Remedies, Analysed

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1. *Introduction*

For most of its history, it's usually said, the common law was understood in terms of *remedies*, not *rights*. In some ways, this is a puzzling idea. When a court grants a remedy, one might think, does it not declare the parties' rights and duties? If so, thinking in terms of remedies necessarily entails thinking in terms of rights and duties. And can't there be rights that courts grant certain remedies? The contrast in play here between 'rights' and 'remedies' needs further elucidation.

Surprisingly, despite this historical mantra about the common law, as Stephen Smith observes in his superb book, *Rights, Wrongs and Injustices*, almost no theoretical attention has been given to the nature of remedies, and their relationship to underlying rights.[1] Of course, much has been written about particular remedies and their justification. But Smith aims, in part, to explain the nature of remedies and remedial law *in general*, a project which the general jurisprudence literature has largely not undertaken.[2]

Such an account is valuable for at least three reasons. First, our understanding of legal systems is incomplete without an account of a pervasive, and morally significant, feature of legal systems: the provision of remedies. Second, the justification for any particular remedy must be just that – a justification for a *remedy* – and so justificatory accounts of remedies require an analysis of the nature of remedies. Third, an appreciation of the common and distinctive normative issues raised by remedies, if any, allows us to formulate general remedial principles, and identify instances of inconsistent treatment of remedial issues in the law.

In this article, broadly following the structuring of the issues in the book itself, I examine three central questions which it aims to answer: (1) What is a remedy? (2) Why do courts grant remedies? (3) On what grounds are remedies awarded?[3] I also consider (4) Should remedial law be considered an area of law?

2. *What is a remedy and remedial law?*

A remedy, in ordinary language, is a cure for something. An initial suggestion, then, is that remedies are the curative parts of the law. But, as Smith points out, this is 'impossibly broad': there is a sense in which all law can be considered, at least in intention, as curative of problems that would exist but for law.[4]

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[1] Stephen Smith, *Rights, Wrongs, Injustices: The Structure of Remedial Law* (OUP 2019). An important exception, on which Smith builds, is Rafal Zakrzewski, *Remedies Reclassified* (OUP 2005).

[2] See below, Section I, *Rules, rulings, sanctions*.

[3] Smith also considers 'What remedies are available?' Space unfortunately precludes discussion of Smith's valuable treatment here.

[4] Smith above (n 1) 2.

Here, then, is Smith's proposal:

> R1. 'a remedy is a judicial ruling, and a private law remedy is a legal ruling that resolves a private law dispute'.[5]

A ruling is distinct from a 'rule' and a 'sanction'. A ruling is a 'legally operative judicial pronouncement'.[6] Rules are 'statements about, and constitutive of, legal duties…or statements about how individuals may create or alter legal relationships'.[7] I return to this contrast between 'rules' and 'rulings' later.[8] A remedy is a specific kind of ruling: it is an order or – the same thing, for Smith – a command to do or not to do something.[9] The resolution of a private law dispute normally ends in the issuance of such a directive order (or a dismissal). A 'sanction', for Smith, is 'an interference with an individual's liberty, person or property'.[10] But orders, and so remedies, are 'just words': they are things that courts *say* in the resolution of disputes.[11] The legal effect of an order is to impose a legal duty upon the addressee to obey it.[12] This duty is owed, not to the claimant, but to the court.[13] The breach – or threatened breach – of this duty may, in turn, give rise to further rights and duties. The claimant may then have a right that the court impose a sanction on the person subject to the order, such as authorising seizure of the addressee's assets to satisfy a debt.[14] A remedy, then, is not identical to, but a precondition of, a sanction.

Smith supplements the definition in R1 in a number of ways.[15] First, as noted, he distinguishes between types of *ruling*. An order is a kind of ruling – it is a ruling which directs a person to do or not do something.[16] For example, a decree dissolving a marriage is a ruling which is not an order, in Smith's sense. Second, it seems that only directive rulings issued in response to *non-criminal* proceedings are 'remedies'.[17] Third, the directive ruling cannot relate to a 'procedural' matter, such as an order to deliver up evidence.[18] Fourth, the book occasionally inserts the word 'final', which excludes interim orders. It is not entirely clear whether this is merely a pragmatic exclusion for reasons of space or whether Smith considers interim measures to be importantly conceptually distinct from 'remedies'.[19] So his account could be more precisely stated thus:

> R2. A remedy is a non-procedural (final) directive judicial ruling issued in non-criminal proceedings.

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5 Smith (n 1) 6.
6 Smith (n 1) 19.
7 Smith (n 1) 7.
8 Section I, *Rules, rulings, sanctions*.
9 Smith (n 1) 7; 113-126.
10 Smith (n 1) 106.
11 Smith (n 1) 106.
12 Smith (n 1) 58.
13 Smith (n 1) 58.
14 The order may require actions of third parties other than the defendant, eg, a third party debt order.
15 A minor gripe is that it would have been useful to have a precise statement of Smith's full definition in the book. It is often abbreviated to 'a judicial ruling'.
16 Smith (n 1) 19.
17 This is implied by the diagram at Smith (n 1) 17.
18 Smith (n 1) 17.
19 Smith (n 1) 18 implies that it is merely pragmatic.

Smith provides a conceptual map of the relationship between remedies, in this sense, and different kinds of legal rights. Remedial rights are (i) *Action rights*: rights held by a person against a court that the court issue an order upon proof of a cause of action or (ii) *Court-ordered rights*: rights held by a court against the addressee of an order that the addressee obey the order or (iii) *Enforcement rights*: rights held against a court (or other state body) that an order be enforced. Remedial rights are distinguished, in his scheme, from *substantive rights* – such as my right that you not negligently damage my body. What makes these rights 'remedial', it seems, is not their aim or function, but rather the fact that they are *about* or *a consequence of* directive rulings.

By way of illustration, suppose you violate my legal right that you not negligently damage my body. This violates my *substantive right*. Having sued you, and proven the facts showing that you violated my substantive right, I have a right against the court that the court issue an order awarding damages (generally assuming loss, etc.) – this is an *action right*. When the court issues the order, the court acquires a right against you that you obey the order – that is, pay me damages – this is a *court-ordered right*. Finally, if you fail to comply with the order, I may acquire an *enforcement right* against the court that it sanction you, for instance, by authorising seizure and sale of your assets in order to satisfy the award.

Let's now consider the adequacy of Smith's understanding of remedies and his account of their relationship to other parts of the law.

The concept of a remedy

R2 successfully captures what would uncontroversially be described as remedies in private law: it correctly holds that damages awards, restitutionary awards, specific performance, injunctions, and orders to pay a debt are remedies. In this subsection I query whether Smith's definition is fully satisfactory by considering the following elements of R2: its restrictions to (i) rulings and (ii) non-criminal proceedings.

Rulings. The breach (or prospective breach) of a person's private law rights sometimes gives rise to new substantive rights, whose aim is to give effect, or permit effect to be given to, the right that was violated. These are often described as 'remedies'. Thus rights to self-help that arise from a breach are described as 'remedies'. The Consumer Rights Act 2015 describes a consumer's right that a trader, upon the consumer's request, repair defective goods after a breach as a 'remedy'.[20] And so one might object that a judicial order is not a necessary condition of an act being a remedy.[21]

Ultimately, all one can do here is acknowledge that the term 'remedy' is applied both to substantive preventive or reparative rights arising from a violation of a right *and* to judicial orders with a wider range of functions. These are distinct phenomena. One involves a kind of speech-act by a court which generates a new duty, the other involves rights that arise without court action. But it is a further question whether the differences between these phenomena are such that it is apt not to categorise both under the term 'remedy'. If the rules and principles which regulate (or should regulate) the phenomena are sufficiently different, then labelling

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[20] Eg s 23. Indeed, in the same section, the Consumer Rights Act 2015 makes no clear distinction between remedies as the imposition of a court-ordered duty and remedies as duties which a right-holder has a power to impose upon a right-violator after a breach. For discussion, see Simon Whittaker, 'Distinctive features of the new consumer contract law' (2017) 133 LQR 47.

