recourse, when one party has legally wronged another party, the victim should be able to act against the wrongdoer.[4] On this view, the private right of action is a state-provided means for the plaintiff to act against the defendant. Recognizing this principle can help explain many features of tort law. Notably, one of the strengths of this account is that it can explain the diversity of remedies available: remedies that range from symbolic damages, to compensatory damages, to punitive damages.[5] While some theories can only account for a subset of these remedies, civil recourse theory offers a foundation for each.

Given this flexibility, it may not be surprising to learn that civil recourse theory also incorporates a diverse set of norms. Some scholars suggest that recourse is a means for plaintiffs to hold defendants accountable for their conduct.[6] This idea of recourse fits well with symbolic damages, and it may also help to explain compensatory damages. Even a demand for an apology can be explained within this rubric. Yet civil recourse can also involve other modes of acting against wrongdoers. Anthony Sebok has argued that punitive damages are explicable in terms of private revenge.[7] This suggests a different type of recourse. And, private revenge poses an interesting problem for the alienability of legal claims.

As soon as we imagine transferring private revenge from one party to another, we will notice a difficulty. Suppose that *A*, the victim of a malicious tort, transfers her legal claim to *B*, an unrelated third party. We may have no problem in imagining *A* seeking revenge, but what would it mean for *B* to seek revenge? Certain concepts are most apt when they apply to specific individuals. The challenge here is not a commodification challenge. The challenge is that the concept of re-

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Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 YALE L.J. 524 (2005) (suggesting a constitutional grounding for a right to redress); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

3. For an argument to this effect, see Sebok, *supra* note 1, at 131–33.

4. Zipursky, *Civil Recourse*, *supra* note 2, at 735.

5. *See id.* at 710–13, 748–52.

6. *See, e.g.*, Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 Nw. U. L. REV. 1765, 1813–14 (2009) (suggesting that in tort law the state is supporting "the instinct to hold another accountable").

7. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1023–29 (2007).

dress at issue may not be flexible enough to apply in the same way it used to, once transferred. I will call this the "transfer problem." I do not think the transfer problem is a bar to the alienability of legal claims, yet it has important ramifications for the law of remedies. The remainder of this Article offers initial thoughts on these ramifications.

Part II of this Article discusses civil recourse theory and its variations. Part III introduces the transfer problem—the way in which particular remedies may cease to be apt once a legal claim has been transferred. Furthermore, it suggests that the transfer problem is not significant for many legal claims, but that it has bearing on particular remedial options. Part IV provides initial thoughts on implications for legal policy. Part V then concludes.

II. Civil Recourse Theory and its Variants

Civil recourse theory provides an interpretive account of tort law. That is, it seeks to understand tort law in light of the concepts embedded in the practice.[8] From this perspective, tort law adopts a conceptual structure of rights, duties, and wrongs. As Benjamin Zipursky argues, there is also a core principle which links these concepts:

> By recognizing a legal right of action against a tortfeasor, our system respects the principle that the plaintiff is entitled to act against one who has legally wronged him or her. I call this the principle of civil recourse. The legal principle that the victim of a tort has a right of action against the tortfeasor is an instance of this more general idea.[9]

This principle is the central component of civil recourse theory.

Of course, there is another interpretive account that also focuses on rights, duties, and wrongs: corrective justice theory. Corrective justice theory usually suggests that tort law's concern is to enforce a wrongdoer's duty of repair.[10] Civil recourse theorists disagree with this account, and for several reasons. They contend that tort law does not recognize a wrongdoer's duty of repair prior to a court order.[11] Fur-

8. On the merits of this type of conceptualism, see Jules L. Coleman, The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory (2001); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 Legal Theory 457 (2000). For an argument that both interpretive and functionalist explanations of private law should seek to understand concepts from the legal perspective, see Andrew S. Gold & Henry E. Smith, How Private Law is Simply Moral (unpublished manuscript) (on file with authors).

9. Zipursky, *Civil Recourse*, *supra* note 2, at 735.

10. For leading examples of corrective justice theories, see Jules L. Coleman, Risks and Wrongs 361–85 (1992); Ernest J. Weinrib, The Idea of Private Law 56–83 (1995); John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, 30 Law & Phil. 1 (2011).