[21] Smith is aware of this issue ((n 1) at 6-7) though I am not sure of his precise response to it.

them distinctly would be apt. The difficulty with excluding substantive powers to impose new duties resulting from breach, or substantive permissions to enforce rights either from the category 'remedy' or 'remedial rights', is that similar principles *are* likely to inform the existence and availability of substantive enforcement rights and court-ordered enforcement rights. For instance, self-help is sometimes conditioned on providing notice of an intention to exercise the right, and so too is court-ordered enforcement only permitted in some cases when notice is given. Similarly, substantive enforcement rights are subject to necessity and proportionality limitations which also, even if obliquely, inform court-ordered enforcement.

It might, then, be useful to define a remedy as:

> R3. A remedy is a right which arises in virtue of, and in order to address, a legal imperfection.

A legal imperfection, let's say, is an existing or prospective breach of a legal duty, or another event which, from the law's perspective, is or will be undesirable. R3 allows us to distinguish between 'judicial' remedies, which are judicially created rights – orders create a right in the court that the order be obeyed – and 'non-institutional' remedies, such as a right to self-help, which are substantive rights arising in virtue of legal imperfections. Each kind of remedy arises 'in virtue of' a legal imperfection in the sense that the imperfection is a condition or reason for the remedy.

R3 itself is under-inclusive, however, if the aim is to capture general usage of the term 'remedy' across the law. A quashing order in judicial review proceedings – typically described as a remedy[22] – eradicates or alters the legal effect of the exercise of a public power, but need not create any new rights or duties. This problem could be met by this modification:

> R4. A remedy is an alteration in the legal normative situation which arises in virtue of, and in order to address, a legal imperfection.

R4, though it is vague in some respects, seems to me to capture an important commonality in the phenomena that are typically picked out by the term 'remedy'.[23]

A different concern to the one raised by 'substantive' remedies relates to Smith's limitation of 'remedies' to *directive* rulings. In private and public law contexts, declarations –eg 'A is entitled to possession of Blackacre' – are not infrequently described as 'remedies', despite not (necessarily) directing a person to do or not to do an act.[24] Similarly, a quashing order in public law would be described as a 'remedy'.[25] Quashing orders, but not declarations, would fall within R4.

[22] See eg *De Smith's Judicial Review* (8th edn, Sweet and Maxwell 2019) ch 18.
[23] Nick McBride pointed out to me that R4 might treat 'settlements' as remedies. It may be possible to tweak R4 to avoid this by referring to the source of the power to alter the normative situation.
[24] See eg Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, OUP 2019) ch 25.
[25] See above (n 22).

Non-criminal. An awkwardness of R2 is that it entails that criminal courts never grant remedies. This is contrary to judicial usage.[26] Further, there are clear parallels between orders issued by criminal courts and paradigmatically remedial private law orders. Criminal courts issue compensation and restitution orders.[27] Nonetheless, it would be odd to describe an order to serve a term of imprisonment as a 'remedy'. It is tempting to modify R2 as follows:

> R5. A remedy is a non-procedural (final) directive judicial ruling issued to *undo* or *prevent* a legal imperfection.

This covers (most) compensation and restitution, but, at least on some views, excludes criminal punishment.[28] But R5 also excludes, on some views, punitive orders in private law. Another modification that may then come to mind is:

> R6. A remedy is a non-procedural (final) directive judicial ruling issued for the benefit of a specific person or set of persons.

This covers private law remedies as well as compensation and restitution orders issued by criminal courts, but it excludes criminal punishment, which is for the benefit of everyone or no one in particular. But R6 excludes mandatory orders in public law that are not for the benefit of specific persons.[29]

In summary, if we seek to capture in our definition of a remedy (a) substantive rights that arise from legal imperfections, (b) criminal court remedies, and (c) remedies in public law, then a broader definition than R2 is required, such as the following:

> R7. A remedy is an alteration in the legal normative situation which arises in virtue of, and in order to address, a legal imperfection, excluding punitive orders in criminal proceedings.

Or if we broadly follow Smith and restrict 'remedies' to judicial rulings, but seek to include (b) and (c):

> R8. A remedy is a non-procedural (final) judicial directive ruling, excluding criminal punishment.[30]

My aim in this section has not been to show that Smith's definition of a 'remedy' is incorrect. Inevitably with a term that has been applied by thousands of legal officials, practitioners and

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[26] *R v Chappell* (1985) 80 Cr App R 31, 34-35 'criminal remedy', cited by Matthew Dyson and Paul Jarvis, 'Remedies of the Criminal Courts' in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (CUP 2017) 534.

[27] See generally Dyson and Jarvis (n 26).

[28] Victor Tadros describes punishment as a 'remedy' in his *The Ends of Harm* (OUP 2011). This makes sense on R5 as, on his theory of punishment, it prevents the wrongdoer not bearing the burden their secondary duty requires them to bear.

[29] What makes a ruling 'non-procedural'? A suggestion: when it is justified by a finding about the applicability of a substantive norm, which is (part of) the subject matter of the dispute. Thus an order to disclose evidence is not 'non-procedural' since it is not justified by a finding about a disputed substantive norm.

[30] Neither R7 nor R8 includes declarations. R8 could be modified to accommodate them by deleting 'directive' from the definition, but then it would include dismissals, which are not remedies.

scholars over hundreds of years, it has been and may be used in different ways.[31] Rather, my aim has been to show that Smith's definition of a 'remedy' may exclude phenomena that are highly similar to those picked out by R2, in such a way as to occlude important structural and normative similarities.

Remedial rights and substantive rights

Smith gives two slightly different accounts of 'substantive rights' at different parts of the book.

(A) At the outset, the 'substantive' law is understood as the 'rules [which] govern individuals' interactions with each other'.[32] So substantive rights would then be rights that individuals have in their interactions with each other.

(B) Later in the book, a legal relationship is defined as substantive when it 'can be explained without reference to litigation, rulings, or anything else that occurs in court'.[33]

(A) is not a promising definition of 'substantive' law in general, if we are aiming to draw a general contrast with 'remedial' law. There are remedies in public law which seem to bear the same contrast with 'substantive public law', but public law is not concerned (only) with rules governing interactions between individuals.

(B) is more illuminating as a general contrast between remedial law and substantive law. My right that you not negligently damage my body can be explained without reference to litigation, rulings, or anything else that occurs in court. But my right to an award of damages is a right that a *court* issue an order that the defendant pay damages.

As Smith notes, there is a complication here: my right may owe its legal validity to a judicial decision.[34] So it might be objected that my right cannot be explained without reference to 'anything that occurs in a court'. Smith's response is that 'A right is substantive not because of the way it is validated, but because of the facts that give rise to it'.[35] The relevant facts 'giving rise' to a right are either a person's residence in the jurisdiction or because 'an 'ordinary' right-creating event has occurred (as opposed to a judicial event, such as an order)'.[36]

This seems inapt, however. First, a right may still be 'substantive' even if it is enjoyed simply by being subject to a jurisdiction, rather than by virtue of *residence.* Second, it is not very clear what it is for something to be an 'ordinary' right-creating event. Third, more fundamentally, on this understanding 'substantive rights' are not distinct from remedial rights. Every person, simply by their presence in the jurisdiction, having exercised their power to sue, has a right that a court order a wrongdoer to pay damages if that person proves

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[31] For a catalogue of others: Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1.
[32] Smith (n 1) 7
[33] Smith (n 1) 77.
[34] Smith (n 1) 77.
[35] Smith (n 1) 77.
[36] Smith (n 1) 77.

that they have suffered loss due to a private law wrong committed against them.[37] But Smith calls this an *action right* – a right that a court issue an order – which he holds to be a kind of remedial right, *not* a substantive right.