11. Zipursky, *Civil Recourse*, *supra* note 2, at 719–20; *see also* Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 Fla. St. U. L. Rev. 137, 139

thermore, they note that there is a wide range of remedies in tort law, some of which are not easy to reconcile with a duty of repair.[12] Finally, they emphasize that only certain parties have standing to pursue a private right of action.[13] These limits may be hard to explain from a corrective justice perspective.[14]

If corrective justice is not adequate to the task, it need not follow that civil recourse is unrelated to justice.[15] As I have argued elsewhere, corrective justice is not the only norm of justice that might help explain private rights of action. Redressive justice provides an important alternative.[16] While corrective justice typically focuses on a wrongdoer's duty to undo a wrongful transaction, redressive justice focuses on a right holder's right to undo that transaction. The two types of justice are not mirror images, and a good case can be made that redressive justice fits well with at least some civil recourse norms.

But what does it mean to have civil recourse? The answer to this question may be dependent on the civil recourse theory under consideration. In the present context, we will need to understand the taxonomy of civil recourse. Despite some superficial resemblances, civil recourse comes in different flavors. There are at least three salient categories: recourse as accountability, recourse as enforcement, and recourse as revenge.[17] These different categories of recourse may have different implications when a legal claim is sold.

The classic understanding of civil recourse suggests that a private right of action empowers a wronged party to respond to the affront of

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(2011) ("There is no duty to pay damages in either tort or contract law."); Stephen A. Smith, *Duties, Liability, and Damages*, 125 HARV. L. REV. 1727, 1727–28 (2012) ("Rather than imposing ordinary or even inchoate duties to pay damages, the common law merely imposes liabilities to pay damages.").

12. Zipursky, *Civil Recourse*, *supra* note 2, at 710–13.

13. *See id.* at 714–16.

14. Some corrective justice theorists have disagreed. *See, e.g.*, Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 282–85 (2011).

15. If there were no conceptual linkage between civil recourse and justice, this might be a significant problem for civil recourse theory as an interpretive theory. The internal point of view recognizes a connection between justice and private law adjudication, and it is a natural conceptual inference to find a connection between justice and private rights of action. *See* Andrew S. Gold, *A Theory of Redressive Justice*, 64 U. TORONTO L.J. (forthcoming 2014), *available at* http://ssrn.com/abstract=1940594 (discussing this concern for civil recourse theory). On the connections between adjudication and norms of justice, see JOHN GARDNER, *The Virtue of Justice and the Character of Law*, *in* LAW AS A LEAP OF FAITH 238 (2012); Stephen A. Smith, *Why Courts Make Orders (And What This Tells Us About Damages)*, 64 CURRENT LEGAL PROBS. 51, 82–83 (2011).

16. *See* Gold, *supra* note 15.

17. For a more detailed discussion of these categories, see Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65 (2011).

being wronged.[18] On this view of civil recourse, the state provides a way for a wronged party to hold the wrongdoer accountable, or, in another phrasing, to "get satisfaction."[19] Some have suggested that civil recourse theory comes close to endorsing revenge.[20] But the originators of civil recourse theory, Benjamin Zipursky and John Goldberg, have distanced their theory from this reading, and it is now clear that holding someone accountable for these purposes does not mean getting revenge.[21]

Although Zipursky and Goldberg distinguish civil recourse from revenge, not every civil recourse theorist takes this path. Sebok holds the view that, at least in the punitive damages setting, civil recourse is about private revenge.[22] Significantly, private revenge is not the same thing as public retribution. In Sebok's view, the victim's role in bringing the case is important, for it allows her to "make claims about the rightful treatment that she was owed."[23] The legal system "is underwriting the victim's right to decide whether and how the wrongdoer will suffer punishment."[24] This is a distinctive understanding. Although it is possible to hold the view that compensatory damages involve accountability while also holding the view that punitive damages involve private revenge, the two perspectives are not readily reduced to a single norm.

Finally, there are cases of civil recourse that do not seem to fit either the accountability conception or the revenge conception. When we consider contract law, for example, it will only occasionally make sense to say that the victim of a broken contract seeks damages out of revenge. For that matter, the contractual promisee may deny that she

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18. Zipursky, *Rights*, *supra* note 2, at 87 ("The answer is that entitlement to recourse does not spring from the need precipitated by injury. It springs from the affront of being wronged by another.").

19. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1162 (2007) (describing tort victims who have been "injured in a way that warrants their thinking that someone else is responsible for mistreating them and that their wrongdoer is an appropriate person from whom to demand redress or satisfaction"); *see also* Solomon, *supra* note 6, at 1814 (suggesting that in tort law the state is supporting "the instinct to hold another accountable").

20. *See* John Finnis, *Natural Law: The Classical Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 2, at 1, 55–58 (critiquing civil recourse accounts on the theory that they treat as worthy the impulse to get even).

21. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 406 (2005) (denying that the idea of civil recourse is a way of referring to vengeance); *see also* Zipursky, *Civil Recourse*, *supra* note 2, at 737 (indicating that Zipursky does not support the normative position that tort law serves the function of "permitting vengeful desires to be satisfied in a civil system").

22. *See generally* Sebok, *supra* note 7.

23. *Id.* at 1028.

24. *Id.*

is interested in holding the defendant accountable. She often just wants performance of the contract, or the next best thing. When a contract plaintiff brings suit, the private action is frequently about enforcing remedial rights, and not about holding someone to account. From this perspective, when a plaintiff acts against a defendant, civil recourse is a form of enforcement.[25]

III. Remedies and the Transfer Problem

This brings us to the problem of transferability. Initially, one might be concerned that civil recourse theory is inconsistent with the sale of legal claims. Civil recourse empowers plaintiffs to bring suit, but perhaps in a way that is personal to those particular plaintiffs. After all, substantive standing limitations generally restrict the class of potential plaintiffs to those individuals whose rights were violated.

Sebok has recently rejected this concern. He contends that civil recourse theory is consistent with claim alienation. According to Sebok,

> Zipursky may be correct that private law—especially with its unique feature of substantive standing—changes the character of the normative relationship between victim and defendant, such that the significant normative fact is the power the victim gains over the defendant to pursue redress. However, it is not clear why this means that the right created by the wrongdoing must be satisfied by the wrongdoer providing redress *only* to the person she wronged.[26]

In other words, there may be a disconnect between the origins of the private right of action and a third party's standing to bring suit. Furthermore, as Sebok adds,

> The right to seek redress was a product of the wrongdoing, and it is not clear why the rightholder cannot do what she wants with that right—destroy it, ignore it, or give it to someone else. The normative fact that gave rise to the right will not be undermined, and it is not clear why the courts should not respect the sovereignty of the rightholder to exercise unlimited control over that right.[27]

In many contexts, a legal power is transferable, and this may be one of those cases. As a conceptual matter, civil recourse seems open to transfer, and at the very least, this interpretation of recourse norms is a plausible one.

This now brings us to the question of remedies. Before considering damages remedies, it may be helpful to consider an arguably more

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25. For discussion of private rights of action from this perspective, see Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 Wm. & Mary L. Rev. 1873 (2011); Gold, *supra* note 17, at 68–73.

26. Sebok, *supra* note 1, at 132–33 (footnote omitted).

27. *See id.* at 133.

personal type of remedy: the apology. Imagine a hypothetical legal regime in which courts regularly ordered apologies. Apologies fit comfortably within a civil recourse approach, or at least some versions of it. This is particularly so for those accounts which emphasize the expressive component of a private right of action. As an example, consider Jason Solomon's understanding. Solomon sees tort law as a system of equal accountability, with civil recourse as a way of expressing the equality of individual citizens and their accountability to each other. As Solomon argues,

> [A] civil recourse view . . . might see a genuine apology as precisely the kind of interpersonal expression of equality and accountability that ought to be promoted. The apology has the unusual and quite powerful qualities of personally acknowledging and affirming the right of the person harmed to demand an explanation and the obligation of the wrongdoer to provide one.[28]

On this view, a court-ordered apology is apparently one way a tortfeasor can be held to account.