It seems better to acknowledge that there are at least two important distinctions we want to draw in using the terms 'remedial' and 'substantive' in relation to rights. The first is a distinction between rights and duties that arise directly, and in virtue of, a court issuing an order, and those which do not. These do not include rights and duties created by the doctrine of precedent. The duty-imposing or right-conferring rules relied upon in arriving at an order, which are binding by virtue of the doctrine of precedent, are not created *by virtue of the order*. Remedial rights, in one sense, then, are court-order-created rights; substantive rights, in one sense, are all rights not of that kind. A second distinction is between rights and powers held against, or held by, courts in relation to the resolution of disputes, and other rights and powers. These are remedial rights in a different sense, but are sometimes *substantive* in terms of the first distinction: sometimes they are rights and powers which arise independently of an order being made.[38]

Rules, rulings, sanctions

One of the striking contributions of Smith's book is the philosophical discussion of the relationship between judicial rulings, rules, and sanctions. The nature of rulings has been neglected by philosophers of law. Indeed, so far as the question has been broached, it has been answered briefly and unsatisfactorily. Here is H.L.A. Hart's treatment:

> Even in a complex large society, like that of a modern state, there are occasions when an official, face to face with an individual, orders him to do something. A policeman orders a particular motorist to stop or a particular beggar to move on. But these simple situations are not, and could not be, the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do. Instead such particularized forms of control are either exceptional or are ancillary accompaniments or reinforcements of general forms of directions which do not name, and are not addressed to, particular individuals, and do not indicate a particular act to be done.'[39]

This passage under-emphasises the importance of judicial orders in a legal system, and misdescribes some of their functions. An order to perform a contractual obligation is not, for instance, an accompaniment or reinforcement of a general form of direction that does not indicate a particular act to be done. Shapiro's *Legality* devotes a page to the distinction between 'general' norms and 'particular' norms.[40] Raz tersely equates 'a great variety of civil remedies' with 'sanctions'.[41]

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[37] Smith might say that 'exercising a power to sue' is not an 'ordinary' right-creating event, but, as noted, it is unclear what this means.

[38] It might be tempting to describe 'substantive rights' as rights whose correlative duties' content can be described without reference to courts. But this doesn't quite work: I have a substantive right that you not maliciously prosecute me through civil or criminal proceedings. This is a substantive right, but the content of the right makes necessary reference to the (malicious) exercise of a power to trigger a court's jurisdiction.

[39] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012). An excellent exception, itself drawing on Smith's work, is Timothy Endicott, 'The Generality of Law' in L Duarte Almeida, A Dolcetti, J Edwards (eds), *Reading The Concept of Law* (Hart 2013), which cites the passage from Hart.

[40] Scott Shapiro*, Legality* (Harvard UP 2011) 40-41.

[41] Joseph Raz, *The Concept of a Legal System* (Clarendon 1980) 152.

What, then, is the nature of a ruling which directs a person to do or not to do something, and how does it relate to 'rules' and 'sanctions'? According to Smith, such a ruling is a *command*. An order to perform a contract *commands* the addressee to perform. Consider first the distinction between a command and a sanction. Smith understands a sanction as 'an interference with an individual's liberty, person or property'.[42] And he clearly means something more than or distinct from a merely normative interference with these things: the imposition of a legal duty is not *itself* a sanction, even if it interferes with liberty (in a thin sense) by making conduct mandatory. A sanction is something 'physical'.[43] By contrast a directive ruling is 'just words'. Clearly, not all commands are sanctions in this sense: the command 'Buy me a cocktail, right now!' is not a sanction in this sense.

Smith's understanding of a sanction seems questionable. A necessary condition of something counting as a sanction is that it is a response to (perceived) misconduct and that misconduct is taken as a reason for imposing it. If I mistakenly pay £5 into your account, and a court orders you to repay it, this is not necessarily a sanction, at least in part, because the court does not necessarily act on the reason that you have committed a wrong. If a criminal court issued the restitutionary order for the reason that the recipient had committed a wrong, then the order is a candidate for being a sanction. This is a simpler argument why not all remedies are sanctions. Further, it also shows that Smith's understanding of an 'enforcement right' may need modification. When a person fails to conform to a court order and their assets are seized in order to satisfy a contractual debt, this need not be a sanction. The breach of the court order may only be a condition, not a reason, for the seizure of the assets. Consequently, enforcement rights are not always rights that a *sanction* be imposed. A better view is probably that an enforcement right is a right that the state authorise the securing of, or secure, the benefit to which the court ordered right entitles the claimant.

I agree, then, with Smith that remedies are conceptually distinct from sanctions. Could it instead be that remedies are merely a way of (i) putting defendants on notice that a sanction may be imposed or (ii) authorisations of sanctions? The basic problem with both suggestions, as Smith shows, is that neither explains the form of directive rulings. These rulings state that defendants are *ordered to do such and such*; they do not *merely* provide notice, nor do they themselves authorise a sanction. Rather, a remedy is a precondition of the existence and exercise of an enforcement right.

Consider, now, the relationship between directive rulings and rules. Smith makes three claims: (1) directive rulings (and so remedies) are commands; (2) rules are conceptually distinct from commands; (3) directive rulings are not merely (a) reminders of rules, (b) rule substitutes, or (c) rule specifications.

(2) is surely right: the command 'Jump on one leg!' is not a rule. Rules, Smith tells us, are 'statements about, and constitutive of, legal duties…or statements about how individuals may create or alter legal relationships'.[44] A simple, but important, point is that commands are things that people (or institutions) *do*. A command is a kind of action. Rules are abstract entities of some kind.[45] Thus Smith is wrong to say that 'duty-imposing legal acts are

[42] Smith (n 1) 106.
[43] Smith (n 1) 7.
[44] Smith (n 1) 7.
[45] We might refer to the duty created by a command as an abstract normative entity, but command also refers to the *act* of commanding.

typically described as 'norms''[46]. A legal duty is a kind of norm, but the legal act that creates a duty is *not* a 'norm'. Of course, rules can sometimes be created by action, but they are not themselves *acts.* So a basic distinction between 'duties' and 'commands' is between *(speech-)acts* and *abstract normative entities.*

Smith has two basic arguments for the claim (1) that directive rulings are commands. The first is that directive rulings are formulated as 'orders'. The label 'injunction' is some evidence that it is, literally, an injunction. This linguistic argument has some force, but it is not decisive. Declarations are described as 'orders' but they are clearly not commands. Similarly, in ordinary life, the language of 'order' is sometimes (knowingly) used when its legal effect is to make an 'offer'.[47]

The second argument is more indirect. It focuses not on the linguistic evidence, but on the normative explanation of what courts could intelligibly be doing when making directive rulings. It proceeds by arguing for (3) – that directive rulings are neither rules, rule-reminders, rule-substitutes, or rule-specifications – and combines this the conclusion that they are not sanctions or notices or authorisations thereof. It then concludes that they must be commands.[48]

Consider, first, 'directive rulings' as *rule-reminders*. The idea is that rulings *remind* defendants of their substantive duties. Smith convincingly shows that this cannot be correct: sometimes defendants are ordered to do that which they had no substantive duty to do prior to the order (for instance re-allocate wealth after a divorce decree). Second, for the same reason, rulings cannot be merely substantive *duty specifications*: there may be no antecedent duty to specify.[49] Third, rulings are not *rule-substitutes*. The idea of a rule-substitute is that there are situations in which a rule would not provide effective guidance, and so the law substitutes a duty-imposing rule for a liability to be ordered to do something. For instance, if it were possible to ascertain immediately the identity of a person who mistakenly pays money into one's bank account, one would have an immediate duty to return the payment. Recognising that such information is unavailable immediately, the law merely imposes a duty once a ruling has been issued. The ruling substitutes for the inappropriateness of having an antecedent duty, by *now* imposing a duty to do the relevant act. Smith's objection to this is that it cannot explain the intelligibility of defendants being ordered to do acts which they already have substantive duties to do. Specific performance orders order the defendant to perform their *existing very close substitute to* their original contractual duty, so it is unclear how it could be said to substitute for that duty.[50] Given the failure or rule-based and sanction-based explanations, and given the linguistic argument, Smith concludes that directive rulings are commands.