Note that for Solomon, the expression brought about by civil recourse is strengthened by having the remedy directed to the victim.[29] What would happen if an apology were instead directed to a third-party transferee? If a particular tort is a tort for which an apology is an apt remedy, we might think that the transferee would acquire a right to an apology. Yet this starts to sound very strange. It is not hard to conceive of a transferee acquiring a right to insist on the defendant's apology to the tort victim, but a transferee's right to insist on the defendant's apology *to the transferee* does not really make sense. The problem here is not a commodification problem; it is a problem of conceptual fit. Perhaps, this remedy is not alienable as a conceptual matter.[30]

Admittedly, we might think that apologies are a special case. They can play a role in tort law settings,[31] but in all likelihood claim transferees will not be interested in seeking apologies directed to the transferee. That said, apologies illustrate what can happen to a remedy

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28. Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 267 (2011) (footnote omitted).

29. *Id.*

30. It should be noted that problems of conceptual inalienability are open to debate, at least in the legal setting. *See* Christopher Essert, Inalienability and Property 7 (unpublished manuscript) (on file with author) (expressing skepticism that rights can ever be conceptually inalienable).

31. There is a significant quantity of empirical data assessing the significance of apologies to potential litigants. *See, e.g.*, Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 493 (2010) (discussing empirical findings concerning the effect of apologies on litigation decisions).

when a claim is transferred. Apologies indicate that it is at least possible for a remedial concept to fit badly post-transfer. The transfer of the claim may be perfectly legitimate, but at least one of the remedies that could go along with it may become doubtful. Even if this feature of apologies has little bearing on the typical case, it demonstrates the existence of an important phenomenon: some remedies may not retain their original meaning post-transfer.[32]

Let's now turn to punitive damages. Punitive damages can readily be incorporated within the accountability version of civil recourse. Yet this remedy might instead be understood in Sebok's terms, as a mode of private revenge. Let's assume that the revenge conception is accurate. This, too, could raise conceptual difficulties. If punitive damages are understood as private revenge, we get a problem similar to the one that arises with apologies.

Revenge is a quintessentially personal thing. Imagine a particularly terrible tort, one for which punitive damages are clearly apt. Now imagine that the victim transfers her right to private revenge to an unrelated third party. This third party could be understood to obtain revenge on the victim's behalf, but that understanding would not take seriously the idea that the right to revenge has been transferred. (Note also that, if the revenge really were taken on behalf of the victim, presumably the damages would go to the victim.) The revenge, per our hypothetical, belongs to the transferee. Does it make sense to say that an unrelated third party can have revenge?

The concern here is not that a wrong is only a matter for the plaintiff to worry about. We may readily agree with John Gardner that "an injustice perpetrated by anyone is in principle everyone's business, and anyone at all has reason to help in securing its avoidance."[33] Revenge, however, seems different from fixing a wrong.[34] It is one thing for a third party to say that she has made things right, or that she has punished a wrongdoer. It is much more unusual to think of a third party getting revenge, unless she somehow has a close relationship to the victim, is a victim herself, or is acting on behalf of the victim. Like

32. Some readers of this Article have suggested that the apology concern could be addressed if the transferee plaintiff gains the right to insist on an apology to the transferor (as opposed to an apology to the transferee). The difficulty here is that this is not necessarily what a transfer would entail, and indeed this proposed structure would appear very different in the damages setting, where presumably the transferee wishes to receive the damages at issue.

33. *See* Gardner, *supra* note 10, at 11.

34. Authorship may also matter in retributive settings. For example, there is a question whether, under expressive approaches to retributive justice, the punishment must be inflicted by the victim or may instead be inflicted by the state. *See* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1692 (1992).

an apology, it is questionable whether private revenge may be alienated without badly distorting the concept.

What about the idea of recourse as a means of holding someone accountable? Accountability is a tougher question, and our answer may depend on what we mean by accountability. If we take Solomon's expressive view, then what is communicated by recourse may change somewhat when the right to hold someone accountable is transferred. It is not clear that this change would be significant enough to really distort the concept. Perhaps the right to hold someone accountable could be transferred without dramatic alterations in the expressive component of accountability. The expressive component might be weakened, but not substantially changed. Still, reactions regarding transfers of a right to hold someone accountable may differ from one person to another.