The key thread of Smith's argument is that directive rulings cannot be intended simply as statements of the existing legal position, because the act of ruling is intended to create a new reason for action. But it is a leap from *this* idea – that rulings create new duties – to the conclusion that directive rulings are commands. It is possible to create duties for others by

[46] Smith (n 1) 120.
[47] If one places an 'order' on a website, this likely constitutes a contractual *offer*.
[48] See Smith (n 1) ch 5.
[49] This is consistent with thinking that orders always specify abstract moral duties; Smith's correct point is that they do not always specify antecedent *legal* duties.
[50] Smith (n 1) 141-142, 164. One might think, however, that the 'close substitute' duty is concretised further by the order and so the order does create a new duty.

one's say so without *commanding* them. Indeed, Smith insists that not all law-creation is by command – when law-makers create *rules*, he thinks, they are not *commanding*. If I appoint you my executor, I impose a duty upon you to do things, but no command has been made. Similarly, when I set essays for my students – 'Students are required to submit an essay of less than 1,500 words for the tutorial' - my intention is to give them a duty to submit an essay of that description, but it seems odd to say that I *commanded* the students to write tutorial essays. It is simply that, given my position in the university, I have a power to set (limited) requirements for the students in relation to their work.

What is needed, then, is a test by which one can determine whether the exercise of a normative power to create a duty is a command or not. Unfortunately, the book never offers a general analysis of the nature of a 'command'– other than to say that it is a kind of imperative, an 'order'.[51] But Smith draws attention to two facts which may help distinguish exercises of the normative powers that amount to *commands* from others. First, he observes that law-makers create rules by 'declaration', and commands are not declarative. A declarative statement is a statement about what is the case. 'Get out!' is not a statement of what is the case. So commands are not declaratives. But, in the relevant sense, legislative enactments are not declaratives either. Legislation does not (normally) purport simply to report what is *already* the case prior to the legislation. It is like the minister who says 'I declare you husband and wife'. It may be formulated as a declarative statement, but its intention is to *alter* the normative situation.[52] Indeed, a declarative sentence can be used to command. Suppose Employer says to Employee: 'Your duty is get over here immediately!'. This apparently reports the existence of a duty – but even if it does, it still functions as a command.

Second, Smith argues that when a command is made, the maker invokes a special kind of authority. He describes this as 'directive' authority, as contrasted with the 'declarative' authority involved in the creation of rules. I have argued that the contrast between 'directive' and 'declarative' in this context is misleading. But Smith points to a further, potentially distinctive, feature of the authority invoked by commanders – namely, they invoke authority to impose duties *owed to the commander*. When Parliament creates a duty upon occupiers of land to take reasonable care towards visitors, it creates a duty on occupiers to do so, but the duty is not *owed to Parliament*. So perhaps this points us in the direction of a necessary condition of commands, as follows:

> *A* commands *B* to φ only if:
>
> (i) A communicates an intention to impose a duty upon B to φ, **owed to A**, by communicating that intention

[51] Smith says ((n 1) 120) that 'the concept of an order itself' has been the subject of 'little discussion' in the literature on authority. But the book does not engage with existing work done by legal (and other) philosophers on the idea of a command. None of these is mentioned: Neil MacCormick, 'Legal Obligation and the Imperative Fallacy' in AWB Simpson (ed), *Oxford Essays in Jurisprudence 2nd series* (Clarendon 1973) (which, like Smith, also draws attention to the ability to use sentences to state duties, without commanding); HLA Hart, 'Commands and Authoritative Legal Reasons' in his *Essays on Bentham* (OUP 1982); Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (OUP 1999) ch 4. There are also valuable analyses of commands in the speech act literature: see eg Kent Bach and Robert Harnish, *Linguistic Communication and Speech Acts* (MIT Press 1979) 47.

[52] Some declarative statements unintentionally alter the normative situation in law, of course. When judges misstate legal rules, their decisions become binding, even if their intention was not to alter the law.

This seems false, however. Suppose that a police officer lawfully orders me to get out of my car. It would be odd to describe any legal duty to exit the car as owed *to the officer*. It's true that the officer may have the power to release me from this duty, but that is insufficient to determine the directionality of the duty. It may be objected that this is an example of *ordering*, not *commanding*, and so it's still possible that commands may have the directionality feature, while orders do not. It's possible. I suspect, however, that the distinction between *orders* and *commands* is relatively superficial at the level of their normative structure, even if they are different kinds of speech act.

Ultimately, 'order' is simply the word that courts use in order to indicate they are exercising a normative power. This is strongly supported by the fact that the word 'order' is used even when the courts are not *directing* people to do anything. Courts issue 'orders' dissolving partnerships or marriages. The language of 'orders' is not wholly arbitrary, of course. Orders, characteristically, have the quality of being directed at specific individuals or sets of individuals. By contrast, legislation, generally, is not. Hence 'enactments' are generally not 'orders'.[53]

Suppose, though, that Smith is right that directive rulings are commands. Is this a partial vindication of Austin's philosophy of law? Austin held that a law was a species of command. Smith's arguments might be taken to establish that legal systems necessarily employ commands, even if not all *laws* are commands. In this way, there would be an important necessary connection between law and command. But even if common law directive rulings are commands, it seems doubtful that legal systems *necessarily* employ commands. What is crucial is that legal systems have a means of creating new duties when their substantive norms are challenged in some way. But not every intentional act of duty-creation, even by a court, need stem from, or amount to, a command.

Remedies and authority

As noted above, for Smith, the award of a remedy, by its nature, creates a duty owed to the court, whereas acts of legal rule-creation do not, characteristically, create duties to the rule-creator. Whether or not this feature of remedies is a distinguishing feature of the concept of an order in general, it is still an important conclusion. Indeed, Smith holds that this feature of remedial awards – that they create duties to the court – requires us to have a different justification for the authority exercised by courts in making orders, compared to the justification for authority to create rules. [54] Let's call the authority invoked by courts in issuing orders 'remedial authority', and the authority invoked by creators of general rules 'general authority'. Raz's service conception of authority, Smith claims, is a compelling account of general authority, but it cannot justify remedial authority.

Consider, first, the claim that the award of a remedy creates (i) a legal duty (ii) owed *to the court*. The evidence for (i) is clear. First, linguistically, an order to pay money is described as creating a judgment 'debt'. Second, the breach of the order may lead to proceedings for contempt of court. Third, applications may be made to discharge or vary an order; these are difficult to understand without the order having a normative effect.

[53] An interesting example are anti-social behaviour 'orders'. Local authorities are given powers to issue 'orders', such as 'people in Oxford must carry receptacles for excrement when walking their dogs'. These orders can thus have a *relatively* general quality.
[54] Smith above (n 1), 117; see also at 124.

The evidence for (ii) is less clear. Smith's main arguments are as follows. First, once an order has been made, it cannot be waived by the beneficiary of the order: the latter must apply to the court for the order to be waived. The control of over the duty vests, then, in the court. Second, the breach of an order does not give rise to a duty or liability to pay damages to the victim.[55]

No doubt these are important considerations, but they are not conclusive. First, presumably very young children are owed legal duties, yet others hold, or may hold, the powers of control associated with such duties. Second, the award of judgment interest and the possibility of enforcement proceedings, combined with the consideration that litigation must come to an end, may explain why there is no duty to pay damages for the breach of an order. Third, the beneficiary of a judgment debt is usually described as a judgment 'creditor'.[56] Fourth, the beneficiaries of orders are given various powers to impose duties upon courts to authorise or order enforcement of remedial orders. A natural explanation is that the duty to comply with the order is owed, at least in part, to them. Fifth, it seems highly unlikely that, if a court is requested to discharge a private law order by the beneficiary, it will normally not do so; it may not be legally bound to discharge the order, but there will be a powerful legal reason for it to do so. Therefore, even if the beneficiary has no unmediated power to waive the order, it still has a significant normative control over it. Sixth, if Smith is right, then persons *never* have a legal duty owed to the people they wrong to pay them damages, or to make restitution of their property. This is a morally surprising conclusion.