One reason for divergent reactions may be that accountability is a somewhat vague word. The identity of the plaintiff may not matter, depending on what we mean when we refer to accountability. This can be illustrated by common usage. It would hardly be surprising to hear a third-party plaintiff say, "I held him accountable for his wrongdoing."[35] Examples like this suggest that accountability can be relatively impersonal. On the other hand, what if accountability means "getting satisfaction"? It might seem odd to hear a third-party plaintiff say, "I got satisfaction for his wrongdoing." Like revenge, getting satisfaction in response to an affront may implicate a personal quality that cannot readily be possessed by unrelated third parties.[36]

Enforcement rights, on the other hand, should pose no conceptual problems. They could be transferred without difficulty, assuming it is legal to do so. For example, suppose some personal property is converted, and the victim has a legitimate claim to the value of the converted property. This fact pattern implicates recourse as enforcement. There is nothing that would seem odd if a third-party transferee brought a claim for the property's value on the transferee's own behalf. To the extent that many remedies can be understood in terms of enforcement rights, a large part of tort law poses no conceptual diffi-

35. On some understandings of accountability, the concept may not have the dyadic features typically noted by civil recourse approaches. I thank Bradley Wendel for emphasizing this interpretation of accountability.

36. Another account of civil recourse that has a personal quality to it is the idea that civil recourse is a means for a plaintiff to vindicate lost honor. *See* Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31 (2011) (providing an honor-based account of civil recourse).

culty for the alienability of legal claims.[37] This component of civil recourse is easily transferred.

IV. Legal Policy Implications

At this time, the implications of the transfer problem are largely unexplored.[38] Most analysis of the alienability of legal claims has centered on the legitimacy or the desirability of the practice, rather than the conceptualization of remedies if the practice were adopted. Once we focus on the transfer problem, there are both normative and empirical questions to be addressed. I will suggest several possible implications below, but the subject merits further inquiry.

An initial response might be to question whether the transfer problem has any implications whatsoever for legal policy. After all, we might reject civil recourse theory as an interpretation of private law. If civil recourse accounts are incorrect, then the transfer problem may not exist. It should be noted, however, that the relevant concern may not solely be an issue of the judicial perspective. Juries might think in terms of providing satisfaction, revenge, or other expressive remedies, even if judges do not.[39] Insights from civil recourse theory may be relevant even if they do not capture the legal point of view from a judge's perspective.

In the alternative, civil recourse accounts may accurately capture the significance of private rights of action. It need not follow that remedies must change. Perhaps we can simply adopt an "as if" perspective, with damages awards, apologies, etc., ordered as if a transferee plaintiff were the original victim of a wrong. Remedies could effectively be transferred by means of this pretended status, even if they do not make conceptual sense as applied to the transferee. In other words, we might adopt a legal fiction and imagine that the transferee is the original party who was wronged.[40]

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37. In prior work, I have suggested that a large part of tort law is explicable in enforcement terms. *See generally* Gold, *supra* note 25.

38. It should also be noted that there are other settings in which similar concerns may arise. In this regard, compare Sean Hannon Williams, *Lost Life and Life Projects*, 87 Ind. L.J. 1745, 1778–80 (2012) (discussing civil recourse implications in the wrongful death damages setting).

39. It is also possible that civil recourse accounts are accurate in terms of the structure of private law, but that an expressive understanding of civil recourse is inconsistent with the legal point of view. For further analysis of expressive theories of private law remedies, see Andrew S. Gold, *Expressive Remedies in Private Law*, *in* Remedies and Property 101 (F. Lichere & R. Weaver, eds., Press Universitaires d'Aix-Marseille 2013).

40. Note that this option might work better with a damages award then it would with an apology.

A concern with this approach is that it might not be adopted in practice, even if we would prefer this approach in an ideal world. For example, a jury might not provide the same remedy to a transferee if it knows the claim was transferred, even if the jury were instructed by a court to do so.[41] (For psychological reasons, it could be hard to give the "wrong" party satisfaction.) This pragmatic consideration is relevant when assessing the merits of a particular remedy as possessed by a claim transferee. Depending on one's perspective, it could mean that plaintiffs will be undercompensated post-transfer. In addition, it could mean that the market for claim transfers will reflect a discount based on the risk of smaller post-transfer awards.