Ultimately, this debate cannot properly be resolved without an account of what it means for a duty to be 'owed to' another person.[57] However, it seems unlikely that the best account of this will require that a person has unrestricted, unmediated, powers of control over a duty for the duty to be owed to them. Further, it may be that remedial orders give rise to multiple duties: a duty owed to the court, and when no duty previously existed, a duty owed to the beneficiary.

Let's now consider whether a different justification is required for remedial authority compared to general authority. Let's say that a court exercises remedial authority when it creates a duty which has the normative effects Smith describes: *inter alia*, it creates a duty which can only be waived with the court's co-operation; it makes it the case that, if the duty is culpably breached, the breach counts as contempt of court; and it gives rise to a power to apply for enforcement if the order is breached. Consider now Raz's Normal Justification Thesis (NJT): 'the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly'.[58] It's unclear to me why, if this thesis justifies the authority of legislative rules, it has no capacity to justify the authority of court orders. It may be that a person will likely do better in terms of conformity to reason by accepting court orders as authoritative. If the courts are reasonably competent, and the

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[55] Smith above (n 1) 60.

[56] See eg CPR 40.9A (1)(a): ''creditor' means the person entitled to the benefit of a judgment or order'.

[57] If a duty is owed to a person if and only if it is justified primarily by their interest, then it seems clear that court-order duties are (also) owed to the beneficiary. Even if other interests play a role, the beneficiary's interest is the major driver in most remedies.

[58] Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 53.

substantive law is reasonably justified, then this seems likely. It is true that the NJT does not itself explain why the duties created by orders are waivable only with the court's co-operation. But this could be justified on pragmatic grounds: given the serious effects of breaching an order, it is important that the court has an up-to-date record of the content of any valid orders in existence.

3. *Why Remedies?*

Why are courts in the business of imposing *new* rights and duties in litigation, through directive rulings rather than merely declaring what parties' rights and duties already are? Imagine an alternative system: at the conclusion of litigation, courts issue a *declaration* that X has a certain duty to Y, and provide notice that, if the duty is not complied with, X will be subject to powers of enforcement.

A first reason is that, for a declaration to be apt, the parties' substantive rights and duties already need to be (believed to be) determinate. But this will not always be the case: for familiar reasons, legal norms are inevitably vague or otherwise indeterminate for some reason. Nonetheless, the courts have a moral obligation to resolve the parties' dispute.

A second reason given by Smith is that regulation purely by substantive duties will sometimes be morally inappropriate. Smith gives two versions of this kind of problem.

The first is that, in some situations, a substantive duty would be overly *epistemically demanding* upon legal subjects. An *immediate* duty to make restitution of a mistaken payment, for instance, one would require one to be constantly monitoring one's bank account, and to have immediate knowledge of the identity of the payor. It is intelligible, then, that the law merely imposes an immediate *liability* upon the recipient to be ordered to make restitution, rather than an immediate duty to do so. Epistemic demandingness seems insufficient, however, to justify the absence of *any* substantive duties in the circumstances Smith describes. What if the recipient does know, or reasonably ought to know, the identity of the payor? The epistemic argument does not justify the absence of a substantive duty in such situations. Similarly, if it is obvious what damages would be awarded by the court, epistemic considerations cannot justify the absence of a duty to pay them.

The second is that, in some situations, a substantive duty would be conceptually impossible or morally inappropriate (for non-epistemic reasons). Smith's main example is a duty to punish oneself.[59] There are two strands to his thinking here. One is that punishment necessarily 'is imposed by a court or other authority'.[60] The other is that a duty to self-punish would be self-defeating in some way, because it would send the wrong message: 'if lawmakers enacted a rule stating that anyone who dumps waste has a duty to pay £1000 to the city, their efforts would almost certainly be self-defeating. The rule would be interpreted as imposing a tax or fee rather than a fine'.[61]

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[59] It's not clear what exact claim is on the table here. Sometimes it seems to be that a duty to punish oneself is conceptually impossible, at other times that it is just morally unappealing, even if possible. Compare Smith (n 1) 118, 'odd (if not incoherent)' with 119 'unintelligible', 'it makes no sense'. For discussion of another example of this kind, see below, p.20.

[60] Smith (n 1) 126.

[61] Smith (n 1) 118

Neither argument is persuasive. While there may be good reasons why punishment is the preserve of courts or other authorities, punishment is conceptually possible without them. A gang can punish one of its members for disloyalty. In doing so, it might be objected, the gang invokes a kind of authority over the member: it presumes to be able to judge the member a wrongdoer. But that kind of authority – if it is properly so described – is possessed by a person over his own life and actions. I can judge that I am worthy of punishment.[62] Is there a normative argument, then, against self-punishment duties? Smith says that the justifications for punishment – 'retribution, deterrence, and so forth' – do not justify duties to self-punish.[63] It seems to depend, though, on the precise conception of 'retribution' at stake. If the intrinsic value served by retribution is 'the imposition of deserved suffering', then it could justify a duty to self-punish, since a person can cause himself to suffer. If the aim of retribution is moral education or inducement of repentance, then, again it is not obvious that a duty to do it oneself, plus the threat of enforcement of that duty, would be inapt. Even if the aim were deterrence, duties to self-punish could be possible. Suppose the state required those who commit criminal offences to report to jail. By reporting to jail, the criminal could contribute to the credibility of the state's power to enforce its mandates. By *voluntarily* reporting to jail, the criminal shows to others that resistance to the state is futile. However, this would only likely be true if there were indeed punishment for failing to self-punish, and *that* punishment would have to be done by (or threatened to be done by) the state. It might also be noted that when a criminal *is* ordered to serve a sentence of imprisonment, this creates a duty not to resist or obstruct punishment which is in the vicinity of a duty to self-punish.

Consider, then, Smith's second argument based on the expressive effects of having a duty, rather than a liability to be ordered to do something. It seems doubtful that if people had a duty, say, to kill themselves if they murdered someone, that they would think of death as a tax on murdering. The argument is more plausible in relation to the payment of money, but even here it seems fairly contingent. If the monetary payment is high enough, in relation to the degree of perceived wrongfulness of the breach, it is still likely to be viewed as a penalty or fine, rather than a fee.

In general terms, to explain the justifiability of the absence of an antecedent legal duty, one must first justify why a substantive *liability* correlative to the claimant's power to impose a duty is not appropriate. Epistemic considerations alone will rarely be sufficient explanation.[64] More plausible are considerations pertaining to the need or advantage for the legal system to intervene in some cases in order to achieve some social goal, such as public condemnation. There may also be an argument that substantive liabilities increase the probability, in certain cases, of an escalation of disputes between people. If I have a power over you after a wrong to impose a duty upon you, perhaps this gives rise, in some cases, to the risk of escalating our dispute, as you now may dispute not only that you violated a legal duty, but also the existence and content of the secondary duty that I purport to impose. Finally, in some cases, the

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[62] The law itself recognises the possibility of something akin to duty to self-punish: it is possible for parties validly to agree upon damages obligations with an *in terrorem* function.

[63] Smith above (n 1) 118.

[64] Epistemic considerations seem apt in the context of justifying substantive liabilities, however. Other considerations include: (i) promoting autonomy – as when a person is given a choice to rescind a contract; (ii) social distancing – after a serious wrong, it may sometimes be better that the ball is 'in the victim's court' in order to avoid negative interactions between a victim and wrongdoer; (iii) substantive remedial choice – sometimes a legal imperfection gives rise to multiple possible inconsistent remedies; in these circumstances only the victim's choice can settle which should be done. I discuss these further in S Steel, 'Being a Liability' (ms).

resolution of a dispute may require a controversial, and potentially indeterminate, balancing of normative considerations, such that a substantive liability would allow one person to impose their individual judgment about the outcome of that balancing upon another person.

4. *The Grounds of Remedies*

A central claim of the book, carefully developed across four chapters, is that private law remedies are responses to three kinds of fact: (1) right-threats, (2) wrongs, (3) injustices.

The taxonomy (briefly) explained

A rights-threat exists when there is some (legally specified) probability that a person's right will be infringed in the future. Specific performance orders, orders for the agreed sum, injunctions, orders to recover land or deliver up chattels, orders to pay damages in lieu of injunctions are all, Smith argues, responses to right-threats.[65] What unites these remedies is essentially that they order performance of substantive duties. Although an injunction (other than a *quia timet* injunction) will not be granted unless a wrong has been committed, the wrong, according to Smith, is merely *evidence* of the probability that the right will be infringed again in the future; the wrong is not itself the reason for the order.

A wrong is a breach of a legal duty. Nominal damages, exemplary damages, pain and suffering damages, and vindicatory damages are responses to wrongs.[66] None of these awards are responses to right-threats, for Smith, because there is no substantive duty to pay the sums prior to the order.[67] So there is no right which will be infringed in the future if those sums are not paid. Even more strikingly, awards of compensatory damages for consequential loss are not responses to wrongs. Rather, while such awards are often made *conditional* upon a wrong, the wrong is not *the reason* why the award of damages for consequential loss is made.[68] By contrast, exemplary damages respond to the wrong '*qua* wrong'.[69] To understand this, think of a duty to pay a debt after the time of payment. When the court orders the debtor to pay, the debtor will (almost?) always have committed a wrong in failing to pay. But the wrong does not *ground* the order to pay: what grounds the duty is simply the continued existence of a duty to pay. Or so Smith argues.

Finally, an injustice exists when there is 'an unfair loss or gain that has arisen from a transaction between the claimant and defendant'.[70] More precisely an injustice refers to an action or state of affairs that is unfair 'because a loss or gain…has been unfairly allocated, distributed, or allowed to persist'.[71] Compensatory damages and restitution after a defective transfer of value fall within this category.[72] So, too, do injunctions to re-transfer property

[65] Not all injunctions respond to right-threats: injunctions which order the return of property transferred by wrongdoing respond to injustice.
[66] Vindicatory damages is a stipulative term used to refer to: user damages, waiver damages, market-price damages, non-pecuniary damages, and gain-based damages: Smith (n 1) 210-221.
[67] For criticism of this: Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283.
[68] Smith (n 1) 179.
[69] Smith (n 1) 179.
[70] Smith (n 1) 93.
[71] Smith (n 1) 229.
[72] Smith (n 1) ch 8. Smith suspects that other restitutionary orders also respond to injustice.

acquired in breach of a duty.[73] Smith gives two main arguments why compensatory damages belong in the 'injustice' category. The first is that the principles regulating the award of compensatory damages are infused with notions of fairness: the rules on mitigation, remoteness, legal causation, contributory negligence, offsetting benefits are all explicitly justified by fairness considerations.[74] The second is that a wrong is not a necessary condition of compensatory awards: vicarious liability for another's wrong, liability under *Rylands v Fletcher*, liability for justified harm imposed in necessity, liability to pay contribution to another wrongdoer, and liability in damages for an innocent misrepresentation are all instances, Smith claims, of compensatory liability absent a breach of legal duty. Further, the law treats the basis of liability in the wrong-based cases of compensatory liability according to the same general principles as in the non-wrong-based cases. In both sets, the overarching question is whether 'it is fair to hold the defendant responsible…or, what amounts to the same thing, whether the relevant losses are fairly attributed to the defendant'.[75]

Assessing the taxonomy

A first problem relates to right-threats. A right threat is the probability that a wrong will occur: a wrong-threat. If so, it might be thought that the fact that the defendant is likely to commit a wrong is a *reason* for the relevant orders. The future occurrence of the wrong is not merely a *condition* of the order, but a reason for it. If so, one might think that the distinction between *wrong-threats* and *wrongs* is a rather flimsy one. In both cases the wrong – existing or future – serves as a reason for the remedy.

A second problem is that, if we do think that it makes sense to distinguish at the fundamental level of a taxonomy between wrongs and wrong-threats, it is odd that there is no parallel distinction between *injustices* and *injustice-threats*. There do appear to be remedies which respond to the likelihood of future injustice. For instance, some US courts award damages in order to cover the costs of medical monitoring after the defendant has negligently exposed a person to a risk of physical injury. Smith thinks that unreasonable risk exposure is a breach of a duty of care – a wrong – and that the occurrence of damage goes to actionability in the tort of negligence.[76] Here, then, is an award which is not aimed at preventing a wrong – since the occurrence of damage is not itself the wrong – nor is it wrong-based in Smith's sense, since the remedy is not a response to the negligent risk exposure *as such*. The remedy is a response to a risk of the future injustice that will occur.[77]

A third problem is that it's not clear whether something's being a right-threat is an illuminating fact about it for taxonomic purposes. Suppose that it was made indisputably clear by court decisions that there is a substantive duty to pay damages for consequential loss. It follows that it would now belong to the *right-threat* part of Smith's taxonomy. But if Smith is right that the basis of compensatory liability for consequential loss is *fairness*, then this fact about it will be obscured in the taxonomy. The point is that whether or not there is a substantive duty prior to an order may or may not tell us much about the underlying justification of the order; the normative form – liability or a duty – may be a purely pragmatic

[73] Smith (n 1) 271-272.
[74] Smith (n 1) 254-255.
[75] Smith (n 1) 266.
[76] Smith (n 1) 151.
[77] One way of accommodating this example within Smith's taxonomy would be to argue that the occurrence of damage constitutes a *further* wrong to the right-holder in these cases, and the damages are then a response to a right-threat.

choice. A more illuminating taxonomy would distinguish at the fundamental level between remedies which respond to unfairness (be it by enforcing existing or imposing new duties) and remedies which respond to right violations not grounded in unfairness (be it by enforcing existing or imposing new duties).

Damages: Right-threats, wrongs, and injustices

Suppose that you negligently break my legs. I am off work for months and lose some earnings. I also suffer considerable pain. According to Smith, my claim for lost earnings is based on an *injustice* which will occur if I am not compensated: I will unfairly bear a loss. My claim for damages for the pain I have suffered is different. It is based on the *wrong* you have done to me. That wrong is aggravated, according to Smith, by the fact that it has caused me pain.

The idea is as follows. Pain, according to Smith, is not a 'loss' and so damages for pain and suffering cannot be compensatory. Rather such damages are *expressive* in character. They express the wrongfulness of the conduct. By contrast, the damages for consequential loss merely repair this loss and are not awarded to express the wrongfulness of the conduct; the wrong is not even a *reason* for their award.

Consider the claim that being caused to be in pain is not a loss. Smith offers no analysis of 'loss', so it is hard to know why he thinks this. I can think of two possible reasons. One is that loss is a comparison between two conditions at particular times: the claimant's condition at the time of trial, and their condition at that time had the wrong not occurred. If my pain has subsided, then it will not register in this comparison. I am not in pain now, and if the wrong had not occurred, I would not have been in pain. A second is that past pain is irreparable by money.

The second reason is not convincing: it seems possible for there to be *irreparable* losses. The first reason also seems doubtful, at least as an analysis of what is normally described as a loss in private law. For instance, the loss of a chance is a loss, but it fails to satisfy this definition.