Another concern is that standard pre-transfer remedies may seem more than inapt post-transfer. It may be considered illegitimate to provide them. For example, assume that Sebok's conception of punitive damages as private revenge is correct. We might be troubled by the idea of transferring a victim's right to private revenge, even if we think that private revenge is entirely appropriate for the victim to pursue. Revenge by a third party may seem sanguinary in a way that revenge by a victim does not. In contrast to the prior concern, this concern poses the risk of overcompensation.

Pluralism offers a distinct consideration. Civil recourse theorists could be correct about one of the justifications for private law remedies, but they might not have captured the only justification.[42] So, for example, a tort remedy could be reasonably understood to provide a plaintiff with a means to get satisfaction, but it might also be reasonably understood to provide efficient deterrence or corrective justice. When a remedy is supported on multiple grounds, the inapplicability of one justification post-transfer might have limited relevance. The desired remedy may be over-determined, and consequently a claim transfer might have little practical effect.

On the other hand, it might be that a pluralist account of private law remedies leaves the transfer problem intact. Suppose that a particular legal claim supports a damages remedy under both an accountability understanding and an efficiency understanding. The measure of damages that would give the plaintiff satisfaction may be different from the measure that would be efficient. These two conceptions may perfectly overlap in a range of cases, but it would be surprising if they overlapped in all cases. In that event, the transfer problem would not

41. On the other hand, this concern might be alleviated in those cases where the injured party is participating in the legal process to some extent. On this issue, see Baker, *supra* note 1, at 297.

42. Or, there may be multiple civil recourse norms involved in a single remedy. *See* Gold, *supra* note 17, at 81 n.66.

be a bar to a remedy, but arguably the measure of that remedy should be adjusted.

Finally, there may be subtler, indirect effects to consider. If post-transfer remedies have different expressive implications from pre-transfer remedies—and it seems quite plausible that they will—then it is conceivable that the legal understanding in the post-transfer setting will have an effect on the expressive content of remedies in the pre-transfer setting.[43] There may be ripple effects. Whether this would be good or bad will depend on one's views concerning the status quo. The answer may also depend on precisely how any expressive changes play out.[44]

V. CONCLUSION

Civil recourse theory has told us a great deal about what it means to bring a private right of action. It may well mean something different when a private right of action is brought by a party who was not a victim of the original wrong. For example, it seems strange for a third party to "get satisfaction" from a party who never wronged the third party; it seems stranger still for that third party to get an apology, or even private revenge.

The concern in these cases is not a normative concern—or at least not directly. It is a conceptual concern. Some things may not readily be transferred because they are no longer the same once transferred.[45] Conceptual inalienability is not a commodification problem, nor is it otherwise the product of moral unease. We might actually wish that apologies or revenge could be transferred for policy reasons. It does not follow, however, that these concepts are open to transfer simply because we would wish it so.

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43. It should be noted that this point would potentially apply for other expressive accounts of legal remedies, and not just for civil recourse accounts. *Cf.* Smith, *supra* note 15, at 85 (providing an expressive account of corrective justice, and contending that "by making the defendant pay compensation *to* the claimant, the order makes clear that the defendant's wrong was a wrong done to the claimant"); Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (John Oberdiek ed., forthcoming 2014) (manuscript at 21), *available at* http://ssrn.com/abstract=2308590 (suggesting that tort damages "do justice through the message that they send about the victim's standing and the wrongdoer's responsibility").

44. The type of underlying claim might also play a significant role—some types of litigation may raise more limited transferability concerns than others. For a helpful analysis of mass tort litigation—a context with distinctive litigation features—see Baker, *supra* note 1.

45. For a very different example of inalienability based on conceptual requirements, consider friendship. *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 352 (1986) ("[O]nly those who would not even consider exchanges of money for friendship are capable of having friends. This is a reasoned attitude. It is based on the recognition that it constitutes a condition for a capacity for friendship.").

The legal and policy ramifications of conceptual inalienability need further exploration. This Article is intended to open up that inquiry. The possibility that some remedies are qualitatively changed by a transfer is not as such an argument against the sale of legal claims. It does mean that legal claims could have a different meaning pre-transfer from their meaning post-transfer. This, in turn, should be relevant both to debates over the alienability of legal claims, and also to the implementation of such alienability if it transpires in the future.