A better justification for Smith's view of damages for pain is simply that pain – regardless of whether it is a *loss* – is irreparable, and so damages must be serving a different aim to compensation. This is still open to the challenge that even if pain – or non-pecuniary loss more generally – is irreparable, it can be counter-balanced, in the sense that it is possible to make people (rationally) indifferent between having suffered pain and not with the payment of money.[78] One might try to explain the phenomenon of negotiating damages for breach of contract on this basis. In these cases, a person arguably suffers a non-pecuniary interference with their autonomy. The hypothetical negotiation measure could be said to aim to identify a figure that would make the person rationally indifferent between having suffered the loss and not. This is the figure a rational version of that person would have accepted to licence the infringement. Whatever the success of this in the context of breach of contract, or in the context of user damages for wrongful use of property, it seems doomed to failure as an explanation of severe bodily injuries, or injuries which render a person permanently unconscious. In these cases, it seems clear that English law does not attempt, through

[78] Anyone who has been paid to mark hundreds of exam papers comes to know this, normally by way of realisation that they are not being paid enough.

damages, to make a person indifferent – even rationally indifferent – between having suffered the injury and not.

If damages for non-pecuniary loss do not (always) compensate, or counterbalance, then, perhaps they are merely 'expressive' in character. Smith thinks that a wide range of damages awards which do not require loss (or which do not *repair* loss) have this character.[79] These awards simply 'mark' the wrongfulness of the defendant's conduct, but the variation in the award is explained by the fact that wrongfulness is a complex function of culpability, duration of the wrong, importance of the right violated, and the consequences of the violation.[80]

For the reasons given (somewhat different to Smith's) I think Smith is right that the current law on damages for wrongs is probably best explained in part by an expressive account. I doubt, however, that the deeper justification of this expressive feature is retributive justice.[81] Retribution, setting aside whether it is ever appropriate, is *clearly* inappropriate in the context of non-culpable wrongs to property rights, such as innocent trespasses to land. Yet the law awards user damages in these cases. Further, the current law on damages for wrongs seems wildly inept as an expressive device. Suppose that due to a reasonable mistake you pick up my Stradivarius violin from the violin repair shop and keep it for a week. You are liable to pay user damages for the rental value of the violin for this period – potentially thousands of pounds. Given that awards of exemplary damages are relatively low, the amount of damages payable for this innocent, relatively trivial trespass to goods could be much greater than the exemplary award made for a seriously culpable right violation.

If we accept Smith's view that many damages awards are expressive responses to wrongdoing, this still leaves open whether he is correct that compensatory damages are *never* justified by wrongdoing. Consider my claim for lost earnings as a result your negligently damaging my legs and call this case *Earnings*. In what sense is your wronging me *not* a reason for the award in *Earnings*? Smith's view is that wrongdoing is one way amongst others by which one can be *responsible* for a person's loss, and it is this *responsibility* which matters to the justification of compensatory liability. Another way in which one can be responsible for a loss, for example, is by causing it through conduct that would normally be a violation of another's right, but which is justified because of the benefit it produces to the loss-causer.[82] For instance, if you inflict minor damage on my property in order to save your life, you do not commit an *all-things-considered* wrong, but your responsibility for the loss makes it fair that you compensate. Call this case *Property*. Smith's view, then, is that the same or similar set of facts justifies liability in *Earnings* and *Property*, and that the wrongdoing in *Earnings* is merely an incidental feature of that case. This may be what Smith means by saying that damages for loss in *Earnings* do not respond to the wrong *qua* wrong. Here is a possible test for when damages do not respond to the wrong *qua* wrong: if the justification for an award can be described in terms which do not mention the wrongfulness of the conduct, then the award is not for the wrong *qua* wrong. In *Earnings*, we might say that your responsibility is shown by the fact that you caused me loss in circumstances in which you had a reasonable opportunity to avoid causing me loss. The wrongfulness of your conduct is relevant only in so far as it demonstrates that you had a reasonable opportunity to avoid the relevant loss-causing act, but it is that *avoidability* which is the fundamental reason

[79] See the list above (n 66).
[80] Smith above (n 1) 206-207.
[81] As Smith seems to claim: (n 1) 204.
[82] Smith (n 1) 268.

for your liability, not the wrong. This could be supported by the fact my contributory negligence is taken into account in determining liability, though it is not a wrong to you. My contributory negligence would show that my loss was also reasonably avoidable by me. So, it might be said, the law compares the extent to which loss was reasonably avoidable by each of us, independently of the wrongfulness of our conduct. Call this the *comparative opportunity to avoid* (COA) account of compensatory liability.

There is perhaps something right about COA, but it is doubtful that it fully expunges the intrinsic significance of wrongdoing from compensatory liability. First, consider cases in which a person commits a serious wrong which they find difficult to avoid, but the victim of the wrong could have avoided it at almost no cost. For example, suppose I know that you become very angry when I over-cook cauliflower, because of an extremely distressing childhood memory this calls to mind. One day I overcook cauliflower, and you stab me with a kitchen knife. I could very easily have avoided overcooking the cauliflower, but you find it extremely difficult to control your anger. Nonetheless, it seems obvious that you must compensate me for the loss I suffer, because you have seriously wronged me. At any rate, the notion of a 'reasonable opportunity to avoid *x-ing*' will likely have to be highly sensitive to whether *x*-ing is wrongful in order for this view to be plausible.

Second, COA fails to explain various situations in which a person is *not* liable. If I deliberately knock you over on a train in central London, and you fall down and are bitten by a viper, I am not liable for the loss due to the snake bite. But I could easily have avoided causing this loss by not wronging you. The explanation seems to be that snake bite is not an instantiation of what made my conduct *wrongful*. If so, the notion of wrongdoing again appears inherently significant. Or suppose that A negligently damages an electricity cable belonging to B, with the result that C's factory is closed for two days. This was reasonably avoidable, but there is no liability to A. A possible explanation is that there was a wrong to B, but not C. But the importance of this fact cannot be explained by the degree of reasonable avoidability.

It is also doubtful that there is a coherent account of *responsibility* which fully explains the difference in compensatory liability between these two cases:

> *Dock.* A causes minor damage to B's dock in order to save A's life in a storm.
>
> *Dock 2*. C, a bystander, causes minor damage B's dock in order to save A's life in a storm.

In *Dock* and *Dock 2*, A and C are responsible for the damage. Each is a factual cause and the damage results from their choice. But only A is likely to be liable to pay compensation, not C. If this is right, then the notion of 'responsibility' is at best *a factor* in determining the apt allocation of compensatory liability. Of course, we could bundle into the notion of 'responsibility' the idea that A benefits in *Dock*, but not in *Dock 2*, but then the idea of responsibility becomes a vacuous catch-all for any consideration that bears upon the aptness of compensatory liability.[83]

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[83] Nothing here precludes the possibility that responsibility operates as a pro tanto reason for liability, which is defeated in *Dock 2*; possibly responsibility could serve as a unifying ground of compensatory liability in this sense.

This leads to a broader worry about the 'injustice' category. Does it have any unity at all or is it simply a label for situations in which liability is considered justifiable, but not for any single reason? Smith says that reasons justifying liability are reasons of *fairness*. But it's not clear that the category could not equally be described as 'situations in which there are reasons for holding one person liable to another independently of wrongs or wrong-threats'. Smith would likely respond that 'fairness' is equally as abstract as 'wrongdoing', and so if we don't think a 'wrongs' category is problematic, then we oughtn't to think of a 'fairness' category as problematic. If it were true, however, that the wrongs in private law all had different justificatory bases, and these justificatory bases had very substantial implications for the principles applicable to determining liability for wrongdoing, then the category of 'wrongs' would indeed not be illuminating. If wrongdoing is a useful category, it is *because* we think that all of the wrongs in tort and contract have some unity such that there are at least *some* regulative principles that follow from (or are strongly associated with) a thing's being classified as a wrong. I'm not sure that the same is true for the instances of liability under the 'injustice' category. The principles that regulate liability to make restitution after a defective transfer of value, and the principles that regulate liability to pay compensation look very different.

Smith also suggests that the 'injustice' category is unified by the fact that reasons of fairness identify something that is valuable (or ''virtuous', 'commendable', 'useful' or 'beneficial'') to do, but which is not *obligatory*.[84] This explains, Smith thinks, why there are no substantive legal duties to make restitution or pay compensation.[85] This is an odd view. First, if these are merely matters of 'virtue', and so not the appropriate subject matter of a substantive duty, it seems incoherent then to believe that it is morally permissible for courts to *order* people to do these things and then enforce those orders with the coercive machinery of the state. Second, paying compensation is not always a matter of virtue. Suppose that A deliberately and wrongfully sets B on fire. B will live a life of unbearable agony without extensive medical care. It's not merely that it would be 'virtuous' for A to provide the means to acquire such care, if there is a risk that it will not be provided. Even if it would cause A significant hardship to provide such means, A could legitimately be required to do so.

5. *The Idea of Remedial Law*

The entirety of Smith's book can be read as a defence of the idea that remedial law should be considered a distinct body of law. What makes it the case that a set of norms should be considered as such? One answer is that the norms can be understood as specifically addressing a distinctive question or problem: they regulate that problem *as such*. On Smith's conception, the distinctive question which 'remedial law' norms address is something like: What non-procedural, final directive rulings must, or may, courts provide to persons who engage their jurisdiction when a private law wrong, right-threat or injustice is proven, and under what conditions?

As Smith impressively shows, there are several legal rules which permit or require courts not to make an order, despite it being the case that a wrong, injustice or rights-threat has been proven; in this sense, remedial issues have an independence from the underlying substantive law.[86] The most straightforward example is a limitation defence: this is (generally) a

[84] Smith (n 1) 233.
[85] Smith (n 1) 233.
[86] See ch 9.

remedial defence in that it may apply despite the defendant still being under a legal duty to do the act in respect of which an order is sought: a contractual debt might still owed, but no order will be obtainable in respect of it.[87] Less obviously, Smith argues that when courts refuse specific relief on the ground that damages would be adequate to obtain substitute performance (for example, a contractual obligation to deliver fungible goods), this is a remedial defence because the reason why specific relief is denied is essentially administrative convenience: ideally, the defendant would perform their legal duty, but unlike specific performance orders, 'orders to pay damages…are easily framed, enforced, and unlikely to lead to further litigation'.[88] And there are other rules which regulate remedies as such that are not discussed by Smith. An important set concerns when it is permissible to combine remedies.[89]

Smith adverts to the fact that remedial defences characteristically involve courts trading off justice or giving effect to people's rights with considerations of cost. He notes, however, that since courts are 'publicly funded institutions', and since justice is one costly good amongst others, such as public health, such trade-offs are inevitable.[90] A fundamental part of the explanation of the legitimacy of such trade-offs in remedial law, however, is also that in failing to provide assistance to a litigant, the courts are generally not using that person as a mere means.[91] By contrast, if the courts punished an innocent person solely to deter future wrongs, this would clearly be impermissible regardless of any cost-savings for the courts.

Even if remedial law is distinctive in the sense that it addresses distinctive problems – when should a person be *ordered* to do something *by a third party* (a court), giving rise to *rights of enforcement* in the event of breach[92] – it does not, of course, follow that we ought to banish remedies from books and courses on the 'substantive' law. It's not possible fully to understand the substantive law of tort and contract, for example, without an awareness of what remedies are available for torts and breaches of contract. One reason is that, although whether a substantive duty or liability exists or should exist is a distinct question from what remedies are or should be available, the substantive law has often been created with the *prospect* of remedies in mind. For example, the decision whether to impose a duty of care in

[87] A defence to an order to φ may be remedial even when the defendant is not under a legal duty to φ if the *reasons* why the order is refused do not bear upon the aptness of the defendant φ-ing. For instance, if we accept Smith's view that there is no substantive duty to pay punitive damages, it is still the case that a limitation bar operates in this instance as a remedial defence: the reasons for the defence do not bear (at least on one view) on the aptness of the defendant being punished. Cf Smith (n 1)

[88] Smith (n 1) 304-305. Smith's nuanced analysis here holds that sometimes 'adequacy' operates as a substantive defence, too. Other examples of remedial defences according to Smith include: immunities, clean hands, illegality, *res judicata*.

[89] There are probably at least two general principles of remedial inconsistency in private law: (1) If remedy R1 pursues goal G to extent *n* and remedy R2 pursues goal G to extent *n*, then only either R1 or R2 may be awarded in relation to the same cause of action; (2) If remedy R1 involves assuming a proposition *P*, and remedy R2 involves assuming a proposition *not*-P, then only either R1 or R2 may be awarded in relation to the same cause of action. An example of (1) is the inconsistency between an account of profits and compensation: the account of profits *pro tanto* reduces the loss, and the compensation *pro tanto* reduces the gain. An example of (2) is the choice between rescission of a contract (albeit not a remedy in Smith's sense) and a claim for breach of contract.

[90] Smith (n 1)

[91] The point is not simply that courts are failing to assist rather than positively harming, as sometimes there is a duty to assist. I discuss these issues further in Sandy Steel 'Deterrence in Private Law' (ms).

[92] Each of these three features – ordering, the fact the court is a third party, and the immediate prospect of triggering enforcement – explains why the considerations bearing on remedial law are partly distinct from those relevant to the content of the substantive law.

negligence has often been (problematically) equated with the question of whether compensatory liability should exist in certain circumstances. One will not fully understand the law of negligence without realising this. Another reason is that, recognition of *x*-ing as a legal duty may, conceptually, imply that *some* court order will be available in relation to it, or at least that a court's jurisdiction can sometimes be raised in respect of it. This doesn't mean that a legal duty must, conceptually, be 'enforceable', unless one takes a very broad view of 'enforcement'. But it does mean that every legal duty has some kind of normative effect for legal institutions, and this normative effect itself needs justification. So justifying substantive legal duties may itself necessarily involve justification of the *possibility* of *some kind of* court order in relation that duty.

Relatedly, even if remedial law is partly distinctive, it is still useful to treat 'private law remedies' or 'public law remedies' – or even, 'commercial remedies'[93] – for some purposes as independent fields of study. It may be that the sets of questions and issues raised by private law remedies are importantly distinctive from public law remedies. The fact that private law is, in many cases, concerned with enforcing the basic interpersonal moral rights of individuals may have an important impact on the types of assistance they can legitimately expect from courts. Indeed, there is a danger in mentally divorcing remedial law from the underlying substantive law, even if each raises distinctive questions. Remedial law is parasitic law: it is in the service of the values and aims of the substantive law, albeit that its mode of operation gives rise to new moral and practical problems. The importance of the underlying values of the substantive law is likely to have a profound impact upon the availability and nature of the remedies for that area.[94]

6. *Conclusion*

No one has advanced the theoretical understanding of remedies in general more than Smith. *Rights, Wrongs and Injustices* is a major achievement. To recap, the main points I have developed in this article in relation to the book's arguments and themes are as follows. First, there may be value in conceiving of remedial law not simply as concerned with judicial orders, but more broadly, as concerned with the rights, duties, powers (etc.) which arise in virtue of, and in order to address, legal imperfections. Second, remedial court orders are (in part) exercises of normative power that alter litigants' legal positions; Smith's arguments do not demonstrate that they are commands. Third, the distinction between orders and enactments is largely a distinction in the generality of the norms created, rather than anything more fundamental. Consequently, in principle, justifications of legislative authority also help to justify remedial authority. Fourth, court orders create duties not merely to the court, but also sometimes to other parties in litigation. Fifth, taxonomies of remedies which rely primarily upon the normative form of the facts generating the remedy, rather than the justificatory ground of the remedy are likely to be unilluminating. Sixth, the idea of 'responsibility' cannot unify or itself explain the contours of compensatory liability. Seventh, remedial law deserves to be considered a partly distinctive body of law in virtue of remedies raising distinctive moral and practical problems.

[93] A self-serving reference to a graduate course I co-teach with that name.
[94] Cf Smith's discussion (n 1) 127-8.